



British American Tobacco Australia Limited's
submission to the Parliamentary Joint Committee on
Law Enforcement inquiry into illicit tobacco

24 February 2017

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Executive summary

British American Tobacco Australia Limited (“BATA”) welcomes the opportunity to make an additional submission to the Parliamentary Joint Committee on Law Enforcement (“the Committee”) inquiry into illicit tobacco. BATA acknowledges the ongoing support and recognition by government of the need to disrupt the smuggling and distribution of illicit tobacco in Australia, including the additional funding that has been allocated and tripling of resources to expand the Australian Border Force Tobacco Strike Team.¹ BATA also welcomes the commitment of the Department of Immigration and Border Protection and the Australian Taxation Office to enhancing the legislative framework to provide stronger penalties.

Detailed response to terms of reference

In February 2016, BATA provided a submission to this inquiry and was privileged to attend the hearing of the Committee in March of that year. In our previous submission, provided as **Attachment 1**, detailed responses to the Committee terms of reference were provided. This current submission supplements BATA’s February 2016 submission, providing updates and new information.

Illicit tobacco consumption at 14%

Despite the ongoing success of the Tobacco Strike Team and seizures by the Australian Taxation Office, illicit tobacco continues to be a significant problem. Estimated at 14% of total tobacco consumption, illicit tobacco deprives government of excise revenue estimated at \$1.49 billion per annum, inhibits the effectiveness of public health policies, funds organised crime and negatively impacts small businesses. Should illicit tobacco consumption remain at this level to 2020, lost excise revenue would be in excess of \$3 billion in that year alone (which is just below 1% of total government revenue).

A comprehensive approach by government is required to manage the drivers of illicit tobacco in Australia.

Requirement for legislative change

While some aspects of the legislative framework are working well, there are a number of areas where changes have been proposed to the Customs Act, the Excise Act and the Tobacco Plain Packaging Act. Many of these changes are likely to be non-controversial while addressing gaps that are currently being exploited by criminals. Strengthening of arrangements across the functions of multiple agencies and in multiple jurisdictions is required to ensure these gaps are minimised. Enhancements to the legislative framework would also clarify enforcement responsibilities and increase successful prosecution outcomes. Given this, BATA respectfully recommends that these changes be implemented as soon as possible. In this regard, BATA welcomes the commitment of both Department of Immigration and Border Protection and the Australian Taxation Office to legislative reform in this space².

¹ Media release, the Hon Peter Dutton MP Minister for Immigration and Border Protection, Expansion of ABF Tobacco Strike Team, June 2016

² Opening statement of the Department of Immigration and Border Protection to the Committee on 23 November 2016 and the Australian Tax Office’s submission (Submission 163) to the Committee.

Industry action under existing legislative framework

Recognising that additional mechanisms could be available for industry to take action under the current legislative framework, BATA, along with Imperial Tobacco Australia Limited and Philip Morris Limited, have made an application to the Australian Competition & Consumer Commission (“ACCC”) under the *Competition and Consumer Act*. The application seeks authorisation to allow the three companies to jointly suspend or cease supply to retailers or wholesalers found to be supplying illicit tobacco products. The application reflects existing commercial rights for each company to enforce terms under our trading agreements with our customers. It will be evidenced-based and follow a transparent process. We consider we are uniquely placed to disrupt the illicit tobacco supply in this way and such commercial action would complement action by law enforcement agencies.

BATA, Imperial and Philip Morris already individually take action under our commercial terms, where appropriate, to cease supply to retailers or wholesalers who are found to be breaching our trade terms (including supplying illicit products). The ACCC application supplements these individual actions by allowing us to act in a coordinated way.

The ACCC published its draft decision on the application in December 2016, which was not to authorise the application. Its decision was based on, among other things, its consideration that there could be potential detriments to the ability of minor tobacco brands to compete, there were no mechanisms for retailers to appeal any decisions, and any action could interfere with law enforcement activities. We are actively engaging with the ACCC through the application process to address the issues raised. The ACCC may likely make its final decision in March 2017.

Ongoing cooperation by industry and consistency of application of WHO FCTC Article 5.3

In the ongoing engagement and cooperation with government agencies on illicit tobacco matters, many government agencies refer to Article 5.3 of the World Health Organisation Framework Convention on Tobacco Control. BATA notes that Article 5.3 does not prohibit the tobacco industry transparently engaging with government. Rather, it is aimed at protecting public health policies when it comes to tobacco control from the vested interests of the tobacco industry. When it comes to combating illicit tobacco, the interests of industry and government are in fact aligned. That is, BATA and the government have the same objective of reducing the availability and supply of illicit tobacco to consumers.

