

A comprehensive ban on the advertising and promotion of tobacco products, including through the pack itself, is essential to reducing the harm caused by tobacco in Australia.

On 7 April 2011, the Australian Government published draft legislation for mandating plain packaging of all tobacco products sold in Australia from 1 July 2012.¹ Cancer Council Australia calls on all federal parliamentarians to support the legislation, thereby enabling the expected health benefits of plain packaging explained in this position statement.

Key messages

- The draft plain packaging legislation should be supported by all federal parliamentarians as a continuation of the bipartisan commitment to tobacco control that has led to substantial reductions in tobacco consumption in Australia over the past 35 years;
- Tobacco is the only consumer product that when used as intended, causes the death of a majority of its lifetime users;
- Tobacco is addictive; many users have great difficulty quitting;
- As well as harming users, tobacco is an unacceptable hazard to others who are exposed to tobacco smoke;
- The dangers of tobacco smoking justify restrictions on its distribution and sale as well as the elimination of tobacco advertising and promotion;
- With the increase in restrictions on tobacco advertising, the tobacco industry relies increasingly on the cigarette pack itself to advertise and promote its products;
- The tobacco industry's use of colour, novelty packaging and other imagery enables it to target particular market segments and convey brand character. Colour and imagery are also used to misleadingly convey relative brand strength and quality;
- The plain packaging of cigarettes would eliminate the tobacco industry's ability to promote smoking and brand personality through the pack, enhance the effectiveness of health warnings on packs and remove the pack's ability to mislead and deceive consumers as to quality and strength;²
- Plain packaging is a key recommendation by the National Preventative Health Taskforce in its report released in 2009 in which it concluded that "there can be no justification for allowing any form of promotion for this uniquely dangerous and addictive product which it is illegal to sell to children", including packaging;³
- Without brand imagery, packs would become nothing more than "functional containers for cigarettes", rather than a medium for advertising.^{4, 5, 6, 7} It is anticipated that mandatory plain packaging will:
 - Remove the ability of tobacco companies to use packs as an advertising vehicle and means of promoting an image, brand personality and quality and remove positive association with cigarette brands and image.⁸
 - Make health warning messages on packs more prominent and enable larger graphic health warnings and more information about cessation and the health effects of smoking to be printed on the pack.⁹

- Remove the packs ability to deceptively influence consumers' perceptions of tobacco quality and sensory appeal,¹⁰ and false implications that products have harm reducing properties and different levels of health risks associated with each brand/product.^{11,12}
- Additionally, recent studies have found that a majority of the Australian population would support plain packaging of cigarettes.¹³

Recommendations

Cancer Council Australia recommends that legislation and associated regulations be passed at a federal level to require the removal of all trademarks, texts and logos, together with all colours and other attractive decorative or design features from the packaging of tobacco products manufactured or sold in, or imported into, Australia from 1 July 2012. These requirements are all covered by the Tobacco Plain Packaging Bill 2011, which therefore should be supported when tabled in federal parliament in mid-2011 as anticipated.

What plain packaging laws must cover

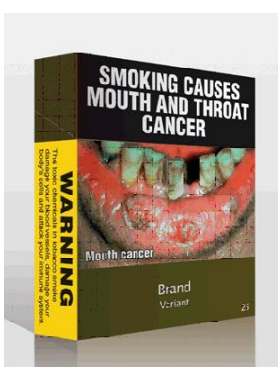
'Plain packaging' is the standardisation of retail packages of tobacco products. In order to be effective and stop the use of the package as a marketing tool, any legislation mandating plain packaging must be comprehensively drafted and strictly defined. The current exclusion of packs from the definition of "advertising" should also be removed from the *Tobacco Advertising Prohibition Act 1992* (Cth) ("the TAP Act") and any corresponding state or territory legislation. Further, plain packaging laws must require all promotional elements of the package, other than the brand name, be prohibited including colours, logos, descriptive words and phrases, distinctive fonts, inserts and onserts, perfuming and audio chips.

Permitted details

Manufacturers should only be permitted to print the brand name in a required size, font and location on the package. Packages must also contain prescribed health warnings and other information as required by law including:

- the manufacturer's/importer's contact details;
- barcode;
- number of cigarettes/cigars/bidis or weight of loose/pipe tobacco or nasal snuff;
- tax markings;
- country of origin etc.

