



Clerk to Subcommittee on Smoking (Public Health) (Notices)(Amendment) Order 2017
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

17 May 2017

Dear Members of the Subcommittee,

Proposed larger (85%) health warnings on tobacco product packaging

We are writing in response to the Subcommittee's invitation for interested parties to provide views on the Smoking (Public Health) (Notice) (Amendment) Order (the *Amendment Order*).

Japan Tobacco (Hong Kong) Limited (*JTHK*) wishes to register, at this point in the procedure, its strong opposition to the requirement under the Amendment Order that health warnings cover 85% of the front and back of cigarette packaging. JTHK's position is clear: tobacco products carry risks to health, and appropriate and proportionate regulation for the industry is both necessary and right. The 85% size requirement is neither appropriate, nor proportionate, nor adopted pursuant to a fair process.

The Amendment Order suffers from a number of fundamental flaws which we wish to outline for the Subcommittee in this letter:

- (i) the process by which the Amendment Order was introduced was inadequate and unfair;
- (ii) there is no evidence that the larger health warnings would reduce smoking rates in Hong Kong, and the Administration has ignored its own Hong Kong smoking prevalence data;
- (iii) international standards do not justify 85% warnings; and
- (iv) the impact on fundamental legal rights has not been properly scrutinized and exposes the Amendment Order to legal challenge.

We have provided several rounds of submissions to the Panel on Health Service (*Panel*) on the proposal for 85% health warnings. In particular, we enclose copies of our submissions dated 23 June 2015 and 10 January 2017. We will not repeat the details of these submissions in this letter but instead enclose copies for the Subcommittee's reference.

Unfair Process

The Department of Health did not meaningfully engage with either the Panel, or ourselves, on the fundamental issue of the size of health warnings. The Administration simply set out an advocacy position, omitting relevant evidence, failing to consider relevant arguments and overlooking less restrictive, proportionate alternatives.



The Administration should have conducted a proper consultation exercise in order to address the inadequate reasoning and the lack of relevant evidence that it put forward. The Panel itself indicated that a consultation should be held but the Administration failed to do so. Instead, the Administration erroneously relied upon the Panel's own engagement with stakeholders and the Administration engaged solely on *technical* and *implementation* aspects of the Amendment Order.

As a result, the Administration's position on important and contentious issues – upon which it relies to justify the Amendment Order – was never properly tested. Indeed, even though the 85% size proposal was launched in May 2015, the Administration only addressed some of the key issues on 27 February 2017 (LC Paper No. CB(2) 859/16-17(12)) – at a time in the process when no debate or scrutiny was possible. In addition, the Amendment Order was introduced in the absence of proper Regulatory Impact Assessment (as the Administration acknowledged) and any consideration of less restrictive, more targeted and proportionate alternatives to achieve the Administration's public policy objectives.

There is no evidence to justify larger health warnings in Hong Kong

The Administration had failed to produce evidence that larger health warnings will reduce smoking in Hong Kong.

It has failed to analyse local Hong Kong smoking prevalence data and the impact of previous increases in the size of health warnings. Hong Kong already has one of the lowest rates of smoking prevalence in the world and there is clear evidence that the rate of decline in tobacco prevalence in Hong Kong was not affected by increasing the size of health warnings in the past. This is set out in Professors Tsui and Tsang's expert report which was submitted to the Panel in June 2015 and January 2017 (LC Paper No. CB(2)584/16-17(26)), and that evidence remains unchallenged. The Administration has ignored its own Hong Kong smoking prevalence data, because the data undermines the argument for larger health warnings.

International standards do not justify 85% warnings

The Administration argues that an increase in the size of health warnings to 85% is necessary to stay in line with international best practice. This is not correct. Hong Kong's 50% pictorial health warnings are already compliant with the WHO's Framework Convention on Tobacco Control. The only countries with warnings of a size equal to, or larger than, the Amendment Order are Thailand, India, Vanuatu and Nepal. These countries are manifestly not comparable to Hong Kong and the measures remain under legal challenge in Nepal and Thailand.

Serious impact on legal rights and illicit trade

The size of health warnings is a highly contentious issue which affects fundamental legal rights, including freedom of expression, freedom of trade and intellectual property rights. 85% health warnings significantly limit the space left on the pack for trademarks and branding to such a critical extent as to harm legal rights. The Amendment Order has been introduced without proper consideration and scrutiny of these issues, which go to the heart of the legality of the Amendment Order. The Amendment Order undermines Hong Kong's status as a free trade hub.



The Amendment Order has also been introduced without giving due regard to the risk of larger health warnings intensifying illicit trade. Illicit trade is already a significant issue in Hong Kong. It is hugely concerning that the Administration dismissed the concern out of hand, without properly considering this risk.

Conclusion

For the above reasons and as set out in our submissions in June 2015 and January 2017, the Subcommittee should be troubled by the unfair process which has been followed to arrive at the Amendment Order and the absence of evidence as to whether larger health warnings can, in practice, achieve any change to the smoking prevalence rate in Hong Kong.

We welcome the opportunity to reiterate, at the deputation meeting, our concerns regarding the 85% requirement. We trust that the Subcommittee will review the process and substantial unanswered issues regarding the Amendment Order, and will consider appropriate procedural and substantive steps to ensure that the Amendment Order is adopted, if at all, in terms that are appropriate and proportionate.

Yours sincerely,

A handwritten signature in black ink, reading '森川 啓三' (Morikawa Keizo).

Keizo Morikawa

General Manager

Japan Tobacco (Hong Kong) Limited

Encl.



Japan Tobacco (Hong Kong) Limited's
response to the Department of
Health's "Legislative Proposals to
Strengthen Tobacco Control"

23 June 2015

Japan Tobacco (Hong Kong) Limited markets world-renowned cigarette brands such as Winston, Mevius, Camel and More in Hong Kong. It is part of the Japan Tobacco Group of companies, a leading international tobacco product manufacturer whose other international brands include Benson and Hedges, Silk Cut, Sobranie of London, Glamour and LD. For more information, visit www.jt.com.

1. INTRODUCTION

- 1.1 On 2 June 2015, the Panel on Health Services (*Panel*) invited interested parties to give views on “Legislative proposals to strengthen tobacco control” (LC Paper No. CB(2)1456/14-15(07))(*Proposal*) at a special meeting on Monday, 6 July 2015, at 4:30 pm in Conference Room 1 of the Legislative Council Complex.
- 1.2 Japan Tobacco (Hong Kong) Limited (*JTHK*) wishes to register its strong opposition to the following elements of the Proposal: larger health warnings on cigarette packs and prohibiting the import and sale of electronic cigarettes in Hong Kong. Given the seriousness of the issues, JTHK requests that it is granted an audience of at least 15 minutes before the Panel.

The existing Hong Kong requirements on the size of health warnings

- 1.3 The size of health warnings on cigarette packs in Hong Kong is governed by the Smoking (Public Health) Ordinance (Cap. 371). Section 18(2) provides that, “*the Secretary may by order in the Gazette prescribe all or any of the following matters –*
- (a) *the form (including specifications) of...*
 - (ii) *any health warning; and*
 - (iii) *any indication of tar and nicotine yields;*
 - (b) *the manner in which any of the matters referred to in paragraph (a) is to be displayed.”*
- 1.4 The Smoking (Public Health) (Notices) Order (Cap. 371B) provides, in paragraph 3(6), that: “*the Chinese or English version of the health warning and indication of tar and nicotine yields shall be of a size that covers at least 50% of the area of the surface on which that version appears.”*
- 1.5 JTHK notes that the existing 50% health warning requirement was adopted in 2006 without the Panel having any meaningful debate on the subject of the size of the health warnings.¹ Indeed, in 2006, the Department of Health produced no scientific or statistical evidence to justify those larger health warnings proposal, relying instead merely on 7 selective examples of health warnings from other countries which were produced in response to a question about the *form* of pictorial warnings, not their size.² It is clear that the issue of the size of health warnings was not debated or analysed in any meaningful way in 2006.

¹ The Department of Health proposed 50% health warnings, amongst a range of tobacco control measures, in January 2005 (CB(2)535/04-05(03)). The Panel on Health Services held three debates on the suite of measures, and only one paragraph of the minutes records any discussion of the size of warnings (10 January 2005, LC. CB(2)838/04-05, para 30).

² The Administration produced one paper on seven countries’ health warnings in response to one question raised in the Bills Committee (CB(2)1428/05-06(04)).

- 1.6 Examples of the current packaging of JTHK's world-renowned brands that are sold in Hong Kong are set out below:



The Department of Health's Proposal

- 1.7 The Proposal was first presented to the Panel on 18 May 2015 by Professor Sophia Chan, Under Secretary of the Food and Health Bureau. The Department of Health has proposed 3 additional tobacco control measures:

- (a) Enlarging health warnings, and repositioning tar and nicotine yield information, on cigarette packets:
 - (i) to increase the size of pictorial health warnings on tobacco packaging from the existing 50% to 85% of the front and back of packaging;
 - (ii) to reposition tar and nicotine yield information from its current position within the 50% health warning to the side panel of cigarette packs;
 - (iii) to increase the number of forms of health warning from six to twelve; and
 - (iv) to add a quit-line number and replace the health warning message “HKSAR GOVERNMENT WARNING” to “Tobacco kills up to half of its users”;
- (b) Designating bus interchange facilities at tunnel portal areas as “no smoking areas”; and
- (c) Prohibiting the import, manufacture, sale, distribution and advertising of “electronic cigarettes”.

1.8 JTHK sets out below the reasons for its opposition to increasing the size of health warnings and the prohibiting of electronic cigarettes.

2. EXECUTIVE SUMMARY

The process to date has been flawed

- The process by which the Department of Health has arrived at the Proposal falls manifestly short of best practice and fundamental requirements of due process: no prior consultation has been conducted; no evidence presented; no apparent evaluation of alternatives and no apparent assessment of costs, benefits and impacts.

There is no need or justification to increase the size of health warnings in Hong Kong

- Hong Kong is already compliant with the Framework Convention on Tobacco Control's (*FCTC*) obligation to mandate 30% health warnings on tobacco packaging. The People's Republic of China has stated this compliance many times. There is no *FCTC* obligation to increase the size of health warnings.
- Hong Kong has one of the lowest rates of smoking prevalence in the world. No one has questioned that there is already a high level of awareness of the health risks of smoking amongst today's public in Hong Kong.

Larger health warnings will not change smoking behaviour

- Packaging has legitimate and important roles for manufacturers (to distinguish their products), for existing adult smokers (to receive information and choose products) and for competition and trade. Assumptions that tobacco packaging is a reason for smoking initiation and/or that larger warnings will change smoking behaviour, are simply wrong and are not supported by science or the Government's own Thematic Household Survey data.
- The evidence in Hong Kong, and internationally, on smoking behaviour demonstrates that larger health warnings will not enhance awareness of the health risks of smoking or change smoking behaviour. That has been confirmed by a senior US Court of Appeal when reviewing the evidence on larger health warnings.

Serious and substantial impact on commercial and legal rights

- With only 15% of the front and back of cigarette packs available for trade marks and branding, the Proposal will harm communication and competition.
- There are serious and significant questions as to the legality of the Proposal. It breaches rights under the Trade Marks Ordinance (Cap. 559)(*TMO*) and the Basic Law, notably as regards the right to property (Art 105) and freedom of expression (Art 27).
- The international law implications undermine Hong Kong's status as a free trade hub and create substantial legal exposure, including under the WTO agreements and bilateral investment treaties.

There are less restrictive, more targeted and proportionate alternatives that the Department of Health should consider to achieve legitimate public policy objectives, including off-pack communications and strengthening measures to prevent minors from accessing tobacco products.

There is no basis for a ban of electronic cigarettes; reasonable and proportionate regulation is a more appropriate response.

3. PROCEDURAL UNFAIRNESS OF THE PROPOSAL

- 3.1 JTHK's position is clear: tobacco products carry risks to health, and appropriate and proportionate regulation of the industry is both necessary and right. JTHK shares a common goal with regulators: everyone should be appropriately informed about the health risks of smoking.
- 3.2 No one has questioned that there is already a high level of awareness of the health risks of smoking amongst today's public. Nevertheless, JTHK supports the continued provision of information to consumers about the health risks of smoking in order to ensure that smokers continue to be reminded of those risks.
- 3.3 Effective communication of the risks of smoking can and should be achieved without having a disproportionate impact on legitimate competition, intellectual property rights and freedom of expression. In that regard, manufacturers compete for their share of the legal tobacco market. Adults who choose to smoke are entitled to be treated fairly, and have the right to choose and purchase the products they prefer.
- 3.4 JTHK supports tobacco control measures that meet internationally accepted principles of Better Regulation.³ The principles promote high-quality regulation which is consistent, promotes innovation and is compatible with competition, trade and investment principles. Any such regulation must be necessary and appropriate to achieve a clearly identified policy objective, be evidence-based, targeted and proportionate.
- 3.5 Drawing together these principles (which are subscribed to by Hong Kong), as well as the protections afforded by the common law and natural justice, the Financial Secretary set out in the "*Be the smart regulator*" programme⁴ certain practical applications of these principles for decision-making that are, in JTHK's view, of universal and current relevance:⁵

"1. Plan

- *all direct and indirect costs fully understood*
- *alternatives to regulation meticulously evaluated*

2. Consult

- *open and inclusive consultation*
- *regulatory impact assessment undertaken*"

³ As defined by the Organisation for Economic Co-operation and Development (*OECD*) and endorsed by numerous organizations such as the World Bank and APEC (Asia Pacific Economic Cooperation).

⁴ Economic Analysis and Business Facilitation Unit, 2007.

