

Commoditising tobacco products through plain packaging will harm public health, violate treaties, and does not meet the test of “evidence-based policy”

**Submission by Philip Morris Limited on the
Tobacco Plain Packaging Bill Exposure Draft
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Commoditising tobacco products through plain packaging will harm public health, violate treaties, and does not meet the test of “evidence-based policy”

A submission by Philip Morris Limited

Philip Morris Limited supports effective and evidence based regulation of all tobacco products. Philip Morris International and its affiliates all share this view. Unfortunately, the plain packaging measure proposed by the Australian Government is not, in our opinion, effective or evidence based. In fact, we believe, and the evidence shows, that plain packaging will harm public health and create other serious debilitating consequences as described herein.

The Government’s proposal will commoditise cigarette packaging, stripping from it all brand imagery. Brand information will be limited to a uniformly sized and styled brand name. The Bill may even authorise regulations that prescribe the precise shape, size, colour, texture, finish, and construction materials of packs. Warning labels will be enlarged to 75% of the front of the packet.¹ The Consultation Paper indicates that the Government intends to issue regulations which go even farther, potentially regulating the way packs open, the colour of pack liners, the number of cigarettes in the pack, and even how the cigarettes and filters themselves look. Although none of those details are contained in the proposed law, the Government intends to implement the law by 1 January 2012 and require that all packs sold in Australia comply with those requirements by 1 July 2012.

Mandating generic packaging² of tobacco products is, as the Government has acknowledged, an unprecedented experiment without empirical support. The available evidence, including the studies relied upon by the Government, demonstrates that plain packaging will not reduce smoking rates, deter youth from smoking, or otherwise benefit public health. To the contrary, illicit trade will flourish and cigarette prices will fall, causing smoking rates to rise, particularly among youth. Plain packaging will constitute brand expropriation that will cost taxpayers millions of dollars in legal fees and may ultimately cost taxpayers billions in compensation. By mandating plain packaging, the Government will contravene international trade laws.

¹ On 7 April 2011, the Government began a consultation on the Exposure Draft *Tobacco Plain Packaging Bill 2011* (the “Bill”), with its rationale explained in its *Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft* (the “Consultation Paper”).

² We use the terms “generic packaging” and “plain packaging” interchangeably. The Government attempts to make a distinction between the two, indicating that its “plain packaging” proposal still allows a brand identity and value to be maintained because the Bill would allow manufacturers to print the name of a brand in prescribed font and place on the pack. That artificial distinction is inconsistent with well-established principles of Australian and international law, as described in Sections 6 and 7 below.

1. The Government has repeatedly recognised that the evidence does not support generic 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."

IP Australia, Briefing note to Parliamentary Secretary for Information Richard Marles, 13 April 2010

Internal documents disclosed by the Government through Freedom of Information requests reveal that, in private conversations, officials have consistently acknowledged that there is no evidence to justify generic packaging.

For example, in March 2010 – just one month before announcing that it was embarking on this unprecedented regulatory measure, the Department of Health and Ageing advised IP Australia, the Australian intellectual property regulator, that it had not yet collected, consulted, shared or analysed evidence on plain packaging with governmental stakeholders, saying that there had been *"no developments on the preparation of the whole-of-government response"* to the proposal for generic packaging.³

A few weeks later, on April 7, the Department of Health filled out a "Best Practice Regulation Preliminary Assessment" for plain packaging. The document's purpose was to identify major issues that would require careful consideration by government stakeholders and strong evidence to justify action. Many were identified, but no evidence was presented in the document.⁴

On April 13, IP Australia similarly flagged the significant problems generic packaging would pose, and cautioned the Government that *"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."*⁵

³ Briefing note from Ian Goss, General Manager, Business Development and Strategy Group, IP Australia, to Richard Marles, Parliamentary Secretary for Information, copied to Minister for Industry and Innovation Kim Carr, 1 March 2010 ("IP Australia Briefing Note, 1 March 2011"), disclosed in response to Freedom of Information Request, attached as Annex 1.

⁴ Simon Cotterrell, Assistant Secretary, Drug Strategy Branch, Department of Health and Ageing, "Best Practice Regulation Preliminary Assessment", 7 April 2010, disclosed in response to Freedom of Information Request, attached as Annex 2.

⁵ "Proposals for plain cigarette packaging," Briefing note from Ian Goss, General Manager, Business Development and Strategy Group, IP Australia, to Richard Marles, Parliamentary Secretary for Information, 13 April 2010 ("IP Australia Briefing Note, 13 April 2010"), disclosed in response to Freedom of Information Request, attached as Annex 3.

IP Australia did not believe that such evidence exists. *"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."*⁶

Less than two weeks later, the Government informed both the Department of Health and IP Australia of its intention to proceed with generic packaging, notwithstanding the lack of evidence or inter-departmental consultation. An e-mail forwarded to the Director General of IP Australia described the situation:

*"We met with Simon Cotterrell (Asst Sec Drug Strategy Branch) and Adrian White. On Tuesday [April 27] the Government will be announcing a number of health reforms. Included in this will be an announcement to introduce plain packaging for cigarettes ... It w[as] very clear from the meeting that DoHA have only recently been advised that this is what the Government was going to do. They certainly didn't know about this earlier in the week."*⁷

Operating against a tight deadline, the Department of Health constructed a Regulation Impact Statement, which it sent to the Office of Best Practice Regulation on April 27. The document highlights the lack of evidence to support the Government's action:

- It contains no estimates of the impact of generic packaging on smoking rates. Although the issue has been considered by Australian governments and task forces dating back to the early 1990s and has been the focus of public health advocates in Australia and other countries over the same time period, the Regulation Impact Statement said:

*"It is not possible to quantify ... this impact at this time as a change to mandatory plain packaging has not been implemented anywhere in the world... It is also very difficult to isolate the impact of an individual policy measure when a comprehensive suite of measures are being implemented simultaneously..."*⁸

⁶ IP Australia Briefing Note, 13 April 2010, previously cited (attached as Annex 3).

⁷ E-mail from Leo O'Keeffe, IP Australia, to Ian Goss, IP Australia, forwarded to Philip Noonan, Director General IP Australia, 23 April 2010, disclosed in response to Freedom of Information Request, attached as Annex 4.

⁸ It is, in fact, possible to estimate the impact of regulatory measures. For example, the European Commission has recognised that an econometric model *"provides a structure around which the policies' effects can be assessed and integrated, and in this way should make the quantification of these effects more transparent."* The European Commission DG Regio, Evaluating Socio-Economic Development, Sourcebook 2: Methods & Techniques Econometric Models, December 2003.

- It recognised that generic packaging could cause prices to fall and consumption to increase, but did not provide any estimate of that impact:

"Smokers could face lower costs of purchasing cigarettes – and higher health impacts and costs associated with higher rates of consumption – if plain packaging leads manufacturers to disinvest in branding and compete solely on price, driving tobacco product prices down." The DOH "does not consider this risk to be significant", but said "this potential impact is hypothetical and cannot be costed."⁹ No evidence was cited to justify the DOH's judgment.

- It recognised that generic packaging could facilitate illicit trade but gave no estimate of the impact or the resulting costs to government, consumers, community safety or others:

"Manufacturers, importers, distributors and retailers of tobacco products, as well as the Australian Taxation Office, Australian Customs and Border Protection Service, the Australian Government more broadly, taxpayers and smokers would all be affected by any change to the trade in illicit products generated by the move to plain packaging...The efforts of the Australian Taxation Office and the Australian Customs and Border Protection Service to collect tobacco excise and customs duty could be affected by the design of plain packaging. Government revenues could be put at risk if the design of plain packaging made counterfeiting of tobacco easier and enforcement efforts less effective. Smokers' health could potentially be put at greater risk if they consume counterfeit products. This potential impact is hypothetical and cannot be costed."¹⁰

That same evening, the Prime Minister's office e-mailed the Department of Health, asking for assistance with media messages: *"There is now a chance we might be doing this tomorrow – shall call to discuss. Can you please fact check this."*¹¹

By the next day, April 28, the Department of Health had prepared a "Budget-In-Confidence Question-and-Answer" document on generic packaging. In response to the question *"Is there any evidence that plain packaging will do anything?"*, the answer made a few conclusory statements about advertising bans, warning labels, and speculative opinion research, and concluded with a telling bullet-point:

- ***Insert more evidence here***¹²

⁹ Here too the Government is wrong. Economic models, discussed in Section 5 below, show that generic packaging would lead to significant decreases in price and significant increases in consumption.

¹⁰ "Cabinet In Confidence: Department of Health and Ageing, Regulation Impact Statement: Plain Packaging of Tobacco Products" ("Regulation Impact Statement"), April 2010, disclosed in response to Freedom of Information Request, attached as Annex 5.

