

7 June 2017



Mr David Jones
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Via email: adjudication@accc.gov.au

Dear Mr Jones,

British American Tobacco Australia & Ors application for authorisation – Further submission (Ref: A91550)

We refer to our earlier submissions dated 28 September 2016 and 5 January 2017, regarding the above application for authorisation.

We note that the applicants have since provided two further submissions dated 15 March 2017 and 24 May 2017. We would like to express a number of concerns regarding the revised approach to the arrangement proposed by the applicants.

Potential for misuse of the proposed arrangement –

As outlined in our earlier submissions, it is Cancer Council Victoria's view that the proposed arrangement has the potential to be misused by the applicants in order to further commercial interests other than the disruption of illicit tobacco trade. We remain concerned about the potential for misuse, despite the clarifications and amendments the applicants have made to the proposed arrangement detailed in their initial application.

We note that evidence from Australia and overseas suggests that the tobacco industry currently uses its relationship with retailers to exert control over individual retailers and the retail tobacco market more broadly. Specifically, information from both Australia and Canada appears to indicate that the tobacco industry currently uses its relationship with retailers as an avenue for maximising tobacco sales. For example, retailers in New South Wales report being offered various incentives for promoting particular brands of tobacco products to customers (see Appendix 1). Similarly, retailers in Quebec report experiencing acute pressure to meet strict sales targets in order to avoid losing contracts with the tobacco industry (see Appendix 2).

We believe the existence of such practices supports the notion that the tobacco industry is prepared to use its relationship with retailers in an attempt to prevent tobacco sales from declining, and we are concerned that the arrangement proposed by the applicants could be misused as another avenue for the tobacco industry to exert control over the retail market.

In particular, we are concerned that there does not appear to be anything in the applicants' revised proposal to prevent the applicants from selectively choosing the retailers or wholesalers that are targeted by their evidence collection programs in an effort to manipulate the retail market. The applicants have attempted to address this concern in their submission dated 15 March 2017.¹ The submission states:

¹ See page 9 of the applicants' submission dated 15 March 2017.

'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...

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...

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.'

Although the applicants claim that the decision to target a particular retailer for the purpose of evidence collection is based on 'market information' only, the proposed arrangement does not appear to provide any mechanism or 'safeguard' for ensuring this is the case. There does not appear to be anything in the proposed arrangement that would prevent the applicants from selectively focusing evidence collection efforts on particular retailers or wholesalers to further commercial interests other than the disruption of illicit trade. For example, the threat of becoming a target of the applicants' evidence collection methods could be used by the applicants to ensure retailers meet strict sales targets for tobacco products.

We therefore remain concerned that the proposed arrangement could be misused for the purpose of manipulating the retail sector, and furthering commercial interests other than the disruption of illicit tobacco trade.

Proposed independent appeal process –

We note that the applicants have altered the proposed conduct to include a right for any retailer or wholesaler to seek independent review of a decision by mediation and/or arbitration through the Australian Disputes Centre ('the ADC'). The applicants appear to have proposed that each party would be liable to bear its own costs of the mediation and/or arbitration, regardless of the outcome.

Having reviewed the ADC Guidelines for Commercial Mediation and the ADC Rules for Domestic Arbitration, we note that the potential costs involved in the mediation/arbitration process include the following:

- ADC registration fee (currently \$1100 for both mediation and arbitration);
- Cost of legal representation;
- Mediator/Arbitrator's fee;
- Administration fees;
- Room hire fees.

In addition, we note that the ADC Rules for Domestic Arbitration state that an arbitrator may order parties to provide pleadings, discovery, sworn statements/affidavits and expert reports as part of the arbitration process.

The proposed dispute resolution process may therefore be expensive and onerous for smaller retailers. This is of particular concern given that the evidence relied on by the applicants may not be unambiguous in every case. It is conceivable that, in some cases, reasonable minds may differ regarding the conclusions that ought to be drawn from the particular evidence relied on by the applicants.

It is therefore possible that under the proposed arrangement, an innocent retailer who is wrongly accused of selling illicit tobacco on the basis of ambiguous (or poor quality) evidence may be forced to incur significant costs by participating in the mediation and/or arbitration process in order to protect their business interests. The potential for innocent retailers to be forced to incur significant costs under the proposed arrangement amounts to a possible public harm which ought to be considered when assessing whether the arrangement is likely to give rise to a net public benefit.

Article 5.3 of the WHO FCTC –

We remain concerned that the arrangement proposed by the applicants is inconsistent with Australia's obligations as a party to the WHO FCTC under Article 5.3.

