

Consultation Paper- Exposure Draft- Public Health (Tobacco and Other Products) Bill 2023 and Public Health (Tobacco and Other Products) Regulations 2023

Overview

On 30 November 2022 the Hon. Mark Butler MP Minister for Health and Aged Care [announced](#) tobacco reforms. These reforms are to bring together current legislation and introduce new measures to reduce tobacco prevalence. The Australian Government is now consulting on the exposure draft legislation for these reforms.

The **exposure draft** includes the:

- **Public Health (Tobacco and Other Products) Bill 2023** (the Bill)
- **Public Health (Tobacco and Other Products) Regulations 2023** (the Regulations)
- **Public Health (Tobacco and Other Products) Consequential and Transitional Bill 2023** (the Consequential and Transitional Bill)
- **Public Health (Tobacco and Other Products) Consequential and Transitional Regulations 2023** (the Consequential and Transitional Regulations).

The reforms represent a renewed focus on improving public health of Australians by discouraging smoking and the use of tobacco or e-cigarette products.

The tobacco regulatory reforms and non-regulatory measures implemented by all Australian Governments have contributed to Australia's smoking prevalence being amongst the lowest in the world. However, tobacco use remains the leading cause of preventable death and disability in Australia and is estimated to kill over 20,000 Australians each year.¹

The National Tobacco Strategy 2023-2030 (NTS) was released on 2 May 2023. It aims to improve the health of all Australians by reducing tobacco use.² The NTS aims to achieve a national daily smoking prevalence of less than 10% by 2025 and 5% or less by 2030 in Australia, and to reduce the daily smoking rate among First Nations people to 27% or less by 2030.³ Consistent with these aims there is more that can be done to further reduce the preventable death and disability caused by tobacco use. Reforms to the current tobacco framework are needed to effectively respond to changes in the market and products which influence consumer behaviour and seek to undermine existing tobacco control measures.⁴ Reforms are also necessary to ensure Australia continues to meet its ongoing obligations under the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC).⁵

¹ Australian Bureau of Statistics, 'Pandemic insights into Australian smokers 2020-21' (2022). Available at: [Pandemic insights into Australian smokers, 2020-21 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/Pandemic-insights-into-Australian-smokers-2020-21). Accessed date: 23/05/2023.

² Australian Government Department of Health and Aged Care, 'National Tobacco Strategy 2023-2030'. Available at: [National Tobacco Strategy 2023-2030 | Australian Government Department of Health and Aged Care](https://www.health.gov.au/national-tobacco-strategy-2023-2030). Accessed date: 23/05/2023.

³ Ibid.

⁴ S Bialous, 'Impact of Implementation of the WHO FCTC on the tobacco industry's behaviour', *Tobacco Control*, (2019) 28: 94-96. Available at: [Impact of implementation of the WHO FCTC on the tobacco industry's behaviour | Tobacco Control \(bmj.com\)](https://www.bmj.com/impact-of-implementation-of-the-who-fctc-on-the-tobacco-industry-s-behaviour). Accessed date: 23/05/2023.

⁵ World Health Organization, 'Framework Convention on Tobacco Control' (2003) <https://fctc.who.int/who-fctc/overview>. Accessed date: 28/05/2023.

Consultation process

This Consultation Paper outlines the potential approach for Government to implement reforms that address limitations of the current tobacco control framework and that will reduce smoking prevalence further to meet government targets. To enable stakeholder and community engagement in the process, the exposure draft of the Public Health (Tobacco and Other Products) legislation and this consultation paper are being released for public comment until **14 July 2023**.

Submissions are invited in response to the wording of the proposed amendments and, in particular, the specific consultation questions.

The Department of Health and Aged Care (the Department) intends to publish submissions. Direct contact details such as phone numbers and email addresses will be redacted. By providing a submission through this process, you are consenting to having your submission published by the Department in full. The Department retains the right to leave unpublished any submission, or part thereof, including any that contain offensive or defamatory comments, or which are outside the scope of the consultation.

When making your submission, please indicate whether you do not want your submission published or would like to make an anonymous submission. Submissions which have been published on the Department's website can be accessed by the general public, including people overseas. Ordinarily, where the Department discloses personal information to an overseas recipient, *Australian Privacy Principle (APP) 8.1* requires the Department to take reasonable steps to ensure that the overseas recipients do not breach the APPs. If you consent to the publication of your submission, APP 8.1 will not apply to this disclosure and the Department will not be accountable under the *Privacy Act 1988 (Cth)* for any subsequent use or disclosure of the submission by an overseas recipient, and you will not be able to seek redress under that Act.

Submissions may be subject to freedom of information requests, or requests from Parliament, which the Department will consider and respond to in line with procedural requirements.

This consultation process is undertaken in accordance with Australia's obligations under Article 5.3 of the FCTC. Article 5.3 of the FCTC obliges Australia to take steps to protect its tobacco control policy setting and implementation from interference from the tobacco industry and its interests. This also extends to the e-cigarette industry. Consistent with Australia's obligations under Article 5.3 of the FCTC, consultation with tobacco and e-cigarette industry and individuals and organisations whose interests may be aligned with the tobacco industry will be limited to what is necessary to enact effective tobacco control measures and will be undertaken in a transparent and accountable manner. Written submissions received from individuals or organisations associated with the tobacco or e-cigarette- industry will be deemed to have a conflict of interest (whether actual or perceived).

Overview of Reform

The *Tobacco Advertising Prohibition Act 1992* and the *Tobacco Plain Packaging Act 2011* and their Regulations, the *Tobacco Advertising Prohibition Regulation 1993* and *Tobacco Plain Packaging Regulations 2011* have been the subject of a thematic review.⁶ The thematic review involved a comprehensive analysis to modernise the legislative framework for tobacco control, ensuring it is fit-for-purpose, addresses current gaps and limitations and future challenges in tobacco control, including identifying options to regulate the advertising of new and emerging products and to adapt to a constantly emerging and changing technological landscape.

