



HERBERT
SMITH
FREEHILLS

The Chairman
Panel on Health Services
Legislative Council
Legislative Council Complex 1
Legislative Council Road Central
Hong Kong

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099
DX 009028

www.herbertsmithfreehills.com

Our ref
6461/30975151
Your ref

Date
20 July 2015

By email: panel_hs@legco.gov.hk and by post

Dear Sirs,

Special Meeting on 6 July 2015 – Legislative proposals to strengthen tobacco control

We write on behalf of our client, British American Tobacco (Hong Kong) Ltd, and further to the special meeting of the Panel on Health Services of the Legislative Council (the "Panel") on 6th July 2015 (the "Meeting"), at which the Government's proposal to increase the size of the graphic health warnings ("GHWs") for packets and retail containers of cigarettes to 85% (the "Proposal") was discussed.

Our client thanks the Panel again for the opportunity to make written and oral submissions on the Proposal, and appreciates the opportunity that was given to them to express their views and concerns.

Following the Meeting, our client believes that there would be a particular benefit in further discussing with the Government and the Panel, in light of submissions that were made and questions raised at the Meeting, the impact that the Proposal will have on intellectual property rights and the market and the experience of other countries that have introduced larger GHWs on tobacco product packaging.

Our client's trademarks and other intellectual property will not be capable of meaningful or economically viable use if the size of the GHW is increased to 85%, as they will no longer be able to display their trademarks and branding as registered on their packaging. As already expressed, since intellectual property rights are protected under the Basic Law, the Proposal would therefore be unconstitutional.

Our client also believes that the Proposal is manifestly disproportionate. The impact on our client and other manufacturers will be very substantial. By devaluing their intellectual property, the Proposal would also distort competition, drive down prices leading to increased consumption, and incentivise illicit trade, so it would actually undermine the Government's public health objective.

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Furthermore, the Proposal would constitute a violation of Hong Kong's international obligations under the WTO Agreements and International Investment Treaties, damaging Hong Kong's international reputation and exposing the Government to the risk of litigation and legal decisions requiring it to repeal the subsidiary legislation and/or pay substantial sums in compensation. Our client believes that further discussion of these issues is essential in order to ensure that the Panel is fully informed of the potential impact of the Proposal.

At the Panel Meeting, it was specifically asked whether there is evidence linking larger health warnings with a reduction in smoking prevalence to which the Undersecretary for Food and Health provided certain statistics from the Canadian, Australian and Thai experience in support. Our client disagrees with the Government's interpretation of this data and submits that a proper analysis actually confirms that there was no correlation between the reduction in smoking prevalence and the increased size of the GHW.

Our client believes it is important for the Panel to consider this evidence and an analysis of data from these three countries is set out in the Annexure to this letter.

In closing, we would again like to thank you and the other Panel members for the time given at the special meeting and the fair remarks made on the need for further and comprehensive consultation by the Government. In particular, our client appreciates the Chairman's remark that the Government has a responsibility to consult and communicate with stakeholders in respect of the Proposal, including members of the tobacco industry, so as to facilitate and best ensure proportionate policy-making that properly takes into account the wider range of interests.

Yours faithfully

Herbert Smith Freehills

Herbert Smith Freehills

cc. The Vice-Chairman and other Panel members

cc: Secretary for Food and Health
18/F, East Wing,
Central Government Offices,
2 Tim Mei Avenue,
Tamar,
Hong Kong

Annexure – Evidence Demonstrating the Lack of Effectiveness of Larger Warnings in Australia, Canada and Thailand.

At the Meeting at which the Government's proposal to increase the size of the GHWs for packets and retail containers of cigarettes to 85% was discussed, the Undersecretary made reference to smoking statistics from Canada, Australia and Thailand as evidence supporting the efficacy of larger GHWs. However, set out below is an analysis of data from these jurisdictions which demonstrates that the introduction of larger GHWs in these countries has not been effective in reducing smoking prevalence.

