

**BRITISH AMERICAN TOBACCO UK LIMITED'S RESPONSE¹ TO
SIR CYRIL CHANTLER'S REVIEW INTO STANDARDISED PACKAGING OF TOBACCO**

1. BACKGROUND

- 1.1 Between April and August 2012 the Department of Health (in conjunction with the Devolved Authorities in Scotland, Wales and Northern Ireland) conducted an extensive and extended UK-wide consultation into the issue of standardised packaging of tobacco (the "**Consultation**"). British American Tobacco UK Limited ("**BAT**") provided a seventy-four page response to the Consultation on 8 August 2012 ("**BAT's 2012 Response**"). This was one of over 668,000 responses the Consultation received.² After almost a year, the Consultation reported in July 2013. Following which, the government announced that it would wait until the impact of the decision in Australia to implement standardised packaging of tobacco could be properly analysed, before it made its decision on such a policy in the UK³ (the "**July Announcement**").
- 1.2 On 27 November 2013 Sir Cyril Chantler was appointed to conduct an independent review into the issue of standardised packaging of tobacco (the "**Review**"). The Government publically announced the Review the next day (the "**November Announcement**"). The Announcement was an unexpected and surprising about-turn, given the Government's decision only four months previously. On 16 December 2013, Sir Cyril Chantler published the method statement for the Review (the "**Method Statement**"). The Method Statement requested all responses by "*not later than Friday 10 January 2013*".⁴ BAT has already registered its objections to the Review, both in terms of form and substance (the "**HSF Letter**").⁵ Following letters from both the Department of Health and Sir Cyril Chantler's solicitors (both dated 6 January 2014), it was confirmed that the Government "*will give full consideration both to the matters within the scope of the [R]eview and to the wider issues raised*" and that it will consider "*whether, and if so, what kind and level of consultation might be required or appropriate.*"

2. INTRODUCTION

- 2.1 It is BAT's view that there is no credible and reliable evidence to support the proposition that the introduction of plain packaging is likely to lead to a decrease in the consumption of tobacco, in particular among children. In fact, given the very likely boost the UK's illicit market in tobacco will receive from the introduction of plain packaging, the opposite appears more likely.
- 2.2 As detailed in the HSF Letter, this Review is flawed. First, due to the unreasonably short response time over Christmas and New Year, BAT has been unable to prepare a complete response. Furthermore, BAT continues to object to the ambiguous and confused scope, methodology and purported purpose of the Review. For the avoidance of doubt, this response is not to be taken as BAT submitting to, or in any way accepting the legitimacy or legality, of the Review. BAT continues to reserve any and all of its rights.

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 trademarks used on cigarette packaging sold in the UK.

² Consultation on standardised packaging of tobacco products: summary report, page 8.

³ The Secretary of State for Health (Right Honourable Jeremy Hunt MP), written Ministerial Statement, *Consultation on Standardised Packaging of Tobacco Products*: http://www.parliament.uk/documents/commons-vote-office/July_2013/12%20July/6.HEALTH.Consultation-standardised-packaging-of-tobacco-products.pdf

⁴ Method Statement, page 2

⁵ Herbert Smith Freehills LLP letter to Sir Cyril Chantler and the Right Honourable Jeremy Hunt MP dated 20 December 2013

- 2.3 This response will first summarise BAT's objections to the Review (set out more fully in the HSF Letter). Second, this response reviews the studies that look at plain packaging which have been published since the Consultation. As explained more fully below, such studies are limited both in their number and by the fundamental flaws in their methodologies and findings. Finally, as explained in paragraph 3.3.3 below, the conflicting recent messages from the Government on the one hand and Sir Cyril Chantler on the other make it unclear whether the important issue of illicit trade is excluded from the scope of the Review (as was originally indicated). However, a brief outline of the importance of this issue to the Review is set out below.
- 2.4 BAT notes that BAT's 2012 Response is available to the Review in full and in summary.⁶ Due to the unfairly short time-frame within which this response was prepared, BAT's 2012 Response is incorporated into this response in full by reference.

3. **BAT'S OBJECTIONS**

The purpose of the Review is flawed: plain packaging is illegal⁷

- 3.1 The proposal which the Review has been established to consider would contravene the UK's legal obligations. It is a basic point of public law that the UK Government must act within the law.⁸ We submit that the proposed plain packaging of tobacco infringes:
- 3.1.1 Article 34 Treaty of the Functioning of the European Union;
 - 3.1.2 Article 13(1) Tobacco Products Directive;
 - 3.1.3 Human Rights Act 1998, European Convention on Human Rights and EU Charter on Fundamental Rights;
 - 3.1.4 several World Trade Organization Agreements, including the Agreement on the Trade-Related Aspects of Intellectual Property and the Agreement on Technical Barriers to Trade; and
 - 3.1.5 other obligations under international law (such as bilateral investment treaties).
- 3.2 Furthermore, if implemented, the proposal would place the UK at risk of expensive litigation and significant compensation to tobacco companies deprived of their intellectual property, such as BAT. We submit that it is inappropriate and premature for the UK Government to propose to implement the very measure that is being challenged by five sovereign states in on-going World Trade Organisation proceedings, particularly given the UK Government is essentially involved in these proceedings.

