

Our reference
ECS/JC/BATA22169-9120903

Your reference
A91550

ONE ONE ONE Eagle Street
111 Eagle Street, Brisbane QLD 4000, Australia
GPO Box 9925, Brisbane QLD 4001, Australia
Tel +61 7 3228 9333
Fax +61 7 3228 9444
www.corrs.com.au



Sydney
Melbourne
Brisbane
Perth

15 March 2017

By email

Hannah Ransom
Senior Project Officer, Adjudication
ACCC

David Hatfield
Director, Adjudication
ACCC

Contact

James Cameron (07) 3228 9752
Email: james.cameron@corrs.com.au

Partner

Eddie Scuderi

Dear Hannah and David

Application for authorisation - A91550

We refer to the pre-decision conference held on 13 February 2017. This submission is made on behalf of the Applicants in response to the draft determination discussed during the conference.

1 Acknowledgement

- 1.1 The Commission has raised a number of questions about whether the proposed conduct could result in the Applicants misusing the benefit of the authorisation to target suppliers of licit tobacco products, engaging in any form of 'law enforcement', interfering with any law enforcement activities or engaging in conduct in a way that might offend the law.
- 1.2 By this letter, and in previous submissions, the Applicants have sought to address all of the Commission's concerns. Their only objective is to reduce the availability and supply of illicit tobacco. The Applicants seek to achieve that in a manner that is permitted by the law and in a way that the Commission can be satisfied will meet the statutory requirements for authorisation.
- 1.3 The application for authorisation enjoys strong support from a number of significant retailer organisations and has not been opposed by the Department of Immigration and Border Protection, being the agency responsible for front-line law enforcement against illicit tobacco.
- 1.4 The public benefits that the Applicants have identified are significant, strongly supported by a range of interested parties and clearly outweigh the matters identified by the Commission and which have been addressed by this and previous submissions.

- 1.5 No material detriment to competition has been identified by the Commission or any third party submission.
- 1.6 The Applicants are seeking to cooperate for a limited period of time for the express purpose of protecting themselves and retailers of lawful tobacco products from illegal conduct. As a matter of principle, the Commission should not favour an outcome that would protect illegal trade.

2 Executive summary

- 2.1 This submission addresses matters raised in the draft determination and in the conference.
- 2.2 A table of the relevant issues, and how the Applicants propose to address each of them, is set out in the table at paragraph 3.1 of this submission.
- 2.3 In particular, in this submission the Applicants have:
- (a) clarified that mystery shopper conduct does **not** form part of the conduct for which authorisation is sought or required;
 - (b) changed the method by which they propose to collect evidence through their respective evidence-gathering programs so that it **does not involve any sale or purchase of suspected illicit tobacco product** occurring as part of any evidence-gathering program; and
 - (c) proposed a range of conditions on which authorisation could be granted so as to address any and all issues raised by the draft determination. Those conditions include matters relevant to independent appeal processes, length of boycott, reporting to and communication with law enforcement agencies responsible for enforcement in relation to illicit tobacco.
- 2.4 Retailer organisations (which represent the participants in the market that would be most affected by the proposed conduct), have made written and oral submissions in support of the proposed conduct.
- 2.5 The proposed conduct has significant potential to create an industry-wide disincentive for retailers and wholesalers to engage in, or to continue to engage in, the supply of illicit tobacco and should be given an opportunity to be tested through the three year authorisation now being proposed.

3 Summary of issues addressed by the Applicants

- 3.1 The following table summarises issues raised in the draft determination and the pre-decision conference and how the Applicants have addressed each of them:

Item	Issue raised	How the Applicants have addressed the issue
1.	Lawfulness of mystery shopper conduct.	Mystery shopper conduct does not form part of the conduct for which authorisation is sought or required.

		<p>In any case, in response to the Commission's stated concerns, the Applicants have altered the means by which they will gather and use evidence to establish whether product is illicit for the purpose of taking the action for which authorisation is sought.</p> <p>The revised means include:</p> <ul style="list-style-type: none"> • evidence will now be acquired without a sale or purchase of any suspected illicit product occurring, thereby avoiding any alleged contravention of provisions that are dependent on a sale or purchase occurring (see section 6 of this submission for more detail on this condition); ▪ agreeing to promptly inform law enforcement agencies and relevant Departments of evidence acquired by the Applicants; • agreeing not to proceed with boycott action against a retailer/wholesaler if advised not to take such action by a law enforcement agency or Department; and • proposing that any authorisation granted be subject to a condition that, if any method of evidence collection is held by a court to contravene the law, the Applicants will (subject to the exhaustion of any appeal rights of one or more of the Applicants) cease using that method of evidence collection for the purposes of the proposed conduct. <p>The Applicants submit that these clarifications and steps thoroughly address the issues raised by the Commission and interested parties with respect to the mystery shopper programs previously proposed as a means of gathering evidence.</p>
2.	Alleged non-compliance with Article 5.3 of the World Health Organisation Framework Convention for Tobacco Control.	<p>Certain interested parties have raised Article 5.3 as being relevant to the proposed conduct on the purported basis that any cooperation between the tobacco industry and government would contravene Article 5.3, including the proposed conduct.</p> <p>These arguments misinterpret the intent and meaning of Article 5.3. They have been comprehensively rebutted by the Applicants in section 2 of their submission dated 23 November 2016. For reference, a copy of that submission is attached to this submission.</p> <p>The submissions of interested parties with respect to Article 5.3 also ignore the fact that government and law</p>