¹¹ E-mail from Ankit Kumar, Office of the Prime Minister, to Chris Picton, Department of Health and Ageing, 27 April 2010, 18:52, disclosed in response to Freedom of Information Request, attached as Annex 6.

¹² "Budget-In-Confidence: Legislation to require plain packaging for tobacco products: Questions and Answers [Attachment being assessed by Dept of Health]", disclosed in response to Freedom of Information Request, attached as Annex 7.

The lack of evidence was recognised by then-Minister for Trade Simon Crean. On April 30, *after* the Government announced its commitment to generic packaging, and *after* the proposal was presented to Cabinet, the Minister jotted this note in the margin of his copy of a Ministerial Submission: "*Have we got the supporting evidence that plain packaging reduces the health risk[?] This seems to be the problem the UK government confronted when they considered the case and decided against it because the supporting evidence was not strong enough.*"¹³

On May 4, the Office of Best Practice Regulation delivered its views, finding that the evidence supporting the proposal for generic packaging was insufficient and the Government did not comply with its own guidelines for evidence-based policy:

"Thank you for the draft Regulation Impact Statement (RIS) on plain packaging of tobacco products, sent 27 April 2010. As discussed the RIS does not satisfy the Australian Government's best practice regulation requirements.

Based on my discussions with you and on the media release by the Prime Minister on 29 April 2010, it would seem that a decision has been made on this proposal and unfortunately there is no capacity now to undertake any further work on the RIS

...

*The OBPR is required to report this matter as **non-compliant** in the Best Practice Regulation Report. Under the Government's requirements a post-implementation review will be required to commence within one to two years of implementation."*¹⁴

More than one year later, the Minister for Health cannot articulate a solid evidence base for generic packaging:

*"...you're right that **there is some level of experiment**...*

*...will it stop people who are already addicted, on its own **probably not**...*

*Look, **I think it's a range of different things**, I don't conduct it myself, obviously, the department does..."*¹⁵

In late May, the Australian media reported that "*[t]here is no proof that plain cigarette packaging would cut smoking rates, Health Minister Nicola Roxon admits.*" According to the Minister, "*The sort of proof they're looking for doesn't exist when this hasn't been introduced around the world.*"¹⁶

¹³ Simon Crean, Minister for Trade, handwritten note on Ministerial Submission ("Minister for Trade Note"), 30 April 2010, disclosed in response to Freedom of Information request, attached as Annex 8.

¹⁴ Letter from Radmila Ristic, Director, office of Best Practice Regulation, Department of Finance and Deregulation to Penny Marshall, Director, Tobacco Control Section, Department of Health and Ageing ("OBPR Letter"), 4 May 2010, disclosed in response to Freedom of Information Request, attached as Annex 9.

¹⁵ Neil Mitchell interview with Nicola Roxon, Federal Minister for Health, Radio 3AW, "Mornings", 8 April 2011 (emphasis added).

¹⁶ "Cigarette packaging proof 'to come'", Herald Sun, 24 May 2011.

2. The Government has not provided adequate evidence that plain packaging will reduce smoking rates or youth smoking or otherwise benefit the public interest.

"Have we got the supporting evidence that plain packaging reduces the health risk[?] This seems to be the problem the UK government confronted when they considered the case and decided against it because the supporting evidence was not strong enough."

Minister for Trade Simon Crean, handwritten note on Ministerial Submission, 30 April 2010

Government Ministers and experts recognise that strong, empirical evidence is required to justify a policy like generic packaging. *"The key issue lies in whether the public interest is better served by plain packaging ... 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."*¹⁷

As the Minister for Health has acknowledged, no such evidence exists.¹⁸ Instead, the Government relies on a collection of studies which it contends show plain packaging will:

- Increase effectiveness of health warnings
- Reduce false health belief about cigarettes
- Reduce brand appeal among smokers, especially youth.

This, the Government argues, will lead to less smoking over time.

But the studies relied upon by the Government are inadequate to support that conclusion. As shown below, those studies and well documented real world experiences show that plain packaging will not reduce smoking rates among adults or youth.

Moreover, the Government fails to provide any estimate of the impact it expects plain packaging to have on smoking prevalence. Nor has it provided a comparative analysis of the alternatives to plain packaging (such as education initiatives, or media campaigns, both described as "highly effective" in the Consultation Paper) which clearly have fewer adverse consequences, to show why it has concluded that these alternatives are insufficient.

Finally, although the Government recognises that generic packaging would fuel the illegal tobacco trade and would encourage overall prices of tobacco products to fall, it did not consider the strong evidence showing the negative impacts both would have on public health, apparently on the basis that these issues are *"hypothetical and cannot be costed."*

¹⁷ Attachment C to IP Australia Briefing Note, 13 April 2010, previously cited (attached as Annex 3).

¹⁸ "Cigarette packaging proof 'to come'", Herald Sun, 24 May 2011.

a. The evidence shows that plain packaging will not reduce smoking rates among adults or youth.

Research and real world experience lead to the same conclusion: plain packaging will not reduce smoking rates. This has been clear since the mid-1990's when Australia and other governments first rejected the measure. Governments that have considered the evidence since then have repeatedly rejected plain packaging.

In the 1990s, research conducted in Canada, which has been cited frequently by proponents of plain packaging, found that:

*"It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarettes from friends. There is no brand choice – the choice is simply to smoke or not to smoke. Therefore, in the uptake process brand and package are very minor components. **This means that changing the package will not have any major effect on the decision(s) to smoke or not to smoke.**"¹⁹*

Subsequent research has not contradicted this finding. In fact, as discussed in Section 3 below, it is widely known that brands and packaging do not motivate youth to begin smoking.

More important, extensive empirical evidence and experience show that smokers – adults and youth – are perfectly willing to purchase cigarettes sold in unbranded packaging to the detriment of public health.

In Canada, for example, almost 33% of the cigarette market is contraband and 60% of that is cigarettes sold in unbranded plastic bags – illegal, tax-evading "baggies".²⁰

¹⁹ Goldberg M et al., "When Packages Can't Speak: Possible impacts of plain and generic packaging of tobacco products - Expert Panel Report for Health Canada", March 1995, pp. 76, 184.

²⁰ Letter from Gary Grant, National Coalition Against Contraband Tobacco, to The Right Honourable Stephen Harper, Prime Minister of Canada, 10 June 2010 ("*Recent studies have shown that the illegal tobacco market has grown to nearly 50% in Ontario, above 40% in Quebec and 33% nationwide.*"); GfK Group, "Illegal Tobacco Sales: A Crisis for Canadians", National Study for the Canadian Tobacco Manufacturers' Council, 2008 (60% of those illegal cigarettes are sold in unbranded plastic bags).

**Figure 1: Plain packaged, cheap, illegal cigarettes –
Purchased by 5 out of 10 Canadian youth smokers**



Image source: Royal Canadian Mounted Police, Contraband Tobacco Enforcement Strategy (2008), p. 12

These plain-packaged cigarettes are Canada's fastest growing "brand", and the growth in "baggies" has reversed Canada's previously declining smoking rates.²¹

Similarly, in Australia chop chop (illegal, tax-evading hand-rolling tobacco) is most commonly sold in unbranded, plain-packaged plastic bags; overall, illicit tobacco accounts for approximately 16% of the total Australian tobacco market, an increase in "market share" of 28% over the previous year.²²

As explained in detail below, in the 1980s smokers in the United States purchased generic "no-name" cigarettes sold in packs without colour branding. Those brands, which were sold at low prices, quickly gained significant market share and notably increased prevalence among youth smokers. Again, as in Canada and Australia, smokers were not deterred by plain packaging.

²¹ Canadian Senator Hugh Segal discovered that illegal cigarettes were so widely available and so cheap that Canadian smoking rates were increasing "So, in fact, smoking has probably gone up – that's what people in the anti-cancer business now say." P Hendra, "Senator lights into illegal smokes," *The Kingston Whig Standard*, May 19, 2010, pp. 1, 6. Similarly, Canada's National Coalition Against Contraband Tobacco observed that "rates of teen smoking have stopped decreasing and even may be on the rise...[T]his is because of the widespread and easy youth access to contraband tobacco which costs pennies compared to legal tobacco. Teens get access through criminal networks that are also responsible for the distribution of illegal cigarettes, drugs and weapons throughout Canada." National Coalition Against Contraband Tobacco, "Federal Government Report Card: Action on Contraband Cigarettes", 26 May 2010, p. 3.

