



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

10 February, 2016

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## Executive summary

British American Tobacco Australia Limited (“BATA”) welcomes the opportunity to submit to the Parliamentary Joint Committee on Law Enforcement (“the Committee”) inquiry into illicit tobacco. In this submission we will be responding to the Committee Terms of Reference as outlined below:

- a) The nature, prevalence and culture of illicit tobacco use in Australia, *including the factors underpinning the growing threat of illegal tobacco in Australia.*

BATA Response:

- Levels of excise tax among the highest in the world drive a significant price difference between illicit products and legitimate tobacco products, presenting a lucrative profit for organised crime.
- Falling consumer affordability and price sensitivity among smokers is creating demand for illicit tobacco.
- Plain packaging of tobacco products, which has removed the most obvious points of difference between competing brands of tobacco products, combined with significant excise increases has resulted in substantial down-trading including into the illicit segment.

- b) The role of Commonwealth law enforcement agencies in responding to the importation, domestic growth, use, manufacture, distribution and sale of illicit tobacco.

BATA Response:

- Relatively low detection rates of illicit tobacco<sup>1</sup> lead to a perception of it being a low risk crime. There is also an apparent disconnect between certain Government bodies responsible for the enforcement of legislation relating to tobacco, thus providing gaps in enforcement activities, which are being exploited by criminals.
- There is evidence of a reluctance by the Courts to hand down strong punishment to those involved in the illicit trade of tobacco so the risk of punishment and/or the extent of its impact vs the benefits which can flow from the activity are relatively low.
- As such illegal tobacco is seen as a low-risk, high-reward criminal activity; traffickers can make millions, with little risk of detection, prosecution or harsh punishments.

- c) The loss of revenue to the Commonwealth arising from the consumption of illicit tobacco products.

BATA Response:

- Lost excise revenue due to illicit tobacco is currently estimated at \$1.42 billion.<sup>2</sup>
- Since 2010 it is estimated that the Government has lost in excess of \$6.7 billion in excise revenue because of illicit tobacco.<sup>3</sup>

- d) The involvement of organised crime, including international organised crime, in the importation, distribution and use of illicit tobacco in Australia.

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<sup>1</sup> Based on the KPMG 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, - the size of the illicit market as compared to the seizure rate by enforcement bodies

<sup>2</sup> KPMG 'Illicit Tobacco in Australia' (2015), 2015 Half Year Report page 6

<sup>3</sup> Based on estimates provided by Deloitte (2010, 2011) and KPMG (2013-2015)

BATA Response:

- The involvement of organised crime syndicates in the illicit tobacco trade has been well documented by the Australian Crime Commission.<sup>4</sup>
- e) *The effectiveness of relevant Commonwealth legislation; including Recommendations to tackle the problem and reduce the levels of illicit tobacco in Australia.*

BATA Response:

- Some elements within the Customs Act and the Excise Act are working well, however further legislative amendment could be made to strengthen Australia's response to imported and domestically grown illicit tobacco. Possible amendments that could be made in an attempt to tackle the illicit tobacco trade, include:
  - The Customs Act:
    - i. Establishing a strict liability offence for importation, which creates a tiered approach to breaches, as well as a tiered penalty structure within the Act for those times when intent cannot be established [to the criminal standard];
    - ii. implementing deemed quantities within the Act, such as a deemed trafficable quantity or an amount for supply;
    - iii. the imposition of sentencing guidelines with specified minimum sentences (or presumptive sentences) for offences based on the amount of duty avoided; and
    - iv. the imposition of minimal non parole periods as a % of the overall sentence.
  - The Excise Act:
    - i. Creating concurrent sentencing provisions within the Act to enable courts to impose both fines (for the recovery of excise) and custodial sentences (as a punitive means of deterrence);
    - ii. recommendations regarding utilising current provisions to prosecute individuals for aiding and abetting;
    - iii. the imposition of sentencing guidelines with specified minimum sentences (or presumptive sentences) for offences based on the amount of excise avoided;
    - iv. the imposition of minimal non parole periods as a % of the overall sentence; and
    - v. deeming provisions that would deem tobacco seized within the land of Australia to be tobacco that has been grown within Australia, unless it can be established otherwise (the burden of proof being on the Defendant to do so).
  - The Tobacco Plain Packaging Act:
    - i. Deeming certain quantities of tobacco products in non-compliant packaging to be for the purpose of commercial supply;

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<sup>4</sup> The involvement of organised crime in illicit tobacco has been well documented by the Australian Crime Commission, the specifics of which are documented later in this submission

- ii. the terms of the Enforcement Policy and the way in which Department of Health (DoH) is utilising that Policy; and
- iii. who is appointed by the Secretary to act as an authorised officer to monitor compliance with the Act.

f) Other related issues.

BATA Response:

- Increased illicit tobacco means small businesses lose revenue and customers to criminals.
- Illicit tobacco exposes consumers to unregulated products with no product controls, much of this illicit tobacco is sold in breach of product regulations including plain packaging, Graphic Health Warning (GHW) and reduced fire risk (RFR) standards;
- the potential role for electronic cigarettes in arresting the growth of the illicit tobacco market.

BATA respectfully requests that the Committee consider that, effective regulation must be based on a sufficiently robust evidential base and properly cognisant of its likely overall impact. Certain measures may have unintended and socially harmful consequences, such as providing a competitive advantage to criminal operators to grow their illegal trade. This submission also outlines ways in which further legislative amendment could be made to strengthen Australia's response to both locally grown and imported illicit tobacco.

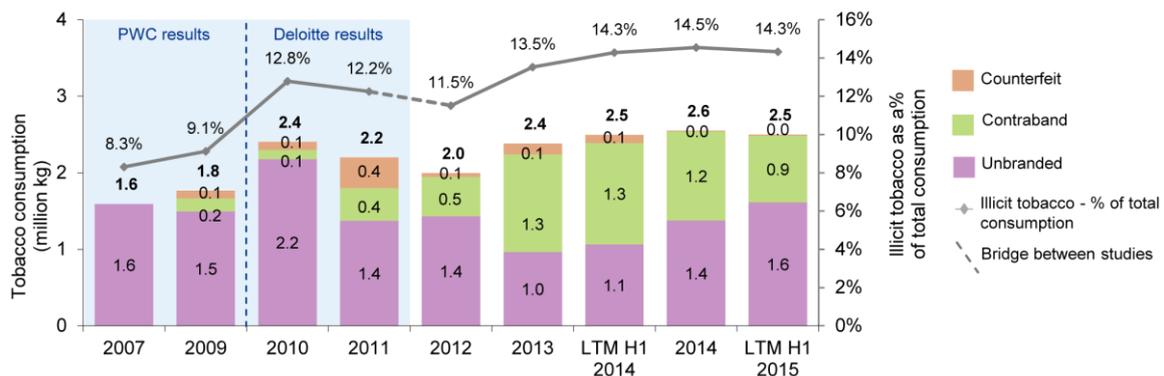
## 1. The nature and prevalence of illicit tobacco use in Australia

BATA commends the Government for the recent creation of a Tobacco Strike Team (TST), a dedicated taskforce set up to disrupt the smuggling and distribution of illicit tobacco into Australia. When launching the Australian Border Force TST in 2015, the Minister for Immigration and Border Protection, the Hon Peter Dutton, stated that *“Combating tobacco smuggling is a high priority for the Australian Government.”*<sup>5</sup>

Over the past few years the Australian Border Force, the Australian Federal Police and other Federal enforcement bodies such as the Australian Crime Commission, have increased their focus on smuggling activities, organised crime syndicates and on activities that can finance terrorism. As such, these bodies are doing substantially more to identify, capture and charge individuals involved in the trade of illicit tobacco, given the nexus between illicit tobacco and other criminal activity.

However, despite these positive measures the illicit trade in tobacco in Australia remains a significant problem. KPMG estimates that illicit tobacco comprises 14.3% of total tobacco consumption. By market share, the illicit tobacco “industry” is the fourth largest competitor in the Australian tobacco market. 14.3% of the Australian tobacco market equates to an estimated street value of between \$1.72 billion and \$2.19 billion,<sup>6</sup> and around \$1.42 billion per annum in lost excise revenue to the Australian government.<sup>7</sup>

**Figure 1:** Consumption of illicit tobacco products by category, Australia 2007 - 2015.<sup>8</sup>



It is imperative that the Government adopts a comprehensive approach to managing all of the drivers of illicit tobacco in Australia. The creation of the Interdepartmental *Tobacco Crime Committee* and the *Illicit Tobacco Industry Advisory Group* are significant and BATA looks forward to working with these newly created Commonwealth Government bodies, with the aim to improve cooperation and close any gaps in the investigation and prosecution of those involved in the trade of illicit tobacco.

Measures to improve enforcement capabilities and action (and the deterrent effect of enforcement outcomes) should reduce the scale of the problem. It is a combination of the probability of being

<sup>5</sup> Media release, the Hon Peter Dutton MP Minister for Immigration and Border Protection, Ten tonnes of tobacco seized in Melbourne, 15 October 2015

<sup>6</sup> Based KPMG 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report total volume of illicit tobacco at 2,499 tonnes and an illicit street price of \$11-\$14 per pack of 20s as of January 2016

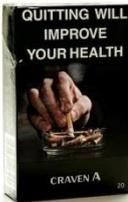
<sup>7</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, page 6

<sup>8</sup> "ibid"

caught and the nature and extent of the penalty or penalties that are likely to be imposed which increases the risk of participating in illicit tobacco and effective deterrence. It is imperative that these two factors are considered in combination to sufficiently reduce the profit incentive to criminal syndicates.

Furthermore the Australian government must take into consideration recent regulatory initiatives such as excessive excise tax increases and plain packaging of tobacco products which have provided the opportunity for criminal organisations to supply the growing consumer demand for illicit tobacco.

**Table 1: Currently the Australian illicit tobacco market comprises three distinct categories**

<p><b>Contraband:</b> Genuine manufactured cigarettes which are sold without the payment of applicable excise taxes in Australia. Contraband cigarettes tend to have been bought in a low-tax country or acquired without taxes (for export purposes) and smuggled into Australia illegally for re-sale.</p> <p>Contraband also includes illicit whites. Illicit whites (known as ‘cheap whites’) are typically produced for the purpose of smuggling them into countries where they are not legitimately sold.</p>	
<p><b>Unbranded chop-chop or loose leaf tobacco:</b> Loose leaf tobacco commonly known as chop-chop carries no health warnings and is consumed as a substitute for legal roll-your-own (RYO) tobacco. Chop-chop is also inserted into empty cigarette tubes and sold pre-made in boxes at tobacco retailers.</p>	
<p><b>Counterfeit:</b> Illegal manufacturing in which a product bears a trademark without the owner’s consent. Illegally manufactured products can be sold in the source country or smuggled into another country.</p>	

Despite there being different types of illicit tobacco, they all have one thing in common – they are illegal, principally because Australian excise duty or customs duty has not been paid.

The Australian Crime Commission believe that most illicit tobacco is imported into Australia rather than grown domestically,<sup>9</sup> however in the last 12 months there have been substantial seizures of locally grown tobacco.

<sup>9</sup> Australian Crime Commission, Organised crime in Australia 2015 Report, 2015, page 68

- March 2015, a 32 hectare tobacco crop in Merrigum was discovered in a joint operation between the Australian Taxation Office, Australian Federal Police and Victoria Police.<sup>10</sup>
- May 2015, a crop with an estimated street value of \$1 million was seized on a farm in Undera in Goulburn Valley, Victoria.<sup>11</sup>

Large-scale smuggling operations into Australia commonly involve commercial size consignments of tobacco products.

- September 2015, a seizure by the Australian Border Force of nine million Manchester branded cigarettes from the United Arab Emirates in an operation that involved corrupt waterfront officials and a crime syndicate involved in the supply of cocaine. The cigarettes had a black market value of \$5.4 million.<sup>12</sup>
- October 2015, the Australian Border Force seized a record haul of 71 tonnes of tobacco in three shipments destined for sale in Australia. The tobacco had a street value of \$40 million and would have delivered the Government \$27 million in tax revenue.<sup>13</sup>
- October 2015 also saw a haul of almost six million illicit cigarettes after raids of storage centres and homes in Melbourne.<sup>14</sup>

**Figure 2:** Shipping container filled with Manchester (known as ‘illicit whites’ – see Table 1) seized in Sydney<sup>15</sup>



The Australian Crime Commission reports that organised crime remains entrenched within the illicit tobacco market in Australia and that there are indications the “*groups involved in the market are*

<sup>10</sup> Tobacco crop bust at Merrigum. Kyabram Free Press, March 2015

<sup>11</sup> Another big tobacco crop seized in Goulburn Valley, Weekly Times Now, May 2015

<sup>12</sup> 12 charged, cocaine and \$700,000 seized after multi-million-dollar cigarette-smuggling operation busted in Sydney, ABC, September 2015

<sup>13</sup> Record haul of illegal tobacco worth \$40 million seized by Australian Border Force, ABC, October 2015

<sup>14</sup> Millions of cigarettes smuggled into Melbourne seized in raids, ABC, October 2015

<sup>15</sup> “ibid”

*highly networked and that they have made significant effort to gain knowledge of Customs procedures, priorities and detection limitations.*<sup>16</sup>

As stated by Minister Dutton:

*“There are clear links to organised crime and we know that groups smuggling illegal tobacco into Australia are also involved in other illegal activities such as narcotics.”*<sup>17</sup>

There are a number of Commonwealth Acts under which a prosecution could be brought against an individual dealing with illicit tobacco in Australia, all of which are administered by different Government authorities or departments. To add complexity, different actions taken by an illicit tobacco trader may infringe different Commonwealth Acts with responsibility for the prosecution of an individual therefore falling across numerous authorities or departments. This crossover presents an opportunity for legislative amendment, as detailed under Section 7 of this submission.

The amendments recommended to the Committee in this submission, with the objective of eliminating all forms of illicit trade in tobacco products, are aligned with the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), to which Australia is a party.

BATA supports the objectives of the FCTC’s Illicit Trade Protocol (ITP) to eliminate all forms of illicit trade in tobacco products. However acceding to, signing and ratifying the ITP in isolation from other countries would have no impact on reducing the transnational flow of illicit tobacco products into Australia. Therefore it is BATA’s view that a considered approach should be taken given the varying ability and practicality of other countries being able to follow Australia’s lead, in particular those countries known to be sources or transit hubs for illicit tobacco products.

## **2. Recent policy changes**

### **2.1 Excise policy**

The growth of illicit tobacco in Australia is in large part driven by unintended consequences of recent tobacco control legislation and policies, namely significant, frequent “ad hoc” excise increases and tobacco plain packaging.

Historically, increases in tobacco excise rates have had the dual policy objective of increasing government revenues whilst reducing consumption over the longer term.

In 2010, the then Rudd Government deviated from the effective and sustainable CPI adjusted excise model to implement a 25% ad hoc excise increase on tobacco products. More recently, in November 2013, the Government confirmed four increases in excise of 12.5% to be levied in December 2013, then September 2014, 2015 and 2016. These increases are in addition to the twice yearly indexation of tobacco excise linked to Average Weekly Ordinary Time Earnings (AWOTE).

