

Inquiry into Tobacco Plain Packaging

Referral

1.1 On 6 July 2011, the Minister for Health and Ageing, The Hon Nicola Roxon MP introduced the following bills in the House of Representatives:

- Tobacco Plain Packaging Bill 2011; and
- Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011.

1.2 The purpose of the Tobacco Plain Packaging Bill 2011 is to improve health outcomes for Australians by reducing use, of and exposure to, tobacco products by removing one of the last forms of tobacco advertising. As outlined in the explanatory memorandum:

The Bill will make it an offence to sell, supply, purchase, package or manufacture tobacco products or packaging for retail sale, that are not compliant with plain packaging requirements.¹

1.3 As the Tobacco Plain Packaging Bill 2011 includes restrictions on the use of trade marks on tobacco products and the retail packaging of those products, the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 was introduced on the same date to complement the main bill. In her second reading speech, the Minister for Health and Ageing explained:

This bill amends the Trade Marks Act to allow regulations to be made in relation to the operation of the Tobacco Plain Packaging Bill 2011. The objective of any such regulations would be to ensure that the practical operation of the Tobacco Plain Packaging Bill 2011 does not prevent businesses from registering new trade

1 Tobacco Plain Packaging Bill 2011, Explanatory Memorandum, p 3.

marks, or from protecting registered trade marks against infringement.²

- 1.4 On 7 July 2011 the House of Representatives Selection Committee referred both bills to the Standing Committee on Health and Ageing (the Committee) for inquiry.

Context of the inquiry

- 1.5 While most forms of tobacco advertising have already been banned in Australia through the *Tobacco Advertising Prohibition Act 1992*, words, signs and symbols on tobacco products and packaging are currently exceptions to the definition of 'tobacco advertising' in the legislation.
- 1.6 In August 2009 Senator Steve Fielding introduced a Private Senator's Bill seeking to amend product information standards to remove brands, trade marks, and logos from tobacco packaging. In November 2009 Senator Fielding's Bill was referred to the Senate Community Affairs Legislation Committee which received 58 submissions. However, following prorogation of the 42nd Parliament in July 2010, and after due consideration, the Senate Committee chose not to continue its inquiry into the bill.³
- 1.7 In April 2010, responding to the recommendations made by the National Preventative Health Taskforce in late 2009, the Australian Government announced a comprehensive anti-smoking action package.⁴ The package aims to reduce Australia's smoking rate to 10 per cent by 2018 and to halve the rate of smoking among Indigenous Australians over time in line with targets set by the Council of Australian Governments' (COAG) National Healthcare Agreement. As part of a wider suite of reforms which includes increasing tobacco excise, restricting internet advertising of tobacco and additional funding for anti-smoking social marketing, the Australian Government announced its intention to introduce legislation to mandate plain packaging for tobacco products.
- 1.8 Prior to introducing tobacco plain packaging legislation, the Australian Government committed to consult broadly. The consultation process was

2 House of Representatives Debate, 6 July 2011, p 7712.

3 Senate Community Affairs Legislation Committee, *Final Report Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*.

4 Anti-smoking action at: <http://www.alporg.au/federal-government/news/anti-smoking-action/>, viewed on 8 August 2011.

administered by the Department of Health and Ageing (DoHA). It comprised targeted consultations with representatives of the tobacco industry (manufacturers, importers and retailers), and wider consultation open to all stakeholders between 7 April 2011 and 6 June 2011. This allowed 60 days for interested parties to comment on an exposure draft of the bill which was made available along with a consultation paper. The consultation received 266 submissions from a range of stakeholders, including public health organisations, non-government organisations, the tobacco industry, and interested individuals.⁵

1.9 During the consultation DoHA met with representatives of the tobacco industry on a number of occasions to discuss issues of concern.⁶ DoHA also met with a number of retail organisations including the Council of Small Business Organisations of Australia, the Australian Newsagents Association, the Master Grocers Association, the Service Station Owners Association, Tobacco Station Group, the National Independent Retailers Association, and the two major supermarket chains, Coles and Woolworths.⁷

1.10 The explanatory memorandum summarises the outcome of the DoHA's consultation as follows:

There was strong support for the Bill amongst the public health and non-government organisations, including endorsement of the view that the proposed plain packaging legislation was necessary for the government to meet its commitment to Article 13 of the WHO FCTC [World Health Organisation Framework Convention on Tobacco Control], and the guidelines issued by the Conference of the Parties. Some submissions opposing the Bill claimed a perceived inadequacy of evidence to justify the plain packaging measure; a potential for detrimental impact on the tobacco industry and retailers; and the potential for the Bill to be in breach of national trade mark and intellectual property rights as well as international law obligations.⁸

1.11 The explanatory memorandum indicates that a relatively small number of submissions made specific suggestions for changes to the exposure draft of the legislation. One issue raised during the consultation related to the

5 Australian Government Department of Health and Ageing at: <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/plainpack-tobacco>, viewed on 5 August 2011.

