

# Tobacco Control Legislation Review: Workshop Consultation Report

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mpconsulting ™

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## Context and purpose of this report

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### Purpose of this report

The purpose of this report is to describe the key outcomes of consultation with stakeholders regarding potential changes to the Department of Health's (the Department) tobacco control legislation.

This report describes:

- the background and context for the Department's review of tobacco legislation
- the process and conduct of consultations
- key themes, outcomes and future legislative reform options broadly stemming from the two phases of consultation to be explored through the thematic and first principles reviews.

*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 workshop discussions, 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. This report will be considered by the Australian Government to inform options for regulatory reform.*

### Background and context

Under the *Legislation Act 2003*, the Australian Government introduced changes to the sunset arrangements for legislative instruments such that they automatically cease to apply, unless an active decision has been made to retain them. The aim of the arrangement is to ensure that legislative instruments are kept up to date and only remain in force so long as they are needed.

The Department's tobacco control regulations are due to sunset on 1 April 2022. Before this occurs and consistent with the Attorney-General's agenda for the sunset of instruments, 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 improve the Department's ability 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 a first principles review.

### 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 sunset 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."*

## Conduct of the consultation

Consultation was undertaken in two phases:

- Phase 1 (January to March 2019): sought views and suggestions on the current legislation, including options for regulatory improvements, via online public consultation submissions.
- Phase 2 (May to July 2019): collaborative exploration of options for regulatory improvements via targeted stakeholder workshops.

### Phase 1

From 18 January to 18 March 2019, the Department conducted a public submission process on the Department's online Consultation Hub seeking stakeholder feedback on the existing legislation and options for regulatory improvement, including options for modernising, streamlining and simplifying the TAP legislation and TPP legislation. Online submissions were received from individuals/consumers, academics, public health organisations, state and territory health departments, Commonwealth agencies, tobacco manufacturers, importers, wholesalers, packagers and retailers.

The Department's review was also informed by public online submissions provided as part of the development of the National Tobacco Strategy 2018-2026 (NTS).

*As part of Phase 1, mpconsulting 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 was limited to the 49 written submissions, noting that the Department also undertook meetings and roundtables, and has separately analysed stakeholder input gained through those processes for the purposes of developing the next iteration of the NTS.*

mpconsulting analysed submissions to the legislation review and provided a report to the Department summarising the key points made by stakeholders in response to these processes. The submissions were also used to inform the content of stakeholder workshops undertaken in Phase 2 of the consultation.

### Phase 2

Five targeted stakeholder consultation workshops were conducted with stakeholders identified by the Department through the online submission process:

- Monday, 20 May 2019 in Melbourne

- Tuesday, 21 May 2019 in Sydney
- Thursday, 23 May 2019 via videoconference
- Thursday, 30 May 2019 in Melbourne
- Tuesday, 2 July 2019 in Canberra.

Approximately 70 stakeholders attended the workshops, comprising representation across Commonwealth, state and territory governments, public health organisations, experts and academics. Phase 2 did not include consultation with the tobacco and/or e-cigarette industry, manufacturers, importers, wholesalers, packagers or retailers.

The workshops included:

- contextual information about the thematic and first principles reviews and the key themes emerging from Phase 1 consultation.
- targeted discussion of the TAP legislation and key issues for consideration, including:
  - the intent and breadth of some of the existing provisions
  - exceptions and defences related to advertising and promotion
  - the intersection between the Commonwealth and state and territory laws
  - administration and enforcement issues
  - potential new measures, including the extension of the TAP legislation to e-cigarettes and other novel or emerging products.
- discussion of the TPP legislation and key issues for consideration, including:
  - clarification or adjustment of some of the existing requirements
  - strengthening packaging controls
  - monitoring and enforcement
  - the role of plain packaging, if any, in the context of e-cigarettes
- discussion of other measures identified in submissions to the review and to the development of the NTS, including new or expanded tobacco controls.

## Approach to summarising consultation outcomes

mpconsulting separately provided an *Analysis and Summary of Public Consultation Submissions* in May 2019. That report provided a summary of key themes and points made by stakeholders through the public consultation submission process that the Department conducted in Phase 1 from 18 January to 18 March 2019. It also informed the direction and content of the targeted stakeholder workshops undertaken in Phase 2 of the consultation.

This report summarises the key points made by stakeholders as part of Phase 2 stakeholder workshops. Pursuant to Australia's obligations under Article 5.3 of the FCTC, the Department requested that the tobacco and/or e-cigarette industry, manufacturers, importers, wholesaler, packagers or retailers were not consulted during the Phase 2 workshops. As a result, the summary of Phase 2 consultation outcomes predominately reflects the views of public health stakeholders, academics, health professionals and government agencies.

Table 1 summarises suggested areas for change identified through the targeted stakeholder workshops, along with an indication as to the relative stakeholder support. The outcome of the Phase 2 consultation predominately reflects the views of public health stakeholders, who were the primary audience at workshops. Where possible, we have reflected in this report where there were

disparate views but note that the summary of Phase 1 submissions better reflects the detailed views of the broader stakeholder group.

**Table 1: Summary of suggested areas for change identified through targeted stakeholder workshops**

Tobacco Advertising Prohibition legislation	Tobacco Plain Packaging legislation (and related issues)	E-cigarettes	Other measures
<b>Strong support</b>			
Remove the requirement for there to be intent to broadcast or publish a tobacco advertisement.	Restrict brand and variant names for example by mandating a single presentation per brand (i.e. do not permit any variants). <i>OR</i> Limiting variant names and prohibiting use of certain positive words.	Further regulation of e-cigarettes with some stakeholders supporting a ban in Australia (including non-nicotine liquids). <i>Noting some preferred tighter regulation rather than a ban. If e-cigarettes are not banned, each of the measures outlined below were supported.</i>	Ban internet sales of tobacco products.
Strengthen the meaning of tobacco advertisement to include combinations of colours, letters and shapes that substantially resemble a tobacco company trademark or brand.	Update health warning messages and imagery more regularly (noting this is separate Commonwealth legislation).	Extend advertising prohibitions in the TAP legislation to include e-cigarettes.	Ban vending machine sales. <i>OR</i> Ban vending machines sales in licensed premises.
Further restrict how tobacco products can be advertised online by Australian retailers (to remove positive imagery associated with the product, e.g. webpage banners).	N/A	N/A	N/A

