

# MAKING THE CASE FOR CANADA TO JOIN THE TOBACCO PLAIN PACKAGING REVOLUTION

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*This article makes the case for introducing plain packaging reforms in Canada. Australia successfully introduced these measures in 2012, and other nations have adopted similar laws, in light of compelling evidence that plain packaging lessens the appeal of tobacco products, increases the effectiveness of health warnings and curbs the use of packaging to mislead consumers about the harmful effects of tobacco use. Tobacco industry arguments that plain packaging does not work, increases illicit trade, presents a slippery slope to over regulating other products, and hurts small business are unfounded. The proposed Canadian reforms open the door to improving on plain packaging legislation by increasing the restrictions on: acceptable brand names, the internal pack design and the appearance of the cigarette itself.*

## I INTRODUCTION

What is the primary purpose of tobacco packaging? Is it to simply hold products, maintain tobacco freshness, or is it perhaps designed to provide essential consumer information? While packaging may perform some of these basic functions, its most critical and exploited role is to convince consumers they are purchasing a desirable and quality product that reflects their tastes and personality.<sup>1</sup> The tobacco industry and its business allies and partners are refreshingly candid about the importance of packaging in marketing cigarettes. For example, in a print industry trade article describing the ‘premiumisation’ of tobacco packaging in Indonesia, innovations in pack design were said to attract consumers and convey brand messaging:

Features such as velvet touch, soft touch, etching, rise and relief can be applied across the surface of the packaging to make the product more impactful and raise customer engagement. The look of the packaging such as intense metallics through the use of foil simulation inks can also give cigarette packaging the luxurious effect and adds on to the premium feel of the product. Using colours as a technique is effective, especially black. Black is often used to give the appearance of strength.<sup>2</sup>

There are countless examples of tobacco packaging that have been designed to appeal to young people,<sup>3</sup> women,<sup>4</sup> smokers concerned about their health,<sup>5</sup> and to minimise the impact of health

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<sup>1</sup> Gerard Hastings, Karine Gallopel-Morvan and Juan Miguel Rey, ‘The Plain Truth about Tobacco Packaging’ (2008) 17 *Tobacco Control* 361.

<sup>2</sup> Sha Jumar, *The Premiumisation of Cigarette Packaging in Indonesia* (18 January 2017) Print Innovation Asia <<http://www.printinnovationasia.com/single-post/2017/01/18/The-Premiumisation-of-Cigarette-Packaging-in-Indonesia>>.

<sup>3</sup> Phillip Gendall et al, ‘A Cross-Sectional Analysis of How Young Adults Perceive Tobacco Brands: Implications for FCTC Signatories’ (2012) 12 *BMC Public Health* 796.

<sup>4</sup> Juliana Doxey and David Hammond, ‘Deadly in Pink: The Impact of Cigarette Packaging Among Young Women’ (2011) 20(5) *Tobacco Control* 353.

<sup>5</sup> David Hammond et al, ‘Cigarette Pack Design and Perceptions of Risk Among UK Adults and Youth’ (2009) 19 *European Journal of Public Health* 631.



warnings. Tobacco packaging comes in bright colours, metallic tins, and limited edition designs.<sup>6</sup> There are even examples of commemorative packages to mark international special events such as the football World Cup.<sup>7</sup> The industry also varies the packaging shape, size and opening method to influence brand appeal and perceptions of risk, and to increase cigarette sales.<sup>8</sup> The cigarette pack also serves as portable advertisement, carried and displayed by smokers.<sup>9</sup>

Of course, the tobacco industry is not alone in using packaging to attract consumers and sell more products. A quick glance in the beverage aisle of a large supermarket will reveal endless sizes, shapes, and design features for what appears to be a relatively straightforward product — bottled water. However, bottled water drinkers are not consuming a product that is likely to addict them, make them sick, and send them to an early death. In recognition of the six million deaths worldwide caused by tobacco products annually, the WHO Framework Convention on Tobacco Control<sup>10</sup> ('WHO FCTC') requires that all ratifying nations adopt a comprehensive ban on tobacco advertising, promotion and sponsorship, and recommends that plain packaging be included as part of the ban.<sup>11</sup>

Since Australia first implemented plain packaging of tobacco products in 2012,<sup>12</sup> there has been an international push to make this policy a global standard in the fight to reduce tobacco-related deaths. The United Kingdom<sup>13</sup> and France implemented plain pack provisions in 2016; Ireland's law commenced in September 2017,<sup>14</sup> New Zealand passed legislation in September 2016,<sup>15</sup> and Hungary's implementation is expected to take effect from May 2019.<sup>16</sup> While the European Union Tobacco Products Directive does not require that member states adopt plain packaging, it encourages and allows member states to do so.<sup>17</sup> At least a dozen other countries — Norway, Slovenia, Uruguay, Thailand, Singapore, Belgium, Romania, Turkey, Finland, Chile, South Africa, and Canada — are in the process of requiring plain packaging or are formally considering doing so.<sup>18</sup>

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<sup>6</sup> Michelle Scollo, Becky Freeman and Elizabeth Greenhalgh, *11.10 Packaging as Promotion* (November 2016) Tobacco in Australia: Facts and Issues <<http://www.tobaccoinaustralia.org.au/chapter-11-advertising/11-10-tobacco-display-as-advertising1>>.

<sup>7</sup> Rob Cunningham, 'Germany: World Cup Special Edition Cigarette Packs' (2010) 19 *Tobacco Control* 265.

<sup>8</sup> Kathy Kotnowski and David Hammond, 'The Impact of Cigarette Pack Shape, Size and Opening: Evidence from Tobacco Company Documents' (2013) 108 *Addiction* 1658.

<sup>9</sup> Melanie Wakefield et al, 'The Silent Salesman: An Observational Study of Personal Tobacco Pack Display at Outdoor Café Strips in Australia' (2013) 23 *Tobacco Control* 339.

<sup>10</sup> *The World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <<http://www.who.int/fctc/en/>>.

<sup>11</sup> World Health Organization, *Plain Packaging of Tobacco Products. Evidence, Design, and Implementation* (WHO Press, 2016) <[http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226_eng.pdf?ua=1)>.

<sup>12</sup> *Tobacco Plain Packaging Act 2011* (Cth); *Tobacco Plain Packaging Regulations 2011* (Cth).

<sup>13</sup> *Tobacco and Related Products Regulations 2016* (UK).

<sup>14</sup> *Public Health (Standardised Packaging of Tobacco) Act 2015* (Ireland); Public Health (Standardised Packaging of Tobacco) Act 2015 (Commencement) Order 2017, SI no 115 of 2017.

<sup>15</sup> *Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016* (NZ), assented to on 14 September 2016 but not yet in force.

<sup>16</sup> European Network for Smoking and Tobacco Prevention and European Respiratory Society, 'ENSP and ERS Congratulate Hungary on the Finalisation of Plain Packaging Requirements' (18 August 2016) <<http://ensp.org/wp-content/uploads/2016/12/ENSP-ERS-congratulate-Hungary.pdf>>.

<sup>17</sup> *Council Directive 2014/40/EU of 3 April 2014 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products and Repealing Directive 2001/37/EC Text with EEA Relevance* [2014] OJ L 127/1, s 53.

<sup>18</sup> Canadian Cancer Society, *Cigarette Package Health Warnings: International Status Report* (5<sup>th</sup> ed, 1 October 2016) Canadian Cancer Society <<http://www.tobaccolabels.ca/wp/wp-content/uploads/2016/11/Cigarette-Package-Health-Warnings-International-Status-Report-English-CCS-Oct-2016.pdf>>.

A *What is Plain Packaging?*

Plain packaging is a somewhat misleading term in that it may conjure images of simple and clean white boxes with the word ‘cigarette’ printed on them. Indeed, some news article and editorials arguing against plain packaging will feature imagery of stark white cigarette boxes.<sup>19</sup> Plain packaging has two primary properties: (1) removal of all brand imagery and logos; and (2) standardisation of the appearance of packs, including the same uniform colour across all brands, and requirements in regard to the shape and size of packs. All health warnings, including pictorial images, are retained or made larger.

