
COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

MINISTRY OF HEALTH

Concerning

CONSULTATION ON PLAIN PACKAGING
OF TOBACCO PRODUCTS IN NEW ZEALAND

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Via Email (tobacco@moh.govt.nz)

Plain Packaging Consultation
Ministry of Health
PO Box 5013
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Re: Consultation on Plain Packaging of Tobacco Products in New Zealand

Dear Sir or Madam:

The Washington Legal Foundation (WLF) very much appreciates the opportunity to comment on the New Zealand Ministry of Health's July 2012 *Consultation on Plain Packaging of Tobacco Products* (the "Consultation Document"). WLF shares the Ministry of Health's concerns regarding the major health hazards posed by cigarette smoking. WLF applauds the Ministry's focus on finding ways to reduce tobacco consumption, particularly among minor children.

WLF nonetheless has serious concerns about several proposals included within the Consultation Document. In particular, WLF is alarmed by Part 2.2, which reports that the Government has "agreed in principle to introduce a plain-packaging regime for tobacco products," based on the Government's assessment that plain packaging would "be an effective measure to reduce the appeal of tobacco products" and would likely "reduce the death toll and costly disease burden caused by smoking." While the Consultation Document states that the Government has not committed itself to adopting plain packaging, WLF finds it troubling that a plain packaging requirement is being seriously considered and that the slim evidence relied on by supporters of such a requirement appears to have been accepted without a serious examination of the shortcomings of that evidence. Any such requirement would raise serious legal issues regarding free speech and intellectual property rights.

WLF submits that numerous countries – and the United States in particular – have been able to achieve sizeable reductions in the level of tobacco use generally (and among children in particular) without resort to drastic measures of this sort. Experience has shown that imposing increased controls at the point of sale can be a very effective in reducing illegal tobacco purchases by minors. Public education efforts have also proven to be increasingly effective.

While prohibiting use of trademarks or logos may reduce sales of the most popular cigarette brands, WLF is aware of no credible evidence to suggest that doing so will reduce overall sales. Rather, the more likely effect is to cause sales to shift toward generic or

counterfeit cigarettes; indeed, an increased focus on price competition will likely lead to reduced prices and thereby could result in increases in the quantity of cigarettes sold. Moreover, the experience of other nations suggests that plain packaging requirements will cause a considerable increase in the sale of illicit cigarettes.

In the face of evidence that tobacco sales can be reduced significantly through normal law enforcement efforts, there can be no justification for adoption of draconian speech controls such as requiring plain packaging of tobacco products. So long as tobacco remains a legal product for adults, efforts to eliminate well-accepted marketing techniques, such as use of labeling with which consumers can identify, is a slippery slope that does not bode well for the future of property rights, speech rights, and personal autonomy.

As the Consultation Document readily concedes, it is virtually impossible to predict with accuracy that imposition of plain packaging requirements would lead to decreased cigarette consumption, primarily because to date such requirements have not been implemented anywhere in the world. In light of that uncertainty, adoption of plain packaging of cigarettes has little to recommend it. At the very least, the Ministry of Health should stay its hand until more evidence regarding the efficacy of plain packaging can be gathered. Australia is scheduled to adopt plain packaging requirements in December 2012. After those requirements have been in place for several years, the Ministry of Health will be in a much better position to evaluate whether plain packaging can provide any health benefits.

I. Interests of WLF

The Washington Legal Foundation (WLF) is a public-interest law and policy center located in Washington, DC, USA. WLF is devoted to the defense and promotion of free enterprise and individual rights. In particular, WLF attorneys have appeared on numerous occasions before government bodies – both internationally and within the United States – in support of property rights and free speech rights. WLF has been a particularly strong advocate for commercial speech rights. WLF believes that government regulators have an appropriate role to play in ensuring that commercial speakers do not provide false or misleading information to consumers. But WLF regularly opposes government efforts to prevent consumers from hearing truthful speech. Such efforts are often justified as an effort to prevent consumers from hearing truthful information that might induce them to make decisions that are not in their best interest. WLF believes that such paternalism towards adult consumers is rarely, if ever, warranted. Rather, WLF urges governments to trust in the ability of consumers who receive truthful information to make decisions that are in their best interests. If adult consumers rationally decide, based on truthful information, to take actions they deem in their best interest, then society as a whole virtually always benefits – even if some public health officials may not agree with all such decisions.

