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British American Tobacco Australia Limited's submission to the Better Regulation Victoria Illicit Tobacco Review

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Size and nature of the illicit tobacco trade

Nationally, KPMG estimates that in 2020 illicit tobacco accounted for 16.9% of total tobacco consumption in Australia, representing \$2.9bn in lost excise revenue for the Australian economy. Based on analysis by KPMG Victoria has historically had some of the highest rates of illicit tobacco consumption in the country.

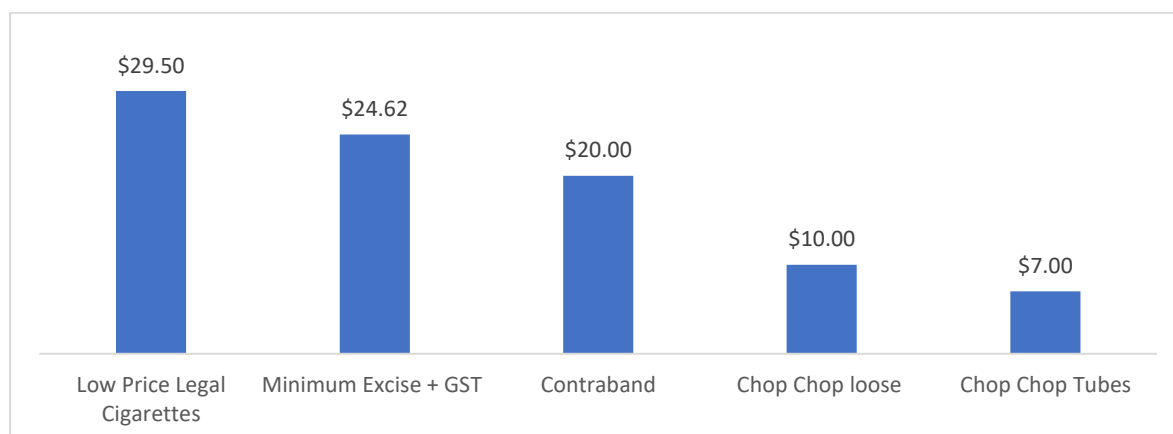
Illicit tobacco is available in 3 main forms in Australia which are:

Contraband – cigarettes manufactured overseas in packaging not intended for the Australian market and smuggled into the country without the payment of excise or customs duties.

Chop-Chop (Loose) – loose tobacco which can be used for rolling, usually sold by weight in plastic bags or small envelopes.

Chop-Chop (Tubes) – a more convenient way to consume Chop-Chop, the tobacco is prefilled into empty cigarette tubes and typically sold in boxes of 100, although smaller boxes of 50 or 20 cigarettes are becoming more common.

Illicit tobacco appeals to smokers as it offers significant savings compared to buying legal tobacco products as Australia has some of the highest cigarette prices in the world.



Price comparison of legal and illicit tobacco products on an equivalent 20 sticks or 20 grams basis in 2022

As depicted in the chart above a consumer can on average save anywhere from \$9.50 to \$22.50 by purchasing illicit tobacco products based on average prices in Victoria. Illicit tobacco can be sold at such a significant discount as no excise or GST has been paid which makes up more than 80% of the price of 'cheap' legal cigarettes which could be purchased from a supermarket.

Illicit tobacco can be both imported from overseas or illegally grown in Australia. Contraband cigarettes are exclusively imported from overseas and are easily identifiable by their coloured packaging that may contain foreign, or no health warnings. Contraband cigarettes are typically sourced from markets in South East Asia including China, Japan and Korea, or from the United Arab Emirates in the Middle East where retail prices can average less than \$5 per pack.

Chop-Chop tobacco can be both imported or illegally grown in Australia. The Australian Tax Office (ATO) is responsible for issuing licenses to grow tobacco in Australia, there has been

no licensed tobacco growers in Australia since 2006 making all tobacco grown in Australia illegal¹. In the 2019-20 financial year almost 45% of the illegal tobacco crops detected by the ATO were found in Victoria with numerous illegal crops identified in regional areas².

Consumer access to illicit tobacco

Most consumers in Victoria gain access to illicit tobacco through traditional bricks and mortar stores. Current intel suggests that in the past 12 months more than 400 stores have been involved in selling illicit tobacco. These shops include gift shops (also known as pop up shops), Asian and Middle Eastern grocery stores, independent tobacconists, and convenience stores, some of which exclusively sell illicit tobacco, while other may also conduct legitimate business.

