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Subject: Expert Report in Respect of Proposal to increase Graphic Health Warnings in Hong Kong to 85%

Dear Honourable Members

I am writing in connection with the Government's proposal to change the graphic health warnings ("GHWs") on tobacco products in Hong Kong from 50% to 85%. I previously prepared a report dated June 2015, in which I assessed the proposals for larger graphic health warnings ('GHW's) as contained in the LC Briefing Paper (LC Paper No. CB(2)1456/14-15(07)). I considered whether the proposals are in line with better regulatory principles, and to what extent they are necessary, appropriate or proportionate. I concluded that the LC Briefing Paper does not include the necessary evidence or analysis to support the implementation of the proposed policy and does not provide proportionate evidence-based policy recommendations. It has not shown that the proposed increase in GHWs from 50% to 85% is necessary, appropriate or proportionate. It was also my opinion that it would be manifestly inappropriate to rely on the LC Briefing Paper to proceed with larger graphic health warnings. A copy of that report is attached to this e-mail for your consideration.

Yours Sincerely

Stephen Gibson



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SLG ECONOMICS LTD

ECONOMICS, REGULATION, COMPETITION

**Review of Proposals for Larger Graphic
Health Warnings in Hong Kong**

SLG Economics Ltd

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Review of Proposals for Larger Graphic Health Warnings in Hong Kong

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Review of Proposals for Larger Graphic Health Warnings in Hong Kong

1 Introduction

The Legislative Council Secretariat has put forward a briefing paper¹ ('**LC Briefing Paper**') and updated background brief,² relating to the progress of tobacco control measures for the meeting of the Panel of Health Services on 18 May 2015. It proposed to strengthen tobacco control measures by amongst other things³:

- Increasing the area covered by graphic health warnings from 50% to at least 85% of the two largest surfaces of the packet;
- Increasing the number of health warnings from six to twelve;
- Changing the health warning message to: "*Tobacco kills up to half of its users, Quitline 1833 183*" (or the Cantonese equivalent); and
- The indication of tar and nicotine yields to be printed in a conspicuous place on a side of the packet adjacent to its flip-top lid.

This report assesses the proposals for larger graphic health warnings ('**GHW**'s) contained in the LC Briefing Paper and considers whether they are in line with better regulatory principles, and to what extent they are necessary, appropriate or proportionate. It has been commissioned by British American Tobacco Company (Hong Kong) Limited.

2 Executive Summary

The LC Briefing Paper:

- Fails to include a public consultation;
- Fails to include a Regulatory Impact Assessment ('**RIA**');
- Fails to follow the recommendations of the 2001 Tobacco Regulation RIA;
- Fails to follow the principles of better regulation
- Fails to recognise that the current tobacco controls are already more than is required under the WHO Framework Convention on Tobacco Control ('**FCTC**')

¹ LC Paper No. CB(2)1456/14-15(07) http://www.legco.gov.hk/yr15-16/english/panels/hs/papers/hs_a.htm

² LC Paper No. CB(2)1456/14-15(08) http://www.legco.gov.hk/yr15-16/english/panels/hs/papers/hs_a.htm

³ There are also proposals to designate bus interchange facilities as non-smoking areas and to regulate electronic cigarettes, but these are not the subject of this report.

- Fails to analyse the baseline or identify any problems with the current 50% GHWs that might need further regulation;
- Fails to properly specify the objectives of the proposals;
- Fails to provide any evidence for the proposals;
- Sets out proposals that are arbitrary and gold-plated;
- Sets out proposals that directly contravene the FCTC Guidelines;
- Fails to consider alternative policies or identify the policy with the greatest net benefits;
- Fails to estimate the costs of the proposals; and
- Fails to estimate the benefits of the proposals.

Overall the failures of process and lack of evidence mean that the proposals cannot be shown to be necessary, appropriate or proportionate. The LC Briefing Paper does not identify any problem with the existing 50% GHWs, establish why the proposed increase in size from 50% to 85% is necessary, or what benefits it would provide over and above existing regulation or alternative measures. Taking all the concerns raised in this report together, it would be manifestly inappropriate to rely on the LC Briefing Paper to proceed with larger graphic health warnings.