Prescribed Pack



The exact dimensions, shape, colour, material and style of opening of the package must be prescribed by type of product and include the colour, gloss level, ink colour and font style that can be used. This would apply to what is on the outside and inside of any packaging and would capture wrapping papers, foils and any other lining material. This would remove distinctive packs, such as soft packs, metal cases and split packs from the market as well as promotional elements from within the pack. It would also prevent the inside of the pack being used to promote the product, brand or other product as is currently occurring in Australia and overseas. An image of the cigarette pack plain packaging as advocated by Cancer Council is shown here.

Prescribed Product

The prohibition against promotional elements should apply both to the exterior and the interior of the package, including the tobacco product itself. This would prohibit the use of unique or coloured filters or the printing or embossing of logos on the tobacco product itself (i.e. the actual cigarette). The shape and size of the actual tobacco product should also be specified.

Background

Following increased restrictions on traditional forms of tobacco advertising and promotion in Australia, the cigarette pack has become an important marketing tool and means of communicating brand quality and image to potential and current smokers.¹⁴

“The increasing imposition of advertising restriction on the tobacco industry inevitably results in the visual impact of the cigarette pack itself assuming more importance as a means of attracting consumer attention to the product” (British American Tobacco)¹⁵

“In our opinion, [after taxation] the other two regulatory environment changes that concern the industry the most are homogenous packaging and below-the-counter sales. Both would significantly restrict the industry’s ability to promote their products (Morgan Stanley Research 2007)”¹⁶

1. Limited regulation of pack design, descriptors and yield information in Australia

The TAP Act and various state and territory laws on tobacco advertising, do not extend to bans on advertising and promotion through the pack itself. Tobacco companies are therefore free to print advertising and promotional material on their packs and have recently launched various innovative pack designs that target particular market segments and promote certain brand characteristics. For example:

- In 2010, Philip Morris used the pack to promote their Peter Jackson brand. The new campaign uses a series of classic Australian themes on the inside of the pack under the flip lid with captions including:

“Over the fence is 6 and out. Another Classic.”
“Jack of all trades, master of none. Another Classic.”
“Abbreviating everyone’s name. Another Classic.”
- In recent years stylish and novelty metal tins have been manufactured in a range of popular brands, including Peter Stuyvesant, Marlboro, Winfield and Dunhill.
- British American Tobacco (“BAT”) have used double sided promotional inserts inside their Winfield packs which state “The smooth choice is here” on one side, and on the reverse “Charcoal makes it smooth”. Philip Morris have also published promotional material on the inner packaging of their Langham Vintage packs.
- In 2006, BAT released the novelty “split pack” which could be divided into two smaller packs by price-conscious consumers and resulted in an increased surface area on which to promote brand characteristics.¹⁷ When the pack was split, one part did not appear to display the health warnings prescribed under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (“the Regulations”). In 2007, after the Australian Competition and Consumer Commission (“ACCC”) took action against it for allegedly failing to comply with the prescribed health warning requirements, BAT signed an undertaking to cease supply of these packs.
- BAT released a range of stylish new Dunhill packs including the “Signature series” and the “My mixture” limited editions. The “My Mixture” limited edition includes three different brightly coloured packs (lime green, bright blue and burnt orange) in what BAT describe as an “innovative 20s spring-box format”.¹⁸ This format also greatly increased the available advertising space on the inside of the pack

Further, a recent UK paper demonstrates how the tobacco industry is exploiting the lack of pack regulation to promote tobacco products and undermine existing regulation through the use of all elements of the pack including the outer film/wrapping, inner pack and pack inserts.¹⁹

Limited regulation also applies in relation to the display of yield information (average tar, nicotine and carbon monoxide content of the smoke from each cigarette) and pack descriptors such as “light” and “mild”. This is despite ACCC findings in 2005 that the display of this information on packs by BAT, Phillip Morris and Imperial Tobacco Australia Ltd had the potential to mislead consumers into believing there were health benefits associated with smoking low yield cigarettes. In light of the ACCC’s findings, and to avoid litigation, BAT, Philip Morris and Imperial Tobacco each signed court-enforceable undertakings in 2005 to cease the display of yield information and descriptors on packs.²⁰

These undertakings remain the only restriction on the display of yield information and descriptors in Australia. While the Regulations no longer require that packs display yield information, they do not ban them from doing so.²¹ This means that tobacco companies not subject to the court enforceable undertakings continue to face no restrictions.

