



BRITISH AMERICAN TOBACCO UNITED KINGDOM

**CONSULTATION ON THE INTRODUCTION OF REGULATIONS FOR THE
STANDARDISED PACKAGING OF TOBACCO PRODUCTS**

**RESPONSE OF BRITISH AMERICAN TOBACCO UK
LIMITED**

7 AUGUST 2014

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1. INTRODUCTION

- 1.1. This submission is made by British American Tobacco UK Limited¹ in response to the Government Consultation on the introduction of regulations for the standardised packaging of tobacco products, published on 26 June 2014.
- 1.2. British American Tobacco UK Limited is a member of the British American Tobacco group of companies and is responsible for the importation, distribution and sale of tobacco products in the United Kingdom (principally cigarettes, but also Roll-Your-Own tobacco (RYO)). British American Tobacco UK Limited has an approximate 8.9% share of the UK market in cigarettes, with brands such as LUCKY STRIKE, DUNHILL, PALL MALL, ROTHMANS, CONSULATE MENTHOL, ROYALS, ST MORITZ MENTHOL and VOGUE. British American Tobacco UK Limited also has a share of 12.9% of the UK Market in RYO with the brands CUTTERS CHOICE, PALL MALL and SAMSON.
- 1.3. British American Tobacco UK Limited responded to the Government's 2012 Consultation on standardised packaging of tobacco products, in its response dated 8 August 2012.² It also made submissions to the review into standardised tobacco packaging undertaken by Sir Cyril Chantler.³
- 1.4. As set forth in its prior submissions and as explained and updated in detail below, British American Tobacco UK Limited is strongly opposed to the introduction of standardised packaging. We believe the proposal is illegal. Furthermore, the proposal is fundamentally flawed in that it would not achieve its stated objectives. Indeed, standardised packaging has led in Australia, and will in the UK lead, to unintended consequences that would adversely impact the public, business and the Government. It should not be forgotten that Plain Packaging has failed to deliver any of the anticipated benefits in Australia, the only country in which it has been implemented to date. There is no reason to believe the result would be different in the UK.
- 1.5. A response to the specific Consultation questions is provided in section 7 of this Response. However, British American Tobacco UK Limited first sets out why the introduction of Plain Packaging would be unlawful and would not work, and therefore should not proceed.

¹ British American Tobacco UK Limited submits this Response on its behalf and on the behalf of other BAT group companies that would be adversely impacted by a Plain Packaging measure, including but not limited to the relevant BAT entities that own the trade marks used on cigarette packaging sold in the UK.

² Available at [http://www.bat.com/group/sites/uk_9d9kcy.nsf/vwPagesWebLive/DO8WZC5E/\\$FILE/medMD8WZC6J.pdf](http://www.bat.com/group/sites/uk_9d9kcy.nsf/vwPagesWebLive/DO8WZC5E/$FILE/medMD8WZC6J.pdf)

³ Available at [http://www.bat.com/group/sites/uk_9d9kcy.nsf/vwPagesWebLive/DO9DKJEB/\\$FILE/medMD9G9H6R.pdf?openelement](http://www.bat.com/group/sites/uk_9d9kcy.nsf/vwPagesWebLive/DO9DKJEB/$FILE/medMD9G9H6R.pdf?openelement) (see Appendix 2)

DEFINITIONS AND ABBREVIATIONS

2012 Consultation	The Government Consultation on standardised packaging of tobacco products, April 2012.
2012 Impact Assessment	The Government Impact Assessment on standardised packaging of tobacco products, April 2012.
2014 Impact Assessment	The Government Impact Assessment on standardised packaging of tobacco products, 17 June 2014.
Alcopops case	E-9/00 <i>EFTA Surveillance Authority v Norway</i> .
ANDSHS	Australian 2013 National Drug Strategy Household Survey.
Anson Report	The expert report of Mr Weston Anson, Chairman of CONSOR Intellectual Asset Management.
Brand IP	Trade marks, trade dress, packaging designs, copyright designs, goodwill and other intellectual property elements.
British American Tobacco, BAT or We	British American Tobacco UK Limited.
CAGR	Compound annual growth rate.
Chantler Report	Report of the independent review undertaken by Sir Cyril Chantler on standardised packaging of tobacco products, April 2014.
CITTS	The Cancer Institute NSW [New South Wales] Tobacco Tracking Survey.
CJEU	Court of Justice of the European Union.
Commission	The European Commission.
Community	The European Union.
Consultation	The Government Consultation on the introduction of regulations for the standardised packaging of tobacco products, published on 26 June 2014, to which this is the Response.
Crookshank Report	The expert report of Mr Stuart Crookshank OBE, a recently retired former Her Majesty's Revenue and Customs officer.
CTMR	Community Trade Mark Regulation.

Dryden Report	The expert report of Mr Neil Dryden, Executive Vice President of Compass Lexecon.
ECHR	European Convention on Human Rights.
EFTA Court	European Free Trade Association Court.
EOS	InfoView Exchange of Industry Sales data.
Faber Report	The expert report of Professor Ronald J. Faber, a Professor of Mass Communication at the University of Minnesota.
FCTC	The World Health Organisation Framework Convention on Tobacco Control Treaty.
FDA	US Food and Drug Administration.
FMC	Factory Made Cigarettes.
Gibson Report	The expert report of Mr Stephen Gibson, an economist, consultant and founder of SLG Economics Ltd, and formerly Chief Economist and Director of Economic Policy at Postcomm.
Government	The government of the United Kingdom.
HMRC	Her Majesty's Revenue and Customs.
IA Guidance	HM Government: Impact Assessment Guidance.
McKeganey Report	The expert report of Dr. Neil McKeganey, Director, Centre for Drug Misuse Research, Glasgow.
Member States	Member States of the European Union.
Method Statement	The Method Statement of the Chantler Review dated 16 December 2013.
Mitchell Report	The expert report of Professor Gregory Mitchell, a psychologist and law professor at the University of Virginia.
NAO	The UK National Audit Office.
PHRC Review	The Government commissioned review of the evidence on Plain Packaging undertaken by the Public Health Research Consortium (PHRC), Moodie, <i>et al.</i> , "Plain

Tobacco Packaging: A Systematic Review” PHRC (2012); and the 2013 update of this review, Moodie, *et al* (2013) "Plain Tobacco Packaging Research: An Update". Stirling, Scotland: Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling.

Plain Packaging	Standardised packaging as described in the 2014 Consultation.
Principles	Principles of Better Regulation forming part of the IA Guidance.
QALY	Quality-adjusted life year.
Response	This document.
RYO	Roll-Your-Own tobacco.
TMD	Trademarks Directive.
TPD1	Directive 89/622/EEC.
TPD2	Directive 2014/40/EU.
TPSAC	Tobacco Products Advisory Committee.
TRIPS Agreement	The WTO Agreement on Trade Related Aspects of Intellectual Property Rights.
UK	The United Kingdom.
Viscusi Report	The expert report of Professor Viscusi, Distinguished Professor of Law, Economics and Management, Vanderbilt University Law School, Nashville, United States.
WHO	The World Health Organisation.
WTO	The World Trade Organisation.

2. EXECUTIVE SUMMARY

BAT is strongly opposed to Plain Packaging on a number of grounds, including:

- 2.1. **The Government has followed a flawed process and appears to have already decided to introduce Plain Packaging.** The Government has spent a number of years looking into the issue of Plain Packaging. Despite this, the Government has not come any closer to discharging its public law duty to make policy on the basis of the best facts available. The Government appears instead to have decided to adopt a policy introducing Plain Packaging come what may. The Government has moved the goalposts on the policy by saying that it no longer needs to show that Plain Packaging will have any specifically identifiable health benefits. The Government has also disregarded the fact that the actual evidence from Australia shows that Plain Packaging has not achieved its objectives. Instead the Government has, since November 2013, embarked on a process of justifying a decision to proceed with Plain Packaging by cloaking the same evidence that it previously rejected as inadequate under the banner of an 'independent review'. The Chantler Review provides no new evidence and cannot be described as independent because it relies on expert opinions from avowedly conflicted tobacco-control advocates whose opinions are inconsistent with actual data from Australia.
- 2.2. The Government attempts to justify the Consultation by saying it must now act without delay to introduce Plain Packaging to avoid future health consequences. This is despite taking six years to consider a change in policy and claiming that no decision has yet been taken. This appears to be a new justification for introducing the policy without any credible evidence. There have been no changes identified by the Government suggesting worsening health consequences, or increasing health benefits, to justify this new sense of urgency.
- 2.3. **Plain Packaging is unlawful.** Plain Packaging would not only breach several UK, EU and international laws and agreements but would constitute a wholesale expropriation of BAT's valuable intellectual property, requiring payment by the Government of very significant compensation. The Government places great weight on its alleged obligations under the FCTC, which in any event do not mandate Plain Packaging at all, and yet ignores its obligations under the Human Rights Act 1998, EU law and the UK's other international agreements.
- 2.4. **Plain Packaging is irrational and disproportionate.** Plain Packaging is irrational because it is a violation of fundamental rights and international obligations that cannot be justified; the Government has not taken account of relevant considerations and evidence. In the circumstances it is a policy that no reasonable decision-maker could make. Plain Packaging would also fail any proportionality assessment because the Government has failed to demonstrate that Plain Packaging is a necessary, adequate and

proportionate measure when considered against the real world evidence from Australia highlighting the failures of the Plain Packaging policy, as well as existing legislation or any of the more effective alternative measures. Accordingly, any decision to implement Plain Packaging would be manifestly inappropriate. This is so because, among other things, Plain Packaging is likely to have serious adverse consequences, including:

- 2.4.1. exacerbating a serious illicit trade problem in the UK; and
 - 2.4.2. potentially stimulating price competition and leading to an increase in down trading, which may in turn lead to an increase in consumption;
 - 2.4.3. raising barriers to entry;
 - 2.4.4. harming small retailers;
 - 2.4.5. stifling innovation; and
 - 2.4.6. reducing consumer choice.
- 2.5. The mere fact that Plain Packaging is presented as a health measure does not relieve the Government of its obligation to demonstrate that Plain Packaging is justified and proportionate.
- 2.6. BAT's responses to the questions in the Consultation are, in summary:
- 2.6.1. In response to Question 1, BAT observes that the Chantler Report does not and cannot support the introduction of Plain Packaging for a number of reasons, including that the Chantler Report fails to take account of the evidence from Australia's experience with Plain Packaging and does not provide a sufficient evidential basis upon which to introduce regulation.
 - 2.6.2. In response to Question 2, BAT wishes to bring to the Government's attention the objective evidence that has emerged since the 2012 Consultation on the impact of Plain Packaging in Australia, which the Government stated it was waiting for, which shows that more than 18 months after its introduction Plain Packaging has not reduced smoking behaviour and, in fact, has been counterproductive.
 - 2.6.3. BAT has not offered a response to Question 3 as it is its view that the regulations proposed are unlawful for the reasons contained in this Response. British American Tobacco reserves its rights in relation to the draft regulations.
 - 2.6.4. In response to Question 4, BAT maintains that the 2014 Impact Assessment is not a proper basis for decision making, that it fails to comply with regulatory impact assessment guidelines, and that

it fails to substantiate that Plain Packaging is necessary, appropriate and proportionate. Furthermore, the methodology pursued in the 2014 Impact Assessment and the process followed by the Government evidences a predisposition towards the implementation of Plain Packaging. In addition, the Government's own expert studies can be shown to be tainted by bias, to be unreliable and to ignore actual direct evidence.

3. LEGAL PROBLEMS WITH PLAIN PACKAGING

- 3.1. As a matter of fundamental public law the Government cannot introduce Plain Packaging insofar as the measure is unlawful *per se*, irrational and/or disproportionate and/or the Government has not acted with procedural propriety and fairness as it is obliged to do. The mere fact that Plain Packaging is presented as a health measure does not relieve the Government of its public law obligations.
- 3.2. As BAT highlights in this Response, the Plain Packaging measures proposed are:
 - 3.2.1. procedurally improper.
 - 3.2.2. unlawful *per se*; and
 - 3.2.3. irrational and disproportionate.
- 3.3. Each of these issues is considered in turn below.

- 4. THE GOVERNMENT HAS NOT ACTED WITH PROCEDURAL PROPRIETY AND FAIRNESS**
- 4.1. The procedure followed by the Government to date in respect of Plain Packaging is fundamentally flawed and unfair. A decision to proceed with Plain Packaging on this basis is liable to be struck down for procedural impropriety.**
- 4.2. Contrary to its public statements, it is clear that the Government is acting as if it has decided to proceed with Plain Packaging. The Government appears to demonstrate an intention to proceed irrespective of stakeholder concerns and evidence that should have been considered as part of the Chantler Report, but was not. Furthermore the Chantler Report is contradicted by evidence subsequent to its publication on 3 April 2014. These concerns lead BAT to believe that the Government's Consultation process is not fair and genuine. This is demonstrated by the following:**
 - 4.2.1. The Government has moved the goalposts on its requirement for actual evidence demonstrating that Plain Packaging would work, now proposing that it is sufficient to show only that Plain Packaging may deliver health benefits in conjunction with other existing or soon to be introduced measures, including the full implementation of the retail display ban and TPD2.**
 - 4.2.2. Despite considering Plain Packaging for 6 years, the Government now says that it must act without delay to introduce Plain Packaging to avoid future health consequences. This appears to be a new justification for introducing the policy without any credible evidence. There have been no changes identified by the Government suggesting worsening health consequences justifying the new sense of urgency in relation to this policy;**
 - 4.2.3. The Government previously stated that it wanted to consider the evidence from the Australian experience on Plain Packaging before making a decision. Evidence is now available showing that Plain Packaging has not had any impact beneficial to public health, and in fact has been counterproductive. The Government has disregarded this evidence; and**
 - 4.2.4. The Government's quantification of the alleged impact of Plain Packaging is biased and fundamentally flawed, which renders the entire claimed health benefit of the measure invalid.**

A. The Government's Flawed Consultation Process

- 4.3. The tobacco industry has been systematically regulated in the UK for many years, including requirements about ever larger health warnings on packs and advertising and promotion restrictions and bans, smoke constituents labelling requirements, ingredients disclosure requirements, restrictions on smoking in public places, the addition of large graphic health warnings to packs, and, most recently, bans on retail displays.
- 4.4. Tobacco has also been heavily regulated at the EU level since the 1980s. The first tobacco products directive, Directive 89/622/EEC ("**TPD1**") provided for, among other things, the strict regulation of the tar, nicotine and carbon monoxide yields for cigarettes, the regulation of the labelling of packaging including the requirement that they carry warnings and a ban on oral snus.
- 4.5. Most recently, the second tobacco products directive, Directive 2014/40/EU ("**TPD2**") was adopted by the European Parliament on 3 April 2014 and entered into force on 19 May 2014. This provides for, among other things, ingredient regulation, including a ban on menthol cigarettes; a ban on flavouring in components and other technical innovation; mandatory general health warnings to include text, a picture and to cover 65% of the front and the back of the pack; restrictions on product presentation and the use of non-misleading descriptors, for instance relating to taste and biodegradability; pack standardisation; tracking and security features; and a ban on cross-border sales. Member States are required to transpose TPD2 by 20 May 2016. BAT filed proceedings in the Administrative Court on 27 June 2014 challenging the validity of the Directive on the grounds of competence, proportionality, delegated and implementing powers and subsidiarity. By an Order of the Administrative Court of 31 July 2014, permission to bring the claim in the judicial review has already been granted. The UK government has, moreover, accepted that the questions relating to the interpretation and validity of TPD2 must indeed be referred to the Court of Justice of the European Union ("**CJEU**"). It is expected that a decision whether or not to refer questions to the CJEU in BAT's challenge will be made by the Court in November 2014.
- 4.6. BAT has commissioned an expert report of Stephen Gibson, formerly Chief Economist and Director of Economic Policy at Postcomm, who specialises in competition and regulatory economics. Mr Gibson's report (the "**Gibson Report**") is submitted with this Response (see Appendix 1). The Gibson Report concludes that the Government's current proposal for Plain Packaging would be layering yet more regulation on top of existing and prospective new measures which have not even been implemented, and the impact of which has not yet been seen or assessed by the Government. Given this, it is not possible for the Government to demonstrate, as it must, that the regulations are no more than is necessary in order to achieve the Government's stated public health objectives.

