

CONSULTATION PAPER

**Tobacco Plain Packaging Bill 2011
Exposure Draft**

7 April 2011

PLAIN PACKAGING OF TOBACCO PRODUCTS

Consultation Paper

Introduction

The Australian Government is implementing a comprehensive suite of reforms to reduce smoking and its harmful effects. As part of these reforms and as a world first, the Government has committed to introduce legislation mandating that all tobacco products sold in Australia be sold in plain packaging by 1 July 2012. This will remove one of the last remaining frontiers for tobacco advertising.

As part of the plain packaging measure, the Government announced that it would develop and test package design to make cigarettes less appealing, particularly to young people. The Government also announced that it would consult retailers on handling issues in a retail setting and the tobacco industry on possible anti-counterfeiting measures that might be included in packaging design.

This Consultation Paper outlines the Government's approach to implementing plain packaging, its response to the design testing and targeted consultations, and provides an explanation of the key provisions of the exposure draft Tobacco Plain Packaging Bill 2011, which is being released alongside this paper for comment.

The proposed design features for cigarettes and for cigarette packaging under the plain packaging regime are set out in this Consultation Paper and accompanying materials. This Consultation Paper also sets out proposed restrictions on the appearance of cigarettes themselves. The proposed design features for the plain packaging of other tobacco products are under development and consultation will occur on these in the second half of 2011.

Australian Government Action on Smoking

The Council of Australian Governments (COAG) has agreed a target of reducing the smoking rate among the Australian population to 10 per cent by 2018, and halving the smoking rate among Aboriginal and Torres Strait Islander people.

Comprehensive reforms initiated by the Australian Government to meet this target include:

- a 25% increase in tobacco excise in April 2010, the first increase above inflation for more than a decade;
- the introduction of plain packaging for tobacco products;
- the introduction of legislation to bring restrictions on internet advertising of tobacco products into line with advertising in other media;
- record investments in anti-smoking social marketing campaigns, including the '4,000 Chemicals' campaign in 2010, and the new \$61 million National Tobacco Campaign 'Every cigarette brings cancer closer' in 2011;
- a further \$27.8 million over four years for social marketing campaigns targeted to high-risk and hard to reach groups;
- investment of \$14.5 million in the Indigenous Tobacco Control Initiative which is funding 18 innovative pilot projects in Indigenous communities around Australia;
- the \$100.6 million COAG Closing the Gap in Indigenous Health National Partnership, Tackling Smoking measure which will employ a tobacco action workforce in 57 regions across Australia by 2012-13;
- the first ever Aboriginal and Torres Strait Islander-specific national anti-smoking television campaign 'Break the Chain' launched in March 2011;
- \$5 million in one-off funding for Quitlines in 2009-10; and
- \$102.4 million to support extended listings on the Pharmaceutical Benefits Scheme for nicotine replacement therapies and other quit smoking supports.

The Government's legislative proposal on plain packaging aims to prevent tobacco advertising and/or promotion on tobacco product packaging in order to:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increase the noticeability and effectiveness of mandated health warnings;
- reduce the ability of the tobacco product packaging to mislead consumers about the harms of smoking; and
- through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.

The Government announced in April 2010 that the legislation to implement plain packaging of tobacco products would be in place by 1 January 2012 and full compliance with the legislation would be required by 1 July 2012. To meet these timelines, the Government is aiming to introduce the Tobacco Plain Packaging Bill 2011 in the Winter 2011 Parliamentary sittings.

Dates and Process for Submissions

To enable full stakeholder and community engagement in the process, the exposure draft of the Bill and this Consultation Paper are being released for public comment for a period of 60 days.

Interested parties and individuals are invited to provide written submissions commenting on the exposure draft Tobacco Plain Packaging Bill 2011 and this Consultation Paper including the proposals for plain packaging design. These submissions must be received by the Department of Health and Ageing by **5.00pm, 6 June 2011**.

Submissions should be addressed to:

Assistant Secretary, Drug Strategy Branch
Attention: Tobacco Reform Section

Department of Health and Ageing
MDP 701
GPO Box 9848
CANBERRA ACT 2601

Or email: tobaccoplainpackaging@health.gov.au

This Consultation Paper and associated documents are available at:

