Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS434)

Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable To Tobacco Products and Packaging (WT/DS435, WT/DS441, WT/DS458, WT/DS467)

Information for Submission to the Panel by a Non-Party

on behalf of the

World Health Organization
and
The WHO Framework Convention on Tobacco Control Secretariat

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EXECUTIVE SUMMARY

Tobacco consumption (of all types of tobacco products) poses significant risks to human life and health and has negative social and economic implications. These consequences are common to all countries, but are particularly acute in developing countries.

Because of these consequences, tobacco control is of increasing importance to the international community. This is reflected in instruments such as the WHO Framework Convention on Tobacco Control (WHO FCTC) and its Guidelines, the 2011 Political Declaration of the High Level Meeting of the General Assembly of the United Nations on the Prevention and Control of Non-Communicable Diseases and the WHO Global Action Plan on Prevention and Control of Non-Communicable Diseases (2013 – 2020).

Plain packaging of tobacco products is one of a number of complementary tobacco control measures that work together to protect human health. Although a single tobacco control measure may be effective alone, tobacco control relies on implementation of a suite of comprehensive multisectoral measures that work together by targeting different drivers of tobacco consumption and population groups as part of a complementary regulatory scheme.

Empirical evidence from well qualified, respected and credible sources suggests that plain packaging will make restrictions on advertising and promotion, prohibitions on misleading packaging and health warnings more effective. This evidence includes experimental studies, surveys and focus group studies that have tested the impact of different forms of plain packaging in different places and yielded consistent results.

Although the primary regulatory objectives of plain packaging are to render tobacco packaging less attractive, minimize misleading packaging and increase the effectiveness of health warnings, it is rational and reasonable to expect that the prevalence of tobacco use will decline as a consequence of this measure. The impact of plain packaging on the prevalence of tobacco use cannot be assessed in a comprehensive manner shortly after implementation. Nonetheless, the official statistics to date from Australia are consistent with the broader evidence base and the conclusion that plain packaging will reduce the prevalence of tobacco use.

The WHO FCTC provides further support for these conclusions. Article 11 obliges Parties to implement effective packaging and labelling measures. Article 13 obliges Parties to undertake a comprehensive ban (or restrictions) on tobacco advertising, promotion and sponsorship. Guidelines to Articles 11 and 13 recommend that Parties implement tobacco plain packaging. These Guidelines are intended to assist Parties in implementing their obligations under the relevant provisions and, in the case of the Article 11 Guidelines, to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures. In drafting the Guidelines, working groups comprised of representatives of the Parties relied on available scientific evidence and the experience of the Parties themselves. Draft versions of the Guidelines were open for consultation with all Parties prior to their submission to the Conference of the Parties, which subsequently adopted the Guidelines by consensus.
INFORMATION FOR SUBMISSION TO THE PANEL

1. **Overview of Tobacco Control: History and Disease Burden**

   Tobacco consumption has negative health, social and economic implications. The importance of tobacco control to the international community is reflected in a number of international instruments, including the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC)\(^1\) and its Guidelines, the 2011 Political Declaration of the High Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases\(^2\) and the WHO Global Action Plan on Prevention and Control of NCDs (2013 – 2020).\(^3\)

   **1.1 Impacts of Tobacco Consumption**

   2. It is well established that tobacco consumption poses significant risks to human life and health and that nicotine, a core component of tobacco products, is addictive. Among other conditions, tobacco use causes cardio-vascular diseases such as stroke and coronary heart disease, respiratory diseases such as emphysema and chronic bronchitis, and cancers such as lung cancer.\(^4\) Globally, approximately 5.1 million adults aged 30 years and over die from direct tobacco use each year. In addition, some 603,000 people die from exposure to second-hand smoke every year.\(^5\)

   3. All tobacco products pose risks to health (even though those risks vary depending on, among other things, the tobacco product consumed and how it is consumed). For example, smoke from cigars contains the same toxic constituents as smoke from cigarettes and cigar smoking causes many of the same diseases caused by cigarette smoking.\(^6\)

   4. Tobacco consumption is also associated with substantial economic and social costs. As a preventable cause of disease, tobacco consumption places unnecessary burdens on already under-resourced health systems. Tobacco consumption has

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\(^2\) Political Declaration of the High Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases, (document A/66/L.1), para. 43(c).
negative implications for sustainable economic development as it results in the
diversion of household income from other expenditures such as food, health-care
and education. 7 Tobacco consumption also has substantial environmental
consequences, resulting in deforestation and the decline of soil fertility where
tobacco is farmed 8, and the discard of tobacco filters and other refuse. 9

5. The health, social, environmental and economic consequences of tobacco
consumption and exposure to tobacco smoke have a particularly acute impact on
developing countries. This is partly because tobacco use is more prevalent among
lower-income households 10 who bear the disproportionate burden of tobacco-
caused diseases and deaths. Lost income due to early death, high proportions of
disposable income spent to treat tobacco-attributable diseases and money spent on
tobacco use rather than other essential goods, such as food, all thwart efforts to
alleviate poverty. 11

6. The prevailing regulatory (rather than prohibitory) approach to tobacco has
evolved over time as public knowledge about the risks associated with tobacco
products has increased. Although researchers began to link tobacco consumption
with lung cancer in the late 1940’s, it was not until the United States Surgeon
General’s Report on Smoking and Health in 1964 that the risks associated with
smoking were better understood. 12 By this time, tobacco consumption was popular
and entrenched, leading governments to pursue regulatory policies less restrictive
than prohibition. These policies have also developed over time alongside
understanding of risk, tobacco industry behaviour and the effects of different
regulatory interventions.

