



**BRITISH AMERICAN
TOBACCO
AUSTRALIA**

=
=
=

=

**Submission by
British American Tobacco Australia
To the Department of Health and Ageing
In Consideration Of the Review of the
Tobacco Advertising Prohibition Act 1992.**

1.0 Executive Summary	P=
1.1 Operation of the Act	P=
1.2 Sensible Regulation	Q=
1.3 Questions Raised in the Issues Paper	R
1.4 Summary of where we stand on the proposals	U
1.5 Youth Smoking Prevention	NQ
1.6 Framework Convention on Tobacco Control (FCTC)	NR
2.0 Introduction	NS=
3.0 The Issues Paper: Our view	NT=
3.1 Business Related Communications	NT
3.2 Product display	ON
3.3 Point of Sale Advertising	OQ=
3.4 Promotions aimed at tobacco retailers	OS
3.5 Tobacco Vending Machines	OV
3.6 Tobacco Sales by Internet and Mail Order	PN
3.7 Indirect Advertising and Sponsorship	PP
3.8 Offences & Penalties	PQ
4.0 Youth Smoking Issues	PU=
5.0 Framework Convention on Tobacco Control	QN=
6.0 Conclusion	QO=
APPENDICES	QP

1.0 Executive Summary

1.1 Operation of the Act

Since 1993, the principal tobacco control instrument in Australia has been the Tobacco Advertising Prohibition Act 1992 (TAPA). In conjunction with relevant State and Territory regulation and legislation, the TAPA sets out a comprehensive set of laws and regulations governing, amongst other things, the advertising and promotion of tobacco products.

The stated objectives of the TAPA are:

- (1) The Act is intended to limit the exposure of the public to messages and images that may persuade them:
 - (a) to start smoking, or to continue smoking; or
 - (b) to use, or to continue to use tobacco products
- (2) The objective is to improve public health¹.

In the view of British American Tobacco Australia (BATA), the TAPA has been successful in meeting these objectives as evidenced by the reduction in consumer consumption by at least 2.5% year on year². In addition, retailer education and awareness of responsible retailing is extremely high and there has been a noticeable reduction in the incidence of under-age purchasing³. In the past 10 years there has been only one prosecution of a tobacco manufacturer⁴ in respect of tobacco advertising restrictions

¹ The Tobacco Advertising Prohibition Act (1992), Sec 3.

² Roy Morgan Smoking Monitor, June 2003

³ "A National Approach for Reducing Access to Tobacco in Australia by Young People under 18 Years of Age", An initiative of the National Expert Advisory Committee on Tobacco and the National Tobacco Policy Officers Group, August 2000.

⁴ An investigation was conducted by the NSW Department of Health and the offender was prosecuted under section 61B(1) of the NSW Public Health Act, Tobacco Advertising Prohibition Act 1992 Issues Paper. August 2003, pp. 18.

Whilst BATA believes that the current regulations have in the broad sense been effective, we also recognise that there are always areas for further enhancements to regulation to ensure its efficacy and its relevancy in managing contemporary issues around tobacco.

1.2 Sensible Regulation

It is the stated aim of BATA that we want to work with Government and other relevant stakeholders in developing sensible regulation whilst ensuring adult consumers can continue to make an informed choice about a legal product. It is also our expectation that the Federal government will maintain regular dialogue with significant stakeholders, such as BATA, to achieve the intentions and objectives of sensible regulation.

In our view, sensible tobacco regulation considers and reflects the differing needs and preferences of all affected stakeholders, be they consumers, tobacco retailers, hospitality providers, public health authorities or tobacco companies. Above all, we believe that the hallmark of sensible regulation lies with its workability and enforceability, as well as its ability to demonstrate clear and measurable public policy objectives.

In line with this position the following submission seeks to canvass the suggestions and options outlined in the Issues Paper released by the Department of Health and Ageing into the review of the TAPA, as they reflect our view of sensible and effective regulation. In doing so, this submission will not address each issue raised,

but, will confine its commentary to those areas where we feel BATA, as a tobacco manufacturer, has a justified interest. These areas include, but are not limited to; tobacco retailing, vending, product display, trade communication and promotions, illegal tobacco and youth smoking prevention⁵.

1.3 Questions Raised in the Issues Paper

The Issues Paper raises many points in relation to the revisions of the TAPA. In general, BATA believes that many of the issues outlined in the paper fall outside the legislative intent of the TAPA. Moreover, we feel strongly that many of the suggestions raised would significantly disrupt normal business-to-business activities with little or no change to the exposure of the public to images and messages regarding smoking and tobacco products.

BATA believes that the resources that would be directed at developing and enforcing the marginal issues raised in the Issues Paper would be better spent in other areas such as supporting retailer and youth education campaigns targeting underage access to tobacco products and tackling the ever increasing problem of illegal tobacco. Indeed, in our view, some of the proposed suggestions in the Issues Paper would be counterproductive and only seek to compound matters in the following areas;

1. **Anti-competitive behaviour** – restrictions on tobacco product display and imposing arbitrary restrictions on retailers will not meet the objectives of the TAPA, but, simply create confusion and the potential for market power to be

⁵ References in this submission to 'young people', 'youth', 'children', 'minors' and 'under-age' relate to those individuals under the age of 18 years.

concentrated in the retail environment to the competitive disadvantage of thousands of small independent retailers.

2. **Growth of the illegal tobacco market** –if legitimate tobacco products are relegated to an ‘under the counter’ status, there is little to distinguish between legal and illegal tobacco products. There is the likelihood that more retailers will be encouraged to engage in the illicit tobacco trade which already costs the government an estimated \$500 million in lost revenue⁶.

