

# Tobacco Control Legislation Review: Analysis and Summary of Public Consultation Submissions

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mpconsulting ™

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## Chapter 1 – Background and context

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### Background

Consistent with the Attorney-General’s agenda for the sunseting of instruments, the Department of Health (the Department) is undertaking a Thematic Review of its tobacco control legislation consisting of the:

- *Tobacco Advertising Prohibition Act 1992* (TAP Act)
- *Tobacco Advertising Prohibition Regulation 1993* (TAP Regulation)
- *Tobacco Plain Packaging Act 2011* (TPP Act)
- *Tobacco Plain Packaging Regulations 2011* (TPP Regulations).

The purpose of the Thematic Review is to consider whether the Department’s tobacco control legislation remains fit for purpose, and whether it can be simplified and streamlined such that it is clearer and does not impose unnecessary regulatory burden. It will also facilitate health and tobacco control objectives, reduce any regulatory uncertainty and position the Department to undertake risk-based enforcement activity.

In addition, the Department is considering how the primary legislation could be improved and/or amended to support the streamlining of tobacco control regulation, as well as future legislative reform options to be explored further through the First Principles Review.

On 18 January 2019, the Department of Health (the Department) established a public submission process on the Department’s online Consultation Hub seeking stakeholder feedback on the existing legislation to inform the development of options for regulatory improvement, including options for modernising, streamlining and simplifying the tobacco advertising prohibition legislation and the tobacco plain packaging legislation. The public consultation process closed on 18 March 2019.

The Department’s review will also be informed by submissions provided as part of the development of the National Tobacco Strategy 2018-2026 (NTS).

*mpconsulting has considered written submissions made through the NTS process to the extent that comments relate to the Department’s tobacco control regulation. mpconsulting’s consideration of stakeholder submissions to the NTS is limited to the 49 written submissions, noting that the Department has also undertaken meetings and roundtables, and has separately analysed stakeholder input gained through those processes for the purposes of the developing the next iteration of the NTS.*

The purpose of this paper is to summarise the key points made by stakeholders in response to the Department’s call for submissions to the review of the tobacco control legislation and to note relevant matters raised in submissions to the development of the NTS 2018-2026. This analysis and identification of key issues will inform the content of stakeholder workshops being undertaken by mpconsulting.

*It is important to note that this report provides a summary of the key points made by stakeholders. It is not intended to represent a comprehensive account of all submissions, nor does it provide any commentary on the viability of suggestions for change.*

*The views expressed in this report are those of the individuals or organisations who provided them, and their publication does not imply any acceptance of, or agreement with, these views by the Department of Health or the Australian Government. These issues will, however, be discussed further through the workshops and will be reflected in the Consultation Report to be prepared by mpconsulting for consideration by the Australian Government to inform options for regulatory reform.*

## What is a thematic review?

A thematic review is a review of two or more instruments that share a common theme, such as the regulation of a particular industry. Thematic reviews are the mechanism for determining if sunseting instruments remain fit-for-purpose, necessary and relevant, and whether they can be simplified and streamlined such that they are clearer and do not impose unnecessary regulatory burden. Such reviews may also consider opportunities to improve the enabling legislation.

For example, a thematic review might consider whether:

- any provisions in the legislation are redundant
- any instruments can be consolidated to make the law easier to understand
- there is any duplication or inconsistency in the instruments
- the legislation overcomplicates processes
- the legislation is ambiguous or unclear regarding any terms and/or processes, and
- the legislation is compatible with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified.

Based on the outcomes of a thematic review, decisions are then made about the ongoing need for the instruments and how they might be adjusted to better achieve their objectives.

## What is a first principles review?

A first principles review is a review of the regulatory arrangements regarding a particular matter or industry. The purpose of a first principles review is to ensure the regulation is fit for purpose and whether changes are required to respond to future challenges.

A first principles review might explore:

- the role of the regulation within the context of broader Australian Government policy and the degree to which it has been achieving its purpose
- whether the regulation is fit for purpose and achieving the policy objectives
- whether the regulation efficiently and effectively implements the policy objectives
- any necessary changes to the regulation to achieve the policy objectives, reduce unnecessary regulatory burden and better align with best practice regulation, and

- preferred processes for implementing any recommended changes to the regulation including ongoing engagement with stakeholders.

Outcomes from a first principles review may inform the development of future policy.

*In the context of stakeholder consultation, it is important to note **Australia's obligations under Article 5.3 of the World Health Organization Framework Convention on Tobacco Control.***

*Australia is obliged as a Party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) to take steps to protect its tobacco control policy settings and implementation from interference from the tobacco industry and its interests. This obligation comes from Article 5.3 of the WHO FCTC, which states: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."*

## Overview of the Department's tobacco control legislation

### Tobacco advertising prohibition legislation

The *Tobacco Advertising Prohibition Regulation 1993 (TAP Regulation)* is made under the *Tobacco Advertising Prohibition Act 1993 (TAP Act)*.

The object of the TAP Act is to limit the exposure of the public to messages and images that may persuade people to start or continue smoking or using tobacco products.

The TAP Act defines 'tobacco advertisement' more broadly than the everyday meaning of the term. Section 9 of the Act defines a 'tobacco advertisement' to be any writing, still or moving picture, sign, symbol or other visual image that gives publicity to, or otherwise promotes or is intended to promote, smoking or the purchase or use of tobacco products.

Under the TAP Act, it is an offence for a corporation to publish or broadcast a tobacco advertisement unless one of the limited exceptions under the Act applies (section 15). Some of the exceptions to the general restriction on tobacco advertising in the Act include:

- political discourse – subsection 9(1A)
- anti-smoking advertisements – subsection 9(7)
- tobacco trade communications – subsection 10(3), and
- accidental or incidental broadcast or publication – sections 14 and 19.