3 SLG Economics

SLG Economics is an economics consultancy set up in 2011 by Stephen Gibson providing specialist micro-economic policy advice to regulated companies, regulators and government. Mr Gibson has over 25 years' experience of leading major economic and strategy projects across a broad range of industries from both sides of the regulatory fence.

Mr Gibson has been Chief Economist at Postcomm – the independent regulator of postal services in the UK, Principal Economist at Ofcom – the communications sector regulator and Head of Economics at Network Rail – the UK rail infrastructure owner, as well as a number of other senior economics positions.

Mr Gibson has been a lecturer at City University, London on their MSc in Competition and Regulation and is a lecturer at Birkbeck University on their undergraduate and postgraduate Industrial Economics courses. He has lectured widely on economic regulation at national and international industry conferences and seminars and is regularly interviewed on BBC TV and Radio, ITV and Sky News about economic issues. He was the external supervisor for a PhD in rail regulation at Cambridge University. He has an MA in Economics and Management Studies from Sidney Sussex College, Cambridge University and postgraduate

qualifications in: Computer Science from Cambridge University; Accounting and Finance from the ACCA; and Corporate Finance from London Business School. He has published papers on regulatory and competition economics issues in peer reviewed books and journals.

4 The Process for developing proposals for increasing graphic health warnings from 50% to 85%

The LC Briefing Paper fails to follow proper process in developing proposals for larger GHWs. It fails to:

- Conduct a public consultation;
- Undertake a RIA;
- Follow the recommendation of the 2001 Tobacco Regulation RIA; and
- Follow the principles for better regulation.

4.1 Failure to conduct a public consultation

Consultations are an important part of policy development. They allow the policy maker to gather the views and preferences of stakeholders (including members of the public), understand the possible unintended consequences of a policy and obtain a better perspective on implementation. Consultation increases the level of transparency and engagement with interested parties and improves the quality of policy making by bringing to bear expertise and alternative perspectives, and identifying practical problems.

The Secretary for Health and Welfare issued proposals in 2001 for a series of tobacco control measures⁴ (the ‘**2001 Tobacco Control proposals**’). The development of these proposals included a formal consultation⁵ inviting views and comments on the proposed legislative arrangements. The consultation responses identified and highlighted problems with the affordability of the proposals for hawkers and small businesses. As a result, the final legislation contained an exemption to the restriction on the display of tobacco advertising for hawkers and small businesses with a turnover less than HK\$500,000.

Hong Kong is a member of the Asia-Pacific Economic Cooperation (APEC). The APEC-OECD checklist on regulatory reform⁶ is clear on the importance of consultation, recommending:

⁴ Including proposals to: expand the statutory no smoking areas, restrict the size of price boards and price markers, prohibit the sale of tobacco products with other merchandise, restrict tobacco sponsorship and allow health warnings to contain graphic content.

⁵ Smoking (Public Health) Ordinance Cap.371 Consultation Document, http://www.fhb.gov.hk/en/press_and_publications/consultation/Smoke2.HTM

⁶ APEC-OECD Integrated Checklist on Regulatory Reform, *a policy instrument for regulatory quality, competition policy and market openness*, 2005 <http://www.oecd.org/regreform/34989455.pdf>

- “Public consultation should not be limited to insiders, such as already established businesses, but should be open to all interested parties”⁷; and
- “Consultation with stakeholders is considered to be fundamentally important for a well-managed regulatory system”⁸.

The APEC *Guidelines for the preparation, adoption and review of technical regulations*⁹ (which are defined as mandatory government regulations put in place to achieve health, safety, consumer information and environmental objectives) require that the administration:

- “ensure that adequate consultation takes place”.

Similarly, the APEC paper *Supporting the TBT Agreement with Good Regulatory Practices*¹⁰ states:

- “The importance of public consultation is widely recognised”; and
- “Consultation should not be a discretionary part of regulating society”.