The proposed Bill consolidates the existing tobacco framework into one Bill with associated regulations thereby streamlining the operation of the laws. It modernises and simplifies the existing provisions and introduces new measures to support the objective of discouraging smoking and seeks to address the health risks posed by vaping and e-cigarette products by advertising and promotion of e-cigarettes. The amalgamation of the tobacco control legislation will help to strengthen the tobacco control framework to meet current and emerging issues.

The proposed Bill does not address the stronger regulation of e-cigarette availability and supply. However, the Government has committed to introduce new controls on e-cigarette importation, contents and packaging and will work with States and Territories to address the black market for e-cigarettes.

The Bill contains 7 chapters that thematically present the **proposed provisions**.

Chapter 1 sets out the preliminary matters including commencement dates, objects of the Act, definitions and key concepts.

Chapter 2 provides for the regulation of tobacco and e-cigarette advertising and sponsorships. The provisions are a consolidation of the *Tobacco Advertising Prohibition Act 1992* and are expanded to also apply to the advertising and promotion of e-cigarettes. The chapter includes offence and civil penalty provisions.

Chapter 3 creates the regime that mandates the requirements relating to plain packaging of tobacco products. The provisions include requirements from the *Tobacco Plain Packaging Act 2011* as well as additional measures. It permits the making of regulations prescribing plain packaging requirements and conditions for the appearance, content and standards of tobacco products. The chapter includes a range of offences and civil penalty provisions in relation to conduct dealings with non-compliant packaging.

⁶ *Tobacco Advertising Prohibition Act 1992* <https://www.legislation.gov.au/Details/C2022C00060>; *Tobacco Plain Packaging Act 2011* <https://www.legislation.gov.au/Details/C2021C00466>; *Tobacco Advertising Prohibition Regulation 1993* <https://www.legislation.gov.au/Details/F2012C00624>; *Tobacco Plain Packaging Regulations 2011* <https://www.legislation.gov.au/Details/F2018C00935>. Accessed date: 28/05/2023.

Chapter 4 provides for permanent bans on certain regulated tobacco items. The chapter facilitates the Minister imposing a permanent ban on chewing tobacco and snuffs intended for oral use consistent with the existing ban in the *Trade Practices Act 1974- Consumer Protection Notice No.10 of 1991- Permanent Ban on Goods*.⁷ The chapter includes offence and civil penalty provisions.

Chapter 5 provides for new reporting requirements. Reporting entities, as defined, would be required to submit reports containing information about tobacco products sold, supplied, or offered for sale or supply in Australia as well as to report on advertising, promotion and sponsorship activities and expenditure. Manufacturers will also be required to report on research and development activities.

Chapter 6 contains compliance and enforcement provisions. It provides for the appointment of authorised officers and supporting monitoring and investigation powers, along with civil penalty provisions, and provision for the issuing of infringement notices, enforceable undertakings and injunctions.

Chapter 7 includes miscellaneous provisions, including those in relation to delegations and the constitutional provisions.

The proposed Regulations will give technical effect to the substantive provisions. They include, among other things, the detailed tobacco product requirements which prescribe the requirements for plain packaging, prohibited terms - brand names and variant names and requirements for tobacco products - appearance and contents, and standardisation. The contents of the proposed Regulations in relation to graphic health warnings, health promotion inserts, and additional features to appear on tobacco products will be separately consulted on at a later date.

The proposed Consequential and Transitional Bill and Consequential and Transitional Regulations are intended to ensure a smooth transition to the new regime. They include provisions to allow time for any required tobacco product production changes.

This consultation paper reflects the structure of the exposure draft of the Bill. It provides an explanation of the proposed legislative reforms, the supporting policy rationale, and targeted consultation questions. Please note that the contents of the exposure draft may change in response to feedback received during this consultation and as such the exposure draft will not necessarily reflect the scope of a final Bill that the Government introduces to the Parliament following this consultation process.

The Government appreciates the time and effort involved in considering the draft legislation. Your feedback and perspectives are invaluable to ensuring the effective operation of the proposed reforms.

⁷ *Trade Practices Act 1974 – Consumer Protection Notice No.10 of 1991 – Permanent Ban on Goods* <https://www.legislation.gov.au/Details/F2010L03294>. Accessed date: 28/5/2023.

Proposed reforms

Streamlining tobacco-related laws, regulations, instruments, and court decisions

The Government aims to increase the strength and clarity of tobacco laws, while reducing regulatory burden. Multiple pieces of legislation governing tobacco control creates ambiguity regarding compliance, and duplication of reporting and enforcement. A review of separate pieces of legislation has been conducted revealing a need for reform. It is proposed that the following instruments be consolidated into a single tobacco control Act and delegated legislation:

- [Tobacco Plain Packaging Act 2011](#) (TPP Act) and [Regulations](#)
- [Tobacco Advertising Prohibition Act 1992](#) (TAP Act) and [Regulations](#)
- [Trade Practices \(Consumer Product Safety Standard\) \(Reduced Fire Risk Cigarettes\) Regulations 2008](#)
- [Trade Practices Act 1974 – Consumer Protection Notice No. 10 of 1991 – Permanent Ban on Goods](#)
- [Competition and Consumer \(Tobacco\) Information Standard 2011](#).

Questions:

Is the legislation package appropriate and adapted to consolidate these instruments?

Chapter 1: Introduction

Objects of the Bill

The objects of the Bill are:

- to improve public health by discouraging smoking and the use of regulated tobacco items; and
- to give effect to certain obligations that Australia has as a party to the WHO FCTC; and
- to address the health risks posed by vaping and the use of e-cigarette products.