The TAP Act also restricts tobacco advertising to the internet and other electronic media in Australia. It is an offence for any person to publish tobacco advertising on the internet or other electronic media in Australia (e.g. via mobile phone, unless certain limited exceptions apply) (section 15A).

A key exception allows internet point-of-sale tobacco advertising (section 16), provided that it complies with state or territory legislation that expressly deals with internet point-of-sale tobacco advertising or, in the absence of such legislation, Australian Government regulations (section 16A).

The TAP Act and the TAP Regulation set out specific requirements regarding the content and format of internet point-of-sale tobacco advertisements. The Regulation aims to reduce the attractiveness and appeal of internet point-of-sale tobacco advertisements, particularly to young people. Broadly, advertisements need to be presented in a plain, text-only format (i.e. no product images) with, among other things, graphic health warnings and warnings about age restrictions on tobacco sales.

To this end, the TAP Regulation describes:

- acknowledgments of assistance and support that are permitted (i.e. that will not amount to a tobacco advertisement), including:
  - written acknowledgements that are in print, in the production of a video or in the form of a donation of an exhibit
  - oral acknowledgements (e.g. speeches at the open or close of an event or as part of formal proceedings)
- rules regarding point of sale advertising, including advertising displayed in shops, on vending machines and on the internet (where accessed from a mobile phone or from a device other than a mobile phone).

### **Tobacco plain packaging legislation**

The Tobacco Plain Packaging Regulations 2011 (TPP Regulations) are made under the Tobacco Plain Packaging Act 2011 (TPP Act).

The object of the TPP Act is to improve public health by discouraging the use of tobacco products to improve public health and to give effect to obligations that Australia has as a party to the FCTC. The TPP Act regulates the retail packaging and appearance of tobacco products with the intention of reducing the appeal of tobacco products to consumers, increasing the effectiveness of warning labels on the packaging of tobacco products and reducing the ability of packaging to mislead consumers about the harmful effects of using tobacco products.

Section 27 of the TPP Act enables the TPP Regulations to prescribe in further detail the requirements for retail packaging of tobacco products.

The retail packaging and appearance of tobacco products must comply with the requirements of the TPP Act and TPP Regulations. Offences and civil penalties apply if tobacco products are supplied, purchased or manufactured and either the retail packaging, or the products themselves, do not comply with these requirements.

The TPP Act defines the retail packaging of a tobacco product as any container, plastic, wrapper or insert that contains a tobacco product or that is placed inside, over or is affixed to the retail packaging of a tobacco product.

Under the TPP Act and TPP Regulations requirements are outlined for:

- the physical features of retail packaging
- the colour and finish of retail packaging
- marks on retail packaging
- brand, business, company and variant names
- wrappers, inserts and onserts
- retail packaging after retail sale
- the appearance of tobacco products.

## Chapter 2 – Key themes

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Submissions in response to the legislative review evidence the polarised views and differing expectations of stakeholders in relation to tobacco control regulation in Australia.

Many stakeholders reiterated support for the general aims of the Department's tobacco control legislation to assist in improving the health of all Australians by reducing the prevalence of tobacco smoking and its associated health, social and economic costs and inequalities. These submissions indicated that the significant reduction in regular smokers and the number of people trying smoking for the first time is evidence that current efforts have been successful. Whereas others felt it is difficult to determine what has been the most effective element of the overall tobacco control measure, but it would be logical to maintain and strengthen the current multi-pronged approach, including by updating existing tobacco control regulation.

Other stakeholders including the tobacco industry and a small number of academics and individuals/consumers described plain packaging legislation as 'patronising', 'redundant' and 'useless', asserting that Australia's plain packaging policy has failed to achieve its stated public health outcomes, whilst significantly increasing illicit counterfeit and contraband tobacco. Further evidencing the divergence of opinion was one suggestion that the TPP legislation should be repealed in its entirety.

Many stakeholders saw the current legislative review process as an opportunity to address broader policy issues and align Commonwealth public health policy with scientific evidence and international regulatory best practice. While many comments were made regarding the need to expand or reduce the scope of the Commonwealth's tobacco control regulation, comments regarding specific changes to improve the operation of the existing legislation were more limited. As reflected in the following chapters of this report, comments ranged from macro policy changes to micro issues with specific legislative provisions.

In summary, the key themes that emerged through the submissions include:

- The importance of policy and legislation being responsive to emerging changes in smoking markets and patterns. For example, many stakeholders referenced the need for tobacco advertising prohibition legislation to adapt to an environment where sales are increasingly conducted online and marketing and promotional activities take place through social media platforms (which has further evolved since the current tobacco advertising laws were developed).
- The challenges presented by the emergence of e-cigarettes and other alternative nicotine and non-nicotine delivery systems. Submissions demonstrated that there is strong consumer and industry interest in these products in Australia, and equally strong concerns about the evidence regarding safety and efficacy of technologies promoted as 'reduced harm smoking cessation tools'. Many suggestions were made regarding the need for a regulatory framework for the rapidly evolving category of smoke-free products.



- The intersection of Commonwealth tobacco control regulation with that of the states and territories. Many submissions noted that Australia’s tobacco control legislation is fragmented and argued for harmonisation of Commonwealth and state and territory laws to ensure consistent arrangements throughout Australia.
- The opportunity to improve tobacco control in Australia by centralising the administration, monitoring and enforcement of legislative interventions relating to the health impacts of tobacco use in one agency.

Based on the submissions to the legislative review, possible issues to explore through Phase 2 of the consultation process include:

- what constitutes a tobacco advertisement and what should be excluded from the definition
- regulation of online sales to align with the regulation of traditional retail including, for example, age verification, health warnings on brand websites and apps and requiring a retail license for the online sale or supply of tobacco products
- restrictions on the sale of tobacco products (for example, through vending machines) and advertising at the point of sale
- regulation of the packaging of tobacco products and the features of cigarettes (including flavours, filters and colours associated with brands)
- increased reporting requirements (for industry and Government)
- issues relating to the potential extension of advertising and promotion restrictions for e-cigarettes to align with the restrictions for tobacco products, and
- regulation of e-cigarettes.

