



6 April 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 March 2017 inviting further submissions from interested parties and extending the statutory date. We have reviewed the applicants' further submission dated 15 March 2017 and welcome the opportunity to make a responsive submission.

We reiterate the myriad of concerns we have expressed previously, although little purpose would be served to repeat them in this submission. The applicants have, however, made a contention that cannot go unchallenged. It is alleged in their most recent submission that interested parties have misinterpreted the intent and meaning of Article 5.3 of the World Health Organisation Framework Convention on Tobacco Control (FCTC). The applicants submit that apart from matters of transparency, Article 5.3 has no bearing on the application. We respectfully disagree, for the reasons given below.

Article 5.3 of the FCTC, to which Australia is a Party and legally bound, requires that, "in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."

In order to ascertain the proper meaning and application of Article 5.3, we invite the Commission to consider the text itself, the preamble to the FCTC, official Implementation Guidelines and the Interpretive Declaration made by the Australian Government in 2015.

Preamble

The preamble to the FCTC recognises that the Parties, "need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts." In our view, this colours the meaning of Article 5.3.

The applicants assert that 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." With respect, such a bare assertion cannot be taken at face value. The tobacco industry has a long history of opposing, delaying and diluting effective tobacco control strategies.

By way of recent and pertinent illustration, the applicants campaigned aggressively against the introduction of plain packaging by claiming that it would facilitate the illicit trade in tobacco.¹ In

¹ Scollo, MM, Freeman, B, & Greenhalgh, EM. 11.10 Packaging as promotion. In Scollo, MM and Winstanley, MH [editors]. Tobacco in Australia: Facts and issues. Melbourne: Cancer Council Victoria; 2016. Available

2011, this message was conveyed in a prominent mass media campaign by the Alliance of Australian Retailers, which was later shown to be orchestrated and funded by the applicants.

Peer-reviewed research indicates that there has been no change in smokers' reported use of unbranded illicit tobacco since the implementation of Australia's plain packaging legislation.² The Department of Health's review of the legislation supports this finding, and includes the observation that plain packaging has not had a substantive impact on the illicit tobacco market in Australia, if there has been any impact at all.³

Notwithstanding the lack of evidence, the applicants continue to falsely assert that plain packaging has fuelled the illicit trade, and even made this assertion in their initial application for authorisation.

In our view, illicit trade is not an issue in which the interests of the tobacco industry and government are perfectly aligned. The preamble indicates that 'public health policies' in Article 5.3 should be seen to encompass policies and practices of government concerning the illicit trade in tobacco products.

Implementation Guidelines

Article 5.3 is considered one of the most important overarching provisions of the Convention and, as such, Implementation Guidelines have been developed by the Conference of Parties.⁴ The Guidelines urge Parties to apply the recommended measures as broadly as necessary, in order best to achieve the objectives of Article 5.3 of the FCTC. The Guidelines include Guiding Principles, the first of which highlights that, "there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests."

To avoid tobacco industry interference in public health policies, the Guidelines recommend that Parties, "reject partnerships and non-binding or non-enforceable agreements with the tobacco industry." Authorisation has been sought by the applicants because it involves organised, joint action between three major tobacco companies by way of targeted boycotts. Even if, as submitted by the applicants, the conduct does not require, contemplate or rely upon any government agency involvement, authorisation of the conduct by the Commission could create a perception of cooperation or partnership with government. Even if such a perception is unwarranted, as argued by the applicants, it has the potential to undermine or subvert tobacco control efforts.

The Guidelines caution that, "the tobacco industry conducts activities described as socially responsible to distance its image from the lethal nature of the product it produces and sells or to interfere with the setting and implementation of public health policies." We have previously expressed concerns that the tobacco industry has exaggerated the size of the illicit tobacco market in Australia to divert attention from the harms caused by its lawful product. Although the applicants assert that their application is 'genuine', there is a risk that the conduct could be promoted as a public relations exercise and to foster a perception of social responsibility.

Chapter <http://www.tobaccoinaustralia.org.au/chapter-11-advertising/11-10-tobacco-display-as-advertising1/#x11.10.6>

² 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>.

³ 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>

⁴ Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry. Available at: http://www.who.int/fctc/guidelines/article_5_3.pdf?ua=1

Interpretive Declaration

On 5 January 2015, the Minister of Foreign Affairs of the Australian Government lodged an Interpretive Declaration as follows:⁵

1. “Australia declares that the Convention does not recognise any ‘right to non-discriminatory treatment of the tobacco industry.
2. Australia recognises that Article 5.3 (General obligations) of the Convention requires the Parties to act to protect their tobacco control policies from commercial and other vested interests of the tobacco industry in accordance with national law.
3. Australia declares its understanding that Parties to the Convention should interact with the tobacco industry only when and **to the extent strictly necessary** to enable them to effectively regulate the tobacco industry and tobacco products, and should ensure that any such interactions are conducted transparently.” [emphasis added]

This Declaration adopts a position of very limited interaction between the tobacco industry and government, in order to protect tobacco control policies from interference. The applicants have undertaken:

- to promptly inform law enforcement agencies and relevant Departments of evidence acquired by the Applicants;
- 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
- to jointly report to the Commission on a 6 monthly basis.

The proposed conduct involves a degree of communication and cooperation that is not strictly necessary, and is therefore in contravention of Article 5.3. The issue of illicit tobacco is a matter for the Australian Government, in particular the Treasury, Australian Tax Office, Department of Health, Department of Immigration and Border Protection (DIBP) and law enforcement agencies such as the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). State and territory governments also play a role by regulating tobacco retailers.

A comprehensive, whole-of-government approach is used to combat illicit tobacco at all levels of the supply chain. Although there is some uncertainty about the details and timing of proposed legislative reform, it is significant that the government is committed to improving its ability to tackle illicit tobacco. Measures to address the supply of illicit tobacco at the retail level can be undertaken by public officers. The conduct and communication proposed by the applicants is not ‘strictly necessary’ for the regulation of tobacco products, and therefore offends Article 5.3.

Our analysis of Article 5.3 and its broader context leads irresistibly to the conclusion that authorisation of the proposed conduct would be an unjustifiable contravention of the FCTC.

We emphasise also that our interpretation of Article 5.3 is consistent with the view of the Australian Government Department of Health, as expressed in its submission to this consultation dated November 2016. The Department stated clearly that Government measures to address illicit trade in tobacco products fall within the definition of public health policies with respect to tobacco control, for the purposes of Article 5.3.

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].⁶ 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.

⁵ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en#1

⁶ *Competition and Consumer Act 2010* (Cth) ss 90(8), 90(8B) and 90(9). This statutory test applies in relation to conduct that would constitute a collective boycott.

Cancer Council WA urges the ACCC to affirm its draft determination to deny authorisation. We thank the ACCC for the opportunity to provide comment. 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,

A handwritten signature in black ink, appearing to read 'Terry Slevin'.

Terry Slevin
Education & Research Director
Cancer Council WA