

21 January 2016

Ms Amanda Honeyman
Research Director
Health and Ambulance Services Committee Parliament House
George Street
BRISBANE QLD 4000

EMAIL: hasc@parliament.qld.gov.au

Inquiry into tobacco licensing arrangements in Queensland

INTRODUCTION

Imperial Tobacco Australia Limited (ITA) welcomes the opportunity to make a submission in respect to the Queensland Government's inquiry into tobacco licensing arrangements in Queensland.

Imperial Tobacco Australia (ITA) is an Australian-based wholly owned subsidiary of Imperial Tobacco Group PLC, the world's fourth largest international tobacco company.

ITA entered the Australian market in September 1999 at the request of the ACCC to ensure that competition was maintained following the global merger between British American Tobacco ("BAT") and Rothmans International.

ITA has a share of approximately 30% of the total tobacco market and approximately 60% of the loose (roll-your-own) market in Australia.

For the 2014/15 year, ITA delivered almost \$3 billion to the Federal Treasury through excise duties on tobacco products (excluding GST). We employ approximately 360 people in Australia (including in Queensland) and makes further contributions to government through corporate taxation, employment taxes and other revenues of approximately \$18 million annually.

The tobacco industry is an entirely legal business contributing billions of dollars in revenue to Australian governments and employing hundreds of people across the country.

We vigorously reject and oppose regulation that is not sensible, practical and measured. We believe that adult consumers have the right to make their own choices.

We sell only to adult consumers who exercise free choice to use our products. We support strong regulation to prohibit supply or use of tobacco products by those under age.

TOBACCO LICENSING

The requirement for a license to sell tobacco at retail level is state based and varies by jurisdiction. For instance:

- In Tasmania, anyone who sells tobacco products must have a Tobacco Seller's License, issued by the Director of Public Health. A license is issued for a period of up to 12 months, and cannot be transferred. A license application fee is \$360.89 and only individuals, not companies, can apply for a tobacco license
- Retailers do not currently require a license to sell tobacco products in Victoria
- In Western Australia retailers, wholesalers, and indirect tobacco product sellers are required to hold an appropriate license. This costs \$240 for retailers; and \$600 for wholesalers. Licenses are valid for 12 months
- To sell tobacco products in South Australia, a person must hold a retail tobacco merchant's license. One license per outlet is required, and a license is only valid for 12 months. A license costs \$253.
- In NSW, a retailer who wants to sell tobacco products can apply for a free Tobacco Retailer Notification (TRN). A TRN does not need to be renewed, any business that sells tobacco can apply, and multiple tobacco retailing premises within the one business can be included under one TRN. IN NSW, recent amendments require a wholesaler to obtain the retailer's TRN prior to supplying tobacco products

Best practice, or suggested scheme: NSW Tobacco Retailer Licensing

If a tobacco retailer licensing scheme were to be replicated, ITA submits that the NSW TRN scheme is the optimal choice.

The scheme is administratively easy for retailers to navigate; no cost impost accrues to the retailer which means cost does not serve as a disincentive from registering; it is a once-off process which provides practical benefits since it is not a process which must be completed annually; and multiple sites can be registered under the one TRN, again, a practical aspect which does not impose administrative burden on retailers.

Additionally, the requirement that a wholesaler obtain the TRN from a retailer before supplying to retailers is perfectly reasonable, providing a safety check to ensure that tobacco products are only being supplied to legitimate tobacco retailers.

In 2014, the NSW Minister for Health, Jillian Skinner, convened a NSW Taskforce on Tobacco Retailing to review and make recommendations on tobacco retailing and regulation.

The Taskforce concluded that "the current licensing scheme and other regulatory strategies are appropriate" and furthermore that "the Taskforce did not find evidence to support

placing restrictions on the number or placement of tobacco retailers at this time."¹

The Taskforce noted that the existing NSW framework was appropriate, and that retailers are largely compliant. The Taskforce also noted that strong enforcement of the existing framework, along with retailer education, would be considered a best practice approach.²

Restrictive tobacco licensing schemes

ITA submits that options for restricting access to tobacco via restrictive tobacco licensing schemes is anti-competitive, will cause negative consequences (such as a shift to purchases of illicit tobacco), are unjustified on public health grounds, and will unfairly impact smaller retailers hardest.

We would discourage an approach that is based more heavily on regulation than on education. With such an approach, rather than educate people about the health risks associated with smoking, there is a fundamental assumption that more intensive regulation will drive behavioural change. There is also an assumption that people can be driven to quit smoking, through increasing regulation, to force behavioural change.