The process for purchasing illicit tobacco in these stores can vary. For some, customers are able to walk straight in and ask for the illicit product, in others a customer may need to be known to staff or attend during specific trading hours. It is not uncommon for illicit tobacco products to be concealed in opaque plastic bags before a customer leaves the store.

Profitability of the illicit tobacco trade

The illicit tobacco trade is considered a low risk/high reward activity by many criminal syndicates, offering more significant returns than illicit drug smuggling while resulting in far smaller jail terms if prosecuted under Commonwealth laws.

To highlight the profitability of importing illicit tobacco the Australian Criminal Intelligence Commission (ACIC) has suggested that criminal syndicates could afford to lose 29 out of 30 shipping containers to border enforcement action and still manage to recoup their costs from the sale of the 1 remaining shipping container of illicit tobacco³.

At a retail level, for a store exclusively selling illicit tobacco, a conservative estimate of turnover would be at least \$700,000 a year.

Trading Hours (9am- 5pm)	8
Trading Days Per Week	7
Average Customers Per Hour	7
Average Spend Per Customer (1 box of Chop-Chop Tubes)	\$35
Weekly Turnover	\$13,720
Annual Turnover	\$713,440

Conservative estimate of the turnover of a store selling illicit tobacco

Illicit tobacco links to organised crime

¹ <https://www.ato.gov.au/general/the-fight-against-tax-crime/our-focus/illicit-tobacco/>

² [https://www.ato.gov.au/Media-centre/Media-releases/ATO-destroys-\\$171-million-of-illicit-tobacco/](https://www.ato.gov.au/Media-centre/Media-releases/ATO-destroys-$171-million-of-illicit-tobacco/)

³ <https://www.acic.gov.au/publications/annual-reports/australian-criminal-intelligence-commission-annual-report-2020-21>

Significant commentary from a variety of law enforcement agencies has continued to highlight the links between the illicit tobacco trade and serious organised crime groups. In 2016 the ACIC provided an estimate of the involvement of serious and organised crime in the illicit tobacco market as being between 57% (low), 78% (medium) and 100% high.

In comments to the Sydney Morning Herald in 2021 ATO Assistant Commissioner Ian Read said “criminal syndicates used the proceeds of illegal tobacco sales to fund their criminal behaviour and it deprived local communities of taxes used to fund roads and schools.”⁴

While in evidence provided to the Parliamentary Joint Committee on Law Enforcement (PJCLE) Illicit Tobacco Inquiry in December 2019 Assistant Commissioner Sharon Huey of the Australian Border Force (ABF) advised “we know that established organised crime groups are diversifying their commodities to include illicit tobacco as it is perceived to be a low-risk and high-value commodity. New organised crime groups are emerging that focus purely on illicit tobacco importation and distribution”⁵.

Current enforcement landscape

Currently the ABF and ATO are the lead agencies on illicit tobacco enforcement in Australia. The ATO takes primary responsibility for disrupting local growing or manufacturing operations within Australia while the ABF focuses their efforts on stopping illicit tobacco at the border before it is distributed within the community.

While the work of these two agencies is significant and results in the seizure of large quantities of illicit tobacco each year, neither considers disrupting retail sales of illicit tobacco to be part of their responsibility. In discussing the role of the Illicit Tobacco Taskforce, which is a multi-agency taskforce established to disrupt serious and organised crime involvement in the illicit tobacco trade, of which the ABF is the lead agency, Assistant Commissioner Sharon Huey said “The Illicit Tobacco Taskforce does focus on the more high-end criminality and the more serious and organised or large-scale importations, targeting the supply chain exploitation. That's where we direct the majority of our focus... state and territory health and policing authorities do have responsibility for enforcement and compliance action - regarding the sale of illicit tobacco by retailers”⁶.

Despite the comments made by Assistant Commissioner Huey the role of state and territory health and policing authorities in disrupting the illicit tobacco trade has been previously been disputed by the Victorian Government with comments suggesting “legislative responsibility for the regulation of the illegal tobacco industry is a matter for the Commonwealth Government under the *Australian Border Force Act 2015*”⁷. For that reason, BATA

⁴ <https://www.smh.com.au/national/nsw/criminal-groups-farm-illicit-tobacco-as-authorities-confiscate-imports-20210719-p58avl.html>

⁵ https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/2f90b936-5747-454f-91eb-2e080848e0e7/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Law%20Enforcement_2019_12_06_7447_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/2f90b936-5747-454f-91eb-2e080848e0e7/0000%22

⁶ Ibid

⁷ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2020/Legislative_Council_2020-04-23.pdf

expresses our support for this review in recognising that Victorian authorities can and do have a role to play in policing illicit tobacco.

