

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2012 No. 29**

#### *Tobacco Plain Packaging Act 2011*

#### *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)*

Subsection 109(1) of the Act provides the power for the Governor-General to make regulations prescribing matters required or permitted by the *Tobacco Plain Packaging Act 2011* (the Act) to be prescribed, or necessary or convenient to be prescribed for the carrying out or giving effect to the Act.

The Act is a crucial part of the Australian Government's comprehensive suite of tobacco control measures. The Act removes one of the last forms of tobacco advertising, the retail packaging of tobacco products, by restricting the use of tobacco industry logos, brand imagery, colours and promotional text other than brand and variant names in a standard colour, position, typeface and font size, so as to prevent them from being used as design features to detract attention from health warnings, mislead about the relative safety of tobacco products, or otherwise to promote the use of tobacco products.

The *Tobacco Plain Packaging Regulations 2011* (the Principal Regulations) initially set out requirements for the retail packaging and appearance of cigarettes only. The Principal Regulations currently do not apply to non-cigarette tobacco products.

The purpose of the regulation is to amend the Principal Regulations to expand their application to non-cigarette tobacco products and to prescribe specific requirements for the retail packaging and appearance of non-cigarette tobacco products.

Details of the regulation are set out in [Attachment A](#).

Details of the Statement of Compatibility with Human Rights is at [Attachment B](#).

### **Consultation**

The Government consulted broadly on the plain packaging measure, including the specifications in the Regulation.

The consultations conducted on the overarching plain packaging measure are detailed in the Explanatory Statement to the Principal Regulations.

The Government also consulted specifically on its proposed approach to implementing plain packaging for non-cigarette tobacco products. In May and June 2011, the Department of Health and Ageing (Department) had a number of meetings with manufacturers, importers and retailers of non-cigarette tobacco products, to discuss the plain packaging specifications included in an exposure draft of the Tobacco Plain Packaging Bill and accompanying consultation paper released for public comment on 7 April 2011. Issues raised in submissions to that public consultation and in the Department's meetings with industry informed the

development of the plain packaging requirements, including the specifications for non-cigarette tobacco products.

An initial draft of the Principal Regulations, which included some general specifications applicable to all tobacco products, was tabled in the House of Representatives on 6 July 2011. Following the tabling of the draft Principal Regulations, in August and September 2011 the Department had a number of further meetings with manufacturers and importers of non-cigarette tobacco products to discuss plain packaging generally and in particular the proposed specifications for non-cigarette tobacco product packaging.

Following the tabling of an updated draft of the Principal Regulations in the House of Representatives on 22 September 2011, on 30 September 2011 the Department released a consultation paper outlining the Government's proposed approach to implementing plain packaging for non-cigarette tobacco products. The public consultation ended on 28 October 2011. 33 submissions were received, from a range of stakeholders including public health organisations, non-government organisations, overseas governments, the tobacco industry (manufacturers and importers), tobacco retailers and interested individuals.

The Department also had a number of meetings with manufacturers and importers of non-cigarette tobacco products in October 2011, to discuss plain packaging generally and the proposed approach to the implementation of plain packaging for non-cigarette tobacco products contained in the consultation paper. Issues raised in submissions to that public consultation and in the Department's meetings with industry informed the drafting of the Regulation.

On 23 December 2011, the Department released a draft of the Regulation for a public consultation period ending 20 January 2012. The Department received 15 submissions in response to the consultation process from a range of stakeholders including the tobacco industry (manufacturers and importers), tobacco retailers, public health organisations, overseas governments and overseas tobacco associations. The Government considered the issues raised in the consultation process on the draft Regulation in finalising the Regulation.

The Act specifies no conditions that need to be satisfied before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulation commences on the commencement of sections 17 to 27A of the Act, which is on 1 October 2012.