1.2 International Efforts to Address Tobacco

7. International efforts by WHO and other actors to highlight the risks
associated with tobacco consumption and to assist WHO Member States in
addressing those risks have also evolved over time. This evolution reflects both the
regulatory environment in which tobacco companies operate and also the
increasing importance of tobacco control to public health and the international
community.

1 See generally Prabhat Jha and Frank Chaloupka (eds) Tobacco Control in Developing Countries,
Oxford University Press, (2000); Katherine Esso n and Stephen Leeder, The Millennium Development
8 Geist HJ. Global Assessment of Deforestation related to Tobacco Farming, 8 Tobacco Control, 1999,
18–28.
9 See for example, Tobacco Control, Supplement, The Environmental Burden of Cigarette Butts, May
10 WHO, 2014. Systematic review of the link between tobacco and poverty. Available at:
http://apps.who.int/iris/bitstream/10665/136001/1/9789241507820_eng.pdf?ua=1&ua=1
11 Esson KM and Leeder SR, the Millennium Development goals and Tobacco Control: an opportunity
for global partnership. WHO. 2004. Available at:
http://whqlibdoc.who.int/publications/2004/9241562870_eng.pdf?ua=1
12 Smoking and Health: Report of the Advisory Committee of the Surgeon General of the Public Health
1.2.1 World Health Assembly Resolutions

8. As far back as 1970 the World Health Assembly (WHA) issued a resolution concerning the Health Consequences of Smoking. This was one of 18 resolutions adopted on tobacco by the WHA\(^{13}\) before adoption of the WHO FCTC in 2003. These resolutions recognize the risks associated with tobacco consumption and make recommendations with respect to the means by which WHO Member States may minimize those risks. In 2013, the WHA also adopted a Global Action Plan on Prevention and Control of Noncommunicable Diseases (NCDs) (2013 – 2020), which includes a tobacco target aiming for a 30% relative reduction in prevalence of current tobacco use in persons aged 15 years and over.\(^{14}\)

1.2.2 Current Work within the UN System

9. The importance of tobacco control to the international community is also reflected in developments within the broader UN system. In 2011, the General Assembly of the UN met for only the second time in history specifically on a health issue and shaped the global agenda on non-communicable diseases. The Political Declaration of the High Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases called upon Parties to accelerate implementation of the WHO FCTC.\(^{15}\) This call was repeated by the WHA in the WHO Global Action Plan on Prevention and Control of NCDs (2013 – 2020).\(^{16}\) As members of the United Nations and the WHO, all Parties to the dispute joined the consensus in these calls for accelerated implementation of the WHO FCTC by its Parties.

10. In August 2014 the Report of the Open Working Group of the United Nations General Assembly on Sustainable Development Goals recommended inclusion of a goal to “[s]trengthen the implementation of the World Health Organization Framework Convention on Tobacco Control in all countries, as appropriate”.\(^{17}\) This report will serve as the main basis for integrating sustainable development goals into the post-2015 development agenda.

11. The United Nations (UN) Interagency Task Force on the Prevention and Control of NCDs, established by the UN Economic and Social Council in 2013, expanded the role of the UN Ad Hoc Interagency Task Force on Tobacco Control, which operated between 1999 and 2013. The Task Force coordinates the activities of the relevant UN organizations and other inter-governmental organizations to support the realization of the commitments made by Heads of State and

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\(^{15}\) Political Declaration of the High Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases, (document A/66/L.1), para. 43(c).


Government in the 2011 Political Declaration on NCDs. More than 25 Agencies of the UN system as well as outside the UN system are active participants in the work of the Task Force, including the World Trade Organization. Although the Task Force works on all aspects of NCDs, tobacco control continues to be duly addressed and prioritized.

1.3 The WHO Framework Convention on Tobacco Control

12. Following its adoption by the WHA in 2003, the WHO FCTC came into force on 28 February 2005. The Convention has 180\textsuperscript{18} Parties, making it one of the most rapidly and widely embraced treaties in the UN system. Australia, Honduras and Ukraine are Parties to the Convention and Cuba is a signatory.

13. The WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health. In the first paragraph of the preamble to the WHO FCTC the Parties express their determination “to give priority to their right to protect public health”. The preamble to the Convention also reflects the concerns of the international community with respect to tobacco consumption and the body of scientific evidence showing the risks associated with tobacco. Paragraphs 2-5 state:

Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response,

Reflecting the concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke,

Seriously concerned about the increase in the worldwide consumption and production of cigarettes and other tobacco products, particularly in developing countries, as well as about the burden this places on families, on the poor, and on national health systems,

Recognizing that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases,

14. With these concerns in mind, Article 3 of the WHO FCTC establishes the objective of the Convention in the following terms:

The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

\textsuperscript{18} Pending the entry into force of the Convention for Zimbabwe on 4 March 2015.
15. To achieve this objective the WHO FCTC obliges Parties to implement a number of tobacco control measures aimed at reducing demand for tobacco products. Provisions aimed at reducing demand include Article 6 (price and tax measures to reduce the demand for tobacco), Article 8 (protection from exposure to tobacco smoke), Article 9 (regulation of the contents of tobacco products), Article 10 (regulation of tobacco product disclosures), Article 11 (packaging and labelling of tobacco products), Article 12 (education, communication, training and public awareness) Article 13 (tobacco advertising, promotion and sponsorship) and Article 14 (demand reduction measures concerning tobacco dependence and cessation).