Feedback on the current Victorian regulatory approach to illicit tobacco and recommendations on how it can be improved

Unfortunately, the current Victorian approach to regulating illicit tobacco is not aligned to its status as a highly profitable criminal activity and as a result is woefully ineffective.

Despite more than 400 stores across Victoria being identified as dealing in illicit tobacco, data from Crime Statistics Agency Victoria shows very few offences being recorded against s 11A of the Tobacco Act 1987 (the Act), which is the only provision dealing with the sale of illicit tobacco⁸.

	2016	2017	2018	2019	2020	2021
Offences recorded against s 11A of the Tobacco Act 1987	8	8	8	22	21	11

Given the widespread availability of illicit tobacco across the state, most of which takes place in shops on busy streets or shopping strips, such low numbers of recorded offences only serve to demonstrate the failings of the current regulatory approach.

Those specific failures are outlined below.

Definition of authorised inspectors

Under the Act enforcement powers are delegated to inspectors, defined as employees of local councils, traditionally in the role of Environmental Health Officers. In previous attempts to engage with local councils on the prevalence of illicit tobacco within their community and the need for enforcement action BATA has received the following responses:

“We recognise the community concern in this space and appreciate the challenges illicit tobacco presents. The possession and sale of illicit tobacco is cross jurisdictional and often relates to much larger, more complex distribution networks that extend beyond the reach or capacity of Local Government and the provisions under the Tobacco Act” – City of Ballarat 2018

“As you are aware our Environmental Health Officers play an important part in tobacco smoking education and enforcement. However, given the significant organised crime involvement with illegal tobacco and the serious risks associated with this, our staff do not become involved with these types of investigations.

Thank you again for your letter but illegal tobacco is a Government Taxation and Victoria Police Issue.” – City of Geelong 2018

Responses such as these highlight that within local councils there is a serious reluctance to act on the responsibilities they have been delegated due to concerns for employees’ safety

⁸ <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2>

and recognition that the supply chains involved are far too complex to be addressed through local council processes. It is BATA's view that these opinions held by council are entirely understandable and warranted and that responsibility for illicit tobacco enforcement should be shifted to a more appropriate agency capable of disrupting significant criminal networks.

Recommendation 1: Move responsibility for responding to illicit tobacco to Victoria Police

Victoria should shift responsibility for disrupting illicit tobacco sales to Victoria Police. As an agency their officers are far more appropriately trained to conduct the necessary investigations and are experienced in dealing with organised crime groups. This approach was supported by the PJCLE Inquiry into Illicit Tobacco which recommended that all responsibility for illicit tobacco be removed from the Department of Health⁹. The Federal Government, in their response to the committees report also agreed that 'illicit tobacco enforcement is best address as a law enforcement responsibility, most appropriately managed and co-ordinated by the relevant law enforcement agencies at the Commonwealth level in collaboration with state and territory police forces'¹⁰.

Lack of a tobacco licensing scheme

Victoria and Queensland are the only two states or territories in Australia that do not have some form of tobacco licensing scheme in place. Without a licensing scheme there is nothing to stop organised crime syndicates opening numerous shops from which to sell illicit tobacco and no guarantee that their activities will be brought to the attention of enforcement authorities.

The reality of this situation was brought to life by La Trobe University in 2021 when a study of tobacco retailers in one LGA, believed to be the City of Greater Bendigo, showed that of 125 identified tobacco retailers in the community, 43.2% of them were unknown to local government authorities and therefore 'likely operating with no formal oversight'¹¹.

When you combine Environmental Health Officers' reluctance to investigate the sale of illicit tobacco, with the fact that more than 40% of tobacco retailers could be operating unnoticed you begin to understand why illicit tobacco sales are as prolific as they are across Victoria.

Another consequence of having no licensing scheme in place is there are insufficient mechanisms in place to exclude unscrupulous retailers from the supply chain or permanently close offending outlets. Section 15D of the Act provides a mechanism for a court to prohibit a retailer from conducting a tobacco business at their premises or any new premises within 5 kilometres of the current store, for a period of 3 months, 12 months or 5 years after being found guilty of committing an offence. However, BATA understands that this power is rarely, if ever used and is not aware of any mechanism by which wholesalers or

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/IllicitTobacco46th/Report

¹⁰https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/25184/&sid=0000

¹¹ <https://www.latrobe.edu.au/news/articles/2021/release/study-reveals-lack-of-tobacco-oversight>

manufacturers could confirm such an order was in place in relation to a customer they may deal with.

