Submission by British American Tobacco (New Zealand) Limited

opposing the Smoke-free Environments

(Tobacco Plain Packaging) Amendment Bill

To the Health Committee

of the House of Representatives of New Zealand
To: The Health Committee of the House of Representatives of New Zealand

Date: 28 March 2014

This submission is made by British American Tobacco (New Zealand) Limited (BAT).

BAT is a member of the global British American Tobacco group of companies. It imports, distributes and sells tobacco products in New Zealand, including cigarettes and roll-your-own tobacco, under a range of brand names, including Benson & Hedges, Dunhill, Kent, Rothmans, Lucky Strike, Winfield, Holiday, Pall Mall, Freedom, Park Drive and Port Royal. Its sales account for approximately 72% of the New Zealand market.

BAT strongly opposes the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill.

Representatives of BAT wish to appear before the Committee to speak to this submission. Mr Steve Rush, BAT’s General Manager, wishes to appear before the Committee. He will be supported by Ms Susan Jones, BAT’s Head of Corporate and Regulatory Affairs, and Mr Saul Derber, BAT’s Head of Legal.
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ABBREVIATIONS

**BAT or We** – British American Tobacco (New Zealand) Limited

**BAT Group** – British American Tobacco plc and the group of companies constituting its direct and indirect subsidiaries worldwide

**Bill** – Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill

**BoRA** – New Zealand Bill of Rights Act 1990

**Committee** – the Health Committee of the House

**Consultation Document** – the Proposal to introduce Plain Packaging of tobacco products in New Zealand, Ministry of Health, July 2012

**Consultation Response** – BAT’s response to the Consultation Document, dated 5 October 2012

**FCTC** – the WHO Framework Convention on Tobacco Control

**GATS** – WTO General Agreement on Trade in Services

**GATT** – WTO General Agreement on Tariffs and Trade 1994

**House** – House of Representatives of New Zealand

**Investment Treaty** – a treaty at public international law providing for the protection and promotion of investments, including the investment chapters of New Zealand’s free trade agreements and also New Zealand’s bilateral investment treaties

**Paris Convention** – Paris Convention for the Protection of Industrial Property

**Plain Packaging** – standardised packaging for tobacco products based on Australia’s TPPA, as described in the Consultation Document

**SFEA** – Smoke-free Environments Act 1990

**Submission** – this document


**RYO** – roll-your-own loose tobacco supplied by tobacco companies

**TBT** – WTO Agreement on Technical Barriers to Trade

**TMC** – tailor-made cigarettes

**TPPA** – Tobacco Plain Packaging Act 2011 (Commonwealth of Australia)

**TRIPS** – WTO Agreement on Trade-Related Aspects of Intellectual Property Rights

**WHO** – the World Health Organisation

**WTO** – the World Trade Organisation
1 EXECUTIVE SUMMARY

1.1 BAT strongly opposes the passing of the Bill.

1.2 BAT asks the Committee to recommend that the House should not pass the Bill. We do so because:

(a) **Plain Packaging would be unlawful and disproportionate.**

- It would amount to an unlawful, uncompensated expropriation of a lawful industry’s property.

- It would clearly violate several WTO agreements which are vital to New Zealand’s economy, including the TRIPS and TBT agreements.

- It would breach Investment Treaties, entitling companies within the BAT Group to arbitral awards requiring New Zealand to repeal the legislation and/or pay substantial sums in compensation.

- It would unjustifiably infringe the right to freedom of expression under the BoRA.

- Plain Packaging is a wholly ineffective and disproportionate measure. Even if it were a proportionate public health policy (and it is not), it would nevertheless be unlawful because it breaches (inter alia) the WTO TRIPS agreement, which contains no general public health exception.

(b) **Plain Packaging will not reduce smoking.**

- There is no credible evidence that the design of tobacco product packaging has any impact on tobacco consumption or smoking initiation or cessation. All of the studies cited in support of Plain Packaging in the RIS and elsewhere are unreliable and rife with methodological errors and biases. The most significant failing is reliance on survey participants’ subjective, speculative opinions about the impact of the policy. Not one of the research papers cited by the Ministry of Health considers the effect of Plain Packaging or similar policies on actual smoking decisions.
• Plain Packaging has now been in force in Australia since 1 December 2012.\textsuperscript{2} Objective evidence about its effects on actual smoking behaviour now exists.

• In 2008-2012, legal tobacco sales volumes were declining in Australia with a compound annual growth rate (\textit{CAGR}) of -4.1\%. But following the introduction of Plain Packaging, this decline has halted entirely. 2013 saw the first increase in tobacco sales volumes in five years (at +0.3\% from 2012 volumes).

• Further, in 2008-2012, the adult smoking incidence rate (the number of adults smoking) in Australia was declining with a CAGR of -3.3\%. For 2012-2013, the change was only -1.4\%. Plain Packaging has failed to reduce smoking rates.

• It is abundantly clear that Plain Packaging has not improved public health in Australia.

(c) \textbf{Plain Packaging would increase illicit trade.}
KPMG research has found that, following the introduction of Plain Packaging in Australia, consumption of illicit tobacco has reached its highest-ever level relative to overall consumption – at 13.3\%.\textsuperscript{3} Plain Packaging would have a similar effect in New Zealand.

(d) \textbf{Plain Packaging would harm New Zealand's exports and reputation.}
If the Bill is passed, New Zealand will be seen to have adopted a wholly disproportionate and highly trade-restrictive measure with no credible public health evidence to support it. This would compromise the Government’s ability to protect brands and products that are vital to New Zealand businesses when they come under threat from similarly misconceived measures in export markets.

(e) \textbf{Effective and less damaging regulatory options are available.}
BAT accepts that smoking is a cause of various fatal diseases and that those who want to quit should be encouraged to do so. BAT respects the Government’s important regulatory role in relation to tobacco. But instead of adopting Plain Packaging, the Government could pursue evidence-based, effective and less damaging regulatory options, as outlined below in this Submission.
1.3 If the Bill proceeds, then at the very least:

(a) the Bill should not be passed until there has been a final determination (including appeals) of the WTO disputes and the Investment Treaty arbitration arising from Australia’s TPPA;

(b) the Bill should be amended to limit it to regulation of the appearance of tobacco products and to remove the power to regulate aspects of tobacco product design. As currently drafted, the Bill goes well beyond the Government’s stated intention of regulating packaging and product appearance. If invoked, the powers to dictate product design conferred by the Bill could create unjustified barriers to international trade additional to those resulting from Australia’s TPPA. That would expose New Zealand to separate WTO challenges which would not be resolved by the present WTO disputes involving Australia; and

(c) the Bill should be amended so as to provide a workable transitional period for tobacco manufacturers and importers.

2 PLAIN PACKAGING IS WHOLLY DISPROPORTIONATE AND UNLAWFUL

Summary

2.1 The following is a general overview of our legal objections to Plain Packaging. It is not exhaustive, and we reserve the right to advance additional legal and factual arguments.

2.2 The consequences of New Zealand adopting Plain Packaging could include:

(a) New Zealand being directed by an international tribunal to repeal the Plain Packaging legislation;

(b) awards of damages enforceable against the assets of the New Zealand Government around the world;

(c) substantial legal costs;

(d) trade sanctions against New Zealand’s export products;

(e) damage to New Zealand’s international reputation among its trading partners and foreign investors; and
prejudice to New Zealand’s ability to challenge unlawful restrictions on its exports.

2.3 Plain Packaging would breach New Zealand’s legal obligations under Investment Treaties and the WTO agreements, which are vital to its economy. That would be the case irrespective of whether it can be shown that Plain Packaging is an effective and proportionate measure (and it clearly is not).

2.4 Even if it were necessary to engage in a proportionality assessment, it would be impossible for the New Zealand Government to demonstrate that Plain Packaging is a necessary, suitable and proportionate public health measure. The reasons for this are explained in greater detail in other sections of this Submission. In summary, they are as follows:

(a) the risks of smoking have been universally known in New Zealand for decades. Branded packaging does not reduce smokers’ existing awareness of the risks of smoking;

(b) there is no credible evidence that Plain Packaging will reduce tobacco consumption or smoking rates. In Australia, Plain Packaging has failed to reduce smoking rates, and tobacco sales volumes have increased (albeit slightly) for the first time in five years;

(c) Plain Packaging would create real risks of unintended consequences which would undermine the Government’s public health objectives, including increased illicit trade and cheaper tobacco;

(d) effective alternative tobacco control measures could be pursued; and

(e) Plain Packaging would involve the extreme and unprecedented step of extinguishing almost all communication about product differences, quality and origin between tobacco companies and their customers. Such interference with the most fundamental principle of the market economy (i.e. a business’s ability to compete effectively) cannot be justified for a lawful product.

Breach of WTO agreements

2.5 It is unquestionably in New Zealand’s interests to comply, and ensure compliance by other States, with the WTO agreements. They are vital for the fair treatment of New
Zealand’s exports. For example, New Zealand obtained access to the Australian market for its apple exports only by challenging Australia’s unreasonable import restrictions through the WTO dispute resolution mechanism. It argued successfully that Australia could not justify its policies on scientific grounds.¹

2.6 Australia’s TPPA is currently the subject of disputes before the WTO. The five complainant States – including Indonesia, one of New Zealand’s largest trading partners – consider that Australia’s TPPA creates unlawful barriers to international trade.

2.7 Plain Packaging prevents the use of validly registered trade marks. It also compels use of certain word marks in a form different from that registered. This violates the protections afforded to trade mark owners by TRIPS.

(a) Plain Packaging violates the obligation under Article 15.1 of TRIPS to make all distinguishing signs capable of constituting a “trade mark” (a “sign used or to be used on a product to distinguish products”).

(b) By virtue of Article 15.4, the nature of the product (i.e. tobacco) cannot be a reason for denying trade mark protection to such distinctive signs.

(c) The severe limitations on the use of trade marks under Plain Packaging undermine the minimum guaranteed rights of trade mark owners in breach of Article 16 of TRIPS.

(d) Under Article 20 of TRIPS, certain special requirements for use of trade marks in a particular form or for use in a manner detrimental to their ability to distinguish products are prohibited as unjustified encumbrances on use. Plain Packaging is the ultimate encumbrance on the use of trade marks and clearly violates Article 20, including by standardising word marks constituting brand names.

(e) Plain Packaging compels the kind of confusing and anti-competitive acts that Article 10bis of the Paris Convention requires governments to prevent, thereby breaching Article 10bis.

(f) Similarly, a measure that destroys trade marks and prohibits use contravenes the obligation to “protect” trade marks “as is” (i.e. in the form in which they were registered) under Article 6 quinquies of the Paris Convention.
Article 17 of TRIPS, as interpreted by WTO jurisprudence, permits “limited exceptions” to the exclusive rights of trade mark owners, provided that such exceptions take account of the recognised “legitimate interest” that owners have in using their trade marks. But Plain Packaging measures that categorically prohibit the use of trade marks are not “limited” in any way and do not take the “legitimate interests” of trade mark owners into account. Plain Packaging accordingly contravenes Article 17 of TRIPS.

Significantly, TRIPS contains no general health exception. Article 8.1 merely confirms that Members remain free to adopt measures necessary to protect health “provided that such measures are consistent with the provisions of this [TRIPS] Agreement”. The negotiators of TRIPS thus deliberately excluded any general health exception for intellectual property rights. Indeed, there is no need for a broad health exception in TRIPS, since trade marks are simply distinguishing signs. Trade marks cannot be harmful to health.

Plain Packaging would further constitute an unjustified barrier to international trade in breach of Article III(4) of the GATT and Articles 2.1 and 2.2 of the TBT.

Plain Packaging is not required by the FCTC in any way. The FCTC does not even mention Plain Packaging. States cannot go beyond the requirements of the FCTC without consideration of their obligations under other international obligations like the TRIPS and TBT agreements. This is expressly confirmed by Article 2.1 of the FCTC, which provides that a Party is not prevented from imposing stricter requirements provided that they are “in accordance with international law”. As explained above, Plain Packaging is not in accordance with – and indeed violates – international law for those Parties to the FCTC that are Members of the WTO or Parties to the Paris Convention.

If the Government were to press ahead without awaiting the outcome of the WTO challenges to Australia’s TPPA, then it would risk needless litigation and the enactment of legislation that may need to be repealed. It would also harm New Zealand’s exports by undermining – rather than encouraging respect for – WTO processes. During discussions in 2014 before the WTO Council for Trade-Related Aspects of Intellectual Property Rights:
A number of countries urged members to refrain from introducing plain packaging for cigarettes and other tobacco products … until a ruling emerges from the WTO dispute settlement cases involving Australia’s law.6

2.12 It is prudent that the New Zealand Government has decided that it will defer enactment of the Bill until the outcome of the legal challenges to the TPPA is known.7

2.13 Finally, as we explain below, some provisions of the Bill create regulatory powers extending beyond those under Australia’s TPPA, which is more narrowly focused on packaging and product appearance. The Bill would delegate the power to dictate almost any feature of tobacco product design. If invoked, these powers could create unjustified barriers to international trade additional to those resulting from Australia’s TPPA. That would expose New Zealand to separate WTO challenges which would not be resolved by the Australian WTO disputes.

Breach of Investment Treaties

2.14 Australia currently faces an Investment Treaty arbitration commenced against it by a company within the Philip Morris group.8 Were it to proceed with Plain Packaging, New Zealand would likely face similar arbitration claims.

2.15 Companies within the BAT Group have substantial investments in New Zealand which are afforded protection under New Zealand’s Investment Treaties. It is hoped that legal proceedings will not be necessary. But these companies will take all steps necessary to protect their investments from unlawful government interference. Plain Packaging legislation would breach various provisions of New Zealand’s Investment Treaties, including those:

(a) prohibiting the expropriation of investments (including goodwill and intellectual property), and measures having an equivalent effect, unless compensation is paid;

(b) requiring that investments be accorded fair and equitable treatment (FET); and

(c) guaranteeing non-discriminatory treatment.

2.16 Plain Packaging would render useless much of the intellectual property created for tobacco products, particularly device trade marks. It would be no defence that Plain Packaging would not result in the Government itself making use of the tobacco trade marks. Liability for expropriation arises if there is destruction “in whole or in significant
part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”

2.17 Further, the FET standard requires the New Zealand Government to act towards foreign investors consistently and to respect their legitimate expectations. Every legal business has a legitimate expectation that it will be able to convey information to consumers regarding product origin and quality, distinguish its products from those of competitors, and continue to use trade marks and other intellectual property which it has used for decades in accordance with New Zealand legislation. The Government must also act proportionately and not discriminate unjustifiably.

2.18 Tobacco is a legal product and the tobacco industry is a legitimate industry. Plain Packaging would undermine the most fundamental principle of participation in a market economy (i.e. an investor’s ability to compete and offer the best product for the best price). It would frustrate the legitimate expectation of BAT Group companies that they will be able to continue using long-established trade marks to differentiate products and compete. This would be a clear breach of the FET standard in New Zealand’s Investment Treaties.

2.19 In an arbitration, the New Zealand Government would be exposed not only to an order for repeal of the Plain Packaging legislation, but also to a substantial damages award. Further, the legal costs alone for each party in complex Investment Treaty arbitrations have been in the region of NZ$10-20 million. The RIS significantly understates the actual costs of such proceedings.

Inconsistency with the BoRA

2.20 Section 14 of the BoRA affirms the fundamental right of companies such as BAT and of informed, adult consumers to “to seek, receive, and impart information ... of any kind in any form”.

2.21 In rejecting a ban on alcohol advertising, the Government rightly accepted that such a ban was “[u]nlikely to be justified under the Bill of Rights Act because of the significant restriction on commercial expression that is not targeted and proportionate”. The same is true of Plain Packaging for tobacco.

2.22 We do not identify all of its flaws here, but we consider the advice of the Ministry of Justice to the Attorney-General that the Bill “appears to be consistent” with the BoRA to be plainly wrong. The Ministry’s advice:
(a) focuses on the subjective question of whether Plain Packaging would reduce the “appeal of tobacco products”. But making tobacco packs ‘plain’ is not a coherent public policy objective in itself. The critical question is whether Plain Packaging would actually cause people to stop smoking or not to start;

(b) fails to consider the experience in Australia following the introduction of Plain Packaging;

(c) fails to consider whether New Zealand’s prior packaging measures, through graphic health warnings, reduced smoking. They did not; and

(d) fails to consider (either properly or at all) decisions of the Supreme Court of Canada and of United States courts which indicate that Plain Packaging legislation would fail the reasonable limitations test under section 5 of the BoRA. The measures struck down by the US and Canadian courts for breaching the right to freedom of expression were far less extreme than Plain Packaging.

**Repugnancy to fundamental common law values**

2.23 It is revealing that the Government appears to accept that an advertising ban on alcohol may amount to an unjustifiable interference with, inter alia, fundamental common law principles because it may restrict property rights. This reasoning, if applied consistently, also precludes the adoption of Plain Packaging for tobacco products. Indeed, it applies even more strongly to tobacco, because tobacco advertising is already prohibited by the SFEA and because Plain Packaging would involve the substantial impairment of trade marks and goodwill, which are recognised as property rights under the Trade Marks Act 2002 and at common law, as well as other intellectual property rights.

**3 PLAIN PACKAGING WILL NOT REDUCE SMOKING RATES**

**Summary**

3.1 The RIS prepared by the Ministry of Health in support of the Bill states that “[t]he overarching purpose of New Zealand’s tobacco control policy is to ultimately reduce smoking prevalence ... and ... improve population health outcomes” [emphasis added].
3.2 But there is no credible evidence that Plain Packaging would reduce smoking prevalence. All studies cited in support of the Bill are based on speculative work with surveys and focus groups. Not a single study cited in the RIS focuses on actual smoker behaviour. There is no credible evidence that packaging has any impact on smoking initiation, cessation or relapse.

3.3 Plain Packaging has not improved public health in Australia. It has failed to reduce smoking rates in Australia, and tobacco sales volumes have ceased to decline. Sales volumes increased slightly in 2013 for the first time in five years.

**Lack of credible evidence**

3.4 The only relevant question for policy makers is whether Plain Packaging would affect actual smoking behaviour.

3.5 The other objectives identified in the Bill’s explanatory note include: “reduc[ing] any wider social acceptance and approval of smoking and tobacco products”; “reduc[ing] the likelihood that consumers might acquire false perceptions about the harms caused by tobacco products”; “reduc[ing] the appeal of tobacco products and smoking”; and “prevent[ing] the design or appearance of any form of tobacco product packaging ... from having any effect, visual or otherwise, that might ... serve to advertise or in any other way promote the desirability of tobacco products ...”. Plain Packaging is unlawful irrespective of any inquiry into proportionality. But if such an inquiry is required, then these subsidiary objectives cannot justify Plain Packaging unless there is evidence that pursuing them will improve public health – by reducing smoking rates. There is no such evidence.

3.6 It cannot credibly be suggested that Plain Packaging is necessary to prevent branded packaging from misleading smokers. If there were evidence that any aspect of tobacco product packaging is misleading, then the Commerce Commission would have exercised its regulatory powers under the Fair Trading Act 1986.

3.7 Tobacco packaging and the appearance of cigarettes themselves do not influence smoking initiation or cessation. Rather, the consistently reported causes of youth smoking initiation are family and peer influence, price and access to cigarettes. Professor James Heckman, a Nobel Prize-winning economist specialising in research on adolescent behaviour, reviewed a vast amount of literature on the causes of youth smoking and concluded that:
The available evidence in the developing literature on adolescent risky behavior, including smoking, supports a multi-causal model for youth smoking, as many factors have been empirically linked to youth smoking in this literature. These factors include price, parental influences, risk preferences, peer influences, and access.20 [emphasis added]

3.8 The available evidence as to what causes New Zealanders to smoke identifies similar causal factors – not packaging. For example, a Health Sponsorship Council report cites “peer smoking, family environment, the nature of access to tobacco products, low self-esteem, and participation in risk-taking behaviours”.21

3.9 It is unsurprising that branded packaging does not cause smoking initiation. The role of branding and trade marks is simply to allow a business to convey information concerning product origin and quality to customers, thereby distinguishing its products from those of rival suppliers. As the New Zealand Government’s Intellectual Property Office explains, “[a] trade mark enables businesses to distinguish their products or services from similar products or services offered by competitors”.22

3.10 Professor Jonathan Klick (Professor of Law and Economics at the University of Pennsylvania, USA and Erasmus Chair of Legal Studies at Erasmus University, The Netherlands) reviewed the evidence cited in support of Plain Packaging in the expert report that accompanied our Consultation Response and stated that “[t]he tobacco industry’s interest in packaging is completely consistent with a desire to compete over market share even if the size of the overall market is unaffected by packaging.”23

3.11 The irrelevance of packaging to smoking initiation and cessation is confirmed by the failure of graphic health warnings to have any impact on tobacco consumption. Tobacco packs in New Zealand have been emblazoned with graphic health warning images since 2008 – see the examples below.
3.12 However, these very prominent warnings had no impact on the prior gradual downward trend in tobacco consumption in New Zealand, even though the Ministry of Health’s focus group studies (based on speculative ‘evidence’) predicted that they would.\textsuperscript{24}

3.13 The failure of the graphic health warnings is clear from the chart below. BAT’s New Zealand sales volumes were unaffected by the introduction of the graphic warnings in 2008.
3.14 The graphic warnings did not affect tobacco consumption because people smoke for the reasons identified above (not because of packaging) and because there has been universal awareness of the risks of smoking for decades.

3.15 Indeed, the High Court has found that “by 1968, those who had even a passing interest in current affairs would undoubtedly have been aware that there was a strong link between smoking and lung cancer”.25 Tobacco has been sold with health warnings in New Zealand for almost 40 years. Even in 1993, well before the introduction of graphic health warnings, 93% of the adolescent smokers who participated in a New Zealand study knew that smoking is harmful.26 A 2004 survey for the Ministry of Health found that 97% of daily smokers were aware of the previous textual pack health warnings.27 This demonstrates comprehensively that branded packaging does not reduce smokers’ awareness of the risks of smoking. Further, 97% awareness is extremely high given that the United States’ Surgeon General recognises that it may be “unrealistic to set a goal above 90 percent of smokers for public knowledge”.28

3.16 Contrary to what the RIS29 and a Cabinet Minute30 suggest, there is no “strong evidence to support the role of Plain Packaging in reducing smoking rates”. Even the
flawed studies cited in the RIS make no such claim. None of the studies considered in the comprehensive 2012 UK Public Health Research Consortium (PHRC) review actually tested whether Plain Packs affect the decision to smoke. The studies generally involved surveys in which participants were asked for their subjective opinions about the appeal of Plain Packs and whether they might cause smokers to quit. A United States appellate court recently dismissed such surveys as inherently unreliable. It described them as “questionable social science”, “mere speculation and conjecture” and as “not provid[ing even] a shred of evidence”.

3.17 The paucity of the so-called ‘evidence’ cited in support of Plain Packaging was analysed in our Consultation Response (see Appendix 1, Section 2) and in the accompanying expert report by Professor Klick, which explained that:

The literature on plain packaging provides neither a reliable nor a relevant foundation for plain packaging regulations. From a relevance standpoint, there is not a single research article that examines the effect of plain packaging on actual smoking decisions. Instead, the vast majority of papers in this literature simply ask people about their preferences over pack designs, the qualities they associate with various packs, or the effect they think differing pack designs might have on their smoking habits. There has never been a published study validating these measures as useful predictors of smoking behavior.

... However, even if the fact that the literature does not examine policy relevant metrics such as actual smoking behavior is ignored, the literature is rife with methodological errors and biases that limit the ability of an impartial referee to draw any conclusions about the likely effect of a plain packaging regulation. As Moodie et al note in the PHRC review …, very few of the studies they examined had representative samples.

Even representative samples in this context could generate troubling biases. Specifically, researchers have raised the concern that in contexts where it is relatively easy for subjects to intuit the preferences of the researcher, subjects will provide answers that confirm the researcher’s expectations even if they do not conform to the subjects’ actual beliefs. This expectancy bias undermines the validity of the research. There are no examples in this literature [cited in support of plain packaging] where researchers take measures to eliminate such sources of bias, such as using double blind experiments. Instead, in every article in the literature, it is clear to the subjects that the researchers are public health researchers. This leaves open the distinct possibility that the subjects are hoping to somehow impress, or at least not offend, the researchers by providing the socially acceptable responses.

... The literature in this area [cited in support of plain packaging] is unreliable and largely irrelevant to the question of how plain packaging would affect smoking rates in New Zealand. This is true even if all of the flawed studies are combined, since there is no sense in which the individual flaws somehow cancel each other out. There is no sound scientific basis for the claim that plain packaging will reduce smoking.
3.18 More recent reviews and studies cited in support of Plain Packaging (including the updated review34 cited in the departmental disclosure statement for the Bill prepared by the Ministry of Health35) suffer from exactly the same fundamental methodological flaws as the earlier material cited in the RIS and reviewed by Professor Klick. They provide no credible evidence to support Plain Packaging.

**No reduction in smoking in Australia**

3.19 There has been a strong focus on Australia as the first and only country in the world to introduce Plain Packaging.

3.20 The Australian experience provides the only objective and credible evidence about the *actual* effects of Plain Packaging – as compared with flawed and biased studies based on survey participants' subjective opinions.

3.21 Significantly, during the 12 months since its introduction in Australia, Plain Packaging has failed to achieve its aims.

(a) The volume of legal tobacco sold in Australia was declining with a CAGR of -4.1% in 2008-2012, before Plain Packaging was introduced.36 After its introduction, this downward trend has halted entirely. Sales volumes actually increased in 2012-2013 for the first time in five years (by +0.3%). This is clear from the chart below.

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**Halting the prior downward trend in tobacco sales volumes**

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Australian legal TMC and RYO sales volumes - RYO converted at 0.8g per stick - Source for data InfoView Technologies Pty Ltd - Billions of sticks / stick equivalents
(b) The adult smoking rate in Australia was declining with a CAGR of -3.3% in 2008-2012, before the introduction of Plain Packaging. But in 2012-2013, the change was only -1.4%. Plain Packaging has failed to reduce smoking rates. The chart below shows sales volumes and Australian adult smoking rates (using independent Roy Morgan survey data).

**Industry volume and smoking incidence (factory made cigarettes and roll your own)**

(c) Further, Plain Packaging has not reduced youth smoking in Australia. In a recently released study, researchers at the University of Zurich found no statistically significant change in smoking incidence among Australian youth (aged 14-17 years) following the introduction of Plain Packaging. The study used Roy Morgan survey data from January 2001 to December 2013.

(d) Finally, consumption of illicit tobacco has increased since Plain Packaging was introduced, as is explained in section 4 of this Submission below.

3.22 It is therefore clear that Plain Packaging has not improved public health in Australia. That is unsurprising, given the established evidence about the actual causes of smoking initiation and the failure of graphic health warnings (see discussion above).

3.23 By contrast, studies which seek to draw positive conclusions about the effects of Plain Packaging in Australia ignore empirical data on smoking rates and consumption. For example, a recent report that has attracted media attention focuses on the number of...
calls to the Quitline support service. It found a 78% increase in calls associated with the phasing in of Plain Packaging.

3.24 There is a very material difference between simply calling Quitline and actually giving up smoking. Quite aside from this, the study suffers from a number of crucial weaknesses. The authors themselves acknowledge that:

A weakness of our study is its inability to differentiate the impact of the increased size of graphic health warnings that happened simultaneously with tobacco plain packaging from the impact of plain packaging itself. Quitline calls are one measure of changes in people’s behaviour in response to legislative change. The rate of calls to Quitline may have been confounded by the Quitline telephone number appearing to be more prominent in the absence of proprietary branding. Also, our study has shown an association but cannot prove causation.

3.25 The calls to Quitline also coincided with a strong media campaign to promote Quitline. Further, as the chart below from the study shows (red markings added), the increase in Quitline calls was not sustained. Calls soon dropped back to their prior levels. In fact, Plain Packaging resulted in a lower relative increase in Quitline peak call volumes than did the introduction of graphic health warnings in Australia in 2005.

![Chart showing weekly calls to Quitline, target audience rating points (TARPs) and cigarette price relative to income, before and after the introduction of plain tobacco packaging and graphic health warnings.]

3.26 None of the research cited in support of Plain Packaging provides any credible evidence that the measure would achieve the Government’s public health aims. The only reliable evidence – as to actual smoker behaviour – indicates that Plain
Packaging in Australia has not reduced smoking. It is a clearly disproportionate and wholly ineffectual measure.

4 ILLICIT TRADE WOULD INCREASE

Summary

4.1 New Zealand already has an illicit market in tobacco products. While it understates the risk, the RIS acknowledges the “possibility of increased counterfeiting and black market sales of tobacco” due to Plain Packaging.42

4.2 Criminals do not abide by tobacco control laws. They will supply cheap tobacco products – with no excise paid, no manufacturing hygiene standards, no health warnings and no age restrictions.

4.3 Evidence from Australia demonstrates that Plain Packaging is likely to make this problem substantially worse. Last year, KPMG conducted a study of the size of Australia’s illicit tobacco market (see Appendix 2). They found that illicit tobacco consumption reached its highest-recorded proportion of total consumption in Australia — 13.3% — following the introduction of Plain Packaging.43

Illicit tobacco consumption as a proportion of total consumption, 2007-H1 2013(1)(2)(3)(4)

(Note: Tobacco excise taxes were increased in Australia in late 2009. Plain Packs were introduced between 1 October 2012 and 1 December 2012.)
Illicit trade in New Zealand

4.4 The illicit trade in tobacco is already a problem in New Zealand. The New Zealand Customs Service is working hard to combat illegal tobacco.

(a) Detentions amounted to 800,000 cigarettes and 221 kilograms of loose tobacco on average per year in 2007-2009 and 805,464 cigarettes between June 2011 and May 2012.

(b) There was a 600% increase in mail interceptions of tobacco in 2012 and a 9% increase in interceptions at airports.

(c) Two men were convicted in 2012 for the unlawful manufacture of ‘chop-chop’ (illicit loose tobacco). Almost 5,000 kilograms of tobacco leaf was seized, worth approximately $2 million if sold. The total fines imposed were only $7,500.

(d) BAT commends the good work of the Customs Service, but these figures are likely to be at the low end of the actual amounts of illicit product in the market because smuggling is difficult to detect.

4.5 A Customs Service report from 2012 released under the Official Information Act 1982 acknowledges the illicit trade risk facing New Zealand:

Without the introduction of additional mitigation strategies (similar to those used overseas) it is LIKELY that the illicit tobacco market in New Zealand will increase over the next five years. Due to the resulting loss of revenue and additional health impacts that any increase in illicit tobacco usage entails, the consequences of an increase in the trade of illicit tobacco to New Zealand are considered MODERATE, and therefore the risk is assessed as HIGH.

Plainer packs are easier to copy

4.6 According to the Anti-Counterfeiting Group (a trade association representing more than 170 organisations globally and a recognised authority on the worldwide trade in fake cigarettes):

Plain packaging will be welcomed by counterfeiters. It will make their job much simpler and make it harder for consumers to spot fakes. It creates a trading environment where all packaging will look essentially the same and where the standard designs will be easy to replicate illegally.

4.7 Put simply, the plainer the pack, the easier it is for criminals to copy, and the easier it is for counterfeit packs to go unnoticed.
4.8 Packaging experts believe that pack complexity and the use of specialist manufacturing processes present a technical barrier to counterfeiting. For example, the packaging features likely to be outlawed under Plain Packaging include:

- Irregular ridges;
- Embossing;
- Any other irregularities of shape or texture or other embellishments;
- Any glues or other adhesives used in manufacturing that are coloured and non-transparent.

4.9 Plain Packaging would thus provide counterfeiters with a single blueprint for tobacco packaging, which they could use ad infinitum. This will drive down the cost of illicit production and create massive economies of scale for smugglers. Rather than having to copy a variety of different packs regularly, they will in essence need to copy only one, with much lower set up costs and simpler equipment.

**Australia’s 154% increase in illicit cigarettes**

4.10 The experience in Australia supports our contention that Plain Packaging will provide a major boost to the illicit industry. An expert report by KPMG\(^5\) (see Appendix 2) shows that the illegal market in Australia has increased significantly since the introduction of Plain Packaging, revealing the negative impact that the Bill could have on retailers, small business and Government excise revenue. The data relates to the twelve months ending 30 June 2013.

4.11 The Australian KPMG report found that:

(a) Illicit tobacco consumption has reached its highest-ever level relative to total consumption and now costs the Australian government an estimated AU$1 billion in lost tax revenue annually.

(b) The Australian illicit tobacco market was previously dominated by chop-chop loose tobacco, as also found in New Zealand. Since the introduction of Plain Packaging, the Australian illegal market has shifted. Consumption of smuggled loose tobacco fell by 40%. But that was more than offset by a 154% rise in consumption of illicit manufactured cigarettes.
Illicit manufactured cigarettes (including ‘illicit white’ brands) are proliferating. Illicit whites such as the ‘Manchester’ brand in Australia are produced quasi-legally, often in overseas free trade zones, and are generally not sold legally anywhere in the world. They are smuggled un-taxed into countries like Australia. Following the introduction of Plain Packaging, their market share in Australia has grown rapidly.

4.12 Further, research carried out by Roy Morgan found that more and more customers are now asking retailers to sell them illicit cigarettes. 33% of retailers have reportedly been asked by customers for illicit tobacco since Plain Packaging was introduced.

4.13 In addition, one of the biggest tobacco seizures in Australian history occurred in 2013. A major police and customs service operation in Melbourne in October saw the seizure of 80 million illegal cigarettes and 71 tonnes of loose tobacco, worth an estimated AU$67 million in lost government revenue.

**Criminals do not care about tobacco control laws**

4.14 Illicit tobacco traders do not pay tax. Nor do they comply with laws and regulations on tobacco control. Most importantly, they provide the cheapest available cigarettes, often at less than half the legal price, and have no qualms about selling to children.

4.15 It is generally accepted that one of the risks associated with Plain Packaging is increased consumer price sensitivity. This is because Plain Packaging removes any visible brand differentiation and increases competition on price. This gives a huge advantage to those who can supply the lowest-cost product: i.e. illegal traders.

4.16 Additionally, an expanding illicit market will expose customers to more unregulated products, with no controls on manufacturing hygiene standards, no health warnings, and no age restrictions. A New Zealand Customs report states that:

> … Counterfeit tobacco [products] have been found to contain arsenic, rat droppings, mites and higher volumes of tar and carbon monoxide than their legal equivalents.

5 **RISK TO NEW ZEALAND’S REPUTATION AND EXPORTS**

5.1 Plain Packaging of tobacco products would represent a fundamental shift in New Zealand’s attitude towards international trade and intellectual property. Its implications would extend far beyond the tobacco industry.
5.2 More than 15 countries (including China and Indonesia)\textsuperscript{54} have publicly voiced their opposition to Plain Packaging at WTO meetings. Leading businesses and trade associations around the world have expressed serious concern.\textsuperscript{55} An unprecedented 35 countries have registered their interest in the WTO proceedings against Australia’s TPPA.

5.3 If New Zealand introduces Plain Packaging, it will do serious damage to its own economic interests. In-bound investors would rightly be disturbed by New Zealand’s apparent willingness to disregard private property rights and its international obligations.

5.4 Further, by adopting Plain Packaging for tobacco, New Zealand would compromise its ability credibly to oppose similar labelling and brand expropriation policies in other countries when they affect New Zealand’s exports. The excessive graphic health warnings for alcoholic beverages proposed by the Government of Thailand are a case in point.

