



Australian Government

Department of Health

PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT

INQUIRY INTO ILLICIT TOBACCO

ADDITIONAL SUBMISSION

**AUSTRALIAN GOVERNMENT
DEPARTMENT OF HEALTH**

NOVEMBER 2019

The Terms of Reference of this inquiry are to examine the use and consequences of illicit tobacco in Australia, including the importation of contraband, counterfeit, and unbranded tobacco as well as domestically grown illicit tobacco, with particular reference to:

- a. the nature, prevalence and culture of illicit tobacco use in Australia, including in indigenous, regional and non-English speaking communities;
- b. the role of Commonwealth law enforcement agencies in responding to the importation, use, manufacture, distribution and domestic growth of illicit tobacco;
- c. the loss of revenue to the Commonwealth arising from the consumption of illicit tobacco products;
- d. the involvement of organised crime, including international organised crime, in the importation, distribution and use of illicit tobacco in Australia;
- e. the effectiveness of relevant Commonwealth legislation; and
- f. other related issues.

The Department of Health (the Department) provided written submissions to the Parliamentary Joint Committee on Law Enforcement (the Committee) in February 2016 and April 2016, and appeared before the Committee (on invitation) to give oral evidence at hearings on 4 March 2016 and 22 March 2017. In this additional submission, the Department will provide an updated response, so far as it pertains to portfolio responsibilities.

Introduction

The Department has primary responsibility for developing the Australian Government's public health policies, and is the focal point for tobacco control in Australia (in accordance with the World Health Organization Framework Convention on Tobacco Control (WHO FCTC)).¹ As such, the Department has a leadership role in cooperatively engaging with other Commonwealth, state and territory stakeholder agencies with regard to tobacco control generally.² The Department also plays a key role in coordinating Whole of Government responses to international tobacco control issues.

The Department notes that issues which relate to excise, customs tariffs, and law enforcement are matters for the Treasury, the Australian Taxation Office (ATO), the Department of Home Affairs (Home Affairs) and law enforcement agencies (including the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC)).

The Department welcomes the continuing work of the Committee in its Inquiry into Illicit Tobacco (the Inquiry).

Australia's Tobacco Control Framework

Consistent with obligations under the WHO FCTC, Australia has in place a comprehensive range of tobacco control measures which address both the supply of and demand for tobacco products. Enforcement and compliance aimed at combating illicit trade in tobacco products is a critical element of Australia's approach to tobacco control, as it ensures that continuing smokers obtain their tobacco products through the legal market where they are exposed to the full range of Australia's tobacco control measures.

The Department does not support tobacco use in any form; there is no safe level of tobacco consumption, regardless of whether tobacco products are obtained through licit or illicit markets.

1. World Health Organization Framework Convention on Tobacco Control, Article 5.2 (a)
2. World Health Organization Framework Convention on Tobacco Control, Article 5.2 (b)

Whole of Government Approach

In order to ensure that Australia's tobacco control framework is as robust as possible, the Department has adopted a Whole of Government approach to the development and implementation of tobacco control policies, underpinned by a strong collaborative process of cooperative engagement with numerous Commonwealth, state and territory stakeholder agencies. This Whole of Government approach is informed by consultation with the public and stakeholders including, to the extent necessary, the tobacco industry. Interactions with the tobacco industry are conducted in accordance with Article 5.3 of the FCTC.³

This inclusive and collaborative approach provides (among other benefits) the most effective means of addressing issues relating to illicit tobacco, particularly through the involvement of other agencies including Home Affairs, the ATO, AFP, ACIC, Australian Competition and Consumer Commission, and state and territory police.

To this end, the Department is a member of several committees and working groups focussed on tobacco control policy generally and/or on combatting illicit tobacco specifically:

- Inter-Departmental Committee on Tobacco Control
- Illicit Tobacco Task Force (ITTF) (partner agency)
- National Drug Strategy Committee (including issue specific working groups)
- National Expert Reference Group on Tobacco
- Tobacco Policy Officers Group

Most of these committees include the involvement of law enforcement agencies.