Tobacco Advertising Prohibition legislation	Tobacco Plain Packaging legislation (and related issues)	E-cigarettes	Other measures
<p>Consider clarifying that mere publicity to a tobacco product comes within the meaning of tobacco advertisement.</p> <p><i>Noting challenges of doing this (see detail in Report).</i></p>	<p>Include health promotion or further health warnings (or positive quit messages) on inside of packet or via an insert.</p> <p><i>Some environmental concerns regarding inserts (see detail in Report).</i></p>	<p>Extend plain packaging requirements to e-cigarettes.</p> <p><i>Noting challenges in doing so – see detail in Report.</i></p>	<p>Require tobacco and/or e-cigarette manufacturers and retailers to disclose to government:</p> <ul style="list-style-type: none"> <li>– sales data</li> <li>– all donation, promotion and sponsorship budgets and spending (<i>if a ban on such activity is not supported</i>)</li> <li>– cigarette ingredients and engineering details.</li> </ul>
<p>Ban any form of benefit or promotion to retailers (including promotion of product attributes and any form of benefit to retailers).</p>	<p>Standardise:</p> <ul style="list-style-type: none"> <li>– packaging (i.e. dimensions and shape of pack for Factory Made Cigarettes (FMC) and Roll Your Own (RYO))</li> <li>– the pack lining (Pantone 448C)</li> <li>– the number of cigarettes in a pack (20 for cigarettes and 30g for RYO tobacco pouch).</li> </ul>	<p>Ban or restrict the use of flavourings in e-liquids particularly those that appeal to young people.</p>	<p>N/A</p>
<p>Ban industry from making donations or purchasing tables/tents/boxes at charity, political and sporting events.</p> <p><i>Noting challenges in defining prohibited expenditure.</i></p>	<p>Standardise the presentation of all cigarettes to remove innovative features. This may include banning filter ventilation, perforated paper, recesses and variable filters.</p>	<p>Restrict where e-cigarettes can be sold and ban online sales.</p> <p><i>Noting challenges re banning import where no nicotine in liquid.</i></p>	<p>N/A</p>
<p>Use administrative mechanisms to educate and warn social media influencers about tobacco control regulation.</p>	<p>Ban flavourings in tobacco products.</p> <p><i>OR</i></p> <p>At a minimum, ban crush balls.</p>	<p>Require manufacturers to disclose ingredients in e-liquids.</p>	<p>N/A</p>



Tobacco Advertising Prohibition legislation	Tobacco Plain Packaging legislation (and related issues)	E-cigarettes	Other measures
Ban in-store price boards. Purchasers would instead request a list of products and prices in alphabetical order.	N/A	N/A	N/A
<b>Some support</b>			
Remove Quit helpline advertising from in-store point of sale (because it alerts people to the availability of cigarettes). <i>Could be implemented in conjunction with ban on in-store price boards.</i>	Dissuasive cigarettes with options being: – colour of cigarettes – health warnings printed on cigarette. <i>Some concerns regarding dissuasive cigarettes (see detail in Report).</i>	N/A	Require film and television viewer warnings where tobacco use is depicted (as per Indian model).
<b>Raised but not widely supported (noting either practical challenges or lower priority)</b>			
Ban tobacco advertisements on international flights. <i>Absence of Commonwealth reach in international airspace.</i>	Ban filters on cigarettes (encouraging quitting by making cigarettes distasteful). <i>Concerns regarding impact on smokers.</i>	N/A	Require film classifications to account for tobacco use. <i>Challenges where films are classified internationally, and classifications are adopted in Australia.</i>
Create new offences aimed at individuals who use social media to give publicity to or otherwise promote smoking and tobacco products. <i>Already banned where benefit provided to individual – challenging to enforce where no benefit to individual.</i>	Mandate health warnings on RYO filter papers. <i>Lower priority.</i>		Increase the legal purchase age of tobacco to 21.
			Further restrict the duty free personal import of tobacco products. <i>Low impact noting current limit to one pack.</i>
			Create a national licensing scheme for tobacco retailers. <i>Concern regarding Commonwealth reach.</i>

Tobacco Advertising Prohibition legislation	Tobacco Plain Packaging legislation (and related issues)	E-cigarettes	Other measures
			<p>Place conditions on retail licences to prevent retailers accepting any form of benefit from a manufacturer. <i>Not all states/territories licence retailers.</i></p> <p>Implement zoning laws for the sale of tobacco. <i>Concerns re practicality of implementation.</i></p> <p>Implement a minimum pricing policy. <i>Concerns re potential to increase profitability for manufacturers.</i></p>

# Overview of the tobacco control legislation

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## 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)
- accidental or incidental broadcast or publication – sections 14 and 19.

The TAP Act also restricts tobacco advertising on 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.

## Consultation outcomes – Tobacco advertising prohibitions

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### Fit for purpose

The majority of stakeholders considered that the TAP legislation:

- remains relevant and fit-for-purpose, and forms a critical part of the overall tobacco control strategy
- has supported a reduction in smoking in Australia.

The majority of stakeholders indicated that the TAP legislation continues to be needed but that changes should be made to better reflect the current environment, the broader policy context and changes to tobacco and/or e-cigarette industry practice.

Those stakeholders who suggested the TAP legislation is not fit-for-purpose suggested that it unfairly discriminates against tobacco manufacturers of a legal product (noting that this point was raised in written submissions but not by the majority of stakeholders attending the workshops).

While stakeholders generally felt the TAP legislation is simple, clear and easy to understand, some stakeholders suggested that:

- some provisions are unnecessarily complicated and could be simplified
- there would be value in clarifying the intent of some provisions
- some of the provisions require updating to reflect contemporary ways in which manufacturers advertise and engage with consumers and retailers online
- there would be value in consolidating tobacco control legislation.

### Objectives of any change

When discussing the objectives of any change, participants at workshops suggested that changes were needed to:

- continue to close avenues used by the tobacco and/or e-cigarette industry to promote smoking
- improve the effectiveness and efficiency of prohibitions in a changing environment
- extend advertising prohibitions to include e-cigarettes (detailed under section on e-cigarettes below).

It was also noted that the cost of any legislative change needs to be balanced against the relative benefit of the change.

### Key areas of concern / suggestions for change

The main areas in which stakeholders supported change include:

- limiting or preventing promotion between tobacco manufacturers, wholesalers and retailers (whether the benefit is financial or otherwise)
- eliminating promotion through events, contributions, donations, etc.

- regulating the display and appearance of price boards
- online advertising.

Stakeholder comments in relation to these matters along with a wide range of other suggestions are detailed below.

## Detailed summary of specific concerns / suggestions relating to tobacco advertising

### Sections 13 and 15 of the TAP Act – Intent to broadcast or publish tobacco advertisement

Noting the outcomes of *Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority* in 2014, most stakeholders supported the proposal for amendments to be made to the TAP Act to remove the need to establish that a broadcaster or publisher intended to promote smoking. It was suggested that this would align better with like schemes (such as racial vilification laws which do not require intent to establish the offending conduct) and would encourage greater due diligence on the part of broadcasters and publishers.

Others suggested that it would be preferable to reverse the onus of proof, so that the person in breach of the provisions bears the onus of proving there was no intent to broadcast or publish.

### Accidental and incidental advertising

Section 19 of the TAP Act provides that a person may publish a tobacco advertisement if it is published as an accidental or incidental accompaniment to the publication of another matter and the person does not receive any direct or indirect benefit.

Stakeholders expressed concern that giving ‘mere publicity’ to the matters in subsection 9(1) of the TAP Act, without positively promoting or advocating for them, can have the effect of promoting smoking, tobacco products or tobacco manufacturers.

