



AN AUSTRALIAN LESSON



THE PLAIN PACKAGING EXPERIMENT IS A FAILURE

Patrick Basham

A Democracy Institute Economic Risk Series Paper



Democracy Institute

The Democracy Institute is a politically independent public policy research organization based in Washington DC and London. Founded in 2006, the Democracy Institute serves to further public education through the production and dissemination of accessible commentary and scholarship. The Democracy Institute aims to provide a balanced and thoughtful perspective on topical issues, promoting open and rational debate based on evidence rather than ideology. An Advisory Council, comprised of internationally renowned scholars and leading writers in a variety of disciplines, guides the work of the Democracy Institute's research staff. Collectively, they seek to challenge conventional wisdom, stimulate policy debate, and enlighten the public conversation.

Many of the institute's research projects have a transatlantic or international flavour. We conduct and commission work in the following areas: economic and social risk and regulation; public health; education policy; fiscal studies; foreign policy and international relations; democratisation; national security; energy and environmental policy; and electoral studies. The Democracy Institute welcomes inquiries, exchanges of ideas, and contributions from individuals or groups with an interest in these issues.

Founding Director

- Patrick Basham

Advisory Council

- Nigel Ashford – Institute of Humane Studies
- Jeannie Cameron – International Law & Regulatory Fellow
- Jason Clemens – Fraser Institute
- Veronique De Rugy – Mercatus Center
- Jamie Dettmer – Fellow in Media Studies
- Chris Edwards – Cato Institute
- Ivan Eland – Independent Institute
- Jeremy Lott – Senior Fellow
- Michael Mosbacher – Social Affairs Unit
- Alfred Ndemo – Adjunct Scholar, African Governance Studies
- Charles Pena – George Washington University
- Christopher Preble – Cato Institute
- Juliette Roberts – Public Health Fellow
- Christopher Snowden – Adjunct Scholar
- Marian Tupy – Cato Institute
- Martin Zelder – Duke University



Democracy Institute

Contact

Democracy Institute
Washington DC
+1 202 770 5953
www.democracyinstitute.org

Democracy Institute
London UK
+44 (0)797 951 8521
www.democracyinstitute.org

Acknowledgements

The author wishes to acknowledge the assistance provided by respective Australian experts during the research phase of this project. The author is also grateful for the comments of respective anonymous peer reviewers that have improved the paper. All views expressed in this publication, however, are those of the author, not those of the Democracy Institute, its Officers, or Advisors.

The Democracy Institute does not accept project-specific funding and, therefore, has not received any financial support for this piece of work from any of the governments, institutions, individuals, industries, organizations, or stakeholders described or discussed in this paper.

© 2015 Democracy Institute
All rights reserved

INTRODUCTION

The policy of plain packaging has been adopted only in Australia, although for decades the global public health establishment has called for its introduction throughout Europe and North America.

The notion behind plain packaging is that by removing all signs of company branding smoking will be less appealing to young people, of whom far fewer will take up the habit, while adult smokers will be more likely to give up cigarettes.

Given this month's British parliamentary vote to put cigarettes in plain packets – in tandem with a comparable commitment from the Irish government and serious interest from the New Zealand and French governments, among others – the political momentum is with plain packaging. As these respective decisions and declarations of regulatory intent are largely based upon the alleged success of plain packaging in Australia, the world is clearly watching the country very closely. An assessment of

Australia's plain packaging experiment is therefore timely and relevant.

In 2011, then-health minister Nicola Roxon boasted that Australia would introduce the “world's toughest anti-smoking laws”¹ in the form of the plain packaging of tobacco products. Subsequently, plain packaging was implemented through the *Tobacco Plain Packaging Act 2011* and the *Tobacco Plain Packaging Regulations 2011*.

As a result, all tobacco products manufactured or packaged in Australia for domestic consumption were required to be in plain packaging effective October 2012. Effective December 2012, all tobacco products were required to be sold in plain packaging.

According to the Australian Department of Health:

The objectives of the tobacco plain packaging measure are to regulate the retail packaging of tobacco products in order:

¹ Christian Kerr, “Labor's plain packaging fails as cigarette sales rise,” *The Australian*, 6 June 2014.

