Response to Senate Motion 1031 (24 September 2001)

Tobacco

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Summary

On 24 September 2001 the Senate passed a motion requesting that the Australian Competition and Consumer Commission provide a report to the Senate in relation to the tobacco industry (see full text of motion in the appendix).

The Commission is a statutory authority responsible for administering the *Trade Practices Act 1974* (TPA). For this reason the subject matter of this report is generally confined to the functions and powers of the Commission. The report focuses on matters on which the Commission is best qualified to comment, and makes reference to other sources of information when a matter falls outside its responsibilities.

The Commission acknowledges serious community concern about tobacco. The conduct of tobacco companies in trade or commerce falls within the general responsibilities of the Commission in administering the TPA. The TPA prohibits restrictive and unfair trade practices, and provides for various penalties and remedies for contraventions. A summary of these is provided on page 31. The Commission is also responsible for enforcing tobacco labelling regulations.

The Commission is aware of allegations that tobacco companies have been involved in systemically misleading and deceiving consumers, in contravention of the TPA through their alleged silence about the health dangers of their products. The Commission has considered this issue in some detail and to date has been of the view that, based on the information and advice currently available to it, that legal proceedings based on such allegations would be unlikely to be successful at present, because of a number of factors including the existence of clear warning labels on tobacco products and, secondly, widespread community awareness of the dangers of smoking.

However, the recent decision of the Victorian Supreme Court in *McCabe v British American Tobacco Australia Services Limited* [1] has raised new allegations which the Commission is currently looking into, including in the context of its current investigation into whether the tobacco industry's use of the terms 'mild' and 'light' are misleading and deceptive. The court's findings that BAT (and their lawyers) systematically destroyed documents of likely relevance to tobacco related litigation is also of considerable concern to the Commission, and is a focus of the Commission's investigations.

In 2001 the Commission dealt with over 100 inquiries from the public about tobacco.

In relation to other litigation concerning tobacco companies, the Commission is monitoring legal developments in the United States[2] and is currently not aware of documents produced in US litigation that constitute evidence of contraventions of Australian trade practices law. The Commission is in ongoing contact with US authorities in this regard, but in any event, significant differences in legal systems make it unlikely that outcomes in US litigation could be directly translated into the Australian context.

The Commission is not in a position to comment on the outcome of current or future litigation in Australia.

Finally, the Commission notes that tobacco control is being pursued through new legislation in some comparable international jurisdictions.

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1 *McCabe v British American Tobaco Australia Services Limited [2002] VSC 73*. British American Tobacco have indicated that they will appeal the decision.

2 The Commission notes the recent US decision against Philip Morris in relation to low-tar cigarettes, which is discussed further under Question 1(f) on page 20.

Introduction

The Australian Competition and Consumer Commission has received the Senate's motion of 24 September 2001 concerning the tobacco industry (see full text in the appendix). The broad scope of the Senate's questions and the depth of community concern about tobacco are acknowledged.

The Commission's role

The Commission has a specific statutory role in administering the *Trade Practices Act 1974 and related legislation. For this reason the subject matter of this report is generally confined to the functions and powers of the Commission.* In seeking to provide the most comprehensive answer, the Commission has focused on matters on which it is best qualified to comment, and made reference to other sources of information where a matter falls outside its responsibilities.[3]

In relation to tobacco products the Commission's main responsibility is to ensure that their marketing and sale comply with the TPA. Broader questions about the costs of smoking to the economy, the health effects of smoking on the community, and the appropriate policy and legislative responses, are the concern of the relevant policy agencies, the Cabinet, and the legislature.

The Commission nevertheless recognises strong community expectations that it will have a role in managing the impact of tobacco as a consumer protection and trade practices issue. The Commission's roles and responsibilities in relation to tobacco products have three aspects.

First, the Commission participates in the Commonwealth Cross Government Tobacco Policy Liaison Committee, which is coordinated by the Department of Health and Ageing. In this forum the Commission has been involved in the development of the National Tobacco Strategy and the Australian Government's contribution to the World Health Organization's Framework Convention on Tobacco Control. The Commission's role in this forum is to advise on the application of trade practices law to issues under discussion.

Secondly, as part of its function under the consumer product safety and information provisions quires retail packages of tobacco products to be labelled with certain health warnings about the effects of tobacco smoking, as well as explanatory statements relating to those health effects. It also provides for messages containing information about the average contents of tar, nicotine, and carbon monoxide in tobacco smoke to be printed on the side of cigarette packages.

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3 The Senate's motion requests information under s. 29(3) of the TPA, which provides that either house of the Parliament or a committee of either house, or of both houses, of the Parliament can require the Commission to furnish to that house or committee any information concerning the performance of the functions of the Commission under the TPA. For a discussion of the use of this power by the Parliament, see Frank Zumbo, 'Section 29(3) of the Trade Practices Act 1974 (Cth) and parliamentary references to the ACCC', *Trade Practices Law Journal*, June 2001, pp. 109-114.

The Commission is currently participating in a review of the health warnings on tobacco products covered by the labelling standard. The review is being conducted jointly by the Commonwealth Departments of Health and Ageing and the Treasury.

Thirdly, the conduct of tobacco companies in trade or commerce also falls within the general competition and consumer protection responsibilities of the Commission under the TPA. Conduct by tobacco companies that is anti-competitive or contrary to consumer protection law is subject to Commission investigation, like any other Australian industry.

It is this third, and primary, aspect of the Commission's work that is the main focus of this report, primarily because of a number of allegations that the marketing and sale of tobacco products may contravene the consumer protection provisions of the TPA.

Tobacco products and the Trade Practices Act 1974 — ss. 52 and 53

Such allegations have been raised over time by a number of complainants. In particular, Action on Smoking and Health (ASH) have alleged that tobacco companies have been engaged in 'systemic contraventions' of s. 52 of the TPA (misleading or deceptive conduct), in that they have concealed the hazards of smoking from consumers.

The Commission has obtained legal advice stating that, on the basis of the information currently available to the Commission, it is unlikely to be successful in proceedings for contraventions of the TPA based on allegations similar to those stated by ASH, for reasons which include that:

- the health dangers of smoking are disclosed to consumers through the mandatory labelling standard; and
- the ordinary or reasonable consumer of cigarettes is generally aware of these dangers.

Case law has illustrated that s. 52 and s. 53 (false or misleading representations) of the TPA cannot be used to impose upon suppliers of goods a duty in trade or commerce to disclose to purchasers every material fact known to the supplier that might affect a consumer's decision to acquire these goods. Every packet of cigarettes supplied in Australia is required to carry prominent warnings pursuant to the labelling standard. Because of these warnings it is difficult to suggest that consumers could be misled or deceived that smoking was safe by reason of the availability of cigarettes, or by reason of an alleged failure by the tobacco companies to warn consumers about the dangers of smoking.

Any failure by tobacco companies to disclose information of this kind must be considered with the surrounding facts and circumstances. For this reason it can be argued that the presence of warning labels means that tobacco companies are not representing that cigarettes are safe.

In the Commission's view it is also likely that a court would regard this area as an issue of policy for the legislature or executive to determine. For example, the matter could be addressed through ss. 65C or 65D of the TPA, which provide for the relevant Minister to declare product safety or information standards, and effectively ban certain products.

If evidence could be obtained to show that smokers were not aware of the addictiveness of nicotine delivered by cigarettes during the period between the tobacco companies first becoming aware of addiction and the introduction of mandatory warnings about addiction (as part of the labelling standard) in 1995, this may increase the likelihood that the tobacco companies contravened ss. 52 and/or 53. However, because of the statutory limitation period in relation to damages (three years for an action for damages pursuant to s. 82 of the TPA), any application would most likely now be time barred. While the time period to bring an action for damages or other orders was extended to six years from 15 December 2001, that benefit only accrues to proceedings that were not time barred before 26 July 2001.

If evidence was available to establish that a 'reasonable consumer' was not aware of addiction, and that the tobacco companies chose not to disclose the problem, it may, however, be possible to seek a **declaration** under s. 163A about whether the tobacco companies contravened the TPA. A declaration can serve to indicate that a contravention has occurred, but may be of no specific value in obtaining remedies in relation to conduct that took place beyond the statutory limitation period. The Commission, the relevant Minister (in this case the Treasurer or the Minister assisting the Treasurer), or any person may institute proceedings to make a declaration.

In some circumstances it can be worthwhile to obtain a declaration to inform the community and the affected industry of the nature of a contravention. However, because of the marginal nature of the potential case against tobacco companies for both current and out-of-time conduct it would, in the Commission's view, not be a sensible use of resources to pursue a court declaration of this kind.

Section 75AD

The Commission sought legal advice on whether a tobacco company that is aware of a serious, specific health danger resulting from cigarettes that has never been specifically covered by a warning label, could be in breach of s. 75AC. This section outlines in what circumstances a product has a defect and states that 'goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances'.

Legal advice received on this issue is to the effect that courts are likely to take the view that consumers are aware that cigarette products are likely to be inherently dangerous and capable of causing a wide range of illnesses/diseases, not all of which may be specifically outlined by tobacco companies on their packaging.

Another provision of the TPA that may be relevant is s. 75AD, liability for defective goods causing injuries. A person who is injured by a defective product has a right to compensation against the manufacturer of the product. However, goods are regarded as defective if their safety is not what persons are entitled to expect in all the relevant circumstances.