		<p>enforcement have, for some time, actively engaged with each other to combat illicit tobacco.</p> <p>The submissions of interested parties with respect to Article 5.3 also ignore the fact that the Department of Border Protections' 'Industry Engagement Strategy 2020' "reaffirms [its] commitment to working with industry in a strategic, forward-focussed partnership".¹</p> <p>The Applicants conduct a lawful business. The proposed conduct involves the Applicants ceasing supply of their own lawful products to retailers and wholesalers engaged in an illegal trade.</p> <p>The conduct for which authorisation is sought is not being proposed with a view to influencing current or future public health policies of government with respect to tobacco control. It is complementary to existing government policy on tobacco control measures.</p>
3.	Proposed legislative reforms are underway.	<p>At the pre-decision conference, a representative of the Department of Immigration and Border Protection (DIBP) stated that the DIBP hoped to be in a position to share further detail about planned legislative reforms during the next round of consultation by the Commission on this matter.² As at the 6 March 2017 cut-off date for submissions by interested parties, no such details have been received.</p> <p>The Applicants note the DIBP's submission of 4 November 2016 that the 'application does not impact directly on border controls, legislation or activities'.³</p> <p>While the Applicants agree that there is a need for law reform to combat the trade in illicit tobacco, the unknown scope, nature and timing of the reforms mean that it is not appropriate for the Commission to take them into account in making its final determination.</p> <p>Even if any proposed reforms were known:</p> <ul style="list-style-type: none"> (a) there is no certainty that those reforms will become law; (b) there is no certainty that they would be implemented in the form in which they are proposed; and

¹ Department of Immigration and Border Protection, Industry Engagement Strategy 2020 (Trade, Customs and Traveller) (2015), p. vi.

² See minutes of pre-decision conference, page 8.

³ Department of Immigration and Border Protection submission (4 November 2016).

		<p>(c) they may not become effective within the three year authorisation period proposed by the Applicants.</p> <p>If the proposed reforms only target border protection issues, they will not operate at the retail or wholesale level where the proposed conduct will be targeted.</p> <p>In any case, if the law substantially changes during the term of the authorisation in a way that removes the justification for the proposed conduct, the Commission could then review the authorisation.</p>
4.	Risk of inadvertent interference with law enforcement activities.	<p>As discussed above, the DIBP considers that this application "does not impact directly on border controls, legislation or activities".</p> <p>The Department of Health speculates that the application might interfere with investigations, but goes on to note that this area "does not fall within the policy remit of the department".</p> <p>In any event, prior to the Applicants taking steps against any retailer or wholesaler that is suspected to have been supplying, or attempting to supply, illicit tobacco, they will:</p> <ul style="list-style-type: none"> (a) notify and disclose evidence acquired by the Applicants to the relevant law enforcement agencies and Departments; and (b) not take any action against the retailer or wholesaler if the relevant law enforcement agencies advise the Applicants not to take such action. <p>Details of this proposed conduct is set out in the annexure to this submission.</p>
5.	Retailers can switch to other sources of supply of the Applicants' lawful tobacco products.	<p>Currently, if one of the Applicants unilaterally ceased supply, it is a simple matter for the retailer/wholesaler to replace the products of that Applicant with those of the other Applicants.</p> <p>It is possible for retailers to switch to other sources if all three Applicants were to cease supply. However, any such supply would likely be on significantly less favourable terms of trade to those offered by the Applicants.</p> <p>The ability of a retailer to switch to an alternative source of supply would not, in the Applicants' view, meaningfully detract from the effectiveness of the proposed conduct.</p>
6.	Retailers could decide to start selling only illicit tobacco.	<p>It is unlikely that a retailer would elect to start selling only illicit tobacco. To do so would remove the 'cover' that such</p>

		<p>retailers use to conceal their supply of illicit tobacco and to switch consumers of licit tobacco products to illicit product.</p> <p>Switching to selling solely illicit tobacco would also substantially increase the risk of the retailer becoming known and identified as a supplier of illicit tobacco because the only tobacco product supplied by the retailer would be illicit.</p> <p>Retailers that supply licit tobacco (and which also supply illicit tobacco) are set up as legitimate legal entities with known owners and a business reputation. The owners of such a business would find it difficult to convert to majority illegal sales quickly enough to cover their overheads because the majority of smokers request licit product and that product would cease to be available from that retailer.</p>
7.	Retailers would not have any opportunity for independent review of a decision made by the Applicants that the retailer has supplied illicit tobacco.	<p>The Applicants have addressed this concern by altering their proposed conduct to include a right for any retailer or wholesaler to require the Applicants to submit to independent review of the decision by mediation and/or arbitration through the Australian Disputes Centre.</p> <p>Details of this independent review process are set out in the annexure to this submission.</p>
8.	Uncertain length of boycott of a retailer.	<p>The Applicants have proposed clear and certain timeframes for the boycott of a retailer/wholesaler found to have been supplying, or attempting to supply, illicit tobacco.</p> <p>Details of the boycott timeframes are set out in the annexure to this submission.</p>
9.	Uncertainty that the proposed conduct would be effective.	<p>The Applicants note that the Commission has formed the view that <i>"a substantial market in illicit tobacco exists and that any reduction in this market would constitute a benefit"</i>.⁴ The Applicants agree with this view.</p> <p>The Applicants also note that the Commission acknowledges that <i>"Government enforcement agencies have previously identified a range of limitations on their ability to investigate and prosecute illicit tobacco offences."</i>⁵</p> <p>Further, the Applicants note that the Chair of the Parliamentary Joint Committee on Law Enforcement in the hearing into illicit tobacco on 23 November 2016, reiterated his suggestion to the Applicants that they pursue the very</p>

⁴ ACCC, draft determination, paragraph 56.

