



Submission – Consultation on the Public Health (Tobacco and Other Products) Legislation 2023

Cancer Council Australia

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Contents

Introduction	3
Chapter 1	4
Do you have any feedback on the definitions or interpretation provisions in the package?	4
Do you have any feedback on the commencement provisions and anticipated transition timeframes?	9
Chapter 2	10
Do you have any feedback on the proposed advertising and sponsorship provisions in Chapter 2 of the Bill?	10
Are the proposed advertising and sponsorship provisions likely to address emerging forms of media through which tobacco or e-cigarettes will be promoted?	24
Are there any other types of promotion that need to be considered?	24
Chapter 3	26
Do you have any feedback on the packaging and product requirements set out in Chapter 3 and in the Regulations?	26
Are there any novel or innovative product or packaging features that could be better addressed by the draft Bill?	26
Do you have any feedback in relation to the offence and civil penalty provisions set out in Chapter 3?	41
Chapter 4	43
Do you have any feedback on the permanent ban on certain regulated tobacco items provisions set out in Chapter 4?	43
Chapter 5	45
Do you have any feedback on the reporting requirements set out in Chapter 5 and the Regulations?	45
Chapter 6	49
Do you have any feedback on the proposed compliance and enforcement provisions set out in Chapter 6?	49
Chapter 7	52
Do you have any feedback on the transitional arrangements?	52
References	54
Appendices	58

Introduction

Cancer Council is the peak, non-Government cancer control organisation in Australia. As the national body in a federation of eight state and territory member organisations, Cancer Council works to make a lasting impact on cancer outcomes by: shaping and influencing policy and practice across the cancer control continuum; developing and disseminating evidence-based cancer information; convening and collaborating with cross-sectorial stakeholders and consumers to set priorities; and speaking as a trusted voice on cancer control in Australia. Cancer Council has a long and proud history in tobacco control policy and advocacy, with world leading experts in a range of tobacco control focus areas.

Cancer Council acknowledges the traditional custodians of the lands on which we live and work. We pay respect to Aboriginal and Torres Strait Islander elders past, present and emerging and extend that respect to all other Aboriginal and Torres Strait Islander people.

We appreciate the opportunity to provide feedback on the proposed reforms to Australia's national tobacco legislation. Cancer Council strongly supports the proposed reforms which will strengthen our national approach to tobacco control, a vitally important action to prevent cancer and to improve cancer outcomes. Smoking remains the leading preventable health risk factor for Australians with almost 20,500 deaths (13% of all deaths) related to smoking each year ¹:

- Almost 11% of Australian adults continue to smoke.²
- Tobacco use is causally linked to more than 40 individual diseases including 19 types of cancer, almost all cardiovascular diseases, chronic obstructive pulmonary disease (COPD), and asthma.³
- Up to two out of every three deaths in current smokers are due to smoking.⁴
- The social cost of tobacco use was estimated to total \$136.9 billion in 2015-16.⁵

We strongly support the aim expressed by the Hon. Mark Butler MP, Minister for Health and Aged Care, that "Australia needs to reclaim its position as a world leader on tobacco control."⁶ In order to progress the "next generation of reform to help us fight against nicotine addiction"⁶ and to reclaim our position as a world leader, the matters raised in this submission need to be addressed. Our responses to each of the questions contained in the Consultation Paper are set out below.

Chapter 1

Do you have any feedback on the definitions or interpretation provisions in the package?

The preliminary matters set out in Chapter 1 of the draft Public Health (Tobacco and Other Products) Bill 2023 (**the Bill**) are generally suitable, but Cancer Council makes the comments below to strengthen some of the key concepts and interpretation provisions.

Clause 3 – Objects of this Act

Clause 3 of the Bill reads:

“Objects of Act

1. The objects of this Act are:
 - a. to improve public health by discouraging smoking and the use of regulated tobacco items; and
 - b. to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control; and
 - c. to address the health risks posed by vaping and the use of e-cigarette products.”

Cancer Council strongly supports the object in clause 3(1)(a) to ‘improve public health by discouraging smoking and the use of regulated tobacco items.’

The object in clause 3(1)(b) is necessary because by giving effect to Australia’s obligations under the Convention on Tobacco Control, the Bill is supported by the external affairs power in section 51 (xxix) of the Australian Constitution.

Cancer Council supports the object in clause 3(1)(c), ‘to address the health risks posed by vaping and the use of e-cigarette products.’

Subclause (2) sets out the means for achieving the objects. Cancer Council supports subclause 2, which is comprehensive, but we make the following recommendations to strengthen the proposed wording.

The words 'emerging innovation' in clause 3(2)(j) are superfluous and should be removed.

Clause 3(2)(k) of the Bill reads, "limiting the risk of e-cigarette products becoming a gateway into smoking and the use of regulated tobacco items." The current wording gives the impression that the gateway effect of e-cigarette products is a theoretical rather than an established risk. Non-smokers who use e-cigarettes are around three times as likely to take up tobacco smoking as their peers who do not use e-cigarettes.⁷ This subclause should be amended to, "limiting the effect of e-cigarette products as a gateway into smoking and the use of regulated tobacco items”.

The means of achieving the objects, set out in clause 3(2) of the Bill, should cover all aspects of the prevention continuum – prevention of initiation, cessation, and prevention of relapse. Cessation, however, is not explicitly addressed in clause 3(2). Consideration should be given to adding, "encouraging people to give up smoking or vaping, and to stop using regulated tobacco items or e-cigarette products."

Recommendations

Cancer Council recommends:

- The words 'emerging innovation' be removed from clause 3(2)(j).
- Clause 3(2)(k) be amended to, 'limiting the effect of e-cigarette products as a gateway into smoking and the use of regulated tobacco items.'
- Consideration be given to adding, as a means for achieving objects in clause 3(2), "encouraging people to give up smoking or vaping, and to stop using regulated tobacco items or e-cigarette products."

Clause 4 – Simplified outline of this Act

Where relevant, the recommendations above apply in respect of the simplified outline of the Bill in clause 4.

Clause 7 – Operation of State and Territory Laws

Cancer Council considers that it is important to have clear provisions regarding the operation of the Bill and State and Territory legislation. The Bill should not restrict the ability of States and Territories to prohibit conduct where this goes further than what the Bill provides for or where such conduct is permitted under the Bill.

Clause 7 of the Bill provides that "This Act does not exclude or limit the operation of a State or Territory law that is capable of operating concurrently with this Act". However, clause 7 does not expressly address the situation where conduct is prohibited by State or Territory law but permitted by the Bill. For example, certain advertising may be prohibited by State law but may be a permitted publication under the Bill.

In addition to the other detail included in clause 7 of the Bill, Cancer Council therefore recommends that it be clearly provided that where conduct is prohibited under State or Territory law but permitted under the Bill, the Bill does not exclude or limit the application of the State or Territory law to that conduct. It should be clear that the provisions that permit conduct only have effect for the purposes of the Bill. A similar approach is taken in the current *Tobacco Advertising Prohibition Act 1992* (Cth) (**TAP Act**), (see sections 6(3) and 7 of the TAP Act).

Recommendation

Cancer Council recommends:

- Clause 7 of the Bill be amended to provide that where conduct is prohibited under State or Territory law but permitted under the Bill, the Bill does not exclude or limit the application of the State or Territory law to that conduct. It should also be clear that the provisions that permit conduct in the Bill only apply to that legislation.

Clause 8 – Definitions

Cancer Council generally supports the definitions in clause 8 but suggests below some amendments for clarity.

Firstly, the definition of 'smoking,' which means 'smoking tobacco products' in the Bill. This definition does not seem precise enough, especially given its importance to the subject matter of the Bill. By way of comparison, we refer to section 3 of the *Tobacco Act 1987* (Vic), in which 'smoke' (in part) means 'smoke, hold or otherwise have control over, an ignited or heated tobacco product.'

This is a broad definition and appears to cover a broad range of uses such as shisha, heated tobacco products or other products in the future that may not involve combustion.

The clause could also be strengthened by including a power to prescribe by regulation circumstances, behaviours or actions that are deemed to meet the definition of 'smoking' in the Bill. This will ensure that the Bill continues to meet its objectives into the future.

Recommendations

Cancer Council recommends:

- Amending clause 8 to define smoking in a clearer way (ensuring a broad interpretation). By way of example for consideration, see section 3 of the *Tobacco Act 1987* (Vic) in relation to the broad definition of 'smoke', which means (in part) 'smoke, hold or otherwise have control over, an ignited or heated tobacco product'.
- Clause 8 be amended so that it includes a power to prescribe by regulation circumstances, behaviours or actions that are deemed to constitute 'smoking' for the purposes of the Bill.

Clause 9 – Meaning of tobacco product

Cancer Council supports the definition of 'tobacco product' and, in particular, the inclusion of a product that contains tobacco as an ingredient. This is an improvement because the TAP Act applies only to products that contain tobacco as a main or substantial ingredient.

To ensure that the Bill can achieve its objects, it should also be possible to prescribe by regulation a product or class of products that is deemed to be a 'tobacco product' for the purpose of the Bill. This should not be constrained by clauses 9(1)(a) and 9(1)(b) of the Bill. Having an ability to deem a product to be a tobacco product would assist with 'future-proofing' the legislation and reduce the need for future amendments to capture other products.

Recommendation

Cancer Council recommends:

- Clause 9 be amended to include a power to prescribe by regulation products or classes or products that are deemed to be 'tobacco products' for the purpose of the Bill.

Clause 10 – Meaning of tobacco product accessory

Cancer Council supports the definition of 'tobacco product accessory,' which is extensive and accompanied by notes that aid interpretation.

Clause 11 – Meaning of e-cigarette

The Bill defines e-cigarette as "a device (whether or not containing nicotine or tobacco) that is designed or intended to generate or release, by electronic means, an aerosol or vapour for inhalation by its user in a way that replicates, or produces an experience similar to, smoking."

Cancer Council considers that the definition is generally suitable but recommends some changes to the wording to ensure that it is broad enough to meet the objects of the Bill, now and into the future.

An important part of the definition is the reference to 'designed or intended.' The WA Court of Appeal considered the meaning of 'designed to resemble a tobacco product' (in section 106 of the

Tobacco Products Control Act 2006 (WA)) in *Van Heerden v Hawkins* [2016] WASCA 42. The judgment is instructive at paragraphs 118 and 119, where his Honour Justice Buss reasoned that:

[118] "The word 'designed', in the context of the phrase 'designed to resemble a tobacco product or a package' in s 106(a), connotes that the product has been constructed, produced, or manufactured with the intention that it should be like, or have a likeness or similarity to, a tobacco product or a package.

[119] The prohibition in s 106(a) therefore refers, in effect, to whether the product was constructed, produced, or manufactured with the intention that it should be like, or have a likeness or similarity to, a tobacco product or package, as distinct from whether the product is *in fact* like, or does *in fact* have a likeness or similarity to, a tobacco product or package. However, whether the product is *in fact* like, or does *in fact* have a likeness or similarity to, a tobacco product or package will, with all other relevant facts and circumstances, inform the judgment that must be made..."

The court held that the question of whether a product is designed to resemble a tobacco product should be determined objectively rather than by reference to the subjective intention of the designer or manufacturer. Buss JA further explained at paragraph [128] that:

[128] "The relevant facts and circumstances relating to the product are not restricted to its physical appearance. They comprise all attributes and features of the product as constructed, produced, or manufactured, including the use for which the product is designed; the manner in which the product is ordinarily used; and the appearance, and any changes in the appearance, of the product during ordinary use. All of those aspects will throw light upon the objective characterisation of the product and the objective comparison of the product with the relevant tobacco product or package; in particular, whether it should be concluded that the product was constructed, produced or manufactured with the intention that it should be like, or have a likeness or similarity to, the relevant tobacco product or package."

In light of the judgment in *Van Heerden v Hawkins* [2016] WASCA 42, the definition of e-cigarette could be improved so that it would read: "a device (whether or not containing nicotine or tobacco) that generates or releases, or is designed or intended to generate or release..." This would ensure that it applies to products that do in fact generate or release, by electronic means, an aerosol or vapour for inhalation by its user.

Cancer Council supports the reference to, 'an experience similar to smoking' in the proposed definition, because it reflects the relevant factors mentioned in the *Van Heerden v Hawkins* [2016] WASCA 42 judgment above. The word 'experience' connotes a feeling, sensation, taste and would include the mode of use, such as a hand to mouth action. This is emphasised by the use of the verb 'smoking' in the definition rather than 'tobacco product,' so as to compare the actions and experiences rather than physical similarities or characteristics alone.

Against this background, Cancer Council submits that the word 'replicate' in the proposed definition of e-cigarette should be replaced with 'resemble.' According to the Cambridge Dictionary, 'replicate' means 'to make or do something again in exactly the same way [emphasis added].' For this reason, Cancer Council submits that the word 'resemble' would be more apt for the definition of e-cigarette.

For clarity, Cancer Council's recommended definition would read: "a device (whether or not containing nicotine or tobacco) that generates or releases, or is designed or intended to generate or release, by electronic means, an aerosol or vapour for inhalation by its user in a way that resembles, or produces an experience similar to, smoking."

As e-cigarette use has increased among young people, e-cigarettes that are disguised as myriad other objects have become available. These products are designed to be easily concealed in order to evade detection in settings such as school classrooms. A basic internet search reveals e-cigarettes disguised as toys, pens, highlighters, USB devices, phone cases, game consoles, glasses cases, cups,

bottles, bags, clothing, jewellery, lip gloss, wallets, watches, cameras, inhalers, lighters, flasks, food, and confectionery. For the avoidance of doubt, a subsection should be added to the definition to clarify that a product can meet the definition of 'e-cigarette' even if it also resembles a toy, food, household object, personal belongings, clothing, or any other object.

Although to date no e-cigarettes have been approved for smoking cessation and included on the Australian Register of Therapeutic Goods, the exclusion for such products in subclause 4 is appropriate.

The definition of e-cigarette in the Bill includes devices that contain tobacco. In this regard, Cancer Council urges that careful consideration be given to the implications for products that have features or characteristics of both tobacco products and e-cigarettes. Nicotine in preparations for human use is in Schedule 4 (Prescription Only Medicines) of the Poisons Standard ⁸ except:

- a. in preparations for oromucosal or transdermal administration for human therapeutic use as an aid in withdrawal from tobacco smoking; or
- b. in tobacco prepared and packed for smoking.

In 2020, the TGA considered an application to amend the scheduling of nicotine in the Poisons Standard to exempt from Schedule 7 nicotine when in tobacco prepared and packed for heating. The TGA made a final decision not to amend the scheduling. Consequently, unapproved heated tobacco products can be accessed with a medical prescription but are not available for general retail sale. This is also the case for all nicotine vaping products.

Cancer Council urges caution in respect of the definitions of 'tobacco product' and 'e-cigarette' and careful attention to the application of the Bill to products that may have features or characteristics of both. This would be especially relevant in the event that heated tobacco products and/or nicotine e-cigarettes were re-scheduled in the future. The drafting of the Bill should not give manufacturers and retailers the opportunity to argue such products are either 'tobacco products' or 'e-cigarettes,' depending on which characterisation is most favourable to them at the time.

Recommendations

Cancer Council recommends:

- That the following amendments be made to the proposed definition of 'e-cigarette' in clause 11:
 - Add the words, 'generates or releases' so that the first line reads: "a device (whether or not containing nicotine or tobacco) that generates or releases, or is designed or intended to generate or release..."
 - Replace the word 'replicates' with 'resembles.'
- For clarity, Cancer Council's recommended definition would read: "a device (whether or not containing nicotine or tobacco) that generates or releases, or is designed or intended to generate or release, by electronic means, an aerosol or vapour for inhalation by its user in a way that resembles, or produces an experience similar to, smoking."
- The addition of a subclause to the definition to clarify that a product can meet the definition of 'e-cigarette' even if it also resembles a toy, food, household object, personal belongings, clothing, or any other object.
- Careful consideration be given to the regulatory implications of the proposed definitions of 'e-cigarette' and 'tobacco product' for heated tobacco products.

Clause 12 – Meaning of e-cigarette accessory

Cancer Council supports the definition ‘e-cigarette accessory’ in clause 12 of the Bill but recommends adding the word ‘pod’ to clause 12(1)(a). This reflects the common use of the word ‘pod’ to describe pre-filled or re-fillable pods that are found in fourth generation e-cigarettes.⁹

Recommendation

Cancer Council recommends:

- The word ‘pod’ be added to the definition of ‘e-cigarette accessory’ in clause 12(1)(a) of the Bill, so that it reads: “a cartridge, capsule, pod or other vessel designed or intended to contain a liquid, gas, aerosol, vapour or other substance for use in an e-cigarette.”

Cancer Council supports the other interpretation provisions in Part 1.2, Division 3 of the Bill.

Do you have any feedback on the commencement provisions and anticipated transition timeframes?

Sections 1 and 2 of the Act commence on the day the Act receives Royal Assent and sections 3 to 186 will commence within 6 months thereafter.

Cancer Council supports the commencement provisions, which appear to be appropriate.

Cancer Council’s feedback on anticipated transition timeframes is provided further below, with our comments on Chapter 7, which considers (amongst other matters) the Public Health (Tobacco and Other Products) Consequential and Transitional Bill 2023 (**Consequential and Transitional Bill**).

Chapter 2

Do you have any feedback on the proposed advertising and sponsorship provisions in Chapter 2 of the Bill?

Overall, Cancer Council strongly supports the measures included in Chapter 2 of the Bill. In particular we support the extension of advertising provisions to cover e-cigarette advertisements, and the simplification/streamlining of the advertising provisions by removing the distinction between ‘publishing’ and ‘broadcasting’ contained in the TAP Act. We also strongly endorse the modernisation of various provisions to better capture the promotion of tobacco and e-cigarette products through emerging forms of media.

Our feedback and recommendations regarding a number of specific clauses within Chapter 2 of the Bill is set out below.