The methodology of the Review is flawed

- 3.3 The scope and methodology of the Review are inadequate, inappropriate, misconceived, ambiguous, unsettled and confused.⁹ The Review's flaws include:
- 3.3.1 the narrow scope of the Review, along with the rushed timetable, means that any conclusion it may reach will not be credible or have any practical real-world application;

⁶ Method Statement, page 1

⁷ For further information: *UK Standardised Packaging Consultation, Response of British American Tobacco UK Limited*, 08 August 2013, part 5 page 6 / 7 and answer to question 6

⁸ This is notwithstanding the Department of Health's unsupported and plainly incorrect assertion to the contrary in their letter of 6 January.

⁹ For the avoidance of doubt, BAT's objections are set out more fully in the HSF Letter and the below is supplementary to, and does not replace, the contents of the HSF Letter.

- 3.3.2 the narrow scope, together with the unreasonably short time-frame to respond, is in breach of BAT's legitimate expectation that it will be properly and fairly consulted on this issue (given that BAT is undoubtedly an interested party); and
- 3.3.3 the scope of the review is ambiguous, unsettled and confused; this will cause any purported conclusion of the Review to have no credibility or practical real-world application. For example, there have been contradictory statements in relation to whether the important issue of the illicit trade of tobacco is within the scope of the Review. On the one hand the Right Honourable Jane Ellison MP stated on 28 November 2013 that issues such as the illicit trade of tobacco are outside the scope of the Review (Hansard, 28 November 2013, column 414); on the other hand, Sir Cyril Chantler's solicitor commented on 6 January 2014 that "*the Review does not exclude an examination of issues such as the illicit trade in tobacco...*". These statements are plainly contradictory and demonstrate the ambiguous, confused and unsettled scope of the Review.

4. **THERE IS NO EVIDENCE TO SUPPORT PLAIN PACKAGING**

- 4.1 According to the Method Statement, the evidence under consideration will include:¹⁰
- a) the systematic review undertaken as part of the Public Health Research Consortium (the "**PHRC Review**");¹¹ and
 - b) the subsequent research update dated September 2013 (the "**2013 Update**").¹²
- 4.2 As discussed in BAT's 2012 Response, when the Department of Health first sought feedback on Plain Packaging (the "**2009 Consultation**"),¹³ it concluded that there was no evidence that plain packaging reduced smoking uptake amongst minors or helped people quit. In light of this, the Minister of State for Public Health stated that considering the impact that plain packaging would have on intellectual property rights, the government would need "*strong and convincing evidence of the benefits to health*" before plain packaging could be promoted and accepted.¹⁴ The need for evidence on the additional health benefits of plain packaging is confirmed in the Government's current Tobacco Control Plan for England which states that prior to implementing plain packaging, the Government "*wants to understand whether there is evidence to demonstrate that plain packaging would have an additional public health benefit*".¹⁵
- 4.3 The Department of Health relied on the PHRC Review in 2012 when considering introduction of plain packaging measures. The PHRC Review cited many of the studies that were already considered by the Department of Health in its 2009 Consultation where these studies were deemed to be insufficient to support the introduction of plain packaging measures. The other studies that were considered in the PHRC Review suffered from the same flaws.¹⁶ They failed to make the key link between packaging and actual smoking behaviour.

¹⁰ Method Statement dated 16 December 2013, Independent Review into standardised packaging.

¹¹ Moodie, C., et al., "Plain Tobacco Packaging: A Systematic Review" available at http://phrc.lshtm.ac.uk/papers/PHRC_006_Final_Report.pdf

¹² Moodie, C., et al. "Plain Tobacco Packaging Research: An Update" available at <http://www.stir.ac.uk/media/schools/management/documents/Plain%20Packaging%20Studies%20Update.pdf>

¹³ The Department of Health's 2008 Future of Tobacco Control Consultation.

¹⁴ Parliamentary Debate (26 June 2009) available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>.

¹⁵ HM Government, "Healthy lives, healthy people: A tobacco control plan for England", (March 2011), at para. 3.6, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213757/dh_124960.pdf.

¹⁶ BAT's 2012 Response, pp. 17-20.

