



British American Tobacco Australia's submission to the
Senate Reference Committee Inquiry into measures
introduced to restrict personal choice '*for the individual's
own good*'

18th of September, 2015

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Executive summary

This document is British American Tobacco Australia (“BATA”)’s submission to the Senate Economic References Committee (“the Committee”) inquiry into personal choice and community impacts. Specifically, BATA will be responding to:

‘The economic and social impact of legislation, policies or Commonwealth guidelines, with particular reference to:

- a. the sale and use of tobacco, tobacco products, nicotine products, and e-cigarettes, including any impact on the health, enjoyment and finances of users and non-users’

BATA acknowledges the harm of tobacco smoking and therefore supports the need for tobacco control policies. However, BATA wishes the Committee to note that current key Australian tobacco control policies, namely tobacco plain packaging and significant ad hoc excise increases, are failing to meet their respective objectives and bring with them considerable unintended consequences.

Since the introduction of both measures from 2010 onward, the evidence shows that:

1. There has been no acceleration in the long-term smoking rate decline;
2. Youth smoking rates have increased;
3. Consumers are down-trading and are now paying less for cigarettes than they did in 2010;
4. There has been a dramatic increase in illegal tobacco; and
5. Specific objectives of plain packaging including the effectiveness of health warnings have not been met.

BATA respectfully requests that the Committee consider that, instead of continuing with costly and counter-productive policies, the opportunity exists to develop an evidence-based progressive approach to tobacco control in Australia. Such an approach could incorporate the tenets of harm reduction, thereby providing adult smokers with a choice to access safer alternatives to smoking.

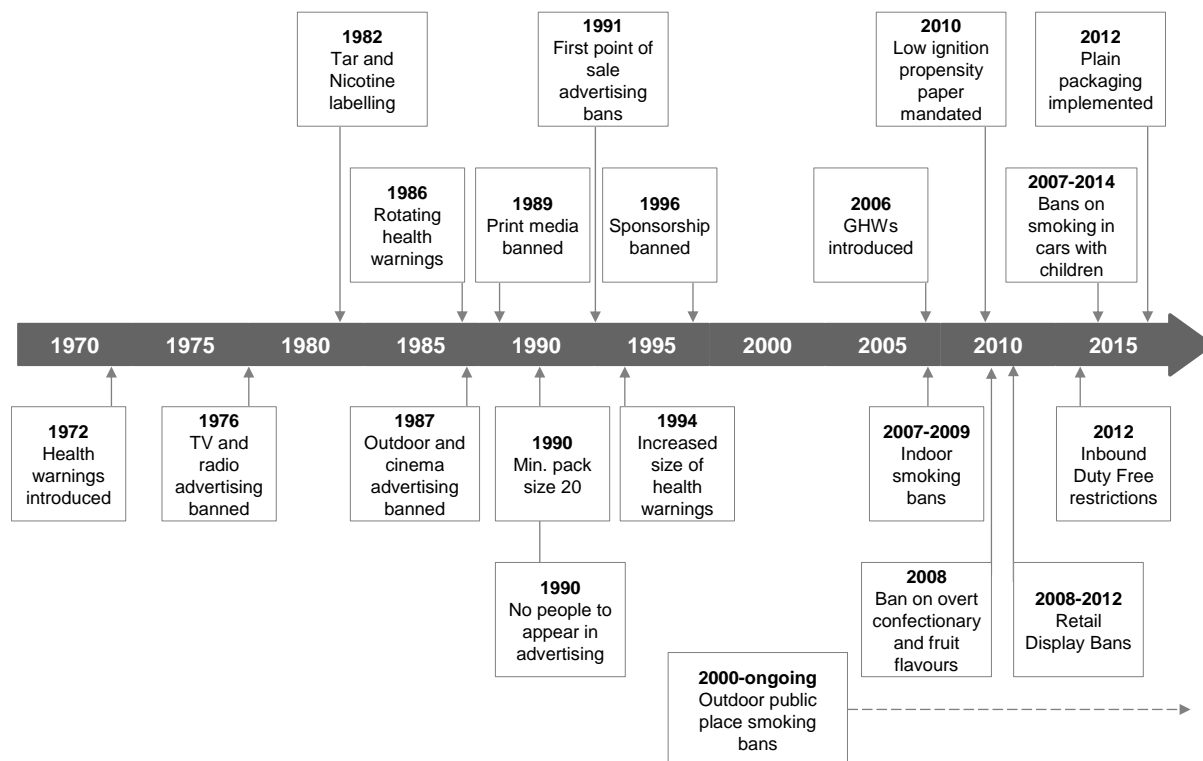
This paper reviews the impact of the current tobacco control regime and explores policy options to supersede it.

1. Developments in Australian tobacco control policy

The Australian Government’s National Tobacco Strategy (2012-2018) provides the context for its tobacco control policies. The key objective of the strategy is to “reduce the national adult daily smoking rate to 10 per cent of the population” by 2018.

Various Australian Governments have implemented tobacco control policies over the last decade in attempts to reduce the overall smoking rates in Australia. *Figure 1* shows the long term history of non-price tobacco control regulation.

Figure 1 - Policy timeline



Additionally, Australian governments have utilised tobacco excise as a demand reduction policy. Between 2001 and 2009, a period of sustainable bi-annual, CPI adjusted excise tax increases, the adult smoking rate fell by 20%¹ while tobacco excise revenue remained stable in real terms. At the same time, there was a minimal and relatively confined illicit tobacco market.²

Emerging evidence suggests however, that recent significant excise increases combined with plain packaging have resulted in a shift in demand towards lower priced cigarettes and illicit tobacco. Consumers are maintaining consumption levels by switching to lower priced cigarettes (i.e. ‘down-

¹ Australian Institute of Health and Welfare, “National Drug Strategy Household Survey Detailed Report: 2013” (February 2015), available from: <http://www.aihw.gov.au/publication-detail/?id=60129549469&tab=3>, accessed on 5 August 2015.

² KPMG LLP, “Illicit tobacco in Australia: 2014 Full Year Report” (March 2015), available from: [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9T9289/\\$FILE/medMD9W6RKB.pdf?openelement](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9T9289/$FILE/medMD9W6RKB.pdf?openelement), accessed on 5 August 2015.

trading') or illicit tobacco products. Indeed, the low price market segment is experiencing strong growth (i.e. 74% over last four years) as is the illicit market (from 8.3% in 2007 to 14.5% in 2014).³

These market developments should be of concern to the Government as it means that current policies will not achieve the smoking rate objective. A point appears to have been reached where the Government should resist further regulation and should consider alternatives for achieving its policy aims, such as opportunities which migrate existing smokers to less harmful products.

2. Recent policy changes

2.1 Tobacco plain packaging

In 2011, the then Labor Government introduced the 2011 Tobacco Plain Packaging Act ("the Act")⁴ with the objective being to reduce smoking rates (s.3(1)). The Act also states that the mechanisms through which plain packaging will achieve this objective are: "reducing the appeal of tobacco products to consumers; increasing the effectiveness of health warnings on the retail packaging of tobacco products; and reducing the ability of the retail packaging of tobacco products to mislead consumers (s3(2))".

After two years of tobacco plain packaging being in force there is no evidence to show that the measure is achieving the objectives of the Act, namely to improve public health by reducing smoking rates.

Moreover, BATA's concerns about unintended consequences (which were raised prior to the passing of this legislation) have been realised. At the same time plain packaging has cost stakeholders a significant amount of money to implement. In the case of BATA, around AUD50 million was required to comply with the measures.

