

19 February 2016

A Healthy Tasmania
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RE: "A HEALTHY TASMANIA" CONSULTATION

(Proposal to raise the legal smoking age to either 21 or 25)

Imperial Tobacco Australia Limited ("ITA") welcomes the opportunity to participate in the Tasmanian Government's consultation in respect of the "Healthy Tasmania Five Year Strategic Plan".

Imperial Tobacco Australia 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.

We have 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 and make 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 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 children - those under the age of 18.

We note that the Strategic Plan includes smoking as a priority area, and that the consultation draft proposes raising the minimum legal smoking age to either 21 or 25. This submission is primarily in respect of this proposal.

Tobacco Regulation

Tobacco has been singled out for a plethora of regulation specifically designed to place limits on the free choice of informed adult consumers so as to approximate illegality. Such has been the rush of regulators to claim their stake in restricting access to the product that policies have stumbled over one another to achieve blatantly perverse outcomes.

The legion of regulators who would dictate to Australian adults what they can consume, how and where they can consume it and, indeed, where and how they can obtain a legal product generally justify their actions on the basis of “protecting” individuals.

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 United States Food and Drug Administration, which has adopted an approach more focused on “harm reduction” and acknowledges that informed adults may want to continue to use tobacco products.

Furthermore, demand is not affected by a reduction in one channel of supply. Consumers simply search either for a new method of supply or, more likely, avail themselves of an existing alternative.

The achievement of excess tobacco regulation has been to remove the free choice of adult consumers and to increase the demand for illicit tobacco.

Youth smoking

ITA acknowledges that a focus for the Tasmanian Government is on reducing smoking amongst underage Tasmanians. We support this focus and would be willing to work with the Tasmanian Government to help address the issue of underage Tasmanian’s access to tobacco products. We do not want children to smoke or to use tobacco products. We support penalties for retailers who sell tobacco products to children.

Youth smoking is on the decline in Australia. A paper published recently in the journal of Public Health, Research and Practice reports that “*Australian adolescent smoking is at a record low, with only 3.4% of people aged 12-17 smoking daily.*”¹

The report further indicates that “*Australia has seen consistent and marked reductions in both adolescent (12-17 years) and young adult (aged 18-24) smoking. Between 2001 and 2013, the proportion of young adults reporting they were ‘never smokers’ increased by almost 20 percentage points, from 58% to 77%.*”²

If consumers are unable to access tobacco legally, they are likely to turn to other avenues. The accessibility of illicit tobacco is already a serious problem in Australia and has been linked to organised crime – these groups have no concerns selling their product to children (or adults, as the case may be). Furthermore, the price of tobacco on the illicit market is often 30-75% cheaper than legal tobacco products.

Tasmanian tobacco legislation

Tasmania has taken the legislative lead nationally on measures to restrict smoking by underage persons.

The current legislative framework in Tasmania is both detailed and thorough in respect to attempting to prevent youth smoking. The Public Health Act 1997 provides that it is an offence for retailers to “permit the sale, loan, gift or supply of any tobacco product to, or for the use of, any child” (Part 4, s 64 (2)).

Likewise, it is also an offence for any person to “sell, lend, give or supply, or offer to sell, lend give or supply any tobacco product to, or for the use of, any child” (Part 4, s 64 (1)).

Furthermore, in Tasmania it is also an offence for a child to smoke, use a tobacco product, or possess a tobacco product (Part 4, s 63 (1)). Interestingly, though it is an offence, there is no penalty.

ITA submits that the current legislative framework to prevent under-age supply is adequately sufficient, with all avenues (with the exception of illicit) dealt with.

The Tasmanian Parliament has legislated a regime that should seriously and effectively curtail access to tobacco by underage Tasmanians. The structure is both

¹ Anita Dessaix, Audrey Maag, Jeanie McKenzie and David Currow, “Factors influencing reductions in smoking among Australian adolescents” in Public Health, Research & Practice, Vol 26 (1), January 2016 p 1

² *ibid*

sound and robust. So why isn't it working? The answer – and our submission – lies with enforcement of existing provisions.

We respectfully submit that **penalties must be enforced to be effective, otherwise even the best legislative framework will be undermined.**

Preventing sales to minors

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, whilst preventing children from using tobacco products.

We submit that stopping children from smoking is achieved through education, monitoring and enforcement of the law, an approach supported by the authors of the Public Health, Research and Practice youth smoking study.³ Indeed, according to the authors, smoke-free environment policies as well as adult-targeted mass media campaigns have been found to be successful in reducing smoking by adolescents.⁴

In Tasmania, Part 4, Division 1 of the Public Health Act 1997 deals with the issue of under-age smoking. Whilst we submit that this framework is adequate in dealing with this issue, we make the following recommendations:

- Ensure that current retailer penalties for supply to those under the age of 18 are enforced.

