

ACCC - RESPONSE TO SENATE MOTION 1031

(24 September 2001)

TOBACCO

DEFICIENCIES IN REPORT OF APRIL 2002

INTRODUCTION

1. Under cover of a letter dated 16 April 2002 the Chairman of the Australian Competition & Consumer Commission ("ACCC") forwarded a report by way of a response to Senate Motion 1031 of 24 September 2001.

2. That report is deficient in a number of significant respects, as set out below.

3. **PAGE 1**

Summary

3.1 The allegations that tobacco companies have been involved in systematically misleading and deceiving consumers, in contravention of the *Trade Practices Act 1974* ("TPA") is not "through their alleged silence about the health dangers of their products" but rather by the fact that they have actively and deliberately promoted a false "controversy" over smoking and disease, disputing the scientific evidence that exists, and by denying that smoking is addictive on spurious grounds from which the tobacco companies themselves now resile, as well as by targeting children in marketing practices whilst publicly promoting the idea that they do not advocate sales to minors.

3.2 Accordingly, the advice that legal proceedings would be unlikely to be successful is based on a misconception of the complaints about the tobacco industry's conduct and accordingly, is not to the point. Furthermore, it is inconceivable that such a conclusion could be based on the information currently available, given material that was submitted to the ACCC for the purposes of its report, unless that material was entirely disregarded.

3.3 Moreover, insofar as that advice was based on "the existence of clear warning labels on tobacco products", that assertion is inconsistent with the review of health warnings on tobacco products referred to in the report at pages 28 and 29, which proceeds on the basis that health warnings to date have been wholly inadequate. It is noted that the Department of Health and Aging is currently developing options for proposed new health warnings and explanatory messages on tobacco products and it would appear that the "advice" currently available to the ACCC ignores the import of that review.

3.4 Insofar as the decision of the Victorian Supreme Court in *McCabe v British American Tobacco Australia Services Limited* has raised new allegations which the Commission is currently looking into:

(a) whether the tobacco industry's use of the terms "mild" and "light" are misleading or deceptive is but a symptom of the totality of misleading or deceptive conduct and not a matter to be considered in isolation; and

(b) the findings that BAT (and its lawyers) systematically destroyed documents of likely relevance to tobacco-related litigation is not confined to that company since there is evidence that, at the very least, Philip Morris Limited (and its lawyers, Arthur Robinson & Hedderwicks) engaged in similar conduct at the same time. The following documents on the Philip Morris website are relevant:

<http://www.pmdocs.com/PDF/2023240976.PDF>

<http://www.pmdocs.com/PDF/2023240945.PDF>

http://www.pmdocs.com/PDF/2023240946_0972.PDF

3.5 Any investigation into the destruction of documents should proceed on the basis of an industry-wide survey, having regard to the fact that there is evidence that the industry in Australia has acted in concert on all these matters since at least January 1975. The following document relates to this matter:

http://www.pmdocs.com/PDF/2025025461_5480.PDF

3.6 In relation to other litigation concerning tobacco companies:

- (a) If the ACCC's monitoring of legal developments in the United States is confined to the footnote at reference 2, to the recent US decision against Philip Morris in relation to low-tar cigarettes, then this again focuses on but a symptom of the overall misleading or deceptive conduct and entirely ignores the overall position. For example, the ACCC report refers nowhere to the significant litigation being undertaken by the US Department of Justice. The following website references are relevant to the *US Department of Justice* litigation:

http://www.tobacco.neu.edu/PR/Backgrounders/DOJ_experts_reports.htm
<http://www.usdoj.gov/civil/cases/tobacco2/complain.pdf>

- (b) Insofar as the ACCC is not currently aware of documents produced in the US litigation that constitutes evidence of contraventions of Australian Trade Practices law, it is obvious that the ACCC has not even considered documents referred to it which demonstrate that the parent companies of subsidiaries operating in Australia have conspired to promote a false "controversy" over smoking and disease, spurious "smoker re-assurance" programs and other tactics aimed at promoting the "social acceptability of smoking" and underplaying the addictiveness of nicotine, since at least mid-1977. The following is the start, and not the end, of relevant materials:

<http://bmj.com/cgi/content/full/321/7257/371>

- (c) The fact that significant differences in legal systems make it unlikely that outcomes in US litigation could be directly translated into the Australian context ignores the fact that the same result could be achieved in the Australian context in an adapted form, and even with more significant results. The following paper, prepared for a World Health Organisation Consultation on *Litigation and Public Inquiries as Public Health Tools for Tobacco Control* provides a comprehensive blueprint and it is understood that this document was made available to the ACCC for the purpose of preparing its report but the contents of the paper appear to be reflected nowhere in the ACCC report.