The Commission is of the view that an action based upon s. 75AD, although arguable, would also probably fail, because a court would be likely to find that persons were not generally entitled to expect cigarettes to be safer than they have now been shown to be. Persons are aware of the dangers of smoking, not just through mandatory labelling, but through the extent of scientific and medical information to which the public has been exposed.

Because warnings about addiction were introduced in 1995, any application in relation to Part VA of the TPA, including s. 75, would also now be out of time. A liability action is subject to a three year limitation period, being three years after the person first became aware of the loss, defect, and identity of the manufacturer (s. 75AO(1)). Further, the action must be commenced within 10 years of supply of the goods by the manufacturer.

This does not rule out the possibility of a private negligence action by affected consumers. Negligence is a concept in tort law (being part of the common, or court made, law), rather than a provision of the TPA, and falls outside the remit of the Commission.

Unconscionable conduct

The Commission has also been made aware of allegations that the sale of cigarettes to children in certain circumstances may amount to unconscionable conduct under Part IVA of the TPA. Conduct is potentially unconscionable when:

- one party to a transaction suffered from a special disability or disadvantage in dealing with the other party;
- the disability was sufficiently evident to the stronger party; and
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

The first point to make about such alleged conduct is that for some time there has been specific legislation in every Australian State and Territory banning the sale of tobacco products to persons under 18 years of age. The New South Wales *Public Health Act 1991* and the Queensland *Tobacco Products (Prevention of Supply to Children) Act 1998* are examples. The Commonwealth *Tobacco Advertising Prohibition Act 1992* also prohibits virtually all forms of marketing of tobacco products in Australia, to both children and adults.

It has been suggested that marketing methods subtle enough to escape this prohibition have been used by tobacco companies to attract underage smokers. These methods allegedly include the sponsorship of youth-oriented events such as dance parties and fashion parades, the sponsored placement of cigarette products in films, and the inclusion of promotional souvenirs with cigarette products, which are seen as attractive to underage people. One allegation is that these promotional activities could lead to unconscionable conduct in the sale of cigarettes to children.

There are, however, substantial evidential difficulties in characterising such promotional activities as unconscionable conduct. In relation to s. 51AA of the TPA (unconscionable conduct within the meaning of the unwritten law of the States and Territories), age and inexperience are factors that can contribute to a characterisation of a person as having a 'special disability'. However, it is difficult to identify a special disability without an awareness of the facts of an actual relationship between a particular cigarette company and a particular consumer that involves the supply of cigarettes to that consumer by that tobacco company. The Commission is unaware of evidence of such direct supply by a tobacco company to a child. It is therefore difficult to speak of a special disability being sufficiently evident to a tobacco company, and of the tobacco company taking advantage of it.

In relation to s. 51AB (unconscionable conduct involving a consumer), it is clear that the supply must be by an identified tobacco company to an identified consumer, and not a supply by a tobacco company to a retailer, which then supplies cigarettes to a child. Although a hypothetical relationship of supply between a tobacco company and a child may involve a position of inequality on the part of the consumer, it is difficult to speak of any 'bargaining' in such a transaction.

Further, although the promotional activities described above could be seen as using undue influence, pressure, or unfair tactics, such activities would have to be used against or exerted upon the child in a direct way. It is not sufficient to say that promotional activities that are attractive to or aimed at adult consumers as well as children (supply to whom is prohibited by law) involves using undue influence, pressure or unfair tactics against children, especially in the absence of any real evidence that a tobacco company has supplied cigarettes directly to children in Australia.

The Commission and tobacco as a consumer protection issue

Accordingly, in relation to the allegations referred to above, the Commission does not consider that, at this point, they are likely to give rise to contraventions of the TPA. In reaching this view the Commission does not seek to minimise in any way the impact of smoking on the community and on the health of individual smokers. It also does not reflect on other existing or future government measures, such as legislation or community education programs. It only indicates that on current evidence there is limited scope for general legal action against tobacco companies under the TPA.

Naturally, this has not and will not prevent the Commission from investigating any other specific alleged contraventions of the TPA by tobacco companies, and presently it is conducting further investigations. The Commission has undertaken a number of investigations into the conduct of tobacco companies, distributors, and retailers over time, including the banning of smokeless tobacco and the current investigation into the use of the terms such as 'light' and 'mild' on tobacco products.[4] The Commission also undertakes compliance surveys of tobacco product labelling requirements under the labelling standard. Summaries of these activities are provided in the response to question 1 (e) of the Senate motion on page 8.

4 To the extent relevant the Commission will also consider the recent developments in Australia and the US. (Footnote 2 and page 28 refers.)

Other agencies and jurisdictions

Commonwealth Department of Health and Ageing

The Commonwealth Department of Health and Ageing has prime responsibility for the National Tobacco Strategy,[5] which is intended to address problems related to smoking among young people, the overall number of smokers in Australia, the harmful health consequences of tobacco products, and exposure to tobacco smoke.

The strategy was prepared by the National Expert Advisory Committee on Tobacco for the Ministerial Council on Drug Strategy. It has been developed to incorporate initiatives implemented by the Commonwealth, State and Territory governments, and non-government organisations, and to ensure an integrated approach to tobacco control. Key strategy areas include:

- public education;
- promoting cessation of tobacco use;
- reducing the availability and supply of tobacco;
- reducing tobacco promotion;
- regulating tobacco ingredients; and
- reducing exposure to environmental tobacco smoke.

Overseas jurisdictions

In some comparable international jurisdictions the overall issue of tobacco and public health is being dealt with through the development of new legal instruments, rather than as a compliance matter under general trade practices law.

For example, on 15 May 2001 the European Parliament adopted a directive on the sale, marketing, and manufacturing of tobacco products. The directive will ban advertising of tobacco products in printed publications, on the Internet, and on radio. In addition, from 30 September 2003, 'text, names, trademarks and figurative or other signs suggesting that a particular tobacco product is less harmful than others' will be prohibited. This includes terms such as 'light' and 'mild.'[6]

The Canadian Government is playing a lead role in negotiations on the World Health Organization's Framework Convention on Tobacco Control (FCTC). The FCTC will be the world's first global agreement devoted entirely to tobacco control. Countries that sign and ratify the convention will commit to a broad set of objectives for reducing tobacco consumption worldwide, including provisions for health warning labels, control of passive smoking, and public education programs. The convention is expected to be signed in 2003. Australia has also been closely involved in negotiations.

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5 National Expert Advisory Committee on Tobacco, *National Tobacco Strategy 1999 to 2002–03: A Framework for Action*, June 1999, <http://www.health.gov.au/pubhlth/publicat/document/metadata/tobccstrat.htm>.

6 The European Commission's tobacco policy web page is at <http://www.europa.eu.int/comm/health/ph/programmes/tobacco/index_en.htm>.

Domestically, the Government of Canada has been active on the issue of 'light' and 'mild' descriptors on cigarette packages. Health Canada has released draft regulations for discussion that propose to ban the use of such descriptors on cigarette packages. It has also undertaken an advertising campaign stating that chemicals such as benzene, formaldehyde, tar, and carbon monoxide are found in both ordinary cigarettes and those labelled 'light' or 'mild'.[7]

Question 1(a)-(e)

Question:

Motion (by **Senator Allison**) agreed to:

(1) That the Senate, having regard to:

(a) the enormous health disaster represented by tobacco;

(b) the rising costs of tobacco diseases, conservatively estimated at $12.7 billion (1992), that are borne by governments, individuals and businesses, including health care costs, lost productivity, absenteeism, social security payments;

(c) the availability of evidence that the tobacco industry in other countries, including parent companies to Australian manufacturers may have engaged in:

(i) misleading and deceptive conduct to downplay the adverse health effects of smoking and the addictiveness of nicotine;

(ii) misleading, deceptive and unconscionable conduct in relation to the marketing of tobacco products to children; and

(d) the desirability of preventing or reducing loss or damage suffered or likely to be suffered by such conduct, and of compensation being available for any loss and damage suffered or likely to be suffered by that conduct;

resolves that there be laid on the table, not later than 30 April 2002, a report by the ACCC on the performance of its functions under the *Trade Practices Act 1974* with respect to:

(e) the outcome of ACCC investigations into the conduct of Australian tobacco companies and their overseas parent and affiliate companies in relation to any such misleading, deceptive or unconscionable conduct;

[…]

7 Health Canada's tobacco policy page is at <http://www.hc-sc.gc.ca/hecs-sesc/tobacco/index.html>.

Response:

The following is a summary of compliance and enforcement activity the Commission has undertaken or is undertaking in relation to tobacco products under the TPA. The summary covers:

- investigations arising from major allegations of misleading or deceptive conduct;
- the Commission's current investigation into the use of terms such as 'light' and 'mild' on tobacco products;
- compliance and enforcement activity relating to the product safety and information provisions of the TPA;
- investigations relating to restrictive trade practices provisions of the TPA;
- other miscellaneous matters; and
- a tabular summary of all tobacco related matters logged by the Commission since 1996.