BATA submits that the existing fora chaired by the Department of Immigration and Border Protection and the Australian Taxation Office, being the Industry Advisory Group (and its sub-committees) and the Tobacco Stakeholders Group respectively, should be maintained.

Development of a national anti-illicit tobacco strategy

Similar to the national tobacco smuggling strategy that is implemented in the United Kingdom, BATA recommends the Committee consider the merits of developing a national anti-illicit tobacco strategy for Australia. Such a strategy could clearly set out the government’s priorities, provide clarity to agencies and set out a road-map for achieving desired policy outcomes. In addition, the strategy could be an engagement tool to educate businesses and the community and reduce the tolerance of illicit tobacco.

A national strategy would create alignment across agencies, in particular State and Territory agencies with Commonwealth agencies, to ensure that illicit activities are dealt with in a consistent manner.

1. Combating illicit tobacco use in Australia – summary of matters addressing the terms of reference

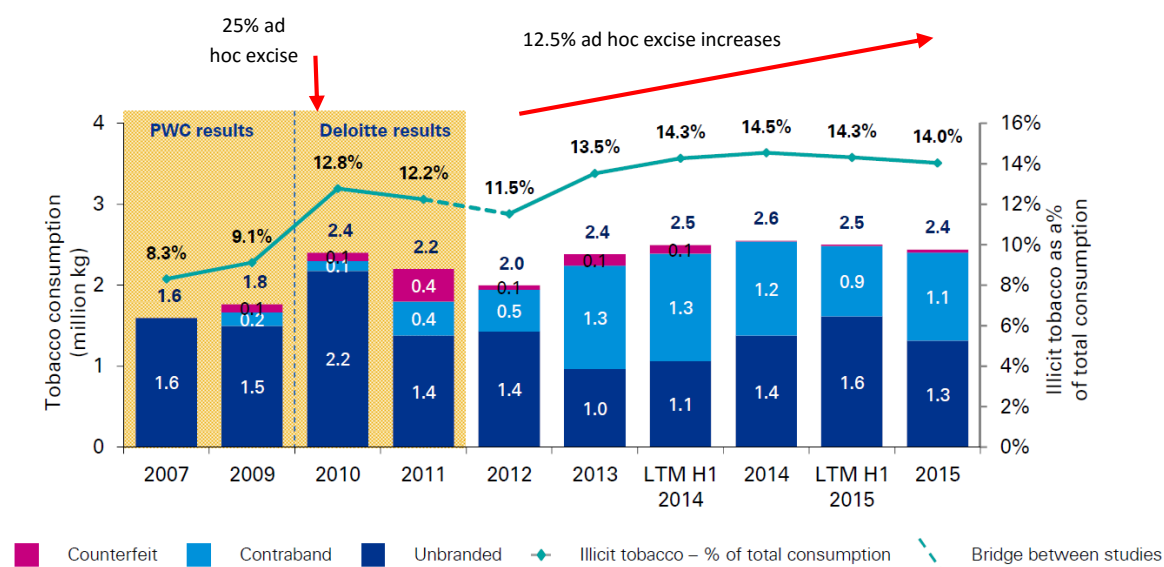
BATA commends the ongoing work of our law enforcement agencies and notes the recent seizures of illicit tobacco products and crops by both the Australian Border Force and the Australian Tax Office. However, despite these positive outcomes, the illicit trade in tobacco remains a significant problem.

BATA’s submission in February 2016 outlined detailed responses to each aspect of the terms of reference for this inquiry. This section provides details on developments and new information available since February 2016.

1.1 The nature and prevalence of illicit tobacco use in Australia

As outlined in our February submission, by market share, the illicit tobacco “industry” is the fourth largest competitor in the Australian tobacco market. KPMG’s 2015 full year report estimates that illicit tobacco comprises 14% of total tobacco consumption. The full year outcome indicates a marginal decline of 0.3%, which could have been impacted by the success of the Tobacco Strike Team that was formed in the second half of 2015. However, the illicit market continues to represent a significant \$1.49 billion per annum in lost excise revenue to the Australian government.³

Figure 1: Consumption of illicit tobacco products by category, Australia 2007 - 2015.⁴



The risk of the further growth of the illicit tobacco market in Australia will be heightened by the annual 12.5% ad hoc excise increases for the next four years that was announced in May 2016. As detailed in section 2 of BATA’s February submission, available evidence indicates that sudden price

³ KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Full Year Report, page 6.

