



Australian Government
Department of Health

SECRETARY

6 June 2017

Mr David Jones
General Manager, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke St
CANBERRA ACT 2601

Dear Mr Jones

Supplementary Submission on Authorisation Application

Thank you for the opportunity to make this supplementary submission following the submission dated 24 May 2017 by British American Tobacco Australia Limited, Imperial Tobacco Australia Limited, and Philip Morris Limited (together, the Applicants), regarding the application for authorisation (the Application).

The Department of Health (the department) acknowledges amendments to the Applicants' original proposal of August 2016, and the Applicants' submissions regarding a number of issues, including the interpretation and application of Article 5.3 of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

The department continues to hold significant reservations regarding a number of the issues previously identified in its submission in November 2016. In particular, should the Application be granted, the department has concerns regarding the high level of ongoing cooperative engagement (both real and perceived) between Australian Government agencies and the tobacco industry, and the inevitable blurring of what has traditionally been a clear and critical delineation between the role and interests of Australian governments and the tobacco industry.

Tobacco is not like any other consumer product. Tobacco is highly addictive, and unlike almost any other consumer product, to use tobacco as recommended by the manufacturer is unequivocally harmful to human health. The estimated social and economic cost of tobacco consumption to the Australian community has been estimated at \$31.5 billion per year.¹

It is for this reason, and also because of the sustained and well-resourced actions of the global tobacco industry to continue to promote tobacco use, including through the targeting of promotion to young people, that tobacco has been the subject of extensive regulatory controls

1. Collins D., and Lapsley H., (2008) The Cost of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05, Commonwealth of Australia, Department of Health and Ageing, Monograph Series No.64, p 65.

and well-funded government sponsored campaigns over several decades both globally and domestically, with significant resources being deployed to reduce tobacco use and protect public health.

Australia's comprehensive approach to tobacco control has nearly halved the number of daily smokers aged 14 years or older over the past 25 years according to findings from the Australian Institute of Health and Welfare (from 24.3 per cent in 1991 to 12.2 per cent in 2016). However, recognising the highly addictive nature of nicotine, evidence from Australia and overseas shows that when tobacco control efforts stall, so does the decline in smoking prevalence – to the detriment of the health and well-being of many Australians.

Australia's strategy of ongoing complementary tobacco interventions is critical to ensuring that the prevalence of smoking in Australia continues to decline, and the department, and the Australian Government, rely heavily on the confidence and support of the Australian community for iterative and ongoing tobacco control interventions.

In this submission, the department seeks to demonstrate how granting the Application would undermine the high level of community confidence and support for further tobacco control interventions, by giving rise to a public perception of a partnership or alignment in the interests and goals of government and industry, and by undermining Australia's international good standing and ability to meet international obligations under the WHO FCTC.

There is no safe level of consumption of tobacco products, and no one tobacco product is safer than any other, whether licit or illicit. The department recognises illicit trade in tobacco products as a very serious public health problem because smokers accessing illicit products are unlikely to benefit from public health measures including price-based interventions, tobacco plain packaging and graphic health warnings.

Australia's leadership role in tobacco control.

The Australian Government is recognised as a world leader in tobacco control, in part due to our commitment to our obligations under the WHO FCTC, and willingness to tackle significant reform. Australia was, for instance, the first country to implement tobacco plain packaging, and we have defended this important and effective measure against sustained and in one case abusive² challenges both domestically in the High Court of Australia, and internationally, including in the World Trade Organization.

This international reputation is recognised and respected domestically by the Australian community, and is a pillar on which the support and confidence of the Australian community rests in respect of Australian Government tobacco control interventions. This has provided the Australian government significant momentum to lead on, and to continue to implement, tobacco control measures.

Further, Australia's international reputation and good standing, built over decades but bolstered recently by our leadership in tobacco control, means we can be influential on a world stage, and not just with regard to tobacco control issues. The ability of the department and Australian Government to play a leadership role in critical international health fora including, for instance,

² PCA Case No. 2012-12: Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, 17 December 2015, paragraph 588:

"In light of the foregoing discussion, the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute."

the World Health Assembly (the decision making body of the World Health Organization) is of significant benefit to Australia, and the Australian community.

The WHO FCTC and Article 5.3

The WHO FCTC was developed in response to the globalisation of the tobacco epidemic. It highlights the international recognition that there is a need to treat the tobacco industry differently to other industries, and that due to the international and well-resourced nature of tobacco trade and promotion, an international strategy was required. Australia became a Party to the FCTC on 27 February 2005.

Critically, State parties to the WHO FCTC commit, in becoming Parties to the Convention, to 'protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke' (Art 3, FCTC). As the Australian Government agency with responsibility for providing leadership on Australia's obligations under the FCTC, the department is committed to ensuring that Australia meets its obligations under the WHO FCTC, including Article 5.3, and acts in good faith to give effect to the intention and substance of Article 5.3.

Additionally, on 5 January 2015 Australia lodged the following Interpretative Declaration in response to a Czech Republic Interpretative Declaration on Article 5.3:

- '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.'

