

# POSITION STATEMENT

## Plain packaging of tobacco products



*A comprehensive ban on the advertising and promotion of tobacco products, including through the pack itself, is essential to reducing the harm caused by tobacco in Australia.*

### Key messages and recommendations

- Tobacco is a unique consumer product; when used as intended long-term, it causes the death of a majority of its users;
- Tobacco is addictive; many users have great difficulty quitting.
- As well as harming users, tobacco is an unacceptable hazard to others who are exposed to tobacco smoke.
- The dangers of tobacco smoking justify restrictions on its distribution and sale as well as the elimination of tobacco advertising and promotion;
- With the gradual increase in restrictions on tobacco advertising, the tobacco industry relies increasingly on the cigarette pack itself to advertise and promote its products;
- The tobacco industry's use of colour, novelty packaging and other imagery enables it to target particular market segments and convey brand character. Colour and imagery are also used to misleadingly convey relative brand strength and quality;
- A comprehensive ban on the advertising and promotion of tobacco products, including through the pack itself, is essential to reducing the harm caused by tobacco in Australia;
- The plain packaging of cigarettes would eliminate the tobacco industry's ability to promote smoking and brand personality through the pack, would reduce rates of smoking initiation and consumption, enhance the effectiveness of pack warnings and remove the pack's ability to mislead and deceive consumers;
- A survey of 3000 Victorian adults in 2006 found that more than half of the current, former and never smokers surveyed supported plain packaging;<sup>1</sup>
- The Australian government should ban the display on packs of all trademarks, texts and logos, together with all colours and other attractive decorative or design features.
- Only prescribed information and graphics, such as brand names, product names, manufacturer details, the number of cigarettes in a pack, prescribed health warnings and any other government-mandated information for consumers, should be permitted to appear on packs in a prescribed size, font, colour and location.
- Packs should only be permitted to be made from a prescribed material in a standardized, dull colour and shape (inside and outside the pack). The permitted shapes and formats of packs should also be prescribed.
- The use of perfuming, audio chips and any other material not prescribed should be prohibited.
- The display of misleading descriptors and yield information on packs should be banned. Only product names that describe taste should be permitted.

## Background

Following increased restrictions on traditional forms of tobacco advertising and promotion in Australia, the cigarette pack has become an increasingly important marketing tool and means of communicating brand quality and image to potential and current smokers.<sup>2</sup>

*“The increasing imposition of advertising restriction on the tobacco industry inevitably results in the visual impact of the cigarette pack itself assuming more importance as a means of attracting consumer attention to the product” (British American Tobacco)<sup>3</sup>*

*“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)”.<sup>4</sup>*

### Limited regulation of pack design, descriptors and yield information in Australia

The *Tobacco Advertising Prohibition Act 1992* (“the Act”), and various state and territory laws on tobacco advertising, do not extend to bans on advertising and promotion through the pack itself. Tobacco companies are therefore free to print advertising and promotional material on their packs and have recently launched various innovative pack designs that target particular market segments and promote certain brand characteristics. For example:

- In recent years stylish and novelty metal tins have been manufactured in a range of popular brands, including Peter Stuyvesant, Marlboro, Winfield and Dunhill.
- British American Tobacco (“BAT”) have used double sided promotional inserts inside their Winfield packs which state “The smooth choice is here” on one side, and on the reverse “Charcoal makes it smooth”. Philip Morris have also published promotional material on the inner packaging of their Langham Vintage packs.
- In 2006, BAT released the novelty “split pack” which could be divided into two smaller packs by price-conscious consumers and resulted in an increased surface area on which to promote brand characteristics.<sup>5</sup> When the pack was split, one part did not appear to display the health warnings prescribed under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth) (“the Regulations”). In 2007, after the Australian Competition and Consumer Commission (“ACCC”) took action against it for allegedly failing to comply with the prescribed health warning requirements, BAT signed an undertaking to cease supply of these packs.
- BAT have recently released a range of stylish new Dunhill packs including the “Signature series” and the “My mixture” limited editions. The “My Mixture” limited edition includes three different brightly coloured packs (lime green, bright blue and burnt orange) in what BAT describe as an “innovative 20s spring-box format”.<sup>6</sup>