⁴ KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Full Year Report, page 6.

increases caused by ad hoc tobacco excise result in consumers maintaining consumption by down-trading to cheaper legal and illicit tobacco products.⁵ High prices also mean that the potential profit from illicit tobacco remains high, presenting a lucrative criminal enterprise. One \$200,000 container shipment of illicit cigarettes could be turned into \$5 million in street value, which not only evades excise but provides funds for further criminal activities.

1.2 The role of Commonwealth law enforcement agencies

BATA welcomed the announcement in July 2016 that additional funding of \$7.7 million has been allocated to expand the Tobacco Strike Team, including the tripling of resources and the commitment expressed by the Department of Immigration and Border Protection to amend legislative provisions to introduce new penalties. We acknowledge the excellent results that the Tobacco Strike Team has been able to achieve to date, including the exposure of a number of smuggling operations and the seizure of more than 25 tonnes of smuggled tobacco and 50 million smuggled cigarettes within its first six months.⁶ The latest empty pack survey that is undertaken as a part of the KPMG illicit market size report found a material reduction in non-domestic cigarette packs in the major cities of Melbourne and Sydney. The incidence of non-domestic packs recovered decreased from 12.3% to 8.7% in Melbourne and from 10.4% to 7.9% in Sydney.⁷ We believe this positive result is directly related to the commendable efforts of the Tobacco Strike Team.

Even if the Tobacco Strike Team increases the detection rates of illicit tobacco, without Courts handing down strong punishment, illegal tobacco will continue to be seen as a low-risk, high reward criminal activity. There also remains a disconnect between government bodies responsible for the enforcement of tobacco related legislation, which has led to gaps that have been exploited by criminals. These issues were discussed in detail in BATA's February 2016 submission and summarised below in section 1.5.

1.3 The loss of revenue to the Commonwealth arising from the consumption of illicit tobacco products

Lost excise revenue due to illicit tobacco is currently estimated at \$1.49 billion per annum.⁸ Given the excise increases to be applied, should the level of illicit consumption remain the same at 2.4 million kilograms, it is estimated that lost excise revenue will increase to over \$3 billion per annum by 2020 (which would be almost 1% of total government revenue).

BATA notes that some parties argue that reductions in illicit tobacco would not necessarily translate to an equivalent increase in excise revenue to government. BATA accepts that due to the nature of the illicit market and consumption of illicit products it may be difficult to estimate a precise revenue gain. However, research undertaken as a part of the KPMG report indicates that users of illicit products are likely to switch to cheaper legal products should illicit tobacco no longer be available. Further, given the significant level of lost excise, recovery of even a portion of this amount would provide material benefits.

⁵ Also refer Figure 6 in **Attachment 1**, which demonstrates the relationship; between illicit tobacco consumption and excise rates.

⁶ Media release, the Hon Peter Dutton MP Minister for Immigration and Border Protection, Expansion of ABF Tobacco Strike Team, June 2016.

⁷ MSIntelligence empty pack survey comparisons between Q4 2015 and Q2 2016.

⁸ KPMG LLP, *'Illicit Tobacco in Australia'* (2015). 2015 Full Year Report, page 6.

1.4 The involvement of organised crime in illicit tobacco in Australia

The involvement of organised crime in the illicit tobacco trade has been well documented, including by the Australian Crime Commission.⁹ More recently, Minister Dutton stated:

“The Australian Government is determined to reduce the availability of illicit tobacco and this funding will allow the Tobacco Strike Team to continue to expose those organised criminal syndicates looking to smuggle illicit tobacco across the border and into the black market”¹⁰

For this reason, BATA considers that legislative amendments should be progressed as quickly as possible to disrupt these criminal activities and provide additional deterrent to further criminal acts.

1.5 The effectiveness of relevant Commonwealth legislation

There are some elements within the existing legislative framework that are working well. However, there are a number of areas where changes could be made to strengthen Australia’s response to imported and domestically grown illicit tobacco, including clarifying the ability of agencies to carry out enforcement.

