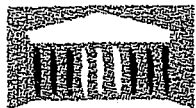
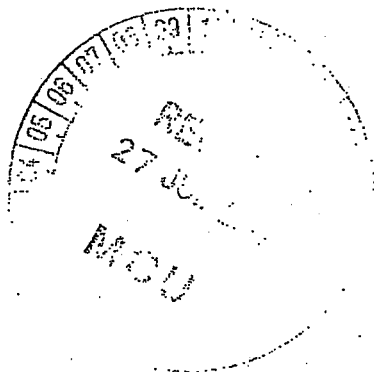


NFA - 14/2/10  
C10/56216

HA

ASSEMBLÉE  
NATIONALE**Yves BUR**Député du Bas-Rhin  
Maire de LingolsheimRÉPUBLIQUE FRANÇAISE  
LIBERTÉ - ÉGALITÉ - FRATERNITÉThe Hon. Julia GILLARD, MP  
Prime Minister of Australia  
PO Box 6500  
CANBERRA ACT 2600  
Australia

Paris, le 20 juillet 2010

Copy : His Excellence, David RITCHIE, Ambassador of Australia in France

Dear Prime Minister,

As a Deputy and a member of the Social Committee of the Parliament in France, I would like to congratulate you on the announcement of Australia's decision to implement standardised and plain packaging for tobacco products with effect from July 2012.

This major decision will consolidate Australia's position as a global leader in innovative tobacco control policy : advertising bans for tobacco products, pictorial warning labels and high taxation of tobacco products.

As part of my parliamentary work on the fight against tobacco addiction I often stepped in to express my disagreement against profit-making but non health-oriented policies. I meant to defend the great legislative and regulatory achievements obtained for a better prevention against the dangers of tobacco in France.

With the support of the *Comité National Contre le Tabagisme* (the oldest French association of smoking prevention), we took the Australian example as the starting point in order to take joint action on introducing this issue on the French political agenda and give publicity in the media. We hope that the implementation of standardised and plain packaging for tobacco products will be discussed and approved in France and, eventually, in Europe.

I admire the courage and sagacity of the Australian Government and I would like to demonstrate my support for this exceptional decision.

s 22

Yours faithfully,

Yves BUR

s 22

s 22

s 22

---

**From:** s 22  
**Sent:** Thursday, 30 September 2010 11:54 AM  
**To:** Castellino, Joe  
**Cc:** s 22  
**Subject:** Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]  
**Attachments:** IDC-Invitation-Castellino-PMC.pdf

Mr Joe Castellino  
Assistant Secretary  
Health Programs, Ageing and Sport Branch  
Department of Prime Minister and Cabinet  
PO Box 6500  
Canberra ACT 2600

Dear Mr Castellino

Please find attached a copy of a letter inviting you to participate in an Inter-Departmental Committee on your organisation's behalf. The original was despatched today.

Regards

s 22  
Tobacco Control Section  
Drug Strategy Branch  
Department of Health and Ageing  
Telephone s 22

---

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**Australian Government**  
**Department of Health and Ageing**

Mr Joe Castellino  
Assistant Secretary  
Health Programs, Ageing and Sport Branch  
Department of Prime Minister and Cabinet  
PO Box 6500  
Canberra ACT 2600

Dear Mr Castellino

**Invitation to participate on the Interdepartmental Committee (IDC) for the introduction of plain packaging for tobacco products**

The Australian Government has announced that legislation will be developed and introduced to require plain packaging for tobacco products commencing in 2012. The legislation will limit or prohibit the use of tobacco industry logos, colours, brand imagery or promotional text on tobacco product packaging.

Due to the complexity of issues regarding plain packaging of tobacco products, and the number of agencies which have an interest in this issue, an Interdepartmental Committee (IDC) is proposed to ensure a whole-of-government approach to this proposal. The IDC will be chaired by the Department of Health and Ageing and representatives are being invited from the Department of Foreign Affairs and Trade, Treasury (including the Australian Taxation Office and the Australian Competition and Consumer Commission), the Australian Customs and Border Protection Service, the Department of Innovation, Industry, Science and Research, the Attorney-General's Department and the Department of the Prime Minister and Cabinet.

Representation is being sought at the Assistant Secretary level or higher in the first instance.

The first meeting of the IDC will take place in late October. I would therefore be grateful if you could advise me by 8 October 2010 of your agreement, or otherwise, to be part of the IDC and the name of your nominated representative. If this issue is more appropriately addressed by another part of your organisation, would you please forward this letter to the relevant area for consideration.

The contact officer in the Department of Health and Ageing is [REDACTED] s 22 whose telephone number is [REDACTED] s 22 and email address is [REDACTED] s 22.

I look forward to your response.

Yours sincerely

s 22

Simon Cotterell  
A/g First Assistant Secretary  
Mental Health and Chronic Disease Division  
Department of Health and Ageing

20 September 2010

s 22

**From:** Castellino, Joe  
**Sent:** Thursday, 30 September 2010 12:49 PM  
**To:** s 22  
**Cc:** Sebar, Gareth; Cass, Yael  
**Subject:** FW: Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]  
**Attachments:** IDC-Invitation-Castellino-PMC.pdf

**Security Classification:**  
 IN-CONFIDENCE

s 22 – I think I'm the right rep for this IDC and you and I can attend meetings – but before we get back to Simon, can we please discuss whether there are other areas around the dept that might be interested (our industry colleagues, for example?) that we will need to keep in the loop.

Joe.

**From:** s 22  
**Sent:** Thursday, 30 September 2010 11:54 AM  
**To:** Castellino, Joe  
**Cc:** s 22  
**Subject:** Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

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 Assistant Secretary  
 Health Programs, Ageing and Sport Branch  
 Department of Prime Minister and Cabinet  
 PO Box 6500  
 Canberra ACT 2600

Dear Mr Castellino

Please find attached a copy of a letter inviting you to participate in an Inter-Departmental Committee on your organisation's behalf. The original was despatched today.

Regards

s 22  
 Tobacco Control Section  
 Drug Strategy Branch  
 Department of Health and Ageing  
 Telephone s 22

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s 22

**From:** s 22  
**Sent:** Thursday, 30 September 2010 1:48 PM  
**To:** Castellino, Joe  
**Subject:** RE: Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

**Security Classification:**  
 IN-CONFIDENCE

I will send the letter on to I&E, International and Eco to see what interest they have.

Cheers

s 22

**From:** Castellino, Joe  
**Sent:** Thursday, 30 September 2010 12:49 PM  
**To:** s 22  
 Sebar, Gareth; Cass, Yael  
**Subject:** FW: Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

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**From:** s 22  
**Sent:** Thursday, 30 September 2010 11:54 AM  
**To:** Castellino, Joe  
**Cc:** s 22  
**Subject:** Invitation to participate in IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

Mr Joe Castellino  
 Assistant Secretary  
 Health Programs, Ageing and Sport Branch  
 Department of Prime Minister and Cabinet  
 PO Box 6500  
 Canberra ACT 2600

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s 22

Tobacco Control Section  
 Drug Strategy Branch  
 Department of Health and Ageing  
 Telephone s 22

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s 22

**From:** s 22  
**Sent:** Thursday, 30 September 2010 2:44 PM  
**To:** Geering, John; Poels, Wayne; s 22; Taylor, Marie; Kierse, Glen; s 22;  
**Cc:** s 22  
**Subject:** IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]  
**Attachments:** IDC-Invitation-Castellino-PMC.pdf

**Security Classification:**  
 IN-CONFIDENCE

Good afternoon

PM&C has been invited (as attached) to participate in an IDC on plain packaging of tobacco products, to be chaired by Health and Ageing. Attorney-General's, IP Australia, DFAT, Customs, Treasury, ACCC, Innovation, Industry, Science and Research and the Australian Taxation Office have also been invited to participate. The first meeting will be in late October.

Health Branch is happy to lead on this and we will consult you on specific issues that arise. Please let us know if you would like to receive meeting papers and outcomes, or if you would like a greater level of involvement.

Thanks and regards  
 Jacqui

s 22

Senior Adviser  
 Public Health Section  
 Social Policy Division  
 Department of the Prime Minister and Cabinet

Direct: s 22  
 Fax: +61 2 6271 5300  
 Mobile: s 22  
 Email: s 22





**Australian Government**  
**Department of Health and Ageing**

Mr Joe Castellino  
Assistant Secretary  
Health Programs, Ageing and Sport Branch  
Department of Prime Minister and Cabinet  
PO Box 6500  
Canberra ACT 2600

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Representation is being sought at the Assistant Secretary level or higher in the first instance.

The first meeting of the IDC will take place in late October. I would therefore be grateful if you could advise me by 8 October 2010 of your agreement, or otherwise, to be part of the IDC and the name of your nominated representative. If this issue is more appropriately addressed by another part of your organisation, would you please forward this letter to the relevant area for consideration.

The contact officer in the Department of Health and Ageing is [REDACTED] s 22 whose telephone number is [REDACTED] s 22 and email address is [REDACTED] s 22.

I look forward to your response.

Yours sincerely

s 22

Simon Cotterell  
A/g First Assistant Secretary  
Mental Health and Chronic Disease Division  
Department of Health and Ageing

20 September 2010

s 22

---

**From:** Taylor, Marie  
**Sent:** Thursday, 30 September 2010 3:18 PM  
**To:** s 22  
**Cc:** s 22  
**Subject:** RE: IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

**Security Classification:**  
IN-CONFIDENCE

Happy to leave this with you s 22

Marie

Marie Taylor  
Assistant Secretary  
Climate Change, Energy & Industry  
Department of the Prime Minister & Cabinet  
s 22

---

**From:** s 22  
**Sent:** Thursday, 30 September 2010 2:44 PM  
**To:** Geering, John; Poels, Wayne; s 22; Taylor, Marie; Kierse, Glen; s 22; s 22  
**Cc:** s 22  
**Subject:** IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

Good afternoon

PM&C has been invited (as attached) to participate in an IDC on plain packaging of tobacco products, to be chaired by Health and Ageing. Attorney-General's, IP Australia, DFAT, Customs, Treasury, ACCC, Innovation, Industry, Science and Research and the Australian Taxation Office have also been invited to participate. The first meeting will be in late October.

Health Branch is happy to lead on this and we will consult you on specific issues that arise. Please let us know if you would like to receive meeting papers and outcomes, or if you would like a greater level of involvement.

anks and regards

s 22

s 22

Senior Adviser  
Public Health Section  
Social Policy Division  
Department of the Prime Minister and Cabinet

Direct: s 22  
Fax: +61 2 6271 5300  
Mobile: s 22  
Email: s 22

s 22

**From:** s 22  
**Sent:** Friday, 1 October 2010 2:30 PM  
**To:** s 22  
**Cc:** s 22  
**Subject:** RE: IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

**Security Classification:**  
 IN-CONFIDENCE

Hi s 22

Thanks for letting us know about this. LPB is interested in being kept in the loop and consulted (and in receiving meeting papers and outcomes) on any significant legal issues that may arise, or any discussions of the handling of FOI applications or FOI AAT matters (we have one application to the AAT about an FOI request on this matter at the moment).

You could send stuff to me in the first instance; Alex Anderson will be back from leave on 11 October so will be the tact from then.

Thanks

s 22

s 22  
 A/g Assistant Secretary  
 Legal Policy Branch  
 Department of the Prime Minister and Cabinet  
 ph s 22  
 fax (02) 6271 5776  
 email s 22

**From:** s 22  
**Sent:** Thursday, 30 September 2010 2:44 PM  
**To:** Geering, John; Poels, Wayne; s 22; Taylor, Marie; Kierse, Glen; s 22; s 22  
**Cc:** s 22  
**Subject:** IDC on plain packaging of tobacco products [SEC=IN-CONFIDENCE]

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Thanks and regards

s 22

s 22  
 Senior Adviser  
 Public Health Section  
 Social Policy Division  
 Department of the Prime Minister and Cabinet

Direct: s 22  
 Fax: +61 2 6271 5300  
 Mobile: s 22 0

s 22

**From:** s 22  
**Sent:** Tuesday, 5 October 2010 5:22 PM  
**To:** s 22  
**Cc:** Castellino, Joe; s 22  
**Subject:** RE: Your availability at various times for first meeting of IDC on plain packaging of tobacco products [SEC=UNCLASSIFIED]

**Security Classification:**  
 UNCLASSIFIED

Hi s 22

Just confirming that Joe Castellino will be PM&C's representative on the IDC on plain packaging. I will also attend the IDC meetings.

The meeting times on 21, 27 or 28<sup>th</sup> are preferable for us, but if none of those work out, we can reschedule things to attend a meeting on the 22<sup>nd</sup>.

d regards

s 22

s 22

Senior Adviser  
 Public Health Section

Direct: s 22  
 Fax: +61 2 6271 5300  
 Mobile: s 22  
 Email: s 22

**From:** s 22  
**Sent:** Tuesday, 5 October 2010 4:43 PM  
**To:** james.popple@ag.gov.au; s 22  
 s 22; Castellino, Joe  
 s 22;  
 s 22  
 s 22  
**Subject:** Your availability at various times for first meeting of IDC on plain packaging of tobacco products.  
 [SEC=UNCLASSIFIED]

Dear participants / prospective participants in the IDC

As some participants have indicated that their diaries for late October are filling up rapidly, we are seeking information about your availability for a meeting of the IDC at all of the following times:

The afternoon of Thursday 21 October  
 The afternoon of Friday 22 October  
 1:00 – 3:00 pm Wednesday 27 October  
 1:30 – 3:30 pm Thursday 28 October

It is expected that the meeting will be held in either Scarborough House or Sirius House, Woden, ACT.

We would be grateful if you could copy replies to the following email addresses:

s 22

s 22

Regards

s 22

Tobacco Control Section  
Drug Strategy Branch  
Department of Health and Ageing  
Telephone s 22

---

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NFA-26/10/10

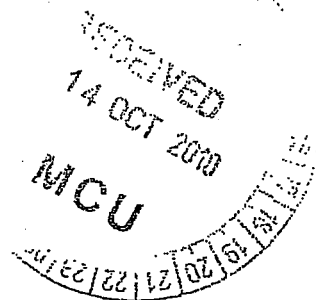
SP/HA

C10/64619

AMERICAN LEGISLATIVE EXCHANGE COUNCIL  
**ALEC**

October 7, 2010

The Hon. Julia Gillard  
Parliament House  
Canberra, ACT 2601  
Australia



Dear Prime Minister Gillard:

On behalf of the nearly 2,000 state legislators who are members of the American Legislative Exchange Council (ALEC), I am pleased to enclose an ALEC resolution respectfully urging you to uphold intellectual property rights (IPR) by opposing plain packaging initiatives being proposed and implemented in your nation. This resolution passed unanimously at the August 5, 2010 meeting of ALEC's International Relations Task Force and was subsequently approved by our Board of Directors.

The importance of IPR protection to international economic health cannot be overstated, and trademarks are fundamental to market competition, enabling a company to differentiate its brand from another and are often an organization's most valuable asset. Plain packaging laws amount to a government seizure of trademarks. While we recognize the good intent of plain packaging regulations, there is no meaningful evidence that plain packaging reduces tobacco use. However, there is research suggesting that plain packaging can result in an increase in tobacco use due to the proliferation of cheaper, counterfeit products. It is easier for counterfeiters to manufacture a plain packaged item.