²² Deloitte Touche Tohmatsu Limited, "Illicit trade of tobacco in Australia: Market overview and updated estimate of market size. A report prepared for British American Tobacco Australia Ltd, Philip Morris Ltd and Imperial Tobacco Australia Ltd", February 2011 ("Deloitte Report"), pp. 4, 24, attached as Annex 10.

Figure 2: Plain packaged “chop chop” – one of the largest tobacco “brands” in Australia



Image source: R Bittoun, “The medical consequences of smoking ‘chop-chop’ tobacco,” Commonwealth Department of Health And Ageing, 2004

The Government’s position that plain packaging will have a meaningful impact on the appeal of smoking, warning effectiveness and health beliefs is not supported by the existing research – including the studies listed by the Government. In fact, data from the very studies the Government cites as supporting generic packaging undermine the Government’s position.

For example, in Wakefield (2008),²³ the researchers maintain that the study shows that smokers find plain packs less appealing than branded packs. However, a review of the actual data shows: (1) one of the three plain packs that were tested was rated by all smokers more favourably on every perception and characteristic than the branded pack, and (2) all smokers’ “intention to smoke” or “intention to try a brand” was not significantly different for any of the plain packs and the branded pack.²⁴

In, Germain, Wakefield et al (2010),²⁵ the authors concluded that plain packaging increases warning label recall. The authors failed to note that generic packs elicited

²³ Wakefield MA, Germain D, Durkin SJ, “How does increasingly plainer cigarette packaging influence adult smokers’ perceptions about brand image? An experimental study”, *Tobacco Control*, December 2008, pp. 416-21.

²⁴ Richard Mizerski, “Plain cigarette packaging as a remedy to reduce smoking”, June 2011, p. 11, (funding provided by Philip Morris International, publication forthcoming) (“Mizerski Study”), p. 11, attached as Annex 11.

²⁵ Germain D, Wakefield MA, Durkin SJ, “Adolescents’ perceptions of cigarette brand image: does plain packaging make a difference?”, *Journal of Adolescent Health*, April 2010, pp. 385-92.

no better response in terms of warning recall than branded packages. In fact, there was no statistically significant difference on recall between the branded cigarette pack and all of the plain packs tested.²⁶

Similarly, Hammond et al. (2009) reported that most smokers (adults and youth) found no difference between plain packs and branded packs on the following measures: “delivers less tar,” “lower health risk,” “smoother taste,” “try smoking,” and “easier to quit.” In 5 of 8 comparisons, the smokers found that plain packs were either more attractive than, or equally attractive as, fully branded packs.²⁷

b. The studies relied upon by the Government are inadequate and do not support its position.

All the studies listed by the Government to support its position that plain packaging will increase the effectiveness of health warnings, reduce false health beliefs and reduce brand appeal are not scientifically robust enough to support a policy of generic packaging.

First, all of the studies are speculative and not based on observed data. At most, they consist of focus groups or opinion polls which asked participants what they think they or others *might do* in another, unknown time and situation if packs were plainer, plain or plainest.²⁸ Such speculative predictions do not provide sufficient evidence.²⁹

Second, all of the studies are subject to inherent biases which render their conclusions unreliable. For example, the studies are based on “self-reports”—in other words, studies which ask participants to report what they did, what they prefer, or what they believe. Extensive research shows that such studies are plagued by “social desirability bias”: subjects report what they believe the interviewer wishes to hear or

²⁶ Mizerski Study, previously cited, p. 11 (attached as Annex 11).

²⁷ In fact, a large-scale study commissioned by the Canadian government found that “*Packages with trade-mark colours and logos were more encouraging to stop/not start smoking for four out of the six sample groups.*” Liefeld JP, “The relative importance of the Size, Content and Pictures on Cigarette Package Warning Messages”, 15 September 1999, p. 32.

²⁸ See, for example, Hammond D & Parkinson C, “The impact of cigarette package design on perceptions of risk”, *Journal of Public Health*, 2009, pp. 345-53; Hoek J et al., “Effects of dissuasive packaging on young adult smokers,” *Tobacco Control*, online publication October 2010.

²⁹ The UK Department of Health summarised the same evidence the Government relies upon: “[T]he research evidence into this initiative [plain packaging] is **speculative**, relying on asking people what they might do in a certain situation.” UK Department of Health, “Consultation on the Future of Tobacco Control,” May 2008, p. 41. The UK government accordingly rejected the policy. The responsible Minister at the time explained why: “No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so.” “Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level—especially as no country in the world has introduced plain packaging.” UK Special Minister for State, House of Commons, Public Bill Committee Debate, Column 305, 25 June 2009. Although the UK government continues to consider the evidence on plain packaging, it recognises that strong, empirical evidence would be required to justify such a policy: “We will clearly need to make sure that there is good evidence to demonstrate that plain packaging would have a public health benefit, as well as carefully exploring the competition, trade and legal implications of the policy.” UK Department of Health, “White Paper, Healthy Lives, Healthy People: Our strategy for public health in England”, 30 November 2010, p. 37.

the socially preferred option.³⁰ That inherent flaw led Canadian government-commissioned researchers to conclude that *"the extent of this influence [of packaging] cannot be validly determined by research that is dependent on asking questions about what they think or what they might do if all cigarettes [were] sold in the same generic packages."*³¹ Every study the Government relies upon is subject to that bias.

Finally, none of the studies addressed substantial evidence from the fields of consumer behaviour,³² economics,³³ law enforcement,³⁴ and public health³⁵ which show that a policy of generic packaging would be counterproductive.

* * *

Philip Morris International commissioned Professor Richard Mizerski, Chairman of the Marketing Department at the University of Western Australia, to review the available literature relied upon by the Government to support its plain packaging proposal. His conclusion is clear:

*"Although the present body of literature on requiring plain packaging is thought-provoking, it does not provide evidence that it will reduce smoking. There is substantial evidence that the use of plain cigarette packaging has no effect on intended trial or quitting in experiments comparing branded and plain packaging."*³⁶

³⁰ Brener ND, Billy JO, Grady WR, "Assessment of factors affecting the validity of self-reported health-risk behavior among adolescents: evidence from the scientific literature", *Journal of Adolescent Health*, December 2003, pp. 436-57.

³¹ Goldberg M et al., "When Packages Can't Speak: Possible impacts of plain and generic packaging of tobacco products - Expert Panel Report for Health Canada", March 1995.

³² For example, a significant body of evidence has found that youth do not smoke because of packaging; other research has raised the concern that "denormalizing" tobacco packaging may increase youth smoking rates, not decrease them. These studies are discussed in Section 4.

³³ Economists recognise that generic packaging would lead to a market-wide reduction in price and an increase in consumption and prevalence. This evidence is discussed in Section 5.

³⁴ Customs and law enforcement officials, as well as numerous others, have shown that plain packaging will facilitate the supply and increase the demand for illegal tobacco products. Evidence on the impact of generic packaging on illicit trade is discussed in Section 3.

³⁵ As described in Section 5, public health experts have described the devastating effect "generic" supermarket tobacco brands had on public health; public health experts descriptions of the adverse impact of illicit tobacco trade on public health is discussed in Section 3.

³⁶ Mizerski Study, previously cited, p. 11 (attached as Annex 11).

3. Generic packaging will facilitate the illegal tobacco trade, which is particularly harmful to youth.

"[R]equiring plain packaging would make it easier for counterfeit goods to be produced and would make it difficult to readily identify those counterfeit goods"

IP Australia briefing note for Parliamentary Secretary for Information Richard Marles and Minister for Industry and Innovation Kim Carr, September 23, 2009

Tobacco products are *"the most illegally trafficked legal product in the world."*³⁷ A report prepared for the Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control estimated that the global illicit trade represents 10.7% of total tobacco sales.³⁸ Levels are even higher in countries such as Ireland, Canada, and many others.³⁹

Illicit trade levels are higher than the global levels in Australia and are increasing. Already at *"all-time high"* levels in 2009,⁴⁰ 15.4% of Australian smokers reported purchasing illicit tobacco in 2010, an increase of nearly 20% from 2009.⁴¹ Last year, approximately 70,000 more Australian smokers used illegal tobacco products than the year before.⁴² Nationwide, illicit tobacco represents nearly 16% of the entire Australian tobacco market – greater than the combined market shares of *Marlboro, Benson & Hedges, Peter Stuyvesant, and Dunhill*.⁴³ The foregone excise for the Government in 2009/10 was over one billion dollars.⁴⁴

³⁷ *"[C]igarettes are believed to be the most illegally trafficked legal product in the world."* Campaign for Tobacco-Free Kids, Fact Sheet, "Illicit tobacco: illegal profits and public peril", October 2008, p. 2.

