

EL 266



BritishAmericanBusiness

75 Brook Street, London W1K 4AD
Tel: 020 7290 9888 Fax: 020 7491 9172

52 Vanderbilt Avenue 20th Floor, New York, NY 10017
Main line: 212 661 4060 Fax: 212 661 4074
Website: www.babinc.org

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation & Skills
Ministerial Correspondence Unit
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET

Friday 7th March 2014

Dear Dr Cable,

Re: Review Into the Public Health Evidence on Standardised Tobacco Packaging

We are writing to you on behalf of BritishAmerican Business and the British American Business Council, to raise our concerns about the possible implications and outcomes of the recently launched review into the public health evidence on standardised tobacco packaging.

BritishAmerican Business is the leading transatlantic business organization, bringing together many of the world's leading multinational and middle-market companies across sectors and geographies; more than 100 of the world's most successful CEOs support its work through their participation in its Advisory Board. It incorporates the American Chamber of Commerce (UK) and the British-American Chamber of Commerce (NYC/London), which merged in 2000 to create a single, pre-eminent transatlantic organization. BritishAmerican Business is a member of, and provides the Secretariat for, the British-American Business Council, the largest transatlantic business network

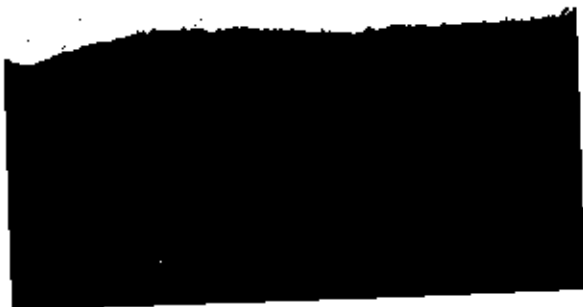
which has more than 20 chapters with more than 2,200 member companies based in major business centers throughout North America and the UK.

We have consistently supported the promotion and protection of strong IP rights and are correspondingly concerned by the potential establishment of any precedent that might lead to any broader impingement on IP rights and international trade obligations, facilitate illicit trade and counterfeiting, and undermine key certainties underpinning confidence and good order in the conduct of international business.

In this context, we are concerned by the possible implications and outcomes of the British Government's launch of a fresh review into standardised tobacco packaging, and by the precedent that the concept of plain packaging would set for eliminating the right of a business to use its trademarks in everyday commerce. We are also unaware of any compelling countervailing evidence that standardised tobacco packaging would advance public health or the public interest.

We would accordingly urge as a minimum that such evidence be produced and validated before the establishment of any such potentially damaging precedent is considered. While we fully respect the right of HMG to regulate in the public interest, we are also committed to supporting and protecting IP rights and the rules-based international trade framework on which the world depends to sustain economic growth, employment, innovation and prosperity. Accordingly, we believe that these broader rights and interests should be upheld and allowed to prevail in this case.

Yours sincerely,

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British American Business and
The British American Business Council

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52 Vanderbilt Avenue 20th Floor, New York, NY 10017
Main line: 212 661 4060 Fax: 212 661 4074
Website: www.babinc.org

Department of Health
Standardised Packaging Tobacco Consultation
PO Box 1126
Canterbury
CT1 9NB

7th August, 2014

Re: Open consultation on the introduction of regulations for standardising packaging of tobacco products

We are writing on behalf of British American Business (BAB) and the British-American Business Council (BABC) to re-emphasise our concerns about the possible implications of the proposed draft regulations for standardised packaging of tobacco products on business. This follows the publication of the Chantler Review in April 2014 and the second consultation on the introduction of regulations for standardised packaging of tobacco products with deadline of 7th August, 2014.

BAB is the leading transatlantic business organization, comprising and representing more than 500 of the world's leading multinational and middle-market companies across sectors and geographies: more than 100 of the world's most successful CEOs support its work through their participation in its Advisory Board. It incorporates the American Chamber of Commerce (UK) and the British-American Chamber of Commerce (USA), which merged in 2000 to create a single, pre-eminent transatlantic organization. The BABC is the largest transatlantic business network, comprising and representing more than 20 chapters, with a collective membership of more than 2,200 companies, based in major business centers throughout North America and the UK.

We welcome the UK Government's decision to conduct a public consultation under the lead of the Department of Health (DOH) to assess the scope and implication of standardised tobacco packaging. We support the UK Government's efforts to introduce measures to protect health and we recognize the importance of reducing smoking rates.

The decision, however, whether to introduce standardised tobacco packaging we believe should take into consideration the lawful protection of intellectual property (IP) and potentially unintended consequences weakening good order in international trade. The protection and promotion of IP rights, in particular in regards to brand differentiation, is fundamental to business and part of domestic law and several international trade agreements.

We note that several countries have made complaints to the World Trade Organisation (WTO) against Australia for breaching its International obligations regarding intellectual property rights, in particular trademarks. The European Union (EU) along with many countries applied to formally observe the dispute settlement case. This case will help to set guidelines for appropriate and well-balanced decisions that reflect both public health and IP globally. We encourage the UK government accordingly not to prejudge the future WTO decision on the topic and therefore not to proceed with the proposed regulation until the WTO case against Australia is decided.

We previously raised concerns on this issue with the Secretary of State for Business, Innovation & Skills (BIS) in our letter dated 7th March, 2014 (copy attached). We were disappointed on that occasion that it appears that BIS has not involved itself as actively as we might have wished in the consideration of the appropriate balance to be made between public health, IP and trade-related aspects in the ongoing consultation. We hope and trust that DOH may be able to take account of our concerns and substantive BIS input around such issues.

Yours sincerely,

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BritishAmerican Business and
The British American Business Council

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BritishAmerican Business

EL267



Department
of Health



Llywodraeth Cymru
Welsh Government



The Scottish
Government
Altaghalta na h-Alba



Department of
Health, Social Services
and Public Safety
www.dhsspsni.gov.uk

Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

a. Are you responding (required):

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

b. Please provide your details and contact information:

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

Now go to question f

c. Please provide your organisation's details and contact information:

Name of organisation (required):

Name of person providing submission (required):

[Redacted]

Job Title (required):

Head of Policy

Contact address of organisation (required):

ADPH, Kemp House, 152 City Road, London, EC1V 2NX

Contact email address (required):

[Redacted]

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

Not-for-profit representative organisation for Directors of Public Health (UK)

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

No

Yes (please describe below)

If yes, please describe:

h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Overview of ADPH views:

ADPH has previously submitted detailed responses to a range of consultation exercises related to tobacco control measures – consistently calling for government to implement evidence-based national action to:

- reduce the harm and health inequalities caused by tobacco – particularly in the most deprived communities;
- reduce the burden of premature death and disability caused by tobacco;
- protect the future health of children in the UK (in light of the 200,000-plus children in the UK who take up smoking each year).

In July 2013, the Association of Directors of Public Health expressed its strong disappointment and concern over the Government's announcement that it would not move forward with action on the introduction of a minimum unit price for alcohol and standardised packaging of tobacco products. In light of these decisions, and concerns that the Government was seemingly allowing vested interests to adversely influence policies intended to improve the public's health, the ADPH President Dr Janet Atherton confirmed that it was no longer tenable for the Association to be involved with the Government's Responsibility Deal, and that therefore the Association of Directors of Public Health was:

- withdrawing from involvement with the Responsibility Deal in its entirety;
- calling on the UK Government to take action now to reduce health inequalities and the health and wider societal harm caused by tobacco and cheap alcohol across the UK, by moving ahead with minimum unit pricing for alcohol and standardised packaging for tobacco products.

In doing so she commended the approach being taken by the Scottish Government to pursue measures – including standardised packaging for tobacco products - that would contribute to reducing tobacco related harm and improve public health in Scotland; and also welcomed the Welsh Government's expression of concern at the delay in progressing with standardised packaging.

ADPH therefore welcomed the Government's subsequent establishment of an Independent Review of standardised packaging for tobacco products and also welcomes the current consultation on regulations for standardised packaging of tobacco products.

Given the expertise, status and influence of DsPH as local leaders for public health*, we considered it was important to collate and submit DPH views, as additional evidence to inform the Review on standardised packaging, and so ADPH, in collaboration with the Faculty of Public Health (FPH) and with support from Public Health England (PHE), undertook a survey of all Directors of Public Health in England to elicit their views on the issue of standardised packaging and the likely impact on local communities.

The survey – which was sent to the **132 DsPH in post in England - took place between 23rd December 2013 and 7th January 2014. Given the tight timescale for submitting evidence to the Review (which included the 2-week Christmas holiday period) we believe the high rate of response (78 responses) indicates the importance of this issue to DsPH. Given more time, we believe an ever higher response rate would have been achieved.

The key points highlighted by the survey were:

- 100% of those who responded supported the introduction of standardised packaging and considered the major impact to be to discourage children and young people from taking up smoking, whilst also having a positive impact on encouraging smokers to quit.
- 94% of the Directors of Public Health who responded considered that standardised packaging would have a positive impact on reducing health inequalities, particularly in relation to children and young people, and to those from deprived communities - including children.
- 65% of the Local Authorities had considered the issue of standardised packaging and the majority discussed this at the Health and Wellbeing Board or with lead Cabinet Members for Health & Wellbeing, Council Leaders and other Council members. Tobacco Control Alliances were also used to consider the issue. 29% of Councils had adopted a formal position on standardised packaging.

The questions, answers and analysis of the responses are set out in Appendix A to our submission, which has been provided as a separate document.

*Directors of Public Health (DsPH) are designated Chief Officers within upper tier/unitary English Local Authorities. DsPH and their Local Authorities have statutory responsibilities for improving the health of their local population. DsPH are the chief source of advice and expertise for local government on tackling health inequalities, with a focus on health improvement, health protection and healthcare public health. Within this remit is responsibility for wider tobacco control activities and smoking cessation (including NHS Stop Smoking Service).

**At the time of the survey there were 132 DPH posts across the 152 top-tier LAs in England – some of which were employed across more than one LA or were 'covering' LAs without a substantive DPH in place.

ADPH response to specific consultation questions:

Consultation Question 1: Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Sir Cyril Chantler's covering letter to the Secretary of State stated: "it is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking" and "the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time in the uptake and prevalence and thus have a positive impact on public health."

The conclusions of a report by Professor David Hammond for the Irish Department of Health backs up Sir Cyril Chantler's view: "Overall, the existing evidence on plain (standardised) packaging supports four primary conclusions:

- 1) Plain packaging will reduce smoking initiation among youth and young adults.
- 2) Plain packaging will promote smoking cessation among established smokers.
- 3) Plain packaging will support former smokers to remain abstinent.
- 4) Plain packaging will help to denormalize tobacco use."

ADPH welcomed the response of Jane Ellison MP, Minister for Public Health, to the Chantler Review. She said that the report found standardised packaging was "very likely to have a positive impact" on public health. She went on to say: "In the light of the report and the responses to the previous consultation in 2012, I am minded to proceed with introducing regulations to provide for standardised packaging" and that she wished to "proceed as swiftly as possible".

The Government's Chief Medical Officer, Dame Sally Davies, also wrote to the Minister for Public Health supporting the conclusions of the Chantler Review and the introduction of standardised packaging.

ADPH strongly believes that the case for standardised packaging has been made, and that the Government should lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible. Given that notification to the European Union of the intended Regulations will take six months, there is now only a short time available to do this before the 2015 General Election.

ADPH believes that the Government should resist efforts by the tobacco industry and its surrogates to delay decision-making and laying of the regulations before Parliament. In this consultation response we review some of the industry's arguments and show them to be either weak or entirely without foundation.

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

Standardised packaging needs to be part of a comprehensive strategy

Tobacco control policies must be pursued in parallel if they are to have their best possible effect in reducing prevalence rates. The optimum date for implementation of standard packaging would be May 2016 at the same time as implementation of the EU Tobacco Products Directive, which includes updated larger health warnings and graphic warnings on the front of the packs.

Standardised packaging was introduced in Australia as part of a comprehensive strategy, which included larger health warnings, and a sustained mass media campaign which, on a per capita basis would cost the equivalent of £33.7 million a year in the UK, a far higher amount than is currently being spent here. Australia is also committed to annual increases in tobacco taxation of 12.5 per cent over inflation each year for four years, starting in December 2013.

The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016-2020, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:

- Increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
- making stop smoking services mandatory and ensuring delivery to a high quality standard;
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;
- introducing tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting; and
- introducing further levies on the industry to fund stop smoking services and other tobacco control initiatives, and to meet health costs caused by tobacco consumption.

Illicit Tobacco Trade: General

A principal tobacco industry argument against standardised packaging has been that it will inevitably lead to an increase in the illicit tobacco trade. There is no good reason to accept this argument, since there is no plausible mechanism of action, and indeed evidence published since the 2012 consultation suggests that it is false.

There is no plausible mechanism of action because all the key security features on existing packs of cigarettes would also be present on standardised packs, and additional markings will be required under the EU Tobacco Products Directive. These include unique identifiers, coded numbering and covert anti-counterfeit marks. Jane Ellison, Parliamentary Under-Secretary of State for Health, said in a November 2013 Parliamentary debate that: "I am grateful to those hon. Members who have made the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route."

The production costs of illicit cigarettes (including packaging) are very low. In Paraguay costs can be as low as 5 US cents a pack, a Jin Ling pack in Kaliningrad or a Chinese counterfeit pack may cost about 20 cents a pack to produce. Counterfeiters are also able to produce quality and apparently genuine packaging at

low prices in a short time. It follows that outside packaging is a very poor indicator of whether a pack of cigarettes is licit or illicit. The only obvious circumstances in which external packaging could be useful in this respect is precisely if standardised packaging is introduced – which would of course enable easy visual identification of "cheap white" brands (ones with no licit market in the UK) and diverted licit brands (where the first destination market was in a country without standardised packaging, and the product has been diverted into illicit channels).

Number codes will develop further into an international standard system because of the requirements of Article 15 of the revised EU Tobacco Products Directive and Article 8 of the Illicit Trade Protocol, a subsidiary treaty under the WHO Framework Convention on Tobacco Control, to which the UK is a Party.

Article 15 of the Tobacco Products Directive states that: "Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet."

Article 8.3 of the Illicit Trade Protocol states that: "With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party".

It should be noted that Philip Morris International has developed a coding system called "Codentify", which the company has licensed for free to JTI, IT and BAT. The four tobacco multinationals have set up a "Digital Coding and Tracking Association", based in Zurich. According to PMI, the system is based on unique twelve digit codes, which enable enforcement authorities to determine key information including: date, time, factory and line of production and intended target market. Since the codes are based on a secure algorithm, it is claimed that it would be a simple matter to identify "fake" codes on illicit packaging. PMI's promotional material claims that "Codentify".... "makes the leap into the digital age and can meet the demands of governments that want to improve tax revenue collection, the robustness of verification processes and supply chain security ... When it comes to protecting government tax revenues, securing the supply chain and fighting illicit trade, Codentify offers a highly advanced, secure and cost-effective solution for the 21st century".

The tobacco industry is promoting contradictory messages depending on which issue it is addressing: on the one hand it claims to have a robust coding system which enables it to identify counterfeit products, and on the other it claims that pack design is vital in combatting illicit trade. While we do not support the use of a coding system which is proprietary to the tobacco industry as is the case with Codentify it is

certainly the case that this or any other coding systems independent of the industry could be used on standardised packs as readily as on branded ones.

Not surprisingly therefore Andrew Leggett, Deputy Director for Tobacco and Alcohol Strategy at HM Revenue and Customs has said about standardised packaging that "we're very doubtful that it would have a material effect [on counterfeiting and the illicit trade in tobacco]". This conclusion was supported by the House of Commons Home Affairs Select Committee, in its report on the illicit tobacco trade published in June 2014. The Committee reported that: "We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government's drive towards introducing standardised packaging."

Illicit Tobacco Trade: Australia

The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging.

These claims were examined during the Chantler Review and shown to be unsupported, a fact that was effectively admitted during Review meetings with representatives of the tobacco industry in Australia. The Australian Government and customs officials have also rejected tobacco industry claims that illicit trade in Australia has risen since the introduction of standardised packaging. In March 2014 the Sydney Morning Herald reported that there had been only one seizure of counterfeit plain packs since December 2012.

In response to this article, the paper was contacted by Sonia Stewart, the former Head of Corporate Affairs & Legal for Imperial Tobacco Australia, who has now left the industry. In her job at IT Australia she had "commented numerous times in the media during 2011-2013 about the anticipated impact of plain packaging", claiming for example that "the legislation will make the counterfeiters' job both cheaper and easier by mandating exactly how a pack must look". She wrote to the paper that "based on these figures from Australian Customs authorities, there doesn't appear to be any evidence that plain packaging itself has caused an increase in tobacco smuggling." She added: "Imperial Tobacco did expect to see an increase in tobacco smuggling because of plain packaging, but based on the figures from Australian Customs it looks like those predictions were simply wrong."

Tobacco Consumption in Australia

The tobacco industry has also claimed that tobacco consumption in Australia has risen since the introduction of standardised packaging. Again, independent evidence does not support this proposition.

In November 2013 a study by the consultancy firm London Economics, funded by Philip Morris, reported that since the introduction of plain packaging in Australia their survey showed no statistically significant change in smoking prevalence. This report has been sharply criticised by, among others, the Cancer Council of Victoria, since:

- The survey was conducted on the mistaken assumption that adult smoking prevalence ought to have markedly declined in the immediate aftermath of the policy's implementation, which was not the assumption underpinning the policy intervention.
- The report used an online survey panel which was not representative of the general population (for example, the panel's smoking prevalence rate was higher than the Australian average).
- The survey had a sample size of 5,000, which is nowhere near big enough to pick up the sort of declines in smoking prevalence expected from one year to the next. To measure a statistically significant decline of, for example half a percentage point, which is the sort of magnitude one might expect to see over a twelve month period, would have required a sample size of around 90,000.

The tobacco industry in Australia has reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013, and the industry and its front groups in the UK have claimed that this showed standardised packaging was not working. Although the industry reported a small (0.28%) increase in sales year on year, they did not report the increase in the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013.

The Australian Government's Department of Health has released figures showing that total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

- \$5.135 billion in September 1959;
 - \$3.508 billion in December 2012 (when standardised packaging was introduced);
- and
- \$3.405 billion in March 2014.

This is supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced. Clearances are an indicator of tobacco volumes in the Australian market.

In June 2014, Professor Ashok Kaul of the University of Saarland and Professor Michael Wolf of the University of Zurich published research funded by Philip Morris International, purporting to show that smoking prevalence had not been reduced in Australia by standardised packaging legislation in the first year since its

implementation. Even if this analysis were correct, it would be largely irrelevant, since the primary purpose of the legislation is to discourage young people from starting to smoke, and thus contribute to reducing smoking prevalence rates over an extended period of time. A one year effect, even if the Kaul and Wolf methodology was adequate, would be unlikely to show up clearly in monthly prevalence data that is affected by a range of factors, including other tobacco control policies, seasonality, and unstable monthly estimates (some monthly sample sizes in the survey data set used by Kaul and Wolf are substantially smaller than others).

Other Evidence from Australia

Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service. Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present.

Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment concludes there is no evidence at all that this is the case from the experience in Australia. Indeed transaction times have tended to decline post implementation not increase. Most recently, research published at the end of May, which may not been taken into account in the IA, reported that the claim that plain packaging would negatively impact small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia.

As highlighted by the recent survey of Directors of Public Health:

- 100% of those who responded supported the introduction of standardised packaging and considered the major impact to be to discourage children and young people from taking up smoking, whilst also having a positive impact on encouraging smokers to quit.

- There is good local engagement and activity on this issue – however national action is needed in order to reduce health inequalities and the health and wider societal harm caused by tobacco.

ADPH strongly believes that there is extensive evidence to support the case for immediate action by Government on standardised packaging for tobacco products in order to reduce health inequalities and the health and wider societal harm caused by tobacco; and supports the conclusions of the systematic review of the evidence for plain tobacco packaging, commissioned by the DH and carried out by the Public Health Research Consortium, 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; that is, that plain packaging would reduce the attractiveness and appeal of tobacco products, it would increase the noticeability and effectiveness of health warnings and messages, and it would reduce the use of design techniques that may mislead consumers about the harmfulness of tobacco products." http://phrc.lshtm.ac.uk/project_2011-2016_006.html)

Standardised packaging is backed by the Smokefree Action Coalition. The consensus of medical professionals, public health and other relevant experts is that it would make an important positive contribution to reducing the harm caused by tobacco consumption.

Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes. It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke.

Section 94 of the Children and Families Act 2014 was passed overwhelmingly in both the House of Lords and House of Commons, following a strong cross-Party campaign in support of the policy. It therefore demonstrably has majority support in Parliament.

Opposition to standardised packaging has been driven and financed by the tobacco industry, which requires young people to start smoking in large numbers every year, as its previous consumers quit or die prematurely from smoking-related disease.

Following the six week consultation on the draft regulations, the Government will then have to notify the European Union of the draft Regulations, under the Technical Standards and Regulations Directive 98/34/EC. This process can take up to six months. Therefore, time is now short if Parliament is to get the opportunity to vote on the Regulations before the General Election. If this opportunity were now to be missed, it would be widely understood as a public health disaster and as suggesting that the tobacco industry still has excessive influence at the heart of Government.

- [Redacted]
3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

ADPH welcomes the draft regulations, which we consider, with the exception of the exclusion of specialist tobacco products as discussed below, are fit for purpose.

However, ADPH also believes that the regulations should also apply to specialist tobacco products including cigars and cigarillos. While we note the explanation for their exclusion is their low rate of use by young people, we consider that it sets an unhelpful example if any smoked tobacco products are excluded from the regulations, since this might be interpreted as endorsement of the idea that they are in some way less harmful to health.

Furthermore, in the Australian regulations, the dimensions of the cigarettes and packs are stipulated, and we suggest that this may be useful in preventing any attempt to circumvent the intent of the regulations by introducing an element of branding. In particular we would like to see the UK prohibit the sale of 'slim' cigarettes. We also recommend that the UK prohibit the use of misleading brand variant names such as 'slim', 'natural', 'organic', 'without additives', 'without flavours' as well as 'smooth', 'gold' and 'silver'.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Illicit trade and cross border shopping

For the reasons stated in answer to Q.2 above we do not think the evidence justifies inclusion in "other key non-monetised costs" of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK".

The UK previously introduced a major change in packaging and labelling in advance of the rest of Europe by introducing coloured picture warnings on packs from 1 October 2008. As shown in table 8 of the IA this did not lead to an increase cross border shopping. Indeed both cross border shopping and illicit trade declined over

the period between introduction and full implementation from October 2008 to September 2010. As the IA acknowledges this is because the greatest influence on cross border shopping is down to external factors such as the £/€ exchange rate and the number of passenger journeys and therefore just as with graphic warnings standardised packaging is unlikely to have a significant impact.

Impact on Retailers

Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80%. Female smoking prevalence continued to rise and reached a peak of 45% in the mid-1960s.²⁷ Since then smoking prevalence amongst both men and women has declined significantly and is now under 20% and government policy is designed to sustain and increase this trend. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. (see table below from the HMRC Tobacco Factsheet November 2013). Small retailers have had to adjust to this decline and will continue to have to do so, it is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

HMRC clearance data also shows the importance of the government's anti-smuggling strategy in supporting retailers. The impact is clearest with respect to handrolled tobacco. At its peak the illicit market share of handrolled tobacco was estimated to be over 60%, most recent estimates by HMRC suggest that it has fallen to 36%. This is matched by a growth in the amount of taxed HRT released for consumption which rose 2.8 million kilograms in 2002/3 to 6.2 million kilograms in 2012/13.

The impact of underlying trends in sales for independent retailers need to be taken into account too, particularly given the rise of small outlets set up by large retailers in the UK. An economic analysis of the impact of point of sale display legislation in Ireland using AC Nielsen data concluded that no statistically significant change in cigarette pack sales was observed following implementation for the legislation over and above seasonal and underlying trends, and that small and independent retailers are facing a broader and longer-term decline in sales generally which is most likely due to other causes. We would expect to see the same pattern occurring in the UK both as a result of the implementation of point of sale display legislation and standardised packaging and recommend to DH that such data should be gathered for the UK as part of the evaluation of the impact of the legislation.

The Impact Assessment page 28 p.112 states 'anecdotally the profit margins on the sale of tobacco may be relatively low.' This is corroborated by information provided to ASH by a retailer in Gateshead, John McClurey, a member of the ASH advisory council. According to John McClurey profit margins on cigarettes average around 4.5% compared to profits on other products on sale in his shop which average around 22%. This means that while tobacco currently amounts to around 50% of his sales turnover it is a much smaller proportion of his profits. In fact he estimates that

currently tobacco sales only amount to about 20% of his profits with 80% of his profits coming from sale of non-tobacco products. To illustrate the point John McClurey has told us that if a customer buys a packet of chewing gum he makes around 17 pence in profit compared to 14 pence on a price-marked packet of 10 John Player Special. Plus a price-marked pack of 10 JPS cigarettes costs £3.50, while a packet of chewing gum only costs 50 pence, so the customer buying chewing gum as opposed to cigarettes has £3 left over available to spend on other items.

For a shop where tobacco only accounts for 20% of turnover, which is the average estimated in the ACS report referenced in the IA, the proportion of profits would be even smaller at around 5% for tobacco compared to 95% for non-tobacco products.

Comprehensive data on prices and profit margins is available from wholesalers such as Bookers who can be contacted via their website <https://www.booker.co.uk/help/contactus.aspx>. Data on the proportion of tobacco sales accounted for by different types of outlet is available from AC Nielsen who can also provide data on the trends in sales of tobacco between different types of retailers over time. We recommend that the DH get in touch with Bookers and AC Nielsen for more information.

Consumer Surplus

In economic theory, consumer surplus is usually defined as the difference between the total amount that consumers are willing and able to pay for a good or service and the total amount that they actually do pay.

In point 160 of the IA it is accepted that the theory of consumer surplus is more difficult to apply both 'in principle and practice' to an addictive product like tobacco. The rationale for including "lost consumer surplus" as a potential cost of standardised packaging does not stand up to scrutiny. In paragraph 21, this is defined as "the loss of the ability of those who continue to smoke to gain the intangible benefit associated with smoking a particular brand that only the packaging of that brand, as it is currently available, can produce". We note that no attempt is made to describe the alleged "intangible benefit", for the very good reason, we would suggest, that it is illusory.

In any case if, in practice, standardised packaging were to lead to some brand switching by consumers, from high price to low price cigarette brands, or if the tobacco industry were to respond to the introduction of standardised packaging by cutting prices, this should be dealt with quickly by additional increases in tobacco taxation, above those currently required by the duty escalator.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

How to get involved in the consultation

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

Completing the online form on the Department of Health website at:

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

- o **Filling in the response form by downloading it at:**

<https://www.gov.uk/government/consultations>

- o **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- o **Posting your response to**

Department of Health
Standardised Packaging Tobacco Consultation
PO Box 1126
CANTERBURY
CT1 9NB



Association of Directors of Public Health (UK)

Association of Directors of Public Health – submission to consultation on the introduction of regulations for standardised packaging of tobacco products, 2014

The Association of Directors of Public Health (ADPH) is the representative body for Directors of Public Health (DsPH) in the UK. It seeks to improve and protect the health of the population through DPH development, sharing good practice, and policy and advocacy programmes. www.adph.org.uk

Directors of Public Health (DsPH) are the frontline leaders of public health working across health improvement, health protection, and health care service planning and commissioning.

ADPH has a strong track record of collaboration with other stakeholders in public health, including those working within the NHS, local authorities, government and other sectors.

ADPH is a member of the Smokefree Action Coalition – a group of more than 190 organisations - committed to promoting public health and reducing the harm caused by tobacco. <http://www.smokefreeaction.org.uk/>

Overview of ADPH views

1. ADPH has previously submitted detailed responses to a range of consultation exercises related to tobacco control measures – consistently calling for government to implement evidence-based national action to:
 - reduce the harm and health inequalities caused by tobacco – particularly in the most deprived communities;
 - reduce the burden of premature death and disability caused by tobacco;
 - protect the future health of children in the UK (in light of the 200,000-plus children in the UK who take up smoking each year).
2. In July 2013, the Association of Directors of Public Health expressed its strong disappointment and concern over the Government's announcement that it would not move forward with action on the introduction of a minimum unit price for alcohol and standardised packaging of tobacco products. In light of these decisions, and concerns that the Government was seemingly allowing vested interests to adversely influence policies intended to improve the public's health, the ADPH President Dr Janet Atherton confirmed that it was no longer tenable for the Association to be involved with the Government's Responsibility Deal, and that therefore the Association of Directors of Public Health was:
 - withdrawing from involvement with the Responsibility Deal in its entirety;
 - calling on the UK Government to take action now to reduce health inequalities and the health and wider societal harm caused by tobacco and cheap alcohol across the UK, by moving ahead with minimum unit pricing for alcohol and standardised packaging for tobacco products.
3. In doing so she commended the approach being taken by the Scottish Government to pursue measures – including standardised packaging for tobacco products - that would contribute to reducing tobacco related harm and improve public health in Scotland; and also welcomed the Welsh Government's expression of concern at the delay in progressing with standardised packaging.
4. ADPH therefore welcomed the Government's subsequent establishment of an Independent Review of standardised packaging for tobacco products and also welcomes the current consultation on regulations for standardised packaging of tobacco products.

5. Given the expertise, status and influence of DsPH as local leaders for public health*, we considered it was important to collate and submit DPH views, as additional evidence to inform the Review on standardised packaging, and so ADPH, in collaboration with the Faculty of Public Health (FPH) and with support from Public Health England (PHE), undertook a survey of all Directors of Public Health in England to elicit their views on the issue of standardised packaging and the likely impact on local communities.
6. The survey – which was sent to the **132 DsPH in post in England - took place between 23rd December 2013 and 7th January 2014. Given the tight timescale for submitting evidence to the Review (which included the 2-week Christmas holiday period) we believe the high rate of response (78 responses) indicates the importance of this issue to DsPH. Given more time, we believe an ever higher response rate would have been achieved.
7. The key points highlighted by the survey were:
 - 100% of those who responded supported the introduction of standardised packaging and considered the major impact to be to discourage children and young people from taking up smoking, whilst also having a positive impact on encouraging smokers to quit.
 - 94% of the Directors of Public Health who responded considered that standardised packaging would have a positive impact on reducing health inequalities, particularly in relation to children and young people, and to those from deprived communities - including children.
 - 65% of the Local Authorities had considered the issue of standardised packaging and the majority discussed this at the Health and Wellbeing Board or with lead Cabinet Members for Health & Wellbeing, Council Leaders and other Council members. Tobacco Control Alliances were also used to consider the issue. 29% of Councils had adopted a formal position on standardised packaging.
8. The questions, answers and analysis of the responses are set out in Appendix A.

**Directors of Public Health (DsPH) are designated Chief Officers within upper tier/unitary English Local Authorities. DsPH and their Local Authorities have statutory responsibilities for improving the health of their local population. DsPH are the chief source of advice and expertise for local government on tackling health inequalities, with a focus on health improvement, health protection and healthcare public health. Within this remit is responsibility for wider tobacco control activities and smoking cessation (including NHS Stop Smoking Service).*

***At the time of the survey there were 132 DPH posts across the 152 top-tier LAs in England – some of which were employed across more than one LA or were 'covering' LAs without a substantive DPH in place.*

ADPH response to specific consultation questions

Consultation Question 1: Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

9. Sir Cyril Chantler's covering letter to the Secretary of State stated: *"It is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking" and "the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time in the uptake and prevalence and thus have a positive impact on public health."*
10. The conclusions of a report by Professor David Hammond for the Irish Department of Health¹ backs up Sir Cyril Chantler's view:
"Overall, the existing evidence on plain (standardised) packaging supports four primary conclusions:
 - 1) *Plain packaging will reduce smoking initiation among youth and young adults.*

¹ Hammond, D. Standardized Packaging of Tobacco Products. Evidence Review. Prepared on behalf of the Irish Department of Health. March 2014.

- 2) Plain packaging will promote smoking cessation among established smokers.
- 3) Plain packaging will support former smokers to remain abstinent.
- 4) Plain packaging will help to denormalize tobacco use."

11. ADPH welcomed the response of Jane Ellison MP, Minister for Public Health, to the Chantler Review. She said that the report found standardised packaging was "very likely to have a positive impact" on public health. She went on to say: "In the light of the report and the responses to the previous consultation in 2012, I am minded to proceed with introducing regulations to provide for standardised packaging" and that she wished to "proceed as swiftly as possible".
12. The Government's Chief Medical Officer, Dame Sally Davies, also wrote to the Minister for Public Health supporting the conclusions of the Chantler Review and the Introduction of standardised packaging.²
13. ADPH strongly believes that the case for standardised packaging has been made, and that the Government should lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible. Given that notification to the European Union of the intended Regulations will take six months, there is now only a short time available to do this before the 2015 General Election.
14. ADPH believes that the Government should resist efforts by the tobacco industry and its surrogates to delay decision-making and laying of the regulations before Parliament. In this consultation response we review some of the industry's arguments and show them to be either weak or entirely without foundation.

Consultation Question 2: Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?

Standardised packaging needs to be part of a comprehensive strategy

15. Tobacco control policies must be pursued in parallel if they are to have their best possible effect in reducing prevalence rates. The optimum date for implementation of standard packaging would be May 2016 at the same time as implementation of the EU Tobacco Products Directive, which includes updated larger health warnings and graphic warnings on the front of the packs.
16. Standardised packaging was introduced in Australia as part of a comprehensive strategy, which included larger health warnings, and a sustained mass media campaign which, on a per capita basis would cost the equivalent of £33.7 million a year in the UK, a far higher amount than is currently being spent here. Australia is also committed to annual increases in tobacco taxation of 12.5 per cent over inflation each year for four years, starting in December 2013.³
17. The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016-2020, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:
 - Increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;

² Hansard, H.C column 1018 et seq. (3rd April 2014); <http://www.parliament.uk/news/2013-04-03/written-questions-to-the-secretary-of-state-for-health-489244>

- making stop smoking services mandatory and ensuring delivery to a high quality standard;
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;
- introducing tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting; and
- introducing further levies on the industry to fund stop smoking services and other tobacco control initiatives, and to meet health costs caused by tobacco consumption.

Illicit Tobacco Trade: General

18. A principal tobacco industry argument against standardised packaging has been that it will inevitably lead to an increase in the illicit tobacco trade. There is no good reason to accept this argument, since there is no plausible mechanism of action, and indeed evidence published since the 2012 consultation suggests that it is false.
19. There is no plausible mechanism of action because all the key security features on existing packs of cigarettes would also be present on standardised packs, and additional markings will be required under the EU Tobacco Products Directive. These include unique identifiers, coded numbering and covert anti-counterfeit marks. Jane Ellison, Parliamentary Under-Secretary of State for Health, said in a November 2013 Parliamentary debate that: *"I am grateful to those hon. Members who have made the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route."*⁴
20. The production costs of illicit cigarettes (including packaging) are very low. In Paraguay costs can be as low as 5 US cents a pack, a Jin Ling pack in Kaliningrad or a Chinese counterfeit pack may cost about 20 cents a pack to produce. Counterfeiters are also able to produce quality and apparently genuine packaging at low prices in a short time. It follows that outside packaging is a very poor indicator of whether a pack of cigarettes is licit or illicit.⁵ The only obvious circumstances in which external packaging could be useful in this respect is precisely if standardised packaging is introduced – which would of course enable easy visual identification of "cheap white" brands (ones with no licit market in the UK) and diverted licit brands (where the first destination market was in a country without standardised packaging, and the product has been diverted into illicit channels).
21. Number codes will develop further into an international standard system because of the requirements of Article 15 of the revised EU Tobacco Products Directive and Article 8 of the Illicit Trade Protocol, a subsidiary treaty under the WHO Framework Convention on Tobacco Control, to which the UK is a Party.
22. Article 15 of the Tobacco Products Directive states that: *"Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet."*⁶
23. Article 8.3 of the Illicit Trade Protocol states that: *"With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a*

⁴ Hansard: backbench business debate, H.C Column 477, (7 November 2013)

⁵ Joossens L. *Smuggling, the Tobacco Industry and Plain Packs*, Cancer Research UK, November, 2012

⁶ Revised EU Tobacco Products Directive: Article 15

period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party".⁷

24. It should be noted that Philip Morris International has developed a coding system called "Codentify", which the company has licensed for free to JTI, IT and BAT. The four tobacco multinationals have set up a "Digital Coding and Tracking Association", based in Zurich. According to PMI, the system is based on unique twelve digit codes, which enable enforcement authorities to determine key information including: date, time, factory and line of production and intended target market. Since the codes are based on a secure algorithm, it is claimed that it would be a simple matter to identify "fake" codes on illicit packaging. PMI's promotional material claims that "Codentify"... "makes the leap into the digital age and can meet the demands of governments that want to improve tax revenue collection, the robustness of verification processes and supply chain security ... When it comes to protecting government tax revenues, securing the supply chain and fighting illicit trade, Codentify offers a highly advanced, secure and cost-effective solution for the 21st century".⁸
25. The tobacco industry is promoting contradictory messages depending on which issue it is addressing: on the one hand it claims to have a robust coding system which enables it to identify counterfeit products, and on the other it claims that pack design is vital in combatting illicit trade. While we do not support the use of a coding system which is proprietary to the tobacco industry as is the case with Codentify it is certainly the case that this or any other coding systems independent of the industry could be used on standardised packs as readily as on branded ones.
26. Not surprisingly therefore Andrew Leggett, Deputy Director for Tobacco and Alcohol Strategy at HM Revenue and Customs has said about standardised packaging that "we're very doubtful that it would have a material effect [on counterfeiting and the illicit trade in tobacco]".⁹ This conclusion was supported by the House of Commons Home Affairs Select Committee, in its report on the illicit tobacco trade published in June 2014. The Committee reported that: "We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government's drive towards introducing standardised packaging."¹⁰

Illicit Tobacco Trade: Australia

27. The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging.¹¹
28. These claims were examined during the Chantler Review and shown to be unsupported, a fact that was effectively admitted during Review meetings with representatives of the tobacco industry in Australia.¹² The Australian Government and customs officials have also rejected tobacco industry claims that illicit trade in Australia has risen since the introduction of

⁷ Text of the Illicit Trade Protocol: Article 8.3

⁸ Codentify: Protecting Government Revenues, Securing the Supply Chain, Fighting Illicit Trade. http://www.pmi.com/eng/documents/Codentify_E_Brochure_English.pdf

⁹ Oral evidence to the House of Lords European Union Sub Committee (Home Affairs) on 24th July 2013.

¹⁰ Home Affairs Select Committee First Report on Tobacco Smuggling: paragraph 44

¹¹ Greenblat, E. Plain packaging making "no impact" on Australian smokers, say tobacco chiefs: *The Australian* 4th March 2014

¹² Chantler Review, Notes of Australia-based meetings; see for example exchange with Mark Connell of BAT Australia, page 38.

standardised packaging.¹³ In March 2014 the *Sydney Morning Herald* reported that there had been only one seizure of counterfeit plain packs since December 2012.¹⁴

29. In response to this article, the paper was contacted by Sonia Stewart, the former Head of Corporate Affairs & Legal for Imperial Tobacco Australia, who has now left the industry. In her job at IT Australia she had "commented numerous times in the media during 2011-2013 about the anticipated impact of plain packaging", claiming for example that "the legislation will make the counterfeiters' job both cheaper and easier by mandating exactly how a pack must look".¹⁵ She wrote to the paper that "based on these figures from Australian Customs authorities, there doesn't appear to be any evidence that plain packaging itself has caused an increase in tobacco smuggling." She added: "Imperial Tobacco did expect to see an increase in tobacco smuggling because of plain packaging, but based on the figures from Australian Customs it looks like those predictions were simply wrong."¹⁶

Tobacco Consumption in Australia

30. The tobacco industry has also claimed that tobacco consumption in Australia has risen since the introduction of standardised packaging. Again, independent evidence does not support this proposition.

31. In November 2013 a study by the consultancy firm London Economics, funded by Philip Morris, reported that since the introduction of plain packaging in Australia their survey showed no statistically significant change in smoking prevalence. This report has been sharply criticised by, among others, the Cancer Council of Victoria¹⁷, since:

- The survey was conducted on the mistaken assumption that adult smoking prevalence ought to have markedly declined in the immediate aftermath of the policy's implementation, which was not the assumption underpinning the policy intervention.
- The report used an online survey panel which was not representative of the general population (for example, the panel's smoking prevalence rate was higher than the Australian average).
- The survey had a sample size of 5,000, which is nowhere near big enough to pick up the sort of declines in smoking prevalence expected from one year to the next. To measure a statistically significant decline of, for example half a percentage point, which is the sort of magnitude one might expect to see over a twelve month period, would have required a sample size of around 90,000.

32. The tobacco industry in Australia has reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013,¹⁸ and the industry and its front groups in the UK have claimed that this showed standardised packaging was not working. Although the industry reported a small (0.28%) increase in sales year on year, they did not report the increase in the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013.¹⁹

33. The Australian Government's Department of Health has released figures showing that total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

¹³ See p.49 of the Explanatory Memorandum to the Australian Excise Tariff Amendment (Tobacco) Bill 2014 and p.8 of Sir Cyril Chantler's report.

¹⁴ Corderoy, A Tobacco industry claims on impact of plain packaging go up in smoke. *Sydney Morning Herald*, 12 March 2014.

¹⁵ Australia cigarette plain packaging law upheld by court *BBC Business News Online*, 15 August 2012

¹⁶ Sonia Stewart, Unpublished Letter to the *Sydney Morning Herald*, 12 March 2014

¹⁷ Cancer Council Victoria, Comments of the Philip Morris funded London Economics report "An analysis of smoking prevalence in Australia: final", 2013, Cancer Council Victoria: Melbourne.

¹⁸ Kerr, C. Labor's plain packaging fails as cigarette sales rise. *The Australian*, 6 June 2014

¹⁹ Is Smoking Increasing In Australia? *Guardian Datablog*, 6 June 2014

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012 (when standardised packaging was introduced); and
- \$3.405 billion in March 2014.

34. This is supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced. Clearances are an indicator of tobacco volumes in the Australian market.²⁰

35. In June 2014, Professor Ashok Kaul of the University of Saarland and Professor Michael Wolf of the University of Zurich published research funded by Philip Morris International, purporting to show that smoking prevalence had not been reduced in Australia by standardised packaging legislation in the first year since its implementation.²¹ Even if this analysis were correct, it would be largely irrelevant, since the primary purpose of the legislation is to discourage young people from starting to smoke, and thus contribute to reducing smoking prevalence rates over an extended period of time. A one year effect, even if the Kaul and Wolf methodology was adequate, would be unlikely to show up clearly in monthly prevalence data that is affected by a range of factors, including other tobacco control policies, seasonality, and unstable monthly estimates (some monthly sample sizes in the survey data set used by Kaul and Wolf are substantially smaller than others).²²

Other Evidence from Australia

36. Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service.²³ Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

37. Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present.²⁴

38. Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment concludes there is no evidence at all that this is the case from the experience in Australia, indeed transaction times have tended to decline post implementation not increase. Most recently, research published at the end of May, which may not been taken

²⁰ Tobacco facts and figures: Australian Department of Health, 19 June 2014

²¹ The (Possible) Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis: University of Zurich Department of Economics, Working Paper no 165

²² Diehelm, P, McKee, M. Tobacco industry-funded research on standardised packaging: there are none so blind as those who will not see! Tobacco Control; 2014 doi:10.1136/tobaccocontrol-2014-051734

²³ Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis Medical Journal of Australia 2014; 200: 29-32

²⁴ Zacher, M et al. Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips Addiction, 2014; 109: 653-663 - doi: 10.1111/add.12486

into account in the IA, reported that the claim that plain packaging would negatively impact small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia.²⁵

Consultation Question 3: Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

39. ADPH welcomes the draft regulations, which we consider, with the exception of the exclusion of specialist tobacco products as discussed below, are fit for purpose.
40. However, ADPH also believes that the regulations should also apply to specialist tobacco products including cigars and cigarillos. While we note the explanation for their exclusion is their low rate of use by young people, we consider that it sets an unhelpful example if any smoked tobacco products are excluded from the regulations, since this might be interpreted as endorsement of the idea that they are in some way less harmful to health.
41. Furthermore, in the Australian regulations, the dimensions of the cigarettes and packs are stipulated, and we suggest that this may be useful in preventing any attempt to circumvent the intent of the regulations by introducing an element of branding. In particular we would like to see the UK prohibit the sale of 'slim' cigarettes. We also recommend that the UK prohibit the use of misleading brand variant names such as 'slim', 'natural', 'organic', 'without additives', 'without flavours' as well as 'smooth', 'gold' and 'silver'.²⁶

Consultation Question 4: Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Illicit trade and cross border shopping

42. For the reasons stated in answer to Q.2 above we do not think the evidence justifies inclusion in "other key non-monetised costs" of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK".
43. The UK previously introduced a major change in packaging and labelling in advance of the rest of Europe by introducing coloured picture warnings on packs from 1 October 2008. As shown in table 8 of the IA this did not lead to an increase cross border shopping. Indeed both cross border shopping and illicit trade declined over the period between introduction and full implementation from October 2008 to September 2010. As the IA acknowledges this is because the greatest influence on cross border shopping is down to external factors such as the £/€ exchange rate and the number of passenger journeys and therefore just as with graphic warnings standardised packaging is unlikely to have a significant impact.

Impact on Retailers

44. Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80%.²⁷ Female smoking prevalence continued to rise and reached a peak of 45% in the mid-1960s.²⁷ Since then smoking prevalence amongst both men and women has declined significantly and is now under 20% and government policy is designed to sustain and

²⁵ Wakefield M, Bayly M, Scolto M. Product retrieval time in small tobacco retail outlets before and after the Australian plain packaging policy: real-world study Tobacco Control 2013 - doi:10.1136/tobaccocontrol-2013-050987.

²⁶ Hammond D, Dockrell M, Arnott D et al. Cigarette pack design and perceptions of risk among UK adults and youth. European Journal of Public Health 2009; 19:631-7.

²⁷ Wald, N. & Nicolaides-Bouman, A. UK Smoking Statistics (2d ed.). OUP, 1991.

increase this trend. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. (see table below from the HMRC Tobacco Factsheet November 2013). Small retailers have had to adjust to this decline and will continue to have to do so, it is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

45. HMRC clearance data also shows the importance of the government's anti-smuggling strategy in supporting retailers. The impact is clearest with respect to handrolled tobacco. At its peak the illicit market share of handrolled tobacco was estimated to be over 60%, most recent estimates by HMRC suggest that it has fallen to 36%. This is matched by a growth in the amount of taxed HRT released for consumption which rose 2.8 million kilograms in 2002/3 to 6.2 million kilograms in 2012/13.

HM Revenue and Customs Tobacco Bulletin - November 2013



6 Historic Clearances

Financial Year	Cigarettes million sticks			Other Tobacco Products 000 kg			Total
	Home Produced	Imported	Cigarettes Total	Cigars	HRT	Other	
1991/92	83,392	10,134	93,498	2,107	4,058	2,081	8,247
1992/93	83,839	10,141	94,080	1,955	3,822	2,027	7,805
1993/94	87,229	7,285	79,514	1,724	3,181	1,785	6,690
1994/95	75,442	9,735	85,177	1,879	3,038	1,585	6,500
1995/96	71,759	9,059	80,828	1,501	2,558	1,347	5,405
1996/97	71,848	9,500	81,348	1,453	2,204	1,221	4,877
1997/98	79,978	11,707	91,683	1,649	1,949	1,148	4,841
1998/99	54,739	5,637	60,376	1,094	1,736	919	3,738
1999/00	64,443	10,488	74,929	1,389	2,184	980	4,553
2000/01	28,668	5,273	31,938	970	2,343	704	4,018
2001/02	45,581	5,691	51,272	618	2,748	832	4,198
2002/03	48,608	6,131	54,737	582	2,808	658	4,424
2003/04	52,297	4,812	57,109	968	3,213	828	4,827
2004/05	47,224	4,444	51,668	778	3,044	522	4,344
2005/06	47,539	4,911	52,350	744	3,409	494	4,647
2006/07	41,754	4,007	45,760	645	3,388	418	4,449
2007/08	42,258	3,682	45,940	568	3,741	388	4,697
2008/09	39,739	3,441	43,180	504	4,078	383	4,965
2009/10	44,839	4,258	49,097	555	5,840	415	6,811
2010/11	42,335	3,343	45,678	486	5,431	359	6,276
2011/12	39,829	2,684	42,513	458	6,238	333	7,025
2012/13	35,202	2,730	37,932	421	6,215	301	6,937

46. The impact of underlying trends in sales for independent retailers need to be taken into account too, particularly given the rise of small outlets set up by large retailers in the UK. An economic analysis of the impact of point of sale display legislation in Ireland using AC Nielsen data concluded that no statistically significant change in cigarette pack sales was observed following implementation for the legislation over and above seasonal and underlying trends, and that small and independent retailers are facing a broader and longer-term decline in sales generally which is most likely due to other causes. We would expect to see the same pattern occurring in the UK both as a result of the implementation of point of sale display legislation and standardised packaging and recommend to DH that such data should be gathered for the UK as part of the evaluation of the impact of the legislation.

47. The Impact Assessment page 28 p.112 states 'anecdotally the profit margins on the sale of tobacco may be relatively low.' This is corroborated by information provided to ASH by a retailer in Gateshead, John McClurey, a member of the ASH advisory council. According to John McClurey profit margins on cigarettes average around 4.5% compared to profits on other products on sale in his shop which average around 22%. This means that while tobacco currently amounts to around 50% of his sales turnover it is a much smaller proportion of his profits. In fact he estimates that currently tobacco sales only amount to about 20% of his profits with 80% of his profits coming from sale of non-tobacco products. To illustrate the point John McClurey has told us that if a customer buys a packet of chewing gum he makes around 17 pence in profit compared to 14 pence on a price-marked packet of 10 John Player Special. Plus a price-marked pack of 10 JPS cigarettes costs £3.50, while a packet of chewing gum only costs 50 pence, so the customer buying chewing gum as opposed to cigarettes has £3 left over available to spend on other items.
48. For a shop where tobacco only accounts for 20% of turnover, which is the average estimated in the ACS report referenced in the IA, the proportion of profits would be even smaller at around 5% for tobacco compared to 95% for non-tobacco products.
49. Comprehensive data on prices and profit margins is available from wholesalers such as Bookers who can be contacted via their website <https://www.booker.co.uk/help/contactus.aspx>. Data on the proportion of tobacco sales accounted for by different types of outlet is available from AC Nielsen who can also provide data on the trends in sales of tobacco between different types of retailers over time. We recommend that the DH get in touch with Bookers and AC Nielsen for more information.

Consumer Surplus

50. In economic theory, consumer surplus is usually defined as the difference between the total amount that consumers are willing and able to pay for a good or service and the total amount that they actually do pay.
51. In point 160 of the IA it is accepted that the theory of consumer surplus is more difficult to apply both 'in principle and practice' to an addictive product like tobacco. The rationale for including "lost consumer surplus" as a potential cost of standardised packaging does not stand up to scrutiny. In paragraph 21, this is defined as "the loss of the ability of those who continue to smoke to gain the intangible benefit associated with smoking a particular brand that only the packaging of that brand, as it is currently available, can produce". We note that no attempt is made to describe the alleged "intangible benefit", for the very good reason, we would suggest, that it is illusory.
52. In any case if, in practice, standardised packaging were to lead to some brand switching by consumers, from high price to low price cigarette brands, or if the tobacco industry were to respond to the introduction of standardised packaging by cutting prices, this should be dealt with quickly by additional increases in tobacco taxation, above those currently required by the duty escalator.

Conclusions

53. As highlighted by the recent survey of Directors of Public Health:
- 100% of those who responded supported the introduction of standardised packaging and considered the major impact to be to discourage children and young people from taking up smoking, whilst also having a positive impact on encouraging smokers to quit.
 - There is good local engagement and activity on this issue – however national action is needed in order to reduce health inequalities and the health and wider societal harm caused by tobacco.

54. ADPH strongly believes that there is extensive evidence to support the case for immediate action by Government on standardised packaging for tobacco products in order to reduce health inequalities and the health and wider societal harm caused by tobacco; and supports the conclusions of the systematic review of the evidence for plain tobacco packaging, commissioned by the DH and carried out by the Public Health Research Consortium, 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; that is, that plain packaging would reduce the attractiveness and appeal of tobacco products, it would increase the noticeability and effectiveness of health warnings and messages, and it would reduce the use of design techniques that may mislead consumers about the harmfulness of tobacco products." http://phrc.lshtm.ac.uk/project_2011-2016_006.html)
55. Standardised packaging is backed by the Smokefree Action Coalition.²⁸ The consensus of medical professionals, public health and other relevant experts is that it would make an important positive contribution to reducing the harm caused by tobacco consumption.
56. Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes.²⁹ It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke.
57. Section 94 of the Children and Families Act 2014 was passed overwhelmingly in both the House of Lords and House of Commons, following a strong cross-Party campaign in support of the policy. It therefore demonstrably has majority support in Parliament.
58. Opposition to standardised packaging has been driven and financed by the tobacco industry, which requires young people to start smoking in large numbers every year, as its previous consumers quit or die prematurely from smoking-related disease.³⁰
59. Following the six week consultation on the draft regulations, the Government will then have to notify the European Union of the draft Regulations, under the Technical Standards and Regulations Directive 98/34/EC. This process can take up to six months.³¹ Therefore, time is now short if Parliament is to get the opportunity to vote on the Regulations before the General Election. If this opportunity were now to be missed, it would be widely understood as a public health disaster and as suggesting that the tobacco industry still has excessive influence at the heart of Government.

**Association of Directors of Public Health
August 2014**

²⁸ [Smokefree Action Coalition](#)

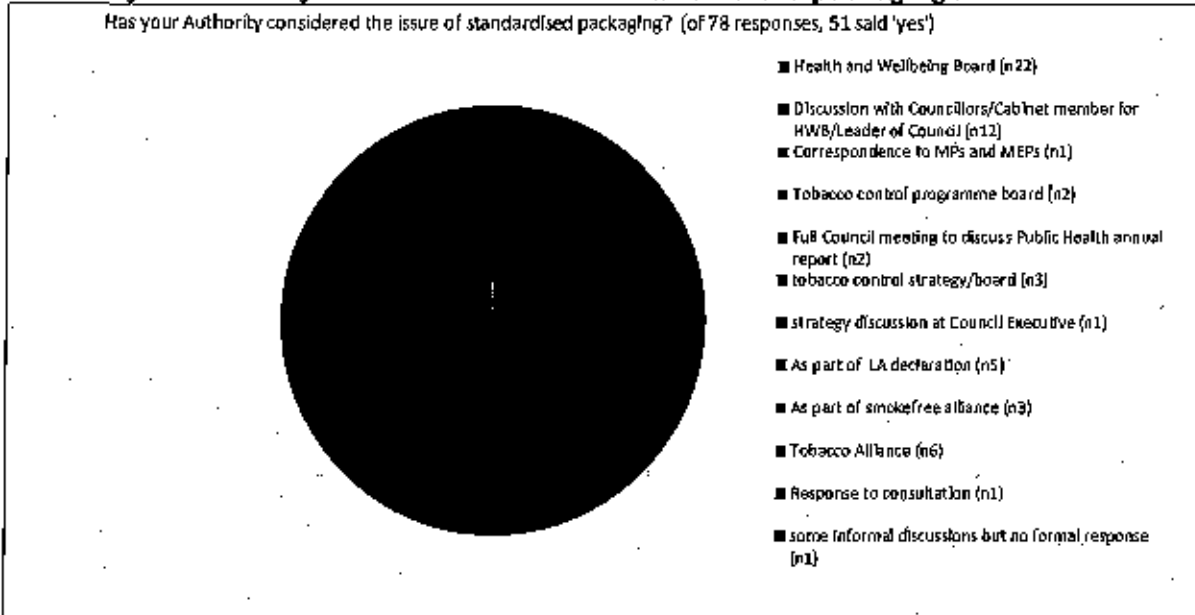
²⁹ The poll total sample size was 12,269 adults. Fieldwork was undertaken by YouGov between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). Respondents were shown what a standard pack could look like, including larger health warnings as in Australia.

³⁰ The pro-smoking group FOREST, which receives virtually all its funding from the tobacco industry, have hired the marketing agency Kreate to collect "digital signatures" for the "Hands off Our Packs" petition to the Prime Minister. Kreate describes itself as "an experiential agency that specialises in the delivery and staffing of face-to-face experiences". Agencies have also been commissioned directly by BAT to run a six week, "anti-plain packs roadshow", aiming to sign up 100,000 people to oppose plain packs. The company is reported to have allocated £500,000 to the activity. Over 100 people a day will be working on this campaign. ASH recommends that consultation responses generated in this way should be regarded by the Government as constituting a single response on behalf of the tobacco industry.

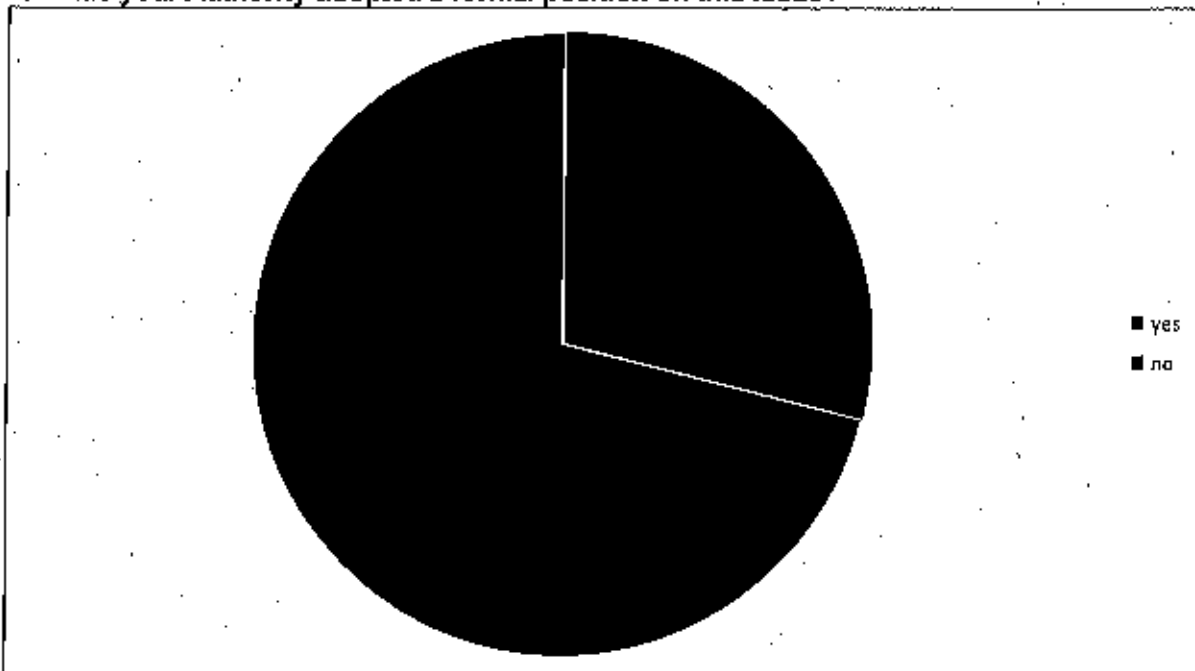
Appendix A – Survey of Directors of Public Health on standardised packaging

Summary of responses

Q 1. Has your Authority considered the issue of standardised packaging?

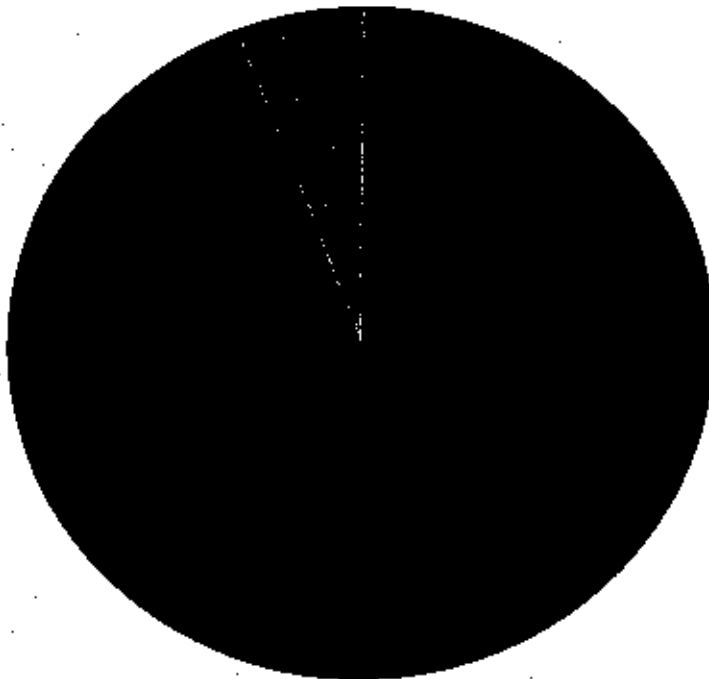


Q2. Has your Authority adopted a formal position on this issue?



Q3 (part 2). What impact would you expect standardised packaging to have?

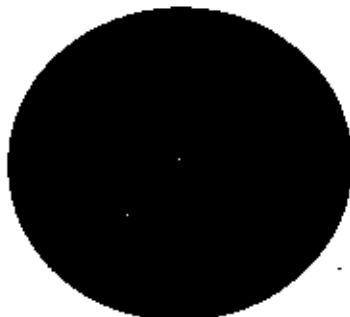
Q3 (part 2) What impact would you expect standardised packaging to have?



- reduction in purchase of cigarettes by young people (n2)
- reduce smoking initiation and/or in children and young people (n36)
- make smoking less attractive (n10)
- clear message as part of other measures (n2)
- impact on adults smoking (n3)
- discourage new smokers (age not specified) (n3)
- reduce opportunities for market segmentation (n3)
- reduce tobacco consumption (n4)
- increase in people stopping smoking (n4)

Q4. Do you consider that standardised packaging would have an impact on health inequalities in relation to any specific population groups? If yes, please specify which groups and how

Do you consider that standardised packaging would have an impact on health inequalities in relation to any particular groups?



- those from deprived backgrounds including children (n29)
- ethnic minorities (n2)
- children and young people (n35)
- people with health needs (mental health, long term and respiratory conditions) (n5)
- all groups (n1)
- young females (n3)
- existing smokers (n5)



HOUSE OF COMMONS
LONDON SW1A 0AA

Consultation response: Standardised Packaging of Tobacco Products

This is my formal response to the consultation on standardised packaging of tobacco products. For the avoidance of doubt, I oppose the proposals.

Declaration of Interest

I am the Member of Parliament for North Antrim, which hosts the largest tobacco factory in the UK. JTI/Gallaher is situated in my constituency's largest town of Ballymena, employing almost 1000 people. The industry contributes £57million directly into the local wage economy, whilst providing business for over 100 Northern Ireland companies, spending a further £16million. I also understand that the factory alone spends £74million on UK packaging materials. The significant economic contribution that this factory makes to my local constituency should in no way be underestimated, and since the 1800's, JTI and previously Gallaher have provided an income and livelihood for thousands of people and their families in Northern Ireland.

Opinion – Ian Paisley MP

At the outset of my response, I would like to once again make clear that I am not pro-smoking, and that I will support any proposal that has a solid evidence base and proven record behind it in reducing UK smoking rates. Plain packaging proposals are comprised of neither of these things.