The means of achieving the objects are set out in the proposed Bill. They include:

- (a) limiting the exposure of the public to communications, recommendations or actions that may persuade people to:
 - (i) start smoking or continue smoking
 - (ii) start vaping or continue vaping
- (b) reducing the appeal of regulated tobacco items and e-cigarette products to consumers
- (c) preventing the retail packaging of tobacco products from misleading or deceiving consumers about the harmful effects of smoking or using tobacco products
- (d) increasing consumer knowledge of health effects relating to the use of tobacco products
- (e) increasing the effectiveness of health warnings, and health promotion messages, on and in the retail packaging of tobacco products
- (f) discouraging people who have given up smoking or vaping from relapsing
- (g) preventing and reducing nicotine addiction
- (h) reducing people's exposure to smoke from tobacco products
- (i) reducing the environmental risks of tobacco products
- (j) limiting novel developments and emerging innovation in tobacco products
- (k) limiting the risk of e-cigarette products becoming a gateway into smoking and the use of regulated tobacco items
- (l) increasing public knowledge about tobacco products and the tobacco industry.

Definitions and interpretation provisions

Chapter 1 includes the definitions and interpretation provisions relevant to the Bill.

'Tobacco product' will mean processed tobacco in any form or a product that contains tobacco as an ingredient designed or intended for human consumption or use. The definition deliberately does not specify the method of consumption so that it can deal with future developments in tobacco products. It will continue to be the case that a tobacco product does not include a product that is entered on the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*. This will similarly be the case for 'e-cigarettes' i.e. e-cigarette products do not include a product that is entered on the Australian Register of Therapeutic Goods maintained under that Act.

'E-cigarette' will be defined to mean a device (whether or not containing nicotine or tobacco) that is designed or intended to generate or release, by electronic means, an aerosol or vapour for inhalation by its user in a way that replicates, or produces an experience similar to, smoking.

The inclusion of definitions for 'tobacco product accessory' and 'e-cigarette accessory' facilitates the expanded requirements and restrictions on accessories related to tobacco products and e-cigarettes.

Chapter 1 also provides for other interpretation provisions including: 'references to different kinds of tobacco products', 'references to manufacturers, importers, distributors and retailers', 'references to an offer to sell or supply' and 'tobacco products- rebuttable presumptions of offer for retail sale'.

Commencement and application provisions

Commencement of the changes is as set out in proposed Bill:

- most of the changes will commence in 6 months' time from enactment unless a different day is set by proclamation
- there will be a lengthy transition for some aspects of the regime following commencement to support compliance as set out below

Transition period

There will be a 12-month transition period that commences on the day that the Act commences. During this time compliance with packaging and product requirements from the old regime will be considered compliance with the new regime. This facilitates industry putting the necessary arrangements in place to become compliant.

Extended transitional arrangements for retailers - There will be a further period of 3 months after the end of the transition period during which a retailer will not contravene the provisions relating to selling or possessing compliant packaging provided that they are at least in compliance with the old regime.

Reporting requirements - The obligations on reporting entities for financial year reports apply in relation to the 2023-2024 financial year and each later financial year.

The obligations in relation to quarterly reports apply in relation to the 3-month period ending 30 June 2024 and each later 3-month period.

For reporting entities who are importers of tobacco products, the reporting obligation commences from the 2024-2025 financial year in relation to tobacco product ingredients.

Operation of State and Territory Law

The proposed reforms do not limit the operation of State or Territory laws relating to tobacco control, where those laws can operate concurrently. It is expected that Commonwealth and State and Territory tobacco control laws will continue to operate alongside each other.

Questions:

Do you have any feedback on the definitions or interpretation provisions in the package?

Do you have any feedback on the commencement provisions and anticipated transition timeframes?

Chapter 2: Advertising and Sponsorship Regulation-updated to additionally capture e-cigarettes

Tobacco advertising is a powerful influence, increasing the use of tobacco products, particularly by children and young people. Article 13 of the FCTC recognises that comprehensive bans on tobacco advertising, promotion and sponsorship are needed to decrease tobacco use. Evidence has shown partial advertising bans only have a minimal effect as companies transfer expenditure to other platforms where advertising is allowed.⁸ The government aims to reduce the initiation and rate of tobacco use by limiting the influence of advertising which poses a range of risks to population health and tobacco control.

Currently tobacco advertising is regulated by the TAP Act. To ensure that the TAP Act provisions remain fit-for-purpose and are kept up to date there is a need to modernise the TAP Act provisions, which were introduced in 1992 and amended in 2012 to extend the restrictions on tobacco advertising to the Internet and other electronic media. The TAP Act will be repealed and the provisions incorporated into this Bill.

Advertising and sponsorship bans are an effective means to reduce the prevalence and initiation of tobacco use.⁹ The proposed reforms include a comprehensive advertising ban in Australia. The ban would include new media platforms and other forms of advertising, promotion and sponsorship. It is important that the public's exposure to advertising and promotion of tobacco products which pose a risk to population health is limited.

⁸ H Saffer and F Chaloupka, 'The effect of tobacco advertising bans on tobacco consumption', *Journal of Health Economics* (2000) 19(6):1117–37. Available at: [The effect of tobacco advertising bans on tobacco consumption - ScienceDirect](#) Accessed date: 23/05/2023.