Ad hoc excise increases and increased prices of legal tobacco have led to a significant decline in consumer affordability, as illustrated in Figure 2. Since 2007 the index of tobacco prices in Australia

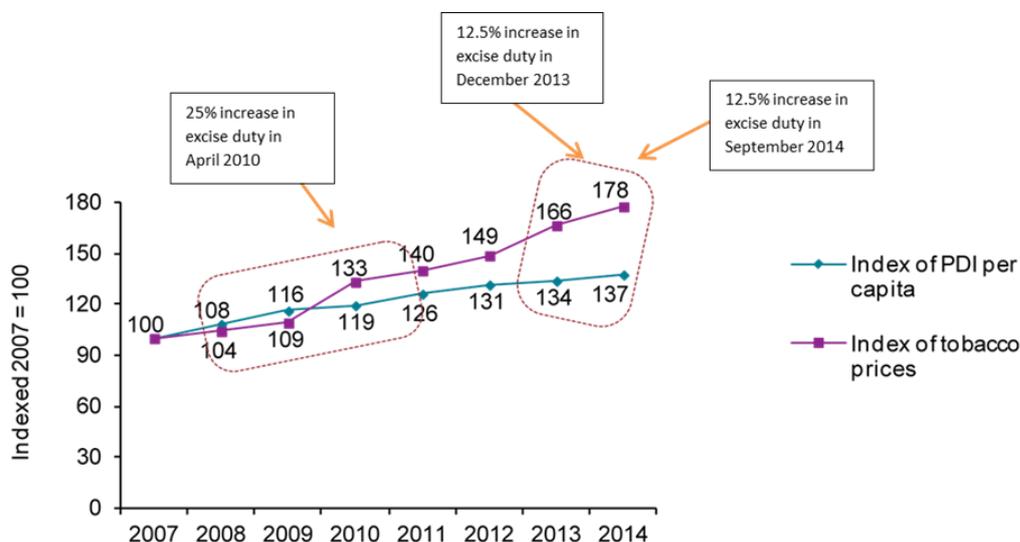
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<sup>16</sup> Australian Crime Commission, Organised crime in Australia 2015 Report 2015, page 68

<sup>17</sup> Media release, Peter Dutton MP Minister for Immigration and Border Protection, Record illicit tobacco seizure leads to new strike team, October 2015

has increased by 78%, while the index of per capita personal disposable income (PDI) has only increased by 37%.

**Figure 3:** Index of tobacco prices and per capita personal disposable income, Australia<sup>18</sup>



Increased excise is designed to have a regressive impact on consumers in order to reduce tobacco consumption. However, available evidence indicates that in the face of sudden price increases caused by ad hoc tobacco excise, consumers are maintaining consumption by down-trading to cheaper legal and illicit tobacco products.

This trend is globally consistent with the World Customs Journal stating that:

*“Experience across both advanced and developing economies demonstrates that the key economic drivers influencing the illegal tobacco trade are excessive tax levels, usually resulting in a sharp decline in cigarette affordability, and organized crime’s willingness to supply given the opportunity to gain large profits from tax avoidance.”<sup>19</sup>*

Indeed, Action on Smoking and Health (ASH UK) has stated that. *“Poorer people are more likely to be tempted by cheaper prices, and access to smuggled tobacco therefore undermines efforts to quit smoking, exacerbating health inequalities. [...] one in four of the poorest smokers buy smuggled tobacco compared to one in eight of the most affluent.”<sup>20</sup>*

A study conducted in the UK has found that. *“Cigarette and tobacco smuggling is therefore viewed positively by low-income smokers as a way of dealing with the increasing cost of cigarettes”<sup>21</sup>*

<sup>18</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, page 21

<sup>19</sup> Cooper and Witt, The linkage between tax burden and illicit trade of excisable products: the example of tobacco, World Customs Journal, 2012

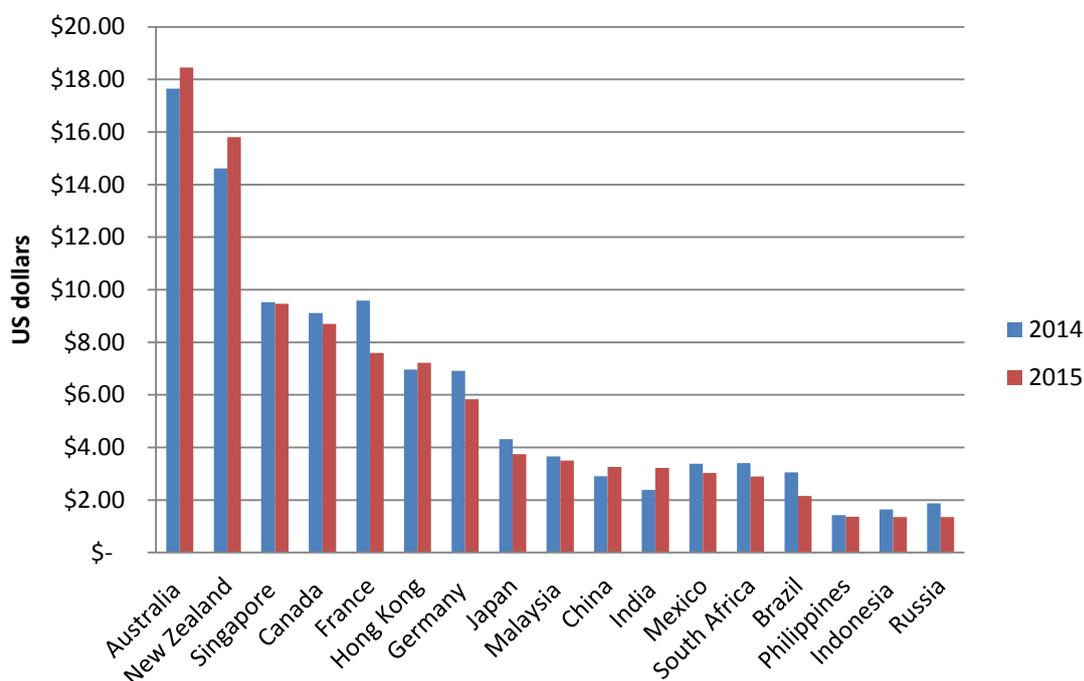
<sup>20</sup> ASH, Tobacco Smuggling, April 2011, page 3

<sup>21</sup> S. Wiltshire et al, They're doing people a service – qualitative study of smoking, smuggling and social deprivation, British Medical Journal, 323, 2001, page 203

Linked to the issue of affordability of tobacco products for smokers, and the price differential between the legal and illicit tobacco, are the supply-side profit incentives for those involved in the illegal trade.

Australia has some of the highest tobacco prices in the world, 58% higher than the most expensive non Australasian markets and over 600% more expensive than source countries such as China.<sup>22</sup> The KPMG report notes that *“this large price differential between Australia and other relatively nearby markets creates smuggling opportunities for those involved in the illegal market”*.<sup>23</sup> One of the key reasons that the price of a pack of cigarettes is so much higher in Australia than virtually every other country in the region is the amount of tax and duty the smoker pays.

**Figure 4:** Global prices of one packet of Marlboro cigarettes.<sup>24</sup>



High prices and taxes in the destination country allow the criminal to buy cheaply and sell high, whilst still undercutting excise paid tobacco prices. In terms of large scale smuggling, the profit per consignment of illicit tobacco is highly lucrative. A single 40 foot cargo container filled with 20 tonnes of loose leaf tobacco is worth approximately \$14.5 million in tax - duty/GST, in September 2016 this is set to increase even further to approximately \$16.8 million in tax – duty/GST.<sup>25</sup> This makes a single cargo container of illicit tobacco a highly valuable commodity to organised crime syndicates involved in illicit tobacco trade. A single 40 foot container of illicit cigarettes can be purchased overseas for under \$200,000 and has a street value of approximately \$5 million. Given the lucrative profits to be made by organised crime, the existing monetary penalties and, in some

<sup>22</sup>KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, Page 23

<sup>23</sup> "ibid"

<sup>24</sup> Graph based on data from Deutsche Bank, Mapping the World's Prices 2015, have selected the top 16 Countries as listed by Deutsche and based prices on the most expensive City in each of the Countries

<sup>25</sup> Value based on 40 foot shipping container with 20,000 kgs of loose leaf tobacco at September 2015 excise/GST rates. 2016 estimates a twice yearly AWOTE increase of 1.5% on top of the September ad hoc excise increase

instances, prison sentences for involvement in the illicit tobacco trade are an inadequate deterrent when considered as part of a risk/reward equation. Refer to detail in **Annexure B**.

## 2.2 Tobacco plain packaging

In 2011, the then Labor Government introduced the Tobacco Plain Packaging Act (“the Plain Packaging Act”)<sup>26</sup> with the objective being to reduce smoking rates (s.3(1)). The Plain Packaging Act also states that the mechanisms through which plain packaging will achieve this objective are:

*“reducing the appeal of tobacco products to consumers; increasing the effectiveness of health warnings on the retail packaging of tobacco products; and reducing the ability of the retail packaging of tobacco products to mislead consumers (s3(2))”*

After three years of tobacco plain packaging being in force there is no proof that the measure is achieving the objectives of the Plain Packaging Act, namely to improve public health by reducing smoking rates.

It is however significant that since the introduction of plain packaging in 2012, there has been an increase in the consumption of illicit tobacco in Australia, from 11.5% of total consumption in 2012 to 14.3% in 2015.<sup>27</sup>

Plain Packaging has significantly restricted the communication of differences in brand and value. This impact, along with pricing factors such as excise increases, mean that many consumers are prioritising price over other considerations.

A market that sees consumers motivated primarily by price plays straight into the hands of illicit tobacco traders, whose tax avoidance allows them to trade at significantly lower prices. The average price for a packet of 20 illicit cigarettes is currently between \$11-14.<sup>28</sup> The result is a total tobacco market that allows the share of illicit tobacco to grow at the expense of regulated, tax-paid, and legal products.

Much of this illicit tobacco is sold in branded packs, many without any health warnings or with warnings printed in a foreign language. They are obviously not plain pack compliant, an offence which can lead to retailers of those products being fined up to \$360,000. That said, smugglers and counterfeiters are starting to bring in counterfeit and contraband plain packaged product into Australia. See below counterfeit packs of Craven A. Plain packaging makes these packs very difficult for both retailers and consumers to identify as counterfeit.

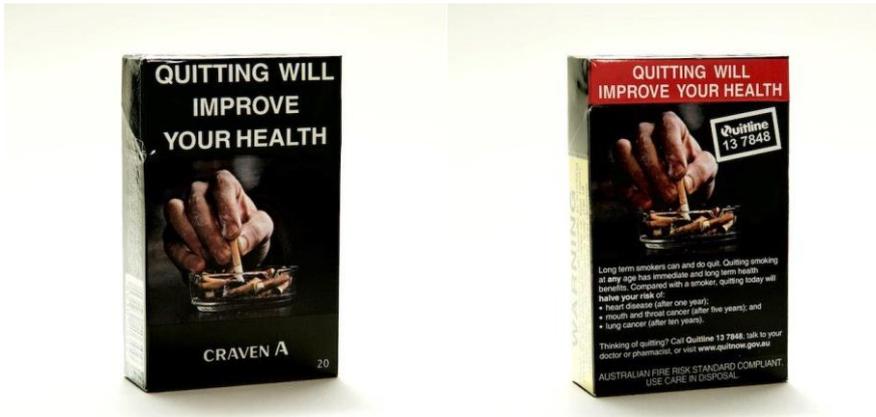
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<sup>26</sup> Tobacco Plain Packaging Act 2011

<sup>27</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, page 6

<sup>28</sup> Based on mystery shopper covert purchases

Figure 5: Plain Packaging counterfeit Craven A.



### Section two: Key point summary

- 103%<sup>29</sup> increase in the excise rate between 2010 and 2015 has seen tobacco price increases well above increases in disposable income.
- This has driven a sharp decline in consumer affordability.
- Plain packaging significantly restricts the communication of differences in brand and value.
- This has created a market where many consumers are motivated primarily by price and plays straight into the hands of the illicit tobacco traders, who trade at significantly lower prices because they pay no taxes.
- Australia now has some of the highest tobacco prices in the world over 600% more expensive than illicit tobacco source countries such as China.
- High taxes in Australia allow organised crime to gain large profits from tax avoidance.

<sup>29</sup> From \$0.2622 per stick in February 2010 stick to \$0.53096 per stick in September 2015

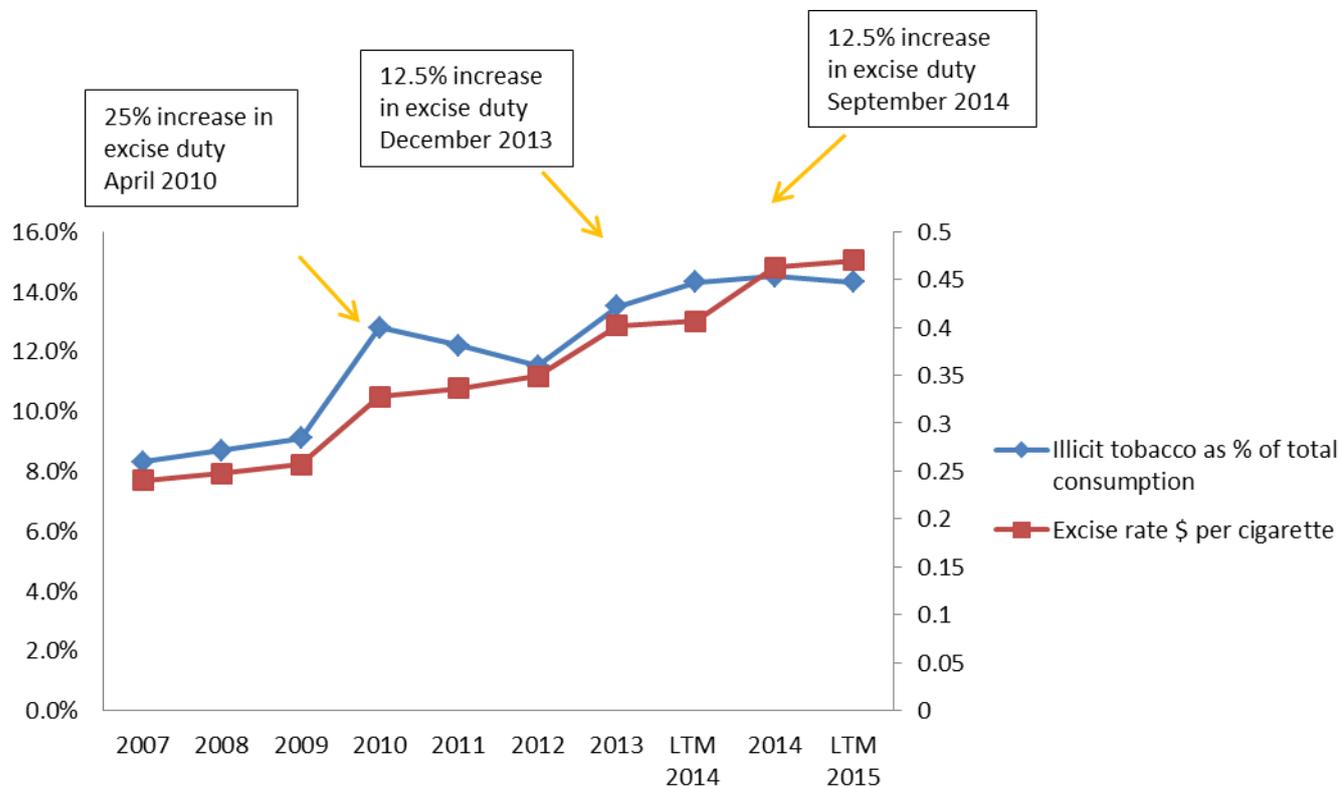
### 3. Impacts of recent policy changes

#### 3.1 There has been a dramatic increase in illicit tobacco

In the first half of 2015 KPMG concluded, that: “The total level of tobacco consumption in Australia was estimated at 17.5 million kilograms.”<sup>30</sup> Of the total consumption, 2.5 million kilograms, or 14.3% of total consumptions were estimated to be illicit.<sup>31</sup>

Between 2007 and 2015 the consumption of illicit tobacco as a proportion of total consumption has increased from 8.3% to 14.3%. That growth has been particularly high since the 25% ad hoc excise increase in 2010. The black market has increased by about 57% since 2010, after the 25% excise increase and 24% since 2013 after plain packaging and the first 12.5% ad hoc excise increase were introduced.