WLF is a non-profit corporation that is funded by court-awarded fees (obtained in lawsuits in which it prevails) and by contributions from a broad coalition consisting of thousands of individuals, foundations, and corporations. In response to the request for information contained in Part 6.4 of the Consultation Document: WLF has received no funding from the tobacco industry for drafting these comments, and it has no direct or indirect ties with the tobacco industry – other than a shared belief in the rights of commercial entities to speak truthfully.

II. Purposes of Consultation Document

Part 1.2 of the Consultation Document states that the Ministry of Health seeks to “gather the views of interested individuals, businesses and organisations” and to “have their views considered before the Government decides whether or not to proceed.” The Government “has agreed in principle to introduce a plain-packaging regime” in order to:

- Reduce the appeal of tobacco products and smoking, particularly for young people;
- Reduce the wider social acceptance and approval of smoking and tobacco use;
- Increase the noticeability and effectiveness of mandates health warning messages and images; and
- Reduce the likelihood that consumers might acquire false perceptions about the harms of tobacco products.

Part 2.1.

Part 2.3 defines “plain packaging” as follows:

- Prohibiting the use of tobacco company branding imagery and all other marketing devices on any form of tobacco product packaging, or on tobacco products themselves;
- Requiring tobacco products to carry large and prominent health warning messages and graphic images;
- Standardising all other design elements on the pack, such as the colours and type fonts that may be used, so as to maximize the impact of the health warnings; and
- Allowing the brand name and certain other manufacturer information to be printed on the pack, but with tight controls over the type font, size, colour and position.

The Consultation Document goes on to suggest that perhaps fewer people would buy cigarettes if attractive labeling were eliminated. The Document states that the Ministry of Health wishes to explore whether plain packaging would reduce smoking rates, whether it would reduce the ability of tobacco packaging to mislead consumers, and whether it would have “any unintended or undesirable consequences.” Part 7.1.

III. The Government’s Review of Available Evidence

The Consultation Document states that the plain-packaging proposal “is based on a substantial body of international evidence and studies related to tobacco product marketing and plain packaging, including several studies undertaken in New Zealand.” Those studies are listed in Appendix 2 to the Consultation Document, as well as a separate Regulatory Impact Statement. Among the documents most prominently relied on (see Part 5.3) is a 2012 report commissioned by the United Kingdom’s Department of Health and prepared by the Public Health Research Consortium (PHRC). Entitled, *Plain Tobacco Packaging: A Systematic Review*, the report (hereinafter, “*Systematic Review*”) attempts to review all existing evidence on plain tobacco packaging.

The report contends that “there is strong evidence to support the propositions set out in the Framework Convention on Tobacco Control relating to the role of plain packaging in helping to reduce smoking rates.” *Systematic Review* at v. WLF has read carefully through the *Systematic Review* and has found virtually no evidence to support that contention. Indeed, the report all but admitted the absence of “strong evidence” when it conceded, “The main limitation [of the evidence] was that because plain packaging has yet to be introduced in any country, it has not yet been possible to evaluate the impact of the policy in practice.” *Id.* That situation is likely to change soon: Australia is scheduled to adopt plain packaging in December 2012. Researchers will be in a position to make a reasonable estimate of the impact of adopting plain packaging in New Zealand after studying the Australian experience for several years. Until that time, claims that plain packaging will “reduce smoking rates” are based largely on guesswork. Indeed, Nicola Roxon, the Attorney-General of Australia and the former Minister for Health, has conceded that plain packaging will “probably not” cause current smokers to give up smoking, and that using it to discourage people from starting to smoke is an “experiment.” See Ainslee Van Onselen, “Rush to be first on plain packaging for tobacco,” *The Australian* (July 29, 2011) (available at <http://www.theaustralian.com.au/business/legal-affairs/rush-to-be-first-on-plain-packaging-on-tobacco/story-e6frg97x-1226103789471>). WLF respectfully suggests that New Zealand wait to see the results of the Australian “experiment” before deciding whether to adopt the same policy.