5.5 BAT’s view that Plain Packaging breaches the TBT is not dissimilar from that adopted by the New Zealand Government itself in opposing Thailand’s proposal to require alcoholic beverages to carry excessive graphic health warnings. The meeting minutes of the WTO Committee record that:

The representative of New Zealand shared the concerns expressed by previous speakers. While New Zealand was supportive of the right of WTO Members to introduce new regulations to address specific public health issues, concerns remained that the proposed labelling requirements were unnecessarily trade restrictive and that less trade-restrictive approaches were available to achieve the stated objective. The New Zealand representative also argued that the new requirements would impose significant additional costs and administrative burdens on exporters, hence causing trade to be reduced. He informed the Committee that written comments had been sent to Thailand’s enquiry point. In particular, New Zealand was interested to know about the reasons and basis for the approach taken to labelling, including information on what alternatives had been considered to achieve the same objective, for example, the consideration of current international practices and the development of public education campaigns.\textsuperscript{56} [emphasis added]

5.6 If New Zealand adopts Plain Packaging, then the Government will have undermined its ability to advance such arguments with credibility in the future.

5.7 The New Zealand Government considers that alcohol consumption imposes enormous costs on New Zealand society in terms of crime and public health.\textsuperscript{57} While it is often asserted that tobacco is unique in that no degree of tobacco consumption is
safe, this overlooks the fact that government and cancer research agencies state that there is no safe level of alcohol consumption:

Studies have consistently shown that there is no safe threshold. Just three units [of alcohol] a day – the amount in a pint of strong lager or a large glass of wine – can significantly increase the [cancer] risk.58

5.8 Further, with regard to unhealthy foods and food labelling, the New Zealand and Australian Governments have stated that:

The chronic disease burden caused by poor diet is the largest cause of ill health in the community. It has a greater impact than smoking, physical inactivity and alcohol misuse. ... In New Zealand, approximately one in three adults is overweight and one in four obese, while one in five children aged 2–14 is overweight, and one in 12 is obese.59

5.9 There is a very real risk that Plain Packaging, once introduced for tobacco products, will be extended to other goods. Even the United Kingdom Government has formally raised the prospect of plain packaging for alcohol.60 Turkey has introduced large graphic health warnings for alcoholic drinks.61 South Africa’s Health Minister has stated that branding should be removed from alcoholic beverages.62 Further, South Africa has adopted severe labeling restrictions for infant formula.63

5.10 By adopting Plain Packaging, New Zealand would be seen to have supported a wholly disproportionate regulatory measure that is not supported by any credible public health evidence. Governments in other countries would see this as an encouragement to pursue similar policies to the detriment of New Zealand’s exports. Important New Zealand industries would be harmed.

6 A RANGE OF EFFECTIVE ALTERNATIVES ARE AVAILABLE

**Summary**

6.1 Instead of pursuing Plain Packaging, the Government should pause, monitor the effect of its ongoing excise tax increases, and then consider whether there is any need to go further. This would allow New Zealand to observe the outcome of the WTO and Investment Treaty proceedings against Australia.

6.2 There are a number of regulatory options which the Government should consider pursuing, either in combination or individually, instead of resorting to Plain Packaging. Each is a better option than Plain Packaging, which would be costly, risky and ineffective.
6.3 It is illogical for the Government to pursue a flawed policy such as Plain Packaging that will not stop people from smoking, while simultaneously permitting significant amounts of tobacco to be manufactured for personal use. Home-grown tobacco has no manufacturing controls, no excise paid, no health warnings and no checks on age.

6.4 Section 68A of the Customs and Excise Act 1996 permits any person over 18 to grow and manufacture for personal use up to 15 kg of tobacco per annum – the equivalent of about 89 RYO cigarettes per day. The health risks for home-grown tobacco are no less than for manufactured tobacco. The regulatory divergence cannot be justified. A less trade-restrictive measure than Plain Packaging would be to remove the personal use exemption. By contrast with Plain Packaging, this could actually help to achieve the Government’s public health objectives – by increasing prices through excise and reducing unregulated supply.

6.5 The current ‘personal allowance’ is extraordinarily high and clearly provides an opportunity for abuse, with semi-commercial scale growing as evidenced by the significant amounts of chop-chop available in New Zealand. Ernst and Young estimated in 2010 that home-grown tobacco equated to about 5% of reported RYO consumption in New Zealand, while illicit New Zealand-grown tobacco equated to about 8%. There is little to deter growers who abuse the exception for personal gain.

6.6 The Customs Service recognises the problem created by the personal allowance: 

Whilst home grown tobacco for personal use is legal in New Zealand, legislative thought should be given to reducing the personal amount of 15 kilograms per year. There is general agreement that this allowance is [higher] than the actual consumption by the average smoker (approximately five kilograms per year). There is potential for internet sourced tobacco, or that which is grown in excess of the personal allowance or personal consumption, to be diverted into the illicit New Zealand market in a similar manner to Australia.

6.8 New Zealand has recently adopted a range of aggressive tax increases. BAT does not oppose measured, graduated increases in tobacco excise taxes. The Ministry of Health itself appears to accept that tobacco consumption in New Zealand has historically fallen principally in response to excise increases. The Hon Tariana Turia has stated that “tax works best” among tobacco control measures.
However, the Prime Minister\textsuperscript{70} has acknowledged the risk that excessive excise increases will fuel illicit trade. Significant excise increases were imposed for 2010-2016. New measures should not be implemented before the conclusion of the Government’s current programme of tax increases and before both the positive and negative consequences of recent tobacco control legislation (including excise increases and the retail display ban) have been properly analysed.

**Well-designed education programmes**

As set out in our Consultation Response (see Appendix 1, Section 3), empirical evidence shows that well-designed education programmes do reduce youth smoking. According to Scandinavian research, to be successful, such programmes must focus on enabling youth to resist peer pressure and on improving their decision-making skills.\textsuperscript{71} This is consistent with findings on the causes of youth smoking initiation.

Mandatory education programmes used in Germany have also shown a marked and lasting improvement in youth smoking prevention. Among young people in Germany, the proportion of smokers has fallen from 27.5\% in 2001 to 11.7\% in 2011.\textsuperscript{72} The German curriculum teaches that smoking is addictive and causes serious, life-threatening illnesses, but it also focuses on helping teenagers to develop independent thinking and resist peer pressure.

**Offences for youth purchasing and proxy-purchasing**

Health Promotion Agency research with Year 10 participants in 2012 found that 55\% of underage smokers said that during the past month cigarettes were usually given to them by friends or peers. One third reported usually buying their cigarettes from friends or peers.\textsuperscript{73}

It is not currently an offence to supply tobacco to minors when not in a public place. It should be an offence to on-supply tobacco to a minor regardless of whether the tobacco is handed over in public or private.\textsuperscript{74} It should also be an offence for a minor to buy tobacco products, as it is in Scotland.\textsuperscript{75} These offences both currently exist in relation to alcohol in New Zealand.\textsuperscript{76} There is no good reason why they should not apply to tobacco.
**Utilising existing enforcement measures**

6.14 Restrictions on youth access to tobacco, when rigorously enforced, have been found to reduce youth smoking. In 2012, around 25% of underage smokers said that during the past month their tobacco was usually purchased directly from retailers.

6.15 The power to issue infringement notices to retailers for selling tobacco to minors came into force in July 2012. Effective utilisation of this scheme, as currently seen through the Ministry of Health, coupled with education for retailers as to their obligations, will make the current scheme even more effective.

**Retailer notification**

6.16 We support a notification requirement, meaning that retailers would have to notify the Ministry of Health if they intend to sell tobacco products. No licence would be required, but there could be a requirement that retailers demonstrate an understanding of the SFEA and their obligations when selling tobacco products. The financial burden for smaller retailers would be minimised, with no licensing fees, while youth access to tobacco could be further reduced through greater retailer education and enforcement.

**7 TWO SPECIFIC COMMENTS CONCERNING THE BILL**

**Prohibition of product features and control of “any aspect of design”**

7.1 Clause 17 of the Bill would insert a new section 39A into the SFEA.

7.2 As noted above, the proposed new section 39A(1)(a) permits the making of regulations “prescribing ... requirements, or options permitted, for all or any aspects of the appearance of a tobacco product”. “Appearance” is defined by the new section 39A(5) to include “anything that may affect a person’s senses” and “any aspect of design, such as shape, size, colour, texture, or material”.

7.3 Similarly, the new section 39A(2)(e) permits the making of regulations which “prohibit any type of feature from a tobacco product ...”.

7.4 These regulation making powers go far beyond the purpose of the Bill as explained in the RIS and the explanatory note, which indicate that the Bill is essentially concerned with “packaging” and the external appearance of tobacco products. The new section 39A, as presently drafted gives the Government wide delegated powers to dictate any
aspect of product design. Section 39A is not limited to packaging or even the external appearance of tobacco products.

7.5 Section 39A goes far beyond the regulatory powers conferred by section 26 of Australia’s TPPA (which authorises regulations governing the appearance, but not the composition or design, of tobacco products) and beyond the Government’s aim – as stated in the Bill’s explanatory note – of "model[ling] ... the legislation [on] Australia’s legislative package for tobacco plain packaging ..." [emphasis added].

7.6 We submit that the Government should not be empowered to dictate the design of cigarettes. Indeed, changing any one design element may have unintended and damaging consequences, such as increased tar, nicotine and carbon monoxide levels. The science focusing on tobacco and tobacco smoke is very complex. The effects of changes to tobacco product design, content or characteristics may not be truly known for decades (only after the necessary epidemiological studies have been carried out and/or until scientific knowledge improves). Regulators should therefore proceed with caution before they mandate, and assume responsibility for, changes to tobacco products, which could result in increased health risks. Even if Government-mandated product changes do not make the products more harmful, there is a very real risk that consumers will mistakenly believe that any cigarette modified in accordance with Government specifications will have been modified to make it safer.

7.7 As noted above, if used, the Bill’s wide powers to dictate product design could have significant implications. New Zealand’s Plain Packaging regime could create unreasonable barriers to trade which are different from or additional to those under Australia’s TPPA. If that occurred, then any WTO decision concerning Australia’s TPPA may not resolve the issue of whether New Zealand’s Plain Packaging regime complies with the WTO agreements. A separate WTO proceeding may be necessary to address New Zealand’s additional design controls.

7.8 It should also be noted that Article 2.8 of the TBT requires governments to specify technical regulations “in terms of performance rather than design or descriptive characteristics.”

7.9 The aspects of the Bill objected to here (and any related provisions to similar effect) should be deleted.
Absence of transition period for manufacturers and importers

7.10 Clause 2 of the Schedule to the Bill provides that “[t]o avoid doubt, there is no transitional period for a manufacturer or an importer or for a person who packages, or arranges for the packaging of, a tobacco product.” This means that manufacturers would not have any certainty as to the timeframe they will have to prepare to comply with the new requirements.

7.11 This could have significant unreasonable consequences. Producing Plain Packs is not as straightforward as taking existing packaging and making it green (or any other ‘plain’ colour). A period of at least 12 months from when the regulations are promulgated will be needed (inter alia) to re-design packaging, adapt packaging machines, schedule production, manufacture new products and packaging, and import new product into New Zealand.

7.12 A 12 month transition period was permitted when graphic health warnings were introduced in New Zealand, and there was a further 6-month transitional period during which non-compliant products could be sold through the retail chain.80 This was reasonable.

7.13 If there is no reasonable transition period, then manufacturers may, through no fault of their own, be unable to comply or supply. That is not the aim of the Bill.

7.14 We submit that clause 2 of the Schedule to the Bill should be amended to provide for a 12 month transition period from the date on which any regulations specifying new Plain Packaging requirements are promulgated.

8 CONCLUSION

8.1 Plain Packaging would be unlawful. It would be a flagrant breach of New Zealand’s obligations under the WTO agreements, which require protection of intellectual property rights. It would further involve unlawful expropriation and unfair and inequitable conduct in breach of Investment Treaties. In addition, it would be repugnant to the BoRA and fundamental common law principles.

8.2 Since TRIPS in particular lacks any general public health exception, the unlawfulness of Plain Packaging does not turn on the wholly disproportionate nature of the Bill. But it would in any event be impossible for the Government to establish that Plain Packaging is a proportionate measure that is reasonably necessary for the protection of public health. Australia’s experiment with Plain Packaging has not achieved its
public health objectives. Less extreme alternative measures are available. Trade marks are not hazardous to health. Prohibiting their use does not reduce smoking. Rather, it all but extinguishes the ability of tobacco companies to compete, confuses consumers, promotes illicit trade, and creates a market driven by increased price competition.

8.3 As Professor Klick has explained,81 the studies cited in support of Plain Packaging are “unreliable and largely irrelevant” because “[t]here has never been a published study validating [opinions expressed by survey and focus group participants] as useful predictors of smoking behavior” and because the literature is “rife with methodological errors and biases”.

8.4 The best evidence about the likely effects of Plain Packaging is the experience in Australia after 1 December 2012, where there has been:

(a) an increase in illicit trade to record levels;
(b) a failure to reduce smoking rates; and
(c) a halting of the prior downward trend in tobacco sales volumes, with sales volumes rising (albeit slightly) for the first time in five years.

8.5 The ineffectiveness of Plain Packaging is unsurprising because the health risks of smoking have been universally known for decades and because packaging design and trade marks are not causal factors in smoking initiation, cessation or relapse.

8.6 Plain Packaging would be a symbolic measure – but one that would ultimately be ineffective, while creating damaging, unintended consequences for retailers, consumers, legitimate businesses and New Zealand’s international reputation.

8.7 BAT strongly urges the Committee to recommend that the Bill should not proceed.
1 For a detailed discussion of the flawed nature of the studies cited in the RIS, see the expert report of Professor Jonathan Klick, which is included as Appendix 2 to our Consultation Response (see Appendix 1 to this Submission).

2 Plain Packaged tobacco products began to be rolled out in Australia in September-October 2012. All tobacco products were required by law to be sold in Plain Packaging from 1 December 2012 onwards.


5 Only the non-binding FCTC Guidelines suggest that parties to the FCTC “should” (not “shall”) “consider” (not “adopt”) Plain Packaging.


Consultation Response (see Appendix 1), at pp 21-28.


See section 9(1) of the Trade Marks Act 2002 and AG Spalding & Bros v AW Gamage Ltd (1915) 32 RPC 273 at pp 284-285 per Lord Parker.

RIS at para 9.

Explanatory note to the Bill, at pp 1-2.


Expert Report of Professor Jonathan Klick at p 2. See Appendix 2 to our Consultation Response (Appendix 1 to this Submission).

Consultation Response (see Appendix 1), at pp 21-28.


RIS at para 35.


Expert Report of Professor Jonathan Klick at pp 1, 5 and 8. See Appendix 2 to our Consultation Response (Appendix 1 to this Submission).


The compound annual growth rate (CAGR) calculation and chart are both based on sales volumes provided by Infовiew Technologies Pty Ltd (industry exchange data).


Cancer Epidemiology and Services Research (CESR), Sydney School of Public Health, University of Sydney "Association between tobacco plain packaging and Quitline calls: a population based,

42 RIS at para 23.


54 Chile, China, Cuba, Dominican Republic, El Salvador, Honduras, Hong Kong, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Philippines, Russian Federation, Switzerland, Turkey, Ukraine, Zambia and Zimbabwe.


56 G/TBT/M/50, 28 May 2010 (10-2960), Committee on Technical Barriers to Trade, Minutes of the Meeting of 24-25 March 2010 at para 7, available at http://www.smoke-free.ca/trade-and-tobacco/wtosecretariat/TBT50_28mai10.pdf (emphasis omitted). New Zealand reiterated its concerns at a further meeting on 20-21 March 2012 (G/TBT/M/56) at para 78, available at https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_S005.aspx?MeetingId=91240&Language=1&StartDate=&EndDate=&SubjectId=&SearchPage=&&CatIds=106524,102698,83374,89254,82922,82938,67836,88898,101664,106751,89001,101299,38682,58962,70172,49004,64285,92374,87592,27743,42230,85358,75192,48480,68324,106242,109496&languageUIChanged=true#.


An empirical study of changes in actual smoking behaviour among 4,441 students in 99 Norwegian schools in response to a school-based smoking prevention programme showed, using regression analyses, that “school-based intervention, based on a social influence approach, proved to be effective at reducing smoking rates among participants” (at p 189). The study’s authors concluded that “a carefully planned and adequately resourced intervention program under the right circumstances actually does produce substantial effects” (at p 198). See Ola Jøsendal, Leif Edvard Aarø, Torbjørn Torsheim and Jon Rasbash “Evaluation of the school-based smoking prevention program ‘BE smokeFREE’” (2005) 46 Scandinavian Journal of Psychology 189.

See Drugs and Addiction Report 2012, carried out on behalf of the federal drug authorities (May 2012) and Investigation by the Federal Centre for Health Education into tobacco consumption by youths and young adults (February 2011).


See section 30AA of the SFEA.


Sale and Supply of Alcohol Act 2012, ss 241 and 243.


Smoke-free Environments (Controls and Enforcement) Amendment Act 2011, s 38C.

See Smoke-free Environments Regulations 2007, regulation 34.

Expert Report of Professor Jonathan Klick at pp 1, 5 and 8. See Appendix 2 to our Consultation Response (Appendix 1 to this Submission).
APPENDIX 1 –

BAT’s Consultation Submission to the Ministry of Health
including expert report by Professor Klick
PROPOSAL TO INTRODUCE PLAIN PACKAGING
OF TOBACCO PRODUCTS IN NEW ZEALAND

SUBMISSION BY
BRITISH AMERICAN TOBACCO (NEW ZEALAND) LIMITED
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SUBMITTER DETAILS REQUESTED BY THE MINISTRY OF HEALTH

This submission is made by British American Tobacco (New Zealand) Limited (BAT), which holds a market share of more than 70% of the New Zealand market in cigarettes and roll-your-own tobacco.

This submission was completed by: (name) British American Tobacco (New Zealand) Limited

Address: (street/box number) Level 14, 66 Wyndham Street

(town/city) Auckland

This submission is dated 5 October 2012.

Submitted by email to tobacco@moh.govt.nz.

BAT consents to the release of this submission by the Ministry of Health under the Official Information Act 1982 and reserves the right to release this document to the public itself.
ABOUT BRITISH AMERICAN TOBACCO (NEW ZEALAND) LIMITED

BAT is a member of the global British American Tobacco group of companies and is responsible for the importation, distribution and sale of tobacco products in New Zealand (including cigarettes, roll-your-own tobacco and cigars). BAT has a share of approximately 71% of New Zealand sales of tailor-made cigarettes principally through the BENSON & HEDGES, DUNHILL, KENT, ROTHMANS, LUCKY STRIKE, WINFIELD, HOLIDAY, PALL MALL and FREEDOM brands and a share of approximately 73% of New Zealand sales of roll-your-own tobacco through the PARK DRIVE, PORT ROYAL, HOLIDAY and WINFIELD brands.

ABBREVIATIONS

**BAT** or **We** – British American Tobacco (New Zealand) Limited

**BAT Group** – British American Tobacco plc and the group of companies constituting its direct and indirect subsidiaries worldwide

**Consultation Document** – the Proposal to introduce Plain Packaging of tobacco products in New Zealand, Ministry of Health, July 2012

**FCTC** – the WHO Framework Convention on Tobacco Control

**Investment Treaty** – a treaty under public international law providing for the protection and promotion of investments, including the investment chapters of New Zealand’s free trade agreements and also New Zealand’s bilateral investment treaties

**Plain Packaging** – standardised packaging for tobacco products based on the legislation adopted in Australia, as described in the Consultation Document

**Response** – this document

**RIS** – the Regulatory Impact Statement: Plain Packaging of Tobacco Products, 28 March 2012

**RYO** – roll-your-own loose tobacco

**TMC** – tailor-made cigarettes

**WHO** – the World Health Organisation

**WTO** – the World Trade Organisation
1 EXECUTIVE SUMMARY

OVERVIEW

1.1 This Response explains the reasons for BAT’s opposition to the Ministry of Health’s Plain Packaging proposal, as described in the Consultation Document and the RIS. A schedule identifying the specific questions in the Consultation Document addressed by this Response is attached as Appendix 1.

1.2 In summary, BAT is strongly opposed to Plain Packaging for the reasons outlined below.

(a) Plain Packaging would not reduce tobacco consumption in New Zealand. There is no evidence that the design of tobacco product packaging has any impact whatsoever on tobacco consumption or smoking initiation or cessation.

(b) The Government could pursue a number of workable, evidence-based and less damaging regulatory options.

(c) Plain Packaging would be unlawful — it would breach New Zealand’s international obligations and be inconsistent with fundamental norms.
   - It would violate several WTO agreements which bind New Zealand and which are vital to its economy.
   - Certain companies within the BAT Group hold significant investments in New Zealand which are protected under several Investment Treaties. Plain Packaging legislation would breach these treaties, entitling the companies to an arbitral award requiring New Zealand to repeal the legislation and/or pay substantial sums in compensation.
   - Plain Packaging would unjustifiably infringe the right to freedom of expression under the New Zealand Bill of Rights Act 1990 (BoRA).
   - It would amount to an unlawful, uncompensated expropriation of a lawful industry’s valuable brands, trade marks and other intellectual property in breach of fundamental common law principles.

(d) Plain Packaging would severely reduce brand differentiation and thereby intensify price competition, reduce prices and increase tobacco consumption.

(e) It would exacerbate a very real illicit trade problem.

(f) It would compromise the Government’s ability to protect brands that are vital to New Zealand businesses when they come under threat from similarly misconceived measures in New Zealand’s export markets. More generally, a dangerous precedent would be set for all New Zealand businesses, investors and consumer autonomy.

1.3 BAT hopes that legal proceedings will not be required, but will take all measures necessary to protect its valuable property rights from unlawful interference.
We accept that smoking is harmful, that youth should not smoke, and that those who want to quit should be encouraged to do so. The Government has a major role to play in achieving these objectives.

However, evidence from New Zealand and overseas overwhelmingly indicates that these objectives cannot be achieved through the introduction of Plain Packaging.

Tobacco packaging is simply not a factor which influences smoking initiation or cessation. People choose to take up, and continue, smoking due to a range of factors, including friends smoking, family members smoking, teenage risk-taking behaviour, a desire for relief from stress, and simply the pleasure of smoking. There is no evidence that packaging influences these decisions.

This is confirmed by the failure of graphic health warnings. Tobacco packs in New Zealand have been emblazoned with gruesome images of (for example) gangrenous toes and decaying teeth since 2008. However, these warnings have not reduced tobacco consumption in New Zealand, even though focus group studies conducted for the Ministry of Health in 2004-2005 predicted that they would. The graphic warnings have failed because:

(a) people smoke for the reasons given above, not because of tobacco packs; and
(b) the warnings did not give smokers any new information about the risks of smoking, since these risks have been universally known for decades.

For the same reasons, Plain Packaging would also be unsuccessful.

The only relevant question for policy makers is whether Plain Packaging would affect actual smoking behaviour by reducing consumption. The RIS prepared by the Ministry of Health\(^1\) and a Cabinet Minute suggest that there is “strong evidence to support the role of Plain Packaging in reducing smoking rates”.\(^2\)

No such evidence exists. Even the flawed studies cited by the Ministry make no such claim. The Public Health Research Consortium (PHRC) Review is described by the Ministry as “the most thorough and up-to-date summary available of the international research evidence base for plain packaging”.\(^3\) Yet the PHRC Review’s timid conclusion is merely that “there is some evidence from the studies in this review that

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plain packaging may affect smoking-related attitudes and beliefs, and smoking behaviour”.

1.11 Even this tentative conclusion is wrong. The studies summarised in the PHRC Review are based on methodologically flawed surveys and interviews with small focus groups. While some survey participants may opine that Plain Packaging would cause smokers to quit, that is not evidence that they will actually do so. The PHRC Review itself cautions that “expressed smoking-related intentions are not always predictive of future smoking behaviour.”

1.12 When survey and focus group studies concerning the effectiveness of graphic health warnings were put to the test before a United States Court of Appeals in 2012, they were rightly dismissed by the Court as “underwhelming” and “mere speculation”. It would be hopeless for the Government to seek to rely upon such material in its defence before a court or international tribunal.

1.13 An expert opinion by Professor Jonathan Klick, Professor of Law and Economics at the University of Pennsylvania, USA and Erasmus Chair of Legal Studies at Erasmus University, The Netherlands, is attached as Appendix 2 to this Response. The opinion describes three fundamental flaws which render the studies cited in the Consultation Document and PHRC Review both irrelevant and unreliable:

(a) a failure to examine the effect of Plain Packaging on actual smoking behaviour (instead, the studies focus on the subjective opinions of survey participants);
(b) a failure to recognise the fact that any perceived differences between branded and plain packs would probably fade once the new pack has lost its novelty; and
(c) methodological flaws, including lack of double-blind study design, use of unrepresentative samples and publication bias.

1.14 Indeed, in deciding not to proceed with Plain Packaging in 2008-2009, the United Kingdom Department of Health determined that there was no evidence that Plain Packaging would reduce smoking uptake among minors or help people to quit. As the quality of the evidence base for Plain Packaging is essentially unchanged since then, it seems the New Zealand Ministry of Health now seeks to justify its Plain Packaging policy on essentially the same evidence which the UK Department of Health concluded was inadequate.

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5 PHRC Review at p 87.
LESS RISKY, EFFECTIVE ALTERNATIVE MEASURES ARE AVAILABLE

1.15 Daily smoking rates for year 10 students have fallen from 15.6% in 1999 to 4.1% in 2011 and overall only 19% of New Zealanders now smoke.7 Plain Packaging would risk reversing this downward trend by reducing prices (through intensified price competition) and fuelling illicit trade, both of which would increase consumption.

1.16 A wide range of aggressive tobacco control measures has been introduced recently, including three compounding excise tax increases in 2010-2012 (in addition to the general rise in GST in October 2010), the retail display ban (which did not come into force until July 2012), and the further substantial compounding excise tax increases announced for 2013-2016. These tax rises are in addition to further price increases resulting from the CPI-indexation of the excise tax.

1.17 Before pursuing a new, risky and unproven policy, the Government should wait to see whether these other measures yield results and should also await the outcome of the WTO challenges and Investment Treaty arbitration against Australia. Alternatively, it should consider pursuing the other measures identified in Section 3 of this Response, such as improved youth prevention programmes, setting a minimum retail price for tobacco products, revised graphic health warnings to target knowledge gaps (if such gaps can be demonstrated), and more rigorous efforts to identify and prosecute retailers who sell cigarettes to minors. The RIS fails to consider these alternative measures either adequately or at all.

PLAIN PACKAGING WOULD VIOLATE NEW ZEALAND’S INTERNATIONAL OBLIGATIONS AND FUNDAMENTAL NORMS

1.18 It is unquestionably in New Zealand’s interests to comply, and ensure compliance by other States, with the WTO agreements. They are vital for the fair treatment of New Zealand’s exports. For example, New Zealand obtained access to the Australian market for its apple exports only by challenging Australia’s unreasonable import restrictions through the WTO dispute resolution mechanism, arguing successfully that Australia could not justify its policies on scientific grounds.8

1.19 Plain Packaging would breach several WTO agreements, but in particular:

(a) Article 2.2 of the Agreement on Technical Barriers to Trade (TBT); and

(b) several key Articles of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

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1.20 The former prohibits unnecessary obstacles to international trade, including unreasonable labelling requirements. The latter prohibits (inter alia) the imposition of restrictions on the registration and use of trade marks based on the nature of the goods.

1.21 Further, the BAT Group’s valuable investments in New Zealand are protected by Investment Treaties which provide for the settlement of disputes through international arbitration. Were Plain Packaging legislation enacted, the relevant BAT Group companies would be entitled to seek an order requiring New Zealand to repeal the legislation and/or a substantial award of damages providing full compensation for the Government’s unlawful acts in destroying BAT’s business model, which relies on premium brands.

1.22 The New Zealand Government’s Intellectual Property Office acknowledges the immense value of brands, which Plain Packaging would destroy and in respect of which full and substantial compensation would be required:

A carefully selected and managed trade mark can become a valuable business asset. As customers learn to value and trust a trade mark, they may be willing to pay more for a product or service bearing that mark. This enables a business owning a quality trade mark to stand out in the market place and gain a competitive edge over its competitors. For some companies an effective trade mark can become their most valuable asset.9

1.23 Although some of the WTO agreements and Investment Treaties to which New Zealand is a party contain exceptions for non-discriminatory regulatory measures which are necessary to protect public health, these exceptions do not authorise the adoption of Plain Packaging. The exceptions either do not apply at all or would not be engaged by Plain Packaging because: there is no reliable evidence that it would reduce tobacco consumption; extensive tobacco control measures are already in place in New Zealand; tobacco remains a legal product; Plain Packaging would be discriminatory and wholly disproportionate; and alternative and less damaging regulatory measures are available. Indeed, under the WTO agreements and Investment Treaties, it is simply impossible for the Government rationally to justify Plain Packaging while accepting (as it does) that the sale of tobacco products should remain legal.

1.24 Further, because New Zealand has already adopted a total advertising ban and a retail display ban for tobacco products and because Plain Packaging would eliminate virtually all communication between the suppliers of a legal product and the 19% of New Zealand’s population who choose to consume it, Plain Packaging would represent a severe assault on freedom of expression which could not be justified under section 5 of the BoRA. That conclusion is supported by decisions of the Supreme Court of the United States, the Supreme Court of Canada, and, most

recently, two US Circuit Courts of Appeal. In all of these decisions, tobacco control measures far less extreme than Plain Packaging were struck down.

1.25 In addition, since the Government has rejected alcohol advertising restrictions, citing fundamental common law principles, it must accept that the same principles apply in respect of Plain Packaging for tobacco.

1.26 The Australian High Court’s dismissal of the challenge to Australia’s Plain Packaging laws is irrelevant to New Zealand. That challenge turned on whether tobacco companies’ intellectual property would be “acquired” otherwise than on just terms in contravention of section 51(xxxi) of the Australian Constitution. The legal rules which constrain New Zealand (particularly the WTO agreements and Investment Treaties) are fundamentally different from the narrowly worded section 51(xxxi). They would unquestionably be breached by Plain Packaging, as we explain in Section 4 of this Response.

**PLAIN PACKAGING WOULD REDUCE PRICES AND INCREASE CONSUMPTION**

1.27 The sum total of the Government’s analysis of the economic implications of Plain Packaging appears to be contained in a one-page email from an analyst at the Ministry of Economic Development. The email acknowledges that removing branding could intensify competition based purely on price.

1.28 In fact, prices would inevitably fall as a matter of basic economics. Plain Packaging would remove virtually all trade marks and other branding from packs, leaving only standardised and inconspicuous word marks. As a result, BAT’s premium tobacco products would lose their distinctiveness. Consumers would be deprived of essential information concerning product origin and quality that allows them to distinguish among products in the market and would increasingly focus on price alone. They would down-trade to cheaper products and the illicit market. Tobacco companies would be forced to reduce the prices of premium products to maintain market share. Average prices would fall. As a result, tobacco companies would suffer significant losses (for which full compensation would be due), but tobacco consumption would also increase, especially among price-sensitive consumers (such as youth). This would undermine the aim of Plain Packaging.

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I. ILLICIT TRADE WOULD INCREASE

1.29 While it understates the risk, the RIS correctly acknowledges the “possibility of increased counterfeiting and black market sales of tobacco” due to the adoption of Plain Packaging.\(^{13}\) A 2010 Ernst and Young study indicates that illicit tobacco already costs New Zealand between $39 million and $50 million in lost excise and GST revenues annually.\(^{14}\) The acting manager of investigations for the New Zealand Customs Service said in 2010 that “it is only a matter of time before … criminal groups will organise themselves to smuggle cigarettes”.\(^{15}\)

1.30 By prohibiting complex pack and cigarette designs and requiring all tobacco products to be of uniform appearance, Plain Packaging would greatly reduce the skill and investment required to manufacture counterfeit cigarettes and would make them more difficult for retailers, consumers and enforcement agencies to identify. The existing cross-border trade in non-duty paid tobacco would also expand to meet the continued demand among New Zealand smokers for branded products. An increase in the supply of illicit tobacco would cause a substantial loss of excise revenue for the Government, increase the supply of tobacco products to minors, increase smoking prevalence through the supply of cheap products, and expose consumers to unregulated products with no controls on hygiene standards or ingredients.

II. DANGEROUS PRECEDENT FOR NEW ZEALAND’S EXPORTS, OTHER BUSINESSES AND CONSUMER CHOICE

1.31 The New Zealand and Australian Governments recognise that their economies are heavily reliant on the food and beverage industries and that a cautious approach to food labelling is required.\(^{16}\) By adopting Plain Packaging, the New Zealand Government would compromise its ability credibly to oppose similarly misconceived regulatory initiatives that may be adopted by foreign governments to the detriment of New Zealand’s food and beverage exporters. The unreasonable graphic health warnings for alcoholic beverages proposed by the Government of Thailand are a case in point. We endorse the New Zealand Government’s objections, based on the WTO agreements, to these proposals, but the Government must be consistent. The New Zealand Government argued that Thailand’s proposed warnings are unnecessarily trade-restrictive and that less damaging measures are available.\(^{17}\) The same applies with regard to tobacco Plain Packaging.

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\(^{13}\) RIS at para 23.

\(^{14}\) Ernst & Young, “Out of the Shadows” (2010), at p 1.


\(^{17}\) G/TBT/M/50, 28 May 2010 (10-2960), Committee on Technical Barriers to Trade, Minutes of the Meeting of 24-25 March 2010. New Zealand reiterated its concerns at a further meeting on 20-21 March 2012 (G/TBT/M/56).
1.32 Indeed, Plain Packaging could not logically be limited to tobacco. The World Health Organisation states that alcohol consumption causes greater harm worldwide in terms of disability-adjusted life years lost than tobacco.\textsuperscript{18} The New Zealand and Australian Governments recognise that “poor diet is the largest cause of ill health in the community [and] has a greater impact than smoking, physical inactivity and alcohol misuse.”\textsuperscript{19}

1.33 Proportionate health warnings are appropriate for tobacco. But the uncompensated and unlawful expropriation of the tobacco industry’s brands and intellectual property through Plain Packaging should be opposed by New Zealand consumers, businesses and the Government. Unless it is halted, consumer autonomy and choice will be severely compromised. Similarly misguided regulatory initiatives will increasingly be demanded for other products by lobby groups. They will be adopted by governments in New Zealand and overseas when politically expedient. New Zealand’s exports will be damaged. Other legal and productive New Zealand industries will suffer.


2 PLAIN PACKAGING WOULD NOT REDUCE TOBACCO CONSUMPTION

SUMMARY

2.1 Plain Packaging would not reduce tobacco consumption in New Zealand.

2.2 We say this because:

(a) there is a significant body of reliable evidence supporting the conclusion that Plain Packaging would not be effective; and

(b) the literature cited in support of the argument that it would be effective is methodologically flawed and unreliable.

2.3 The Ministry of Health, in its Consultation Document:

(a) has neglected entirely to take the former into account; and

(b) has vastly overstated the reliability of the conclusions reached by the latter.

2.4 The so-called “evidence” on which the Ministry of Health relies consists of opinions expressed by members of the public participating in focus group interviews and surveys, and is rife with methodological flaws and limitations.

2.5 Even the PHRC Review, on which the Ministry of Health relies, acknowledges that caution is required in using the findings as a basis for policy decisions, as “expressed smoking-related intentions are not always predictive of future smoking behaviour”.\(^{20}\)

2.6 In fact, the same type of “evidence” was seen as inadequate by the UK Government when it first considered plain packaging in 2008-2009.