The only information currently required to be printed on cigarette packs manufactured in, or imported into, Australia are the health warnings, explanatory messages and corresponding graphics prescribed in the Regulations.

2. Brand image and personality communicated through pack

Bereft of brand image, cigarettes would lose their appeal.²² Through the use of colours, novelty packaging, logos and other imagery, manufacturers are able to engineer the pack to appeal to their intended market segment and convey certain brand characteristics and quality.

“It’s very difficult for people to discriminate blind-tested. Put it in a package and put a name on it, then it has a lot of product characteristics” (Imperial Tobacco).²³

“...one in every two smokers is not able to distinguish in blind (masked) tests between similar cigarettes... for most smokers and the decisive group of new, younger smokers, the consumer’s choice is dictated more by psychological, image factors than by relatively minor differences in smoking characteristics.” (British American Tobacco).²⁴

Marketing literature highlights the role of the pack by emphasising that the “*product package is the communication life-blood of the firm*”²⁵ and “*act[s] as a promotional tool in its own right*”.²⁶

The pack and associated brand image communicate a lot about a brand’s character and quality, as well as the stylishness and sophistication of the person who smokes it. Tobacco packs are often described as “badge products” as they “remain with the user once opened and are repeatedly displayed in social situations, thereby servicing as a direct form of mobile advertising for the brand”²⁷ A recent survey of adult Australian smokers found that smokers of plain cigarette packs were rated as significantly less trendy/stylish, less sociable/outgoing and less mature than smokers of fully branded packs. Plain packs were also rated as significantly less attractive and the cigarettes contained in plain packs were perceived to be less rich in tobacco, less satisfying and of lower quality tobacco.²⁸ Packs with the *least brand design elements* were rated as having the least appeal, compared to the other packs progressing from some brand design elements to full branding.²⁹

A Norwegian study similarly found that the pack communicates a lot about a smoker’s social identity and status.³⁰ It found that young people described some brands as more exclusive than others and some as more elegant and sophisticated than others. The pack was described by those surveyed as an important element in their perception of brand image.³¹

A study undertaken in Canada found that pack designs were well recognised by teenagers. Even when brand names were removed from the packs, almost half of the teenagers surveyed were able to identify the product brand on the basis of package design alone.³²

3. Packs target market segments, new smokers and brand switching

New and attractive pack designs are primarily used by tobacco companies to entice new smokers to try their brands and to persuade habitual smokers to consider switching brands.³³

*“the primary job of the package is to create the desire to purchase and try. To do this, it must look new and different enough to attract the attention of the consumer.”(Report to Liggett and Myers).*³⁴

While the tobacco industry claims it is interested only in promoting brand switching, and not recruiting new customers,³⁵ these claims are inconsistent with smokers’ high level of brand loyalty. Research indicates that less than 10% of smokers switch brands annually.³⁶

Tobacco company documents also demonstrate the industry’s recognition of the importance of recruiting young people to their brands.³⁷ A new smoker usually makes their brand choice early and there is a high correlation between the brand first smoked and the brand eventually selected and usually smoked.³⁸ Packaging that appeals to young people is therefore critical.

*“16-21 – the formative years; smoking starts and brand preferences are developed”
(Liggett and Myers).*³⁹

Packaging has been used for many years to generate evocative images such as luxury, freedom, glamour, status and masculinity and femininity.⁴⁰

Tobacco companies constantly test their brands for acceptability among young people and innovative packs are designed to ensure that a brand maintains its appeal amongst a group where fashions change rapidly.⁴¹

*“focus groups have indicated that the green (Lucky Strike) pack would be well received by young adult males ...Many of the smokers at the groups thought that the green packing was very new and unique. They thought it was eye-catching and a different approach to packaging. Specifically they stated: it looks distinguished.... it would be great to put down on the bar” (American Tobacco Company).*⁴²

Tobacco industry documents also show that packaging designed to appeal to women has been carefully developed.⁴³ Cigarettes are often packaged in slim long packs, with pastel colours or extensive white space used to appear sophisticated and feminine.