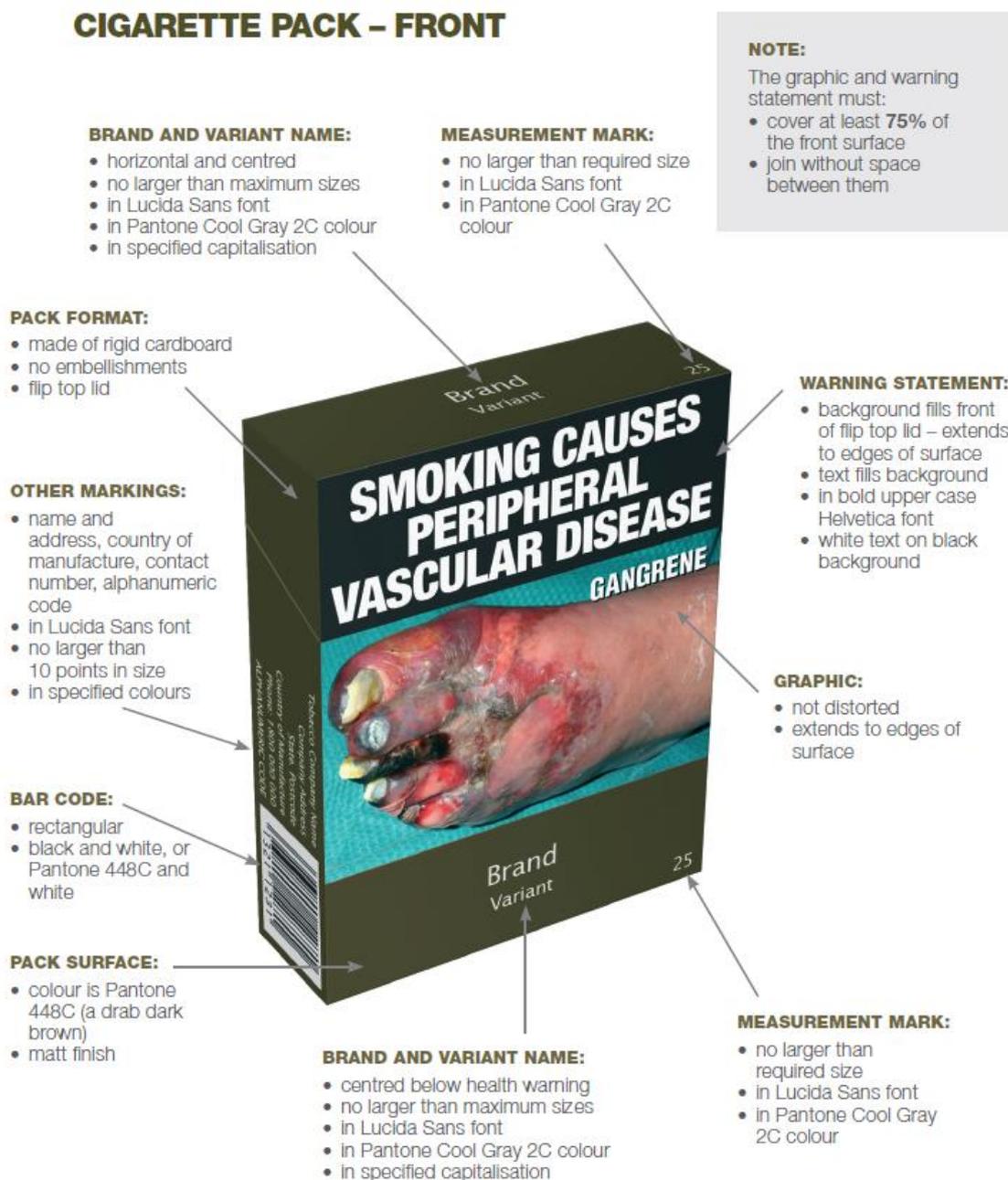
In Australia, plain packaging requires that cigarette packs have a large pictorial health warning on both the front (75 per cent of the surface) and the back (90 per cent of the surface), that the remaining pack surface be a drab dark brown colour, that the product brand and variant name be written in a standard font, size and shade of grey, and that the package be made of stiff cardboard with no embellishments and have a flip top lid.<sup>20</sup> (See Figure 1.) The box must also adhere to minimum pack dimensions. No company logos, trade marks, or brand colours are permitted. Similar requirements are applied to cigar and loose-leaf tobacco packages.

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<sup>19</sup> Alex Scholten, ‘Plain Packaging is Not the Answer to Canada’s Tobacco Problem’, *Huffington Post* (online), 6 June 2016 <[http://www.huffingtonpost.ca/alex-scholten/plain-packaging-tobacco\\_b\\_10283546.html](http://www.huffingtonpost.ca/alex-scholten/plain-packaging-tobacco_b_10283546.html)>.

<sup>20</sup> Department of Health and Ageing (Aust), *Tobacco Plain Packaging: Your Guide* (9 July 2014) Department of Health <<http://health.gov.au/internet/main/publishing.nsf/Content/tppbook>>.

**Figure 1: Australian plain packaging design for a cigarette pack<sup>21</sup>**



The goal of comprehensive tobacco control programs, as outlined in the WHO FCTC, is to reduce the enormous health toll of tobacco use, chiefly by discouraging people from taking up tobacco consumption, encouraging those who consume tobacco products to quit, preventing those who have quit from relapsing to use, and protecting people from second-hand smoke. Plain packaging contributes to effective tobacco control by lessening the appeal of tobacco products, increasing the effectiveness of health warnings and curbing the use of packaging to mislead consumers about the harmful effects of tobacco use.<sup>22</sup>

<sup>21</sup> Department of Health and Ageing (Aust), Tobacco Plain Packaging: Your Guide (September 2014) Department of Health

<[www.health.gov.au/internet/main/publishing.nsf/Content/822B369C0196CB1CCA257D140082A22F/\\$File/TPP%20%20Your%20Guide%20\(High%20Res\).PDF](http://www.health.gov.au/internet/main/publishing.nsf/Content/822B369C0196CB1CCA257D140082A22F/$File/TPP%20%20Your%20Guide%20(High%20Res).PDF)>.

<sup>22</sup> Department of Health (Aust), *Introduction of Tobacco Plain Packaging in Australia* (27 May 2016) Department of Health <<http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-plain>>.

B Canada — Plain Packaging a Brief History

While plain packaging laws were first implemented in Australia in 2012, initial discussions of this policy reform can be traced back to Canada in the mid-1980s. In 1986, at the Annual General Meeting of the Canadian Medical Association ('CMA'), Dr Gerry Karr proposed that cigarettes be sold 'in the equivalent of plain brown wrappers'. This motion was adopted by the CMA, and in 1987, then CMA president, Jake Dyck, called on the Canadian federal government to require 'tobacco products be sold in plain, standard-size packages that state: This product is injurious to your health'.<sup>23</sup> In 1988, Canadian tobacco control organisations tried unsuccessfully to convince the federal government to amend Bill C-51, later enacted as the *Tobacco Products Control Act*<sup>24</sup> to authorise plain packaging regulations. The *Tobacco Products Control Act* included provisions to restrict tobacco advertising and phase out sponsorship.<sup>25</sup>

Six years later, in 1994, the Canadian Prime Minister, Jean Chrétien, as part of a compensatory measure for significantly rolling back tobacco taxes, announced a review to examine the feasibility of tobacco plain packaging and tasked the House of Commons Standing Committee on Health ('the Committee') to make recommendations. In April 1994, with the expressed support of eight provincial governments for the measure, the Committee began hearings on plain packaging.<sup>26</sup>

The tobacco industry mounted a high-profile campaign suggesting there would be significant job losses among Canadian tobacco workers. Threats were made that the government would be expected to compensate for revenue lost to the tobacco firms. The tobacco industry, predictably, used legal threats as their core strategy and made unsubstantiated claims that plain packaging would be a violation of trade treaties and international intellectual property laws.

Philip Morris and RJ Reynolds retained a high-profile lawyer, Carla Hills, the US Trade Representative to Canada from 1989 to 1993. She submitted to the Committee a legal opinion stating that plain packaging would infringe a trade mark provision of the relatively recent North American Free Trade Agreement ('NAFTA') and lead to massive compensation payments to the tobacco industry. She claimed that plain packaging would also violate the international General Agreement on Tariffs and Trade ('GATT'). When these arguments were presented to the Committee, the members were outraged at the notion that NAFTA could prevent the Canadian government from implementing an initiative that would save lives.<sup>27</sup>

Health groups retained their own legal counsel, Jean Castel, a respected professor of international law at Osgoode Hall Law School, and lawyer Michael Robinson of the Toronto firm Fasken Campbell Godfrey. They publicly released legal opinions that outlined the clear health exceptions in both GATT and NAFTA, which allow governments to act in the best interest of public health.<sup>28</sup>

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<sup>23</sup> Physicians for Smoke-Free Canada, *The Plot Against Plain Packaging* (version 2, 1 April 2008) <[http://www.smoke-free.ca/pdf\\_1/plotagainstplainpackaging-apr1.pdf](http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1.pdf)>.