Various examples were given of accidental and incidental advertising (or advertising that is otherwise permitted) that can have the effect of promoting smoking, tobacco products or tobacco manufacturers. For example:

- the historical depiction of cigarettes and smoking:
  - Stakeholders gave differing views regarding this, with only a few indicating that it would be reasonable to eliminate the depiction of smoking in contemporary broadcasts depicting historical events. These stakeholders considered that the depiction of old tobacco products can be a potential stimulus for the older generation who have quit smoking and do not recognise their previously preferred brand in the context of plain packaging.
  - Most stakeholders thought historical references should continue to fall within the existing exceptions to the ban on tobacco advertising.
- a news report does not have to include a positive promotion or advocate smoking to elicit a response. Images of people smoking even where there is no promotion can still elicit a response and have the impact of promoting smoking:
  - For example, the reporting related to the illicit tobacco trade may play a role in maintaining smokers who might otherwise be on the path to quitting (including where they switch to

illicit cigarettes) and keeping the name of tobacco companies in the media. One stakeholder described a news report of discount cigarettes causing a stampede in Bondi.

- imagery used in a retailer advertisement in Tasmania whereby the 'i' in Cignall is depicted as a lit cigarette
- broadcast of international events that give publicity to smoking (noting that this cannot be controlled internationally):
  - Stakeholders acknowledged that it is difficult to eliminate all accidental scenarios, noting in particular the broadcast of international sporting events where tobacco sponsorship might be displayed on or around sporting fields. Others felt athletes should accept that if they are competing internationally, where broadcast in Australia would amount to promoting tobacco, then events should not be shown in Australia. Another view was that athletes should not receive government sponsorship to compete at the event.

Stakeholders also noted the importance of interpreting 'direct or indirect benefit' broadly, particularly in the context of social media (refer to the issues detailed below) and the potential for a benefit to be gained after the broadcast.

#### **Subsections 9(1B) and 9(3A) of the TAP Act – Name of manufacturer and management advertisements**

Some stakeholders expressed concern that tobacco manufacturers can place large job advertisements in the print media, giving publicity to that manufacturer. Concern was expressed that this may also promote smoking by virtue of the connection people make between the names of tobacco manufacturers and tobacco products. Job advertisements can currently be published by virtue of the exception in subsection 9(3A) for advertisements (e.g. an advertisement for staff or calling for tenders), relating to the internal management of the business of a manufacturer, distributor or retailer of tobacco products, that does not promote a tobacco product or smoking.

While this was of concern to some stakeholders, others acknowledged that it is not illegal to work for a tobacco manufacturer and it may be problematic to ban job advertisements. However, as with the matters discussed above, if the onus of proof were reversed in relation to establishing whether the advertisement promotes a tobacco product or smoking, this would better support action being taken where an advertisement 'pushes the boundaries'.

#### **Section 9 of the TAP Act – Colour and colour schemes**

In considering the scope of subsection 9(1) currently, stakeholders suggested that the provision could be strengthened to ensure branding associated with a specific set of trademarks is prohibited. Most felt that brand stretching and the use of colour in association with a brand is an issue, particularly given the literature supporting people's association of a colour with a brand or a product.

Stakeholders suggested two ways in which to describe what it is they would like to see section 9 expanded to include:

- a combination of colours, letters and shapes that evoke recognition awareness
- anything that 'substantially resembles' a trademark or combination of colours or a brand associated with the product:

- One stakeholder noted that if a manufacturer has trademark protection for a logo or imagery, they may also have protection for associated branding. In this scenario the nexus between what substantially resembles a logo or image has already been established and could be used for the purposes of determining a breach of the tobacco advertising legislation.

### Promotion to tobacco supply chain

The TAP legislation bans messages to the public (either through broadcast or publication of tobacco advertisements) that may persuade people to buy, smoke or use tobacco. However, the advertising prohibitions do not extend to communications with retailers. In this context, stakeholders discussed the various ways they considered promotion to retailers is, in effect, promoting tobacco.

Stakeholders felt the objective of the legislation is to limit exposure to tobacco and smoking messages and, while at the time of legislating this was about the public more broadly, the landscape has changed, and the limitation should be explicitly applied to promotion to retailers. It was noted that promotion to retailers is competitive across companies and brands to encourage retailers to switch products.

In considering the kinds of activities or behaviours that a ban should encompass, stakeholders raised:

- mocked up advertising packs given to retailers with lots of provocative images and appealing material around new flavours, with the underlying intent that this messaging is communicated to consumers
- prizes, rewards, discounts, incentives and promotions (such as trips)
- free products (including extension products) and promotions associated with competitions (noting that this is theoretically illegal under some state legislation)
- trade discounts that enable retailers to discount products
- assistance with in-store set-up or fit-out.

It was also noted that there is no requirement to disclose promotion to retailers currently and this could be explored. Reference was made to the obligation on pharmaceutical companies to publish information regarding medical practitioners to whom money or incentives have been given.

On the whole, stakeholders thought that a ban on promotion to retailers should be two-fold in order to ban:

- the promotion of any attributes of a tobacco product (e.g. imagery, pack sizes, product pricing)
- any form of benefit or contribution being offered to retailers.

Stakeholders also discussed alternatives to a ban that could still have the effect of limiting the kind of promotion that is happening currently. This included:

- creating disclosure requirements, such that tobacco companies would have to report detailed information regarding any type of promotion or incentive given to a retailer



- placing conditions on retail licenses that would prevent the acceptance of any type of promotion or incentive (however, this approach would have limited application as not all jurisdictions have licencing schemes)
- prohibiting any money or benefit passing from a manufacturer to a retailer for anything but the installation of the tobacco cabinet which must include the Quit helpline details.

### **Acknowledgement of assistance or support**

Subsection 10(5) of the TAP Act currently provides exceptions in relation to written acknowledgement of assistance or support. The exception is limited by regulation 4 of the TAP Regulations, including in relation to where the acknowledgment appears on printed matter, the type face and size, how acknowledgements of donations of an exhibit can appear, etc.

Some stakeholders (in both written submissions and workshops) supported the removal of this exception, such that there would no longer be written acknowledgement of assistance and support. For example, donations from tobacco industry could no longer be acknowledged in annual reports. Others felt that regardless of whether assistance or support could be acknowledged, there is a broader issue regarding the act of assistance or support in itself that needs to be considered. Discussion on this issue is detailed below.

### **Promotion through events, donations to individuals and organisations**

Stakeholders gave various examples of how promotion through events and donations is occurring, such as:

- buying tables at charity or political events, which stakeholders acknowledged is not an overt donation (or promotion of a product) but potentially enables industry to influence government
- donating to causes that raise a positive public profile (e.g. Phillip Morris gave money to Habitat for Humanity, which was revealed through Habitat for Humanity's annual report)
- pavilions and private tents at sporting events and fashion events that involve opportunities for attendees to learn about e-cigarettes and heated tobacco products
- invitation only track-side events at the Melbourne Grand Prix associated with e-cigarettes and heated tobacco products.