16. Although these interventions are effective alone, they are cumulative interventions that work together by targeting different drivers of tobacco consumption and different population groups as part of a complementary regulatory scheme. This is recognized in Article 4.4 of the Convention, which states:

Comprehensive multisectoral measures and responses to reduce consumption of all tobacco products at the national, regional and international levels are essential so as to prevent, in accordance with public health principles, the incidence of diseases, premature disability and mortality due to tobacco consumption and exposure to tobacco smoke.

Article 5.1 of the Convention also obliges Parties to implement comprehensive multisectoral national tobacco control strategies, plans and programmes.

17. In addition to comprehensive multisectoral demand reduction measures, the WHO FCTC obliges Parties to implement measures to reduce the supply of tobacco products, including Article 15 (illicit trade in tobacco products), Article 16 (sales to and by minors) and Article 17 (provision of support for economically viable alternative activities).

18. Article 5.3 of the WHO FCTC also obliges Parties to act to protect public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry in accordance with national law.

19. The Conference of the Parties to the WHO FCTC has adopted a number of additional instruments. These instruments include evidence-based Guidelines for the implementation of a number of provisions, including Article 11 (packaging and labelling of tobacco products) and Article 13 (tobacco advertising, promotion and sponsorship). The development of the guidelines for implementation of the provisions in Articles 8 – 13 in particular was (and where relevant, continues to be) conducted in accordance with Article 7 of the WHO FCTC, which states:

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19 See Guidelines for Implementation of the WHO FCTC: Article 5.3; Article 8; Articles 9 and 10; Article 11; Article 12; Article 13; Article 14. WHO Framework Convention on Tobacco Control, World Health Organization, 2013 available at http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf?ua=1.
The Parties recognize that comprehensive non-price measures are an effective and important means of reducing tobacco consumption. Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.

Working groups comprised of representatives of Parties to the Convention drafted these and other WHO FCTC Guidelines. In drafting the guidelines, the working groups relied on available scientific evidence and the experience of the Parties themselves in implementing tobacco control measures. In each case, WHO FCTC Guidelines proposed by working groups were opened for consultation with all Parties to the WHO FCTC before being submitted to the Conference of the Parties for consideration. Each of the Guidelines has come into effect through adoption by consensus of the Conference of the Parties.

20. The status of each set of Guidelines is governed first by its wording. For example, paragraph 1 of the Guidelines on Implementation of Article 11 (packaging and labelling of tobacco products) states:

Consistent with other provisions of the WHO Framework Convention on Tobacco Control and the intentions of the Conference of the Parties to the Convention, these guidelines are intended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures. Article 11 stipulates that each Party shall adopt and implement effective packaging and labelling measures within a period of three years after entry into force of the Convention for that Party.

21. Similarly, paragraph 1 of the Guidelines on Implementation of Article 13 (tobacco advertising, promotion and sponsorship) states:

The purpose of these guidelines is to assist Parties in meeting their obligations under Article 13 of the WHO Framework Convention on Tobacco Control. They draw on the best available evidence and the experience of Parties that have successfully implemented effective measures against tobacco advertising, promotion and sponsorship. They give Parties guidance for introducing and enforcing a comprehensive ban on tobacco advertising, promotion and sponsorship or, for those Parties that are not in a position to undertake a comprehensive ban owing to their constitutions or constitutional principles, for applying restrictions on tobacco advertising, promotion and sponsorship that are as comprehensive as possible.

22. As these passages indicate, the Guidelines are intended to assist Parties in meeting their legal obligations and in increasing the effectiveness of measures adopted. The Guidelines play a particularly important role in settings where resource constraints may otherwise impede domestic policy development.

23. In addition to WHO FCTC Guidelines, the Conference of the Parties to the WHO adopted by consensus the Punta del Este Declaration on Implementation of
the WHO FCTC in 2010.\textsuperscript{20} In the preamble to the Declaration Parties recognize “that measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest, which includes public health”. In the operative paragraphs of the Declaration the Parties declare, \textit{inter alia}:

1. The firm commitment to prioritize the implementation of health measures designed to control tobacco consumption in their respective jurisdictions.
2. Their concern regarding actions taken by the tobacco industry that seek to subvert and undermine government policies on tobacco control.

... 