## Chapter 3 – Summary of submissions to the legislative review

### Background

In total, 75 submissions were received. Submissions were made by individuals, public health organisations, tobacco importers, manufacturers and retailers, government and non-government organisations and policy institutions.

Stakeholders were invited to respond to 14 questions to assist in writing their submission: 5 relating to advertising prohibitions; 4 relating to plain packaging; and 5 seeking more general comments about the regulation. Stakeholders could also provide a standalone submission with or without responding to these questions. The following table includes the questions stakeholders were invited to respond to.

Question	
<b>Tobacco advertising prohibition</b>	
1	What is working well in relation to the <i>Tobacco Advertising Prohibition Act 1992</i> and the <i>Tobacco Advertising Prohibition Regulation 1993</i> ?
2	Do you consider the <i>Tobacco Advertising Prohibition Regulation 1993</i> simple, clear and easy to read? If not, which elements of the regulation pose particular challenges, and what changes would you suggest?
3	What, if any, changes could be made to the <i>Tobacco Advertising Prohibition Act 1992</i> and the <i>Tobacco Advertising Prohibition Regulation 1993</i> ?
4	Are there any studies that would support the measures that you are suggesting?
5	Do you consider the <i>Tobacco Advertising Prohibition Regulation 1993</i> (or provisions within) redundant, unnecessary or otherwise not fit-for-purpose?
<b>Tobacco plain packaging</b>	
6	What is working well in relation to the <i>Tobacco Plain Packaging Act 2011</i> and the <i>Tobacco Plain Packaging Regulations 2011</i> ?
7	Do you consider the <i>Tobacco Plain Packaging Regulations 2011</i> simple, clear and easy to read? If not, which elements of the legislation pose particular challenges, and what changes would you suggest?
8	What, if any, changes could be made to the <i>Tobacco Plain Packaging Act 2011</i> and the <i>Tobacco Plain Packaging Regulations 2011</i> ?
9	Are there any studies that would support the measures that you are suggesting?
<b>General</b>	
10	What are the benefits to you associated with the current regulatory arrangements?
11	What are the costs or disadvantages to you associated with the current regulatory arrangements?
12	Do you consider that any of the legislation generates unnecessary administrative burden? If so, what changes could be made to address this?
13	Do you consider that any of the Department of Health's tobacco control legislation imposes significant unnecessary compliance costs on business, community organisations and individuals? If so, how could compliance costs be reduced?

14	Are there any other measures for tobacco control regulation that you think the Australian Government should consider and prioritise?
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## Summary of feedback against the survey questions

### Tobacco advertising prohibition legislation

Stakeholders were asked what is working well in relation to the TAP Act and TAP Regulation, and what could be changed or improved.

Many noted that the TAP legislation is working well and has been effective in:

- decreasing the familiarity and appeal of particular brands
- greatly reducing the overall exposure of the public to tobacco products
- lowering the rates of impulse purchasing by banning point of sale display advertisements, and
- significantly reducing daily smoking prevalence among adults.

In considering areas for improvement, many stakeholders suggested that the legislation is not having the desired impact in reducing exposure to online advertising and promotional activities, particularly through social media platforms that are increasing the visibility of tobacco products and branding.

Reference was also made to the need to ‘future proof’ the legislation, including reviewing emerging digital channels, online shopping trends, social media, streaming services, online video content and assessing how they are covered currently. Examples of breaches of the ‘spirit’ of the legislation were provided and concerns raised that despite amendments made in 2012 (which extended restrictions on tobacco advertising to the internet and other electronic media), the promotion of tobacco products on international websites, through product placement and through social media influence remain largely unregulated.

#### Clarity of the TAP legislation

While stakeholders generally felt the TAP legislation is simple, clear and easy to understand, the following comments were made in relation to clarity of the provisions:

- some sections are unnecessarily complicated. For example, the definitions of *tobacco advertisement* in section 9 and *publish* in section 10 of the TAP Act are defined by exceptions to enable some forms of advertising to take place. Some stakeholders note that some of these provisions are subjective and would be difficult to enforce (such as regulation 5 of the TAP Regulation regarding oral acknowledgement of tobacco industry assistance or support). It was suggested that ideally these provisions would be simplified, and the exceptions removed
- paragraph 9(1)(a) should be clarified to make clear whether the advertising of e-cigarettes comes within the scope of advertising that promotes or is intended to promote ‘smoking’.

Stakeholders also acknowledge the value of consolidating tobacco control legislation wherever possible.

## Fit-for-purpose

When asked whether they consider that the TAP Regulation (or provisions within) was redundant, unnecessary or otherwise not fit-for-purpose, stakeholders noted that the Regulation:

- remains relevant and fit-for-purpose, and forms a critical part of the overall tobacco control strategy
- could introduce tighter control measures. For example:
  - greater restrictions on online and social media advertising, banning sales via vending machines (where proof of age cannot be established), eliminating point of sale discount promotions and introducing advertising restrictions for e-cigarettes that mirror the restrictions for tobacco products
  - e-cigarette advertising prohibitions
- has supported a reduction in smoking in Australia through curtailing point of sale advertising but needs review and update (including to address the ways tobacco companies have sought other ways to market their products through avenues that have not been closed to them).

Stakeholders who felt the TAP Regulation is not fit-for-purpose suggested that it unfairly discriminates against manufacturers of a legal product. It was suggested that if tobacco control legislation is not repealed, then consideration should be given to introducing similar laws to regulate other products carrying serious health risks, namely alcohol and junk food.