It is important to note that this is now the second time in two years that the Government has conducted a consultation into this matter. You will be aware that I responded to the consultation in 2012, and I do not wish for this to be a re-written version of that document. However many of the arguments against plain packaging in 2012 were correct at that time and they remain correct now. I would like to also put on the record that I believe the disparity between the lengths of the two consultations is both disappointing and confusing. In 2012, you allowed 16 weeks for the standardised packaging consultation; however in 2014, you have provided the shortest possible time of 6 weeks. This is hugely disproportionate, given that Sir Cyril Chantler, tasked to review only the public health evidence for this measure, was allocated over three months to report. As there are many serious and wide-ranging potential ramifications of this policy impacting on thousands of people in the UK, should it be implemented, it would have been correct and proper to allow the same amount of time to consult on the broader consequences of the proposals.

For Northern Ireland, the entire month of July, which incorporates our "twelfth fortnight", to celebrate the victory in the Battle of the Boyne in 1690, is the time when most people will go on holiday. For some, the Department of Health's decision to conduct such a short consultation period over this holiday time is at best careless and at worst cynical. However I am of no doubt that others



will have made this feeling clear to you, as many already have to me. This is the first flaw of the consultation, which I believe adds to the general belief that this entire process is skewed and amounts to nothing more than 'tick-box' policy making.

As you know, I very much welcomed the Government's decision following the 2012 consultation into plain packaging, when in July 2013 it was announced that they would await evidence from Australia before deciding what action to take in the UK. Given that Australia is the only country in the world to have introduced this policy, and the fact that this is an extremely polarised debate, I welcomed this sensible and pragmatic approach. I also applauded the Prime Minister's statement in the House of Commons when he said: *"The decision not to go ahead, for the time being, with plain paper packaging for cigarettes is a decision taken by me with the health secretary for the very simple reason that there isn't yet sufficient evidence for it and there is considerable legal uncertainty about it."*

You can understand the general confusion, when just five months later in November, the Public Health Minister announced the Chantler Review, to look at the potential public health impacts of this policy. This was to be conducted by the "independent" paediatrician Sir Cyril Chantler, alongside two Department of Health Civil Servants, who would be seconded to him for the duration. For anyone to claim that a doctor and two Department of Health civil servants represented an "independent" review on this issue, is quite ridiculous, and again builds feeling that the entire process is flawed and constructed in such a way that the Department of Health are attempting to justify their reasoning for bringing in this policy by any means possible, should they decide to implement.

It is my belief that the Chantler Report is biased and skewed towards a pre-supported proposal. Not one single shred of hard, credible evidence is presented that actually proves that plain packaging, if implemented, would actually reduce the smoking rate across the UK. In fact, from what I can tell, almost the entire document is based on theory and perceived behavioural changes that advocates from the tobacco-control lobby have produced. How Sir Cyril can reach the conclusion that plain packaging would have a positive impact on smoking rates, when he has no data or evidence to substantiate this claim, is once again testament to the belief that this exercise was always designed to produce a pre-determined result. I also note that the report stated it was too early to draw conclusions on the policy's impact in Australia. Could Sir Cyril not have analysed the available data and decided this before his tax-payer funded trip to the country? Or was it the case that when he arrived in Australia, Sir Cyril found that the evidence there did not support the forgone conclusion of his review? I suspect there is an element of both in the answer, of which we will never know.

Here are some extracts from Sir Cyril's report, which essentially show the disparity between the evidence available and the conclusion he has reached. The report states that *"there are limitations to the evidence currently available"*, the evidence base *"is relatively modest"*, that the evidence was insufficient to *"quantify the size of the likely impact"*, and *"changes in consumption since the*



introduction of plain packaging in Australia are not yet clear". And of course his comments on Australia, where he says it is *"too early to draw definitive conclusions"* on the policy. I have to say, that from reading this abysmal attempt by Chantler to justify his claim that plain packaging would have a positive impact on smoking rates, I was astounded that the Public Health Minister, Jane Ellison MP, announced in Parliament on 3 April 2014 that she was *"minded to proceed"* with the policy, after reading the same report herself. Serious questions have to be raised about this policy and the process by which we have found ourselves at this stage.

It is a far cry from the Government's previous position, outlined clearly by the former Public Health Minister, Anna Soubry MP, in July 2013, when she stated, *"all good legislation should be based on firm, good strong evidence."* What is *"firm"*, *"good"* or *"strong"* about Chantler's theoretical and biased report is beyond me, and I find this lowering of standards by the Department of Health in the potential formation of Government policy, extremely regrettable.

There are too many theories and assumptions attributed to this policy to ever make it justifiable as a strong piece of legislation. When the Government brought the Children and Families Bill plain packaging amendment through the House of Commons earlier this year (a farce in itself as no final decision has been taken on this policy apparently), it reads that the Secretary of State can introduce plain packaging if they are satisfied the regulations *"may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18"*. What is regrettable, in my opinion, is that the Member of Parliament for Shireley, Philip Davies MP, proposed an amendment to this wording that changed *"may"* to *"will"*. This was rejected by the Government, and the Public Health Minister admitted that this would *"probably have the effect of stopping the use of powers altogether."* If ever there was an admittance that the Government has no confidence in the evidence behind this policy, then that is it. It was telling, and unsurprising, that the Government's amendment was presented to the House of Commons alongside cries of *"shame"* from the Conservative benches; the Conservative Party would do well to listen to its own back benches regarding this policy.

Knowing that the policy won't work, but with a determined Department of Health and the willingness of the Minister, there has been a continual attempt to lower the threshold of evidence needed for this policy to become law. It is exceptionally poor governance, and I suspect highly likely to be vehemently and rightly challenged in the courts, should the Government proceed, leaving the UK taxpayer open and vulnerable to having to pay billions in compensation. It would be a prime example of irresponsible and reckless behaviour by this Department of Health.

The wider ramifications for businesses throughout the tobacco chain have not been adequately assessed by the Department of Health, as demonstrated by the Regulatory Policy Committee's (RPC) amber rating of the impact assessment that has been produced for these proposals. Under the RPC's guidelines, the policy is not fit for purpose, and further evaluation of the impact on legitimate businesses should be considered. For me, all this indicates is that for the second time in two years,



there has been absolutely no regard shown for businesses or the economy by the Department of Health with regard to these proposals. However, we perhaps should not be surprised by this outcome, given the RPC's previous comments on the quality of the DQH's impact assessments in 2012:

"We have seen a wide range of proposals from DH, a high proportion of which received a Red rating. Many of these proposals were highly sensitive and complex measures for which we would therefore expect a high level of evidence and analysis in order to accept with the impacts presented. The most common flaw in these IAs was that analysis of wider economic impacts was incomplete. For example, tobacco IAs tended to provide a full analysis of the benefits, but failed to estimate the full economic costs to producers and retailers"

The 2014 IA contains a number of inaccuracies and assumptions throughout, many of which only involve guesswork and manufactured figures for the purpose of achieving the pre-decided outcome that is desired. Of particular concern for me though, is the acceptance within this document that plain packaging would increase the scale of the illicit trade in the UK, to the tune of around £2 billion over 10 years. However, this statistic then appears to be dismissed altogether within this IA. The fact that the Department of Health is purposefully ignoring such a serious issue for the UK in this way again proves how it is determined at all costs to get this policy through, regardless of what the wider ramifications may be for the wider UK economy. I would hope you are aware that the Non UK Duty Paid Market in the UK, according to HMRC, currently accounts for up to 16% of cigarettes and up to 48% of Roll-Your-Own tobacco consumed. The fact that any increase on these already significant numbers can be ignored, considering the damage that is already done to the UK (up to £3.1 billion annually), is grossly negligent.

The Government's previous position on this policy, when the need for robust and strong evidence was regarded as essential, was the correct approach to take. The Government should always advocate the need for policy based on real evidence; otherwise it would open up the UK Parliament for criticism and letting constituents down. In this case, all evidence available from Australia has not indicated any positive results for this policy. I understand that smoking levels have declined at the same rate as previously seen, and youth smoking has actually increased (although I am not necessarily attributing this to the introduction of plain packaging). Similarly KPMG produced a report on the illicit trade, which indicated that figures had increased by 2.1% in the year following the introduction of plain packaging. These are the statistics that should be considered and used to come to a final decision regarding this extreme measure. A set of perceived behavioural studies by health experts does not constitute an adequate basis for a policy that will have such a wide range of negative consequences, whilst having no impact on the rates of smoking. The UK cannot act prematurely and damage the economy in such a significant manner.

The Tobacco Products Directive has already been finalised by the EU this year. The health warnings on tobacco packs will increase to 65% of the pack on both sides leaving already very little room for branding, just enough to enable the differentiation between brands. And as a result of minimum



pack sizing, 70 of my constituents have been told they will lose their jobs in the Ballymena factory, which will be devastating for them and their families. For the UK Government to move further, and "gold-plate" the TPD with plain packaging, would represent a blatant lack of regard for my constituents and their livelihoods, something with which I would have enormous personal grievance – especially when there is no strong, robust or credible evidence for the policy.

To conclude, I believe it is absolutely ludicrous that the Public Health Minister is "minded to proceed" with proposals for plain packaging. The damage and wider ramifications for jobs, investment and the economy as a whole have not in any way been appropriately considered and the evidence behind this policy is simply not there. I am calling on the Government to reject these proposals once and for all, and to stop giving into external pressure from the tobacco control lobby, and from a Labour opposition who rejected the very same proposal themselves, whilst in Government in 2009. Instead, the Department of Health should be looking at viable and proven measures, such as education campaigns and fighting illegal tobacco. By bringing in a policy such as plain packaging, and increasing the illicit trade (as the 2014 IA itself accepts will be a risk), the Government would only be making tobacco more readily available to children on our streets. But most importantly for me, the damage this Department would be doing to jobs in my constituency, especially after the TPD, would demonstrate that there is no care whatsoever for my constituents or their livelihoods. Should the policy be implemented, it will show the extreme lack of regard that this Coalition (and supposedly pro-business) Government will have for the average worker throughout the UK, simply trying to earn a living. By heedlessly destroying jobs throughout the supply chain, for a naïve and ill-researched policy, would demonstrate how the UK Government would actually prioritise political point scoring over jobs. That would be a shameful position to take.

I will be extremely interested in reading the final consultation report and I trust this submission is taken seriously by the Department and the Ministers, who I hope will see common sense and allow better regulation to prevail, over political point scoring and bad Governance.

Yours Sincerely,

Ian Paisley MP



Department of Health



Llywodraeth Cymru
Welsh Government



The Scottish Government
Riaghais na h-Alba



Department of Health, Social Services and Public Safety
www.dhssps.gov.uk

Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

a. Are you responding (required):

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

b. Please provide your details and contact information:

Name of respondent (required)

Trans-Atlantic Business Council

Address of respondent (required):

Avenue de Cortenbergh 168, 1000 Brussels, Belgium

Contact email address (required):

[Redacted]

Now go to question f

c. Please provide your organisation's details and contact information:

Name of organisation (required):

Trans-Atlantic Business Council

Name of person providing submission (required):

[Redacted]

Job Title (required):

Contact address of organisation (required):

Contact email address (required):

[Redacted]

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

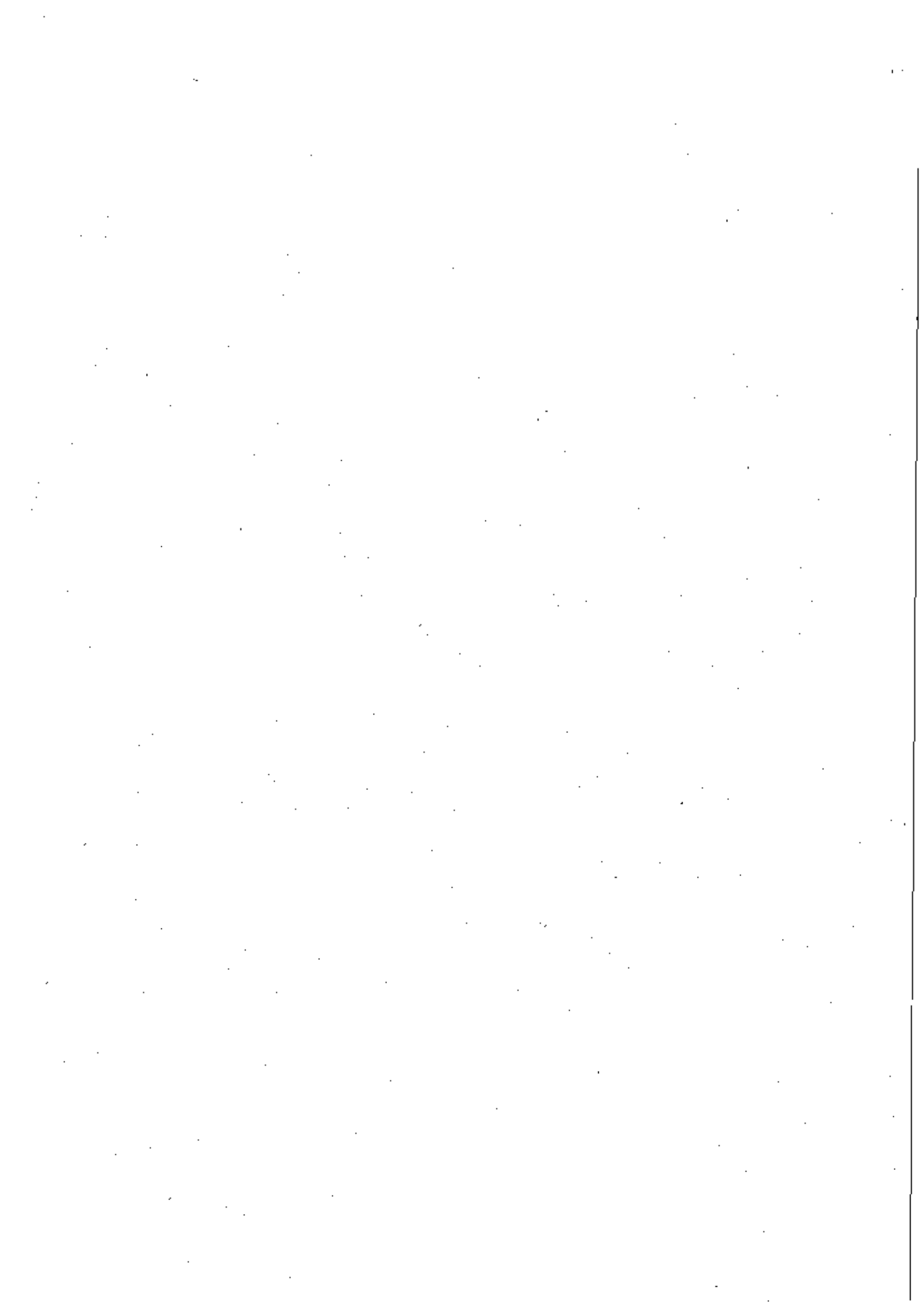
- Tobacco retailer (supermarket)
- Tobacco retailer (convenience store)
- Tobacco retailer (other type of shop or business)
- Specialist tobacconist
- Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)



If other, please tell us the type of organisation:

The Trans-Atlantic Business Council is a cross-sectoral business association representing more than 70 global companies and more than 5.6 million employees. TABC member companies are headquartered in the EU and the US.

f. Does your response relate to (required):

- United Kingdom
 England only
 Scotland only
 Wales only
 Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

- No
 Yes (please describe below)

If yes, please describe:

Among TABC's 70 member companies, 2 are from the tobacco industry.

h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

The report of the Chantler Review deals with potential effects of standardized packaging of tobacco products on public health. TABC does not question the findings relating to health and tobacco consumption and recognizes that governments have the authority to regulate when necessary to protect the public interest.

However, the effects on public health are not the only aspects to consider when deciding whether to introduce standardized packaging. Impacts on Intellectual Property Rights (IPRs) and illicit trade have to be taken into account as well as potential compensation costs for expropriation of trademarks. In particular, it is important to recall that such draft regulations would have significant impact on IPRs (see question 3) and the consequences on IPRs should be better examined. IPRs or other legal issues have not been considered for the policy deliberation process after the UK 2012 consultation, including in the Chantler Review.

TABC is also concerned about the Chantler Review's findings on illicit trade. It does not appear that these findings enable the Government to carefully take into account the impact and risks of standardized packaging on illicit trade. TABC is worried about the problem of illicit trade for all kind of industries. The European Commission report on EU customs enforcement of IPR in 2013, published on 31 July 2014, shows that the customs authorities in the EU detained almost 36 million items which are suspected of IPRs 2013.

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

There have been two sets of developments since 2012, which are important to refer to:

(a) Legal challenges against the Australian plain packaging law before the World Trade Organisation (WTO)

Since the end of the 2012 consultation, five countries (Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia) filed complaints at the WTO in connection with the Australian plain packaging law for tobacco products. These countries have based their complaints on the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Paris Convention for the

Protection of Industrial Property (Paris Convention) and the Technical Barrier to Trade Agreement (TBT). The UK is likely to have to face similar complaints and proceedings at the WTO. It could be better to wait for the outcome of these challenges before any government decides to proceed with standardized packaging legislations.

(b) Illicit trade

The Australian experience since the policy was implemented in October 2012 provides further evidence of the connection between standardized packaging and an increase in the illicit trade. The illicit trade in the tobacco sector remains a major problem at the international and UK levels. HM Revenue and Customs estimated the loss to the UK Government at up to £2.9bn in 2012-13. Standardized packaging will then increase the risk of illicit trade. A study by KPMG found indeed that overall the illicit trade increased from 11.8% of the total Australian tobacco market in 2012 to 13.9% in 2013, driven not only by counterfeit and contraband but also the emergence of new unlicensed brands with no legitimate distribution in Australia, such as 'Manchester'.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

Since its submission to the previous consultation in 2012 consultation, TABC's position remains the same: IPRs are the core element of a barrier-free transatlantic market that serves as a catalyst for global trade and investment liberalization and help stimulate innovation, job creation and economic growth. TABC is therefore very concerned about the proposed draft regulations that would abrogate trademark rights for an entire industry with significant consequences for all other IPR holders, and would be in breach of EU and UK international obligations.

The proposed draft regulations would indeed be incompatible with international treaties, national and EU laws:

- First, they contravene EU law by violating the free movement of goods as protected by Article 34 of the Treaty on the Functioning of the European Union (TFEU). Adoption of standardised packaging would create market distortions and barriers to trade, being within or outside the European Union.

- Secondly, they infringe United Kingdom's obligations under international law. TRIPS, the Paris Convention and TBT are applicable to its adhering member states amongst which is the UK. Amongst the articles not respected by UK, the following can be mentioned:

• Article 20 TRIPS states that "the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings....".

• Article 2.2 of the TBT requires Members to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade".

- Thirdly, they are contrary to EU and UK laws by violating the right of property principle and expropriating the trademark owners without providing for adequate compensation, according to Article 17 of the Charter of Fundamental Rights of the European Union, the First Protocol to the European Convention on Human Rights (ECHR), the CTM (Community Trade Marks) Regulation and the UK trade mark law, implementing the Harmonization Directive. Therefore, expropriation of such rights would result in serious and unjustified losses to the brand owners.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

A more thorough investigation on the impact on the illicit trade and on IPRs, especially expropriation of IPRs, is needed.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

How to get involved in the consultation

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

Completing the online form on the Department of Health website at:

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[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

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- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

Department of Health
Standardised Packaging Tobacco Consultation
PO Box 1126
CANTERBURY
CT1 9NB



Standardised Packaging Consultation

Response by ACS (the Association of Convenience Stores) and supported by the Northern Ireland Independent Retail Trade Association (NIIRTA)

1. ACS (the Association of Convenience Stores) welcomes the opportunity to respond to this consultation. ACS represents 33,500 stores across the UK who would be affected by the proposed implementation of standardised packaging.
2. ACS continues to have concerns that the introduction of standardised packaging for tobacco products would present significant burdens for retailers in the form of operational implications, impact on service times, loss of retail margin and the potential to drive consumers away from the legitimate UK market. While we welcome the additional information provided in this consultation document, draft regulations and impact assessment, these documents highlight that the burden of this policy will fall upon retailers, without being able to quantify the benefits they will bring.
3. We welcome the significant progress to reduce consumption rates, especially among young people, which has been achieved and continues to be made in the UK. Retailers support responsible retailing initiatives and are committed to tackling underage sales. The combined efforts of improved industry practices, better access to information about the dangers of smoking and regulation have seen the number of pupils who smoke at least one cigarette a week fall to 3%, from 9% in 2003, and the number of pupils ever having tried cigarettes nearly halve in this timeframe from 42% to 22% in 2013¹.
4. ACS welcomes this progress, however we believe a full assessment needs to be made of the success and interaction of each element of the tobacco control policy in order to ensure resources are effectively targeted and undue regulatory burdens are not introduced where other measures will achieve similar or improved results. The 2012 consultation on standardised packaging even stated that the impact of the display ban on consumption rates should be assessed before further measures are adopted. As this does not come into force until April 2015 for small shops, there is no way to accurately assess what impact, if any, that standardised packaging would have on tobacco consumption rates. We therefore remain of the view that Government should conduct a review and assessment of existing tobacco control measures before deciding whether to introduce standardised packaging, as set out in Option 3 of the consultation.
5. In addition, we remain concerned over the scale and impact of the illicit trade. The harm, both to the health of smokers, government finances and legitimate businesses of the illicit trade is widely reported, with the Exchequer alone losing around £1.6 billion

¹ Smoking, Drinking and Drug Use among young people report: HSCIC 2014.

each year². We would urge the Government to prioritise tackling the illicit trade as the most effective means to address health harms, while also protecting UK retailers, and to avoid taking any action which may increase the likelihood of smokers engaging with the illicit trade.

6. This response outlines the key issues for the convenience store sector in response to these proposals, and calls on the Government to ensure that this regulation will not be introduced unless the benefits to the UK can be unequivocally proven to outweigh the detrimental impact on businesses.
7. For the purpose of transparency, we have also attached a copy of our annual letter to the Department of Health³ highlighting the nature of our commercial relationships with the tobacco industry. Copies of this and equivalent letters dating from 2012 are available on our website.

Consultation process

8. ACS is concerned that stakeholders have only been given six weeks to respond to this consultation, which in addition to providing new evidence, invites detailed feedback on draft regulations and a detailed impact assessment. Given the scope, and the fact the consultation period extends over the summer holiday period which is both a busy trading period and a time staff are likely to be on annual leave, we do not believe six weeks is sufficient time to fully engage with and respond to the issues raised in the consultation.
9. We would therefore urge Government to give all stakeholders further opportunity to submit their views to this consultation.

Operational Impact

10. As highlighted in our submission to the 2012 consultation, the very nature of removing brands from tobacco products would make individual tobacco products harder to recognise within the retail environment. This would cause difficulty and delay every time a product has to be retrieved, moved or checked. This is a significant operational burden that will have a direct harmful impact on convenience store retailers.
11. From receiving stock to the customer transaction, retailers must check, and sometimes double check, the type and quantity of stock at several points throughout their business, including on delivery of the products, checking stock levels in store, stocktaking on shelves, restocking shelves, when clearing units for cleaning as well as at point of sale. Given the relative value of tobacco products compared to other categories sold within convenience stores, even more precautions are taken with these products than other items in store.
12. Delays at each of these stages would have a serious cumulative impact on a retail business, leading to the need for more staff resource for these processes, and either a reduction in customer service or higher costs for the retailer. For every additional staff hour per day required, retailers would face an additional cost of £2614 per year, based

² HMRC tax gaps report, 2013

³ ACS Letter to Department for Health 2014

on current national minimum wage rates. With the likely additional loss of margin due to smokers moving to cheaper products, these costs will be a significant financial burden for retailers.

13. Delays at point of sale, in particular, severely undermine customer satisfaction levels. The main problem will be the increase in queuing times in store. Convenience stores, rely on speed of service to be successful.
14. The average time spent queuing in an independent convenience store is 26 seconds⁴, with customers spending on average £6.13 per visit⁵. A typical convenience store will handle on average 1200 transactions per day, however these transactions do not occur at a consistent rate but will vary with the busy trading periods throughout the day. During these busy periods in particular disruption to transactions would have a significant impact on both queuing times and satisfaction of tobacco and non-tobacco purchasing customers. The volume of transactions happening in convenience stores are also increasing because of new services retailers are offers such as bill payment services and new format Post Office Local counters. Each person that walks away because the queue is too long equates to a lost sale.
15. Furthermore, the proportionate impact of this on retailers has actually increased given the increase in wage costs (12p per hour, NMW) and value of the tobacco products (63p per pack increase)⁶, in relation to the marginal increase in basket spend (9p). It would therefore now be even harder for retailers to replace income lost through lost sales or increased staffing costs than in 2012.
16. Given this clear operational burden on retailers, ACS would urge the Government to fully assess whether this measure is necessary or proportionate before determining whether to proceed. Given the complexities of assessing potential impact in light of recent and upcoming additional tobacco control measures for the UK market, such as the Tobacco Display ban and the Tobacco Products Directive, we would urge the Government to favour option 3 as set out in the Impact Assessment. This would enable further data on both the longer term impact of this measure in Australia, and the effects of UK tobacco control policy to be gathered in order to determine a base level by which to assess the potential benefits and costs of standardised packaging.

Tobacco Display Ban

17. ACS is also concerned that the nature of the regulations would introduce unnecessary and duplicate burdens for retailers if implemented. The impact assessment in the 2012 consultation clearly stated that a full assessment of the impact of the display ban should be taken before any decision on standardised packaging was made. We continue to believe this should be the case, and would call on the Government to defer this decision until further evidence is available.

⁴ HIMI (2008) Convenience Tracking Programme (note: this question has not been included in more recent studies)

⁵ HIMI (2014) Convenience Tracking Programme, Purchases and Spend

⁶ <http://www.the-tma.org.uk/tma-publications-research/facts-figures/uk-cigarette-prices/>, pack of 20, change reflective of prices from 2012 to 2013.

18. Furthermore, the extension of the Tobacco Display Ban to small retailers in April 2015 will criminalise practices which would become obsolete if standardised packaging is introduced. For example, it would make it illegal to display cigarette packs when transporting them through a store to a tobacco gantry. Should standardised packaging be introduced, and the branding and easily identifiable features already removed, retaining this requirement would criminalise retailers for displaying drab packs bearing large health warnings, neither of which are argued could be appealing or enticing to adults or young people.
19. Similar concerns apply to the rules which make it a criminal offence to display tobacco products on request to an under 18 year old. While we support measures to tackle underage sales, the majority of retailers use till prompts⁷ to remind staff to check for ID at the point of sale. To criminalise behaviour before the item has been scanned causes practical issues for staff training in stores, and again would risk criminalising retailers for showing health warnings and drab packs to potential customers should standardised packaging be introduced.
20. We would therefore urge Government to work with industry, should this measure be implemented, to ensure existing tobacco control regulations, including the Tobacco Display Ban regulations, are reviewed and amended to remove and reduce unnecessary, duplicate and excessive burdens from retailers.

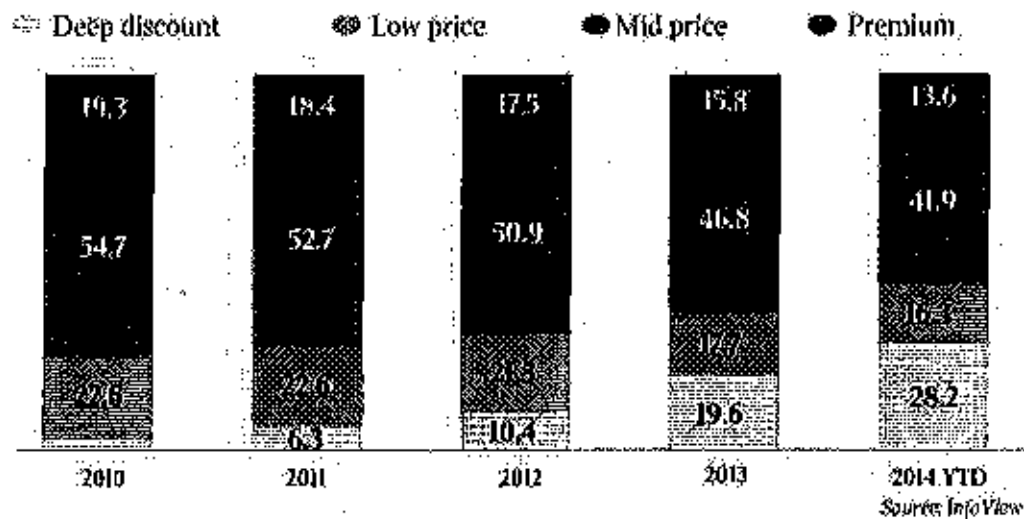
Commoditisation

21. As highlighted in the consultation document, the Chantler Review specifically considered whether it was likely that standardised packaging would lead to an increase in tobacco consumption by lowering the price of tobacco as the market is commoditised. He concluded that *‘the risks of price effects undermining the objectives of a standardised packaging policy are small’*.
22. However, this view has been undermined by evidence from Australia since the publication of the Chantler Report which has shown increasing price-based competition as customers move away from premium products. Figure 1 below shows the significant increase in discount brands in Australia since the introduction of standardised packaging.

Figure 1 – Cigarette Market Segments by % In Australia

⁷ Each time tobacco products are scanned by an employee the till automatically generates a reminder to the staff to check the age of the customer buying the product.

CIGARETTE MARKET SEGMENTS



23. In addition, data from Nielsen shows that 42.3 per cent of all cigarettes purchased 18 months after the introduction of standardised packaging are priced at less than \$15 a pack, a rise from 25.6 per cent of the market in 2011 and 35.2 per cent at the end of 2012. This is despite predictions that continuous duty rises outlined in the Australian National Tobacco Strategy 2012-18 could see prices increase to over \$20⁸⁹.
24. As highlighted in our 2012 submission, retailers generally receive a higher margin on premium brand products than mid-priced or discount products. Assuming a move away from premium to economy brands, at a reduction in price from £8.74 to £6.80 and an associated move from 8% margin to 5% for retailers, the return for retailers from this part of the market would halve. These figures show that the total impact over ten years could cost the retail sector up to £1.26 billion in lost margins alone¹⁰. The full impact is illustrated below:

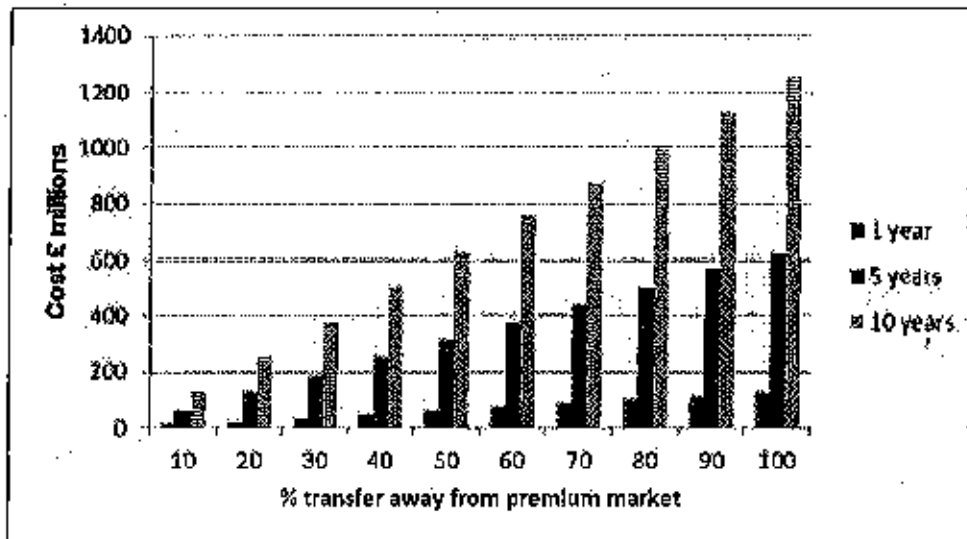
Fig.2. Cost of standardised packaging on retailer margin

⁸ [http://www.nationaldrugstrategy.gov.au/Internet/drgstrategy/publishing.nsf/Content/D4E37279508DBAE4CA257AE70003730C/\\$File/National%20Tobacco%20Strategy%202012-2018.pdf](http://www.nationaldrugstrategy.gov.au/Internet/drgstrategy/publishing.nsf/Content/D4E37279508DBAE4CA257AE70003730C/$File/National%20Tobacco%20Strategy%202012-2018.pdf)

⁹ Reports on price published in the Australian newspaper, January 2013.

¹⁰ Figures based on premium brands having 24.6% market share (Anna Gilmore, University of Bath, 2010 projection (latest figures available)); and value of cigarette market being £12.84 Billion in 2012 (TMA UK Tobacco Market Summary)

8% margin on £3159m worth of premium product is £252.72 million. If all moved to economy, value would be £2536 million, and retailer margin would be £126.8 million, with a loss of £125.92m



Consumption data

25. While we are aware of a number of statistics highlighting a fall in consumption since the introduction of standardised packaging in Australia, we do not believe that there can be credible evidence of long term impacts of the policy only 18 months since implementation. In addition, the decline in consumption rates reflect the long term trend in Australia which has seen a fall in daily smoking rates from 17.4% in 2004, to 15.1% in 2010, and 12.8% in 2013¹¹. Consumption rates for all smokers have declined from 20.6% in 2004, to 18% in 2010 and 15.8% in 2013.
26. While this success in reducing consumption rates is to be welcomed, it is in line with long term trends, and cannot clearly be attributed to the introduction of standardised packaging in December 2012. Also we note that at the same time Australia has chosen to implement a range of other tobacco control measures. For example, 2012 not only saw the introduction of plain packs, but also an increase in tobacco excise duty, restrictions on tobacco advertising online and \$27.8 million in additional funding for anti-smoking campaigns.
27. We would therefore urge the Government to base any decision on the likely impact of standardised packaging on evidence of how it would affect the UK market, over and above existing tobacco control measures such as the tobacco display ban.

Illicit trade

28. The scale and impact of the illicit trade continues to be of significant concern to retailers. As such, ACS continues to believe that tackling the illicit trade should be the central focus of UK tobacco control policy, both in order to significantly reduce health harms and protect legitimate retail.

¹¹ 2004 and 2013 National Drug Strategy Household Surveys: key findings - Australian Institute of Health and Welfare (AIHW).

29. Evidence from Australia contains worrying indicators of a potential increase in the illicit market share. A report by KPMG, commissioned by tobacco manufacturers, showed that 1,433 tonnes of illegal tobacco was smuggled into Australia in 2013, an increase of 154 percent from the previous year, and that 13.3 percent of all tobacco sales in Australia were of black market cigarettes. If a similar increase were to be seen in the UK, the loss of would equate to an extra £1.57 billion in lost Government revenue each year, bring the total to £3.17 billion.¹²
30. As plain packs will not be adopted across the EU, cross border trade and the legitimate import of branded packs for personal consumption would make it harder to identify illicit products. The legitimate existence of branded packs bought for personal consumption would also make it harder to identify illicit packs, both for enforcers and consumers, while the likely move to price-based competition, rather than brand, could make cheaper imports more appealing to smokers. These factors create significant risks that the illicit trade could benefit from the introduction of standardised packaging.
31. As highlighted in the Impact Assessment, every percentage point increase in the size of the illicit cigarette market corresponds to a loss of around £120m per annum in revenue to the exchequer. Given the existing scale of the problem, ACS urges the Government to prioritise action to tackle the illicit trade, both at the borders and within communities, and ensure that addressing this issue is central to all tobacco control policy.
32. This position was supported by findings of both the Chantler Review and Home Affairs Select Committee when looking at the potential impact of plain packaging on the illicit trade. Both concluded that, while they were not convinced the measure would increase the illicit market, the most effective way to be sure and counter any risk would be to have an effective, and improved, enforcement regime. The Home Affairs Committee went further and recommended that the standardised packaging regulations contain specific measures to boost tracking capability of legitimate tobacco products. This would enable all those in the supply chain to ensure they were in receipt of legitimate products, and to make it easier for enforcement agencies to identify those engaged in the illicit trade.
33. While we understand EU regulations are not yet at a stage to incorporate within the draft regulations set out in this consultation, we urge the Government to work within the EU to ensure effective, proportionate track and trace systems are designed and implemented, in conjunction with retail and wholesale representatives. Comprehensive anti-fraud measures such as these will help to counter the risk of increased illicit trade activity resulting from standardised packaging, as well as deter those already operating within the illicit trade.
34. As highlighted by HMRC figures, the illicit tobacco trade costs the exchequer up to £1.6bn each year in lost duty¹³. Removing or reducing this market would not only protect smokers from illegal products with no quality control, but would also generate more government income which could be used towards improving education and tackling underage smoking, which has already proven to deliver results.

¹² Figures based on HMRC tax gaps upper estimate figures, 2013.

¹³ HMRC Tax Gaps report 2013

Regulations: Implementation dates

35. The draft regulations in the consultation set out the suggested implementation dates for standardised packaging, if the policy is taken forward. These suggested harmonising dates with the implementation of the Tobacco Products Directive, in order to minimise the burden and disruption of two regulatory changes being implemented in close proximity.
36. ACS Agrees that given the regulations will not apply to cigars or specialist tobacco products, a sell-through period of one year should ensure retailers are not left with unmanageable loss. However, we would wish to clarify one aspect in relation to these timings. The consultation document states that a year sell-through period would be allowed, but the dates set out in the regulations state this period will run from 20 May 2016 to 21 March 2017 – only allowing 10 months.
37. We would be grateful if the government could clarify which of these timeframes reflects the intended implementation date. We would strongly urge Government to stick to the year sell through period for retailers, and ensure these measures would not come into force before May 2017 if implemented.

Comments on Impact Assessment

Assessment of costs

38. ACS disagrees with the impact assessment view that the introduction of standardised packaging should be classified as 'zero net cost' for the purpose of the One In Two Out (OITO) policy for reducing regulatory burdens. We question how accurately the impact of other tobacco control measures, such as advertising bans can be directly compared with the introduction of standardised packaging. While this may be the overall assessment, the IA makes clear that the financial costs will be borne by retailers and manufacturers, and a financial loss to the exchequer if the measure were to deliver reduced consumption rates. However the benefits will fall to government in terms of reduced health costs resulting from a reduction in the take-up of smoking.
39. The cost assessment also makes no mention of increased retail costs due to increased transaction and stock taking times, as highlighted above. The net result of this measure on retailers would therefore be to add significant operational and financial burdens, and should therefore be considered as new regulation for the purposes of OITO.
40. In addition, the consultation acknowledges that no effort has been made to quantify or include the potential costs arising from increased cross-border trade or a rise in consumption of illicit products, which would both add further costs for retailers and reduce the net benefits to Government.
41. The Regulatory Policy Committee shared concerns over the confusion on how costs have been defined and attributed within the IA. We welcome the RPCs call for clarification between direct and indirect costs.

Assessment of impact on business

42. The IA states reduced profits from reduction in demand will be offset by increased profits on goods and services purchased in place of tobacco (point 86). Given the average basket spend in a convenience store is £8.13, a standard pack of 20 cigarettes can cost around £8, and cigarettes account for 20.1% of sales (by value) within convenience stores, it is unlikely that any additional sales will offset to any significant extent this financial loss to retailers.

Reduction in retail transaction costs

43. As highlighted above, the removal of branding is likely to lead to increased transaction and stock taking times, leading to an increase in retail costs. The IA acknowledges evidence from Australia that demonstrated significantly longer transaction times (12.43 seconds for retrieval post-ban, compared to 9.84 before plain packs), however concludes that this is likely to be short lived and overall impact is likely to be a reduction in transaction times of 1.5 seconds, and associated cost saving, in the longer term, despite the only studies promoting this view having also been acknowledged in the IA as 'not being directly applicable to a typical retailer'.
44. This level of assessment also fails to take into account the other stages of the retail process at which stock must be checked and accounted for, as outlined above. We therefore feel that the assessment of Impact on transaction times significantly underestimates the operational burdens that would result from this measure.
45. Concerns over transaction times have also been raised by the Regulatory Policy Committee in their scrutiny of the IA. We believe that the report by the Rural Shops Alliance report is a better reflection of the impact of standardise packaging in a retail environment and clearly showed transaction times increased from 30 seconds to 58 seconds.¹⁴ The RPC have recommended that the Department of Health should test the evidence base and conclusions on transaction times ahead of the publication of the final IA. ACS would urge the Government to act on this recommendation.

ACS Local Shop Report

46. The impact assessment quotes the ACS Local Shop Report as saying 21.1% of sales in convenience stores are from tobacco. We would wish to clarify that the report lists this figure as 20.1% of sales. These figures are obtained from IGD 2013 sales data.

Small retailers

47. The IA highlights the existing pressures and challenges that small retailers need to plan for and adapt to, and concludes that the introduction of standardised packaging is just one other component of this, and therefore does not attribute any additional cost or burden as part of the impact assessment. However, this fails to take account of the fact that small retailers are already responding to the increasing challenges and demands within the sector, including through diversifying and offering increasing ranges of products and services such as click and collect, parcel services and offering fresh and hot food to go.

¹⁴ Rural Shops Alliance Effective Standardised Packaging Report, September 2012



Response to the consultation on the introduction of regulations for standardised packaging of tobacco products

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Scottish Directors of Public Health (SDsPH) have been supportive of moving to plain packaging for the following reasons:

- To reduce the appeal of tobacco products to consumers;
- To increase the effectiveness of health warnings on the packaging of tobacco products;
- To reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking;
- To reduce the likelihood that children and young people will take up smoking; and
- As an important contribution to our efforts to reduce the harm and health inequalities caused by tobacco.

Given the conclusion of the Chantler review that there is a strong public health case for standardised packs we would like to see the measure implemented in the fastest reasonable timescale to protect the health of children.

Our one concern was in relation to the engagement with the tobacco companies as part of the review, which we feel legitimised the tobacco industry as a stakeholder in a debate about health. In addition this appears to be in contravention of Article 5.3 of the Framework Convention on Tobacco Control which clearly sets out that the tobacco industry should not be allowed to influence public health policy.

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?

Emerging evidence from Australia following the introduction of standard packs is providing support as to the efficacy of standardised packaging as a public health measure and challenges the arguments against standardised packaging presented by the tobacco industry and partners.

Positive impact on smoking behaviour:

Data from the treasury shows a 3.4% decrease in tobacco sold in 2013, after plain packs were introduced in December 2012. At the same time research has shown an increase in calls to the stop smoking helpline

Illicit tobacco:

The latest annual report from the Australian customs service indicates that only 4% of cigarettes seized were in plain packaging with the conclusion that plain packaging does not appear to have an effect on smugglers. This confirms our previous view.

Impact on retailers:

Tobacco sales are in long term decline unrelated to plain packaging. National and local work is underway to work with retail outlets and retailers associations to support diversification away from harmful, addictive products.

In relation to plain packaging, there have been no real issues for shopkeepers identifying products or increases in serving times. Researchers who monitored outlets before and after the introduction of plain packs found a small increase in serving times for about a week, after which staff adapted to the new setup and carried on as before.

It is vital that standard packaging is in place on or before May 2016 when the EU Tobacco Products Directive, which includes updated larger health warnings and graphic warnings on the front of the packs, is introduced.

Parallel issues

Standardised packaging must be seen as part of a sustainably-funded comprehensive approach to delivering a smoke free generation. Tobacco control policies must be pursued in parallel if they are to have their best possible effect in reducing prevalence rates. Tax rises, levies on industry, improving enforcement rates, extending smoke-free areas and making smoking cessation services opt out are all essential.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

SDsPH generally support the draft regulations believing them to be comprehensive. However there are two areas which require to be strengthened:

The range of products:

The range of products covered in the legislation should be extended to cover cigars, hand rolling tobacco, pipe tobacco, shisha and the various forms of oral tobacco including paan. We are particularly concerned about the lack of inclusion of shisha and oral tobacco given the multi-cultural

population of the central belt of Scotland, with recent work in Glasgow and Clyde indicating a rise in shisha use particularly amongst young people

Pack size:

The draft regulations do not set limitations on the size and shape of packs. Setting pack size (to standard 20 cigarette packs), as in Australia, limits opportunities for brand definition through pack size and limits the size and shape of cigarettes themselves. Slim and superslim cigarettes are of particular concern given their appeal to young people and we would like the final regulations to include set box dimensions, as in Australia.

- 4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?**

No



Department of Health



Llywodraeth Cymru
Welsh Government



The Scottish Government
Riaghaltas na h-Alba



Department of Health, Social Services and Public Safety
www.dhsspsni.gov.uk

Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

a. Are you responding (required):

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

b. Please provide your details and contact information:

Name of respondent (required):

[Redacted name]

Address of respondent (required):

NHS Lothian, Waverley Gate, 2-4 Waterloo Place, Edinburgh EH1 3EG

Contact email address (required):

[Redacted email address]

Now go to question f

c. Please provide your organisation's details and contact information:

Name of organisation (required):

[Redacted organisation name]

Name of person providing submission (required):

Job Title (required):

Contact address of organisation (required):

Contact email address (required):

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

No

Yes (please describe below)

If yes, please describe:

h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

Consultation questions

- 1.** Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

- 2.** Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

- 3.** Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

- 4.** Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

How to get involved in the consultation

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

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Department of Health
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PO Box 1126
CANTERBURY
CT1 9NB

RESPONSE - CONSULTATION ON THE INTRODUCTION OF REGULATIONS FOR STANDARDISED PACKAGING OF TOBACCO PRODUCTS

- [REDACTED]
3. In this submission I will use the terms "plain packaging" and "standardised packaging" interchangeably.

I am aware of the submission from the Cancer Council Victoria which admirably summarises the Australian situation and evidence on plain packaging. I endorse the information, approach and recommendations in the Cancer Council Victoria document; this response therefore seeks to complement that from the Cancer Council Victoria with some personal observations.

4. I strongly support the recommendations and approach of the Chantler Review. This Review is exceptionally well researched, evidence-based and rational in its approach.
5. It is important that plain packaging is seen in context. The lethal nature of smoking has been recognised for more than 60 years. There has been overwhelming evidence about the dangers of smoking since the landmark papers by Doll and Hill (British Medical Journal) and Wynder and Graham (JAMA) in 1950. There is overwhelming evidence about the harms of smoking and since 1981 (Harayama, BMJ) about the harms of passive smoking). We know beyond doubt that cigarettes kill more than one in two regular users. This is the only consumer product that kills consumers when used precisely as intended. If it were a new product, not only would promotion be forbidden but it would not be allowed on the market.

There is no case for permitting any form of tobacco promotion.

6. The tobacco industry has a long history – again dating back for more than 60 years – of denying the evidence, undermining government health policies, obstructing and attacking the work of health researchers and organisations, and opposing and delaying any measures that might impact negatively on its capacity to sell or market its products whether to adults or children and vulnerable communities. There is also a long history of tobacco industry distortion of research, evidence and data, while providing research, evidence and data that are subsequently found to be flawed, often to the extent of being grossly deceptive.

There is no case for accepting at face value any evidence or research submitted by or on behalf of tobacco companies.

7. Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC), to which the UK and Australia are signatories, notes that signatories will protect their tobacco policies from commercial and other vested interests of the tobacco industry, and that "the purpose of guidelines is to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and effective". The Director General of the World Health Organisation, Dr Margaret Chan, has emphasised the importance of protecting governments and communities from "efforts by industry to shape the public health policies and strategies that affect their products", noting that when such industries are involved in policy making, "rest assured that the most effective control measures will be downplayed or left out entirely". As Dr. Chan has also noted, "... the tobacco industry is "a ruthless and devious enemy" to public health and that this is "an industry known for its dirty tricks and dirty laundry".

Given the tobacco industry's record and intentions, there is no case for permitting tobacco companies any involvement in tobacco control policy development or implementation.

8. Plain packaging was introduced in Australia as an important component of a comprehensive approach to tobacco control entailing action over time at national and state level. It should always be seen in the context of a comprehensive approach, with measures introduced sequentially. The main aims of plain packaging (as set out in the object of the legislation) are, as part of the comprehensive approach, to contribute to a decline over time in smoking, with a particular focus on children and young people. This was made clear from the initial announcement by then Health Minister the Hon Nicola Roxon, who said, "We're targeting people who have not yet started, and that's the key to this plain packaging announcement — to make sure we make it less attractive for people to experiment with tobacco in the first place."
9. Any early impacts on adult smoking are a bonus, although it is reasonable to expect that over time plain packaging, complementing other measures, will assist in reducing smoking in adults as well as children and young people.
10. As with other aspects of a comprehensive approach, plain packaging will optimally be accompanied and reinforced by other components of the program.
11. Plain packaging in Australia was introduced following a thorough review by the Australian Government's National Preventative Health Taskforce and its Tobacco Expert Committee. The committee carefully examined the evidence that has developed over at least two decades: the recommendation was based on a strong and compelling body of research and evidence. This was complemented by further evidence on packaging and related matters from tobacco industry documents.
12. The Cancer Council Victoria submission provides information on developments in Australia since the introduction of plain packaging. These are encouraging, particular in relation to the objects of the legislation, and also as plain packaging was (as often happens in public health and tobacco control) introduced without all the recommended complementary activities. There was, for example, a pause for more than a year in national mass media tobacco advertising campaigns, which could have assisted substantially in further increasing public awareness and encouraging quitting. Given clear evidence on the importance of well-run, sustained and adequately funded media mass campaigns in tobacco control, it is encouraging that the current Federal Government is now committed to reinstating such campaigns.

13. Tobacco companies have made a series of grossly misleading claims following the introduction of plain packaging.

They have claimed that cigarette sales increased during 2013. This claim has been made on the basis of a secret report that the industry has refused to make available for scrutiny. It has no credibility.

By contrast, official Treasury figures show that "tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced" noting further that "clearances are an indicator of tobacco volumes in the Australian market". The Health Department also notes that "recent figures released by the Australian Bureau of Statistics (ABS) show that total consumption of tobacco and cigarettes in the March quarter 2014 is the lowest ever recorded, as measured by estimated expenditure on tobacco products".

Further, the recently released authoritative National Drugs Strategy Household Survey report shows a substantial decline in adult smoking prevalence in Australians aged 14+ between 2010-2013, from 15.1% to 12.8% (the largest fall in more than two decades). While this cannot of course be entirely attributed to plain packaging, it is reasonable to assert that plain packaging and the publicity surrounding the debate and discussion on its introduction will have played a valuable role, and can be expected to contribute to further declines in smoking in adult smoking in the years ahead. This is particularly encouraging, given that the main aims of tobacco plain packaging relate to children and young people.

There has also been encouraging evidence since the introduction of plain packaging in areas such as smokers' attitudes, increased calls to Quitlines and less pack visibility.

The industry and its allies claimed not only that plain packaging in Australia was unconstitutional, but that the Government could face payments for compensation in the order of \$3 billion. This claim has been completely discredited following a comprehensive rejection of the industry's case by the High Court.

The companies have made grotesquely inflated claims about the size of the illicit market, with further claims that this would be increased by plain packaging. Official data again refute these claims as do comments from the tobacco industry cited in the Chantler Review.

Further claims around product retrieval times and a range of further industry-predicted problems have again been demonstrated to be without foundation. There were even claims that plain packaging might somehow increase smoking – again completely without foundation and rebutted by developments since.

There is no case for accepting industry arguments that oppose plain packaging, or claim any failure or adverse consequences.

14. As in the UK, the introduction of plain packaging was ferociously opposed by tobacco companies in Australia. It is distressing to see that the same companies are using the same tactics, misleading arguments and misinformation in the UK, apparently in the assumption that British decision-makers will not be aware that similar arguments have been tried, rebutted and failed elsewhere.
15. There has been strong and consistent public support for plain packaging, with minimal opposition, other than from tobacco interests.

16. In conclusion:

Smoking remains the largest preventable cause of death and disease, causing the deaths of more than half of regular smokers.

Plain packaging is an important part of a comprehensive tobacco control program.

The case for plain packaging is based on sound research going back over many years, as well as internal tobacco industry materials.


Packaging provides the last remaining opportunity for tobacco companies to promote and glamorise their product. Plain packaging turns the cigarette package from a fashion accessory and a colourful object of admiration to something unsightly and unpleasant, with which children especially will not wish to be associated.

The primary aim of plain packaging is to prevent uptake of smoking by children and young people. Given this focus, it would be wrong to expect immediate evidence of instant dramatic falls in smoking. Nonetheless, even the early research evidence is encouraging; in the period following the introduction of plain packaging there has been a marked fall in cigarette sales; smoking prevalence among adults is declining; and – importantly – none of the adverse consequences claimed in tobacco industry scare campaigns have eventuated.

The strength of the tobacco industry's opposition to plain packaging – more ferocious than anything I have seen in more than forty years – is testament to the likely impact over time of this important public health measure. The evidence supporting plain packaging is compelling; there is no case for delaying its introduction.

While the case for plain packaging is based on strong, sound research, a final anecdote may also be relevant.

A few days after the introduction of plain packaging, I stopped at a supermarket to buy some of the new packs on the way to a TV interview. The young woman behind the counter, who clearly had no idea as to who I might be, pointed to the packaging and said, "that made me quit".


8th August 2012

EL273



PHILIP MORRIS
LIMITED

No. 1 PARKSHOT • RICHMOND UPON THAMES • TW9 2RD • UNITED KINGDOM

Department of Health
Standardised Tobacco Packaging Consultation
PO Box 1126
Canterbury
CT1 9NB

DEPT OF HEALTH
RECEIVED

08 AUG 2014

MCPE
(RH)

To Whom It May Concern,

Please find attached our response to the "Consultation on the Introduction of Regulations for Standardised Packaging of Tobacco Products", which Philip Morris Limited (PML) also submit on behalf of Philip Morris International and its affiliates.

The consultation is designed to inform decision making by the Department of Health and Devolved Administrations on whether to introduce "standardised packaging".

Our response explains in detail why "standardised packaging" is unlawful, disproportionate, and at odds with the rule of law and the Government's own standards for sound, evidence-led policy making.

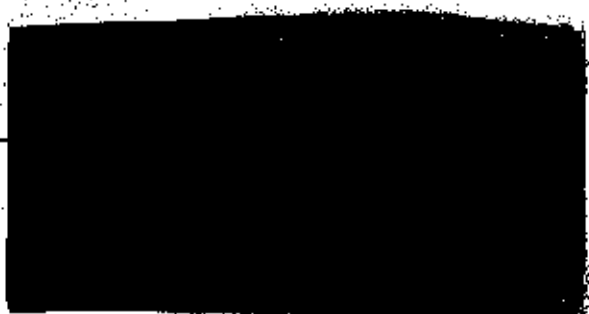
This response should be read in conjunction with our previous submissions, in particular:

- PML's response to the consultation on the future of tobacco control dated 8 September 2008;
- PML's response to the consultation on "standardised packaging" of tobacco products dated 9 August 2012;
- PML's submission of supplemental information regarding the impact of "standardised tobacco packaging" dated 22 March 2013;
- PML's letter to the Chantler review dated 10 January 2014.

As such, in Annex 1 of the attached submission, we list key materials previously provided to the Department of Health for consideration. These detailed submissions along with the studies, data, expert reports, and analyses continue to be directly relevant to many of the issues raised in the current consultation.

Our response and associated documentation is also being submitted directly to the Department of Health.

Yours faithfully,



PHILIP MORRIS LIMITED

Response to the Consultation on "Standardised Packaging"

7 August 2014

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I. Introduction

"Standardised packaging" is a euphemism for government-mandated destruction of property. It is unlawful, disproportionate, and at odds with the most basic requirements of the rule of law. Philip Morris International ("PMI") respectfully encourages the Department of Health (the "DH") to honor the UK principles of sound policy and reject "standardised packaging" in favor of legally sound alternatives. If necessary, however, PMI is prepared to protect its rights in the courts and to seek fair compensation for the value of its property.

There is no dispute that tobacco is harmful and that the UK government has a clear interest in subjecting it to strict regulation. In fact, the UK has done so extensively for decades. But the mandatory de-branding of tobacco products is no ordinary regulation. The DH is not banning tobacco (thereby preserving the substantial tax revenues that the UK government derives each year from its continued sale); nor is it restricting its usage as such. Instead, "standardised packaging" targets intellectual property, which the proposed measure treats as sinister agents of "Big Tobacco" that must be destroyed. While proponents of this excessive measure may believe that all is fair in their bid to extinguish the tobacco companies' intellectual property, the law requires the UK government to satisfy a higher standard:

First, the DH cannot dismiss the tobacco companies' trademarks as something short of property that can be obliterated by fiat. Intellectual property is *property* – and is subject to the same legal protections as any other form of property. For that reason, the DH's proposal must be held to the same legal standards as if it were taking the tobacco companies' factories or other assets. Thus, even if the DH could establish that the measure were in the public interest, the UK must, as with any deprivation of property, compensate owners for the value of their property. This obligation binds the UK government regardless of whether the value of deprived property is small or substantial. In this case, however, the value is enormous. Since the DH's proposal does not countenance any compensation for the deprivation, the measure would be unlawful. The subtle drafting of the regulations would not avoid this result. While the draft regulations (the "Draft Regulations") proposed by the DH in its consultation paper¹ purport to maintain some semblance of trademark usage by allowing tobacco companies to register their trademarks and use them in the wholesale trade, this remaining "usage" does not serve the trademarks' essential functions.

Second, the DH's proposal does not address whether the proposed measure complies with the EU's Community Trademark Regulation (the "CTMR"), which gives trademark owners the right to use their Community trademarks by "*identical means*" throughout the entirety of the EU, regardless of frontiers. In fact, the DH's proposal would simultaneously prohibit tobacco companies from using Community trademarks in the UK and force them to use their brand names in a way that is diametrically opposed to how they are used throughout the rest of the EU. In this and other ways, the proposal would violate the CTMR and contradict the free movement principles the CTMR serves.

Third, the DH does not answer another key question: What is the scope of the UK's legal authority under EU law to enact the proposed measure? As the DH is aware, the tobacco

¹ DH, Consultation on the introduction of regulations for standardised packaging of tobacco products, 26 June 2014.

companies are currently seeking review by the Court of Justice of the European Union (the "CJEU") of the validity of the revised Tobacco Products Directive (the "TPD2")², which purports to harmonize labelling and packaging requirements across the EU while allowing Member States to adopt even stricter requirements without regard for the free movement of goods. As the DH is aware, however, the CJEU previously struck down another tobacco-related directive on the grounds that the EU cannot harmonize Member State laws on the basis of its internal market powers while simultaneously allowing Member States to prohibit the trade in products from other Member States that otherwise comply with the directive's harmonized rules. As the CJEU held, to do so would rob the directive of any genuine internal market purpose. Given this precedent, it would be unwise for the DH to proceed with the proposal before the CJEU's determination of this issue.

Last, the DH has not undertaken a sufficient analysis of whether the proposed measure would constitute a proportionate or disproportionate interference with the tobacco companies' fundamental rights and freedoms. At a minimum, the DH must carefully and objectively consider the measure's potential impact on fundamental rights and freedoms and consider whether the measure is narrowly tailored to achieve its purported objectives while impacting the affected rights and freedoms as little as possible.

The DH has not satisfied these requirements. For example, the DH estimates that the proposed "standardised packaging" measure *might* reduce overall smoking prevalence by 0.69 percentage points by 2025. The basis for this projection in the DH's Impact Assessment (the "IA 2014"), however, is deeply flawed. As the DH acknowledges, its assumptions are based entirely on a single exercise that sought to elicit the subjective guesswork of a panel of anonymous tobacco control advocates, most of whom declared biases and financial interests with respect to the measure. Moreover, the means by which the DH proposes to achieve the hypothetical – and at 0.69 percentage points, quite modest – reduction are drastic. The measure would: (i) deprive tobacco companies of the value of their trademarks and other protected property rights; (ii) force tobacco companies to communicate their brands in a manner that is intended to rob them of their distinctiveness and other core functions; (iii) prohibit tobacco companies from communicating basic information about their products to consumers; (iv) force tobacco companies to disparage their own products by paradoxically signaling that each and all of the brands are of the lowest possible quality and no different in quality from any other product on the market; (v) force tobacco companies to disparage their own brands by requiring them to be conveyed in the most unattractive manner possible; and (vi) distort competition and intra-EU trade by making it impossible for tobacco companies to compete on the basis of their brands.

Given this dramatic impact on the tobacco companies' fundamental rights and freedoms, the DH should have – in keeping with the UK's robust standards for policy making – taken into account the "best information available" as to whether the measure will contribute in a demonstrably meaningful way to its purported objectives. However, the DH chose to disregard the real-world data emerging from Australia – the only country in the world to have implemented "standardised packaging" – as relevant to whether "standardised

² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

packaging" has had any significant impact on smoking prevalence or consumption and whether there have been unintended consequences, especially with respect to illicit trade. By disregarding the Australia data and proceeding instead on the basis of the guesswork at the heart of the IA 2014, the DH has made it impossible to determine whether its proposed measure will accomplish the stated public health objectives in a meaningful way or whether less restrictive means would do so, perhaps even more effectively.

II. The DH's Proposal Violates the Cardinal Rule of Property: No Deprivation Absent Compensation

A. Basic Principles of Law

The law on deprivation of private property is straightforward: trademarks are legally protected property, and if the UK government wants to deprive an owner of that property, it must, as with any other form of property taken for a public purpose, compensate the owner for its value. These points are explicit in Article 17 of the Charter of Fundamental Rights of the European Union (the "Charter"), which provides:

"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected." (Emphasis added)

The European Court of Human Rights (the "ECtHR") has also repeatedly emphasized the rules governing property in its jurisprudence under Article 1 of Protocol No 1 ("A1P1") to the European Convention on Human Rights (the "ECHR"):

*"... under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances ... As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants"*³

The need for just compensation is also a bedrock principle of several centuries of the UK law that remains valid today. Indeed, as Blackstone emphasized in his 1765 Commentaries on property:

"The third absolute right, inherent in every Englishman, is that of property..."

³ ECtHR, *James and Others v UK*, [1986] BHRR 123, paragraph 54 (emphasis added). The only "deprivation" case to date in which the ECtHR has found that no compensation was necessary is ECtHR, *Jahn and Others v Germany*, [2006] 42 BHRR 49. The case concerned the unique situation of German reunification whereby the owner of the property had not been entitled to ownership in the first place.

He continued:

"In vain may it be urged, that the good of the individual ought to yield to that of the community. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce."

Blackstone clarified, however:

*"But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."*⁴

In sum, the following inarguable principles govern the DH's consideration of "standardised packaging":

First, trademarks are legally protected property. As such, the DH's proposal would be held to the same standards as if it were depriving the tobacco companies of their factories or other assets (whether tangible or intangible).

Second, if the DH wants to deprive the tobacco companies of their trademarks – even for a valid public purpose – it must compensate them for the value of that property. In other words, the lawfulness of the deprivation would not merely depend on its purported efficacy, which is a necessary but not sufficient requirement for the lawfulness of a deprivation.

Third, absent compensation, a deprivation of property is unlawful.

B. The DH's Proposal Would Deprive the Tobacco Companies of Their Intellectual Property

The DH seems to assert that "standardised packaging" is not a deprivation of property. The DH should not base that assessment, however, on the mere fact that the tobacco companies would continue to retain formal "ownership" of their trademarks. A proper inquiry looks behind the appearances and investigates the reality of the situation complained of to assess "*whether the consequences of the situation are so serious as to amount to a de facto deprivation of property.*"⁵ Rhetoric cannot alter reality: the DH's proposal would destroy the very substance of the tobacco companies' trademarks, thereby depriving them of their property.

1. The Role and Function of Trademarks

Trademarks are a type of intellectual property that act as a "sign" to distinguish goods and services of one enterprise from those of others. As the UK Trade Marks Act 1994 states: "*A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.*" According to the CJEU, these "signs" perform certain essential functions, i.e., they serve to "*guarantee the identity of the*

⁴ William Blackstone, Commentaries, paragraphs 1:134-35, 140-41 (emphasis added).

