

The Senate

Community Affairs
Legislation Committee

Tobacco advertising prohibition

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Membership of the Committee

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Senator Brian Greig, Deputy Chairman	AD, Western Australia
Senator Guy Barnett	LP, Tasmania
Senator Kay Denman	ALP, Tasmania
Senator Gary Humphries	LP, Australian Capital Territory
Senator Jan McLucas	ALP, Queensland

Substitute member

Senator Lyn Allison to replace Senator Greig for the inquiry	AD, Victoria
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REPORT

TOBACCO ADVERTISING PROHIBITION

The Inquiry

1.1 The Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004 (the Electoral Amendment Bill), a Private Member's Bill, was introduced into the House of Representatives on 16 February 2004 by Mr Duncan Kerr. On 10 March 2004 Senator Lyn Allison tabled in the Senate an exposure draft of a Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004 (the TAP Draft Bill).

1.2 The Senate also passed a number of motions requiring the Australian Competition and Consumer Commission (ACCC) to report on various issues concerning tobacco on 24 September 2001, 27 June 2002 and 12 November 2002. The ACCC responded to the Senate's orders on 14 May 2002, 9 December 2002 and 24 November 2003.

1.3 On 13 May 2004, the Senate referred to the Committee for inquiry and report by 4 August 2004 both the Electoral Amendment Bill and exposure draft of the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004, together with the adequacy of the response to date of the ACCC to the orders of the Senate dealing with the various issues concerning tobacco.

1.4 The Committee considered these matters at public hearings on 25 June and 12 August 2004. Details of the public hearings are referred to in Appendix 2. The Committee received 12 submissions and these are listed at Appendix 1. The submissions and Hansard transcript of evidence may be accessed through the Committee's website at http://www.aph.gov.au/senate_ca

The Electoral Amendment Bill

1.5 The Electoral Amendment Bill proposes to amend the Commonwealth Electoral Act 1918 to deny public election funding to political parties or candidates accepting donations from the tobacco industry, or from a person who derives substantial revenue from the manufacture, distribution or retail sale of tobacco products.¹

1.6 Currently, the public election funding is available to parties and candidates, regardless of the source of other donations, provided those donations are fully disclosed in accordance with the provisions of the Commonwealth Electoral Act.

1 Commonwealth Electoral Amendment (Preventing Smoking Related Death) Bill 2004

The TAP Exposure Draft

1.7 The Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004, which the Exposure Draft reflects, aims to expand the scope of the original Act, passed in 1992. It will achieve this through a recognition of technological advances in advertising, specifically the proliferation of internet-based advertising, and the advent of tobacco product placement in films and computer games. It also seeks to prohibit the offering for sale of tobacco products on the internet, and the use of certain words in advertising, of whatever media, which are misleading, deceptive and are not conducive to public health.²

The Senate Orders and ACCC response

1.8 The Orders of the Senate and links to the ACCC response are reproduced in Appendix 3. In essence the Senate Order of 24 September 2001 requested the ACCC to report on the performance of its functions under the *Trade Practices Act 1974*, with respect to its investigations into misleading, deceptive or unconscionable conduct of tobacco companies including loss or damage caused and the extent to which the tobacco industry may be liable to compensate for the loss or damage; the adequacy of current labelling laws; tobacco litigation in the United States; and the potential for tobacco litigation in Australia. The Order of 27 June 2002 required the ACCC to report on the use of the descriptors 'light' and 'mild' by tobacco companies and whether there had been misleading, deceptive or unconscionable conduct by British American Tobacco and/or Clayton Utz with regard to the destruction of documents for the purpose of withholding information relevant to possible litigation.

Issues

Political donations

1.9 A number of respondents argued that political donations derived from tobacco companies create a number of risks or perceived risks. These were summarised by the VicHealth Centre for Tobacco Control³, and fell into four main categories:

- that private political donations may actually buy political influence;
- that private political donations may give rise to a perception that influence is being 'bought';
- that political donations and better access to politicians go hand in hand, enhancing the chances of a close and/or profitable personal relationship being formed, often in an informal setting; and

2 Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004 (Exposure Draft)

3 Prepared by the VicHealth Centre for Tobacco Control on behalf of The Cancer Council Australia, National Heart Foundation, VicHealth Centre for Tobacco Control, Action on Smoking and Health and Australian Council on Smoking and Health.

- that by accepting donations, politicians will necessarily have a difficulty in avoiding conflicts of interest.⁴

1.10 VicHealth argued that, in turn, by accepting donations from particular organisations or individuals, policy makers 'may in fact limit, or at least be seen to be limiting, their capacity or their will to represent all of their constituents fairly and evenly, and so uphold the principles of democratic representation'.⁵

1.11 However, VicHealth also argued that the tobacco industry is a special case, and that:

Unlike other industries, there is no space in which the interests of the tobacco industry coincide with those of the rest of the community. There is no safe level of smoking.⁶

Further:

I note from some of the tobacco industry submissions that they equate donations to political parties as part of the political process. I take issue with that. Certainly everyone, including the tobacco industry, is able to participate in the political process but not everyone is able to make political donations of the same magnitude as the tobacco industry.⁷

1.12 The Royal Australian College of General Practitioners (RACGP) concluded:

To end political donations of tobacco companies would not only send a strong message to tobacco companies, it would also show other countries and the Australian community that our Governments are serious about tobacco control. In particular, it will show that Australian political parties are not prepared to have tobacco companies make an investment in them.⁸

1.13 The tobacco industry argued in their submissions that the issue was one of equality with other industries, and of a right to participate in the political process. British American Tobacco Australia stated:

We strongly oppose any legislative amendment which would deprive Australian tobacco manufacturers, distributors and retailers of their rights to donate to political parties and to participate in the democratic process on an equal footing with other legitimate businesses.⁹

In evidence, British American Tobacco went on to state:

4 *Submission 5*, pp.3-4 (VicHealth Centre for Tobacco Control).

5 *Submission 5*, p.4 (VicHealth Centre for Tobacco Control).

6 *Submission 5*, p.4 (VicHealth Centre for Tobacco Control).

7 *Committee Hansard 25.6.04*, p.18 (VicHealth Centre for Tobacco Control).

8 *Submission 7*, p.1 (RACGP).

9 *Submission 3*, p. 3 (BAT).

Like any organisation in this country, we are entitled to participate in political debate and the political process. For right or for wrong, participation in the political process in Australia has for some time involved receipts of funds to political organisations... We are a very political product, as evidenced by our appearance before the committee today, and I think in many ways it is only respectable that we are involved in the political process. If people want to change the way in which organisations across the spectrum involve themselves in the political debate, I think it is a broader question about political funding, not about the complexion of the particular companies that are engaged in that activity. To hive off or excise tobacco companies versus any other company... is, I would say, a broader question that potentially the committee on electoral matters may have to look at.¹⁰

1.14 While Philip Morris argued that the proposed Bill would 'effectively exclude a single class of corporations, their business partners, and their employees from participating in an important part of political discourse... The Bill would also discriminate against individual politicians and their political parties.'¹¹

1.15 Philip Morris also saw the proposed amendment as unnecessary and undesirable. It argued that:

[disclosing contributions] to the AEC [Australian Electoral Commission] and making those disclosures available to the public in a readily-accessible format such as the Internet, is the best way to promote transparency and accountability in elected officials and strengthen the political process.¹²

Extension of the prohibition on tobacco advertising

1.16 VicHealth and the RACGP supported the proposed amendment, submitting that tobacco advertising was a powerful medium which normalised smoking, associated it with an active and successful lifestyle, and encouraged young people to take up the habit.¹³ VicHealth also pointed out that:

Although many forms of advertising are prohibited, tobacco companies still manage to spend millions of dollars on marketing their products... The World Bank recently concluded that 'bans on advertising and promotion prove effective, but only if they are comprehensive, covering all media and all uses of brand names and logos'.¹⁴

1.17 The RACGP stated:

(1) evidence supports the importance of banning all direct and indirect tobacco marketing, promotion and product placement in new media,

10 *Committee Hansard* 25.6.04, p.9 (BAT).