Major allegations of misleading or deceptive conduct by tobacco companies

Complaints by ASH and APLA (1998)

In 1998 complaints were received by the Commission from Action on Smoking and Health (ASH) and the Australian Plaintiff Lawyers Association (APLA) regarding alleged misleading or deceptive conduct by Australian tobacco companies with respect to the health dangers of smoking and the addictive nature of nicotine in cigarettes. An investigation was launched into these allegations. The Commission sought to determine whether, on the basis of the assumption that tobacco is harmful and in light of the mandatory health warnings, a case could be made against tobacco companies under s. 52 of the TPA (misleading or deceptive conduct) for the supply of cigarettes, the non-disclosure of the dangers of smoking, and the addictiveness of nicotine in cigarettes.

The Commission obtained legal advice and based on the information presently available to it, it would be unlikely to succeed in relation to action based on s. 52, for reasons including the existence of mandatory health warnings on tobacco packaging, which inform Australian consumers about the health dangers of smoking. Accordingly, in June 1999, the Commission informed ASH and APLA that it would not be taking any further action in relation to the allegations they had raised. In July 1999, following further representations by the complainants, the Commission allocated further resources to the investigation.

On 15 February 2002 the Commission received a further significant submission on behalf of ASH, the Cancer Council of Australia, the VicHealth Centre For Tobacco Control, and Quit Victoria. The submission contained further allegations and a large amount of evidence not previously presented to the Commission.

One of the subsequent allegations is that a smoker's addiction to the nicotine delivered by cigarettes could result in unconscionable conduct in the ongoing sale of cigarettes to that person. The Commission has given careful consideration to this allegation, but considers it unlikely that nicotine addiction could be regarded as a 'special disability' under s. 51AA (unconscionable conduct within the meaning of the unwritten law of the States and Territories).

This is because under s. 51AA it is necessary to identify a transaction in which a person who is aware of a special disability in another takes unfair advantage of it to gain a beneficial bargain. Since tobacco companies do not sell directly to consumers, this allegation would have to centre on a transaction between a consumer and a retail outlet. It would be necessary to demonstrate that the retailer was aware of nicotine addiction in a specific customer and took advantage of it to gain a beneficial bargain (for example by charging an excessive price for cigarettes). As a result there is insufficient evidence before the Commission on this issue to warrant further investigation of this allegation.

It is also suggested in the later submission that tobacco companies have augmented the amount of nicotine in cigarettes to manipulate addiction in the consumer market. While clearly disturbing, it is not clear at present that this in itself could amount to unconscionable conduct for the purpose of the TPA. However, the Commission is continuing to examine this and other allegations in the new submission.

Complaints by the NHF and Quit Victoria (1998)

In October 1998 the National Heart Foundation (NHF) and Quit Victoria alleged that cigarette manufacturers WD & HO Wills and Rothmans had misrepresented an International Agency for Research on Cancer (IARC) study on passive smoking in media releases and other public statements. Wills and Rothmans had claimed in media statements that the IARC study had not demonstrated scientifically that passive smoking is a risk to health.

The Commission sought an expert scientific opinion on the claims of the cigarette manufacturers in relation to the IARC study. Professor Jeffrey Berry, a professional adviser in epidemiology and biostatics at the University of Sydney, advised that as the results reported in the study were not statistically significant, the study in question did not in itself establish scientifically that passive smoking was a risk to health. He concluded that the statements made about the IARC study by Wills and Rothmans could not be regarded as scientifically incorrect.

The Commission advised Quit and NHF that, based on Professor Berry's advice, the likelihood of convincing a court that the representations by Wills and Rothmans constituted misleading or deceptive conduct under the TPA was marginal. In these circumstances the Commission could not pursue the matter, but would give careful consideration to any further allegations of this nature.

Approach by Slater and Gordon (2000)

In September 2000 law firm Slater and Gordon asked the Commission to take over representative proceedings it had instituted against tobacco companies in the Federal Court. These proceedings had been ruled inappropriate to be heard as a representative action under s. 33(c) of the *Federal Court of Australia Act 1976* because of lack of commonality between the parties. Slater and Gordon had also not secured special leave to appeal to the High Court.

Slater and Gordon had alleged in its statement of claim to the Federal Court that tobacco companies had contravened ss. 52 and 53 of the TPA by communicating to the applicants (the smokers who were party to the action) that, among other things, smoking cigarettes was free of risk to health and could be stopped at any time.

In early 2000 the Standing Committee of Attorneys-General (SCAG) had announced that it was investigating the feasibility of a similar representative action against tobacco companies. The Commission considered that rather than taking over an existing Slater and Gordon action, it would be appropriate to await the outcome of SCAG's consideration. In light of SCAG's work and previous investigation by the Commission after the allegations by ASH and APLA, the Commission made a decision to focus resources on an existing investigation into possible misleading or deceptive conduct in relation to the use of terms such as 'light' and 'mild' on cigarette packaging.

Investigation into 'light' and 'mild' terminology (current)

In January and February 2001 the Commission received allegations that tobacco companies had misled consumers by implying that low tar cigarettes carry health advantages over other cigarettes. Specifically, the allegation was that tobacco companies have engaged in misleading or deceptive conduct and made false representations by promoting their cigarette brands as 'light', 'ultra-light', 'mild', 'ultra-mild', or 'low tar' on the basis of test results that indicate low tar readings. It was alleged that the testing methods are artificial, and do not provide an accurate reflection of an actual smoker's exposure to tar when smoking these cigarettes.

The Commission is investigating this matter in respect of:

- s. 52, misleading or deceptive conduct;
- s. 53(a), false representations that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- s. 53(c), representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; and
- s. 55, misleading conduct to which Industrial Property Convention applies.

It has sought documents from Philip Morris (Australia) Ltd, British American Tobacco Australasia Ltd, and Imperial Tobacco Australia Ltd to assist in the consideration of this matter. The investigation is ongoing.

Compliance and enforcement activity relating to the product safety and information provisions of the TPA

Compliance activity in relation to the labelling standard

The labelling standard is included in the Commission's routine monitoring survey program, which is part of its enforcement strategy for mandatory product safety and information standards. A random selection of retail outlets throughout Australia is surveyed on a six-monthly basis to detect products that do not comply with the relevant standards, to assess the overall level of marketplace compliance, and to make contact with suppliers. The results for tobacco products are as follows.

Compliance survey: January 1998

The Canberra office undertook a survey of the labelling of tobacco products carried by retailers in the Australian Capital Territory to ensure compliance with the labelling standard. No contraventions of the standard were detected.

Compliance surveys: April and May 1999

The Brisbane office undertook surveys in the Brisbane metropolitan area of the labelling of tobacco products to ensure compliance with the labelling standard. No contraventions were detected.

Compliance surveys: November 2001 to February 2002

During this period Commission offices in all capital cities and Townsville conducted surveys to assess compliance with the tobacco labelling standard. Overall, the level of compliance with the standard was very high. All brands of cigarettes and tobacco products supplied by the major manufacturers or importers complied with the standard. Technical contraventions of the standard were found on the packaging of a small number of imported Chinese cigarettes, Indian Beedie cigars, and imported tobacco. These matters are currently being pursued with the importers concerned.

Investigation into non-compliance with the labelling standard: Gudang Garam and White Ox (September 1997)

The Sydney office received a complaint referred from the New South Wales Department of Health alleging that Gudang Garam and White Ox tobacco did not carry the health warning labels required under the labelling standard.

Investigations showed that the packaging of White Ox tobacco did comply with the regulations. The retailers of Gudang Garam advised the Commission in October 1997 that they had discontinued the product line and would ensure compliance with the labelling standard in the future. The Commission did not take any further action.

Investigation into non-compliance with the labelling standard: importation of Cuban cigars (November 1997)

The Australian Customs Service informed the Commission that it had discovered 15 kilograms of Cuban cigars with incorrect labelling. Following queries by the Commission it was determined that the cigars were for personal use rather than for resale. The Commission only has jurisdiction over conduct undertaken in trade or commerce. For this reason no further action was taken.

Investigation into non-compliance with the labelling standard: various Sydney retail outlets (May 1998)

The Commission's Sydney office received complaints about retailers selling small packages of loose tobacco and cigarette packs without the required labels. Surveys at the retail outlets in question substantiated the complaints. Commission officials informed the retailers that the products were in contravention of the labelling standard and ensured that they were withdrawn from sale.

Investigation into non-compliance with the labelling standard: Clove cigarettes (May 1999)

In May 1999 Lay and Sons Organisation Pty Ltd, trading as Asian Importer-Exporter and Company, withdrew several brands of clove cigarette from sale in Darwin after advice from the Commission that they failed to meet the requirements of the labelling standard. The brands included Professional Gudang Garam Filter Kretek cigarettes, which were purchased by the Commission and tested for their tar, nicotine, and carbon monoxide levels. Testing found that the average tar content was 50.3 milligrams per cigarette. This very high level was not disclosed on the packets of cigarettes, nor did they carry the health warning messages required by the labelling standard.

The Commission accepted a court enforceable undertaking from Lay and Sons to cease supplying cigarettes that fail to meet the labelling standard, and to ensure that in future all cigarettes supplied by them meet the standard.

Investigation into non-compliance with the labelling standard: various Sydney retail outlets (August 1999)

The Commission received complaints that tobacco products were being sold without the required health warnings. Following investigations and action by the Commission, the traders advised that the cigarettes were not from their regular supplier, and that they would cease supplying tobacco products that do not comply with the labelling regulations.