It is therefore a failure of process that (unlike the 2001 tobacco control proposals) the current proposals have not been subject to a proper public consultation process. As well as not following better regulation principles, the lack of public consultation means that the proposals do not take account of stakeholder feedback and fail to consider the practical consequences of the proposals.

4.2 Failure to undertake a Regulatory Impact Assessment

The 2001 Tobacco Regulation proposals were also supported by a detailed (214 page) RIA¹¹ of the proposed amendments. RIAs are a structured process for collecting and using evidence to better solve policy problems. They are an important part of policy development that enables the government to understand the costs, benefits and risks of its proposed actions and policy alternatives and to thereby choose the solution that best achieves the policy goals at lowest cost. The APEC paper *Supporting the TBT Agreement with Good*

⁷ Ibid, page 17

⁸ Ibid, page 17

⁹ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHATcAvA&usg=AFQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

¹⁰ *Supporting the TBT Agreement with Good Regulatory Practices*, APEC, March 2012

http://publications.apec.org/publication-detail.php?pub_id=1266

¹¹ Regulatory Impact Assessment, *Proposed amendments to the existing smoking legislation*, Environmental Resources Management Limited, LC Paper No. CB(2)1/02-03(04), Dec 2001 <http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>

*Regulatory Practices*¹² states: “it is impossible to regulate well if the consequences of government action are not understood in advance. Understanding consequences of various options for action more clearly is the main purpose of RIA”. The APEC Good Practice Guide on Regulatory Reform¹³ comments: “as parliaments realise the importance of RIA, they can provide invaluable support for its use.”

It is therefore a further failure of process that (unlike the 2001 Tobacco Control proposals) the current proposals have not been subject to a proper (or indeed any) RIA process (see also Section 7 below on the proportionality of the proposals).

4.3 Failure to follow the recommendation of the 2001 Tobacco Control RIA

The 2001 Tobacco Control RIA concluded that: “it is recommended that the proposed amendment be enacted, but that any future requirements for pictorial and graphic contents take into account the likely financial and economic costs of implementation and that these be weighed against the likely health and economic benefits likely to arise”¹⁴. The lack of an RIA or any assessment of the costs and benefits of the current proposals totally disregards this recommendation.

4.4 Failure to follow the principles of better regulation

The APEC *Good Practice Guide on Regulatory Reform*¹⁵ sets out a set of seven principles of better regulation that have been widely accepted as good practice and are intended to be applicable to any economy and any policy issue. It is remarkable that the LC Briefing Paper fails to comply properly with any of the principles. The APEC principles for better regulation are:

- *Clearly define the problem* – The LC Briefing Paper fails to identify any problems with the current 50% GHWs that might need to be rectified by new regulations (see Section 5.2) or specify the objectives of the proposals (see Section 5.3).
- *Justify government action* – The LC Briefing Paper fails to provide explicit evidence that government action is justified (see Section 6.1).
- *Consider a range of policy options* – The LC Briefing Paper fails to consider alternative policy options (see Section 7.1).

¹² *Supporting the TBT Agreement with Good Regulatory Practices*, APEC, March 2012

http://publications.apec.org/publication-detail.php?pub_id=1266

¹³ *Good Practice Guide on Regulatory Reform*, APEC, August 2008 http://publications.apec.org/publication-detail.php?pub_id=1061

¹⁴ Regulatory Impact Assessment, *Proposed amendments to the existing smoking legislation*, Environmental Resources Management Limited, LC Paper No. CB(2)1/02-03(04), Dec 2001, page 107
<http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>

¹⁵ *Good Practice Guide on Regulatory Reform*, August 2008, APEC, July 2010, paragraph 8
http://publications.apec.org/publication-detail.php?pub_id=1061

- *Weigh the benefits and the costs of the regulation* – The LC Briefing Paper fails to estimate the costs and benefits of the proposed regulations (see Sections 7.2 and 7.3) or weigh them together (see Section 7.1).
- *Consult with interested parties* - The LC Briefing Paper fails to consult with stakeholders (see Section 4.1).
- *Consider enforcement and incentives for compliance* - The LC Briefing Paper fails to assess the incentives and institutions through which the regulation will take effect and design implementation strategies that make best use of them.
- *Review mechanisms to ensure the continuing effectiveness of the regulation* - The LC Briefing Paper fails to consider review mechanisms (such as a post-implementation review) to check whether the regulations are working effectively and remain relevant.