6 Mr Simon Cotterell, Transcript of Evidence, 4 August 2011, p 29.

7 Mr Simon Cotterell, Transcript of Evidence, 4 August 2011, pp 29-30.

8 Tobacco Plain Packaging Bill 2011, Explanatory Memorandum, p 3.

importation of tobacco products packaged outside of Australia in non-compliant packaging. Provisions in the exposure draft which would have prohibited this importation were modified to allow importers to repackage goods into compliant packaging once they are received in Australia.⁹

Conduct of the inquiry

- 1.12 Following referral of the two bills to the Committee on 7 July 2011, the inquiry was promoted on the Committee's webpage and through a media release sent to a distribution list administered by the House of Representatives' International and Community Relations Office. On 13 July 2011 an advertisement was placed in *The Australian* inviting submissions from organisations and interested individuals. The Committee agreed to a closing date for submissions of 22 July 2011.
- 1.13 The inquiry received 63 submissions and 18 exhibits. The inquiry also received other evidentiary material. This material included almost 1000 near identical e-mails opposing the legislation from small retailers. There were three variants of the e-mail, referred to as form letters 1, 2 or 3. The Committee also received two variants of very similar correspondence, referred to as template letters 1 or 2 that appear to have been written based on a set of dot points. Template letter 1, opposing the legislation, was submitted by five individuals. Template letter 2, supporting the legislation, was submitted by 12 individuals or organisations. Additional information received on the issue of tobacco plain packaging included documents that had been prepared for the Senate Community Affairs Legislation Committee's inquiry in the previous Parliament and DoHA's consultation on exposure draft legislation.
- 1.14 The Committee held a public hearing with representatives from British American Tobacco, the Australian National Preventive Health Agency, the Cancer Council Australia, National Heart Foundation and Quit Victoria (appearing together), and the Department of Health and Ageing. The hearing was held on 4 August 2011 (See Appendix C) and focussed on the health related aspects of the bills.

9 Tobacco Plain Packaging Bill 2011, Explanatory Memorandum, p 3.

Tobacco Plain Packaging Bill 2011

1.15 According the explanatory memorandum the rationale for the adoption of plain packaging of tobacco products is that it:

... 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 and its 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.¹⁰

1.16 The Bill is set out in six Chapters.

- Chapter 1 sets out preliminary matters including commencement dates, objects of the Act, definitions, application of the Act to external Territories and the Crown, interactions with State and Territory laws, and Constitutional provisions.
- Chapter 2 creates the regime that mandates the requirements relating to plain packaging of tobacco products. It permits regulations prescribing plain packaging requirements and conditions for the appearance of tobacco products to be made.
- Chapter 3 sets out the offences and civil penalty provisions that will apply to conduct involving non-compliant packaging and tobacco products.
- Chapter 4 creates the powers of authorised officers to investigate contraventions of the Bill, including search and seizure provisions.
- Chapter 5 creates civil penalty and infringement notice regimes, which are designed to encourage compliance with the requirements of the legislation.
- Chapter 6 includes miscellaneous provisions, and creates the power by which the Governor-General, on advice from the Government, may make regulations to give effect to the legislation.¹¹

¹⁰ Tobacco Plain Packaging Bill 2011, Explanatory Memorandum, p 1.

Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011

- 1.17 The objective of the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 is to ensure that the practical operation of the Tobacco Plain Packaging Bill 2011 does not prevent businesses from protecting registered trade marks against infringement or from registering new trade marks. The explanatory memorandum specifically states:

The Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 ... 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.¹²

- 1.18 In effect this means that owners of trade marks relating 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, owners will still be able to sue trade marks on business correspondence.

Evidence

- 1.19 Evidence to the inquiry was starkly divided into those expressing strong support for the proposed legislation and those expressing strong opposition. Most submissions provided either broad ‘in principle’ support¹³ or opposition¹⁴ for the legislation, rather than commenting on specific provisions contained within the bills.

11 Australian Government Department of Health and Ageing, *Tobacco Plain Packaging Bill 2011 – Exposure Draft – Consultation Paper*, p 9.

12 Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011, Explanatory Memorandum, p 1.

13 See for example: NSW Department of Health & Cancer Institute NSW, Submission No 47; Action on Smoking and Health Australia, Submission No 48; Consumers Health Forum of Australia, Submission No 60; Australian National Preventive Health Agency, Submission No 61; Public Health Association of Australia, Submission No 62.