Authority: Subsection 109(1) of the *Tobacco Plain Packaging Act 2011*

**ATTACHMENT A****DETAILS OF THE TOBACCO PLAIN PACKAGING AMENDMENT  
REGULATION 2012 (No. 1)****Section 1 – Name of Regulation**

This section provides that the title of the regulation is the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)*.

**Section 2 – Commencement**

This section provides for the regulation to commence on commencement of sections 17 to 27A of the *Tobacco Plain Packaging Act 2011* (the Act). This date is 1 October 2012.

**Section 3 – Amendment of *Tobacco Plain Packaging Regulations 2011***

This section provides that the *Tobacco Plain Packaging Regulations 2011* (the Principal Regulations) are amended as set out in Schedule 1 of the regulation.

**Schedule 1 – Amendments****Items [1], [2] and [3] – Regulation 1.1.3 and after regulation 1.1.3**

Regulation 1.1.3 of the Principal Regulations contains definitions of terms used in the Principal Regulations that are not used in the Act.

Item [1] amends the definition of ‘bar code’ in the Principal Regulations to clarify that the numbers that usually appear as part of a bar code are permitted to appear as part of any bar code on retail packaging.

Item [2] inserts definitions of ‘bidi’, ‘cigar’, ‘cigar tube’ and ‘pouch’ into the Principal Regulations, consistent with the definitions of those terms in the *Competition and Consumer (Tobacco) Information Standard 2011*.

Items [2] and [3] also incorporate definitions of ‘inner surface’ and ‘outer surface’ of a pouch into the Principal Regulations. These definitions clarify the inner and outer surfaces of this packaging type for the purposes of regulation 2.2.1, which specifies the colours that those surfaces are required to be. These definitions were added to the regulation in response to a comment from a tobacco company that the ordinary meaning of ‘inner surface’ and ‘outer surface’ for roll-your-own (RYO) tobacco pouches is unclear and should be clarified.

**Item [4] – Regulation 1.1.6**

Regulation 1.1.6 of the Principal Regulations provides that the Regulations only apply to the retail packaging and appearance of cigarettes. This item removes

regulation 1.1.6 from the Principal Regulations, so that the Principal Regulations will apply to all tobacco products.

### **Items [5] and [6] – Regulation 2.1.3**

Regulation 2.1.3 of the Principal Regulations allows texturing or embossing of cigarette pack lining in a standardised format, where such embossing is necessary for the automated manufacture of cigarette packs or the packing of cigarettes into cigarette packs. Items [5] and [6] amend regulation 2.1.3 and its heading to expand the application of this provision to the lining of primary packaging of all tobacco products, not just the lining of cigarette packs.

### **Item [7] – After regulation 2.1.3**

This item inserts three new regulations into the Principal Regulations, setting out requirements for the physical features of non-cigarette tobacco product retail packaging. Research commissioned by the Department of Health and Ageing indicates that elements of packaging design such as innovative packaging shape, size and openings create strong associations with level of appeal and attractiveness of tobacco products.

Regulation 2.1.4 requires cigar tubes to be rigid and have a cylindrical cross-section, and require the opening of a cigar tube to be at least 15 mm in diameter. This regulation also allows one or both ends of a cigar tube to be tapered or rounded. These requirements accommodate the vast majority of currently available cigar tube formats. A minimum diameter has been included to prohibit very small cigar tubes.

Regulation 2.1.5 requires the primary packaging of all non-cigarette tobacco products, other than cigar tubes, to meet minimum dimension requirements. The purpose of this regulation is to prohibit very small packaging formats, consistent with the approach taken for cigarette packs, as evidence indicates that such packaging formats could be particularly appealing to young people.

When determining the largest and second largest dimensions of packaging, the height, width and depth of the package as a whole should be considered, rather than the measurements of particular surfaces of the packaging or the circumference of a cylindrical container. For example, in the case of a cylindrical container, the diameter of the cylinder may constitute both the width and depth of the cylinder.

