

# The Dark Market

How Action on Smoking and Health and the Department of Health misled MPs about the tobacco display ban

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# **The Dark Market**

## **Introduction**

On October 12 2009, the third and final reading of the Health Bill saw MPs voting in favour of a total ban on the display of tobacco products in all general retail shops, thus creating the 'dark market'. For the Department of Health (DH) and the anti-smoking pressure group Action on Smoking and Health (ASH), this represented the culmination of an 18 month campaign to persuade MPs of the merits of the legislation.

Throughout the campaign, concerns were raised about the efficacy of tobacco display bans, which have been enforced by only a small handful of other countries to date. Other concerns were raised about the financial damage the legislation would cause to convenience stores, newsagents and shopkeepers. Briefings from ASH (which is part-funded by the DH), and from the DH itself, assured MPs and peers that the legislation had overwhelming public support, that the cost of compliance would be minimal and that other countries had seen a decline in youth smoking as a result of similar legislation.

None of these claims stand up to scrutiny. The 'public consultation' which provided superficial support the legislation was dominated from the outset by organisations funded by the DH, and its final report did not acknowledge the existence of several stakeholders who disagreed with the DH position. Data from other countries have failed to show any public health benefit from tobacco display bans and the costings given to MPs and peers have been shown to be unrealistically low.

E-mails released under the Freedom of Information Act reveal that the DH, ASH and Cancer Research UK worked closely together to brief MPs, peers and the media with highly misleading estimates about the cost to retailers, and refused to retract these figures even after their own source had confirmed that they were invalid. These e-mails reveal that important facts were withheld from peers and MPs at a time when they most needed honest and impartial briefings.

This report provides an illustration of the way pressure groups and government departments influence and subvert the democratic process to achieve set goals. It raises significant questions about the validity of the 'government lobbying the government' in modern politics.

## Summary

In October 2009, the House of Commons voted to ban the display of tobacco products in shops. This report reveals how MPs and peers were repeatedly misled about the cost, popularity and efficacy of this legislation.

- E-mails released under the Freedom of Information Act show how Action on Smoking Health (ASH), Cancer Research UK and the Department of Health (DH) briefed MPs and peers with unrealistically low estimates of the cost to retailers and continued to do so even after their own source made them aware of their error.
- The government now accepts that the cost of complying with the law will be ten to forty times greater than the estimate given to MPs and peers at the time of the vote.
- The Department of Health's consultation paper was dominated by groups funded by the DH. The DH did not acknowledge the participation of groups like the Tobacco Retailers Alliance until the press accused Ministers of "cultivating a fake grassroots movement in order to make a position appear more popular than it really is." ('Government "fixing health consultations" with taxpayer-funded groups', *The Telegraph*, 02.01.09).
- ASH and the DH briefed ministers with incorrect figures purporting to show a dramatic decline in youth smoking in countries which had implemented display bans. Although ASH later blamed a "technical error" for these false figures, misleading statistics continued to be cited in the press and in Parliament. To this day, there is no credible evidence that display bans reduce youth smoking.
- Crucial information was denied MPs at the time of the vote. The draft regulations were not available in the House of Commons library and were not sent by e-mail prior to the debate, contrary to claims made by the minister during the debate.
- MPs and peers were unaware of the economic damage the legislation would do to small retailers and newsagents in addition to the cost of compliance.
- The campaign of misinformation surrounding the tobacco display ban raises serious questions about the validity of the 'government lobbying the government' to achieve predetermined objectives. It illustrates the power of unelected bureaucrats and state-funded pressure groups to influence the democratic process.

# Consultation

On 31 May 2008, the Department of Health launched the Consultation on the Future of Tobacco Control.<sup>1</sup> Amongst the questions asked was:

Question 8: Do you believe that there should be further controls on the display of tobacco products in retail environments? If so, what is your preferred option?

Option one:

- Do nothing, retain current restrictions, maintaining enforcement of relevant legislation.

Option two:

- Regulate point of sale display more strictly by further restricting permitted advertising space and/or restricting display space or ways in which tobacco products are displayed.

Option three:

- Require retailers to remove tobacco products from display.

This consultation paper invited responses from ‘stake-holders’, but it was evident from the outset that the ‘public consultation’ was, in effect, a public sector consultation. It was heavily weighted towards organisations funded by the state and, in particular, those funded by the Department of Health.

This was made explicit at the start of the document in which it was specified that the ‘target audience’ was made up of Chief Executives of Primary Care Trusts, NHS Trusts, Foundation Trusts, Strategic Health Authorities and Local Authorities, as well as Directors of Public Health, Medical Directors and Communications Leads.

<b>Author</b>	DH
<b>Publication date</b>	31 May 2008
<b>Target audience</b>	PCT CEs, NHS Trust CEs, SHA CEs, Foundation Trust CEs, Medical Directors, Directors of PH, Directors of Nursing, Local Authority CEs, Communications Leads
<b>Circulation list</b>	Local Authority CEs, Voluntary Organisations/NDPBs

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There is no indication that the consultation document was circulated to retailers, business associations or any other organisation that might oppose the legislation. The launch of the consultation received minimal press coverage and the public was largely unaware that the wheels were in motion.

Prompted by the DH, local PCTs, NGOs, charities and QUANGOs set up e-mail campaigns, online voting systems and pre-printed postcards to encourage their supporters and employees to approve of all the proposed tobacco control measures. Supporters were not required to read the document or to vote on specific policies. They were simply asked to agree or disagree with statements such as “I support measures to protect our children from tobacco marketing” or “I support a long-term plan which protects our children and future generations from the harm that smoking causes”.<sup>2</sup> By sending the postcard or ticking the boxes, it was assumed that the supporter favoured the most draconian policy available. Over 85% of responses came through generically worded e-mails and postcards of this kind.

When the responses were counted, the overwhelming majority had come from groups funded by the Department of Health. Smokefree North West ran a particularly well organised campaign, accounting for more than half of the total responses. The only non-DH funded groups to respond in any number were Cancer Research UK, FOREST and Independent Retail News (although there is, as we shall see, one notable exception).

Campaign/Organisation	Submissions
Smokefree North West	49,507
Cancer Research UK	9,200
Dmyst	10,757
Smokefree Action	1,562
Smokefree North East	8,128
Tobacco Control Alliance Wales	118
FOREST	2,121
Independent Retail News (petition)	581

Unsurprisingly, the DH’s proposals received the kind of landslide support normally seen only in North Korean elections. “Over 99%” favoured further restrictions of the advertising of cigarette papers, more than 97% favoured further controls on vending machines (with 90% opting for a total ban) and “almost 98%” were in favour of plain packaging of cigarettes. Since this kind of unanimity is almost unheard of in opinion polls, the validity of these results as a reflection of public feeling is highly questionable.

The consensus was somewhat weaker, but still strong, in the case of the tobacco display ban. Around 84% voted in favour for a complete ban on the display of tobacco products.

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Generic voting from DH-funded organisations would have ensured another 97-99% landslide had it not been for over 10,000 small retailers who were almost unanimously opposed to the proposal. As the published consultation report explained:

"Among the 10,570 small retailers responding, virtually all are against the proposal."

"Ninety-five percent of specialist tobacconists and all non-specialist shops surveyed suggested that a display ban would lead to them being unable to carry on trading."

Although the DH had specifically said it was "particularly interested in hearing from small retailers", the negative response from these shopkeepers was effectively ignored. A ban was announced on December 9 2008, with Health Secretary Alan Johnson declaring that there was "overwhelming evidence and support" for the legislation. The true nature of this "overwhelming" support was later highlighted in a report in *The Telegraph*:<sup>3</sup>

### Government 'fixing health consultations' with taxpayer-funded groups

The Government has been accused of fixing the outcome of public consultations on health policy after it emerged that reviews were flooded with block votes from groups funded entirely by the taxpayer.

...Mr Johnson boasted that the display ban was favoured by an "overwhelming majority" of 96,000 responses to a six-month public consultation on the subject. Yet only a handful of those 96,000 respondents came from individuals submitting their personal views. Almost 70,000 came from those collected by pressure groups entirely funded by the Department for Health.

