Annex 1

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RESPONSE OF BAT SINGAPORE TO THE PUBLIC CONSULTATION PAPER ON POTENTIAL TOBACCO CONTROL POLICIES

29 MARCH 2016

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INTRODUCTION

This submission by British American Tobacco ("**BAT**") Singapore (the "**Response**") responds to the Public Consultation Paper on Potential Tobacco Control Policies, issued by the Ministry of Health, the Health Protection Board and the Health Sciences Authority (the "**Consultation**").

British American Tobacco Singapore is a member of the British American Tobacco group of companies and is responsible for the importation, distribution and sale of tobacco companies in Singapore. BAT Singapore has an approximate 23 % share of the Singapore market. BAT Singapore currently supplies 10 brands in Singapore, including brands such as Dunhill, Lucky Strike, Pall Mall and Viceroy.

The Consultation seeks the public's views on the following:

1. reducing the appeal of tobacco products through standardised packaging;
2. enhancing graphic health warnings ("**GHWs**");
3. restricting the sale of flavoured tobacco products; and
4. increasing the minimum legal age ("**MLA**") for the purchase, possession and use of tobacco in Singapore, from 18 to 21 years old.

As explained in detail in this Response, BAT Singapore is strongly opposed to the tobacco control measures being studied for potential implementation as set out in the Consultation document.

EXECUTIVE SUMMARY

BAT Singapore opposes the potential tobacco control measures raised in the Consultation to introduce standardised packaging; further increase the size of GHWs; ban all flavourings including traditional flavourings such as menthol; and increase the MLA for tobacco products to 21 (together the "**Proposals**") on a number of grounds, including:

1. THE GOVERNMENT HAS NOT YET UNDERTAKEN A REGULATORY IMPACT ANALYSIS

The enactment of effective and evidence-based regulation which meets public health objectives and respects Singapore's legal framework and international obligations is central to its reputation as a top international trade and investment hub.

However, the Government has not yet undertaken any assessment or studies to assess the efficacy of the existing tobacco control regulations in Singapore and identify any problems with them that would be rectified by the Proposals. The Government merely proposes measures based on foreign countries and studies without any consideration of whether the Proposals are lawful, necessary and would be effective in Singapore. The lack of a proper evidence-based regulatory impact analysis means that the Government cannot properly scrutinise the Proposals.

2. THE PROPOSALS ARE INCONSISTENT WITH EXISTING TRADING ENVIRONMENT

The Proposals would also represent a fundamental shift in Singapore's attitude towards intellectual property and property rights generally. Adopting the Proposals would diminish the reputation of Singapore as an international trading centre which supports and protects intellectual property and investment. Its implications would also extend beyond the tobacco industry. Industries that sell other consumer products that pose health risks would also become targets for similar policies.

3. THE PROPOSALS WOULD PLACE THE SINGAPORE GOVERNMENT IN BREACH OF ITS INTERNATIONAL OBLIGATIONS

The Proposals would violate Singapore's international obligations under World Trade Organization ("**WTO**") Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**"), the Agreement on Technical Barriers to Trade ("**TBT Agreement**") and the General Agreement on Tariffs and Trade 1994 ("**GATT**"). Further, certain companies within the BAT Group hold significant investments in Singapore that are protected under Bilateral Investment Treaties ("**BITs**"). The Proposals would breach these treaties, damaging Singapore's international reputation and putting the Government at risk of legal awards requiring it to repeal the legislation and/or pay substantial sums in compensation.

4. THE PROPOSALS ARE MANIFESTLY DISPROPORTIONATE

The interference resulting from the Proposals goes to the very essence of the fundamental rights protected by the Constitution and so the requisite thresholds for justification and proportionality are at their highest. The Proposals are not necessary. There is already universal awareness of the risks of smoking in Singapore and laws in place do prevent minors from purchasing cigarettes. Evidence also demonstrates that the Proposals would not be effective in reducing smoking prevalence amongst youth or otherwise.

The Proposals must also be considered against the background of the existing comprehensive ban on tobacco advertising and promotion in Singapore, existing 50% GHWs on tobacco packaging, and the current MLA of 18. Packs, and the trademarks used on them, are to all practical purposes the only means by which manufacturers can identify and differentiate their products from those of their competitors. It is clear that measures such as standardised packaging and further increasing the size of GHWS, which cannot be shown to be effective, and that would virtually extinguish this last means of communication for a lawfully available product, while resulting in adverse consequences in respect of pricing, the illicit market and public health, cannot be justified or proportionate.

The Proposals are also likely to have serious adverse consequences which undermine the public health objective, including:

- exacerbating a serious illicit trade problem in Singapore;
- stimulating price competition leading to downtrading to cheaper products, which may in turn lead to an increase in consumption;
- distorting competition and raising barriers to entry; and
- stifling innovation.

5. THE PROPOSALS WOULD EXACERBATE AN ALREADY SIGNIFICANT ILLICIT TRADE PROBLEM IN SINGAPORE

Singapore already has one of the highest rates of illicit cigarette consumption in the Asia markets. The Proposals will give this very significant problem the opportunity to grow to unprecedented levels, including that the Government could stand to lose revenue of almost SG$600 million[1] per annum in accordance with the current market share of mentholated cigarettes if they were banned.

An increase in illicit tobacco would also undermine public health by:

- supplying tobacco products to minors;

[1] Estimate based upon menthol prevalence and Singapore Customs revenue statistics, available at: http://www.customs.gov.sg/news-and-media/publications/statistics

- increasing smoking prevalence through the supply of cheap products; and
- exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

It would be manifestly inappropriate for the Government to even consider introducing the Proposals without having properly considered the risks of increasing the level of illicit trade and the fact that the proceeds of illicit trade are funnelled toward organised crime and potential terrorist activity.

6. THERE ARE A NUMBER OF ALTERNATIVE EVIDENCE-BASED OPTIONS THAT ARE PROPORTIONATE, EFFECTIVE, WORKABLE AND CAN ACHIEVE PUBLIC HEALTH OBJECTIVES

Given all of the difficulties associated with pursuing the Proposals, we strongly recommend that the Government consider the following alternative measures to achieve its public health objectives. These alternatives (discussed in our Response) are:

- Implementing more targeted youth education programmes;
- Implementing a consistent tax policy;
- Increasing measures to prevent the trade of illicit tobacco;
- Enforcing existing laws forbidding retailers to sell to minors and/or the implementation of additional age verification measures;
- Exploring the use of more targeted warnings to address any perceived information deficits; and
- Using existing laws to address claims that particular trademarks used on tobacco packaging mislead consumers.

These measures have the capacity to significantly affect youth smoking rates without the implementation of illegal, disproportionate measures in breach of Singapore's international obligations.

A PROPER IMPACT ASSESSMENT IS REQUIRED BEFORE PROCEEDING WITH THE PROPOSALS

As further discussed in this Response, the Government has not undertaken any assessment or studies to assess the efficacy of the existing tobacco control regulations in Singapore and identify any problems with them that would be rectified by the measures proposed. The Government merely proposes measures based on foreign countries and studies without any consideration of whether the Proposals are lawful, necessary and would be effective in Singapore. Furthermore, as also outlined in this Response, the Proposals violate fundamental rights and are neither necessary (including because there is already universal awareness of the risks of smoking in Singapore) nor adequate as public health measures.

Accordingly, a regulatory impact assessment ("**RIA**") that undertakes a thorough analysis of the proposed measures, including whether they are necessary and whether there are less burdensome means of achieving the regulatory objective, ought to be undertaken to enable the Government to properly scrutinise the proposed measures.

An RIA is also the cornerstone of internationally accepted principles of Better Regulation, such as those defined by the Organization for Economic Co-operation and Development and the Asia-Pacific Economic Cooperation ("**APEC**") of which Singapore is a member. The APEC paper supporting the TBT Agreement with Good Regulatory Practices states: "*it is impossible to regulate well if the consequences of government action are not understood in advance. Understanding consequences of various options for action more clearly is the main purpose of RIA*".

The failure to undertake a proper evidence based RIA would violate these principles and would mean that the measure could not be shown to be justified or that the measures comply with the obligations under WTO Agreements such as the TRIPS Agreement and the TBT Agreement to "ensure" that requirements do not violate internationally protected intellectual property rights or constitute an "*unnecessary obstacle to trade*".

Accordingly, a proper RIA should be carried out before proceeding further with the Proposals.

QUESTION 1

Q1a. Do you support the idea that tobacco products should come in standardised packaging?

Q1b. If you answered no to Q1a, please state your reasons

Q1c. Do you think that standardised packaging will make tobacco products less attractive to potential buyers?

If you answered No to Q1c, please state your reasons

BAT Singapore strongly opposes the introduction of standardised packaging on the following grounds:

- Standardised packaging would impermissibly eviscerate the essential role of trademarks;
- Standardised packaging is unlawful;
- There is no problem that requires standardised packaging;
- Evidence from Australia shows that standardised packaging does not work;
- Standardised packaging is disproportionate and irrational;
- Standardised packaging violates Singapore's international obligations; and
- Standardised packaging is neither required nor authorised by the WHO Framework Convention on Tobacco Control ("**FCTC**").

In response to the question as to whether standardised packaging will make tobacco products less attractive to potential buyers, BAT Singapore also submits that:

- Standardised packaging will not make tobacco products less attractive to potential buyers; and
- "Attractiveness" is an illegitimate basis for regulation.

In addition, the Chantler Report relied on in the Consultation document cannot support the introduction of standardised packaging.

STANDARDISED PACKAGING WOULD IMPERMISSIBLY EVISCERATE THE ESSENTIAL ROLE OF TRADEMARKS

1.1 Trademarks are used by manufacturers as an essential tool to distinguish their goods from similar products. The function of trademarks is to indicate the source or origin of the product and to identify the product by distinguishing it from its competitors. Trademarks also symbolize a product's quality and features and guarantee that the goods or services measure up to expectation. Trademarks are essential for effective competition in the market, as they enable firms to uniquely identify and differentiate their products other than on the basis of

price alone. They are an important tool to permit market penetration and facilitate local and international trade. Trademarks can only perform these functions if they can be effectively used as they were registered.

1.2 Trademarks are often the most valuable asset that a manufacturer possesses. For manufacturers, the protection of the intellectual property rights afforded to trademark owners means that firms can invest in the trademark and the associated brand with confidence. In addition to firms' ability to obtain the benefits of its valuable asset sustained over time, it provides an incentive for firms to create greater value for all stakeholders including consumers.

1.3 The importance of trademarks to the global economy, is recognized by a recent report of the World Intellectual Property Organization, *World Intellectual Property Report 2013: Brands – Reputation and Image in the Global Marketplace.*[2] According to this report, the "public good" of trademarks exists in their functional use as a communication tool. The report notes that "*the trademark system provides the legal framework underpinning [consumer] confidence*", and "*trademarks play an important role in preventing market failure*". It concludes that "*society is bound to be worse off*" without the "*market-enabling role of trademarks*" as, without protected trademarks, consumers can no longer gain access to the product reputation mechanism to guide their brand selection and producers have a reduced incentive to invest in product differentiation, thus undermining product quality and diversity. This would gravely damage the interests of consumers in general.

1.4 The Government of Singapore clearly recognises the importance of intellectual property, including trademarks, which is reflected in its very strong reputation for protecting intellectual property. The website of the Government's Intellectual Property Office, states that "*International surveys consistently rank Singapore's IP regime as one of the best in the world*" and notes that Singapore is ranked fourth in the world and top in Asia for the best intellectual property protection in the World Economic Forum's Global Competitiveness Report 2015/2016 and that it was ranked as top in Asia for its intellectual property environment in the U.S. Global Intellectual Property Center's International IP Index 2015.[3]

1.5 In Singapore, the extensive ban on advertising and sponsorship of cigarettes means that the limited space available on cigarette packs for trademarks is the only tool manufacturers have to identify and differentiate their products from other competitive offerings. Standardised packaging will eliminate the use of trademarks and, in doing so, destroy their value. As a result, decades of investment in brands and their related trademarks, along with their inherent goodwill, will be lost.

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2 2013, World Intellectual Property Report, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf.

3 http://www.ipos.gov.sg/MediaEvents/SingaporesIPRanking.aspx accessed on 9 February 2016.

1.6 Brands including trademarks play an important role in the cigarette market, and their erosion or elimination changes the nature of the market. In general, markets without brands become price-driven commodity markets.

1.7 Commodity markets produce lower prices that encourage more consumption. Commodity markets also make the market inhospitable to firms trying to enter the market and for existing brands, particularly small brands, to compete for a greater market share. Commoditization of the cigarette market in Singapore and a shift to pure price driven competition could also lead to an increase in illicit trade because without the added value of brands, legitimate products will be less clearly differentiated from illicit products in terms of appearance and perceived value.

THERE IS NO PROBLEM THAT REQUIRES STANDARDISED PACKAGING

1.8 The Government must be able to identify a specific and addressable problem before it can show why standardised packaging is required and how it will address the problem identified.

1.9 Standardised packaging is not required because public awareness in Singapore about the risks of smoking cigarettes is effectively universal. Accordingly, there is no information deficit that requires the measure.

1.10 The high level of awareness in Singapore includes youth. This is demonstrated by the independent *2000 Global Youth Tobacco Survey* ("**GYTS**") for Singapore which found that 96.4% of respondents answered "*Definitely Yes*" (89.7%) or "*Probably Yes*" (6.7%) to the question "*Do you think cigarette smoking is harmful to your health?*" [4]

1.11 The high level of awareness of the risks of smoking in Singapore has also been documented in a study by Roxburgh et al. (2010)[5], which found that "*In both Singapore and Scotland, the awareness levels of the link between smoking and lung cancer were highest at over 95% (Table 2). This was followed by that of mouth and throat cancer, heart disease, and stroke, which were all over 85%.*"[6] Current warnings on cigarette packets that occupy 50% of the front and back surfaces of tobacco packaging also continue to reinforce the existing awareness of smoking risks.

1.12 These levels of awareness exist with branded packaging. Accordingly, it is clear that branded packaging does not prevent consumers from seeing and assimilating the health warnings or mislead consumers about the harmful effects of smoking. The removal of

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4 Singapore Global Youth Tobacco Survey 2000. Figures taken from "*GYTS2000 Singapore All Schools Region 1 – Web Codebook*"

5 Ng, D. H. L., Roxburgh, S. T. D., Sanjay, S., & Eong, K. A. (2010). Awareness of smoking risks and attitudes towards graphic health warning labels on cigarette packs: a cross-cultural study of two populations in Singapore and Scotland. Eye, 24(5), 864-868.

6 Ibid.

trademarks from packaging is not required to and, would not in any event, increase the effectiveness of health warnings.

1.13 It must also be noted that trademarks and packaging are not drivers of smoking behaviour. It is clear from numerous government funded studies that factors other than packaging are the real drivers of smoking behaviour. These studies have demonstrated that the real drivers of smoking initiation include factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price.[7] Similarly, the drivers of cessation are well known and do not include packaging. The known drivers of cessation are concerns about current or future health effects of smoking; the desire to set a good example for children; the cost of smoking; and pressure from family and friends to quit.[8] None of these relate to cigarette packaging.

1.14 BAT Singapore submits with this Response an expert report from Dr Neil McKeganey, Director, Centre for Drug Misuse Research, Glasgow, who has undertaken research for a wide range of bodies including the WHO and the UK Department of Health as Appendix 2 to this Response.[9] BAT United Kingdom has previously submitted this analysis, which crucially analyses the evidence that standardised tobacco packaging will reduce smoking prevalence in the United Kingdom, in the framework of the 2014 consultation on the introduction of regulations for the standardised packaging of tobacco products in the UK. In this report, Dr McKeganey concludes:

"*The hypothesis, therefore, that plain tobacco packaging will reduce smoking prevalence and tobacco consumption has, to date, simply not been demonstrated or borne out by the evidence. Indeed, three decades and hundreds of studies of predictors/risk factors for smoking initiation, cessation and relapse have not identified packaging as a factor that influences people's decisions to start, stop, or re-start smoking.*"[10]

1.15 This report further explains that:

"*The appeal of branded packaging is not empirically-supported as a factor that increases the likelihood of smoking initiation during adolescence; there is currently no empirical basis, therefore, from which the UK Government can confidently expect that reducing the*

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7 See, e.g., "Smoking, drinking and drug use among young people in England in 2012" Editor: E Fuller, London: National Centre for Social Research, (2013); US Government and Human Services. "Preventing tobacco use among young people: A report of the Surgeon General". (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use); *see also* US Government and Human Services. "Preventing tobacco use among youth and young adults: A report of the Surgeon General" (2012), at Ch. 4 (reinforcing findings of 1994 Surgeon General's report with added emphasis on individual cognitive processes).

8 See, e.g., M.T. Halpern and K.E. Warner, "Motivations for Smoking Cessation: A Comparison of Successful Quitters and Failures," Journal of Substance Abuse, Vol. 5 (1993), p. 247.

9 N. McKeganey, "A Critical Analysis of Evidence that Standardised Tobacco Packaging Will Reduce Smoking Prevalence in the United Kingdom." Appendix 2.

10 *Ibid.* at p. 10.

appeal/attractiveness of tobacco packaging via standardised packaging will reduce the rate of smoking initiation by young people. More critically for public health, such action would not address the factors that do motivate young people to start smoking."[11]

1.16 Furthermore, existing laws are sufficient to meet any demonstrable concerns regarding deceptive packaging so that standardised packaging is not required. The existing protections against misleading communications on the packaging of tobacco products[12] under Singapore law are sufficient to address the types of allegedly misleading elements intended to be addressed by standardised packaging, while also respecting the choices and rights of adults who choose to use tobacco products and allowing tobacco manufacturers, as a part of a legal industry, to communicate with consumers

1.17 Given the absence of any problem requiring standardised packaging, the measure is disproportionate as it cannot be necessary or serve a legitimate objective.

