

Philip Morris Limited

Submission to Australia's plain packaging post-implementation review

Executive Summary

Philip Morris Limited (PML) makes this submission in response to the public consultation on the Post-Implementation Review (PIR) of the *Tobacco Plain Packaging Act 2011* (the “Act”). The submission has two parts.

In Part I we outline specific concerns regarding the ongoing PIR process and consultation. In our view the consultation has not accurately identified the objectives of plain packaging; incorrectly considers only a one-directional effect of the policy; and is designed with a (misplaced) focus on measuring public opinion instead of results.

The Office of Best Practice Regulation (OBPR) Guidance Note, Post Implementation Reviews July 2014 (OBPR 2014 guidance note) states that the purpose of a PIR is to assess how “*effective and efficient [a government policy] has been in meeting its original objectives*”ⁱ.

The objectives of plain packaging as stated in section 3(1) of the Act are to improve public health by:

- *discouraging people from taking up smoking;*
- *encouraging people to give up smoking;*
- *discouraging people who have given up smoking from relapsing; and*
- *reducing people’s exposure to smoke from tobacco products.*

However, the Department of Health (DoH) and Siggins Miller Consultants (Siggins Miller) have inaccurately identified the three elements listed in section 3(2) of the Act as the relevant objectives for purposes of the PIR, namely:

- *reduce the appeal of tobacco products to consumers;*
- *increase the effectiveness of health warnings on the retail packaging of tobacco products; and*
- *reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.*

But the Act is clear that these three elements are not objectives, but the *means* intended to “contribute to achieving the objects in subsection (1).”

Modifying the objectives for purposes of the PIR, even unintentionally, undermines the PIR process. Without an accurate identification of the policy’s stated objectives, a PIR is, by definition, not a valid assessment.

In Part II, we highlight key elements of a compliant PIR, including the need to clearly identify the problem that plain packaging was meant to solve, the importance of constructing a credible baseline scenario, the quality criteria for specific data sets to be used for assessing the effectiveness of plain packaging, and the types of cost to consider for assessing efficiency.

In order to properly assess whether plain packaging has been effective in reducing smoking, the PIR must carefully review pre- and post-implementation data on smoking prevalence and consumption. Indirect measures, such as packaging appeal, provide no insight into whether plain packaging has impacted smoking prevalence or consumption and, therefore, are not evidence of effectiveness.

Only if the policy is shown through robust analysis of data capable of controlling for pre-existing trends and other policy interventions to have reduced smoking prevalence or consumption would a PIR need to go on to quantify the benefits of the policy and weigh them against the of costs.

Such a cost-benefit analysis would have to consider and quantify all relevant impacts that have resulted from plain packaging, including, among other things, the impact on the black market and the overall shift to lower-priced products.

- KPMG's *Illicit Tobacco in Australia, 2014 Half Year Report*ⁱⁱ estimates that illegal tobacco accounted for 14.3% of total consumption in 2014 – up from 13.5% the previous year and 11.5% in 2012. KPMG has estimated that the black market in tobacco cost the Australian government some AUD 2.3 billion in lost excise taxes from July 2012 to June 2014. A robust PIR should attempt to ascertain the portion of this loss that can be attributed to plain packaging, along with other related costs resulting from increased criminal activity and law enforcement efforts to fight it.
- The commoditization of tobacco products in Australia has altered the competitive dynamics of the market by shifting consumer demand to lower-priced products, while not reducing smoking prevalence or tobacco consumption. The deep discount segment of the cigarette market grew by nearly 300% (from 10.4% to 28.2%) between 2012 and mid-2014 as demand shifted to less expensive products. The associated destruction in value of the legal tobacco market should be quantified as a cost of plain packaging.

The vast majority of the data available from the first two years of plain packaging show consistently that there is no sound basis today for concluding that plain packaging has been effective in achieving its original objectives. Accordingly, it can also not have been efficient – even when setting aside the various costs that have already materialized, such as the wholesale destruction of intellectual property, the elimination of brand choice for consumers, the market's downward trend to cheaper products, and the increased black market activities.