<sup>24</sup> *Tobacco Products Control Act 1988* (Canada).

<sup>25</sup> Physicians for Smoke-Free Canada, *Filter Tips. A Review of Cigarette Marketing in Canada* <<http://www.smoke-free.ca/filtertips04/tobacco%20act%20provisions.htm>>.

<sup>26</sup> Rob Cunningham, *Smoke and Mirrors: The Canadian Tobacco War* (International Development Research Centre, 1996) <<https://prd-idrc.azureedge.net/sites/default/files/openebooks/755-8/index.html>>.

<sup>27</sup> *Ibid* 'Health Committee Studies Plain Packaging'.

<sup>28</sup> *Ibid*.

Despite the intense tobacco industry pressure, the Committee endorsed the concept of plain packaging:

In the interest of the health of Canadians, as suggested by the evidence available to the Committee to date and in the absence of evidence to the contrary, the Committee affirms that plain or generic packaging could be a reasonable step in the overall strategy to reduce tobacco consumption.<sup>29</sup>

The Committee further recommended that the federal government establish a legislative framework to implement plain packaging but that regulations would only be introduced if the results of Health Canada (the Canadian federal government health agency) research, ‘support[ed] the available evidence that such packaging will reduce consumption’.<sup>30</sup> In March 1995, Health Canada released its lengthy report (457 pages) on its studies of plain packaging.<sup>31</sup> At that time, it was the most comprehensive examination of plain packaging ever conducted.<sup>32</sup> The report concluded:

Plain and generic packaging of tobacco products (all other things being equal), through its impact on image formation and retention, recall and recognition, knowledge, and consumer attitudes and perceived utilities, would likely depress the incidence of smoking uptake by non-smoking teens, and increase the incidence of smoking cessation by teens and adult smokers.<sup>33</sup>

Canada was then the first country in the world with a parliamentary committee level endorsement of plain packaging as a government policy.<sup>34</sup>

An industry legal challenge to the federal *Tobacco Act*,<sup>35</sup> and subsequent changes in health ministers amidst intense tobacco industry lobbying, meant the issue lost momentum on the Canadian policy agenda. However, in 2000, Canada paved the way for governments to acquire significant control of the appearance of tobacco packaging, by becoming the first country to implement pictorial health warnings on packs. Health warnings were required to cover 50 per cent of both the front and the back of cigarette packages. As of October 2016, 105 countries or jurisdictions have adopted graphic health warnings, with Nepal leading in terms of size by requiring 90 per cent of the front and back of the pack surface to be covered by a health warning. Canada refreshed and increased the graphic warnings in 2012, requiring that they cover 75 per cent of both sides of the pack.<sup>36</sup>

Then, in the October 2015 Canadian election, the Liberal party, led by Justin Trudeau, formed a majority government. The Liberal win followed on from ten years of a Conservative party led government under Stephen Harper, an era in which minimal tobacco control reforms and

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Marvin E Goldberg et al, *When Packages Can't Speak: Possible Impact of Plain and Generic Packaging of Tobacco Products* (Expert Panel Report Prepared at the Request of Health Canada, 1995).

<sup>32</sup> Becky Freeman, Simon Chapman and Matthew Rimmer, ‘The Case for the Plain Packaging of Tobacco Products’ (2008) 103 *Addiction* 580.

<sup>33</sup> Goldberg et al, above n 3131.

<sup>34</sup> Ryan Hoskins, ‘How Canada Lost its Chance to Make Anti-Tobacco History’, *TVO Current Affairs* (online), 16 February 2016 <<http://tvo.org/article/current-affairs/the-next-ontario/how-canada-lost-its-chance-to-make-anti-tobacco-history>>.

<sup>35</sup> *Tobacco Act*, SC 1997, c 13.

<sup>36</sup> Canadian Cancer Society, above n 188.

programmes were implemented.<sup>37</sup> The Liberal party had campaigned with a commitment to introduce plain packaging for tobacco products.<sup>38</sup> On World NO Tobacco Day, 31 May 2016, plain packaging was officially put back on the Canadian tobacco control policy agenda with an official government consultation on proposed requirements.<sup>39</sup> Interested stakeholders and members of the public were invited to make a consultation submission until the closing date of 31 August 2016. The measures considered under the consultation were very similar to other tobacco plain packaging laws in that they proposed standardising the colour of all tobacco packages, prohibiting the use of brand elements on packs, standardising the shape and size of packages, and mandating how brand names are written on tobacco packages. Health warnings and other required markings (such as a tax stamp) would not be modified by these changes. The measures would apply to all tobacco products, including cigarettes, loose cigarette tobacco, cigars, pipe tobacco, tobacco sticks, smokeless tobacco, kreteks (clove cigarettes), bidis (a thin roll of tobacco wrapped in a leaf), shisha, tubes, blunt wraps, and rolling papers.

However, some innovative policy measures that go beyond Australian plain pack regulations and that are not in place in any other jurisdictions are also being considered. These novel approaches include:

- Limits on the number of words in the product brand name;
- Package walls of prescribed thickness;
- No ‘space fillers’ inside of packages (to prevent modifications to the inner dimensions of packages);
- No distinctive colours or designs (such as grooves, hole or recess) in cigarette filters;
- Single length and minimum diameter for cigarettes;
- Single unattractive colour for cigarette and other products that are rolled in cigarette paper (for example tobacco sticks, kreteks (clove cigarettes), tubes, and rolling papers).<sup>40</sup>

In January 2017, the consultation summary report was released and a process for undertaking legislative changes commenced.<sup>41</sup> In total, 58 000 responses to the consultation were received, with 92 per cent in support of the proposed measures. The majority of these comments were from the general public, but support also came from non-government agencies, public health organisations, government, and academic researchers. The 8 per cent of submissions not in support primarily came from industry, retailers and business associations.

Of those opposed to the measures, the arguments put forth included that plain packaging would not work to reduce smoking and had failed in Australia, be violation of trade agreements and international intellectual property rights, have prohibitively high implementation costs, lead to lost tax revenue for governments, result in job losses, and lead to an increase in illicit tobacco

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<sup>37</sup> Canada, *Parliamentary Debates*, House of Commons, 30 September 2016, 42<sup>nd</sup> Parl, 1<sup>st</sup> Sess, No 85, Statements by Members: Tobacco Control (Mark Holland) <<http://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-85/hansard#Int-9103835>>.

<sup>38</sup> Canada, *Parliamentary Debates*, House of Commons, 1 June 2016, 42<sup>nd</sup> Parl, 1<sup>st</sup> Sess, No 63. Statements by Members: Health (Linda Lapointe) <<http://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-63/hansard#Int-8956231>>.

<sup>39</sup> Tobacco Products Regulatory Office, Health Canada, *Consultation on ‘Plain and Standardized Packaging’ for Tobacco Products* (31 May 2016) Government of Canada <<http://healthycanadians.gc.ca/health-system-systeme-sante/consultations/tobacco-packages-emballages-produits-tabac/document-eng.php>>.

<sup>40</sup> *Ibid.*

<sup>41</sup> Health Canada, *Consultation Summary: ‘Plain and Standardized Packaging’ for Tobacco Products* (January 2017) <[http://www.healthycanadians.gc.ca/publications/healthy-living-vie-saine/tobacco-packages-summary-resume-consultation-emballages-tabac/alt/plain\\_and\\_standardized\\_packaging-eng.pdf](http://www.healthycanadians.gc.ca/publications/healthy-living-vie-saine/tobacco-packages-summary-resume-consultation-emballages-tabac/alt/plain_and_standardized_packaging-eng.pdf)>.

use. The tobacco industry also argued that the policy violated the right to freedom of expression under the *Canadian Charter of Rights and Freedoms*<sup>42</sup> by not allowing manufacturers to communicate product information and branding elements to adult consumers. Tobacco retailers suggested it would impact on their ability to serve customers efficiently and make stock management difficult. Cigar manufacturers claimed that consumers would turn to online purchasing for more attractive products and argued that only cigarettes should be included, not other tobacco products.