- 4.4 As discussed in BAT's 2012 Response, there is strong evidence to show that packaging has no impact on smoking initiation, cessation and relapse.¹⁷ For example, according to a survey commissioned by the European Commission,¹⁸ the primary drivers of initiation among youth were friends and family smoking. The other major factors cited as an influence for smoking initiation were the affordability of cigarettes and the taste or smell of tobacco. Even when prompted to consider packaging as a significant element in their decision to start smoking, and notwithstanding that the respondents could choose more than one element, 99% of the UK respondents did not choose packaging as a relevant factor. As far as cessation is concerned, according to a survey by the UK Office of National Statistics,¹⁹ factors that affect smokers' decisions to quit smoking include concerns about current and future health effects of smoking, the costs of smoking and pressure from the family to quit, but not packaging. The PHRC Review and (as discussed below) the 2013 Update fail to consider this evidence in any way.

The 2013 Update

- 4.5 In September 2013, Moodie et al. published the 2013 Update which considered seventeen studies which had been published after the PHRC Review.

| No. | Study | Factors Assessed |
|-----|---------------------------------------|--|
| 1. | Al-Hamdani (2013) ²⁰ | Warning Salience and Effectiveness (" Warnings ") |
| 2. | Borland & Savvas (2013) ²¹ | Appeal, Harm Perception |
| 3. | Borland et al (2013) ²² | Appeal, Warnings |
| 4. | Edwards et al (2013) ²³ | Facilitators/Barriers to Introduction of Plain Packaging (" Facilitators/Barriers ") |
| 5. | Ford et al (2013a) ²⁴ | Appeal, Harm Perception |
| 6. | Ford et al (2013b) ²⁵ | Appeal, Harm Perception, Intentions, Beliefs, Attitudes and Behaviour towards Smoking (" Attitudes ") |
| 7. | Hoek et al (2012) ²⁶ | Attitudes, Facilitators/Barriers |

¹⁷ BAT's 2012 Response, pp. 20-23.

¹⁸ TNS Opinion & Social. Special Eurobarometer 385, "Attitudes of Europeans towards tobacco", (May 2012), available at http://ec.europa.eu/health/tobacco/docs/eurobaro_attitudes_towards_tobacco_2012_en.pdf.

¹⁹ The UK Office for National Statistics, "Opinions Survey Report No. 40 Smoking-related Behaviour and Attitudes 2008/09", (2009).

²⁰ Al-Hamdani, M. (2013) "The effect of cigarette plain packaging on individuals' health warning recall" *Healthcare Policy*, 8(3): 68-77 available <http://www.longwoods.com/content/23210>.

²¹ Borland, R. and Savvas, S. (2013) "The effects of variant descriptors on the potential effectiveness of plain packaging", *Tobacco Control*, published online 22nd February 2013. doi:10.1136/tobaccocontrol-2012-050736

²² Borland, R., Savvas, S., Sharkie, F. and Moore, K. (2013) "The impact of structural packaging design on young adult smokers' perceptions of tobacco products", *Tobacco Control*, 22(2): 97-102. doi:10.1136/tobaccocontrol-2011-050078

²³ Edwards, R., Peace, J., Russell, M., Gifford, H., Thomson, G. and Wilson, N. (2012) "Qualitative exploration of public and smoker understanding of, and reactions to, an endgame solution to the tobacco epidemic", *BMC Public Health*, 12: 782. doi:10.1186/1471-2458-12-782

²⁴ Ford, A., Moodie, C., MacKintosh, AM. and Hastings, G. (2013) "How adolescents perceive cigarette packaging and possible benefits of plain packaging", *Education and Health*, 31(2): 83-88. Available online: <http://sheu.org.uk/x/eh312af.pdf>

²⁵ Ford, A., MacKintosh, AM., Moodie, C., Richardson, S. and Hastings, G. (2013) "Cigarette pack design and adolescent smoking susceptibility: a cross-sectional survey", *BMJ Open*, 3: e003282. doi:10.1136/bmjopen-2013-003282

| | | |
|-----|--|--|
| 8. | Maynard et al (2013) ²⁷ | Warnings |
| 9. | McCool et al (2012) ²⁸ | Appeal, Warnings, Harm Perception |
| 10. | Moodie & MacKintosh (2013) ²⁹ | Appeals, Warnings, Attitudes |
| 11. | Pechey et al (2013) ³⁰ | Attitudes |
| 12. | Ramuno et al (2012) ³¹ | Warnings |
| 13. | Rosenberg et al (2012) ³² | Facilitators/Barriers |
| 14. | Scheffels & Saebo (2013) ³³ | Appeals, Warnings, Harm Perception, Attitudes |
| 15. | Uppal et al (2013) ³⁴ | Attitudes |
| 16. | Wakefield et al (2012) ³⁵ | Appeals, Warnings, Harm Perception, Attitudes |
| 17. | Wakefield et al (2013) ³⁶ | Appeals, Harm Perception, Attitudes, Facilitators/Barriers |

4.6 These studies suffer from many of the same flaws as those reviewed in the PHRC Review, as summarised below.

4.6.1 The fundamental shortcoming of most of these studies is that they fail to observe plain packs in a natural setting. They lack real world evidence and do not evaluate the impact of plain packaging policy in practice.