It was noted that much of this information is revealed by whistle blowers, including because the venue spaces are often private and therefore it is not possible to monitor compliance with the advertising prohibitions.

When prompted further, stakeholders recognised the difficulty in drawing a line between the kind of promotion that the TAP legislation is intended to cover versus legitimate business promotion. The challenge of defining who should be caught by any extension of the existing prohibition was also acknowledged, particularly in the case of a related entity.

On the whole, stakeholders were concerned that this kind of activity is not consistent with the intent and objectives of the advertising prohibitions. For this reason, stakeholders sought to:

- prohibit the ability of the industry to influence through invitations to events

- prohibit donations, including to limit industry’s ability to ‘purchase’ their attendance at events.
  - On this point, many stakeholders felt it is not just the act of promoting tobacco products through events and donations that should be banned, but the act of donating itself.

## International flights

The potential to prohibit advertising on international flights by removing the exemption for tobacco advertisements on international flights (refer section 26A of the TAP Act) was raised through written submissions. However, in workshops stakeholders did not feel strongly about creating regulation that would be difficult to enforce, particularly where Australia would not have the necessary extra territorial power to regulate international airlines and flights. There was broad consensus that this option should not be pursued.

## Social media

The issue of social media and the role of social media influencers was a strong theme in written submissions and continued to be a significant part of discussion at most workshops. It was acknowledged that the tobacco advertising prohibition legislation was implemented before the rise of social media, and that advertising prohibitions needed to be relevant in contemporary society.

Concerns in relation to social media included:

- Stakeholders felt strongly that the tobacco industry could promote smoking by paying influencers. There was a keen interest in closing any legislative loopholes that would result in industry resurgence in promoting smoking and tobacco products.
- It is not clear if social media influencers are getting sponsorship/incentives/payment, and the difficulty of interpreting what is a ‘benefit’ in the current environment was noted, e.g. increasing the number of followers on social media could be a benefit in the social media context.
- Noting the complexity of the issue where the media is originating from overseas, stakeholders still expressed concern about Australians being exposed to smoking promotion through social media by international influencers (with the example of a Russian model sponsored by the tobacco industry being raised).

Stakeholders made various suggestions for how some of the concerns might be addressed. These included a range of administrative and/or legislative measures, such as:

- Send letters to individual influencers (who consistently post in a way that promotes smoking) that both educate and alert them to the expectations of the Australian Government in this space.
  - One stakeholder referred to the New Zealand experience of ‘calling out’ influencers and making individuals accountable for what they are promoting, which resulted in some people removing social media posts.
  - Others were mindful that individuals have a right to freedom of expression and their social media pages and posts are not necessarily linked to a benefit.
- Using Departmental social media platforms to counter social media messages promoting and advertising tobacco products.

- Require industry to disclose information about money spent on advertising. This could take the form of a register for disclosure of contributions made by tobacco industry to influencers or others.
  - Some stakeholders felt industry declaration was important because it is not always clear whether an individual is getting a benefit, and this could evidence the link between influencers and tobacco companies.
  - Existing international models could provide guidance on the degree of information to be disclosed and period within which the disclosure must be made.
- Some stakeholders expressed concern regarding the Department’s capacity to take action against individuals who receive a direct or indirect benefit for the publication of an advertisement. Through discussion, the relevance of section 20 of the TAP Act was identified (including where promotion is through social media platforms). Noting the potential application of section 20 in this scenario, stakeholders acknowledge the challenge of detection and enforcement.
- Strengthen Commonwealth powers of investigation to determine if an influencer who is based in Australia is being paid or is benefiting from the placement of tobacco products on their social media, etc.
- The Commonwealth could consider raising this issue through the Conference of the Parties at the next forum of the World Health Organization on Framework Convention on Tobacco Control (FCTC). Some stakeholders felt that this is an international problem and that the FCTC is the appropriate avenue through which to seek assistance.

#### **Point of sale advertising – In-store**

It was generally felt that removing price boards entirely (through a prohibition on retailers displaying them) would resolve a number of the concerns that stakeholders discussed, including:

- there is evidence that price boards prompt impulse purchasing
- there are no requirements to display products alphabetically or in any particular order and it is therefore possible to highlight specials and new products
- manufacturers pay retailers to display flashier, digital signs, and to also be placed at the top of a product list (brand order)
- concern regarding the breadth of the current exception for price boards under the TAP legislation.

Some stakeholders felt that the alternative to a price board would be a simple, hard copy price list in alphabetical order that consumers would need to ask for. This approach would reduce the potential for manufacturers and retailers to offer sales related incentives and prevent any type of promotion. The international precedent for banning price boards was also noted (with a ban already in place in New Zealand).

Noting that state and territory legislation governs price boards, some stakeholders flagged the issue of the Commonwealth’s scope of power to create law in this space, and that this would need further consideration.

Other issues raised in this context included:

- requiring retailers to keep tobacco cabinets shut, which goes to the issue of enforcement

- the potential to remove ‘Call the Quit helpline’ advertising from points of sale on the basis that it is alerting people that cigarettes are sold on the premises.

### **Point of sale advertising – Internet**

Across the workshops there was strong support for a ban of online sales to be adopted nationally, noting that one jurisdiction already has in place such a ban. Reasons for a ban included:

- the scope and nature of promotion happening on websites that are prohibited in-store, including information about product attributes and variants, and positive associations through appealing imagery, colour and language even if there is no direct promotion of a product
- the complexity of enforcing online age verification
- monitoring and enforcement issues with the current arrangements.

In the absence of a national ban, stakeholders felt there should be:

- better monitoring of the age of the online purchaser (the online purchase of alcohol was given as an example where age sensitive business systems have been developed)
- delivery protocols, including more stringent requirements at the point of delivery (because it is not clear if IDs are being checked on delivery or if the courier company is even aware what they are delivering).

### **Point of sale – Vending machines**

There was significant support for a national ban on sales through vending machines. It was noted that this would be most easily achieved through states and territories agreeing to achieve a total ban by a specified date, with stakeholders advising that the ACT has already banned vending machines and that Tasmania only has one vending machine in the state.

Stakeholders support for the change included that:

- minors can access machines
- the presence of vending machines is a form of promotion (which is not consistent with Article 13 of the FCTC).

Some stakeholders also noted there was there is evidence of vending machine sales contributing to smoker relapse.

Noting that the preferred approach would be a total ban, stakeholders felt removing vending machines from licensed premises and liquor stores would be a positive step. The ban of sales via mobile trucks and vans was also supported.