⁵ ECtHR *Fredin v. Sweden*, [1991] 13 EHRR 784, paragraph 43; see also ECtHR *Sporrong and Lönnroth v. Sweden*, [1982] ECHR 5, paragraph 63.

origin of the marked goods or service to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or service from others which have another origin."⁶ Trademarks also act as a "guarantee" as to the quality of the goods, a means of communicating with consumers, an "instrument of commercial strategy ... to develop customer loyalty", and a source of investment that trademark owners can convey, license, or otherwise exploit.⁷

Those functions have enormous value. They allow the owner to develop a unique identity for its product, *i.e.*, a "brand", which enables the owner to generate goodwill and establish a position for itself in a crowded marketplace. In its 2014 report on the "Top 100 Most Valuable Brands", for example, BrandZ valued *Marlboro* as the ninth most valuable brand in the world, with an estimated market value of 67 billion USD, after *Coca-Cola* (sixth), *McDonald's* (fifth), *Apple* (second) and *Google* (first).⁸

Moreover, some of the most valuable trademarks in the world are purely graphical, *i.e.*, they do not contain any words or brand names. For example, consumers can instantly identify the following trademark as identifying products developed by Apple, Inc.:



The same is often true for well-known tobacco brands. Indeed, even without any reference to the brand name, consumers will identify the following trademarked design as representing PMI's iconic *Marlboro* brand:



To illustrate the point further, we refer to a "brand board" that graphically depicts all of the major tobacco brands in the UK market by company. Each of the packs depicted in the board looks different (*i.e.*, different colors, designs, images, styles, *etc.*), which means that consumers can identify their chosen brands without any likelihood of confusion.

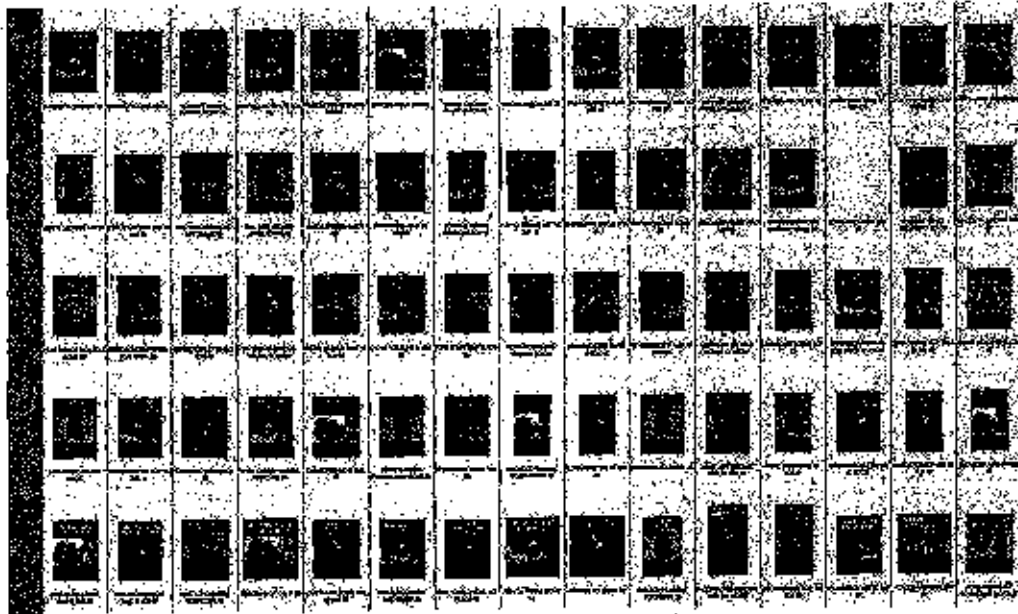
⁶ See CJEU Case C-39/97 Canon [1998] ECR I-05507, paragraph 28; CJEU Case C-517/99 Merz & Krell [2001] ECR I-06959, paragraph 22.

⁷ See, *e.g.*, CJEU Case C-323/09 Interflora v Marks and Spencer [2011] ECR I-8625, paragraph 39.

⁸ BrandZ, Top 100 Most Valuable Global Brands 2014, available at <http://www.millwardbrown.com>.

IT	IT	PMI	B&T
 Regal Embassy Rupeking L&G	 B&H Gold B&H Cut Camel B&H Silver	 Marlboro Virginia 6 Marlboro Bright Leaf Marlboro Gold Tooth	 Dunhill Lucky Strike Rothmans Vogue Vogue Paris Royals Rothmans Value Full Mail
 Windsor Blue Players JPS Silver Carlton	 Blending Starline Winston Sovereign Blue	 Chesterfield	

Now compare a brand board for the Australian market, which shows cigarette packs without any branding (aside from the small, non-distinctive typeface as mandated by the Australian legislation). Will consumers be able to easily identify their chosen brands without any risk of confusion? If we reference the IA 2014, there is no indication that the DH even considered this question.



2. The DH's Proposal Would Deprive PMI's Trademarks of Their "Very Substance"

In *British American Tobacco (Investments) Limited and Imperial Tobacco Limited*, the CJEU specifically noted that the tobacco companies must be provided "sufficient space ... to affix other material, in particular concerning their trade marks" on their packs. Otherwise, they would suffer a "disproportionate and intolerable interference" with the "very substance" of their property.⁹ As the CJEU has repeatedly emphasized, the "very substance" of a trademark is, among other things, the valuable function it performs in enabling consumers to easily identify a product's source and to distinguish it from competing products without any risk of confusion.¹⁰ As illustrated above, however, the DH's proposal aims to destroy this function by making all competing tobacco products as similar as possible to each other (and in a manner that aims to denigrate the characteristics of all brands). Thus, even though PMI would still "own" its trademarks, the essence of the proposal is to strip the trademarks of the very purpose that EU and UK registration has long protected.¹¹

PMI has submitted evidence on this point previously.¹² Two years ago, we shared with the DH the opinion of Lord Hoffmann, a former Law Lord, who is currently Chair of the Intellectual Property Institute's Research Council and Visiting Professor of Intellectual Property Law at Oxford University. Lord Hoffmann concluded that:

*"A prohibition on the use of a mark is ... a complete deprivation of the property in that mark...."*¹³

He also explained that there is:

*"...no reason why depriving someone of his proprietary interest in a trade mark for a tobacco product (however much it may be in the public interest to do so) should be different in principle from any other deprivation in which compensation is required."*¹⁴

Similarly, the Australian High Court specifically noted this point when ruling on the legality of Australia's de-branding legislation. Although the Court held that Australia's law did not amount to an "acquisition" of the tobacco companies' intellectual property

⁹ CJEU Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraphs 132, 149.

¹⁰ See, e.g., CJEU, Case C-206/01, *Arsenal/Reed* [2002] ECR I-10299, paragraph 48; CJEU, Case 102/77, *Hoffmann-La Roche* [1978] ECR 01139, paragraph 7.

¹¹ Indeed, the proposed measure would constitute a sweeping ban on the use of all tobacco trademarks without any individualized assessment as to whether consumers are capable of identifying their chosen brands without those trademarks or whether banning them would directly advance the measure's purported objectives. This blanket approach to extinguishing individual property rights violates otherwise applicable general principles that trademarks "must be assessed in concreto." See, e.g., CJEU, Case C-421/13 *Apple v DPMA* [2014], paragraphs 22-23 (emphasis added).

¹² See Annex 1, Overview of key materials provided to the UK DH for consideration: Requirement to pay compensation for the deprivation of brands.

¹³ Opinion of Lord Hoffmann, 24 May 2012, paragraph 19 (emphasis added).

¹⁴ *Ibid.*, paragraph 20.

(which, unlike in the EU, is the relevant standard for determining whether the Australian government is required to pay compensation), it specifically found that there was a deprivation of property.

Indeed, French CJ concluded:

*"rights to exclude others from using property have no substance if all use of the property is prohibited."*¹⁵

And in his opinion, Gummow J stated:

"The rights mentioned in respect of registered trade marks are in substance, if not in form, denuded of their value and thus of their utility by the imposition of the regime under the Packaging Act."

As he further explained:

*"the result is that while the trade marks remain on the face of the register, their value and utility for assignment and licensing is substantially impaired."*¹⁶

As a majority of the Australian High Court found, the law constituted a *"taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted...."*¹⁷

The UK government should be particularly mindful of the Australia High Court opinions, especially because they align with the standard for assessing a deprivation of property that the courts would apply when evaluating the legality of the proposed measure.¹⁸

3. The DH's Proposal Cannot Withstand Scrutiny as a Deprivation Simply by Preserving the Illusory "Rights" to Register Trademarks and Use Them with Retailers and in the Wholesale Trade

The DH's proposal seeks to obscure its primary intent, *i.e.*, to do away with the tobacco companies' intellectual property without having to pay for it. To that end, it purports to preserve some semblance of trademark ownership and usage in order to create the illusion that the measure is not a deprivation of property. Again, however, the reality remains: The vestigial "ownership" and "usage" that the proposal purports to maintain miss the point of trademarks.

First, the DH's proposal preserves the right of trademark owners to register their tobacco-related trademarks and to keep them on the registry after five years of non-use. However, this "right" does not justify deprivation without compensation because the proposed ban would gut the trademarks of their essential function. The proposal also upends one of the basic foundations of trademark law, which is that trademarks are only valid if they are being used. This "use it or lose it" rule prohibits enterprises from registering trademarks

¹⁵ High Court of Australia, *JTI and others v Commonwealth* [2012] HCA 43, 5 October 2012, paragraph 37.

¹⁶ *Ibid.*, paragraphs 138-139.

¹⁷ *Ibid.*, paragraph 44.

¹⁸ See also Opinion of the Committee of Legal Affairs of the European Parliament on the revised Tobacco Products Directive, 25 June 2013, 2012/0366(COD), p. 4, footnote 4, available at <http://www.europarl.europa.eu>.

for purely defensive or “negative” purposes, *i.e.*, to register the trademarks just to prevent others from using them. If enterprises want trademark protection, they have to show that they genuinely intend to use those trademarks. And if they fail to use those trademarks, the trademarks are subject to cancellation. The DH’s proposal distorts this basic principle by turning the registry into a repository of “negative rights” that can only be enforced against third parties who are, in any event, prohibited from using them by virtue of “standardised packaging.” Indeed, the only real purpose that this repository serves is to mask the reality that all meaningful use of the trademarks will in fact be prohibited.¹⁹

Second, the DH’s proposal allows trademark owners to use their trademarks with retailers and in the wholesale trade (“for example, for stock management in a warehouse”)²⁰, thus suggesting that some remaining use of their trademarks remains possible. Here too, however, this remaining “use” ignores the *raison d’être* of trademarks. As the CJEU has emphasized, trademark rights must be assessed from the perspective of the end consumer, not the intermediary chain of distribution.²¹ If trademark owners cannot use their trademarks to perform their essential functions, *e.g.*, to allow consumers to easily identify a product’s source and to distinguish the product from competing products without any risk of confusion, the trademarks do not acquire, build, and preserve value,²² an outcome that denies trademark owners their legally protected rights – including those that the UK

¹⁹ The DH’s attempt to deem “standardised packaging” to be a “proper reason” for non-use within section 46(1) of the Trade Marks Act 1994 in Draft Regulation 16, is also incompatible with EU law. As the CJEU has repeatedly emphasized, the notion of “genuine use” and “proper reasons” relating to Community trademarks is an autonomous concept of EU law that cannot be qualified by Member State legislation. See, *e.g.*, CJEU Case C-40/01 *Ansil BV* [2003] ECR I-02439, paragraph 31; CJEU Case C-246/05 *Hauptl* [2007] ECR I-4694, paragraph 45. In CJEU Case C-234/06 P, *Il Ponte Finanziaria SpA v OHIM* [2007] ECR I-07333, paragraph 102, the CJEU held: “The concept of ‘proper reasons’ mentioned in that article [of the CTMR] refers essentially to circumstances unconnected with the proprietor of a trade mark which prevent him from using the mark, rather than to national legislation which makes an exception to the rule that a trade mark that has not been used for a period of five years must be revoked, even where such lack of use is intentional on the part of the proprietor of the trade mark.” See also AG Sharpston’s opinion in that case at paragraph 88 which makes clear that the question of proof of use is governed solely by the relevant provisions of the CTMR and “... not by any provision of national law adding a rider to the rule that a national trade mark is liable to revocation if it has not been put to genuine use over a period of five years.”

²⁰ Consultation on the introduction of regulations for standardised packaging of tobacco products, 26 June 2014, paragraph 5.8.

²¹ See *e.g.*, CJEU Case C-517/99 *Merz & Krell* [2001] ECR I-06956, paragraphs 21-22; CJEU Case C-299/99 *Phillips v Remington* [2002] ECR I-5490, paragraph 30 (recognizing that distinctiveness for the purposes of Article 3(1)(b) of the Trade Marks Directive must be judged from the consumer’s perspective because the essential function of a trademark is to “guarantee the identity of the origin of the marked product to the consumer or end-user”); CJEU Case C-409/12 *Kornspitz*, [6 March 2014] (finding that consumer perceptions were determinative in deciding whether a trademark had become generic even if retailers were aware of the trademark’s source).

²² See, *e.g.*, CJEU Case C-40/01 *Ansil BV* [2003] ECR I-02439, paragraph 37 (defining “genuine use” under the Trade Marks Directive as “use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers ... cannot continue to operate if the mark loses its commercial *raison d’être*, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings”).

government has long protected through registration and a strong system of intellectual property law.

Last, UK law already severely restricts tobacco companies from using their trademarks on non-tobacco related products. This fact raises another important question: what meaningful use of tobacco trademarks would remain if the DH's proposal were enacted? Absent compensation, the hypothetical "*stock management in a warehouse*" to which the proposal refers would be insufficient to save "standardised packaging" from being struck down as an unlawful deprivation of intellectual property.

4. The DH's Proposal Would Not Survive Scrutiny Because It Fails to Provide Compensation for PMI's Property

In sum, PMI respectfully submits that the DH's proposal would be unlawful because it fails to provide any compensation for the value of the tobacco companies' property. In this regard, the IA 2014 is *per se* deficient because it does not even consider the *possibility* of just compensation. This omission should be particularly troubling from the perspective of the UK Treasury, as the appropriate compensation would be substantial. Indeed, as PMI and others pointed out in their responses to the DH's 2012 Consultation on "standardised packaging" of tobacco products (the "2012 Consultation"), the total compensation could amount to billions of Pounds.²³

The IA 2014 does not, however, address this aspect of the proposal. Instead, it simply references the lost profits that *UK shareholders* – as distinct from non-UK shareholders who are apparently of no concern – might suffer as a result of down trading to lower-priced products and reduced prevalence (estimated at £44 million). But the IA 2014 fails to consider the most relevant question, *i.e.*, what is the value of the intellectual property that will be lost? Short of that, the DH is simply asking the UK government to roll the dice without being told how much it is wagering or the odds of whether it will have to make good on its bet.

III. The DH's Proposal Is Invalid Because It Would Violate the CTMR

The DH's proposal is also invalid because it would violate the CTMR, which gives trademark owners the right to use their Community trademarks by "*identical means*" throughout the entirety of the EU, regardless of frontiers.

As the CTMR's second recital makes clear, the CTMR is intended to create:

"... legal conditions ... which enable undertakings to adapt their activities to the scale of the Community, whether in manufacturing and distributing goods or in providing services. For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the

²³ In 2014, global research and equities firm Exane BNP Paribas estimated "*this value at £9 billion to £11 billion in Britain*" (see, e.g., Tobacco giants may sue over "standardised packaging", "[I]ndustry had a robust case" and could claim compensation in billions, The Irish Times, 21 July 2014, available at <http://www.irishtimes.com>). See also, e.g., Adam Spielman, Submission on the Future of Tobacco Control, 2008, p. 11, available at <http://www.scribd.com>: "*If a court does order compensation, then it could potentially be very large indeed. We outline two valuation approaches that both lead to 'fair' values for the brand designs of about £3-5 billion for the UK industry as a whole.*"

entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.” (Emphasis added)

This intent is echoed in CTMR’s fourth recital, which states:

“... trade marks should be created which are governed by a uniform Community law directly applicable in all Member States.”

In order to achieve those objectives, Article 1(2) of the CTMR states that a Community trademark is to be a single instrument governed only by Community law:

“A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle shall apply unless otherwise provided in this Regulation.” (Emphasis added)

Moreover, as the CJEU has specifically recognized:

“As regards the objectives pursued by Regulation No 207/2009, if recitals 2, 4 and 6 thereto are read together, it is apparent that the regulation seeks to remove the barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States by enabling undertakings to adapt their activities to the scale of the Community and carry them out without restriction. The Community trade mark thus enables its proprietor to distinguish his goods and services by identical means throughout the entire Community, regardless of frontiers.”²⁴

The DH’s proposal would violate this framework by simultaneously prohibiting tobacco companies from using Community trademarks in the UK and forcing them to use their brand names in a way that is diametrically opposed to how they are used throughout the rest of the EU. The proposal is therefore invalid as breaching the CTMR.

IV. The DH Should Not Proceed Until the CJEU Determines Whether the UK Can Enact the Proposed Measure on the Basis of Article 24(2) of TPD2

As the DH is aware, PMI and other parties recently commenced judicial review proceedings to challenge the validity of the TPD2.

Among its claims, PMI challenges the validity of Article 24(2) of the TPD2, which purports to allow Member States to introduce measures relating to the “standardisation” of packaging that are stricter than those contained in the TPD2. PMI submits that were it not for Article 24(2), the UK government would have no power to introduce the DH’s proposal. If the CJEU annuls Article 24(2) or annuls the TPD2 in its entirety, the UK government would not be able to introduce the DH’s proposed measure.

The DH has recognized that PMI’s claim to challenge the validity of the TPD2 is arguable and has therefore agreed that it would be appropriate for the Administrative Court to grant permission for the challenge to proceed and also make a reference to the CJEU for a

²⁴ CJEU Case C-149/11, *Leno Marken BV v Hagelkruls Behear BV* [2012], paragraph 40 (emphasis added).

preliminary ruling. On 30 July 2014, Supperstone J granted permission for PMI's challenge to proceed.

Indeed, the UK government appears to accept the importance of resolving this point because it has asked PMI to seek expedition of its claim so that the Administrative Court makes the reference to the CJEU as soon as possible. PMI agreed to request expedition of the claim and, on 25 July 2014, Davis J ordered that the claim should be listed in court as soon as possible after 1 October 2014.

Given that the CJEU may well make a ruling that means Member States have no power to enact "standardised packaging", it would be premature for the DH to implement its proposal while TPD2 is *sub judice*.

V. The DH Has Failed to Undertake Any Meaningful Analysis of Whether the Proposed Measure Would Meet the Standards for a Proportionate Interference with Fundamental Rights and Freedoms

The DH has failed to undertake the necessary and proper analysis of whether the proposed measure would constitute a proportionate interference with the tobacco companies' fundamental rights. These interferences are undeniably sharp in intent and severe in effect. For example, the measure would: (i) essentially prohibit tobacco companies from any commercial speech about their products and brands; (ii) compel the tobacco companies to disparage their own products and brands; and (iii) deprive them of their property.

The measure would also constitute a clear barrier to trade within the meaning of Article 34 of the Treaty of the Functioning of the European Union (the "TFEU"), which prohibits "*quantitative restrictions on imports and all measures having equivalent effect*" between Member States. According to Article 34 TFEU, if a product is lawfully produced and marketed in one Member State, it should be admitted for marketing and sale in any other Member State without restriction.²⁵ The measure, however, would explicitly ban branded products lawfully produced and marketed in other Member States from being sold in the UK and instead require firms to make special non-branded packs solely for the UK market.²⁶ It would also prevent firms from other Member States from using their brand equity to retain consumers and gain market share. Similarly, the measure is likely to discriminate against new market entrants and smaller players in the market who rely on their brands to gain market share against larger and more established players.

If Member States choose to deviate from the free movement of goods by erecting barriers to intra-Union trade, they must "*demonstrate that their rules ... are necessary in order to achieve the declared objective*"²⁷ and provide "*appropriate evidence or ... analysis of the*

²⁵ CJEU Case 120/78, *Cassis de Dijon* [1979] ECR 649.

²⁶ As Annex 2 illustrates, PMI produces its products for sale in the United Kingdom in factories across four Member States. If the DH's proposal were to be implemented, however, branded packs produced in factories in Portugal, Poland, Lithuania, or the Czech Republic could no longer be sold in the UK.

²⁷ CJEU Case C-434/04, *Ahokainen and Leppik* [2006] ECR I-09171, paragraph 31 (emphasis added).

*appropriateness and proportionality of the restrictive measure ... and precise evidence enabling its arguments to be substantiated.*²⁸

The DH would also be required to show that the measure constitutes proportionate interference with the tobacco companies' fundamental rights.²⁹ In the context of fundamental rights, the CJEU has held that "*derogations and limitations ... must apply only in so far as is strictly necessary.*"³⁰ To that end, the DH would be required to show compelling evidence that the measure is capable of achieving its public health objectives and that there are no less restrictive means of achieving those objectives. It must also show that the restriction strikes a fair balance between the UK government's interest in introducing the measure and its impact on the fundamental rights and freedoms affected.

As discussed below, the DH fails to satisfy these requirements. Given the seriousness of the rights and freedoms at stake and the severity of their infringement, the DH must show that the proposed measure would result in significant benefits that would demonstrably justify the infringement of protected rights and legitimate expectations. But the DH's evidence base is so limited and deeply flawed that it is not even possible to determine whether the proposed measure is proportionate.

A. The DH Disregards Its Own Practices for Developing Sound Policy

According to the UK's Legislative and Regulatory Reform Act 2006, Section 21, "*regulatory activities should be carried out in a way which is transparent, accountable, proportionate, consistent and targeted.*"³¹ To that end, the UK government's IA Guidance counsels: "*Good policy making should not start with the solution.*"³² Rather, a "*good RIA will include the best information available at the time.*"³³ IAs are designed "*to help policy makers to fully think through the reasons for government intervention, to weigh up various*

²⁸ European Commission, "Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods," p. 30; CJEU Case C-254/05, *Commission v Belgium* [2007] ECR I-04269, paragraph 36 (emphasis added).

²⁹ By acting on the basis of its purported powers under Article 24(2) of TPD2, the UK would be subject to the constraints imposed by the Charter, which apply by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ (EU) C 306 of 13 December 2007, pp. 1 et seq. According to Article 52(1) of the Charter: "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*"

³⁰ See, e.g., CJEU Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, 8 April 2014, paragraph 52; Joined Cases C-92/09 and C-93/09, CJEU *Schecke and Elfert v State of Hesse* [2010] ECR I-11063, paragraph 86; CJEU, Case C-236/09, CJEU *Fugt & Basselier* [2011] ECR I-00773 (emphasis added).

³¹ See Annex 3 for an overview of applicable Better Regulation principles.

³² See HM Government, *Impact Assessment Guidance, When to do an Impact Assessment*, August 2011, paragraph 5.

³³ Cabinet Office, *Regulatory Impact Unit, Better Policy Making: A Guide to Regulatory Impact Assessment*, 2003, paragraph 1 (emphasis added).

*options for achieving an objective and to understand the consequences of a proposed intervention.*³⁴

As detailed below, the DH disregarded these principles: it failed to follow the appropriate process to reach sound conclusions; it limited itself to a narrow piece of evidence that was – by virtue of its design – deeply flawed and non-transparent; and it failed to consider available data from Australia on the impact (if any) of “standardised packaging” in that jurisdiction. As a result, the DH has failed to create a sufficient record to objectively determine – let alone show – whether the proposed measure constitutes a proportionate interference with the tobacco companies’ fundamental rights and freedoms.

B. The Circuitous Process Leading Up to the Issuance of the DH’s Proposal

The UK government has considered the possibility of requiring the mandatory de-branding of tobacco products on several occasions over the past several years, indeed as early as 2008. Each time, however, the UK government decided to shelve these proposals and noted that there was insufficient evidence to conclude that the measure would result in any positive public health benefits.³⁵ Indeed, in its 2012 Impact Assessment (the “IA 2012”), the DH highlighted that a “*key difficulty in evaluating this policy ... is the lack of quantifiable evidence on the likely impact of plain packaging, given that no country has yet introduced this measure.*”³⁶

1. The Curious Tale of Pechey and the Anonymous Group of Conflicted “Experts”

The DH announced in the IA 2012 that it would try to fill the critical gap in the evidentiary record by commissioning Pechey et al. to conduct an “*elicitation of subjective judgments*” from panels of tobacco control experts to obtain their “*best guess estimates*” as to the measure’s likely effects.³⁷ According to the IA 2012, Pechey personally selected a number of individuals, all of whom are described as tobacco control experts, to serve on these panels.³⁸ By design, these experts have remained anonymous throughout the entire process.³⁹ The DH did disclose, however, that each of the panel members would be partial and/or have an economic or personal stake in the outcome of the process. According to the DH, “*impartiality and lack of an economic or personal stake in potential findings are*

³⁴ HM Government, Impact Assessment Guidance, When to do an Impact Assessment, August 2011, paragraph 4.

³⁵ See Annex 4 for an overview of the UK government’s statements on the lack of convincing evidence.

³⁶ IA 2012, paragraph 122 (emphasis added).

³⁷ IA 2012, Annex 2; in January 2013, Pechey published the results of this elicitation process in Rachal Pechey, David Spiegelhalter and Theresa M Marteau, Impact of plain packing of tobacco products on smoking in adults and children: an elicitation of international experts’ estimates, BMC Public Health 2013, available at <http://www.biomedcentral.com> (hereinafter “Pechey et al.”).

³⁸ IA 2012, paragraphs 125, 126.

³⁹ IA 2012, paragraph 128 (“[p]articipants will be asked not to provide any details that could allow them to be identified, and the time and date of data collection will not be recorded”). See Annex 5 showing that a private recruiting company was specifically hired to shield against Freedom of Information requests.

considered impractical in this area.⁴⁰ Of the 33 participants (all of whom completed anonymous and vaguely worded declarations of interest), 23 declared competing interests. Of these 23, some worked as consultants for pharmaceutical companies; others were senior officers in anti-tobacco organizations that lobbied for "standardised packaging"; and others served as expert witnesses in litigation concerning "standardised packaging."⁴¹ With respect to the participants from the UK, all 14 declared competing interests.

According to the IA 2012, the anonymous panelists were provided with information on "standardised packaging" and then asked to provide their "best guess estimates"⁴² after "giving some thought to likely impact" of "standardised packaging."⁴³ By its own admission, the Pechey exercise used unrealistic hypotheses to elicit these subjective guesses: "A more substantial concern regards the need to impose restrictions on estimates in form of using a hypothetical scenario, i.e. all other factors remaining constant, which does not reflect reality, as noted by many participants."⁴⁴ Specifically, the participants were asked to disregard the impact that price and the illicit trade might have on smoking prevalence rates.

In connection with the IA 2012, Professor Hora, who in the 1990s had developed an elicit judgment method upon which the Pechey exercise was purportedly based, submitted a pointed critique of the exercise's design. For example, he commented that he "strongly disagree[d] with decision to have anonymity" and questioned: "Why are impartiality and lack of economic or personal stake considered impractical? Who considers them impractical and why?"⁴⁵ He also criticized the methodology for failing to control for overconfidence, which Professor Hora noted was "the most severe and prevalent bias."⁴⁶

Neither the DH nor Pechey took Professor Hora's comments into account; nor did they consider the comments made by various other stakeholders in the 2012 Consultation.⁴⁷ Indeed, unbeknownst to the public, the Pechey exercise was in fact conducted prior to the closing of the 2012 Consultation.⁴⁸

⁴⁰ IA 2012, paragraph 125; see also the IA 2014, paragraph 230.

⁴¹ Annex 6 provides an overview of the composition of the panels and the competing interests the various participants had declared.

⁴² IA 2012, paragraph 129; Pechey et al., p. 5.

⁴³ IA 2012, paragraph 127.

⁴⁴ Pechey et al., p. 6 (emphasis added).

⁴⁵ Stephen Hora, Comments to DH on expert judgments, 14 June 2012.

⁴⁶ *Ibid.*

⁴⁷ See Annex 7, Comments on DH "Subjective judgment elicitation" methodology.

⁴⁸ Pechey et al. was published in January 2013. The first manuscript of the exercise, however, was already made public on 20 August 2012 (see Annex 8). The manuscript describes that "[p]rior to interview participants were sent a copy of a new (currently unpublished) systematic review on the impact of plain packaging of tobacco products" (p. 4, footnote 6 with reference to Crawford Moodie, Martine Stead, Linda Bauld, Ann McNeill, Kathryn Angus, Kate Hinds, Irene Kwan, James Thomas, Gerard Hastings and Alison O'Mara-Eves, Plain Tobacco Packaging: A Systematic Review, University of Stirling, 2011). The Stirling Review was published on 17 April 2012. The 2012 Consultation ran from 16 April 2012 to 10 August 2012, i.e., the exercise, including the selection of experts and the interviews, appears to have already taken place

When the Pechey exercise was ultimately made public in January 2013, it reported that the panelists had estimated that “standardised packaging” would – over a two-year period – reduce adult smoking prevalence by one percentage point and the rate of children trying smoking by three percentage points.

According to the record, Pechey sought the opinions of people who have similar views about tobacco control and have various conflicts of interest. As such, it is not surprising that the group’s “best guess” hypothesized that “standardised packaging” would reduce prevalence.

2. The DH Waits for Evidence from Australia

In July 2013, the UK government announced that it would “wait until the emerging impact of the decision in Australia can be measured” before deciding whether to proceed with “standardised packaging.”⁴⁹ That announcement therefore appeared to suggest that the DH was preparing to look beyond the best guess estimates of Pechey and focus instead on actual data from Australia as to whether “standardised packaging” was having a significantly demonstrable effect on tobacco usage.

Indeed, Jane Ellison, the Under Secretary of State for Health, stated as recently as 14 October 2013:

*“The Government have decided to wait before making a final decision on standardised packaging. This allows time to benefit from the experience in Australia, where they introduced standardised packaging in December 2012.”*⁵⁰

This view appeared to echo an earlier suggestion from the authors of the Stirling Review on the need for a proper data-driven assessment:

*“Plain packaging is not yet in place in any country and therefore it has not yet been possible to conduct research that could fully evaluate the potential impact of this policy.”*⁵¹

In a similar vein, Pechey recommended that:

*“Future research could compare these results with the actual impact of plain packaging, to inform understanding of the validity of experts’ estimates by looking at the accuracy of these predictions.”*⁵²

prior to the 2012 Consultation. In any event, given that the first manuscript with results was already made public only 10 days after the DH’s consultation closed, it is clear that the DH knew from the outset that it would not be able to take into account any comments on its subjective judgment elicitation method.

⁴⁹ See Annex 4 for an overview of the UK government’s statements about waiting to evaluate developments in Australia.

⁵⁰ House of Commons Hansard Written Answers for 14 October 2013 (pt 0007), available at <http://www.publications.parliament.uk>.

⁵¹ Crawford Moodie, Martine Stead, Linda Bauld, Ann McNeill, Kathryn Angus, Kate Hinds, Irene Kwan, James Thomas, Gerard Hastings and Alison O’Mara-Eves, *Plain Tobacco Packaging: A Systematic Review*, University of Stirling, 2012, p. 88.

⁵² Pechey et al., p. 5 (emphasis added).

3. The Data Emerging from Australia

a) Youth smoking prevalence trend analysis

In March 2014, Professors Kaul and Wolf from the University of Zurich and the University of Saarland made public a study, funded by PMI, which analyzed whether there was evidence for a significant effect of "standardised packaging" on smoking prevalence among minors (Australians aged 14 to 17 years) during the 13 months from introduction of "standardised packaging" in December 2012 through December 2013.⁵³ In conducting their analysis, the professors relied on data covering the time period from January 2001 to December 2013, based on a total sample size of 41,438 survey responses. The data were collected by Roy Morgan Research, an independent Australian research firm that regularly collects data on a range of consumer products. Public health experts and the Australian government regularly rely on Roy Morgan Research data. The professors' analysis did not find evidence of an actual "standardised packaging" effect.

PMI submitted this study as part of a review into "standardised packaging" of tobacco products conducted by Cyril Chantler (the "Chantler Review"), and the two experts met personally with the Chantler Review team to discuss their work.⁵⁴ Neither the Chantler Review nor the IA 2014 so much as mentions the study.

b) Overall smoking prevalence trend analysis

A second study by Kaul and Wolf, made public in June 2014, analyzed whether "standardised packaging" had had any significant effect on smoking prevalence among Australians aged 14 and above.⁵⁵ The total sample size over the entire period was around 700,000; the average annual sample size around 54,200 surveys.

In both studies, using standard techniques for statistical analysis and applying the standard statistical significance level of 5%, the experts found no evidence that "standardised packaging" had had an effect on smoking prevalence among Australians aged 14 to 17 years old (in the case of the March study) or Australians aged 14 and above (in the case of the June study). Kaul and Wolf confirmed that if there had been an effect in reality (including of the magnitude predicted by Pechey and the DH), it would have been reflected in the data. According to the study, however, no effect was found.

c) South Australia government data

Recent data from South Australia indicate that, in that State, smoking prevalence has increased since the introduction of "standardised packaging" (reversing the previously declining trend of smoking prevalence between 2003 and 2012). The Health Minister for

⁵³ Ashok Kaul and Michael Wolf, *The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis*, Working paper series / Department of Economics No. 149, March 2014, available at <http://www.econ.uzh.ch>.

⁵⁴ Transcribed notes from the Meeting to Discuss the (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis, Working Paper, 20 March 2014, available at <http://www.kel.ac.uk>.

⁵⁵ Ashok Kaul and Michael Wolf, *The (Possible) Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis*, Working paper series / Department of Economics No. 165, June 2014 available at <http://www.econ.uzh.ch> (Annex 9).

South Australia stated in a press release dated 21 May 2014 that *"the State's smoking rates ... have increased from 16.7 percent to 19.4 per cent over the last 12 months."*⁵⁶ Significantly, the trend in the sub-group of 15-29 year-olds also reversed: between 2012 and 2013, the smoking prevalence of adolescents and young adults has increased by 1.3 percentage points.⁵⁷

d) NDSHS top-line results

The Australian Institute of Health and Welfare ("AIHW") recently released certain top-line data from its 2013 National Drug Strategy Household Survey ("NDSHS"), which is conducted every three years in Australia. The full report and data sets will not be published until "late 2014."

The 2013 NDSHS top-line results report that daily smoking prevalence has dropped in the three years from 2010 to 2013 from 15.1% to 12.8%. Fieldwork for this study was conducted from July to November 2013. The reported overall decline continues the long-term downward trend in smoking prevalence that was observed in previous NDSHS studies. With respect to 12-17 year-olds, however, the NDSHS data show an increase in daily smoking prevalence: in 2010, the smoking rate for adolescents was 2.5%; in 2013 it was 3.4%.⁵⁸

Between 2010 and 2013, there were a multitude of policy interventions, including the largest tobacco tax increase in Australian history, the ban of display of tobacco products at retail, and a number of additional smoking restrictions. Without further statistical analysis, the NDSHS as such cannot identify the effect of any one measure because it spans over a three year period. In this respect, Geoff Neideck, the director of the AIHW is quoted as saying: *"It is quite evident that there are a range of government policies to minimise the harms to do with smoking and alcohol. ... Plain packaging came in between 2010 and 2013, in what was a fairly strong drop in the daily smoking rate, but it would be a stretch to say this data shows that was a key factor."*⁵⁹

e) Additional Australia data are forthcoming

The Household, Income and Labour Dynamics in Australia ("HILDA") Survey is an annual household-based panel study that began in 2001. The key distinction of this data set is that it is longitudinal; it follows the same panel members over time and tracks smoking prevalence along with many other demographic information.⁶⁰ The first HILDA survey

⁵⁶ Minister Jack Snelling, News Release, 21 May 2014, available at <http://www.premier.sa.gov.au> (Annex 10).

⁵⁷ South Australia Health & Medical Research Institute, Key smoking statistics for South Australia - 2013, available at <http://www.sahmri.com>.

⁵⁸ Australian Institute of Health and Welfare, National Drug Household Survey 2013, available at <http://www.aihw.gov.au>.

⁵⁹ News.com.au, More Australian teenagers are choosing not to drink and smoke according to a major new report, 17 July 2014, available at news.com.au.

⁶⁰ The Australian government has described this data set as follows: *"HILDA is a longitudinal study - this means we seek to tell the story of the same group of people over a period of time. The HILDA study uses a longitudinal design to put together a true, detailed story of Australians for decision makers to help plan for our future. It's the only study of its kind in Australia."* See <http://livinginaustralia.org/faqs>.

conducted after the implementation of “standardised packaging” in Australia was in the field beginning in July 2013. Based on previous practice, we expect that this wave of HILDA data will be released around December 2014. As mentioned above, later this year, the AIHW plans to release the full report on the NDSHS data.

4. Chantler Summarily Dismisses the Importance of Australia Data

Despite the data emerging from Australia, Chantler summarily dismissed its relevance in his April 2014 report⁶¹ (the “Chantler Report”): “Australia does not constitute a trial because a number of things have happened together, including tax rises. Disentangling and evaluating these will take years, not months.”⁶² In his view, “in Australia it will be difficult in due course to separate the effect of plain packaging from other factors such as changes in pack sizes introduced by the manufacturers, and price and tax increases.”⁶³

Chantler did not provide any further explanation for his views, which differed significantly from prior statements made by the UK government and tobacco control advocates as to the relevance of the Australia data. Nor did he provide any support for his view that it would be difficult to disentangle the effects of “standardised packaging” from other variables.

There are, however, well-established econometric techniques that can distinguish among the effects of multiple factors on a single outcome like smoking prevalence.⁶⁴ Given two years’ worth of data, a qualified econometrician should be able to test for the impact of “standardised packaging” in Australia, if any. Indeed, the Draft Regulations themselves would require the UK government to carry out a review of the legislation from time to time, an effort that would necessarily include an assessment of the extent to which its objectives are achieved.⁶⁵

5. The DH Relies Again on Pechey

The DH’s IA 2014 avoids any discussion of the Australia data and chooses to rely solely on the subjective guesswork of the Pechey exercise: “The key variables that define the size of both these benefits and cost are the number of people quitting or not taking up smoking. Fundamentally these key variables are derived from the work of Pechey et al. as described

⁶¹ Standardised Packaging of Tobacco – Report of the independent review undertaken by Sir Cyril Chantler, 3 April 2014.

⁶² Chantler Report, summary paragraph 10.

⁶³ Chantler Report, paragraph 1.19.

⁶⁴ See, e.g., Nick Wilkins, Ayda Yurekli and The-wei Hu, Economic Analysis of Tobacco Demand, World Bank economics of tobacco control toolkit, Tool 3, p. 11; Magdalena Czubek and Surjinder Johal, Econometric Analysis of Cigarette Consumption in the UK, HMRC Working Paper Number 9, December 2010; Melanie A. Wakefield, Kerri Coomber, Sarah J. Durkin, Michello Scollo, Megan Bayly, Matthew J. Spittal, Julie A. Simpson and David Hills, Time Series Analysis of the Impact of Tobacco Control Policies on Smoking Prevalence Among Australian Adults, 2001–2011, Bulletin of the World Health Organisation, March 2014; Jon P. Nelson, *Cigarette Demand, Structural Change and Advertising Bans: International Evidence – 1970–1995*, Contributions to Economic Analysis & Policy, Volume 2, Issue 1, Article 10 (2003); European Commission DG Regio, Evaluating Socio-Economic Development, Sourcebook 2: Methods & Techniques Econometric Models, December 2003; Stephen L. Morgan and Christopher Winship, *Counterfactuals and Causal Inference, Methods and Principles for Social Research*, Cambridge University Press, Chapter 5, 2007.

⁶⁵ Draft Regulation 13.

previously and in Annex B.”⁶⁶ In doing so, the DH not only ignores all of the prior criticisms that it received in the 2012 Consultation as described above⁶⁷, but compounds them with additional flaws. For instance:

- i. The DH uses Pechey’s overall median best guess estimate for New Zealand, Australia, the U.S., Canada, and the UK, rather than its median best guess estimate as to how much the measure would reduce smoking prevalence in the UK alone, which is significantly lower.⁶⁸ Why would the DH not base its assessment for the UK on the UK median? Is it because that would reduce the (speculative) benefits projection by more than 20%, thereby distorting its overall benefits by at least £4 billion? Would a focus on the UK median highlight the fact that 14 out of the 14 UK experts had competing interests?
- ii. Many of the participants in the Pechey exercise acknowledged that “standardised packaging” might lead to material increases in smoking prevalence, both among children and adults. Yet, the IA 2014 does not consider any scenario that factors in those assumptions.

And, despite all the weaknesses in the Pechey exercise, the DH is only able to muster a prediction that the measure might reduce overall smoking prevalence by 0.69 percentage points by 2025.⁶⁹ Moreover, a reduction of that degree could easily be obtained with much less severe but certain measures.⁷⁰ In any event, there is good reason to question whether the 0.69 reduction can be substantiated.

First, both the UK government as well as UK tobacco control researchers have stated that the impact of “standardised packaging” in Australia on smoking behavior would be a critical factor for evaluating the policy. As discussed above, data from the experience in Australia are now available. More data will become available over the coming months.

While the data from Australia cannot justify imposing “standardised packaging” in the UK, the data are certainly a *necessary* component of a proper assessment. Absent other evidence regarding the actual impact on behavior, the prevalence data from Australia are the “*best information available*”⁷¹ today to test the plausibility of the differing hypotheses regarding “standardised packaging.” Indeed, if the DH really believes that “standardised packaging” will have most of its effect on prevalence within the first two years, why would it not want to avail itself of the empirical data from Australia to check if the data confirm

⁶⁶ IA 2014, paragraph 186 (emphasis added).

⁶⁷ See Annex 7, Comments on DH “Subjective Judgment Elicitation” Methodology.

⁶⁸ See Forest plot in Figure 1 at Annex 11.

⁶⁹ IA 2014, paragraph 29. According to the IA’s assumptions, the prevalence rate under the “no standardised packaging” option will be 18.96% in 2025, compared to 18.27% “with standardised packaging.”

⁷⁰ For instance, we estimate that a hypothetical above-inflation tax increase in the range of 0.6% to 1.6% annually over 10 years would have the same impact on smoking prevalence as the DH’s assumed impact of “standardised packaging.” We also believe that any of the alternative measures on which we have previously provided information to the DH could equally achieve the same or better results than the DH’s estimate. See Annex 1, Overview of key materials provided to the UK DH for consideration: Possible key less restrictive measures to “standardised packaging.”

⁷¹ See Annex 3 for an overview of applicable Better Regulations standards.

that belief? Excluding what may be the best evidence available is not a sound basis for policy making; nor will it allow the UK government to adequately test the proportionality of the measure.

Second, as discussed in more detail below, the IA 2014 fails to properly take into account the potential impact of the illicit trade on prevalence rates.

C. The IA 2014 Is Incomplete Because It Fails to Assess the Potential Impact of the Illicit Trade on Prevalence Rates

On several occasions since 2008, the DH has stated that the potential impact of "standardised packaging" on the illicit trade is a major risk factor to consider in deciding whether to mandate "standardised packaging." As numerous sources attest, the illicit trade undermines public health objectives, including by making tobacco more affordable and accessible to youth and other sub-populations who are sensitive to price. As the DH itself explained, the illicit trade "*creates a completely unregulated distribution network and makes tobacco far more accessible to children and young people.*"⁷² The WHO has likewise observed that tobacco smuggling "*poses a serious threat to public health ... because smuggled cigarettes are sold at below market price. Cigarettes are available cheaply, thereby increasing consumption and undermining efforts to keep youngsters from smoking.*"⁷³ Indeed, in a survey conducted by Action on Smoking Health ("ASH") and cited by the DH, researchers found that there was a "*strong association*" between age and purchase of illicit tobacco, with one in three smokers aged 16 to 24 indicating they bought cigarettes from illicit sources.⁷⁴

In accordance with the UK government's Better Regulation principles,⁷⁵ the DH should assess the ways in which proposed policy measures can backfire. The DH did not properly consider, however, how the measure's potential impact on the illicit trade could undermine its purported public health objectives.

In the IA 2014, the DH accepts that "standardised packaging" "*is likely to enhance and diversify current risk that the UK faces from tobacco fraud.*"⁷⁶ It also states that "standardised packaging" is "*likely*"⁷⁷ to cause an increase in the duty unpaid market, and that there is "*a particularly large risk*" related to an increase in cross border shopping which "*cannot be mitigated.*"⁷⁸

Yet, the DH has not addressed this risk and instead notes that "[t]he potential impact on the UK duty unpaid market remains unknown and unquantified." Once again, the DH

⁷² Department of Health, Consultation on the future of tobacco control, 31 May 2008, paragraph 2.30.

⁷³ WHO, Subjects of possible protocols and their relation to the Framework Convention on Tobacco Control (A/FCTC/WG1/3), September 1999, p. 9, available at <http://apps.who.int>.

⁷⁴ DH, Consultation on the future of tobacco control, 31 May 2008, paragraph 2.34.

⁷⁵ See, e.g., HM Treasury, The Green Book, Appraisal and Evaluation in Central Government, July 2011, paragraph 2.6; Better Regulation Task Force, Principles of Good Regulation, 2003, p. 6.

⁷⁶ IA 2014, paragraph 126.

⁷⁷ IA 2014, paragraph 135.

⁷⁸ IA 2014, paragraph 131.

promises that “potential changes in the illicit market and cross border shopping ... will be investigated after this consultation stage IA”, while also claiming that there is “no means of quantification.”

In other words, the proposal lacks the substantiation necessary to quantify the “likely” risk that the measure will increase the illicit trade in tobacco products. This omission renders the IA 2014 incomplete and deprives it of any sufficient basis to determine whether the proposed measure is proportionate.

1. It Is Possible to Quantify the Measure’s Impact on the Illicit Trade

The DH claims that it has no means of quantifying the “likely” risk that the proposed measure will increase illicit trade, although it states that it will investigate this risk after this consultation concludes. But it offers no justification as to why it has failed to conduct that investigation already.

A double standard appears to be at work. For quantifying the impact of “standardised packaging” on smoking prevalence, the DH relies exclusively on Pechey’s subjective judgment elicitation process. Yet the DH dismisses the suggestion that it could quantify the measure’s likely impact on the illicit trade and the corresponding effect on smoking prevalence rates. Indeed, the DH could have used the SKIM study, a behavioral experiment involving UK smokers that we submitted to the DH in March 2013, which estimated a potential increase of illicit trade by more than 30%. The DH could have also used data from Australia.

Moreover, it could have quantified the effects that an increase in illicit trade would have on smoking prevalence rates. Tobacco control groups have developed models to describe such effects. ASH, for example, has presented a model to illustrate the effects of a decrease in illicit trade. The DH could have used the same basic model to study the effects of an increase in illicit trade.⁷⁹ But the DH did not conduct any such analysis, even though we provided the DH with relevant information and data for its consideration.⁸⁰

2. The DH Did Not Evaluate Data from Australia Showing That Illicit Tobacco Trade in Australia Has Increased Since the Introduction of “Standardised Packaging”

Using a widely accepted methodology, KPMG has concluded that illicit tobacco in Australia has reached record levels, increasing from 11.3% in July 2012 to 13.3% in June 2013 and reversing a trend established during the previous two years.⁸¹ PMI provided the KPMG findings to the DH as part of the Chantler Review in January 2014, but the DH has not taken them into account.⁸²

⁷⁹ See Annex 12, Illicit Trade Feedback Loop.

⁸⁰ See Annex 1, Overview of key materials provided to the UK DH for consideration: Impact of plain packaging on illicit trade.

⁸¹ KPMG, Illicit tobacco in Australia, 2013 Half Year Report, October 2013, available at <http://www.pmi.com>.

⁸² Since then, KPMG published their 2013 full year results. In the twelve months leading to December 2013, the level of illicit consumption grew to 13.9% of total consumption, 2.1 percentage points higher than in

Chantler summarily dismissed the findings of KPMG based on his view that he did "not have confidence in KPMG's assessment of the size or changes in – the illicit market in Australia."⁸³ Many things are wrong with Chantler's cursory review of the KPMG report, and the DH should not have followed suit.⁸⁴

First, KPMG's method is widely accepted⁸⁵ and has recently been validated by UK's National Audit Office.⁸⁶

Second, in clear contrast to Chantler, the DH does believe it is likely that "standardised packaging" will increase illicit trade.⁸⁷ The data from Australia are consistent with that belief. But then why not use the data to at least estimate the magnitude of such an increase in the UK?

In sum, the illicit trade is a major risk factor, and the DH has already concluded that "standardised packaging" is likely to increase illicit trade. Yet, the proposed measure does not adequately address the potential magnitude of this likely risk, which makes it impossible to evaluate the benefits and costs of the proposed measure, as UK regulatory standards require.⁸⁸

D. The Record is Insufficient to Justify a Finding that the Proposed Measure is Proportionate

The DH has not properly assessed whether the proposed measure would constitute a proportionate interference with the tobacco companies' fundamental rights and freedoms. As detailed above, the evidentiary record is so deeply flawed that it is objectively impossible to determine whether the proposed measure is proportionate. For that reason as well as others discussed earlier, the measure, if pursued, is likely to be struck down as unlawful.

2012, and 0.6 percentage points higher than in the twelve months ending June 2013 (KPMG, *Illicit tobacco in Australia, 2013 Full Year Report*, 3 April 2014, available at <http://www.pmi.com>) (Annex 13).

⁸³ Chantler Report, paragraph 5.6. The Chantler Report cites to two other data sources as purported proof that the illicit trade in Australia is lower than KPMG's estimates. However, one source (ACBPS data) is misrepresented and the other was accepted without critical scrutiny (Quit Victoria). Both of these sources provide seizure rates and not actual consumption rates of illicit tobacco. These rates differ significantly from consumption rates as even the most effective law enforcement undertaking seizes only a fraction of actual illicit tobacco.

⁸⁴ IA 2014, paragraphs 137-138.

⁸⁵ KPMG uses a robust methodology developed in conjunction with the European Commission Anti-Fraud Office (OLAF), and accepted and relied upon by the European Union, all 28 Member States, and the OECD.

⁸⁶ In its June 2013 "Progress in tackling tobacco smuggling Report", the Comptroller and Auditor General of the National Audit Office compared HMRC's estimates with industry (including KPMG) and academic figures. It concluded that these other sources are "broadly supporting HMRC's tax gap analysis" and that "[i]ndustry figures support the scale and downward trend of HMRC's market estimates for cigarettes since 2000."

⁸⁷ See IA 2014, paragraphs 20, 83, 118, 120, 126, 132-133, 135, 176.

⁸⁸ IA 2014, paragraphs 116 and 135.

VI. Conclusion

The proposal to require "standardised packaging" would be unlawful if enacted:

First, it would be an unlawful deprivation of property. The measure would deprive tobacco companies of the very substance of their valuable trademark rights. Since the DH does not make any provision to compensate the tobacco companies for this deprivation, the measure would be unlawful.

Second, the measure would violate the CTMR, which gives trademark owners the right to use their Community trademarks by "identical means" throughout the EU, regardless of frontiers. The measure would simultaneously prohibit tobacco companies from using Community trademarks in the UK and instead force them to use their brand names in a way that is diametrically opposed to how they are used throughout the rest of the EU. The proposal is therefore invalid as breaching the CTMR.

Third, Article 24(2) of TPD2 does not provide a valid basis to enact the measure. PMI and other tobacco companies are currently challenging the validity of Article 24(2), which purports to allow Member States to adopt stricter rules than those required by the TPD2 without ensuring the free movement of goods from other Member States that otherwise comply with TPD2's harmonized rules. As the UK government is aware, the CJEU previously struck down another tobacco-related directive on similar grounds.

Last, the DH has not followed the UK government's high standards for ensuring that there is an adequate evidence base to assess the proportionality of its proposed measures. The DH limited itself to a narrow piece of evidence that was – by virtue of its design and execution – flawed and non-transparent. At the same time, the DH has not taken adequate account of available data from Australia on the impact (if any) of "standardised packaging" in that jurisdiction. As a result, the record does not enable an objective determination of whether the proposed measure constitutes a lawful interference with fundamental rights and freedoms.

Each of these defects would constitute a separate and independent basis to invalidate the measure. For that reason, PMI respectfully submits that the UK government should exercise significant caution in deciding how to proceed.

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Evidence from Australia since Introduction of “Standardised Packaging” in December 2012

<p>Kaul and Wolf, The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis, University of Zurich Working Paper Series, March 2014.</p>	<p>20 March 2014</p>	<p>Statistical trend analysis of 13 years of publicly available Australian adolescent (14 to 17 years) smoking prevalence data, including 13 months of data from after the implementation of “standardised packaging.” The analysis showed no evidence, at a statistical significance level of 5%, for a “standardised packaging” effect on smoking prevalence.</p>	<p>IGNORED.</p>
<p>KPMG, Illicit tobacco in Australia, October 2013.</p>	<p>10 January 2014</p>	<p>KPMG examined the size of the illicit tobacco market in Australia covering the period from July 2012 to June 2013. KPMG found that the level of illegal consumption of tobacco reached record levels (from 11.8% to 13.3% of total consumption), driven by a large increase in the consumption of illegal, branded cigarettes, primarily in the form of contraband, concurrent with a reduction in consumption of unbranded tobacco. Consumption of counterfeit cigarettes has also increased. Over the period, the total consumption of tobacco appeared to be stable.</p>	<p>DISMISSED: “I do not have confidence in KPMG’s assessment of the size of - or changes in - the illicit market in Australia” (Standardised packaging of tobacco – Report of the independent review undertaken by Sir Cyril Chantler, 3 April 2014, the “Chantler Report”, para 5.6; the DH’s Impact Assessment, 17 June 2014, “JA 2014”, para 137).</p>
<p>London Economics, An analysis of smoking prevalence in Australia, November 2013.</p>	<p>10 January 2014</p>	<p>London Economics administered a series of online surveys to a representative sample of approximately 9,000 Australian residents aged 18 or above, both pre- and post- the introduction of “standardised packaging” (July–October 2012, March 2013 and July 2013). The data does not demonstrate that there has been a change in adult smoking prevalence before and after the introduction of “standardised packaging” and more prominent health warnings.</p>	<p>IGNORED.</p>

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Impact of “Standardised Packaging” on Illicit Trade

<p>Centre for Economics and Business Research (“CEBR”), Quantification of the economic impact of plain packaging for tobacco products in the UK, March 2013.</p>	<p>22 March 2013</p>	<p>CEBR modelled the impact of “standardised packaging” on the UK economy and predicted illicit cigarette consumption would increase from 4.52 billion sticks per year to 5.98 billion sticks per year.</p>	<p>Chantler: IGNORED: “I have seen no convincing evidence to suggest that standardised packaging would increase the illicit market” (Chantler Report, para 5.11). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 135).</p>
<p>SKJM Consumer Research, The impact of standardised packaging on the illicit trade in the UK, August 2012.</p>	<p>22 March 2013</p>	<p>Choice-based conjoint behavioral experiment in the UK shows that a lack of branding in the legal market would create a significant incentive for consumers to buy branded illicit products. The research predicts that “standardised packaging” will cause the illicit trade to increase by more than 30%.</p>	<p>Chantler: IGNORED: “I have seen no convincing evidence to suggest that standardised packaging would increase the illicit market” (Chantler Report, para 5.11). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 135).</p>
<p>Savona and Calderoni, Plain Packaging and Illicit Trade in the UK, Transcrime, May 2012.</p>	<p>9 August 2012</p>	<p>The Joint Research Centre on Transnational Crime, Transcrime, regularly conducts research for the European Commission. It assessed the effects of “standardised packaging” on the illicit trade in the UK and concluded that “plain packaging may have major impacts on the [illicit trade], and particularly on the counterfeiting of tobacco products.”</p>	<p>Chantler: IGNORED: “I have seen no convincing evidence to suggest that standardised packaging would increase the illicit market” (Chantler Report, para 5.11). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 135).</p>

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Impact of “Standardised Packaging” on Illicit Trade

<p>KPMG, Illicit tobacco in Australia, October 2013.</p>	<p>10 January 2014 and 28 February 2014</p>	<p>KPMG examined the size of the illicit tobacco market in Australia covering the period from July 2012 to June 2013, using a robust and globally consistent methodology approved by the European Commission’s Anti-Fraud Office (OLAF), the EU and the EU 27 Member States. KPMG found that the level of illegal consumption of tobacco reached record levels (from 11.8% to 13.3% of total consumption), driven by a large increase in the consumption of illegal, branded cigarettes, primarily in the form of contraband, concurrent with a reduction in consumption of unbranded tobacco. Consumption of counterfeit cigarettes has also increased. Over the period, the total consumption of tobacco appeared to be stable.</p>	<p>Chantler: DISMISSED: “I do not have confidence in KPMG’s assessment of the size of – or changes in – the illicit market in Australia” (Chantler Report, para 5.6). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 155).</p>
<p>Populus, Law Enforcement Survey, Fieldwork, 21-25 June 2012.</p>	<p>9 August 2012</p>	<p>UK police officer survey indicates that most police officers believe that “standardised packaging” will cause an increase in the illicit tobacco market and make counterfeiting easier.</p>	<p>Chantler: IGNORED: “I have seen no convincing evidence to suggest that standardised packaging would increase the illicit market” (Chantler Report, para 5.11). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 135).</p>
<p>Hide, Will plain packaging attract smokers?, The National Business Review, 9 July 2012.</p>	<p>9 August 2012</p>	<p>Former New Zealand Minister Rodney Hide stated: “I suspect plain packaging makes black market cigarettes all the more likely. Driving cigarettes underground would boost tobacco sales no end. Plain packaging and the black market have certainly worked wonders for cannabis.”</p>	<p>Chantler: IGNORED: “I have seen no convincing evidence to suggest that standardised packaging would increase the illicit market.” (Chantler Report, para 5.11). DH: DISMISSED: “We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification” (JA 2014, para 135).</p>

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Impact of “Standardised Packaging” on Illicit Trade

<p>Joossens, Smuggling, The Tobacco Industry, and Plain Packs, Cancer Research UK, November 2012.</p>	<p>22 March 2013</p>	<p>Study by “standardised packaging” proponent estimates that “standardised packaging” would result in a 50% reduction in counterfeiting packaging costs, from 2 to 6 pence to 1 to 3 pence.</p>	<p><u>Chandler: IGNORED.</u> <u>DH: MISREPRESENTED:</u> Joossens does not assess the respective costs of manufacturing legal plain vs. branded packs. The DH, however, uses Joossens’ estimate for counterfeit pack manufacturing costs and applies the estimate to the manufacturing of legal packs (IA 2014, para 100).</p>
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Packaging and Smoking Prevalence	
Heckman, UK Plain Packaging Consultation, 9 August 2012..	<p>9 August 2012</p> <p>There is overwhelming evidence which demonstrates that brands and packaging have nothing to do with why young people begin smoking. Nobel Prize-winning economist James J. Heckman reviewed a vast amount of literature on the causes of youth smoking and concluded that “[t]he economics and public health literatures have extensively investigated the causes of smoking behavior. These literatures have identified multiple causal factors affecting youth smoking behavior, such as prices, parental and peer smoking, early family environments and investments in children.”</p>
PML, Response to the DH consultation on standardised packaging of tobacco products.	<p>9 August 2012</p> <p>The introduction of the Lambert & Butler “Celebration pack” in November 2004 has contributed to a £60 million increase in sales of Lambert & Butler cigarettes. However, the data show total UK cigarette sales volumes continued to decline during the period that the “Celebration pack” was on the market and for three consecutive years. The data also show that youth and adult smoking prevalence continued its steady decline during the same period. The increase in Lambert & Butler sales solely reflects the brand ability to take market share from competing brands.</p>
US Department of Health and Human Services, The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General, 2014.	<p>18 March 2014</p> <p>Branded packaging is fundamentally different from advertising and promotion. The US Surgeon General states that advertising is “a type of marketing that uses the media to create positive product imagery or associations or to connect the product with desirable personal traits, activities, or outcomes.” None of these activities apply to the use of branded packaging to distinguish competitors’ goods offered for sale.</p>

IGNORED.

Chantler: IGNORED: The tobacco industry argues that “packaging mainly influenced switching rather than overall consumption. However as explained earlier in this section, I do not find this convincing” (Chantler Report, para 3.17).

DH: IGNORED: Focuses solely on the increase in sales of Lambert & Butler, ignoring the decline in total sales volumes (LA 2014, para 56).

Chantler: MISREPRESENTED: Chantler selectively quotes the Surgeon General’s 2012 findings, ignoring that the report concluded that “[t]he evidence is suggestive but not sufficient to conclude that tobacco companies have changed the packaging and design of their products in ways that have increased these products’ appeal to adolescents and young adults” (Surgeon General Report 2012 at p. 10, emphasis added).

