A response

Consultation on the introduction of regulations for standardised packaging of tobacco products

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OVERVIEW

The Anti-Counterfeiting Group and British Brands Group remain concerned that the policy to standardise packaging of tobacco products has not been sufficiently scrutinised or founded on reliable evidence, to the extent that the desired policy goals may not be achieved.

There are particular concerns that standardised packaging will result in:
- down-trading, prompting no change or an increase in consumption;
- a growth in illicit imported brands, resulting in an increase in consumption and weaker age control;
- a growth in counterfeit products, increasing risks to public health including to children.

Rises in taxation and stronger border enforcement cannot be relied upon to provide realistic remedies to these concerns.

Further analysis and further monitoring of the Australian market is recommended to ensure the goal of reduced tobacco consumption is achieved.

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1 **INTRODUCTION**

The Anti-Counterfeiting Group and British Brands Group welcome the opportunity to respond to the Department of Health's consultation on the introduction of regulations for standardised packaging of tobacco products.

2 The Anti-Counterfeiting Group (ACG) campaigns on behalf of consumers and legitimate businesses for recognition of the economic and social cost of counterfeiting. The British Brands Group champions the benefits of branding and the potential for brands to deliver choice and value to consumers in an environment of vigorous but fair competition.

3 Both organisations contributed to the 2012 consultation and the respective submissions are linked here and here. The ground covered in these submissions is not duplicated here.

4 Both organisations support fully the objective to improve public health and wellbeing. Our response to the consultation is intended to help government achieve that goal and focuses on those aspects of the policy that have a brand dimension.

5 The introduction of standardised packaging represents a significant intervention in the market which will affect consumer behaviour and the working of that market. Some of those effects may support the policy goal but others may well not. Specifically our primary concerns are that:

(1) making tobacco products visually more similar will be a strong commoditising influence on consumer behaviour. Over time consumers who perceive fewer differences between products will use price as a stronger determinant of choice. Down-trading risks thwarting the policy goal, with smokers consuming the same or more;

(2) consumer preference for branded packs and/or a desire to be individual may increase the appeal of – and market for – illicit branded packs (contraband) from abroad. Such packs are likely to use – and stimulate – unregulated supply chains which in turn ignore age controls;

(3) the simplification and homogenisation of tobacco packaging reduces the complexity and cost of producing fake products, encouraging supply. At the same time, commoditisation of the market may encourage demand for such products. This increases the exposure of the public to low quality, even more harmful products that use unregulated supply chains.

6   These factors remain largely un- or under-scrutinised, with the result that the policy faces a risk of causing a net harm to public health and wellbeing, not the intended improvement.

7   **THE CHANTLER REVIEW**

The Review concludes that the benefit of standardised packaging, on the parameters so far assessed, is finely judged:

> I am satisfied that the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health. (para 18)

8   **Commoditisation / down-trading**
The Review recognises the risks of down-trading (see paras 5.1-5.4 and Annex C). However it focuses on reduced desirability of the product while ignoring the effects of price on consumer decision-making and choice when products are presented to them in a way that suggests they are all essentially the same. The analysis is therefore incomplete.

9   While the Review refers to the reduction of brand appeal leading to reduced consumption, it does not acknowledge or analyse the potential outcome that, were tobacco prices to fall or consumer choice to be driven more strongly by price, consumption might stay constant or rise.

10   The Review's solution to commoditisation is to raise tax levels. This amounts to the use of one policy to overcome the shortcomings of another and is itself imperfect. A tax increase would raise prices of all tobacco products, so while all may be more expensive relative to their pre-tax-rise levels, the relative prices of one product to another will remain unchanged. Consumers may still feel they are getting a good deal by trading down. Furthermore, any increase in tax increases incentives to import illicit branded packs and trade in counterfeit product.

11   **Illicit branded and 'white' packs** (contraband)
The Review acknowledges 'contraband' and 'illicit whites' (see para 5.5 and Box 3) but does not address the contradiction present in the core evidence used to support standardised packaging: that consumer preference for branded packs designs supports the hypothesis that consumers will prefer imported branded or illicit whites over domestic standardised packs.