5 Establishing whether increasing the graphic health warnings from 50% to 85% is necessary

The LC Briefing paper fails to show that increasing the size of the GHWs from 50% to 85% is necessary, in fact:

- The current 50% GHWs are more than is required under the FCTC;
- There is no analysis of the baseline to support further regulations; and
- The LC Briefing Paper fails to properly set out the objectives of the proposals. It is therefore impossible to assess what the proposals are intended to achieve and whether they will meet those objectives.

5.1 The current tobacco control regulations are more than is required under the Framework Convention on Tobacco Control

The LC Briefing Paper justifies the proposed increase in GHWs solely on the basis of recommendations in the WHO Guidelines. These state that: "*the size of the health warnings and messages should cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.*"¹⁶ However, the WHO Guidelines¹⁷ quote Article 11.1(b)(iv) of the FCTC which provides that that health warnings and messages on tobacco product packaging and labelling: "*should be 50% or more, but no less than 30%, of the principal display areas*" and "*may be in the form of or include pictures or pictograms.*" Therefore the FCTC only requires Parties to implement 30% text warnings, and the current

¹⁶ LC Briefing Paper, paragraph 15

¹⁷ *Who Framework Convention on Tobacco Control* Guidelines for implementation, 2013 edition, http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf?ua=1

regulations in Hong Kong that require 50% GHWs are already more than is required under the FCTC. This is not recognised in the LC Briefing Paper and means that larger GHWs are not necessary to meet the requirements of Article 11 of the FCTC.

5.2 Failure to assess the problem against a baseline

In order to properly make a case for further tobacco control regulation, the LC Briefing Paper should assess the efficacy of the current tobacco control regulations to provide a baseline and identify any problems that might need to be rectified by new regulations. There is no analysis of the baseline or the need for further regulations. The LC Briefing Paper doesn't identify any problem with the existing 50% GHWs or establish why an increase in size from 50% to 85% is necessary or what benefits it might bring. As the *APEC Guidelines for the preparation, adoption and review of technical regulations*¹⁸ state: “The first step in the development process should be to clearly identify the problem that needs to be addressed” and “accurate problem definition reduces the risk of choosing inappropriate options for government action or ignoring more effective solutions, and reduces the likelihood of over regulation.”

5.3 Failure to properly specify the objectives of the proposals

The LC Briefing Paper does not set out the objectives of the proposals – it simply proposes them to “strengthen our tobacco control efforts”. This is in contrast to the 2001 tobacco control proposals which set out two clear objectives to: “reduce the exposure and impacts of second hand smoke, and to reduce the uptake of smoking and hence overall smoking rates”¹⁹.

Without a clearly framed objective(s), it is impossible to assess what the proposals are intended to achieve, whether the proposals are likely to deliver the objective(s), whether there are alternative less costly or more effective ways of delivering the objective(s) and to debate whether the objective(s) is a sensible goal for public policy. The *APEC Guidelines for the preparation, adoption and review of technical regulations*²⁰ are clear that “it is essential to clearly specify policy goals. These goals or objectives should focus on outcomes, rather than means to achieve them, so that all possible alternatives can be considered”. Similarly

¹⁸ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC
http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHATcAvA&usg=AFQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

¹⁹ Regulatory Impact Assessment, Proposed amendments to the existing smoking legislation, Environmental Resources Management Limited, LC Paper No. CB(2)1/02-03(04), Dec 2001, page 15
<http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>

²⁰ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC
http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHATcAvA&usg=AFQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

the Hong Kong Department of Justice in their publication *How Legislation is made in Hong Kong*²¹ state that Instructions for Bills and subsidiary legislation should include a general statement setting out “*the principal objectives to be achieved by the legislation*”²² and the APEC *Good Practice Guide on Regulatory Reform*²³ states: “*A regulatory reform policy should have clear objectives*”

6 Establishing whether the evidence for increasing graphic health warnings from 50% to 85% is adequate

The LC Briefing Paper (and the WHO Guidelines on which it is based) does not demonstrate adequate evidence to support increasing the size of GHWs to 85%. It does not provide any evidence of an information deficit that requires larger warnings and fails to identify a problem with the existing 50% GHWs:

- It is solely based on a reference to the WHO Guidelines and does not set out any supporting evidence ;
- The choice of 85% is arbitrary and results in gold-plated regulations ; and
- The proposals directly contravene WHO Guidelines relating to printing tar and nicotine yields on packets.

