



Tobacco Association of Hong Kong
香港煙草業聯會

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

27 February 2017

Dear Chairman,

Food and Health Bureau's 85% Graphic Health Warning Proposal

We refer to the Food and Health Bureau's ("FHB") discussion paper of CB(2)859/16-17(12).

Whilst the FHB has finally provided some responses to our various concerns with the 85% graphic health warning proposal ("the Proposal"), we are deeply disappointed that the responses lack substance and contain selective and incomplete data. The FHB's view and the tobacco industry's view remain in divergence, and many substantive and technical aspects of the Proposal have been in heated contest still with no feasible solution. As our core concerns have not been addressed and the Proposal would lead to trade and operational infeasibility, the Proposal will benefit no one but lead to many negative consequences, especially given there are plenty of evidence that the Proposal would not effectively achieve the objective of reducing smoking prevalence in Hong Kong.

Therefore, we urge the FHB to give further consideration to our concerns raised in our previous submissions as well as those stated in the enclosed table particularly in the light that the Proposal is unlawful and irrational. We also welcome an opportunity for a direct dialogue with the FHB to discuss our concerns so as to work out the practical and feasible solutions before the implementation of the Proposal.

We thank the Chairman and the members of the Health Services Panel for your time and consideration of this matter.

Yours faithfully,

Chairperson
Tobacco Association of Hong Kong Limited





Comments on the Food and Health Bureau's Paper to the Health Services Panel

LC Paper No. CB(2)859/16-17(12)

Paragraph/	Government's Paper	Industry's Response
3	Over the years, the government has been taking a progressive and multi-pronged approach in tobacco control...	<ul style="list-style-type: none"> Increasing the size of GWH from 50%-85% in one go is not "progressive". China has recently increased the size of the text warning from 30%-35%. Canada has increased the size of the GHW from 50%-75%.
FN 5	Article 11.1(b)(iv) of the Convention specifies that health warnings and messages on tobacco product packaging and labeling should be 50% or more, but no less than 30% of the principal display area... 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.	<ul style="list-style-type: none"> EU has only adopted 65% GWH as the European Parliament Committee on Legal Affairs stated that the introduction of 75% GHWs would not be in accordance with national constitutional law as well as international treaties such as the TRIPS Agreement and recommended 50% GHW.¹ In any event, the size of the GHW should be subject to local circumstances.
4(b)	The number of forms and health warning will increase from 6-12.	The full 12 versions have not been released and the Panel members should be given the opportunities to review and comment before the GHW designs are going to the final amendment.
4(d)	The indication of tar and nicotine yields should be printed on a side adjacent to a typical flip-top lid...	There is no justification on why the tar and nicotine yields need to be separated from the GHW. This effectively takes more space from the total pack space leaving even less space to display consumer information, product information, bar code and authentication symbols, etc. We urge the government to put the nic/tar yield indications back onto the GHW so as not to confuse the public that they are manufacturer rather than government's warning.
5	According to the Guidelines of Article 5.3 of FCTC... the tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies...	Article 5.3 of FCTC does not prohibit the government to conduct public consultation and in fact countries like UK, Australia, Canada and NZ (which are all members of FCTC) did conduct rounds of public consultation before proposing and legislating for GHW or PP.

¹ The Opinion can be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-510.591%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>