- 4.7. Furthermore, while not an argument related to illegality, Plain Packaging is effectively a "gold-plating" of TPD2. TPD2 itself contains no requirement to introduce Plain Packaging. As noted by the RPC itself, "[b]y going beyond minimum EU requirements, the Department is gold-plating the measure". Such burdensome additions to EU legislation were something the present Government explicitly committed itself to avoiding in its 2010 *Programme for Government* document.⁴ The Government offers no compelling argument why this Government commitment should be ignored in the rush to introduce Plain Packaging.
- 4.8. A summary timeline of events leading up to this Consultation is set out below:
- 4.8.1. In May 2008, the Government examined Plain Packaging in connection with its 2008 consultation on the Future of Tobacco Control. It concluded that: "*the research evidence into this [Plain Packaging] initiative is speculative, relying on asking people what they might do in a certain situation.*"
- 4.8.2. In March 2011, the Government released the publication entitled, "Healthy Lives, Healthy People: a tobacco control plan for England", which included a commitment to consider whether Plain Packaging of tobacco products could be an effective way to (a) reduce the number of young people smoking; and (b) support adult smokers who want to quit. However this was contingent on there being evidence. The Government stated (at paragraph 3.6) that it:
- "Will look at whether the Plain Packaging of tobacco products could be effective in reducing the number of young people who take up smoking and in supporting adult smokers who want to quit. The Government wants to make it easier for people to make healthy choices but **wants to understand whether there is evidence to demonstrate that Plain Packaging would have an additional public health benefit.** We will explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around tobacco packaging."* (emphasis added)
- 4.8.3. On 16 April 2012, the Government published the 2012 Consultation and 2012 Impact Assessment on standardised packaging of tobacco products. In particular the Government stated:
- "Any decisions to take further policy action on tobacco packaging will be taken **only after full consideration is given to consultation responses, evidence and other relevant***

⁴ "We will end the so-called 'gold-plating' of EU rules, so that British businesses are not disadvantaged relative to their European competitors" The Coalition: our programme for government, HMSO, 2010, page 10.

information" (emphasis added) (at paragraph 1.3 of the 2012 Consultation);

We seek feedback on whether there might be public health benefits from the introduction of standardised tobacco packaging in addition to policies currently in place, including legislation ending the permanent display of tobacco products by retailers" (emphasis added) (at paragraph 3.3 of the 2012 Consultation); and

A policy to introduce standardised tobacco packaging would need to be justified and be based on expected benefits over and above existing tobacco control measures." (emphasis added) (at paragraph 13 of the 2012 Impact Assessment).

4.8.4. In August 2012, BAT's response to the Government's 2012 Consultation identified seven key reasons for opposing the introduction of Plain Packaging. These included, in brief, that:

4.8.4.1. Plain Packaging would not be effective in reducing smoking prevalence since tobacco packaging is not a relevant factor in people's decision to smoke or to quit smoking;

4.8.4.2. The Government had not considered the relevant research and relied on insufficient and unreliable evidence that failed to make the crucial link between packaging and any reduction in smoking;

4.8.4.3. Plain Packaging would exacerbate an already significant illicit trade problem in the UK;

4.8.4.4. Plain Packaging could have other significant adverse unintended consequences such as lowering average prices and thereby increasing smoking, reducing Government revenue and harming small businesses;

4.8.4.5. Plain Packaging is unlawful as it would not only breach several UK, EU and international laws and agreements but would constitute a wholesale expropriation of BAT's valuable intellectual property, requiring payment by the Government of very significant compensation;

4.8.4.6. Given the lack of evidence and acknowledged risks, the Government has not demonstrated that the benefits would outweigh the adverse consequences of Plain Packaging; and

4.8.4.7. There are a number of alternative evidence-based options that are proportionate, effective, workable and

can achieve public health objectives while respecting intellectual property rights.

4.8.5. On 12 July 2013, the Government published a report and a written Ministerial Statement stating that it was the Government's intention to await the outcome of Plain Packaging in Australia before going ahead with the implementation of Plain Packaging proposals. In particular the Government stated that, "*[h]aving carefully considered these differing views, the Government has decided to wait until the emerging impact of the decision in Australia can be measured before making a final decision on this policy.*" In other words, the Government considered just 12 months ago that it had insufficient evidence to proceed.

4.8.6. Nevertheless, on 28 November 2013, the Government announced that Sir Cyril Chantler, a paediatrician, had been asked to conduct an independent review of the public health evidence for the introduction of Plain Packaging.

4.8.7. On the same day Jane Ellison MP, the Parliamentary Under-Secretary of State for Health, stated in response to questions in Parliament:

*"...we would need to be able to act quickly if, following the recommendation, we decided to proceed. The power to make regulations is being proposed in the other place exactly so that we may move quickly at the point we receive Sir Cyril's review. I have looked at the draft schedule, and if the Government were minded to go forward with this policy, I see no reason why it could not be put through before the end of this Parliament."*⁵

4.8.8. Sir Cyril published a Method Statement on 16 December 2013.

4.8.9. Shortly thereafter, on 20 December 2013, Herbert Smith Freehills LLP, on behalf of BAT, wrote to the Government and Sir Cyril explaining, among other things, how:

4.8.9.1. both the 28 November 2013 announcement and the Chantler review were misconceived and raised serious issues of legality in circumstances where any implementation by the UK of measures resulting in Plain Packaging would contravene EU law, significantly interfere with fundamental rights and be contrary to the UK Government's domestic law obligations;

4.8.9.2. the announcement signified a surprising about-turn in the Government's position that it would wait until the

⁵ HC Deb 28 November 2013 c409 – 410.

impact of the decision in Australia to implement Plain Packaging could properly be analysed, before it made its decision on such a policy in the UK;

- 4.8.9.3. the terms of the Chantler Review were exceedingly narrow; and
- 4.8.9.4. the approach taken by the Government is such that companies which will be adversely affected by any possible new measure have a legitimate expectation of being consulted in relation to the issues now being considered and that this consultation should be lawful.
- 4.8.10. BAT submitted its response to the Chantler Review on 9 January 2014, reiterating that Plain Packaging is illegal and the methodology of the review was flawed. This response is attached at Appendix 2.
- 4.8.11. The report following Sir Cyril Chantler's review was published on 3 April 2014. On the same day, Jane Ellison MP announced that she was "minded" to proceed with Plain Packaging following a short and limited consultation: "*Sir Cyril's report makes a compelling case that if standardised packaging were introduced it would be very likely to have a positive impact on public health and that these health benefits would include health benefits for children*".
- 4.8.12. On 9 April 2014 the Government submitted an Impact Assessment to the Regulatory Policy Committee for review. This was only 6 days (including a weekend) after the Chantler Report was published on 3 April 2014, suggesting that the Government had made up its mind and prepared the Impact Assessment long before Sir Cyril Chantler published his report, of which the Government had only 48 hours' notice according to the Method Statement issued by Sir Cyril Chantler in December 2013.
- 4.8.13. On 26 June 2014, the Government published this Consultation on the introduction of regulations for Plain Packaging of tobacco products and a fresh Impact Assessment with a six week consultation period. The Government made it clear in its announcement of the same day that "*[i]t is vital that any decision is properly and fully informed*".
- 4.9. The Government has spent a number of years looking into the issue of Plain Packaging. Despite this, the Government has not come any closer to having the necessary evidence or information (as it is its public law duty to have) to deprive BAT of its intellectual property rights based on speculation and without proper regard to data showing that Plain Packaging does not work.

- 4.10. The Government's attempts to gather evidence (the 2012 Consultation, the Chantler Report and this Consultation) have been inadequate in their scope, process and methodology, and at each stage BAT has been compelled to raise procedural objections. The Government has not yet taken the time to evaluate all of the evidence fairly and properly. We are concerned that the Government will now push forward with proposals that constitute a clear interference with the rights of BAT without knowing the real costs. In these circumstances, it is not possible for the Government to demonstrate, as it must, that the regulations are no more than is necessary to accomplish the objective or that it strikes a fair balance (*R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45).
- 4.11. At the heart of BAT's concerns is that this latest Consultation process, by its content, its timing and its duration, gives the impression that a decision has already been made to press ahead with these flawed proposals, and the Government will disregard any response – no matter how cogent, no matter how convincing – from those opposed to Plain Packaging, and the independent expert evidence presented in this Response.
- 4.12. It is a fundamental requirement of a fair and lawful consultation, enshrined in a number of Court judgments, that it takes place at a time when proposals are still at a formative stage, and that the product of the consultation is given conscientious consideration. These requirements, summarised in *R v North and East Devon HA, ex parte Coughlan* [2001] QB 213, are well known to the Government's legal advisers and do not need repetition here.⁶
- 4.13. But here, as the timeline set out at paragraph 4.8 above clearly shows, the Government as recently as mid-2013 was stating that it had decided to postpone any Plain Packaging decision “*until the emerging impact of the decision in Australia can be measured before making a final decision on this policy*”. This fact is notably omitted from paragraph 2.3 of the background to the 2014 Consultation, and from the 2014 Impact Assessment. Further, the Government has made its position clear that a decision on Plain Packaging should not be delayed on the asserted basis “*that the cost of delaying is too great in public health terms*” (2014 Impact Assessment, para 28). In so doing, the Government is disregarding the actual evidence from Australia that shows that Plain Packaging has not had the intended impact, and also the impact of the changes to UK legislation required by TPD2 and the extension of the ban on retail sale displays in small shops commencing in April 2015, and dismissed the “do nothing” option (see 2014 Impact Assessment, Policy Option 1). This (and similar statements) indicates that, notwithstanding paragraph 1.1 of the Consultation, the Government seems determined that Plain Packaging should be introduced, whatever the response to this Consultation.

⁶ For a recent re-iteration see *R (on the application of United Company Rusal plc) v London Metal Exchange* [2014] EWHC 890. (Admin), Philips J.

- 4.14. Mr Gibson notes that the Government submitted the 2014 Impact Assessment to the Regulatory Policy Committee on 9 April 2014, the Chantler Report having only been published on 3 April 2014. Mr Gibson considers that this "*implies that [the Government] had drafted the [2014 Impact Assessment] and made up its mind on their preferred policy before they had received or considered the evidence in the Chantler Report. Again, this suggests that the policy development process has been rushed and that the [Government] had made up its mind before properly considering the evidence.*"⁷
- 4.15. This is further reflected in the unreasonable time period provided to respond to the 2014 Consultation. The Consultation seeks "*new or additional information since the 2012 consultation*", but sets an unfair time limit of only 6 weeks, ending on 7 August 2014. The Government will be very well aware of the time required for the preparation of detailed and useful expert responses to the lengthy, and heavily foot-noted, 2014 Impact Assessment. The period set is too short, and fails to take account of the Government's own recently amended Consultation Principles⁸ - which state:
- "Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating action."*
- 4.16. The holiday period there referred includes "*Summer (August) = 22 Working Days.*" There is no sensible reason for including any of these holiday days in the six week period applicable to the Consultation.
- 4.17. The Consultation is also predicated on preferring the option of further regulation (in the form of Plain Packaging) without giving adequate consideration to, for example, better enforcement of existing regulations. The National Audit Office ("**NAO**") published a report in June 2014 urging the Government to do more to consider non-statutory alternatives to regulatory interventions in the UK.⁹ This does not appear to have happened in the case of Plain Packaging.
- 4.18. BAT requested an extension to the time limit for responding to the Consultation on 9 July 2014. This request was rejected by the Government on 18 July 2014.

⁷ Paragraphs 4.1 and 4.4 of the Gibson Report.

⁸ Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf at page 2.

⁹ The NAO: *Using alternatives to regulation to achieve policy objectives* (June 2014). Available at: <http://www.nao.org.uk/wp-content/uploads/2014/06/Using-alternatives-to-regulation-to-achieve-policy-objectives-summary.pdf>

- 4.19. The inadequacy of the Government's work is reflected in its 2014 Impact Assessment. As explained in more detail in the Response to Question 4 of the Consultation, the 2014 Impact Assessment is materially inadequate both in terms of its substance and its failure to meet the standards which the Government has set for itself (the "**IA Guidance**"¹⁰) in respect of impact assessments. The proposed Plain Packaging measure is highly controversial and represents an unprecedented expropriation of BAT's business and associated rights, including its intellectual property rights. Consistent with the Government's IA Guidance and associated toolkit, a detailed level of analysis is appropriate and necessary. The onus is on the Government to analyse the available options properly.
- 4.20. The 2014 Impact Assessment fails to provide the range of options and the level of analysis of the viability of those options that would be expected based upon the IA Guidance. Instead, it suggests a predisposition towards the Plain Packaging option, and fails to give full and proper consideration to alternative means of reducing tobacco consumption. It does not even analyse the Options 1 and 3 that it puts forward, beyond quantifying Option 1 as £0. Option 1 cannot have a zero cost because it includes measures that have yet to be implemented (such as TPD2 and the remainder of the retail display ban). The Government should include the costs and effectiveness of those measures in Option 1 if they are to be fully and frankly appraised as part of the Consultation. This is in stark contrast to the consideration given to the Plain Packaging option (Option 2). Accordingly, the 2014 Impact Assessment fails to demonstrate that Options 1 or 3 (or indeed any other alternative) cannot achieve the outcome the Government is seeking to achieve, namely a reduction in smoking prevalence, particularly among youths. This is contrary to the Government's own IA Guidance. No proper analysis of costs and benefits has been undertaken in order to select the most appropriate option in terms of the evidence and law.
- 4.21. The Department's pursuit of Plain Packaging is also contrary to the Principles of Regulation (the "**Principles**") annexed to the IA Guidance which require that the Government will regulate to achieve objectives only "*having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches*"¹¹ and that "*the regulatory approach is superior by a clear margin*"¹² to possible alternatives.
- 4.22. Further, those Principles state a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made. The relevant test for Plain Packaging to pass in this case is

¹⁰ The IA Guidance is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf

¹¹ IA Guidance, pages 4 and 65.

¹² IA Guidance, page 4.

that no suitable alternative, non-regulatory or self-regulatory means of achieving the same outcome exists.

- 4.23. Further detail on the inadequacies in the Government's 2014 Impact Assessment is included in the response to Consultation Question 4 (at paragraph 7.51 below) and in the Gibson Report.

B. Government's Failure to Consider Relevant Evidence

- 4.24. The Government, having previously stated that it wanted to consider the evidence from the Australian experience on Plain Packaging before making any decision, has now ignored the evidence that does not support the introduction of Plain Packaging.

- 4.25. Objective data about actual smoking behaviour in Australia, available after the 2012 Consultation, shows that more than 18 months after its introduction in Australia, Plain Packaging has not had the intended impact and, indeed, has proved to be counterproductive.

- 4.26. The Government dismisses the need to wait for further evidence from Australia because it believes incorrectly that:

4.26.1. the information is likely to be of a limited class and is likely to be far outweighed by the health benefits the Government claims will flow from Plain Packaging (paragraph 81 of the 2014 Impact Assessment);

4.26.2. initial studies on Plain Packaging in Australia show positive results (paragraph 55 of the 2014 Impact Assessment); and

4.26.3. any data about the effect of Plain Packaging on illicit trade in Australia will be of no relevance to the UK because of the proximity of the EU and the free movement of goods (paragraph 175 of the 2014 Impact Assessment).

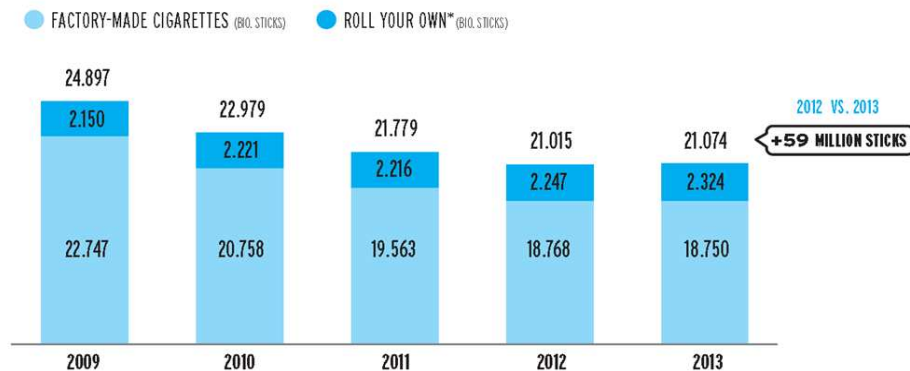
- 4.27. In fact, the Government's position on not waiting for further Australian evidence is misguided. The evidence from Australia showing this is misguided includes:

4.27.1. The InfoView Exchange¹³ analysis of Industry Sales data which shows an increase in volumes of 0.3% since the introduction of Plain Packaging in Australia. According to these data, between 2008 and 2012 the volume of cigarettes (that is, Factory Made Cigarettes ("**FMC**") and RYO tobacco) sold in Australia had been declining at an average rate of 4.1% (2008-2012 CAGR). By contrast, total industry volumes actually increased over the course of 2013 by 59 million cigarettes (equating to a growth of 0.3%).

¹³ InfoView Exchange of Industry Sales data ("**EOS**") tracks industry wholesale shipping figures from cigarette and tobacco factories.