To comply with Article 5.3 of the FCTC, Australia must be able to demonstrate that it has taken concrete steps towards protecting public health policies with respect to tobacco control from the interests of the tobacco industry. The Applicants have submitted that tackling illicit trade in tobacco is not a public health policy, which, with respect, is incorrect. There is no doubt that the subject matter covered by the application for authorisation clearly falls within the ambit of Article 5.3.

The *Guidelines for Implementation of Article 5.3* (the Guidelines) were approved unanimously by the Conference of the Parties to the WHO FCTC, are intended to assist FCTC Parties in implementing their obligations under Article 5.3. It follows that implementation action in accordance with the guidelines would be compatible with Article 5.3. Importantly, the Guidelines recommend that 'Parties 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.' The Guidelines also state that 'Parties should not accept, support or endorse partnerships and non-binding or non-enforceable agreements as well as any voluntary arrangement with the tobacco industry ...'

The Guidelines also importantly recommend that 'Parties should not accept, support or endorse any voluntary code of conduct or instrument drafted by the tobacco industry that is offered as a substitute for legally enforceable tobacco control measures.' The department considers the Application could reasonably be categorised as an *instrument drafted by the tobacco industry*; and the quasi law-enforcement offered by the Applicants, *a substitute for legally enforceable tobacco control measures*.

It is the department's view that granting the Application could be taken as the Australian Government 'accept[ing], support[ing] or endors[ing]' a partnership, agreement or arrangement between the Australian Government and the tobacco industry. Granting the Application would be at odds with Australia's reputation as a leader in tobacco control, attract significant international criticism, and undermine Australia's ongoing efforts to meet our FCTC obligations including under Article 5.3. Conversely, refusal of the application would demonstrate that the Australian Government takes seriously the danger of tobacco industry interference in tobacco control policy, and represents a 'concrete step' toward demonstrating compliance with Article 5.3.

The role, interests and goals of the Australian Government and the tobacco industry

The Applicants claim the interests of industry and government are aligned, because they have the same objective of reducing the availability and supply of illicit tobacco to consumers. As such they claim that Article 5.3 is not relevant because their Application does not conflict with public health policy.

The public health goal of Australian governments (and governments internationally as reflected in the WHO FCTC) is to reduce consumption of tobacco products by reducing both supply and demand, and the Australian Government investment in achieving that aim has been significant over many decades.

The goal of the tobacco industry in combating illicit tobacco, conversely, is to increase sales of their own products – not decrease overall consumption. There is a fundamental and irreconcilable conflict between the tobacco industry's interests and the Australian Government's public health policy interests.

In the Applicants' submission of 24 May 2017, they state that Article 5.3 expressly permits agencies or departments to 'interact with the tobacco industry to enable the effective regulation of the tobacco industry and tobacco products', and that as such, granting the Authorisation, and any activity taken pursuant to it would not be inconsistent with Australia's international obligations.

The department however is of the view that the Authorisation sought by the Applicants – both in the act of authorisation itself and in respect of quasi-law enforcement activity taken by the Applicants pursuant to it – would lead to a community perception of unprecedented partnership between the Australian Government and the tobacco industry. Further, it would require interaction between the Australian Government and industry more than is strictly necessary to enable Australia to effectively regulate the tobacco industry and tobacco products.

Moreover, for decades there has been a clear and critical delineation between the role and interests of Australian governments and the tobacco industry. This delineation, which existed prior to the negotiation and coming into force of the WHO FCTC, is now enshrined in Article 5.3, and the department is of the view that it provides a further pillar on which the support and confidence of the Australian community rests in respect of Australian governments' tobacco control interventions.

The department holds significant concerns that the perception of a partnership between government agencies (including law enforcement agencies) and the tobacco industry that would arise should the Authorisation be granted would significantly blur this delineation, and undermine public confidence and support in Australian governments' legitimate role in protecting the health of Australians through reducing smoking prevalence. In turn, the department is concerned that diminishing the confidence and support of the Australian community in the government's ongoing tobacco control efforts has the potential to stall future tobacco control activities and efforts to reduce smoking prevalence.

The Applicants also make various references to several pre-existing cooperative initiatives with government agencies. In the department's view, the Applicants have overstated the relationship between industry and the Government, by implying that some kind of agreement or partnership exists with these agencies, which is not the case. Government agencies will accept intelligence information and referrals of non-compliance from all sources, including the tobacco industry, and the department is of the view that this interaction is of a different character than that proposed in the Application.

Further, the 24 May 2017 amendments to the proposal may bind Government agencies into resource intensive stakeholder engagement with respect to agencies maintaining consideration of tobacco industry activity. This has the potential to divert limited Government resources from conducting regular compliance and enforcement activities, in order to maintain visibility of the tobacco industry's investigation.

FCTC Protocol to Eliminate Illicit Trade in Tobacco Products

The department notes the Applicants make reference to Article 8.13 of the FCTC Protocol to Eliminate Illicit Trade in Tobacco Products throughout their 24 May 2017 submission. The Applicants suggest that the Protocol expressly recognises the need for interaction between the tobacco industry and regulatory agencies. The department wishes to clarify that Article 8.13 relates specifically to interaction between authorities participating in the 'tracking and tracing regime' and the tobacco industry and those representing the interests of the tobacco industry.