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Packaging and Smoking Prevalence

<p>Hammond et al, Cigarette pack design and perceptions of risk among UK adults and youth, <i>European Journal of Public Health</i>, 2009, 19(6):631-7.</p>	<p>9 August 2012</p>	<p>Study by "standardised packaging" proponent found that the majority of young people in the UK reported no difference between plain and branded packs with respect to their interest in trying cigarettes, their perception of health risk or their ability to quit.</p>	<p>Chamber: MISREPRESENTED as part of full endorsement of the Stirling Reviews. DH: MISREPRESENTED by selectively focusing on individuals' ratings of smoothness (LA 2014, para 65).</p>
<p>U.S. Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General, 2012.</p>	<p>9 August 2012</p>	<p>Brands do not cause youth smoking. Other factors such as peer influence, parental smoking or rebelliousness are recognized causes, as experts have long stated and real world experience shows.</p>	<p>IGNORED.</p>
<p>TNS Opinion & Social, Special Eurobarometer 385, Attitudes of Europeans towards Tobacco, May 2012.</p>	<p>9 August 2012</p>	<p>This 2012 Eurobarometer survey found that 77% of people in the UK said they started smoking because their friends smoked, while only 1% said packaging played any role (while multiple answers were possible).</p>	<p>IGNORED.</p>
<p>Populus, Cigarette Packaging Survey, fieldwork, 4-5 July 2012.</p>	<p>9 August 2012</p>	<p>UK survey of current and former smokers shows that 97% of those who began smoking before the age of 18 said that "standardised packaging" would not have stopped them from taking up smoking.</p>	<p>IGNORED.</p>
<p>Chapman, quoted in "Plain packs will make smoking history", <i>The Guardian</i>, 24 January 2012.</p>	<p>9 August 2012</p>	<p>"We're not expecting plain packaging to have much impact on existing smokers."</p>	<p>IGNORED: By contrast, a major part of the net benefit of "standardised packaging" calculated in the LA 2014 is based on estimated impact on smoking cessation.</p>
<p>Cancer Research UK, available at http://www.cancercampaigns.org.uk</p>	<p>9 August 2012</p>	<p>"Standardised packaging" "Isn't about telling people to quit, it's about stopping the next generation from starting in the first place."</p>	<p>IGNORED: By contrast, a major part of the net benefit of "standardised packaging" calculated in the LA 2014 is based on estimated impact on smoking cessation.</p>

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Packaging and Smoking Prevalence

<p>Bröck, NHS Somerset, quotation available at http://www.plainpacksprotect.co.uk.</p>	<p>9 August 2012</p>	<p><i>"Plain packaging is designed to protect [children] and is not about current smokers."</i></p>	<p>IGNORED. By contrast, a major part of the net benefit of "standardised packaging" calculated in the IA 2014 is based on estimated impact on smoking cessation.</p>
<p>Conrad, Why children start smoking cigarettes: predictors of onset, British Journal of Addiction, 1992, 87(12):1711-1724.</p>	<p>9 August 2012</p>	<p>Brands do not cause youth smoking. Other factors such as peer influence, parental smoking or rebelliousness are recognized causes, as experts have long stated and real world experience shows.</p>	<p>IGNORED.</p>
<p>Gilman et al., Parental Smoking and Adolescent Smoking Initiation: An Inter-generational Perspective on Tobacco Control, Pediatrics, 2009, 123(2):e274-81.</p>	<p>9 August 2012</p>	<p>Brands do not cause youth smoking. Other factors such as peer influence, parental smoking or rebelliousness are recognized causes, as experts have long stated and real world experience shows.</p>	<p>IGNORED.</p>
<p>Weiss et al., Longitudinal effects of hostility, depression, and bullying on adolescent smoking initiation, Journal of Adolescent Health, June 2011, 48(6): 591-96.</p>	<p>9 August 2012</p>	<p>Brands do not cause youth smoking. Other factors such as peer influence, parental smoking or rebelliousness are recognized causes, as experts have long stated and real world experience shows.</p>	<p>IGNORED.</p>
<p>Mereken et al., No smoke without fire: The impact of future friends on adolescent smoking behaviour, British Journal of Health Psychology, 2011, 16(Pt 1):170-88.</p>	<p>9 August 2012</p>	<p>Brands do not cause youth smoking. Other factors such as peer influence, parental smoking or rebelliousness are recognized causes, as experts have long stated and real world experience shows.</p>	<p>IGNORED.</p>

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Packaging and Smoking Prevalence

<p>Rochman et al., A study on Youth Smoking: Plain Packaging, Health Warnings, Event Marketing and Price Reductions, Center for Health Promotion, University of Toronto, 2003.</p>	<p>8 September 2008 and 9 August 2012</p>	<p>A Canadian study reported that the majority of surveyed university students said “standardised packaging” would make no difference regarding smoking initiation and intensity.</p>	<p>DH: MISREPRESENTED by selectively focusing on the study findings on perceptions of health warnings prominence (JA 2014, para 63).</p>
<p>Goldberg et al., When Packages Can't Speak Possible impacts of plain and generic packaging of tobacco products, Expert Panel Report for Health Canada, March 1995.</p>	<p>9 August 2012</p>	<p>Study conducted for the expert panel that considered “standardised packaging” for the Canadian government in the 1990s noted that “[i]t is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from friends. There is no brand choice – the choice is simply to smoke or not to smoke. Therefore, in the uptake process brand and package are very minor components. This means that changing the package will not have any major effect on the decision(s) to smoke or not to smoke.”</p>	<p>DH: MISREPRESENTED by selectively focusing on the recall of health warnings (JA 2014, para 63).</p>
<p>Andrews, Director of Smokefree South West, quoted in “Smokefree South West welcomes Government consultation on tobacco packaging”, This is Bristol, 16 April 2012.</p>	<p>9 August 2012</p>	<p>“Plain packaging ... is not about current smokers.”</p>	<p>IGNORED: By contrast, a major part of the net benefit of “standardised packaging” calculated in the JA 2014 is based on estimated impact on smoking cessation.</p>
<p>Lloyd, Fresh (Smoker Free North West), Comment: Plain packaging will help cut youth smoking, Politics.co.uk, 24 February 2012.</p>	<p>9 August 2012</p>	<p>“Plain packaging is not about stopping existing smokers.”</p>	<p>IGNORED: By contrast, a major part of the net benefit of “standardised packaging” calculated in the JA 2014 is based on estimated impact on smoking cessation.</p>

Annex I – Overview of Key Materials Provided to the UK Department of Health for Consideration

Packaging and Smoking Prevalence

<p>Pitsurangsanit, TRC conducts research on plain packaging – change pack to reduce consumption, Maticion, 4 April 2012.</p>	<p>9 August 2012</p>	<p>“Plain packaging will not really affect those who are already addicted to smoking.”</p>	<p>IGNORED: By contrast, a major part of the net benefit of “standardised packaging” calculated in the IA 2014 is based on estimated impact on smoking cessation.</p>
<p>Connop et al., Youth smoking and the role of the peer group, Ontario Tobacco Research Unit, Working Paper No. 47, 1999, cited in Bloomquist, Global Tobacco: The Plain Risk to Global Tobacco, 21 March 2011.</p>	<p>9 August 2012</p>	<p>Authors of a study commissioned by Health Canada observed that “[s]moking’s negatively charged public image” attracts young people to it, “a fact that suggests that the widely advocated policy of denormalisation could have significant counterproductive consequences.” By further “denormalising” tobacco consumption, “standardised packaging” could enhance the effect of young people feeling that they are being rebellious and engaging in a non-mainstream activity.</p>	<p>Chantler: DISMISSED: “The suggestion that standardised packaging could produce a perverse appeal for children ... in my view remains speculative and lacking in supporting evidence... [W]hilst not entirely lacking plausibility, at least for a subset of young people...” (Chantler Report, para 4.23). DH: IGNORED.</p>
<p>NHS Information Centre, Smoking, drinking and drug use among young people in England in 2011, 2012.</p>	<p>9 August 2012</p>	<p>The “forbidden fruit perception”, a direct effect of denormalization, often attracts young people most. This phenomenon is clearly evidenced by illegal – and unbranded – drug use by youngsters in many countries. In England, more 11 to 15 year olds used drugs in a 30 day period than were regular smokers.</p>	<p>Chantler: DISMISSED: “The suggestion that standardised packaging could produce a perverse appeal for children ... in my view remains speculative and lacking in supporting evidence... [W]hilst not entirely lacking plausibility, at least for a subset of young people...” (Chantler Report, para 4.23). DH: IGNORED.</p>
<p>Australian Institute of Health and Welfare, 2010 National Drug Strategy Household Survey Report, July 2011.</p>	<p>9 August 2012</p>	<p>The “forbidden fruit perception”, a direct effect of denormalization, often attracts young people most. This phenomenon is clearly evidenced by illegal – and unbranded – drug use by youngsters in many countries. In 2010, 21.5% of Australian 14 to 19 year olds tried cannabis while 11.9% tried tobacco.</p>	<p>Chantler: DISMISSED: “The suggestion that standardised packaging could produce a perverse appeal for children ... in my view remains speculative and lacking in supporting evidence... [W]hilst not entirely lacking plausibility, at least for a subset of young people...” (Chantler Report, para 4.23). DH: IGNORED.</p>

Annex 1 – Overview of Key Materials Provided to the UK Department of Health for Consideration

Assessment of DH's Evidence Base on "Standardised Packaging"	
<p>PML, Letter to independent review undertaken by Sir Cynil Chanter.</p>	<p>10 January 2014</p> <p>The studies reviewed in the Stirling Review research update (Moodie et al., 2013) rely on surveys of perceptions and intentions, even though the Australian experience has shown that consumer perceptions and intentions have not led to changes in smoking behavior. In addition, each study contains a number of flaws, including extremely small sample size and flawed methodologies.</p>
<p>Darwall, Selecting the Evidence to Fit the Policy, An Evaluation of the Department of Health's Consultation on Standardised Tobacco Packaging, January 2013.</p>	<p>22 March 2013</p> <p>The report highlights "[t]he questionable nature of the evidence adduced in support of the policy and the misleading inference drawn from it." "As a matter of logic, for standardised packaging to work, there must exist a causal relationship between tobacco packaging and smoking. The DH has not demonstrated that such a relationship exists. What is described as evidence in the consultation is based mainly on surveys of smokers' views and intentions – not what they actually do (a crucial distinction recognised elsewhere by the DH, but not for the purposes of this consultation) – which a US Court described as 'mere speculation and conjecture.'"</p>
<p>PML, Response to the DH consultation on standardised packaging of tobacco products.</p>	<p>9 August 2012</p> <p>Virtually all of the papers considered in the Stirling Review are based on participants' self-reports and on "speculative data such as survey questionnaires or focus group responses." Self-reported perceptions and speculation are not measures of actual impact or behavior and do not provide evidence that "standardised packaging" will reduce smoking prevalence among youth or adults.</p>

Chanter, DISMISSED: "I am satisfied that the methods employed by the Stirling Review, such as the search protocol, were appropriate, and as close as could be achieved to a Cochrane standard given the particular circumstances and nature of the problem being considered" (Chanter Report, para 4.7).

DISMISSED, Chanter, followed by the DH, chooses to accept "intermediate outcomes... debatably public health benefits in themselves" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and 'speculative'" and "the well-known weakness of stated intentions in predicting behavior" (Chanter Report, paras 4.2.1, 5.2 and 6.3).

DISMISSED, Chanter, followed by the DH, chooses to accept "intermediate outcomes... debatably public health benefits in themselves" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and 'speculative'" and "the well-known weakness of stated intentions in predicting behavior" (Chanter Report, paras 4.2.1, 6.2 and 6.3).

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Assessment of DH's Evidence Base on "Standardised Packaging"

<p>LECG (Compass Lexecon), Summary assessment of "Plain Tobacco Packaging: a systematic review", 22 May 2012.</p>	<p>9 August 2012</p>	<p>None of the 37 papers reviewed in the Stirling Review measured actual smoking behavior and none of these answered, directly or indirectly, the question of whether "standardised packaging" will reduce tobacco use. Instead, the studies are based on unreliable self-reports and speculation. Moreover, the data is far from conclusive on the three outcomes addressed by the Stirling Review, namely appeal, salience of health warnings, perception of harm and smoking-related intentions and behaviors.</p>	<p>DISMISSED. <u>Chantler</u>, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and speculative" and "the well-known weakness of stated intentions in predicting behavior" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>
<p>Nisbett et al., Telling More Than We Can Know: Verbal Reports on Mental Processes, Psychological Review, 1977, 84:231-259.</p>	<p>9 August 2012</p>	<p>"It may be quite misleading for social scientists to ask their subjects about the influences on their evaluations, choices or behaviour. ... such reports, as well as predictions, may have little value. ... More importantly, the evidence suggests that people's erroneous reports about their cognitive processes are not capricious or haphazard, but instead are regular and systematic."</p>	<p>DISMISSED. <u>Chandler</u>, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and speculative" and "the well-known weakness of stated intentions in predicting behavior" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>
<p>Kleijnen Systematic Reviews Ltd., Systematic review of the effectiveness of an increase in the size of tobacco health warning labels on cigarette packs in reducing smoking, June 2011.</p>	<p>9 August 2012</p>	<p>"[O]pinions, beliefs and affective responses" often "can be misleading by over or underestimating the true outcome. ... As such, they are an unreliable measure of actual quitting behavior."</p>	<p>DISMISSED. <u>Chantler</u>, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and speculative" and "the well-known weakness of stated intentions in predicting behavior" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>
<p>Roxon, cited in "Cigarette packaging proof 'to come'", Herald Sun, 25 May 2011; Roxon, Transcript of interview with Neil Mitchell, 8 April 2011.</p>	<p>9 August 2012</p>	<p>Officials from Australia, the only country that has passed "standardised packaging" legislation, admitted to having no evidence of its effectiveness. Nicola Roxon, the Health Minister at the time the policy was introduced, admitted on various occasions that there is "no proof that plain cigarette packaging would cut smoking rates," that the "sort of proof [people] are looking for doesn't exist" and even referred to "standardised packaging" as an "experiment."</p>	<p>DISMISSED. <u>Chantler</u>, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and speculative" and "the well-known weakness of stated intentions in predicting behavior" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>

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Assessment of DH's Evidence Base on "Standardised Packaging"

<p>Van Onselen, Where there's smoke there's cash, Daily Telegraph, 15 July 2012.</p>	<p>9 August 2012</p>	<p>Officials from Australia, the only country that has passed "standardised packaging" legislation, admitted to having no evidence of its effectiveness. IP Australia, the government agency responsible for administering Australia's intellectual property rights system, concluded: "A Senate report in 1995 concluded that there was insufficient evidence to demonstrate the efficacy of generic packaging in achieving health policy objectives and recommended further investigation. IP Australia is unaware of any subsequent evidence that the public interest would be better served by plain packaging."</p>	<p>DISMISSED. Chantler, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and 'speculative'" and "the well-known weakness of stated intentions in predicting behaviour" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>
<p>Public Health Research Consortium, Evaluating the Impact of Picture Health Warnings on Cigarette Packs, June 2010.</p>	<p>9 August 2012</p>	<p>The Public Health Research Consortium evaluated the impact of the 2008 introduction of picture warnings in the UK. <i>"Forgoing a cigarette when about to smoke one; stubbing out a cigarette or using a variety of techniques to avoid viewing the health warnings messages are important behavioural responses to the health warnings. Among both adults and young people, the prevalence of forgoing a cigarette or stubbing a cigarette out did not change post implementation of the pictures."</i></p>	<p>DISMISSED. Chantler, followed by the DH, chooses to accept "intermediate outcomes... <i>debatably public health benefits in themselves</i>" and the Stirling Reviews findings, despite them being "relatively modest", "essentially indirect and 'speculative'" and "the well-known weakness of stated intentions in predicting behaviour" (Chantler Report, paras 4.21, 6.2 and 6.3).</p>

Annex 1 – Overview of Key Materials Provided to the UK Department of Health for Consideration

Effect of “Standardised Packaging”-Induced Down Trading on Consumption

<p>Roland Berger Strategy Consultants, The New Tobacco Products Directive - Potential Economic Impact, April 2013.</p>	<p>10 January 2014</p>	<p>Roland Berger assessed the potential economic impact of the 2012 proposal for a revised EU Tobacco Products Directive on the entire tobacco sector and EU Member States' economies focusing on pack and product standardization measures. It forecasted that “[p]rice competition will reduce prices across all tobacco market segments. As a result demand for cigarettes and fine/cut is expected to increase by up to 2%.” Roland Berger noted that “these effects would be even stronger in the case of plain packaging, a measure not discussed here, in particular for the premium segment.”</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>
<p>Padilla, The impact of plain packaging of cigarettes in UK: a simulation exercise, LECCO, 2010.</p>	<p>22 March 2013</p>	<p>International economics expert Dr Jorge Padilla has modelled the impact of removing branding on the legal cigarette market in the UK and predicts down trading will force price competition resulting in price declines of up to 16.1%.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>
<p>CEBR, Quantification of the economic impact of plain packaging for tobacco products in the UK, March 2013.</p>	<p>22 March 2013</p>	<p>CEBR modelled the impact of “standardised packaging” on the UK economy and predicts that “standardised packaging” would cause the average price of legal cigarettes to decline by up to £0.95 per pack, consumption of legal cigarettes to increase by up to 3.5 billion sticks per year.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>
<p>Cavin et al., Low-cost cigarettes and smoking behavior in California, 1990-1993, American Journal of Preventive Medicine, 1996, 12(1):17-21.</p>	<p>9 August 2012</p>	<p>The growth in market share of generic cigarettes in the US in the 1980s led directly to very significant price reductions across the whole market. The negative effect of this on smoking behavior and, in particular, the increase in youth smoking is well documented.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>

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Effect of “Standardised Packaging”-Induced Down Trading on Consumption

<p>PML, Supplemental information regarding the impact of standardised tobacco packaging.</p>	<p>22 March 2013</p>	<p>“Standardised packaging” will exacerbate down trading to lower-priced tobacco and price competition, cause an increase in the illicit trade and result in more smoking (compared to the baseline scenario) along with a host of consequences.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>
<p>Thrasher et al., Estimating the impact of pictorial health warnings and “plain” cigarette packaging: Evidence from experimental auctions among adult smokers in the United States, Health Policy, 2011.</p>	<p>22 March 2013</p>	<p>An experimental auction study found smokers are willing to pay less for de-branded packs with pictorial health warnings compared to branded cigarette packs. The average price difference was nearly 15%.</p>	<p>Chandler: MISREPRESENTED as part of full endorsement of the Stirling Reviews.</p>
<p>Ross and Chaloupka, The Effect of Cigarette Prices on Youth Smoking, February 2001.</p>	<p>22 March 2013</p>	<p>An empirical test of the effects of price on youth demand for cigarettes confirms that youth propensity to smoke and the intensity of the smoking habit were closely linked with price. Adolescents were found to be more responsive than adults to price.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>
<p>Spielman, Anti-Tobacco Plans for England Should Not Upset Investors, February 2010; Spielman, Submission on the Future of Tobacco Control, 2008.</p>	<p>9 August 2012</p>	<p>Tobacco analyst at Citigroup Investment Research highlighted that given the widely acknowledged relation between price and consumption, it is simply irrational for governments to introduce legislation that, by taking away branding and product differentiation, attacks the higher price, premium segment.</p>	<p>Chandler: DISMISSED: “[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise” (Chandler Report, para 5.4).</p>

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Effect of “Standardised packaging”-Induced Down Trading on Consumption

<p>Bonadia, quoted in Stewart-Robertson, T., Cigarette branding faces Scottish ban to cut smoking rate, The Herald Scotland, 14 November 2010.</p>	<p>9 August 2012</p>	<p>Dr. Enrico Bonadia, a law lecturer at the University of Abertay, warned that “standardised packaging” could provoke a price war, driving down costs and increasing smoking rates. <i>“If the UK adopts plain packaging, a price war is a probability”</i> he said. <i>“If there was a price war and the price goes down, the number of smokers would go up in Scotland. By reducing price, you stimulate consumption. It would be a boomerang effect.”</i></p>	<p>Chandler; DEMISSED: <i>“[I]t is my view that the risk of such effects undermining the objectives of a standardised packaging policy are small and that the impacts could be readily mitigated through taxation if nevertheless they were to materialise”</i> (Chandler Report, para 5.4).</p>
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Annex 1 – Overview of Key Materials Provided to the UK Department of Health for Consideration

Requirement to Pay Compensation for the Deprivation of Brands			
PML, Supplemental information regarding the impact of standardised tobacco packaging.	22 March 2013	“Standardised packaging” is an expropriation of valuable tobacco industry property rights that would require the government to pay substantial compensation to the tobacco industry under Article 1, Protocol 1 of the European Convention on Human Rights. The value of the intellectual property rights that would be lost as a result of this measure runs into billions of pounds.	IGNORED.
British American Tobacco Australasia Ltd. v. The Commonwealth of Australia, High Court of Australia, Case No. S389/2011.	22 March 2013	Six of the seven Australian High Court judges found that “standardised packaging” is a taking or deprivation of the tobacco industry’s property. Under EU law standards, given different requirements applicable to claims for expropriation, legal challenges to “standardised packaging” would be subject to compensation payments.	IGNORED.
Lord Hoffmann, Opinion on whether a prohibition on the use of a registered trade mark without compensation would be contrary to Article 1 Protocol 1 of the European Convention on Human Rights, 24 May 2012.	22 March 2013 and 9 August 2012	“Standardised packaging” is an expropriation of the tobacco industry’s valuable intellectual property rights and will require the UK government to pay tobacco companies billions of pounds in compensation.	IGNORED.
Spielman, Submission on the Future of Tobacco Control, 2008.	22 March 2013	Tobacco analyst at Citiigroup Investment Research, using simplified discounted cash flow modelling of tobacco industry profits, calculated a fair value for tobacco industry brand designs (which are lost with “standardised packaging”) of £5 billion.	IGNORED.

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Requirement to Pay Compensation for the Deprivation of Brands

<p>PML, Response to the DH's Consultation on the Future of Tobacco Control.</p>	<p>8 September 2008</p>	<p>Even if the Government could demonstrate that "standardised packaging" were a proportionate and legal measure (which it is not) the Government will be required to compensate manufacturers for the value of the expropriated trademarks. As recognized consistently, the value of tobacco manufacturers' trademarks, brand logos and pack designs is enormous, including some of the most valuable commercial brands in the world.</p>	<p>IGNORED.</p>
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Annex 1 – Overview of Key Materials Provided to the UK Department of Health for Consideration

Economic Impact of “Standardised Packaging” (Retailers/Manufacturers)

			<p>CEBR, Quantification of the economic impact of plain packaging for tobacco products in the UK, March 2013.</p>	<p>22 March 2013</p>	<p>CEBR modelled the impact of “standardised packaging” on the UK economy and found that lower prices combined with purchases lost to the illicit trade will result in lost earnings of up to £300 million for small independent retailers, despite a likely increase in the consumption of legal (and illicit) tobacco. This translates into approximately 30,000 lost jobs, and would likely drive many small independent retailers into insolvency.</p>	<p>IGNORED.</p>
			<p>Ridgway, quoted in “A bonfire of brands”, FMCG News, August/September 2012.</p>	<p>22 March 2013</p>	<p>UK’s leading packaging manufacturers explained, “<i>Should legislation go ahead, the packaging industry will be severely affected; there will almost certainly be factory closures and redundancies.</i>”</p>	<p>IGNORED.</p>
			<p>Mardle, Print wins respite in battle against tobacco packs plan, PrintWeek, 13 July 2012.</p>	<p>22 March 2013</p>	<p>Unite National Officer stated “<i>if [“standardised packaging”] goes forward, hundreds of jobs could be lost.</i>”</p>	<p>IGNORED.</p>
			<p>Visuality, The Effects of Standardised Tobacco Packaging on Retail Service in the UK, September 2012.</p>	<p>22 March 2013</p>	<p>The Rural Shops Alliance study and the experiences of retailers in Australia confirm that “standardised packaging” will increase retailers’ costs. The RSA Study found transaction times would nearly double, and the service error rate would increase by three to six times.</p>	<p>DH: DISMISSED to come up with own estimate of 1.5 seconds time saving per transaction (IA 2014, para 109).</p>
			<p>Roy Morgan Research, Impact of Plain Packaging on Small Retailers, 25 January 2013.</p>	<p>22 March 2013</p>	<p>Survey of Australian retailers showed the negative consequences of “standardised packaging” on retail shops <i>inter alia</i> increased transaction times, customer frustration, increase in service errors, product returns, decreased level of service, greater impact for smaller retailers, increased stock and inventory times (ordering, delivery, stocking), greater impact for specialist tobacconists, increased staffing costs (training, workload).</p>	<p>IGNORED.</p>

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Economic Impact of “Standardised Packaging” (retailers/manufacturers)

<p>Drummond, It's plain: cigarette packs create fuss, Australian Financial Review, 19 November 2012.</p>	<p>22 March 2013</p>	<p>In a survey, nine out of ten small retailers confirmed that they had experienced an increase in the time taken to serve customers, 75% have faced increased frustration from adult consumers and the majority of retailers have seen an increase in service errors and heavier workloads for their staff.</p>	<p>IGNORED.</p>
<p>Wardell, Australia's tobacco marketing laws give retailers a headache, Reuters Newsletters, ANZ, 30 November 2012.</p>	<p>22 March 2013</p>	<p>In a survey, Australian retailers complain about the burden and cost imposed on them by “standardised packaging.”</p>	<p>IGNORED.</p>
<p>Rogut, Plain Packaging Proving Bad for Retailers' Health, AACCS press release, 12 February 2013.</p>	<p>22 March 2013</p>	<p>The Australian Association of Convenience Stores (AACCS) confirmed that “<i>while the volume of tobacco sold has not been impacted by the plain packaging reforms, the cost burden on individual retailers has escalated.</i>”</p>	<p>IGNORED.</p>

Annex 1 – Overview of Key Materials Provided to the UK Department of Health for Consideration

Possible Less Restrictive Alternative Measures to “Standardised Packaging”

<p>Sutcliffe et al., Institute of Education, University of London, Young people's access to tobacco: A mixed method systematic review, December 2011.</p>	<p>9 August 2012</p>	<p>DH-funded systematic review by the London University Institute of Education found that “social access via friends is the source used most commonly” by young people to access tobacco. This is particularly true for “younger and occasional smokers” – those most at risk of becoming daily smokers. Because of this, the Institute of Education concludes that “[i]nterventions to prevent social access are therefore likely to have the broadest impact whilst also being particularly useful in deterring smoking initiation.” Also, youth access to tobacco products through retail outlets is still a problem: “patterns of retail access shown in surveys and qualitative data suggest that retail regulation implementation is variable, but where implemented consistently will deter access attempts.”</p>	<p>IGNORED.</p>
<p>Local Government Group, Tobacco control survey, England 2010/11: A report of council trading standards service and activity, September 2011.</p>	<p>9 August 2012</p>	<p>Trading Standards report highlighted the ease with which young people buy tobacco in retail outlets: in 15% of undercover test buys, retailers sold to underage youths, and an estimated 1,100 premises across England regularly sell tobacco products to minors. At the same time, only 51% of councils carried out education initiatives related to the sale of tobacco products to minors.</p>	<p>IGNORED.</p>
<p>Minister of Health Maria Larsson, available at http://www.riksdagen.se.</p>	<p>9 August 2012</p>	<p>Sweden has taken the position that reducing young people's access to tobacco, coupled with in-school education programs, is an effective way to reduce youth smoking. Citing official data released by ESPAD, the European School Survey Project on Alcohol and Other Drugs, Minister of Health Maria Larsson explained: “The results show that Swedish school children smoke less than in most countries. ... It should be noted that Finland, although they have adopted a zero vision for tobacco and a display ban for tobacco sales, has a higher proportion of adolescents who smoke than Sweden.”</p>	<p>IGNORED.</p>

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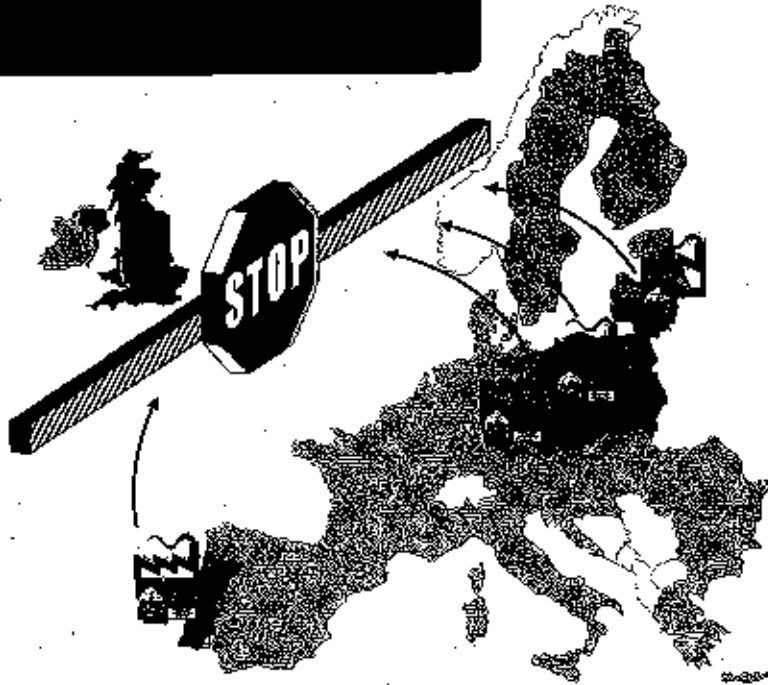
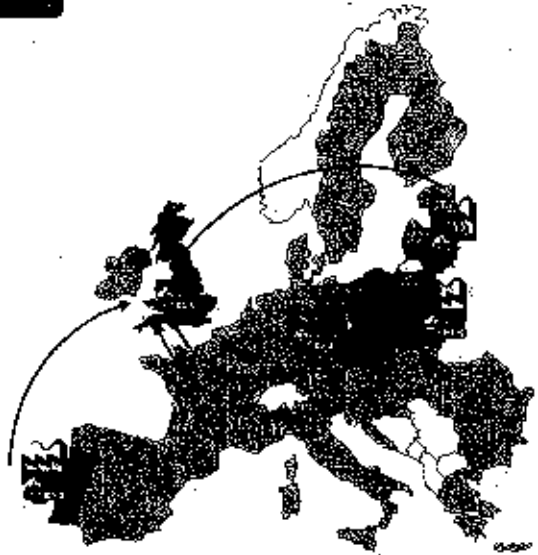
Possible Less Restrictive Alternative Measures to "Standardised Packaging"

<p>Drug Commissioner of the Federal Government, National Strategy for the Drug and Addiction Policy, 15 February 2012; BZgA, Survey on Youth Affinity for Drugs – 2011, 2012.</p>	<p>9 August 2012 and 18 March 2014</p>	<p>Germany shows that reducing youth smoking is feasible through targeted prevention and education campaigns. The Federal Centre for Health Education (BzGä) reported that the "percentage of smokers among young people aged between 12 and 17 years has dropped to a new all-time low: 11.7 per cent in 2011 from 27.5 per cent in 2001." The Federal Drug Commissioner explained this success as follows: "Alongside regulatory measures such as the Youth Protection Bill's smoking restriction for under-ages persons, tobacco tax increases and regulations aimed to provide protection from passive smoking in Germany, the Federal Office for Health Education's (BZgA) 'Smoke Free' youth campaign has contributed significantly to the success of tobacco policies in the target group of under-aged and young adults."</p>	<p>IGNORED.</p>
<p>U.S. Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General, 2012.</p>	<p>9 August 2012</p>	<p>The US has enjoyed low youth smoking and overall consumption through much less restrictive and costly measures than "standardised packaging": "Coordinated, multicomponent interventions that combine mass media campaigns, price increases including those that result from tax increases, school-based policies and programs, and statewide or community-wide changes in smoke-free policies and norms are effective in reducing the initiation, prevalence, and intensity of smoking among youth and young adults."</p>	<p>IGNORED.</p>
<p>Office on Smoking and Health, CDC, Cigarette Use Among High School Students - United States, 1991-2005, Morbidity and Mortality Weekly Reports, 2006, 55(26):724-726.</p>	<p>8 September 2008</p>	<p>"Evidence-based strategies that can increase the rate of decline in youth smoking include greater exposure to effective media campaigns, comprehensive school-based tobacco-use prevention policies and programs in conjunction with supportive community activities, and higher retail prices for tobacco products."</p>	<p>IGNORED.</p>

Article 34 TFEU

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

In its seminal *Cassis de Dijon*-judgment (Case 120/78) the Court of Justice of the European Union established the principle of mutual recognition: This means that as a matter of principle a product lawfully produced and marketed in one Member State may be imported and sold in another Member State without restriction absent any justified reason.



“...the risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research.”
(CJEU, Case C-17/93 Criminal Proceedings against Van der Veldt)

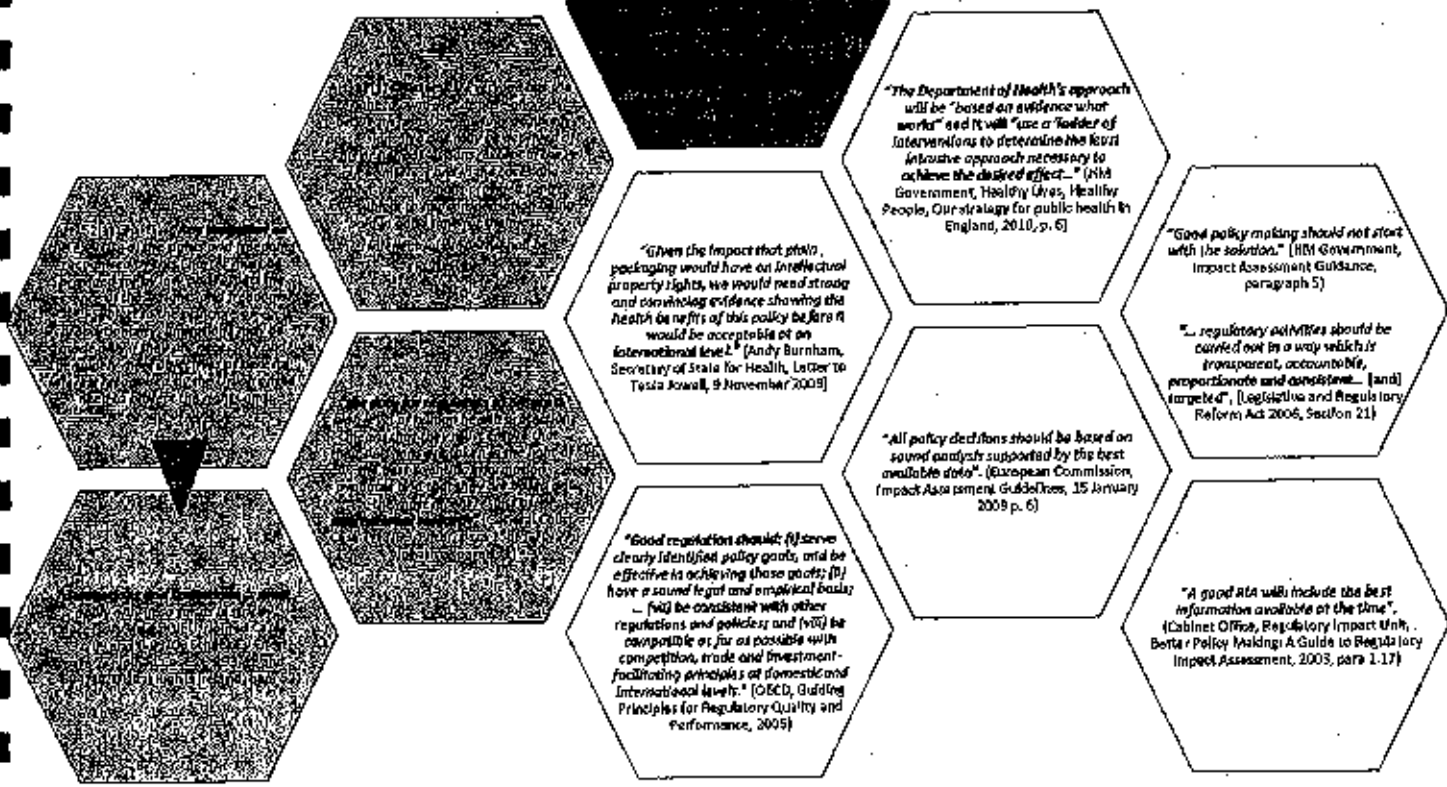
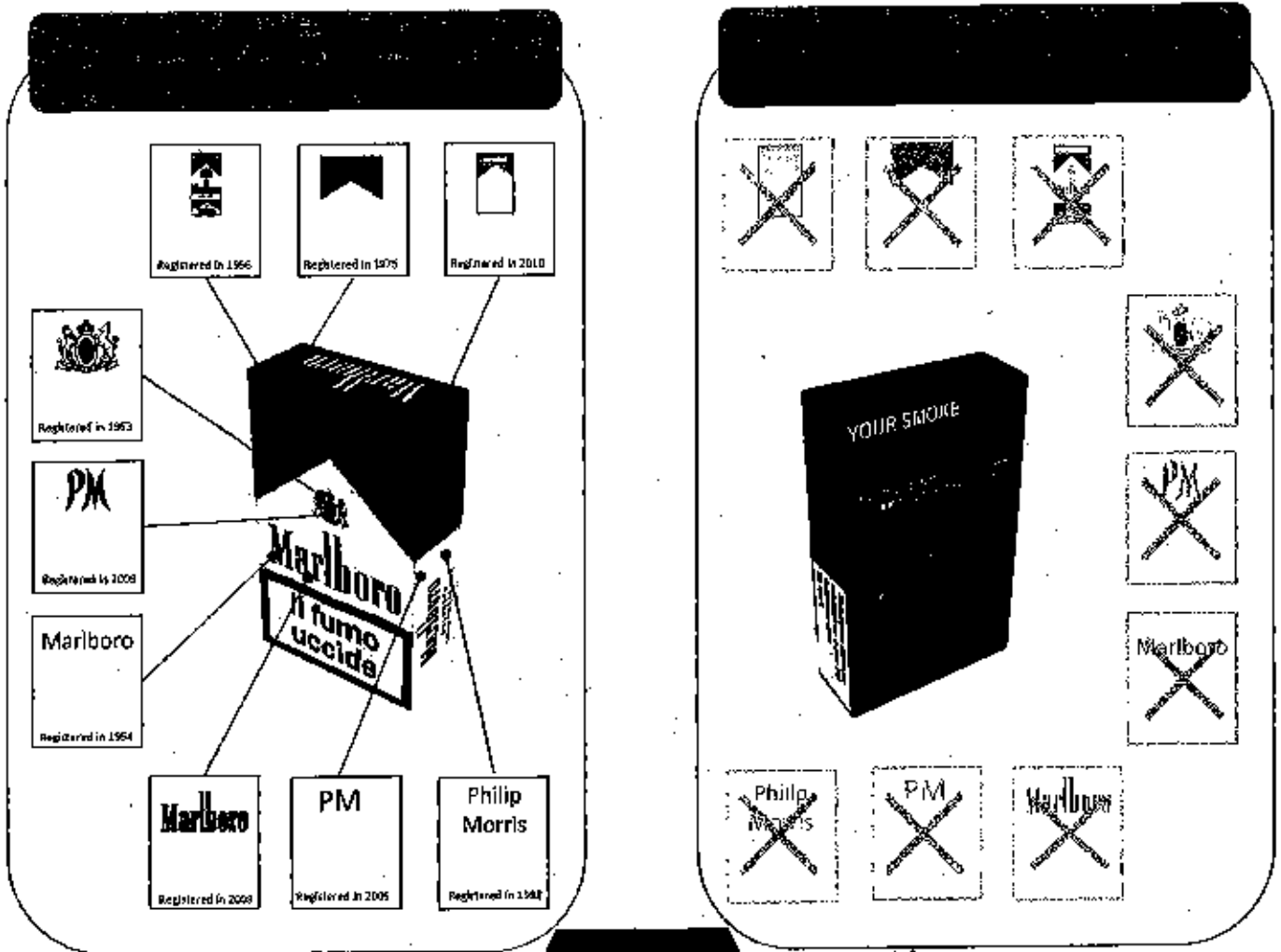
“...the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated...”
(European Commission “Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods”; CJEU, Case C-254/05 *Commission v Belgium*)

“... authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established...”
(CJEU, Case C-320/03 *Commission v Austria*)

“... It is for the national authorities, where they adopt a measure derogating from a principle enshrined by European Union law, to show in each individual case that that measure is appropriate...”
(CJEU, Case C-456/10 *Anett*)

“... It is for the national authorities to demonstrate that their rules – are necessary in order to achieve the declared objective, which in the present case is the protection of public health and public order, and that this objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on Intra-Community trade...”
(CJEU, Case C-434/04 *Ahokainen and Leppik*)

Annex 3 – Overview of Better Regulation Principles

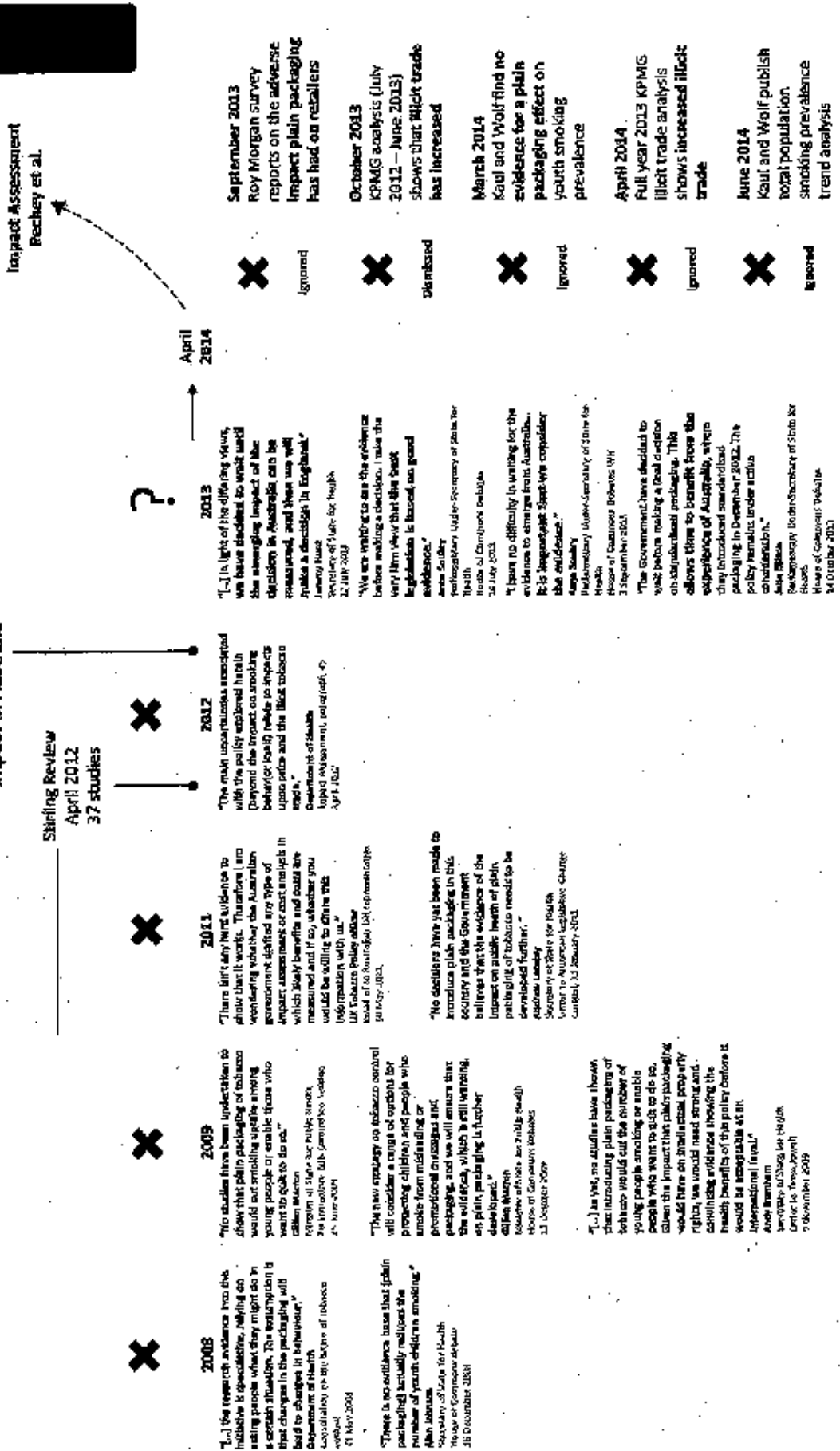


Annex 4 – Overview of Government Statements on Lack of Convincing Evidence

Pechey et al. was published 6 months BEFORE the announcement to wait and assess the impact in Australia

(para 186 of the Impact Assessment)
 "[T]he key variables are derived from the work of Pechey et al."

The Stirling Update was published September 2013, but 15 of the 17 studies included were published BEFORE the announcement to wait and assess the impact in Australia



2008
 "[...] the research evidence from the indicative is speculative, relying on selling people what they might do in a certain situation. The expectation is that changes in the packaging will lead to changes in behaviour."
 Department of Health
 Consultation on the future of tobacco control
 01 March 2008

"There is no evidence base that [plain packaging] actually reduces the number of young children smoking."
 Alan Johnson
 Secretary of State for Health
 House of Commons debate
 26 December 2008

2009
 "No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so."
 Martin Sturt
 Minister of State for Health
 24 June 2009

"The new strategy on tobacco control will consider a range of options for protecting children and people who smoke from misleading or promotional messages and packaging, and we will ensure that the evidence, which is still emerging, on plain packaging is taken into account."
 Gillian Triggs
 Minister of Health
 House of Commons debate
 13 October 2009

"[...] as yet, no studies have shown that introducing plain packaging of tobacco would cut the number of young people smoking or enable people who want to quit to do so. Given the impact that plain packaging would have on individual property rights, we would need strong and compelling evidence showing the health benefits of the policy before it would be acceptable at an international level."
 Andy Brennan
 Director, GCSO for Health
 Letter to the Hon. Martin Sturt
 9 December 2009

2011
 "There isn't any hard evidence to show that it works. Therefore I am wondering whether the Australian government defined any type of impact, assessment or cost analysis in which they benefits and costs are measured and if so, whether you would be willing to share this information with us."
 UK Tobacco Policy advice
 Lord of St. Nicholas (UK representative)
 20 May 2011

"No decisions have yet been made to introduce plain packaging in this country and the Government believes that the evidence of the impact on public health of plain packaging of tobacco needs to be developed further."
 Andrew Lewis
 Secretary of State for Health
 Letter to Australian Embassy
 13 January 2011

2012
 "The main uncertainties associated with the policy explored herein beyond the impact on smoking behaviour itself relate to impacts upon prices and the illicit tobacco market."
 Government of Canada
 Impact assessment, paragraph 4
 April 2012

2013
 "[...] In light of the differing views, we have decided to wait until the emerging impact of the decision in Australia can be measured, and then we will make a decision in England."
 Jeremy Hunt
 Secretary of State for Health
 22 July 2013

"We are waiting to see the evidence before making a decision. I take the very firm view that the best legislation is based on good evidence."
 Anne Scahill
 Parliamentary Under-Secretary of State for Health
 House of Commons debate
 26 July 2013

"I found no difficulty in waiting for the evidence to emerge from Australia... It is important that we consider the evidence."
 Anne Scahill
 Parliamentary Under-Secretary of State for Health
 House of Commons debate
 3 September 2013

"The Government have decided to wait before making a final decision on standardised packaging. This allows them to benefit from the experience of Australia, where they introduced standardised packaging in December 2012. The policy remains under active consideration."
 Alan Blewett
 Secretary of State for Health
 House of Commons debate
 24 October 2013

April 2014

September 2013
 Roy Morgan survey reports on the adverse impact plain packaging has had on retailers

October 2013
 KPMG analysis (July 2012 – June 2013) shows that illicit trade has increased

March 2014
 Kaul and Wolf find no evidence for a plain packaging effect on youth smoking prevalence

April 2014
 Full year 2013 KPMG illicit trade analysis shows increased illicit trade

June 2014
 Kaul and Wolf publish total population smoking prevalence trend analysis

Impact Assessment
 Pechey et al.



Annex 5 - Emails regarding Shielding of Identity of Pechey et al. Experts.

From: Ross, Richard [mailto:Richard.Ross@uk.imptob.com]
Sent: 28 March 2013 12:39
To: [REDACTED]
Subject: FW: Urgent FOI request deadline 3 April 2013

I note [REDACTED] is on holiday.

From: Ross, Richard
Sent: Thursday, March 28, 2013 10:22 AM
To: [REDACTED]@dh.esl.gov.uk
Subject: RE: Urgent FOI request deadline 3 April 2013

Dear [REDACTED]

In response to this email and your email of 27/03/2013 at 12:42 attaching an additional document the letter from [REDACTED] (DH) to Colin Wragg (Imperial Tobacco) dated 18th January 2013.

- Imperial Tobacco can see no reason that an applicable exemption would prevent DH from responding to the request by disclosing the correspondence attached to the two emails referred to above subject to the following points. Please note your references in your letter of 26 March 2013 to documents 1 and 2 are not correct.
- Please ensure in document 12, my personal email address (ending tesco.net) at bottom of page 2 and on page 3 is redacted along with all other personal contact details for anyone in all the documents as appropriate.
- We note that documents items 3 and 6 are the same.
- The letter from [REDACTED] (DH) to Imperial Tobacco referred to in document 3 is not included. Has this already been released or is this an omission?

- Email from Imperial Tobacco to DH [REDACTED] dated 10/01/2013 11:35 is missing. This should be included in the release. A copy is as follows:

From: Ross, Richard
Sent: Thursday, January 10, 2013 11:35 AM
To: [REDACTED]@dh.gsi.gov.uk
Subject: Meeting yesterday

Good morning [REDACTED]

Thank you and your colleague for a good meeting yesterday.

Just to expand on a point in the discussion yesterday. In response to a recent Freedom of Information request I made, [REDACTED] responded by letter on 31 December 2012 including with it a document entitled "Elicitation of subjective judgements of the impact on smoking of plain packaging policies for tobacco products".

In that document the second paragraph of the section "Sample and recruitment" states:

"We will identify experts through our knowledge of the field and through nomination from other experts in the area. A third party, employed by a not-for-profit company and hence not subject to Freedom of Information requests, will write to potential participants, informing them of the study aim and requirements (see Appendix I for information provided to participants). Informed consent for participants in a one-off telephone interview will be obtained at this stage (see Appendix II)."

In the Appendix I information sheet for participants it states:

"We have organised the data collection for this study in such a way that no links will exist between individual participants and the data they provide, so this information cannot be obtained under an FOI request."

"During the study, personal data will be stored on a secure computer with access only by the study administrator at Cambridge University Health Partners, a not-for-profit company that is not subject to FOI requests."

Note my highlighting.

It is interesting that protection has been put in to protect these experts from FOI requests but no such provision is made for commercially confidential information starting with the industry which DH is requesting from the tobacco industry to enable a full and accurate Impact Assessment to be produced. This information is only held by the industry so not available from other sources and it is competitive information so if individual information was released it could be damaging to the company providing the information.

Regards

Richard Ross

Head of Political Affairs UK

- An email from DH [REDACTED] to Imperial Tobacco Richard Ross dated 11/01/2013 re an FOI is missing.
- The emails from DH [REDACTED] to Imperial Tobacco dated 15/01/2013 15:06 in response to my email of 15/01/2013 14:19 are both missing.
- The cut-off date for this disclosure is not clear. Your letter states 4 February and February 2013 (inclusive) in the second paragraph. If it is February (inclusive) there is an email trail ending with email from DH [REDACTED] to Imperial Tobacco dated 21/02/2013 17:48 and an email DH to Imperial Tobacco dated 19/02/2013 11:31 Nottingham factory visit.

I hope this helps to ensure a complete disclosure to this Freedom of Information Act 2000 request

Regards

Richard Ross

Head of Political Affairs UK

Pechey et al. (2013)

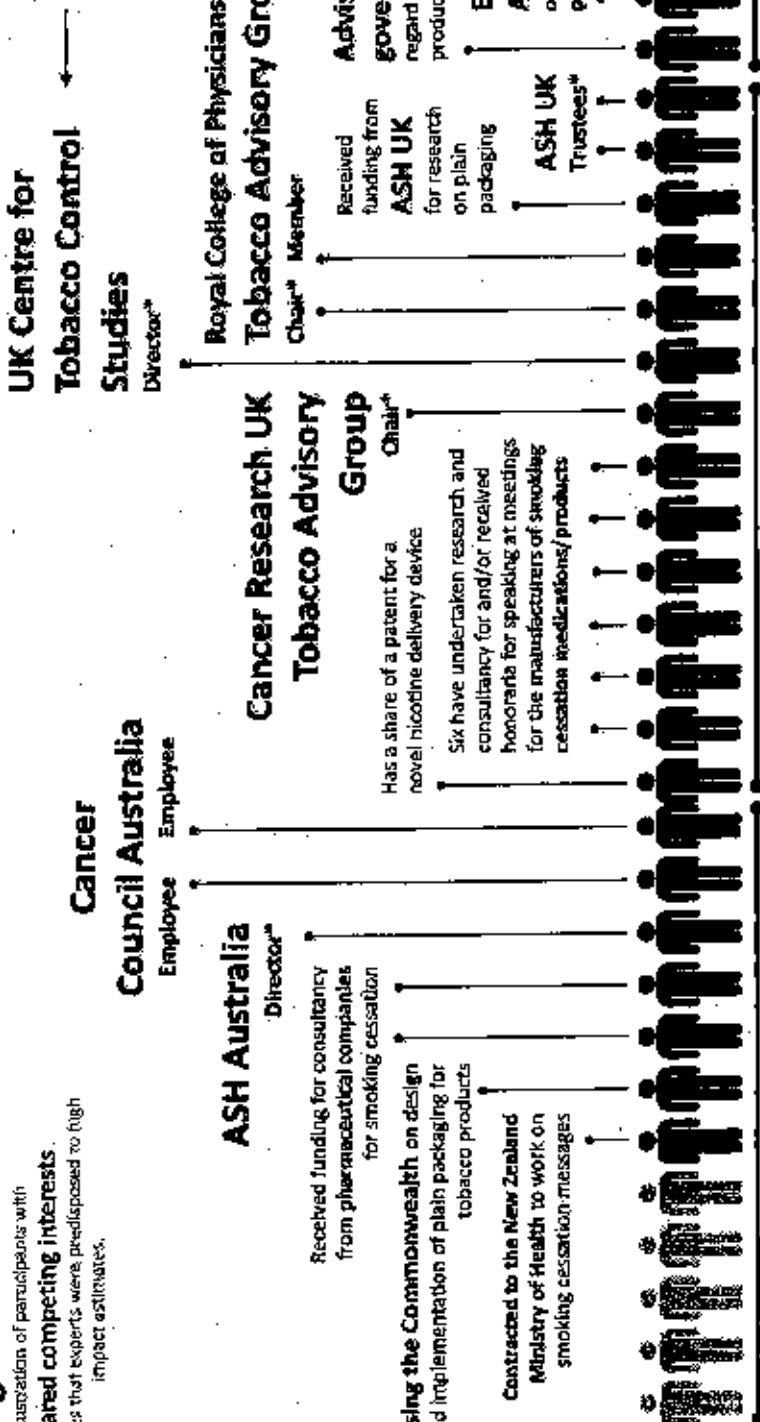
"Best guess estimates"

Illustration of participants with declared competing interests demonstrates that experts were predisposed to high impact estimates.

Annex 6 – Overview of Competing Interests of Pechey et al. Experts



6 / 10
Strong Review authors are members of this organization.



Australasia

7 / 12

UK

14 / 14

North America

2 / 7

* Denotes the original title disclosed in the first manuscript published online. In the final publication, the disclosed titles are more vague than originally stated (e.g., an individual is listed as "associated" with an organisation, rather than "Director" or "Chair" of the organization). See Pechey et al., *Impact of plain packaging of tobacco products on smoking in adults and children: an elicitation of international experts' estimates*, BMC Public Health, 2013, 13:18, p. 6 and original manuscripts published at <http://www.biomedcentral.com>.

Annex 7 – Comments on the DH’s “Subjective Judgment Elicitation” Methodology
(2012 “Standardised Packaging” Consultation)

<p>Stephen Hora, Comments on expert judgments - Tobacco Packs Consultation, 14 June 2012.</p>	<ul style="list-style-type: none"> • Overconfidence: “most severe and prevalent bias”, but not mentioned. • Training to reduce overconfidence bias is “standard practice, but seems to be omitted from the protocol.” • Why are “impartiality and lack of economic or personal stake considered impractical? Who considers them impractical and why?” • List of potential experts having a view against tobacco use: “not considering motivational bias to be a disqualifying factor would seem to invite biased results.” • Issue studied is essentially of economic nature: unclear if the selected organizations can “provide well qualified economists.” • Anonymity: “strongly disagree with anonymity”; experts perform best when there is no anonymity. • Possible misuse of linear opinion pool approach which “can lead to absurd results.”
<p>Alfred Kuss, Comments concerning Annex 2 “Elicitation of Subjective Judgments of the Impact of Smoking of Plain Packaging Policies for Tobacco Products” of the IA No. 3080 “Standardized packaging for tobacco products”, 1 June 2012.</p>	<ul style="list-style-type: none"> • Approach and details of implementation will lead to weak results with severe and systematic bias. • Method is extremely unusual in social and marketing research; well established and proven methods of marketing research (e.g., market testing) were ignored, but could have been used to estimate the impact of “standardised packaging.” • Use of expert judgments as predictors of consumer behavior has been outdated since the 1940s. • Severe methodological problems, therefore subjective expert judgments only used for a few very special purposes. • Impartiality should be one of the major criteria for the selection of experts. • Hora/Winnerfeldt applied additional criterion of “balance among all participants so that various constituent groups are represented” – “Why will this requirement not be used?”

	<ul style="list-style-type: none"> • Pre-briefing suggests “<i>intention to influence the results of the study.</i>” • Anonymity is arbitrary, “<i>absolutely not appropriate for a serious study with important consequences.</i>” • “<i>The whole procedure is in contradiction to the basic principle of scientific work that it must be clear and comprehensible how results are found and inferences are drawn.</i>” • Priming – “<i>interviewer will again influence the ‘experts’.</i>” • Proposed method is not suitable to generate valid and objective estimate. • Does not reach minimal standards of scientific research. • Allows researchers and “experts” to manipulate results.
<p>Rupert Darwall, Selecting the Evidence to Fit the Policy, An Evaluation of the Department of Health’s Consultation on Standardised Tobacco Packaging, January 2013, pp. 24 and following.</p>	<ul style="list-style-type: none"> • Experts’ subjective opinions about a hypothetical situation do not constitute data to be analyzed and cannot substitute for analysis of objective data. • Deriving a quantified estimate of subjective opinions gives misleading impression of objectivity. • Selection bias due to: <ul style="list-style-type: none"> - excluding those with an economics and econometrics background susceptible to test the claims of previous restrictions against hard data; - briefing given to experts before the interviews as to what is expected of them; and - selected assumptions, on which opinions must be based, e.g., cigarette prices should be considered unchanged. • The design builds in confirmation bias towards the preferred outcome and confers a “<i>spurious</i>” sense of objectivity on the numbers derived. • Possible downward change in price is a critical issue to the success or failure of the policy but is completely ignored in the “<i>elicitation</i>” exercise.
<p>TMA submission, The TMA Response to the Department of Health’s Consultation on Standardised Packaging of Tobacco Products”, July 2012, p. 5.</p>	<ul style="list-style-type: none"> • Use of “<i>best guesses</i>” and “<i>subjective views</i>” is not a reliable proxy for actual behavioral evidence in a public policy context. • Panel of un-named experts side-steps Better Regulation requirements.

<p>JTI submission, Response to the Department of Health's Consultation on the Standardised Packaging of Tobacco Products, 3 July 2012, p. 17.</p>	<ul style="list-style-type: none"> • The use of subjective judgments is no substitute for proper behavioral evidence and should be used with caution. • It cannot replace hard science and its use in justifying regulation is flawed. • Inclusion of biased and self-interested experts contravenes HM Government's guidelines on the choice and selection of experts, requiring to draw upon a "range of appropriate expert sources" that "should be sufficiently wide to reflect the diversity of opinion among experts in the appropriate field(s) in a balanced way."
<p>BAT submission, UK Standardised Packaging Consultation – Response of BAT, 8 August 2012, pp. 16-17, pp. 69 and following.</p>	<ul style="list-style-type: none"> • None of the examples provided by the DH where expert judgments have been previously used, involves complex market decisions as with "standardised packaging." • Selection bias: choosing by design to obtain estimates from proponents of "standardised packaging" can only be expected to support "standardised packaging." • The requirements of impartiality and lack of economic or personal stake in the potential findings are not applied, which is a major shortcoming and undermines the credibility of the results. • No guarantee provided that the panel of experts would have the right set of expertise in youth smoking initiation, smoking cessation, relapse, risk perception, illicit trade and marketing, to assess properly the impact of "standardised packaging." • The assumption holding prices stable is unjustified.
<p>Imperial Tobacco submission, Bad for business; bad for consumers; good for criminals; Standardised packaging is unjustified, anti-competitive and anti-business, 6 August 2012, p. 68.</p>	<ul style="list-style-type: none"> • DH subjective elicitation exercise will not provide evidence but opinions, which cannot properly form the basis for the introduction of "standardised packaging." • Impartiality and independence of experts is judged "impractical" without explaining why it is the case. • Concerns due to the fact that experts are anonymous and given that impartiality is judged impractical.

Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An elicitation of international experts' estimates

Rachel Pechey¹, David Spiegelhalter^{1,2}, Theresa M Marteau^{1*}

¹ *Behaviour and Health Research Unit, Institute of Public Health, Cambridge CB2 0SR, UK*

² *Statistical Laboratory, Centre for Mathematical Sciences, Cambridge CB3 0WB, UK*

** Corresponding author: Theresa M Marteau*

Address: Behaviour and Health Research Unit, Institute of Public Health, Cambridge, CB2 0SR, UK

Tel: +44 1223 330562.

*Emails: rachel.pechey@medschl.cam.ac.uk; d.spiegelhalter@statslab.cam.ac.uk;
theresa.marteau@medschl.cam.ac.uk*

Word count: 2106

Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An elicitation of international experts' estimates

Abstract

Background: Governments sometimes face important decisions in the absence of direct evidence. In these cases, expert elicitation can be used to quantify uncertainty. We report the results of an expert elicitation study of the likely impact of the introduction of plain packaging for tobacco products on the percentage of (i) smokers and (ii) children trying smoking, all other things being held constant.

Methods: Thirty-three tobacco control experts from the UK (n=14), Australasia (n=12) and North America (n=7) participated. Experts' estimates were individually elicited via telephone interviews, and then linearly pooled. Experts were asked for their best guess estimates and highest and lowest possible values for the percentage of (a) smokers and (b) children trying smoking, two years after the introduction of plain packaging (all other things being constant) in a target country in their region of residence.

Results: Median expert estimate for overall smoking prevalence was a 1 percentage point decline (99% range 2.25 to 0), and for the percentage of children trying smoking was a 3 percentage point decline (99% range 6.1 to 0), the latter estimate being larger than the former ($P < 0.001$, sign test). There were no differences in either estimate by region (I^2 : Adults: 0; Children: 0) but there was considerable variability between experts' estimates within regions (I^2 : Adults: 0.91; Children: 0.89).

Conclusions: In the absence of direct evidence for the impact of introducing plain packaging, this study shows that tobacco control experts felt the most likely outcome would be a reduction in smoking prevalence in adults, and a greater reduction in the numbers of children trying smoking, although there was substantial variability in the estimated size of these impacts. No experts judged an increase in smoking as a likely outcome.

Keywords: *Tobacco; plain packaging; expert elicitation*

Introduction

Governments and others in authority sometimes face important decisions in the absence of direct quantifiable evidence. Expert elicitation methods have been developed to quantify uncertainty in such contexts including estimating risks of volcanic eruptions[1], climate change[2] and effect sizes in clinical trials[3]. We report a study using this method to quantify uncertainty regarding the likely impact on smoking rates of plain packaging of tobacco products.

The Australian government has recently passed legislation to require all tobacco products to be sold in plain packaging from December 2012, and the UK government has begun consultation on the possible introduction of such a policy[4]. As yet, however, no country has implemented this measure so the evidence available to anticipate the impact of such a policy is inevitably indirect.

Two systematic reviews have described three ways in which plain packaging may reduce smoking rates, particularly amongst children and young adults: first, by reducing the appeal of packs; second, by increasing the salience of health warnings; and third, by standardising pack colour, thus avoiding perceptions of this as an indicator of product harmfulness[5, 6].

The relevance of this indirect evidence has been questioned, and doubts raised too as to the strength of anti-smoking campaigners' beliefs about the likelihood that plain packaging will reduce rates of smoking[7].

Based on different assumptions, at least two recent reports suggest that plain packaging could increase smoking: first, by reducing product differentiation, leading to smokers buying cheaper brands; and second, by increasing smuggling and counterfeit products, thereby increasing the availability of cheaper cigarettes[7, 8]. The assumptions underlying these predictions have also been contested[9].

This study aims to elicit estimates of international tobacco control experts on the likely impact of plain packaging of tobacco products on smoking prevalence in adults and the percentage of children trying smoking. The impact on children is of particular importance given that the majority of smokers

first try smoking in adolescence, with nicotine dependence developing rapidly thereafter, even before the user becomes a regular (weekly) smoker[10].

Method

Sample

The sample comprised internationally-renowned experts on tobacco control policies, meeting criteria for expert elicitation judgments[11], recruited from three regions where plain packaging policies are in the process of being implemented or are under active consideration or discussion (Australasia, UK, North America). Participants were identified from editorial lists for relevant journals (*Addiction*; *Tobacco Control*; *Nicotine and Tobacco Research*), and leadership positions in the Society for Research on Nicotine and Tobacco. Forty-five experts (15 from each region) were invited to participate, of whom 33 accepted (UK: 14/15; Australasia: 12/15; and North America: 7/15). The study received ethical approval from the Psychology Research Ethics Committee of the University of Cambridge [Ref. 2011.77]. Participants gave informed consent before taking part.

Procedure

A semi-structured telephone interview was used to elicit subjective judgments for the impact of plain packaging on (a) the prevalence of smoking in adults and (b) the percentage of children trying smoking. The script was developed by the authors from those used in similar studies[12-14]. Prior to interview participants were sent a copy of a new (currently unpublished) systematic review on the impact of plain packaging of tobacco products[6] to ensure that all participants had the same summary of the most recent evidence relating to plain packaging. This did not provide numerical estimates of the likely impact of plain packaging policies on the two outcomes of interest in this study. During the interview, the interviewer provided the prevalence rates for the two outcomes of interest and asked participants to estimate the expected values of these two years after the introduction of plain packaging in their region, and the lowest and highest likely values, holding all other relevant factors

constant (e.g. with current controls regarding the sale of tobacco still being in force, and the price and current prevalence levels[15-19] being stable over the two year period). Subsidiary questions were used to explore the range of plausible values provided, to ensure that experts felt they would be extremely surprised if the actual values fell outside the range they had provided ('extremely' was described as a 1% chance), given the tendency of individuals to provide too narrow a range in these types of study[20]. Finally, participants were asked to outline the reasoning behind the estimates they provided.