www.yourhealth.gov.au

Plain packaging: Context

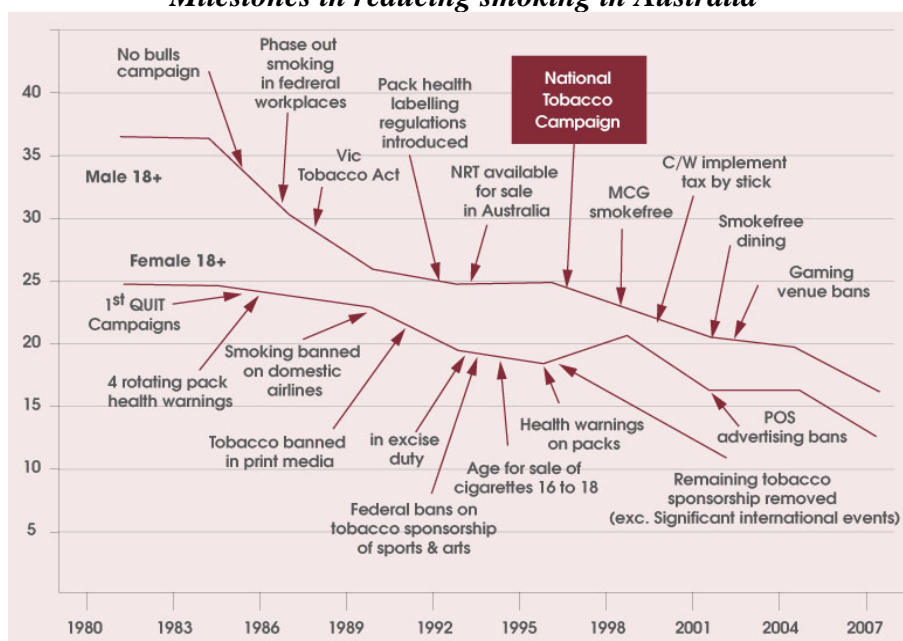
Smoking in Australia

The prevalence of smoking in Australia has fallen steadily over a long period, in response to concerted and comprehensive public policy efforts from Commonwealth, State and Territory Governments and action from public health organisations. These have included social marketing campaigns, health warnings on packaging, workplace and broader indoor smoking bans, support for smoking cessation through Quitlines and public funding for pharmaceuticals, restrictions on sales to minors, tobacco excise increases and advertising bans. As a result of this comprehensive approach, the proportion of Australians aged 14 years and over smoking daily has fallen from 30.5 per cent in 1988 to 16.6 per cent in 2007¹.

Nonetheless, almost 3 million Australians continue to smoke², including almost half of Aboriginal and Torres Strait Islander people aged 15 years and over³. Tobacco smoking remains one of Australia's leading causes of preventable death and disease and kills over 15,000 Australians each year⁴. The economic and social costs of smoking are estimated at \$31.5 billion each year⁵. As the effects are so long-term and so far-reaching, the personal and social costs of smoking will continue to be high for many years⁶.

That is why the Council of Australian Governments (COAG) agreed in the 2008 National Healthcare Agreement to a target of reducing the national adult smoking rate to 10 per cent and halving the Aboriginal and Torres Strait Islander smoking rate by 2018.

Milestones in reducing smoking in Australia



Source: The Cancer Council of Victoria 2009

¹Australian Market Research, 1988 *National Campaign Against Drug Abuse social issues survey*, Canberra 1988; and Australian Institute of Health and Welfare, 2007 *National Drug Strategy Household Survey: detailed findings*. Drug Statistics Series, Number 22. Canberra: Australian Institute of Health and Welfare, 2008.

²Australian Institute of Health and Welfare, 2007 *National Drug Strategy Household Survey: detailed findings*. Drug Statistics Series, Number 22. Canberra: Australian Institute of Health and Welfare, 2008.

³Australian Bureau of Statistics 2009, *National Aboriginal and Torres Strait Islander Social Survey 2008*, cat. no. 4714.0, ABS, Canberra 2009.

⁴Begg S, Vos T, Barker B, Stevenson C, Stanley L and Lopez A, *The burden of disease and injury in Australia 2003*. PHE 82. Canberra: Australian Institute of Health and Welfare, 2007.

⁵Collins D and Lapsley H. *The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05*. P3 2625. Canberra: Department of Health and Ageing, 2008.

⁶National Preventive Health Taskforce 2009, *Australia: the healthiest country by 2020, Technical Report 2 - Tobacco control in Australia: making smoking history*. Prepared for the National Preventive Health Taskforce by the Tobacco Working Group.

As can be seen in the chart above, Australia has made significant gains in reducing smoking over the past 30 years. However, the COAG targets will not be achieved without additional action. A continuation of current smoking cessation and initiation patterns would see around 14 per cent of adults still smoking in 2020, well above the COAG target. Smoking cessation rates will need to double if we are to reach the COAG target of 10 per cent by 2018⁷.

Australian Government Initiatives

The Government has taken a number of important steps towards achieving the COAG goal.

In April 2010, the Government announced a 25 per cent increase in the tobacco excise, the first increase above inflation in more than a decade. This increased the tax on a pack of 30 cigarettes by \$2.16. Revenue raised from the excise increase, together with existing tobacco excise, has been directed to health and hospital reform.



The Government is making record investments in anti-smoking social marketing campaigns. The Government revived the '4,000 Chemicals' campaign in 2010. In 2011, the first advertisements under the new \$61 million National Tobacco Campaign 'Every cigarette brings cancer closer' were aired. A further \$27.8 million has been committed for targeted communications to high-risk and hard-to-reach groups including pregnant women and their partners; people from culturally and linguistically diverse backgrounds; people living in socially disadvantaged circumstances; people with mental illness; and prisoners.

⁷ Gartner CE, Barendregt JJ, Hall WD. Predicting the future prevalence of cigarette smoking in Australia: how low can we go and by when? *Tob Control*. 2009 Jun;18(3):183-9. Epub 2009 Jan 29.

The Government is also making record investments in helping Aboriginal and Torres Strait Islander communities to tackle smoking. Some 47 per cent of Aboriginal and Torres Strait Islander people aged 15 years and over smoke and it is estimated to cause one-fifth of deaths in Indigenous communities. Since 2008, the \$14.5 million Indigenous Tobacco Control Initiative has funded some 18 pilot projects in Indigenous communities around Australia. Since 2009 the Government has been rolling out a national Tackling Smoking Workforce under the \$100.6 million COAG Closing the Gap in Indigenous Health National Partnership. This workforce will be deployed in 57 regions across Australia by 2012-13.

On 28 March 2011 the Government launched the first ever national television campaign 'Break the Chain' to encourage Aboriginal and Torres Strait Islander people to quit smoking.