6	<p>With smoking prevalence rate as low as 10.5%, the main goals of our tobacco control regime are to encourage existing smokers to quit and prevent non-smokers, particularly youngsters, from picking up smoking.... The survey also found that 37.2% of ex-daily smokers gave up smoking because they wanted to “prevent health from being harmed”. These figures reflected the need to provide smokers with information related to smoking cessation reinforce their will in quitting smoking and remind them of the health hazard which smoking may bring about... The containers and packets of cigarettes and tobacco products, of which daily smokers access on average 13 times a day, would naturally be the most direct means of communicating such information. Experience of other countries indicated that well-designed health warnings on tobacco product packages will not only increase the awareness of the health effects of tobacco use but also smokers’ motivation to quit smoking, thus increasing the number of quit attempts...</p>	<ul style="list-style-type: none"> • From the 2009 Global Youth Tobacco Survey (GYTS) data for Hong Kong, Hong Kong has a high levels of awareness of the risks of smoking at 95.4% (for the youth). • There is no direct correlation between the size of the GHW and smoking rate. • Information relating to smoking cessation can be distributed via other means such as public campaign or advertisement. • Smoking cessation is not about health risk associating with smoking. • The government can use less intrusive mean to achieve public awareness. • In fact, the FHB’s response offers no evidence demonstrating that larger graphic warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. Instead, the Government relies on evidence on downstream psychosocial variables or precursors to intention that are an insufficient basis to evaluate the effectiveness of tobacco control policies. None of these studies examine actual behavioural outcomes, but instead merely ask about people's intentions, thoughts and perceptions. This type of evidence was rejected by the U.S. Court of Appeals decision in <i>R.J. Reynolds Tobacco Co. v. Food and Drug Admin</i>² when commenting on the U.S. FDA's reliance on this type of evidence to support the claim that graphic warnings will advance its interest in reducing the number of Americans who smoke.
7	<p>The THS of 2015 also found that 31.1% of ex-daily smokers gave up smoking because of objection from family members or friends or concern about exposing family members and friends to second-hand smoke. In this connection, we note the WHO’s advice that graphic health warnings can persuade smokers to protect the health of non-smokers by smoking less at home and avoiding smoking near children....</p>	<p>50% GHW is big enough for anyone to see and the objective can be achieved by refreshing the pictorial designs without changing the size of the GHW.</p>
8	<p>Among various choices of tobacco control measures, a sizeable proportion (about 32%) of secondary school students chose</p>	<p>If the study was done for 75% GHW, why the government is proposing 85%GHW? Now what are the bases?</p>

² *R.J.Reynolds Tobacco Company, et al., Appellees v FDA, et al., Appellants*, No. 11-5332, Appeals from the United States District Court for the District of Columbia (No. 1:11-cv-01482)



	showing health warning texts and pictures on at least 75% of the cigarette packet surface area and banning trademarks.	
9	The Hong Kong Council on Smoking and Health's Tobacco Control Policy-related Survey of 2015...	This survey was based on 75% GHW and why the government now proposes 85% GHW. The FHB still fails to provide any evidence why 85% GHW is justified. Why the FHB not considering more progressive approach say 55% (like the % increase in china from 30% text to 35% text) or 65% (like EU).
6-9	Local statistics supporting the proposal	Hong Kong prevalence data (e.g. study done by Professor Tsui) continues to be ignored. The local statistics referred in the proposal simply are irrelevant.
6-9	Local statistics supporting the proposal	The statistics enquired was for the effectiveness of the larger health warning in reducing smoking prevalence. Various statistics presented do not address the issue raised and irrelevant to the enquiry.
10	Since May 2016, the WHO has been advocating for plain packaging of tobacco products.	But COP7 WHO meeting did not include in the agenda to discuss any excessive GHW or PP topics.
10	Three years after implementation of plain packaging and expanded health warnings, a study revealed that, after excluding the effects of other concurrent tobacco control measures, including the increase of excise tax in April 2010, December 2013 and September 2014, Australia saw a 0.55% points drop of the daily smoking prevalence of people aged 14 years or older....	<ul style="list-style-type: none"> • The 0.55% point drop from Dr. T Chipty's report is flawed because: <ul style="list-style-type: none"> ○ Her methodology for controlling for taxes is inadequate given she only controls for 3 tax increases out of the 14 that occurred between 2010 and 2015. ○ Her models implicitly assume that the probability that a particular person is a smoker in any particular month depends only on the tax level in that month and not on the tax level in any previously month. Thus, the analysis fails to identify the quitting that results from the cumulative impact of increased price over more than one month. This gives rise to a bias in her analysis in misinterpreting price effects as packaging effects. ○ Her report does not claim to determine the effects of PP. It only estimates the impact of PP and enlarged GHW. Even by her own analysis, a 0% effect of PP is possible. ○ The report erroneously uses a linear trend. She admits in her report that there is "some indication that the decline in smoking prevalence has accelerated in recent years" which makes her linear trend line inappropriate. ○ The report fails to take other price factors into account. ○ She fails to address limitations in the RMSS data. The RMSS prevalence data are drawn from survey evidence that asks respondents whether they smoke. However, it is well