In reality, in the rare cases where retail enforcement does take place, the majority of the time, the outlet reopens and resumes dealing in illicit tobacco products the very next day or if necessary, relocates to another shop front in close proximity to the original location.

Recommendation 2: Introduce a tobacco licensing scheme that can effectively exclude criminal operators

Victoria should introduce a tobacco retailer licensing scheme that makes it more difficult for criminal syndicates to enter the tobacco supply chain and provides clear mechanisms to exclude those found breaching the regulations.

In terms of creating a model to specifically target illicit tobacco the existing scheme in Western Australia provides the best blueprint to refer to. Under the Western Australian scheme all applicants must demonstrate that they are a fit and proper person to hold a tobacco license by declaring any previous criminal convictions, pending charges or previous license disqualifications under the WA Act or a corresponding law.

The details of all license holders under the WA scheme are also published online, including the status of that license, whether active or suspended which provides increased transparency in the system and would allow all industry participants to ensure that unlicensed operators are excluded from the supply chain. A further benefit of the WA model is that it is a two-tiered system with separate licenses for retail and wholesale operators which can allow for greater oversight of the distribution of tobacco products and facilitate targeted engagement and compliance checks on wholesale operators.

The WA model could be further improved by introducing a requirement that tobacco wholesalers declare to the Victorian Government the details of their Department of Home Affairs issued tobacco import permit or provide evidence that their product is sourced from the holder of a federal import permit as a further mechanism for ensuring only excise paid product enters the market. While in the current environment illicit tobacco in plain packaging is rare, it does exist, and can be challenging for legitimate retailers to identify. Introducing a requirement to demonstrate that tobacco products sold in Victoria have been sourced from an authorised importer would provide greater certainty to retailers that they are purchasing legitimate product and future proof a new regulatory regime against changes in illicit tobacco product offerings in the future.

Powers of inspectors and rights to enter or search a retail premises

The current powers to enter and search a retail premise given to inspectors under the Act are another hurdle that make consistent and effective enforcement challenging. Under the Act, an inspector, without a warrant can only inspect areas of the premises open to the public, or other areas of the premises with the occupier's consent.

Areas of the premises open to the public do not include behind the counter or storage rooms where illicit tobacco is likely kept and any occupier that has illicit tobacco within their premises is very unlikely to consent to an inspector conducting a more thorough search.

For enforcement action to be effective and straightforward for police they need to be given appropriate powers to search and seizure powers. If regulation requires police continually apply for warrants before searching a retail premises this will add unnecessary administrative burden for police and make enforcement action far less efficient.

As discussed previously, it is not uncommon for raided stores to reopen very quickly after enforcement action which may require multiple searches conduct over a series of dates to truly disrupt the activity.

Recommendation 3: Provide police with broader powers to enter and search retail premises suspected of dealing in illicit tobacco

To enable members of Victoria Police to respond in an agile manner to illicit tobacco sales they should be provided with broad powers to enter and search retail premises selling tobacco products, without a warrant, as part of the administration of the tobacco licensing scheme.

Both Western Australia and South Australia provide these sorts of entry and search powers to members of their respective police forces who are considered 'authorised officers' under each state's tobacco control legislation.

Western Australia

- S 85 Power to enter premises - Subject to section 86, an investigator may, for investigation purposes, enter and remain on premises to exercise the investigator's powers of investigation. (NB s 86 relates to residential premises)
- S 89 Investigator's powers as to premises - (1) When an investigator exercises the power of entry under section 85, the investigator may do any or all of the following —
(a) search the premises and examine anything at the premises, opening it if necessary and, if given specific prior authorisation in writing by the CEO with respect to those premises, breaking it open;

South Australia

- S 66 Powers of authorised officers - (1) Subject to this Part, an authorised officer may— (a) enter and remain on premises and inspect the premises and any part of or thing in or on the premises as reasonably required in connection with the administration or enforcement of this Act;

Penalties and consequences of dealing in illicit tobacco

Under the current regulatory scheme, the maximum penalty for breaching s 11A of the Act, is a fine of 240 penalty units for a person and 1200 penalty units for a corporation equating to \$43,617.60 and \$218,088 respectively. On paper these penalties appear significant and an effective means of reducing the incentive to deal in illicit tobacco however, when, and how they are applied undermines their efficacy.

Under the Act breaches of s 11A cannot be dealt with by an infringement notice, this means that the case must go to court in a process that can drag out for many months. While offenders wait for the matter to be heard in court, they are usually able to return to dealing in illicit tobacco, allowing them to quickly make enough profit to cover any financial penalty they

receive. In addition to this media and other coverage of these cases suggest that the maximum penalty is rarely handed down.