⁵ ACCC, draft determination, paragraph 36.

		<p>conduct that is the subject of this application for authorisation by stating the following:</p> <p><i>"It was my suggestion to make an authorisation for the ACCC process, firstly, to protect the legitimate retailer that is doing the right thing and, secondly, to protect government revenue, because we see that this issue is going to continue to expand as the legislation we have in place increases the government revenue."</i>⁶</p> <p>It is the availability and supply of illicit tobacco at the wholesale and retail level that the proposed conduct has the potential to significantly reduce. The Applicants consider that this potential public health benefit alone should be given significant weight.</p> <p>Quantitative consumer survey data supports the Applicants' analysis that the bulk of supply of illicit tobacco to consumers occurs through existing retail channels. Based on consumer surveys conducted by Roy Morgan Research, approximately 70% of unbranded tobacco is sourced by consumers from retailers of legal tobacco products, including independent supermarkets, tobacconists, convenience stores, service stations and newsagencies.⁷</p> <p>The problem at the retail level is supported by the high proportion of submissions made by retailer associations confirming the Applicants' analysis about the problem at the retail level and how it impacts on retailers that are not breaking the law by selling illicit tobacco. Those submissions include oral submissions at the pre-decision conference by:</p> <ul style="list-style-type: none"> • Mr Jeff Rogut, CEO, Australasian Association of Convenience Stores; • Mr Fred Harrison, CEO, Ritchies Supermarkets; • Mr Heath Michael, Director of Policy, Australian Retailers' Association; and • Mr Jos de Bruin, CEO, Master Grocers' Association. <p>The Applicants acknowledge that the Commission's current position (as expressed in the draft determination) is that it is</p>
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⁶ Commonwealth of Australia, Proof Committee Hansard, Parliamentary Joint Committee on Law Enforcement into illicit tobacco (23 November 2016), Canberra, page 24.

⁷ See summary of quantitative data extracted from Roy Morgan Research surveys at Annexure A of the Applicants submission in response to the draft determination dated 19 January 2017.