⁵ *R v. Home Secretary, ex parte Doody* [1994] 1 AC 531: Lord Mustill noted that "*where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*"

3.6 The Financial Secretary set out detailed explanations of the requirements regarding consultation. These identify the procedural and substantive steps that should have already been taken by the Department of Health:

“Open and inclusive consultation

- *start early – before proposals are developed*
- *consult widely – include the views of industry, professionals, academics and the community*
- *use quantitative (surveys) and qualitative (interviews, focus groups, etc) techniques to gain a full understanding of different views*
- *provide easy access (typically Internet-based) to consultation papers, regulatory impact assessments, etc*
- *explain rationale for positive and negative decisions before they are taken”*

3.7 The Department of Health had sought to proceed to exercise delegated statutory powers seemingly without any form of consultation or engagement with relevant stakeholders, or following due process.

3.8 JTHK welcomes the opportunity to present written and oral submissions, and is grateful to the Panel for having arranged the deputation at this point in the procedure.

3.9 The Proposal fails to respect basic principles of good governance and due process, in a manner that leaves JTHK substantially prejudiced by the procedure. For example, as regards the proposal to increase the size of health warnings:

- (a) the Proposal does not identify the nature and scale of the specific “problem” which the proposed regulation seeks to address. The proposal simply refers to the FCTC and its non-binding guidelines, without any indication as to why there is a need in Hong Kong for the proposed measure;
- (b) the Proposal fails to identify any objectives for increasing the size of health warnings;
- (c) there is no indication in the Proposal that the Department of Health has conducted any analysis of all direct and indirect costs associated with its Proposal, nor examined alternatives; and
- (d) contrary to the principle that there must be clear and reliable evidence to support the Proposal, no evidence – and specifically no evidence relevant to Hong Kong – has been presented by the Department of Health to justify the increase in the size of health warnings.

3.10 In the light of the very significant issues raised in this submission (and the manifest lack of evaluation of the evidence base and alternatives when the current 50% health warnings were introduced in 2006), fairness in the circumstances requires that, as a minimum, the Department of Health should

conduct a thorough cost/benefit analysis of available options to achieve clearly stated objectives to meet an articulated “problem”. A full assessment is necessary. Adequate time should be spent to engage with all stakeholders, and all relevant Government departments (as many government departments’ policies are affected) once the details of the proposal, and the underlying evidence, have been made available by the Department of Health.

- 3.11 If the Panel considers (which JTHK does not, for the reasons explained below) that there is a need in Hong Kong to consider additional measures regarding health warnings or an electronic cigarette prohibition, then the procedural “short cuts” of the current Proposal should be reversed, and appropriate procedures followed before any amendment order is tabled with LegCo.
- 3.12 Similarly, given the paucity of information provided to date by the Department of Health, JTHK has already written to the Panel to express its concern that, if the Department of Health only comes forward with further reasons and evidence as part of this deputation process, all stakeholders should be granted adequate additional time both to *consider* those materials and to *present their views* on them to the Panel. To proceed otherwise would be to undermine a fundamental notion of stakeholder consultation, namely knowing the basis of the proposal on which consultation is being sought.
- 3.13 JTHK is confident that, if appropriate procedures are followed, none of the existing elements of the Proposal, as currently formulated, would remain.

4. LARGER HEALTH WARNINGS

- 4.1 The Proposal is to increase the size of pictorial health warnings on tobacco packaging from the existing 50%, to 85%, of the front and back of packaging. In addition, tar and nicotine yield information would be repositioned from its current position within the 50% health warning to the side panel of cigarette packs. Lastly, the Department of Health has proposed to increase the number of forms of health warning from six to twelve, showing various new images to appear on cigarette packs.
- 4.2 Whilst the Department of Health may – within limits imposed by the Basic Law – propose changes to the content of the health warnings, JTHK is fundamentally opposed to the increase in the size of the health warning on the front and back of cigarette packs, and the repositioning of the tar and nicotine yield information. Larger health warnings are unnecessary, unjustified and disproportionate. Increasing the size of health warnings will neither enhance awareness of the health risks of smoking nor change the behaviour of smokers.

No identified need or justification for larger health warnings in Hong Kong

- 4.3 The Department of Health has not identified in the Proposal any valid need for larger health warnings in Hong Kong. Hong Kong already has pictorial warnings that cover 50% of the front and back of cigarette packets.
- 4.4 JTHK notes the following points which are relevant in this regard:
- (a) Smoking prevalence in Hong Kong in 2012 was 10.7% (for those aged 15 or above).⁶ This has been acknowledged by the Department of Health to be the lowest rate recorded since 1982. It is also lower than the prevalence rate of all 20 of the OECD countries (in 2012)⁷ and “*one of the lowest rates in the world*”.⁸
 - (b) No one has ever questioned that there is already a high level of awareness of the health risks of smoking amongst today’s public in Hong Kong.
 - (i) The Department of Health itself referred in the Proposal to the “general publicity, health education, announcements of public interest, campaigns, and mobile phone-based application” that have been undertaken over the years.
 - (ii) Education about the health risks of smoking is included in the curricula prepared by the Curriculum Development Council for both primary and secondary school students in Hong Kong.⁹

⁶ Thematic Household Survey Report No. 53, Census and Statistics Department, 8 November 2013.

⁷ <https://data.oecd.org/healthrisk/daily-smokers.htm>

⁸ South China Morning Post, 8 April 2015

⁹ For example: (1) *Primary*: Core elements of Strand 1 of the General Studies for Primary Schools Curriculum Guide (Primary 1 – Primary 6) include “say “NO” to...smoking”. An example thematic approach is provided. For primary 5, one of the units includes “Smoking and health” as its content.

4.5 Hong Kong has for many years been involved with the OECD, particularly as regards issues of international trade and financial regulation. The table below shows that Hong Kong's existing health warning requirement is already more stringent than most OECD countries' current regulations. In addition, Hong Kong's health warnings are already larger than the 30% health warnings required in Mainland China.

TABLE OF CURRENT HEALTH WARNING SIZES IN OECD COUNTRIES AND HONG KONG¹⁰

Front/back of pack warning size	Country	
75/90	Australia ^z	
75/75	Canada ^z	
65/65	Turkey	
30/100	Mexico	
30/90	New Zealand	
50/50	Hong Kong Chile	
35/50	Belgium* Switzerland	
32/45	Finland* Ireland* Luxemburg*	
30/40	Austria* Netherlands* Norway Poland* Portugal* Slovakia* Slovenia* Spain* Sweden* United Kingdom*	Italy* Czech Republic* Denmark* Estonia* France* Germany* Greece* Hungary* Iceland*
30/30	Israel Japan South Korea ^s	
0/0	United States of America (NB: HW on side panel)	

http://www.edb.gov.hk/attachment/en/curriculum-development/cross-kla-studies/gs-primary/gs_p_guide-eng_300dpi-final%20version.pdf. (2) *Secondary*: Unit 7.7 of the Science (Secondary 1–3) syllabus covers the effects of smoking on our respiratory system. One of the unit objectives is that all students should “be able to evaluate the effects of smoking on health”. The core content includes “Smoking & health: passive smoking; diseases related to smoking, e.g. lung cancer and heart disease”. http://cd1.edb.hkedcity.net/cd/science/is/sci_syllabus_S1to3_e.pdf. (3) *Secondary*: Module 5 of the Liberal Studies Curriculum and Assessment Guide (Secondary 4 – 6) covers “the impact of smoking on our respiratory system”. http://ls.edb.hkedcity.net/LSCms/file/web_v2/C_and_A_guide/201401/LS%20C&A%20Guide_updated_e.pdf.

¹⁰ Only two countries have health warnings at, or larger than, the Proposal: Thailand (85/85) and Nepal (90/90), neither of which are in the OECD. Those warnings are both subject to legal challenges. Neither country is obviously comparable to Hong Kong.

[‡] The legality of the Canadian measure mandating 75% health warnings is subject to pending legal challenges before the national courts. The Australian legislation (which introduced the larger health warnings and plain packaging) is subject to challenges in the WTO dispute settlement procedure (Cases DS435, DS441, DS458 and DS467) and in investor-State arbitration under the Hong Kong/Australia bilateral investment treaty (*Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12).

^{*} From 20 May 2016, the EU Second Tobacco Products Directive (*EU TPD2*) will require that all tobacco product packaging must carry a 65% health warning on the front and back surfaces of the packaging. The legality of the EU TPD2 is subject to at least three pending legal challenges before the European Court of Justice: C-477/14 *Pillbox 38 (UK) Ltd*, C-358/14 *Poland v European Parliament and Council*, and C-547/14 *Philip Morris Brands*

[§] South Korea has passed an amendment to adopt 50% health warnings, effective from 23 December 2016.

4.6 The only purported basis identified in the Proposal for increasing the size of health warnings in Hong Kong is the FCTC. The FCTC is an international convention adopted in 2003 under the auspices of the World Health Organization, and has been ratified by China in 2005. Article 11 of FCTC addresses the packaging and labelling of tobacco products. The most relevant part provides as follows (emphasis added):

“1. Each Party shall, within a period of 3 years after the entry into force of this Convention for that party, adopt and implement, in accordance with its national law, effective measures to ensure that:...

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

4.7 The Conference of the Parties of the FCTC adopted “Guidelines for implementation of Article 11” in 2008. The Guidelines are non-binding. Paragraph 12 of the Guidelines states, after repeating the texts of Article 11(1)(b):

“given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.”

4.8 Three points demonstrate that the FCTC provides no basis on which the Proposal should be taken forward:

(a) **The People’s Republic of China has stated Hong Kong SAR to be FCTC-compliant:** the Government of China has submitted 3 reports to the Secretariat of the FCTC, pursuant to Article 21(1) of the FCTC, on 14 April 2008, 6 July 2011 and 15 April 2014. In all three reports, the “Yes” boxes are ticked for whether Hong Kong has implemented laws to ensure that (i) the health warnings occupy no less than 30% of

the principal display areas; and (ii) the health warnings occupy 50% or more of the principal display areas. It is clear that there is *no obligation* on Hong Kong, by virtue of the FCTC, to increase the size of health warnings;

- (b) **the Guidelines are not binding** – they are not part of the FCTC itself and, as is stated expressly in their recitals, are not binding and are not intended to increase the obligations of the Parties; and
- (c) **neither the FCTC nor the Guidelines cites any evidence.** The Department of Health has, to date, presented no evidence to support its proposal. The Proposal refers, indirectly, to the evidence in the FCTC Guidelines. Those Guidelines do not set out that evidence.

4.9 The Department of Health manifestly failed to identify any need for an increase in the size of health warnings, the “problem” that it seeks to address or the objective that such an increase would achieve.

The Proposal ignores the fundamental role of tobacco packaging

4.10 The packaging of consumer goods, including tobacco products, enables consumers to differentiate between available products. Tobacco is a legal product, and manufacturers compete among themselves for their share of the legal tobacco market. Smoking is an adult choice, and adults who choose to smoke are entitled to be treated fairly, equally and have the right to choose and buy the product they prefer. The ability of manufacturers to distinguish their products through packaging provides a key means by which existing adult smokers are able to freely exercise economic rights of purchase.

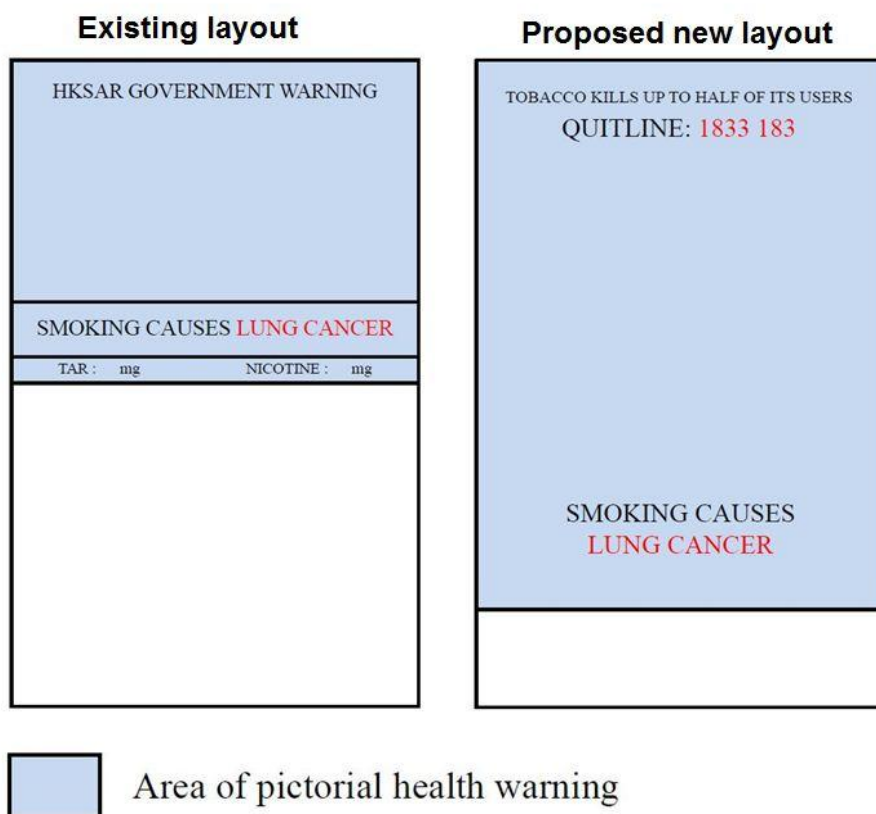
4.11 Packaging is one of the essential and in this market one of the few remaining components of non-price brand competition: **it is the means by which adult smokers identify, obtain information about and choose tobacco products, easily and without confusion.** The branding and get up of packaging allows manufacturers like JTHK to communicate and reinforce information, which allows smokers: (i) to identify, distinguish and differentiate our products from each other, and from our competitors’ products; (ii) differentiate between different variants of a particular brand, and to compare across and within brand families; (iii) recognise different brands, and those with the characteristics they prefer; and (iv) identify that a new product is on the market (including through brand extensions).