Investigation into non-compliance with the labelling standard: Marrickville retailer (October 1999)

The Commission investigated a complaint that a store in Marrickville, New South Wales, was selling Peter Stuyvesant cigarettes without the required health warnings. The Australian Customs Service was notified as the cigarettes, upon Commission investigations, appeared to be imported. The Commission sent a warning letter to the trader, who ceased supplying the cigarettes.

Banning of smokeless tobacco products (1988)

On 14 January 1988 the then Minister for Consumer Affairs, the Hon Peter Staples MP, acting under advice from the Trade Practices Commission (predecessor of the Australian Competition and Consumer Commission), issued a draft notice under s. 65C of the TPA. The notice declared ‘smokeless tobacco products intended for oral use and snuffs intended for oral use manufactured in, or imported into, Australia’ to be unsafe goods, and therefore subject to a ban.

Under s. 65C, where the relevant Minister bans a product that involves no imminent risk of death or serious injury, the Minister is required to publish a draft of the notice proposing the ban and a summary of the reasons for the ban. Any supplier of the product in question is then able to request that a conference be held by the Commission in relation to the proposed banning of the product.

On 8 February 1988 the United States Tobacco Company Incorporated asked the Trade Practices Commission to hold a conference on the matter. After extensive consultation with industry and community groups and medical experts the Trade Practices Commission decided on the available evidence that a causal relationship between the use of chewing tobacco and oral cancer was not sufficiently strong to warrant classification of such products as ‘unsafe goods’ within the meaning of s. 65C.

In September 1989 the Trade Practices Commission then recommended that the Minister (by then Senator the Hon Nick Bolkus) publish a modified draft notice specifically declaring 'snuffs intended for oral use manufactured in, or imported into, Australia after 30 April 1988' to be unsafe goods. Smokeless tobacco products, except for chewing tobacco, has accordingly been a banned product in Australia since 30 April 1988.

Smokeless tobacco compliance survey (January to June 2000)

In the first half of 2000 the Canberra office undertook a product safety survey in the Australian Capital Territory to ensure that no banned smokeless tobacco products were being sold. Fifteen retailers were randomly surveyed and no banned smokeless products were identified.

Smokeless tobacco compliance survey (July 2000)

The Brisbane office undertook a product safety survey in the Brisbane metropolitan area to ensure that no banned smokeless tobacco products were being sold. Fifteen retailers were randomly surveyed and no banned smokeless products were identified. The survey found that retailers were well aware of the ban on smokeless tobacco.

Investigations under restrictive trade practices provisions of the TPA

Price fixing: WD & HO Wills (Australia) Ltd and Brenton Porter (February 1998)

In February 1998 the Federal Court, Adelaide, imposed penalties of $250 000 and costs of $30 000 on cigarette manufacturer WD & HO Wills for its role in attempted price fixing of cigarettes. The court accepted joint submissions on injunctions and penalty for contraventions of the TPA by Wills and Mr Brenton Porter of the Fourth Avenue Delicatessen in Adelaide.

The Commission had alleged that Wills employees attempted to make a price-fixing agreement between Mr Porter and the proprietor of two nearby businesses. The agreement was allegedly made at a series of meetings between Wills employees and each of the other parties in September and October 1996. The agreement provided for the delicatessen to raise its prices of certain brands on 10 October 1996 and for the competitor to follow one week later. The competitor was a major discounter whose prices attracted both resellers and cigarette consumers from a wide area.

In addition to monetary penalties and costs orders, Wills was ordered to revise its existing trade practices compliance program and to write to each of its South Australian retailers informing them of their respective obligations under the TPA. Mr Porter also consented to an injunction and agreed to contribute to the Commission's costs.

This was the first Commission action under a State Competition Code, which applies the restrictive trade practices sections of the TPA to individuals. The individual in this case was not subject to a penalty because the offence occurred during the phasing in of the code, when no penalties applied.

Imperial Tobacco Group acquisition of Douwe Egberts Van Nelle (May 1998)

In May 1998 Imperial Tobacco Group signalled its intention to acquire Douwe Egberts Van Nelle, a manufacturer of hand rolling and pipe tobacco and cigarette papers. Douwe Egberts Van Nelle had a 5 per cent share of the cigarette papers market in Australia. Through a subsidiary, Imperial Tobacco Group had an 8.5 per cent share of the papers market. Imperial Tobacco Group was not a manufacturer of hand rolling tobacco. While the entities were competitors in the pipe tobacco market the total value of this market in Australia was in the order of $300 000, and was not regarded as substantial.

This acquisition did not cross the Commission's merger threshold and was unlikely to substantially lessen competition in the relevant market. The Commission therefore did not oppose it.

British American Tobacco merger with Rothmans International BV (March 1999)

In March 1999 the Commission announced that the proposed world-wide merger between British American Tobacco PLC and Rothmans International BV was likely to substantially lessen competition in the Australian cigarette market, and would be likely to contravene s. 50 of the TPA (prohibition of acquisitions that would result in a substantial lessening of competition). In June 1999 the Commission accepted a court enforceable undertaking that resulted in the divestiture by the merged group of cigarette and loose tobacco brands to Imperial Tobacco Group PLC. Imperial paid A$325 million to acquire the brands in Australia and New Zealand.

The sale of the brands resulted in three competitors in the Australian cigarette market, with the merged entity having a market share of 44 per cent. The companies' original proposal would have resulted in the merged entity having 61 per cent market share. Subsequent to the divestiture Imperial had a 17 per cent share of the market.

Other matters

Declaration of tobacco companies under the Prices Surveillance Act 1983

On 19 December 1984 the then Prices Surveillance Authority, a predecessor organisation of the Australian Competition and Consumer Commission, implemented a declaration under the *Prices Surveillance Act 1983* of cigarette manufacturers Philip Morris (Australia) Ltd, Rothmans of Pall Mall (Australia) Ltd, and WD & HO Wills (Australia) Ltd. The declaration required the cigarette companies to provide to the Prices Surveillance Authority separate advance notifications for general price increases, new product launches, excise recovery price increases, and any other price change. After a public inquiry into cigarette prices in 1985, a reduction of 0.5 per cent in reviewed prices was recommended. The reduction was implemented at the following round of notifications.

In 1994 the Prices Surveillance Authority reviewed the declaration and recommended that it be maintained for Rothmans and WD & HO Wills. However, in September 1996 the Treasurer, the Hon Peter Costello MP, announced that the declaration would end.

The Prices Surveillance Authority and the Trades Practices Commission were merged to form the Australian Competition and Consumer Commission in 1995. The declaration formally ended in November 1997. The tobacco companies that had been subject to declaration committed to price capping arrangements that limit price increases to slightly less than overall inflation.

Between 1973 and 1981 tobacco companies were also subject to scrutiny under the *Prices Justification Act 1973*.

Goods and Services Tax public compliance register (2000)

In 2000 the Commission established a public compliance register under which companies could commit to complying with price exploitation guidelines and the price exploitation provisions of the TPA. The register was part of the Commission's strategy to ensure that prices did not increase unreasonably as a result of the introduction of the Goods and Services Tax (GST).

Registered companies agreed to provide to the Commission cost-savings information every six months so that savings achieved during the transition to the New Tax System could be monitored. British American Tobacco Australasia Ltd and Imperial Tobacco Australia Ltd were registered.

GST pricing complaint: Morningside retailer (November 2000)

The Commission investigated a complaint about overcharging on tobacco products by a retailer in Morningside, Queensland, following the introduction of the GST. In response to Commission inquiries about the pricing of cigarettes, the trader confirmed incorrect calculation of GST-inclusive prices. The Commission suggested that the trader either discount the product for a specified period or donate the excess funds to a nominated charity. The trader chose the latter option and provided the Commission with evidence of such.

Capstan tobacco (June 1998)

A complaint was received that a trader had purchased a carton of Capstan cigarettes labelled '10 x 50 gram' packs. There were allegedly only nine packs in the carton. The complainant had contacted Capstan and was advised that it was a one-off production error. Commission investigations confirmed this, and the complainant and the trader resolved the matter.

Tobacco matters logged by the Commission

The table on the next page sets out all matters involving tobacco products logged by the Commission including matters nominally falling under Part IV (restrictive trade practices), Part V (consumer protection), and Part VB (price exploitation relating to A New Tax System) of the TPA since the current system for electronic tracking of matters was implemented in 1996.

It should be noted that the table reflects all matters rather than complaints. Not all inquiries to the Commission on tobacco-related matters were complaints. Similarly, not all complaints resulted in investigations. In most cases the matter was resolved through further inquiries or the provision of information.

The table indicates that tobacco-related inquiries constitute on average under 1 per cent of total matters referred to the Commission. The unusually high number of total matters in 2000 reflects inquiries about the introduction of the GST. Taking into account the relatively small statistical sample the table suggests an underlying upward trend in both the total number of matters addressed to the Commission and the total number of tobacco-related matters.