- To reduce the appeal of tobacco products to consumers.
- To increase the effectiveness of health warnings on the retail packaging of tobacco products.
- To reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.
- Through the achievement of these objectives in the long term, as part of a comprehensive package of tobacco control measures, contribute to efforts to improve public health by discouraging people from taking up smoking or using tobacco products; encouraging people to give up smoking and to stop using tobacco products; discouraging people who have given up smoking or who have stopped using tobacco products, from relapsing; and reducing peoples exposure to tobacco smoke.

How likely was it that the plain packaging legislation would achieve any or all of its objectives when, for the very first time, unattractive olive green packaging replaced a cigarette packet's traditional commercial branding?

Plain packaging advocates forecast less smoking by fewer smokers. For instance, Cancer Council Victoria's director, academic David Hill, predicted that, "Plain packaging will slash smoking rates."² Comparable levels of confidence underpinned the expectation that small retailers selling tobacco products in their corner shops would experience minimal, if any difficulties. Finally, it was asserted that there would be no increase in the illicit tobacco trade.

Since its inception, plain packaging's supporters have proclaimed the policy an unqualified success. At the end of last week, Australian media headlines trumpeted Cancer Council Victoria-led research findings that were presented at the World

² David Hill, "Tobacco industry has much to fear," *Sydney Morning Herald*, 8 April 2011.

Conference on Tobacco or Health in Abu Dhabi on 19 March 2015.³

The respective papers, authored by a team of longstanding plain packaging campaign advocates, pronounced that plain packaging is changing popular attitudes, as more and more teenagers find cigarettes less appealing. Furthermore, this research concluded that there is “no evidence” plain packaging has led to an increase in the illicit tobacco trade.⁴

Nevertheless, the authors did not make the factual error of a claim that plain packaging has resulted in a fall in the smoking rate or an increase in smoking cessation. On the latter measure, their work claims only that smokers are now *more likely* to quit smoking, an attitudinal change that is very different from the act of having stopped smoking.

³ See, for example, AAP, “Plain packets helping smokers quit: study,” in *The Australian*, 19 March 2015.

⁴ The papers may be found in “Implementation and evaluation of the Australian tobacco plain packaging policy,” *Tobacco Control*, April 2015 (24: Supplement 2), http://tobaccocontrol.bmj.com/content/24/Suppl_2.toc.

It is no doubt unintentional that the authors placed a stringent limitation upon the efficacy of the much-heralded new, larger,⁵ and more graphic health warnings. After all, the research findings show that, apart from an increased awareness of bladder cancer, the new warnings did *not* increase adolescents’ cognitive processing of the warning information, itself.

The paucity of evidence that graphic health warnings are an effective regulatory prescription for better public health was comprehensively documented at the time of Australia’s introduction of plain packaging.⁶

Meanwhile, critics of plain packaging argued that smoking rates would be unaffected by plain packaging.⁷ They also

⁵ Prior to the introduction of plain packaging, health warnings made up 30 percent of the front of packs; they now constitute 75 percent.

⁶ See Patrick Basham and John Luik, *Health Warnings on Consumer Products: Why Scarier Is Not Better*, Washington Legal Foundation, Critical Legal Issues Working Paper Series No 178, Washington DC, January 2012.

⁷ See, for example, the critique of the plain packaging prescription for public health found in Patrick Basham and John Luik, *The Plain Truth: Does Packaging Influence Smoking?* London: Democracy Institute, 2012, which provides an exhaustive and methodologically

predicted there would be unintended negative consequences, such as a boost to the illicit tobacco trade, as traditionally branded cigarette packs and easily counterfeited plain packs made their way to the black market.

The rest of this paper is therefore divided into four parts:

1. An assessment of the available empirical evidence to determine whether this 28 month-long regulatory experiment has achieved the principal objectives (that is, fewer smokers smoking fewer cigarettes and more smokers quitting the habit) set out by its political patrons and the public health establishment.
2. A discussion of any unintended public health or economic consequences that may result from the plain packaging policy.

rigorous analysis of the relevant research literature.

3. An answer to the pivotal, but overlooked, question, “Why is plain packaging a failure?”
4. A brief discussion of the lesson from the Australian experience that may serve to educate policymakers in other countries.