### **Administration, monitoring and enforcement**

Comments and suggestions in relation to the administration, monitoring and enforcement of the TAP legislation included:

- Support for the consolidation of Commonwealth tobacco control legislation, noting that the existing provision in the TAP Act that enables the continued operation of state and territory legislation would need to be included in any consolidation (see section 6). As part of consolidating, the opportunity to create a modular Act was noted, such that Commonwealth powers could be expressed more broadly, and other tobacco control measures could be included over time.
- The opportunity to remove redundant provisions. For example, stakeholders supported the repeal of section 22 of the TAP Act, which relates to the display of signs before 31 December 1995.
- There was support for the use of Regulatory Powers laws in the tobacco control legislation (noting that TPP legislation was introduced more recently and already draws on Regulatory Powers provisions). In relation to Regulatory Powers, it was also noted that:
  - a suite of tools that enables a proportionate response to the offending conduct is needed. Stakeholders felt criminal penalties and the potential to enforce for high financial penalties is necessary for this industry
  - consideration could also be given to the deterrence factor of extending penalties to reach individuals within companies
  - corrective statements could be required where a breach of the legislation is identified (noting that this could be achieved through adopting the Regulatory Powers legislation)
  - Regulatory Powers is a good base, but additional inspection powers should be included to support intelligence gathering.
- Stakeholders supported strengthened enforcement efforts (noting their frustration over a lack of enforcement and the complexity in knowing who to report potential breaches or concerns to). The 2018-19 Budget Measure to tighten tobacco border controls by introducing a permit scheme for tobacco importers was also noted.
- Strengthened reporting of the number and nature of complaints. The TAP Act currently requires reporting of the number and nature of contraventions and the action taken in response but does not require the reporting of complaints.

## Consultation outcomes – Tobacco plain packaging

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### Fit for purpose

In relation to fit for purpose, feedback from written submissions was polarised.

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.

Some stakeholders attending the workshops (noting this point was also raised in written submissions from the tobacco industry, retailers and some individuals/consumers), felt that even in the context of a comprehensive tobacco control framework, the 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, and while it may have changed smoking habits (e.g. buying in bulk), it has not impacted prevalence in Australia
- impacts on retailer ability to accurately identify tobacco products, which impacts ordering, dispensing and unpacking stock
- causes confusion and frustration for consumers at point of sale
- has led to a significant rise in illicit trade and counterfeit cigarettes.

### Objectives of any change

When discussing the objectives of any change, participants at workshops suggested that changes were needed to continue to:

- decrease the palatability of tobacco products
- decrease the desirability of tobacco products
- decrease uptake, particularly by young people
- encourage cessation.

Overall workshop participants acknowledged the success of Australia's tobacco control measures to date (including plain packaging). However, some stakeholders preferred more radical changes to packs (and tobacco products) to further advance the above objectives, while others preferred a more incremental approach.

## Key areas of concern / suggestions for change

Based on feedback at the workshops, the key areas in which stakeholders sought further strengthening of regulation controls, including to reduce any opportunity for industry to offset the effect of plain packaging laws, related to:

- Standardisation of packs and tobacco products with suggestions made in the following main areas:
  - For RYO standardise:
    - size and structure of pouch
    - amount of tobacco in pouch (e.g 30g).
  - For FMC standardise:
    - size and structure of pack
    - number of cigarettes in pack (e.g. 20)
    - length, width and diameter of cigarette
    - length, width and diameter of filter.
- Restricting brand and variant names.
- Restricting innovation in relation to filters, flavouring and masking agents.
- Health warnings.

Stakeholder comments in relation to these matters, along with a wide range of other suggestions, are detailed below.

## Detailed summary of specific concerns / suggestions relating to plain packaging

### Product identification

It was noted that in written submissions some industry stakeholders, including retailers and retailer associations, raised concerns about product identification, specifically that plain packaging can cause challenges for retailers identifying and dispensing products. Various suggestions had been made by the tobacco and/or e-cigarette industry to better enable product identification, including a coloured dot system and the return of logos.

However, workshop participants strongly disagreed with any changes to better enable the identification of the product.

These stakeholders noted the TPP legislation has been effective including if there are challenges in selling the product. Stakeholders made a range of suggestions to manage the challenges industry reported, including that products can currently be displayed alphabetically or in accordance with manufacturers planogram, which could assist retailers to identify products.

### Brand and variant names

Stakeholders raised concerns about the use of brand variant names to promote tobacco products or imbue a positive connotation by suggesting, for example, value or by conveying quality, sophistication or innovation (particularly in relation to filters).

Across the workshops, stakeholders discussed options for prohibiting or restricting brand and variant names. Some stakeholders suggested that there could be a single presentation per brand (i.e. there would be no variants). However, it was not clear how different product types (e.g. lower strength or menthol) would be distinguishable if there only the brand (rather than a variant) could be displayed.

If a single presentation is not attainable, various suggestions were made regarding how brand variants could be limited. For example, the variant name could:

- be one word only with limited characters
- not include names of colours or numbers (where the number is used to promote the product, e.g. 'double crush balls')
- be a specified number and letter combination (e.g. J6)
- not include words that imbue positive meaning:
  - Reference was made to the French model which includes a list of the types of words that cannot be used in a variant name (e.g. the restricted words might allude to strength, social desirability, appeal, natural, organic or value).
- only include words that are approved:
  - It was suggested that Government could determine the 50 words that can be used instead of attempting to ban appealing language more broadly.

On the whole, stakeholders considered that limiting variant names to two words only, restricted by reference to types of words that cannot be used (e.g. could not use words that imply value, social benefit, healthiness, etc.) would be reasonable.

Some stakeholders noted that the intent of the plain packaging legislation was to make the package plain and less appealing, not to restrict smokers' ability to choose their cigarette of preference. For these stakeholders, the changes discussed were not a priority if such change was at the expense of changes to filters, flavourings and to strengthen standardised packaging (as discussed below).

### **Standardisation of packs and cigarettes**

In relation to FMC, stakeholders noted that:

- All states have now regulated a minimum of 20 cigarettes in a pack.
- 20 is commonly standardised internationally but 25 is a popular sale size in Australia:
  - One stakeholder suggested that the larger the standardised pack size (e.g. 50 or 100) the less affordable the pack would be for consumers. However, most stakeholders did not support mandating pack sizes larger than 25.
  - On the whole, stakeholders felt that standardising the number of cigarettes at 20 was appropriate.
- Effective implementation of a standard number of cigarettes per pack, would also require standardising the dimensions of the pack and the size of cigarettes to avoid this being the point of differentiation:
  - It was noted that this may have a relatively small impact (in that only about 12 of 200 products might be non-standardised currently) but it would effectively future proof the policy to avoid innovation in pack sizing.



- If the number of cigarettes in a pack is standardised and the cigarette size is standardised then there is a reduced need to standardise the pack size also, but on the whole, it was suggested that the pack shape (size and structure) should also be standardised to avoid innovation in this area.
- Standardisation should also apply to little cigars and cigarillos.

In relation to RYO tobacco, stakeholders suggested that:

- 30g would be an appropriate standardised quantity of tobacco in pouches and that this would be consistent with New Zealand
- current health warnings can be avoided because flaps can currently be detached from the packaging and soft packs can be rolled up and obscured. Stakeholders suggested that the RYO pack size and structure should be regulated so that health warnings could not be avoided.

## Filters

Stakeholder concern regarding filters included:

- that this the key area where innovation is currently happening, including to distinguish products and variants and for marketing appeal
- the perception that filters contribute to the health of smokers and make it safer to smoke
- the impact of filters on the environment.