Part I — Concerns regarding the PIR process

A. Failure to identify the legislative objective

The purpose of a PIR is to assess how “*effective and efficient [a government policy] has been in meeting its original objectives.*”ⁱⁱⁱ The first step of such an assessment is therefore to identify and state the objectives that the policy under review set out to achieve. Without an accurate identification of the policy’s stated objectives, a PIR is, by definition, not a valid assessment.

According to the Office of Best Practice Regulation (OBPR), the identification of original objectives starts with the legislation itself: The PIR is required to “*explain the objectives, outcomes, goals or targets of the regulatory intervention*” and “*where relevant, discuss **the set of objectives stated in the Act** associated with the change.*”^{iv} This is the case with plain packaging. However, as is readily apparent from the comparison below, Siggins Miller, the consultancy engaged by the DoH to undertake consultation with stakeholders and conduct a cost benefit analysis of the plain packaging measure for the PIR, has not accurately identified the relevant objectives.

The Act^v	DoH/Siggins Miller^{vi}
<p>(1) <i>The objects of this Act are:</i></p> <p>(a) <i>to improve public health by:</i></p> <p style="padding-left: 20px;">(i) <i>discouraging people from taking up smoking, or using tobacco products; and</i></p> <p style="padding-left: 20px;">(ii) <i>encouraging people to give up smoking, and to stop using tobacco products; and</i></p> <p style="padding-left: 20px;">(iii) <i>discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and</i></p> <p style="padding-left: 20px;">(iv) <i>reducing people’s exposure to smoke from tobacco products; and</i></p> <p>(b) <i>to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.</i></p>	<p><i>The objectives of the tobacco plain packaging measure are to regulate the retail packaging and appearance of tobacco products in order to:</i></p> <ul style="list-style-type: none"> • <i>reduce the appeal of tobacco products to consumers;</i> • <i>increase the effectiveness of health warnings on the retail packaging of tobacco products;</i> • <i>reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products;</i>
<p>(2) <i>It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:</i></p> <p style="padding-left: 20px;">(a) <i>reduce the appeal of tobacco products to consumers; and</i></p> <p style="padding-left: 20px;">(b) <i>increase the effectiveness of health warnings on the retail packaging of tobacco products; and</i></p> <p style="padding-left: 20px;">(c) <i>reduce the ability of the retail packaging of tobacco products</i></p>	<ul style="list-style-type: none"> • <i>through the achievement of these objectives, in the long term, as part of a comprehensive range of tobacco control measures, contribute to efforts to improve public health by discouraging people from taking up smoking, or using tobacco products; encouraging people to give up smoking, and to stop using tobacco products; discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and reducing people’s exposure to smoke from tobacco products.</i>

<i>to mislead consumers about the harmful effects of smoking or using tobacco products.</i>	
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Clearly, the first three elements identified by the DoH and Siggins Miller are not the objectives of the Act as passed by Parliament in 2011 – namely improving public health by reducing smoking, particularly the number of people who smoke.¹

In fact, it is clear in section 3(2) of the Act that the three elements that Siggins Miller lists as objectives are in fact **means** intended to “contribute to achieving the **objects** in subsection (1).”

Siggins Miller seems to conflate the means and objectives when it describes plain packaging “as part of a comprehensive range of tobacco control measures” that is expected to make an undefined contribution to “efforts” to improve public health over the “long-term”^{vii}. This summary description is very different from the clearly articulated objectives in the Act.

The difference between Siggins Miller’s formulation of the legislative objectives and the express language of the Act may be the result of different perspectives on the Act. In evidence before the Community Affairs Legislation Committee during Senate Estimates on 25 February 2015, Mr Nathan Smyth (First Assistant Secretary, Population Health Division, DoH) identified the objectives of the Act as follows:

“Reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; to increase the noticeability and effectiveness of mandated health warnings; to reduce the ability of retail packaging of tobacco products to mislead consumers about the harms of smoking; and, through the achievement of these aims in the long term—and I want to emphasise that—as part of a comprehensive range of tobacco control measures, to contribute to efforts to reduce smoking rates.”

