



Tobacco Association of Hong Kong
香港煙草業聯會

Submission on the Food and Health Bureau's Proposed Amendments to the Smoking (Public Health) (Notices) Order by the Tobacco Association of Hong Kong

Foreword

1. Recently, the Food and Health Bureau submitted certain papers to the Legislative Council and proposed to amend the smoking control regulations currently in force. One proposal is on graphic health warnings (GHW) which includes amendments on the form (including specifications), size and number of health warnings required to be displayed on packets or retail containers of tobacco products as specified in the Smoking (Public Health) (Notices) Order. This would involve significantly increasing the area of health warnings on the two largest surfaces of packets and retail containers of tobacco products from 50% to 85%. The number of forms of health warning would be increased from six to twelve.
2. In addition, the Administration's papers proposed that the indication of tar and nicotine yields should be printed on a side adjacent to a typical flip-top lid of a cigarette packet, excluding the portion which forms part of the lid and the two largest surfaces, presented in a conspicuous place of such side of the packet. It is also proposed that the health warning message "HKSAR GOVERNMENT WARNING" / "香港特區政府忠告市民" be replaced by "Tobacco kills up to half of its users: 半數煙民因煙草失去生命".
3. The Tobacco Association of Hong Kong ("TAHK") is strongly opposed to the amendments proposed by the Government. TAHK makes this submission with a view to presenting the facts to the Administration.



Summary of Key Points

4. The existing regulatory requirement of 50% not only exceeds the international requirement of 30% but also places Hong Kong in the upper percentile for the region, and thus mandates a significantly larger health warning than many of its neighbours, which is illustrated in the latter part. The example of the US and Canada is also a good reference for the Administration to look at, with the former laying claim to a lower smoking prevalence rate and higher year-on-year reduction than the latter, when the latter has a significantly stricter health warning requirement, demonstrates that there is no correlation between the reduction in the smoking rate and the size of the health warning. Therefore, there is no justification or need for the introduction of an 85% requirement.
5. Moreover, one particular unintended consequence of heightening the stringency of the size requirements is especially worrying, namely the increase in illicit tobacco. Of course, the mandatory enlargement of the health warning to such a size that it covers almost the entirety of the packaging causes evident difficulties for consumers since they would be hindered in their ability to obtain crucial product information, as well as being able to determine the authenticity of the product and this feeds back to the issue of illicit tobacco.
6. Intellectual property and the protection thereof is the cornerstone of a developed and mature economy. The proposed 85% requirement would obstruct the utility of branding and thus trademark owners' right to use trademarks, into which they have invested significant sums and benefited from the ensuing goodwill, will be compromised. Ultimately, this could have an adverse impact on Hong Kong's reputation as a business-friendly territory with a strong rule of law, since intellectual property is protected under local and international law.



International Standards – WHO Guidelines

7. Firstly, according to the Guidelines for Article 11.1(b)(iv) of the World Health Organization Framework Convention on Tobacco Control (“FCTC”), health warnings and messages on tobacco product packaging and labelling “*should* be 50% or more of the principal display areas but *shall* be no less than 30% of the principal display areas”.¹ In other words, it is well-established that “shall” denotes an act that is mandated and thus any reading of Article 11(b)(iv) will signify that there is no requirement to have health warnings covering more than 30% of the packaging.
8. The current health warnings on tobacco product packaging in Hong Kong already cover 50% of the two largest surfaces of the packaging, and are therefore in full compliance with FCTC’s requirement on the health warning size:

“Packaging and labelling of tobacco products

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) ...

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii) shall be large, clear, visible and legible,

(iv) **should be** 50% or more of the principal display areas but **shall be no less than 30%** of the principal display areas,

(v) **may be** in the form of or include pictures or pictograms.”

9. In contrast, the control measures on tobacco product packaging in Hong Kong’s neighbouring countries rarely require overly large health warnings (see the table). Hong Kong’s current regulations not only require that health warnings cover 50% of both sides of tobacco product packaging, but also require health warnings to be in form of graphics. Therefore, this is already a high standard in comparison.