4.12 Further, distinctive product packaging is fundamental to facilitate inter- and intra-brand¹¹ navigation and competition, and is the primary tool for developing brand equity, innovation and non-price competition. It is not, and should not be, a simple vehicle for communicating government-mandated health warnings. Manufacturers and consumers must be able to identify and

¹¹ Inter-brand is used in this document to refer to navigation and competition between different brands of tobacco product (i.e. Winston and Camel) whereas intra-brand refers to navigation and competition between members of the same brand family (i.e. Winston Classic or Winston Wild Mint).

distinguish products. This is an essential function of packaging and trade marks.

- 4.13 The Department of Health produced a graphic representation (below) of the proposed new pack layout. That representation, when scaled to the size of an average cigarette pack (as has been done below) vividly demonstrates the tiny area on the front and back of cigarette packs that will remain available to manufacturers for the purpose of differentiating their products.



Larger health warnings are based on a fundamental mischaracterisation of the role of packaging

- 4.14 The Department of Health appears to be proceeding on the basis of a fundamental mischaracterisation of the role of packaging.
- 4.15 Larger health warnings are not based on, or consistent with, a credible and scientifically rigorous understanding of smoking behaviour. The Department of Health appears to be proceeding on the incorrect assumption that tobacco packaging is a reason for smoking initiation, and that the provision of information about the health risks of smoking in larger formats on packaging will change smoking behaviour. These notions are wrong and are not supported by science.
- 4.16 The need for, and likely effectiveness of, tobacco regulation can only be properly and coherently assessed if it is informed by the best contemporary science on the smoking behaviour of adults and minors. In December 2010,

Japan Tobacco International (*JTI*), the JT Group's international tobacco business, responded to the European Commission's Consultation on possible changes to the Tobacco Products Directive, which also addressed plain packaging.¹² Leading experts (notably Professors Steinberg,¹³ Dhar and Nowlis¹⁴) prepared reports, which accompanied JTI's submission, and which gave their independent opinions, on the basis of contemporary scientific thinking, on how the smoking behaviour of adults and minors should best be understood. In JTI's opinion, it flows from these experts' findings that:

- (a) **measures to reduce smoking among minors will only be effective if they control minors' ability to obtain tobacco products and remove cigarettes from the social networks of teenagers.** Access-based solutions take due account of the fact that minors are *naturally* more prone to risk-taking behaviour than adults. As Professor Steinberg explains, decision-making during adolescence is characterised by a heightened emphasis on rewards over risks; a tendency to focus on the immediate, rather than longer term, consequences of a decision; a susceptibility to peer influence; and weak self-regulation. Minors are well aware of the risks of smoking, but may choose to experiment anyway. These factors, together, explain why a psychological profile characterized by sensation-seeking, peer and family influence (i.e. peers and family members who smoke) and the availability of cigarettes are the main risk factors for smoking. Accordingly, measures focussed on packaging are unlikely to be effective;¹⁵ and
- (b) **measures directed at adult smoking behaviour** need to target adults' decision-making at the point of consumption in order to be effective, taking due account of the analysis that adults employ when making decisions about risk. They would also need to be more individualised and to be positively framed, in the light of the triggers to smoking behaviour. Professors Dhar and Nowlis therefore dismiss the likely effectiveness of interventions that reflect the so-called "traditional model" of consumer decision-making, which is based on the notion that rational consumers will shift their smoking behaviour in accordance with the evaluation of already-known information on the health risks of smoking.¹⁶

4.17 These experts demonstrate, firstly, that packaging is not a factor in why adults smoke and, secondly, that the notion that packaging is a reason for smoking by minors or initiation is misconceived. Enlarging health warnings in an attempt

¹² JTI's response is available at: <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

¹³ In respect of this issue of adult decision making, see Professor Laurence Steinberg's report, entitled "Adolescent Decision Making and the Prevention of Underage Smoking" dated 30 November 2010, available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

¹⁴ In respect of this issue of adult decision making, see Professors Dhar and Nowlis's report, entitled "Report on Adult Consumer Behaviour and Decision-Making of Cigarette Smokers" dated 2 December 2010, available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

¹⁵ Professor Steinberg's Report.

¹⁶ Professors Dhar and Nowlis's Report.

to change smoking behaviour is based on a fundamental mischaracterisation of the role of packaging.

- 4.18 The Department of Health should already be keenly aware of this because of the clear results of surveys conducted by the Hong Kong Government's Census and Statistics Department. The Thematic Household Surveys¹⁷ have never identified packaging as a reason for smoking initiation, whether by youths or adults. According to the Thematic Household Survey Report No. 53 (being the most recent available on this issue):

“Some 69.9% of those 645 000 daily cigarette smokers started smoking cigarette because of “influence of friends” and 44.2%, “out of curiosity”. Other commonly cited reasons included “influence of family members” (15.4%), “necessity in social functions” (13.2%) and “refreshing one’s mind” (10.8%).”¹⁸

- 4.19 In other words, the work of societal and peer influences as a causative factor in smoking uptake by young people is acknowledged by the Government. The considerable body of evidence which exists on the reasons for smoking initiation does not suggest any link between packaging and youth uptake.
- 4.20 It follows that, even if it were possible to increase the already high levels of awareness through larger health warnings, it would not produce the desired outcome of reduced initiation or increased quitting.

There is no reliable evidence that larger health warnings will change smoking behaviour

- 4.21 The Department of Health has, to date, presented **no evidence** to justify increasing the size of the health warnings. The burden lies on the Government to justify any proposal to increase the size of health warnings, and it has manifestly failed to do so.
- 4.22 JTHK believes that there is no reliable evidence that larger health warnings would achieve public health objectives. The Department of Health has failed to take into account significant evidence that, in fact, increasing the size of health warnings will not change the behaviour of smokers.

The Hong Kong experience enlarging health warnings

- 4.23 The Department of Health has failed to take into account direct and relevant evidence from Hong Kong. The Hong Kong Government has conducted General Household Surveys since 1982 and Thematic Household Surveys since 2000. These surveys have sought to identify smoking prevalence rates in Hong Kong, notably daily smokers aged 15 or above.

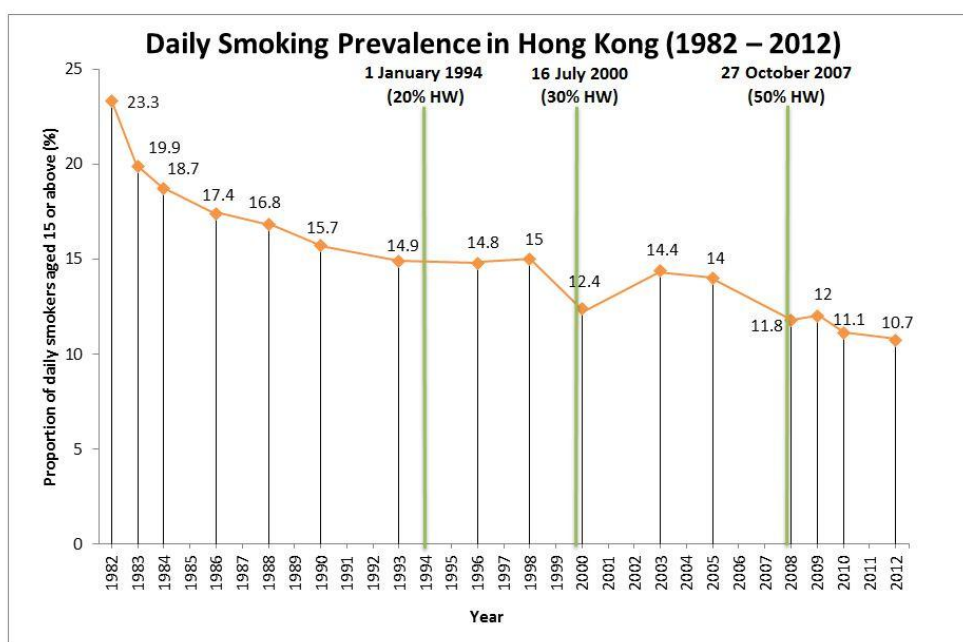
¹⁷ Thematic Household Survey Reports No. 53 (8 November 2013), No. 48 (24 August 2011), No. 36 (20 November 2008), No. 26 (29 August 2006), No. 16 (30 December 2003), No. 5 (30 August 2001). <http://www.censtatd.gov.hk/home/index.jsp>

¹⁸ Report No. 53, p 12. NB: percentages can exceed 100 due to multiple possible answers. Other reasons cited include: “out of curiosity; influence of family members; necessity in social functions; refreshing one’s mind; influenced by public figures / artistes; influenced by TV programmes / movies; killing time; easing tension; to look more mature / stylish”.

4.24 The graph below sets out the results of those surveys for the percentage of daily smokers. The graph identifies the three dates on which health warnings were increased in size:

- (a) from 1 January 1994, the size was specified, for the first time, to comprise 20% of the front and back of cigarette packets (the prior mandated health warnings were of an unspecified size);
- (b) from 16 July 2000, the size was specified as “50 mm x 24 mm” being approximately 25–30% of the front and back of cigarette packs, (depending on the physical size of the pack); and
- (c) from 27 October 2007, the size was enlarged to 50%, with pictures, of the front and back of cigarette packets.

4.25 It is clear that the rate of decline in tobacco prevalence was not affected by increasing the size of health warnings. As increases to 20%, to 25–30% and to 50% did not change smoking behaviour; there is no basis for believing that the latest proposal will change smoking behaviour either.



Source: Thematic Household Survey Reports and General Household Surveys (HKSAR Census and Statistics Department)

The international experience enlarging health warnings

4.26 The evidence that increasing the size of health warnings has not caused a change in smoking behaviour in Hong Kong is consistent with other international evidence.

- (a) A judgment in 2012 of a senior **US Federal Court of Appeal** – which examined the evidence presented by the US Food and Drug Administration (**FDA**) for the proposed introduction of 50% pictorial health warnings – found that there is not a “shred of evidence” that

pictorial health warnings reduce smoking and that evidence advanced by the US Government to support the case for enlarged and pictorial warnings was “*mere speculation and conjecture*”.¹⁹ The Court noted that “*The RIA [regulatory impact assessment] estimated the new warnings would reduce U.S. smoking rates by a mere 0.088% ... a number the FDA concedes is “in general not statistically distinguishable from zero.”*” In March 2013, the US FDA decided not to appeal this judgment and has instead taken its proposals back to the drawing board.²⁰

(b) The **Canadian Wave Surveys** demonstrate that the larger pictorial warnings do not enhance awareness of the health risks of smoking or change the behaviour of smokers. Cross-sectional wave survey evidence was collected in Canada before and after health warnings increased in size from 25% to 50% (with pictures) in 2001.²¹

(i) Daily consumption among continuing regular smokers, both adult and youth, showed no decline between 2000 and 2002. Notwithstanding what the subjects of the surveys said about the would-be effectiveness of larger pictorial health warnings at encouraging them to smoke less, this does not translate into actual reported behaviour.²²

(ii) Professors Dhar and Nowlis state, with regard to Wave 5: “*This survey shows that cigarette consumption, for either those who smoke every day or those who smoke on occasion, was not affected by the new health warnings, at least as of July 2002. This survey also shows that neither quit attempts, number of times tried to quit, nor potential quitters were influenced by these new health warnings. This is a very important finding, because it provides useful evidence, using a more appropriate methodology, that the proposed changes to the health warning messages are not likely to be effective. This finding was confirmed by another study (Gospodinov and Irvine 2004), which found that the Canadian warnings had no effect on*

¹⁹ *RJ Reynolds Tobacco Company v Food and Drug Administration* US Court of Appeals, District of Columbia Circuit, 24 August 2012 at p 25 and p 26, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf), by which the FDA’s rule was declared unconstitutional. The Court of Appeals for the Sixth Circuit upheld the constitutionality of the FDA’s proposed rule (*Disc. Tobacco City & Lottery, Inc v United States*).

²⁰ See statement of Dr. Howard K. Koh, Assistant Secretary for Health, U.S. Department of Health and Human Services, available at <http://www.hhs.gov/ash/news/20130318.html>.

²¹ Surveys by Environics Research Group Limited, “*The Health Effects of Tobacco Health warnings on Cigarette Packages*”, Wave 1 to Wave 13 Surveys of Adults and Adult Smokers and Surveys of Youth, 2001-2007. Canada was the first country in the world to introduce pictorial health warnings covering 50% of the principal display surfaces of the pack.

²² *Ibid.*, Wave 13, Survey of Adults and Adult Smokers, pages 5-6; Survey of Youth, page 6.

*smoking prevalence, nor a statistically significant effect on the amount smoked at a high confidence level.*²³

- (iii) Likewise, the larger pictorial warnings were not successful at getting more smokers actually to attempt to quit. Enviro-nics concludes that *“there have been no significant changes since the November-December 2000 baseline survey in the proportion that stopped smoking for at least 24 hours at least once in the past year”*.²⁴

There has, of course, been a decline in overall prevalence of smoking in Canada since the beginning of the decade, as indicated by the Canadian Wave Surveys. But, it is impossible to attribute any identifiable portion of the decline to the larger size of the warnings.