Among the groups submitting block responses were SmokeFree NorthWest, SmokeFree Liverpool and SmokeFree North East, which were all set up by the Government to lobby against the tobacco industry.

The finding has prompted critics to accuse the Government of spending taxpayers' money on establishing groups designed merely to back the Government line on public health issues.

Ministers have effectively been accused of "astroturfing" - cultivating a fake grassroots movement in order to make a position appear more popular than it really is.

Matthew Elliott, the chief executive of the Taxpayers' Alliance, said: "This is the Government funding bodies to lobby itself. The consultations appear to be biased in favour of the Government's preferred position.

"It's ludicrous that public money is being spent on forming a bogus veneer of support. At a time when patients wait weeks for doctors' appointments and cannot get the right drugs for their ailments, why on earth is the Department of Health spending so much of our hard-earned cash on these pointless exercises?"

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In response to these claims of ‘astro-turfing’, Andrew Lansley MP said:<sup>4</sup>

*"It will come as no surprise to us if the Department of Health has funded organisations that provide the responses to consultations that the Government is looking for. The public are understandably cynical about the way Labour consults the public—it's time we had a Government that treats the public and their views with the respect they deserve."*

There were further complaints from the Tobacco Retailers Alliance (TRA), a coalition of 25,000 independent retailers who were fearful of the effect the display ban would have on their businesses. Although the organisation submitted thousands of responses to the consultation, the TRA was not mentioned anywhere in the document, nor was it even listed in the eight page list of consultation respondents.

Ken Patel, National Spokesman for the TRA, said:<sup>5</sup>

*"First the Minister refused to meet with retailers, now they have censored our formal response to a public consultation. Retailers are very concerned to see that their views were not taken into account, even though the Government said it wanted to hear from us. It feels as though we have been gagged, even though this measure will have a massive impact on our businesses."*

After this was made public, the consultation report was quietly taken off-line and replaced with a new version. This version was identical in every respect to the original report, except that it deleted the reference to its ‘target audience’ and added an additional 80 organisations—including the TRA—to its list of respondents. No explanation was ever given for this change and the original document has disappeared without trace (contact the author for a copy).

**"It will come as no surprise to us if the Department of Health has funded organisations that provide the responses to consultations that the Government is looking for. The public are understandably cynical about the way Labour consults the public it's time we had a Government that treats the public and their views with the respect they deserve."**

**Andrew Lansley MP**

## **The cost of compliance —behind the scenes at the Department of Health**

With the consultation won and the government committed to implementing the tobacco display ban, questions were being asked about the cost to shopkeepers of complying with the legislation.

In December 2008, the government estimated that it would cost the average shop £1,000 to do so—a significant sum for small retailers, particularly during a recession. With a debate due in the House of Lords in May 2009, it was in the interests of the Department of Health, Action on Smoking and Health and Cancer Research to find ways of bringing down that estimate.

This is the story of how they went about it, made possible by the Freedom of Information Act, under which dozens of previously unseen Department of Health e-mails have been made public.

### **Persons mentioned**

Deborah Arnott—Head of the UK anti-smoking organisation Action on Smoking and Health (ASH). ASH is part-funded by Cancer Research UK and the Department of Health.

Elsbeth Lee—Head of Tobacco Control at Cancer Research UK. Works two days a week at the Department of Health.

Lucy Holdstock—Tobacco Policy Manager at the Department of Health

Shane Brennan—Public Affairs Director for the Association of Convenience Stores

Phil Beder—Vice-president of 4 Solutions Display, a Canadian shop-fitting company

The names of several other individuals have been blocked out of the e-mails by the Department of Health (DH).



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### **Time line**

9/9/08

A small delegation of DH staff travel to Canada for a fact-finding mission, to see how Canadian shopkeepers have coped with the tobacco display ban. They meet representatives from the Canadian Convenience Stores Association (CCSA) and Phil Beder of 4 Solutions Display. The latter tells them that refitting a shop to comply with the ban costs an estimated £550.

The delegates write a memo to the DH which concludes that the ban has widespread support and that few stores have had to close as a result. But they also note that the Ontario government has spent \$50 million enforcing the ban and, according to the CCSA, retraining staff was a “logistical nightmare.” Neither of these last points were reiterated by the DH back in England.

19/12/08

An unnamed DH employee e-mails staff, saying “we need to be able to quote the Canadian evidence on the \$1,000 [£550] cost to businesses of refitting displays”.

Another member of staff replies to say that the \$1,000 figure came from “a personal communication in a meeting with the Canadian Convenience Stores Association in September.” He/she adds:

“The estimate was confirmed by 4 Solutions Display Corporation.  
We could ask the company for a price list.”

7/1/09

The Department of Health’s Tobacco Policy Manager, Lucy Holdstock, e-mails Phil Beder of the Canadian company 4 Solutions Display saying:

“We are keen to make sure we have the latest info on costs available so  
I wondered whether you might have a price list available at all?”

Beder replies, saying:

“Our pricing is based on per foot, for example if you had 200 feet of backwall space  
the price might be \$9.00 per foot, which would cost you \$1,800.00”

13/1/09

Holdstock requests a quote for a 25 square feet display.

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14/1/09

The government has already published its Regulatory Impact Assessment relating to the tobacco display ban. Having taken advice from stake-holders, the government estimates that the average cost of refitting a shop to comply with the proposed law will be £1,000.

Lucy Holdstock, Tobacco Policy Manager, sends an internal e-mail saying:

“We have taken a rather different approach in light of Andrew/Anne’s visit to Canada last year. Companies there have developed innovative methods of concealing displays that make the most of existing gantries and find cost effective solutions. One company in particular (Solution 4 Display [sic]) provided an estimate of £550 per store... I have since been in touch with them, and at the cost per squared foot they quoted for a large display, the cost to small retailers in the UK...could be as little as £200.

However, I have asked for re-quotes from the company bearing in mind possible economies of scale.”

28/1/09

Apologising for his delay in replying, Beder gives Holdstock his price-list with high volume discounts:

\$15 per linear feet for single premises

\$13 per linear feet for 10 or more premises

\$11 per linear feet for 1,500 or more premises

11/2/09

An unnamed DH employee forwards Beder’s price-list to ASH director Deborah Arnott. Arnott forwards the e-mail to Cancer Research UK’s Elspeth Lee, who also works for the Department of Health, saying:

“it would cost only £65 for a display in a small convenience store - but we need to check that as it’s expressed in Canadian dollars.”

12/2/09 - 3.29 pm

Elspeth Lee replies to Arnott (and copies in several unnamed people) saying that the overall cost for a 25 square feet display would be £212.57. She adds that “it would helpful if we can agree how to present this.” She gives her own suggestion as:

“The Department of Health has estimated that the average cost to stores in Canada was approximately £550 per store (ref consultation).

Even more recently the Department has received quotes from one of the major current Canadian re-fitters that refits for displays of approximately 7.5m in length cost in the region of £200.”

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12/2/09 - 5.23 pm

Arnott replies to Elspeth with an even lower figure:

“If a deal were done for 1500 shops then the cost would only be \$11 which would amount to \$216 or **£121**. (At the current exchange rate of 1 Canadian dollar = 0.56 GBP)

But we should check with the Canadians - Phil Beder and Bruno Dell’Unto that this is correct?” [bold emphasis in the original]

12/2/09 - 6.28 pm

Lee replies to Arnott:

“This additional info is helpful - clearly many factors to be borne in mind. I think it might be more appropriate for DH to continue to liaise with the companies rather than CR-UK getting involved.”

But with an eye to the briefing Cancer Research UK is preparing for the Lords debate, she adds:

“We can certainly add some generic wording in the briefing to imply that costs could well be under £200 until DH has agreed on firmer figs that they are happy for others to use.”

13/2/09

Arnott tells Lee that she will e-mail 4 Solutions Display and sends an e-mail to Phil Beder:

“Dear Phil,

\*\*\*\* from the Department of Health in England gave me your contact details. I am writing to ask for your help in developing a quote that we can use in a public report for MPs and peers. We’re trying to finalise this over the next few days so need your help urgently...

According to the information you provided to \*\*\*\* (see below) I worked out the following calculation:

1 metre - 3.28 ft

3.28ft x 6 = 19.68 linear feet

19.68 x \$15 = \$295.2 Canadian dollars = £166

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If a deal were done for 1500 shops then the cost would only be \$11 which would amount to \$216 or £121.”