This increase came about in spite of the fact that the Australian government increased tobacco taxes both before and after the introduction of Plain Packaging. The change can be seen in the chart below:

Australian legal tobacco sales volume trend



Source: InfoView Technologies Pty Ltd.
 *Cigarette equivalent conversion for "Roll Your Own" is 0.8 grams per stick

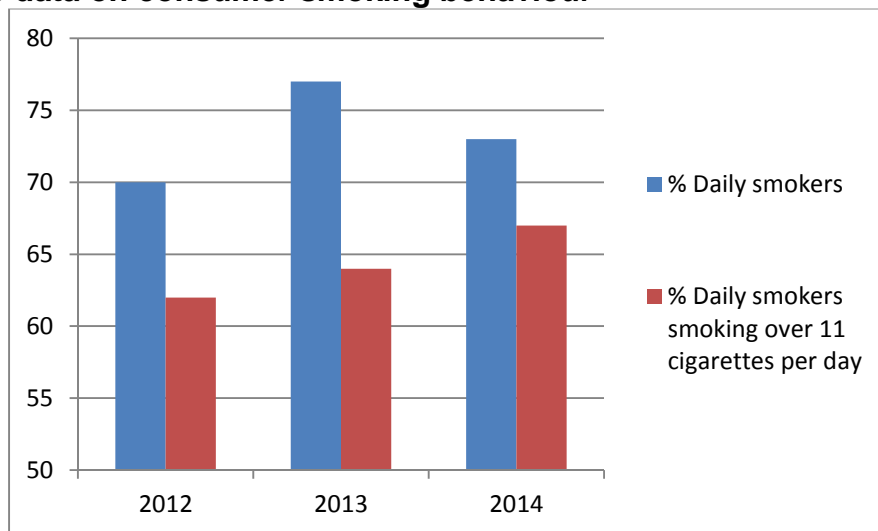
- 4.27.2. Data from The Cancer Institute NSW [New South Wales] Tobacco Tracking Survey ("**CITTS**"), which was not reviewed by the Chantler Report team, notwithstanding that the review team specifically travelled to Australia to "*see at first hand the implementation of Plain Packaging there*", and in fact met with the Cancer Institute NSW and were advised that the Cancer Institute NSW carries out several surveys.¹⁴ It is extraordinary that the review team did not review this data in order to undertake their own analysis, or even refer to the existence of this data in the Chantler Report.
- 4.27.3. In order to obtain the CITTS data, related questionnaires and the data dictionary to be able to analyse the data, BAT was required to undertake a lengthy Freedom of Information request procedure. The Cancer Institute NSW refused to provide the raw data in electronic format making the analysis of that data substantially harder to undertake.
- 4.27.4. CITTS is a serial cross-sectional telephone survey of adult smokers and recent quitters (smokers who quit in the previous 12 months) that includes questions pertaining to smoking-related cognitions and behaviours, as well as responses to tobacco control media campaigns and policies. Data obtained from this survey was produced by Cancer Institute NSW in response to a Freedom of

¹⁴ Chantler Review at p29, paragraph 6.6; see also Notes of Australia-based meetings. Meeting with Cancer Institute New South Wales – Weds 12 Mar – Professor David Currow & Professor Jane Young. Present: Sir Cyril Chantler and Tabitha Jay. Independent Review into Standardised Packaging of Tobacco, at p8 (available at <http://www.kcl.ac.uk/health/packaging-docs.aspx>).

Information request and has been analysed by Mr Gibson. This data shows that (see Gibson Report at sections 6.6 to 6.7):

4.27.4.1. the proportion of smokers surveyed who smoked on a daily basis actually increased from 70% in 2012 to 77% in 2013 (after the introduction of Plain Packaging in Australia) and remained at 73% into 2014, while the proportion of people smoking at least weekly (including those who smoked daily) increased from 79.5% to 80.5% between 2012 and 2013. In addition there was a rise in the number of daily smokers who smoked over 11 cigarettes a day from 62% in 2012 to 64% in 2013 and to 67% in 2014; and

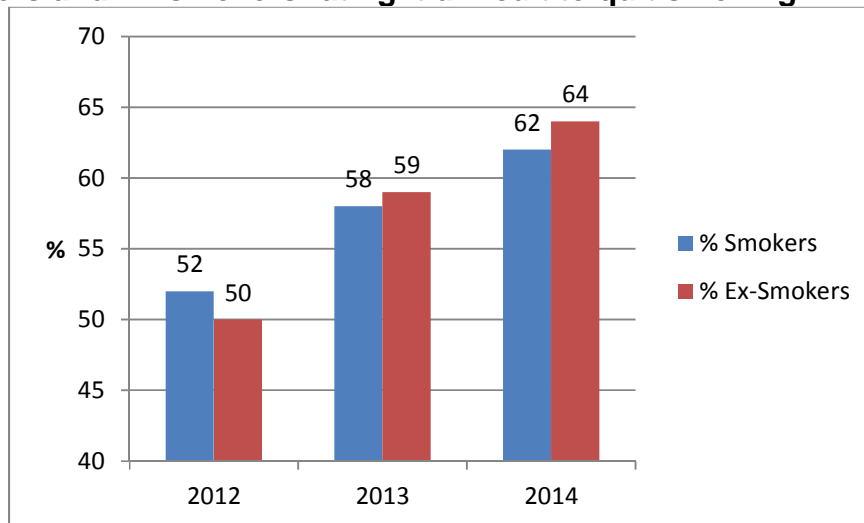
CITTS data on consumer smoking behaviour



Source: Gibson analysis of CITTS data (Figure 2, paragraph 6.6 of the Gibson Report)

4.27.4.2. for both smokers and ex-smokers it was perceived as more difficult to quit after Plain Packaging than before it (for smokers this increase was significant at the 95% level).

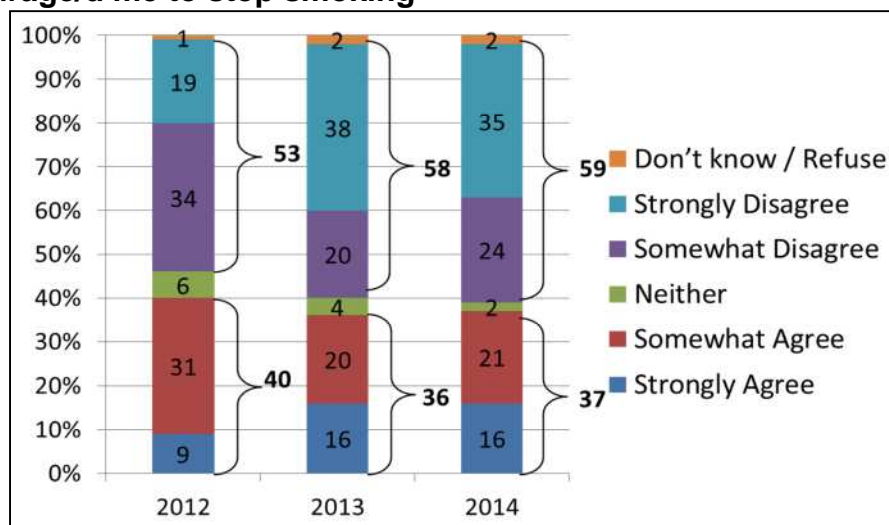
Smokers and Ex-smokers rating it difficult to quit smoking



Source: Gibson analysis of CITTs data (Figure 3, paragraph 6.6 of the Gibson Report)

4.27.4.3. when asked whether graphic warnings encouraged smokers to quit, the number of respondents strongly agreeing or somewhat agreeing reduced from 40% in 2012 to 36% in 2013 – after the introduction of Plain Packaging in Australia in December 2012, remaining at 37% in 2014. The number of respondents somewhat or strongly disagreeing increased from 53% to 58% between 2012 and 2013 and increased further to 59% in 2014 (and the number of respondents strongly disagreeing doubled from 19% to 38% between 2012 and 2013).

Do you agree with the following statement? The graphic warnings encourage/d me to stop smoking



Source: Gibson analysis of CITTs data (figure 1 of paragraph 6.6 of the Gibson Report)

4.27.5. The CITTS data also reveals that since Plain Packaging was introduced the proportion of smokers:

- 4.27.5.1. ignoring the health warning has increased;
- 4.27.5.2. thinking health warnings are exaggerated has increased;
- 4.27.5.3. thinking health warnings help them quit has decreased; and
- 4.27.5.4. seeking to hide their cigarettes from others due to the health warnings has not changed.

Awareness of graphic warnings before and after Plain Packaging

	2012	2013	2014
I don't look at warnings each time I get a cigarette	3.7%	3.8%	3.8%
The graphic health warnings are exaggerated	2.7%	3.2%	3.3%
The graphic warnings encouraged me to stop smoking	2.8%	2.5%	2.6%
They make me feel that I should hide my packet from the view of others	2.5%	2.6%	2.5%

Source: Gibson Report, Table 4, paragraph 6.6

4.27.6. The CITTS datasets supporting the analysis above have obviously not been analysed by the Government or in the Chantler Report. BAT will provide them upon request by the Government.

4.27.7. The Roy Morgan population survey data, which shows that there has been no change in the pre-existing trend in youth or adult smoking since the introduction of Plain Packaging. Analysis of this data by expert economists:

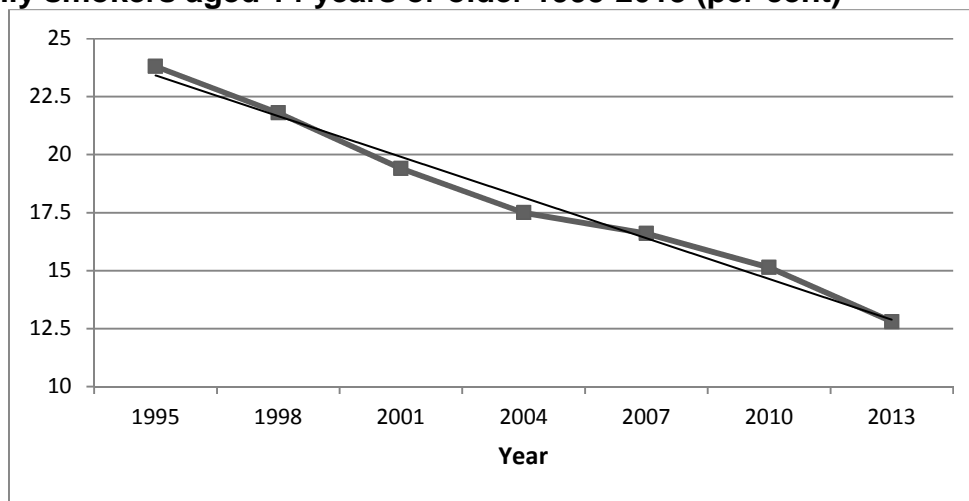
- 4.27.7.1. failed to find any evidence for an actual effect of Plain Packaging on Australians aged 14 to 17 years¹⁵; and
- 4.27.7.2. failed to find any sustained impact of Plain Packaging on existing smoking prevalence trends generally.¹⁶

¹⁵ Ashok Kaul and Michael Wolf (2014), Working paper series / Department of Economics No. 149, The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis, available at <http://www.econ.uzh.ch/static/workingpapers.php?id=828>.

¹⁶ Ashok Kaul and Michael Wolf (2014), The (Possible) Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis, available at <http://www.econ.uzh.ch/static/wp/econwp149.pdf>.

- 4.27.8. Statistical analysis undertaken by Mr Gibson of this data for the 14 to 17 age group also found "*no systematic relationship or significant association between the surveyed levels of FMC, RYO tobacco, pipe or cigar smoking and the introduction of plain packaging*"¹⁷. *None of the regression models show any statistically significant impact of the introduction of plain packaging on reported tobacco usage.*"¹⁸
- 4.27.9. Australian 2013 National Drug Strategy Household Survey ("**ANDSHS**") data, which shows that there has been no change in the pre-existing trend in daily smokers aged 14 and over since the introduction of Plain Packaging. Mr Gibson has reviewed this data and concluded that: "*While there are not enough data points for detailed statistical analysis, it is clear that the proportion of daily smokers has been declining steadily over time and the proportion in 2013 is almost exactly on the trendline (despite a 25% tax increase on tobacco in 2010). This is consistent with and supports the findings from Roy Morgan Research and suggests that there has been no significant effect on daily smoking from the introduction of plain packaging in Australia.*"¹⁹

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



Source: Gibson Report, Figure 4, page 22.

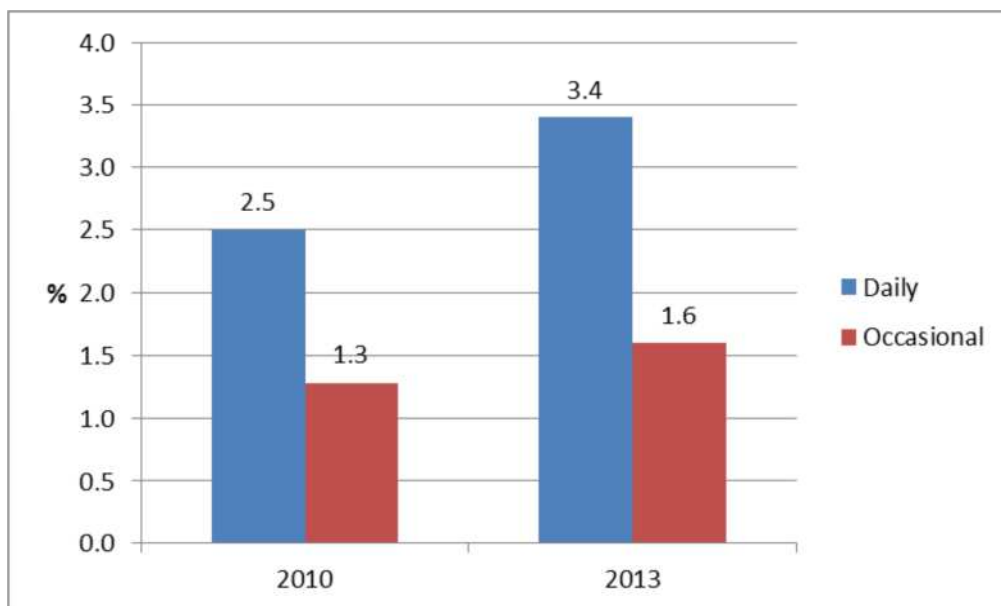
- 4.27.10. Mr Gibson also notes that: "*[t]he ANDSHS also shows that the percentage of daily smokers aged 12-17 increased between 2010 and 2013 from 2.5% to 3.4% (the highest rate in the last 10 years) and the percentage of occasional smokers aged 12-17 also*

¹⁷ In fact using a quadratic time trend suggests that Plain Packaging is associated with a 0.5 percentage point increase in FMC, although this effect is not statistically significant.

¹⁸ Gibson Report at section 6.4.

¹⁹ Gibson Report at section 6.7.

increased from 1.3% to 1.6% over this period"²⁰ as demonstrated by the chart below:



Source: Gibson Report, Figure 5, paragraph 6.7, page 22.

4.28. The Government must take this data into account in coming to its decision on Plain Packaging. Sir Cyril Chantler had access to this data as a result of his meetings in Australia. If the Chantler Report is to have any credence, this data should have been analysed and included in his report.

4.29. Moreover, the New South Wales CITTS data is the exact type of data that the Government instructed Sir Cyril to consider in his terms of reference.²¹ The Government cannot turn a blind eye and reasonably expect to rely on a report that ignores highly pertinent data, which casts doubt on the efficacy of the very policy the Government prefers.

C. The Government's quantification of the alleged impact of Plain Packaging is biased and fundamentally flawed, which renders the entire claimed health benefit of the measure invalid.

4.30. The quantification of the alleged health benefits of Plain Packaging in the 2014 Impact Assessment is based on the elicited subjective assessments of "internationally-renowned experts" on tobacco control of what they believed to be the likely impact of standardised packaging on the prevalence of smoking in adults and the prevalence of children trying smoking (as

²⁰ *Ibid.*

²¹ See letter dated 27 November 2013 from Jane Ellison MP to Sir Cyril Chantler setting out terms of reference for Sir Cyril Chantler including "taking into account any existing and fresh evidence" as to public health benefits. Available online at: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/ellison-letter.pdf>

reported in Pechey et al., 2013²²). Such subjective assessments have no predictive validity and the proposal to only select tobacco control advocates disregards the crucial requirements of impartiality and lack of conflict of interest.

- 4.31. The 2014 Impact Assessment purports to justify the selection of only tobacco control advocates simply on the basis of an assertion that impartiality and lack of an economic or personal stake in potential findings "*are considered impractical in this area*".²³ The disclosure of the interests of the experts clearly demonstrates their lack of independence and vested interest in the issue.²⁴ Yet, the Government says that those with interests in tobacco must declare these in their responses to the Consultation. Conflicts of interest cannot exist solely on one side of the argument.
- 4.32. The biased and flawed nature of the expert assessment is further exacerbated by the experts only being provided with the PHRC Review endorsement of the Plain Packaging literature, and the experts not being provided with any of the actual evidence from Australia which shows that Plain Packaging has not had any impact on smoking rates.
- 4.33. The Gibson Report, prepared by an economist and consultant, who has over 24 years of extensive experience in leading major economic and strategy projects across a broad range of industries and for Governments, concludes that: "*The IA ignores better quality and more direct evidence from Australia that directly challenges the effectiveness of plain packaging. It instead relies on weak, speculative and biased evidence from just one study (Pechey) to quantify the effects of plain packaging even though the paper's authors conclude that direct evidence would be superior and that their results are not quantified but purely directional.*"²⁵
- 4.34. Reliance on this biased and flawed quantification of the alleged impacts of Plain Packaging renders the entire calculation of alleged health impacts of Plain Packaging, which are claimed to justify the measure, invalid.
- 4.35. In this respect, it is noted that the US District Court of Columbia recently barred the US Food and Drug Administration ("**FDA**") from using the work product of the Tobacco Products Advisory Committee ("**TPSAC**") (established by the FDA to provide advice and recommendations on scientific issues relating to tobacco products) on the basis of members of TPSAC having conflicts of interests. The Court wrote that "*the presence of conflicted members on the Committee irrevocably tainted its very composition and its work product. In turn, the Committee's finding and recommendations, including reports such as the [TPSAC] Menthol Report,*

²² Pechey R, Spiegelhalter D, Marteau T M (2013). Impact of Plain Packaging of tobacco products on smoking in adults and children: an elicitation of international experts' estimates. *BMC Public Health* 13:18-24.

²³ 2014 Impact Assessment at paragraph 230.

²⁴ See Pechey et al., 2013, at.pp8-9.