## Opportunities to change or improve the TAP legislation

A number of stakeholders felt that the TAP Act and TAP Regulation could be updated and strengthened. In particular, the following amendments and changes were suggested:

- amend the **definition of tobacco advertisement** in section 9 of TAP Act to:
  - clarify the meaning of the phrase ‘gives publicity to or otherwise promotes’ (i.e. clarify that communications which give publicity to any of the matters listed in subsection 9(1) (without necessarily positively promoting or ‘advocating for’ those matters) can fall within the definition of a tobacco advertisement)
- remove the **exemption for tobacco advertisements on international flights** (refer section 26A of the TAP Act)
- prohibit **price boards** on the basis that they entice smokers to buy cheaper products, make unintended purchases and make larger than intended purchases. It was suggested that:
  - if price boards are not banned entirely, there should be further restrictions on size, colour and images used in signs and at point of sale
  - price boards as a mode of promotion are not permitted in Queensland or the Australian Capital Territory (ACT) but are still used in other jurisdictions
- prohibit **vending machines**. The WHO FCTC recommends prohibition of vending machines but to date only the ACT has a total ban on the sale of cigarettes through vending machines

- prohibit the **direct or indirect provision of incentives** financial or otherwise, to tobacco retailers and proprietors of hospitality venues by tobacco manufacturers and distributors (for example, prizes or gifts for retailers promoting certain brands or reaching sales targets)
  - By extension, amend the TAP Act to ensure all ‘invitation only’ events involving the promotion of tobacco and/or e-cigarette products are prohibited. Specifically:
    - the definition of ‘publish’ in section 10 could be broadened to ensure invitees to special events are considered to be a ‘section of the public’
    - amend subsection 9(1) and section 10 to ensure various forms of promotional activity engaged in at such events (such as verbal promotion) are captured
  - One stakeholder cited the ban on advertising to retailers introduced in Quebec in 2016, prohibiting a manufacturer or distributor of tobacco products from offering ‘rebates, gratuities or any other form of benefit related to the sale or the retail price of a tobacco product to operators of tobacco retail outlets, including their employees’.
- prohibit **provision of all forms of contribution to any event, activity, cause or individual by the tobacco industry** or, if this is not feasible, to be consistent with Article 13 of the FCTC, prohibit the direct or indirect promotion of tobacco-funded initiatives at any event or activity and for any cause or individual. Stakeholders suggested amending subsection 10(5) of the TAP Act to remove the exemption regarding the publication of an acknowledgement of support or assistance from the tobacco industry
- prohibit the **distribution of advertising and promotional material between manufacturers, distributors and retailers**. For example, stakeholders felt that trade publications should not be promotional in nature, and should contain only factual information regarding price, availability, pack size and name of product
- **mandatory reporting of annual marketing and promotional activities and budgets by tobacco industry** including donations or payments made to third parties such as hospitality groups, as well as public relations and corporate social responsibility activities
- **mandatory quarterly reporting of volumes of wholesale sales by tobacco industry** by product type, brand, pack size and variant, and for agreed geographical areas (to enable the Department to analyse sales)
- **extension of Ministerial reporting requirements** to include all reports and complaints (not only contraventions) made in relation to breaches of the Act, the action taken and the outcome
- address **onscreen tobacco product placement** of cigarette smoking and strengthen enforcement of offence provisions by making it mandatory to display anti-smoking content warnings for online streaming services that are hosted within Australia and films that depict smoking
- clarify that it is not necessary to prove that a broadcaster/publisher had the **subjective intention of promoting tobacco products**, smoking or any other matters listed in section 9 (as per sections 13 and 15 of the TAP Act).

## Intersection with state and territory legislation

A number of stakeholders felt that Australia's tobacco control legislation is overly fragmented and there is a strong case to be made for harmonisation of Commonwealth and state and territory laws to reduce the confusion and complexity of overlapping laws and to ensure a consistent approach throughout Australia.

Some suggested that provisions in the TAP Act have been superseded by jurisdictional legislation and that the complexities associated with this include:

- differing policies and practices in each jurisdiction regarding signage, storage, licensing, ticketing, definitions of tobacco products and sales to minors
  - For example: online tobacco product retailing is banned altogether in South Australia; Western Australia has specific licensing conditions; and laws governing the size of price tickets in retail outlets vary across jurisdictions.
- some jurisdictions have introduced laws specifically addressing e-cigarettes, others regulate e-cigarettes through laws relating to poisons and therapeutic goods.

Suggestions made in relation to harmonisation included:

- the development of one overarching piece of legislation (for example, a Tobacco Control Act) that includes provisions relating to tobacco advertising, smoke-free public space, sales, product packaging and labelling, that also enables emerging issues (for example, product ingredients, heat-not-burn products, e-cigarettes, retail reform) to be more easily regulated in the future
- the establishment of a single, centralised national enforcement body with the objective of reducing and, in time, eliminating illicit tobacco.
  - It was noted that there are currently multiple agencies involved in tobacco control enforcement, including the Australian Tax Office, Australian Federal Police, Australian Criminal Intelligence Commission, Department of Health, state and territory police and health authorities.

## E-cigarettes and e-liquid products

E-cigarettes were a key issue raised in over half of the submissions. Submissions highlighted frustration amongst consumers, retailers and the tobacco industry in relation to the availability and regulation of e-cigarettes in Australia, noting that non-tobacco products are specifically excluded from the TAP and the TPP legislation.

It was noted that:

- under current laws relating to nicotine, it is illegal to sell, buy or use e-cigarettes that contain nicotine in Australia (due to legislative controls on nicotine that apply in each state and territory by reason of nicotine being classified as a 'Schedule 7 – Dangerous Poison' under the Commonwealth 'Poisons Standard')
- It is possible to legally sell and buy e-cigarettes that do not contain nicotine. However, it's illegal for manufacturers to claim that these can help a person to quit smoking (i.e. make a therapeutic claim).