1. AUSTRALIA

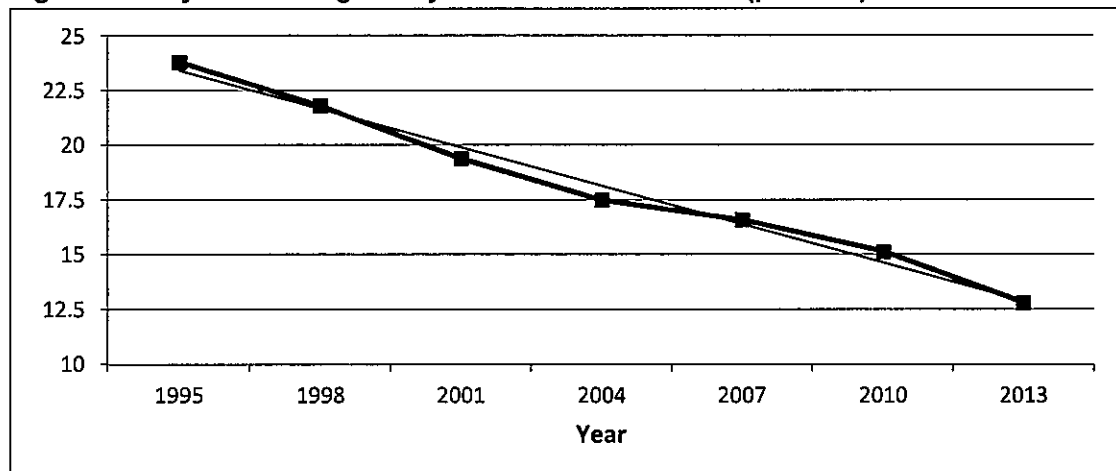
Australia increased the size of the warnings on the front of cigarette packets from 30% to 75% (in addition to existing 90% warnings on the back of cigarette packets), along with introducing plain packaging in December 2012. At the Meeting, the Undersecretary quoted figures for Australia that the percentage of smokers had decreased from 15.1% in 2010 to 12.8% in 2013. However, simply noting a decline in smoking prevalence without factoring in the existing long term declining trend is inaccurate and inappropriate, and cannot be taken as proof of increased GHWs leading to reduced smoking prevalence.

In fact, as shown below, analysis of the data quoted by the Undersecretary shows that the increased GHWs have not had any impact on the pre-existing declining trend in smoking prevalence in Australia and the larger GHWs have not been more effective in changing behaviours. For completeness, there were also a number of other measures in force at the time which may also have contributed to the declining trend (including a bi-annual 25% tax increase on tobacco and other regulatory measures).

The statistics quoted by the Undersecretary are derived from the Australian National Drug Strategy Household Survey ('ANDSHS'), which is conducted by the Australian Government every 3 years. The most recent survey was carried out in 2013 after the introduction of larger graphic health warnings and plain packaging in December 2012.

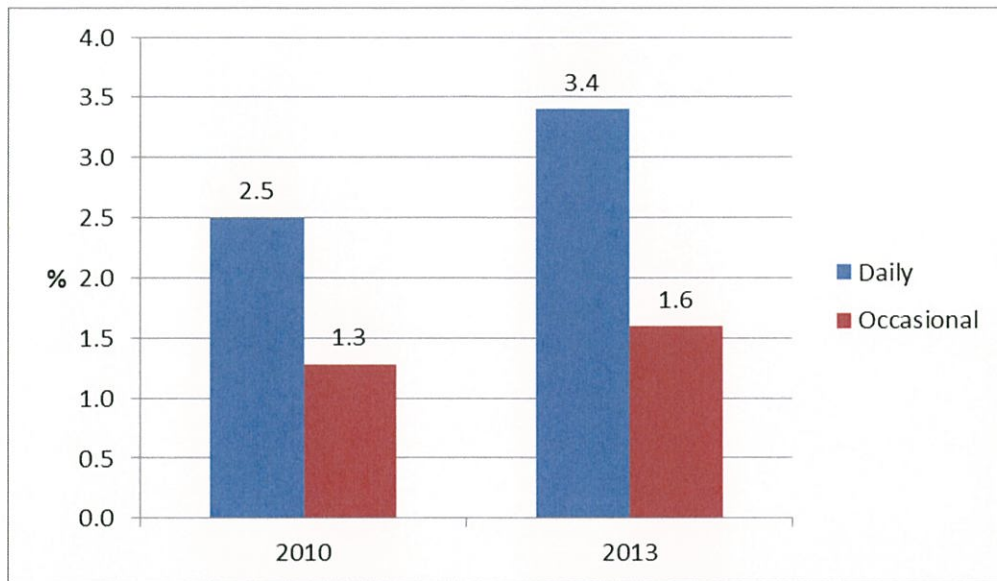
Figure 1 below shows the data for daily smokers aged 14 and over from the ANDSHS for the years 1995 to 2013, together with a linear best-fit trendline. As shown, the proportion of daily smokers has been declining steadily in Australia for a number of years and the proportion in 2013 is almost exactly on the trendline.

