

Elton Humphery Esq
Secretary
Australian Senate
Community Affairs Legislation Committee
Parliament House
Canberra
ACT 2600

22 June 2004

Dear Sir

Inquiry into tobacco advertising prohibition

With reference to your letter of 7 June 2004 addressed to Peter Richards I would like to make the following submissions on behalf of Imperial Tobacco Australia (ITA):

a. *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004*

Tobacco is a legal product consumed by approximately 20% of the adult population.

Furthermore, the Australian tobacco industry - comprising growers, manufacturers, distributors and retailers - is a significant player in the Australian economy. It contributes more than \$6.2 billion a year in value – add and generates (directly and indirectly) more than 57,000 jobs throughout Australia.

It is also a major source of tax revenue, with annual collections of excise tax of more than \$5 billion.

With the above in mind, it is difficult to understand on what rational and reasonable basis any representative of the tobacco industry should be precluded, if they so wish, from making a political donation.

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

ITA has previously provided a submission to the Commonwealth Department of Health and Ageing in response to its Tobacco Advertising Prohibition Act 1992 Issues Paper – August 2003.

A copy of that submission is attached hereto and, for the purposes of the Senate Committee's inquiry, ITA has nothing further to add.

c. Response of the Australian Competition & Consumer Commission (ACCC) to previous orders of the Senate

It is ITA's understanding that the ACCC are conducting an investigation into the use of descriptors on tobacco products.

Prior to the release of the ACCC's findings, it would be inappropriate for ITA to make any comment on the investigation.

As a separate, but related, point please note that in the context of the Federal Government's current review of cigarette health warnings, it is of very great concern to ITA that government has not seen fit to try and co-ordinate any tobacco packaging and labelling changes that may be decided upon, whether they arise from the Federal Government's review of health warnings and/or from the ACCC's investigation into the use of descriptors.

I trust that the above clarifies ITA's position in relation to those matters which are covered by the Senate Committee's inquiry.

Please do not hesitate to contact me if you have further questions in relation to the above. As discussed with Tim Watling I shall be available on the telephone this Friday 25 June at 10.00am, for the purposes of the proposed public hearing, to the extent that you have any further questions.

With thanks

Yours sincerely

Charles Hamshaw-Thomas
Head of Corporate Affairs
Imperial Tobacco Australia

SUBMISSION

by

IMPERIAL TOBACCO AUSTRALIA LIMITED

in response to

*Commonwealth Department of Health and Ageing
Tobacco Advertising Prohibition Act 1992 Issues Paper
August 2003*

OCTOBER 2003

This submission is made by Imperial Tobacco Australia Limited (“Imperial Tobacco” or “ITA”) in response to the invitation by the Commonwealth Department of Health and Ageing to submit comments on the Tobacco Advertising Prohibition Act 1992 Issues Paper - August 2003 (“the Issues Paper”).

Introduction

Imperial Tobacco is a responsible company that aims to meet the demands of those adults who choose to smoke with knowledge of the risks associated with smoking. Imperial Tobacco’s policy is to recognise and respond to the concerns of Government, public health and other regulatory authorities regarding the production, sale and use of tobacco products. Furthermore, Imperial Tobacco is committed to strengthening co-operation with Government and other regulatory bodies to support practical regulations and self regulatory initiatives that, amongst other things, seek to ensure a consistent public health message about tobacco products and agree on suitable regulations for tobacco marketing and advertising.

Imperial Tobacco’s marketing and promotional initiatives are directed at existing adult smokers. Nevertheless, we accept and recognise the need for a reasonable level of legislative regulation.

It is however important that that level of regulation does not reach a point where legitimate competition in the marketplace becomes a practicable impossibility. In this regard, there are some important points to note:

- Tobacco products are legal and are consumed by approximately 20% of the population. It is surely therefore equitable that competition in the market place should be maintained, thereby affording a full range of product and brand offerings to consumers.
- Imperial Tobacco was encouraged by the Government (through the Australian Competition and Consumer Commission (“ACCC”)) to enter the Australian cigarette market in 1999 to meet the Government’s objective of maintaining competition. ITA made a substantial investment (\$325 million) in purchasing a portfolio of tobacco trademarks. Unless Imperial Tobacco continues to have the opportunity to use those trademarks, in consumer and trade communication and through having visibility at point of sale, the value of that investment (which the Government, in effect, encouraged us to make) will be unfairly and unreasonably reduced.
- If the opportunities to communicate tobacco trademarks (a right incidentally granted by the Commonwealth Legislation Trade Marks Act 1995) are further reduced, and the visibility of the product further eroded, it will arguably give further credibility to the “unofficial” or “black” market. It is brand equity that helps to support the excise premium charged on legal products and consequently there is potentially a huge benefit to the illegal market if the industry’s ability to communicate that equity to smokers is substantially eroded.