11 *Submission* 6, p.2 (Philip Morris Ltd).

12 *Submission* 6, p.3 (Philip Morris Ltd).

13 *Submission* 5, p.6 (VicHealth Centre for Tobacco Control); *Submission* 7, pp.1-2 (Royal Australian College of General Practitioners).

14 *Submission* 5, p.7 (VicHealth Centre for Tobacco Control).

especially in preventing the uptake of smoking by young Australians; (2) the cost to individuals and the Australian community of smoking far outweighs the economic considerations of the impact on the tobacco industry and retailers—this is a moral and ethical issue in deciding about funding for political parties; and (3) the evidence shows that reductions in the level of smoking, both uptake and quitting, are directly related to the level of antismoking campaigns, legislation and resources.¹⁵

1.18 Respondents from the tobacco industry saw this issue as being about a right to remain competitive in the market of adult smokers. The point was made that tobacco is a legal product, and is consumed by around 20 per cent of Australians.

1.19 It was asserted by two tobacco companies that, rather than attracting potential young smokers, advertising was designed to appeal to adults who made the personal decision to take up the habit. It was also asserted that tobacco advertising aims to attract existing smokers using products of a different brand.¹⁶

1.20 However, VicHealth submitted that:

The overwhelming majority of research shows that tobacco advertising not only leads to an increase in consumption but that young people, the source of replacement smokers, are heavily influenced by that advertising. The tobacco industry continues to vigorously fight effective advertising restrictions...it asserts that the purpose of tobacco advertising is to encourage current adult smokers to switch brands. This claim has been examined and, based on economic evidence, dismissed.¹⁷

1.21 While accepting the need for some legislative regulation, Imperial Tobacco Australia submitted that 'it is important that the level of regulation does not reach a point where legitimate competition in the marketplace becomes a practical impossibility'. Imperial Tobacco stated that it was 'committed to the efforts it has made in the past and continues to be committed to engage in constructive dialogue with Government on several different issues'. It had the view that there were 'large areas of agreement between regulators and the tobacco industry and that regulators can benefit from our experience to fashion rules that will accomplish their objectives'.¹⁸

Internet sales and marketing

1.22 The TAP Draft Bill proposes to prohibit the sale of tobacco products on the Internet. VicHealth argued that, while tobacco sales over the internet should be regulated, a complete ban was not warranted for products purchased from within

15 *Committee Hansard* 25.6.04, p.15 (RACGP).

16 *Submission* 10 (Attachment 1), p.3 (Imperial Tobacco); *Submission* 3, p.6 (BAT).

17 *Submission* 5, p.6 (VicHealth Centre for Tobacco Control).

18 *Submission* 10 (Attachment 1), pp.2,7 (Imperial Tobacco Australia). See also *Submission* 6, p.6 (Philip Morris); *Submission* 3, p.18 (BAT).

Australia. It stated that there should be a prohibition on Internet sales from overseas for personal use to Australians and on purchases for personal use by Australians from overseas via the Internet. It was further contended that only factual information be communicated via the internet, excluding multicoloured pictorial advertisements, brand names and logos. This information should only be available on secure sites to registered users.¹⁹

1.23 Philip Morris stated that consideration should be given to providing for exemptions for some form of tobacco advertising on age-restricted websites arguing that 'this would be consistent with the TAPA [Tobacco Advertising Prohibition Act] objectives of preventing youth access and exposure to tobacco products and would permit responsible competition among product manufacturers'. It also supported the prohibition of unrestricted consumer internet cigarette sales. However, it stated that business-to-business internet communications and sales should continue to be permitted as the TAPA explicitly excludes trade communications from its prohibitions and permits access-restricted business-to-business internet sales.²⁰

Product placement

1.24 The TAP Draft Bill proposes that a person or regulated Corporation must not, knowingly or recklessly, screen a film, or television program made after 1 July 2004 that contains a product placement of tobacco products. The same applies to product placements in computer games. In addition the Bill proposed to prohibit a person engaged in the film industry from offering or accepting a product placement arrangement in a film, television program or computer game.

1.25 VicHealth supported the prohibition of tobacco placements. It noted that there are those who believe that product placement is not prohibited 'and it would be helpful to make this explicit in the legislation'.²¹

1.26 The Australian Subscription Television and Radio Association (ASTRA) submitted that compliance with this provision posed a number of difficulties. First, as the legislation is not restricted to programs which are produced in Australia, broadcasters would be required to consider the appearance of tobacco products in films and television programs made anywhere in the world. ASTRA stated that given the large volume of material broadcast by subscription television operators, 'this clearly amounts to a very onerous obligation and one that would be impossible to administer given that operators are not notified, and would not be able to obtain this information even if it were requested from program or channel suppliers'.

1.27 ASTRA also argued that subscription television operators 'are simply not in a position to know whether program material contains product placement of tobacco

19 *Submission 5*, p.10 (VicHealth Centre for Tobacco Control); see also *Committee Hansard* 25.6.04, p.17 (RACGP).

20 *Submission 6*, p.4 (Philip Morris).

21 *Submission 5*, p.10 (VicHealth).

products as there is no way of determining whether the appearance of a tobacco product in a program is a product placement'. ASTRA went on to note that product placement arrangements are confidential between production companies and program suppliers and would not be disclosed to operators as part of any licensing arrangement. ASTRA concluded that 'given this lack of control and knowledge over the arrangements involving tobacco manufacturers and the inability to investigate these arrangements it is unclear what, if anything, subscription television operators could do to ensure compliance with the legislation'.²²

1.28 SBS argued that it is not clear what actions would amount to a reckless screening under the proposed legislation and it would be very difficult for SBS to introduce a process that ensured proper investigation of the actions of all the people involved in film making prior to screening a film that included depictions of smoking. SBS also stated:

Tighter restrictions on tobacco product placements have serious implications for the moral rights of overseas filmmakers. When broadcasting overseas produced material SBS aims as far as possible to avoid interfering with the integrity of the material and the moral rights of the creator, while being conscious of legislative and Code obligations.

SBS concluded that as it was not in a position to edit films to avoid depictions of smoking that may or may not be product placements, the proposed amendment has the potential to cause unreasonable burden on SBS in identifying suitable overseas films for broadcast.²³

1.29 Both SBS and Free TV Australia submitted that the existing regulation is extremely comprehensive and adequately addresses the policy underlying the legislation. This includes the regulation of tobacco advertising under the Broadcasting Services Act, as a condition of licence, and the existing restriction in the *Tobacco Advertising Prohibition Act 1992*.²⁴

1.30 Philip Morris and British American Tobacco stated that they did not pay for any of their tobacco products to be placed or displayed in the media, films, television programs or computer games.²⁵

1.31 The Committee notes that at a meeting of the Ministerial Council on Drug Strategy on 24 May 2004 the ACT reported that tobacco used in popular youth oriented movies had increased by 50 per cent since 1998. This exposure to smoking on screen has been found to normalise and glamorise smoking for young people. Ministers discussed screening anti-smoking advertisements in cinemas prior to

22 *Submission 11*, p.1 (ASTRA).

23 *Submission 9*, p.2 (SBS).

24 *Submission 8*, p.2 (Free TV Australia); *Submission 9*, pp.2-3 (SBS). See also *Committee Hansard 25.6.04*, p.23 (Free TV Australia).