Clauses 18 and 41 – Prohibitions on publication of tobacco/e-cigarette advertisements

We note that the prohibitions in clauses 18 and 41 will apply where a person ‘*publishes material or authorises or causes material to be published*’. We strongly support the breadth of the wording here. However, for the avoidance of doubt, we recommend that the Bill be amended to also include specific reference to circumstances where a person ‘encourages’ or ‘procures’ someone else to publish material. While it’s arguable that such conduct could be captured by the words ‘authorises’ or ‘causes’, we believe this should be specifically clarified in the wording of clauses 18(1)(a) and 41(1)(a).

We note that it is particularly important for the wording of clause 41(1)(a) to be sufficiently broad, given the limitations imposed by clause 41(1)(c). A constitutional corporation who encourages or procures an individual to publish an e-cigarette advertisement should not be able to avoid penalty (even if the individual themselves is not caught by clause 41, due to the operation of 41(1)(c)).

Defence for individual publication

We acknowledge the need for the Bill to include some allowance for freedom of expression by private individuals. We therefore consider the defences in subclauses 18(8) and 41(8) to be appropriate. However, we strongly support the application of clause 13.4 of the *Criminal Code* here (so that the defendant has the burden of proving each element of the defences in clauses 18(8) and 41(8)).

We also strongly recommend that subclauses 18(8)(c) and 41(8)(c) be amended to require a defendant to prove they did not receive any direct or indirect benefit for publishing the tobacco or e-cigarette advertisement or the material containing the tobacco or e-cigarette advertisement. This is necessary to ensure that an individual social media influencer who is paid to promote another product/service but who, on their own initiative, publishes a tobacco or e-cigarette advertisement in the course of promoting that other product, will not be able to rely on the defence for individual publication.

For example – Influencer A is paid by marketing company B to create social media content promoting a particular pair of jeans. Influencer A (on their own initiative) creates an Instagram story showing themselves wearing the particular pair of jeans *whilst vaping*. Applying the current wording of

subclauses 18(8)(c) and 41(8)(c), Influencer A could argue that the defence for individual publication should nevertheless apply because:

- (a) he/she published the 'e-cigarette advertisement' contained within the Instagram story on his/her own initiative (i.e., he/she was not instructed by the marketing company to include vaping in the story); and
- (b) While he/she did receive a benefit for posting the Instagram story, he/she did not receive any particular benefit for publishing the e-cigarette advertisement itself (i.e., he/she did not receive a benefit for including vaping in the Instagram story).

While we acknowledge it could be argued that Influencer A received an *indirect* benefit for publishing the e-cigarette advertisement (on the basis that it formed a part of the content for which he/she was paid), we strongly recommend that specific wording be included in subclauses 18(8) and 41(8) to clarify this point and avoid any ambiguity.

Clause 19 – Definition of tobacco advertisement

Overall, Cancer Council supports the definition of 'tobacco advertisement' set out in clause 19 of the Bill. We support the use of the words 'any form of communication, recommendation or action'. This wording is significantly broader than the current wording in section 9 of the TAP Act and should help to expand the types of communication that will be captured by the definition (thereby reducing the need for future amendments to capture new and inventive advertising techniques). We also strongly support the use of the words 'directly or indirectly.'

Clarification required regarding promotion vs publicity

We note, however, that the definition of 'tobacco advertisement' seems to require some level of positive promotion of the matters listed, and that giving publicity to those matters (i.e., increasing awareness of them without necessarily positively advancing or encouraging them) may not be enough for conduct to be a 'tobacco advertisement.' Since it will not always be easy to demonstrate that a particular communication has the 'aim, effect or likely effect' of *positively promoting* smoking or regulated tobacco items, we recommend that the Bill be amended to clarify that communications which give mere publicity to the matters mentioned can constitute a tobacco advertisement. We note that the various exemptions in clauses 20-28 provide a sufficient safeguard against any concerns regarding restrictions on freedom of communication.

As an alternative, we note that clause 19 could be amended to specifically provide that it is not necessary to prove an element of positive promotion of regulated tobacco products or smoking when it comes to communications by persons *involved in the manufacture, distribution, marketing, or sale of tobacco products (or any person/entity acting on their behalf)*. In other words, clause 19 could be amended to include specific wording which clarifies that in the case of industry players, it will be enough for the communication to merely 'give publicity to' (or increase awareness of) smoking or regulated tobacco products.

Clarification required regarding interaction with definition of 'e-cigarette advertisement'

Cancer Council recommends that consideration be given to amending the Bill to clarify that a communication can be both a 'tobacco advertisement' and an 'e-cigarette advertisement' (i.e., that the two definitions are not mutually exclusive).

We believe this is particularly important given that the application of clause 41 (which sets out the prohibition on e-cigarette advertisements) is limited by subclause 41(1)(c). Conduct that falls outside the scope of clause 41(1) by virtue of subclause 41(1)(c) (but would have otherwise contravened clause 41), should still be capable of attracting penalties under clause 18 in circumstances where the communication can be said to have also had the aim/effect of promoting tobacco products or smoking (such as where the communication shows behaviour that simulates smoking). We acknowledge that subclause 19(3) could arguably be read as having this effect, however we recommend that this be specifically clarified in the Bill. If necessary, we note that a specific provision could be included to ensure there would be no doubling up of liabilities between the offences in clauses 18 and 41.

Rebuttable presumption in s 19(4)

Cancer Council supports the inclusion of the rebuttable presumption set out in subclause 19(4) for material containing designs, trademarks etc relating to regulated tobacco items.

We recommend that the words 'brand or variant name' also be specifically included in clause 19(4)(c). We also recommend that clause 19(4) be extended to include reference to any trademark or design registered by a manufacturer, importer, or distributor of regulated tobacco items.

Tobacco advertisements may be prescribed

Cancer Council strongly supports the power to prescribe a kind of material to be a tobacco advertisement. Industry marketing tactics continue to evolve rapidly. Subclause 19(6) builds an element of 'future-proofing' into the legislation to avoid the need for frequent amendments to capture new and inventive forms of industry promotion.

We note, however, that subclause 19(6) will only apply where the making of regulations would not be inconsistent with any of the exceptions set out in Part 2.2, Division 3 (see subclause 19(7)(c)). We strongly recommend that subclause 19(7)(c) be removed from the Bill. A number of the exceptions set out in Part 2.2; Division 3 are quite broad (as discussed further below). It is possible that new (and unforeseen) forms of industry promotion will fall within one or more of these exceptions but would nevertheless have the effect of encouraging smoking and/or the use of regulated tobacco items. The Bill should allow scope for such forms of promotion to be captured by clause 19.

It is our understanding that any regulation made under subclause 19(6) would be a disallowable instrument.¹ The status of the regulations as a disallowable instrument (together with the limitations imposed by s 19(7)(a) and (b)) would therefore be enough to prevent unfettered use of the regulation-making power in subclause 19(6). It is Cancer Council's view that there is no need for subclause 19(6) to be further limited by subclause 19(7)(c).

Clause 42 – Definition of 'e-cigarette advertisement'

¹ As the regulations do not appear to fall within section 44 of the *Legislation Act 2003*.

Regarding the definition of 'e-cigarette advertisement' in clause 42, we support the breadth of the wording used in the basic definition set out in clause 42(1).

We reiterate the comments set out above concerning the following issues:

- (a) The clarification required regarding promotion vs publicity;
- (b) The clarification required regarding interaction between the definitions of 'tobacco advertisement' and 'e-cigarette advertisement' (i.e., that the definitions not be mutually exclusive).
- (c) The power to prescribe a kind of material to be an 'e-cigarette advertisement' (noting that the same concerns above regarding clause 19(7)(c) also apply in relation to clause 42(3)(c)).

In addition, we note that the definition of 'e-cigarette advertisement' in clause 42 does not include equivalent provisions to those set out in subclauses 19(2), (3), (4) or (5). The justification for this is unclear. We strongly recommend consideration be given to including equivalent provisions in clause 42, to ensure the definition of 'e-cigarette advertisement' is sufficiently broad.

Exceptions to definition of 'tobacco advertisement' and 'e-cigarette advertisement' should be subject to further limitations

We note that the limitations set out in clauses 18(8)(b) and (c) of the Bill (regarding the defence for individual publication) will not apply where the published material falls within any of the exceptions to the definition of 'tobacco advertisement' set out in Part 2.2, Division 3. Similarly, the limitations in 41(8)(b) and (c) will not apply to the publication of material that falls within any of the exceptions to the definitions of 'e-cigarette advertisement' set out in Part 2.4, Division 3. This is problematic, as it means each of the exceptions has very broad application. We therefore strongly recommend that the Bill be amended to ensure the exceptions in Part 2.2, Division 3 and Part 2.4, Division 3 are subject to similar limitations to those imposed under clauses 18(8) and 41(8). We have expanded on this recommendation in our discussion of each individual exception (further below).

While we acknowledge there needs to be some allowance for freedom of expression in the Bill, the breadth of a number of the exceptions is inconsistent with Australia's obligations under Article 13 of the FCTC. We note the Guidelines to Article 13 specifically state that parties should '*take measures to prevent the use of journalistic, artistic, or academic expression or social or political commentary for the promotion of tobacco use or tobacco products*'.¹⁰ The current wording of a number of the exceptions fails to adequately safeguard against exploitation of the exceptions for this purpose (again, we have expanded on this point further below in our discussion of each exception).

Clauses 21 and 44 - Exceptions for standard business documents

Regarding the exceptions for standard business documents set out in clauses 21 and 44, we recommend the Bill be amended to clarify that only writing or other marks that appear *as part of the standard wording* of such documents should be exempt from the prohibitions on publishing tobacco and e-cigarette advertisements. This would ensure that unusual or innovative words/imagery (which may have a promotional effect) cannot be included in standard business documents. We note that specific wording to this effect is currently included in section 9(2)(c) of the TAP Act.

In addition, we recommend consideration be given to amending the Bill to clarify that only documents of a kind that are *ordinarily* prepared in the normal course of business of a manufacturer, importer etc. will fall within clauses 21 and 44 (regardless of whether the importer, manufacturer distributor or retailer claims to have *in fact* prepared the document in the ordinary course of their business).

We therefore recommend consideration be given to amending clauses 21(1) and 44(1) to read as follows (or similar to the following):

‘Writing and other marks that appear as part of the standard wording of a document ordinarily prepared in the normal course of business of a manufacturer, importer, distributor or retailer of regulated tobacco items do not, of themselves, constitute a tobacco advertisement.’

Clauses 22 and 45 – Exceptions for business signage

Regarding the exceptions for business signage in clauses 22 and 45 of the Bill, we recommend that the words ‘in, on or near’ be replaced with ‘in or on’.

The term ‘near’ is ambiguous and arguably would cover a situation where a tobacco manufacturer/distributor/importer purchased or leased land or signage space in the same neighbourhood as the business premises (but perhaps a block or two away) in order to promote its business at a much more prominent/busy location.

Clauses 25 and 48 – Exceptions for communications about government or political matters

It is Cancer Council’s view that the wording in clauses 25 and 48 is too broad. While we acknowledge there needs to be some allowance in the Bill for communications about government or political matters, the current wording allows too much scope for exploitation of this exception by the tobacco and e-cigarette industry. We recommend that the application of clauses 25 and 48 be limited as follows:

- (a) Communications about government or political matters should only be permitted where the relevant communication does not actively promote smoking/vaping or a regulated tobacco item/e-cigarette product etc. We note that wording to this effect is currently included in section 9(1A) of the TAP Act and should remain in future equivalent provisions.
- (b) Communications about government or political matters that are (a) in written or visual form, and (b) are initiated by, or any way associated with the tobacco or e-cigarette industry should be required to be in plain text only and should not be permitted to include pictures or images (particularly aspirational imagery). Tobacco and e-cigarette industry players should not be able to use the exemptions in clauses 25 and 58 as a means for indirectly influencing their brand/image by linking tobacco and e-cigarette products with positive imagery, feelings, or values.

As an example, we note that British American Tobacco continues to promote its ‘Responsible Vaping Australia’ (RVA) initiative extensively online. Advertisements promoting the RVA regularly appear in advertising banners on the websites of major

mainstream news outlets (and elsewhere). The RVA website is visually appealing and contains numerous aspirational images of young, healthy-looking people. Websites such as this clearly enable the cultivation of associations between the tobacco and e-cigarette industry, and ideals that are far removed from the harms of tobacco and e-cigarette use.

- (c) Communications promoting industry 'initiatives' regarding government or political matters should also be required to include a very clear and prominent disclosure of the funding source(s) behind the advertisement (including the full trading name of any funding sources).

Clauses 26 and 49 – Exceptions for artistic works and public interest expression

While we acknowledge that there needs to be some allowance for freedom of expression in the Bill, it is Cancer Council's view that the exceptions in clauses 26 and 49 for artistic works and public interest expression are too broad.

Artistic works

As currently worded, the exceptions in clauses 26(a) and 49(a) allow for the publication of any tobacco advertisement contained in an artistic work, provided it is performed/exhibited/distributed 'in good faith'. The term 'good faith' is not defined and could be construed very broadly. Inclusion of the words 'in good faith' are unlikely to act as a sufficient safeguard against the publication of works which have the ultimate effect of promoting smoking and/or vaping. We note that the term 'artistic work' has also not been defined.

Cancer Council is very concerned that clauses 26(a) and 49(a) as currently worded will undermine the objects of the Bill. We strongly recommend that clauses 26(a) and 49(a) be amended as follows:

- (a) The Bill should include examples of the sorts of works that would be considered 'artistic works' in order to aid interpretation of that term.
- (b) The performance/exhibition/distribution of artistic works that include a tobacco/e-cigarette advertisement should only be permitted where the tobacco/e-cigarette advertisement is an *incidental accompaniment* to the work itself (or an incidental accompaniment to part of the work). It should not form part of the main thrust of the work. Inclusion of a broad exception for artistic works without this important qualification would open the door to publication of a range of material currently prohibited under the TAP Act.
- (c) The performance/exhibition/distribution of artistic works containing a tobacco/e-cigarette advertisement should only be permitted where the person publishing the advertisement does so on their own initiative and does not receive any direct or indirect benefit for publishing the advertisement (in addition to any direct/indirect benefit the person receives for publishing the work itself).
- (d) Tobacco/e-cigarette advertisements should not be permitted to be included as an incidental accompaniment to an artistic work where the target audience (or one of the target audiences) of the work is children or young people. There is no justification for

including a tobacco or e-cigarette advertisement in material directed at children or young people under the guise of ‘artistic expression.’

Public interest expression

Again, we believe the current wording of clauses 26(b) and 49(b) will open up a significant ‘loophole’ in the Bill. Clause 26 essentially allows for the publication of any ‘*communication made for any genuine academic, educational or scientific purpose or any other genuine purpose in the public interest*’. We note that the words ‘*any other genuine purpose in the public interest*’ are particularly broad and are likely to open the door for industry players to claim that a range of communications/activities/events fall within the scope of clauses 26(b) and (c) (such as youth prevention programs for schools, or other corporate social responsibility ‘initiatives’).

We strongly recommend that consideration be given to removing the broad ‘public interest’ exemptions in clauses 26(b) and 49(b) and replacing these broad exemptions with much more specific exemptions for defined public interest activities if necessary (such as specific exemptions for genuine academic research and anti-smoking campaigns – discussed below).

We appreciate that it is difficult to anticipate the full range of circumstances in which a publication could genuinely be in the public interest. In addition to including much more specific exemptions for defined public interest activities (such as an exemption for anti-smoking campaigns), we note that the Bill could include a power to prescribe by regulation (or by Ministerial order) certain other publications that will be permitted on public interest grounds.

Absence of specific exception for anti-smoking campaigns

We recommend that the Bill be amended to include a specific exception for the publication of material for the sole or principal purpose of discouraging smoking/vaping or the use of a regulated tobacco item/e-cigarette product (similar to the exception currently set out in section 10(7) of the TAP Act).

We note, however, that such an exception should include wording specifically clarifying that a communication by or on behalf of a manufacturer/distributor/importer/retailer of a regulated tobacco item or e-cigarette product (or an associated entity) is not to be taken to be for the purpose of discouraging smoking or vaping.

Clauses 27 and 50 – Exceptions for journalism

While we appreciate there needs to be some allowance for material relating to news reports, we are again concerned that the wording in clauses 27 and 50 is far too broad.

We strongly recommend that a number of additional safeguards be added to clauses 27 and 50 in order to limit the potential for these exceptions to be exploited. In particular, we recommend the following:

- (a) The publication of material that is/relates to a news report or current affairs report should only be permitted where the person publishing the report does so on their own initiative and does not receive any direct or indirect benefit for publishing the

- advertisement (in addition to any benefit the person receives for publishing the report itself);
- (b) Where the person receives a benefit for publishing the report itself (as opposed to the tobacco/e-cigarette advertisement within the report), it should be made clear that for the exception to apply, that benefit must not have been provided (either wholly or in part) by a manufacturer/importer/distributor/retailer of regulated tobacco items/e-cigarette products (or an entity that is in any way associated with a manufacturer/distributor/importer/retailer);
 - (c) The publication of the material should only be permitted where it is not in the course of or in any way connected with the manufacture, importation, distribution, or sale of regulated tobacco items;
 - (d) The publication of the material should only be permitted where it does not actively promote smoking/vaping, or a regulated tobacco item or an e-cigarette product.

Clauses 29 and 55 – Meaning of ‘publish’

Private events or functions

Cancer Council strongly supports the breadth of the wording used in clauses 29(1) and 55(1). We also support the extended meaning of the words ‘public or a section of the public’ set out in clauses 29(4) and 55(4). This extended meaning will help to ensure that ‘invitation only’ promotional events hosted by the tobacco and e-cigarette industry (such as that hosted by Philip Morris at the 2017 Formula One Grand Prix)¹¹ are captured by legislation.

We recommend that clauses 29(4) and 55(4) be amended, however, to clarify that an advertisement will be taken to be made available to the ‘public or a section of the public’ notwithstanding that the promotion of the matters in 29(4)(b) and 55(4)(b) is not one of the primary or principal purposes of the event. We acknowledge that the words ‘or includes’ in 29(4)(b) and 55(4)(b) will go some way towards clarifying this point, but we recommend additional wording be inserted to provide further clarification on this issue. The inclusion of additional wording here would help to ensure that the tobacco and e-cigarette industry are unable to circumvent clauses 29(4) and 55(4) by using ‘sham’ companies to host events with an alternative stated primary/principal purpose (or purposes).