Beder replies:

“Hi Deborah, you are correct with your quote to be provided...good job!  
If you require anything else, please contact me.”

Arnott forwards this e-mail to Elspeth Lee, saying that “he’s confirmed my calculations.”

Lee immediately replies: “We will be adding this [the estimate] to our Lord’s briefing.”

This, she did. Cancer Research UK produced a briefing document titled ‘Protecting children from tobacco marketing’ which was aimed at members of the House of Lords. It includes this passage:

“A quote from a Canadian shop fitter confirmed it could cost  
as little as £200 to refit a typical small UK shop.”<sup>1</sup>

The SmokeFree Action Coalition (funded by DH) used the same source in its own briefing paper, saying:

“one of the major suppliers in Canada has reported that it could cost under  
£200 to fit a standard UK small retailer display.”<sup>2</sup>

But several problems. Neither Arnott nor Holdstock had asked Beder about installation costs. Both calculations were for raw materials only. In addition, Arnott’s figure was based on 1,500 very small premises being converted at once—a highly unlikely scenario. To make matters worse, the products Beder was quoting for were temporary solutions and might not be legal under the tough law being proposed in the UK.

Despite these shortcomings, Arnott writes an e-mail to the Department of Health, quoting the figure of £166 for “a small convenience store” and £120 “if they were providing for a large number of stores”. She points out that these figures might be “helpful for the presentation to the peers next week...to show that the legislation would not be difficult or very expensive for small shopkeepers to implement.” Within days, an unnamed Tobacco Programme Manager has circulated Arnott’s e-mail to other employees at the DH.

26/2/09

Cancer Research UK and the Department of Health attempt to drum up some support for the controversial ban. An e-mail from Elspeth Lee (to a number of unnamed recipients at the DH) illustrates how unpopular the measure is with retailers:

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“The coalition is (still) trying to find one or two supportive retailers who would be happy to show support in further oral or written briefings or even do more, but we are failing miserably. Someone today mentioned that DH might have some warmer contacts - are there any that we could follow up with?”

However, these “warmer contacts” turn out to be supermarkets who can expect to profit from the disappearance of large numbers of smaller shops, as Lucy Holdstock explains:

“It’s the bigger chains who are not too fussed about this, at least in private. However, that could work against us as the criticisms are all about costs to smaller businesses.”

27/2/09

Elspeth Lee replies to Holdstock:

“Many thanks. I was most keen on small retailers but we have drawn a blank...”

9/3/09

News from the other side of the world is not encouraging for the anti-smoking lobby. The New Zealand government has dropped plans to implement a tobacco display ban, saying there is no proof that it will reduce the smoking rate. Murray Gibson, spokesman for a coalition of New Zealand retailers, applauds the government for taking a “commonsense approach”:

“For more than two years retailers have been on a knife-edge wondering if, at the flick of a pen, they would be required to spend thousands of dollars reconfiguring their shops.”<sup>3</sup>

9/3/9

In a House of Lords debate, Baroness Thornton uses the ASH/DH figures when talking about the cost of the ban to shopkeepers:

“The cost could be as little as £120. Even a display of 25 square feet could be covered at a cost of around £210.”

10/3/09

Lucy Holdstock gives a Powerpoint presentation to the Association of Convenience Stores which explicitly states:

How much is it going to cost? Experience in Canada suggests the cost to cover a one-off display of 25 sq ft = £210

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16/3/09

An ASH spokesman is quoted in *The Telegraph* as saying:

“This legislation is not going to come into force until 2013 and it will only cost small shopkeepers £200 to comply.”<sup>4</sup>

23/3/09 - 9.53 am

Shane Brennan of the Association of Convenience Stores e-mails the Department of Health to tell them that the Canadian Convenience Stores Association (CCSA) has stated that the figures being cited by the DH only refer to temporary solutions. Permanent solutions, say the CCSA, cost in the region of £2,800.

23/3/09 - 10.06 am

A concerned Lucy Holdstock quickly e-mails Phil Beder, asking:

“I wanted to check with yourself - the solutions your company offers are permanent solutions?  
Do you have any idea why CCSA would claim they are only temporary?”

23/3/09 - 12.36 pm

Beder replies to Holdstock with the ambiguous comment that “my solutions have been up for over a year problem free.” Beder goes on to tell her how the tobacco display ban has affected shopkeepers in Canada:

“My only assumption is that they do not want health groups covering up tobacco, which really has not caused a decline in tobacco sales or discouraging kids from smoking. The truth is that it has hurt small businesses...”

Tobacco sales I believe across Canada has not felt a negative impact at all since the dark market was legislated.”

Holdstock asks Beder if he has any “hard data” about the impact on shops. Beder replies:

“I do not have any data for you, basically my information is from hearing from independents that I have visited and seeing what is going on in my community. The big convenience chains are putting the small guy out of business.”

23/4/09

Lord Darzi sends a letter to all peers which includes the following statement:

Removing displays need not be costly—in Canada, even professional covers cost as little as £120 for an area measuring 1 metre by 1.3 metres

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28/4/09

Phil Beder e-mails Deborah Arnott.

“I wanted to take a moment and clarify some of the issues surrounding the display ban covers that are presently being explored by your organization in the UK...”

Beder explains that the £200 figure being quoted by ASH, CR-UK and the DH “does not include shipping, installation or specific changes or dimensions”. He also explains that the price was based on 1,500 units, and that the product described was “clearly temporary, lasting three to six months” and is not a permanent solution.

He adds:

“Estimated costs to cover all stores in the UK would be in the neighbourhood of over 30 million pounds for the initial set up plus shipping, installation and setup.”

“Single shop all in costs estimates including all the above specifications is approx. 450 pounds for a normal single gantry.”

“Hopefully I have been able to dispel any costs perceptions and everyone has a better understanding of mass producing versus individual shops as well as other costs associated with the install procedures.”

29/4/09

Shane Brennan of the Association of Convenience Stores e-mails Lucy Holdstock, saying:

“I have recently received communication from 4 Solutions Displays, a Canadian shopfitting company and the source of the information that DH and others are using to explain a cost of £120 (in Lord Darzi’s last briefing to Peers) or £200 (in DH’s briefings to Parliamentarians).

This communication shows quite clearly that information from 4 Solutions Displays has been taken out of context and, frankly, **has not been used truthfully** by those who have made the case that compliance costs are lower than those stated in your own Regulatory Impact Assessment of December 2008.

I am certainly prepared to accept that the reason that DH have briefed Parliamentarians with **incomplete and misleading information** is that you have yourselves been misinformed by whoever briefed you on these costs. Nevertheless it is a serious matter when briefings from government departments **do not reflect the truth.**” (my emphasis)

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On the same day, ACS Chief Executive James Lowman writes a letter to Lord Darzi, telling him that the Canadian data is of “poor quality” and that, since the Regulatory Impact Assessment gives a figure of £1,000, that should be the figure used by the Government in discussions about the tobacco display ban. He also reminds him that the ACS believes that even the £1,000 figure is an underestimate.

29/4/09

Lucy Holdstock and an unnamed person begin drafting a statement to be used by Department of Health staff should they be questioned about the now discredited £120/£200 figures.

30/4/09

Phil Beder e-mails Deborah Arnott again:

“Hi Deborah,

I want to reiterate that the last e-mail I sent to you (April 28) was a complete clarification of all costs associated with covering of tobacco. I also want to make sure you are not making additional assumptions on costs to suit your internal needs...

4 Solutions Displays cannot produce, deliver and install for the minimal dollars you are publishing...

We would ask that you remove 4 Solutions Displays from any of your promotional materials as the numbers are misrepresenting the actual costs to a wide base of retailers in the UK...

I trust your organization will insure the entire financial story is told to all and not choose a single number that doesn't represent the actual facts.”

Beder copies in the Department of Health to this e-mail.



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1/5/09

Shane Brennan receives a letter from ASH's lawyers, reading, in part:

"Dear Sir,

### **Unlawful Defamatory Imputations Regarding 'Action on Smoking & Health'**

We are instructed on behalf of Action on Smoking & Health (ASH) in connection with a highly inappropriate and unlawful e-mail sent by you today to individuals at the Department of Health...