25 *Submission 3*, p.15 (BATA); *Submission 6*, p.5 (Philip Morris).

screening movies that depict smoking and referred this proposal to the Intergovernmental Committee on Drugs to report on progress at the next meeting of the Ministerial Council on Drug Strategy in November 2004.²⁶

Tobacco industry co-sponsorships with the Commonwealth

1.32 The Bill proposes to prohibit Commonwealth expenditure where co-sponsorship from tobacco companies exists. This was supported by VicHealth insofar as it would prohibit events and activities co-sponsored by the Commonwealth being publicly sponsored by tobacco manufacturers, distributors or retailers. However, it did see some difficulties in seeking to prohibit the Commonwealth from co-sponsoring events or activities with tobacco companies under any circumstances as it may prevent or reduce funding to some useful events and activities. It argued:

...we would, instead, focus on the publicity given to tobacco industry sponsorship of such events, which is, of course, a powerful form of tobacco industry marketing...we consider it contrary to the public interest for a tobacco company, and its products, to gain publicity that links them with worthy causes or particular imagery, feeling, values or ideals, and works to cultivate association far removed from the realities of harms and addictiveness.²⁷

1.33 British America Tobacco argued that the proposed prohibition would 'represent a severe restriction on BATA, and other tobacco manufacturers to participate in forums where they have a legitimate business interest'.²⁸

The adequacy and accuracy of the Australian Competition and Consumer Commission response to Senate orders for information

1.34 On 24 September 2001, the Senate ordered that the Australian Competition and Consumer Commission (ACCC) report to the Senate on the performance of its functions under the *Trade Practices Act 1974* (TPA) with respect to certain matters relating to the tobacco industry.

1.35 The ACCC responded to the Order on 30 April 2002. In its report, tabled in the Senate on 14 May 2002, the ACCC stated that the subject matter of the report was 'generally confined to the functions and powers of the Commission'. In relation to allegations that tobacco companies have been involved in systemically misleading and deceiving consumers, in contravention of the TPA through their alleged silence about the health dangers of their products, the ACCC stated:

The Commission has considered this issue in some detail and to date has been of the view that, based on the information and advice currently available to it, that legal proceedings based on such allegations would be unlikely to be successful at present, because of a number of factors

26 Ministerial Council on Drug Strategy, Joint Communique, 20 May 2004.

27 *Submission 5*, p.11 (VicHealth).

28 *Submission 3*, p.16 (BATA).

including the existence of clear warning labels on tobacco products and, secondly, widespread community awareness of the dangers of smoking.²⁹

1.36 The ACCC went on to note that it was looking into new allegations raised in relation to the decision in the *McCabe v British American Tobacco Australia Services Limited*. The Victorian Supreme Court's finding of systematic destruction of documents of likely relevance to tobacco related litigation was also of concern and was the focus of the ACCC's investigation.

1.37 In relation to litigation concerning tobacco companies, the ACCC stated that it was 'monitoring legal developments in the United States and is currently not aware of documents produced in US litigation that constitute evidence of contraventions of Australian trade practice law'. The Commission also stated that it was not in a position to comment on the outcome of current or future litigation in Australia.³⁰

1.38 Following the tabling of the report, the Senate passed a further Order on 27 June 2002 requiring the ACCC to report on further matters including the use of the terms 'light' and 'mild' and whether there had been any misleading, deceptive or unconscionable conduct in breach of the Trade Practices Act by Clayton Utz/British American Tobacco with regard to destruction of documents.

1.39 The ACCC informed the Senate in December 2002 that it was investigating the two issues raised in the June 2002 Order. It had sought documents and it was taking some time for Commission staff to go through the information received. The Commission was not in a position to provide the Senate with any more detailed information on the status of the investigations. On 24 November 2003, the ACCC informed the Senate that the investigation was still continuing.

1.40 VicHealth submitted that, in its view, the tobacco industry has engaged, and continues to engage, in conduct that contravenes the Trade Practices Act and the ACCC fails to enforce the Act against the tobacco industry. This allows 'the tobacco industry to operate as if it were above consumer protection law, and in so doing, to cause great harm to individuals and enormous costs to the Australian community as a whole'.³¹

1.41 VicHealth went on to state that the ACCC report tabled in 2002 was 'replete with mischaracterisations of the arguments that had been put by the [peak non-government tobacco control organisations] and basic factual and legal errors'. VicHealth stated that the report referred to health warnings on cigarette packs and that people were generally aware that smoking is harmful. VicHealth submitted that the tobacco industry had engaged in conduct which included false and misleading statements about, and false and misleading advertising of, tobacco products which sought to downplay evidence of the harms and addictiveness of smoking. Further, the

29 ACCC, *Response to Senate Motion 1031 (24 September 2001) Tobacco*, April 2002, p.1.

30 ACCC, *Response to Senate Motion 1031 (24 September 2001) Tobacco*, April 2002, p.1.

31 *Submission 5*, p.12 (VicHealth).

use of 'low-tar', 'light' and 'mild', in the knowledge that consumers believe them to be less harmful than regular cigarettes while the manufacturers know that they are not less harmful.

1.42 VicHealth argued that the ACCC made a legal error in relation to the statutory time limitation period in relation to the failure by the tobacco industry to disclose to consumers that nicotine is addictive in the period between it first becoming so aware and the introduction of mandatory labelling referring to addiction. Further, the Commission had read section 51AB of the Act (unconscionable conduct in connection with the supply or possible supply of goods and services) very narrowly and concluded that the section cannot apply to the conduct of tobacco manufacturers.³²

1.43 VicHealth had provided the ACCC with a response to the report and meetings were held with the Commission. VicHealth commented that the peak organisations 'do not believe that the Commission has at any stage genuinely addressed their concerns or explained to them why it has chosen not to act on them'. It concluded:

The Commission's position has come as a surprise to the organisations, given the Commission's reputation for willingness to enforce the Act in a variety of areas and against a wide range of corporations. The organisations have never understood the Commission's lack of interest in this area. Recent public statements by the Chairman and CEO of the Commission in respect of the likely cost of litigation against the tobacco industry and the need for funding for such a course may, in retrospect, go some way to explaining the Commission's position.³³

However, VicHealth argued that 'if it is a funding issue...the amount of funding that would be required would be a drop in the ocean compared to the scale of the wrongdoing, the scale of the harm and the potential benefits of proceedings'.³⁴ The benefits include public policy and public health benefits and the recovery of large amounts of public expenditure on health and social security costs.³⁵

1.44 Mr Neil Francey also commented on the ACCC's 2002 Report. Mr Francey argued that the report was 'deficient in a number of significant respects'. This included that the advice that legal proceedings would be unlikely to be successful was 'based on a misconception of the complaints about the tobacco industry's conduct and accordingly, is not to the point' and that information currently available would not support such a conclusion.³⁶

1.45 Mr Francey stated that the report did not refer to the litigation being undertaken by the US Department of Justice and the ACCC's lack of awareness of US

32 *Submission 5*, p.17 (VicHealth).

33 *Submission 5*, p.13 (VicHealth).

34 *Committee Hansard* 12.8.04, p.31 (VicHealth).

35 *Submission 5*, p.21 (VicHealth).

