

**HSR-In-Confidence**  
**IP Australia**

**Parliamentary Secretary for Information**

B10/1473

cc Minister

**PROPOSALS FOR PLAIN CIGARETTE PACKAGING**

**Purpose:** To brief you on the issue of plain packaging for cigarettes currently being proposed in a private member's Bill and in recommendations by the National Preventative Health Taskforce.

**Background:** The National Preventative Health Taskforce has made a recommendation in its *National Preventative Health Strategy, Australia: the healthiest country by 2020* to introduce plain packaging of tobacco products.

Senator Fielding has put forward a private member's Bill entitled the "Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009". The Senate has referred the Bill to the Community Affairs Legislation Committee for consideration and report by 26 August 2010.

**Issues:** Senator Fielding's Bill proposes to amend the *Trade Practices Act 1974* and *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Trade Practices Regulations). The effect of the amendments would be to impose labelling standards which limit the display of trade marks to the brand name in black, Helvetica type face and 12 point size letters. The Bill would prevent the display of logos, decorative fonts and other trade mark devices on cigarette packaging.

The Preventative Health Taskforce recommends (in recommendations 3 and 5) that the remaining forms of advertising and promotion of tobacco products be removed (**Attachment A**). Although curtailing trade mark use is not specifically mentioned in these recommendations, in the *National Preventative Health Strategy – the roadmap for action* (page 181) (**Attachment B**), the intention is to prohibit brand imagery, colours, corporate logos, trade marks and to permit manufacturers only to print the brand name in a mandated size, font and place. Consequently, the recommendations would have the same impact as Senator Fielding's proposed legislation.

It is unlikely that changes to the *Trade Marks Act 1995* would be required. Senator Fielding's Bill proposes to amend the trade practices legislation whilst the Taskforce has recommended amending the *Tobacco Advertising Prohibition Act 1992* and the Trade Practices Regulations.

IP Australia has provided advice to the Department of Health and Ageing in the form of a Policy Statement (**Attachment C**). IP Australia considers that restricting the right to use a trade mark would reduce the ability of a trade mark to fulfil its economic role. In addition, any restrictions should only be introduced if there is a clear public interest to be served. Notably, analysis of the public interest should be based on strong empirical evidence. Also, Australia's international obligations would need to be fully considered before introducing any restrictions on the use of trade marks.

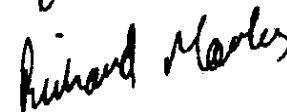
**Slipstream Version 13 April 2010**

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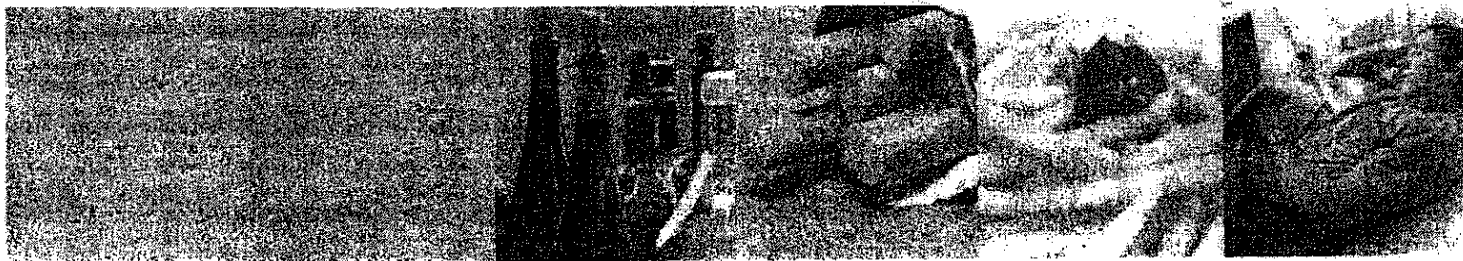
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NOTED/PLEASE DISCUSS



Richard Marles / /

16/4/10



## Attachment A

### TOBACCO

#### First phase (2010–2013)

##### 1. Make tobacco products significantly more expensive

- Ensure that the average price of a packet of 30 cigarettes is at least \$20 (in 2008 \$ terms) within three years
- Contribute to developing and implementing international agreements and a national strategy to combat the illicit trade of tobacco

##### 2. Increase the frequency, reach and intensity of social marketing campaigns

- Develop and implement effective and sustained national social marketing campaigns through COAG tobacco initiative and coordinated by NPA
- Design messages and place media to ensure reach with young smokers and socially disadvantaged groups

##### 3. End all remaining forms of advertising and promotion of tobacco products

- Legislate to eliminate all remaining forms of tobacco promotion, including, as feasible, through new and emerging forms of media
- Amend legislation nationally and in all states and territories to ensure that tobacco is out-of-sight in retail outlets
- Eliminate the promotion of tobacco products through design of packaging
  - Amend *Tobacco Advertising Prohibition Act 1992* to require that no tobacco product may be sold except in packaging of a shape, size, material and colour prescribed by government
  - Amend *Trade Practices CPIS (Tobacco) Regulations 2004* to specify exact requirements for plain packaging

##### 4. Eliminate exposure to second-hand smoke in public places

- Amend current legislation to:
  - Ensure smoking is prohibited in any public places where children are likely to be exposed
  - Ensure children are not exposed to tobacco smoke when travelling in cars
  - Protect against exposure to second-hand smoke in workplaces, including outdoor areas