Targeted online advertising

Cancer Council strongly supports the extended meaning of ‘publishes’ set out in clauses 29(3) and 55(3). This extended meaning will help to ensure a number of new and emerging methods for reaching members of the public through online media platforms are captured by the legislation. We note that the wording in clauses 29(3) and 55(3) appears to be broad enough to capture temporary digital publication of a tobacco or e-cigarette advertisement (i.e., publication of an advertisement which disappears once viewed by the internet end user). The wording also appears broad enough to capture subscription-based content (i.e., content paid for by the internet user and personalised to them). We strongly support prohibition of both these forms of targeted internet advertising, which we note are increasingly utilised by the tobacco and e-cigarette industry.

While we support the wording in clause 29(3) and 55(3), we note that online marketing techniques are rapidly evolving, with the specific techniques used to reach individuals becoming increasingly

more complex. Future technological developments in this area are difficult to predict, and the need for frequent amendments to capture new forms of digital promotion should be avoided.

We therefore strongly recommend that clauses 29 and 55 be amended to incorporate some level of ‘future-proofing’ in this regard. For example, clauses 29(3) and 55(3) could be amended to include a power to prescribe by way of regulation further circumstances in which a tobacco or e-cigarette advertisement made available to, or accessible by, a person using the internet will be taken to be made available to, or accessible by, the public or a section of the public.

Clauses 31 and 57 – Online sales

We note that the Bill allows for the continuation of online sales for tobacco and e-cigarette products (see clauses 31 and 57). As outlined in Cancer Council Australia’s previous submission to the thematic review, we recommend that the Commonwealth Government consider banning the online sale of tobacco and e-cigarette products across Australia. Such an approach would be consistent with Australia’s obligations under Article 13 of the FCTC. The Guidelines to article 13 *specifically* state that internet sales of tobacco should be banned ‘*as they inherently involve tobacco advertising and promotion*’.²

Age-verification procedures

In the event that a national ban of online sales is not implemented, the Bill and Public Health (Tobacco and Other Products) Regulations 2023 (**Regulations**) should (at a minimum) be amended to set out very clear national requirements for age-verification procedures. We note that draft regulations 16 and 22 require websites to ‘*include an age verification system that limits access to the website to a person who is at least 18.*’ We strongly recommend that more detailed requirements for age-verification procedures be included in the regulations. Most tobacco retailers (including major supermarkets) appear to rely on self-report procedures (for example, requiring online shoppers to enter their date of birth before accessing an online store). These verification measures are highly unlikely to be effective in preventing sales to minors. Research undertaken in the US has found that the vast majority³ of minors who attempt to purchase tobacco online are successful, due to weak or non-existent age-verification procedures.¹²

In addition, it appears that draft regulations 16 and 22 will only apply in circumstances where there is no State/Territory legislation in place expressly dealing with online sales (pursuant to clauses 31(3) and 57(3)). The proposed requirement for inclusion of an age verification system will not apply where there is a State or Territory law in place regulating online sales, (even if that State or Territory law does not impose any age verification requirements). This is problematic. National regulation of age verification procedures is essential, due to the pervasiveness of interstate online sales in Australia.

Ability to ‘sort by unit price’

We are aware that a number of online tobacco retailers (including major supermarkets) have included a website function for online sales that allows consumers to sort tobacco products advertised on the website by ‘unit price.’ This function allows consumers to quickly ascertain which

² See paragraphs 18-21 of the Guidelines.

³ 93.6% of credit card purchase attempts, and 88.9% of money order attempts.

tobacco product has the lowest price per stick at any given time and amounts to a form of price promotion. We note there does not appear to be anything in the Bill or draft regulations preventing retailers from continuing this practice. We recommend that the Bill be amended to prohibit online retailers from allowing consumers to sort tobacco or e-cigarette products advertised online by 'unit price.'

Clauses 32 and 58 – Trade communications

Cancer Council strongly supports the limitations imposed on the publication of trade communications. In particular, we strongly support clauses 32(b) and 58(b), which provide that permitted trade publications must not actively promote smoking/vaping or the use of regulated tobacco items/e-cigarette products. As outlined in Cancer Council's 2019 submission to the thematic review, the introduction of restrictions on advertising and marketing to retailers is crucial in order to prevent the tobacco and e-cigarette industry from continuing to exploit this remaining avenue for promotion.

We also support subclauses 32(c) and 58(c), which limit trade communications about particular tobacco/e-cigarette products to 'factual information about the item and the terms of the sale or supply of the item'. However, we recommend that the *type* of factual information that is permitted be specifically limited to information regarding price, availability, pack size and name of the product.

Trade communications should be limited to text only. We recommend the use of video/audio or images in trade communications be specifically excluded. As outlined in Cancer Council's submission to the thematic review, the use of branded packs and clear brand imagery in trade communications is not uncommon and is completely at odds with the objects of the Bill. A number of specific examples of trade communications were included in appendix 3 of that submission and have been reattached to this submission for ease of reference (see **Appendix 1**).

We also recommend consideration be given to allowing further restrictions on the content/appearance of trade publications to be prescribed by regulation (e.g., use of colour/colour schemes, use of fonts and font size etc).

Interaction with Tobacco Products Control Act 2006 (WA)

Section 106(a) of the *Tobacco Products Control Act 2006* (WA) provides as follows:

"106. Products resembling tobacco products etc. not to be sold

A person must not sell any food, toy or other product that is not a tobacco product but is —

(a) designed to resemble a tobacco product or a package; or

(b) in packaging that is designed to resemble a tobacco product or a package.

Penalty: see section 115."

Section 106(a) of the *Tobacco Products Control Act 2006* (WA) has been held to prohibit the sale of e-cigarettes (please see *Hawkins v Van Heerden* [2014] WASC 127; *Van Heerden v Hawkins* [2016] WASCA 42). The WA Department of Health website provides:

“It is the Department of Health’s view that e -cigarette devices and their components, whether (in the case of components) they are sold separately or not, constitute products that are designed to resemble tobacco products. Any person selling e-cigarettes and vaping products (external site), or their components may be liable for offences under the Tobacco Products Control Act 2006 (external site)”.¹³

Cancer Council considers that it is important that the Bill does not undermine State and Territory legislation by permitting e-cigarette advertisements in circumstances where the sale of e-cigarettes is prohibited. Cancer Council recommends that the Australian Department of Health and Aged Care liaise with the WA Department of Health regarding the appropriateness of the clauses regarding “e-cigarette advertisements – permitted publications” in light of WA legislation.

We also refer to and reiterate our comments in relation to clause 7 of the Bill regarding the operation of State and Territory legislation more generally.

Clauses 37 and 64 – Prohibitions on sponsorship

Cancer Council strongly supports the general prohibitions on tobacco and e-cigarette sponsorships set out in clauses 37 and 64.

Clauses 38 and 65 – Definitions of tobacco/e-cigarette sponsorship

We broadly support the definitions of ‘tobacco sponsorship’ and ‘e-cigarette sponsorship’ set out in clauses 38 and 65 respectively. However, we strongly recommend the following amendments be made to the definitions, to ensure key promotional ‘loopholes’ currently exploited by the tobacco and e-cigarette industry are captured.

Reference to promotion of manufacturer/distributor/importer

We recommend that the definitions be amended to specifically include any form of contribution with the aim, effect, or likely effect of promoting a manufacturer, distributor or importer of a regulated tobacco item or e-cigarette product or an initiative of a manufacturer, distributor, or importer. This would ensure that sponsorship arrangements promoting tobacco/e-cigarette industry ‘initiatives’ (that are not explicitly tied to a particular product, but nevertheless serve to promote the interests of a manufacturer/distributor/importer) could also be captured.

The partnership between Philip Morris International’s ‘Mission Winnow’ initiative and the Ferrari F1 team provides an appalling example of a sponsorship arrangement which is not explicitly tied to a particular product, but which nevertheless serves as a means for keeping the tobacco and e-cigarette industry in the public eye. While we acknowledge it could be argued that such arrangements would have the aim, effect, or likely effect of promoting ‘smoking’ or ‘vaping’, we strongly recommend that clauses 38 and 65 of the Bill be amended to include specific wording clarifying this point, in order to avoid any ambiguity.

Use of the term ‘individual’

We note that the definitions of ‘tobacco sponsorship’ and ‘e-cigarette sponsorship’ refer to contributions made to an ‘event, activity or individual’. We are concerned that the term ‘individual’

appears to refer to natural persons only (and does not capture bodies corporate, or similar entities).¹⁴ The use of the term ‘individual’ here significantly narrows the scope of clause 38 and 65.

Under the current wording, contributions to sporting teams or other organisations or causes would not be captured (even where they have the aim, effect, or likely effect of promoting smoking/vaping or a regulated tobacco item/e-cigarette product). We are also concerned that under the current wording, the sponsorship prohibitions in clauses 37 and 64 could potentially be avoided through the use of inventive corporate structuring by individuals.

We therefore strongly recommend that the wording in clauses 38 and 65 be broadened to ensure contributions to bodies corporate, and other organisations/causes are also captured where they have the aim, effect, or likely effect of promoting smoking/vaping etc.

Provision of payments and incentives to retailers should be specifically captured

We recommend that consideration be given to amending clauses 38 and 65 to specifically include reference to the direct or indirect provision of payments, incentives, rebates, or any other form of benefit by tobacco/e-cigarette manufacturers and distributors to retailers and proprietors of hospitality venues.

As outlined on pages 2-3 of Cancer Council’s 2019 submission to the thematic review, tobacco companies continue to heavily market their products to retailers and proprietors of hospitality venues by offering a wide range of contractual incentives for maintaining stock availability, meeting sales targets, trialling new stock, promoting particular brands etc. These arrangements have the ultimate aim of promoting smoking/vaping (and the use of regulated tobacco items/e-cigarette products). We recommend that clauses 38 and 65 be amended to specifically capture these arrangements.

We note the importance of prohibiting this form of marketing to retailers is recognised by Article 13 of the FCTC and its related Guidelines. The Guidelines to Article 13 provide a non-exhaustive list of the various forms of tobacco advertising, promotion and sponsorship that fall within the scope of the FCTC. The list states that the provision of payments or other contributions to retailers in order to encourage or induce them to sell tobacco products falls within the terms of the FCTC.

Clauses 39 and 66 – Exception for political donations

While we strongly support the general prohibitions on sponsorship in clauses 37 and 64, we are concerned about the proposed exceptions to the prohibition on sponsorships for political donations (set out in clauses 39 and 66). Clauses 39 and 66 essentially provide that it will not be an offence to contribute (a) gifts or (b) ‘*payments or reimbursements of expenses incurred in the course of an election*’, where those gifts or payments are made to:

- (a) Members of Parliament (State or Federal)
- (b) candidates for election
- (c) registered political parties
- (d) entities associated with any of the above, or persons campaigning on behalf of any of the above.

It is unclear from the wording of clauses 39 and 66 whether all payments made to the above persons/entities will be exempt from the prohibitions on sponsorship or whether only those

payments made to cover expenses incurred in the course of an election will be exempt (in other words, it is unclear whether the word 'payment' in clauses 39(1)(b) and 66(1)(b) is intended to be qualified by the words '*of expenditure incurred during the course of an election*'). However, regardless of which interpretation is intended, Cancer Council does not support the inclusion of any exemption to the prohibition on sponsorships for political donations by any tobacco or e-cigarette industry business entity (including close associates or those who accept industry funding themselves).

As a signatory to the WHO FCTC, the Commonwealth Government has a commitment under Article 5.3 to '*act to protect tobacco control policies from commercial and other vested interests of the tobacco industry in accordance with national law.*' We believe the Bill provides a unique opportunity for the Commonwealth Government to take action to implement Article 5.3 by introducing legislation which seeks to protect Australia's public health policies from the profit motivated interference of the tobacco and e-cigarette industry and its front groups. The Guidelines to Article 5.3 of the FCTC specifically state that provision of financial or other support by the tobacco industry to politicians, political candidates or political parties amounts to a form of promotion or sponsorship within the terms of the Convention. The proposed exceptions in clauses 39 and 66 are therefore completely out of step with Australia's obligations under the FCTC.

We note that removal of the exception for political donations from the Bill may mean that consequential amendments are required to the *Commonwealth Electoral Act 1918* (Cth). However, it is Cancer Council's view that this is not in itself a sufficient reason for including this exception.

Penalties in Chapter 2

In relation to the penalties provided in Chapter 2, Cancer Council supports the inclusion of multiple consequence provisions for the contravention of prohibitions on publishing tobacco advertisements (clause 18); entering into tobacco sponsorships (clause 37); publishing e-cigarette advertisements (clause 41) and entering into e-cigarette sponsorships (clause 64). It is important that there is a fault-based offence, a strict liability offence and a civil penalty provision to allow for a range of enforcement options. We note that the inclusion of strict liability offences allows for a penalty to be imposed in circumstances where the fault element (recklessness) is difficult to establish.

The penalties proposed in Chapter 2 of the Bill for each of the offences are as follows:

- Fault-based offence - (a) for an individual—2,000 penalty units; and (b) for a body corporate—20,000 penalty units;
- Strict liability offence - (a) for an individual—60 penalty units; and (b) for a body corporate—600 penalty units;
- Civil penalty provision - (a) for an individual—2,000 penalty units; and (b) for a body corporate—20,000 penalty units.

We note the current penalty for the offence of contravening section 15 and 15A of the TAP Act is 120 penalty units (or we understand 600 penalty units in the case of a body corporate, please see subsection 4B (3) of the *Crimes Act 1914* (Cth)).

A penalty unit is currently \$313, which we understand means that the maximum fault-based offence and civil penalty offence for bodies corporate in Chapter 2 of the Bill is \$6,260,000. We understand the maximum penalty for a strict liability offence for a body corporate is \$187,800. It is noted that the maximum penalty for an infringement notice appears to be significantly lower than the

maximum penalty for a strict liability offence (in accordance with section 104(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**)).

We note the penalties set out in the Bill are substantially lower than those imposed against corporations under the Australian Consumer Law. For example, the maximum penalty for bodies corporate for the offence of contravening section 151 of the Australian Consumer Law (regarding false or misleading representations about goods or services) is the greater of:

- “\$50,000,000;
- if the Court can determine the "reasonably attributable" benefit obtained, 3 times that value; or
- if the Court cannot determine the benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the offence”¹⁵ (see section 151(5) of the Australian Consumer Law).

If the offence is committed by a person other than a body corporate, the maximum fine is \$2,500,000.

The maximum civil penalty under the *Australian Securities and Investments Commission Act 2001* (Cth) for a body corporate is the greater of:

- 50,000 penalty units;
- three times the benefit obtained and detriment avoided, or
- 10% of annual turnover, capped at 2.5 million penalty units.¹⁶

The maximum civil penalty for individuals is the greater of 5,000 penalty units or three times the benefit obtained, and detriment avoided. (See section 12GBCA of the *Australian Securities and Investments Commission Act 2001* (Cth)).

Similarly, the maximum civil penalty relating to advertising under section 42DLB of the *Therapeutic Goods Act 1989* (Cth) is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate.

Although the penalties set out in the Bill are higher than those in the TAP Act, it appears they are still significantly lower than the maximum penalties imposed under other corporate and financial sector laws at the Federal level. We therefore recommend that the penalties be further increased to align them with other corporate and financial sector penalties, and to reflect the seriousness of the offending conduct. Non-compliance with Chapter 2 of the Bill directly and indirectly risks increasing tobacco¹⁷ and/or e-cigarette use,¹⁸ and the range of health effects, risks and social costs associated with this use.

We also recommend further mechanisms be introduced to ensure that a person does not profit from contravening the offence and civil penalty provisions, so that there is a sufficient deterrence from non-compliant conduct (please see our comments in relation to Chapters 6 and 7 here). In particular, we strongly recommend that the quantum of penalties imposed be tied to the benefit obtained by the breach, and/or the corporation's annual turnover, or adjusted turnover during the period of the breach. This would help to ensure the penalties operate as an effective deterrent against contravention by an industry with incredibly deep pockets.

Finally, while we acknowledge that it is appropriate to attach lower penalties to strict liability offences (as compared to fault-based offences), we recommend that the penalties for strict liability offences be increased. As noted above, we understand the Bill provides that the maximum penalty for a strict liability offence is currently \$187,800. We anticipate there will be many instances where recklessness on the part of an offender will be difficult to prove, and it is not difficult to imagine a scenario where the publication of an offending tobacco or e-cigarette advertisement could result in a profit for a body corporate greatly exceeding \$187,800.

Are the proposed advertising and sponsorship provisions likely to address emerging forms of media through which tobacco or e-cigarettes will be promoted?

Overall, we believe the proposed provisions will help to address emerging forms of media through which tobacco or e-cigarettes will be promoted. However, as noted further above, marketing, and promotional techniques are rapidly evolving. In particular, online marketing techniques used to reach individuals are becoming increasingly more complex. Future technological developments in this area are incredibly difficult to predict, and the need for frequent amendments to capture new forms of digital promotion should be avoided.

We reiterate that it is essential for the proposed new legislation to be flexible, and capable of adapting to new marketing technologies as they are developed. We have therefore recommended that a number of provisions in the Bill be amended to incorporate a level of ‘future-proofing’ by including regulation-making powers. In particular, we have recommended clauses 29(3) and 55(3) be amended to include a power to prescribe by way of regulation further circumstances in which a tobacco or e-cigarette advertisement made available to, or accessible by, a person using the internet will be taken to be made available to, or accessible by, the public or a section of the public.

Are there any other types of promotion that need to be considered?

In addition to each of the recommendations discussed above, we recommend that specific consideration be given to ensuring the promotion of corporate social responsibility activities by the tobacco and e-cigarette industry is prohibited. Industry players are increasingly relying on promotion of so called ‘socially responsible’ business practices as a means of ‘rebranding’ themselves and fostering associations between the tobacco and e-cigarette industry, and socially responsible ideals and causes that are far removed from the harms of tobacco and e-cigarette use.