Extra funding is being provided to help support smokers to quit. In June 2010, the Government provided \$5 million in one-off funding for Quitlines. In January 2011, the Government announced extended listings on the Pharmaceutical Benefits Scheme (PBS) for nicotine replacement therapies and other quit smoking supports. From 1 February 2011, nicotine patches, Nicorette[®], Nicobate P[®] and Nicotinell[®], were included on the PBS for all eligible Australians, which includes concession card holders, as an aid to quit smoking. In addition, the listing of varenicline (Champix[®]) was extended to allow a second course within 12 months for smokers who need this extended support to help them quit.

The Government is moving to remove exceptions to Australia's tobacco advertising laws. Legislation has passed the House of Representatives to explicitly restrict Australian internet advertising of tobacco products, ensuring that it is in line with restrictions already in place in other media and at retail points of sale. The plain packaging legislation will remove one of the last major exceptions to tobacco advertising laws.

State and Territory Governments are also taking further action in their areas of responsibility, through smoking bans in cars and outdoor areas where children may be exposed to second hand smoke, and restrictions on the retail display of tobacco products.

Why is plain packaging necessary?

The Commonwealth is responsible for legislation banning almost all forms of tobacco advertising and promotion through the *Tobacco Advertising Prohibition Act 1992* (the *TAP Act*). The *TAP Act* and associated Regulations, including the new amendment to explicitly restrict internet advertising of tobacco products, provide the existing legislative basis for the Australian Government to limit the exposure of the public to messages and images that may persuade people to start or continue smoking or using tobacco products.

Words, signs or symbols that appear on a tobacco product or its packaging are currently a key exception to the definition of ‘tobacco advertisement’ in the *TAP Act*. The introduction of plain packaging for tobacco products will remove this exception.

The Preventative Health Taskforce, an expert group established by the Government to examine the evidence on tobacco, alcohol and obesity, found that:

- young adult smokers associate cigarette brand names and package design with positive personal characteristics, social identity and aspirations;
- packaging can create misperceptions about the relative strength, level of tar and health risks of tobacco products;
- plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall health warnings on plain packs; and
- decreasing the number of design elements on cigarette packs reduces their appeal and perceptions about the likely enjoyment and desirability of smoking.

The research evidence to June 2009 is set out in detail in the reports of the Preventative Health Taskforce available at www.preventativehealth.org.au

Since the publication of the Preventative Health Taskforce reports, the evidence base in support of plain and standardised packaging of tobacco products has continued to grow. Peer-reviewed studies show how branding on packaging influences smoking choices and that plain packaging increases the effectiveness of health warnings, reduces false health beliefs about cigarettes, and reduces brand appeal among smokers.^{8 9 10 11 12 13 14 15 16}

International framework

In taking action to implement plain packaging, Australia is acting consistently with its obligations under the World Health Organization *Framework Convention on Tobacco Control* (WHO FCTC).

Article 5 of the FCTC requires each Party to develop and implement comprehensive national tobacco control strategies, plans and programs, and to take effective legislative and other measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

Article 11 of the FCTC requires Parties to implement effective measures to ensure that tobacco packaging does not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions.

⁸ Germain D et al 2009, ‘Adolescents’ perceptions of cigarette brand image: does plain packaging make a difference?’, *Journal of Adolescent Health*, (2009) 1-8.

⁹ Hammond D & Parkinson C 2009, ‘The impact of cigarette package design on perceptions of risk’, *Journal of Public Health*, 31(3), pp 345-353.

¹⁰ Hammond, D 2010. "Plain packaging" regulations for tobacco products: the impact of standardizing the color and design of cigarette packs. *Salud pública Méx.* 2010, vol.52, suppl.2, pp S226-S232.

¹¹ Hammond D, Daniel S 2011. Plain packaging: Findings from female youth in the UK. Paper presented at the Society for Research on Nicotine and Tobacco, 17 Feb 2011; Toronto, Canada.

¹² Hoek J, Wong C, Gendall P, et al 2010, ‘Effects of dissuasive packaging on young adult smokers’, *Tobacco Control* doi: [10.1136/tc.2010.037861](https://doi.org/10.1136/tc.2010.037861).

¹³ Moodie, C & Hastings, G 2009, ‘Making the Pack the Hero, Tobacco Industry Response to Marketing Restrictions in the UK: Findings from a Long-Term Audit’, *International Journal of Mental Health and Addiction* 9(1), pp 24-38.

¹⁴ Moodie, C & Hastings, G 2009, ‘Plain packaging: a time for action’, *European Journal of Public Health*, 20(1), pp 10–11.

¹⁵ Moodie C and Hastings G 2010. Tobacco packaging as promotion. *Tobacco Control* 2010;19:168-170.

¹⁶ Wakefield, M, Germain D, Durkin S, Hammond D, Goldberg M and Borland R 2011. Effects of increasing size of health warnings on plain vs branded packs. Presentation at Society for Research on Nicotine and Tobacco 17th Annual Meeting, February 17, 2011. Toronto, Canada.

Article 13 of the FCTC requires Parties to implement comprehensive bans on tobacco advertising, promotion and sponsorship.

Guidelines adopted by the Conference of the Parties to the FCTC for Article 11 and Article 13 recommend that Parties consider introducing plain packaging.