A number of stakeholders:

- referenced websites, purporting to be Australian, actively selling e-cigarettes and e-liquid products to Australians. They also submitted that e-cigarettes and related devices are frequently promoted by retailers using social media techniques that would appear to be inconsistent with the current tobacco control legislation (for example, the use of competitions, loyalty programs and quality discounts).
- claimed that the long term decline in smoking incidence has all but come to a halt in Australia and there is a need to move beyond a prohibitionist approach (such as, high prices, display bans, plain packaging) and look at how many other countries are adopting a harm minimisation approach to their tobacco control policies. For these stakeholders, the widespread availability and promotion of e-cigarettes and other reduced harm products in Europe, Canada, the United States and, recently, New Zealand as a smoking cessation tool is a step in the right direction for reducing smoking prevalence and minimising the harm caused by smoking.

As part of the online consultation process, a large number of individuals and Cignall staff signed a petition addressed to the Department, supporting legislative changes to allow quality-controlled e-cigarettes that contain nicotine into the Australian market. Other stakeholders strongly disagreed with this position, claiming there is insufficient evidence regarding how availability and promotion of e-cigarettes is impacting on smoking rates and preventative health, and that introducing e-nicotine delivery systems may renormalise smoking-related behaviours and undermine decades of successful tobacco control.

Submissions relating to the treatment of e-cigarettes and e-liquid products in the TAP Act covered both sides of the debate, suggesting that:

- the TAP legislation be extended to include e-nicotine delivery systems, heat-not-burn products and other novel smoking/vaping devices developed by the tobacco and/or vaping industries
  - For example, following the approach in the UK, the law could regulate the availability of prescribed e-cigarettes to long-term smokers who have been unable to quit using Nicotine Replacement Therapies.
- Commonwealth legislation be developed that prohibits the sale of both nicotine and non-nicotine e-cigarettes (and other novel products) unless these products have been approved by the Therapeutic Goods Administration (TGA). If e-cigarettes and e-liquid products are approved by the TGA there must be:
  - restrictions on the flavouring and additives that can be used
  - mandated disclosure of the contents of electronic nicotine delivery systems
- if the online sale of e-cigarettes and e-liquid products is not entirely banned, there should be safeguards against people under the age of 18 purchasing products online, with national regulation that requires the verification of age prior to purchase and upon delivery of products
  - The differential treatment of online versus instore sales, whereby identification must be viewed as evidence of a person's age, was identified across many submissions.



- marketing and advertising of e-cigarettes should be subject to the same advertising and promotion prohibition as tobacco products such as those contained in the TAP legislation.
  - However, some stakeholders felt vaping should not be included in the tobacco control legislation if the product does not contain nicotine.

## Plain Packaging

Stakeholders were asked what is working well in relation to the TPP Act and TPP Regulations, and what could be changed or improved.

Stakeholders who felt the plain packaging legislation was working well noted that the TPP Act:

- is one tool in a comprehensive set of tobacco control measures that, in combination, reduce the prevalence of smoking
- has significantly eroded tobacco ‘brand value’, preventing tobacco companies from conveying social messages around status, values and character through their products
- provides greater opportunity for enforcement action against the illegal tobacco trade with the recent amendments allowing for expanded categories of persons who may be appointed as ‘authorised officers’ under the Act.

Other stakeholders, including those from the tobacco industry, retailers and some consumers, felt that even in the context of a comprehensive tobacco control framework, plain packaging legislation has not been an effective policy intervention because:

- it has not had a determinable effect on the rate of decline in smokers over the past six years
  - A number of submitters questioned the evidence base for the Department’s claim that standardised packaging has reduced the prevalence of tobacco consumption in Australia beyond any pre-existing trend.
- it causes confusion and frustration for consumers at point of sale
- it has not changed smoking habits and prevalence in Australia, but it has changed smoking preferences
  - Smokers continue to buy the same amount of tobacco but will buy in bulk quantities because it is difficult to differentiate between brands at point of sale (evidenced by an increase in 40 cigarette carton sales and a decrease in 25 cigarette carton sales).
- it makes it harder for retailers to accurately identify tobacco products, which impacts ordering, dispensing and unpacking stock. It was also suggested that retailers have had to invest more in training staff, and that risk to personal safety has increased as staff have to turn their back on customers for longer to locate the product requested
- it has led to a significant rise of illicit trade and counterfeit cigarettes
  - By eliminating packaging complexity and introducing a simpler design and shape specification, authentic products can be more easily copied and re-produced. Some submissions cited a report from KPMG that stated there has been a 25 percent increase in illicit tobacco in the three years since plain packaging was introduced.



## Clarity of the TPP Regulations

On the whole, stakeholders felt that the TPP Regulations are well understood by retailers and the tobacco industry.

One stakeholder suggested that the Regulations are open to interpretation by individual health inspectors, who do not interpret the rules in a consistent manner, which can be particularly problematic for retailers operating multiple stores across different regions.

Another stakeholder noted that while the simplified outline provided at the beginning of each chapter of the Act is useful the wording would still be challenging for many users.

## Opportunities to change or improve to the TPP legislation

A number of stakeholders felt that the TPP Act and TPP Regulations could be updated and strengthened with the following amendments and/or introduction of prohibitions:

- prohibit the sale and importation of tobacco products and other products intended for tobacco use that contain **flavourings and other masking agents**.
  - Menthol was specifically mentioned as a flavouring that increases the palatability of the cigarette and has been associated with secondary marketing that implies reduced harm, 'smoother' or 'fresher' smoke.
- in relation to **brand and variant names** (which some stakeholders suggested have become more diverse and evocative since the introduction of the TPP Act):
  - prohibit use of colours and numbers, and limit the length of brand and variant names
  - prohibit brand and variant names that imbue meaning about perceived strength, quality, tar content or relative harmfulness of a cigarette brand
  - prohibit brand and variant names that imply physiological benefits (for example, 'refreshing' or 'rush')
  - prevent industry subverting the requirement that brand and variant names appear on two separate lines
- either ban **filter tips**, or in relation to filter designs, structures and colours:
  - ban the use of distinctive filter designs (for example, grooves, holes, recess)
  - ban filters containing additional elements (for example, charcoal)
  - standardise the colour of filters to reduce appeal to smokers
- require a **single filter type** of uniform length, diameter, weight and denier of filter fibres and maximum level of plasticiser
- **standardise permeability of tipping paper** and ban perforation of tipping paper ('filter venting')
- **standardise the number of cigarettes** able to be sold in a pack, thereby reducing the ability of tobacco companies to imply value for money or 'bonus' cigarettes:

- require that packs of cigarettes are sold only in packs of 20 and RYO tobacco in pouches of 30g (stakeholders noted that New Zealand regulates pack sizes of 20 or 25 and in the USA the pack size is mandated at 20)
- specify an exact set of dimensions for packs of cigarettes and RYO tobacco
- in relation to **pack size for other tobacco products**, standardise:
  - the number of cigarillos allowed in a pack to be 20
  - the number of items or the weight of items for all other categories of tobacco products
  - the shape, height, width and depth of dimensions for packaging for all other tobacco products in line with number and weight restrictions
- in relation to **on pack health warnings**:
  - implement an ongoing program of research to develop and test new on-pack warnings and ensure high salience and impact among different smoker sub-groups
  - regularly review and refresh warnings to avoid warning wear-out and enable the rapid introduction of new warnings
- in relation to the **packaging of RYO loose tobacco**:
  - require RYO loose tobacco to be sold in rigid rectangular containers of one specified size (to ensure that graphic health warnings cannot be easily removed and are visible for the life of the pack)
- in relation to the **colour of inner surface and linings of packs**:
  - require the inner surfaces of all tobacco packaging to be the colour Pantone 448C
  - require any package lining to be the colour Pantone 448C
- in relation to **lift out foil packaging/lining and 'fillers'**:
  - prohibit linings in all tobacco products that constitute a sealed/complete pack within the main packaging
  - prohibit the use of 'space fillers' or other design elements within the main packaging of all tobacco products
- in relation to the **cigarette stick dimensions and colour**:
  - specify an exact length and diameter permissible for cigarette sticks
  - specify an exact length and width for RYO papers
  - specify the colour that must be used for cigarette and cigarillo paper casing and RYO casing
- require **mandatory disclosure of cigarette ingredients** by cigarette manufacturers
  - The information should be made available to the public, after the Government has examined it and provided expert commentary with regards to cigarette ingredients and any harmful effects from their consumption.
- ensure that **health warnings** are still visible on digital apps and mobile websites that simplify content for easy navigation
- introduce **mandatory cigarette pack inserts** that contain impactful cessation advice and positive images that support quitting smoking (such as been implemented in Canada).

Stakeholders who felt the TPP Act was not working well also made a number of suggestions for changes, including:

- repeal the TPP Act and TPP Regulations on the basis that legal tobacco has to be packaged and stocked in a way that makes individual products more identifiable. Specifically, regulations could:
  - permit the brand of the product on the front flap of product in an approved size format, allowing for simple and effective identification of important details
  - permit the implementation of a simple, coloured dot system to assist in identification of products, increasing the speed of stock management in store as well as transactions and minimising customer frustration and confusion
- consider operational issues that could result from contradictory regulatory arrangements in different countries
- amend regulation 2.3.1(1) of the TPP Regulations regarding trademarks or marks appearing on retail packaging to include the 'use of trademarks for retail purposes' to the list of permitted uses
- in relation to monitoring and enforcement of the TPP legislation:
  - consider how to address the lack of effective monitoring and enforcement, possibly by establishing an agency that is able to monitor and approve plain packaging artwork from approved suppliers, issue import permits to suppliers and manage compliance
  - implement a 3-point sensibility check based on whether plain packaging non-compliance is serious and allow suppliers to take corrective action within a reasonable time period.

Various comments were made in relation to fine cut tobacco (FCT), with submitters noting that there are some aspects of the TPP legislation that lack consistency between packages containing Factory Made Cigarettes (FMC) and those containing FCT. On this point, submitters variously noted:

- brand and variant names may only appear once on no more than two surfaces of retail packages of FCT (regulation 2.4.4) whereas they may appear no more than once on up to three surfaces or retail packages of FMC (paragraph 21(2)(b) of the Act)
- regulation 2.2.1(3A)(b) (requiring that the colour of the packaging material must be in its natural state) introduces a level of subjectivity that has caused confusion and inconsistency in the past
- regulation 2.2.1(6) has the effect that part of the 'inner' surface of pouches must be printed in Pantone 448C and the other part must be white. Printing would be simplified and uniformity across supplies would be achieved, if all surfaces that do not carry text or images were required to be one colour
- unlike FMC cartons, there is no specific permission for a perforated strip to be used for opening FCT cartons
- unlike FMC packaging, for FCT packaging there is no prescription as to where the origin mark (regulation 2.3.2(1)), the measurement mark and trade description (regulations 2.3.4(3) and (4)), the bar code (regulation 2.3.5), the locally made product statement (regulation 2.3.7(2)), the name and address of packer (regulation 3.3.8) must appear.

## General

Stakeholders gave various responses to the general questions in the survey regarding the current regulatory arrangements.

### **Benefits of current regulatory arrangements**

The following overarching benefits of the current regulatory arrangements were cited:

- clear and impactful linking of smoking with negative health outcomes
- removal of the power of advertising and positive brands association
- reduced appeal of smoking to young people. Tobacco products are almost completely out of sight of children and this represents a significant step forward
- reduced affordability (specifically for teenagers).

Some also suggested that the Commonwealth laws are complementary to existing state and territory tobacco control mechanisms. However, on the whole, stakeholders suggested there was confusion about the relative state/territory versus Commonwealth coverage.

### **Administrative burden**

Comments on unnecessary administrative burden were limited. Some stakeholders felt that it would ease the administrative burden associated with operating within the legislative framework if there was:

- a single set of rules for tobacco retailers across Australia, rather than varying rules across the jurisdictions
- more conclusive research on the impact and effectiveness of plain packaging to justify the administrative requirements.