36 *Submission 4*, p.1 (Mr N Francey).

documents that constitute evidence of contraventions of Australian trade practices law indicated that:

...the ACCC has not even considered documents referred to it which demonstrate that the parent companies of subsidiaries operating in Australia have conspired to promote a false "controversy" over smoking and disease, spurious "smoker re-assurance" programs and other tactics aimed at promoting the "social acceptability of smoking" and underplay the addictiveness of nicotine, since at least mid-1977.³⁷

1.46 Mr Francey also noted the ACCC's comments on time limitations on actions under section 82 of the Act in relation to possible claims based on addiction and stated that this ignores cases to the effect that there is no applicable time limit to applications under section 87(1) of the Act. Mr Francey stated that the 'advice in the report of the ACCC is incompetent in the extreme'.³⁸

1.47 Mr Francey recommended the establishment of a Tobacco Litigation Support Centre to which appropriate staff could be seconded from the ACCC and State and Territory fair trading departments as well as a Tobacco Litigation Support Fund. In addition, it was recommended that a National Tobacco Control and Compensation Fund be established into which courts could order money to be paid for compensation and for prevention and reduction of harm.³⁹

1.48 In response to evidence received by the Committee, the ACCC stated that it had consulted with interest groups and had put their comments on the 2002 report to senior counsel. As a result 'he came back and said there was only one point on which he thought we erred. That was on the issue of limitation periods'.⁴⁰

1.49 The ACCC also indicated to the Committee that it had written to the Minister for Health stating that the ACCC was monitoring and had sought legal advice on a number of tobacco issues. It was noted that action in the United States was quite substantial and protracted litigation and 'we did not see, within our existing resources, that we had sufficient resources to be able to undertake that sort of action'. In order to commence similar litigation, the ACCC would face a very substantial resource cost 'which we just could not accommodate within our existing budget'. The Minister for Health noted the ACCC's comments.⁴¹

1.50 The ACCC also stated that it had undertaken consultations with the interest groups on 'light' and 'mild' descriptors following comments about the ACCC's 2002 report. The ACCC also stated that it had held discussions with the tobacco industry in its more recent 'light' and 'mild' investigation following the Senate's Order of 27 June

37 *Submission 4*, p.3 (Mr N Francey).

38 *Committee Hansard 25.6.04*, p.3 (Mr N Francey).

39 *Committee Hansard 25.6.04*, p.5 (Mr N Francey).

40 *Committee Hansard 12.8.04*, p.34 (ACCC).

41 *Committee Hansard 12.8.04*, pp.34-35 (ACCC).

2002. The Commission stated that its investigation 'is all but complete' with a brief to be given to senior counsel for advice.

1.51 The ACCC commented that the tobacco companies had agreed that the 'light' and 'mild' descriptors on cigarette packets need to be modified and/or removed. Proposals for how the descriptors might be modified had been put to the ACCC which it had indicated were not acceptable. Timing was also an issue as some companies 'would like to defer any changes to the cigarette packaging until the changes to the labelling warning are mooted'. As there is a possibility of this being delayed for 12 to 18 months, the ACCC stated that 'our response to that has been to say that that is an unacceptable time frame'. However, the Commission considered that this matter 'could be dealt with quickly and effectively and would rectify concerns in respect of the 'light' and 'mild' descriptors.⁴²

1.52 In relation to past conduct, that is to prove that consumers had been misled and deceived by the use of the terms 'light' and 'mild', the ACCC stated:

The big critical issues, in terms of legal advice and the resources of the ACCC, relates to the commencement of litigation to deal with past conduct. I think it is clear that, if those proceedings were instituted, they would be defended vigorously. That is the issue that the ACCC has to focus on.⁴³

Any litigation on this matter would be substantial. Further, it had taken the view that 'on the basis that preliminary advice suggests that there is a possible case that they are misleading and deceptive', but final advice from counsel on the strength or otherwise of that case was being sought.⁴⁴

1.53 In response to the issue of the systematic destruction of documents, the ACCC commented that the McCabe case had been overturned by the full bench of the Victorian Supreme Court and leave to appeal to the High Court had been refused. As a result, 'our assessment now is that it would be very difficult for us to establish that the shredding of documents by tobacco companies was misleading and deceptive conduct... basically because we now have a superior court determination that there is a legitimate commercial reason why documents might be disposed of'.⁴⁵

1.54 In relation to monitoring legal developments in the United States, the ACCC stated that a great volume of documentary evidence had come out of the action (currently there are about 26 million pages of evidence) and 'to pursue that further gets into a resource issue'. The ACCC also noted that its US counterpart, the Federal Trade Commission, had not taken action against tobacco companies. The action that has been taken has been either by individual plaintiffs or by state governments under

42 *Committee Hansard* 12.8.04, pp.36, 37 (ACCC).

43 *Committee Hansard* 12.8.04, p.37 (ACCC).

44 *Committee Hansard* 12.8.04, p.36 (ACCC).

45 *Committee Hansard* 12.8.04, p.40 (ACCC).

legislation such as the Racketeer Influenced and Corrupt Organisations Act. Similar legislation does not exist in Australia.⁴⁶

A handwritten signature in black ink, appearing to read "Sue Knowles", with a long horizontal line underneath it.

Senator Sue Knowles

Chairman

September 2004

46 *Committee Hansard* 12.8.04, p.41 (ACCC).

ADDITIONAL COMMENTS FROM AUSTRALIAN LABOR PARTY SENATORS

The Australian Labor Party Senators supported the referral of the Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004 and the exposure draft of the Tobacco Advertising (Film, Internet and Misleading Promotion) Amendment Bill 2004 to the Committee together with the adequacy of the response of the ACCC to the Senate's orders.

Labor Senators agree with the Chair's Report in so far that it is an accurate description of the evidence place before the Committee both in its hearings and from the submissions.

Labor Senators generally agree with the commentary of the Report of the Australian Democrats.

Labor Senators recommend:

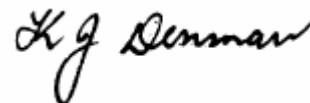
That if reintroduced, the Electoral Amendment Bill proceed.

That the Tobacco Advertising (Film, Internet and Misleading Promotion) Amendment Bill 2004 be introduced and proceed; and

That the ACCC report in full to the orders of the Senate by the end of November 2004.



Senator Jan McLucas
Senator for Queensland



Senator Kay Denman
Senator for Tasmania

AUSTRALIAN DEMOCRATS SUPPLEMENTARY REPORT

1.1 The Australian Democrats initiated the inquiry into both the Electoral Amendment Bill and exposure draft of the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004, together with the adequacy of the response to date of the ACCC to the orders of the Senate dealing with the various issues concerning tobacco.

1.2 The impact on health and the economy of tobacco smoking is described by Mr Liberman representing the VicHealth Centre for Tobacco Control, The Cancer Council of Australia, the Health Foundation, Action on Smoking and Health Australia and Australian Council on Smoking and Health:

"The organisations on whose behalf I appear today are concerned about the matters that the committee is examining, for two main reasons. The first is the enormous toll of death, disease, and suffering caused by tobacco and the enormous associated costs to the community. These occur through various cancers, including of the lung, kidney, pancreas, bladder, cervix, oesophagus, larynx, mouth and stomach as well as leukaemia, cardiovascular disease, respiratory disease, stroke, emphysema, blindness, miscarriage, reduced fertility, impotence and a range of other conditions. Over 19,000 Australians die prematurely each year as a result of tobacco. The overall figure since 1950 is about 750,000. Tobacco costs the Australian community over \$21 billion a year. Tobacco use is highly addictive. The overwhelming majority of smokers say they would prefer not to be smoking, and the overwhelming majority of smokers commence in childhood. The second reason is that, in our view, much of this harm has been caused or contributed to by the unlawful conduct of the tobacco industry – that is, both misleading and deceptive conduct in contravention of section 52 of the Trade Practices Act and unconscionable conduct in breach of section 51AB."¹

Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004

1.3 In its submission, VicHealth et al advised that it had made a submission to the Department of Health and Ageing's review of the TAP Act, announced in 2002, outlining the forms of advertising in which the tobacco industry continues to engage such as event and venue promotions; affinity marketing (connecting tobacco products with other popular brands); marketing at the point of sale; promotions through the pack; direct marketing; value-added promotions; Internet marketing; and advertising in international magazines, arguing that substantial legislative change was needed. The submission stresses the point that this bill 'only seeks to deal with a very few of the issues that concern us'.

1 *Committee Hansard* 12.8.04, p.29 (Mr J Liberman).