²⁶ Hoek, J., Gendall, P., Maubach, N. and Edwards, R. (2012) "Strong public support for plain packaging of tobacco products", *Australian and New Zealand Journal of Public Health*, **36**(5): 405-407. doi:10.1111/j.1753-6405.2012.00907.x

²⁷ Maynard, OM., Munafò, MR. and Leonards, U. (2013) "Visual attention to health warnings on plain tobacco packaging in adolescent smokers and non-smokers", *Addiction*, **108**(2): 413-419. doi:10.1111/j.1360-0443.2012.04028.x

²⁸ McCool, J., Webb, L., Cameron, LD. and Hoek, J. (2012) "Graphic warning labels on plain cigarette packs: will they make a difference to adolescents?" *Social Science & Medicine*, **74**(8): 1269-1273. doi:10.1016/j.socscimed.2011.12.043

²⁹ Moodie, CS. and MacKintosh, AM. (2013) "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach", *BMJ Open*, **3**: e002402. doi: 10.1136/bmjopen-2012-002402.

³⁰ Pechey, R., Spielgelhalter, D. and Marteau, TM. (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. doi:10.1186/1471-2458-13-18.

³¹ Ramunno, S., Mandeville, KL. and Yarrow, K. (2012) "The effect of plain cigarette packaging on attention to health warnings," *The Lancet*, **380**(November Suppl.): S5. doi:10.1016/S0140-6736(13)60361-X.

³² Rosenberg, M., Pettigrew, S., Wood, L., Ferguson, R. and Houghton, S. (2012) "Public support for tobacco control policy extensions in Western Australia: a cross-sectional study", *BMJ Open*, **2**: e000784. doi:10.1136/bmjopen-2011-000784.

³³ Scheffels, J. and Sæbø, G. (2013) "Perceptions of plain and branded cigarette packaging among Norwegian youth and adults: a focus group study", *Nicotine & Tobacco Research*, **15**(2): 450-456. doi:10.1093/ntr/nts153.

³⁴ Uppal, N., Shahab, L., Britton, J. and Ratschen, E. (2013) "The forgotten smoker: a qualitative study of attitudes towards smoking, quitting, and tobacco control policies among continuing smokers", *BMC Public Health*, **13**: 432. doi:10.1186/1471-2458-13-432

³⁵ Wakefield, M., Germain, D., Durkin, S., Hammond, D., Goldberg, M. and Borland, R. (2012) "Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?" *Addiction*, **107**(6): 1159-1167. doi:10.1111/j.1360-0443.2012.03774.x

³⁶ Wakefield, MA., Hayes, L., Durkin, S. and Borland, R. (2013) "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study", *BMJ Open*, **3**: e003175. doi:10.1136/bmjopen-2013-003175

- 4.6.2 These studies generally do not demonstrate any impact on actual smoking behaviours.
- 4.6.3 These studies do not establish any information deficit or any misperceptions about the health risks associated with cigarettes.
- 4.6.4 Even the 2013 Update states that these studies merely "*suggest that plain packaging would: reduce the appeal of cigarettes and smoking; enhance the salience of health warnings on packs; and address the use of packaging elements that mislead smokers about product harm*" (emphasis supplied). Notwithstanding the methodological flaws in the studies, these effects that plain packaging may allegedly have are not predictive of a change in actual smoking behaviour. Therefore, the additional studies reviewed in the 2013 Update do not justify introduction of plain packaging because it fails to make the key link between packaging and smoking behaviour.
- 4.6.5 Many of these studies look at aspects like intentions, attitudes and impressions. They measure perceptions which are not predictive of actual behaviour. They examine the subjects' stated views of plain packaging but observe no actual smoking practices.
- 4.6.6 The studies do not consider well established evidence (as discussed in paragraph 4.4 above and BAT's 2012 Response³⁷) on the real factors driving smoking initiation, cessation and relapse. These reports establish that packaging has never been considered a relevant factor in driving these behaviours.
- 4.7 Some of the more prominent studies reviewed in the 2013 Update are discussed in more detail below.