3. **Retailer’s livelihoods** – many of the suggestions would have the greatest impact on small independent retailers. Many of these retailers rely heavily on category information from tobacco manufacturers to ensure they remain a viable entity in the retail environment. Any restrictions on this information would affect the competitive position of these small retailers *vis a vis* larger more organised retailers.

4. **Underage tobacco sales** – restrictions on trade promotions, trade communications and product display fail to address the growing concern of underage tobacco sales. If retailers are limited in what information they can receive about responsible retailing from tobacco manufacturers, there is an

⁶ The illicit tobacco market in Australia is estimated to be in the order of \$600 million per annum. Often referred to as ‘Chop Chop’, illicit tobacco is illegally grown and manufactured tobacco leaf subsequently distributed and retailed through black market operators as well as a number of independent tobacco retailers. This trade affects tobacco companies as well as many stakeholders in the community, the most notable of which are state and Federal governments. Not only does the trade in illegal tobacco evade the payment of the excise tax, but due to its cash nature other taxes and levies are also avoided, such as GST and income tax. Indeed, the loss of revenue to government alone has been estimated to be in the order of \$500 million, or nearly 10 percent of total tobacco excise collections, The Current Economic and Policy Environment for the Australian Tobacco Industry, PricewaterhouseCoopers June 2001, pp.46.

increased chance that retailers will be confused about the status of the laws and their obligations under them, possibly leading to unintentional breaches.

1.4 Summary of where we stand on the proposals

The following is a summary of BATA's key positions on the proposals in the Issues Paper. A more detailed discussion of our positions is covered in section 3.

1.4.1 Business Related Communications

In our view, trade communications do not stimulate consumer demand for tobacco products, nor do they promote to the public smoking or particular brands of tobacco products. Communications between tobacco companies and retailers provides tobacco companies with the opportunity to provide important and relevant product information which could not otherwise be communicated.

Retailer communications are about providing relevant category, product and regulatory information to tobacco retailers so that they are informed about the product that they are supplying, including issues such as; wholesaling pricing, stock availability, product information, legislative information and even product recall notices. They also ensure that retailers are aware of their legal obligations and assist them in being compliant with tobacco legislation.

1.4.2 Tobacco Product Display

BATA would support any move towards a national regulatory scheme governing the display of tobacco products which respects the commercial rights of retailers and their requirements for inventory category management. We would, however, not support any scheme which would ban or severely compromise the display of tobacco products in the retail environment. Our recommendation would favour one similar to that operating in New South Wales, which, from our experience reflected a large degree of retailer consultation in its development. This model allows for two facings per tobacco product variant with one carton per variant allowed to be displayed at the point of sale. This, in our view, represents a balance between the commercial needs of retailers to display their available merchandise whilst ensuring the category is not overly represented in the retail outlet.

In our view, any proposal to ‘shroud’ the display of tobacco products would not only be impractical, but would also impede competition amongst tobacco companies and tobacco retailers. Moreover, based on the experiences in Victoria and Tasmania, there is very little evidence to suggest that product display restrictions on their own bring about a measurable reduction in smoking levels⁷. Indeed, we would contend that by shrouding, or severely restricting tobacco product display, consumer choice would be undermined. In addition, shrouding would have the effect of equating

⁷ Evidence from Victoria and Tasmania suggests that zero visibility or restricted visibility has had little impact on the incidence levels of smoking. According to Roy Morgan Research (June 2003) the incidence of smoking in Victoria and Tasmania (two of the most restrictive states in Australia for product display) is declining more slowly than in jurisdictions that have less restrictions in terms of product display or allow for point of sale advertising, such as Western Australia and South Australia. This suggests that product display does not generate or drive consumer demand for tobacco products but rather ensures that retailers are able to effectively manage the tobacco category and ensure their customers are well serviced.

legal tobacco sales with the sale of illegal products, such as Chop Chop, that are often sold illegally ‘under the counter’.

1.4.3 Point-of-Sale Advertising

Currently, State and Territory governments regulate point of sale advertising, with only two states exempting the use of any in-store promotional material for tobacco products.

As with product display, BATA would favour a national approach to point of sale advertising legislation. If the Federal Government were to legislate for a national scheme we would be concerned about the practicalities of having two differing tiers of legislation at both the Federal and State/Territory levels. In our opinion, many retailers are not equipped, nor do they have the understanding to ensure they are compliant with both a Federal and a State/Territory system of point of sale regulation. As such we would strongly support that there be uniform legislation governing point of sale.

1.4.4 Promotions/incentives aimed at tobacco retailers

The Issues Paper considers a ban on trade promotions aimed at tobacco retailers. In our opinion, trade promotions do not generate consumer demand for tobacco products. They exist to promote competition between tobacco companies and amongst the retail sector. Any restriction or ban on the ability for a supplier of tobacco products to communicate or provide promotional opportunities to retail customers would reduce the level of competition within the tobacco industry and the

retail sector. We believe that such restrictions on trade promotions fall outside the legislative intent of the TAPA and the current exemptions should be retained.

BATA uses trade promotions to support, recognise and reward responsible and professional retailing. This information is designed to assist the retailer in managing the category. In respect of youth smoking prevention communication this approach is also complimentary to and supportive of the Department's objectives to eliminate under-age smoking.

1.4.5 Vending

Restricting youth access to tobacco vending machines is a concern that BATA shares with government. As such, we would support further enhancements to the current laws and regulations regarding the location of vending machines and would support that vending machines be located only in licensed premises and that controlled access technology be considered as a viable and effective means of limiting youth access to vending machines.

In our view, a total prohibition of all tobacco vending machines is not only unreasonable but there would be significant financial implications as well as impacting on the ability of licensees to manage the tobacco category.