STANDARDISED PACKAGING IS INCONSISTENT WITH EXISTING TRADING ENVIRONMENT

1.18 Standardised packaging is inconsistent with the existing trading environment because:

1.18.1 it restricts freedom of expression by impairing the ability of manufacturers to communicate with adult consumers about the origin, quality and other points of differentiation and innovation regarding their products; and

1.18.2 it amounts to a devaluation of BAT's property rights in its trademarks, as well as its copyright, patents and designs incorporated in the packaging, together with the goodwill arising in the brand by rendering them irrelevant; and

Restriction of Freedom of Expression

1.19 Standardised packaging would restrict BAT Singapore's freedom of expression by:

1.19.1 impairing BAT Singapore's ability to communicate with adult consumers about the origin, quality and other points of differentiation and innovation regarding their products; and

1.19.2 forcing BAT Singapore to disparage its product and brands.

1.20 The impact of standardised packaging must be considered in a context where:

1.20.1 the packaging of the tobacco-based products is the only means of communication between BAT Singapore and its consumers, since the *Tobacco (Control of Advertisements and Sale) Act* prohibits any other form of promotion of tobacco products; and

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[11] *Ibid.* at p. 40.

[12] Tobacco (Control of Advertisements and Sale) Act (Cap. 309), Consumer Protection (Fair Trading) Act (Cap. 52A), Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap. 52)

1.20.2 the physical size of the packaging of tobacco products is small and the current warnings on cigarette packets that occupy 50% of the front and back surfaces of tobacco packaging leave very little space for the display of trademarks.

1.21 In order to serve as a source and quality identifier, a sign must be easily identifiable and visible on the pack space. Although there is still room left for applying restricted word marks on the cigarette pack, their ability to effectively communicate the commercial origin and the quality of the underlying product would also be destroyed.

Devaluation of Property Rights

1.22 Standardised packaging devalues BAT's and other rights holders' property rights in their trademarks, as well as in copyright incorporated in the packaging, together with the goodwill arising in its brands.

1.23 Standardised packaging would prohibit manufacturers from using virtually all of their trademarks as registered (including logos and labels). The value of these trademarks would thus be eliminated. Only the use of some word marks would still be allowed, but in a standardised form and without any graphical elements - preventing them from being able to adequately serve their essential functions of differentiating products and uniquely identify their origin and quality. As a result, BAT Singapore would be unable to use and control its trademarks on its packaging anddecades of investment in trademarks and their related brands, along with the associated goodwill, would be destroyed.

1.24 Moreover, standardised packaging would confiscate manufacturers' cigarette packages. The ability of a manufacturer to control the form, appearance, and content of material printed on cigarette packs that they own, is another aspect of the bundle of proprietary rights comprising ownership of the packet. Therefore, in addition to depriving manufacturers of their trademarks and associated goodwill, standardised packaging would also deprive manufacturers of their proprietary interest in their cigarette packets.

1.25

STANDARDISED PACKAGING DOES NOT WORK

1.26 Australia is the only country in the world to have implemented standardised packaging to date. Australia is therefore the only country in the world with real-world evidence of whether standardised packaging is an effective policy measure. The evidence from Australia's experience with standardised packaging shows that it is an ineffective policy measure that has not achieved any of the Australian Government's stated objectives.

1.27 Given that the measure has failed to demonstrate that it has achieved any of its objectives in Australia, it cannot be considered that it would be any more effective if it is adopted in Singapore.

1.28 In particular, the evidence from Australia shows that more than 3 years after the introduction of standardised packaging:

1.28.1 There has been no acceleration in the long-term smoking rate decline since standardised packaging was introduced;

1.28.2 Youth smoking rates have not reduced between 2010 and 2013;

1.28.3 There has been no reduction in the percentage of all smokers who are daily smokers in New South Wales, Australia's most populous state;

1.28.4 There has been no acceleration in the long-term trend of declining volume sales since standardised packaging was introduced;

1.28.5 Standardised packaging has not increased the effectiveness of health warnings;

1.28.6 Standardised packaging is associated with a relative reduction in the prices of cigarettes; an increase in the consumption of cigarettes; and an acceleration in the shift from premium to non-premium brands in Australia; and

1.28.7 There has been a 25% increase in illegal tobacco since the introduction of standardised packaging.

There has been no increase in the rate of decline of smoking in the Australian population

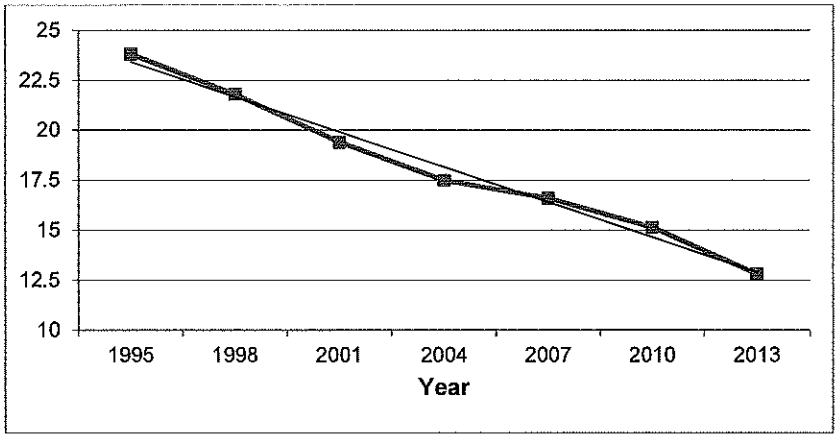
1.29 The Australian Government said that standardised packaging was required to reduce smoking rates. In the 3 years following the introduction of standardised packaging in Australia, there has been no increase in the rate of decline of smoking in the Australian population.

1.30 This lack of any observed impact on the long-term rates of smoking in Australia can be seen in a number of different data sources.

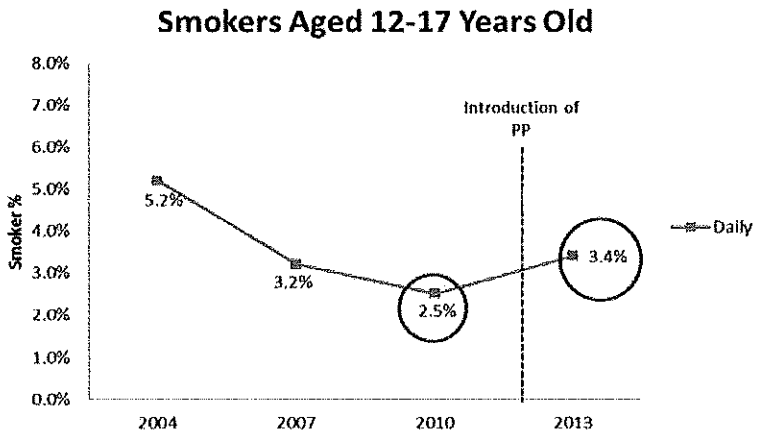
Australian National Drug Strategy Household Survey

1.31 The Australian Federal government's National Drug Strategy Household Survey ("**ANDSHS**") data shows that smoking prevalence has been declining steadily since 1995 and the proportion in 2013 is almost exactly on the long-term trend-line (despite a 25% tax increase on tobacco in 2010). Accordingly, this data does not provide any evidence of an additional effect from standardised packaging.

Daily smokers aged 14 years or older 1995-2013 (per cent)



1.32 The ANDSHS data also shows an increase in the rate of under-age smoking. Following the introduction of standardised packaging, the number of daily smokers aged 12 to 17 years appears to have increased between 2010 and 2013 to its highest level in more than 6 years.

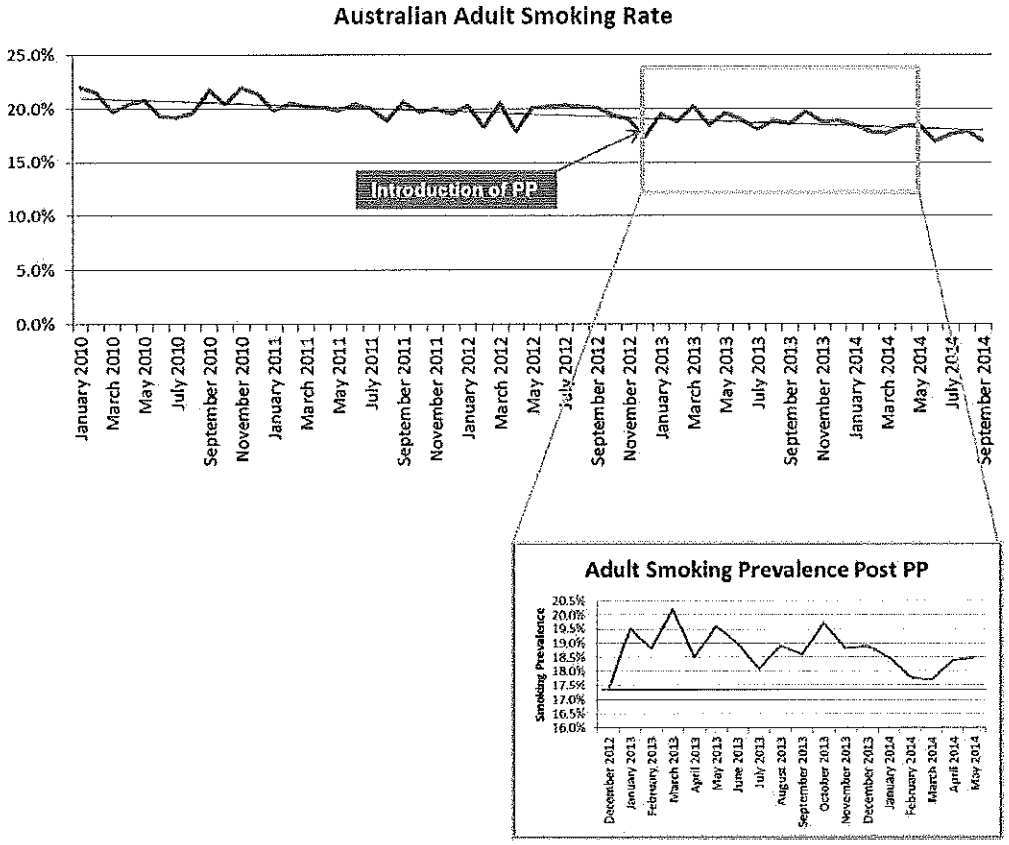


The percentage of occasional smokers aged 12-17 also increased from 1.3% in 2010 to 1.6% in 2013. While not statistically significant the fact remains that this data is not supportive of standardised packaging leading to fewer adolescents taking up smoking.

Roy Morgan Research Survey

1.33 Roy Morgan Research figures for the Australian adult (18+) smoking rate also show a long-standing declining trend that has not accelerated since the introduction of standardised packaging (see graph below). In fact, the trend for the year 2013 shows a 1.8% annual increase in smoking rates.

1.34 It could be presumed that a revolutionary measure such as standardised packaging would be at its most impactful in the first 12 months of implementation yet in this period the smoking rate was higher than the day the policy was implemented.

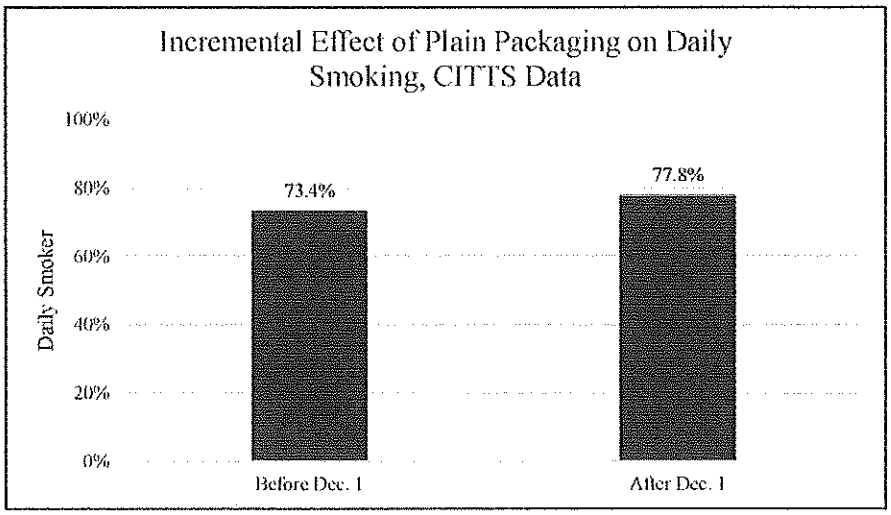


The proportion of daily smokers has not changed

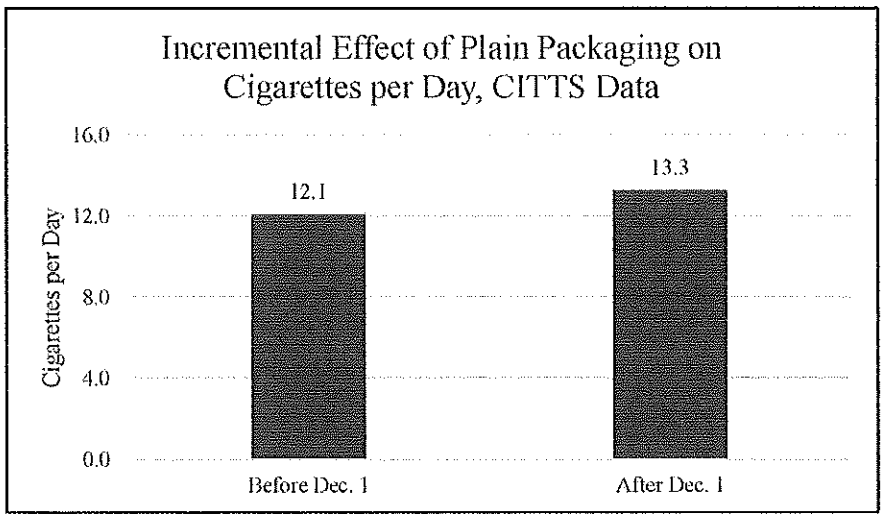
1.35 BAT has commissioned an expert report of Professor Kip Viscusi, Distinguished Professor of Law, Economics and Management, Vanderbilt University Law School, Nashville United States, an expert on hazard warnings and how they affect consumer behaviour, which was submitted in Australia's Post-Implementation Review ("**PIR**") of standardised packaging. Professor Viscusi reviewed the data from two key surveys on Australian smokers' beliefs and behaviours before and after the advent of the standardised packaging policy which are relied on in a number of the studies that have been published following the implementation of standardised packaging in Australia, i.e. the Cancer Institute New South Wales Tobacco Tracking Survey ("**CITTS**") and the National Tobacco Plain Packs Tracking Survey ("**NTPPTS**"). **A copy of Professor Viscusi's expert report is provided as Appendix 3 to this Response.**

1.36 Professor Viscusi's analysis of the CITTS data shows that after the implementation of standardised packaging in Australia:

- There has been an increase in the intensity of smoking behaviour by those surveyed, with more smokers reporting that they are daily smoking;[13] and



- The number of cigarettes smoked per day by those surveyed increased.[14]

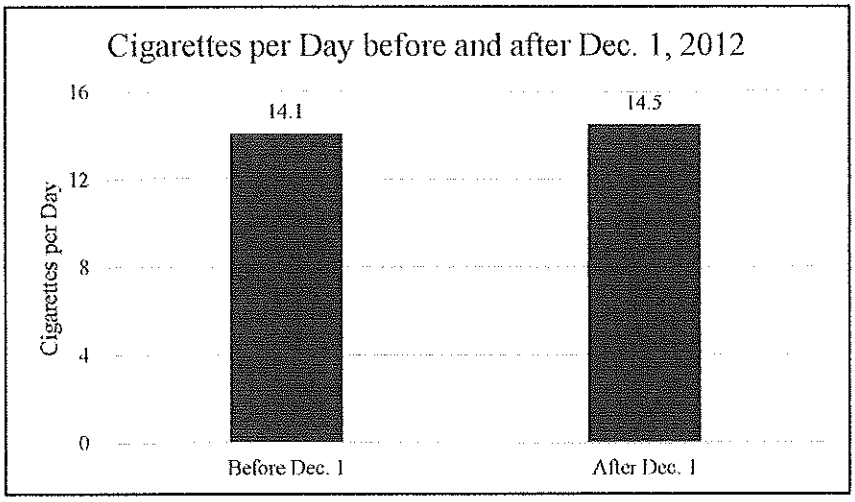


13 W. Kip Viscusi, Analysis of CITTS data and NTPPTS data – a report for the post-implementation review: 3 November 2015. Appendix 3.

14 Ibid.

1.37 Analysis of the NTPPTS data presented by Professor Viscusi also demonstrates that after the implementation of standardised packaging in Australia:

- The number of cigarettes smoked per day by those surveyed increased.[15]



1.38 Professor Viscusi also reports that in a study of the NTPPTS data undertaken by Scollo et al. (2015),[16] the authors also concluded that standardised packaging had not impacted on consumption.[17] The authors state that:

> *"Among daily cigarette smokers, there was no change in consumption between pre-[plain packaging] and the transition phase or [plain packaging] year 1 period...Nor was any change detected when mean daily consumption was analysed among regular smokers...Mean daily consumption also did not change from the pre-[plain packaging] to subsequent two phases among current smokers...Furthermore consumption did not change from pre-[plain packaging] to the subsequent two phases among current smokers of brands of any market segment..."*[18]

The effectiveness of health warnings has not increased

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15 Ibid.

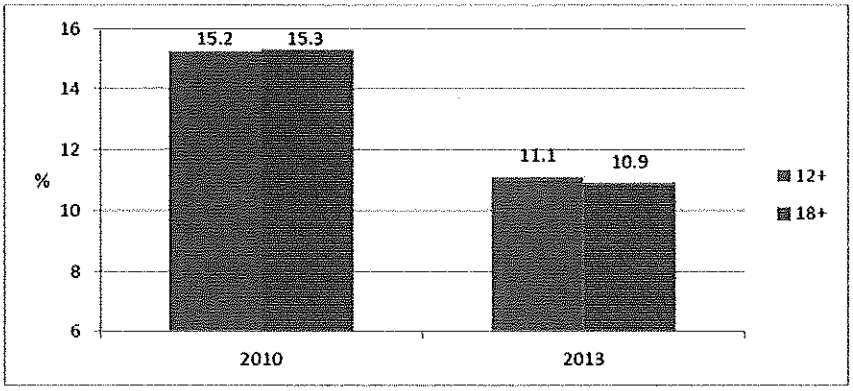
16 Michelle Scollo, Meghan Zacher, Kerri Coomber, Megan Bayly, and Melanie Wakefield, "Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption Following the Introduction of Plain Packaging in Australia," *Tobacco Control* 2015;24:ii66-ii75.