Expanding the definition of tobacco advertisement

1.4 VicHealth and the RACGP indicated support for the proposed amendments to the Tobacco Advertising Prohibition Act in the Draft Bill. VicHealth argued that the expansion of the definition of tobacco advertisement was needed:

"...to ensure that it covers the sorts of techniques that the tobacco industry has used to try to get around the precise wording of the definition, such as colours and colour schemes. We agree that there should be a set of catch-all words at the end of the definition to put coverage of the term beyond doubt and to put an end to efforts to find ways through and around the definition. We support the use of words such as 'or any image, message or communication' as is proposed".²

Advertising and sale of tobacco products on the internet

1.5 VicHealth added that there was currently some confusion regarding whether internet publication was covered by the TAP Act, suggesting it was necessary to amend the Act to ensure it was clear that the Act did apply to publication of tobacco advertisements via the internet.³

1.6 Neither VicHealth nor the Royal Australian College of General Practitioners favoured a total ban on the sale of tobacco products on the internet but favoured a strict regulatory framework

Commonwealth co-sponsorship of events

1.7 VicHealth advised that it may be problematic to seek to prohibit the Commonwealth from co-sponsoring events and activities and that their preferred course of action would be to prevent tobacco companies from achieving publicity from such sponsorship.

Tobacco placement in film

1.8 The South Australian Minister for Health submitted that there has been an increasing trend by tobacco companies to use films and the internet as pathways to encourage the uptake of cigarettes by younger people and offered the view that the provisions in the bill will reduce marketing channels for tobacco companies and was supported by the SA Government.

"The South Australian Government is concerned about the deliberate portrayal of modelling of the attractiveness of smoking in films and other electronic media and as a result has asked the South Australian Ministerial Reference Group on Tobacco to advise on ways to reduce the attractiveness of smoking in films."⁴

2 *Submission 5*, p.12 (VicHealth Centre for Tobacco Control).

3 *Submission 5*, p.9 (VicHealth Centre for Tobacco Control).

4 *Submission 12*, p.1 (South Australian Government).

1.9 VicHealth argued that product placement in film, television and computer games is, under current law prohibited but support making this explicit in the legislation.

1.10 Professor Zwar of the Royal Australian College of General Practitioners also argued that there was evidence that the amount of visible advertising and visible tobacco products in films was increasing.

Stan Glantz from the University of California, Los Angeles, has shown that and published that in the work he has done...I would contend that the law needs to make it very explicit that that is not an acceptable thing and that the law needs to be strengthened along the lines set out in this bill.

Anything that glamorises smoking and is depicted as cool and acceptable and as making a young person more attractive encourages young people to experiment and perhaps very easily become addicted to cigarettes. There is evidence from the National Institute on Drug Abuse in the US that as few as seven cigarettes may be enough to create an addiction to nicotine. It is a highly addictive chemical and it does not take a lot to transfer experimentation into dependence. New South Wales Health were active in exposing sponsorship of a web site about fashion parades in nightclubs which was supported by the tobacco industry without it being declared. That was some years ago, but it is an example of how the link between glamorous industries – the fashion industry being another example – and tobacco products makes young people in particular see smoking as something that is still desirable.⁵

The adequacy and accuracy of the Australian Competition and Consumer Commission response to Senate orders for information

1.11 The Senate ordered the ACCC to examine its responsibilities under the Trade Practices Act 1974 with respect to misleading, deceptive or unconscionable conduct by Tobacco companies in Australia, evidence from US litigation that implicates tobacco companies breaching Australian law, the adequacy of current labelling laws and avenues for litigation and compensation in Australia.

1.12 Mr Neil Francey, a barrister who for some time has been involved in tobacco litigation, including the *Cauvin v. Philip Morris* case, provided advice on trade practice law as it relates to this matter:

In Part V [of the Trade Practices Act] which deals with consumer protection, there is a general prohibition on misleading or deceptive conduct. There are other specific prohibitions that can be the subject of prosecutions. There are also in part IVA prohibitions of unconscionable conduct. Any contravention of the misleading conduct prohibition can be the subject of injunctive relief under section 80 at the behest of any person, as held by the High Court. Under section 82 there is a provision for a person who has suffered loss or damage to make a claim for that loss or damage.

5 *Committee Hansard* 25.6.04, p.15 (RACGP).

There is a provision under section 87CA...for the ACCC to intervene in proceedings, to apply to the court for leave to intervene. It is unnecessary for the ACCC to commence litigation, there is litigation already on foot.⁶

1.13 The responses by the ACCC were criticised in evidence to the inquiry. Mr Liberman advised that VicHealth wrote to the ACCC after its initial report to the Senate, pointing out the flaws in the report.

1.14 Mr Francey argued that, despite the fact that he had provided the ACCC with documents produced in litigation in the US and various documents relating to the Australian context:

"None of it [the material] appears in the report that they produced to the Senate in April 2002. One of the aspects of the report that I find most astounding is that they were asked to specifically search the documents that are on the Internet to locate evidence implicating the tobacco industry. They did one search they say in their report over tobacco and price. They produced a lot of price lists and concluded that there was no evidence that would be of any use in litigation. Nothing could be further from the truth. The material is well documented and catalogued in journals as eminent as the British Medical Journal and in my paper for the world Health Organisation. Both were made available to the ACCC and neither were mentioned in any way whatsoever in their report.

"The other disturbing aspect of the ACCC report is that they said that they basically could not do anything about it because there was a time limit in the Trade Practices Act of three years, which was subsequently changed to six years. That is true of section 82 of the Trade Practices Act, but it is not true of section 87(1) of the Trade Practices Act, which is the remedy that is being pursued in the Cauvin litigation."⁷

1.15 It was subsequently confirmed by the ACCC during Senate Estimates in June 2001 that their advice to the Senate was erroneous in relation to time limitation periods, according to legal advice from Mr Alan Robertson SC. Whilst that error was acknowledged, the ACCC has as yet still not taken the action that it originally claimed could not be pursued because of time limitations.

1.16 VicHealth challenged what it said was a very narrow reading of section 51AB of the Act by the ACCC relating to unconscionable conduct in connection with the supply or possible supply of goods and services, saying ACCC is:

...insisting that it can only apply where there is a direct relationship between the manufacturer and consumer, and that, because there is no such direct relationship between tobacco manufacturers and consumers – the relationship being between retailer and consumer – the section cannot apply to the conduct of tobacco manufacturers. Yet there is nothing in section

6 *Committee Hansard* 25.6.04, p.4 (Mr N Francey).

7 *Committee Hansard* 25.6.04, pp.2-3 (Mr N Francey).

51AB or any case law applying or interpreting it that requires it to be so confined.⁸

1.17 VicHealth point out that:

While the tobacco industry has begun over the last decade to be held to legal account in the US, this has not yet happened in Australia. This has meant that the law has gone unenforced against the tobacco industry. It has also therefore meant that the enormous damage and costs caused by the tobacco industry are borne by individuals, their families and taxpayers and not at all by the tobacco industry.⁹

ACCC resources and opportunities for litigation

1.18 The ACCC advised that the costs associated with proceeding on litigation in relation to tobacco companies would ‘impact significantly on the ability of the commission to deal with other enforcement activities that are within the scope of its jurisdiction’.¹⁰ VicHealth also commented that the size and wealth of the tobacco industry made it likely that “only well-resourced litigation by a strong public agency will be able to bring the industry to account”.¹¹

1.19 Substantial moneys were provided in the US for the purposes of taking action against tobacco companies – about \$26 million under the Clinton administration.

1.20 Mr Francey argued for a participation agreement between the states, territories and Commonwealth, and the Commonwealth contribute 50% of the necessary funds and the rest proportionately by the states, establishing a ‘Tobacco Litigation Support Fund’ under the agreement, similar to the Travel Compensation Fund, and for action to be taken quickly.

