

The case for the plain packaging of tobacco products

Becky Freeman¹, Simon Chapman¹ & Matthew Rimmer²

School of Public Health, University of Sydney, Australia¹ and Australian Centre for Intellectual Property in Agriculture, Australian National University College of Law, Australia²

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 tentatively, 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

This research was supported by NHMRC grant 401558 'The future of tobacco control'.

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