You plainly stated in your e-mail that information provided by 4 Solutions Display Corp, had 'not been used truthfully' by those who had made the case that compliance costs are lower than those stated in the Department of Health's Regulatory Impact Assessment of December 2008. You will appreciate readily that such reference could not but be taken to refer to our client...

Your assertion is wholly inaccurate and highly damaging to both our client and its employees involved in such work, who are known to recipients of your e-mail. It is hard to think of a more serious imputation to make against individuals engaged in such work and, as such, our client (and its relevant employees) are entitled as a matter of law to initiate proceedings against you personally seeking injunctive relief, substantial damages and payment of legal costs."

1/5/09

The *Evening Standard* reports the story of the ever-decreasing cost estimates:

The Ministry of Health asked anti-smoking organisation ASH (which is hardly a disinterested party) to check on the cost, and it claimed the figure for the gantries was just £120. This figure was sent by health minister Lord Darzi to every member of the House of Lords.

When the supplier, 4 Solutions of Canada, heard about this, it pointed out the individual cost would be approximately £450 and this did not include any of the installation costs, which would be around £1000. They also pointed out that the costs of the gantries for all the outlets in Britain could be over £30 million.

Neither ASH nor the Ministry of Health has corrected the information they have given to the members of the House of Lords in advance of the vote.

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Deborah Arnott forwards the *Standard's* article to an unnamed DH employee, describing it as “completely wrong - as you know we didn’t provide you with the information.”

2/5/09

Phil Beder tells *The Grocer* magazine that the cost would be £480 for even the cheapest temporary solution.

3/5/09

Despite James Lowman telling him about the flaws in the Canadian data only a few days earlier, Lord Darzi is still quoting the figure, as *The Observer* reports:

[Lord Darzi] says it will cost retailers as little as £210 to make changes. That has prompted a furious row with the Association of Convenience Stores, which represents 33,000 local shops.

Its chief executive said: “The information provided to peers is highly misleading.” The ACS claims the £210 estimate is based on the price for bulk orders, and excludes installation costs.<sup>5</sup>

4/5/09

Phil Beder e-mails Suleman Khonat of The National Federation of Retail Newsagents, and other unnamed recipients, to say that his company “has received numerous enquiries from retailers in the UK about a display ban solution for small shops” and informs them that the full cost is substantially more than the DH and ASH are saying:

“We quoted £200 (not £120) for the materials necessary to fit a standard small gantry, based on a minimum purchase of 1500 stores.”

Beder reiterates that the £200 price related to “a temporary solution” and “does not include the cost of shipping, installation or specific changes to size and dimensions.”

“We have made ASH aware of these points so presumably the misperception that we can offer a display ban solution for £120 to small retailers will be dispelled by them shortly.”

5/5/09 - 1.35 pm

Phil Beder’s e-mails to Arnott and Khonat are forwarded by an unnamed person to Lucy Holdstock, who replies:

“Thanks \* \* \* \* \*, yes we have received this also.  
Please see below for lines to take.”

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The “line to take” is the prepared statement that Holdstock began working on on the 29 April. It reads, in part:

“We have not misled Peers. We have given information in good faith based on quotes received by the Department of Health from the Vice President of a Canadian company...”

The DH then introduces a new argument to the debate:

“We also understand that in Canada, tobacco companies continued to pay for tobacco gantries even after a display ban meaning the covers cost nothing to the retailer.”

Under the heading “IF NEEDED”, is an *ad hominem* attack on Phil Beder’s integrity:

“It is perhaps worth remembering that although this company is not owned by the tobacco industry, its major customers are tobacco companies, who buy covered tobacco gantries for retailers in Canada.

Maybe it is not so surprising, then, that the company needs to roll back on previously given quotes that showed removing tobacco displays need not be costly.”

Holdstock tells DH staff:

“Fortunately for us, we didn’t use the ASH quotes, but our own directly from the man in question.”

5/5/09

Having received the letter from ASH’s solicitors, Shane Brennan sends an e-mail to two unnamed people (possibly Arnott and Holdstock) apologising if he may have “implied that Action on Smoking and Health were being deliberately untruthful in their dealings.”

5/5/09 - 5.54pm

Baroness Finlay has received an e-mail from 4 Solutions Display and plans to quote from it in the House of Lords debate the following day. She sends it to an unnamed ‘Bill Manager’ at the DH.

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The 'Bill Manager' forwards the e-mail as an attachment (not disclosed by FOI team), saying:

“Please see the attached email from Baroness Finlay. She is thinking of circulating this as a counter response to a letter which has been circulated to Crossbench Peers (also attached here).  
However, reading through her email, I'm not sure that's helpful.

Could you take a look at this and let me know whether this document is factually correct/incorrect and whether this is therefore something it's helpful to circulate to support the Government's case?”

There is no trace in the FOI files of a reply to this e-mail (probably someone telephoned him instead), but within 40 minutes the Bill Manager has sent another e-mail:

“I've just spoken with Baroness Finlay, who has agreed not to circulate the email she received from the Canadian display company (she had thought it might be a helpful rebuttal to the Lord Palmer/Baroness Golding letter, but in fact it's the opposite!).”

As a result of this intervention from the DH, the new e-mail from 4 Solutions Display is never made public and never has the chance to influence the Lords debate.

6/5/09

The House of Lords debate takes place, and it is obvious that both Lord Faulkner and Baroness Thornton have been extremely well briefed. Baroness Thornton, in particular, was able to recite whole lines from e-mails from the DH's Tobacco Policy Manager. Like the DH, she was keen to emphasise that “the costings given to ASH were not the basis of the letter to Peers from my noble Lord Darzi.” She also repeated the line that “in Canada, tobacco companies continue to pay for the tobacco gantries even after the display ban - meaning that the covers cost nothing to the retailer.”

The House of Lords pass the Bill without amendment.<sup>6</sup>

15/5/09

Shane Brennan e-mails Lucy Holdstock to express his “frustration” at how she has treated the Association of Convenience Stores. He also raises, in a rather weary way, the rumours that the DH has been spreading about the tobacco industry paying for the shop-fitting work that is now inevitable:

“If you have clear information that tobacco companies in the UK plan to pay for the costs of transition then it would be really useful to us to have that.

## **The Dark Market**

Unfortunately this is not what the companies  
are telling industry representatives.”

Brennan even agrees to go along with the original £1,000 cost estimate that was included in the government’s original assessment:

“We are willing to adopt the RIA figure, in spite of our reservations,  
because we believe that gives better clarity to those debating the issue.  
What is DH’s approach to this going forward?”

20/5/09

With the battle now won, the DH holds out a small olive branch to Shane Brennan and the ACS. Lucy Holdstock e-mails him, saying:

“We regret that tensions have entered into our relationship and hope that  
we can now move things on to a more constructive footing.”

Holdstock agrees to “recommend that Ministers avoid the low cost issue where they can” but, if challenged, “they will have to defend the low estimates that have been provided to us as illustrative example costs by 4 Solutions Display.”

In an extraordinary statement, considering the number of times Phil Beder has stated that his company could not do the necessary work for £120, Holdstock asserts:

“On the question of the costs provided by the company,  
we have not received any indication from them that the estimates that  
Ministers have been quoting in debates were incorrect, and so, where necessary,  
Ministers will continue to cite them.”

And so they did. Even though the government’s own Impact Assessment estimated the cost would be £1,000 per shop (itself, probably an underestimate), ministers, peers and MPs quoted figures in the low hundreds in all Parliamentary debates, including on the final reading on October 12th 2009.

## **The Dark Market**

### **Questions raised**

None of the health groups involved come out of this affair well. ASH and Cancer Research UK, in particular, were so eager to find a solution which would, in Arnott's words, "show that the legislation would not be difficult or very expensive for small shopkeepers to implement" that they readily accepted the lowest quote that came along, however implausible.

By 3.29pm on 12 February - less than two hours after first seeing 4 Solutions Display's price list - Cancer Research UK's Elspeth Lee had not only settled on a figure of £212.57, but had drafted a statement to present it to the House of Lords. Deborah Arnott went out of her way to base cost estimates on the very smallest convenience store and the very largest bulk discount, to come up with her £120 figure.