Maynard et al (2013)

- 4.7.1 This study examined eye movements with a convenience sample of 87 students (14-19 years) in three secondary schools in Bristol, UK. They were divided into four groups: never-smokers, experimenters, weekly smokers and daily smokers. The findings revealed that most participants made more eye movements towards the health warnings than to the brand name on plain packs but, overall, the participants made essentially the same number of eye movements to the health warnings irrespective of whether the packs were branded or plain. Moreover, the study found that adolescent never-smokers -- the key population focus of this Review -- looked at the health warnings more than any branding element irrespective of whether the pack was branded or plain and, actually, looked at the health warnings more when the pack was branded.
- 4.7.2 The key shortcomings of the study include:
- (A) as admitted by the authors, the sample used in the study is not representative of the relevant policy population and the extent to which the results of this study generalise to the wider population would be limited. For example:
- (1) only students from three schools were considered and the sample size was very small;
- (2) the majority of the students were attending a school which was academically scoring above the national average;

³⁷ BAT's 2012 Response, pp. 20-23.

- (3) the majority of the students were studying psychology which could affect their opinions; and
 - (4) the never-smokers and experimenters were predominantly female, with more males in the smoking group.
- (B) eye movement as a test is not indicative of actual smoking behaviour. There is no validated link between the amount of attention people pay towards health warnings and their decision to smoke.
- (C) while this study finds more eye movements towards health warnings than to the brand name on plain packs, the total eye movement towards warnings as between plain packs and branded packs were essentially the same. If the premise for evaluating eye movements is that paying more attention to warnings leads people to quit smoking, this study suggests that plain packs do not focus more total attention to warnings as the difference between the actual time that adolescents pay attention to warnings on plain packs relative to branded packs is marginal.
- (D) the study provides no credible support to the claim that plain packaging is more effective in achieving actual reduction in smoking.

Moodie and MacKintosh (2013)

4.7.3 For this study, 187 young adult women (18 to 35 years) were recruited and instructed to use plain packs for one week and their own fully branded packs for one week. Following this, they completed questionnaires designed to assess their perceptions and feelings towards packaging and smoking, response to the warnings and avoidant and cessation behaviour. Plain packs were found to be less attractive than branded packs. The participants reported looking more closely at warnings on plain packs and thinking more about cessation.

4.7.4 The key shortcomings of the study include:

- (A) the duration of the study was only two weeks. It is an extremely short time frame and is not reflective of long term behaviour, particularly where the smokers would get accustomed to plain packs over time in a plain packaging environment. Moreover, the disparate emotions and intentions reported in this study in relation to branded and plain packs will be expected to dissipate if plain packs are the only packs available. Indeed, as the authors note, "*participants may respond differently if only plain packs were available on the legitimate market.*" Therefore, the value of the findings of this study is limited.
- (B) the impact on attitudes, beliefs and intentions of the participants is not predictive of actual behaviour. A respondent indicating that they find the packaging of a tobacco product less (or more) attractive alone is not an indication that the respondent's tobacco consumption will be affected by a change in the packaging.
- (C) it is self-reported and respondents to the study may not have been honest in their responses.
- (D) as the authors themselves admit, the results of this "*study cannot be generalised to all young women smokers*"³⁸. Further, the findings cannot be generalised to male smokers, older female smokers, adolescent smokers and non-smokers.

³⁸ Moodie and MacKintosh (2013), at p. 8.

- (E) as is the case with most of the studies reviewed in the 2013 Update more generally, the setting is artificial as the plain packs carried fictitious names. Subjects trust existing brand names and may be suspicious of fake brand names. They may even consider the cigarettes provided under a fictitious brand name to be fake. This may have generated responses that one would not see if people were to smoke cigarettes from plain packs bearing actual brand names. Therefore, this study does not inform on the impact of the policy in practice.

Wakefield et al (2013)

4.7.5 This study involved a cross-sectional study conducted in November 2012 when plain packs were being rolled out in Australia but were not yet mandatory. It found that plain packs were associated with lower appeal relative to branded packs. People smoking from plain packs were more likely to think about quitting and support plain packaging measures.

4.7.6 The key shortcomings of this study are:

- (A) its conclusions focus only on intentions, attitudes and impressions (and ignore objective smoking measures). It does not examine actual behavioural changes.
- (B) it found no differences between plain and branded pack smokers in relation to quit intentions within 30 days or the next six months. The study further found that there were no significant differences in the proportion of plain and branded pack smokers who thought frequently about the harms of smoking. As noted in the NHS's critique of this study, "There was no significant difference between groups for intentions to quit smoking, frequency of thoughts about harms or perceived exaggeration of harms."³⁹
- (C) given that the study was conducted in November 2012, when plain packs had not yet been introduced in Australia, the findings of the survey may reflect an initial short term effect that would dissipate once people are accustomed to the plain packs after such packaging was made mandatory and plain packs were the only available cigarette packaging on the legal market.
- (D) as further noted by the NHS, this study has many other flaws, including: "that the study could not assess whether a change in packaging achieves the desired outcomes – of an increase in quit rates . . . whether the change in packaging prevented people from starting smoking in the first place . . . It also only looked at adults' beliefs, so the findings cannot be generalised to younger people . . . the amount people smoked was based on their own reporting, and there is a possibility that participants did not report their level of smoking consumption accurately. This could potentially bias the results as could the fact that some of the smokers of branded packs, may have previously smoked from plain packs."⁴⁰