Regulation 2.1.6 prohibits retail packaging of tobacco products from having a transparent or cut-out area that enables the tobacco products inside the packaging to be visible before the packaging is opened. The purpose of this regulation is to ensure that the effect of the plain packaging is not undermined; for example that consumers are not distracted from the health warnings on the packaging by display of the tobacco product.

### **Item [8] – After subregulation 2.2.1(3)**

Regulation 2.2.1 of the Principal Regulations requires all outer surfaces of primary packaging and secondary packaging to be the colour known as Pantone 448C, a drab

dark brown colour which research commissioned by the Department of Health and Ageing found to be optimal in terms of decreasing the appeal and attractiveness of tobacco packaging, decreasing the potential of the pack to mislead consumers about the harms of tobacco use, and increasing the impact of graphic health warnings. Regulation 2.2.1 also requires the inner surfaces of cigarette packs and cigarette cartons to be white, which is the ordinary colour of the cardboard packaging material before it is printed.

Item [8] amends the Principal Regulations to insert a new subregulation 2.2.1(3A), which requires the inner surfaces of primary packaging and secondary packaging of non-cigarette tobacco products to be either white or the colour of the packaging material in its natural state. The specifications for the inner surfaces of non-cigarette tobacco product packaging are more flexible in recognition of the wide range of packaging materials and formats currently used (and permitted under the plain packaging legislation) for those products, as compared with the standardised packaging of cigarette products. For both cigarette and non-cigarette tobacco products, the specifications mean that the inner surfaces of packaging do not need to be printed. For example, where wooden boxes or metal tins are used as retail packaging of non-cigarette tobacco products, the inner surfaces of those containers can remain the colour that they are naturally prior to printing or any colouration treatment. The outer surfaces will still be required to be Pantone 448C, in accordance with the general requirement in subregulation 2.2.1(2) of the Principal Regulations which is consistent for all tobacco products.

#### **Item [9] – Subregulation 2.3.4(4)**

Regulation 2.3.4 of the Principal Regulations specifies the requirements for measurement marks and trade descriptions appearing on retail packaging of cigarettes, including the surfaces of the retail packaging on which the measurement marks and trade descriptions may appear, and the number of times that those statements may appear. The specific permitted surfaces for these statements are only prescribed for cigarette packs and cigarette cartons. For plastic or other wrappers covering more than one item of primary packaging, only the number of times that the statement can appear is specified, in subregulation 2.3.4(4) of the Principal Regulations.

Item [9] expands subregulation 2.3.4(4) of the Principal Regulations to capture all retail packaging other than cigarette packs and cigarette cartons. This will still include plastic or other wrappers covering more than one item of primary packaging, and also include all retail packaging of non-cigarette tobacco products.

#### **Items [10] and [11] – Paragraph 2.3.5(3)(a) and After subregulation 2.3.5(3)**

Items [10] and [11] ensure that bar codes that are affixed to the packaging via adhesive labels are fixed firmly to the packaging and are not easily removable.

#### **Item [12] – Subparagraph 2.3.9(1)(b)(iv)**

Regulation 2.3.9 of the Principal Regulations specifies the requirements for the appearance of a consumer contact telephone number printed on retail packaging.

This regulation was added in response to requests from the tobacco industry that a call centre number be allowed to be printed on retail packaging. Subparagraph 2.3.9(1)(b)(iv) specifies the surface on which the number is permitted to appear for cigarette packs.

Item [12] adds a new subparagraph 2.3.9(1)(b)(v) requiring, for all retail packaging except for cigarette packs, the consumer contact telephone number to appear on the same surface as any name and address appearing on the retail packaging. The purpose of this subparagraph is to ensure that where a name and address is printed on the packaging, the consumer contact telephone number is printed on the same surface as that name and address, to make it clear that the phone number is a contact number for the relevant business or company. If there is no name and address printed on the packaging, the consumer contact telephone number can appear on any surface of the packaging.

