

**A Submission prepared by
British American Tobacco Australia Limited**

In consideration of the

**Australian Senate Community Affairs Legislation Committee
*Inquiry into Tobacco Advertising Prohibition***

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EXECUTIVE SUMMARY

British American Tobacco Australia Limited ('BATA') welcomes the opportunity to contribute to the Senate Community Affairs Legislation Committee *Inquiry into tobacco advertising prohibition*.

The following is a summary of the response of BATA to the issues raised. Our detailed response is included in the attached submission.

The provisions of the *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004*

Political Donations

We are strongly opposed to 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.

In our view it is integral to the democratic process operating in Australia that political parties maintain the right to choose from whom they accept donations. Indeed some political parties have already self-regulated in this regard, choosing not to accept political donations from certain classes of businesses.

The exposure draft of the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*

The issues dealt with by the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*, namely the sale of tobacco products via the Internet, trade communications, and the depiction of smoking in the media, are issues

currently under consideration by the Federal Department of Health & Ageing ('DOHA') as part of its review of the *Tobacco Advertising Prohibition Act 1992 (CTH)*.

In our view, these issues are most appropriately dealt with as part of this review process currently in train. A copy of our submission to DOHA in October 2003, which includes our views on Internet sales, trade communications and the depiction of smoking in the media, is attached.

Tobacco Product Placement

We do not encourage or assist with the depiction of smoking in film, television, theatre and computer games. We also believe that it would be impractical to remove all images of smoking and tobacco use from these media.

Nevertheless we would not oppose a prohibition on the "product placement"¹ of tobacco products, but note that since we do not participate in such practices, this may be a matter for those in the media business.

Commonwealth Expenditure where Co-sponsorship from tobacco companies

While the intention of this provision is unclear, we are opposed in principle to any legislation designed to impede our ability to participate in discussions or activities in which we have an interest.

¹ For the purposes of this submission, the term "product placement" is given the same meaning as it is defined in Section 8 of the *Tobacco Advertising Prohibition (Film, Internet & Misleading Promotion) Bill 2004*.

The adequacy of the response to date of the Australian Competition and Consumer Commission ('ACCC') to the orders of the Senate of the 24 September 2001, 27 June 2002 and 12 November, which require the ACCC to report to the Senate on various issues concerning tobacco.

In light of the current ACCC investigation into the use of descriptors on tobacco products, we consider it inappropriate for us to comment on the adequacy of the ACCC's responses. However we would be concerned at any undue level of political interference on the deliberations of the ACCC, which is an independent body.

1 INTRODUCTION

1.1 Where We Stand

At British American Tobacco Australia Limited ('BATA') we believe that with smoking come real risks of serious disease. Our business is not about persuading people to smoke; it is about offering quality brands to those informed adults who have already taken the decision to do so. We strongly believe that smoking should only be for adults and that all smokers are aware of the risks.

BATA is committed to working with government and relevant stakeholders to develop sensible and workable tobacco regulation while ensuring adult consumers can continue to make informed choices about the use of a legal product.

1.2 The Terms of Reference

The Senate Community Affairs Legislation Committee has invited submissions regarding:

- 1 The provisions of the *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004*
- 2 The exposure draft of the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*; and
- 3 The adequacy of the response to date of the Australian Competition and Consumer Commission ('ACCC') to the orders of the Senate of the 24 September 2001, 27 June 2002 and 12 November, which require the ACCC to report to the Senate on various issues concerning tobacco.

The following section outlines the position of BATA on the issues raised. Our commentary is confined to those areas where we believe BATA, as a tobacco manufacturer, has a justified interest and where we believe it is appropriate to

comment in light of independent regulatory reviews currently being conducted by the ACCC and the Federal Department of Health & Ageing.

2 THE TERMS OF REFERENCE - OUR VIEW

2.1 The *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004*

We are strongly opposed to 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.

In our view it is integral to the democratic process operating in Australia that political parties maintain the right to choose from whom they accept donations. Indeed some political parties have already self-regulated in this regard, choosing not to accept political donations from some classes of businesses.

The Proposed Amendment

The *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004* (*the Bill*) seeks to amend the *Commonwealth Electoral Act 1918* (*the CEA*) to “deny election funding to political candidates accepting gifts from tobacco smoking, and for related purposes.”

Specifically the Bill proposes that the CEA be amended to include, without limitation, the following provision:

“Subject to subsections (1) and (2), a payment under this Division shall not be made if a candidate, group or political party accepts a gift from a person who derives **substantial revenue from the manufacture, distribution or retail of tobacco products.**”

Our View

We are strongly opposed to the Bill, whose effect, should it receive assent, will be to preclude Australian tobacco manufacturers, and many distributors and retailers of tobacco products from making donations to political parties and thereby participating in the democratic process.

Because of the health risks associated with smoking we support sensible regulation of tobacco products based on sound public policy grounds. We believe that the proposed law has no policy-basis, nor is it in the best interests of the general community.