¹ Source: WHO Framework Convention on Tobacco Control.
<http://whqlibdoc.who.int/publications/2003/9241591013>.



Requirements on the Form of Health Warning for Tobacco Product Packaging in
Hong Kong's Neighbouring Countries

| Country/Region | Form of Health Warning | Percentage of Area of 2 Largest Surfaces |
|-----------------------|------------------------|--|
| China | Text | 30% on both sides |
| Macau | Graphical | 50% on both sides |
| South Korea | Text | 30% on both sides |
| Philippines | Graphical | 50% on both sides |
| Indonesia | Graphical | 40% on both sides |
| Japan | Text | 30% on both sides |
| Malaysia | Graphical | 50% (front) / 60% (back) |
| Vietnam | Graphical | 50% on both sides |
| Singapore | Graphical | 50% on both sides |
| Taiwan | Graphical | 35% on both sides |
| Thailand ² | Graphical | 85% on both sides |
| Brunei | Graphical | 75% on both sides |

The Example of US and Canada

10. Currently there is no evidence indicating that increasing the area of health warnings on cigarette packs is effective in lowering the smoking rate.
11. Take the example of the United States and Canada. In 2001, Canada became the first country in the world to require the display of health warnings on cigarette packs. Today the area of health warnings takes up 75% of the two largest surfaces of a cigarette pack. In contrast, the United States only requires tobacco companies to display health warnings in plain text on the sides of cigarette packs.

² Currently subject to legal challenge



12. The smoking rate in Canada remained as high as 16.1%³; while the overall smoking rate in the United States was 14.2%⁴ in 2012. In addition, the smoking population in the United States is decreasing at the rate of 2.3% per year; while the rate of decrease in Canada's smoking population is only up to around 1% per year.⁵

The Unexpected Consequence: Illicit Tobacco

13. Enlarging the GHW will give rise to the already serious illicit cigarette trade in Hong Kong. Taking Australia as an example, in December 2012, Australia enlarged the GHW and standardized the pack design for tobacco products. However, a report titled Illicit Tobacco in Australia 2014 written by KPMG UK and published this year shows that the consumption of illicit tobacco in Australia has increased by around 30% in the past two years to a historic high of 14.5%.⁶

14. Also, according to reports by different media, almost 50% of the cigarettes sold in Canada's Ontario and Quebec provinces are illicit cigarettes.⁷

15. The facts show that overly stringent regulations, such as disproportionately increasing the area of health warnings on tobacco products, would only bring about unexpected consequences.

³ Source: <https://data.oecd.org/healthrisk/daily-smokers.htm>

⁴ Source: <https://data.oecd.org/healthrisk/daily-smokers.htm>

⁵ 19.3% in 2013, 19.9% in 2012, 20.8% in 2011 and 20.3% in 2010 according to Statistic Canada, National Statistics Agency: (See: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health74b-eng.htm>)

⁶ Illicit Tobacco in Australia 2014 is an independent research report written by KPMG UK. It provides a reliable reference for the consumption of illicit cigarettes in Australia. This report was financially sponsored by Australia's Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia. KPMG UK was engaged by the tobacco industry to conduct economic analysis in different countries. The Organization for Economic Co-operation and Development (OECD) takes the view that KPMG UK's method of analysis is the most authoritative way of assessing the scale of counterfeit and illicit tobacco trade within the European Union.