Bill S-5, for an Act to Amend the Tobacco Act and the Non-smokers' Health Act and to Make Consequential Amendments to Other Acts, was passed during its third reading in the Canadian Senate on 1 June 2017.<sup>43</sup> This parliamentary approval now allows Health Canada to develop draft regulations for plain packaging. These draft regulations will first be published in the *Canada Gazette* and then Canadians, and other stakeholders, will have another opportunity to give their opinions and feedback on the proposal. The measures to introduce plain packaging of tobacco products will be implemented by regulation.<sup>44</sup>

During the second reading of the Bill in December 2016, Senator Chantal Petitclerc (Independent) emphasised in her speech in support of the Bill that:

[B]ill S-5 ensures that compliance with the new packaging requirements does not result in the loss of registered trademarks. That's a question that comes back often, so I would like to take this opportunity to clarify that there has been no finding of a breach on intellectual property rights in any of the other countries that have already implemented plain and standardized packaging. There have also been no findings to date that it is inconsistent with any international trade agreement.<sup>45</sup>

In her response speech, in March 2017, Senator Judith Seidman (Conservative), the opposition critic of the S5 Bill, outlined the industry arguments against plain packaging, but balanced this with overall support for tobacco control, in particular, measures that protect children. Her concluding remark on the plain packaging aspects of the Bill emphasised her focus on young people: 'the question that must be asked is: will the introduction of standardised packaging in Canada achieve its stated objective to make tobacco cigarettes less appealing to youth and reduce their consumption?'<sup>46</sup>

Given that Canada is signalling a commitment to adopt plain packaging measures, it is timely to re-examine the case for plain packaging.<sup>47</sup> This case will be argued by systematically addressing the common questions and criticisms that the tobacco industry and its allies raise in order to convince governments that they must not pursue these measures.<sup>48</sup>

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<sup>42</sup> *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 7.

<sup>43</sup> Bill S-5, An Act to Amend the Tobacco Act and the Non-smokers' Health Act and to Make Consequential Amendments to Other Acts, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2017.

<sup>44</sup> The Bill also contained significant measures to change the regulation of electronic cigarettes.

<sup>45</sup> *Canada Parliamentary Debates*, Senate, 13 December 2016, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, Vol 150, Issue 87, 1910 (Sen Chantal Petitclerc) <[https://sencanada.ca/en/Content/Sen/chamber/421/debates/087db\\_2016-12-13-e#46](https://sencanada.ca/en/Content/Sen/chamber/421/debates/087db_2016-12-13-e#46)>.

<sup>46</sup> *Canada Parliamentary Debates*, Senate, 9 March 2017, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, Vol 150, Issue 87, 1510 (Sen Judith Seidman) <[https://sencanada.ca/en/content/sen/chamber/421/debates/104db\\_2017-03-09-e#47](https://sencanada.ca/en/content/sen/chamber/421/debates/104db_2017-03-09-e#47)>.

<sup>47</sup> Rob Cunningham and Ken Kyle, 'The Case for Plain Packaging' (1995) 4 *Tobacco Control* 80; Freeman, Chapman and Rimmer, above n 321.

<sup>48</sup> Becky Freeman, 'Tobacco Plain Packaging Legislation: A Content Analysis of Commentary Posted on Australian Online News' (2011) 20 *Tobacco Control* 361; Jenny L Hatchard et al, 'A Critical Evaluation of the Volume, Relevance and Quality of Evidence Submitted by the Tobacco Industry to Oppose Standardised Packaging of Tobacco Products' (2014) 4(2) *BMJ Open* <<http://dx.doi.org.ezp01.library.qut.edu.au/10.1136/bmjopen-2013-003757>>.

## II WILL PLAIN PACKAGING WORK?

Critics of plain packaging suggest that there is insufficient evidence that plain packaging will ‘work’.<sup>49</sup> For example, the Alliance of Australian Retailers (‘AAR’) adopted the theme, ‘it won’t work, so why do it’ in a mass media lobbying effort to block the adoption of plain pack laws.<sup>50</sup> The AAR presented itself as a grassroots organisation that was representing small, local business. It was quickly revealed through a series of leaked documents, that the AAR was in fact a front group for the three major multi-national tobacco companies operating in Australia and had been formed and funded with the exclusive purpose of preventing plain pack laws from being enacted.<sup>51</sup> The tobacco industry has a long history of being highly unsupportive of public health policy measures that it claims will not work to reduce tobacco.<sup>52</sup> And, public health has an equally long history of providing volumes of evidence that show these policy approaches are exceedingly effective. The same is true for plain packaging.

As described above, plain packaging is designed to lessen the appeal of tobacco, increase health warning effectiveness and curb the use of packaging to mislead consumers about the harmful effects of tobacco use.<sup>53</sup> To know whether or not plain packaging ‘works’ it must then be measured against these three clear objectives. Prior to Australia adopting plain packaging measures, much of the evidence in support of plain packaging came from experimental studies where smokers and potential smokers were shown mock-ups of tobacco packages that had larger health warnings and/or the removal of band elements. Research participants were then asked about their attitudes, beliefs, and likely behaviours in response to the packs.

A 2013 review of 25 quantitative studies that explored the likely effect of plain packaging on the three core policy objectives found that studies consistently showed that plain packaging reduced the appeal of cigarettes.<sup>54</sup> And while the results were more mixed, plain packaging also tended to increase the salience and believability of health warnings and it improved smoker misconceptions about product strength and associated harms. Pack colour was also found to play a significant role in influencing consumer perceptions, with lighter coloured packs deemed to contain weaker and less harmful cigarettes than darker coloured packs.<sup>55</sup> Yet further reinforcing that plain packaging should not be misinterpreted to mean that tobacco products are sold in pristine, white boxes.

A 2015 narrative review builds on the above findings and included additional qualitative research and preliminary population-level data assessing the impact of the Australian plain packaging laws.<sup>56</sup> The review authors emphasised that plain packaging laws are likely to be

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<sup>49</sup> Deloitte, *Tobacco Packaging Regulation: An International Assessment of the Intended and Unintended Impacts: A Deloitte Report for British American Tobacco* (May 2011) Deloitte Touche Tohmatsu Limited <<http://www.webcitation.org/69OaF3cDR>>.

<sup>50</sup> The media campaign can be viewed online: The Alliance of Australian Retailers, *It Won’t Work So Why Do It* (television commercial, 11 August 2010) <<https://www.youtube.com/watch?v=hjqeiNvBSqw>>.

<sup>51</sup> Tobacco Tactics, *Alliance of Australian Retailers* (17 March 2016) <[http://www.tobaccotactics.org/index.php/Alliance\\_of\\_Australian\\_Retailers](http://www.tobaccotactics.org/index.php/Alliance_of_Australian_Retailers)>.

<sup>52</sup> Mike M Daube and Simon Chapman, ‘Tobacco Plain Packaging’ (2012) 197(5) *Medical Journal of Australia* 272.

<sup>53</sup> David Hammond, ‘“Plain Packaging” Regulations for Tobacco Products: The Impact of Standardizing the Color and Design of Cigarette Packs’ (2010) 52 (Suppl 2) *Salud Publica de Mexico* S226.

<sup>54</sup> Martine Stead et al, ‘Is Consumer Response to Plain/Standardised Tobacco Packaging Consistent with Framework Convention on Tobacco Control Guidelines? A Systematic Review of Quantitative Studies’ (2013) 8(10) *PLoS One* e75919.

<sup>55</sup> *Ibid.*

<sup>56</sup> Collin N Smith et al, ‘Plain Packaging of Cigarettes: Do We Have Sufficient Evidence?’ (2015) 8 *Risk Management Healthcare Policy* 21.

most effective when accompanied by large graphic health warnings and implemented as part of a comprehensive smoking prevention strategy. The totality of the evidence reviewed was deemed to be reliable and supported a strong case that plain packaging can reduce positive perceptions of smoking and dissuade tobacco use.

#### A *Australian Adult Smoker Responses to Plain Packaging*

As evaluation and research of Australia's plain packaging laws is now available to supplement earlier experimental work it provides the 'real world' evidence that sceptics demanded. A cross-sectional study that examined Australian adult smokers' responses to plain packaging before and one year after implementation found that more smokers disliked their pack, perceived lower pack appeal, lower cigarette quality, lower satisfaction and lower value.<sup>57</sup> More smokers also no longer believed that brands differ in terms of prestige. In terms of the new and larger graphic health warnings, more smokers noticed them, attributed motivation to quit to the warnings, avoided specific warnings when purchasing a pack and covered up their packs. The warnings remained believable, as there was no change to the perceived exaggeration of harms presented in the warnings. The proportion of smokers who believed that brands do not differ in harmfulness also increased, but no there was change in the belief that some brand variants do not differ in strength or to overall the perceived harmfulness of cigarettes. The study authors concluded that the first two objectives of the legislation relating to reducing appeal and increasing graphic warning effectiveness had been achieved. However, the third objective of reducing the extent to which smokers are misled about the harms of smoking was only partially met, which may be attributed to the fact that misleading brand variant names that imply reduced harm or product strength, are still permitted under the plain packaging laws.