Figure 1: Daily smokers aged 14 years or older 1995-2013 (per cent)



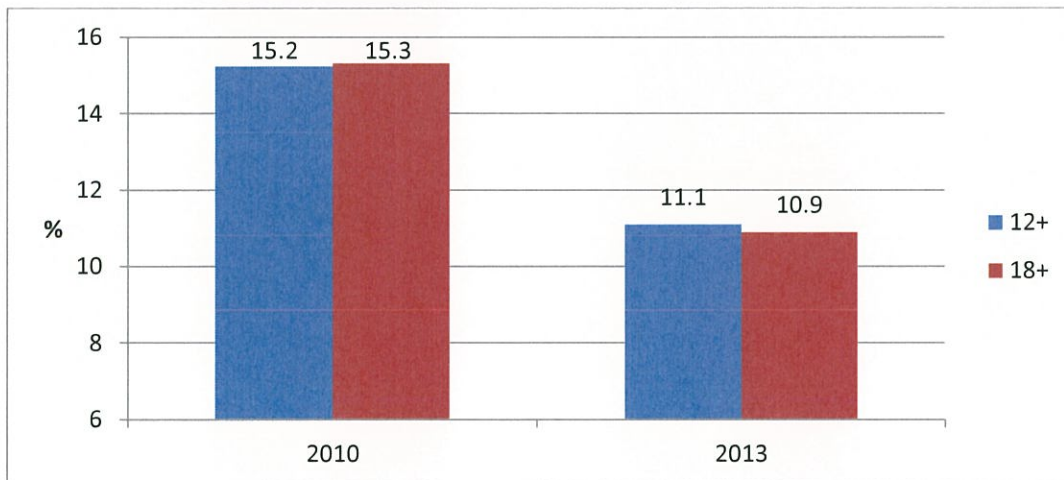
The ANDSHS also shows that the percentage of 12-17 year olds who smoked on a daily basis increased from 2.5% to 3.4% between 2010 and 2013 (the highest rate since the ANDSHS in 2004), and the percentage of occasional smokers aged 12-17 also increased from 1.3% to 1.6% over this period (Figure 2). While not statistically significant, this data is not supportive of either larger GHWs or plain packaging leading to fewer adolescents taking up smoking.

Figure 2: Daily and occasional smokers¹ aged 12-17 years (per cent)



The ANDSHS also examines the main reasons that smokers attempted to quit or change their smoking behaviour in 2013 compared to 2010. As shown in Figure 3, the percentage of smokers *nominating health warnings on tobacco packets as the reason* for trying to quit smoking reduced from 15.2% in 2010 to 11.1% in 2013 for all respondents (aged over 12) and from 15.3% to 10.9% for respondents aged over 18.² In other words, the percentage of smokers citing health warnings as the cause of their smoking cessation efforts actually reduced significantly in the period following the introduction of the plain packaging. Therefore, contrary to supporting the proposal for introduction of larger GHWs, this suggests that larger GHWs are less effective in inducing smokers to quit.

Figure 3: Proportion of respondents nominating health warnings on tobacco packs as the reason for trying to quit smoking



