



Clerk to Panel on Health Services
Legislative Council Secretariat
1 Legislative Council Road
Central
Hong Kong

20 March 2017

Dear members of Panel on Health Services,

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

We are writing to express our continuing concern that the Department of Health has not meaningfully engaged with either the Panel, or ourselves, on key issues regarding the Proposal. The Administration has simply set out an advocacy position: it omits relevant evidence and fails to consider relevant arguments. A proper consultation exercise by the Administration remains the only way by which the inadequate reasoning and/or the evasion of relevant evidence can be tackled through evidence and engagement, and so addressed by the Panel.

The Panel, the Administration and stakeholders are currently at cross-purposes:

- On 22 February 2017, the Panel requested the Administration to reply to a series of questions regarding the Proposal (LC Paper No. CB(2)859/16-17(11))(**Panel's Questions**). These were very similar to JTHK's questions, raised with the Director of Health in a letter of 26 January 2017 (copy attached).
- The Administration published, around the same date, a paper responding to issues raised at the Panel special meeting on 17 January 2017 (LC Paper No. CB(2)859/16-17(12))(**Paper**). This Paper was stated to be "for discussion on 28 February 2017", but does not reference the Panel's Questions.

Two of the most significant issues raised in the Panel's Questions have not received any meaningful response:

1. Panel Question (a) asked the Administration to identify local statistics (i.e. the evidence) to justify that the Proposal "*would be effective in reducing smoking prevalence.*" The Administration's Paper manifestly fails to analyze Hong Kong smoking prevalence data and the impact of larger health warnings. Professor Tsui's research on this issue remains unchallenged, and shows that larger health warnings in Hong Kong have not changed smoking prevalence trends.
2. Panel Question (h) asked whether the Administration would conduct a public consultation exercise on the Proposal. The Administration has avoided the issue and has certainly not stated that it would hold a consultation. Rather, the Paper repeats references to *technical briefings* to stakeholders (which specifically excluded consultation on the 85% requirement) and the *Panel's* own engagements with stakeholders. The Panel has indicated that a consultation should be held, but the Administration continues to avoid the issue.



The need for a public consultation is reinforced by the positions taken by the Administration in the Paper regarding a number of the Panel's Questions. With the exception of the concession regarding a 12 month transitional period (which in reality is not a concession but adherence to consistent precedent), we object strongly to the selective, unbalanced and broad-brush positions set out in the Paper.

In particular, the Administration's positions in respect of the following issues should be properly tested, as in our view a correct understanding of those issues does not justify the 85% health warnings:

- the legal arguments (Panel Question (f) and paragraphs 12 – 33 of the Paper);
- the possibility of adopting less extensive increases in the size of warnings (such as the German model of 65%) (Panel Question (c) and paragraph 11 of the Paper); and
- the risk of intensifying illicit trade (Panel Question (b) and paragraphs 35-36 of the Paper);

The Paper is, logically, the start of a process of consultation and engagement on relevant issues; not the conclusion. Even though we (and others) have made several rounds of submissions to the Department – most notably on 23 June 2015 (LC Paper No. CB(2)1808/14-15(40)) and 10 January 2017 (LC Paper No. CB(2)584/16-17(31)) – it is only now, for the first time, that we have seen the Administration's position on the substantive issues and therefore it is only at this point can there be meaningful engagement on the position that the Department is taking.

We have written today to the Department of Health to identify to them our concerns regarding the Paper (copy attached).

It is unclear how the arguments made by the Administration can be properly tested, and assessed by the Panel, without a meaningful consultation process. We suggest that the Department of Health is directed to produce a further paper which properly addresses in a balanced, thorough and complete manner all the outstanding issues, and that further paper is used as the basis of a public consultation.

We should be delighted to explain our concerns and proposals in more detail.

Yours sincerely,

A handwritten signature in black ink, appearing to read '森川 啓三' (Morikawa Keizo).

Keizo Morikawa
General Manager
Japan Tobacco (Hong Kong) Limited

Encl.



Attachment

JAPAN TOBACCO (HONG KONG) LIMITED
Suite 609-13, 6/F, Prudential Tower, The Gateway,
21 Canton Road, Tsimshatsui, Kowloon, Hong Kong
Tel: 852-2110-0084

Dr CHAN Hon-yea, Constance, JP
Department of Health
21/F, Wu Chung House
213 Queen's Road East
Hong Kong

20 March 2017

Dear Dr Chan,

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

We refer to the letter from the Department of Health dated 27 February 2017, enclosing a paper dated February 2017 (LC Paper No. CB(2)859/16-17(12))(Paper). The Paper purportedly responds to our letter dated 26 January 2017.

