

28 September 2016



Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Via email: adjudication@acc.gov.au

Dear Mr Jones,

Submission regarding application for authorisation by British American Tobacco Limited & Ors (Ref: A91550)

We refer to the above application for authorisation, lodged on behalf of British American Tobacco Australia Limited, Imperial Tobacco Australia Limited and Philip Morris Limited ('the applicants').

We understand the applicants have requested that the ACCC authorise an arrangement which would permit them to identify suppliers of illicit tobacco within Australia and take action against those suppliers by, among other things, jointly refusing to make further sales of their tobacco products to those suppliers for an agreed period.

Cancer Council Victoria acknowledges that the applicants have a responsibility to ensure that appropriate duties (excise and customs) have been paid on all products manufactured by their companies and that the arrangement outlined in the application is one avenue for monitoring this. However we have concerns regarding this arrangement as proposed. It is Cancer Council Victoria's view that there are a number of potential public harms which may arise and that these ought to be considered when assessing whether the arrangement is likely to give rise to a net public benefit. In addition, we believe the application for authorisation lodged on behalf of the applicants contains a number of inaccurate assertions, which require correcting.

We have outlined each of our concerns below. We would be grateful if the ACCC would take these concerns into account in reaching its determination.

The Australian illicit tobacco market – How big is the problem?

The application for authorisation makes a number of allegations regarding the illicit tobacco market in Australia. While Cancer Council Victoria acknowledges that some illicit tobacco trade occurs at the retail and/or wholesale level in Australia, we do not agree with the estimates referred to in the application regarding the level/frequency at which it occurs.

In particular, we note that the application refers to a report prepared by KPMG (at the applicants' request) dated 15 April 2016. The report asserts that illicit tobacco represented 14% of Australia's total tobacco consumption in 2015. Cancer Council Victoria strongly disputes the accuracy of this estimate.

A detailed explanation of the reasons why we consider the estimate to be inaccurate is **enclosed** (see 'Appendix 1').¹

It is important to note that previous reports commissioned by the tobacco industry regarding illicit tobacco trade have significantly differed from data collected by the Australian Institute of Health and Welfare.² We therefore recommend that a high degree of caution be exercised when considering the information contained in these reports, due to the risk of industry bias.

Alleged link between illicit trade and plain packaging of tobacco products –

The application also asserts that Australia's plain packaging laws have played a role in increasing the 'importation, availability, supply of, and demand for, illicit tobacco products in Australia.' Cancer Council Victoria does not accept this assertion.

Since the implementation of Australia's plain packaging legislation, a number of peer-reviewed studies have been undertaken which have found no change in smokers' reported use of unbranded illicit tobacco, and no evidence of any increase in use of contraband cigarettes.³ Furthermore, in its post-implementation review of Australia's plain packaging legislation, the Department of Health observed that it is 'most likely that the impact of the tobacco plain packaging measure on the changes in the illicit tobacco market in Australia has not been substantive, if there has been any impact at all.'⁴

Further information disputing the alleged link between illicit tobacco trade and Australia's plain packaging legislation is **enclosed** (see 'Appendix 2').

WHO Framework Convention on Tobacco Control –

It is Cancer Council Victoria's view that the arrangement as proposed, without additional requirements for transparency and reporting to government agencies discussed below, could potentially be inconsistent with Australia's obligations as a party to the World Health Organization Framework Convention on Tobacco Control ('the FCTC') under Article 5.3.

Article 5.3 of the FCTC

Article 5.3 of the FCTC requires parties to take measures to protect tobacco control policies from commercial and other vested interests of the tobacco industry, in view of the 'fundamental and

¹ Please note: the enclosed document refers to an earlier KMPG report (dated 30 March 2015). However, the estimates provided in the 2016 report appear to be based on the same methodology as the estimates contained in the earlier report. The limitations identified in the attached document therefore apply equally to the 2016 report.