- (c) A further Canadian study²⁵ undertook an econometric analysis comparing tobacco consumption in Canada over the last six months of 2000 and the first half of 2001. The authors were of the view that such a measure as health warnings introduced on January 1, 2001, would have an effect, if any, in the very near term. The study showed that none of the decline observed in the first half of 2001 could be attributed to the new warnings.
- (d) **Research by Dr Evans, Dr Satchachai and Dr McEwin** on whether larger health warnings reduced smoking prevalence in **Thailand** found, using econometric analysis, that increasing the size of the health warnings from 33% to 50% in 2005 did not reduce smoking prevalence. There was already an ongoing decreasing trend in smoking rates from 2001. The actual smoking rates primarily remained on their trend lines, despite the introduction of significantly larger health warnings in 2005. In other words, the introduction of larger health warnings did not accelerate the decrease in the smoking rate.

The same research identified that Government-supported Global Adult Tobacco Survey²⁶ in Thailand found that *“the prevalence of current tobacco smoking did not show a statistically significant change between 2009 and 2011, among men, women and overall”*, even though Thailand implemented larger health warnings (from 50% to 55%) in 2010.

4.27 In short, available evidence demonstrates that increasing the size of health warnings did not enhance awareness of the health risks of smoking or change smoking behaviour.

²³ Professors Dhar and Nowlis’s Report, paragraph 6.15.

²⁴ Wave 13, Survey of Adults and Adult Smokers, page 7; Survey of Youth, page 7.

²⁵ N. Gospodinov and I.J. Irvine, *“Global Health Warnings on Tobacco Packaging: Evidence from the Canadian Experiment”*, Topics in Economic analysis & Policy, 2004, Volume 4, Issue 1.

²⁶ <http://www.who.int/tobacco/surveillance/survey/gats/thailand/en/>

An unreasonable interference with JTHK's commercial rights and lawful market activity

4.28 The Proposal interferes disproportionately with JTHK's commercial rights as a manufacturer/distributor of a legal product, competing in a legitimate market.

- (a) **Unjustified limitation on trade marks.** Increasing the size of health warnings will only serve to further restrict legal products' packaging and impair the value of their trade marks and brands. Larger health warnings impair the substance of those rights, the goodwill associated with its trade marks and the value of JTHK's brands.

If the Proposal is advanced, certain of the Japan Tobacco Group's trade marks, notably distinctive non-word elements, cannot be used as registered, or currently used, in the remaining 15% of the front and back of cigarette packs. Trade marks will need to be re-designed, re-shaped, re-proportioned and/or re-arranged to such an extent that it risks altering their distinctive character; for some, there may simply be insufficient space to display one or more distinctive elements of the mark on the front or back of the pack such that the distinctive character of the mark could be irreparably impaired.²⁷

- (b) **Unjustified limitation on the ability to communicate with consumers,** and on consumers' rights to product choice, fair competition and product information.

Many consumers are ready to pay a premium to purchase goods bearing a trade mark that they associate with a guarantee of quality. Increasing the size of health warnings will only serve to reduce the value of JTHK's premium brands. The Proposal would reduce JTHK's ability to convey the premium characteristics of its products to existing adult smokers, thereby damaging the brand identity of its products and the associated goodwill. The Proposal restricts JTHK's ability to communicate freely the origin, quality and consistency of its brands with adult smokers using information and branding on the front and back of its cigarette packs.

- (c) **Distortion of free and fair competition.** The Proposal will reduce the ability of JTHK to compete with other, better known, brands in the market. Existing adult smokers will be less able to distinguish each JTHK product on the basis of trade dress, branding and intellectual property. Whilst JTHK will continue to be able to use a limited number of trade dress and design features, the ability to distinguish its

²⁷ Under the TMO, a "trade mark" must be capable of distinguishing the goods or services of one undertaking from those of other undertakings. Courts in Hong Kong have recognised that the essential function of a trade mark is to guarantee the commercial origin of the goods or services in question, by enabling a consumer, without any possibility of confusion, to distinguish the trade mark owner's goods or services from those of a different commercial origin.

products from each other and from competitor products will be materially impaired.

On account of the likelihood that existing adult smokers will be less willing to pay for a premium product if they are unable to identify and distinguish it as such, existing adult smokers are less likely to purchase such products in favour of less expensive brands. This so-called “down-trading” from premium products to mid-price or value brands will result in damage to JTHK’s brands and business, and benefit notably the better known brands and the lower priced brands in the market.

- (d) **Reduced ability to launch new products and evolve brands.** Trade dress of a cigarette pack is key in enabling JTHK effectively to change other elements of branding over time. The Proposal would also materially impair JTHK’s ability to launch new products in Hong Kong (other than on the basis of price), whether new brands or new brand variants, incorporating innovations or providing additional choice for existing adult smokers. With only 15% of the front and back of cigarette packs by which consumers can identify and distinguish the origin and quality of the product, it would be significantly harder for JTHK to demonstrate that:
 - (i) the new brand has particular characteristics, innovations or features; or
 - (ii) in particular, that it is a premium product.

Larger health warnings harm the Japan Tobacco Group’s legal rights

- 4.29 The Japan Tobacco Group has invested very substantially in its intellectual property rights, brands and products to compete with products available to existing adult smokers. This investment is reflected in the strong equity of its brands, which are worth billions of US dollars.
- 4.30 The Japan Tobacco Group owns a broad range of sophisticated intellectual property rights in relation to the packaging of its tobacco products. Its portfolio of registered trade marks in Hong Kong take a variety of forms including word marks, devices or design marks, both alone and claimed as composite marks comprising word and device elements, including composite marks displayed on cigarette packs that claim the shape of the pack as an element of the trade mark. Extensive efforts are taken to protect such rights by way of a rolling programme of trade mark registrations, oppositions, renewals and enforcement actions.
- 4.31 The Proposal’s larger health warnings will limit the space left for manufacturers’ trade marks and branding to such a critical extent as to harm

legal rights that are protected, in particular, by the Basic Law (e.g. freedom of expression and the right to property) and the TMO.²⁸

- 4.32 The power conferred on the Department of Health by section 18 of the Smoking (Public Health) Ordinance, in respect of the form and content of health warnings on tobacco products, cannot be exercised in an arbitrary manner, which would be the case, if the Proposals are not supported by good evidence that they are likely to have effect. Indeed, the evidence so far, as seen by experts, is that they would not.
- 4.33 Further, the Department of Health's power under section 18 of the Smoking (Public Health) Ordinance cannot be exercised in a manner which contravenes or is inconsistent with the Basic Law or the TMO.
- 4.34 Article 6 of the Basic Law protects the ownership of property, including intellectual property. Serious issues are raised under Article 105 of the Basic Law, in Chapter 5 on the Economy, which protects against the expropriation, deprivation or limitation on the economically viable use of property. Article 105 provides:
- “The 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.*
- Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.*
- The ownership of enterprises and the investments from outside the Region shall be protected by law.”*
- 4.35 Under the Proposal and against the background of the existing regulatory measures in Hong Kong on tobacco control, certain of Japan Tobacco Group's trade marks would be left without any meaningful alternative use and/or without any reasonably economically viable use, amounting to an unjustified limitation and unlawful (de facto) deprivation of property in the absence of compensation, in breach of Article 105.
- 4.36 The limitation on JTHK's ability to communicate also engages the freedom of expression protected under Article 27 of the Basic Law. Expression encompasses the imparting (by tobacco manufacturers) and the receiving (by consumers) of materials intending to convey information, including commercial speech and use of intellectual property. It is one of the essential foundations of a democratic society, and the necessity for any restrictions must be convincingly established. Article 27 provides:

²⁸ For example, under the TMO, the Proposal may render certain trade marks revocable for non-use within three years, and the Japan Tobacco Group may over time lose the ability to maintain the enhanced protection available to its trade marks as well-known trade marks.

“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

- 4.37 In the absence of any meaningful justification advanced in the Proposal, JTHK considers that the necessity – or indeed the appropriateness or proportionality – of larger health warnings have not been convincingly established.
- 4.38 The Proposal therefore raises serious and significant issues under the Basic Law.

International law protections

- 4.39 The Japan Tobacco Group’s rights are also protected by relevant international commitments including the World Trade Organisation Agreements on Trade-related Aspects of Intellectual Property Rights (“**TRIPS**”), the Agreement on Technical Barriers to Trade (“**TBT**”), and the World Intellectual Property Organisation’s Paris Convention for the Protection of Intellectual Property (“**Paris Convention**”).

- 4.40 Of particular relevance is, firstly, Article 20 of TRIPS, which provides that:

“The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.”

- 4.41 In order to prevent trade distortion, Article 20 of TRIPS limits WTO Members’ ability to impose certain special requirements on the use of a trade mark. It protects trade marks from unjustifiable encumbrances by requirements such as use in a special form or in a manner detrimental to the trade mark’s capacity to distinguish products. TRIPS Article 20 also protects against the ultimate encumbrance, namely a requirement that prevents using the trade mark on the product.

- 4.42 Secondly, Article 2.2 of the TBT provides:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information related processing technology or intended end-uses of products.”

- 4.43 A measure increasing the size of health warnings constitutes “technical regulations” under the TBT. Technical regulations that have limiting effects on the competitive opportunities of imported products are highly trade restrictive.
- 4.44 In addition, quite separately, the Proposal engages various investment protections under bilateral investment treaties. Of the 17 treaties entered into by Hong Kong, a relevant example is the bilateral investment treaty entered into on 15 May 1997 between Hong Kong, China SAR, and Japan that protects investors who make an investment, including in intellectual property (see, in terms, Article 1(3)), in the other State. The treaty contains notable protections, including protection against unfair and inequitable treatment and protection against unreasonable or discriminatory conduct (both Article 2(3)) and the right to compensation for the deprivation of investments (Article 5).
- 4.45 The Proposal therefore engages, and disregards, commercial and legal implications for Hong Kong, and so risks reducing Hong Kong’s international business reputation. The Proposal also creates identifiable international litigation risk for Hong Kong, both at the possible instance of third country States (under the WTO disputes regime) and/or of investors (under the investor-State arbitration mechanisms regularly included in Hong Kong’s bilateral investment treaties).

Impact on illegal trade in tobacco products

- 4.46 JTHK is concerned that the Proposal risks facilitating and encouraging the illegal trade in tobacco products. Increasing regulation will only raise the costs to the legal tobacco industry and enhances the competitive advantage of the illegal trade. Smugglers operate across multiple borders and continents, and quickly adapt their operations to take advantage of new opportunities that result from changes in taxation and regulation.
- 4.47 The Proposal will diminish the role of trade marks and branding and, as explained above, reduces the premium value of JTHK’s brands. This facilitates the task of counterfeiters (as there is less branding to copy on the packaging and such branding uses sophisticated combinations of distinctive colours) and increases the opportunity for contraband smugglers (to meet consumers’ demand for premium packaging).
- 4.48 This, in turn, has negative consequences: on youth smoking (as illegal cigarettes are more available to youth), which defeats any purpose of the Proposal; on crime; on the public treasury; on the legal tobacco industry; and on convenience stores and other legitimate retailers.
- 4.49 JTHK believes that the Proposal to increase the size of health warnings should be examined critically from the perspective of the impact on illegal trade. There is no indication that the Department of Health has considered this issue.

JTHK's Proposed Alternative Solutions

- 4.50 There are less restrictive, more targeted and proportionate alternative solutions to achieve legitimate public policy objectives and to ensure that smokers continue to be reminded of the health risks of smoking.
- 4.51 The Proposal includes changes to the content of the health warning messages. The Department of Health should first examine whether their public policy objectives can be achieved through changes to the content of health warnings within the existing mandated space (50%) or through other communications vehicles and points of communication, rather than seeking to increase the size of health warnings.
- 4.52 In particular, **off-pack communications**: the pack is not, and should not be, a simple vehicle for communicating government-mandated health warnings. Regulators cannot rely excessively on on-pack health warnings whilst underutilising and failing adequately to consider other communication vehicles, such as television, print media, newspapers, magazines and the Internet. Official research²⁹ suggests that television is cited by today's adult consumers and minors as the main source of information on smoking and health. Minors also cite schools as a main source of information. Print media, newspapers and magazines and the Internet³⁰ are also important sources of information. JTHK believes that regulators should consider a mix of communications vehicles and points of communication, rather than relying on the pack alone.
- 4.53 Furthermore, JTHK shares a common goal with regulators: minors should not smoke and should not be able to obtain tobacco products. To the extent that the Department of Health's motivation for the Proposal (which has not yet been spelt out) is to **prevent minors from smoking**, it follows notably from the Thematic Household Survey in Hong Kong and the work of Professor Steinberg, referred to above, that measures will only be effective if they control minors' ability to obtain tobacco products and remove cigarettes from the social networks of teenagers.
- 4.54 The Department of Health should examine and assess solutions that have been adopted by other jurisdictions with the goal of reducing the prevalence of smoking by minors and addressing the key methods by which minors access tobacco products:
- (a) more effective, targeted enforcement of the current regulatory regime;
 - (b) alternative legislative measures to tackle access by minors to tobacco products, such as:

²⁹ See, notably, Surveys by Environics Research Group Limited, "*The Health Effects of Tobacco and Health Warnings on Cigarette Package*", Wave 13, Survey of Adults and Adult Smokers (2008), page 14; Survey of Youth (2008), page 14.

³⁰ The popularity of the internet as a source of information amongst minors on the risks associated with smoking has also been identified in surveys. See, notably, Elliott and Shanahan Research for the Australian Department of Health, "*Evaluation of the effectiveness of graphic health warnings on tobacco products*", (2008), page 174.

- (i) penalising purchase of tobacco products by adults for minors (often referred to as “proxy” purchasing); and
- (ii) ‘negative licensing’ of retailers - retailers can be prohibited from selling tobacco products if they repeatedly sell to minors;
- (c) mandating or reinforcing retail access prevention measures, such as a ‘No ID No Sale’ programme and including youth access prevention signage at point of sale;³¹ and
- (d) renewing targeted public information campaigns to quickly and effectively raise the awareness of tobacco control measures, such as the proxy-purchasing offence and negative licensing regime.