SMOKING PREVALENCE, CONSUMPTION & CESSATION

There is now sufficient real-world evidence to draw firm conclusions about plain packaging’s actual impact in Australia, as well as its probable impact elsewhere.

Plain packaging advocates maintain that the policy increases the likelihood of smokers thinking about quitting and paying more attention to the health warnings on cigarette packs. Of course, even if the research evidence uniformly supported these assertions, which it does not, the goal of plain packaging, as explicitly established

by its proponents, is not so much to change the way people *think* about smoking but to reduce the numbers who are smoking and to increase the numbers who are quitting.

Therefore, it is only on that basis, on the terms set forth by the pro-plain packaging lobby, itself, that the success or failure of plain packaging may be measured.

What do the most methodologically rigorous research studies teach us about the consequences of plain packaging?

Central to any examination of plain packaging's influence upon smoking is an appreciation that the smoking rate in Australia has been on a downward trajectory since 1991. Depending upon the individual expert consulted and the specific piece of research examined, the causal factors may include demography, socio-economic changes, educational levels, and taxation. Indisputable, however, is the fact that at the outset of the plain packaging experiment far fewer Australians were smoking than a generation earlier.

In late 2013, the leading European policy consultancy, London Economics, released

the first comprehensive study measuring smoking rates in Australia since plain packaging was introduced.⁸ The data collected by the study's lead researcher, Gavan Conlon, found the smoking rate had remained unchanged.

Critically, Conlon's analysis concentrated on actual smoking behaviour, as reported by study participants both before and after the implementation of the new tobacco packaging requirements, which more than doubled the size of the health warning on the front of the pack.

Three months after the introduction of plain packaging, the proportion of adult respondents that smoked tobacco products declined from 24.8 percent to 23.4 percent. However, eight months following the introduction, the apparent decline experienced in the first three months started to reverse.

⁸ Gavan Conlon, "An analysis of smoking prevalence in Australia," London Economics, 25 November 2013, <http://londoneconomics.co.uk/wp-content/uploads/2013/11/London-Economics-Press-Release-Australian-Prevalence-25-11-2013.pdf>.

The proportion of respondents indicating that they smoked tobacco products increased from 23.4 percent to 24.3 percent between three and eight months after the introduction. Both of these changes in smoking prevalence are so small they are not statistically significant, which means there was no change, up or down, in real terms.

Yet, reporting by *The Australian* found “sales figures showing tobacco consumption growing during the first full year of the new laws.”⁹ This follows on, logically, from the fact that, since the introduction of plain packaging, tobacco industry sales volumes have increased. Specifically, during 2013 tobacco sales volumes increased by 59 million ‘sticks’ (individual cigarettes), or their roll-your-own equivalents, which was equivalent to a 0.3 percent increase.

In striking contrast, between 2009 and 2012 tobacco sales had fallen by 15.6 percent. Aztec sales data reveals that the value of tobacco sales in convenience stores has

increased since plain packaging. Last year, for example, saw an 8.8 percent increase.¹⁰

Over the course of plain packaging’s first year on the books, research by InfoView, an industry monitor, found a 50 percent rise in the demand for cheaper cigarettes, increasing the market share of cheaper cigarettes from 32 per cent to 37 per cent.

According to Jeff Rogut of the Australasian Association of Convenience Stores, cheaper cigarette sales grew by 5.4 percent in 2013.

Rogut also noted that, with the move to lower priced products, “People are coming back more often.”¹¹

His experience was confirmed by Geoffrey Smith, the general manager of consumer products at Roy Morgan Research, a leading Australian economic consultancy firm. Smith found plain packaging was “not having much impact.” In his view, “It’s causing a shift towards lower priced product rather than ‘I’m stopping smoking’.”¹²

⁹ Kerr.

¹⁰ Cited in Australasian Association of Convenience Stores, media release, 19 March 2015.

¹¹ Quoted in Kerr.

