GUIDE 3.2

Draft the law

Drafting the detailed legislation can take time and it is sensible to start the process early, making adjustments as policy decision are made. The International Legal Consortium at the Campaign for Tobacco-Free Kids can provide technical legal assistance with drafting the law.

ull details are in **Reference Section D: DRAFTING THE LEGISLATION**, together with **Reference Section F, which is a DRAFT MODEL LAW**. These reference material provide recommended solutions to all the issues listed below, and the reasons for them, together with straight forward options on how the legislation could be drafted. They draw on existing legislative examples and the policy development undertaken in Australia, UK, Ireland and France.

1. Regulate every part of the pack

Every aspect of the packaging presents the tobacco industry with a potential opportunity to introduce novel or different elements which could differentiate and promote the product and undermine the intention to create truly standard packs. Experience shows that tobacco companies will seek to exploit whatever avenue is left to them to differentiate their product in a way that is attractive or which allows positive associations with the brand. The guiding principle behind plain packaging is that the only means of differentiation is through the brand and variant name, which are presented in a standard typeface. Achieving this requires regulating each aspect of the packaging and the appearance of individual products, such as cigarette sticks, including:

- the exact color of each element of the packaging (exterior and interior)
- permitted text (such as name and address of manufacturer)
- typeface and text point size of text
- type of opening
- material used
- pack shape
- pack size
- surface texture and embossing
- multipacks and multiple layers of packaging
- bevelled or rounded pack edges
- plastic wrappers and tear strips
- cigarette pack foil linings
- inserts, stickers and additional materials
- changeable packaging
- sounds and smells
- quantity per pack
- flavouring
- bar codes and calibration marks
- track and trace or origin marks
- the length and nature of brand and variant names

This means the legislation can end up being quite detailed – aiming for simplicity risks the tobacco industry developing novel ways to differentiate their products.

Anatomy of a Cigarette Packet

2. Emulate existing laws

The legislation in force in Australia, the UK, Ireland, France and Hungary (and at the time of writing the proposed laws in New Zealand, Slovenia and Norway) are, in their effect, all very similar (although there are some differences which are highlighted in this toolkit).

There have been a number of positive legal rulings on challenges to plain packaging laws in Australia, the EU and the UK, and a ruling is expected in early 2017 on a WTO dispute (*see* **Guide 4.3**). Some of the evidence supporting the policy is based around the specific policy decisions that were first developed in Australia. Deviating from those key evidence based policy decisions could risk providing tobacco companies with sufficient grounds to mount legal challenges.

Countries considering plain packaging should therefore be cautious of introducing legislation that differs significantly from the plain packaging laws already in force. Emulating existing laws will allow the government to rely on both the evidence base and the positive legal rulings from around the world.

3. Keep it flexible

It is prudent to adopt legislation that allows for subsequent changes through delegated regulatory powers to the appropriate ministry. Unanticipated issues may arise and the tobacco industry will inevitably try to find ways to undermine the policy.

4. Color

The color of packs provides a good example of the need for detail and for emulating existing legislation. Unless the exact color required for the packaging is prescribed very precisely, variations of color will appear, defeating the intention of standardizing packaging. Simply requiring 'brown', or a 'green/brown' in legislation is insufficient. Australia commissioned research into which color was perceived to be the least appealing for tobacco packaging :

The color of this box is Pantone 448C, and this text is Pantone Cool Grey 2C

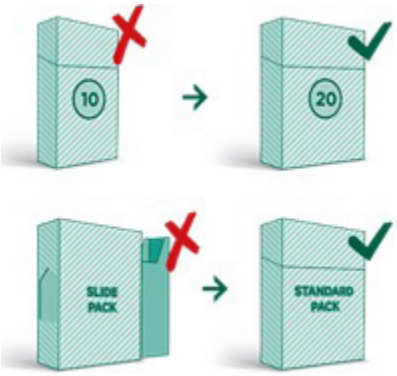
Pantone 448C (opaque couche) with a matt finish is the dull brown/green color specified in the Australian, UK, Ireland, France and Hungary legislation for the packaging.[1]

Pantone Cool Grey 2 C with a matt finish is the color specified in those countries for any text permitted on the packaging, such as brand name or contact details.

Unless there is specific evidence or research that demonstrates different colors would be more effective in a particular country at achieving the aims of the policy, it is recommended that these colors are used in all plain packaging legislation because of the research already conducted that demonstrates the colour to be effective. A 'matt finish' to the surface should also be specified to avoid some packs appearing with a glossy finish.

5. Shape, size and opening of pack

This is another area where it is recommended that particular care be taken to provide detail and to follow existing legislation. Many of the policy decisions in Australia, UK and Ireland, require cigarette packs must be in the form that is generally the standard or most common type of packet - a cuboid box made of cardboard with 20 cigarettes in it, which uses a flip top lid. Because this is the most common form of packaging for cigarettes, tobacco companies will not have to make any major adjustments to their machinery to produce this packaging and therefore it is a least restrictive approach which should be followed unless a different type or style of packet is more common in the particular country considering plain packaging.



6. Plain packaging 'light' policy should be avoided

For instance, legislation should not allow for a small amount of space for branding on a pack, or permit certain figurative logos (such as a small logo in the same colour as the text such as in the picture below). With no specific evidence available as to whether or how effective such a policy would be, a policy choice of that nature could introduce unnecessary legal risks.

1. Market research to determine effective plain packaging of tobacco products: report. GfK Bluemoon, August 2011, available at http://www.health.gov.au/internet/publications/publishing.nsf/Content/mr-plainpack-mr-tob-products

7. Include a trademark registration saving provision

There are important legal reasons to ensure that tobacco companies can maintain their trademark registrations even if the use of those trademarks is severely restricted by plain packaging. There are international, regional and national laws which oblige states to maintain trademark registrations. For instance Article 15 of the WTO Trade Related aspects of Intellectual Property Rights Agreement (TRIPS) obliges member states to permit registration of signs as trademarks so long as they are capable of distinguishing the goods of one undertaking from those of another.

In most jurisdictions non-use of a trademark in practice can lead to applications for de-registration of that trademark, typically after 5 years where there is no good reason for the non-use.

If a country's plain packaging laws mean that tobacco trademarks are fully prohibited or the trademark registration will necessarily be liable to cancellation this may breach international obligations. In addition, plain packaging is better viewed as a control on the use of trademarks rather than a deprivation or expropriation of trademarks.

Therefore, most plain packaging legislation (for instance in Australia, UK and Ireland[1]) has a trademark registration saving provision which states that the legislation does not amount to a prohibition on the use of the trademarks in all circumstances, and that non-use of a trademark as a result of the legislation amounts to a good reason for non-use.

The way in which plain packaging might otherwise intersect with a country's domestic trademark laws needs to be considered carefully.

An example of a trademark registration saving provision is in the **DRAFT MODEL BILL** at Article 13.

1. Trademark registration saving provisions:
   Australia - Section 28 of the Tobacco Plain Packaging Act 2011
   UK - Regulation 13, of the Standardised Packaging of Tobacco Products Regulations 2015
   Ireland – Section 5, Public Health (Standardised Packaging of Tobacco) Act 2015