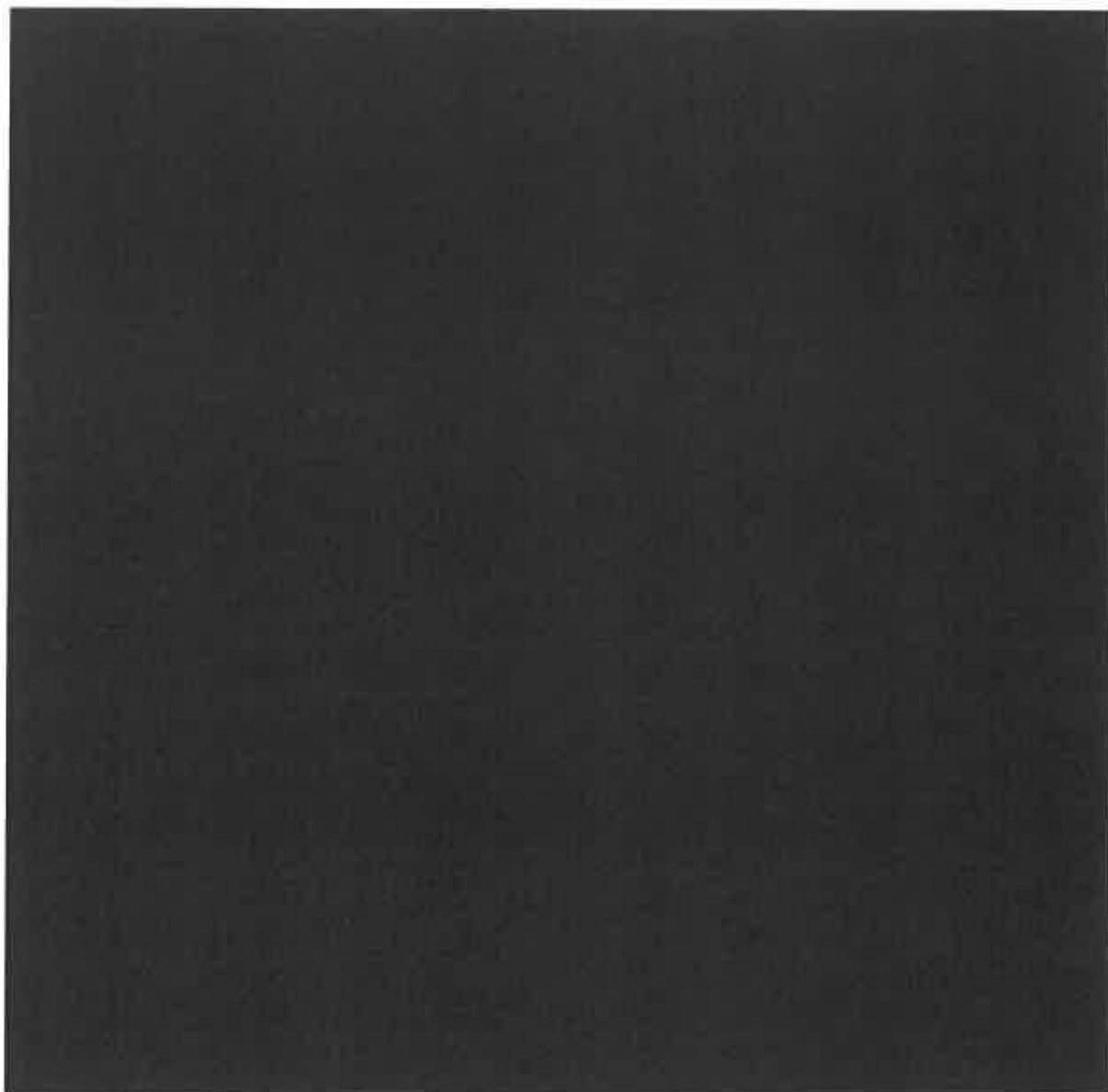
		<p>not sufficiently certain that the proposed conduct would be effective.</p> <p>The Applicants' primary submission is that, given the acknowledged scale and highly damaging nature of the illicit trade problem (and related criminality), the current issues in effectively tackling it and the desirability of securing "<i>any reduction in this market</i>", there is a strong net public benefit in permitting the proposed conduct. Only then can a proper and meaningful assessment of its effectiveness in contributing to reducing the volume of illicit trade and/or deterring such conduct in the future be made.</p> <p>The Applicants have also proposed a reduction in the term of the authorisation from five years to three years, which will give the Commission the ability to assess the effectiveness of the authorised conduct sooner, should the Applicants wish to apply for a fresh authorisation.</p> <p>The Applicants also note that the Commission has the power to review an authorisation at any time after it has been granted and, following consultation with interested parties, substitute or revoke the authorisation.⁸</p>
10.	The Applicants are likely to selectively target retailers of competing brands.	<p>The Applicants note that the proposed conduct is aimed at targeting illicit tobacco, not any suppliers of lawful tobacco products that may compete with those of the Applicants.</p> <p>Nonetheless, the Applicants acknowledge the Commission's concerns about the potential targeting of smaller suppliers and have addressed those concerns by offering for other suppliers of lawful tobacco products (including minor brands) who may wish to participate in the proposed conduct to become a party to the Cooperation Deed.</p> <p>For clarity, the Applicants would not agree to any supplier of tobacco products that has in the past been found to have supplied, or is currently under investigation by law enforcement agencies for supplying, illicit tobacco products becoming party to the Cooperation Deed.</p> <p>Finally, the Applicants will not engage in the proposed conduct unless the objective evidence (not their subjective opinions) clearly substantiates the supply or attempted supply of:</p> <p>(a) illicit 'picture packs', including counterfeit and contraband picture packs (for clarity, these are packs</p>