17 Ibid.

18 Ibid, at ii73.

1.39 The detailed report of the ANDSHS[19] analyses the principal reasons for which smokers tried to stop smoking or change their tobacco consumption in 2013 in comparison to 2010. As illustrated 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 for all respondents (aged over 12) and from 15.3% to 10.9% for respondents aged over 18. This suggests that GHWs were less effective in inducing smokers to quit after the introduction of standardised packaging.

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



1.40 Analyses of the CITTS and NTPPTS data presented by Professor Viscusi also demonstrates that the implementation of standardised packaging in Australia has not increased the effectiveness of GHWs. Professor Viscusi's analysis of the CITTS data shows that after the implementation of standardised packaging in Australia more smokers now believe that:

- health warnings exaggerate the health effects of smoking;
- the government pesters people too much about smoking risks;
- the health effects of smoking are exaggerated; and
- smoking is only harmful to heavy smokers.[20]

1.41 Professor Viscusi's analysis of the NTPPTS data also shows that after the implementation of standardised packaging in Australia:

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19 *National Drug Strategy Household Survey detailed report: 2013*, Drug statistics series no. 28, Australian Institute of Health and Welfare, Nov. 2014 http://www.aihw.gov.au/publication-detail/?id=60129549469.

20 W. Kip Viscusi, Analysis of CITTS data and NTPPTS data – a report for the post-implementation review: 3 November 2015. Appendix 3.

- there has been no statistically significant impact on beliefs regarding the harmfulness of cigarettes; and
- more smokers believe that smoking does not affect their health at all.[21]

The introduction of standardised packaging has not encouraged smokers to stop smoking

1.42 Professor Viscusi's analysis of the CITTS and NTPPTS data also indicates that standardised packaging has not increased quit-related behaviours. Professor Viscusi's analysis of the CITTS data shows that after the implementation of standardised packaging in Australia:

- respondents rate it significantly more difficult to quit both in terms of how difficult it would be to quit and how difficult they thought it would be to quit;
- respondents are significantly less confident that they can quit; and
- there were no statistically significant effects of standardised packaging on the perceived difficulty of the last quit attempt or confidence that they can stay as quitters.[22]

1.43 Professor Viscusi's analysis of the NTPPTS data also shows that after the implementation of standardised packaging in Australia there is:

- a decline in respondents' rating of the importance of quitting;
- a decrease in respondents' intention to quit in the next month;
- no change in the fraction of respondents who have ever attempted to quit smoking;
- no change in the number of days since respondents' last quit attempt; and
- a decrease in smokers stubbing out their cigarette after thinking about the harms of smoking.[23]

Lack of effect on the trend of legal trading volumes

1.44 InfoView industry exchange of sales data demonstrate that legal volumes of tobacco in Australia increased by the equivalent of 59 million sticks in the first 12 months following the implementation of standardised packaging (which is the only period of time when there was standardised packaging without the influence of the additional large excise increases introduced from December 2013). This reversed a multi-year trend of volume decline in legal Australian tobacco product sales; between 2004 and 2012 the volume of factory-made cigarettes and roll-your-own/loose tobacco sold in Australia declined at an average rate of 3.0% per year. Data from 2014 indicates that, after a large excise increases in December

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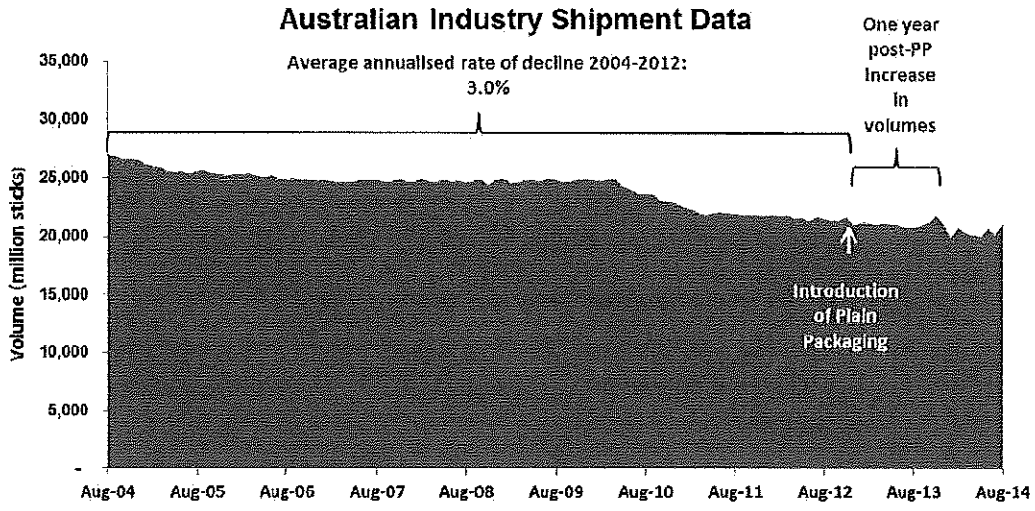
21 W. Kip Viscusi, Analysis of CITTS data and NTPPTS data – a report for the post-implementation review: 3 November 2015. Appendix 3.

22 Ibid.

23 Ibid.

2013 and September 2014 on top of regular bi-annual increases, volumes have reverted to this trend.



There have been a number of unintended consequences that undermine the public health objective

Standardised packaging is associated with a relative reduction in the prices of cigarettes; an increase in the consumption of cigarettes; and an acceleration in the shift from premium to non-premium brands in Australia.

1.45 Standardising packaging prevents manufacturers from being able to differentiate their products and will make the packages all look the same. Without the ability to differentiate or offer the quality and value attributes created by trademarks and the brands they represent, tobacco products would become increasingly standardised and manufacturers would only be able to compete on price. As such, price competition, which is already extremely vigorous in the tobacco market, would become even more intense leading to further price reductions.

1.46 The impact of reduced prices is likely to increase consumption, especially among price-sensitive consumers, as tobacco products become more affordable. This would undermine the public health objective of reducing smoking prevalence.

1.47 By implementing measures that distort competition, standardised packaging would also betray Singapore's policy to facilitate fair competition, as inferred from the Competition Act 2004. We refer again to Singapore's long-standing reputation for economic freedom and a supportive business friendly environment which will be damaged by measures that undermine competition and business investment.

1.48 BAT commissioned an expert report of Neil Dryden of Compass Lexicon in November 2015, analysing the impact of standardised packaging on price, consumption and downtrading, using data up to and including May 2015, i.e. two and a half years after the implementation of standardised packaging in Australia. Mr Dryden's expert report was submitted in Australia's PIR of standardised packaging. **A copy of Mr Dryden's expert report is included as Appendix 1 to this response.**

1.49 In order to analyse the impact of standardised packaging in Australia, Mr Dryden undertakes an analysis using the position in New Zealand as a benchmark comparator. Mr Dryden's empirical analysis shows that:

1.49.1 Standardised packaging is associated with a reduction in the pre-tax prices of cigarettes in Australia relative to New Zealand;

1.49.2 Standardised 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

1.49.3 Standardised packaging is associated with acceleration in the trend of downtrading.[24]

There has been a 25% increase in illegal tobacco since the introduction of standardised packaging

1.50 A 2014 KPMG report shows that the volume and market share of illegal tobacco in Australia has increased significantly since the introduction of standardised packaging. From 2012 to 2014, annual illegal volumes increased by 500,000 kilograms. This resulted in an increase of nearly 25% in illegal tobacco's market share - from 11.5% in 2012 to 14.3% midway through 2015.[25]

STANDARDISED PACKAGING IS DISPROPORTIONATE AND IRRATIONAL

1.51 As discussed earlier in this Response, BAT Singapore exhort the need to undertake a thorough regulatory impact assessment to determine, amongst other things, if the proposed measures are necessary and if there are less burdensome means of achieving the regulatory objective. As part of the RIA to be undertaken, it is therefore necessary to examine the principles of proportionality and BAT Singapore proposes that the requirements applicable to administrative acts be applied in this instance. The requirements are as follows:

1.51.1 there must be a legitimate aim for the measure;

1.51.2 the measure must be suitable or appropriate to achieve the objective pursued;

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24 Neil Dryden, (2015) The impact of tobacco plain packaging in Australia: an update report for the Post-Implementation Review. Appendix 1.

25 KPMG Illicit Trade in Australia 2015 Half Year Report, 9 October 2014.

1.51.3 the measure must be necessary to achieve the aim;

1.51.4 the burden imposed by the measure must not be disproportionate, *stricto sensu.*

1.52 In this case, the proportionality of the interference must be judged against the background of the existing comprehensive ban on tobacco advertising in Singapore. Packs, and the trademarks used on them, are for all practical purposes the only means by which manufacturers can differentiate their products from those of their competitors.

1.53 The first step in the analysis must be to clearly identify the inadequacies in the existing state of affairs which need to be rectified. A problem must be identified which specifically requires the proposed measures as opposed to other tobacco control measures. However, as discussed above, The Government has not identified a problem that requires standardised packaging. Given the absence of any problem requiring standardised packaging, the measure is disproportionate as it cannot be necessary or serve a legitimate objective.

1.54 In addition, standardised packaging is a disproportionate and irrational measure on each of the following grounds:

1.54.1 Standardised packaging is not necessary because:

(A) As noted above, the risks of smoking have been universally known in Singapore for decades and branded packaging does not neutralise consumers' existing awareness of the risks of smoking;

(B) It is clear from numerous government-funded studies that factors other than branded packaging are the real drivers of smoking behaviours; and

(C) Existing regulation already prohibits the use of any misleading and deceptive terms on tobacco packaging.

1.54.2 Standardised packaging is not appropriate because:

(A) As explained at paragraphs 1.26-1.50 above, the objective evidence to date about actual smoking behaviour in Australia shows that, as expected, standardised packaging has not reduced smoking behaviour and, if anything, appears to have had unintended and undesirable consequences, such as increasing illicit trade.

1.54.3 Standardised packaging is disproportionate because:

(A) It is impossible on the evidence currently available to justify standardised packaging, and the Government offers insufficient evidence to support its introduction;

(B) It is a wholesale expropriation of an industry's brands and trademarks and also represents an unprecedented assault on commercial expression, which cannot be justified; and

(C) Existing warnings that occupy 50% of the front and back of cigarette packages, along with existing laws that prevent false or misleading trade descriptions of goods, are sufficient to meet any demonstrable concerns regarding packaging while also respecting the rights of adults who choose to use tobacco products and allowing manufactures, as a part of a legal industry, to communicate product information to consumers. Enforcement of these laws should be undertaken, if required, before introducing more unnecessary regulation.

(D) There are a number of alternative regulations that are more effectively targeted to reducing youth smoking. For example:

- Greater enforcement of existing laws forbidding retailers to sell to minors and/or the implementation of additional age verification measures. In 2015, only 17 retailers [26] were penalised for breaches of their license conditions such as selling to underage youth. Given the Government's clear concern for youth access to tobacco, greater enforcement of suppliers would significantly curtail youth purchases;
- Implementing more targeted youth education programmes aimed at preventing young people from taking up smoking. A significant body of research, including research by the Nobel prize-winning economist James Heckman, establishes that early childhood interventions that affect personality traits and cognitive skills supportive of health can be effective policy tools in preventing unhealthy behaviour, such as smoking;[27]
- Implementing a consistent tax policy that discourages youth uptake of smoking while disincentivising adult consumers from purchasing illicit products;
- Increasing measures to prevent the trade of illicit tobacco;
- Exploring the use of targeted warnings to address any perceived information deficits. To the extent that the Government is concerned about any specific information deficits about the health

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26 HSA list of suspended/revoked tobacco licenses, available at: http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Tobacco_Control/List_of_Suspended_Revoked_Licences.html.

27 Heckman J. "Skill formation and the economics of investing in disadvantaged children" Science, 312(5782), 1900-1902 (2006); Feeny T. "The case for investing in early childhood. A snapshot of research by Professor James Heckman (University of Chicago, USA) and Dr. Richard Tremblay (University of Montreal, Canada)", (April 2006).

risks of smoking (despite the well-established nature of the public's awareness of these risks), it can remedy these concerns through focussed warning messages that would provide the appropriate, purportedly "unknown" information to targeted populations; and

- Using existing laws to address claims that particular trademarks or colours used on tobacco packaging mislead consumers. As already noted above existing regulation already prohibits the use of any misleading and deceptive terms on tobacco. The Government should not be introducing additional regulation when there is already regulation that can be enforced.

The implementation of these measures has the capacity to significantly affect youth smoking rates without the implementation of illegal, disproportionate measures in breach of Singapore's international obligations.

STANDARDISED PACKAGING VIOLATES SINGAPORE'S INTERNATIONAL OBLIGATIONS

1.55 Standardised packaging violates Singapore's international obligations under:

1.55.1 WTO Agreements; and

1.55.2 Bilateral Investment Treaties ("**BITs**").

World Trade Organization Agreements

1.56 Standardised packaging would violate several WTO Agreements, including the TRIPS Agreement (and the related Paris Convention for the Protection of Industrial Property ("**Paris Convention**")), and the TBT Agreement. It is unquestionably in Singapore's interests to comply, and ensure compliance by other States, with these WTO Agreements. They are vital to the fair treatment of Singapore's exports.

1.57 Standardised packaging would undermine intellectual property rights by altogether eviscerating the use of trademarks on the packaging of tobacco products and the enforcement of trademark rights. As a result of their impact on internationally protected trademark rights, standardised packaging must be analysed under the provisions of the TRIPS Agreement. In particular, by removing or affecting BAT Singapore's right to use its trademarks, standardised packaging would violate Article 20 of the TRIPS Agreement, Articles 15 and 16 of the TRIPS Agreement, and Articles 6quinquies and 10*bis* of the Paris Convention.

1.58 Article 20 of the TRIPS Agreement provides that use of trademarks in the course of trade shall not be "*unjustifiably encumbered by special requirements ...*" Article 20 continues by clarifying that requirements that the mark be used in a special form or that the trademark is

used in a manner detrimental to the capability of the trademark to distinguish products are examples of prima facie unjustifiable encumbrances on the use of trademarks.

1.59 Standardised packaging is the "ultimate encumbrance" as it prohibits the use of trademarks in retail trade. Given that there is no general health exception in the TRIPS Agreement and in light of the text, context and structure of the TRIPS section on trademarks, a measure that impairs the very substance of the functional and relational trademark right and prevents it from performing its essential function of distinguishing products, is *ipso facto* an "unjustifiable" encumbrance. Even if the measure could be justified, the absence of any contribution to the reduction of smoking rates, let alone a material reduction, and the availability of less trademark-restrictive alternative measures that are equally or more effective, confirms that the encumbrances resulting from standardised packaging are not "necessary" and thus certainly not "justifiable" under Article 20 of the TRIPS Agreement.

1.60 Standardised packaging would also place Singapore in breach of its obligations under Articles 15.1 and 15.4 of the TRIPS Agreement. It would violate Singapore's obligation to make all distinguishing signs "*capable of constituting a trademark*". A distinctive sign only makes the trademark what it is, and thus "constitutes" a trademark, if it can be used on a product to distinguish products from one undertaking from those of another undertaking. The definition of a trademark is that it is a sign used or to be used on a product or in relation to a service to distinguish and identify products or services. By denying the distinctive sign from being used on a product, standardised packaging effectively denies any non-word mark from being capable of constituting a "trademark", in violation of Article 15.1 of the TRIPS Agreement.

1.61 Standardised packaging would also violate Singapore's obligations under Article 15.4 of TRIPS and Article 7 of the Paris Convention because it adversely affects only tobacco-related trademarks and prevents these from performing their essential functions, only because of the nature of the product.

1.62 Standardised packaging would also violate Article 16 of the TRIPS Agreement because it would reduce the scope of protection of the rights conferred by Article 16 below its minimum guaranteed level. Standardised packaging undermines the right of registered trademark owners effectively to prevent others from using similar signs that are likely to cause confusion. Article 16 of the TRIPS Agreement confers exclusive rights to owners of registered trademarks and provides a guaranteed minimum level of protection of the distinctiveness and reputation of the mark. The scope of protection guaranteed under Article 16 of the TRIPS Agreement is determined by the use made of the mark and the resulting strength of the mark. The more intensive the use made of the mark, the stronger the mark; and the stronger the mark the greater its scope of protection. A measure that prevents the use of

trademarks therefore significantly reduces the scope of protection of the trademark, in violation of Article 16.1.

1.63 The additional protection for well-known marks under Article 16.3 of the TRIPS Agreement is a confirmation and logical extension of this direct and intrinsic link between use of the trademark and the scope of the trademark owners' rights of protection against infringement. Article 16.3 of the TRIPS Agreement protects well known marks from dilution and allows the owner of a well-known mark to prevent the use of similar marks even on dissimilar products when that use would risk damaging the mark owner's interests and if it would suggest an association with the well-known mark. A standardised packaging measure that prevents the use of all trademarks and requires the use of the brand name in a standardised form and font reduces the level of protection below that minimum level. A well-known mark that can no longer be used will soon lose its special status and its extended scope of protection. The standardised packaging measure would therefore violate Singapore's obligation to guarantee a minimum level of protection for well-known marks under Article 16.3 of the TRIPS Agreement.

1.64 Standardised packaging would also violate Article 10*bis* of the Paris Convention, which prohibits "*all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.*" A standardised packaging measure would remove all distinctive elements of tobacco packaging with the exception of the brand name, which would also have to be printed in a prescribed font and font size. As a result, there is a very substantial risk that there will be confusion in the retail setting as to which brand of tobacco product consumers are purchasing. Singapore would thus be requiring the kind of behaviour it is under an obligation to prevent, in violation of Article 10*bis* of the Paris Convention.

1.65 This is not to say that Singapore cannot deal with trademarks that are misleading or deceptive or that are of such a nature to violate public morals; those are all well-established reasons for invalidating the registration and protection of a trademark and can be the basis for preventing its use. However, that requires an analysis of the specific sign and its allegedly misleading nature. A standardised packaging measure does not examine the trademark against a general criterion of deception but simply bans all trademarks. That is not permissible under the TRIPS Agreement.