The Paper is the first attempt by the Department in this process to address some of the relevant issues. We write nevertheless to express our concern that the Paper does not properly address the issues which Japan Tobacco (Hong Kong) Limited (*JTHK*) and other stakeholders have previously raised. Furthermore, the Paper does not properly address all the issues set out in the Panel's "list of actions" dated 22 February 2017 (LC Paper No. CB(2)859/16-17(11))(Panel's Questions).

Two of the most significant issues raised in the Panel's Questions have not received any meaningful response:

1. Panel Question (a) asked the Administration to identify local statistics (i.e. the evidence) to justify that the Proposal "*would be effective in reducing smoking prevalence.*" The Administration's Paper manifestly fails to analyze Hong Kong smoking prevalence data and the impact of larger health warnings. Professor Tsui's research on this issue remains unchallenged, and shows that larger health warnings in Hong Kong have not changed smoking prevalence trends.
2. Panel Question (h) asked whether the Administration would conduct a public consultation exercise on the Proposal. The Administration has certainly not stated that it would hold a consultation. Rather, the Paper erroneously repeats references to *technical briefings* to stakeholders (which specifically excluded consultation on the 85% requirement) and the *Panel's* engagements with stakeholders. The Panel has indicated that a consultation should be held, but the Administration continues to avoid the issue.

The need for a public consultation is reinforced by the positions taken by the Administration in the Paper regarding a number of the Panel's Questions. The Paper represents an advocacy position, and does not address relevant evidence or consider relevant arguments. We object strongly to the selective, unbalanced and broad-brush positions set out in the Paper.

In particular, the Administration's positions in respect of the following issues (in addition to those above) are flawed and in our view a correct understanding of those issues does not justify the 85% health warnings:

- the legal arguments (Panel Question (f) and paragraphs 12 – 33 of the Paper);



- the possibility of adopting less extensive and restrictive alternatives, such as smaller increases in the size of warnings (such as the German model of 65%) (Panel Question (c) and paragraph 11 of the Paper); and
- the risk of intensifying illicit trade (Panel Question (b) and paragraphs 35-36 of the Paper);

Annexed to this letter is a high level discussion of some of the key deficiencies of the Paper. These highlight the need for a proper consultation.

A meaningful consultation should be held by the Department to examine all of the issues regarding the Proposal. The Paper is, logically, the start of a process of consultation and engagement on relevant issues; not the conclusion. Even though we (and others) have made several rounds of submissions to the Department – most notably on 23 June 2015 (LC Paper No. CB(2)1808/14-15(40)) and 10 January 2017 (LC Paper No. CB(2)584/16-17(31)) – it is only now, for the first time, that we have seen the Administration's position on the substantive issues and therefore it is only at this point can there be meaningful engagement on the position that the Department is taking.

We would be delighted to meet with the Department of Health to discuss the outstanding issues in more detail.

Yours sincerely,

森川 啓三

Keizo Morikawa

General Manager
Japan Tobacco (Hong Kong) Limited

Encl.



JAPAN TOBACCO (HONG KONG) LIMITED

ANNEX TO LETTER TO DEPARTMENT OF HEALTH DATED 16 MARCH 2017

Examples of outstanding issues and deficiencies with the Department of Health's paper dated February 2017 (LC Paper No. CB(2)859/16-17(12))

CONSULTATION

1. The Administration has failed to (i) explain the public consultation steps it has taken to consult stakeholders regarding the 85% health warning size requirements in the Proposal;¹ and (ii) issue to the public, for comment, a comprehensive consultation report on the Proposal setting out the alternatives and cost/benefit analyses for each alternative or a Regulatory Impact Assessment (*RIA*).²
 - Paragraph 38 of LC Paper No. CB(2)859/16-17(12) (*Paper*) demonstrates how the Administration is erroneously seeking to rely on the consultation process conducted by the Panel, not the Administration, and the steps that the Administration has taken regarding only *technical* issues and *implementation* aspects of the Proposal.
 - Whilst the Administration has considered alternatives, at paragraph 23 of the Paper, there is a fundamental lack of analysis as to how it has reached the conclusion that alternatives are “*complimentary*” and should “*not be considered alternatives to the measures at issue*”.
 - Paragraph 34 of the Paper contains an implicit acknowledgment that no RIA has been conducted.