14 See for example: National Foreign Trade Council Inc, Submission No 10; Alliance of Australian Retailers Pty Ltd, Submission No 19; The CTC Group, Submission No 22; Imperial Tobacco

- 1.20 Support for the legislation came largely from government and non-government organisations operating within the health sector, and other public health advocates. In summary the rationale for support was based on the understanding that plain packaging will:
- reduce the appeal of tobacco products, particularly for younger or new smokers;
 - increase the visibility and impact of health warning on packaging; and
 - reduce the scope for confusion on the harmfulness of tobacco use.
- 1.21 Opposition to plain packaging came primarily, though not exclusively, from tobacco manufacturers, importers of tobacco products, and retailers. In summary the rationale for opposition is based on the following:
- that there is insufficient evidence to indicate that the health benefits will be achieved as a result of plain packaging;
 - that there will be negative impacts on manufacturers, importers and retailers of tobacco products; and
 - legal objections associated with intellectual property.
- 1.22 The Committee considers these main issues below, noting that as a Committee responsible for investigating issues related to health and/or ageing, that the focus of its inquiry is on the health related aspects of the proposed legislation.

Health issues

Evidence base

- 1.23 While there was no dispute among witnesses and submitters about the damaging health impacts of tobacco use, there was some disagreement about the efficacy of tobacco plain packaging as a measure to reduce tobacco use. Supporters of the legislation stated that there is sound evidence to suggest that tobacco plain packaging will have positive health impacts by reducing tobacco use among adults, and by reducing initiation of tobacco use, particularly among young people. Many of those opposing the legislation argued that this is not the case.¹⁵ In summary, the evidence base used to support a move to tobacco plain packaging was questioned by the tobacco industry, and supported by public health advocates.

Australia Limited, Submission No 51; British American Tobacco Australia Limited, Submission No 53.

15 Mr Matthew Landau, Submission No 5, p 1; Mr John McGarry, Submission No 8, p 1.

- 1.24 Mr David Crow of British American Tobacco Australia criticised the research that had been done on tobacco plain packaging, suggesting it had been ‘very limited in its scope’¹⁶ and that there were more effective ways of reducing tobacco use. He pointed to the 25 per cent increase in tobacco excise implemented in the 2010-2011 budget¹⁷ and suggested that anti-smoking education measures should be increased as a more effective way of reducing the smoking rate.¹⁸
- 1.25 The claim that the evidence base is insufficient was refuted by Mr Maurice Swanson of The Heart Foundation Western Australia. He noted at the Committee’s public hearing, that there was sufficient evidence from peer reviewed and other published studies to support tobacco plain packaging as an effective measure to reduce tobacco use.¹⁹
- 1.26 The Committee was provided with evidence from multiple witnesses and submitters that showed a less favourable response by consumers to tobacco products presented in plain packaging when compared with branded packaging.²⁰
- 1.27 Ms Michelle Scollo of Quit Victoria expanded on this point noting there was ‘a strong body of evidence’²¹ overall, including approximately 30 rigorous experimental studies that had been conducted specifically on the influence of tobacco packaging.²² Ms Scollo reported that all of these studies had concluded that the packaging of cigarettes was an important marketing device for cigarette manufacturers, and that a reduction in branding had made cigarettes less attractive, and had increased the power of graphic health warnings.²³
- 1.28 In responding to criticism of the evidence base, Professor Ian Olver of the Cancer Council agreed that there was sufficient research to support the implementation of tobacco plain packaging, and that in his view implementation in Australia would itself establish more evidence to show the rest of the world that plain packaging is an effective tobacco control measure.²⁴ This point of view was supported by the Canadian Cancer
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16 Mr David Crow, Transcript of Evidence, 4 August 2011, p 3.

17 Mr David Crow, Transcript of Evidence, 4 August 2011, p 5.

18 Mr David Crow, Transcript of Evidence, 4 August 2011, p 5.

19 Mr Maurice Swanson, Transcript of Evidence, 4 August 2011, p 18.

20 Dr Lisa Studdert, Transcript of Evidence, 4 August 2011, p 14; Australian Council on Smoking and Health, Submission No 39, p 2.

21 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 22.

22 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 21.

23 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 22.