2.2 Ad hoc excise increases

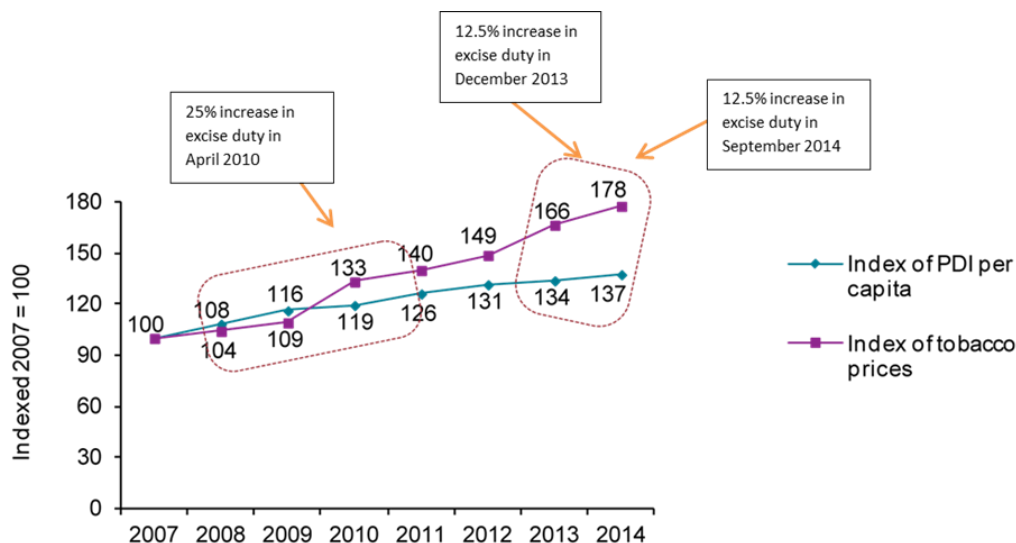
In 2010, the then Rudd Government deviated from the effective and sustainable CPI adjusted excise model to implement a 25% ad hoc excise increase on tobacco products. More recently, in November 2013, the Government confirmed four increases in excise of 12.5% to be levied in December 2013, then September 2014, 2015 and 2016. These increases are in addition to the annual indexation linked to Average Weekly Ordinary Time Earnings (AWOTE).

Ad hoc excise increases have led to a significant decline in consumer affordability, as illustrated in *Figure 2*. Since 2007 the index of tobacco prices in Australia has increased by 78%, while the index of per capita personal disposal income (PDI) has only increased by 37%.

³ Based on data sourced from: KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report",

⁴ Tobacco Plain Packaging Act 2011

Figure 2 - Index of tobacco prices and per capita personal disposable income, Australia⁵



Increased excise is designed to have a regressive impact on consumers in order to reduce tobacco consumption. However available evidence indicates that in the face of sudden price increases caused by ad hoc tobacco excise, consumers are maintaining consumption by down-trading to cheaper legal and illicit tobacco products.

Further detail on these concerns is addressed in the following sections.

3. Impacts of recent policy changes

The latest trends in Australian tobacco consumption and market dynamics call into question how effective these policies have been at meeting stated objectives; from both a tobacco harm reduction and an excise revenue perspective.

Tobacco control measures such as plain packaging and taxation are complex matters. Any tobacco control policy needs to factor in issues such as affordability, regressivity of taxes, sustainability of policies and a raft of potential unintended consequences such as, down-trading, illicit trade and revenue volatility.

Evidence put forward in this submission illustrates that despite (or indeed because of) significant ad hoc excise increases and the introduction of plain packaging, consumers are increasingly maintaining consumption levels by down-trading to lower priced and illicit products. Indeed, both the illicit market and the low price market segment in legal tobacco products are experiencing strong growth. These market developments should be of concern to the Government as it indicates that these policies are

⁵ KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

failing to contribute to the pre-existing decline in smoking prevalence and consumption and are instead creating revenue volatility.

BATA contends that neither policy has met its objectives and both are contributing to significant unintended consequences. BATA also submits that the introduction of four ad hoc excise increases immediately after the introduction of plain packaging may have been an attempt to mask the failure of plain packaging to meet its objectives. Irrespective of this, there is clear evidence to demonstrate that neither policy in isolation or in tandem are having the intended impact on tobacco harm reduction.

In summary, the evidence shows that:

1. There has been no acceleration in the long-term smoking rate decline;
2. Youth smoking rates have increased;
3. Consumers are down-trading and are now paying less for cigarettes than they did in 2010;
4. There has been a dramatic increase in illegal tobacco; and
5. Specific objectives of plain packaging including the effectiveness of health warnings have not been met.

3.1 There has been no acceleration in the long-term smoking rate decline since plain packaging was introduced

Smoking prevalence has been in steady decline since 1995. This trend has not changed despite the introduction of these extreme policies aimed at supporting the Government's target of a daily adult smoking rate of 10%, by 2018, as outlined in the National Tobacco Strategy (2012-2018).⁶ Consequently, given current rates of decline and despite these extreme measures, the Government's target is unlikely to be achieved.

The number of adult daily smokers or smoking 'prevalence' as the National Tobacco Strategy describes it is measured by the Australian Federal Government's National Drug Strategy Household Survey (NDSHS)⁷. The survey was last completed in 2013.

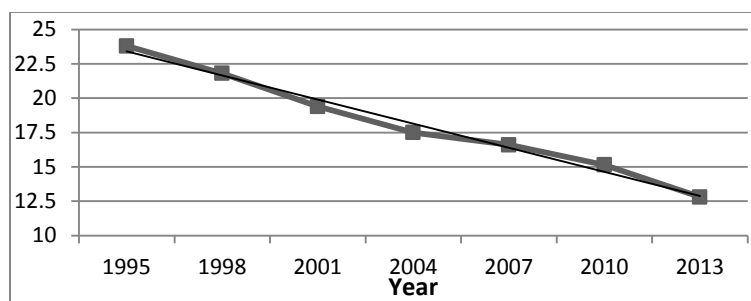
The NDSHS data shows that smoking prevalence has been declining steadily since 1995 and, as at 2013, this trend remains consistent. Accordingly, this data does not provide any evidence of an additional effect from either plain packaging or the significant ad hoc excise increases.

In 2013, NDSHS data showed that 13.3% of Australian adults aged 18 years or older were daily smokers. Based on this, in order to achieve the government target of 10% daily smokers by 2018, there would need to be a decline in smoking prevalence of 3.3 percentage points between 2013 and 2018. This represents a 25% reduction over five years (or circa 5% per annum) which is extremely ambitious given historical experience and current trends.

⁶ Steering Committee for the Review of Government Service Provision, "National Healthcare Agreement: National Agreement performance information 2008-09" (December 2009), available from http://www.pc.gov.au/data/assets/pdf_file/0009/98757/healthcare-agreement.pdf, accessed on 5 August 2015.

⁷ Australian Institute of Health and Welfare, "National Drug Strategy Household Survey Detailed Report: 2013", above n.1.