One view was that filters, including for RYO, should be banned entirely on the basis that the cigarette would be so unpalatable that smokers would be highly likely to quit. However, this view was not well supported largely because the impacts of banning filters on population health are inconclusive. It was also noted that the effects of banning charcoal in filters is not well evidenced and therefore should not be pursued at this time.

A number of stakeholders did, however, feel there is evidence to support the banning of filter ventilation (also referred to as perforation) and that the engineering and design of the filter should be regulated and standardised.

On the whole, stakeholders felt that filters should be retained in terms of function but standardised in terms of presentation. This could include, for example, banning:

- filter ventilation
- perforated paper
- recesses
- hard filters (which appear innovative and more appealing to smokers)
- crush balls in the filter (see further detail below in relation to flavourings).

Some stakeholders also noted that:

- there is likely to be industry resistance around regulation of filters, noting that industry will be mindful of the opportunities for market differentiation and the palatability of cigarettes

- there are some risks associated with mandating the way the filter operates because of its role in combustion.

### **Flavourings and masking agents**

While the issue of flavourings was a greater focus in the context of e-cigarettes (refer below), consistent with the discussion around filters, there was consensus across workshops that banning crush balls was a priority, particularly given the popularity among teenage smokers and the potential impact on uptake.

There was some discussion regarding menthol, including that while most brands have a menthol offering it is more likely to be used by females and the older demographic and it is not a large part of the market. There was some speculation that the crush ball market may have overtaken menthol among the younger population.

Stakeholders were concerned to ensure that avenues for industry to make tobacco products more appealing to younger people (through sweet flavourings) were not available. It was noted that Brazil and possibly Canada are considering a ban on sugar in cigarettes.

Some stakeholders also suggested that part of the concern around flavourings and masking agents is the limited voluntary disclosure that is currently required regarding ingredients. Some desired mandatory reporting of the constituents in tobacco products including the use of flavourings. Further discussion regarding disclosure is detailed below in other options.

### **Health promotion and health warnings**

Stakeholders discussed the need to update health warning messages and imagery on tobacco packaging more regularly as people become desensitised over time, and to be more agile in messaging in response to emerging evidence (giving people new reasons to quit).

Stakeholders expressed differing views about whether health promotion and additional health warnings should be included inside the pack:

- Some felt that an additional pack insert could include health warnings, health promotion (e.g. cessation advice) or facts about smoking that would promote consumer education. Others were concerned that the insert should not be a removable component of a pack. This was largely due to environmental concerns from both a litter and waste perspective, particularly noting the impact of filters on the environment. Stakeholders noted the approach adopted in Canada where a slide out pack (matchbox style) has been standardised, which removes the issue of lining and also places the warning front and centre by requiring warnings to be printed on the inside of the pack.
- Others suggested that extending the colour requirement for the inside of the pack (and the lining) to be Pantone 448C would be preferable to further health warnings or education on the inside of the pack.

The idea of printing health warnings, including that it is not safer to smoke RYO, on RYO papers was also considered (with some United Kingdom studies and precedent noted). However, some stakeholders noted that papers are not only used in relation to tobacco and, in the broader scheme

of regulating tobacco, it was felt that health warnings on RYO papers were not a high priority for reform.

### **Dissuasive cigarettes**

Consideration was also given to dissuasive cigarettes as a means of enhancing the impact of plain packaging measures and to make smoking an aversive experience. Stakeholders discussed the idea of printing dissuasive messages (such as, health warnings or a graphic indicating the minutes of life lost as the cigarette is smoked) or standardising the colour of the stick to be Pantone 448C or another unappealing colour.

The majority of stakeholders were impartial to the concept of dissuasive cigarettes and indicated it was not a policy priority, noting that research in this area is important to inform policy and to ensure there are no unintended consequences from particular colour or appearance. Some stakeholders questioned whether incinerating ink could pose additional health risks and several stakeholders suggested that dissuasive cigarettes might be annoying to smokers.

There was some support for the idea of mandating a standardised colour because:

- the colour white has connotations of freshness, purity and a sanitised experience
- standardising the colour of cigarettes in Australia could help address the issue of illicit tobacco as non-compliant imported cigarettes would be highly identifiable.

### **Administration, monitoring and enforcement**

Comments and suggestions in relation to the administration, monitoring and enforcement of the TPP legislation included:

- Consider strengthening reporting of the number and nature of complaints.
- Consider consistency in the mechanism for reporting:
  - It was noted that information on tobacco plain packaging is reported through the Department's annual report, whereas information regarding tobacco advertising prohibition is published through a report tabled in Parliament. Ideally information regarding tobacco control would be reported in a consistent manner
- Consider strengthening powers, noting the limitations of the existing legislation to ensure a full suite of enforcement options and the importance of appropriate resourcing component for compliance and enforcement in any new regulatory framework.
- As for TAP legislation, there was strong stakeholder support for strengthened monitoring and enforcement efforts across all jurisdictions.

## Consultation outcomes – E-cigarettes and emerging products

### Context

E-cigarettes and e-liquids were a key issue raised in over half of the submissions. Some submissions highlighted frustration amongst consumers, retailers and the tobacco and/or e-cigarette industry in relation to the availability and regulation of e-cigarettes in Australia, noting that e-cigarettes and alternative nicotine and non-nicotine delivery systems are not specifically covered in the TAP and the TPP legislation.

Stakeholders variously noted that:

- Under current laws relating to nicotine, it is illegal to sell, buy or use e-cigarettes or e-liquids 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'). However, some stakeholders expressed concern that the laws are not well enforced, and many stakeholders referred to the ease of accessing e-cigarettes and e-liquids that contain nicotine in Australia.
- It is legal to buy and sell e-cigarettes and e-liquids that do not contain nicotine in some jurisdictions.

### Overarching regulation of e-cigarettes

Stakeholder views on the means for regulating e-cigarettes were divided.

- Some supported e-cigarettes being regulated by the Therapeutic Goods Administration (TGA) as a therapeutic good, requiring the manufacturers to meet TGA requirements for a therapeutic good, with availability tightly controlled (with some suggesting availability only via prescription):
  - Some stakeholders noted evidence that e-cigarettes have been successfully used as a smoking cessation device in other countries. Others strongly disagreed stating that there is no evidence of the value of e-cigarettes in smoking cessation.
  - The approach taken in the UK was noted, with suggestions that a similar approach in Australia could restrict the availability of e-cigarettes to those prescribed to long-term smokers who have been unable to quit using nicotine replacement therapies.
- Some stakeholders advocated for a ban to be placed on all e-cigarettes, including those that do not contain nicotine:
  - In particular some stakeholders expressed concern that the health effects of vaping are not well known, with others suggesting that there is already evidence of harmful effects.
  - Different ways for achieving a ban were discussed including though scheduling all vaping liquids as a dangerous goods under the Poisons Schedule, a national ban (under subject-specific Commonwealth legislation), bans via product regulation under trade practices legislation and or bans in state and territory legislation.
- Most stakeholders suggested that in the absence of a ban, restrictions on sales and advertising were critical, including better monitoring and enforcement on the age limits on legal purchase:

- Most stakeholders noted the need for better monitoring and enforcement of the import and sales of e-cigarettes with nicotine.
- The potential to raise the legal age of purchase was also discussed, with stakeholders noting that because e-cigarettes are an emerging product there is opportunity to trial a different approach (particularly given the appeal of e-cigarettes to the younger population). While this idea was not discussed at length, reference was made to a Bill to be debated in Tasmania, which proposes to increase the legal age for tobacco purchase to 21.