12   Any growth in contraband or illicit whites will run counter to the policy, not only because it undermines its core nature (the removal of branding/differentiation from the market) but because

it will encourage the use of – and stimulate – the unregulated supply chain with its less rigorous age controls.

13   The unregulated supply chain and the risks of exposing children to tobacco products – directly and indirectly – has yet to be analysed, representing a significant gap in policy understanding.

14   The Review's solution to growth in illicit branded or white packs is effective border enforcement. The efficacy of border enforcement however is, we suggest, over-claimed (see below).

15   **Counterfeit**
        The Review contends that standardised packaging is no easier than differentiated packaging to counterfeit. This is counter intuitive and contrary to the evidence presented by the Consumer Packaging Manufacturers Alliance.

16   Discrepancies in findings between a KPMG study and Australian government figures resulted in the KPMG study being dismissed in the Review, rather than both studies being used to inform on a market that is notoriously difficult to analyse.

17   Once more, the Review places the focus on enforcement as the only means to counter any increase in counterfeits. We question whether this is realistic.

18   **THE EVIDENCE**

        The effects of a significant market intervention such as standardised packaging on consumer behaviour and competitive market responses will only become apparent in the medium to long term.

19   While evidence from Australia may provide a useful indicator, the impact of standardised packaging cannot be isolated easily from other effects (cf the tax rise on 1st December 2013). The Australian market has also unique attributes that mean lessons cannot be imported wholesale into other markets. It would appear there is no conclusive evidence yet of the efficacy of standardised packaging so the risks of unintended consequences arising from a policy that is already finely judged remain real.

20   **Commoditisation / down-trading**
        There are already some indications of down-trading in the Australian market:
        -   between 2012 and 2013, sales of factory-made cigarettes fell by 1.1% while hand-rolled tobacco increased by 3.5%, with indications that historic trends have not been disrupted (source: Illicit tobacco in Australia, KMPG, 3 April 2014, p.6);
        -   Data from InfoView indicates down-trading to cheaper price segments accelerate following the introduction of standard packaging in December 2012 (see Annex 1). Tax effects may influence the 2014 figures;
        -   A C Nielsen reports that the market share of cigarettes priced under $15 grew from 25.6% in 2011 to 35.2% by the end of 2013 (source: The Australian, 18 June 2014);
        -   The same article quotes Roy Morgan consumer research suggesting that smokers of low-price brands claim to smoke more cigarettes per day (14-17) than smokers of higher priced brands (9-12). This is corroborated by experience in the US where the rise in discounted cigarettes in the 1980-90s correlated with an increase in youth smoking (source: Health, United States, 2007,p101 and Harvard Business School Philip Morris: Marlboro Friday, p19).

21   The Impact Assessment acknowledges the potential significant down-trading effect:
      -    the rate of down-trading between the top two price bands and the lower two bands is
           predicted to double in rate after the introduction of standardised packaging (paras 88 and 115);
      -    by 2025 the number of premium and mid-priced products is estimated to be around half the
           level of that anticipated were current trends to continue (para 122);
      -    it states that "Standardised tobacco packaging will limit competition through limiting product
           differentiation. However, it is also expected to increase price competition." (para 203)
      It is worth noting that the Impact Assessment makes no prediction for down-trading from factory-
      made cigarettes to hand-rolled tobacco (para 122), despite that being seen in Australia (see para 20
      above).

22   The Impact Assessment also warns of the implications of raising duty to compensate for down-
      trading, stating that duty changes will only be effective if the reduced distinction between legal
      and illicit packaging is compensated by stronger measures to deter illicit imports. It goes on to
      state that "these stronger measures are likely to involve additional resources and funding which
      cannot be assumed or guaranteed" (para 120).

23   Looking at tobacco consumption overall in Australia, it is not yet clear that standardised
      packaging is causing a reduction. Declines in consumption seen to date seem to be following a
      pre-existing trend, with consumption falling more in a period when duty increased than when
      standardised packaging was introduced. There is also some evidence that more young people
      are smoking (see Annex 2).