24. Similarly, at the Fifth Session of the Conference of the Parties to the WHO FCTC in 2012, the Parties issued the Seoul Declaration, in which they declared “[t]heir commitment to accelerate implementation of the Convention in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”\textsuperscript{21}

25. The Sixth Session of the Conference of the Parties welcomed the Report of the Open Working Group of the United Nations General Assembly on Sustainable Development Goals mentioned above at paragraph 10.\textsuperscript{22} In the Moscow Declaration, the Conference of the Parties called on Parties to accelerate implementation of the WHO FCTC at the national level.\textsuperscript{23}

2. The Evidence Base concerning the Contribution of Plain Packaging to Protection of Human Health

26. This section describes the evidence base underlying implementation of plain packaging (also referred to as standardized packaging). Prior to Australian implementation of plain packaging, there was a body of peer-reviewed evidence in the form of experimental studies and surveys that tested different forms of plain packaging in different places. Common to these studies is the idea that plain packaging involves the standardization of tobacco packaging and removal of brand elements from packaging. Although individual studies each have their limitations, when viewed together the body of evidence permits generally applicable conclusions to be drawn regarding plain packaging. These conclusions include that plain packaging reduces the attractiveness of tobacco products, restricts use of the

\textsuperscript{20} Punta del Este Declaration on Implementation of the WHO Framework Convention on Tobacco Control, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fourth session, Punta del Este, Uruguay, 6 December 2010, FCTC/COP/4/DIV/6.

\textsuperscript{21} Seoul Declaration, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fifth session, Seoul, Republic of Korea, 17 November 2012, FCTC/COP5(5).

\textsuperscript{22} Towards a Stronger Contribution of the Conference of the Parties to achieving the Noncommunicable Disease Global Target on Reduction of Tobacco Use, Conference of the Parties to the WHO Framework Convention on Tobacco Control, sixth session, Moscow, Russian Federation, FCTC/COP6(16), p. 2.

\textsuperscript{23} Moscow Declaration, Conference of the Parties to the WHO Framework Convention on Tobacco Control, sixth session, Moscow, Russian Federation, FCTC/COP6(26), p. 2.
pack as a form of advertising and promotion, limits misleading packaging and increases the effectiveness of health warnings.

27. These are general conclusions about the effects of plain packaging and are not specific to implementation in any one WHO Member State. Nonetheless, these general conclusions are relevant to Australia's implementation of plain packaging. Additionally, although it is too early to measure the impacts of plain packaging in Australia in a comprehensive manner, the evidence to date is consistent with the general conclusions set out in sections 2.1 - 2.3 concerning the evidence.

2.1 The Attractiveness of Tobacco Products and the Advertising Function of Branding

28. Fully branded tobacco packaging is a prominent form of tobacco advertising and promotion. As internal tobacco industry documents recognize, packaging plays an increasingly important role in promoting tobacco products as other restrictions on tobacco advertising and promotion are tightened.  

29. Tobacco packs promote tobacco consumption not only at the point of sale, but also after the point of sale. Consumers display branded tobacco packaging when they use tobacco products, when they offer tobacco products to others and in other ways, such as by placing branded packaging on display in a social setting. In this way, tobacco products are "badge products", meaning that they have a high degree of social visibility and that consumers identify with the brand image cultivated on product packaging. As counsel for Japan Tobacco International stated in domestic court proceedings concerning plain packaging in Australia, tobacco packaging functions like a billboard. The advertising function served by tobacco packaging has also been targeted specifically at youth in a context where many consumers of tobacco products become addicted before reaching adulthood. It is estimated that approximately 10% of students between the ages of 13 and 15 smoke cigarettes worldwide. Additionally, among these same students, almost 20% of those who had

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never smoked cigarettes indicated they were susceptible to initiate smoking during the next year.\textsuperscript{28}

30. A substantial number of peer-reviewed studies that examine plain packaging support the conclusion that the measure reduces the attractiveness and appeal of tobacco products. This body of evidence includes recent experimental studies from Australia,\textsuperscript{29} Brazil,\textsuperscript{30} Canada,\textsuperscript{31} New Zealand,\textsuperscript{32} and the United States\textsuperscript{33}, survey evidence from Australia,\textsuperscript{34} France,\textsuperscript{35} the United Kingdom,\textsuperscript{36} the United States,\textsuperscript{37} and focus group studies from New Zealand\textsuperscript{38} and the United Kingdom.\textsuperscript{39}


\textsuperscript{31} Juliana Doxy and David Hammond, Deadly in Pink: The Impact of Cigarette Packaging Among Young Women, 20 Tobacco Control, 2011, 353e - 360.

\textsuperscript{32} Janet Hoek, Christiane Wong, Philip Gendall, Jordan Louviere, Karen Cong, Effects of Dissuasive Packaging on Young Adult Smokers, 20 Tobacco Control, 2011, 183e - 188.


\textsuperscript{38} Janet Hoek, Philip Gendall, Heather Gifford, Gill Pirikahu, Judith McCool, Gina Pene, Richard Edwards, George Thomson, Tobacco Branding, Plain Packaging, Pictorial Warnings, and Symbolic Consumption, 22(5) Qualitative Health Research, 2012, 630-639

31. A number of these studies also examine smoking attitudes and behaviour, such as the question whether plain packaging influences the intention of smokers to quit, and suggest that this is indeed the case. Although intention does not necessarily indicate future behaviour, it is nonetheless a precursor to behavioural change.

32. These studies provide empirical confirmation of the rational conclusion that limiting use of product packaging for promotional purposes will reduce the appeal of tobacco products and encourage quitting. This conclusion is consistent across the recent studies cited and strengthened by the fact that these studies use different methodologies, test different forms of plain packaging and are undertaken in different locations.