Figure 3 - Daily smokers aged 18 years or older 1995-2013 (per cent)⁸



We note that some tobacco control groups such as the Cancer Council Victoria (CCV) have sought to attribute the reduction in smoking prevalence shown in the NDSHS survey results from 2010 to 2013 to plain packaging.⁹ However CCV fails to demonstrate that there has been any acceleration in the long-term smoking rate decline since plain packaging was introduced. BATA's view of the NDSHS data is also supported by a recent article in the *International Journal of Drug Policy*¹⁰ which argues that:

"Viewing the 2013 reduction in prevalence within its historical context does increase the salience of an alternative interpretation of the data, namely that the most recent 2.3%¹¹ reduction in daily smoking prevalence between 2010 and 2013 is entirely consistent with the 20-year trend in reducing daily smoking prevalence."

It goes on to state that:

"The 2013 NDSHS findings suggest that the progress that has been made in smoking prevention in Australia in the past 20 years was continued between 2010 and 2013 at approximately the same pace."

In addition, the Roy Morgan Research data for adult (18+) smoking rates included in *Figure 4* below also show a long-standing decline trend of 3.3% from 2008 to 2012. This rate has not increased or accelerated since the introduction of plain packaging. In fact, the smoking rate decline for 2013 actually slowed to 1.4%.¹² It could be presumed that a revolutionary measure such as plain packaging would have the most impact in the first 12 months of implementation yet in this period the smoking rate was higher than the day the policy was implemented.

⁸ *Ibid.*

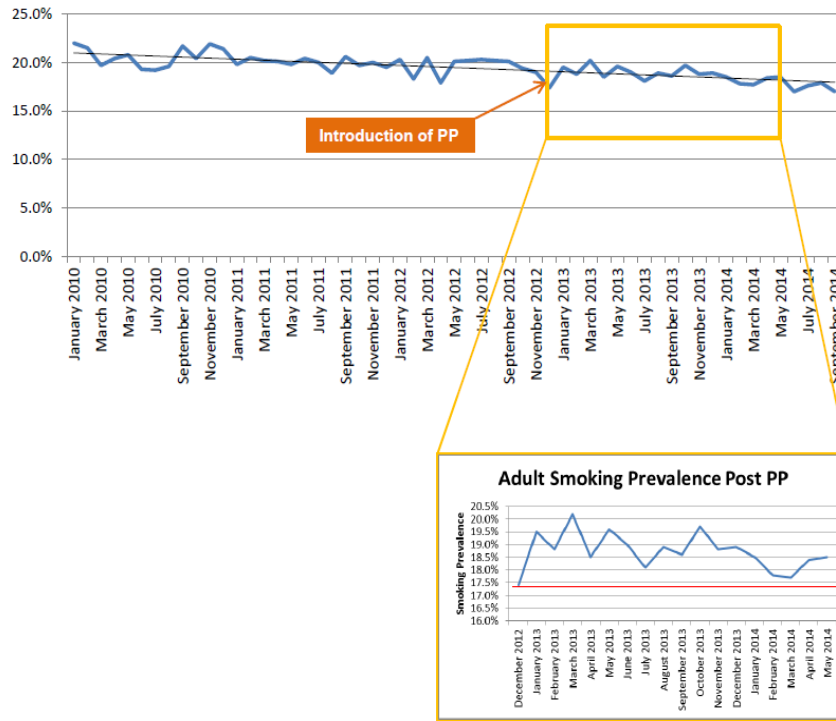
⁹ Cancer Council Victoria, "Questions and answers on plain packaging in Australia - Facts sheet no. 4: What is happening to the prevalence of smoking in Australia?" (November 2014), available from https://www.cancervic.org.au/downloads/plainfacts/Facts_sheets/Facts_Sheet_no_4_Prevalence.pdf, accessed on 19 August 2015.

¹⁰ N., McKegany, C., Russell, "Tobacco plain packaging: Evidence based policy or public health advocacy", *International Journal of Drug Policy*, 26 (2015) 560-568, available from [http://www.ijdp.org/article/S0955-3959\(15\)00071-7/abstract](http://www.ijdp.org/article/S0955-3959(15)00071-7/abstract), accessed on 19 August 2015.

¹¹ The paper relied on the data for Australians aged 14 years and over who smoked daily, hence the discrepancy with the data in Section 3.1, which focusses on those aged 18 years and over.

¹² Roy Morgan Research figures for adult (18+) smoking rates.

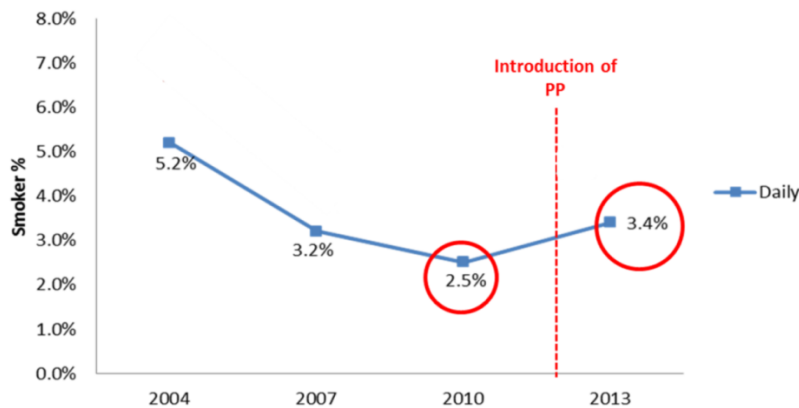
Figure 4 - Australian Adult Smoking Rate¹³



3.2 Youth smoking rates have increased

NDSHS data shows an increase in the rate of under-age smoking. The number of daily smokers aged 12 to 17 years increased by 36% between 2010 and 2013 to its highest level in 7 years.¹⁴ The introduction of plain packaging and ad hoc excise increases have failed to arrest this increase.

Figure 5 - Smokers Aged 12-17 years old¹⁵



¹³ Based on data from Roy Morgan Research survey of adult (18+) smoking rates.

¹⁴ Australian Institute of Health and Welfare, "National Drug Strategy Household Survey Detailed Report: 2013", above n.1.

¹⁵ Based on data from Australian Institute of Health and Welfare, "National Drug Strategy Household Survey Detailed Report: 2013", above n.1.

CCV makes an erroneous claim that this data should not be used as the change between 2010 and 2013 was not statistically significant.¹⁶ A national survey demonstrating an increase of 36% cannot be dismissed.

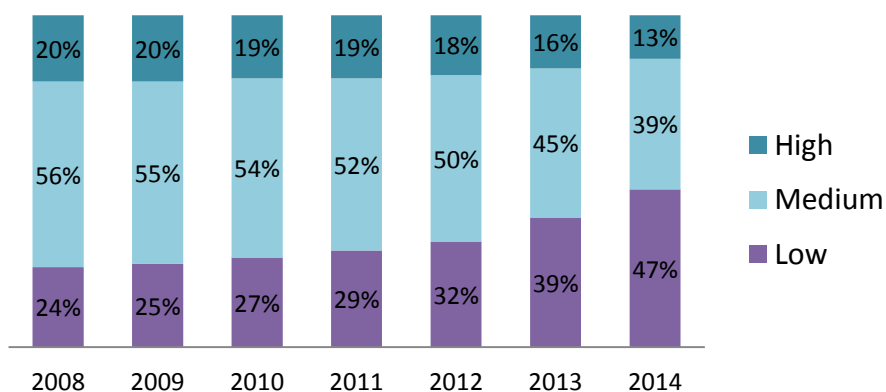
Any data relevant to the efficacy of plain packaging collected for the DoH should be made available and time allowed for stakeholders to comment on it in order to ensure that the process is fully transparent and meets the principles of procedural fairness.