### **Item [13] – After regulation 2.4.1**

Regulation 2.4.1 of the Principal Regulations specifies the requirements for the appearance of brand, business, company and variant names on retail packaging of cigarettes. This regulation builds upon the requirements for the appearance and location of names on cigarette packaging in subsections 21(2) and (3) of the Act.

Item [13] adds three new regulations (regulations 2.4.2, 2.4.3 and 2.4.4) to Division 2.4 of the Principal Regulations, to specify the requirements for the appearance and location of brand, business, company and variant names on retail packaging of non-cigarette tobacco products.

Regulation 2.4.2 specifies the required appearance of the text in which names are printed on non-cigarette tobacco product retail packaging, broadly mirroring the requirements in regulation 2.4.1 of the Principal Regulations. Unlike regulation 2.4.1 of the Principal Regulations however, regulation 2.4.2 also permits the names to be printed on an adhesive label which is firmly affixed to the packaging and not easily removable, rather than printed directly on the packaging.

This allows manufacturers/suppliers of non-cigarette tobacco products sold in Australia to use packaging that is not brand/variant specific and subsequently apply the brand and variant details via an adhesive label. This recognises that non-cigarette tobacco products are currently packaged in a wide range of packaging formats, as compared with cigarette products. It also takes into account that the non-cigarette tobacco product market in Australia is smaller than the cigarette market and therefore it may be more burdensome on foreign manufacturers of non-cigarette tobacco products to package products in compliant packaging exclusively for the Australian market where the numbers are so small, as compared with the large quantity of cigarette products both imported into Australia and packaged domestically. Regulations 2.4.3 and 2.4.4 specify the permitted location of brand, business, company and variant names on cigar tubes (regulation 2.4.3) and the retail packaging of other non-cigarette tobacco products (regulation 2.4.4). These two regulations set out requirements for non-cigarette product retail packaging that are broadly equivalent to the requirements for cigarette packaging contained in subsections 21(2) and (3) of the Act. Some of the requirements for the permitted location of the brand,

business, company and variant names on non-cigarette tobacco product retail packaging differ from those applied to cigarette packaging. The differences take into account the practical differences in packaging, distribution and retail of such products such as the wider range of packaging formats and sizes that are currently on the Australian market for non-cigarette tobacco products, while ensuring that the regulations across all tobacco products are consistent and work together to achieve the public health objectives.

#### **Item [14] – After Division 2.5**

Section 23 of the Act provides that no inserts or onserts can be included in or on retail packaging, unless they are permitted by the regulations. Item [14] amends the Principal Regulations to include a new Division 2.6, which sets out a limited number of circumstances in which inserts or onserts are permitted.

##### *Regulation 2.6.1*

Health warnings are required to appear on tobacco product retail packaging under other legislation. That legislation allows health warnings to appear on non-cigarette retail packaging via an adhesive label affixed to the packaging. An adhesive label affixed to retail packaging is considered an onsert under the *Tobacco Plain Packaging Act 2011* and will therefore be prohibited by the Act, unless it was explicitly permitted in the regulations.

Regulation 2.6.1 is included to address this. This regulation allows retail packaging of tobacco products to include an adhesive label bearing a health warning that complies with the applicable health warning standard. From 1 October 2012 to 30 November 2012, suppliers of tobacco products can choose to comply with either the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* or the *Competition and Consumer (Tobacco) Information Standard 2011*. On 1 December 2012, the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* will be repealed. From that date onwards, if a health warning is displayed on retail packaging by way of an adhesive label, the adhesive label must comply with the *Competition and Consumer (Tobacco) Information Standard 2011*.