1.4.6 Tobacco Sales by Internet and mail order

BATA firmly believes that smoking is an adult choice and is adamant that people under 18 years of age should not smoke. It is for this reason that we would support practical and common sense measures which are aimed at reducing underage access

to tobacco products via the internet or mail order such as improvements to age verification. However, we believe that any regulation on the sale and distribution of tobacco products through the internet or mail order should be consistent with regulations governing access to other restricted products, such as alcohol.

BATA would also submit that any restrictions considered in this area should not impact on internet or electronic arrangements between tobacco suppliers and retail customers. In our view, internet transactions ensure a transparency on the movement and sale of tobacco products. It is not surprising, therefore that the evolution of the internet has led to the development of logistics portals for business-to-business supply chain efficiencies. Any such arrangements should be exempted from any change to the regulations on internet or mail-order sales.

1.4.7 Indirect advertising and sponsorship

In our view, there is no justification provided in the Issues Paper that outlines why information such as indirect advertising and sponsorship would be required from tobacco companies and how its disclosure would achieve the objectives of the TAPA. This is highly confidential commercial information and its disclosure would result in an unequal playing field amongst tobacco companies as well as other companies competing for retail business. This proposal would merely serve as a punitive measure on a legitimate and legal industry as well as falling outside the objectives of the TAPA.

1.4.8 Offences and Penalties

BATA believes that the TAPA is an inappropriate instrument for the imposition of strict liability offences. Strict liability is acceptable only for offences which are readily understood and easily proven and where failure to comply is obvious, unacceptable and deserving of punishment such as speeding and parking offences. Given that nearly 50% of all tobacco retailers are of non-English speaking backgrounds and their understanding of legal matters is tenuous, particularly given the complexity of tobacco control legislation, we feel that there could be regular unintentional breaches of the TAPA through inadvertence or oversight rather than through a deliberate act.

The tobacco industry is one of diversity; not only by its size and the large number of transactions that occur within it, but by the diverse number of industry participants ranging from individual business operators, such as small independent retailers through to multinational corporations. Unless the Federal government is able to review the circumstances of alleged breaches on a case by case basis, strict liability offences are unsuitable for the tobacco industry.

1.5 Youth Smoking Prevention

Youth smoking remains a serious concern to BATA and we support workable initiatives that reduce the access of under-age people to tobacco products. In light of the problem, we believe that youth access is a national issue and requires a coordinated response at a national level.

At the present time, tobacco manufacturers are one of the only providers of on-going education and support to retailers across the country in preventing under age access to tobacco products. BATA believes that retail access prevention programmes are a critical part of effective industry action on youth smoking prevention.

It would be of concern if changes suggested by the Issues Paper, such as proposed restrictions on communication with retailers, limited our ability to support retailers on this important issue. In our view, rather than arbitrary law changes, BATA would prefer to see government focus on providing support to retailers as recommended in the National Approach for Reducing Access to Tobacco by Young People under 18 Years of Age⁸.

⁸ "A National Approach for Reducing Access to Tobacco in Australia by Young People under 18 Years of Age", An initiative of the National Expert Advisory Committee on Tobacco and the National Tobacco Policy Officers Group, August 2000

1.6 Framework Convention on Tobacco Control (FCTC)

There are a number of areas raised in the Issues Paper that quite clearly relate to the Articles 13 and 16 of the FCTC. In particular we note that trade communications, trade promotions, indirect market spending disclosure and vending are all issues being considered by the Issues Paper and the FCTC.

On this basis, BATA believes that further discussion on many of these measures should take place in the context of the normal treaty ratification processes.

2.0 Introduction

BATA considers the current review of the TAPA as a valuable opportunity for an open discussion on tobacco control.

BATA will apply our resources to assist governments and public health authorities in achieving the many outcomes where we have a shared concern; but, we also reserve the right to state our opposition on those measures which, in our opinion, are neither workable nor necessary.

We would like to think that recommendations from a tobacco company will be objectively evaluated on their merits and not automatically dismissed and it is in this spirit that we provide our views on the TAPA Issues Paper.

For more information, please contact:
Mr Sam Maher
Corporate and Regulatory Affairs Department
British American Tobacco Australia Limited
Private Bag 1
Maroubra NSW 2035
(02) 9370 1069
(02) 9370 1074
sam_maher@bat.com
www.bata.com.au

3.0 The Issues Paper: Our view

The following section outlines in detail the position of BATA on the main issues raised in the Issues Paper as well as providing our recommendations on the appropriate way forward.

3.1 Business Related Communications

3.1.1 Issues Paper suggestion

The Issues Paper outlines changes to the manner in which tobacco companies communicate with their retail partners. While the Issues Paper acknowledges that tobacco companies should be able to communicate about the availability of their products to distributors and retailers, it asks whether the TAPA should be amended to ‘restrict all references to tobacco products in trade communications without images or symbols of any kind, including trademarks’.

3.1.2 Our view – Overview of Trade Communications

In our view, trade communications do not stimulate demand for tobacco products, nor do they promote smoking or ‘push’ particular brands. Retailers receive trade communications not as members of the general community, but, in their capacity as sellers and distributors of tobacco products. As such the need to ensure they have the correct information regarding the product they are selling is essential. Trade communications are consistent with retailers overall product category management policies and ensures efficiency by the retailers at the point of sale. In this regard,

tobacco products should not be considered any differently from other categories of products they might sell. Moreover, in our view, placing further restrictions on a tobacco companies' ability to communicate with their retailers and trading partners falls outside the objectives of the TAPA.