24 Professor Ian Olver, Transcript of Evidence, 4 August 2011, p 22.

Society, which identified Australia as a potential role model for other countries considering the introduction of tobacco plain packaging.²⁵

- 1.29 Several submitters who did not support the introduction of plain packaging believed that there would be no health benefits at all, some claiming that it would have unintended health consequences, leading to an increase in smoking, or an increase in medical problems due to the consumption of illegal and unregulated tobacco products.²⁶ Some submitters also suggested that plain packaging would make it easier for tobacco products to be counterfeited,²⁷ and that increasing cigarette prices would be a more effective mechanism to reduce the smoking rate.²⁸ It was also argued that plain packaging would force manufacturers to compete on price, rather than brand,²⁹ with the unintended consequence of reducing the price of tobacco products:

Moreover, in promoting the plain-packaging proposal, the [Department of Health and Ageing] Consultation Paper fails to look at its impact on prices of tobacco products. Price is regarded as the single-most-important determinant of smoking behavior [sic], with higher prices leading to substantial reductions in smoking rates. By removing the only non-price factor that brands can use to inform customers and to compete, the only remaining form of competition will be price. Lower prices have long been shown to increase smoking rates. While Australia has significant taxes on tobacco, there are still substantial price differentials between branded and generic cigarettes in Australia's market. By removing trade marks and all other brand imagery and information from the packs, price competition is expected to intensify, which would likely increase tobacco consumption, especially by youth.

In sum, Australia's health justification for plain packaging is not supported by actual evidence and seems more likely to cause an increase in smoking rates, not a reduction.³⁰

- 1.30 Mr Swanson, who had expressed the view that the evidence base was sufficient to implement tobacco plain packaging legislation, noted the

25 Canadian Cancer Society, Submission No 63, p 3.

26 Mr John McGarry, Submission No 8, p 1.

27 Mr Graham Rodgers, Submission No, 18, p 1; International Trademark Association, Submission No 35, p 2; Amcor Ltd, Submission No 42, pp 9-15.

28 Mr John McGarry, Submission No 8, p 1.

29 Property Rights Alliance, Submission No 27, p 2.

30 Emergency Committee for American Trade, Submission No 9, p 4.

strong resistance to the proposal was inconsistent with the position held by major tobacco manufacturers that plain packaging would be an ineffective measure in reducing the smoking rate.³¹

- 1.31 The Committee asked representatives from DoHA whether the department was satisfied that sufficient evidence had been established to support tobacco plain packaging and was informed:

We absolutely have sufficient public health evidence to go forward with this legislation. This is as good a set of public health evidence as you get for preventative health measures.³²

Australia and tobacco control measures

- 1.32 Several witnesses and submitters advised the Committee that Australia was considered one of the world leaders in tobacco control,³³ and that Australia was amongst the first countries to implement innovations such as graphic health warnings.³⁴
- 1.33 The Australian National Preventive Health Agency reported to the Committee that Australian tobacco control measures had been replicated overseas, and that Australian made anti-smoking television commercials had been sold overseas.³⁵ The Committee was also informed that the actual images used on graphic health warnings on individual cigarette packages had also been used as tobacco control measures by foreign governments.³⁶

The role and impact of tobacco packaging

- 1.34 The Committee heard from witnesses and submitters that branded packs detract from the graphic health warnings currently displayed on packaging.³⁷ While the scientific basis behind this assertion was disputed by one submitter,³⁸ The Australian National Preventive Health Agency noted that health warnings were more salient on plain packaged cigarette

31 Mr Maurice Swanson, Transcript of Evidence, 4 August 2011, p 18.

32 Mr Simon Cotterell, Transcript of Evidence, 4 August 2011, p 31.

33 Mr Nathan Smyth, Transcript of Evidence, 4 August 2011, p 32; Australian Medical Association, Submission No 2, p 2; Deakin University, La Trobe University, Monash University & The University of Melbourne, Submission No 23, p 1.

34 Mr Simon Cotterell, Transcript of Evidence, 4 August 2011, p 32.

35 Mr Jack Quinane, Transcript of Evidence, 4 August 2011, p 14.

36 Mr Simon Cotterell, Transcript of Evidence, 4 August 2011, p 32.

37 Australian Medical Association, Submission No 2, p 4.

38 Democracy Institute, Submission No 34, p 64.

packages.³⁹ Professor Olver reported that some tobacco companies had even changed pack colours to blunt the visual effect of graphical health warnings.⁴⁰

- 1.35 The Australian National Preventive Health Agency noted that tobacco control measures had been implemented steadily and progressively in Australia over the years, and that the roll out of plain packaging was a natural continuation of these measures.⁴¹
- 1.36 Several witnesses and submitters observed that branding and packaging on cigarette packages was the last remaining marketing opportunity open to tobacco companies,⁴² and that after the introduction of graphic health warnings on cigarette packs, that manufacturers had become even more creative in using their packaging to make their product more attractive to consumers.⁴³ It was also noted by the Australian National Preventive Health Agency that these new packaging features had been carefully planned and market tested.⁴⁴
- 1.37 Ms Michelle Scollo of Quit Victoria reported that it was clear from the changes in packaging that companies no longer just used packaging to allow for distinction between brands, but to promote an image and lifestyle, and to appeal to different sectors of the community,⁴⁵ a point supported by the Australian Medical Association.⁴⁶ The Committee saw the vast array of packaging currently used by tobacco manufacturers in Australia, ranging from slimline, pastel coloured packs and cigarettes branded to appeal to young women, to masculine cigarette tins aimed at young men.