²⁵ Gibson Report, page 5, paragraph 2.

are at a minimum, suspect and, at worst, untrustworthy." On that basis, the Court remanded the matter to the FDA, ordering the FDA to reconstitute the TPSAC membership. Furthermore, the Court barred the FDA from using the 2011 TPSAC Menthol Report.²⁶ BAT's view is that any Court reviewing the Government's reliance on the subjective assessments of hopelessly conflicted tobacco control advocates would apply the same reasoning and reach the same result because the principles engaged are identical.

²⁶ *Lorillard, Inc et al v United States Food and Drug Administration*, Civil case No. 11-400, US District Court of Columbia (Leon J), July 21 2014.

5. PLAIN PACKAGING IS UNLAWFUL, *PER SE*

Plain Packaging is *per se* unlawful because:

- 5.1. **The introduction of Plain Packaging is reliant on Article 24(2) of TPD2, which is unlawful and which is also currently subject to a legal challenge.**
- 5.2. **Plain Packaging amounts to a complete deprivation of BAT's intellectual property without compensation contrary to Article 1 of Protocol 1 to the ECHR.**
- 5.3. **Plain Packaging violates the UK's international obligations such as:**
 - 5.3.1. **the Community Trade Mark Regulation;**
 - 5.3.2. **the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"); and**
 - 5.3.3. **Bilateral Investment Treaties.**
- A. The interpretation and validity of TPD2, which is currently subject to legal challenge, is relevant to whether the Government can introduce Plain Packaging.**
- 5.4. On 27 June 2014, BAT submitted an application to the English High Court challenging the validity of TPD2 requesting that the High Court refer the issue to the CJEU for a preliminary ruling.
- 5.5. Permission to apply for judicial review was granted by Order of the Administrative Court dated 31 July 2014. The Government has acknowledged that the validity and interpretation of TPD2 is relevant to, among other things, whether it can introduce Plain Packaging and has agreed that it is appropriate for such questions to be referred to the CJEU for a preliminary ruling. Internal documents from the EU Institutions demonstrate that the Legal Services of the EU Institutions themselves had serious doubts regarding the lawfulness of the TPD2. For example, in the course of the legislative process, the Legal Service of the Commission complained that allowing Member States to impose stricter rules in the way that Article 24 does would "*totally undermine the internal market objective of the proposal*".
- 5.6. In light of the circumstances set out above, we respectfully submit that the Government must in any event suspend its proposals to introduce Plain Packaging until the questions of the legality and interpretation of TPD2 have been resolved by the CJEU pursuant to the application referred to above.
- 5.7. As set out in greater detail in Section 6, even if, contrary to the foregoing, TPD2 were ultimately to be upheld by the CJEU, Plain Packaging does not

satisfy the requirements of Article 24(2) TPD2 that such measures be justified on grounds of public health, be proportionate and not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

B. Plain Packaging is *per se* unlawful, since it amounts to a complete deprivation of the property in BAT's intellectual property without compensation.

- 5.8. Plain Packaging is *per se* unlawful, since it amounts to a complete deprivation of property without compensation contrary to Article 1 of Protocol 1 to the ECHR. It is well understood that under section 6 of the Human Rights Act 1998 any acts of a public authority, including the Government, must be compatible with the guaranteed rights under the ECHR. The legal position was set out in Section 6.4 of BAT's response to the 2012 Consultation. BAT also agrees with the legal opinion of Lord Hoffmann (see Appendix 5 of Philip Morris International's response to the 2012 Consultation). In summary, the taking of property in the public interest without compensation is treated as justifiable only in exceptional circumstances, which do not apply here, and such payment of compensation should reasonably relate to the value of the property taken.
- 5.9. Plain Packaging would deprive BAT of its valuable property rights in its trade marks, as well as in copyright, patents and designs incorporated in the packaging, together with the goodwill arising in the brand. The 2014 Impact Assessment acknowledges that, under Plain Packaging, tobacco manufacturers would be deprived of the value of their brands and would be required to transform their current brand-led business model in the UK.²⁷
- 5.10. Not only has the Government failed to offer compensation for the deprivation of BAT's valuable intellectual property, but the analysis of the value of the loss of brand equity to all UK tobacco manufacturers arising from Plain Packaging in the 2014 Impact Assessment is based on a flawed methodology and is hopelessly inadequate. BAT submits the expert report of Mr Weston Anson, an expert in intellectual property valuation. Mr Anson's report (the "**Anson Report**") is submitted with this Response (see Appendix 3).
- 5.11. The Anson Report concludes that an accurate calculation of lost brand equity value should include the value of trade marks, trade dress, packaging designs, copyright designs, goodwill and other intellectual property elements (together "**Brand IP**"). The actual loss in Brand IP value to UK tobacco companies using a market valuation approach, considering recent tobacco sector transactions, suggests that current tobacco Brand IP

²⁷ 2014 Impact assessment at paragraph 85.

valuations are in the order of several billions of pounds for UK tobacco brands.²⁸

C. Plain Packaging violates the UK's international obligations

Community Trade Marks Regulation

The proposed measure violates Community trade mark law

- 5.12. Plain Packaging would violate the Trade Marks Act 1994, the Community Trade Mark Regulation ("**CTMR**") and the Trademarks Directive ("**TMD**") which all protect the essential functions of valid trade marks. Article 5 of the TMD and Article 9 of the CTMR confer "exclusive rights" to trade mark owners under EU law. In addition, distinctive signs must be capable of "constituting trade marks", unless there is a ground for refusal or invalidity of the sign (Article 2 to 3 of the TMD; Articles 4 to 8 CTMR).
- 5.13. The CJEU has consistently held that the essential function of a trade mark is to guarantee the origin of a product vis-à-vis the consumer or end-user by enabling him to distinguish it without risk of confusion from products of different origin. The exclusive rights of the owner of registered trade marks relate inevitably to the essential functions of the trade mark. The most important and universally recognised of these functions is the function to distinguish products on the market. Plain Packaging prevents a vast number of tobacco trade marks from fulfilling their essential function. Plain Packaging at Member State level thereby violates the Community law right of the trade mark owner to have its trade marks meet their essential function. It also violates the Member States' obligation to ensure that signs can constitute trade marks. Signs cannot do that when they are prevented from fulfilling their essential function of distinguishing products vis-à-vis the end consumer.
- 5.14. Plain Packaging violates the right of the trade mark owner under Article 9 CTMR and Article 5 TMD to prevent the use of confusingly similar trade marks for similar goods. It does so by undermining the distinctiveness of those trade marks affected by Plain Packaging. A trade mark of greater distinctiveness has a broader scope of protection than on which is less distinctive. The distinctiveness of a trade mark is enhanced through use. This is particularly relevant for trade marks consisting of logos, colours and other device elements. With the prohibition of the use of such trade marks their distinctiveness and therefore their scope of protection will over time diminish.
- 5.15. In addition, Plain Packaging is incompatible with the obligation of the Member States to provide enhanced protection for well-known marks, under Article 9(1)(a) CTMR. Plain Packaging deprives a large number of trade marks of the possibility of maintaining the protection of well-known marks. It

²⁸ Anson Report at page 16.

deprives well-known marks of protection instead of providing enhanced protection.

The proposed measures violate Community law on designs

- 5.16. Article 19(1) of the Community Design Regulation and Article 12(1) of the Designs Directive provide that a registered (Community) design shall confer on its holder "*the exclusive right to use it ...*" Plain Packaging deprives the holder of a Community design of the right to use its design. This is incompatible with the Community rule.
- 5.17. According to Article 1(3) of the Community Design Regulation a Community design shall have a unitary character. It shall have equal effect throughout the Community. Its use shall not be prohibited, save in respect of the whole Community. Plain Packaging will prohibit the use of Community designs in one Member State only. This is incompatible with the unitary character of the Community design.

WTO agreements

- 5.18. WTO agreements concluded by the EU form an integral part of Community law, with which Member States are obliged to comply. Moreover, the principle of consistent or harmonious interpretation (see, for example, Case C-53/96 *Hermes*) requires that domestic legislation must be interpreted consistently with Member States' WTO obligations. Recent jurisprudence of the CJEU in Case C-414/11 *Daiichi Sankyo* EU:C:2013:520 and Case C-583/12 *Syntax Trading* EU:C:2014:244 suggests moreover that the CJEU may go so far as to apply the TRIPS agreement directly. Consistent with these obligations, Recital 53 of TPD2 envisages that Member States may introduce "*further standardisation of the packaging ... provided that those provisions are compatible with ... WTO obligations.*" Accordingly, the empowering provision in section 94 of the Children and Families Act 2014 must be construed consistently with the United Kingdom's WTO obligations. In particular, regulations which are inconsistent with such obligations will be *ultra vires* and unlawful.
- 5.19. Plain Packaging would violate several WTO Agreements, including the TRIPS Agreement because it impermissibly infringes upon trade mark rights.
- 5.20. By removing or affecting BAT's right to use its trade marks, Plain Packaging would violate Article 20 of the TRIPS Agreement, Articles 15 and 16 of the TRIPS Agreement, and Articles 6*quinquies* and 10*bis* of the Paris Convention. The Government has failed to respond to these arguments.
- 5.21. Article 20 of the TRIPS Agreement provides that use of trade marks 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 trade mark is used in a

manner detrimental to the capability of the trade mark to distinguish products are examples of *prima facie* unjustifiable encumbrances on the use of trade marks. Plain Packaging is the "*ultimate encumbrance*" as it prohibits the use of trade marks in retail trade. In the absence of a 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 trade mark right and prevents it from performing its essential function of distinguishing products, is *ipso facto* an "*unjustifiable*" encumbrance.

- 5.22. Plain Packaging would also put the UK in breach of its obligations under Article 15.1 and 15.4 of the TRIPS Agreement. It would violate the UK's obligation to make all distinguishing signs "capable of constituting a trade mark". A distinctive sign only makes the trade mark what it is, and thus "constitutes" a trade mark, if it can be used on a product to distinguish products from one undertaking from those of another undertaking. The definition of a trade mark 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, Plain Packaging effectively denies any non-word mark from being capable of constituting a "trade mark", in violation of Article 15.1 of the TRIPS Agreement.
- 5.23. The reason for denying the sign from performing its communication function that is the essence of a trade mark is not one of the many that are provided for in Article 15.2 of the TRIPS Agreement or in the relevant provisions of the Paris Convention, like public order, or deception. The reason is the nature of the product. Article 15.4 of the TRIPS Agreement, like Article 7 of the Paris Convention, embodies the principle of product neutrality that is so typical of intellectual property law – the nature of the product is not what should determine the scope of protection. Plain Packaging would therefore violate the UK's obligations under Article 15.4 of TRIPS and Article 7 of the Paris Convention because it adversely affects only tobacco-related trade marks and prevents these from performing their essential functions, only because of the nature of the product.
- 5.24. Plain 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. Plain Packaging undermines the right of registered trade mark 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 trade marks 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 trade marks therefore significantly reduces the scope of protection of the trade mark, in violation of Article 16.1.

- 5.25. 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 trade mark and the scope of the trade mark 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 Plain Packaging measure that prevents the use of all trade marks 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 Plain Packaging measure would therefore violate the UK's obligation to guarantee a minimum level of protection for well-known marks under Article 16.3 of the TRIPS Agreement.
- 5.26. Plain 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 rule 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. The UK 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.
- 5.27. This is not to say that the UK cannot deal with trade marks 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 trade mark and can be the basis for preventing its use. However, that requires an analysis of the specific sign and its allegedly misleading nature. The blunt Plain Packaging measure does not examine the trade mark against a general criterion of deception but simply bans all trade marks. That is not permissible under the TRIPS Agreement.

Challenge of Australia's Plain Packaging regime at the WTO

- 5.28. Australia's measure to introduce Plain Packaging is being challenged in the WTO. Over the course of 2012 and 2013, Ukraine, Honduras, Dominican Republic, Cuba and Indonesia have sought consultations with Australia in relation to Australia's Tobacco Plain Packaging Act 2011 and the associated implementing regulations (the Tobacco Plain Packaging Regulations 2011); the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011; and all further legislation, policies or practices that

have been adopted by Australia to implement these measures. The challenges have been raised on the basis that the measures are inconsistent with the TRIPS Agreement. A record number of countries have since joined the challenge, making it the largest in WTO disputes panel history in terms of the number of third parties.²⁹

- 5.29. A panel for the disputes was composed on 5 May 2014. 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.
- 5.30. The Indonesian government has also been reported as considering standardising the packaging of Australian wine in retaliation for the effect Australian Plain Packaging of tobacco products has had on Indonesia. An equivalent risk may apply to, for example, Scotch whisky in Indonesia if the UK were to proceed with Plain Packaging.³⁰
- 5.31. In introducing Plain Packaging, the Government may also be starting down a slippery slope of further regulation that would harm other industries as well. For example, Mars has expressed concerns that its own valuable intellectual property could be damaged without good reason if Plain Packaging were applied to food.³¹ This suggests heightened levels of concern in business generally about the Government's thinking on future regulation.

Bilateral Investment Treaties

- 5.32. As explained in BAT's response to the 2012 Consultation, Plain Packaging would also expose the UK Government to numerous claims from foreign investors under Bilateral Investment Treaties. Ironically, these treaties which were designed to protect investors from developed countries being subject to the same damaging effects the Government proposes through Plain Packaging that were anticipated to arise only through the actions of the governments of developing countries.

²⁹ As at 4 August 2014, the countries named as third parties (for, against and neutral/no position) were China, the European Union, Japan, the United States of America, Brazil, Chile, India, New Zealand, Singapore, South Korea, Argentina, Canada, Malaysia, Mexico, the Philippines, Ecuador, Egypt, Guatemala, Nicaragua, Nigeria, Peru, Turkey, Uruguay, Malawi, Moldova, Norway, Oman, Taiwan, Thailand, Zambia, Zimbabwe, Russia, South Africa, El Salvador and Panama.

³⁰ <http://www.scotsman.com/lifestyle/food-drink/features/cigarette-packs-could-see-whisky-in-trade-war-1-3407242>

³¹ "Plain packaging pay out to Mars would 'certainly not be trivial' says Institute of Economic Affairs" (Confectionery News), see: <http://www.confectionerynews.com/Regulation-Safety/Mars-complaint-over-tobacco-plain-packaging-unearted>

6. PLAIN PACKAGING IS DISPROPORTIONATE AND IRRATIONAL

6.1. As set out in Section 5 of this Response above, Plain Packaging amounts to a *per se* violation of fundamental rights and international obligations. However, even if it were necessary to engage in a proportionality assessment, it is impossible on the evidence currently available for the Government to demonstrate that Plain Packaging is necessary, appropriate and proportionate to its aims. Moreover, for the reasons set out below, Plain Packaging is manifestly irrational.

6.2. Plain Packaging is an irrational measure on each of the following grounds:

6.3. Plain Packaging is not necessary because:

6.3.1. the risks of smoking have been universally known in the UK for decades. Branded packaging does not neutralise consumers' existing awareness of the risks of smoking;

6.3.2. it is clear from numerous Government-funded studies that factors other than branded packaging are the real drivers of smoking behaviours; and

6.3.3. existing regulation already prohibits the use of any misleading and deceptive terms on tobacco packaging.

6.4. Plain Packaging is not appropriate because the:

6.4.1. objective evidence to date about actual smoking behaviour in Australia shows that, as expected, Plain Packaging has not reduced smoking behaviour and, if anything, appears to have had unintended and undesirable consequences, such as increasing illicit trade;

6.4.2. Government's speculative quantification of the alleged health impacts of Plain Packaging is an inappropriate basis on which to base a policy decision to introduce Plain Packaging;

6.4.3. studies on which the Government relies are based entirely on the biased subjective assessments of tobacco control advocates, which have no predictive validity; and

6.4.4. expert evidence provided with this Response demonstrates that the studies relied on to promote Plain Packaging are flawed and unreliable, and Plain Packaging would not be expected to reduce smoking prevalence and, indeed, may be counterproductive.

6.4.5. evidence shows it would also have significant adverse unintended consequences that would undermine the public health objective, including:

- 6.4.5.1. potentially stimulating price competition and leading to an increase in downtrading which may in turn lead to an increase in consumption;
- 6.4.5.2. increasing illicit trade;
- 6.4.5.3. concentrating market power;
- 6.4.5.4. raising barriers to entry;
- 6.4.5.5. harming small retailers;
- 6.4.5.6. reducing the Government's tax revenues;
- 6.4.5.7. reducing consumer surplus;
- 6.4.5.8. stifling innovation; and
- 6.4.5.9. reducing consumer choice.

6.5. Plain Packaging is disproportionate because:

- 6.5.1. it is impossible on the evidence currently available to justify the measures, and the Chantler Report and the 2014 Impact Assessment rely on flawed and speculative analysis to support the Plain Packaging policy;
- 6.5.2. it is a wholesale expropriation of an industry's brands and trade marks, for which the Government does not propose to pay any compensation, and also represents an unprecedented assault on commercial expression, which cannot be justified;
- 6.5.3. a range of effective alternatives is available; and
- 6.5.4. the proposal unjustifiably discriminates between cigarettes and RYO tobacco, and other tobacco products such as cigars.