In October 2021 a Shepparton man was fined \$2,400 after he was caught with more than 50 kilograms of illicit tobacco in his delivery van when warrants were executed on gift shops in Shepparton, Euroa and Mooroopna¹². Based on the quantity of tobacco seized from the van during the raids the defendant was caught with almost \$80,000 of illicit tobacco and admitted that he had been delivering to those shops for the past 5 or 6 months, suggesting he likely moved hundreds of thousands, if not millions of dollars' worth of illicit tobacco. Despite this admission, of the \$2,400 fine he was given, only \$1000 was for the possession of the tobacco, \$700 was for possessing a steal baton and a further \$700 for selling hookahs and ice pipes. Retailer feedback during the intervening 10 months between the searches and the case confirm that these stores in continued trading in illicit tobacco throughout this period.

When fines this small are handed out for offenses as significant as the example above they provide no deterrent value, and when handed out as infrequently as they are, become just a cost of doing business that is all too easy for criminal syndicates to bare.

Recommendation 4: Introduce on-the-spot fines, simplify mechanisms for excluding offenders from the tobacco supply chain and introduce criminal offences for seizures involving significant quantities of illicit tobacco

To increase the pace at which financial penalties hit criminals' bottom lines police conducting retail enforcement action should be empowered to hand out significant on-the-spot fines. These fines must be large enough to offset the profits made through the sale of illicit tobacco i.e. in the thousands of dollars per offence. Use of on-the-spot fines or infringement notices as an effective enforcement tool was recommended by the Police Federation of Australia in their submission to the PJCLE inquiry as an easier and less time-consuming way police could disrupt illicit tobacco sales and as a way state government could generate revenue as the proceeds of those fines would be directed to the state¹³.

Any licensed retailer caught selling illicit tobacco on more than one occasion should be excluded from participating in the legal tobacco supply chain in the future through a temporary or permanent suspension of their license, like the rarely used powers of s 15D of the Act but applied in a way that the suspension could take immediate effect following confirmation of a second or subsequent offence, rather than waiting months for the matter to be heard in court.

Finally, in addition to financial penalties for retail offences, an expanded framework of illicit tobacco offences should be introduced, including indictable offences, where large commercial quantities of illicit tobacco are found. As part of a recommendation to see illicit tobacco treated more consistently across different states and territories the PJCLE report recommended that states consider harmonising their legislation with the Commonwealth illicit tobacco offences and penalties. Under Commonwealth law there is an existing tiered framework of offences and penalties which take into consideration the quantity of illicit tobacco seized, as well as the culpability of the defendant through the inclusion of both strict

¹² <https://www.pressreader.com/australia/shepparton-news/20211013/281612423582746>

¹³

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/IllicitTobacco46th/Submissions

liability and fault-based offences. Through that structure the legislation provides for escalating jail terms based on the quantity of illicit tobacco seized and offers an alternate method of calculating financial penalties through a x2 or x5 multiplier of the excise value of the tobacco seized. Such a calculation may be impractical or inappropriate for on-the-spot fines but would provide significant deterrent value for offences involving commercial quantities of illicit tobacco.

If certain serious offences were made indictable offences under a new regulatory scheme it is understood that proceeds of crime legislation could then apply, allowing for the seizure of cash or assets obtained through the sale of illicit tobacco. As outlined earlier in this submission stores can be generating significant turnovers from their illicit operations which could be subject to seizure, therefore providing a funding base for future enforcement activity.

Examples of the scale of cash or assets seized from operations involving the seizure of illicit tobacco include:

- [Three face court after police smash multimillion-dollar money laundering ring – The Age 15.10.2021](#)
- [Six arrested and nearly \\$1 million in cash seized following operation in Melbourne – AFP media release 16.8.2018](#)
- [\\$8 million cash seized; four charged as part of money laundering investigation - Organised Crime Squad – NSW Police media release 13.1.22](#)
- [\\$6m in cash allegedly found in Belmore kitchen cupboards, 4 charged – The Daily Telegraph 5.12.2019](#)
- [Tobacco and cash seized during Shepparton warrants – Mirage News 24.9.2020](#)

Conclusion

The ongoing distribution of illicit tobacco across Victoria is a serious issue that needs an overhauled regulatory response, led by Victorian Police. The sale of illicit tobacco is not a victimless crime, it hurts local businesses, robs the Australian economy of billions of dollars a year and provides ongoing funding for those that seek to make our communities less safe.

BATA appreciates the opportunity to contribute to this review and hopes that the Commissioner will make the findings of this review public in due course.