##### *Regulation 2.6.2*

Regulation 2.6.2 allows retail packaging of non-cigarette tobacco products to include inserts used to avoid damage to the tobacco product during transportation or storage. This may include linings or other packaging material. The insert must be either white or the colour of the packaging material in its natural state. The regulation is intended to take into account the practical differences in packaging of non-cigarette tobacco products as compared with cigarette packaging, while ensuring that the regulations across all tobacco products are consistent and work together to achieve the public health objectives. The regulation is included in response to representations from the non-cigarette tobacco industry about the wide variety of packing materials currently used in non-cigarette tobacco packaging, particularly premium cigars. In contrast, the paper-backed foil lining of cigarette packs are used consistently by different companies and across different brands.

### *Regulation 2.6.3*

Regulation 2.6.3 ensure that primary packaging of non-cigarette tobacco products can include a tab to reseal the packaging. The regulation is included in response to concerns from some tobacco companies that the resealable tabs currently used on many RYO tobacco pouches will be prohibited under the legislation, by virtue of being an onsert. For example, many RYO tobacco pouches currently use one or more resealable tabs in the form of stickers or “Velcro” affixed to the surface of the retail packaging to seal the pouch closed after it is first opened.

The regulation requires such tabs to be either black, transparent or drab dark brown (Pantone 448C), and provide that an adhesive tab must not obscure any information, warning messages or other material required by legislation. The regulation allows tabs to be a number of different colours, in response to requests from some tobacco companies. These companies state that they currently use more than one resealable tab and claim that they require different colours to distinguish the different tabs.

The regulation is intended to take into account the practical differences in packaging of non-cigarette tobacco products such as roll-your-own tobacco, as compared with cigarette packaging, while ensuring that the regulations across all tobacco products are consistent and work together to achieve the public health objectives.

### **Item [15] – After Division 3.1**

Part 3 of the Principal Regulations is titled “Requirements for appearance of tobacco products”, with Division 3.1 setting out requirements for the appearance of cigarettes. Item [15] amends Part 3 of the Principal Regulations to add a new Division 3.2, specifying the requirements for the appearance of non-cigarette tobacco products. Guidelines for the implementation of Article 13 (Tobacco advertising, promotion and sponsorship) of the Framework Convention on Tobacco Control identify product design features as a form of tobacco advertising and promotion.

Currently, many cigars have cigar bands that display brand names and logos and use colour and other decorative features and embellishments. Regulation 3.2.1 allows a cigar to include one cigar band in the specified drab dark brown colour (Pantone 448C). The plain packaged cigar band may be placed directly on the cigar or may be an adhesive band that completely covers an existing band or bands on the cigar.



Regulation 3.2.1 permits the following information about the cigar to appear on the cigar band in a specified location, typeface, font size and colour: brand, company or business name, variant name, country of origin, covert marks and an alphanumeric code. These features will be permitted on cigar bands in response to industry representations about the important role played by cigar bands for purchasers in assuring the legitimacy and authenticity of the product.

The regulation provides that the alphanumeric code must not constitute or provide access to tobacco advertising and promotion, must not be false, misleading or deceptive or likely to create an erroneous or false impression, and must not represent or be linked or related in any way to the emission yields of the cigar. These limitations have been included for consistency with the WHO Framework Convention on Tobacco Control Guidelines for Implementation of Article 11, which provides guidance on developing effective packaging and labelling requirements.

Bidis often have a piece of coloured thread tied around their circumference. Regulation 3.2.2 requires any thread that is tied around a bidi to be black. Black was selected as the required colour in recognition of the impracticalities that manufacturers and importers of this small volume product may have in manufacturing drab dark brown (Pantone 448C) coloured thread. Any thread that is not black needs to be replaced with black thread or be removed.

Regulations 3.2.1 and 3.2.2 are intended to take into account the practical differences in format and features of non-cigarette tobacco products such as cigars and bidis as compared with cigarette packaging, while ensuring that the regulations across all tobacco products are consistent and work together to achieve the public health objectives.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Tobacco Plain Packaging Amendment Regulation 2012***

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Tobacco Plain Packaging Act 2011* (the Act) is a crucial part of the Australian Government's comprehensive suite of tobacco control measures. The Act removes one of the last forms of tobacco advertising, the retail packaging of tobacco products, by restricting the use of tobacco industry logos, brand imagery, colours and promotional text other than brand and variant names in a standard colour, position, typeface and font size, so as to prevent them from being used as design features to detract attention from health warnings, mislead about the relative safety of tobacco products, or otherwise to promote the use of tobacco products.

