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Tobacco Reforms Consultation Team
Department of Health and Aged Care

Submitted via Consultation Hub

Dear Sir/Madam

ACCC submission to the public consultation on the exposure draft package Public Health (Tobacco and Other Products) Bill and Regulations 2023

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Department of Health and Aged Care's (DHAC) exposure draft package on the proposed Public Health (Tobacco and Other Products) Bill 2023 (the Bill).

The ACCC considers the draft package to be an important opportunity to better protect the Australian community. We support the consolidation of existing tobacco Acts and delegated legislation into the proposed single control bill. This strengthens tobacco laws and ultimately will lead to improvements in public health. The consolidation of tobacco legislation to within the portfolio of DHAC also improves regulatory efficiency. The DHAC is the appropriate agency with the relevant technical expertise to effectively regulate tobacco products and e-cigarettes (both nicotine and non-nicotine).

Overview

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The Australian Consumer Law (ACL) forms part of the CCA, and through the ACL's application the ACCC aims to minimise the risk posed by unsafe general consumer goods, ensure consumers are informed about safety risks, and prevent misleading behaviour and unconscionable conduct.

In relation to tobacco and e-cigarette products, currently the ACCC and the state and territory consumer protection agencies administer specific legislative instruments under the ACL:

- Competition and Consumer (Tobacco) Information Standard 2011 (Tobacco Information Standard) concerning graphic health warnings
- Trade Practices Act 1974- Consumer Protection Notice No.10 of 1991- Permanent Ban on Goods (smokeless tobacco products ban)
- Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008 (RFR Safety Standard)

The general provision of the ACL also applies, and suppliers of consumer goods (including as e-cigarettes and tobacco products) must not mislead the public or misrepresent features, contents or the suitability of their products.

The ACCC continues to hold the views expressed in the agency's previous submissions to the Therapeutic Goods Administration (TGA) consultation on vaporiser nicotine products¹, Senate Select Committee on Tobacco Harm Reduction², the DHAC's Review of Tobacco Control Legislation³ and the Parliamentary inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia⁴.

We consider the use of tobacco, nicotine and non-nicotine e-cigarette products to be an important and urgent public health issue, particularly amongst young people. The ACCC supports the proposed legislative interventions to consolidate regulation and for the Health and Aged Care portfolio to have policy leadership and responsibility for tobacco and e-cigarette regulation. This change will enable the DHAC to better improve health outcomes for all Australians.

Mandatory information standards for retail packaging for tobacco products

The ACCC supports the proposal to consolidate the [Competition and Consumer \(Tobacco\) Information Standard 2011](#) (Tobacco Information Standard) into a single tobacco control Act and delegated legislation.

Under the ACL, mandatory information standards are made by the responsible Commonwealth Minister to increase consumer welfare and wellbeing by providing specific information about goods or services.

Currently all tobacco products sold in Australia must comply with the health warning labelling requirements set out in the Tobacco Information Standard. When it was introduced in December 2012, this standard updated and expanded existing health warnings as part of a comprehensive suite of reforms implemented by the Australian Government with the support of relevant State and Territory Ministers, to reduce smoking and its harmful effects.

Under the Tobacco Information Standard, any product containing tobacco, which is manufactured for smoking, sucking, chewing or snuffing is considered a tobacco product.

For the purposes of consolidating the Information Standard into a single Tobacco control Act, the ACCC notes that section 9 of the proposed Bill similarly defines a tobacco product to be processed tobacco in any form, or a product that contains tobacco as an ingredient, that is designated or intended for human consumption. A tobacco product also includes parts of the product that are not tobacco, such as cigarette papers and cigarette filters.