A. Legal context for Requirement to Demonstrate Proportionality

- 6.6. Article 24(2) TPD2 expressly requires that measures taken in relation to standardisation of the packaging of tobacco products must be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
- 6.7. Further, Plain Packaging amounts to an interference with tobacco manufacturers' rights to property under Article 1 of Protocol 1 to the ECHR and Article 17 of the EU Charter; their freedom of communication under Article 10 of the ECHR and Article 11 of the EU Charter; and their freedom to conduct a business under Article 16 of the EU Charter. Any such interference must pursue a legitimate aim and respect the principle of

proportionality. The freedom of communication extends to "commercial speech" and encompasses an entitlement to express and receive information and views in relation to goods marketed and purchased. While commercial speech can be regulated, effectively "silencing" speech about a lawful product, where there are no other opportunities to differentiate between one product and another, cannot be justified and is disproportionate. The interference of freedom of expression is exacerbated, rather than justified, by the fact that trade mark owners (if they are to sell their product at all): (i) must strip the packages in which their products are sold of any recognised markers of quality vis-à-vis competitor products; and (ii) undermine their own brands by requiring them to be conveyed in the most unattractive manner possible.

- 6.8. The Courts will rigorously scrutinise the proportionality of a measure which amounts to an unprecedented interference with fundamental rights: see *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland*, judgment of 8 April 2014 at [47].
- 6.9. Yet further, Plain Packaging will constitute a technical regulation which creates an unnecessary obstacle to international trade contrary to Article 2.2 of the Agreement on Technical Barriers to Trade unless it can be shown that it is not more trade-restrictive than necessary to fulfil a legitimate objective.
- 6.10. Proportionality or justification requires (amongst other things) that a measure which interferes with a protected right "*must correspond to a pressing social need and go no further than strictly necessary in a pluralistic society to achieve its permitted purpose*" (*B v Secretary of State for the Home Department* [2000] UKHRR 498, 502C).
- 6.11. It is for the Government to demonstrate that the interference with the rights of BAT is justified; the justification must be "*convincingly established*" (*R (BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin) [2012] 2 All ER 1089 (para 76)).
- 6.12. Justifying a measure requires substantiating its intended impacts, or to put it another way, providing "*real and cogent evidence of a pressing need*" (*R. v Local Authority in the Midlands ex p. LM* [2000] 1 F.L.R. 612).
- 6.13. Finally, it is axiomatic that a public authority may not take into account irrelevant matters, fail to take into account relevant matters or come to a conclusion so unreasonable that no reasonable public authority could have come to it: *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 233-34. Equally, a public authority must equip itself with the information necessary to make an informed decision: *R (DF) v Chief Constable of Norfolk Police* [2002] EWHC 1738 (Admin) at [45].
- 6.14. Plain Packaging would amount to a wholesale expropriation of an industry's brands and trade marks and also represents an unprecedented assault on

commercial expression. The Government's proposals are based on the flawed assumptions contained in the 2014 Impact Assessment, which in turn rely on the speculative Chantler Report and the PHRC Review, both of which do not seriously address the unintended consequences of Plain Packaging. The interference resulting from Plain Packaging goes to the very essence of the fundamental rights of property and freedom of expression, meaning that the requisite thresholds for justification and proportionality are at their highest. In this case, the proportionality of the interference must be judged against the background of the existing comprehensive ban on tobacco advertising and promotion as well as the full implementation of the ban on retail displays and, of course, the Government's proposed forthcoming implementation of TPD2. Packs, and the trade marks used on them, are for all practical purposes the only means by which manufacturers can differentiate their products from those of their competitors. It is manifestly inappropriate.

B. Plain Packaging is unnecessary

The risks of smoking have been universally known in the UK for decades

6.15. Public awareness in the UK about the risks of smoking cigarettes is effectively universal. Accordingly, there is no information purpose that justifies the Plain Packaging. Warnings on cigarette packs, which have also been in place since 1971, continue to reinforce the existing awareness of smoking risks.

6.16. The PHRC report on a study commissioned by the UK Government to review the effects of the implementation of graphic health warnings in England in 2008 (2010 PHRC Review), found that:

"Among those aged 13-17, awareness of the health risks associated with smoking was high both pre and post 1st October 2008. For example, 100% of young people agreed that smoking causes lung cancer and virtually all young people named at least one health effect associated with smoking. No young people perceived smoking to carry no health risks."³²

6.17. The most recent NHS Statistics on Smoking: England, 2012, also reiterates that:

"When asked about their beliefs about smoking, the majority of pupils reported strong agreement with the negative effects of smoking. Almost all the pupils thought smoking can cause lung cancer (99%), makes your clothes smell (97%), harms unborn babies (97%), can harm non-smokers health (96%) and can cause heart disease (93%)."³³

³² Public Health Research Consortium. "Evaluating the Impact of Picture Health Warnings on Cigarette Packets", National Centre for Social Research, (2010) at 52.

³³ The NHS Information Centre, Lifestyles Statistics, "Statistics on Smoking: England", (2012), at 47.

- 6.18. As a statistical matter, it is virtually impossible for any poll or public opinion survey to reach a result of 100% awareness; to quote a report on smoking from the U.S. Surgeon General, it may be “*unrealistic to set a goal above 90 percent of smokers for public knowledge.*”³⁴
- 6.19. The PHRC Review for the UK Government, “Evaluating the Impact of Picture Health Warnings on Cigarette Packets”, also demonstrates that the existing warnings are seen and assimilated by consumers on branded packs. The report states that:
- 6.19.1. For adults (aged 18 years and older) “*Overall, recall of at least one health warning message was high, 93% of smokers pre 1st October 2008 and 100% post 1st October 2008 could name at least one warning message. Post 1st October 2008, awareness of the picture health warnings was high, only 6% of smokers did not name one of the new warnings messages when asked...*”³⁵
- 6.19.2. For youth (aged 13-17) “*Awareness and recall of the picture health warnings was high. Post 1st October 2008, 85% of young people correctly described one of the health warning message, though for a majority of young people, the message most remembered was the front of packet message ‘Smoking Kills’.*”³⁶
- 6.20. Accordingly, there is no evidence that branded packaging in any way neutralises, impairs or impedes consumers’ awareness of the risks or their ability to assimilate warnings. The Chantler Report and the 2014 Impact Assessment both fail to acknowledge the established state of knowledge regarding the risks of smoking and awareness of existing warnings on branded packs. Additionally, the Chantler Report fails to address or consider the well-researched field of smoking initiation mechanisms.
- 6.21. BAT is also submitting the expert report of Professor 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. Professor Viscusi's report (the “**Viscusi Report**”) is submitted with this Response (see Appendix 4). Professor Viscusi notes that given that consumers are adequately informed, there is no beneficial role for additional warning efforts that do not provide any new information to consumers, which would be the case with Plain Packaging. Professor Viscusi, following “*a critical review and assessment of the studies allegedly supporting the conclusion that plain packaging increases the effectiveness of health warnings,*” found “*no evidence from these studies*

³⁴ U.S. Public Health Service, “Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General,” at 221 (1989).

³⁵ Public Health Research Consortium. “Evaluating the Impact of Picture Health Warnings on Cigarette Packets”, National Centre for Social Research, (2010) at 33.

³⁶ *Ibid.* at 65.

*that plain packaging will increase the effectiveness of warnings.*³⁷ Adding that:

*"The public is overwhelmingly aware of the dangers of smoking. In this environment, there is no beneficial role of plain packs for increasing the effectiveness of warnings or discouraging smoking initiation."*³⁸

Factors other than branded packaging are the real drivers of smoking behaviours

6.22. It is clear from numerous government funded studies that factors other than branded packaging are the real drivers of smoking behaviour. BAT 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 (the "**McKeganey Report**") (see Appendix 5), who 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."*³⁹

6.23. The McKeganey Report explains further 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 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."*⁴⁰

6.24. BAT also submits the expert report of Professor Gregory Mitchell, a psychologist and law professor at the University of Virginia, whose core research is in the fields of behavioural law and economics. This entails, among other things, the application of behavioural research to legal and economic policy and the empirical study of how people make judgments and decisions and how regulations may affect these judgments and decisions. Professor Mitchell's report (the "**Mitchell Report**") is submitted with this Response (see Appendix 6). Professor Mitchell concludes:

"Factors associated with the initiation, continuation, and cessation of underage smoking have been the subject of a large amount of empirical

³⁷ Viscusi Report at paragraph 14.

³⁸ Viscusi Report at paragraph 32.

³⁹ McKeganey Report at page 10.

⁴⁰ McKeganey Report at page 40

research. Two propositions relevant to the question of the effects of standardized packaging regulations on underage smoking are apparent from this body of research: (a) many variables are now known to be associated with underage decisions to initiate and continue smoking; (b) features of cigarette packaging have been relatively little studied as a cause or correlate of underage smoking, with no published field studies demonstrating an association between standardized cigarette packaging characteristics and reduced smoking initiation or continuation by underage persons. Together, these propositions urge caution in basing the draft regulations on speculation from indirect evidence about the possible impacts of standardized packaging on adolescent smoking."⁴¹

Adding that:

"Given the numerous factors that influence adolescent decisions to smoke, and given that these factors can interact to produce unexpected results or to undermine an intervention that is aimed at a subset of these factors, it is perilous to base a large-scale intervention on hopeful speculation about the positive effects of this intervention."⁴²

Existing regulation already prohibits the use of any misleading and deceptive terms on tobacco packaging

6.25. Plain Packaging is also unnecessary because existing regulation already prohibits the use of any misleading and deceptive terms on tobacco packaging:

6.25.1. The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002/3041, provide that *"No person shall supply a tobacco product the packaging of which carries any name, brand name, text, trade mark or pictorial or any other representation or sign which suggests that that tobacco product is less harmful to health than other tobacco products."* (Regulation 11(1)). The same regulations make it an offence under the Consumer Protection Act 1987 to supply tobacco products that are not compliant with this regulation; and

6.25.2. The Consumer Protection from Unfair Trading Regulations 2008/1277 also provides that it is a criminal offence to engage in unfair commercial practices, including:

6.25.2.1. marketing products that *"[In] overall presentation in any way deceives or is likely to deceive the average consumer"* as to matters including the *"main characteristics of the product"* and such characteristics

⁴¹ Mitchell Report at paragraph 50.

⁴² Mitchell Report at paragraph 58.

include the "*risks of the product*" and the "*benefits of the product*" (Regulations 5(2), 5(4) and 5(5)); and

6.25.2.2. engaging in any practice that "*omits material information*" or "*hides material information*" or "*provides material information in a manner which is unclear, unintelligible, ambiguous or untimely*" (Regulations 6(1)(a), (b) and (c)).

6.26. The Government should not be introducing additional regulation when there is already existing regulation that can be enforced, should the Government have legitimate basis to claim that the extant trade marks on cigarette packaging are misleading.

C. Plain Packaging is not appropriate

6.27. The Government has correctly stated that in order for Plain Packaging to be justified, it must provide a genuine contribution to the objective of reducing smoking prevalence "*over and above existing tobacco control measures.*"⁴³ As detailed below, Plain Packaging is not appropriate for achieving this objective.

The objective evidence to date shows that Plain Packaging has not reduced smoking behaviour

6.28. As detailed in section 4 of this Response, the evidence to date from Australia shows that more than 18 months after its introduction, Plain Packaging has not had any effect on smoking behaviours beneficial to public health. This evidence includes:

6.28.1. the Roy Morgan population survey data;

6.28.2. industry sales data;

6.28.3. CITTS data; and

6.28.4. the 2013 National Drug Strategy Household Survey data.

The Government's speculative quantification of the alleged health impacts of Plain Packaging is an inappropriate basis on which to base a policy decision to introduce Plain Packaging

6.29. As explained in Section 4 of this Response, the quantification of the alleged health benefits of Plain Packaging in the 2014 Impact Assessment, based entirely on the biased subjective assessments of tobacco control advocates, has no predictive validity.

⁴³ 2012 Impact Assessment at paragraph 13. See also 2014 Impact assessment at paragraph 45.

- 6.30. The quantification is entirely flawed and renders the entire calculation of alleged health impacts of Plain Packaging, which are claimed to justify the measure, invalid.
- 6.31. The Gibson Report examined the 2014 Impact Assessment and concludes that:

*"The IA's evaluation of the health benefits of plain packaging relies exclusively on the Pechey paper which [...] is biased, purely directional and second-best compared to the direct evidence which contradicts the Pechey results. The IA recognises that the evidence is indirect and suggests that it will "take account of any later research that becomes available". However, the IA has not taken account of the evidence from the Roy Morgan Research data or the Cancer Institute NSW Tobacco Tracking Survey (both of which were available at the time) in estimating the possible benefits of plain packaging. The sensitivity analysis in the IA shows that if one uses the direct evidence of the impact of plain packaging on smoking prevalence from RMR, rather than the indirect evidence of the impact from Pechey, the NPV of the policy (using the other assumptions and calculations in the IA) is reduced to -£2bn and would be significantly higher if the costs were properly calculated."*⁴⁴

Expert evidence provided with this Response demonstrates that the studies relied on to promote Plain Packaging are flawed and unreliable, and Plain Packaging would not reduce smoking prevalence

- 6.32. The studies relied on to promote Plain Packaging are flawed and unreliable, and Plain Packaging would not reduce smoking prevalence. BAT provided evidence of this to Sir Cyril Chantler as part of his evidence gathering (see Appendix 2).
- 6.33. The evidence provided by BAT has been ignored or inadequately addressed by the Chantler Report and the 2014 Impact Assessment. As further explained in BAT's response to Question 1 of the Consultation below (paragraph 7.1 *et seq.*), given the acknowledged lack of evidence on actual behaviours, the Chantler Report seeks to 'bridge the gap' by relying on limited 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*"⁴⁵. These conclusions are hypothetical and speculative.
- 6.34. As part of this Response, BAT also submits reports from experts directly involved in areas of behavioural psychology, warnings and smoking behaviour to review the Chantler Report and the evidence relied on to promote Plain Packaging, and to provide their opinions on whether Plain Packaging will impact on smoking behaviours. These expert reports include the:

⁴⁴ Gibson Report at section 8.9.

⁴⁵ Chantler Report at page 30

- 6.34.1. Viscusi Report, which having reviewed the literature that claims that Plain Packaging will contribute to reducing smoking initiation and more generally to reducing smoking prevalence by making health warnings more effective, and which concludes that "*the adoption of a plain packs policy will not make warnings more effective, increase risk awareness, or reduce smoking initiation.*"⁴⁶
- 6.34.2. Mitchell Report, which addresses whether Plain Packaging is likely to reduce underage smoking in light of relevant scientific research on adolescent decision-making and behaviour. The Mitchell Report concludes that:

*"Existing theories and research on adolescent decision-making and behavior do not support the contention that standardized packaging regulations will result in net reductions in underage smoking."*⁴⁷

And

*"The draft regulations, if implemented, are not likely to change norms about the act of smoking or beliefs about smoking among adolescents."*⁴⁸

- 6.34.3. Furthermore, the Mitchell Report cautions about the risk of a "boomerang effect", noting that "[t]o the extent that elimination of brand-specific packaging is perceived as governmental overreaching, or is portrayed that way in the media or within families or peer groups, the [Plain Packaging] regulations are likely to trigger psychological reactance motivations that increase the motivation to smoke and increase the willingness to display cigarette packs."⁴⁹
- 6.34.4. In short, the Mitchell report underscores that Plain Packaging will not work and, in fact, could be counterproductive.

Plain Packaging may encourage down trading which could lead to an increase in consumption

- 6.35. Plain Packaging would remove all trade marks and other branding from packs, except for standardised and inconspicuous word marks. As a result, premium tobacco products would lose their distinctiveness. Consumers would be deprived of essential information concerning product origin and quality that allows them to distinguish among products in the market and would increasingly focus on price alone. This would encourage consumers to downtrade to cheaper products and the illicit market. The only means by which tobacco companies could differentiate their products would be price.

⁴⁶ Viscusi Report at page 1.

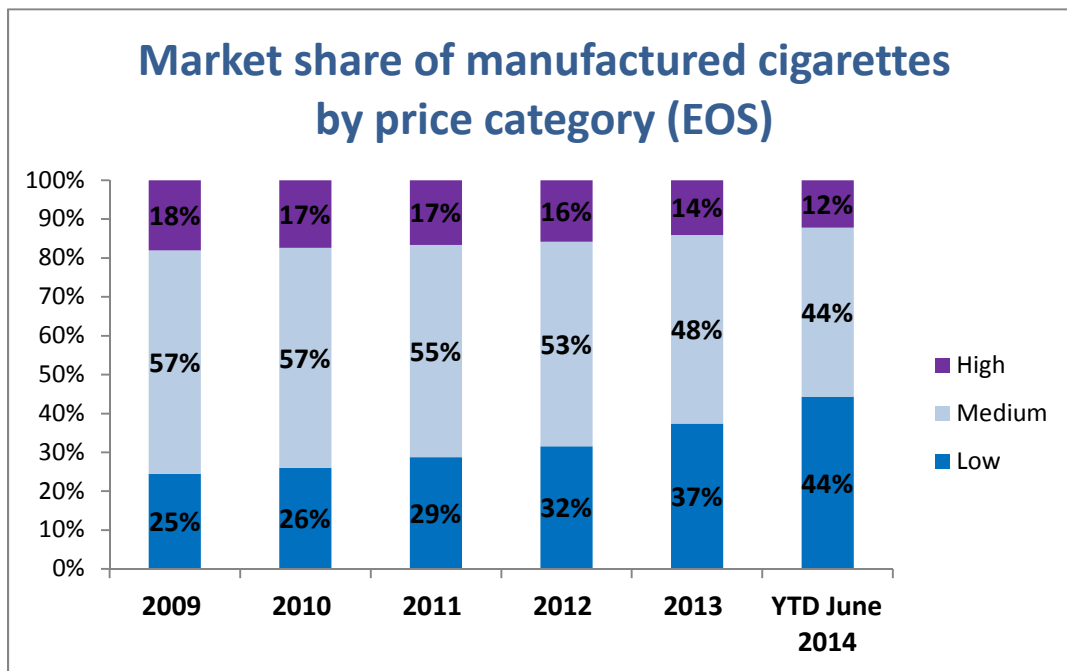
⁴⁷ Mitchell Report at paragraph 59.