⁹ DT Levy, F Chaloupka and J Gitchell. 'The effects of tobacco control policies on smoking rates: a tobacco control scorecard', *Journal of Public Health Management & Practice* (2004) 10(4):338–53, doi:[10.1097/00124784-200407000-00011](#). Accessed date: 24/05/2023

There is growing evidence that e-cigarette products with and without nicotine pose a range of harms to human health. Evidence from observational and experimental studies have implicated the use of e-cigarettes to various harms to the heart and lungs.¹⁰ Known carcinogens have also been found in e-cigarette aerosols, although the extent to which e-cigarette use increases the risk of cancer remains to be determined.¹¹ The 2022 National Health and Medical Research Council [CEO Statement on E-cigarettes](#) found that all e-cigarette users are exposed to chemicals and toxins that have the potential to cause adverse health effects, and ingestion of nicotine e-liquids can result in poisoning. Additionally, e-cigarettes have been reported to overheat, catch fire or explode which can cause serious burns and injuries.¹² Strategies undertaken by industries marketing these products have the potential to undermine Australia’s achievements to date in tobacco control and public health. It is therefore proposed that the advertising and sponsorship prohibitions relating to tobacco also apply to e-cigarettes.

Chapter 2 of the Bill relates to advertising and sponsorship prohibitions.

The chapter includes definitions for ‘tobacco advertisement’ and ‘e-cigarette advertisement’.

The Bill prohibits tobacco advertising and tobacco sponsorships. In addition, there is a new prohibition on e-cigarette advertisements and sponsorships.

‘E-cigarette advertisement’ will be defined to mean any form of communication, recommendation or action that has the aim, effect or likely effect of promoting vaping or an e-cigarette product, or the use of such products, whether directly or indirectly. The definition is based on that for a tobacco advertisement which is based on the WHO FCTC definition of that term.

There will be a regulation making power to prescribe a ‘tobacco advertisement’ and an ‘e-cigarette advertisement’.

Contravention of the tobacco and e-cigarette advertising and sponsorship provisions give rise to a fault-based- offence, an offence of strict liability and a civil penalty provision.

There are a wide range of exceptions which can be raised by a defendant which go toward establishing that something is not a tobacco advertisement or an e-cigarette advertisement.

¹⁰ J Gotts et al. What are the respiratory effects of e-cigarettes? (2019), 336:15275 *BMJ*. Available at: [What are the respiratory effects of e-cigarettes? \(bmj.com\)](#); C Kennedy et al. ‘The cardiovascular effects of electronic cigarettes: a systematic review of experimental studies’ (2019) 127 (5) 1362-1390. *Preventative Medicine*. Available at: [The cardiovascular effects of electronic cigarettes: A systematic review of experimental studies - ScienceDirect](#); J Fetterman et al. ‘Alterations in Vascular Function Associated with the Use of Combustible and Electronic Cigarettes’ (2020) 9(9): e014570 *Journal of the American Heart Association*. Available at: [Alterations in Vascular Function Associated With the Use of Combustible and Electronic Cigarettes - PMC \(nih.gov\)](#). Accessed date: 24/05/2023

¹¹ J Bozier et al. ‘The Evolving Landscape of e-Cigarettes: A Systematic Review of Recent Evidence’ (2020) 157(5), 1362-90 *Chest*. Available at: [The cardiovascular effects of electronic cigarettes: A systematic review of experimental studies - ScienceDirect](#).

¹² National Health and Medical Research Council. ‘2022 CEO statement on e-cigarettes’ Australian Government. Available at: <https://www.nhmrc.gov.au/health-advice/all-topics/electronic-cigarettes/ceo-statement>. Accessed date: 24/05/2023.

Questions:

Do you have any feedback on the proposed advertising and sponsorship provisions in Chapter 2 of the Bill?

Are the proposed advertising and sponsorship provisions likely to address emerging forms of media through which tobacco or e-cigarettes will be promoted? Are there other types of promotion that need to be considered?

Chapter 3: Product Regulation and standardisation

Australia's tobacco plain packaging measure (plain packaging and large graphic health warnings) was ground-breaking, and its impact has been significant in reducing smoking prevalence and passive smoking in Australia.¹³ It also has had a positive impact on reducing the appeal of tobacco products, reducing the potential for tobacco packaging to mislead consumers, and enhancing the effectiveness of graphic health warnings.¹⁴

Under the tobacco plain packaging laws (TPP Act, Regulations and Competition and Consumer (Tobacco) Information Standard), all tobacco products must be packaged in a certain colour, display brand names in certain ways, display the required text and health warnings and not display logos, brand images or promotional text. These laws apply if you sell, offer to sell, supply, package or manufacture tobacco products in Australia.

While the TPP Act and Regulations have been effective and efficient, they have not kept pace with challenges in the evolving operating environment, and the thematic review found they would benefit from updates and amendments.

Since Australia's health warnings were last updated in 2012 new scientific research has emerged on the effects of tobacco use on health. Consistent with the WHO FCTC, it is important that health warnings are updated to reflect this evidence in order to adequately inform Australians of what is currently known about the health consequences of smoking.

The following additional measures are proposed:

Further standardise the size of tobacco packets and products- cigarette pack, carton and stick size, roll your own (RYO) tobacco pouch size and little cigar and cigarillo pack size

Design features are a means of product differentiation used to enhance the appeal of assorted products to different market segments. Product design features can meet people's interests in areas such as health, glamour, novelty, self-image, weight loss, convenience/ease of use and sensory experience.¹⁵

The Government advocates for packaging and design requirements to prevent exploitation of cigarette pack size and shape as a form of promotion. This is in line with obligations under Article 16, FCTC to reduce sales to and uptake by youth.

This measure aims to ensure that low price point packs, which are attractive to youth, are not available by standardising the number of cigarettes in a pack and the amount of tobacco in a RYO pouch. Moreover, measures such as standardising carton size support the effectiveness of health warnings and health promotion inserts, by helping even distribution of messages in rotation ensuring that smokers are exposed to all messages.