Hammond et al (2013)⁴¹

³⁹ <http://www.nhs.uk/news/2013/07July/Pages/Does-plain-packaging-help-smokers-quit.aspx>

⁴⁰ <http://www.nhs.uk/news/2013/07July/Pages/Does-plain-packaging-help-smokers-quit.aspx>

⁴¹ Hammond D, Daniel S and White C (2013). The effect of cigarette branding and plain packaging on female youth in the United Kingdom. *Journal of Adolescent Health*, **52**: 151-157. doi:10.1016/j.jadohealth.2012.06.003

- 4.7.7 While this study was not reviewed in the main body, it is considered in Appendix 2 of the 2013 Update as a part of the research within the UK. As a part of this study, 16 to 19 year old female subjects in the United Kingdom participated in an online survey. They were offered a cigarette pack that would be sent to them on conclusion of the study. Branded or plain packs were offered randomly. The study found that those who were offered branded packs were more likely to accept a pack than those offered plain packs (51.8% vs. 44.6%).
- 4.7.8 The shortcomings of this report are:
- (A) as in the case of Moodie and MacKintosh (2013), the preference may be an initial short term effect that would go away once people are accustomed to the packs or where plain packs become the norm extinguishing the legal availability of branded packs altogether.
 - (B) it is possible that people may have deduced the purpose of the study. This would bias their responses, which are consequently unreliable.
 - (C) the study cannot be generalised to a wider population as it exclusively looks at young female subjects. The findings cannot be generalised to males and older females (whether smokers or non-smokers).

Other recent studies

- 4.8 In addition to the studies considered in the 2013 Update, there are some other studies that have purported to look at the impact of plain packaging. These suffer from similar methodological flaws as the studies discussed above.

White et al. (2012)⁴²

This study involved 640 Brazilian women (16 to 26 years) who participated in an online survey involving comparison of branded and plain packs on perceived appeal, taste, health risk, smoothness, etc. At the conclusion of the survey, they were shown a range of branded and plain packs from which they could select one as a free gift if they wanted, which constituted a behavioural measure of appeal. This paper found a large difference with 40% people choosing a branded pack and only 13% choosing a plain pack.⁴³

- 4.8.1 This study suffers from the following shortcomings:
- (A) the survey suffers from a methodological flaw in that it offered people a choice between branded and plain packs. This is an artificial setting. In a real life situation, people would not get such a choice. Therefore, the mere fact that they would prefer branded packs over plain packs does not suggest that there would be any change in smoking prevalence if only plain packs were available. As a later study indicates,⁴⁴ the difference between people accepting a branded pack and people accepting a plain pack is significantly reduced once the element of choice is removed.
 - (B) the shortcomings of Hammond et al. (2013), as discussed in paragraph 4.7.8 above are also applicable here.

⁴² White, C., Hammond, D., Thrasher, J. and Fong, G. (2012) "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study" *BMC Public Health* 2012, 12:737. Available online: <http://www.biomedcentral.com/1471-2458/12/737>

⁴³ It appears that the remaining 47% chose not to select a free pack of cigarettes.

⁴⁴ Hammond D, Daniel S and White C (2013). The effect of cigarette branding and plain packaging on female youth in the United Kingdom. *Journal of Adolescent Health*, **52**: 151-157. doi:10.1016/j.jadohealth.2012.06.003

- (C) the relevance of the findings in the context of the UK is limited given that the sample consists exclusively of Brazilian women.

Rousu and Thrasher (2013)⁴⁵

4.8.2 This study reports the results of experimental auctions with US smokers, assessing the percentage of smokers whose demand for cigarettes decreases when bidding on packs with graphic health warnings ("**GHWs**") and plain packs relative to packs with only text warnings. The study finds that GHWs are more effective in reducing demand than text-only warnings. Further, GHWs are more effective at encouraging younger smokers to reduce their demand. Plain packaging was found to be most effective in reducing demand among less educated smokers.

4.8.3 They key shortcomings of this study are:

- (A) the auction experiment that took place at tables in several grocery stores was contrived and very far from any naturalistic setting.
- (B) the sample is not representative. It includes only smokers and does not consider what the impact of larger GHWs and plain packs would be on young non-smokers – the key focus of this Review. Further, the authors admit that the study was conducted with a convenience sample of smokers recruited from grocery stores. Therefore, the results may not be generalizable to all US smokers. Given that the sample is not representative of US smokers, it may be of limited, if any value when considering the impact of plain packaging measures in the UK.
- (C) the reduction in demand for packs with larger GHWs and plain packs could be reflective of merely a short term demand change. The influence of the warnings may wear out and dissipate over time as they lose their novelty and smokers become more accustomed to them. Therefore, this study is not relevant when considering the long term impact of plain packaging on smoking.
- (D) as in the case of Hammond et al. (2013) and White et al. (2013), as discussed above, the reduction in demand could also be explained on the basis that, as packs become more and more different from what is available, subjects may become more suspicious that the pack of cigarettes is genuine. The study does not control for this possibility and therefore, its findings have limited, if any, value.