WLF will briefly critique the evidence relied on by the PHRC in arriving at its conclusions regarding the effects of plain packaging. It will then summarize evidence from around the world suggesting that plain packaging would have no appreciable effect on smoking

rates.

First, the PHRC cites studies suggesting that, when consumers were asked to compare plain packaging with existing cigarette packaging, “plain packs were rated as less attractive than branded equivalent packs, or were rated as unattractive, by both adults and children” and that “plain packs were perceived to be poorer quality by both children and adults.” *Systematic Review* at i-ii. The explanation of the cited studies for those differing perceptions: “plain pack colours have negative connotations; plain packs weaken attachments to brands; plain packs project a less desirable smoker identity, and plain packs expose the reality of smoking.” Noticeable absence from those studies is any evidence suggesting that decreased attractiveness of packaging leads to decreased smoking rates. Undoubtedly, attractive labeling helps to increase purchases of a specific cigarette brand, and requiring that brand’s manufacturer to switch to plain packaging is likely to result in decreased sales for the brand. But the studies provide no evidence upon which to base a conclusion that decreased sales for premium brands will lead to a decrease in overall smoking rates. The much more likely conclusion is that smokers of the premium brand will simply switch to a low-cost alternative brand once they are no longer attracted by the premium brand’s packaging.

Second, the PHRC cites four studies suggesting that “plain packaging increases the salience of health warnings,” although it also cites three studies that reached contrary results. *Id.* at ii. Even if one accepts the four studies as accurate, they provide no evidence relevant to the health care debate. At most, they demonstrate that consumers are more likely to notice the health warning on a specific pack of cigarettes if the warning does not need to compete for attention with an attractive logo and coloring. The relevant question, however, is whether plain packaging increases public awareness of the health risks of smoking. The cited studies do not speak to that latter question. In fact, numerous studies demonstrate that smokers as a group are well aware of the health risks of smoking – indeed, if anything, they tend to overestimate those risks. Smokers are also well aware that every cigarette package includes a health warning. Accordingly, even if plain packaging would increase the number of times that a smoker notices the health warning on each pack of cigarettes that he smokes, there is no reason to conclude that it would cause any change in his appreciation of the health risks of smoking.

Third, citing studies regarding correlations between packaging and consumer perceptions regarding “harm and strength” of cigarettes, the PHRC concluded that requiring plain packaging would reduce the possibility that consumers would be misled by attractive packaging (or by use of particular “descriptor terms”) into believing that cigarettes are less harmful than they actually are. This PHRC argument for censorship is particularly pernicious. Of course, if there are particular words that the Ministry of Health finds to be deceptive, then it ought to ban use of those words. For example, the United States has banned the use of the term “light” on cigarette packages because of a fear that consumers might conclude that a “light” cigarette poses a reduced health risk. But a conclusion that *some* words may mislead consumers is not a reason to

prohibit use of *all* words on a cigarette package. Moreover, in the absence of any evidence that consumers believe that attractively packaged cigarettes do not pose a health risk, there can be no justification for banning attractive packaging. Of course smokers will tend to choose a product that is attractively packaged over one that is not attractively packaged; but that preference does not suggest that consumers are being deceived. Smokers tend to be very loyal to their preferred brand of cigarette, but the PHRC has presented no evidence that smokers with a strong brand loyalty are less likely than other smokers to quit smoking or to fully appreciate the health risks.

Fourth, the PHRC cited studies that “asked participants how the introduction of plain packs might impact on the smoking behaviour of smokers in general and/or young people in general.” *Id.* at iv. The studies reported that a majority of respondents believed that plain packaging would lead to reduced smoking rates. Social scientists routinely berate such studies as having zero scientific validity. Among the numerous shortcomings of such studies: participants have little difficulty perceiving the “correct” answer to the survey questions and thus tend to answer in a manner that they perceive as likely to please the questioner. Moreover, there is little reason to assume any correlation between what the general public thinks are the likely effects of plain packaging and its actual effects.