³⁸ L Murdoch and J Strong, "Where there's smokes," *The Age*, 29 April 2010; also see Framework Convention Alliance, "How big was the global illicit tobacco trade problem in 2006?", report prepared for the Second Session of the Conference of Parties to the WHO FCTC, July 2007, p. 5.

³⁹ For example, in Ireland, the Director of Public Prosecutions estimated that the illicit trade represented 25% of the total tobacco sales in Ireland in 2009. "Smuggling hits taxman", *The Irish Examiner*, 20 March 2009. In Canada, illegal tobacco sales are estimated to represent 33% of sales nationwide and even higher levels in several provinces. Letter from Gary Grant, National Coalition Against Contraband Tobacco, to The Right Honourable Stephen Harper, Prime Minister of Canada, 10 June 2010 (*"Recent studies have shown that the illegal tobacco market has grown to nearly 50% in Ontario, above 40% in Quebec and 33% nationwide."*)

⁴⁰ J Vallejo, "Cigarette smuggling hits all-time high," *The Daily Telegraph*, 7 September 2009.

⁴¹ Deloitte Report, previously cited, p. 34, citing Roy Morgan Research 2009, Tobacco usage study, and Roy Morgan Research 2010, Tobacco usage study (Deloitte Report attached as Annex 10).

⁴² Research by Roy Morgan Research Limited found that 15.4% of Australian smokers purchased illegal tobacco in 2010, up 18% from 2009. Roy Morgan Research 2009, Tobacco usage study (finding 13% of all adult smokers purchased illicit tobacco); Roy Morgan Research Limited 2010, Tobacco usage study (finding 15.4% of all adult smokers purchased illicit tobacco). Data from the Australian Bureau of Statistics indicate that is an increase of approximately 70,000 adult smokers. Australian Bureau of Statistics 2009, National Health Survey: Summary of Results 2007-2008 (Reissue), cat. no. 4364.0 (most recent government data, indicating approximately 3 million adult smokers nationwide).

⁴³ PwC Industry Exchange, April 2011.

⁴⁴ The Deloitte Report calculated that the illicit tobacco trade cost the Commonwealth \$1.1 billion in foregone excise revenues in the 2009/10 fiscal year. Deloitte Report, previously cited, p. 32 (attached as Annex 10).

Commoditising tobacco packaging will encourage even more smokers to switch to cheaper, branded and unbranded illicit tobacco products. A well-organised illegal industry stands ready to meet that demand – and standardising all cigarette packaging makes their job even easier.

Awareness of the availability of illicit tobacco increased significantly between 2009 and 2010. Nearly 60% of smokers were aware of the availability of illicit tobacco products in 2010, up from around 50% in 2009.⁴⁵ Illicit tobacco consumers reported their ability to buy illicit tobacco products from multiple suppliers in 2010,⁴⁶ and illicit trade market investigators have seen an increase in the availability of illicit products at convenience stores, milk bars and grocery stores.⁴⁷ This trend is reinforced by a 77% increase in the volume of tobacco detections by the Customs and Protection Services in 2009/10.⁴⁸

Although unbranded, plain-packaged chop chop remains the most popular form of illegal tobacco, illicit suppliers are already providing consumers with a wide range of illegal tobacco products in order to meet a wide range of consumer preferences.⁴⁹ Some illicit traders have begun to manufacture chop chop cigarettes, which make it even easier for consumers to purchase and use chop chop. In fact, a report by Deloitte commissioned by Philip Morris Limited, British American Tobacco Australia Limited, and Imperial Tobacco Australia Limited found that "*approximately 50 per cent of unbranded tobacco consumers purchased cigarettes in packs.*"⁵⁰

The Government recognises that mandating generic packaging will facilitate the supply and increase consumer demand for illicit tobacco products:

*"Manufacturers, importers, distributors and retailers of tobacco products, as well as the Australian Taxation Office, Australian Customs and Border Protection Service, the Australian Government more broadly, taxpayers and smokers would all be affected by any change to the trade in illicit products generated by the move to plain packaging...The efforts of the Australian Taxation Office and the Australian Customs and Border Protection Service to collect tobacco excise and customs duty could be affected by the design of plain packaging. Government revenues could be put at risk if the design of plain packaging made counterfeiting of tobacco easier and enforcement efforts less effective. Smokers' health could potentially be put at greater risk if they consume counterfeit products."*⁵¹

⁴⁵ Deloitte Report, previously cited, p. 32 (attached as Annex 10).

⁴⁶ Deloitte Report, previously cited, pp. 20-21, citing Roy Morgan Research 2010, Tobacco usage study (Deloitte Report attached as Annex 10).

⁴⁷ Deloitte Report, previously cited, p. 20 (attached as Annex 10).

⁴⁸ The Australian Customs and Protection Service 2009/10 Annual Report.

⁴⁹ Chop chop, illegal, tax-evading hand-rolling tobacco sold in unbranded, "plain packaged" plastic bags, remains the most common form of illegal tobacco sold in Australia: it represented an estimated 90% of the market in 2010. Deloitte Report, previously cited, p. 33 (attached as Annex 10).

⁵⁰ Deloitte Report, previously cited, pp. 24, 25 and Figure 13 (attached as Annex 10).

⁵¹ Regulation Impact Statement, previously cited, p. 9 (attached as Annex 5).

The Government made no attempt to measure the scope of the problem, the impact plain packaging would have on it, or how health and safety objectives would be harmed by it. Instead, it abdicated all responsibility for assessing or addressing it: *"This potential impact is hypothetical and cannot be costed."*⁵²

Differentiated, branded packaging makes it easier to distinguish between legal, regulated products and illegal, unregulated, untaxed products. High-quality packaging also provides consumers an incentive to purchase more expensive products instead of cheaper, commoditised ones.⁵³

It is therefore not surprising that countries which have implemented bans on the retail display of tobacco products have seen consumers switch to cheaper, illicit tobacco products without any reductions in smoking rates. For example, Norway implemented such a display ban on 1 January 2010; media there recently reported that *"[t]obacco sales in Norway have increased after the authorities imposed a display ban on tobacco products last year..."* and that *"[m]ore [are] smuggled: Around half of all cigarettes smoked in Norway come from tax-free sources, smuggling and purchases abroad."*⁵⁴ Similarly, data from Canada show significant increases in illicit trade following provincial implementation of display bans beginning in 2005.

In fact, tobacco control advocates in Canada have observed that the progressive "denormalization" of tobacco brands by means of display bans, larger health warnings and other measures may have been one of the causes. The Ontario Tobacco Research Unit remarked that

*"Several key informants noted the growth of a market for baggies of loose cigarettes in Canada. Tobacco control measures such as advertising bans, public awareness campaigns, and point-of-sale display bans have had the cumulative effects of denormalizing traditional cigarette brands, stripping them of the social significance they once had. As big tobacco company brands have been denormalized, there has been growth in demand for 'no-name' [illicit] cigarettes and discount brands..."*⁵⁵

If the Government mandates generic packaging, it will provide illegal operators with a further incentive to supply consumers with products they prefer. Many will choose cheaper, illegal, branded products when faced with the choice the Government seeks to impose.

⁵² Regulation Impact Statement, previously cited, p. 9 (attached as Annex 5).

⁵³ Steenkamp JBEM et al., "What makes consumers willing to pay a price premium for national brands over private labels?", *Journal of Marketing Research*, 2009, p. 4.

⁵⁴ B Gran, "Buying more hidden tobacco", *Dagens Naeringsliv*, 31 May 2011 (translation).

⁵⁵ Sweeting J et al., Ontario Tobacco Research Unit, "Anti-Contraband Policy Measures: Evidence for Better Practice", June 2009, p. 41.

Figure 3: Generic packaging makes consumer choice easy	
Legal cigarettes	Illegal cigarettes
	
Retail price: \$18.25 ⁵⁶	Retail price: \$7.20 - \$9.60 ⁵⁷

Illicit, unbranded cigarettes are particularly accessible to and popular with youth because they are both cheaper and illegal sellers willingly sell to them. The World Health Organization has observed that *“Smuggling poses a serious threat to public health also because smuggled cigarettes are sold at below market price. Cigarettes are available cheaply, thereby increasing consumption and undermining efforts to keep youngsters from smoking.”*⁵⁸ In Canada, for example, more than 50% of youth smokers purchase machine-made cigarettes in unbranded plastic bags – illegal, tax-evading “baggies”.⁵⁹

A recent media report found that Canadian youth are *“very familiar with black market cigarettes and many even support their sale.”* Research found that a majority of youth smokers purchased and approved of illicit tobacco in Canada:

“[T]he level of awareness and knowledge of contraband cigarettes is very high. Most focus group participants could readily describe their taste, appearance and packaging and knew where to buy them. It was clear that the vast majority of participants had bought and smoked illegal cigarettes. They talked about buying them from school friends, co-workers, directly from native reserves and even under the

⁵⁶ Image from “Cigarette packaging up in smoke”, www.abc.net.au, April 2010; recommended retail price of Peter Jackson 30 cigarettes as of May 2011.