¹³ Australian Government Department of Health and Aged Care. 'Post-Implementation Review of Tobacco Plain Packaging' (2016) Australian Government. Available at: <https://oia.pmc.gov.au/sites/default/files/posts/2016/02/Tobacco-Plain-Packaging-PIR.pdf>. Accessed date: 24/05/2023.

¹⁴ Ibid.

¹⁵ World Health Organization, 'Partial guidelines for implementation of Articles 9 and 10' (2014) World Health Organization. Available at: [Partial guidelines for implementation of Articles 9 and 10 \(who.int\)](https://www.who.int/publications/m/item/partial-guidelines-for-implementation-of-articles-9-and-10) Date accessed: 24/05/2023.

Plain packaging- pack and product standardisation

The existing plain packaging product requirements such as those relating to physical features, colour and finish of retail packaging will continue to apply.

It is proposed to further standardise tobacco products. It will be provided that tobacco products must comply with the requirements prescribed by the regulations as to the number of units, weight or volume of a tobacco product included in the retail packaging of that product and the pricing of a tobacco product in retail packaging of that number of units, weight or volume.

The regulations are proposed to prescribe standardised pack sizes of 20 for cigarettes and 30 grams for RYO pouches.

Standardised cigarette dimensions are also proposed such that all cigarettes in the pack of 20 will be required to be the same dimensions. The dimension requirements will be for the diameter- at least 7.65mm but not more than 8.0mm and for the length- at least 82.00mm but not more than 85.00mm.

In relation to cigars that have a filter tip or that have a diameter no greater than 10mm and weigh less than 1.4g, the retail packaging must contain 20 cigars and must all be of the same dimension.

There will be additional requirements in relation to filter tips of cigarettes from the current prescription that it must be white. These requirements may include that it must be on the outside - covered by imitation cork tipping paper and on the inside white and solid without any recessing or perforation and smooth without any raised features, embossing, decorative designs, ridges, bulges or other irregularities. Dissuasive measures may also be prescribed to apply to cigarette sticks.

It will be provided that a cigarette carton must contain 10 cigarette packs and that the price of a cigarette carton must be equivalent to the sum of the price of the individual cigarette packs contained in the carton.

Regulating product design features that create novelty value

Australia has obligations in respect to product design under Article 9 of the WHO FCTC. The Guidelines for implementation recommend that Parties regulate all tobacco product design features that increase the attractiveness of tobacco products, in order to decrease the attractiveness of tobacco products.

The attractiveness and appeal of tobacco products is strongly associated with their physical characteristics and design features.¹⁶ Product design features, such as crush balls/capsules (which add a flavour or substance to a tobacco product when crushed by the user) and novel cigarette filters make products more attractive to current smokers and attract new users.¹⁷

This measure aims to reduce the attractiveness of tobacco products by regulating product design features that may enhance novelty or appeal. It is expected to reduce smoking uptake, particularly among youth.

Appearance and contents requirements- Novelty measures

It is proposed that a tobacco product must not contain any device prohibited by the Regulations. Prohibited devices are proposed to include any card, capsule, bead, mouthpiece or other device that is capable of altering the flavour, smell or intensity of the product.

This means that novelty products such as 'crush balls' (ie flavour capsules) and other novelties that are part of the processed tobacco product itself will be prohibited.

It is also proposed that a tobacco product accessory must not alter, or be capable of altering, the flavour or smell of a tobacco product with which it is used. Examples of tobacco product accessories that will be covered by this section include a flavoured filter tip intended for use with roll your own tobacco; or a flavour card designed to infuse a tobacco product with a flavour or smell.

¹⁶ World Health Organization, 'WHO Study Group on Tobacco Product Regulation: Report on the Scientific Basis of Tobacco Product Regulation: Sixth Report of a WHO Study Group'(2017) World Health Organization. Available at: [9789241210010-eng.pdf \(who.int\)](#) Accessed date: 24/05/2023.

¹⁷ R Talhout et al. 'Cigarette Design Features: Effects on Emission Levels, User Perception, and Behavior' (2018) 4 (1), 592–604 *Tobacco Regulatory Science*. Available at: [Cigarette Design Features: Effects on Emission Levels, User Perce...: Ingenta Connect](#) Accessed date: 24/05/2023.

Brand and variant name use

Brand and variant names that create the false impression that a particular tobacco product is less harmful than others will be restricted. This measure aligns with FCTC Articles 11 and 13.

This measure aims to reduce the ability of packaging to mislead consumers about the harmful effects of smoking. This will target descriptors and specific terms which falsely imply reduced harm.

Plain packaging- prohibited terms, trade marks and other marks

It will continue to be the case that there are prescribed trade marks and other marks that are permitted to appear on the retail packaging of tobacco products. These include the brand name and variant name, health warnings and mandatory markings for the tobacco product.

Additional packaging requirements for brand or variant names are proposed. These will include prohibiting brand and variant names which promote tobacco, or imply that these products are less harmful, and specifying orientation, location and size requirements for brand and variant names.

It is proposed that the Bill will provide that no *prohibited terms* may appear anywhere on the retail packaging of a tobacco product, the tobacco product itself, a tobacco product accessory or the wrapping of a tobacco product accessory. 'Prohibited term' is defined in the proposed Bill and such 'prohibited terms' will not be permitted on tobacco packaging.

A table is proposed to be included in the Bill which will include in column one a list of prohibited terms and in column two examples of such prohibited terms. It is proposed that prohibited terms will include a term that implies reduced harm (low tar, light, lite, mild, ultra-light, ultra-lite), a term that refers to quality (extra, smooth, ultra), a colour (black, blue, gold, red, white), a term that refers to a filter (charcoal filter, firm filter, flo-filter, recessed filter), a non-alphabetical character or numeral other than "&", a term that refers to health effects (organic, natural, additive-free) and a term that suggests the inclusion of a prohibited ingredient (caffeine, menthol, vitamin).