- Aside from marketing and advertising restrictions, there is a plethora of other tobacco regulations (e.g. regarding health warnings and other packaging requirements, disclosure of product information etc) which also impact upon Imperial Tobacco's ability to communicate with consumers and therefore compete in the market place. We firmly believe that the Government's priority should be to produce a balanced, coherent and cohesive tobacco regulatory framework which would address and reconcile the Government's various policy objectives (whether for example the communication of the public health message, youth smoking prevention, the disclosure of information or the regulation of sales etc) whilst also maintaining competition and consumer choice. Imperial Tobacco is and remains happy to work with the Government to achieve a sensible and balanced regulatory framework which satisfies the Government's different social, health, tax and competition objectives.

With the above points in mind, it is Imperial Tobacco's view that some of the issues raised in the Issues Paper go beyond what is appropriate and necessary for a sensible and balanced framework of tobacco regulation. The major concerns for Imperial Tobacco are set out in this brief submission document. Please note however that we have not addressed all matters of concern and the absence of comment should not necessarily be taken as agreement with other matters. We also take particular note of the fact that opinions will be sought from all interested parties whether for example publishers and broadcasters, internet providers or retail organisations.

Tobacco Product Advertising

Responsible Advertising as an aid to Competition

Imperial Tobacco believes that the Tobacco Advertising Prohibition Act 1992 is serving its purpose as an effective deterrent to advertising and promoting tobacco products to young people.

Imperial Tobacco's view is that the purpose of advertising is to encourage existing adult smokers to select ITA's products as opposed to those of its competitors. Advertising, in itself, is therefore a commercial communication as between ITA and the smoker to promote the purchase by that smoker of a particular ITA product.

Imperial Tobacco operates a stringent Code of Marketing Practice (i.e. a self regulatory initiative) that is designed to address concerns relating to youth smoking and to ensure that its tobacco products and marketing and promotional activities are conducted responsibly and directed only to existing adult smokers. As mentioned above, we support the reasonable regulation of our industry and, specifically, measures which are designed to prevent youth smoking. Imperial Tobacco does not want children to smoke and supports a range of initiatives designed to combat youth smoking, including programmes to ensure that retailers understand their obligations.

The above mentioned Code of Marketing Practice also prohibits payments to solicit the placement of Imperial Tobacco's products, brands or advertisements in any film, television programme or any other public performance or entertainment medium for viewing by the general public.

The Existence of a Legitimate Market

It is important that Imperial Tobacco continues to have the ability to market its range of tobacco products to existing adult smokers. Tobacco products are legal and are consumed by approximately 20% of the population. The Issues Paper also clearly identifies that smoking tobacco products is a culturally accepted practice.

It is in our view also important that we remain able to communicate about our products to our adult consumers and inform them about the characteristics of our products.

Unfair Restrictions on Advertising – Heightened Illegal Activity

If unreasonable restrictions are to be placed on the continuing promotion of tobacco products, such that the freedoms and economic viability of the tobacco manufacturing and retailing industries become further challenged, it must be a concern that the "unofficial" or "black" market will be given further stimulus. The "unofficial" market, by definition, operates outside any tobacco regulatory framework that the Government may wish to pursue.

Aside from the loss of significant Government excise revenue, the "unofficial" market creates an unregulated market with many attendant law and order issues, such as uncontrolled distribution and counterfeit product. As mentioned above, the "unofficial" market also undermines health objectives such as product quality control, packaging requirements and prevention of youth access.

Unfair Restrictions on Advertising – Constraint of Competition

Imperial Tobacco believes that it should continue to be able to communicate information regarding its business, its brands and its products to all its business associates and partners (be they suppliers, customers or other interested parties) as they see fit. No legislation or code should deny ITA that freedom. If Imperial Tobacco does not have that freedom, real competition will be stifled.

Furthermore it appears to Imperial Tobacco that a denial of the freedom to compete in the market place would make a mockery of the Government's commitment to competition law and policy. As explained above, it was in reliance on that commitment to competition (through the ACCC) that Imperial Tobacco made a very significant investment, in 1999, to enter the Australian cigarette market. Accordingly, any change to the existing legislation should, in our view, be analysed in terms of its potential of unfairly restricting legitimate competition and any tendency to encourage growth of the "unofficial" market.