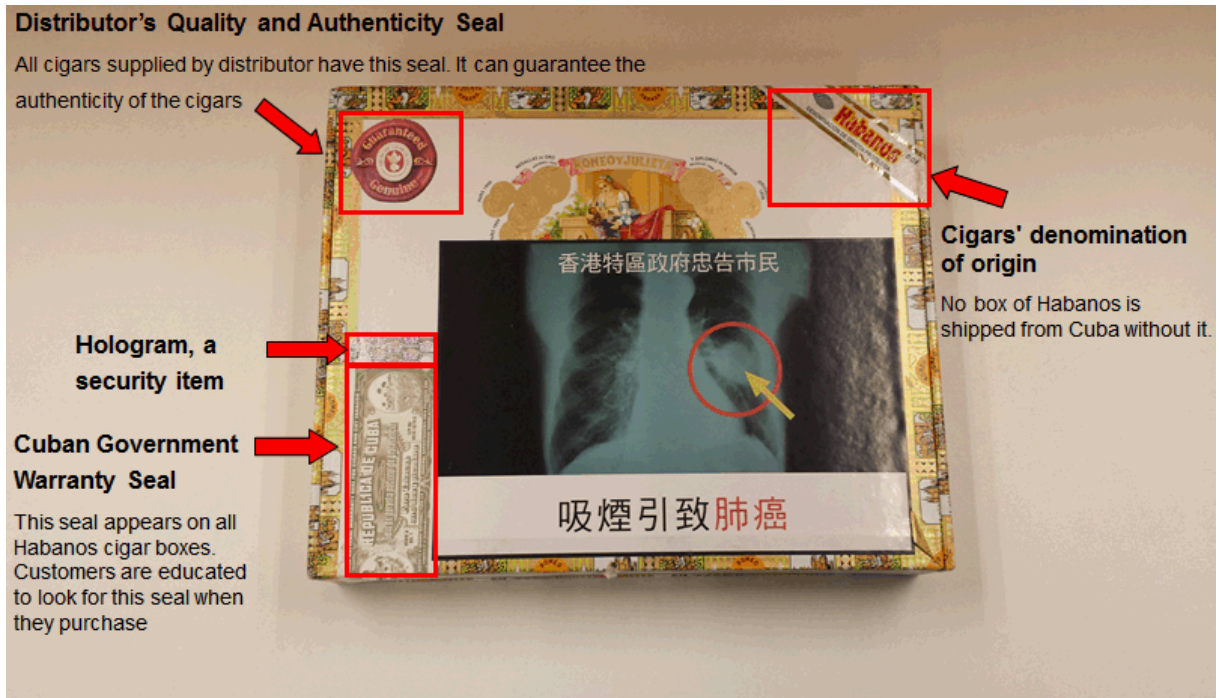
⁷ C. Andrews, "Bigger Warning Label Requirements Disserve Canadian Consumers And Undermine Property Rights", Washington Legal Foundation (2010) (Source: http://www.wlf.org/publishing/publication_detail.asp?id=2204)



16. It is well known that Hong Kong has a very serious problem of illicit cigarette sales. According to the Asia-14 Illicit Tobacco Indicator 2013 published by Oxford Economics last year, 33.6% of cigarettes sold in Hong Kong are illicit cigarettes, costing the Government HK\$32 billion in tax revenue. TAHK expects the GHW proposal would only exacerbate the already serious problem of illicit cigarette sales.
17. Of particular concern is the fact that illicit tobacco is being used by cross-border criminal syndicates to finance other illegal activities, including drugs, money laundering and human trafficking. These syndicates are small-time criminals but highly organized gangs.
18. The illicit tobacco trade not only harms Hong Kong's rule of law, but also seriously affects the business of over 4,700 hardworking, tax-paying legitimate retailers, which include around 400 newspaper hawkers who make ends meet by selling cigarettes and newspapers.

Product Information and Consumers' Rights

19. From consumers' perspective, overly large health warnings on tobacco product packaging or retail containers would make it difficult for them to obtain product information. For example, as imported cigars and pipe tobacco have limited import volumes and numerous packaging specifications, product information on retail containers and even the authenticity labels are originally designed. Overly large health warnings will make consumers unable to obtain crucial product information.
20. Take the example of the following retail container of cigars. Due to the abundance of counterfeit products in the international market, some of these products may infiltrate the Hong Kong market through different channels. To protect consumers, manufacturers affix different identification labels to the containers to help consumers identify authentic products.