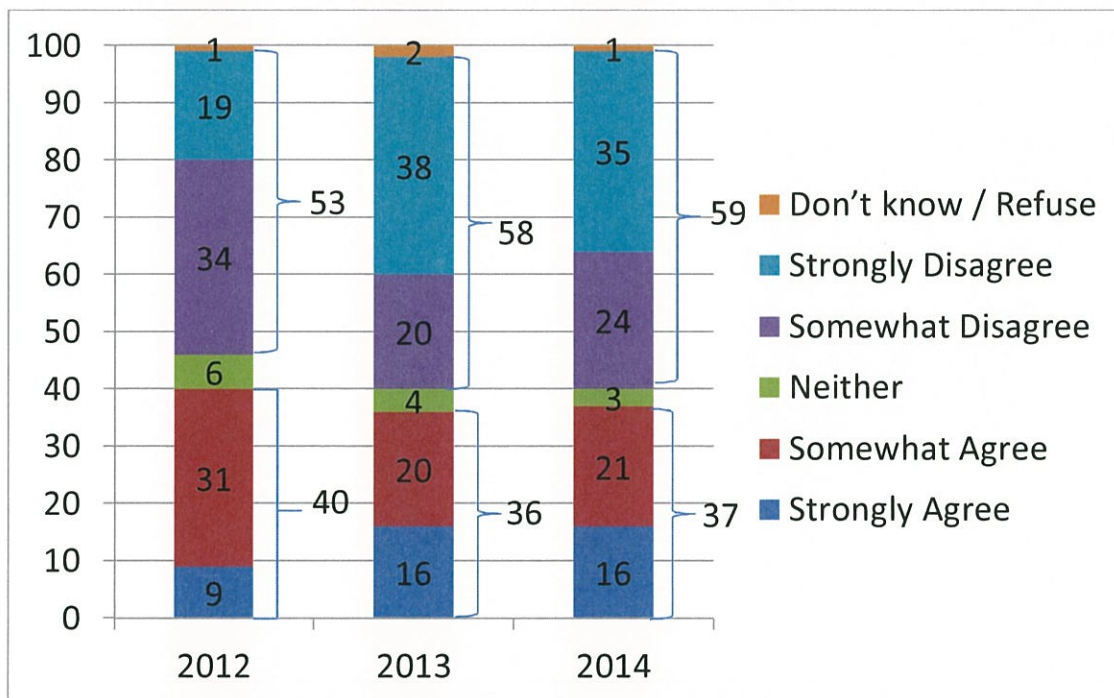
¹ Occasional smokers includes people who reported smoking weekly or less than weekly.

² *National Drug Strategy Household Survey detailed report: 2013*, Drug statistics series no. 28, Australian Institute of Health and Welfare, Nov 2014 <http://www.aihw.gov.au/publication-detail/?id=60129549469>, at Table 3.16.

Other evidence also shows that the larger GHWs in Australia, along with plain packaging, have not been effective in increasing the effectiveness of warnings. This evidence includes the Cancer Institute NSW (New South Wales) Tobacco Tracking Survey ('CITTS') which is a serial cross-sectional survey of adult smokers and recent quitters that includes questions pertaining to smoking-related cognitions and behaviours. The CITTS sample obtained provides data from January 2009 to December 2014.

Figure 4 shows that when asked whether graphic warnings encouraged smokers to quit, the number of respondents strongly agreeing or somewhat agreeing reduced from 40% in 2012 to 36% in 2013 (after the introduction of larger GHWs and plain packaging in Australia in December 2012) and remained at 37% in 2014. The number of respondents somewhat or strongly disagreeing increased from 53% to 58% between 2012 and 2013 and increased further to 59% in 2014 (whilst the number of respondents strongly disagreeing doubled from 19% to 38% between 2012 and 2013).³ This suggests that GHWs were less effective at encouraging smokers and recent quitters to stop smoking after they were made larger, even with the introduction of plain packaging.

Figure 4: Do you agree with the following statement? The graphic warnings encourage/d me to stop smoking



In terms of the wider impact of GHWs, the CITTS data also strongly challenge the assumption that an increase in size improves the effectiveness of GHWs as shown in Table 1 below. They show that since the larger GHWs and plain packaging were introduced in Australia:

- The proportion of smokers ignoring the health warning has increased;
- The proportion of smokers thinking that health warnings are exaggerated has increased;
- The proportion of smokers thinking that health warnings help them quit has decreased; and
- The proportion of smokers seeking to hide their cigarettes from others due to the health warnings has not changed.

³ This question was asked to respondents who noticed graphic health warnings in 2012 and to all respondents in 2013 and 2014. (2012 n=2314, 2013 n=1085, 2014 n=1986).