Breakdown of tobacco-related inquiries to the Australian Competition and Consumer Commission, 1996–2001

CONDUCT	1996	1997	1998	1999	2000	2001
Part IV, general	2	6	4	7	4	14
Part IV, s. 45, agreements lessening competition		8	1	3		2
Part IV, s. 45A, price fixing	1	2	2		1	
Part IV, s. 46, misuse of market power	1	3	10	8	4	3
Part IV, s. 47, exclusive dealing		1		1	3	4
Part IV, s. 48, resale price maintenance	3	2				1
Part IV, s. 50, mergers				3		
Part IVA, s. 51AA, commercial unconscionable conduct			1			
Part IVA, s. 51AB, consumer unconscionable conduct					1	
Part IVA, s. 51AC, unconscionable conduct in business			1	1		2
Part IVB, s. 51AD, contravention of industry codes					1	
Part V, general	2	1	3	2	2	15

Part V, s. 52, misleading or deceptive conduct	2	4	6	2	9	12
Part V, s. 53(aa), misrepresentation as to grade, etc.	1					
Part V, s. 53(a), misrepresentation as to composition, etc.					1	
Part V, s. 53(e), misrepresentation as to price	1		1		1	6
Part V, s. 53(ea), misrepresentation as to repair facility, etc.	1					
Part V, s. 53C, cash price to be stated					1	
Part V-1A, general product safety complaint				1	2	
Part V-1A, s. 65C, product safety standards etc.		9	29	4	11	5
Part V-1A, s. 65D, product information standards	1	9	16	16	4	4
Part V-2, retail warranties					2	
Part V-2A, manufacturer or importer warranties					2	

Part VB, GST	N/A	N/A	N/A	507	593	22
Miscellaneous	3	6	4	8	15	29
Prices Surveillance Act 1983, price inquiries	4	2	4	9	11	4
TOTAL TOBACCO RELATED (% OF TOTAL)	22 (0.26%)	53 (0.48 %)	83 (0.7 %)	572 (2.6 %)	668 (0.5 %)	123 (0.2 %)
Total Part V tobacco related (% of total)	8 (0.1%)	23 (0.2%)	55 (0.47%)	25 (0.11%)	35 (0.03%)	24 (0.05%)
Total matters	8353	10 988	11 812	21 837	13 3140	49 341

Question 1(f)

Question:

[…]

(f) whether documents publicly released during the course of tobacco litigation in the United States of America contained evidence of anti-competitive behaviour or breaches of Australian law;

[…]

Response:

Tobacco litigation in the United States

Anti-trust action in the United States against tobacco companies dates back to the early part of the 20th century, while legal action by individual smokers has occurred since the 1950s. However, lawsuits leading to major financial settlements only began to emerge in the 1990s. Recent types of legal action in the US against tobacco companies may be considered in five broad categories.

1. Individual lawsuits by smokers

A large number of actions have been launched by individual smokers against tobacco companies seeking damages for illnesses caused by tobacco use. However, tobacco companies have so far been required to pay damages to only one plaintiff (in March 2001). Other significant verdicts have been given against tobacco companies, but these remain subject to appeal.

The low success rate of these actions can be accounted for by:

- the limited resources of the plaintiffs;
- a successful defence by the tobacco companies of 'remoteness', or the unforeseeability of damages; and
- a successful defence by the tobacco companies of 'voluntary assumption of risk' on the part of a consumer who, it is argued, knows the risks of smoking.

Counterarguments based on tobacco companies' knowledge of, and failure to disclose, the addictiveness of their products have to date met with very limited success.

2. Class action suits

Substantial damages have been awarded in a number of class actions in the US. In July 2000 a jury awarded nearly US$150 million in punitive damages and compensation to three named members of a class. However, this award is subject to appeal. The individual factual trials of each class member are also yet to be heard.

Several US courts have certified classes of current smokers who have not been diagnosed as suffering from smoking-related illnesses. One such action failed after a jury determined that the relief sought — establishment of an industry funded medical monitoring scheme — was an unreasonable remedy.

3. Environmental tobacco smoke lawsuits

The first successful US environmental tobacco smoke (ETS, or 'passive smoking') case was decided in 1997. The tobacco industry was forced to pay US$300 million for studies on tobacco-related illness and legal costs in lieu of punitive damages. However, it was not required to pay damages to the plaintiffs, who have been allowed to proceed with their own personal actions. Importantly, the burden of proof in this case was switched to the industry in claims involving lung cancer, chronic bronchitis, emphysema, chronic sinusitis, and chronic obstructive pulmonary disease. Other passive smoking cases have been won by tobacco companies. Further lawsuits remain on foot.

Related ETS litigation includes worker's compensation actions, family law actions to prevent smoking parents getting custody of children, and actions seeking injunctive relief to keep workplaces smoke free.

4. Suits by health care providers and suits to recover moneys spent on caring for persons suffering from smoking-related diseases

Litigation by US health insurance companies to recover health care costs has generally not been as successful as governmental action. Eight of 12 such actions so far have been decided in the tobacco industry's favour, usually on the basis of a 'remoteness' defence (that is, a successful argument by the respondent that damages could not have been foreseen). A jury recently awarded the Empire Blue Cross medical insurance fund the relatively modest total of US$29.6 million in compensation. It is believed that the tobacco industry will not appeal the decision because the amount involved is small in comparison with other awards.

5. Suits by governments to recover moneys spent on caring for persons suffering from smoking-related diseases

These actions began in the 1990s and soon involved most US State Governments. All current and future litigation of this type was settled by the tobacco companies in 1998 through a Master Settlement Agreement, under which they undertook to pay the States US$246 billion over 25 years subject to conditions, and to modify aspects of their marketing practices.

The US Federal Government is also undertaking legal action against tobacco companies to recover health care costs associated with the care and treatment of patients with conditions such as lung cancer, heart disease, emphysema, and other tobacco related illnesses. It estimates these costs at approximately US$20 billion per year.

The US Government claims that the illnesses were caused by the fraudulent and tortious conduct of the defendants. It seeks to recoup the tobacco companies' proceeds under the Racketeer Influenced and Corrupt Organizations Act (the RICO Act) and other legislation.

Litigation and the US Federal Trade Commission

There has been no broad-based litigation by the Federal Trade Commission (FTC) against tobacco companies under the statutes it administers. Litigation has focused on specific matters such as merger proposals, chewing tobacco, and tobacco cessation products.[8]

The FTC has, however, expressed reservations about potential anti-competitive consequences of the Master Settlement Agreement. In a series of statements in 1997 and 1998 on draft provisions of the Agreement, the FTC suggested that 'price coordination' by tobacco companies would be possible, in that they would be granted an exemption from anti-trust laws to confer on how the funds to pay the settlement would be raised. In a statement to the US Senate's Judiciary Committee in October 1997, FTC Chairman Robert Pitofsky stated that 'an antitrust exemption could permit firms to raise cigarette prices beyond the level necessary to satisfy payments under the settlement, resulting in a windfall to industry'.[9]

Relating US litigation to potential legal action in Australia

There are significant differences between the US and Australian legal systems, meaning that not all legal outcomes in the United States may be translated directly to the Australian situation. Some of the more significant differences are that:

- there are no Australian equivalents for actions based on 'unjust enrichment' as a stand-alone cause of action, or 'anti-racketeering' laws aimed at recovering ill-gotten gains (for example, the RICO Act), which have become significant factors in US litigation;
- the far greater number of States, each with its own tort and class action law, makes it possible to 'forum shop' for a favourable venue;
- juries, which have proved more willing to award damages in tobacco cases than judges, are used far more extensively in tort actions in the US; and
- class actions are far more frequently certified by US courts.

8 For more information on the activities of the FTC in relation to tobacco, see <http://www.ftc.gov/bcp/menu-tobac.htm>.

9 Robert Pitofsky, 'Prepared Statement of the Federal Trade Commission Presented by Robert Pitofsky, Chairman Before the Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary, United States Senate, on the Proposed Tobacco Settlement,' 1997, <http://www.ftc.gov/os/1997/9710/tobacco.tes.HTM>. Tobacco companies have indeed reported significant profit increases since the Master Settlement Agreement was signed. For example, Philip Morris's net profit has improved from US$5.372 billion in 1998 to US$8.566 billion in 2001. The rise is attributed to higher cigarette prices (see <http://www.valueline.com/dow30/f7058.pdf> and <http://www.philipmorris.com/docs/pressroom/report_yr_end_2001.pdf>).

The two attempts to launch class actions in Australia have both failed to get to trial. In September 1999 the Tobacco Control Coalition Incorporated (TCCI) alleged that tobacco companies had been guilty of misleading or deceptive conduct and unconscionable conduct under the TPA. The representative action failed because the TCCI was unable to provide security for costs. In finding that security was necessary the court referred to the seeming impossibility of determining which persons would fall into the classes suggested by the applicants.

In March 2000 a representative action brought by Slater and Gordon on behalf of smokers with tobacco-related diseases was struck out by the full bench of the Federal Court. One of the grounds for this decision was that, contrary to Australian requirements, not all members of the proposed class pleaded an action against all the respondents, and their claims did not 'arise out of the same, similar or related circumstances'.

Action to recover medical treatment costs has also been planned by Australia's Standing Committee of Attorneys-General (SCAG) for some time. SCAG is yet to announce its intentions with respect to this legal action.

US litigation documents

Part of the Master Settlement Agreement concluded by the tobacco industry and US State Attorneys-General in November 1998 provided that the settling companies would establish a website indexing documents produced as evidence. This website is at <http://www.tobaccoresolution.com>. The number of pages of evidence available through this website was estimated at 26 million in September 1999. New documents are added every month.

In general the Commission does not have the resources to do an exhaustive search of any large body of documents for evidence of a contravention of the TPA unless there are specific, pre-existing grounds. As already noted, there are also significant differences between the US and Australian legal systems, and in many US court cases a settlement was reached before the court made any finding, or while findings were subject to appeal. In other words, it is often far from clear that these published documents can be regarded as evidence of contraventions of US law, let alone Australian law.