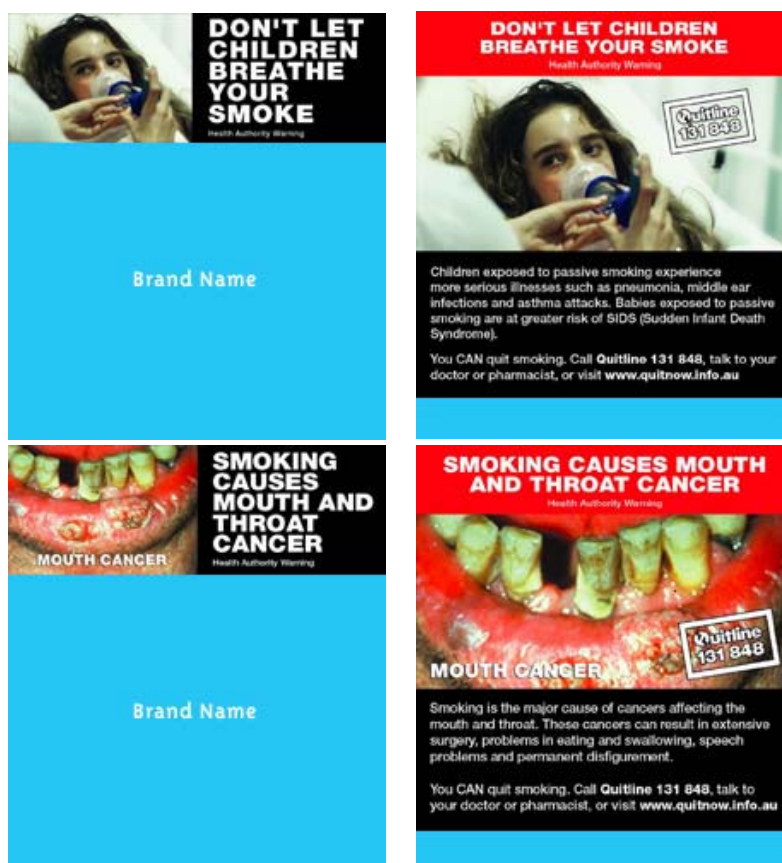
Plain packaging is being introduced as a necessary measure to protect public health, and will be applied in a way that is consistent with Australia's obligations under international trade and other agreements, including without discriminating between local and imported products.

Graphic Health Warnings

Alongside the plain packaging measure, the Government announced that it would be moving to update and expand the graphic health warnings on the packaging of tobacco products.

Graphic health warnings on tobacco packaging are currently mandated through the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*¹⁷ under the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010*¹⁸ (formerly the *Trade Practices Act 1974*). Since 1 March 2006, there has been a requirement that most Australian-manufactured and imported tobacco product packaging must be printed with graphic health warnings.

Examples of current graphic health warnings:



¹⁷ *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*, available at: <http://www.comlaw.gov.au/Details/F2007C00131/Download>.

¹⁸ The *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010* on 1 January 2011. Legislative instruments made under the *Trade Practices Act 1974*, including the *Trade Practices (Consumer Protection Information Standards) (Tobacco) Regulations 2004*, continue to apply under the *Competition and Consumer Act 2010*, available at: <http://www.comlaw.gov.au/Details/C2011C00003/Download> (see Volume 3).

In 2008, a comprehensive evaluation of the effectiveness of the graphic health warnings was undertaken¹⁹. The evaluation demonstrated that the graphic health warnings had achieved their intended purpose by increasing consumer knowledge of the health effects related to smoking, encouraging cessation of smoking and discouraging smoking uptake or relapse.

However, areas for improvement were identified. The image and text on the front of packs was described by some as 'too small'. The importance of regularly updating and refreshing the health warnings to maintain effectiveness was also identified with some indications that their impact may have been beginning to wear out. The tobacco industry branding and use of colour was also thought to overpower the warning on the front of packs.

The Preventative Health Taskforce recommended that graphic health warnings be regularly updated and substantially expanded.

The Government is currently developing and testing new graphic health warnings for introduction at the same time as plain packaging. As part of this, the graphic health warnings will be expanded to cover 75 per cent of the front of cigarette packaging. Warnings covering 90 per cent of the back of cigarette packaging and the qualitative side message will remain. A comparable change will apply to other tobacco products.

This change will be implemented through the *Australian Consumer Law* in consultation with State and Territory governments.

Plain packaging design

Examples of the proposed plain packaging design are appended to this Consultation Paper.

Cost recovery

The Government is considering cost recovery options for the monitoring and enforcement of the Tobacco Plain Packaging Bill 2011. Before any decision is taken to proceed with cost recovery, a Cost Recovery Impact Statement will be prepared. This will form the basis for further consultation, and will be conducted in the middle of this year, in accordance with the Guidelines administered by the Department of Finance and Deregulation.

¹⁹ <http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn-eval08>.

Tobacco Plain Packaging Bill 2011

The new Tobacco Plain Packaging Bill 2011 will give effect to the plain packaging measure. An exposure draft of the Bill is being released alongside this Consultation Paper.

Features of the Bill

The Bill is set out in six chapters:

Chapter 1 sets out preliminary matters including commencement dates, objects of the Act, definitions, application of the Act to external Territories and the Crown, interactions with State and Territory laws, and Constitutional provisions.

Chapter 2 creates the regime that mandates the requirements relating to plain packaging of tobacco products. It permits regulations prescribing plain packaging requirements and conditions for the appearance of tobacco products to be made.

Chapter 3 sets out the offences and civil penalty provisions that will apply to conduct involving non-compliant packaging and tobacco products.