This differs significantly from the approach of regulators in other markets, such as the US FDA, which has adopted an approach more focused on “harm reduction” and acknowledges that informed adults may want to continue to use tobacco products.

ITA supports sound, evidence-based, reasonable and practical regulation of tobacco products and encourages the government to balance the shared concern for public health with the important principles of freedom of choice for adults and freedom of competition between businesses.

We believe that the decision to enjoy tobacco products is a choice for adults and support the right of adults to choose to smoke. We do not want children to smoke or to use tobacco products. We support penalties for retailers who sell tobacco products to children.

However, the only impact of restrictive licensing measures (or, indeed, further unnecessary regulatory measures) is on local retailers. ITA believes that such licensing regulation will have no health outcomes but will simply limit legitimate business competition, increase market concentration, and limit consumer choice.

We do not support the view that retailer licensing will prevent illegal sales of tobacco, for example, to minors. ITA strongly supports penalties for retailers who sell tobacco products to children and for those who trade in illicit products, but believes that the key to greater compliance with the law is education campaigns.

¹ <http://www.smh.com.au/national/health/cigarette-retailers-found-in-higher-density-around-nsw-schools-study-reveals-20150307-13xvql.html>

² <http://www.health.nsw.gov.au/tobacco/Documents/taskforce-tobacco-retailing-report.pdf>

ITA has independently engaged in campaigns raising awareness amongst retailers about the penalties for supplying tobacco products to minors and providing retailers with age calculators, for instance, to assist ensuring that tobacco sales are only to adults.

Government resources would be better directed towards educating retailers about illegal practices and enforcing the law rather than creating any restrictive licensing scheme, creating an additional layer of red tape for small businesses.

We believe that larger operations would most likely be in a position to sell tobacco products as a result of their greater resources and ability to absorb any costs associated with meeting government criteria and/or purchasing licenses. This means that small businesses will either lose the ability to sell cigarettes or will lose the ability to compete on prices with larger retailers. As a result, market competition would be significantly lessened and consumers denied legitimate choice about where they prefer to purchase tobacco products.

Further, such restriction would create market distortion as consumers will simply travel further, or choose an alternate convenient location, to make their purchases. Such a scheme may also disadvantage persons living in less populated or remote areas of Australia and may even result in consumers buying product in bulk.

There is no credible evidence to support the view that limiting the number of retail outlets would reduce the consumption of tobacco products or smoking initiation.

However, there is a considerable danger that consumers unable to conveniently purchase tobacco products in their local area could turn to illicit products.

As long as tobacco products remain legal, ordinary principles of free market competition should apply to businesses who sell tobacco products to adults.

Any such measure which proposes unjustified and burdensome red tape regulation on retailers will necessarily have the highest impact on small businesses.

ILLCIT TOBACCO TRADE

The suggestion that restrictive licensing of retailers will curtail supply of tobacco, hence cutting smoking rates, is unfounded. The central tenet of the argument is that people will be unable to access tobacco products if legal supply is restricted. But should restrictive licensing measures be implemented, as with other restricted products, demand for tobacco will remain and a black market will open up to fill it.

Furthermore, it would be a misguided and naïve policy to think that licensing conditions would reduce illicit trade, as those who import and who sell illicit product are criminals, often associated with organised crime. These groups do not obey the law, they do not pay excise or duty and will not be bound by mandated licensing requirements.

Any suggestion that retailer licensing would stop illicit trade is a fundamental misunderstanding of the trade in the first instance. Were those engaged in illicit trade concerned with regulation, they wouldn't be engaged at present.

The World Health Organisation recognises that “[F]rom many angles, the illicit trade of tobacco products is a major global concern, including health, legal and economic, governance and corruption. The illicit tobacco market may account for as much as one in every 10 cigarettes consumed globally.”³

In Australia, illicit trade currently sits at approximately 14.3% of the total market representing \$1.42 billion dollars in lost revenue to the Government with lost revenue instead funding organised crime.⁴

Instead of paying tax to the Australian Government, criminal gangs are profiting from this illegal tobacco trade at the expense of Australian taxpayers and law-abiding retailers.

The illicit market represents approximately 2.7 million kilograms of tobacco, or 3.3 billion cigarettes or more than 156 million packs of 20s sold on the black market in one year. Roughly 1 in 7 smokes is now illegal.