Political parties can choose from whom they accept donations

In our view it is integral to the democratic process operating in Australia that political parties maintain their right to choose from whom they accept donations.

The current disclosure regime for political donations and BATA's own internal policy ensures that political donations are made transparently:

- J Corporations are required to disclose the amounts donated to political parties under the provisions of the CEA (for amounts over \$1000 during an election period and amounts totalling over \$1500 in any one financial year); and
- J It is our policy to donate only to registered political parties with published policies and disclosure arrangements with the Australian Electoral Commission.

Both political parties and the public are therefore aware of the source of all political donations. Indeed some political parties have already set their own policy in this regard, voluntarily ceasing to accept donations from tobacco companies.

To this end we consider it an unnecessary restriction on the democratic process to legislate for the cessation of donations from any particular source.

Deprivation of legal rights of certain entities to participate in the political process

While tobacco is a controversial product, it is a legal one, and one of many controversial products which are legally sold in Australia. As responsible members of the legitimate tobacco industry operating in Australia we are strongly opposed to any regulation, including the proposed Bill, which would seek to deprive BATA of its right to participate transparently in the political process in the same manner afforded other legitimate businesses.

Electoral campaign financing is a legitimate avenue for corporations and other interested parties to participate in the party-political system and the discussion of political and public issues. To single out tobacco manufacturers, retailers and distributors and prevent them from freely donating to political parties would mean that tobacco companies and those deriving substantial revenue from the sale and distribution of tobacco products would be limited in their opportunity to participate in discussion of political and public issues.

A freedom of communication on matters of public and political interest is an indispensable incident of the system of representative government which the Commonwealth Constitution creates (*Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 at 106). Integral to this system is a freedom of public discussion of public affairs and political and economic matters among all members of the community (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577 at 603 per Brennan J).

The High Court has held that “[f]reedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the

electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.” (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577 at 594 per Mason CJ and *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 at 12). We maintain that the Bill unnecessarily restricts this implied freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, by limiting the ability of tobacco companies to participate in the political discussion and public affairs.

Impacts on tobacco retailers and others deriving substantial revenue from tobacco products

While The Hon. Duncan Kerr MP, in his First Reading Speech, stated that “the notion of ‘substantial revenue’ means the Bill will not apply to those whose revenue from the retailing of tobacco is only incidental to their supply of other retail products – for example supermarkets, corner stores and petrol stations”², sales of cigarettes and tobacco products are significant contributors to the profitability of many of these stakeholders:

- J Tobacconists derive about 95% of their total sales from cigarettes and tobacco products;
- J Many small and mixed business derive up to 40% of their total sales from cigarettes and tobacco products;
- J Convenience stores and petrol stations, each derive around 30% of their non-petrol sales from cigarettes and tobacco products;³ and
- J Cigarettes rank as five of the top 10 branded goods sold by supermarkets and major grocery stores. Sales of these five brands generated more than \$1.5billion in revenue for these stores during 1997.⁴

² The Hon. Duncan Kerr MP, *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004*: First Reading, Extracted from House of Representatives Hansard, 16 February 2004.

³ PricewaterhouseCoopers, *The Significance of Tobacco Products to Retailers, An analysis of retail sales*, March 1999 at 4.

We therefore contend that the amendment to the Bill as currently proposed will have the unintended effect of preventing many retailers and distributors from making political donations.

Recommendation

We strongly recommend that the Committee disregard the *Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004* and maintain the status quo in terms of political donations. Such a Bill risks seeing regulators making laws based on moral rather than policy grounds and thus has potential implications for not only the range of stakeholders involved in the manufacture, sale and distribution of tobacco products but also for many other industries.

2.2 The exposure draft of the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*

The exposure draft of the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004* (*the Exposure Draft*) seeks to amend the *Tobacco Advertising Prohibition Act 1992* (*the TAP Act*) to:

“prohibit tobacco advertising and the offering for sale of tobacco products on the Internet and the prohibition of tobacco product placement in films, and for related purposes.”⁵

⁴ PricewaterhouseCoopers, *The Significance of Tobacco Products to Retailers, An analysis of retail sales*, March 1999 at 3.

⁵ Section 8, *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*

2.2.1 Internet Sales of Tobacco Products & Trade Communications

The sale of tobacco products via the Internet and trade communications are issues currently under consideration by the Federal Department of Health & Ageing ('DOHA') as part of its review of the Tobacco Advertising Prohibition Act 1992 (CTH).

In our view, issues surrounding the Internet sale of tobacco products are most appropriately dealt with as part of this review process currently in train.

The Proposed Amendment

The *Exposure Draft* seeks to prohibit the sale of tobacco products via the Internet (clause 13C) and also the communication of the availability of tobacco products on the Internet to both consumers and trade customers (clause 10(1)(aa)).

Our View

The sale of tobacco products via the Internet and trade communications are issues currently under consideration by the Federal Department of Health & Ageing ('DOHA') as part of its review of the *Tobacco Advertising Prohibition Act 1992 (CTH)*.