Refer <http://www.globalink.org/tobacco/docs/ap-docs/0103francey.rtf>

(d) It is not clear on what basis it is said that the ACCC is not in a position to comment on the outcome of current or future litigation in Australia, especially as a specific proposal is identified in the WHO paper referred to above. In any event, fresh litigation has now been commenced in the Supreme Court of New South Wales in which the ACCC could intervene to provide assistance, providing it was fully and properly informed on all relevant issues:

- *Cauvin v Philip Morris Limited and Ors*, Common Law Division, No. 11301 of 2002.
- *Cauvin v Philip Morris Limited and Ors*, Equity Law Division, No. 2625 of 2002.

4. PAGE 3

Tobacco products and the *Trade Practices Act 1974* - ss.52 and 53

- 4.1 The formulation of the allegation that tobacco companies have engaged in "systemic contraventions" of s.52 of the TPA "in that they have concealed the hazards of smoking from consumers" misconceives the nature of the complaint (see paragraph 3.1 above).
- 4.2 The legal advice suggesting that proceedings for contraventions would be unlikely to be successful appears to be based on a misconception of the allegations and in any event:
- (a) overlooks that the disclosure of health dangers of smoking to date have been inadequate and have been the subject of an ongoing counter-campaign by the industry for at least 25 years.
 - (b) the test for whether or not conduct is misleading or deceptive is not that of the "ordinary or reasonable consumer".

- 4.3 It is an elementary principle of the law in misleading or deceptive conduct that it is necessary to look at the relevant class of persons exposed to the conduct. The test is relative, not absolute, particularly where conduct is directed to the public at large. In a case such as the marketing of cigarettes, the matter must be considered by reference to all people who come within the general public, including the astute and the gullible, the intelligent and not-so-intelligent, the well-educated and the poorly-educated.
- 4.4 Insofar as marketing practices are directed at children, with some as young as 10 and 12 taking up the habit, whilst the tobacco companies assert that smoking is a matter of "adult choice", the conduct is misleading and unconscionable. In this context, the notion of "the ordinary or reasonable consumer of cigarettes" is completely inappropriate.
- 4.5 Furthermore, significant sections of the Australian population have English as a second language and current warnings may be especially inadequate in their case: e.g. in comparison to proposed graphic warnings. Just as an illustration, whilst smoking prevalence rates among the non-aboriginal community have declined significantly in recent decades, smoking rates in indigenous populations have increased to almost double the Australian average. This may well be explicable by a lack of appreciation of the warnings and targeted counter-strategies by the tobacco industry.
- 4.6 The ACCC's view that it is also likely that a Court would regard this area as an issue of policy, for the Legislature or Executive to determine, ignores the fact that the Courts have already held that the prohibition of misleading or deceptive conduct exists so that action may be taken under a general provision where there is lack of specific legislative or administrative action, e.g. *R v The Judges of the Federal Court of Australia and Anor; Ex parte Pilkington ACI (Operations) Pty Limited* (1978) 142 CLR 113, especially per Murphy J at p.131, cited by Burchett J in *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Limited* (1988) ATPR 40-874 at 49,453-5.
5. **PAGE 4**

5.1 As to possible claims based on addiction, the assertion that the three year time limit in s.82 would mean "any application would most likely now be time-barred" ignores cases to the effect that there is no applicable time limit to applications under s.87(1) of the TPA:

- *Tanzone Pty Limited v Wespac Banking Corporation and Ors* (1999) ATPR 46-195;
- *Multigroup Distribution Services Pty Limited v TNT Australia Pty Limited* [2001] FCA 226 (12 March 2001)
- *Mayne Nickless Limited v Multigroup Distribution Services Pty Limited* [2001] FCA 162A (16 November 2001)

5.2 The reference to evidence available to establish that a "reasonable consumer" was not aware of addiction is also not a correct test of the evidence which would establish a contravention: the notion of a "reasonable consumer" has never been part of the law in relation to s.52. Obiter to that effect by Gibb CJ in *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1982) 149 CLR 191 has never been followed or adopted in the last two decades.

Section 75AD

5.3 The legal advice received to the effect that Courts are likely to take the view that consumers are aware that cigarette products are likely to be inherently dangerous and capable of causing a wide range of illnesses/diseases, not all of which may be specifically outlined by tobacco companies on their packaging, ignores the whole notion of **consumer protection**. A vague idea that a product is dangerous does not represent anything remotely like what is required in order to enable consumers to make an informed choice. If the range of illnesses/diseases capable of being caused by the product is so wide-ranging that not all may be specifically outlined by the tobacco companies on their packaging, then that only demonstrates that existing warnings are

inadequate.