In this context, Article 8.13 provides that interaction should be 'only to the extent strictly necessary'. The department notes that a tracking and tracing regime does not currently operate in Australia, and further that Article 8.13 does not expressly refer to or otherwise recognise a general need for interaction between the tobacco industry and regulatory agencies in the context of illicit trade. We also note that the Protocol is not yet in force and Australia is presently not a signatory to the Protocol.

Size of the Illicit Tobacco Market in Australia

As stated in the department's submission to the ACCC in November 2016, the size of the illicit tobacco market in Australia is unknown with there being a wide variation between various estimates. The DIBP and the ATO are working toward developing more accurate models to estimate the size of the illicit tobacco market.

There is, however, no evidence to suggest that illicit tobacco in Australia is a large and growing problem.

The results of the latest National Drug Strategy Household Survey (NDSHS) conducted in 2016 by the Australian Institute of Health and Welfare were released on 1 June 2017.³ The

³ This report is available at <http://www.aihw.gov.au/alcohol-and-other-drugs/data-sources/ndshs-2016/key-findings/>

results indicate that there has been no change in the use of unbranded tobacco (chop-chop) with about one in 26 smokers currently smoking unbranded tobacco – similar proportions to 2013. The proportion of smokers reporting that they had seen tobacco products without plain packaging in the last three months declined in 2016 (to 13 per cent from 18.5 per cent in 2013), and there were fewer smokers purchasing these products (from 9.6 per cent in 2013 to 5.5 per cent in 2016). These findings suggest that the amount of illicit tobacco products which are not in plain packaging is lower than claimed by some sources.⁴

Identifying illicit tobacco

The Applicants still have not clearly articulated in their most recent submissions how they intend to accurately and consistently identify illicit tobacco. Illicit tobacco is a broader issue than simply identifying counterfeits of genuine products or products in unbranded or branded packaging.

Branded tobacco products that may appear illicit, instead may have had duty paid on them (including personally imported tobacco products), and rather than being illicit tobacco products, may in fact be licit tobacco products which are non-compliant with the plain packaging requirements. On the other hand, illicit tobacco products on which excise duties have not been paid may be in plain packaging that complies with the *Tobacco Plain Packaging Act 2011*.

The department believes the Applicants should not be authorised to take the actions described in their submission, until the process by which they base their allegation against a retailer is robust, with there being no question on whether or not a particular product is illicit or not in terms of duties or excises being paid. An unclear process in which errors of identification occur could adversely or even catastrophically affect a small retailer.

The Australian Government and Illicit tobacco

To ensure that there is a robust approach the tobacco control framework in Australia, there is a whole of Government approach to the development and implementation of tobacco control policies and measures. As part of this approach, which includes illicit tobacco, there is strong collaboration and cooperation between agencies including the Department of Immigration and Border Protection (DIBP), the Australian Taxation Office (ATO), the Australian Federal Police, Australian Criminal Intelligence Commission and the Australian Consumer and Competition Commission and state and territory police.

As previously stated, the department takes illicit trade in tobacco products very seriously because it impacts directly on the effectiveness of price-based public health policies aimed at decreasing smoking rates, and smokers accessing illicit products are unlikely to benefit from other public health measures including tobacco plain packaging and graphic health warnings.

Even viewed as a discrete part of the Australian Government's overall investment in tobacco control, the investment in tackling illicit tobacco is of itself significant. For instance, detecting, deterring and disrupting the illicit trade of tobacco is an operational priority for the Australian Border Force (the operational arm of the Department of Immigration and Border Protection), with \$7.7 million allocated over two years to strengthen efforts to combat the illicit trade in tobacco. Since 2015, the Australian Border Force's Tobacco Strike Team has seized over 40 tonnes of smuggled tobacco and over 105 million cigarette sticks worth over \$85 million in

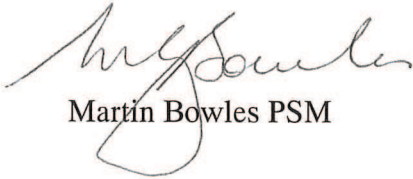
⁴ Revisions were made in 2016 to add 'in Australia' to the survey question that specifically asks about whether people have seen tobacco products which do not have plain packaging/graphic health warnings. Although the change may have impacted on these results the extent of the impact is unclear as it is not known how many people surveyed in 2013 may have been thinking of cigarette packets they saw or purchased overseas rather than in Australia.

evaded duty. They have also issued penalties for over \$4 million, and confiscated over \$7.5 million in proceeds of crime (in joint operations with the Australian Federal Police).

Work also continues at a whole of government level on a legislative reform program aimed at strengthening the ability of Commonwealth, state, and territory law enforcement agencies to tackle illicit tobacco at all levels of the supply chain.

The department trusts that this additional information in response to the Applicants' further submissions will assist the ACCC in its consideration of the Application.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Martin Bowles', with a large, stylized loop at the end.

Martin Bowles PSM