*“Some women admit that they buy Virginia Slims, Benson & Hedges etc when they go out at night to complement a desire to look more feminine and stylish. ...more fashionable feminine packaging can enhance the relevance of some of our brands”
(Philip Morris).*⁴⁴

4. Deceptive use of colour and imagery, undermining graphic health warnings

Studies on the effects of pack design, including by the tobacco industry, have found that packaging materials and imagery all influence consumer perceptions about the quality and sensory attributes of different brands.⁴⁵ For example, light colours and pastel shades are universally used to suggest that a particular brand is less harmful than its “stronger” counterpart. Green shades are often used for menthol variants to convey the concepts of freshness and mint flavour.

In Australia, following ACCC acceptance of court enforceable undertakings by Philip Morris, British American Tobacco Australia Limited and Imperial Tobacco Australia Limited, to cease their use of descriptors and yield information,⁴⁶ red packs have commonly been used to deceptively represent “full” strength, blue and gold for milder strength and grey for “light” strength.⁴⁷

Whilst the use of colour and other descriptive words are still permitted on cigarette packs, tobacco companies can continue to mislead consumers as to the quality, strength and associated health risks of various brand variants.⁴⁸ A recent study in Ontario, Canada found that the appearance of the words “smooth” and “silver” on packs gave participants the perception that the product would deliver less tar, had lower health risks and would have a smoother taste when compared to full flavor and regular brands.⁴⁹

Brand imagery appearing alongside health warnings on packs also sends a mixed message about the product and has the potential to undermine the quality of pack warnings, particularly among young

people.⁵⁰ BAT's use of a pack insert "Charcoal makes it... smooth as" essentially promotes the product and weakens the effect of the health warnings on the outside of the pack. Some brands even incorporate the colours of health warnings into the design of the pack, causing the warning to blend in to the overall pack design and become less salient.⁵¹

A survey of 8000 smokers across four countries, published in 2011, showed that one in five smokers wrongly believed certain cigarettes were less harmful because of the colour of the pack or the shape of the cigarette itself (e.g. "slims").⁵²

5. Trademarks and international trade agreements

The tobacco industry argues that plain packaging laws would breach international trade agreements such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994*, the *Northern American Free Trade Agreement 1994* and the *Paris Convention for the Protection of Industrial Property 1983* which provide minimum standards for the protection of intellectual property rights, including trademarks.

Such arguments are unlikely to be successful given there are sufficient flexibilities and exceptions contained in the international trade agreements to protect public health. Given trademark law is aimed at protecting broader public interests and does not provide for absolute private property rights, plain packaging is justifiable, proportionate and not inconsistent with international trade agreements.⁵³ The decision of the European Court of Justice in *R (on the application of British American Tobacco (Investments) Ltd v Secretary of State for Health*, that large size health warnings did not constitute an infringement to BAT's intellectual property rights, also lends support to the view that plain packaging will not breach intellectual property rights. It should also be noted that tobacco companies do not hesitate to disrupt their own trade mark when using new imagery on packs.⁵⁴

The release of tobacco industry documents has also shown that the tobacco industry has known that international trade agreements do not offer the protection they have so publicly claimed.⁵⁵

*"...the international trade argument by itself will not however be sufficient to ward off the threat of plain packs..."*⁵⁶

*"The Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted."*⁵⁷

Concern has also been raised that plain packaging laws may result in the "acquisition of property" for the purposes of s.51(xxxi) of the Australian Constitution,¹ and that compensation on "just terms" will therefore be payable by the Commonwealth to tobacco companies. It is, however, highly unlikely that Australian government or High Court would take this view. While the rights of tobacco companies to use their trademarks and the retail package itself may be limited by plain packaging laws, the government will not obtain any advantage, gain or benefit capable of constituting an "acquisition" of property for the purposes of s.51(xxxi).⁵⁸

There are no international or domestic barriers to the introduction of plain packaging laws in Australia.