“My recommendation is that this should be pursued on a whole-of-government approach and it should be bipartisan. It basically involves getting a couple of hundred billion dollars from the US or UK parent companies which have been responsible for the harm inflicted in this country. If we do not do it and do it quickly then the money is going elsewhere. For a start, it is going to the US Department of Justice. Secondly it is going to US victims, including for punitive damages awards. It is going to monitor the health of smokers in Louisiana under a class action. It is going to smokers in Florida.”¹²

1.21 Mr Liberman confirmed that there had been an enormous amount of litigation in the US in particular over the last 10 years, citing the ones brought in the mid-nineties by US state governments which sought to recover public health expenditure

8 *Submission 5*, p.17 (VicHealth Centre for Tobacco Control).

9 *Committee Hansard* 12.8.04, p.29 (Mr J Liberman).

10 *Committee Hansard* 12.8.04, p.38 (ACCC).

11 *Submission 5*, p.12 (VicHealth Centre for Tobacco Control).

12 *Committee Hansard* 25.6.04, p.5 (Mr N Francey).

on tobacco related disease which were settled for approximately US\$246 billion, paid to the states over 25 years.

"Broadly speaking, those cases have involved claims of a similar nature to the claims that we say could be brought here. They were based on false and misleading advertising and misleading conduct about the harm and addictiveness of tobacco.

In addition to those proceedings brought by states, there are currently hundreds of cases of individuals before the courts. As I understand it, there are about 15 that have been successful and that have not been overturned on appeal... There have also been a number of class actions. Then most recent one was a jury in Louisiana that required the tobacco industry to pay over US\$500 million that was to be used to help addicted smokers quit and stop using their products. There was another one that delivered a verdict of about \$7 billion."¹³

1.22 VicHealth argued that proceedings brought by the ACCC could assist individuals making claims and could recover public expenditure on tobacco related disease, as the Commonwealth does under other legislation such as the Social Security Act. A report to the Commonwealth in 2002 estimates the recoverable expenditure to be in the order of \$1.044 billion each year.¹⁴

1.23 The ACCC drew attention to the fact that court action in the US was being taken by the states rather than its counterpart, the Federal Trade Commission, 'under legislation that we do not have in Australia – quite often the Racketeer Influenced and Corrupt Organisations Act.'

1.24 Mr Liberman argued however that whilst there were differences between the laws of the two jurisdictions, it was 'quite clear that you could bring similar cases under both section 52 and section 51AB of the Trade Practices Act'.

It seems to me from looking at the law that the ACCC is the more obvious candidate to bring proceedings, rather than what has occurred in the US, where state governments and the US Department of Justice have taken on those proceedings.¹⁵

1.25 Mr Samuel's letter to the Minister for Health of 21 November 2003, copied to the Treasurer advising that the ACCC was unable to advance the investigation into potential contraventions of the Trade Practices Act without a funding allocation to do so, was merely noted by the Health Minister in January 2004 and no further discussion or correspondence on the matter had taken place.

1.26 The ACCC advised that although its annual budget of \$65 million has an allocated amount for litigation, it would require 'a substantial vote of our litigation budget towards these particular proceedings. That would then impact significantly on

13 *Committee Hansard* 12.8.04, p.30 (Mr J Liberman).

14 *Submission 5*, p.20 (VicHealth Centre for Tobacco Control).

15 *Committee Hansard* 12.8.04, p.30 (Mr J Liberman).

the ability of the commission to deal with other enforcement activities that are within the scope of its jurisdiction.’ The ACCC also pointed out that cost recovery from litigation goes into consolidated revenue.

1.27 The ACCC advised that it had sought advice from senior counsel which was said to be due within a week or two [of 12 August 2004] on the action-ability of past conduct in the use ‘mild’ and ‘light’ descriptors and that:

“...when that advice is received, we will also have advice as to the feasibility of instituting proceedings and the potential cost. The commission will then make a decision as to whether or not it is able to institute proceedings or whether or not it may need to seek additional funding to do just that. I think that is something that will transpire over the next few weeks.”¹⁶

Misleading descriptors such as ‘mild’, ‘light’ and ‘low tar’

1.28 Mr Neil Francey provided a background to the use of these descriptors:

"...from the mid-seventies, when health concerns materialised, the tobacco companies have responded by producing cigarettes with varying levels of tar and nicotine and the use of terms like ‘light’ and ‘mild’. If anything, those companies encouraged governments to go down the tar derby road because it meant that their customers could continue to smoke, I would suggest, under the mistaken belief that light and mild cigarettes may not be as harmful. In fact they admit, as Philip Morris does in its insert, that they are no safer. The World Health Organisation has concluded that they are no safer. In fact, in some respects they are more dangerous because smokers have to compensate to get the requisite amount of nicotine, so they inhale more deeply and they get different forms of cancer as a result of that. There are a number of problems that have arisen from the use and exploitation of the terms ‘light’ and ‘mild’. Those terms should be abolished."¹⁷

1.29 Around 95% of tobacco products sold in Australia are described as ‘light’, ‘mild’, ‘menthol’, ‘low tar’, etc., leading consumers to believe that these products are less harmful than others. There is however overwhelming evidence that this is not the case and one of the consequences of this deception is that consumers are discouraged from quitting on the assumption that they are minimising harm to themselves.

1.30 VicHealth argued in their submission that the ACCC had over the last three or so years, stated that it was investigating the use of these terms.

"It is difficult for us to accept that this issue has ever been a serious priority for the Commission, given the length of time that has passed without any action. We hope that the commission is genuinely examining this issue, but the perception has developed that any time the Commission is questioned or

16 *Committee Hansard* 12.8.04, p.38 (ACCC).

17 *Committee Hansard* 25.6.04, p.5 (Mr N Francey).

criticised, with respect to its failure to do anything about tobacco, it simply states that it is still investigating the issue."¹⁸

1.31 VicHealth documented the ways in which tobacco companies have kept information about the addictiveness of their product and the design of products to capitalise on addictiveness and point out that:

"the Commission has, thus far, failed to take any steps with regard to these issues. It has either ignored the allegations, mischaracterised them or sought to dismiss them with narrow and unjustified readings of the Act..."¹⁹

1.32 The ACCC advised that tobacco companies had now agreed in principle that these terms were not appropriate and reported on its recent discussions with the three major tobacco companies on the matter:

"I think it is fair to say that they have all agreed in one form or another that, at a point in time, the 'light' and 'mild' descriptors on cigarette packets need to be modified and/or removed. Various proposals have been put to us as to how they might be modified, which we have indicated are not acceptable. I think the indication has come back from industry that they are prepared to work to remove any misleading or deceptive nature of the 'light' and 'mild' descriptors, as they appear on cigarette packets. The primary issue that we are dealing with in this context is the timing of dealing with it. At least one or two of the cigarette companies would like to defer any changes to the cigarette packaging until the changes to the labelling warning are mooted. That has a possibility of being delayed for at least another 12 to 18 months. Our response to that has been to say that that is an unacceptable time frame."²⁰

1.33 Despite evidence from overseas clinical trials that 'light' and 'mild' cigarettes were no less harmful than standard cigarettes, the ACCC argued that it was questionable as to whether the results of those trials would be able to be used in Australia:

"There is a lot of assertion that we can simply import what is happening and what is being done overseas into Australian cases. In our 'light' and 'mild' investigation, we have had to rely fairly heavily on the sorts of studies that have been done in the US that you refer to. That also requires us to establish whether the way in which a cigarette is manufactured in the US and the qualities of the cigarette – things that go to the density and the size of the filter and the composition of the tobacco – are basically the same as in Australia. Otherwise we cannot make that link."²¹

18 *Submission 5*, p.15 (VicHealth Centre for Tobacco Control).

19 *Submission 5*, p.17 (VicHealth Centre for Tobacco Control).

20 *Committee Hansard* 12.8.04, p.40 (ACCC).

21 *Committee Hansard* 12.8.04, p.37 (ACCC).

1.34 The ACCC said it was collecting evidence ‘...through scientific and expert witness material as to the similarities between, say, cigarettes in the US and cigarettes in Australia’.