There were many reports of illicit tobacco ‘busts’ during 2015. These include:

- 30 September 2015 – a tobacco smuggling operation with links to organised crime and involving corrupt Sydney waterfront workers was ‘shut down’ after the seizure of millions of cigarettes bound for black markets (The Daily Telegraph, ‘Illegal tobacco and drug syndicate run by corrupt waterfront officials smashed by police in Sydney’, 30 September 2015, <http://www.dailytelegraph.com.au/news/nsw/illegal-tobacco-and-drug-syndicate-run-by-corrupt-waterfront-officials-smashed-by-police-in-sydney/story-fni0cx12-1227550031940>);
- 21 August 2015 – illicit tobacco seizures from raids on supermarkets and tobacconists in Sydney’s South-West (Daily Mail Australia, ‘Raids on supermarkets, tobacconists and newsagents in Sydney nets 15,000 packets of ‘fake’ cut price cigarettes worth at least \$190,000...as well as 57 pipes to smoke ice’, 21 August 2015, <http://www.dailymail.co.uk/news/article-3205736/Police-raid-nine-small-businesses-seize-15-000-packets-illicit-tobacco-estimated-190-000-worth-57-glass-pipes-used-smoking-drug-ice.html>);
- June 2015 – almost 276kg of chop chop discovered in a van driven by two Queensland men during a search by Coffs Harbour police, with a street value of up to \$60,000 and a retail value of up to \$275,000. (The Coffs Coast Advocate, “Illegal tobacco haul lands men in court”, 24 June 2015 <http://www.coffscostadvocate.com.au/news/haul-lands-men-with-fines/2682935/>

³ <http://www.who.int/campaigns/no-tobacco-day/2015/event/en/>

⁴ KPMG “Illicit Tobacco in Australia” 2015 Half Year Report, 9 October 2015

- June 2015 – interception of forty seven tonnes of tobacco shipped into Sydney, along with a further 24 tonnes seized in Indonesia, it was reported that the seized tobacco would have earned around \$40 million and would have cost over \$27 million in tax revenue (news.com.au, 'More than 88 million cigarettes go up in smoke after illegal tobacco haul', 16 October 2015, <http://www.news.com.au/national/more-than-88-million-cigarettes-go-up-in-smoke-after-illegal-tobacco-haul/news-story/81cf46363909204933b621f638617a47>);
- March 2015 – seizure of illicit tobacco on Hume Highway NSW with convictions under the excise legislation resulting in imprisonment (ATO, 'Illegal tobacco farmer cops jail sentence', 31 March 2015, <https://www.ato.gov.au/Media-centre/Media-releases/Illegal-tobacco-farmer-cops-jail-sentence/>).

The latest KPMG report indicates there are a number of hot spots for illicit product in Queensland: Gold Coast 8.9% up from 7.4%; Cairns 14.9% up from 6.1%; Townsville 5.6% up from 0.0%; and Toowoomba 9.8% up from 1.1%.⁵

The illegal supplies are already available and will quickly fill any gaps. That means a supply chain with no product control, no compliance with packaging requirements and no qualms in supplying to underage consumers.

In Senate Estimates early last year (23 Feb 15), Roman Quaedvleig, the Chief Executive of ACBPS said, "Serious and organised crime will use the same infrastructural spine upon which it imports prohibited drugs to import tobacco" and "(Illicit tobacco)...now requires the wit and wherewithal of serious and organised crime."

The 2015 Australian Crime Commission Report states that organised crime remains entrenched within the illegal tobacco market in Australia and it continues to perceive involvement in this market as a low risk, high profit enterprise.⁶

According to the ACC, it is highly likely that the illegal tobacco market will remain attractive for serious and organised crime groups because of the very large profits that can be made with very low risk.⁷

The concept that curtailing supply automatically cancels demand is both logically and factually ridiculous. Prohibition of alcohol in the United States famously didn't work. If prohibition in the modern era were successful, there would be no marijuana use, no heroin, no methamphetamines and – more obviously – no underage use of alcohol.

Laws as they apply to restrain the sale and use of illicit tobacco in Australia

Illicit trade represents an opportunity for government.

For the purposes of this commentary, we use the definition of 'illicit tobacco', thus

⁵ KPMG "Illicit Tobacco in Australia" 2015 Half Year Report, 9 October 2015

⁶ <https://www.crimecommission.gov.au/sites/default/files/FINAL-ACC-OCA2015-180515.pdf>

⁷ <https://www.crimecommission.gov.au/sites/default/files/FINAL-ACC-OCA2015-180515.pdf>

- **Illicit tobacco** is any product on which required duties and taxes have not been paid. This may include: processed or unprocessed tobacco; smoking tobacco or cigarettes; products grown or produced locally or smuggled from over borders; products that are counterfeit or “genuine”.