6.1 Lack of evidence for proposals

The proposal for increasing the size of the GHWs from 50% to 85% is based solely on the non-binding recommendation in the WHO Guidelines that the size of the health warnings and messages should cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. However, there is no indication of the source or quality of the evidence on which this recommendation is based. Without the evidence being properly set out, it is inappropriate to place any weight on recommendations stemming from it. Again, it must be remembered that the current regulations in Hong Kong that require 50% GHWs are already more than is required under the FCTC and meet the recommendation under the WHO Guidelines (see Section 5.1).

I have also reviewed the expert report of Professor W. K. Viscusi²⁴ which provides evidence which directly contradicts the assumption that increasing the size of graphic health warnings will have any impact on smoking behaviours. This evidence includes: statistical analysis by the U.S. Food and Drug Administration of Canadian data which found no evidence of a

²¹ *How Legislation is made in Hong Kong, A Drafter's View of the Process*, Law Drafting Division, Department of Justice, June 2012, <http://www.legislation.gov.hk/blis/eng/pdf/2012/drafting2e.PDF>

²² Ibid, Appendix to Chapter V, paragraph 8(c)

²³ *Good Practice Guide on Regulatory Reform, August 2008*, APEC, July 2010, paragraph 4
http://publications.apec.org/publication-detail.php?pub_id=1061

²⁴ *Expert Report on Proposals to Increase the Size of Graphic Cigarette Warnings in Hong Kong*, W. Kip Viscusi, June 2015

beneficial effect of graphic warnings on smoking behaviour; evidence that the introduction of 50% GHWs in Hong Kong in 2007 had no impact on reducing smoking prevalence; and evidence that GHWs in Canada, Australia and the UK had no effect on the trend in smoking prevalence rates in those countries. Professor Viscusi concludes that: *“There is no sound basis in experimental data, survey data, or data on smoking behavior to conclude that larger graphic warnings are more effective in increasing risk awareness or reducing smoking behavior. It therefore cannot be expected that increasing the size of existing graphic warnings from 50% to 85% would have any impact on smoking behaviors”*. The LC Briefing Paper fails to consider any evidence or undertake any analysis of the type referred to in Professor Viscusi's report.

6.2 Arbitrary and gold-plated regulations

The WHO Guidelines are silent as to the basis on which graphic health warnings of any percentage above 50% are to be chosen. They do not provide any recommendations for 85% GHWs. The choice of 85% in the LC Briefing Paper is purely arbitrary and has no evidential basis at all. It effectively gold-plates the regulations – going well beyond the 30% text warnings required under the FCTC or indeed even the non-binding recommendation of 50% GHWs in the WHO Guidelines.

6.3 Proposals directly contravene WHO Guidelines relating to tar and nicotine yields

The WHO Guidelines clearly state that: *“Parties should prohibit the display of figures for emission yields (such as tar, nicotine and carbon monoxide) on packaging and labelling”*²⁵, because they are concerned that *“marketing of cigarettes with stated tar and nicotine yields has resulted in the mistaken belief that those cigarettes are less harmful”*. However the LC Briefing Paper proposes that: *“tar and nicotine yields be printed on a side adjacent to a typical flip-top lid of a cigarette packet ... presented in a conspicuous place of such side of the packet”*²⁶ - in direct contravention of the Guidelines.

It is remarkable, given that the only justification put forward in the LC Briefing Paper for the proposals is to seek to follow WHO Guidelines, that they then directly contravene those Guidelines.