Chapter 4 creates the powers of authorised officers to investigate contraventions of the Bill, including search and seizure provisions.

Chapter 5 creates civil penalty and infringement notice regimes, which are designed to encourage compliance with the requirements of the legislation.

Chapter 6 includes miscellaneous provisions, and creates the power by which the Governor-General, on advice from the Government, may make regulations to give effect to the legislation.

Chapter 1

Commencement

The Commencement provisions are detailed at the discussion of Chapter 3 below.

Objects

The objects of the Bill are to improve public health by:

- (i) discouraging people from taking up smoking, or using tobacco products;
- (ii) encouraging people to give up smoking, and to stop using tobacco products;
- (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
- (iv) reducing people's exposure to smoke from tobacco products;

and to give effect to certain obligations that Australia has as a party to the World Health Organization's Framework Convention on Tobacco Control (WHO FCTC).

It is intended to contribute to achieving these objects by regulating the packaging and appearance of tobacco products in order to:

- (a) reduce the appeal of tobacco products to consumers; and
- (b) increase the effectiveness of health warnings on the packaging of tobacco products; and
- (c) reduce the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking.

Definitions: What products will the legislation cover?

The definition of tobacco product in the Tobacco Plain Packaging Bill 2011 means that generally any product containing tobacco, no matter how small the amount, will be within the scope of the Bill if it was manufactured for smoking, sucking, chewing or snuffing.

The definition of tobacco product is intended to encompass all tobacco products designed for human consumption, and will include, for example, cigarettes, cigars, roll-your-own tobacco, bidis, kreteks, little cigars, and dissolvable tobacco products. This definition is based on the definition in the WHO FCTC.

It is important to note that therapeutic goods, which are aimed at helping people to quit their use of tobacco products, will not be regulated by the Tobacco Plain Packaging Bill 2011 when they are included on the Australian Register of Therapeutic Goods. Products that contain nicotine, but do not contain any tobacco, will not be regulated by the Tobacco Plain Packaging Bill 2011.

Definitions: What type of packaging will the legislation affect?

The packaging that will be regulated by the Tobacco Plain Packaging Bill 2011 includes any box, bag or other container that a tobacco product is packed in for retail sale. This includes the package immediately around the tobacco product, any wrapper that covers the packaging of a tobacco product, any carton that contains one or more packages of tobacco products, anything placed in the packaging apart from the tobacco product and anything attached to or forming part of the packaging. Where there is more than one form of packaging used for retail sale, for example where a carton or other container holds more than one packet of tobacco products, each layer of packaging including the initial packet and the carton, will have to comply with plain packaging requirements.

The legislation is not intended to apply to packaging of tobacco products for the purpose of shipping or wholesale distribution.

Operation of State and Territory Law

The Bill does not limit the operation of State or Territory laws relating to packaging and appearance of tobacco products, where those laws are capable of operating concurrently with the Bill. It is expected that Commonwealth and State and Territory tobacco control laws will continue to operate alongside each other. However, where there is any conflict with the plain packaging requirements, the Bill will prevail.

Constitutional Provisions

The Bill will be supported by the external affairs power in section 51(xxix) of the Australian Constitution, as it gives effect to obligations under the FCTC.

In case there may be any doubt that all of the provisions are fully supported by the external affairs power, there is also provision for alternative constitutional bases for the Bill. Section 10 of the Bill provides for the prohibitions in the Bill to have effect in such a way as to be supported by the Commonwealth's constitutional powers with respect to corporations (section 51(xx)), international and interstate trade and commerce (section 51(i)) and the Territories (section 122). To ensure the broadest possible support by the corporations power, Part 3 of Chapter 3 also prohibits a person doing, in relation to a corporation, things prohibited more generally by Part 1 of Chapter 3.

It is not anticipated that the Bill will result in any acquisition of property other than on just terms which would be contrary to section 51(xxxi) of the Constitution. However, out of an abundance of caution, section 11 provides that the Bill does not apply to the extent that it would cause an acquisition contrary to section 51 (xxxi). Some tobacco manufacturers have argued that legislation preventing the use of their trade marks on packaging would be an acquisition of property other than on just terms. The Government considers that this argument is incorrect. However, out of an abundance of caution section 11(2) of the Bill provides that if preventing the use of trade marks on packaging of products is contrary to section 51(xxxi) of the Constitution, the trade marks can be used, but only in accordance with restrictions (for example, on size and placement) that would be imposed by the regulations.

Chapter 2

Chapter 2 provides for the Governor-General (on the advice of the Minister) to make regulations specifying the requirements for plain packaging and the appearance of tobacco products amongst other things. The effect of the proposed requirements will be that tobacco company branding, logos, symbols and other images that may be used to advertise the tobacco product will not be able to appear on tobacco products or their packaging, other than a brand name and variant in specified locations, with a specified appearance, or information which is required to appear in compliance with other regulations.

What will the plain packaging requirements be?

Sample images of the cigarette package design are available at the Appendix to this Consultation Paper. The proposed designs for the packaging of other tobacco products are still under development. Consultation on these will occur in the second half of 2011.

In September 2010, the Department of Health and Ageing established an Expert Advisory Group (EAG) of leading experts in tobacco control (see box) to advise on plain packaging design, including to oversee consumer research on optimal design and design features that take into account concerns expressed by retailers about handling of packages. The EAG oversaw testing of cigarette pack designs through late 2010 into early 2011.