Analysis

Expert estimates were linearly pooled to obtain medians of best estimates, lower, and upper points, which are presented as summary statistics, to represent the opinion of an 'average expert'. (Linear pooling requires a minimum of five or six participants per group[21, 22]). Impact, measured as absolute percentage change, is displayed on forest plots to distinguish within-person uncertainty from between-subject variability. Non-parametric tests (Kruskal-Wallis, sign) were used for differences in best-estimates between regions and adult/child estimates. Finally, I^2 , the proportion of variability due to heterogeneity, is used in an informal manner here, as the estimates generated in the current study are not based on independent samples, but subjective opinions that we can expect to be correlated. The 'standard errors' that are used in the calculation of I^2 were taken as the range provided by each expert divided by 5.2, as if the range were a 99% normal interval.

Results

Estimates of the prevalence of smoking following plain packaging were provided by 14/14 UK, 11/12 Australasian, and 7/7 North American participants. Similar numbers provided estimates for the percentage of children trying smoking with the exception of North American participants, of whom 6/7 provided estimates. These estimates were subtracted from the region-specific baseline rates to produce absolute changes expressed as percentage points, as shown in Figures 1 and 2.

FIGURES ONE AND TWO ABOUT HERE

The overall median estimate for the absolute change in the prevalence of adults smoking two years after the introduction of plain packaging was -1% (between-expert range -3% to 0%). The median estimates for the lowest and highest values were -2.25% (between-expert range -6% to -0.5%) and 0% (between-expert range -1% to 1%).

The overall median estimate for the absolute change in the percentage of children trying smoking two years after the introduction of plain packaging was -3% (between-expert range -7.1% to -0.4%). The median estimates for the lowest and highest values were -6.1% (between-expert range -16.1% to -1%) and 0% (between-expert range -5.1% to 3.9%).

The majority (26/31) of experts had a larger 'best estimate' of the absolute effect on children than adults ($P < 0.001$, sign test).

There was no evidence for systematic difference between regions for estimates of either the prevalence of smoking in adults or for the percentage of children trying smoking (Adults: Kruskal-Wallis chi-squared = 3.06, $df = 2$, p -value = 0.22; Children: Kruskal-Wallis chi-squared = 1.59, $df = 2$, p -value = 0.45). The I^2 between regions for both adults and children was 0. However, there was strong heterogeneity within regions (I^2 within regions (adults): 0.91; I^2 within regions (children): 0.89).

Discussion

In the absence of direct evidence for the impact of plain packaging of tobacco products, this sample of tobacco control experts believe such a policy is likely to lead to a decline in smoking prevalence, and in particular, to a decline in the numbers of children trying smoking, two years after the introduction of plain packaging. No experts felt that the most likely outcome would be an increase in rates for either adults or children, and in each case the median lower estimate of the change was 0%, indicating a strong consensus that plain packaging would not increase consumption, assuming all else stayed equal. These findings were supported by the reasoning provided by experts, the majority of whom stated that they would expect a larger impact on the numbers of children smoking, expecting younger people to be more affected by less appealing packs, less brand identification, and changes in social norms around smoking. In contrast, impact on cessation-related behaviours was less frequently suggested, reflecting a view that plain packaging would have little impact on more-established, heavily addicted smokers.

The results provide the best guess estimates of a sample of international experts, along with a quantification of their uncertainty regarding the impact of plain packaging, using a method that provides independently generated estimates, in contrast with consensus development methods such as the Delphi method[20]. While previous studies have asked the general population about the likely impact of plain packaging on smoking, this study collates the views of tobacco control experts, who are able to put this into the perspective of other tobacco control measures implemented previously. Even so, many experts mentioned that they were uncomfortable with providing a precise estimate for the impact, given the lack of direct evidence, and a few declined to give numerical estimates on this basis. This uncertainty is reflected in the heterogeneity between responses within regions. The study method means that the results were based on subjective judgements, albeit those of highly-informed individuals. Future research could compare these results with the actual impact of plain packaging, to inform understanding of the validity of experts' estimates by looking at the accuracy of these predictions.

One potential limitation of the current study is the different response rates for the regions (high in the UK and Australasia but considerably lower for North America), although any resulting bias is unlikely given that no differences in estimates were found between regions. (The lower response rate from North America is perhaps due to the majority of invitees being from the US (with a minority from Canada), where plain packaging is unlikely to be implemented soon.) A more substantial concern regards the need to impose restrictions on estimates in the form of using a hypothetical scenario, i.e. all other factors remaining constant, which does not reflect reality, as noted by many participants. Several participants talked of the importance of tobacco control policies acting in concert, noting that if plain packaging were to be most effective, it should happen alongside media campaigns and taxation policies to ensure that the price of cigarettes is not driven down. In addition, only one time period (2 years post-policy introduction) was considered. Many participants felt that this was not sufficient time to see fully the impact of plain packaging in prevalence rates, suggesting a greater impact would be seen longer-term, as the impact on young people starting smoking fed through into smoking prevalence rates.

In summary, while there remains considerable uncertainty about the likely impact of plain packaging of tobacco products given the policy has yet to be implemented anywhere, the views of experts in tobacco control are that such a policy will reduce smoking rates and that this will be greatest in children. None viewed an increase in smoking as the most likely outcome.

Competing Interests

Authors:

The authors have no connections to the tobacco industry, nor any financial or non-financial competing interests that relate to the area of this study.

Participants:

Australasia: Two have received funding for consultancy from pharmaceutical companies for smoking cessation; one has contracts with the New Zealand Ministry of Health to work on smoking cessation messages; one is on a Technical Advisory Committee advising the Commonwealth on design and implementation of plain packaging for tobacco products; two work for the Cancer Council Organisation (Australia); one is director of Action on Smoking and Health (Australia)

UK: One has received funding from Action on Smoking and Health (ASH) UK for research on plain packaging; two are trustees of ASH UK; one is chair of the Cancer Research UK Tobacco Advisory Group; one is chair and one is a member of the Royal College of Physicians' Tobacco Advisory Group; one is director of UK Centre for Tobacco Control Studies; six have undertaken research and consultancy for, and/or received honoraria for speaking at meetings for the manufacturers of smoking cessation medications/products; one has a share of a patent for a novel nicotine delivery device.

North America: one is serving as an expert witness for the Australian government on litigation concerning plain packaging of tobacco products; one has advised different government agencies with regard to plain packaging of tobacco products

Authors' contributions

All authors were involved in study design, data interpretation and writing the report. RP collected the data and DS conducted the statistical analyses. All authors read and approved the final manuscript.

Acknowledgements

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The Department of Health had no role in the study design, data collection, analysis, or interpretation.

The final version of the report and ultimate decision to submit for publication was determined by the

authors. The research was conducted independently of the funders, and the views expressed in this paper are those of the authors and not necessarily those of the Department of Health.

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Figure captions

FIGURE 1. Forest plot of estimates of absolute change in the prevalence of adult smokers two years after the introduction of plain packaging (holding other factors constant). [Region 1: UK; Region 2: Australasia; Region 3: North America. Prevalence rates provided to experts were: Britain: 21%; Australia: 18%; Canada: 17.5%]

FIGURE 2. Forest plot of estimates of absolute change in the prevalence of children trying smoking two years after the introduction of plain packaging (holding other factors constant). [Region 1: UK; Region 2: Australasia; Region 3: North America. Prevalence rates provided to experts were: Britain: 27%; Australia: 21.1%; Canada: 21.6%]

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 Region 1 median

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 region = 2 ; ID = 2
 region = 2 ; ID = 4
 region = 2 ; ID = 27
 Region 2 median

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 Region 3 median

Overall median

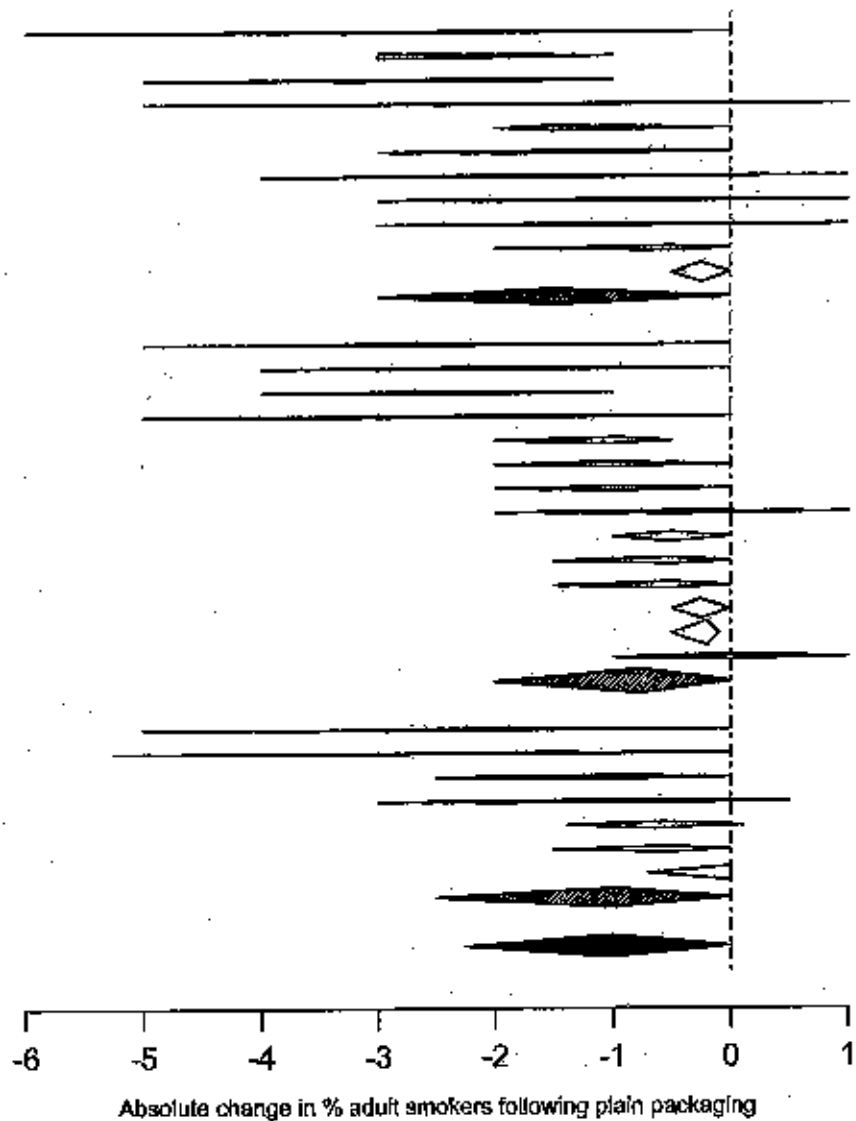


Figure 1

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 Region 1 median

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 Region 2 median

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 Region 3 median

Overall median

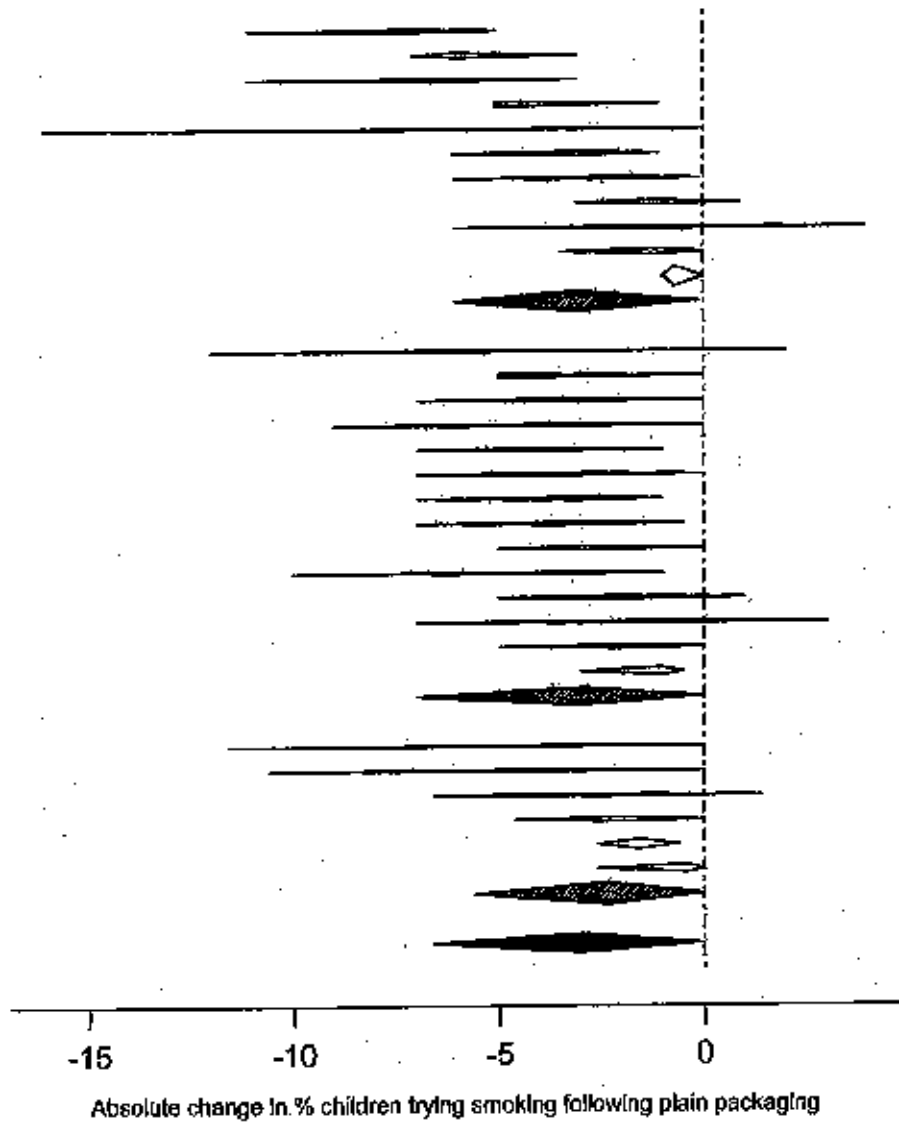


Figure 2

Annex 9

The (Possible) Effect of Plain Packaging on Smoking Prevalence
in Australia: A Trend Analysis*

Prof. Dr. Ashok Kaul[†]
Institute for Policy Evaluation (IPE), Saarland
and Department of Economics, Saarland University

Prof. Michael Wolf, Ph.D.[‡]
Department of Economics
University of Zurich

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Abstract

A stated objective of the Australian Plain Packaging Act 2011 is to reduce smoking prevalence. We use the Roy Morgan Single Source (Australia) data set over the time period January 2001 to December 2013 to analyze whether this goal has been achieved in the first year since the implementation. In particular, we carry out a statistical trend analysis to study the (possible) effect of plain packaging on smoking prevalence. Two informative analyses help to draw conclusions on the (actual) effect of plain packaging on smoking prevalence in Australia. First, we look at the year of data before plain packaging was introduced, which happened in December 2012. Second, we compute confidence intervals around the estimated treatment effects.

Our main results can be summarized as follows. First, if a statistical significance level of 5% is required, then there is no evidence at all for a plain packaging effect on smoking prevalence. Second, if one is willing to accept a relatively low level of statistical significance (that is, 10%), then there is evidence for a very short-lived plain packaging effect on smoking prevalence, namely in December 2012 only (after which smoking prevalence is statistically indistinguishable from its pre-existing trend).

A formal power analysis demonstrates that the power of our inference methods is remarkably high.

KEY WORDS: Plain packaging, smoking prevalence, treatment effect, trend analysis.

JEL CLASSIFICATION NOS: C13, C22, H43, I18.

*Philip Morris International provided the funding for this research. At no time did we provide Philip Morris International with access to the underlying data for minors (14–17 years old). The data for adults were provided to us by Philip Morris International.

[†]Saarland University, Department of Economics, Campus Building C3.1, D-66123 Saarbrücken, Germany. Email: a.kaul@ipe-saarland.de.

[‡]University of Zurich, Department of Economics, Wilfridstrasse 6, CH-8032 Zurich, Switzerland. Email: michael.wolf@econ.usz.ch. Michael Wolf is corresponding author.

1 Goals and Basic Setup

The Australian Tobacco Plain Packaging Act 2011 prescribes that from December 2012 on, cigarettes and other tobacco products have to be sold in plain packages in Australia, that is, in packs with a standardized design and shape. Australia is thereby the first country to introduce such a regulation. The key objective of the Plain Packaging Act 2011 is the improvement of public health by discouraging the taking up of smoking and by encouraging the giving up of smoking and the use of other tobacco products. So far, there is no empirical evidence that the measures prescribed by the Plain Packaging Act 2011 are effective in attaining the stated goals of the Australian government. In fact, there is hitherto only a single research paper that empirically studies the (possible) effect of plain packaging in Australia on changes in smoking prevalence: Kaul and Wolf (2014) provide a trend analysis similar to the one in this paper but focusing on minors (aged 14–17 years) only.¹ They fail to find any evidence for a plain packaging effect on Australians aged 14–17 years.

Plain packaging in Australia was implemented in December 2012 and thus had been in place for one year in December 2013. As a consequence, reliable data that cover both the pre-implementation period and a sufficiently long post-implementation period are now available for a first thorough empirical assessment of the effects of plain packaging. Given the unprecedented nature of the intervention, no one could predict for sure what the intervention would lead to. In a notable contribution, Peckey et al. (2013) run an elicitation survey on over 30 internationally-renowned experts on tobacco control policies, asking them about their expectations of the effect of plain packaging on smoking prevalence rates two years after its introduction. The experts were asked to provide estimates, *holding all other factors constant*. In the case of Australia, the introduction of plain packaging came together with an enlargement of graphical health warnings. Assuming both effects work in the same direction, the Australian case should therefore show a bigger reaction than what would be expected based on an isolated plain packaging experiment alone. The median estimate of the experts in Peckey et al. (2013) for the impact on adult smoking prevalence was a one percentage point decline. Taking the expected reaction for adults as a lower bound, we can therefore expect to find at least a drop in smoking prevalence of one percentage point two years after the introduction of plain packaging (if the expert opinions are correct predictors of what to expect). Since we have one year of post-implementation data, it is important to ensure that an actual plain packaging effect of less than one percentage point is picked up by the chosen statistical inference methods with reasonable power.

This paper addresses the question whether there is empirical evidence showing that the pre-implementation trend in smoking prevalence in Australia has been changed by plain pack-

¹Since a major reason for the introduction of plain packaging was the objective of reducing smoking prevalence of minors in particular, there is considerable interest in analyzing the sub-population of minors separately.

aging. The research question guiding our statistical analysis is the following: Can we find any plain packaging effect on smoking prevalence *at all* over the 13 months from December 2012 to December 2013? In principle, a careful analysis requires the use of a multiple-testing adjustment to take the possibility of "cherry picking" into account (that is, the possibility of searching for a statistically significant effect over the entire period).² Note, however, that in most of the paper, we employ a statistical approach more favorable to finding a plain packaging effect, namely by asking whether there is a plain packaging effect in any *specific* month. This approach ignores "cherry picking" and does not require any multiple-testing adjustment. A formal power analysis demonstrates that our approach can identify even small reductions in smoking prevalence with reasonable power.

2 Data Description and Construction

We use the Roy Morgan Single Source (Australia) data set (RMSS subsequently) over the time period January 2001 to December 2013. The total sample size over this 13-year period is around 700,000; the average annual sample size is around 54,200.

Roy Morgan is a major Australian market research firm and the Single Source data set has been drawn from the so-called establishment survey. These are weekly surveys realized as computer-assisted personal interviews (CAPI) that are administered door-to-door; see Roy Morgan Research (2012).

In each month, we compute (observed) smoking prevalence as the average of the 0-1 variable *smoker* in the RMSS data that indicates whether an individual in the sample smokes. Note that there is considerable variation in the sample size over time; see Figure 1. The sample sizes generally range between 3,500 and 5,000 and are thus quite large.³ On the other hand, the composition of the sample changes from month to month; therefore, it is expected that monthly observed prevalence is unstable over time. This is indeed the case; see Figure 2.

3 Data Analysis

3.1 Fitting a Linear Time Trend

We start by modeling a simple linear time trend. This is achieved by estimating the regression model

$$p_t = \alpha + \beta \cdot t + \varepsilon_t \quad (3.1)$$

²For example, Heckman et al. (2010) convincingly promote the use of multiple-testing adjustments to avoid the erroneous detection of treatment effects when "cherry picking" is possible.

³December 2013 is marked by a relatively low number because Roy Morgan decided not to interview in the week leading up to Christmas. Therefore, the sample size for December 2013 is 'only' 3,124. Future numbers are expected to be higher again.

Here, p_t denotes the observed prevalence in month t ($t = 1, \dots, 156$), α denotes the intercept of the linear time trend, β denotes the slope of the linear time trend, and ε_t denotes the error term in month t (that is, the deviation of the observed prevalence from the trend line).

We fit model (3.1) by weighted least squares, using the monthly sample sizes as the weights.⁴ The fitted model is given by

$$\hat{p}_t = 24.61 - 0.040 \cdot t. \quad (3.2)$$

This model implies an average yearly decline of $12 \cdot 0.040 \approx 0.48$ percentage points in smoking prevalence over the period 2001 until 2013; see Figure 2 for a graphical display. We also include a local, nonparametric trend that does not make any assumptions on the parametric form of the trend (like linear or quadratic). Such a nonparametric trend provides a good local fit and avoids the problem of misspecification.⁵ It can be seen that the (global) linear trend is not a very satisfactory fit to the observed data: it is somewhat too high early on and in the final years while somewhat too low in the middle.

Despite its flexible nature, the nonparametric fit resembles a straight line in the second two thirds of the observation period, which is the interval of main interest to us. For simplicity, and for ease of reproducibility of our results by other researchers, we match the nonparametric trend in the second two thirds of the data by fitting a linear time trend from 07/2004 on.⁶ Furthermore, we exclude the data from 12/2012 until 12/2013 in fitting this linear time trend, thereby avoiding a possible contamination of the fitted trend line in case there should be a strong plain packaging effect. The fitted trend⁷ based on the period 07/2004–11/2012 is given by

$$\hat{p}_t = 25.23 - 0.045 \cdot t. \quad (3.3)$$

(A more detailed regression output can be found in Table 1.) This model implies an average yearly decline of $12 \cdot 0.045 \approx 0.54$ percentage points in prevalence from 07/2004 on. The results are displayed in Figure 3. It can be seen that in the last two thirds of the period, the linear trend is, for all practical purposes, indistinguishable from the nonparametric trend.

From here on, we will therefore base the analyses on the fitted linear trend (3.3).

⁴Since the sample sizes vary considerably over time, as evidenced in Figure 1, weighted least squares (WLS) gives more accurate estimation results than ordinary least squares (OLS); for example see Hayashi (2000, Section 1.6).

⁵We use a standard off-the-shelf method, namely the function `loess` of the statistical package R (with default model parameters); see <http://stat.ethz.ch/R-manual/R-patched/library/stats/html/loess.html>.

⁶Other researchers who do not use the statistical package R might get slightly different results when fitting a nonparametric trend. But they will get the same results when fitting a linear time trend from 07/2004 on.

⁷Again obtained by weighted least squares.

3.2 Analyzing Deviations from the Linear Time Trend

3.2.1 A Naïve First Step

The deviations of the observed data from the fitted linear time trend from 12/2012 until 12/2013 are displayed in Figure 4. Of the 13 deviations, seven are negative and six are positive. The average deviation is -0.16 percentage points. A naïve (and incorrect) interpretation would be that, on average, plain packaging has resulted in a monthly reduction in prevalence of 0.16 percentage points.

However, one must take into account that the observed prevalence numbers are only estimates themselves. Therefore, one must not equate an estimated (treatment) effect of plain packaging in a given month — namely, the deviation of the observed prevalence from the fitted trend line — with the true effect.

3.2.2 A More Informative Analysis Based on Pre Plain Packaging Deviations

One robustness check is to also include *previous deviations* from the linear time trend in such a plot. If one starts the plot one year prior to the intervention, that is, in 12/2011 rather than in 12/2012, then the numbers post 12/2012 are not 'unusual' compared to the numbers pre 12/2012; see Figure 5.⁹ In fact, given the generally larger deviations (in absolute value) pre 12/2012, the deviations post 12/2012, with the possible exception of 12/2012 itself, appear just like random noise. The largest negative deviation from 01/2013 on is -0.87 percentage points in 04/2013. But there are two larger negative deviations before 12/2012, namely -1.32 in 02/2012 and -1.56 in 04/2012. It is clear that a negative deviation from the fitted time trend alone cannot be equated with an actual plain packaging effect.

The average deviation post 12/2012 is -0.04 percentage points.⁹ This is smaller than the average deviation pre 12/2012, which is 0.23 percentage points. However, this difference is not statistically significant: carrying out a two-sided *t*-test¹⁰ yields a *p*-value of 0.38 .

According to this analysis then, there is no evidence for a plain packaging effect beyond 12/2012 itself.

3.2.3 A More Informative Analysis Based on Confidence Intervals

Another robustness check is to add confidence intervals to the estimated effects of plain packaging in Figure 4. For a given month, this can be achieved as follows:

⁹The numbers pre 12/2012 are the numbers 12/2011–11/2012 and the numbers post 12/2012 are the numbers 01/2013–12/2013, so each set of numbers corresponds to twelve months (for reasons of symmetry).

⁹This number differs from the number -0.16 percentage points stated in Section 3.2.1, since 12/2012 itself is excluded now.

¹⁰Using a nonparametric inference method, such as a bootstrap test, does not change this conclusion. We report the outcome of the *t*-test, since this simple result can be easily reproduced by other researchers.

Algorithm 3.1 (Computation of Confidence Intervals for Plain Packaging Effects)

1. Compute a 90% prediction interval for the observed prevalence based on the fitted time trend (that is, assuming no plain packaging effect). This means if another random sample (with the same sample size) had been chosen instead for this month, then the resulting observed prevalence would have fallen in this interval with 90% confidence (assuming no plain packaging effect). Or, alternatively, 90% of all possible random samples (with the same sample size) would have resulted in observed prevalence numbers falling in this interval (assuming no plain packaging effect). By construction, this interval is centered at the linear time trend.
2. Subtract the observed prevalence based on the original data from the upper and the lower interval end points.
3. The thus shifted resulting interval can be interpreted as a 90% confidence interval for the actual (treatment) effect of plain packaging. By construction, this interval is centered at the deviation from the linear time trend. If the entire interval lies below zero, then there is evidence (at the 90% confidence level¹¹) that plain packaging has led to a reduction in prevalence.

The results are displayed in Figure 6. It can be seen that there is no statistical significance for a plain packaging effect beyond 12/2012 itself: for all other months, the number zero is contained in the confidence interval.

Several reasonable variations to the methodology used are possible and could in fact be called for, either because they are more standard than the method we use or because they are more appropriate (superior) given the properties of the data.

- We have computed the prediction intervals in step 1. of Algorithm 3.1 using standard textbook methodology based on an assumption of a normal distribution of the error terms ε_t in the linear model for the time trend. An analysis of the residuals¹² of the fitted model (3.2) indicates that this assumption is not violated in any noticeable way. It is possible in step 1. to use a more refined (and more computationally involved) bootstrap approach to compute prediction intervals that also incorporate potential non-normality of the error terms. The resulting changes would be minor, at most, and they would not change our conclusions.¹³
- The standard textbook methodology for the prediction intervals in step 1. of Algorithm 3.1 also assumes that the error terms ε_t around the linear time trend are independent and identically distributed (i.i.d.). This assumption might be violated in our

¹¹Or, equivalently, at the 10% significance level.

¹²The residuals $\hat{\varepsilon}_t$ are computed as $\hat{\varepsilon}_t = p_t - \hat{p}_t$ ($t = 43, \dots, 143$).

¹³Again, we opt for sticking with the simpler methodology, so that our findings can be more easily reproduced by other researchers.

application, since the data is collected over time and so the error terms might be autocorrelated. First of all, ignoring such a violation would only have a minor effect, since a (possible) autocorrelation of the error terms enters into the uncertainty of the estimated coefficients of the fitted model (3.3) (that is, the estimated trend line) but not the uncertainty due to a new observation (that is, the deviation from the trend line); the latter uncertainty far outweighs the former in determining the width of the interval. Second, ignoring a (possible) autocorrelation of the error terms generally makes the intervals smaller rather than wider, since error terms are generally positively autocorrelated rather than negatively autocorrelated, if autocorrelated at all. Third, an analysis of the residuals of the fitted model (3.3) does not show any autocorrelation whatsoever; see Figure 7.

- The confidence level could be changed from 90% to 95%. The latter is more standard in applied research and would result in wider confidence intervals. If the confidence level is changed to 95%, then there is no evidence for a plain packaging effect whatsoever, since even the confidence interval for 12/2012 contains zero. More precisely, the confidence interval for 12/2012 changes from $[-3.03, -0.25]$ to $[-3.30, 0.02]$; see Figure 8.
- We have computed *pointwise* confidence intervals. That is, the confidence of 90% holds for any given month. Doing so is appropriate if one is interested in whether there is a plain packaging effect in any *specific* month, say in December 2012. But if one is interested in whether there is any plain packaging effect *at all* over the 13 months under consideration, it is more appropriate to compute *uniform* confidence intervals, where the 90% confidence holds over all 13 months together.¹⁴ Doing so results in wider intervals, and now even the interval for 12/2012 contains zero; see Figure 9.¹⁵

3.3 Power Analysis

As mentioned in Section 2, monthly observed prevalence is unstable over time and the deviations from the fitted trend line (3.3) are not small. This might raise the concern of whether our trend analysis has any reasonable power at all against a possible plain packaging effect beyond 12/2012 itself. We address this concern by carrying out a formal power analysis.

In particular, we consider the following inference methods to test for a plain packaging effect during the period 01/2013–12/2013 which is consistent with our previous analyses.

Algorithm 3.2. (Inference Methods)

¹⁴Doing so prevents *data mining* or *cherry picking* by searching for any effect over the 13 months under consideration.

¹⁵Since there is no evidence for any autocorrelation in the error terms ε_t , uniform confidence intervals can be computed in the same fashion as pointwise confidence intervals, except that the confidence level is changed from 90% to 99.2%. Note here that $0.9^{1/13} = 0.992$.

1. Fit a linear time trend (using weighted least squares) based on the observation period 07/2004–11/2012, that is, based on $t = 43, \dots, 143$.
2. Compare the average deviation pre 12/2012 to the average deviation post 12/2012, as done in Section 3.2.2. If the average deviation post 12/2012 is smaller than the average deviation pre 12/2012, carry out a formal two-sample t -test for the null hypothesis of zero difference in population (that is, for the null hypothesis of no treatment effect).¹⁶ If the t -test rejects the null hypothesis, this is considered evidence for a plain packaging effect. We call this approach inference method 1 (IM-1).
3. Compute individual 90% confidence intervals for plain packaging effects from 01/2013 until 12/2013, as detailed in Section 3.2.3. If at least one of the resulting 12 confidence intervals is entirely negative, this is considered evidence for a plain packaging effect. We call this approach inference method 2 (IM-2).
4. Overall, evidence for a plain packaging effect is established if at least one of these two approaches, IM-1 or IM-2, finds evidence. We call this 'combined' approach inference method 3 (IM-3).

The next step is to generate pseudo data that are qualitatively similar to the observed data, but where a specified plain packaging effect is 'enforced'. Here some care must be taken, since the monthly sample sizes are not constant, which implies that the error terms ε_t around the trend line do not have the same variance. Denote the sample size in month t by n_t ($t = 43, \dots, 156$). Then we may assume

$$\text{Var}(\varepsilon_t) = \frac{\sigma^2}{n_t} \quad \text{for some } \sigma^2 > 0.$$

The fitted model (3.3) yields the estimator $\hat{\sigma}^2 = 2589.7$.

We next detail how we generate pseudo prevalence data according to a model that is in agreement with the observed data but has a specified plain packaging effect $\Delta > 0$ 'enforced' from 12/2012 on, that is, from $t = 144$ on.¹⁷

Algorithm 3.3 (Generation of Pseudo Data with Specified Plain Packaging Effect)

1. Generate $\gamma_{43}^*, \dots, \gamma_{156}^*$ independent and identically distributed as $N(0, 2589.7)$, where the notation $N(0, \sigma^2)$ denotes a normal distribution with mean zero and variance σ^2 .
2. For $t = 43, \dots, 156$, let

$$p_t^* = 25.23 - 0.045 \cdot t + \varepsilon_t^* \quad \text{where} \quad \varepsilon_t^* = \frac{\gamma_t^*}{\sqrt{n_t}}.$$

¹⁶There was no need to carry out such a t -test in Section 3.2.2, since the average deviation post 12/2012 was larger than the average deviation pre 12/2012.

¹⁷So Δ is the (fraction of) percentage points by which plain packaging has lowered prevalence beyond the time trend. It makes no difference for the purposes of this power analysis whether we enforce the effect from 12/2012 or from 01/2013 on.

3. For $t = 144, \dots, 156$, let

$$p_t^* = p_t^* - \Delta. \text{ }^{18}$$

We finally detail how we 'compute' power against a specific plain packaging effect $\Delta > 0$ via Monte Carlo simulation.

Algorithm 3.4 (Computation of Power against Specific Plain Packaging Effect)

1. Generate pseudo data with a plain packaging effect Δ according to Algorithm 3.3.
2. Analyze the pseudo data according to Algorithm 3.2.
3. If evidence is claimed, record a one; otherwise, record a zero.
4. Repeat this process a large number B of times.
5. The 'computed' power is the fraction of ones over the B repetitions.

The resulting numbers are presented in Table 2. One can see that power is actually high in general. For example, power of the inference method 3 (IM-3) against a plain packaging effect of 0.5 percentage points is 0.85 and power against a plain packaging effect of 1.0 percentage point is 0.99. Power of 0.8 is a commonly accepted industry standard¹⁹, so even the power against a plain packaging effect of only 0.5 percentage points is already very high.

4 Conclusion

We carried out a trend analysis to study the (possible) effect of plain packaging on smoking prevalence in Australia. More specifically, we fitted a linear time trend that explains well the fact that observed prevalence has declined steadily from mid 2004 on at an annual rate of about 0.54 percentage points.²⁰

It is of particular interest to see how observed prevalence behaves relative to the fitted trend line from December 2012 on (that is, from the point when plain packaging was implemented). It was seen that observed prevalence lies sometimes above and sometimes below the fitted trend line.

Two informative analyses help to draw conclusions on the (actual) effect of plain packaging on smoking prevalence in Australia. First, we looked at the year of data *before* December 2012. Second, we computed confidence intervals around the estimated plain packaging effects (that is, around the deviations from the fitted trend line) from December 2012 on. Both analyses fail to find any evidence for an actual plain packaging effect on smoking prevalence in Australia after December 2012.

Our results can be summarized as follows. First, if one is willing to accept a relatively low level of statistical significance (10%), then there is evidence for a very short-lived plain

¹⁸This slight abuse of notation means that the final value of p_t^* equals the value of p_t^* after step 2, minus Δ .

¹⁹For example, see Section V.G. of FDA (2008).

²⁰Observed prevalence had declined before also, but at a slower rate.

packaging effect on smoking prevalence, namely in December 2012 only (after which smoking prevalence is statistically indistinguishable from its pre-existing trend). Second, if a stronger statistical significance level (5%) is required, then there is no evidence at all for a plain packaging effect on smoking prevalence. Third, if the guiding research question is whether there is a plain packaging effect at all, one must adjust the confidence intervals to take the possibility of "cherry picking" into account (that is, the possibility of searching for a statistically significant effect over the entire period). Such an adjustment requires the use of uniform confidence intervals, in which case there is again no evidence for a plain packaging effect on smoking prevalence.

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A Figures and Tables

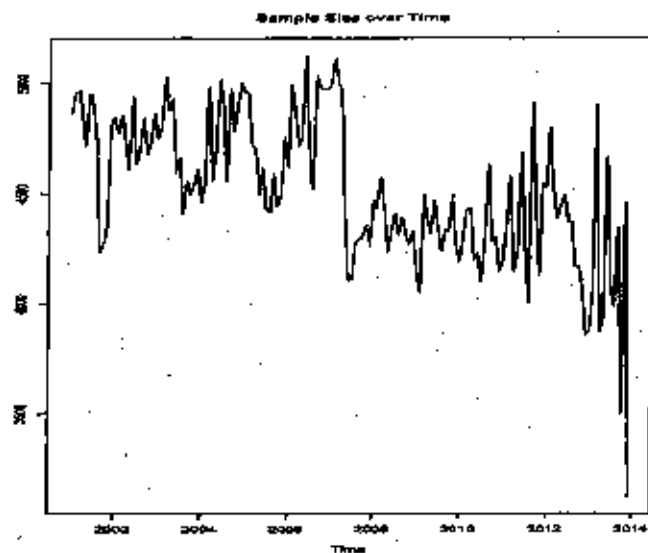


Figure 1: Time series plot of the monthly sample sizes.

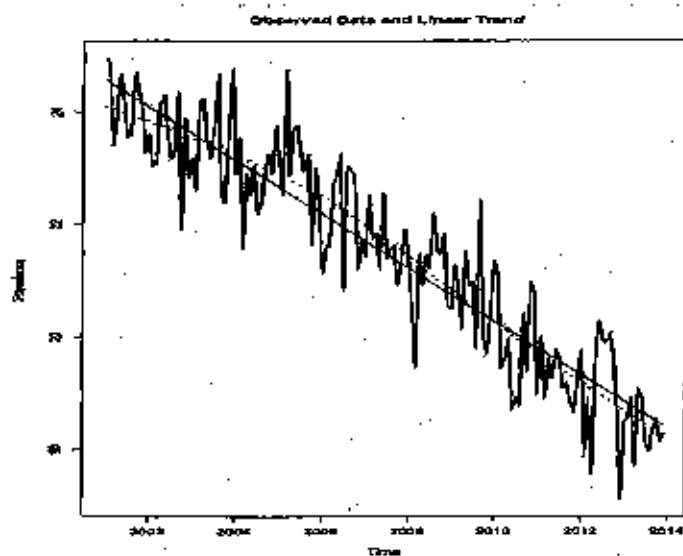


Figure 2: Time series plot of observed prevalence with fitted linear trend based on all observations (solid line). In addition, a fitted nonparametric trend has been added (dotted line).

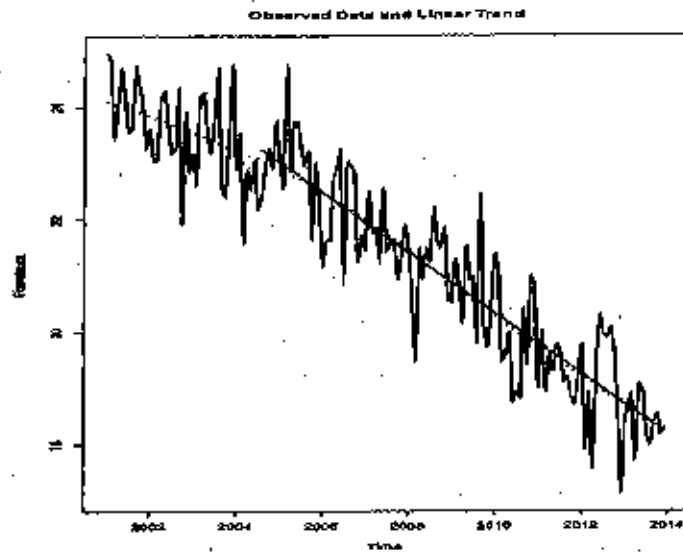


Figure 3: Time series plot of observed prevalence with fitted linear trend based on the observations from 07/2004 on (solid line). In addition, a fitted nonparametric trend has been added (dotted line).

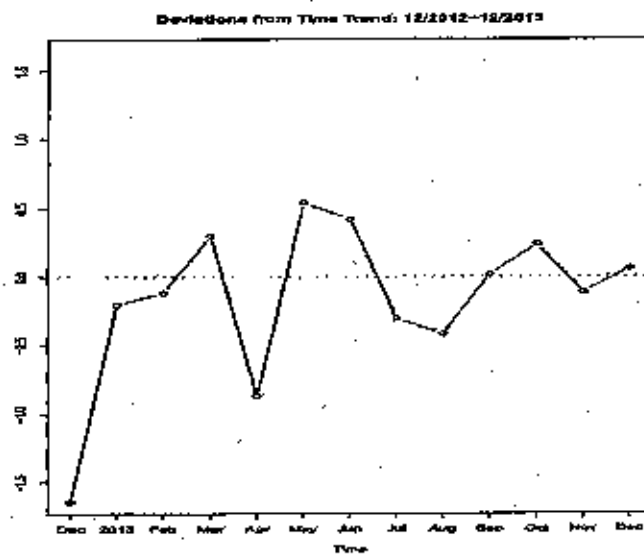


Figure 4: Deviations of observed prevalence from fitted time trend.

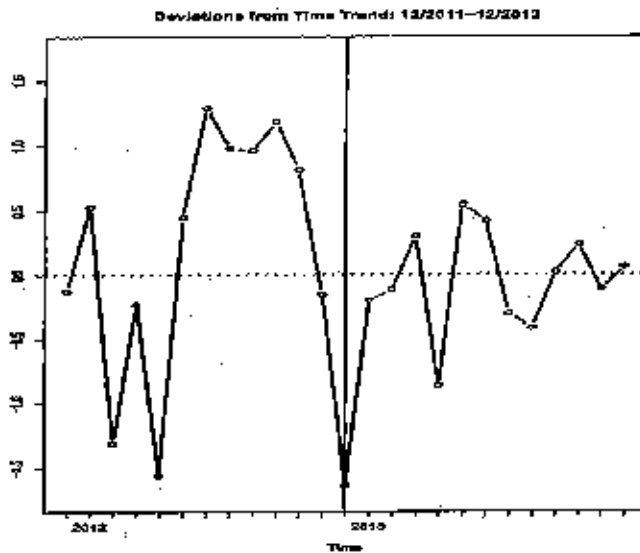


Figure 5: Deviations of observed prevalence from fitted time trend.

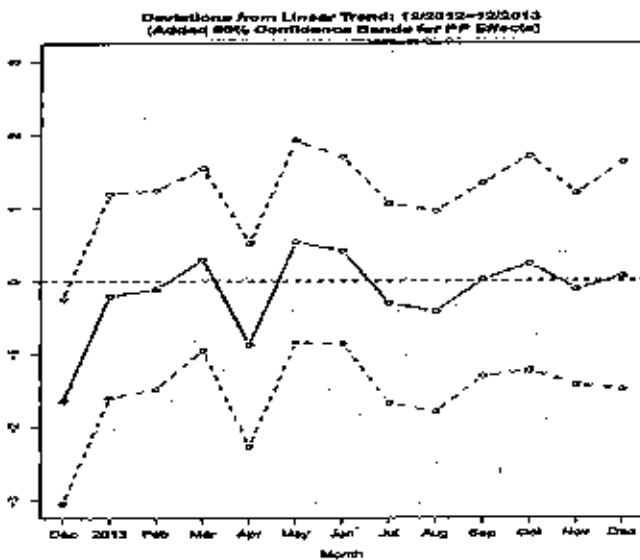


Figure 6: Deviations of observed prevalence from fitted linear time trend. Pointwise 90% confidence intervals for these estimated plain packaging effects have been added.

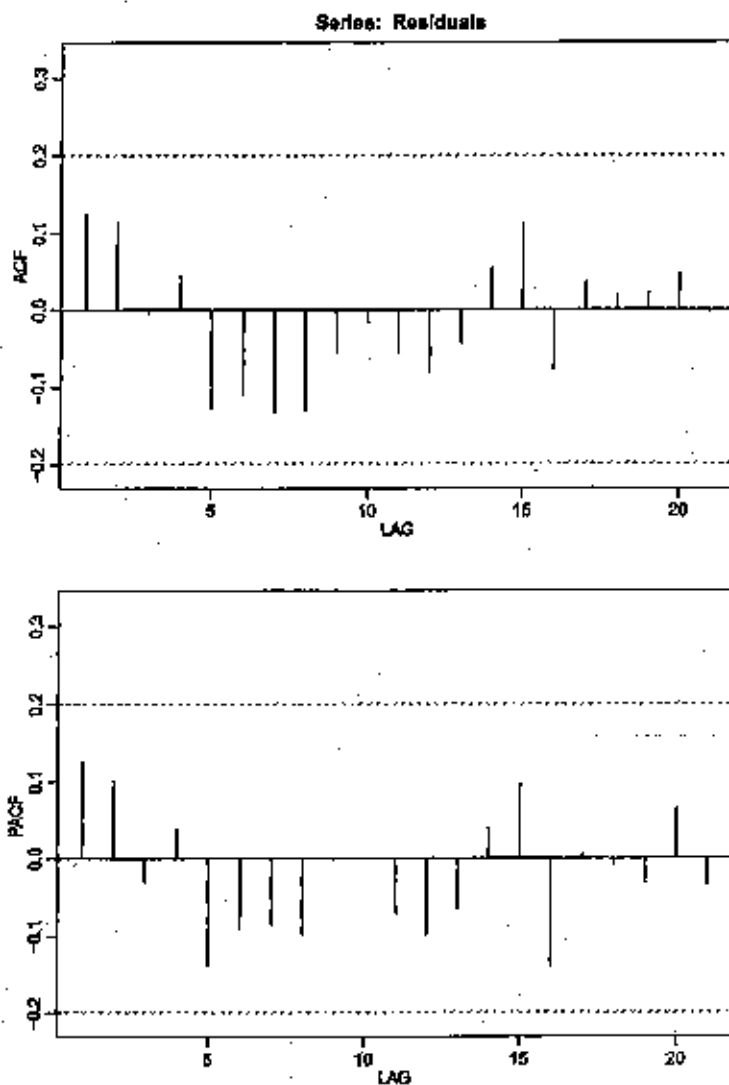


Figure 7: Autocorrelation function (ACF) and partial autocorrelation function (PACF) of the residuals of the fitted model (3.3). In each plot, bars outside the dotted bands would indicate the existence of autocorrelation.

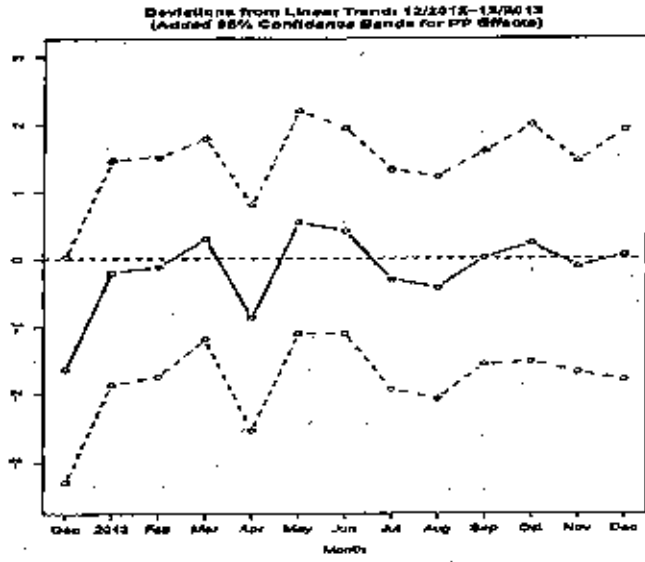


Figure 8: Deviations of observed prevalence from fitted linear time trend. Pointwise 95% confidence intervals for these estimated plain packaging effects have been added.

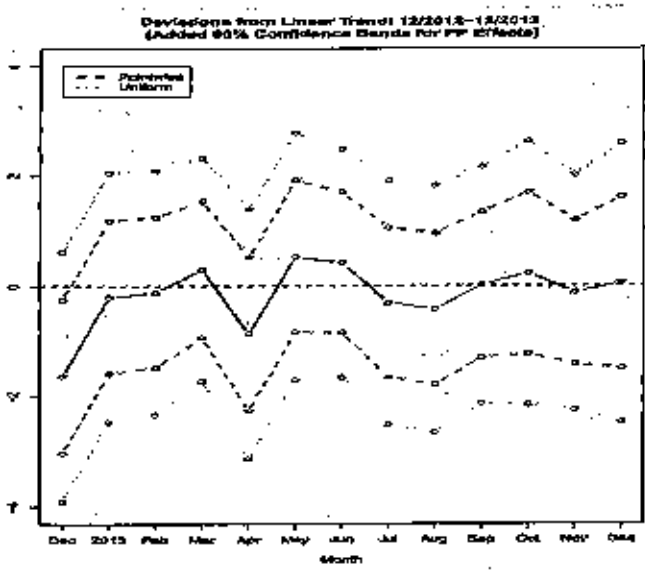


Figure 9: Deviations of observed prevalence from fitted linear time trend. Pointwise and uniform 90% confidence intervals for these estimated plain packaging effects have been added.

(Intercept)	25.230*** (0.250)
t (Month)	-0.045*** (0.003)
R^2	0.75
Adjusted R^2	0.75
Sample size	101
Degrees of freedom	99

*** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$

Table 1: Regression output for the fitted model (3.3). The numbers in parentheses below the estimated coefficients are corresponding standard errors.

Effect Δ	IM-1	IM-2	IM-3
0.25	0.20	0.64	0.67
0.50	0.45	0.82	0.85
0.75	0.72	0.93	0.96
1.00	0.91	0.98	0.99

Table 2: Power against a permanent plain packaging effect Δ over the period 01/2013–12/2013. The inference methods IM-1, IM-2, and IM-3 are detailed in Algorithm 3.2. All numbers are based on $B = 50,000$ Monte Carlo repetitions in Algorithm 3.4.



News Release Minister Jack Snelling

Minister for Health
Minister for Mental Health & Substance Abuse
Minister for the Arts
Minister for Defence Industries
Minister for Health Industries

Wednesday, 21 May 2014

Alfresco dining areas out of puff

Outdoor dining areas will be smoke free by July 2016 in an effort to reduce the number of South Australian smokers.

Health Minister Jack Snelling said outdoor dining areas were among the last public places where the community are regularly exposed to potentially harmful tobacco smoke.

"The majority of people who responded to our public consultation last year indicated that they supported the introduction of smoke-free outdoor dining areas," Mr Snelling said.

"By banning smoking in outdoor dining areas by July 2016 we will help protect the health of our community and increase the comfort and enjoyment of non-smokers using public spaces.

"Research also shows that smoking restrictions support people who are trying to quit."

Mr Snelling said South Australia was the last state beside Victoria to take action to restrict smoking in alfresco settings. Smoking will still be allowed in outdoor drinking areas but only in an area where food is not served.

"We recognise that the hotel industry in particular has invested significant money in outdoor alfresco areas after the banning of smoking inside hotels," he said.

"That is why we will give time for the hotel industry to adapt to the new measures to ensure a smooth transition and allow those hotels to plan separate outdoor drinking areas where food is not served if that's what they wish to do."

"But the time has come to ban smoking where people are eating. We think this is a common sense result."

Health Minister Jack Snelling said the new measures would help to tackle an increase in the State's smoking rates which have increased from 16.7 per cent to 19.4 percent over the past 12 months.

As a result of the smoking rate increase, the State Government will re-instate \$1.1 million a year in anti-tobacco mass media campaigns.

In last week's Budget, the Federal Government announced it would save \$2.9 million in 2013-14 by ceasing the next phase of the Australian National Preventive Health Agency's mainstream National Tobacco Campaign.

Last year, the State Government also ceased mass media anti-smoking advertising, recognising that the Commonwealth Government already funded a number of similar campaigns.

"We can't afford another year of smoking increases so that advertising funding will be reinstated," Mr Snelling said.

"The recent rise in smoking rates has demonstrated the importance that anti-smoking advertising has in preventing people taking up the habit, and supporting those wanting to quit."

The re-instatement of funding for anti-smoking advertising will begin in July.

The changes to smoke free outdoor dining areas will require an amendment to the *Tobacco Products Regulation Act 1997*

For more information about quitting smoking call Quitline on 137 846 or visit www.quit.org.au

Annex 11 – Estimates of Impact of “Standardised Packaging” on Adult Smokers based on Pechey et al.

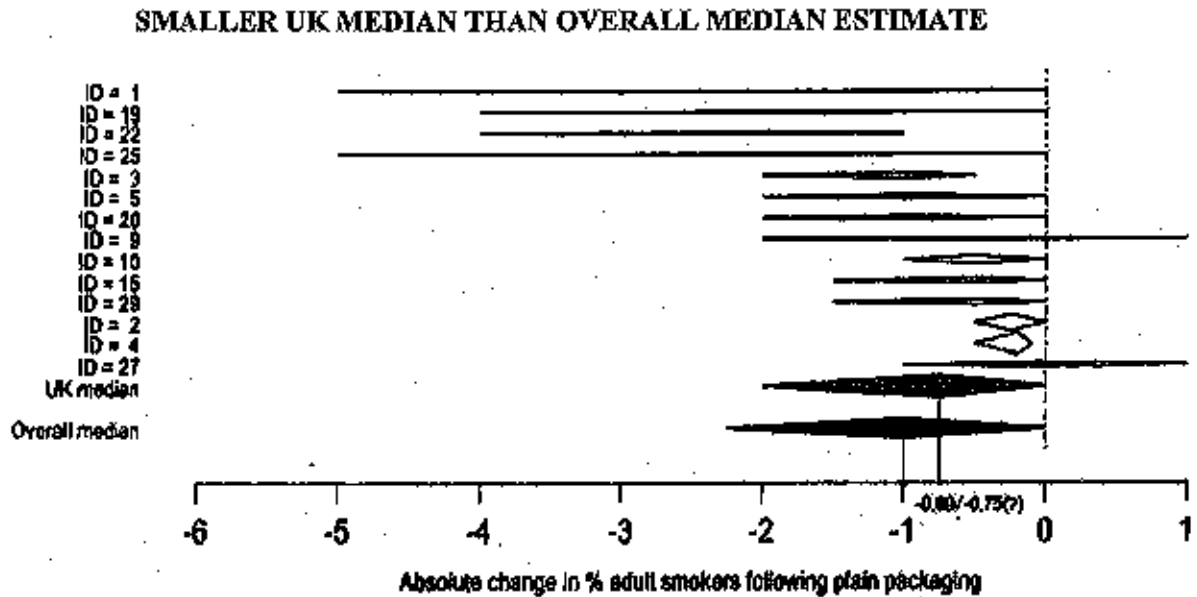
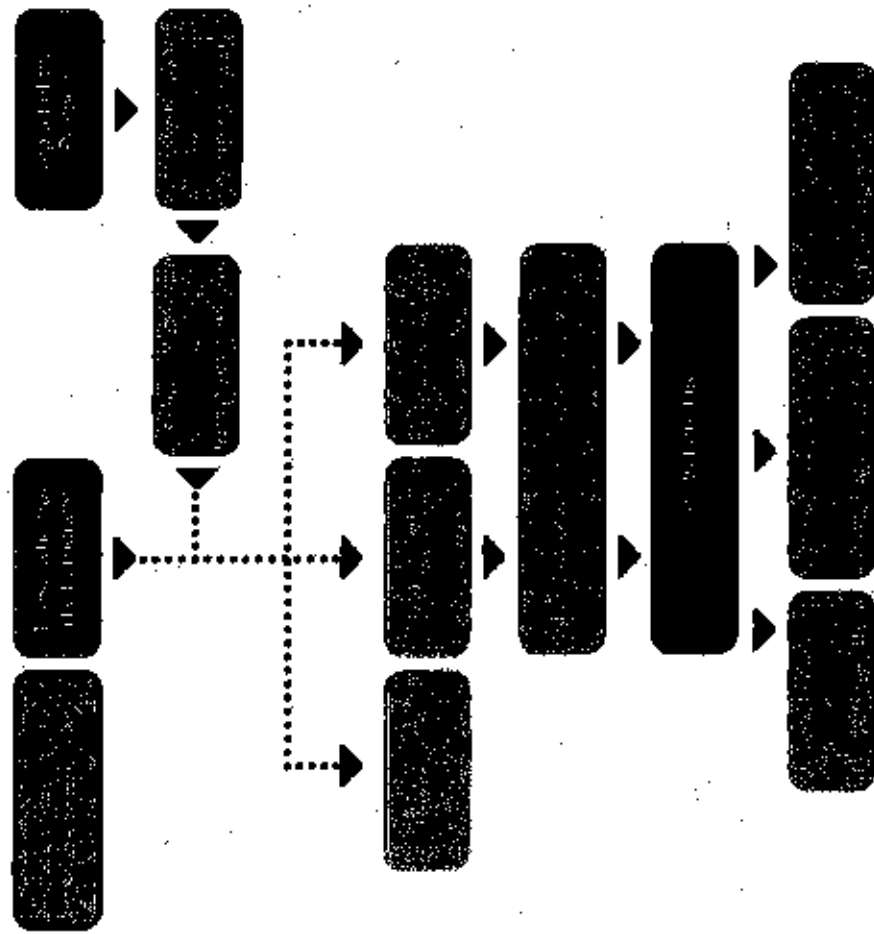


Figure 1 Forest plot of estimates of absolute change in the prevalence of adult smokers two years after the introduction of plain packaging (holding other factors constant). [Prevalence rates provided to experts were: Britain: 21%; Australia: 18%; Canada: 17.5%].

Notes:

- The figure above has been adapted from the Forest plot in Pechey et al. (2013) to visually compare the overall median to the UK median. The overall median combines the UK median, the Australia median and the North America median.
- In Forest plots, the centers of the diamonds usually represent the pooled point estimates. See, e.g., S. Lewis, “Forest plots: trying to see the wood and the trees”, BMJ 2001, 322, p. 1479, available at <http://www.bmj.com>.
- Although Pechey et al. did not provide the numerical values for the UK median (which they should have done), it is clear from Figure 1 that the UK median is significantly lower (by approx. 20%-25%) than the overall median (see adaptation here above).
- In the DH’s 2014 impact assessment, using the overall median instead of the UK median artificially increases the assumed benefits of the policy related to adults in Table 4 (para 172) by approximately the same 20%-25%, inflating its overall benefits of £24.7bn (as per Table 5) by around £4bn to £5bn.

Annex 12 – Illicit Trade Feedback Loop
 ASH model of decrease in illicit trade related to FCTC Protocol



Source: Paul Johnson, "Costs and benefits of the FCTC Protocol on Illicit Trade in Tobacco Products", ASH UK (year unspecified), p. 30, available at <http://www.ash.org.uk>.



cutting through complexity

Illicit tobacco in Australia

2013 Full Year Report
3 & 4 2014





KPMG LLP
Strategy Group
15 Canada Square
Canary Wharf
London E14 5GL
United Kingdom

Tel +44 (0) 20 7311 1000
Fax +44 (0) 20 7311 3311
DX 167480 Canary Wharf 6

3 April 2014

IMPORTANT NOTICE

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Glossary

ABS	Australian Bureau of Statistics
ACT	Australia Capital Territory
AIHW	Australian Institute of Health and Welfare
AIT	Anti Illicit Trade
ATO	Australian Taxation Office
AWOTE	Average Weekly Ordinary Time Earnings
BATA	British American Tobacco Australia
CAGR	Compound Annual Growth Rate
CATI	Computer Aided Telephone Interview
CAWI	Computer Aided Web Interview
Contraband	Genuine manufactured cigarettes that are sold without the payment of applicable excise taxes in the market of consumption. Contraband cigarettes tend to have been made in a low-tax country and brought into the country of consumption illegally, or acquired without taxes (for export purposes) and illegally re-sold in the market of consumption. This includes genuine products which are brought into a country in amounts exceeding the personal allowance; in Australia this limit is 60 sticks or 60 grams of RYO per person
Counterfeit	Manufactured cigarettes which are illegally manufactured and carry the trademark and/or branding of a legally sold brand without the consent of the trademark owner. Counterfeit cigarettes are also known as fake cigarettes. For the purposes of this analysis, data relating to counterfeit is not included within the definition of contraband
CPI	Consumer Price Index
EOS	Exchange Of Sales data, Shipment data provided by the industry
EPS	Empty Pack Survey
FCTC	Framework Convention on Tobacco Control
GDP	Gross Domestic Product
H1	First half of the year i.e. the period from January to June
H2	Second half of the year i.e. the period from July to December
Illicit whites	'Illicit whites' is a term for brands of manufactured cigarettes that are not legally available in the local market. Whilst possibly legal at the point of manufacture, these brands are typically not sold legally anywhere, and are often made exclusively for smuggling
Inflows	Total volume of cigarettes coming into Australia
ITA	Imperial Tobacco Australia
kg	Kilogram
KPI	Key Performance Indicator
LDC	Legal Domestic Consumption
LDS	Legal Domestic Sales
LTM	Last Twelve Months
LTM H1	Last Twelve Months to the end of June (e.g. 1 July 2012 to 30 June 2013)
LTM H2	Last Twelve Months to the end of December (e.g. 1 January 2013 to 31 December 2013)
MSI	MSIntelligence

Glossary

ND(L)	Non-Domestic Legal is the legitimate tobacco purchased in duty free or abroad within personal allowance limits
Non-domestic cigarettes	Cigarettes which are not Australian (i.e. health warnings missing or not in English, brands not sold in Australia, packs with identifying marks from other markets such as tax stamps)
OECD	Organisation for Economic Cooperation & Development
PDI	Personal Disposable Income
PML	Philip Morris Limited
pp	Percentage point
Outflows	Legitimate tobacco purchased in Australia and taken abroad
RMR	Roy Morgan Research
RSP	Retail Selling Price
RYO	Roll Your Own
TISG	Tobacco Industry Stakeholder Group. Formerly known as the Tobacco Industry Forum (TIF)
Tonnes	Thousand kilograms
WHO	World Health Organisation
Unbranded tobacco	Legal loose leaf tobacco upon which no duty has been paid and which carries no labelling or health warnings. It is sold and consumed either in RYO form (called Chop Chop) or inserted into empty cigarette tubes. Commonly sold in both bags or boxes
YoY	Year on Year

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2. Australian tobacco market	8
3. Macroeconomic environment	13
4. Regulation and taxation	16
5. Size of the illicit tobacco market	23
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1. Executive summary and key findings

1.1 Key messages

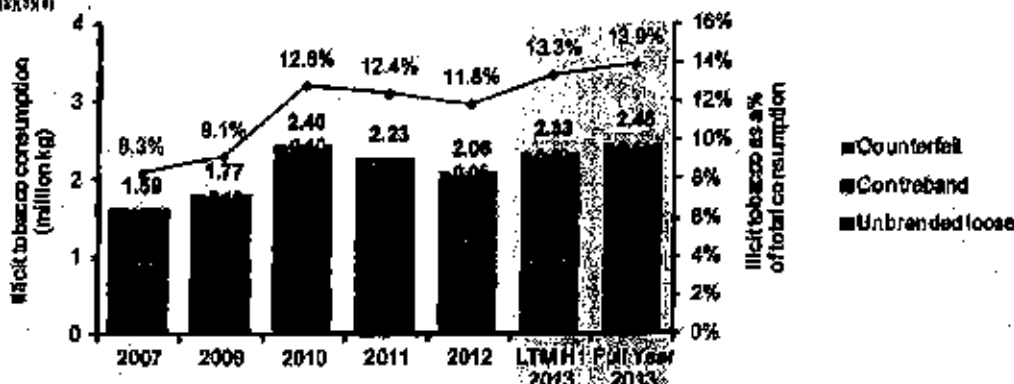
1.2 The purpose of this report

1.3 KPMG LLP's experience in measuring illicit trade

Illicit tobacco consumption has increased, driven by a growth in illicit manufactured cigarettes

1.1 Key messages

Figure 1.1 Illicit tobacco consumption as a proportion of total consumption 2007 – 2013 (H&M)(1)(2)(3)(4)



Introduction

This is the 2013 full year report examining the size of the illicit tobacco market in Australia for the twelve months ending December 2013. The percentage of the overall illicit tobacco consumption in 2013 has been calculated using the approach adopted in the H1 2013 report and uses all the available data captured in 2013.