¹ Section 51(xxxi) of the Australian Constitution provides the Commonwealth with power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

Recommendations on plain packaging

1. Legislation is required to implement the policy announcements of the Australian Government to introduce plain cigarette packaging.
2. Plain packaging laws are also required to implement the National Tobacco Strategy recommendation to eliminate remaining forms of tobacco promotion. It would also assist the Australian Government to reach its recommended policy goal of reducing smoking rates to 9 per cent by 2020.
3. Plain packaging laws are required to implement Australia's obligations under Article 13 (tobacco advertising, promotion and sponsorship) of the FCTC, which requires a 'comprehensive ban of *all* tobacco advertising, promotion and sponsorship', and to maximize the effectiveness of Australia's implementation of its obligations under Article 11 (packaging and labelling of tobacco products). The World Health Organization's guidelines for the implementation of Article 13 include the following recommendation:

*"Packaging and product design are important elements of advertising and promotion. The effect of advertising or promotion on packaging can be eliminated if plain packaging is required. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive."*⁵⁹
4. Cancer Council Australia recommends that legislation and associated regulations be passed at a Federal level to require the removal of all trademarks, texts and logos, together with all colours and other attractive decorative or design features from the packaging of tobacco products manufactured or sold in, or imported into, Australia from 1 July 2012.

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¹ The draft legislation is available for comment at:

<http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/plainpack-tobacco>

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³ Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – the roadmap for action. July 2009, Commonwealth of Australia. Available from: [http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/\\$File/nphs-roadmap.pdf](http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/$File/nphs-roadmap.pdf).

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- ⁴⁸ Hammond, D. Parkinson, C The impact of cigarette package design on perceptions of risk. *J Public Health* Vol 31, No. 3 pp345-353, Advance Access Publication 27 July 2009.
- ⁴⁹ Hammond, D. Parkinson, C The impact of cigarette package design on perceptions of risk. *J Public Health* Vol 31, No. 3 pp345-353, Advance Access Publication 27 July 2009.
- ⁵⁰ Goldberg M, cited in Freeman B, Chapman S & Rimmer M, The case for the plain packaging of tobacco products. *Addiction*: 2008: 103; 580-590.
- ⁵¹ Lindorff 2008, cited in Wakefield M, Germain D and Durkin S. How does increasingly plainer cigarette packaging influence adult smokers' perceptions around brand image? An experimental study. *Tobacco Control* published on-line 30 September 2008 doi:10.1136/tc.2008.026732 p.3
- ⁵² Mutti S., Hammond D., Borland R., Cummings K.M., O'Connor R.J., and Fong G.T. [Beyond light and mild: Cigarette brand descriptors and perceptions of risk in the International Tobacco Control \(ITC\) Four Country Survey.](#) *Addiction*, 106: doi:10.1111/j.1360-0443.2011.03402.x
- ⁵³ See Freeman B, Chapman S & Rimmer M. The case for the plain packaging of tobacco products. *Addiction*: 2008:103; 580-590.
- ⁵⁴ Wakefield M, Letcher T. My pack is cuter than your pack. *Tobacco Control* 2002; 11:154-156
- ⁵⁵ For a detailed outline of industry arguments and previous legal advice see: The Plot Against Plain Packaging, How multinational tobacco companies colluded to use trade arguments they knew were phoney to oppose plain packaging. Physicians for Smoke-Free Canada, April 2008 (version 2). See also Freeman B, Chapman S & Rimmer M, The case for the plain packaging of tobacco products. *Addiction*: 2008: 103; 580-590.
- ⁵⁶ Industry Documents referred to by Callard C, Tobacco Control & International Intellectual Property Agreements, Physicians for a Smoke-Free Canada, Presented in Mumbai, March, 2009.
- ⁵⁷ Industry Documents referred to by Callard C, Tobacco Control & International Intellectual Property Agreements, Physicians for a Smoke-Free Canada, Presented in Mumbai, March, 2009.

⁵⁸ For the meaning of “acquired” for the purposes of s.51(xxxi) of the Constitution, see *The Commonwealth v Tasmania* (1983) 158 CLR 1, per Murphy and Deane JJ; *Australian Tape Manufacturers Association Ltd and Others v Commonwealth of Australia* (1993) 112 ALR 53; *Commonwealth v WMC Resources* (1998) 194 CLR 1 and *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297

⁵⁹ World Health Organization. Guidelines for implementation of Article 13. WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship). Available from http://www.who.int/fctc/guidelines/article_13.pdf.