**Figure 6:** Relationship between illicit tobacco consumption and excise rates.<sup>32</sup>



The above graph makes evident that levels of illicit trade have grown sharply when tax rates have increased rapidly.

<sup>30</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, page 29

<sup>31</sup> "ibid" page 30

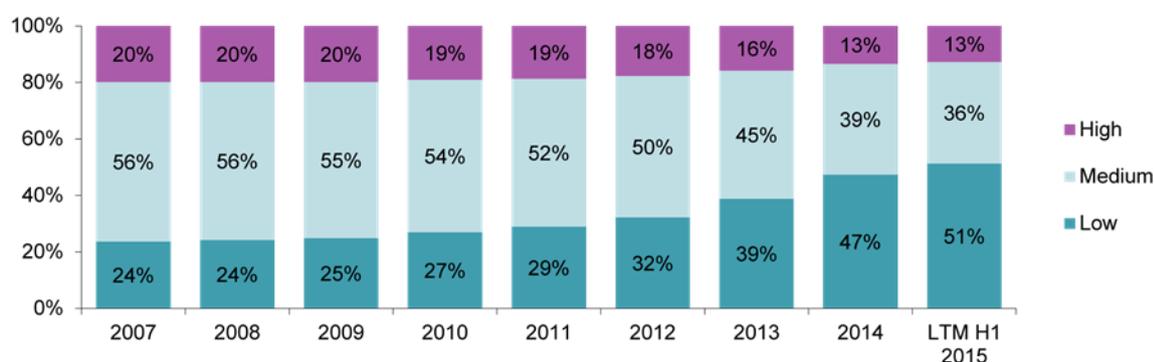
<sup>32</sup> Based on data sourced from: KPMG LLP, 'Illicit Tobacco in Australia' (2015). Half year Report and excise rates per cigarette stick from Rates published by the Australian Taxation Office—see <http://law.ato.gov.au/atolaw/view.htm?Docid=PAC/BL030002/1&PiT=99991231235958>. Current dollars: the price in the applicable year; no adjustment has been made for inflation

### 3.2 Down-trading in the legal market supports this trend

In the face of significant excise increases, plain packaging and falling consumer affordability, relatively few smokers are quitting or reducing consumption. Instead smokers are down-trading within the legal market as well as moving into the illicit market.

Since the 2010 shift away from a sustainable excise policy and the introduction of plain packaging in 2012, the low price market segment has grown from 27% of the market to 51% (a 89% increase). This growth has come at the expense of both the medium and high price market segments which have fallen by 33% and 32% respectively.

**Figure 8** - Market share of manufactured cigarettes by price category.<sup>33</sup>



This analysis excludes the impact of down-trading from the legitimate market to the illicit market. However, it is not surprising that illicit consumption is rising, given the strong down-trading trend in the legal market. It could reasonably be assumed that consumers moving into the illicit market are mostly likely from the low price market segment, given they have no capacity to down-trade further in the legal market.

BAT commissioned an expert report by noted economist, Neil Dryden of Compass Lexicon in August 2014, in which Mr Dryden used standard microeconomic models of competition to analyse the impact of plain packaging on competition and consumption i.e. whether packaging distorts competition, or increases consumption of tobacco products contrary to the health objectives of the regulations. Mr Dryden also produced a supplementary report dated 6 March 2015 using New Zealand as a benchmark comparator, which provides empirical analyses of the effects of the introduction of plain packaging in Australia, to test the hypotheses put forward in his previous report.

That report was subsequently updated in a report dated 2 December 2015, which took into account two and half years' of post implementation data.

Consistent with economic theory as outlined in Mr Dryden's first report, empirical analysis outlined in his supplemental and subsequent report shows that.<sup>34</sup>

<sup>33</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report, page 11

<sup>34</sup> Neil Dryden, The impact of tobacco plain packaging in Australia, Compass Lexecon, December 2014, .

- i. Plain packaging is associated with a reduction in the pre-tax prices of cigarettes in Australia relative to New Zealand;
- ii. Plain packaging is associated with an increase in the consumption of cigarettes in Australia relative to New Zealand. This result is robust across the analysis of retail and wholesale data; and
- iii. While consumers' shift from premium to non-premium brands in Australia was already in place since at least 2009, the adoption of standardised packaging is associated with an acceleration of this down-trading trend.

#### **Section three: Key point summary**

- A 57% increase in illicit tobacco consumption between 2010 and 2015, driven in large part by ad hoc excise tax increases.
- The evidence indicates that levels of illicit trade have grown sharply when tax rates have increased rapidly.
- Whilst legitimate industry volumes are declining, total tobacco consumption has stabilised because of a growth of illicit tobacco consumption.
- This analysis is supported by down-trading trends in the legitimate market, where the low price market segment has grown by 89% since 2010.

## **4. Negative impacts of illicit trade in tobacco**

### **4.1 Loss of revenue to the Government**

The legitimate sale and purchase of tobacco products play a significant role in the Australian economy, with the industry paying \$8.3 billion annually.<sup>35</sup> In Australia excise and other tax represents approximately 70 per cent of the total cost of cigarettes in Australia. It is this high proportion of tax that provides generous margins to illicit traders. As no tax is paid on illicit tobacco products, their sale deprives governments of revenues that would otherwise have been collected. In the last 12 months to June 2015 the illicit market cost the Government \$1.42 billion in foregone excise revenue.<sup>36</sup>

In order to recover this lost excise revenue BATA recommends the Government establish a dedicated program resourcing tobacco crime measures under the relevant Commonwealth Government Department Portfolio Budget Statements. This recommendation would seek to define and resource an ongoing official budget program to ensure greater focus on illicit tobacco.

### **4.2 Retailers**

Linked with the impact on government is the impact of illicit trade has on legitimate businesses, which play an integral role in Australia's economy. It can be reasonably assumed that legitimate tobacco products are sold by retailers who pay income and other taxes to the Government. The lawful sale of tobacco products benefits all of those in the legitimate supply chain in the market including; the retailer, distributor, and importers, all of whom pay taxes.

<sup>35</sup> Table 4 Australian Government general government sector (accrual) revenue, 2014-2015 Australian Government Budget Outcome

<sup>36</sup> KPMG LLP, 'Illicit Tobacco in Australia' (2015). 2015 Half Year Report. Page 6.

Lawful businesses already comply with significant regulations when it comes to tobacco – products are behind closed doors; they are in plain packaging; the right signage is displayed; and, most importantly, they are not sold to minors. Criminal suppliers of illicit tobacco don't worry about obeying the law.

Legal tobacco is an important category for retailers and legitimate retailers are already losing out on business to those involved in illegal tobacco trade and small retailers are among the worst hit.

As stated by Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores;

*“The increased illegal sales cause responsible retailers to miss out on critical tobacco product sales, which generally account for about 36% of sales in a typical convenience store, many of which are small business owners who operate as franchisees or licensees.”<sup>37</sup>*

### 4.3 Involvement of organised crime

Tobacco is one of the most smuggled legal products in the world, and tobacco smuggling is a form of transnational organised crime. The illicit trade in tobacco, including cigarettes, has been linked to the financing of terrorist organisations.<sup>38</sup> In most cases, smugglers deal in tobacco and other illegal commodities or activities, such as drugs, weapons, money laundering and counterfeit goods.

In February 2015, the CEO of the Australian Customs and Border Protection Service, Roman Quaedvlieg, listed illicit tobacco as one of the agency's top six priorities. He told Senate Estimates that:

*“Serious and organised crime will use the same infrastructural spine upon which it imports prohibited drugs to import tobacco ... We are seeing an increase in organised crime entities involved in this. I put it down partially to the fact that the excise in duty payable on tobacco is increasing. We are halfway through a four-year incremental increase to a tune of 12.5 per cent”<sup>39</sup>*

According to the International Tax and Investment Centre (ITIC):

*“in many countries, enforcement agencies have insufficient legal powers to enable them to operate effectively as illegal trade of tobacco products is considered a relatively minor offence. This attracts crime syndicates who see cigarette smuggling as a high profit, low risk activity which incurs lighter penalties than criminal activities like drug trafficking, human trafficking and arms smuggling.”<sup>40</sup>*

This view has been echoed by other analysts, including the Australian Crime Commission which in its Organised Crime in Australia 2013 report states that;

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<sup>37</sup> Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores, 2014  
<http://www.nacsonline.com/news/daily/pages/nd1203142.aspx>

<sup>38</sup> Interpol, Countering Illicit Trade in Tobacco Products – A guide for policy makers, 2014

<sup>39</sup> Legal And Constitutional Affairs Legislation Committee : 23/02/2015 : Senate Estimates: Department Of Immigration And Border Protection<sup>1</sup> – since this statement there has since been another ad hoc excise increase

<sup>40</sup> The Illicit Trade in Tobacco Products and How to Tackle It April 2011, ITIC, p.21

*“Organised crime has sustained access to cheap tobacco product overseas, which can be illegally imported, avoiding tax obligations to supply the illegal tobacco market in Australia. Many of those involved in illegal tobacco importations are also involved in other illegal markets, such as drugs”.*

The involvement of organised crime syndicates in the illicit tobacco trade is well documented in Australia.

- In December 2015 Federal Police seized \$8.35 million of assets, after busting an illicit tobacco importation syndicate. Proceeds of crime, including cash in bank accounts and nine properties across Melbourne suburbs.<sup>41</sup>
- In August 2014 police seized 500,00 sticks of illicit tobacco along with 70kg of loose leaf tobacco, \$1 million cash, credit cards in various names, 164 individual deal bags of synthetic cannabis; and eight packets of Viagra.<sup>42</sup>

Some organised crime groups involved in illicit tobacco have become so clever in their illegal business practices that they operate as if they were a large-scale legitimate business, producing a variety of different counterfeit brands and ‘illicit whites’ to varying degrees of sophistication.

In 2012 Interpol targeted the illicit tobacco trade in Eastern Europe and led to the discovery of a complete covert cigarette production factory in Sumy, Ukraine which was hidden in an underground complex.

*“The manufacturing capacity of the production line is estimated to be between 100,000-125,000 individual packs of cigarettes per day. Seizures included machinery used for manufacturing, 30 tons of cut tobacco, 350,000 of ready-to-sell individual cigarettes packs with an estimated value of USD 560,000, 1.5 million counterfeit excise stamps, and vehicles.”<sup>43</sup>*

In Australia the lack of more stringent enforcement at a retail level means that there is a strong incentive to participate. Very few retailers are being caught and charged in court, and when they are it is widely assumed that the fines are paid by the syndicates who can afford to cover this operational expense and maintain the good will and cooperation of the unscrupulous retailers.

The international case studies detailed under Section 5 of this submission highlight the importance of appropriate criminal penalties and adequate enforcement action in combatting the trade in illicit tobacco.

Often the funds from this illicit tobacco trade are used to finance other serious criminal or terrorist activity. For example, a 2007 report prepared for the US House Committee on Homeland Security states that,

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<sup>41</sup> Herald Sun, Police bust alleged illicit tobacco importation gang, December 2015

<sup>42</sup> Media release, SCC Property Crime Squad, Seven business raided as part of investigation into counterfeit tobacco trade, August 2014

<sup>43</sup> The Global Illicit Trade in Tobacco: a National Threat to National Security, Interpol page 4

*“recent law enforcement investigations have directly linked those involved in illegal tobacco trade to infamous terrorist organizations such as Hezbollah, Hamas, and al Qaeda.”*<sup>44</sup>

#### **4.4 Impact on the broader community**

The widespread prevalence of illicit tobacco in some Australian communities has a detrimental influence on the whole of society as the ITIC notes,

*“where the general public becomes aware that laws are not being complied with and no consequences arise, there is a general erosion of respect for legislation and enforcement authorities. If people rarely hear of arrests and successful prosecutions of those involved in illegal trade, then the perception will spread both that enforcement authorities are ineffective and that the law doesn’t really matter.”*<sup>45</sup>

The Australian Crime Commission in its report - The costs of serious and organised crime in Australia 2013-14 states.

*“The relentless pursuit of illegal profit and power by serious and organised crime affects the Australian community in many ways. The impact is negative, the costs are high, and we all pay the price.”*<sup>46</sup>

#### **4.5 Additional harmful effects on smokers**

Smokers could be exposed to greater health risks by consuming an illegal product. Legitimate tobacco manufacturers are required to comply with applicable industry best practice and standards in the manufacture, sale, and presentation of tobacco products. In Australia this includes the reporting of ingredients use to regulators and complying with the mandatory safety standard for reduced fire risk. Obviously, illegal manufactures are not subject to any of these restrictions.