² See Winstanley MH. 'The tobacco industry and the illegal tobacco market', in Scollo, MM and Winstanley, MH [editors]. Tobacco in Australia: Facts and issues. Melbourne: Cancer Council Victoria; 2010. Available from <http://www.tobaccoinaustralia.org.au/chapter-10-tobacco-industry/10-9-the-tobacco-industry-and-the-illegal-tobacco/>

³ See, e.g., M. Scollo, M. Zacher, K. Coomber and M. Wakefield, 'Use of Illicit Tobacco Following Introduction of Standardised Packaging of Tobacco Products in Australia: Results from a National Cross-sectional Survey' (2015) 24 *Tobacco Control* pp. ii76-ii81; M. Scollo, M. Zacher, K. Coomber, M. Bayly, and M. Wakefield, 'Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption following the Introduction of Plain Packaging in Australia' (2015) 24 *Tobacco Control* pp. ii66-ii75; M. Scollo, M. Zacher, S. Durkin and M. Wakefield, 'Early Evidence about the Predicted Unintended Consequences of Standardised Packaging of Tobacco Products in Australia: A Cross-sectional Study of the Place of Purchase, Regular Brands and Use of Illicit Tobacco' (2014) 4(8) *BMJ Open*. Available from: <http://bmjopen.bmj.com/content/4/8/e005873.full>.

⁴ Australian Government, Department of Health. *Post-Implementation Review: Tobacco Plain Packaging 2016*. Available from: <https://ris.govspace.gov.au/files/2016/02/Tobacco-Plain-Packaging-PIR.pdf>

irreconcilable conflict between the interests of the tobacco industry and the interests of public health policy.⁵

1. *Lack of transparency in proposed arrangement -*

Principle 3 of the Guidelines for Implementation of Article 5.3 of the FCTC, which were adopted by the FCTC's Conference of the Parties to assist parties in implementing their obligations, states that *'parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.'*⁶ Recommendation 5.1 of the Guidelines recommends that *'Parties should introduce and apply measures to ensure that all operations and activities of the tobacco industry are transparent.'*

Cancer Council Victoria is concerned that the proposed arrangement lacks transparency. In particular, there is no requirement for the applicants to provide any information to the ACCC, the Australian Tax Office (ATO) or the Department of Immigration and Border Protection's Tobacco Strike Team (DIBP Tobacco Strike Team) (or other government departments/agencies) regarding any illicit tobacco sales detected, or any action taken by the applicants as a result of such detection.

In the event that the proposed arrangement is authorised, we recommend the arrangement be closely monitored by the ACCC. In particular, we are of the view that the arrangement should require the applicants to provide the ACCC, the ATO and the DIBP Tobacco Strike Team (and/or other government departments/agencies) with the following information:

- (a) Details of all 'covert purchases' made by the applicants;
- (b) Details of any illicit tobacco sales detected (including the basis upon which the applicants have formed the view that illicit sales have occurred);
- (c) Full details of any action taken by the applicants in response to detected illicit sales.

In addition, retailers and wholesalers should be encouraged to raise with the ACCC any concerns they may have about potential misuse of the arrangement by the applicants.

2. *Importance of avoiding perception of any partnership between the tobacco industry and government departments/agencies -*

The Guidelines for Implementation of Article 5.3 of the FCTC require parties to avoid the creation of any perception of a real or potential partnership or cooperation between government and the tobacco industry.⁷

In the event that the proposed arrangement is authorised, we are of the view that the authorisation should be conditional upon the applicants refraining from making any representation or engaging in any conduct which is capable of giving retailers, wholesalers or members of the public the impression that the applicants are in any way working in collaboration or partnership with the ACCC, the ATO or the DIBP Tobacco Strike Team (or any other government department or agency).

⁵ Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control. Available from: http://www.who.int/fctc/guidelines/article_5_3.pdf

⁶ See Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, at page 3.

⁷ See Recommendation 2 of the Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, at page 4.