1.35 VicHealth argued that it was possible for the ACCC to act in advance of establishing the characteristics of Australian manufactured cigarettes vis a vis those from the US:

"section 80 allows the Federal Court, on the application of the ACCC, to grant an injunction “in such terms as the Court determines to be appropriate”, where, inter alia, the Court is satisfied that a person has engaged in misleading or deceptive or unconscionable conduct. The Court can make both orders requiring a party to refrain from certain conduct, and orders requiring a party to do something. Section 80 confers a broad power on the Court - it allows the Court to grant an injunction “in such terms as [it] determines to be appropriate”. The breadth of this power, as long as it is exercised within the scope and purposes of the Act, has been repeatedly emphasised by the Federal Court".

VicHealth also emphasised that 'there is substantial scope for proceedings brought by the Commission to...have very real, practical effects'.

"We think that, given the past and ongoing conduct of the tobacco industry, section 80 would support a broad range of mandatory and prohibitive injunctions against the tobacco industry, including:

- Requiring the tobacco industry to provide the funding for, without controlling the content of, consumer education / corrective advertising required to adequately inform consumers of the magnitude and full range of health risks of smoking;
- Requiring the tobacco industry to provide assistance to consumers addicted to their products and wanting to give up;
- Prohibiting the use of misleading terms such as “light” and “mild”;
- Prohibiting the use of trade marks, logos and imagery which, through misleading communications in the past, have been imbued with meaning that is substantially at odds with the harmful, addictive reality of tobacco products;
- Requiring the industry to disclose all information within its power, custody or control in respect of the health risks of smoking
- Requiring the industry to disclose all information within its power, custody or control in respect of the addictiveness / physiological effects of tobacco products, and the ways in which addictiveness / physiological effects are affected by methods of product manufacture and design;
- Requiring the industry to disclose all information within its power, custody or control in respect of steps it has taken to encourage or induce consumers to use its products.

Each of these orders would flow rationally and reasonably from the contravening conduct – as a way of counterbalancing the injury done to the public interest."²²

1.36 Any agreement between the tobacco industry and the ACCC should not include any undertaking by the Commission to the effect that it will not bring proceedings with respect to damages for past conduct.

Remedial action

1.37 The ACCC also suggested a remedy for what it described as future conduct with regard to ‘mild’ and ‘light’ descriptors:

"In our view it would be possible - probable - to achieve changes in respect of future conduct in a very short time frame and the changes would relate to the light and mild descriptors on cigarette packets. It would relate to corrective advertising that advertised to consumers that the ‘light’ and ‘mild’ descriptors were inappropriate and may have misled and deceived, and to community service obligations to provide education to consumers about the harmful impacts of cigarettes – that is, the future conduct."²³

1.38 According to the ACCC these corrective advertisements and education programs would be conducted at the expense of tobacco companies.

1.39 The Democrats strongly support remedial action funded by the tobacco industry, however, warn that such action should not be able to be used to absolve the tobacco industry from its legal obligations and that the tobacco industry should exert no influence or control over the form or content of this advertising. It should be noted that it is a complex matter to provide advice on highly addictive and harmful products and this material should be developed by those with expertise in psychology and behavioural science.

1.40 It is also our view that remedial action should include the funding of measures to quit smoking such as gum, nicotine patches, lozenges, bupropion and counselling services, particularly for those who attempt to do so as a result of the corrective advertising referred to above. This would be consistent with the Act and would be along the lines of an order recently made by a Louisiana jury requiring the tobacco industry defendants to pay US\$590 million to help smokers quit.

Conclusion

1.41 In conclusion, the evidence presented to the Committee supports the need for amendments to the existing tobacco advertising prohibition legislation. It is however the case that the ACCC has not enforced the Trade Practices Act which does provide a sufficient framework to pursue litigation against the tobacco industry. As VicHealth argues:

The Commission’s failure to enforce the Act against the tobacco industry has, in our view, been an important factor in allowing the tobacco industry

22 Submission 5, p.19 (VicHealth Centre for Tobacco Control).

23 *Committee Hansard* 12.8.04, p.37 (ACCC).

to operate as if it were above consumer protection law, and, in doing so, to cause great harm to individuals and enormous costs to the Australian community as a whole. Strong enforcement of the Act against the tobacco industry would deliver significant public policy and public health benefits, and facilitate the recovery of large amounts of public expenditure on health and social security costs which will otherwise continue to be borne by the Australian taxpayer, rather than the tobacco industry, which is primarily responsible for them.²⁴

Recommendation 1

That the exposure draft of the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004 proceed, amended to put in place a strict regulatory framework rather than a ban on tobacco product sales on the Internet and to tighten restrictions on tobacco sponsorship to prohibit publicity achieved through sponsorship.

Recommendation 2

That the Electoral Amendment Bill proceed.

Recommendation 3

That the Federal government provide sufficient funding for the ACCC to undertake legal action to recover the public costs associated with tobacco use arising from misleading and deceptive conduct by the tobacco industry.

Recommendation 4

That the tobacco industry be required to undertake substantial remedial action through providing funding for appropriate ongoing corrective advertising and community awareness programmes. Any agreement for remedial action:

- must ensure that the tobacco industry has no control over any part of the form or content of any corrective advertising or community awareness programmes;
- must ensure that the industry is required to pay money towards the costs of people's efforts to quit smoking, particularly those who do so as a result of any corrective advertising and community service obligations undertaken by the tobacco industry;
- must not include any undertaking by the ACCC to the effect that it will not bring proceedings with respect to damages for past conduct.

24 Submission 5, p.21 (VicHealth Centre for Tobacco Control).

Recommendation 5

Prohibit as quickly as possible the use of descriptors, terms or communications that have the capacity to mislead or deceive consumers.

A handwritten signature in black ink, appearing to be 'Lyn Allison', with a long horizontal flourish extending to the right.

Senator Lyn Allison
September 2004

APPENDIX 1

Submissions received by the Committee

- 1 Spencer, Ms Geraldine (ACT)
- 2 Save Albert Park Inc (VIC)
- 3 British American Tobacco Australia Limited (NSW)
Supplementary Information
 - Additional information following hearing dated 7.7.04
- 4 Francy, Mr Neil (NSW)
Supplementary Information
 - Additional information received 21.6.04 and 8.7.04
Provided at hearing 25.6.04
 - Participation agreement
 - *Tobacco Litigation The Case Against Passive Smoking* by R Everingham & S Woodward
 - Statement by Neil Francey
- 5 VicHealth Centre for Tobacco Control, The Cancer Council Australia; The National Heart Foundation; Action on Smoking and Health Australia; Australian Council on Smoking and Health and Australian Drug Foundation (VIC)
Supplementary Information
 - Additional information following hearing 12 August 2004, dated 30.8.04
- 6 Philip Morris Limited (VIC)
- 7 Royal Australian College of General Practitioners (RACGP) (VIC)
- 8 Free TV Australia (NSW)
- 9 Special Broadcasting Service (SBS) (NSW)
- 10 Imperial Tobacco Australia (NSW)
- 11 Australian Subscription Television and Radio Association (ASTRA) (NSW)
- 12 South Australian Government (SA)

Additional information

Australian Competition and Consumer Commission – Response to questions from hearing 12 August 2004, dated 15.9.04

APPENDIX 2

Witnesses who appeared before the Committee at public hearings

Friday, 25 June 2004

Senate Committee Room 2S1, Parliament House, Canberra

Committee Members in attendance

Senator Knowles
Senator Allison
Senator Barnett
Senator Humphries
Senator McLucas

Witnesses

Mr Neil Francey

British American Tobacco (teleconference)

Mr John Gallagan, Director, Corporate and Regulatory Affairs

Imperial Tobacco (teleconference)