The ACCC also notes that section 9 states tobacco wrappers in the form of a sheet or tube, e-cigarette products (even those containing tobacco), and products entered on the

¹ ACCC submission to the Therapeutic Goods Administration public consultation on vaporiser nicotine products (March 2021) <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Therapeutic%20Goods%20Administration%20consultation%20on%20vaporiser%20nicotine%20products.pdf>

² ACCC submission to the Senate Select Committee on Tobacco Harm Reduction inquiry into tobacco reduction strategies (November 2020) <https://www.aph.gov.au/DocumentStore.ashx?id=4b2d0fcc-2fee-4b87-a234-657bc374989a&subId=695742>

³ ACCC submission to the DHAC's Review of Tobacco Control Legislation (April 2019) <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Therapeutic%20Goods%20Administration.pdf>

⁴ ACCC submission to the Parliamentary inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia (July 2017) <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20inquiry%20into%20electronic%20cigarettes%20and%20personal%20vaporisers%20-%203%20July%202017.pdf>

Australian Register of Therapeutic Goods are not considered to be tobacco products and will not be covered by the proposed Bill (we provide comments on e-cigarette products below).

We support the proposed transitional arrangements and note that suppliers will not contravene packaging and product requirements for a period of 12 months from the day the new Act commences and will not contravene provisions relating to selling or possessing compliant packaging for a further period of 3 months after this period, providing products comply with the 'old regime'.

The ACCC notes the contents of the proposed Regulations in relation to graphic health warnings, health promotion inserts, and additional features to appear on tobacco products will be separately consulted on later. As the Commonwealth agency administering and able to enforce the Tobacco Information Standard, we also look forward to participating in that consultation.

Mandatory safety standards for reduced fire risk cigarettes

The ACCC supports the proposal to consolidate the [Trade Practices \(Consumer Product Safety Standard\) \(Reduced Fire Risk Cigarettes\) Regulations 2008](#) (RFR Safety Standard) into the single tobacco control Act and delegated legislation.

All cigarettes manufactured or imported into Australia must comply with the RFR Safety Standard. This mandatory standard prescribes requirements for the performance, packaging and marking of reduced fire risk cigarettes. It also references the test methodology from [Australian Standard AS 4830-2007, Determination of the extinction propensity of cigarettes](#).

We also support the proposed transitional arrangements and note that suppliers will not contravene product requirements for a period of 12 months from the day the new Act commences providing products comply with the 'old regime'.

Nicotine and non-nicotine e-cigarette products

Currently, there are different regulations that apply to nicotine and non-nicotine e-cigarette products in Australia.

The ACCC maintains its position that the regulation of both nicotine and non-nicotine e-cigarette products requires a tailored approach that is outside the scope of the general intent and effect of the Australian Consumer Law (ACL). The ACL product safety provisions do not contain the full suite of advertising, access or supply controls that policy makers have determined are the most effective for traditional nicotine (tobacco) products.

Nicotine is regulated by the TGA through the Therapeutic Goods (Poisons Standard – June 2023) Instrument 2023 (the Poisons Standard) and Therapeutic Goods (Standard for Nicotine Vaping Products) Order 2021 (TGO 110).

The Poisons Standard is a legislative instrument under the *Therapeutic Goods Act 1989* and is given legal effect through relevant state and territory legislation. Nicotine is listed as a prescription only medicine in Schedule 4 of the Poisons Standard (except when in tobacco prepared and packed for smoking or for therapeutic use as a cessation aid). Nicotine is also listed as a dangerous poison under Schedule 7.

Under the Poisons Standard, consumers can only purchase or import nicotine products with a prescription from an Australian doctor.

Products must also comply with TGO 110, which sets out safety and quality requirements for nicotine vaping products imported, supplied or manufactured in Australia. Requirements

include child resistant packaging, mandatory warning statements, record keeping, prohibition of certain ingredients, maximum nicotine concentrations and ingredient labelling.

The scope of TGO 110 creates a regulatory gap for e-cigarette products that do not contain nicotine including non-nicotine flavouring that can be mixed with nicotine concentrates by consumers⁵. These products are currently captured as consumer products under the ACL. In some cases, these products may also be subject to state regulation as it relates to sale and possession, as well as Commonwealth border controls.

E-cigarettes that do not contain nicotine or make a therapeutic claim can be sold legally in most states and territories. However, these products have been found to frequently contain unsafe ingredients that are prohibited in TGO 110 because they have been identified as unsafe by the Australian Industrial Chemicals Introduction Scheme (AICIS). In these circumstances TGO 110 does not apply because these products do not contain nicotine.