4.55 JTHK considers that these alternative solutions (potentially amongst others, depending on the objectives of the Department of Health, once identified) should be examined and assessed before any further steps are taken to increase the size of health warnings in Hong Kong.

³¹ See, for example, <http://noidnosale.org/>.

5. PROHIBITION ON E-CIGARETTES

- 5.1 JTHK is fundamentally opposed to a ban on electronic cigarettes. It is disproportionate, unnecessary and an ineffective legislative response. There is no reliable evidence that supports prohibiting electronic cigarettes. The Proposal is manifestly inadequate; the Department of Health should enable an informed public debate and ensure that there is adequate consultation before inviting LegCo to take a position on this issue.
- 5.2 Electronic cigarettes are consumer products that provide an inhalable aerosol by direct electrical heating of a liquid contained within the device or a replaceable cartridge. The liquid typically consists of a carrier, such as propylene glycol or glycerol, and flavour compounds which on heating form a visible aerosol. Most electronic cigarette liquids also contain nicotine, although nicotine-free liquids are available. Electronic cigarettes differ from tobacco products in that they do not contain tobacco. They also differ from medicinal NRT (nicotine replacement therapy) products in that they do not make therapeutic claims (e.g. about smoking cessation).
- 5.3 In Hong Kong, nicotine is characterized as a poison under the Pharmacy and Poisons Ordinance and associated Regulations. The wholesale and retail sale of such electronic cigarettes requires various licences. The Ordinance and Regulations' regime also imposes certain labelling requirements. Also, if electronic cigarettes are correctly defined as "pharmaceutical products", they cannot be imported unless under licence and subject to prior registration with the Pharmacy and Poisons Board. In other words, Hong Kong has a regulatory regime for electronic cigarettes.
- 5.4 A report produced for the WHO and considered at the Sixth Conference of the Parties to the FCTC (**COP6**)³² has recognised that electronic cigarettes are "*the subject of a public health dispute among bona fide tobacco-control advocates.*" According to the report, while some experts consider that electronic cigarettes may harm public health efforts to "denormalize" smoking, other "*experts suggest that in some smokers who have failed treatment, have been intolerant to it or who refuse to use conventional smoking cessation medication, the use of appropriately regulated ENDS may have a role to play in supporting attempts to quit.*" The report was welcomed by COP6, which did not require Parties to prohibit the sale of these products.³³ Prominent organisations dedicated to tobacco control, such as Action on Smoking and Health³⁴ and the British Heart Foundation³⁵, support the appropriate regulation of electronic cigarettes but not their prohibition.

³² FCTC, *Electronic nicotine delivery systems – Report by WHO*, FCTC/COP/6/10 Rev. 1, 1 September 2014. Available at: http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10Rev1-en.pdf?ua=1

³³ FCTC, *Decision – FCTC/COP6(9) – Electronic nicotine delivery systems and electronic non-nicotine delivery systems*, 18 October 2014. Available at: [http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6\(9\)-en.pdf?ua=1](http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6(9)-en.pdf?ua=1)

³⁴ See ASH briefing, *Electronic Cigarettes*, November 2014. Available at: http://ash.org.uk/files/documents/ASH_715.pdf

- 5.5 Both the US and European authorities have recently examined how electronic cigarettes should be regulated, and neither has proposed prohibiting their sale. For example, the EU TPD2 contains strict regulations on (among other things) product quality, labelling, consumer information and advertising and promotion, but permits the sale of electronic cigarettes in the EU provided that these conditions are met.
- 5.6 The main drivers for the regulation of electronic cigarettes are recognised as the FCTC, the EU TPD2 and the FDA. The Panel should note that none of these organizations are calling for a ban on electronic cigarettes.
- 5.7 JTHK believes that electronic cigarettes should be legal for adults to purchase and use. Adults who choose to use electronic cigarettes are entitled to be treated fairly, equally and have the right to choose and the ability to obtain the products they prefer. Regulation, rather than prohibition, is the most appropriate policy.
- 5.8 JTHK supports the development of appropriate, targeted and proportionate regulation for electronic cigarettes that meets internationally accepted principles of Better Regulation. We believe that:
- (a) Adults should be free to choose whether they wish to use electronic cigarettes and no one should use them without understanding the risks associated with doing so.
 - (b) All marketed electronic cigarettes should comply with all relevant regulations, such as those concerning consumer product safety, electrical safety and consumer protection from misleading marketing claims. If anyone chooses to make a claim that their product can assist with smoking cessation, their respective electronic cigarettes should be regulated as medicinal products or medical devices, as for existing medicinal NRT (Nicotine Replacement Therapies).
 - (c) Minors should not use electronic cigarettes and should not be able to obtain these products. Regulation of electronic cigarettes should aim to keep electronic cigarettes out of the hands of minors and to remind users of the risks associated with their use.
 - (d) Governments and regulators should avoid excessive regulation that prevents adult consumers from choosing these products.

Negative consequences of a ban on electronic cigarettes

- 5.9 The introduction of a ban of electronic cigarettes will interfere with **manufacturers' and retailers' commercial rights** (for instance, to property and to trade), many of which are protected by national and international law, as well as with adult electronic cigarette users' ability to access electronic cigarettes.

³⁵ See British Heart Foundation, *Policy Statement – Electronic Cigarettes*. Available at: https://www.bhf.org.uk/~media/files/publications/policy-documents/policy_statement_e-cigarettes_for_sitecore.pdf

- 5.10 A ban on electronic cigarettes effectively **discriminates between different legally available products for adult purchase**. A number of adults enjoy the use of electronic cigarettes. The proposed prohibition limits consumer choice between legal products and creates unnecessary barriers to trade. It unjustifiably infringes fundamental legal rights to trade as protected by international trade treaties, such as the TBT.
- 5.11 A prohibition of electronic cigarettes will **increase opportunities for illegal trade**, as it will create a void that will be filled by new retail opportunities for the criminal gangs behind the illegal market. As can be seen from history, prohibition increases opportunities for the illegal trade. As with the prohibition of alcohol in the US during the early 20th century, the continued demand for alcohol was satisfied by unregulated and illegal product. Such products were often of poor quality, with consequent increased health risks associated with their consumption. With respect to tobacco products, similar issues have arisen in Bhutan. Following a ban on the sale of tobacco products, Bhutan has a thriving illegal tobacco market.³⁶

Better Regulation and the Precautionary Principle

- 5.12 An overly risk averse approach by regulators may drive them to resort to unwarranted application of the precautionary principle. The precautionary principle means regulating for a threat of serious or irreversible harm, where there is scientific uncertainty about the nature and the extent of the risk. This principle has to be applied with a view to encouraging innovation and further scientific research and only to the extent necessary to prevent the threat.³⁷
- 5.13 The main problem with a prohibition of electronic cigarettes is that it is substantiated on the notion “*prevention is better than the cure*” and thus aims to reduce the potential risks electronic cigarettes may pose on health without having a clear assessment of these risks, their probability of occurrence and possible effects.
- 5.14 Given that there is no reliable scientific evidence supporting a prohibition of electronic cigarettes, and that prohibition would have a number of negative effects (as described above), reasonable and proportionate regulation of electronic cigarettes, after full public consultation and detailed study, is a more appropriate response.

³⁶ See: Givel, Michael S. “*History of Bhutan’s prohibition of cigarette: Implications for neo-prohibitionists and their critics*”, *International Journal of Drug Policy* 22 (2011) 306–310.

³⁷ See: WHO: The precautionary principle: protecting public health, the environment and the future of our children, http://www.euro.who.int/_data/assets/pdf_file/0003/91173/E83079.pdf

6. CONCLUSION

- 6.1 The Department of Health has not provided any reliable evidence or justification that its Proposal to increase the size of health warnings is either necessary in Hong Kong or would, in fact, change smoking behaviour. Its Proposals to ban electronic cigarettes are similarly misguided.
- 6.2 JTHK believes that the Proposal should not proceed. The shortcuts in the process should be avoided, and an appropriate and rigorous procedure should be followed by the Department of Health so that impacts on intellectual property rights, branding, competition and Hong Kong's international obligations are properly assessed, and less restrictive alternative measures to achieve legitimate public policy objectives are properly considered.
- 6.3 JTHK welcomes the opportunity, at the deputation meeting, to share with the Panel our views in more detail and our proposals based upon our experience.

Japan Tobacco (Hong Kong) Limited
23 June 2015



Japan Tobacco (Hong Kong) Limited's response to the Department of Health's "Proposal to Amend Health Warnings on Tobacco Product packets and Retail Containers"

10 January 2017

Japan Tobacco (Hong Kong) Limited markets world-renowned cigarette brands such as Winston, Mevius, Camel and More in Hong Kong. It is part of the Japan Tobacco Group of companies, a leading international tobacco product manufacturer whose other international brands include Benson and Hedges, Silk Cut, Sobranie of London, Glamour, LD and Natural American Spirit. For more information, visit www.jt.com.

概要

衛生署至今沒有跟隨委員會的指示；立法諮詢程序不公平

- 衛生署的立法建議基本上與18個月前的建議相同；儘管建議引起重大憂慮，當局似乎執意將其貫徹推行。
- 鑒於迄今立法建議程序不當，根本無法適當評估2016年立法建議或證明建議有理據。
 - 當局並未向有關持份者進行實質性諮詢，這與委員會2015年7月的指示相悖。
 - 對於委員會成員和有關持份者在過去18個月提出的眾多憂慮，當局並未提供有意義的回應。
 - 當局並未就替代方案、成本、效益和影響進行衡量及評估。
- 日本烟草香港相信，如果能遵循適當程序並審視所有相關問題和證據，85%的面積要求將被擱置。

日本烟草香港僅反對健康忠告的面積需佔85%

- 倘若衛生署認為健康忠告必須更新，那麼變更內容（圖像）便已足夠，而且不會引起異議。

既無需要亦無理據支持在香港擴大健康忠告的面積

- 香港是全球吸煙率最低的地區之一 -- 僅為10.5%，而衛生署拒絕說明佔85%面積的健康忠告旨在對吸煙率達到什麼程度的跌幅。
- 香港現今大眾對吸煙帶來健康風險的意識水平已非常高，無庸置疑。
- 香港現時佔50%面積的圖像健康忠告已經完全符合《煙草控制框架公約》（《控煙公約》）對健康忠告面積的要求。《控煙公約》並未強制要求更大的健康忠告面積。

面積佔85%的健康忠告與減少吸煙，兩者之間並無關聯

- 衛生署的資料顯示，過去擴大忠告面積並未加快吸煙率的下降 - 儘管擴大至85%情況依然會一樣。
- 在國際上，關於吸煙率的統計證據表明，更大的健康忠告並不能減少吸煙。美國上訴法院在審核較大健康忠告的證據時已確認此點。

對知識產權、資訊和競爭構成威脅

- 立法建議的合法性存有嚴重而重大的問題。立法建議違反了香港法例第559章《商標條例》和《基本法》規定的權利，尤其是《基本法》之下有關財產（第105條）和自由表達（第27條）的權利。
- 將封包的正面和背面可供生產商使用的空間降至區區15%，會損害商業競爭，對成年吸煙人士甄別不同產品的權利造成無理干預，窒礙資訊傳達。

如煙包包裝須作任何變更，委員會應認可為期12個月的「適應期」

- 衛生署就適應期的立場並不明確。12個月之適應期實屬合理，並符合直接相關的先例。

EXECUTIVE SUMMARY

The procedure to date ignores the Panel's directions and is unfair

- The Administration's proposal is essentially identical to the one of 18 months ago, and it seems intent on pushing it through, regardless of serious concerns.
- The 2016 Proposal cannot be properly assessed or justified in the light of the improper procedure followed to date.
 - No substantive consultation has been held with stakeholders, contrary to the direction of the Panel in July 2015.
 - No meaningful response has been given to numerous areas of concern raised by Panel members and stakeholders over the last 18 months.
 - No attempt has been made to evaluate alternatives, costs, benefits and impacts.
- JTHK is confident that, if appropriate procedures are followed and all relevant issues and evidence are examined, the 85% size requirement would be shelved.

JTHK only objects to the size of the 85% health warning

- If the Administration considers that the health warnings must be refreshed, then changing the content (the pictures) is sufficient and unobjectionable.

There is no need or justification to increase the size of health warnings in Hong Kong

- Hong Kong has one of the lowest rates of smoking prevalence in the world – 10.5% – and the Administration refuses to say what percentage the 85% warnings are to achieve.
- No one has questioned that there is already a high level of awareness of the health risks of smoking in Hong Kong.
- Hong Kong's 50% pictorial health warnings are already compliant with the Framework Convention on Tobacco Control's (*FCTC*) size obligations. There is no *FCTC* obligation to increase the size of health warnings.

There is no link between 85% health warnings and reducing smoking

- The Administration's own data shows that the decline in smoking prevalence has not accelerated when warnings have been enlarged in the past – and it will not with 85%.
- In Hong Kong and internationally, the statistical evidence on prevalence shows that larger health warnings do not reduce smoking. That has been confirmed by a senior US Court of Appeal when reviewing the evidence on larger health warnings.

A threat to intellectual property, communication and competition

- There are serious and significant questions as to the legality of the Proposal. It breaches rights under the Trade Marks Ordinance (Cap. 559)(*TMO*) and the Basic Law, notably as regards the right to property (Art 105) and freedom of expression (Art 27).
- Reducing to just 15% the manufacturers' space on the front and back of the pack damages competition and communication with adult smokers by unjustifiably interfering with their rights to differentiate between available products.

The Panel should endorse a 12 month "adaptation period" (if changes are adopted)

- The Administration is uncertain of its position on an adaptation period. A 12 month period is reasonable and in line with directly relevant precedents.