3.3 Consumers are down-trading and are now paying less for cigarettes than they did in 2010

In the face of significant excise increases, plain packaging and falling consumer affordability, relatively few smokers are quitting or reducing consumption. This can be explained by down-trading trends within the market.

Since the 2010 shift away from a sustainable excise policy and the introduction of plain packaging in 2012, the low price market segment has grown from 27% of the market to 47% (a 74% increase). This growth has come at the expense of both the medium and high price market segments which have fallen by 28% and 32% respectively.

Figure 6 - Market share of manufactured cigarettes by price category¹⁷



In order to better illustrate the overall impact of down-trading it is necessary to isolate and estimate the impact on the average price paid for cigarettes, by virtue of changes in consumer preferences (i.e. shifting consumption between brand categories by value).

Table 1. overleaf shows the change in the weighted average price in real terms by virtue of the consumer response. It shows that between 2011 and 2015, down-trading has reduced the real weighted average price paid by 4.5%.

¹⁶ Cancer Council Victoria, "Questions and answers on plain packaging in Australia - Facts sheet no. 4: What is happening to the prevalence of smoking in Australia?", above n.7.

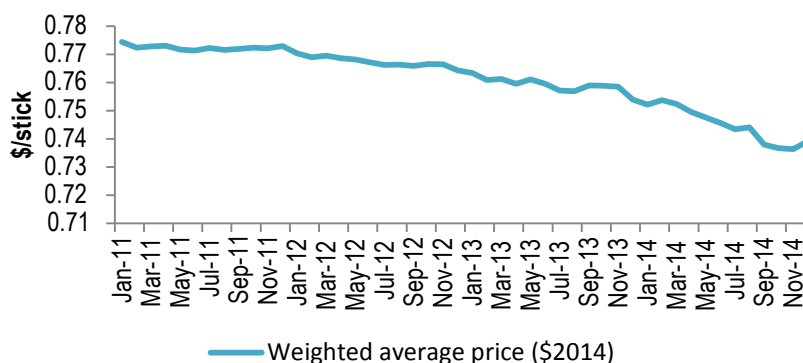
¹⁷ KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

Table 1 - Down-trading impact on real weighted average price (%) from January 2011¹⁸

	Dec-11	Dec-12	Dec-13	Dec-14
Down-trading impact (%)	-0.2	-1.3	-2.6	-4.5

The figure below also illustrates the impact of down-trading on price per stick (cigarette) basis.

Figure 7 - Down-trading impact on weighted average price¹⁹



This analysis excludes the impact of down-trading from the legitimate market to the illicit market, which would increase the impact on the weighted average price paid for cigarettes, taking into account the illicit markets growing market share and significantly lower prices paid.²⁰

BAT commissioned an expert report by noted economist, Neil Dryden of Compass Lexicon in August 2014, in which Mr Dryden used standard microeconomic models of competition to analyse the impact of plain packaging on competition and consumption i.e. whether packaging distorts competition, or increase consumption of tobacco products contrary to the health objectives of the regulations. Mr Dryden also produced a supplemental report dated 6 March 2015 which provides empirical analyses of the effects of the introduction of plain packaging in Australia to test the hypotheses put forward in his previous report.

Mr Dryden undertook an analysis using the position in New Zealand as a benchmark comparator. Consistent with economic theory outlined in Mr Dryden's first report, empirical analysis outlined in his supplemental report shows that²¹:

- i. Plain packaging is associated with a reduction in the pre-tax prices of cigarettes in Australia relative to New Zealand;
- ii. Plain packaging is associated with an increase in the consumption of cigarettes in Australia relative to New Zealand. This result is robust across the analysis of retail and wholesale data; and

¹⁸ British American Tobacco Australia data calculating weighted average industry prices.

¹⁹ *Ibid*

²⁰ KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

²¹ Neil Dryden, "The impact of tobacco plain packaging in Australia", (Compass Lexecon: December 2014), attached as appendix 3.

- iii. while consumers' shift from premium to non-premium brands in Australia was already in place since at least 2009, the adoption of standardised packaging is associated with an acceleration of this down-trading trend.

A copy of Mr Dryden's report and his supplemental report are included with this response.

3.4 There has been a dramatic increase in illegal tobacco

Australia has some of the highest tobacco prices in the world, 75% higher than the most expensive non Australasian markets.²² This large price differential provides the economic opportunity for illicit tobacco traders to make lucrative profits by evading excise taxes. The current duty/GST value for a single 40 foot shipping container filled with 20 tons of loose leaf tobacco is worth approximately \$12.9 million, in 2016 this is set to increase even further to approximately \$17.1 million in duty/GST.²³

In February 2015, the chief executive officer of the Australian Customs and Border Protection Service, Roman Quaedvlieg, listed illicit tobacco as one of the agency's top six priorities. He told Senate Estimates that:

'Serious and organised crime will use the same infrastructural spine upon which it imports prohibited drugs to import tobacco ... We are seeing an increase in organised crime entities involved in this. I put it down partially to the fact that the excise in duty payable on tobacco is increasing. We are halfway through a four-year incremental increase to a tune of 12.5 per cent'.

The evidence indicates that levels of illicit trade have grown sharply when tax rates have increased rapidly and have stabilised when tax rates were applied in an efficient and sustainable way.²⁴ This results in revenue erosion for the Government and the legitimate tax-paying industry.

Given the dramatic growth of the illicit tobacco market in Australia, any dialogue relating to tobacco is incomplete without considering the significant illicit tobacco consumption. The figure below shows that since the change in excise policy in 2010 resulting in excessive and frequent excise hikes, total tobacco consumption has remained relatively stable.²⁵

²² KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

²³ Value based on 40 foot shipping container with 20,000 kgs of loose leaf tobacco at June 2015 excise/GST rates. 2016 estimates a twice yearly AWOTE increase of 1.5%

²⁴ KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

²⁵ *Ibid.*

Figure 8 - Total tobacco consumption in Australia

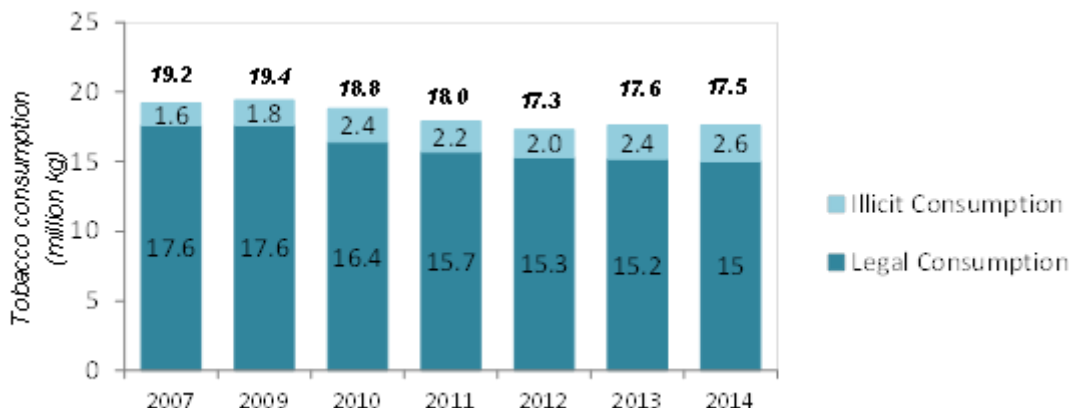
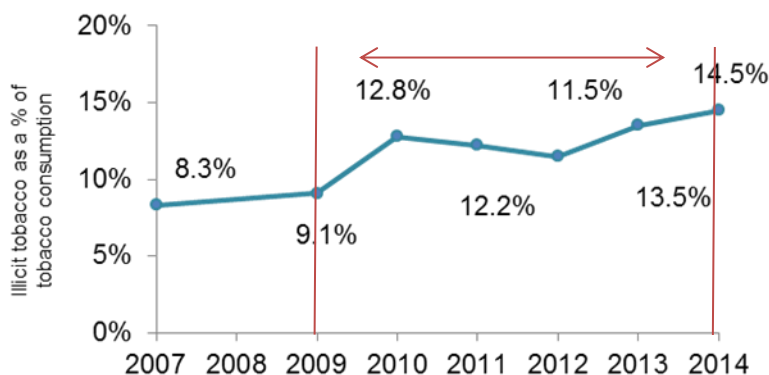