The inclusion of non-alphabetical character or numerals in the list of prohibited terms is to seek to minimise the scope for brand and variant names to be used as a promotional tool and to strengthen existing plain packaging requirements.

The introduction of a maximum width for a brand and variant name means the scope for brand and variant names to be long and evocative, to entice and encourage use of the products, particularly among youth, will be limited.

Require Health Promotion Inserts

There is an opportunity to better use tobacco packaging to increase and enhance cessation activity through the inclusion of health promotion inserts. Health promotion inserts are small information cards included in tobacco product packets, which include messages highlighting the benefits of quitting and promote effective cessation resources and strategies.

Health promotion inserts are modelled on international best practice and are consistent with the *Guidelines for Implementation of Article 11*, of the FCTC which encourage the use of 'positive and supportive information' and state that the effectiveness of health warnings that generate negative emotions can be enhanced when combined with information designed to increase smokers' motivation and confidence in their ability to quit.¹⁸

The measure aims to empower people who smoke by providing education and quitting information to increase knowledge and awareness of supports.

Health Promotion Inserts

The proposed new requirements would require manufacturers to enclose a health promotion insert into tobacco product packaging.

The details of the health promotion insert requirements will be included in the regulations and will cover such things as the tobacco products whose retail packaging must include health promotion inserts, the content of the health promotion insert and rotation frequency.

Before the Governor-General makes regulations prescribing health promotion inserts the Chief Medical Officer must have recommended that the inserts be prescribed.

Where there is to be a change in inserts prescribed, there will be a 6 month period before the new requirements come into effect.

Further consultation on regulations relating to health promotion inserts will be undertaken at a later date.

¹⁸ World Health Organization. 'Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products)' (2023) World Health Organization. Available at: [Guidelines for implementation of Article 11 \(who.int\)](https://www.who.int/publications/m/item/guidelines-for-implementation-of-article-11). Access date: 24/05/2023.

Prohibit certain ingredients from tobacco products

It is proposed to prohibit certain ingredients that contribute to product attractiveness.

The proposed prohibited and permitted additive lists are based on an assessment of Australian cigarette ingredient reports; the *WHO FCTC Partial Guidelines for Implementation of Articles 9 and 10*; the WHO Study Group on Tobacco Product Regulation; the WHO Advisory Note relating to Banning Menthol in Tobacco Products; as well as consideration of additives that have been prohibited in international markets.

The measure is intended to ban certain flavours and additives from inclusion in tobacco products because they may enhance the attractiveness and palatability of tobacco products, have colouring properties, create the impression of health benefits and or that are associated with energy and vitality. The Bill will provide that a tobacco product must not contain an ingredient prohibited by the regulations and may contain an ingredient permitted by the regulations.

It is proposed to ban certain flavours and additives from inclusion in tobacco products because they may enhance the attractiveness and palatability of tobacco products, have colouring properties, create the impression of health benefits and/or that they are associated with energy and vitality.

The table of prohibited ingredients is proposed to include such things as menthol, caffeine, vitamins, probiotics and additives that have flavouring properties or that enhance flavour (except where these are listed as permitted ingredients).

The table of permitted ingredients is proposed to include 18 items as set out, including such things as benzoic acid, citric acid and ethanol.

The reporting requirements, to be discussed below, will also require, among other things, disclosure of ingredients included in tobacco products.

Update Graphic Health Warnings

The government aims to motivate people who use tobacco to quit and remain quit; discourage uptake of tobacco use; and reshape social norms about the tobacco industry and tobacco use. Over time, it will contribute to reducing smoking prevalence and support implementation of Article 14 of the FCTC.

Under the *Competition and Consumer (Tobacco) Information Standard 2011* (Tobacco Information Standard), all tobacco products for sale in Australia must display health warnings that cover most of the packaging, include text and graphics as set out in the standard and are formatted in a certain way. Health warnings include statements, graphics, explanatory messages and information messages. The standard explains how to display health warnings on the packaging of all tobacco products.

Australia's set of health warnings were last updated in 2012. New scientific research has shown more effects of tobacco use on health.¹⁹ It is important that health warnings are updated to reduce consumer wear out and reflect new evidence to inform Australians of what is currently known about the risk to health from tobacco.²⁰

Dissuasive measures on tobacco products aim to reduce the appeal and attractiveness of tobacco products. They work in conjunction with and as an extension of graphic health warnings.

Dissuasive measures on tobacco products are intended to communicate the risks and harms of smoking, compared to a standard product. Potential dissuasive features employed will be subject to research and market testing to identify those that are most likely to be effective in the Australian context.

Graphic Health Warnings (including dissuasive measures on tobacco products)

The proposed Bill will consolidate the provisions from the Tobacco Information Standard and update the graphic health warnings.

It will provide that the retail packaging of tobacco products must display the images or combination of images prescribed by the regulations.

It will increase the number of health warnings and provide for more variation in design and image style to optimise the impact of the warnings.

Before the Governor-General makes the regulations, the Commonwealth Chief Medical Officer must have recommended that the images or combination of images be prescribed. This is intended to ensure that the health warnings are evidence-based and in line with contemporary medical knowledge.

¹⁹ National Institute on Drug Abuse. 'Tobacco, Nicotine, and E-Cigarettes, Research Report- What Research is being done on tobacco use?' (2022) US Department of Health and Human Services. Available at [What research is being done on tobacco use? | National Institute on Drug Abuse \(NIDA\) \(nih.gov\)](#) Access date: 24/05/2023.