1.66 Furthermore, standardised packaging would be inconsistent with Article 2.2 of the TBT Agreement as it would create an unnecessary obstacle to trade because it would:

1.66.1 significantly limit market entry for imported tobacco products;

1.66.2 reduce product differentiation and lower the value of imported products; and

1.66.3 strongly disincentivise exports to Singapore because of the required adaptation costs and the potential risk of penalties for non-compliance.

Challenge of Australia's Standardised Packaging regime at the WTO

1.67 Australia's standardised packaging measure is currently being challenged in the WTO by a number of Member States. The challenges have been raised on the basis that the measures are inconsistent with WTO Agreements, including the TRIPS Agreement.

1.68 The Government should wait for the outcome of these WTO dispute settlement proceedings rather than rushing into a decision which only months later may be found to be in violation of international law.

Bilateral Investment Treaties ("BITs")

1.69 Standardised packaging could also expose Singapore to numerous claims from foreign investors under BITs.

1.70 Invariably, intellectual property is specifically included in the definition of investments protected by such treaties and introducing standardised packaging would inevitably breach several of the usual protections afforded by BITs including those prohibiting expropriation of investments (including goodwill and intellectual property) without the payment of compensation, as well as those requiring fair and equitable treatment.

1.71 The "fair and equitable" standard requires the Government to act towards foreign investors consistently and to respect their legitimate expectations. Every legal business has a legitimate expectation of its continuity without unlawful or arbitrary impairment or obstruction, and that it will be able to use its registered trademarks and other intellectual property which it has used for decades in accordance with Singapore legislation.

1.72 The Government must also act proportionately and not discriminate unjustifiably. Tobacco is a legal product and the tobacco industry is a legitimate industry. The implementation of standardised packaging would frustrate BAT Singapore's legitimate expectation that it will be able to continue to use long-established trademarks. Moreover, as discussed at paragraphs 1.26-1.50 above, the evidence from Australia's experience with standardised packaging shows that standardised packaging does not work.

STANDARDISED PACKAGING IS NEITHER REQUIRED NOR AUTHORISED BY THE WHO FCTC

1.73 The FCTC neither requires nor authorises standardised packaging.

1.74 First, as a matter of international law, the FCTC is a mere "framework" agreement which is an important reason why so many countries have been willing to sign up to the FCTC. The World Health Organisation ("**WHO**") itself has acknowledged that "*even sceptical States*

acquiesced in the adoption of [certain framework] conventions, since the conventions did not commit them to take any specific measures."

1.75 Second, none of the binding provisions of the FCTC itself even mention standardised packaging. Furthermore, the WHO Guidelines to Article 11 and 13 of the FCTC which suggest that parties to the FCTC "should" (not "shall") "consider" (not "adopt") standardised packaging are only "*intended to assist Parties in meeting their obligations*" under the FCTC and do not create legally binding obligations.

1.76 Importantly, the FCTC does not authorise Parties to implement or issue measures that breach national law-making criteria or procedures, which would be the case with standardised packaging. Article 11 of the FCTC expressly states that the implementation of measures shall be: "*in accordance with [a Party's] national laws*". Article 5(2) of the FCTC, which sets out the general obligations of parties, similarly acknowledges that the implementation of tobacco control measures must be in "*accordance with [Parties'] capabilities*". As explained in paragraphs 1.18-**Error! Reference source not found.**, standardised packaging would be inconsistent with Singapore law and, and would therefore be contrary to the FCTC.

1.77 Article 2.1 of the FCTC also confirms Parties' obligations to comply with international laws in respect of the implementation of any measures that exceed a party's obligations under the FCTC. It provides that: "*nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are <u>in accordance with international law</u>*" (emphasis added). Thus, standardised packaging, which goes far beyond the requirements in the FCTC to impose textual warnings covering 30%, must be "*in accordance with international law.*" However, as explained above, standardised packaging would violate Singapore's international obligations under the TRIPS Agreement, the Paris Convention, and the TBT Agreement.

1.78 Furthermore the FCTC directs Parties to implement only measures that are supported by evidence and that can be shown to be effective. This is confirmed by the requirement in the FCTC, that Parties shall implement "effective" measures. The Guidelines for Implementation of Article 11 also state: "*Parties should consider the evidence and the experience of others when determining new packaging and labelling measures and aim to implement the most effective measures they can achieve*". If a measure is not effective – and, as explained above, standardised packaging cannot be shown to contribute to any public health objective – it should not be implemented.

1.79 Accordingly, the FCTC does not require or authorise standardised packaging. Rather it requires that Governments examine the evidence to determine whether proposed regulatory measures are effective or whether alternative strategies should be preferred. Such an

evidence base must be established by reliable science and empirical evidence that demonstrates the effectiveness of standardised packaging in reducing prevalence rates.

STANDARDISED PACKAGING WILL NOT MAKE TOBACCO PRODUCTS LESS ATTRACTIVE TO POTENTIAL BUYERS

1.80 Standardised packaging would not make tobacco products less attractive to potential buyers. On the contrary, as discussed below, there is a real risk that standardised packaging would generate a "forbidden fruit" effect that would increase the appeal of tobacco products to youth.

1.81 There is no evidence that standardised packaging would have any effect on the appeal of cigarette smoking itself. Research relied on to support standardised packaging only evaluates the comparative appeal between branded and standardised packs, not tobacco products or smoking itself. Asking people to compare branded packs to standardised packs is the wrong question. The studies do not address the appeal of cigarette smoking itself if all cigarettes are sold in standardised packaging. Furthermore, the studies do not relate comparative evaluations between branded and standardised packs to smoking behaviours or establish how people would behave if all cigarettes are sold in standardised packs and such packaging is not unusual.

1.82 As discussed above, it is also clear from numerous studies that factors other than branded packaging are the real drivers of smoking initiation. Further, the studies relied on to support standardised packaging do not examine the influence of any of these well recognised drivers of smoking initiation or address how standardised packaging would impact on them.

1.83 In fact there is a real risk that standardised packaging would generate a "forbidden fruit" effect that would promote youth initiation. While proponents of tobacco control often speculate that standardised packaging restrictions might help de-normalise cigarette smoking, especially for youth, the opposite effect is possible as adolescents tend to gravitate toward a product that is "off limits" to them. For example, Sussman, et al., (2010)[28] found that adolescents who believed that society views smoking as inappropriate for youth were significantly more likely to smoke than those who did not. Standardised packaging could generate this effect especially among youth and young adults who may rebel against such restrictions.

"Attractiveness" is an illegitimate basis for regulation

1.84 Furthermore, "attractiveness" on its own is an illegitimate basis for regulation because it is a subjective concept that cannot be objectively determined or measured and, as such, is inherently arbitrary.

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28 Sussman S, Grana R. "Forbidden fruit and the prediction of cigarette smoking" *Substance Use & Misuse*, 45(10), 1683-1693, (2010).

1.85 The WHO defines attractiveness as:

> *" 'Attractiveness' or 'consumer appeal' refer to factors such as taste, smell and other sensory attributes, ease of use, flexibility of the dosing system, cost, reputation or image, assumed risks and benefits, and other characteristics of a product designed to stimulate use. Physical product characteristics are often integrated with marketing. For example, a flavour such as 'menthol', 'mint', or 'cherry', which is intended to appeal to a target population, may be incorporated into the product name or descriptors and marketed to reach out to that population."*[29]

1.86 This definition is simply a list of all the features of a product and the factors relating to its offering for sale. These factors are inherently matters of consumer personal preference and (with the exception of price) their impact on stimulating use cannot be objectively determined or measured. While a factor may be attractive to one person it can be extremely unattractive to other persons, as demonstrated by the broad range of cigarette brands that are sold. There is no objective criterion in this respect. In addition, "attractiveness" is stated to not be a function of any one of these factors, but rather their combined impact. This creates further ambiguity to a determination of the alleged attractiveness of any factor.

1.87 A determination of an actual public health benefit requires reliable evidence that the regulation of an alleged "attractiveness" factor would reduce smoking rates. However, there is no agreed or validated method for objectively determining "attractiveness" or measuring the impact of an alleged "attractiveness" factor on smoking behaviour.

1.88 The Scientific Committee on Emerging and Newly Identified Health Risks ("**SCENIHR**") in its report "Addictiveness and Attractiveness of Tobacco Additives"[30] provided to the European Commission, confirms that there are no standardised methods to measure or assess "attractiveness."

> *"Animal models do not currently exist for the assessment of attractiveness. In humans, the attractiveness of individual tobacco products may be compared with other tobacco products by panel studies and surveys, and by experimental measures. When examining what is known about the additive content of these products, judgements can be made as to the role of individual additives in the overall attractiveness of the product. Another method is to experimentally adjust tobacco products to include or exclude individual additives and test responses to*

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29 World Health Organization, The Scientific Basis of Tobacco Product Regulation, Technical Report Series 945, 2007, at 9; See also *Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control*, at 4, available at http://www.who.int/fctc/guidelines/Decisions9and10.pdf.

30 SCENIHR (2010). Addictiveness and Attractiveness of Tobacco Additives – Final Opinion. European Commission.

them. In addition, the quantity of the additive can be varied to assess dose response and whether there is a threshold below which any impact is not observed. However, this type of research is difficult due to ethical considerations that will usually preclude human testing of different tobacco products, particularly among non-users or children. The methods currently used are thus not adequate."

We agree with the comments that there is a lack of standardised methods for assessing attractiveness in the context of tobacco products.

1.89 Basing tobacco regulation on a concept that does not have any objective scientific standard of measurement is inherently arbitrary. It accordingly cannot be demonstrated to be a legitimate measure to protect the risk of public health.

THE CHANTLER REPORT RELIED ON IN THE CONSULTATION DOCUMENT CANNOT SUPPORT THE INTRODUCTION OF STANDARDISED PACKAGING

1.90 The Consultation document relies upon the report of review undertaken by Sir Cyril Chantler of standardised packaging for the UK Government, dated April 2014 (the "**Chantler Report**").[31] However, the Chantler Report cannot support the introduction of standardised packaging. This is because the Chantler Report:

1.90.1 does not take account of the evidence from Australia's experience with standardised packaging;

1.90.2 does not provide a sufficient evidential basis upon which to introduce regulation;

1.90.3 relies on unsound, hypothetical evidence and ignores relevant evidence;

1.90.4 incorrectly concludes that branded packaging contributes to increased tobacco consumption;

1.90.5 inappropriately dismisses concerns over the price impact of standardised packaging; and

1.90.6 unjustifiably fails to consider the impact of standardised packaging on illicit trade.

The Chantler Report does not take account of the evidence from Australia's experience with standardised packaging.

1.91 The Chantler Report purports to review the relevant evidence supporting and opposing standardised packaging. However, the Chantler Report does not address recent data from Australia that standardised packaging has not reduced smoking behaviour since its introduction in 2012 (as discussed at paragraphs 1.26-1.50 of this Response).

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31 Report of the independent review undertaken by Sir Cyril Chantler, April 2014.

1.92 Thus, although the Chantler Report suggests that the evidence on standardised packaging points in one direction (a reduction in the consumption of tobacco), the data shows otherwise. That the Chantler Report does not take account of the up to date evidence wholly undermines any reliance on the report as a basis to introduce standardised packaging.

1.93 A proper consideration of the data from the Australian experience as discussed at paragraphs 1.26-1.50 of this Response shows that standardised packaging is not reducing smoking in Australia, and rebuts claims that standardised packaging would be effective.

The Chantler Report relies on unsound, hypothetical evidence and ignores relevant evidence.

1.94 The Chantler Report relies on the standardised packaging literature reviewed in what it refers to as the "Stirling Review", a review of the evidence on the impacts of standardised packaging that was commissioned by the UK Government and accompanied the 2012 Consultation on standardised packaging,[32] as well as the update report,[33] which is acknowledged to be "*relatively modest*", subject to "*limitations due in particular to constraints on study design*" and "*the findings are essentially indirect and 'speculative'*".[34] It is also acknowledged that the evidence relies on stated intentions which are poor predictors of behaviour.[35]

1.95 However, it is claimed that the evidence has some strength because of its consistency of results on intermediate outcomes and because it points in a single direction. This does not fully acknowledge the findings of the assessment of the evidence undertaken by the academics for the Chantler Report. For example:

1.95.1 the quantitative analysis (Annex D of the Chantler Report) notes that the outcomes of the different studies were too disparate to permit pooling and merely concludes that the Stirling reviews: "*are a reasonable reflection of the evidence available*".[36]This provides no assessment of the relevance of the experimental effects of the studies to likely policy impacts; and

1.95.2 the qualitative analysis (Annex E of the Chantler Report) also notes that while the qualitative research suggests that standardised packaging increases the visibility/prominence of health warnings, "*there is some evidence that smokers and non-smokers – including young people – are aware of, and/or can recall messages about health risks and harm but this may not alter behaviour*" and standardised

32 Moodie et al. (2012) Plain Tobacco Packaging A Systematic Review.

33 Moodie et al (2013) Plain Tobacco Packaging Research An Update.

34 Chantler Report at p29, paragraph 4.21 and p38, paragraph 6.2.

35 Chantler Report at p5, paragraph 14.

36 Chantler Report at p49, Annex D.

packaging "*may not deter current smokers*".[37] The conclusion reached was that, in the absence of strong experimental or quantitative analyses of actual behaviour, the qualitative research reviewed provides a reasonable summary of attitudes and perceptions regarding standardised packaging. However, as outlined above there are now quantitative analyses available of over 2 ½ years of data which show that standardised packaging has not had any impact on smoking behaviours. Consistent with the expert advice received by Sir Cyril Chantler, this empirical evidence of the lack of actual impact of the measure must be preferred to the *indirect and 'speculative'* findings of the standardised packaging studies available at the time of the Chantler Report.

1.96 Given the acknowledged lack of evidence on actual behaviours, the Chantler Report seeks to bridge the gap by relying on evidence from other spheres and experiments that have taken place in different contexts and on the basis of conclusions that are stated to have "*considerable intuitive plausibility*" and offer "*the best fit with the wider evidence.*"[38] These conclusions are merely hypothetical and speculative.

1.97 The Chantler Report points to an article alleging that the tobacco companies have engaged in "*evidential landscaping*", promoting a parallel evidence base to deflect attention from standardised packaging.[39] This allegation is false. The Chantler Report, however, does exactly this in promoting studies from other spheres and in different contexts which provide no support for the proposition that removing branding from tobacco packaging will impact on behaviours. For example:

1.97.1 The Chantler Report states: "[e]vidence from other spheres shows a strong non-conscious link between appeal and subsequent behaviour regardless of stated intentions. I therefore conclude that, by reducing its appeal, standardised packaging would affect smoking behaviour."[40] The Chantler Report cites Webb et al, (2006)[41] in support of this proposition. However, this paper concerned a meta-analysis of experimental studies which assess the impact of the manipulation of intention on subsequent behaviour. The analysis did not study the extent to which non-conscious processes effect behaviours and the concept of "appeal" is not mentioned in the paper at all. The paper concludes that:

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37 Chantler Report at p57, Annex E.

38 Chantler Report at p30, paragraph 4.22.

39 Chantler Report at p28, paragraph 4.15.

40 Chantler Report at p5, para 14.

41 Webb TL, and Sheeran P, (2006). Does Changing Behavioral Intentions Engender Behavior Change? A Meta-Analysis of the Experimental Evidence. *Psychological Bulletin*. Vol. 132, No. 2, pp, 249–268.

"An integration of 47 tests showed that a medium-to-large sized change in intention engenders only a small-to-medium change in behavior. Findings also showed that intentions have less impact on behavior when participants lack control over the behavior, when there is potential for social reaction, and when circumstances of the performance are conducive to habit formation. Thus, this review suggests that intentional control of behavior is a great deal more limited than previous meta-analyses of correlational studies have indicated."

This provides no support for the claim that standardised packaging will impact on smoking behaviours.

1.97.2 The Chantler Report cites Robinson et al., (2007)[42] in support of the proposition that in other consumer goods markets, where children can safely be allowed to participate in experiments, it has been proven that appealing branding does influence consumption.[43] However, this study did not examine consumption behaviour. The study only looked at taste perceptions. The participants of the study were sixty-three 3-5 years old preschool children from low-income families. They are not within the age group that the Chantler Report is concerned with and they cannot represent children in general. Furthermore the study was designed to try and capture the influences of the entirety of McDonald's brand exposure, including direct and indirect marketing and the McDonald's brand was chosen because it is the largest fast food advertiser in the United States. The paper noted that the results may not generalise to less known brands, and stated that:

"We did not, and cannot, anticipate or test how each individual direct and indirect exposure to McDonald's marketing, food, packaging, etc, influences a child's perceptions but accepted these as a complex whole of both independent and interacting influences on emotions and perceptions about the brand."[44]

Accordingly, this study provides no evidence that removing branding from tobacco products in a market such as the UK, where marketing is heavily restricted, and where there are already large health warnings displayed on packaging, will have any impact on smoking behaviours.

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42 Robinson TN et al, (2007). Effects of Fast Food Branding on Young Children's Taste Preferences. Archives of Pediatric and Adolescent Medicine. Vol 161, No.8.

43 Chantler Report at p22.

44 *Ibid* at p796.

1.97.3 The Chantler Report also cites Field at al. (2009)[45] in support of the claim that other experiments, in relation to fast food, alcohol, and tobacco show that exposure to an advertisement for a branded product increases consumption of that type of product, rather than solely the specific brand. However, this paper investigated the association between self-reported craving and attentional bias for substance-related cues. It was not a study of advertising or consumption.

1.97.4 The Chantler Report also relies on Harris et al. (2009)[46] which is a study of the impact of television advertising on the amount of food consumption, and Engels et al. (2009)[47] which is a study of the impact of alcohol portrayal in movies and commercials on the amount of alcohol consumption. These studies do not relate to packaging, initiation, or long term behaviours. The Chantler Report also fails to note that a number of studies have found that advertising has no or only modest effects on aggregate alcohol consumption. According to the U.S. National Institute on Alcohol Abuse and Alcoholism which is a part of the U.S. Department of Health and Human Services and funded by the U.S. government: "*When all of the studies are considered, the results of research on the effects of alcohol advertising are mixed and not conclusive*".[48] In any event, these studies are not instructive on the issue of tobacco use in Singapore, especially since, as noted, Singapore has already prohibited the advertising of tobacco products which still remain open to alcohol and food products.