## **5. Regulate manufacturing and further regulate packaging and supply of tobacco products**

- Improve consumer information related to tobacco products
  - Mandate standard plain packaging of all tobacco products to ensure that design features of the pack in no way reduce the prominence or impact of prescribed government warnings
  - Automatically review and upgrade warnings on tobacco packages at least every three years, with the Chief Medical Officer to have the capacity to require amendments and issue additional warnings of new and emerging risks in between
- Tighten and enforce legislation to eliminate sales to minors and any form of promotion at retail level
- Give government power to regulate design, contents and maximum emissions for tobacco and related products, and establish a regulatory body with responsibility for specifying required disclosure to government, labelling and any other communication to consumers
- Investigate the feasibility of legal action by governments and others against tobacco companies

## **6. Ensure all smokers in contact with health services are encouraged and supported to quit, especially pregnant women and their partners, and people living with chronic disease**

- Ensure all state- or territory-funded healthcare services (general, maternity and psychiatric) are smoke-free, protecting staff, patients and visitors from exposure to second-hand smoke both indoors and on facility grounds
- Increase availability of Quitline services, and ensure that Quitlines are resourced to respond to projected demand from media campaigns
- Ensure that nicotine replacement therapy (NRT) is affordable for all those for whom it is clinically appropriate

## **7. Work in partnership with Indigenous groups to boost efforts to reduce smoking and exposure to tobacco among Indigenous Australians**

- Establish multi-component community-based tobacco control projects that are locally developed and delivered
- Enhance social marketing campaigns for Indigenous smokers ensuring a 'win track' approach of using existing effective mainstream campaigns complemented by Indigenous-specific campaign elements
- Provide training to Aboriginal and Torres Strait Islander health workers to improve skills in the provision of smoking cessation advice and in developing community-based tobacco control programs
- Place specialist Tobacco Control Workers in Indigenous community health organisations to build capacity at the local health service level to develop and deliver tobacco control activities



## Attachment B

### Action 3.3

*Amend legislation to ensure that tobacco is out-of-sight in retail outlets in all jurisdictions.*

#### PROMOTION THROUGH PACKAGING

In Australia and other countries that have already banned traditional forms of tobacco marketing, packaging has become a cornerstone of marketing strategy. Brand names and package design enable the communication of personal characteristics, social identity and aspirations,(90) and are a crucial aspect of marketing tobacco products.(91, 92) Market-testing studies show that package design – through the use of varying colour and other design elements – induces smokers to expect, and then actually experience, their cigarettes to be lower strength, lower in tar and lower in health risk than exactly the same cigarettes presented without this packaging.(93, 94) These misperceptions are part of the constellation of modifiable tobacco marketing factors that make smoking easier to take up and harder to quit.

As noted above, there can be no justification for allowing any form of promotion for this uniquely dangerous and addictive product which it is illegal to sell to children. 'Plain packaging' entails prohibiting brand imagery, colours, corporate logos and trademarks, and permitting manufacturers only to print the brand name in a mandated size, font and place, in addition to required health warnings and other legally mandated product information such as toxic constituents, tax-paid seals or package contents. A standard cardboard texture would be mandatory, and the size and shape of the package and cellophane wrapper would also be prescribed. A detailed analysis of current marketing practices(92) suggests that regulations prescribing plain packaging would also need to 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 or affixing of 'inserts' would also need to be banned.

Consumer research indicates that decreasing the number of design elements on the package reduces its appeal and perceptions about the likely enjoyment and desirability of smoking.(95) Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item. It would also reduce the potential for cigarettes to be used to signify status. Plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall health warnings on plain packs.(96-98)

Guidelines for implementation of Article 11 adopted by the WHO's Conference of the Parties to the FCTC state:

*Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging).(99)*

Shareholder nervousness(100) and industry opposition to restrictions on pack design are a strong indication of the importance of packaging to tobacco sales.(101)

*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)(102)*

Threatened legal challenges from tobacco companies also testify to the importance they attach to packaging as a promotional mechanism. Given that trademark law is aimed at protecting broader public interests and does not provide for absolute private property rights, plain packaging is justifiable, proportionate and not inconsistent with international trade

## **Trade marks – public vs commercial interest**

Trade marks are a critical commercial tool in today's economy. They help business to establish, and benefit from, a marketplace reputation by:

- signifying the commercial origin of goods or services;
- giving consumer confidence in the quality of goods or services;
- building a business's brand value and good will;
- allowing owners to prevent competitors from copying or unfairly using their trademark without their permission; and
- protecting an owner's investment in the marketing and goodwill of their business.

Facilitating business in this way brings economic benefits across the economy. Trade mark owners are given a broad exclusive right to use their mark in relation to the class of goods and/or services against which the mark is registered. IP Australia considers that plain packaging of tobacco products if implemented would impinge on this right.

The key issue lies in whether the public interest is better served by plain packaging. Restrictions on the right to use a trademark would reduce the ability of a trade mark to fulfil its economic role. Such restrictions should only be introduced if there is a clear public interest to be served. Notably, analysis of the public interest need should be based on strong empirical evidence.

This is not the first time government has considered the issue of plain packaging. A Senate report in 1995 concluded that there was insufficient evidence to demonstrate the efficacy of generic packaging in achieving health policy objectives and recommended further investigation. IP Australia is unaware of any subsequent evidence that establishes that the public interest would be better served by plain packaging.

Any changes must also be considered in the context of Australia's international trade and intellectual property obligations, for example under the Australia-US Free Trade Agreement and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). One example is a potential violation under Article 20 of TRIPS which is intended to prevent the imposition of special requirements on the use of a trademark in the course of trade. While we are not qualified to provide legal advice on this the potential for dispute about the matter seems clear.

IP Australia is not aware of any overseas jurisdictions which currently require plain packaging of tobacco products.