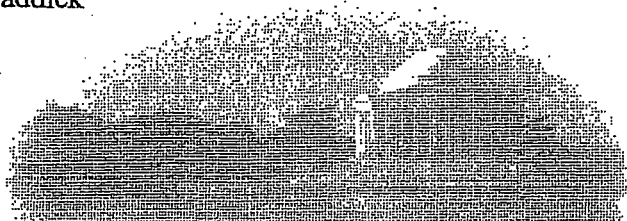
Further, Australia is party to several multilateral and bilateral trade agreements and treaties that contain IPR provisions including the Paris Convention for the Protection of Industrial Property, WTO Technical Barriers to Trade Agreement and the WTO Trade-Related Aspects of Intellectual Property Agreement. Plain packaging legislation is inconsistent with these agreements. The violation of these treaties by developed nations sends a clear message to the developing world that these agreements are not binding international law but rather suggestions setting a dangerous precedent and encouraging further disregard of IPR.

IPR are essential to international competitiveness in an innovation economy. We urge you to protect IPR and oppose and repeal plain packaging legislation wherever it appears.

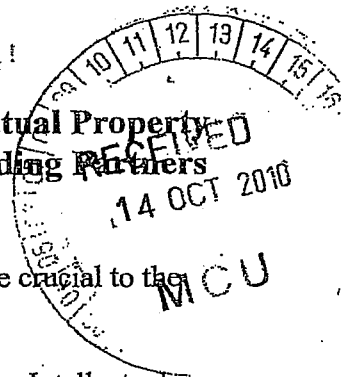
Very respectfully,  
s 22



Representative Tom Craddick  
National Chair, ALEC



**Resolution Urging the Obama Administration to Protect Intellectual Property Rights and Oppose Plain Packaging Initiatives Proposed by Trading Partners Worldwide**



**WHEREAS**, protection and enforcement of intellectual property rights (IPR) are crucial to the future of the innovation-based economy; and

**WHEREAS**, the Obama Administration released the 2010 Joint Strategic Plan on Intellectual Property Enforcement in June highlighting the importance of IPR to the U.S. economy; and pledged to work with U.S. trading partners and within international organizations to better enforce American intellectual property rights in the global economy; and

**WHEREAS**, the Obama Administration pledged to initiate a comprehensive review of current efforts in support of U.S. businesses that have difficulty enforcing their intellectual property rights in overseas markets; and

**WHEREAS**, U.S. intellectual property is worth an estimated \$5.5 trillion, more than the GDP of any country, and IP-related industries account for more than half of all U.S. exports, helping to drive 40% of America's domestic growth; and

**WHEREAS**, intellectual property, including trademarks, are essential to a company's ability to compete and thrive in the global economy; and plain packaging legislation is, in effect, a government seizure of a corporation's most valuable asset, its brand, trademark and/or logo; and

**WHEREAS**, the American Legislative Exchange Council (ALEC) recognizes the importance to the market economy of protecting IPR, including trademarks; and

**WHEREAS**, plain packaging proposals mandate that consumer products be packaged in plain or brown matte paper, using standardized font, no color and without logos or any other identifying characteristics; and

**WHEREAS**, legislatures in a number of countries and regions including but not limited to Australia, Canada and the European Union (EU) are considering policies that would result in plain packaging mandates; and

**WHEREAS**, compliance with plain packaging regulations would wipe out the value of goodwill accrued by a company over many years through the development of its trademark and branding; and

**WHEREAS**, IPR protection provides predictability and certainty for consumers and producers; and

**WHEREAS**, IPR protection, including the protection of trademarks, is codified in the Paris Convention for the Protection of Industrial Property to which the United States and said countries that are considering plain packaging regulations are signatories; and



# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## ALEC

**WHEREAS**, the United States along with all other members of the World Trade Organization (WTO), including the countries considering plain packaging legislation, are parties to the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement, which has codified the importance of protecting IPR, including trademarks; and

**WHEREAS**, the United States along with all other members of the WTO, including the countries considering plain-packaging legislation, are parties to the Technical Barriers to Trade (TBT) Agreement which requires that technical regulations, including packaging and labeling requirements, should avoid unnecessary obstacles to trade; and

**WHEREAS**, a number of countries currently considering plain packaging proposals have bilateral trade agreements with the United States which have provisions protecting IPR, including trademarks; and

**WHEREAS**, plain packaging and labeling requirements would appear to be inconsistent with the IPR provisions in TRIPS, the TBT and certain bilateral free trade agreements entered into by the United States and set a dangerous precedent that could further erode current international IPR protection and enforcement efforts; and

**WHEREAS**, the U.S. Chamber of Commerce and other U.S. organizations recognize that plain packaging is likely to increase the incidence of counterfeiting and will harm brands and industries by decreasing the amount of differentiation between products and introducing an element of risk into the market; and

**WHEREAS**, plain packaging will decrease consumer confidence in goods because of a lack of knowledge as to the origin and quality of the product; and

**NOW THEREFORE, BE IT RESOLVED** that ALEC call upon the Obama Administration's new IP Enforcement Coordinator, Victoria Espinel, to continue to uphold intellectual property rights by speaking out against calls for plain packaging legislation by our trading partners; and

**BE IT FURTHER RESOLVED**, that ALEC urge legislatures around the world to reject plain packaging legislation it is asked to consider; and

**BE IT FURTHER RESOLVED**, that ALEC will submit this resolution to Victoria Espinel, U.S. IP Enforcement Coordinator at the U.S. Office of Management and Budget, U.S. Trade Representative Ron Kirk, U.S. Department of Commerce, the Australian government, the British Parliament, the European Union's European Economic and Social Committee, the Director General Trade and the governments of countries that consider enacting plain packaging regulations in the future.

s 22

From: s 22  
 Sent: Friday, 22 October 2010 10:00 AM  
 To: Castellino, Joe  
 Subject: FW: The Australian AFACT conference feature. - URGENT [SEC=UNCLASSIFIED]

Security Classification:  
 UNCLASSIFIED

Hi - will come and have a quick chat about this.

s 22

From: s 22  
 Sent: Friday, 22 October 2010 10:00 AM  
 To: s 22  
 Subject: Fw: The Australian AFACT conference feature. - URGENT [SEC=UNCLASSIFIED]

s 22

Please see below - I will give you a call about this shortly.

Regards

s 22

s 22

Director  
 Tobacco Control Section  
 Department of Health and Ageing  
 Telephone: s 22  
 Fax: (02) 6289 8456  
 Mobile: s 22

----- Forwarded by s 22 /MHCDD/Health on 22/10/2010 09:57 AM -----

Simon Cotterell/MHCDD/Health

To MHCDDInputs/Health@Health\_gov\_au, s 22 /MHCDD/Health@Health\_gov\_au,  
 DSB Coordination/Health@Health\_Gov\_Au

cc s 22 /BG/Health@Health\_gov\_au

22/10/2010 08:21 AM

Subject Re: The Australian AFACT conference feature. [SEC=UNCLASSIFIED] [Link](#)

Classification: [SEC=UNCLASSIFIED]

s 22 this will take a bit of work-up and I am in Estimates at lunchtime, so we won't be able to get response to you till this afternoon.

s 22 could you talk to PMC about appropriate responses to some of these please. You will know which ones.

Simon

----- Original Message -----

From: MHCDDInputs  
 Sent: 22/10/2010 08:09 AM ZE10  
 To: s 22; DSB Coordination  
 Cc: s 22; Simon Cotterell  
 Subject: Fw: The Australian AFACT conference feature. [SEC=UNCLASSIFIED]

Hi

I have not seen this request before. Can you please prepare a response to the journalist's questions as soon as possible for Simon and s 22 clearance. The response will need to be sent today.

Thanks

s 22  
MHCDDInputs

Parliamentary Coord - s 22  
Assistant Business Manager - s 22  
----- Forwarded by s 22 /MHCDD/Health on 22/10/2010 08:05 AM -----  
s 22 BG/Health

21/10/2010 05:03 PM

To MHCDDInputs/Health@Health\_gov\_au  
cc News/Health@Health\_Gov\_Au  
Subject Fw: The Australian APACT conference feature. [SEC=UNCLASSIFIED]

Has this been sent to you previously - thought I had.

happy to discuss again in the morning

cheers

S  
----- Forwarded by s 22 /BG/Health on 21/10/2010 05:02 PM -----

News  
Sent by: s 22 To s 22 /BG/Health@Health\_gov\_au  
cc

21/10/2010 04:57 PM

Subject Fw: The Australian APACT conference feature. [SEC=UNCLASSIFIED]

This chap just called (I missed the call) chasing up his interview with the Minister.

S  
cc

Media Unit  
Australian Government Department of Health and Ageing  
Media enquiries: s 22  
Email: news@health.gov.au

----- Forwarded by Neil Branch/BG/Health on 21/10/2010 16:56 -----

Benjamin Sheehan  
s 22 To news@health.gov.au  
cc

19/10/2010 22:08

Subject The Australian APACT conference feature. [SEC=No Protective Marking]

To whom it may concern,

Just a quick follow up from my phone call to media there earlier today - below is a list of questions I wish to put to the Heath Minister in a ten minute phone interview. The Minister's responses will be used in a feature I've been commissioned to write by The Australian newspaper, on the recent APACT conference held in Canberra.

My deadline for comment for this article is 5pm Tuesday October 25. I am contactable on s 22 during the day.

Questions follow below.

Best regards,

Ben Sheehan  
s 22

s 22

3. With many nations looking to the outcome of our plain cigarette packaging legislation due to be enforced in 2012, is there added pressure on the Government to defeat a legal challenge from the Tobacco industry?

---

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s 22

**From:** Health.NoReply@health.gov.au on behalf of Plain.Packaging.Team@health.gov.au  
**Sent:** Tuesday, 26 October 2010 4:27 PM  
**To:** Stephen.Bouwhuis@aql.gov.au; s 22  
 s 22; Castellino, Joe; s 22  
 s 22; s 22  
 s 22; s 22  
 s 22; s 22  
 s 22; s 22  
**Cc:** Plain.Packaging.Team@health.gov.au  
**Subject:** Agenda for IDC meeting 27 October 2010 [SEC=UNCLASSIFIED]  
**Attachments:** Agenda.doc

Good afternoon, Members.

Thank you for being participants in the Intergovernmental Committee (IDC) on the Plain Packaging of Tobacco Products.

Attached is the Agenda for tomorrow's meeting:

(See attached file: Agenda.doc)

The meeting details:

**Time:** 1:00-3:00 pm

**Date:** 27 October 2010

**Venue:** Meeting Room 4  
 7th Floor  
 Sirius House  
 23 Furzer Street  
 Phillip ACT 2606

Regards

s 22

Departmental Officer  
 Plain Packaging Team  
 Tobacco Control Section

s 22

s 22

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**CABINET - IN - CONFIDENCE**

**Interdepartmental Committee (IDC)  
Plain Packaging of Tobacco Products**

**Meeting  
27 October 2010**

**Agenda**

1. Welcome and introductions
2. Draft Terms of Reference for the IDC
3. Update on progress and timelines
4. Legislative approach
5. Anti-counterfeiting measures
6. Consultation
7. Other business

s 22

**From:** s 22  
**Sent:** Thursday, 4 November 2010 4:50 PM  
**To:** 'Simon.Cotterell@Health.gov.au'; s 22  
**Subject:** RE: Plain packaging IDC follow up [SEC=IN-CONFIDENCE]

**Security Classification:**  
 IN-CONFIDENCE

Hi Simon and s 22

I also wanted to confirm that we are happy with the TORs for the plain packaging IDC.

Cheers  
 Jacqui

s 22  
 Senior Adviser  
 Policy Health Section

act: s 22  
 Fax: +61 2 6271 5300  
 Mobile: s 22  
 Email: s 22

---

**From:** Simon.Cotterell@Health.gov.au [mailto:Simon.Cotterell@Health.gov.au]  
**Sent:** Thursday, 28 October 2010 3:45 PM  
**To:** s 22  
**Cc:** Castellino, Joe; s 22  
**Subject:** Re: Plain packaging IDC follow up [SEC=IN-CONFIDENCE]

Thanks very much for this Jacqui

We will certainly acknowledge the PM in the Health Minister's response to ALEC.

s 22

Best regards

Simon Cotterell  
 Assistant Secretary  
 Drug Strategy Branch  
 Department of Health and Ageing

Ph: s 22  
 Mobile: s 22  
 E-mail: [simon.cotterell@health.gov.au](mailto:simon.cotterell@health.gov.au)

s 22

To "Simon.Cotterell@Health.gov.au" <Simon.Cotterell@Health.gov.au>,  
 s 22

cc "Castellino, Joe" <Joe.Castellino@pmc.gov.au>

Subject Plain packaging IDC follow up [SEC=IN-CONFIDENCE]

28/10/2010 03:23 PM

Hi Simon and s 22

Just wanted to follow up a couple of items from the IDC discussion yesterday.

The first is the letter from the American Legislative Exchange Council that Treasury raised. The PM also received an identical letter, so if the Health Minister responds on behalf of the Australian Government, could her response please acknowledge that.

s 22

Kind regards

s 22

s 22  
Senior Adviser  
Public Health Section  
Social Policy Division  
Department of the Prime Minister and Cabinet

Direct: s 22 8  
Fax: +61 2 6271 5300  
M: s 22  
Cell: s 22

---

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s 22

s 22

**From:** s 22  
**Sent:** Monday, 8 November 2010 2:17 PM  
**To:** s 22  
**Subject:** Prevention words for s 22 brief [SEC=UNCLASSIFIED]

s 22, Joe asked for a couple of dot points on prevention.....

Prevention

Under the National Health and Hospitals Network the Government is tackling the lifestyle related risks that cause chronic disease, targeting smoking in particular. To achieve this, the Government increased the tobacco excise by 25 per cent above normal CPI adjustments on 30 April 2010; is legislating to mandate plain packaging for cigarettes from 1 July 2012; and is implementing a \$28 million national public education campaign on smoking.

s 22

s 22 | Prime Minister and Cabinet | Adviser, Health Programs, Ageing and Sport Branch

1 National Crct, Barton ACT 2600 Australia  
PO Box 6500, Canberra ACT 2600 Australia

T s 22 | F 02 6271 5300  
E s 22 | W [www.pmc.gov.au](http://www.pmc.gov.au)

s 22

**From:** s 22  
**Sent:** Tuesday, 9 November 2010 5:27 PM  
**To:** s 22  
**Subject:** RE: ALEC letter - Plain packaging IDC follow up [SEC=IN-CONFIDENCE]  
**Attachments:** C10-64617 ALEC to PM.tif

**Security Classification:**  
 IN-CONFIDENCE

Hi s 22

No problem.

Cheers

s 22

**From:** s 22  
**Sent:** Tuesday, 9 November 2010 5:07 PM  
**To:** s 22  
**Subject:** Re: ALEC letter - Plain packaging IDC follow up [SEC=IN-CONFIDENCE]

Hi s 22

I would be very grateful if you could arrange for a scanned copy of the incoming letter from ALEC to the Prime Minister to be emailed to me, to put on the file with the reply.