It is therefore unlikely that this documentation would yield evidence of contraventions of the TPA in Australia without considerable analysis, if at all. The Commission is at this stage unaware of evidence of restrictive trade practices in the terms defined in the TPA or other contraventions of Australian trade practices law in these documents. It is, however, always exchanging information with the US Federal Trade Commission about developments in this area.

An example search of the Philip Morris database on <http://www.tobaccoresolution.com> using the keywords 'Australia' and 'price' yields 121 documents ranging in length from one to 363 pages. While there is some discussion of pricing strategy in Australia by Philip Morris executives in these documents, none warrants an investigation.

Agreements between Australian and US fair trading authorities

In 1999 the Governments of Australia and the United States concluded an 'Agreement on Mutual Anti-Trust Enforcement Assistance', which provides a formal channel for the disclosure, provision, exchange, and discussion of anti-trust information in the possession of either authority. A request under this agreement must normally relate to an existing investigation in the country of the requesting party, and must be specific in its formulation. The agreement also limits the scope of requests in recognition of the resource limitations of the responding party.

An agreement between the Commission and the FTC on mutual enforcement assistance in consumer protection matters was also signed in 2000. It allows the sharing of evidence to facilitate enforcement of consumer protection laws in each country and to coordinate investigations.

At this stage the Commission does not have sufficient information to launch a formal request under either agreement in respect of the conduct of tobacco companies.

A summary of the types of conduct that could potentially contravene the relevant provisions of the TPA is provided below in response to questions 1(i) and (j) of the Senate's motion.

Other tobacco litigation in Australia under the TPA

Australian Federation of Consumer Organisations Incorporated v Tobacco Institute of Australia Ltd

Another noteworthy court case in Australia was that of *Australian Federation of Consumer Organisations Incorporated v Tobacco Institute of Australia Ltd*, which concerned representations about scientific research into passive smoking.[10] In July 1986 the Tobacco Institute, a tobacco industry lobby group, had published an advertisement claiming that there was 'little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers'.[11]

The Australian Federation of Consumer Organisations (AFCO) wrote to the then Trade Practices Commission claiming that the advertisement was a contravention of s. 52 of the TPA. AFCO argued that it was likely to mislead or deceive consumers about scientific research into the effect of passive smoking on health. In January 1987 the Trade Practices Commission informed AFCO that the Tobacco Institute had agreed to publish a corrective follow-up advertisement.

In AFCO's view the follow-up advertisement did not correct the elements of the original advertisement that it regarded as misleading, and in 1988 it took the Tobacco Institute to court. AFCO sought an injunction under s. 80 of the TPA, forbidding the repetition of the advertisement on the basis that it contravened s. 52.

10 See Roland Everingham and Stephen Woodward, *The Case Against Passive Smoking: AFCO v TIA*, 1991, Sydney, Legal Books.

11 Quoted in Everingham and Woodward, p. 31.

On 7 February 1991, in ruling in AFCO's favour, Justice Morling found that:

- the original advertisement was conduct in trade or commerce (which is required for the TPA to have jurisdiction);
- it purported to be a representation of fact rather than simply an expression of an opinion;
- a misleading representation of scientific research on passive smoking had occurred; and
- too much time had elapsed for additional corrective advertising to be worthwhile.

He found that there had been a contravention of s. 52 and granted the s. 80 injunction. He also awarded costs to AFCO.

The Tobacco Institute appealed this decision to the Full Federal Court, but on 17 December 1992 the court unanimously found that the Tobacco Institute's advertisement was indeed misleading or deceptive under s. 52 of the TPA. On 10 March 1993, in a supplementary decision, the court decided that it would be too difficult to frame an injunction to prevent the Tobacco Institute from engaging in similar conduct in the future, but instead made a declaration that the advertisement in question was misleading and deceptive in contravention of the TPA, and ordered that the Tobacco Institute pay a substantial part of AFCO's costs. The court also cautioned the parties not to distort the judgment.

Rolah Anne McCabe v British American Tobacco Services Limited

The Commission is currently considering the 11 April 2002 decision of Justice Eames of the Victorian Supreme Court in *Rolah Ann McCabe v British American Tobacco Australia Services* ('*McCabe*'). This case involved allegations of negligence against British American Tobacco (BAT), in that BAT suppressed knowledge of the health dangers of smoking and continued to sell cigarettes to the detriment of Mrs McCabe's health. Mrs McCabe is suffering from terminal lung cancer and is unlikely to live more than a few months.

The court found in Mrs McCabe's favour (and awarded damages of approximately $700 000), on the basis of striking out BAT's defence to Mrs McCabe's claim. In the court's view, this was warranted due to evidence that BAT had a systematic program for the destruction of potentially incriminating evidence by BAT and its legal advisers, which included the Australian law firm Clayton Utz. The court considered that the so-called 'Document Retention Policy', which had been in place since 1985, had led to the destruction of key documents which did not allow Mrs McCabe to get a fair trial.

The Commission is investigating the issues raised by the court decision, and is particularly concerned about the fact that both BAT and Clayton Utz solicitors engaged in a process of document destruction to withhold information relevant to possible litigation. The misleading and deceptive provisions of the TPA not only seek to prevent behaviour which is positively misleading or deceptive but may, in appropriate cases, include behaviour which withholds information if the effect is misleading or deceptive. There has been a number of cases where acts of omission have been regarded as misleading and/or deceptive. When health concerns are involved omission is an even more important issue. In addition to these concerns the Commission will also consider whether other consumer protection provisions, including those relating to unconscionable conduct, have been contravened.

The Commission will continue to investigate the issues raised in the McCabe case including in relation to its current 'mild' and 'light' investigation, and will continue to monitor developments in other tobacco related litigation.

Recent litigation developments in the USA

On 24 March 2002 it was reported that a jury in the Circuit Court of the State of Oregon for the County of Multnomah in the United States had ordered Philip Morris Inc. to pay the estate of Michelle Schwarz $US150 million in punitive damages and $168 000 in compensatory damages. The jury found that Philip Morris misrepresented low-tar cigarettes as being safer than regular cigarettes. This is the first verdict of this kind in America. Philip Morris has already indicated that it will appeal this decision.

The implications of this case are being considered by the Commission in the context of its 'mild'/'light' investigation which is still ongoing.

Question 1(g)

Question:

[…]

(g) the adequacy of current labelling laws under the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations to fully inform consumers of the risk that they are exposed to;

[…]

Response:

The labelling standard

The Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994 are prescribed under s. 65D of the TPA. Specifically, s. 65D(2) provides that a regulation may, in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements about:

(a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;

(b) the form and manner in which that information is to be disclosed on or with the goods;

as are reasonably necessary to give persons using the goods information about the quantity, quality, nature, and value of the goods.

Section 65D(1) provides that a corporation shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the corporation has complied with that standard in relation to those goods.

The current labelling standard requires retail packages of tobacco (including cigarettes, cigars, pipe tobacco and cut tobacco for rolling cigarettes) to contain certain health warnings in relation to the effects of tobacco smoking, as well as explanatory statements relating to those health effects. The labelling standard specifies the format, positioning, size, and orientation of the warning messages and explanatory statements on tobacco packaging. The text of these messages must be printed on a white background within a black, rectangular or square border.

The labelling standard also provides for messages containing information on the average contents of tar, nicotine, and carbon monoxide in tobacco smoke to be printed on the side of packages. The text, position and format of these messages are specified, as are testing methods to be used when determining the average amount of tar, nicotine, and carbon monoxide produced by a cigarette.

The labelling standard is administered by three separate agencies:

- the Consumer Affairs Division of Treasury, which has policy responsibility;
- the Department of Health and Ageing, which has an overarching health policy interest and policy responsibility for the content of the health warnings; and
- the Commission, which is responsible for the enforcement of the labelling standard.

In light of these arrangements, the issue of whether the current labelling laws fully inform consumers of the risk that they are exposed to is a matter for consideration by the Treasury and the Department of Health and Ageing.

Difficulties with enforcing the labelling standard

The Commission is, however, in a position to comment on issues relating to the enforcement of the labelling standard. While the overall level of compliance with the labelling standard is high and the majority of investigations have resulted in successful enforcement action, the Commission has encountered some enforcement obstacles.

First, the limitation of the consumer protection provisions of the TPA to incorporated traders (with minor exceptions) means that the Commission generally cannot take action when unincorporated traders are involved. While unincorporated traders are subject to legislation complementary to the majority of mandatory product safety or information standards in most States and Territories, no such legislation has been enacted for the labelling standard. In these circumstances the intrastate conduct of some smaller unincorporated traders selling unlabelled or incorrectly labelled tobacco products falls outside the jurisdiction of the TPA, and hence the labelling standard.

Secondly, as tobacco is subject to a range of legislation at the federal level as well as other levels, it is often the case that contraventions of the labelling standard may be associated with other, more serious, criminal activity. If a trader is already subject to an investigation by the Australia Federal Police, the Australian Customs Service, or the Australian Taxation Office (especially regarding evasion of tobacco excise), the Commission may exercise discretion so as not to jeopardise these investigations. In some cases this has limited the opportunities for effective enforcement of the labelling standard.