¹² *Ibid.*

Of considerable concern is an increase in the rate of under-age smoking that is evident in the 2013 National Drug Survey conducted by the Australian Institute of Health and Welfare. According to this research, between 2010 and 2013 there was a 36 percent increase in the number of daily and occasional teenage smokers.¹³

Australian state government data also shows an increase in smoking. For example, data provided by the respective New South Wales and South Australian governments shows smoking on the rise. In 2013, 16.4 percent of all adults in New South Wales smoked, up from 14.7 percent in 2011.¹⁴ In South Australia, the smoking rate increased from 16.7 percent to 19.4 percent during 2013.¹⁵

¹³ 2013 National Drug Survey, Australian Institute for Health and Welfare, <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/tobacco/>.

¹⁴ Centre for Epidemiology and Evidence, *Health Statistics New South Wales – Current smoking in adults by age and year*, NSW Ministry of Health, Sydney, December 2014, www.healthstats.nsw.gov.au.

¹⁵ Joanne Dono and Caroline Miller, *Key Smoking Statistics for SA – 2013*, South Australian Health & Medical Research Institute, Adelaide, 2014.

Furthermore, under plain packaging the number of people quitting has dropped. According to Roy Morgan Research data, from 2008 to 2012 the number of people smoking was declining by 3.3 percent per year, on average. But, in 2013 the rate of decline slowed to only 1.4 percent.¹⁶

Also last summer, researchers from the Institute of Policy Evaluation Saarland & Department of Economics at Saarland University and from the Department of Economics at the University of Zurich conducted a statistical trend analysis of smoking prevalence among Australians (aged 14 and older) between January 2001 and December 2013. The objective was to determine whether there was evidence for a plain packaging effect on smoking prevalence at any time during the 13 months from December 2012 through December 2013.

Using standard statistical analysis techniques, these experts found no evidence for a plain packaging effect on

¹⁶ Data cited in Nick Evershed, "Is smoking increasing in Australia?" *Guardian*, 6 June 2014.

smoking prevalence. As explained by lead author, Ashok Kaul:

[W]e found no solid evidence for a plain packaging effect in any month. Only when using statistical techniques biased in favour of finding a plain packaging effect could we detect weak evidence for a one-time effect on smoking prevalence in December 2012 itself, after which smoking prevalence is statistically indistinguishable from the pre-existing trend.

Based on our analysis, one could, at most, claim an effect on smoking prevalence among the total Australian population in December 2012 only, that is, an effect that lasted no more than one month. From January 2013 on, even very powerful statistical techniques no longer can pick up any change from the pre-existing trend.¹⁷

¹⁷ Ashok Kaul et al. "The (Possible) Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis," University of Zurich Department of Economics Working Paper Series, 1 July 2014, <http://www.econ.uzh.ch/static/workingpapers.php?id=844>.

Furthermore, Australian economists Sinclair Davidson and Ashton De Silva conducted their own independent analysis of the plain packaging legislation. They found no empirical support for the policy. They wrote:

Despite our econometric efforts, the data refused to yield any indication this policy has been successful; there is no empirical evidence to support the notion that the plain packaging policy has resulted in lower household expenditure on tobacco than there otherwise would have been. There is some faint evidence to suggest, *ceteris paribus*, household expenditure on tobacco increased.¹⁸

According to Davidson and De Silva, the 'success' to date of the plain packaging policy has rested on highly imperfect indicators, such as an increase in the number of individuals telephoning smoking

¹⁸ Sinclair Davidson and Ashton de Silva, "The Plain Truth about Plain Packaging: An Econometric Analysis of the Australian 2011 Tobacco Plain Packaging Act," *Agenda: a Journal of Policy Analysis & Reform* 21 (2014), <http://press.anu.edu.au/apps/bookworm/view/Volume+21,+Number+1,+2014/11311/davidson.xhtml>.

cessation services. They concluded that, “It would be a very brave public-health advocate that claims vindication from one data point (subject to revision) in supporting the plain packaging policy.”

At present, there simply is no definitive evidence to support the efficacy of plain packaging. The pair of Australian economists also confirmed that tobacco consumers are substituting to cheaper brands of cigarette. To the extent that branding disappears, they found that it is becoming easier for counterfeit or illegal tobacco to enter the Australian market.