⁴⁸ Mitchell Report at paragraph 60.

⁴⁹ Mitchell Report at paragraph 45.

As a result tobacco consumption could also increase, especially among price-sensitive consumers (such as youth). This would undermine the aim of Plain Packaging.

- 6.36. The chart below confirms that the anticipated risk of commoditisation and down-trading continuing or increasing following the introduction of Plain Packaging has become a reality in the Australian market. Consumers are moving away from the mid-priced and premium brands and towards cheaper cigarettes.



- 6.37. BAT also submits the expert report of Mr Neil Dryden, Executive Vice President of Compass Lexecon, which analyses the impacts of Plain Packaging on competition. Mr Dryden's report (the "**Dryden Report**") is submitted with this Response (see Appendix 7). Mr Dryden explains that the standardisation of cigarette packaging under Plain Packaging will distort competition by reducing overall consumer economic welfare, concluding that:

"Before any tax increases to offset anticipated price reductions, standardised packaging will either distort competition by reducing consumer welfare, or increase consumption contrary to the health objectives of standardised packaging. I conclude that the tax increase required to neutralise the likely price reduction is large, will unambiguously reduce consumer welfare and will increase incentives for illicit trade. I conclude that Sir Cyril Chantler's review and the impact assessment contain an

incomplete, and in some cases erroneous and simplistic, analysis of these issues."⁵⁰

- 6.38. The Dryden Report also concludes that Plain Packaging would likely result in further tax revenue losses to the UK exchequer because those consumers who value branded packaging would have: "*increase[d] incentives [...] to engage in legitimate cross-border trade to the extent that they valued the packaging itself.*"⁵¹

Plain Packaging would exacerbate an already significant illicit trade problem in the UK

- 6.39. The 2014 Impact Assessment recognises the risk that Plain Packaging will increase the illicit market, stating that: "*There is a risk that the intervention may unintentionally encourage smokers who want branded tobacco to seek it from places where it is still available ... standardised packaging could increase the demand for and supply of illicit tobacco.*" The 2014 Impact Assessment also concludes that "*there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification.*" However, the 2014 Impact Assessment provides no proposal for dealing with this increased risk. Instead, the 2014 Impact Assessment proposes to monitor the impact on the illicit market on the basis that "*[m]itigating action could however be taken if the intervention causes an increase in the illicit tobacco market.*" However, it is also stated that: "*[t]o mitigate any increase in illicit trade would require additional resources devoted to reducing the demand, and intercepting the supply of illicit tobacco products which would increase costs and the additional funding required cannot be guaranteed or assumed.*" This is not a proposal to address the issue at all, but essentially ignores the issue and hopes for the best. There is no proposed measure to mitigate the risk.

- 6.40. As part of this Response, BAT also submits the expert report of Mr Stuart Crookshank, a recently retired former Her Majesty's Revenue and Customs ("**HMRC**") officer with nearly 40 years' experience, including in several senior roles devising and implementing the strategies for tackling tobacco smuggling in the UK. Mr Crookshank sets out his observations on the illicit trade of tobacco products in the UK and the likely impact of Plain Packaging on the illicit trade, based on his many years of experience in tackling the illicit tobacco market in the UK. Mr Crookshank's report (the "**Crookshank Report**") is submitted with this Response (see Appendix 8)

- 6.41. The Crookshank Report's main conclusion is that Plain Packaging would make a bad situation worse because:

"Law enforcement is already challenged and it cannot be expected without significant additional resources to contain any potential growth in the illicit

⁵⁰ Dryden Report at paragraph 2.2.

⁵¹ Dryden Report at paragraph 8.23.

*market in the future. The Government cannot rely on enforcement reducing the risk that introducing standardised packaging will have on the illicit market if it does not at the same time provide more resources for enforcement, more frontline officers, more customs officers inland to control the international shops and supply chains together with a tobacco licensing regime, more DTS officers, a publicity campaign to provide intelligence to tackle the problem and robust sanctions procedures including prosecutions. Given the current lack of priority, resourcing and an effective approach to deterring and disrupting the illicit market within the UK, I cannot see how the Government can justify taking the unquantifiable risk of increasing criminality and reducing revenues collected by the Treasury and thereby not meeting Sir Cyril Chantler's proposed response to the increased risk to the illicit market which is to have an effective enforcement regime and appropriate sanctions."*⁵²

D. Plain Packaging is disproportionate

- 6.42. Plain Packaging is a wholesale expropriation of an industry's brands and trade marks, for which the Government is not offering any compensation, and also represents an unprecedented assault on commercial expression, which cannot be justified. The Government's proposals are based on the flawed assumptions contained in the 2014 Impact Assessment, which in turn rely on the speculative Chantler Report and the PHRC Review, both of which fail to address seriously the unintended consequences of Plain Packaging. In BAT's view, it is impossible on the basis of the current evidence to support Plain Packaging. The interference resulting from Plain Packaging goes to the very essence of the fundamental rights of property and freedom of expression, meaning that the requisite thresholds for justification and proportionality are at their highest.
- 6.43. In this case, the proportionality of the interference must be judged against the background of the existing comprehensive ban on tobacco advertising and promotion as well as the ban on retail displays. Packs, and the trade marks used on them, are to all practical purposes the only means by which manufacturers can differentiate their products from those of their competitors. This further underscores that Plain Packaging is manifestly inappropriate.
- 6.44. BAT also submits the expert report of Professor Ronald J. Faber, a Professor of Mass Communication with expertise in advertising, marketing, mass communication and consumer behaviour. Professor Faber's report (the "**Faber Report**") is submitted with this Response (see Appendix 9). Professor Faber addresses the impact that Plain Packaging would have on trade marks and the brands that they represent, and on the market. His conclusions include:

⁵² Crookshank Report at paragraph 43.

"Trade marks are a key element in branding a product and perform valuable functions for both consumers and the brand manufacturers. They serve to help consumers identify brands and distinguish between competing brands. They aid consumers in selecting preferred brands over other alternatives. From a manufacturer's perspective, trade marks are a key element in developing and maintaining brand equity and "goodwill". This allows a company to enhance market share, achieve and maintain brand loyalty and command a premium price for its products."⁵³

And

"In a mature market, like tobacco, trade marks and the brands that they represent are important to consumers because they help people who want a specific product to make informed decisions about which brand to buy i.e. selective demand. Once people have tried a brand, they may determine that they like it and buying it in the future will ensure that they are making a satisfactory product choice. Trademarked elements of the brand such as symbols, logos, designs or distinctive coloring or lettering can help people to identify and remember the brand. Consumers learn that a good identified by a specific trademarked symbol, design characteristic or brand can be relied upon to come from a particular source and have a given standard of quality and reliability."⁵⁴

And

"In the current regulatory environment in the U.K., packaging is among the last remaining branding elements that can be used to differentiate between competing brands. Standardized packaging would prohibit the use of all trade mark elements on tobacco products and packages. This will limit adult consumers' ability to distinguish and identify preferred brands and adversely impact the ability of tobacco companies to successfully sell their brands, but will not serve to reduce primary demand. This change in trademarked packaging will also adversely affect the goodwill and brand equity a company has cultivated over years of investment."⁵⁵

A range of effective alternatives are available

- 6.45. In addition, there are a number of effective alternative measures that the Government could implement to further reduce tobacco use and youth access to tobacco.
- 6.46. The following measures, some of which are identified in the Government's current Tobacco Control Plan for England, are more effectively aimed at reducing tobacco use and youth access than Plain Packaging, and do not

⁵³ Faber Report at paragraph 7.

⁵⁴ Faber Report at paragraph 15.

⁵⁵ Faber Report at paragraph 7.

require the unlawful and unjustified expropriation of companies' intellectual property rights:

6.46.1. **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.⁵⁶

6.46.2. **Implementing a consistent tax policy** that discourages youth uptake of smoking while disincentivising adult consumers from purchasing illicit products.

6.46.3. **Increasing measures to prevent the trade of illicit tobacco.** As already noted, illicit trade is a major problem in the UK and more needs to be done to combat it. Illicit tobacco undermines public health by:

6.46.3.1. supplying tobacco products to minors;

6.46.3.2. increasing smoking prevalence through the supply of cheap products; and

6.46.3.3. 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.

6.46.4. Accordingly, BAT sees it as vitally important that governments do not implement policies such as Plain Packaging that create conditions that encourage illicit trade and that they establish strong border controls and effective enforcement of laws to combat illicit trade.

6.46.5. **Enforcing existing laws forbidding retailers to sell to children.** The Government has taken welcome actions to reduce under-age access to tobacco products by raising the minimum age for sale to 18 years, and strengthening the penalties for retailers who break the law. We support more rigorous enforcement of these laws, which already contain tough but largely unused sanctions for

⁵⁶ 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), available at http://www.thsmithfamily.com.au/webdata/resources/files/Heckman_Tramblay_Snapshot_April_2006_B4F6_8.pdf.

breach. For example, the Trading Standards Institute reported that in England in 2012/13:

- 6.46.5.1. 12% of test visits to shops by underage buyers in England resulted in a successful purchase;⁵⁷
 - 6.46.5.2. the total number of prosecutions undertaken in England was 40, an average rate of prosecutions per authority of 0.6, of which 51% resulted in conviction;⁵⁸ and
 - 6.46.5.3. 86% of fines imposed for convictions for offences related to underage selling were of £500 or less against a maximum of £2,500.⁵⁹
- 6.46.6. Introducing Plain Packaging without improving existing enforcement means that legitimate businesses are being further regulated because less scrupulous businesses are not being punished under existing legislation. It is unacceptable for the Government to impose further regulation to make up for its other enforcement shortcomings.
- 6.46.7. **Commencing the prohibition on 'proxy purchasing' for tobacco products** (*i.e.* the purchase of cigarettes on behalf of underage youth). The Government recently enacted legislation in the Children and Families Act 2014 to create an offence for a person to purchase tobacco products on behalf of those less than 18 years of age. However, this offence has not been commenced. We strongly support the commencement of this and related offences in England and Wales. Proxy purchases remain a significant problem. A recent survey carried out for the NHS Information Centre reported that:

"In 2012, 8% of all pupils said that they had asked other people to buy cigarettes on their behalf. This figure increased with age from 1% of 11 year olds to 17% of 15 year olds. Girls were more likely to have done this than boys (9% and 7% respectively). The majority of current smokers had asked someone else to buy them cigarettes from a shop (88% of regular smokers and 49% of occasional smokers)."

And

"Pupils who had asked someone else to buy cigarettes on their behalf had generally been successful at some point. 88% of those

⁵⁷ Tobacco Control Survey, England 2012/13 (the "**Tobacco Control Survey**"): A report of council trading standards service activity at page 16 (available online at: <http://www.derby.gov.uk/media/Trading-Standards-Institute-Tobacco-Control-Survey-2012-13.pdf>).

⁵⁸ Tobacco Control Survey, page 19.

⁵⁹ Tobacco Control Survey, page 19.

*who had asked someone else to buy them cigarettes from a shop had been bought cigarettes at least once in the last year.*⁶⁰

- 6.46.8. **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 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.
- 6.46.9. **Using existing laws to address claims that particular trade marks 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 packaging (*cf.* Regulation 11(1) Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002/3041, and Regulations 5(2), 5(4) and 5(5) Consumer Protection from Unfair Trading Regulations 2008/1277). The Government should not be introducing additional regulation when there is already regulation that can be enforced.
- 6.47. **Implement and evaluate the tobacco control measures already enacted but not yet in force.** The Government should review the actual impact of measures such as the retail display ban and TPD2 (once each is fully implemented) to investigate whether additional measures are necessary before considering new initiatives.
- 6.48. The measures outlined above are sensible steps that could be taken to achieve the apparent aims of Plain Packaging, and do not have the real risks inherent in Plain Packaging. By failing to consider alternatives, the Government has not demonstrated that satisfactory outcomes cannot be achieved by less restrictive alternative measures. Such failure is inconsistent with Government policy to only regulate: "*having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches*".⁶¹

Unjustified discrimination in comparison to other tobacco products such as cigars

- 6.49. The draft regulations provide that the Plain Packaging requirements would only apply to cigarettes and hand rolled tobacco products. The provisions would not apply to other tobacco products, such as cigars. The purported rationale for this exemption, as set out in the 2014 Consultation, is the low

⁶⁰ "Smoking, drinking and drug use among young people in England in 2012" Editor: E Fuller, London: National Centre for Social Research, (2013) at 29.

⁶¹ Department for Business Innovation and Skills, "Principles of Regulation", available at <http://www.bis.gov.uk/policies/bre/principles-of-regulation>.

rates of use of these other tobacco products, particularly by young people.⁶² However, the Government's stated objectives in introducing Plain Packaging are not limited to reducing youth initiation.

- 6.50. The fact that the Government has limited the scope of Plain Packaging to cigarettes and RYO in this way therefore reflects an internal inconsistency in the Government's tobacco policy. It also suggests that the Government has no real belief that Plain Packaging will achieve its objectives of increasing successful quit attempts, and reducing relapse.
- 6.51. There is also no lawful basis for such a distinction. The decision of the European Free Trade Association ("**EFTA Court**") in E-9/00 *EFTA Surveillance Authority v Norway* (the "**Alcopops case**") establishes that differential treatment of products based on their appeal to youth cannot be justified in circumstances in which both types of products in question are illegal to sell to young people.
- 6.52. In that case, the Norwegian Government argued that the stricter rules for the sale of alcopops were justified by the particular appeal that these products have to youth, referring to studies by the WHO. The EFTA Court accepted that alcopops appeal in particular to young people but nevertheless rejected Norway's argument and stated that "*the appeal to young consumers cannot justify the different treatment of those products.*" The EFTA Court stated:
- "The different treatment of beer and other beverages with the same alcohol content appears to be neither necessary nor proportionate in relation to the health objectives pursued. In this context the Court notes that the Norwegian Alcohol Act prevents the serving of any form of alcoholic beverage to anyone under the age of 18 in establishments with a license to serve alcohol. **To the extent that the defendant's concerns for an increase in the consumption of alcohol among people younger than 18, the adoption of measures to ensure the compliance with this requirement and the enforcement thereof, may constitute a more appropriate and less restrictive measure.** In this context, the Court also notes that the advertising of alcoholic beverages is prohibited in Norway."* (emphasis added).
- 6.53. Similarly, more effective enforcement of existing laws prohibiting youth access would be a more appropriate and less restrictive measure to reduce youth smoking than the introduction of Plain Packaging.

⁶² 2014 Consultation at paras 5.9 to 5.12.

7. SUBSTANTIVE RESPONSE TO QUESTIONS

RESPONSE TO QUESTION 1

Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

7.1. The Chantler Report does not and cannot support the introduction of Plain Packaging. This is because the Chantler Report:

- 7.1.1. fails to take account of the evidence from Australia's experience with Plain Packaging;**
- 7.1.2. does not provide a sufficient evidential basis upon which to introduce regulation;**
- 7.1.3. relies on unsound, hypothetical evidence and ignores relevant evidence;**
- 7.1.4. incorrectly concludes that branded packaging contributes to increased tobacco consumption;**
- 7.1.5. inappropriately dismisses concerns over the price impact of Plain Packaging; and**
- 7.1.6. unjustifiably fails to consider the impact of Plain Packaging on illicit trade.**

A. The Chantler Report fails to take account of the evidence from Australia's experience with Plain Packaging.

7.2. The Chantler Report purports to review the relevant evidence supporting and opposing Plain Packaging. However, omissions in the evidence examined in the Chantler Report indicate that the review was not approached in a thorough and unbiased manner. Most notably, the Chantler Report fails to address recent data from Australia that Plain Packaging has not reduced smoking behaviour since its introduction in 2012 (as discussed at paragraph 4.27 of this Response), including survey data from New South Wales showing that the proportion of smokers surveyed who smoked on a daily basis actually increased after the introduction of Plain Packaging.

7.3. As noted above, this disregard is made all the more striking by the fact that members of the Chantler Report team (including Sir Cyril Chantler) travelled to Australia specially to observe the impact of Plain Packaging, including meeting with the Cancer Institute NSW whose surveys generated some of this data, and were advised of the existence of surveys but did not analyse the data so that it could be included in the Chantler Report.

7.4. Thus, although the Chantler Report suggests that the evidence on Plain Packaging points in one direction (a reduction in the consumption of tobacco), the data shows otherwise. That the Chantler Report does not take proper account of this evidence wholly undermines the conclusion of that report, as discussed above at paragraphs 4.27 to 4.35.

7.5. Proper consideration of the data from the Australian Plain Packaging experience shows that Plain Packaging is not reducing smoking in Australia, and rebuts claims that Plain Packaging will be effective.

B. The Chantler Report's conclusion is an insufficient evidential basis upon which to introduce regulation.

7.6. The Chantler Report concludes that:

*"... there is sufficient evidence derived from independent sources that the introduction of standardised packaging as part of a comprehensive policy of tobacco control measures would be very likely over time to contribute to a modest but important reduction in smoking prevalence especially in children and young adults."*⁶³

7.7. By its own admission, the Chantler Report's claimed impact is only likely to be "modest", to occur "over time" and only as part of other tobacco control measures. The Chantler Report provides absolutely no clarity as to what level the impact will be, when the impact will occur or how the impact will be affected by other tobacco control measures.