3.1.3 Category Management

Trade communications provides tobacco companies with the opportunity to provide relevant product information to retailers so that they are informed about the product that they are selling.

Trade communications are commercial communications and are not targeted at the wider community. Rather, they are specifically targeted to tobacco retailers who engage in the supply of tobacco products. Tobacco companies provide information to tobacco retailers about the product including; ordering information, wholesale pricing details, inventory management, changes to the product and packaging and information on illegal tobacco and youth smoking prevention. This information is central in enabling retailers to meet the needs of their customers and is considered a normal and vital part of doing business.

In our view, if retailers are not allowed to receive this information they lose the capacity to better manage an important product category, fully service their customers and remain up to date on changes in the commercial and regulatory environment. Trade communications are an effective and efficient communication tool and give a higher degree of confidence that all retailers have awareness of the important matters in managing the tobacco category. The removal of this medium

may result in some retailers being vulnerable to prosecution, more confusion in the retail environment and, ultimately, less knowledgeable about the product they are selling. The long term effect of this will be a deterioration of retailing standards on many important issues such as youth smoking prevention and illegal tobacco.

3.1.4 Financial implications

In our view, placing greater restraints on the information that tobacco retailers may receive from tobacco companies will place a greater financial burden on small retailers.

Independent tobacco retailers, in particular, rely on category information and category management advice to inform them of the availability of products, wholesale pricing and product or packaging changes and information.

Many small 'mixed businesses' derive up to 40 percent of their total sales from cigarettes and tobacco products, generating on average 10 percent of their gross margin⁹. By restricting the trade communications that these retailers receive from tobacco companies, their ability to remain commercially viable is impacted upon as is their ability to compete against larger retail groups.

3.1.5 Anti-Competitive implications

The retail environment is a highly competitive environment and imposing arbitrary restrictions on trade communication creates artificial barriers that restrict levels of competition between tobacco companies for adult smokers. Independent retailers

⁹ "The Significance of Cigarettes and Tobacco Products to Retailers, an Analysis of Retail Sales, PricewaterhouseCoopers, p.4

rely heavily on trade communications to assist them in their business and without this information their ability to be viable and compete against the larger, organised accounts is compromised. Independent retailers would be forced out of the sector and the retail segment would become characterised by a small group of large retailers.

In addition, restrictions on trade communication may also have an unintended impact on a tobacco franchisor's ability to communicate with their franchisees, or for other retailers to communicate with group members. This might lead to business inefficiencies as well as impact on levels of competition within the retail environment. As some of these franchise groups have up to several hundred stores the ability to communicate between them is an integral and fundamental part of administering and managing their franchise business.

3.1.6 Other Issues

Currently, tobacco companies are one of the few groups actively providing ongoing support and education to retailers on issues surrounding under-age access to tobacco products and illegal tobacco. The loss of trade communications would undermine this effort, particularly in the absence of any Federal Government action to support retailers on under-age access.

3.2 Product display

3.2.1 Issues Paper suggestion

The Issues Paper asks whether tobacco display units should ‘not be transparent’ and whether restricting the display of tobacco products at the point of sale within retail premises should remain the jurisdiction of State and Territory governments as it is currently, or, if there should be one single Federal policy.

3.2.2 Our View – Overview of Product Display

The reasoning behind the call to limit the visibility of tobacco products in retail outlets is based on the assumption that the decision to purchase tobacco products is prompted by the display of the product. We believe the decision to buy tobacco products is not an impulse purchase and that the display of products merely informs existing consumers to availability of brands and makes servicing and stocking by the retailer both simpler and more secure. There is no evidence to suggest that restricting product display will bring about a measurable reduction in smoking incidence in line with the objectives of the TAPA¹⁰.

However, in recognizing the trend to limit product display at the point of sale, BATA would support a national policy in this area. We would support a regime that is workable and that takes into account the legitimate commercial and competitive role that product display has in ensuring that consumers can access their brands, retailers can manage their inventory and the illegal market is kept under control.

¹⁰ Roy Morgan Smoking Monitor, June 2003

3.2.3 Illegal Tobacco

By restricting product visibility and forcing the visual removal of tobacco products, legitimate tobacco products would be increasingly stigmatised and those adults who choose to smoke would be further marginalised. Legitimate tobacco products would potentially be treated in the same way as other highly restricted products, such as pornography, and create a further allure to young people to seek access to the product. Moreover, it is not improbable to suggest that if legitimate tobacco products are relegated to an ‘under the counter’ status, then there is little to distinguish between legal and illegal tobacco products and there is the likelihood that more retailers will be encouraged to engage in the illicit trade.

3.2.4 Retail Implications

The current method of product display is important for retailers in managing inventory and servicing their customers. Currently, stock inventories are visible, can be easily and securely replaced and the customer’s choice is readily accessible.

Additionally, specialist tobacconist represent a significant portion of the industry sales volume are one of the main groups who would be most negatively impacted upon if any changes occurred with product display. Recognition of their unique status as tobacco retailers would need to be considered in any change in this area as up to 80% of their revenue is generated through the sale of tobacco products.

It is also our view that unnecessary changes to the way stock is managed at the point of sale increases the risks and lowers security over what is often a retailer’s most

valuable stock item. Tobacco retailers are spending increasing amounts of money to secure their stock and minimise the threat to personal safety and inventory security. In fact, for many retailers it is now cost prohibitive for them to have insurance on their tobacco category. The visual removal of tobacco products places retailers in far greater danger as their ability to manage the category is negatively impacted upon.

Imposing arbitrary conditions on the placement of tobacco in retail outlets will not assist in meeting the TAPA objectives, but only further compromise the ability of retailers to adequately secure and safeguard a valuable inventory item and jeopardise the livelihoods of many tobacconists who rely on this exclusive revenue stream.