Impact of illicit trade in tobacco

By being cheaper, illicit tobacco impacts directly on the effectiveness of price-based public health policies aimed at decreasing smoking rates. Smokers accessing illicit tobacco products may not benefit from other tobacco control measures including tobacco plain packaging, graphic health warnings and smoking cessation information.

The impact of illicit tobacco in Australia is minimised by a robust legislative framework and a strong and active regime of enforcement aimed at eliminating illicit trade. This was strengthened further by establishing the ITTF and the recent legislative changes.

Nature and size of the illicit tobacco market in Australia

The term 'illicit tobacco' refers to tobacco products (defined as products made entirely or partly of leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing⁴) which are traded illicitly. Illicit trade includes any 'practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase'.⁵

3. Consistent with the Australian Government's interpretation of Australia's obligations under Article 5.3 of the WHO FCTC (clarified by the Australian Minister for Foreign Affairs on 5 January 2015 by way of Declaration communicated to the Secretary General of the UN), Australia should interact with the tobacco industry only when and to the extent strictly necessary to enable [it] to effectively regulate the tobacco industry and tobacco products, and should ensure that any such interactions are conducted transparently, available at: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=ix-4&chapter=9&clang=en

4. WHO Protocol to Eliminate Illicit Trade in Tobacco Products, available at: <http://who.int/fctc/protocol/ratification/en/>

5. Ibid.

The Department notes that Home Affairs and the ATO have developed the ‘Tobacco tax gap’ to determine an official estimate of the size of the illicit tobacco market (as listed below in Table 1). The tobacco tax gap estimate covers:

- illicit tobacco importation
- unlicensed domestic cultivation (“chop chop”)
- leakage of pre-taxed (“underbond”) legal tobacco product from warehouses

The Department accepts the estimates of the tobacco tax gap, as prepared by the ATO and Home Affairs as a reliable representation of the size of the illicit tobacco market in Australia.

Table 1: ATO Tobacco tax gap estimates.⁶

Element	2015-16	2016-17	2017-18
Gross gap (\$m)	720	934	1,094
Seizures of illicit tobacco (\$m)	135	355	447
Net gap (\$m)	585	579	647
Tax paid (\$m)	10,063	10,967	12,361
Theoretical liability (\$m)	10,648	11,546	13,008
Gross Gap (%)	6.8%	8.1%	8.4%
Net gap (%)	5.5%	5.0%	5.0%

Current Australian strategies and interventions (relevant to illicit tobacco)

The Department is actively working with other Commonwealth, state and territory government agencies in a collaborative manner to combat illicit tobacco, including through the Interdepartmental Committee on Tobacco Control (the IDC). The IDC was established to coordinate the Whole of Government approach to Australia’s implementation of the WHO FCTC. This includes making recommendations on Australia’s overall tobacco control policy, including measures relating to the reduction of the supply of tobacco including tackling illicit trade in tobacco products.

Article 5.3

The Department notes that pursuant to Article 5.3 of the WTO FCTC, in the case of tobacco control policy, Australian governments should ‘act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’.⁷ Accordingly, the Australian Government interacts with the tobacco industry only to the extent strictly necessary to enable it to effectively regulate the tobacco industry and tobacco products, and ensures that any such interactions are conducted transparently.

The National Tobacco Strategy (NTS)

The NTS provides a national framework for all Australian governments and non-government organisations to work together to improve the health of Australians by reducing smoking and its associated harms. The NTS 2012-2018 remains in effect until the next iteration of the NTS is finalised. The new NTS is being developed by the Department in consultation with government and non-government stakeholders.

One of the nine priority areas in the current NTS is to continue to reduce the affordability of tobacco products, due to strong evidence of the influence of price on the prevalence of tobacco smoking.