Table 1: Awareness of graphic warnings before and after increased GHWs and plain packaging⁴

	2012	2013	2014
I don't look at warnings each time I get a cigarette	3.7%	3.8%	3.8%
The graphic health warnings are exaggerated	2.7%	3.2%	3.1%
The graphic warnings encouraged me to stop smoking	2.8%	2.6%	2.6%
They make me feel that I should hide my packet from the view of others	2.5%	2.6%	2.5%

2. CANADA

Canada increased the size of the warnings on cigarette packets from 50% to 75% in March 2012. However, similar to the trend observed from the Australian data, the data from Canada following the introduction of larger GHWs does not show any acceleration in the trend of long term decline in smoking prevalence in Canada. Therefore, the Undersecretary's reliance on this data as evidence of the success of larger GHWs is similarly misplaced.

Indeed it is notable that official Canadian smoking prevalence data for 2013⁵, which the Undersecretary quoted as evidence in support of the effectiveness of larger GHWs, specifically notes that there was no change in the overall smoking prevalence from 2012 (when the larger GHWs were introduced in Canada) to 2013.

Figure 5 shows the smoking prevalence rates in Canada from 1999 to 2013 using Canadian Government data.⁶ It indicates no evidence of any acceleration in the pre-existing smoking prevalence trend after the introduction of the 50% graphic warning or after the size of these warnings was increased to 75%. The dashed trend line is based on the best-fitting straight line for the smoking prevalence rate data.⁷

It also should be noted that there was a dramatic 82% increase in cigarette excise tax rates from 2000 to 2002. Consequently, the introduction of graphic health warnings in the middle of that time period was accompanied by a stark increase in cigarette taxes. Given the negative effect of taxes on cigarette consumption – as taxes increase, consumption decreases – any assessment of the effect of graphic health warnings based on overall trends in smoking prevalence rates will be confounded by the influence of the higher tax rates.

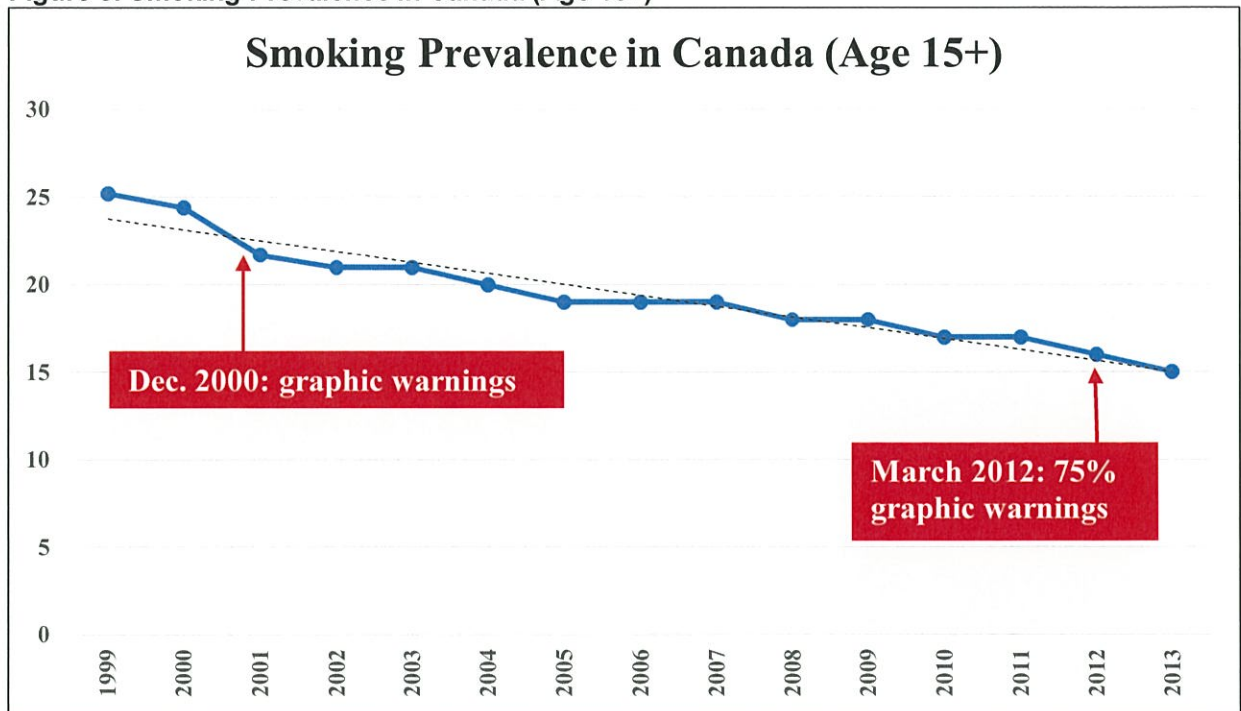
⁴ The analysis in Table 1 is an average response score using a scale of 1 to 5 for each response, where 1 = "strongly disagree" and 5 = "strongly agree". "Don't know" and "refuse" responses were removed before calculating the average.