The AICIS is administered by DHAC and regulates the importation, manufacture and promotion of safe use of industrial chemicals in Australia.

In January 2022, the AICIS published an evaluation on 2 chemicals (acetylpropionyl and diacetyl) commonly used in non-nicotine e-liquids, which TGO 110 already prohibits from use in nicotine e-liquids. The AICIS recommended the Poisons Standard be amended to prohibit the use of both chemicals in non-nicotine e-liquids.

In March 2023, the AICIS made the same recommendation in draft evaluations for 2 other chemicals (benzaldehyde and tocopherols) also commonly used in non-nicotine e-liquids that are already prohibited from use under TGO 110.

The ACCC considers the regulatory gap and health risks posed by non-nicotine e-cigarettes is best filled through the scheduling of the ingredients of non-nicotine e-cigarettes in the Poisons Standard to achieve consistency with TGO 110. This would continue to recognise scheduling on the Poisons Standard as the most effective way to control how chemicals are made available to the public to protect public health and safety.

We note the proposed reforms do not address the broader regulation of e-cigarette availability and supply and that these issues will be considered separately.

Smokeless tobacco products

Snuffs

The ACCC supports the proposal to consolidate the [Trade Practices Act 1974 – Consumer Protection Notice No. 10 of 1991 – Permanent Ban on Goods](#) (smokeless tobacco products ban) into a single tobacco control act and delegated legislation.

Chewing tobacco and snuffs intended for oral use are currently banned from supply in Australia under Subsection 114(1)(a) of the ACL.

However, other smokeless tobacco products, such as nasal snuff or tobacco free oral snuffs, are available for Australian consumers to buy online and may not be captured under the current smokeless tobacco products ban. These products may be subject to TGA or state and territory legislation including restrictions on the advertising, promotion and sponsorship of tobacco products. Oral snuffs may also be subjected duty and tax upon importation.

⁵ Guidance for the *Therapeutic Goods (Standard for Nicotine Vaping Products) (TGO 110) Order 2021* and related matters https://www.tga.gov.au/sites/default/files/nicotine-vaping-products-and-vaping-devices_0.pdf

The ACCC recommends DHAC consider expanding the scope of the smokeless tobacco products ban as part of its legislative consolidation process and include nasal snuffs and tobacco free oral snuffs in the Bill to address this regulatory gap.

Permission to import smokeless tobacco products

The ACCC is not an at-border agency and has no direct regulatory responsibility for enforcing the ACL at the Australian border.

The Australian Border Force (ABF) administers and enforces the Customs (Prohibited Imports) Regulations 1991 (Customs Regulations) which places prohibitions and restrictions on the importation of certain goods. The Customs Regulations play an important role in aligning at-border regulations with post-border regulations, such as prohibiting and restricting the importation of certain goods if a domestic prohibition or restriction exists, such as a ban made under the ACL.

While chewing tobacco and snuffs intended for oral use are currently banned from supply in Australia, the Customs Regulations provide for individuals to import these products for personal use (i.e. not for the purpose of sale or supply) if the amount weighs no more than 1.5 kilograms.

The importation of smokeless tobacco products over 1.5 kilograms is prohibited unless permission from the Minister administering Part 3-3 of Schedule 2 to the CCA has been given. Currently, the ACCC advises the Minister responsible for the CCA on these permit applications.

The ACCC notes the proposed Bill includes offence and civil penalty provisions for permanently banned smokeless tobacco products which are intended to be broadly equivalent to offence provisions in section 118 of the ACL.

We also note the proposed Bill contains offence exceptions as they relate to dealing in and possessing permanently banned tobacco products, including if the importation of the products is for personal use and is imported in compliance with another law of the Commonwealth (such as the Customs Regulations).