²⁰ H Parada, et al. 'Trajectories of Responses to Pictorial Cigarette Pack Warnings' (2018) *Nicotine & Tobacco Research: Official Journal of the Society for Research on Nicotine and Tobacco* (20)7: 876-881. Available at: [Trajectories of Responses to Pictorial Cigarette Pack Warnings - PMC \(nih.gov\)](#). Accessed date: 30 May 2023.

Where new Regulations are made in the future, the requirement to display such images on the retail packaging of tobacco products must commence no earlier than 6 months after the day any new regulations are made. This will ensure a lead time that allows industry to prepare the new packaging requirement.

It is proposed to include requirements on the appearance of tobacco products. It will be provided that the appearance of a tobacco product must comply with the requirements prescribed by the Regulations. These requirements might include dissuasive tobacco product measures.

The Regulations relating to graphic health warnings and dissuasive tobacco product measures will be consulted on at a later date.

Questions:

Do you have any feedback on the packaging and product requirements set out in Chapter 3 and in the Regulations?

Are there any novel or innovative product or packaging features that could be better addressed by the draft Bill?

Offence and civil penalty provisions- plain packaging requirements

Part 3.4 of the proposed Bill creates a range of offences and civil penalty provisions relating to the sale, supply, purchase, possession, packaging and manufacturing of tobacco products where retail packaging does not comply with a tobacco product requirement. The offences will not apply to people who purchase tobacco products for their personal use.

Each of the offences set out in the Bill (including those in other parts of the Bill) is a fault-based criminal offence, which also has a corresponding strict liability offence (that is, where no fault elements apply to the physical elements of the offence), as well as a civil penalty provision for the same action.

The Commonwealth will decide in each particular case whether to prosecute a person for a fault-based offence or strict liability offence, or whether to bring proceedings for a civil penalty order. For most of the offences outlined in the Bill there are several levels of penalty specified. The approach reflects the approach in the TPP Act.

Offences and civil penalty provisions

There will continue to be a wide range of offences and civil penalty provisions for failure to comply with the plain packaging requirements. These offences largely reflect the existing provisions, with proposed changes to offences relating to packaging requirements.

The following offences relating to non-compliance with plain packaging are proposed to be included in the new Bill:

- retail sale of tobacco products without retail packaging
- selling or supplying tobacco products to retailers without retail packaging
- selling or supplying tobacco products in non-compliant retail packaging
- purchasing tobacco products in non-compliant retail packaging
- possessing tobacco products in non-compliant retail packaging
- packaging tobacco products in non-compliant retail packaging
- manufacturing non-compliant retail packaging of tobacco products
- possessing non-compliant retail packaging of tobacco products
- manufacturing tobacco products that are packaged in non-compliant retail packaging
- selling or supplying non-compliant regulated tobacco items
- purchasing non-compliant regulated tobacco items
- possessing non-compliant regulated tobacco items
- manufacturing non-compliant regulated tobacco items.

In relation to selling or supplying tobacco products to retailers without retail packaging – this will continue to be an offence but it will no longer be possible to rely on there being a contract in place that states that the retailer will repackage the goods. There is also a new offence of possession of tobacco products in non-compliant packaging. All other offence provisions broadly reflect the current regime, however they have been reviewed and updated.

The Bill includes a part dealing with conduct already dealt with by the above offences but which is restricted to dealings with constitutional corporations, for example the retail sale of tobacco products without retail packaging to a constitutional corporation. This is to ensure the broadest possible support by the corporations power for these offences. It broadly reflects the approach adopted in the TPP Act.

Question:

Do you have any feedback in relation to the offence and civil penalty provisions set out in Chapter 3?

Chapter 4: Permanent bans on certain regulated tobacco items

The *Trade Practices Act 1974- Consumer Protection Notice No.10 of 1991- Permanent Ban on Goods* reflects a ban on oral tobacco. On 3 June 1991, the then Minister of State for Justice and Consumer Affairs declared a permanent ban on chewing tobacco and snuffs intended for oral use, due to the evidence that shows the link between smokeless tobacco and a variety of diseases including pancreatic cancer, oral cancer, pharyngeal cancer and local lesions in the mouth.²¹

Chapter 4 of the Bill provides for permanent bans on certain regulated tobacco items. The chapter imposes a permanent ban on chewing tobacco and snuffs intended for oral use.

The Bill will make it an offence and civil penalty to be dealing in permanently banned regulated tobacco items. This is a continuation of the status quo but reflects the consolidation of the provisions in to the one regulatory regime. The offence is broadly equivalent to the offence in s118 of the *Australian Consumer Law (ACL)* - it is restricted to conduct by corporations, conduct that occurs in the course of constitutional trade or commerce or conduct in a territory.²²

There are two exceptions to the offence. The first is a personal use exception and the second is an export exception. A person is able to apply for approval to export a regulated tobacco item that is subject to a permanent ban.

Question:

Do you have any feedback on the permanent ban on certain regulated tobacco items provisions set out in Chapter 4?

²¹ Federal Register of Legislative Instruments, 'Trade Practices Act 1974 Consumer Protection Notice No 10 of 1991 PERMANENT BAN ON GOODS' (3 June 1991) [Microsoft Word - S144 1991.doc \(d3vqfzrrx1ccvd.cloudfront.net\)](#). Accessed date: 30 May 2023.

²² Australian Consumer Law s118 [COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2 - TABLE OF CONTENTS \(austlii.edu.au\)](#).

Chapter 5: Reporting and information disclosure

There is a lack of transparency in the Australian tobacco market and the public has limited access to data on sales volumes and pricing for specific brands and products or information on tobacco advertising, promotion and sponsorship activities.