24   This suggests the policy is indeed finely judged. In light of this, it is clear that down-trading and
      the implications for consumption warrant closer and more considered analysis than has currently
      been undertaken.

25   **Illicit branded and 'white' packs** (contraband)
      The Stirling Review asserts that people prefer branded packs over standardised packaging
      designs when presented with the choice.

26   Consumption of contraband products has shown a significant and accelerating rise, from 0.42
      million kg of illicit tobacco consumption in 2011 to 0.51 million kg in 2012 but then to 1.28 million
      kg in 2013 (source: Illicit tobacco in Australia, KMPG, 3 April 2014).

27   'Illicit whites', a subset of contraband, are a feature of the Australian market with a growing
      share over the period when standardised packaging was introduced, rising from 0.4% of total
      tobacco consumption in Q2, 2012 to 1.7% in Q2, 2013. Manchester, for example, grew its share
      from 0.2% to 1.0% of the total market in the same period (source: Illicit tobacco in Australia, KMPG, 3
      April 2014).

28   While experience from Australia is illustrative, the consumption of contraband products can be
      expected to be a greater issue in the UK in light of its proximity to continental Europe, the extent
      of cross-channel traffic, the concept of the single market and the greater population. It is
      therefore important to understand the contraband market and its supply chain much better if the
      predicted modest positive effect of standardised packaging is not to be neutralised.

29 **Counterfeit**
    The KPMG study, dismissed in the Chantler Review, identifies the consumption of counterfeit
    products as small in overall terms (0.14% of all consumption in 2013). Using a consistent
    methodology, this represented a rise over the period when standardised packaging was
    introduced, from 0.05% in 2012.

30 Meanwhile Australian government figures show a rise in detections over a similar period:

Tobacco detections in sea cargo and amount of duty evaded

Year	No of detections	Tobacco (tonnes)	Cigarettes (millions of sticks)
2011–12	45	177	141
2012–13	76	183	200

    It is not known the extent to which there is a rise in counterfeit activity or a rise in enforcement.

31 The Impact Assessment, in exploring counterfeiting, acknowledges that:
    -   "standardised packaging may increase the attractiveness of counterfeit [ ] products" (para 120);
    -   "standardised packaging may lead to easier market entry for new counterfeit suppliers
        leading to an overall increase in the supply of counterfeit cigarettes" (para 132);
    -   "it is hard to predict the potential impact on the complex and dynamic nature of the illicit trade
        in contraband and counterfeit tobacco and any switching in legitimate trade to branded packs
        purchased abroad" (para 128); and
    -   "the potential impact on the UK duty unpaid market remains unknown and unquantified. If the
        illicit market increased significantly it could significantly increase the costs of a standardised
        packaging policy" (Para 126).

32 The particular threats to public health posed by counterfeit products and the wider implications of
    any growth in counterfeiting, such as links to organised crime, warrant a deeper assessment.

33 **Enforcement**
    A fuller analysis of the enforcement regime is required before proceeding with the policy, both in
    the context of age controls and to assess whether it represents a viable solution to a rise in
    consumption of illicit products, whether contraband or counterfeit.

34 While we acknowledge the professionalism and diligence of enforcement agencies such as
    Trading Standards and the Border Force, they would be presented with a significant additional
    burden if required to offset negative consequences arising from the policy, especially so if there is
    no additional resource to do so.

35 In terms of the enforcement of age controls, Trading Standards is already over-stretched,
    reporting a significant reduction in both budget and staff (see Annex 3). The Trading Standards
    Workforce Survey in March 2014 identified a reduction in staff of over 40% between 2009 (3,534
    FTE) and 2014 (1,995.4 FTE).

36 In relation to border control, the Chantler Review described the HMRC's actions in combating
    illicit trade as "very effective" (para 5.10). This may be misleading. A key indicator of effectiveness
    would be to identify the interception rate of illicit products as a proportion of all illicit tobacco.
    Such rates are hard to measure and generally not available, although a UNODC report (see p181,
    The Globalization of Crime) considered a 7% interception rate of footwear from China as plausible.
    Were this rate also to apply to tobacco products, it would fall well short of 'effective'.