As noted in our submission dated 28 September 2016, the Guidelines for Implementation of Article 5.3 require parties to 'avoid the creation of any perception of real or potential partnership or cooperation' between government and the tobacco industry.²

We believe that the proposed arrangement has the potential to create the perception of such cooperation and/or partnership. As noted in our previous submissions, we are concerned that any such perception may have the effect of restoring a level of trust by the public in the industry, which may in turn give the industry the ability to undermine Australia's tobacco control efforts. This concern has not been addressed in the revised approach to the arrangement proposed by the applicants.

Furthermore, we are concerned with the interpretation of Article 5.3 suggested by the applicants in their submissions. In particular, we note that in their submission dated 24 May 2017, the applicants have repeatedly stated that Article 5.3 'expressly permits' government agencies or departments to interact with the tobacco industry to enable effective regulation of the industry and its products.³ We believe this is an inaccurate and misleading interpretation of the scope and intent of Article 5.3.

Article 5.3 itself makes no reference at all to any permitted interaction between the government and the tobacco industry. The precise wording of Article 5.3 is as follows:

'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.'

The Guidelines for Implementation of Article 5.3 specifically recommend that Parties 'establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur'. While the Guidelines appear to contemplate that there may be limited circumstances when interactions between government and the tobacco industry are necessary for the purpose of ensuring effective regulation of the tobacco industry and its products, the Guidelines clearly state that such interactions should be limited as far as possible.

The applicants' repeated suggestion that the Guidelines 'expressly permit' interactions between government and the tobacco industry is therefore misleading.

We also note that the applicants have repeatedly referred to submissions made by retailer organisations in support of the application for authorisation.⁴

The Guidelines for Implementation of Article 5.3 specifically refer to the importance of raising awareness about 'the tobacco industry's practice of using individuals, front groups and affiliated organisations to act, openly or covertly, on their behalf or to take action to further the interests of the tobacco industry'.⁵ We believe it is important for this practice to be borne in mind when considering the submissions made by retailer organisations. We note that it is unclear whether the retailer organisations that have made written and oral submissions in support of the conduct proposed by the applicants have any relationship to the tobacco industry.

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

³ See paragraphs 5.4, 5.6, and 5.20 of the applicants' submission dated 24 May 2017.

⁴ See paragraph 7.11(b) of the applicants' submission dated 24 May 2017. See also paragraphs 1.3, 2.4 and 6.8 of the applicants' submission dated 15 March 2017.

⁵ See recommendation 1.2 of the Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, at page 4.

Article 8.13 of the WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products -

In their submission dated 24 May 2017, the applicants have referred to Article 8.13 of the WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products ('the Illicit Trade Protocol').

The applicants appear to have failed to point out that Australia is not currently a signatory to the Illicit Trade Protocol.

Furthermore, we believe the applicants' submission gives an inaccurate and misleading interpretation of Article 8.13. The applicants' submission repeatedly suggests that the Illicit Trade Protocol '*expressly acknowledges the need for interaction between relevant government agencies and the tobacco industry for the purpose of combatting illicit trade*'. We note that Article 8 of the Illicit Trade Protocol recommends that Parties establish a global 'tracking and tracing' regime for the purpose of combatting illicit trade in tobacco. Articles 8.12 and 8.13 state:

'12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.'

13. Each party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article.'

When read in context, it is therefore clear that Article 8.13 is in fact intended to operate to *limit* the interaction between authorities and the industry, and is not an express acknowledgement of any '*need for interaction between relevant government agencies and the tobacco industry*'. In this regard, we note that the preamble to the Illicit Trade Protocol requires that Parties be mindful of Article 5.3 of the WHO FCTC '*in which Parties agree 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.*'⁶

Cancer Council Victoria remains supportive of the ACCC's draft determination -

In view of the issues outlined above, we have increasing concerns regarding the application for authorisation of the proposed conduct. We remain of the view that the proposed conduct has the potential to give rise to a number of public harms.

Cancer Council Victoria therefore remains supportive of the ACCC's draft determination to deny authorisation of the arrangements proposed by the applicants.

Thank you again 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

⁶ See page 4 of the WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products.

(Available from: http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11768375)

The New Zealand Herald

Sneaky tobacco companies use mystery shoppers to exploit ciggie loophole

12:07 PM Friday Dec 16, 2016

Tobacco companies are offering gift cards, flights and hotel stays to retailers to try and encourage them to push their brand onto customers.

With the battle for Australia's A\$2.6 billion tobacco industry fiercer than ever, manufacturers are fighting to lure the nation's dwindling number of smokers.

And while advertising bans and plain packaging laws have hit their profits, tobacco companies have found a sneaky legal loophole around them.



And while advertising bans and plain packaging laws have hit their profits, tobacco companies have found a sneaky legal loophole around them. Photo / 123RF

Marketing reps are sent to hotels, supermarkets, petrol stations, tobacconists and newsagents to train sales assistants in how to promote their brands to customers.