Fifth, the PHRC cited studies that examined public acceptance of plain packaging. It cited studies suggesting that plain packaging might reduce production costs, “resulting in a reduction in price.” *Id.* at 5. Of course, any price reduction would tend to increase consumption – a result that would undercut the Ministry’s public health goals. The PHRC also cited studies reporting on the harms that the public thought would flow from plain packaging – including a tendency to “increase the appeal of smoking to young people by making it ‘forbidden’” and to “increase tobacco smuggling.” WLF fully agrees with the public that the plain packaging’s potential to cause such harms is very real.

IV. The Experience in the United States and Around the World

The experience of other industrialized nations with cigarette packaging restrictions should help to inform the Ministry of Health’s consideration of the plain packaging issue.

The Consultation Document defines “plain packaging” in a manner similar to the definition adopted in Australia, whose “plain packaging” requirements for cigarettes are the most draconian of the cigarette packaging restrictions adopted by a number of nations. The United States adopted cigarette packaging restrictions in 2009. Those restrictions are far less severe than those adopted in Australia, and they have not yet taken effect. Also, the U.S. packaging restrictions may never actually come into effect; they are being challenged in American courts as a violation of the First Amendment to the U.S. Constitution, which protects freedom of speech. An appeals court located in the District of Columbia recently struck down a major portion of the packaging restrictions on First Amendment grounds; another appeals court located in Ohio

recently upheld most of the restrictions. The free-speech issue will not be resolved until decided by the U.S. Supreme Court, likely in another year or two.

Within the United States, a sizable market for the sale of “generic” cigarettes has arisen within the last 20 years. The experience with that market is worth noting. Some “generic” cigarettes are sold in relatively plain packaging; others are sold with some colorful labeling but under brand names that are generally unrecognizable to consumers. Generic cigarettes generally sell at a considerable discount to the more popular “brand” names. Interestingly, evidence indicates that virtually the only selling point for generic cigarettes is the price. In other words, consumers in America do not appear to differentiate among generic cigarettes based on the elaborateness of the label; a lower-priced generic cigarette with a plain label will almost always outsell a somewhat higher-priced generic cigarette with a fancier label.

That experience does not bode well for using plain packaging as a means of cutting down on cigarette consumption. Consumers looking for reduced price will continue to buy the lowest-priced cigarette, regardless how it is packaged. Consumers who, from their personal experience, have developed a preference for the taste, freshness, and feel of a particular brand of cigarette will continue to seek out that brand regardless of how it is packaged.

Supporters of plain packaging may be correct, of course, that over time consumers will begin to doubt the taste and freshness of products that are required to be packaged with unattractive labels. But WLF would not view such a result as a plus. If adult consumers are seeking out cigarettes that are not stale or otherwise substandard, it ill behooves public officials to seek to deceive consumers into believing that such cigarettes are not available. So long as cigarettes remain a legal product, consumers who choose to use them ought to be permitted to receive information that allows them to differentiate among available products based on quality.

The likelihood that the Government’s proposal will lead to increased consumer confusion is exacerbated by the increased threat of illicit sales created by “plain packaging” requirements. Illicit sales and counterfeiting of cigarettes is a huge problem in the United Kingdom, the United States, Canada, Australia, and elsewhere. Most estimates place the annual cost of counterfeit goods to the U.S. economy at \$200-\$250 billion, with counterfeit cigarettes comprising a significant portion of that total. While WLF is unaware of evidence regarding the extent of counterfeiting in New Zealand, there is every reason to believe that adoption of plain packaging would cause the counterfeiting problem to sky-rocket; the existence of elaborate trademarks is one of the best controls on counterfeiting currently in place.

In countries (like New Zealand) with high taxes on cigarettes, illicit sales (*i.e.*, sales of cigarettes that are produced legally abroad but brought illegally into the country) are also likely to become a major problem. Cigarette smokers are attracted to illicit cigarettes because (since taxes are not paid) they cost considerably less than cigarettes available through regular

commercial channels. For example, the government of the United Kingdom recently estimated that 10% of all cigarettes sold in the country, and 46% of all hand-rolled tobacco, were purchased through illicit channels in 2009-2010. *See* HM Revenue & Customs, “Measuring Tax Gaps - 2011” at 25-27 (available at <http://www.hmrc.gov.uk/stats/mtg-2011.pdf>). New Zealand heavily taxes cigarettes as a means of discouraging smoking. Tax increases since 2010 have increased cigarette prices by 40% since 2010, and annual 10% excise tax increases are scheduled for each of the next four years – those increases are expected to increase the average retail price of a single cigarette to \$1 or higher by 2016. *See* Appendix 1 at p.29. If the experience in the UK is any guide, those prices are likely to increase the sale of counterfeit and illicit cigarettes in New Zealand considerably.