OBJECTIVES

2. The Administration has failed to clarify exactly what smoking prevalence rate the introduction of 85% health warnings is to achieve in Hong Kong.³
 - Paragraph 13 of the Paper simply defines the Administration's objective as “*reducing the prevalence of smoking*” without identifying the precise intended smoking prevalence rate that the measure is alleged to achieve.
 - The Administration has to date only indicated that it wishes to achieve a “*single-digit*” figure.
3. The Paper seeks, in multiple places, to justify the 85% health warning proposal simply because it forms part of a “*progressive and multi-pronged tobacco control strategy*”. This is a circular argument, and could be used to justify any measure.

EVIDENCE – HONG KONG

4. The Administration has failed, firstly, to examine and/or conduct a statistical analysis:

¹ See Annex to JTHK's letter of 26 Jan 2017, para 1 and Panel Question, para (h).

² See Annex to JTHK's letter of 26 Jan 2017, para 2 and Panel Question, para (f).

³ See Annex to JTHK's letter of 26 Jan 2017, para 3.



- a) of the Hong Kong smoking prevalence rate statistics to assess the impact of previous increases in the size of health warnings, including appropriate time trend and regression analysis;
 - b) to justify an increase in the size of health warnings in Hong Kong to 85% rather than a lower figure; and
 - c) to demonstrate that packaging is a reason for smoking initiation, whether by youths or adults.
5. The Administration has failed, secondly, to explain how the COSH survey (June 2016) is evidence of 85% health warnings reducing smoking prevalence in Hong Kong (given that survey assesses public perceptions regarding existing 50% health warnings and attitudes towards the so-called “strengthening” of health warnings).⁴
- Paragraphs 6 to 9 of the Paper seek to deal with the “*local statistics supporting the proposal*”. Yet the local statistics referred to simply miss the point – the Administration continues to ignore *prevalence data*.
 - Alarmingly, the Administration focuses on how cigarette packs are purportedly a good medium to inform minors about smoking notwithstanding the fact that minors should not, of course, have access to tobacco products.
 - In Hong Kong, there is clear evidence that the rate of decline in tobacco prevalence was not affected by increasing the size of health warnings in the past⁵ and that it will not with 85%.⁶ The Administration has not sought to challenge this evidence, but has not referred to it either.
 - It is unclear why the Administration’s letter of 27 February 2017 stated that “*the Government will ... , if necessary, conducting survey [sic] to collect useful statistical data ...*” when the Department ignores the statistical data and evidence that it already has on the impact of larger health warnings in Hong Kong on smoking prevalence.
6. There is ultimately a continued failure by the Administration to present local analysis to justify the Proposal.

EVIDENCE - OVERSEAS

7. The Paper pays scant regard to overseas evidence regarding the effectiveness of larger health warnings. This is despite the prominent part that evidence from overseas played in the Department’s paper for discussion on 19 December 2016 (LC Paper No. CB(2)386/16-17(05)), notably the use of (misleading) statistics in Annex C to that paper.
8. The Administration has failed to identify the statistical or other analysis it has considered and/or conducted (i) regarding the smoking prevalence rates in each of the third countries

⁴ See JTHK’s letter of 26 Jan 2017, paras 4-7 and Panel Question, paras (a) and (c).

⁵ See the Thematic Household Surveys and General Household Surveys.

⁶ See the expert reports of Professor Tsui dated 9 January 2017 (LC Paper No. CB(2)584/16-17(26)) and Professor Viscusi dated 17 June 2015 (LC Paper No. CB(2)584/16-17(116)).



referred to in the Proposal (or in the studies cited in the Proposal) to assess whether the introduction of larger health warnings (and not other measures) in each of those countries has accelerated the rate of decline of smoking prevalence; or (ii) to assess whether these jurisdictions are comparable to Hong Kong. The Paper again ignores the evidence presented to the Panel from a large number of deputations in support of an argument that larger health warnings do not decrease smoking prevalence.⁷