3.3 Point of Sale Advertising

3.3.1 Issues Paper suggestion

The TAPA Issues Paper asks whether the existing point of sale exception be retained in the TAPA given that it has become ineffective by operation of legislation that has been enacted in all but two jurisdictions, South Australia and Western Australia. It also asks if the point of sale exception in the TAPA be extended and expressed to operate in addition to any relevant State or Territory law so that it sets a minimum standard.

3.3.2 Our view

Currently, State and Territory governments regulate point of sale advertising, with only two states exempting the use of any in-store promotional material for tobacco products.

As with product display, BATA would favour a national approach to point of sale advertising legislation. If the Federal Government were to regulate for a national scheme we would be concerned about the practicalities of having two differing tiers of legislation at both the Federal and State/Territory levels as this could result in a section of the tobacco industry being disadvantaged against.

In our opinion, many retailers are not equipped, nor do they have the understanding to ensure they are compliant with both a Federal system regarding point of sale and State and Territory legislation. For many retailers English is their second language and as such, interpreting any tobacco legislation is incredibly difficult and is often

misunderstood which leads to unintentional breaches and contraventions of the law.

As such, we would strongly support that there be uniform legislation governing point of sale.

3.4 Promotions aimed at tobacco retailers

3.4.1 Issues Paper suggestion

The Issues Paper asks whether s.10(e) of the TAPA should be amended to ensure that a regulated corporation or a person engaged in regulated trade or commerce cannot advertise or include material in a trade communication that might reasonably be seen to encourage the consumption of tobacco by another person. It also asks whether the Act should be amended so a regulated corporation or a person engaged in regulated trade or commerce cannot conduct activity that promotes (rather than simply gives publicity to) the consumption of tobacco products.

3.4.2 Our view – Overview of Promotions aimed at Retailers

BATA does not use trade promotions or provide incentives to promote or publicise smoking. Trade promotions are legitimate business-to-business arrangements between tobacco companies and their retail customers, the purpose of which is to build loyalty with retailers in order that they support one manufacturer over another.

They are not intended to, nor do they in any way, generate consumer demand for tobacco products or expose the public to messages and images that promote smoking. Any move to further restrict trade promotions would severely reduce competition in a market segment that is already highly regulated.

In our experience, restrictions on trade promotions would only interfere with the category management of the individual retailer as well as the levels of competition

within the category. Certain classes of retailers, those not covered by the regulations will be severely disadvantaged, thereby creating a more uneven playing field with unnecessary restrictions in place.

3.4.3 Anti- competitive Implications

Existing trade promotions do not generate an increased consumer demand for tobacco products or for smoking, but provide an opportunity for tobacco companies to effectively compete within the category and at the retail level. We submit that any further reduction in the ability to compete for existing adult smokers and any reasonable regulation of relationships between tobacco companies and retailers would fall outside the legislative intent of the TAPA.

Trade promotions provide an opportunity for tobacco companies to effectively compete within the category and at the retail level. Such promotions encourage retailers to support and align themselves with preferred suppliers. This activity is in line with ensuring there is an efficient and competitive market and is considered a normal and integral part of doing business for any company in the fast moving consumer good sector. Restrictions on trade promotions will also undermine legitimate and responsible retailing.

3.4.4 Retail Implications

Restrictions on trade promotions impact the retailer's ability to manage the category which is a central facet to generating a competitive market place. These restrictions would make it economically unviable for many small independent retailers to try and

compete in the tobacco category against large retail chains, as it would require a disproportionate level of investment for them to stay competitive.

As such the current concerns regarding the market power of larger retail groups, including convenience and grocery stores, would be accelerated and enhanced as small retailers, who derive up to 40% of their revenue from tobacco, would over time, be forced out of business because their service offering would be diluted.

3.5 Tobacco Vending Machines

3.5.1 Issues Paper suggestion

The Issues Paper asks whether s.16(3) should be amended to include a ‘vending machine accessible to a restricted section of the public as well as the general public’ whilst also asking if the Federal government should legislate to ban tobacco vending machines or is this an issue that is better left to States and Territories.

3.5.2 Our view –Tobacco Vending Machines

BATA firmly believes that smoking is an adult choice and because of this we are adamant that anyone under 18 years of age should not have access to tobacco products.

In line with this view, restricting youth access to vending machines is a shared concern of BATA and Government. But, we believe that there are more appropriate measures to control youth access to vending machines than through a total ban. As such, we would support further enhancements to the current laws and regulations regarding the location of vending machines and propose that vending machines should only be located in licensed premises. In addition, we would also support the implementing of controlled-access units. These units require the active intervention of staff members, normally the bar staff, before customer’s can access the machine. This ensures the same age-verification applies to the sales of tobacco products as it does to the sale of alcohol in licensed premises.

Vending is a service hospitality providers offer for their patrons and it is the preferred method for the sale of tobacco products, as it provides a secure and responsible way for tobacco products to be sold. As such, the removal of vending machines would place a far greater burden on licensees. If there is a total ban on all vending machines, hoteliers and licensees will be forced to bear the burden of stocking and ranging cigarettes and tobacco products behind the bar which also results in increased amounts of cash held on site. It is not only impractical to have stock ranged and stored behind the bar, but it leads to problems of stock security, stock and staff management issues and potential staff pilferage concerns.

There is also the possibility that smaller independent licensee's would be unable to meet these costs and as such would be forced to forgo this legitimate revenue stream upon which their businesses are reliant.