It is unclear in the proposed Bill however, how permissions to import smokeless tobacco products in amounts greater than 1.5 kg, as prescribed by the Customs Regulations, are to be considered. This includes whether the Minister for Health and Aged Care (or relevant delegate) will have this authority and if DHAC will consider these applications on their behalf, as the ACCC currently does on behalf of the Minister responsible for the CCA (as prescribed by the Customs Regulations).

It is the ACCC's view that if the existing ban is to be consolidated in the new Bill, amendments to the Customs Regulations are needed to ensure the Minister for Health and Aged Care (as the Minister responsible for the ban) also takes responsibility for considering permissions to import these products in amounts greater than 1.5 kg.

If the proposed Bill were to proceed without amending the Customs Regulations, the ACCC on behalf of the Minister responsible for the CCA would continue to receive requests for permission to import smokeless tobacco in amounts greater than 1.5 kg, despite the ban for these products no longer falling under the ACL. This would divide regulatory responsibility between health and consumer protection regimes, creating unnecessary complexity and duplication.

The ACCC recommends the DHAC take steps to address this regulatory overlap by working with ABF to amend the Customs Regulations to empower the Minister for Health and Aged

Care (or relevant delegate) to consider applications for permission to import smokeless tobacco products (in amounts greater than 1.5 kg).

This would ensure that the ban and permission to import provisions in the Customs Regulations transition together and achieve the objective of streamlining and simplifying the operation of the proposed tobacco laws.

Enforceable undertakings

The ACCC supports the inclusion of standard provisions from the *Regulatory Powers (Standards Provisions) Act 2014* in the proposed Bill to provide authorised officers of the DHAC with a standard suite of monitoring and investigation powers, as well as enforcement provisions (civil penalties, infringement notices, enforceable undertakings and injunctions).

The ACCC notes these regulatory powers reduce duplication of functions across the *Tobacco Plain Packaging Act 2011*, *Tobacco Advertising Prohibition Act 1992* and the ACL and aligns enforcement through a single regulatory framework.

The ACCC supports consolidation of these provisions to enable a streamlined enforcement function for authorised officers within the DHAC for all consolidated measures.

We note that past enforceable undertakings provided to the ACCC for tobacco related matters will remain on the ACCC's [Section 87B undertakings register](#). This includes undertakings relating to the permanent ban on chewing tobacco and oral snuffs, graphic health warnings, as well as other ACL provisions such as misleading and deceptive conduct.

Rebuttable presumption of offer for retail sale

The ACCC notes that under Section 15 of the proposed Bill, there is a clear distinction between tobacco or e-cigarette products being offered for retail sale or supply online and those being sold from physical (brick and mortar) premises.

We further note that under Section 16, a tobacco product is presumed to be offered for retail sale if it is being offered from a physical premise in an amount (if any) that exceeds what is prescribed in the regulations (Section 16).

It appears that the Section 16 definition of a 'physical premises' does not extend to any kind of storage warehouse (or similar building) where tobacco items might be stored and supplied to consumers via mail once they have placed an order on a supplier's website.

Further, we note that e-cigarettes would not be captured by Section 16, as Section 9 excludes e-cigarette products as tobacco products (even if they contain tobacco).

The ACCC suggests the limited definition of 'physical premises' throughout the proposed Bill may unintentionally limit the ability for the DHAC to protect consumers who are likely to purchase tobacco and e-cigarette products online, compared to consumers purchasing them from physical premises.

The ACCC recommends expanding the rebuttable presumption in Section 16 to physical premises associated with *online* sale of tobacco products as well as ensuring Section 16 covers e-cigarettes and non-nicotine vaping products.

Minor amendments to the CCA

The ACCC notes minor consequential amendments to the CCA will need to be made to substitute reference to the definition of smoking from the '*Tobacco Advertising Prohibition Act 1992*' to the '*Public Health (Tobacco and Other Products) Act 2023*'.

Next steps

If you would like to discuss the ACCC's submission, please contact Neville Matthew, General Manager, Risk Management and Policy Branch, on [REDACTED] or at [REDACTED]

Yours sincerely

Handwritten signature of Timothy Grimwade in cursive script.

Timothy Grimwade
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