Limited regulation also applies in relation to the display of yield information (average tar, nicotine and carbon monoxide content of the smoke from each cigarette) and pack descriptors such as “light” and “mild”. This is despite ACCC findings in 2005 that the display of this information on packs by BAT, Phillip Morris and Imperial Tobacco Australia Ltd had the potential to mislead consumers into believing there were health benefits associated with smoking low yield cigarettes. In light of the ACCC’s findings, and to avoid litigation, BAT, Philip Morris and Imperial Tobacco each signed court-enforceable undertakings in 2005 to cease the display of yield information and descriptors on packs.<sup>7</sup>

These undertakings remain the only restriction on the display of yield information and descriptors in Australia. While the Regulations no longer require that packs display yield information, they do not ban them from doing so.<sup>8</sup> This means that tobacco companies not subject to the court enforceable undertakings continue to face no restrictions.

The only information currently required to be printed on cigarette packs manufactured in, or imported into, Australia are the health warnings, explanatory messages and corresponding graphics prescribed in the Regulations.

### **Brand image and personality communicated through pack**

Bereft of brand image, cigarettes would lose their appeal.<sup>9</sup> Through the use of colours, novelty packaging, logos and other imagery, manufacturers are able to engineer the pack to appeal to their intended market segment and convey certain brand characteristics and quality.

*“It’s very difficult for people to discriminate blind-tested. Put it in a package and put a name on it, then it has a lot of product characteristics” (Imperial Tobacco).<sup>10</sup>*

*“..one in every two smokers is not able to distinguish in blind (masked) tests between similar cigarettes... for most smokers and the decisive group of new, younger smokers, the consumer’s choice is dictated more by psychological, image factors than by relatively minor differences in smoking characteristics.” (British American Tobacco).<sup>11</sup>*

Marketing literature highlights the role of the pack by emphasising that the “*product package is the communication life-blood of the firm*”<sup>12</sup> and “*act[s] as a promotional tool in its own right*”.<sup>13</sup>

The pack and associated brand image communicate a lot about a brand’s character and quality, as well as the stylishness and sophistication of the person who smokes it. Tobacco packs are often described as “badge products” as they “remain with the user once opened and are repeatedly displayed in social situations, thereby servicing as a direct form of mobile advertising for the brand”.<sup>14</sup> A recent survey of adult Australian smokers found that smokers of plain cigarette packs were rated as significantly less trendy/stylish, less sociable/outgoing and less mature than smokers of fully branded packs. Plain packs were also rated as significantly less attractive and the cigarettes contained in plain packs were perceived to be less rich in tobacco, less satisfying and of lower quality tobacco.<sup>15</sup> Packs with the *least brand design elements* were rated as having the least appeal, compared to the other packs progressing from some brand design elements to full branding.<sup>16</sup>

A Norwegian study similarly found that the pack communicates a lot about a smoker’s social identity and status.<sup>17</sup> A 19 year old girl, surveyed for the purpose of a Norwegian study reflected:

*“My friend showed up the other day at my house and she brought a package of Marlboro Light. And I said ‘Do you smoke Marlboro Light? You are not allowed to do that in my house, you little brat. Who do you think you are now?’ She is kind of pretending to come from another place. She is trying to be a bit posh, she usually smokes Prince, just like me”.<sup>18</sup>*

This survey found that young people described some brands as more exclusive than others and some as more elegant and sophisticated than others. The pack was described by those surveyed as an important element in their perception of brand image.<sup>19</sup>