In our view, it would be far more cost effective and efficient to regulate the placement of vending machines. Currently there are around 10 vending machine operators in Australia and we would submit that it would be more effective in managing issues regarding tobacco access in licensed premises to regulate this small group of operators than it would be to remove vending machines and then have to regulate the 12 000 licensed outlets who would instead be supplying tobacco products over the counter. We would also suggest that the issue of vending machines should remain the focus of State and Territory governments as they are better placed than the Federal Government to address immediate concerns, particularly as vending machines are increasingly restricted to licensed premises which are regulated at State and Territory level.

3.6 Tobacco Sales by Internet and Mail Order

3.6.1 Issues Paper suggestion

The Issues Paper asks whether there should be a total prohibition on the sale by mail order of all tobacco products or if there is an effective way to permit mail order sales while preventing people under 18 years of age from purchasing tobacco by mail order.

3.6.2 Our view – Overview of Sales by Internet and Mail Order

BATA firmly believes that smoking is an adult choice and for this reason we would support practical and common sense measures which are aimed at reducing under-age access to tobacco products via the internet or mail order.

We share the view that any business-to-consumer internet sites used for mail order for tobacco products should either use age verification technology or they should be password protected. This is no different than it would be for sales of other restricted products, such as alcohol.

As far as tobacco sales are concerned, it should also be noted that it is our understanding that age verification is required once the consumer has purchased the product and prior to receiving the goods. Regardless of the protocols in place by on-line retailers, we would strongly support any sensible moves or suggestions put forward by the Federal government to ensure that underage sales cannot occur online, provided they did not unnecessarily impede a legitimate platform from which products can be sold to adult consumers.

In addition, we believe that if standards are not set regarding business-to-consumer retail sites or if these sites are removed or restricted, sales and traffic will be forced to international mail-order sites, which not only encourage excise avoidance but possibly creates another form of illicit trade in tobacco.

3.6.3 Business to Business Communications

Based on the assumption that Questions 10.9-10.10 in the Issues Paper refer solely to business-to-consumer websites and that the Review is not looking at business-to-business sites, BATA would be concerned at any restrictions which inadvertently affect business-to-business internet sites which, as we have already stated, are legitimate trading channels that should be maintained.

To underscore our position, retailers are increasingly demanding that their suppliers utilise the internet as a means of ordering products. BATA utilises this medium in response to these demands. We also use the internet as a channel for trade and business related communications and its ongoing future in commerce and business efficiency should not be unduly compromised. The internet and business-to-business internet sites are seen as the accepted medium through which companies do business in the 21st century and these sites, and the companies utilising them, should not be further penalised from engaging in this type of trading, as long as it is done within the legislative framework provided by the TAPA.

3.7 Indirect Advertising and Sponsorship

3.7.1 Issues Paper suggestion

The Issues Paper asks what public health value would derive from a requirement for corporations to make a declaration of their direct and indirect promotional activities with respect to tobacco products.

3.7.2 Our view – Indirect Advertising and Sponsorship

It is our view that compelling tobacco companies to disclose any figures associated with the manufacture, marketing and distribution of their products falls outside the legislative intent of the TAPA.

3.7.3 Anti Competitive Implications

The type of information of which disclosure is proposed to be required is highly confidential commercial information. Its disclosure would result in the creation of an unequal playing field amongst tobacco companies as well as other companies supplying the retail channel, with no impact on the incidence of smoking in the wider community. As this question relates to what is described as ‘product placement’, it is worth restating that BATA does not engage in any product placement activity in Australia and has a strict policy to that effect¹¹.

¹¹ We have formalised into a written policy what was standard practice, whereby we discourage the use of our tobacco products in the media, not only because any such depiction may breach relevant tobacco advertising legislation and infringe on our trademark rights, but moreover, because we know it may be inconsistent with community expectations. Accordingly, when responding to any approach for our products to be depicted in any media, we advise the applicant of our policy and draw their attention to possible breaches of tobacco control legislation.

3.8 Offences & Penalties

3.8.1 Issues Paper suggestion

The Issues Paper asks whether the TAPA should be amended to include an offence of giving publicity to smoking, or to a tobacco product, or a range of tobacco products. It also asks whether the Prosecution should be required to prove that the alleged offender intended to give the publicity, or if this should be a strict liability offence.

3.8.2 Our view

In our view it is not appropriate that offences such as giving publicity to smoking or to tobacco products should be a strict liability offence. The Prosecution should be required to prove that an alleged offender intended to give publicity to smoking or to tobacco products.

We have reviewed the Sixth Report of 2002 of the Senate Standing Committee for the Scrutiny of Bills, titled *Application of Absolute and Strict Liability Offences in Commonwealth Legislation, 26 June 2002*. This report notes that the Attorney-General's Department has issued guidelines for the application of strict and absolute liability. Relevant points arising from those guidelines are:

- The appropriateness of strict liability must be considered in relation to each element of every offence to which it is proposed to be applied
- If strict liability is applied:
 - (i) The penalty should not include imprisonment

- (ii) The maximum penalty should in general be no more than 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate)

The Standing Committee's report also provides a number of principles and recommendations that are to make up the framework of Commonwealth policy and practice in relation to strict liability. The relevant principles are as follows:

- Fault liability is one of the most fundamental protections of criminal law. To exclude this protection is a serious matter
- Strict liability should be introduced only after careful consideration on a case-by-case basis of all available options. It would not be proper to base strict liability on mere administrative convenience or on a rigid formula
- Strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties. The general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) is thought to be a reasonable maximum

If strict liability is introduced;

- The general defence of mistake of fact, with its lower evidentiary burden, is a substantial safeguard for those affected by strict liability and this defence should be expressly provided for