In our view, issues surrounding the Internet sale of tobacco products are most appropriately dealt with as part of this review process currently in train.

A copy of our submission to DOHA in October 2003, which includes our views on Internet sales and trade communications, is attached to this submission.

2.2.2 Tobacco Product Placement

The depiction of smoking in the media is an issue currently under consideration by the Federal Department of Health & Ageing ('DOHA') as part of its review of the Tobacco Advertising Prohibition Act 1992 (CTH). In our view, this issue is most appropriately dealt with as part of this review.

We would not oppose a prohibition on the product placement of tobacco products in films and computer games.

While we believe that it would be impractical to remove all images of smoking and tobacco use from film, television and theatre, we do not encourage nor assist with the depiction of smoking in these media.

The Proposed Amendment

The *Exposure Draft* seeks to prohibit “product placement” of tobacco products in film and in computer games.

“Product placement” is defined to include:

“the depiction of advertisements of tobacco products or smoking in a film, television program or computer game in return for a benefit given by the manufacturer, distributor or retailer of the tobacco product to the maker of the film, television, program or computer game.”

Our View

The depiction of smoking in the media is an issue currently under consideration by the Federal Department of Health & Ageing ('DOHA') as part of its review of the *Tobacco Advertising Prohibition Act 1992 (CTH)*. In our view, this issue is most appropriately dealt with as part of this review.

Because smoking poses health risks and because many people find it difficult to quit, we strongly believe that smoking should only be a choice for informed adults and that tobacco products should never be marketed to persons under the age of 18 years of age.

Consistent with this view we do not pay for any of our tobacco products to be displayed by the media or entertainment industries, nor do we pay for personalities to be seen smoking our products. Indeed we have voluntarily adopted *International Tobacco Products Marketing Standards*, section 10 of which expressly prohibits the placement of tobacco products in various media and the use of celebrities to endorse our products. A copy of our International Marketing Standards is attached to this submission.

We believe that while it would be impractical to remove all images of smoking and tobacco use from film, television and theatre, we do not encourage nor assist with the depiction of smoking in these media.

To this end we would not oppose the proposal set out in clauses 13 (A), (B) and (D) of the *Exposure Draft* to prohibit the “product placement” of tobacco products in films and computer games.

2.2.3 Commonwealth Expenditure where Co-sponsorship from tobacco companies

While the intention of this provision is unclear, we are opposed in principle to any legislation designed to impede our ability to participate in discussions or activities in which we have an interest.

The Proposed Amendment

Clause 22A (1) of the Bill states:

“No expenditure shall be made by the Commonwealth for any purpose or promotional activity where the purpose or promotional activity is also supported by a manufacturer, distributor, or retailer of tobacco products.”

Our View

In our view, the proposed prohibition on Commonwealth expenditure where co-sponsorship or support from tobacco companies exist, would represent a severe restriction on the ability of BATA, and other tobacco manufacturers to participate in forums where they have a legitimate business interest.

Of particular concern to BATA, is the fact that the proposal does not make clear the extent to which Commonwealth expenditure will be restricted, nor is it clear what types of events are intended to be captured by the prohibition.. For example, BATA participates in forums with government agencies in relation to issues such as taxation as well as public forums on a wide range of business issues where BATA has a legitimate business interest and where Commonwealth agencies may be participants or supporters.

In addition, BATA has a number of community partners to which BATA staff provide financial and in-kind support. Some of these organizations also receive government support and, BATA does, from time-to-time, participate in forums organized by these community partners.

2.3 The adequacy of the response to date of the Australian Competition and Consumer Commission (ACCC) to the orders of the Senate of the 24 September 2001, 27 June 2002 and 12 November, which require the ACCC to report to the Senate on various issues concerning tobacco.

We believe it would be inappropriate for us to comment on matters currently under consideration by the ACCC.

Our View

In light of the current ACCC investigation into the use of descriptors on tobacco products, we consider it is inappropriate for us to comment on the adequacy of the ACCC's responses. However we would be concerned about any undue level of political interference on the ACCC in its deliberations, which is an independent body.

4 CONCLUSION

BATA strongly supports and promotes open and transparent dialogue on issues relating to our products and our industry with key stakeholders and at all times we are prepared to assist the Government in the policy making process where we have a valid and productive role to play.

In line with this policy of open dialogue, BATA believes that the decision to smoke is one for informed adults and we will continue to support the dissemination of accurate, unbiased and factual information that assists in this decision-making process.

To this end we remain committed to working with all stakeholders to achieve workable and sensible regulation now and in the future.

British American Tobacco Australia

July 2004

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5 APPENDIX

- Submission prepared by British American Tobacco Australia to the Department of Health and Ageing in Consideration of the Review of the *Tobacco Advertising Prohibition Act 1992*.

- *International Tobacco Products Marketing Standards*.