6. **PAGE 5**

- 6.1 Time limit restrictions in relation to Part VA do not prevent action by the ACCC directly, or indirectly to support private litigation, which seeks to expose the conduct of the tobacco industry, seeks injunctions to remedy the effect of that conduct, and other orders under s.87(1) to compensate, prevent or reduce damage.

Unconscionable conduct

- 6.2 The prohibition of unconscionable conduct is unqualified in s.51AB(1) and does not pre-suppose the conventional notion of parties to a transaction. The legislation makes it quite clear that the circumstances in subsection 51AB are intended to operate "without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1)".

7. **PAGE 6**

- 7.1 It is not essential that there be a direct supply by a tobacco company to a child in order for the corporation to have engaged in unconscionable conduct, at least in relation to s.51AB. It is far from clear that the supply "must be by an identified tobacco company to an identified consumer, and not by a supply by a tobacco company to a retailer, which then supplies cigarettes to a child". It is entirely possible for a tobacco company to engage in conduct that influences the supply from the retailer to the child, or the acquisition of cigarettes by the child from the retailer. The ACCC report entirely ignores this scenario.

The ACCC and Tobacco as a Consumer Protection Issue

- 7.2 Given the inadequacies in the ACCC report to this point, there appears to be no warrant for asserting that the **real** complaints about tobacco companies (as compared to the

misconceived allegations) are unlikely to give rise to a contravention of the TPA. Given the plethora of evidence available that the Australian tobacco companies and their overseas parents have deliberately conspired to engage in misleading or deceptive conduct for over 25 years, there is no basis for saying that "on current evidence there is limited scope for general legal action against tobacco companies under the TPA". This statement could only be made by ignoring the evidence which actually exists.

8. PAGE 11

Question 1(a)-(e)

Investigation into "Light" and "Mild" terminology (current)

- 8.1 As stated above (paragraph 3.4 (a) and paragraph 3.5(a)), this is but one symptom of the conduct of the tobacco industry over the last 25 years. The ACCC should refocus its resources to exposing the underlying cause of such marketing rather than treat the "symptoms". In that regard, further consultation should take place with Action on Smoking and Health (ASH), the Australian Plaintiff Lawyers' Association (APLA) and the Vic Health Centre for Tobacco Control.

9. PAGE 15

British American Tobacco - Merger with Rothmans International BV (March 1999)

- 9.1 Given the fact that extensive material was provided to the ACCC regarding the fact that Imperial Tobacco Limited (UK) instigated the meeting of seven of the world's major tobacco companies in 1977, including the parents of all three companies then operating in Australia, to establish an international conspiracy to engage in misleading or deceptive conduct, including through National Manufacturers Associations, such as the Tobacco Institute of Australia (TIA), it seems incomprehensible that the ACCC should record in its report its approval of the BAT/Rothmans merger on condition that Imperial be a new entrant into the Australian market without acknowledging the fact that this involved introducing as a third entrant into the Australian market, the corporate group which had

been instrumental in enabling the world's major tobacco companies to formalise and expand misleading or deceptive conduct throughout the world.

10. PAGE 22

Question 1(f) - Litigation in the US Federal Trade Commission

- 10.1 This treatment of litigation in the US entirely ignores current developments, such as the *US Department of Justice* suit which addresses the underlying conspiratorial conduct of the US companies, and BAT, which alone seems to have permeated the subsidiaries of BAT and Philip Morris in Australia with a consequential influence on Rothmans (see paragraph 3.5(a) above).

11. PAGE 23

**Relating US Litigation to Potential Legal Action in Australia
US Litigation Documents**

- 11.1 Given that a primary requirement of the Senate Motion 1/03/01 (24 September 2001) was to investigate whether documents publicly released during the course of tobacco litigation in the United States of America contained evidence of contraventions in Australia, the effort described for the single search about price-fixing is pathetically inadequate, not the least because extensive references to search results by others were provided, or were able to be provided, to the ACCC, which form no part of the ACCC report. This leads to the inescapable conclusion that none of this material submitted to the ACCC was ever looked at. See for example:

Cullman Memo 3/12/76 - <http://www.pmdocs.com/PDF/2025025286.PDF>

Letter Garrett to Cullman 3/12/77 -

http://www.pmdocs.com/PDF/2025025290_5291.PDF

Letter Garrett to Holtzman 24/3 -

http://www.pmdocs.com/PDF/2025025341_5343.PDF

Draft Agenda - <http://www.pmdocs.com/PDF/2501024570.PDF>

25/4 - http://www.pmdocs.com/PDF/2025025351_5355.PDF

Brochure - http://www.pmdocs.com/PDF/1000219796_9802.PDF

Press Release - <http://www.pmdocs.com/PDF/1000219803.PDF>

Agenda 28?/5 - <http://www.pmdocs.com/PDF/2025025356.PDF>

Position Paper 25/4 - http://www.pmdocs.com/PDF/2025025314_5318.PDF

Letter BAT to Garrett with PP - <http://www.pmdocs.com/PDF/2501024571.PDF>

Letter Garrett to PM with PP - <http://www.pmdocs.com/PDF/2025025362.PDF>

Letter Garret to Holtzman with Whist changes -

<http://www.pmdocs.com/PDF/2025025369.PDF>

Imperial PP - http://www.pmdocs.com/PDF/2501024534_4539.PDF

Position Paper 27/4 - http://www.pmdocs.com/PDF/2501024572_4575.PDF

28/4 - http://www.pmdocs.com/PDF/2501024529_4532.PDF

Revised??? - http://www.pmdocs.com/PDF/2501024540_4544.PDF

10/6 - http://www.pmdocs.com/PDF/2501024522_4525.PDF

June 77 - http://www.pmdocs.com/PDF/2501024488_4493.PDF

http://www.pmdocs.com/PDF/2501024497_4501.PDF

Brief Notes - http://www.pmdocs.com/PDF/2024266422_6428.PDF

Proposed Mod Nov 77 - <http://www.pmdocs.com/PDF/2501024495.PDF>

11.2 Moreover, Professor Simon Chapman, University of Sydney, was awarded a 4 year grant by the US National Institutes of Health in 2001 for the sum of \$1.6 million and holds a 3 year grant from the National Health and Medical Research Council of \$150,000 to study tobacco industry documents, being a substantial resource which appears to have been entirely ignored by the ACCC.

12. PAGE 24

Other Tobacco Litigation in Australia under the TPA

Australian Federation of Consumer Organisations Incorporated v Tobacco Industry of Australia Limited

12.1 The reference to this case is itself a damning indictment of the predecessor to the ACCC, which failed to act appropriately in relation to tobacco industry advertisements disputing the effects of passive smoking. Given that this conduct now appears to have been simply a small part of an internationally orchestrated campaign that has spread over the last 2½ decades, the failure of the ACCC to appreciate the significance of inaction in the present context is palpable. Having regard to the seriousness of the issue, which was made plain in the Senate Motion, and which appears to have been acknowledged by the ACCC, it is an indictment of the ACCC report deserving of censure that there has been such an inadequate response to the Senate Motion.

13. PAGE 27

Question 1(g)

The Labelling Standard

13.1 The extent to which the review of existing warnings indicate they are inadequate does not appear to have been appreciated elsewhere in the ACCC report. Moreover, the ACCC's responsibility is not confined to the enforcement of the labelling standard. Quite apart from enforcement action, and the potential to participate in civil action including civil

remedies on behalf of persons who have suffered or are likely to suffer loss or damage from contravening conduct, the ACCC has a number of functions under s.28 of the TPA, specifically subsection (1)(c), (ca), (d) and (e) which give the ACCC a much broader role than it has hitherto undertaken.

14. PAGE 29

Question 1(h)

Estimating the Impact of Tobacco

- 14.1 Since this section of the report proceeds and unfounded "view of the remote possibility of a successful prosecution (?)" of the conduct in question, the absence of an estimate of the extent of loss or damage is explicable, but not excusable. The ACCC should re-assess the scope for making the tobacco industry accountable for its conduct since the commencement of the *Trade Practices Act* on 1 October 1974 and produce at least some meaningful assessment of the loss or damage caused, or likely to be caused, by that conduct.
- 14.2 As an indicated of the significance of action which may be taken, to the considerable benefit of Australian tax payers, the Cauvin litigation (paragraph 3.5(b)) has the potential to:
- (a) Reimburse the Health Insurance Commission for medical treatment for smoking related disease.
 - (b) Provide for future medical needs for smoking related disease, including medication currently subsidised under the Pharmaceutical Benefits Scheme.
 - (c) Significantly reduce the dependence of persons suffering of smoking related disease on Social Security Benefits.
 - (d) Establish a Fund to provide for such benefits in respect of other persons who have suffered or are likely to suffer smoking related disease by the conduct of the Australian tobacco companies and their overseas parents or related companies.

15. PAGE 30

Questions 1(i) and (j)

Response

- 15.1 Having regard to all of the foregoing, the ACCC response to these important issues is wholly inadequate. It is certainly not sufficient to simply recite sections of the TPA which were themselves enacted by the Parliament.

CONCLUSION

16. In summary, the ACCC report is not, in substance, a response to Senate Motion 1031 of 24 September 2001. Having regard to the time elapsed since the Motion was passed, the ACCC should prepare a supplementary report appropriately addressing all of the issues in a proper and comprehensive manner no later than 16 August 2002.