Non-health issues

Retail concerns

- 1.38 Several submissions discussed the impact on tobacco plain packaging on the tobacco industry, including cigarette manufacturers, importers of

39 Dr Lisa Studdert, Transcript of Evidence, 4 August 2011, p 15.

40 Professor Ian Olver, Transcript of Evidence, 4 August 2011, p 24.

41 Dr Lisa Studdert, Transcript of Evidence, 4 August 2011, p 13.

42 Dr Lisa Studdert, Transcript of Evidence, 4 August 2011, p 14.

43 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 19; Mr Shane Butler, Submission No 1, p 1; The Benevolent Society, Submission No 21, p 1.

44 Dr Lisa Studdert, Transcript of Evidence, 4 August 2011, p 13.

45 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 20; Curtin University, Submission No 45, p 1.

46 Australian Medical Association, Submission No 2, p 3.

tobacco products, and retailers that sell tobacco products. By far the largest number of submissions received, were from small business people operating in the retail sector⁴⁷ or bodies representing these small businesses.⁴⁸ While many expressed doubts about the effectiveness of plain packaging as a deterrent, without exception small retailers considered that plain packaging would have negative consequences for their businesses. This comment is typical of those received from retailers:

There is absolutely no evidence that the proposed legislation will reduce smoking. What the legislation will achieve however, is reduced productivity and additional expense to small business, at a time when this sector can least afford it.⁴⁹

1.39 The main issues raised in submissions from this sector were summarised in the form letter sent by over 400 retailers:

- impeding my ability to serve my customers quickly, causing unnecessary confusion for my retail staff ;
- causing delays in service time and inconvenience for my customers;
- driving my customers away to the large supermarket chains;
- making managing stock more needlessly difficult and time consuming which is lost time I cannot afford; and
- further increasing the trade in illicit tobacco as plain packets will be easier to counterfeit, increasing the risk of teenagers getting hold of cheap, illegal cigarettes.⁵⁰

The illicit tobacco market

1.40 The Committee heard conflicting evidence over the percentage of illicit tobacco consumed in Australia. British American Tobacco informed the Committee that they had commissioned a report in conjunction with the other major tobacco manufacturers from Deloitte Consulting that found

47 Mr Gilbert Belleli, Submission No 14, p 1; Caltex Coober Pedy, Submission No, 24, p 1; Mr Keith Spicer, Submission No 25; FREECHOICE Stores Tobacconist (Wendouree), Submission No 27; Cathy, Submission No 37.

48 Master Grocers Association, Submission No 3; Service Station Association Pty Ltd, Submission No 16; Alliance of Australian Retailers Pty Ltd, Submission No 19; National Association of Retail Grocers of Australia Pty Ltd, Submission No 20; The CTC Group, Submission No 22; Australasian Association of Convenience Stores, Submission No 29; Australian Retailers Association, Submission No 31; Australian Newsagents' Federation Ltd, Submission No 41; TSG Franchise Management Pty Ltd, Submission No 43; Convenience and Mixed Business Association Inc, Submission No 57.

49 G J Sandercock Pty Ltd, Submission No 11, p 1.

50 Form Letter 1, p 1; Similar concerns were also raised by APCO Service Stations Pty Ltd, Submission No 6.

that almost 16 per cent of tobacco consumed in Australia was illicit, either as unbranded or counterfeit cigarettes or loose leaf tobacco.⁵¹

- 1.41 This figure was disputed by both DoHA, and Quit Victoria. DoHA noted the Australian Government's own 2010 National Drug Strategy Household Survey found the figure closer to 3 per cent of illicit tobacco consumption per annum, with Quit Victoria suggesting the figure provided by British American Tobacco was 'a major overestimate'.⁵² Ms Scollo reported the survey's finding that 20 per cent of smokers had tried illicit tobacco, and that 80 per cent of those who had tried illicit tobacco had never used it again.⁵³ Further, she reported that the 3 per cent figure was consistent with previous findings, and that there had been no significant increase in illicit tobacco consumption in recent years.⁵⁴ Professor Olver agreed that the 16 per cent figure was an overestimate, observing that for consumption of illegal tobacco to be that high, Australia's borders would have to be 'incredibly porous', suggesting a level of corruption and ineptitude on the part of agencies responsible for border protection and law enforcement that he considered unlikely to be the case.⁵⁵