By the summer of 2014, Davidson had found that:

[T]he first full year of plain packaging resulted in an increase in tobacco consumption – contrary to the stated aim of the policy. The decline in the first quarter of this year [2014] is more likely due to the 12.5% increase in tobacco excise that came into effect in December. Bottom line – not even the ABS [Australian Bureau of

Statistics] data support the plain packaging policy.¹⁹

The Australian government’s *National Drug Strategy Household Survey 2013* found a reduction in daily smoking among those aged 14 and over from 15.1 per cent in 2010 to 12.8 per cent in 2013.²⁰ Hence, the Australian government’s own data confirms that any decline in smoking rates during 2013 is merely a continuation of the same downward trend in effect prior to plain packaging. Critically, plain packaging is not listed among the “motivators for change to [smoking] behavior.”

The most recently available data supports earlier findings that plain packaging has not reduced smoking. Published in late January 2015, this conclusion is drawn from publicly available government data that is collected (unlike the *National Drug Strategy Household Survey*) on an annual basis. As a result, this state-level data shows what

¹⁹ Sinclair Davidson, “Cherry picking tobacco data,” blog post, 6 June 2014.

²⁰ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey detailed report 2013*, Canberra, July 2014, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549848>.

happened immediately before and after the introduction of plain packaging.

Annual state surveys indicate that smoking prevalence rates did not fall under the plain packaging regulatory regime. For example, smoking prevalence rose in four of the five most populous states from 2012 through 2013.²¹

Combining these percentage increases with Australian census data for the above four states, Neil McKeganey, the director of the Glasgow-based Centre for Drug Misuse Research, recently calculated that in the period following the adoption of plain

packaging there was a 57,388 *increase* in the number of smokers.²²

A fairly steady decline in smoking prevalence, as documented at the state-level, appears to have halted by plain packaging, given that there was no decline, and arguably an increase, in 2013. Furthermore, although household spending on tobacco may have fallen in the last quarter of 2014,²³ Davidson and de Silva found no empirical evidence that plain packaging played a role in the (long term) decrease of those expenditures.²⁴

Research data recently released by the Cancer Council of Victoria provides an additional layer of state-level evidence that plain packaging has failed its supporters. After the introduction of plain packaging, the state's smoking rate stopped falling. The Cancer Council is clear: smoking

²¹ In Victoria, smoking prevalence went from 14.7 percent to 15.0 percent; in Queensland, it went from 14.3 percent to 15.8 percent; in Western Australia, from 12.7 percent to 13 percent; and from 16.7 percent to 19.4 percent in South Australia.

Sources: Monique Alexander, et al. *Smoking prevalence & consumption in Victoria – 1998 to 2011*, CBRC Research Paper Series No. 44, Cancer Council Victoria, Queensland Health, *Self reported health status 2012: preventive health indicators*, Brisbane, 2012; for Western Australia, see Western Australian Health and Wellbeing Surveillance System, www.health.wa.gov.au; and for South Australia, see <http://www.sahmri.com>.

²² Neil McKeganey, "Plain packets may spark a rise in smoking," *The Times*, 11 March 2015, <http://www.thetimes.co.uk/tto/news/uk/scotland/article4376655.ece>.

²³ Australian Bureau of Statistics, *Household Final Consumption Expenditures, Tobacco*, for the 4th quarter of 2014.

²⁴ Davidson and de Silva, "The Plain Truth about Plain Packaging."

prevalence in Victoria did not change from 2012 through 2013.

PLAIN PACKAGING'S UNINTENDED CONSEQUENCES

ILLICIT TRADE

Although smoking has not fallen due to plain packaging, there has been a clear change in Australia: a rise in illegal tobacco sales.

A research report by KPMG, the auditors with a global reputation on illicit trade issues, found that the level of illegal consumption of tobacco in Australia has reached record levels.²⁵ For example, illicit consumption grew from 11.8 percent of the tobacco market in June 2012 to 13.3 percent by June 2013 under plain packaging. Since December 2011, the volume of illegal cigarettes has increased by 25 percent. This increase has led to illicit

²⁵ KPMG, *Illicit Tobacco in Australia*, April 2014.

consumption that now stands at 14.3 percent of all tobacco consumed.

According to the KPMG researchers, the key driver of this growth has been a large increase in the consumption of illegal *branded* cigarettes, primarily in the form of contraband. From 2012 to 2013, volumes of illicit branded tobacco products increased by 151 percent.