Limited access to data and lack of transparency is a barrier to reducing tobacco use in Australia and meeting its obligations under the WHO FCTC.²³ To address this, Chapter 5 outlines the requirements for reporting and disclosure of certain information to government. The implementation of this measure is supported by Articles 13.4(d) and 20(2) of the WHO FCTC.

It is proposed that aggregated and de-identified information would be published on an annual basis. Data would be published in accordance with the APPs and would provide benefit to the Australian public and other public health stakeholders in tobacco control.

Chapter 5 of the Bill- these provisions would apply to “reporting entities”.

A ‘reporting entity’ is a person who is a manufacturer or importer of tobacco products that are sold or supplied, or offered for sale or supply, in Australia.

The requirements mean the tobacco industry would be required to provide reports to the Minister on a range of matters.

It is proposed that reporting entities (manufacturers and importers) would be required to submit reports containing information about tobacco products sold, supplied, or offered for sale or supply in Australia. The reports would relate to tobacco product ingredients, tobacco product volumes, marketing and promotional expenditure and additionally, for manufacturers, a report on tobacco product research and development. The reports relating to tobacco product ingredients, marketing and promotional expenditure and research and development would be required annually, while reports relating to tobacco product volumes would be required quarterly.

The requirement to report on tobacco product ingredients relates to those used in manufacturing each kind of tobacco product sold or supplied, or offered for sale or supply, in Australia during the period covered by the report. The ingredients of a cigarette would additionally include the paper, and any filter tip, used in manufacturing the cigarette.

For each kind of tobacco product it would be necessary to identify the brand name and variant name of the product, the common, chemical and trade name of each ingredient, the purpose for which the ingredient is used and the amount of the ingredient used in the product.

²³ C Watts, et al, ‘How tobacco companies use the revolving door between government and industry to influence policymaking: an Australian case study’ (2023) *Public Health Research and Practice* (online early publication). Available at: [How tobacco companies use the revolving door between government and industry to influence policymaking: an Australian case study | PHRP](#). Accessed date: 30 May 2023.

There would be specific reporting requirements in relation to tobacco product volumes. These would require the report to cover such things as total number of units imported (where the reporting entity is an importer) and total weight, in kilograms, sold or supplied.

Reporting in relation to marketing and promotional expenditure must cover the marketing and promotional activities set out, which includes such things as marketing, promotion and sponsorship such as corporate hospitality functions.

Reporting by manufacturers in relation to tobacco product research and development must cover information about activities including tobacco product innovation, ingredients of tobacco products and toxicity of tobacco products.

A reporting entity that does not comply with the reporting obligations could be subject to the offence and civil penalty provisions.

It is also proposed that the Minister may publish, in any manner the Minister considers appropriate, a report received from a reporting entity under Chapter 5. Data would be published in accordance with the APPs.

Question:

Do you have any feedback on the reporting requirements set out in Chapter 5 and the Regulations?

Chapter 6: Compliance and enforcement

The proposed new compliance and enforcement provisions will streamline the approach to enforcement by consolidating the enforcement role in the Department.

The current arrangement provides limited compliance and enforcement tools for regulators, especially while undertaking investigations into potential non-compliance. The reliance on prosecution as a primary enforcement tool, reduces the ability to capacity build and educate retailers. The inclusion of the ability to seek injunctions and enforceable undertakings will enhance the effectiveness of the compliance regime.

The proposed updated compliance and enforcement provisions will support more efficient and effective compliance and enforcement activities that support the implementation of the measures.

Chapter 6 of the Bill relates to compliance and enforcement.

The chapter utilises standard provisions from the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). The Regulatory Powers Act provides for a standard suite of provisions in relation to monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions. The Act only has effect where provisions are drafted to trigger the provisions.

The regulatory powers will be the same in relation to all provisions under the Bill which is a change from the previous approach where there were different powers under the TPP Act, TAP Act and the *Australian Consumer Law*. This approach reduces duplication of functions and aligns enforcement through a single regulatory framework.

The chapter provides for the appointment of authorised officers and their powers. Authorised officers will have the ability to monitor and investigate the range of offences in the proposed Bill. Part 6.3 will provide for such monitoring and investigation powers.

Part 6.4 includes provisions for civil penalty provisions, infringement notices, enforceable undertakings and injunctions. The ability to seek enforceable undertakings and injunctions will enhance the compliance regime.

Currently the TPP Act and TAP Act provisions are covered by authorised officers under the Department while ACCC officers have compliance functions in relation to the ACL. With the consolidation of the provisions the intention is that authorised officers under the Department will have the enforcement function for all of the consolidated measures.

Question:

Do you have any feedback on the proposed compliance and enforcement provisions set out in Chapter 6?

Chapter 7: Miscellaneous

Chapter 7 of the Bill includes provisions that will support the effective operation of the regulatory regime including cost recovery provisions and delegations.

Part 7.4 provides the constitutional basis of the provisions.

Constitutional provisions

The Bill will be supported by the external affairs power in section 51 (xxix) of the *Australian Constitution*, as it gives effect to obligations under the FCTC. The Act also has effect under alternate constitutional bases including the trade or commerce power, the communications power, the intellectual property power, corporations power, external affairs power and the territories power.

The provisions in Part 3.5 (offences and civil penalty provisions relating to constitutional corporations - tobacco product requirements) relate expressly to the conduct of constitutional corporations as noted above to ensure broad support from the corporations power.

Transitional and consequential provisions

The transitional and consequential provisions are intended to ensure a smooth transition to the new regime. This will be contained in a separate Bill- the Public Health (Tobacco and Other Products) Transitional and Consequential Bill. The provisions will be designed to allow manufacturers, suppliers and retailers sufficient time to familiarise themselves with the changed requirements and to make necessary production changes.

Question:

Do you have any feedback on the transitional arrangements?