A study in the UK compared the heavy metal concentrations in tobacco from a sample of 47 counterfeit products, representative of the substantial market for these products in the UK, with their genuine equivalents and it found significantly higher concentrations of heavy metals in the counterfeits. The study concluded that habitual smokers of counterfeits may be risking additional harm from high levels of cadmium and possibly other metals.<sup>47</sup>

These findings were consistent with a US study that measured the toxic elements such as lead (Pb) and cadmium (Cd) in counterfeit cigarettes as compared with their genuine equivalents. The results found that both Pb and Cd concentration in counterfeit cigarettes were markedly higher than those in their legitimate products, suggesting that counterfeit cigarettes may impose higher risks to public health.<sup>48</sup>

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<sup>44</sup> Tobacco and Terror: How Cigarette Smuggling is Funding our Enemies Abroad, Prepared by the Republican Staff of the U.S. House Committee on Homeland Security U.S. Rep. Peter T. King (R-NY), Ranking Member, 2007, page1

<sup>45</sup> The Illicit Trade in Tobacco Products and How to Tackle It, International Tax and Investment Center, page13

<sup>46</sup> Australian Crime Commission, The costs of serious and organised crime in Australia 2013-14

<sup>47</sup> Stephens WE1, Calder A, Newton J, Source and Health Implications of High Toxic Metal Concentrations in Illicit Tobacco Products, School of Geography & Geoscience, University of St Andrews, Vol 39

<sup>48</sup> Yi Hea, Klaus von Lampe, Laura Wood, Marin Kurtid, Investigation of lead and cadmium in counterfeit cigarettes seized in the United States, Food and Chemical Toxicology, Volume 81, July 2015, Pages 40–45

In Australia a study that surveyed current and lifetime users of chop-chop found that they had significantly worse health than smokers of legal tobacco.<sup>49</sup>

**Section four: Key point summary**

- \$1.42 billion is the estimate cost to the Australian Government in foregone revenue due to illicit tobacco.
- Legitimate retailers are already losing out on business to those involved in illicit tobacco trade and small retailers are among the worst hit.
- The involvement of organised crime syndicates in the illicit tobacco trade is well documented in Australia.
- The widespread prevalence of illicit tobacco in some Australian communities has a detrimental influence on the whole of society.
- Smokers could be exposed to greater health risks by consuming an illicit product.

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<sup>49</sup>Bittoun R. The medical consequences of smoking 'chop chop' tobacco. Report prepared for the Commonwealth Department of Health and Ageing. Canberra: Department of Health and Ageing, 2004

## 5. Global experience

The behaviour of Australian smokers is consistent with experience in other countries. Numerous international examples show that sharp increases in excise duty often lead to a rapid expansion of the illicit tobacco market, hindering governments' efforts to reduce smoking prevalence.

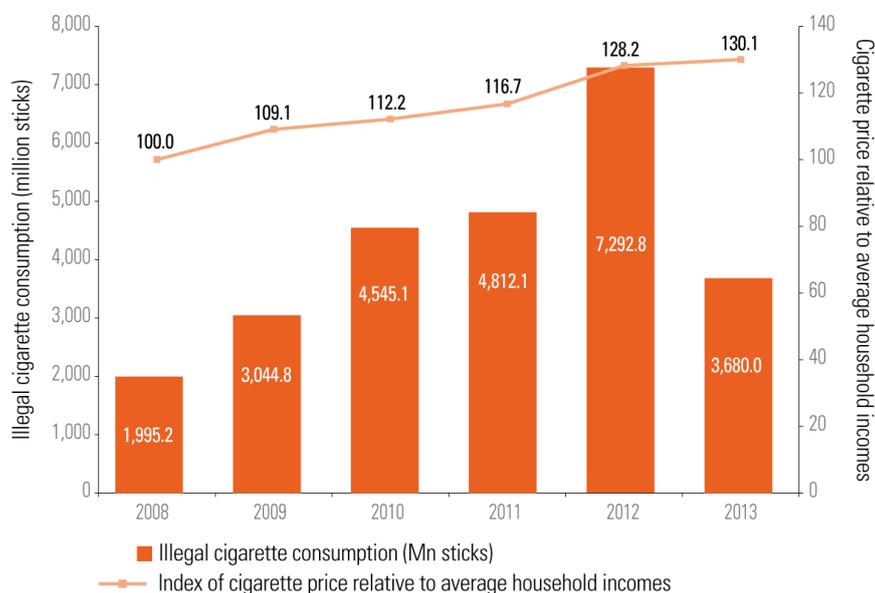
### Italy

In Italy between 2008 and 2013 tobacco prices increased by 9% in real terms, with 85% of this change due to an increase in cigarette tax rates. Between 2008 and 2012 there was a strong correlation (98 per cent) between the consumption of illicit tobacco and legitimate cigarette affordability. When legal tobacco becomes less affordable for consumers this, all other things being equal, tended to result in higher levels of illicit cigarette consumption.

Illicit cigarette consumption increased by 84% between 2008 and 2012 but fell by 50% between 2012 and 2013.<sup>50</sup> The reduction in illicit tobacco consumption in 2013 was due in large part to improved enforcement measures which led to a significant decline in illicit imports from Eastern Europe. Another key factor was the impact of the "super-low" segment (€4.00) which also contributed to a decline in illegal sales in the second part of 2013.

The lost tax revenue to Government due to illicit tobacco was €4.3 billion, in real terms, between 2008 and 2013.<sup>51</sup>

**Figure 9:** Italy comparison between illicit cigarette consumption and the affordability of legal cigarettes<sup>52</sup>



<sup>50</sup> KPMG analysis of Project Sun Report; EC excise duty tables for manufactured tobacco; Euromonitor estimates for average household income; IMF inflation index

<sup>51</sup> KPMG analysis of EC excise duty tables for manufactured tobacco; EC Releases for consumption; KPMG Project Sun; IMF inflation index

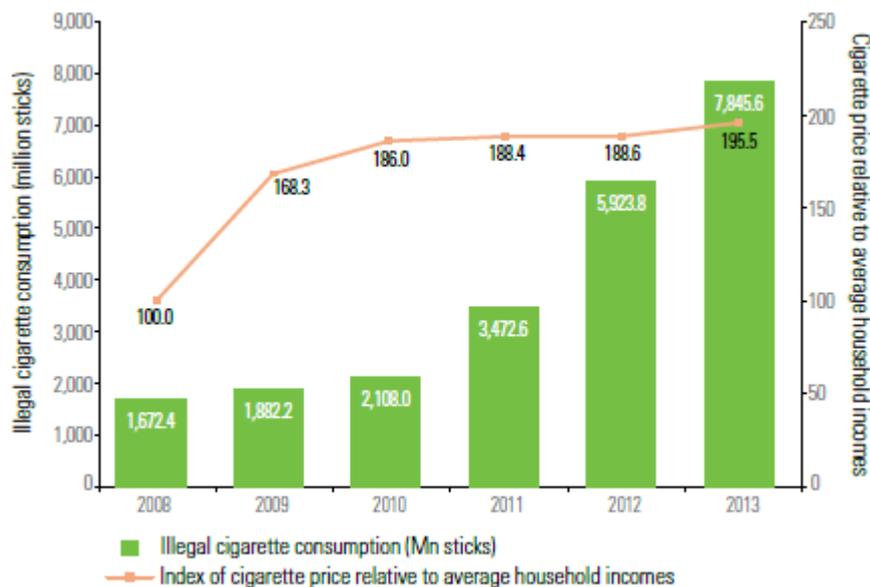
<sup>52</sup> KPMG analysis of Project Sun Report; EC excise duty tables for manufactured tobacco; Euromonitor estimates for average household income; IMF inflation index

## Ukraine

Tobacco prices increased by 166% in real terms in the Ukraine, between 2008 and 2013, with 70% of this change driven by tax rate increase. During this period illicit cigarette consumption increased by 370%<sup>53</sup>. The increase in illicit consumption has been caused by the Ukrainian government increasing the tax rate of cigarettes to push prices closer to those in Western European countries. However, in doing so, the price differential between Ukraine and neighbouring countries to the East have increased. This has resulted in illicit cigarettes being smuggled into Ukraine from Russia and Moldova.

Action is being taken to minimise this cross-border smuggling by implementing tougher border controls. The lost tax revenue to Government due to illicit tobacco was \$700 million, in real terms, between 2008 and 2013.

**Figure 10:** Ukraine comparison between illicit cigarette consumption and the affordability of legal cigarettes



## Canada

In Canada cigarette prices increased by 6%, in real terms, between 2008 and 2013. Illicit cigarette consumption decreased by 32% between 2008 and 2013, despite this decrease, illicit cigarette consumption remains high, specifically in Central Canada. The decrease in illicit consumption between 2008 and 2013 has, for the most part, been attributed to the Government's strategy of reducing both the availability of and the demand for illicit tobacco. Lost tax due to illicit tobacco was \$13.4 billion, in real terms, between 2008 and 2013. The Royal Canadian Mounted Police have drawn a clear link between the increasing tax rates and illicit trade between the early 1990s and 2008. The large tax increases that were implemented widened the price differentials between illicit and legal cigarettes thereby increasing the incentives for illicit traders in Canada, and particularly in the provinces of Ontario and Quebec.

<sup>53</sup> KPMG analysis; Euromonitor; Nielsen; IMF inflation index

In May 2008, in response to the rise in illicit tobacco, the Minister of Public Safety launched the Royal Canadian Mounted Police's Contraband Tobacco Enforcement Strategy: a three-year strategy with the objective of reducing both the availability of and the demand for illicit tobacco. Several priority areas were identified in the strategy and, in 2011, the RCMP reported success in:

- measures to disrupt organised crime and the supply chain;
- improving effective information and intelligence, sharing and improved target identification;
- initiatives to educate the public, as well as participants in the legitimate tobacco distribution;
- more effective use and allocation of resources;
- contributing to the development of legislative and regulatory tools;
- research on emerging contraband tobacco packaging and tobacco crop trends;
- training and learning opportunities for Customs and Excise; and
- the creation of the Cornwall Regional Task Force (RTF) to investigate smuggling activities and enforce the law along the borders.

Overall consumption of illicit tobacco in Canada fell by 32% between 2008 and 2013. This suggests that investments in curtailing a large scale illicit trade problem can make a substantial difference but as long as a profit opportunity exists, driven either by large price or tax differentials, it is difficult to eliminate the problem entirely.

### **Quebec**

In 2009, the Government of Quebec introduced new legislation allowing any peace officer (a civil officer appointed to preserve law and order, such as a sheriff or police officer) to investigate illicit tobacco and more importantly made provision to allow local police forces to keep the proceeds of crime resulting from prosecution for illicit tobacco. This was accompanied by a program called ACCES Tabac, which provides funding to local enforcement in their fight against illicit tobacco. The result was a reduction of illicit tobacco levels by 50% over the next two years in the province.

#### **Section five: Key point summary**

- The illicit tobacco trade is a global phenomenon, it occurs on every continent and it takes place in high and low income countries.
- These case-studies demonstrate the greater the expected profits from trading in illicit tobacco, the greater the criminal incentive.
- They also show where there is political will to address illicit trade, such as investment in effective enforcement, can result in a reduction of illicit tobacco.

## **6. Existing framework of measures to combat illicit tobacco**

The illicit trade in tobacco products is a global problem that requires a multi-level response. Therefore, collaboration at the national, regional, and international level between regulators (who set tobacco control and excise measures), enforcement agencies, and those who operate within the legitimate product supply chain is critical to tackling the problem in an effective and sustainable manner.

Within Australia, there are a number of different Commonwealth Acts under which a prosecution could be brought against an individual dealing with illicit tobacco in Australia, all of which are administered by different Government authorities or departments. These include:

Commonwealth Acts under which proceedings can be brought	Domestic tobacco			Imported tobacco			Body responsible for enforcement
	Contraband	Counterfeit	Chop Chop	Contraband	Counterfeit	Chop Chop	
Criminal Code	Y	Y	Y	Y	Y	Y	Australian Federal Police (AFP)
Customs Act	N	N	N	Y	Y	Y	Border Force
Excise Act	Y	Y	Y	N	N	N	Australian Taxation Office (ATO)
Proceeds of Crime Act	Y	Y	Y	Y	Y	Y	AFP, Australian Crime Commission (ACC)
Tobacco Plain Packaging Act	Maybe	Maybe	Maybe	Maybe	Maybe	Maybe	DoH
Trade Marks Act	Maybe	Y	N	Maybe	Y	N	Trademark Owner

To add complexity to the situation, different actions within the illicit tobacco trade may infringe a number of different Commonwealth Acts, which in turn will determine the Government department or authority that is responsible for prosecuting an individual found to be engaging in that activity. By way of example:

Infringing action involving illicit tobacco	Organisation responsible for enforcement
Importation	Border Force, AFP
Manufacture	ATO, DoH
Purchase	ATO, DoH
Transport	ATO, Border Force, AFP
Sale/Supply	ATO, DoH, AFP
Possession	ATO, Border Force, AFP

For further details see **Annexure A**.

There seems to be differing levels of commitment within the various Government departments and authorities when it comes to prosecuting persons:

- a) involved in the illicit tobacco trade and the proceeds of those dealings; and
- b) that breach the Act(s) that they are responsible for administering.

The Australian Border Force, the Australian Federal Police and, the Australian Tax Office, appear to have stepped up to the challenge when it comes to these matters. On the other hand, to BATA's knowledge, the DoH has not taken any enforcement action under the Plain Packaging Act since it was enacted on 1 December 2011, save for issuing a small number of infringement notices and warning letters.

While there have been joint taskforces formed to identify conduct and the individuals involved in that conduct, such as the Trident Taskforce<sup>54</sup>, Polaris Taskforce<sup>55</sup>, Criminal Asset Confiscation Taskforce<sup>56</sup>, there is little evidence of interdepartmental collaboration when it comes to prosecution of persons caught trading in illicit tobacco. To BATA's knowledge, there are only a few examples of interdepartmental collaboration in prosecutions under the respective Acts that each administers. For example, on 15 December 2015, through investigations carried out by Australian Border Force, AFP and the ATO, a man was charged with:

- a) dealing in the Proceeds of Crime, contrary to s 400.3(2) of the Criminal Code;
- b) smuggling of tobacco products contrary to section 233BABAD of the Customs Act; and
- c) general Dishonesty, contrary to s 135.1(3) of the Criminal Code<sup>57</sup>

The combination of these offences could lead to a total maximum penalty of 17 years imprisonment (as opposed to the 10 years available under the Customs Act for smuggling) plus the amount of duty payable on the day the offence was committed, being \$5 million.

If this prosecution succeeds, it will demonstrate the potential for the various Commonwealth bodies to work together on prosecutions with respect to each specific action taken by the defendant in committing the crime – and ensure that the maximum possible penalty is imposed to those involved in the importation, manufacture and sale of illicit tobacco.

Other recent examples involve individuals being charged with smuggling tobacco products, forgery in respect of shipping documents, conspiracy to defraud causing a loss to the Commonwealth, dealing in proceeds of crime and obtaining a financial advantage by deception.

Unfortunately, however, these are rare examples, with the majority of the prosecutions being brought by only one Government department under only one Act, or, if multiple charges are pleaded it is only for actions which breach the legislation administered by the Department bringing the prosecution.

## **6.1 Courts interpretation of the legislation**

In the last 15 years, a number of cases have been brought against individuals for offences under the Excise Act and the Customs Act. It appears that the majority of cases involving illicit tobacco are unreported. In fact, Courts have previously imposed suppression orders on the parties or had ordered that the court be closed for the hearing. Presumably this is because, at the time of the hearing, there were still ongoing investigations into others involved in the criminal activity.