Plain packaging is likely to exacerbate the problem. If branded cigarettes must be sold in plain packages, consumers will have a much more difficult time distinguishing between legal, regulated cigarettes and illegal, unregulated, untaxed cigarettes. Indeed, an April 2012 report issued by the Joint Research Centre on Transnational Crime concluded that adoption of plain packaging would likely lead to significant increases in illicit tobacco sales in Europe. *See* Transcrime, “New Report Shows Tobacco Policies Being Considered by European Commission Carry ‘Significant Risk’ of Increasing Crime in Europe” (April 3, 2012) (available at http://transcrime.cs.unitn.it/tc/fso/publicazioni/AP/Transcrime-Press_Release-CP_of_the_EU.TPD.pdf). Moreover, the global implications of increased crime should not be ignored. If crime increases in New Zealand, criminal activity will of necessity increase in other countries in order to support shipments of illicit product into New Zealand.

Counterfeiting and illicit sales cause substantial losses to cigarette manufacturers, of course, but they are not the only losers. Governments around the world derive substantial revenues from the sale of tobacco products. That revenue is lost when consumers buy counterfeit or illicit cigarettes. Honest retailers who sell cigarettes legally are also injured, due both to a reduction in cigarette sales and to a loss of customers who could be expected to make other purchases when they come to buy cigarettes.

Moreover, in the United States increased availability of counterfeit cigarettes has been associated with increased tobacco sales, particularly among young people. The high price of cigarettes, a situation caused primarily by high tax rates, is by far the largest impediment faced by teenagers seeking to purchase cigarettes. Counterfeit cigarettes are generally sold in the United States with counterfeit tax stamps, falsely indicating that taxes have been paid. For that reason, counterfeit cigarettes can be sold at a markedly lower price than cigarettes being sold legitimately. The same is true of illicit cigarettes. Consumers attracted by the lower price flock to these counterfeit and illicit products – and teenage tobacco use thereby increases.

V. Free Expression and Australia's Legislation

The “plain packaging” restrictions imposed by Australia law (and scheduled to take effect later this year) would not be permissible within the United States. Based on existing case precedent, American courts would strike down those restrictions as violations of the First Amendment to the U.S. Constitution. WLF recognizes, of course, that the U.S. Constitution is inapplicable in New Zealand, which operates under a somewhat different set of rules governing protection of free expression. But regardless whether the restrictions of the sort imposed by Australia would be constitutionally permissible in New Zealand, WLF respectfully suggests that the Ministry of Health ought to think twice before recommending imposition of such severe restrictions on the marketing of a lawful product.

WLF notes that Australia's purported legislative findings are wholly unsubstantiated and that its restrictions are way out of proportion to its listed objectives. The Australian Parliament stated that the tobacco industry has used “colour and imagery” on its packaging to “misleadingly convey relative brand strength and quality.” But it provided no substantiation for that claim, which on its face makes little sense. The principal purpose of using “colour and imagery” on packaging is to create an image for a particular brand that is distinct from other brands. A consumer who has had a positive experience with that brand in the past will be drawn to that brand when making his next purchase; if not, no amount of attractive colouring will draw the consumer back to that brand. WLF does not understand how a colour could be said to convey anything about relative strength and quality. But even assuming that it could, consumers would quickly realize if a product did not bear the qualities “promised” by its package colour/logo, and those trademarks would have little or no value in the marketplace.

Moreover, if the Ministry of Health were to conclude that some cigarette packaging is misleading consumers regarding “strength” or “quality,” then an obvious solution is to adopt legislation prohibiting manufacturers from “mislead[ing]” or “deceiv[ing] consumers,” not to bar all use of trademarks and logos. Surely there is no basis for arguing that *any* distinctive packaging is inherently misleading.