Others felt that legislation should not be measured by administrative burden, but by impact on public health outcomes.

### **Compliance costs**

Compliance costs and related costs (financial and other) associated with the regulatory arrangements were referenced in many submissions. For example, stakeholders commented that:

- compliance costs could be reduced by streamlining and centralising the administration, monitoring and enforcement of tobacco control legislation (including the Information Standard administered by the Australian Competition and Consumer Commission, which has strong links to plain packaging, and the ban on the supply of chewable tobacco and snuffs)
- retailers incur significant compliance costs to ensure that all tobacco products sold are: in plain packaging; kept out of sight behind closed doors; not sold to anyone under the age of 18; and that relevant signage is posted
- retailers have experienced increased labour, inventory and security costs with the introduction of the TPP Act

- the exposure of retailers and the tobacco industry to competition from criminals has resulted in a loss of income
- there is a loss of commercial rights for producers to market their product
- there is a loss of consumer sovereignty and increased frustration and cost associated with being supplied with the wrong product
- the rising prices of cigarettes are a significant cost for individuals. This was observed to impact negatively on smokers who have an addiction when what they need is meaningful and personalised support to enable them to break the habit.

One stakeholder queried whether an incentive scheme could be offered to retailers who choose not to sell tobacco.

### **Opportunities for other tobacco control measures**

A number of suggestions were made regarding other measures for tobacco control regulation that the Government could consider and prioritise. It was also noted that any changes to the tobacco control legislation must be mindful of the impact on Aboriginal and Torres Strait Islander people given prevalence of smoking in the population.

Suggestions included:

- The need for governments at all levels to create an appropriate and consistent framework for the legal sale of e-cigarettes across Australia.
- Raising the minimum purchasing age to 21 years. Stakeholders submitted that, since 2005, the USA has implemented 'T21' legislation in more than 425 locations, which has significantly reduced smoking rates amongst children and young adults.
- In relation to price policy measures, stakeholders suggested:
  - prohibiting all discounting, price-related promotion and multi-buy pack bundling of tobacco products
  - establishing minimum prices for each tobacco product type and making minimum pricing a condition of retail licenses
  - using revenue from tobacco licensing to monitor compliance with tobacco excise legislation and restrictions on price-related promotion.
- In relation to breaches and penalties, stakeholders suggested amending the legislation to:
  - increase penalties for offences committed by tobacco manufacturers (including in relation to counterfeit products and violating customs laws)
  - introduce greater potential to investigate breaches of the TAP Act, and
  - introduce personal liability for directors and executives where offences have been committed knowingly.
- Restricting access to tobacco products. For example, introducing zoning for premises selling tobacco products (by requiring a minimum distance from health care facilities and educational institutions), banning the purchase of tobacco products online and via vending machines.

- Opportunities for public campaigns and education were also raised, including:
  - Launch a public education campaign around the prevalence and dangers of illicit tobacco to discourage tobacco consumption and create consumer awareness of the dangers of purchasing unregulated products.
  - Introduce clear guidelines to enable retailers to provide information regarding the potential benefits of e-cigarettes compared to traditional tobacco.
  - Improve access to evidence-based cessation services. It was submitted that smokers in Australia and around the world are rationally choosing to switch to less harmful products (like vaping and e-cigarettes) and that this needs further policy analysis in Australia.
- Further regulate what can be put into cigarettes and slowly reduce the amount of nicotine per cigarette.
- Ban the import of tobacco products by visitors to Australia and returning residents and exclude tobacco from duty free sales for travellers leaving Australia.
- Increase the frequency of review of the tobacco control regulation, with one stakeholder suggesting reviews should be conducted at intervals of no more than 24 months.
- In relation to smoke free environments:
  - Develop and support, through legislation, the implementation of comprehensive smoke-free workplace policies for health services and custodial settings that include a focus on smoke-free environments. This should include support for clients and staff to quit smoking, which might involve access to nicotine replacement therapy and intervention training for staff.
  - Further expand smoke-free areas to include pedestrian malls and outdoor areas in licensed premises.
- The activities of other countries were also flagged, with the suggestion that Australia should take a proactive approach to address smoking rates similar in form to countries such as the UK, Canada, parts of Europe and New Zealand, where a 'harm minimisation' approach to tobacco policy has been adopted.

## Chapter 4 – Summary of written submissions to the NTS

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The National Tobacco Strategy 2012-2018 (NTS) sets out a national policy framework for the Commonwealth and state and territory governments to work together, and in collaboration with non-government organisations, to improve the health of all Australians by reducing the prevalence of tobacco smoking and its associated health, social and economic costs and the inequalities it causes.

The Commonwealth Department of Health invited written submissions from members of the public and stakeholders on the next iteration of the NTS in July and August 2018. 49 submissions from a range of interested parties including individuals and public health organisations were received.

Themes from the submissions to the NTS that may inform the Department's First Principles and Thematic Reviews of the tobacco control regulation have been grouped and summarised as follows:

- advertising of tobacco products
- promotion and sponsorship of tobacco products
- financial incentives and support to retailers, venue operations and corporate social responsibility activities
- packaging and product design features
- expanding the scope of Commonwealth legislation.

*mpconsulting has considered written submissions made through this process to the extent that comments relate to the Department's tobacco control regulation. mpconsulting's consideration of stakeholder submissions to the NTS is limited to the 49 written submissions, noting that the Department has also undertaken meetings and roundtables, and has separately analysed stakeholder input gained through those processes for the purposes of the developing the next iteration of the NTS.*

### **Advertising of tobacco products**

Stakeholders were asked what could be done to further eliminate the remaining advertising, promotion and sponsorship of tobacco products in Australia. Although some stakeholders suggested the current regulations are appropriate, others felt that changes are necessary and that the TAP Act should specifically prohibit:

- tobacco price boards in retail outlets at point of sale, as they enable companies to headline new products, draw attention to value and budget brands and this entails a form of reassurance-based marketing
- direct advertising and promotional material between tobacco industry, manufacturers and retailers, and
- variant/novel brand names of cigarettes (including Roll Your Own (RYO) products) with words that imply lower harm or natural/organic ingredients.