⁵⁷ *Magna* cigarettes reportedly available in Australia according to J Stapleton, “Illegal cigarette trade has plenty of puff”, The Australian, 4 July 2009 (reporting easy purchase of illegal pack of *Magna* cigarettes in a “plain red packet with no details apart from the name”); price from Deloitte Report, previously cited, p. 30 (attached as Annex 10); image sourced from www.cigbuynow.com/cigarettes/magna.php, (accessed 30 May 2011), which indicates that a carton of 10 packets of *Magna* is currently available for \$20.94, or \$2.09 per packet.

⁵⁸ World Health Organisation, Subjects of possible protocols and their relation to the framework convention on tobacco control (A/FCTC/WG1/3), 3 September 1999.

⁵⁹ “Cheap tobacco and kids”, The [Toronto] Star, 12 April 2010.

*counter...Though participants in the focus groups knew they were illegal, they are so common that this is not a concern ... Almost all said they buy contraband cigarettes because of their low cost."*⁶⁰

Australian youth are well aware of chop chop as well, and Australian research has found that when compared to smokers of licit products, Australian *"users of illicit tobacco had significantly greater odds of beginning smoking at younger than legal age."*⁶¹

Thus, plain packaging – which will further denormalize and commoditise the legal market – would have the perverse effect of *normalizing* contraband and counterfeit products sold illegally by criminals.

That will have negative consequences for public health. Cancer Council Victoria recognises that illicit tobacco trade in Australia *"undermines the health impact of tobacco control policies by making cheaper products available to those willing to buy from illicit sources..."* Although the Government has made no attempt to measure that impact in Australia, a recent analysis of the UK market shows that the effect can be significant. In that country, research shows that *"the average price of tobacco [in the UK] would be about 11.6% higher were smuggling eliminated."*⁶² The authors estimated that the price-depressing effect of illicit tobacco in the UK leads to higher tobacco consumption and causes more premature deaths in a year than the death toll from all illegal drugs put together.⁶³ Moreover, a recent Australian study of lifetime and current smokers of chop chop reported that these people ended up having a substantially worse health condition than regular smokers of licit products.⁶⁴

Even though it acknowledges that illicit trade may be aggravated by plain packaging, the Government is not considering anti-contraband measures. The Consultation Paper explains that the Government will not include mandatory tracking and tracing systems in the Bill because the Government *"does not endorse tobacco products"* and that it *"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."*⁶⁵ We regret this view, especially in light of the already growing problem of the illicit tobacco trade which generic packaging will surely worsen.

⁶⁰ D Butler, "Young smokers think Ottawa's blowing smoke on black-market tobacco", Montreal Gazette, 24 January 2011.

⁶¹ Campbell K et al., "Smokers of illicit tobacco report significantly worse health than other smokers", Nicotine & Tobacco Research, 2009, pp. 996-1001.

⁶² West R, "Why combating tobacco smuggling is a priority", British Medical Journal, November 2008, pp. 1028-1029.

⁶³ West R, "Why combating tobacco smuggling is a priority", British Medical Journal, November 2008, pp. 1028-1029.

⁶⁴ Campbell K et al., "Smokers of illicit tobacco report significantly worse health than other smokers", Nicotine & Tobacco Research, 2009, pp. 996-1001.

⁶⁵ Consultation Paper, p. 15.

4. Generic packaging will not prevent youth smoking and may even encourage it.

"In both a major piece of Canadian research into generic packaging...and in Australian research into health warnings and contents labelling on tobacco products...it has been noted...that while the intent of generic packaging is to replace positive brand imagery with negative brand imagery, such packaging could in fact have the opposite effect.. "

Senate Community Affairs Reference Committee Report, 1997

Although acknowledging that generic packaging will likely have no impact on current smokers, the Government relies on the same speculative studies discussed in Section 2, in asserting that generic packaging will discourage youth from starting smoking.

The Government has not raised in the Consultation Paper the overwhelming evidence which demonstrates that brands and packaging have *nothing* to do with why young people begin smoking. James Heckman, a Nobel Prize-winning economist specialising in why people behave as they do, reviewed a vast amount of literature on the causes of youth smoking and concluded that:

*"The available evidence in the developing literature on adolescent risky behavior, including smoking, supports a multicausal model for youth smoking, as many factors have been empirically linked to youth smoking in this literature. These factors include price, parental influences, risk preferences, peer influences, and access."*⁶⁶

Decades of peer-reviewed publications by other experts support Dr Heckman's conclusion: Youth smoking uptake happens through social circle interactions and peer pressure, and not because of brands or packaging.⁶⁷ Studies prepared for a Canadian expert panel that considered the evidence on plain packaging agreed, finding smoking behaviour has nothing to do with packaging or brand information:

"It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarettes from friends. There is no brand choice - the choice is simply to smoke or not to smoke. Therefore, in the uptake process brand and package are

⁶⁶ Heckman JJ, Flyer F, Loughlin C, "An assessment of causal inference in smoking initiation research and a framework for future research", *Economic Inquiry*, January 2008, pp. 37-44.

⁶⁷ Horn D et al., "Cigarette smoking among high school students", *American Journal of Public Health*, 1959, pp. 1497-1511; Salber EJ et al., "Reasons for smoking given by secondary school children", *Journal of Health and Human Behavior*, 1963, pp. 118-29; Bajda L, "A survey of the smoking habits of students of Newton High School - a cooperative project", *American Journal of Public Health*, 1964, pp. 441-46; Conrad KM et al., "Why children start smoking cigarettes: predictors of onset", *British Journal of Addiction*, December 1992, pp. 1711-24; McCool J et al., "Do parents have any influence over how young people appraise tobacco images in the media?", *Journal of Adolescent Health*, February 2011, pp. 170-75; Weiss JW et al., "Longitudinal effects of hostility, depression, and bullying on adolescent smoking initiation", *Journal of Adolescent Health*, June 2011, pp. 591-96; Mercken L et al., "No smoke without fire: The impact of future friends on adolescent smoking behaviour", *British Journal of Health Psychology*, February 2011, pp. 170-88.

*very minor components. This means that changing the package will not have any major effect on the decision(s) to smoke or not to smoke."*⁶⁸

We respectfully suggest that the Government has not established how the evidence to date shows that plain packaging will reduce youth smoking initiation in light of this body of research. In fact, neither the Government nor any of the studies it has cited has done so.

The Government also has not addressed the significant body of evidence which raises questions about the potential for generic packaging to be *counterproductive*. Research has consistently shown rebelliousness to be a strong predictor of youth smoking. For instance, in a study commissioned by Health Canada on adolescent smoking initiation,⁶⁹ Connop and King observe that "*Smoking's negatively charged public image*" is precisely what attracts young people to it, "*a fact that suggests that the widely advocated policy of denormalisation could have significant counterproductive consequences.*"⁷⁰

This issue was raised in a report by an Australian Senate Committee which considered the evidence on generic packaging more than a decade ago:

"Q[uestion]: It has been put to the Committee that generic packaging may, in fact, enhance the appeal of cigarettes to young people. Does the Department have any information on this? Is there any research that has addressed this issue?

*[Answer]: In both a major piece of Canadian research into generic packaging...and in Australian research into health warnings and contents labelling on tobacco products...it has been noted...that while the intent of generic packaging is to replace positive brand imagery with negative brand imagery, such packaging could in fact have the opposite effect becoming a heuristic with which teenagers could identify in their search for expression and peer approval."*⁷¹

Although this report was in the Department of Health's files, it was not considered or even mentioned in the Regulation Impact Statement, the evidence presented to Cabinet, or the Consultation Paper.

The Government's opinion that generic packaging will discourage youth smoking is fundamentally misplaced.

⁶⁸ Goldberg M et al., "When packages can't speak: Possible impacts of plain and generic packaging of tobacco products - Expert Panel Report for Health Canada", March 1995, p. 184. Although the panel's final report concluded that generic packaging might actually reduce smoking rates, the policy was not adopted by the government.

⁶⁹ Connop H et al., "Youth smoking and the role of the peer group", Ontario Tobacco Research Unit, Working Paper No. 47, 1999.

⁷⁰ E Bloomquist, "The plain risk to global tobacco", Berenberg Bank, April 2011, attached as Annex 12.