We note the Guidelines for implementation of Article 13 of the FCTC specifically state that publicly promoting socially responsible business practices constitutes a form of advertising and promotion, and contributions from tobacco companies to socially responsible causes are a form of sponsorship.⁴

We also recommend that tobacco and e-cigarette companies be ineligible for awards or schemes such as ‘top ranking companies’ overseen by the Commonwealth and State/Territory Governments (or their agencies), particularly where such awards and schemes are likely to have the effect of promoting ‘socially responsible’ elements of a company’s business practices. The granting of such awards or positive rankings is clearly inconsistent with Australia’s obligations under Article 5.3 of the FCTC. The Guidelines to Article 5.3 specifically state that parties ‘*should not endorse, support, form*

⁴ See paragraphs 25-28 of the Guidelines.

partnerships with or participate in activities of the tobacco industry described as socially responsible.⁵

⁵ See paragraphs 25-28 of the Guidelines.

Chapter 3

Do you have any feedback on the packaging and product requirements set out in Chapter 3 and in the Regulations?

Are there any novel or innovative product or packaging features that could be better addressed by the draft Bill?

Cancer Council addresses the above questions in considering the provisions of Chapter 3 of the Bill below, together with relevant clauses from the Regulations.

Comments on Bill--Chapter 3 Tobacco product requirements

Clause 70 - Meaning of *retail packaging* of a tobacco product

Cancer Council notes that the meaning of *retail packaging* of a tobacco product is the same as was contained in the *Tobacco Plain Packaging Act 2011 (TPP Act)* with the addition of clause 70(g) which adds 'lining' to the meaning.

Cancer Council supports the meaning of *retail packaging* and notes that this meaning is comprehensive and has served to meet the objects of the TPP Act previously without issue.

Clause 71 - Meaning of *packages* a tobacco product for retail sale

Cancer Council notes that the meaning of *packages* a tobacco product is the same as was contained in the TPP Act with the addition of clause 71(g) which includes placing a 'lining' in a container as a form of packaging.

Cancer Council supports the meaning of *packages*.

Clause 72 - Meaning of *prohibited term*

Cancer Council strongly supports the inclusion of prohibited terms in relation to regulated tobacco items.

The seven proposed categories (term that implies reduced harm; term that refers to quality, a colour, a term that refers to a filter; non-alphabetical character, a numeral or an ideograph; term that refers to health effects; term that suggests the inclusion of a prohibited ingredients) are supported.

We are concerned that none of the items specifically refer to terms that are numbers in words (as opposed to numerals), for example 'three', 'five', 'one' etc or even one, two, four, eight, twelve and sixteen (common putative levels of tar under the former ISO testing system). We believe an additional item should be added to make clear that any terms that refer to numbers, whether numerical or spelled out as words, are prohibited. This would prevent numerical brand or variant names which could create an erroneous impression about the product's harm when viewed as part of a product range or in comparison to a competitor's product with similar terms used.

Should our recommendation below not be adopted, then we note that Item 5 includes a numeral as a prohibited term, however the examples provided in Column 2 do not include a numeral such as '2' - we suggest an example such as this be added for clarity.

Cancer Council supports the inclusion that an ability for regulations to prescribe a word or mark to be a prohibited term to 'future-proof' the legislation.

Recommendation

Cancer Council recommends inclusion of an additional item to the table in clause 72(1) of the Bill as follows:

A term that refers to a number, whether numerical (Arabic or Roman) or spelled out as words. Examples include 1, i or One; 3, iii or Three; 50, L or Fifty.

(Item 5 could be amended to remove a numeral if it is included as per our recommendation above to avoid duplication).

Clause 73 - Plain packaging - physical features

Cancer Council notes that requirements for many of the physical features of retail packaging that were previously contained in the TPP Act, are now proposed to be prescribed in the Regulations. While we understand that there may be drafting reasons for this to be contained in Regulations, it also means they can be more easily changed. Our concern is that this would allow key gains to be wound back in the future. We request that consideration be given to including any requirements that are unlikely to need revision in the future be included in the Bill/Act for safeguarding.

Clause 74 - Plain packaging – colour and finish

Cancer Council notes that some of the requirements for colour and finish previously contained in the TPP Act are now in the Regulations. It is unclear as to why the requirement that retail packaging must have a matt finish (clause 19(2)(b) of the TPP Act) is now contained in the Regulations (Part 3.3, 37(1)). Any type of sheen allowed on packaging is likely to enhance its attractiveness and so it is difficult to envisage any future scenario when the requirement for a matt finish would need to be amended. As such, we consider this requirement should be contained in the Bill as a default requirement.

When read together, we note that subclauses 74(2) and (3) of the Bill essentially require that all outer and inner surfaces of retail packaging as well as any lining be coloured Pantone 448C *unless the regulations prescribe a different colour for these parts*. We note that Regulation 37 appears to require the inner surfaces to be white and lining to be silver/white (**not** Pantone 448C).

Cancer Council is greatly concerned with the colours the draft Regulations prescribe for the inner surfaces as well as the lining (please see our detailed comments further below regarding Part 3.3, clause 37 of the Regulations in this regard).

We strongly recommend that the Bill and/or the Regulations be amended to ensure that (i) the inner surface of all retail packaging is required to be coloured Pantone 448C and (ii) both sides of any lining is also required to be coloured Pantone 448C.

Recommendation

Cancer Council recommends that:

- The requirement for a matt finish on tobacco packaging be included in the Bill as the default finish, not in the Regulations.

- The Bill and/or Regulations be amended to ensure that (i) the inner surface of all retail packaging is required to be coloured Pantone 448C and (ii) both sides of any lining is also required to be coloured Pantone 448C.

Clause 75 - Plain packaging—standardisation

Cancer Council is strongly in favour of the specification that retail packaging must comply with any requirements prescribed by the regulations concerning the number of units, mass or volume of a tobacco product included in retail packaging, and any requirements on the pricing of that product. Diversification of pack and pouch sizes in Australia has greatly undermined the effectiveness of tobacco excise policy. Ending this way of increasing the affordability and appeal of tobacco products is highly desirable in order to meet the objects of the Bill and to meet the Government's targets for reduced smoking prevalence. In this regard, the National Tobacco Strategy 2023-2030 aims "to achieve a national daily smoking prevalence of less than 10% by 2025 and 5% or less by 2030 in Australia, and reduce the daily smoking rate among First Nations people to 27% or less by 2030." ¹⁹

Clause 76 - Plain packaging—prohibited terms, trademarks, and other marks

Cancer Council is supportive of the provisions in this section of the Bill, in particular the reinforcement that no *prohibited term* may appear as part of a mark or trademark.

We are also strongly supportive of the inclusion of clause 76(5) which ensures that no permitted mark or trademark can undermine the objects of the Act by, for example, directly or indirectly creating an impression that the tobacco product is less harmful than other tobacco products.

Clause 77 - Plain packaging—Health warning

Cancer Council strongly supports provisions requiring display of images prescribed by regulations on recommendation of the Commonwealth Chief Medical Officer.

Clause 78 - Plain packaging – mandatory markings

Cancer Council supports this clause.

Clause 79 - Plain packaging – wrappers

Cancer Council supports this clause.

Clause 80 - Plain packaging – prohibited tobacco product accessories

Cancer Council supports this clause.

Clause 81 - Plain packaging—inserts and onserts

Cancer Council strongly supports the new provision which provides for the inclusion of health promotion inserts and onserts in retail packaging of tobacco products as prescribed by regulations on recommendation of the Commonwealth Chief Medical Officer.

We also support the provision that retail packaging must not contain any other inserts or onserts other than those described above.

Clause 82 - Retail packaging not to produce noise or smell

Cancer Council supports this provision including the wording that has been updated from the TPP Act to make it more comprehensive and less ambiguous.

Clause 83 - Retail packaging must not change after retail sale

Cancer Council supports this clause.

Clause 84 - Prohibited terms—brand names and variant names

Cancer Council strongly supports the provision that brand and variant names must not be or include prohibited terms.

Clause 85 - Tobacco products – appearance and physical features

Cancer Council supports this clause.

Clause 86 - Tobacco products—contents

Cancer Council strongly supports the provision that allows tobacco product ingredients to be prohibited by regulation, particularly where those ingredients may be contributing to increased palatability, appeal, or addictiveness of tobacco products.

We note, however, that clause 86(1) does not apply to tobacco product accessories. It is unclear why this is the case. We strongly recommend the application of clause 86 be extended to ensure that tobacco product accessories (such as filter tips, cards, capsules etc) are not able to contain ingredients that are prohibited by the regulations.

Recommendation:

Clause 86(1) be amended to ensure it applies to tobacco products and tobacco product accessories.

Clause 87 - Tobacco products – prohibited devices

Cancer Council strongly supports the provision that a tobacco product must not contain any device prohibited by the regulations, specifically as the regulations prohibit devices that are capable of altering the flavour, smell, or intensity of the product (please see clause 121 of the Regulations).

Clause 88 - Tobacco products - performance requirements

Cancer Council supports this clause.

Clause 89 - Tobacco products – testing requirements

Cancer Council supports this clause.

Clause 90 - Tobacco product accessories – prohibited terms

Cancer Council strongly supports the provision that prohibited terms must not appear anywhere on tobacco product accessories or the wrapping of a tobacco product accessory.

Clause 91 - Tobacco product accessories – prohibited functions

Cancer Council strongly supports the provision that a tobacco product accessory must not alter, or be capable of altering, the flavour or smell of a tobacco product with which it is used.

We note, however, that clause 91 does not appear to prohibit tobacco product accessories from altering the *intensity* of a tobacco product even though the definition of a tobacco product accessory in clause 10 (1)(e) of the Bill includes this as a function an accessory is capable of performing, along with altering flavour and smell. Tobacco product accessories (such as filter tips, capsules etc) should not be able to alter the intensity of the tobacco product with which they are used (for example by reducing the harshness and strength of taste of the product, without necessarily altering the flavour). We therefore strongly recommend that clause 91 be amended to ensure accessories that alter the intensity of a tobacco product are also captured.

Recommendation

Cancer Council recommends that clause 91 be amended to prohibit tobacco product accessories from altering the *intensity* of a tobacco product (as well as the flavour or smell).

PART 3.6 – Miscellaneous

Division 1 - Export exceptions

Cancer Council has no comment on this Division.

Division 2 - Interaction with Trademarks Act and Designs Act

Cancer Council has no comment on this Division.

Division 3 - Additional tobacco product requirements

Cancer Council supports this clause.

Comments on Regulations related to Chapter 3

Part 3.1 Introduction

We have no comments on this Part.

Part 3.2 Plain packaging – physical features

Clause 27 - Physical features of retail packaging – general

Cancer Council supports this clause.

Clause 28 - Physical features of cigarette packs – dimensions

Cancer Council is strongly supportive of the updates to allowable cigarette pack dimensions. Greatly narrowing the allowable dimensions will reinforce the standardisation of pack sizes.

Clause 29 - Physical features of cigarette cartons

Cancer Council supports this clause.

Clause 30 - Physical features of lining of primary packaging of tobacco products

Cancer Council is generally supportive of this clause. We note that the wording of clause 30(4)(c) *‘must not: represent, or be suggestive of, the brand name or variant name (if any) of the tobacco product’*, is different from the previous wording of regulation 2.1.3(3)(c) of the *Tobacco Plain Packaging Regulations 2011* (Cth) (**TPP Regulations**) which stated, *‘must not: constitute tobacco advertising or promotion’*. We are concerned that the updated wording is narrower in scope than previous requirements.

Recommendation

Cancer Council recommends further consideration be given to broadening the scope of clause 30(4)(c) to protect against all tobacco advertising or promotion.

Clause 31 - Physical features of cigar tubes

Cancer Council supports this clause.

Clause 32 - Physical features of primary packaging of other tobacco products

Cancer Council supports this clause.

Clause 33 - Resealing tobacco products

Cancer Council is strongly supportive of the addition of points (b) and (c) which add extra safeguards to prevent the ability of companies to exploit the provision for resealing mechanisms. We also note that white is now an allowable colour for these mechanisms instead of black. We assume this is a manufacturing allowance and consideration has been given that the colour white will not add to the appeal of the packaging.

Clause 34 - Windows in packaging prohibited

Cancer Council supports this clause.

Clause 35 - No voids, spacers, or fillers etc.

Cancer Council is strongly supportive of this additional provision and notes that tobacco companies have previously exploited lack of regulation to continue to manufacture appealing, slim cigarettes, package them in the smallest sized pack allowable and then fill any extra space inside the pack with spacers/fillers.

Part 3.3 - Plain packaging – colour and finish

Cancer Council strongly recommends that clause 37(3) specify that inner surfaces of cigarette packs or cartons must be Pantone 448C.

Cancer Council strongly recommends that clause 37(4) specify that inner surfaces of primary or secondary packaging other than cigarette packs or cartons must be Pantone 448C.

Cancer Council strongly recommends that clause 37(5) specify that both sides of any lining for cigarette packs must be Pantone 448C.

While Australia led the world when it introduced plain packaging in 2012, countries that followed have taken note of Australia's experiences and the industry's response and introduced further measures to improve regulation of packaging. Canada's regulations for plain and standardised packaging specify that every interior surface and exterior surface of a primary package and of a secondary package must be the colour Pantone 448C – the colour specified for outer surfaces in Australia's plain packaging regime. Australia should not only meet current world's best practice as set by Canada and mandate that inner surfaces are Pantone 448C but improve upon it by requiring foil linings to also be Pantone 448C, further reducing the appeal of the inside of packaging.

We raised our concerns with these policy oversights in our original submission in 2019 and recommended that all inner surfaces, as well as linings, be required to be the same colour as outer surfaces which is Pantone 448C. In our view, the necessity of this change has become even stronger in the last 3 years for the following reasons:

1. *Increases the appeal of tobacco products and the ability to mislead or deceive about harmful effects of tobacco use.*

Continuing to allow inner surfaces and linings to be white/silver is counter to the means described in the Bill for achieving the objects of the Bill. Specifically, subclauses 3(2)(b) and (c) refers to 'reducing the appeal of regulated tobacco items and e-cigarette products to consumers' and 'preventing the retail packaging of tobacco products from misleading or deceiving consumers about the harmful effects of smoking or using tobacco products.' White coloured packaging has been shown through research to give rise to perceptions of decreased product strength and harm (among other things).^{20, 21} Having the inside of packaging and any linings the same drab, unattractive colour as the outside of the packaging will further reduce the appeal of tobacco products. It is inconsistent that the outside of tobacco packaging should look unattractive and provide graphic images of the damage tobacco use can cause, while the inside of packaging where the cigarettes (or other tobacco products) are kept remains pristine, white/silver, and clean. This may give the false impression that tobacco use is somehow less damaging than the outside packaging conveys.

2. *Undermines health promotion inserts.*

Inner surfaces and linings that are white/silver will undermine health promotion inserts when prescribed by regulations. Drab, dark brown packaging in the colour Pantone 448C was chosen for the current TPP Act as the colour most likely to increase the effectiveness of health warnings on the retail packaging of tobacco products, that is, a colour that would not draw attention away from the health warnings. It is illogical that this premise does not also apply to the interior of packaging which will carry health promotion inserts in the near future. Allowing inner surfaces and linings to be white is a regulatory inconsistency and failure - it will not provide health promotion inserts the best chance of success from the outset.

3. *Failure to meet world's best practice as announced by Health Minister Mark Butler.*

On the 30th November 2022 when Health Minister Mark Butler announced these reforms, he stated that *"The reforms will put us back into a world-leading position, alongside fellow OECD nations like New Zealand and Canada."*²² Canada requires the inner surfaces of its tobacco packaging to be the same colour as its outer surfaces, Pantone 448C, which is what Australia requires for outer surfaces.²³ Failure to require inner surfaces to be this colour is a failure to meet world's best practice, and failure to require linings to be Pantone 448C will mean Australia is not in a world-leading position as promised by Minister Butler.

4. *Failure to fully implement Australia's obligations under WHO FCTC Articles 11 and 13.*

Plain packaging aims to implement Article 11²⁴ of the WHO FCTC by reducing the ability of the pack to mislead consumers under Article 11.1(a) and increasing the salience of health warnings under Article 11.1(b), and Article 13²⁴ of the WHO FCTC by removing advertising, promotion, and sponsorship on tobacco product packaging. The Article 11 guidelines²⁵ note that plain packaging 'may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others' (paragraph 46).

Plain packaging laws have been in place in Australia for over a decade. Improving on the previous legislation is in line with our obligations under WHO FCTC Articles 11 and 13.

5. *Evidence the tobacco industry can comply with further regulation*

Cancer Council believes it is likely the tobacco industry would object to inner surfaces/linings being a colour other than white/white-silver. We believe any objections are likely to be baseless and the industry's own practices show they can comply with these requirements. Canada requires inner surfaces to be Pantone 448C - the industry have complied and there have been no unintended negative public health consequences. In relation to foil linings, the industry itself has used coloured foil linings in many different colours across product ranges as a marketing tool to entice smokers – any claims that they cannot manufacture foil linings in colour Pantone 448C, whatever the reason, are clearly baseless when they manufacture coloured foil linings to meet their own marketing objectives. Please see examples of coloured foil linings in **Appendix 2**.

We have an additional concern specific to a wording change in clause 37(4) of the Regulations. In the corresponding regulation 2.2.1(3A) (b) of the current TPP Regulations the wording specifies that inner surface of primary or secondary packaging other than cigarette packs or cartons must be (a) white; or (b) the colour of the packaging material in its natural state. 'Natural state' we understand denotes cardboard in the colour of its raw form i.e., brown. Clause 37(4)(b) in the Regulations changes this specification to *"the colour of the material from which the packaging is made"*. Notwithstanding our overall objection to this whole clause, *the colour of the material from which the packaging is made* provides a concerning loophole that is unnecessarily vague and open to exploitation by the industry. *The colour of the material from which the packaging is made* could be any colour industry determines as there is nothing in other regulations to prevent them using a colour of their choice. If this clause is not changed to require inner surfaces to be the colour Pantone 448C as per our recommendation, then at the very least this clause needs to be amended to ensure that the tobacco industry cannot use a colour that would further increase the appeal of their product.