By way of example of a reasonable approach to the scope of legislation restricting tobacco advertising, the stated objectives of the Government are not at all threatened by Imperial Tobacco being able to communicate information about its products, to those involved in the tobacco industry, at private functions.

In addition, Imperial Tobacco has serious concerns about its intellectual property rights and believes that many proposals within the Issues Paper would, if implemented, potentially infringe those rights.

Need for a Consistent, Reasonable National Approach

Many tobacco regulations in Australia are currently dealt with as issues of State rather than Commonwealth law. Examples include public place smoking, placement of vending machines, point of sale material, display requirements etc. At the moment, there is no uniform standard adopted by the States and differences between States in the way tobacco products must be presented at retail level creates confusion and significant additional cost to national retailers who are forced to develop State specific shop fits.

As already made clear, Imperial Tobacco accepts the need for a reasonable level of regulation at national level and we would support a national (and correspondingly consistent) standard for point of sale regulations.

Regrettably, and as we have previously indicated to Government, Imperial Tobacco believes that a number of States have already gone far beyond what could reasonably be classed as advertising and promotional restrictions. For instance in Tasmania not only are all forms of advertising, promotional and consumer communication banned, but half of the products currently available in the market can no longer be displayed at all in retail outlets and have to be kept out of sight and under the counter. When half of the product range is arbitrarily removed from the shelves in retail outlets there is no realistic prospect of consumers continuing to purchase those products removed.

For obvious reasons it is the smaller market players which will be disproportionately affected by any such display regulations. In effect, the minor brands will be driven off the market, distorting the market in favour of a few main brands. This is highly anti-competitive.

Further Examples of Excessive Regulation

The display of tobacco products at point of sale is vital if a truly competitive market place is to be maintained. Displays enable existing adult smokers to see the range of product offerings (whether in relation to brand or product variants) available and enable them to have a choice between the different products available. Any ban on display would potentially create a status quo by fixing existing market shares; market entry and the introduction of new market products becoming impossible. The effect would therefore also be to close the Australian market for any new introductions or new imports.

There are already very significant hurdles in launching a new brand or product in the Australian market. If it is intended to “close” the market even further, not only will competition become negated but consumer choice will also be denied (or at best become extremely limited). Imperial Tobacco believes that any such restrictions could potentially be discriminatory against overseas suppliers, seeking to enter or operate in the Australian cigarette market, and therefore contrary to any laws or rules of international trade.

To the extent that vending machines provide a channel for retail sales (and a channel which is already appropriately regulated through the restrictions as to where machines can be sited) Imperial Tobacco is unsure why it is felt necessary to propose a ban on vending machines. ITA is opposed to a ban on vending machines and suggests other more proportionate means be used to address the concerns of both Government and the industry regarding youth access to tobacco products (for example via tokens or electronic cards).

It is Imperial Tobacco’s view that sales of tobacco products through the internet should be regulated such that the relevant internet site should be treated as a point of sale. Each internet site should therefore comply with all appropriate rules and regulations, ensuring that the site is properly protected against youth access and that sales are similarly controlled.

Imperial Tobacco is of the view that issues relating to historic racing cars with tobacco livery and other tobacco memorabilia should be seen in the relevant historical and/or cultural context. We believe we live in a free democracy where we are informed about history without it being re-written.

Conclusion

Imperial Tobacco supports a reasonable level of regulation relating to the marketing and advertising of tobacco products.

We believe however that some of the suggestions and questions raised in the Issues Paper exceed both what is reasonable and what are the limits of the law, to the extent that competition would become stifled.

We encourage the Government to consult and discuss further with all the interested parties. It is not just the tobacco companies that will be affected. Imperial Tobacco believes that it is only through such consultation and discussion that proper decisions can be arrived at regarding any further regulation of tobacco marketing and advertising.

Imperial Tobacco is 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 is Imperial Tobacco's view that there are 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. As explained above, we continue to believe a coherent and cohesive framework of tobacco regulation should be a priority and Imperial Tobacco is eager to be involved in the process that leads to a promulgation of that framework.

Accordingly, and as the review of the Tobacco Advertising Prohibition Act 1992 continues, Imperial Tobacco would welcome the continuing opportunity to discuss and provide input on all the issues that are raised.

Charles Hamshaw-Thomas
Head of Legal and Corporate Affairs
Imperial Tobacco Australia Limited

17th October 2003