Unbranded tobacco consumption has been calculated using a consumer survey whilst the consumption of illicit manufactured cigarettes has been estimated based on empty pack survey results.

Tobacco consumption in Australia

The overall level of tobacco consumption in Australia was approximately 17.7 million kilograms in the full year 2013, of which 2.45 million kilograms are estimated to be illicit. This estimate of total consumption is marginally higher than both the 2012 and the H1 2013 figures.

Illicit tobacco consumption in Australia

Figure 1.1 highlights that in the twelve months to the end of 2013, the level of illicit consumption grew to 13.9% of total consumption, 2.1 percentage points higher than in 2012, and 0.6 percentage points higher than in the twelve months ending June 2013.

If all of this tobacco had been consumed in the legitimate market it would have represented an excise amount payable to the Government of AUD1.1bn at current excise rates.

This growth in illicit consumption is driven by a slight increase in unbranded tobacco consumption volumes from H1 2013 whilst illicit manufactured cigarette consumption volumes have stabilised at levels recorded in LTM H1 2013.

There has, however, been a change in the mix of illicit manufactured cigarettes consumed with counterfeit

volumes experiencing a large increase in 2013, though when compared to the total illicit consumption, counterfeit consumption continues to be relatively small. Contraband volumes, despite witnessing a decline from H1 2013 levels, continue to account for the majority share of illicit manufactured cigarette consumption. Additionally, the consumption of illicit whites continues to be a growing issue – they accounted for more than 2.3% of total manufactured cigarette consumption in 2013. Manchester is currently the largest illicit white brand in Australia; if it were sold legally in Australia it would have a 1.4% market share.⁽⁵⁾

Legal tobacco market in Australia

The overall sales of legal domestic tobacco in the full year 2013 declined by 0.5% from the previous year; a lower decrease compared to an annual fall of 1.6% between 2000 and 2013. Whilst manufactured cigarette volumes have declined at an annual rate of 2.1% over the last thirteen years, loose tobacco volumes have increased at a CAGR of 3.0% over the same period, representing a shift in the mix of tobacco products consumed. In line with this trend, manufactured cigarette volumes declined by 1.1% and loose tobacco volumes grew by 3.5% between 2012 and 2013.

Regulatory changes

In August 2013 the Australian government announced excise duty increases in tobacco products of an additional 12.5% annually for the next four years. The first of these increases was implemented on 1 December 2013, with further 12.5% increases to be applied on 1 September 2014, 1 September 2016 and 1 September 2018. Additionally from 1 March 2014 excise and excise equivalent customs duty will be indexed to the Average Weekly Ordinary Time Earnings (AWOTE) instead of the Consumer Price Index.⁽⁶⁾ The Victorian government recently announced its intention to quadruple fines for retailers caught with illicit tobacco.⁽⁷⁾

Sources: (1) Deloitte, *Illicit Trade of Tobacco in Australia*, 2010, 2011, 2012

(2) Industry data

(3) KPMG Analysis

(4) Eurostat, *Tobacco Consumption in Australia*, 2013

(5) Treasurer of the Commonwealth of Australia, *Government to increase tobacco excise*, August 2013

(6) Department of Health, *Victoria*

KPMG LLP is the leading advisor in the field of illicit tobacco consumption measurement

1.2 The purpose of this report

British American Tobacco Australia, Imperial Tobacco Australia Limited and Philip Morris Limited have commissioned KPMG LLP to conduct an independent report to estimate the size of the consumption of illicit tobacco in Australia. KPMG LLP had final decisions on all methodologies and messages contained in this report. The purpose of this report is:

1. To provide an overview of the nature and dynamics of the legal and illicit tobacco markets in Australia, and
2. To provide an independent estimate of the size of the illicit tobacco market in Australia.

KPMG was appointed to produce bi-annual reports on the illicit trade for the industry in Australia.

This full year 2013 report is the second of two reports that are published focusing on 2013 and is an update to the H1 2013 report that was released in October 2013.

This report covers the period from January to December 2013 and shows the 2013 results based on our methodology. The result for 2013 is also presented on a basis consistent with H1 2013 report.

1.3 KPMG LLP's experience in measuring illicit trade

KPMG LLP has significant experience in the measurement of illicit tobacco consumption across a number of markets. Our experience covers the following:

Europe

Since 2005, KPMG LLP has led a Pan European assessment of the scale of counterfeit and contraband tobacco on behalf of Philip Morris International Management S.A. (PMI) and the European Commission Anti Fraud Office (OLAF). Project Star has been conducted annually since 2006 by KPMG for PMI, the European Commission and the 28 EU Member States.

We have worked extensively with the industry and other stakeholders on developing an approach to illicit market sizing and implementing a common, global approach to illicit trade measurement.

Latin America

In 2013 KPMG LLP led the first multi-territory study into the illicit trade in Latin America. The study focuses on the levels of inflows and outflows of both legal and illicit cigarettes and other tobacco products across a selection of Latin American countries. The work performed has allowed a variety of stakeholders access to the first picture of the cross border nature of illicit tobacco volumes in Latin America. This report was prepared for an internal use of a tobacco company and has not been published.

Oceania

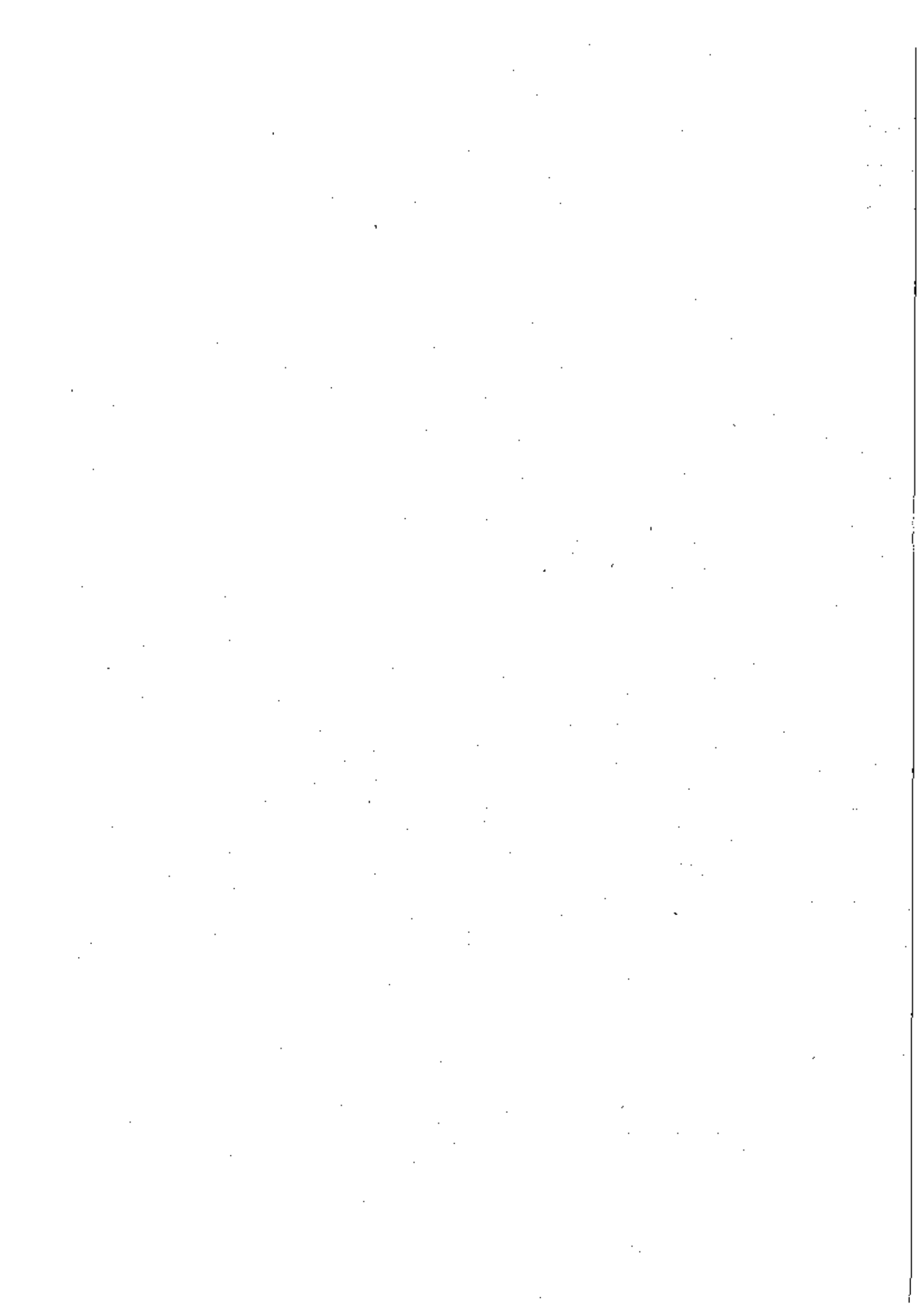
KPMG LLP is currently involved in assessing the illicit tobacco trade in selected South Pacific markets for a tobacco company.

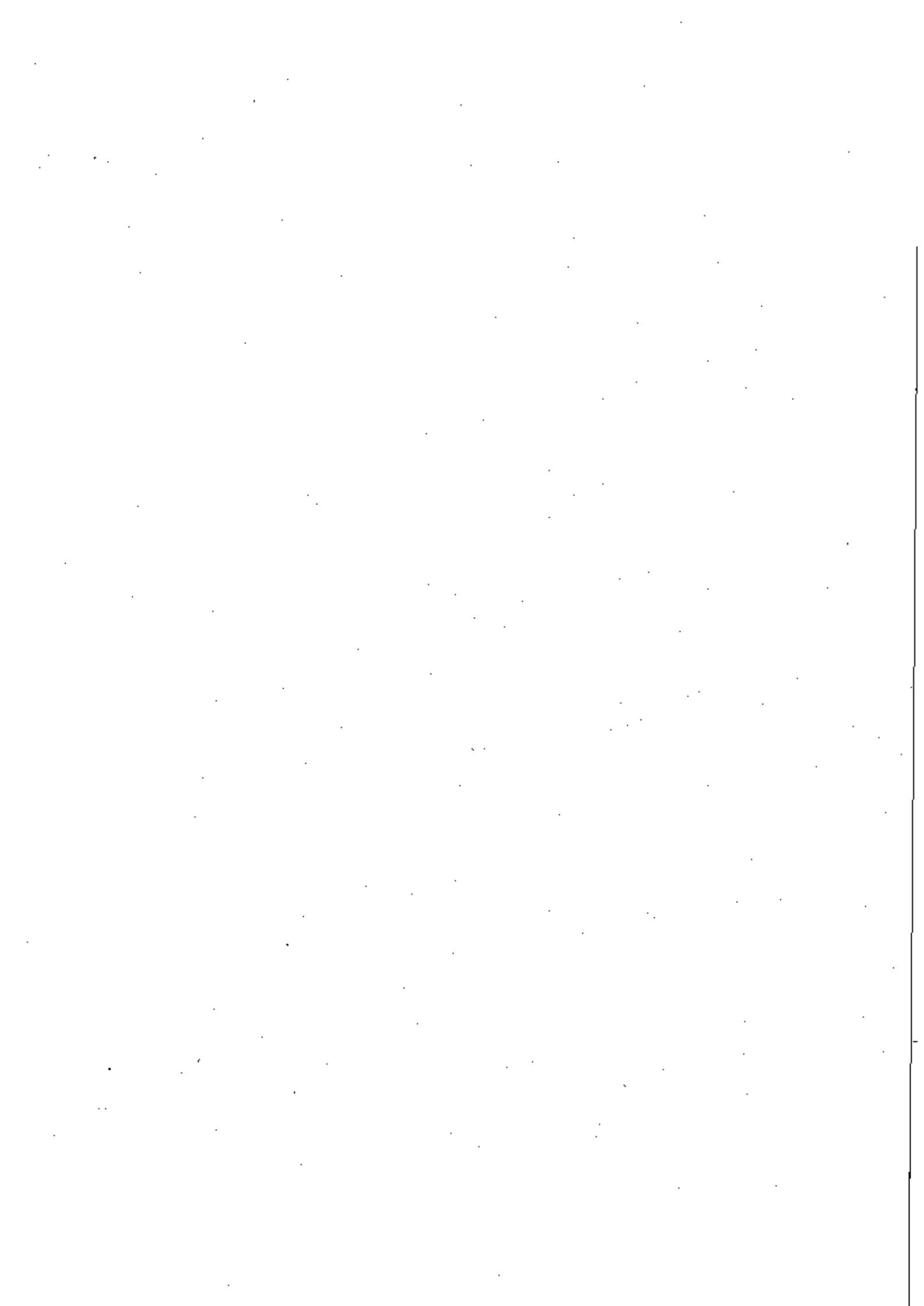
As part of this ongoing work, KPMG has a strong understanding of some of the unique issues found in the wider Oceania region outside of Australia and have developed specific methodologies designed for the purpose of sizing the illicit trade in each country.

2. Australian tobacco market

2.1 Tobacco consumption in Australia

2.2 Legal tobacco market



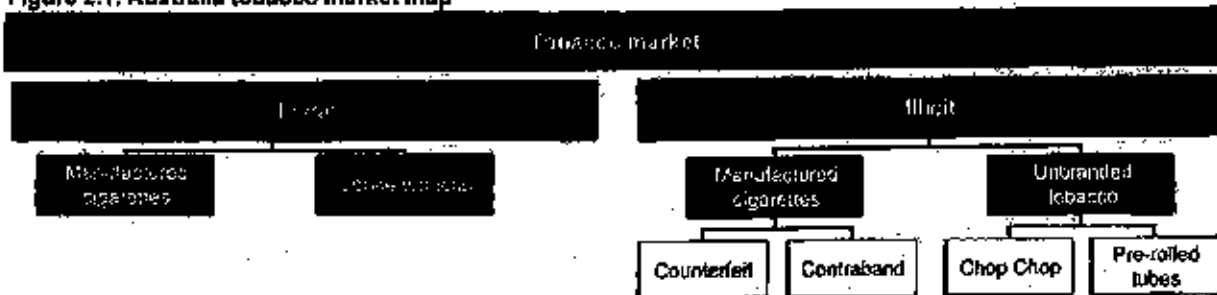


The legal and illicit markets are made up of manufactured cigarettes and loose tobacco

2.1 Tobacco consumption in Australia

Tobacco consumption refers to total volume of consumption for all types of tobacco as mapped out in figure 2.1. This section deals with the tobacco market and related products:

Figure 2.1: Australia tobacco market map



Legal tobacco products

There are two main types of tobacco products considered in total tobacco consumption (cigars and pipe tobacco have been excluded for the purposes of this study):

Manufactured cigarettes – made for the legal tobacco market and sold in packets.

Loose tobacco – Legal loose leaf tobacco sold in pouches and used in Roll-Your-Own (RYO) cigarettes, which are consumed using rolling papers or tubes.

As shown in section 5.1, additional legal consumption is possible in the form of non-domestic legal product, that is tobacco purchased by consumers in other countries and imported into Australia legally for personal consumption.

Illicit tobacco consumption

Illicit tobacco is mainly brought into the country legally from overseas markets without the payment of excise duties. This tobacco is sold to consumers at lower prices than Australian cigarettes, avoiding Australian tax obligations or is brought into the country in amounts exceeding the allowable personal limit. The Australian Crime Commission believes that organised crime groups perceive tobacco smuggling to be low-risk and high profitability. Penalties for smuggling illicit tobacco have been increased, with potential for a jail term of up to ten years.⁽¹⁾

Counterfeit

These are manufactured cigarettes, often specifically manufactured overseas on a large scale. Once manufactured, they are smuggled into Australia most commonly via ports on large container freight and other channels including airmail. These products carry branding without the consent of the trademark owner to imitate popular legitimate tobacco product brands.

According to the Tobacco Industry Stakeholder Group (TISG)⁽²⁾ they do not adhere to industry production

standards, they may pose additional serious health risks and are also known as fake cigarettes.⁽²⁾

Contraband

These are mainly genuine cigarettes that are manufactured legally outside of Australia adhering to local regulations and smuggled into the Australian market. This also includes cigarettes which are purchased legally outside Australia but exceed the personal import allowance and have no duty paid.

Contraband cigarettes are legitimately manufactured by the trademark owner but avoid Australian government regulations, quarantine inspections and local ingredient controls.⁽²⁾

Illicit whites, as discussed in section 6, are also a constituent part of contraband. 'Illicit whites' is a term for brands of manufactured cigarettes that are not legally available in the local market, though they could be legal at the point of manufacture. These brands are often made exclusively for smuggling.

Unbranded tobacco

Unbranded tobacco is sold as finely cut loose leaf tobacco in half kilogram or one kilogram amounts. TISG indicates that it may be grown illicitly without a licence in Australia but is most commonly smuggled from overseas countries.

This product carries no labelling or health warnings and is consumed in RYO form or inserted into empty cigarette tubes and sold in boxes which are available from tobacco retailers. The product is then sold loose in bags or pre-rolled tubes (called Chop Chop).⁽²⁾

The Australian Crime Commission believes that the majority of unbranded tobacco is imported rather than grown in Australia. It is distributed to retailers in the same way as counterfeit and contraband products.⁽¹⁾

Note: (2) Formerly known as Tobacco Industry Forum (TIF), recently changed as the result of recent changes by the Australian Taxation Office (ATO) Forum

Sources: (1) Australian Crime Commission, Organised Crime in Australia, July 2013

(2) Tobacco Industry Stakeholder Group (TISG) formerly known as Tobacco Industry Forum (TIF)

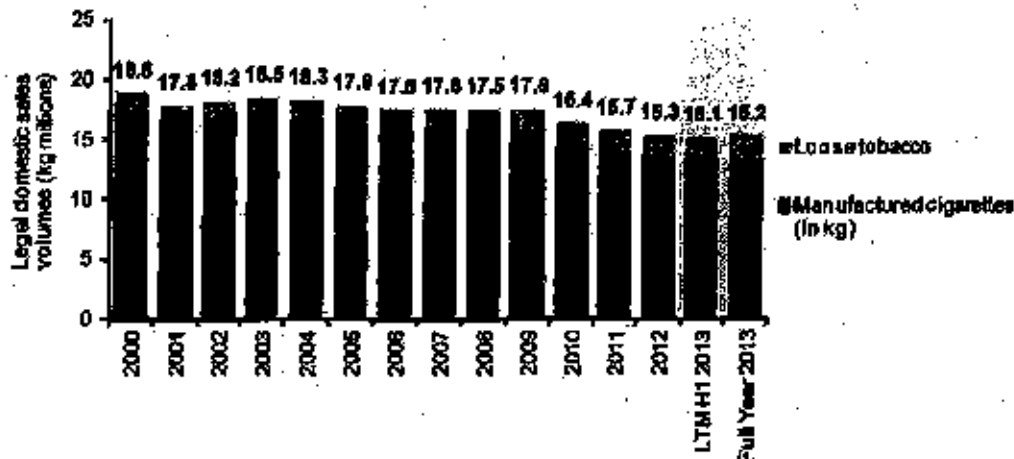
Australian tobacco market

The legal domestic sales volumes have gradually declined since 2000 but the decline appears to have levelled out in recent years

2.2 Legal tobacco market

2.2.1 Historic legal domestic sales

Legal domestic sales in Australia, 2000 – 2013⁽¹⁾⁽²⁾



CAGR (%)	2000-09	2009-12	2000-12
■ Manufactured cigarettes	-1.1%	-5.3%	-2.2%
■ Loose tobacco	3.0%	2.8%	3.0%
Total market	-0.8%	-4.5%	-1.7%

The overall sales of legal domestic tobacco in the full year 2013 declined by 0.6% from the previous year, a lower decrease compared to an annual fall of 1.6% between 2000 and 2013.

The legal domestic sales volumes between LTM H1 2013 and 2013 have largely remained flat, and the marginal increase witnessed has been driven by an increase in legal domestic sales volumes for loose tobacco and a slight increase in sales of manufactured cigarettes during the last quarter of 2013. This, in particular the slight increase in fourth quarter volumes, is consistent with and supported by recently released industry volume figures reflecting a small increase in sales by manufacturers into the tobacco trade.⁽³⁾

However, along with these marginal increases in legal sales between LTM H1 2013 and 2013 there was also an increase in illicit tobacco consumption.

Australian legal domestic sales volumes have gradually declined since 2000. The 25% increase in excise duties in April 2010 coincided with a 6.8% decline in legal domestic sales volumes.

Whilst manufactured cigarette volumes have declined at an annual rate of 2.1% over the last thirteen years, loose tobacco volumes have increased at an annual rate of 3.0% over the same period, representing a shift in the mix of tobacco products consumed.

Note: (a) Legal domestic sales numbers presented here are based on Eurostat data. Through an analysis of confidential Exchange of Sales data, Eurostat appears to underestimate actual sales and so we have taken a historic average to uplift Eurostat manufactured cigarette volumes in each year by 2%. Loose tobacco volumes remain unchanged. Please refer to page 58 for details.

Sources: (1) Eurostat, Legal domestic sales, accessed January 2014

(2) KPMG analysis of data from Nielsen Australia and ADBS database

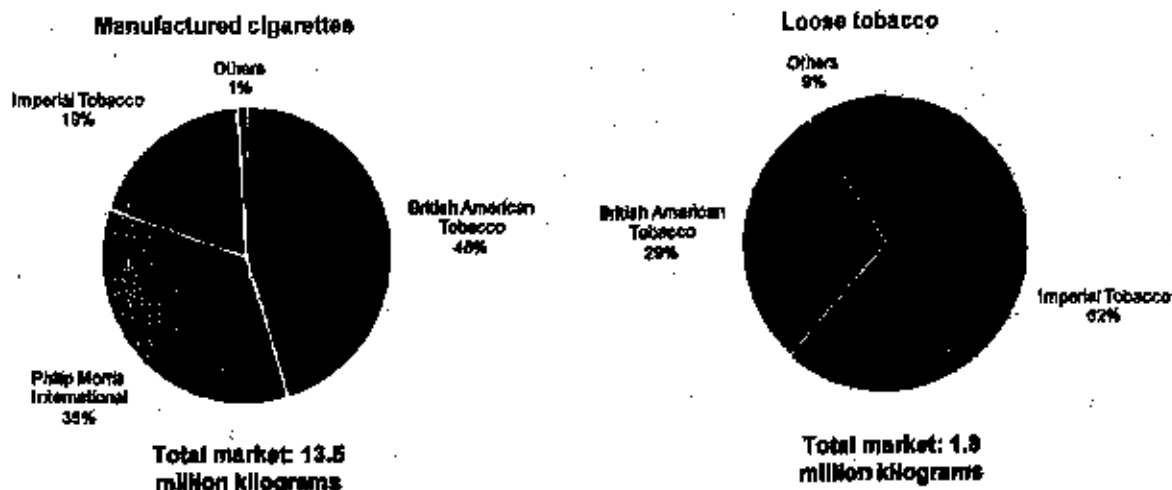
(3) Reuters, [Australia tobacco sales edge up, mostly into cigarettes](http://www.reuters.com/article/2014/03/26/tobacco-sales-4/US26MAM1D720140326), <http://www.reuters.com/article/2014/03/26/tobacco-sales-4/US26MAM1D720140326>

Australian tobacco market

BAT has the largest market share in manufactured cigarettes whilst Imperial Tobacco has the biggest market share in loose tobacco

2.2.2 Australia legal tobacco competitive overview.

Market share by manufacturer,
2012⁽¹⁾

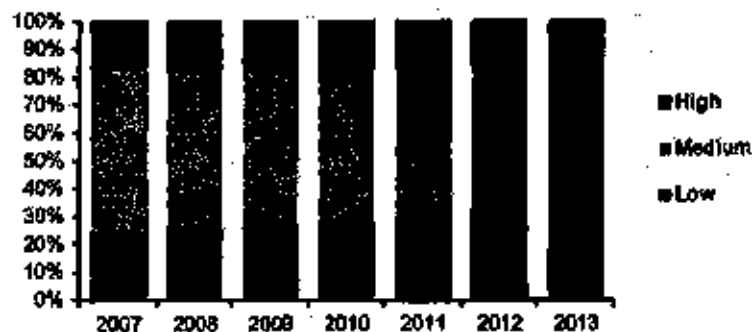


Market share

The three major tobacco manufacturers have large shares across both the manufactured cigarette and loose tobacco market. British American Tobacco has a market share of 45% in manufactured cigarettes with its brand Winfield having the largest market share of 23%.

Imperial Tobacco has the largest market share in loose tobacco with five of the top six loose tobacco brands.

Market share of manufactured cigarettes by price category,
2013⁽²⁾



Price category

Cigarettes are taxed by the stick rather than value and as a result increases in prices through excise tax do not increase the gap in price between high and low priced categories.

Since 2007 there has been an increase in the market share of low priced categories at the expense of medium and high priced cigarettes as people are switching to cheaper cigarettes. This trend appears to have developed further in 2013 as the low price segment increased by 5pp. between 2012 and 2013, the biggest increase since 2007.

Note: (1) The market share information has not been updated since the H1 2013 report as new data from Euromonitor is likely to be available only by the end of 2014

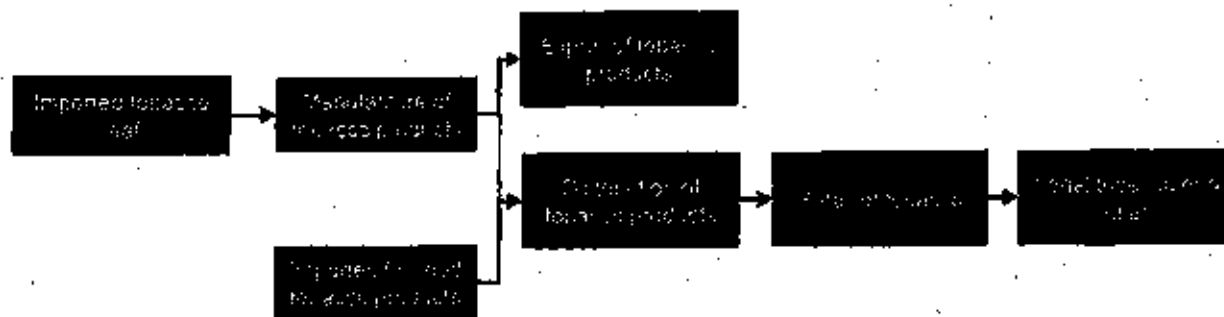
Sources: (1) Euromonitor, Tobacco in Australia, 2013

(2) KPMG analysis of Nielsen Australia - BAT Tobacco Industry database

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2.2.3 Supply and distribution of legal manufactured tobacco in Australia

Supply chain for legal tobacco products in Australia, 2013



Tobacco supply chain

All manufactured tobacco products are imported into Australia as tobacco leaf or finished products. No tobacco is legally grown in Australia for commercial purposes. However, the majority of PML and BATA products are manufactured in Australia, whilst all of ITA's products are imported. Some of the products manufactured in Australia are exported to other countries in the region.

Non-domestic legal consumption channel

A small amount of tobacco is imported into Australia by consumers for their own personal consumption. Since 1 September 2012, consumers have a limit of 50 cigarettes or 50g of loose tobacco (down from 250 of each) which can be brought into Australia without paying excise duty. This volume can be brought in from the country of origin or through duty free sales channels. Given this low allowance, the non-domestic legal volume is likely to be a small proportion of consumption and is discussed further in the appendix A2.4.

Source: (1) Industry data

3. Macroeconomic environment

- 3.1 Macroeconomic context
- 3.2 Gross domestic product growth
- 3.3 Unemployment
- 3.4 Personal Disposable Income
- 3.5 Consumer Price Index

Macroeconomic environment

The Australian economy has achieved steady growth over the last five years, with low unemployment rates compared with other OECD countries

3.1 Macroeconomic context

This section provides background on the Australian economy as a change in GDP growth, unemployment, personal disposable income or inflation, could impact consumer behavior and subsequently tobacco consumption.

The decline in legal domestic sales since 2009 needs to be examined in the context of the affordability of tobacco products. Personal disposable income (PDI) and the consumer price index (CPI) are analysed in order to assess possible reasons for changes in consumer behavior.

3.2 Gross domestic product growth

Australia has been one of the few members of the OECD to have experienced continuous economic growth since the 1990s. The global financial crisis caused a slow-down in growth as opposed to a recession.

Between 2007 and 2012 the economy grew at a compound annual growth-rate (CAGR) of 2.5%; however, growth in 2013 appears to have slowed down.

Year-on-year GDP Growth,
2007 - 2013⁽¹⁾⁽²⁾⁽⁴⁾

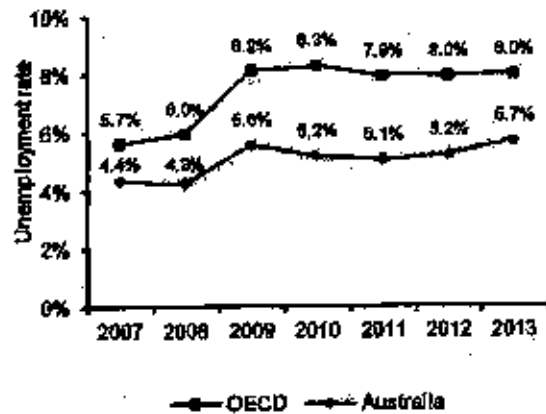


3.3 Unemployment

Unemployment in Australia is one of the lowest of all OECD countries. Unemployment increased in 2009 but remained broadly stable until 2012.

Unemployment in December 2013 was 5.9%, a slight increase from the 5.8% recorded in November 2013.⁽⁵⁾

Recorded unemployment,
2007 - 2013⁽³⁾⁽⁴⁾



Note: (a) Historical numbers for GDP have been updated and have been based on data from the Economist Intelligence Unit
Sources: (1) The Economist Intelligence Unit, GDP at constant prices, accessed March 2014
(2) OECD, GDP (expenditure approach), accessed March 2014
(3) The Economist Intelligence Unit, recorded unemployment as a percentage of total labour force, accessed March 2014
(4) OECD, harmonized unemployment rates, accessed March 2014
(5) Australia Bureau of Statistics

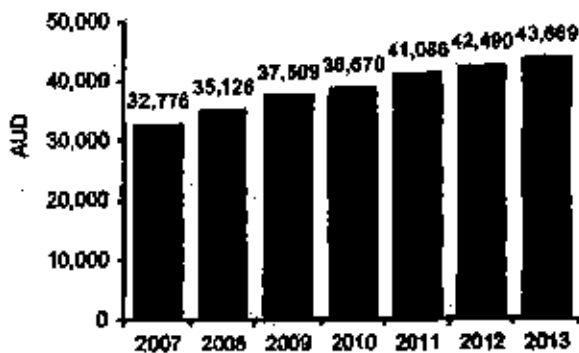
Australia has seen consistent growth in personal disposable incomes

3.4 Personal Disposable Income

Australia has been through a period of increasing consumer disposable income during the past decade. Personal Disposable Income (PDI) per capita increased by 4.9% p.a. between 2007 and 2013.

Despite the global financial crisis, income levels in Australia do not appear to be considerably impacted with growth in PDI being supported by an increase in hours worked (by part-time workers) and increased hourly wages.⁽¹⁾

Personal disposable income per capita, 2007 – 2013⁽¹⁾

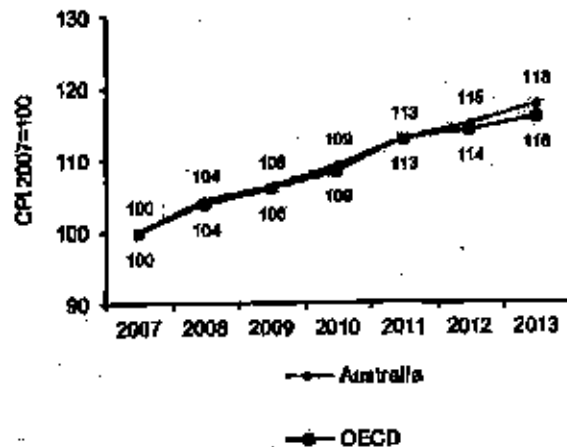


3.5 Consumer Price Index

Australia's Consumer Price Index has developed at the same pace as the OECD average, growing consistently since 2007. However, forecasts suggest that inflation will be higher than the OECD average in 2013.

The Economist Intelligence Unit forecast that annual inflation will average 2.8% in 2013-17 is subject to both upside and downside risk.⁽²⁾ Interest-rate rises may relieve some inflationary pressure, but a revival in the housing market could cause inflation to accelerate.

Consumer price index, 2007 – 2013⁽²⁾⁽³⁾



Sources: (1) Economist, Annual disposable income per capita, accessed March 2014
 (2) Productivity Commission media release, Trends in the distribution of income in Australia, March 2013
 (3) Economist, Index of consumer prices, accessed March 2014
 (4) OECD Economic, Consumer prices, accessed February 2014, revised to 2007
 (5) Economist Intelligence Unit, Consumer prices, accessed February 2014
 (6) Australian Bureau of Statistics, Consumer price index, accessed February 2014

4. Regulation and taxation

4.1 Tobacco regulation in Australia

4.2 Future proposed legislation

Regulation and taxation

Australia continues to explore new legislation in order to reduce smoking prevalence

4.1 Tobacco regulation in Australia (continued)

Tobacco products regulation

Tobacco products are regulated through, amongst other things, bans on advertising and packaging restrictions. The Tobacco Advertising Prohibition Act in 1992 banned the publication or broadcast of tobacco advertisements.

Subsequent amendments to the Act have resulted in online tobacco retailers having to display health warnings and comply with restrictions on advertisement wording.

Retailer regulations

Australia has a Commonwealth wide law which bans the sale of tobacco products to anyone under the age of 18. During the 1990s, States introduced laws which imposed harsher penalties on vendors that sold cigarettes to individuals under 18 years. Some States have also undertaken surveillance programmes to ensure compliance. In order to further regulate retailers, some States have required vendors to hold licenses to sell

The tobacco market in Australia is one of the most tightly regulated in the world

4.1 Tobacco regulation in Australia

In this section we discuss key government legislation and activities undertaken to control tobacco consumption. The advertising and promotion of tobacco is regulated by the Tobacco Advertising Prohibition Act 1992, and similar laws in each Australian state and territory. These laws set strict rules on how tobacco can be advertised, displayed and sold. The Department of Health and Ageing's National Tobacco Strategy aims to reduce smoking prevalence nationally from over 15% in 2012 to 10% in 2018.⁽¹⁾ To reduce smoking prevalence, numerous tobacco control regulations have been developed over time as demonstrated in Figure 4.1. A more detailed overview of recent legislative changes both at the Australian Commonwealth level and the state level are detailed in the appendix.

National Tobacco Strategy

The National Tobacco Strategy 2012-18 was released in January 2013. The strategy highlights nine priority areas including:

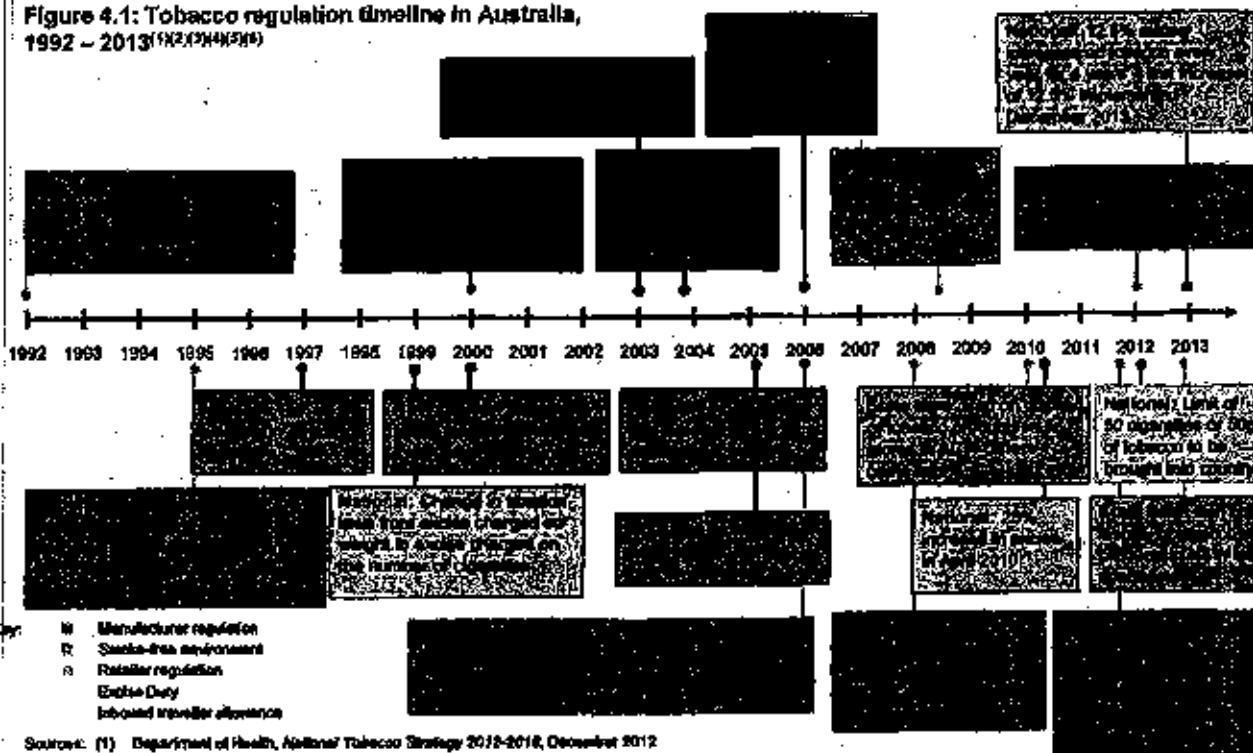
- 1 Protect public health policy, including tobacco control policies, from tobacco industry interference
- 2 Strengthen mass media campaigns to motivate smokers to quit and recent quitters to remain non-

smokers; discourage uptake of smoking; and reshape social norms about smoking

- 3 Continue to reduce the affordability of tobacco products
- 4 Bolster and build on existing programs and partnerships to reduce smoking rates among Aboriginal and Torres Strait Islander people
- 5 Strengthen efforts to reduce smoking among people in populations with a high prevalence of smoking
- 6 Eliminate remaining advertising, promotion and sponsorship of tobacco products
- 7 Consider further regulation of the contents, product disclosure and supply of tobacco products and alternative nicotine delivery systems
- 8 Reduce exceptions to smoke-free workplaces, public places and other settings
- 9 Provide greater access to a range of evidence-based cessation services and support to help smokers to quit.

The strategy also proposes a number of actions to combat the illicit trade of tobacco.

Figure 4.1: Tobacco regulation timeline in Australia, 1992 - 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾⁽⁵⁾⁽⁶⁾



Sources: (1) Department of Health, National Tobacco Strategy 2012-2018, December 2012
 (2) The Cancer Council, Victoria, Tobacco in Australia: Facts and Issues, 2012
 (3) Australian Government Department of Health
 (4) WHO, Convention on Tobacco Control Protocol, July 2012
 (5) Tobacco Control Laws, Campaign for tobacco free kids, August 2013
 (6) Australian Taxation Office, www.ato.gov.au

Australia continues to explore new legislation in order to reduce smoking prevalence

4.1 Tobacco regulation in Australia (continued)

Tobacco products regulation

Tobacco products are regulated through, amongst other things, bans on advertising and packaging restrictions. The Tobacco Advertising Prohibition Act in 1992 banned the publication or broadcast of tobacco advertisements.

Subsequent amendments to the Act have resulted in online tobacco retailers having to display health warnings and comply with restrictions on advertisement wording. Brand and variant information is permitted to be displayed.

The Tobacco Plain Packaging Act, passed in 2011, made Australia the first country in the world to implement plain packaging of tobacco products. This means that all tobacco products are required to be displayed in the same standard colour packaging with all trademarks banned and the only differentiator being the name of the brand and descriptor, printed in Luckia Sans font.

Smoke-free environment legislation

The majority of smoke-free environmental laws in Australia are determined by State parliaments and further fragmented by local council by-laws. The Australian Federal Government passed legislation to create smoke-free environments in areas within its own jurisdiction, such as airports and public transport, whilst State parliaments historically created their own laws banning smoking in some public places. State parliaments followed the Australian Commonwealth by passing legislation which banned smoking in restaurants in the early 2000s.⁽¹⁾

The establishment of the Framework Convention on Tobacco Control (FCTC) resulted in the creation of guidelines surrounding smoke-free environments which some State Parliaments adopted. In 2005 and 2008 the States passed laws which created smoke-free environments in public places including licensed premises, partially covered outdoor spaces and all fresco dining areas. States have continued to establish further smoke-free environments, including the banning of smoking on beaches, playgrounds and at stadia or other sporting events and concerts.⁽²⁾

Individual States in Australia have also passed laws which restrict smoking in cars with children under the age of 17.⁽³⁾ In November 2013, the Tobacco Amendment Act was passed by both houses of Victorian Parliament and will come into effect when proclaimed or on 1 October 2014 at latest. This bill aims to extend smoking bans to a range of areas especially where children are present.⁽⁴⁾

Retailer regulations

Australia has a Commonwealth wide law which bans the sale of tobacco products to anyone under the age of 18. During the 1990s, States introduced laws which imposed harsher penalties on vendors that sold cigarettes to individuals under 18 years. Some States have also undertaken surveillance programmes to ensure compliance. In order to further regulate retailers, some States have required vendors to hold licenses to sell tobacco. With the exception of Victoria and Queensland, all other States and Territories require tobacco retailers to hold a licence. In the States and Territories that do require a tobacco licence, fees range from AU\$200-AU\$302.22 per annum. In New South Wales, retailers must inform the Department of Health that they will sell tobacco products. This enables the State to have additional control over tobacco retailers, as it can threaten to withhold licenses in the event of sales to minors.⁽⁵⁾

States and Territories have also banned retailers from point of sale advertising and the display of tobacco products within stores. Australia Capital Territory (ACT), New South Wales, the Northern Territory, Queensland and Tasmania all have legislation in place banning point of sale displays. South Australia, Victoria and Western Australia have similar legislation; however, there are exemptions in place for specialist outlets.⁽⁶⁾ South Australia has an exemption until December 2014. Victorian specialist outlets who were granted exemption prior to 1 April 2014 will be able to continue displaying products, however following this date no new specialist licenses will be issued.⁽⁶⁾ There is currently no set timeframe for the expiration of the exemptions in Western Australia.

Some States and Territories have also applied restrictions on the number and operation of vending machines in licensed premises and gambling establishments.⁽⁷⁾ In the ACT, cigarette vending machines have been banned entirely.

The Victorian government recently announced its intent to quadruple fines for retailers caught with illicit tobacco.⁽⁸⁾

Note: (4) Customs duty is at the excise equivalent rate

Source: (1) Tobacco Control Laws, Campaign for tobacco free Aot. August 2013

(2) The Cancer Council Victoria, Tobacco in Australia: Facts and Issues, 2012

(3) Parliament of Victoria, www.legislation.vic.gov.au

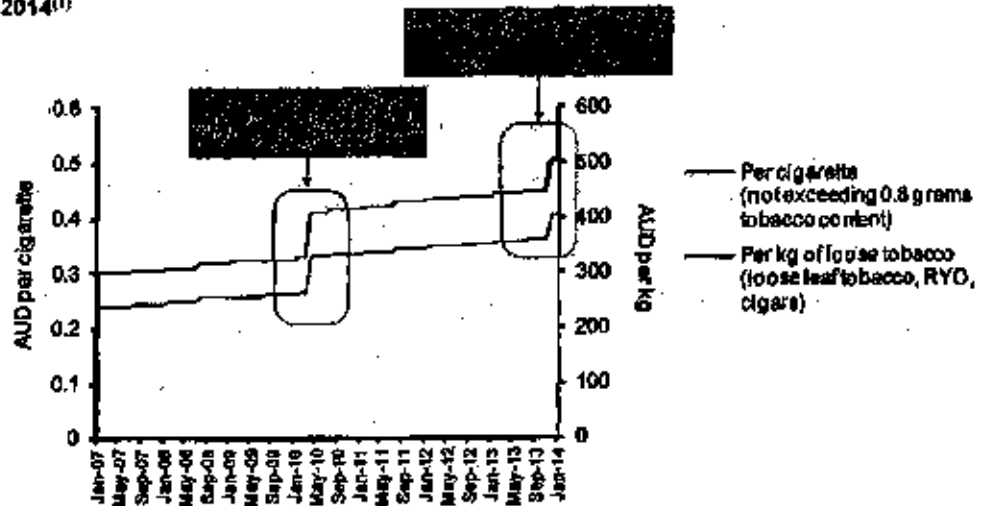
(4) Australian Government, Customs Amendment Act, July 2013

Regulation and taxation

Excise rates have increased steadily in addition to two large excise increases: one in April 2010 and another in December 2013

4.3 Recent development of excise duty and tobacco affordability in Australia

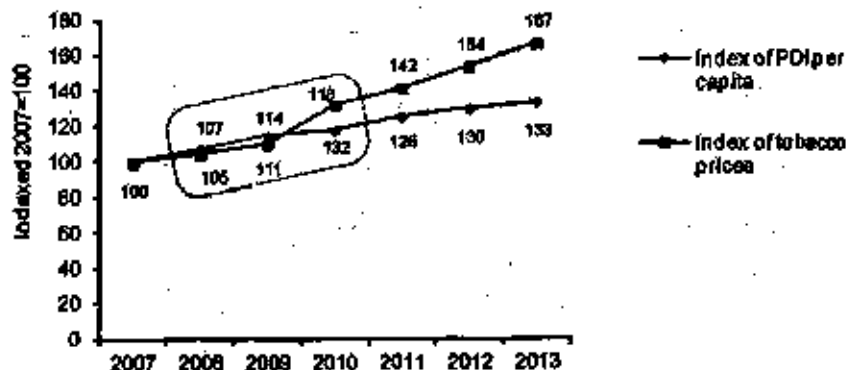
Values of tobacco excise and customs duty, Australia, January 2007 – January 2014⁽¹⁾



Excise rates are revised twice a year in February and August. Under the new regime, excise will be indexed to AWOTE in March and September.⁽²⁾ There was a one-off 26% increase in excise, introduced on 30 April 2010 in accordance with the National Preventive Health Strategy.

Excise duty on tobacco products increased by 12.6% in December 2013. The Australian government announced further successive excise duty increases of 12.5% above the rate of AWOTE in the September of each of the following three years.

Index of tobacco prices and per capita PDI, Australia, 2007 – 2013⁽³⁾⁽⁴⁾⁽⁵⁾



Although PDI per capita has continued to grow, the excise rate increase in 2010, combined with subsequent increases, saw tobacco prices increase at a higher rate than PDI per capita.

This has resulted in a decline in relative affordability. This decline in relative affordability is likely to continue with the future planned excise rate increases.

Note: (4) Indexed with 2007 values below to 100

Source: (1) Australian Taxation Office, www.ato.gov.au

(2) Australian Government – Australian Taxation Office, New legislation: Excise and excise-equivalent customs duty - Index tobacco excise in average weekly ordinary time earnings, 25 June 2013

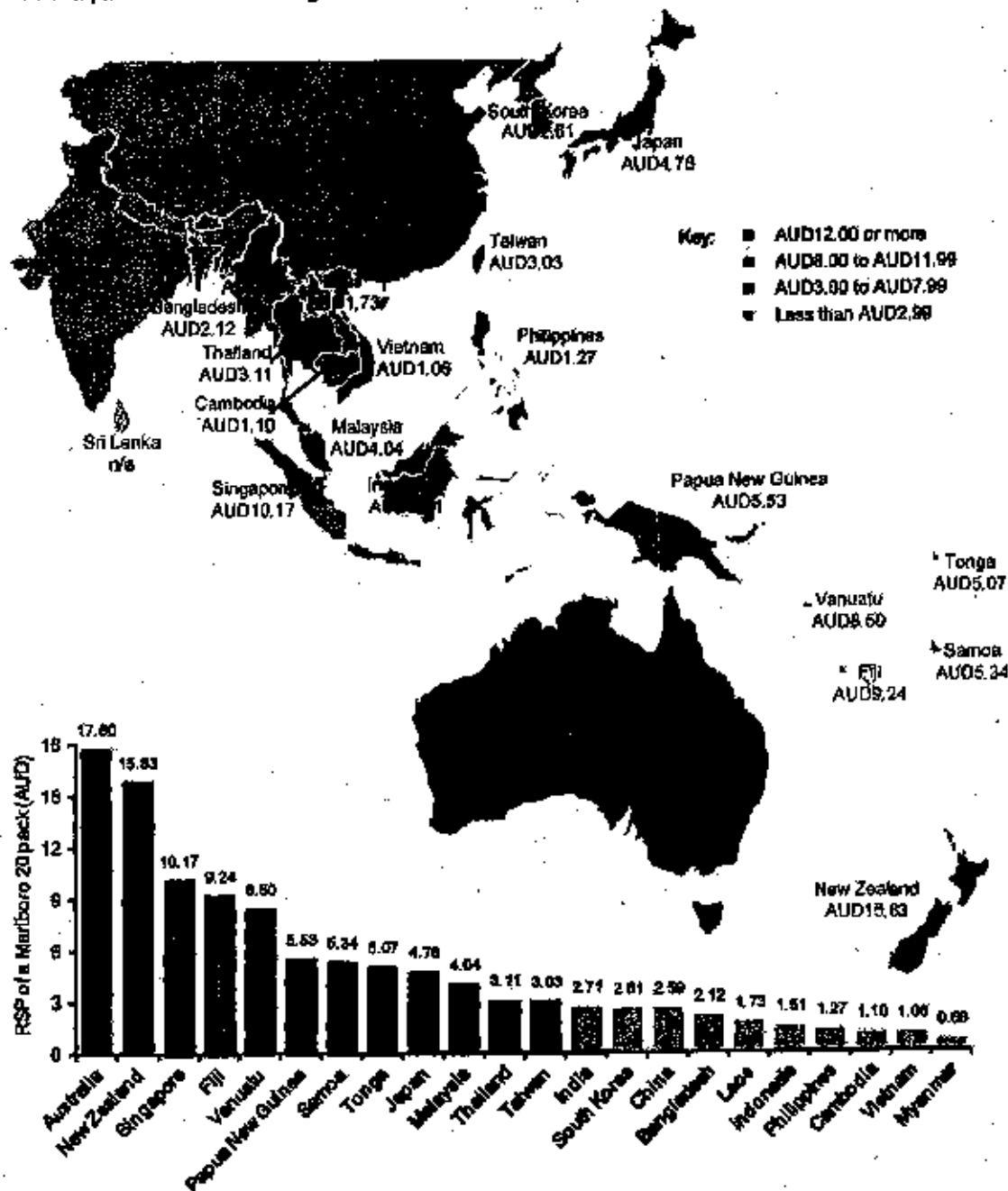
(3) Eurostat, Index of tobacco prices, accessed January 2014

(4) Eurostat, Annual Disposable Income, accessed January 2014

Australia has the highest cigarette prices within the Asia Pacific region

4.4 Regional tobacco prices

Price of a pack of 20 Marlboro cigarettes – Australia and selected markets, 2013⁽¹⁾⁽²⁾⁽³⁾



Australia and New Zealand have significantly higher cigarette prices than surrounding markets in South East Asia, with Australian prices more than 60% higher than those of the nearest non-Australasian market.

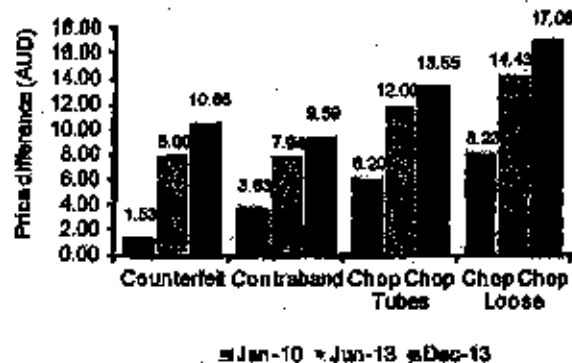
This large price differential between Australia and other relatively nearby markets creates smuggling opportunities for those involved in the illicit market.

Notes: (1) Prices for a 20 cigarette pack of Marlboro (taxes included); where Marlboro is not available, a comparable premium brand has been used
 (2) In the H1 2013 report, the price of Duty Free Marlboro has been used to represent the price of premium brand in Myanmar. However, as Marlboro is not legally sold in Myanmar, the price of a comparable premium local brand, Red Ruby, has been used in this report
 Sources: (1) Industry data
 (2) www.oxpi.com

The price differential between legal products and illicit products continues to widen

4.5 Relative price of illicit tobacco

Price differential of illicit products to a packet of Winfield 25s,
2010 – 2013⁽¹⁾



Data provided by BATA based upon covert purchases made across Australia highlights the price difference of illicit products compared to legitimate products. While this data will be impacted by the split of random versus intelligence led purchases, the data will provide some insights into the size and change in the market.

The data illustrated above highlights the difference in price between different types of illicit tobacco products and a packet of legitimate Winfield 25s. The chart also shows how this difference in price has increased since January 2010.

Over the last three years, the largest relative increases have developed in counterfeit and contraband products and this price differential appears to have widened by the end of 2013. For instance, the per pack price of counterfeit cigarettes averaged AUD10.82 compared to AUD12.45 for a pack of Winfield in January 2010 (i.e. AUD1.53 price differential). By December 2013, however, although the average price of a counterfeit pack was approximately the same (AUD10.75), the price of Winfield had increased to AUD21.40 (i.e. AUD10.65 price differential).

The industry has also highlighted that prices of contraband in particular have increased by 37% since January 2010, which has likely fuelled bigger margins to smugglers and illegal retailers.

Note: (1) Contraband and counterfeit prices are an average of prices for products found in Sydney and Melbourne. Unbranded prices have been converted to a pack of 25 cigarette equivalents.

Source: (1) BATA Intelligence data.

5. Size of the illicit tobacco market

5.1 Estimating the illicit tobacco market

5.2 Illicit tobacco consumption in Australia

Size of the illicit tobacco market

We have used a robust, methodical and globally consistent approach to produce an estimate for the size of the Australian illicit tobacco market

5.1 Estimating the illicit tobacco market

Methodology and validation

As discussed in section 2.1, the illicit tobacco market is split into unbranded tobacco and illicit manufactured cigarettes in the form of counterfeit and contraband. Both of these categories taken together form total illicit consumption. It is therefore important to take account of all consumption flows when assessing the amount of illicit tobacco consumed.

The chart below illustrates how KPMG breaks consumption into a number of categories (defined in section 2.1) and how each category requires different data sources to estimate the size of the market and to validate the findings.

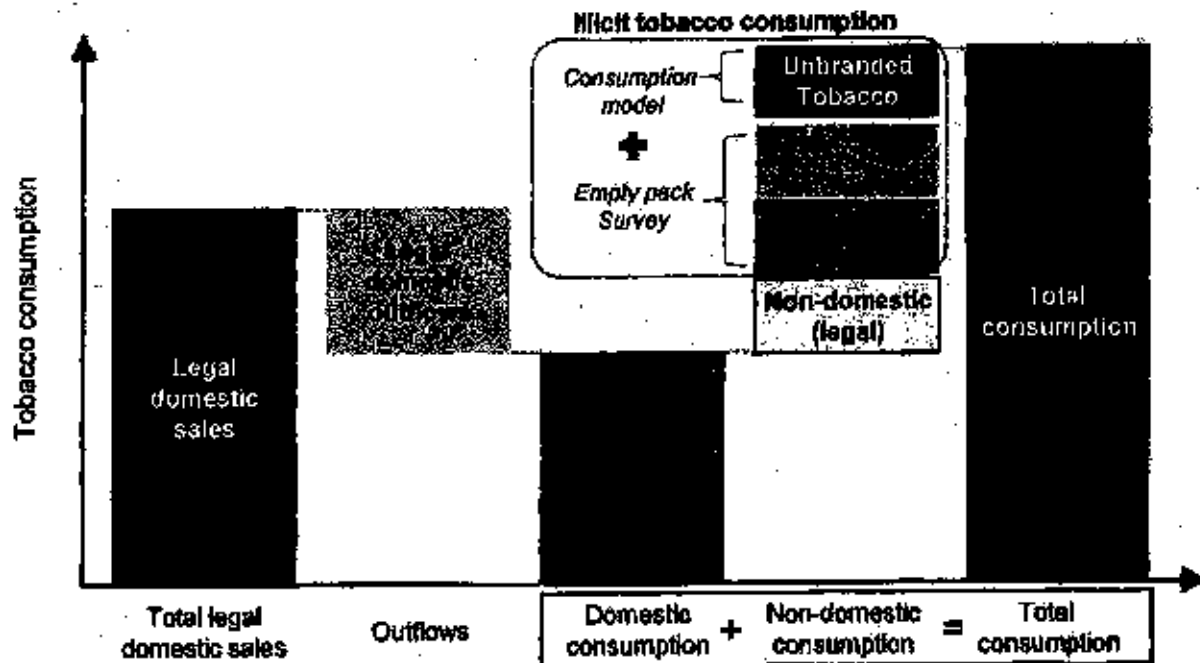
For each of these categories a separate primary approach is used in order to estimate the volume of illicit tobacco. For unbranded tobacco a consumption model approach is used, based on results from a consumer survey. This

includes Chop Chop (unbranded loose tobacco sold in bags) and unbranded tobacco sold in pre-filled tubes. For illicit manufactured cigarettes an empty pack survey analysis is used, based on the collection of discarded cigarette packs across Australia.

We believe this approach provides a robust estimate of the size of the illicit market in Australia. However, to further increase the level of confidence in this estimate, some alternative approaches are used to validate the illicit tobacco volumes generated by the consumption model and the empty pack survey analysis.

The validations can be used as alternative estimations, or to support trends and changes noted in the market. In this section each of the approaches are described before the process of estimation and validation is explained. A detailed overview of these approaches can be found in appendix A1.

Estimation of the illicit market^(a)



Data sources

Tobacco industry database (Nielsen, Aztec)	RMR consumer survey	RMR consumer survey	RMR consumer survey
Euromonitor	Tourism statistics	Empty pack survey	Health statistics
Datamonitor		Rolling papers sales data	
Exchange of Sales		Internal company intelligence data	
		Customs' seizure data	

Note: (a) Definitions for the above sales categories can be found in the glossary on page 2

We have used a broad range of approaches to produce an estimate for the size of the Australian illicit tobacco market

5.1 Estimating the illicit tobacco market (continued)

Primary approaches

Consumption model

This approach is based on the responses of consumers to the survey conducted by Roy Morgan Research in H2 2013. Like the LTM H1 report, the survey asks consumers about their consumption of both legal and illicit tobacco. These survey responses are then combined with other data sources to arrive at an estimate for total illicit tobacco consumption. Consumers are asked about both unbranded tobacco and illicit manufactured cigarettes.

For the purpose of this report, the consumption model number for unbranded volumes in the full year 2013 is based on the average of the H1 2013 and the H2 2013 consumer survey results. Since consumers are likely to give a more accurate estimate of their purchase behaviour over a shorter time period rather than the last twelve months, using an average of the H1 and H2 consumer survey results provide a more accurate number for 2013. Detailed results of the consumer survey are discussed in section 6.

Empty pack survey (EPS)

An empty pack survey is a study undertaken independently by MSIintelligence which collected 12,000 discarded cigarette packs across 16 different towns and cities in Australia. The brand and market of destination of each collected pack is assessed to determine whether it is a domestic or non-domestic product, and genuine or a counterfeit product. Products from different markets are labelled as non-domestic. The empty pack survey is used to extrapolate overall consumption in the market by projecting legal domestic sales. The percentages of non-domestic and counterfeit packs are added to this total in order to establish the total consumption of manufactured cigarettes in Australia.

We believe that the empty pack survey approach provides a robust and statistically significant estimate of the size of the illicit manufactured cigarette market. The results are not subject to respondent behaviour and are therefore less prone to sampling errors, whilst the 16 cities covered by the sample plan covers the equivalent of over 75% of Australia's population.

A small proportion of non-domestic cigarettes are likely to have been brought into Australia legally by Australians travelling overseas or by tourists arriving in Australia. Travel statistics from the Australian Bureau of Statistics are reviewed in order to determine the likely volume.

These non-domestic legal cigarettes are removed from the total non-domestic volume, which leaves the total illicit manufactured cigarette market, split into contraband and counterfeit cigarettes as described in section 2. The empty pack survey was used for the first time in the H1 2013 report to size the illicit manufactured cigarette consumption. The empty pack survey was not used previously because of the low levels of illicit manufactured cigarettes consumption. Recent observations that the consumption of illicit manufactured cigarettes has been growing now means that it is a required tool to gain a detailed understanding of these trends.

An empty pack survey was jointly commissioned by BATA, ITA and PML in 2012. The study was carried out by ACNielsen. Prior surveys were also run in 2009 and 2010 by ACNielsen on behalf of PML, and these have been made available to KPMG for use in this report.

For the purpose of this update report a new empty pack survey has been conducted in Q4 2013. The results from this survey have been used in conjunction with the empty pack survey results from Q2 2013 to arrive at an estimate for the illicit manufactured cigarette consumption for the year 2013. This method is consistent with the approach used by KPMG in Project STAR to assess the level of counterfeit and contraband cigarettes across the EU Member States. It is a widely accepted method for measuring the illicit market.

Means of validation

Rolling papers analysis

This analysis has been developed by KPMG and has been used with other clients to infer the volume of loose tobacco smoked from the quantum of papers sold. It compares this with the legal sales of loose tobacco to estimate a consumption gap between legal and illicit.

In order to use this approach several assumptions are made:

1. Grams per rolled cigarette
2. Wastage rate of rolling papers
3. Rolling papers used for consumption of illegal drugs

Data obtained in consumer surveys carried out by the industry and sales figures from rolling papers manufacturers are used in order to verify these assumptions, along with data from the National Drug and Alcohol Centre.

We have found from previous analyses that given the number of assumptions in this approach it is useful for providing a range of estimates for the market size to help validate other estimates.

Rolling papers, seizures data and consumption gap analysis are used to validate the results of the consumption model and empty pack survey

5.1 Estimating the illicit tobacco market (continued)

Means of validation (cont.)

Seizures data

Seizures data obtained from the Australian Customs and Border Protection Authorities shows the volume and type of tobacco intercepted at ports and airports. Using seizure data to size the illicit market is often unreliable since it is difficult to ascertain the proportion of total illicit product that is seized. In addition, seizure data used to intercept tobacco products coming into Australia will not pick up loose tobacco which may have been illegally grown in Australia.

Whilst seizure data is unlikely to generate an accurate estimate for the illicit tobacco market, it can be used to indicate trends and validate any considerable changes to the illicit market. For example, an increase in manufactured cigarette flows from a country picked up in the empty pack survey could be validated with a corresponding increase in seizures from that country or in manufactured cigarettes representing a growing percentage of seizures. We also use internal tobacco company intelligence data as a validation of trends. However, since this data is commercially sensitive we are unable to publish it.

Consumption gap analysis

Consumption gap analysis is used to identify the 'gap' in consumption between legal domestic sales and total tobacco consumption, calculated based on the number of smokers known to exist in Australia and historic consumption patterns. The 'gap' between total consumption and legal domestic sales is likely to be filled by illicit tobacco consumption.