Conclusion

4.9 In conclusion, the studies considered above all suffer from several methodological flaws which undermine any evidential value they may otherwise have: no individual study is capable of being credible and reliable evidence that the introduction of plain packaging "*is likely to lead to a decrease in the consumption of tobacco, including in particular a decrease in the risk of children becoming addicted*".⁴⁶ Furthermore, a collection of studies which are all fundamentally flawed cannot together form credible and reliable evidence.

⁴⁵ Rousu, M. and Thrasher, J. (2013) "Demand Reduction from Plain and Pictorial Cigarette Warning Labels: Evidence from Experimental Auctions", *Applied Economic Perspectives and Policy* (2013) volume 35, number 1, pp. 171–184. doi:10.1093/aep/paps049

⁴⁶ Method Statement dated 16 December 2013, Independent Review into standardised packaging.

- 4.10 In contrast, there is robust evidence to suggest that packaging is irrelevant to smoking initiation, cessation and relapse.⁴⁷ The studies cited in support of plain packaging fail to respond to - or even consider - such evidence.

5. ILLICIT TRADE AND CONSUMPTION – THE AUSTRALIAN NARRATIVE

5.1 Background

- 5.2 The illicit trade of tobacco is already a major problem in the UK. The HMRC estimate that in 2011-2012 the illicit market accounted for 7% of the market share for cigarettes and 35% of the market share for hand rolling tobacco.⁴⁸

- 5.3 As explained in detail in BAT's 2012 Response,⁴⁹ it is accepted by a wide range of commentators, academics, law enforcement officials and members of the business community that plain packaging of tobacco is a policy option that comes with a very real risk of increasing illicit trade.

- 5.4 It is generally accepted that one of the biggest risks with plain packaging of tobacco is that it would increase price sensitivity and consumers' focus on price.⁵⁰ This would provide a huge advantage to those who can supply the lowest cost product: i.e. the illicit trader.⁵¹ This would result in the price of tobacco being driven down, which would undermine the whole rationale for the proposal: it would make cigarettes more affordable for everyone and, in particular for children who are particularly price sensitive, and therefore is unlikely to achieve the aim of decreasing the prevalence of smoking⁵² (and may even lead to an increased prevalence⁵³). Additionally, this would expose customers to more 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.

- 5.5 Furthermore, there are very important potential economic consequences for the downward pressure on the price of tobacco products (which the Review has expressly stated it is uninterested in).

Research post-Consultation

- 5.6 Since the Consultation, a number of further studies have been published supporting the above:

*"Plain packaging is likely to lead to strong price competition triggered by illicit market suppliers."*⁵⁴

"In our expert opinion, plain packaging for tobacco products will worsen the illicit trade in tobacco products as it would open a number of new opportunities for illicit traders..."

In our expert opinion, plain packaging is highly likely to aggravate the existing negative impacts of the already serious and socially damaging trade in illicit tobacco. Since illicit products are often more accessible to those underage and those from low-income groups,

⁴⁷ See footnotes 15, 16 and 17 above.

⁴⁸ HM Revenue & Customs, "Measuring Tax gaps 2013 Edition", (11 October 2013), at 27 and 28, available at <http://www.hmrc.gov.uk/statistics/tax-gaps/mtg-2013.pdf>

⁴⁹ BAT's 2012 Response, at pp. 56-59.

⁵⁰ Transcrime, *Plain Packaging and Illicit Trade in the UK: Study on the risks of illicit trade in tobacco products as unintended consequences of the introduction of plain packaging in the UK*, 2012, page 23

⁵¹ Roland Berger Strategy Consultants, *The Potential Economic Impact of Plain Packaging for Cigarettes and Fine-Cut Tobacco in Ireland*, 2013 page 9

⁵² Roland Berger Strategy Consultants, *The Potential Economic Impact of Plain Packaging for Cigarettes and Fine-Cut Tobacco in Ireland*, 2013

⁵³ Transcrime, *Plain Packaging and Illicit Trade in the UK: Study on the risks of illicit trade in tobacco products as unintended consequences of the introduction of plain packaging in the UK*, 2012, page 23

⁵⁴ Roland Berger, *The Potential Economic Impact of Plain Packaging for Cigarettes and Fine-Cut Tobacco in Ireland*, page 9

plain pack laws risk undermining a key objective of plain packaging: to reduce smoking by these groups....