Recommendations

Cancer Council strongly recommends in order to meet the objects of the Bill, Minister Butler's declaration that Australia would be back to a world-leading position, and Australia's obligations under Articles 11 and 13 of the WHO FCTC that:

- The Bill and/or Regulations be amended to ensure that (i) the inner surface of all retail packaging is required to be coloured Pantone 448C and (ii) both sides of any lining is also required to be coloured Pantone 448C.
- If it remains, clause 37(4)(b) of the Regulations be reviewed to tighten the language to ensure it has not provided an avenue for increasing product appeal and differentiation.

Part 3.4 - Plain packaging—standardisation

Cancer Council supports clauses 38, 39, 40, 41 and 42 of the Regulations in full. We agree that 20 cigarettes per pack, 20 filtered and small cigars per pack, 10 cigarette packs per carton and 30g for loose tobacco is the optimal standardised package sizing. Any smaller would make such products much more affordable to children. Any larger and they might promote higher levels of consumption among consumers.

We are also highly supportive of the new clause 40(2) of the Regulations which standardises the retail price of a cigarette carton so that it must equal the sum of the retail price of the individual packs. This is important to ensure that retail pricing strategies for cartons cannot undermine increases in tobacco excise intended to reduce tobacco consumption. It will also dissuade bulk purchasing at discount prices that might encourage higher levels of consumption.

Part 3.5 - Plain packaging – permitted trademarks and other marks

Clause 43 – Purpose of this Part

Cancer Council supports this clause.

Clause 44 - Plain packaging – permitted marks generally

Cancer Council supports this clause.

Clause 45 - Permitted marks – origin marks

Cancer Council queries why the more generic 'sans serif typeface' is specified for these marks when previously they were required to be Lucida Sans typeface and other marks in the Regulations are specified as requiring Lucida Sans typeface.

Recommendation

Cancer Council recommends consideration be given to requiring clause 45 of the Regulations to specify the Lucida Sans typeface for origin marks instead of the generic 'sans serif typeface'.

Clause 46 - Permitted marks – AQS marks

Cancer Council supports this clause.

Clause 47 - Permitted marks – calibration marks

Cancer Council supports this clause.

Clause 48 - Permitted marks – primary packaging track and trace identifiers and

Clause 49 Permitted marks – secondary packaging track and trace identifiers

We note that the current TPP Regulations impose certain requirements in relation to the use of T&T identifiers if companies choose to include them or they are required to meet regulatory requirements in other jurisdictions. We note that T&T identifiers are not mandatory in Australia at present.

We are concerned that the proposed Regulations do not specify a maximum size for the T&T identifiers as they do for other permitted marks which is generally no larger than 3mm in size. For consistency and to ensure there are no opportunities for exploitation of this allowance by the tobacco industry we recommend a maximum size be specified of 3mm consistent with size requirements for other markings, or the smallest size to meet regulatory requirements in other jurisdictions.

We are also concerned that T&T identifiers could provide public access to industry managed websites or databases and while technically they may comply with clause 76(5) of the Bill, might still provide a false sense of reassurance that these products are somehow ‘approved’ or ‘legitimate’ and therefore don’t carry the same harms of products that might not be carrying T&T identifiers. We recommend that consideration be given that information provided by any T&T identifier only be accessible to the necessary authorities and cannot be accessed by the general public from within Australia (to allow for regulatory requirements in other jurisdictions).

We also query why T&T identifiers that are on primary or secondary packaging of products other than cigarette packs or cartons are permitted to be on the outer surface on which a health warning is displayed. The same clauses specify that T&T identifiers on cigarette packs and cartons must *not* be on the surface that the health warning is displayed. We are concerned with this inconsistency and that T&T identifiers may distract from health warnings on packaging where they are permitted to be on the same surface.

Recommendation

Cancer Council recommends that track and trace identifiers be permitted to be either no larger than 3mm in size consistent with size requirements for other markings, or the smallest size to meet regulatory requirements in other jurisdictions.

Cancer Council recommends that consideration be given to amending clauses 48 and 49 of the Regulations to introduce a requirement that track and trace identifiers must not provide information that is accessible to the general public from within Australia.

Cancer Council queries why there is inconsistency in relation to whether T&T identifiers are allowed to appear on the same surface as health warnings and recommends that clauses 48 and 49 require T&T identifiers to not be on the same outer surface as health warnings across all primary and secondary packaging.

Part 3.6 - Plain packaging – brand names and variant names

Clause 51 - Retail packaging of cigarettes – brand names and variant names **and**

Clause 52 - Appearance of names on retail packaging of cigarettes

Clauses 51 and 52 of the Regulations do not specify that brand and variant names must be printed on the pack or carton, nor do they exclude adhesive labels from being able to be used. The introductory sentence to clause 53(2) of the Regulations specifically states that brand and variant names must be printed on the packaging (or on adhesive labels, see our objections to this at clause 53 below). This wording is not included in clauses 51 or 52 and as such, it appears they allow adhesive labels to be used on cigarette packs and cartons. If this is the case, Cancer Council objects to adhesive labels being able to be used for brand and variant names on cigarette packs and cartons.

Cancer Council supports the new restrictions on the length of brand and variant names that will prevent long and evocative names being used as a promotional element.

Recommendation

Cancer Council recommends that clause 51 of the Regulations specifically state that brand and variant names must be printed on the packaging of cigarette packs and cartons and that adhesive labels are not allowed. Cancer Council objects to adhesive labels being allowed for brand and variant names on cigarette packs and cartons.

Clause 53 - Appearance of names on other retail packaging

Cancer Council supports the new restrictions on the length of brand and variant names that will prevent long and evocative names being used as a promotional element.

Clause 54 - Location of names on cigar tubes

and

Clause 55 Location of names on other retail packaging

Cancer Council supports these clauses.

Part 3.7 - Plain packaging – health warnings

Cancer Council strongly supports the requirements for the display of health warnings in Part 3.7.

Part 3.8 - Plain packaging – mandatory markings

Clause 85 - Mandatory marking – country of origin statement

Cancer Council supports clause 85, in particular that country of origin statement may appear only in the format specified and that other descriptive or promotional statements or words are prohibited.

Clause 86 - Mandatory marking – manufacturer's date mark

Clause 87 - Mandatory marking – measurement marks

Clause 88 - Mandatory marking – trade description

Clause 89 - Mandatory marking – bar code

Clause 90 - Mandatory marking – fire risk statement

Clause 91 - Mandatory marking – name and address

Clause 92 - Mandatory marking – consumer contact telephone number

Cancer Council supports clauses 86-92.

Part 3.9 - Plain packaging – wrappers

Cancer Council supports this Part.

Part 3.10 - Plain packaging – inserts (other than health promotion inserts) and inserts

Cancer Council supports this part subject to our recommendations in Parts 3.5 and 3.6 that correspond with clause 99 of the Regulations regarding adhesive labels.

Part 3.11 - Plain packaging—health promotion inserts

Divisions 1 to 3, Clauses 100 to 110

Cancer Council strongly supports the inclusion of Health Promotion Inserts and notes the intention to required rotating series of multiple inserts. Such an approach is strongly supported by the findings of experimental and population-level research.²⁶⁻²⁹

Clauses 100 to 110 seem appropriate to ensure that the inserts appear roughly equally and without being altered or distorted in any way.

Part 3.12 - Plain packaging - tobacco products - appearance, physical feature and contents

Division 1 - Appearance and physical feature requirements

Clause 112 - Alphanumeric code on cigarettes

and

113 Appearance of cigars

Cancer Council is very concerned that a major omission in Division 1 is the failure to ensure that any marks that are allowed under regulations in this Division do not meet the same restrictions as applied to a trade mark or marks permitted on retail packaging of tobacco products as per clause 76(5) of the Bill which states:

“(5) Any trade mark or mark that is permitted under this Act to appear on the retail packaging of tobacco products must not:

- (a) be false, misleading, deceptive or likely to create an erroneous impression about the tobacco product’s characteristics, health effects, risks or emissions; or
- (b) directly or indirectly create an impression that the tobacco product is less harmful than other tobacco products; or
- (c) wholly or partly obscure any health warning or mandatory marking; or
- (d) constitute a tobacco advertisement; or
- (e) provide access to a tobacco advertisement.”

In the current TPP Regulations, alphanumeric codes on cigarettes and cigars are subject to these restrictions under Regulations 3.1.2(3) and 3.2.1(7). In the proposed Regulations the only restrictions for alphanumeric codes on cigarettes are that they not form a symbol or design and not represent, or be suggestive of, the brand name or variant name of the cigarette. There are no similar restrictions on the alphanumeric codes permissible on cigar bands. Omitting these restrictions in the proposed Regulations is a major oversight and will allow advertising to occur similar to 2012 when alphanumeric codes on cigarette sticks were designed as an advertising feature. The Minister for Health at the time wrote to companies alerting them that they were likely in breach of the legislation and the practice ceased soon after.

See examples below:



Source – Cancer Council Victoria

Recommendations

Cancer Council strongly recommends that the clauses below be reinstated so that they apply to alphanumeric codes allowed on cigarette sticks and cigar bands.

For cigarettes, the alphanumeric code must not:

- (a) constitute tobacco advertising and promotion; or
- (b) provide access to tobacco advertising and promotion; or
- (c) be false, misleading, deceptive or likely to create an erroneous impression about the cigarette's characteristics, health effects, hazards or emissions; or
- (d) directly or indirectly create a false impression that a particular tobacco product is less harmful than other tobacco products; or
- (e) represent, or be linked or related in any way to, the emission yields of the cigarette, such as tar, nicotine or carbon monoxide.

For cigars, the alphanumeric code must not:

- (a) constitute tobacco advertising and promotion; or
- (b) provide access to tobacco advertising and promotion; or
- (c) be false, misleading, deceptive or likely to create an erroneous impression about the cigar's characteristics, health effects, hazards or emissions; or
- (d) directly or indirectly create a false impression that a particular tobacco product is less harmful than other tobacco products; or
- (e) represent, or be linked or related in any way to, the emission yields of the cigar, such as tar, nicotine or carbon monoxide.

Claus 114 - Appearance of bidis

Cancer Council supports this clause.

Clause 115 - Paper casing for cigarettes

Filter ventilation refers to perforations in the paper casing of cigarettes over the filter section that allow air to dilute the mainstream smoke during inhalation. Filter venting increases the palatability

of products as the diluted smoke tastes weaker or ‘milder’ and produces less harshness (the immediate burning/ scratching sensations in the mouth and throat) and irritation (the lingering tingling sensations in the throat and chest).³⁰ Filter ventilated cigarettes have previously been referred to as “light”, “mild” or “low-tar”, giving the false impression of reduced harm. While this terminology is prohibited in Australia, the cigarettes remain on the market.

Eliminating filter ventilation is suggested by the WHO as a policy target for reducing the attractiveness of cigarette smoking.³¹ In 2016, in the further development of the partial guidelines for implementation of Articles 9 and 10 of the WHO FCTC it was recommended that *“Parties should regulate all tobacco product design features that increase the attractiveness of tobacco products, in order to decrease the attractiveness of tobacco products.”*³²

In order to meet the objects of the Bill, Cancer Council recommends that perforations in paper casing for cigarettes (filter venting) be prohibited to reduce the palatability and appeal of regulated tobacco items.

There is a large and growing evidence base that shows the appeal of tobacco products could be further reduced if the colour of cigarette sticks was changed to an unappealing colour. Australian Government research on sticks showed that white sticks with cork tips were seen as ‘everyday’ and ‘standard’, and denoted a user experience that was familiar and desired. All white sticks portrayed sophistication linked with premium brands, association with menthol, foreign or budget cigarettes and female smokers.³³

New Zealand research also shows that denormalising the appearance of sticks through the use of unappealing colours could further enhance the effects of standardised packaging.

Recommendation

Cancer Council recommends that perforation of paper casing for cigarettes (‘filter venting’) be prohibited.

Cancer Council strongly supports the prescription of dissuasive colours for paper casing. Cancer Council recommends that testing be undertaken on the most unappealing colour for cigarette and cigarillo paper casing and RYO papers and that this be introduced in regulations as soon as feasible.

Clause 116 - Lowered permeability bands

Cancer Council supports this clause.

Clause 117 - Standardised cigarette dimensions

Cancer Council strongly supports the new requirements that standardise the diameter and length of cigarettes as this will greatly reduce cigarette appeal and use of cigarette dimensions as a promotional element.

Clause 118 - Filter tips

Cancer Council strongly supports the new requirements to standardise filter tips and remove any features and decorative elements that would increase appeal or be false, misleading, deceptive, or likely to create an erroneous impression about the cigarette’s characteristics, health effects, hazards, or emissions.

Division 2 - Content requirements

Clause 119 - Tobacco products - prohibited ingredients

Additives were rarely used up until the 1970s, but are now common in tobacco products, constituting up to 10% of the weight of a cigarette or roll-you-own tobacco.³⁴ There are almost 600 additives that have been documented in cigarettes, but individual brands usually have 40 or more additives.³⁴

Roll-your-own tobacco contains at least as many additives by weight as the tobacco in ready-made cigarettes (also called factory-made cigarettes).³⁵⁻³⁷ Cigars and pipe tobacco generally contain less additives by weight than cigarette tobacco.³⁴ Cigar retailers often claim their products are ‘all natural’,³⁸ however flavour additives and high-intensity sweeteners have been found in cigars.³⁹⁻⁴¹ Some pipe tobaccos contain midribs (smaller stem that extends from the main stalk of the tobacco plant), and flavours in casing and sauces are frequently added to these.³⁴ Waterpipe tobacco commonly contains many additives, mostly flavours and sweeteners.^{34, 42} Kreteks contain significant amounts of cut cloves and sun-dried flower buds as well as other additives.^{43, 44} Flavourings are common in bidis, such as cherry, menthol and strawberry.⁴⁵

Regulation of the contents and emissions of tobacco products is covered by Article 9 of the FCTC.²⁴ The Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC⁴⁶ as well as other TobReg reports include recommendations for the regulation of nicotine, toxicants, flavours, menthol and other additives. The banning of flavours that appeal to young people also contributes to the reduction of sales to youth, which comes under Article 16 of the FCTC.²⁴

Numerous jurisdictions internationally have now introduced bans on menthol resulting in considerable increases in cessation among menthol smokers.⁴⁷ Companies have gone to considerable lengths to mitigate the effects of menthol bans, including by developing menthol-impregnated accessories such as infusion cards, menthol flavoured roll-your-own papers, flavour drops and sprays for cigarettes, flavoured filters and flavour “stones”.⁴⁸ Coverage of such accessories under this Bill is welcome. Numerous products containing synthetic menthol substitutes have been introduced into North American markets blatantly promoted as ‘getting around’ menthol bans.⁶ This loophole is now seriously undermining the effectiveness on menthol bans;⁴⁹ it is crucial that such substances be deemed prohibited ingredients. Cancer Council generally supports the list of prohibited ingredients in clause 119 of the Regulations but recommends the additions set out in the recommendations below.

Recommendations

Cancer Council recommends that the list of prohibited ingredients be expanded as follows

- Expand Item 1 to include not just additives that ‘have flavouring properties or that enhance flavour’, but also those that ‘enhance flavour once burned either individually or in combination with other unprohibited chemicals’ or which ‘mask or reduce unpleasant flavours’, specifying that this includes, but is not limited to
 - additives identified as flavouring agents by the Joint Food and Agricultural Organization of the United Nations/WHO Expert Committee on Food Additives in the Committee’s evaluations, as published from time to time in the WHO Technical Report Series; and

⁶ See for instance, this catalogue of products in ‘non-menthol products’ from California
<https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/>

- additives identified as generally recognized as safe (GRAS) flavouring substances by the Flavor and Extract Manufacturers Association (FEMA) Expert Panel in its lists of GRAS substances referred to as “GRAS 3” to “GRAS 30” and subsequent lists of GRAS substances, as published from time to time, if any.
- Amend Item 4 to read “Cloves, eugenol, clove oil and clove extract”.
- Add after (or within) Items 9 and 10, ‘menthol derivatives, synthetic cooling agents such as N-Ethyl-p-menthane-3-carboxamide (WS-3) and 2-Isopropyl-N,2,3-trimethylbutanamide (WS- 23), and any other chemicals that have a cooling effect or mask the harshness of tobacco smoke’.
- Add ‘honey’ to Item 14.

Clause 120 - Tobacco products - permitted ingredients

Cancer Council is generally supportive of the list of permitted ingredients in Clause 120 apart from the following:

Item 1 Benzoic acid

Benzoic acid is classified as **TUB: toxic or potentially toxic in unburnt form** and **TAB: toxic or potentially toxic after burning (irritant, toxic and/or CMR after burning)**. It is included by the European Union’s Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) in its list of priority additives for removal. It’s described as a preservative or pH adjustor. Since other preservatives/pH adjustors are not specifically targeted for removal, it seems unlikely that benzoic acid will need to be used once the flavours etc. are removed.

Item 4 Citric acid

Citric acid should not be allowed when other flavourings are banned. Citric acid is also on the SCENIHR list as a priority for removal.

Item 9 Guar gum

Once again, this is on the SCENHIR priority list on the basis that it is *toxic or potentially toxic after burning (irritant, toxic and/or CMR after burning)*, *CMR: carcinogenic, mutagenic, or reproductive toxicant*.

Recommendations

Cancer Council recommends benzoic acid, citric acid and guar gum should be omitted from the list of permitted substances.

Part 3.13 - Tobacco products – standards

Cancer Council supports the clauses under Part 3.13.

Do you have any feedback in relation to the offence and civil penalty provisions set out in Chapter 3?

That Cancer Council generally supports the offence and civil penalty provisions in Parts 3.4 and 3.5. In relation to the offence and civil penalty provisions, appropriate exemptions are noted in relation to personal use and compliance and enforcement activities.