This statement is consistent with the portrayal of the objectives of the plain packaging measure on the DoH website under the heading “Introduction of tobacco plain packaging in Australia”^{viii}.

However, the focus by Siggins Miller and the DoH is on the means listed in Section 3(2) of the Act and does not and should not change the set of objectives in the Act that is the relevant reference for assessment in a PIR.

Modifying the objectives for purposes of the PIR, even unintentionally, would undermine the PIR. As mentioned, the critical first step in a PIR, according to the OBPR, is to “outline the original problem and the **Government’s objectives**”^{ix} when implementing a regulation. How the PIR defines the objectives sets the premise for the entire assessment and necessarily affects, or even determines, its outcome.

Consider, for example, legislation with the ultimate objective of reducing crime by means of increasing the number of police officers. If two years after the implementation of the legislation, the number of police officers has increased but crime has not declined, a PIR identifying the objective as increasing the

¹ See also, Department of Health’s Explanatory Memorandum submitted to the House of Representatives: “the objects of this Bill are to improve public health by **reducing people’s use of and exposure to tobacco products.**” (emphasis added).

number of police officers will find the regulation effective. On the other hand, a PIR that properly defines the objective as reducing crime would find the very same regulation ineffective.

Likewise, plain packaging may well have made tobacco packaging less attractive, but this does not mean that it has been effective (let alone efficient) in achieving its objectives of reducing the number of people who smoke.

Finally consider the Government's already completed PIR of the 25% increase of tobacco excise tax and corresponding customs duty. When conducting that PIR in 2013, the Treasury Department clearly identified that policy's objectives as cutting tobacco consumption and smoking prevalence.^x As such, the focus of the review was correctly anchored in the original objectives of the tax increase (reducing consumption and prevalence) and not the means for achieving them (increasing the price of tobacco products).

Why then, does the current PIR of plain packaging choose a different approach?

B. Failure to consider the direction of effects

The World Health Organization (WHO) recognizes that tobacco control policies may backfire: *"It is also important to consider the direction of effects. Some interventions might prove counter-productive. Clearly less evidence should be required to stop an intervention where the evidence suggests that it is counter-productive, than if it suggested no effect or only a small positive effect."*^{xi}

The current PIR consultation does not consider the direction of effects. Instead it presumes a one-directional effect.

Indeed, the way the consultation questionnaire is structured prevents respondents from identifying effects in the opposite direction.

Question 10 illustrates this limited approach. It asks: *"To what extent do you think that the tobacco plain packaging measure, as part of a broader effort has discouraged people from taking up smoking, or using tobacco products?"* As with the other questions, respondents can only choose from the following one-directional options: "Not at all;" "Very little;" "Unsure;" "Somewhat;" and "To a great extent." By designing the questionnaire in such manner, the PIR consultation *assumes* that there was some effect of plain packaging on tobacco use or – worst case – that there was none.

But what if, as a result of plain packaging, the decades-long decline in smoking in Australia has slowed down? What if, compared to the baseline, plain packaging has caused more smoking?² Basic economic theory suggests that such an opposite direction of the effect is possible, and a thorough and objective PIR should therefore investigate the effect of plain packaging in both directions. In fact, government data indicates that since the implementation of plain packaging, smoking rates among some segments of the population may have stopped declining or even increased. For instance, the government's Australian institute of Health and Welfare (AIHW) National Drug Strategy Household Survey (NDSHS) data on youth

² The direction of effects depends to a large degree on identifying the proper baseline – i.e., what would have happened absent the policy intervention. In the case of Australia, where smoking has been declining for decades, a slowing of this rate of decline would already signal an effect in the opposite direction of what plain packaging was intended to achieve.

smoking (which the AIHW tells us should be interpreted with caution due to the small sample size) show an increase from 2.5% in 2010 to 3.4% in 2013.^{xii} Similarly, data from some Australian states show increases in observed smoking rates following the implementation of plain packaging (see below).