1. INTRODUCTION

1.1 On 26 December 2016, the Panel on Health Services (*Panel*) invited interested parties to give views on the Department of Health (Food and Health Bureau (*FHB*))’s paper on “Proposal to Amend Health Warnings on Tobacco Packets and Retail Containers” (LC Paper No. CB(2)386/16-17(05)(*2016 Proposal*)) at a special meeting on Tuesday, 17 January 2017. The critical proposal is to increase the size of health warnings on cigarette packets from the existing 50% pictorial health warnings to 85% of the front and back of packaging.

1.2 This proposal is identical to the one made in May 2015.¹ At that time, the Panel on Health Services (*Panel*) held a special meeting on 6 July 2015 to receive deputations on the 2015 Proposal, and concluded that:

“the Administration should revert to the Panel on how it would take forward the legislative proposals after communicating with the tobacco industry and the relevant stakeholders having regard to their concerns over the legislative proposals.”²

1.3 There has been no consultation with the industry on substantive concerns over the legislative proposal. Panel members and stakeholders have consistently raised concerns regarding the lack of need, evidence or justification for the 85% proposal, its damaging impact on legal and commercial rights and the risk of facilitating the illegal trade. These serious concerns have effectively been ignored.

1.4 The process has been unfair. The Administration has proceeded on the basis that its 85% health warning proposal has, in principle, been accepted. But, it is clear, notably from the Panel’s meeting on 19 December 2016, that issues remain to be resolved and it has not to date been accepted by the Panel.

1.5 Japan Tobacco (Hong Kong) Limited (*JTHK*) wishes to register, again, its strong and consistent opposition to the process and to the proposal to increase the size of health warnings on cigarette packets. These submissions oppose only the 85% size element of the Proposal. Put briefly, 85% health warnings are unnecessary, unjustified and disproportionate, and increasing their size from 50% will not reduce smoking prevalence.

1.6 JTHK sets out below the fundamental procedural and substantive weaknesses of the 2016 Proposal and the materials presented to date by the Administration.

¹ “Legislative proposals to strengthen tobacco control” (LC Paper No. CB(2)1456/14-15(07))(*2015 Proposal*). The only amendments relate to the lid of a drum shape container and additional requirements relating to the indication of tar and nicotine yields (see Annex B to the 2016 Proposal). JTHK has previously set out its substantive, technical and procedural concerns in its submissions dated 23 June 2015 (*June 2015 Submission*) and 22 July 2016 (*July 2016 Submission*). These are attached as Annexes 1 and 2 to this submission.

² LC Paper No. CB(2)373/15-16, Minutes of special meeting held on Monday 6 July 2015 (minutes identified as having been seen by the Administration), paragraph 29.

2. PROCEDURAL UNFAIRNESS OF THE PROPOSAL

- 2.1 JTHK welcomes the opportunity to present to the Panel, for a second time, written and oral submissions, and is grateful to the Panel for having arranged a further deputation. The Panel has – again – been left to conduct public deputations in the continued absence of meaningful consultation with stakeholders or an appropriate evidence-based preparation of the file.
- 2.2 The 2016 Proposal and the process adopted to date are unfair. From a more technical perspective, they are contrary not only to principles of good governance and due process (including internationally recognised Better Regulation principles and the Financial Secretary’s “*Be the smart regulator*” programme), but also to the protections afforded by the common law and natural justice.³
- 2.3 It is particularly striking that the process has not followed the clear directions from the Panel at the 6 July 2015 meeting. The Chairman of the Panel concluded that “*there is a need for this Panel to make clear to the Government that the process has to be proper ... different stakeholders should have a chance to voice their views*”. The process must be fair and consultation should mean real consultation.
- 2.4 The 2016 Proposal cannot be properly assessed or justified in the light of the improper and unfair procedures described below.
- 2.5 JTHK is confident that, if appropriate procedures are followed and all relevant issues and evidence are examined, the 85% size requirement would be shelved.

Unfair procedural “short cuts”

- 2.6 The procedure continues to involve improper “short cuts” that deny Panel members and stakeholders of the chance to understand the proposal. The “short cuts” can be seen by asking various questions that arise in respect of any and every proposal for new regulation, but to which the Administration has not provided answers in this case:

What “problem” is being addressed and is there a “need” in Hong Kong for 85% health warnings?

- 2.7 Hong Kong already has pictorial warnings that cover 50% of the front and back of cigarette packets. Neither the 2015 Proposal nor the 2016 Proposal identifies the nature or scale of the specific “problem” which the proposed regulation seeks to address, or any valid need for larger health warnings in Hong Kong. How can a proposed regulatory change be properly assessed if neither the problem nor need is identified?
- 2.8 JTHK believes that there is no problem or need to address, and the existing 50% pictorial health warnings should be retained:
- (a) Hong Kong is already compliant with its international obligations, namely Article 11(1)(b) of the FCTC, as confirmed by the People’s Republic of

³ For more detail on these principles and protections, see paragraphs 3.4 to 3.6 of the June 2015 Submission.

China's submissions to the FCTC Secretariat.⁴ If the Administration sought to describe its 85% proposal as being an "international obligation" (the title to paragraph 4 of its letter to JTHK dated 31 May 2016), such a reference would obviously be wholly misleading. The non-binding Guidelines of the FCTC, although often quoted in the 2016 Proposal, do not create a problem to be addressed, nor a need or requirement to adopt 85% health warnings.

- (b) Smoking prevalence in Hong Kong is 10.5% in 2015.⁵ This is *one of the lowest rates in the world*, and this further year-on-year drop in prevalence continues the gradual decline since the Hong Kong surveys began in 1982.
- (c) No one has ever questioned that there is already a high level of awareness in Hong Kong of the health risks of smoking.
- (d) No Thematic Household Survey in Hong Kong has ever identified packaging as a reason for smoking initiation, whether by youths or adults. The considerable body of evidence which exists on the reasons for smoking initiation does not suggest any link between packaging and youth uptake.⁶

2.9 Simply referring (as the 2016 Proposal does) to non-binding international FCTC Guidelines, the fact that a very limited numbers of different countries have adopted 85%, or larger, health warnings (or indeed different tobacco control measures) and that "*the Administration considered it high time to change the prescribed forms of the health warnings*", is not an answer to the fundamental issues of problem identification and need for 85% health warnings.

2.10 If the Administration considers that the health warnings must be refreshed, because the existing regulations have been in place since 2007, then changing the content (the pictures) is sufficient and unobjectionable. This would be a fairer approach, and JTHK does not object to those elements of the 2016 Proposal.

What is the objective of the proposal?

2.11 Neither the 2015 nor 2016 Proposal identifies any clear objectives for increasing the size of health warnings. It has been left to the LegCo Secretariat to repeat an oral statement by the Under Secretary for Food and Health that "*it was hoped that smoking prevalence in Hong Kong could be lowered to single digit in the not-too-far away future*"⁷ from the current 10.5% prevalence rate. The objective is, therefore, to change smoking behaviour to reduce smoking prevalence. The Administration has never been more specific – is it 9%, 5%, 3%? How can the proposal be assessed if the objective is unstated?

What is the evidential basis to justify the proposal?

⁴ See the details at paragraphs 4.6 to 4.8 of the June 2015 Submission.

⁵ Thematic Household Survey Report No. 59, Census and Statistics Department, February 2016.

⁶ See, for example, paragraphs 4.14 to 4.20 of the June 2015 Submission and the Expert Reports of Professor Steinberg, and Professors Dhar and Nowlis, at <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

⁷ LegCo Secretariat Briefing dated 13 December 2016 (LC Paper No. CB(2)386/16-17(06)), para 6.

- 2.12 There must be clear, reliable and relevant evidence to support and justify the Proposal. Members of the Panel and stakeholders have consistently requested to see the Administration's evidence base. There is a major evidence deficit in this matter. Not a shred of evidence – and specifically no evidence relevant to Hong Kong – had been presented by the Administration, until the limited references set out for the first time in the 2016 Proposal paper dated 13 December 2016.
- 2.13 But, the 2016 Proposal ignores direct and relevant Hong Kong statistical evidence and relevant analysis from overseas. Rather, the Administration refers to materials that are irrelevant, flawed, misguided or of little value in Hong Kong. The Administration has been selective in the materials it has presented, misleading in their presentation and has not assessed relevant information. This is unfair on the Panel and stakeholders. The evidence deficit is described further below.

What alternatives have been considered, including maintaining the status quo of 50% health warnings?

- 2.14 Despite submissions having been made on alternative solutions, none have been identified and/or presented to the Panel for consideration. JTHK has set out alternatives which it considers should form part of the consultation process; it is these alternatives, and not 85% health warnings, that the Panel should take forward (if anything).⁸ The absence of alternatives demonstrates a closed mind and an intention to push through 85% health warnings, regardless of serious concerns.

Where is the regulatory impact assessment (RIA)? What is the cost / benefit analysis between different options and what impact will the proposal have on stakeholders?

- 2.15 No RIA has been conducted and there is no analysis of all direct and indirect costs associated with the 2016 Proposal. No cost / benefit analysis has been conducted and/or objections have been ignored and/or objections have been brushed aside without meaningful consideration.

No public or stakeholder consultation on the substance of the 85% proposal

- 2.16 The Chairman of the Panel was explicit at the 6 July 2015 meeting: as the industry will be affected, “*the Government has a duty to take up these points with the industry during the legislative process and come back to us in LegCo to see what should be done further*”.
- 2.17 In this context, the Chairman had already made it clear that “*the purpose of this special meeting [of the Panel on 6 July] is not a consultation exercise for the Government.*” Similarly, the deputation process on 17 January 2017 does not negate the need for the Administration to consult meaningfully.
- 2.18 As set out above, the Administration has not consulted the tobacco industry on the substance of the 85% health warning proposal. The Administration's engagements since the statements by the Chairman of the Panel have been solely on technical issues and/or in the form of briefings, and did not address the substance – i.e. the size

⁸ June 2015 Submission, paragraphs 4.50 to 4.55.

of the health warning. The Panel should be extremely wary of the “smokescreen” engagements since the July 2015 special meeting.

- (a) In May 2016, the FHB wrote to stakeholders to “*facilitate the tobacco trade’s understanding and preparation for the implementation of the proposal*”⁹ and to invite submissions “*on the layout, adaptation period of the amendments and other technical specifics regarding the proposal*”;¹⁰ and
 - (b) in November 2016, the FHB held a “*briefing on the technical issues*” related to the proposal.¹¹
- 2.19 These engagements did not concern the substance of the proposal. This explains the incomplete list of issues appearing in Annex A to the 2016 Proposal which purportedly summarises the concerns raised at the May 2016 meeting.
- 2.20 In this regard, the reference by the Under Secretary for Food and Health at the 6 July 2015 deputation to Article 5.3 of the FCTC as a purported explanation for not consulting the industry on the Proposal is wholly misplaced and wrongfully distorts the FCTC:
- (a) Article 5.3 does not exclude consultation with the tobacco industry;
 - (b) Article 5.3 expressly requires Parties to act “*in accordance with national law*”. The Chairman of the Panel has stipulated, in accordance with Hong Kong law and fundamental requirements of due process, that the Administration must conduct a consultation process; and
 - (c) seeking to exclude the industry in respect of the making of regulations that govern that industry is wrong as a matter of principle, balance and effectiveness. As the Chairman of the Panel noted in closing the deputation on 6 July 2015, “*I believe that the panel has played the role of check and balance against the Government by having this hearing.*”
- 2.21 It falls to the Administration to explain its failure to proceed as directed by the Panel. The process remains unfair, fundamentally flawed and an improper basis on which to adopt 85% health warnings.

The 2016 Proposal does not deal with the issues and objections raised previously

- 2.22 A series of substantive and procedural concerns have been raised consistently by members of the Panel and stakeholders since the start of this process. So, for example, issues such as lack of consultation, the goal of the legislation, questions regarding the effectiveness of 85% health warnings, the evidence to justify the measure, the proportionality of the proposed warnings, the impact on trade marks and branding, the issue of illicit trade and the short transitional period, were all voiced by members at its meeting on 18 May 2015¹² and thereafter.¹³

⁹ 2016 Proposal, paragraph 6.

¹⁰ FHB letter to JTHK dated 31 May 2016, paragraph 10.

¹¹ FHB letter to JTHK dated 4 November 2016, paragraph 1.

¹² LegCo Secretariat Briefing dated 2 July 2015, LC Paper No. CB(2)1808/14-15(02), paras 6 and 8.

2.23 These issues have remained substantively unresolved to date. In the exercise of its role as a “*check and balance*” on the Administration and in the interest of fairness, the Panel should impose means of ensuring that all relevant issues and evidence are assessed by the Administration before any regulatory amendment is tabled.

3. THERE IS NO LINK BETWEEN 85% HEALTH WARNINGS AND REDUCING SMOKING

3.1 The burden lies on the Administration to justify any proposal to increase the size of health warnings with clear, relevant and reliable evidence. The Administration must prove that the proposed means (85% health warnings) is rationally connected to the objective (reducing smoking). Members of the Panel and stakeholders, including JTHK, have called on the Administration to produce evidence to justify this restrictive regulatory measure.

3.2 The Administration has, for the first time, produced some materials in the 2016 Proposal; but it has manifestly failed to adduce clear, relevant and reliable evidence. Furthermore, it has failed to take into account significant evidence that, in fact, increasing the size of health warnings will not reduce smoking.

3.3 In summary, the Administration has not proved that enlarging health warnings to 85% will reduce smoking in Hong Kong.

The Hong Kong experience of enlarging health warnings

3.4 The Administration continues to ignore direct and relevant evidence. The Hong Kong Government has conducted General Household Surveys since 1982 and Thematic Household Surveys since 2000. These surveys have sought to identify smoking prevalence rates in Hong Kong, notably daily smokers aged 15 or above.