⁷¹ Senate Community Affairs References Committee Report, "The Senate Inquiry Into The Tobacco Industry and the Costs of Tobacco-Related Illness", disclosed in response to a Freedom of Information Request, attached as Annex 13. The report noted that the government at the time rejected generic packaging because of "*major legal and Constitutional impediments to such action rather than by research indicating the potential for generic packaging to be adopted as a positive badge or symbol by youth.*"

5. Experience and evidence prove that generic packaging encourages prices to fall and tobacco consumption to rise.

"Smokers could face lower costs of purchasing cigarettes – and higher health impacts and costs associated with higher rates of consumption – if plain packaging leads manufacturers to disinvest in branding and compete solely on price, driving tobacco product prices down."

Department of Health and Ageing, Regulation Impact Statement: Plain Packaging of Tobacco Products, April 2010

According to most public health advocates, price is the single strongest determinant of smoking rates. *"The single most consistent conclusion from the economic literature on the demand for cigarettes is that consumers react to price changes according to general economic principles – an increase in price leads to a decrease in consumption."*⁷² The effect is particularly strong among youth, who are *"particularly sensitive to price and responsive to cigarette prices..."* according to Cancer Council Victoria and research by the Department of Health and Ageing.⁷³

Although it cannot be demonstrated that packaging has any effect on whether a person smokes or not, high quality packaging significantly affects adult smokers' brand preferences and willingness to pay a higher price.⁷⁴ A recent study of consumer purchasing behaviours in six OECD countries observed that as UK regulations increasingly restricted tobacco brand information, consumers increasingly based their cigarette purchasing decisions on price rather than brand.⁷⁵ Thus, plain packaging will remove a major incentive for consumers to pay more for tobacco products, and encourages consumers to buy cheaper products.

Governments, business analysts and other experts have consistently recognised that *"greying out all packs would lead to rapid down-trading"*,⁷⁶ encouraging consumers to shop based on price and reducing overall market prices for all tobacco products. Simply put, with generic packaging, competition will focus on price and as *"the price*

⁷² Ross H and Chaloupka F, "The Effect of Cigarette Prices on Youth Smoking", Health Economics, 2003, p. 219.

⁷³ Cancer Council Victoria, Tobacco In Australia: Facts and Issues, A comprehensive online guide, 3d edition, <http://www.tobaccoinaustralia.org.au/chapter-5-uptake/5-30-taxation-and-pricing-of-tobacco-products>, citing Commonwealth Department of Health and Ageing, "Youth tobacco prevention literature review", 2005.

⁷⁴ Steenkamp JBEM et al., "What makes consumers willing to pay a price premium for national brands over private labels?", Journal of Marketing Research, 2009, p. 4.

⁷⁵ Fischer M et al., "How important are brands? A cross-category, cross-country study", Journal of Marketing Research, October 2010.

⁷⁶ A Spielman, Citigroup Global Markets, "Anti-Tobacco Plans for England Should Not Upset Investors", 1 February 2010.

goes down, the number of smokers would go up ... By reducing price, you stimulate consumption. It would be a boomerang effect."⁷⁷

The Australian Government's Regulation Impact Statement recognised that likelihood as well: "Smokers could face lower costs of purchasing cigarettes – and higher health impacts and costs associated with higher rates of consumption – if plain packaging leads manufacturers to disinvest in branding and compete solely on price, driving tobacco product prices down."⁷⁸ The Government does not appear to have made any attempt to measure the impact that will have on smoking rates.

Australian businesses clearly understand that prices will fall if generic packaging is mandated. Just weeks after the Government's announcement on generic packaging, the Sunday Telegraph reported that Coles began "importing cigarettes from Germany and selling them at discount prices" – reportedly nearly \$4 less than leading brands – and went on to say that the move "positions Coles to profit when mandatory plain packaging of tobacco products is introduced in 2012."⁷⁹

Figure 4: Coles knows that generic packaging drives prices down



Image source: R Squires, "Coles importing cheap cigarettes from Germany and selling them at discount prices", Sunday Telegraph, July 18, 2010

According to a Coles employee quoted in the article, "I have been selling cigarettes for four years now. Lately I have noticed people just want the cheapest ones ... When customers come in and complain that their usual cigarettes are too expensive we suggest they try one of the new ones."⁸⁰ Indeed, low-priced brands are already the

⁷⁷ T Stewart-Robinson, "Cigarette branding faces Scottish ban to cut smoking rate", Herald Scotland, 17 November 2010.

⁷⁸ Regulation Impact Statement, previously cited, p. 9 (attached as Annex 5).

⁷⁹ R Squires, "Coles importing cheap cigarettes from Germany and selling them at discount prices", Sunday Telegraph, July 18, 2010.

⁸⁰ R Squires, "Coles importing cheap cigarettes from Germany and selling them at discount prices", Sunday Telegraph, July 18, 2010.

fastest-growing segment in the Australian legal tobacco market.⁸¹ Plain packaging will further lower consumers' willingness to pay a premium for tobacco products⁸² and inevitably drive overall market prices down.

Experience from other goods clearly demonstrates that generic packaging will reduce prices and increase consumption. The World Health Organization actively promotes generic pharmaceuticals, for instance, as a means to increase their affordability and availability. "*Generics serve the logic of the pocket*" because they are "*considerably less expensive than originator products, and competition among generic manufacturers reduces prices even further.*"⁸³ The Australian Government is fully aware of this, as it stated during the negotiations for the US-Australia Free Trade Agreement, "*The availability of generic medicines has a direct impact on drug prices, as they provide competition and thus lower prices for pharmaceuticals.*"⁸⁴ The European Union found the same, observing that "*generic entry - especially when it is accompanied by significant price reductions - may also lead to an increase in overall consumption of the medicine.*"⁸⁵ Removing intellectual property protections for pharmaceuticals decreases prices and increases product availability; mandating generic packaging for cigarettes could only have the same effect. Because the laws of economics will not change, and because price is the single strongest determinant of youth and adult smoking rates, plain packaging is likely to backfire.

Philip Morris International commissioned expert economists at LECG Consulting to study the issue and provide price calculation impact estimates. LECG evaluated the market dynamics in Australia using established statistical techniques to calculate the impact generic packaging would have on overall price. They concluded that generic packaging would effectively limit competition to price alone, and would reduce overall prices by between 4.8 and 19.2%. Using historical values on the relationship between price and demand, LECG concluded that those price drops would result in an *increase* in overall consumption between 2.6 and 16.6%.⁸⁶

⁸¹ Indeed, April 2011 data from PwC Industry Exchange show that the low-priced segment is the *only* growing segment in the legal tobacco market.

⁸² Steenkamp JBEM et al., "What makes consumers willing to pay a price premium for national brands over private labels?", *Journal of Marketing Research*, 2009, p. 4.

⁸³ Dr Margaret Chan, Director-General of the World Health Organization, Opening remarks at the Working Group of Member States on Substandard/ Spurious/ Falsely-labelled/Falsified/Counterfeit Medical Products, Geneva, Switzerland, 28 February 2011.

⁸⁴ Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 2004, available at http://www.aph.gov.au/senate_freetrade/report/final/ch04.htm.

⁸⁵ Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 2004, p. 82.

⁸⁶ Padilla J, "The impact of plain packaging of cigarettes in Australia: a simulation exercise", a report prepared for Philip Morris International, February 2010, attached as Annex 14.

History proves that generic packaging drives prices down and smoking rates up

In the 1980's, supermarket chains in the United States began promoting their own no-name, low-price brands, similar to what Coles is now doing in Australia.



Because they were significantly cheaper than established brands, those generic-packaged cigarettes quickly seized more than 30% of the American market.⁸⁷ Tobacco control advocates at the time expressed dismay that the market-wide price declines led by generic supermarket brands would make cigarettes more affordable and increase overall demand:

"The attraction of [generic supermarket] label brands to consumers is simple. By undercutting mainstream brands by up to 20%, they mitigate the effects of the annual increase in the real cost of cigarettes that is currently government policy (...) In so doing, they would work against the achievement of targets for reducing the prevalence of smoking ... Thus, even within the context of the cigarette market, [generic] label cigarettes are not neutral."⁸⁸

⁸⁷ B Isaacson and A Silk, "Philip Morris: Marlboro Friday", Harvard Business School case study, 22 December 1997.

⁸⁸ M Jarvis, "Supermarket cigarettes: the brands that dare not speak their name", British Medical Journal, March 1998.

In the years that followed, as the average price of cigarettes fell, US adult smoking rates stopped declining and youth smoking rates spiked.