If they do as they are instructed, staff can win points and prizes such as gift cards, flights, hotel stays and vouchers for spa and beauty packages.

That's where mystery shoppers come in: they keep tabs on staff, awarding points to those who recommend one cigarette brand over another.

It's called "trade marketing", and is one of the only legal ways cigarette makers can promote their wares under the highly restrictive regime that governs the sale and use of tobacco.

Health advocates say the scheme threatens to undermine the government's plan to slash the rate of smoking to 10 per cent of the population by 2018.

But the loophole may soon be closed, with NSW Health Minister Jillian Skinner vowing to clamp down on the practice after being contacted by news.com.au.

'WHAT WOULD YOU RECOMMEND?'

Mystery shoppers hired by Imperial Tobacco are sent to retailers with a very specific script.

"I normally smoke Winfield 30s but I am looking for an alternative, what would you recommend instead of Winfield 30s?" the shoppers are instructed to ask, in a job summary seen by news.com.au.

When asked how much they want to spend, the mystery shopper says "maybe something a little cheaper".

If asked about their preferred cigarette's strength, the shopper replies: "I usually smoke the blue ones."

Then it's over to the staff member who says the magic words and steers the "customer" towards John Player Special, a brand imported by Imperial. If the staff member does not mention any other brand, they score points towards the company's incentive program.

At this point, the mystery shopper identifies him or herself and informs the staff member that the results will be tallied at head office and prizes awarded to those with the top scores.

'PUSHING THE ENVELOPE'

Scott Walsberger, the head of tobacco control and prevention at Cancer Council NSW, said mystery shopping was central to tobacco companies' marketing strategies.

"Trade marketing as they call it is a significant part of their work," Mr Walsberger said, adding that building relationships with retailers was one of the only legal methods to promote cigarettes after successive law reforms.

He said tobacco companies were desperate to make their products attractive to consumers after being banned from advertising in print and on television, and having the distinctive imagery and colour in their packaging replaced with drab, dark brown.

"Every time we've brought in legislation, you see the tobacco industry push the envelope, continually trying to make their product attractive and market them as much as possible," he said.

"They're always focused on selling more cigarettes, more people getting addicted and they go to all lengths to do that - so it's not surprising that, as we tighten up regulations of how they market their products in some ways, that they've sought out the channels where they're not regulated and exploit them to continue to promote their product."

He called for new laws to better regulate how tobacco products are sold and marketed and made available through retail outlets, and rejected the argument that trade marketing only targeted customers who were already smokers.

"They say they're not marketing to new customers, just getting people to switch brands or building brand loyalty; we know that's not true," Mr Walsberger said.

"Two out of every three smokers will die from their smoking habit. If that's your consumer base, your target audience and you're losing two out of every three of those, you need to be recruiting new smokers. So that has to be a key part of their marketing strategy."

MINISTER PROMISES REFORM

Health Minister Jillian Skinner vowed to crack down on the mystery shopping scheme after being contacted by news.com.au.

"The NSW Government will seek to amend the Public Health (Tobacco) Act 2008 with the intention of tightening the law to prohibit this practice," Ms Skinner said. "I am proud of this government's record in reducing smoking in this state."

A spokesman for Imperial Tobacco Australia said the company sold a legal product and defended its trade marketing practices.

"We work with a range of retail partners to have adult consumers of tobacco products choose our brands – including Peter Stuyvesant and JPS – over those of our competitors," the spokesman said.

"The program in question sees shoppers specifically identifying themselves as adult consumers of tobacco products who are seeking a brand recommendation from a retailer.

"This clearly neither 'circumvents legislation' nor has any bearing on the choice of an adult to consume tobacco. It simply addresses which brand that adult consumer might choose."

He said "anti-tobacco zealots" should look at the billion-dollar illicit tobacco trade and "focus their attention on serious problems rather than attempting to undermine legitimate and legal competition for no apparent purpose".

– news.com.au

LE DEVOIR

LE DEVOIR, LE LUNDI 26 OCTOBRE 2015

Tabac: des dépanneurs sous pression

Tobacco: convenience stores under pressure

[Translated by COCTI]

ISABELLE PORTER | Québec | October 26, 2015

Increasingly constrained by legislation, tobacco companies are now waging war convenience store by convenience store through "loyalty programs". For some small owners, the situation has become unbearable.

Charlie (not his real name) has owned a small convenience store in Montreal for six years. Although rather shy by nature, he does not hesitate to call himself "the slave" of the tobacco companies. Like everyone interviewed for this report, he has requested anonymity for fear of retaliatory trade measures from tobacco manufacturers.