37   There is some evidence that the Border Force is already facing challenges in controlling illicit trade, before the imposition of any additional burden:

-    Recent figures indicate that cigarettes represent 8.95% of all articles detained, demonstrating that the trade in fakes is well-established (source: Customs action to tackle goods infringing Intellectual Property Rights – Frequently Asked Questions, 2014, European Commission);

-    There was a significant decrease in tobacco articles detained in 2013 compared with 2012 (source: Report on EU customs enforcement of intellectual property rights, European Commission, p. 12). The reasons for this are unclear but may reflect less effective enforcement;

-    the National Audit Office, in a 2013 report on border controls, found that Border Force performed consistently below target in relation to cigarette seizures, due to staff shortages and a focus on other priorities (para 2.14);

-    the report also found that, when the Border Force flagged to individual ports the need to improve performance on illegal cigarettes, it made little material difference (para 2.15);

-    the Independent Chief Inspector of Borders and Immigration, in a 2013 report on freight operations, found that large seizures of cigarettes were not being investigated or prosecuted and that operating protocols were being breached, with physical examinations of consignments selected by HMRC not being carried out (Foreword);

-    in a 2013 report on Stansted Airport, the Inspector highlighted the shortage of staff (para 3.8) and shortfalls in Border Force oversight relating to tobacco products (para 4.81);

-    in a 2013 report on e-borders, the Inspector found that poor data quality and prioritisation of immigration over customs resulted in 649,000 records relating to drug and tobacco smuggling being deleted from the system without being read, having a significant impact on border staff's ability to seize restricted goods (para 24).

38   As we have highlighted, the Impact Assessment indicates that additional resources and funding for stronger enforcement cannot be assumed or guaranteed (para 120).


39   **FURTHER CONCERNS**

The British Brands Group has expressed concerns over standardised packaging in other brand-related areas such as the weakening of the positive effects of branding (such as investments in innovation, quality and reputation) and the implications of appropriating intellectual property rights. These concerns remain but are not articulated further in this response.

40   **MEMBERSHIP**

The Anti-Counterfeiting Group has 162 members, of which 86 are trade mark holders. Five of those are in the tobacco industry. Additionally, the Tobacco Manufacturers Association is a correspondent member, being a sectoral trade association rather than a manufacturer. The British Brands Group has 36 members of which 3 are in the tobacco industry. Membership lists of both organisations are available on request.