⁵ Summary of Results for 2013 available at <http://healthycanadians.gc.ca/science-research-sciences-recherches/data-donnees/ctads-ectad/summary-sommaire-2013-eng.php>

⁶ The data is derived from that Canadian Government Canadian Tobacco Use Monitoring Surveys (CTUMS) data for 1999-2012, and Canadian Tobacco, Alcohol, and Drug Survey (CTADS) data for 2013.

⁷ More specifically, the trend line is based on a linear regression of the smoking prevalence rate on a constant term and a time trend.

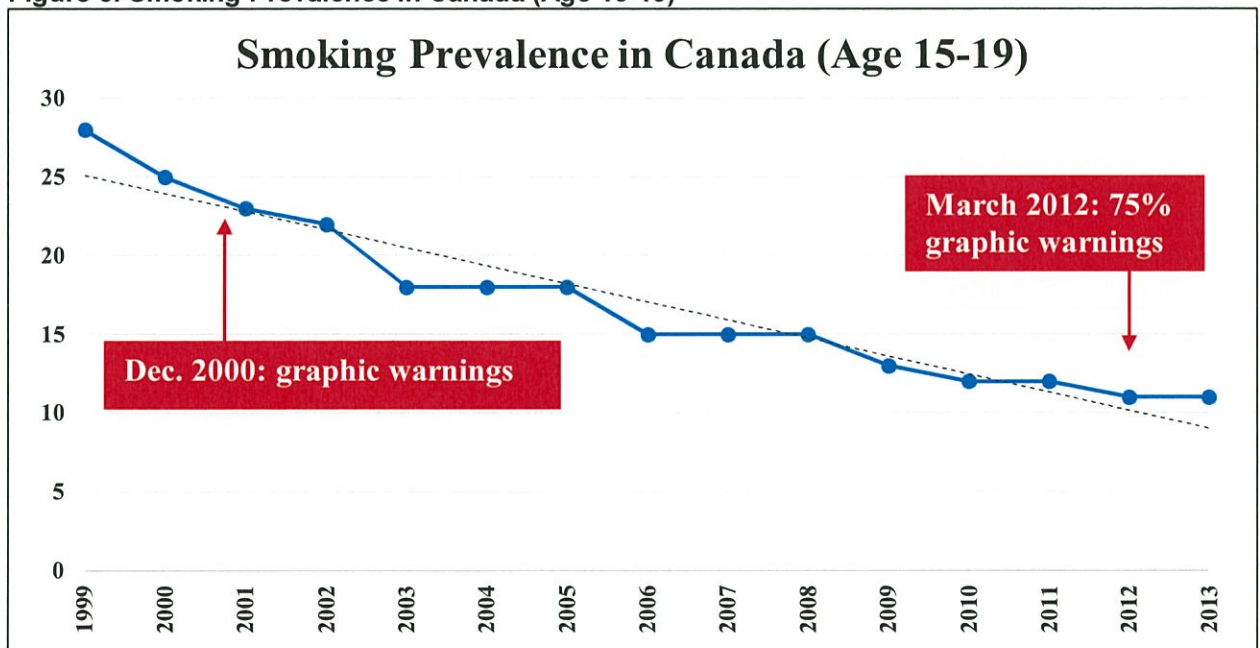
Figure 5: Smoking Prevalence in Canada (Age 15+)



This result demonstrates that simply assuming, on the basis of “common sense” or otherwise, that larger warnings will reduce smoking, is unjustified based on real world experience.