2.7 The same kind of “evidence” was relied on by the US Food & Drug Administration (FDA) when seeking to justify nine graphic health warnings for tobacco packages. In a recent ruling against the FDA, the US Court of Appeals for the District of Columbia branded such evidence “mere speculation and conjecture”.\(^{21}\)

2.8 Before any international tribunal, the New Zealand Government would fail to justify Plain Packaging using this kind of speculative “evidence”.

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\(^{20}\) PHRC Review at p 87.

2.9 Significantly, speculative “evidence”, of the type currently relied on in support of Plain Packaging, was used to justify the introduction of graphic health warnings on cigarette packs in New Zealand in 2008. The fact that this measure failed to have any impact on tobacco consumption is important for several reasons:

(a) it demonstrates that speculative focus group and survey “evidence” is an unreliable predictor of real world outcomes and actual smoker behaviour;

(b) it confirms that tobacco packaging is simply not a factor in smoking initiation or cessation; and

(c) it indicates that the graphic health warnings provided smokers with no new information – as there has been universal awareness of the risks of smoking for decades.

EVIDENCE THAT PLAIN PACKAGING WOULD BE INEFFECTIVE

PACKAGING IS NOT A FACTOR IN SMOKING INITIATION OR CESSATION

2.10 If packaging is not a relevant factor in a smoker’s decision to smoke or to quit smoking, then Plain Packaging cannot be effective in reducing smoking prevalence.

2.11 It is clear from the existing peer reviewed evidence, funded by both governments and tobacco control bodies, that packaging is not a factor that influences either smoking initiation or cessation.

2.12 A very recent survey report, the May 2012 Eurobarometer survey, commissioned by the EU Health Department, concluded that the most significant elements that made UK smokers start smoking were:22

(a) friends smoking (77%);

(b) parents smoking (24%); and

(c) affordability (12%).

2.13 Even when specifically prompted to consider packaging as a significant element in their decisions to start smoking, and notwithstanding that respondents could choose more than one element, 99% of UK respondents did not choose packaging as a relevant factor.

2.14 These conclusions are consistent with an earlier report for Health Canada, which concluded 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.23

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23
2.15 Professor James Heckman, a Nobel Prize-winning economist who specialises in research regarding why young people behave as they do, reviewed a vast amount of literature on the causes of youth smoking and concluded, in his 2008 paper, that:

The available evidence in the developing literature on adolescent risky behavior, including smoking, supports a multi-causal model for youth smoking, as many factors have been empirically linked to youth smoking in this literature. These factors include price, parental influences, risk preferences, peer influences, and access.\(^{24}\)

2.16 One of the UK Government’s most recent survey reports identifies the key drivers of smoking cessation, which were concerns about the current and future health effects of smoking, the cost of smoking, and pressure from family to quit.\(^{25}\) None of the survey respondents cited packaging as having any impact on the decision to quit.

**NEW ZEALAND-SPECIFIC EVIDENCE**

2.17 The Consultation Document indicates, and Ministry of Health has confirmed in response to BAT’s inquiries, that the Ministry has commissioned no research to determine whether Plain Packaging would have any effect on smoking prevalence.

2.18 The available evidence as to what causes New Zealand smokers to smoke indicates that packaging has no influence. A New Zealand study reported that adolescent smokers gave the following main reasons for smoking:\(^{26}\)

(a) “I want to join in with my friends who smoke” (52.4%);

(b) “I smoke because I don’t want to be the ‘odd one out’ in a group” (41.4%);

(c) “Most of my friends smoke” (38.8%);

(d) “I smoke just to have a good time” (31.7%);

(e) “Most of my family smoke” (21.6%);

(f) “When I smoke I have a better time” (18.1%); and

(g) “Smoking makes me feel happy and relaxed” (16.7%).

\(^{23}\) M 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) at p 182, available at http://legacy.library.ucsf.edu/tid/rce50d00/pdf;jsessionid=5121065E400B6C2A7C7D8B158D8549A.tobacco03


2.19 A report by the New Zealand Health Sponsorship Council summarises the factors contributing to smoking initiation among adolescents as follows:

Evidence shows that the most prominent modifiable risk factors for smoking initiation are peer smoking, family environment, the nature of access to tobacco products, low self-esteem, and participation in risk-taking behaviours. The most prominent protective factors across all cohorts include doing well within the school environment, participation in community or sports clubs, spiritual connectedness and family connectedness.  

2.20 A 2005 study based on interviews with 130 Maori smokers reported that aside from habit, respondents’ main reasons for smoking included:

(a) stress (48%);
(b) social (34%);
(c) boredom (29%);
(d) enjoyment (25%);
(e) emotions (23%);
(f) time out (17%); and
(g) weight control (5%).

2.21 None of this evidence is considered in the PHRC Review or by the Ministry of Health in the Consultation Document.

2.22 Further, the studies which are relied on by the Ministry of Health do not examine the above-mentioned, well-recognised drivers of smoking initiation and cessation or address the impact that Plain Packaging would have on them.

FLAWED AND SPECULATIVE STUDIES CITED BY THE MINISTRY OF HEALTH

2.23 The literature that the Ministry of Health relied on in producing the Consultation Document is summarised in the PHRC Review, which the Ministry of Health describes as the “most thorough and up-to-date summary available of the international research evidence base for plain packaging.”

2.24 However, the studies summarised in the PHRC Review, based as they are on focus group research and opinion surveys, show only the hypothetical and speculative effect of Plain Packaging on actual smoking behaviour, and suffer from fatal methodological errors and biases. Further, there is a general failure to recognise the fact that any

29 Consultation Document at p 18.
perceived differences between branded and plain packs would only be short-lived, as
the plain pack design would lose its novelty.

2.25 Professor Klick summarises these flaws as follows:

The literature on plain packaging provides neither a reliable nor a relevant foundation for
plain packaging regulations. From a relevance standpoint, there is not a single research
article that examines the effect of plain packaging on actual smoking decisions. Instead,
the vast majority of papers in this literature simply ask people about their preferences
over pack designs, the qualities they associate with various packs, or the effect they
think differing pack designs might have on their smoking habits. There has never been
a published study validating these measures as useful predictors of smoking behavior.

Beyond this fundamental problem, all of the studies examine short term reactions to
plain packs. From a policy perspective, this presents a problem since such short term
reactions may be driven by the impression that the plain packs are simply different or
odd. In a setting where plain packs are mandated, there will no longer be a difference
between one pack and another. Further, as time goes on, individuals will become
familiar with the plain packs, eliminating the impression that they are odd. Given these
effects, even if the plain packaging studies do identify an effect on subjective
impressions, these impressions may not continue under a plain packaging regulation
and any effects that do exist are likely to dissipate.

Even putting these crucial relevance issues aside, this literature is methodologically
flawed. The lack of double blind designs makes it likely that subjects are influenced by
the expectations and preferences of the researcher. Given the widespread recognition
that blinding is an important element of study designs across academic fields, it is
disconcerting that no studies in the plain packaging literature follow best practices in this
regard. Moreover, the samples examined in this literature likely suffer from self-
selection problems that could create statistical bias. Many of the researchers fully admit
that the samples they use are not representative of the populations studied. Finally,
given the policy preferences of the public health community, this is an area where
publication bias is likely to be severe. Each of these flaws has the strong potential to
overstate the true magnitude of any effect of plain packaging on stated intentions and
subjective impressions, which are, in any event, unreliable predictors of actual behavior.

Although plain packaging proponents suggest that the consistency of results in the
literature provide evidence that is greater than the sum of the individual studies, this is
not correct. Repeating the same logical and methodological flaws does not eliminate
those flaws. The scientifically honest approach to this literature is to infer that the extant
literature provides no insight into how plain packaging would affect smoking.30

2.26 The PHRC Review itself notes the numerous limitations of the studies reviewed – e.g.
the absence of trials and longitudinal research, samples unrepresentative of the
general population, and unreliability of self-reporting.31

2.27 A number of other experts have reviewed the Plain Packaging literature and
concluded that the studies are flawed and unreliable.32

30 Klick Opinion at p 1 (emphasis added).

31 PHRC Review at pp 88-89.
2.28 The assertion by the authors of the PHRC Review – which is relied on in the New Zealand Consultation Document – that the consistency of findings across the studies can provide confidence about the observed potential effects of Plain Packaging, is therefore entirely unjustified. As Professor Klick observes:

Given these problems, the PHRC report's claim to provide a “systematic” review is somewhat misleading. These publication and file-drawer biases make any review of this type fundamentally incomplete in that the published literature likely is a selected sample of all inquiries started with respect to the topic. In a more important sense, the PHRC report's claim (p. v) that “This consistency of evidence can provide confidence about the observed potential effects of plain packaging” is patently false. Consistent results from studies that uniformly have the same methodological problems provide zero confidence in any conclusion except, perhaps, that the research designs were flawed in consistent ways.33

SPECULATIVE “EVIDENCE”

2.29 The majority of the PHRC Review considers the evidence in relation to whether Plain Packaging would contribute to:

(a) reducing the appeal of branded cigarette packages relative to unbranded packages;
(b) increasing the salience of warnings; and
(c) improving perceptions of product harm and strength.

2.30 This evidence deals with the participants’ opinions about packaging and the relative appeal of branded packs and plain packs, but does not demonstrate that Plain Packaging would have any impact on actual smoking behaviour.


33 Klick Opinion at p 5.
2.31 Put another way, the literature may suggest that participants prefer branded packs to plain packs. But it cannot establish that those same participants would stop smoking, or would not have started, if branded packs were not available.

2.32 There is no empirical evidence which demonstrates that Plain Packaging would have any effect on actual smoking behaviour.

2.33 Professor Klick comments that:

Virtually all of the studies in this literature examine the subjects' stated views of plain packaging but observe no actual smoking choices. Researchers jump from these stated positions to the conclusion that plain packaging will lower smoking rates.

The New Zealand Ministry of Health is also quick to jump to conclusions that are not actually demonstrated by the underlying literature. For example, in its Regulatory Impact Statement, the Ministry asserts “tobacco packaging has become the tobacco industry’s key marketing tool to attract and retain customers (paragraph 6)” implying that packaging is effective in increasing the total demand for tobacco. No study has demonstrated this. The tobacco industry’s interest in packaging is completely consistent with a desire to compete over market share even if the size of the overall market is unaffected by packaging. Paragraph 7 goes on to assert that current packaging attracts new smokers, an issue that has never been examined in the literature given that actual smoking behaviors are not analyzed in any existing study. These unsubstantiated assertions are carried over in the Ministry’s consultation document which fails to note that none of the existing research papers looks at the effect of plain packaging on actual smoking decisions.

There is no published study validating any link between the kinds of outcomes analyzed in the plain packaging literature, such as subjective impressions or stated intentions, and real world smoking decisions. As a general matter, marketing scholars are skeptical that such survey based information is very useful in predicting ultimate consumption behavior.

In the entire literature on plain packaging, there are only two studies that examine anything beyond stated impressions or intentions. These studies that observe some behavioral effect present significant problems for the claim that plain packaging will reduce smoking.34

2.34 The PHRC Review itself acknowledges that the perceptions of individuals, which are mixed, are not predictive of actual behaviour, and recognises that there is no direct evidence establishing that Plain Packaging would contribute to improving public health by reducing the uptake of smoking or improving quit rates:

… [E]xpressed smoking-related intentions are not always predictive of future smoking behaviour … and perceptions of the impact of a future policy measure on the behaviour of others are of course subjective.36

34 Klick Opinion at p 2 (emphasis added).
35 PHRC Review at p iv.
36 PHRC Review at p 87.
METHODOLOGICAL FLAWS AND BIAS

2.35 In the opinion of Professor Klick, the Plain Packaging literature is flawed and unreliable, “rife with methodological errors and biases that limit the ability of an impartial referee to draw any conclusions about the likely effect of a plain packaging regulation.”

2.36 The relevant errors and biases are discussed more fully in Professor Klick’s opinion, but include:

(a) a lack of representative samples;

(b) publication bias: created by the greater likelihood of publication of literature supporting Plain Packaging, which skews the weight of “evidence” in favour of Plain Packaging;

(c) expectancy bias: where participants give the answer they believe the researcher would prefer to hear, regardless of their actual beliefs; and

(d) a failure to take any measures to eliminate such sources of bias, such as using double-blind experiments.

2.37 It is also important to take into account the background views of those who have published in this area, to distinguish independent research from anti-tobacco advocacy.

THE UK EXPERIENCE

2.38 The UK Department of Health also conducted a consultation into Plain Packaging for tobacco products in the UK earlier this year.

2.39 In fact, the New Zealand Ministry of Health in its Consultation Document has relied heavily on the UK Department of Health consultation process — to the point of using similarly worded consultation questions and relying on the UK PHRC Review.

2.40 It is therefore significant that the UK Department of Health and the PHRC Review have identified no significant new evidence since the UK Department last considered Plain Packaging in 2008-2009.

37 Klick Opinion at p 5.
38 Klick Opinion at p 5.
2.41 At that time, the UK Government concluded that there was no evidence that Plain Packaging would reduce smoking uptake amongst minors or help people to quit, and stated “the research evidence into this [Plain Packaging] initiative is speculative, relying on asking people what they might do in a certain situation”.  

2.42 Indeed, the then Minister of State for Public Health in the UK stated that:

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. Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level. 

2.43 Notwithstanding these clear statements, the studies on Plain Packaging which have been undertaken since the 2008 UK consultation, and which are relied on in the PHRC Review, contain the same methodological flaws and limitations as the studies considered in the 2008 UK consultation.

2.44 The New Zealand Ministry of Health therefore proposes to justify its Plain Packaging policy on essentially the same evidence base which the UK Department of Health concluded could not be used to justify a Plain Packaging policy back in 2008-2009.

**FAILURE OF GRAPHIC HEALTH WARNINGS**

**SPECULATIVE EVIDENCE WAS CITED IN SUPPORT OF GRAPHIC HEALTH WARNINGS**

2.45 In 2004-2005, the Ministry of Health commissioned focus group interviews and a series of reports concerning the graphic health warnings which it proposed to introduce in New Zealand.

2.46 The arguments recited by the Ministry in favour of the graphic warnings were identical in all material respects to those advanced by the Ministry today in support of Plain Packaging.

2.47 A report for the Ministry from May 2004 recorded the results of focus group interviews with 100 participants, who were presented with mock-up cigarette packs featuring shocking photographs and textual warnings very similar to the graphic warnings.


eventually introduced in New Zealand in 2008. The Ministry’s report records, for example, that 34 of 73 current smokers and recent quitters (47%) felt that image 10 was the graphic pack warning image most likely to have an impact. Image 10 showed an eye that had been clamped open and warned that smoking causes blindness. Of those 34 people, 26 (75%) said that image 10 “would encourage them to quit smoking or at least reduce the amount they smoke”. The Ministry apparently attached weight to their opinions, as it eventually adopted a warning based on image 10. The 2004 report sought to determine “[t]o what extent the health warnings ... may change behaviour leading to reduced smoking”.43

A further report for the Ministry from March 2005 was also based on further focus group interviews with 100 participants. This report cautioned that the number of participants was small, that the results were merely an “estimate of intention”, and that the results were “best considered from the perspective of relative differences across the different warning messages”.45

Nevertheless, the report stated that:

… the key deliverables for this current study – the third in a serious of related research projects … in relation to these different health warnings and images, were:

• To measure the extent to which health messages influence beliefs and attitudes to smoking. …

• The likelihood that a particular message may change behaviour leading to reduced smoking. Specifically, the likelihood that a particular message would or would not impact a smoker’s decision to:

  o Smoke a cigarette today (if the message was contained on the pack from which the cigarette came).

  o Reduce the number of cigarettes smoked each day … .46

The focus group participants were again asked for their opinions as to the likely impact of sample graphic health warnings on smokers’ behaviour. They were shown mock-up cigarette packs featuring images of, for example, oral cancer and asked “if your normal brand of cigarettes came in a pack like this, on ... a scale of zero to 10 ... how likely is it that you will reduce the number of cigarettes you smoke each day?” Participants said they were shocked and opined that the messages would cause them to reduce their cigarette consumption. For example, 66 current smokers ranked


44 May 2004 Report at p 8 (emphasis in original).


Message 2 either first or second of all the mock-up packs which they were shown when asked to “place these packs from left to right, in order of the message that you believe will have the most impact in terms of encouraging smokers to change their smoking behaviour”. Message 2 was a pack featuring an unpleasant photograph of cancerous lesions and the message “Smoking can give you mouth and throat cancer”. Of these 66 smokers, 50% agreed that being subjected to this graphic warning would cause them to reduce their cigarette consumption.

2.51 The Ministry’s 2005 report contained a table setting out figures for the “probability of behaviour change”, a condensed version of which appears below:

<table>
<thead>
<tr>
<th>Message</th>
<th>Sub-sample size</th>
<th>Probability of reducing number of cigarettes smoked per day</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Smoking can give you mouth and throat cancer” (message 2)</td>
<td>n=66</td>
<td>56%</td>
</tr>
<tr>
<td>“A stroke from smoking can disable or kill you” (message 16)</td>
<td>n=8</td>
<td>58%</td>
</tr>
<tr>
<td>“9 out of 10 lung cancers are caused by smoking” (message 18)</td>
<td>n=30</td>
<td>54%</td>
</tr>
<tr>
<td>“Quitting smoking improves your health” (message 19)</td>
<td>n=5</td>
<td>54%</td>
</tr>
<tr>
<td>“Your smoking can harm your kids” (message 4)</td>
<td>n=13</td>
<td>57%</td>
</tr>
<tr>
<td>“Smoking while pregnant starves your baby” (message 5)</td>
<td>n = 45</td>
<td>45%</td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2.52 In yet another Ministry of Health report, Professors Janet Hoek and Philip Gendall in 2005 supported the introduction of graphic health warnings on tobacco packs, again on the basis of speculative focus group studies and opinion surveys.

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2.53 Like today’s Plain Packaging literature, the Ministry’s studies in 2004-2005 and the literature reviewed by Professors Hoek and Gendall were:

(a) based on survey participants’ opinions;

(b) did not seek to test the impact of the graphic warnings on actual smoking behaviour; and

(c) were subject to methodological errors and flawed research design.

2.54 Nevertheless, Professors Hoek and Gendall argued that the studies reviewed by them:

... were generally well designed and conducted and, when viewed holistically, they suggest that pictorial warning labels will be more impactful and credible than text-only warning messages. ...

... In the absence of behavioural measures, it is nevertheless possible to compare alternative warning labels and to obtain estimates of their likely effects on respondents’ behaviour.51

2.55 As it transpired, this conclusion, and the opinions of the participants in the Ministry’s 2004-2005 focus groups, were wholly inaccurate.

http://www.moh.govt.nz/moh.nsf/pagescm/903/$File/pictorialwarningsresearchevidencemay2006.pdf. See also the various studies summarised by Professors Hoek and Gendall in their report.

2.56 The graphic warnings introduced by the Ministry of Health in 2008 are gruesome and very prominent, as is clear from the photographs below.

**Figure 1 - Photographs of front and back of New Zealand Dunhill cigarette pack**

2.57 Yet, as the charts below indicate, the introduction of these warnings in 2008 had no impact on tobacco consumption.

2.58 Econometric analysis confirms that the warnings had no statistically significant effect.

2.59 As the charts below indicate, following the introduction of the graphic warnings, consumption continued to move in accordance with its previously established gradual downward trend. The charts plot the 12 month moving average of BAT’s total monthly sales volumes for RYO and TMC for the 2000-2012 period. BAT’s sales represent over 70% of the New Zealand tobacco market.
Figure 2

Failure of graphic health warnings to reduce BAT’s TMC volumes sold

Figure 3

Failure of graphic health warnings to reduce BAT’s RYO volumes sold
2.60 Similarly, the introduction of graphic health warnings in Australia and Canada had no statistically significant impact on tobacco volumes sold, which continued to fall in line with their historical downward trend.⁵²

SPECULATIVE EVIDENCE TESTED IN US COURTS

2.61 “Evidence” based on surveys and discussions with focus groups was recently put to the test in United States courts. The FDA sought to use such studies to justify nine graphic health warnings covering 50% of the front and back of cigarette packs. The evidence presented to the US Courts was very similar to that surveyed in the PHRC Review. The majority opinion of the US Court of Appeals for the District of Columbia is worth quoting at some length:

FDA has not provided a shred of evidence ... showing that the graphic warnings will “directly advance” its interest in reducing the number of Americans who smoke. ... While studies of Canadian and Australian youth smokers showed that the warnings on cigarette packs caused a substantial number of survey participants to think—or think more—about quitting smoking, ... and FDA might be correct that intentions are a “necessary precursor” to behavior change, ... it is mere speculation to suggest that respondents who report increased thoughts about quitting smoking will actually follow through on their intentions. And at no point did these studies attempt to evaluate whether the increased thoughts about smoking cessation led participants to actually quit. Another Australian study reported increased quit attempts by survey participants after that country enacted large graphic warnings, but found “no association with short-term quit success.” ... Some Canadian and Australian studies indicated that large graphic warnings might induce individual smokers to reduce consumption, or to help persons who have already quit smoking remain abstinent. ... But again, the study did not purport to show that the implementation of large graphic warnings has actually led to a reduction in smoking rates.

FDA’s reliance on this questionable social science is unsurprising when we consider the raw data regarding smoking rates in countries that have enacted graphic warnings. FDA claims that Canadian national survey data suggest that graphic warnings may reduce smoking rates. But the strength of the evidence is underwhelming, making FDA’s claim somewhat misleading. In the year prior to the introduction of graphic warnings, the Canadian national survey showed that 24 percent of Canadians aged 15 or older smoked cigarettes. In 2001, the year the warnings were introduced, the national smoking rate dropped to 22 percent, and it further dropped to 21 percent in 2002. ... But the raw numbers don’t tell the whole tale. FDA concedes it cannot directly attribute any decrease in the Canadian smoking rate to the graphic warnings because the Canadian government implemented other smoking control initiatives, including an increase in the cigarette tax and new restrictions on public smoking, during the same period. ... Although FDA maintains the data “are suggestive” that large graphic warnings “may” reduce smoking consumption ... it cannot satisfy its First Amendment burden with “mere speculation and conjecture”. ...
... And one of the principal researchers on whom FDA relies recently surveyed the relevant literature and conceded that “[t]here is no way to attribute ... declines [in smoking] to the new health warnings.” David Hammond, *Health Warnings Messages on Tobacco Products: A Review*, 20 Tobacco Control 327, 331 (2011)...

2.62 Like the FDA, in proceedings before a Court or international tribunal, the New Zealand Government would bear the burden of having to justify Plain Packaging and could not do so on the basis merely of speculative focus group discussions and poorly conducted surveys.

**FAILURE OF GRAPHIC HEALTH WARNINGS IS EXPLAINED BY UNIVERSAL AWARENESS OF HEALTH RISKS**

2.63 The failure of graphic health warnings to reduce tobacco consumption is unsurprising for two reasons.

(a) As explained above, the appeal of packaging is simply not a factor which influences either smoking initiation or cessation.

(b) Even prior to the introduction of graphic warnings, there was already effectively universal awareness among the New Zealand smoking population of the health risks of smoking, and so the graphic warnings gave smokers no new information.

2.64 In a 2004 survey conducted for the Ministry of Health, it was found that 97% of daily smokers were aware of the previous textual pack health warnings.

2.65 Even in 1993, 93% of the adolescent smokers who participated in a New Zealand study knew that smoking is harmful.

2.66 Indeed, in the New Zealand High Court in *Pou v British American Tobacco (New Zealand) Ltd*, Lang J stated that:

... by 1968, those who had even a passing interest in current affairs would undoubtedly have been aware that there was a strong link between smoking and lung cancer. As such, they must have known that smoking brought with it the danger of injury to health. My conclusion is primarily based on the extent to which this issue was the subject of articles and reports in the print media, coupled with supporting information disseminated by the [Department of Health] and other organisations. Finally, it must also have been disseminated further by word of mouth.

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I consider that members of the general public in New Zealand should also be credited with having the ability to weigh up competing arguments and messages and to make up their own minds on an issue such as this. ... There was nothing to prevent individual members of the public from making up their own minds regarding the dangers of smoking in the same way that they were asked to decide other important matters in their daily lives.56

CONCLUSION

2.67 As discussed above, in 2008 the New Zealand Government introduced graphic health warnings for tobacco packaging based on the speculative “evidence” endorsed by Professors Hoek and Gendall. Yet the measure had no statistically significant effect on tobacco consumption.

2.68 The failure of graphic health warnings is strong evidence that Plain Packaging would also be ineffective.

(a) If graphic health warnings (e.g. photographs of decaying teeth and gangrenous toes) dissuaded people from smoking, then the existing graphic warnings occupying 90% of the back, and 30% of the front, of each pack sold in New Zealand since 2008 would have reduced tobacco consumption significantly.

(b) It cannot plausibly be suggested that smokers fail to see the existing warnings, which are both gruesome and very prominent – see the images above.

(c) The reason that consumers are continuing to smoke is not that branded packaging diverts their attention from the already prominent graphic warnings, but rather that they are choosing to smoke despite knowing the risks, of which there has been awareness for decades.

2.69 Nevertheless, advocates of Plain Packaging argue, again on the basis of speculation and conjecture, that removing the last remaining branding elements from tobacco packages would increase the impact of the already very prominent health warnings on an already informed smoking population and that this increased impact would lead to a reduction in smoking.

2.70 This argument was proven to be misconceived in 2008. It is similarly misconceived today. It is also revealing that the Australian Treasury is not forecasting a reduction in tobacco consumption as a result of Plain Packaging.57


2.71 The Ministry of Health itself has implicitly acknowledged that no impact of graphic health warnings on tobacco consumption can be isolated. In a 2010 paper, it commented as follows and reproduced the chart below:

Tobacco consumption per capita has dropped considerably since 1970, with occasionally spectacular declines. It is difficult to isolate the reasons for these declines given the range of concurrent tobacco control activity, although the larger drops in tobacco consumption appear to be related to increases in the excise on tobacco products. The exception is the drop in 2003 which may be attributed to the widespread media and other publicity around the passing of the amendment to the Smoke-free Environments Act 1990 which included the banning of smoking in venues. There has been little change in tobacco consumption since 2003 (see below) but it is anticipated that the recent increase in the tobacco excise will see the downward trend resume. Each 10 percent increase in price is predicted to result in a 5 percent decline in tobacco consumption.58

Figure 4

2.72 The evidence that Plain Packaging would not reduce smoking rates is overwhelming.

2.73 We urge the Government to give serious consideration to the alternative tobacco control measures discussed in Section 3 of this Response.

3 EFFECTIVE ALTERNATIVES ARE AVAILABLE

3.1 There are a number of other options which the Government should consider pursuing, either in combination or individually, instead of resorting to Plain Packaging. We outline those options below. Each is a better option than Plain Packaging, which would be costly, risky and ineffective.

STATUS QUO

3.2 This option equates generally to Option 1 considered in the Consultation Document and RIS. It would involve making no change to the already comprehensive suite of tobacco control measures now in place.

3.3 Smoking rates in New Zealand have fallen significantly and are continuing to decline. For example, the percentage of year 10 students who smoke daily fell from 15.6% in 1999 to 4.1% in 2011.\(^{59}\) Overall smoking prevalence in New Zealand has fallen from 28% in 1983 to 19% in 2009, according to the Ministry of Health.\(^{60}\)

Figure 5

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3.4 New Zealand has recently adopted a range of new tobacco control measures. Their full effect is yet to be felt. Some of these changes have only recently come into force, while others are yet to do so. For instance:

(a) the retail display ban and new enforcement regime involving infringement notices only came into effect on 23 July 2012;\(^{61}\)

(b) the Excise and Excise-equivalent Duties Table (Tobacco Products) Amendment Act 2010 only came into force on 29 April 2010,\(^{62}\) and provided for three compounding 10% increases in the excise on manufactured cigarettes in April 2010, January 2011 and January 2012 (in addition to the rise in GST in October 2010 and further rises linked to the Consumer Price Index); and

(c) the Customs and Excise (Tobacco Products – Budget Measures) Amendment Bill, which would increase the tobacco excise tax by a further 10% every year for four years, is still to be passed by Parliament. The Finance and Expenditure Committee did not rule out further excise increases.

3.5 The significant combined effect of these tax increases is evident from the chart below.

Figure 6

Effect of excise tax increases

3.6 It may take time for the full impact of some of the recent changes to become apparent. Instead of pursuing Plain Packaging, the Government should pause, wait for the effect of the recent changes to flow through, and then consider again whether there is any

\(^{61}\) Sections 2 and 9 of the Smoke-free Environments (Controls and Enforcement) Amendment Act 2011.

\(^{62}\) Section 2 of the Excise and Excise-equivalent Duties Table (Tobacco Products) Amendment Act 2010.
need to go further. This would allow New Zealand to observe the outcome of the WTO and Investment Treaty proceedings against Australia.

**SETTING MINIMUM RETAIL PRICE**

3.7 This option would involve setting a minimum retail price per unit. Because young people and those from lower socio-economic groups are said to be particularly price-sensitive, this option would reduce smoking uptake among the socio-economic groups whose welfare is of most concern to the Government.

**MEASURED TAX INCREASES**

3.8 BAT does not oppose measured, graduated increases in tobacco excise taxes. As we have noted above, the Ministry of Health itself appears to accept that tobacco consumption in New Zealand has historically fallen principally in response to excise increases. However, given the coercive nature of excise tax increases, the risk (acknowledged by the Prime Minister)\(^63\) that excessive excise increases would fuel illicit trade, and the significant excise increases imposed in 2010-2012 and announced for 2013-2016, we consider that existing measures and those already announced should be given time to have an impact before new measures are considered.

**REVISING HEALTH WARNINGS**

3.9 This option would involve renewing and clarifying the messages and images which must currently appear on tobacco products. Insofar as there is evidence that any particular consequence of tobacco use is not fully understood among the public, new health warnings could be developed to address any knowledge gap.

**INCREASED EMPHASIS ON YOUTH SMOKING PREVENTION**

3.10 This option would involve a number of targeted initiatives focused on preventing children and young people from smoking. Educational campaigns intended to reduce youth tobacco consumption by simply informing youth about the risks of smoking and thereby arousing concern or fear have "no effects or only minimal effects on behavior".\(^64\)

3.11 By contrast, “[i]nterventions focused on the development of behavioral norms that [favour] non-smoking and of skills to identify and resist social pressure to smoke”\(^65\) are much more likely to reduce youth smoking prevalence, if properly designed.

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\(^65\) Jøsendal at p 190.
3.12 An empirical study of changes in actual smoking behaviour among 4,441 students in 99 Norwegian schools in response to a school-based smoking prevention programme showed, using multilevel multiple logistic regression analyses, that “school-based intervention, based on a social influence approach, proved to be effective at reducing smoking rates among participants”. The study’s authors concluded that “a carefully planned and adequately resourced intervention program under the right circumstances actually does produce substantial effects.”

3.13 Youth programmes need to be carefully designed to recognise adolescents’ specific needs and interests, and should be based on sound empirical evidence. The available options include:

(a) new youth educational campaigns designed to give youth the skills and assertiveness needed to recognise and resist peer influences as well as improved decision-making skills;

(b) increased Government campaigns aimed at children and families, stressing that children should not smoke and that family members should not supply tobacco to other family members under the age of 18.

UTILISING EXISTING MEASURES

3.14 A 2005 study found that 38% of the underage smokers surveyed had not been asked for proof of their age when purchasing cigarettes in the month preceding the survey. As that study concluded, “[p]olicies that restrict youth access to tobacco products can only be effective if they are rigorously enforced.” Historically, proper enforcement has been lacking in New Zealand. The new power to issue infringement notices only came into force in July 2012. Time should be allowed for this new power to be properly utilised and its effect observed.

3.15 Other investigatory and enforcement powers are vested in the Commerce Commission under the Fair Trading Act 1986 in relation to misleading and deceptive conduct. If there were evidence of any such conduct on the part of tobacco wholesalers and retailers, the Commission would be the appropriate body to investigate and take action.

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66 Jøsendal at p 189.
67 Jøsendal at p 198.
68 Jøsendal at p 191.
69 In particular, greater attention could be drawn to the fact that there are already restrictions on the on-supply of tobacco products to minors (eg sections 30, 30AA and 36 of the SFEA).
71 Darling at p 1.
INTRODUCING OFFENCES FOR YOUTH PURCHASING AND PROXY-PURCHASING

3.16 Around half of underage daily smokers purchase their tobacco directly from retailers.\(^{72}\) A requirement should be introduced for retailers to notify the Ministry of Health if they intend to sell tobacco products and to demonstrate that they understand the requirements of the Smoke-free Environments Act 1990 (SFEA) and their obligations when selling tobacco products.

3.17 It should be an offence for a minor to buy tobacco products, as it is in Scotland.\(^{73}\)

3.18 It should also be an offence to on-supply tobacco to a minor regardless of whether the tobacco is handed over in public or private.\(^{74}\)

3.19 These offences both currently exist in relation to alcohol, and there is no good reason why they should not apply to tobacco.

\(^{72}\) Darling at p 3.


\(^{74}\) See section 30AA of the SFEA.
4 PLAIN PACKAGING WOULD VIOLATE NEW ZEALAND’S INTERNATIONAL OBLIGATIONS AND FUNDAMENTAL NORMS

SUMMARY

4.1 Plain Packaging would breach (inter alia):
   (a) the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the Paris Convention for the Protection of Industrial Property (the Paris Convention);
   (b) the WTO Agreement on Tariffs and Trade 1994 (GATT) and the WTO Agreement on Technical Barriers to Trade (TBT);
   (c) several Investment Treaties entered into by New Zealand;
   (d) the BoRA; and
   (e) fundamental common law principles.

4.2 The consequences of such breaches include:
   (a) substantial awards of damages enforceable against the assets of the New Zealand Government in courts around the world;
   (b) trade sanctions against New Zealand’s export products;
   (c) New Zealand being instructed by an international tribunal to repeal the Plain Packaging legislation; and
   (d) lasting damage to New Zealand’s international reputation among its trading partners and foreign investors, who would rightly question the security of investments in New Zealand and its respect for international trade rules, intellectual property, and basic property rights.

BREACH OF TRIPS AND THE PARIS CONVENTION

4.3 Plain Packaging legislation would prohibit the use of all trade marks, designs and patented pack features on tobacco packaging and tobacco products, with the sole exception of the brand name and variant.

4.4 Even these would have to be printed in small lettering, in a uniform typeface, and with uniform colouring across all manufacturers’ products.

4.5 The effect of Plain Packaging would therefore be to prevent tobacco companies from conveying information to customers regarding product origin and quality and from effectively distinguishing their products from those of their competitors. The inevitable result would be confusion among consumers.
4.6 Article 20 of TRIPS requires that the use of trade marks in the course of trade shall not be:

unjustifiably encumbered by special requirements, such as ... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

4.7 Plain Packaging would violate this provision by:

(a) imposing "special requirements" – as described above – which directly, specifically and severely restrict use of registered tobacco word marks on the product and its packaging;

(b) permitting use of tobacco word marks only in a limited manner clearly detrimental to the trade marks' capability to distinguish a manufacturer’s goods from those of other undertakings; and

(c) prohibiting use of device marks altogether.

4.8 Article 20 of TRIPS confirms that the use requirements listed in the second part of the sentence are examples of unjustifiable encumbrances. This means that under TRIPS, Plain Packaging clearly breaches Article 20 and cannot be justified under any circumstances.

4.9 Plain Packaging would also violate:

(a) Article 15 of TRIPS, because it would violate New Zealand’s obligation to make all distinguishing signs capable of constituting a trade mark; and

(b) Article 16 of TRIPS, because it would undermine the right of registered trade mark owners effectively to prevent others from using similar signs that are likely to cause confusion.