It all started around 2009-2010, he says, when tobacco giant Japan Tobacco International (JTI) started selling cartons of Macdonald Special cigarettes to certain retailers at a deep discount. Retailers could pay five or six dollars less a carton but, in exchange, they had to sell packs for less. For selected stores, the agreement was even more rewarding, since it allowed them to attract customers away from competitors in the neighborhood without a contract.

In 2011, Macdonald became the best-selling brand in Quebec. A short time later, Imperial Tobacco and Rothmans, Benson & Hedges (RBH) created their own loyalty program.

Since Charlie has a contract with RBH, he lives in fear of losing it. "If I sold less, they can cancel my contract," he said. "If the representative comes around and asks me for something I have to do it. Otherwise, I will lose my contract."

Those without a contract are also under pressure, explains Robert (not his real name), another convenience store owner. "We argue with customers all the time. I charge them \$9 a pack, but they can get it for \$8 elsewhere. They think I'm putting more money in my pockets."

Tired of fighting, Robert has resigned himself to it all. "Now it's not as bad, I send customers to another store that sells them cheaper." In total, cigarettes account for one-third of Robert's revenue.

Le Devoir was able to see a few of these written agreements, which show the discount given to the retailer and the selling price. However, it does not say how many packs must be sold to maintain the contract. One thing is certain: retailers will not tempt fate.

Before any representatives come around, they will try to sell as many packs as possible of the brand under contract, sometimes selling it at a lower price, even at a loss. "I'll tell the customer that if he buys this brand, I will sell it for even less, except it's at my own expense," says Robert.

In the past, RBH and JTI have also offered retailers contracts based on point systems and contests to win prizes, including trips down South. Beyond these options, the principle is always the same: the company offers cartons at a discount, but sets the selling price. More and more retailers are also being offered discounts for two-pack combos (so-called "duo-packs") at a low price.

Previously, retailers would buy cartons from a wholesaler at the same price and sell them at a price of their choosing. But the tobacco companies now deliver their products themselves and send representatives to ensure that retailers adhere to their contracts.

The company line

Charlie and Robert are far from the only ones to complain about this situation. In 2010 and 2012, the Association of Chinese Convenience Stores organized demonstrations to denounce the practice outside the Imperial Tobacco's offices in Montreal. Contacted recently, members of the Association told the *Le Devoir* that nothing has been resolved and that the situation has even deteriorated. They did not want to be named in the article for fear of losing their contracts.

"This is war, this is war, I can tell you that," said Yves Servais, President of the Association des marchands dépanneurs et épiciers du Québec, on the subject. Mr. Servais made those remarks on August 31st before the Parliamentary Committee on the revision of the Tobacco Act during a particularly tense exchange with PQ MNA Jean-François Lisée.

Mr. Lisée is preparing to propose amendments to Bill 44 aiming to outright ban these loyalty programs. He argues that these contracts may make people smoke more. "Yes, there are loyalty programs for airlines and other companies, but this is a toxic product [...] This is clearly a way to circumvent the law and push convenience stores to commit an illegal act. Normally, they should not be pushing to sell cigarettes."

Imperial Tobacco is the only company to appear before the Parliamentary Committee, and responded to questions from Mr. Lisée about loyalty contracts. "The only thing retailers can do is answer some factual questions from consumers," argued spokesperson Eric Gagnon. "So if you're suggesting that Imperial Tobacco Canada, through partnership programs with retailers, incites people to smoke, that is completely wrong. What we do, with adults who have made a choice to smoke, is test our market share."

RBH is said to be "proud of its relationships with retailers." Those who participate "receive a special discount in exchange for a broader range of products, competitive prices and the guarantee of adequate inventory management," said the spokesperson contacted by *Le Devoir*. "This is a common business practice for many industries."

At the Association québécoise des dépanneurs en alimentation (AQDA), we believe that the debate is not even relevant. "Retailers benefit from more attention and support from tobacco companies than they do from Loto-Québec, the SAQ or credit card companies," argues AQDA spokesperson Guy Leroux. "This is an attempt to exploit the fact that the tobacco industry is in the spotlight in the context of the adoption of a bill."

Some, however, take the AQDA's view with a grain of salt because it receives funding from tobacco companies. "I asked them how much of their revenue comes from tobacco companies," says MNA Lisée. "I got two answers: 'We do not know' and 'We do not want to tell you'."

At AMDEQ, however, the president conceded that it would be unfortunate if these agreements disappeared. To him, the problem lies mainly in the fact that the agreements particularly favour large stores, chain stores and service stations that have the most advantageous contracts.

This kind of practice, he says, is widespread for a growing number of products, be it beer or chips. Ultimately, it's the small independent convenience store model that is threatened, according to him.