An earlier population-level, cross sectional study that investigated the impact of Australia's plain tobacco packaging policy amongst adult smokers in the state of New South Wales two to three months following implementation found similar results.<sup>58</sup> There was a significant increase in the absolute proportion of smokers having strong cognitive, emotional, and avoidant responses to the new and larger graphic health warnings. Similarly, there was a significant increase in the proportion of smokers strongly disagreeing that the look of their cigarette pack is attractive, says something good about them, influences the brand they buy, makes their pack stand out, is fashionable and matches their style. Together these two studies<sup>59</sup> confirm that the policy objectives were met in both the short (two to three months) and long (one year) term following policy implementation.

While not a direct objective of plain packaging, there is also evidence that the revised health warnings and plain packaging reforms have an impact on quitting behaviour among adults.<sup>60</sup> As happened when Australia first introduced graphic health warnings in 2006, there was a 78 per cent increase in the number of calls to the Quitline (a toll free smoking cessation

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<sup>57</sup> Melanie Wakefield et al, 'Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings 1 Year After Implementation: Results from a National Cross-sectional Tracking Survey' (2015) 24 (Suppl 2) *Tobacco Control* ii17.

<sup>58</sup> Sally M Dunlop et al, 'Impact of Australia's Introduction of Tobacco Plain Packs on Adult Smokers' Pack-Related Perceptions and Responses: Results from a Continuous Tracking Survey' (2014) 4(12) *BMJ Open* e005836 <<http://dx.doi.org.ezp01.library.qut.edu.au/10.1136/bmjopen-2014-005836>>.

<sup>59</sup> *Ibid*; Wakefield et al, above n 57.

<sup>60</sup> Sarah Durkin et al, 'Short-term Changes in Quitting-related Cognitions and Behaviours after the Implementation of Plain Packaging with Larger Health Warnings: Findings From a National Cohort Study with Australian Adult Smokers' (2015) 24 (Suppl 2) *Tobacco Control* ii26; Jane M Young et al, 'Association Between Tobacco Plain Packaging and Quitline Calls: A Population-based, Interrupted Time-series Analysis' (2014) 200(1) *Medical Journal of Australia* 29.

counselling service) with the introduction of plain packaging, peaking four weeks after plain packs initial appearance on the market.<sup>61</sup> However, this increased call rate was sustained for much longer, 43 weeks versus 20 weeks, than when graphic health warnings were introduced. In a study comparing a series of smoker cohorts that were surveyed about quitting behaviours before, during the transition period of plain packs being on the market, and one year after implementation, there was significantly greater increases in quit attempt rates in the transition and one year following periods, as compared to the period before plain packs.<sup>62</sup>

### B *Australian Adolescent Responses to Plain Packaging*

The impact these laws had on adolescent perceptions about cigarette brands and packs,<sup>63</sup> and their knowledge of smoking harms has also been investigated.<sup>64</sup> A school based cross-sectional survey conducted prior to and 7–12 months following the implementation of plain pack laws was the first ‘real world’ study to assess adolescent perceptions of tobacco brands and packs.<sup>65</sup> This study found that following plain pack implementation, among the 65 per cent of adolescents who had seen a cigarette pack in the previous six months, the appeal of cigarette packs and brands had decreased and there was a large increase in the proportion disagreeing that some brands have better looking packs than others. The researchers also found a decrease in positive pack image ratings. These findings were consistent across both smokers and non-smokers. The same survey examined how cognitive processing of warnings and awareness of different health consequences of smoking changed following the adoption of the new health warnings and plain pack laws.<sup>66</sup> While students did have an increased awareness of bladder cancer, which was newly highlighted in the refreshed warnings, students’ cognitive processes, including reading, attending to, thinking or talking about the health warnings on cigarette packs, did not change. This is in stark contrast to the adult reactions to the new and larger health warnings, and may simply reflect the fact that daily smoking amongst Australian adolescents is exceptionally low, so they do not access and handle cigarette packs as frequently as adult smokers.<sup>67</sup>

Another Australian cross-sectional telephone survey, that included adolescents and young adults (age 12–24 years) from the states of New South Wales and Queensland, assessed attitudes towards, and responses to, tobacco plain packs pre- (2011) and post- (2012) implementation.<sup>68</sup> Encouragingly, youth responses to plain packaging were greater than they had anticipated prior to the introduction of plain packaging. This suggests that the experimental studies conducted prior to the adoption of plain pack reforms may in fact be underestimating the real-world effects of plain packaging, not overestimating, as some critiques have suggested.<sup>69</sup> For example, in 2011, only 8 per cent of ‘never smokers’ anticipated that plain packaging would make them less likely to try smoking, whereas in 2012, following policy

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<sup>61</sup> Young et al, above n 59.

<sup>62</sup> Durkin et al, above n 59.

<sup>63</sup> Victoria White, Tahlia Williams and Melanie Wakefield, ‘Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents’ Perceptions of Cigarette Packs and Brands?’ (2015) 24 (Suppl 2) *Tobacco Control* ii42.

<sup>64</sup> Victoria White et al, ‘Do Larger Graphic Health Warnings on Standardised Cigarette Packs Increase Adolescents’ Cognitive Processing of Consumer Health Information and Beliefs About Smoking-Related Harms?’ (2015) 24 (Suppl 2) *Tobacco Control* ii50.

<sup>65</sup> White, Williams and Wakefield, above n 62.

<sup>66</sup> White et al, above n 63.

<sup>67</sup> Dunlop et al, above n 57; Wakefield et al, above n 56.

<sup>68</sup> Sally Dunlop et al, ‘Australia’s Plain Tobacco Packs: Anticipated and Actual Responses Among Adolescents and Young Adults 2010–2013’ (2016) *Tobacco Control* (online first, 15 November 2016).

<sup>69</sup> Hatchard et al, above n 47.

implementation, 16 per cent reported that the measure made them less likely to try smoking. Smoker responses were also greater, with significantly more smokers reporting quitting and social de-normalisation related responses (hiding packs, feeling embarrassed about smoking) to the plain packaging than predicted.

### C *Does Plain Packaging Contribute to Lowering the Prevalence of Smoking?*

In a similar vein as the ‘it won’t work’ argument was the suggestion that even if plain packaging did succeed in increasing the effectiveness of health warnings and reducing tobacco brand appeal, it would have no real effect on actual smoking rates. There are two important points to consider when analysing the validity of this argument:

- (1) Plain packaging was primarily conceived as a prevention measure, to protect young people from taking up smoking. This means any impact on smoking rates will not be measurable until sometime in the future, especially in countries like Canada where youth smoking rates are very low.<sup>70</sup>
- (2) There is no magic policy approach that has seen smoking rates plummet overnight, reductions are incremental and occur slowly over time as a result of prolonged investment in public health measures and increased regulation of tobacco products. Additionally, others have reasoned that requiring ironclad proof of a policy’s effect, prior to implementing such a policy, means that innovative approaches could never be adopted.<sup>71</sup>

Nonetheless, three years after the adoption of plain packaging, the Australian Department of Health and Ageing commissioned a study to determine if plain packaging had had a discernible effect on the prevalence of smoking. As Australia had also implemented a series of significant tobacco tax increases at the same time as adopting plain packaging laws, these were adjusted for in the final analysis. Tobacco plain packaging in combination with graphic health warnings was associated with one quarter of the total drop (0.55 percentage points) in smoking prevalence between December 2012 and September 2015.<sup>72</sup> This translates to 108 228 fewer smokers as a direct result of the policy. Again, it must be emphasised that this was not an explicit objective of the plain packaging legislation, but nonetheless, a goal of any comprehensive tobacco control program, of which plain packaging should be a part, is to reduce smoking rates. Other nations that follow Australia’s lead, can now readily point to robust and ample evidence of the impact of plain packaging laws on smoking-related opinions, attitudes, and behaviours.

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<sup>70</sup> Jessica L Reid et al, *Tobacco Use in Canada: Patterns and Trends, 2015 Edition* (Propel Centre for Population Health Impact, University of Waterloo, 2015) <<https://uwaterloo.ca/tobacco-use-canada/tobacco-use-canada-patterns-and-trends-2015-edition>>.