4.10 Article 15.1 confirms that “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trade mark”. The ordinary meaning of a “trade mark” is a sign used on products to distinguish products. Plain Packaging would prevent certain distinguishing signs from being capable of constituting a “trade mark” on tobacco products legally sold in New Zealand. Moreover, Article 15.4 makes it very clear that registered trade mark protection is to apply irrespective of the nature of the product. Plain Packaging would, therefore, violate New Zealand’s obligation under Article 15.1 and would not provide the same rights to tobacco-related trade marks as are granted to other trade marks, in violation of Article 15.4 of TRIPS.

4.11 Article 16.1 of TRIPS confirms the right to prevent others from using signs similar to trade marked signs when such use is likely to cause confusion. Measures that prevent the trade mark from being used on the product or its packaging undermine the ability of registered trade mark owners to maintain the distinctiveness, and the associations between the trade mark and the product, which are required to exercise this right effectively and to establish “confusion” in any infringement proceeding.
Accordingly, Plain Packaging would violate New Zealand’s obligations to preserve the rights of registered trade mark owners under Article 16.1 of TRIPS.

4.12 Further, Plain Packaging requirements regarding the use of trade marks would violate provisions of the Paris Convention that are incorporated into TRIPS through Article 2.1. In particular, Article 6quinquies of the Paris Convention requires Members to ensure that “[e]very trade mark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union” (emphasis added). This provision requires Members to respect and “protect” the form of the trade mark “as is”, meaning as filed in any other country that is a party to the Paris Convention. Plain Packaging requires the use of trade marks in a form that is clearly not the same form that was lawfully registered in registrants’ countries of origin.

4.13 In addition, Article 10bis of the Paris Convention, as incorporated into TRIPS by Article 2.1, establishes that WTO Members have an obligation to provide effective protection against unfair competition, such as against “all acts of such a nature as to create confusion by any means whatever” (emphasis added). Plain Packaging would create confusion among trade marked products. In fact, the very objective of Plain Packaging appears to be the removal of the most important means that allow consumers to distinguish among tobacco products. Through its proposed Plain Packaging measures, New Zealand would positively mandate the unfair competition that results from the removal of the trade marks and the confusion that Article 10bis requires New Zealand to prohibit.

4.14 Importantly, TRIPS does not contain a general health exception. This is unexceptionable, as trade marks and other intellectual property per se are legal constructs and do not cause physical harm. Article 8.1 of TRIPS thus permits measures necessary to protect health “provided that such measures are consistent with the provisions of this Agreement”.

4.15 In any event, the Government could not possibly establish that Plain Packaging is necessary for the protection of public health since: tobacco remains a legal product; less damaging alternative measures are available; and there is no evidence whatsoever that Plain Packaging would reduce tobacco consumption.

4.16 Accordingly, the introduction of Plain Packaging would breach New Zealand’s obligations under TRIPS and the Paris Convention and would result in a request by WTO dispute resolution bodies that New Zealand reverse the measure.

BREACH OF THE GATT AND TBT AGREEMENT

4.17 A Plain Packaging requirement would further constitute an unjustified barrier to international trade in contravention of New Zealand’s international obligations under Article III(4) of the GATT and Articles 2.1 and 2.2 of the TBT Agreement.

4.18 The TBT Agreement, in particular, prohibits technical regulations, such as packaging and labelling requirements, from constituting unnecessary obstacles to the international trade in goods. Technical regulations extend to product characteristics, including packaging, marking and labelling requirements. Plain Packaging would
constitute an unnecessary obstacle to international trade in contravention of the TBT Agreement because:

(a) there is no reliable evidence that the measure would actually contribute to the achievement of the stated health objectives by reducing tobacco consumption;

(b) the measure would be highly trade restrictive. It would create a disincentive to export to New Zealand, distort the conditions of competition, and result in decreases to price and value because Plain Packaging would leave virtually no avenue by which manufacturers and retailers of a legal product could communicate important information concerning the source and quality of the product to their customers;

(c) effective alternative measures which would be less trade-restrictive are available; and

(d) it would impose unnecessary costs on tobacco product manufacturers, especially manufacturers in developing countries whose products are sold in small volumes in New Zealand. Indeed, the compliance costs which Plain Packaging would entail could make it uneconomic for manufacturers of tobacco products in developing countries to sell their products in New Zealand.

4.19 BAT’s position with regard to Plain Packaging and the TBT is not dissimilar from that adopted by the New Zealand Government itself in opposing Thailand’s proposal to require alcoholic beverages to carry graphic health warnings. The meeting minutes of the WTO Committee on Technical Barriers to Trade record that:

The representative of New Zealand shared the concerns expressed by previous speakers. While New Zealand was supportive of the right of WTO Members to introduce new regulations to address specific public health issues, concerns remained that the proposed labelling requirements were unnecessarily trade restrictive and that less trade-restrictive approaches were available to achieve the stated objective. The New Zealand representative also argued that the new requirements would impose significant additional costs and administrative burdens on exporters, hence causing trade to be reduced. He informed the Committee that written comments had been sent to Thailand’s enquiry point. In particular, New Zealand was interested to know about the reasons and basis for the approach taken to labelling, including information on what alternatives had been considered to achieve the same objective, for example, the consideration of current international practices and the development of public education campaigns.75

BREACH OF INVESTMENT TREATIES

4.20 In addition to claims by States under the WTO agreements, the New Zealand Government would likely face claims from foreign investors under Investment Treaties which it has ratified, including various free trade agreements.

75 G/TBT/M/50, 28 May 2010 (10-2960), Committee on Technical Barriers to Trade, Minutes of the Meeting of 24-25 March 2010 at p 3, available at http://www.smoke-free.ca/trade-and-tobacco/wto-secretariat/TBT50_28mai10.pdf (emphasis omitted). New Zealand reiterated its concerns at a further meeting on 20-21 March 2012 (G/TBT/M/S6).
4.21 As has been stated above, certain companies within the BAT Group have substantial investments in New Zealand which enjoy protection under New Zealand’s Investment Treaties. These companies will take all steps necessary to protect their investments from unlawful government interference.

4.22 Other tobacco manufacturers are also likely to enjoy protection under New Zealand’s Investment Treaties.

4.23 Plain Packaging legislation would breach numerous provisions of New Zealand’s Investment Treaties, including those:

(a) prohibiting the expropriation of investments (including goodwill and intellectual property), and measures having an effect equivalent to expropriation, without the payment of compensation;

(b) requiring that investments be accorded fair and equitable treatment;

(c) requiring that investments be accorded full protection and security; and

(d) guaranteeing non-discriminatory treatment.

4.24 The concept of “measures having an effect equivalent to expropriation” precludes any argument by the New Zealand Government that Plain Packaging would not breach New Zealand’s Investment Treaties because it would not result in the Government itself making use of the tobacco trade marks. The destruction in substance of the value of the investment held by an investor is determinative. Whether the Government thereby obtains a benefit is irrelevant, as was stated in Metalclad Corporation v The United Mexican States:

... [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.  

4.25 The “fair and equitable” treatment standard requires the New Zealand Government to act towards foreign investors with total transparency and to respect their legitimate expectations. Every legal business has a legitimate expectation that it will be able to communicate with its customers, distinguish its products from those of competitors, and continue to use trade marks and other intellectual property which it has used for decades, in accordance with New Zealand legislation. As the tribunal said in Técnicas Medioambientales Tecmed SA v The United Mexican States:

[a state having undertaken to accord investments fair and equitable treatment must] provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the

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76 ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at para 103, available at https://icsid.worldbank.org/ICSID/FrontServlet?actionVal=showDoc&docId=DC542_En&caseId=C155 (emphasis added).
investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. ... The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.77

4.26 Further, while the consumption of tobacco products may in the long-term harm an individual user, so too may other legal products, such as alcohol and fast food — see paragraphs 6.46 to 6.50 below.78 Were it to proceed with Plain Packaging for tobacco products, the New Zealand Government would breach the fair and equitable treatment and non-discrimination requirements through its unjustifiably discriminatory approach to regulation. The requirement for consistency and the absence of unjustifiable regulatory distinctions has been expressed thus:

A foreign investor protected by the Treaty may in any case properly expect that the [host state] implements its policies bona fide by conduct that is, as far as it affects the investor[s] investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.79

4.27 Public health justifications would not be a defence if the Government breaches an Investment Treaty through unfair, inequitable and discriminatory conduct. Even if in theory they could be a defence, given the absence of evidence that Plain Packaging would reduce tobacco consumption, the existence of suitable alternative tobacco control measures, and the fact that tobacco remains a legal product, it would be impossible for the Government to discharge its burden of proving that Plain Packaging is a proportionate, pressing and reasonable measure that is necessary for the protection of public health.

4.28 Nor does the FCTC provide a justification for breaching New Zealand’s international obligations. The binding Articles of the FCTC do not even mention Plain Packaging. The Guidelines for Articles 11 and 13 of the FCTC, which are not binding, merely

77 ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para 154, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caselid=C186.
propose that parties should “consider adopting”80 Plain Packaging, and recognise that such measures may be precluded by domestic or international laws.

4.29 The remedies to which the relevant BAT Group companies and other tobacco manufacturers would be entitled under Investment Treaties include an order for restitution pursuant to Article 35 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.81 Indeed, the New Zealand Government itself has rightly argued that an order for specific performance should be the primary remedy under public international law. It said that:

[If the party in breach [of a treaty] were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm pacta sunt servanda would cease to have any real meaning.82]

4.30 The New Zealand Government would be exposed not only to an order for restitution, but also to an award of substantial damages. The award would be fashioned so as to wipe out all consequences of the Government’s illegal acts.83 As we comment in Section 6 of this Response, Plain Packaging would result in a move towards the commoditisation of the market for tobacco products in New Zealand, causing prices for BAT’s premium products to fall. The losses resulting from this would form a material part of the damages for which the New Zealand Government would be liable.

4.31 The RIS suggests that the average costs incurred by each party in Investment Treaty arbitrations come to NZ$3-6 million.84 The complexity of the economic, industry and public policy evidence that would be required for such an arbitration relating to Plain Packaging would very likely result in costs on a substantially higher scale. In more

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83 Case Concerning the Factory at Chorzów, Merits, Judgment No 13,, PCIJ, Series A, No 17 (13 September 1928) at p 47, available at http://www.icj-cij.org/cij/judgments/1928/1928-merits.jsp: “The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

84 RIS at para 23.
complex Investment Treaty arbitrations, the legal costs for each party have in the past been in the region of NZ$10-20 million and can be significantly higher.\(^{85}\)

## UNJUSTIFIABLE RESTRICTION OF FREEDOM OF EXPRESSION

### THE RIGHT IS INFRINGED

4.32 The right to freedom of expression is enshrined in section 14 of the BoRA. It includes both the right of companies like BAT to impart information, and the right of consumers to receive information.

4.33 The Hon Tariana Turia, the Associate Minister of Health, accepts in a Cabinet paper that “[r]estricting the use of tobacco brand marketing elements on packaging will impact on freedom of expression...” under section 14 of the BoRA.\(^{86}\)

## THE INFRINGEMENT CANNOT BE JUSTIFIED

4.34 Ms Turia’s Cabinet paper proceeds to suggest, without any legal analysis, that Plain Packaging legislation would be “a justified limitation arising from the significant public harm being addressed and the relatively less significant type of commercial expression involved”.\(^{87}\)

4.35 These statements are incorrect in the light of the relevant United States and Canadian authorities discussed below and contradict the Government’s own legal reasoning in the context of alcohol. In rejecting a ban on alcohol advertising, the Government rightly accepted that such a ban was “[u]nlikely to be justified under the Bill of Rights Act because of the significant restriction on commercial expression that is not targeted and proportionate”.\(^{88}\)

4.36 The same is true of Plain Packaging for tobacco.

4.37 In order for the Ministry to be confident that the Attorney-General would be able to endorse Plain Packaging legislation under section 7 of the BoRA, and that the Government could justify the measure in legal proceedings, it would be necessary to demonstrate that Plain Packaging satisfies the reasonable limitations test under section 5 of the BoRA in that it:\(^ {89}\)

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85 See for example Quasar de Valores SICA SA v Russian Federation, SCC Case No 24/2007; IIC 557 (2012), Award, 20 July 2012 at para 220.


87 At para 48.


(a) is designed to further a pressing and substantial social policy objective which is sufficiently important to warrant overriding the constitutionally protected right to freedom of expression. The more severe the deleterious effects of the measure, the more important must be the objective which it seeks to attain;

(b) has been carefully designed to achieve the objective in question and is rationally connected to that objective; and

(c) impairs the right to freedom of expression as little as possible or to the minimum degree necessary.

4.38 Decisions of the Supreme Court of Canada, the Supreme Court of the United States and, more recently, two United States Circuit Courts of Appeal all indicate that Plain Packaging legislation would fail this test. Since there is no evidence that Plain Packaging would be effective, since tobacco remains a legal product, and since alternative measures are available, Plain Packaging would not be carefully designed or rationally connected to its purpose, and it would not impair the right to freedom of expression only to the minimum degree necessary.

4.39 In RJ Reynolds Tobacco Company v Food and Drug Administration, when striking down nine graphic health warnings as unconstitutional, the US Court of Appeals for the District of Columbia Circuit held that the warnings could be justified only if there was substantial evidence to support their effectiveness. Citing US Supreme Court decisions, the Court stated that:

Assuming FDA’s interest in reducing smoking rates is substantial, we next evaluate whether FDA has offered substantial evidence showing that the graphic warning requirements “directly advance[] the governmental interest asserted,” … to a “material degree,” … . The government bears the burden of justifying its attempt to restrict commercial speech …, and its burden is not light. A restriction that “provides only ineffective or remote support for the government’s purposes,” … is not sufficient, and the government cannot satisfy its burden “by mere speculation or conjecture”.

4.40 Similarly, in RJR-MacDonald Inc v Canada, where the Supreme Court of Canada found a tobacco advertising ban to be inconsistent with the Canadian Charter of Rights and Freedoms, McLachlin J (now McLachlin CJ) stated that:

The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament’s goal may seem, if the state has not demonstrated

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that the means by which it seeks to achieve its goal are reasonable and proportionate to
the infringement of rights, then the law must perforce fail.

... Even on difficult social issues where the stakes are high, Parliament does not have the
right to determine unilaterally the limits of its intrusion on the rights and freedoms
guaranteed by the Charter.91

4.41 The New Zealand Government could not meet this test by reference to its inadequate
RIS and the speculative “evidence” summarised in the PHRC Review.

4.42 Nor is Plain Packaging narrowly tailored to meet its purpose. It is a blanket prohibition
that affects tobacco companies, adult consumers, and youth alike. It must be
remembered that the sale of tobacco to persons under the age of 18 years is
prohibited in New Zealand. In Lorillard Tobacco Co v Reilly, the Supreme Court of the
United States struck down a tobacco advertising ban for being insufficiently tailored to
achieve its purposes, one of which was to reduce youth smoking. The majority stated
that:

We must consider that tobacco retailers and manufacturers have an interest in
conveying truthful information about their products to adults, and adults have a
corresponding interest in receiving truthful information about tobacco products. In a
case involving indecent speech on the Internet we explained that “the governmental
interest in protecting children from harmful materials ... does not justify an unnecessarily
broad suppression of speech addressed to adults.” Reno v. American Civil Liberties
Products Corp, 463 US 60, 74 (1983) (“The level of discourse reaching a mailbox simply
cannot be limited to that which would be suitable for a sandbox”); Butler v Michigan,
352 US 380, 383 (1957) (“The incidence of this enactment is to reduce the adult
population ... to reading only what is fit for children”). As the State protects children from
tobacco advertisements, tobacco manufacturers and retailers and their adult consumers
still have a protected interest in communication.92

4.43 Further, as the Supreme Court recognised in that case, when a business has only a
limited ability to communicate with consumers, any further restriction is
correspondingly more difficult to justify and there is an even greater need for it to be
appropriately tailored.93

4.44 Moreover, in Discount Tobacco City & Lottery v United States, the United States Court
of Appeals for the Sixth Circuit indicated that health warnings would be struck down if
the “remaining portions of their packaging [were] insufficient for [manufacturers] to

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place their brand names, logos or other information” and held that “banning the use of color and graphics in tobacco advertising is vastly overbroad”.94

4.45 Under the SFEA, New Zealand has already adopted a total advertising ban, prominent graphic health warnings, and now a retail display ban. Combined with these existing measures, Plain Packaging would amount to virtually the total prohibition of all communication by BAT with the 19% of New Zealanders who choose to consume tobacco products. Plain Packaging would be a wholly disproportionate measure which could not be justified under section 5 of the BoRA.

**VIOLATION OF FUNDAMENTAL COMMON LAW PRINCIPLES**

4.46 The Government’s stated justifications for its refusal to prohibit alcohol advertising and impose other restrictions on alcohol marketing are revealing. Despite its view that alcohol imposes enormous costs on New Zealand society, the Government appears to accept that an advertising ban may amount to an unjustifiable interference with, inter alia, fundamental common law principles:

> One of the most significant areas of risk is alcohol advertising, as there is limited information available to determine impacts. Some of the options may over-ride fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines), as they may restrict property rights.95

4.47 This reasoning, if applied consistently, also precludes the adoption of Plain Packaging for tobacco products. Indeed, it applies even more strongly to tobacco, because tobacco advertising is already prohibited by the SFEA and because Plain Packaging would involve the impairment of trade marks and goodwill, which are recognised as property rights under the Trade Marks Act 2002 and at common law,96 as well as other intellectual property rights.

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96 See section 9(1) of the Trade Marks Act 2002 and *AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273 at pp 283-284 per Lord Parker.
If New Zealand introduces Plain Packaging, it will do serious damage to its reputation as a trading nation and as a destination for investment.

The Government has continually emphasised the importance of free trade agreements to New Zealand’s continued prosperity. By way of example, during the first reading of the ASEAN-Australia-New Zealand Free Trade Area Bill, the Hon Tim Groser stated that:

The ASEAN free-trade agreement, like all of our free-trade agreements, helps to create an environment that makes it easier, more profitable, and more predictable for New Zealand businesses to enter markets and to do business in those markets. Now, as we find ourselves in the greatest period of economic downturn since the Great Depression of the 1930s, securing new market access is more critical than ever. 97

Many international business groups have warned of the threat to intellectual property that is posed by Plain Packaging and the violation of international commitments it would entail. 98 For example, the United States Chamber of Commerce has stated that it is:

… most troubling that as efforts are underway to deepen the opportunities for economic growth and opportunity between the United States and New Zealand, we now find that the New Zealand government is considering the destruction of an industry’s legitimate trademark protection and branding – rights long protected under law and international treaties. 99

More than 15 countries (including China and Indonesia) 100 have already publicly voiced their opposition to Plain Packaging measures at the TBT Committee and the TRIPS Council meetings. Leading businesses and trade associations around the world 101 have expressed serious concern. Ukraine, Honduras and the Dominican Republic, China, Cuba, Dominican Republic, El Salvador, Honduras, Hong Kong, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Philippines, Russian Federation, Switzerland, Turkey, Ukraine, Zambia and Zimbabwe.


98 Including TransAtlantic Business Dialogue, the Emergency Committee for American Trade, the National Association of Manufacturers, the United States Council for International Business, the National Foreign Trade Council, the European Communities Trade Mark Association, the British Brands Group and the International Trademark Association.


100 Chile, China, Cuba, Dominican Republic, El Salvador, Honduras, Hong Kong, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Philippines, Russian Federation, Switzerland, Turkey, Ukraine, Zambia and Zimbabwe.

Republic have submitted formal requests for consultation under the WTO agreements to Australia, and Ukraine has already requested the constitution of a WTO Panel.\textsuperscript{102} An arbitration has been commenced against Australia by Philip Morris Asia Limited under the Investment Treaty between Australia and Hong Kong, seeking substantial compensation.\textsuperscript{103}

5.5 It is in New Zealand’s interest to observe, and encourage other states to comply with, free trade agreements and Investment Treaties for two principal reasons.

5.6 First, were New Zealand to disregard its international commitments, this would have a significant negative impact on foreign direct investment in New Zealand. Inbound investors would be deterred by New Zealand’s apparent willingness to disregard private property rights.

5.7 Secondly, by adopting Plain Packaging for tobacco, New Zealand would compromise its ability credibly to oppose similar labelling and brand expropriation policies in other countries when they affect New Zealand’s exports. For example, New Zealand would find it difficult to prevent other countries from requiring that New Zealand wine be sold in plain packages or with inappropriate health warnings. In particular, it could become difficult for New Zealand to oppose Thailand’s proposal that alcohol be sold only in bottles with graphic health warnings. Even the United Kingdom Government has raised the prospect of plain packaging for alcohol,\textsuperscript{104} and South Africa’s Health Minister has stated that branding should be removed from alcoholic beverages.\textsuperscript{105}

5.8 New Zealand is a small, distant, open economy that depends heavily on trade and foreign investment for its continued prosperity. If key exports were to be burdened by the introduction of irresponsible labelling policies in overseas markets and if foreign investment in New Zealand is discouraged, the impact on New Zealand’s economy would be significant.

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Committee for American Trade, the US-ASEAN Business Council, the TransAtlantic Business Dialogue, and the American Legislative Exchange Council.
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6  PLAIN PACKAGING WOULD HAVE SERIOUS UNINTENDED CONSEQUENCES

SUMMARY

6.1 Plain Packaging would have significant unintended, undesirable consequences. In particular, it would:

(a) cause prices to fall, which would cause tobacco consumption to increase;
(b) cause illicit trade in tobacco to increase;
(c) set a dangerous precedent for other businesses; and
(d) create significant costs and security risks for retailers.

PRICES WOULD FALL AND CONSUMPTION WOULD INCREASE

6.2 The tobacco market is already subject to significant restrictions (including the ban on advertising, the prohibition of event sponsorship, and the retail display ban) which exist for almost no other industry. Plain Packaging would take that regulation yet further, by removing the ability of manufacturers to compete by way of product differentiation, thereby leaving price as the only meaningful competitive lever. This would have the undesirable effect of moving the tobacco market towards a lower-priced, commodity market.

6.3 Plain Packaging would have the following price effects on the New Zealand market:

(a) in the short term there would be little immediate change in consumer behaviour, particularly in the premium brand segment, due to residual brand loyalty;
(b) over time, residual brand loyalty would decline, meaning that adult smokers would become increasingly influenced by price as the basis for product choice;
(c) consumers’ increased focus on price would increase the levels of down-trading to lower-priced products (across all market segments, including the illicit market);
(d) price competition would inevitably increase, leading to price falls across all segments of the legal market, with the greatest price falls in the premium sector, where branding is a key element of differentiation. Many smokers who today are prepared to pay more for a premium product would be unwilling to pay premium prices when all brands are sold in plain packs. Such smokers would be likely to trade down to cheaper cigarettes; and
(e) lower prices would lead to increased tobacco consumption, particularly amongst young people and those from lower socio-economic groups, who are said to be more price-sensitive.
Plain Packaging would exacerbate a very real illicit trade problem in the following ways:

(a) Plain Packaging would reduce brand equity, which leads to commoditisation and lower prices. When price is the key driver of consumption, the cheapest product has the greatest competitive advantage. The cheapest products would be those for which no excise or GST is paid: contraband, counterfeit, and “chop chop” (New Zealand-grown illicit tobacco);

(b) counterfeiting would be made much easier because the packs’ design complexity would be reduced. It would also be harder for retailers, consumers, and enforcement agencies to detect fake products because certain packaging elements that prove the product’s authenticity (such as special seals for cigarette packs) would be banned by Plain Packaging legislation; and

(c) there would likely be an increased demand for branded cigarettes from overseas jurisdictions from consumers who would prefer to use the branded products to which they are accustomed, creating incentives for smugglers of contraband and counterfeit packs.

An increase in illicit trade would undermine the stated aims behind Plain Packaging. It would also have a significant impact on Government revenues (via reduced excise and GST receipts) and society in general through increased criminal activity.

There are three main kinds of illicit tobacco in New Zealand: smuggled counterfeit tobacco, contraband (non-duty paid but non-counterfeit) tobacco, and “chop chop”.

Smuggled counterfeit tobacco is generally sourced from Asia or jurisdictions with lower excise rates.

“Chop chop” is grown in Motueka and the Far North. Two men from Motueka and Wellsford were recently convicted for the unlawful manufacture of “chop chop”. Almost 5,000 kilograms of tobacco leaf was seized, worth approximately $2 million dollars if manufactured. By contrast to the substantial value of the tobacco, the fines imposed on the two men totalled a mere $7,500.

There is also evidence of an increase in consumers ordering branded products from overseas suppliers online, as well as the smuggling of contraband (non-duty paid) branded cigarettes into New Zealand.

SIZE AND EXTENT OF ILLICIT MARKET

6.9 The illicit trade in tobacco is a very real problem. Customs figures show that Customs detained an average of 800,000 cigarettes and 221 kilograms of loose tobacco per year between 2007-2009.\(^{109}\) A 2010 Ernst and Young study indicates that illicit tobacco costs New Zealand between $39 million and $50 million in lost revenue from excise and GST every year.\(^{110}\)

6.10 More recent Customs figures obtained under the Official Information Act 1982 show that in the period June 2011 to May 2012, Customs detained 805,464 cigarettes. That is an average of over 67,000 cigarettes a month, or over 2,200 cigarettes a day. These are likely to be at the low end of the actual amounts of illicit product in the market. It cannot be assumed that Customs finds and seizes anything like all contraband and counterfeit tobacco entering New Zealand, and this may well explain the large variations in the quantities detained by Customs year to year.

PLAIN PACKAGING WOULD INCREASE THE INCENTIVES AND OPPORTUNITY FOR ILLICIT TRADE

6.11 The RIS acknowledges that “there is also a possibility of increased counterfeiting and black market sales of tobacco” as a result of the adoption of Plain Packaging in New Zealand.\(^{111}\) However, BAT believes this significantly understates the risk.

6.12 Indeed, in 2009, it was reported that Customs recognised that there was a growing illicit tobacco market in New Zealand in response to the tough economic times:

Smugglers have switched from pornography and exercise machines to the old mainstays of booze and cigarettes in response to the recession, Customs officers say.

... Customs investigations officers reported a rise in both tobacco found stashed in containers and carried by “tobacco mules” people bringing more than their allotment into New Zealand in their luggage.

... [Customs investigations operations manager Dave] Meredith, a 40-year Customs veteran, said officers had noticed changes in the type of goods being seized.

“Until six to seven months ago, we were inundated with objectionable material and IPR [intellectual property rights] material, such as counterfeit exercise machines, hair straighteners and brand-name products.


\(^{111}\) RIS at para 23.
Since the recession ... it’s been commercial fraud people trying to bring in cigarettes to sell.”

... Smuggled cigarettes were a problem, but so were counterfeit cigarettes, he said.¹¹²

### PRICE AND BRAND EQUITY

#### 6.13 Further, as the Rt Hon John Key has recognised, excessive excise tax rises would inevitably increase illicit trade.¹¹³

#### 6.14 Although some tobacco consumers are driven largely by price, the existence of significant premium and sub-premium segments in the high-price New Zealand tobacco market indicates that a large section of consumers are willing to pay a premium for high quality cigarette brands. Plain Packaging would deprive quality tobacco products of the look and feel of premium products and therefore drive prices down. This would confer a competitive advantage on those able to supply the cheapest product – i.e. illicit traders. According to the Ontario Tobacco Research Unit:

> Tobacco control measures such as advertising bans, public awareness campaigns, and point-of-sale display bans have had the cumulative effects of denormalizing traditional cigarette brands, stripping them of the social significance they once had. As big tobacco company brands have been denormalized, there has been growth in demand for “no-name” [illicit] cigarettes and discount brands.¹¹⁴

#### 6.15 Customs has also noted the attractions to organised crime in smuggling tobacco that can result from their ability to compete on price:

> “I think it is only a matter of time before we end up in the situation where criminal groups will organise themselves to smuggle cigarettes,” [Customs’ acting national manager of investigations, Noel] Dravitski said, pointing out its advantages over drug smuggling.

> “You don’t spend a million years in jail if you smuggle cigarettes ... and there’s a reasonable profit.”¹¹⁵

### MAKING COUNTERFEITS EASIER TO MANUFACTURE

#### 6.16 Plain Packaging would increase levels of counterfeit tobacco by making the manufacture of counterfeit plain packs much easier and cheaper.
6.17 It is much simpler to manufacture fake packs that would no longer come in numerous and varied shapes and sizes or feature complex design features, such as bevelled edges or rounded corners. Plain Packaging would mean that much simpler technology and machinery to make the new packs would suffice.

6.18 It would also be simpler to print plain packs, without embossing, metallic finishes and difficult “gravure” print technology. This makes it easier and therefore more attractive for criminals to start counterfeiting packs.

6.19 Some commentators have suggested that the requirement to reproduce the pictorial health warnings would still make counterfeiting difficult and costly. However, compared with the print and design features referred to above, the reproduction of graphic health warnings is relatively straightforward for most counterfeiters.

6.20 As the UK Transcrime Report points out:

Experts from the carton-making industry recently declared that “pictorial health warnings pose no real barrier to counterfeiters: they can be produced (and reproduced) using low-cost printing techniques from equipment readily available in the market and four basic print colours”.

6.21 The International Chamber of Commerce's director for Business Action to Stop Counterfeiting and Piracy (BASCAP), Jeffrey Hardy, has warned that Plain Packaging would increase counterfeiting and smuggling:

Once brands are removed and all packaging is made to look the same, it is easy to imagine how much simpler it will be to counterfeit a pack of cigarettes. It will reduce brand owners’ ability to take action against counterfeiting and will increase the burden on already overstretched public agencies as they try to keep illicit products away from consumers.

6.22 By facilitating the counterfeiters’ ability to make fake products that look virtually identical to the genuine ones, Plain Packaging would make it much harder for both retailers and consumers to identify what is fake and what is not. As retailers and consumers are increasingly misled in relation to fake products, the intelligence information that enforcement authorities receive from the public in relation to illicit product would also diminish.

6.23 In light of the considerations described above, it oversimplifies the issue to contend (as do some tobacco control advocates) that counterfeit plain packs would not be any more difficult to detect because packs are still required to have covert security markings. Consumers are plainly not aware of the existence and relevance of covert security markings. 

markings using ink that can only be detected with sophisticated identification equipment. Such equipment is generally not available to retailers and consumers.

6.24 Fakes of branded cross border products would also be harder to detect as consumers would no longer be able to compare them with legal branded products.

6.25 Ruth Orchard, Director-General of the Anti-Counterfeiting Group (ACG), a trade association that represents more than 170 organisations globally and a recognised leading authority on the worldwide trade in fakes, has said:

Plain packaging will be welcomed by counterfeiters. It will make their job much simpler and make it harder for consumers to spot fakes. It creates a trading environment where all packaging will look essentially the same and where the standard designs will be easy to replicate illegally. Such effects need to be integrated into Government thinking.118

ILLEGAL CROSS BORDER TRADE AND PLAIN PACKAGING

6.26 Today, the illegal cross border trade is driven by consumers’ desire for cheaper product and the ability of illicit traders to supply it from overseas. In a Plain Packaging world, those same traders would have an additional opportunity to supply branded product to those who prefer products recognisable by their current branded format. Indeed, Plain Packaging would create a significant competitive advantage in favour of overseas branded products, as they would be perceived as better quality than Plain Packaged products, which would lack the origin, quality and value attributes created by branding. This is a point forcefully made by Erik Bloomquist, Berenberg Bank, in March 2011:

... [I]t is possible that in a plain package environment, the only ‘branded’ product would be either illicit whites (such as Jin Ling) or grey market product brought in from non-plain-package jurisdictions. This increase in the illicit market would then accentuate not only our expectation of PP’s failure to reduce initiation or consumption in the overall market, but also its unintended negative impact on the tobacco tax base, eroding control by public health of tobacco generally and likely increasing youth access.119

NEGATIVE FINANCIAL AND HEALTH CONSEQUENCES FOR NEW ZEALAND

LOST EXCISE AND GST REVENUE

6.27 The New Zealand Government already loses between $39 million and $50 million in lost revenue from excise and GST on illicit tobacco every year.120 An increase in illicit trade would result in further excise and GST losses. Even if Plain Packaging caused

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only a 5% shift from legal products to illicit products, the New Zealand Government’s
tax take from excise alone would fall by roughly $57 million annually.

**ILLEGIT TRADING INCREASES CONSUMPTION AND RESULTS IN GREATER HEALTH RISKS**

6.28 It has not been demonstrated that Plain Packaging would lower youth smoking rates.
In fact, an increase in the availability of cheaper illicit product would increase youth
smoking rates. As has been recognised by the UK Government:

Unregulated distribution networks associated with smuggling make tobacco more
accessible to children and young people and perpetuate health inequalities across
socio-economic groups.121

6.29 The fact that consumption increases as the availability of illicit tobacco increases was
accepted by the Hon Chris Carter on the first reading of the Customs and Excise
Amendment Bill (No 3) in December 2007:

The Bill is particularly concerned about the undesirable health and social consequences
that stem from the illegal manufacture of tobacco products. These include making
tobacco products available at low cost, which encourages higher consumption levels
with the associated health impacts.122

6.30 The Hon Chester Borrows said:

It may be surprising to people to learn that there is a trade in illicitly grown and
manufactured tobacco products. People are taking the opportunity to grow tobacco
products on a commercial scale.123

6.31 The Australian Department of Health and Ageing has also recognised that illicit
tobacco undermines Government tobacco policy and increases health risks:

Tobacco smuggling undermines Government efforts to reduce rates of smoking in
Australia. In particular, smuggling reduces the effectiveness of tobacco excise as a
tobacco control measure, and could reduce the effectiveness of plain packaging and
expanded graphic health warning requirements ... 124

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121 HM Revenue & Customs. “Tackling tobacco smuggling—building on our success. A renewed strategy for
HM Revenue & Customs and the UK Border Agency”, (April 2011) at p 2, available at
http://www.google.co.nz/url?sa=t&rct=j&q=a%20renewed%20strategy%20for%20hm%20revenue%20%26%20
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First.htm.

124 Australian Government Department of Health and Ageing, “Submission to the Senate Legal and Constitutional
Affairs Legislation Committee on the Inquiry into Customs Amendment (Smuggled Tobacco) Bill 2012”,
(July 2012) at p 6, available at
6.32 These consequences are the very opposite of the outcome Plain Packaging is intended to achieve. The New Zealand Customs Service has recognised that “the financial and health impacts of home-grown tobacco can be significant.”  

6.33 There are additional health risks relating to illicit tobacco, besides increased consumption. Illicit tobacco exposes consumers to unregulated products with no controls on the hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

6.34 Europol, the main European law enforcement agency, which is engaged in combating illicit tobacco trade, has stated:

> To increase profits, illegal tobacco is produced with cheap materials, and with little regard for health and quality controls. These cigarettes are sold to smokers, instead of genuine products which have to meet certain standards. Seized counterfeit cigarettes have been found to contain mites, insect eggs, fungi and even human faeces.

6.35 A report commissioned by the Australian Department of Health and Ageing also concluded that there are significant quality problems with “chop chop” that can have serious consequences for growers and users:

> The smoking and handling of “chop-chop” tobacco has the potential to induce illness and possible fatality in those who use it. These illnesses may range from allergic reactions, chronic bronchitis, asthma, aspergillosis, alveolitis, pneumonitis, lung cancer to Legionnaire’s disease.