A Statham   J A Noble

Anti-Counterfeiting Group   British Brans Group
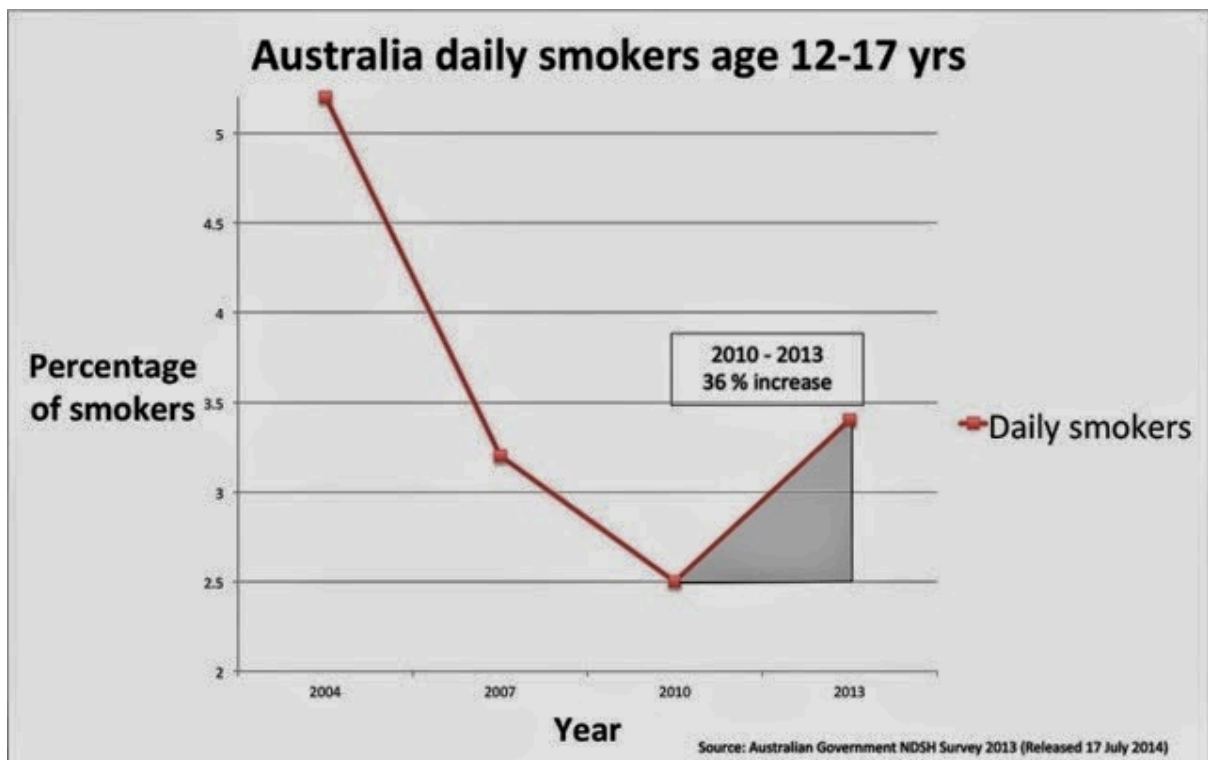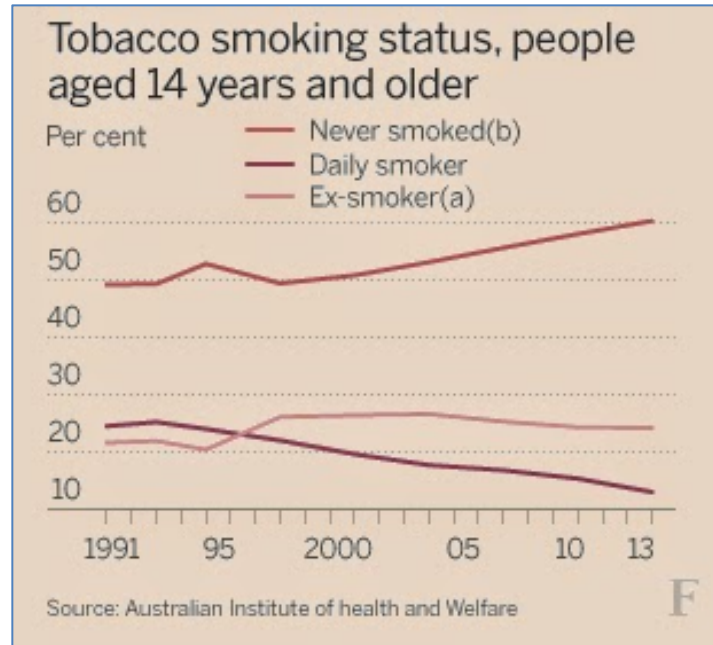