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<sup>54</sup> Joint taskforce between AFP, Border Force, Victorian Police and the ACC

<sup>55</sup> Joint taskforce between AFP, Border Force, NSW Police and the ACC

<sup>56</sup> Joint taskforce between AFP, Border Force, Victorian Police and the ACC

<sup>57</sup> <http://newsroom.border.gov.au/releases/man-charged-for-evading-more-than-5-million-of-duty-and-gst-in-joint-agency-illegal-tobacco-investigation>

Notwithstanding the challenges, there are a number of cases brought against individuals. On a review of the cases it is clear (and somewhat troubling) that:

- a) there is a substantial amount of inconsistency when it comes to sentencing of individuals under the respective acts; and
- b) where penalties are being *imposed* by the Courts, those penalties are not being *enforced* against the individuals.

Attached, and marked **Annexure B**, is a random selection of 42 cases from the last 15 years to illustrate the above points. It is merely an example of the cases but you will see that of the 42 cases:

- The Courts have imposed on individuals prison sentences totalling 36 years, of which only 2.9 years were actually served by the respective Defendants<sup>58</sup>.
- In 18 of the 42 cases, upon handing down a prison sentence, the court immediately released the Defendant without *any* time being served<sup>59</sup>.
- In 4 of the 42 cases, upon handing down the prison sentence, the court immediately ordered the defendant be released with a suspended sentence<sup>60</sup>.
- The Courts imposed \$28,373,258 in fines, of which only a proportion would have been paid<sup>61</sup>.

#### **Section six: Key point summary**

- There's an apparent disconnect between certain Government bodies responsible for the enforcement of legislation relating to tobacco, thus providing gaps in enforcement activities, which are being exploited by criminals.
- Whilst the Australian Border Force, the Australian Federal Police and, Australian Tax Office, have taken steps to better tack the issue of illicit tobacco, the DoH has not taken any enforcement action under the Plain Packaging Act, save for issuing a small number of infringement notices and warning letters.
- The Courts are reluctant to hand down strong punishment to those involved in the illicit trade of tobacco.
- Even when Courts do impose a jail sentence against the perpetrators, there is a tendency for the Court to immediately release the defendants, either on a good behaviour bond or a suspended sentence, so the disincentive to deal with illicit tobacco is relatively non-existent.

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<sup>58</sup> A one year sentence was imposed in November 2015 and a 3 year sentence was imposed in December 2015, but it is unclear how much will be served. The amount served should be added to this figure

<sup>59</sup> Some of the Defendants were released on the payment of a recognisance of \$1,000, but not in all cases

<sup>60</sup> Offender doesn't receive a custodial sentence but any breach of good behaviour results in the offender having to serve the entirety of the sentence from the point at which the breach occurs

<sup>61</sup> Principally because a large proportion of the Defendants appeared to be impecunious

## 7. An opportunity – to address legislative and law enforcement gaps

### 7.1 Domestic illicit product

#### The Excise Act and Tariff Act

The Excise Act 1901 (Cth) (the **Excise Act**) works in tandem with the *Excise Tariff Act 1921* (the **Tariff Act**) to:

- a) levy excise on relevant goods manufactured or produced in Australia (ie. the Tariff Act); and
- b) set up the administrative arrangements applying to the excise system and the imposition of penalties for, among other things, the sale, purchase and possession of excisable goods on which duty has not been paid (ie. the Excise Act).

An introduction to the Tariff Act and the Excise Act, as well as the ATO's role in administering the Acts appears at **Annexure C**.

#### What appears to be working well

The ATO have indicated that the supply, sale and manufacture of illicit tobacco is a key strategic priority.<sup>62</sup>

There have been a number of successful prosecutions brought by the ATO against individuals pursuant to s117 and 117B of the Excise Act.<sup>63</sup> These provisions were introduced into the Excise Act in 2002 and were principally focused on recovering revenue gained as a result of illicit tobacco sales. All of the amendments made to the Excise Act in 2002 appear to have improved the arsenal available to the ATO in recovering lost revenue.

By way of example, s117 and s117B of the Excise Act establish a tiered approach to prosecutions for possessing or selling excisable goods without paying duty on those goods and create a two tiered penalty structure. The tiered approach works well because in s117(1) and s117B(1) the prosecution must prove the accused's intent to possess or sell the goods without paying excise, whereas s117(2) and s117B(2) only require proof that excisable goods are possessed by the accused or have been sold by the accused, and that duty hasn't been paid. Prosecutions are generally commenced concurrently for breach of both sub-sections within the relevant section, with the primary penalty sought under s117(1)/117B(1), and s117(2)/117B(2) operating as a safety net if the prosecution is not able to establish the element of 'intent' beyond a reasonable doubt. That is, the individual's illegal activity is being prosecuted as a fault based offence and as an offence of strict liability.

A full summary of the tiered approach is detailed in **Annexure C**.

#### Issues that are arising

##### Origin

One difficulty in prosecutions under the Excise Act is the requirement that the tobacco be grown and/or manufactured or partly manufactured in Australia. The identification of the origin and curing location of tobacco is a subjective task, dependent upon the use of graders and analysts. Even the latest technology is unable to conclusively determine origin by reference to the characteristics and

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<sup>62</sup>See <https://www.ato.gov.au/Media-centre/Media-releases/Illegal-tobacco-farmer-cops-jail-sentence/>

<sup>63</sup> For further reference please refer to the table at 5

DNA in the leaf. Further, it is also extremely difficult, if not impossible, to determine if a tobacco product, particularly chop-chop, has been manufactured or partly manufactured in Australia. This origin requirement has been the downfall of a number of prosecutions<sup>64</sup>. The strong likelihood is that this evidentiary burden prevents a number of cases under the Excise Act from being brought to Court.

### Sentencing

The sentences imposed by the Courts appear to be where the real failure of prosecutions under the Excise Act lies. **Annexure B** illustrates the large number of suspended sentences, immediate release despite the imposition of a sentence in excess of 12 months, and short parole periods.

In deciding on sentencing options, judges are also forced to choose between financial or custodial sentences<sup>65</sup>. This ignores the reality that:

- a) It is through the imposition of fines that the Commonwealth recovers its lost duty on the manufacture of these goods;
- b) the likelihood, in some cases, that offenders may have access to significant financial resources as a result of their previous dealings or connections;
- c) there is a simultaneous need to impose strong penalties, such as imprisonment as well as fines, particularly for commercial operations or where significant excise is being avoided; and
- d) there is a need to send a strong message that the illicit tobacco trade is illegal.

### Suggested Amendments

BATA suggests mirroring the concurrent sentencing provisions of s233BABAD of the Customs Act within s117A, s117B and s117C to enable Courts to impose both fines (for the recovery of lost excise) and custodial sentences (as a punitive means of deterrence), rather than the current position under the Excise Act of imposing a fine or a custodial sentence.

The ATO should be encouraged to use ss116 to 117H to ensure that owners of premises and other accessories are prosecuted, essentially as 'aiders and abettors'.

In an attempt to address the inconsistent and low penalties being imposed by the Courts, the Committee might wish to consider a number of different mechanisms, such as:

- a) **Imposing minimum sentences** for conduct which surpasses a certain excisable value, or for which there is evidence of it being carried out on a commercial scale.
  - i. Minimum sentences are one of the simplest solutions to address the low sentencing rate, and the recent judicial discourse about the failures of previous decisions to impose appropriate sentences supports this view.
  - ii. It is becoming more common for Parliament to fix mandatory sentences and minimum non-parole periods – reflecting a growing desire for the implementation of tougher sentences.<sup>66</sup> Below are some examples of Acts incorporating mandatory

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<sup>64</sup> See, for example *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35 and *Commissioner of Taxation v Esho & Anor* [2003] NSWSC 410

<sup>65</sup> See s117B(1) of the Excise Act

<sup>66</sup> Gray, Anthony, and Elmore, Gerard, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* p. 37

sentencing provisions, and how equivalent provisions could be applied to the issue of illicit tobacco:

A. Queensland

Section 182A of the *Criminal Law and Other Legislation Amendment Act 2013* creates a minimum non-parole period of 80 per cent of the sentence for a drug trafficking offence. In the explanatory memorandum to the Bill, it was reasoned that trafficking in dangerous drugs is the most serious form of drug related offending - it has the potential to cause significant broader social harm. Strong deterrent sanctions are justified.

A similar argument could be put for the impact of illicit tobacco and on the loss of Australian excise revenue. Imposing a mandatory sentence or minimum non-parole period will ensure that a consistent approach is applied and the sentences imposed for serious offences fits the severity of the crime.

B. Northern Territory

Under s37(2) of the *Misuse of Drugs Act 1990* (NT) when sentencing a person for an offence under the Act, the Court must impose a sentence requiring the offender to serve actual imprisonment unless, after having regard to the offender's particular circumstances or the circumstances of the offence, actual imprisonment should not be imposed.

b) An alternative to mandatory sentencing is the **implementation of a presumptive minimum sentence**. A presumptive sentencing system is where a prescribed minimum penalty must be imposed unless it is determined, in accordance with the facts of the case, that a departure is justified. Examples of current presumptive minimums include:

- i. Section 37(3) of the *Misuse of Drugs Act 1990* (NT) stipulates that when imposing a sentence requiring actual imprisonment, it shall not impose a sentence of less than 28 days. It does not, however, mandate the imposition of the sentence itself.
- ii. Section 121(2) of the *Domestic and Family Violence Act 2009* (NT) contains a presumptive minimum sentence of seven days imprisonment for a subsequent breach of a domestic violence order. The provision does not apply if no harm is caused or if the Court is satisfied that it is not appropriate in the circumstances to record a conviction and sentence.
- iii. Division 1A of the *Crimes (Sentencing Procedure Act) 1999* (NSW) and s19AG of the *Crimes Act 1914* (Cth) similarly have prescribed minimums however, these predominately deal with parole periods.

The formula for the presumptive minimum for breach of the Excise Act, based upon the considerations in the table of cases cited at **Annexure B**, could include:

- i. Provision for the presumption to be displaced if the offender demonstrated prospects of rehabilitation, had no prior convictions and/or expressed remorse for their actions and/or where the excise avoided was minimal; and
- ii. the discretion to be less readily exercised in circumstances where the excise avoided was substantial and/or the defendant had engaged in an offence of a similar manner, had

failed to cooperate with authorities or had deliberately misled Border Force officials – to ensure offenders who engage with smuggling and importation at the highest level will be caught by the strictest provisions.

- c) The **implementation of minimum non-parole periods** for certain offences. These provide legislative guidance to the courts on the length of time an offender should spend in prison before being eligible to apply for release on parole. Examples of minimum non-parole periods include:
- i. s182A of the *Criminal law and Other Legislation Amendment Customs Act 2013* (QLD) provides that drug trafficking offences are subject to a minimum non parole period of 80% of the total sentence;
  - ii. s19AG of the *Crimes Customs Act 1914* (Cth), imposes a minimum non-parole period of at least 75% of the sentence of imprisonment, although the Court retains the discretion to impose a longer non-parole period, if considered appropriate in the circumstances.

The following are sentencing guidelines, which would result in custodial sentences proportionate to the offence committed. This is taken from a review of the various case law under the Excise Act and the general penalties imposed by the Courts:

Excise Avoided	Recommended sentence
>\$1,000,000	> six months' imprisonment
\$500,001 - \$1,000,000	At least six months' imprisonment
\$250,001 - \$500,000	At least three months' imprisonment
\$100,000 - \$250,000	At least one month's imprisonment
<\$100,000	Immediate release with a suspended sentence

The above is consistent with comments made by the Court in *R v Kopa; Istogu ex parte DPP*<sup>67</sup>, who also considered a number of decisions under the Act and the sentences imposed in those cases.

BATA would also support a minimum non-parole period of at least 75% of the sentence of imprisonment be imposed.

In respect of the issues relating to the requirement that the tobacco be grown and/or manufactured or partly manufactured in Australia for proceedings to be instituted under the Excise Act, bearing in mind the onus of proof required for criminal prosecutions, this is a difficult issue. BATA recommends that deeming provisions within the Excise Act that would deem tobacco seized within the land of Australia to be tobacco that has been grown within Australia, unless it can be established otherwise. An example of where binding decisions are made in respect of the origin of certain goods can be found in the EU, where the Taxation and Customs Union, for the purposes of determining duty on goods being imported/exporting in the EU, issues binding decisions on the origin of certain goods. In this case, the existence of a binding decision doesn't exempt a person from the requirement to provide proof of origin but the binding decision is a fall-back position if the information provided is found to be incorrect or incomplete.

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<sup>67</sup> [2004] QCA 100

## 7.2 Imported illicit product

### The Customs Act

The Customs Act 1901 (Cth) (**the Customs Act**), deals with matters relating to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition/restriction or a tax, duty, levy or charge.

An introduction to the Customs Act and Australian Border Force's role in administering the Act appears at **Annexure D**.

### What is working well

In November 2012, the Government implemented the *Customs Amendment (Smuggled Tobacco) Act 2012* (Cth). This created a new offence in s233BABAD specifically targeting the smuggling of tobacco and conveying or possessing smuggled tobacco products. It also strengthened the enforcement mechanism through the creation of a maximum penalty of 10 years imprisonment.

Similar to the Excise Act, the overwhelming number of prosecutions brought under s233 and (now) s233BABAD of the Customs Act are successful, and indicate that under the current legal framework, prosecutors have been able to prove the elements of the offences beyond a reasonable doubt. BATA commends the Australian Border Force for making the targeting of illicit tobacco importation a key operational priority.<sup>68</sup>

### Issues that are arising

BATA could only find a relatively small number of judgments since the enactment of s233BABAD of the Customs Act (only four cases) which makes it difficult to analyse any trends in enforcement approaches or penalties being imposed by the Courts. Of those four cases, two were for comparatively small tobacco quantities, ranging from \$3,000 to \$432,000 in evaded dutiable value, and in both instances, the accused were given suspended sentences<sup>69</sup>. More significantly, in 2014 an attempt by two men to evade \$3,278,000 worth of duty was also met with a suspended sentence<sup>70</sup>.

As a consequence, it is too early to say whether the 2012 amendments will result in any actual change in the nature of the cases being prosecuted, and the sentences imposed upon conviction.

The Courts have acknowledged the importance of deterring the importation of illicit tobacco, and the crucial role of imposing significant fines in that process.<sup>71</sup> The limitations of the imposition of fines on large scale tobacco smuggling operations as a deterrent – given the net benefits to those operations of immense profit versus occasional fines - has also been acknowledged by the Courts.<sup>72</sup>

In instances where a custodial sentence is imposed, it is often accompanied by a low non-parole period, as shown in **Annexure B**. Typically this is resulting in a suspended sentence once the non-parole period has been served.