Members of the Expert Advisory Group

- Professor Ron Borland PhD
Nigel Gray Distinguished Fellow in Cancer Prevention
VicHealth Centre for Tobacco Control
Cancer Council Victoria
- Professor Mike Daube
Professor of Health Policy
Curtin University
- Professor Mark Davison
Professor of Intellectual Property
Monash University
- Assistant Professor David Hammond
Department of Health Studies
University of Waterloo, Canada
- Professor Janet Hoek
Department of Marketing
School of Business, University of Otago,
New Zealand
- Mr Jonathan Liberman
Senior Adviser, International Legal Policy
Cancer Council Victoria
- Ms Caroline Miller
General Manager Cancer Control
Cancer Council South Australia
- Associate Professor Andrew D Mitchell
Melbourne Law School
The University of Melbourne
- Professor Melanie Wakefield PhD
Director & NHMRC Principal Research Fellow
Centre for Behavioural Research in Cancer
Cancer Council Victoria

As a result of that testing, and drawing on evidence from existing research, the Government is proposing that the legislation and associated regulations governing cigarette packaging design specify the following features:

Colour of packaging: A particular shade of dark olive brown in a matt finish

A range of eight colours were selected based on colours used in research that has demonstrated the effectiveness of plain packaging in the past. A particular shade of dark olive brown in a matt finish was found to be optimal in terms of decreasing the appeal and attractiveness of tobacco packaging, decreasing the potential of the pack to mislead consumers about the harms of tobacco use and increasing the impact of graphic health warnings. The particular shade of dark olive brown will be specified in the regulations.

Font used on packaging: Lucida sans 14 or similar

Research was undertaken to determine the optimal font style and font size that would assist retailers in handling of tobacco products while maintaining the public health objectives of the measure. Legibility of brand names was tested at a distance of one metre to simulate identification in a retail setting. All participants in the research could read the brand name in font Lucida Sans at 14 point size and this or a similar style will be mandated in the new regulations. In addition, the font style and size of the brand variant and quantity of cigarettes, which will be required to appear under the brand name, will be mandated in the new regulations.

Shape, size and opening of packaging: Rectangular box with flip-top opening

Research was undertaken to determine the impact of innovative packaging shape, size and opening. The research indicated that all these elements of pack design created strong associations with level of appeal and brand personality. Packs will be required to be a standard rectangular shape with a flip-top opening. Pack size will be limited, with size ranging from a minimum based on standard packs of 20 cigarettes to a maximum based on standard packs of 50 cigarettes. The exact specifications for shape, opening and size will be mandated in the new regulations.

Other design features:

Research has also indicated that other elements of current pack design such as packaging material, decorative inks, ridging and embossing, foils and inside linings impact on level of appeal and brand personality. Design elements such as these will either be banned (for example decorative inks, ridging or embossing) or restricted (for example foils must also be a dark olive shade of brown in a matt finish and packaging must be made of rigid cardboard). The exact specifications for all design features will be mandated in the new regulations.

Position of brand names: Top, front and base of pack

Retailers requested that the brand name be placed on the top, front and bottom of packages to assist in handling of packages and restocking. In order to accommodate this request, it is proposed that the brand name and variant will appear on these surfaces subject to the size and font limitations specified in the Bill.

Some retailers also requested that the brand name on the front of the pack be placed towards the top of the pack so that it could be seen above shelving required under state and territory retail display laws and regulations.

Research was conducted on this design option along with research to determine the optimal size for graphic health warnings. The research indicated that this design disrupted the comprehension of the graphic health warnings, potentially undermining the public health objectives of the measure.

The WHO FCTC Guidelines for Article 11 (Packaging and labelling of tobacco products) state that research indicates that graphic health warnings are more visible at the top rather than the bottom of the pack and should be placed at the top of principal display areas of the pack.

It is proposed therefore, that the front of pack brand names be placed below the graphic health warnings. The identification of products on shelves in a retail setting can be handled through the use of price tickets including brand names on shelving. These are consistent with state and territory laws.

Side panels

Manufacturers' details will continue to be required on one of the side panels. The font size and style and exact positioning of these details will be mandated in the regulations. The barcode will also be required to be on the same side panel as the manufacturers' details.

Other symbols and logos

To ensure that no other design features detract from the impact of the plain packaging measure, it is proposed that no other symbols or logos, apart from those required under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* under the *Australian Consumer Law*, or other regulations, are to appear on tobacco packaging.

Some tobacco manufacturers voluntarily include the 'Tidy Man' littering symbol on packs. The Government is unaware of any evidence of the impact of this symbol on tobacco product related litter in Australia, and is proposing that this not be allowed under the plain packaging regime.

Graphic health warnings

Graphic health warnings will continue to be required on the front, side and back of packages as currently specified in the *Trade Practices (Consumer Protection Information Standards) (Tobacco) Regulations 2004* under the *Australian Consumer Law*. It is proposed to expand the front of pack graphic health warnings to cover 75 per cent of the surface. The Government is also developing and testing new images and text for graphic health warnings.

These changes will initially be implemented through the *Australian Consumer Law*, in consultation with State and Territory Governments, to coincide with the introduction of plain packaging.

Cigarette stick appearance

There are currently no restrictions on how cigarette sticks themselves are to appear. Cigarette sticks have a range of decorative elements printed on them including brand names, use of colour, bands, filter designs and filter colours. Research undertaken shows that inclusion of brand names and other design embellishments on cigarettes are strongly associated with level of appeal and perceived brand personalities. Guidelines for the implementation of Article 13 (Tobacco advertising, promotion and sponsorship) of the FCTC identify product design features as a form of tobacco advertising and promotion.