		<p>established that such survey data are subject to problems of under-reporting which undermine its usefulness.</p> <ul style="list-style-type: none"> ○ See further from Dr. A Lilico report of August 2016³ and Davidson’s report of March 2016⁴. ● Further, data from the Cancer Council Victoria 2014 Australia Secondary Student Alcohol and Drug survey shows that the Australian youth smoking rate for 2014 fell from 6.7% in 2011 to 5.1% in 2014. However, countries without PP, including US, Canada, UK and NZ have recorded similar or greater declines in their youth smoking rates. For example⁵: <ul style="list-style-type: none"> ○ US youth smoking rate declined 42% between 2011 and 2014 compared to 23% in Australia during that same period. ○ Canada’s youth smoking rate fell by more than 33% between 2010 and 2013, while NZ also records a lower youth smoking rate than Australia. ○ ASH UK states that the Australian decline “is comparable to a similar fall in smoking in England where regular smoking is now down to 3% among 11-15 year olds (and this occurred before UK implemented PP).
10	Some members of the European Union such as France and the United Kingdom have followed the same path and implemented the plain packaging policy in May 2016, with Hungary and Ireland having passed the relevant laws. New Zealand has also passed the plain packaging legislation and is already preparing for implementation of the newly passed laws...	However, the countries which has implemented PP have only 65% GHW while Australia and NZ have GHW less than 85%. The FHB should not confuse the Panel members by saying PP as 100% GHW which is not the case.
10	We consider that the proposed requirement of expanding the size of health warning to cover 85% of the two largest surfaces of the container and packet of cigarettes and tobacco products is moderate and appropriate for the local context. This is also in line with our progressive tobacco control strategy.	If the COSH survey was based on the 75% in the 2015 survey, why the Government is now proposing 85%GHW?
10	International Trend on Health Warning Requirement	Smoking prevalence in Australia had already been on a declining trend well before the implementation of plain packaging. The statistics presented, in fact, prove the point that plain packaging does not have any additional impact to the already declining smoking trend.

³ Dr. A. Lilico, Europe Economic, (August 2016), “Analysis of the Chipty Report’s conclusions regarding packaging changes and smoking prevalence in Australia”

⁴ Davidson, Submission to Public Consultation on Potential Measures to Enhance Singapore’s Tobacco Control Policies (March 2016).

⁵ Data provided by CCV, US Centre for Disease Control, and Health Canada.