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<sup>68</sup> Annual Report p 1 <https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/ACBPS-Annual-report-2014-15-optimised.pdf>

<sup>69</sup> *DPP v Hong* [2015] VCC 344 and *R v Seung Hyeok Jeongh and Sejin* (unreported Old District Court 11 July 2014)

<sup>70</sup> *DPP v Abdulah* [2014] VCC 2030

<sup>71</sup> See for eg. *Chief Executive Officer of the Australian Customs Service v Karam (No 2)* [2013] NSWSC 33. The offender was handed down a fine of \$7,866,885.32 for evasion of duty and approximately \$8,000,000

<sup>72</sup> See the reasoning in *CEO of the Australian Customs Service v Nabhan* [2009] NSWSC 199

Despite having the power under s233BABAD to order both financial penalties and imprisonment, the Courts do not appear to have imposed any such concurrent penalties. In order to deter the most serious smuggling and importation offenders, the failure of the Courts to impose a custodial sentence alongside a financial penalty is an issue that must be addressed.

### Suggested Amendments

BATA recommends Australian Border Force be encouraged to apply for, and the Courts should be encouraged to enforce, the concurrent sentencing provisions in the Customs Act by imposing both fines and custodial sentences, pursuant to the powers in s233BABAD(1)(c) of the Customs Act.

There are possibly a few ways in which the issues relating to establishing intent to defraud the revenue may be addressed, including:

- a) Creating a ‘tiered approach’ (similar to s117(2) and s117B(2) of the Excise Act), whereby the only proof that is required is that tobacco products were imported by the accused, and that duty wasn’t paid, thus making it a ‘strict liability’ offence. We note that an offence of this nature could only attract a financial penalty.
- b) Consideration could be given to implementing deemed quantities in the Act. For example, if a person is found to have imported of a certain amount of tobacco, it is deemed to be trafficable quantity. This would assist in establishing intent and the person will be presumed to be supplying the tobacco regardless of whether there is evidence of supply or sale. By way of example, the below table sets out the quantities and penalties for cannabis possession as at September 2015.

Drug	Quantities		
	Indictable	Commercial	Large commercial
Cannabis leaf/heads	1 kg	25 kg	100 kg
Penalties <sup>i</sup>	10 years	15 years	20 years
	\$220,000	\$385,000	\$550,000

In determining the threshold for a trafficable quantity of tobacco, one option is to base it off the current allowance for bringing tobacco products into Australia duty-free as set by Australian Border Force (ie. 50 cigarettes or 50 grams of cigars or tobacco products).

To ensure that the legislation can be shown to be targeting smuggling operations and commercial imports, BATA suggests that available sentences and penalties be tiered proportionate to the size of the duty avoided. For example, empower Australian Border Force officials to issue on the spot

infringement notices for people in possession of 51 to say, 200 cigarettes, or 51 to 200 grams of tobacco leaf. The appropriate threshold for these figures should be assessed by reference to the amount of duty avoided by reason of the import, and the minimum within which commercial smuggling (if broken into those portions) would become unviable.

Currently, the Customs Act provides a statutory maximum of 10 years imprisonment if an individual is convicted of an offence under s233BABAD. Despite this, the recent case law shows that custodial sentences fail to represent the seriousness of the offence and are often imposed on a suspended basis. Consequently, BATA recommends the imposition of minimum sentences or presumptive sentences, for conduct in the same manner outlined in respect of the Excise Act above, being dependent on the amount of duty avoided.

## 7.3 Packaging that breaches the Plain Packaging Act - imported or domestic

### Plain Packaging Act

The Plain Packaging Act and supplementary *Tobacco Plain Packaging Regulations 2011* (Cth) (**Plain Packaging Regulations**) require all tobacco products manufactured, imported, supplied, sold and purchased in Australia to be in plain packaging. The Plain Packaging Act came into force on 1 December 2012.

An introduction to the Plain Packaging Act, Plain Packaging Regulations and DoH's role in administering the legislation appears as **Annexure E**.

### What is working well

The focus of the DoH has predominantly been on educative measures, providing innocent parties dealing with legitimate tobacco products an opportunity to address any issues without penalty if they are inadvertently in breach the Plain Packaging Act.

### What issues are arising

#### **DoH administration of the Act**

According to DoH's annual report there were a number of investigations carried out by DoH between 2014 and 2015, but in only a very low number did DoH issue an infringement notice.<sup>73</sup>

A key limitation to the DoH's enforcement capacity is their Enforcement Policy and the Enforcement Committee itself, which purportedly aims to ensure compliance with the Plain Packaging Act (see **Annexure E**). Only a handful of non-punitive actions (providing education, communicating with persons about compliance and issuing notices of alleged non-compliance) can be undertaken by authorised officers without first seeking guidance from the Enforcement Committee and the DoH.

To take substantive enforcement action in respect of breaches of the Plain Packaging Act, the Enforcement Committee must formulate a report based on findings of its authorised officers and provide that report to the DoH. The DoH then makes a decision on what action to take based on a number of considerations.

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<sup>73</sup> 2014-2015 Department of Health Annual Report, page 156

The Plain Packaging Act is now over 4 years old and, it is BATA's view that the enforcement approach of DoH should adapt accordingly. The use of harsher penalties should no longer be a last resort, particularly in circumstances involving illicit tobacco.

The issuing of infringement notices for strict liability offences is a power available to DoH under the Plain Packaging Act that is not currently being utilised due to the administrative and policy barriers.

The suitability of National Measurement Institutes (NMI) officials as the appointed authorised officers under the Plain Packaging Act could also be an issue. Much like DoH, NMI has a number of other functions and obligations outside of ensuring compliance with the Plain Packaging Act such as food testing, drug testing and trade measurements in relation to packaged products. NMI's effectiveness in dealing with Plain Packaging Act issues is limited by the following:

- a) The scope of work to be undertaken by NMI's officers and their limited focus on product measurement;
- b) the lack of authority granted to NMI's authorised officers to carry out enforcement operations; and
- c) the existence and role of the Enforcement Committee.

While the NMI officers may be experienced with tobacco packaging, there are other, more suitable alternatives for authorised officers to be appointed by DoH.

### **The Act itself**

It is not unlawful under the Plain Packaging Act to simply *possess* processed tobacco products in non-compliant packaging. For an offence to be committed it must be proven that the tobacco products were:

- c) sold;
- d) offered to be sold or supplied; or
- e) products were packaged for retail sale.

This results in a situation where a person may be found with a substantial amount of non-compliant processed tobacco product (such as chop-chop) but there is no evidence that the person sold, supplied, or packaged the tobacco product for retail sale. In these circumstances no offence has been committed under the Plain Packaging Act.

This makes it difficult to employ the Plain Packaging Act against people who are stockpiling 'chop-chop', or those found with large quantities of tobacco products on their person or premises which, because of the amount of product, could only reasonably be for commercial supply and retail sale.

### **Suggested amendments**

#### ***Prohibiting possession of non-compliant tobacco products***

Consideration could be given to amending the Plain Packaging Act to:

- Deem certain quantities of tobacco product to be for the purpose of commercial supply or retail sale. If tobacco or tobacco products are deemed to be for commercial supply, it follows that it or they will arguably fall within the definition of 'package a tobacco product

for retail sale' under the Plain Packaging Act because goods that are for the purposes of commercial supply are also goods for retail sale.

The Excise Act prohibits the possession of raw tobacco materials (ie. seed, leaf and plant) so amendments to the Plain Packaging Act along these lines above would merely enhance the action which can be taken against individuals and the likelihood of obtaining a successful prosecution.

### **Granting authorised officers more power to enforce Plain Packaging Act**

In order to properly administer the Act, the DoH should broaden the scope for enforcement of the Act by authorised NMI officers without recourse to the Enforcement Committee and the DoH. For example, by permitting authorised officers to issue infringement notices for specified strict liability offences without first seeking guidance from the Enforcement Committee and the DoH. Any amended Enforcement Policy (assuming the DoH wishes to persist with an Enforcement Policy) should provide that authorised officers are to issue minimum on the spot fines akin to breaches of liquor licensing laws.<sup>74</sup>

### **Considering whether authorised officers should be appointed from other Government bodies**

In view of the DoH's other priorities, it needs to rely upon agencies other than the NMI to detect non-compliant packaging, such as the members of the Australian Federal Police and other governmental employees who are both responsible and incentivised to enforce Australia's tobacco legislation and combat the illicit tobacco trade. This may also more readily facilitate the sharing of key information and enforcement opportunities between the different government bodies.

It may also be more appropriate for government organisations such as the ATO and Border Force, or perhaps the TST, to be appointed as authorised officers to investigate and carry out enforcement activities under the Plain Packaging Act.

ATO and Border Force have the resources and targeting the illicit tobacco trade is already a priority for both organisations. Currently, the Plain Packaging Act only allows the Secretary to delegate their powers or functions to an SES employee employed by the DoH. The delegate must also comply with the directions of the Secretary.<sup>75</sup>

By amending the Plain Packaging Act to allow the Secretary to delegate their powers to government employees both internal and external to the DoH, would permit organisations such as the ATO and Border Force to enforce the provisions contained in the Plain Packaging Act. This includes allowing them to apply to the Federal Court seeking civil penalty orders against persons who have contravened the Plain Packaging Act, investigating contraventions, and issuing infringement notices. This can be done alongside their other operations. Overall it would increase the power of ATO and Border Force to do everything within their collective power to eliminate illicit tobacco and actively prosecute those involved in the illicit tobacco trade with, depending on the circumstances of the case, a variety of available actions under the various Commonwealth Acts to ensure a successful prosecution.

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<sup>74</sup> For instance, on the spot fines issued under the *Liquor Act 2007* (NSW).

<sup>75</sup> Plain Packaging Act s 107

### Section seven: Key point summary

- BATA recommends amending s117A, s117B and s117 of the Excise Act to enable the Courts to impose both fines (for the recovery of its lost excise) and custodial sentences (as a punitive means of deterrence).
- The ATO should be encouraged to use ss116 to 117H to ensure that owners of premises and other accessories are prosecuted, essentially as ‘aiders and abettors’.
- In an attempt to address the inconsistent and low penalties being imposed by the Courts, the Committee might wish to consider a number of different mechanisms, such as:
  - a) Imposing minimum sentences;
  - b) alternatively implementing a presumptive minimum sentence;
  - c) the implementation of minimum non-parole periods for certain offences.
- Deeming provisions within the Excise Act that would deem tobacco seized within the land of Australia to be tobacco that has been grown within Australia, unless it can be established otherwise.
- The Australian Border Force to apply for, and the Courts should be encouraged to enforce, the concurrent sentencing provisions in the Customs Act by imposing both fines and custodial sentences, pursuant to the powers in s233BABAD(1)(c) of the Customs Act.
- There are possibly a few ways in which the issues relating to establishing intent to defraud the revenue may be addressed, including:
  - a) Creating a ‘tiered approach’ (whereby the only proof that is required is that tobacco products were imported by the accused, and that duty wasn’t paid, thus making it a ‘strict liability’ offence.
  - b) Consideration could be given to implementing deemed quantities in the Customs Act.
- DoH should broaden the scope for enforcement of the Act by authorised NMI officers without recourse to the Enforcement Committee and the DoH.
- It may also be more appropriate for government organisations such as the ATO or TST to be appointed as authorised officers to investigate and carry out enforcement activities under the Plain Packaging Act.

## 8. The potential role for electronic cigarettes in arresting the growth of the illicit tobacco market

Recent comprehensive research holds electronic cigarettes to be 95% safer than traditional tobacco products.<sup>76</sup> These products are supported by the likes of Great Britain's National Health Service<sup>77</sup> and notably by British Prime Minister David Cameron who stated in the House of Commons:

*"It is promising to see that over a million people [in Britain] are estimated to have used e-cigarettes to help them quit or have replaced smoking with e-cigarettes completely. I think we should be making it clear that this is a very legitimate path for many people to improve their health and therefore the health of the nation."*<sup>78</sup>

Importantly, in the context of this submission, electronic cigarettes are cheaper than traditional tobacco products in those countries where they are regulated and sold.

As we know, one of the drivers of the growth of the illicit tobacco market in Australia is consumer price sensitivity. As such, consideration ought to be given to the role cheaper, regulated electronic cigarettes could play in arresting the growth of the illicit tobacco market.

At the moment electronic cigarettes are subject to a de facto ban in Australia. The Department of Health has commissioned the University of Sydney to develop a paper on options for an e-cigarette regulatory framework.<sup>79</sup> This paper is expected to go to public consultation in early 2016. Moreover, the Senate Economics References Committee Inquiry into Measures Introduced to Restrict Personal Choice '*for the individual's own good*' is also reviewing how electronic cigarettes should best be made available.<sup>80</sup>

BATA believes that the opportunity exists for the PJCLE to seek involvement in these inquiries to best understand how these innovative products could stem the flow of consumers to the tobacco black market.

### Section eight: Key point summary

- Electronic cigarettes provide an alternative for all tobacco users, including for those down-trading. These products could play a role in arresting the growth of the illicit market.

## 9. Conclusion

This submission clearly illustrates that the illicit tobacco market in Australia is experiencing strong growth and is underpinned by the unintended consequences of tobacco control legislation. This should be of concern to the Government because:

<sup>76</sup> Nutt et al, Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach. *Eur Addict Res* 2014; 20:218–225, at 224, Fig 3 at 223. See also Fagerström Report, ¶ 20 and fn. 18.

<sup>77</sup> <http://www.dailymail.co.uk/health/article-3382818/E-cigarettes-available-NHS-prescription-one-world-s-biggest-tobacco-firms-lined-supplier.html>

<sup>78</sup> <http://www.thegrocer.co.uk/buying-and-supplying/health/david-cameron-e-cigs-legitimate-path-to-health-improvement/529520.article>

<sup>79</sup> The Australian Government Department of Health. 2015. *Tobacco product regulation and disclosure*. [Website] Accessed 23 July 2015. <<http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-prod-reg>>

<sup>80</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Personal\\_choice](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Personal_choice)

- i. The smuggling and illicit trade of tobacco undermines the effectiveness of excise tax increases; resulting in cheaper prices and potential increases in tobacco use. Legitimate tobacco volumes are decreasing and total tobacco consumption has largely stabilised due to the growth in illicit tobacco consumption.
- ii. The Government is losing excise tax revenue to the black market. The most recent estimates by KPMG put lost excise revenue at \$1.42 billion.
- iii. Small businesses are impacted as struggling retailers lose revenue and customers to criminals.
- iv. The illicit tobacco trade is generally run by organised crime which uses profits from illicit tobacco for expanding other illegal activities such as drugs.
- v. Illicit tobacco exposes consumers to unregulated products with no product controls, much of this illicit tobacco is sold in breach of product regulations including plain packaging, graphic health warning (GHW) and reduced fire risk (RFR) standards.

Furthermore there are three Commonwealth Acts (in addition to the Criminal Code) and at least three separate bodies that have the ability to combat illicit tobacco and, as such, there exists a considerable amount of crossover. This presents an opportunity for legislative amendment.

The creation of the TST, on 16 October 2015, is an important step to addressing illicit tobacco and BATA supports any measure which sees greater cooperation, between the DoH, ATO and Australian Border Force in relation to enforcement and prosecution activities required to effectively deal with the issue of illicit tobacco.