The Government is proposing that cigarette stick appearance be limited to either plain white, or plain white with an 'imitation cork' filter tip. No branding, other colours or design features will be permitted.

Anti-counterfeiting measures

The Department of Health and Ageing has consulted with the tobacco industry on possible anti-counterfeiting measures that might be included in packaging design.

The tobacco industry requested that anti-counterfeiting measures in the plain packaging design include:

- the 'Codentify' system of a unique alphanumeric code on each pack, generated by a government-endorsed and licensed machine, with an associated government-operated phone line and/or website to allow consumers and law enforcement agencies to check the authenticity of individual packs;
- covert markings including taggart ink, which can only be identified through specialised equipment available to the manufacturer and/or law enforcement agencies. Such markings are currently used by the industry; and
- forensic-level differentiation of the content of the cardboard/other materials used in the manufacture of the pack.

The Government is proposing that the plain packaging legislation and regulations:

- permit the use of unique alphanumeric code markings on either the bottom of the pack or the side of the pack on a voluntary basis on condition that these codes are not linked to tobacco marketing or promotion and do not interfere with graphic health warnings;
- permit the continued use of covert markings in compliance with all other aspects of the Tobacco Plain Packaging Bill 2011; and
- not seek to specify the packaging material to a forensic level.

The Government does not endorse tobacco products. The Government will therefore not be providing supporting infrastructure in the form of Government endorsed or licensed machines for the production of the codes, nor consumer phone lines or websites. The Government also considers the proposals put forward by the tobacco industry would not be a cost-effective response to the issue of counterfeiting/illicit trade.

Trade Mark and Design Issues

It is proposed that the legislation will prevent a trade mark from being placed on tobacco products or their retail packaging. However, a trade mark owner's rights to protect the trade mark, and the right to register a trade mark, will be preserved. The Bill prevents the Registrar of Trade Marks from, among other things, rejecting an application for the registration of a trade mark, revoking the registration of a trade mark, or removing a trade mark from the Register of Trade Marks merely because a registered owner is prevented from using it on tobacco products and their packaging. The Bill also prevents a court from ordering the Registrar to do any of these things.

The Bill also prevents an order being made requiring a licence to be granted in relation to a registered design, or revoking registration of a design under the *Designs Act 2003*, as a result of the Bill preventing the use of a registered design.

Chapters 3 and 5

Offences and Civil Penalties

The Bill would create several offences relating to tobacco products and packaging that do not comply with plain packaging requirements. These offences relate to the sale or supply, purchase, import, packaging, or manufacturing, of tobacco products for retail sale. These offences will apply to manufacturers, importers, packagers, wholesalers, distributors and retailers of tobacco products in Australia who fail to comply with the requirements for tobacco products and packaging created under Chapter 2. The offences **will not** apply to people who purchase tobacco products for their personal use.

As already mentioned, the offences in Part 3 of Chapter 3 apply to conduct already covered by Part 1 of Chapter 3, but are restricted to dealings with constitutional corporations. Part 3 is included out of an abundance of caution for constitutional reasons.

Each of the offences set out in the Bill is a fault-based criminal offence, which also has a corresponding strict liability offence (that is, where no fault elements apply to the physical elements of the offence), as well as a civil penalty provision for the same action. Part 3 of Chapter 5 also establishes that infringement notices may be given where an authorised officer has reasonable grounds to believe a person has contravened a strict liability offence. The civil penalty and infringement notice schemes are designed to encourage compliance with the legislative requirements without resorting to criminal prosecution. The Commonwealth will decide in each particular case whether to prosecute a person for a fault-based offence or strict liability offence, or whether to bring proceedings for a civil penalty order.

For most of the offences outlined in the Bill there are several levels of penalty specified. The scheme of penalties established within the Bill is based on the penalties set out in the *Competition and Consumer Act 2010*. This structure has been adopted to ensure that the penalties applied for a breach of plain packaging

requirements are equivalent to the penalties that could be applied under the *Australian Consumer Law* for a breach of the requirement that graphic health warnings must appear on cigarette packages and cartons under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*.

Fault-based criminal offences, for which an accused individual or body corporate may be prosecuted, must be proved beyond reasonable doubt in a Court. Some elements of fault-based criminal offences included in this legislation require no intention of the individual or body corporate to be proved; establishing recklessness is sufficient. The maximum penalty amount of a fault-based criminal offence for non-compliance committed by an individual is 2,000 penalty units (currently \$220,000), and for non-compliance committed by a body corporate is 10,000 penalty units (currently \$1.1 million).

Strict liability criminal offences must also be proved beyond reasonable doubt in the Federal Court. No elements of a strict liability criminal offence require a particular state of mind to be proved. The maximum penalty amount of a strict liability criminal offence for non-compliance committed by an individual is 60 penalty units (currently \$6,600) and committed by a body corporate is 300 penalty units (currently \$33,000).

The civil penalty scheme allows the Secretary of the Department of Health and Ageing (or a delegate) to apply to the Federal Court for an order that a person must pay a civil penalty for contravention of the plain packaging requirements. Civil penalty provision contraventions must be proved on the balance of probabilities in a Court, and no conviction may be recorded. The maximum penalty for contravention of a civil penalty provision is the same as for fault-based criminal offences. That is, 2,000 penalty units (currently \$220,000) for an individual and 10,000 penalty units (currently \$1.1 million) for a body corporate.