In our February submission, BATA outlined in detail the possible legislative amendments that could be considered. A high level summary is provided below:

Table 1: Summary of legislative amendments for consideration

Act	Proposed area for amendment
Customs Act	<ul style="list-style-type: none"> • Establish a strict liability offence for importation (tiered approach to breaches) • Implement deemed quantities • Impose sentencing guidelines • Impose minimum non parole periods • Enhance consistency between the Acts regarding individuals dealing in illicit tobacco
Excise Act	<ul style="list-style-type: none"> • Create concurrent sentencing provisions • Establish recommendations to prosecute for aiding and abetting • Impose sentencing guidelines • Impose minimum non parole periods • Deem provisions that tobacco seized in Australia has been grown in Australia unless otherwise proven
Tobacco Plain Packaging Act	<ul style="list-style-type: none"> • Deem quantities considered for commercial supply • Clarify the terms of the Enforcement Policy • Expand the definition of who are Authorised Officers

BATA recognises that, effective regulation must be based on a sufficiently robust evidential base which takes into consideration its likely overall impact. Regulatory measures may have unintended consequences that could be socially harmful, such as providing a competitive advantage to criminal operators to grow their illegal trade. BATA’s February submission also outlines in detail the ways in

⁹ As discussed in detail in **Attachment 1**.

¹⁰ Media release, the Hon Peter Dutton MP Minister for Immigration and Border Protection, Expansion of ABF Tobacco Strike Team, June 2016.

which further legislative amendment could be made to strengthen Australia's response to both locally grown and imported illicit tobacco.

BATA understands that a number of these proposed amendments are being considered by government and being progressed by the Department of Immigration and Border Protection. In BATA's view many of these proposed changes would likely be considered non-controversial and should be supported by interested parties. For these reasons, BATA requests consideration for any potential changes to be progressed as quickly as possible and in consultation with all interested parties.

1.6 Other related issues

BATA's submission in February raised a number of other related issues for the Committee's consideration. These were:

- **Impact on small businesses** – increased illicit tobacco means small businesses lose revenue and customers to rogue retailers and ultimately criminals.
- **Impact on tobacco control policies** – in addition to bypassing excise payments, illicit tobacco exposes consumers to unregulated products with no product controls, much of this illicit tobacco is sold in breach of product regulations including plain packaging, Graphic Health Warning and reduced fire risk standards. Legal tobacco products are subject to stringent manufacturing and regulatory standards. Illicit products on the other hand are not. A study previously prepared for the Commonwealth Department of Health and Ageing found that chop chop can contain “very dense volume of fungal contamination ... [resulting in] serious potential for hazardous inhalation responses”. This is an additional risk that can be avoided.¹¹
- **Role of electronic cigarettes** – the potential role for electronic cigarettes in arresting the growth of the illicit tobacco market.

In addition to our previous submission, the following matters are outlined for consideration by the Committee:

- **ACCC application** – the application is to allow the industry to undertake coordinated commercial action at the retail level to disrupt supply of illicit products to consumers. Such action would complement those activities undertaken by our law enforcement agencies and is an extension of our commercial rights to individually cease supply.
- **World Health Organisation Framework Convention for Tobacco Control (WHO FCTC) Article 5.3** – Article 5.3 of the WHO FCTC relates to protecting public health policy from the interest of the tobacco industry. The Article does not prohibit government engaging with industry on relevant matters. Article 5.3 needs to be applied consistently and in recognition of the fact that the reduction of illicit tobacco is consistent with and complimentary to the promotion of public health policies.
- **National Anti-Illicit Tobacco Strategy** – the United Kingdom has developed a national strategy on the approach to tackling tobacco smuggling in the UK. BATA submits that

¹¹ Bittoun, Renee, *The medical consequences of smoking 'chop chop' tobacco*, prepared for the Commonwealth Department of Health and Ageing, December 2004, p. 13.

developing a national anti-illicit tobacco strategy for Australia would likely be beneficial and should be considered.

- **Harmonisation of State and Territory legislative provisions** – in addition to enhancements of Commonwealth provisions, reform of State and Territory legislative provisions would clarify the role of State agencies to respond to illicit tobacco. Review of State and Territory provisions could be undertaken under a Council of Australian Governments process.

2. ACCC application – coordinated commercial action at the retail level

While the proposed legislative amendments discussed above are being considered, BATA, together with Philip Morris Limited and Imperial Tobacco Australia Limited, have made an application to the ACCC to seek authorisation to take coordinated commercial action at the retail level.

In December 2016, the ACCC released its draft decision not to authorise the application. This draft decision was on the basis that, among other things, its consideration that there could be potential detriments to the ability of minor tobacco brands to compete, there were no mechanisms for retailers to appeal any decisions, and any action could interfere with law enforcement activities.