1.98 The Chantler Report claims that it is reasonable to conclude that the *"intermediate outcomes"* of standardised packaging will impact on behaviours partly on the basis that this conclusion has considerable intuitive plausibility, supported by much psychological evidence that "*humans are generally predisposed to approach positive stimuli (those we anticipate as being rewarding) and avoid negative stimuli (those we anticipate as being unrewarding or even punishing)*."[49] Intuitive plausibility cannot replace evidence and is not a sufficient basis

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45 Field M, Munafo MR, and Franken IHA, (2009). Meta-Analytic Investigation of the Relationship Between Attentional Bias and Subjective Craving in Substance Abuse. Psychological Bulletin. Vol. 135, No. 4, pp,589–607.

46 Harris JL, Bargh JA and Brownell KD, (2009). Priming Effects of Television Food Advertising on Eating Behaviour. Health Psychology. Vol 28, No 4, pp. 404-413.

47 Engels R.C.M.E et al. (2009). Special Issue: The Message and The Media, Alcohol Portrayal on Television Affects Actual Drinking Behaviour. *Alcohol and Alcoholism*. Vol: 44, No: 3, pp. 244-249.

48 National Institute on Alcohol Abuse and Alcoholism (NIAAA). (2000). Tenth special report to the U.S. Congress on alcohol and health. Washington, DC: U.S. Department of Health and Human Services, p.422. Research suggests that advertising also does not drive aggregate tobacco product demand. Lancaster K and Lancaster A, (2003). The Economics of Tobacco Advertising: Spending, Demand, and the Effects of Bans. International Journal of Advertising 22, pp 41-65, at p57 ("On the whole, the evidence indicates that full or partial bans on advertising are likely to have little or no effect on aggregate cigarette or tobacco demand because the banned advertising itself apparently has little or no effect on aggregate demand.").

49 Chantler Report at p30, para 4.22.

on which to make policy decisions. Furthermore, the paper cited in the Chantler Report does not provide any evidence to support the claim that standardised packaging will impact on behaviours. The Chantler Report refers to Marteau et al. (2012)[50] which is an opinion article and does not provide any independent research. The article makes the claim that removing branded packaging of tobacco reduces the attractiveness of the products based on the Stirling Review, so it provides no more evidence than the Stirling Review itself. Furthermore the authors note that it is uncertain whether any of the interventions they propose will be effective and further evidence is required. The article states:

> *"The interventions we have described are, in principle, scaleable to the population level, although uncertainty remains about whether they will be effective in changing behavior in populations living in complex environments and at a level needed to reduce the global burden of chronic disease."*[51]

1.99 The conclusion reached in the Chantler Report that standardised packaging will result in fewer people being deceived into thinking that some brands are healthier than others, and health warnings will be more credible, memorable and effective, also ignores the evidence discussed in paragraphs 1.10-1.12 of this Response that public awareness in Singapore about the risks of smoking is effectively universal and that branding and packaging do not neutralise consumers' existing awareness of the risks of smoking or prevent consumers from seeing and assimilating the health warnings.

The Chantler Report incorrectly concludes that branded packaging contributes to increased tobacco consumption.

1.100 At the outset, it must be recognised that packaging is not advertising. Thus, the effect of advertising, which is banned in Singapore, is not relevant for the purposes of examining the effects of standardised packaging that prohibits the use of trade marks to identify and distinguish products.

1.101 In any event, and contrary to what the Chantler Report states, the evidence is not "*clear*", but rather is quite mixed, on the question of whether advertising causes or increases aggregate consumption. For example, Duffy (1996) undertook an empirical investigation of the effect of total cigarette advertising on the demand for cigarettes in the UK and concluded that: "[n]*o evidence is found in this research to back up the view that aggregate cigarette advertising has the effect of expanding total market demand for cigarettes.*"[52]

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50 Marteau TM, Hollands GJ, Fletcher PC, (2012) Changing human behavior to prevent disease: the importance of targeting non-conscious processes. Science. 337: 1492-5.

51 *Ibid* at p1494.

52 Duffy, An Econometric Study of Advertising and Cigarette Demand in the UK. International Journal of Advertising, 1996, 15, 262-284; see generally, www.health.gov.au/internet/yourhealth/publishing.nsf/Content/pcda~tpha~ta~resta#.U0GqWGg6LzI.

1.102 Furthermore, it is not credible to assert that branded packaging has the same effect as advertising when:

1.102.1 Singapore heavily restricts advertising for tobacco products, which restrictions include (but are not limited to) a ban on advertising, on event sponsorship, and on vending machine sales, as well as the retail display ban. These restrictions mean there can be no synergy between branded packaging and advertising and promotion instruments; and

1.102.2 the branding on packaging in Singapore is already severely limited by the requirement to display large 50% warnings and other information.

1.103 Standardised packaging has not worked in Australia and will not work in Singapore because tobacco packaging is not a relevant factor that influences smoking behaviour. As noted above, the real and universally accepted drivers of smoking initiation include factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price.[53] These factors do not include product packaging.

1.104 The suggestion in the Chantler Report that branded packaging can stimulate smoking in experimental and established smokers by acting as a 'visual trigger' and that standardised packaging will remove this effect,[54] is ill-considered. Under standardised packaging the plain pack, or indeed the cigarette itself, would simply take on the significance, if any, of the formerly branded pack. Furthermore, numerous government-funded and independent studies show that factors other than packaging are the real drivers of decisions relating to quitting and relapse.[55]

1.105 Similarly, the suggestion in the Chantler Report that seeing branded packaging is a 'here and now' reward to which teenagers are particularly sensitive[56] ignores the evidence regarding the role of packaging in teenage smoking. For example, in preparing a report for Health Canada, Goldberg et al. concluded that: "*It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from*

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53 See, e.g., "Smoking, drinking and drug use among young people in England in 2012" Editor: E Fuller, London: National Centre for Social Research, (2013); US Government and Human Services. "Preventing tobacco use among young people: A report of the Surgeon General". (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use); *see also* US Government and Human Services. "Preventing tobacco use among youth and young adults: A report of the Surgeon General" (2012), at Ch. 4 (reinforcing findings of 1994 Surgeon General's report with added emphasis on individual cognitive processes).

54 Chantler Report at p23, paragraph 3.21.

55 See, e.g. The UK Office for National Statistics, "Opinions Survey Report No. 40 Smoking-related Behaviour and Attitudes, 2008/09", (2009), Tables 3.5, 4, 11, and 4.12.

56 Chantler Report at pp21-22, paragraph 3.16.

friends. There is no brand choice - the choice is simply to smoke or not to smoke."[57] Similarly, and more than a decade later, the Cancer Research UK report, "The Packaging of Tobacco Products", noted that: "*To some extent the pack appeared peripheral compared with the cigarette in youth smoking, particularly at the initiation/experimentation stage. . . Some said they never really saw the pack being used it was just the cigarette that was passed around. . . .*"[58]

The Chantler Report inappropriately dismisses concerns over the price impact of standardised packaging.

1.106 As outlined above, the expert report of Mr Dryden (Appendix 1) demonstrates that standardised packaging is associated with a reduction in the pre-tax prices of cigarettes in Australia relative to New Zealand and 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. Accordingly, the dismissal in the Chantler Report of the concern that standardised packaging could cause price reductions and, as a result, lead to increased consumption, is wrong and cannot be relied on.

1.107 Furthermore, the suggestion in the Chantler Report that any price reductions could simply be mitigated through tax hikes is also misguided and over-simplifies matters. Tax hikes would most likely push the entire market upward and exacerbate existing price differentials between the legal and illicit market, at a time when the incentive to pay premiums for products is diminishing. Consequently, any such tax-hikes would only exacerbate downtrading and push more people into the illicit market in Singapore. Any use of taxation to mitigate downtrading would necessarily further distort competition in the market.

The Chantler Report's rejection of the impact of standardised packaging on illicit trade is not justified.

1.108 While the Chantler Report seeks to discredit and dismiss the report on the illicit market in Australia undertaken by KPMG[59], which found that illicit tobacco consumption reached its highest-recorded proportion of total consumption in Australia — 13.3% — following the introduction of standardised packaging, it fails to justify the basis on which it does so.

1.109 The Chantler Report merely relies on the views of others that KPMG's methodology is flawed without identifying and explaining the alleged flaws, and concludes that: "[i]*n a situation*

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57 Goldberg M, Liefeld J, Kindra G, Madill-Marshall J, Lefebvre J, Martohardjono N, Vredenburg H. "When packages can't speak: Possible impacts of plain and generic packaging of tobacco products - Expert panel report for Health Canada", (March 1995), at 184.

58 The Centre for Tobacco Control Research Core funded by Cancer Research UK, "The packaging of tobacco products", (March 2012), at 31.

59 The Chantler Report cites the KPMG, "Illicit tobacco in Australia, 2013 Half Year Report", October 2013.

where estimates differ by such magnitudes, I do not have confidence in KPMG's assessment of the size of – or changes in – the illicit market in Australia."[60] The fact that they are different estimates does not justify rejecting one estimate. The Chantler Report's dismissal of KPMG's 2013 Half Year Australian report on this basis is entirely arbitrary.

1.110 Since the publication of the Chantler Report, KPMG has also published its 2015 Half Year report, which further shows a marked increase in the illicit market in Australia since the introduction of standardised packaging.

1.111 The illicit trade in tobacco is a major concern to society in undermining public health attempts to reduce smoking prevalence and the financing of organised crime.

1.112 A 2013 International Tax and Investment Centre and Oxford Economics report on the illicit tobacco trade in 14 selected Asian markets estimated that 19.6% of tobacco consumption in Singapore is illicit.[61] It was estimated that illicit trade in tobacco would cost the Singapore Government S$262 million in lost tax revenues in the fiscal year 2013/2014.

1.113 Standardised packaging would exacerbate the already significant illicit trade in Singapore by:

1.113.1 Removing the incentive to pay premiums for products that no longer look or feel premium. This would drive prices down across all cigarette market segments, conferring a competitive advantage to those able to supply the lowest cost product – i.e. the illicit trader. As a Morgan Stanley research note on tobacco and illicit trade points out:

> *"...to the extent that brand equity is degraded over time, it could result in lower tobacco prices than would otherwise have been the case (presumably resulting in higher tobacco consumption), and a potential substantial increase in illicit volumes."*[62]

1.113.2 The market in illicit fully branded products would grow in response to demand from those consumers who would rather continue using the fully branded product they are used to. This is likely to be sourced either through illegal supply from other countries or by suppliers of counterfeit branded products

1.114 The illicit trade severely undermines the public health objectives. The proliferation of cheap illicit products will stimulate demand for tobacco products rather than reduce it, may also have a significant impact on government revenues and society in general through increased criminal activity, and may further undermine public health by:

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60 Chantler Report at p33, paragraph 5.7.

61 Asia-14: Illicit Tobacco Indicator 2013, at p. 114, available at http://www.oxfordeconomics.com/asia14

62 Tobacco – Legitimate Manufacturers or Illicit Trade? A Stark Choice", Morgan Stanley Research, July 2, 2012.

1.114.1 increasing youth access to tobacco products; and

1.114.2 exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

1.115 It would be manifestly inappropriate for the Government to even consider introducing standardised packaging without having properly considered the risks of increasing the level of illicit trade and the fact that the proceeds of illicit trade are funnelled toward organised crime and potential terrorist activity.

THE POST-IMPLEMENTATION REVIEW (PIR) OF THE AUSTRALIAN TOBACCO PLAIN PACKAGING (TPP) ACT 2011 IS FLAWED AND SHOWS THAT STANDARDISED PACKAGING IS INEFFECTIVE

1.116 On 26 February 2016, more than two years after PIR was due to commence, the Australian Department of Health (the **"Department of Health"**) published its PIR of the TPP Act 2011, which purports to assess the effectiveness and efficiency of the Australia's standardised packaging measure to meet its objective in order to determine if it is an appropriate regulatory intervention.[63]

The PIR itself fails to comply with Australian Best Practice Regulation Requirements

1.117 At the outset, it must be noted that, in addition to a delay of more than two years, the PIR itself is an attempt to make up for the significant shortcomings in the flawed process that led to the adoption of standardised packaging in Australia. Indeed, already on 23 April 2009, the Office of Best Practice Regulation ("**OBPR**") had advised the Department of Health that the RIS failed to meet Australia's best practice regulation requirements and provided extensive comments on fundamental shortcomings in the RIS, such as the fact that the problem had not been adequately defined.[64]

1.118 On 29 April 2010, the Prime Minister of Australia announced[65] that standardised packaging would be proposed to Parliament. This announcement took place before the OBPR had a chance to look at a revised regulatory impact statement ("**RIS**") submitted to it only two days earlier, on 27 April 2010. The OBPR subsequently advised the Department of Health on 4

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63 Available at <https://ris.govspace.gov.au/files/2016/02/Tobacco-Plain-Packaging-PIR.pdf>

64 23 April 2009 correspondence from OBPR to DHA, FOI Disclosure Log reference 11/26, Australian Department of Finance and Deregulation, 7 June 2011. Part 2 ("OBPR 's Response to Draft RIS") at p 2, available at http://www.finance.gov.au/sites/default/files/RIS_tobacco_control_act_part2.pdf.

65 Prime Minister of Australia Media Release, 29 April 2010, available at: http://pmtranscripts.dpmc.gov.au/release/transcript-17255

May 2010 that even this new RIS did still not satisfy Australia's best practice regulation requirements.[66]

1.119 The Australian Government's Guidance Note on PIRs states that *"[w]here a compliant RIS for the regulatory change was not prepared for the final decision, a PIR needs to be completed within two years of the regulation being implemented."*[67] Given that Australia's standardised packaging measures were fully implemented by December 2012, the PIR was overdue by more than a year, yet another violation of Australian best practice regulation requirements.

1.120 Against the backdrop of these extensive delays and successive failures to comply with best regulatory practice, rather than an opportunity to conduct an objective assessment of standardised packaging policy, the PIR is now (in no small part due to these flaws and delays) being released while Australia is facing an ongoing challenge of the policy at the WTO. In this context, there is little choice for the Australian Government to arrive at any conclusion other than one that supports the effectiveness of standardised packaging. However, the PIR is able to reach a (rather weak) supportive conclusion only by disregarding the available evidence and relying on flawed analysis, as explained below.

The PIR is based on a flawed assessment of the evidence, which shows that standardised packaging is ineffective

1.121 Despite there being three years' worth of data available since the implementation of standardised packaging in Australia, all that the PIR Report can provide is the tentative conclusion that *"the measure has begun to achieve its public health objectives of reducing smoking and exposure to tobacco smoke in Australia and is expected to continue to do so into the future."* Importantly, as will be explained in the following paragraphs, the PIR arrives at this tepid conclusion by on the one hand, disregarding relevant evidence and, on the other hand, basing itself on unreliable evidence and flawed analysis.

1.122 Turning to the first point concerning the fact that the PIR has disregarded relevant evidence, BAT Australia submitted two expert reports to the Department of Health prepared by Mr Dryden, the second of which is annexed to this Response as Appendix 1. As explained in paragraph 1.49 above, Mr. Dryden's empirical analysis shows a reduction in prices of cigarettes in Australia relative to New Zealand, an increase in consumption relative to New Zealand and an acceleration in downtrading.[68]

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66 Non-Compliance With Best Practice Regulation Requirements, OBPR 's Response to Draft RJS at p3

67 Available at: http://www.dpmc.gov.au/sites/default/files/publications/017_Post-implementation_reviews_1.pdf

68 Neil Dryden, (2015) The impact of tobacco plain packaging in Australia: an update report for the Post-Implementation Review. Appendix 1.

1.123 The PIR disregards this evidence on the grounds that the data relied upon was not provided to the PIR team and is not publicly available.[69] However, it is disingenuous and self-serving for the Department of Health to disregard the reports on this basis, when it did not even request these data. In its discussion of the post-implementation studies in relation to the NTPPTS data, the PIR also chose to disregard the study by Scollo et al. (2015),[70] which is the only published study of the NTPPTS data that discusses the data on actual consumption behavior, and concluded that plain packaging had no impact on consumption. Finally, it bears mentioning that the data underlying the single empirical study on which the PIR relies was itself not publicly disclosed (see paragraph 1.127 below).

1.124 Turning to the second point regarding the fact that the PIR is based on unreliable evidence, it cites a number of post-implementation studies,[71] which it claims show that standardised packaging has been effective in Australia. However, none of the studies rely on actual behavioural outcomes and instead merely ask about people's perception of the aesthetics of plain packages and their expectations of how plain packaging will affect smoking-related intentions and perceptions. These studies are not relevant for determining whether plain packaging met its objective of contributing to reducing smoking. However, even in relation to these intermediate and non-behavioural outcomes the evidence shows that plain packaging is ineffective. Indeed, BAT Singapore refers to the report of the ANDSHS analyses[72] and Professor's Viscusi's analysis of the CITTS and NTPPS data[73] highlighted in paras. 1.36-1.43 above, which show that the effectiveness of GHWs has not increased and that the introduction of standardised packaging has not increased quit-related behaviours.

1.125 Professor Viscusi's analysis of the CITTS data also invalidates the PIR's reliance on a study by *Dunlop et al. (2015)*, which purports to find that the early effects of standardised packaging

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69 PIR Report at ¶138.

70 Michelle Scollo, Meghan Zacher, Kerri Coomber, Megan Bayly, and Melanie Wakefield, "Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption Following the Introduction of Plain Packaging in Australia," Tobacco Control 2015;24:ii66-ii75.

71 These studies are: Wakefield M, Coomber K, Zacher M, Durkin S, Brennan E, Scollo M. (2015) Australian 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; 24(Suppl 2): ii17-ii25.

Brennan E, Durkin S, Coomber K, Zacher M, Scollo M, Wakefield M. Are quitting-related cognitions and behaviours predicted by proximal responses to plain packaging with larger health warnings? Findings from a national cohort study with Australian adult smokers. Tobacco Control 2015; 24(Suppl 2): ii33-ii41.

Durkin S, Brennan E, Coomber K, Zacher M, Scollo M, Wakefield M. Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: findings from a national cohort study with Australian adult smokers. Tobacco Control 2015; 24(Suppl 2): p. ii26-ii32.

72 *National Drug Strategy Household Survey detailed report: 2013,* Drug statistics series no. 28, Australian Institute of Health and Welfare, Nov. 2014, available at http://www.aihw.gov.au/publication-detail/?id=60129549469.

