



# Submission to British American Tobacco Australia Limited & Ors application for authorisation A91550 —interested party consultation from Dr John Coyne

*This submission does not reflect an Australian Strategic Policy Institute (ASPI) perspective but is the opinion of the author Dr John Coyne, Head of Border Security Program, ASPI.*

## Overview

ASPI welcomes the opportunity for one of its staff to make a submission to the Australian Competition and Consumer Commission (the ACCC) on the application for authorisation from British American Tobacco Australia Limited, Imperial Tobacco Australia Limited, and Philip Morris Limited (the Applicants). This submission relates to the Applicants request for authorisation of an arrangement between them whereby they intend to work together to identify, issue warning notices and, if warning notices are not heeded, suspend or cease supply of their tobacco products to retailers and wholesalers who sell illicit tobacco products.

This submission will address two specific issues:

- The likely public benefits of the application; and
- The possible impacts of the application on competition.

Overall, this submission strongly supports the application, which is likely to provide a number of benefits with respect tax revenues, community safety and organised crime.

## Public benefits

The public should be under no illusion that tobacco companies, and their representatives, have a vested interest in lobbying for additional powers to disrupt the illicit tobacco market. The sale of counterfeit tobacco products is an infringement of the Applicants' intellectual property and erodes their bottom line profit thereby impacting on shareholders' returns. While some people are unlikely to care about a tobacco company's loss of profit, the illicit tobacco market in Australia has real impacts on the safety and security of our communities. Not the least of which it is reducing the demand reduction impacts of tobacco consumption taxes.

It would appear that the illicit tobacco market exists as a result of a strong demand for cheaper products. And arguably this may be an unintended consequence of increased taxation of tobacco products.

Unlike most other illegal or illicit markets, the importation, distribution, sale and consumption of illicit tobacco is most likely not viewed by most participants and users as a crime. At various points in the past the Applicants, or their representatives, have argued that many smokers view the use of illicit tobacco as a victimless crime, but the scope of the problem might actually be far more complex.

Arguably the current legislation and enforcement regime encourage the importation, distribution, sale and consumption of illicit tobacco to be viewed as a regulatory misdemeanour: and most definitely not a crime. Anecdotally, this seems plausible when some organised crime groups have use illicit tobacco products in ‘dummy’ smuggling runs before sending illicit drugs.

The trade in illicit tobacco is an increasingly attractive market for organised crime groups. There are few barriers for those seeking to enter the illicit tobacco market, and a large demand for products. For organised crime the illicit tobacco market has high profits and low risk.

By definition the manufacture, importation, distribution and sale of illicit tobacco is a transnational organised crime. The trade generally involves two or more people or entities and the movement of illicit tobacco across one or more international borders: especially with respect counterfeit products.

In general, every stage of the illicit tobacco trade—manufacture, importation, wholesale and retail sales—involves a number of enabling crimes from intellectual property offences, fraud, corruption, tax evasion to money laundering. Naturally Australia’s various enforcement officials should continue disrupt the illicit tobacco market by investigating these offences.

The Commonwealth’s law enforcement agencies continue to play an important role in responding to the importation, manufacture, domestic growth and distribution of illicit tobacco. Expectations regarding the effectiveness of this strategy need to be tempered by what can and should be achieved by law enforcement in this space. Disrupting the illicit tobacco market is no easy task and the allocation of new commonwealth enforcement resources in a tight fiscal environment is unlikely. But also the allocation of resources to this problem needs to be tempered by its overall priority against other crime types. Collectively these factors support the Applicants’ request to undertake proactive steps, as an industry, to make these illegal practices more difficult to undertake.

The Applicants’ proposal will likely realise the following public benefits:

- The proposal will likely, over time, encourage greater retailer compliance with Australian tax regulations, leading to increased tax collection;
- The proposal will reinforce the benefits of Commonwealth demand reduction strategies through mitigating the impacts of the illicit tobacco market;
- The proposal will disrupt organised crime groups’ undermining the rule of law. This will be achieved through the proposal’s disruption of the low-risk, high-profit illicit tobacco market. Arguably, this will be the greatest benefit realised by the proposal.

### Impacts on competition

There can be no doubt that the trade in illicit loose leaf tobacco (chop-chop) and counterfeit packets places the regulated tobacco industry in an uncompetitive position. The introduction of the proposal does not have any apparent negative impacts on competition in the tobacco import, wholesale or retail markets. Rather, the proposal:

- encourages industry compliance with market regulations and legislation, where law enforcement and regulatory resources are not adequate;
- acts to protect the intellectual property rights of the applicants, but does not impinge on fair competition;
- is unlikely to provide the Applicants with any undue advantage.

## Recommendation

This submission:

- strongly supports the Applicants' proposed covert purchase proposal with the caveat that the applicants ensure compliance with all relevant state or territory and Commonwealth legislation; and
- supports the agency cooperation approach.