6.36 During the first reading of the Customs and Excise Amendment Bill (No 3), the Hon Shane Ardern said:

> The third point is the tighter control of exemptions around the harvesting and domestic cultivation of tobacco, and the potential risks not only to health but also for black market—clandestine, call it what you will—underground activity, with the Customs Service not having the ability to charge a fair tax, which has all sorts of ramifications in terms of developing a market. It also has a negative impact on health in that those who are supposedly cultivating this tobacco for their own domestic use may be selling it, and there is no possibility of the State recovering any costs that may flow from that in terms of health care.


6.37 The illicit tobacco trade is generally run by organised crime which uses profits from illicit tobacco for expanding other illegal activities.

6.38 John Whiting, Assistant Director of Criminal Investigations at Her Majesty’s Revenue and Customs has stated:

Tobacco smuggling is organised crime on a global scale, with huge profits ploughed straight back into the criminal underworld, feeding activities such as drug dealing, people smuggling and fraud.

Purchasing cheap cigarettes without the duty paid on them means trading with criminals and under-mining honest businesses.

Organised criminal gangs will deal in any commodity: alcohol, tobacco, rebated oils, drugs, stolen goods, illegal immigrants and human trafficking – whatever makes them money and allows them to launder their criminal profits.

Many people who buy a few cans of lager or dodgy cigarettes do not realise the scale of criminality behind the sellers they are dealing with.129

6.39 Intelligence shows organised crime networks are looking to enter or have already entered New Zealand. The potential for a significant increase of the illicit market in New Zealand is very real. BAT has engaged with the New Zealand Customs Service on this issue and will continue to do so.

DANGEROUS PRECEDENT FOR OTHER BUSINESSES

6.40 Plain Packaging of tobacco products would represent a fundamental shift in the Government’s attitude towards intellectual and other property rights and would have far-reaching implications.

6.41 There is no reason why the arguments which have been deployed in support of Plain Packaging for tobacco products would not apply equally in relation to a number of other products, particularly alcohol and fast food.

6.42 This has already been implicitly recognised by New Zealand’s Trade Minister, the Hon Tim Groser:

We need to listen carefully, especially to other companies that would be very concerned if we were setting a precedent on this [Plain Packaging for tobacco]. That might actually go against our own interests.

We know what the real target is, but we need to consult the public and then we’ll need to have some very careful decisions to make sure that if we are going to move forward with legislation in this area, is properly designed to deal with those legitimate concerns.

... I’m thinking really outside tobacco I should say.130

6.43 The International Chamber of Commerce has noted:

With the plain packaging principle, the elimination of branding creates a severe trade restraint, interfering with the legitimate growth of markets and very real adverse precedential implications for other legal and branded products and services.131

6.44 Similarly, the UK arm of the International Chamber of Commerce has observed:

This is not just an issue for the tobacco industry and health groups. The introduction of plain packaging legislation would break new ground for the UK in terms of how commercial expression is regulated – the possible consequences of which need to be carefully considered for the economy as whole. ...

What might be viewed as a justifiable measure in narrow terms, could set a precedent which would be hugely damaging to global trade.132

6.45 Indeed, the UK House of Commons’ Health Select Committee has included plain packaging for alcohol as part of its current inquiry into the Government’s alcohol strategy.133

6.46 A link between Plain Packaging for tobacco and alcohol is by no means far-fetched. The WHO states that alcohol causes greater harm than tobacco globally in terms of disability-adjusted life years lost134 and that it is the world’s “third largest risk factor for disease burden”.135 The New Zealand Government appears to consider that alcohol consumption imposes enormous costs on New Zealand society in terms of crime and public health.136 While it is often asserted that tobacco is unique in that no degree of tobacco consumption is safe, this overlooks the fact that government and cancer research agencies state that there is no safe level of alcohol consumption:

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The evidence linking alcohol and cancer has been very strong for many years. The International Agency for Research on Cancer (IARC) first said that there is ‘sufficient evidence’ that ‘alcoholic beverages are carcinogenic to humans’ back in 1988.

The evidence has strengthened since, with hundreds of studies showing the same thing. Alcohol causes seven types of cancer: mouth, oesophageal, pharyngeal, laryngeal, breast, colorectal and liver.

The most recent estimates from a large European EPIC study suggest that anywhere from 13,000 to 17,000 cases of cancer in the UK are caused by alcohol. …

Studies have consistently shown that there is no safe threshold. Just three units a day – the amount in a pint of strong lager or a large glass of wine – can significantly increase the risk.137

6.47 Professors Sellman and Connor of the University of Otago are campaigning aggressively for disproportionate restrictions of the alcohol industry,138 and the former has gone so far as to suggest that alcohol would appropriately be classified as a Class B drug.139

6.48 Further, the New Zealand and Australian Governments have stated that:

The chronic disease burden caused by poor diet is the largest cause of ill health in the community. It has a greater impact than smoking, physical inactivity and alcohol misuse. … In New Zealand, approximately one in three adults is overweight and one in four obese, while one in five children aged 2–14 is overweight, and one in 12 is obese.140

6.49 Professor Hoek, whose writings concerning graphic health warnings and Plain Packaging appear to have influenced the Ministry of Health, has drawn an explicit connection between tobacco and fast food, argues for advertising restrictions for all


manner of food products consumed by children, and appears to suggest that fast food should be "de-normalised":

*Is it fair to compare food with tobacco?*

‘While food and tobacco are different (tobacco is unambiguously harmful, good food is important to life), not all foods are ‘healthy’. Energy-dense and nutrient-poor (EDNP) foods are linked to obesity which, in turn, increases the risk of serious chronic illnesses such as diabetes. Where products present risks to public health, it seems reasonable to review the marketing used to promote them with the marketing used to promote other unhealthy products, such as tobacco.’

... Should we be supporting fast food de-normalisation campaigns?...

‘... The wide availability of fast food and its dominant commercial presence will make fast food denormalisation campaigns difficult to undertake, unless these are funded at the same level. We need first to change the food marketing environment so healthy eating (or unhealthy food avoidance) campaigns can have more effect.’

6.50 We draw attention to these statements about alcohol and fast food, not because we endorse the views of those who advocate radical and misconceived measures with respect to these products, but to illustrate the risks to the New Zealand economy which would be created by Plain Packaging.

6.51 By contrast with the views of Professors Sellman, Connor and Hoek, the New Zealand and Australian Governments take the view that a very cautious approach to labelling is warranted for the food and beverage sector, including alcohol:

[F]ood and beverage manufacturing in New Zealand is crucial to the New Zealand economy, employing approximately 20% of the working population with sales of approximately $27 billion per annum. Foods and beverages account for more than half of New Zealand’s total merchandise exports at around $15.3 billion per annum, with domestic retail sales of $12.4 billion each year.

Any regulatory decisions affecting the sector need to be reasonable and sensible. In addition the outcomes need to be practical to enforce by regulators. Any regulatory decisions impacting on the international competitiveness of the Australian and New Zealand food industries will need to be carefully considered. ...

The food labelling regulatory framework must strike a balance between seeking to ensure good public health outcomes (both short and longer term) and ensuring a strong

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142 “‘Big Food’ needs scrutiny – experts” (20 June 2012), available at http://www.sciencemediacentre.co.nz/2012/06/20/big-food-needs-scrutiny-experts/.
and profitable food industry. For this reason, the development of a response and plan of action to the recommendations of *Labelling Logic* has been a complex task.  

6.52 Unjustifiable discrimination would occur were the Government not to approach tobacco regulation in a similarly balanced manner.

6.53 Leaving that aside, if the Government resolves to pursue Plain Packaging for tobacco products, a dangerous precedent for other industries would have been set – most notably New Zealand’s crucial food and beverage sector.

6.54 The Government would (as we have noted above) have limited its ability credibly to challenge overseas regulatory measures that harm New Zealand’s export sector, but would also find itself subjected to increasingly strident demands from lobby groups for the extension of Plain Packaging and other de-normalisation policies to a wide range of consumer products.

### SIGNIFICANT BURDENS ON RETAILERS

6.55 Retailers face many challenges in order to make a living, and unsurprisingly, it is often smaller, independently-owned retailers who are most affected by adverse economic developments and regulatory change (like the recent implementation of the retail display ban for tobacco products). BAT representatives call on many retailers and, in so doing, gain an understanding of their concerns.

6.56 Small retailers already feel rightly aggrieved about the retail display ban, which has increased transaction times and exposed them to security risks.

6.57 Plain Packaging would impose further burdens on these retailers. It would compound the logistical problems created by the retail display ban. Transaction times would become even longer. Stock management would become even more time-consuming due to the difficulty of quickly and accurately counting high value stock when all packaging looks essentially the same.

6.58 In Australia, the annual cost to each retailer from these problems has been estimated as follows:  

(a) stock management costs: A$1,200-A$5,500;
(b) transaction costs: A$3,000-A$27,000; and
(c) product selection errors: A$180-A$1,400.

6.59 Stock management and transaction time problems also heighten retailers’ very real concerns about personal safety and loss of sales to store theft.

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6.60 Small retailers are an important part of the community, and additional burdens for them would negatively impact the wider economy.
7 INADEQUATE POLICY ANALYSIS IN THE RIS

SUMMARY

7.1 The RIS prepared by the Ministry of Health fails to meet even rudimentary standards for regulatory analysis and is wholly inadequate as a basis for the enactment of legislation.

7.2 Most notably, the RIS:

(a) fails to acknowledge that Plain Packaging would amount to an unjustifiable violation of international trade rules and an uncompensated expropriation of property rights, in breach of fundamental principles and international law;

(b) defines the policy objective too narrowly, targeting packaging specifically (rather than a reduction in tobacco consumption), and thus pre-justifies the choice of Plain Packaging;

(c) exaggerates the so-called “evidence” as to the likely effectiveness of Plain Packaging and the conclusions of the studies upon which it relies;

(d) fails to acknowledge the severe limitations of these speculative studies, which are based on surveys and focus groups;

(e) fails to acknowledge that graphic health warnings had no impact on tobacco consumption trends when introduced in New Zealand in 2008;

(f) understates the serious risks of adopting Plain Packaging;

(g) fails to consider less trade restrictive and less damaging alternative options for reducing tobacco consumption; and

(h) fails properly to assess the overall net effects of Plain Packaging.

7.3 Plain Packaging legislation enacted on the basis of the RIS would represent poor-quality regulation that fails to comply with the Government’s commitment that it will:

(a) introduce new regulation only if satisfied that it is “required, reasonable and robust”; and

(b) “require there to be a particularly strong case made for any regulatory proposals that are likely to … impair private property rights, market competition, or the incentives on businesses to innovate and invest”.\(^{145}\)

7.4 We have identified in this section the most severe defects in the RIS which are directly relevant to a cost/benefit assessment for Plain Packaging. The RIS contains a raft of

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additional, unsupported and incorrect assertions upon which we do not comment here, but which we should not be assumed to accept.

7.5 By letter dated 23 August 2012, BAT requested from the New Zealand Treasury under the Official Information Act 1982 copies of working papers relating to the Treasury’s review of the RIS. The Treasury extended the time limit for providing its response, and no working papers have been received to date.

7.6 As is explained below, the overall net effect of adopting Plain Packaging would be a clear and material detriment to New Zealand.

THE STATUS QUO IS INADEQUATELY AND IMPROPERLY DEFINED

7.7 The RIS acknowledges that New Zealand already has a “comprehensive suite” of tobacco control initiatives, including high excise taxes, education campaigns, a retail display ban, an advertising ban, and new enforcement tools. As has been explained above in Section 3, some of these initiatives are yet to come into force, or have only recently done so. The RIS does not provide any proper assessment of how the status quo is likely to evolve under these current measures and so fails to assess the need for further regulation against the correct benchmark.

7.8 The RIS also accepts that existing tobacco control initiatives – such as the tobacco excise tax – could be strengthened over time, but states that such enhancements should be regarded as part of the status quo. This is an error. The status quo should take into account only those changes which have already been adopted. As a result of its faulty definition of the status quo, the RIS assesses the impact of Plain Packaging against the wrong benchmark.

THE PROBLEM AND POLICY OBJECTIVE ARE IMPROPERLY DEFINED

7.9 Coherent public health regulatory analysis should always:

(a) begin with the identification of a relevant health risk; and

(b) proceed to evaluate the net benefit of each viable remedy, so that the most effective and efficient means of addressing the risk can be identified from among the range of available alternatives.

7.10 The RIS properly acknowledges that the purpose of New Zealand’s tobacco control policies is to reduce smoking prevalence. Accordingly, the RIS should have identified and compared the net benefits of various tobacco control measures that would contribute to this objective.

146 At para 2.
147 At p 1.
149 At para 9.
7.11 Instead, the RIS defines the policy problem as “the continued ability of the tobacco industry to use packaging in a way that allows advertising and promotion of tobacco products.”

7.12 Defining the problem in this way pre-justifies Plain Packaging and excludes proper consideration of all relevant alternatives.

7.13 This is inconsistent with the approach set out in the New Zealand Treasury’s Regulatory Impact Analysis Handbook. The Handbook states that a proper impact analysis exercise should:

... identify the root cause of the problem ....

The objectives should be clear and should not pre-justify a particular solution. They should be specified broadly enough to allow consideration of all relevant alternative solutions. ... The objectives should focus on the desired final outcome [reduced tobacco consumption in this case] rather than the means of achieving it [e.g. regulation of packaging]. ...

...

[Regulators should] [i]dentify the full range of policy options that may fully or partially achieve the stated objectives and thereby address the identified problem. ...

...

The net benefit (or cost) of each option should also be assessed.\(^\text{151}\)

THE FULL RANGE OF FEASIBLE OPTIONS HAS NOT BEEN CONSIDERED

7.14 The RIS considered only three options in detail, and dismissed three others as unrealistic. Those six options considered were as follows:

(a) **Option 1**: status quo;\(^\text{152}\)
(b) **Option 2**: increased and refreshed health warnings;\(^\text{153}\)
(c) **Option 3**: regulatory change to require Plain Packaging of tobacco products;\(^\text{154}\)
(d) **Option 4**: increased public education about the effects of tobacco packaging;\(^\text{155}\)
(e) **Option 5**: voluntary agreements with industry or self-regulation;\(^\text{156}\) and

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\(^{150}\) At p 3.

\(^{151}\) At p 3.


\(^{153}\) At para 19.

\(^{154}\) At para 22.

\(^{155}\) At para 26.
(f) **Option 6: supply control measure (monopsony).**\(^{157}\)

7.15 As we commented above, Option 1 is incorrectly defined. By definition, the status quo should not take into account the effect of new initiatives which could be pursued in the future but which have not been adopted as Government policy.

7.16 Likewise, Option 2 has been improperly defined. It conflates two different ideas. It may be worthwhile for the Government to improve its existing health warnings without increasing their size. They could be targeted at specific social groups to address any demonstrated information deficits, should be fact-based, and should aim to inform rather than merely to shock. These possibilities have not been considered.

7.17 What the Ministry of Health had in mind under Option 4 is unclear. To the extent that the Ministry considered public education campaigns concerning solely the (non-existent) effect of packaging on tobacco consumption, Option 4 was misconceived since it could have no rational connection to improved public health.

7.18 If in relation to Option 4 the Ministry of Health dismissed the possibility of improved, targeted education campaigns, it did so wrongly. The RIS simply asserts that education campaigns “can be costly”\(^ {158}\) but makes no attempt to quantify their costs or assess them against the benefits of a successful education campaign. Further, no evidence is cited to support the assertion that education campaigns are “not sufficient in and of themselves to spark behavioural change”\(^ {159}\). Contrary to the Ministry’s assertion, there is empirical evidence demonstrating that well-designed youth education campaigns can reduce the incidence of smoking among youth, as we have explained in Section 3 above.

7.19 The RIS was also wrong not to consider further alternatives. As we explain in Section 3, there are a number of alternatives – such as a minimum price and more rigorous prosecution of retailers who sell cigarettes to children – which the Government should consider in preference to the draconian, ineffective and risky step of introducing Plain Packaging. Those alternatives are not referred to at all in the RIS. Until they are considered, the RIS cannot be relied upon as anything like coherent public policy analysis.

\(^{156}\) At para 27.

\(^{157}\) At para 28.

\(^{158}\) At para 26.

\(^{159}\) At para 26.
### THE BENEFITS OF PLAIN PACKAGING HAVE BEEN EXAGGERATED

#### REDUCED TOBACCO CONSUMPTION

7.20 One of the RIS’s most severe defects is its exaggeration of the conclusions of the speculative studies arguing for Plain Packaging. Thus, the RIS asserts that:

> Combined with other mutually supporting measures in a comprehensive tobacco control programme, plain packaging will lead to a reduction in smoking rates, improvements to the health and well-being of the public. …

> [Plain Packaging is] [i]likely [to cause an] increase in quit rates, reduced uptake, reduced relapse and ultimately a reduction in tobacco consumption in New Zealand. Lower rates of smoking will result in reduced health impacts of second-hand smoke. 

7.21 This is pure speculation. The only “evidence” specifically referred to in the RIS in support of these propositions is a paper by Quit Victoria and, by extension, various studies mentioned therein based on opinions expressed by participants in focus groups and surveys.

7.22 Yet, like the PHRC Review, the Quit Victoria paper does not state that the various speculative studies cited therein establish that Plain Packaging would actually reduce tobacco consumption. Instead, it merely asserts (for example) that Plain Packaging would improve the effectiveness of health warnings and that tobacco companies’ opposition to Plain Packaging suggests that the measure would work. The Quit Victoria paper thus contains no conclusion which supports the RIS’s categorical assertion that Plain Packaging would reduce tobacco consumption and improve public health.

7.23 Indeed, as has been explained in Section 2 above, there is no evidence whatsoever to support the Ministry’s assertions about reduced tobacco consumption.

7.24 It is clear from the failure of graphic health warnings that speculative studies of the sort reviewed in the Quit Victoria report are unreliable and that limiting branding and requiring shocking images to appear on packs does not reduce consumption. Surprisingly, the RIS makes no reference to the failure of the graphic warnings.

7.25 At the very least, the RIS should have discussed the nature of the studies upon which the Ministry relied and should have noted the limitations which these studies themselves acknowledge. The Treasury’s *Handbook* outlines the analysis which should have been (but apparently was not) performed by the Ministry as part of “an evidence-based approach to policy development”:

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160 At pp 8 and 10. See also at para 34 (emphasis added).

161 PHRC Review at p 87.

This means providing references and sources for assertions made (such as about the nature of the problem and about the expected viability or effectiveness of policy options), and for all estimates of costs, benefits and risks. Evidence may be quantitative or it may be qualitative; in each case the strengths, biases and limitations of the information sources should be explained. Where there are information gaps, for instance where there are no data available to support the analysis, this should be explicitly stated.\footnote{The Treasury, Regulatory Impact Analysis Handbook (November 2009), at p 8, available at http://www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis/ria-handbk-nov09.pdf (emphasis added)}

7.26 The RIS also states that the “likely increase in quit rates [as a result of Plain Packaging] .... is not quantifiable, as it is not possible to estimate the impact of one intervention alone.”\footnote{At p 10.} This is unsatisfactory and incorrect. If no incremental reduction in tobacco consumption arising from Plain Packaging could be identified, then it cannot be credibly asserted that Plain Packaging would be beneficial or is necessary.

7.27 Further, the New Zealand Treasury appears to consider that reductions in tobacco consumption as a result of tobacco excise tax increases are quantifiable with a fair degree of precision.\footnote{Regulatory Impact Statement, Increase in Tobacco Excise and Equivalent Duties, (20 April 2012), at p 6, available at http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-tsy-iteed-may12.pdf: “Price elasticity of demand constant at -0.5. A 10% increase in price leads to 5% decrease in consumption.”} The charts reproduced in Section 2 above also confirm that excise tax increases have had a measurable effect on tobacco consumption.

7.28 It is not legitimate for the Ministry to infer that its tobacco control initiatives apart from excise tax increases have reduced tobacco consumption but that their effects are somehow un-measurable solely because they cannot be separated from those of other measures. Unless the Ministry can point to solid evidence to the contrary, if a tobacco control measure, like Plain Packaging, has no measurable effect on consumption, then the correct inference is that, like graphic health warnings, the measure is ineffectual.

### ELIMINATION OF TOBACCO PROMOTION

7.29 The RIS asserts that Plain Packaging is desirable:\footnote{At paras 6 and 7.}

(a) because tobacco packaging is a “highly effective form of tobacco marketing” and to reduce the appeal of smoking for youth;

(b) to make the existing health warnings more effective; and

(c) to prevent colours such as “gold, blue, silver and purple” from causing consumers to believe that some cigarettes are less harmful than others.

7.30 We have addressed these points above. In summary:
(a) there is no evidence that packaging influences smoking initiation or cessation or the overall level of tobacco consumption. The function of trade marks and branded packaging is to allow consumers to identify products which they have already chosen to consume, as the Government itself recognises;\(^{167}\)

(b) prominent and shocking graphic health warnings were introduced in 2008. They were ineffectual, not because they are insufficiently prominent, but because packaging does not affect smoking decisions and because smokers have been aware of the risks for decades; and

(c) there is no evidence that colours neutralise consumers’ existing awareness of the risks of smoking or prevent consumers from seeing and assimilating health warnings. The studies relied upon in the Quit Victoria paper and the PHRC Review do not establish that any branded cigarette packs are viewed as safe or that people would smoke less if all cigarettes were sold in plain packs of uniform colour. If there were evidence that misleading material is present on tobacco packaging, the New Zealand Commerce Commission could exercise its extensive powers under the Fair Trading Act 1986.

**COMPLIANCE WITH THE FCTC**

7.31 The RIS incorrectly suggests that the FCTC requires Plain Packaging.\(^{168}\) As we have explained above, the FCTC’s non-binding guidelines merely recommend that Plain Packaging be considered and recognise that its adoption may be precluded by domestic or international law.

**THE COSTS OF PLAIN PACKAGING HAVE BEEN UNDERSTATE**

7.32 Both the RIS and the Consultation Document appear to proceed under the misapprehension that Plain Packaging would be entirely costless. Plain Packaging would in fact impose a number of very significant costs on the Government, private parties and the industry.

**DETRIMENT TO TRADE AND COMPETITION**

7.33 The RIS reflects a failure to understand the effect of Plain Packaging on competition in the tobacco market. As we have commented above in Section 6, Plain Packaging would severely reduce brand differentiation and thereby intensify price competition, reduce prices and increase tobacco consumption.

7.34 Given the view expressed in the RIS that tobacco consumption is detrimental, a reduction in prices causing consumption to increase must be seen as counterproductive and as a significant cost of adopting Plain Packaging.

7.35 Further, the expropriation of intellectual property rights and downward pressure on prices resulting from Plain Packaging would cause very significant financial losses for


\(^{168}\) At pp 8-9.
BAT, New Zealand retailers and others involved in the tobacco industry, for which compensation would be due.

DETRIIMENT TO CONSUMERS AND ECONOMIC INEFFICIENCY

7.36 The shift towards commoditisation of the market, reduction of information available to consumers, and diminished innovation resulting from Plain Packaging would all be economically inefficient. The RIS does not adequately address, let alone quantify, these significant costs.

INCREASE IN ILICIT TRADE

7.37 As is explained above in Section 6, Plain Packaging would expand the illicit tobacco market in New Zealand. This would give rise to significant costs, including reduced Government revenues and increased crime. This risk is dismissed in the RIS without adequate explanation.

BREACH OF WTO AGREEMENTS AND INVESTMENT TREATIES

7.38 As we have explained above in Section 4 of this Response, by introducing Plain Packaging, New Zealand would be very publicly and deliberately breaching its obligations under the WTO agreements and several Investment Treaties.

7.39 This would expose the Government to significant legal costs, liability for damages under Investment Treaties, and a formal request that the Plain Packaging legislation be repealed. Australia’s Department of Health and Ageing suggested that legal costs associated with Plain Packaging were likely to exceed A$10 million.169 We have explained that they may well be significantly higher. No attempt is made in the RIS to quantify New Zealand’s exposure to awards of compensation, which would be substantial.

DAMAGING PRECEDENT

7.40 As we have commented above, other countries and foreign investors would be rightly concerned if New Zealand were to introduce Plain Packaging. If New Zealand does not respect trade marks and other intellectual property in which companies around the world invest in order to differentiate their products and allow consumers to identify them, then international businesses could become reluctant to do business with, or invest in, New Zealand. Indeed, the RIS acknowledges that “there is potentially a negative reputational impact in the global investment market for interference with intellectual property.”170

7.41 The RIS seeks to downplay this significant risk by reference to the alleged uniqueness of the tobacco industry. This is misconceived. As has been explained above in

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169 Health Reform Briefing note sent under cover of email (18 February 2010).
170 At para 23.
Section 6, the Hon Tim Groser\textsuperscript{171} and others have recognised that Plain Packaging would set a concerning precedent internationally and in New Zealand for a range of industries.

7.42 As has been explained above in Sections 5 and 6, the effects of Plain Packaging would not be limited to deterring investment in New Zealand. New Zealand’s exports could be damaged as Plain Packaging would set a precedent for decreased respect for brands and intellectual property rights worldwide. Adopting Plain Packaging would make it difficult for the New Zealand Government credibly to oppose measures taken overseas to the detriment of brands and trade marks that are vital to New Zealand’s export sector.

**DISREGARDING FUNDAMENTAL COMMON LAW PRINCIPLES**

7.43 As we have noted above in Section 4, the Government appears to consider that an alcohol advertising ban could interfere with fundamental common law principles and property rights. Under section 9(1) of the Trade Marks Act 2002, a trade mark is personal property. Plain Packaging would, in particular, prohibit the use of registered tobacco device marks. This would offend against the fundamental common law principle that property rights should not be expropriated without payment of compensation. The RIS is defective in failing even to acknowledge this (contrary to the requirements of the Treasury’s Handbook\textsuperscript{172} and the Legislation Advisory Committee’s Guidelines on Process and Content of Legislation\textsuperscript{173}) and in failing to present a “particularly strong case” to justify the measure.\textsuperscript{174}

**CONCLUSION AND QUALITATIVE NET BENEFIT ASSESSMENT**

7.44 The RIS is superficial and unsound, particularly in exaggerating the conclusions of the speculative literature arguing in favour of Plain Packaging and in failing to consider alternative policy options. It falls far short of demonstrating that Plain Packaging is reasonable, let alone necessary.

7.45 The table below provides a qualitative assessment of the overall benefits and costs of Plain Packaging. The measure would clearly result in a material net cost to New Zealand.

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### BENEFITS

**ZERO**
(The RIS fails to demonstrate that Plain Packaging would reduce tobacco consumption)

### COSTS

- Increased tobacco consumption (due to a shift towards commoditisation, lower prices and increased illicit trade)
- Damaging precedent creating serious risk of adverse impact on New Zealand’s exports
- Disincentive to invest in New Zealand due to reduced protection for intellectual and other property rights
- Expansion of illicit tobacco market, leading to increased criminal activity, loss of tax revenue, and exposure of consumers to risky unregulated tobacco products
- Reduced producer and consumer surplus (due to shift to commoditisation, reduction in information available to consumers, and diminished innovation)
- Increased regulatory and cost burden on retailers
- Cost of defending Investment Treaty arbitration (could be NZ$10-20 million for each arbitration) and liability in damages to tobacco companies (would be significant – e.g. BAT’s after tax profits for 2011 were NZ$121 million)
- Cost of defending WTO proceedings

**OVERALL NET IMPACT:**

**A material net cost to New Zealand**
# Appendix 1—Schedule of Consultation Questions Answered

The following table cross-references the Sections in this Response to the questions in the Consultation Document.

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October 2, 2012

I, Jonathan Klick, am a tenured full professor of law at the University of Pennsylvania in Philadelphia, Pennsylvania (USA). I am also the Erasmus Chair of Empirical Legal Studies at Erasmus University Rotterdam (the Netherlands). This position is partially funded by an Erasmus Mundus grant from the European Commission. I was previously the Jeffrey A. Stoops Professor of Law and Economics at the Florida State University. I have held visiting professor positions at Columbia University, Northwestern University, the University of Southern California, the University of Hamburg, and have been invited to be a visiting professor at the Yale Law School. I am the editor of the *International Review of Law and Economics*.

In 2010, I taught honors-level econometrics as the Erskine Fellow in the Department of Economics and Finance at the University of Canterbury in Christchurch, New Zealand. This class focused on the problems of causal inference in non-experimental settings.

I have also taught courses on statistics and causal inference to state and federal judges in the United States through George Mason University’s Law and Economics Center. I have taught similar material to state attorneys general, congressional staffers, and law professors through the Center’s programs.

My training includes a master’s degree in economics from the University of Maryland at College Park, a Ph.D. in economics and a J.D. in law, both from George Mason University. Professionally, I have served as a research economist on statistical methodology issues for the U.S. Bureau of Economic Analysis. I have also served as a senior economist for the RAND Corporation, contributing to its working paper series and presenting my empirical work at a number of RAND events, including its board meetings.

My academic work on the causal effects of health regulations on behavior has been published in the *Journal of Law and Economics, the Journal of Legal Studies, the Journal of Law, Economics, and Organization, the American Law and Economics Review*, and *Health Economics*.

I have presented my research at Harvard University, including the Harvard Medical School, Yale University, Stanford University, the University of Chicago, and many other top universities throughout the world.

My complete CV is attached to this letter.

I have been retained by British American Tobacco (New Zealand) Limited to offer my opinion on the literature regarding the effect of plain packaging on smoking rates as it pertains to the New Zealand Ministry of Health’s July 2012 consultation. This letter provides a summary of my evaluation of this literature.
Executive Summary

The literature on plain packaging provides neither a reliable nor a relevant foundation for plain packaging regulations. From a relevance standpoint, there is not a single research article that examines the effect of plain packaging on actual smoking decisions. Instead, the vast majority of papers in this literature simply ask people about their preferences over pack designs, the qualities they associate with various packs, or the effect they think differing pack designs might have on their smoking habits. There has never been a published study validating these measures as useful predictors of smoking behavior.

Beyond this fundamental problem, all of the studies examine short term reactions to plain packs. From a policy perspective, this presents a problem since such short term reactions may be driven by the impression that the plain packs are simply different or odd. In a setting where plain packs are mandated, there will no longer be a difference between one pack and another. Further, as time goes on, individuals will become familiar with the plain packs, eliminating the impression that they are odd. Given these effects, even if the plain packaging studies do identify an effect on subjective impressions, these impressions may not continue under a plain packaging regulation and any effects that do exist are likely to dissipate.

Even putting these crucial relevance issues aside, this literature is methodologically flawed. The lack of double blind designs makes it likely that subjects are influenced by the expectations and preferences of the researcher. Given the widespread recognition that blinding is an important element of study designs across academic fields, it is disconcerting that no studies in the plain packaging literature follow best practices in this regard. Moreover, the samples examined in this literature likely suffer from self-selection problems that could create statistical bias. Many of the researchers fully admit that the samples they use are not representative of the populations studied. Finally, given the policy preferences of the public health community, this is an area where publication bias is likely to be severe. Each of these flaws has the strong potential to overstate the true magnitude of any effect of plain packaging on stated intentions and subjective impressions, which are, in any event, unreliable predictors of actual behavior.

Although plain packaging proponents suggest that the consistency of results in the literature provide evidence that is greater than the sum of the individual studies, this is not correct. Repeating the same logical and methodological flaws does not eliminate those flaws. The scientifically honest approach to this literature is to infer that the extant literature provides no insight into how plain packaging would affect smoking.

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1 In a double-blind design, the subjects cannot identify who the researcher is and the researcher cannot identify who a specific subject is. Such an approach minimizes the likelihood that the presumed preferences of the researcher will influence how the subject answers questions and, because the subject knows the researcher cannot identify her, it is less likely that she will modify her answers to avoid embarrassment or some other negative feeling associated with others knowing her true beliefs.
The Literature on Plain Packaging and the Reviews Relied on by the Ministry of Health

The New Zealand Ministry of Health consultation on plain packaging relies heavily on two reviews of the literature. While the Public Health Research Consortium’s report *Plain Tobacco Packaging: A Systematic Review* concludes that there is “some evidence” that plain packaging “may” affect smoking behaviour, it admits that this conclusion is speculative given the lack of research that actually examines smoking outcomes (p. 87). The second document that forms the research basis for the consultation, Quit Victoria’s report *Plain Packaging of Cigarettes: A Review of the Evidence*, ignores these problems and embraces plain packaging despite the lack of reliable evidence showing it will reduce tobacco use.

*Lack of real world evidence*

The fundamental shortcoming of the literature is summed up nicely in the Public Health Research Consortium (PHRC) report *Plain Tobacco Packaging: A Systematic Review* when it states, “it has not yet been possible to evaluate the impact of the policy in practice (p. v).” Virtually all of the studies in this literature examine the subjects’ stated views of plain packaging but observe no actual smoking choices. Researchers jump from these stated positions to the conclusion that plain packaging will lower smoking rates.

The New Zealand Ministry of Health is also quick to jump to conclusions that are not actually demonstrated by the underlying literature. For example, in its Regulatory Impact Statement, the Ministry asserts “tobacco packaging has become the tobacco industry’s key marketing tool to attract and retain customers (paragraph 6)” implying that packaging is effective in increasing the total demand for tobacco. No study has demonstrated this. The tobacco industry’s interest in packaging is completely consistent with a desire to compete over market share even if the size of the overall market is unaffected by packaging. Paragraph 7 goes on to assert that current packaging attracts new smokers, an issue that has never been examined in the literature given that actual smoking behaviors are not analyzed in any existing study. These unsubstantiated assertions are carried over in the Ministry’s consultation document which fails to note that none of the existing research papers looks at the effect of plain packaging on actual smoking decisions.

There is no published study validating any link between the kinds of outcomes analyzed in the plain packaging literature, such as subjective impressions or stated intentions, and real world smoking decisions. As a general matter, marketing scholars are skeptical that such survey based information is very useful in predicting ultimate consumption behavior.²

In the entire literature on plain packaging, there are only two studies that examine anything beyond stated impressions or intentions. These studies that observe some behavioral effect present significant problems for the claim that plain packaging will reduce smoking.³

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³ A third article, Munafò M, Roberts N, Bauld L, Ute L (2011). Plain packaging increases visual attention to health warnings on cigarette packs in non-smokers and weekly smokers but not daily smokers.
Crawford Moodie (the lead author on the PHRC Report) and coauthors\(^4\) ask subjects to put their cigarettes in researcher provided plain packages and then record details about their smoking behavior over a two week period. Most individuals did not change their behavior at all when using the plain packages, even though virtually all individuals expressed negative opinions of the plain packs. This highlights the problems of jumping from claims that individuals view plain packs negatively to the conclusion that plain packages will reduce smoking relative to the status quo. Even among the few individuals who indicated some behavioral changes, these changes, such as smoking less around others or forgoing a cigarette at a specific time, provide no evidence that these individuals actually smoked less in total. Further, there was no statistically significant difference in how individuals viewed health warnings between the branded and plain packages, as noted in the PHRC report (p. 54). This last finding suggests that plain packaging bears little relationship if any to the New Zealand Ministry of Health’s goal of increasing the effectiveness of health warnings on tobacco products.

This study also presents significant challenges with respect to extrapolating its results to predict the effect of plain packaging in New Zealand. The negative impressions of the plain packaging and any behavioral changes resulting from those impressions were very likely motivated by the fact that the packs were different rather than because they were plain. Many of the subjects’ responses suggested this, noting the novelty of the pack. Under a plain packaging regime, such novelty would disappear as all packs would be packaged similarly. Further, this study, like all others, focuses on short term impressions of plain packaging. As individuals become familiar with such packs, any perceived differences are likely to fade.