Intellectual property and trade marks

- 1.42 The tobacco industry and several overseas-based organisations raised intellectual property concerns, querying the legality of the legislation⁵⁶, suggesting compensation would have to be provided to tobacco manufacturers who were unable to use their trade marks on packaging.
- 1.43 The same witnesses suggested the bills were inconsistent with Australia's international obligations and were also contrary to Australia's domestic intellectual property policies. It was suggested that the proposed

51 Mr David Crow, Transcript of Evidence, 4 August 2011, p 5.

52 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 26.

53 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 26.

54 Ms Michelle Scollo, Transcript of Evidence, 4 August 2011, p 26.

55 Professor Ian Olver, Transcript of Evidence, 4 August 2011, p 17.

56 National Foreign Trade Council Inc, Submission No 10, pp 2-3; Brazilian Intellectual Property Association, Submission No 32, p 2; Government of Nicaragua, Submission No 33; Democracy Institute, Submission No 34; International Trademark Association, Submission No 35, pp 3-4; United States Chamber of Commerce, Submission No 36; International Chamber of Commerce, Submission No 38; Government of Indonesia, Submission No 56; Government of Mexico, Submission No 58.

legislation may be in breach of several international conventions⁵⁷ and bilateral agreements to which Australia is a party, including:

- The World Trade Organisation Agreement on Trade-Related Aspects of International Property Rights (TRIPS);
- the Paris Convention for the Protection of Industrial Property;⁵⁸
- the Agreement on Technical Barriers to Trade (TBT);⁵⁹
- Free Trade Agreements to which Australia is a party; and
- bilateral investment treaties.⁶⁰

1.44 These assertions were disputed by representatives of the University of Melbourne, who argued that the legislation was consistent with Australian obligations under the General Agreement on Tariffs and Trade, TRIPS, and the TBT.⁶¹

1.45 Some submitters also argued that the bills were unconstitutional as they were perceived to represent an unreasonable acquisition of property in contravention of Section 51(xxxi) of The Constitution⁶² which reads:

51. The Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: -

(xxxi) 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.⁶³

1.46 Submitters suggested that were a court to find that the government had acquired the trade marks of tobacco companies on terms that were not just, that it would have to pay compensation to these companies to account for this acquisition.⁶⁴

57 AIPPI Australia Inc, Submission No 46; National Association of Manufacturers, Submission No 7, p 1.

58 Imperial Tobacco Australia Limited, Submission No 51, p 19.

59 Imperial Tobacco Australia Limited, Submission No 51, p 25.

60 Imperial Tobacco Australia Limited, Submission No 51, p 27.

61 The University of Melbourne, Submission No 30.

62 Imperial Tobacco Australia Limited, Submission No 51, p 29.

63 The Constitution, s 51 (xxxi).

64 International Trademark Association, Submission No 35, p 1.

The cigar industry

- 1.47 Several submitters involved in the importation and sales of hand rolled cigars suggested that plain packaging would damage the industry far more than it would impact on the cigarette industry, and that there were significant differences between cigar and cigarette use.
- 1.48 The Scandinavian Tobacco Group Australia advised that all cigars sold in Australia were imported, and equated to less than 0.3 per cent of annual cigarette sales by volume.⁶⁵ The Group also noted the differences between the average cigar and cigarette user, stating that the average cigar user is a middle aged male in a higher socioeconomic bracket, who occasionally smoked, rather than smoking regularly.⁶⁶ This was also supported by the European Cigar Manufacturers Association.⁶⁷
- 1.49 The Pacific Cigar Company noted that unlike cigarettes, cigars were packed in many different ways after manufacture overseas, including in ceramic and glass containers,⁶⁸ and this would make it difficult to present products in plain packaging under the legislation.
- 1.50 It also noted the key differences between the purchase and consumption of cigars and cigarettes:
- It should also be noted that the majority of Cuban handmade long filler cigars are sold individually and not per box. This is analogous to a vintage wine buyer buying an exclusive wine to enjoy as an occasional treat not as part of a staple diet.
- This kind of buyer is making an informed decision on the product they are consuming, rather than a cigarette smoker purchasing a product as part of a sustained habit giving rise to the significant social and health consequences the Commonwealth Government is aiming to curb.
- Globally, a handmade long filler Cuban cigar buyer is an educated sporadic buyer who is not engaged or captured by the marketing involved in cigarette sales campaigns.⁶⁹
- 1.51 The legislation would also require the removal of branding from individual cigarettes and cigars, including the ring on a cigar that denotes the brand and is also used to hold the product together. Mr Ray Battistella