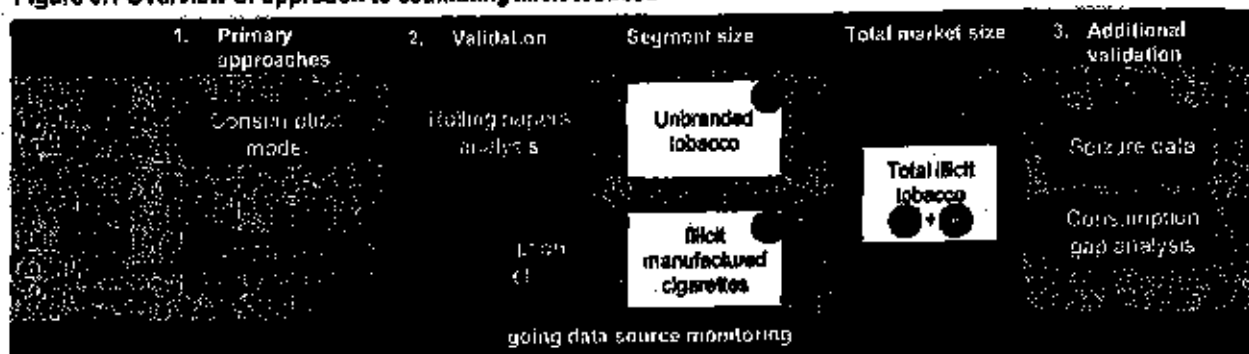
The consumption gap takes into account likely changes to the smoking population and the impact that it will have on tobacco consumption. For example, if legal domestic sales fell significantly, but there was no significant fall in the smoking population it may imply an increase in illicit tobacco consumption. Given the historic and consistent trends in tobacco consumption, significant drops are unlikely without major changes taking place in the market.

The consumption gap analysis is used in order to support any movements in the total illicit tobacco market across both unbranded tobacco and illicit manufactured cigarettes.

The validation of our measurements with additional data sources provides confidence in the results

5.1 Estimating the illicit tobacco market (continued)

Figure 5.1 Overview of approach to estimating illicit tobacco



The empty pack survey and consumption model approaches are thought to be the most robust for estimating the illicit tobacco market. Figure 5.1 shows the process by which the consumption model and empty pack survey analysis is validated through alternative analysis.

1. Primary approaches

A Unbranded tobacco: The consumption model uses data from the Roy Morgan Research consumer survey; other external data sources such as the Australian Institute of Health and Welfare and the Australian Bureau of Statistics are taken into account to determine the result. Roy Morgan Research conducted consumer surveys in H1 2013 and H2 2013. Both surveys were leveraged to derive the estimated unbranded consumption volume in 2013.

B Manufactured cigarettes: The empty pack survey is the most reliable measure of contraband and counterfeit. It also forms the foundation for Project Star. Two empty pack surveys were conducted in 2013 (Q2 and Q4). A blended empty pack survey approach, assigning equal weighting to both surveys, has been used to size the illicit manufactured cigarette consumption volume for the year 2013.

Total illicit tobacco (A+B): The total illicit tobacco market size estimate is calculated by adding the results of the validated empty pack survey analysis for manufactured cigarettes (i.e. contraband and counterfeit) with the output of the validated consumption model for unbranded tobacco.

2. Validation

Rolling papers analysis is used in order to validate the unbranded tobacco market. Whilst assumptions relating to grams per tobacco, rolling paper leaf wastage and cannable usage are hard to verify, rolling papers analysis is helpful to determine the likely ratio between consumption of loose tobacco and illicit loose (unbranded) tobacco.

The consumption model has historically been used in order to estimate the illicit volume of manufactured cigarettes. As

such it provides a good approach by which to validate the empty pack survey results.

3. Additional validation

Total illicit tobacco consumption (i.e. unbranded tobacco and manufactured cigarettes together) can be validated by two further data sources.

Seizures data can be used in order to validate the likely mix of illicit tobacco consumption. If the consumption model and empty pack survey show a large change in the mix of illicit products, seizures data should support this change.

Consumption gap analysis is also used in order to support the estimate for illicit tobacco consumption. Changes in total tobacco consumption tends to be a slow long-term decline, as seen by the decline recorded by the AIHW in surveys in 2007 and 2010. Given this consistent trend, the likely corresponding change in overall tobacco consumption is likely to follow an equivalent pattern. For example, large changes in total estimated consumption unprompted by external factors indicate there may be an issue in the estimation of illicit consumption.

Using this validation process enables us to understand and corroborate any major changes to illicit tobacco consumption.

Ongoing data source monitoring

We take a forward looking approach to ensuring the most appropriate data is used in the modeling process. For example, many surveys of smoking prevalence are conducted at irregular intervals whereas the actual decline is smooth over time between these periods. To avoid major future restatements that distort trends we continuously monitor the relevance of data sources and may rebase some data based on historic and forecast trends.

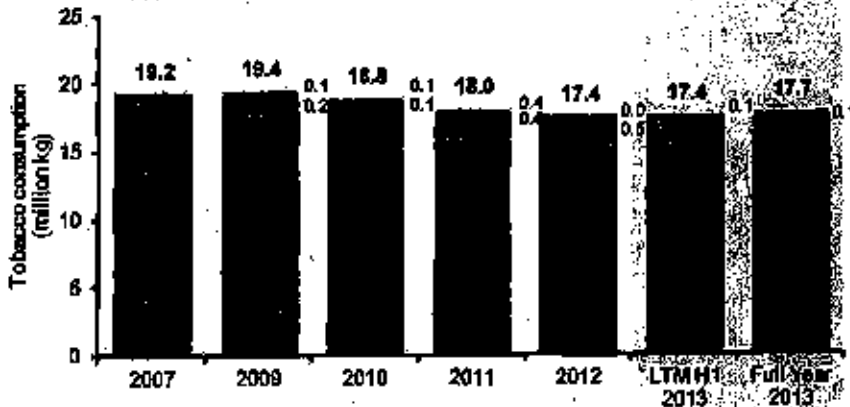
To ensure comparability with our ongoing methodology we have applied these changes retrospectively. See appendix A2 for details.

Size of the illicit tobacco market

Illicit tobacco accounted for 13.9% of total tobacco consumption in 2013, primarily driven by the increase in consumption of contraband products

5.2 Illicit tobacco consumption in Australia

Consumption of tobacco products by category, 2007 - 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾

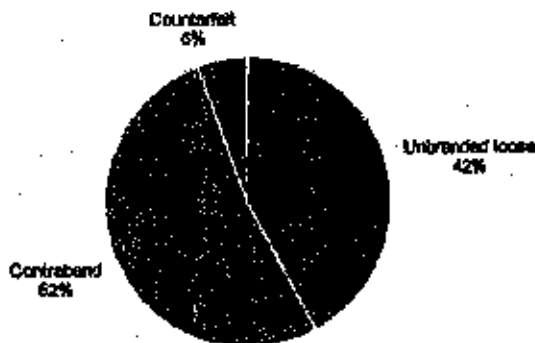


CAGR (%)	2009-13
All illicit product	+8.6%
Counterfeit	+9.4%
Contraband	+65.1%
Unbranded	-8.8%
Non-domestic (legal)	-10.7%
Legal domestic sales	-3.5%
Total consumption	-2.2%

The overall level of tobacco consumption in Australia was calculated to be equal to 17.7 million kilograms in 2013, of which 2.45 million kilograms are estimated to be illicit. This estimate of total consumption is marginally higher than both the 2012 and the H1 2013 measures. This is contrary to the long term trend that shows a decline in tobacco consumption of 2.2% per annum between 2009 and 2013.

The full year 2013 consumption volumes support the structural shift within the illicit market towards illicit manufactured cigarettes and away from illicit unbranded tobacco which was highlighted in the H1 report. The growth since H1 2013, however, was driven by a slight increase of unbranded consumption whilst the illicit manufactured cigarettes consumption has stabilised. Whilst counterfeit consumption has increased in 2013, its share in total illicit consumption continues to be relatively small and contraband consumption remains the largest driver of illicit manufactured cigarette consumption.

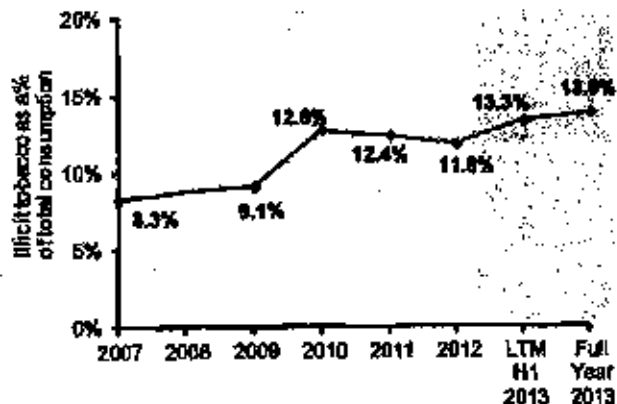
Share of illicit tobacco consumption, 2013⁽¹⁾



Since 2012 there has been an increase in both the illicit proportion of tobacco consumption and a change in mix of illicit products consumed away from unbranded tobacco and towards manufactured cigarettes. Volumes of illicit unbranded tobacco have declined by 31% whilst volumes of illicit manufactured cigarettes have increased by 151% between 2012 and 2013.

Overall consumption of illicit product is estimated to be equivalent to 13.9% of total tobacco consumption in 2013, 2.1 percentage points higher than in 2012. This is the highest level recorded and indicates a confirmation of an increase in illicit consumption highlighted in the H1 2013 report.

Illicit tobacco consumption as a proportion of total consumption, 2007 - 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾



Notes: (a) H1 2013 represent consumption for the twelve months to end June 2013
(b) Counterfeit and contraband estimations are unavailable for 2007
(c) Non-domestic legal volumes are smaller than 0.1 million kg and volume labels have not been included for this category

Sources: (1) KPMG analysis
(2) Customs, *Misc Trade of Tobacco in Australia, 2010, 2011, 2012*
(3) PricewaterhouseCoopers, *Australia's Legal Tobacco Market, 2007, 2009*
(4) Industry data

Size of the illicit tobacco market

The shift in mix towards manufactured cigarettes is supported by the consumption model. The validation process provides some certainty around the results

5.2 Illicit tobacco consumption in Australia (continued)

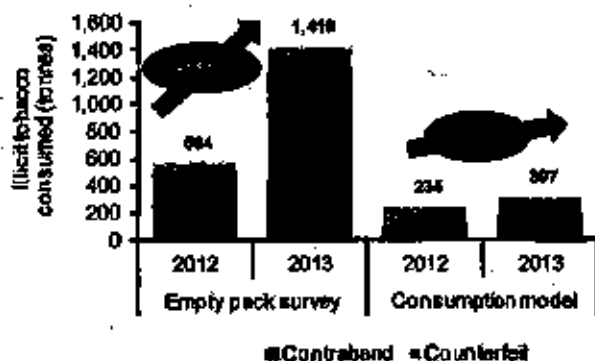
Table 5.2 Results of primary methodologies, 2012 – 2013

2012 and 2013 results (tonnes)			
	2012	2013	
1. Illicit manufactured cigarettes	Contraband	518	1,276
	Counterfeit	50	143
	Total	564	1,419
2. Unbranded tobacco	1,495	1,034	
3. Total illicit tobacco	2,060	2,453	

1. Illicit manufactured cigarettes

Based on the empty pack survey analysis, our full year 2013 estimation of the illicit manufactured cigarettes market is 1,276 tonnes for contraband and 143 tonnes for counterfeit. This represents an increase of 148% for contraband and 187% for counterfeit; and a total increase of 151%.

Estimates of illicit manufactured cigarettes, 2012 – 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾



The empty pack survey and consumption model produce different estimates for the consumption of illicit manufactured cigarettes. See appendix A1.1 for a detailed analysis of the consumption model. There are a number of reasons that may explain the differences between the estimates:

- Consumers may have difficulty identifying if they have purchased a contraband or counterfeit product. Unbranded tobacco is much more obvious to determine. This will affect the consumption model estimate for manufactured cigarettes, but not the empty pack survey estimate.
- Some contraband and counterfeit is sold at full retail sales price which means respondents in these cases will not have an important indicator of illicit consumption. This is not an issue in the empty pack survey.
- There could be some underreporting by survey respondents who do not wish to admit to illicit activities.

However, both the empty pack survey (+151%) and the consumption model (+31%) indicate a considerable growth in the consumption of illicit manufactured cigarettes.

Given the robustness and credibility of the empty pack survey for manufactured cigarettes we have adopted the empty pack survey as our primary method of estimating illicit manufactured cigarettes consumption.

2. Unbranded tobacco

The consumption model indicates that the volume of unbranded tobacco consumed declined by 31% between 2012 and 2013, from 1.8 million kilograms to 1.0 million kilograms. This illicit volume is supported by the rolling papers analysis.

Our rolling papers analysis indicates that the unbranded tobacco market is likely to be between 0.7 million kilograms and 1.4 million kilograms. The 1.0 million kilograms sits comfortably within the mid point of this range. See appendix A1.3 for more detail.

Sources: (1) Deloitte, *Illicit Trade of Tobacco in Australia*, 2012
 (2) Roy Morgan Research, *Consumer survey*, H1 2013 and H2 2013
 (3) EuroMonitor, *Legal domestic sales*, January 2014
 (4) KPMG analysis

Size of the illicit tobacco market - Key conclusions

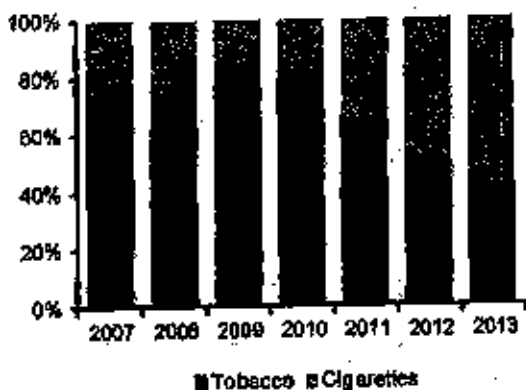
The additional validation process indicates that the trend and mix shift in illicit tobacco consumption is in line with secondary data sources

3. Overall illicit tobacco consumption

The estimated movement in the unbranded tobacco and manufactured cigarette consumption between 2012 and 2013 is an overall increase of 19.1% with illicit tobacco consumption rising to 2,453 tonnes in 2013. This increase is also characterised by a change in the mix of illicit tobacco consumed towards manufactured cigarettes. In 2013 manufactured cigarettes accounted for nearly 60% of total illicit consumption. The results are further validated by seizures data and consumption gap analysis.

Seizures data demonstrates a rise in the proportion of manufactured cigarettes as a percentage of illicit tobacco intercepted between 2009 and 2013. In 2009 16% of the volume of seizures came from manufactured cigarettes, whilst in 2013 56% of tobacco seizures were manufactured cigarettes.

Sea cargo seizures split by type of illicit tobacco, 2007 - 2013⁽¹⁾ (Millions)

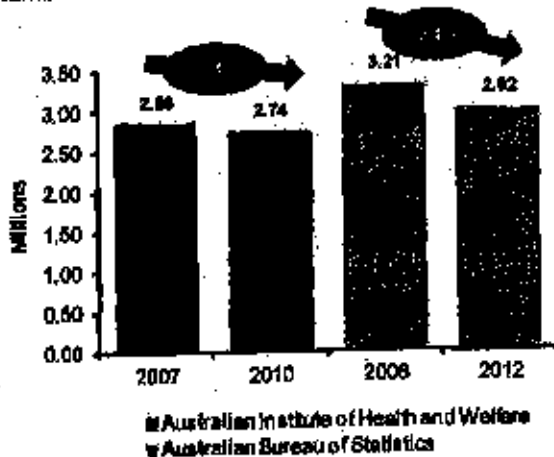


This indicates that the proportion of manufactured cigarettes smuggled into Australia appears to be growing as a percentage of total illicit tobacco, validating the growth of illicit manufactured cigarettes indicated by the primary approaches.

Recent seizures include eighty million cigarettes and over seventy tonnes of tobacco in Melbourne in October 2013.⁽²⁾ Additionally, in March 2014, the police seized 36,000 tobacco plants being grown illegally at Moorabool.⁽³⁾

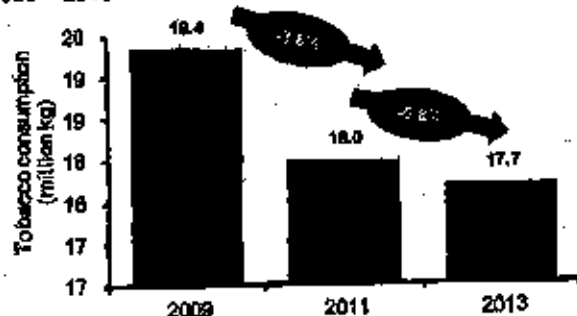
Consumption gap analysis indicates that both legal domestic sales and the smoking population have declined marginally in the long term.

Number of smokers⁽⁴⁾⁽⁵⁾



However, the smoking population has declined at a slower pace than legal domestic sales, indicating that there may be room for an increase in illicit tobacco consumption.

Estimates of year on year change in tobacco consumption, 2009 - 2013⁽⁶⁾⁽⁷⁾



The consumption gap validates the overall estimate of the volume of illicit tobacco, indicating shifts in the mix of illicit tobacco between manufactured cigarettes and unbranded tobacco. This corroborates the results of the empty pack survey analysis and consumption model.

- (Notes: (a) Illicit tobacco detections were also made in air cargo. However, volumes are considerably smaller and have not been included in the figures above
(b) Tobacco seizures have been converted to cigarette equivalents based on the conversion rates used for consumption modelling
(c) Numbers for 2012 have been updated and are based on data provided by the Australian Customs and Border Protection Service
(d) Percentages for 2013 are based on seizures data for the first six months of 2013
Sources: (1) Australian Customs and Border Protection Service, 2013
(2) The Age Victoria, Ten arrested in massive illegal tobacco bust, www.theage.com.au/victoria/
(3) Geelong Advertiser, Police seize 36,000 tobacco plants from Moorabool plantation, www.geelongadvertiser.com.au/news/
(4) Australian Institute of Health and Welfare, National Drug Strategy Household Survey, 2007, 2011
(5) Australian Bureau of Statistics
(6) KPMG analysis of previous reports on illicit trade in Australia, written by Deloitte between 2009 and 2012
(7) Deloitte, Illicit Trade of Tobacco in Australia, 2010, 2011, 2012

6. Drivers of results

6.1 Consumer survey results

6.2 Empty pack survey results

6.1 Consumer survey results

6.1.1 Roy Morgan Research survey overview

The consumer survey is a primary piece of research carried out to establish the size of the illicit tobacco market in Australia. The survey was again carried out by Roy Morgan Research to ensure comparability with previous years.

The survey made use of Computer Assisted Web-based Interviewing (CAWI). This enabled a sample of 2,116 adult respondents to be collected from 10,286 who responded to the email link sent out to Roy Morgan Research's pool of respondents in November 2013.

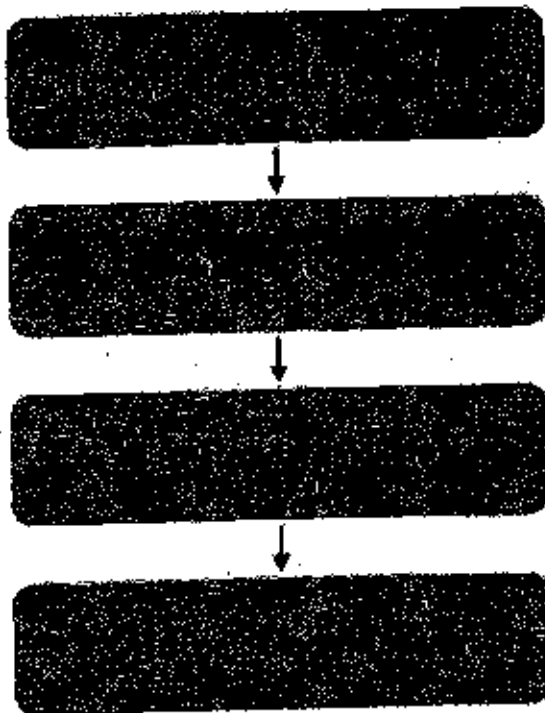
If a respondent was a regular smoker and fell into the correct demographic to be surveyed, they were considered eligible for the survey.

For the purposes of this report, a regular smoker is defined as a person who smokes tobacco products at least 5 days a week. The correct demographic is someone who is a regular smoker and above 18 years of age.

Of those who proved to be eligible for the survey, 89% completed the survey.



Figure 6.1.1 Roy Morgan Research survey attrition chart



- Roy Morgan Research contact their panel by email in order to undertake the survey.
- The panel is based across a range of cities and demographics within Australia.
- The panel is filtered out with screening questions which enables the right demographics and a representative sample to be taken.
- The respondents are now broadly representative of Australia's demographics.
- The survey asks more screening questions about smoking habits and products smoked.
- This establishes that the panel are regular smokers.
- 89% of those that were filtered into the correct demographic completed the survey, reaching the target of over 2,000 respondents.
- Sample of over 2,000 respondents improves statistical significance.

Drivers of results

Whilst the proportion of smokers who purchased unbranded illicit tobacco has increased since 2012, the average frequency of purchase of unbranded tobacco declined over the same period

6.1.2 Purchasers of illicit tobacco

Proportion of respondents who reported purchasing illicit unbranded tobacco, 2012 – H2 2013^{(1)(2)(a)}



The H2 2013 Roy Morgan Research consumer survey saw a level of consistency in the key metrics between H1 2013 and H2 2013. The results showed that the proportion of respondents who said they purchased unbranded tobacco increased between 2012 and 2013, the average frequency declined whereas the average amount purchased remained broadly stable. Purchase frequency declined by approximately 25% and purchase amount by 11%.

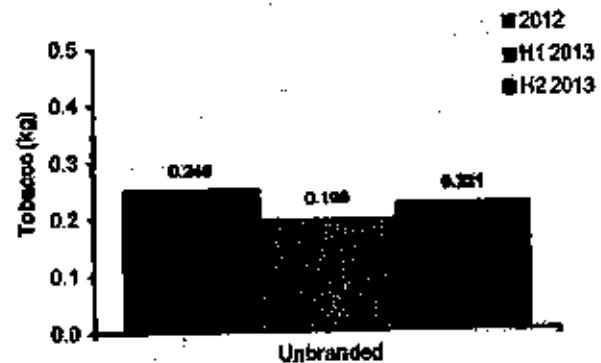
The combination of these movements in the consumption model equates to an overall decline in the amount of illicit unbranded tobacco consumed.

The change in consumption patterns may indicate a relative decline in the availability of illicit unbranded tobacco. Many respondents highlight that they purchase whenever illicit product is available.

Average frequency of purchase per annum, 2012 – H2 2013^{(1)(2)(a)}



Average volume purchased (kg) per occasion, 2012 – H2 2013^{(1)(2)(a)}



Note: (a) 2012 and 2013 analysis is based on GAMA consumer survey results
 Sources: (1) Deloitte, *Illicit Trade of Tobacco in Australia*, 2012
 (2) Roy Morgan Research, *Consumer survey, H1 2013 and H2 2013*

Drivers of results

The empty pack survey sampling plan comprised collection of 12,000 empty packs across 16 cities in Australia

6.2 Empty pack survey results

6.2.1 Australian empty pack survey sampling plan⁽¹⁾⁽²⁾

Empty pack surveys analyse discarded cigarette packets which have been collected from a set area. The aim is to collect a representative sample of discarded cigarette packets which can then be analysed to provide information about the nature of consumption of manufactured tobacco products.

Empty packs are collected on a proportionate basis from several neighbourhoods. Packs are collected from streets and easy access public bins in areas on the sampling plan.

For the purpose of this report, an empty pack survey was carried out by an independent market research agency: MIntelligence (MSI) across October – November 2013. This Q4 2013 EPS collection was based on a sampling plan consistent with the Q2 2013 EPS sampling plan i.e. 12,000 empty packs, collected in the same neighbourhoods as in Q2 2013 across 16 cities in Australia, providing coverage for approximately 75% of the total population as shown in Figure 6.2.1.

Packs are collected from pre-determined neighbourhoods, selected to be representative of the city being sampled. Similarly, the neighbourhoods selected are also consistent with the previous surveys. Packs are collected irrespective of their brand and country of origin. Residences, offices and other locations such as stadiums have been excluded from the sampling plan.

After the collection is completed, to ensure the representativeness of the sample, packs are weighted based on the proportion of each city's population.



Figure 6.2.1 Q4 2013 empty pack survey sampling plan

City	Population (million) 2012 estimate	Sample packs	Weighted packs
Sydney	4.7	3,000	3,253
Brisbane	2.2	1,200	1,626
Adelaide	1.3	500	690
Newcastle	0.4	400	292
Wollongong	0.3	300	197
Hobart	0.2	300	161
Townsville	0.2	300	120
Darwin	0.1	300	92
Total sample	17.2	12,000	12,000
Total population of Australia	22.9		

Note: (1) Population estimates for 2012 have been used as population numbers for 2013 were updated in December 2013, i.e. after the empty pack survey was conducted

Source: (1) MIntelligence Research, Empty pack survey, Q2 2013 and Q4 2013

(2) Australian Bureau of Statistics

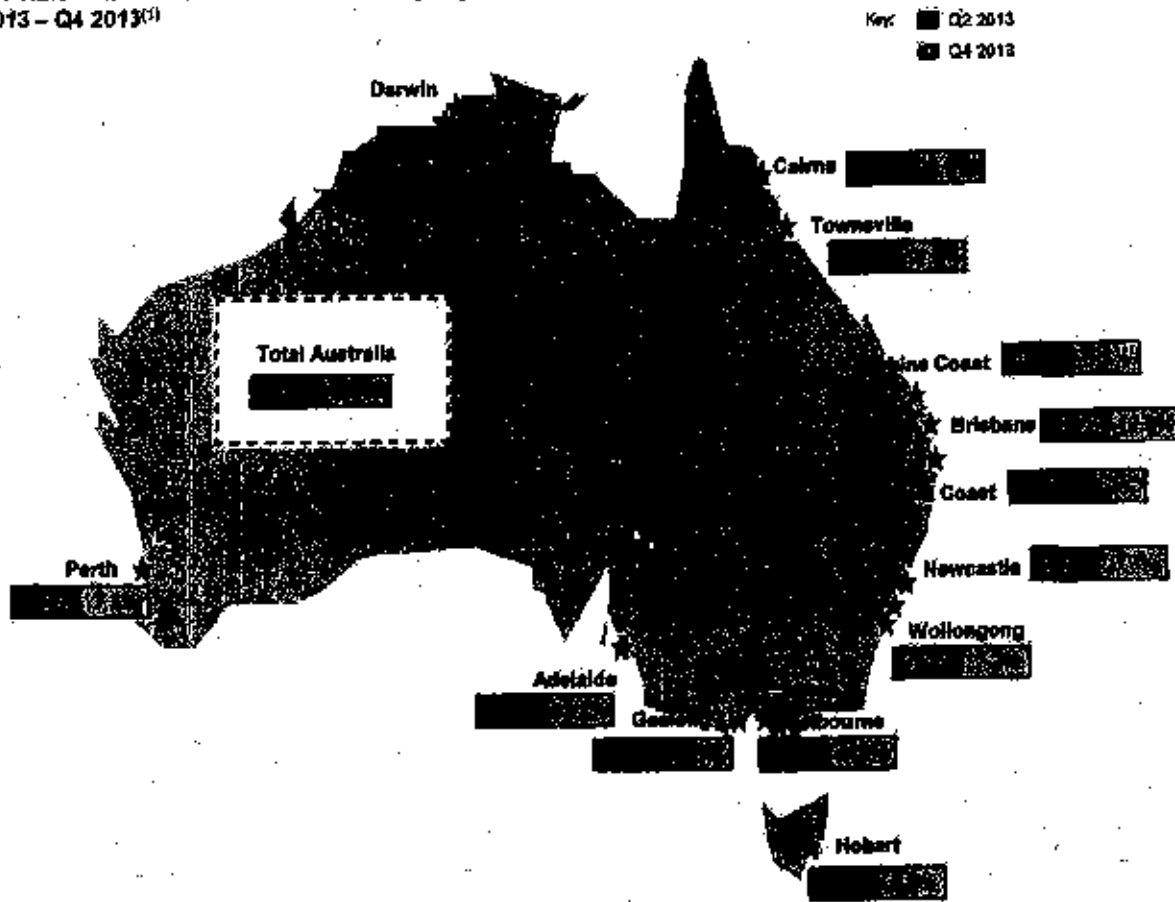
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Drivers of results

The growth of non-domestic consumption continues to be a national trend with notable increases recorded in Adelaide, Toowoomba and Townsville

6.2.2 Australian empty pack survey results – non-domestic incidence by city

Figure 6.2.2 Total non-domestic incidence by city, Q2 2013 – Q4 2013⁽¹⁾



Consistent with the Q2 2013 empty pack survey findings, the non-domestic incidence was spread across the sixteen cities sampled in the Q4 2013 empty pack survey. Only Townsville recorded a non-domestic incidence higher than 15% in the Q4 2013 empty pack survey whereas Darwin, Sydney, Calms and Townsville all recorded non-domestic consumption higher than 15% in the Q2 2013 empty pack survey.

A notable increase in non-domestic incidence was recorded in Adelaide (+6.8pp.) and Toowoomba (+5.5pp.) whilst there were notable declines in non-domestic consumption in Darwin (-11.0pp.), Calms (-3.3pp.) and Sydney (-3.8pp.).

The pack survey shows a large increase in manufactured cigarettes from South Korea and other locations which has driven the growth in non-domestic incidence in Adelaide. In Darwin, a lower incidence of illicit whites has led to a reduction in the non-domestic incidence in the Q4 2013 empty pack survey. The share of illicit whites in Darwin declined to 23.4% in Q4 2013 from the 42.7% recorded in the previous quarter.

Additionally, the size of the city does not appear to be indicative of the non-domestic consumption as both small and large cities reported a range of incidences in the empty pack surveys for the last two years.

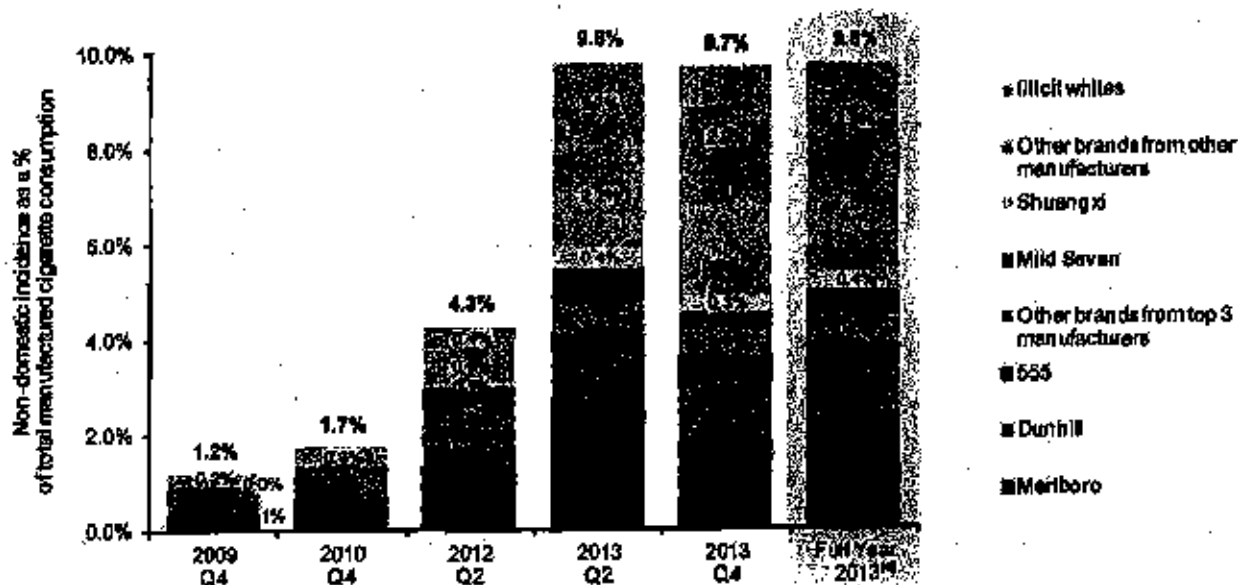
Source: (1) MSA Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013

Drivers of results:

Non-domestic incidence has increased in the past years across most brands as well as illicit white brands

6.2.3 Australian empty pack survey results – non-domestic incidence by brand

Total non-domestic incidence by brand as a percentage of total manufactured cigarette consumption
Q4 2009 – Q4 2013⁽¹⁾⁽²⁾



Two empty pack surveys were conducted in 2013 (Q2 and Q4). A blended empty pack survey approach, assigning equal weighting to both surveys, has been used to size the illicit manufactured cigarette consumption volume for the year 2013. As highlighted earlier, using the blended method is consistent with the approach used by KPMG in Project STAR to assess the level of counterfeit and contraband cigarettes across the EU Member States. A blended approach gives a more accurate view on the full year findings as each quarterly empty pack survey is reflective of market trends at that point in time only.

The empty pack survey findings indicate that the growth in non-domestic incidence since 2012 appears to be driven by an increase in the number of identified illicit white brands.

'Illicit whites' is a term for brands of manufactured cigarettes that are not legally available in the local market, although they could be legal at the point of manufacture. These brands are often made exclusively for smuggling.

Illicit white brands are not counterfeit products as they do not infringe on intellectual property rights. Illicit white volumes form part of the contraband volumes in Australia. Please refer to section 6.2.8 for further details.

The share of illicit whites has increased noticeably since 2012 and was 2.5pp higher in Q4 2013 when compared to 2012. Illicit whites account for approximately 30% of non-domestic manufactured cigarettes consumption in Q4 2013, up from 10% in Q2 2012. Legitimate brands produced by other manufacturers, including Mild Seven and Shuangxi, have witnessed a 1.3 pp increase during the same period. Marlboro remains the largest brand in terms of non-domestic consumption. However, as a percentage of total non-domestic manufactured cigarette consumption it has declined to approximately 19% from over 31% in Q2 2012.

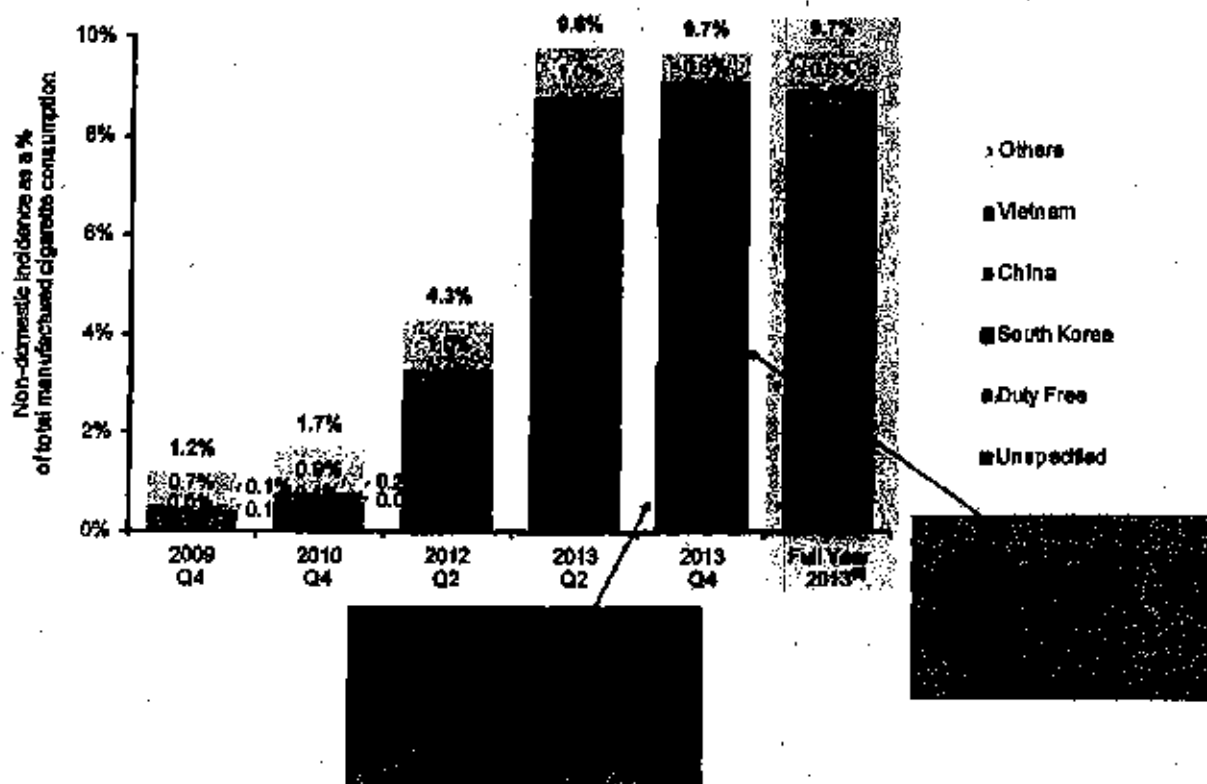
Note: (3) The full year 2013 figures are based on the blended result of the Q2 2013 and the Q4 2013 empty pack surveys.
Sources: (1) MIntelligence Research, Empty pack survey, Q2 2013 and Q4 2013
(2) AD Heinen, Empty pack survey, 2009, 2010, 2012

Drivers of results:

South Korean variant products have declined yet remain a large part of non-domestic manufactured products in the empty pack survey

6.2.4 Australian empty pack survey results – market variants

Total non-domestic incidence by market variant as a percentage of total manufactured cigarette consumption Q4 2009 – Q4 2013⁽¹⁾⁽²⁾⁽³⁾



Neighbouring Asian countries continue to be the primary source for inflow of non-domestic manufactured products into Australia, with high levels of duty free products also present. South Korea (including South Korea duty free) remains the largest individual source country for non-domestic manufactured products. However, the share of South Korean products declined to 33% in Q4 2013 from the 40% recorded in the Q2 2013 empty pack survey.

Inflow of non-domestic manufactured products from unspecified destination markets have shown a sizeable increase in 2013. Unspecified destination markets were the largest constituent of non-domestic inflows in Q4 2013 empty pack survey with a share of over 35%. Unspecified are cigarette packs that do not bear any specific market or duty free labelling. Some unspecified packs are counterfeit. Based on the result of the Q4 2013 empty pack survey, 14.3% of all unspecified packs were counterfeit, an increase from the 8.1% incidence recorded in the Q2 2013 empty pack survey.

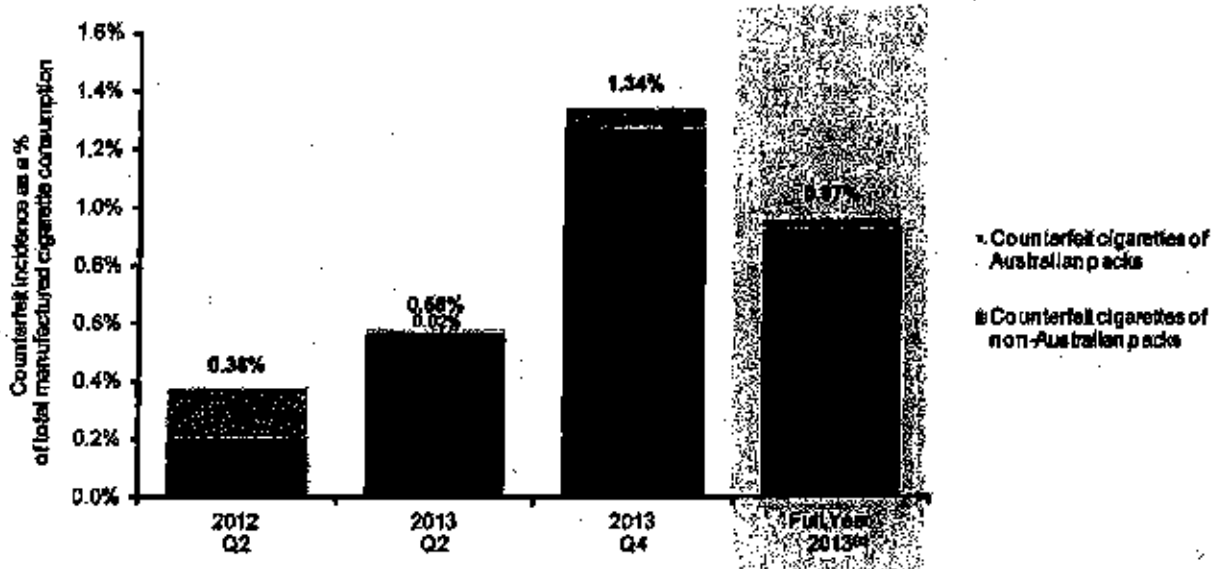
Note: (a) Vietnam has replaced Indonesia as the 6th largest constituent of non-domestic products in the Q4 2013 empty pack survey
 (b) The full year 2013 figures are based on the blended result of the Q2 2014 and the Q4 2013 empty pack surveys
 Sources: (1) IQS Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013
 (2) AC Nielsen, Empty pack survey, 2009, 2010, 2012

Drivers of results

Counterfeit incidence has experienced a large increase in Q4 2013, more than double the Q2 2013 incidence

6.2.5 Australian empty pack survey results – counterfeit

Counterfeit incidence as a percentage of total manufactured cigarette consumption
2012– 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾



The Q4 2013 empty pack survey indicates that 1.34% of all manufactured cigarettes consumed in Australia were counterfeit. This represents a greater than 100% increase of counterfeit incidence recorded in the Q2 2013 empty pack survey.

Although the share of counterfeit of total consumption remains relatively small, it is worth noting that this is the highest level of counterfeit incidence recorded in an empty pack survey in Australia.

Counterfeit cigarettes that were designed for the Australian market, i.e. compliant with Australian regulations, accounted for 4.6% of all counterfeit cigarettes consumed in 2013. This represents a change from 2012 where approximately 45% of counterfeit cigarettes consumed appeared to have been designed for the local market. Analysis of counterfeit packs has also highlighted that no plain packaged counterfeit packs were reported in the Q4 2013 empty pack survey.

Notes: (a) Counterfeit incidence is not available for 2009, 2010 and 2011
(b) Counterfeit packs refer to counterfeit packs of the companies participating in the empty pack surveys only
(c) The full year 2013 figures are based on the blended result of the Q2 2013 and the Q4 2013 empty pack surveys
Sources: (1) M&I Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013
(2) AC Nielsen, Empty pack survey, 2012

Drivers of results

Consumption of counterfeit cigarettes has more than doubled and was located in 15 out of the 16 cities sampled in the Q4 2013 empty pack survey

6.2.5 Australian empty pack survey results – counterfeit

Figure 6.2.5 Consumption of counterfeit manufactured cigarettes by city Q2 2013 – Q4 2013⁽¹⁾

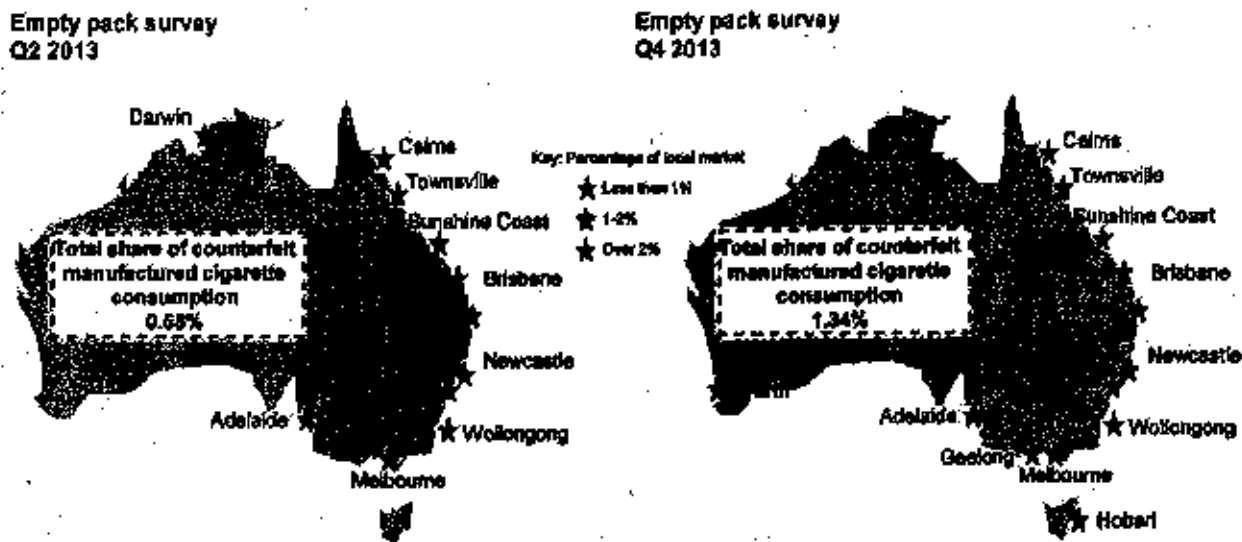


Figure 6.2.6 shows the growth of counterfeit cigarettes in Australia between Q2 2013 and Q4 2013. The empty pack survey for Q4 2013 showed that total consumption of counterfeit cigarettes had grown from 0.69% to 1.34% of manufactured cigarettes. It was located in 15 out of 16 cities across Australia, compared to 12 cities in Q2 2013.

Geelong, Hobart, Perth and Toowoomba were the four new cities where counterfeit cigarettes were found in the Q4 2013 empty pack survey whilst Darwin was the only city which did not record any counterfeit incidence.

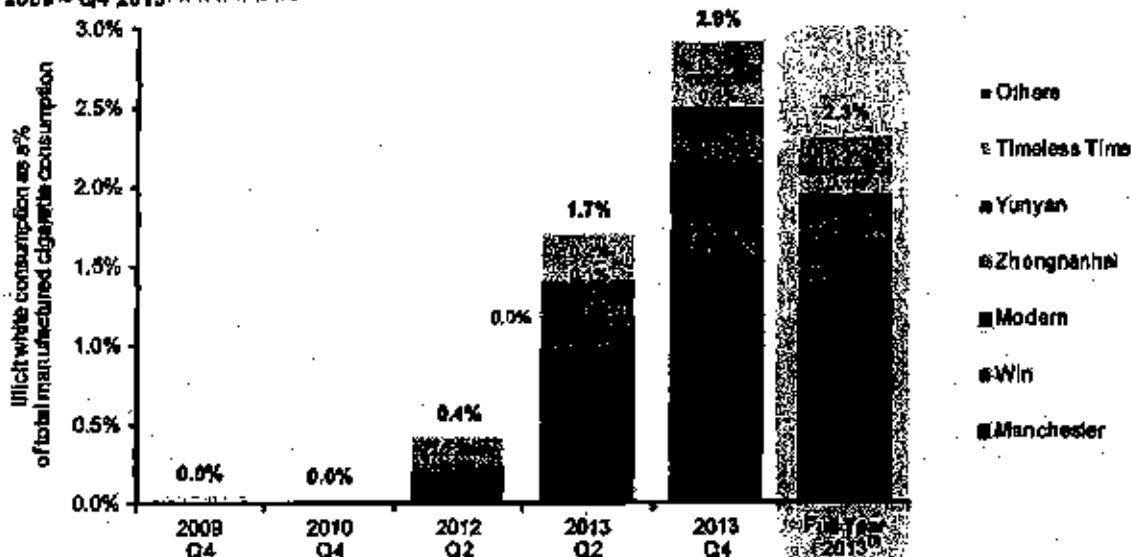
The highest increase in counterfeit incidence in Q4 2013 was observed in Hobart and Brisbane. Incidentally, Hobart recorded no counterfeit incidence in the Q2 2013 empty pack survey and Brisbane had a share of less than 1%.

Notes: (a) Analysis is based on weighted number of sites
Source: (1) MSA Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013

The consumption of illicit whites continues to be a growing issue and Manchester remains the largest illicit white brand in Australia

6.2.6 Australian empty pack survey results – illicit whites

Consumption of selected illicit white brands as a percentage of total manufactured cigarette consumption Q4 2009 – Q4 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾⁽⁵⁾⁽⁶⁾⁽⁷⁾



As indicated earlier, 'illicit whites' is a term for brands of manufactured cigarettes that are not legally available in the local market.

Industry sales data on illicit white cigarettes shows that between July and December 2013, an illicit white pack was sold at an average price of AUD8.69. This represents a slight increase from the average selling price of AUD8.60 recorded between March and June 2013. The illicit white packs in general continue to be sold at a price which is 50% less than the cost of a Marlboro or Winfield Blue.⁽⁸⁾

For consistency with the rest of this report, we are expressing illicit whites as a percentage of sticks. In the H1 2013 report, it was reported as a percentage of packs. As a result, the numbers reported are slightly lower than those reported previously due to the fact that illicit whites tend to come in smaller pack sizes.

According to the Q4 2013 empty pack survey, 2.9% of all manufactured cigarettes consumed in Australia were illicit whites, an increase from the 1.7% consumption recorded in the Q2 2013 empty pack survey.

As highlighted in the H1 2013 report, this analysis is based on the combined volume of selected illicit white brands, focusing on the most prominent brands identified in 2013.

Analysis of the total illicit white volumes in a market is difficult to perform as manufacturers of illicit whites often change brand names frequently in order to avoid detection.

In addition to the brands classified as illicit whites in the H1 report, we have identified five new illicit white brands in the Q4 2013 empty pack survey. These brands are Modern, Mega, Bridgeway, Kingdom and Ashima. With the exception of Modern, all other new brands have a relatively small share and have been classified as others.

Manchester continues to be the largest illicit white brand in Australia. According to the Q4 2013 empty pack survey results, Manchester represented 1.5% of total manufactured cigarette consumption and if it were sold legally in Australia it would have an equivalent legal market share of 1.7%.⁽⁹⁾

Incidence of illicit whites increased by over 500% between Q2 2012 and Q4 2013, a much larger increase than that of the total contraband incidence. According to the Q4 2013 empty pack survey findings, illicit whites now make up approximately 30% of non-domestic manufactured cigarette consumption.

Notes:

- (a) Others include Mega, Sepholves, Shellie, Bridgeway, Kingdom, Ashima, Moberg, Ash Cup and Mader brands
- (b) The following brands were not included in the H1 2013 report because we had limited information at that time to establish their status as illicit whites: Modern, Mega, Bridgeway, Kingdom and Ashima
- (c) The top six brands reported in the Q4 2013 empty pack survey are different from the ones reported in the H1 2013 report. Modern is the new brand that has come in and Shellie has now been classified under others
- (d) These brands are known illicit whites as provided by the industry
- (e) The share of illicit whites is calculated based on the number of sticks, however, in the H1 report the share of illicit white brands was calculated based on weighted packs. The share of illicit whites when calculated based on weighted packs would have been: 0.1% in Q4 2009, 0.0% in Q4 2010, 0.9% in Q2 2012, 2.9% in Q2 2013 and 3.5% in Q4 2013
- (f) The full year 2013 figures are based on the blended result of the Q2 2014 and the Q4 2013 empty pack surveys

Sources:

- (1) MStratelligence Research, Empty pack survey, Q2 2013 and Q4 2013
- (2) AC Nielsen, Empty pack survey, 2009, 2010, 2012

Drivers of results

Consumption of Manchester cigarettes continues to increase and was located in 15 out of the 16 cities sampled in the Q4 2013 empty pack survey

6.2.6 Australian empty pack survey results – illicit whites

Figure 6.2.6 Consumption of Manchester by city
Q2 2013 – Q4 2013⁽¹⁾⁽²⁾

Empty pack survey
Q2 2013

Empty pack survey
Q4 2013

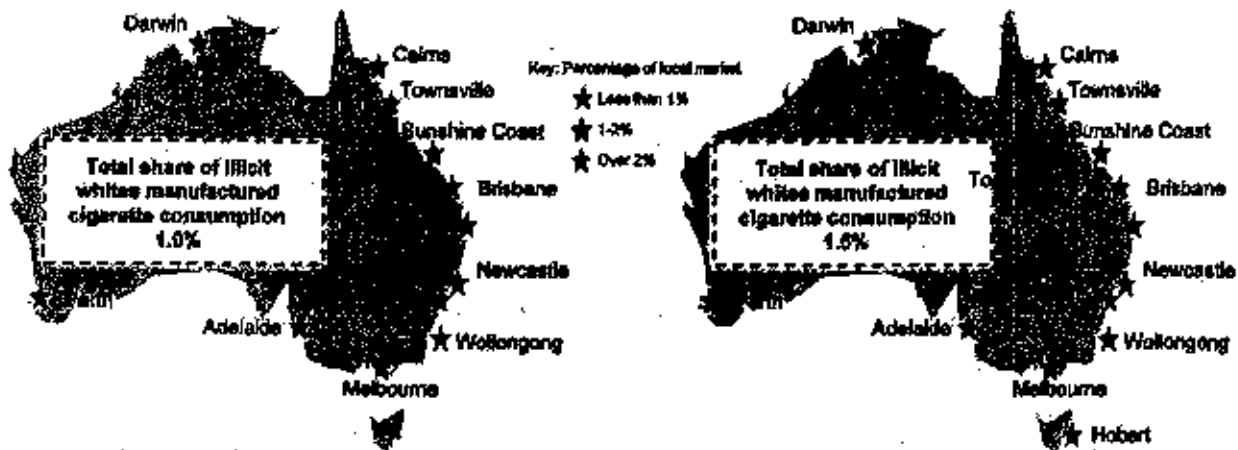


Figure 6.2.6 shows the growth of Manchester in Australia between Q2 2013 and Q4 2013. The Q4 2013 empty pack survey shows that total consumption of Manchester has grown from 1.0% to 1.5% of manufactured cigarettes, and it was located in 15 out of 16 cities across Australia, compared to 13 cities in Q2 2013.

Hobart and Toowoomba were the two new cities where Manchester was found in the Q4 2013 empty pack survey. Incidentally, Hobart along with Brisbane also reported the highest shares of Manchester in Q4 2013. Brisbane and Hobart had a share of 2.7% and 2.5% respectively.

Manchester is not sold legally in any retail outlets in Australia but Manchester appears to be available throughout the country. Whilst 73% of Manchester cigarettes collected in Q2 2013 were found in Sydney, in Q4 2013 they were distributed between Sydney (37.3%), Brisbane (21.6%) and Melbourne (13.2%). Together they accounted for approximately 72% of the total cigarettes of Manchester that were collected in Q4 2013.

Note: (2) Analysis is based on weighted number of illicit. However, in the H1 report the share was calculated based on weighted packs.
Source: (1) MSTATelligence Research, Empty pack survey, Q2 2013 and Q4 2013

7. Conclusion

Conclusion

A nation wide issue, illicit tobacco consumption rose from 11.3% in 2012 to 13.9% in 2013. Total consumption of tobacco in Australia also grew in 2013

2012 and 2013 results (tonnes)

	2012	LTM H1 2013	% change (2012-13)	
Illicit manufactured cigarettes	Contraband	516	1,348	140%
	Counterfeit	50	86	167%
	Total	564	1,433	151%
Unbranded tobacco	1,485	885	-31%	
Total illicit tobacco	2,049	2,329	10%	
Illicit tobacco consumption as % of total consumption	11.8%	13.3%	n/a	
Equivalent excise value (AUDm)	AUD893	AUD1,021	23%	

The Illicit market in Australia

Our study indicates there has been a growth in the consumption of illicit tobacco in Australia. As a proportion of total consumption this represents an increase from 11.8% in 2012 and 13.3% in LTM H1 2013 to 13.8% in the full year 2013. This trend is consistent with a range of secondary data sources.

If all of this tobacco had been consumed in the legitimate market, it would have represented an excise amount of AUD1.1bn at current excise rates.⁽¹⁾

This growth in illicit consumption appears to be driven by a slight increase in unbranded tobacco consumption volumes whilst illicit manufactured cigarette consumption volumes have stabilised at levels recorded in LTM H1 2013. There has, however, been a change in the mix of illicit manufactured cigarettes consumed with counterfeit volumes witnessing a large increase in 2013. The consumption of illicit whites also continues to be a growing issue – they accounted for more than 2.3% of total manufactured cigarette consumption in 2013 with a large proportion of this growth coming from illicit white brands like Manchester that are not legally sold in Australia.

The legal tobacco market in Australia

Whilst legally manufactured cigarette volumes have declined at an annual rate of 2.1% over the last thirteen years, loose tobacco volumes have increased at a CAGR of 3.0% over the same period, representing a shift in the mix of tobacco products consumed. Overall sales of legal domestic tobacco declined by 1.8% over the thirteen year period. During 2013, the decline slowed, with sales only declining by 0.5%.

Regional overview

The Australian market is the most expensive market in the region and with the December 2013 increase in excise, the gap has further widened. A packet of 20 Marlboro cigarettes is now 12% more expensive than in New Zealand; the second most expensive market. However, a packet is 75% more than the third most expensive market (Singapore) and nearly 600% more expensive than in South Korea from where the empty pack survey indicates the majority of new contraband is originating.

The Australian Crime Commission believes that organised crime groups perceive tobacco smuggling to be low-risk and highly profitable.⁽²⁾ As a result, this price differential may explain some of this growth.

Sources: (1) Based upon the average excise rate over the past 12 months for both loose and manufactured cigarettes
(2) Australian Crime Commission, Organised Crime in Australia, July 2013

Appendices

Appendix 1. Illicit market measurements

Appendix 2. Technical appendices

Appendix 1: Illicit market measurements

A1.1 Consumption mode

A1.2 Empty pack survey analysis

A1.3 Rolling papers analysis

A1.4 Consumption gap analysis

KPMG has used a consumption based approach to size the unbranded tobacco market in Australia

A1 Review of illicit tobacco estimates

A1.1 Consumption model

Introduction

The primary methodology we have used to size the unbranded tobacco market in Australia is the consumption model approach. The approach adopted by KPMG is similar to that used in previous reports on the illicit tobacco market in Australia.

The consumption model utilises the results of the Roy Morgan consumer survey to determine the core inputs to the model, combined with publicly available information on the legal tobacco market and smoking population.

For the purpose of this report, the consumption model number for unbranded volumes in the full year 2013 is based on the average of the H1 2013 and the H2 2013 consumer survey results. Since consumers are likely to give a more accurate estimate of their purchase behaviour over a shorter time period rather than the last twelve months, using an average of the H1 and H2 consumer survey results provide a more accurate number for 2013.

The consumer survey

The consumer survey was based on the responses of 2,116 smokers in Australia to a CAWI web based questionnaire. Respondents were selected from across the country, from both metropolitan and non-metropolitan areas, in a sampling plan consistent with the survey carried out by Roy Morgan Research in the first half of 2013.

The survey was conducted in November 2013. Consumers were asked about their consumption and purchase of legal and illicit tobacco products; namely Chop Chop (unbranded loose tobacco sold in bags), pre-rolled unbranded tobacco as well as counterfeit and contraband manufactured cigarette products.

The consumer survey is used as one tool to form an estimate of the illicit market

The consumer survey responses are used to obtain several core inputs for the consumption model process. These core inputs are based on consumer responses and include;

- How many smokers purchase the different types of illicit tobacco,
- How often these illicit purchasers purchase illicit tobacco, and
- How much illicit tobacco these illicit purchasers purchase on each purchase occasion.

These responses generate the core assumptions which are used in the consumption model and are illustrated on figure A1.1 overleaf.

Additional assumptions

In addition to the results generated by the consumer survey there are some additional assumptions and data-points which are used:

- Total adult smoking population – we assumed that the total smoking population was 2.6 million. This is based on AIHW data updated for the decline in smoking population numbers since the last official estimate.
- Quantity of legal tobacco purchased – we have obtained this data from Euromonitor and estimate the total legal sales volume to be 15.2 million kilograms.

The consumption modelling calculation relies on the results of the Roy Morgan Research consumer survey and publicly available data

A1.1 Consumption model (continued)

The core inputs from the consumer survey and publicly available information are used in the consumption model, illustrated in table A1.1. These core inputs are factored together to produce an estimate of the amount of illicit tobacco product consumed by the representative population sampled in the Roy Morgan Research consumer survey covering the steps outlined:

- Steps 1 and 2 are used to calculate the total annual volume of illicit consumption per consumer in step 3.
- The number of illicit tobacco users is calculated using the percentage of illicit tobacco users noted in the consumer survey in step 5.
- This is multiplied by the total number of smokers in Australia in Step 6 which is multiplied by the average quantity purchased to give the total quantity of illicit tobacco consumption in Australia in step 7.

The consumption model approach measures illicit tobacco consumption by utilising consumers' responses. It is not possible to accurately break down illicit consumption into its constituent parts of loose unbranded and branded tobacco as consumers may be unable to tell the difference in the way in which the tobacco is sold.

The 2013 consumption model process and relevant data sources are shown in detail overleaf.

Table A1.1 Consumption model data sources and process

Consumption model inputs		
Quantity of illicit tobacco purchased per occasion (g)	①	Roy Morgan consumer survey
Frequency of illicit tobacco purchased per annum	②	Roy Morgan consumer survey
Quantity of illicit tobacco purchased per annum (g)	③	① X ② = ③
Total adult smoking population ('000)	④	Extrapolated Australian Bureau of Statistics smoking prevalence data ^(a)
Illicit tobacco users as % of Australia tobacco users	⑤	Roy Morgan consumer survey
Number of illicit tobacco users, Australia ('000)	⑥	④ X ⑤ = ⑥
Quantity of illicit tobacco purchased in Australia (tonnes)	⑦	③ X ⑥ = ⑦
Quantity of illicit tobacco purchased in Australia in 2013 (tonnes)	⑧	Average of H1 2013 and H2 2013 quantity of unbranded tobacco

Notes: (a) Please see appendix A2.2 for details of the estimation of the smoking population.

Appendix - Illicit market measurements

The results of the H2 2013 consumption model indicate an increase in unbranded volume but a moderate decline in illicit manufactured cigarette volume

A1.1 Consumption model (continued)

Figure A1.1 Consumption model results, 2013 (H1)(H2)(H4)

	Unbranded	Counterfeit	Contraband	Total illicit tobacco
① Quantity of illicit tobacco purchased per occasion (g)	196 221	142 94	136 117	
② Frequency of illicit tobacco purchased per annum	10 12	9 7	9 8	
③ Quantity of illicit Tobacco purchased per annum (g) ① x ②	1,960 2,652	1,278 658	1,224 936	
④ Total adult smoking population ('000)	2,609 2,615	2,609 2,615	2,609 2,615	
⑤ Illicit tobacco users as % of Australian tobacco users	17.5% 16.9%	4.3% 4.1%	6.8% 7.3%	
⑥ Number of illicit tobacco users, Australia ('000) ④ x ⑤	457 442	112 108	180 181	
⑦ Quantity of illicit tobacco purchased in Australia (tonnes) ③ x ⑥	895 1,173 1,034	143 71 107	220 179 200	

The full year 2013 consumption model results indicate that total consumption of illicit tobacco is approximately 1.3 million kilograms. This estimate is based on the average of the H1 2013 and H2 2013 consumer survey results.

The consumption model indicates that illicit manufactured cigarette volumes declined moderately between H1 2013 and H2 2013, whilst unbranded volumes has increased from 0.9 million kilograms in LTM H1 2013 to 1.2 million kilograms in LTM H2 2013. This annualised increase of 71.6% in unbranded consumption between LTM H1 2013 and LTM H2 2013 appears to be high and does not accurately reflect the market trend.

Additionally, we believe that consumers are likely to give a more accurate estimate of their recent purchase behaviour rather than that of the last twelve months. Therefore, using an average of the H1 and H2 consumption model results would provide a more accurate number for 2013.

For the purpose of this report, the 2013 estimate of unbranded consumption volume is based on the average of the H1 2013 and H2 2013 consumer surveys. The net result of this approach is a reduction of unbranded tobacco consumption.

Note: (8) The number for 2013 is the average of the H1 2013 and the H2 2013 consumer survey results.