A similar pattern is observed in Figure 6 for smoking prevalence rates since 1999 for youth, aged 15 to 19. The 2013 smoking prevalence rate for those aged 15 to 19 reflects a continuation of past trends and is not even significantly different than the smoking prevalence rate before the advent of 75% graphic warnings. Figure 6 and the dashed trend line indicate this long-run pattern.

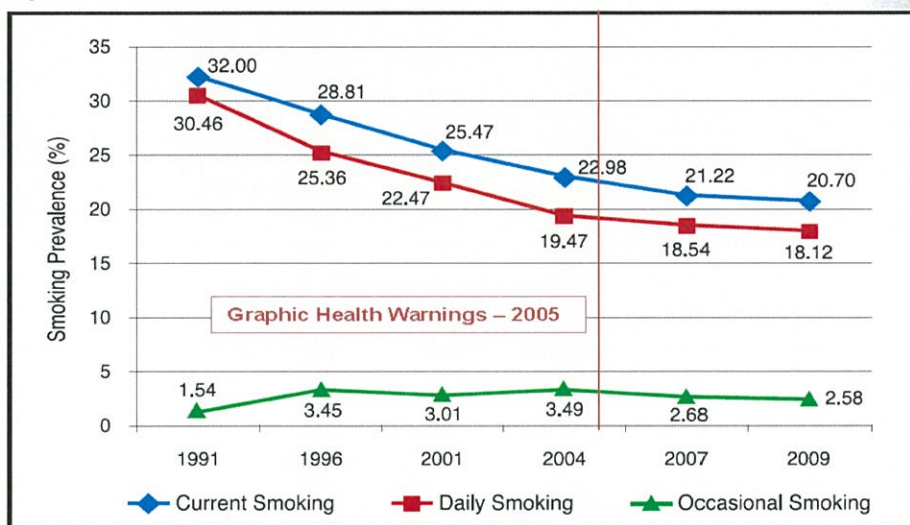
Figure 6: Smoking Prevalence in Canada (Age 15-19)



3. THAILAND

At the meeting before the Panel, the Undersecretary also claimed that evidence from Thailand demonstrated that larger GHWs are more effective. However, the introduction of graphic warnings in Thailand in 2005 has similarly had no impact on reducing smoking prevalence. The chart below demonstrates that the rate of decline in smoking prevalence rates in Thailand actually diminished after the introduction of graphic warnings in 2005.⁸ This failure to accelerate the decline in smoking rates is especially noteworthy since cigarette taxes and cigarette prices rose during the post-2005 period.⁹

Figure 1: Trends of Smoking Prevalence (1991-2009)



Consistent with the lack of impact of graphic warnings in Thailand on smoking prevalence, the Thailand Ministry of Information and Communication Technology, National Statistical Office, Smoking and Drinking Behaviour Surveys show that smoking prevalence slightly increased in Thailand from 21.2% in 2007 to 21.4% in 2011.¹⁰ The Global Adult Tobacco Survey (GATS) Thailand 2011 also found that "[t]he prevalence of current tobacco smoking did not show a statistically significant change between 2009 and 2011 among men (45.6% vs 46.6%, respectively), women (3.1% vs 2.6%, respectively), and overall (23.7% vs 24.0%, respectively)." This survey also found that 94.6 percent of current smokers in Thailand noticed the health warning on cigarettes packages when they covered 55% of the packaging¹¹ (which is only 5% larger than the current warnings in Hong Kong), so the lack of impact of the warnings is not because they are not seen by smokers. It follows that these survey results do not provide any evidence that increasing the size of the graphic warnings would make them more effective. The data from Thailand is therefore not supportive of a conclusion that larger GHWs lead to a decrease in smoking prevalence.

⁸ Chart sourced from Southeast Asia Initiative on Tobacco Tax, Thailand Tobacco Tax Report Card, October 2010.

⁹ Id, Figure 4 for taxes and Figure 7 for prices.

¹⁰ Ministry of Information and Communication Technology, National Statistical Office, Smoking and Drinking Behaviour Survey, 2007 & 2011, Table 1.

¹¹ GATS Report, (2011) Thailand Country Report, Page xxiii & Table 8.2.