6. ATO. *Tobacco Tax Gap Trends and latest findings*. Available at: <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Tobacco-tax-gap/?anchor=Trendsandlatestfindings1#Trendsandlatestfindings1>

7. Article 5.3 of the World Health Organization Framework Convention on Tobacco Control. Available at: https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/

As noted above, illicit trade in tobacco significantly reduces the effectiveness of price-based tobacco control measures. Under this priority area, the current NTS outlines three actions that directly relate to minimising illicit trade in tobacco:

- 6.3.5 Continue to engage in international cooperation relating to tobacco taxation and addressing illicit trade in tobacco products, including through the WHO FCTC.
- 6.3.6 Continue enforcement efforts to prevent the illegal importation and illegal supply and cultivation of tobacco and enhance technology and support systems to identify and respond to illicit trade in tobacco.
- 6.3.7 Continue to monitor the supply and use of illicit tobacco in Australia and effective approaches to reduce the illicit trade in tobacco.

Existing Australian legislation and enforcement action

The issue of illicit tobacco is primarily a revenue evasion matter that attracts significant penalties under the *Excise Act 1901* and *Customs Act 1901*. A number of agencies are involved in administering and enforcing relevant legislation in relation to illicit tobacco, including Home Affairs, the ATO, AFP, and state/territory law enforcement bodies.

State and territory governments also play a key role in tobacco control. State and territory laws cover tobacco retailers, bans on smoking in public places, outdoor places, vehicles and airports. Measures undertaken at state and territory level also help prevent illicit trade in tobacco products, including the licensing of retailers, which is required in most states and territories.

Excise on Tobacco Products

While the development of Australian excise policy is primarily the responsibility of the Treasury, the Department has a significant interest in the development of tobacco excise policy due to the public health impact of tobacco excise policies and Australia's obligation under the WHO FCTC (Article 6) to implement tax and price measures to reduce the demand for tobacco.

Excise increases as an effective tobacco control measure

The WHO and World Bank recognise that tobacco excise increases are one of the most effective ways to reduce the prevalence of smoking. Tobacco excise increases prevent initiation and uptake among young people, promote cessation among current users and lower consumption among continuing smokers.^{8,9} The WHO regards increasing taxes and prices on tobacco products as the single most effective (and cost effective) tobacco control intervention for reducing tobacco use,¹⁰ with a 10 percent price increase resulting in a 4 percent reduction in tobacco consumption (in high income countries).¹¹ The WHO Guidelines for Implementation of Article 6 of the WHO FCTC provide

8. International Agency for Research on Cancer. *Effectiveness of tax and price policies for tobacco control*. Handbooks of Cancer Prevention Vol.14. Lyon France: IARC 2011. Available at: <http://www.iarc.fr/en/publications/list/handbooks/>

9. Chaloupka FJ, Straif K and Leon ME. *Effectiveness of tax and price policies in tobacco control*. Tobacco Control 2011;20(3):235-8. Available at: <http://tobaccocontrol.bmj.com/content/20/3/235.abstract>

10. Chaloupka, FJ, Cummings KM, Morley CP and Horan JK, *Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies*. Tobacco Control, 2002. Available at: https://tobaccocontrol.bmj.com/content/11/suppl_1/i62

11. International Agency for Research on Cancer. *Effectiveness of tax and price policies for tobacco control*. Handbooks of Cancer Prevention Vol.14. Lyon France: IARC 2011. Available at: <http://www.iarc.fr/en/publications/list/handbooks/>

that 'the inverse relationship between price and tobacco use has been demonstrated by numerous studies and is not contested'.¹²

In recognition of the effectiveness of excise and price based interventions on reducing tobacco use, the WHO technical manual on tobacco taxation administration recommends that tobacco excise (as a subset of 'total taxes' which includes GST) account for at least 70% of the retail prices for tobacco products.¹³ This best practice recommendation is based on over one hundred studies examining the impact of a wide variety of tobacco excise policies and interventions on tobacco use.

Tobacco Plain Packaging

The Analysis of Costs and Benefits (published as Appendix C to the Post Implementation Review¹⁴), concluded that tobacco plain packaging had not had a substantive impact on the illicit tobacco market in Australia, if any at all. Peer reviewed studies found there was no change in smokers' reported use of unbranded illicit tobacco, no evidence of increases in use of contraband cigarettes, low levels of use of cigarettes likely to be contraband, and no increase in purchases of tobacco from informal sellers over the relevant period.¹⁵

On 15 October 2015 the Australian Border Force's (ABF) Assistant Commissioner Murray stated that the ABF had not detected any discernible impact on the illicit tobacco trade as a result of the introduction of plain packaging.¹⁶

Enforcement of Tobacco Plain Packaging

Regardless of whether illicit tobacco is plain packaged or not, it should not be available for sale. Tobacco plain packaging was established as a public health measure and as such, compliance and enforcement mechanisms in the *Tobacco Plain Packaging Act 2011* (the TPP Act) are designed to ensure that people accessing tobacco products receive the full benefit of plain packaging as a health measure – they are not intended or designed to counter criminal behaviour.