73 W. Kip Viscusi, Analysis of CITTS data and NTPPTS data – a report for the post-implementation review: 3 November 2015. Appendix 3.

among adult smokers are consistent with reduced promotional appeal of the packaging and increased effectiveness of health warnings.

1.126 Moreover, the PIR relies on a study by *Yong et al. (2015)*, which reviewed the data from the Australian component of the International Tobacco Control (ITC) Policy Evaluation Project.[74] However, this study does not provide consistent evidence of any positive effect of standardised packaging. The study found that there was no change in frequency of reading the warning labels among current smokers and there was no evidence of a significant impact on frequency of forgoing a cigarette in reaction to pack warning messages. The study also recognises that some of the findings, such as an increase in attentional orientation towards the warnings and frequency of noticing warnings, could be a result of the increase in the size of the GHWs rather than standardised packaging.

1.127 Importantly, the only direct empirical evidence relating to standardised packaging's claimed impact on smoking prevalence on which the PIR relies is a study commissioned by the Department of Health from Dr. Chipty, who acknowledges in her report that she worked as an expert hired by the Australian Government to defend the measure in the WTO disputes. The data files underlying this study are not disclosed, resulting in an utter lack of transparency.

1.128 Dr Chipty purports to examine the effect of standardised packaging and the enlarged graphic health warnings introduced at the same time as standardised packaging on smoking prevalence in Australia by undertaking a regression analysis of Roy Morgan Single Source Survey ("**RMSS**") data for the period January 2001 to September 2015.[75]

1.129 Dr Chipty concludes that the evidence indicates clearly that the combination of standardised packaging and updated and enlarged GHWs is succeeding in reducing smoking prevalence. Specifically, she estimates a statistically significant decline in smoking prevalence of 0.55 percentage points over the post-implementation period, relative to what the prevalence would have been without the packaging changes. Given that this is the estimated effect of the combination of standardised packaging and enlarged GHWs, the effect of standardised packaging taken in isolation is unknown and a zero effect cannot be discounted.

1.130 While the data files underlying the Chipty Report have not been disclosed, which prevents a review of the empirical analysis underlying the report, there are a number of clear flaws in the analysis even on the face of the report. These include:

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74 PIR Report at ¶81-82.

75 Dr Chipty states that her preferred approach excludes the two months of October and November 2012 and measures the effect of the 2012 packaging changes using a December 2012 start date but in other specifications, she retains October and November 2012 to explore the effect of alternative policy start dates (Chipty Report. at p9).

1.130.1 Failure to properly control for price. The analysis does not control for price but rather for the excise tax increases that occurred in 2010, 2013, and 2014.[76] However, consumers do not care about tobacco taxes *per se*. Rather, they care about price, of which taxes are only a component. Thus, it is preferable to control for price effects and not tax effects, because a focus on tax effects ignores that manufacturer or retailer response to tax increases may eliminate or compound the tax effects. The report fails to take this into consideration.

1.130.2 Invalid use of a linear trend. In order to isolate the effect of standardised packaging on smoking in Australia, it is necessary to account for the pre-existing downward trend in smoking. If this trend is not properly taken into account then it will be conflated with any effect of standardised packaging. Dr Chipty accounts for this pre-existing trend by applying a linear time trend, which she states: "*captures the effects of both a societal trend, created in part by the influence of historical tobacco control policies, and other factors that are otherwise unmeasured*".[77] By using a linear time trend, Dr Chipty assumes that the pre-existing trend is declining in a straight line (as shown in Figure 1 of the Chipty Report). However, Dr Chipty fails to validate whether this assumption is correct. This is particularly surprising given that she acknowledges that there is: "*some indication that this decline in prevalence has accelerated in recent years*".[78] This indicates that the trend is in fact non-linear and that Dr Chipty's use of a linear time trend is therefore inappropriate.

1.130.3 Failure to address limitations in the RMSS data. The RMSS prevalence data are drawn from survey evidence that asks respondents whether they smoke. However, it is well established that such survey data are subject to problems of under-reporting which undermine its usefulness. Importantly, although the RMSS data is now analysed by Dr Chipty at the request of the Department of Health as if it is the ultimate prevalence data, Australia's official statistics on prevalence are not and were never based on the RMSS dataset. Australia suddenly has given great prominence to a dataset it not previously consider particularly relevant for purposes of determining prevalence levels in Australia. Dr Chipty fails to take account of this problem with the data and does not put

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76 Chipty Report, para 20.
77 Chipty Report, para 23.
78 Chipty Report, para 25.

the RMSS data in the context of other prevalence and consumption related data that contradict her conclusions.

1.131 Therefore, even without being able to undertake an analysis of the underlying data to scrutinise the conclusions reached by Dr Chipty, it is clear that her report is irremediably flawed and, remarkably, this is the only empirical analysis that the Department of Health is relying on, after three years of data collection, to seek to show an alleged benefit of the measure.

1.132 In view of the above, BAT Singapore submits that the weakness of the PIR's conclusions and evidence base positively do not support the effectiveness of standardised packaging.

QUESTION 2

Q2a. Do you support larger Graphic Health Warnings ("GHWs") on tobacco packaging?

Q2b. If you answered No to Q.2a, please state your reasons.

Q2c. In your opinion, how big should the increase in size for GHWs be for tobacco packaging? Currently health warning images take up 50% of the front and back packaging.

- ***Increase to 85% of front and back packaging***
- **Increase to 75% of front and back packaging**
- **Remain at 50% of front and back packaging**

BAT Singapore is strongly opposed to an increase in the size of GHWs. We believe that an increase in the size of GHWs:

- is unlawful;
- is manifestly disproportionate;
- would place the Government in breach of its international obligations; and
- is neither required nor authorised by the FCTC.

BAT Singapore submits that the warnings should remain at 50% of the front and back of tobacco packaging.

FURTHER INCREASING THE SIZE OF GHWS DENIES MEANINGFUL USE OF TRADEMARKS

2.1 The proposal to increase the area of the GHWs on tobacco packaging in Singapore to cover the vast majority of the two largest surfaces of the packet would deny all meaningful use or all economically viable use of the trademarks. It would thereby deprive BAT Singapore of its extremely valuable intellectual property rights; namely, its trademark rights together with the goodwill arising in its brands.

2.2 The concept of "use" of a trademark involves use on or in relation to goods to distinguish them from competitors' goods. The proposed increase in GHWs to 75% or 85% would make it impossible to use a number of trademarks consisting of logos and other devices placed at certain positions on the pack (including, but not limited to, position marks and entire pack marks). The right to use these trademarks would be eliminated. In addition, the proposed oversized GHWs would have such a severe impact on the use of other trademarks that they would effectively deprive owners of the "use" right.

2.3 The following special features of the tobacco products further exacerbate manufacturers' vulnerability to deprivation of their freedom of expression and property rights:

2.3.1 The advertising of tobacco products has already been banned in Singapore, such that one of the last remaining channels of communication between the manufacturer and the consumer is through the packaging of the product for retail sale; and

2.3.2 The physical size of the packaging of tobacco products is small and the use of the packaging is already severely limited by the existing warnings that occupy 50% of the front and back surfaces of tobacco packaging;

2.4 Although there may still be room left for applying some word and device trademarks, the space left for displaying the trademarks being a maximum of 25% or 15% of the two largest surfaces of the packet, is patently insufficient to effectively differentiate the product from the competition. This leaves the trademark without its ability to serves its essential function as an identification of the commercial origin and the quality of the underlying product. In order to serve as a source-identifier, a sign must be easily identifiable and widely visible on the pack space. Where only 25% or 15% of the packet is left for the display of trademarks and the package is dominated by oversized GHWs, this requirement cannot be fulfilled and manufacturers are deprived of the "right to use" their registered trademarks.

2.5 In addition to trademark rights, the goodwill associated with the packaging of BAT Singapore's products and used in connection with their sale, including the main panels of the packaging of the product which make up its trade dress, would be adversely affected. Generally, the longer a trade dress has been in use, the more valuable it will be as a tool to help visually distinguish the product from those manufactured or marketed by competitors. This is all the more important given that the effect of the proposed GHWs will be to allow a maximum of only 25% or 15% of cigarette packaging to bear the relevant trademark, logo and reflect the trade dress.

2.6 The practical sterilization of the manufacturers' property, by reason of the requirement to print warnings covering 75% or 85% of the surfaces of the packaging amounts to a deprivation of substantial intellectual property rights and the associated goodwill that manufacturers have cultivated over years of investment. Given the commercial value of BAT Singapore's trademarks and valuable goodwill built over the years in their brand portfolios, the loss caused by the proposal would clearly be very substantial.

FURTHER INCREASING THE SIZE OF GHWS IS DISPROPORTIONATE AND UNJUSTIFIED

2.7 As part of BAT Singapore's exhortation for the Government to undertake the relevant RIA for its proposed measures, we refer to the requirements of proportionality discussed at paragraph1.51 above.

2.8 The proportionality of the proposed GHWs must also be considered in context, namely that the current GHWs already occupy 50% of the front and back sides of cigarette packs. The

Government has not adduced any evidence to show either (a) that the current size of GHWs are inadequate or insufficient to achieve their intended purpose, namely to inform the public of the health risks involved by smoking, or (b) that the further increase in the size of the GHWs will more effectively achieve that purpose than the current size of 50%.

There is no legitimate purpose that requires the proposal

2.9 The first essential step in an impact analysis is to identify and establish the problem that the measure is intended to solve. The Government must be able to identify a specific and addressable problem before it can show why further increasing the size of GHWs from 50% is required and how it will address the problem identified.

2.10 There is no problem that requires further increasing the size of GHWs from 50% because:

2.10.1 Public awareness in Singapore about the risks of smoking cigarettes is effectively universal (see paragraph 1.10-1.12 above).

2.10.2 Branded packaging does not neutralise consumers' existing awareness of the risks of smoking or prevent consumers from seeing and assimilating the health warnings. Accordingly the removal of trademarks from packaging is not required to increase the effectiveness of health warnings (see paragraph 1.12 above).

2.10.3 The existing cigarette packages in Singapore, which already carry large GHWs that cover 50% of the two largest surfaces of packages, do not mislead consumers about the harmful effects of smoking as demonstrated by the universal awareness of the risks of smoking as highlighted above.

2.11 Furthermore, as noted above, existing laws are sufficient to meet any demonstrable concerns regarding allegedly deceptive packaging. The existing protections under Singapore law are sufficient to address any allegedly misleading elements of packaging, while also respecting the choices and rights of adults who choose to use tobacco products and allowing tobacco manufacturers, as a part of a legal industry, to communicate with consumers about product information.

2.12 It is also clear from numerous studies that factors other than a deficit of information or branded packaging are the real drivers of smoking initiation (see paragraph 1.13 above).

Further increasing the size of GHWs is inadequate as a public health measure

Further increasing the size of GHWs would not reduce smoking

2.13 The Government has not cited any existing studies or commissioned any studies to support its assertion that increasing the size of GHWs from the current 50% will meet these aims.

2.14 A proper evidence-based analysis also demonstrates that enlarged warnings do not reduce smoking prevalence. This is confirmed by analyses undertaken by the U.S. Food and Drug

Administration ("**FDA**") on the effectiveness of health warnings on cigarette packages, which is the most comprehensive analysis undertaken to date.

2.15 To test for the likely effect of enlarged GHWs on cigarette packages, the FDA undertook two types of studies. The first line of inquiry consisted of statistical analyses of the effect of enlarged GHWs on smoking prevalence rates. The other approach was a large scale experimental study of the effect of different types of enlarged GHWs. Neither study indicated that there would be an effect of enlarged GHWs on smoking behaviour.

2.16 The statistical analyses tested whether GHWs in Canada reduced smoking prevalence rates. In its preferred analysis the estimated effect of GHWs was 0.088 percentage points. The FDA concluded that their "*effectiveness estimates are in general not distinguishable from zero; we therefore cannot reject, in a statistical sense, the possibility that the rule [requiring graphic warnings] will not change the U.S. smoking rate.*"[79]

2.17 As a second level of analysis, the FDA commissioned a survey to measure consumer attitudes, beliefs, perceptions, and intended behaviours related to cigarette smoking in response to graphic warning labels (the "**FDA Study**").[80] The FDA Study included approximately 18,000 participants and is the largest study of consumer responses to cigarette warnings ever conducted.[81]

2.18 This experimental study failed to find a consistent pattern of significant effects on risk beliefs for a wide variety of possible GHWs.[82] Notably, the authors concede that *"[t]he graphic cigarette warning labels did not elicit strong responses in terms of intentions related to cessation or initiation."* [83]

2.19 Even putting aside the methodological limitations of the study, it is clear from the data that the warning labels were ineffective at increasing smokers' stated intentions to quit. The consistent result was that, irrespective of the warning or the graphic illustration accompanying it, there was no evident effect on quit intentions or other smoking-related

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79 U.S. Dept. of Health and Human Services, Food and Drug Administration, Required Warnings for Cigarette Packages and Advertisements – Final Rule, Federal Register, Vol. 76, No. 120, June 22, 2011, at p36776.

80 Nonnemaker, J., et al., 'Experimental Study of Graphic Cigarette Warning Labels: Final Results Report Prepared for Center for Tobacco Products, Food and Drug Administration', Contract No. HHSF-223-2009-10135G, Dec. 2010 at 1-2.

81 U.S. FDA, Frequently Asked Questions: Final Rule "Required Warnings for Cigarette Packages and Advertisements" , available at http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/ucm259953.htm.

82 For example, the study concluded with respect to the warning for fatal lung disease: "*None of the warning images were significantly associated with the likelihood of quitting in the next 30 days (among adults and young adults) or the likelihood of smoking 1 year for now (among youth) compared with the control group.*" Supra (3-11).

83 *Nonnemaker, J., et al.,* Experimental Study of Graphic Cigarette Warning Labels: Final Results Report Prepared for Center for Tobacco Products, Food and Drug Administration, Contract No. HHSF-223-2009-10135G, Dec. 2010 at 4-4.

behaviours for any of the sample groups. In particular, the study concluded that the data does not support the conclusion that exposure to the graphic warning labels will discourage smoking initiation. The authors stated:

> *"For youth, we used a measure of how likely [they] felt they were to be smoking 1 year from now as a measure of the impact of viewing the warning images on potential initiation. We did not find much evidence for an impact of the warning labels on this outcome."*[84]

2.20 Notwithstanding that the FDA's own analysis and study did not find any support for the effectiveness of proposed GHWs, the FDA proceeded to introduce the warnings. However, the U.S. courts overturned this regulation in 2012, finding that the proposed GHWs were unconstitutional. The U.S. Court of Appeals for the D.C. Circuit concluded that there is a consistent lack of evidence in support of the efficacy of enlarged GHWs. The Court stated:

> *"FDA has not provided a shred of evidence—much less the "substantial evidence"' required by the APA [Administrative Procedures Act]—showing that the graphic warnings will "directly advance"' its interest in reducing the number of Americans who smoke.*
>
> ...
>
> *FDA's Regulatory Impact Analysis ("RIA") essentially concedes the agency lacks any evidence showing that the graphic warnings are likely to reduce smoking rates... In light of the number of foreign jurisdictions that have enacted large graphic warning labels, the dearth of data reflecting decreased smoking rates in these countries is somewhat surprising, and strongly implies that such warnings are not very effective at promoting cessation and discouraging initiation."*[85]

2.21 As noted above, the Government has not undertaken any assessment to establish if further increasing the size of GHWs from 50% would in some shape or form address an information deficit that has not been demonstrated to exist. This renders the proposed increase in GHWs arbitrary and irrational. Further, it must be considered that if the Government had undertaken a proper evidence-based analysis it would have reached a similar outcome to the FDA, namely that increasing the size of the existing warnings would not be effective in reducing smoking prevalence. The FDA analysis is *state of the art* when it comes to assessing the impact of GHWs, which nevertheless failed to find any impact of GHWs on smoking behaviours. This is particularly telling in the present case where GHWs in Singapore already cover 50% of the pack. In these circumstances further increasing the size of GHWs, when there is no information deficit to be addressed and no evidence that (i) consumers do not

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84 *Supra* at 4-4.

85 *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).

understand the current warnings covering 50% of the pack and that (ii) the increased warnings would reduce smoking prevalence, is clearly arbitrary and an improper use of power.

Further increasing the size of GHWs would distort competition and drive down prices which may lead to an increase in consumption contrary to the public health objective

2.22 In view of the prohibition of all forms of advertising and existing restrictions on tobacco packaging, the principal, if not sole remaining competitive levers available to tobacco manufacturers are product differentiation and price.

2.23 Further increasing the size of GHWs as proposed would effectively prevent manufacturers from being able to differentiate their products and will make the packages all look largely the same. To the limited extent that trademarks can be squeezed onto the remaining space on the pack, they will be unable to effectively perform their function of identifying and differentiating products, signalling the source or origin of the product and indicating a product's quality and characteristics.

2.24 Without the ability to differentiate or offer the quality and value attributes created by trademarks and the brands they represent, tobacco products will become increasingly standardised and manufacturers would only be able to compete on price. As such, price competition, which is already extremely vigorous in the tobacco market, will become even more intense leading to further price reductions.

2.25 The impact of reduced prices is likely to increase consumption, especially among price-sensitive consumers, as tobacco products become more affordable. This would undermine the public health objective of reducing smoking prevalence.

2.26 As noted above, the implementation of measures that distort competition, such as further increasing the size of GHWs, would also betray a policy of Singapore to facilitate fair competition, as inferred from the Competition Act 2004. We refer again to Singapore's long-standing reputation for economic freedom and a supportive business friendly environment which will be damaged by measures that undermine competition and business investment.

Further increasing the size of GHWs would incentivise the illicit trade

2.27 As noted above, the illicit trade in tobacco is already a major concern to society in undermining public health attempts to reduce smoking prevalence and the financing of organised crime.

2.28 As in the case of standardised packaging, further increasing the size of GHWs would similarly exacerbate the already significant illicit trade in Singapore by removing the incentive to pay premiums for products that no longer look or feel premium and conferring a competitive advantage to those able to supply the lowest cost product – i.e. the illicit trader; and incentivising the market in illicit fully branded products.