7.8. This does not meet the standard required to justify the introduction of Plain Packaging, as recognised in the Government's 2012 Impact Assessment, which states:

"For tobacco control policies to be justified the impact on smoking behaviour and the consequent improvement in health need to be sufficiently large to justify the related costs."

And further:

*"A policy to introduce standardised tobacco packaging would need to be justified and be based on expected benefits over and above existing tobacco control measures."*⁶⁴

7.9. Mr Gibson considered the Chantler Report and concluded that the 2014 Impact Assessment is a manifestly inappropriate document on which to base a decision as important as the one facing the Government, saying that:

"Overall the Chantler Report does little to extend the evidence base for plain packaging or to consider alternative approaches to reducing tobacco

⁶³ Chantler Report at p40, paragraph 6.11.

⁶⁴ IA No. 3080, Standardised Packaging for Tobacco Products at pp 3 and 5, paragraph 13.

*consumption or the costs of plain packaging. It does not address the evidential and analytical weaknesses of the 2012 impact assessment, most of which are still evident in the current [2014 Impact Assessment].*⁶⁵

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

- 7.10. The Chantler Report relies on the Plain Packaging literature reviewed in what it refers to as the "Stirling Review", a review of the evidence on the impacts of Plain Packaging that was commissioned by the UK Government and accompanied the 2012 Consultation on Plain Packaging,⁶⁶ as well as the update report,⁶⁷ 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'*".⁶⁸ It is also acknowledged that the evidence relies on stated intentions which are poor predictors of behaviour.⁶⁹
- 7.11. 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, the quantitative analysis (Annex D of the Chantler Report) notes that the outcomes of the different studies were too disparate to permit pooling.⁷⁰ The conclusions of the qualitative analysis (Annex E of the Chantler Report) also include that while the qualitative research suggests that Plain 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 Plain Packaging "*may not deter current smokers*".⁷¹
- 7.12. Furthermore, a combination of unreliable and flawed studies does not create a reliable evidence base. BAT refers to the Viscusi Report which states: "*[c]ounting studies and the direction of the results does not certify the soundness of the experimental procedures, the relevance of the experimental effects to likely policy impacts, the statistical significance of the results, or the magnitude of the results.*"⁷²
- 7.13. 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

⁶⁵ Gibson Report at section 6.1

⁶⁶ Moodie et al (2012) Plain Tobacco Packaging A Systematic Review.

⁶⁷ Moodie et al (2013) Plain Tobacco Packaging Research An Update.

⁶⁸ Chantler Report at p29, paragraph 4.21 and p38, paragraph 6.2.

⁶⁹ Chantler Report at p5, paragraph 14.

⁷⁰ Chantler Report at p49, Annex D.

⁷¹ Chantler Report at p57, Annex E.

⁷² Viscusi Report at paragraph 36.

the basis of conclusions that are stated to have "*considerable intuitive plausibility*" and offer "*the best fit with the wider evidence.*"⁷³ These conclusions are merely hypothetical and speculative, as discussed above at paragraphs 7.11 and 7.12.

7.14. 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 Plain Packaging.⁷⁴ 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.

7.15. The Mitchell Report states:

*"The Chantler Report's facile invocation of unconscious processes as an influence on adolescent decisions and behavior reveals a lack of understanding of adolescent theories of health behavior and of the limits of the research into unconscious causes of behavior."*⁷⁵

7.16. The conclusion reached in the Chantler Report that Plain 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, ignores the evidence discussed in paragraphs 6.15 to 6.20 of this Response that public awareness in the UK 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.

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

7.17. At the outset, it must be recognised that packaging is not advertising. Packaging is the identification of the product. Thus, the effect of advertising, which is banned in the UK, is not relevant for the purposes of examining the effects of Plain Packaging that prohibits the use of trade marks to identify and distinguish products.

7.18. 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

⁷³ Chantler Report at p30, paragraph 4.22.

⁷⁴ Chantler Report at p28, paragraph 4.15.

⁷⁵ Mitchell Report at paragraph 16.

aggregate cigarette advertising has the effect of expanding total market demand for cigarettes."⁷⁶

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

7.19.1. the UK 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 (which has already been introduced into large retailers in England and will become effective for small retailers in 2015). These restrictions mean there can be no synergy between branded packaging and advertising and promotion instruments; and

7.19.2. the branding on packaging in the UK is already severely limited by the requirement to display large warnings and other information.

7.20. Plain Packaging has not worked in Australia and will not work in the UK because tobacco packaging is not a relevant factor that influences smoking behaviour. The real and universally accepted drivers of smoking initiation include factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price.⁷⁷ These factors do not include product packaging.

7.21. 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 Plain Packaging will remove this effect,⁷⁸ is ill-considered. Under Plain 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.⁷⁹

7.22. Similarly, the suggestion in the Chantler Report that seeing branded packaging is a 'here and now' reward to which teenagers are particularly

⁷⁶ 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#.U0GgWGg6Lzl.

⁷⁷ 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).

⁷⁸ Chantler Report at p23, paragraph 3.21.

⁷⁹ 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.

sensitive⁸⁰ 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 friends. There is no brand choice - the choice is simply to smoke or not to smoke."*⁸¹ 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. . . ."*⁸²

- 7.23. Professor Mitchell also found that the 'badge effect' the Chantler Report says exists as a result of branded packaging will not go away, it will merely change the balance between which brands are viewed positively and which brands are viewed negatively, without having any net effect on underage smoking prevalence.⁸³

E. The Chantler Report inappropriately dismisses concerns over the price impact of Plain Packaging.

- 7.24. This anticipated increase in price competition and consequential downtrading to cheaper products is recognised as one of the key potential implications of trade mark/brand removal resulting from a Plain Packaging regime, including in the 2012 Impact Assessment⁸⁴ and the 2014 Impact Assessment (*"Our central estimate for downtrading under standardised packaging is a doubling of the existing downtrading trend."*)⁸⁵
- 7.25. The downtrading to cheaper brands following the introduction of Plain Packaging in Australia (which the Chantler Report recognises is already happening) is predictive of anticipated price competition. Contrary to the Chantler Report itself, the economic analysis (Annex C of the Chantler Report) notes that: *"there is some evidence that an existing trend for 'downtrading' towards value brands may have accelerated since the introduction of Plain Packaging."*⁸⁶
- 7.26. It is premature for the Chantler Report to dismiss the downtrading risk which would be expected to occur over time. As the economic analysis attached to the Chantler Report notes: *"[i]t is too soon to make definitive*

⁸⁰ Chantler Report at pp21-22, paragraph 3.16.

⁸¹ 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.

⁸² The Centre for Tobacco Control Research Core funded by Cancer Research UK, "The packaging of tobacco products", (March 2012), at 31.

⁸³ Mitchell Report at p. 27, paragraph 39-41.

⁸⁴ 2012 Impact Assessment at pp 17-18, paras 67-68.

⁸⁵ 2014 Impact Assessment at paragraph 244.

⁸⁶ Chantler Report at p45, Annex C.

conclusions."⁸⁷ It is disingenuous to assert on the one hand that the benefits of Plain Packaging will take time, but on the other hand dismiss an impact on average prices because it has not been clearly seen to date.

7.27. To that point, the Gibson Report states:

*"The Chantler Report should be scrupulously balanced, however it seems to give 'the benefit of the doubt' to possible future developments where they favour plain packaging, while dismissing concerns raised in respect of plain packaging on the basis that the evidence is not already apparent."*⁸⁸

7.28. 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 the UK. Any use of taxation to mitigate downtrading would necessarily further distort competition in the UK market.⁸⁹

F. The Chantler Report's rejection of the impact of Plain Packaging on illicit trade is not justified.

7.29. While the Chantler Report seeks to discredit and dismiss the report on the illicit market in Australia undertaken by KPMG⁹⁰, which found that illicit tobacco consumption reached its highest-recorded proportion of total consumption in Australia — 13.3% — following the introduction of Plain Packaging, it fails to justify the basis on which it does so.

7.30. 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 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.*"⁹¹ 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. It is notable that the NAO recognised that the same KPMG methodology as used by KPMG in Australia confirmed HMRC's own

⁸⁷ Chantler Report at p46, Annex C.

⁸⁸ Gibson Report at section 6.1.

⁸⁹ Dryden Report at paragraph 10.12, page 59.

⁹⁰ The Chantler Report cites the KPMG, "Illicit tobacco in Australia, 2013 Half Year Report", October 2013.

⁹¹ Chantler Report at p33, paragraph 5.7.

estimate of illicit market share trends in the UK. This suggests, contrary to the Chantler Report's dismissal, the KPMG methodology is valid.⁹²

- 7.31. Since the publication of the Chantler Report, KPMG has also published its 2013 Full Year report, which further shows a marked increase in the illicit market in Australia since the introduction of Plain Packaging, as set out in the response to Question 2 of the Consultation below.
- 7.32. The Chantler Report also fails to undertake any analysis of the UK illicit market but simply asserts that: "*HMRC's actions in combating illicit trade appear to have been very effective.*"⁹³ The illicit trade in tobacco in the UK remains a significant problem. The most recent estimates published by HMRC indicate that illicit tobacco cost the UK up to £2.4 billion in lost revenue in the 2011/12 year (with a mid-point estimate of £1.6 billion). The estimate of the non-UK duty paid market share for cigarettes for 2010/11 is up to 12% (with a mid-point estimate of 7%) and for hand rolled tobacco is up to 41% (with a mid-point estimate of 35%).⁹⁴ The NAO Report, also reports that the latest industry figures suggest that, for cigarettes, non-UK duty paid consumption increased from 17% in 2011 to 21% in 2012, while the KPMG Europe survey (Project Star) showed an increase from 12.7% in 2011 to 19.2% in 2012.⁹⁵ It is also noted that, while in 2000, most large cigarette seizures consisted of genuine UK brands, by 2012-13 most large seizures were of illicit whites. Some types of illicit white cigarettes are so popular in the UK that their 'brand' has become well-known, for example 'Jin Ling'.⁹⁶
- 7.33. As discussed above at paragraph 6.42, the Crookshank Report, which is based on the Mr Crookshank's nearly forty years of experience with HMRC and predecessor bodies, explains that Plain Packaging runs the very real risk of incentivising the illicit market and driving currently compliant tax-paying smokers down the non-compliant illicit route. Mr Crookshank doubts whether the tax gap analysis on which the Government bases its estimates of an illicit market share are accurate in light of the difficulties he encountered in measuring illicit trading when attempting to combat that trading.⁹⁷
- 7.34. Mr Crookshank also states that the proposal in the 2014 Impact Assessment to simply monitor the impact of Plain Packaging on the illicit market ignores the issue and risks creating a much worse situation that will undermine public health and support organised crime in the current

⁹² National Audit Office, Progress in tackling tobacco smuggling, 6 June 2013, p14 ("**NAO Report**").

⁹³ Chantler Report at p35, paragraph 5.10.

⁹⁴ HM Revenue & Customs, "Measuring Tax gaps" 2013 Edition, at 27-28.

⁹⁵ National Audit Office, Progress in tackling tobacco smuggling, 6 June 2013, p14.

⁹⁶ *Ibid* at p10.

⁹⁷ Crookshank Report at paragraphs 9 to 11.

environment where there is a well-established illicit market and already established supply lines.⁹⁸

- 7.35. There is also evidence from the UK that young smokers in the North East were twice as likely as adult smokers to be comfortable buying illicit tobacco.⁹⁹
- 7.36. The NAO Report, which is not referred to in the Chantler Report, also found that HMRC has failed to meet any of its targets in 2012-13. The NAO Report noted that key initiatives to curb smuggling had been delayed or cancelled, while HMRC lacked a "good understanding" of the volume of prosecutions and other legal sanctions needed to provide an effective deterrent.¹⁰⁰ NAO head Amyas Morse said:

*"Tobacco smuggling is a significant threat to tax revenues, as well as making illicit tobacco cheaper and more accessible, which has implications for public health. HMRC's renewed strategy for tackling tobacco smuggling sets out the right measures but, two years on, the Department's performance on the ground is disappointing. It has not capitalised on extra reinvestment funding available under the 2010 spending review settlement. And it still cannot properly assess how effective its strategy is in tackling tobacco smuggling and the trade in illicit tobacco products in the UK."*¹⁰¹

Margaret Hodge, chairwoman of the Commons Public Accounts Committee, said HMRC had "not got a grip" on smuggling and was "falling short".¹⁰²

- 7.37. The recent Home Affairs Committee Report on Tobacco Smuggling also concluded that the Government was not doing enough to combat the illicit tobacco trade, concluding that:

"We are worried that not enough is being done by the Government and its appropriate agencies to combat the problem of tobacco smuggling at source"

and:

*"over the last three years the numbers of prosecutions and convictions for organised crime cases involving tobacco have fallen. We do not believe that these numbers are decreasing due to the reduction in this type of crime and are deeply concerned that these figures may indicate a reduction in enforcement action."*¹⁰³

⁹⁸ Crookshank Report at paragraphs 38 and 40.

⁹⁹ Tackling Illicit Tobacco in the North of England, NEMS Illicit Tobacco Survey 2013, Executive Summary at paragraph 32 (http://www.illegal-tobacco.co.uk/wp-content/uploads/2014/03/NE_Illicit_Tobacco_Report_key_findings.pdf),

¹⁰⁰ *Ibid.*

¹⁰¹ <https://www.nao.org.uk/report/progress-in-tackling-tobacco-smuggling/>

¹⁰² BBC News UK HM Revenue and Customs 'missing cigarette smuggling targets', 6 June 2013, available at <http://www.bbc.co.uk/news/uk-22786085>

¹⁰³ Home Affairs Committee First Report of Session 2014-15 on Tobacco Smuggling, June 2014.

- 7.38. It is clear that on all estimates, the illicit trade of tobacco in the UK is significant and well established. The suggestion in the Chantler Report that the illicit trade is being kept "*to low levels*"¹⁰⁴ is also clearly wrong and it cannot be assumed that any increase will be prevented by effective enforcement.
- 7.39. It would be manifestly inappropriate for the Government to even consider introducing Plain 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.

¹⁰⁴ Chantler Report at p37, paragraph 5.13.

RESPONSE TO QUESTION 2

Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?

7.40. **The objective evidence that has emerged since the 2012 Consultation on the impact of Plain Packaging in Australia, for which the Government stated it was waiting, shows that more than 18 months after its introduction Plain Packaging has not decreased smoking behaviour. Further evidence also shows that the illicit market in Australia has increased significantly since the introduction of Plain Packaging, revealing the risk that Plain Packaging could have on public health, organised crime and Government excise revenue in the UK.**

7.41. **BAT is also submitting a number of expert reports along with this Response and which we strongly urge the Government to consider carefully.**

G. Evidence on the Australian experience with Plain Packaging demonstrates that Plain Packaging has not had the intended impact and, indeed, has proven to be counterproductive.

7.42. As detailed at paragraph 4.27 of this Response, the evidence from Australia shows that more than 18 months after its introduction, Plain Packaging has not decreased smoking behaviours. This evidence includes:

7.42.1. the Roy Morgan population survey data;

7.42.2. industry sales data;

7.42.3. data from The Cancer Institute NSW [New South Wales] Tobacco Tracking Survey; and

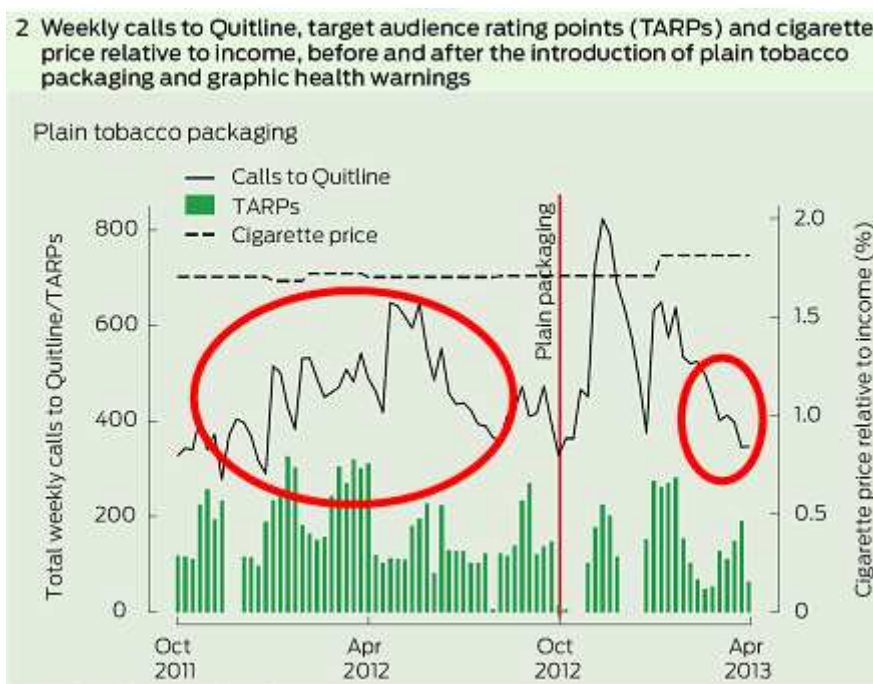
7.42.4. the 2013 National Drug Strategy Household Survey data.