The Australian legislation also stated that distinctive packaging enables manufacturers “to target particular market segments, and convey brand character.” That statement is no doubt true, but WLF fails to understand why that is an argument for prohibiting distinctive packaging. If a particular brand of cigarettes is filtered, or has a distinctive taste, or is menthol-flavored,¹ a reasonable consumer would want to know that fact. Prohibiting distinctive cigarette packaging

¹ For example, in the United States, menthol-flavored cigarettes often have green labels. American consumers have thus come to understand that if they want to purchase a menthol cigarette, they should look for a green label.

would make it more difficult for smokers to find the type of cigarette for which they are looking. Disempowering consumers in this manner serves no valid public health purpose of which WLF is aware.

VI. The “Slippery Slope” Toward Widespread Speech Restrictions

WLF notes that the right of cigarette manufacturers and retailers to advertise their products is already subject to significant restrictions within New Zealand. For example, legislation limiting the display of tobacco products went into effect on July 23, 2012; merchants must now place cigarettes out of sight in their shops. One of the few remaining avenues by which manufacturers can differentiate their products from other cigarettes is through the use of distinctive packaging. If “plain packaging” is adopted and cigarette manufacturer’s are essentially disabled from engaging in any communications with consumers, it is difficult to discern how those speech restrictions can be meaningfully distinguished from a wide variety of potentially onerous restrictions on other products. WLF is concerned that this precedent would, for example, justify broad restrictions on marketing and packaging for liquor, candy, soft drinks, butter, red meat, prescription drugs, and a broad array of products whose consumption, in the view of some government officials, should be curtailed for public health reasons. Nor would one need go very far down the “slippery slope” before government officials could justify restricting the speech of those who oppose government measures designed to improve public health (*e.g.*, measures designed to reduce the emission of greenhouse gasses that can lead to global warming).

Indeed, proposals put forth in Ireland suggest that some officials in that country have already proceeded well down the slippery slope. Ireland’s recently released Framework Paper on improving public health includes suggestions for imposing similarly draconian packaging restrictions on the alcoholic beverage industry.

WLF believes that one of the best measures of a free society is its willingness to permit individuals to speak freely. The New Zealand government should, of course, take steps to ensure that consumers are not being provided false or misleading information. The “plain packaging” restrictions suggested by the Consultation Document, however, have little or nothing to do with the prevention of misleading speech. Rather, they are designed to reduce sales by greatly limiting the quantity of *nonmisleading* information that manufacturers are permitted to convey. But the premise of a free society is that there is no such thing as too much speech – that the people are not foolish and will separate the wheat from the chaff. Even if use of trademarks and logos on cigarette packaging has a tendency to increase overall cigarette sales – and, as explained below, there is virtually no evidence suggesting that to be true – the proper course of action is for the government to respond with speech of its own rather than to engage in censorship. Government education programs can ensure that consumers are fully aware of the health risks of smoking, and such full awareness has been shown to lead to significant decreases in smoking rates. *See, e.g.*, Federal Republic of Germany, National Strategy for Drug &

Addiction Prevention (Feb. 2012) at 35 (“Along with such regulatory measures as the Youth Protection Bill’s smoking restriction for under-age persons, tobacco tax increases and regulations aimed to provide protection from passive smoking in Germany, the Federal Office for Health Education’s ‘Smoke Free’ youth program has contributed to the success of tobacco policies in the target group of under-aged and young adults significantly.”). Smoking rates in New Zealand have fallen significantly since the Smoke-free Environments Act of 1990 imposed a ban on almost all forms of advertising and promotion of tobacco products. There is no evidence to suggest that the recently adopted product display ban will not lead to continued reductions in smoking rates, without the need to adopt the untested plain packaging requirements recommended by the Consultation Document.

There will, of course, be a fair number of adults who will choose to continue to smoke despite full awareness of the health risks involved. Permitting them to make such choices is no different from permitting individuals to make a wide variety of choices that entail increased risks to personal safety, everything from BASE jumping and mountain climbing to luge racing. A free society permits adults to make such rational choices because it recognizes that society benefits thereby. And the only way to ensure that such choices are truly rational is to ensure that the dissemination of speech is uninhibited – thereby ensuring that consumers receive information from the greatest possible number of sources.