One of the cigar packs sold in Hong Kong

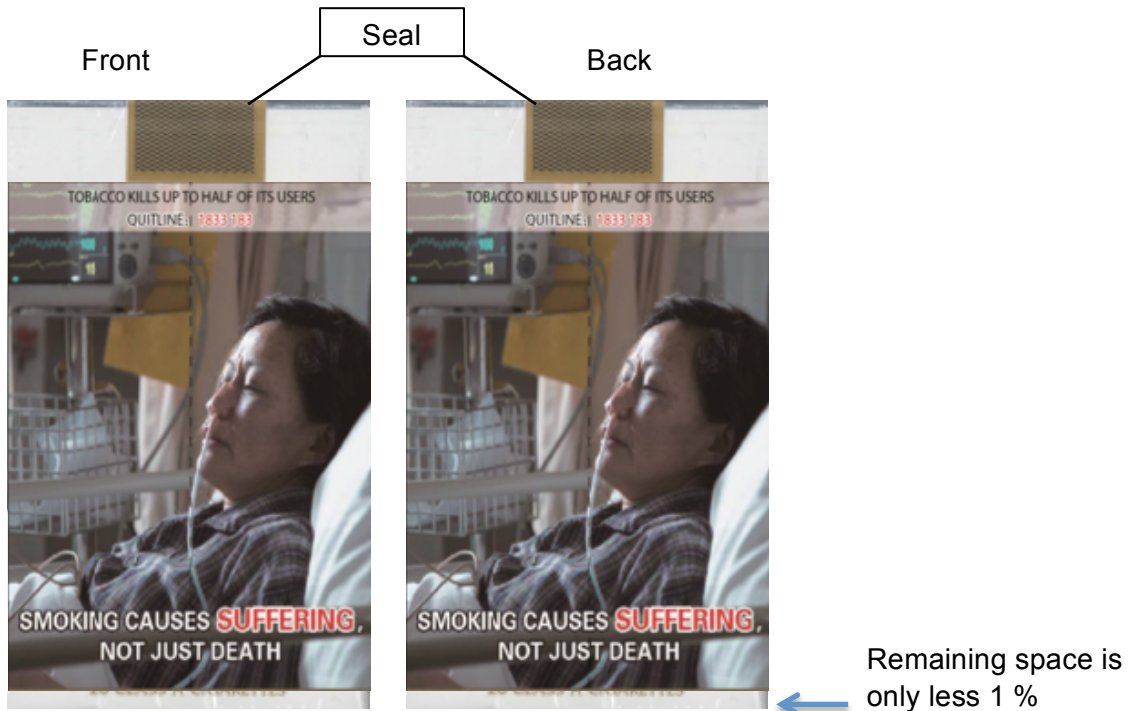
21. Although brand trademarks have already been largely covered by the current version of health warnings, consumers are still able to determine the product's authenticity from the seal and the anti-counterfeit label. If the health warning area is increased from 50% to 85% of the two largest surfaces of packaging or retail containers according to the Administration's proposals, the product will look like the figure on the right. How is it possible for consumers to obtain basic product information?



22. Apart from cigars, some cigarette retail containers in Hong Kong are designed as soft packs (see images below). The seal on a soft pack of cigarettes has already occupied 15% or more of the two largest surface areas of the pack; therefore, it is



impossible for manufacturers to comply with the 85% requirement without obscuring the health warnings and while trying to maintain space for the brand, trademarks and other product information.



Soft pack designs are seriously affected by the new GHW

23. On the other hand, the papers proposed that the tar and nicotine yields should be presented in a conspicuous place on a side adjacent to the flip-top lid of a cigarette pack. Similarly, the conspicuous places on the sides of a cigarette pack are already printed with product information such as the statement “no sales to persons under the age of 18”, the name of the manufacturer, consumers’ hotline and the barcode. If the tar and nicotine yields are presented on the sides of cigarette packs, consumers will be unable to clearly obtain such important product information.



