



3 March 2017

Mr David Jones
General Manager - Adjudication
Australian Competition and Consumer Commission (ACCC)
GPO Box 3131
Canberra ACT 2601
Email: adjudication@accc.gov.au

Dear Sir,

RE: British American Tobacco Australia Limited & Ors application for authorisation A91550

We refer to your letter dated 23 February 2017 inviting further submissions from interested parties following the Pre-Decision Conference on 13 February 2017. We have reviewed the applicants' response to the draft determination and the transcript of the Pre-Decision Conference and welcome the opportunity to make further comment.

We understand that the applicants have proposed some amendments to the application to address public detriments identified by the ACCC in its draft determination. In particular, the applicants propose:

- to issue warning letters to non-compliant retailers in the first instance, to impose a six month suspension in the second instance and 12 months for the third;
- an appeals process that includes mediation and arbitration;
- that all legitimate suppliers of tobacco can become parties to the Cooperation Deed;
- to disclose mystery shopper evidence to the relevant law enforcement agencies and Departments;
- to report regularly to the ACCC on the effectiveness of the arrangements; and
- to accept authorisation for a period of three instead of five years.

We submit that the proposed changes are unworkable and do not assuage the Commission's concerns about substantial public detriments that may flow from the proposed conduct.

Although an appeals process has been added to improve transparency and procedural fairness, retailers should not be forced to submit to mediation and arbitration (and associated legal and business costs) when the likely effectiveness of the arrangement is largely unknown. This can be considered an additional public detriment.

The applicants propose to invite all other suppliers of lawful tobacco products (including minor brands) to become parties to the Cooperation Deed, in order to address the Commission's concerns that they may selectively target retailers of competing brands. This proposal is impractical given that the parties to the Deed of Cooperation would regularly need to make consensus decisions about proposed boycotts. The proposal increases the risk of disputes between the parties to the Deed, which may preclude it from achieving its alleged objectives.

The applicants' undertaking to disclose mystery shopper evidence to the relevant Australian law enforcement agencies and Departments serves only to highlight a fundamental flaw in the application. As expressed in our previous submissions, the enforcement of laws to reduce the supply of illicit tobacco is a matter for the Australian Government. The applicants have provided

**Funded by
Community Donations**

420 Bagot Road
Subiaco WA 6008

T 08 9212 4333
F 08 9212 4334

Cancer Council **13 11 20**
for information and support
www.cancerwa.asn.au

no compelling reasons why these mystery shopping operations could not be undertaken by public officers. In New South Wales, for example, inspectors from the Department of Health recently seized around 240,000 illicit cigarettes and 24kg of loose leaf tobacco directly from retailers.¹

The amended application wholly fails to address our concern that it is a serious and unjustifiable departure from Article 5.3 of the WHO Framework Convention on Tobacco Control. This recognises that there is an irreconcilable conflict between the tobacco industry's interests and public health policy interests. The applicants' proposal is likely to give the public impression that the tobacco industry is working in partnership with Government. This may undermine public health policy to reduce the harm of tobacco and divert attention from effective tobacco control strategies.

Industry interference is especially inappropriate given that the Department of Immigration and Border Protection's legislative reform program is imminent. This is likely to strengthen the ability of the Commonwealth, state and territory law enforcement agencies to tackle illicit tobacco at all levels of the supply chain.

The Commission has acknowledged that although a substantial reduction in the market for illicit tobacco would constitute a public benefit, it is not sufficiently certain that the proposed conduct would be effective. Contrary to the applicants' most recent submission, a degree of probability is required when significant public detriments have been identified. Clearly, the application is not one where the only likely detriment is a lessening of competition. The evidentiary burden on the applicants to prove the existence of public benefits increases with the level of public detriment that is likely to result from the conduct.² The Commission's reasoning is therefore sound. The applicants' undertaking to report regularly to the ACCC does not overcome this prerequisite to authorisation.

The applicants have emphasised that the ACCC has a right to review, substitute or revoke authorisation. We submit that this has no bearing on and does not displace the statutory test that must be applied to the application in the first instance. Given that the proposed conduct would otherwise constitute a collective boycott, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the proposed conduct would result or be likely to result *in such a benefit to the public that it should be allowed* [emphasis added].³ We submit that the applicants have failed to discharge their onus and agree with the ACCC's assessment that the proposed arrangements would be unlikely to result in a net public benefit.

Cancer Council WA urges the ACCC to affirm its draft determination to deny authorisation. We thank the ACCC for the opportunity to provide comment following the Pre-Decision Conference. Please do not hesitate to contact Libby Jardine on 08 9388 4368 or email ljardine@cancerwa.asn.au if you wish to clarify any matters.

Yours sincerely,



Terry Slevin
Education & Research Director
Cancer Council WA

¹ Mazoe Ford, Australian Broadcasting Corporation, 'Illegal tobacco imports on the rise; criminals using high heels, fluffy toys to stash cigarettes' 20 February 2017. Available at: <http://www.abc.net.au/news/2017-02-20/illegal-tobacco-cigarettes-smuggled-into-australia-fluffy-toys/8285470>

² Australian Competition and Consumer Commission, Authorisation Guidelines 2013 [5.12]. Available at: <https://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf>

³ *Competition and Consumer Act 2010* (Cth) ss 90(8), 90(8B) and 90(9).