Infringement notices may be issued to an individual or to a body corporate suspected of having committed a strict liability offence. The amount of an infringement notice for an individual is 12 penalty units (currently \$1,320), and the amount for a body corporate is 60 penalty units (currently \$6,600). An infringement notice may be issued for non-compliance with the plain packaging or tobacco product requirements, as an alternative to criminal prosecution or civil penalty provisions. Failure to pay the amount specified in an infringement notice may lead to criminal prosecution or civil penalty proceedings.

When will the offences and penalties commence?

Currently, the parts of the Tobacco Plain Packaging Bill 2011 are scheduled to commence on three different dates:

- On 1 January 2012, the preliminary provisions of the legislation; the power to make regulations specifying plain packaging requirements; and the provisions that allow the authorised investigative and enforcement officer roles to be established will commence.
- On 20 May 2012, the offences relating to importing, packaging and manufacturing non-compliant tobacco products, and tobacco products in non-compliant packaging will commence, along with investigation and enforcement powers of authorised officers.

- On 1 July 2012, the offences relating to selling and purchasing non-compliant tobacco products and tobacco products in non-compliant packaging commence.

During targeted consultations, some retailers of tobacco products requested a clear end-point to the manufacture and/or import of non-plain packaged tobacco products ahead of the end-point for retail sale to ensure there would be enough time for stocks of non-plain packaged product to be sold before the 1 July 2012 date for full commencement of the legislation. The period proposed in the exposure draft legislation is six weeks. Comment is invited in particular on this point.

To allow the Tobacco Plain Packaging Bill 2011 to be effectively administered, information gathering and enforcement powers will also come into effect on 20 May 2012. Various other administrative provisions will take effect with commencement of the legislation on 1 January 2012 so that administrative structures can be put in place, and to ensure that the tobacco, packaging and retail industry can be given as much notice as possible of the regulations made under the legislation.

Chapter 4

Investigation and enforcement activity relating to the Bill will be the responsibility of a health regulatory unit within the Department of Health and Ageing. Authorised officers will be appointed to investigate and monitor compliance with the plain packaging requirements. The legislation is drafted to provide for assistance from other Commonwealth agencies should that be necessary.

The Government is considering cost recovery options for the monitoring and enforcement of the Tobacco Plain Packaging Bill 2011. Before any decision is taken to proceed with cost recovery, a draft Cost Recovery Impact Statement will be prepared. This will form the basis of industry consultation, and will be conducted in the middle of this year, in accordance with the Guidelines administered by the Department of Finance and Deregulation.

Information Gathering Powers

Chapter 4 of the Bill deals with the powers of certain officers to investigate suspected contraventions of the legislation. The provisions create a regime under which warrants to search premises and seize evidence may be issued, and certain authorised officers may be appointed to execute warrants. The regime includes the ability to enter and search premises with a warrant, and to seize evidence to support investigation of suspected offences or contraventions of civil penalty provisions. The legislation empowers authorised officers to ask questions, and to seek production of documents.

The legislation also contains safeguards and obligations to which authorised officers must adhere when exercising their powers. This includes that authorised officers must provide warrant details to occupiers of premises, and must announce themselves before entering a premises. The occupiers of premises which are entered and searched will also have responsibilities under the legislation. The legislation requires seized items to be handled in a particular way, and outlines when seized items will be returned to their owner.

Other Regulation of Packaging and Tobacco Products

Various forms of regulation of tobacco products already exist, including:

- requirements for graphic health warnings to appear on packaging, under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*, and for performance standards and labelling of cigarettes, under the *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008*;
- bans on advertising of tobacco products through the *Tobacco Advertising Prohibition Act 1992*;
- requirements for payment of excise on tobacco products through the *Excise Act 1901*, *Excise Regulations 1925* and the *Excise Tariff Act 1921*, and through the *Customs Act 1901*, *Customs Regulations 1926* and the *Customs Tariff Act 1995* for imported tobacco; and
- bans on smokeless tobacco products through the *Trade Practices Act 1974 – Consumer Protection Notice No. 10 of 1991 – Permanent Ban on Goods*.

In order to ensure effective public health regulation, State and Territory governments also continue to implement regulatory reforms in the areas of tobacco retailing and exposure to second-hand smoke, including most recently and notably: restrictions and bans on point of sale advertising and retail displays of tobacco products; and bans on smoking in cars and other environments in which children may be exposed to second hand smoke.

In addition, requirements exist for the packaging of products generally, including the:

- *National Trade Measurement Regulations 2009*; and the
- *Commerce (Imports) Regulations 1940*.

The Tobacco Plain Packaging Bill 2011 is not intended to interfere with any other regulation of tobacco products, including any regulation creating a requirement for packaging generally. Nor is the Bill intended to interfere with a ban on any form of tobacco product whether or not that product would fall within the definition of tobacco product for the purposes of the Tobacco Plain Packaging Bill 2011. It is also not intended to detract from any form of regulation of advertising of tobacco products, but is intended to support existing advertising restrictions in so far as it creates requirements to restrict advertising on tobacco products.

Appendix

*Images of proposed design for cigarette packaging**





Front of Pack Image

Back of Pack Image

The colour viewed in these images may change depending on print quality and screen settings, and is therefore indicative only. Plain packaging regulations will prescribe a specific dark olive brown colour for print purposes.

**Images created using a selection of existing graphic health warnings.*