Smoking Prevalence in Asia

24. Since the Hong Kong Government began conducting smoking control education in the 1980s, basically all citizens, smokers or non-smokers, have already been well aware of the fact that smoking is harmful to health and is addictive. The smoking rate in Hong Kong was reported in 2013 as being 10.7%⁸, which is already one of the lowest rates in Asia, and thus increasing the area of health warnings will not be conducive to lowering the smoking rate. As examples, the smoking rate in Singapore was 13.3% in 2013,⁹ 18% in Taiwan in 2013¹⁰ and 22.9% in South Korea in 2012.¹¹

Lack of Knowledge about the Industry's Operation

25. The Administration's papers state that it plans to table the amendment order in the Legislative Council in the second quarter of 2015 with a view to effecting the new forms and warning pictures/messages in early 2016. *"This should give sufficient lead time for the industry and manufacturers to change their packets."* This is a groundless assumption due to a lack of consultation and regulatory impact assessment.

26. During the discussion of the Smoking (Public Health) (Amendment) Bill 2005 in April 2005, the industry explained to the Administration in numerous occasions the complexity of the production process of tobacco products and the actual time needed for replacing the packaging.

27. When the Smoking (Public Health) (Amendment) Ordinance 2006 was passed in the Legislative Council on 19 October 2006, the implementation date of the

⁸ Source: <http://www.statistics.gov.hk/pub/B11302532013XXXXB0100.pdf>

⁹ Source: <https://www.nrdo.gov.sg/docs/librariesprovider3/default-document-library/nrdo-wntd-info-paper-2015.pdf?sfvrsn=0>

¹⁰ Source:

http://www.hpa.gov.tw/English/file/ContentFile/201502140514171717/2014_Health_Promotion_Administration_Annual_Report.pdf

¹¹ Source: <http://www.oecd.org/els/health-systems/Briefing-Note-KOREA-2014.pdf>



requirements regarding new graphic health warnings and packaging restrictions on tobacco products was postponed to 27 October 2007, in response to the industry's request.

28. From consultation, discussion, legislation to implementation, the previous amendments to the smoking control legislation lasted over two years. The Administration discussed with the industry and allowed sufficient time for the industry to co-ordinate with the supply chain, including to replace product packaging designs and to procure materials, as well as to allow time for packaging, transportation and clearing inventory.
29. It is clear that the timetable proposed in the papers has been ill-advised without thorough consideration or consultation with the industry, and without reference to past legislative experience.

Intellectual Property

30. Article 105 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property ... The ownership of enterprises and the investments from outside the Region shall be protected by law.”
31. Article 115 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.”
32. Overly large health warnings on tobacco product packaging requirements restrict the freedom of expression of legitimate foreign investors (i.e. tobacco product manufacturers and importers), and restrict trademark owners' right to use their highly valuable intellectual property. Local and international laws that protect intellectual property may be violated. The implementation of overly large graphic



health warnings may attract cross-border litigation and damage Hong Kong's reputation for its strong rule of law.

Conclusion

33. The Tobacco Association of Hong Kong is an organization representing the tobacco industry. We hope to utilize members' understanding of the industry to express our opinions to the Government with a view to assisting the Government to formulate more effective smoking control measures, thereby minimizing the negative impact of relevant regulations.

34. Throughout the years, TAHK advocates a moderate and ordered approach to achieving the long-term smoking control target which is conducive to public health. Regulations or fiscal measures unsupported by data and evidence are not effective and will cause unexpected consequences.

35. Therefore, TAHK urges the Administration to reconsider the necessity and operability of the current proposed amendments to the Smoking (Public Health) (Notices) Order while maintaining communication with the industry and different stakeholders, so as to construct a reasoned approach and ensure its operability.

36. Should the Administration require any information at this state, please contact Ms. Irene Leung at (852) 3171 8825.



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About Tobacco Association of Hong Kong

The Tobacco Association of Hong Kong was established in 2005 by major participants from the tobacco and related industries who are committed to a collective industry effort to address tobacco-related issues. Founding members are British-American Tobacco Company (HK) Ltd., Japan Tobacco Inc., The Pacific Cigar Company Limited, and SUTL Corporation (Hong Kong) Limited.

The Association is committed to establishing an on-going, constructive working relationship and dialogues with the Government and other key stakeholders, and drives the Hong Kong tobacco industry to continuously support important tobacco related issues including youth smoking prevention and anti-illicit cigarette initiative.