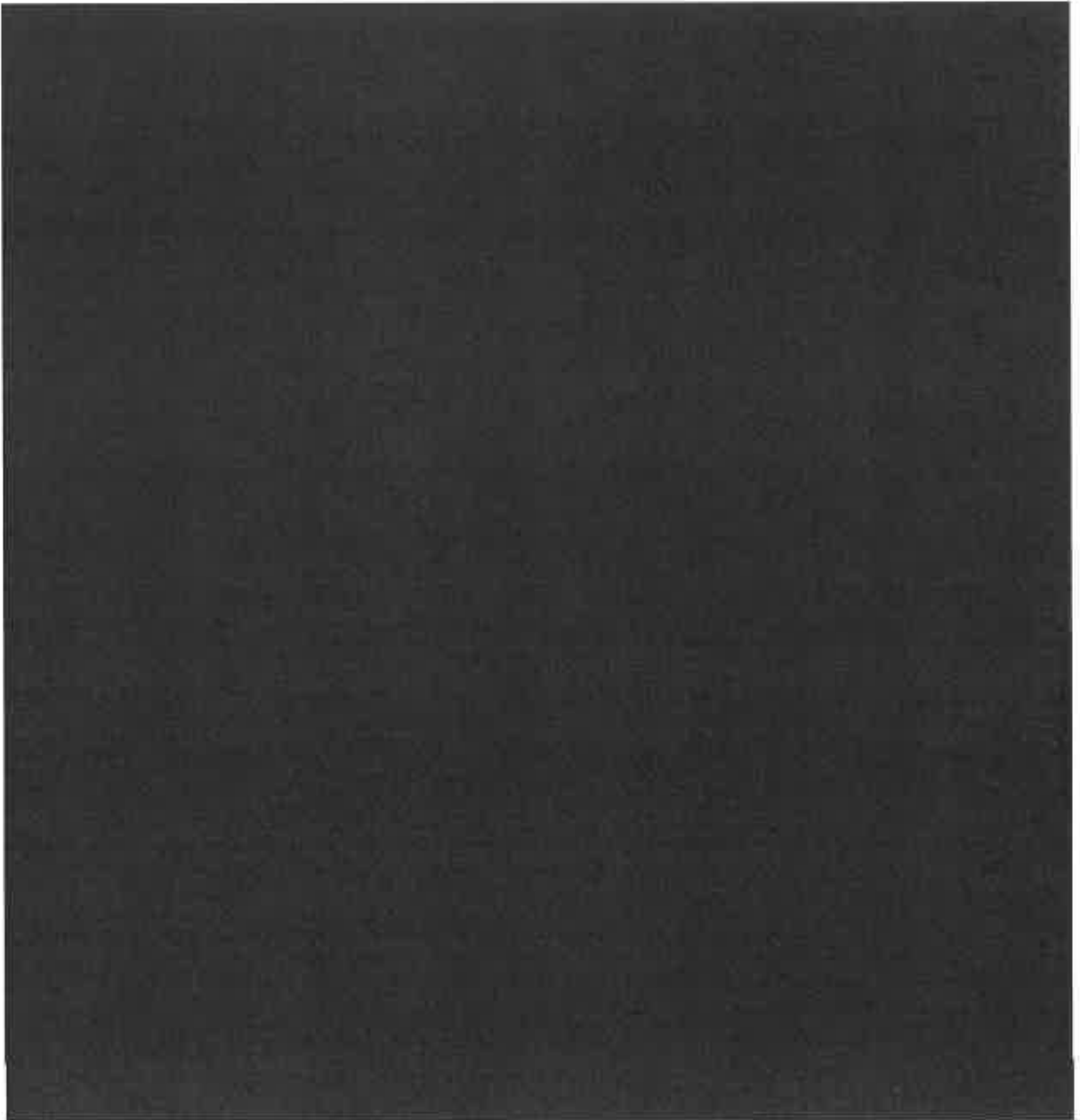
⁸ Competition and Consumer Act 2010, sections 91B and 91C.

		<p>that include, trade marks, logos or other branding on the pack);</p> <p>(a) illicit chop chop tobacco (including loose chop chop in bags and pre-filled tubes of chop chop); or</p> <p>(b) illicit shisha.</p> <p>('Non Plain-Pack Illicit Tobacco').</p> <p>The Applicants are willing to agree to this condition to address concerns of the Commission about the Applicants potentially targeting smaller licit tobacco suppliers for technical breaches of the plain packaging legislation - only evidence of picture packs, chop chop and illicit shisha will be used to trigger the proposed conduct.</p> <p>Limiting the type of evidence used to trigger the proposed conduct will not reduce the effectiveness of the proposed conduct because Non Plain-Pack Illicit Tobacco comprises the majority of illicit tobacco supplied in Australia. For example, the Q4 2015 Empty Pack Survey (EPS) conducted by MSI Intelligence Research found that none of the counterfeit packs collected as part of the EPS were in plain packaging.⁹</p> <p>Non-compliant plain packs comprise a very small percentage of the illicit market, so excluding them as a form of evidence will not reduce the effectiveness of the proposed conduct over the short three year term of authorisation.</p>
11.	Applicants could selectively choose the retailers or wholesalers that are targeted by their evidence collection programs.	<p>Each Applicant's evidence collection activity has for some time been informed by several streams of market intelligence, which are used to determine where to undertake evidence collection, including:</p> <ul style="list-style-type: none"> • Retailers: retailers directly inform an Applicant when they see illegal tobacco being supplied by other retailers; • Field operatives: retailers tell field operatives about suppliers of illicit tobacco or those field operatives witness the supply of illicit tobacco themselves; • Market surveys: highlighting geographies of higher risk, channels of higher risk; and • Historical evidence: where an Applicant has evidence that illicit tobacco has been supplied by a retailer in the past.

⁹ KPMG 2015 Full Year Report (15 April 2016), page 44.

		<p>In short, there is no single source of intelligence about illicit tobacco supplies and the Applicants do not influence, or seek to influence, those sources. Each of the Applicants treat such intelligence as an indication of areas for focus.</p> <p>Once the areas of focus are determined, the Applicants gather evidence based on those areas of focus.</p> <p>The targeting of evidence collection is based only on market information, not on any existing supply arrangements or on the basis of giving 'preferential treatment' to particular customers of one or more of the Applicants.</p>
12.	The proposed conduct amounts to a 'blunt instrument' in contrast to the more direct and proportionate approach of law enforcement.	<p>The Applicants do not consider that it is fair or appropriate to describe the proposed conduct as a 'blunt instrument'. Indeed, the proposed conduct constitutes a proportionate, measured and reasonable approach involving:</p> <ul style="list-style-type: none"> • careful evidence collection; • staged periods for cessation of supply; and • an independent appeals process. <p>In addition, the approach proposed by the Applicants is strongly supported by retailer organisations, lending support to the view that the proposed conduct does not amount to a 'blunt instrument'.</p>





5 Amendments to section 3 of supporting submission

5.1 The annexure to this submission replaces section 3 of the Applicants' supporting submission dated 25 August 2016 and consolidates:

- (a) clarifications given in the Applicants' submission dated 19 January 2017 and in this submission;
- (b) amendments to:
 - (i) address concerns held by the Commission and interested parties; and



- (ii) reflect proposals made by the Applicants in their 19 January 2017 and in this submission.