There is no record of anyone from ASH or DH checking specifics with 4 Solutions Display until the end of March, and then only because Shane Brennan alerted them to the glaring deficiencies in their guesstimates. Common sense should have told them that £120 was far too cheap a price to pay for the materials and labour involved in reconfiguring a significant part of a convenience store. At best, they can be accused of naivety. But even if it is unfair to expect them to have a rudimentary knowledge of shop-fitting, they had ample opportunity to take advice from those who knew more about the subject.

There was every indication that the ASH/DH figure was far too low. The Department of Health had themselves carried out a fact-finding mission in Canada the previous September which concluded that the average cost would be £550. The ACS had carried out detailed research and firmly believed the cost would be around £1,850. The British government's own Regulatory Impact Assessment had settled on a figure of £1,000. The Scottish Tobacco Control Unit gave estimates ranging from £550 to £17,500. In New Zealand, where the debate was also coming to a head, the Association of Convenience Stores estimated that the cost would be \$6,000 (£2,400).

The Canadian figure was, therefore, an obvious outlier, and this fact alone should have been enough to make ASH and DH check and double-check it. That they did not is confirmed in an e-mail from Shane Brennan (to the Department of Health) written on 15 May:

"We raised from the outset of our discussions in meetings with yourself and other team members that we do not believe that the 'Canadian' solution is a permanent one. I accept that 4 Solutions Display told you that it was.

To what extent did you take on board our concerns  
and clarify them with 4 Solutions?"

## The Dark Market

These e-mails raise a number of questions...

### Question 1 - Who came up with the £120 figure?

As dubious as the £200 estimate was, the £120 figure was the subject of particular controversy. Lord Darzi had put that figure at the heart of the debate by sending all peers a letter telling them that the costs could be “as little as £120”. By May 8th 2009, many peers had realised that the £120 estimate was unrealistic. As a leading advocate of the display ban, Baroness Thornton came under fire in the House for having used the £120 figure, with Lord Naseby leading the charge:

*“My question to the Minister is: was she totally misled by 4 Solutions, was she totally misled by ASH, or has she in effect totally misled the House?... I am making a serious challenge to her. I am not alleging that she has misled the House, but I hope she has a good answer on whether the figure is £120 or closer to £2,000.”*

In reply, the Baroness emphasised that ASH had *not* been responsible for the dubious estimates Lord Darzi had provided peers:

*“The costings given to ASH were not the basis for Lord Darzi’s letter to Peers or for the information given through debates or other Government briefing provided to Peers. The information given by the Government relates to quotes received directly by the Government and we have provided it in good faith.”*

That the Baroness was parroting the ASH/DH line is obvious from an e-mail Lucy Holdstock sent the previous day, in which she quotes from her own prepared statement:

“The Association of Convenience Stores have received information from the same company regarding quotes that company gave to the charity ASH. This was a separate matter.

The costings given to ASH were not the basis for Lord Darzi’s letter to Peers.”

There is no doubt that the Department of Health passed on Phil Beder’s price-list to ASH, as well as his contact details. Both ASH and DH were working from a price-list from the same source and both were regularly e-mailing one another. Neither of them bothered to ask the fundamental questions about installation costs and hidden fees but either of them could have used the price-list to find the lowest theoretical quote. But whilst either of them *could* have done so, only Deborah Arnott is *proven* to have done so.

The Arnott/Lee correspondence of 12 February shows that it was Arnott who came up with the idea of getting an estimate based on 1,500 premises and it was Arnott who decided to get a quote for a display of 19.68 square feet (rather than the 25 square feet Holdstock had used as an example).

## The Dark Market

It is conceivable that somebody at the Department of Health could have come up with the attention-grabbing £120 figure independently but, if so, there is no evidence of it in these e-mails. There is, however, ample evidence that ASH and Cancer Research UK were highly influential both in calculating the £120 figure and in bringing it to the public's attention. Arnott calculated the figure, e-mailed Phil Beder, telephoned him and then told Elsepeth Lee that he had "confirmed my calculations". Elspeth Lee then decided to add them to the Lords briefing papers. Lee's e-mail of 12 February says:

"We can certainly add some generic wording **in the briefing** to imply that costs could well be under £200."

The following day, after Arnott reiterates her figure of £120, Lee writes:

"We will be adding this [the estimate] to **our Lord's briefing**."

The question of who came up with the £120 figure is in some ways academic. Anyone who extrapolated from Beder's price-list could have come up with the same figure. It is, however, interesting that the DH was so keen to distance itself from "the costings given to ASH" after they became widely circulated. Arnott herself was quick to disown them, once the *Evening Standard* reported the story ("as you know, we didn't provide you with the information.")

But the e-mails prove that Arnott *did* come up with the £120 figure (12/2/09) and she *did* send it to the DH (18/2/09). That figure then appeared in Lord Darzi's influential letter to peers. Does correlation equal causation? Not necessarily. Still, it is intriguing to see how eager the DH were to take responsibility for a discredited figure, rather than be seen to have invited the obviously partisan anti-smoking group ASH ("hardly a disinterested party", as the *Standard* described them) to help them out. If the DH's intention was to give the impression that ASH had not been working closely with them, these e-mails shatter that impression.

### Question 2 - Did the tobacco industry tell Phil Beder to change his prices?

On 5 May, Lucy Holdstock sent an e-mail to unnamed persons, stating in unequivocal terms:

"He [Phil Beder] has been contacted by the Canadian Convenience Store Association on behalf of the ACS - the CCSA is run by a man formerly employed by the tobacco industry and we rather suspect tobacco companies have been threatening to pull business from him if he continues to support better information about costs to the UK Gov't."



## The Dark Market

This is a very bold statement. What evidence did Holdstock have to show that the CCSA had been in touch with Beder at all, let alone at the behest of the Association of Convenience Stores? Certainly there is no evidence of it in the numerous e-mails released under the Freedom of Information Act.

The possibility that Beder was leant on by the tobacco industry cannot, of course, be entirely discounted. On the other hand, the tactic of accusing any dissenting voice of being a stooge of the tobacco industry is used with tedious regularity by anti-smoking groups around the world and it is no surprise to see it being used again here. It should be noted that neither the DH nor ASH expressed any reservations about Phil Beder when they thought his prices suited them.

Perhaps more likely is the fact that, by the end of April, Beder had come to realise that his quote was being used in a highly political debate. His company's name was being cited in fact-sheets produced by Smokefree Action and Cancer Research UK, as well as in House of Lords briefing papers. As early as 7 March, *The Grocer* was naming 4 Solutions Display as the source of the £120 figure (*'Fury at 'misleading' cost estimate of display ban'*).<sup>7</sup> Word of this is likely to have reached Beder's ears.

Beder's job is to sell his products and services. As a businessman, he cannot have expected to become embroiled in a House of Lords debate. Two months after first promoting his goods to the DH, he may have realised that these trans-Atlantic requests for quotes were not going to result in business.

In her initial contact with him, Holdstock had not made it clear that she only wanted a quote for the purposes of a ministerial briefing. After she failed to get a reply to one of her early e-mails, Holdstock sent another, this time asking him if he "might be interested in presenting to UK trade organisations/the Department of Health". This sounds like a sweetener to get Beder to reply, and would have encouraged him to believe that there was a potentially lucrative deal at the end of the rainbow. The fact that Arnott specifically asked for a quote for 1,500 units would have reinforced this. His replies to the DH suggest that he anticipated winning a contract with the government. He repeatedly offered to give a live demonstration of his products, something he is unlikely to have done if he did not expect to win sales.

There is inevitably an element of speculation here, but it would explain why he was happy to give of his time so freely and why his initial quotes were so competitive. That his decision to make the full cost of his services public was a business decision is reinforced by his e-mail to the National Federation of Retail Newsagents, in which he said he had received "numerous enquiries from retailers in the UK about a display ban solution" but that this "does not include the cost of shipping, installation or specific changes to size and dimensions". If - as the DH suggested - these extra costs were fictitious, Beder would be doing himself out of business.

When I approached Beder about this article he told me that he had nothing more to add. He did, however, say "perhaps they should get quotes locally in the UK."