Drawing parallels between laws that restrict where people are allowed to vape in the same way as restricting where tobacco products can be smoked, some stakeholders felt it would be appropriate to include e-cigarettes (with or without nicotine) in the scope of Commonwealth tobacco control legislation. This could include:

- continuing to ban e-cigarettes that contain nicotine
- regulating the advertising of e-cigarettes and emerging products under the TAP legislation
- regulating e-cigarette names and packaging
- banning the use of flavourings in e-cigarettes.

It was also noted that legislating to regulate e-cigarettes like tobacco products would not prevent the TGA considering the therapeutic benefits of e-cigarettes in the future.

## Advertising of e-cigarettes

While stakeholders acknowledged in-principle the desirability of extending advertising prohibition regulation to e-cigarettes, it was noted that further work would need to be done to define the scope of devices, liquids and the sector to be regulated (stakeholders noted there are potentially more manufacturers in the e-cigarette space).

Many of the issues raised in the relation to the TAP legislation and the advertising of tobacco also extended to e-cigarettes. For example, stakeholders referred to recent VIP and invitation only events where attendees were invited to try new e-cigarettes products. The prevalence of e-cigarettes on social media was also of concern to stakeholders.

Across workshops stakeholders felt e-cigarettes should be subject to the same advertising prohibitions at the Commonwealth level as tobacco. This would include the same exceptions, offences and any new proposals for ingredient disclosure, etc.

In considering the products that the TAP legislation should be extended to include, stakeholders suggested:

- e-cigarettes and e-liquids (noting that this relates to non-nicotine products as the existing regulation under state and territory Poisons Schedules would remain in respect of e-cigarettes containing nicotine)
- heated tobacco products
- non-tobacco shisha (noting that shisha with tobacco is currently regulated under the TAP legislation)
- other novel smoking/vaping devices developed by the tobacco and vaping industries.

Extending the regulation of point of sale in-store advertising for tobacco to e-cigarettes was also supported.

## Packaging of e-cigarettes

As for the extension of packaging regulations, many stakeholders supported standardised packaging or extending plain packaging regulation to e-cigarettes but did not discuss in detail how this could be implemented. For example, should restrictions be placed on the packaging of the device or the e-liquid (noting that this packaging is disposed of once opened) or should health warnings be included on the device itself, etc.

In considering the potential for standardised packaging or to extend plain packaging regulation to e-cigarettes, stakeholders variously suggested:

- device build and size could be standardised and regulated such that devices are visually unappealing (e.g. adopt a similar approach to Pantone 448C)
- packaging should include text only in a standard font with no enticing or promotional images, such as food
- the names of products should be regulated to ban the use of food, alcohol or brand names, along with anything that is banned in relation to brand and variant names for tobacco products (i.e. no socially attractive terms could be used)
- child safe packaging should also be considered.

Stakeholders noted that e-cigarettes are readily accessed through overseas markets and that packaging regulations should extend to products that are available for sale in the Australian market (i.e. manufactured, or imported for sale, in Australia).

Prohibiting or further restricting flavours used with e-cigarettes was supported by a majority of stakeholders, who noted that:

- Flavourings are used to make products more attractive (particularly to children) and that food and confectionary flavours should be eliminated:
  - It was noted that fruit and confectionary flavoured cigarettes have already been banned in some jurisdictions and this should be extended to e-cigarettes.
  - The issue of popcorn flavours and many other flavourings appealing to children.
- While there is some regulation of flavouring at a state/territory level, this needs to be coordinated nationally.

Stakeholders acknowledged the challenge in identifying flavours that would be of most appeal to children versus those that would appeal to adults and discussed the logic in banning only some flavours where the health effects of flavourings could be the same. It was also noted that risks associated with the use of flavouring in e-liquids will be better informed by research currently being undertaken by the Office for Chemical Safety, but in any case, suggestions to mandate ingredient disclosure for tobacco products (refer discussion below) should include ingredient disclosure for e-liquids.

## Consultation outcomes – Other measures

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In addition to discussing how the existing regulation could be improved and/or strengthened, stakeholders also discussed a range of new policy measures that could be considered through the first principles review. The key measures identified are detailed below.

### Disclosure

Across all workshops, stakeholders discussed three key areas of disclosure:

- ingredient disclosure
- sales data disclosure
- advertising/promotion expenditure disclosure.

There were mixed views as to what information would usefully be disclosed, who should be required to disclose it (manufacturers and/or retailers) and whether it should involve mandatory reporting to government or public disclosure.

### Ingredient disclosure data

Under the current arrangements, there are three tobacco companies that undertake voluntary reporting of ingredients to Government. The potential to expand and mandate this requirement was considered by stakeholders, including what information should be disclosed, how it should be disclosed and to whom.

Some stakeholders suggested that mandatory ingredient disclosure could be valuable for monitoring purposes to understand the addition of certain components and enable identification of product innovation in future (e.g. innovation that makes the cigarette burn longer). In addition to ingredients, some felt it would be important to know why the ingredient is included in the product. This would inform, for example, an understanding of what is happening in terms of product engineering to improve palatability. It was therefore suggested that information regarding content (which influences composition) and engineering (which influences harmfulness or otherwise and can manipulate the component of certain ingredients) should also be disclosed.

Some stakeholders who supported disclosure suggested that ingredient and constituent information could be printed on cigarette packs. Others felt that while it would be good to make information about ingredients, constituents and engineering available to consumers, this information could be published on a website rather than printed on packs.

For others, the value in knowing this information was not clear, including because ingredients are unlikely to resonate with consumers (and are probably more important to toxicologists), which makes the printing of ingredients on packs or on inserts less compelling than health warnings or educative information about quitting.

On the whole, stakeholders at the workshops supported mandatory reporting of all ingredients and information about engineering to government.

Stakeholders said they would expect the same requirements for disclosure to be applied in respect of e-cigarettes also.

### **Sales data disclosure**

Stakeholders discussed the potential for sales data to provide a better understanding of activities by manufacturers, which would assist tobacco control measures. Some stakeholders felt that the opportunity to gain details about what manufacturers are selling to retailers and, in turn, what retailers are selling to consumers would assist with the monitoring of bulk discounts given to retailers and could also address claims regarding the illegal tobacco trade in Australia.

It was suggested pricing is an effective way to influence sales and consumption, and that other countries have good intelligence regarding the kinds of products being sold and associated prices.