These black market cigarette packs bear no health warnings and are smuggled into the island nation through various ports, including the port of Melbourne, where one seizure netted a record 71 tons of tobacco in 16 shipping containers. KPMG forecast that by the end of 2014 illegal cigarettes would constitute an astonishing 15 per cent of the Australian market.

A subsequent study published by Oxford Economics revealed similar findings to the KPMG report.²⁶ Oxford Economics found that, “The volume of Illicit Consumption in

²⁶ Oxford Economics, *Asia-14 Illicit Tobacco Indicator 2013*, September 2014, http://www.pmi.com/eng/tobacco_regulation/illicit_trade/Documents/Asia-14%20Illicit%20Tobacco%20Indicator%202013.pdf.

Australia has risen despite an increase in enforcement activity. In 2012-13, the Australian Customs and Border Protection Service seized 183 tons of tobacco and 200 million cigarettes, an increase of 3.4% and 41.8% respectively on 2011-12.”

Nevertheless, the KPMG data was immediately dismissed by plain packaging lobbyists as an overestimation of the problem. KPMG’s critics appear to be completely unaware that these private findings were confirmed by the Australian government’s own statistical research.

For example, the *National Drug Strategy Household Survey* provides the information necessary to calculate that the percentages of those who purchased illicit unbranded (so-called “chop-chop”) tobacco (3.6 percent) together with those that purchased illicit branded tobacco (9.6 percent), is consistent (13.2 percent) with the KPMG estimates (13.5 percent) for 2013.²⁷

²⁷ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey detailed report 2013*, pp. 25-26.

The plain packaging-induced rise of illicit tobacco has had dramatic impacts upon Australia’s small retailers. Roy Morgan Research found that 43 percent of small Australian retailers now notice a moderate or major impact on their business from illegal tobacco, up from 36 percent shortly after the introduction of plain packaging.²⁸ One-third of these retailers say their customers have asked if they can purchase illegal cigarettes from their store.

Furthermore, 69 percent of small retailers said plain packaging has had a negative impact on their overall business. For instance, nearly eight-in-ten small retailers experienced increases in the time it takes to serve adult tobacco customers, while two-thirds saw an increase in the frequency of staff supplying the wrong products primarily due to the difficulty in recognising and distinguishing between specific brands.

²⁸ Roy Morgan Research, *The Impact of Plain Packaging on Australia Small Retailers*, 1 October 2013, <http://www.aacs.org.au/new-research-validates-retailers-fears-of-illicit-trade-and-other-negative-impacts-of-plain-packaging/>.

TRADE DISPUTES

Plain packaging's impact upon smoking and the illicit cigarette trade will remain a political, if not necessarily an evidentiary, debate. No longer debatable, however, is plain packaging's negative affect upon the alcohol industry and other non-tobacco sectors of the Australian economy.²⁹

The unintended effects of plain packaging have the potential to vastly outweigh the legislation's intended public health benefits, real or imagined. In fact, Australia's imposition of plain packaging on tobacco opened a Pandora's Box of potential trade costs with the nation's alcohol sector set to become the first example of the policy's collateral damage.

Manufacturers of consumer products across the board should fear the export of plain packaging, as the public health establishment considers tobacco merely the

first domino to fall; the global food and drinks industries will be next.

For example, the Indonesian trade ministry is preparing to mandate the plain packaging of alcohol products, including Australian wine, with the respective labelling devoted to warnings of the adverse health consequences associated with alcohol consumption. Indonesia is Australia's second largest trading partner.

Providing political support for these plans are Indonesian business lobbyists seeking to protect their domestic market from foreign competition, as well as global and domestic public health NGOs who support plain packaging on all manner of 'unhealthy' consumer products, including alcohol and tobacco.

Such support would not have mattered to the Indonesian government if Australia had not opted for plain packaging in late 2011. But, then-Prime Minister Julia Gillard's Labor government could not resist the temptation to become the global 'leader' in tobacco control policy. Consequently, Australia is now embroiled in a messy trade

²⁹ This section draws upon Patrick Basham, "Alcohol: plain packaging's next casualty," *Online Opinion*, 16 December 2014, <http://onlineopinion.com.au/view.asp?article=16949>.

dispute that may spill over into a costly trade war.