This study provides another reason to doubt the conclusion that negative impressions of plain packages will translate into less smoking, though it goes unnoticed by the authors. Namely, in this design, smokers were provided with after-market packs to put their cigarettes into, and none of the subjects reported any inconvenience or hesitance in doing so. This suggests, in a plain packaging regime, if individuals really do dislike plain packs, it would be low cost for them to simply put their cigarettes in different after-market packages. Given all of these issues, it seems unlikely that plain packaging will have an effect on smoking rates.

The other study to observe some measure of behavior related to plain packaging uses an auction to elicit the value smokers place on plain and branded packs.\(^5\) The Thrasher et al study finds that individuals value plain packs less than branded packs. There are a number of methodological and interpretive problems with the study.\(^6\) The primary problem arises from the fact that the mean

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\(^6\) Briefly, since the purpose of this letter is not to discuss methodological issues in great depth, the model used to analyze the data in Thrasher et al is a random effects model which essentially assumes that each time a given smoker evaluates the value of a pack of cigarettes, he randomly draws a baseline value from some unknown distribution. Thus, if he evaluates the value on a Monday, his baseline value could be $10, while on a Tuesday it
valuation of the branded packs sold through the auction was lower than the actual price of cigarettes in the given markets where the research was conducted. That is, the smokers who were the subjects in the study generally pay X for their cigarettes yet they were only willing to pay something less than X for the cigarettes in the auction. This suggests the existence of an external validity problem even for this study that examined actual behavior with real consequences. If such generalizability problems exist for a study like this, it seems very likely that the results from studies that simply ask subjects for their impressions or intentions (with no ultimate consequences for the subjects) cannot be extrapolated to predict the consequences of a plain packaging regulation.

This auction study too suffers from the shortcoming that any identified effect of plain packaging may be an artifact of the packs simply being different. In an environment where all packs are plain, any differential opinions may disappear, especially after smokers have some time to adjust to the new packaging.

All of the other studies in this literature rely on stated impressions and smoking intentions, as opposed to actual smoking decisions. The link between these impressions and intentions and actual smoking behavior has not been validated. As stated in the PHRC report, “Without any form of validation (such as validating reported changes in cigarette consumption) [self-reported impressions and intentions] have quite weak predictive validity (p. 89).” Given this, it is not possible to draw reliable conclusions about the effects of plain packaging on smoking in the real world, and, yet, this does not stop many of the researchers in this area from becoming advocates for plain packaging regulations. For example, although Crawford Moodie recognizes this fundamental disconnect between the evidence and the conclusion that plain packaging will reduce smoking, as noted above in the PHRC report (of which he is the main author), it does not stop him from advocating for a plain packaging mandate. This movement between scholarship and advocacy, especially given the paucity of reliable evidence, is very troubling and reflects an absence of scientific impartiality.

could be $2, and those values would be statistically independent despite the fact that many of his characteristics that affect his valuation remain constant. If the more appropriate fixed effects model (i.e., the baseline value for a given person’s choice stays fairly constant), the likelihood the authors would have found statistically significant differences between plain and branded pack valuations would decline. Another methodological problem comes from the authors’ failure to account for dependence across their observations. That is, if a given individual made 10 choices in the experiment, the authors count that as 10 statistically independent observations even though a given person’s choice in one round is likely to be highly correlated with his choice in another round. This too inflates the statistical significance of the authors’ results.

This focus on stated impressions continues in the literature that post-dates the PHRC report as well. For example, in Christine White, David Hammond, James Thrasher, and Geoffrey Fong, “The Potential Impact of Plain Packaging of Cigarette Products Among Brazilian Young Women: An Experimental Study,” BMC Public Health, 12: 737 (2012), 640 Brazilian women were shown standard or some version of a plain pack (either with brand descriptors or not) and then asked about their perceptions of the cigarettes’ appeal, taste, health risk, smoothness, and smoker attributes. Although the authors conclude that “the findings provide support for plain packaging regulations, such as those proposed in Australia,” none of their studied outcomes involved actual smoking decisions. Further, one of their impressionistic measures, perceived health risks, exhibited no statistically significant difference between branded and plain packages. Lastly, although the authors claim they examine a “behavioral” measure of appeal since they asked individuals what pack of cigarettes they would like to receive, individuals were not given the policy relevant choice between a plain pack and no pack; and actual smoking behavior is not observed.

Methodological errors and biases

However, even if the fact that the literature does not examine policy relevant metrics such as actual smoking behavior is ignored, the literature is rife with methodological errors and biases that limit the ability of an impartial referee to draw any conclusions about the likely effect of a plain packaging regulation. As Moodie et al note in the PHRC review (Table 4.1), very few of the studies they examined had representative samples.

Even representative samples in this context could generate troubling biases. Specifically, researchers have raised the concern that in contexts where it is relatively easy for subjects to intuít the preferences of the researcher, subjects will provide answers that confirm the researcher’s expectations even if they do not conform to the subjects’ actual beliefs. This expectancy bias undermines the validity of the research. There are no examples in this literature where researchers take measures to eliminate such sources of bias, such as using double blind experiments. Instead, in every article in the literature, it is clear to the subjects that the researchers are public health researchers. This leaves open the distinct possibility that the subjects are hoping to somehow impress, or at least not offend, the researchers by providing the socially acceptable responses.

Another large concern in this literature arises from publication bias. That is, given the policy preferences of the public health community, it is extremely unlikely that a study concluding that plain packaging will not have a negative effect on smoking will be accepted by a journal such as Tobacco Control or any of the other public health journals that publish articles on the topic. This implies that if one were to estimate the likely effect of a plain packaging regulation on smoking rates based solely on the published literature, she would overstate the negative effect of such a regulation on smoking rates. Further, given that this publication bias is predictable, it is unlikely that researchers will even write up results that do not conform to the desired result. Thus, this bias cannot be mitigated by looking for unpublished studies with contrary findings because of the so-called “file-drawer” problem in which researchers abandon their research before circulating or publicizing a draft when they believe their results will not be well-received.

Given these problems, the PHRC report’s claim to provide a “systematic” review is somewhat misleading. These publication and file-drawer biases make any review of this type fundamentally incomplete in that the published literature likely is a selected sample of all inquiries started with respect to the topic. In a more important sense, the PHRC report’s claim (p. v) that “This consistency of evidence can provide confidence about the observed potential effects of plain packaging” is patently false. Consistent results from studies that uniformly have the same methodological problems provide zero confidence in any conclusion except, perhaps, that the research designs were flawed in consistent ways.

The Quit Victoria report, Plain Packaging of Cigarettes: A Review of the Evidence, covers largely the same underlying research but it does not provide even the small acknowledgement of the flaws in the literature that the PHRC report does. The Quit Victoria report is quite selective in the views it presents.


10 See supra note 1 for a discussion of the merits of double blind research designs in this context.

For example, in discussing the Canadian Department of Health’s Report “When Packages Can’t Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products,” the Quit Victoria Report gives the impression that the Canadian Report clearly supports the proposition that plain packaging will reduce smoking. The Canadian Report itself, however, notes that any effect is likely to be small ("A close examination of these responses suggests that effects will be more marginal than large.” p. 7), and it also notes that its conclusion that there would be any effect is based purely on theoretical arguments as opposed to any empirical evidence. The Canadian Report also notes that a fundamental short-coming in the literature is its failure to examine actual smoking behavior noting “Theoretically, plain and generic packaging should strike at the very process of adolescent decision making related to cigarette adoption. But presently there is little empirical evidence to support this theory (p. 2).”

There is no mention in the Quit Victoria report of the admission in the Canadian review of the fundamentally speculative nature of the conclusion regarding the effect of plain packaging on actual smoking. In discussing some of their conclusions, for example, the Canadian review states “Taken as a whole, these findings suggest that plain and generic packaging will, to some unknown degree, encourage non-smokers not to start smoking and smokers to stop smoking. The absolute extent of this influence cannot be validly determined by research that is dependent on asking consumers questions about what they think or what they might do if all cigarettes were sold in the same plain and generic packages (p. 129).” It is interesting that the Canadian review, published in 1995, recognized that “The extent of change in incidence is impossible to assess except through field experiments conducted over time (p. 158),” and, yet, despite the fact that no such field experiment has been performed in the 17 intervening years, plain packaging proponents proclaim confidence in an unreliable research base.

The Quit Victoria report also places heavy weight on the notion that because tobacco companies are opposed to plain packaging, this is evidence that plain packaging will reduce smoking (see, for example, section 6). The report nowhere mentions the possibility that packaging is important for inter-brand competition. That is, the desire to compete for a greater share of a market of a given (or even declining) size is sufficient to explain an opposition to plain packaging. On the whole, the Quit Victoria report provides a misleading impression of what the current literature implies for the effect of a plain packaging regulation on smoking behavior.

The Quit Victoria report provides no new analysis of the literature and it avoids providing any constructive criticism of the research or any recognition of the limits of the research base. Given this, reliance on the Quit Victoria report is imprudent from a policy standpoint.

This brief summary of the literature suggests that there is no scientific basis upon which to conclude that plain packaging will lead to a reduction in smoking by discouraging young people from taking up smoking, encouraging people to quit smoking, or by discouraging relapse among people who have quit smoking. Only two studies in the entire literature plausibly examine actual smoking outcomes, and neither of them examines children or people who have quit smoking. Further, these studies provide little indication that plain packaging will increase quit rates. All of the other studies have significant methodological problems. Even putting that aside, these studies make the unsubstantiated jump from stated impressions and intentions to actual behavior. There is no evidence to validate this link, as the PHRC report readily concedes. The Quit Victoria report simply ignores this fact.

Given that New Zealand’s goal, as stated in this consultation, is “to further reducing the prevalence of smoking in New Zealand. [The government] has set an aspirational long-term goal of making New Zealand essentially a smokefree nation by 2025 (p. 1)” it is essential that any regulatory analysis focuses
on evidence that relates to actual smoking behavior. The issues examined in the literature, such as subjective impressions of plain packaging, have no validated relationship to New Zealand’s policy goals.

**Proper Research Design**

The ideal research design for studying the effects of plain packaging on smoking outcomes would involve randomly selecting some markets (for example individual cities), introducing plain packaging in those markets, and observing actual smoking behavior over an extended time period (e.g., 1-2 years) in the plain package markets as compared to the markets that retained branded packaging. The randomization would ensure that any observed change was not due to pre-existing trends or other confounding variables. Further, by making all of the packs in the market plain, the design would avoid the possibility that smokers were simply reacting to the fact that the plain packs were different from other available packs. Comparing smoking rates to control markets where branded packs remain would account for general changes in smoking behavior over time. Studying smoking behavior over an extended time period would rule out the possibility that any change was simply a short term reaction to the oddness of the new packs. Most important, this design would focus on actual smoking behavior rather than self-reports of impressions and intentions which are not generally predictive of actual smoking behavior. Such a study does not exist in the literature. It is important to note that such an experiment could only be run by a government\(^{12}\), yet no government has publicly contemplated running such an experiment before instituting plain packaging regulations even though this would be the best way to provide reliable guidance as to the effect of such a regulation.\(^{13}\)

While it may seem that such experimentation is not feasible, similar methods have been used in the past to help predict how behavior will respond to different policy choices. One of the seminal examples involves the British electricity market. Between 1966 and 1972, a sample of British residential electricity customers (n = 3,420) was randomized across three different pricing schemes\(^{14}\) and a control group that faced conventional pricing. Actual consumption was monitored over a long period to generate confidence in the likely effects of using different pricing policies. This field experiment exhibited all of the elements discussed above, and the results of this inquiry are still cited today in discussions of electricity consumption.\(^{15}\) Employment policies have also been studied via field experiments throughout Europe, including the Restart Program in the U.K.\(^{16}\)

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12 An individual company could not change the packaging of competing brands, and the industry could not coordinate on such an experiment due to competition laws.

13 For a detailed conceptual discussion of the value of running these kinds of field experiments to evaluate regulations, see Michael Abramowicz, Ian Ayres, and Yair Listokin, “Randomizing Law,” 159 University of Pennsylvania Law Review 929 (2011).

14 One group faced higher prices in the seasons with high demand; another group faced higher prices in high demand seasons and during high demand periods of the day; the third group paid a reduced rate for consumption below some pre-determined level and an increased rate above that level of usage.

15 For a detailed discussion of the results of this field experiment, see Boggis, J. G., Domestic Tariffs Experiment, Load and Market Research Report No. 121, The Electricity Council, 1974.

Although not used for evaluation purposes by government entities, there have been a number of policy-relevant field studies performed in New Zealand. For example, World Bank researchers implemented a field experiment in which they provided financial literacy training to Pacific Islander migrants and East Asian migrants in New Zealand regarding financial remittances to their home countries. A randomly chosen subset of the sample was provided with information regarding the costs associated with remitting money in different fashions. Relative to the control group, members of which were not provided with this information, the treatment group members were significantly more likely to know what the cheapest method of remittances is and to have actually compared costs among different methods when making a remittance.\textsuperscript{17}

This policy relevant field experiment suggests the feasibility and the value of using more methodologically sound research designs to analyze behavior. Implementing something along these lines in the plain packaging context would improve our knowledge of the effects of plain packaging immensely.

A second best approach would examine the change in smoking outcomes in a jurisdiction that adopts plain packaging over an extended time period as compared to non-adopting jurisdictions. While such a design would have the benefit of examining actual smoking behavior, causal inference would be difficult in many practical circumstances given the non-random adoption of the regulation. In many cases, the adopting jurisdiction will be one with an especially steep pre-adoption downward trend in smoking (as fewer people smoke, all other things equal, anti-smoking regulations tend to be more politically palatable) which may be difficult to control for, and often when jurisdictions adopt such policies, they do it as part of a bundle of tobacco policies, making it difficult to parse out the effects of any individual policy.

Unfortunately, in the plain packaging literature, nothing approaches the ideal approach or even the second best approach because actual smoking behavior is never observed. Instead, virtually all of the existing research examines individuals’ perceptions of packages or their smoking intentions. Neither of these reliably translates into valid predictions of real world behavior.

**Conclusion**

The literature in this area is unreliable and largely irrelevant to the question of how plain packaging would affect smoking rates in New Zealand. This is true even if all of the flawed studies are combined, since there is no sense in which the individual flaws somehow cancel each other out. There is no sound scientific basis for the claim that plain packaging will reduce smoking.

EDUCATION

J.D., George Mason University School of Law, Arlington Virginia, Awarded May 2003 (cum laude)
Robert A. Levy Fellow in Law and Liberty (Tuition Waiver and Stipend); Whitney Writing Prize

Ph.D., Economics, George Mason University, Fairfax Virginia, Defended November 2001
Fields: Public Choice, Industrial Organization and Public Policy

M.A., Economics, University of Maryland at College Park, Awarded May 1999
Fields: Public Finance, Political Economy of Growth & Income Distribution, Microeconometrics

B.S., Economics, Villanova University, Villanova Pennsylvania, Awarded May 1997 (summa cum laude)
Villanova University Presidential Scholar and British Marshall Scholarship Finalist (100 nationally)

PROFESSIONAL EXPERIENCE

University of Pennsylvania: Visiting Professor of Law (Fall 2007); Professor of Law (Summer 2008 – Present).

University of Canterbury: Erskine Visitor (Summer 2010).

Erasmus University Rotterdam: Erasmus Chair of Empirical Legal Studies (2009 – Present).

Property and Environment Research Center: Julian Simon Fellow (Summer 2009).


Northwestern University Searle Center: Visiting Scholar (January 2009); Instructor in Judicial Education Program (Spring 2009 – Spring 2010); Senior Economist (Spring 2009 – Spring 2010).


Columbia Law School: Visiting Professor (Spring 2008).

University of Southern California School of Law: Visiting Professor (August/September 2007).

Northwestern University School of Law: Visiting Professor (November 2006).

Florida State University: Assistant Professor of Law (Summer 2004 – Summer 2007); Jeffrey A. Stoops Professor of Law (Summer 2005 – Spring 2008); Associate Professor (August 2007 – Spring 2008); Courtesy Professor of Economics (Summer 2004 – Spring 2008).

American Enterprise Institute: Associate Director of Liability Project (June 2003 – June 2005).

The Mercatus Center: Research Fellow in Health Policy (September 2001 – March 2002); Dorothy Donnelley Moller Research Fellow (March 2002 – June 2003).

TEACHING EXPERIENCE

University of Pennsylvania Law School: Corporations; Torts; Law & Economics; Empirical Finance; Law & Economics of Crime; Health Policy; Statistics for Lawyers; Empirical Law & Economics (2007 – Present).


University of Canterbury: Econometrics II (2010).


Florida State Law: Business Associations; Corporate Finance; Strategy in Law and Business; (2004 – 2007).


Prince George’s Community College: Microeconomics; Macroeconomics (1999, 2000).
REVIEWED PUBLICATIONS

REFEREED PUBLICATIONS (CONTINUED)


LAW REVIEW PUBLICATIONS


BOOK CONTRIBUTIONS, ENCYCLOPEDIA ENTRIES, MONOGRAPHS, REVIEWS, ETC.

BOOK CONTRIBUTIONS, ETC. (CONTINUED)

Recent Presentations

- Cornell University, Empirical Health Law Conference (April 2012).
- Brooklyn Law School, Federalist Society Workshop (March 2012).
- Washington University in St. Louis Law School, Federalist Society Workshop (March 2012).
- Penn/NYU Law & Finance Conference (February 2012).
- West Virginia University Economics Seminar, (February 2012).
- Rotterdam Institute of Law and Economics Workshop (December 2011).
- Regulatory Breakdown Conference, Penn Program on Regulation (September 2011).
- Journal of Institutional and Theoretical Economics Conference (June 2011).
- Queen’s University, Faculty of Law, Law and Economics Workshop (April 2011).
- European Masters in Law and Economics Program, Mid-Year Meeting Keynote Lecture (February 2011).
- AALS, Law and Economics Panel (January 2011)
- Law and Economics Center, American Disease Conference (December 2010)
- University of Arizona/Resources for the Future, Wildfire Symposium (November 2010).
- George Mason University, Levy Workshop (November 2010).
- Erasmus University Rotterdam, European Doctorate in Law and Economics Seminar (October 2010).
- Erasmus University School of Law, Inaugural Empirical Legal Studies Chair Lecture (November 2010).
- University of Amsterdam, Center for the Study of EU Contract Law, Workshop (October 2010).
- University of Otago, Economics Department Seminar (September 2010).
- University of Canterbury, Economics and Finance Department Seminar (September 2010).
- University of Hamburg, Hamburg Lectures on Law and Economics (July 2010).
- Penn Law European Society, Academic Program Lecture (June 2010).
- St. Louis Lawyers Chapter of the Federalist Society, Health Care Reform Lecture (April 2010).
- Temple University Beasly School of Law, Human Behavior Colloquium (April 2010).
- University of Virginia Law School, Olin Conference on Crime (March 2010).
- Erasmus University School of Law, Behavioral Approaches to Contract and Tort Group (January 2010).
- European Doctorate in Law and Economics Program, Erasmus University Rotterdam (January 2010).
- Northwestern University Federalist Society Panel Discussion (November 2009).
- University of Illinois Corporate Colloquium (November 2009).
- Fordham University Federalist Society, Health Care Reform Debate (October 2009).
- University of Pennsylvania, Wharton Research Scholars Seminar (September 2009).
- Property and Environment Research Center (August 2009).
- Harvard Medical School, Race Disparities Panel (April 2009).
- Stanford Law School, Law and Economics Workshop (February 2009).
- University of Virginia School of Law, Law & Economics Workshop (January 2009).
- Northwestern University, Searle Center, Symposium on Civil Liability (October 2008).
- University of Pennsylvania Law School, Faculty Retreat (September 2008).
- Harvard University, Petrie-Flom Center, Our Fragmented Health Care System (June 2008).
- CUNY Graduate Center/NBER, Seminar in Health, Labor, and Demography (May 2008).
- The Rand Corporation, Institute for Civil Justice Annual Board Meeting (March 2008).
- George Mason University, Philosophy, Politics, and Economics Workshop (March 2008).
- Columbia University Law School, Faculty Workshop (March 2008).
- Claremont McKenna College/RAND, The Future of Securities Litigation Conference (February 2008).
- University of Michigan Law School, Law and Economics Workshop (February 2008).
RECENT PRESENTATIONS (CONTINUED)

- Emory University School of Law, Faculty Colloquium (November 2007).
- Rice University/University of Houston Economics, Microeconomics Workshop (October 2007).
- University of Pennsylvania Law School, Faculty Workshop (October 2007).
- George Mason University School of Law, Levy Fellows Workshop (October 2007).
- The RAND Corporation, Institute for Civil Justice Workshop (September 2007).
- University of Southern California School of Law, Faculty Workshop (September 2007).
- University of Southern California School of Law, Faculty Workshop (August 2007).
- Yale Law School, Faculty Enrichment Lectures (July 2007).
- Florida State College of Law, Primer on Statistics for Legal Scholars (July 2007).
- Florida State University, Center for Demography and Population Health Workshop (March 2007).
- University of Toronto, Law & Economics Workshop (February 2007).
- Florida State University Department of Economics, Faculty Workshop (March 2007).
- University of Georgia School of Law, Faculty Workshop (February 2007).
- University of Southern California School of Law, Law and Economics Workshop (February 2007).
- Cornell Department of Policy Analysis and Management, Faculty Workshop (November 2006).
- Boston University School of Law, Faculty Workshop (November 2006).
- University of Illinois College of Law, Faculty Workshop (November 2006).
- Northwestern University School of Law, Faculty Workshop (October 2006).
- Conference on Empirical Legal Studies (October 2006).
- University of Maryland Department of Economics, Labor/Public Workshop (April 2006).
- Columbia University School of Law, Blue Sky Workshop (March 2006).
- American Enterprise Institute, Health Disparities Myth Panel (February 2006).
- William & Mary School of Law, Faculty Workshop (February 2006).
- Georgetown University Law Center, Law and Economics Workshop (February 2006).
- George Mason University School of Law, Levy Workshop (February 2006).
- Northwestern University School of Law, Faculty Workshop (February 2006).
- American Association of Law Schools, Annual Meeting (January 2006).
- Northwestern University School of Law, Law and Economics Workshop (September 2005).
- Southeastern Association of Law Schools, Annual Meeting (July 2005).
- West Virginia University Department of Economics, Faculty Workshop (January 2005).
- International Society for New Institutional Economics, Annual Meeting (September 2004).
APPENDIX 2 –

KPMG report
Illicit tobacco in Australia

2013 Half Year Report
October 2013
IMPORTANT NOTICE

This report on illicit tobacco consumption in Australia (“Report”) has been prepared by KPMG LLP in accordance with specific terms of reference (“terms of reference”) agreed between British American Tobacco Australia, Philip Morris Limited and Imperial Tobacco Australia Limited “the Addressees”, and KPMG LLP.

KPMG LLP has agreed that the Report may be disclosed to any party on the basis set out herein. KPMG LLP wishes all parties to be aware that KPMG LLP’s work for the Addressees was performed to meet specific terms of reference agreed between the Addressees and KPMG LLP and that there were particular features determined for the purposes of the engagement.

The Report should not therefore be regarded as suitable to be used or relied on by any other person or for any other purpose. The Report is issued to all parties on the basis that it is for information only. Should any party choose to rely on the Report they do so at their own risk. KPMG LLP will accordingly accept no responsibility or liability in respect of the Report to any party other than the Addressees.
## Glossary

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>AIHW</td>
<td>Australian Institute of Health and Welfare</td>
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<tr>
<td>AIT</td>
<td>Anti Illicit Trade</td>
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<tr>
<td>AWOTE</td>
<td>Average Weekly Ordinary Time Earnings</td>
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<tr>
<td>BATA</td>
<td>British American Tobacco Australia</td>
</tr>
<tr>
<td>CAGR</td>
<td>Compound Annual Growth Rate</td>
</tr>
<tr>
<td>CATI</td>
<td>Computer Aided Telephone Interview</td>
</tr>
<tr>
<td>CAWI</td>
<td>Computer Aided Web Interview</td>
</tr>
<tr>
<td>Contraband</td>
<td>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 50 sticks or 50 grams of RYO per person.</td>
</tr>
<tr>
<td>Counterfeit</td>
<td>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.</td>
</tr>
<tr>
<td>CPI</td>
<td>Consumer Price Index</td>
</tr>
<tr>
<td>EOS</td>
<td>Exchange Of Sales data. Shipment data provided by the industry.</td>
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<tr>
<td>EPS</td>
<td>Empty Pack Survey</td>
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<tr>
<td>FCTC</td>
<td>Framework Convention on Tobacco Control</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>H1</td>
<td>First half of the year i.e. the period from January to June</td>
</tr>
<tr>
<td>Illicit whites</td>
<td>‘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.</td>
</tr>
<tr>
<td>Inflows</td>
<td>Total volume of cigarettes coming into Australia</td>
</tr>
<tr>
<td>ITA</td>
<td>Imperial Tobacco Australia</td>
</tr>
<tr>
<td>kg</td>
<td>Kilogram</td>
</tr>
<tr>
<td>KPI</td>
<td>Key Performance Indicator</td>
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<tr>
<td>LDC</td>
<td>Legal Domestic Consumption</td>
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<tr>
<td>LDS</td>
<td>Legal Domestic Sales</td>
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<tr>
<td>LTM</td>
<td>Last Twelve Months</td>
</tr>
<tr>
<td>LTM H1</td>
<td>Last Twelve Months to the end of June (e.g. 1 July 2012 to 30 June 2013)</td>
</tr>
<tr>
<td>MSI</td>
<td>MSIntelligence</td>
</tr>
<tr>
<td>ND(L)</td>
<td>Non-Domestic Legal is the legitimate tobacco purchased in duty free or abroad within personal allowance limits</td>
</tr>
<tr>
<td>Non-domestic cigarettes</td>
<td>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)</td>
</tr>
</tbody>
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## Glossary

<table>
<thead>
<tr>
<th>Acronym</th>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation &amp; Development</td>
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<tr>
<td>PDI</td>
<td>Personal Disposable Income</td>
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<tr>
<td>PML</td>
<td>Philip Morris Limited</td>
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<tr>
<td>Outflows</td>
<td>Legitimate tobacco purchased in Australia and taken abroad</td>
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<tr>
<td>RMR</td>
<td>Roy Morgan Research</td>
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<tr>
<td>RYO</td>
<td>Roll Your Own</td>
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<tr>
<td>TIF</td>
<td>Tobacco Industry Forum</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organisation</td>
</tr>
<tr>
<td>Unbranded tobacco</td>
<td>Illegal 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</td>
</tr>
<tr>
<td>Y o Y</td>
<td>Year on Year</td>
</tr>
</tbody>
</table>
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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 anti-illicit tobacco experience
Illicit tobacco consumption has increased, driven by a large growth of contraband

1.1 Key messages

Introduction

This is the first report published by KPMG LLP examining the size of the illicit tobacco market in Australia. We have adopted the approaches we have used to measure and track illicit tobacco consumption in other global markets. Figure 1.1 illustrates our measure and the previously published measures. We present illicit tobacco consumption as a percentage of total consumption rather than as a percentage of legal domestic sales.

The size of the illicit market is measured using a consumer survey and an empty pack survey. This approach is a widely accepted method for measuring the illicit market around the globe. In the past, only a consumer survey was used in Australia.

Comparison to prior reports

As can be observed from Figure 1.1, our approach shows a similar overall trend to historical estimates. The main difference is that it provides a more stable trend over time consistent with what we have observed in other markets.

The percentage of illicit consumption in Australia

Figure 1.1 highlights that in the twelve months to the end of June 2013 (LTM H1 2013), the level of illicit consumption grew from 11.8% to 13.3% of total consumption.

If all of this tobacco had been consumed in the legitimate market it would have represented an excise amount payable to Government of AUD1.0bn at current excise rates.

The key driver of this growth has been a large increase in the consumption of illicit manufactured cigarettes, primarily in the form of contraband. Counterfeit also appears to have increased.

These trends are supported by the observation that the total consumption of tobacco (i.e. legal and illicit) appears to be stable. Consumption between 2012 and LTM H1 2013 was flat compared to a longer term annual decline between 2009 and LTM H1 2013 of 2.9%.

The empty pack survey indicates that the proportion of non-domestic cigarettes has increased from 4.3% of all manufactured cigarettes that were consumed in 2012 to 9.8% in LTM H1 2013.

Australian tobacco market

The market has seen several regulatory changes in the last 12 months to June 2013 (see section 4). The main changes include the Tobacco Plain Packaging Act (December 2012), the Customs Amendments Act (September 2012) which reduced the duty free limit from 250g to 50g/50 sticks of tobacco and the Customs Amendment Bill (November 2012) related to smuggled tobacco.

Sources: (1) Deloitte, Illicit Trade of Tobacco in Australia, 2010, 2011, 2012 (2) Industry data (3) KPMG analysis (4) Euromonitor, Tobacco Consumption in Australia, July 2012
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.

This report covers the period from July 2012 to June 2013 (H1 2013). The H2 2013 report will be published in 2014.

This H1 2013 report measuring the consumption of illicit tobacco in Australia is the first of two reports that will be published focusing on 2013. KPMG has been appointed to produce bi-annual reports on the illicit trade for the industry in Australia.

This report primarily shows the 2013 results based on our methodology. The result for 2013 is also presented on a basis consistent with prior reports in the appendix.

1.3 KPMG LLP’s anti-illicit tobacco experience

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 Commissions Anti Fraud Office (OLAF). Project Star has been conducted annually since 2006 by KPMG for PMI, the European Commission and the 27 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 anti-illicit trade measurement.

Latin America

KPMG LLP has just finished leading 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.
2. Australian tobacco market

2.1 Tobacco consumption in Australia
2.2 Legal tobacco market
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** – 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 illegally from cheaper overseas markets. 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 believe that organised crime groups perceive tobacco smuggling to be low-risk and high profitability. Tobacco is often smuggled alongside other illegal substances. Penalties for smuggling illicit tobacco have recently been increased, with potential for a jail term of up to ten years. (1)

**Counterfeit**

These are manufactured cigarettes. They are specifically manufactured overseas in countries with large scale tobacco production and sophisticated tobacco manufacturing machinery. Once manufactured they are illegally smuggled into Australia most commonly via ports on large container freight and other channels including airmail and online purchases.

**Contraband**

These are any genuine cigarettes that are sold without the payment of applicable excise taxes. They are manufactured legally outside of Australia adhering to local regulations and smuggled into the Australian market. This includes cigarettes which are purchased legally outside Australia but exceed personal import allowances.

Contraband cigarettes are legitimately manufactured by the trademark owner but avoid Australian government regulations, quarantine inspections and ingredient controls. (2)

Illicit whites, as discussed in section 6, are also a constituent part of contraband. They are manufactured cigarettes that are not legally available in the local market. These brands are typically not sold legally anywhere, and 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. TIF indicates that it may be grown illicitly without a licence in Australia but is most commonly imported.

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)
2.2 Legal tobacco market

2.2.1 Historic legal domestic sales

Legal domestic sales in Australia, 2000-LTM 2013

<table>
<thead>
<tr>
<th>Year</th>
<th>Manufactured Cigarettes</th>
<th>Loose Tobacco</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>18.8</td>
<td>13</td>
</tr>
<tr>
<td>2001</td>
<td>17.8</td>
<td>13</td>
</tr>
<tr>
<td>2002</td>
<td>17.3</td>
<td>15</td>
</tr>
<tr>
<td>2003</td>
<td>16.7</td>
<td>15</td>
</tr>
<tr>
<td>2004</td>
<td>16.8</td>
<td>15</td>
</tr>
<tr>
<td>2005</td>
<td>16.8</td>
<td>16</td>
</tr>
<tr>
<td>2006</td>
<td>16.3</td>
<td>16</td>
</tr>
<tr>
<td>2007</td>
<td>16.0</td>
<td>16</td>
</tr>
<tr>
<td>2008</td>
<td>15.9</td>
<td>16</td>
</tr>
<tr>
<td>2009</td>
<td>15.9</td>
<td>17</td>
</tr>
<tr>
<td>2010</td>
<td>14.6</td>
<td>18</td>
</tr>
<tr>
<td>2011</td>
<td>13.9</td>
<td>18</td>
</tr>
<tr>
<td>2012</td>
<td>13.5</td>
<td>18</td>
</tr>
<tr>
<td>LTM H1 2013</td>
<td>13.3</td>
<td>18</td>
</tr>
</tbody>
</table>

CAGR (%) 2000-09 2009-12 2000-12 2000-LTM 2013

<table>
<thead>
<tr>
<th>Category</th>
<th>2000-09</th>
<th>2009-12</th>
<th>2000-12</th>
<th>2000-LTM 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufactured cigarettes</td>
<td>-1.1%</td>
<td>-5.3%</td>
<td>-2.2%</td>
<td>-2.2%</td>
</tr>
<tr>
<td>Loose tobacco</td>
<td>3.0%</td>
<td>2.8%</td>
<td>3.0%</td>
<td>2.9%</td>
</tr>
<tr>
<td>Total market</td>
<td>-0.8%</td>
<td>-4.5%</td>
<td>-1.7%</td>
<td>-1.8%</td>
</tr>
</tbody>
</table>

Australian legal domestic sales volumes gradually declined between 2000 and 2009. The 25% increase in excise duties in April 2010 coincided with a 6.8% decline in legal domestic sales volumes. However, the same period also saw an increase in illicit consumption of tobacco.

Whilst manufactured cigarette volumes have declined at an annual rate of 2.2% over the last twelve 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 Euromonitor data. Through an analysis of confidential Exchange of Sales data, Euromonitor appears to underestimate actual sales and so we have taken an historic average to uplift Euromonitor manufactured cigarette volumes in each year by 2%. Loose tobacco volumes remain unchanged. See page 59 for details.
(b) An analysis of LTM and how this is calculated is provided in Appendix A2 2.
Sources: (1) Euromonitor, legal domestic sales, August 2013
(2) Industry data
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 2012(2)

Price category

The price difference between different types of cigarettes is relatively small. Cigarettes are taxed by the stick rather than value and as a result increases in prices through excise tax does not increase the gap in price between high and low priced categories.

Since 2011 there has been an increase in low priced categories at the expense of medium and high priced cigarettes. This trend appears to have developed significantly in 2013.

Source:  
(1) Euromonitor, Tobacco in Australia, August 2012  
(2) KPMG analysis of Nielsen Australia - BAT Tobacco Industry database
2.2.3 Supply and distribution of legal manufactured tobacco in Australia

Supply chain for legal tobacco products in Australia, 2012

- **Imported tobacco leaf**
- **Manufacture of tobacco products**
- **Export of tobacco products**
- **Distribution of tobacco products**
- **Retail of tobacco**
- **Legal tobacco end user**

**Tobacco supply chain and sales channels**

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.

According to Euromonitor, over half of tobacco products were sold through supermarkets.

**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.

**Sales of legal tobacco products by retailer, by volume 2012**

- **Supermarket**: 53.4%
- **Groceries, forecourts and convenience**: 25.2%
- **Food, drink and tobacco specialists**: 18.1%
- **Others**: 3.2%

Notes:
- (a) “Others” refers to any non-store based retail such as vending machines, or hotels and bars
- (b) Weighted average of Euromonitor distribution channels of RYO and manufactured cigarettes legal domestic sales

Source: (1) Euromonitor, Tobacco in Australia, August 2012
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 5 years, with low unemployment rates compared with the OECD.

3.1 Macroeconomic context

This section provides background on the Australian economy as a significant 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

The 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 the first half of 2013 has slowed, and some analysts have cut future growth forecasts.