Figure 6: Following growth of cheap generic-packaged cigarettes, US youth smoking rates increased dramatically

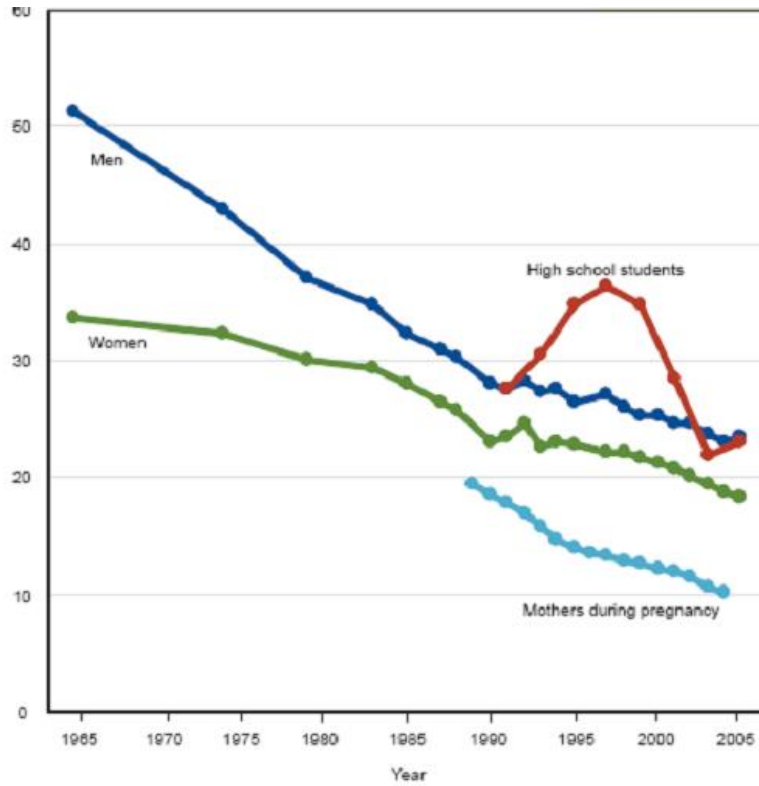


Chart taken from US Public Health Service, Chartbook on Trends in the Health of Americans, 2007, p. 33

6. Generic packaging violates Australia's international obligations.

"IP Australia considers that plain packaging may not be consistent with Australia's intellectual property treaty obligations."

Briefing note for Parliamentary Secretary for Information Richard Marles, copied to Minister for Industry and Innovation Kim Carr, September 23, 2009

Intellectual property is protected by treaties to which Australia is a party. Those protections cannot be revised on a whim and any deviation from them must be justified by solid, compelling evidence and must be consistent with other obligations under those treaties.

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property set minimum mandatory standards for the protection of trade marks, copyright and other intellectual property rights. IP Australia described how generic packaging would violate those treaty obligations in a briefing note to the Government Parliamentary Secretary and Minister for Industry and Innovation:

"Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires that

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

Requiring plain packaging would be regarded as encumbering the ability of an entity to distinguish its goods through its trade marks from those of other entities. IP Australia's understanding is that this Article was drafted with the intention of restricting mechanisms like plain packaging."⁸⁹

Simply citing "public health" is not enough to supersede those obligations. IP Australia and the team which negotiated the treaty for Australia know this to be the case:

"I'm not surprised that (was it Health?) are arguing that Article 20 is ambiguous [does not apply] – it suits their purposes for that. However:

⁸⁹ IP Australia Briefing Note for Parliamentary Secretary for Information Richard Marles, copied to Minister for Industry and Innovation Kim Carr, 23 September 2009 ("IP Australia Briefing Note, 23 September 2009"), disclosed in response to a Freedom of Information Request, attached as Annex 15.

- *It is pretty clear from (people I've spoken to who were TRIPS negotiators and) the negotiation documents that this is exactly the issue that Article 20 was targeted at...*
- *"Shall not be unjustifiably encumbered' – it is perhaps possible to argue that there is justification – but that is a long bow I think."⁹⁰*

An IP Australia ministerial briefing note echoed those views:

"Article 8(1) of TRIPS allows for members to adopt measures necessary to protect public health...But the final part of this Article stipulates that measures like this have to be consistent with the rest of the provisions of TRIPS. Therefore it seems unlikely that this Article could be used to avoid Article 20."⁹¹

Given the importance of intellectual property to Australia, and the strong requirements of international agreements by which Australia is bound, any proposal to restrict those rights would require *strong, compelling, empirical evidence*, according to the Government's advice from IP Australia:

"Trade marks are a critical commercial tool in today's economy... 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...against which the mark is registered. IP Australia considers that plain packaging of tobacco products 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."⁹²

The speculative arguments and evidence relied upon by the Government fall well short of that requirement. As a result, plain packaging would violate Australia's international obligations.

⁹⁰ Memo from Mark Arblaster, Trade Mark Technical Policy and Projects, Deputy Registrar of Trade Marks, IP Australia, to Karen Tipler, Domestic Policy Section, IP Australia, 18 February 2009, disclosed in response to a Freedom of Information Request, attached as Annex 16.

⁹¹ IP Australia Briefing Note, 23 September 2009, previously cited (attached as Annex 15).

⁹² IP Australia Briefing Note, 13 April 2010, previously cited (attached as Annex 3).

7. Generic Packaging expropriates valuable brands and could require the Government to provide compensation to trademark owners – at significant cost to Australian taxpayers

“Even if there were only a 5% risk that the Government ends up having to pay multiple billions to the tobacco companies, I believe such a risk would need to be taken into consideration by any government.”

Adam Spielman, Citigroup Investment Research, Personal submission to the UK DoH consultation on the Future of Tobacco Control, Summer 2008

Section 51(xxxi) of the Commonwealth Constitution protects private property. In general, the Government cannot pass a law that acquires property unless it pays compensation. If it does not pay compensation, the law is invalid.

The Bill, if enacted, will acquire private property without providing for compensation. The Government’s refusal to include in the Bill a provision for the payment of compensation is a tacit admission that plain packaging may constitute an acquisition of private property. Because the cost of acquiring that property would be so enormous, the Government has decided that it would rather have the legislation invalidated than pay compensation.

However, the Government seems to want to keep its options open. As explained in the Consultation Paper, *“out of an abundance of caution, section 11 [of the Bill] provides that the Bill does not apply to the extent that it would cause an acquisition of property...”* and 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 regulation.”*⁹³ Not only is it attempting to avoid paying compensation, it is also seeking to limit the extent of the invalidity of the law. Rather than having the legislation fail, as Section 51(xxxi) of the Constitution says it should, the Government includes a provision in the Bill (Section 11(2)) which will still allow it to severely restrict the future use of trade marks on tobacco products in the event that the generic packaging provision of the law is invalidated.

In addition to the domestic Constitutional protection of private property, international Bilateral Investment Treaties (“BITs”) oblige Australia to protect foreign investments made in Australia from expropriation. If Australia breaches its commitments under those treaties, compensation may be sought (among other remedies) through arbitration proceedings outside of Australia by private parties whose investments have been impaired.

The Bill violates those protections contained in BITs. If enacted, it would substantially deprive companies of the real value of their investments in Australia by

⁹³ Consultation Paper, p. 11.

transforming the cigarette market from a branded, competitive market into a commoditised business. It would deprive investors of intellectual property and destroy the corresponding value generated by their brands. It would also treat investors and their investments unfairly and inequitably by dramatically changing the Australian legal and regulatory environment for the tobacco industry, including by violating Australia's international trade treaty obligations. As a result of those violations, affected investors would be entitled to full compensation for the substantial loss in value of their investments. No Government-passed law can avoid that treaty-imposed obligation.

Australia, like other OECD countries, enshrines property protections in its Constitution, and it has spent decades negotiating multilateral and bilateral treaties which protect Australian investors abroad as well as foreign investors in Australia. The Government's insistence on enacting plain packaging has led it to adopt a policy — the first in the developed world — of negotiating *against* investment protection clauses in all its future treaties. In April 2011, the Government announced it "*will not accept provisions [in treaties] that limit its capacity to put health warnings or plain packaging requirements on tobacco products.*"⁹⁴

The new policy – taken to defend the government's commitment to generic packaging – is not limited to tobacco, and is already being applied to treaty negotiations. The Government explained its stance, and warned potential investors:

*"In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries."*⁹⁵

This policy shift has no effect on Australia's Constitutional provisions and existing treaty obligations, but has already raised concerns in Australian overseas investors and foreign investors in Australia.⁹⁶ Even though the evidence on generic packaging is lacking the Government is pursuing that policy to the detriment of taxpayers and investors.

⁹⁴ Australian Government, Department of Foreign Affairs and Trade, "Trading our way to more jobs and prosperity", April 2011, p. 14.