Regards

s 22  
 Tobacco Control Section  
 Drug Strategy Branch  
 Department of Health and Ageing  
 Telephone s 22  
 Email: s 22

----- Forwarded by s 22 /MHCDD/Health on 09/11/2010 05:04 PM -----

Simon Cotterell/MHCDD/Health

28/10/2010 03:44 PM

**To:** s 22  
**cc:** "Castellino, Joe" <Joe.Castellino@pmc.gov.au>, s 22  
**Subject:** Re: Plain packaging IDC follow up [SEC=IN-CONFIDENCE] [Link](#)

Thanks very much for this s 22

We will certainly acknowledge the PM in the Health Minister's response to ALEC.

s 22

Best regards

Simon Cotterell  
 Assistant Secretary  
 Drug Strategy Branch

Department of Health and Ageing

Ph: [REDACTED] s 22  
Mobile: [REDACTED] s 22  
E-mail: [simon.cotterell@health.gov.au](mailto:simon.cotterell@health.gov.au)

[REDACTED] s 22

28/10/2010 03:23 PM

To "Simon.Cotterell@Health.gov.au"

[REDACTED] s 22

[REDACTED] s 22

[REDACTED] s 22

cc "Castellino, Joe" <[Joe.Castellino@pmc.gov.au](mailto:Joe.Castellino@pmc.gov.au)>

Subject Plain packaging IDC follow up [SEC=IN-CONFIDENCE]

Hi Simon and [REDACTED] s 22

Just wanted to follow up a couple of items from the IDC discussion yesterday.

The first is the letter from the American Legislative Exchange Council that Treasury raised. The PM also received an identical letter, so if the Health Minister responds on behalf of the Australian Government, could her response please acknowledge that.

[REDACTED] s 22

Kind regards

[REDACTED] s 22

[REDACTED] s 22

Senior Adviser  
Public Health Section  
Social Policy Division  
Department of the Prime Minister and Cabinet

Direct: [REDACTED] s 22  
Fax: +61 2 6271 5300  
Mobile: [REDACTED] s 22  
Email: [REDACTED] s 22

---

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s 22

**From:** s 22  
**Sent:** Thursday, 11 November 2010 3:04 PM  
**To:** s 22  
**Subject:** RE: Campaigns - s 22 and plain packaging [SEC=UNCLASSIFIED]

**Security Classification:** UNCLASSIFIED

Thank you s 22

Regards

s 22

A/Manager Ministerial Correspondence Unit  
Prime Minister and Cabinet

p- s 22  
e s 22

One National Circuit, Barton ACT  
Postal Address: PO Box 6500, CANBERRA ACT 2600

---

**From:** s 22  
**Sent:** Thursday, 11 November 2010 2:41 PM  
**To:** s 22  
**Subject:** Campaigns - s 22 and plain packaging [SEC=UNCLASSIFIED]

H's 22

You asked for our advice on handling these two campaigns. We agree they should be referred to Health and Ageing.

Thanks

s 22

s 22

Policy Adviser  
Public Health Section  
Social Policy Division  
Department of the Prime Minister and Cabinet

Direct: s 22  
Fax: +61 2 6271 5300  
Mobile: s 22  
Email: s 22

s 22

---

**From:** s 22  
**Sent:** Friday, 26 November 2010 10:50 AM  
**To:** s 22  
**Subject:** FW: Study released today supporting plain packaging effects [SEC=UNCLASSIFIED]  
**Attachments:** Case for Plain Packaging article.pdf; ArticlePresenter.pdf

**Security Classification:**  
UNCLASSIFIED

s 22, just looking through my 'unactioned' emails and came across this. Lisa Webb's article referred to in the attached newspaper clip doesn't appear to have been released as yet (she presented preliminary findings at the Asia Pacific Tobacco conference referred to in the newspaper article).

I have however found another rather interesting article that supports our plain packaging policy (see attached) and will keep my eye out for Ms Webb's article.

s

---

**From:** s 22  
**Sent:** Friday, 8 October 2010 9:18 AM  
**To:** s 22  
**Subject:** Study released today supporting plain packaging effects

For info – good to get a copy of the article when it comes out.

Cheers

s 22



Sydney Morning Herald

08/10/2010

Page: 9

By: Amy Corderoy

Section: General News

Region: Sydney Circulation: 211066

Type: Capital City Daily

Size: 159.00 sq.cms

Frequency: MTWTFSS-

## For teenagers, plain packets take gloss off cigarettes

Amy Corderoy

HEALTH

PLAIN packaging makes cigarettes much less appealing to teenagers, research shows.

When 14- and 15-year-olds were shown cigarettes with plain packaging they became more aware of the graphic health warnings on the packets and had higher overall perceptions of the harm caused by smoking.

It also made cigarettes seem less socially appealing, said the study leader, Lisa Webb.

The teenagers found the packaging boring said Ms Webb, who presented the findings of her interviews with 80 New Zealand teenagers yesterday at the Asia Pacific Conference on Tobacco and Health in Sydney.

It was particularly important to influence 14- and 15-year-olds because that was the age at which most people started smoking, she said.

The chief executive of the Cancer Council Australia, Ian Olver, said plain packets should be introduced as soon as possible.

"People use cigarette packs to reinforce the image they want to create about their lifestyle," he said. "If they just have a plain pack with a graphic health warning they can't do that."

Professor Olver said tobacco companies had used colours to suggest some cigarettes were mild after a ban on labelling them that way. "They would change the pack to a colour that looked mild and then tell the tobaccoist that was the mild one."

Lung cancer, for which smoking is a big risk factor, is still the number one killer of people in NSW, according to a report by the Cancer Institute NSW. In 2008 more than 2600 people died of lung cancer, which accounted for 20 per cent of all cancer deaths.

Simon Chapman, a professor of public health at the University of Sydney, said despite the state's high rate of lung cancer, it was significantly under-represented in the media.

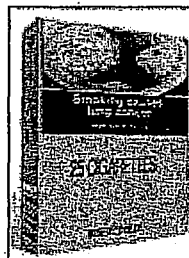
Of more than 2000 TV reports

on cancer on Sydney's five free-to-air stations between May 2005 and August last year, only 45 referred to lung cancer.

And most of those referred to lung cancer in non-smokers, according to a study he co-wrote to be published online today by the *Australian & New Zealand Journal of Public Health*.

Professor Chapman said TV stations might be unwilling to show lung cancer because there was a stigma attached to developing it, even though many cancers were linked to lifestyle. "It probably has something to do with the tobacco industry over the years running the argument that people choose to smoke but that 'choice' is very compromised."

Many became addicted at a young age when they were easily influenced by messages that played down the harmfulness of smoking. They might also have quit years before developing cancer.



A mock-up of plainly packaged cigarettes.

Supplied:  
Department of Health

## The case for the plain packaging of tobacco products

Becky Freeman<sup>1</sup>, Simon Chapman<sup>1</sup> & Matthew Rimmer<sup>2</sup>

School of Public Health, University of Sydney, Australia<sup>1</sup> and Australian Centre for Intellectual Property in Agriculture, Australian National University College of Law, Australia<sup>2</sup>

### ABSTRACT

**Aims** The Framework Convention on Tobacco Control (FCTC) requires nations that have ratified the convention to ban all tobacco advertising and promotion. In the face of these restrictions, tobacco packaging has become the key promotional vehicle for the tobacco industry to interest smokers and potential smokers in tobacco products. This paper reviews available research into the probable impact of mandatory plain packaging and internal tobacco industry statements about the importance of packs as promotional vehicles. It critiques legal objections raised by the industry about plain packaging violating laws and international trade agreements. **Methods** Searches for available evidence were conducted within the internal tobacco industry documents through the online document archives; tobacco industry trade publications; research literature through the Medline and Business Source Premier databases; and grey literature including government documents, research reports and non-governmental organization papers via the Google internet search engine. **Results** Plain packaging of all tobacco products would remove a key remaining means for the industry to promote its products to billions of the world's smokers and future smokers. Governments have required large surface areas of tobacco packs to be used exclusively for health warnings without legal impediment or need to compensate tobacco companies. **Conclusions** Requiring plain packaging is consistent with the intention to ban all tobacco promotions. There is no impediment in the FCTC to interpreting tobacco advertising and promotion to include tobacco packs.

**Keywords** Packaging, regulation, tobacco industry, tobacco, trade marks.

Correspondence to: Simon Chapman, School of Public Health, University of Sydney, NSW 2006, Australia. E-mail: sc@med.usyd.edu.au  
Submitted 29 September 2007; initial review completed 24 October 2007; final version accepted 19 December 2007

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 [1]).

### INTRODUCTION

The Framework Convention on Tobacco Control (FCTC) is the most significant development in international tobacco control in the past 40 years [2]. The FCTC defines tobacco advertising and promotion as 'any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly', and requires that each ratifying country shall 'undertake a comprehensive ban on all tobacco advertising, promotion and sponsorship' [3]. In 1995, Cun-

ningham & Kyle [4] argued for the plain, 'generic' packaging of tobacco products, stressing that the pack was a key promotional vehicle and as such should be subject to the same controls applying to all forms of tobacco advertising.

With global acceleration in tobacco advertising and sponsorship bans, the pack assumes unprecedented importance as a promotional vehicle for reaching potential and current smokers [5–12]. British American Tobacco (BAT) and Philip Morris (PM) have predicted that pack design alone will drive brand imagery [13]. Packs can communicate the 'personality' of a brand to smokers, and smokers can project these characteristics by handling and displaying the package throughout their daily routines [6]. Just as designer clothing, accessories and cars serve as social cues to style, status and character so too can cigarette packs signify a range of user attributes. As 'badge products', cigarettes can reinforce the characteristics conjured by brand image [6,14–17].

Governments have required extensive areas of tobacco packs to be used for mandatory health warnings, including 14 nations (at July 2007) which require pictorial warnings [18]. The largest appropriations are in Australia and New Zealand, where warnings cover 30% of the front and 90% of the back of packs. No nation has compensated any company for the loss of brand identity in this process. As will be discussed, these major incursions into pack design, often alleged by the industry to be inviolable commercial property, show that governments can override commercial concerns in the public interest with regard to packaging.

This paper reviews evidence from internal tobacco industry documents and trade publications; research literature about the probable impact of plain packaging; recent industry statements about packs as vehicles for tobacco promotion; and its efforts to counteract nascent momentum toward plain packaging.

## BACKGROUND

Packaging differentiates brands, being particularly important in homogeneous consumer goods categories such as cigarettes [19]. Marketing literature highlights routinely the critical role played by pack design in the marketing mix, emphasizing that the 'product package is the communication life-blood of the firm', the 'silent salesman' that reaches out to customers [20] and that packaging 'act[s] as a promotional tool in its own right' [21]. Cigarette packaging conveys brand identity through brand logos, colours, founts, pictures, packaging materials and pack shapes. The world's most popular cigarette brand, Marlboro [5], can be identified readily through its iconic red chevron. The Marlboro brand is estimated to be worth \$US27 billion, making it the tenth most valuable (all product) brand in the world [22].

Unique among industries, the tobacco industry claims that it has no interest in attracting new customers but is interested only in stimulating brand-switching among smokers and in maintaining brand loyalty in current customers. Notwithstanding the commercial absurdity of any industry professing disinterest in attracting new recruits, this position has been undermined by revelations from industry documents acknowledging the importance of attracting new smokers [13,23–29]. It is therefore taken as read that in designing tobacco packs to appeal to potential purchasers, tobacco companies count among these those already smoking their brand, those smoking competitors' brands and those who might be persuaded to start smoking.

### Features of plain packaging

Plain packaging would require the removal of colours, brand imagery, corporate logos and trade marks, permit-

ting manufacturers to print only the brand name in a mandated size, fount and place, in addition to required health warnings and other legally mandated product information such as toxic constituents, tax-paid seals or package contents (see Fig. 1) [4]. A standard cardboard texture would be mandatory and the size and shape of the package and cellophane wrappers would also be regulated to prevent novelty pack shape varieties and covers replacing on-pack imagery. Plain packaging would encompass pack interiors and the cigarette itself, given the potential for manufacturers to use colours, bandings and markings and different length and gauges to make cigarettes more 'interesting' and appealing. Any use of perfuming, incorporation of audio chips [30] or affixing of 'onserts' would be banned. Plain packaging would standardize the appearance of all cigarette packages and cigarettes [4], greatly reducing the status signalling roles and appeal of cigarettes.

## METHODS

Medline (1966–November 2006) and Business Source Premier (BSP) (1922–November 2006) were searched. With Medline, all articles with the keyword 'smoking' and the wild-cards packag\$, plain packag\$, generic packag\$ were located, yielding 241 articles. With the BSP search, the wild-cards smoking and packag\*, plain packag\* and generic packag\* were combined, yielding 167 articles. A Google search for grey literature including government documents, research reports and non-governmental organization papers was completed. Search terms with 'tobacco' included: plain packaging, generic packaging, plain pack and generic pack. The first 30 items returned for each search were examined. Tobacco document archives (at: <http://bat.library.ucsf.edu/index.html> and <http://legacy.library.ucsf.edu/>) were searched using the exact phrase terms plain pack, plain package, plain packaging, generic pack, generic package and generic packaging. Combined results from both archives yielded 1298 documents. A hand search of the industry trade publication, *World Tobacco*, was also conducted.