2.29 The illicit trade severely undermines the public health objectives by stimulating demand for tobacco products, increasing youth access and exposing consumers to unregulated products. It also has a significant impact on government revenues and society in general through increased criminal activity.

Further increasing the size of graphic health warnings would not be proportionate

2.30 As explained above, the proposed increase in GHWs would deprive BAT Singapore of its extremely valuable intellectual property rights; namely, its trademark rights together with the goodwill arising in their brands.

2.31 The burden imposed by a requirement for 75% or 85% GHWs would manifestly outweigh any possible illusory benefit. The proposed increase is also disproportionate for the following further reasons.

Further increasing the size of GHWs would go beyond what is necessary to effectively warn consumers.

2.32 Oversized GHWs that effectively commoditise cigarette packs, such as the proposed 75% or 85% GHWs, are unnecessary for the purpose of effectively conveying warnings to consumers. There is no evidence that consumers are unable to comprehend the current warnings which already occupy 50% of the front and back of the pack.

2.33 Furthermore, concerns that the current 50% warnings are worn out, which would have to be substantiated by evidence that has not been presented, and that there are lower levels of awareness of specific illnesses—evidence of which the Government has not identified -- can be met by changing the current warning content and do not require increasing the size of the warnings. Accordingly, 75% or 85% GHWs would go beyond what is necessary to effectively warn consumers.

There are a number of more effective and less intrusive measures

2.34 There are also a number of alternative regulations that are more effectively targeted to reducing youth smoking such as better enforcement of current regulations and education measures for youth as discussed further at paragraph 1.54.3(D) above.

FURTHER INCREASING THE SIZE OF GHWS WOULD VIOLATE SINGAPORE'S INTERNATIONAL OBLIGATIONS

World Trade Organization Agreements

2.35 Further increasing of size of GHWs on pack surfaces is also entirely inconsistent with Singapore's obligations under the under the TRIPS Agreement, the Paris Convention, and the TBT Agreement.

2.36 BAT Singapore refers to the outline of the principles applicable to the TRIPS Agreement, the Paris Convention, and the TBT Agreement set out at paragraphs 1.56-1.68 of this Response

in relation to standardised packaging. Further increasing the size of GHWs would also violate these agreements by

2.36.1 Imposing "special requirements" that directly and specifically concern the trademark when used on the product as well as imposing "use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings". This amounts to an unjustifiable encumbrance within the meaning of Article 20 TRIPS;

2.36.2 Violating the obligation to make all distinguishing signs capable of constituting a trade mark protected under Article 15; and Article 15.4 which confirms that the nature of the product cannot be a reason for denying trademark protection to such distinctive signs;

2.36.3 Undermining the right of registered trade mark owners to prevent others from using similar signs that are likely to cause confusion protected under Article 16 TRIPS;

2.36.4 Effectively mandating packaging that causes confusion and unfair competition and fails to ensure protection of the trademark "as is" registered and protected in other countries that are parties to the Paris Convention; and

2.36.5 Constituting an unjustified barrier to international trade in contravention of obligations under Article 2.2 of the TBT Agreement.

2.37 Further increasing the size of GHWs could also expose Singapore to claims from foreign investors under BITs. As explained above, intellectual property is often specifically included in the definition of investments protected by such treaties and increasing the size of GHWs to 75% or 85% would inevitably breach several of the usual protections afforded by BITs including those prohibiting expropriation of investments (including intellectual property) without the payment of compensation, as well as those requiring fair and equitable treatment.

FURTHER INCREASING THE SIZE OF GHWS IS NEITHER REQUIRED NOR AUTHORISED BY THE WHO FCTC

2.38 The FCTC neither requires nor authorises the increase in the size proposed. Singapore's existing GHWs of 50% of the front and back of packages are already over and above the FCTC requirements.

2.39 Article 11 of the FCTC requires that a Party shall "*adopt and implement, in accordance with its national law, effective measures to ensure that*" tobacco product packaging carries health warnings in the form of text warnings covering "*no less than 30% of the principal display areas*" of packages. The FCTC only suggests that such warnings "should" (not "shall") cover 50% or more of the principal display areas and "may" (not "shall") be in the form of or include pictures or pictograms.

2.40 Furthermore, as discussed above, the WHO Guidelines to Article 11 of the FCTC which call for parties to consider warnings that cover no less than 50% and to use pictures, do not impose any binding obligations.

2.41 Accordingly, in order to comply with its binding legal obligations under the FCTC, a Party must issue a notification or law, consistent with national law, so as to adopt and implement "effective" textual warning labels on tobacco packaging covering not less than 30% of the principal display area. Singapore's existing GHWs of not less than 50% are already over and above the FCTC requirements. Accordingly, there is nothing in the FCTC that requires increasing the size of GHWs above 50%

2.42 In addition, as explained above, the FCTC does not authorise Parties to implement measures that breach national law-making criteria or procedures or that violate Parties' obligations under international laws. However, further increasing the size of GHWs would be inconsistent with Singapore law and would violate Singapore's international obligations, and would therefore be contrary to the FCTC. Further increasing the size of GHWs also cannot be shown to be supported by evidence and effective in line with FCTC guidance.

QUESTION 3

Q3a. Do you support banning the sale of tobacco products that are flavoured (e.g. fruit and candy) in order to reduce smoking in Singapore?

Q3b. If you answered No to Q3b, please state your reasons.

BAT Singapore supports the prohibition of ingredients in tobacco products that are shown by sound scientific evidence to increase the toxicological effects of the product, to enhance the pharmacological effects of nicotine or to lead to increased underage smoking.

However, BAT Singapore opposes any proposed ban on traditional flavourings such as menthol on the following grounds:

- There is no scientific basis to conclude that the use of menthol increases smoking prevalence or that banning of menthol will result in cigarettes that are any less harmful or less addictive;
- A ban on the sale of menthol tobacco products:
  - is unlawful;
  - is disproportionate and unjustified;
  - would place the Government in breach of its international obligations; and
  - is neither required nor authorised by the FCTC.

The Government should distinguish between products that are designed and marketed to appeal to youth, and traditional products made for adult consumers, such as menthol cigarettes.

MENTHOL: THE EVIDENCE

3.1 Menthol has been used as a traditional additive to tobacco for over 90 years. A ban on the sale of menthol cigarettes would be without basis as there is no reliable authoritative evidence to conclude that menthol (as a characterising flavour or otherwise) increases smoking prevalence, or the harmfulness or addictiveness of cigarettes.

3.2 The Government argues that menthol cigarettes "*have a greater appeal among youth*", but this does not consider the available scientific evidence or even the actual state of affairs in Singapore. Menthol cigarettes in Singapore hold one of the world's largest market share among adult consumers at approximately 48%,[86] yet according to the GYTS 2000, Singapore also has the lowest national percentage of youth who have ever tried smoking or

[86] The influence of the availability of menthol cigarettes on youth smoking prevalence, Oxford Economics 2013 available at: http://www.oxfordeconomics.com/my-oxford/projects/246456

are regular smokers in the region.[87] Accordingly, there is no correlation between the apparent "appeal" of menthol cigarettes to adult consumers in Singapore (represented by the market share of menthol) and youth initiation.

3.3 The Government also alleges that the presence of menthol affects the rate of youth smoking, but studies demonstrate that this assertion is false:

3.3.1 Assessing data from 52 countries worldwide, including Singapore, Oxford Economics confirmed that "*there is no evidence, for the countries in our sample, to support the proposition that greater availability of menthol cigarettes (as represented by market share) is associated with higher youth smoking prevalence*";[88]

3.3.2 the American Council of Science and Health concluded in 2010: "*Overall, the evidence [...] does not suggest that mentholated cigarettes are associated with any independent reduction in age of starting to smoke ('starter product for youth'), increase in cigarette consumption or dependency ('greater addiction potential')*";[89] and

3.3.3 The Scientific Committee on Emerging and Newly Identified Health Risks ("**SCENIHR**") report on Addictiveness and attractiveness of tobacco additives provided to the European Commission (the "**SCENIHR Report**") concluded that: "*there is a lack of evidence regarding the specific impact of menthol on smoking behavior*".[90]

3.4 Scientific studies show that menthol in cigarettes is not associated with any increased risk of cancer or increased intake of carcinogens as compared to non-menthol cigarettes, including:

3.4.1 Blot, W.J. et al. : "*The findings suggest that menthol cigarettes are no more, and perhaps less, harmful than nonmenthol cigarettes*";[91]

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87 The Global Youth Tobacco Survey Collaborative Group, Tobacco use among youth: a cross country comparison Tob Control 2002;11:252-270 doi:10.1136/tc.11.3.252

88 The influence of the availability of menthol cigarettes on youth smoking prevalence, Oxford Economics 2013 available at: http://www.oxfordeconomics.com/my-oxford/projects/246456

89 The American Council of Science and Health (Spring 2010), The Mentholation of Cigarettes: A Position Statement of the American Council on Science and Health, at 19-20.

90 Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) Addictiveness and attractiveness of tobacco additives. European Union; Brussels: 2010 page 91

91 Blot, W.J. et al. (2011), Lung Cancer Risk Among Smokers of Menthol Cigarettes, Journal of the National Cancer Institute.

3.4.2 Rostron, B.: "*We found evidence of lower lung cancer mortality risk among menthol smokers compared with non-menthol smokers at ages 50 and over in the U.S. population*";[92]

3.4.3 Benowitz N.L. et al.: no evidence found that smoking mentholated cigarettes resulted in greater intake or systemic exposure to nicotine and carbon monoxide;[93]

3.4.4 Muscat , E. J. et al.: no increase in smoke toxin exposure in menthol smokers;[94]

3.4.5 Nil, R. & Battig, K. and Ahijveych et al.: no change in inhalation and exhalation behaviour among menthol smokers;[95]

3.4.6 Ashley M., et al.: addition of menthol to cigarettes did not reduce the irritation or harshness produced during smoke inhalation, and did not result in an increase in mouth-level exposures to tar or nicotine;[96] and

3.4.7 Lin et al. found menthol to have potential antitumor qualities.[97]

3.5 A survey of other jurisdictions, including the U.S. and Canada, shows that menthol is actually specifically excluded from bans on flavoured tobacco. In the course of discussions in Canada as to the direction its regulation should take, the view was expressed by an expert witness from the Canadian federal health department (under oath) that menthol:

> *"is not something that youth view as attractive. When presented with it, they actually refuse it and prefer something else. We do not feel that it is a product that needs to be acted upon, and therefore we are not proposing action."*[98]

3.6 Finally, any reliance by the Government on a report published by the U.S. FDA's Tobacco Scientific Products Advisory Committee ("**TPSAC**") on the use of menthol in cigarettes (the "**TPSAC Menthol Report**") as the primary evidentiary basis for the ban on menthol is unjustified. At first instance, the U.S. District Court for the District of Columbia barred the

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92 Rostron, B. (2012), Lung Cancer Mortality Risk for U.S. Menthol Cigarette Smokers, Society for Research on Nicotine and Tobacco.

93 Benowitz, N. L. et al. (2004), Mentholated Cigarette Smoking Inhibits Nicotine Metabolism, The Journal of Pharmacology and Experimental Therapeutics.

94 Muscat, E. J. et al. (January 2009), Effects of menthol on tobacco smoke exposure, nicotine dependence, and NNAL glcuronidation, Cancer Epidermiol Biomarkers Prev. 18(1) 35-41.

95 Nil, R., Battig, K. (1989), Separate effects of cigarette smoke yield and smoke taste on smoking behaviour, Psychopharmacology 99: 54-59.

96 Ashley, M. et al. (2012), Lack of effect of menthol level and type on smoker's estimated mouth level exposure to tar and nicotine and perceived sensory characteristics of cigarette smoke, Regulatory Toxicology and Pharmacology 63, 381-390.

97 Lin JP, Lu HF, Lee JH, Lin JG, Hsia TC, Wu LT, Chung JG. (2005). (-)-Menthol inhibits DNA topoisomerases I, II alpha and beta and promotes NF-kappaB expression in human gastric cancer SNU-5 cells. Anticancer Research 25(3B):2069-74.

98 Paul Glover, Assistant Deputy Minister, Healthy Environments and Consumer Safety Branch, Department of Health at the Health Committee on June 16th 2009, in re. Bill C-32, An Act to amend the Tobacco Act.

FDA from using the work product of TPSAC, including the TPSAC Menthol Report, on the basis that certain members of TPSAC were biased. Their presence on TPSAC "*irrevocably tainted its very composition and its work product" and meant that the TPSAC's findings were "at minimum, suspect, and, at worst, untrustworthy.*" Although the decision was overturned on appeal by the United States Court of Appeals for the District of Columbia on the basis of jurisdiction and the plaintiffs' lack of standing, the conflict of interest findings of the of US District Court were not disturbed and still stand.

3.7 Furthermore, the Government has failed to conduct any studies on the demographics of menthol smokers and the consequences of a potential ban on menthol products in Singapore. The Government has relied on foreign studies without any consideration of whether the outcomes would apply in Singapore. It cannot be assumed that foreign data on menthol and youth smoking are automatically applicable to other nations. For example analysis undertaken in Canada did not support the proposition that menthol increases smoking initiation. Heath Canada noted that: "*menthol use in Canada is very different from what it is in other countries*".

3.8 The scientific evidence suggests that smoking cigarettes containing menthol confers no increased risk of other tobacco-related cancers and disease, including heart and cardiovascular diseases, beyond that of smoking non-menthol cigarettes. Individual studies of other tobacco-related cancers have reported no material difference in risk associated with smoking menthol as compared to non-menthol cigarettes.

3.9 In sum, the weight of the evidence demonstrates that the presence of menthol has no effect on smoking prevalence or the harmfulness or addictiveness of cigarettes.

A BAN ON THE SALE OF MENTHOL CIGARETTES WOULD \DEPRIVE CONSUMERS' RIGHT OF CHOICE

3.10 A ban on the sale on menthol cigarettes would be inconsistent with existing laws because consumers would be deprived of their right of liberty to continue purchasing the cigarettes of their preference.

3.11 Such persons would be unable to obtain the products they prefer lawfully in Singapore. Furthermore, these rights are infringed without any corresponding public health benefit.

A BAN ON THE SALE OF MENTHOL CIGARETTES WOULD BE DISPROPORTIONATE AND UNJUSTIFIED

3.12 The Government has the burden of showing that the proposed GHWs meet the requirements of proportionality discussed at paragraph 1.51 above.

A ban on menthol cigarettes is not necessary

3.13 Consumers are overwhelmingly aware of the risks of smoking. Furthermore, the structure, content, and format of cigarette warning labels are the same for all cigarettes. This uniformity in the risk information reinforces that all cigarettes are dangerous. Accordingly, a ban on menthol cigarettes is unnecessary. A ban on menthol cigarettes would ban products that are lawfully available to informed adult consumers.

3.14 As explained above, it is also clear from numerous scientific studies that the real drivers of smoking initiation are factors unrelated to the availability of menthol cigarettes. These factors include low socioeconomic status, tobacco accessibility, sibling use, peer use, normative expectations, academic achievement, social support, problem behaviours, expected utility, self-esteem and self-image, personality factors, and psychological well-being[99]. This is also demonstrated by the May 2012 Special Eurobarometer 385 Survey of the Attitudes of Europeans Towards Tobacco, commissioned by the EU Health Department which concluded that the most significant elements that made EU smokers start smoking were friends smoking (79%) and parents smoking (21%)[100]. A recent study analysing this Eurobarometer data concluded that there was no significant association between design and marketing features of tobacco products (including flavours) and early initiation of regular smoking.[101]

3.15 The Government fails to address this. Still less does it explain why, despite it, it is necessary to require a ban on menthol cigarettes.

A ban on menthol cigarettes is not adequate for the purpose of reducing the risk to public health

3.16 The Government has not demonstrated how a ban on menthol cigarettes would achieve its purported public health objectives. A Government, as a regulatory agency, must assess the suitability of the regulations it imposes. However, rather than engage in a careful analysis of cigarette ingredients, the Government has instead proposed an indiscriminate ban on the sale of all flavoured tobacco products without showing the effect such a ban would have on the marketplace or consumers, much less that such a ban is necessary to achieve the Government's public health objective.

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99 See, e.g., US Department of Health and Human Services (1994). Preventing tobacco use among young people: A report of the Surgeon General(summarising approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use). See also US Department of Health and Human Services (2012), Preventing tobacco use among youth and young adults: A report of the Surgeon General,at Ch. 4 (reinforcing findings of 1994 Surgeon General's report with added emphasis on individual cognitive processes).

100 TNS Opinion & Social. Special Eurobarometer 385 (May 2012), Attitudes of Europeans towards tobacco, at 69.

101 Filippidis et al (2015) The association between peer, parental influence and tobacco product features and earlier age of onset of regular smoking among adults in 27 European countries The European Journal of Public Health, doi:10.1093/eurpub/ckv068, 1–4

3.17 As explained above, the weight of the evidence demonstrates that the presence of menthol has no effect on smoking prevalence or the harmfulness or addictiveness of cigarettes.

3.18 A ban on the sale of flavoured tobacco products would also create unintended consequences which undermine the health objectives, including driving down prices and increasing illicit trade.

3.19 Such a ban would hinder manufacturers from being able to differentiate their products, effectively forcing tobacco products to become increasingly indistinguishable from one another in taste. Tobacco products will become increasingly standardised and manufacturers will be driven to compete on price. As such, price competition, which is already extremely vigorous in the tobacco market, will become even more intense leading to further price reductions.

3.20 The impact of reduced prices will be an increase in consumption as:

3.20.1 existing smokers will consume more (as tobacco products become more affordable); and

3.20.2 some existing smokers will continue to smoke, who would otherwise have quit at higher prices.

3.21 The impact of lower prices will be particularly significant on youth initiation and consumption, given that young people are generally more price sensitive. This would undermine the apparent objective of the proposed measure.

3.22 A ban on menthol cigarettes would also deprive some consumers of the products that they regularly consume, and therefore find acceptable and to their particular taste. This will inevitably encourage consumers to source such products elsewhere, including on the illicit market. Given that these products will be available at a lower price on the illicit market, manufacturers will be placed in the invidious position of having to compete with the illicit market on both price and taste. The natural consequence of this will be a further increase in downward price pressures on the legal market and an increase in the illicit market. A transfer of some consumers to illicit products will be inevitable.