2.2 Misleading Tobacco Packaging

33. Tobacco branding, including on packaging, may mislead consumers with respect to the health consequences of consuming different tobacco products. Light, mild and similar brand variants are misleading to consumers because they suggest that the products with which they are associated are less harmful to health than regular brand variants, when this is not in fact the case. Rather, consumers compensate for the lower tar and nicotine yields in these products, including by smoking more of a cigarette and taking deeper puffs. Machine tests for tar and


nicotine yields are also affected by small holes in cigarette filters that are partially blocked by a smoker’s fingers during inhalation.42

34. The 2009 Global Adult Tobacco Survey (GATS)43 examined this issue in the Russian Federation and Uruguay. Among those Uruguayan adults who identified smoking as harmful 19.2% were unaware that light, ultra light or mild cigarettes are as harmful as regular cigarettes.44 Similarly, 21.9% of respondents in the Russian Federation believed that some cigarettes may be less harmful than others.45 In a separate study, respondents to a four-country survey in Australia, Canada, the United Kingdom (UK) and US were asked to respond to the incorrect propositions that "(1) light cigarettes are less harmful than regular cigarettes, (2) smokers of light cigarettes take in less tar than smokers of regular cigarettes and (3) light cigarettes make it easier to quit smoking." Approximately 50% of respondents in each of these states agreed with at least one of these incorrect propositions, even after misleading terms had been banned on product packaging.46

35. Notwithstanding bans on misleading descriptors in Australia and other jurisdictions, consumers maintain erroneous views about the risks associated with different tobacco products. This is partly because colours and other elements of package design have been used to preserve misleading brand extensions in the absence of descriptors. Evidence of this comes from a number of sources, including the United States where an Altria brochure, concerning Philip Morris USA products was distributed to retailers.47 That brochure showed the new pack identifiers associated with misleading brand variants and enabled retailers to assist consumers in identifying those variants after misleading descriptors were banned from packaging. For example, Marlboro Lights became Marlboro Gold and Marlboro Ultra Lights became Marlboro Silver. The brochure also indicated that "some cigarette

42 Ibid.
43 The Global Adult Tobacco Survey (GATS) is conducted by the WHO and the United States Centers for Disease Control and Prevention in collaboration with selected WHO Member States. GATS is the global standard to monitor systematically adult tobacco use and track key tobacco indicators. GATS is intended to generate comparable data within and across countries. It enhances countries’ capacity to design, implement and evaluate tobacco control interventions. GATS has been conducted in 36 countries, including Uruguay, representing 60% of the world’s population and approximately 40% of cigarette smokers globally.
46 R Borland et al. What happened to Smokers’ Beliefs about Light Cigarettes when “Light/Mild” Brand Descriptors were banned in the UK? Findings from the International Tobacco Control (ITC) Four Country Survey, 17 Tobacco Control, 2008, 256 – 262.
and smokeless packaging is changing, but the product stays the same". In this context, a nationally representative survey of US smokers conducted one year after the ban on misleading descriptors came into effect found that 92% of smokers reported that they could easily identify their usual brands and 68% correctly named the package colour associated with their usual brand.48

36. In this and other ways, there is a strong association between packaging design and how consumers perceive risk.49 For example, different variants of one tobacco brand can in themselves be misleading to consumers, particularly when presented in the course of trade alongside one another and regular or full flavoured brands. One reason for this is that people try to find attributes among brand variants.50 Another reason is that packaging, and particularly colour, affect consumers’ perceptions of risk. Early evidence of this can be found in internal tobacco industry documents released to the public through litigation. For example, a 1990 tobacco industry document recognized that so-called “lower delivery products” were featured in lighter packs because they have a clean healthy connotation.51

37. This observation is consistent with other internal tobacco industry documents, including studies that tested consumer reactions to ultra light products packaged in different colour packs.52 These reactions included consumers ranking the perceived tar level of products in different colour packs53 and commenting on factors such as the harshness and strength of the flavour of different colour packs with otherwise identical products inside them.54

51 Philip Morris. Marketing New Products in a Restrictive Environment; 1990 June Report Bates No 2044762173-2364. The document states “Lower delivery products tend to be featured in blue packs. Indeed, as one moves down the delivery sector, then the closer to white a pack tends to become. This is because white is generally held to convey a clean healthy association.”
Against this backdrop, recent peer-reviewed studies suggest that plain packaging will minimize the tendency of tobacco packaging and brand variants to mislead consumers concerning the relative health consequences of different products. This evidence includes experimental studies from Australia, Brazil, and Canada, survey evidence from Australia, France, the United Kingdom, and the United States, and a focus group study from the United Kingdom. These and other studies provide empirical evidence confirming the rational conclusion that removing misleading and deceptive branding from product packaging will reduce consumers being misled.

2.3 The Effectiveness of Health Warnings

Health warnings inform consumers and non-consumers about the risks associated with tobacco products and discourage tobacco consumption. Branding on tobacco packaging distracts from health warnings, reducing the ability of warnings to inform consumers and discourage tobacco consumption.

A number of peer-reviewed studies suggest that plain packaging will increase the salience of health warnings on tobacco packaging. This body of evidence includes experimental studies from Australia and Canada, as well as survey

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evidence from Australia. These studies are consistent with a separate body of evidence, which suggests that the effects of health warnings increase with their size. Importantly, the evidence suggests plain packaging also has effects above and beyond those of large health warnings.