7.43. Overall tobacco consumption in Australia has been declining gradually for many years. Following the introduction of Plain Packaging on 1 December 2012, the trend has in fact flattened. KPMG confirms that:

"Consumption between [the full year] 2012 and [the 12 months to 30 June 2013] was flat compared to a longer term annual decline ... of 2.9%."¹⁰⁵

¹⁰⁵ KPMG "Illicit tobacco in Australia" (October 2013) at p 6 (emphasis added) available at [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9879X3/\\$FILE/medMD9D4L6C.pdf?openelement](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9879X3/$FILE/medMD9D4L6C.pdf?openelement).

- 7.44. This is further supported by the recently released London Economics report which similarly established that there had been no change in smoking prevalence following the introduction of Plain Packaging in Australia.¹⁰⁶
- 7.45. By contrast, the studies which seek to draw positive conclusions about the effects of Plain Packaging in Australia do not address the empirical data on smoking rates and consumption. For example, the Chantler Report refers to evidence of increased calls to the Australian Quitline,¹⁰⁷ but fails to note that this increase was only temporary and the number of calls returned to the level prior to the introduction of Plain Packaging within 6 months:¹⁰⁸



- 7.46. It should also be noted that this study does not establish any change in actual smoking behaviours. The authors themselves acknowledge that: "*our study has shown an association but cannot prove causation.*"¹⁰⁹ Moreover, even where there was a short term increase in calls to the Australian Quitline (which was promoted by an advertising campaign confounding any role of Plain Packaging) there was no increase in actual quitting behaviour. This is consistent with the CITTs data, indicating that

¹⁰⁶ London Economics "An Analysis of Smoking Prevalence in Australia - Final" (November 2013), at p 1, available at <http://londoneconomics.co.uk/wp-content/uploads/2013/11/London-Economics-Report-Australian-Prevalence-Final-Report-25-11-2013.pdf>. London Economics "An Analysis of Smoking Prevalence in Australia - Press Release" (25 November 2013), available at <http://londoneconomics.co.uk/wp-content/uploads/2013/11/London-Economics-Press-Release-Australian-Prevalence-25-11-2013.pdf>.

¹⁰⁷ Chantler Report at p31, Box 2.

¹⁰⁸ Young JM et al. (2014). Association between tobacco Plain Packaging and Quitline Calls; a population based, interrupted time-series analysis. *Medical Journal Australia*. 200 (1): 29-32.

¹⁰⁹ *Ibid*, page 32.

smokers are finding it harder to quit following the introduction of Plain Packaging. It is also consistent with the McKeganey Report, which observes that "*smoking cessation was not in any study found to be associated with smokers' perceptions of the attractiveness or appeal of branded packaging.*"¹¹⁰

H. The illicit market in Australia has increased significantly since the introduction of Plain Packaging.

7.47. Since the 2012 Consultation, KPMG has also published its 2013 Full Year report on illicit tobacco in Australia, which shows a marked increase in the illicit market in Australia since the introduction of Plain Packaging. The findings of the KPMG study include:

7.47.1. consumption of illegal tobacco products reached record levels growing from 11.8% in 2012 to 13.9% in 2013, an increase of 19.1%;

7.47.2. the primary driver of growth in the consumption of illegal tobacco products has been a large increase in the consumption of illegal, branded cigarettes, with a 187% increase in counterfeit and a 148% increase in the consumption of contraband cigarettes (including illicit whites) from 2012 to 2013; and

7.47.3. the incidence of illicit whites increased by over 500% between Q2 2012 and Q4 2013, with the largest illicit white brand "Manchester", with a get-up similar to MARLBORO, having an equivalent legal market share of 1.7%. This was higher than that of legal brands such as CAMEL or KENT.¹¹¹

7.48. While the illicit market in Australia is different to that in the UK, this report provides some insights into the risks that Plain Packaging could have on the illicit market, with the likely impact in the UK being significantly worse. As the Crookshank Report states:

"The Chantler Report states (at page 35) that hardly any counterfeit standardised packages have been found in Australia, where standardised packaging has already been introduced. Whether this is the case or not, the UK is a different market to Australia. Australia does not have the availability of counterfeit cigarettes (and cheap whites) from the EU in the same way as the UK does. Counterfeit cigarettes would need to be flown into Australia or brought in by ship whereas in 2013, in Dover alone, there was an average of approximately 6770 tourist cars, 248 coaches and 6046 trucks passing through the port every day. The total number of passengers for the year was 12,753,343. In addition, the fact that the UK (and particularly London) has an extremely multicultural society means that there

¹¹⁰ McKeganey Report at page 26.

¹¹¹ KPMG "Illicit tobacco in Australia 2013 Full Year Report", April 2014.



*already is a thriving market here for counterfeits and cheap whites as brands of choice, as outlined below."*¹¹²

¹¹² Crookshank Report at paragraph 19.

RESPONSE TO QUESTION 3

Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

7.49. BAT's view is that the regulations proposed are unlawful for the reasons set out in this Response. BAT offers no response at this time, but reserves its rights to do so in the future.

RESPONSE TO QUESTION 4

Are you aware of any further evidence or information would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

7.50. The 2014 Impact Assessment is not a proper basis for decision making by the Government and a decision to move forward with Plain Packaging on the basis of the 2014 Impact Assessment would be manifestly inappropriate.

7.51. The 2014 Impact Assessment fails to comply with regulatory impact assessment guidelines and best practice for policy-making and fails to substantiate that Plain Packaging is necessary, appropriate and proportionate. It ignores the direct evidence that the Government stated that it wanted to consider, relies on erroneous biased assumptions, skews uncertain estimates toward results that favour the implementation of Plain Packaging, and lacks evidence in key areas. Furthermore, the methodology pursued in the 2014 Impact Assessment and process followed by the Government evidences a clear predisposition towards the implementation of Plain Packaging.

7.52. In addition, the Government's own expert studies underpinning the assumptions in the 2014 Impact Assessment can be shown to be tainted by bias and also to be unreliable and ignoring actual evidence.

I. The Gibson Report's conclusions on the 2014 Impact Assessment.

7.53. The Gibson Report assesses whether the 2014 Impact Assessment (defined in that report as the "IA") is consistent with the IA Guidance and the Principles, and whether the 2014 Impact Assessment provides an adequate basis to conclude that Plain Packaging is necessary, appropriate and proportionate. Mr Gibson concludes that:

"The purpose of an impact assessment is to provide decision makers with "an analysis of the likely impact of a range of options for implementing a policy change". However it is clear that this IA has not followed the Government's impact assessment guidelines or regulatory best practice. The IA is subject to biases and errors and does not provide a solid, evidence-based proportionate basis on which to proceed with UK legislation. The IA has not shown that plain packaging is necessary, appropriate or proportionate as a policy measure."

And

"Overall the standard of process, evidence and analysis in this impact assessment falls well below that required for a policy decision of this type. Taking all the concerns raised in this report together, it would be manifestly inappropriate to rely on this IA to move forward with UK

legislation on plain packaging.¹¹³ (emphasis in original)

7.54. Mr Gibson's specific criticisms of the assumptions and estimates in the 2014 Impact Assessment include:

7.54.1. The 2014 Impact Assessment fails to substantiate that Plain Packaging is necessary, including that:

- 7.54.1.1. the 2014 Impact Assessment relies on the European Commission's flawed impact assessment supporting TPD2 and therefore does not assess the efficacy of the tobacco control regulations in the baseline (which includes TPD2 measures and the ending of the retail display of tobacco) and identify any problems with them that might need to be rectified;¹¹⁴
- 7.54.1.2. there is no assessment of the efficacy of current tobacco control measures or those that are already 'in the pipeline';
- 7.54.1.3. the 2014 Impact Assessment does not demonstrate that the objectives of the policy are clearly necessary; and
- 7.54.1.4. there is no quantified assessment of Option 3 (the 'wait and see' option) against either Option 1 or Option 2 and no serious consideration given to this option.

7.54.2. The 2014 Impact Assessment fails to substantiate that Plain Packaging is appropriate, including:

- 7.54.2.1. the 2014 Impact Assessment ignores better quality and more direct evidence (discussed in paragraph 4.27 of this Response) pointing to the ineffectiveness of Plain Packaging in reducing smoking prevalence;
- 7.54.2.2. the assessment of health benefits is entirely dependent on the use of the elicitation of subjective assessments of tobacco control advocates to quantify the impact of Plain Packaging (reported in the Pechey report) despite the clear evidence that it is biased and its authors' own recognition that it is purely directional and second-best

¹¹³ Gibson Report at section 2.

¹¹⁴ In terms of the lack of an evidential base for Option Two, Mr Gibson concludes that paragraphs 15, 16, 71 to 74 of the 2014 Impact Assessment are inadequate because they all depend on the European Commission's TPD2 Impact Assessment (section 5.1.1 of the Gibson Report). Mr Gibson dismisses paragraphs 153 to 154 for the same reason. Paragraph 172 of the 2014 Impact Assessment is found to be inadequate because the added years of life and discount rates are inappropriately adjusted (section 8.7 of the Gibson Report). Mr Gibson also considers that paragraphs 260 to 266 are an inappropriate explanation of the value of lost consumer surplus (section 8.10 of the Gibson Report).

to direct evidence which directly contradicts the Pechey estimates;

7.54.2.3. Mr Gibson states:

"It is clear that in relying exclusively on the Pechey report for quantitative results, where the authors themselves conclude that it only provides directional evidence and that it is second-best to direct evidence and then ignoring the direct evidence which contradicts those results, the IA has not provided adequate evidence of the effectiveness of plain packaging. Indeed, the direct evidence (which was available, but not considered in the Chantler Report or the IA) points to the ineffectiveness of plain packaging in reducing smoking prevalence."¹¹⁵

7.54.3. **The 2014 Impact Assessment fails to substantiate that Plain Packaging is proportionate**, including in its price premium method of the loss of tobacco companies' Brand IP. The Anson Report concludes that:¹¹⁶

7.54.3.1. no rational decision maker could conclude, on the basis of the Government's calculations as presented, that Plain Packaging would only result in lost profits of £44 million and lost Brand IP of £39 million to UK tobacco manufacturers.

7.54.3.2. there is no basis for the Government's estimate that UK shareholders of tobacco manufacturers will bear only 10% of the lost Brand IP and lost profits.

7.54.3.3. there is no reason to assess lost brand equity using a price premium method, as claimed by the Government in the 2014 Impact Assessment which, in any event, has not been applied properly to the UK market.

7.54.3.4. the Government's choice of the price premium methodology is inappropriate and misapplied; instead, on the facts as currently available, the calculation would be better made using one or more of the cost approach, the income approach, the relief from royalty method or the market approach.

7.54.4. In addition, the 2014 Impact Assessment does not properly consider the impact on cross-border sales and the illicit trade. Mr

¹¹⁵ Gibson Report at section 6.8.

¹¹⁶ Anson Report at page 16.

Gibson refers to the Crookshank Report outlined above in this Response at section 6.3, which concludes that the proposal in the 2014 Impact Assessment to simply monitor the impact of Plain Packaging on the illicit market ignores the issue and risks creating a much worse situation that will undermine public health and support organised crime in the current environment where there is a well-established illicit market and already established supply lines (see Appendix 8).

7.54.5. The discussion in the 2014 Impact Assessment of the impact on competition is very limited, as set out in the Dryden Report and at paragraphs 6.39 and 6.40 above. The 2014 Impact Assessment does not consider, for example, issues of undue discrimination between different tobacco products - by requiring factory manufactured cigarettes and RYO tobacco to use Plain Packaging, but not requiring this for pipes, cigars or cigarillos; or the impact of Plain Packaging on:

7.54.5.1. barriers to entry;

7.54.5.2. market power;

7.54.5.3. innovation;

7.54.5.4. reduced consumer choice; or

7.54.5.5. other competitive impacts, including potential unintended consequences such as increased illicit trade and increased smoking.

7.54.6. The 2014 Impact Assessment does not address policy alternatives apart from the 'Do Nothing' baseline (Option 1), Plain Packaging (Option 2) and wait and see (Option 3). This is not in line with best practice or IA guidelines and seriously limits the value of the Consultation and impact assessment in supporting policy development.

7.54.7. **There are a number of unwarranted assumptions and errors in the 2014 Impact Assessment analysis of the costs and benefits of Plain Packaging, including:**

7.54.7.1. The assessment of costs and benefits is dependent on quantification from the Pechey report (the subjective assessments of tobacco control experts) despite clear evidence that it is biased and its authors' recognition that it is second-best to direct evidence (which contradicts those estimates).

7.54.8. Mr Gibson states:

"The IA purports to show a very large net benefit of around £25bn for Option 2 (requiring plain packaging of tobacco products), however this is critically dependent on the assumptions (based on Pechey) about the effectiveness of the measure. If the more direct evidence showing the lack of any impact of plain packaging in Australia is used, then the purported benefits disappear and the policy gives rise to negative net benefits of over £2bn (using the other assumptions and calculations in the IA) and would be significantly higher if the costs were properly calculated."¹¹⁷

7.54.9. As Mr Gibson opines in his report, the IA also includes a large number of unwarranted assumptions and errors:

- 7.54.9.1. there is no evidence for the estimated cost of switching/downtrading;
- 7.54.9.2. there is no evidence that the impact on young people will be identical to that for adults;
- 7.54.9.3. the assumption that reduced tobacco profits will be offset by increased profits on other goods is incorrect and has been criticised by the RPC;
- 7.54.9.4. there is no evidence for excess revenue being equally split between manufacturers and retailers;
- 7.54.9.5. the discussion of loss of brand value is superficial and inconsistent with accepted valuation methodologies;
- 7.54.9.6. the reduction of tobacco manufacturers' profits by a factor of 10 is against UK Treasury "Green Book" team guidance, not in line with other impact assessments and would have catastrophic implications for the UK economy if applied more widely;
- 7.54.9.7. introducing Plain Packaging on top of other tobacco control regulations and other changes in the marketplace stretches the assessment of impacts well beyond what is justified by the evidence;
- 7.54.9.8. the estimate of retailer costs is implausible and likely to be subject to large margins of error;
- 7.54.9.9. the estimate of lifetime benefit is subject to uncertainty and QALYs are valued at double previous estimates;

¹¹⁷ Gibson Report at section 2, page 6.

- 7.54.9.10. reducing the discount rate by 2% is not in line with Green Book guidance and artificially increases the benefits very significantly;
 - 7.54.9.11. there is no evidence for a linear relationship between the number of cigarettes smoked and the level of risk;
 - 7.54.9.12. it is incorrect to 'assume away' the impact of mitigation of smoking reduction due to the availability of illicit and cross-border tobacco;
 - 7.54.9.13. the purported benefits of a reduction in children smoking are inflated by using the figure for 15 year olds; and
 - 7.54.9.14. the treatment of consumer surplus is very weak even though this potentially represents a very significant loss to continuing smokers.
- 7.55. Overall, as stated at the beginning of BAT's response to this Consultation Question, and for the reasons explained in detail above, in the words of Mr Gibson, the 2014 Impact Assessment:

"[F]alls well below that required for a policy decision of this type. Taking all the concerns raised in this report together, it would be manifestly inappropriate to rely on this IA to move forward with UK legislation on plain packaging."¹¹⁸ (emphasis in original).

¹¹⁸ Gibson Report at section 2.

8. CONCLUSION

For the reasons set out above, BAT believes that the Plain Packaging proposal should be abandoned. In summary, those reasons include:

- 8.1. Plain Packaging appears to be the product of a flawed consultation exercise. The Government has followed a flawed and unfair process and appears to have closed its mind, moving the goal posts to avoid having to consider evidence contrary to its proposals from Australia.
- 8.2. The Government's quantification of the alleged impact of Plain Packaging is biased and fundamentally flawed, which renders the entire claimed health benefit of the measure invalid. The Government has failed to consider the costs and effects of existing tobacco control measures and those in the regulatory "pipeline" for the near future, and therefore offers no serious baseline for comparison.
- 8.3. Plain Packaging is unlawful, both *per se* and also because it is disproportionate, and irrational.
- 8.4. The Government appears to be running ahead with Plain Packaging when it is not even clear if the European Union legislation on which the Government will have to rely, namely Article 24(2) TPD2, will survive a legal challenge. Moreover, even if TPD2 does survive a legal challenge, the Government has not explained why it cannot wait to see the effects of full implementation of the retail display ban and TPD2.
- 8.5. Further, Plain Packaging amounts to a complete deprivation of BAT's intellectual property without compensation contrary to Article 1 of Protocol 1 to the ECHR. Any compensation payable for the loss of UK Brand IP, on any recognised valuation basis, would run into billions.
- 8.6. In addition, Plain Packaging violates the UK's international obligations such as the Community Trade Mark Regulation, the TRIPS Agreement and Bilateral Investment Treaties. Put simply, Plain Packaging places the EU in breach of its WTO obligations. The UK may also be exposed to retaliatory measures on UK exports to other countries.
- 8.7. It is clear that the evidence is against Plain Packaging, both in Australia and if proper and full consideration is given to all of the evidence available.
- 8.8. The latest data from Australia show that Plain Packaging has not reduced consumption, and has led to other negative and unintended consequences.
- 8.9. An unbiased examination of the evidence available shows that Plain Packaging will have no effect on smoking initiation or cessation because those processes are not driven by packaging at all.

8.10. The expert reports submitted by BAT along with this Response conclude that Plain Packaging is likely to exacerbate an already serious illicit trading problem.