3.23 As noted above, Singapore already has one of the highest rates of illicit cigarette consumption in the Asia markets. This problem would only be made worse if menthol cigarettes, which represent almost half[102] of the tobacco market in Singapore, are banned. In 2014 the Singapore government collected SG$1.23 billion in excise taxes on tobacco products. Should this decrease in accordance with the market share of mentholated cigarettes, Singapore would see a revenue shortfall of almost SG$600 million[103] per annum.

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102 The influence of the availability of menthol cigarettes on youth smoking prevalence, Oxford Economics 2013 available at: http://www.oxfordeconomics.com/my-oxford/projects/246456

103 Estimate based upon menthol prevalence and Singapore Customs revenue statistics, available at: http://www.customs.gov.sg/news-and-media/publications/statistics

3.24 Studies undertaken to assess the willingness of consumers to purchase cigarettes from the illicit market in Poland[104] and Finland[105] found that when menthol cigarettes were removed from the legal market, consumer preference for cigarettes sold through the illicit market increased significantly. Menthol cigarettes in Poland have a market share of about 15% and thus the effect in Singapore can be expected to be significantly greater, given the 48% market share of mentholated cigarettes.

3.25 Measures that foster illicit trade are by their very nature manifestly inappropriate. Not only would this increase in illicit trade severely undermine the public health objectives but, it would also have a significant impact on government revenues and society in general through increased criminal activity.

A ban on menthol cigarettes is not proportionate

3.26 The ban on the use of menthol is disproportionate, because it would result in a complete loss of a certain portion of the business of tobacco manufacturers with no compensation and no demonstrable benefit to public health. It will also prevent adult consumer choice, distort market competition and incentivise the illicit trade.

3.27 There are also a number of alternative regulatory options that are more properly targeted to reducing youth access and smoking initiation, and which do not improperly restrict adult consumers' free choice or restrict the rights of manufacturers.

3.28 In particular, the Government could ban tobacco products that have a distinctive fruity, sweet or confectionary like character and that are marketed to youth. Such measures have been introduced for example in the United States, which banned the sale of cigarettes that have an overt non-tobacco characterising flavour other than menthol, without banning any particular ingredient or other type of cigarette; and in some Australian states, such as the Australia Capital Territories, that ban products that have a distinctive fruity, sweet or confectionery-like character and the nature of the product, or the product's package or packaging, may be attractive to children. This type of targeted alternative achieves the health objective of reducing the appeal of cigarettes to youth in a less trade restrictive manner than a ban including menthol cigarettes, which are not marketed towards or preferred by youth.

3.29 There are also a number of other regulations that are more effectively targeted to reducing youth smoking, such as increasing measures to curtail the illicit tobacco market, as per paragraph 1.54.3(D) above.

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104 The impact of a ban on menthol cigarettes on illicit trade in Poland, SKIM | Consumer Research, 2013, available at: http://www.pmi.com/eng/media_center/Documents/PMI_Menthol_Ban_Impact%20Poland_final_M.pdf

105 The impact of a ban on menthol cigarettes on illicit trade in Finland, SKIM | Consumer Research, 2013, available at: http://www.pmi.com/eng/media_center/Documents/PMI_Menthol_Ban_Impact_Finland_Final_Report_2013Jul4.pdf

A BAN ON MENTHOL CIGARETTES WOULD VIOLATE SINGAPORE'S INTERNATIONAL OBLIGATIONS.

3.30 A ban on menthol cigarettes would violate Singapore's obligations under international treaties, including the TBT Agreement and GATT.

TBT Agreement

3.31 A ban on menthol cigarettes would violate Article 2.2 of the TBT Agreement, as it would constitute a technical regulation that is more trade restrictive than necessary to achieve the legitimate policy objective of protecting public health.

3.32 Second, although reducing youth uptake of smoking by imposing a ban on candy and fruit flavoured cigarettes may achieve a legitimate policy objective, a blanket ban on all flavoured cigarettes, including the traditional use of menthol, is more trade restrictive than necessary to achieve this objective. Such a ban would not materially contribute to achieving the purported health objective, because, as explained above, there is no evidence that menthol flavoured cigarettes increase smoking prevalence, are more harmful to health or more appealing to youth than cigarettes that do not use menthol as a flavouring.

3.33 Indeed, as has already been explained, there are likely to be unintended, adverse consequences caused by such a ban, including downward price pressures on the licit market as consumers turn to black market alternatives – as well as potentially leading to the banned products attaining a status as "forbidden fruit", which could in fact increase their appeal to younger consumers.

3.34 Furthermore, as discussed above less trade restrictive but equally effective measures are reasonably available to Singapore, as evidenced by the measures adopted in other countries with strict tobacco control policies, such as the United States and Australia.

General Agreement on Tariffs and Trade

3.35 GATT Article XI forbids the imposition of any prohibition or restriction on importation other than duties, taxes or other charges. A ban on menthol cigarettes would constitute a restriction on importation that does not take the form of a duty, tax or other charge. This "prohibition" on importation represents an absolute numerical limit (of zero) on the amount of imports that can be made, and thus serves as the ultimate quantitative restriction. The inconsistency of a ban on menthol cigarettes with Article XI:1 of the GATT is evident on its face. This is comparable to a ban imposed on the importation of certain periodicals in Canada – Periodicals, where the panel found that *"[s]ince the importation of certain foreign products into Canada is completely denied..., it appears that this provision by its terms is inconsistent with Article XI:1 of the GATT 1994."* A ban on menthol cigarettes would similarly completely deny importation of certain foreign tobacco products and is also 'by its terms' inconsistent with Article XI:1.

A BAN ON MENTHOL CIGARETTES CANNOT BE JUSTIFIED BY REFERENCE TO THE FCTC

3.36 The Government cannot rely on the FCTC to justify a ban on menthol cigarettes.

3.37 The FCTC does not contain any obligation to ban ingredients generally or menthol specifically.

3.38 Articles 9 and 10 of the FCTC provide:

"Article 9

Regulation of the contents of tobacco products

The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.

Article 10

Regulation of tobacco product disclosures

Each Party shall, in accordance with its national law, adopt and implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products. Each Party shall further adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce."

3.39 The partial and provisional guidelines to Articles 9 and 10 of the FCTC do not impose any legal obligations on Parties, but rather provide non-binding "guidelines" that are "*intended to assist generally Parties in meeting their obligations*" under the Convention. The Guidelines cannot increase any obligations under the FCTC.

3.40 In addition, as explained above, the FCTC does not authorise Parties to implement measures that breach national law-making powers or that violate Parties' obligations under international laws. However, a ban on menthol cigarettes would be inconsistent with Singapore law and would violate Singapore's international obligations, and would therefore be contrary to the FCTC.

3.41 Furthermore, as discussed above, the FCTC directs Parties to implement only measures that are supported by evidence and that can be shown to be effective. This is also confirmed by the Partial Guidelines for Implementation of Articles 9 and 10 which state: "*Parties should consider scientific evidence, other evidence and experience of other countries when*

determining new measures on ingredients of tobacco products and they should aim to implement the most effective measures that they can achieve."

3.42 The FCTC also does not provide any evidence that a ban on menthol cigarettes will reduce youth smoking or otherwise reduce the risk of public health. Indeed the Partial Guidelines for Implementation of Articles 9 and 10 state that: *"[a]ny reduction of [the] attractiveness [of tobacco products] resulting from removing or reducing certain ingredients in no way suggests that those tobacco products are less dangerous for human health*".[106]

3.43 Accordingly, the FCTC does not require nor authorise a ban on menthol cigarettes, nor does it constitute an evidence base demonstrating the adequacy of a ban on menthol cigarettes in reducing the public health risk associated with smoking. Such an evidence base must be established by reliable science and empirical evidence that demonstrates the effectiveness of a ban on menthol cigarettes in reducing prevalence rates.

[106] Partial Guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control

QUESTION 4

Q4a. Do you support raising the legal age for smoking from 18 to 21 years?

Q4b. If the legal age is raised from 18 to 21, should the Government phase in the ban to allow time for smokers to quit their habit?

Q4c. If your answer is No to Q4b, what are some suggestions to help those between 18 and 21 who are already smokers to quit the habit?

BAT Singapore opposes raising the minimum legal age ("**MLA**") for smoking from 18 to 21 years on the following grounds:

- Increasing the MLA to 21 would not be effective;
- Increasing the MLA to 21 would incentivise the illicit trade; and
- There are more effective and less onerous measures available.

INCREASING THE MLA WOULD NOT BE EFFECTIVE

4.1 Increasing the MLA for smoking to 21 would not be an effective policy for reducing youth smoking, and instead would be likely to increase the risk that consumers will turn to illicit products.

4.2 The Government has not adduced any evidence to show that increasing the MLA to 21 is necessary in Singapore. Survey results from Singapore suggest that the majority of participants had their first cigarette before the age of 16. The 2000 GYTS shows that in response to the question "*How old were you when you first tried a cigarette*" only 0.6% respondents tried their first cigarette when 16 years or older, and 24% respondents tried their first cigarette before they were 16 years old.[107]

4.3 The Government relies upon Kuwait and Sri Lanka for examples of implementation of an increase in MLA to 21 for tobacco products. However, it is clear from the GYTS results in these countries, that an increase in MLA to 21 has had no effect whatsoever on reducing youth smoking rates.

4.4 Sri Lanka increased the MLA for purchase of any tobacco products from 16 to 21 in 2006.[108] According to the Sri Lanka GYTS in 2003, 8%[109] of children aged 13-15 were current users

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107 The Global Youth Tobacco Survey Collaborative Group, Tobacco use among youth: a cross country comparison Tob Control 2002;11:252-270 doi:10.1136/tc.11.3.252; Figures taken from "*GYTS2000 Singapore All Schools Region 1 – Web Codebook*".

108 National Authority On Tobacco And Alcohol Act, No. 27 OF 2006.

109 Sri Lanka Global Youth Tobacco Survey 2003 Fact Sheet available at: http://www.cdc.gov/tobacco/global/

of tobacco products. A year after implementation of the increase in MLA to 21, in 2007, 9.1%[110] were current users. By 2011, this had increased again to 10.5%.[111]

4.5 Kuwait introduced a MLA of 21 for purchase of tobacco products in 1995.[112] Although no data is available for youth smoking prior to the age limitation, over the period 2001 to 2009 youth aged 13-15 who "currently smoke cigarettes" increased from 10%[113] to 12.2%[114].

4.6 The Consultation document also relies on a report released by the US Institute of Medicine in the United States, March 2015. The authors of this report conducted a review of existing literature relating to tobacco use initiation and used modelling tools to predict the likely public health impacts of raising the MLA of purchasing tobacco products to 21 years and 25 years. Thus the report reflects a prediction as opposed to actual data. Indeed the report confirmed that "*there is no direct empirical evidence on the effects on adolescent and young adult tobacco use of raising the MLA above 18 years of age.*" [115] The report also acknowledged the: "*absence of pertinent studies of the effect of raising the MLA for tobacco*"[116] and: "*the dearth of direct evidence on the effects of raising the MLA for tobacco.*"[117] Accordingly, the report provides no certainty of outcome and should not be regarded as a sufficient evidence base upon which to justify the restriction on adult free choice or the increased costs imposed on retailers

4.7 Moreover, the report also acknowledges that that underage persons obtain most of their tobacco products from "*social sources*" and that there is no evidence indicating that youth access restrictions against non-commercial distributors are enforced.

4.8 Prohibiting the use of tobacco products by some adults is not a preventive health policy, but potentially an infringement on civil liberties. Tobacco is a legal product and there is insufficient justification for denying the choice of some adults to use tobacco products. Irrespective of the harms associated with tobacco, of which adult consumers are fully informed, this is an unnecessary and negative precedent to set for a legal product, and one

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110 Sri Lanka Global Youth Tobacco Survey 2007 Fact Sheet available at: http://www.cdc.gov/tobacco/global/

111 Sri Lanka Global Youth Tobacco Survey 2011 Fact Sheet available at: http://www.cdc.gov/tobacco/global/

112 Law No. 15 of 1995 on Smoking Control, Article 3.

113 WHO GYTS Fact Sheet available at http://www.emro.who.int/images/stories/tfi/documents/GYTS_FS_KUW_R1.pdf

114 WHO GYTS Factsheet available at: http://www.emro.who.int/images/stories/tfi/documents/GYTS_FS_KUW_R3.pdf

115 Richard J. Bonnie, Kathleen Stratton, and Leslie Y. Kwan, "Raising the minimum age of legal access to tobacco products", Committee on the Public Health Implications of Raising the Minimum Age for Purchasing Tobacco Products, Board on Population Health and Public Health Practice, (March 2015), p.1-6, available from: http://www.ncbi.nlm.nih.gov/books/NBK310412/, accessed on 16 February 2016.

116 Ibid at p 1-6

117 Ibid at 6-22

which has a number of unintended consequences which go against the public health objective.

INCREASING THE MLA WOULD FURTHER INCENTIVISE THE ILLICIT TRADE

4.9 Prohibition does not work. It will further incentivise the illicit market in cigarettes and drive adult smokers into the hands of illicit traders. Raising the MLA would open up opportunities for the illegal market just as was seen in the United States with alcohol prohibition in the early 20th Century, during which unregulated products and criminal enterprise flourished. Prohibition of a legal product to a group of informed adults is destined to have the same negative effects.

4.10 As noted above, Singapore already has one of the highest rates of illicit cigarette consumption in the Asia markets. The prevention of a source of licit tobacco products for those aged 18 to 20 years would only further exacerbate this problem and further increase youth access to illicit products and increasing risks associated with the illicit trade as detailed above at 3.22-3.25.

THERE ARE A NUMBER OF MORE EFFECTIVE AND LESS INTRUSIVE MEASURES

4.11 In addition to an increase in the MLA to 21 years restricting personal freedoms and setting a dangerous precedent in forbidding adults from purchasing legal and highly regulated products, and incentivising the illicit tobacco trade based on entirely insufficient evidence of a public health gain, there are also a number of alternative measures that are more effectively targeted to reducing youth smoking.

4.12 Given the concerning statistic noted above that many smokers started before the age of 16, the Government should be more concerned about the rate of smoking for children under the existing MLA of 18 and should focus on implementing measures that will reduce the rate of smoking in that group, rather than prohibiting a group of informed adults from purchasing tobacco.

4.13 For example, the Government should focus on the enforcement of existing laws forbidding retailers to sell to minors and/or the implementation of additional age verification measures. In 2015, only 17 retailers[118] were penalised for breaches of their license conditions such as selling to underage youth. The best opportunity for public health gains is through better enforcement of the current laws, rather than through enacting additional unnecessary regulation.

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118 HSA list of suspended/revoked tobacco licenses, available at: http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Tobacco_Control/List_of_Suspended_Revoked_Licences.html

4.14 There are also a number of other regulations that are more effectively targeted to reducing youth smoking as outlined in paragraph 1.54.3(D).

4.15 As the Deputy Chair for the Government Parliamentary Committee for Health Tin Pei Ling has stated:

> *"What's critical and most challenging is to educate and raise awareness of the ills of smoking to the general public and persuade them to decide for themselves that they will not take up smoking or they will quit smoking, otherwise whether it's raising or lowering the age limit - (that) is just a numbers game"*[119]

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119 Channel News Asia, "Raise the minimum smoking age? Public feedback on potential tobacco control measures wanted", 29 December 2015 available at: http://www.channelnewsasia.com/news/singapore/raise-the-minimum-smoking/2384128.html

CONCLUSION

For the reasons set out above, BAT Singapore believes that the Proposals should be abandoned. In summary, those reasons include:

5.1 **The Government has not yet undertaken a Regulatory Impact Analysis.** The Government has not yet undertaken any assessment or studies to assess the efficacy of existing tobacco control regulations in Singapore, and identify any problems with them that would be rectified by the Proposals. The Proposals are based on measures adopted in foreign countries and studies without any consideration of whether they are lawful, necessary, and whether they would be effective in Singapore. The lack of a proper evidence-based regulatory impact analysis means that the Government cannot properly scrutinise the Proposals.

5.2 **The Proposals are inconsistent with existing laws and/or current trading environment.** The Proposals would deprive BAT Singapore of its property rights and the abilityto use its trademarks by rendering such intellectual property valueless and irrelevant, and infringe on consumers' personal liberty as protected under the Constitution. The Proposals would also represent a fundamental shift in Singapore's attitude towards intellectual property and property rights generally, which would diminish Singapore's reputation as an international trading centre which supports and protects IP and investment.

5.3 **The Proposals would place the Singapore Government in breach of its international obligations.** The Proposals would violate Singapore's international obligations under WTO Agreements such as the TRIPs Agreement, the TBT Agreement and GATT. The Proposals would also breach BITs, which would damage Singapore's international reputation and put the Government at risk of legal awards requiring it to repeal the legislation and/or pay substantial compensatory sums.

5.4 **The Proposals are manifestly disproportionate.** The Proposals are not necessary. There is already universal awareness of the risks of smoking in Singapore, and laws in place already prevent minors from purchasing cigarettes. Evidence also demonstrates that the Proposals would not be effective in reducing smoking prevalence amongst youth or otherwise. Given the current regulatory landscape in Singapore, measures such as standardised packaging and increased GHWs cannot be justified or proportionate, as they cannot be shown to be effective and would virtually extinguish the last means of communication for a lawfully available product, while resulting in adverse consequences in respect of pricing, the illicit market and public health.

5.5 **The Proposals would exacerbate an already significant illicit trade problem in Singapore.** Singapore already has one of the highest rates of illicit cigarette consumption in

the Asia markets. The Proposals will facilitate the growth of this market, and could lead to the Government losing revenue of almost SG$600 million per annum in accordance with the current market share of mentholated cigarettes if they were banned. An increase in illicit tobacco would also undermine the Government's public health objective by supplying tobacco products to minors, increasing smoking prevalence through the supply of cheap products, and exposing consumers to unregulated products.

5.6 **There are a number of alternative evidence-based options that are proportionate, effective, workable and can achieve public health objectives.** Given the difficulties associated with pursuing the Proposals, we strongly recommend that the Government consider the alternative measures discussed in our Response. These measures have the capacity to significantly affect youth smoking rates without the implementation of illegal, disproportionate measures in breach of Singapore's international obligations.