It was also suggested that enforcement mechanisms could be strengthened, including making prosecution of advertising breaches easier and ensuring enforcement is sufficient to deter further breaches.

Some stakeholders commented that the TAP Act does not adequately address the following media platforms:

- social media and networking sites – for example, product placement through social media. Some suggested that tobacco retailers with an Instagram account have the capacity to generate followers and promote messaging that circumvents tobacco advertising prohibitions
- online websites that are not adequately regulated and monitored, particularly online tobacco content targeting young adults and minors
- digital and new media channels
- talk back radio and television (where current measures are not sufficiently preventing indirect positive references)
- films, which could potentially be classified based on whether or not smoking is depicted.

Some stakeholders also suggested considering extending prohibitions on tobacco advertising, promotion and sponsorship to cover electronic nicotine delivery systems, particularly e-cigarettes.

### ***Promotion and sponsorship***

A number of stakeholders felt that activities undertaken by the tobacco industry that fell into the area of promotion and sponsorship arguably amounted to product advertising or broad promotion activities. Consequently, consideration could be given to how the TAP Act could better restrict or prohibit:

- payments, incentives and rebates by any tobacco manufacturer, importer or wholesaler to tobacco retailers and proprietors of hospitality venues
- public relations and lobbying activities intended to promote tobacco use or the purchase of tobacco products
- publicity about tobacco industry sponsorship or charitable activities.

It was suggested that the legislation could require any company importing or wholesaling tobacco products in Australia to report annually on all expenditure and on any form of marketing and promotion (with the objective of eliminating incentive programs between tobacco manufacturers, wholesalers and promotions), including donations or payments to third parties such as hospitality groups.

### ***Plain packaging***

A number of stakeholders felt that Australia's plain packaging regulations were best practice at the time they were introduced, but numerous countries have now introduced further measures that have improved the legislation. Consideration could therefore be given to how Australia's plain packaging requirements could be made more effective based on international experience.



A number of stakeholders raised the issue of filters in particular and suggested amendments that could be made to the TPP Regulations that would standardise the design and appearance of cigarette filters, such as:

- prohibiting filter capsules
- mandating a single filter type of uniform length, weight and denier of filter fibres and maximum level of plasticiser
- standardising permeability and prohibiting perforation of tipping paper.

Suggestions were also made regarding the regulation of pack sizes for cigarettes and RYO tobacco pouches, including that there should be a legislated minimum or standard pack size.

### ***Expanding the scope of existing legislation***

A number of the submissions referenced ways in which the scope of the existing legislation could be expanded. For example, to introduce further regulation:

- of the contents of tobacco products
- of new, novel and/or emerging tobacco products and electronic nicotine and non-nicotine delivery systems including e-cigarettes
- to reduce the supply of tobacco products.

### **Contents of tobacco products and disclosure**

In relation to the contents of tobacco products, some submitters felt the legislation could be strengthened to:

- ban characterising flavouring, including the use of flavour crush capsules in the filter (such as ‘crushballs’ marketed at young people). It was suggested that:
  - flavoured products such as menthol are particularly popular with young people and act to increase the palatability and addictiveness of cigarettes
  - this ban would apply to all additives unless it can be demonstrated beyond doubt that a particular additive actually reduces immediate dangers to tobacco users (for example, benzoic acid and sorbitol, preservatives known to prevent the growth of mould)
- ban all filter technologies that cannot be demonstrated to differentially reduce exposure to the more harmful toxicants in tobacco smoke
- require mandatory reduction in the nicotine content of cigarettes
- require companies to fully disclose all additives, and the purpose for their inclusion, in cigars and smoking tobacco (pipe and RYO), as well as in cigarettes
- improve tobacco users’ understanding of the risks of using tobacco products, and to provide appropriate information about available cessation supports.

### **New, novel and/or emerging tobacco products and alternative nicotine and non-nicotine delivery systems, including e-cigarettes**

Many stakeholders were concerned about the growing evidence of harm associated with emerging alternative nicotine delivery systems (including e-cigarettes) and the potential for them to act as a

gateway to smoking tobacco, particularly in young people. Conversely, some others argued that, subject to an appropriate regulatory framework, alternative nicotine delivery systems may offer the potential for significant public health benefits.

It was consistently acknowledged that there is currently insufficient evidence available regarding the efficacy of e-cigarettes and other emerging technologies in reducing the harmful impacts of conventional tobacco products. Stakeholders noted that the future regulation of these products should be guided by scientific evidence from the National Health and Medical Research Council and other reputable national and international scientific bodies, and that the TGA should continue to have responsibility for all matters of product regulation of alternative nicotine delivery devices and the scheduling of substances for use in these devices in Australia.

#### *Reducing the availability and supply of tobacco products*

Some of the suggestions for reducing the supply of tobacco products related to state and territory legislation (for example, prohibiting sales of tobacco products in vending machines). Others suggested Commonwealth responsibilities should include:

- developing a framework to regulate the retail availability and supply of tobacco products.
- banning online sales and/or establishing processes for checking proof of age of recipients ordering and on delivery of internet-ordered tobacco
- introducing compulsory licensing of tobacco retailers. This would facilitate the enforcement of tobacco control measures and provide health authorities with the addresses of sellers, and provide revenue to fund monitoring and education/training of retailers, and
- raising the minimum legal age of purchase of tobacco products
- monitoring and enforcement of all tobacco control legislation applicable at the retail level

Many also felt that stronger implementation and enforcement measures were required to control the illicit tobacco trade.