The *Tobacco Plain Packaging Regulations 2011* (the Principal Regulations), made under the Act, set out requirements for the retail packaging and appearance of cigarettes only. The Principal Regulations currently do not apply to non-cigarette tobacco products.

The purpose of the Tobacco Plain Packaging Amendment Regulation 2012 (the Regulation) is to amend the Principal Regulations to expand their application to non-cigarette tobacco products and to prescribe specific requirements for the retail packaging and appearance of non-cigarette tobacco products.

**Human rights implications**

The Regulation engages the following human rights:

**Freedom of expression**

The restriction on the appearance of tobacco products and their retail packaging may engage Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR protects the right to freedom of expression, which extends to any medium, including written and oral communications, the media, public protest, broadcasting and artistic works, and may include commercial advertising.

It is possible that, by restricting the appearance of tobacco products and their retail packaging, including by prohibiting the use of tobacco company logos, the Regulation limits the right to freedom of expression.

*Legitimate objective: measure is justified under a permitted limitation*

The right to freedom of expression is not absolute. It carries with it special responsibilities, and may be restricted on several grounds. Article 19(3) of the ICCPR expressly states that the right to freedom of expression may be subject to limitations necessary for the protection of public health.

The limitation (if any) of the right to freedom of expression in the Regulation aims to achieve a legitimate objective – the protection of public health – by contributing to efforts to reduce smoking rates. The plain packaging legislation, including the Regulation, aims to achieve this by:

- reducing the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increasing the noticeability and effectiveness of mandated health warnings; and
- reducing the ability of the retail packaging of tobacco products to mislead consumers about the harms of smoking.

The World Health Organisation (WHO) has stated that tobacco “is the only legal consumer product that kills when used exactly as intended by the manufacturer.”<sup>1</sup> The plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates. This strategy is designed to address one of the leading causes of preventable death and disease in Australia, which kills around 15,000 Australians each year, causes chronic disease for many others and is a significant burden both on productivity and on Australia’s health care system.

*Reasonable: measure will be effective to achieve the desired ends*

The plain packaging measure is based on a broad range of studies and reports, and supported by leading Australian and international public health experts. The research evidence to June 2009 in support of plain packaging is set out extensively in the reports of the National Preventative Health Taskforce (“the Taskforce”), a group of Australia’s leading public health experts commissioned by the Government to develop a preventive health strategy for Australia. The reports of the Taskforce and the Government response are available at [www.preventativehealth.org.au](http://www.preventativehealth.org.au).

The research shows that advertising on tobacco packaging, including industry branding and packaging design, can mislead about the relative safety of the product, reduce the effectiveness of graphic health warnings on tobacco products, and increase the appeal of tobacco to young people.

Since 2009 the evidence base has continued to grow. Some additional studies were referenced in the Government’s consultation paper on the plain packaging legislation released in April 2011 (available at [www.yourhealth.gov.au](http://www.yourhealth.gov.au)). A review of the evidence prepared by the Cancer Council Victoria – which cited 24 studies in the

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<sup>1</sup> World Health Organisation, “Call for Pictorial Warnings on Tobacco Packs” (29 May 2009), [http://www.who.int/mediacentre/news/releases/2009/no\\_tobacco\\_day\\_20090529/en/index.html](http://www.who.int/mediacentre/news/releases/2009/no_tobacco_day_20090529/en/index.html).

peer-reviewed literature – was tabled in the House of Representatives on 25 May 2011 and further updated in August 2011.<sup>2</sup>

The WHO and the Secretariat of the WHO Framework Convention on Tobacco Control (the “FCTC”, an international treaty to which Australia is a party) have each made submissions to the Australian Government strongly supporting the legislation. In its submission, the WHO stated its view that:<sup>3</sup>

[I]mplementing the proposed legislation aiming to prevent tobacco advertising and/or promotion on tobacco product packaging will achieve its stated goals of: reducing the attractiveness and appeal of tobacco products to consumers, particularly young people; increasing the noticeability and effectiveness of mandated health warnings; and reducing the ability of the tobacco product packaging to mislead consumers about the harms of smoking.