Along with Philip Morris and Imperial Tobacco, we are actively engaging with the ACCC through the application process. This includes submitting a response to the ACCC, proposing to mitigate the potential risks they have raised and attending a conference before the ACCC and other interested parties.

Our application is summarised below:

Table 2: Summary of the ACCC application

Area of note	Summary
Application	Made under the <i>Competition and Consumer Act 2010</i> , subsections 88(1A) and (1); seeking authorisation for a period of 3 to 5 years
Applicants	British American Tobacco Australia Limited Imperial Tobacco Australia Limited Philip Morris Limited
Purpose	To deter and minimise the supply of illicit tobacco products at the retail level, the application seeks authorisation for the Applicants, in accordance with an authorised process, to suspend or cease supply to retailers or wholesalers found to be supplying illicit tobacco products
Key issues	The Applicants have a common objective of taking coordinated, measured and targeted steps to cease supply to retailers or wholesalers that supply illicit tobacco products. Any action would be undertaken based on evidenced-based and clearly defined processes. Research undertaken as a part of the KPMG Report has indicated that a significant portion of illicit purchases are made through retail outlets that also sell legal tobacco products. Such

Area of note	Summary
	<p>coordinated action under this application is therefore warranted to disrupt the sale of illicit tobacco products.</p> <p>The application would allow the Applicants to take coordinated commercial action that each Applicant is already currently able to individually undertake.</p> <p>The Applicants are in a unique position to provide this type of disruption to the supply of illicit products. For this reason, the conduct contemplated by this application would complement actions undertaken by law enforcement agencies.</p>
Costs/Benefits	<p>To approve the authorisation, the ACCC, among other things, needs to be satisfied the authorisation would provide a net public benefit.</p> <p>Potential benefits include:</p> <ul style="list-style-type: none"> • Decreasing the availability of illicit tobacco products • Decreasing loss of excise revenue • Ensuring consumers are purchasing legal products with graphic health warnings
Stakeholders' views	<p>Most legitimate retailers are strong supporters of this application as demonstrated in the submissions to the ACCC on this application.</p> <p>The Department of Health and Department of Immigration and Border Protection have queried if the application, if authorised, would be consistent with WHO FCTC Article 5.3 and submitted that there should be sufficient transparency in any authorised process.</p> <p>The Applicants consider that the authorisation is consistent with Article 5.3 (discussed further below) and provides for a transparent process to be applied.</p>
Process and timeframe	<p>The ACCC undertakes a transparent process to assess the application including consulting with interested parties.</p> <p>Submissions on the application are published on the ACCC website.¹²</p> <p>The ACCC made its draft decision in December 2016, with the final decision due in February 2017. The ACCC will undertake further consultation prior to finalising its decision.</p>

3. WHO Framework Convention on Tobacco Control Article 5.3 application

BATA notes that Australian government departments and agencies have referred to the need to ensure that any engagement with the tobacco industry, including on illicit tobacco matters, takes into account Article 5.3 of the WHO FCTC. The WHO FCTC sets out the framework for regulatory tobacco control measures to be implemented to reduce tobacco use and exposure to tobacco smoke. Article 5.3 states that:

¹² <http://registers.accc.gov.au/content/index.phtml/itemId/1198125/fromItemId/278039/display/submission>

“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”

BATA submits that there needs to be consistency in the application of Article 5.3, in accordance with its intent to protect the development and implementation of public health policies.

In regulatory policy development, it is most effective when all stakeholders are engaged and provided with the opportunity to contribute their expertise and unique insights. Article 5.3 does not prohibit industry engagement with governments and should not be interpreted as limiting the ability for industry to contribute to robust debates on relevant policy issues in open and transparent processes. It is also noted that industry engagement is a key strategy of the Department of Immigration and Border Protection. Its ‘Industry Engagement Strategy 2020’ “reaffirms [its] commitment to working with industry in strategy, forward-focused partnership”.¹³

Further, Article 5.3 applies only to the setting of public health policies and therefore may not be relevant to the consideration of anti-illicit tobacco initiatives or actions under commercial law (for example the ACCC application discussed above). If effective, anti-illicit tobacco initiatives would likely enhance the effectiveness of public health policies, such as supporting the awareness of graphic health warnings. In the case of combating illicit tobacco, the interests of industry and government are aligned. That is, BATA and the government have the same objective of reducing the availability and supply of illicit tobacco to consumers.