Other concerns –

In addition to the above concerns regarding the potential conflict between the proposed arrangement and Australia's obligations under the FCTC, we have a number of further concerns regarding the potential negative impacts of the proposed arrangement which we believe ought to be taken into account when assessing whether the arrangement is likely to give rise to a 'net public benefit'. These include the following:

1. *Potential increase in supply of illicit tobacco* – The proposed arrangement could result in some offsetting increases in the supply of illicit tobacco by retailers and wholesalers. For example, it is possible that covert 'mystery shopper' purchases could give retailers and wholesalers the impression that the demand for illicit tobacco has increased. Furthermore, any public statements made by the applicants about the proposed arrangement may result in an increase in public awareness of the availability of illicit tobacco. This may in turn increase demand for illicit tobacco products among members of the public.
2. *Potential for misuse* – It is Cancer Council Victoria's view that the 'covert purchase model' outlined in the application has the potential to be misused by the applicants and/or their agents or employees, in order to further commercial (or even possibly personal) interests other than the disruption of illicit tobacco trade. We note that the World Health Organization has warned Member States to be aware of efforts by the tobacco industry to use 'social responsibility initiatives' to thwart effective tobacco control policies and programs.⁸ We are concerned that authorisation of the arrangement as proposed, without further requirements for transparency and reporting, would give the applicants broad discretion that could potentially lead to misuse of the arrangement for the purpose of manipulating the retail and/or wholesale sector and thereby potentially interfering with tobacco control efforts.

Recommendations –

Australia has made significant progress in reducing the prevalence of tobacco use over many years, through the use of evidence-based tobacco control policies. In view of the concerns outlined above, and in order to ensure that Australia continues to reduce the harm caused by tobacco, we recommend that a high degree of caution be exercised when considering whether to authorise the proposed arrangement.

In the event that the proposed arrangement is authorised, we recommend that the arrangement be closely monitored by the ACCC. In particular, we recommend that any authorisation be subject to the following conditions:

- (1) Each of the applicants should be required to immediately (e.g. within two business days) notify nominated officers at the ATO and the DIBP Tobacco Strike Team of any suspected illicit tobacco products detected by the applicants. In addition, each of the applicants should be required to provide the ATO and DIBP Tobacco Strike Team with details of the basis upon which they have formed the view that sales of illicit products may have occurred in each case.

⁸ See Recommendation 6 and paragraphs 17, 26-27 of Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control. Available from: http://www.who.int/fctc/guidelines/article_5_3.pdf
See also paragraphs 25 – 28 of Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control. Available from: http://www.who.int/fctc/guidelines/article_13.pdf?ua=1

- (2) The applicants should be required to report to the ACCC on a regular basis (e.g. quarterly) with the following information:
 - (i) Details of all 'covert purchases' made by the applicants;
 - (ii) Details of any illicit tobacco sales detected (including the basis upon which the applicants have formed the view that illicit sales have occurred);
 - (iii) Full details of any action taken by the applicants in response to detected illicit sales.
- (3) The applicants should be required to refrain from making any representation or engaging in any conduct which is capable of giving retailers, wholesalers or members of the public the impression that the applicants are in any way working in collaboration or partnership with the ACCC, the ATO or the DIBP Tobacco Strike Team (or any other government department or agency).
- (4) The applicants should be required to refrain from publicly using data regarding rates of detection and surveillance as estimates of the prevalence of illicit tobacco sales (given that surveillance activity undertaken by the applicants is unlikely to be random).
- (5) Retailers should be clearly informed about the arrangement, and should be encouraged to raise any concerns they may have about the arrangement with the ACCC.
- (6) The arrangement should be subject to review by the ACCC in two years in order to allow an opportunity to identify and address any problems with the arrangement. The review should involve public consultation with interested parties.

Thank you for the opportunity to comment on the request for authorisation.

If you require any further information, please do not hesitate to contact Kylie Lindorff, Manager, Tobacco Control Policy on 9514 6462 or via email at kylie.lindorff@cancervic.org.au

Sincerely,



Todd Harper
Chief Executive Officer
Cancer Council Victoria