There is precedent whereby some jurisdictions have the power to seek annual sales information. However, the extent to which this information has been requested and/or used to inform policy is not clear.

It was suggested that tobacco manufacturers would have information regarding product sales and stock keeping level data (including for RYO and little cigars) by outlet and that this information could be reported at a regional level. The potential for de-identified data to be published was also considered, particularly where publishing information that reveals how pricing and sales are working across the country could create market opportunities for manufacturers and/or retailers that would not otherwise have access to this kind of data.

Overall, while some stakeholders felt this information could give useful insights, it was not entirely clear what information would most usefully be collected or for what purpose it might be used.

### **Advertising budget disclosure**

Stakeholders discussed a potential new requirement for manufacturers to disclose all donation, promotion, and sponsorship budgets and spending. Noting that support for disclosure (particularly over the prohibitions detailed under the TAP legislation discussion above) was divided, stakeholders variously said:

- Disclosure would enable a better understanding of the influence of industry to inform how it might be undermining tobacco control measures (and this would be in keeping with Article 5.3).
- Disclosure would be a valid way to understand the reach of industry and could have the effect of reducing the acceptance of donations (particularly in research fields) where people know this will be made public.
- The disclosure/declaration would need to break down the value, the recipients and also require the disclosure to be made within a set timeframe.
- Disclosure does not go far enough to resolve the issue of promotion, and sponsorship is always a form of advertising. These stakeholders felt that the behaviour of concern would not be resolved through a declaration.

Stakeholders who supported a disclosure requirement suggested it would be possible to remove the current exception for acknowledgement of assistance or support, which would mean the



acknowledgement could no longer be published on the charity's website or at an event (making it a control measure rather than an exception).

## Tobacco tax and price measures

The majority of stakeholders supported the ongoing use of excise tax on tobacco as one of the strongest tobacco control measures.

In discussing the option of a minimum pricing policy, some stakeholders felt the purpose of a minimum pricing policy could be aimed at preventing the discounting of cigarettes by retailers by setting a minimum price point. However, other stakeholders felt this would be problematic if the pricing baseline was wrong, making cigarettes cheaper than they are currently. Nor would it prevent price incentives on premium products where competition in price drops and discounting could be retained.

It was also suggested by one stakeholder that minimum pricing on alcohol in Scotland has not had the desired outcome.

## Personal importation of tobacco products

The issue of further restricting the personal importation (for example, duty free or foreign purchase) of tobacco products did not gain significant stakeholder support. Stakeholders largely felt the current restrictions (which permit the import of one packet of cigarettes duty free) were sufficient and this was not an important policy change to pursue in the overall scheme of the review.

## Depiction in films and TV

Written submissions suggested that onscreen depiction of cigarettes and smoking could be addressed through new regulations that would require anti-smoking content warnings for films that depict smoking and for online streaming services that are hosted within Australia.

There were mixed views on this option in workshops, including whether there is evidence to support such a policy. Some stakeholders liked the idea that tobacco use in a film could influence the film's classification rating without calling out the tobacco use. Others felt there was not a lot of evidence to support this approach. Reference was also made to New Zealand's experience, whereby the opportunity to impose a new classification was limited because film classifications are internationally harmonised.

Others preferred the use of a warning that tobacco use is depicted, indicating that there is some research that suggests smoking by actors influences younger people and that this is one way smoking can be made to look 'cool'. These stakeholders suggested there has been some success in India in relation to laws that require anti-tobacco health warnings to be displayed as a static message during the period tobacco products are displayed or used on screen.

## Restricting access by zones

The idea of zoning to mandate the distance between retailers and that tobacco sales to be a minimum distance away from health and educational facilities was initially raised through written submissions in Phase 1.

In workshops, a few stakeholders referred to research that suggests retailer density does impact smoking prevalence, however, on the whole there was not much support for this proposal.

## National licensing of retailers

Stakeholders had differing views as to whether a national licensing scheme is necessary. Those in support of national licensing felt that:

- regulation at the national level is preferred because it creates Australian-wide consistency, suggesting that it is also easier to enforce
- national licensing would enable better monitoring of illicit sales and better support the education of retailers.

Others considered that:

- states and territories have different approaches to charging for licenses and that a national approach would inevitably reduce the cost of a licence in some jurisdictions
- there would be pros and cons in terms of enforcement in that it could be improved in some locations and across some areas of non-compliance, but there could also be locations and areas in which enforcement would be diminished.

At one workshop the idea of licensing manufacturers and tobacco importers was considered but was not pursued.

Stakeholders felt that online sales are an area in which the Commonwealth could have an impact, either in the form of a total ban or through the introduction of a licensing scheme for online retailers. On the whole, this option was not well supported in the context of getting higher priority changes to tobacco control legislation through Parliament.

## Increasing age of purchase

Though Phase 1 stakeholders noted the T21 policy being implemented in the United States, which restricts the sale of tobacco to persons aged 21 years and over. This idea did not gain much support through the workshops, with stakeholders indicating it could distract from the real policy changes to be achieved.

In considering regulation of tobacco sales based on age, some stakeholders suggested that tobacco should only be sold by persons aged 18 years and over but noted that some jurisdictions are already testing this policy and implementing associated laws.

## Consultation outcomes – Summary

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This report details the key outcomes of the second phases of consultation with stakeholders regarding potential changes to the Department’s tobacco control legislation. It also references some of the key themes emerging through Phase 1, as summarised below.

### Phase 1

Many stakeholders reiterated support through the public consultation process 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.

### Phase 2

The targeted stakeholder workshops further explored the key themes and issues raised through the public consultation process. Stakeholders at these workshops generally considered the Department’s tobacco control legislation remains fit for purpose and has been significant in reducing smoking appeal and use in Australia.

Suggestions for change primarily related to the need to maintain the currency of the legislation in today’s environment, particularly in relation to social media, e-cigarettes and changes in tobacco and/or e-cigarette industry practices. While most stakeholders felt the legislation is clear and easy to read, there were some suggestions to further clarify the intent of specific provisions.

Opportunities to consolidate Commonwealth tobacco control legislation were also supported, particularly in the context of creating flexibility to expand Commonwealth measures beyond advertising prohibitions and plain packaging.

Stakeholders saw the benefit in consistently adopting standard provisions from Commonwealth regulatory powers legislation, including to benchmark penalties and to give a better range of regulatory response options across both the TAP and TPP legislation. Various comments were made regarding the need to better enforce tobacco control measures, noting that the investigative powers of the TAP Act and TPP Act were at times not fit for purpose. This was a concern that also encompassed the enforcement of state and territory legislation.

In conclusion, in considering proposals for change, stakeholders acknowledged the importance of clarity in policy design and intent, the value of evidence and the need to future proof the regulation where possible. They also recognised the need for a coherent and balanced package of reforms, with a focus on more significant changes that reach the broader population. Stakeholders were conscious that any proposals should limit opportunities for the tobacco and/or e-cigarette industry to innovate in ways that undermine the intent of the advertising and packaging controls.