The penalty amounts in relation to Chapter 3 of the Bill mirror those provided in Chapter 2 and 4 of the Bill in relation to fault-based offences, strict liability offences and civil penalty provisions. That is, the penalties proposed for each of the offences in Part 3.4 (General offences and civil penalty

provisions – tobacco product requirements) and 3.5 of the Bill (Offences and civil penalty provisions relating to constitutional corporations) are as follows:

- Fault-based offence - (a) for an individual—2,000 penalty units; and (b) for a body corporate—20,000 penalty units;
- Strict liability offence - (a) for an individual—60 penalty units; and (b) for a body corporate—600 penalty units;
- Civil penalty provision - (a) for an individual—2,000 penalty units; and (b) for a body corporate—20,000 penalty units.

The penalties provided for in Chapter 3 of the TPP Act for non-compliant retail packaging and tobacco products are stated to be:

- Fault-based offence – 2,000 penalty units;
- Strict liability offence – 60 penalty units;
- Civil penalty provision – 2,000 penalty units.

However, we understand the maximum fault-based offence for a body corporate under the TPP Act is 10,000 penalty units (see section 4B (3) of the *Crimes Act 1914* (Cth)). Similarly, we understand the maximum civil penalty for bodies corporate under the TPP Act is 10,000 penalty units (see section 82(5) of the Regulatory Powers Act).

While it is noted that the penalties have increased in Chapter 3 of the Bill for bodies corporate (when compared to those in Chapter 3 of the TPP Act), they have not increased for individuals. While higher penalties for bodies corporate are welcomed, it appears the penalties proposed under Chapter 3 of the Bill (for both bodies corporates and individuals) are substantially lower than the maximum under the corporate and financial sector laws at the Federal level (please see the discussion regarding penalties in Chapter 2). Non-compliance with Chapter 3 is serious, and directly and indirectly risks increasing tobacco use, and the range of health effects, risks and social costs associated with this use.⁵⁰ Accordingly, the penalties should be strengthened to reflect the seriousness of the conduct and align with corporate and financial sector penalties at the Federal level.

Cancer Council also considers that further mechanisms should be introduced to ensure that a person does not profit from contravening offence and civil penalty provisions and that there is sufficient deterrence from non-compliant conduct (please see the Cancer Council response in relation to Chapters 6 and 7). In particular, we strongly recommend that quantum of penalties imposed be tied to the benefit obtained by the breach, and/or the corporation's annual turnover, or adjusted turnover for the period of the breach. This would help to ensure the penalties operate as an effective deterrent against contravention.

Finally, while we acknowledge that it is appropriate to attach lower penalties to strict liability offences (as compared to fault-based offences), we recommend that the penalties for strict liability offences be increased in order to be an effective deterrent to non-complying conduct.

Recommendation

Cancer Council recommends further strengthening the penalties in alignment with corporate and financial sector penalties at the Federal level.

Chapter 4

Do you have any feedback on the permanent ban on certain regulated tobacco items provisions set out in Chapter 4?

In order to consolidate tobacco related legislation and instruments, Chapter 4 of the Bill reproduces Consumer Protection Notice No.10 of 1991 – Permanent Ban on Goods, which applies to chewing tobacco and snuffs intended for oral use.

Cancer Council supports the provisions relating to the permanent ban on oral tobacco but submits that the Chapter should be drafted to future-proof the Bill and ensure that it continues to consolidate tobacco related matters.

Chapter 4 could be strengthened by adding a power to impose, by Ministerial order published on the internet, a permanent ban on tobacco products or tobacco product accessories of a particular kind or class. Currently, the Bill is limited to oral tobacco and there is no ability to extend a ban to any other tobacco product in the future. In a similar vein, such a power should extend to products that are not tobacco products or tobacco product accessories, but which resemble them.

It is noted that the Australian Consumer Law provides a power to the Commonwealth Minister to impose a permanent ban on consumer goods in certain circumstances. Under the Australian Consumer Law, the Commonwealth Minister may impose a permanent ban on consumer goods of a particular kind that will or may cause injury to any person, or where a reasonably foreseeable use (including a misuse) will or may cause injury to any person: see section 114, Australian Consumer Law. Similarly, the addition of a power to impose a permanent ban by Ministerial order in the Bill would enable an urgent response when necessary to advance the objects of the Bill.

While noting the Government has committed to separately addressing e-cigarette availability and supply, consideration could be given to including adding a power to impose, by Ministerial order, e-cigarettes or e-cigarette accessories, or a class of e-cigarettes or e-cigarette accessories, that are permanently banned. This could incorporate, for example, the proposed ban on single use, disposable vapes that was recently announced.

All of these powers could be drafted so that before any such an order is made, the Minister must be satisfied:

- (a) that it is appropriate to do so; and
- (b) that making the proposed order will advance the objects of this Act.

Cancer Council supports the exceptions set out in Chapter 4 of the Bill.

Further, Cancer Council queries whether Chapter 4 could adopt the permanent bans on novelty cigarettes and novelty cigarette lighters that exist under the Australian Consumer Law: see Consumer Protection Notices 15 and 18 of 2011. This would further the objective of consolidating legislation relevant to tobacco control.

Although novelty cigarette lighters can be used for many purposes, they are strongly associated with cigarettes and smoking. Aside from being a fire safety risk, such items have strong appeal to children because they may appear to be a toy, depict stylised animals and cartoon characters. In this way, novelty cigarette lighters advertise and promote smoking to children. Similarly, novelty or puff cigarettes are not tobacco products but are imitation cigarettes that contain a fine powder that allows users to blow into, or inhale from, to produce a cloud of fine dust. Given their appeal,

especially to children, and use to promote smoking, Cancer Council queries whether the ban should also fall within Chapter 4 of the Bill.

Penalties

The penalty amounts in relation to Chapter 4 of the Bill mirror those provided in Chapter 2 and 3 of the Bill in relation to fault-based offences, strict liability offences and civil penalty provisions. While they are significant penalties, they appear to be less than that provided in similar legislation at the Federal level. The Australian Consumer Law provides for offences in relation to supplying etc consumer goods covered by a ban (see section 197 of the Australian Consumer Law).

It should be noted that the penalties provided in section 197 of the Australian Consumer Law are, in relation to a body corporate punishable on conviction by a fine of not more than greater of the following:

- (a) \$50,000,000;
- (b) If that court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the commission of the offence – 3 times the value of that benefit;
- (c) If the court cannot determine the value of that benefit – 30% of the body corporate's adjusted turnover during the breach turnover period for the offence.

An offence committed by a person other than a body corporate is punishable on conviction by a fine of not more than \$2,500,000.

Cancer Council WA considers the penalties under the Bill should be strengthened in alignment with those under the Australian Consumer Law at the Federal level.

Recommendations

Cancer Council recommends the following:

- Add a power to impose, by Ministerial order published on the internet, a permanent ban on:
 - a tobacco product or a kind or class of tobacco products
 - a tobacco product accessory or a kind or class of tobacco product accessories
 - certain products that resemble tobacco products or tobacco product accessories.
- While noting that the Government has committed to separately addressing e-cigarette availability and supply, consideration could still be given to including a power in the Bill to permanently ban e-cigarettes or a kind or class of e-cigarettes; and e-cigarette accessories or a kind or class of e-cigarette accessories.
- Consider whether the permanent ban on novelty cigarettes and novelty cigarette lighters (Consumer Protection Notices 15 and 18 of 2011) should be brought within Chapter 4 of the Bill.
- Further strengthen the penalties to align with those under the Australian Consumer Law at the Federal level.

Chapter 5

Do you have any feedback on the reporting requirements set out in Chapter 5 and the Regulations?

The requirement to mandate reporting by tobacco companies on ingredients, marketing expenditure and sales to the level of individual tobacco product is justified by the extreme harm caused by use of such products, and the need for governments not just to monitor tobacco use and trends in the tobacco market, but also the efficacy of tobacco control interventions.

“Kinds of tobacco products”

A possible ambiguity in the current drafting in Chapter 5 results from the proposed interpretation and use of the term “kinds of tobacco products”. While clause 13 of the Bill provides assistance in interpreting this phrase, some ambiguity remains due to the different ways in which this phrase appears to be used in the Bill and Regulations. The ambiguity appears to arise due to clause 127 of the Regulations referring to kinds of tobacco products as *categories* (or types) of products (cigarettes, cigars processed tobacco etc). However, in other instances (e.g., in clauses 128 and 129 of the Regulations) it appears to refer to *particular* products of specified brand name and variant name. Cancer Council considers it important that the reporting obligations are in respect of each particular product and that “kinds of tobacco product” should be taken to mean particular products.

Recommendation

In order to address this ambiguity regarding “kinds of tobacco products,” Cancer Council recommends that:

- The European Article Number (**EAN**) or Universal Product Code (**UPC**) be specified in clause 130(2) of the Bill and clause 129 of the Regulations.
- The specific information required in relation to clause 132(3)(c) of the Bill be set out (including the EAN or UPC).
- Clause 127 of the Regulations be amended to remove the reference to “kinds of tobacco products” and instead include a phrase like the following, “by reference to each of the following categories of tobacco products”.

Clause 129 Meaning of reporting entity

As currently drafted, the Bill fails to include wholesalers/distributors in the definition of reporting entities. Without these being covered, it will be impossible to track volumes distributed to retailers by groups which are not (also) manufacturers or importers of tobacco products. Failure to include wholesalers/distributors will result in a major gap and distortion in reporting as envisaged in the postcode-level reporting specified in clause 129 of the Regulations. Products distributed by a manufacturer or importer to an independent wholesaler/distributor (i.e., one which is not in itself a manufacturer or importer) will be recorded as going to the postcode in which that wholesaler is located. This will create artificially high levels of product seeming to go to those particular postcodes. And further distribution to retailers from those wholesalers will not be recorded. This would create a huge gap in the reporting, and greatly reduce the utility of the data in enabling the Government to assess the efficacy of tobacco control policy at the local, regional, and state-wide levels. With surveys in Australia becoming increasingly more difficult and costly, this is likely to become the only feasible way to reliably undertake such assessments into the future.

Recommendation

Cancer Council recommends that clause 129 of the Bill be amended to include independent wholesalers/distributors as reporting entities.

Clause 130 - Tobacco product ingredients

It is unclear why there is an exemption for “processing aids” and exactly what would be said to constitute a processing aid. The term ‘processing aids’ seems somewhat vague and potentially open to interpretation. We strongly recommend that clause 130(1) be amended to require entities to report on processing aids used in manufacturing. The exact names of the ‘processing aids’ that are permitted to be used in tobacco products should be specifically listed/identified in the table of permitted ingredients contained in clause 120 of the Regulations.

Most chemicals have >10 different names, some up to 100 names. Tobacco companies could create new names for particular chemicals. This would make collating the information and doing searches very difficult for researchers. Companies should be required to provide the unique identifying registry number for each chemical that is assigned by the American Chemical Society’s Chemical Abstracts Service.

Information is needed on ingredients added to product components such as the papers and filter, not just those added to the tobacco. The 2017 partial guidelines for FCTC Articles 9 and 10 (page 8) specifically state:

Parties should ensure that manufacturers and importers disclose to governmental authorities the ingredients used in the manufacture of each of their tobacco products and the quantities thereof per unit of each tobacco product, **including those ingredients present in the product’s components (e.g., filter, papers, glue)**, for each brand within a brand family. Parties should not accept disclosure only of maximum quantities by category of ingredient, or only of the total quantity. To do so would seriously limit the kind of analysis that could be performed.

The reporting provisions should require reporting not just on country of manufacture of the product, but also countries from which tobacco used in the products is grown and sourced. This could complement requirements under Australia’s modern slavery legislation which requires large companies to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. It also allows greater transparency in relation to the operations of tobacco companies.

We note that the reporting period is a financial year. We note the definition in section 2B of the *Acts Interpretation Act 1901* (Cth) defines financial year as “a period of 12 months starting on 1 July”.

Recommendations

Cancer Council recommends that ingredient reports under clause 130 of the Bill be required to include (in addition to the detail already specified):

- the EAN or UPC for the product
- processing aids (these should not be exempted as currently specified)
- the Registry number assigned by the American Chemical Society’s Chemical Abstracts Service of each ingredient used
- the names and amounts of the ingredients included not just in the tobacco but also in components such as the inks and glues used in paper and filter tips

- the country or countries of origin of all of the tobacco used to manufacture the cigarettes or processed tobacco products (not just where the tobacco product itself was manufactured).

Clause 132 - Marketing and promotional expenditure

The requirement to report on marketing and promotional expenditures is welcome. In order to provide clarity regarding the meaning of marketing, it is recommended that a broad definition be included in the Bill in this regard. The list of activities to be reported is a good one but could be somewhat expanded to include development and design not just of product packaging but also product names, and arrangements entered into not just with social media influencers, but also with journalists and media commentators and other opinion leaders (i.e., also social influencers but of a more traditional kind). Companies should be required not just to describe the activity and amount spent, but also to specify who or what body was the recipient of benefits or philanthropic or political donations.

Recommendations

Cancer Council recommends the following amendments to clause 132 of the Bill:

- The term “marketing” in clause 132(2)(a) be defined broadly.
- Clause 132(2)(c) of the Bill should be amended to read “developing and designing retail packaging and product brand and variant names for tobacco products”.
- Clause 132(2)(e) of the Bill should be further clarified in relation to ‘lobbying’. This clause should be amended to expressly capture direct and indirect representations to politicians, political staff, members of advisory bodies or departmental representatives.
- Clause 132(2)(h) of the Bill is fine as worded but noting that this form of marketing (retailer incentive schemes) should not be allowed under the provisions of Chapter 2 of the legislation.
- Clause 132(2)(i) of the Bill, in addition to ‘arrangements entered into with social media influencers’ the clause should be broadened to capture broadcast and print media journalists, hosts and commentators and other opinion leaders.
- As set out previously, the specific information required in relation to clause 132(3)(c) of the Bill be set out (including the EAN or UPC).
- Clause 132 (3) of the Bill should be amended to specifically require names of individuals and organisations receiving such funds.

Clause 133 - Tobacco product research and development—Manufacturers

Cancer Council is strongly supportive of these provisions.

No changes recommended here.

Clause 134 - Determinations by Secretary

No changes recommended here.

Part 5.2, Division 2—General matters relating to reports

Clauses 135 to 144

No changes recommended here.

Part 5.2 Division 3—Publication and Disclosure

Clauses 145-147

No changes recommended here.

Part 5.3 Offence and civil penalty provision

Cancer Council supports the inclusion of offence and civil penalty provisions for non-compliance with reporting obligations in Chapter 5 of the Bill. The offence and civil penalty provisions proposed are set out in clause 148 of the Bill. The penalties proposed are as follows:

- Fault-based offence: 20 penalty units
- Strict liability offence: 10 penalty units
- Civil penalty: 20 penalty units.

Unlike the penalties set out in Chapters 2,3 and 4, separate penalties are not expressly provided for individuals and bodies corporate. However, we understand that the maximum rate for bodies corporate is impacted by section 4B (3) of the *Crimes Act 1914* (Cth) and section 82(5) of the *Regulatory Powers Act* (i.e., we understand it will be five times the penalty set out in clause 148 of the Bill).

The current rate in respect of penalty units is \$313.

In respect of the offence provisions, a separate offence is committed in respect of each day during which the contravention continues (see also section 4K of the *Crimes Act 1914* (Cth)). In respect of the civil penalty, the maximum civil penalty for each day that a contravention continues is 10% of the maximum civil penalty that can be imposed for the particular contravention (see also section 93 of the *Regulatory Powers Act*).

Cancer Council considers it appropriate that the offence and civil penalty provisions in Chapter 5 are continuing (until the obligation has been met). The maximum penalties for each offence or contravention of a civil penalty provision are less than the penalties provided in Chapters 2, 3 and 4 of the Bill. Cancer Council considers this appropriate.

However, Cancer Council considers the penalty amounts currently do not appear to reflect the seriousness of non-compliance. The reporting obligations are important in ensuring access to data and transparency as part of a strategy of reducing tobacco use and the associated burden of disease, disability, and death. Cancer Council considers these penalties should be increased as a deterrent to non-compliance or delayed compliance with reporting requirements.

Recommendation

Cancer Council recommends that the penalties in Chapter 5 of the Bill be strengthened as a deterrent to non-compliance or delayed compliance with reporting requirements.

Comments in relation to the Regulations

Cancer Council recommends amendments should be made to clauses 127 and 129 of the Regulations in line with our comments above regarding clarifying ambiguity regarding the use of the phrase “kinds of tobacco products”.

Chapter 6

Do you have any feedback on the proposed compliance and enforcement provisions set out in Chapter 6?

Cancer Council considers it important that the Bill has broad compliance and enforcement provisions. Cancer Council supports the compliance and enforcement provisions in Chapter 6 and the way in which the Bill utilises and adds to the standard provisions from the Regulatory Powers Act.

Cancer Council considers it an important inclusion that the Bill includes powers to require persons to give information or produce documents (clause 151) and the power to require a person to attend and answer questions (clause 152). Clause 153 of the Bill complements the operation of clauses 151 and 152 of the Bill.

In relation to the monitoring powers, it is unclear why clause 155(1)(d) does not also apply to entry for the purpose of exercising monitoring powers in relation to a broader range of matters, for example, in relation to inspecting e-cigarette advertisements. It is recommended that consideration be given to whether a broader range of matters should be captured by clause 155(1)(d) of the Bill.

In relation to the investigation powers, it is unclear as to whether the powers referred to in the Regulatory Powers Act are sufficient in relation to electronic equipment. For example, the question arises as to whether broader powers are required to move electronic equipment to another place for examination or processing; or whether a power to require a person to provide expert assistance should be included. It is noted that broader powers of this nature are included in the *National Disability Insurance Scheme Act 2013* (Cth), see sections 73ZG, 73ZH and 73ZI of that legislation. It is recommended that consideration be given to whether the proposed powers are sufficient.