5.2 The annexure significantly narrows the scope of proposed conduct and provides more detailed information about particular aspects of the proposed conduct.

6 Conduct for which authorisation is not sought

6.1 Interested parties and the Commission have raised potential public detriments about conduct for which authorisation is not sought or required.

Evidence collection does not form part of the conduct for which authorisation is sought or required

6.2 Information about particular methods of acquisition of evidence was provided in the original application to provide background.

6.3 However, the conduct of acquiring such evidence:

- (a) is not conduct for which authorisation is required under the *Competition and Consumer Act 2010* (Cth) because, as stated in the original application,¹⁴ it does not involve any joint conduct between the Applicants (each Applicant operates, and will continue to operate, its own programs for identification of potentially illicit product independently of the other Applicants); and
- (b) does not form part of the conduct for which authorisation is being sought by the Applicants.

Evidence will be acquired without any sale or purchase occurring

6.4 In any event, the Applicants acknowledge the Commission's concern with respect to evidence acquired by way of mystery shopper purchases and will alter the means by which evidence of potentially illicit trade is collected for the purposes of the conduct for which authorisation is sought.

6.5 The Applicants have received legal advice with respect to these alternative methods of evidence collection and will continue to do with respect to any changes to the surveillance laws applicable in each State and Territory.

6.6 Where it is lawful to do so, evidence will be gathered by means of photographic, video and audio evidence rather than by sale and purchase of product. Evidence collected by these means will:

- (a) be an effective means of identifying Non Plain-Pack Illicit Tobacco (as defined in item 10 of the table above) because images of those forms of illicit tobacco will readily identify whether the product is illicit or not;
- (b) provide the retailer with clearer evidence (by way of audio, photographic and video evidence) to demonstrate that the retailer was in possession of and attempted to sell Non Plain-Pack Illicit Tobacco; and

¹⁴ See paragraph (a) in section 3.2 of supporting attachment to Form A Application for Authorisation, which stated that the acquisition of evidence by way of mystery shopper programs is performed 'individually'.

- (c) not involve any 'sale' or 'purchase' for the purposes of the *Tobacco Plain Packaging Act 2011* (Cth) such that no purported contravention of any provisions of the *Tobacco Plain Packaging Act 2011* (Cth) or any other legislation that are conditional on a supply, sale or purchase would occur.

- 6.7 Where it is not lawful to collect evidence by the means specified in paragraph 6.6 above, the Applicants will collect evidence by means of sworn affidavits or statements by trained operatives detailing their interaction with the sales assistant that made an offer to sell illicit tobacco to the operative. Those interactions will be conducted without the operative proceeding with any purchase of the illicit tobacco offered to them and without the use of any audio, photographic or video recording devices. Where this means of evidence collection is used, different operatives will visit the retailer/wholesaler on different days. The sworn affidavits or statements of the operatives will only be used, and that the evidence will only trigger the proposed conduct, where the sworn affidavits or statements of **two or more** of them confirms that illicit tobacco was offered to them for purchase by that retailer or wholesaler.
- 6.8 The Applicants confirm that the evidence collected in the manner proposed in paragraphs 6.6 and 6.7 above (without any sale or purchase occurring) may still be challenged by a retailer/wholesaler through the independent mediation and arbitration process that forms part of the proposed conduct described in the annexure to this submission.
- 6.9 Further, the Applicants are willing to agree to a condition of authorisation that, if any method of evidence collection used for the proposed conduct is held by an Australian court to contravene the law, the Applicants will (subject to the exhaustion of any appeal rights of one or more of the Applicants) cease using that method of evidence collection for the purposes of the proposed conduct.
- 6.10 Finally, the Applicants will liaise with law enforcement agencies and relevant Departments by providing them with evidence acquired through their evidence-gathering programs and will not proceed with action against a retailer/wholesaler where the law enforcement agency advises the Applicants not to proceed with such boycott action.

7 Period for which authorisation is sought

- 7.1 Authorisation is sought for a period of three years, instead of the originally proposed five year period.
- 7.2 The Applicants submit that a three year period is a reasonable and relatively short period of authorisation that is appropriate for the Applicants to implement and assess the effectiveness of their proposed conduct.

8 Conclusion

- 8.1 The Applicants have adopted an open and transparent approach throughout this matter and have provided quantitative evidence prepared by respected consultants, KPMG and Roy Morgan Research, to support their submissions.