9. Furthermore, the Administration has failed to explain its third country selection criteria or confirm that evidence from no other country contradicts its position that larger health warnings are effective.⁸
- Paragraphs 10 and 12 of the Paper purport to deal with the “*international trend on health warning requirement*”. However, that section deals almost exclusively with plain packaging and/or other measures (ie, increased excise tax).
 - The Administration portrays 85% health warnings as “*moderate and appropriate*” but provides no basis – statistical or otherwise – to evidence such a claim.
 - The Administration has put forward no evidence on the effectiveness of larger health warnings, save for misconstrued statistics regarding Canada and Thailand (see below).
 - The international evidence supports the view that increasing the size of health warnings has not caused a change in smoking behaviour. Despite such evidence having been put to the Department, it is simply ignored. For example, 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*”.⁹ Similarly, the Canada and Thailand data states explicitly that smoking prevalence rates are plateauing or increasing.

ILLICIT TRADE

10. The Administration has failed to (i) advance the analysis that it has conducted regarding the regarding the potential effect of larger health warnings on illicit trade in Hong Kong; (ii) confirm the extent, and the underlying analysis, to which illicit trade in third countries is comparable or not to Hong Kong; and (iii) clarify its statement in the Proposal that “*there is*

⁷ See JTHK’s letter of 26 Jan 2017, paras 8-11 and Panel Question, para (a).

⁸ See JTHK’s letter of 26 Jan 2017, para 12 and Panel Question, para (a).

⁹ *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*).



*no solid evidence suggesting that increasing the size of the graphic health warnings would lead to intensification of illicit cigarette trade”.*¹⁰

- Paragraph 35 of the Paper demonstrates the sleight of hand adopted by the Administration in addressing this issue. The paper states: “*The tobacco trade expressed concern that the increase in health warning size would lead to intensification of illicit cigarette trade. However, studies showed that graphic health warnings do not increase illicit trade”.*
 - The industry has expressed concern regarding the size of warnings – i.e. the substance of the Proposal; but
 - the Department replies by reference to graphic warnings (which Hong Kong already has) and by reference to markets that do not have 85% health warnings.
- The Administration also erroneously focuses on the experience in Australia following the introduction of plain packaging and ignores the risk identified by Panel members and stakeholders that the Proposal facilitates the illegal trade. The evidence regarding Australia is, in any event, highly contested.
- The only reference to Hong Kong is a peculiar statement that “*the Customs and Excise Department has been undertaking stringent enforcement against illicit cigarette activities and there has been no evidence that illicit cigarettes have been intensified*”. This statement, aside from the fact that it ignores the significant illegal trade issue in Hong Kong, and that tobacco regulation can create non price-led demand for illegal tobacco products, is wholly irrelevant given that larger health warnings have not yet been introduced.

LEGAL ISSUES

11. The Administration has advanced a one sided legal argument in an attempt to deal with the legal issues raised by a large number of deputations that the 85% health warning requirement undermines intellectual property and breaches of rights under the Trade Mark Ordinance (Cap.559) and the Basic Law (notably Articles 27 and 105).
12. Put at its most fundamental, the Paper’s analysis appears to rest on two highly contentious and contested propositions:
 - a. First, that “*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 of the diseases and deaths it causes*” (paragraph 13 of the Paper). As identified above, the Administration has manifestly failed to establish any such link. The only evidence to date analysing Hong Kong prevalence data (Professor Tsui), establishes the opposite.
 - b. Secondly, “*the rights enjoyed by trade mark owners in respect of the marks would not be prejudiced or impeded by the proposal*” (paragraph 20 of the Paper). This conclusion is reached on the basis of (i) a UK judgment - that is in fact currently under appeal to the UK Supreme Court; (ii) a highly contested interpretation of the

¹⁰ See JTHK’s letter of 26 Jan 2017, paras 13 to 15 and Panel Question, para (b).



judgment in *Hysan Development Co. Ltd v Town Planning Board* (2016) 19 HKCFAR 372; and (iii) a bare factual assertion – which is highly disputed - that the distinctive character of registered trademarks can be preserved after they have been adapted or re-sized to fit in the remaining 15% of the front and back of the pack.

13. Without it being necessary – or appropriate – at this stage to engage in a full legal and factual analysis, it is patently clear that the Administration’s legal arguments are highly contentious and should be scrutinised and examined carefully, in the forum of a public consultation, before any conclusions are reached as to the legality of the Proposal.
14. This approach is further substantiated by the fact that the introduction of larger health warnings, of similar size to those in the Proposal are currently subject to judicial challenges in Nepal, Thailand and India (amongst others).