<sup>71</sup> Ross Gittins, ‘Under Fire, Big Tobacco Rolls Out the Poor Little Stupid Nation Argument’ *The Sydney Morning Herald* (online), 30 May 2011 <<http://www.smh.com.au/business/under-fire-big-tobacco-rolls-out-the-poor-little-stupid-nation-argument-20110529-1fb12.html>>.

<sup>72</sup> Department of Health (Aust), *Post-Implementation Review: Tobacco Plain Packaging* (2016) <<http://ris.pmc.gov.au/2016/02/26/tobacco-plain-packaging>>.

### III ARGUMENTS PRESENTED AGAINST PLAIN PACKAGING REFORMS

#### A *Slippery Slope Objections: Tobacco Today, But What Will Be Sold in a Plain Package Next?*

In countries like Australia and Canada,<sup>73</sup> where smoking rates are amongst the lowest in the world, and most smokers wish they could quit,<sup>74</sup> the tobacco industry finds itself in the awkward position of having very few community supporters. It is necessary then for it to try to appeal beyond its addicted customer base, and convince non-smokers and other industries that the products they hold dear will be affected next, in hopes they will assist in lobbying efforts to derail reforms. Slippery slope arguments position tobacco as the first victim of an unfair policy that will see other industries fall foul of government over-regulation.

JTI-Macdonald Corp, in Canada, and British American Tobacco, in Australia, and Imperial Tobacco UK, all developed print materials, online content, and advertisements warning that other products such as beer, wine, confectionary, and French fries would be next, should the government pass plain packaging laws.<sup>75</sup> These tobacco industry-funded ads featured mock-ups of these other products in plain packages, some in the same green/brown colour as plain tobacco packages and some in plain white packaging. In Australia, this attempt to make allies of other industries backfired when the Winemakers Federation of Australia moved quickly to publicly dissociate itself from any tobacco industry campaign, stating that its members would reject any links made between the two industries.<sup>76</sup>

It is true that some public health stakeholders have encouraged the obesity and alcohol control fields to adopt some of the same measures that have worked so well to reduce smoking rates, such as advertising restrictions, tax increases, health warnings, and mass media campaigns.<sup>77</sup> However, the pace of success in adopting these approaches has been glacially slow and some of these policies, particularly taxes and advertising controls on alcohol have already been in place for decades. The WHO FCTC remains the only global health treaty, food is still advertised on television around the world, graphic health warnings do not appear on fast food containers and alcohol is still sold in branded bottles. While there has been some success in adopting novel obesity prevention taxes, particularly on sugar sweetened beverages, the amount of tax per product is a small fraction of the high rates of tobacco taxes in the nations

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<sup>73</sup> E M Greenhalgh, M Bayly and M H Winstanley, '1.13 International Comparisons of Prevalence of Smoking' in M M Scollo and M H Winstanley (eds) *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, 2015) <<http://www.tobaccoin australia.org.au/chapter-1-prevalence/1-13-international-comparisons-of-prevalence-of-sm>>.

<sup>74</sup> Geoffrey T Fong et al, 'The Near-universal Experience of Regret Among Smokers in Four Countries: Findings from the International Tobacco Control Policy Evaluation Survey' (2004) 6 (Suppl 3) *Nicotine and Tobacco Research* S341.

<sup>75</sup> British American Tobacco Australia, *Plain Pack: Campaign* (1 September 2011) <<https://tinyurl.com/jzkjxud>>; JTI-Macdonald Corp, *Where's the Next Focus for the Canadian Branding Ban?* (September 2016) <<https://www.bothsidesoftheargument.ca/wheres-next-focus-canadian-branding-ban/>>; Tobacco Tactics, 'Where Will it Stop?' *Industry Arguments Against Plain Packaging* (19 May 2016) <[http://www.tobaccotactics.org/index.php/Industry\\_Arguments\\_Against\\_Plain\\_Packaging](http://www.tobaccotactics.org/index.php/Industry_Arguments_Against_Plain_Packaging)>.

<sup>76</sup> D Stone, 'Wine Industry Panicked Over Links to Plain Packaging Tobacco' *Food Mag* (online), 30 June 2011 <<https://foodmag.com.au/wine-industry-panicked-over-links-to-plain-packaging-tobacco/>>.

<sup>77</sup> Chantal Blouin and Laurette Dubé, 'Global Health Diplomacy for Obesity Prevention: Lessons from Tobacco Control' (2010) 31 *Journal of Public Health Policy* 244; Mohammed Al-Hamdani and Steven M Smith, 'Alcohol Warning Label Perceptions: Do Warning Sizes and Plain Packaging Matter?' (2017) 78 *Journal of Studies on Alcohol and Drugs* 79; Shawna L Mercer et al, 'Possible Lessons from the Tobacco Experience for Obesity Control' (2003) 77 *The American Journal of Clinical Nutrition* 1073S.

that are also adopting tobacco plain packaging.<sup>78</sup> Slippery slope arguments are decidedly flat in the face of real world progress on other chronic disease prevention policy changes.

### B *Plain Packaging Will Ruin Small Businesses*

The tobacco industry has to cultivate this argument very carefully. If it were to suggest that plain packaging would have a detrimental financial effect on all tobacco retailers, it is essentially admitting that the law will negatively impact tobacco sales or profits. This is tantamount to agreeing that the regulation actually does work to reduce tobacco sales and use. Instead, the industry suggests that plain packaging laws will shift tobacco sales away from small, local business owners and retailers and have it end up concentrated in the hands of a few, large retail outlets. Given that just six corporations control the majority of the global tobacco industry,<sup>79</sup> the sincerity of this concern for small, local business is somewhat unconvincing.

The industry argues that smokers will swap to larger retailers because the service they will receive at small retailers will be too inconvenient. Plain packaging is said to slow down sales clerks and increase the number of pack selection errors so dramatically that smokers will no longer be willing to stand in line waiting to buy their purchases. In a simulation study, where participants were randomly assigned to a display of 50 plain or coloured cigarette packets and then read a list of cigarette brands, the time it took to locate each packet was significantly quicker for *plain* compared to coloured packs.<sup>80</sup> A follow-up study that timed real-world tobacco transactions in 100 convenience stores, newsagents, petrol stations, and supermarkets immediately before and after plain packaging found that retailers actually slightly decreased the pack selection times after the legislation was implemented.<sup>81</sup> Neither study found an increase in pack error selection. It appears that small retailer employees are readily able to adapt to plain packaging and to read and remember the tobacco brand names that remain on the packs and continue or even improve on their level of service.

In terms of actual smoker purchasing behaviour, in a large national Australian telephone survey, the odds of reporting a current tobacco purchase from major retail channels such as supermarkets, tobacconists, small mixed businesses and petrol stations did not change after the implementation of plain packaging.<sup>82</sup>

This ‘financial impact, but no public health impact’ argument is furthered by suggestions that plain packaging leads to smokers down-trading brands, instead of affecting initiation or cessation of smoking. It is suggested then that plain packaging reduces prices that can be charged for premium cigarettes, thereby reducing revenue and profits for retailers. One year following plain packaging law implementation in Australia saw an increase in the

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<sup>78</sup> BBC, ‘UK Pushes Ahead with Sugar Tax’ *BBC News (Health)* (online), 5 December 2016 <<http://www.bbc.com/news/health-38212608>>.

<sup>79</sup> M Eriksen et al, ‘Tobacco Companies Should be Strictly Regulated in Ways that Minimize the Harm Caused by Their Products’ *The Tobacco Atlas* (5<sup>th</sup> ed, 2015). <<http://www.tobaccoatlas.org/topic/tobacco-companies/>>.

<sup>80</sup> Owen B J Carter et al, ‘Measuring the Effect of Cigarette Plain Packaging on Transaction Times and Selection Errors in a Simulation Experiment’ (2012) 21 *Tobacco Control* 572.

<sup>81</sup> Owen Carter et al, ‘Plain Packaging for Cigarettes Improves Retail Transaction Times’ (2013) 346 *British Medical Journal* (online) <<http://dx.doi.org.ezp01.library.qut.edu.au/10.1136/bmj.f1063>>.