Thirdly, when a mandatory standard has been contravened the Commission may request that a supplier carry out a voluntary recall of products either to retail level or to a consumer level. The latter is commonly referred to as a consumer recall. A request for a voluntary product recall is one of the main methods used by the Commission to address goods that are non-compliant with mandatory safety standards. The advantages of a voluntary recall are that it removes hazardous products from the market, and acts as a strong deterrent to a supplier for cost reasons. In the case of cigarettes and other tobacco products that do not carry the requisite health warnings, requesting a consumer recall or even corrective advertising is generally not considered an appropriate measure. It is unlikely that consumers will respond, and it is also likely that the offending product will have already been consumed.

Review of health warnings on tobacco products

In February 2000 the then Department of Health and Aged Care commenced a review of the health warnings on tobacco products within the existing framework of the TPA and the labelling standard. A technical advisory group was established, comprising representatives from the Commission, the Consumer Affairs Division of Treasury, the National Expert Advisory Committee on Tobacco, and the VicHealth Centre for Tobacco Control.

Elliott and Shanahan Research were commissioned by the department to conduct an assessment of the current health warnings and explanatory health messages on tobacco products after six years of exposure. The objective of the evaluation was to determine the effectiveness of the labels and their impact on consumers over time. It explored the content of the health warnings and explanatory messages, as well as the size, colour, and location of the warnings.

The study confirmed that after six years of exposure the current messages are stale and need to be updated to include new information on the health effects of tobacco. Recall of the specific warning labels or awareness of the health messages had not varied significantly since 1996, with the three most frequently recalled messages being ‘Smoking causes lung cancer’, ‘Smoking when pregnant harms your baby’, and ‘Smoking kills’. Despite this level of awareness, there was agreement that they had become less noticeable over time.

Elliott and Shanahan therefore suggested that the introduction of new warnings and accompanying explanatory information should be considered to renew interest, increase readership levels, and optimise quitting attempts. The evaluation also found that there was an increase in the proportion of smokers agreeing that health warnings should be stronger, and an acknowledgment among smokers that smoking has affected their health or increased their health risk.[12]

An evaluation of the health warnings and explanatory health messages on tobacco products was incorporated into a *Discussion Paper on the Review of Health Warnings on Tobacco Products in Australia*, which was released by the department in May 2001. The discussion paper represented the commencement of extensive consultation with interested individuals and organisations on the development of new health warnings.

The paper stated that health warnings offer a direct way of communicating information to users and potential users of tobacco products about health effects. Health warnings are regarded as important by all segments of the community, with seven out of 10 smokers considering health warnings

12 Commonwealth Department of Health and Aged Care, *Review of Health Warnings on Tobacco Products in Australia – Discussion Paper*, April 2001, pp. 11–12.

'very' or 'quite' important. Over time, there has been a significant increase in the proportion of smokers who agree that the labels are 'very important'.[13] It further stated that health warnings on tobacco products have become recognised as an integral element in tobacco control, and are one component of an overall tobacco strategy.[14] Public comments on the discussion paper were accepted in 2001.

Following a review of these comments the Department of Health and Ageing is currently developing options for proposed new health warnings and explanatory messages on tobacco products. It is expected that market testing of new options will commence in April 2002.

Question 1(h)

Question:

[…]

(h) the extent of loss or damage caused, or likely to be caused, by that conduct referred to in paragraph (e) in Australia;

[…]

Response:

Estimating the impact of tobacco

The Commission would normally only develop an estimate of loss or damage in the course of a specific investigation into a possible contravention of the TPA. Such an estimate would be pertinent to the conduct that was being assessed with a view to instituting in the courts. It would be an estimate of what may be legally claimable. In light of the Commission's view of the remote possibility of a successful prosecution of the conduct referred to in paragraph (e), no estimate of this kind is available.

This is very different from estimating the general economic or social cost of tobacco usage in Australia, or particular aspects of tobacco manufacture, sale, and usage. It is beyond the normal statutory role of the Commission to make such an estimate. The National Health and Medical Research Council estimated in 1997 that the net health care cost of tobacco use in Australia in 1992 was $832 million, a 72 per cent increase on 1988 figures. As the Senate notes in 1(b) of the motion, the total tangible and intangible costs of tobacco use (including health care costs) were estimated to be $12 736 million in 1992. These figures do not include costs associated with exposure to environmental tobacco smoke, use of welfare services, absenteeism, or the pain and suffering of the sick and others.[15]

13 Ibid., p. 10.

14 Ibid.

15 National Health and Medical Research Council, *The health effects of passive smoking: a scientific information paper*, 1997, Canberra, Commonwealth Department of Health and Family Services, p. 36.

Further information about the impact of tobacco on the Australian community and research done as part of the National Tobacco Strategy is available on the website of the Department of Health and Ageing at <http://www.health.gov.au/tobacco>.

Question 1(i) and (j)

Question:

[…]

(i) the extent to which the tobacco industry may be made liable to compensate for that loss or damage, or the extent to which that loss or damage may be prevented or reduced;

(j) the potential for tobacco litigation in Australia, including for compensation and remedial action, in respect of that conduct.

[…]

Response:

It is difficult to hypothesise on the scope of future legal proceedings in respect of any conduct, and it would be outside the responsibilities of the Commission to do so. Furthermore, it may be inappropriate for the Commission to speculate on a possible finding of liability in a future court action.

However, the Commission can provide information about the types of penalties and remedies that are applicable in respect of contraventions of the TPA, and about what types of commercial conduct potentially contravene the TPA and could lead to litigation.[16] A summary follows.

16 This information about penalties and remedies is reproduced from the Commission's September 2001 publication, *Summary of the Trade Practices Act 1974*, which is available at <http://www.accc.gov.au/pubs/Publications/Corporate/Summary_of_TPA.pdf>.

Remedies and penalties for contravention of restrictive trade practices provisions

Various penalties and remedies are available in the Federal Court for contravention of the Part IV provisions of the TPA (restrictive trade practices). These are:

- monetary penalties of up to $10 million for companies;[17]
- monetary penalties of up to $500 000 for individuals;[18]
- injunctions (s. 80);
- damages (s. 82);
- divestiture of shares or assets illegally acquired, or a declaration that a share transaction is void in the case of a prohibited merger (s. 81);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
    - specific performance;
    - rescission and variation of contracts;
    - compensation;
    - probation orders, community service orders and corrective advertising orders (s. 86C);[19] and
    - adverse publicity orders (s. 86D);[20]

If a defendant is unable to pay both a fine and compensation to victims, the court must give preference to compensation (s. 79B).[21]

The Commission now has the power to take class actions for contraventions of Part IV (s. 87(1B)).[22] It also has the power to seek monetary penalties, injunctions, or divestiture.

Individuals and corporations may, through private action, seek:

- injunctions (except in the case of a merger prohibited by s. 50);
- damages or one of the ancillary orders available under s. 87; and

17 With the exception of ss. 45D (secondary boycotts for the purpose of causing substantial loss or damage), 45DB (boycotts affecting trade or commerce), 45E (prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services), and 45EA (provisions contravening s. 45E not to be given effect), for which penalties of up to $750 000 apply (s. 76).

18 With no penalties applying to the same exceptions, above.

19 For contraventions occurring on or after 26 July 2001.

20 As above.

21 As above.

22 As above, excluding actions for contraventions of ss. 45D (secondary boycotts for the purpose of causing substantial loss or damage) and 45E (prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services).

- divestiture in relation to a merger (s. 81(1)).

The Federal Court has the power to enforce undertakings concerning conduct given by a person to the Commission (s. 87B).

Under s. 163A, any person or the Minister may seek a declaration from the court about the operation of the TPA, excluding certain provisions, in relation to conduct or proposed conduct. Under paragraphs 163A(2) and 163A(3), the Minister and the Commission are entitled to intervene in any such proceedings.

Remedies and penalties for contravention of fair trading provisions

The TPA provides a range of penalties and remedies for contraventions of the unfair practices provisions in Part V (fair trading). These are:

- up to and including 14 December 2001, monetary penalties of up to $220 000 for individuals and $1.1 million for companies for Part V contraventions;
- on or after 15 December 2001, monetary penalties of up to $220 000 for individuals and $1.1 million for companies, for contraventions of those provisions replicated in Part VC (the new offence provisions of the TPA);[23]
- injunctions to prevent the prohibited conduct continuing, or being repeated, or to require that some action be taken (s. 80);
- damages (s. 82);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
    - specific performance;
    - rescission and variation of contracts;
    - compensation;
    - probation orders, community service orders, and corrective advertising orders (s. 86C); [24] and
    - adversepublicity orders in relation to an offence under Part VC or a penalty under s. 76.

The Commission, the Minister, or any other person can apply to the court for an injunction.

Finally, it is also important to note that s. 83 of the TPA provides that if in a proceeding it is proved that a person has contravened a Part IV (restrictive trade practices), Part IVA (unconscionable conduct), Part IVB (industry codes), Part V (consumer protection), or Part VC (offences), a finding of fact made by the court may be used as prima facie evidence in subsequent related proceedings by a person for compensation.