### Question 3 - What did Phil Beder's e-mail to Baroness Finlay say?

By May, Phil Beder had broken off communications with the DH. On May 5, Holdstock mentions that "he now refuses to speak to us!" But Baroness Finlay, a supporter of the Bill, had apparently received a new e-mail from him and forwarded it onto the DH.

The contents of the e-mail are not revealed by the FOI team but it is clear from the DH's swift decision to suppress it that it contained information that did not "support the Government's case." Probably, it contained further confirmation that the £120 and £200 estimates were far too low.

Any information from the company at that time could only have shone further light on the true cost of the display ban and yet the DH encouraged Baroness Finlay not to disclose whatever information she had been sent.

### Question 4 - Why did Lucy Holdstock say she had no reason to think the £120 was wrong, even after Phil Beder had told her it was?

On 20th May, Lucy Holdstock e-mailed Shane Brennan saying:

"On the question of the costs provided by the company,  
**we have not received any indication from them that the estimates that  
Ministers have been quoting in debates were incorrect**, and so,  
where necessary, Ministers will continue to cite them."

This is one of the strangest e-mails to have surfaced from the FOI request. Strange because we know that Holdstock had seen the e-mails Phil Beder had sent Deborah Arnott explaining in no uncertain terms why the £120 figure was wrong (April 28 and 30). We know that she saw these because when an unnamed person forwarded them to her on 5 May, she said "yes we have received this also." Lest there be any doubt, Beder personally forwarded these e-mails to the DH on 30 April.

The e-mails include passages wherein Beder explicitly states:

"Single shop all in costs estimates including all the above specifications  
is approx. 450 pounds for a normal single gantry."

And:

"4 Solutions Displays cannot produce, deliver and install for the  
minimal dollars you are publishing."

Assuming she read these e-mails, why did Holdstock tell Shane Brennan that she had received "no indication" that the £120 estimate was incorrect?

### Question 5 - What evidence did the DH have to claim that the tobacco industry would foot the bill for the new displays?

By May 7, the £120 figure had fallen to pieces as a serious estimate of the cost of re-fitting a convenience store to comply with the new law. In its place, the DH resorted to the claim that the tobacco industry would probably pay for the new gantries anyway. In the space of six months, therefore, the cost to shopkeepers of the Health Bill had fallen from £1,850, to £1,000, to £200, to £120 and finally to zero.

This claim, said ASH and the DH, was based on the Canadian experience. In an e-mail to Shane Brennan (5 May), Lucy Holdstock said:

“We also understand that in Canada, tobacco companies continued to pay for tobacco gantries even after a display ban, meaning the covers cost nothing to the retailer.”

A day later, and using virtually the same words, Baroness Thornton confidently told the House of Lords:

“I add that we understand that, in Canada, tobacco companies continue to pay for the tobacco gantries even after the display ban - meaning that the covers cost nothing to the retailer.”

Nothing in the DH e-mails backs up this claim. In fact, the delegates who visited Canada on the fact-finding mission of September 2008, concluded quite the opposite:

“There is limited evidence that tobacco companies are prepared to help meet the cost of re-fitting.”

“[The CCSA] claim loss of \$40m a year in display allowances from tobacco industry which has proved very little help with re-fitting stores to comply with the ban.”

This was confirmed in the UK by Steve Stotesbury of Imperial Tobacco, who said on 30 June that they would not be contributing to the cost of removing tobacco from view, saying:

*“It is not in our interest to fund any changes if a full ban on display is implemented.”*<sup>8</sup>

The claim that “international evidence suggests that most of the costs of re-fitting were borne by tobacco wholesalers” is stated as fact on the Cancer Research UK website.<sup>9</sup> The only reference given is “data provided to Action on Smoking and Health by Health Canada”. If such data exists, there is no record of it in the DH e-mails or on ASH’s website.

### Misleading figures

*The Guardian* ran a story about the DH e-mails in September 2009:

#### Ministers accused in tobacco display ban row

The government has been accused of misleading Parliament over the cost for retailers of implementing the controversial tobacco display ban.

Internal documents obtained under the Freedom of Information Act show that officials at the Department of Health (DoH) were warned by manufacturers that they had dramatically underestimated how much it would cost retailers to modify their shops to comply with the ban.

Lord Darzi, the health minister, told the House of Lords this year that shops would pay as little as £120 each to install sliding screens in their premises. In a Lords debate in March, the government minister Baroness Thornton said that the cost "could be as little as £120".

The figure was also quoted in government briefing notes sent to peers in the Lords who oppose the display ban. The Conservative party and the Liberal Democrats are both likely to vote against it.

But according to the internal documents, which have been posted on the DoH website, the £120 figure was calculated in January this year after a quote had been obtained from a Canadian manufacturer, 4 Solutions Display. When Phil Beder, the company's vice-president, was made aware of the figure being quoted, he wrote to the DoH and to Ash an anti-smoking pressure group, which had also quoted the figure in its literature to ask that it be withdrawn.

In an email sent to Ash, dated 29 April this year, Beder said that the price quoted was based on a bulk order and did not include shipping or installation costs. He forwarded the correspondence to the DoH on 30 April, saying that he wanted to "clarify" the company's position.

Beder told Ash that he wanted "to make sure you are not making additional assumptions on costs to suit your internal needs. 4 Solutions cannot produce, deliver and install for the minimal dollars you are publishing. I trust your organisation will ensure the entire financial story is told to all."

Ash responded by telling 4 Solutions that it was confident its figures were correct. [!]

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Replying to *The Guardian's* allegations, a spokesperson for the Department of Health made no apology for the misleading figures and reasserted the case for the ban as a way of deterring teenagers from smoking:

When asked about the allegations a spokeswoman at the DoH said that the government remained committed to introducing the ban.

The DoH said: "Point-of-sale displays have already been removed in a number of countries, including Canada, [where] removing point-of-sale display has coincided with a fall in smoking prevalence rates among 15 to 19-year-olds from 29% in 2002 to 19% in 2007."

Reducing teen smoking prevalence was the key argument used to push through the display ban from the initial consultation to the final vote. MPs and peers voted for the legislation in the sincere belief that it would have a significant impact on youth smoking while having an insignificant effect on retailers. In truth, there was never any evidence for either of these beliefs.

By late 2008, ASH was telling ministers that tobacco display bans led to a 10% drop in youth smoking. As the BBC reported:

Ministers say where other countries - such as Iceland and Canada - have removed displays, smoking prevalence among young people has fallen by up to 10%.<sup>1</sup>

On 9th December 2008, health secretary Alan Johnson appeared on Radio 4's Today programme, saying:

*"What other countries have found when they've banned point of sale [tobacco] displays is they reduced the number of young people taking up smoking, and that's the primary concern we have here."*

In a (now deleted) ASH press release, figures from Canada were used to justify this claim:

Removing point of sale display has coincided with a fall in smoking prevalence rates amongst 15-19-year-olds - from 29 per cent in 2002 to 19 per cent in 2007.