Indonesia and four other countries are challenging Australia's plain packaging law before the Dispute Settlement Body of the World Trade Organization (WTO) and the WTO's Committee to Technical Barriers on Trade. This particular trade challenge is shaping up to be one of the most significant in recent years, given the sheer number of parties involved, as well as the substantive effect regarding the interpretation of WTO provisions. The latter will define how key global trade rules are interpreted and applied in the future, not just in relation to tobacco, but to other controversial products, including alcohol.

The WTO framework provides stability and consistency in international trade rules. The rules, which are the result of decades of negotiations, were drafted to provide regulators with the flexibility to implement measures to protect public health, the environment, and public morality. These global rules require all regulators to ensure that any measure that is adopted is actually

effective in practice and is proportional in achieving its public policy objectives.

From a trade perspective, plain packaging's fundamental problem is it requires the confiscation of the intellectual property owned by the companies that manufacture, brand, and label the affected products. Specifically, Australia's plain packaging law constitutes a fundamental attack on the global protection of intellectual property rights contained in the General Agreement on Trade and Tariffs' *Trade Related Aspects of Intellectual Property Rights* (TRIPS).³⁰

Indonesia and her fellow WTO complainants argue that, among other effects, plain packaging amounts to an unjustifiable infringement of corporate trademarks, which is in direct violation of TRIPS Article 20. They also assert that plain packaging violates Article 2.2 of the *Global Agreement on Technical Barriers to Trade*, which requires technical regulations not to create

³⁰ The seminal discussion of the enormous legal and intellectual property hurdles that plain packaging must overcome is found in Patrick Basham and John Luik, *Erasing Intellectual Property: Plain Packaging of Consumer Products and the Implications for Trademark Rights*, Washington DC: Washington Legal Foundation, 2011.

unnecessary obstacles to international trade.

Whatever the outcome at the WTO, both Australia and her alcohol sector face a lose-lose situation. If the WTO rules against Australia and if Prime Minister Tony Abbott's government refuses to bring the country's plain packaging law into compliance with global trade rules, Australia would face retaliatory protectionist measures on its exports to Indonesia and probably other nations, too. She will also suffer the tangible reputational damage associated with losing such a high profile case at the global trade body.

Of course, if Australia prevails at the WTO, plain packaging would be legitimized as a valid regulatory measure to curb consumption of harmful consumer goods, such as tobacco, or potentially harmful goods, such as alcohol. However, the tangible economic downside is that Australian producers of wine, beer, and spirits would face the very real prospect of plain packaging being applied on some or all alcoholic beverages for reasons of public health, morality, or both.

The bottom-line is that Australia's alcohol sector could face packaging restrictions in overseas markets solely because the Australian government mandated comparable restrictions on domestic tobacco products. The dispute between Australia and Indonesia boils down to a high-stakes, tit-for-tat political row. Regulatory retribution, if you will. Nonetheless, it is an expensive political reality that now confronts the Abbott government.

Its predecessor should have thought more carefully about the unintended, yet entirely predictable, domino effect of plain packaging-induced trade retribution. Perhaps, the UK, New Zealand, Ireland, and other trade-dependent countries currently considering or moving forward with plain packaging should think twice before setting into motion a comparable economic fiasco.

WHY IS PLAIN PACKAGING A FAILURE?³¹

The failure of plain packaging should not come as a surprise to policymakers, least of all the Australian government. Prior to the decision to move ahead with plain packaging, Australian parliamentarians were explicitly warned about the policy's probable negative outcomes.

For example, the Democracy Institute's submission to the parliamentary inquiry into plain packaging argued against the introduction of plain packaging for tobacco products on two grounds.³² First, it violated regulatory best practices in that it was not supported by reliable evidence. Second, it violated intellectual property treaties to which Australia is a party.

The submission detailed how the weight of the scientific evidence failed to show that

plain packaging would reduce smoking initiation, reduce smoking prevalence and consumption, increase changes in smoking behaviour as a result of health warnings, and increase cessation.

Of course, the failure of Australian policymakers to heed the warnings about plain packaging is similarly unsurprising. The Australian public health establishment, in comparable ways to its European and North American peers, disseminates numerous 'truths' about health, disease, and lifestyle. Sadly, junk science is often the driving force behind these regulatory assaults on drinkers, smokers, gamblers, and the overweight.

