

IP and plain packaging

Two cases

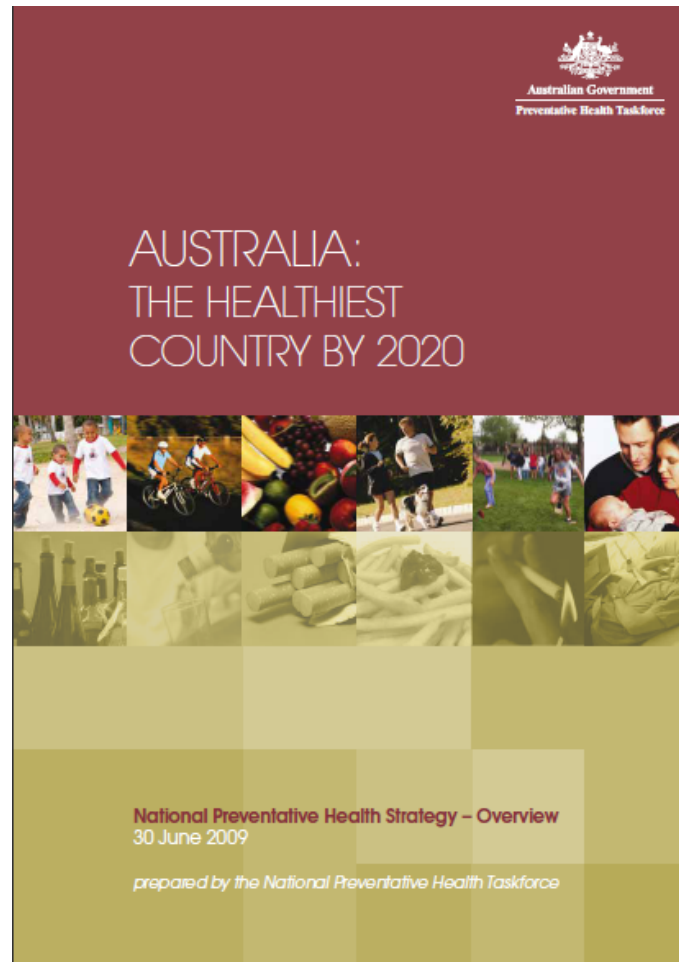
- State of South Australia introduced plain packaging for R18+ videos
- Commonwealth has proposed introduction of plain packaging for tobacco products

What would it mean



Courtesy Cancer Council Aus

National Preventative Health Taskforce



Not advertising

Tobacco Advertising Prohibition Act, Section 9

Exception-words etc. on products, packaging and business documents

(2) Words, signs or symbols that appear:

(a) on a tobacco product; or

(b) on the packaging of a tobacco product;

...

do not, when so appearing, constitute a tobacco advertisement.

Australian Trademark Law

Trademarks Act 1995, Section 20

Rights given by registration of trade mark

- (1) If a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights:
 - (a) to use the trade mark; and
 - (b) to authorise other persons to use the trade mark

Section 21

Nature of registered trade mark as property

- (1) A registered trade mark is personal property.
- (2) Equities in respect of a registered trade mark may be enforced in the same way as equities in respect of any other personal property.

Acquisition of property

Australian Constitution, Section 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.

WTO and TRIPS

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

Justifiability

News

New research grant to study cigarette packaging



Professor Melanie Wakefield and her colleagues at the Centre for Behavioural Research in Cancer have been awarded funding from the National Medical Health and Research Council to study how cigarette packaging and labelling influences the actual sensory experiences of smoking the cigarettes inside.

It is already known that the use of elaborate pack designs, colours and suggestive brand names tricks smokers, allowing them to mistakenly believe some cigarettes are safer than others. Cigarettes in lighter colour packs are wrongly perceived as being lower in health risk than those in darker colour packs. Tobacco-industry-conducted research, made public under the terms of legal rulings, has shown that identical cigarettes can seem different from each other when the packaging changes. This is because consumers modify their expectations based on the packaging. The so-called 'halo effect' of packaging can change perceptions concerning tar content, cigarette strength and overall health risk. These misperceptions are part of a range of marketing ploys that make smoking easier to take up and harder to quit.