There are circumstances in which a person will breach several different pieces of tobacco related legislation when dealing with illicit tobacco so the ATO, Australian Border Force, the DoH and the Australian Federal Police need to continue to co-operate, not only in the investigation phase but also in prosecuting the individuals and groups involved in the trade of illicit tobacco.

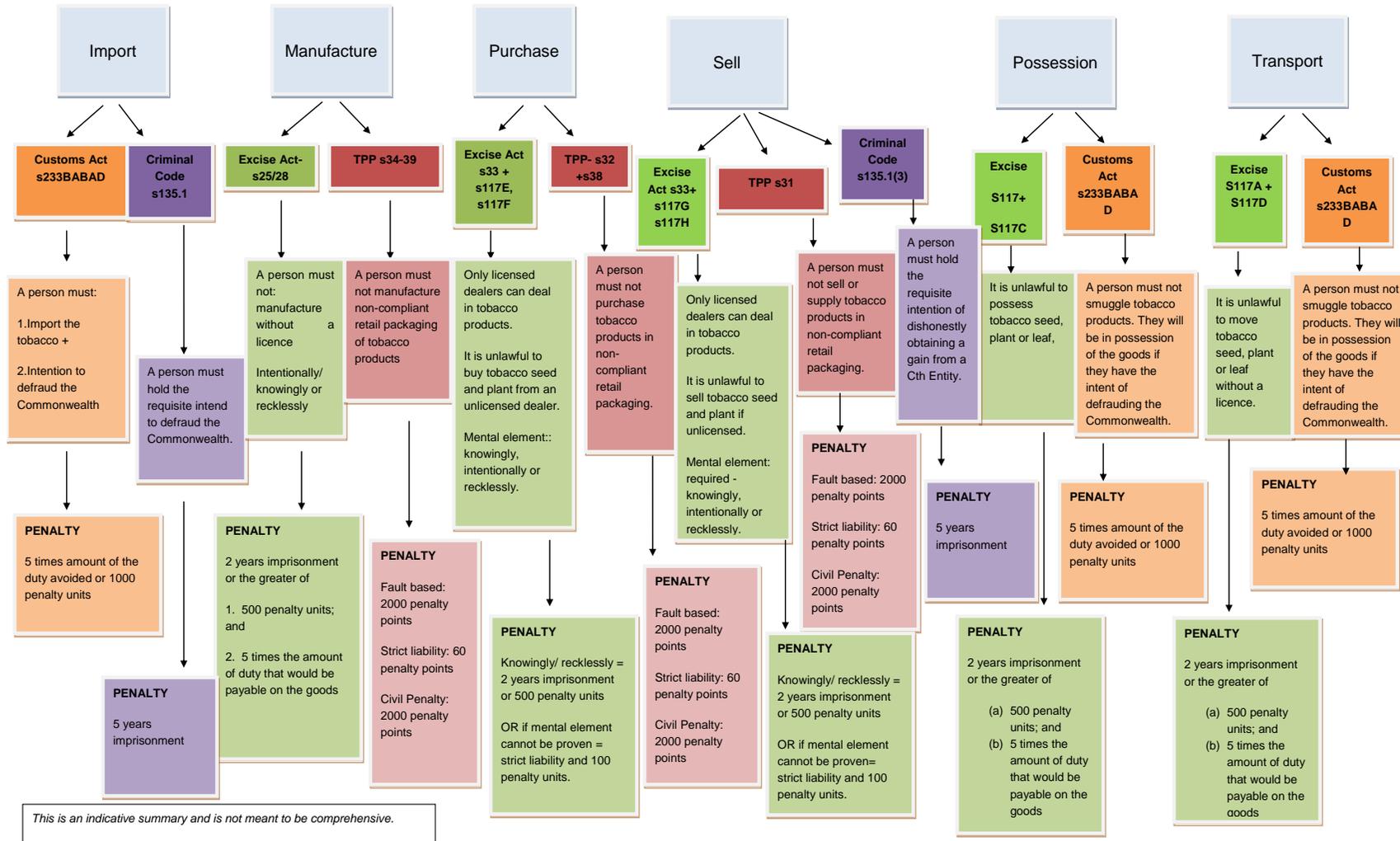
The DoH is responsible for enforcing and prosecuting the importation or sale of illicit tobacco in packaging that does not comply with the Plain Packaging Act. It is troubling that there is an absence of any recorded prosecutions from the DoH and demonstrates its apparently low appetite for penalising those involved in the importation or sale of illicit tobacco .

BATA recognises that the ATO and Australian Border Force's interest in stamping out the illicit tobacco trade is consistent with their pecuniary interest in successfully prosecuting those involved with illicit tobacco. While the number of successful prosecutions commenced under the Customs Act and the Excise Act is reasonable, however it is possible that there are a large number of suspected infringements which are not being prosecuted. The offences within the ATO and Australian Border Force's remit often require the prosecution to establish beyond reasonable doubt an element of intent (in order to obtain penalties of consequence), or the country of origin of the tobacco.

It is BATA's hypothesis that such elements will often act as a bar to the commencement of a prosecution under the Excise Act and Customs Act, due to the financial and reputational implications of leading unsuccessful prosecutions. The Committee's recommendations on the matters set out in the Terms of Reference will hopefully deal with all or some of these issues.

BATA appreciates this opportunity to contribute to the Parliamentary Joint Committee on Law Enforcement inquiry into illicit tobacco and would be happy to engage in further discussion on the issues in this submission as the inquiry begins to formulate its conclusions.

## Annexure A - Stages in illicit tobacco trade and legislation that applies



## Annexure B - Examples of cases brought under the Excise Act & Customs Act in the last 15 years

Date	Defendant	Name of Act breached	Excise/Duty Avoided (approx)	Penalty given by Court	Actual penalty paid/undertaken	
1	January 2001	Clark-Kennedy	Excise Act	\$277,019	12 months	Immediate release
2	January 2001	Kalaja	Excise Act	\$516,908	12 months	Immediate release
3	October 2001	Maksuti	Excise Act	\$1,000,000	12 months	Immediate release
4	November 2001	Krepi	Excise Act	\$505,892	12 months	Immediate release
5	February 2002	Jelic	Excise Act	\$246,066	9 months	Released after serving 1 month
6	May 2002	Drobec	Excise Act	\$66,000	12 months	Immediate release
7	May 2002	Robison	Excise Act	\$244,312	10 months	Immediate release
8	October 2002	Khadem	Excise Act	\$401,309	12 months	Immediate release
9	November 2002	Krause	Excise Act	\$740,249	15 months	Released after serving six months
10	January 2003	Khourri	Excise Act	\$51,970	9 months	Immediate release
11	March 2003	Q B Lam	Excise Act	\$325,731	12 months	Released after serving six months
12	March 2003	G T Lam	Excise Act	\$325,731	12 months	Released after serving four months
13	April 2002	Stanic	Excise Act	\$249,944	11 months	Released after serving 2 months
14	June 2003	Dodaj	Excise Act	\$427,651	12 months	Immediate release
15	June 2003	Alibasic	Excise Act	\$272,270	12 months	Immediate release
16	June 2003	Sweeney	Excise Act	\$216,461	9 months	Immediate release
17	June 2003	Sambolec	Excise Act	\$85,800	12 months	Immediate release
18	June 2003	Fazliu	Excise Act	\$1,000,000	12 months	Released after serving three months
19	July 2003	Clarke	Excise Act	\$1,239,425	12 months	Released after serving 4 months
20	July 2003	Begic	Excise Act	\$349,916	12 months	Immediate release
21	August 2003	Krizsan	Excise Act	\$536,814	15 months	Release after serving five months

22	August 2003	El Hajje	Excise Act	\$165,567	Penalty - \$331,135	Uncertain
23	September 2003	Serra	Excise Act	\$321,910	8 months	Immediate release
24	September 2003	Dauti	Excise Act	\$290,568	12 months	Immediate release
25	October 2003	Husovic	Excise Act	\$49,531	Intensive Correction order	Intensive Correction order
26	October 2003	Meco	Excise Act	\$75,000	18 months	Released after serving four months
27	October 2003	El Kodhr	Excise Act	\$279,636	15 months	Immediate release
28	November 2003	Sayed	Customs Act	\$4,200,000	Penalty - \$2,883,500	Uncertain
29	March 2004	Cocaj	Excise Act	\$718,200	Penalty - \$41,000	Uncertain
30	March 2004	Behluli	Excise Act	\$307,554	Penalty - \$40,000	Uncertain
31	April 2004	Kopa	Excise Act	\$3,905,568	12 months	Immediate release, with suspended sentence of 3 years
32	April 2004	Istogu	Excise Act	\$149,400	15 months	Suspended sentence
33	September 2005	Coulton	Customs Act	\$548,715	Penalty - \$2,052,000	Uncertain
34	December 2006	Pham & Anor	Customs Act	\$409,052	Penalty - \$3,575,000	Uncertain
35	July 2007	Martino	Excise Act	\$160,022,400	Declaration of conviction	Immediate release
36	March 2009	Nabhan	Customs Act	\$12,592,000	Penalty - \$11,495,709	Uncertain
37	February 2013	Karam	Customs Act	\$90,000	Fine - \$7,954,914	Uncertain
38	March 2014	Abdulah and Haddara	Customs Act	\$3,278,000	15 months & 21 months respectively	Suspended sentence
39	July 2014	Jeong	Customs Act	\$432,000	20 months	Suspended sentence
40	March 2015	Hong	Customs Act	\$3,000	12 months	Suspended sentence
41	November 2015	El Hamid El Kerdi	Excise Act	\$2,200,000	12 months	Will be released after serving a maximum of six months
42	December 2015	Saleh	Customs Act	\$1,350,000	3 years	Imprisonment, uncertain on how long will be

served

*Key:*

**Suspended sentence:** Offender does not receive a custodial sentence but any breach of good behaviour results in the offender serving the entirety of the suspended term from the point at which the breach occurs.

**Immediate release:** No custodial sentence; immediate release on recognisance of a sum (generally around \$1,000).

**Intensive Correction Order:** It is an order of imprisonment of not more than 2 years made by a Court, which directs that the sentence is to be served by way of intensive correction in the community. An intensive correction order is served in the community under the strict supervision of the Corrective Services NSW.

## Annexure C - The Excise Act and Tariff Act

### Introduction

The Excise Act works in tandem with the *Excise Tariff Act 1921* (the **Tariff Act**) to

- a) levy excise on relevant goods manufactured or produced in Australia (ie. the Tariff Act); and
- b) set up the administrative arrangements applying to the excise system and the imposition of penalties (ie. the Excise Act).

Section 5 of the Tariff Act imposes excise duty on certain goods manufactured or produced in Australia. Excise duty is imposed at the time of manufacture/ production or when the tobacco products are released from a bonded licensed hold, at the rates listed in the Schedule to the Act. This is referred to as the Excise Tariff. Cigarettes and other tobacco products are subject to this tariff.

Accordingly, until tobacco leaf is subjected to processes after curing it is not excisable. Although tobacco seed and plant are not excisable goods, they are subject to special provisions within the Tariff Act that strictly control production and/or possession of these goods.

### Excise

Prior to 1 November 1999 excise duty on tobacco products was calculated according to a complex formula involving a combination of a Commonwealth weight based charge, plus a hybrid state surcharge based on both the wholesale price of tobacco and the tobacco weight. Since 1 November 1999 tobacco products have been subject to a per-stick rate of duty.

### Excise Administration

The Commissioner of Taxation<sup>81</sup> has the power of general administration under the Excise Act and the Tariff Act. The Minister may delegate to an officer all or any of its powers under the Excise Act<sup>82</sup>.

### Offences

Pursuant to Section 117(1) of the Excise Act:

- a) A person must not intentionally possess excisable goods on which duty has not been paid knowing, or being reckless as to whether, the goods are excisable goods on which duty has not been paid.
- b) The penalty for committing the offence is 2 years of imprisonment or the greater of:
  - i. 500 penalty units (\$90,000)<sup>83</sup>; and
  - ii. 5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day.

Further, pursuant to s117(2) of the Excise Act, a person must not sell excisable goods on which duty has not been paid. This is a strict liability offence, however it only attracts 100 penalty units (ie.

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<sup>81</sup> *Excise Act 1901* (Cth) s 7

<sup>82</sup> *Excise Act 1901* (Cth) s 8

<sup>83</sup> One penalty unit = \$180

\$18,000). This Section acts as a safety net to make an offender liable under the Act without the prosecution having to prove the requisite mental element of 'intent'.

Pursuant to section 117B(1) of the Excise Act:

- a) A person must not intentionally sell excisable goods on which duty has not been paid knowing, or being reckless as to whether, the goods are excisable goods on which duty has not been paid.
- b) The penalty for committing the offence is 2 years imprisonment or the greater of:
  - i. 500 penalty units (ie. \$90,000)<sup>84</sup>; and
  - ii. 5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day.

Section 117B(2) also contains a strict liability offence, mirroring the provisions of s117(2).

The 'tiered approach' is created because in s117(1) and s117B(1) the prosecution must prove the accused's *intent* to possess or sell the goods without paying excise, whereas s117(2) and s117B(2) only require proof that excisable goods are possessed by the accused or have been sold by the accused, and that duty hasn't been paid. The absence of a requirement to prove intent makes subsection (2) of each of section 117 and 117B one of 'strict liability', albeit one with a lesser penalty than subsection (1)<sup>85</sup>. It appears that prosecutions are generally commenced concurrently for breach of both sub-sections within the relevant section, with the primary penalty sought under s117(1)/117B(1), and s117(2)/117B(2) operating as a safety net if the prosecution is not able to establish the element of 'intent' beyond a reasonable doubt. In other words, the individual's illegal activity is being prosecuted as a fault based offence and as an offence of strict liability.

While we had expected to see a fatal element of the prosecutions under s117(1) and s117B(1) of Excise Act to be the requirement to prove the intent of the accused to sell the tobacco without having paid duty, the cases we reviewed (including those set out in Annexure B) tell a different story. The number of successful prosecutions under s117 and s117B of the Excise Act show the following:

- a) the elements of the offence are not particularly onerous – including the intent element - and in most cases can be established by the prosecution;
- b) there have been some minor evidential issues relating to:
  - i. whether the use of presumptions of fact (ie. where the defendant is required to disprove a fact stated by the prosecution) in revenue proceedings without any further evidence being tendered proves the fact beyond a reasonable doubt<sup>86</sup>; and
  - ii. whether those presumptions in the Excise Act sufficiently distinguish between the ultimate fact in issue and other facts.<sup>87</sup>

BATA notes that the provisions of s117C can also be called upon to prosecute those against whom the elements of supply/intent to supply cannot be established – where that person is in possession

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<sup>84</sup> One penalty unit = \$180

<sup>85</sup> 100 penalty units (\$18,000) -v- 2 years imprisonment or the greater of 500 penalty units (\$90,000) or 5 times the duty that would have been payable

<sup>86</sup> *Commissioner of Taxation v Esho & Anor* [2003] NSWSC 410

<sup>87</sup> *Chief Executive of Customs v El Hajje* [2005] HCA 35

of tobacco seed, plant or leaf. Similar to s117B, it establishes a tiered penalty system with a higher penalty of 500 penalty units (or 5 times the dutiable value) or 2 years imprisonment, where the element of intent to possess, have custody or control of tobacco seed, plant or leaf can be established, by contrast to mere possession without intent, which carries only 100 penalty units. However, we only found two cases in which this provision was used.<sup>88</sup> One possible (and hypothetical) explanation for this is that the straightforward elements of the provision facilitate the issuing of infringement notices and/or encourage accused persons to admit guilt without the need to prove the case.