Mr Charles Hampshaw-Thomas

Royal Australian College of General Practitioners

Professor Michael Kidd, President

Professor Nick Zwar

VicHealth Centre for Tobacco Control (teleconference)

Mr Todd Harper

Free TV Australia (teleconference)

Ms Pam Longstaff

SBS Television (teleconference)

Ms Julie Eisenberg, Head of Policy

Thursday, 12 August 2004

Senate Committee Room 2S1, Parliament House, Canberra

Committee Members in attendance

Senator Knowles
Senator Allison
Senator Barnett
Senator Denman
Senator Humphries
Senator McLucas

Witnesses

**VicHealth Centre for Tobacco Control,
The Cancer Council Australia;
The National Heart Foundation;
Action on Smoking and Health Australia;
Australian Council on Smoking & Health and
Australian Drug Foundation**

Mr Jonathan Liberman, Director,
Law and Regulation VicHealth Centre for Tobacco Control,
The Cancer Council Victoria

Australian Competition & Consumer Commission

Mr Graeme Samuel, Chairman
Mr Brian Cassidy, Chief Executive Officer
Ms Karen McKernan, Senior Project Officer

APPENDIX 3

Senate Orders for production of documents

Senate Journal No. 214, 24 September 2001

17 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENTS

Senator Allison, pursuant to notice of motion not objected to as a formal motion, moved

(1) That the Senate, having regard to:

- (a) the enormous health disaster represented by tobacco;
- (b) the rising costs of tobacco diseases, conservatively estimated at \$12.7 billion (1992), that are borne by governments, individuals and businesses, including health care costs, lost productivity, absenteeism, and social security payments;
- (c) the availability of evidence that the tobacco industry in other countries, including parent companies to Australian manufacturers may have engaged in:
 - (i) misleading and deceptive conduct to downplay the adverse health effects of smoking and the addictiveness of nicotine, and
 - (ii) misleading, deceptive and unconscionable conduct in relation to the marketing of tobacco products to children; and
- (d) the desirability of preventing or reducing loss or damage suffered or likely to be suffered by such conduct, and of compensation being available for any loss and damage suffered or likely to be suffered by that conduct;

resolves that there be laid on the table, no later than 30 April 2002, a report by the Australian Competition and Consumer Commission (ACCC) on the performance of its functions under the Trade Practices Act 1974, with respect to:

- (e) the outcome of ACCC investigations into the conduct of Australian tobacco companies and their overseas parent and affiliate companies in relation to any such misleading, deceptive or unconscionable conduct;
- (f) whether documents publicly released during the course of tobacco litigation in the United States of America contain evidence of anti-competitive behaviour or breaches of Australian law;
- (g) the adequacy of current labelling laws under the Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations to fully inform consumers of the risk that they are exposed to;
- (h) the extent of loss or damage caused, or likely to be caused, by the conduct referred to in paragraph (e) in Australia;

(i) the extent to which the tobacco industry may be made liable to compensate for that loss or damage, or the extent to which that loss or damage may be prevented or reduced; and

(j) the potential for tobacco litigation in Australia, including for compensation and remedial action, in respect of that conduct.

(2) That, in preparing a report under paragraph (1), the ACCC is to consider:

(a) the importance of this issue to Australian public health;

(b) the impact of the costs of treating tobacco-related disease in Australia and the associated productivity losses borne by Australian businesses;

(c) the desirability of ensuring that the tobacco industry is made accountable under the Trade Practices Act in respect of such conduct, that any loss or damage suffered or likely to be suffered by that conduct be prevented or reduced and that any persons harmed or likely to be harmed by that conduct obtain appropriate compensation; and

(d) the potential for overseas parent and affiliate companies being made liable for such loss or damage; and

indicate in its report the action it has taken, and the action it proposes to take, with regard to the matters upon which it is required to report.

Question put and passed.

Senate Journal No. 11, 14 May 2002

31 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENTS DOCUMENT

Pursuant to the order of the Senate of 24 September 2001, the Deputy President (Senator West) tabled the following document received on 30 April 2002:

Tobacco Australian Competition and Consumer Commission Report Performance of the Australian Competition and Consumer Commission's functions under the Trade Practices Act 1974 in relation to the tobacco industry, dated April 2002.

The document may be accessed at:

<http://www.accc.gov.au/content/item.phtml?itemId=264000&nodeId=file409890548d049&fn=Tobacco%20report.pdf>

Senate Journal No. 21, 27 June 2002

9 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENT

Senator Allison, pursuant to notice of motion not objected to as a formal motion, moved general business notice of motion no. 107 That the Senate

(a) notes the report tabled in the Senate on 6 [14] May 2002 from the Australian Competition and Consumer Commission (ACCC) on the performance of its functions under the Trade Practices Act 1974 (the Act) with regard to tobacco and related matters, as required by the order of the Senate of 24 September 2001;

(b) notes that the Senate may require the ACCC to provide it with information in accordance with section 29 of the Act;

(c) requires the ACCC to report, as soon as possible, on the following issues:

(i) whether Australian tobacco companies have engaged in misleading or deceptive conduct in their use of the terms 'mild' and 'light', and

(ii) whether there has been any misleading, deceptive or unconscionable conduct in breach of the Act by British American Tobacco and/or Clayton Utz with regard to document destruction for the purpose of withholding information relevant to possible litigation;

(d) requests the ACCC to engage in consultation with interested parties and stakeholders over the perceived inadequacies in its response to the order of the Senate of 24 September 2001 and requires the ACCC to report on those consultations as soon as possible;

(e) notes that once the Senate has had the opportunity to consider the ACCC's further reports on the use of the terms 'mild' and 'light', whether there has been misleading, deceptive or unconscionable conduct in relation to document destruction, and the ACCC's consultations, it will consider whether a further report should be sought from the ACCC in response to the order of the Senate of 24 September 2001;

(f) calls on the Commonwealth Government to pursue the possibility of a Commonwealth/state public liability action against tobacco companies to recover healthcare costs to the Commonwealth and the states caused by the use of tobacco; and

(g) calls on the Commonwealth to address the issue of who should have access to the more than \$200 million collected in respect of tobacco tax and licence fees by tobacco wholesalers but not passed on to Government (see *Roxborough v. Rothmans*) by introducing legislation to retrospectively recover that amount for the Commonwealth and/or to establish a fund on behalf of Australian consumers and taxpayers, and in either case for the moneys to be used for the purpose of anti-smoking and other public health issues.

Question put and passed.

Senate Journal No. 47, 12 November 2002

22 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENT

Senator Allison, pursuant to notice of motion not objected to as a formal motion, moved general business notice of motion no. 197—That the Senate requires advice from the Australian Competition and Consumer Commission on its progress in responding to the Senate order of 27 June 2002 and its expected date of reporting to the Senate.

Question put and passed.

Senate Journal No. 57, 9 December 2002

**18 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENT -
DOCUMENT**

The Deputy President (Senator Hogg) tabled the following document:

Health Tobacco Letter to the President of the Senate from the Chairman, Australian Competition and Consumer Commission (Professor Fels) responding to the resolution of the Senate of 12 November 2002, dated 29 November 2002.

The document may be accessed at:

http://www.aph.gov.au/senate/committee/clac_ctte/tob_adv_proh/documents_tor/taledpaper91202.pdf

Senate Journal No. 116, 24 November 2003

**24 HEALTH TOBACCO ORDER FOR PRODUCTION OF DOCUMENT
DOCUMENT**

The Acting Deputy President (Senator Watson) tabled the following document:

Health Tobacco Letter to the President of the Senate from the Chairman, Australian Competition and Consumer Commission (Mr Samuel) responding to the resolutions of the Senate of 27 June and 12 November 2002, dated 28 October 2003.

The document may be accessed at:

http://www.aph.gov.au/senate/committee/clac_ctte/tob_adv_proh/documents_tor/taledpaper241103.pdf