3.5 As Professors Tsui and Tsang concluded in their expert report submitted and presented to the Panel in 2015,¹⁴ the rate of decline in tobacco prevalence in Hong Kong has not been affected by increasing the size of health warnings in 1994, 2000 and 2007. As respective increases to 20%, to 25–30% and to 50% did not change smoking behaviour; there is no basis for believing that the 2016 Proposal will change smoking behaviour either.

3.6 The Administration has not contested these conclusions or attempted to assess the impact of increasing the size of health warnings in Hong Kong (even using their own data). Professor Tsui’s statistical analysis is unchallenged and the Panel should rely on it as the best available evidence on the impact of increasing the size of health warnings in Hong Kong.

3.7 The Administration ignores this evidence and instead relies on a survey commissioned by the Hong Kong Council on Smoking and Health (COSH).¹⁵ The survey was published in June 2016 and examined various public *perceptions*

¹³ LegCo Secretariat Briefing dated 13 December 2016, LC Paper No. CB(2)386/16-17(06), paragraphs 5, 6, 7, 8 and 10.

¹⁴ LC Paper No. CB(2)1862/14-15(43)

¹⁵ 2016 Proposal, paragraph 16.

regarding existing health warnings and *attitudes* towards the so-called “strengthening” of health warnings.

- 3.8 Without it being necessary to examine the methodology or results of the survey, it is sufficient to highlight that the survey is irrelevant to the potential effectiveness, or not, of the 2016 Proposal to reduce smoking in Hong Kong. The Survey reviewed the existing 50% pictorial health warnings, and not *increases* in the size of health warnings. The Survey states, in terms of its section 5 (limitations), “*this study does not assess the support for the latest policy on the health warnings proposed by the Food and Health Bureau, which warranted further exploration*”. Nor does it seek to assess whether the 85% health warning proposal would reduce smoking, for example by reference to the Thematic Household Surveys.
- 3.9 COSH also cite a “Tobacco Control Policy-related Survey 2016”, which is not publicly available, and trumpet that public support on enhancing the pictorial health warnings was overwhelming. This is irrelevant. As JTHK has established, enlarging health warnings to 85% will not reduce smoking. Accordingly, the survey’s results are immaterial as the proposal will not be effective. Relying on this type of consumer survey cannot improve a bad policy and cannot justify the adoption of a proposal that is not supported by evidence.

The international experience enlarging health warnings

- 3.10 Annexes C and E to the 2016 Proposal refer to a series of documents and statistics in third countries that allegedly demonstrate the effectiveness of 85% health warnings. The Administration has adopted an unfair and misleading approach to prevalence statistics, has taken irrelevant materials into account and has ignored relevant materials that has been presented to it. The international experience presented does not demonstrate that larger health warnings reduce smoking, and so – even if those experiences could be transposed to Hong Kong – cannot justify the 85% proposal in Hong Kong.
- 3.11 Whilst referring to a large number of third countries, the Administration does not set out clearly the fact that it seeks to impose health warnings of a size that only currently exist in just three countries - Thailand (85%), India (85%) and Nepal (90%). These countries are manifestly not comparable to Hong Kong. Hong Kong is one of the world’s most significant financial centres, is consistently ranked as the world’s most competitive international entity, has high confidence in its independent judiciary, is in the top 10 of the OECD’s latest global PISA education standards survey, has one of the world’s longest life expectancies and has one of the lowest smoking prevalence rates in the world. The Administration has not justified why Hong Kong should follow the regulatory lead of such manifestly different countries.

Misleading use of smoking prevalence statistics in Annexes C and E

- 3.12 In an attempt to persuade the Panel that 85% health warning would be effective in reducing smoking, the 2016 Proposal systematically refers to isolated smoking prevalence statistics in third countries (usually one higher rate before, and one lower

rate after, the date of entry into force of larger health warnings).¹⁶ This gives the misleading impression that the larger health warnings have *caused* the change in smoking prevalence.

- 3.13 As the work of Professors Tsui and Tsang demonstrates, this is an unfair and misleading use of statistics. Smoking prevalence rates should be considered over time in order to determine trends, and not simply across two data points. Furthermore, to assess whether the trend is changed by an event (such as the introduction of larger health warnings) it is necessary to exclude extraneous factors, for example through the use of regression analysis. The 2016 Proposal does neither.
- 3.14 If the Administration seeks to rely on smoking prevalence statistics in third countries in an attempt to demonstrate that larger health warnings change smoking prevalence, it should apply sound and robust statistical analysis techniques. Until such an approach is adopted, JTHK proposes that the Panel ignores the references to statistics in Annexes C and E.¹⁷

Materials from third countries do not justify larger health warnings

- 3.15 The Administration has relied upon materials in Annex C in relation to the following countries.
- (a) **Australia:** the documents referred to in Annex C concern the introduction of *plain packaging* with larger health warnings, and are examined below (paragraphs 3.20-3.30).
 - (b) **Brazil and Singapore:** the references to the WHO “World No Tobacco Day 2009” brochure are irrelevant to the justification of 85% health warnings in Hong Kong. The full title of the brochure is “*Showing the truth, saving lives: the case for pictorial health warnings*”. The brochure and the statistics quoted relate to the issue of pictorial health warnings – which Hong Kong has had since 2007.
 - (c) **Canada:** the 2016 Proposal cites two different sources from Canada, being an experimental opinion survey by Createc and government statistics on smoking prevalence: but neither are useful to the debate.
 - (i) The Createc study from 2008 is fundamentally flawed. Respondents were not asked direct questions about how they themselves would react in response to a range of health warnings of different sizes. So, the survey does not observe or address how health warnings of

¹⁶ See Annex C (“Effectiveness of Health Warnings on Tobacco Products”) in respect of Australia (“*The daily smoking prevalence ... in Australia decreased from 15.1% in 2010 to 12.8% in 2013 after implementation of plain packaging (while the size of health warnings was also increased) in December 2012*”) and Canada, and Annex D in respect of Australia, Canada, UK, France, Hungary, Singapore, Thailand, New Zealand and Uruguay.

¹⁷ JTHK notes that there has been insufficient time since the publication of the 2016 Proposal on 13 December 2016 – i.e. the first date on which the Administrations made known its reliance on these statistics for the identified 9 third countries – and this submission dated 10 January 2017, to perform the necessary analysis itself. It would, of course, have been open to the Administration to disclose its approach at any point in the last 18 months.

different sizes in fact influence actual smoking behaviour, but rather how the respondents *perceived* the effectiveness of health warnings *in influencing the behaviour of others*. The study cannot therefore provide objective data on whether larger health warnings are in fact more effective, since its conclusions were based on attitudinal rather than behavioural data. An international expert, Dr Keegan, has concluded that “*this study is attitudinal in nature and therefore irrelevant to a discussion of the potential behavioural impact of larger health warnings*”.¹⁸

- (ii) The Health Canada statistics cited in Annex C simply set out smoking prevalence in 2011, 2012 and 2013. There has, of course, been a decline in overall prevalence of smoking in Canada since the beginning of the Canadian surveys in 1999 (as the website statistics demonstrate). But, it is impossible to attribute any identifiable portion of the decline to the larger size of the warnings. Indeed, the Health Canada website makes no such claim,¹⁹ and the Administration should not do so either.

Indeed, in its 2016 online consultation on plain packaging, the Canadian Government claims that, “*The decline in rate of tobacco use among youth witnessed since 2003 has slowed down. For the period 2003-2010, the rate of past 30-day tobacco use for all tobacco products has dropped from 22% to 16% among 15 to 19 years old. However in the following three-year period, the slope of this decline has mostly plateaued*”. This contradicts the Administration’s view that the Canadian experience has increased the rate of decline of smoking prevalence.²⁰

Lastly, JTHK has previously identified by reference to the full set of statistics and various statistical and scientific studies that, in fact, the introduction of larger pictorial warnings in Canada did not enhance awareness of the health risks of smoking or change the behaviour of smokers.²¹

- (d) **Thailand:** although the unidentified and unattributed information from a lobby group “Action on Smoking and Health Foundation Thailand” purports to justify larger health warnings, the so-called evidence is manifestly

¹⁸ Dr Warren J. Keegan, “Analysis of Consumer Survey Evidence Relevant to DG SANCO’s Proposal to Increase the Size of Health Warnings on Tobacco Packaging,” dated 24 November 2010, paragraphs 250 – 262. <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>

¹⁹ Note that the website referred to in the 2016 Proposal carries a warning that there are differences between the surveys for 2008-2012 (Canadian Alcohol and Drug Use Monitoring Survey) and the Canadian Tobacco, Alcohol and Drug Survey for 2013, such that comparisons of prevalence estimates should be interpreted with caution.

²⁰ See more at: The online consultation on “Plain and Standardized Packaging” for Tobacco Products. Available at: <http://healthycanadians.gc.ca/health-system-systeme-sante/consultations/tobacco-packages-emballages-produits-tabac/document-eng.php>.

²¹ June 2015 Submission, paragraph 4.26(b). JTHK letter to the FHB dated 22 July 2016, page 5.

inconsistent with smoking prevalence rates for Thailand set out in Annex E of the 2016 Proposal. The regular smoking rates show smoking prevalence increased in 2015 after the introduction of larger health warnings in 2014.

This is consistent with, firstly, the research referred to in the June 2015 Submission which found that the introduction of larger health warnings in Thailand did not accelerate the decrease in the smoking rate.²² Secondly, the Government-supported Global Adult Tobacco Survey²³ in Thailand itself found that “*the prevalence of current tobacco smoking did not show a statistically significant change between 2009 and 2011, among men, women and overall*”, even though Thailand implemented larger health warnings (from 50% to 55%) in 2010.

- (e) **Uruguay:** the Gravelly *et al* study, even if methodologically reliable, is relied on in Annex C as showing an increase in “thinking about” risks of smoking or quitting, and not changes in smoking behaviour. Furthermore, the study acknowledges as its own limitations that increases “*cannot be attributed to the increased size of HWL [health warning labels] alone*” and “*it may be that some of the effects of the HWL are due to novelty effects as we did not analyse whether the changes were sustained over time.*”

- 3.16 In short, the evidence presented by the Administration does not demonstrate that increasing the size of health warnings reduces smoking.
- 3.17 This is consistent with the finding of a judgment in 2012 of a senior US Federal Court of Appeal – which examined the evidence presented by the US Food and Drug Administration (**FDA**) for the proposed introduction of 50% pictorial health warnings – found that there is not a “*shred of evidence*” that pictorial health warnings reduce smoking and that evidence advanced by the US Government to support the case for enlarged and pictorial warnings was “*mere speculation and conjecture*”.²⁴ The Court noted that “*The RIA [regulatory impact assessment] estimated the new warnings would reduce U.S. smoking rates by a mere 0.088% ... a number the FDA concedes is “in general not statistically distinguishable from zero.”*” In March 2013, the US FDA decided not to appeal this judgment and has instead taken its proposals back to the drawing board.²⁵
- 3.18 It is not clear why the Administration has ignored this important evidence, despite it having been presented to it in JTHK’s June 2015 Submission.

²² June 2015 Submission, paragraph 4.26(d).

²³ <http://www.who.int/tobacco/surveillance/survey/gats/thailand/en/>

²⁴ *RJ Reynolds Tobacco Company v Food and Drug Administration* US Court of Appeals, District of Columbia Circuit, 24 August 2012 at p 25 and p 26, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf), by which the FDA’s rule was declared unconstitutional. The Court of Appeals for the Sixth Circuit upheld the constitutionality of the FDA’s proposed rule (*Disc. Tobacco City & Lottery, Inc v United States*).

²⁵ See statement of Dr. Howard K. Koh, Assistant Secretary for Health, U.S. Department of Health and Human Services, available at <http://www.hhs.gov/ash/news/20130318.html>.

- 3.19 JTHK believes that a thorough analysis of the evidence presented would lead the Administration and the Panel to conclude that there is no rational connection between increasing the size of health warnings to 85% and reducing smoking.

Australian post-plain packaging statistics do not justify larger health warnings

- 3.20 In the absence of any reliable evidence to support the effectiveness of the 2016 Proposal's enlargement of health warnings to 85%, the Administration resorts – in paragraphs 15 and 17 of the 2016 Proposal and Annex E – to describe an alleged trend towards different tobacco control measures, namely plain packaging and display bans.
- 3.21 It is sufficient to note that the 2016 Proposal concerns neither plain packaging nor a display ban.
- 3.22 The fact that the WHO “advocates” plain packaging, or that Australia has pioneered its adoption (a measure that is still subject to legal challenge),²⁶ is not a justification for Hong Kong to adopt 85% health warnings.
- 3.23 Australia introduced a series of measures in 2012 in conjunction with plain packaging, including a tax increase and larger health warnings. The 2016 Proposal refers, in Annex C, to various pages of the Australian Department of Health's website and consumer research by Durkin *et al* as alleged support for the effectiveness of larger health warnings. This is wholly misplaced and does not provide justification for larger health warnings in Hong Kong.
- 3.24 The first webpage simply identifies that Australia's smoking prevalence rate has decreased between 1991 and 2013 (and not just between two isolated points of 2010 and 2013 as stated in the 2016 Proposal).²⁷ The decline in smoking prevalence continues without a noticeable acceleration since the introduction of plain packaging and larger health warnings. Importantly, the National Drug Strategy Household Survey itself makes no assertion at all as to whether the continuing downward trend of smoking prevalence has any causative or correlative relationship with the introduction of larger health warnings. In fact, the report (whose statistics the Administration relies upon) states that:

“When looking at more specific reasons [for changes to smoking behaviour], the most common motivations for trying to quit smoking in 2013 were similar to 2010, except for: ... ‘health warnings on tobacco packets’—proportion nominating this reason declined from 15.2% in 2010 to 11.1% in 2013.”²⁸

- 3.25 The Australian survey flatly contradicts the assertions in the 2016 Proposal.