Yet, the PIR survey response options prevent participants from responding that plain packaging may have had an opposite effect. This design makes the consultation vulnerable to a systematic bias in favour of receiving responses that find an effect of plain packaging in the one direction pre-set in the questionnaire.

C. Misplaced focus on measuring public opinion

It appears from the questionnaire that the consultation's primary focus is to quantify the extent to which members of the general public "*think*" or "*believe*" that plain packaging has been an effective and efficient measure.

But the assessment of the impacts of plain packaging is a matter of hard empirical data measuring what actually did happen, and not a matter of public opinion.

Furthermore, many of the questions posed in the consultation are unclear and therefore liable to produce meaningless results. For example, Siggins Miller asks whether plain packaging has improved health warning "*effectiveness*" and instructs respondents to consider the removal of branding from tobacco packaging in isolation from the more than doubling of graphic health warnings on the front of packs. How are respondents expected to distinguish between the two? Furthermore, what is health warning "*effectiveness*?" Does it mean noticeability? Does it mean raising awareness of the health risks associated with smoking? Or something else? Responses to the question will vary widely depending on what participants understand "*effectiveness*" to mean.

To be sure, stakeholder consultation is an important part of a PIR. But polling an undefined number of people about their subjective views is not an appropriate method to assess whether plain packaging has been effective and efficient in achieving its original objectives.

Part II — Key elements of a compliant PIR

A PIR that thoroughly and objectively assesses the actual impacts of plain packaging in light of the objectives identified by Parliament must follow OBPR's PIR requirements, as set out in particular in the OBPR 2014 guidance note. In the following, we highlight certain key elements of a compliant PIR – in addition to the points we raise in Part I above.

A. Problem identification

The OBPR requires the DoH to set out the problem plain packaging was intended to address and why the government needed to act.^{xiii} When plain packaging was implemented, the federal and state governments had in place a variety of tobacco control measures, including increased tobacco taxes, strong advertising restrictions, large graphic health warnings, public place smoking bans and bans on the display of tobacco products at retail. Also, smoking had been declining in Australia for decades. Against this backdrop, the PIR will need to explain:

- Whether there was a market failure that existing policy measures did not adequately address;

- Whether existing policies had failed to achieve their objectives (i.e., whether there was a regulatory failure); and
- Why plain packaging was the only viable option to solve the specific problems caused by the market failure or regulatory failure.

By way of illustration, in order to justify taking action to improve health warning effectiveness, the DoH will need to consider that at least as early as 2000, *“awareness of the warnings on the front of cigarette packs [was] virtually universal.”*^{xiv} Prior to the implementation of plain packaging, in 2012, 97.1% of South Australians reported being aware that smoking is harmful to health.^{xv} With such a large percentage of the population aware of the risks of smoking, it is difficult to understand what problem, at least with respect to health warnings, the government sought to address.³

Similarly, for appropriately identifying the ability of tobacco packaging to mislead consumers as a problem that plain packaging was meant to solve, the DoH will have to explain why the mandate of the Australian Competition and Consumer Commission (ACCC) to take action to prevent misleading tobacco packaging was not sufficient in this regard. By way of background, in 2005, the ACCC claimed that certain elements on tobacco packaging misled consumers about the health effects of smoking those tobacco products. Philip Morris Limited and British American Tobacco Australia Limited provided enforceable undertakings to the ACCC in which they separately agreed to stop using the packaging elements in question. With the ACCC responsible for policing misleading tobacco packaging, why was additional regulation necessary to address the same issue some 7 years later?

In a second step, the problem identification in the PIR will also have to explain whether and to what extent the supposed absence of effective health warnings or the supposed ability of packaging to mislead consumers had in fact contributed to more people taking up smoking and fewer smokers quitting. Making this link, supported by data, will be necessary in light of the specific objectives of plain packaging as set out in Section 3(1) of the Act.