## RESULTS

### History of advocacy for plain packaging

In 1989, the New Zealand Department of Health's Toxic Substances Board recommended that cigarettes be sold in white packs with simple black text and no colours or logos [31]. During the 1989 industry legal challenge to Canadian legislation banning tobacco advertising, industry testimony stimulated tobacco control groups to call for plain packs. Imperial Tobacco Ltd's vice president of marketing agreed that packaging was vital in marketing: 'it's very difficult for people to discriminate blind-tested. Put it



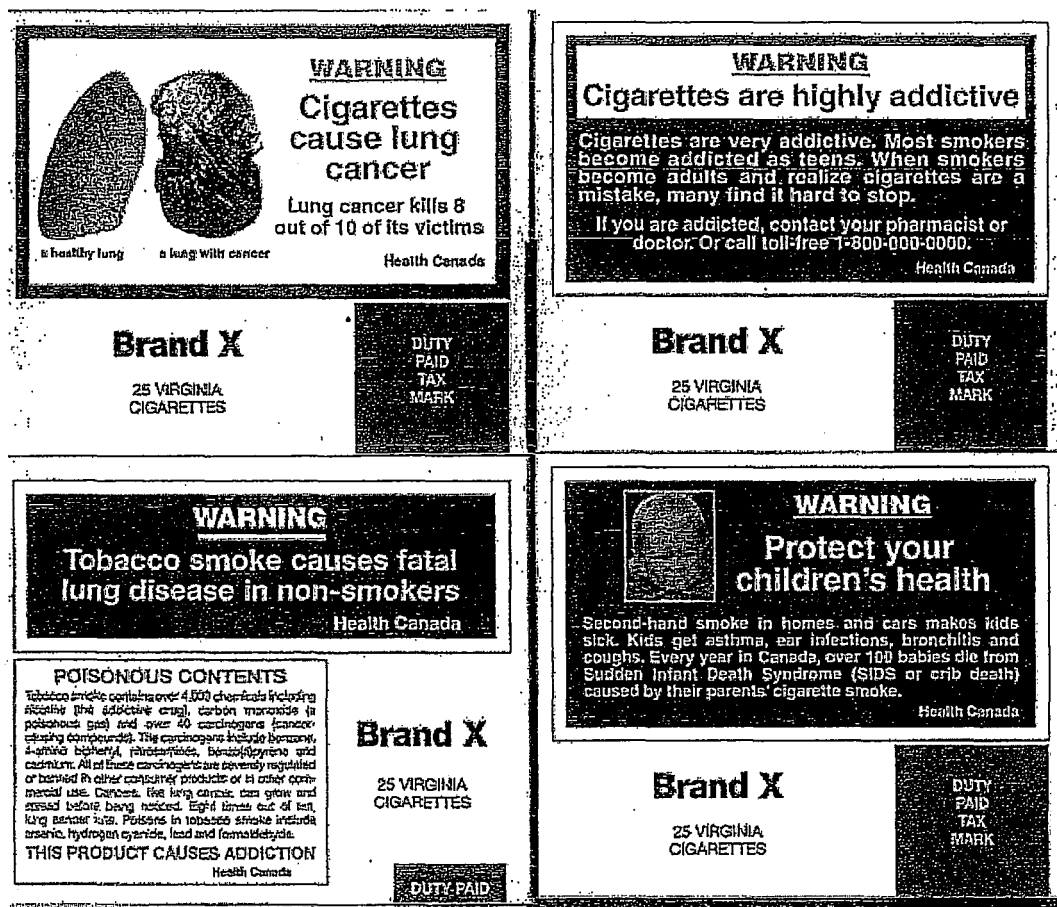


Figure 1 An example of cigarettes in proposed plain packaging.  
Source: Garfield Mahood, Non-Smokers' Rights Association, Ottawa, Canada.

in a package and put a name on it, then it has a lot of product characteristics' [32]. This corroborated an earlier comment from a BAT official that:

... one of 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 [33].

In Australia in 1992 the Centre for Behavioural Research in Cancer recommended that 'regulations be extended to cover the colours, design and wording of the entire exterior of the pack' [34].

Plain packaging was examined by the Canadian House of Commons Standing Committee on Health in 1994 [4]. The Committee endorsed plain packaging and recommended that enabling legislation be implemented pending the outcome of research on the probable effectiveness of plain packs [35]. Subsequent changes in

health ministers and tobacco industry lobbying saw plain packaging legislation fall from the policy agenda [36].

#### Experimental studies of plain packaging

As plain packs have never been legislated, evidence about their possible impact derives from experimental studies where subjects have been presented with mock-up plain and branded packs and their associations and preferences explored. A 1995 Canadian report, 'When packages can't speak: possible impacts of plain and generic packaging of tobacco products', containing several such studies, remains the most comprehensive review of the probable effects of plain packaging [37]. Such studies have shown consistently that compared to branded packs, plain packs are perceived as 'dull and boring', cheap-looking and reduce the flair and appeal associated with smoking [34,37-41]. Teens are less likely to associate specific brands with specific types of people when packs are plain [37]. Students have enhanced ability to recall health warnings on plain packs, suggesting that

imagery can distract from health warnings [38,41]. Health warnings on plain packs were seen as being more serious than the same warnings on branded packs, suggesting that brand imagery diffuses the impact of health warnings [40].

The Canadian report concluded:

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 teens and adult smokers [37].

#### Cigarette packaging as a key site for marketing

The tobacco industry trade magazine, *World Tobacco*, contains numerous examples of appeals to manufacturers to utilize packaging as an advertising vehicle [9–11,42–44]. Manufacturers were advised 'if your brand can no longer shout from billboards, let alone from the cinema screen or the pages of a glossy magazine . . . it can at least court smokers from the retailer's shelf, or from wherever it is placed by those already wed to it' [7].

Industry documents confirm that companies invest significant research effort into pack design in order to communicate messages to specific demographic groups, chiefly young people [6,13]. PM saw opportunities in packaging innovation among young people, as they 'are ready for change' and 'once exposed to innovative [packaging] especially young adults see their current packaging as dated and boring' [45]. Packs aimed at younger women should be 'slick, sleek, flashy, glittery, shiny, silky, bold' [45].

Packaging designers remain optimistic about opportunities to increase the appeal of cigarette packs:

. . . we will increasingly see the pack being viewed as a total opportunity for communications—from printed outer film and tear tape through to the inner frame and inner bundle. Each pack component will provide an integrated function as part of a carefully planned brand or information communications campaign [46].

One packaging firm urged tobacco companies to skirt 'Draconian legislation' by using pack over-wrapping to create an in-store advertisement.

Where cigarette advertising is banned by law . . . the retailer can 'quite coincidentally' stack up a kind of billboard using the products at the point of sale if, for example, the cigarette cartons of a particular brand bear different parts of an overall design, which complete a puzzle or a caption when stacked up [9].

Advances in printing technology have enabled printing of on-pack imagery on the inner frame card (the inner frame is a rectangle of card that acts as a barrier between the outer box and cigarettes; it also helps to hold the cigarettes inside the package) [46], outer film and tear tape [9], and the incorporation of holograms, collectable art, metallic finishes [47], multi-fold stickers [10], photographs and images in pack design [48–50]. In the early 1900s, collectable cigarette cards were a major form of in-pack promotion [51]. A contemporary return to the package as the primary source of advertising is apparent in the following examples.

#### Australia

Australia is a quintessential 'dark market' where all tobacco advertising is banned [52]. Subtle changes to cigarette packs and trade marks were observed on both Benson & Hedges and Winfield cigarette packs during 2000–2002 [53]. When researchers called the company to inquire about the changes, an employee said they were 'playing with the logo because we can't do any advertising anymore' [53].

BAT Australia (BATA) introduced split Dunhill packs in October 2006 [54]. The pack could be split along a perforated line to create two mini-packs, shared easily between two smokers perhaps unable to afford a full pack. Once split, one of the two packs did not bear the mandatory graphic health warning. BATA was forced to remove the packets from the market when they were found to be in breach of tobacco product labelling laws [55].

#### Canada

In June 2005, Imperial Tobacco Canada introduced octagonal packs for the du Maurier brand, presenting an eye-catching package but also obscuring the health warning by wrapping it around the angled pack sides [56]. Imperial's Vice President of Marketing received an international industry award for the innovative design, 'considered an outstanding example of the capacity of product packaging to influence the end user' [57].

#### Korea

In December 2006, KT&G, Korea's largest tobacco manufacturer, released new packaging for the Raison D'etre brand. The pack featured a 'variety of colourful designs, including graffiti, indie band, B-boy and X-sports' [58]. The 1-month limited pack release sought to create a sense of product scarcity, a common marketing tactic to enhance product desirability [59].

#### United States of America

In February 2007, R.J. Reynolds launched a new Camel cigarette aimed at women. Camel no. 9 is packaged in

black and pink or teal (menthol variety) designed to conjure images of sophistication, as in being 'dressed to the nines' [60]. Women's internet sites featured positive commentary about the new packaging:

... yeah my husband bought them for me last night, because I was so turned on by the black and pink package [61].

I don't smoke at all, but I keep seeing this [sic] ads for Camel no. 9. The packaging alone makes me want to try them. It just looks damn good and doesn't follow that style that seemingly every other carton out there does [62].

#### Subverting bans on light and mild descriptors

In nations where the deceptive descriptors 'light' and 'mild' have been banned, manufacturers have used packaging innovations to subvert the intent of those bans [63] where different colour gradations and intensities are used to perpetuate smokers' understanding that a brand is allegedly lower- or higher-yielding [64]. For example, Derby cigarettes in Brazil substituted red for full-strength cigarettes, blue for mild and silver for light [65].

### TOBACCO INDUSTRY RESPONSE TO PLAIN PACKAGING PROPOSALS

The industry denies that packaging has an impact on consumption. For example, the Tobacco Institute of New Zealand argued 'package stimuli, including the use of trade mark, are of no interest to people not already within the market for that specific product' [66]. However, there is evidence that, privately, industry thinks differently about the promotional potential of packs. For example, in 1995 a Brown and Williamson employee stated:

... if you smoke, a cigarette pack is one of the few things you use regularly that makes a statement about you. A cigarette pack is the only thing you take out of your pocket 20 times a day and lay out for everyone to see. That's a lot different than buying your soap powder in generic packaging [67].

Insights into the importance the industry places on packs arise from the international scale of its efforts to undermine plain packaging proposals [68]. In 1993 a 'plain packs group' was formed representing BAT Co. Ltd, RJR Tobacco International, Gallaher, Reemtsma, Rothmans, Benson & Hedges, Imperial, Rothmans International Services and PM International [69]. The industry was adamant it did not 'want to see plain packaging introduced anywhere regardless of the size and importance of the market' [70].

Key public messages were developed to support the primary position that there was no evidence that plain packaging would reduce the uptake of smoking by youth [71]. Moreover, it was suggested that plain packaging would actually increase uptake, as companies would be forced to compete on price alone, causing cigarettes to be more affordable for young people [72]. While seeking to frame its public concerns around fears that children might take up smoking, the industry would have experienced a commercial windfall had plain packs in fact stimulated increased uptake.

All research undertaken on the possible effects of plain packs was dismissed as not showing what people would do in the face of plain packaging but only showing what people *think* they would do [73]. Claims that plain packs increased knowledge of health warnings were dismissed because there 'is no evidence to indicate that knowledge of warnings is related to smoking behavior' [66]. The tobacco industry also attempted to complicate the issue by suggesting that tobacco control agencies were unclear about what plain packaging would require. Arguments that a 'laundry list' of items had been suggested by 'packaging non-professionals' were presented as an unworkable barrier to implementation [74].

The availability of budget generic brand cigarettes in the United States was cited as evidence that plain packaging would be ineffective in reducing demand: the market for these generics being argued as demonstrating that smokers would still smoke such products [68]. However, sales of these products are marginal and their appeal is confounded by their low price. There is no evidence that plain packages are more appealing to smokers [75]. Should a price decrease accompany the introduction of universal plain packaging, a concurrent tax increase could counter that effect.

#### Slippery slope arguments

The industry has recruited allies from the packaging sector who have argued that there would be crippling job losses among printers and packaging suppliers should generics be mandated [35]. They also argue that plain packaging would set a dangerous precedent for other products, such as those containing high amounts of sugar, chocolate, fat or additives [31], epitomized in a brochure, 'The Plain facts about Plain Packs', produced by the New Zealand Tobacco Institute. A jar of Kraft Vegemite (a popular yeast extract product) was shown with all branding imagery removed, being simply labelled 'Savory Spread'. Industry efforts to recruit supporters from the other commercial sectors such as pharmaceuticals and beverages appear to have proved fruitless [68,76,77].

Industry consultant John Luik was commissioned by the plain packs group to produce a book on plain pack-

aging, published in 1998 [78,79]. The majority of the content was written and either signed off by, or under the review of, industry law firm Shook, Hardy and Bacon (SHB) [80,81]. Funding from six tobacco manufacturers was declared, but it is claimed that 'the views in this book are solely those of the contributing authors' [82] who were all selected by the plain pack group [83], with all chapters vetted through SHB.

Five opening chapters position available research on plain packaging as fraught with methodological problems and inconclusive findings. It was argued that plain packaging would serve to increase the attractiveness of smoking among youth, as it would be seen as 'more risky and antiauthoritarian'. The remainder of the book repeats arguments summarized above that branding is entirely about capturing market share and assisting smokers to identify the right product for their personality. The book also argues that plain packaging would violate trade treaties and freedom of expression.

#### Legal objections to plain packaging: trade mark law and international trade law

The tobacco industry is heavily reliant upon trade mark protection in order to communicate to consumers, and exclude rivals and competitors from the market-place (for example, Philip Morris has 159 trade marks listed on the United States trade mark register related to tobacco; British American Tobacco Investments, 113; Imperial Tobacco, 129). It argues that plain packaging regulations would violate minimum obligations for the protection of intellectual property rights under of international trade agreements [71,84–86] such as the *Agreement on Trade-Related Aspects of International Property Rights* 1994 (TRIPS), the *North American Free Trade Agreement* 1994 (NAFTA), and the *Paris Convention for the Protection of Industrial Property* 1883 [35,87]. Industry lawyers insisted that plain packaging would curtail, or even annul, tobacco companies' most valuable assets—trade marks.

However, there is some internal acknowledgement that these 'current conventions and treaties afford little protection' [72] and that there is 'little joy' [77] in GATT/TRIPS. Public health advocates have maintained that nation states should be able to take advantage of flexibilities within international trade agreements to protect public health, maintaining that plain packaging regulations are consistent and compliant with the obligations of such multilateral and regional trade agreements.

#### TRIPS

TRIPS lays down minimum standards for the protection of intellectual property rights—including trade marks,

patent law and copyright law. In the industry-funded plain pack book, Julius Katz & Richard Dearden assert that a measure requiring plain packaging would violate TRIPS [88]. They maintain that plain packaging of tobacco products offends Article 20 of TRIPS, which provides that use of a trade mark in the course of trade is not to be encumbered unjustifiably by special requirements, such as its use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. Somewhat tendentiously, they argue that plain packaging would 'undermine the very purposes underlying trade mark protection and the reason why trade marks are given protection under the Agreement' [88].

Trade mark law does not merely serve the limited purpose of protecting private property rights; it ultimately supports the broader public interest in providing accurate information to consumers. In this light, plain packaging of tobacco seems an eminently reasonable and justifiable measure, entirely consistent with the goal of promoting consumer welfare. International trade law expert Nuno Pires de Carvalho observes that Article 20 of TRIPS presents no obstacle to special requirements for tobacco trade marks because such measures are justifiable 'in order to reduce the good-will associated to those marks and thus limit their power to induce consumption' [89].

Article 8(1) of TRIPS acknowledges 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 recognizes that:

members may provide limited exceptions 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.

It has long been recognized that member states may take advantage of flexibilities within TRIPS to address public health concerns. For example, *The Doha Declaration on Public Health and TRIPS* 2001 [90] and the *WTO General Council Decision* 2003 [91] provide support for such measures in the context of access to essential medicines.

Katz & Dearden also contend that plain packaging would offend the obligation of members to comply with certain provisions of the *Paris Convention for the Protection of Industrial Property* 1883. They note that Article 1(3)

suggests that broad protection should be provided to all forms of industrial property, including tobacco [88]. The authors maintain that trade mark protection can be invalidated only in limited circumstances. However, such a position is based on the false assumption that trade mark owners have a right to registration. As Kingston observes, trade mark protection 'is a privilege, it can be withdrawn in any case where the result that it is intended to bring about has not been achieved or cannot be' [92].

#### NAFTA

J. G. Castel, a Professor of International Trade Law, observed that trade action threats from PM International were unfounded, as 'plain packaging is not concerned with encumbering the use of trademarks but with the sale of cigarettes as a product that is potentially harmful to the public'. He commented:

It has to do with the packaging of goods and with the standards to be applied by manufacturers of tobacco products. The fact that most products sold today carry a trademark to identify them and distinguish them from competing products is a side issue. Therefore, considered as a measure related to the sale of goods, plain packaging falls within the provisions of the GATT, the Agreement on Technical Barriers to Trade, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and NAFTA applicable to trade in goods, which contain numerous provisions that recognise the health exception. Even if one considers the issue of trademarks in isolation, there is enough in the NAFTA chapter on intellectual property and in TRIPS to allow for a health exception [93].