A study undertaken in Canada found that pack designs were well recognised by teenagers. Even when brand names were removed from the packs, almost half of the teenagers surveyed were able to identify the product brand on the basis of package design alone.<sup>20</sup>

## Packs target market segments, new smokers and brand switching

New and attractive pack designs are primarily used by tobacco companies to entice new smokers to try their brands and to persuade habitual smokers to consider switching brands.<sup>21</sup>

*“the primary job of the package is to create the desire to purchase and try. To do this, it must look new and different enough to attract the attention of the consumer.”(Report to Liggett and Myers).<sup>22</sup>*

While the tobacco industry claims it is interested only in promoting brand switching, and not recruiting new customers,<sup>23</sup> these claims are inconsistent with smokers’ high level of brand loyalty. Research indicates that less than 10% of smokers switch brands annually.<sup>24</sup>

Tobacco company documents also demonstrate the industry’s recognition of the importance of recruiting young people to their brands.<sup>25</sup> A new smoker usually makes their brand choice early and there is a high correlation between the brand first smoked and the brand eventually selected and usually smoked.<sup>26</sup> Packaging that appeals to young people is therefore critical.

*“16-21 – the formative years; smoking starts and brand preferences are developed” (Liggett and Myers).<sup>27</sup>*

Packaging has been used for many years to generate evocative images such as luxury, freedom, glamour, status and masculinity and femininity.<sup>28</sup>

Tobacco companies constantly test their brands for acceptability among young people and innovative packs are designed to ensure that a brand maintains its appeal amongst a group where fashions change rapidly.<sup>29</sup>

*“focus groups have indicated that the green (Lucky Strike) pack would be well received by young adult males ... Many of the smokers at the groups thought that the green packing was very new and unique. They thought it was eye-catching and a different approach to packaging. Specifically they stated: it looks distinguished.... it would be great to put down on the bar” (American Tobacco Company).<sup>30</sup>*

Tobacco industry documents also show that packaging designed to appeal to women has been carefully developed.<sup>31</sup> Cigarettes are often packaged in slim long packs, with pastel colours or extensive white space used to appear sophisticated and feminine.

*“Some women admit that they buy Virginia Slims, Benson & Hedges etc when they go out at night to complement a desire to look more feminine and stylish. ... more fashionable feminine packaging can enhance the relevance of some of our brands” (Philip Morris).<sup>32</sup>*

## Deceptive use of colour and imagery, undermining graphic health warnings

Studies on the effects of pack design, including by the tobacco industry, have found that packaging materials and imagery all influence consumer perceptions about the quality and sensory attributes of different brands.<sup>33</sup> For example, light colours and pastel shades are universally used to suggest that a particular brand is less harmful than its “stronger” counterpart. Green shades are often used for menthol variants to convey the concepts of freshness and mint flavour.

In Australia, following ACCC acceptance of court enforceable undertakings by Philip Morris, British American Tobacco Australia Limited and Imperial Tobacco Australia Limited, to cease their use of descriptors and yield information,<sup>34</sup> red packs have commonly been used to deceptively represent “full” strength, blue and gold for milder strength and grey for “light” strength.<sup>35</sup>

Brand imagery appearing alongside health warnings on packs also sends a mixed message about the product and has the potential to undermine the quality of pack warnings, particularly among young people.<sup>36</sup> BAT's use of a pack insert "Charcoal makes it... smooth as" essentially promotes the product and weakens the effect of the health warnings on the outside of the pack. Some brands even incorporate the colours of health warnings into the design of the pack, causing the warning to blend in to the overall pack design and become less salient.<sup>37</sup>

## Trademarks and international trade agreements

The tobacco industry argue that plain packaging laws would breach international trade agreements such as the *Agreement on Trade-Related Aspects of International Property Rights 1994*, the *Northern American Free Trade Agreement 1994* and the *Paris Convention for the Protection of Industrial Property 1983* which provide minimum standards for the protection of intellectual property rights, including trademarks.