7th August 2014

Market shares by price segment in the Australian market
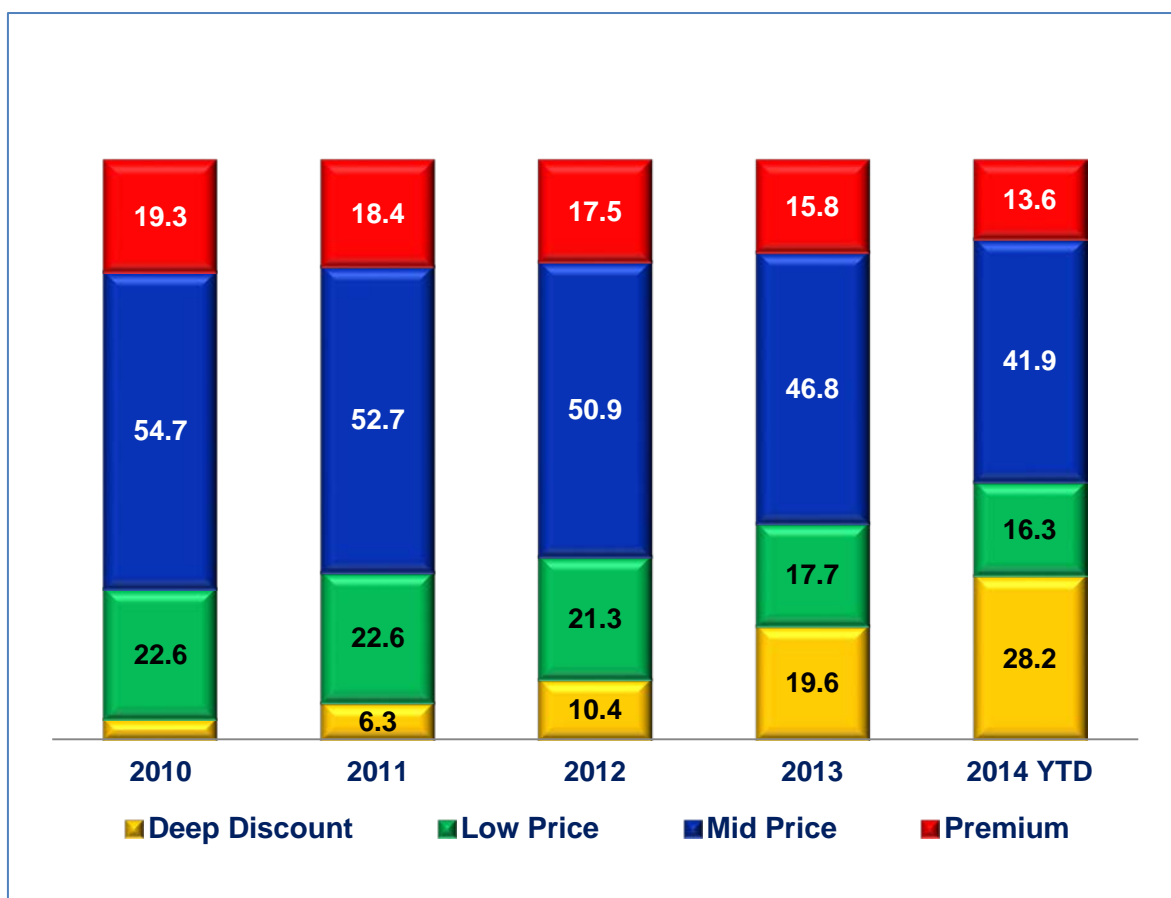
Australia: Shares of tobacco sales by segment Source: InfoView