This definition encompasses a wide variety of unlawful tobacco products. These include (using the October 2015 KPMG Report definitions):

- **Contraband** – Genuine manufactured cigarettes that are sold without the payment of applicable excise taxes in the market of consumption. Contraband cigarettes tend to have been bought in a low-tax country and brought into the country of consumption illegally or acquired without taxes (for export purposes) and illegally re-sold in the market of consumption. This includes genuine products which are brought into a country in amounts exceeding the personal allowance.
- **Counterfeit** – Manufactured cigarettes which are illegally manufactured and carry the trademark and/or branding of a legally manufactured brand without the consent of the trademark owner. Counterfeit cigarettes are also known as fake cigarettes.
- **Illicit whites** – Manufactured cigarettes which are usually manufactured legally in one country/market but which the evidence suggests have been smuggled across borders during their transit to Australia, where they have limited or no legal distribution and are sold without the payment of tax.
- **Unbranded tobacco** – Illegal loose leaf tobacco upon which no duty has been paid and which carries no labelling or health warnings. It is sold and consumed either in RYO form (called Chop Chop) or inserted into empty cigarette tubes. Commonly sold in both bags or boxes.

All Australian State and Territory consumer and fair trading laws, as well as tobacco specific legislation, may apply to illicit tobacco, however, VIC, WA and most recently NSW have enacted legislation specifically targeting illicit tobacco.

Queensland tobacco-specific legislation only prohibits illicit tobacco to the extent it is a smokeless tobacco product. Thus, illicit tobacco which is snuff or chewing or any tobacco prepared for consumption other than by smoking is banned in QLD. Otherwise QLD legislation does not criminalise illicit tobacco generally.

Various State courts and tribunals as well as Government departments and agencies enforce the laws applying to illicit tobacco. There has been no court reported enforcement of any of these Australian *State and Territory laws* (not including Commonwealth legislation) insofar as they apply to illicit tobacco.

CRIMINAL LEGISLATION – DRUG MISUSE AND TRAFFICKING LAWS

State drug trafficking and misuse laws do not apply to tobacco. However these laws, of course, do extend to certain plants such as cannabis. Accordingly, the principles in these laws insofar as they apply to banned plants may, with some minor legislative amendments, be extended to illicit tobacco.

Were those amendments to occur, the drug misuse and trafficking laws would be available to be used to prohibit the sale, possession, or cultivation of illicit tobacco or criminalise the receipt of proceeds from illicit tobacco.

POISONS AND THERAPEUTIC GOODS LEGISLATION

The poisons and therapeutic goods legislation across the States and Territories does not apply to nicotine when it is in tobacco prepared and packed for smoking. Accordingly, the supply or possession of illicit tobacco prepared and packed for smoking is not an offence under any of these laws.

VIC

Section 11A was first inserted by the *Tobacco (Amendment) Act 2000 (Vic)* and commenced on 1 November 2000: *Tobacco (Amendment) Act 2000 (Vic)* ss 2(2) and 11. Section 11A initially provided:

A person who carries on a tobacco retailing business or a tobacco wholesaling business must not, without reasonable excuse, have in the person's possession or under the person's control, any tobacco products that the person knows or ought reasonably to know –

- (a) are smuggled goods or prohibited imports within the meaning of the Customs Act 1901 of the Commonwealth; or*
- (b) are excisable goods within the meaning of the Excise Act 1901 of the Commonwealth upon which excise duty has not been paid.*

Section 11A remains in the same form today except for a significantly increased penalty provision. The Parliament first increased the penalty from 50 penalty units to 60 for a natural person and 300 penalty units for a body corporate through section 26 of the *Tobacco Amendment (Protection of Children) Act 2009 (Vic)*. The Parliament then later quadrupled the penalties with section 10 the *Tobacco Amendment Act 2014 (Vic)*.

ITA understands that prosecuting authorities rarely, if at all, use section 11A of the *Tobacco Act 1987 (Vic)* ('**Section 11A**') relying rather on provisions in the *Customs Act 1901 (Cth)* (the '**Customs Act**') and the *Excise Act 1901 (Cth)* (the '**Excise Act**') to pursue convictions.

As such, we would recommend Section 11A be amended so that:

- it clearly applies to any person who possesses or controls illegal tobacco products;

- it does not rely on a business 'selling tobacco';
- its terminology better aligns with the Customs Act; and
- the evidentiary burden upon the accused is increased.

WA

WA has a specific provision addressing illicit tobacco. Section 105 of the Tobacco Products Control Act 2006 provides:

105. Licence holders not to process certain tobacco products

The holder of a licence must not, without reasonable excuse, be in possession or control of any tobacco products that the licence holder knows or ought reasonably to know –

- (a) are prohibited goods as defined in the Customs Act 1901 of the Commonwealth; or
- (b) are excisable goods as defined in the Excise Act 1901 of the Commonwealth upon which excise duty has not been paid.