B. Assessing effectiveness in comparison to the baseline trend

In order to properly assess whether plain packaging has been effective in reducing smoking, one must carefully review the data providing direct evidence of this primary outcome, i.e., pre- and post-implementation data on smoking prevalence and consumption. Indirect measures, such as packaging appeal, provide no insight into whether plain packaging has impacted smoking prevalence or consumption and, therefore, are not evidence of effectiveness.

The DoH must identify and account for the decades-long declines in smoking prevalence and tobacco consumption in Australia in order to establish a baseline – according to OBPR, *“what is most likely to have happened if the regulatory change had not been made.”*^{xvi}

Once it has established a credible baseline scenario (in other words are “counterfactual”), the DoH will have to compare actual post-implementation data to the long-term trend to assess whether there have

³ Incidentally, in 2013, after the implementation of plain packaging, awareness that smoking is harmful dropped a full percentage point among South Australians – again highlighting the limitation of the unidirectional survey form used in the consultation, which has a built-in assumption that such effects in the opposite direction cannot have occurred.(see endnote xviii)

been any statistically significant deviations. If there are no such deviations, the DoH can conclude that there is no evidence of a plain packaging effect – in either direction.

If there are statistically significant deviations from pre-existing trends – e.g. smoking prevalence has declined at a slower or faster rate than in past years – the DoH would then need to assess whether that deviation can be found consistently in multiple data sets.

If the deviation is confirmed in multiple data sets, the DoH should proceed to disentangle the effects of plain packaging from other interventions that occurred at or about the same time. For example, at the same time that it banned branding the government more than doubled the size of the graphic health warning on the front of cigarette packs, and a year later imposed the first of four annual 12.5% off-cycle excise tax increases (in addition to the regularly scheduled inflation-adjusted tax increases).

C. Data sources for assessing effectiveness

In order to establish the baseline trend and conduct the necessary analyses, the DoH should rely on data that:

- Address the primary outcomes of interest – smoking prevalence and tobacco consumption;
- Have a sufficiently long time series to ensure that “before and after” statistical analyses can be conducted;
- Are collected at least annually using the same methodology in order to allow for comparability over time and for the disentanglement of effects from other regulatory interventions; and
- Are drawn from a sample that is representative of the population.

There are several data sets that meet at least some of these criteria.

1. Prevalence data sources

a. AIHW

Since 1995, every three years, the AIHW in its regular NDSHS has surveyed Australians aged 12 years and older. The most recent survey was conducted in the second half of 2013.^{xvii}

Plain packaging supporters claim that the decline in smoking between 2010 and 2013, when general prevalence levels reached historic lows, is evidence plain packaging works. However, when considered in light of the long-term decline in smoking, the AIHW explained the decline as “*continuing a downward trend from 1991*,”^{xviii} and confirming that “*it would be a stretch to say this data shows that [plain packaging] was a key factor.*”^{xix} Furthermore, the AIHW’s data suggest that youth smoking prevalence may have increased after a decade of declines with reported smoking among 12-17 year-olds increasing from 2.5% in 2010 to 3.4% in 2013.^{xx}

The main limitation of the NDSHS data is the three year gap between surveys. Even if there was a deviation between 2010 and 2013 from the continuous downward trend, the three year gap does not make it possible to determine whether that deviation occurred before or after the implementation of plain packaging. The three year gap also prevents an assessment of the distinct impacts of unrelated factors or other policy interventions.

b. State and Territory prevalence data sets

Several Australian states and territories (and one NGO) conduct annual surveys of statewide smoking prevalence and have released official data reflecting changes in smoking rates between 2012 and 2013 – i.e., before and after the implementation of plain packaging. The data from New South Wales,^{xxi} Victoria,^{xxii} Queensland,^{xxiii} Western Australia^{xxiv} and South Australia^{xxv} (representing 95% of the total Australian population) show no decline in smoking prevalence between 2012 and 2013. In fact, four of five states, Victoria, Queensland, Western Australia and South Australia reported increases in smoking prevalence after the implementation of plain packaging.