Castel observed: 'It would be unheard of and contrary to international practice if Canada could not take necessary health measures to protect its population without having to pay enormous sums of money to the American tobacco industry.' He concluded: 'The bottom line is whether plain-packaging legislation is necessary for the protection of the life and health of Canadians and has that effect' [93].

Accordingly, the Government of Canada was not persuaded by the arguments of PM International, finding threats of trade action to be hollow. When such legal arguments were presented at the Canadian House of Commons hearings on plain packaging they did little to sway the panel from recommending further action [94,95].

#### European union directive on the manufacture, presentation and sale of tobacco products

In the 2002 case of *R. (on the application of British American Tobacco (Investments) Ltd) v Secretary of State*

*for Health*, the European Court of Justice considered the validity of the European Parliament and Council Directive 2001/37 concerning the manufacture, presentation and sale of tobacco products [96]. The directive imposed strict requirements on the composition and designation of cigarettes—including the need for severe health warnings on packets, and the prohibition of 'descriptors', such as 'light and mild'. BAT (Investments) Ltd and Imperial Tobacco Ltd—supported by Japan Tobacco Inc. and JT International SA—brought legal proceedings before the High Court in the United Kingdom challenging the intention of the United Kingdom Government to transpose the directive into national law. The High Court requested the European Court of Justice to determine that the directive was invalid in whole or in part by reason of infringement of Article 295 EC, the fundamental right to property, or Article 20 of the *TRIPs Agreement 1994*.

Tobacco companies claimed that the large size of the health warnings required by Article 5 of the Directive constituted a serious infringement of their intellectual property rights. The companies submitted that the warnings would dominate the overall appearance of tobacco product packaging, and so curtail or even prevent the use of their trade marks by the manufacturers of those products. The tobacco companies also argued that the absolute prohibition on using the descriptive terms such as 'light and mild' would deprive them of a number of their trade marks because they will no longer be permitted to use them.

The European Court of Justice denied that the Directive violated the fundamental right of property, emphasizing that:

... as regards the validity of the Directive in respect of the right to property, the Court has consistently held that, while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function [96].

It noted further that:

... its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

The decision of the European Court of Justice provides support for the position that plain packaging regimes are compatible with property and intellectual property rights.

## DISCUSSION

While the research body on the effects of plain packaging is small and necessarily experimental, industry candor in internal documents and trade literature shows that tobacco product packaging is seen to be a persuasive form of advertising. Plain packaging legislation remains an important but under-explored part of comprehensive tobacco control legislation designed to eliminate all forms of tobacco advertising and promotion. Given the near-universal appropriation by governments of tobacco packaging for health warnings, and the failure of any company to ever succeed in finally resisting this appropriation or in being compensated for any loss of trade predicted by the industry, the failure of international tobacco control to advance plain packaging is all the more remarkable. The absence of explicit reference to packs as a key form of tobacco promotion in the FCTC is an unfortunate omission, although there is nothing in the current wording of the Convention that could be interpreted to exclude packs as being embraced fully by the provisions on advertising and promotion.

While the industry promotes an unattainably high standard of proof for research showing that plain packaging would reduce smoking, they do not hold this same high standard with their own position, that packaging serves only to encourage brand-switching among adults. Claims that brand imagery merely facilitates product differentiation for current smokers at point-of-sale are disingenuous. Ninety per cent of Australian adult smokers say that they never decide on their brand at point-of-sale, with only 1% saying that they always decide in the shop [97]. This is consistent with internal industry market analysis which highlights 'both gross and net [brand] switching continue to decline indicating stability in the market' and the industry's continuing monitoring of the volume of new smokers commencing smoking with different brands [98].

As the body of plain package research shows consistently, package brand imagery distracts from and therefore reduces the impact of health warnings. A recent multi-country tobacco survey examining the effectiveness of warnings showed that the larger and more prominent a health warning, the more likely it is to be recalled [99]. Plain packaging would enable the warning size to be increased further and allow for additional information about smoking cessation to be printed on packs.

The Technical Barriers to Trade Agreement (TBT) could be invoked to suggest that 'plain packaging is not the least trade restrictive alternative to reduce tobacco related problems' [100]. TBT have yet to be involved in any tobacco-related controversy, and implementation of plain packaging could result in a test case. Other international trade treaties, such as the General Agreement on

Tariffs and Trade (GATT), contain exceptions for health-related issues which have been defended successfully [101]. There is a strong case to exclude tobacco from all trade agreements and to empower the FCTC to assume priority over trade agreements.

Although we are aware of no precedents of laws requiring plain packaging for any other commercial goods, in Australia, for example, a voluntary *de facto* system of generic packaging exists for pharmaceuticals which require prescriptions [102] (with the exception of the 'use of different colours or colour bars to distinguish between different strengths or presentations of the product is encouraged' [102] purely to assist the pharmacist in providing the correct drug). Such drugs are packaged in essentially plain packs, with no attention-getting features incorporated in packaging to entice either users or the mediating doctors who are required to prescribe such drugs. Prescription-only drugs and many other non-prescription, but 'under-the-counter' drugs where a sale is required to be handled by a pharmacist do not see their manufacturers seeking to imbue such products with qualities of 'brand identity' or 'personality' via packaging and other devices. The potential for abuse of such products (for example psychotropic and analgesic drugs) is such that nearly every society requires their advertising to be restricted to only prescribing doctors, that they not be displayed openly in pharmacies and that customers be counselled on their correct use and contraindications. Cigarettes, which cause the death of 50% of their long-term users, are sold in very different circumstances: in nearly all nations, there are no restrictions on where they may be sold, ineffective policing of their supply to minors and, other than accommodating prescribed warnings, no restrictions on packaging. This paradox, whereby life-saving drugs are regulated heavily and life-harming drugs such as nicotine sold in tobacco products are subject to few restrictions, requires radical change. Plain packaging would be an important step in that direction.

## Acknowledgements

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s 22

From: s 22  
 Sent: Thursday, 6 January 2011 5:27 PM  
 To: Castellino, Joe; s 22  
 Subject: RE: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

Security Classification: UNCLASSIFIED

Will do.

-----Original Message-----

From: Castellino, Joe  
 Sent: Thursday, 6 January 2011 5:26 PM  
 To: s 22 ; s 22  
 Subject: FW: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

s 22 - can you find a time that suits you, me and s 22. Just in case we are still in the world of current responsibilities. I am possibly in Sydney on 2 Feb but the other days may be OK. That all said, I'd be more than comfortable with you representing PM&C.

Thanks.

-----Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [<mailto:Health.NoReply@health.gov.au>] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)  
 Sent: Thursday, 6 January 2011 3:09 PM  
 To: Castellino, Joe  
 Subject: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

Good afternoon, Mr Castellino.

The date for the next meeting for the IDC for Plain Packaging of Tobacco Products is proposed for early February 2011.

Would you advise of your availability on these dates, please?

2 February 2011

3 February 2011

4 February 2011

Thank you.

Regards

s 22

Departmental Officer  
 Plain Packaging Team  
 Tobacco Control Section

s 22

s 22

"Important: This transmission is intended only for the use of the addressee and may contain confidential or legally privileged information. If you are not the intended recipient, you are notified that any use or dissemination of this communication is strictly prohibited. If you receive this transmission in error please notify the author immediately and delete all copies of this transmission."

s 22

From: s 22  
 Sent: Friday, 7 January 2011 2:23 PM  
 To: 'plain.packaging.team@health.gov.au'  
 Cc: s 22  
 Subject: FW: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

Security Classification: UNCLASSIFIED

Hi s 22

Some time on the 3rd or 4th of February would be preferable for PM&C.

Thanks

s 22

s 22

Senior Adviser  
 Public Health Section

Direct: s 22  
 Fax: +61 2 6271 5300  
 Mobile: s 22  
 Email: s 22

-----Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [<mailto:Health.NoReply@health.gov.au>] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)  
 Sent: Thursday, 6 January 2011 3:09 PM  
 To: Castellino, Joe  
 Subject: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

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2 February 2011

3 February 2011

4 February 2011

Thank you.

Regards

s 22

Departmental Officer  
 Plain Packaging Team  
 Tobacco Control Section

s 22

s 22

s 22

s 22

From: [REDACTED]  
 Sent: Friday, 7 January 2011 3:29 PM  
 To: 'Plain.Packaging.Team@health.gov.au'  
 Cc: Castellino, Joe; [REDACTED]  
 Subject: RE: FW: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

## Security Classification:

UNCLASSIFIED

Hi [REDACTED] - yes, Joe just passed it on. 3rd is OK as advised, as is the afternoon of the 7th or any time on the 10th.

s 22

-----Original Message-----

From: Health.NoReply@health.gov.au [mailto:Health.NoReply@health.gov.au] On Behalf Of  
 Plain.Packaging.Team@health.gov.au  
 Sent: Friday, 7 January 2011 3:28 PM  
 To: [REDACTED]  
 Subject: Re: FW: Next meeting of the IDC for Plain Packaging of Tobacco Products  
 [SEC=UNCLASSIFIED]

Thank you, [REDACTED]

I have just sent an new email to Mr Castellino.

There has been a change of dates.

Regards

s 22

Departmental Officer  
 Plain Packaging Team  
 Tobacco Control Section

s 22

s 22

s 22

07/01/2011  
 02:23 PM

To  
 "'plain.packaging.team@health.gov  
 .au'"  
 <plain.packaging.team@health.gov.  
 au>

cc

s 22

Subject  
 FW: Next meeting of the IDC for  
 Plain Packaging of Tobacco  
 Products [SEC=UNCLASSIFIED]

Hi [REDACTED] s 22

Some time on the 3rd or 4th of February would be preferable for PM&C.

Thanks

[REDACTED] s 22

[REDACTED] s 22

Senior Adviser  
Public Health Section

Direct: [REDACTED] s 22

Fax: +61 2 6271 5300

Mobile: [REDACTED] s 22

Email: [REDACTED] s 22

---Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [<mailto:Health.NoReply@health.gov.au>] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)

Sent: Thursday, 6 January 2011 3:09 PM

To: Castellino, Joe

Subject: Next meeting of the IDC for Plain Packaging of Tobacco Products  
[SEC=UNCLASSIFIED]

Good afternoon, Mr Castellino.

The date for the next meeting for the IDC for Plain Packaging of Tobacco Products is proposed for early February 2011.

Would you advise of your availability on these dates, please?

2 February 2011

3 February 2011

4 February 2011

Thank you.

Regards

[REDACTED] s 22

Departmental Officer  
Plain Packaging Team  
Tobacco Control Section

[REDACTED] s 22

[REDACTED] s 22

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s 22

From: s 22  
Sent: Wednesday, 2 February 2011 2:04 PM  
To: s 22  
Subject: FW: Next meeting of the IDC for Plain Packaging of Tobacco Products  
[SEC=UNCLASSIFIED]

Security Classification: UNCLASSIFIED

Hi s 22

Joe and I are available at the new suggested time.

Cheers  
s 22

s 22

Senior Adviser  
Public Health Section

Direct: s 22  
Fax: +61 2 6271 5300  
Mobile: s 22  
Email: s 22

-----Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [<mailto:Health.NoReply@health.gov.au>] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)  
Sent: Wednesday, 2 February 2011 12:46 PM  
To: Castellino, Joe  
Subject: Fw: Next meeting of the IDC for Plain Packaging of Tobacco Products  
[SEC=UNCLASSIFIED]

Dear Mr Castellino.

Mr Cotterell has advised that he has to be in the Minister's office at  
11:30 on Thursday 10 February 2011.

Are you available for an amended time of 9:30-11:00am, Thursday 10 February  
2011, please?

Thank you.

Regards

s 22

Plain Packaging Team  
Tobacco Reform

s 22

----- Forwarded by s 22 /MHCDD/Health on 02/02/2011 12:41 PM -----

Plain  
Packaging Team  
Sent by:

To



s 22

"Castellino, Joe"  
<Joe.Castellino@pmc.gov.au>

cc

13/01/2011  
10:08 AM

s 22

Subject

Fw: Next meeting of the IDC for  
Plain Packaging of Tobacco  
Products [SEC=UNCLASSIFIED]

Good morning, Mr Castellino.

Below are the details of the next meeting of the Intergovernmental  
Committee on the Plain Packaging of Tobacco Products:

Date: 10 February 2011

Time: 10:00-11:30am

Venue: Sirius Building  
23 Furzer Street  
Phillip ACT

Regards

s 22

Departmental Officer  
Plain Packaging Team  
Tobacco Control Section

s 22

s 22

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s 22

From: s 22  
 Sent: Thursday, 10 February 2011 9:14 AM  
 To: s 22  
 Subject: FW: Annotated Agenda and Draft Minutes [SEC=UNCLASSIFIED]  
 Attachments: Annotated Agenda - 10 February 2011.doc; Draft Minutes IDC 27 Oct 2010.doc

Security Classification: UNCLASSIFIED

-----Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [<mailto:Health.NoReply@health.gov.au>] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)  
 Sent: Wednesday, 9 February 2011 4:52 PM  
 Subject: Annotated Agenda and Draft Minutes [SEC=UNCLASSIFIED]

Good afternoon, All.