VII. Plain Packaging Is Ineffective

WLF shares the Ministry of Health’s goal of reducing cigarette consumption, particularly among the New Zealand’s youth. There simply is no credible evidence, however, that “plain packaging” will reduce consumption. In the absence of such evidence, there can be no justification whatsoever for imposing such severe speech restrictions.

WLF notes, for example, that Ireland several years ago adopted a ban on displaying cigarettes openly in stores. A report from the Ireland Office of Tobacco Control (issued in October 2010, one year after the display ban went into effect) indicates that the ban has had little impact on smoking rates. *See* Ireland Office of Tobacco Control, “Ireland: Current Trends in Cigarette Smoking” (available at <http://www.otc.ie/research.asp#section1>). In particular, the report concluded that smoking rates among 15-17-year-olds “did not decline.” *Id.* Leading researchers at Compass Lexecon recently completed a comprehensive review of *all* of the scientific research conducted in recent years regarding the likely impact of “plain packaging” requirements on cigarette sales. Their conclusion: none of the literature provides “evidence that can be used to support the contention that generic packaging would reduce the uptake of youth smoking or overall smoking prevalence.” *See* Jorge Padilla and Nadine Watson, *Update of the Critical Review of the Literature on Generic Packaging* (Dec. 2011) (available at <http://www.plain-packaging.com>). A study released by Deloitte (a highly respected public accounting firm) in May 2011 reached largely similar conclusions. *See Tobacco Packaging Regulation: An*

International Assessment of Intended and Unintended Impacts (Deloitte MCS Limited 2011).²

In the absence of credible evidence that “plain packaging” will lead to reductions in smoking, adoption of that proposal makes no sense at this time. At the very least, New Zealand ought to wait until Australia’s plain packaging law has been in place for two years or more and then examine the results, before adopting a speech-restricting measure with no record of success.

VIII. Property Rights

Because some cigarette brands have developed devoted users over the years, their manufacturers have acquired valuable property rights in the trademarks associated with their brands. Plain packaging threatens to decrease considerably the value of those property rights. In the United States, federal courts have repeatedly enjoined state governments that have taken steps to lessen or destroy the value of such trademarks.

WLF does not claim particular expertise regarding all relevant laws that protect the intellectual property rights of cigarette manufacturers. But our somewhat limited knowledge of that law suggests that adoption of plain packaging might well place New Zealand in breach of several such laws. Indeed, WLF understands that in 2010 the UK government abandoned a proposal to adopt plain packaging out of such legal concerns – as well as concerns that plain packaging would do little if anything to reduce cigarette consumption. Plain packaging appears to be inconsistent with each of the following laws:

1. The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Article 20 of the TRIPS Agreement (to which New Zealand is a party) prohibits “unjustifiable encumbrances” on trademarks by, among other things, requiring “use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of another.” “Plain packaging” would have just such detrimental impact – by prohibiting the use of trademarks or logos on cigarette packaging, it would greatly diminish the ability of consumers to distinguish among brands. Nothing in TRIPS suggests that an untested hope that the encumbrances would decrease cigarette sales (and thereby improve public health) renders such an encumbrance “justifiable.” “Plain packaging” also

² The report drew on information and data from New Zealand, as well as Australia, Canada, the European Union, France, the United Kingdom, and the United States. Among other conclusions, the report concluded that: (1) there is a correlation between cigarette price increases and reductions in licit cigarette consumption; but (2) there is no statistical correlation between increased government regulation of cigarette package labeling and cigarette consumption. *Id.* at 4. The report was commissioned by British American Tobacco but represented the independent work of statisticians at Deloitte.

appears to violate TRIPS Article 15 (which provides that “the nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark”). While the TRIPS Agreement does permit limited exceptions to trademark rights, *see* Article 17, that provision is not relevant here because it is limited to exceptions that “take account of the legitimate interests of the owner of the trademark and third parties.” “Plain packaging” cannot be said to “take account” of the interests of cigarette manufacturers in their trademarks given that it would essentially eliminate all value in the trademarks, and cannot be said to “take account” of the interests of consumers because it diminishes their ability to understand the nature of the products they are buying.