Specifically, smoking prevalence in South Australia increased from 16.7% to 19.4% between 2012 and 2013.^{xxvi} During the same period, smoking prevalence in Queensland and Western Australia went from 14.3% to 15.8% and 12.7% to 13%, respectively. On their face, these figures conflict with the declining prevalence identified in the NDSHS data. One possible explanation, which the PIR will have to thoroughly investigate, is that any decline in smoking prevalence reported in the NDSHS data occurred between 2010 and 2012 (before the implementation of plain packaging), after which the decline may have stalled or, in some states, reversed.

c. Roy Morgan Single Source

The most robust data set with respect to smoking prevalence is from Roy Morgan Single Source (RMSS). RMSS is a commercially available data set designed and collected by Roy Morgan Research, a leading Australian research agency. Roy Morgan Research collects its data via approximately 54,000 interviews with Australians aged 14 years and older each year.^{xxvii} The long data history allows for the identification of robust smoking prevalence trends against which to assess the actual post-implementation data. RMSS has also been used by public health advocates who advise the Australian government,^{xxviii} and the Australian government is working with Roy Morgan Research to administer the NDSHS.

Two published research papers relying on RMSS data show how these data can be analysed to identify (or not) evidence for an effect of plain packaging. In the first of their analyses, Professors Kaul and Wolf of the Universities of Saarland and Zurich searched for evidence of a plain packaging effect on smoking prevalence among Australians aged 14 to 17 – they found none.^{xxix} In the second, they analysed RMSS data from Australians aged 14 years and older – and again could find no evidence of a lasting plain packaging effect.^{xxx}

2. Tobacco consumption data

a. ABS Household Final Consumption Expenditure Data

On a quarterly basis, the Australian Bureau of Statistics releases estimates of consumption volumes for a range of categories including tobacco. Researchers from RMIT University in Australia who analyzed this data could find no evidence of a plain packaging effect.^{xxxi} When holding price constant and controlling for long-term declines in spending on tobacco, the researchers found: “*Any evidence to suggest that the plain packaging policy has reduced household expenditure on tobacco is simply lacking.*”

b. Cancer Council Victoria Tracking Survey

The plain packaging tracking study conducted by Cancer Council Victoria surveyed smokers and recent quitters on a monthly basis from April 2012 to March 2014. Although the study by design did not measure smoking prevalence, it did analyze individual daily consumption patterns. The researchers found no change in tobacco consumption following the implementation of plain packaging:

*Consumption **did not change** in PP year 1 among daily, regular or current smokers or among smokers of brands in any market segment.*^{xxxii}

Only after the government increased tobacco excise taxes by 12.5% in December 2013 did consumption as measured by the study begin to decline.^{xxxiii}

c. Tobacco industry volume data

Legal tobacco sales are recorded at both wholesale and retail level:

- Manufacturers report shipment volumes to data agency InfoView on a monthly basis. The data are then aggregated to cover the entire tobacco market; and
- The data agency Aztec aggregates monthly retail sales data recorded through bar code scanning at a representative sample of retail outlets.

Shipment data collected by InfoView showed that in 2013, the first full year of plain packaging, legal sales actually increased slightly (0.3% or 59 million sticks) despite an average decline of 4.1% per year in the previous three years.^{xxxiv} Subsequently, Ernst & Young analyzed data from InfoView and Aztec and “*found no evidence that plain packaging in Australia has reduced total consumption to date.*”^{xxxv}

One obvious limitation of the InfoView and Aztec data sets is that they reflect only the legal tobacco market and do not include illicit tobacco consumption, which is a “*significant percentage*” of the Australian tobacco market according to the Chief Executive Officer of the Australian Customs and Border Protection Service.^{xxxvi}

d. Illicit tobacco consumption data

The only robust data on illicit tobacco consumption in Australia comes from KPMG, which uses a methodology accepted and relied on by the European Commission, all EU Member States, and the OECD. Assessing both the absolute size of the black market and long-term trends, KPMG identified a substantial increase in the black market following the implementation of plain packaging, from 11.5% of total consumption in 2012 to 14.3% in the first half of 2014, despite declining illicit consumption in the years before 2012.^{xxxvii}

Other illicit trade data, such as data on law enforcement seizures, are not measures of illicit tobacco consumption. Seizures reflect only illicit tobacco detected by law enforcement, which is usually a small proportion of the total black market. This proportion can vary depending on factors such as law enforcement strategy and resources, the methods employed by smugglers and pure luck.