*Proportionate: measure does not impinge on freedom of expression to a greater degree than is necessary*

The plain packaging legislation prohibits the display on tobacco products and their packaging of all tobacco company logos, symbols, and other images that may have the effect of advertising or promoting tobacco products. The legislation requires that all tobacco packaging be in a particular shade of drab dark brown and also imposes restrictions on the dimensions and make-up of tobacco packaging, preventing unique or “novelty” cigarette packets. All of these restrictions are central to achieving the aims and objectives of the plain packaging measure and were determined following consumer research on proposed plain packaging specifications commissioned by the Department of Health and Ageing.

However, the plain packaging legislation, including the Regulation, will allow product brand names and variant names (as well as a range of other markings) to appear on tobacco packaging in specified locations, and in a standard colour, position, font style and size. Plain packaging does not prevent tobacco companies from distinguishing their products, nor the identification of a product’s place of origin on its packaging. In this manner, the plain packaging legislation, including the Regulation, limits the right to freedom of expression only to the extent necessary to achieve the objectives of the plain packaging measure.

*Necessary: no less restrictive means of achieving the desired ends*

Plain packaging will prohibit the use of tobacco company logos, symbols, and other images on tobacco retail packaging that may have the effect of advertising or promoting tobacco products. Such advertising is one of the principal remaining means for tobacco companies to advertise tobacco. By removing one of the last forms of tobacco advertising in Australia, the Australian Government intends that plain packaging will contribute to efforts to reduce smoking rates in Australia. Plain packaging is not an alternative to other tobacco control measures but is an integral

<sup>2</sup> *Plain packaging of cigarettes: a review of the evidence*. Prepared by Quit, Cancer Council Victoria, May 2011 (updated August 2011). Available at

[http://www.cancervic.org.au/downloads/mini\\_sites/Plain-facts/TCUCCVEvOverview\\_FINALAUG122011.pdf](http://www.cancervic.org.au/downloads/mini_sites/Plain-facts/TCUCCVEvOverview_FINALAUG122011.pdf).

<sup>3</sup> Submission of the WHO Re: *Australia Plain Packaging Legislation*

[http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/8EA505E09FEA1631CA2579540005F686/\\$File/World%20Health%20Organization.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/8EA505E09FEA1631CA2579540005F686/$File/World%20Health%20Organization.pdf).

part of the comprehensive suite of measures adopted by the Government to respond to the public health problems caused by tobacco.

Australia's extensive anti-smoking measures have helped reduce daily smoking rates in Australia from over 30 per cent of Australians aged 14 years and over in 1988 to around 15 per cent in 2010.<sup>4</sup> However, some three million Australians aged 14 or over continue to smoke daily or weekly.<sup>5</sup>

The plain packaging measure is part of a balanced package of measures that will help the Government reach the COAG National Healthcare Agreement target of reducing the adult daily smoking rate in Australia to 10 per cent by 2018. Other measures introduced by the Government include:

- the 25 per cent tobacco excise increase in April 2010;
- over \$85 million in investment in anti-smoking social marketing campaigns;
- legislation to restrict internet advertising of tobacco products in Australia;
- the extended listing of nicotine replacement therapies and other smoking cessation supports on the PBS; and
- record investments in support for indigenous communities to reduce smoking rates.