²⁶ Honduras, the Dominican Republic, Cuba and Indonesia have brought challenges against the Australian plain packaging legislation, which are to be settled by the WTO Dispute Settlement Body.

²⁷ 2016 Proposal, Annex C: <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco>

²⁸ Australian Institute of Health and Welfare 2014. National Drug Strategy Household Survey detailed report 2013. Drug statistics series no. 28. Cat. No. PHE 183. Canberra AIHW. Page 28.

- 3.26 The next webpage referred to is entitled “*Evaluation of Tobacco Plain Packaging in Australia*”.²⁹ The statistics referred to by the Administration are found in a report by Dr Chipty that is appended to the “*Post-Implementation Review of Tobacco Plain Packaging 2016*” (*PIR*). The report by Dr Chipty does not distinguish between the introduction of plain packaging and the introduction in Australia of new, larger health warnings at the same time. Unsurprisingly, therefore, the PIR is left unable to isolate the specific impact that plain packaging or larger health warnings is said to have.
- 3.27 In any event, Dr Chipty’s analysis has been strongly criticised by experts and in the ongoing WTO proceedings against the Australian plain packaging measure.³⁰
- 3.28 Finally, the Administration refers to a survey by Durkin *et al* regarding quitting after the implementation of “*plain packaging with larger health warnings*”. In the same way as Dr Chipty’s analysis, the Durkin *et al* study is unable to isolate specific impacts of larger health warnings. Indeed, without it being necessary to critique the methodology, the study acknowledges that it “*was not designed or powered to examine quitting success*”, i.e. reducing smoking prevalence, which is the objective in Hong Kong.
- 3.29 The Australian evaluation of plain packaging is therefore an unsound basis on which to introduce larger health warnings in Hong Kong.
- 3.30 Since the Administration has raised the issue of plain packaging, JTHK notes that it has been, and remains, categorically opposed to the plain packaging of tobacco products.³¹ It is an unjustified ban on branding with no real health benefits.
- 4. THE ADMINISTRATION FAILS TO RECOGNISE OR ADDRESS SIGNIFICANT NEGATIVE IMPACTS OF 85% HEALTH WARNINGS**
- 4.1 The Proposal interferes disproportionately and unjustifiably with JTHK’s commercial and legal rights as a manufacturer/distributor of a legal product, competing in a legitimate market. JTHK has set out these concerns at length in its June 2015 Submission, paragraphs 4.28 to 4.49, all of which are repeated here. In short:

²⁹ 2016 Proposal, Annex C: <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain-packaging-evaluation>

³⁰ See JTI’s Response to Health Canada’s “Consultation on ‘Plain and Standardized Packaging’ for Tobacco Products”, 31 August 2016, paragraphs 70-81 and the appended report by Dr Lilico at http://www.jti.com/files/2014/7281/6956/JTI_response_to_Health_Canada_Consultation_on_Plain_and_Standardized_Packaging_for_Tobacco_Products_31_August_2016.pdf. As to the WTO, Dr Chipty’s PIR-related analysis has been strongly criticized: “*Dr Chipty’s PIR Report provides a flawed and misleading assessment based on a narrow and self-serving selection of datasets, behavioural metrics, and methodologies presented in the WTO proceedings. Conveniently, Australia fails to mention in the PIR that Dr Chipty’s PIR analysis – largely recycled from the WTO proceedings with a few novel tweaks – has been subject to detailed criticisms by the complainants’ experts, such as her failure to control for breaks in the secular smoking trend, or reweighting*”. See paragraphs 79 – 82 of the Dominican Republic’s “Integrated Summary of its Submissions to the WTO Dispute Settlement Panel”, dated 23 March 2016.

³¹ See the detailed reasons set out in JTI’s Response to Health Canada’s “Consultation on ‘Plain and Standardized Packaging’ for Tobacco Products”, August 31, 2016, above.

- (a) The 2016 Proposal imposes **unjustified commercial limitations**: on the use of trade marks and branding, on the ability of JTHK to communicate with consumers, the adult smoker’s right to differentiate between available products and to choose the products they prefer, the distortion of free and fair competition and the reduction of the ability to launch new products and evolve brands.
 - (b) The proposal raises **serious and significant issues under the Basic Law**. It limits the space left for manufacturers’ trade marks and branding to such a critical extent that certain trade marks would be left without any meaningful alternative use and/or without any reasonably economically viable use. In the absence of any meaningful justification advanced in the 2016 Proposal, JTHK considers that the necessity – or indeed the appropriateness or proportionality – of larger health warnings have not been established, breaching JTHK’s freedom of expression and an unlawful (*de facto*) deprivation of property.
 - (c) The absence of justification also renders **arbitrary** the exercise of powers under section 18 of the Smoking (Public Health) Ordinance, in respect of the form and content of health warnings on tobacco products.
 - (d) The 2016 Proposal would also **unjustifiably restrict international trade**, contrary to the protections of the World Trade Organisation Agreements on Trade-related Aspects of Intellectual Property Rights (“*TRIPS*”), the Agreement on Technical Barriers to Trade (“*TBT*”), the World Intellectual Property Organisation’s Paris Convention for the Protection of Intellectual Property (“*Paris Convention*”) and the protection of investment under relevant bilateral investment treaties.
 - (e) Lastly, JTHK is concerned that the Proposal risks facilitating and encouraging the **illegal trade** in tobacco products in Hong Kong.
- 4.2 The Administration has made brief responses to two of these issues (in just 1 paragraph per issue). The responses are wholly unconvincing and do not address the concerns in any meaningful way.
- 4.3 First, in respect of the deprivation of trade marks, the Administration argues in a letter to JTHK (nothing has been set out in the papers to the Panel) that the proposal “*does not prohibit the use of any trade marks (whether registered or unregistered) or any elements of such marks on tobacco packets*”.³² That this position is factually incorrect (as JTHK has clearly stated) seems to have been recognised by the Administration, as it also argues that “*apart from the 15% remaining area of the two largest surfaces, space was also available on the other surfaces of the packets or retail containers for trade marks and branding*.”³³ The Administration has fundamentally misunderstood the position and has not addressed the detailed points raised in by JTHK and other stakeholders (including the International Trademark

³² FHB Letter to JTHK dated 31 May 2016, paragraph 6.

³³ LegCo Secretariat Briefing dated 13 December 2016, LC Paper No. CB(2)386/16-17(06), para 8.

Association³⁴) in 2015. The Administration has no coherent answer to the impact on trade marks.

4.4 Secondly, the 2016 Proposal states that concerns regarding illegal trade raised by the tobacco trade should be rejected due to there being “*no solid evidence*” and on the basis of papers from Australia, Belgium and the United Kingdom (Annex D to the 2016 Response). This is extraordinary policy-making.

(a) The Administration has a duty to examine the impact in Hong Kong of proposed regulations. It has not done so, and has relied on papers from third countries to avoid the issue.

(b) The third country papers are not relevant to the issue of 85% health warnings and illegal trade:

(i) they concern plain packaging (Australia/UK)³⁵ and pictorial health warnings (Belgium/UK). Furthermore, the papers are not even from the relevant national authorities (law enforcement or customs organisations); and

(ii) the illegal trade in tobacco products is markedly different in each country. Relying on Australia, Belgium and the UK data is bad policy-making for Hong Kong.

(c) Hong Kong has a significant issue with illegal trade in tobacco products. Illegal cigarettes are estimated to account for 29.1% of total consumption, of which contraband accounts for the vast majority (mainly imported from China).³⁶ The Government is well aware of the scale and financial significance of this issue.³⁷

(d) Panel members and stakeholders have identified the risk that the proposal facilitates the illegal trade. It is clear that tobacco regulation can create non-price-led demand for illegal tobacco products.

³⁴ LC Paper No. CB(2)1808/14-15(70).

³⁵ JTHK notes that, in any event, the experience in Australia (following the introduction of plain packaging with larger health warnings) is that the illegal trade has increased. See, for example, “*The level of illegal tobacco consumption has grown more than 20% since plain packaging was introduced in Australia. In 2015, it had reached 14% of total consumption, up from 11.5% in 2012*”. See KPMG’s 2015 Full-Year Report “*Illicit Tobacco in Australia*”, April 2016, page 6. Available at: <https://home.kpmg.com/content/dam/kpmg/pdf/2016/04/australia-illicit-tobacco-2015.pdf>.

³⁶ *Asia Illicit Tobacco Indicator 2015*, Prepared by International Tax and Investment Center and Oxford Economics, December 2016. Hong Kong is analysed at pages 52-61. Dave Hartnett, Former Permanent Secretary for Tax, HM Revenue and Customs, United Kingdom, states in the Foreword that “*This fourth annual report provides important data for governments, health bodies, tax administrators and manufacturers concerned about the level of illicit consumption of cigarettes.*” See also, Euromonitor *Illicit Trade in Tobacco Products* (2016), page 34, identifies Hong Kong as having the 3rd largest illegal trade in Asia Pacific (<http://www.euromonitor.com/illicit-trade-in-tobacco-products/report>).

³⁷ Customs and Excise Department statistics for the total cigarette seizures from January to November 2016 identify that 60m sticks were seized with a potential loss of duty of HK\$114m. Statistics sent by Customs & Excise to the Tobacco Association of Hong Kong on 16 December 2016.

- (e) The Administration cannot shut its eyes to the issue in its policy-making. The response in the 2016 Proposal is manifestly insufficient and the Administration should address this issue. This involves, as a minimum, consulting stakeholders on the issue and engaging with relevant Hong Kong authorities, such as Customs & Excise.

4.5 It is clear that the vast majority of the concerns identified by JTHK lie wholly unanswered by the Administration. The limited number (2) that have been addressed are wholly unconvincing and do not resolve the concerns. Indeed, the approach to these concerns highlights the apparent desire of the Administration to push through the 85% proposal, regardless of serious concerns.

5. THE PANEL SHOULD ENDORSE A 12 MONTH “ADAPTATION PERIOD”

5.1 The Administration has suggested a 6 month adaptation period from the date of publication of the Amendment Order for the implementation of the 85% health warning requirement, if – contrary to our submissions – the Panel proceeds with the proposal.

5.2 The members of the Panel, and the tobacco industry, have however been left in the dark as to the current position, given the statement in the 2016 Proposal, paragraph 8, that *“In light of the concerns raised by the trade, we would consider suitably extending the adaptation period.”* There is no clarity whether the period will be extended and, if so, by how much.

5.3 For any regulations mandating packaging changes, JTHK would welcome an extension of the adaptation period to at least 12 months, as an appropriate and reasonable period in line with precedent. The Panel is invited to endorse a 12 month adaptation period.

A 6 month adaptation period is impractical and unrealistic

5.4 The 6 month adaptation period is impracticable and unrealistic - it does not take into account the practical realities of implementing enlarged health warnings and confirms a misunderstanding of the way in which JTHK, and other tobacco manufacturers, operate.

5.5 There are various implementation steps, requiring significant time, that JTHK will need to go through once the images of the new pictorial health warnings are shared with manufacturers. These include:

- (a) layout development;
- (b) feasibility and costs assessments, notably from a development and supply chain perspective;
- (c) printing tool development;
- (d) preparation of non-tobacco materials;
- (e) production; and

- (f) shipment to Hong Kong – the products which we sell in Hong Kong are manufactured in various countries and there are therefore transportation times to take into account.
- 5.6 There needs to be an “adaptation period” of at least 12 months to allow compliance and to prevent manufacturers and retailers from having to dispose of their inventories of tobacco products carrying existing health warnings.

A 12 month adaptation period follows precedent

- 5.7 The most relevant precedent in Hong Kong is the introduction of 50% enlarged health warnings in 2007. There was a 12 month adaptation period for complying with that new requirement, which in technical terms is markedly similar to the 2016 Proposal.
- 5.8 The Administration referred to “*overseas experience on implementing the proposal*” to justify an adaptation period of six months.³⁸ However, no such experience has been set out in the 2016 Proposal.
- 5.9 In these circumstances, there is no reason to depart from directly relevant Hong Kong precedent of 12 months.

6. CONCLUSION

- 6.1 There is no need or justification for 85% health warnings in Hong Kong. But the Administration is seemingly determined to enact 85% health warnings in any event, despite serious concerns being raised by Panel members and stakeholders.
- 6.2 The Panel has the opportunity, once again, to act as a “check and balance” in order to ensure:
 - (a) fairness to all parties in the procedure (including the implementation of the Panel’s directions of July 2015, namely a full and real consultation with the tobacco industry); and
 - (b) rigour in the examination and assessment of all relevant issues and evidence (including through directions to the Administration to undertake the necessary relevant work, including identifying the need and objectives for the proposal, conducting an RIA and considering alternatives).
- 6.3 Simple delay by the Administration (such as the 18 months between its May 2015 and December 2016 papers to the Panel) cannot justify either procedural “short cuts” that undermine stakeholder participation or the adoption of unjustified regulations. The Panel should mandate the Administration to undertake these fundamental steps, and to revert again to the Panel.
- 6.4 On the basis of the analysis and evidence identified in this submission, JTHK is confident that, if appropriate procedures are followed and all relevant issues and evidence are examined, the 85% size requirement would be shelved as an ineffective measure with significant negative impacts.

³⁸ FHB letter to JTHK dated 31 May 2016, paragraph 9.

6.5 JTHK welcomes the opportunity, at the deputation meeting, to share with the Panel our views in more detail and our proposals based upon our experience.

Japan Tobacco (Hong Kong) Limited
10 January 2017