- Further strict liability should, wherever possible, be subject to program-specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect. These defences should be in addition to the defence of mistake of fact

In light of the above guidelines and because of the following, BATA believes that the TAPA is an inappropriate area for the imposition of strict liability offences:

- Strict liability is acceptable only for offences which are readily understood and easily proven and where failure to comply is obvious, unacceptable and deserving of punishment. Speeding and parking offences are two examples. The TAPA and its associated regulations is complex and this may result in regular breaches through inadvertence or oversight rather than deliberate act. This is particularly so given that complex state and territory legislative schemes operate concurrently with the federal legislation
- Smaller entities would be disadvantaged in compliance and legal matters compared to larger organisations. For example, independent retailers may find the cost of defending alleged breaches against them prohibitive. This may result in innocent persons choosing to pay financial penalties rather than defending prosecutions. This is an undesirable situation
- Imposing the same penalties on a strict liability basis for small and large retailers may have the effect of putting smaller retailers out of business. Penalties which may be seen to be adequately severe to coerce compliance

by substantial entities may be unfairly high in the context of smaller retailers

- There is no mention in the Issues Paper of an external review of a decision to prosecute a person for infringement of the TAPA. This raises the concern of lack of transparency in decisions by the Department to issue penalty notices or to prosecute for alleged offences
- Given the large number of tobacco industry participants, both large and small, it is unlikely that the Department has the capacity to investigate properly each contravening act. Therefore the decision whether to investigate and to initiate court proceedings will be selective and likely to result in inconsistencies, regardless of principles and guidelines
- The Department may not always consider the circumstances of individual cases. If it does not, then arguably strict liability is unsuitable for the tobacco industry, given the great magnitude of transactions and industry participants ranging from individual business operators to multinational corporations
- The legitimate rights of the tobacco industry participants should be paramount and take precedence over administrative convenience and perceived cost savings in administration of the TAPA

4.0 Youth Smoking Issues

Youth smoking remains of concern to BATA and we support any workable initiatives that reduce the access of people under the age of 18 years to tobacco products.

At the present time, tobacco companies are among the only stakeholders providing on-going education and support to retailers in preventing under-age access to tobacco products. These programmes focus on the retail sector seeking to prevent under 18's from buying tobacco products at the point of sale.

The principal programme for the past decade has been the '18+ It's the Law' campaign, a joint campaign between BATA and Philip Morris (Australia)¹². This campaign was designed to assist retailers to understand the laws and regulations relating to tobacco sales and to provide them with the tools to help ensure tobacco products are only sold to those over 18 years of age.

The sales representatives of BATA and Philip Morris (Australia), as well as independent wholesalers, distribute '18+ It's the Law' kits to retailers throughout Australia. The kit includes a booklet explaining current legislation on the penalties of selling tobacco products to people aged under 18 years of age and a guide to help retailers identify underage customers and successfully refuse their request for tobacco products. Material for display inside retail outlets is also included in the kits to remind employees of their legal requirements, and to notify customers that retailers

¹² See Appendix B

cannot legally sell tobacco products to anyone under 18 years of age and that they may be asked for photo identification.

If restrictions are placed on tobacco manufacturer's ability to communicate with their retailers the opportunity for retailers to receive information on issues such as youth smoking prevention is reduced. Tobacco companies have strong relationships with retailers who sell tobacco products which the Department, or indeed other public health bodies, do not have. Therefore, to rely solely on the Department or other bodies to communicate youth smoking prevention campaigns or any other educational programmes would, in our opinion, be less ineffective.

We firmly believe that youth access to tobacco products is a national issue and requires a national response. In our opinion, public policy would be better focused on education and prevention rather than imposing arbitrary and unworkable restrictions on the retail trading of tobacco products. Indeed, BATA would support actions to implement several of the key recommendations from the *National Approach for Reducing Access to Tobacco in Australia under 18 years of Age*¹³.

Despite this report being nearly three years old, most of the key recommendations that would practically reduce access by young people to tobacco products remains unimplemented. Specifically, BATA would like to see action, led by the Federal Government, in regards to recommendations 5, 6 and 8 in the *Recommended Key*

¹³ "A National Approach for Reducing Access to Tobacco in Australia by Young People under 18 Years of Age", An initiative of the National Expert Advisory Committee on Tobacco and the National Tobacco Policy Officers Group, August 2000.

*Elements For A National Best Practice Model*¹⁴. These recommendations relate to the development and implementation of education strategies for retailers and the general public as well as research to determine the best methods of strategies and communications programs to prevent under-age people from accessing tobacco products from non-retail sources.

As youth smoking is a national issue of concern to the broader Australian community, BATA would support greater involvement by the Federal Government in the development of nation-wide curriculum activities targeted at reducing demand for tobacco products amongst people under the age of 18. The current *National School Drug Education Strategy* is nearly five-years old and is in urgent need of updating, particularly as it relates to youth smoking education.

¹⁴ "A National Approach for Reducing Access to Tobacco in Australia by Young People under 18 Years of Age", An initiative of the National Expert Advisory Committee on Tobacco and the National Tobacco Policy Officers Group, August 2000, pp. 27.

5.0 Framework Convention on Tobacco Control

On 26 September 2003, the Commonwealth Government announced its intention to become a signatory to the Framework Convention on Tobacco Control (FCTC).

There are a number of areas raised in the Issues Paper that quite clearly relate to the Articles 13 and 16 of the FCTC¹⁵. In particular we note that business related communications, trade promotions, indirect market spending disclosure and vending are all issues being considered by the Issues Paper and the FCTC.