In any event, because the black market makes up a significant portion of the overall Australian tobacco market, the PIR will have to analyze illicit consumption data in order to properly assess the impact of plain packaging on consumption trends.

Based on the consistent patterns in available prevalence and consumption data sets, the only credible conclusion today is that plain packaging has not been effective in achieving its original objectives.

D. Assessing efficiency

If the data show what they appear to show, namely that plain packaging has not been effective in achieving the objective of reducing smoking, the PIR need go no further – a regulation that fails to achieve its objectives clearly does not “*remain appropriate.*”

If, on the other hand, the data were to show – in comparison to the proper baseline and having disentangled other effects – that plain packaging has materially reduced smoking, the DoH would then have to assess whether the measure has been efficient. Assessing the efficiency would require a cost-benefit analysis that quantifies the benefits of any reduction in smoking and weighs them against the costs of plain packaging.⁴

To inform the cost-benefit analysis, Siggins Miller has circulated a survey of operational costs to the tobacco industry and others. This survey misses the point. There were certainly operational costs associated with the change to plain packs, such as the redesign of packaging and the destruction of branded products that could no longer be sold. These costs, however, pale in comparison to the costs of the wholesale destruction of a vast swath of intellectual property.

Intellectual property is **property** – and valuable property at that. Companies expend substantial resources over many years to build and defend their brands, which are embodied by their trademarks. Plain packaging has destroyed the vast majority of those extremely valuable trademarks, and their value must be quantified as a cost of plain packaging.

The destruction of intellectual property has already damaged Australia’s reputation internationally – an additional cost that the PIR must recognize. For example, the recently released US Chamber of Commerce Global IP Index highlighted Australia’s “*restrictions on the use of brands, trademark and trade dress in packaging*” as a key area of weakness in IP protection.^{xxxviii} It further noted the potential contagion effect triggered by plain packaging for tobacco products, which “*threatens to affect trademark owners across different sectors and economies.*”^{xxxix}

The PIR must also quantify the reduction in consumer choice in the legal market. Plain packaging deprives informed adult smokers of the brands and packaging that they prefer and enjoy. Indeed, the Government specifically intended to make every tobacco product convey the message that it is the least appealing, lowest quality, most harmful to health and hardest to quit.^{xl} Undoubtedly, this impact on consumers’ ability to decide for themselves which brand they find appealing (or not) is also a cost of the regulation. According to the OBPR, a cost-benefit analysis must further take into account “significant changes to the level of competition since the regulation was introduced.”^{xli} The commoditization of tobacco products in Australia has altered the competitive dynamics of the market by shifting consumer demand to lower-priced products, while not reducing smoking prevalence or tobacco consumption. In June 2014, *The Australian* reported that the deep discount segment of the cigarette market had grown nearly 200% (from

⁴ In addition, at that stage it may also make sense to investigate to what extent each of the three intermediary mechanisms set out in Section 3(2) of the Act have contributed to the reduction in smoking that is attributable to plain packaging. If, on the other hand, plain packaging has not been shown to reduce smoking, then there is no point in separately assessing to what extent, for instance, plain packaging has reduced product appeal.

10.4% to 28.2%) between 2012 and mid-2014 as demand shifted to less expensive products.^{xlii} The associated destruction in value of the legal tobacco market should be quantified as a cost of plain packaging.

In addition, the black market triggers substantial costs to the government, including *“lost taxation revenue, [and] a totally unregulated market with no rules or laws about who it sells to, including minors.”*^{xliii} In October 2014, KPMG estimated that the black market cost the Australian government some AUD 1.2 billion in lost excise taxes from July 2013 to June 2014.^{xliiv} A robust PIR should attempt to ascertain the portion of this loss that can be attributed to plain packaging, along with other related costs resulting from increased criminal activity and law enforcement efforts to fight it.