Similar provisions exist from s116 through the s117H, which collectively create the legislative regime for prosecution of most types of aiding and abetting conduct. For example, if individual X is found in possession of 300kg of tobacco leaf they could be prosecuted under s117 of the Excise Act. If X then instructs individual Y to transport the leaf, instead of merely forfeiting the vehicle for transportation pursuant to s116<sup>89</sup>, Y can also be prosecuted under s117A for unlawfully moving excisable goods.

### **Amendments in 2000**

In February 2000 the industry prepared a submission to the Australian Government entitled '*Chop Chop*'; *A Report on the Manufacture and Sale of Illegal Tobacco in Australia*. This report argued that despite recent raids and seizures by customs officials, the ATO's resources were inadequate to deal with the tobacco excise evasion. In particular, the report recommended that there should be an increase in resources devoted to dealing with the illicit tobacco trade and there should be a much tougher penalty regime imposed on those convicted of offences relating to this trade. The Excise Amendment (Compliance Improvement) Bill 2000 (the Bill) was the Government's response to that report.

Prior to September 2000 the Excise Act did not provide for imprisonment as a penalty for contravention of s117B. Before that, only monetary penalties could be imposed for such breaches - although that penalty could only be up to five times the amount of duty that would have been payable on the tobacco in question.

The purpose of the amendments, through the *Excise Amendment Compliance Improvement Act 2000* (Cth), was to improve compliance with the excise law and protect the excise revenue base with a particular focus directed against illicit tobacco. Its stated aims were to:

- a) establish a new licensing system for the growing, transporting, trade, manufacture and storage of tobacco, and
- b) introduce a new penalty regime with larger monetary penalties combined with sentences of imprisonment for some offences.

The amendment also created a number of new offences including:

- a) s117A(1) – unlawfully moving excisable goods;
- b) s117B(1)- unlawfully selling excisable goods;
- c) s117C(1)- unlawfully possession of tobacco seed, plant or leaf;
- d) s117D(1)- unlawfully moving tobacco leaf;

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<sup>88</sup> *DPP (Cth) v Halimi* [2003] VSCA 178; *R V Kopa; Istogu ex parte DPP (Cth)* [2004] QCA 100

<sup>89</sup> Section 16 provides for, among other things, that any vehicle which conveys the goods shall be forfeited to the Crown.

- e) s117E(1) – unlawfully buying tobacco seed or plant;
- f) s117F(1)- unlawfully buying tobacco leaf;
- g) s117G(1) – unlawfully selling tobacco seed or plant; and
- h) s117H(1)- unlawfully selling tobacco leaf.

It also established a new licensing scheme to cover tobacco producers and dealers as well as manufacturers of all excisable goods.

Breaches of these licensing requirements will be subject to a two tiered penalty structure. This means they may be prosecuted either as fault based offences or as offences of strict liability. In the case where the person breaches the particular licence requirement either knowingly or recklessly they will be subject to:

- a) 2 years imprisonment; and/or the greater of
- b) 500 penalty units (currently \$90,000) and 5 times the amount of the potential loss of revenue.

Where the person breaches these requirements without the requisite elements of intention or recklessness (ie where it is a strict liability offence) then that person will be subject to a penalty of 100 penalty units (currently \$18,000).

Licensed producers and dealers who fail to keep accounts will be subject to a lesser penalty of 30 penalty units (ie \$5,400).

## Annexure D – Customs Act

### Introduction

On 1 July 2015 the functions of the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service were integrated into a new Department. The Australian Border Force was established as the new front-line operational agency within the Department reflecting a greater focus on the border as a strategic national asset.

### Customs-related laws

The Australian Border Force administers customs related laws, which include:

- the Customs Act; or
- s 72.13 of the *Criminal Code*; or
- Division 307 of the *Criminal Code*; or
- any other Act or regulation relating to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition/ restriction or a tax, duty, levy or charge.

### Offences under the Customs Act

Under the Customs Act, a person commits an offence if they:

- import goods, and the goods are tobacco products with the intention of defrauding the revenue;<sup>90</sup> and
- they have in possession goods that are tobacco products, with the intention to defraud revenue;<sup>91</sup>

(together **Offences**)

The Offences are punishable on conviction by a maximum imprisonment of 10 years and/or a fine.<sup>92</sup>

The fine is determined by calculating the amount of the duty that would have been payable on the goods if they had been entered for home consumption on either the day the offence is committed, or, if not known, the day in which prosecution was instituted (Duty Amount). The fine is either five times the Duty Amount or 1,000 penalty units (\$180,000).<sup>93</sup>

### Administration of the Act

The Comptroller-General of Customs has the power to administer the Customs Act;

The Comptroller-General of Customs is also the Australian Border Force Commissioner in accordance with ss 11(3) and 14(2) of the Australian Border Force Act 2015;

The Minister may delegate to an officer of Customs all or any functions and powers of the Minister under s9 (1) of the Customs Act; and

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<sup>90</sup> The Customs Act s 233BABAD(1)(a)–(c)

<sup>91</sup> Ibid (2)(a)–(c)

<sup>92</sup> Ibid (4)

<sup>93</sup> Ibid s233BABAD 5(a)-(b)

The Australian Customs and Border Protection Service is responsible for the enforcement of the Act.

### **2012 Amendments**

The *Customs Amendment (Smuggled Tobacco) Bill 2012* was introduced in June 2012 and its purpose was to amend the Customs Act to create specific criminal offences for the smuggling of tobacco products and for the conveyance or possession of smuggled tobacco products where the person conveying or possessing the goods knows they were smuggled.

### **Reduction in Duty Free Allowances**

In the 2012 Budget, the Government reduced the inbound duty free allowance for cigarettes and tobacco for international travellers. Prior to the implementation of the changes, international travellers aged 18 years and over arriving in Australia were able to bring in up to 250 cigarettes or 250 grams of tobacco free of duty.

From 1 September 2012, the maximum amount travellers are allowed to bring into Australia will be 50 cigarettes or 50 grams of tobacco. At the time this measure was criticised by Liberal Party members, who have stated that the reduction in the amount of tobacco that can be brought in legally will lead to an increase in tobacco smuggling. In his second reading speech for this Bill Warren Entsch<sup>94</sup> stated:

*'In my view it is also very much likely to lead to a very significant increase in the black market trade in tobacco. Now that the Australian tobacco industry is virtually shut down, the opportunities for illegal chop chop coming out of Australia have been significantly reduced and this is highly unlikely. But what we are going to see is much more illegal product being imported in larger quantities. We have seen that in recent times, coming probably through our docks.'*

He further stated:

*'Duty-free sales constitute about one per cent of the tobacco industry sales, yet tobacco represents up to 30 per cent of duty-free sales. In its attempt to hurt the tobacco industry, it is instead damaging those who sell it legally. It is also encouraging the illicit trade.'*

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<sup>94</sup> W Entsch, 'Second reading speech: Customs Amendment (Smuggled Tobacco) Bill 2012', House of Representatives, *Debates*, 22 August 2012

## Annexure E- Tobacco Plain Packaging Act

### Introduction to the Act

The Plain Packaging Act and supplementary *Tobacco Plain Packaging Regulations 2011* (Cth) (Plain Packaging Regulations) require all tobacco products sold in Australia to be sold in plain packaging from 1 December 2012.

Whilst no amendments have been made to the Plain Packaging Act since its enactment, the Plain Packaging Regulations were amended in 2012 via the *Tobacco Plain Packaging Amendment Regulations 2012* (Cth) to incorporate additional plain packaging specifications for non-cigarette tobacco products.

The Plain Packaging Act and the Plain Packaging Regulations (Plain Packaging Legislation) along with the Competition and Consumer (Tobacco) Information Standard 2011, set a number of requirements for tobacco products including:

- a) the size, colour and features of the packaging;
- b) the types of labels and health warnings that need to be displayed on the packaging; and
- c) the size, colour and features of tobacco products

(together Plain Packaging Requirements).

### Offences

Chapter 3 of the Plain Packaging Act lists a number of offences for breaches of the Plain Packaging Requirements. These include:

- a) purchasing, packaging, manufacturing, selling or supplying tobacco products in non-compliant retail packaging;
- b) manufacturing non-compliant retail packaging of tobacco products;
- c) manufacturing tobacco products that are packed in non-compliant retail packaging; and
- d) purchasing, selling, manufacturing or supplying non-compliant tobacco products.

There is currently no provision in the Plain Packaging Act for offences involving possession of non-compliant retail packaging or non-compliant tobacco products. The Plain Packaging Act is solely focused on tobacco products and packaging of those products for the purposes of retail sale.

### Penalties

The penalties imposed upon a person (or company) are dependent upon whether an offence is a strict liability offence, a fault-based offence, or whether a civil penalty order is sought. A strict liability offence is one which does not require proof that the person intended to contravene the Plain Packaging Act, only that the person committed the act.

The Plain Packaging Act only provides for pecuniary penalties, there are no penalties that result in imprisonment. The penalties are currently as follows:

- a) \$10,800 for a strict liability offence;
- b) \$360,000 for a fault based offence; and

- c) \$360,000 for an individual and \$1,800,000 for a corporation for a civil penalty.

The above penalties apply to all offences under the Plain Packaging Act. Similar to a strict liability offence, if proceedings for a civil penalty against a person are commenced it is not necessary to prove the person’s intention, knowledge or recklessness.<sup>95</sup>

Breaches of the Plain Packaging Act are investigated by authorised officers.

### Administration

Breaches of the Plain Packaging Act are investigated by authorised officers. Under the Plain Packaging Act, the Secretary may appoint government employees<sup>96</sup> or a member of the Australian Federal Police (AFP) as authorised officers.<sup>97</sup> To date the Secretary has only appointed authorised officers of the NMI to investigate matters under the Plain Packaging Act.

To date, there have been no civil penalties imposed or criminal prosecutions commenced for non-compliance, only a handful of infringement notices and a few warning letters.

Since the Plain Packaging Act came in to force in 1 December 2012 up until 30 June 2015, there have been 344 alleged contraventions investigated, resulting in the issuing of 3 infringement notices and 27 warning letters. These figures are disclosed in DoH’s annual reports and are set out in the table below.

Period	Alleged Contraventions Investigated	Criminal Prosecutions or Civil Penalty Orders	Infringement Notices	Warning Letters
2012 – 2013	59	0	3	8
2013 – 2014	59	0	0	19
2014 – 2015	226	0	0	0
Total	344	0	3	27

There was a significant increase in investigations in the 2014 – 2015 period however it is evident that this failed to result in increased infringement notices, warning letters, civil penalty orders or criminal prosecutions. Ultimately, the figures are inconsistent with the evidence of the high prevalence of illicit tobacco<sup>98</sup>. It would be reasonable to assume that there should have been an increase in infringement notices, action taken or even penalties imposed, but this has not occurred.

### Enforcement

Enforcement of the Plain Packaging Requirements are managed by DoH. To assist with enforcement, the Tobacco Plain Packaging Enforcement Committee (Enforcement Committee) was

<sup>95</sup> Plain Packaging Act s 97

<sup>96</sup> A person engaged under the *Public Service Act 1999* (Cth) such as an APS or SES employee

<sup>97</sup> Plain Packaging Act s 81

<sup>98</sup> KPMG Report, *Illicit Tobacco in Australia, 2015 Half Year Report* p 7.

established in 2013 and comprises representatives of DoH and the National Measurement Institute (NMI).

In conjunction with the Enforcement Committee, the Tobacco Plain Packaging Enforcement Policy (Enforcement Policy) explains the options for enforcement of the Plain Packaging Legislation, as well as the strategies and priorities that guide decisions about enforcement actions. While initially it was thought that the Enforcement Policy would only be in place during a set grace period following introduction of the Plain Packaging Act, it remains in force some 4 years after introduction of the Plain Packaging Legislation. While the Enforcement Policy is not a legislative instrument and is not meant to replace provisions of the Plain Packaging Legislation, it appears that DoH is currently applying more weight to the Enforcement Policy than the provisions of the Plain Packaging Act.

The NMI, through its authorised officers, is responsible for enforcement activities across Australia on DoH's behalf and reports potential contraventions to the Enforcement Committee.

The Enforcement Policy directs focus to the investigation of retailers and suppliers. It does not set out an inspection protocol and/or procedure for authorised officers, nor does it provide guidance as to whether the focus is on established retailers such as tobacconists, service stations and newsagencies or whether inspections of non-traditional suppliers such as market stalls etc.

It is BATA's understanding that the process of taking action under the Plain Packaging Legislation is as follows:

- a) An NMI representative investigates a retailer and/or supplier.
- b) If a potential breach is found, the NMI representative refers this to the Enforcement Committee.
- c) The Enforcement Committee meets on (what we assume is) a regular basis.
- d) The Enforcement Committee considers reports of potential contraventions of the Plain Packaging Act and advises DoH what action should be taken.
- e) DoH can consider the Enforcement Committee's recommendation and the seriousness of the contravention and:
  - Ignore it; or
  - Decide if it should be implemented; or
  - otherwise determine what action it will take.

DoH is not statutorily required to act upon or adopt any recommendation from the Enforcement Committee.

DoH will consider the recommendation of the Enforcement Committee and the seriousness of the contravention before it will consider whether it will take any action. DoH's assessment of the seriousness of the contravention includes:

- a) the extent of the contravention;
- b) the efforts made to comply with the Plain Packaging Act and Plain Packaging Regulations;
- c) the reason for the contravention;
- d) any history of contraventions;
- e) the previous provision of any educational information;
- f) any likelihood of future contraventions;

- g) any apparent willingness to comply with the plain packaging laws in the future; and any other matter it considers relevant.

According to the Enforcement Policy, not every contravention of the Plain Packaging Act must be prosecuted - options for non-compliance include:

- a) education and communications;
- b) notices of alleged non-compliance;
- c) written warnings;
- d) infringement notices;
- e) civil penalties; and
- f) criminal prosecution.

To date DoH's main action has been to encourage compliance through the provision of information and education. Education continues to be an important (and it appears, primary) feature of DoH's compliance and enforcement strategy.

It appears that enforcement via pecuniary measures such as infringement notices or court action will only be taken if there is reason to be concerned about the future behaviour or where the party involved fails to demonstrate a willingness to achieve complete compliance. However, the decision to prosecute ultimately rests with the Commonwealth Director of Public Prosecutions.