British American Tobacco Australia would be concerned if future regulatory changes such as those outlined in the Issues Paper were proposed on the basis of the FCTC without proper disclosure and without the proper public scrutiny which would accompany any treaty consideration. Given this, any further discussion around these issues should only take place in the context of the ratification process for the FCTC. This is particularly important given the number of issues raised in the Issues Paper that deal with the capacity of the Federal Government (as opposed to State Governments) to make laws to regulate activities in these areas.

¹⁵ See Appendix C

6.0 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. Furthermore, BATA is committed to effective campaigns that actively discourage people under the age of 18 from smoking, and educating the community that smoking is an adult choice.

BATA therefore welcomes this opportunity to present its views on the review into the TAPA in the spirit of finding tobacco solutions that are effective and measurable. Accordingly, we endorse a number of the proposals raised in the Issues Paper, but, are equally concerned that many are also inconsistent with what we suggest is workable and sensible tobacco control policy.

In our view, many of the proposals will not achieve their policy end, but, simply place heavier burdens on those who choose to manufacture, sell and consume tobacco products.

In addition, if the majority of suggested amendments were introduced we believe that it would create an anti-competitive environment for tobacco retailers and establish an overly restrictive and complicated regulatory framework which would be inefficient and difficult to enforce.

As a way forward, BATA recommends a legislative framework that accommodates the valid rights of stakeholders in this debate including; tobacco retailers, hospitality providers, consumers, and tobacco manufacturers. Moreover, we recognise that any such framework must be premised on the understanding that individuals must be allowed to exercise their freedom of choice - be that the choice to manufacture, retail or consume tobacco products. Australia has the benefit of long-standing tobacco control policies, policies which have, to a large extent, been successful in striking a balance between the interests of public health and the rights of individuals.

We submit that some of suggestions in the Issues Paper will undermine this balance and only punish the choices of individuals and businesses without any corresponding measure of success in terms of public health outcomes. To this end, whilst we believe that the TAPA, in a broad sense, is operating effectively and meeting its intended objectives, we also recognise that regulation needs to remain contemporary and be amended to meet an ever changing environment. 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
October 2003**

APPENDICES

Appendix A

Background to British American Tobacco Australia Limited

British American Tobacco Australia Limited is Australia's leading tobacco company. We manufacture and sell a variety of well-known tobacco brands, including Winfield, Benson & Hedges, Dunhill and Holiday.

British American Tobacco Australia was created by the merger of two respected tobacco companies that had operated in Australia since the early years of the last century; W.D. & H.O. Wills (Holdings) Limited and Rothmans (Holdings) Limited

The merger was completed in September 1999. The merger was brought about as part of a global merger between the two parent companies – British American Tobacco p.l.c. and Rothmans International B.V.

More than 1200 people are employed directly by British American Tobacco Australia. The company's headquarters and production facilities are located in Eastgardens, Sydney. Supporting a national sales and distribution network are the company's State offices -- located in all major capital cities.

Together, the people who make up British American Tobacco Australia manufacture, distribute and sell the majority of the cigarettes, roll-your-own tobacco, cigars and pipe tobacco sold in Australia.

Our employees are proud of their work and committed to producing the best quality tobacco products for the adult Australian consumer as well as supporting the many thousands of businesses, large and small, which rely heavily on the sale of our products for their livelihoods.

In view of the controversial industry in which we operate, our people are dedicated to acting in a responsible manner -- meeting the broader community's expectations of how a modern tobacco company conducts its business. Indeed, we seek constantly to exceed public expectations by ensuring responsibility is at the core of everything we do.

Appendix B

“18 + It’s the Law kit”

Appendix C

Framework Convention on Tobacco Control

Article 13

Tobacco advertising, promotion and sponsorship

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.
2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on crossborder advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.
3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.
4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:
 - (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;
 - (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;
 - (c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;
 - (d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;
 - (e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and
 - (f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.
5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.

6. Parties shall cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising.

7. Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.

8. Parties shall consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship.

Article 16
Sales to and by minors

1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen. These measures may include:

(a) requiring that all sellers of tobacco products place a clear and prominent indicator inside their point of sale about the prohibition of tobacco sales to minors and, in case of doubt, request that each tobacco purchaser provide appropriate evidence of having reached full legal age;

(b) banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves;

(c) prohibiting the manufacture and sale of sweets, snacks, toys or any other objects in the form of tobacco products which appeal to minors; and

(d) ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors.

2. Each Party shall prohibit or promote the prohibition of the distribution of free tobacco products to the public and especially minors.

3. Each Party shall endeavour to prohibit the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.

4. The Parties recognize that in order to increase their effectiveness, measures to prevent tobacco product sales to minors should, where appropriate, be implemented in conjunction with other provisions contained in this Convention.

5. When signing, ratifying, accepting, approving or acceding to the Convention or at any time thereafter, a Party may, by means of a binding written declaration, indicate its commitment to prohibit the introduction of tobacco vending machines within its jurisdiction or, as appropriate, to a total ban on tobacco vending machines. The declaration made pursuant to this Article shall be circulated by the Depositary to all Parties to the Convention.

6. Each Party shall adopt and implement effective legislative, executive, administrative or other measures, including penalties against sellers and distributors, in order to ensure compliance with the obligations contained in paragraphs 1-5 of this Article.

7. Each Party should, as appropriate, adopt and implement effective legislative, executive, administrative or other measures to prohibit the sales of tobacco products by persons under the age set by domestic law, national law or eighteen.

Appendix D

*The Current Economic and Policy Environment for the Australian Tobacco Industry,
PricewaterhouseCoopers, June 2001.*

Appendix E

The Significance of Cigarettes and Tobacco products to Retailers, An Analysis of Retail Sales, PricewaterhouseCoopers, March 1999.