Figure 9 - Illicit tobacco consumption as a percent of total consumption in Australia²⁶



As can be seen from *Figure 8*, above, following the 25% excise increase in 2010, there has been a 59% increase in illicit tobacco. In 2014 KPMG concluded, that: *'The total level of tobacco consumption in Australia was estimated at 17.5 million kilograms in 2014'*²⁷ Of the total consumption, 2.6 million kilograms, or 14.5% of total consumptions were estimated to be illicit.

The net result is that the consumption of illicit tobacco as a proportion of total consumption has increased from 9.1% in 2009 (prior to the 25% ad hoc excise increase as instituted by the Rudd Government in 2010) to 14.5% in 2014.²⁸ Of note, the growing cheaper, illicit tobacco is more affordable to youth and thereby at odds with the objectives of the Act.

In 2014 the illicit market cost the Government \$1.35 billion in lost revenue – based on the average excise rate for 2014.²⁹ Revenue leakages to the illicit trade are the underlying cause of the current diminishing marginal returns associated with tobacco excise increases. Between 2009 and 2014 the excise rate increased by 79% whilst total revenue receipts to Government from tobacco excise only

²⁶ Based on data sourced from: KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

²⁷ KPMG LLP, "Illicit tobacco in Australia: 2014 Full Year Report", above n.2.

²⁸ *Ibid.*

²⁹ *Ibid.*

increased by 28%. Furthermore in 2013 -2014 excise increased 33%, whereas according to the latest Treasury estimates revenue from excise is set to fall by 3%.³⁰

4. Specific objectives of plain packaging including the effectiveness of health warnings have not been met

It has not been demonstrated that the introduction of plain packaging has achieved any of the public health objectives it was introduced to deliver including:

- Reducing the appeal of tobacco products to consumers;
- Increasing the effectiveness of health warnings on the retail packaging of tobacco products; and
- Reducing the ability of the retail packaging of tobacco products to mislead consumers.

Attempting to demonstrate that these objectives had been met, the CCV conducted The National Tobacco Plain Packaging Tracking Survey ('NTPPTS') which included phone surveys of 400 smokers and recent quitters every 4 four weeks between 9 April 2012 and 30 March 2014, asking questions of perceptions and attitudes after the introduction of plain packaging rather than measuring actual smoking rates.

BATA contends that such surveys tracking attitudes and perceptions do not relate in any way to the stated objectives of the Act and that the only meaningful way to measure the impact of plain packaging is against actual smoking rates and market trends as evidenced above.

Nevertheless, BAT commissioned leading regulation and competition economist Stephen Gibson to produce a report in January 2015 which critiqued the NTPPTS and supplemented his previous work of August 2014 ("the Gibson Report") which had analysed data obtained from the New South Wales Cancer Institute Tobacco Tracking Survey ("CITTS"). A copy of the original Gibson Report and his supplemental report are included with this response.

4.1 Plain packaging has not reduced the appeal of tobacco

Stephen Gibson's analysis of the NTPPTS demonstrates that based on CCV's own data, plain packaging was not successful in reducing the appeal of tobacco. In particular³¹:

- Frequency of thoughts about enjoying smoking did not change;
- The proportion of smokers not thinking about quitting and thinking quitting unimportant increased;
- The proportion with no intention to quit increased
- The proportion who had not attempted to quit and who had not attempted in the previous year increased;

³⁰ The Australian Treasury, "Budget 2015 - Budget Paper No. 1 - Statement 4: Variations in Receipts Estimates" (May 2015), available from: http://www.budget.gov.au/2015-16/content/bp1/html/bp1_bs4-03.htm, accessed 5 August 2015.

³¹ SLG Economics Ltd, "Review of Evidence on the introduction of Plain Packaging of Tobacco Products in Australia" (June 2015), attached as appendix 2.

- The proportion thinking that quitting was of low importance increased;
- The proportion not attempting to limit their consumption increased;
- Smoking frequency increased (slightly); and
- The average daily consumption of cigarettes increased.

4.2 Plain packaging has not increased the effectiveness of health warnings

Similarly, several studies have demonstrated that plain packaging has not lead to an increase in the effectiveness of health warnings.

4.2.1 National Tobacco Plain Packaging Tracking Survey

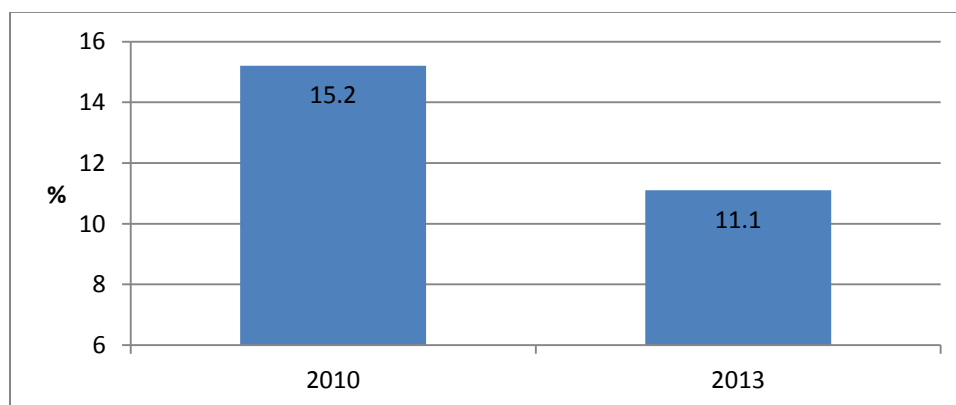
In terms of increasing the effectiveness of Graphic Health Warnings (GHWs), the supplementary Gibson Report also concludes that the NTPPTS shows:

- The short-term increase in motivation to quit from GHWs immediately after the introduction of plain packaging quickly reversed to below pre plain packaging levels and there was an increase in smokers not motivated by GHWs after plain packaging.
- GHWs do not appear to have made smokers more concerned about the health risks of smoking after plain packaging with an increase in the proportion of smokers not concerned or only a little concerned about adverse health consequences.
- Plain packaging did not have had an impact on smoker behaviour. The proportion of smokers who stubbed out cigarettes/cigars/pipes due to thoughts about the health impact reduced post the introduction of plain packaging.

4.2.2 Australian National Drug Strategy Household Survey

The NDSHS asked smokers the main reasons for attempting to quit or change their smoking behaviour. As shown in the Figure below, the percentage of smokers nominating health warnings on tobacco packets as the reason for trying to quit smoking reduced from 15.2% in 2010 to 11.1% in 2013, suggesting that GHWs were less effective in inducing smokers to quit after the introduction of plain packaging.