It comes on top of a comprehensive suite of tobacco control measures already in place in Australia, including:

- minimum age restrictions on purchase of tobacco products;
- comprehensive advertising bans under the *Tobacco Advertising Prohibition Act 1992*;
- retail display bans;
- bans on smoking in offices, bars, restaurants and other indoor public spaces, and increasingly outdoor places where children may be exposed to environmental tobacco smoke;
- extensive and continuing public education campaigns on the dangers of smoking;
- PBS subsidies for smoking cessation supports; and
- Quitlines and other smoking cessation support services in each State and Territory to help people quit.

Australia's history of progressively more comprehensive and stringent tobacco regulation is consistent with trends in countries around the world, and also international steps to combat the global health epidemic posed by tobacco smoking through the FCTC.

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<sup>4</sup> Australian Market Research, 1988 *National Campaign Against Drug Abuse social issues survey*, Canberra 1988; and Australian Institute of Health and Welfare 2011 National Drug Strategy Household Survey report pp 22. Drug statistics series no.25. Cat. No. PHE 145. Canberra: Australian Institute of Health and Welfare.

<sup>5</sup> Australian Institute of Health and Welfare 2011 National Drug Strategy Household Survey report pp 22-23. Drug statistics series no.25. Cat. No. PHE 145. Canberra: Australian Institute of Health and Welfare.

The FCTC imposes a comprehensive set of obligations for Parties to implement and manage tobacco control programmes. Article 11 of the FCTC requires Parties to adopt and implement effective measures in respect of the packaging and labelling of tobacco products, including health warnings and other appropriate messages. Further, Article 13(2) obliges each Party “in accordance with its constitution or constitutional principles, [to] undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.” Under the FCTC, tobacco advertising and promotion means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.

In addition, the Guidelines for the implementation of Articles 11 and 13, adopted by the Conference of the Parties to the FCTC in November 2008, recommend that Parties should consider adopting a suite of measures, including plain packaging, to give effect to the FCTC.<sup>6</sup>

Plain packaging of tobacco products, including the specifications and requirements set out in the Regulation, are part of the comprehensive tobacco control strategy recommended by the Taskforce in 2009 and in the FCTC implementation guidelines. The implementation of a wide-ranging set of measures, including plain packaging, will be critical to achieving significant reductions in smoking rates in Australia.

### Right to health

The plain packaging legislation, including the Regulation, engages the right to health in Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The right to health includes, in Article 12(1)(c), the right to the prevention, treatment and control of diseases. The Committee on Economic, Social and Cultural Rights considers that this “requires the establishment of prevention and education programmes for behaviour-related health concerns... and the promotion of social determinants of good health”.

The plain packaging legislation, including the Regulation, promotes the right to health by aiming, as part of a comprehensive suite of tobacco control measures, to contribute to efforts to reduce smoking rates and thereby reduce the significant health and economic effects of tobacco usage.

As outlined above in the discussion of the right to freedom of expression, the devastating effects of tobacco usage are clear, and the research evidence in support of plain packaging is well documented. The research shows that advertising on tobacco packaging, including industry branding and packaging design, can mislead about the relative safety of the product, reduce the effectiveness of graphic health warnings on tobacco products, and increase the appeal of tobacco to young people.

Plain packaging will prohibit the use of tobacco company logos, symbols, and other images on tobacco retail packaging that may have the effect of advertising or promoting tobacco products. By removing one of the last forms of tobacco advertising

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<sup>6</sup> WHO Framework Convention on Tobacco Control: Guidelines for Implementation (May 2011), p 59 and 95-96, available at: [http://www.who.int/fctc/protocol/guidelines/adopted/guidel\\_2011/en/index.html](http://www.who.int/fctc/protocol/guidelines/adopted/guidel_2011/en/index.html).

in Australia, the Australian Government intends that plain packaging will contribute to efforts to reduce smoking rates in Australia

**Conclusion**

The Regulation is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

**Tanya Plibersek, Minister for Health**