<sup>82</sup> Michelle Scollo et al, ‘Did Smokers Shift from Small Mixed Businesses to Discount Outlets Following the Introduction of Plain Packaging in Australia? A National Cross-Sectional Survey’ (2015) 24 (Suppl 2) *Tobacco Control* ii98.

recommended retail price of tobacco products, and the advertised price of products at retail outlets did not decrease.<sup>83</sup>

### C *Plain Packaging Will Increase the Illicit Tobacco Market*

The argument that the market for illicit tobacco products will increase is not unique to plain packaging; it is used by the tobacco industry, and the third parties it funds, in the face of nearly every tobacco policy reform that is proposed or enacted.<sup>84</sup> The key to controlling the illicit tobacco market is not to handcuff effective tobacco control measures, but to control the supply chain of tobacco, and resource and prioritise enforcement efforts appropriately.<sup>85</sup> In Canada, contraband tobacco use has declined considerably since 2009 due to increased, and improved coordination of, enforcement activities.<sup>86</sup> Plain packaging reforms will also retain the traceable tax paid stamps currently required on all Canadian tobacco packages and should be placed on packs to avoid obscuring graphic health warnings.<sup>87</sup>

The Australian market for illicit tobacco did not increase following plain packaging. A large, national survey showed no increase in use, before versus after the introduction of plain packaging, of two key subsets of cigarettes likely to be contraband: (1) brands that are produced specifically for the illicit market, and (2) international brands purchased by survey respondents for a suspiciously low price.<sup>88</sup> The same study also found no increase in use of cigarettes purchased from informal sources (non-retail purchases). The purchasing of any unbranded tobacco declined following plain packaging, and the level of use of any completely unbranded tobacco did not change and remained very low at between 3 per cent and 4 per cent.<sup>89</sup>

### D *Governments That Enact Plain Packaging Will Face Legal Action*

Threatening legal action, regardless of how unlikely it is that the tobacco industry will be successful, is de rigeur when governments want to enact innovative legislation to curb tobacco use.<sup>90</sup> The Australian government expected and was prepared when the tobacco industry issued legal challenges to the plain packaging laws. The industry used nearly identical legal arguments to those they put forth during the Canadian debate in the 1990s (as described in Part IB above). The industry launched three separate legal processes, firstly to the Australian domestic courts,<sup>91</sup>

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<sup>83</sup> Michelle Scollo, Megan Bayly and Melanie Wakefield, 'Did the Recommended Retail Price of Tobacco Products Fall in Australia Following the Implementation of Plain Packaging?' (2015) 24 *Tobacco Control* ii90; Michelle Scollo, Megan Bayly and Melanie Wakefield, 'The Advertised Price of Cigarette Packs in Retail Outlets Across Australia Before and After the Implementation of Plain Packaging: a Repeated Measures Observational Study' (2015) 24 *Tobacco Control* ii82.

<sup>84</sup> Katherine E Smith, Emily Savell and Anna B Gilmore, 'What is Known About Tobacco Industry Efforts to Influence Tobacco Tax? A Systematic Review of Empirical Studies' (2013) 22 *Tobacco Control* 144.

<sup>85</sup> Hana Ross et al, 'Approaches for Controlling Illicit Tobacco Trade — Nine Countries and the European Union' (2015) 64(20) *Morbidity and Mortality Weekly Report* 547.

<sup>86</sup> G Emmanuel Guindon, Robin Burkhalter and K Stephen Brown, 'Levels and Trends in Cigarette Contraband in Canada' (2016) *Tobacco Control* (Online First, 6 September 2016).

<sup>87</sup> Michael Iacobelli et al, 'When the Tax Stamp Covers the Health Warning Label: Conflicting 'Best Practices' for Tobacco Control Policy' (2016) *Tobacco Control* (Online First, 20 December 2016) doi: 10.1136/tobaccocontrol.

<sup>88</sup> Michelle Scollo et al, 'Use of Illicit Tobacco Following Introduction of Standardised Packaging of Tobacco Products in Australia: Results From a National Cross-Sectional Survey' (2015) 24 (Suppl 2) *Tobacco Control* ii76.

<sup>89</sup> *Ibid.*

<sup>90</sup> Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar Publishing, 2014).

<sup>91</sup> *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.

next through an investment treaty with Hong Kong, and finally by supporting four countries<sup>92</sup> (Cuba, Honduras, Indonesia, and the Dominican Republic) in filing disputes through the World Trade Organization ('WTO') as a violation of the GATT,<sup>93</sup> the Agreement on Technical Barriers to Trade,<sup>94</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>95</sup> Canada is a third party in the WTO dispute, as it 'has a substantial trade interest in these proceedings as an importer of tobacco products and the interpretation of WTO obligations in this dispute could materially affect Canadian domestic measures'.<sup>96</sup>

Two of these three Australian legal disputes have been resolved, in the government's favour. In May 2017, leaked documents suggested that the WTO would also rule in the government's favour.<sup>97</sup> In October 2012, the High Court of Australia rejected the constitutional challenge to plain packaging legislation brought by British American Tobacco, Imperial Tobacco, Japan Tobacco and Philip Morris.<sup>98</sup> The primary argument put forth by the tobacco industry was that plain packaging constituted an unfair acquisition of its property by the Australian government, for which just terms had not been provided. The High Court ruling in favour of the Commonwealth emphasised that the Australian government had acquired no benefit or advantage of a proprietary nature by enacting plain packaging.<sup>99</sup> The tobacco industry was also ordered to pay the Australian government's associated legal costs.

In December 2015, Philip Morris Asia's ('PMA') challenge to Australia's plain packaging laws under a 1993 bilateral investment treaty between Australia and Hong Kong was dismissed. The tribunal that dismissed the claim stated that the PMA challenge was 'an abuse of rights' and that PMA's sole rationale for restructuring its company, after plain packaging adoption, was so that the Australian arm of its business would be based in Hong Kong, and it could then pursue a complaint under the investment treaty.<sup>100</sup>

Similarly, in the UK in May 2016, the UK High Court rejected a claim made by British American, Imperial, Japan International, and Philip Morris, that plain packaging laws infringed

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<sup>92</sup> A fifth country, Ukraine, withdrew its complaint in 2015: World Trade Organization, *DS434: Australia — Certain Measures Concerning Trade marks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>.

<sup>93</sup> *Marrakesh Agreement Establishing the World Trade Organization: Annex 1B: General Agreement on Trade in Services*, opened for signature 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (1994).

<sup>94</sup> *Marrakesh Agreement Establishing the World Trade Organization: Annex 1A: Agreement on Technical Barriers to Trade*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

<sup>95</sup> *Marrakesh Agreement Establishing the World Trade Organization: Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995); see Tania Voon and Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22 *Public Law Review* 218.

<sup>96</sup> World Trade Organization, *Australia — Certain Measures Concerning Trade marks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request to Join Consultations: Communication from Canada* (23 April 2012) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=89292,82951,34394,42215,46800,32464,29599,33205,86578&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=89292,82951,34394,42215,46800,32464,29599,33205,86578&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)>.

<sup>97</sup> ABC News, 'Australia Wins Landmark WTO Tobacco Plain Packaging Case' *ABC News* (online), 5 May 2017 <<http://www.abc.net.au/news/2017-05-05/australia-wins-landmark-wto-tobacco-packaging-case/8498750>>.

<sup>98</sup> *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.

<sup>99</sup> Jonathan Liberman, 'Plainly Constitutional: the Upholding of Plain Tobacco Packaging by the High Court of Australia' (2013) 39 *American Journal of Law and Medicine* 361.

<sup>100</sup> McCabe Centre for Law and Cancer, *Philip Morris Asia Challenge Under Australia – Hong Kong Bilateral Investment Treaty Dismissed* (2016) <<http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge>>.

on their human and intellectual property rights.<sup>101</sup> Some of the tobacco companies then took the case to the Court of Appeal. In November 2016, a panel of three judges dismissed the appeal.<sup>102</sup> The final domestic legal decision was made in April 2017, when the UK supreme court refused permission to the tobacco industry to appeal against the laws.<sup>103</sup>

Plain packaging has then been defended successfully in two domestic High Courts. Nations need to be prepared for and not daunted by tobacco industry legal threats and action. In recognition of tobacco industry efforts to use the courts to intimidate governments and to thwart tobacco control reforms, Bloomberg Philanthropies has established an international legal fund to provide technical support of legal experts to draw up legislation and defend court actions brought by the tobacco industry.<sup>104</sup>

Canada has a strong track record of successfully defending its tobacco control reforms when challenged by the tobacco industry. Recent Supreme Court of Canada rulings suggest there are legal precedents for restricting the tobacco industry from advertising and promoting its products and brands,<sup>105</sup> and that provisions of the *Tobacco Act* and the Tobacco Products Information Regulations<sup>106</sup> that impose limitations on freedom of expression are justified as reasonable, and are constitutional under the Canadian Charter of Rights and Freedoms.<sup>107</sup>

#### IV BUILDING ON THE SUCCESS OF PLAIN PACKAGING LEGISLATION

Evidence that Australia's plain packaging laws are sound and should be replicated and adopted by other nations is convincing. But there is room to improve on the Australian laws and adopt measures that may counter industry adaptations and exploitation of loopholes. As marketing restrictions tighten, the tobacco industry must look to any remaining windows, no matter how small, to promote its products. The proposed Canadian reforms open the door to significantly improving on plain packaging legislation, by increasing the restrictions on acceptable brand names, the internal pack design, and the appearance of the cigarette itself.