Figure 10 - Proportion of respondents nominating health warnings on tobacco packs as the reason for trying to quit smoking

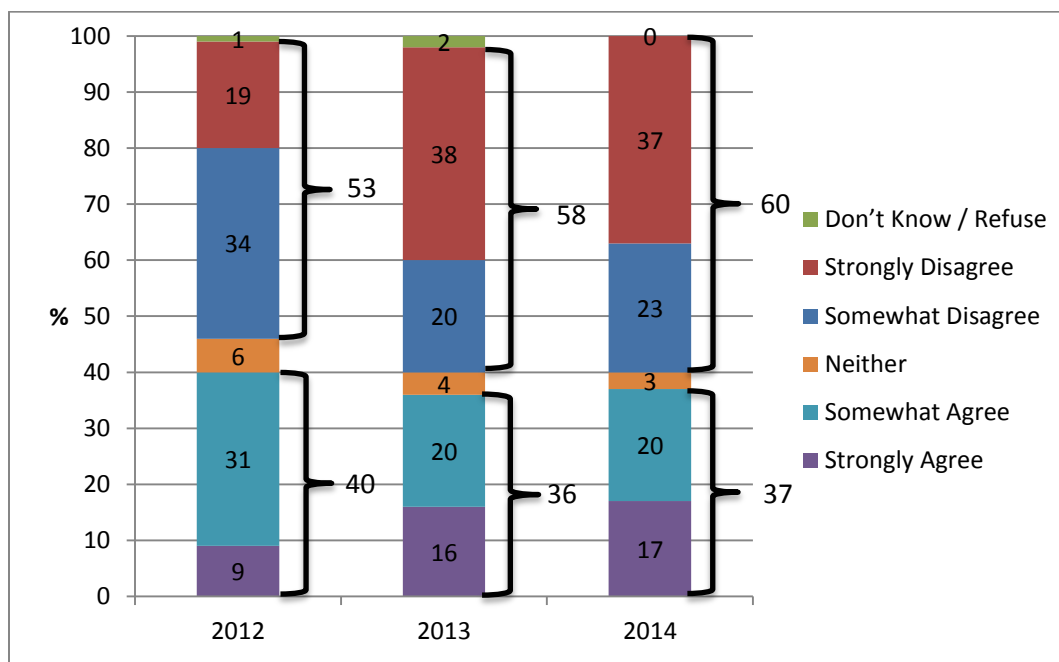


4.2.3 Cancer Institute Tobacco Tracking Survey

The original Gibson Report of August 2014 analysed data obtained from the CITTs and was supplemented in January 2015 following the release of further CITTs data for the period up to Q2 2014 (June 2014).

As reported in the original Gibson Report and subsequent supplemental report, the CITTs asked whether graphic warnings encouraged smokers to quit. The number of respondents strongly agreeing or somewhat agreeing reduced from 40% in 2012 to 36% in 2013 (after the introduction of plain packaging in Australia in December 2012) remaining at 37% in 2014. The number of respondents somewhat or strongly disagreeing increased from 53% to 58% between 2012 and 2013 and increased further to 60% in 2014. Moreover, the number of respondents strongly disagreeing doubled from 19% to 38% between 2012 and 2013.^{32,33}

Figure 11 - Do you agree with the following statement? The graphic warnings encourage/d me to stop smoking³⁴



In terms of the wider impact of graphic health warnings, the CITTs data also strongly challenges the assumption that plain packaging increases the effectiveness of graphic health warnings. As shown in the Table below the data shows that since plain packaging was introduced:

- The proportion of smokers ignoring the health warning has increased;
- The proportion of smokers thinking health warnings are exaggerated has increased;
- The proportion of smokers thinking health warnings help them quit has decreased; and

³² *Ibid.*

³³ This question was asked to respondents who noticed graphic health warnings in 2012 and to all respondents in 2013 and 2014. (2012 n=2314, 2013 n=1085, 2014 n=977 {386}).

³⁴ Based on SLG Economics analysis of the updated CITTs dataset obtained through Freedom of Information requests.

- The proportion of smokers seeking to hide their cigarettes from others due to the health warnings has not changed.

Figure 12 - Awareness of graphic warnings before and after plain packaging³⁵

	2012	2013	2014
I don't look at warnings each time I get a cigarette	3.7%	3.8%	3.8%
The graphic health warnings are exaggerated	2.7%	3.2%	3.1%
The graphic warnings encouraged me to stop smoking	2.8%	2.6%	2.6%
They make me feel that I should hide my packet from the view of others	2.5%	2.6%	2.5%

Dunlop *et al* have recently published a paper (the 'Dunlop paper')³⁶ investigating the impact of plain packaging on smokers' perceptions and responses using data from the CITTs survey from April 2006 to May 2013.³⁷ The Dunlop paper finds that for the six month period after the introduction of plain packaging there was a statistically significant increase in responses "strongly agreeing" with these statements and concludes that "the introductory effects of the plain packaging legislation among adult smokers are consistent with the specific objectives of the legislation in regards to reducing promotional appeal and increasing effectiveness of health warnings".

However, as explained by Mr Gibson in his supplemental report, the Dunlop paper only looks at one part of the responses to the CITTs questions – whether smokers "strongly agreed" with the statement. Respondents had the choice of six responses to the questions - that they: "strongly agreed", "somewhat agreed", "neither", "somewhat disagreed", "strongly disagreed" or "refused/don't know" – changes in the levels of the other responses were ignored in the Dunlop paper. By using the CITTs data selectively, the Dunlop paper fails to consider the full spectrum of responses and therefore reaches unjustified and incorrect conclusions. In contrast with the conclusions reached in the Dunlop paper, it is clear that an examination of the full responses in the CITTs data (outlined by Mr Gibson in his supplemental report) shows no evidence of a systematic movement in opinion or increase in the effectiveness of health warnings following the introduction of plain packaging.

4.3 The Department of Health assessment of tobacco plain packaging has been flawed

BATA is concerned that the then Government prepared and adopted the plain packaging measure in a manner that failed to follow its own best regulatory practices.

³⁵ Based on SLG Economics analysis of the updated CITTs survey dataset obtained through Freedom of Information Requests. The analysis in Table 4 is an average response score using a scale of 1 to 5 for each response, where 1 = "strongly disagree" and 5 = "strongly agree". "Don't know" and "refuse" responses were removed before calculating the average.

³⁶ S Dunlop, T Dobbins, J Young, D Perez, D Currow, "Impact of Australia's introduction of tobacco plain packs on adult smokers' pack-related perceptions and responses: results from a continuous tracking survey" (June 2014), *British Medical Journal Open*, available from <http://bmjopen.bmj.com/content/4/12/e005836.full>, accessed on 19 August 2015.

³⁷ The authors do not explain why their dataset only extends to May 2013, while their paper was submitted in June 2014 and therefore a far longer post-implementation dataset would have been available to them.

The circumstances surrounding the adoption of the measure and the failure of the then Government to follow its own better regulation principles reveal that the decision to enact plain packaging was driven by political expediency.

4.3.1 Flawed Regulatory Impact Statement

The regulatory impact assessment (RIS) completed by the Department of Health (DoH) was deemed inadequate by the Office of Best Practice Regulation (OBPR). However, even before the OBPR had provided its assessment of the RIS the then Prime Minister announced the Government's intention to introduce plain packaging. While the OBPR continued to express misgivings about the process of analysis of the impact of the plain packaging measure, an adequate RIS was never completed. Had the Government undertaken a RIS, some of the negative impacts of this policy and its failures might have been anticipated and consequently avoided.