11	There is enquiry about why the Government does not follow the practice of Germany, which only requires the health warning to cover 65%...	Not just Germany, many EU states have only adopted 65% GHW such as Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Greece, Italy, Latvia, Lithuania, Malta, Netherland, Poland, Portugal, San Marino, Slovakia and Sweden. The government should not single out one of the countries without providing the full picture to the Panel.
11	According to the WHO, countries should consider implementing tobacco control policies with regard to the local situation. Germany has a daily smoking prevalence rate at 20.9% in 2013.	<ul style="list-style-type: none"> • If Germany has a smoking prevalence rate at 20.9% with 65% GHW, then considering HK local situation which includes a smoking prevalence at 10.5% and much more restrictive smoking and advertisement bans, the size of the GHW for Hong Kong should be even less than 65%. • Hong Kong would rank 14th with 65% GHW and 7th with 75% GWH in terms of GHW size but with the lowest smoking rate on the list.
11	International Trend on Health Warning Requirement	Once again, the information presented highlights the fact that the size of the GHW does not have an impact on reducing the smoking prevalence. The WHO data on smoking incidence and the ranking of GHW from a research from the Canada Cancer Society when read together provides an excellent proof.
10-11	International Trend on Health Warning Requirement	International experience focused almost on PP. 85% is portrayed as "moderate and appropriate". No evidence on GHW effectiveness is raised (other than Canada and Thailand - both of which are dealt with in the footnote).
12	The tobacco trade has instructed legal firms to forward their submissions to the Legislative Council Panel on Health Services for the meetings with deputations and to the Food and Health Bureau, including legal firm like Herbert Smith Freehills (representing British American Tobacco Company Hong Kong Limited) ...	Why the government does not acknowledge other legal opinions from other firms? Why only single out one firm or one association to tone down the seriousness issues raised? What about submissions from other industry members?
13	"..The evidence as to the effectiveness of larger health warnings establishes a rational connection between Government's requirement for enlarging warnings and its objectives of reducing the prevalence of smoking and the diseases and deaths it causes."	The government has not provided any evidence that proves the effectiveness of larger health warnings in reducing smoking prevalence. Prof. Chan herself, admitted at the Deputation that the case of Thailand was in the end not a good reference as there were conflicting results from different data.
17	A tobacco trader could still display his trade mark, though with adaptation or re-sizing in some cases, on the remaining areas (i.e. 15%) of the two largest surfaces, as well as the lateral surfaces, of the packet or retail container in a way that does not alter the distinctive character of the trade mark. Insofar as the distinctive character of the registered trade mark can be	<ul style="list-style-type: none"> • This is not the case for 3D and pack shot trade marks as their designs are based on the existing size of the pack. • Many other trademarks will also lose their distinctive feature even if they can be resized so as to fit onto the remaining 15% space. This in effect causes the trade marks to lose their substantial, if not



	preserved and is recognizable after adjustment under the proposal...	all, meaningful or economic viable use and amounts to deprivation within the meaning of Article 105 of the Basic Law.
20	Having taken into consideration that the aim of the proposal is to promote and protect public health in which the rights enjoyed by trade mark owners in respect of the marks would not be prejudiced or impeded by the proposal...	Not true at least for 3D and pack shot trade marks but the Government has neglected to mention this period.
22	In Philip Morris Brand Sarl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay (ICSID Case No. ARB/10/7).. which involved a complaint against the 80/80 Regulation on tobacco packaging promulgated by Uruguay, WHO and FCTC Secretariat stated that there existed a considerable body of experimental and survey evidence suggesting that larger warnings are more legible and noticeable and, therefore, better at informing smokers and non-smokers of risk.	<ul style="list-style-type: none"> • A case from the Court of Appeal of Sri Lanka held that 80% GHW on cigarette packages would not allow sufficient space to display trademarks and directed that the size of the graphic health warnings should only occupy a space of 50% to 60% of the packs⁶. • In its opinion dated 25 June 2013, the European Parliament Committee on Legal Affairs stated that the introduction of 75% GHWs would not be in accordance with national constitutional law as well as international treaties such as the TRIPS Agreement and recommended 50% GHWs. The European Union ultimately adopted 65% GHWs⁷.
23	According to WTO jurisprudence, the WTO member alleging a violation of Article 2.2 of the TBT Agreement by another WTO member bears the burden to present a prima facie case that the relevant technical regulation is more trade restrictive than necessary and, as a step in establishing the prima facie case, must identify a possible alternative measure that is less trade restrictive... Our assessment is that the “alternatives” identified by the trade are not reasonably available alternatives to our proposal... it has been clarified in WTO jurisprudence that measures which form one element of a comprehensive policy, and are thus merely “complementary”, should not be considered alternatives to the measures at issue.	There are many less restrictive measures, including public bill board advertisement, TV education program, computer or mobile app targeted for youth available.
25	We will ensure compliance with the notification requirements and other transparency obligations under the TBT Agreement	Could the government please clarify what transparency obligations it is referring to?
34	The trade queried whether the Government has conducted a regulatory impact assessment...	<ul style="list-style-type: none"> • The steps allegedly taken by the government are not a proper RIA. RIA is a systematic appraisal of how a proposed policy would affect the stakeholders. It requires 1) the identification of the problem, 2) consideration of alternative option, 3) assessment of the positive, 4) negative impacts of each option via public