This provision is similar in design to section 11A of Victoria's Tobacco Act 1987 (Vic).

Importantly, just like the Victorian provision, the WA provision only applies to licenced tobacco retailers, wholesalers and indirect sellers of tobacco products only. Accordingly, the WA provision does not apply to:

- consumers; or
- persons in possession of illicit tobacco who do not sell the illicit tobacco.

Otherwise, the WA and VIC provisions differ in that:

- the WA provision uses the term 'prohibited goods' whereas VIC uses 'smuggled goods' or 'prohibited imports' – 'prohibited goods' is a term specifically defined in section 4 of the Customs Act 1901 (Cth);
- the penalty in WA is smaller – the WA penalties range from \$10,000 to \$20,000 for individuals and from \$40,000 to \$80,000 for corporations, whereas the VIC provisions impose a \$36,401 penalty on individuals and a \$182,004 penalty on corporations.

NSW

The NSW Government recently completed a statutory review on its tobacco-specific legislation. Part of the Report on the Statutory Review addressed 'illegal tobacco' for the

purposes of NSW's tobacco-specific legislation; i.e. incorrectly packaged, without health warnings or using prohibited words.

According to the Report, the Ministry of Health had received a number of reports concerning a perceived increase of such illegal tobacco. The Report noted that health inspectors have broad inspection powers and are able to take photos and samples of illegal tobacco products, but are currently unable to seize quantities of illegal tobacco.

The Report recommended strengthening the tobacco-specific legislation to deter the distribution of illegal tobacco. Probably owing to retailers claiming illegal tobacco in their possession is not for sale, the Report proposed amendments to deem quantities of illegal tobacco to be for retail sale. The Report also proposed extending seizure powers to where it was believed on reasonable grounds that the tobacco was for unlawful packaging.

In October 2015, the Health Minister, the Hon Jillian Skinner MP, made amendments to The Public Health (Tobacco) Act. Sections 6 and 7 of the Act make it illegal to sell tobacco in a product that is not in the original packaging or that does not have appropriate health warnings.

"Such tobacco is often known as "illegal tobacco". The availability of "illegal tobacco" in New South Wales is a community concern. Illegal tobacco is harmful to the health of the user as it may contain other impurities not normally found in legal tobacco products. The lower cost of illegal tobacco makes it more appealing and affordable to young people and lower income groups and encourages the uptake of smoking by these groups. Further, tobacco products without a health warning mean that people are not warned of the dangers of smoking."⁸

The bill amends sections 6 and 7 to create a rebuttable presumption that prescribed quantities of tobacco are for sale. Further, a new section 8A give inspectors a power to seize illegal tobacco found in retail tobacco shops over the prescribed quantities.

CONCLUSION

ITA submits that most tobacco retailers want to do the right thing. Often issues of non-compliance can be due to a lack of clarity, lack of understanding of the relevant legislation or language barriers.

Education and compliance through enforcement would have the most positive impact on ensuring tobacco retailers comply with relevant health policy.

Should QLD choose to introduce a tobacco retailer licensing scheme, ITA submits that a similar scheme to the NSW TRN scheme would be optimal.

However, any such measure which proposes unjustified and burdensome red tape regulation on retailers will necessarily have a negative impact on small businesses.

⁸ Hansard, NSW Legislative Council, Wednesday 21 October 2015, Health Legislation Amendment Bill 2015

This would be anti-competitive and will result in the closure of many small businesses in the community. Instead of having the effect of restricting access to tobacco, these proposed changes would simply create a channel shift of where tobacco is purchased, most likely to larger retailers and/or the illicit market. It may also have the unintended consequence of forcing retailers to sell tobacco illegally.

As mentioned above, illicit trade represents an opportunity for government.

By clamping down on illicit trade, and reducing the illegal market, the government would be taking a stance against the supply of tobacco products to minors – those criminals engaged in selling illicit tobacco do not comply with legislation, and clearly would not have concerns selling to children.

Illicit trade also results in lost government revenue, undermines public health initiatives to curb tobacco consumption and is often linked to organised crime.

Before any further restrictive measures are taken in relation to legal tobacco products, the government should instead target available resources towards stemming the growth of illegal, unregulated tobacco products.

ITA recommends the Government consider an approach targeting the growth of illicit trade (which is unaccountable for its products and actions), not one which further restricts and penalises already accountable and legitimate retailers.

ENDS