Attached is the Annotated Agenda for the IDC meeting 10 February 2011:

(See attached file: Annotated Agenda - 10 February 2011.doc)

and the Draft Minutes for the meeting held 27 October 2010:

(See attached file: Draft Minutes IDC 27 Oct 2010.doc)

Regards

s 22

Plain Packaging Team  
 Tobacco Reform

s 22

s 22

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## **CABINET - IN - CONFIDENCE**

### **Interdepartmental Committee (IDC) Plain Packaging of Tobacco Products**

**Meeting  
10 February 2011  
Meeting Room 2 – 7.S. 103**

#### **Annotated Agenda**

Expected attendance:

<b>NAME</b>	<b>ORGANISATION</b>
Stephen Bouwhuis Richard Braddock	Attorney-General's Department
James Baxter Margaret Durnan	Department of Foreign Affairs and Trade
Sarah Major	Australian Customs and Border Protection Service
Simon Writer Simon Winckler	Treasury
Valerie Villiere	Department of Innovation, Industry, Science and Research
Steve Hutchison	Australian Competition and Consumer Commission
Peter Harding	Australian Taxation Office
Joe Castellino s 22	Department of Prime Minister and Cabinet
Simon Cotterell Kylie Lindorff	Department of Health and Ageing

Apologies: Thomas Wheeler – Australian Taxation Office

- 1. Welcome and introductions – DoHA**
- 2. Minutes from meeting 27 October 2010 – DoHA**
  - For adoption by the Committee
- 3. Update on progress and timelines – DoHA**
  - Retailer consultations undertaken
  - Tobacco industry consultations undertaken
  - Market research on design of cigarette packs complete end of February
  - Market research on design of other tobacco products (cigars, pouch tobacco etc) beginning March
- 4. Cabinet process and timing – DoHA**
  - 17 February – Exposure Draft Circulated

## **CABINET - IN - CONFIDENCE**

- 3 March – Draft Submission circulated for Coord Comments
- 7 March – Coord comments due
- 7 March – Lodgement
- 15 March – SPSIC Meeting
- 21 March – Cabinet Meeting

### **5. Legislative summary – DoHA**

- New legislation - Tobacco Control Act
- Enforcement by Therapeutic Goods Administration
- Public exposure draft of legislation and design specifications: proposed 8 week public consultation April – May 2011
- Winter sittings 2011 – legislation introduced into Parliament
- Regulations drafted between May - October
- 1 January 2012 – legislation commences
- 1 July 2012 – full compliance required

### **6. Freedom of Information – DoHA**

- DOHA currently 16 FOI requests relating to tobacco, six of these were transferred from other Commonwealth agencies.
- Two further FOI requests were recently completed and another matter is before the Administrative Appeals Tribunal (AAT). The decision is still pending.
- All of the current requests originate from the tobacco industry

### **7. Trade and International perspective - DFAT**

### **8. Other business - All**

## CABINET - IN - CONFIDENCE

### Interdepartmental Committee (IDC) Plain Packaging of Tobacco Products

#### Draft Minutes of Meeting 27 October 2010

##### Attendance

NAME	ORGANISATION
Stephen Bouwhuis	Attorney-General's Department
James Baxter Margaret Durnan	Department of Foreign Affairs and Trade
Sarah Major	Australian Customs and Border Protection Service
Simon Writer Shaz Naidu	Treasury
Valerie Villiere	Department of Innovation, Industry, Science and Research
Steve Hutchison	Australian Competition and Consumer Commission
John McNamara	Australian Taxation Office
Joe Castellino s 22	Department of Prime Minister and Cabinet
Kim Loveday	Therapeutic Goods Administration
Simon Cotterell Kylie Lindorff	Department of Health and Ageing

##### Agenda Item

###### 1. Welcome and introductions

The Chair welcomed the group and thanked everyone for their time in attending. IDC members introduced themselves.

###### 2. Draft Terms of Reference for the IDC

The Chair gave an overview of the Draft Terms of Reference (TOR) and invited comment. There was a brief discussion and it was agreed that IDC members would review the TOR and provide comment to Health via email by 3 November 2010. Draft TOR are at Attachment A.

###### 3. Update on progress and timelines

The Committee was provided with an overview of the plain packaging measure and the associated timelines (Attachment B). Mr Cotterell talked the committee through the overview of the measure and associated key milestones. The committee noted the information.

###### 4. Legislative approach

The Committee was provided with a document that outlined the options for the

## CABINET - IN - CONFIDENCE

legislative approach and enforcement of the plain packaging measure. Health outlined the options, invited comments from the committee and noted that the options would be put to the Minister for Health and Ageing for decision.

Treasury provided the Committee with information on the new Australian Consumer Law (ACL) that will be in place from 1 January 2011. This law has provisions that not only prescribe what information must be provided to consumers, but can also prescribe the presentation of this information, and also prescribe information that manufacturers are not allowed to present to consumers. This ACL may therefore be an option for implementation of the plain packaging legislation. The ACL will be enforced by the ACCC, with State and Territory consumer protection authorities supplementing the ACCC's role. Health undertook to have further discussions with Treasury about the new ACL as an option.

### 5. **Anti-counterfeiting measures**

The Australian Customs and Border Protection Service (Customs) gave an update on the illicit trade in tobacco products. Illicit tobacco products is one of six key risks that Customs has identified in relation to revenue evasion. Smuggling of tobacco is profitable and the crime gangs involved are highly organised and sophisticated.

In relation to counterfeiting of tobacco products, Customs believes that there is a very strong regime already in place and that no changes are necessary. Customs' focus for counterfeit goods is the same as for illicit trade overall and is one of revenue protection. The tobacco industry has programs in place for monitoring of counterfeit goods and their focus is on protection of intellectual property. To Customs' knowledge the industry has never taken action in Australia against trademark infringement for counterfeit goods. Customs considers that there will not be a significant increase in counterfeit goods when plain packaging is introduced, as the ability of crime gangs to counterfeit existing tobacco product packaging is already sophisticated and rapid.

The Australian Tax Office (ATO) provided background on illicit trade from the tax office's point of view. From ATO's perspective local counterfeiting of goods within Australia has not been an issue and has not been detected by the ATO. Counterfeit goods have only been detected as being imported. Locally grown illicit tobacco known as chop-chop was a focus for the ATO when tobacco was still grown in Australia, but this problem has almost disappeared since commercial tobacco growing ceased in Australia. The ATO considered that plain packaging of tobacco products will have no impact on ATO risks or activities.

Health updated the committee on progress in the negotiations under the WHO Framework Convention on Tobacco Control (FCTC) for a Protocol to Eliminate the Illicit Trade in Tobacco Products. Health noted that there seemed to be agreement on a track and trace system involving unique identifiers.

Customs noted that it did not consider tracking and tracing to be a useful enforcement tool and did not wish to devote resources to administering such a system.

### 6. **Retailer Consultation**

Health outlined the proposed approach to consultation with retailers. A first round of consultation was planned for late November 2010. Organisations to be consulted included Woolworths, Coles, the Council of Small Business in Australia (COSBOA) and

## CABINET - IN - CONFIDENCE

possibly the Australia National Retailers Association (ANRA). If necessary or in response to requests, additional meetings would be held with other retailer organisations.

### 7. Other business

#### *Freedom of Information requests (FOI)*

Health informed the Committee that a large number of FOI requests had been received, the majority from the tobacco industry. Most requests relate to plain packaging, but some are more broadly about tobacco control. Health is aware that similar requests had also been sent to other Departments and agencies. It was agreed that all Departments and agencies advise Health of relevant FOI requests and inform the Health of any documents they decided to release.

#### *Correspondence on plain packaging*

Prime Minister and Cabinet and Treasury representatives informed the group they had received correspondence to the Prime Minister and the Treasurer from the American Legislative Exchange Council (ALEC). Health had received similar correspondence. Health offered to respond to this correspondence on behalf of all Ministers or alternatively provide input into replies as appropriate. Health also asked to be informed of any correspondence that Ministers receive in relation to plain packaging.

#### *National Measurement Act*

The Department of Innovation, Industry, Science and Research (DIISR) representative informed the Committee of the provisions of the National Trade Measurement Regulations under the National Measurement Act. These regulations outline the responsibilities of packers, suppliers and importers to ensure that packages are correctly labeled including prescribed information such as the name and address of the person who packed the product. These are international legal requirements and will need to be kept in mind when implementing plain packaging legislation. DIISR will forward Health further information on this legislation for their consideration.

#### *Next meeting date*

Health proposed that the Committee meet on an ad hoc basis when input is needed from other Departments and agencies or when there is key information to share. This was agreed by the Committee.

**Interdepartmental Committee (IDC)  
Plain Packaging of Tobacco Products**

**DRAFT Terms of Reference**

**Background**

On 29 April 2010 the Government announced that it will develop and implement legislation to mandate plain packaging of tobacco products from 1 January 2012 with full implementation by 1 July 2012.

The objectives of plain packaging are to:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- reduce the ability of the tobacco product to mislead consumers about the harms of smoking; and
- increase the noticeability and effectiveness of mandated health warnings.

**Agencies represented**

The Interdepartmental Committee for the introduction of plain packaging for tobacco products (IDC) has been established with representatives from the following agencies: PM & C; Attorney-General's; DFAT; Customs and Border Protection; Treasury; ACCC; Innovation, Industry, Science and Research; and the ATO.

The **Terms of Reference** for the IDC are to provide advice to DoHA to inform the preparation of advice to the Minister for Health and Ageing and the Cabinet on:

- (a) plain packaging specifications;
- (b) implementation issues that will contribute to the effective introduction of Plain Packaging of Tobacco Products legislation;
- (c) current and emerging risks and issues that could impede the effective implementation of the measure;
- (d) strategies to manage those risks so that they do not undermine the effective delivery of plain packaging of tobacco products;
- (e) approaches to consultation;
- (f) international aspects; and
- (g) other related activities and advice as required.



## CABINET - IN - CONFIDENCE

Attachment B

### PLAIN PACKAGING MEASURE - OVERVIEW AND TIMELINES

On 29 April 2010 the Government announced that it will develop and implement legislation to mandate plain packaging of tobacco products from 1 January 2012 with full implementation by 1 July 2012. The objectives of the plain packaging measure are to:

- reduce the ability of the tobacco product to mislead consumers about the harms of smoking;
- increase the noticeability and effectiveness of mandated health warnings; and
- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people.

The legislation will restrict or prohibit tobacco industry logos, brand imagery, colours and promotional text other than brand and product names in a standard colour, position, font style and size.

#### Current Situation

The plain packaging design will be developed and tested over the remainder of 2010 and early 2011 and will take into account, in addition to the core public health objectives:

- concerns expressed by small retailers about the need for ready identification of different products, and
- the need for anti-counterfeiting measures to reduce the risk of illicit trade.

The Government will develop and test package designs that will make cigarettes less appealing, particularly to young people. Work is already underway to review the current graphic health warnings.

The Government will be consulting with stakeholders starting in later 2010, before the plain packaging legislation is finalised.

#### Key Plain Packaging Milestones

October 2010	Expert Advisory Group established to guide package design Inter-Departmental Committee established to guide on legal issues, design and consultations Design features developed
November 2010	Testing of design commences Consultation with retailers commences Consultation with industry on anti-counterfeiting commences
February 2011	Testing of design complete Draft legislative proposal prepared for Cabinet consideration
March 2011	Cabinet approves legislative proposal Design released for final consultation with industry, retailers and tobacco control groups
April 2011	Legislation drafted
Winter sittings 2011	Legislation introduced
1 January 2012	Legislation commences
1 July 2012	Full compliance required

## PLAIN PACKAGING MEASURE - LEGISLATIVE & ENFORCEMENT OPTIONS

### Options for form of plain packaging legislation

Currently, there are three primary legislative options for introduction of the plain packaging measure:

1. Introducing a new Tobacco Control Act with broad enough scope to incorporate all tobacco regulation in the future;
2. Amending existing legislation administered by the Department of Health and Ageing, for example the *Tobacco Advertising Prohibition Act 1992*; or
3. Amending existing legislation administered in a different Australian Government portfolio, for example the *Trade Practices Act 1974*.

Each of the legislative options identified could be a primary mechanism to introduce plain packaging requirements for tobacco, but the final option for legislation used to implement plain packaging may depend on the enforcement mechanism.

### Options for enforcement of the plain packaging mechanism

Enforcement of the plain packaging measure will require the Australian Government to take on new responsibilities. A mechanism for enforcement of plain packaging obligations is required to support the regulatory aims of the measure. Without an appropriate enforcement regime in cases of persistent or major breaches, the plain packaging measure will fail in its objectives.

We have identified five possible options for enforcement:

#### **1. Administering the legislation within the Department of Health and Ageing: Drug Strategy Branch**

The plain packaging measure could be enforced in the same way as the existing *Tobacco Advertising Prohibition Act 1992* (TAP Act). The TAP Act is currently administered by departmental officers within Drug Strategy Branch and, where necessary, referred to the Director of Public Prosecutions for enforcement.

#### **2. Enforcement by an area of the Department of Health and Ageing with existing enforcement capabilities, for example, the Therapeutic Goods Administration**

Enforcement of the plain packaging measure could be established under an existing enforcement arm within the Department. This would allow the Department to retain administrative responsibility for the plain packaging legislation, while taking advantage of enforcement expertise and structures that already exist.

#### **3. Enforcement within another Australian Government portfolio or agency with existing enforcement capabilities, for example, the Australian Competition and Consumer Commission (ACCC)**

The plain packaging measure could be enforced by an Australian Government portfolio or agency with enforcement expertise and skills. With respect to tobacco products, the ACCC currently enforces graphic health warnings as per the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994, and product safety standards for reduced fire risk cigarettes as per the Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008.

## **CABINET - IN - CONFIDENCE**

### **4. Referring responsibilities for enforcement within their jurisdictions to States and Territories**

The plain packaging legislation could empower State and Territory Health offices to enforce the measure. Further work would need to be undertaken to determine State and Territory co-operation, and what enforcement mechanisms would be employed by each State and Territory. It is likely that each State and Territory would have different arrangements for enforcement.

### **5. Creating a new enforcement or regulatory compliance unit**

A new enforcement body could be created to ensure ongoing effective enforcement of tobacco regulation. Organisational structures within a new enforcement body would be able to be established according to the specific requirements of tobacco control, and not subject to limitations within existing structures, however large set-up costs would be needed to establish such a structure.

s 22

**From:** Health.NoReply@health.gov.au on behalf of Plain.Packaging.Team@health.gov.au  
**Sent:** Thursday, 10 February 2011 1:47 PM  
**Cc:** Simon.Cotterell@Health.gov.au; [REDACTED] s 22  
**Subject:** Australian Intellectual Property Law Bulletin Article [SEC=UNCLASSIFIED]  
**Attachments:** AIPL Bulletin Vol 23 No 7.pdf

Good afternoon, All.

Attached is the article from the Australian Intellectual Property Law Bulletin that Mr Cotterell advised would be provided:

(See attached file: AIPL Bulletin Vol 23 No 7.pdf)

Regards

[REDACTED] s 22

Plain Packaging Team  
Tobacco Reform

[REDACTED] s 22

[REDACTED] s 22

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## Generic packaging — A bridge (over the bodies of IP rights) too far?

*Stephen Stern and Olivia Draudins<sup>1</sup> CORRS CHAMBERS WESTGARTH<sup>2</sup>*

*On 29 April 2010, the then-Prime Minister, Kevin Rudd, together with the Health Minister, Nicola Roxon, announced that the government will enact legislation that will force tobacco products to appear in plain or generic packaging from January 2012. A common misconception made by commentators<sup>3</sup> is that this is merely a debate about tobacco — this is actually a debate about intellectual property on a much broader scale. From reports in the press, it is clear that government regulation of this nature is highly likely to affect other industries in the not-so-distant future; in particular the alcoholic beverages and snack food industries.*

*This article aims to respond to the arguments that are making this a debate about tobacco, rather than a debate about IP rights in general. One of the topics that is so important to the holders of IP rights is the question of the acquisition of their rights by the Government (and whether or not compensation is paid).*

### The alcoholic beverages industry

The Government is already investigating, quite openly, introducing the same series of steps for the alcoholic beverages industry as those that have been introduced in the tobacco industry. These include:

- the concept of banning advertising of alcoholic beverages at sports venues, which has already been debated and would seem to remain a live issue; and

- the suggestion that alcoholic drinks should display similar mandatory graphic health warnings like those on cigarette packets in another move to tackle youth binge drinking.

Surveys have been carried out by VicHealth, along with the Social Research Centre, to determine public reaction to alcohol products bearing graphic health warnings as seen in Figure 1.