One of the most clear-cut examples is the belief of then-Prime Minister Julia Gillard's Labor government that tobacco advertising and promotion are the major reasons why young people begin to smoke. It was believed rather than known that packaging is merely an extension of advertising, and because advertising increases tobacco consumption, it is necessary to require all tobacco products to be sold in plain packaging.

³¹ This section draws upon Basham and Luik, *The Plain Truth*, chapters 1 to 4, and chapter 6.

³² See Patrick Basham, "Inquiry into Tobacco Plain Packaging," Submission to the Health and Ageing Committee, House of Representatives, Parliament of Australia, Canberra, 21 July 2011.

Unfortunately, neither this belief nor this policy meets the standards of evidence-based policymaking, which requires decisions based on rigorous, systematic reviews of 'best practice', that is, interventions that work the best in reducing harm. Evidence alone, not theory or tradition, should drive policy.

The empirical record about tobacco advertising's effect on young people is decidedly mixed. Large independent studies have failed to find a statistically significant connection between tobacco advertising, consumption, and youth smoking.

This lack of evidence is confirmed by the fact that countries that have had advertising bans for a quarter century or more have not experienced statistically significant declines in youth smoking. Consumption and prevalence data from 145 countries finds little evidence that the entire range of tobacco control measures, including advertising restrictions and bans, has a statistically significant effect on smoking prevalence in any country.

Yet, in 2011 Canberra pushed ahead with draconian restrictions on tobacco brand promotion through legislation to require cigarettes be sold in plain packaging. Even though the pro-plain packaging lobby claimed there was substantial evidence to show that plain packaging would reduce youth smoking, that simply was not the case.

The evidence in support of plain packaging, just as for tobacco advertising bans, was always embarrassingly thin. Most studies showed that plain packaging would have no statistically significant effect on youth smoking.

None of the so-called evidence about plain packaging provided compelling behavioural evidence that any young person started smoking after seeing conventional displays of heavily branded cigarette products.

For these and other reasons, other nations earlier rejected plain packaging. For example, Canada briefly considered plain packaging in 1994, but eventually took no action. The British government first seriously examined the concept in 2008 and

2009, but the then-Labour cabinet concluded, correctly, there was insufficient evidence to justify legislation.

The studies that purportedly prove a causal connection between advertising and youth consumption must actually prove that advertising is a significant factor in relation to all other possible causes of youth smoking. The studies cited by plain packaging advocates did not do that, as those studies did not show advertising to be a significant factor.

These studies also suffered from deep methodological flaws, overstated the persuasive power of advertising, understated young people's appreciation for the purposes of advertising, and failed to consider and refute other smoking initiation factors, such as family and peer influence.

If tobacco advertising bans are to be a useful proxy for exempting plain packaging laws from intellectual property protection treaties, advocates must show that those bans are effective at reducing tobacco consumption. There is a growing body of

empirical evidence, however, that reveals how unsuccessful full or partial advertising bans have been in reducing smoking, especially among youth.

In addition, studies done on alternative instigators of youth smoking – peer pressure, parental environment, and economic and educational backgrounds – further undermine claims that advertising causes tobacco consumption.

Proponents will ultimately have to rely upon the relatively small body of studies directly focused on plain packaging to make their case that their policies merit exemptions from their respective treaty obligations. An assessment of the most frequently cited studies, however, exposes extensive methodological flaws that violate the scientific method and therefore reduce apparently scientific claims to mere rhetorical dogma.

CONCLUSION – A REGULATORY LESSON FOR THE WORLD

packaging bandwagon at the very moment that it is headed for the evidentiary ditch.

In assessing the plain packaging experiment, it is increasingly obvious that while the pro-packaging lobby is entitled to its own opinion on the best way to reduce smoking, it is not entitled to its own evidence.

Rigorous empirical data derived from scholarly, private, and government research shows that Australia's public health experiment has failed to reduce smoking, yet it has damaged small retailers, while simultaneously boosting the illicit tobacco trade.

Given these deeply disappointing, if entirely predictable, results, one policy lesson is abundantly clear. On both public health and economic grounds, it would be unwise for the UK, Irish, New Zealand, and French governments to climb aboard the plain