Additionally, the structure of the public consultation on the draft Tobacco Plain Packaging Bill was not a true consultation process, but rather the presentation of a *fait accompli* given the then Prime Minister's announcement. The process was neither fully transparent nor inclusive.

Due to the lack of an adequate RIS, the DoH is now required to submit a Post Implementation Review (PIR) of the plain packaging legislation to the OBPR. However, BATA believes that the PIR is following a flawed and inadequate process that further raises important questions on just how committed the government and the DoH are to evidence-based policy and best practice regulation. In particular, BATA notes the following flaws in relation to the PIR and consultation process.

4.3.2 Undue delay

While the PIR was due to commence by December 2014 (two years after the introduction of the legislation) the DoH only announced publicly the appointment of Siggins Miller Consultants Pty Ltd to undertake a consultation with stakeholders on the 16 February 2015.

4.3.3 Narrow scope of consultation

In BATA's view the terms of the PIR consultation were narrow and failed to address the purpose of the PIR. The OBPR guidance note on PIRs specifies that a PIR should address each of the following questions:

- What problem was the regulation meant to solve?
- Why was government action needed?
- What policy options were considered?
- What were the impacts of the regulation?
- Which stakeholders have been consulted?
- Has the regulation delivered a net benefit?
- How was the regulation implemented and evaluated?

However, the scope of the consultation is limited to:

- Whether the tobacco plain packaging measure has been effective and efficient in meeting its objectives;

- The positive and/or negative impacts (if any) of the measure including economic, social and environmental impacts; and
- The major costs and/or benefits of the measure.

It appears that the PIR will fail to appropriately assess the efficacy of the measure and the choice made not to focus on actual smoking outcomes is never directly addressed. The Act states that the objective of the measure is to reduce smoking rates (s.3 (1)). The Act also states that the mechanisms through which plain packaging will achieve this objective are: reducing the appeal of tobacco products to consumers; increasing the effectiveness of health warnings on the retail packaging of tobacco products; and reducing the ability of the retail packaging of tobacco products to mislead consumers (s3(2)).

However, the announcement of the PIR states:

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

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

This wrongly structures the assessment of the measure against the mechanisms through which it was claimed that plain packaging would act rather than the objective itself of reducing smoking rates. Furthermore it improperly seeks to shield the measure from appropriate scrutiny by claiming that the measure is only intended to contribute to its actual objective of reducing smoking rates "*in the long term as part of a comprehensive range of tobacco control measures.*"

As raised earlier in this document, in order to achieve its aim of assessing plain packaging and to be credible, the PIR must clearly distinguish the impacts of plain packaging from other significant measures such as large ad hoc excise increases. BATA believes there should be greater transparency regarding how the PIR will achieve this.

If a measure fails to make any discernible contribution to an objective it cannot be justified as necessary or proportionate whether it is part of a comprehensive program or not.

4.3.4 Restricted access to data

The PIR is also being improperly conducted in circumstances where the Government withheld key evidence in relation to the very issues which are to be addressed by the PIR. In particular, 14 pieces of

DoH-commissioned research were released on the 19th of March, 2015;³⁸ too late to be adequately assessed by stakeholders during the PIR process.

Numerous requests have been made to government departments and other public agencies for the release of relevant information in relation to the impacts of plain packaging.

The requests made include in particular requests to the DoH and the CCV for the release of the data gathered from surveys and studies conducted by CCV on behalf of the DoH regarding plain packaging, namely a monthly tracking study of Australians aged 18 to 69 years. The purpose of these surveys were to assess the impact of plain packaging and a study assessing perceptions of packaging and salience of warnings among secondary school children aged 12 to 17 years. The DoH and CCV have refused to provide this data. This is in contrast to the CITTS data which has been released by the Cancer Institute NSW.

Accordingly, stakeholders are being required to respond to the PIR in circumstances where key relevant evidence is being withheld. The Government should release all relevant evidence that it is holding, and allow time for stakeholders to comment on it in order to ensure that the process is fully transparent and meets the principles of procedural fairness. It should not be the case that relevant data paid for by taxpayers money is not subject to public scrutiny. As clearly demonstrated by the Dunlop Paper, the failure to release data can mean that it is only selectively published which prevents a full assessment of the data being available.

Indeed, this also appears to be the case in relation to the latest articles published in *Tobacco Control* which analyse select aspects of non-public data sets collected by CCV. Specifically, the latest publications fail to assess actual smoking behavior (e.g., smoking status; cigarettes per day).

Cigarettes per day are used in the Heaviness of Smoking Index referred to in the *"Australia adult smokers' responses to plain packaging with larger graphic health warnings one year after implementation: results from a national cross-sectional tracking survey"* article (as well as the article's supplementary material). However, neither cigarettes per day nor the index were used as outcome variables in the article's analyses. As for smoking status, this information was collected in the survey as well, but it is not used as an outcome variable in all but one of the articles.

Moreover, one of the articles does provide the mean of the "Heaviness of Smoking Index" across the pre-plain packaging, transition period, and post plain packaging year one samples. The index increases from 2.07 in the sample period prior to implementation, to 2.12 in the sample period concurrent with implementation and 2.17 in the sample period following implementation.³⁹ The increase between the pre-plain packaging and post-plain packaging year one averages is statistically significant. While we cannot know for sure if the cigarettes per day number, if used directly, would have generated a statistically significant increase (because the DOHA and CCV have refused to release this data), this

³⁸ Australian Department of Health, "Implementation and evaluation of the Australian tobacco plain packaging policy", *Tobacco Control Journal* (2015 volume 24 issue 2), available from http://tobaccocontrol.bmj.com/content/24/Suppl_2.toc, accessed on 19 August 2015.

³⁹ Wakefield, et al, "Australia adult smokers' responses to plain packaging with larger graphic health warnings 1 year after implementation: results from a national cross-sectional tracking survey", *Tobacco Control Journal* (2015 – 24:2), available from http://tobaccocontrol.bmj.com/content/24/Suppl_2.toc, accessed on 19 August 2015.

comparison of mean indexes is very suggestive. Combined with the researchers' failure to examine this obvious metric directly, it is plausible (if not likely) that their survey data show an increase in smoking among smokers post plain packaging. This one example underscores the need to access the raw data.

5. An opportunity – tobacco harm reduction

Harm reduction is about developing policies to try and minimise the negative health impact of a risky activity.⁴⁰ Dr Alex Wodak, a notable proponent of harm reduction from St Vincent's Hospital in Sydney stated that the approach "is consistent with the best traditions of both medicine and public health".⁴¹

Australian Governments have been at the forefront of initiating harm reduction strategies to reduce the impacts of heroin use - methadone, motor vehicle accidents – seatbelts and sexually transmitted diseases - condoms.⁴² These strategies are widely hailed as saving significant numbers of Australian lives.⁴³

Australia risks falling behind other comparable countries in relation to best public policy practice for harm reduction in relation to tobacco use. New innovative products that are increasingly considered to have the potential to pose significantly reduced risks for existing smokers than conventional tobacco are illegal to buy in Australia. Rather Australian tobacco control policy-makers are focused on punitive tobacco control, such as 'quit or die' strategies notably represented by tobacco plain packaging. This means that Australian smokers are denied the opportunity to choose alternatives to smoking such as snus and electronic cigarettes, which have been proven to work in other countries as part of a tobacco harm reduction strategy if appropriately regulated.