As the primary aim of enforcement and compliance mechanisms under the TPP Act are to achieve compliance with regulatory requirements, activities under the TPP Act are undertaken in a conciliatory manner (including educative responses and issue of warning letters) aimed primarily

12. WHO, *Guidelines for implementation of Article 6 of the WHO FCTC: Price and tax measures to reduce demand for tobacco*. Available at:

https://www.who.int/fctc/treaty_instruments/Guidelines_Article_6_English.pdf?ua=1

13. WHO *Technical Manual on Tobacco Tax Administration*. Geneva: World Health Organization, 2010, pages 21 and 104. Available at:

http://www.who.int/tobacco/publications/tax_administration/en/index.html

14. Department of Health, *Tobacco Plain Packaging Post Implementation Review*; February 2016. Available at: <https://ris.pmc.gov.au/2016/02/26/tobacco-plain-packaging>

15. The peer-reviewed studies are also consistent with the Australian Institute Health and Welfare (AIHW) National Drug Strategy Household Survey (NDSHS) data that indicates that the reported use of illicit tobacco in Australia declined from 6.1% in 2007 to 3.6% in 2013. M. Scollo, M. Zacher, K. Coomber and M. Wakefield, 'Use of Illicit Tobacco Following Introduction of Standardised Packaging of Tobacco Products in Australia: Results from a National Cross-sectional Survey' (2015) 24 *Tobacco Control* pp. ii76-ii81; M. Scollo, M. Zacher, S. Durkin and M. Wakefield, 'Early Evidence about the Predicted Unintended Consequences of Standardised Packaging of Tobacco Products in Australia: A Cross-sectional Study of the Place of Purchase, Regular Brands and Use of Illicit Tobacco' (2014) 4(8) *BMJ Open*. Available at:

<http://bmjopen.bmj.com/content/4/8/e005873.full>

16. ABC news online, *Millions of cigarettes smuggled into Melbourne seized in raids*; 15 October 2015. Available at <http://www.abc.net.au/news/2015-10-15/millions-of-cigarettes-smuggled-into-melbourne-seized-in-raids/6856290>

at quickly rectifying non-compliance, and in line with the *Tobacco Plain Packaging Enforcement Policy*.¹⁷

Department interaction with other agencies on illicit tobacco

The purpose of the TPP Act is not to tackle illicit tobacco or criminal behaviour by organised groups or syndicates. The Department acknowledges the potential for cooperation with other agencies on illicit tobacco. When the Department suspects the sale of illicit tobacco occurring, information is provided to relevant agencies to appropriately deal with the criminal networks and elements who profit from illegal activity.

The Department provides assistance and support to enforcement and health agencies who deal with illicit tobacco through various means, including providing formal statements, assistance in warrant execution, information and advice in relation to tobacco products.

New Measures to tackle illicit tobacco

Several new measures have been implemented by the Australian Government to combat illicit tobacco and these are welcomed by the Department. These measures include:

- Modernising and strengthening offences that apply to illicit tobacco
- Coordinated enforcement to combat illicit tobacco (establishment of the ITTF)
- Move the taxing point for tobacco excise (removal of bonded warehouses)
- Import Permit Scheme applied to all importers of tobacco products.

The Department is committed to continuing its work as the agency primarily responsible for the development and implementation of tobacco control measures, including on illicit tobacco and will continue its efforts to tackle illicit tobacco in collaboration and cooperation with other agencies.

17. Department of Health, *Tobacco Plain Packaging Enforcement Policy*; May 2018. Available at <https://www.health.gov.au/resources/publications/tobacco-plain-packaging-enforcement-policy>