65 Scandinavian Tobacco Group Australia Pty Ltd, Submission No 17, p 1.

66 Scandinavian Tobacco Group Australia Pty Ltd, Submission No 17, p 2.

67 European Cigar Manufacturers Association, Submission No 55, p 1.

68 Pacific Cigar Company (Australia) Pty Ltd, Submission No 49, p 19.

69 Pacific Cigar Company (Australia) Pty Ltd, Submission No 49, p 16.

of Cigarworld Australia agreed with other submitters that the majority of cigar sales were of single cigars, and suggested that the bill would make it impossible for consumers make an informed choice between single cigars if the removal of the cigar ring was required under the legislation.⁷⁰

Personal freedom

- 1.52 Some individuals also made submissions to the inquiry criticising what they called a 'nanny state' approach to tobacco control – reducing the freedom of choice, making people feel like criminals when engaging in a legitimate activity⁷¹ and as illustrated by the following comment:

It is a gross invasion of peoples' rights to be forced to plain packaging. Users of the products are 18 or older therefore considered adult, therefore they know the consequences of smoking to their health and environment, why should they have their choices of using a totally legal product seriously reduced.⁷²

Committee comment on tobacco plain packaging legislation

- 1.53 Australia has shown itself to be a world leader in the field of tobacco control through the progressive and methodical adoption of anti-smoking measures and initiatives that have sought to ameliorate the harmful effects of tobacco on health. The Committee notes a recent Organisation for Economic Co-operation and Development (OECD) report which makes the following observation:

The proportion of daily smokers among adults has shown a marked decline over the past two decades in most OECD countries. Australia provides an example of a country that has achieved remarkable progress in reducing tobacco consumption, cutting by half the percentage of adults who smoke daily (from 35.4% in 1983 to 16.6% in 2007). The smoking rate among adults in Australia is now one of the lowest in OECD countries, behind a small group of countries including Sweden, Iceland, the United States and Canada. Much of this decline in Australia and in other countries can be attributed to policies aimed at reducing tobacco consumption through public awareness campaigns, advertising bans and increased taxation.⁷³

70 Cigarworld Australia, Submission No 28, p 1.

71 Mr Peter Loney, Submission No 4, p 1.

72 Edens Landing News, Submission No 13, p 1.

73 OECD Health Data 2011 – Country Notes.

- 1.54 It is of the utmost importance that Australia continues to innovate in the field of tobacco control to further reduce its smoking rates in accordance with agreed COAG targets.⁷⁴ The Committee notes that tobacco plain packaging is one part of a suite of measures to reduce the smoking rate, and that multiple witnesses and submitters stated that the most effective anti-smoking initiatives were always multi-faceted.
- 1.55 The Committee is also aware that there is a history of multi-partisan support for tobacco control measures in Australia, as articulated in the submission from the Cancer Council and others:
- This multi-partisan support [for plain packaging] is a continuation of Australia's long and proud history of both Labor and Coalition governments, with respective Opposition support, introducing public policies that put community health before tobacco industry interests.⁷⁵
- 1.56 In its deliberations, the Committee did not view plain packaging as an isolated measure, instead viewing the initiative as part of a range of interventions to reduce tobacco use and its harmful effects. Plain packaging of tobacco products is not a 'silver bullet' to reduce the smoking rate. Rather the Committee understands that it is a measure that will work in concert with other measures, such as an increase in tobacco excise, broader indoor and outdoor smoking bans, the availability of nicotine replacement therapies through the Pharmaceutical Benefits Scheme and continued education about the harmful effects of tobacco use.
- 1.57 The Committee believes the evidence base as outlined by witnesses and submitters is sufficient for the initiative to proceed. The Committee considers that criticisms of the evidence base in submissions and the Committee's public hearing were insubstantial and, on the whole, superficial. Notably, the fact that plain packaging has not been introduced in other countries should not function as a deterrent to passage of the legislation. Rather it demonstrates Australia's willingness to take the lead in tobacco control, a role that Australia has taken in the past.
- 1.58 It is abundantly clear that packaging plays a significant role in the marketing of tobacco products, and that different packages are designed to appeal to different socioeconomic groups. The Public Health Association suggested that tobacco packaging may function as a 'mobile

74 Australian Government Department of Health and Ageing, Submission No 54, p 3.

75 Cancer Council of Australia, The National Heart Foundation, Quit Victoria et al, Submission No 50, p 3.

billboard for tobacco products'.⁷⁶ It is also clear that packaging has been used to detract from the impact of graphic health warnings, and that plain packaging will increase the impact of these warnings. The Committee notes that other tobacco control measures introduced by governments from both sides of politics have been resisted by the tobacco industry, employing the same arguments that are currently being employed to oppose the introduction of plain packaging of tobacco products. Research has shown that over time many of these tobacco control measures have been effective in reducing the smoking rate, and there is no reason to believe that it will not be the same in this case.