- 8.2 The DIBP has acknowledged that distribution channels for illicit tobacco follow similar distribution and sales patterns as duty-paid tobacco.¹⁵ In addition, it is clear from quantitative evidence supplied with the application for authorisation that the bulk of illicit tobacco is supplied through existing retail channels.¹⁶
- 8.3 The proposed conduct will directly target tobacco retailers and wholesalers that are customers of one or more of the Applicants that are supplying illicit tobacco to Australian consumers.
- 8.4 If authorised, the proposed conduct will not only send a message to those that trade in illicit tobacco, it will prevent those retailers/wholesalers from switching between the Applicants for the acquisition of licit tobacco products commonly used as a 'cover' by those retailers for their trade in illicit tobacco.
- 8.5 In 2016, the Chair of the Parliamentary Joint Committee on Law Enforcement inquiry into illicit tobacco had the benefit of considering over 160 submissions on the issue of illicit tobacco and presided over public hearings held by the Parliamentary Joint Committee. Those submissions and hearings were arguably more comprehensive and detailed than those involved in this authorisation process.
- 8.6 Having had the benefit of considering all submissions and presiding over public hearings held by Parliamentary Joint Committee on Law Enforcement inquiry into illicit tobacco, the Chair, in addressing the Executive General Manager, Merger and Authorisation Review Division of the Commission, made the following comments (emphasis added):¹⁷

You probably missed some of the evidence we had before from the AFP and Border Protection. There are all these different jurisdictions, and they are looking at different angles to crack down on this illegal market, but there is not a lot being done in the retail sector. The fact that these products are being sold so openly over the counter with seemingly no sanction from anyone is legitimising the illegal product; is a boon for smugglers, outlaws, criminals and gangs; and is affecting government revenue.

So they are just a few things that I would like you to take on board. I am talking as the committee chair. I see it in the genuine public interest. And this is probably one of the rare occasions where I would say prefer large companies to boycott small businesses. I cannot think of any other circumstances where I would say this is what you should do. Normally I would be on the other side of the argument, as Nigel knows. But I think in this case there is a clear public interest, this authorisation being granted.

- 8.7 The views of the Chair of the Parliamentary Joint Committee should be accorded the weight they deserve. He was in a unique and very informed position. His

¹⁵ Department of Immigration and Border Protection, Inquiry into Illicit Tobacco (Submission no. 77), 4.

¹⁶ Based on consumer surveys conducted by Roy Morgan Research approximately 70% of unbranded tobacco is sourced by consumers from retailers of legal tobacco products, including independent supermarkets, tobacconists, convenience stores, service stations and newsagencies (see summary of quantitative data extracted from Roy Morgan Research surveys at Annexure A of the Applicants' submission dated 19 January 2017).

¹⁷ Commonwealth of Australia, Proof Committee Hansard, Parliamentary Joint Committee on Law Enforcement into illicit tobacco (23 November 2016), Canberra, page 24.

views are not merely 'passing comments'. The Chair's views would appear to cast serious doubt on the Commission's position (as stated in its draft determination) that the proposed conduct is unlikely to have any significant impact on the availability and supply of illicit tobacco at the retail level. The Chair's views clearly support the Applicants' position that the proposed conduct should be authorised and is very likely to be effective if implemented.

- 8.8 As a matter of principle, and in the face of such strong support from retailer associations and the informed and considered views of the Chair of the Parliamentary Joint Committee, the Commission should not favour an outcome that would only serve to protect illegal trade, particularly when all public detriments raised by the Commission in its draft determination have now been thoroughly addressed by the Applicants in a public and transparent forum.
- 8.9 In particular, alleged public detriments have now (through the range of measures proposed by the Applicants) either been eliminated or limited to a point where it is, in the Applicants' opinion, no longer reasonable, nor appropriate, for the Commission to afford those public detriments any significant weight in performing its balancing exercise.
- 8.10 For the reasons set out in section 5 of the Applicants' supporting submission dated 25 August 2016, the Applicants submit that the extensive public benefits of the proposed contract and arrangement between them will significantly outweigh any public detriment, particularly given the clarifications and amendments effected by this submission.
- 8.11 The Applicants respectfully request that the Commission re-evaluates its draft decision in light of the significant and extensive clarifications, amendments and conditions proposed in this and previous submissions of the Applicants.

Thank you for the opportunity for the Applicants to provide this submission.

If you have any questions about this submission, please contact us to discuss.

Yours faithfully
Corrs Chambers Westgarth



Eddie Scuderi
Partner

Attachment

Applicants' submission dated 23 November 2016.

Annexure

Proposed conduct

3 Contract, arrangement or understanding

Sharing of evidence and type of illicit tobacco targeted

- 3.1 Following the independent acquisition of evidence of a retailer or wholesaler supplying, or attempting to supply, illicit tobacco, the Applicant that has acquired that evidence must notify the other Applicants of the evidence regardless of the identity of the retailer/wholesaler.
- 3.2 This notification would be made to ensure that the boycott decision is automatic and based on objective factual evidence, as well as to ensure that there is no preferential treatment of retailers or wholesalers that may be perceived as being a 'preferred' retailer or wholesaler of one or more of the Applicants.
- 3.3 The Applicants will not engage in the proposed conduct unless the evidence clearly substantiates the supply or attempted supply of:
- (a) picture packs, including counterfeit and contraband picture packs (these are packs that clearly do not comply with plain packaging legislation by including trade marks, logos or other branding on the pack);
 - (b) chop chop tobacco (including loose chop chop in bags and pre-filled tubes of chop chop); or
 - (c) illicit shisha.
- (together, '**Non Plain-Pack Illicit Tobacco**').
- 3.4 The effect of the Applicants agreeing to only allow evidence of the supply or attempted supply of Non Plain-Pack Tobacco to trigger the proposed boycott conduct is that they will not be able to use purely 'technical' breaches of the plain packaging legislation to target minor tobacco brands.