23 For contraventions occurring on or after 26 July 2001.

24 As above.

Remedies and fines for contravention of product safety and product information provisions

In addition, the TPA provides a range of remedies and fines for contraventions of the product safety and product information provisions. Principally, these are:

- up to and including 14 December 2001, fines of up to $220 000 for individuals and $1.1 million for companies for contraventions of Part V;
- on or after 15 December 2001, fines of up to $220 000 for individuals and $1.1 million for companies, for contraventions of those provisions replicated in Part VC (the new offence provisions of the TPA);[25]
- injunctions to prevent the prohibited conduct continuing, or being repeated, or to require that some action be taken (s. 80);
- damages (s. 82);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
    - specific performance;
    - rescission and variation of contracts;
    - damages;
    - provision of repairs and spare parts (s. 87); and
    - probation orders, community service orders, and corrective advertising orders (s. 86C).[26]

The Commission can seek fines or injunctions if a supplier is found to have supplied goods that do not comply with a compulsory standard or are the subject of a banning order. Any person who has suffered loss or damage as a result of a failure to comply with a standard or banning order or with a compulsory recall order can seek, by way of a private action, damages, injunctions, or other court orders.

25 As above.

26 As above.

Types of conduct prohibited under the TPA

Broadly speaking, Part IV of the TPA prohibits:

- anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts (s. 45);
- misuse of market power (s. 46);
- exclusive dealing (s. 47);
- resale price maintenance (ss. 8, 96-100); and
- mergers that would have the effect or likely effect of substantially lessening competition in a substantial market (ss. 50, 50A).

Part IVA prohibits unconscionable conduct.

Part V prohibits unfair practices in trade or commerce. Some relevant provisions are those prohibiting:

- misleading representations about the future supply and use of goods and services (s. 51A);
- misleading or deceptive conduct (s. 52);
- false or misleading representations (s. 53); and
- misleading the public as to the nature or characteristics of goods and services (ss. 55 and 55A).

Misleading representations about the future supply and use of goods and services

Section 51A deems as misleading the making of representations about the happening of any future event without reasonable grounds. A business is deemed not to have had reasonable grounds for making a prediction unless it can produce evidence to the contrary.

Unconscionable conduct

Section 51AA provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law of the Australian States and Territories — that is, the general non-statutory or common law as it has evolved through decisions of the courts. 'Unconscionability' is accordingly not defined in the TPA.

The term 'unconscionable conduct' has come to refer to circumstances that have the following elements:

- one party to a transaction suffered from a special disability or disadvantage in dealing with the other party; and
- the disability was sufficiently evident to the stronger party; and
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

The TPA also has specific provision for unconscionable conduct in consumer transactions (s. 51AB) and in business dealings (s. 51AC).

Misleading or deceptive conduct

Section 52 is a very broad provision. It prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

Generally, sellers are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material information may in some circumstances be a contravention. The duty to disclose can arise even when there is no particular relationship between the parties — such as trustee and beneficiary or principal and agent.

Only civil proceedings can be brought for contraventions of s. 52.

False or misleading representations

Section 53 specifically prohibits false claims about:

- the standard, quality, value, grade, composition, style, model, or history of goods or services (s. 53(a), s. 53(aa));
- whether goods are new (s. 53(b));
- the agreement of a particular person to acquire the goods or services (s. 53(bb));
- the sponsorship, approval, performance characteristics, accessories, uses, or benefits of goods or services (se. 53(c));
- the sponsorship, approval, or affiliation of a corporation (s. 53(d));
- the price of goods or services, for example that it is less than a competitor's price (s. 53(e));
- the availability of repair facilities or spare parts (s. 53(ea));
- the place of origin of goods (s. 53(eb));
- a buyer's need for goods or services (s. 53(f)); and
- the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy (s. 53(g)).

Misleading the public as to the nature or characteristics of goods and services

Section 55 prohibits a person from engaging in conduct that is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. Section 55A prohibits a corporation from engaging in conduct that is liable to mislead the public about the nature, the characteristics, the suitability for their purpose, or the quantity of any services.

State of mind

In proceedings against a corporation, the state of mind of its directors, servants and agents can |be attributed to the corporation. A person's state of mind includes knowledge, intention, opinion, belief, or purpose. For the person's state of mind to be so attributed, the conduct in question must be within the scope of their actual or apparent authority (s. 84).

Defective goods

There is also provision in the TPA in respect of defective goods. Under Part VA a person who is injured or whose property is damaged by a defective product will have a right to compensation against the manufacturer of the product. Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances (s. 75AC).

A claimant does not have to prove negligence, but does have to prove that on the balance of probabilities the product supplied by the manufacturer or importer was defective and that the defect caused a loss. The provisions of Part VA cannot be restricted, excluded or modified by contract (s. 75AP).

Manufacturers may not be liable for defects that occurred later in the distribution chain or as a result of unforeseeable misuse by the injured party or other users. If, however, an injury resulted from a defect such as unsafe product packaging or packaging with inadequate warnings, they could be found liable.

A manufacturer will not be liable to compensate a claimant for defective goods if it can prove one of the following defences:

- the defect did not exist when the product left its control;
- the only reason the product was defective was because it complied with a mandatory standard;
- detection of the defect would not have been possible when the manufacturer supplied the product, given the state of scientific or technical knowledge at the time (known as the 'development risks' or 'state of the art' defence); or
- in the case of a manufacturer of component parts, the defect was the fault (for example careless assembly, use of an unsuitable component, or incorrect or inadequate instructions) of the ultimate manufacturer, not the component manufacturer (s. 75AK).

Manufacturers of defective goods are liable both individually and collectively to a claimant for the same loss. A claimant may sue the party that will best be able to pay compensation and is not required to take separate action against each party that is liable to make compensation (s. 75AM).

Product safety and product information

Sections 65B to 65T in Division 1A of Part V of the TPA are designed to ensure that:

- certain goods meet particular standards; and
- dangerous goods are not sold or can be quickly withdrawn from sale.

The Commission is responsible for enforcing ss. 65C and 65D, which relate to goods not complying with standards or bans, and for conducting conferences to review proposed or emergency bans or proposed compulsory recalls of consumer products (ss. 65J, 65K, 65M and 65N).

The Consumer Affairs Division of the Treasury has policy responsibility for standards and bans and is also responsible for recalls and warning notices.

Compulsory consumer product standards

Compulsory consumer product standards for a particular good may be made by regulation or declared by the Minister by a notice in the *Commonwealth Gazette* (ss. 65C, 65D and 65E). Corporations are prohibited from supplying goods:

- that do not conform with a compulsory consumer product safety standard;
- for which there is in force a notice declaring the goods to be unsafe; or
- which are subject to a notice imposing a permanent ban (s. 65C).

There are two types of compulsory consumer product standard:

- safety standards, which require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging rules, for example to display warning labels on the flammability of children's nightwear (s. 65C); and
- information standards, which require prescribed information to be given to consumers when they purchase specified goods, for example labelling garments or household fabrics to indicate the most suitable method of cleaning (s. 65D).

Unsafe goods and bans

Goods that may cause injury to any person can be declared unsafe by the Minister, by notice in the *Commonwealth Gazette* (s. 65C).

Appendix. Senate notice of motion (September 2001)

(1) That the Senate, having regard to:

(a) the enormous health disaster represented by tobacco;

(b) the rising costs of tobacco diseases, conservatively estimated at $12.7 billion (1992), that are borne by governments, individuals and businesses, including health care costs, lost productivity, absenteeism, social security payments;

(c) the availability of evidence that the tobacco industry in other countries, including parent companies to Australian manufacturers may have engaged in:

1. misleading and deceptive conduct to downplay the adverse health effects of smoking and the addictiveness of nicotine,

2. misleading, deceptive and unconscionable conduct in relation to the marketing of tobacco products to children; and

(d) the desirability of preventing or reducing loss or damage suffered or likely to be suffered by such conduct, and of compensation being available for any loss and damage suffered or likely to be suffered by that conduct;

resolves that there be laid on the table, not later than 30 April 2002, a report by the ACCC on the performance of its functions under the *Trade Practices Act 1974* with respect to:

(e) the outcome of ACCC investigations into the conduct of Australian tobacco companies and their overseas parent and affiliate companies in relation to any such misleading, deceptive or unconscionable conduct;

(f) whether documents publicly released during the course of tobacco litigation in the United States of America contained evidence of anti competitive behaviour or breaches of Australian law;

(g) the adequacy of current labelling laws under the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations to fully inform consumers of the risk that they are exposed to;

(h) the extent of loss or damage caused, or likely to be caused, by that conduct referred to in paragraph (e) in Australia;

(i) the extent to which the tobacco industry may be made liable to compensate for that loss or damage, or the extent to which that loss or damage may be prevented or reduced; and

(j) the potential for tobacco litigation in Australia, including for compensation and remedial action, in respect of that conduct.

(2) That, in preparing a report under paragraph (1), the ACCC is to consider:

(a) the importance of this issue to Australian public health;

(b) the impact of the costs of treating tobacco-related disease in Australia and the associated productivity losses borne by Australian businesses;

(c) the desirability of ensuring that the tobacco industry is made accountable under the TPA in respect of such conduct, that any loss or damage suffered or likely to be suffered by that conduct be prevented or reduced and that any persons harmed or likely to be harmed by that conduct obtain appropriate compensation; and

(d) the potential for overseas parent and affiliate companies being made liable for such loss or damage;

and indicate in its report the action it has taken, and the action it proposes to take, with regard to the matters upon which it is required to report.

Senator Lyn Allison

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