7 The proportionality of 85% graphic health warnings

The LC Briefing Paper does not demonstrate that increasing the size of GHWs from 50% to 85% would be a proportionate policy measure i.e. whether the benefits significantly outweigh the costs. In fact the LC Briefing Paper does not provide any quantified or even qualitative evidence on the impact of the incremental increase in the size of GHWs from

²⁵ *Who Framework Convention on Tobacco Control* Guidelines for implementation, 2013 edition, page 63 http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf?ua=1

²⁶ LC Paper No. CB(2)1456/14-15(07), paragraph 17(d) http://www.legco.gov.hk/yr15-16/english/panels/hs/papers/hs_a.htm

50% to 85% and fails to consider any of the costs or benefits that might arise as a result of the measure or possible alternative measures. The LC Briefing Paper fails to:

- Consider alternative policies or identify the policy with the greatest net benefit to society;
- Consider the costs of the proposals and in particular the impact on trademarks; and
- Estimate the benefits of the proposal.

7.1 Failure to consider alternative policies and identify the policy with the greatest net benefit

The LC Briefing Paper fails to consider any policy alternatives. The Hong Kong Department of Justice in their publication *How Legislation is made in Hong Kong*²⁷ states that the responsible Government agency is required to provide a clear statement of purpose for a proposed measure, demonstrating that “*legislation is necessary, in the public interest and that other options ... cannot achieve the objective*”²⁸

The APEC *Guidelines for the preparation, adoption and review of technical regulations*²⁹ similarly state that: “*In order to ensure that any government intervention brings the greatest possible net benefits, it is important to ensure that all the feasible options are identified and assessed. In addition to the imposition of technical regulations, there are a number of policy instruments available which should be considered.*”

Without an estimate of the costs and benefits of the proposed measure, it is impossible to judge whether the proposal is proportionate, whether the benefits outweigh the costs and risks involved, and whether it provides the maximum net benefit compared to alternative policy options. The APEC *Guidelines for the preparation, adoption and review of technical regulations*³⁰ state: “*Each option should then be considered carefully in terms of costs and benefits. The option chosen should be the option which either provides the maximum net benefit or the least net cost to society. It is important to include the status quo in the set of options being considered, to ensure that no option is chosen which would in fact be worse for the economy than the status quo.*”

²⁷ *How Legislation is made in Hong Kong, A Drafter’s View of the Process*, Law Drafting Division, Department of Justice, June 2012, <http://www.legislation.gov.hk/blis/eng/pdf/2012/drafting2e.PDF>

²⁸ Ibid, Appendix 3, paragraph 451 (a)

²⁹ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHaTcAvA&usg=A FQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

³⁰ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHaTcAvA&usg=A FQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

This evidence on costs, benefits and risks of a range of policy options should have been provided through the RIA process (see Section 4.2) which would have allowed comparison of the proposal with the 'Do Nothing' option of maintaining existing GHWs and alternative options – for example using different warning messages.

7.2 Failure to estimate the costs of the proposals

The LC Briefing Paper does not even mention the potential costs of the measure. In contrast, the previous 2001 Tobacco Control RIA showed that the costs of tobacco control measures could be substantial – for example the costs of the previous amendments to restrict tobacco advertising and promotion were estimated at HK\$555m. There are a wide range of costs that should be addressed, but are not considered at all in the LC Briefing Paper, including:

- One-off costs and running costs of changing health warnings;
- Loss of manufacturing industry profits - particularly through the impact on trademarks;
- The impact on the packaging industry;
- The cost of introducing the regulations;
- The impact on employment; and
- The impact on tax revenues and illicit trade.