Furthermore, a robust PIR should account for the costs of litigation resulting from several constitutional challenges, an investor-state dispute under the 1993 Agreement Between the Government of Australia and the Government of Hong Kong for the promotion and protection of Investments, and dispute resolution proceedings before the World Trade Organization Dispute Resolution Body brought by five WTO members. Potential damages awards and trade sanctions must also be considered.

Finally, costs would have to be weighed against benefits. This requires quantification. Merely claiming that plain packaging will still over the “long term” make some undefined contribution to reducing smoking, does not satisfy OBPR requirements. In order to consider a potential future impact, the PIR would have to define quantitatively the specific contribution that plain packaging will make to reducing smoking, when the contribution will occur, the bases for these conclusions and the level of certainty that the reduction will come to pass. Without such quantitative findings, it will not be possible to perform a cost-benefit analysis.

Conclusion

Stating the policy’s objectives correctly is a critical step in conducting a PIR of plain packaging. Without accurately identifying the objectives, a PIR is, by definition, not a valid assessment. A proper PIR will first determine whether plain packaging has been effective in achieving its objective of reducing smoking based on data capable of controlling for pre-existing trends and other policy interventions. Only if the policy is shown through robust analysis to have reduced smoking prevalence or consumption would a PIR have to go on to quantify the benefits of the policy and weigh them against the myriad of costs.

The vast majority of the data available from the first two years of plain packaging show consistently that there is no sound basis today for concluding that plain packaging has been effective in achieving its original objectives of reducing smoking prevalence or consumption. Accordingly, it can also not have been efficient, even when setting aside the various costs that have already materialized, such as the wholesale destruction of intellectual property, the elimination of brand choice for consumers, the market’s downward trend to cheaper products, and the increased black market activities.

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- ⁱ OBPR Guidance Note, Post-implementation Reviews July 2014 (OPBR 2014 guidance note)
- ⁱⁱ KPMG *Illicit Tobacco in Australia, 2014 Half Year Report* available at: http://www.pmi.com/eng/media_center/media_kit/Pages/2014_kpmg_report_illegal_tobacco_at_record_levels_in_australia.aspx.
- ⁱⁱⁱ OPBR 2014 guidance note.
- ^{iv} Ibid (emphasis added).
- ^v Tobacco Plain Packaging Act 2011 Section. 3 (emphasis added).
- ^{vi} See, for example: <http://www.sigginsmiller.com/plainpackaging/> (emphasis added).
- ^{vii} Ibid.
- ^{viii} DoH – Introduction of Tobacco Plain Packaging in Australia, available at: <http://health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain>
- ^{ix} OPBR 2014 guidance note.
- ^x The Treasury, Post-implementation Review: 25 Per Cent Tobacco Excise Increase, February 2013, p. 13.
- ^{xi} World Health Organization, International Agency for Research on Cancer, Handbooks of Cancer Prevention, Volume 12, Methods for Evaluating Tobacco Control Policies, 2008, p. 29.
- ^{xii} 2013 NDSHS.
- ^{xiii} OPBR 2014 guidance note.
- ^{xiv} See Elliott and Shanahan Research, Evaluation of the Health Warnings and Explanatory Messages on Tobacco Products, Executive Summary, October 2000, p. 4.
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- ^{xvii} 2013 NDSHS.
- ^{xviii} NDSHS 2013, p. 6.
- ^{xix} Geoff Neideck, quoted in ‘More Australian teenagers are choosing not to drink and smoke, according to a major new report’, news.com.au, 17 July 2014, available at: <http://www.news.com.au/national/more-australian-teenagers-are-choosing-not-to-drink-and-smoke-according-to-a-major-new-report/story-fncynjr2-1226991404242>.
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- ^{xxi} Health Statistics New South Wales, available at: http://www.healthstats.nsw.gov.au/Indicator/beh_smo_age/beh_smo_age_snap.
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