*Policy makers should be aware that plain packaging will, in our expert opinion, make the illicit trade in tobacco worse and these policy makers should therefore be exceptionally careful to ensure that such regulations do not inadvertently undermine anti-illicit trade programs and initiatives."*⁵⁵

5.7 Prior to the UK Government's abrupt and unexplained about-turn, BAT and the UK Government both believed that the impact of plain packaging of tobacco in Australia should be understood before other states considered similar regulation. Whereas the UK Government appears to have changed its view, demonstrated by the launch of the Review, BAT has been funding research into the impact of plain packaging in Australia. BAT, together with Imperial Tobacco Australia Limited and Philip Morris Limited, have commissioned KPMG to independently report on the consumption of illicit trade in tobacco in Australia bi-annually. KPMG's utilised several different sampling techniques⁵⁶ in its first bi-annual report was published in October 2013, and concluded that:

5.7.1 the level of illicit consumption grew from 11.8% to 13.3% (expressed as a percentage of total consumption);⁵⁷

5.7.2 this growth in the illicit market has been mainly fuelled by a major shift to illicit manufactured cigarettes, which saw sales quadruple;⁵⁸ and

5.7.3 "[c]onsumption between 2012 and LTM H1 2013 was flat compared to a longer term annual decline" in each year since 2009.⁵⁹

5.8 These reports suggest an alarming trend: an increasing illicit market and a deceleration of the longstanding decline in tobacco consumption. This is further supported by the recently released London Economics' report (commissioned by Philip Morris) which similarly established that there had been no change in smoking prevalence following the introduction of plain packaging in Australia, at least in regard to the number of people reporting smoking cigarettes⁶⁰

5.9 It is interesting to note that, notwithstanding any alleged and anecdotal suggestion of an initial increase in consumer complaints about the taste of tobacco products after the introduction of plain packaging, there has been no recorded corresponding decrease in tobacco consumption.

Conclusion

5.10 The risk of increased illicit trade undermining the health objectives associated with plain packaging of tobacco has long been widely recognised. Prior to any jurisdiction actually standardising the packaging of tobacco, the actual effect could not be researched (furthermore, it remains BAT's view that there is a lack of credible and reliable academic research in the area). The initial KPMG study in Australia that postdates the implementation of plain packaging of tobacco concludes that illicit trade is on the rise.

5.11 BAT submits that the above-referred KPMG study makes it very difficult – if not impossible – for the Review to conclude that new evidence (since the Consultation) supports the

⁵⁵ Zimmerman and Chaudhry, *The Impact of Plain Packaging on the Illicit Trade in Tobacco Products*, 2012

⁵⁶ Including: surveying smokers, examining empty packs, analysing sales of rolling papers and examining customs seizures data.

⁵⁷ KPMG (instructed by BAT, Imperial Tobacco Australia Limited and Philip Morris Limited), *Illicit tobacco in Australia 2013 Half Year Report*, October 2013 page 6

⁵⁸ KPMG (instructed by BAT, Imperial Tobacco Australia Limited and Philip Morris Limited), *Illicit tobacco in Australia 2013 Half Year Report*, October 2013 page 38

⁵⁹ KPMG (instructed by BAT, Imperial Tobacco Australia Limited and Philip Morris Limited), *Illicit tobacco in Australia 2013 Half Year Report*, October 2013 page 6

⁶⁰ London Economics, *An analysis of smoking prevalence in Australia Final*, November 2013, page 4

theory that plain packaging of tobacco is likely to lead to a decrease in the consumption of tobacco, in particular amongst children. The KPMG study suggests that the introduction of plain packaging has coincided with an increase in the illicit market and a deceleration of the historic decline in smoking prevalence. This latter conclusion is bolstered by the recent report released by London Economics.

6. **CONCLUSION**

- 6.1 We submit that there is no credible and reliable evidence to support the proposition that the introduction of plain packaging of tobacco is likely to lead to a decrease in the consumption of tobacco, in particular among children. As outlined above, the studies that purport to reach such a conclusion do not look at any actual smoking behaviour but rather focus on intentions, attitudes and impressions. Moreover, the methodologies of the studies are fundamentally flawed. Furthermore, the initial KPMG report suggests an alarming trend following plain packaging of tobacco in Australia: an illicit market increasing in size and a deceleration of the longstanding decline in tobacco consumption.
- 6.2 It is difficult to see, on this evidence, how anyone could conclude that there is a likely public health benefit to the very expensive and illegal move of standardising packaging of tobacco in the UK.
- 6.3 Moreover, it belies common sense for the UK Government to move forward with this review where the legality of the measure under the World Trade Organisation agreements is currently pending and the UK Government is essentially involved in that litigation as a third party.