A comparable country example is Sweden which has the lowest rate of smoking-related disease in Europe and the lowest rate of lung cancer in males in the world⁴⁴. Swedish smokers are able to freely access snus, small bags of moist tobacco that are placed under the top lip. A traditional Scandinavian product, snus use has grown significantly over the past 40 years with the proportion of male smokers falling from 40% in 1976 to just 15% in 2002.⁴⁵ Despite being supported by noted public health experts,⁴⁶ Snus is banned in Australia.

Electronic cigarettes are another tobacco harm reduction option. Electronic cigarettes contain a nicotine-based liquid that is vaporized and inhaled and are used to simulate the experience of smoking.

⁴⁰ Australian Department of Health definition, available from <http://www.health.gov.au/internet/publications/publishing.nsf/Content/phd-hepc-manual-toc~phd-hepc-manual-ch3~phd-hepc-manual-ch3-4>, accessed on 19 August 2015.

⁴¹ Dr Alex Wodak, "Harm reduction: Australia as a case study", *Bulletin of the New York Academy of Medicine* (1995 – 72:2), available from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2359449/>, accessed on 19 August 2015.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Cancer Research UK, "Lung Cancer Incidence Statistics", available from <http://www.cancerresearchuk.org/health-professional/cancer-statistics/statistics-by-cancer-type/lung-cancer/incidence> accessed on 19 August 2015.

⁴⁵ J Foulds, L Ramstrom, M Burke, K Fagerstrom, "Effect of smokeless tobacco (snus) on smoking and public health in Sweden", *Tobacco Control Journal* (2003 – 12), available from <http://tobaccocontrol.bmj.com/content/12/4/349.full.pdf+html>, accessed on 19 August 2015.

⁴⁶ Paul Haydon, "In Sweden smokers have another option - Snus", *The Guardian* (October 2012), available from <http://www.theguardian.com/commentisfree/2012/oct/29/sweden-smokers-option-snus>, accessed on 19 August 2015.

Because the products do not involve igniting tobacco, the carcinogens associated with smoke are absent. British smokers are now 50% more likely to quit using electronic cigarettes than nicotine patches or gums.⁴⁷

The British Government is one of the most progressive when it comes to harm reduced nicotine products.⁴⁸ Supporters of electronic cigarettes include: the Medicines and Healthcare Products Regulatory Agency; Royal College of Physicians; and Action on Smoking and Health.

Recognising the growth in sales of these products, the European Union has recently moved to appropriately regulate the market-place.⁴⁹

Outside of Europe, in March 2015 the Canadian Parliament's Standing Committee on Health released a Report titled: *Vaping: Towards a Regulatory Framework for E-cigarettes*⁵⁰. The Report found it would be appropriate to develop a regulatory model designed specifically for electronic cigarettes and banning them was "not an option"⁵¹. The Report presented a series of practical recommendations which will inform the Canadian Government's electronic cigarette regulation.

By way of contrast, electronic cigarettes are effectively banned in Australia.

BATA's parent company, BAT plc, is developing a range of products to offer smokers a choice of alternate products that the scientific community is increasingly endorsing as having significantly lower risk profiles when compared with conventional cigarettes. BAT plc believes these products will appeal to existing smokers and, therefore has the greatest potential to reduce smoking-related disease. This range includes an electronic cigarette and a nicotine inhalation device – these products are being addressed in a submission by Nicoventures - the relevant BAT plc subsidiary.

Importantly, the emerging evidence suggests that harm-reduced products have the greatest capacity for public health benefits, over and above nicotine replacement therapies, however, they need to be regulated to appropriate standards and available only to adult smokers. It is also important that policy-makers do not look at regulating harm-reduced products in isolation but in the context of tobacco product pricing. Ensuring that there is a relative differential will encourage smokers to transition.

BATA respectfully asks that, in the course of its inquiry, the Committee reviews evidence in relation to tobacco harm reduction.

⁴⁷ Robert West et al, "Smoking toolkit study: Trends in electronic cigarette use in England" (July 2015), available from <http://www.smokinginengland.info/latest-statistics/>, accessed on 19 August 2015.

⁴⁸ UK Medicines and Healthcare products Regulatory Agency, "Licensing Procedure for Electronic Cigarettes and Other Nicotine Containing Products", available from <http://webarchive.nationalarchives.gov.uk/20141205150130/http://www.mhra.gov.uk/Safetyinformation/Generalsafetyinformationandadvice/Product-specificinformationandadvice/Product-specificinformationandadvice%E2%80%93M%E2%80%93T/NicotineContainingProducts/index.htm>, accessed on 19 August 2015.

⁴⁹ European Commission, "Commissioner Borg welcomes agreement on the revision of the Tobacco Products Directive" (December 2013), available from http://europa.eu/rapid/press-release_MEMO-13-1177_en.htm, accessed on 19 August 2015.

⁵⁰ Canadian House of Commons, "Vaping: Towards a Regulatory Framework for E-Cigarettes: Report of the Standing Committee on Health", Ben Lobb Chair (March 2015), available from http://www.nsr-a-adnf.ca/cms/file/files/412_HESA_Rpt09-e.pdf, accessed on 19 August 2015.

⁵¹ Tom Blackwell, "E-cigarette ban 'not an option': Commons health committee calls for legalization", *National Post* (March 2015), available from <http://news.nationalpost.com/2015/03/12/e-cigarette-ban-not-an-option-commons-health-committee-calls-for-legalization/>, accessed on 19 August 2015.

6. A further opportunity – the principles of better regulation

In light of the above opportunity and recent policy failings, the Government should avoid further tobacco product and packaging regulation as a means of achieving its tobacco reduction targets.

To the extent that future tobacco control regulation is to be expected, there is now an opportunity to help ensure that such future regulation avoids the failings of recent excise and plain packaging policies, including through the implementation of a more robust framework for evidence-based regulation.

As discussed above, as far as Plain Packaging is concerned, the DoH failed to carry out an adequate RIS before the introduction of the legislation. Had an adequate RIS been carried out, it would have been clear that the policy did not meet criteria of effective regulation and that there were significant risks of adverse consequences, which are now materialising.

7. Conclusion

This submission clearly shows that the current punitive approach to tobacco control policy in Australia, particularly plain packaging and significant excise increases, is not meeting its objectives. This is whilst having significant adverse impacts. The most notable social impact is a 36% increase in youth smoking and no acceleration in the long-term smoking rate decline. As such, it is unlikely that the government will meet the 2018 smoking rate target of 10%.

Moreover, both measures have contributed to a growing black-market in tobacco that cost Australian taxpayers AUD1.35 billion in 2014. In the case of implementing tobacco plain packaging, the costs to BATA alone were AUD50 million.

Instead of continuing with costly and counter-productive policies, the opportunity exists to develop an evidence-led tobacco control approach based on the principles of harm reduction. Such an approach would build on Australia's experience with harm reduction in other policy areas such as road safety and illicit drugs.

Tobacco harm reduction is supported in jurisdictions similar to Australia and by many within the public health community in this country.

As such, BATA respectfully suggests that the Committee review the efficacy of tobacco control policies such as plain packaging and significant ad hoc excise increases and compares these findings with the evidence supporting tobacco harm reduction measures.

8. APPENDICES

A. SLG Report

B. Supplementary SLG Report

C. Dryden Report

D. KPMG report “Illicit tobacco in Australia: 2014 Full Year Report”