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. However, unemployment forecasts for 2013 have recently been revised upwards from the previous forecast of 5.3%.(3)

Unemployment in June 2013 was 5.7%, the highest rate of unemployment Australia has seen since September 2009.(5)

Recorded unemployment, 2007-2013(3)(4)(a)

Year-on-year GDP Growth, 2007-2013(1)(2)(a)

Note: (a) Figures for 2013 are based on full year estimates
Sources: (1) The Economist Intelligence Unit, GDP at constant prices, accessed August 2013
(2) OECD, GDP (expenditure approach), accessed July 2013
(3) The Economist Intelligence Unit, recorded unemployment as a percentage of total labour force, accessed July 2013
(4) OECD, harmonized unemployment rates, 2012
(5) Australia Bureau of Statistics

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Macroeconomic environment
Australia has seen consistent growth in personal disposable incomes

3.4 Personal Disposable Income per capita

Australia has been through a period of increasing consumer disposable income during the past decade. Personal Disposable Income (PDI) per capita increased by 5.3% p.a. between 2007 and 2012.

Despite the global financial crisis, income levels in Australia do not appear to be significantly impacted with growth in PDI being supported by an increase in hours worked (by part-time workers) and increased hourly wages.(2)

3.5 Consumer Price Index

Australia’s Consumer Price Index has developed at the same pace as the OECD average, growing consistently since 2006. However, forecasts suggest that inflation will be higher than the OECD average in 2013.

The Economist Intelligence Unit forecast that annual inflation will average 2.6% in 2013-17 is subject to both upside and downside risk. Interest-rate rises may relieve some inflationary pressure, but a revival in the housing market could cause inflation to accelerate.
4. Regulation and taxation

4.1 Tobacco regulation in Australia
4.2 Future proposed legislation
4.3 Recent development of excise duty and tobacco affordability in Australia
4.4 Regional tobacco prices
Regulation and taxation

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. 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, Australia, 1990-2013

Key:
- Manufacturer regulation
- Smoke-free environment
- Retailer regulation
- Excise Duty
- Duty free allowance

Sources:
3. Australian Government Department of Health
5. Tobacco Control Laws, Campaign for tobacco free kids, August 2013

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4.1 Tobacco regulation in Australia (continued)

Manufacturer regulation

Manufacturers 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 packaging with no trademarks and the only differentiator being the name of the brand, printed in Lucida 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.

The establishment of the FCTC resulted in the creation of guidelines surrounding smoke-free environments which State parliaments were obliged to adopt. In 2005 and 2006 the States passed laws which created smoke-free environments in public places including licensed premises, partially covered outdoor spaces and al 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.

Individual States in Australia have also passed laws which restrict smoking in cars with children under the age of 17. Recently the Victorian Government announced further outdoor smoking bans to be considered in 2013 and is now at the second reading stage, aiming to further reduce the range of public areas where smoking is permitted, especially when children are present.

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. All States and Territories require tobacco retailers to hold a licence, with the exception of Victoria and Queensland. 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.

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. Victoria, South Australia and Western Australia have similar legislation; however, there are exemptions in place for specialist tobacconists. South Australia has an exemption until December 2014; there is currently no set timeframe for the expiration of the exemptions in Western Australia and Victoria.

Some States and Territories have also applied restrictions on the number and operation of vending machines in licensed premises and gambling establishments. In the ACT, cigarette vending machines have been banned entirely.

Duty free and customs allowances

In the 2012 budget, it was announced that the inbound duty free allowance from international travel would be reduced from 250g of tobacco per person to 50g/50 sticks. In 2012 Australia passed the Customs Amendment Act which conveyed new offences for smuggling or possessing illicit tobacco. It was the first time that custodial sentences were recommended for smuggling tobacco. Victoria has legislation which criminalises the possession of illicit tobacco or tobacco on which the appropriate excise duties have not been paid.

Note: (a) Customs duty is at the excise equivalent rate

Sources:
1. WHO, Convention on Tobacco Control Booklet, July 2012
2. Tobacco Control Laws, Campaign for tobacco free kids, August 2013
4. Australian Government, Customs Amendment Act, July 2013
5. Department of Health, Victoria
6. Treasurer of the Commonwealth of Australia, Government to increase tobacco excise, August 2013
4.1 Tobacco regulation in Australia

Framework Convention on Tobacco Control (FCTC)(1)

Australia became a Signatory to the World Health Organization’s (WHO) Framework Convention on Tobacco Control (FCTC) on 5 December 2003. The Conference of Parties (COP) has adopted detailed guidelines for effective implementation of many of the broad range of legislative, executive, administrative and other measures required under the Convention. Together, the FCTC and its guidelines have the potential to help set the priorities of Australian governments, including Commonwealth, State and Territory, in relation to tobacco control policies and programmes.

The FCTC also provides a framework for international cooperation in a number of areas of tobacco control in which Australia and other Parties cannot effectively act alone. These include the regulation of cross-border tobacco advertising, promotion and sponsorship and the implementation of measures to address illicit trade in tobacco products.

Australia has the responsibility to cooperate with other FCTC Parties to address trans-boundary tobacco control problems and to assist other Parties in meeting common challenges to effective tobacco control.

The Australian tobacco industry is currently participating in a consultation around the Anti-I illicit Trade Protocol (AITP). All submissions were delivered by 14 June.

Excise duty increases

Australian excise duty has risen with inflation with the exception of a one-off 25% increase in 2010. The 2013-14 federal budget included a change to indexation of excise duty for tobacco and tobacco products from the Consumer Price Index (CPI) to Average Weekly Ordinary Time Earnings (AWOTE).

In August 2013 the Australian government announced excise duty increases in tobacco products of an additional 12.5% for the next four years in addition to the switch to AWOTE(2). As a result of these tax increases the excise on a pack of cigarettes in Australia will increase by 60% (compounded over four years) above the increase of AWOTE.

4.2 Future proposed legislation

Continuous pursuit of smoke-free environments

State governments have continued to focus on the banning of smoking in public outdoor areas. Where States have not banned smoking in outdoor public areas, many local councils have issued the relevant bans and often play a key role in expanding public smoking restrictions. States continue to ban smoking or implement buffer zones at public events and any areas where children may be present such as open air concerts, playgrounds, sporting events and skate parks.(1)

Sources:
(2) Treasurer of the Commonwealth of Australia, Government to increase tobacco excise, August 2013
Regulation and taxation
Tobacco excise rates have been rising in line with inflation, with the exception of a one-off 25% increase in April 2010

4.3 Recent development of excise duty and tobacco affordability in Australia

Values of tobacco excise and customs duty, Australia, January 2007- September 2013

Excise duty on tobacco products increased by 2.4% between August 2012 and August 2013 in line with the Consumer Price Index (CPI). Excise rates are revised twice a year in February and August. There was a one-off 25% increase in excise, introduced on 30 April 2010 in accordance with the National Preventive Health Strategy.

Recently, the Australian government announced that it intends to raise excise duty on tobacco products by 12.5% above CPI at the end of 2013. This will be followed by successive increases of 12.5% above the rate of AWOTE in each of the following three years.

Index of tobacco prices and per capita PDI, Australia, 2007-2012

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.

Notes: (a) Indexed with 2006 values taken as 100
(b) PDI per capita, year on year change
Sources: (1) Euromonitor, index of tobacco prices, accessed July 2013
(2) Euromonitor, annual disposable income, accessed July 2013
4.4 Relative regional price of tobacco
Price of a pack of 20 Marlboro cigarettes – Australia and selected markets, 2013(1)(2)(a)

Australia and New Zealand have significantly higher cigarette prices than surrounding markets in South East Asia, with Australian prices 50% 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.

Note: (a) Prices for a 20 cigarette pack of Marlboro (taxes included); where Marlboro is not available, a comparable premium brand has been used
Sources: (1) Industry data (2) www.oanda.com
Regulation and taxation

The price differential between legal products and illicit products has been widening

5.3 Relative price of illicit tobacco

Price differential of illicit products to a packet of Winfield 25s, 2010 - 2013\(^{(1)(2)(a)}\)

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 both the current price differential of illicit products to a legal packet of Winfield 25s and the growth in this price differential.

The largest relative increases have developed in counterfeit and contraband products.

The industry highlighted that prices of contraband in particular has increased by 29% since March 2010, which has likely fuelled bigger margins to smugglers and illegal retailers.

Note: (a) Contraband and counterfeit prices are an average of price for products found in Sydney and Melbourne. Unbranded prices have been converted to a pack of 25 cigarette equivalents.

Sources: (1) BATA intelligence data

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5. Size of the illicit tobacco market

5.1 Estimating the illicit tobacco market

5.2 Illicit tobacco consumption in Australia
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)

<table>
<thead>
<tr>
<th>Tobacco consumption</th>
<th>Total legal domestic sales</th>
<th>Outflows</th>
<th>Domestic consumption</th>
<th>+ Non-domestic consumption = Total consumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illicit tobacco consumption</td>
<td>Legal domestic sales</td>
<td>Legal domestic outflows</td>
<td>Unbranded Tobacco</td>
<td>Contraband</td>
</tr>
<tr>
<td>Data sources</td>
<td>Nielsen Australia - BAT Tobacco Industry database</td>
<td>Euromonitor</td>
<td>Datamonitor</td>
<td>Exchange of Sales</td>
</tr>
</tbody>
</table>

Notes: (a) Definitions for the above sales categories can be found in the glossary on page 2
Primary approaches

Consumption model

This approach is based on the responses of consumers to a survey conducted by Roy Morgan Research in H1 2013. The survey asks consumers about their consumption of both legal and illicit tobacco. These survey responses are 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.

The survey is directly comparable to previous years, which makes it possible to pick up trends and developments in the market. Detailed results of the consumer survey are discussed in section 6.

Empty pack survey (EPS)

An empty pack survey is a sample undertaken independently by MSIntelligence which collected 12,000 discarded cigarette packs across 16 different towns and cities in Australia. The brand and market of origin of each collected pack is assessed to determine whether it is a legitimate product, a product from a different market to Australia or counterfeit. 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. 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 has not been used in prior reports 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 Phillip Morris Limited, and these have been made available to KPMG for use in this report.

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.
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 significant 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.
5.1 Estimating the illicit tobacco market (continued)

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, external data sources such as the Australian Institute of Health and Welfare and the Australian Bureau of Statistics to determine the results. We consider it to be the best way of sizing the unbranded tobacco market.

B Manufactured cigarettes: The empty pack survey is the most reliable measure of contraband and counterfeit. It also forms the foundation for Project Star.

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 cannabis 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 significant 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 modelling 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.
Illicit tobacco accounted for 13.3% of total tobacco consumption in the twelve months to June 2013, caused by a major switch to illicit manufactured cigarettes.

Overall consumption of illicit product is estimated to be equivalent to 13.3% of total tobacco consumption in the last twelve months to June 2013. This is the highest level recorded.

The introduction of a 25% increase in excise duty in 2010 coincided with an increase in the illicit proportion of tobacco consumption. The illicit proportion then declined steadily between 2010 and 2012.

Volumes of illicit unbranded tobacco have declined by 40% and volumes of illicit manufactured cigarettes have increased by 154% since 2012. This continued trend seems to indicate a structural shift within the illicit market towards illicit manufactured cigarettes and away from illicit unbranded tobacco.

The overall level of tobacco consumption in Australia was calculated to be equal to 17.4 million kilograms in the twelve months to June 2013. This estimate of total consumption is in line with the 2012 measure and shows a continuation of the long term historic trend of declining tobacco consumption since 2009.

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.

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Overall consumption of illicit product is estimated to be equivalent to 13.3% of total tobacco consumption in the last twelve months to June 2013. This is the highest level recorded.

Illicit tobacco consumption as a proportion of total consumption,
2007-H1 2013\(^{(1)(2)(3)(4)}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>LTM H1 2013(1)</th>
<th>2009-H1 2013</th>
<th>2009-H1 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>8.3%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2008</td>
<td>9.1%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2009</td>
<td>12.8%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2010</td>
<td>12.4%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2011</td>
<td>11.8%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2012</td>
<td>13.3%</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

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

Source:

(1) KPMG analysis
(3) PriceWaterhouseCoopers, Australia's Illegal Tobacco Market, 2007, 2009
(4) Industry data
1. Illicit manufactured cigarettes

Based on the empty pack survey analysis, our LTM H1 2013 estimation of the illicit manufactured cigarettes market is 1,348 tonnes for contraband and 85 tonnes for counterfeit. This represents an increase of 162% for contraband and 71% for counterfeit; a total increase of 154%.

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 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 (+154%) and the consumption model (+55%) indicate a significant 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 40% between 2012 and 2013, from 1.5 million kg to 0.9 million kg. 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 0.6 million kg and 1.3 million kg. The 0.90 million kg sits comfortably within the mid point of this range. See appendix A1.3 for more detail.

### Table 5.2 Results of primary methodologies, 2012 – LTM H1 2013

<table>
<thead>
<tr>
<th>2012 and LTM H1 2013 results (kg ‘000)</th>
<th>2012</th>
<th>LTM H1 2013</th>
<th>% change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Illicit manufactured cigarettes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contraband</td>
<td>515</td>
<td>1,348</td>
<td>162%</td>
</tr>
<tr>
<td>Counterfeit</td>
<td>50</td>
<td>85</td>
<td>71%</td>
</tr>
<tr>
<td>Total</td>
<td>564</td>
<td>1,433</td>
<td>154%</td>
</tr>
<tr>
<td>2. Unbranded tobacco</td>
<td>1,495</td>
<td>895</td>
<td>-40%</td>
</tr>
<tr>
<td>3. Total illicit tobacco</td>
<td>2,060</td>
<td>2,329</td>
<td>13%</td>
</tr>
</tbody>
</table>

Sources:
(1) Deloitte, *Illicit Trade of Tobacco in Australia*, 2012
(2) Roy Morgan Research, consumer survey, H1 2013
(3) Euromonitor, *Tobacco consumption in Australia*, July 2012
(4) KPMG analysis
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 13% with illicit tobacco consumption rising to 2,329 tonnes in 2013. This increase is also characterised by a large change in the mix of illicit tobacco consumed. In 2013 manufactured cigarettes accounted for the predominant amount of 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 2012. In 2009 16% of the volume of seizures came from manufactured cigarettes, whilst in 2012 47% of tobacco seizures were manufactured cigarettes.

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.

Seizures data split by type of illicit tobacco, 2007-2012

Consumption gap analysis indicates that both legal domestic sales and the smoking population have declined marginally in the long term.

<table>
<thead>
<tr>
<th>Year</th>
<th>Millions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>2.86</td>
</tr>
<tr>
<td>2010</td>
<td>2.74</td>
</tr>
<tr>
<td>2008</td>
<td>3.21</td>
</tr>
<tr>
<td>2012</td>
<td>2.92</td>
</tr>
</tbody>
</table>

Sea cargo seizures split by type of illicit tobacco, 2007-2012

The consumption gap validates the overall estimate of the volume of illicit tobacco, indicating significant 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.
6. Drivers of results

6.1 Consumer survey results

6.2 Empty pack 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 2,107 adult respondents to be collected from 14,494 who responded to the email link sent out to Roy Morgan Research’s pool of respondents in May and June of 2013.

If a respondent was a regular smoker and fell into the correct demographic to be surveyed, they were considered eligible for the survey. Of those who proved to be eligible for the survey, 73% 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.

- Over 70% 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.

Note: (a) For the purposes of this report, a regular smoker is a person who smokes tobacco products on at least five days in a given week.
Drivers of results

Whilst the proportion of smokers who purchased unbranded illicit tobacco increased in H1 2013, the average frequency and average amount purchased of unbranded declined

6.1.2 Purchasers of illicit tobacco

Proportion of respondents who reported purchasing illicit unbranded tobacco, 2012 – H1 2013

The H1 2013 Roy Morgan Research consumer survey saw significant changes in the key metrics which drive the consumption model estimate. The results showed that, whilst the proportion of respondents who said they purchased unbranded tobacco increased between 2012 and 2013, the frequency and amount of the average purchase declined. Purchase frequency declined by approximately 38% and purchase amount by 21%. 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 which was also highlighted by seizures data. Many respondents highlight that they purchase whenever illicit product is available.

Average frequency of purchase per annum, 2012 – H1 2013

Average volume purchased (kg) per occasion, 2012 – H1 2013

Note: (a) 2012 and 2013 analysis is based on CAWI consumer survey results
Sources: (1) Deloitte, Illicit Trade of Tobacco in Australia, 2012
(2) Roy Morgan Research, consumer survey, H1 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 purposes of this report, an empty pack survey was carried out by an independent market research agency; MSIntelligence (MSI) across May and June 2013. This H1 2012 EPS collection consisted of 12,000 empty packs, collected across 16 cities in Australia, providing coverage for approximately 75% of the total population as shown in Fig 6.2.1

Packs are collected from pre-determined neighborhoods, selected to be representative of the city being sampled. 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 collection is completed, weightings are overlaid in order to more accurately represent the relative size of each city's population.

Figure 6.2.1 H1 2013 empty pack survey sampling plan

<table>
<thead>
<tr>
<th>City</th>
<th>Population (million) 2012 estimate(2)</th>
<th>Sample packs</th>
<th>Weighted packs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sydney</td>
<td>4.7</td>
<td>3,000</td>
<td>3,253</td>
</tr>
<tr>
<td>Melbourne</td>
<td>4.2</td>
<td>2,500</td>
<td>2,959</td>
</tr>
<tr>
<td>Brisbane</td>
<td>2.2</td>
<td>1,200</td>
<td>1,526</td>
</tr>
<tr>
<td>Perth</td>
<td>1.9</td>
<td>1,000</td>
<td>1,322</td>
</tr>
<tr>
<td>Adelaide</td>
<td>1.3</td>
<td>800</td>
<td>890</td>
</tr>
<tr>
<td>Goldcoast – Tweed Heads</td>
<td>0.6</td>
<td>400</td>
<td>412</td>
</tr>
<tr>
<td>Newcastle</td>
<td>0.4</td>
<td>400</td>
<td>292</td>
</tr>
<tr>
<td>Canberra - Queanbeyan</td>
<td>0.4</td>
<td>300</td>
<td>287</td>
</tr>
<tr>
<td>Wollongong</td>
<td>0.3</td>
<td>300</td>
<td>197</td>
</tr>
<tr>
<td>Sunshine coast</td>
<td>0.3</td>
<td>300</td>
<td>199</td>
</tr>
<tr>
<td>Hobart</td>
<td>0.2</td>
<td>300</td>
<td>151</td>
</tr>
<tr>
<td>Geelong</td>
<td>0.2</td>
<td>300</td>
<td>125</td>
</tr>
<tr>
<td>Townsville</td>
<td>0.2</td>
<td>300</td>
<td>120</td>
</tr>
<tr>
<td>Cairns</td>
<td>0.1</td>
<td>300</td>
<td>98</td>
</tr>
<tr>
<td>Darwin</td>
<td>0.1</td>
<td>300</td>
<td>92</td>
</tr>
<tr>
<td>Toowoomba</td>
<td>0.1</td>
<td>300</td>
<td>77</td>
</tr>
<tr>
<td><strong>Total sample</strong></td>
<td><strong>17.2</strong></td>
<td><strong>12,000</strong></td>
<td><strong>12,000</strong></td>
</tr>
<tr>
<td><strong>Total population of Australia</strong></td>
<td></td>
<td></td>
<td>22.9</td>
</tr>
</tbody>
</table>

Sources: (1) MSIntelligence Research, Empty pack survey; Q2 2013
(2) Australian Bureau of Statistics

Founded in 2001, MSI is a private company with headquarters in Geneva, Switzerland specialising in market research. MSI have particular experience in the tobacco industry and conduct over 700 surveys a year in more than 70 countries.
6.2.2 Australian empty pack survey results – non-domestic incidence by city

Drivers of results
The growth of non-domestic cigarette consumption appears to be a national trend

Of the sixteen cities sampled in the Q2 2013 empty pack survey only Geelong and Toowoomba witnessed a decline in non-domestic consumption in 2013. Darwin, Sydney, Cairns and Townsville were the only cities to have reported a non-domestic incidence higher than 15%.

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) MSIntelligence Research, Empty pack survey, Q2 2013
Drivers of results

South Korean variant products were the main constituent of non-domestic manufactured products found in the empty pack survey.

### 6.2.3 Australian empty pack survey results – market variants

**Total non-domestic incidence by market variant, Q4 2009- Q2 2013**(1)(2)(a)

<table>
<thead>
<tr>
<th>Year</th>
<th>South Korea</th>
<th>Unspecified</th>
<th>China</th>
<th>Indonesia</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009 Q4</td>
<td>1.2%</td>
<td>0.1%</td>
<td>0.3%</td>
<td>0.2%</td>
<td>0.3%</td>
</tr>
<tr>
<td>2010 Q4</td>
<td>1.7%</td>
<td>0.6%</td>
<td>0.5%</td>
<td>0.3%</td>
<td>0.2%</td>
</tr>
<tr>
<td>2012 Q2</td>
<td>4.3%</td>
<td>0.8%</td>
<td>0.5%</td>
<td>0.3%</td>
<td>0.6%</td>
</tr>
<tr>
<td>2013 Q2</td>
<td>9.8%</td>
<td>0.9%</td>
<td>1.3%</td>
<td>2.1%</td>
<td>2.5%</td>
</tr>
</tbody>
</table>

Note: (a) Please refer to appendix A2.4 for detailed travel trends

Sources: (1) MSIntelligence Research, Empty pack survey, Q2 2013

The inflow of non-domestic manufactured products into Australia is primarily from neighboring Asian markets, with high levels of duty free products also present. South Korea (including South Korea duty free sales) is the largest individual source country for non-domestic manufactured products, with a share of over 40% of non-domestic inflows. This is discussed in further detail later in the report.

Whilst the inflows from South Korea are high, the outbound and inbound travel statistics between Australia and South Korea are relatively low when compared to other countries, including China and Indonesia.(a)
Drivers of results
The consumption of illicit whites in Australia is a growing phenomenon, accounting for 2% of total manufactured cigarette consumption

6.2.4 Australian empty pack survey results – illicit whites

Consumption of selected illicit white brands as a percentage of total manufactured cigarette consumption
Q4 2009- Q2 2013(1)(2)(a)

‘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. 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.

Industry sales data on illicit white cigarettes shows between March and June in 2013 they were sold at an average price of AUD$6.60. This would be 45 to 50% less than the cost of a Marlboro or Winfield Blue.(3)

According to the Q2 2013 empty pack survey, 2% of all manufactured cigarettes consumed in Australia were illicit whites. 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.

The increase in consumption of these illicit white brands represents a quadrupling of the volumes seen in 2012. Manchester is currently the largest illicit white brand in Australia; if it were sold legally in Australia it would have an equivalent legal market share of 1.3%.(3)(c)

Incidence of illicit whites increased by over 250% between 2012 and 2013, a much larger increase than total contraband incidence. According to the empty pack survey findings, illicit whites now make up over 20% of contraband consumption.

Notes: (a) Others include Septwolves, Modeng, Asia Cup, Master brands
(b) These brands are known illicit whites as provided by the industry
(c) Unlike other results from the EPS, the shares of each illicit white brand were calculated by weighted packs, not weighted sticks. The share of Manchester would be 1% when calculated in weighted sticks.
Sources: (1) MSIntelligence Research, Empty pack survey, Q2 2013
(3) Industry data
6.2.4 Australian empty pack survey results – illicit whites

Figure 6.2.4 shows the growth of Manchester in Australia between 2012 and 2013. It shows that small numbers of packs were identified solely in Sydney and Melbourne in 2012. When the empty pack survey was carried out in 2013, it showed that total consumption of Manchester had grown from 0.3% to 1.2% of manufactured cigarettes, and it was located in 13 out of 16 cities across Australia.

In Q2 2013, Manchester in Sydney and Townsville had a share of 3.8% and 3.0% respectively. Manchester is not sold legally in any retail outlets in Australia. Whilst 73% of packs collected were found in Sydney, Manchester appears to be available throughout the country.
7. Conclusion
Conclusion

Recent increases in illicit tobacco consumption are a result of contraband and counterfeit. Analysis indicates this is an Australia wide issue rather than focused in a few areas.

<table>
<thead>
<tr>
<th>2012 and LTM H1 2013 results (kg '000)</th>
<th>2012</th>
<th>LTM H1 2013</th>
<th>% change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illicit manufactured cigarettes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contraband</td>
<td>515</td>
<td>1,348</td>
<td>162%</td>
</tr>
<tr>
<td>Counterfeit</td>
<td>50</td>
<td>85</td>
<td>71%</td>
</tr>
<tr>
<td>Total</td>
<td>564</td>
<td>1,433</td>
<td>154%</td>
</tr>
<tr>
<td>Unbranded tobacco</td>
<td>1,495</td>
<td>895</td>
<td>-40%</td>
</tr>
<tr>
<td>Total illicit tobacco</td>
<td>2,060</td>
<td>2,329</td>
<td>13%</td>
</tr>
<tr>
<td>Illicit tobacco consumption as % of total consumption</td>
<td>11.8%</td>
<td>13.3%</td>
<td>n/a</td>
</tr>
<tr>
<td>Equivalent excise value (AUDm)</td>
<td>AUD893</td>
<td>AUD1,021</td>
<td>20%</td>
</tr>
</tbody>
</table>

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 to 13.3% in LTM H1 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 AUD1.0bn at current excise rates.\(^1\)

Contrary to the trend in legal sales, this growth would seem to have been due to a large increase in the consumption of illicit manufactured cigarettes. With a significant proportion of this growth coming from the emergence of illicit white brands like Manchester that are not legally sold in Australia. The empty pack survey in 2012 only found Manchester in Sydney and Melbourne. The latest empty pack survey found the product in 13 of the 16 main cities.

The growth of contraband and counterfeit cigarettes has come at the expense of the consumption of unbranded tobacco. The results from this report would seem to indicate structural shift in the market away from unbranded tobacco and towards manufactured cigarettes.

The legal tobacco market in Australia

Whilst legally manufactured cigarette volumes have declined at an annual rate of 2.2% over the last twelve 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%.

Regional overview

The Australian market is the most expensive market in the region. A packet of 20 Marlboro is 5% more expensive than in New Zealand; the second most expensive market. However, a packet is 55% more than the third most expensive market (Singapore) and 500% more expensive than in South Korea from where the empty pack survey indicates the majority of new contraband is originating.

The Australian Crime Commission believe 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.  

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Appendices

Appendix 1. Illicit market measurements

Appendix 2. Technical appendices
Appendix 1: Illicit market measurements

A1.1 Consumption model
A1.2 Empty pack survey
A1.3 Rolling papers analysis
A1.4 Consumption gap analysis
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. This 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.

The consumer survey

The consumer survey was based on the responses of 2,107 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 late 2012.

The survey was conducted in May and June of 2013. Consumers were asked about their consumption and purchase of both 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 15.1 million kilograms.
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 H1 LTM consumption model process and relevant data sources are shown in detail overleaf.

### Table A1.1 Consumption model data sources and process

<table>
<thead>
<tr>
<th>Consumption model inputs</th>
<th>Roy Morgan consumer survey</th>
<th>Extrapolated Australian Bureau of Statistics smoking prevalence data^(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity of illicit tobacco purchased per occasion (g)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Frequency of illicit tobacco purchased per annum</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Quantity of illicit tobacco purchased per annum (g)</td>
<td>3</td>
<td>1 × 2 = 3</td>
</tr>
<tr>
<td>Total adult smoking population (‘000)</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Illicit tobacco users as % of Australia tobacco users</td>
<td>5</td>
<td>Roy Morgan consumer survey</td>
</tr>
<tr>
<td>Number of illicit tobacco users, Australia (‘000)</td>
<td>6</td>
<td>4 × 5 = 6</td>
</tr>
<tr>
<td>Quantity of illicit tobacco purchased in Australia (‘000kg)</td>
<td>7</td>
<td>3 × 6 = 7</td>
</tr>
</tbody>
</table>

Notes: (a) Please see appendix A2.1.9 for details of the estimation of the smoking population
A1.1 Consumption model (continued)

The LTM H1 2013 consumption model results indicate that consumption of illicit tobacco has decreased from approximately 1.8 million kilograms in 2012 to approximately 1.3 million kilograms in 2013.

The consumer survey indicates a significant decline in unbranded volumes, which decreased by 42% to 0.9 million kilograms. Unbranded tobacco volumes declined as a result of lower quantities purchased and lower purchase frequency being reported.

Illicit manufactured cigarette volumes increased by 56% to 0.4 million kilograms in LTM H1 2013, with the majority of the growth resulting from increased contraband volumes. The amount purchased per occasion and frequency of purchase per annum increased for both contraband and counterfeit cigarettes according to consumer responses in the H1 2013 survey.

Figure A1.1 Consumption model results
Q3 2012-H1 2013\(^{(1)(2)(3)(4)}\)

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>LTM H1 2013</th>
<th>2012</th>
<th>LTM H1 2013</th>
<th>2012</th>
<th>LTM H1 2013</th>
<th>2012</th>
<th>LTM H1 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quantity of illicit tobacco purchased per occasion (g)</strong></td>
<td>248</td>
<td>196</td>
<td>132</td>
<td>142</td>
<td>126</td>
<td>136</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Frequency of illicit tobacco purchase per annum</strong></td>
<td>16</td>
<td>10</td>
<td>5</td>
<td>9</td>
<td>4</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Quantity of illicit tobacco purchased per annum (g)</strong></td>
<td>3,968</td>
<td>1,960</td>
<td>660</td>
<td>1,278</td>
<td>504</td>
<td>1,224</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total adult smoking population (‘000)</strong></td>
<td>2,742</td>
<td>2,609</td>
<td>2,742</td>
<td>2,609</td>
<td>2,742</td>
<td>2,609</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Illicit tobacco users as % of Australian tobacco users</strong></td>
<td>14.2%</td>
<td>17.5%</td>
<td>6.8%</td>
<td>4.3%</td>
<td>8.0%</td>
<td>6.9%</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Number of illicit tobacco users, Australia (‘000)</strong></td>
<td>389</td>
<td>457</td>
<td>186</td>
<td>112</td>
<td>219</td>
<td>180</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Quantity of illicit tobacco purchased in Australia (‘000kg)</strong></td>
<td>1,545</td>
<td>895</td>
<td>123</td>
<td>143</td>
<td>111</td>
<td>220</td>
<td>1,779</td>
<td>1,259</td>
</tr>
</tbody>
</table>

Note: the number highlighted here is the original result from the Deloitte 2012 study. For a fair comparison to the 2013 KPMG result, we have shown a comparative volume estimate on page 29. The detail behind the comparative result is illustrated in Appendix A2 noting the different data sources that have been used.

Note (a) The 2012 numbers presented here are the numbers from the 2012 Deloitte report. These numbers will not tally to the KPMG restated numbers stated on page 29.

Sources:
1. Deloitte, Illicit Trade of Tobacco in Australia, 2012
2. Roy Morgan Research, consumer survey, H1 2013
3. Euromonitor, Tobacco consumption in Australia, July 2012
4. KPMG analysis
Appendix – Illicit market measurements

The Q2 2013 empty pack survey found that 9.8% of manufactured cigarettes consumed originated outside Australia.

A1.2 Empty pack survey analysis

Four empty pack surveys have been carried out in Australia in the last five years.

AC Nielsen carried out surveys solely for Philip Morris Limited in Q4 2009 and Q4 2010. The 2009 survey consisted of 9,343 collected packs, and the 2010 survey 6,000 packs. KPMG have not had visibility of the sampling plans of these surveys but they 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.

The 2013 survey was again produced for all three industry parties and was conducted in May and June. The survey was carried out in the same 16 cities as 2012 and again consisted of 12,000 collected packs.

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 significant 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 surveys is shown above.

The total non-domestic incidence in Australia in the 2013 survey was 9.8% (on the basis of number of cigarettes) and 11.7% (on the basis of number of packs). This indicates that more non-domestic packs would need to be consumed to get the same number of cigarettes and explains why the approach uses cigarettes rather than packs. This 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 duty free allowance was reduced in September 2012.
Appendix – Illicit market measurements

The increase in the non-domestic incidence of manufactured cigarettes has been primarily driven by contraband products

A1.2.2 Empty pack survey analysis (continued)

Break down of non-domestic incidence,
Q2 2012 - Q2 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’ duty free allowance.\(^{(a)}\)

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.

Of the total non-domestic incidence reported in the 2013 survey, 0.1% can be attributed to non-domestic legal volumes. The decline from 2012 is in part explained by the reduction in Australia’s duty free allowance from 250g to 50g/50 sticks per person per trip in September 2012.\(^{(a)}\)

The majority of non-domestic cigarettes are therefore illicit, with the illicit proportion of manufactured cigarettes consumed in Australia showing a marked increase.

The empty pack survey findings showed that 0.6% of all packs collected in 2013 were counterfeit products, with contraband cigarettes representing the remaining 9.1%. Indicating that contraband product is the predominant driver of the increase in illicit manufactured cigarette volumes seen between 2012 and 2013.

Note: (a) Please refer to appendix A2.4 for detailed for detail on the calculation of non-domestic legal volumes

Sources: (1) MSIntelligence Research, Empty pack survey, Q2 2013
(2) AC Nielsen, Empty pack survey, 2012
(3) KPMG analysis
Appendix – Illicit market measurements

The results of the empty pack survey analysis indicate an illicit volume of 1.4 million kilograms for manufactured cigarettes

A1.2.3 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.

The 9.8% non-domestic incidence is combined with estimates for legal domestic sales volumes from 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.

Figure A1.2.3

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal sales of manufactured cigarettes (kg’000s)</td>
<td>1</td>
<td>10</td>
<td>15,881</td>
<td>14,598</td>
<td>13,908</td>
<td>13,468</td>
</tr>
<tr>
<td>Empty pack survey non-domestic incidence</td>
<td>2</td>
<td>46</td>
<td>1.2%</td>
<td>1.7%</td>
<td>-</td>
<td>4.3%</td>
</tr>
<tr>
<td>Total consumption of manufactured cigarettes (kg’000s)</td>
<td>3</td>
<td>= 1 / (100% – 2)</td>
<td>16,071</td>
<td>14,857</td>
<td>-</td>
<td>14,068</td>
</tr>
<tr>
<td>Non-domestic consumption (kg’000s)</td>
<td>4</td>
<td>= 3 – 1</td>
<td>191</td>
<td>258</td>
<td>-</td>
<td>600</td>
</tr>
<tr>
<td>Non-domestic (legal) volume estimate (kg’000s)</td>
<td>5</td>
<td>69</td>
<td>34.6</td>
<td>33.7</td>
<td>-</td>
<td>35.6</td>
</tr>
<tr>
<td>Illicit consumption (kg’000s)</td>
<td>6</td>
<td>= 4 – 5</td>
<td>156.4</td>
<td>224.3</td>
<td>-</td>
<td>564</td>
</tr>
<tr>
<td>Empty pack survey counterfeit incidence</td>
<td>7</td>
<td>46</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0.4%</td>
</tr>
<tr>
<td>Counterfeit consumption (kg’000s)</td>
<td>8</td>
<td>= 6 * (7 / 2)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>50</td>
</tr>
<tr>
<td>Contraband consumption (kg’000s)</td>
<td>9</td>
<td>= 6 - 8</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>515</td>
</tr>
</tbody>
</table>

Figure A1.2.3 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 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 illicit consumption estimate in step 8, with the remainder contraband in step 9.

The results of the empty pack survey analysis show non-domestic volumes increased significantly in 2013. As non-domestic legal volumes declined sharply, this translated into much higher volumes of illicit counterfeit and contraband manufactured cigarettes.

Whilst volumes attributable to counterfeit manufactured cigarettes rose, the true volume increase was driven by contraband product, which accounts for 94% of the total illicit consumption indicated by the empty pack survey analysis.