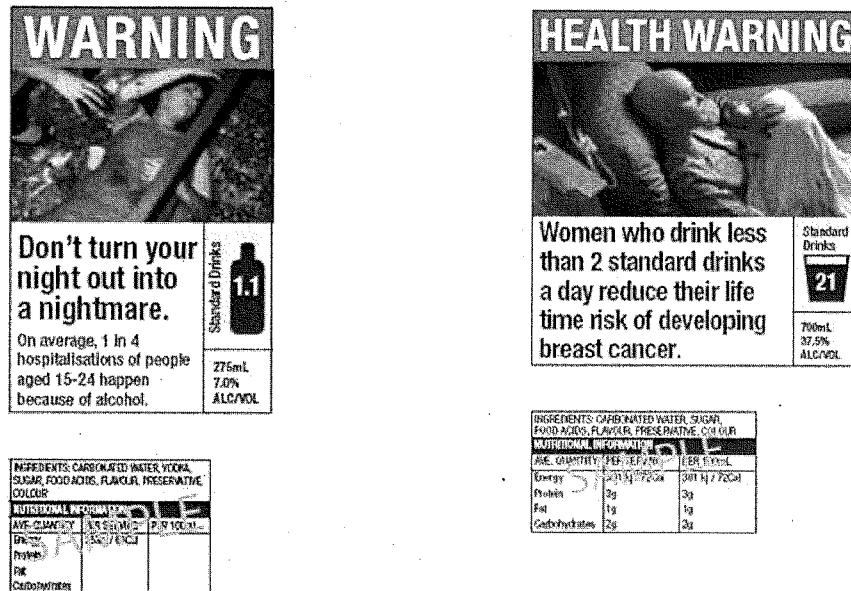


Figure 1: Is this the future for alcoholic beverages?

A media conference detailing the results of these surveys entitled "Alcohol health information labels: Report of qualitative research into health information labels on alcoholic beverages",<sup>4</sup> claims that "[a] 2009 survey commissioned by VicHealth has found 85% of people interviewed support the introduction of labels detailing health information on a product".<sup>5</sup> However, when the report is more closely scrutinised, the results are not as positive as they first appear. The report states that "this support needs to be understood in the context that participants demonstrated considerable resistance to being told what to do and suggested that the social environment was becoming saturated with health messages".<sup>6</sup> This is one of the many qualifications that are made to the sweeping 85% support statistic.

The alcoholic beverages industry needs to be aware that significant pressure is being placed on the federal government to make it compulsory for all alcoholic products to bear graphic health warning labels, particularly by the Alcohol Policy Coalition.<sup>7</sup> With the Alcohol Policy Coalition citing the success of health warnings on cigarette packets as proof that labels can change the behaviour of consumers,<sup>8</sup> it may be that the voluntary decision to place warnings on alcohol products will also be made compulsory in the alcoholic beverages industry. From there, the next steps, as imposed on the tobacco industry, would be to increase the size of the mandatory warnings (which now occupy 30% of the front label and

90% of the back label of a cigarette package, for example).<sup>9</sup> Introducing generic labelling in the alcoholic beverages industry may be but a short step thereafter.

### The snack foods industry

The snack food industry is also being subject to similar regulatory proposals. It has been claimed that new research has established that obesity has overtaken tobacco as the leading preventable cause of premature deaths and illnesses in WA (a result which is expected to be echoed across Australia).<sup>10</sup> The federal government has been heavily criticised by anti-obesity campaigners and in the editorials appearing in the nation's newspapers, for rejecting the recommendations of its own National Preventative Health Taskforce, to impose severe restrictions on the advertising of "junk food".<sup>11</sup>

The CEO of Diabetes Australia, Queensland, Michelle Trute, believes that snack foods should be taken just as seriously as cigarettes, suggesting "[i]t might seem radical but perhaps the junk food industry needs to be forced to use plain packaging too".<sup>12</sup> She has further suggested that "if the health and welfare of people is important enough to our government to control the tobacco industry, then the same approach [namely the adoption of generic labelling] should be applied to the junk food industry".<sup>13</sup>

With the surge of rules and regulations that covertly aim to engineer the behaviour of society, the alcohol and

snack food industries should view the regulation of tobacco products as a cautionary tale. Their intellectual property may soon be at risk too.

### The legalities of generic packaging

Generic packaging is only threatening the tobacco industry for now. The foreshadowed generic packaging legislation for tobacco products, currently only visible through the now-lapsed Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009 (Cth), is expected to prohibit the use of colour, novelty packaging

and other imagery on the packaging of tobacco products. All tobacco packaging will be the same colour without any decoration or embossing. The use of any trade marks or logos that are not the product name would be prohibited. The only use of a product name contemplated is on the front of the packaging in a mandated size and font. The use of colours, other than as prescribed, would also be prohibited. A cigarette packet, for example, would look something like the representation in Figure 2 below.<sup>14</sup>

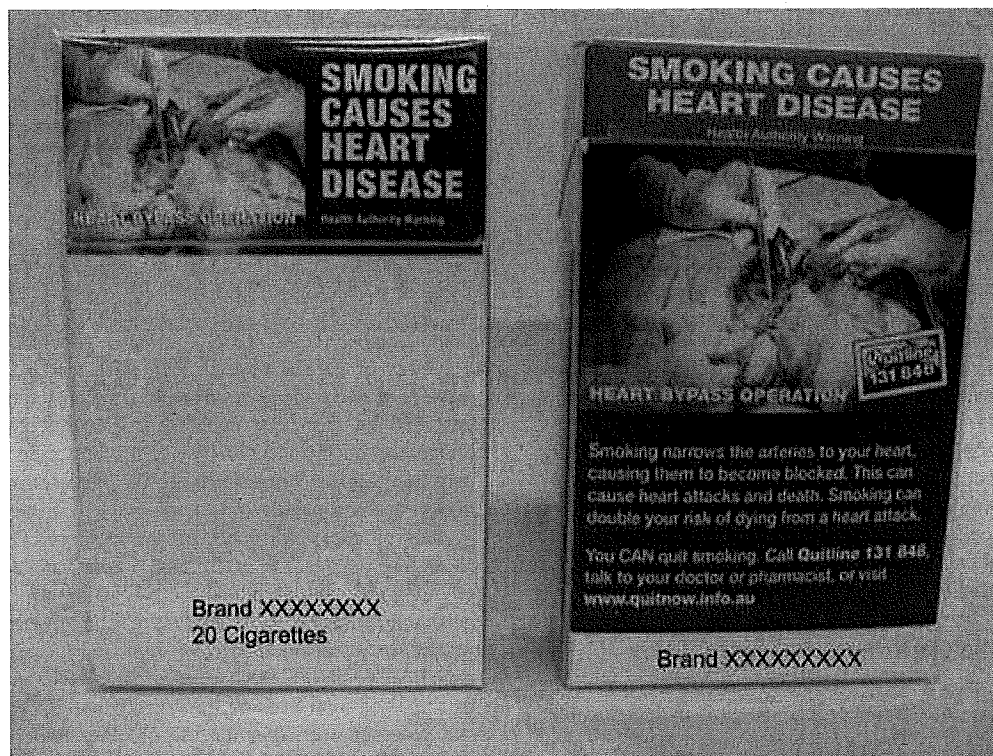


Figure 2: Find the trade mark.

Such legislation, if passed, would prevent the use of various registered and unregistered trade marks, as well as the use of all copyright rights subsisting in the artistic (and literary) works on the packaging. Tobacco companies would lose the ability to use any of their valuable intellectual property, save for the word marks that are the names of their various products.

The objectives of the Bill were stated to include the reduction of tobacco consumption, the enhancement of the effectiveness of package warnings and the removal of the package's ability to mislead and deceive consum-

ers.<sup>15</sup> Whether such measures would achieve these ends is yet to be proven, but, putting this aside, the legalities of such measures must also be questioned.

### The constitutional argument

Depending on its final form once drafted, generic packaging legislation could well amount to a breach in s 51(xxxi) of the Constitution if the intellectual property of the tobacco companies, namely their copyright and trade marks rights, are acquired on terms that are not "just".

Sections 7(4) and 20(1) of the Trade Marks Act 1995 (Cth) provide that owners of registered trade marks should have the right to use their trade marks. A trade mark is also regarded as personal property under s 21 of the Trade Marks Act, with registration conferring a proprietary right on the registered owner. These provisions clearly indicate that the rights in a registered trade mark include the right to use that trade mark. Further, most legal definitions of the term "ownership" of property incorporate the rights to use and enjoy the property.<sup>16</sup>

If tobacco companies lose the right to use and enjoy their trade marks as a result of generic packaging legislation, the privileges that underlie the concept of ownership have also been lost. In this way, it is strongly arguable that tobacco companies have been deprived of their proprietary rights.

While the concept of "acquisition" may require a corresponding or related benefit to be conferred on the Commonwealth or some other person, "there does not need to be correspondence either in appearance, value or characterisation between what has been lost and what may have been acquired".<sup>17</sup>

An example of a "corresponding benefit" acquired by the federal government is, in the view of health advocates and indeed as set out in the Bill, the increased prominence of the health messages.

In this way, an acquisition of the tobacco industry's intellectual property on terms that are not "just", may indeed occur if generic packaging legislation is introduced. Any expropriation of the intellectual property of the tobacco companies may require the federal government to pay substantial compensation if it is to be constitutionally valid.

### Australia's international obligations

It is widely acknowledged that a key aspect of Australia's intellectual property regime is that Australia must comply with its obligations under TRIPS.<sup>18</sup> Several Articles of TRIPS may be breached if generic packaging legislation is introduced.

#### (a) Article 16

Although it has been argued that Art 16.1 of TRIPS<sup>19</sup> only confers upon trade mark owners the right to prevent others from using their trade mark, rather than conferring a positive right for the owner to be able to use their trade marks,<sup>20</sup> Article 16.1 of TRIPS also aims to prevent existing trade mark rights from being prejudiced. Where tobacco companies can no longer use their trade marks due to generic packaging legislation, the exposure to actions seeking to remove trade marks for non-use is arguably prejudicing the existing prior trade mark rights held by tobacco companies. By exposing

tobacco companies to the risk of non-use actions, generic packaging legislation may indeed breach Art 16 of TRIPS.

While it has been asserted that the World Trade Organisation (WTO) has directly rejected the argument that TRIPS contains an implied right of a trade mark owner to use its trade mark,<sup>21</sup> that ruling was in the context of the relationship between the protection of geographical indicators and prior trade marks under TRIPS and which decision was principally focussed on the meaning of Art 24 of TRIPS.<sup>22</sup> Comments made by the panel in that context need to be treated with caution.

#### (b) Article 20

Article 20 of TRIPS provides:

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

Despite the fact that this article does not explicitly state that a total ban on trade mark use is prohibited, this appears to be the most persuasive interpretation. States cannot impose requirements that are detrimental to the capability of a trade mark to distinguish the goods and services of one trader from those of another. Imposing a total ban on particular trade mark use and imposing limitations on the manner in which other trade marks may be used, are actions that are far more severe than impeding the capability of a trade mark to distinguish.

One of the very goals of the proposed generic packaging legislation is to ensure that all tobacco products look alike and that there is nothing to distinguish one product from another (save for a product name written in a specified size of font and placed in a prescribed position). As this goal is sought to be achieved by imposing total bans on the use of some trade marks and severely restricting the use of other trade marks, such legislation would, in our view, breach Australia's obligations under TRIPS.

Article 20 does provide that the use of a trade mark can be encumbered if the encumbrance is justifiable. This is likely to be one of the key battlegrounds of any likely WTO panel, as health advocates assert that any such encumbrance would be justified by reason of health benefits to the community. The tobacco industry would assert that there is no proven health benefit from generic packaging.

It has been argued that tobacco companies have accepted another breach of TRIPS, namely that occasioned by the legislative requirement that the "Quitline" trade mark must be placed on tobacco products.<sup>23</sup> However, the fact that no objection has yet been taken to



legislation that is in contravention of Australia's TRIPS obligations, does not mean that there has been no breach.

Further, only member states of the WTO are entitled to challenge a potential breach of Australia's obligations under TRIPS. Tobacco companies, as private legal persons, cannot request that a WTO panel be convened to rule on Australia's legislative action. Thus, there can be no acceptance or acquiescence by a private individual or company of TRIPS breaches by the Australian Federal Government.

### (c) Article 8

Proponents of generic packaging have argued that Art 20 of TRIPS is not breached, as generic packaging is a "justifiable encumbrance",<sup>24</sup> excusable by virtue of Art 8 of TRIPS, which provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement.* (Emphasis added)

Generic packaging legislation severely impedes the capability of trade marks owned by tobacco companies to distinguish one product from another. Should it be asserted by the federal government, as is inevitable, that the measures are being taken to "protect public health and to promote the public interest", those measures must still be consistent with the other provisions of the TRIPS. Article 8 is not a mechanism to allow signatories of TRIPS to evade their obligations, such as the obligation under Art 20 of TRIPS.

Further, the WTO has stated that where the measures imposed by a state are asserted to be necessary to protect public health, this necessity should be supported by coherent reasoning and scientific evidence.<sup>25</sup>

Whether coherent reasoning and scientific evidence of the public health benefits generic packaging would deliver have been sufficiently demonstrated is highly debateable. Although it has been pointed out that the precise impact of banning the advertisement of tobacco products in the media was not known until such bans were introduced,<sup>26</sup> it must be remembered that there was no obvious breach of Australia's international obligations as a result of these advertising bans. Further, unlike advertising bans, generic packaging legislation has not been introduced anywhere else in the world.

Hypotheses about the impact that generic packaging legislation will have on smoking rates do not provide coherent reasoning and scientific evidence to support its introduction. Studies that have been cited relating to what packaging design may cause consumers to believe

cigarettes are "lighter" than others of equivalent strength, and whether plain packaging is perceived as "less attractive" by consumers,<sup>27</sup> are not on point. There is a disconnect between perceptions of "lightness" or "attractiveness" of tobacco products and the likelihood that tobacco consumption will be reduced, which is stated as one of the objectives of the Bill.<sup>28</sup>

Additionally, as has been correctly noted, consideration must be given to whether alternative measures that are less restrictive of trade are available. A recent article focuses on the measures that have been employed to reduce the promotion of cigarettes and simply asserts generic packaging is the next step.<sup>29</sup> However, the focus should be on whether there are less restrictive alternatives than generic labelling that will achieve the goal of reducing smoking rates. Further, education is one such alternative to generic packaging that could be implemented and may not only be more effective, but more importantly, under TRIPS, it would be less restrictive of trade.

### (d) Article 17

Article 17 of TRIPS provides exceptions to the overall obligations in TRIPS for governments, which must be "limited exceptions ... such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trade mark and of third parties".

The WTO has stressed that "[t]he addition of the word 'limited' [in Art 17 of TRIPS] emphasises that the exception must be narrow and permit only a small diminution of rights and ... [t]he issue is whether the exception to the *rights conferred by a trade mark* is narrow".<sup>30</sup> (Emphasis is that of the panel report)

The rights conferred on owners of trade marks related to tobacco products are not just limited by generic packaging legislation; many trade marks will no longer be able to be used at all. These restrictions deprive the trade marks of their value and can therefore hardly be considered "limited" or as restrictions that take into account the interests of the trade mark owners.