Sources: (1) Debita, Illicit Trade of Tobacco in Australia, 2012
 (2) Roy Morgan Research, Consumer survey, H1 2013 and H2 2013
 (3) Eurostat, Tobacco consumption in Australia, 2013
 (4) KPMG analysis

The Q4 2013 empty pack survey found that 9.7% of manufactured cigarettes consumed originated outside Australia, consistent with the Q2 2013 results

A1.2 Empty pack survey analysis

Five empty pack surveys have been carried out in Australia in the last five years.

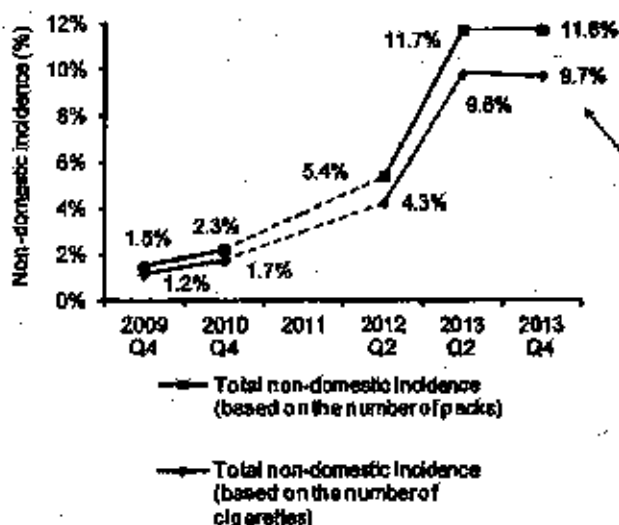
AC Nielsen carried out surveys solely for PML in Q4 2009 and Q4 2010. The 2009 survey consisted of 9,343 collected packs and the 2010 survey 6,000 packs and these surveys are believed to be broadly comparable to the 2012 and 2013 empty pack surveys.

AC Nielsen also carried out the 2012 Q2 survey which was commissioned by all three industry parties; BATA, PML and ITA. The 2012 survey was conducted in May, June and July and consisted of 12,000 packs collected across 16 cities.

In 2013, the empty pack survey provider changed from AC Nielsen to MSIntelligence (MSI). MSI were selected after a tender process. MSIntelligence were commissioned to replicate the survey using an identical methodology to AC Nielsen.

Two surveys have been conducted for 2013 and have been again produced for all three industry parties. The Q2 survey was conducted in May and June whilst the Q4 survey was conducted in October and November. Both the surveys were carried out in the same 16 cities as 2012 and again consisted of 12,000 collected packs.

Total non-domestic incidence, Q4 2009 – Q4 2013 (1000000)



Empty pack survey results can be calculated on either a cigarettes basis or a packs basis. This is possible as the size of each pack collected is recorded during the survey. As there is considerable variation in pack sizes, utilising a measurement based on the number of cigarettes provides a more accurate representation of consumption patterns.

The empty pack survey analysis takes the proportion of cigarettes which are not Australian (health warnings missing or not in English, brands not sold in Australia, packs with identifying marks from other markets such as tax stamps) and classifies these cigarettes as "non-domestic". The proportion of non-domestic cigarettes recorded by the empty pack survey is called the non-domestic incidence. The non-domestic incidence of the EPS is shown above.

The total non-domestic incidence in Australia in the Q4 2013 survey was 9.7% (on the basis of number of cigarettes) and 11.8% (on the basis of number of packs). These results are consistent with the non-domestic incidence recorded in the Q2 2013 survey. Overall the 2013 non-domestic incidence is the highest level of non-domestic incidence recorded in an empty pack survey and indicates an increase in illicit manufactured cigarettes.

Whilst a proportion of non-domestic cigarettes will be legally brought into Australia by both inbound (foreign nationals travelling to Australia) and outbound travellers (Australians returning from abroad), this legal proportion is relatively small, with the majority of non-domestic cigarettes being illicit. A calculation of the legal volume of non-domestic cigarettes is shown in appendix A2.4. Nonetheless, this increase occurred at a time after the inbound traveller allowance was reduced in September 2012.

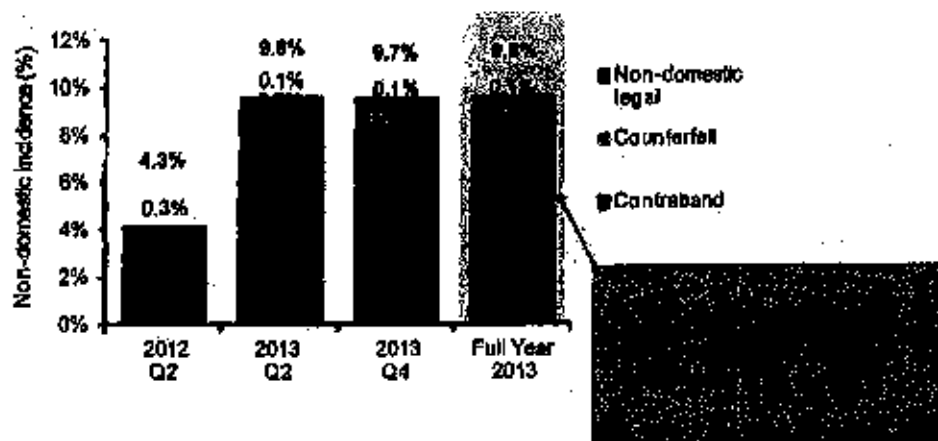
Notes: (a) No survey was conducted in 2011, trend line is for information only
 (b) Non-domestic incidence based on the number of packs is higher than the non-domestic incidence based on the number of cigarettes due to the average Australian pack of cigarettes being larger than an international pack, i.e. the most commonly sold pack size in Australia is 25 cigarettes compared to the standard 20 cigarette packs available internationally

Sources: (1) MSIntelligence Research, Empty pack survey, Q2 2013 and Q4 2013
 (2) AC Nielsen, Empty pack survey, 2009, 2010, 2012

Whilst contraband products continue to be the primary driver of increased illicit consumption, counterfeit products witnessed a large increase in the Q4 2013 empty pack survey results

A1.2.1 Empty pack survey analysis (continued)

Break down of non-domestic incidence, Q2 2012 – Q4 2013⁽¹⁾⁽²⁾⁽³⁾



As discussed on the previous page, not all non-domestic tobacco is illicit tobacco. Non-domestic incidence can be broken down into three separate categories:

1. Non-domestic legal – These are cigarettes legally brought into Australia as part of travelers' inbound allowance.⁽⁴⁾
2. Counterfeit – The packs collected in the empty pack survey are examined by the participating companies. They are able to identify packs which are counterfeit versions of their products.
3. Contraband – The remainder, and majority, of non-domestic manufactured cigarettes are legitimate products (i.e. non-counterfeit) that have entered Australia illegally.

Non-domestic legal volumes constitute only a very small proportion of the total non-domestic incidence. They accounted for 0.1% of the total non-domestic incidence in both Q2 2013 and the Q4 2013. The decline from 2012 is in part explained by the reduction in Australia's inbound traveler allowance from 250g to 50g/ 50 sticks per person per trip in September 2012.⁽⁴⁾

The majority of non-domestic cigarettes are therefore illicit, with the illicit proportion of manufactured cigarettes consumed in Australia showing a marked increase since 2012.

The empty pack survey findings for both quarters of 2013 indicate that contraband product, with a share of more than 85% in the total illicit consumption, is the predominant driver of the increase in illicit manufactured cigarette volumes seen between 2012 and 2013.

However, the contraband share of the total non-domestic incidence declined slightly in the Q4 2013 empty pack survey when compared to the previous quarter. This decline is attributed to a concurrent increase in counterfeit volumes.

The empty pack survey findings showed that 1.3% of all packs collected in Q4 2013 were counterfeit products, compared to the 0.6% level recorded in the Q2 2013 survey.

Note: (4) Please refer to appendix A2.4 for detailed information on the calculation of non-domestic legal volumes.

Sources: (1) MSR Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013

(2) AC Nielsen, Empty pack survey, 2012

(3) KPMG analysis

The results of the empty pack survey analysis indicate an illicit volume of 1.4 million kilograms for manufactured cigarettes

A1.2.2 Empty pack survey analysis (continued)

We have used the non-domestic incidence obtained from the empty pack surveys as the basis of estimates for the volumes of counterfeit and contraband consumption in Australia.

Euromonitor to create a volume estimate for illicit manufactured cigarettes. This can then be broken down into volume estimates for non-domestic legal, counterfeit and contraband.

The 9.8% non-domestic incidence is combined with estimates for legal domestic sales volumes from Figure A1.2.2

Australian empty pack survey non-domestic consumption and illicit estimate (1X2X3X4X5X6X7X8X9)				2009	2010	2011	2012
	Report page						
Legal sales of manufactured cigarettes (tonnes)	(1) 10			15,881	14,598	13,908	13,468
Empty pack survey non-domestic incidence	(2) 49			1.2%	1.7%	-	4.3%
Total consumption of manufactured cigarettes (tonnes)	(3)	= (1) / (100% - (2))		16,071	14,857	-	14,088
Non-domestic consumption (tonnes)	(4)	= (3) - (1)		191	259	-	600
Non-domestic (legal) volume estimate (tonnes)	(5) 62.64			34.6	33.7	-	35.6
Illicit consumption (tonnes)	(6)	= (4) - (5)		156.4	224.3	-	564
Empty pack survey counterfeit incidence	(7) 50			-	-	-	0.4%
Counterfeit consumption (tonnes)	(8)	= (4) * ((7) / (2))		-	-	-	60
Contraband consumption (tonnes)	(9)	= (6) - (8)		-	-	-	515

Figure A1.2.2 shows the calculation used to estimate the total volume of illicit manufactured cigarettes consumed in Australia. The percentage of non-domestic cigarettes is added to legal domestic consumption in order to calculate total consumption in step 3. Total illicit consumption is calculated by removing the non-domestic legal volume estimate in step 6.

The results of the empty pack survey analysis show a large increase in non-domestic volumes in 2013. As non-domestic legal volumes declined, this translated into much higher volumes of illicit counterfeit and contraband manufactured cigarettes.

The EPS also records the counterfeit incidence as a percentage in step 7. This counterfeit incidence is taken as a percentage of total non-domestic consumption and multiplied by the non-domestic consumption estimate in step 8, with the remainder contraband in step 9.

Whilst volumes attributable to counterfeit manufactured cigarettes rose, the true volume increase was driven by contraband product, which accounts for 80% of the total illicit consumption indicated by the empty pack survey analysis.

Notes: (a) We have applied the Euromonitor manufactured cigarette volume by 2% in each year, as we believe that the overall quantity of estimate is too low
 (b) Counterfeit incidence is not available for 2009, 2010 and 2011
 (c) The non-domestic legal estimate for 2013 is based on both the volumes brought by tourists arriving in Australia and by short term resident departures. Please refer to appendix A2.4 for further details

Sources: (1) Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013
 (2) AC Nielsen, Empty pack survey, 2009, 2010, 2012
 (3) Euromonitor, Legal domestic sales, accessed January 2014
 (4) KPMG analysis

The illicit tobacco volumes generated by the consumption model fall within the range provided by the rolling papers analysis

A1.3 Rolling papers analysis

Figure A1.3.1 Rolling papers calculation for unbranded tobacco

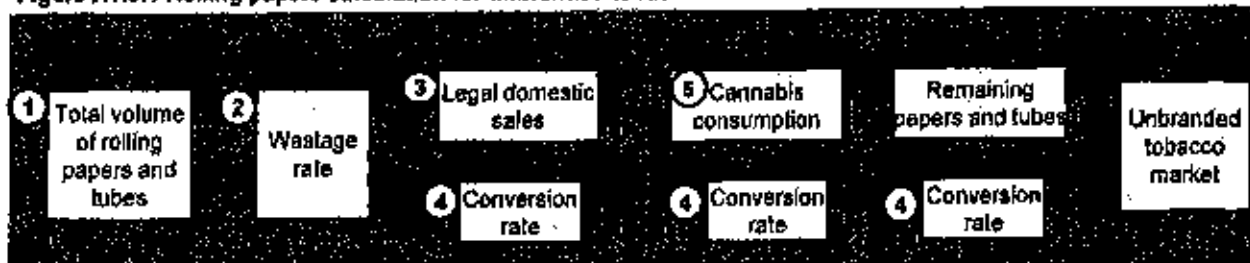
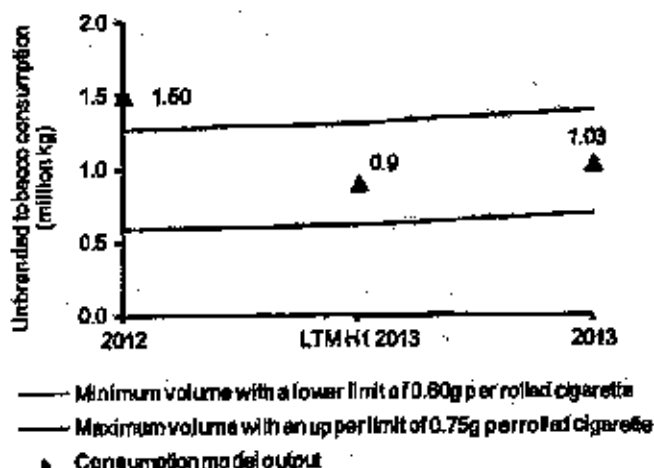


Figure A1.3.1 highlights our approach to the rolling papers analysis used to calculate the total volume of unbranded tobacco. For other clients we have applied this approach to markets with sizeable loose tobacco consumption and has proven to help validate the size of the unbranded market. Each step of the calculation involves the following assumptions and data-points:

- 1 Total volume of rolling papers and tubes – the volume used comes from retail sales data provided by Aztec and cannot be published due to contractual obligations with the data provider.
- 2 Wastage rate – The wastage rate is the percentage of rolling papers used and excludes any discarded or spoilt papers. This data has been sourced through consumer research undertaken by the industry and is commercially sensitive and cannot be published.
- 3 Legal domestic sales of loose tobacco – We use the same volumes calculated for 2013, which equated to 1,893 tonnes.
- 4 Conversion rate – The amount of grams of tobacco used in a rolled cigarette. Consumer surveys and estimations by the industry have produced a range of values. As a sensitivity, we use an upper and lower limit of 0.75 and 0.6 respectively. We believe that a lower limit of 0.6g is reflective of the Australian market – this limit may be lower or higher than other markets.
- 5 Cannabis consumption – Rolling papers are also used in the consumption of cannabis. The conversion rate for use of papers and tubes is assumed to be the same as the conversion rate for cigarettes. Total cannabis consumption is estimated on the basis of the Australian Department of Health and Aging survey at a total volume of 22,600kg.⁽²⁾

Volume of illicit unbranded tobacco generated by the rolling papers analysis, 2012- 2013



The chart above illustrates a sensitized range for the rolling papers analysis. The sensitivity is based around the value for the conversion rate which is the most uncertain variable in the analysis. By flexing this value between a high value of 0.75g per rolled cigarette and a low value of 0.6g per rolled cigarette, we can determine a range of potential market sizes. We believe that this approach is appropriate to validate the unbranded tobacco market and we intend to keep tracking it similarly in subsequent reports.

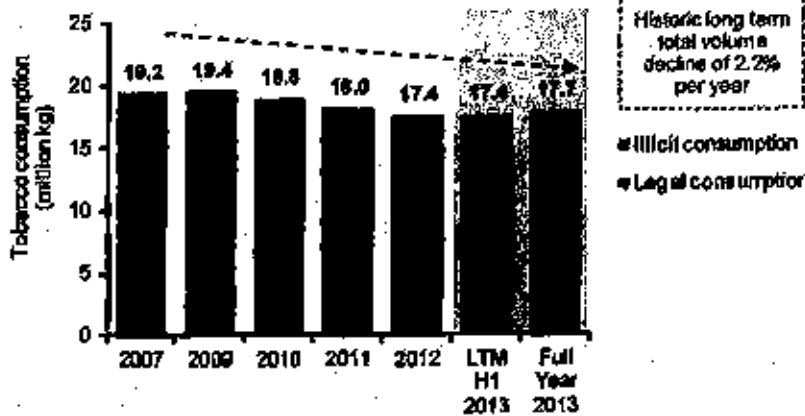
The volume of illicit unbranded tobacco generated by the consumption model output is within the range of the rolling papers analysis in both the H1 2013 and 2013. As highlighted earlier, KPMG has used a prudent estimate of unbranded consumption in 2013. The consumer survey results for H2 2013 indicated a large increase in consumption of unbranded tobacco which does not appear to accurately reflect the market trend. We have utilised the average of the H1 and H2 results to derive a more accurate estimate for 2013.

Sources: (1) Size of rolling papers market obtained from the industry
(2) National Drug and Alcohol Centre NSW, Cannabis in Australia, June 2007

Our estimate of total tobacco consumption for 2013 is consistent with the historic decline in tobacco consumption

A1.4 Consumption gap analysis

Trend in total consumption of tobacco in Australia, 2007 – 2013 (ORZHARNG)



CAGR (%)	2007-LTM H1 2013	2009-LTM H1 2013	
Illicit consumption	n/a	8.2%	
Legal consumption	-2.7%	-4.2%	
Total consumption	-1.7%	-2.8%	

Under the KPMG methodology, the overall level of tobacco consumption was equal to 17.7 million kilograms in 2013.

Although the full year 2013 estimate of total consumption is higher than the 2012 estimate, it shows a continuation of the long term historical trend of declining tobacco consumption since 2007 when the first study was conducted.

The 2013 estimate indicates a confirmation of a small increase in consumption initially highlighted in the H1 2013 report.

Overall, as our 2013 estimate fits with the trend of continuing decline in total tobacco consumption, we believe the consumption gap analysis supports our estimate.

Notes: (a) H1 2013 represents consumption for the twelve months to and June 2013
 (b) Counterfeit and contraband estimations are unavailable for 2007
 (c) Legal consumption includes both legal domestic sales volumes and non-domestic legal volumes
 Sources: (1) KPMG analysis of previous reports on illicit trade in Australia, run by Deloitte between 2008 and 2012
 (2) Deloitte, *Illicit Trade of Tobacco in Australia, 2012, 2013, 2013*



Appendix 2: Technical appendices

A2.1 Source of legal domestic sales estimates

A2.2 Estimation of smoking population

A2.3 Recent regulatory changes

A2.4 Travel trends and non-domestic legal
calculation

A2.5 Consumer surveys

A2.6 Scope of work

A2.7 Roy Morgan Research questionnaire

A2.8 Bibliography

Appendix Technical appendices

Over the past few years Euromonitor has tracked the market most accurately in Australia. As a result we have adopted this as our measure for legal domestic sales

A2.1 Source of legal domestic sales estimates

Estimates of legal domestic sales manufactured cigarette volumes, 2007 – 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾



CAGR (%)	2007-09
→ Datamonitor	-2.9%
→ Euromonitor	-0.0%

In order to accurately reflect the size and trend of the illicit tobacco volumes, it is necessary to obtain a robust estimate of legal domestic sales. Understating legal domestic sales has the effect of incorrectly inflating the estimate of the illicit proportion of the market.

We have examined several publicly available estimates of Australian legal domestic sales and have compared it to sales data supplied by the industry. Whilst we cannot publish sales data from industry players due to the commercial sensitivity of this information, we show an indicative range on the chart above. We have analysed this industry sales data and how it relates to publicly available estimates of the illicit market in Australia.

As indicated in the HI 2013 report, compared with industry sales data, Euromonitor data most accurately captures both the nominal volumes and the trend in the market across the 2007-2012 period as a whole. As a result, we have adjusted the historic illicit volumes estimations based on using Euromonitor volume estimates.

We have sought to avoid possible over estimation of the illicit proportion of the market that would be caused by having an estimation of legal domestic sales lower than industry supplied volumes. As a result, we have uplifted the Euromonitor volume estimate for manufactured cigarettes by 2% in each year between 2007 and 2013. Loose tobacco volumes do not require adjustment.

Note: (4) To preserve confidentiality of commercially sensitive data, Exchange of Sales data has been grossed up in factor in the market coverage of the data and then rounded to the nearest thousand.

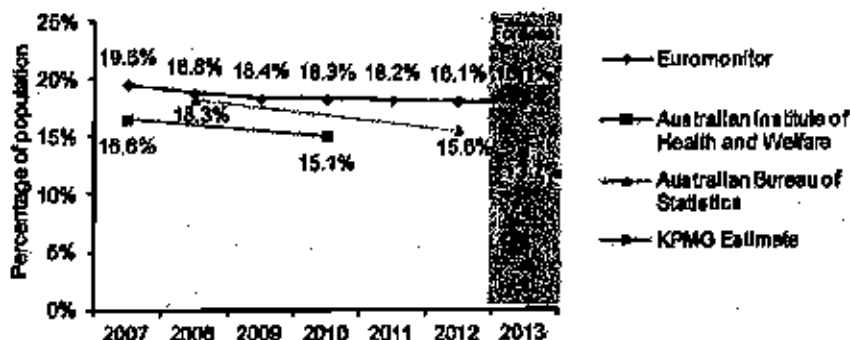
Sources: (1) Datamonitor
(2) Euromonitor, Legal domestic sales, accessed January 2014
(3) Industry sales data

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Several estimations of Australian smoking prevalence are publicly available, but yearly data is not available from the Australian government

A2.2 Estimation of smoking population

Smokers as a percentage of population,
2007 – 2013 (1)(2)(3)(4)(5)(6)



CAGR (%)	2007-10	2008-12
Euromonitor	-2.3%	-0.9%
Australian Institute of Health and Welfare	-3.1%	-
Australian Bureau of Statistics	-	-3.9%

Official Australian Government estimates of smoking incidence are available from both the Australian Institute of Health and Welfare (AIHW) and the Australian Bureau of Statistics (ABS). Euromonitor also provide estimates of smoking incidence.

Each of the surveys reflects specific age groups. The AIHW and ABS estimates reflect prevalence for 14 year olds and above, whilst Euromonitor figures estimate prevalence among those aged over 18. This in part explains the higher Euromonitor estimate.

Timing of estimates also varies. The National Drug Strategy Household Survey is conducted by the AIHW every three years and includes questions on smoking prevalence. The last two surveys were conducted in 2007 and 2010; the 2013 survey is underway and results are expected to be released in 2014.

ABS figures are taken from Australian Health Surveys carried out in 2008 and 2012, whilst Euromonitor compiles its estimates annually.

All smoking prevalence surveys encounter issues with respondents under reporting. The AIHW survey highlights the possibility of under-reporting as some respondents did not answer smoking related questions. Potential under-reporting was identified in the ABS report, primarily due to social pressures, especially where other household members / parents were present at the interviews for respondents.

Where KPMG require prevalence data for our modelling process, we have used the AIHW results to ensure that our estimate for the number of Australian smokers is not overstated. Overstating the number of smokers would lead to an incorrectly inflated estimate of the size of the illicit trade.

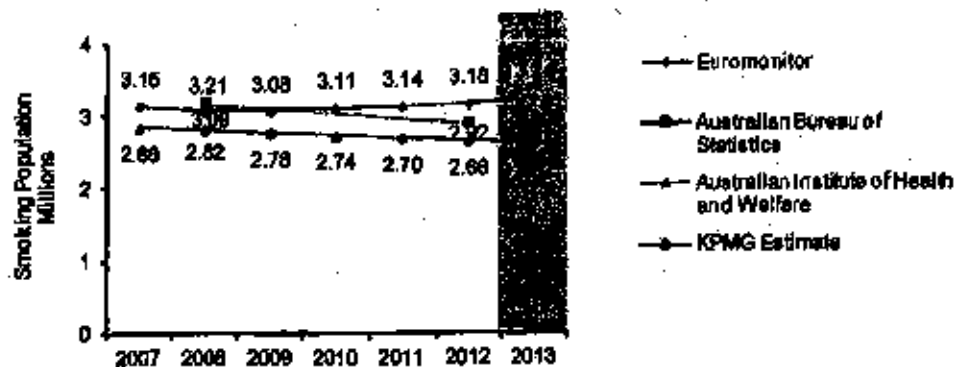
We have estimated the smoking population for 2013 based on AIHW results for 2007 and 2010.

Notes: (1) Euromonitor, percentage of population that are smokers refers to daily smokers > 18 years
 (2) Australian Institute of Health and Welfare and ABS percentage of population that are smokers refers to daily smokers > 14 years
 (3) Euromonitor figures for 2013 are based on full year estimates
 Sources: (1) Euromonitor, Smoking prevalence, updated January 2014
 (2) Australian Institute of Health and Welfare, National Drug Strategy Household Survey, 2007, 2010
 (3) Australian Bureau of Statistics

As with prevalence, KPMG believes it is prudent to use the lowest estimates of smoking population to calculate illicit consumption.

A2.2 Estimation of smoking population (cont.)

Total number of smokers, 2007 – 2013 (Millions)



CAGR (%)	2007-10	2008-12
Euromonitor	-0.4%	0.7%
Australian Institute of Health and Welfare	-1.4%	-
Australian Bureau of Statistics	-	-2.4%
KPMG Estimate	-1.4%	-1.5%

The number of adult daily smokers in Australia is used to extrapolate the consumer survey results up to an illicit estimate for the entire population.

To avoid overstatement of results, KPMG considers it prudent to use the lowest estimate for smoking population to extrapolate illicit consumption due to the effect it has on the modeling process – i.e. as a higher smoking population equates to a higher illicit estimate.

As there is no recent AIHW estimate, KPMG has had to extrapolate forward the rate of decline in smoker numbers to create an estimate for 2013. Extrapolating the rate of decline forwards is more likely to give us an accurate estimate of the smoking population in comparison to taking the published 2010 AIHW estimate.

Notes: (a) Euromonitor considers adult population as >18 years, while ABS and the Australian Institute of Health and Welfare considers adult population >14 years
 (b) Figures for Australian Bureau of Statistics are taken for 2008 & 2012 from Australian Health Survey; for the Australian Institute of Health and Welfare they are taken from the National Drug Strategy Household Survey, 2007 and 2010
 (c) Figures for 2013 are based on full year estimates
 Sources: (1) Euromonitor, Smoking prevalence, accessed January 2014
 (2) Australian Institute of Health and Welfare, National Drug Strategy Household Survey, 2007, 2010
 (3) Australian Bureau of Statistics

The Commonwealth government has implemented the Plain Packaging Act and other tobacco controls in 2012

A2.3 Recent regulatory changes

Table A2.3.1: Recent regulatory changes 2012/13⁽¹⁾⁽²⁾

Jurisdiction	Legislation title	Regulation type	Effective date	Brief description
Australia	Tobacco Advertising Prohibition Amendment Act 1992	Internet advertising	8 September 2012	<ul style="list-style-type: none"> It is made a criminal offence to publish tobacco advertising on the internet or other electronic media. Internet point-of-sale tobacco advertisements need to be presented in plain text-only format with graphic health warnings and warnings about age restriction on tobacco sales. Online tobacco retailers will have to display health warnings and comply with restrictions on advertisement wording under the same legislation that other forms of advertising are covered.
	Tobacco Plain Packaging Act 2011; Trade Marks Amendment (Tobacco Plain Packaging) Act 2011	Plain packaging of tobacco	1 December 2012	<ul style="list-style-type: none"> Law on plain packaging for all tobacco products sold enacted and fully implemented.
	Customs Amendment (Smuggled Tobacco) Bill 2012 Amendment of Customs Act 1901	Illicit tobacco	November 2012	<ul style="list-style-type: none"> Smuggling tobacco or possessing illicit tobacco will attract tougher penalties including potential imprisonment.
	Competition and Consumer (Tobacco) Information Standard 2011	Health warnings	1 December 2012	<ul style="list-style-type: none"> Tobacco products required to display the updated and expanded graphic health warnings covering 75% of the front of face.
	Customs Act 1901, Customs Tariff Act 1995	Duty free tobacco restrictions	1 September 2012	<ul style="list-style-type: none"> Inbound traveller allowance for tobacco products is reduced from 250g per person to 50g/ 50 sticks per person.
	Excise Tariff Amendment (Tobacco) Bill 2014 and Customs Tariff Amendment (Tobacco) Bill 2014	Excise	1 December 2013 for excise increases 1 March 2014 AWOTE change will be effective	<ul style="list-style-type: none"> In August 2013 the Australian government announced excise duty increases in tobacco products of an additional 12.5% annually for the next four years in addition to the switch to AWOTE. The first of these increases was implemented on 1 December 2013. These four tax increases will increase the excise on a pack of cigarettes in Australia by 60% above the rate of AWOTE inflation until September 2016.

Sources: (1) Australian Government Department of Health
(2) Department of Health, Victoria, www.health.vic.gov.au/tobaccocontrol

Local states have been introducing additional regulations to further restrict tobacco consumption and meet local market requirements

A2.3 Recent regulatory changes (continued)

Table A2.3.2 Recent regulatory changes 2012/13 – state specific⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾

Jurisdiction	Legislation title	Regulation type	Effective date	Brief description
New South Wales	Public Health Act 2008; Public Health Regulation 2008	Retail Display Ban	1 July 2013	Exemption for specialist tobacconists under the ban on the display of tobacco products at point-of-sale ends
Victoria	Tobacco Act 1987	Smoke free Local Areas	1 December 2012	A ban on smoking at all of Victoria's patrolled beaches in the area between the red-and-yellow lifesaving flags and within a 50 metre radius of a red-and-yellow flag.
	Tobacco Amendment (Shopper Loyalty Schemes) Bill 2012	Removal of tobacco from shopper loyalty programs	1 March 2013	Tobacco products are prohibited from earning points under shopper loyalty initiatives.
	Tobacco Amendment Act 2013	Smoke free Local Areas, Cessation of new certification for specialist tobacconists	1 October 2014	Introduction of smoke-free children's playgrounds and related recreational areas. Applications for specialist tobacconist certification received on or after 1 April 2014 will not be considered. Price boards will come under closer scrutiny and there are provisions to repeal certain packaging and labelling requirements made redundant by plain packaging. The Bill received Royal assent on 6 November 2013
South Australia	Tobacco Products Regulation Act 1997. Tobacco Products Regulations 2004. Tobacco Products Variation Regulations 2012 (Capsule cigarette)	Retail Display Ban	1 January 2012	A ban on the display of tobacco products at point-of-sale with an exemption for specialist tobacconists. Display of 'capsule' cigarettes banned, extending previous ban on fruit & confectionery flavoured cigarettes.

Note: (4) There has been no new legislation specifically for the Australian Capital Territory

Sources: (1) Australian Government Department of Health
(2) Department of Health, Victoria, www.health.vic.gov.au/tobaccoorders.htm
(3) The Tobacco Amendment Act 2013

Appendix Technical appendices

Local states have been introducing additional regulations to further restrict tobacco consumption and meet local market requirements

A2.3 Recent regulatory changes (continued)

Table A2.3.2 Recent regulatory changes 2012/13 – state specific⁽¹⁾⁽²⁾⁽³⁾

Jurisdiction	Legislation title	Regulation type	Effective Date	Brief description
Tasmania	Public Health Act 1997	Retail Display Ban	1 March 2012	Specialist tobacconists included in retail display ban, removing earlier exemption.
		Removal of tobacco from shopper loyalty programs	1 March 2012	Tobacco products are prohibited from earning points under shopper loyalty initiatives.
		Licensing of tobacco retailers	1 March 2012	<ul style="list-style-type: none"> ■ Licences must be obtained prior to selling products from additional venues. ■ Licences are not transferable to new business owners. ■ Licences will not be displayed in premises.
		Vending machine restrictions	1 March 2012	Tobacco vending machines now restricted to one machine per site within specified locations.
Queensland	Health Legislation Amendment Act 2012	Tobacco type restriction	26 November 2012	Ban on the sale of fruit & confectionery flavoured cigarettes.
The Northern Territory	Smokefree legislation	Ban on smoking in prisons	1 July 2013	Total ban on tobacco in prisons.

Note: (1) There has been no new legislation specifically for the Australian Capital Territory

Source: (1) Australian Government, Department of Health

(2) Department of Health, Victoria, www.health.vic.gov.au/tobaccocontrol

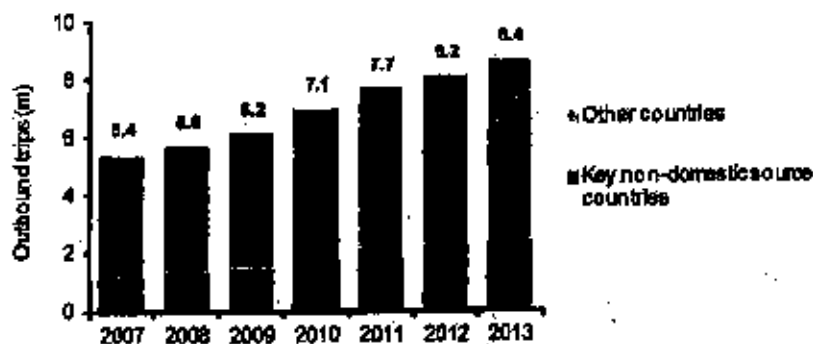
(3) *ABNN Media Release, 22 October 2013*

Appendix Technical appendices

Visits to countries indicated by the empty pack survey as contributors to non-domestic packs found in Australia have grown strongly. This could imply a growth in legal non-domestic consumption.

A2.4.1 Travel trends and non-domestic legal calculation based on departures of Australians

Oversaeas travel of Australian residents, 2007 – 2013^{(1)(X)}



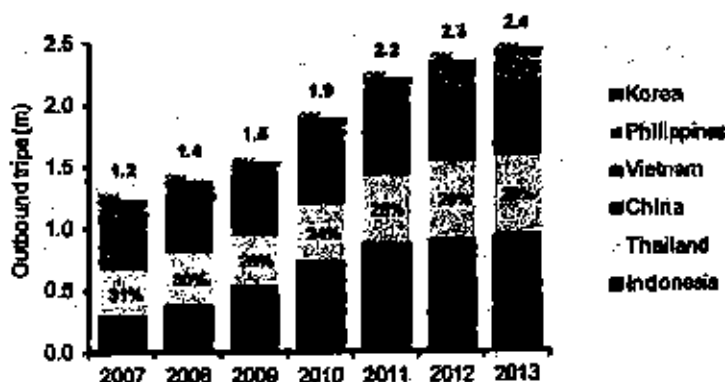
CAGR (%)	2007-09	2009-11
Key ND source countries	11.9%	20.1%
Total overseas trips	7.0%	11.5%

Travel trend data can be used in the calculation of non-domestic legal volumes, i.e. tobacco products that are brought into the country legally by consumers, such as during an overseas trip.

Trips made to key non-domestic source countries of manufactured cigarettes increased at a faster rate than overall visits, 12.2% compared to 8.2% between 2007 to 2013.

Later in the report this data is used to estimate legal non-domestic sales which, it will be shown, is immaterial in size.

Oversaeas travel of Australian residents to key non-domestic source countries, 2007 – 2013^{(1)(X)}



Visits to key non-domestic source countries reached a total of 2.44 million in 2013 accounting for approximately 30% of all trips made overseas by Australian residents.

However, reductions in inbound traveller allowances will likely have tempered the growth of legal non-domestic consumption. We examine this in more detail overleaf.

Note: (A) Key non-domestic source countries have been selected from the empty pack survey carried out in 2013, the countries highlighted in the graph above accounted for over 70% of the non-domestic cigarette packs found in Australia and excludes packs that come from unspecified countries

Source: (1) Australian Bureau of Statistics, Short-Term Movements, Resident Departures - Selected Destinations: Trend, 2013

Non-domestic legal ND(L) estimates account for a small proportion of total consumption and have a limited effect on the aggregate results

A2.4.1 Travel trends and non-domestic legal calculation (continued)

		2.4m	10%	13.7%	59%	50g	10.8
KPMG non-domestic legal calculation							
Overseas trips to non-domestic source countries in the year (m)	Australian Bureau of statistics	1.22	1.53	1.63	2.2	2.35	2.44
Non-domestic source uplift	Empty pack survey	10%	10%	10%	10%	10%	10%
% of population that are smokers	AHW (and extrapolated)	16.1%	16.5%	18.1%	14.7%	14.2%	13.7%
% of smokers that buy tobacco	RMR consumer survey						59%
Number of smokers purchasing overseas (m)		0.11	0.14	0.14	0.19	0.20	0.22
Amount purchased	Inbound traveller allowance	250	250	250	250	183	50
Total (kg)		28,628	34,585	33,673	47,138	35,602	10,835
Non-domestic legal as % of total consumption		0.1%	0.2%	0.2%	0.3%	0.2%	0.1%

Estimates of non-domestic legal show that total volumes account for a small proportion of total consumption.

The change to inbound traveller allowances made in September 2012 has a considerable impact on the amount of tobacco consumers can bring back into the country legally, reducing the estimate of legal non-domestic volumes further in 2013.

A consumer survey undertaken in February 2013 was the first time respondents were asked about overseas travel and tobacco purchase. The percentage of smokers who bought tobacco whilst overseas was 53%, however, this may have changed during the period from 2007-2012. The H2 2013 survey suggested that 59% of smokers bought cigarettes overseas, potentially indicating how the difference in price impacts purchasing decisions.

- Notes: (a) Respondents were asked "Q51. Have you travelled outside of Australia in the last 6 months?"
 (b) Respondents were then asked "Q52. Did you buy any manufactured cigarettes or any other tobacco products to bring back to Australia on any of your trips to other countries in the past 6 months?"
 (c) The inbound traveller allowance for 2012 has been calculated using the 250g limit for 6 months and the 50g limit for 4 months to reflect the change in inbound traveller allowances made in September 2012.
- Sources: (1) Roy Morgan Research, Consumer survey, H1 2013 and H2 2013
 (2) Australian Institute of Health and Welfare, National Drug Strategy Household Survey, 2007, 2010
 (3) Australian Bureau of Statistics, Short-term movement, Resident Departures - Selected Destinations Trend, 2013

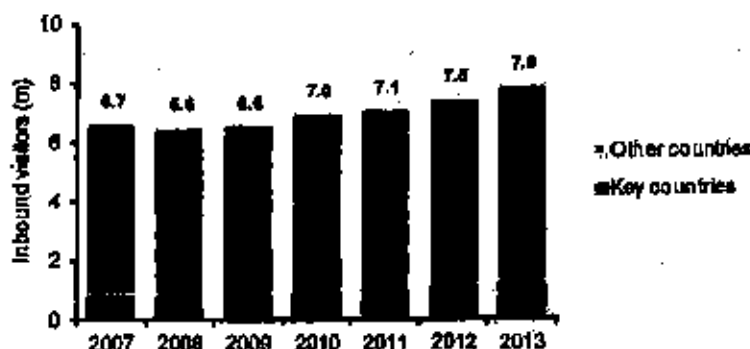
Visitors from countries indicated by the empty pack survey also serve as contributors to non-domestic packs found in Australia

A2.4.2 Travel trends and non-domestic legal calculation based on arrivals of visitors (short-term visitors and permanent settlers)

A common comment on the H1 2013 report was that domestic legal inflows calculation only considers the amount of product brought in by Australian residents returning from short-term visits overseas and does not reflect any cigarettes brought to Australia by overseas visitors.

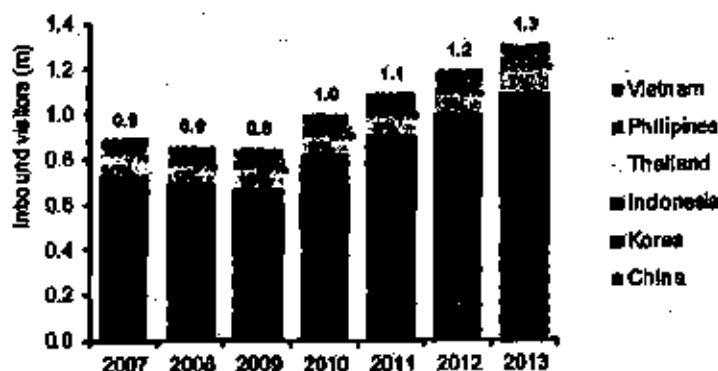
At the time we understood the immateriality of the impact, but feel it is worth highlighting. Thus, we provide an approach of estimating non-domestic legal inflows that considers both the amount of product brought in by Australian residents returning from overseas visits as well as cigarettes brought by overseas visitors (short-term visitors and settlers).

Overseas visitors (short term visitors and settlers) arrivals to Australia, 2007 - 2013⁽¹⁾⁽²⁾⁽⁴⁾



CAGR (%)	2007-09	2009-11
Key ND source countries	-2.3%	13.4%
Total overseas trips	-0.4%	2.5%

Overseas visitors arrivals from key non-domestic source countries, 2007 - 2013⁽¹⁾⁽²⁾⁽⁴⁾



Overseas visitors arrivals from key non-domestic countries include both short term arrivals and permanent settlers.

Visitors from the key non-domestic source countries have increased since 2007. Visitors from China have increased by 12% between 2007 and 2013.

Later in the report this data together with the overseas travel of Australian residents data are used to estimate legal non-domestic sales which, it will be shown, the impact of the change in domestic legal inflows calculation is immaterial in size.

Note: (4) Key non-domestic source countries have been selected from the empty pack survey carried out in 2013, the countries highlighted in the graph above accounted for over 75% of the non-domestic cigarette packs found in Australia. Packs that come from unspecified countries are excluded.

Sources: (1) Australian Bureau of Statistics, Short-Term Movement, Visitor Arrivals - Selected Countries of Residence: Trend, 2013

(2) Australian Bureau of Statistics, Permanent Movement, Settlers - Country of Birth, Major Groups and Selected Source Countries: Original, 2013

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Non-domestic legal estimates calculated on the basis of inbound visitor arrivals indicate that non-domestic legal remains a small proportion of total consumption

A2.4.2 Inbound travel trends and non-domestic legal calculation (continued)

Inbound visitor arrivals ^(a)	% population above 18	% population smokers	Amount per trip (max. allowance of 50g)	Total (Kg)	
Example of KPMG non-domestic legal calculation based on overseas visitor arrivals to Australia					
Source	Australian Bureau of statistics	Euromonitor	Euromonitor		
China	0.78	70%	25%	0.132	6,598
Korea	0.19	69%	20%	0.028	1,318
Indonesia	0.15	63%	36%	0.034	1,685
Thailand	0.09	67%	23%	0.014	678
Philippines	0.07	66%	28%	0.011	561
Vietnam	0.05	68%	22%	0.007	338
Total (kg)	1.30			0.224	11,178

Estimation of non-domestic legal volumes shows that total volumes account for a small proportion of total consumption.

This proportion remains insignificant even if arrivals data is included in the non-domestic legal calculation. This has been shown in detail on the next page.

Notes: (a) Inbound visitor arrivals to include arrivals of short term business visitors and permanent settlers
 (b) Population within the age group 18-64 years
 (c) KPMG has used a prudent approach and assumed that 100% of visitors arriving in Australia purchase the maximum inbound traveller allowance
 Sources: (1) Australian Bureau of Statistics, Short-Term Movement, Visitor Arrivals - Selected Countries of Residence: Trend, 2013
 (2) Australian Bureau of Statistics, Foreigners of Government, Settlers - Country of Birth, Major Groups and Selected Source Countries: Original, 2013
 (3) Euromonitor, Population: National Estimates, accessed January 2014
 (4) Euromonitor, Smoking Prevalence Among Total Adult Population, accessed January 2014

Appendix Technical appendix

The change in the calculation of non-domestic legal ND(L) estimates has a limited impact on the aggregate results

A2.4.2 Inbound travel trends and non-domestic legal calculation (continued)

Comparison of non-domestic legal estimate, 2012 – 2013⁽¹⁾⁽²⁾⁽³⁾⁽⁴⁾⁽⁵⁾⁽⁶⁾⁽⁷⁾

	2012		H1 H1 2013		2013 ⁽²⁾	
	H1 2013 Approach	New approach	H1 2013 Approach	New approach	H1 2013 Approach	New approach
Legal domestic sales	15,298.8	15,298.8	15,113.8	15,113.8	15,214.2	15,214.2
Non-domestic legal	35.8	73.0	10.7	21.5	10.8	22.0
Unbranded loose	1,495.2	1,495.2	895.5	895.5	1,034.3	1,034.3
Contraband	505.5	505.5	1,347.9	1,347.9	1,276.2	1,276.2
Counterfeit	48.9	48.9	84.9	84.9	142.8	142.8
Total	17,382.0	17,419.4	17,452.8	17,463.6	17,676.3	17,689.4
Non-domestic legal as % of total consumption	0.20%	0.42%	0.06%	0.12%	0.06%	0.12%
Total illicit as % of total consumption	11.8%	11.5%	13.3%	13.3%	13.9%	13.9%

Under the H1 2013 approach, the non-domestic legal volumes have been computed based on only the short-term departures data i.e. tobacco brought back into Australia by locals travelling overseas.

The new approach estimates the non-domestic legal volumes by combining the volume of tobacco brought into Australia by Australian residents travelling overseas (i.e. short-term resident departures) and by visitors coming to Australia (i.e. short-term arrivals as well as permanent settlers).

There is a marginal difference in the proportion of non-domestic legal as a percentage of total consumption but non-domestic legal volumes remain small.

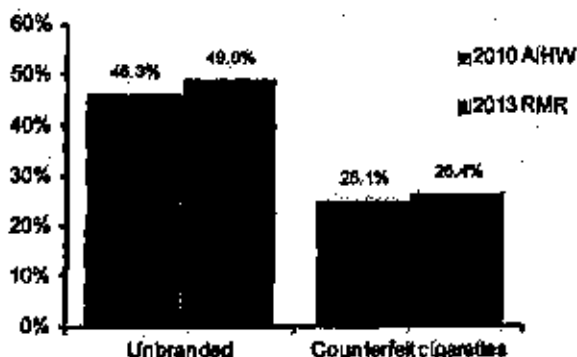
In this report we have used the new approach to derive the 2013 results. However, we have not updated or restated non-domestic estimates from previous years as the overall non-domestic legal volumes remain immaterial.

Notes: (a) The amount per trip in 2012 is based on the inbound travel allowance for 2012. This has been calculated using the 200g limit for 8 months and the 50g limit for 4 months to reflect the change in inbound travel allowance made in September 2012.
 (b) The amount per trip in 2013 is based on the new maximum inbound traveller allowance of 50g per person per trip.
 Sources: (1) Eurostat, Legal domestic sales, accessed January 2014
 (2) IAS Intelligence Research, Empty pack survey, Q2 2013 and Q4 2013
 (3) Roy Morgan Research, Consumer survey, H1 2013 and H2 2013
 (4) Australian Bureau of Statistics, Short-term Movement, Visitor Arrivals - Selected Countries of Residence: Trend, 2013
 (5) Australian Bureau of Statistics, Short-term movement, Resident Departures - Selected Destinations: Trend, 2013
 (6) Australian Bureau of Statistics, Permanent Movement, Settlers - Country of Birth, Major Groups and Selected Source Countries: Original, 2013
 (7) KPMG Analysis

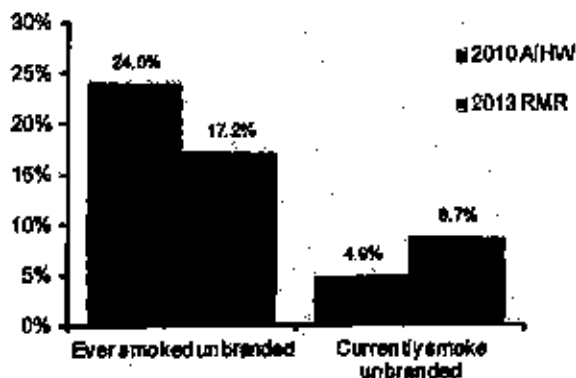
The outputs of the Roy Morgan Research survey are broadly consistent with the AIHW survey on major indicators

A2.5 Consumer surveys

Comparison of illicit tobacco awareness levels in consumer surveys⁽¹⁾⁽²⁾⁽³⁾



Comparison of unbranded illicit tobacco prevalence in consumer surveys⁽¹⁾⁽²⁾⁽³⁾



Comparison of RMR and AIHW consumer surveys

	RMR	AIHW (conducted by RMR)
Survey focus	■ Size of the illicit tobacco market	■ Knowledge of and attitudes towards drugs, drug consumption histories and related behaviours
Frequency	■ At least annually from 2009	■ Every three years
Sample size	■ 2010: 848 ■ 2011: 931 ■ 2012: 1,405 ■ 2013: 4,223 (H1: 2,107 + H2: 2,116)	■ > 28,000 people aged 12 years or older participated in the survey
Age groups	■ Smokers aged 18 +	■ Smokers aged 14+
Methodology	■ Web based surveys	■ Self-completion drop and collect methodology
Types of tobacco addressed	■ Unbranded, counterfeit cigarettes, contraband cigarettes	■ Unbranded, counterfeit cigarettes

The Australian Institute of Health and Welfare's (AIHW) National Drug Strategy Household Survey is the only other major consumer survey in Australia that provides an overview on the prevalence of the use of illicit tobacco. There are a number of differences between the Roy Morgan Research and AIHW survey including the frequency of surveys carried out, size of the sample and the key purpose of each. The RMR survey is used to estimate the size of the illicit market whereas the AIHW survey is focused more on attitudes and behaviours. A key metric used from the RMR survey for sizing the illicit market is the quantity of illicit tobacco purchased per occasion, data that is not captured in the AIHW survey.

Despite differences in the survey objectives and methodologies, headline awareness and prevalence indicators of unbranded illicit tobacco are similar in the AIHW and RMR surveys. Awareness of unbranded tobacco was close to 50% in both studies, while awareness of counterfeit cigarettes was close to 30%. Both surveys highlight the difference in responses when asking consumers about having 'ever smoked' compared to 'currently smoking'. Respondents in both cases appear to be more willing to admit to illicit behaviour when its not considered a 'current' activity. The 2010 AIHW survey asks consumers about Chop Chop (unbranded loose tobacco sold in bags) only whereas the 2007 survey asked about both Chop Chop and unbranded cigarettes.

Note: (a) Roy Morgan Research results for 2013 are based on CAWI responses only
 Source: (1) Roy Morgan Research, Consumer survey, H1 2013 and H2 2013
 (2) Australian Institute of Health and Welfare, The 2010 National Drug Strategy Household Survey, 2011

The description of the services set out below comprises the agreed scope of our work

A2.6 Scope of work

Scope

We will analyse and report on:

- The total level of legal domestic sales of tobacco products and consumption in the market.
- The estimated proportion of the Australian tobacco market accounted for by the illicit trade, across both manufactured products and the unbranded, encompassing contraband, counterfeit and unbranded products (including 'chop chop').
- An overview of the nature of the illicit trade in the country, including the sources of illicit product.
- Findings on the characteristics and consumption patterns of illicit tobacco users, and how these have changed from the results of surveys previously undertaken, based on the consumer research outputs.
- Data on how taxation has evolved over time and report on tobacco regulation in the Australian market.

Methodology

In order to size the illicit tobacco market, we will use two principal approaches:

Consumer research approach: utilising the half yearly and full year 2013 Roy Morgan Research reports, as used in the previously published Deloitte 'Illicit trade of tobacco in Australia: Report for 2011/2012'; namely:

- Analyse consumer responses to establish the proportion of illicit tobacco consumed (including assisting with the design of the sampling methodology and the questionnaire for the 2013 surveys in order to help ensure that the consumer research is as robust as possible).
- Extrapolate the proportion of illicit tobacco consumed on a national level.
- Express the findings as a proportion of total tobacco consumption.

Empty pack survey approach: utilising empty pack survey data; namely:

- Analyse the data output from the empty pack surveys to establish the proportion of market accounted for by non-domestic manufactured cigarettes.
- Extrapolate the non-domestic and counterfeit incidence estimates identified in the empty pack survey against the level of legal domestic sales in Australia.
- Express findings on the estimates of both non-domestic consumption of manufactured cigarettes and consumption of counterfeit product as a proportion of consumption.

The overall results from the two approaches will then be compared and combined in order to build up our overall estimate of the size and composition of the illicit market as a proportion of total tobacco consumption.

Questions asked by the consumer survey

A2.7 Roy Morgan Research questionnaire

Do you, or does any member of your immediate family work in any of the following companies/industry sectors?

What is your post code?

What is your gender?

Are you currently employed?

Which of the following occupational categories best suits you? (Options provided)

What is your approximate annual personal income?

What is your current age?

Which products do you currently consume? (Options provided)

What type of tobacco product do you smoke or use, even if only occasionally?

How often do you normally smoke manufactured cigarettes?

How often do you normally smoke roll your own cigarettes?

How many manufactured cigarettes do you normally smoke each day (on average)?

How many roll your own cigarettes do you normally smoke each day (on average)?

What is your regular brand of manufactured cigarettes, that is, the one you smoke more than any other brand now-a-days?

What other brands of manufactured cigarettes do you currently smoke?

What is your regular brand of roll your own cigarettes, that is, the one you smoke more than any other brand now-a-days?

What other brands of roll your own cigarettes do you currently smoke?

Are you aware that unbranded tobacco can be purchased? Unbranded tobacco is also known as 'chop chop.' It is loose tobacco or cigarettes in cartons or packs that are sold without a brand name. This does not include branded tobacco products that are now sold in plain packaging that are green/brown in colour with graphic health warnings and information messages.

Since you turned 18 have you ever purchased unbranded tobacco?

Throughout the survey, we're just focusing on products you buy for your own use. Do you purchase unbranded tobacco for your own use currently?

Have you purchased unbranded tobacco in the last 12 months? (we are talking about purchases for your use)

In the past 12 months, how often did you purchase unbranded tobacco?

Well, can you give me an estimate of how often you purchased unbranded tobacco in the past 12 months?

Since you turned 18, how long had you been buying unbranded tobacco?

Well, can you give an estimate of how long you had been buying unbranded tobacco since you turned 18?

When you last purchased unbranded tobacco, from which outlet or outlets did you buy it?

When you last purchased unbranded tobacco, how many grams of unbranded tobacco did you purchase?

When you last purchased unbranded tobacco, what format or formats was the unbranded tobacco in?

When you last purchased loose unbranded tobacco, how many grams did you buy? (In grams)

When you last purchased loose unbranded tobacco, how much did it cost in total?

How long ago was your most recent purchase of loose unbranded tobacco?

Well, can you give me an estimate of when your most recent purchase of loose unbranded tobacco was?

When you last purchased cartons of unbranded tobacco, how many did you buy?

When you last purchased cartons of unbranded tobacco, how much did it cost in total?

How long ago was your most recent purchase of unbranded tobacco in cartons?

Well, can you give me an estimate of when your most recent purchase of unbranded tobacco in cartons was?

When you last purchased packs of unbranded tobacco, how many did you buy?

When you last purchased packs of unbranded tobacco, how much did it cost in total?

How long ago was your most recent purchase of unbranded tobacco in packs?

Well, can you provide an estimate of when your most recent purchase of unbranded tobacco in packs was?

When you were smoking unbranded tobacco, how much of it would you say that you smoked per day?

Well, can you provide an estimate of how much unbranded tobacco you were smoking per day?

How did you usually consume unbranded tobacco?

Questions asked by the consumer survey

A2.7 Roy Morgan Research questionnaire

How many suppliers did you ever purchase unbranded tobacco from, since you turned 18?

When you stopped buying unbranded tobacco did you not smoke or did you purchase duty paid tobacco products?

Why did you smoke unbranded tobacco?

Do you know the country of origin of the unbranded tobacco that you purchased?

Where does it usually come from?

Please select the reasons why you stopped purchasing unbranded tobacco? (Options provided)

How often do you purchase unbranded tobacco?

Well, can you provide an estimate of how often you purchase unbranded tobacco?

Since you turned 18, how long have you been buying unbranded tobacco?

Well, can you provide an estimate of how long you have been buying unbranded tobacco?

From which outlets do you usually buy your unbranded tobacco?

How many grams of unbranded tobacco do you purchase for the average purchase?

What format or formats do you usually purchase unbranded tobacco in?

What is the minimum price that you have paid for loose unbranded tobacco in bags?

What is the average price that you have paid for loose unbranded tobacco in bags?

What is the maximum price that you have paid for loose unbranded tobacco in bags?

What is the minimum price that you have paid for unbranded cigarettes in cartons?

What is the average price that you have paid for unbranded cigarettes in cartons?

What is the maximum price that you have paid for unbranded cigarettes in cartons?

What is the minimum price that you have paid for unbranded cigarettes in packs?

What is the average price that you have paid for unbranded cigarettes in packs?

What is the maximum price that you have paid for unbranded cigarettes in packs?

How much would you say that you smoke per day of unbranded tobacco?

per day of unbranded tobacco?

The most recent time you purchased unbranded tobacco what format or formats was it?

How much loose unbranded tobacco did you buy? (in grams)

How much did it cost in total?

How long ago was your most recent purchase of loose unbranded tobacco?

Well, can you provide an estimate of when your most recent purchase of loose unbranded tobacco was?

How many cartons of unbranded cigarettes did you buy?

How much did it cost in total?

How long ago was your most recent purchase of unbranded tobacco in cartons?

Well, can you provide an estimate of when your most recent purchase of unbranded tobacco in cartons was?

How many packs of unbranded cigarettes did you buy?

How much did it cost in total?

How long ago was your most recent purchase of unbranded tobacco in packs?

Well, can you provide an estimate of when your most recent purchase of unbranded tobacco in packs was?

How do you usually consume unbranded tobacco?

How many suppliers have you ever purchased unbranded tobacco from, since you turned 18?

Do you find unbranded tobacco easier or harder to obtain than a year ago or has there been no change?

If you cannot get unbranded tobacco do you not smoke or do you purchase duty paid tobacco products?

Why do you smoke unbranded tobacco?

Do you know the country of origin of the unbranded tobacco that you purchase?

Where does it usually come from?

Contraband cigarettes are legitimate brands of cigarettes purchased in shops without duty paid.

Are you aware that contraband cigarettes can be purchased?

How did you become aware of the availability of contraband cigarettes?

Since you turned 18, have you ever purchased contraband cigarettes?

Questions asked by the consumer survey

A2.7 Roy Morgan Research questionnaire

Do you purchase contraband cigarettes for your own use currently?

Have you purchased contraband cigarettes in the last 12 months?

If you think you might have purchased contraband cigarettes, which brand(s) was it? Any others?

What would you do if contraband product were not available where you usually purchase it from? (Options provided)

How would you rate the overall quality of the contraband product(s) you purchase compared to the non-contraband version(s)?

Counterfeit cigarettes are packs of cigarettes labelled with a brand name that are not really that particular brand. They have been smuggled into the country without duty paid.

Are you aware that counterfeit cigarettes can be purchased?

How did you become aware of the availability of counterfeit cigarettes?

Since you turned 18 have you ever purchased counterfeit cigarettes?

Do you purchase counterfeit cigarettes for your own use currently?

Have you purchased counterfeit cigarettes in the last 12 months?

If you think you might have purchased counterfeit cigarettes, which brand(s) was it? Any others?

What made you believe the cigarettes were counterfeit?

What would you do if counterfeit product were not available where you usually purchase it from?

How would you rate the overall quality of the counterfeit product(s) you purchase compared to the non-counterfeit version(s)?

You have indicated that you have bought counterfeit product. What does the availability of the brand(s) in counterfeit form make you feel? (Options provided)

You indicated that you would feel more negative towards the brand knowing that it is available in counterfeit, can you please explain why you feel this way.

What would you do if counterfeit product were not available where you usually purchase it from? (Options provided)

How would you rate the overall quality of the counterfeit product you purchase compared to the real legitimate brand?

The most recent time you purchased counterfeit cigarettes, did you buy them by weight, by packs, or by cartons?

When you bought the counterfeit cigarettes by weight, how much did you buy?

How much did it cost in total?

How long ago was your most recent purchase of counterfeit cigarettes by pack?

When you bought the counterfeit cigarettes/carton, how much did you buy?

How much did it cost in total?

How long ago was your most recent purchase of counterfeit cigarettes by carton?

Do you find counterfeit cigarettes easier or harder to obtain than a year ago or has there been no change?

Why do (or did) you smoke counterfeit cigarettes?

The most recent time you purchased contraband cigarettes, did you buy them by weight, by packs, or by cartons?

When you bought the contraband cigarettes by weight, how much did you buy?

How much did it cost in total?

How long ago was your most recent purchase of contraband cigarettes by weight?

When you bought the contraband cigarettes by pack, how much did you buy?

How much did it cost in total?

How long ago was your most recent purchase of contraband cigarettes by pack?

When you bought the contraband cigarettes by carton, how much did you buy?

How much did it cost in total?

How long ago was your most recent purchase of contraband cigarettes by carton?

Do you find contraband cigarettes easier or harder to obtain than a year ago or has there been no change?

Why do (or did) you smoke contraband cigarettes?

It is sometimes possible to purchase cigarettes for less than the normal retail price. The price of these 'cheap cigarettes' is several dollars or more below the normal retail price, (for example, a price of AUD10 or less for a pack of 25, or AUD8 or less for a pack of 20).

Questions asked by the consumer survey

A2.7 Roy Morgan Research questionnaire

Before today, were you aware of packs of cheap cigarettes that can be purchased for less than the normal retail price?

Since you turned 18 have you ever purchased cheap cigarettes for your own use?

Do you purchase cheap cigarettes for your own use currently?

Have you purchased cheap cigarettes for your own use in the last 12 months?

How did you become aware of the availability of cheap cigarettes?

If you think you might have purchased cheap cigarettes, what brand(s) were they?

What would you do if cheap cigarettes were not available where you usually purchase them from?

What did you do if cheap cigarettes were not available where you usually purchased them from?

How would you rate the overall quality of the cheap cigarettes that you have purchase(d) compared to the full price product(s)?

The most recent time you purchased cheap cigarettes, did you buy them by packs, or by cartons, or both?

When you bought the cheap cigarettes by pack, how many packs did you buy?

How much did it cost in total?

How long ago was your most recent purchase of cheap cigarettes by pack?

When you bought the cheap cigarettes by carton, how many cartons did you buy?

How much did it cost in total?

How long ago was your most recent purchase of cheap cigarettes by carton?

From what outlets do/did you usually buy cheap cigarettes?

Do you find cheap cigarettes easier or harder to obtain than a year ago or has there been no change?

Why do (or did) you smoke cheap cigarettes?

Why did you stop smoking cheap cigarettes?

You have indicated that you have purchased either contraband or counterfeit cigarettes in the past. Sometimes people refer to contraband or counterfeit cigarettes as 'cheap' cigarettes. These people may or may not know that the 'cheap' cigarettes are contraband or counterfeit.

Whilst you are familiar with the terms contraband and/or counterfeit, do you also know contraband or counterfeit cigarettes as 'cheap' cigarettes?

Do you purchase rolling papers, tubes, or both for the purpose of smoking loose tobacco?

When you purchase rolling papers for smoking loose tobacco, what is the once pack size of rolling papers you usually purchase?

What percentage of that pack of rolling papers do you use before the pack is damaged, lost or discarded? (Options provided)

When you purchase tubes for smoking loose tobacco, what is the one pack size of tubes you usually purchase?

What percentage of that pack of tubes do you use before the pack is damaged, lost or discarded? (Options provided)

Have you travelled outside of Australia in the last 6 months?

Did you bring back any manufactured cigarettes or any other tobacco products to bring back to Australia on any of your trips to other countries in the past 6 months?

How many trips in the last 6 months did you make where you purchased manufactured cigarettes or any other tobacco products to bring back to Australia?

For each type of product listed below, indicate how much you brought back into Australia on average per trip? (Options provided)

In which countries did you buy manufactured cigarettes/any other tobacco products?

Did you buy duty free manufactured cigarettes or any tobacco products at the airport or port on your return to Australia after any of your trips to other countries in the last 6 months?

How many trips did you make in the last 6 months where you purchased duty free manufactured cigarettes or any other tobacco products on your return to Australia?

For each type of product, indicate how much you purchased in duty free on average per trip.

Appendix Technical appendices Bibliography

A2.6 Bibliography

- 1) Deloitte, *illicit Trade of Tobacco in Australia*, Feb 2011, June 2011, May 2011 and December 2012
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