2.4 Early Evidence is Consistent with the Conclusion that Plain Packaging will reduce the Prevalence of Tobacco Use

41. As the discussion in sections 2.1 – 2.3 above indicates, reducing the prevalence of tobacco use is not the sole regulatory objective of plain packaging. There are a number of legitimate intermediate public health objectives. Nonetheless, it is rational and reasonable to expect that the prevalence of tobacco use will decline as tobacco packaging becomes less attractive, misleading packaging is minimized and health warnings become more effective.

42. Assessing the impact of plain packaging on the prevalence of tobacco consumption is not, however, something that can be done in a comprehensive manner shortly after implementation. Nonetheless, the official statistics to date from Australia are consistent with the conclusion that plain packaging will reduce the prevalence of tobacco use. This evidence includes declining total expenditure, declining customs and excise clearances and declines in the prevalence of smoking found in the National Drug Strategy Household Survey. These figures show a correlation between plain packaging, reduced total consumption and reduced prevalence of consumption.

43. In addition to these official figures, other studies published in respected peer-reviewed journals are consistent with the conclusion that plain packaging will reduce prevalence. These include studies showing increased urgency among smokers to quit, a significant and sustained increase in calls to the Quitline (a


See for example Les Études De Marché Créatec, Quantitative Study Of Canadian Adult Smokers Effects Of Modified Packaging Through Increasing the Size of Warnings on Cigarette Packages, Prepared for Health Canada, April 2008, p. 4.


On each of these issues see

service that assists consumers in quitting tobacco use), and evidence that the display of tobacco packs in outdoor settings has declined and that smokers have increased active steps to conceal packaging.

44. Tobacco companies have commissioned a number of studies that seek to question the public health impact of plain packaging. The credibility of these studies is questionable for a number of reasons. First, tobacco companies have commissioned these studies. Second, the conclusions in these studies are at odds with both official figures and a substantial body of evidence published in respected peer-reviewed academic journals. Third, the conclusions in these commissioned studies are not themselves supported by independent studies found in respected peer-reviewed journals. Fourth, in any case, it is too soon after the implementation of plain packaging to measure its full impacts.

45. In summary, although this submission is not focused on evidence specific to implementation in Australia, the evidence to date provides some support for the rational conclusion that plain packaging will reduce the prevalence of tobacco consumption.

2.5 Expert Reviews of the Evidence

46. The conclusions reached above are consistently supported by expert reviews of the evidence conducted in WHO Member States. These reviews emanate from qualified and respected sources and draw upon material published in peer-reviewed academic journals in the field of public health.

2.5.1 The Australian Preventative Health Taskforce

47. On 1 September 2009, Australia launched its National Preventative Health Strategy titled "Australia: the healthiest country by 2020." The strategy was

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prepared by the Preventative Health Taskforce, which was comprised of well qualified and respected public health experts. A tobacco working group, also comprised of well qualified and respected public health experts, considered the state of tobacco control in Australia and evidence of the likely effect of plain packaging before recommending that Australia implement the measure.\textsuperscript{74} With respect to the evidence, the working group stated in part:

Cigarette brand names and package design enable the communication of personal characteristics, social identity and aspirations,\textsuperscript{6} and are a crucial aspect of marketing the product.\textsuperscript{6,7} Consumer research indicates that decreasing the number of design elements on the packet reduces its appeal and perceptions about the likely enjoyment and desirability of smoking.\textsuperscript{9} Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item. It would also reduce the potential for cigarettes to be used to signify status. Plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall health warnings on plain packs.\textsuperscript{6,8}

48. These conclusions, reached by public health experts with specific knowledge of the Australian context, support the conclusions drawn above in sections 2.1 – 2.3.

2.5.2 The United Kingdom Public Health Research Consortium Review and Update

49. In 2011, prior to implementation of plain packaging in Australia, the United Kingdom (UK) Department of Health Commissioned a review of the evidence

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\textsuperscript{6} Scheffels J. A Difference that makes a Difference: Young Adult Smokers’ Accounts of Cigarette Brands and Package Design. 17 Tobacco Control, 2008, 118-22.
\textsuperscript{9} Wakefield M, Germain D and Durkin S. How does increasingly Plainer Cigarette Packaging Influence Adult Smokers’ Perceptions about Brand Image? An Experimental Study, Tobacco Control, 2008, online pre-publication.
concerning the impacts of plain tobacco packaging on public health.\textsuperscript{75} The Public Health Research Consortium, including researchers from a number of respected UK academic institutions, conducted the review. The review examined 37 primary research studies with a variety of study designs across a number of disciplines.

50. The review examined the impact of plain packaging on the appeal of cigarettes, packs and brands and found \textit{inter alia} consistent conclusions that plain packs were rated as less attractive than branded packaging and that plain packs were rated as containing poorer quality products.\textsuperscript{76} Among the studies that examined sub-group differences, non-smokers and younger respondents tended to find plain packs less appealing than smokers and older respondents respectively.\textsuperscript{77} The review found that plain packaging may increase the salience of health warnings, although this depends on other conditions such as the size, type and position of the warnings.\textsuperscript{78} Perceptions of the harmfulness of tobacco products were found to depend primarily on the colour of packaging, with darker plain packs seen as more harmful.\textsuperscript{79} The evidence on smoking related attitudes, beliefs, intentions and behaviour was mixed, but supportive of the general conclusion that plain packaging would affect behaviour.\textsuperscript{80}

