

2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**TRADE MARKS AMENDMENT
(TOBACCO PLAIN PACKAGING) BILL 2011**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Health and Ageing)

TRADE MARKS AMENDMENT (TOBACCO PLAIN PACKAGING) BILL 2011

OUTLINE

The *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011* (the Bill) is being introduced so, if necessary, the government can quickly remedy any unintended interaction between the *Tobacco Plain Packaging Act 2011* (the Plain Packaging Act) and the *Trade Marks Act 1995* (the Trade Marks Act). The objective of any such exercise of power under the Bill will be to ensure that applicants for trade mark registration and registered owners of trade marks are not disadvantaged by the practical operation of the Plain Packaging Act.

The Australian Government is implementing a comprehensive suite of reforms to reduce smoking and its harmful effects. As part of these reforms the Government committed to introduce legislation to require plain packaging of tobacco products, to remove one of the last remaining frontiers for tobacco advertising.

The Plain Packaging Act will prevent tobacco advertising and promotion on tobacco products and tobacco product packaging in order to:

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

The Plain Packaging Act prevents a trade mark from being placed on tobacco products or their retail packaging, so as to prevent trade marks from being used as design features to detract attention from health warnings or otherwise to promote the use of tobacco products. However, section 28 of the Plain Packaging Act deals with the operation of that Act and the Trade Marks Act, in a way that is intended to ensure that the operation of the Plain Packaging Act will not affect trade mark owners' ability to protect their trade marks from use by other persons, and to register and maintain the registration of a trade mark. Owners of trade marks in relation to tobacco products will be able to use their trade marks, other than on retail packaging and the products themselves, in ways that do not contravene the *Tobacco Advertising Prohibition Act 1992* or other laws, for example on business correspondence.

To ensure that this intention is achieved, the proposed Bill will insert a new section 231A to allow regulations to be made under the Trade Marks Act in relation to the effect of the operation of the Plain Packaging Act and regulations made under that Act on (a) a provision of the Trade Marks Act or (b) of a regulation made under that Act.

Regulations made under new section 231A are not intended to have any effect on the operation of the Trade Marks Act in relation to goods or services not governed by the Plain Packaging Act.

Financial Impact Statement

It is not expected that the proposed Bill will have any significant financial impact.

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NOTES ON CLAUSES

Clause 1 – Short Title

This clause provides that the Bill, once enacted, may be cited as the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*.

Clause 2 – Commencement

This clause provides, in a table, that sections 1-3 of the Act will commence the day the Act receives Royal Assent. The table also provides that Schedule 1 to the Act commences at the same time as section 28 of the Plain Packaging Act on 1 January 2012. If the Plain Packaging Act does not commence, the provisions in Schedule 1 do not commence at all.

Clause 3 – Schedule(s)

This clause provides that each Act that is specified in the Schedule is amended or repealed as set out in the applicable items in the Schedule, and any other item in a Schedule to the Bill will, once enacted, have effect according to its terms. The only Act specified in the Schedule is the Trade Marks Act.

SCHEDULE 1 — AMENDMENT OF THE TRADE MARKS ACT 1995

Item 1

This item of Schedule 1 adds a note to the end of subsection 231(2) of the Trade Marks Act.

Section 231(2) of the Trade Marks Act confers power to make regulations in relation to a number of matters. The proposed note states that regulations in relation to the Plain Packaging Act can also be made under a new section 231A.

Item 2

This item provides that new section 231A is added at the end of Division 3 of Part 21 of the Trade Marks Act providing that regulations may make provision in relation to the Plain Packaging Act. The new section provides that regulations made under the Trade Marks Act may make provision in relation to the effect of the operation of the Plain Packaging Act, and the regulations made under that Act, on the Trade Marks Act and the *Trade Marks Regulations 1995*.

Regulations made under new section 231A are not intended to have any effect on the operation of the Trade Marks Act and Regulations in relation to goods or services not governed by the Plain Packaging Act and its regulations.

New subsection 231A(1) of the Trade Marks Act will provide for the making of regulations under the Trade Marks Act, to govern the effect of the operation of the Plain Packaging Act and regulations made under that Act, on the Trade Marks Act, and the Trade Mark Regulations.

New subsection 231A(2) of the Trade Marks Act illustrates, but does not limit, the scope of the regulations that may be made under new subsection 231A(1). In particular, it provides that the regulations may clarify or state the effect of both the Plain Packaging Act and regulations made under that Act on the Trade Marks Act and the Trade Marks Regulations.

New subsection 231A(3) of the Trade Marks Act provides that the regulations made under new subsection 213A(1) may be inconsistent with that Act and Trade Mark Regulations. Regulation made under new section 231A prevail over provisions in the Trade Marks Act (and other regulations or instruments made under that Act) to the extent of the inconsistency. There is an equivalent provision in subsection 189A(3) of the Trade Marks Act. Section 189A authorises the making of regulations to give effect to the *Madrid Protocol Relating to the Madrid Agreement concerning the International Registration of Marks (Madrid Protocol)*. Allowing such regulations to be inconsistent with, and prevail over, the Trade Marks Act ensures that Australia can comply with its obligations under the Madrid Protocol. Regulations under section 189A may, for example, provide that provisions of the Trade Marks Act apply in modified form to matters covered by the Madrid Protocol. To ensure that the regulations under the proposed section 231A can affect the operation of such provisions, new subsection 231A(3) also provides that regulations under section 231A may be inconsistent with and prevail over the Act.