ANNEX 2

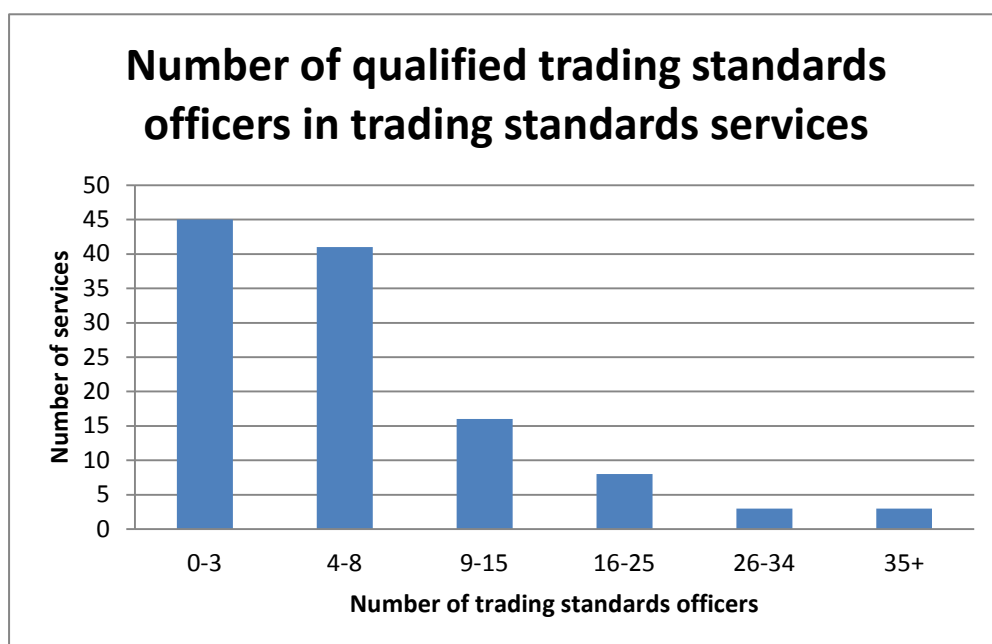**Trends in the Australian market**

Tobacco smoking status, people aged 14 years and older
Per cent
— Never smoked(b)
— Daily smoker
— Ex-smoker(a)
Source: Australian Institute of health and Welfare

Australia daily smokers age 12-17 yrs
Percentage of smokers
2010 - 2013
36 % increase
Daily smokers
Year
Source: Australian Government NDSH Survey 2013 (Released 17 July 2014)

Cigarettes and tobacco. Chain volume measures ($ millions)

4100

3800

3500

3200

Dec 2009   Dec 2010   Dec 2011   Dec 2012   Dec 2013

Plain packaging

Tax hike

Evidence of declining resources for Trading Standards

Average budget for trading standards services from 2010-11 to 2015-16

Number of qualified trading standards officers in trading standards services
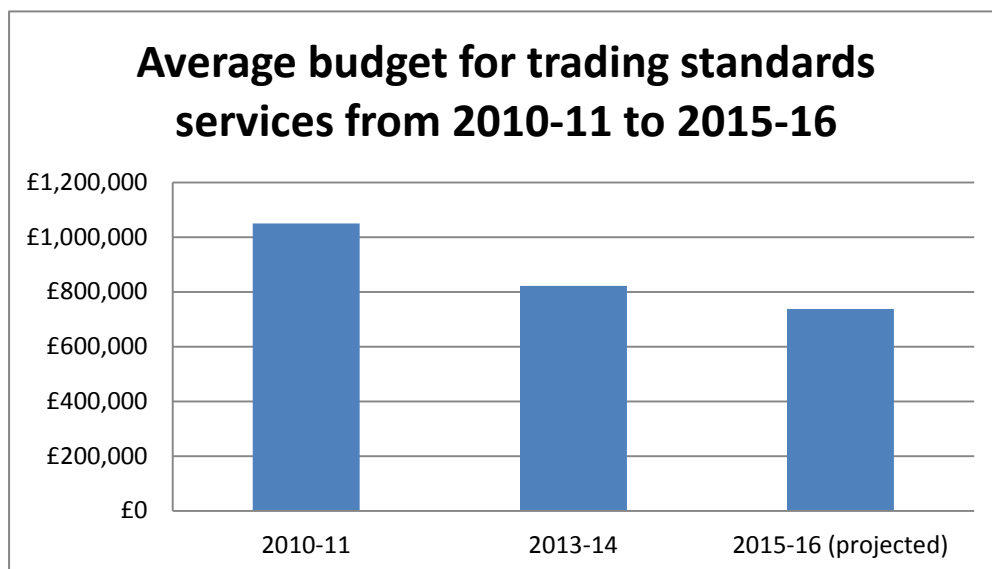
The 2014 Trading Standards Workforce Survey in March identified a total of 889.9 FTE trading standards officers across 126 services in England and Wales, and 1995.4 FTE total staff. This represents a sharp decrease from the 2009 survey which identified 3534 FTE staff working in 122 trading standards services in England and Wales.

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