51. Following criticism of the review by the tobacco industry, a number of the experts released an update to the research in September 2013, which included 17 published studies that had not been included in the original review. It was concluded in this update that the findings of these studies “suggest that plain packaging would: reduce the appeal of cigarettes and smoking; enhance the salience of health warnings on packs; and address the use of packaging elements that mislead smokers about product harm.”\textsuperscript{81}

2.5.3 The United Kingdom Chantler Review

52. In November 2013 the UK Parliamentary Under Secretary for Public Health invited Professor Sir Cyril Chantler to advise with respect to the public health impact of standardized packaging.\textsuperscript{82} The terms of reference asked Professor Chantler:

\begin{itemize}
  \item \textsuperscript{76} \textit{Ibid}, pp 38–51.
  \item \textsuperscript{77} \textit{Ibid}, pp 48–51.
  \item \textsuperscript{78} \textit{Ibid}, pp 52–58.
  \item \textsuperscript{79} \textit{Ibid}, pp 58–68.
  \item \textsuperscript{80} \textit{Ibid}, pp 68–79.
\end{itemize}
To give advice to the Secretary of State for Health, taking into account existing and any fresh evidence, as to whether or not the introduction of standardised packaging is likely to have an effect on public health (and what any effect might be), in particular in relation to the health of children.83

53. Professor Chantler undertook a review of the evidence, consulted with interested parties, commissioned expert advice to assist in qualitative analysis of the key evidence, including the studies reviewed in the Public Health Research Consortium Review and Update, and undertook field research in Australia. The subsequent report, which was released in April 2014, examined three questions.

54. First, the report examined whether branded packaging promotes tobacco consumption, especially by encouraging children to take up smoking. On this question, the report concluded:

In my opinion, the balance of evidence suggests that the appeal of branded packaging acts as one of the factors encouraging children and young adults to experiment with tobacco and to establish and continue a habit of smoking. As British American Tobacco Australia’s spokesman acknowledged in our meeting, tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of marketing. This is supported by numerous internal tobacco industry documents. Although the tobacco industry says that the purpose of branded packaging is to encourage brand switching only, they cannot explain how it would only ever attract switchers from one brand to another, and would never encourage initiation from non-smokers or increased overall consumption. Further, they have not been able to explain why, given that advertising and promotion are proven to increase tobacco consumption, the related marketing tool of branded packaging (referred to by Japan Tobacco International’s counsel against the Australian Government as their mobile “billboard”) should so differ in its effect.9

55. Second, the report examined whether standardized packaging is likely to lead to a reduction in the consumption of tobacco. On this question, the report first considered possible intermediate effects of plain packaging, such as effects on the attractiveness of tobacco products, the salience of health warnings, perceptions concerning the harmfulness of different products and smoking-related intentions. The report concluded that, although the overall size of the effect cannot be calculated, the evidence base for these intermediate conclusions is methodologically sound and that criticisms made by the tobacco industry are without merit. The report states “[t]aken together the studies and reviews based on them put forward evidence with a high degree of consistency across more than 50 studies of differing designs, undertaken in a range of countries. This conclusion is not seriously undermined by the criticisms made, many of which reflect necessary constraints on study design. This is confirmed by the independent analysis I commissioned.”84

83 Ibid, p. 41.
84 Chantler Review, p. 31, para. 4.24.
56. The report went on to make findings concerning the evidence, stating:

I am of the opinion that on the basis of the evidence I have seen, it is likely that standardised packaging will result in smokers and potential smokers acquiring more negative feelings about smoking. They will be less deceived into thinking that some brands are healthier than others and that therefore health warnings apply less to them. Susceptible children and young adult smokers will be less likely to associate particular brands with the peers they want to emulate. Health warnings will be more credible, memorable and effective when not confusingly juxtaposed with attractive branded packaging. This is, in turn likely to lead to behavioural changes such as smokers hiding their cigarette packets, thereby diminishing their role in creating an exaggerated view of smoking as a social norm. This may help to make smoking seem less "normal" and therefore less desirable to children to take up smoking to 'fit in' with peers.\textsuperscript{85}

57. Third, the report examined whether it is likely that standardized packaging will lead to an increase in tobacco consumption by lowering the price of tobacco as the market is commoditized or by increasing the consumption of illicit products. The report concluded that the risks of prices falling are small and can be mitigated through taxation and that the solution to illicit trade lies in an effective enforcement regime.\textsuperscript{86}

2.5.4 The Irish Department of Health Review

58. In March 2014, the Irish Department of Health released an evidence review on standardized packaging of tobacco products prepared by David Hammond of the University of Waterloo. The review of the evidence examined a total of 75 original empirical articles. The review states:

The evidence indicates that tobacco packaging is a critically important form of tobacco promotion, particularly in jurisdictions with comprehensive advertising and marketing restrictions, such as Ireland. The evidence indicates that plain packaging reduces false beliefs about the risks of smoking, increases the efficacy of health warnings, reduces consumer appeal among youth and young adults, and may promote smoking cessation among established smokers.\textsuperscript{87}

These and other conclusions of the evidence review are consistent with those cited in sections 2.5.1 – 2.5.3 above.