⁹⁵ Australian Government, Department of Foreign Affairs and Trade, "Trading our way to more jobs and prosperity", April 2011, p. 14.

⁹⁶ Hunt & Hunt, "Release of Australian Trade Policy Statement casts light on Government's intentions", Customs Trade and Transport Update, 10 May 2011.

8. The Government should use proven measures to reduce smoking rates, not “experiment” on the Australian public.

“...you’re right that there is some level of experiment...”

Minister for Health Nicola Roxon, Radio 3AW
– Neil Mitchell Mornings, 8 April 2011

Australia and other OECD nations have long embraced the concept of “evidence-based policy,” and the current Australian Government has frequently used the phrase. Yet the Government’s own internal documents make clear that generic packaging is being embraced despite the evidence, not because of it. Indeed, the Office for Best Practice Regulations has reported the Government’s Regulation Impact Assessment – the “evidence” for generic packaging – as violating the Government’s own principles,⁹⁷ and has notified the Government that if the Bill is adopted, “a post-implementation review will be required to commence within one to two years of implementation.”⁹⁸

Good regulatory practice demands that the Government carefully consider the need for regulation; scrutinise the evidence for and against the proposal; and explore a wide variety of legislative and non-legislative alternatives for achieving government objectives. As the Office of Best Practice Regulation has indicated, generic packaging fails those tests.

In its Consultation Paper, the Government stated its dual objectives of reducing the national smoking rate to 10% by 2018 and halving smoking prevalence among Aboriginals and Torres Strait Islanders.⁹⁹ Current trends indicate that the Government’s current policies will achieve that objective *even without generic packaging*. As Cancer Council Victoria explained, “With the prevalence of smoking declining among Australian schoolchildren and continued cessation occurring among the population of smokers, it is reasonable to assume that levels of smoking will continue to fall in future decades.”¹⁰⁰ As Figure 6 illustrates, that “reasonable assumption” shows smoking rates falling below 10% by 2018 without any drastic change in the status quo.

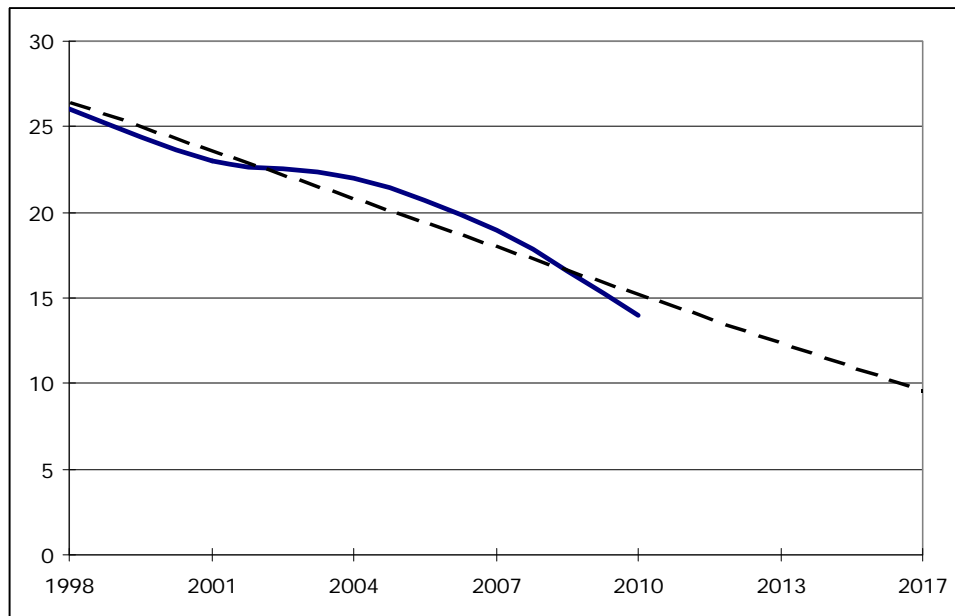
⁹⁷ OBPR Letter, previously cited, pp. 1-2 (attached as Annex 9).

⁹⁸OBPR Letter, previously cited, p. 2 (attached as Annex 9).

⁹⁹ Consultation Paper, p. 3.

¹⁰⁰ Cancer Council Victoria, Tobacco In Australia: Facts and Issues, A comprehensive online guide, 3d edition, “Future smoking rates?”, available online at <http://tobaccoinaustralia.org.au/chapter-1-prevalence/1-12-future-smoking-rates->.

Figure 7: The Cancer Council's "reasonable assumption" shows that Government smoking rate objectives will be met without mandating generic packaging



Sources: Current smoking rates (solid line) taken from Cancer Council Victoria: "Prevalence of smoking – adults", available online at <http://tobaccoinustralia.org.au/chapter-1-prevalence/1-3-prevalence-of-smoking-adults>

Projected smoking rates (dotted line) based on Cancer Council Victoria's "reasonable assumption", extrapolating current trends forward 6 years.

More importantly, the Government appears not to have considered whether other, less restrictive measures could meet its objectives. The Preventative Health Taskforce, Australian governments, and governments around the world have pointed to strong evidence that long-term education, media and cessation initiatives are highly effective at reducing smoking rates. The Consultation Paper similarly states that such measures are effective, but the Government has given *no consideration* to whether those measures could meet government smoking incidence objectives instead of the experiment of generic packaging.¹⁰¹ Evidence and experience prove that they do. Why, respectfully, then are they not pursued or even explored?

The Office of Best Practice Regulation put it more succinctly. Responding to the Government's assertion that "doing nothing [on generic packaging] is not realistic", the OBPR simply wrote:

"Why not?"¹⁰²

¹⁰¹ It is also spending less than one-tenth of one percent of the revenues it collects in tobacco excise on such measures.

¹⁰² Handwritten comments on Regulation Impact Statement attached to OBPR Letter, previously cited, p. 5 (attached as Annex 9).

Acting without sufficient evidence, not adequately assessing severe adverse consequences, and failing to meaningfully consider alternatives flies in the face of what is necessary for “evidence-based regulation.”

The Government has chastised other countries for failing to consider effective, proven alternatives to excessive packaging requirements to achieve health objectives because it recognises that good regulatory practice and international treaties require it. For example, when the Royal Thai Government announced that it would require graphic health warnings on alcoholic beverages, the Australian Government and others shared concerns with the World Trade Organization’s Technical Barriers to Trade Committee. The TBT committee summarised Australian and other countries’ objections:

“Members did not contest the legitimacy of Thailand’s objectives to address public health concerns, but they argued that the labeling requirements created unnecessary obstacles to trade and that Thailand could instead use less restrictive methods such as public information campaigns to achieve the same objective.”¹⁰³

Governments may well expect the Australian Government to apply the same standard to its own policies

Rather than running “experiments” which are destined to fail, the Government should take steps that are proven effective. Doing so stands a much better chance of achieving the Government’s stated health objectives.

¹⁰³ WTO, Technical Barriers to Trade, “Tobacco and alcohol technical barriers among members’ trade concerns”, 24 and 25 March 2010.

Conclusion

Generic packaging will not reduce smoking rates. Government Ministers, after seeing the “evidence” supporting generic packaging, were left questioning “*Have we got the supporting evidence that plain packaging reduces the health risk?*” The Q&A Document prepared for them answered that with a placeholder. Each successive, repetitive study conducted by plain packaging advocates fails to fill that void, because each is no more than speculation.

A well-organised illegal industry is poised to capitalise on the tremendous opportunity which “plain packaging” represents, both as a facilitator of supply and a boost to consumer demand. The Government raised this threat in its Regulation Impact Statement but is not taking steps to contain the current problem or stem the future tide.

Generic packaging will drive prices down, and price is the single strongest determinant of smoking rates. One of Australia’s largest retailers has already introduced cheap cigarettes, anticipating the price-driven commodity market the Government policy will create. The Government’s own policies on generic pharmaceuticals are designed to drive prices down and availability up. Leading tobacco control advocates – including some of those now advocating for generic packaging – described generic, store brand cigarettes as a public health disaster. Further tax increases on the legal market would simply encourage even more consumers to switch to illicit products.

Generic packaging violates treaty obligations and may require compensation. The Minister for Trade, IP Australia, and others sounded the alarm, but their consultation was skipped and their concerns seemingly not taken into account. The Government is embarked on a policy which will jeopardise future Australian investments in all industries, and sends a bad signal to investors and innovators in Australia.

The Government has embraced generic packaging despite the evidence, not because of it. The Office of Best Practice Regulation found the Government’s Regulation Impact Statement deficient and non-compliant with the Government’s own policies, and will require a re-assessment if the “experiment” is implemented.

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