Cancer Council supports the ability of the Commonwealth to recover costs reasonably incurred in seizing, retaining, destroying, or otherwise dealing with seized items where a person has been convicted of an offence or found to have contravened a civil penalty provision under Part 3.4 or 3.5 (per clause 158 of the Bill).

Cancer Council considers the inclusion of infringement notices and civil penalty provisions in the Bill, which are not in the current TAP Act (but are included in the TPP Act) are desirable inclusions and provide a broad range of enforcement options.

In addition to the powers already provided for in Chapter 6, Cancer Council recommends the inclusion of an additional mechanism for enforcement, being corrective advertising to counterbalance offending conduct. In this regard, Cancer Council considers there should be the inclusion of the power for an order to be made requiring a person to publish an appropriate anti-tobacco/anti-e-cigarette advertisement. Cancer Council considers there should be the ability to have an order made requiring a person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with the order. It is noted there is a similar provision in sections 246(2)(d) and 247 of the Australian Consumer Law.

Further, Cancer Council recommends other additional enforcement mechanisms that are directed at ensuring that a person does not profit from contravening the legislation. In addition to other enforcement mechanisms, Cancer Council recommends the inclusion in the Bill of a Court having the ability to order a person to pay the Commonwealth an amount equal to the benefit derived and detriment avoided because of a contravention of the provision of the Bill. An example of legislation that addresses this in a similar way (where it is called a relinquishment order) is the *Australian*

Securities and Investments Commission Act 2001 (Cth), section 12GBCC. In addition, it is recommended that for specified provisions, penalties are set as the greater of:

- the penalty units specified;
- a multiple of the benefit gained and loss avoided by the non-compliance (where this can be determined by the Court); or
- a percentage of the body corporate's:
 - annual turnover for a 12-month period ending on the month the body corporate contravened the relevant provision; or
 - adjusted turnover for the period of the breach (where a body corporate).

An example of legislation that addresses penalties in a similar manner is the *Australian Securities and Investments Commission Act 2001* (Cth), see for example section 12GBCA of that legislation. Please also see the Australian Consumer Law penalty provisions, for example section 197 of that legislation.

Further, it is suggested that the Bill include the ability of a Court to disqualify a person from managing corporations for a period the court thinks appropriate where the person has contravened, or been involved in a contravention, of specified provisions of the legislation and the Court is satisfied that disqualification is justified. An example of a provision of this nature is included at section 248 of the Australian Consumer Law. Such a disqualification may, for example, be justified where an offence committed by a body corporate is proven to have been committed with the knowledge or consent of the director/executive.

As an operational matter, consideration could also be given to the Secretary having the ability to appoint a class of people to be authorised officers (rather than only individual appointments) (see clause 150). Consideration could be given to whether this may create operational efficiencies and hence aid enforcement. It is noted that certain State legislation allows for the designation of a class of authorised officers (see for example, section 24 of the *Public Health Act 2016* (WA)).

Recommendations

Cancer Council recommends:

- Consideration be given to whether a broader range of matters should be captured by clause 155(1)(d).
- Consideration be given to whether the powers referred to in the Regulatory Powers Act are sufficient in relation to electronic equipment or whether broader provisions are required in this regard in the Bill.
- Corrective advertising be provided for in the Bill to counterbalance offending conduct. Cancer Council considers there should be the ability to have an order made by a Court requiring a person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with the order.
- Including in the Bill the ability of a Court to order a person to pay the Commonwealth an amount equal to the benefit derived and detriment avoided because of a contravention of the provision of the legislation (where this can be determined by the Court), in addition to other enforcement measures.
- Setting penalties for specified provisions as the greater of the penalty units specified; or a multiple of the benefit gained or loss avoided by the non-compliance with the legislation (where this can be determined by the Court); or a percentage of the body corporate's annual turnover for a 12-month period (where a body corporate), or a percentage of the adjusted turnover for the period of the breach.

- Including in the Bill the ability of a Court to disqualify a person from managing corporations for a period the court thinks appropriate where the person has contravened, or been involved in a contravention, of specified provisions of the legislation and the Court is satisfied that disqualification is justified.

Chapter 7

Do you have any feedback on the transitional arrangements?

In relation to Chapter 7, Cancer Council considers the following matters should be included in relation to the Bill in order to deter non-complying conduct:

- The personal liability of executive officers of a body corporate be addressed to ensure they are personally liable for acts of the body corporate in appropriate circumstances where it commits an offence or is subject to a civil penalty. For example, an offence could be included in the Bill that an executive officer (being defined broadly to include a person taking part in the management of the body) commits an offence if:
 - the body corporate commits an offence under the Act;
 - the officer knew the offence would be committed;
 - the officer was in the position to influence the conduct of the body in relation to the offence; and
 - the officer failed to take all reasonable steps to prevent the commission of the offence.

It is noted that a similar provision is included in section 54B of the *Therapeutic Goods Act 1989* (Cth).

- That the report under clause 185 by the Secretary which is provided to the Minister be broader to include detail about the complaints made, action taken and outcomes of complaints (not only detail about contraventions). This is necessary to attain a full picture of the operation of the legislation and how it is being enforced. In relation to a contravention by a body corporate, the body corporate should be named within the report (and there should be a clear legal basis to do this in the Bill).

Further, where complaints are made regarding potential contraventions of the legislation, the complainant should be informed whether the complaint will be investigated and the outcome of the complaint (including any action taken). This is important for transparency. This is a matter that could be specifically provided for in the Bill (or as a matter of policy or guidelines, provided there is a clear legal basis for doing this in the Bill).

Further, it is suggested that consideration be given to including provisions that exclude or limit the ability to insure and/or obtain an indemnity in relation to liability under the proposed legislation. Provisions of this nature would likely act as a deterrence and highlight the possible serious financial consequences of non-compliance. A provision excluding insurance and other indemnities against fines is included in section 272A of the *Work Health and Safety Act 2020* (WA). It is also noted that there are limited restrictions regarding insurance and indemnities in the *Corporations Act 2001* (Cth) and regarding the indemnification of officers in the *Australian Consumer Law*.

The inclusion of cost recovery provisions in the Bill is important and it is noted that cost recovery provisions are included in certain State public health legislation (for example, the *Public Health Act 2016* (WA)). Including a regulation making power in relation to fees is supported to future-proof the legislation.

Clause 184 of the Bill provides protection from civil liability for protected persons in specified circumstances. Consideration could also be given to whether it would be appropriate to provide authorised officers and a person acting under the authorised officer's direction or authority with protection from criminal responsibility in limited circumstances. It is noted that certain APS

employees have protection from criminal responsibility under section 62 of the *Therapeutic Goods Act 1989* (Cth) in certain circumstances relating to the obtaining, possession, conveyance, or facilitation of the conveyance of goods.

Recommendations

Cancer Council recommends:

- The Bill be amended to include personal liability of persons involved in the management of a body corporate for acts of the body corporate, where the body corporate commits an offence or is subject to a civil penalty, in appropriate circumstances. For example, such as where the person knew the offence would be committed and failed to take reasonable steps to prevent the commission of the offence.
- The report under clause 185 of the Bill be broadened in scope to include detail about the complaints made, action taken and outcomes of complaints (not only detail about contraventions). Bodies corporate should be able to be named in the report in relation to contraventions.
- Consideration be given to giving greater transparency to complainants regarding complaints regarding potential contraventions of the legislation. The transparency should include being advised whether the complaint will be investigated, and the outcome of the complaint (including any action taken).
- Consideration be given to excluding or limiting the ability to insure and/or obtain an indemnity in relation to liability under the Bill.

Feedback on the Transitional Arrangements

The transitional arrangements for tobacco and e-cigarette sponsorship provisions (see clauses 37 and 64 of the Bill) under the Consequential and Transitional Bill appear only to apply to arrangements etc entered into from the commencement day (being the day section 3 of the *Public Health (Tobacco and Other Products) Act 2023* commences). It does not appear to apply to arrangements entered into prior to this time (that is, existing arrangements). It is recommended that consideration be given to whether there may be certain circumstances where the provisions in clauses 37 and 64 of the Bill should apply to existing arrangements.

The transitional arrangement timeframes otherwise seem reasonable to allow industry to put in place necessary arrangements to become compliant.

Recommendation

Cancer Council recommends:

- Consideration be given to whether there may be certain circumstances where the provisions in clauses 37 and 64 of the Bill should apply to existing arrangements (that is, arrangements prior to the commencement day).

Thank you for your consideration of our submission.

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Appendices

APPENDIX 1—COPIES OF LEAFLETS/BROCHURES DISTRIBUTED TO VICTORIAN RETAILERS

FIGURE 1: Leaflet regarding 'Champion Freshseal Retailer Survey'

CHAMPION FRESHSEAL

NEW

HEAT SEAL
Push through seal when you're ready for more fresh tobacco

CHAMPION FRESHSEAL

FRESH LOCK
Resealable lock helps keep your tobacco fresher for longer

CHAMPION FRESHSEAL
LEGENDARY BLEND

RETAILER SURVEY
A surveyor will make two visits to your store between 6th March through to 17th April 2017, asking...

"I've heard about the new Champion Freshseal, what can you tell me about it?"

For each visit, mention any of the below and receive \$50 for the staff member and \$50 for the store.

- **FRESH LOCK & HEAT SEAL**
- **HELPS KEEP TOBACCO FRESHER FOR LONGER**
- **WE'VE SEALED IN THE FRESHNESS. TWICE**
- **AVAILABLE IN 40g**
- **AFFORDABLE**

SMOKING IS ADDICTIVE
Health Warning: Smoking
increases the risk of serious heart and lung diseases.

Smoked papers are used to communicate product information to the public.
Actual product supplied will comply with Australian Plain Packaging Laws.

Imperial Tobacco
Work together. Win together.

IMPERIAL TOBACCO AUSTRALIA LTD RETAILER SURVEY PROGRAM TERMS and CONDITIONS

In these terms and conditions:

ITA means Imperial Tobacco Australia Ltd of 4-6 Inglewood Place, Baulkham Hills, NSW, 2153 (ABN 46 088 148 681)

Participant means a tobacco product retailer and their staff who are invited to, and who agree to, participate in the Program

Program means this Champion Freshseal Legendary Ruby 40g Retailer Survey Program (excludes ACT)

eVoucher means \$50 electronic voucher delivered by email and claimable from GiftPay.com.au.

Term means the entire term of the Program from 6th March 2017 to 17th April 2017 inclusive.

TM means an ITA's Territory Manager.

STR means an ITA's Saleslink Telephone Representative.

Surveyor means a person authorised by ITA and its agencies to visit tobacco retailers and their staff for the purpose of surveying for understanding of Champion Freshseal Legendary Ruby 40g product attributes.

Background

1. This is not a consumer program. eVouchers are available to tobacco product retailers and their staff only. 2. ITA retains complete discretion in determining whether or not to offer an eVoucher to a tobacco product retailer or staff. 3. No eVoucher is transferable or exchangeable. WA outlets must purchase a minimum of 2 packets of Champion Freshseal Legendary Ruby 40g during the term of the program. 4. In order to redeem any eVoucher in the Program, a Participant's trading account with ITA must be current and free from overdue payments at the time of redemption of such eVoucher. 5. As a condition of entry, a Participant accepts these terms and conditions and any rules, policies or procedures that may be adopted by ITA from time to time. ITA may change, amend or vary these terms and conditions and may extend the period of, or cancel, the Program without notice. 6. Entry in the Program is by invitation from ITA to tobacco product retailers and their staff only. ITA retains complete discretion in determining whether or not it will offer an invitation to participate in the Program to a tobacco product retailer and their staff. 7. ITA has authorised TM's & STR's to extend invitations to participate in the Program and to monitor the Performance of Participants throughout the Term of the Program. ITA and its agencies have authorised surveyors to visit participant's outlets and ask questions that require a specific response. 8. At the commencement of the Program TMs and STRs will:

- Provide a summary of these terms and conditions to the Participant;
- Give a presentation of information about Champion Freshseal Legendary Ruby 40g to the Participant and the Participant's staff
- Introduce the Retailer Survey Program

9. ITA will record the responses given to the surveyor at each visit. Surveyors will visit each outlet twice during the period of the program. At each visit the surveyor will approach the participant asking "I've heard about the new Champion Freshseal, what you can tell me about it?" A correct response to the surveyor from the Participant will be eligible for an eVoucher. Acceptable responses are limited to:

- Fresh Lock & Heat Seal;
- Helps keep tobacco fresher for longer;
- We've sealed in the freshness. Twice;
- Available in 40g;
- Affordable. Any other responses are not eligible for an eVoucher.

10. ITA retains complete discretion in determining whether or not to offer a prize to a tobacco product retailer.

eVouchers

11. An acceptable response to the surveyor from a Participant, will include any combination of the acceptable responses noted in Clause 9 and will be eligible for an eVoucher.

Mechanics

- eVouchers will be paid via email. To facilitate this, the surveyor will collect email addresses of Participants. Collection of this information is protected under ITA's Privacy Policy (see Clause 20). eVouchers can only be delivered via email. It is up to the participant to ensure they have a valid email address.
- An eVoucher will be given to the store staff member who correctly responds to the surveyor's question.
- An additional equal eVoucher will be paid to the store owner when a store staff member correctly responds to the surveyor's question. The store owner's eVoucher will be delivered at the end of the program.
- Maximum potential value of eVouchers per visit is \$100, with a \$50 eVoucher for the staff member spoken to, and \$50 eVoucher for the store principal.
- Any response that does not mention those listed in Clause 9 will not be eligible for an eVoucher.
- eVouchers will be emailed within 10 days of the surveyor visit.

General

12. Participants are responsible to ensure that their contact details with ITA are up to date. 13. All eVouchers are only claimable from www.GiftPay.com.au. ITA reserves the right to substitute an alternative eVoucher of equivalent value in the event that any eVoucher is not readily available. Participant will have three months from the date of eVouchers delivery to collect their eVouchers. 14. All claims for eVouchers will be subject to ITA's verification procedures, as determined by ITA in its absolute discretion. 15. ITA's decision in relation to all aspects of the Program, including but not limited to, any dispute as to the identity of a Participant, eligibility to participate in the Program and determining a Participant's eligibility to receive any eVoucher, is final and binding and no correspondence will be entered into. These Terms and Conditions may be changed, amended or varied at any time by ITA in its absolute discretion without notice and without assigning any reason therefor. ITA reserves the right to cancel or vary the Program in whole or in part in its absolute discretion at any time without prior notice. Any such cancellation shall not affect any Participant's entitlement to any eVoucher that has accrued at the time of cancellation. 16. The Participant accepts these terms and conditions as amended from time to time and agrees to be bound by them. Participation in the Program is subject to these terms and conditions. In the case of any inconsistency between these terms and conditions and any promotional material, these terms and conditions prevail. ITA reserves the right to cancel a Participant's participation in the Program without assigning any reason therefore where ITA, in its absolute discretion, considers that the Participant has not acted honestly, fairly, in good faith or in the spirit of the Program. 17. Liability for any tax on any benefits provided to Participants pursuant to the Program is the sole responsibility of the Participants. It is recommended that Participants contact their own accountant or taxation advisor in this regard. 18. As a condition of entry, Participants acknowledge that they have taken their own legal advice in relation to their participation in the Program, including, but not limited to their rights, duties and obligations under these conditions of entry. 19. To the extent permitted by law, ITA is not liable and shall be kept harmless for any loss or damage to property or person, howsoever arising, including but not limited to direct or consequential loss and including loss from personal injury, as a result of any person participating in the Program or making use of an eVoucher. 20. This program is covered under ITA's Privacy Policy. Please contact ITA Privacy Officer on 02 9881 0668. 21. By participating in this program you confirm that you have read and understood the terms and conditions of the program and that you agree to be bound by these terms and conditions.

FIGURE 2: Leaflet regarding 'Champion Freshseal Trade Program'



NEW

CHAMPION FRESHSEAL

TRADE PROGRAM

From Monday 23rd January to Sunday 19th March, participate in the Champion Legendary Freshseal Trade Program to collect your Freshseal Offer.

Three Simple Steps:

1. Do the Freshseal Quiz with your Territory Manager
2. Sell (Scan) a minimum of 10 pouches of Champion Legendary Freshseal 40g
3. Grow your current total Champion Family Scan Volume during the promotion

Grow Up to 5% (0.1% - 5%)	\$150 FRESH Offer** 17.24
Grow Over 5.01%	\$300 FRESH Offer** 17.94

**Fresh Offer payments are inclusive of GST and will be paid as a credit directly off invoice from 10th April

Your current Champion Family Scan Volume*

17.1

Kg's

*Based on After Scan Volume 8 weeks to 1st January 2017



WE'VE SEALED IN THE FRESHNESS. *TWICE.*

SMOKING IS ADDICTIVE
Health Authority Warning
Intended for the tobacco trade only

For more information, contact your ITA representative or call Customer Service Centre on 1300 308 208.
Branded packs are used to communicate product information to the trade. Actual product supplied will comply with Australian Plain Packaging Laws.

Imperial Tobacco

IMPERIAL TOBACCO AUSTRALIA LTD TON CHAMPION FRESHSEAL TRADE PROGRAM TERMS and CONDITIONS

In these terms and conditions:

ITA means Imperial Tobacco Australia Ltd of 4-8 Inglewood Place, Baulkham Hills, NSW, 2153 (ABN 46 088 148 681)

Participant means a tobacco product retailer and their staff who are invited to, and agree to, participate in the Program

Program means this CHAMPION FRESHSEAL TRADE PROGRAM (excludes ACT)

Scan Volume means the target ITA will monitor each Participant against in terms of volume for Champion Family Tobacco products during the term using Scan share extracts from Aztec Database

Off invoice discounts means either of the levels defined in point 11.

Term means the entire term of the Program of 8 weeks from 23rd January 2017 to 19th March 2017 inclusive.