3. Plain Packaging and the WHO FCTC

59. The WHO FCTC and its Guidelines include a number of provisions relevant to plain packaging. These include an obligation to implement effective packaging and labelling measures (Article 11) and an obligation to undertake a comprehensive ban or restrictions where a party is not in a position to implement a comprehensive ban

\textsuperscript{85} Ibid, p. 31, para. 4.25.
\textsuperscript{86} Ibid, p. 37, para. 5.13.
due to its constitution or constitutional principles) on tobacco advertising, promotion and sponsorship (Article 13). Guidelines to Articles 11 and 13 recommend that Parties implement plain packaging of tobacco products. These Guidelines, which were adopted by consensus of the Conference of the Parties to the WHO FCTC, also reflect the international consensus concerning the evidence base discussed above in section 2.

3.1 Article 11 – Packaging and Labelling of Tobacco Products

60. Article 11 obliges Parties to implement effective measures to ensure that tobacco packaging and labelling does not promote tobacco products by means that are false, misleading or deceptive (Article 11.1(a)) and to ensure that tobacco packaging carries health warnings describing the harmful effects of tobacco use (Article 11.1(b)). The relevant passages state:

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

   (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and

   (b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

       (i) shall be approved by the competent national authority,
       (ii) shall be rotating,
       (iii) shall be large, clear, visible and legible,
       (iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,
       (v) may be in the form of or include pictures or pictograms.

61. Guidelines for Implementation of Article 11 “are intended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labeling measures.”88 With respect to plain packaging, paragraph 46 of the Guidelines states:

Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from

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88 Guidelines for Implementation of Article 11, para. 1.
detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

62. This passage is set out in a broader context of other packaging and labelling measures. For example, the Guidelines stress that the terms included in Article 11.1(a) are indicative of misleading terms, but that the list is not exhaustive.\(^{89}\)

63. Similarly, with respect to health warnings, paragraph 3 states:

Globally, many people are not fully aware of, misunderstand or underestimate the risks for morbidity and premature mortality due to tobacco use and exposure to tobacco smoke. Well designed health warnings and messages on tobacco product packages have been shown to be a cost-effective means to increase public awareness of the health effects of tobacco use and to be effective in reducing tobacco consumption. Effective health warnings and messages and other tobacco product packaging and labelling measures are key components of a comprehensive, integrated approach to tobacco control.

64. The Guidelines also provide specific guidance with respect to the size of health warnings. The Parties recognize that the effectiveness of health warnings increases with their size. Paragraph 12 states:

Article 11.1(b)(iv) of the Convention specifies that health warnings and messages on tobacco product packaging and labelling should be 50% or more, but no less than 30%, of the principal display areas. Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility.

65. The Guidelines also recognize that health warnings require review. The Guidelines state that “[l]egal measures should be reviewed periodically and updated as new evidence emerges and as specific health warnings and messages wear out.”\(^{90}\) As this implies, the effectiveness of packaging and labelling measures is greatest when they are updated periodically, such as by changing the content of warnings and increasing their size.

66. In summary, the Guidelines for Implementation of Article 11 recommend adoption of plain packaging in addition to a number of other packaging and labelling measures, including health warnings that cover as much of the principal display areas as possible and other measures prohibiting misleading packaging.

3.2 Article 13 - Tobacco Advertising, Promotion and Sponsorship

67. Article 13 obliges Parties to undertake a comprehensive ban on tobacco advertising, promotion and sponsorship. As is the case with Article 11, Guidelines

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\(^{89}\) *Ibid*, para. 43.

\(^{90}\) *Ibid*, para. 60.
for Implementation of Article 13 recommend that Parties implement plain packaging.

68. The relevant passages of Article 13 state:

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

   (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

   (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;

   (c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;

   (d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;

   (e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and

   (f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.

5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.
69. Guidelines for Implementation of Article 13 address packaging and product features relevant to tobacco advertising, promotion and sponsorship. Paragraphs 15 and 16 state:

15. Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.

16. The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer’s name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.

70. The following recommendation is made in paragraph 17:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.

71. In summary, Guidelines for Implementation of Article 13 recognize the use of tobacco packaging as a means of tobacco advertising and promotion and recommend implementation of plain packaging for purposes of restricting use of packaging in that way.

4. Conclusion and the Role of Plain Packaging as Part of a Comprehensive Multisectoral Approach to Tobacco Control

72. As the approach set out in the WHO FCTC suggests, tobacco control relies upon implementation of comprehensive multisectoral measures that work together as cumulative interventions in a complementary regulatory scheme. Demand reduction measures such as taxes, measures protecting people from exposure to tobacco smoke, health warnings, packaging and labelling measures, education campaigns and restrictions on advertising, promotion and sponsorship work together by targeting different drivers of tobacco consumption and different population groups. This is also true for regulation of all types of tobacco products.

73. Plain packaging should be viewed in this broader tobacco control context. In particular, as the Guidelines for implementation of Articles 11 and 13 indicate, plain packaging augments packaging and labelling measures and measures prohibiting tobacco promotion and advertising. The evidence base underpinning plain packaging should also be viewed in this context. There are strong arguments that plain packaging will make restrictions on advertising and promotion, prohibitions
on misleading packaging and health warnings more effective. As is detailed above, these arguments are also supported by a body of empirical evidence in the form of experimental studies, surveys and focus group studies from well qualified, credible and respected sources. Guidelines for Implementation of Articles 11 and 13 of the WHO FCTC reflect the international consensus around this evidence, which also finds further support in early evidence from the experience of implementing plain packaging in Australia.