2. The Paris Convention for the Protection of Industrial Property. Article *6quinquies* of the Paris Convention requires that a trademark “duly registered in its country of origin” must be protected in other countries of the Paris Union (including New Zealand). All of the significant trademarks potentially affected by “plain packaging” are registered in their country of origin. In the absence of evidence that the trademarks are deceptive to the public, the failure to provide protection to those trademarks appears inconsistent with Article *6quinquies*.

3. The WTO Agreement on Technical Barriers to Trade (the “TBT Agreement”). If adopted, “plain packaging” is highly likely to have a significant impact on trade – its ban on trademarks and logos will lead to a shift in sales to counterfeit and illicit cigarettes, as well as lower-priced generic cigarettes, and thus a significant decrease in importation of brand-name cigarettes and cigarette components. Article 2.2 of the TBT Agreement prohibits adoption of regulations that create “unnecessary obstacles to trade,” that is, regulations that are “more trade-restrictive than necessary to fulfill a legitimate objective.” In the absence of significant evidence supporting the contention of “plain packaging” supporters that adoption would lead to fulfillment of their “legitimate objective” (a decrease in overall tobacco sales), the proposal appears to conflict with Article 2.2.

In an apparent effort to counteract arguments that plain packaging would destroy valuable trademarks and thereby place New Zealand in violation of its international trade obligations, the Health Ministry has included the following language in the Consultation Document:

Tobacco companies will continue to be free to register and protect their trade marks. Trade marks in the form of printed brand names would still be permitted to appear on tobacco products, to distinguish brands and brand variants in the market. . . . The use of logos, colours, graphics and other special effects such as embossing or textured materials would be prohibited from tobacco products and tobacco packs. Tobacco companies would continue to be free to use logos and other representations of their trade marks in other ways, such as on corporate documents, but only if these other uses do not have the intent or effect of advertising or promoting their tobacco products.

Consultation Document, Part 2.5.

To the extent that Part 2.5 has been included in the Consultation Document for the purpose of avoiding conflict with New Zealand's international treaty obligations, it is unavailing. The principal value of tobacco trademarks is derived from their recognition by members of the consuming public, not recognition by competitors and/or others within the tobacco industry. Allowing manufacturers to display their trademarks to others within the tobacco trade may prevent the trademarks from lapsing due to non-use, but that concession is unlikely to contribute in the slightest to a manufacturer's ability to market its product to consumers. Part 2.5 does nothing to ameliorate plain packaging's violation of Article 20 of the TRIPS Agreement, which bans encumbrances on trademarks that require "use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of another." It cannot seriously be contended that plain packaging would not make it more difficult for consumers to distinguish their preferred brand of cigarettes from other brands; indeed, plain packaging appears to be designed for the very purpose of creating such difficulties.

Quite apart from the issue of New Zealand's treaty obligations, the Consultation Document's cavalier treatment of intellectual property rights cannot help but damage the nation's reputation within the world business community. New Zealand cannot hope to continue to attract investments from abroad unless the signal it sends to potential investors is that money invested in building up valuable trademarks will not be subject to uncompensated destruction at the hands of the New Zealand government.

IX. Alternative Measures

The experience in the United States indicates that there are numerous means of reducing smoking without interfering with the speech rights of manufacturers and consumers, or the property rights of manufacturers. Those techniques include: (1) stiff fines for retailers shown to have made sales to underage consumers; (2) increased educational campaigns warning of the health effects of smoking; (3) increasing the number of public places at which smoking is prohibited; and (4) imposing sanctions for proxy purchases. Indeed, studies indicate that a combination of enforcement and education has allowed Germany (through its "Federal Drug Prevention Strategy") to reduce cigarette consumption considerably, even though Germany does not impose significant speech restrictions on the tobacco industry.

In light of the proven success of those methods, there is little justification for adoption of more drastic techniques – such as plain packaging – that deprive us all of a little of our freedom and could well place New Zealand in violation of its international agreements.

X. Conclusion.

The Washington Legal Foundation respectfully requests that the Ministry of Health defer all further consideration of plain packaging for tobacco products. It should await implementation of plain packaging in Australia and a thorough evaluation of the Australian experience before deciding whether plain packaging is appropriate in New Zealand. Moreover, all other techniques for reducing tobacco consumption should be tried first before the nation gives serious consideration to such drastic curbs on the marketing of a legal product.

Respectfully submitted,

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