While restrictions on tobacco advertising and promotion have helped to reduce tobacco consumption, the tobacco industry has responded by making cigarette pack design the cornerstone of its marketing strategy. Even with the current pictorial health warnings on the packs, tobacco companies are adept at using pack design to subtly influence consumer perceptions of the cigarettes inside.

To protect young people and smokers from being misled by pack design, there are proposals from public health groups to introduce plain packaging; these proposals are gaining momentum. Proposals have been put forward to standardize all packaging, removing all promotional elements and graphics, leaving only the brand name (as pictured above). Colours, logos, distinctive fonts and descriptive words and phrases would all be prohibited. Manufacturers would only be permitted to print the brand name in a required size, font and location, in addition to required health warnings. The exact size, shape, colour, material and style of the packaging would be prescribed, along with the lining material, glass level, and font. This would remove distinctive exteriors such as soft packs, metal cases and split packs from the market.

Professor Wakefield's proposed program of research will run for two years and feature three experimental studies. The first will examine the specific elements of current pack design that influence smokers and cause them to underestimate the health risks of their cigarettes. The second study will assess the extent to which plain packaging, compared with branded packaging, might potentially protect consumers against making incorrect assumptions. The third study will examine the roles of plain packaging and pictorial health warnings in driving consumer perceptions about health risks. For the final study, both adult smokers and adolescents will be involved. The research will provide timely evidence for policy-makers in Australia and other countries who are currently considering plain packaging as a tobacco control policy.

The importance of cigarette packaging is receiving increased attention in Australia and internationally. Australia has already ratified a World Health Organization treaty on tobacco control urging governments to consider the use of plain packaging. In Australia, the National Preventative Health Taskforce presented a comprehensive range of tobacco control measures to the Minister for Health and Ageing, the Hon. Nicola Roxon, one of which recommended the introduction of plain packaging of cigarettes. The government is yet to respond to the recommendations, but plain packaging is strongly supported by Cancer Council Victoria, Cancer Council Australia and other key health groups.

Wakefield M, Reesman D, Colburn W, Darbin S, Chapman S, Borland A. Effects of current and plain cigarette packaging designs on smokers' cigarette evaluations. National Health & Medical Research Council Project Grant (9634, 800).



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Cancer News (Cancer Council Victoria), April 2010:

“(The) proposed program of research will run for two years... examin(ing) the specific elements of current pack design that influence smokers and cause them to underestimate the health risks of their cigarettes ... assess the extent to which plain packaging, compared with branded packaging, might potentially protect consumers against making incorrect assumptions ... examin(ing) the roles of plain packaging and pictorial health warnings in driving consumer perceptions about health risks ... The research will provide timely evidence for policy-makers in Australia and other countries who are currently considering plain packaging as a tobacco control policy”.

Cost: \$636,880

Government announcement: 29/04/2010

Rejected

- Canada
- New Zealand
- United Kingdom
- Lithuania (2010)
- Australia (1995)

Secret government documents

IP Australia, Briefing to Minister, 30/04/2010:

“Sensitivities: Yes. Implementation of plain packaging for tobacco products may be seen as a restriction by trade mark owners on the ability to use their marks. This may result in tobacco companies challenging the Government’s legislation. DoHA has advised that they are aware of the risk”.

Secret government documents

IP Australia, Briefing to Minister, 09/2010:

“IP Australia considers that plain packaging may not be consistent with Australia’s intellectual property treaty obligations (Attachment A). Whether or not a requirement of plain packaging would actually constitute an acquisition of property is debateable. However, that may not prevent tobacco companies from seeking compensation. Requiring plain packaging would make it easier for counterfeit products to be produced and would make it difficult to readily identify these counterfeit goods”.

Attachment A:

“Requiring plain packaging would be regarded as encumbering the ability of an entity to distinguish its goods through its trade marks from those of other entities. IP Australia’s understanding is that this Article was drafted with the intention of restricting mechanisms like plain packaging”.

Secret government documents

Email exchange between two senior IP Australia Trademark Division Officials, 18/01/2009:

“I’m not surprised that (was it Health?) are arguing that Article 20 [of TRIPS] is ambiguous – it suits their purposes for that. However:

- It is pretty clear from (people I’ve spoken to who were TRIPS negotiators and) from negotiation documents that this is exactly the issue that A20 was targeted at ...
- “Shall not be unjustifiably encumbered” – it is perhaps possible to argue that there is justification – but that is a long bow I think”.