TM means an ITA's Territory Manager

STR means an ITA's Saleslink Telephone Representative

Background

1. This is not a consumer program. The off invoice discounts are available to tobacco product retailers only.
2. ITA retains complete discretion in determining whether or not to offer off invoice discounts to a tobacco product retailer.
3. The off invoice discount is not transferable or exchangeable.
4. In order to redeem the discount in the Program, a Participant's trading account with ITA must be current and free from overdue payments at the time of redemption of such offer.
5. As a condition of entry, a Participant accepts these terms and conditions and any rules, policies or procedures that may be adopted by ITA from time to time. ITA may change, amend or vary these terms and conditions and may extend the period of, or cancel, the Program without notice.
6. Entry in the Program is by invitation from ITA to tobacco product retailers only. ITA retains complete discretion in determining whether or not it will offer an invitation to participate in the Program to a tobacco product retailer.
7. ITA has authorised TM's & STR's to extend invitations to participate in the Program and to monitor the Performance of Participants throughout the Term of the

Program

8. At the commencement of the Program TMs and STRs will:
 - a. Provide a summary of these terms and conditions to the Participant;
 - b. Give a presentation of information about ITA's business and products to the Participant and the Participant's staff; and
 - c. Notify the Participant of their current Champion Family scan volume of tobacco (based on Mechanics, c (ii)) prior to program commencing.
9. ITA will measure the Performance of each Participant on all aspects of the Program throughout the Term.
10. ITA retains complete discretion in determining whether or not to offer an off invoice discount to a tobacco product retailer.

Off invoice discounts

11. If Participant's Champion Family FCT scan volume reaches one of the levels indicated below, the discount will be as follows:-
Grow up to 5% means Aztec scan volume database increase between 0.01% - 5.00% of Champion Family FCT \$150.00 including GST off invoice payment
Grow over 5% means Aztec scan volume database increase over 5.01% of Champion Family FCT \$300.00 including GST off invoice payment.

Mechanics

To be eligible participants must complete all of the following

- a. Scan sell a minimum of 10 pouches of Champion Freshseal Legendary Ruby 40g
- b. Complete iPad Freshseal Quiz with ITA Territory Manager
- c. Reach one of the levels:
 - i. Base determined by Aztec scan volume database of Champion Family FCT volume of tobacco
 - ii. Base period 7th November 2016 to 1st January 2017 (8 weeks)
 - iii. Final results period 23.01.2017 - 19th March 2017 (8 weeks)
- d. Verified against ITA purchases from Saleslink
- e. Off invoice discount will be paid from 10th April 2017

General

12. Participants are responsible to ensure that their contact details with ITA are up to date.
13. All values are correct as at the date of publication. ITA accepts no responsibility for any change in the value and reserves the right to substitute an alternative of equivalent value.
14. All claims will be subject to ITA's verification procedures, as determined by ITA in its absolute discretion.
15. ITA's decision in relation to all aspects of the Program, including but not limited to, any dispute as to the identity of a Participant, eligibility to participate in the Program and determining a Participant's eligibility to receive a discount, is final and binding and no correspondence will be entered into. These Terms and Conditions may be changed, amended or varied at any time by ITA in its absolute discretion without notice and without assigning any reason therefore. ITA reserves the right to cancel or vary the Program in whole or in part in its absolute discretion at any time without prior notice. Any such cancellation shall not affect any Participant's entitlement to a discount that has accrued at the time of cancellation.
16. The Participant accepts these terms and conditions as amended from time to time and agrees to be bound by them. Participation in the Program is subject to these terms and conditions. In the case of any inconsistency between these terms and conditions and any promotional material, these terms and conditions prevail. ITA reserves the right to cancel a Participant's participation in the Program without assigning any reason therefore where ITA, in its absolute discretion, considers that the Participant has not acted honestly, fairly, in good faith or in the spirit of the Program.
17. Liability for any tax on any benefits provided to Participants pursuant to the Program is the sole responsibility of the Participants. It is recommended that Participants contact their own accountant or taxation advisor in this regard.
18. As a condition of entry, Participants acknowledge that they have taken their own legal advice in relation to their participation in the Program, including, but not limited to their rights, duties and obligations under these conditions of entry.
19. To the extent permitted by law, ITA is not liable and shall be kept harmless for any loss or damage to property or person, however arising, including but not limited to direct or consequential loss and including loss from personal injury, as a result of any person participating in the Program.
20. This program is covered under ITA's Privacy Policy. Please contact ITA Privacy Officer on 02 9881 0888.
21. By participating in this program you confirm that you have read and understood the terms and conditions of the program and that you agree to be bound by these terms and conditions.

FIGURE 3: Brochure promoting 'JPS+ Crushball' cigarettes



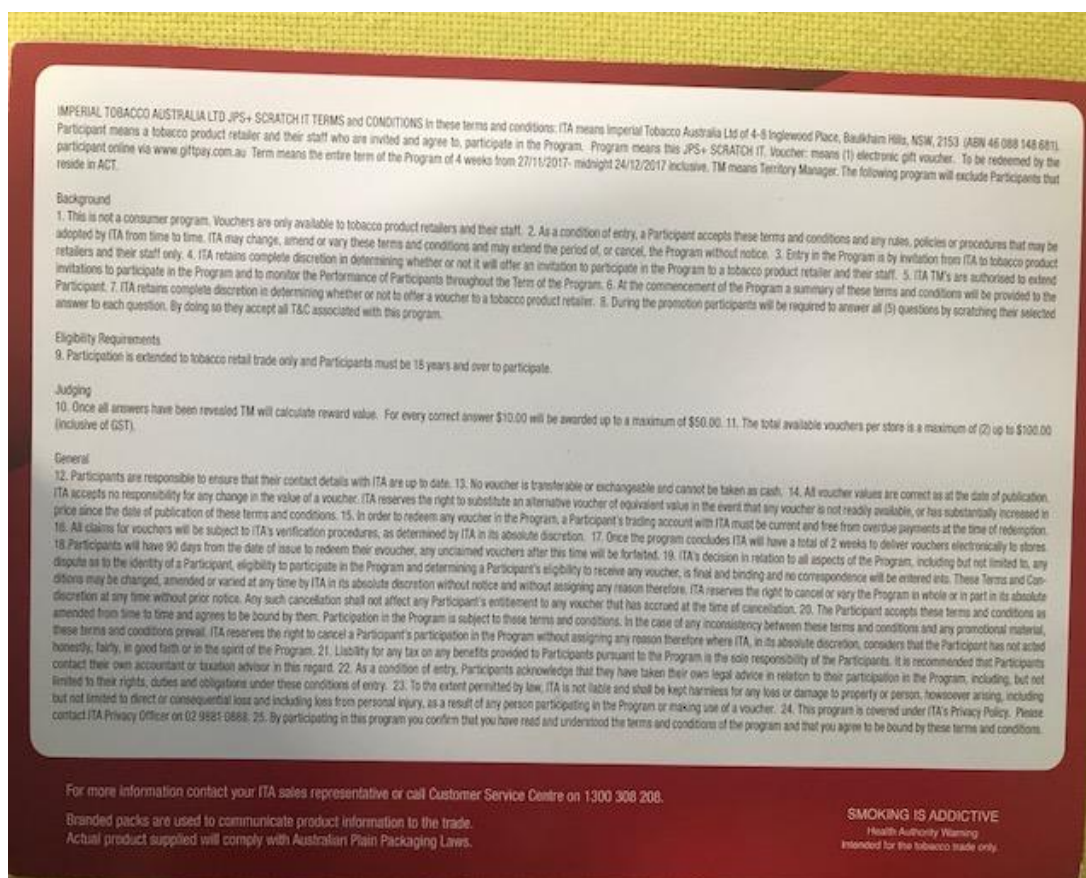
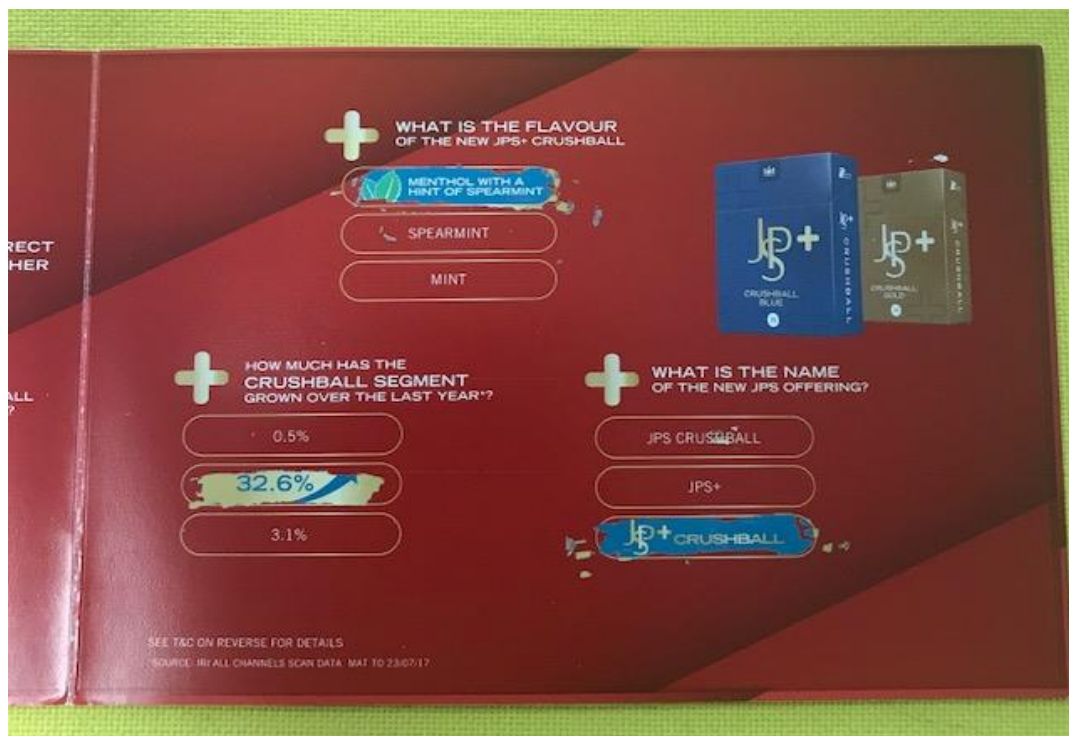
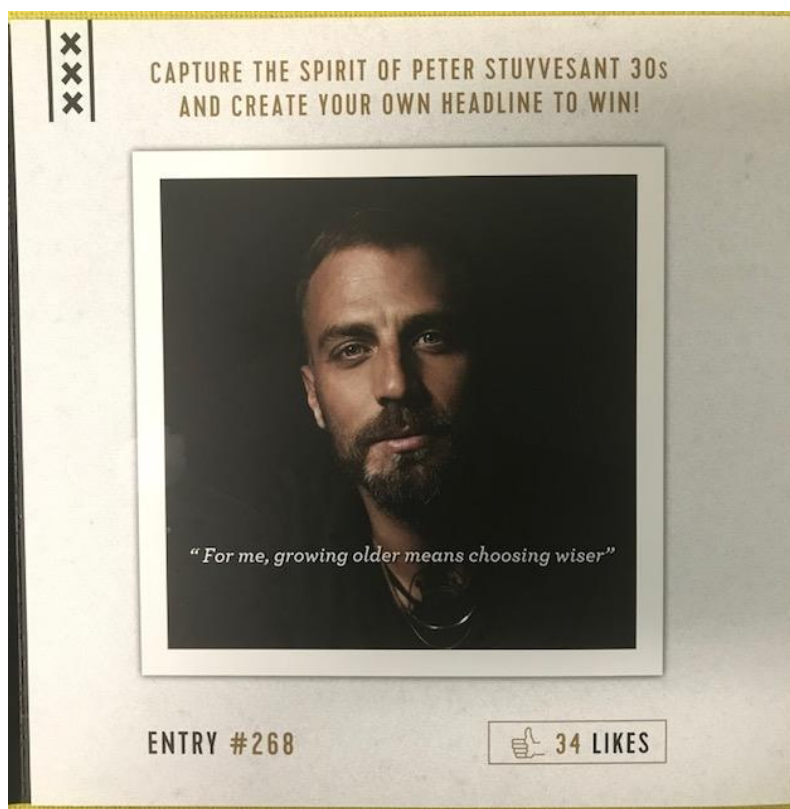


FIGURE 4: Brochure promoting Peter Stuyvesant 30s



**CREATE YOUR VERY OWN
PETER STUYVESANT 30s HEADLINE**

For your chance to WIN!

3 Simple steps:

UPLOAD Your own image or select from the gallery

TYPE Your own headline that captures the spirit of Peter Stuyvesant 30s

SUBMIT Review your entry and submit



3 WINNERS WILL BE SELECTED IN EACH REGION
NSW, QLD, VIC/TAS & SA/NT

MAJOR PRIZE
XXX
APPLE IMAC PRO
- OR -
\$5,000 TRAVEL VOUCHER
Flight Centre Travel Voucher

MINOR PRIZE
XX
APPLE IPHONE 8
- OR -
\$1,500 TRAVEL VOUCHER
Flight Centre Travel Voucher

MINI PRIZE
X
BOSE HEADPHONES
- OR -
\$500 TRAVEL VOUCHER
Flight Centre Travel Voucher

**PLAY THE CROSSES GAME
30 WINNERS WEEKLY!**



PRIZES ON OFFER

Participant with the highest weekly score **WINS**
\$500 Gift Pay Voucher*



Runners Up will Receive a
\$20 iTunes Voucher



Visit weekly for more chances to WIN!

*** LIMITED EDITION
XXX TOWEL ****

Participate to **RECEIVE**
your very own **LIMITED EDITION
XXX TOWEL**



Visit **PETERSTUYVESANT.COM.AU**

FOR MORE INFORMATION SPEAK TO YOUR ITA TERRITORY MANAGER
OR CALL CUSTOMER SERVICE ON 1300 308 208

NEW VISITORS

REGISTER NOW

ITA Account Number

BPAY Reference Number

*Your ITA account number & BPAY reference number
can be found on your ITA invoice*

RETURNING VISITORS

LOGIN

Email address

Password

*Enter the email address and password
you registered with*

PETER STUYVESANT 30S
RETAIN YOUR PREMIUM SMOKERS WHO DON'T COMPROMISE ON QUALITY



 **Imperial Tobacco** | Work together. Win together

For more information contact your ITA sales representative or call Customer Service Centre on 1300 308 208.
Branded packs are used to communicate product information to the trade.
Actual product supplied will comply with Australian Plain Packaging Laws.

SMOKING IS ADDICTIVE
Health Authority Warning
Intended for the tobacco trade only

FIGURE 5 – Leaflet instructing retailers to recommend specific alternatives when certain JPS products are unavailable

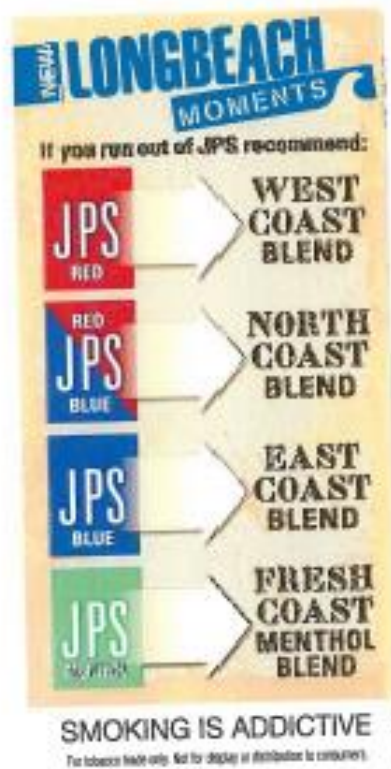


FIGURE 6: Brochure promoting Craftsman Cigarillos



SMOKING IS ADDICTIVE

Confidential. For Trade Only. Not for Distribution to Consumers.

NEW

TRADITIONAL CRAFTSMAN

CIGARILLO

Natural Leaf Wrap

Surprisingly smooth

Your questions answered:

Q: What does it mean by double filtered?
A: In addition to a standard filter, there is a second carbon filter added to ensure a smooth taste. This is why the product is so *surprisingly smooth*, and can be inhaled or, consumed like a cigar.

Q: What is the cut filler in Craftsman Cigarillos?
A: A combination of Virginia and Oriental Leaf, balanced harmoniously with the outer dark air cured natural leaf wrap*.

Q: I can't say cigarillo, how else can I describe the product to adult smokers, when asked?
A: Refer to it as a natural leaf wrap, or a double filtered mini cigar. However, unlike traditional cigars it is surprisingly smooth.

Q: How is this different from other cigarillos?
A: Outside of the high quality craft tobacco used, and the double filter, the exterior dark air cured wrap is the first natural leafwrap in the category. All other cigarillos, in the Australian market, have a reconstituted tobacco or "recon" wrap, which is a manufactured substitute for natural leaf.

Q: Is it a flavored product?
A: No. The taste profile is predominantly the marrying of the high-quality craft tobaccos, Oriental, Virginia and the outer dark air cured natural leafwrap.

Q: What is it like?
A: It may be seen as similar to Tycoon, Colts and Captain Black, which are also filtered cigarillos but do not have the natural leaf wrap.

Q: Can the product be inhaled?
A: Yes. It certainly can be. The double filter means that it is the adult smoker's choice, to inhale, or smoke it like you would a traditional cigar.

Q: How many do you get in a pack?
A: There are twelve Craftsman Cigarillos in a pack.

Q: If it is so high quality, how come the price point is so competitive?
A: We offer Craftsman Cigarillos in a twelve pack, allowing us to deliver high quality craft tobaccos at a competitive price point.

Q: What adult smokers would enjoy Craftsman Cigarillos?
A: Any existing cigar and cigarillo adult smokers after a new and unique experience.

*Any references to 'natural' made in relation to Craftsman Natural Leaf Wrap are not to be construed or interpreted as a healthier or safer alternative for adult smokers.

SMOKING IS ADDICTIVE

Confidential. For Trade Only. Not for Distribution to Consumers.

Appendix 2 – EXAMPLES OF COLOURED FOIL LININGS

FIGURE 1 Examples of coloured inner foil previously allowed in Canada

Source: Canadian Cancer Society



FIGURE 2: Examples of coloured inner foil previously allowed in Canada

Source: Canadian Cancer Society



FIGURE 3: Examples of coloured inner foil previously allowed in Canada

Source: Canadian Cancer Society