- 1.59 Some witnesses and submitters suggested that the adoption of plain packaging would lead to an increase in the consumption of illicit tobacco, which would be an unintended health consequence of the legislation. The Committee notes the vast difference between the official government figures on illicit tobacco consumption, and the commissioned research on behalf of the tobacco industry, and considers the official figures to be more reliable due to the rigour of the research undertaken. The Committee also notes the comment made by Professor Olver that a higher figure would suggest poor quality border protection and customs procedures, and notes that there is no evidence to suggest that this is the case. The Committee notes that Australia has a strong customs and quarantine regime, and that there are also a range of sophisticated anti-counterfeiting measures which could be adopted⁷⁷ to further reduce the risk of counterfeit tobacco products. Therefore, from a health perspective, the Committee does not find the argument that the legislation will lead to unintended negative health consequences to be convincing.
- 1.60 Having considered the evidence placed before the Committee, and having comprehensively examined the arguments made on matters relating to the health implications of the proposed legislation, the Committee recommends that the House of Representative pass the bills.

Recommendation 1

- 1.61 **The Committee recommends that the House of Representatives pass the *Tobacco Plain Packaging Bill 2011***

⁷⁶ Public Health Association Australia, Submission No 62, p 5.

⁷⁷ SICPA Security Solutions, Submission No 40, p 1.

Recommendation 2

- 1.62 **The Committee recommends that the House of Representatives pass the *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011***
- 1.63 While the Committee recognises that there are potential financial implications of this legislation for the tobacco industry (manufacturers, importers and retailers) and complex legal issues relating intellectual property and trade marks, it considers these issues to be beyond the purview of a Committee formed to consider matters directly related to health and/or ageing. Therefore the Committee has decided to confine its comments to evidence relating to health implications of the legislation. The Committee makes some additional comments on the process of referral of the legislation by the Selection Committee below.

Committee comment on the referral process

- 1.64 In the preceding comments the Committee has indicated that its examination of tobacco plain packaging legislation is limited to issues pertaining to directly to health. In confining its consideration to health related issues however, the Committee is aware that the most contentious aspects of the proposed legislation relate to the impact on the tobacco industry, including the retail sector, and on legal issues relating to intellectual property and trade marks. Not surprisingly therefore, a significant volume of evidence to the inquiry addressed these two issues.
- 1.65 It is in this context that the Committee seeks to comment on the process of referral of bills to committees by the House Selection Committee. In general the Committee supports the increased opportunities in the 43rd Parliament for House committees to contribute to review of legislation. However, to be fully effective the Committee believes that due consideration should be given to the reason(s) for referral of specific legislation to a particular committee.
- 1.66 In this current inquiry, while it is clear that the underlying premise of tobacco plain packaging legislation is to achieve improved health outcomes by reducing tobacco use, the contentious issues extend beyond this scope. In view of this, the Committee believes that examination of the financial and legal aspects of the tobacco plain packaging legislation would have been more appropriately referred to the House of

Representatives Standing Committee on Economics, or alternatively to a select committee specifically established to review all aspects of the legislation.

- 1.67 Furthermore, with regard to the legality of the legislation as it relates to intellectual property and trade marks, the Committee understands that these issues are likely to be considered through the legal system and subject to rulings of the courts. In these circumstances the Committee considers that it would be inappropriate for it (or indeed any other parliamentary committee) to comment further.
- 1.68 The Committee notes the Procedure Committee's recent report on the referral of bills to committees by the Selection Committee, and the report's recommendation that:
- ... standing order 222(a)(iii) be amended to remove the provision that one member of the Selection Committee is sufficient to select a bill for referral to a House or joint committee for advisory report – thereby requiring a majority decision of the Committee – and to require that the Committee provide reasons for the referral of bills to committees.⁷⁸
- 1.69 The Committee endorses the Procedure Committee's recommendation and believes that if implemented it will enhance the referral process of bills to House committees, and the utility and outcomes of these inquiries.

Steve Georganas MP
Chair

78 Standing Committee on Procedure, *Interim Report No 2: Monitoring and review of procedural changes implemented in the 43rd Parliament. Referral of bills to committees by the House Selection Committee*, June 2011, p 12.