⁶ Ceylon Tobacco Company PLC v Minister of Health, CA 336/2012

⁷ The Opinion can be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%2BCOMPARL%2BPE-510.591%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>



		<p>consultation, 5) evidence base study, and 6) costs/benefit analysis and etc.</p> <ul style="list-style-type: none"> FCTC also requires market research and focus group study to be done before proposing the GHW.
35	<p>The tobacco trade expressed concern that the increase in the health warning size would lead to intensification of illicit cigarette trade. ... A document of the European Parliament revealed that there is no indication that implementation of graphic health warnings increases illicit cigarettes...</p>	<ul style="list-style-type: none"> Due to geographic and local differences, overseas studies do not apply to HK. In fact, HK has a 29.1%⁸ illicit consumption. Scollo M's report seems to focus on part of the illicit market only, and mentions the decline of certain categories in isolation. However, the overall levels of illicit trade actually increased significantly. The change in % use of the different categories of the Australian illicit market changes each year; therefore the overall level of illicit trade is what needs to be looked at. See also page 6 of KPMG report⁹ which identify a significant increase in overall levels of illicit trade in Australia owing to a massive increase in the volume of contraband products. Australia has also reported an increase in illicit trade after the implementation of PP. For UK and Belgium, GWH was introduced as part of an EU-wide rollout such that regulatory asymmetries between neighboring countries was minimal which also reduces the scope for increases in illicit trade compared to a scenario in which neighboring countries have different sizes in GWH (like HK: 85% and China: 35%). <ul style="list-style-type: none"> From 2001 to 2009, the UK Government stepped off the "duty escalator" of 5% above inflation y-o-y to counteract the rampant smuggling that had led to 1 out of 3 cigarettes consumed in the UK be non-UK duty paid. This means that by 2008, taxes on tobacco in the UK had not increased over inflation for eight consecutive years leading to significantly greater affordability. In fact, total tax incidence on cigarettes decreased from 76.8% to 76% between 2007 and 2008 in the UK. It is therefore hardly surprising that illicit trade in cigarettes saw no increase in 2008¹⁰. The suspension of the duty escalator was part of a wider, comprehensive strategy to

⁸ <https://www.oxfordeconomics.com/my-oxford/projects/353052>

⁹ <http://home.kpmg.com/content/dam/kpmg/pdf/2016/04/australia-illicit-tobacco-2015.pdf>

¹⁰ <http://www.the-tma.org.uk/wp-content/uploads/2014/01/TMA-Tobacco-Tax-Briefing-Final.pdf>