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But these figures were simply wrong. As Health Canada data show, the actual decline was from 22% to 15%—a 7%, not 10%, drop. When this was pointed out to them, ASH blamed a “transcription error” for the mistake and reworded their press release to read:

“In Canada, research by the Canadian Tobacco Use Monitoring Survey shows that banning point of sale displays in a growing number of provinces has coincided with a fall in smoking prevalence rates amongst 15 to 19 year olds – from 22% in 2002 to 15% in 2007.”<sup>2</sup>

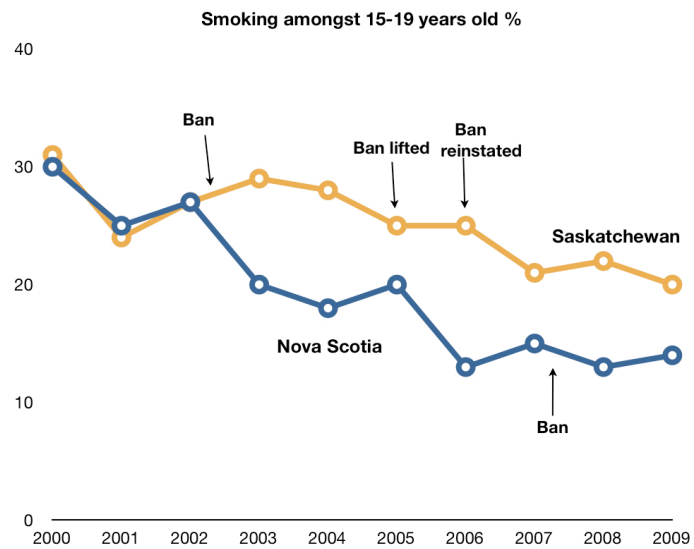
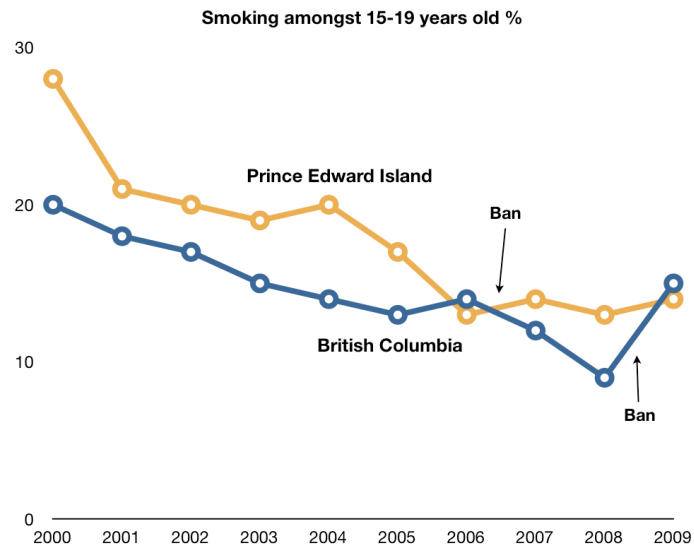
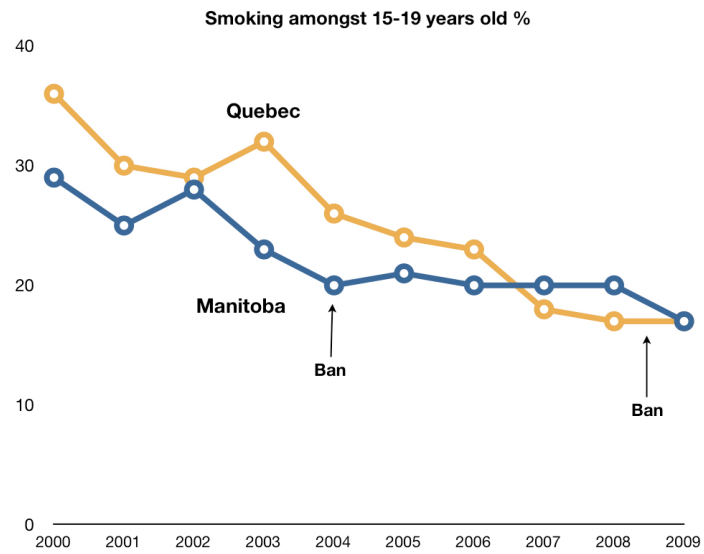
But this was only marginally less misleading. The use of the word ‘coincided’ barely hinted at the lack of demonstrable cause-and-effect. Indeed, it was *impossible* for there to be a cause-and-effect at work because the vast majority of Canadians did not live in places which had display bans in 2007.

ASH did not mention the fact, but the most heavily populated provinces of Ontario, British Columbia, Alberta and Quebec did not bring in display bans until 2008. Between 2002 and 2007, only 10% of the Canadian population lived in provinces which had display bans. Even if the bans had a dramatic impact in these regions, the effect on Canada’s overall figure could never be anything but negligible.

The truth was that youth smoking rates fell throughout the decade with or without display bans. The question should have been whether the provinces with display bans did better than those without. A look at teen smoking prevalence figures for individual provinces give us a clue as to why ASH never asked that question.

The graphs on the next page show smoking prevalence amongst 15-19 year olds in four of the six provinces that had adopted tobacco display bans by the end of 2007 (figures for the sparsely populated Nunavut and Northwest Territories are not available). Quebec and British Columbia brought in bans in summer 2008—too soon for any effect to make itself evident—and are shown as effective control groups. (All data from Health Canada.)<sup>3</sup>

# The Dark Market



## The Dark Market

It is quite apparent from these graphs that tobacco display bans had no effect on youth smoking rates in Canada. Perhaps surprisingly, five of the six provinces saw a *rise* in teen smoking prevalence in the year when the ban came in. This is probably a coincidence. What can certainly be said is that youth smoking has declined at around the same rate across all territories, albeit with occasional upward blips. It is also notable that the the first province to bring in a ban (Saskatchewan) now has the highest youth smoking rate of all, having overtaken Quebec.

Despite a conspicuous lack of even circumstantial evidence that display bans deter teenagers from smoking, the myth of a dramatic effect in Canada and Iceland persisted until the end of the campaign (for a discussion of the data from Iceland, see *Basham, 2010*.<sup>4</sup>)

When the Health Bill reached its third and final reading on October 12 2009, several MPs drew attention to the paucity of evidence. Mike Penning MP (Con) said:

*“I have looked long and hard for evidence from around the world that the Government’s proposals are sufficiently evidence-based, but I do not think that they are. I am sure that the Minister will refer to the experiment in Canada. When the measure was introduced in one state, there was a drop, but in states where it was not introduced, there was also a drop. What is the evidence base from that?”*

Sandra Gidley MP (Lib Dem) who, like Penning, was firmly anti-smoking (she jokingly described herself as a “tobacco health fascist” during the debate), said:

*“The ban has been touted as a means of reducing smoking among the under-aged. If I felt for one moment that it would do that, I would support it, but it does not, so I will be supporting provisions to remove it.”*

However, the day before the debate *The Times* had published a letter from Cancer Research UK and three other charities which stated:

Research shows that keeping tobacco out of sight helps to reduce teenage smoking. Display bans and other measures have helped to reduce smoking rates in Iceland and Canada.

There is strong evidence — backed by the World Health Organisation and other leading medical experts — that these measures will help to stop children smoking.<sup>5</sup>



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Citing this letter while at the despatch box, public health minister Gillian Merron told the House:

*"I am confident that there is convincing publicly available evidence—from Canada and Iceland as well as from Ireland—to justify removing tobacco displays. Cancer Research UK, in summarising much of the relevant publicly available evidence, tells us that there is clear evidence that "tobacco point of sale has a direct impact on young people's smoking"*

Aside from Merron's reliance on quotes from Cancer Research UK, the reference to Ireland was, again, misleading. Ireland had only introduced its ban three months earlier, and there was no new smoking prevalence data on which to judge the success or otherwise of the Irish legislation.

One final point needed addressing. The government had still not published the draft regulations and so nobody knew the details of the ban, nor how it would be implemented.

*Mike Penning: At the moment, we do not have the recommendations from the Government, or know what they are likely to do or how they will interpret the measure. They are as yet unavailable, so we are going to be voting this evening on measures in the Bill the impact of which we do not directly know. We were promised those details early in Committee and last week. Will the Minister tell us where they are?*

*Gillian Merron: The hon. Gentleman may be aware that the regulations were published earlier today, before the debate commenced. Indeed, they were e-mailed to all Members of Parliament and are available in the Library and the Vote Office.*

But this, too, turned out to be untrue. The regulations were *not* e-mailed before the debate and when Christopher Chope MP returned from the library having looked for the regulations, he told the House:

*"On a point of order, Mr. Deputy Speaker. Earlier, the Minister assured the House that the draft regulations were now available in the Library and the Vote Office. I have just been to both, seeking copies, and they are not available. It is in any event extraordinary that the Minister did not have the courtesy to distribute the draft regulations to the shadow Minister. I request an adjournment of this debate, pending the production of these regulations."*

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At this new turn of events, Mike Penning addressed Gillian Merron, saying:

*“She should be embarrassed, because this debate is about people's livelihoods, and the impact assessments would allow Members to take a view on how this legislation would affect businesses in their constituency.”*

It was in keeping with the tangled narrative of the display ban that MPs were not fully aware of what the legislation would mean for retailers even as they voted for it. Nevertheless, with only three Labour MPs voting against the government at the final reading, the tobacco display ban passed into law.