In Australia there are cooperative arrangements whereby BATA, and other tobacco companies, have been cooperating with a number of government agencies under transparent and well-defined processes. These include participation in the Department of Immigration and Border Control’s Tobacco Industry Advisory Group and the Australian Taxation Office’s Tobacco Stakeholders Working Group.

4. National Anti-Illicit Tobacco Strategy

The HM Revenue and Customs (HMRC) and Border Force (UK) has in place a national anti-illicit tobacco strategy “Tackling illicit tobacco: from leaf to light”. The strategy sets out the HMRC and Border Force’s direction and approach to tackling tobacco smuggling in the UK.

Provided for the Committee’s review and consideration in **Attachment 2**, the UK anti-illicit tobacco strategy recognises that tobacco excise fraud is a crime depriving the government of revenue in addition to damaging legitimate businesses, undermining public health and facilitating the supply of tobacco to young people.

The UK strategy is updated on a regular basis and sets out how the HMRC and Border Force continue to target, catch and punish those in the illicit tobacco trade, and report on the progress of their activities. Each update takes into consideration the latest developments to ensure the applicability and effectiveness of the strategy. Key aims of the latest strategy include intelligence sharing and

¹³ Department of Immigration and Border Protection, Industry Engagement Strategy 2020 (Trade, Customs and Traveller) (2015), p. vi.

policy change; tackling fraud at all points in the supply chain; raising public awareness; and optimising the use of sanctions and toughening them where necessary.¹⁴

BATA requests that the Committee consider establishing a national anti-illicit tobacco strategy for Australia. A national strategy would likely provide a number of benefits including:

- **Direction and mandate:** a strategy could clearly articulate the policy objectives of government and, importantly, identify and set the government’s priorities.
- **Clarity to agencies:** a strategy could provide clarity to each Department and agency and their respective roles in driving reform and legislative change. This would be particularly beneficial given our legislative framework and the number of agencies responsible for different aspects of enforcement and operations.
- **Enhance collaboration and cooperation:** a strategy could allow more coordinated collaboration and cooperation between governments, industry and the community.
- **Provide an implementation plan or roadmap:** ideally a strategy would also set out an implementation plan or roadmap to identify a clear plan for the achievement of the government’s objectives.
- **Engagement and education:** a strategy could enhance the ways in which industry and the community can engage with government on relevant issues and to reduce the tolerance of illicit tobacco among some retailers and the community.

Such a strategy should be developed in consultation with interested parties, including industry, and could be a tool that government can use on an ongoing basis to ensure that its priorities are met.

5. Harmonisation and enhancement of State and Territory legislative arrangements

In addition to potential enhancements to the Commonwealth legislative framework, as discussed above, there are State and Territory legislative arrangements that could be enhanced.

BATA proposes that enhancing and harmonising State and Territory legislative frameworks be considered to ensure the most efficient and effective operation of State laws. Such reform would clarify the role of State agencies to respond to the importation, use, manufacture, distribution, supply and domestic growth of illicit tobacco. Such reform could be conducted under a Council of Australian Governments process. Potential areas for consideration are outlined in the table below.

Table 3: Harmonisation of State and Territory arrangements – some potential areas for review

Area for review	Summary
Fair trading / Prohibition of illicit tobacco	Most State and Territories have fair trading laws and tobacco specific legislation that may apply to illicit tobacco. However, Queensland tobacco-specific legislation only prohibits smokeless illicit tobacco products (e.g. snuff or chewing tobacco). Otherwise Queensland legislation does not criminalise illicit tobacco generally.

¹⁴ HMRC & Border Force, Tackling illicit tobacco: from leaf to light (2015), p. 5.

Area for review	Summary
Criminalisation	<p>State drug trafficking and misuse laws do not apply to tobacco. However laws apply to certain plants such as cannabis. Accordingly, the principles in these laws insofar as they apply to banned plants may, with some minor change, be extended to illicit tobacco.</p>
Specific illicit tobacco legislation and consistency with Commonwealth provisions	<p>Victoria has enacted legislation specifically targeting illicit tobacco. However, there are some terminology inconsistencies with the Customs Act that should be clarified. Such clarification would enable more effective enforcement and prosecution. Western Australia also has some similar provisions to Victoria. New South Wales also has provisions that allow inspectors a power to seize illegal tobacco found in retail tobacco stores over prescribed quantities.</p>
Enforcement	<p>The enforcement of the State based provisions vary markedly. Reforms to ensure enforcement officers have appropriate clarity and to provide harmonisation should be considered.</p>