Joint letter to retailer/wholesaler

- 3.5 If the evidence shared between each of the Applicants demonstrates that there has been a supply or attempted supply by a retailer or wholesaler of any Non Plain-Pack Illicit Tobacco, the Applicants will cause a joint letter from them to be served upon (or delivered by some other method that enables proof of delivery to be established) the retailer/wholesaler that:
- (a) informs the retailer/wholesaler that the Applicants have evidence that the retailer/wholesaler has supplied or attempted to supply Non Plain-Pack Illicit Tobacco;
 - (b) provides details of the reasons why the tobacco involved in the supply or attempted supply is considered to be illicit;

- (c) informs the retailer/wholesaler of:
 - (i) the avenues available to it to challenge the decision through independent mediation or arbitration through the Australian Disputes Centre; and
 - (ii) that the retailer/wholesaler has a 14 day period from the date of the service of the letter within which to notify the Applicants of the retailer's/wholesaler's request to challenge;
- (d) subject to any request by the retailer/wholesaler to challenge evidence through the ADC process, seeks a written undertaking from the retailer/wholesaler that they will cease and desist from supplying or attempting to supply illicit tobacco from a specified date;
- (e) advises that, should the retailer/wholesaler:
 - (i) fail to provide the undertaking within 14 days of the date of the letter; or
 - (ii) if a mediation or arbitration process has been conducted and the outcome of that process is an agreement or finding (as applicable) that the retailer/wholesaler supplied, or attempted to supply, Non Plain-Pack Illicit Tobacco, fail to provide the undertaking within 7 days of the date of the agreement or finding; or
 - (iii) fail to comply with any undertaking given by the retailer or wholesaler (as demonstrated by further evidence collected, such evidence able to be challenged by the retailer/wholesaler through the same process described in paragraph 3.5(c)),

the Applicants will jointly cease supply of their lawful tobacco products to the retailer/wholesaler for the periods set out under paragraphs 3.7 and 3.8 below.

Joint cessation of supply

- 3.6 Should any of the events contemplated by paragraph 3.5(e) occur, the Applicants may, by immediate notice to the retailer/wholesaler, jointly cease supply of their illicit tobacco products for the periods of time specified under paragraphs 3.7 and 3.8 below.
- 3.7 The following periods will apply to joint cessation of supply:
 - (a) for the first instance in which a retailer or wholesaler has failed to comply with any of the requirements in paragraph 3.5(e), 6 months;
 - (b) for the second instance in which a retailer or wholesaler has failed to comply with any of the requirements in paragraph 3.5(e), 12 months; and
 - (c) for the third instance in which a retailer or wholesaler has failed to comply with any of the requirements in paragraph 3.5(e), permanent cessation of supply.

- 3.8 Where the retailer or wholesaler has requested mediation and/or arbitration, the cessation of supply would only occur:
- (a) following completion of the mediation and/or arbitration process (and any genuine appeal flowing from it); and
 - (b) where the dispute process has progressed beyond mediation through to arbitration, only where:
 - (i) the mediation results in an agreement between the Applicants and the retailer/wholesaler that the retailer/wholesaler supplied or attempted to supply illicit tobacco; or
 - (ii) the arbitration decision is made in favour of the Applicants that the evidence acquired is evidence of the supply or attempted supply of Non Plain-Pack Illicit Tobacco.

- 3.9 For clarity, a retailer or wholesaler may request both mediation and (if the mediation does not resolve the dispute), arbitration.

Reporting by the Applicants

- 3.10 The Applicants will jointly report to the Commission on a 6 monthly basis providing the following information:
- (a) the number of transactions conducted to collect evidence, broken down by Applicant;
 - (b) the number of those transactions that identified illicit tobacco;
 - (c) whether any retailers or wholesalers requested mediation or arbitration following receipt of a letter served by the Applicants under clause 3.5 above;
 - (d) the action taken against the retailer or wholesaler (for example, cessation of supply for 6 months); and
 - (e) the Applicants' assessment of the impact of the conduct, as supported by any qualitative and quantitative evidence available.

Joint communication with law enforcement agencies

- 3.11 Prior to the Applicants taking steps against any retailer or wholesaler that is found to have been supplying illicit tobacco, the Applicants will:
- (a) notify and disclose the evidence acquired by the Applicants to the relevant law enforcement agencies and Departments (namely, the Australian Tax Office, the Department of Immigration and Border Protection, the Australian Federal Police and relevant State and Territory law enforcement involved in combating the trade in illicit tobacco); and
 - (b) provided those agencies respond to the Applicants within a reasonable period of time of being notified of the new evidence by the Applicants (which the Applicants propose be a period of 14 days), not take any action against the retailer or wholesaler should any of those agencies so request

(for example, where the relevant agency considers that the proposed conduct may jeopardise a current or planned law enforcement activity in which the retailer or wholesaler may be implicated).

Authorised conduct will be open to other licit tobacco suppliers

- 3.12 The Applicants will allow other suppliers of lawful tobacco products in Australia (including minor brands) who may wish to participate in the proposed conduct to become a party to the Cooperation Deed.
- 3.13 The Applicants would not agree to any supplier of tobacco products that has in the past been, or is currently, under investigation by Australian law enforcement agencies for supplying illicit tobacco products becoming party to the Cooperation Deed.