The tobacco industry quickly trade-marked new brand names under plain pack laws in Australia.<sup>108</sup> Imperial Tobacco, for example, introduced the brand *Peter Stuyvesant + Loosie*, the pack included a bonus cigarette (21 instead of the usual 20), and the name served to promote this premium offer.<sup>109</sup> The inclusion of the extra cigarette also meant the internal pack dimensions were modified to accommodate it. The proposed Canadian regulations limiting brand names and pack fillers may have prevented this promotional activity from occurring.

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<sup>101</sup> *British American Tobacco Limited and others v The Queen* [2016] EWHC 1169 (Admin).

<sup>102</sup> *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182 (30 November 2016).

<sup>103</sup> Chris Johnston, 'UK supreme court denies tobacco firms permission for plain packaging appeal', *The Guardian* (online), 12 April 2017 <<https://www.theguardian.com/society/2017/apr/11/uk-supreme-court-denies-tobacco-firms-permission-for-plain-packaging-appeal>>.

<sup>104</sup> Bloomberg Philanthropies, *Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund* (18 March 2015) <<https://www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/>>.

<sup>105</sup> *Rothmans, Benson & Hedges Inc v Saskatchewan* [2005] 1 SCR 188; *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610.

<sup>106</sup> Tobacco Act, S C 1997, c 13; *Tobacco Products Information Regulations*, SOR/2000-272.

<sup>107</sup> *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610; *Canada Act 1982* (UK) c 11, sch B, Part I *Canadian Charter of Rights and Freedoms*, s 7.

<sup>108</sup> Intellectual Property in Australia, *Trade mark Details. Peter Stuyvesant + Loosie* (17 October 2013) <<http://www.ipaustralia.com.au/applicant/van-nelle-tabak-nederland-bv/strade-marks/1551230/>>.

<sup>109</sup> Simon Chapman and Becky Freeman, *Removing the Emperor's Clothes: Australia and Tobacco Plain Packaging* (Sydney University Press, 2017).

The perceived sensory differences between cigarettes can be heavily influenced by the image of the brand, rather than any real differences between premium and value cigarettes. The importance of tobacco brand names in influencing consumer perceptions of their smoking experience continues to be evident, even in a plain packaging environment. An Australian experimental study that took place two years after plain packaging laws were implemented, found that smokers rated cigarettes given a premium brand name as having a better taste, as less harsh and less dry than identical cigarettes given a value brand name.<sup>110</sup> This result was irrespective of whether the packs actually contained premium or value cigarettes. Limiting brand names may be able to reduce the impact that brand names have on convincing smokers that they are using a quality product.

The appearance of the cigarette itself also has an impact on how smokers perceive quality, taste, and safety, and the tobacco industry has manufactured and marketed cigarettes of varying lengths and diameters. Long, exceptionally slim cigarettes have been shown to increase product appeal to young women,<sup>111</sup> and Philip Morris International developed a variant of its flagship brand, Marlboro, known as Marlboro Intense, that was 1.5 cm shorter, and designed to deliver the same amount of nicotine but requiring less time to smoke.<sup>112</sup> But while the Australian plain packaging legislation does not allow cigarettes to be printed with logos and marketing messages, it does not prescribe the length or diameter of cigarettes, or that they be wrapped in a dissuasive colour. This means that while the cigarette packs are the unattractive drab dark brown colour, the cigarettes themselves can be a bright, clean white. Research from New Zealand suggests requiring individual cigarettes to be wrapped in an unattractive colour,<sup>113</sup> or to feature a health warning, could increase the impact of plain packaging. The proposed Canadian regulations could prevent tobacco manufacturers from using cigarette shape and length as yet another way of targeting vulnerable smokers.

The Canadian government is planning to refresh the graphic health warnings on tobacco packages. Canadian tobacco warnings also include personal testimonials from smokers that have suffered from the devastating impacts of smoking. In December 2016, Health Canada issued a call for new individuals to submit their stories as part of the graphic warning refresh.<sup>114</sup> While personal testimonials are common in tobacco control mass media campaigns,<sup>115</sup> they are not universally part of graphic health warning messages. It is not enough for countries to adopt graphic health warnings and plain packaging measures. It is essential to renew the images regularly, and include a variety of messages and message types. Stale messaging lessens the impact of graphic health warnings over time.<sup>116</sup>

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<sup>110</sup> Gemma Skaczkowski et al, 'Influence of Premium Versus Value Brand Names on the Smoking Experience in a Plain Packaging Environment: An Experimental Study' (2017) 7(1) *BMJ Open* e014099.

<sup>111</sup> David Hammond et al, 'Impact of Female-Oriented Cigarette Packaging in the United States' (2011) 13 *Nicotine and Tobacco Research* 579.

<sup>112</sup> Daily Mail, 'Tobacco Firm Launches "Mini-Cigarette" for Shorter Smoking Breaks', *Daily Mail* (online), 3 February 2008 <<http://www.dailymail.co.uk/news/article-512049/Tobacco-firm-launches-mini-cigarette-shorter-smoking-breaks.html>>.

<sup>113</sup> Janet Hoek et al, 'Dissuasive Cigarette Sticks: The Next Step in Standardised ("Plain") Packaging?' (2015) 25 *Tobacco Control* 699.

<sup>114</sup> Health Canada, 'HC Seeks Testimonials for Tobacco Product Warnings' (Media Release, 7 December 2016) <[http://www.newswire.ca/news-releases/hc-seeks-testimonials-for-tobacco-product-warnings-605279886.html?tc=eml\\_mycnw](http://www.newswire.ca/news-releases/hc-seeks-testimonials-for-tobacco-product-warnings-605279886.html?tc=eml_mycnw)>.

<sup>115</sup> Sarah Durkin, Emily Brennan and Melanie Wakefield, 'Mass Media Campaigns to Promote Smoking Cessation Among Adults: An Integrative Review' (2012) 21 *Tobacco Control* 127.

<sup>116</sup> Culadeeban Ratneswaran et al, 'Desensitisation to Cigarette Package Graphic Health Warnings: A Cohort Comparison Between London and Singapore' (2016) 6 *BMJ Open* <<http://dx.doi.org.ezp01.library.qut.edu.au/10.1136/bmjopen-2016-012693>>.

V THE FUTURE

It is naive to assume that plain packaging will see an end to tobacco marketing. Tobacco companies will still rely heavily on their relationships with retailers to ensure their brands are readily available to consumers, are positioned as market leaders, and sold alongside other everyday items. Tobacco trade marketing is largely unregulated and allows the tobacco industry to offer retailers incentives and discounts to push its brands to consumers.<sup>117</sup> However, one potential benefit of plain packaging is that it may also curb social media and consumer generated marketing of tobacco brands. In an age where consumers regularly post photos and videos of their favourite brands to social media, with little or no incentive from brand owners, a tobacco pack that is mostly covered in gruesome disease imagery offers little incentive to ‘selfie’ takers.<sup>118</sup> The next generation of children will grow up with no knowledge or memory of tobacco brand imagery — the first to do so in more than 100 years.

Since the Australian adoption of tobacco plain packaging in 2012, there has been increasing international momentum to spread this successful reform. Canada appears poised to become the next nation to adopt and implement this essential component of a comprehensive ban on tobacco advertising. Just as on-pack graphic health warnings once seemed a radical and subversive measure, plain packaging is predicted to become commonplace amongst nations committed to improving public health. Branded tobacco packs are set to be novelty items destined for museum collections.

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<sup>117</sup> Suzan Burton et al, ‘Marketing Cigarettes When All Else is Unavailable: Evidence of Discounting in Price-sensitive Neighbourhoods’ (2014) 23 *Tobacco Control* e24.

<sup>118</sup> Becky Freeman et al, ‘Digital Junk: Food and Beverage Marketing on Facebook’ (2014) 104(12) *American Journal of Public Health* e56. The Oxford English Dictionary defines ‘selfie’ as: ‘A photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media’: *Oxford English Dictionary* (online ed, 7 July 2017) <<https://en.oxforddictionaries.com/definition/selfie>>.