As the legitimate interests of the tobacco companies would be substantially affected by generic packaging legislation, Art 20 of TRIPS is arguably breached with no exception to justify such a breach. This is especially evident given the uncertainty concerning whether generic packaging would have any dissuasive impact on tobacco consumption.

### (e) Article 15

Of the greatest significance, Art 15(4) of TRIPS provides that "[t]he nature of the goods or services to which a trade mark is to be applied shall in no case form an obstacle to registration of the trade mark".

As the proposed limitations on the right to use trade marks are limited to those that are to be used on tobacco products, they are clearly flying in the face of Art 15(4). The proposed restrictions are aimed at a specific industry and are therefore provisions that are applicable to goods of a particular nature.

Given that one must have a bona fide intention to use a trade mark to be entitled to lodge an application to register it, the proposed legislation would mean that trade marks intended to be used for tobacco goods could never be the proper subject of trade mark applications and subsequent protection in Australia if the proposed legislation is enacted. While the provisions of the Bill did not, on their face, seek to limit the registration of trade marks, their effect would clearly make further tobacco trade mark applications arguably invalid.

#### (f) *The Paris Convention*<sup>31</sup>

Some commentators have overlooked Australia's international obligations under the Paris Convention, although it is one of the oldest and most important treaties for the protection of intellectual property rights, and is adhered to by most states in the world.

Article 6quinquies(A)(1) of the Paris Convention makes it clear that Australia has an obligation to recognise trade marks, stating that "[e]very trade mark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this article".

As the exclusive rights that an owner acquires upon registering a trade mark for tobacco products would not be conferred if plain packaging is introduced, the registration of a trade mark itself is arguably restricted. This would, in our view, constitute a breach of Australia's obligations under the Paris Convention.

Although Art 6quinquies(A)(1) provides that the obligation to register a trade mark is subject to the reservations that are contained in Art 6quinquies(B), none of those reservations provide a justification to limit the registration of the trade marks of tobacco companies in the manner foreshadowed by the federal government.<sup>32</sup>

Article 7 of the Paris Convention reinforces this point, making it clear that the nature of products "shall in no case form an obstacle to the registration of the [trade] mark".

Finally, Art 2 of TRIPS requires members of the WTO to respect these provisions of the Paris Convention. These potential breaches of both the Paris Convention and TRIPS should not, in our view, be ignored.

#### **The views of the government**

Although (some of) the views of the tobacco companies in relation to generic packaging have been touted as

important,<sup>33</sup> those of the federal government should arguably be regarded as much more significant.

In 1995, the Department of Health was of the view that generic packaging would "breach constitutional requirements for free trade".<sup>34</sup> A spokeswoman for the Health Minister, Dr Lawrence, said that generic packaging "is just not feasible ... [the federal government] would need to buy the tobacco companies' trade marks and that would cost us hundreds of millions of dollars".<sup>35</sup>

Further, a memorandum written by one of the IP Australia officers obtained by a freedom of information request<sup>36</sup> indicates that the author believes that there is a significant chance that Art 20 of TRIPS and Art 7 of the Paris Convention could be breached should generic packaging legislation be introduced with only "a long bow" for a justification argument.

#### **The broader implications**

The consequence of Australia flouting its international obligations could be more severe than one would expect. Australia promotes its reputation on the world stage as being a staunch and fierce protector of intellectual property rights. This asserted reputation is placed at risk where Australia knowingly defies its international obligations. This could also set a precedent for other countries to also ignore their obligations.

Where there is potentially a breach of Australia's international obligations, if the WTO convenes a panel at the request of a member state, any other member state has the ability to join the dispute and to make submissions to the panel. Tobacco products are made up from components that are sourced from all over the world. Many companies in many different countries may be affected if generic packaging is introduced in Australia. Thus there is a real prospect that several countries could request the convening of a WTO panel.

If Australia is found to have breached its international obligations by introducing generic packaging legislation, it may be subject to trade sanctions imposed by other member states — principally those that have been affected by Australia's action to introduce generic packaging. Whether Australia should introduce legislation that has such severe consequences, both at a domestic and international level, should be seriously questioned.

#### **Conclusion**

The foreshadowed introduction of generic packaging legislation for the tobacco industry is one that is attracting significant legal and public interest. Other industries should be properly concerned about the knock-on effect of such legislation — these industries are arguably the next targets. However, these industries also say that they

do not want to be aligned with the tobacco industry. Tobacco and tobacco control is, for many, a highly emotive topic. It is understandable that other industries may not want to be affiliated with an industry that sells products injurious to health. However, those other industries should, in our view, align themselves not with the tobacco industry, but with the legal arguments made by the tobacco industry and that are directed towards protecting IP rights. That is, before it is too late.

**Stephen Stern,**  
Partner; and  
**Olivia Draudins,**  
Lawyer;  
Corrs Chambers Westgarth.

### Footnotes

1. Stephen Stern, partner, and Olivia Draudins, lawyer.
2. We would like to declare our interests at the outset. We act for clients in the tobacco industry, the alcoholic beverages industry and the snack food industry.
3. See, Mark Davidson "Plain packaging of cigarettes: Would it be lawful?" (2010) 23 *IPLB* 105.
4. VicHealth, *Alcohol health information labels: Report of qualitative research into health information labels on alcoholic beverages*, Victorian Government, Vic, 2009, accessed 14 November 2010, [www.vichealth.vic.gov.au](http://www.vichealth.vic.gov.au).
5. VicHealth, *Alcohol Health Information Labels*, Victorian Government, Vic, 2009, accessed 14 November 2010, [www.vichealth.vic.gov.au](http://www.vichealth.vic.gov.au).
6. See above note 4 at p 5.
7. The Alcohol Policy Coalition consists of the Australian Drug Foundation, Cancer Council Victoria, Turning Point Alcohol and Drug Centre and VicHealth.
8. Food Labelling Review, *Alcohol Policy Coalition Position Statement July 2009*, Commonwealth of Australia, Canberra, 2009, accessed 14 November 2010, [www.foodlabellingreview.gov.au](http://www.foodlabellingreview.gov.au).
9. Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004 (Cth), Sch 2 Pt 2.1.
10. A Corderoy, "Obesity is now more deadly than smoking" (2009) *The Age* (online), [www.theage.com.au](http://www.theage.com.au).
11. See above note 10 for criticism.
12. V March, "Junk food packets should be plain" (2010) *NewsMail* (online), [www.news-mail.com.au](http://www.news-mail.com.au).
13. M Trute, "Obesity epidemic is here" (2010) *The Observer* 20.
14. S Chapman, *Cigarette Packaging, Pack Warnings, Plain Packaging Mock-ups*, The University of Melbourne, Vic, 2002, accessed 11 August 2010, [www.mulr.law.unimelb.edu.au](http://www.mulr.law.unimelb.edu.au).
15. Section 3, Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009.
16. See example of the definition of ownership in Dr Peter Nygh and Peter Butt (eds) *Butterworth's Australian Legal Dictionary*; David Hay (ed), *Words and Phrases Legally Defined (Volume 2:L-Z)* (4<sup>th</sup> ed, 2007); and Oxford University Press's Elizabeth Martin (ed), *A Concise Dictionary of Law* (1983).
17. *Smith v ANL Ltd* (2000) 204 CLR 493; 176 ALR 449; [2000] HCA 58; BC200006928, [157] (Callinan J). See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; 119 ALR 629; [1994] HCA 6; BC9404637, 304–305 (Mason CJ, Deane and Gaudron JJ) where it was stated "'acquisition' directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken". See also Brennan J at 310–311. See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; 119 ALR 577; [1994] HCA 9; BC9404619, 173 (Mason CJ), 177 (Brennan J), 184–185 (Deane and Gaudron JJ), 223 (McHugh J).
18. The Agreement on Trade-Related Aspects of Intellectual Property Rights. Annexure 1C of the Marrakesh Agreement Establishing the World Trade Organisation.
19. Article 16(1) of TRIP provides that "[t]he owner of a registered trade mark shall have the exclusive right to prevent all third parties... from using in the course of trade, identical or similar signs for goods or services which are identical or similar to those in respect of which the trade mark is registered where such use would result in a likelihood of confusion... The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of members making rights available on the basis of use".
20. Mark Davidson "Plain Packaging of Cigarettes: Would it be lawful?" (2010) 23 *IPLB* 105.
21. See above note.
22. See Report of the Panel of 15 March 2005 for "EC — Protection of Trade marks and Geographical Indications for Agricultural Products and Foodstuffs" WT/DS174/R at [7.650].
23. See above note 20 at 106.
24. See above note 20 at 106.
25. Report of the Appellate Body of 16 October 2008 for "US — Continued Suspension of Obligations in the EC–Hormones Dispute" WT/DS320/AB/R at [590].
26. See above note 20 at 106.
27. See above note 20 at 106 (fn 12).
28. Section 3, Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009.
29. See above note 20 at 106.
30. See above note 22.
31. The Paris Convention for the Protection of Industrial Property. Signed in Paris, France on March 20 1883. Australia is a signatory to the Paris Convention and is therefore subject to further international obligations under its terms.
32. For example, the reservation in Art 6quinquies(B)(3) of the Paris Convention, that allows for registrations to be denied where the registration is "contrary to morality or public order", could not feasibly be used to prevent the registration of tobacco trade marks. For the exemption to apply, the trade mark itself must conflict with the concepts of morality or public order,

rather than the issue of morality or public order being related to the products upon which the trade mark is used.

33. See above note 20 at 106–7.

34. Adam Harvey, “Doctors’ plan to put cigarettes in plain wrap fails” (1995) *SMH* 2.

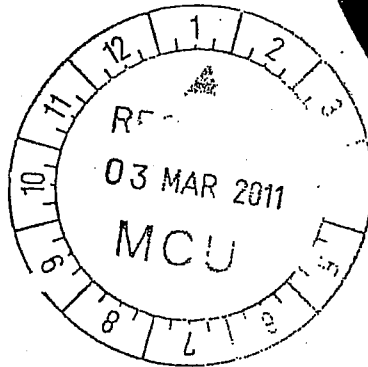
35. See above note.

36. Memorandum addressed to Karen Tipler of IP Australia.

MAR-9-3-11

14<sup>th</sup> February 2011

The Hon. Julia Gillard, MP  
 Prime Minister of Australia  
 PO Locked Bag 14  
 Werribee 3030 Vic



TSG Franchise Management P/L

Level 7, 691 High St, Box 3101

PO Box 641, Werribee 3030

Telephone 1800 777 000

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Dear Prime Minister,

### PROPOSED GENERIC PACKAGING FOR CIGARETTES

At TSG we represent over 280 small business tobacconists and believe plain packaging for cigarettes will cause significant problems for the retailers we support and work with.

No country to date has introduced plain packaging. Why is that and why are we flying in the face of world opinion just to rightfully market a product that's legal?

What will happen is illegal tobacco products like chop-chop, which is sold in unbranded, plain plastic bags will increase, resulting in losses for retailers, not to mention lost tax revenue. No brand differentiation will also encourage smokers to try illegal counterfeit cigarettes.

To add to that, plain cigarette packaging will do nothing but confuse adult smokers while they're looking for their chosen product.

TSG retailers are finding it increasingly difficult to succeed in business. Plain cigarette packaging would introduce yet another challenge.

Several states have banned tobacco displays – others are considering it. That means sales staff will have their backs turned while they search for up to 300 cigarette types that all look identical. The potential security risks are enormous.

Finally, tobacco manufacturers will almost certainly resort to price cutting to compete and that means lower margins for small businesses that are already finding it difficult.

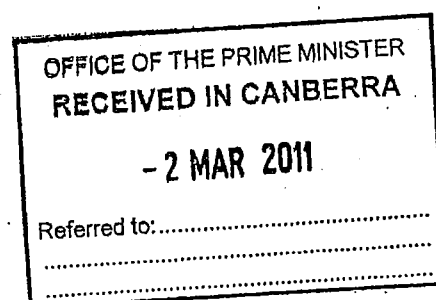
When you take in all of the above it's not hard to see why we at TSG have adopted this position. The people we represent are small family businesses and they in the end will be the people who suffer the most from this bill.

We strongly believe other options also available which will assist with reducing the incidence of smoking would be the introduction of Tobacco Licences, similar to liquor licences, and youth education programs.

We realise you, the Government are conducting further consultation on this matter and we encourage you to take what we've underlined here into account in your decision making.

Yours faithfully

*Kerry Browne*  
 National Business Manager



s 22

**From:** Lynch, Philippa  
**Sent:** Tuesday, 1 March 2011 1:23 PM  
**To:** s 22  
**Subject:** FW: Big tobacco using FOI to stall reforms: Roxon - ABC News (Australian Broadcasting Corporation) [SEC=UNCLASSIFIED]

**Categories:** Red Category  
**Security Classification:** UNCLASSIFIED

-----Original Message-----

**From:** Lynch, Philippa  
**Sent:** Friday, 25 February 2011 5:20 PM  
**To:** Anderson, Alex; s 22  
**Subject:** Big tobacco using FOI to stall reforms: Roxon - ABC News (Australian Broadcasting Corporation) [SEC=UNCLASSIFIED]

<http://www.abc.net.au/news/stories/2011/02/25/3149344.htm?section=justin>

s 22

From: s 22  
Sent: Friday, 11 March 2011 9:46 AM  
To: Castellino, Joe; s 22  
Subject: UK to consult on plain packaging of tobacco [SEC=UNCLASSIFIED]

Security Classification: UNCLASSIFIED

[http://www.dh.gov.uk/en/MediaCentre/Pressreleases/DH\\_124966](http://www.dh.gov.uk/en/MediaCentre/Pressreleases/DH_124966)

<http://www.abc.net.au/news/stories/2011/03/10/3159821.htm>

<http://www.sbs.com.au/news/article/1497696/headline>

s 22

Senior Adviser  
Public Health Section  
Policy Division  
Department of the Prime Minister and Cabinet

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Fax: +61 2 6271 5300  
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s 22

From: s 22  
 Sent: Thursday, 17 March 2011 11:47 AM  
 To: s 22  
 Subject: FW: IDC for Plain Packaging of Tobacco Products Meeting [SEC=UNCLASSIFIED]

Security Classification:  
 UNCLASSIFIED

FYI

-----Original Message-----

From: [Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au) [mailto:[Health.NoReply@health.gov.au](mailto:Health.NoReply@health.gov.au)] On Behalf Of  
[Plain.Packaging.Team@health.gov.au](mailto:Plain.Packaging.Team@health.gov.au)  
 Sent: Wednesday, 16 March 2011 12:40 PM  
 To: Castellino, Joe  
 Cc: s 22  
 Subject: IDC for Plain Packaging of Tobacco Products Meeting [SEC=UNCLASSIFIED]

Good afternoon, Mr Castellino.

The next IDC for Plain Packaging of Tobacco Products is being held:

Date: Thursday 24 March 2011  
 Time: 11:00am-12:30pm  
 Venue: Sirius Building  
 23 Furzer Street  
 Phillip ACT 2606

The meeting will discuss Cabinet outcomes as well as the public consultation on the exposure draft of the Bill and packaging design specifications.

Would you advise of your attendance, or that of your representative, by COB Monday 21 March 2011, please?

Regards

s 22

Plain Packaging Team  
 Tobacco Reform  
 s 22

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