Such arguments are unlikely to be successful given there are sufficient flexibilities and exceptions contained in the international trade agreements to protect public health. Given 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 agreements.<sup>38</sup> The decision of the European Court of Justice in *R (on the application of British American Tobacco (Investments) Ltd v Secretary of State for Health*, that large size health warnings did not constitute an infringement to BAT's intellectual property rights, also lends support to the view that plain packaging will not breach intellectual property rights. It should also be noted that tobacco companies do not hesitate to disrupt their own trade mark when using new imagery on packs.<sup>39</sup>

Concern has also been raised that plain packaging laws may result in the "acquisition of property" for the purposes of s.51(xxxi) of the Australian Constitution<sup>1</sup>, and that compensation on "just terms" will therefore be payable by the Commonwealth to tobacco companies. It is, however, highly unlikely that Australian government or High Court would take this view. While the rights of tobacco companies to use their trademarks and the retail package itself may be limited by plain packaging laws, the government will not obtain any advantage, gain or benefit capable of constituting an "acquisition" of property for the purposes of s.51(xxxi).<sup>40</sup>

There are no international or domestic barriers to the introduction of plain packaging laws in Australia.

## Recommended reform – plain packaging

Plain packaging laws are required to implement the *National Tobacco Strategy* proposal to eliminate remaining forms of tobacco promotion. They are also required to implement Australia's obligations under Article 13 (tobacco advertising, promotion and sponsorship) of the FCTC, which requires a 'comprehensive ban of *all* tobacco advertising, promotion and sponsorship', and to maximize the effectiveness of Australia's implementation of its obligations under Article 11 (packaging and labelling of tobacco products). The World Health Organization's draft guidelines for the implementation of Article 13 include the following recommendation:

"Packaging and product design are important elements of advertising and promotion. The effect of advertising or promotion on packaging can be eliminated if plain packaging is required. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive."<sup>41</sup>

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<sup>1</sup> Section 51(xxxi) of the Australian Constitution provides the Commonwealth with power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

Cancer Council Australia recommends that:

- Regulations be passed under the Trade Practices Act 1974 to require the removal of all trademarks, texts and logos, together with all colours and other attractive decorative or design features.
- Only information and graphics prescribed under the Regulations, such as brand names, product names, manufacturer details, the number of cigarettes in a pack, prescribed health warnings and any other government-mandated information for consumers, should be permitted to appear on packs in a prescribed size, font, colour and location.
- Packs should be required to be made from a material prescribed under the Regulations in a standardized, dull colour and shape (inside and outside the pack). The permitted shapes and formats of packs should also be prescribed.

The use of perfuming, audio chips and other material not prescribed under the Regulations should be prohibited. The display on packs of yield information, and descriptors that have the potential to mislead consumers into believing there are health benefits associated with smoking low yield cigarettes, should be banned. Only product names that describe taste should be permitted.

Without brand imagery, packs would become nothing more than "functional containers for cigarettes", rather than a medium for advertising.<sup>42</sup> It is anticipated that mandatory plain packaging will:

- Reduce tobacco consumption, discourage young people from starting up smoking and increase smoking cessation rates among young people and teenagers.<sup>43</sup> This will significantly reduce the number of Australians that currently die from smoking related disease each year (currently, approximately 15,500 per year) and the high social costs of smoking in Australia that are estimated to be around \$31 billion per year.<sup>44</sup>
- Remove the ability of tobacco companies to use packs as an advertising vehicle and means of promoting an image, brand personality and quality.<sup>45</sup>
- Eliminate the industries' use of the pack to undermine graphic health warnings on packs.
- Remove the packs ability to deceptively influence consumers' perceptions of tobacco quality and sensory appeal,<sup>46</sup> and false implications that products have harm reducing properties.<sup>47</sup>
- Enable larger graphic health warnings and more information about cessation and the health effects of smoking to be printed on the pack.<sup>48</sup>

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