		<p>reduce illicit trade in tobacco in the UK that was introduced by the HMRC.¹¹</p> <ul style="list-style-type: none"> ○ The Belgian market has, for many years, been characterized by high levels of affordability of legal tobacco products and prices that are lower than that of neighbouring countries. In fact, UK consumers routinely buy tobacco products in Belgium, often even in excess of the minimum indicative level (this is the level at which excise goods are presumed to be for personal consumption). This is perhaps the most relevant factor that explains the low level of illicit products in Belgium. ● The illicit trade concern raised was misrepresented. The concern was not on "GHW will increase illicit trade" rather the concern was the extremely large GHW will leave little space for product differentiation which will encourage illicit trade.
37	Under the existing section 18 of Cap. 371, the Secretary for Food and Health may by order in the Gazette prescribe the matters in relation to health warning and indication of tar and nicotine yields and the manner in which such matters are to be displayed and table the amendments for negative vetting.	S. 18 of the Smoking (Public Health) Ordinance only authorizes the government to prescribe how the GHW shall be displayed. It does not authorize the government to interfere with trademark right which requires clear and express language based on the principle of legality. There is no such language in the said Ordinance. As such, the government cannot amend the relevant regulation via negative vetting without being "ultra vires".
38	The Government consulted members of the HS Panel in May 2015 and attended a special meeting with around 100 deputations on 6 July 2015. There were more than 100 submissions... Majority of the views supported the proposal.	<ul style="list-style-type: none"> ● This is misleading and incomplete as the 100 submissions were for 3 proposals including e-cigarette, bus terminal smoking ban and 85% GHW. ● Further, 70% of the opinions submitted from the commercial sector was not supporting the FHB's proposal.
38	With a view to facilitating the trade's understanding, the Government organized a briefing on the technical issues relating to the implementation of the proposal in November 2016... Over 70 parties attended the January meeting with over 170 submissions made. Majority of the views supported the proposal.	This is misleading as only about 50% of the deputations supported the proposal in 17 January 2017. Further, in terms of the substance in the written submissions, about 2/3 were against the proposal.
40	We understand that the trade is concerned about the display of the tar and nicotine yield indication, which is to be printed on a white background...	<ul style="list-style-type: none"> ● The industry's voice is to put the nic/tar yields as part of the government GHW so as not to take up even more space than 85%.

¹¹ For evidence of the new policy that was adopted by HMRC in 2000 you can refer to page 6 of the following HMRC report:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418732/Tackling_illicit_tobacco_-_From_leaf_to_light_2015_.pdf



		<ul style="list-style-type: none"> It is fair and transparent to let consumer and the public know that this is part of the government warning not manufacturer information.
41	Given our progressive approach, we consider it necessary to retain the indication of tar and nicotine yields to make the public aware of the existence of such substances that are harmful to health.	This progressive approach appears to be inconsistent with the “progressive” approach on deciding the 85% GHW size. One is lagging behind FCTC standard while the latter is way more aggressive.
43	Under the adjusted proposal, with a view to providing greater flexibility, the health warning will cover 100% of one of the two largest surfaces and 70% of the other largest surface of the cigar box.	This remains impractical to the cigar industry, and do not solve the concerns raised. The FHB should have met the industry to work on a practical plan.
44	To allow more time for the trade to prepare for the implementation of the proposal, we propose to extend the adaptation period from 6 months to 12 months upon gazettal of the amendment order.	This adjustment finally meets the legitimate expectation of the industry in terms of the grace period as the same 12 months’ grace period was given for the 50% GHW and there was no basis for the government’s initial proposed 6 months.
45	There are concerns that the seal on soft pack cigarette packets... we propose to remove that requirement and allow the health warning to be positioned at the lower part of the packet.	These adjustments are unreasonable and infeasible without regarding to the technical difficulties on machine manufacturing, alignment variance and the substantial costs to purchase new machines. We urge the government and the Panel members to conduct site visit to some of our members’ manufacture so as to gain some practical knowledge before proposing any “solution”.
46	To facilitate the trade in preparing for the implementation of the proposal, the Government will provide the tobacco trade with a standardized electronic archive version of graphic health warning once the Amendment Order is gazette.	The grace period should not start until the official release of the AI file of the GHW designs. As of today, there is no disclosure of the full pictorial designs for the Panel members to review or comment.
Annex D		The tobacco industry should not be involved in anti-smoking campaign. This is a job to be done by the FHB and FCTC has recommended not to involve tobacco industry in anti-smoking or quit-smoking campaign. Why the FBH forces the tobacco manufacturer to print quit hotline and advertisement.