**“I have looked long and hard for evidence from around the world that the Government’s proposals are sufficiently evidence-based, but I do not think that they are.”**

**Mike Penning MP (shadow health secretary 2007-2010)**

### What happened next

A change of government in May 2010 offered retailers hope that the display ban would be shelved as part of the 'Freedom (Great Repeal) Bill' announced in the Queen's Speech on May 25th. This piece of legislation promised the "repeal of unnecessary laws."

Since the display ban had first appeared on the UK's political radar, several countries had considered and rejected similar plans. In March 2009, New Zealand's Prime Minister decided against implementing a tobacco display ban, saying "there is no international evidence that it actually works, and it's hugely expensive to do it."<sup>1</sup> And although Norway implemented a tobacco display ban in January 2010, both Sweden and Denmark decided against doing likewise a few months later.<sup>2</sup>

In 2010, the new government issued a new Impact Assessment stating that compliance would cost "£4,965 average per small store, and £7,500 average per larger store" if the government forces retailers to store tobacco products above or below the counter.<sup>3</sup> At the time of writing, regulations will allow tobacco to be kept behind the counter, so long as they it is professionally covered. For this, the DH estimates a one-off cost to the retail industry of £27.7 million, with annual costs of £36.2 million. Incredibly, the DH continues to rely on the 4 Solutions Display figures to come up with this estimate. The only source given in the new Impact Assessment document for the costings is 'Emails from 4 Solutions Display to the Department of Health and ASH see [www.ash.org.uk](http://www.ash.org.uk)'.

Today, with the display ban looking uncertain, ASH continue to play down the financial burden the legislation will place on retailers. Cancer Research UK has now removed any trace of the £200 per shop estimate from its website, but ASH press doggedly on. In May 2010, ASH published a fresh document, this time claiming that shops in Ireland had paid an average of just £300 to comply with the legislation.

The source for this new ASH claim was a survey carried out by the Association of Convenience Stores (ACS) in November 2009.<sup>4</sup> The ACS did indeed find the average cost of compliance to be £300. However, as they made clear, this figure was not applicable to UK retailers, since the Irish were able to comply with the law by, for example, putting their cigarettes behind a curtain. Such cheap and cheerful methods would be denied to retailers under the UK's tougher regulations, as the ACS explained:

"It is also hard to compare costs between the ROI and what it may cost to implement a tobacco display ban in the UK. Many respondents chose a low cost option of compliance such as a curtain, a solution which has been indicated that the Governments in the United Kingdom will not allow."

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ASH also continues to portray the costs of compliance as largely academic since the tobacco industry will pay for the bulk of them. ASH has been saying this since 2008, when their report—‘The need for a comprehensive tobacco control strategy’—stated:

Tobacco display bans need not be expensive for retailers. Canadian evidence shows that any initial financial impacts of the prohibition of tobacco displays were minor, even for small stores reliant on tobacco sales. The costs of re-fitting were largely borne by tobacco wholesalers, and the tobacco industry continued to pay retailers for the tobacco storage units.

As with so many statements from this pressure group, it is worth checking the source of this claim. The only reference ASH provide is an article from *The Montreal Gazette* which interviewed two shopkeepers in Quebec.<sup>5</sup> Neither of them supported the law and there was no mention of the tobacco industry providing financial support. Indeed, the only reference to the cost of compliance was negative.

Alexandre, a Pointe Claire dépanneur owner who asked that his last name not be published, estimated the shelving he needs in his store will cost between \$2,000 and \$3,000. "Not everybody has that money," he said. "If you are a mom and pop shop, not affiliated with a chain, it's a big expense."

ASH continues to make unfounded claims about the industry paying for “most” of the compliance costs. In May 2010, ASH referred to the ACS survey in Ireland, saying:

Compliance cost most Irish retailers little or nothing... The Association of Convenience Stores commissioned research on the costs to Irish retailers and found most convenience stores had at least some of the costs met by the tobacco companies

Once again, this is simply untrue. As can be seen from the ACS survey (which, again, is ASH’s source), most retailers (56%) did not receive a penny from the tobacco industry to comply with the law. A full three-quarters of newsagents and corner shops had to bear the full cost of compliance and while convenience stores received more help, 50% still received nothing. And, contrary to the popular wisdom, the ACS found that “94% of those surveyed receive no financial support from tobacco companies on an ongoing basis.”

Having referenced the ACS survey, it is a shame that ASH did not report any of its key findings (shown overleaf). The ACS found that the majority of Irish retailers found the legislation burdensome, the public viewed it as bizarre and pointless, and there was a suspicion that it was encouraging illicit trade (as it seems to have done in Canada).

## **The Dark Market**

Other findings from the survey showed that “on the whole, the overriding perception was that the display ban was an ineffective measure”, with only 3% of customers seeing it as a positive change.

### **Summary of Findings**

- The biggest compliance costs and burdens are experienced by the smallest retailers
- Irish Retailers tend to see the ban as unnecessary and compliance as a burden
- Most retailers chose the cheapest and easiest compliance solution and the majority adopted a compliance solution that was fitted to the existing unit
- The findings are not conclusive about the kind of financial support that retailers can expect from tobacco suppliers. Over half surveyed had to wholly fund the solution themselves and there was a wide disparity in compliance costs.
- There was confusion for some retailers regarding the change and the majority relied on trade press, symbol groups and tobacco manufactures for their information.
- The overriding customer reaction seems to be not to notice a change at all
- There is a perception that the ban has contributed to an increase in the illicit trade
- There are two key limitations to drawing comparisons between the markets
  - the UK market is ten times the size of the Irish Market and so the logistical and communications challenges are more significant; and
  - the high pre-existing prominence of vending units in the chains and symbol group stores has reduced the compliance burden.

Summary of the survey of Irish retailers, November 2009

**“The reason is there is no international evidence that it actually works,  
and it’s hugely expensive to do it.”**

**New Zealand Prime Minister John Key, on why he rejected the tobacco display ban**

### Conclusions

There can be no little doubt that MPs and peers were misled about the likely costs and impact of the tobacco display ban. When Parliamentarians voted for the law, they did so in the sincere belief that it had widespread public support, that it would lead to a dramatic fall in youth smoking, and that compliance costs would be minimal.

But, as we have seen, the public consultation of May 2008 was heavily weighted towards organisations funded by the Department of Health. Most respondents merely agreed with vague and generic sentiments, while the concerns of over 10,000 shopkeepers were effectively ignored. As a gauge of genuine public opinion, the consultation had little value. A recent poll of 2,000 people conducted by Populus and commissioned by the National Federation of Retail Newsagents, found that 78% supported, or would not oppose, the ban's withdrawal. 74% said they believed the ban would be ineffective and 17% believed it would make tobacco *more* appealing to young people.<sup>1</sup>

On the issue of youth smoking, MPs and the media were briefed with misleading figures about the 'success' of similar legislation abroad. The significant drop in youth smoking in Canada between 2002 and 2007 was frequently portrayed as compelling evidence, despite the fact that 90% of the Canadian population lived in provinces which had no display ban until 2008 or later.

On the critical issue of the cost to retailers, MPs and the media were briefed with implausibly low estimates of between £120 and £200 per shop. Although the government's official estimate was £1,000 per shop, the lower figures circulated by ASH and the Department of Health dominated the public and Parliamentary debates. ASH and the DH continued to cite these figures long after they had been discredited.

Since the first Impact Assessment was published, e-mails released under the Freedom of Information e-mails have revealed how those low estimates were arrived at. Retailers in the UK have consistently argued that the cost of compliance will be in the thousands rather than the low hundreds, and ASH's original source at 4 Solutions Display has disowned the figures being bandied around in the Parliamentary debates. It is extraordinary, therefore, that the DH continues to base cost estimates on these figures.

Given the concern expressed by MPs about the financial impact on small shopkeepers, it is likely that many of them would have voted against the legislation had they known the full story of how the consultation, costings and international evidence was distorted by advocates for the legislation. However, as the law has not yet come into force, there is still time for a balanced and evidence-based debate on the issue of tobacco display bans.

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