7.2.1 The impact on trademarks

I have reviewed the expert report of Professor Zerrillo³¹ which describes the importance of trademarks and the brands that they represent, how they affect consumers, manufacturers and competition in the marketplace, and the ramifications to trademarks and brands that will result from the requirement to increase the size of the GHWs to 85%. Professor Zerrillo explains that:

- Increasing the size of GHWs to cover 85% of the cigarette packages will make it impossible for manufacturers to use some trademarks as registered (including logos and labels) and for them to use other trademarked elements effectively. Trademarks will not be able to adequately serve their essential functions of differentiating products and uniquely identifying their origin and quality.
- In Hong Kong, the extensive ban on advertising and sponsorship of cigarettes means that the limited space available on cigarette packs for trademarks is the only tool manufacturers have to identify and differentiate their products from other competitive offerings. A further reduction in this already limited space will minimize

³¹ Expert Report of Professor Philip Zerrillo, June 2015

or even eliminate any meaningful use of trademarks and, in doing so, destroy their value. As a result, decades of investment in brands and their related trademarks, along with their inherent goodwill, will be lost.

- Brands including trademarks play an important role in the cigarette market, and their erosion or elimination changes the nature of the market. In general, markets without brands become price-driven commodity markets.
- Commodity markets produce lower prices that encourage more consumption. Commodity markets also make the market inhospitable to firms trying to enter the market and for existing brands, particularly small brands, to compete for a greater market share. Commoditization of the cigarette market in Hong Kong and a shift to pure price driven competition could also lead to an increase in illicit trade because without the added value of brands, legitimate products will be less clearly differentiated from illicit products.

Professor Zerrillo concludes: *“In sum, it is my opinion that increasing the size of GHWs to 85% will preclude any effective or meaningful use of trademarks, thereby preventing them from performing their essential brand functions. Further, it is my opinion that the elimination of trademarks as a platform for brand communication has a number of important negative repercussions for consumers, manufacturers, and the market in general, including some unintended consequences that are at cross-purposes with the stated health goals of the initiatives.”*³²

These impacts are not considered at all in the LC Briefing Paper. This is not only a failure of process, but as noted in Section 4.3 above, also goes against the recommendation made in the 2001 Tobacco Control RIA that: *“any future requirements for pictorial and graphic contents take into account the likely financial and economic costs of implementation and that these be weighed against the likely health and economic benefits likely to arise.”*³³

7.3 Failure to estimate the benefits of the proposals

The LC Briefing Paper does not estimate the extent of the benefits of its proposals in order to establish that some form of government intervention is warranted. The APEC *Guidelines for the preparation, adoption and review of technical regulations*³⁴ are clear that *“once the nature of the problem is established, the magnitude of the problem must be assessed”*,

³² Expert Report of Professor Philip Zerrillo, June 2015, Paragraph 56.

³³ Regulatory Impact Assessment, *Proposed amendments to the existing smoking legislation*, Environmental Resources Management Limited, LC Paper No. CB(2)1/02-03(04), Dec 2001, page 107
<http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>

³⁴ *Guidelines for the Preparation, Adoption and Review of Technical Regulations*, APEC
http://www.google.co.uk/url?url=http://www.jsm.gov.my/documents/10180/86670/Guidelines%2Btechnical%2Bregulations.doc/8bce9281-59f4-4403-bc7d-5c9dbf35997f&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB4QFjABahUKEwio3e63sIfGAhXkKNsKHaTcAvA&usg=A FQjCNHe0Mkpx2A5xUFXEkebDhKg4cu_Yg

because “*the mere existence of a problem does not mean that Government intervention is warranted*”. It warns about the danger of over regulation: “*Over regulation occurs where the extent and/or nature of regulation is greater than what is needed to address a problem. This results in additional costs to the economy, for example through increased production costs, reduced competition, reduced innovation, or reduced customer choice.*”

8 Conclusion

The analysis in this report shows that the LC Briefing Paper does not include the necessary evidence or analysis to support the implementation of the proposed policy and does not provide proportionate evidence-based policy recommendations. It has not shown that the proposed increase in GHWs from 50% to 85% is necessary, appropriate or proportionate.

The LC Briefing Paper does not identify any problem with the existing 50% GHWs, establish why the incremental increase in size from 50% to 85% is necessary or what benefits it would provide over and above existing regulation or alternative measures. It fails to consider any evidence on the costs or benefits that might arise from the measure.

Taking all the concerns raised in this report together, it would be manifestly inappropriate to rely on the LC Briefing Paper to proceed with larger graphic health warnings.

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