Notes:  
(a) We have uplifted the Euromonitor manufactured cigarettes volumes by 2% in each year, as we believe that the overall quantum of estimate is too low  
(b) 2013 legal sales of manufactured cigarettes are for the latest 12 months  
(c) Counterfeit incidence is not available for 2009, 2010 and 2011

Sources:  
(1) MSIntelligence Research, Empty pack survey, Q2 2013  
(3) Euromonitor, Legal domestic sales, August 2013  
(4) KPMG analysis
Appendix – Illicit market measurements

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 the LTM period for July 2012 to June 2013, which equated to 1,833 kg.

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.

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 22,500 kg.

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 0.75 g per rolled cigarette and a low value of 0.6 g per rolled cigarette, we can determine a range of potential market sizes.

The volume of illicit unbranded tobacco generated by the consumption model output is within the range of the rolling papers analysis.

---

**Sources:**

1. Size of rolling papers market obtained from the industry
2. National Drug and Alcohol Centre NSW, Cannabis in Australia, June 2007

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Appendix – Illicit market measurements

Our estimate of total tobacco consumption for the twelve months to June 2013 is consistent with the historic overall decline in tobacco consumption

A1.4 Consumption gap analysis

Trend in total consumption of tobacco in Australia, 2007 - H1 2013\(^{(1)(2)(a)(b)(c)}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Illicit consumption</th>
<th>Legal consumption</th>
<th>Total consumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>17.6</td>
<td>17.6</td>
<td>15.3</td>
</tr>
<tr>
<td>2009</td>
<td>18.0</td>
<td>17.6</td>
<td>16.4</td>
</tr>
<tr>
<td>2010</td>
<td>18.8</td>
<td>16.4</td>
<td>16.8</td>
</tr>
<tr>
<td>2011</td>
<td>18.0</td>
<td>15.8</td>
<td>17.4</td>
</tr>
<tr>
<td>2012</td>
<td>17.4</td>
<td>15.3</td>
<td>17.4</td>
</tr>
<tr>
<td>LTM H1 2013</td>
<td>17.4</td>
<td>15.1</td>
<td>16.4</td>
</tr>
</tbody>
</table>

Historic long term total volume decline of 2.9% per year

Under the KPMG methodology, the overall level of tobacco consumption was equal to 17.4 million kilograms in the twelve months to June 2013.

This estimate of total consumption is in line with the overall historic trend of declining total tobacco consumption. Though the LTM H1 2013 total consumption estimate represents a slight increase when compared to the 2012 level.

We also note that legal domestic sales have not shown a significant decline between 2012 and H1 LTM 2013, reducing by only 0.3%.

Overall, as our LTM H1 estimate fits with the trend of continuing decline in total tobacco consumption, we believe the consumption gap analysis supports our estimate.
Appendix 2: Technical appendices

A2.1 Impact of the methodology changes on prior results
A2.2 Last 12 months analysis
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 Questionnaire
A2.8 Bibliography
A2.1 Impact of the methodology changes on prior results
A2.1.1 Context of KPMG methodology alterations and adjustments to prior results

We have leveraged our global experience in the measurement of illicit tobacco markets and made a number of enhancements to the methodology. In order to ensure historic comparability with our methodology we have updated the drivers of prior results so that we are able to understand a longer term trend.

Our methodology calls for five alterations to the historic approach, each of which addresses a specific item. We note that:

- These alterations do not undermine the previous methodology, but instead enhance it by adding a broader range of sources.
- The individual and cumulative effects of each of the alterations is detailed in full in this section, and
- All previous results have been made consistent with our methodology by applying all methodological adjustments retrospectively in order to ensure all years are presented on a consistent basis.

5 methodology adjustments to achieve comparability

1. The method of sizing volumes of counterfeit and contraband product has been changed from the consumption model to the 2012 empty pack survey
2. The illicit market is now expressed as a proportion of total tobacco consumption instead of a proportion of legal domestic sales
3. A consistent conversion rate for translating cigarette sales in tobacco volumes has been applied across all years
4. The source of legal domestic sales data has been changed from Datamonitor to Euromonitor to better reflect market trends
5. The source for the size of the smoking population in Australia remains the AIHW Drug Survey Report, but has been updated to reflect recent declines
On the basis used in previous reports on the illicit tobacco market in Australia, overall consumption of illicit tobacco products increased to the equivalent of 14.2% of legal domestic sales volumes in the last twelve months to June 2013. This increase in illicit consumption has primarily been driven by an increase in contraband consumption. Consumption of contraband was equal to 8.9% of legal sales in H1 2013.

We have examined the methodology used in past studies and have made adjustments to ensure consistency with the KPMG methodology.

Under the KPMG consumption model basis, overall consumption of illicit product is equivalent to 13.3% of total tobacco consumption.

The effect of each of these adjustments on the historic results is detailed in the following section.

Sources:  
(2) Industry data  
(3) KPMG analysis
Appendix – Technical appendices

The following section highlights how our methodology impacts prior results

A2.1.4 Overview of KPMG adjustments to results of previous reports

This section presents detail on the effect of each of the adjustments we have made to prior years results. The adjustments have been made in order to establish the most accurate measure for illicit trade in Australia.

The diagram below shows the high level rationale and the cumulative effect of each of the adjustments.

Each of these individual adjustments is discussed in more detail in the next section.

Historic results position

This is the position reported in previous studies on the illicit tobacco market in Australia.

The 2013 results have been calculated by KPMG on a basis consistent with the methodology of previous studies.

2012 results adjusted

Empty pack survey studies provide a robust estimate of contraband and counterfeit volumes.

Our 2013 estimate uses empty pack survey data to estimate volumes of illicit manufactured cigarettes. We have adjusted the result of 2012 on a comparable basis.

Basis of measurement changed to total consumption

We believe total consumption is a better metric against which to measure the level of illicit consumption.

All historic results have therefore been adjusted as a percentage of total consumption instead of legal domestic sales.

Change to consistent conversion rate

Different conversion rates were used to convert cigarette volumes into kilogram volumes before 2010.

To ensure comparability for all years, we have adjusted 2007 and 2009 results using the conversion rate used in 2010 and onwards.

Change in source of legal domestic sales

Historically, Datamonitor was used as the source of data on the level of legal domestic sales in the market.

We have changed the source of legal domestic sales to Euromonitor data, as our analysis indicates it tracks the market more closely.

Change in smoking population estimate

Prior studies had taken estimates of the total smoking population of Australia from several different sources.

We have adjusted results taking smoking population estimates from a single source, the Australian Institute of Health and Welfare (AIHW) Drug Survey.

Note: Grey line represents relative historic results position  
Source: KPMG analysis
A2.1.5 Adjustments of results – adjustment 1; empty pack survey

In the 2012 report on the illicit tobacco market in Australia, the Roy Morgan consumer survey carried out was the only method used to size the illicit market.

An empty pack survey was also carried out in 2012, though it was not incorporated in the results. As discussed earlier in this report, empty pack survey results can provide a more robust view of the scale and split of illicit manufactured cigarettes between counterfeit and contraband. It has been incorporated into the LTM 2013 report as there was increasing evidence from tobacco company intelligence initiatives that the size of the illicit manufactured cigarettes market was increasing, a view supported by these results.

In line with our methodology, we have examined the 2012 empty pack survey and used it to generate an alternative estimate of the volume of illicit manufactured product (shown below in comparison to the 2012 consumer survey estimate). This estimate benefits from the robustness provided by an empty pack survey and is also in line with previous estimates of counterfeit and contraband.

As a result, KPMG have presented adjusted 2012 results showing the level of contraband and counterfeit consumption indicated by the 2012 empty pack survey result, which we believe is a strong representation of the 2012 illicit tobacco consumption level.

KPMG also examined empty pack survey studies that were conducted in 2009 and 2010. Whilst these empty pack survey studies were carried out under a slightly different methodology compared to the 2012 and 2013 empty pack survey, they broadly support the counterfeit and contraband estimates from the consumer surveys.

<table>
<thead>
<tr>
<th>Empty pack survey illicit manufactured estimate</th>
<th>Consumer survey illicit manufactured estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal sales of manufactured cigarettes (kg’000s)</td>
<td>Quantity of illicit counterfeit tobacco purchased in Australia (kg’000s)</td>
</tr>
<tr>
<td>Empty pack survey non-domestic incidence</td>
<td>Quantity of illicit contraband tobacco purchased in Australia (kg’000s)</td>
</tr>
<tr>
<td>Total consumption of manufactured cigarettes (kg’000s)</td>
<td>Illicit manufactured consumption (kg’000s)</td>
</tr>
<tr>
<td>Non-domestic manufactured consumption (kg’000s)</td>
<td>3 = 1 + 2</td>
</tr>
<tr>
<td>Non-domestic legal volumes (kg’000s)</td>
<td>36</td>
</tr>
<tr>
<td>Illicit manufactured consumption (kg’000s)</td>
<td>564</td>
</tr>
</tbody>
</table>

(2) Industry data
(3) KPMG analysis
A2.1.5 Adjustment of results – adjustment 1; empty pack survey (cont.)

The effect of the adjustment of the illicit manufactured volume using the 2012 empty pack survey as opposed to the consumer survey on the 2012 illicit estimate is shown in the below chart and table.

This adjustment effects only the 2012 result. The H1 2013 result already incorporates the 2013 empty pack survey result as discussed earlier in the report.

Illicit tobacco consumption as a proportion of legal domestic sales, 2007- H1 2013\(^{(1)}\)(2)(3)

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original prior survey results</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>10.5%</td>
<td>14.2%</td>
</tr>
<tr>
<td>Effect of 2012 manufactured cigarettes illicit trade adjustment on original results</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>12.5%</td>
<td>14.2%</td>
</tr>
</tbody>
</table>

Sources:  
(2) Industry data  
(3) KPMG analysis
A2.1.6 Adjustment of results – adjustment 2; basis of measurement

Illicit tobacco consumption as a proportion of legal domestic sales and total consumption, 2007-H1 2013(1)

Previous estimates of the Australian illicit tobacco market have been presented as a proportion of legal domestic sales.

Whilst this form of presentation raises no specific issues in terms of measurement, we have presented our estimate of the illicit trade as a proportion of total consumption, and adjusted previous results on the same basis to ensure comparability.

Expressing the illicit trade as a proportion of total consumption better reflects the true size of the illicit trade, as it captures all forms of tobacco consumption, and is a more common way of expressing the size of the illicit trade, allowing direct comparisons to be made between Australia and other markets.

KPMG results adjustment summary – adjustment 2

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original prior survey results</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>10.5%</td>
<td>14.2%</td>
</tr>
<tr>
<td>Effect of basis of measurement adjustment on original results</td>
<td>8.7%</td>
<td>11.0%</td>
<td>13.5%</td>
<td>11.8%</td>
<td>9.5%</td>
<td>12.5%</td>
</tr>
</tbody>
</table>

KPMG results adjustment summary – cumulative effect of adjustment 1 & 2

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cumulative adjustment position after adjustment 1</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>12.5%</td>
<td>14.2%</td>
</tr>
<tr>
<td>Cumulative adjustment position after adjustment 2</td>
<td>8.7%</td>
<td>11.0%</td>
<td>13.5%</td>
<td>11.8%</td>
<td>11.1%</td>
<td>12.5%</td>
</tr>
</tbody>
</table>

Sources: (1) Deloitte, Illicit Trade of Tobacco in Australia, 2010, 2011, 2012
(2) Industry data
(3) KPMG analysis
KPMG have adjusted the results from 2007 and 2009 to incorporate the same cigarette to kilogram conversion used from 2010 onwards

A2.1.7 Adjustment of results – adjustment 3; consistent conversion rate

Illicit tobacco consumption as a proportion of total consumption, 2007-H1 2013(1)(2)(3)

A key metric in producing the illicit estimate is the weight of tobacco per manufactured cigarette as this is used to convert manufactured cigarette volumes into kilogram volumes. This weight of tobacco per cigarette is referred to as the conversion rate.

The illicit tobacco reports carried out in 2007 and 2009 were produced for a single industry player and so were based on the conversion rate of that single player.

Since 2010, the illicit tobacco reports have been produced for all of the three major industry players and have used a weighted average conversion rate which incorporates information from all three players about the average weight of tobacco per cigarette.

When the report was produced for all industry players for the first time in 2010, the new conversion rate was not applied retrospectively to the results for 2007 and 2009. To ensure comparability between years, we have presented all historic results using the industry conversion metric consistently throughout.

KPMG have verified the conversion rate and ensured that it has been applied consistently across the historic period. The data used to compile the conversion rate is confidential to the participating companies and as a result, the data is not published in this report.

<table>
<thead>
<tr>
<th>KPMG results adjustment summary – adjustment 3</th>
<th>2007</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original prior survey results</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>10.5%</td>
<td>14.2%</td>
</tr>
<tr>
<td>Effect of conversion rate adjustment on original results</td>
<td>10.3%</td>
<td>13.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>10.5%</td>
<td>14.2%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KPMG results adjustment summary – cumulative effect of adjustment 1, 2, &amp; 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cumulative adjustment position after adjustment 2</td>
</tr>
<tr>
<td>Cumulative adjustment position after adjustment 3</td>
</tr>
</tbody>
</table>

Sources: (1) Deloitte, Illicit Trade of Tobacco in Australia, 2010, 2011, 2012
(2) Industry data
(3) KPMG analysis

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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

A2.1.8 Adjustment of results – adjustment 4; source of legal domestic sales estimates


<table>
<thead>
<tr>
<th>Year</th>
<th>Exchange of sales indication</th>
<th>Previous reports</th>
<th>Datamonitor</th>
<th>Euromonitor</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>15</td>
<td>-2.1%</td>
<td>-2.9%</td>
<td>-0.0%</td>
</tr>
<tr>
<td>2008</td>
<td>15</td>
<td>-1.8%</td>
<td>-4.5%</td>
<td>-2.7%</td>
</tr>
<tr>
<td>2009</td>
<td>15</td>
<td>-2.3%</td>
<td>-2.3%</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>15</td>
<td>-2.3%</td>
<td>-2.3%</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>15</td>
<td>-2.3%</td>
<td>-2.3%</td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>15</td>
<td>-2.3%</td>
<td>-2.3%</td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Previous reports</td>
<td>-0.1%</td>
<td>-2.1%</td>
<td>-1.3%</td>
</tr>
<tr>
<td>Datamonitor</td>
<td>-2.9%</td>
<td>-1.8%</td>
<td>-2.3%</td>
</tr>
<tr>
<td>Euromonitor</td>
<td>-0.0%</td>
<td>-4.5%</td>
<td>-2.7%</td>
</tr>
</tbody>
</table>

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 and estimates used in prior reports on the illicit market in Australia.

From our analysis, 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 as opposed to using the Datamonitor data previously used.

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.

Notes:  
(a) To preserve confidentiality of commercially sensitive data, Exchange of Sales data has been grossed up to factor in the market coverage of the data and then rounded to the nearest thousand  
(b) No illicit tobacco study was carried out in 2008 and as such no ‘previous report’ sales estimate exists for this year

Sources:  
(1) Datamonitor  
(2) Euromonitor, Legal domestic sales, accessed August 2013  
(3) Industry sales data
Appendix – Technical appendices
KPMG have adjusted legal domestic sales volumes based on publicly available data to ensure current sales volumes are reflected

A2.1.8 Adjustment of results – adjustment 4; source of legal domestic sales estimates (cont.)


<table>
<thead>
<tr>
<th>Year</th>
<th>Prior reports manufactured cigarettes legal domestic sales (kg '000s)</th>
<th>Prior reports loose tobacco legal domestic sales (kg '000s)</th>
<th>Total prior reports legal domestic sales (kg '000s)</th>
<th>KPMG manufactured cigarettes legal domestic sales (kg '000s)</th>
<th>KPMG loose tobacco legal domestic sales (kg '000s)</th>
<th>Total KPMG legal domestic sales (kg '000s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007(^{(a)})</td>
<td>17,491</td>
<td>1,593</td>
<td>19,084</td>
<td>17,319</td>
<td>1,595</td>
<td>18,915</td>
</tr>
<tr>
<td>2009(^{(a)})</td>
<td>17,410</td>
<td>1,640</td>
<td>19,050</td>
<td>17,223</td>
<td>1,684</td>
<td>18,907</td>
</tr>
<tr>
<td>2010</td>
<td>15,253</td>
<td>1,600</td>
<td>16,853</td>
<td>14,598</td>
<td>1,768</td>
<td>16,367</td>
</tr>
<tr>
<td>2011</td>
<td>15,261</td>
<td>1,600</td>
<td>16,861</td>
<td>13,908</td>
<td>1,800</td>
<td>15,708</td>
</tr>
<tr>
<td>2012</td>
<td>15,261</td>
<td>1,600</td>
<td>16,861</td>
<td>13,468</td>
<td>1,829</td>
<td>15,297</td>
</tr>
<tr>
<td>LTM H1 2013</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>13,267</td>
<td>1,846</td>
<td>15,114</td>
</tr>
</tbody>
</table>

Comparative estimates of legal domestic sales\(^{(a)}\)

On page 59 we discussed the difference between Datamonitor and Euromonitor legal domestic sales figures. The chart and table above show the different volumes generated using previous report sales data and our estimates. Given that legal domestic sales volumes are an important input into both the consumption model and EPS analysis, it is important to reflect the actual market size and growth. This will minimise any over or under estimation and also ensure that the trend in illicit consumption is more accurate.

Note: (a) Estimates of legal domestic sales in kilograms for 2007 and 2009 are presented on the basis of a comparable conversion rate to show comparability between KPMG estimates and estimates stated in prior reports
Sources: (1) Deloitte, Illicit Trade of Tobacco in Australia, 2010, 2011, 2012
(2) Industry data
(3) KPMG analysis
(4) Datamonitor
(5) Euromonitor, Legal domestic sales, accessed August 2013
The adjustment of the legal domestic sales level increases the relative size of the illicit market from 2010 onwards

A2.1.8 Adjustment of results – adjustment 4; source of legal domestic sales estimates (cont.)

Illicit tobacco consumption as a proportion of total consumption, 2007- H1 2013

The effect of changing the source of legal domestic sales data to adjusted Euromonitor volumes is to increase the estimate of the proportion of consumption attributable to the illicit trade from 2010 onwards. This occurs as our estimate of legal domestic sales volume is lower in 2011 to LTM H1 2013 than the volume used in previous reports, resulting in the percentage of illicit tobacco consumption being higher as a proportion of total consumption.

<table>
<thead>
<tr>
<th>KPMG results adjustment summary – adjustment 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original prior survey results</td>
</tr>
<tr>
<td>2007</td>
</tr>
<tr>
<td>Effect of legal domestic sales adjustment on original results</td>
</tr>
<tr>
<td>2007</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KPMG results adjustment summary – cumulative effect of adjustment 1, 2, 3 &amp; 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cumulative adjustment position after adjustment 3</td>
</tr>
<tr>
<td>2007</td>
</tr>
<tr>
<td>Cumulative adjustment position after adjustment 4</td>
</tr>
<tr>
<td>2007</td>
</tr>
</tbody>
</table>

Sources:  
(2) Industry data  
(3) KPMG analysis
Appendix – Technical appendices

Several estimations of Australian smoking prevalence are publicly available, but yearly data is not available from Australian government estimates.

A2.1.9 Adjustment of results – adjustment 5; estimation of smoking population

Smokers as a percentage of population, 2007-2013 (1)(2)(3)(a)(b)(c)

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.

Notes:
(a) Euromonitor, percentage of population that are smokers refers to daily smokers > 18 years
(b) Australian Institute of Health and Welfare and ABS percentage of population that are smokers refers to daily smokers >14 years
(c) Euromonitor figures for 2013 are based on full year estimates

Sources:
(1) Euromonitor, smoking prevalence, accessed July 2013
(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.

A2.1.9 Adjustment of results – adjustment 5; estimation of smoking population (cont.)

Total number of smokers, 2007-2013 (1)(2)(3)(a)(b)(c)

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 modelling process – i.e. as a higher smoking population equates to a higher illicit estimate.

As there is no recent AIHW estimate, KPMG have 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.

Sources:
(1) Euromonitor, smoking prevalence, accessed July 2013
(3) Australia Bureau of Statistics

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
Appendix – Technical appendices

Rather than using a historic smoking prevalence estimate, we have estimated the size of the smoking population to avoid large, periodic restatements.

A2.1.9 Adjustment of results – adjustment 5; estimation of smoking population (cont.)

The estimate of the number of adult daily smokers in Australia is another key input for the consumption model. This number is used to extrapolate the consumption model results to arrive at an illicit estimate for the entire population.

There is no robust, pan-Australian, yearly estimate of smoking incidence available. The most widely accepted estimate of adult smoking incidence is obtained from the AIHW Drug Use survey. These incidence levels, combined with Australian Bureau of Statistics population data, give a consistent measure of the smoking population.

To avoid large, periodic restatements we smooth the data based on historic growth rates.

Since the 2013 AIHW result will not be available until 2014, we have assumed a 3.1% CAGR decline in incidence per year from 2010 to 2013. This is consistent with the rate of decline between 2007 and 2010(5). Whilst this prediction of smoker numbers is an estimate, assuming a lower smoking population will return a lower estimate of the illicit trade, and as such we have used a higher than expected rate of decline. This approach also avoids large step changes in estimates as new data in released.

The effect of the adjustment of the smoking population on the estimate of the illicit trade as a percentage of overall consumption is shown below.

Illicit tobacco consumption as a proportion of total consumption, 2007- H1 2013(1)(2)(3)(4)(5)

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original prior survey results</td>
<td>9.6%</td>
<td>12.3%</td>
<td>15.6%</td>
<td>13.4%</td>
<td>10.5%</td>
<td>14.2%</td>
<td></td>
</tr>
<tr>
<td>Effect of smoking population adjustment on original results</td>
<td>8.3%</td>
<td>9.3%</td>
<td>14.3%</td>
<td>13.2%</td>
<td>10.2%</td>
<td>13.6%</td>
<td></td>
</tr>
<tr>
<td>KPMG results adjustment summary – cumulative effect of adjustment 1, 2, 3, 4 &amp; 5</td>
<td>9.4%</td>
<td>11.8%</td>
<td>13.8%</td>
<td>12.6%</td>
<td>12.1%</td>
<td>13.5%</td>
<td></td>
</tr>
<tr>
<td>Cumulative adjustment position after adjustment 4</td>
<td>8.3%</td>
<td>9.1%</td>
<td>12.8%</td>
<td>12.4%</td>
<td>11.8%</td>
<td>13.3%</td>
<td></td>
</tr>
</tbody>
</table>

Sources:
(2) Industry data
(3) KPMG analysis
(4) Australian Bureau of Statistics
(5) AIHW National Drug Strategy Household Survey Report
Appendix – Technical appendices

The annual distribution of legal sales has been taken into account when calculating legal volumes for the 12 month period ending in June 2013

A2.2 LTM to June 2013 Analysis

Average distribution of legal domestic sales, 2007-2012\(^{(1)(a)}\)

This report is based on the period July 2012 to June 2013. As no publicly available estimation of legal domestic sales exists for this period (Euromonitor only release calendar year estimates), KPMG have used a mixture of publicly available sources and confidential industry sales volume data to estimate sales for the LTM period.

In order to estimate total tobacco consumption for the LTM period ending in June 2013, the distribution of sales throughout prior years was analysed. Analysis of legal domestic sales volumes from 2007 to 2012 showed that approximately 49% of yearly sales are generated in the first six months of a given year. By applying this percentage to annual sales data, legal domestic sales levels for the first half and second half of a year can be estimated. We have then used industry sales data detailing the percentage change in sales volumes between H1 2012 and H1 2013 to estimate a sales volume for H1 2013. Combining H2 2012 volumes with H1 2013 volumes give us our LTM 2013 estimate.

The result of this analysis produces a year-on-year decline in line with the rate of decline seen over the last three years. For comparative purposes, this method has also been applied to prior years to show the trend in LTM sales.

Legal domestic sales LTM comparison, LTM 2008 – LTM 2013\(^{(1)(2)(a)}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Manufactured Cigarettes (kg)</th>
<th>Loose Tobacco (kg)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>15.9</td>
<td>17.5</td>
</tr>
<tr>
<td>2009</td>
<td>15.9</td>
<td>17.5</td>
</tr>
<tr>
<td>2010</td>
<td>15.3</td>
<td>17.0</td>
</tr>
<tr>
<td>2011</td>
<td>14.3</td>
<td>16.0</td>
</tr>
<tr>
<td>2012</td>
<td>13.7</td>
<td>15.5</td>
</tr>
<tr>
<td>2013</td>
<td>13.3</td>
<td>15.3</td>
</tr>
</tbody>
</table>

CAGR (%) 2008-10 2010-12 2011-13 2008-13

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufactured cigarettes</td>
<td>-2.2%</td>
<td>-5.3%</td>
<td>-4.7%</td>
<td>-4.0%</td>
</tr>
<tr>
<td>Loose tobacco</td>
<td>3.2%</td>
<td>2.6%</td>
<td>1.7%</td>
<td>2.7%</td>
</tr>
<tr>
<td>Total market kg equivalents</td>
<td>-1.6%</td>
<td>-4.4%</td>
<td>-2.9%</td>
<td>-2.9%</td>
</tr>
</tbody>
</table>

Note: (a) Monthly sales distribution is based on industry data
Sources: (1) Industry data
(2) Euromonitor
### A2.3 Recent regulatory changes

#### Table A2.3.1: Recent regulatory changes 2012/13(1)(2)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation title</th>
<th>Regulation type</th>
<th>Effective date</th>
<th>Brief description</th>
</tr>
</thead>
</table>
| Australia    | Tobacco Advertising Prohibition Amendment Act 1992 | Internet advertising | 6 September 2012 | ■ 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 | ■ 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 | ■ 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 | ■ Tobacco products required to display the updated and expanded graphic health warnings covering 75% of the front of face. |
|              | Budget 2012 | Duty free tobacco restrictions | 1 September 2012 | ■ Inbound duty free allowance for tobacco products is reduced from 250g per person to 50g/ 50 sticks per person. |
|              | Budget 2013 announcement | Excise | 1 December 2013 | ■ In August 2013 the Australian government announced excise duty increases in tobacco products of an additional 12.5% for the next four years in addition to the switch to AWOTE. The impact of these tax increases will be to increase the excise on a pack of cigarettes in Australia by 60% above the rate of AWOTE inflation over the four years.  
1 March 2013 AWOTE change will be effective |

Sources:  
(1) Australian Government Department of Health  
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\(^{(1)}\)\(^{(2)}\)(a)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation title</th>
<th>Regulation type</th>
<th>Effective date</th>
<th>Brief description</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Public Health Act 2008; Public Health Regulation 2009</td>
<td>Retail Display Ban</td>
<td>1 July 2013</td>
<td>Exemption for specialist tobacconists under the ban on the display of tobacco products at point-of-sale ends</td>
</tr>
<tr>
<td>Victoria</td>
<td>Tobacco Act 1987</td>
<td>Smoke free Local Areas</td>
<td>1 December 2012</td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>Tobacco Amendment (Shopper Loyalty Schemes) Bill 2012</td>
<td>Removal of tobacco from shopper loyalty programs</td>
<td>1 March 2013</td>
<td>Tobacco products are prohibited from earning points under shopper loyalty initiatives.</td>
</tr>
</tbody>
</table>

Note: (a) There has been no new legislation specifically for The Northern Territory or the Australian Capital Territory
## A2.3 Recent regulatory changes (continued)

### Table A2.3.2 Recent regulatory changes 2012/13 – state specific\(^{(1)}\)\(^{(2)}\)\(^{(a)}\)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation title</th>
<th>Regulation type</th>
<th>Effective date</th>
<th>Brief description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Public Health Act 1997</td>
<td>Retail Display Ban</td>
<td>1 March 2012</td>
<td>Specialist tobacconists included in retail display ban, removing earlier exemption.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Removal of tobacco from</td>
<td>1 March 2012</td>
<td>Tobacco products are prohibited from earning points under shopper loyalty initiatives.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>shopper loyalty programs</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Licensing of tobacco</td>
<td>1 March 2012</td>
<td>- Licences must be obtained prior to selling products from additional venues.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>retailers</td>
<td></td>
<td>- Licenses are not transferable to new business owners.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Licences will not be displayed in premises.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Vending machine</td>
<td>1 March 2012</td>
<td>Tobacco vending machines now restricted to one machine per site within specified locations.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>restrictions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

\(^{(1)}\) There has been no new legislation specifically for The Northern Territory or the Australian Capital Territory
\(^{(2)}\) Australian Government Department of Health
\(^{(a)}\) Department of Health, Victoria (http://www.health.vic.gov.au/tobaccoreforms/)
A2.4 Travel trends and non-domestic legal calculation

Overseas travel of Australian residents, 2007-2013 (LTM)\(^{(1)(a)}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Key ND source countries</th>
<th>Total overseas trips</th>
</tr>
</thead>
<tbody>
<tr>
<td>07-09</td>
<td>11.9%</td>
<td>7.0%</td>
</tr>
<tr>
<td>09-11</td>
<td>20.1%</td>
<td>11.5%</td>
</tr>
<tr>
<td>10-12</td>
<td>11.8%</td>
<td>7.5%</td>
</tr>
<tr>
<td>07-12</td>
<td>14.0%</td>
<td>8.5%</td>
</tr>
</tbody>
</table>

Trips made to key non-domestic source countries of manufactured cigarettes increased at a faster rate than overall visits, 14.0% compared to 8.5% between 2007 to 2012.

Later in the report this data is used to estimate legal non-domestic sales which, it will be shown, is immaterial in size.

Overseas travel of Australian residents to key non-domestic source countries, 2007-2013 (LTM)\(^{(1)(a)}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Korea</th>
<th>Philippines</th>
<th>Vietnam</th>
<th>China</th>
<th>Thailand</th>
<th>Indonesia</th>
</tr>
</thead>
<tbody>
<tr>
<td>07</td>
<td>1.22%</td>
<td>3%</td>
<td>31%</td>
<td>13%</td>
<td>23%</td>
<td>23%</td>
</tr>
<tr>
<td>08</td>
<td>1.37%</td>
<td>7%</td>
<td>28%</td>
<td>12%</td>
<td>30%</td>
<td>30%</td>
</tr>
<tr>
<td>09</td>
<td>1.53%</td>
<td>2%</td>
<td>36%</td>
<td>18%</td>
<td>26%</td>
<td>26%</td>
</tr>
<tr>
<td>10</td>
<td>1.88%</td>
<td>2%</td>
<td>39%</td>
<td>10%</td>
<td>24%</td>
<td>24%</td>
</tr>
<tr>
<td>11</td>
<td>2.20%</td>
<td>7%</td>
<td>40%</td>
<td>17%</td>
<td>25%</td>
<td>26%</td>
</tr>
<tr>
<td>12</td>
<td>2.35%</td>
<td>9%</td>
<td>39%</td>
<td>16%</td>
<td>26%</td>
<td>26%</td>
</tr>
<tr>
<td>13</td>
<td>2.37%</td>
<td>9%</td>
<td>38%</td>
<td>16%</td>
<td>16%</td>
<td>16%</td>
</tr>
</tbody>
</table>

Visits to key non-domestic source countries reached a total of 2.37 million over the past 12 months to June 2013, accounting for approximately 30% of all trips made overseas by Australian residents.

However, reductions in duty free 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 90% of the non-domestic cigarette packs found in Australia.

Appendix – Technical appendices

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 Travel trends and non-domestic legal calculation (continued)

<p>| Example non-domestic legal calculation |
|----------------------------------------|---|---|---|---|---|---|</p>
<table>
<thead>
<tr>
<th><strong>Year 2013</strong></th>
<th><strong>Overseas visits</strong></th>
<th><strong>ND uplift</strong></th>
<th><strong>% population smokers</strong></th>
<th><strong>Propensity to purchase</strong></th>
<th><strong>Amount per trip</strong></th>
<th><strong>Total ('000 Kg)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4m</td>
<td>x</td>
<td>10%</td>
<td>13.7%</td>
<td>x</td>
<td>60%</td>
<td>50g</td>
</tr>
</tbody>
</table>

KPMG non-domestic legal calculation

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Overseas trips to non-domestic source countries in the year (m)</td>
<td>Australian Bureau of statistics</td>
<td>1.22</td>
<td>1.53</td>
<td>1.53</td>
<td>2.2</td>
<td>2.35</td>
</tr>
<tr>
<td>Non-domestic source uplift</td>
<td>Empty pack survey</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
</tr>
<tr>
<td>% of population that are smokers</td>
<td>AIHW (and extrapolated)</td>
<td>16.1%</td>
<td>15.5%</td>
<td>15.1%</td>
<td>14.7%</td>
<td>14.2%</td>
</tr>
<tr>
<td>% of smokers that buy tobacco</td>
<td>RMR consumer survey (Q1 2013)</td>
<td>53%</td>
<td>53%</td>
<td>53%</td>
<td>53%</td>
<td>53%</td>
</tr>
<tr>
<td>Number of smokers purchasing overseas (m)</td>
<td></td>
<td>0.11</td>
<td>0.14</td>
<td>0.14</td>
<td>0.19</td>
<td>0.20</td>
</tr>
<tr>
<td>Amount purchased</td>
<td>Duty Free allowance</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>183</td>
</tr>
<tr>
<td>Total (kg)</td>
<td></td>
<td>28,628</td>
<td>34,565</td>
<td>33,673</td>
<td>47,136</td>
<td>35,602</td>
</tr>
<tr>
<td>Non-domestic legal as % of total consumption</td>
<td></td>
<td>0.1%</td>
<td>0.2%</td>
<td>0.2%</td>
<td>0.3%</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

Estimates of non-domestic legal show that total volumes account for a small proportion total consumption.

The change to inbound duty free allowances made in September 2012 has a significant 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 H1 2013 survey showed that now 60% of smokers bought cigarettes overseas, potentially showing 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 duty free allowance for 2012 has been calculated using the 250g limit for 8 months and the 50 gram limit for 4 months, to reflect the change in duty free allowances made in September 2012.
Sources:
(1) Roy Morgan Research, consumer survey, H1 2013
Appendix – Technical appendices

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\(^{(1)(2)(a)}\)

<table>
<thead>
<tr>
<th></th>
<th>2010 AIHW</th>
<th>H1 2013 RMR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unbranded</td>
<td>46.3%</td>
<td>46.4%</td>
</tr>
<tr>
<td>Counterfeit</td>
<td>25.1%</td>
<td>23.8%</td>
</tr>
</tbody>
</table>

Comparison of unbranded illicit tobacco prevalence in consumer surveys\(^{(1)(2)(a)}\)

<table>
<thead>
<tr>
<th></th>
<th>2010 AIHW</th>
<th>H1 2013 RMR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ever smoked unbranded</td>
<td>24.0%</td>
<td>17.5%</td>
</tr>
<tr>
<td>Currently smoke unbranded</td>
<td>4.9%</td>
<td>8.6%</td>
</tr>
</tbody>
</table>

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. The 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.

Methodologies, headline awareness and prevalence indicators of unbranded illicit tobacco are similar in the AIHW and RMR surveys. Awareness of unbranded tobacco was around 46% in both studies, while awareness of counterfeit cigarettes was similar at 25.1% under the AIHW methodology and 23.8% under the RMR methodology. 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
Sources: \((1)\) Roy Morgan Research consumer survey, H1 2013  
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.
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? (Remember, we are talking about purchases for your own 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?
Appendix – Technical appendices

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?

Well, can you provide an estimate of how much you smoke 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?
Appendix – Technical appendices
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 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).
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.
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