Furthermore, the Government could consider introducing a “3 strikes” policy: 50 penalty points for the first offence; 100 penalty units for the second offence; suspension of the retailer licence for a third offence, for example.

- Enforce current penalties to those legal-aged consumers (persons) who purchase for, and supply to, minors.

In Tasmania, penalty provisions extend beyond retailers to any person who provides tobacco products to those under 18. This is not the case in all States. However, we are unaware of these penalties having been enforced,

³ Ibid p 3

⁴ Ibid, p 2

and submit that this appears to be the logical starting point in terms of an action plan to discourage youth smoking.

The Government could also consider a “3 strikes policy” in relation to non-retailers, for instance, a mandated education course on the third offence (or even in conjunction with a fine upon the first offence).

- Penalise those under-18 who are found smoking, or in possession of tobacco products.

Tasmania is one of the few states where it is an offence for children to smoke or possess a tobacco product (Part 4, s 63). However, there is no penalty attached to the offence. We submit that, since it is considered an offence, a (nominal) penalty may be attached.

Alternatively, the Government may consider enforcing seizure powers for nominated officers (police and/or health inspectors) (Part 4, s 66). The Act does provide, however, that in exercising this power, an officer may not search a child’s clothing or possessions. By comparison, NSW does not have such an exemption [in NSW, s 26 of the Public Health (Tobacco) Act 2008 provides that a police officer may seize tobacco products in the possession of a person in a public place on reasonable grounds that the person is under the age of 18].

Furthermore, this particular section could also be utilised with respect to requiring under-age Tasmanian’s who have been caught smoking to undergo an education course.

- Increase the value of penalties attached to offences.

The current penalty for a person (or retailer) providing a tobacco product to a child is not exceeding 50 penalty units for a first offence (\$7,700) or 100 penalty units for a subsequent offence (\$15,400).

By comparison, in NSW it is an \$11,000 penalty for a first offence (100 penalty units where a penalty unit is \$110). In Victoria, a person who sells to a child could face a penalty of \$18,120 for a first offence (120 penalty units where a penalty unit is \$151), whilst a body corporate faces penalties of up to \$90,600 (600 penalty units).

In Victoria, a person also must not purchase **for** a minor, in which case the fine is \$3020, whilst in South Australia, it is an offence if a tobacco product is

sold or supplied to a child and the maximum penalty is \$5,000. Tasmanian penalties are already higher than these cases.

- The Government could choose to introduce Tobacco Retailer Licensing Wholesaler Requirements.

The NSW Government recently passed legislative amendments which require that a wholesaler obtain the Tobacco Retailer Notification from a retailer before supplying tobacco products to a retailer.

The Tasmanian Government could choose to adopt such a requirement in order to provide an added safety check to ensure that tobacco products are only being supplied to legitimate tobacco retailers.

Practicality of raising the minimum legal smoking age to either 21 or 25

This proposal carries far greater consequence – it seeks to undermine a standardised age of majority. Are we to change the definition of an adult?

As an 18 year old, Tasmanians are considered sufficiently responsible to vote, consume alcohol, gamble, get married, or go to war. Yet the Tasmanian Government are proposing that adults are not sufficiently responsible to consume tobacco, a legal product.

Alcohol and gambling are also sufficiently contentious issues, and yet, curiously, tobacco has been targeted to a far greater extent than other lifestyle choices – with no evidence to suggest that the regulation has been any more effective in curbing choices than against its peers.

Popular belief in this country holds that a sizeable problem with alcohol infests our society. The belief is possibly based on the proliferation of products available to the market, the vast array of outlets available in which to obtain and consume them, the all-pervasive cultural aspect of alcohol consumption and the control of the vast trade by the supermarket duopoly who's every action is viewed negatively. It may equally be based on the fact that advertising is not banned, branding on packaging remains pervasive and display is largely free of restriction. That is, the proliferation of tobacco regulation has certainly not been extended to the alcoholic beverages sector.

In defiance of conventional wisdom, then, is evidence of decreasing consumption of alcohol in Australia. Early this year, the Australian Bureau of Statistics (ABS) released data showing that consumption rates are now lower than at any time in the past 50 years on a per capita basis. At 2.1 standard drinks per person per day, we're now drinking less than Australians were in the early 1960s.

What's more, Australia does not rate highly as against international peers according to the World Health Organisation. Our incidence of heavy episodic drinking is lower than nations across all continents and fell within the category of "least risky drinking patterns." Our total consumption per person falls below that of the vast majority of Europe.

A similar pattern occurs in respect of tobacco consumption which has been on a long term downward trend in Australia for decades. In the face of a regulatory onslaught, the long term trend has scarcely deviated from its course. Even the dramatic regulatory impost of stripping away all on-pack branding has, in its first two years, singularly failed to redirect the long term trend in overall consumption.

The comparison between alcohol and tobacco is most telling. Consumption of both has been on a long term decline – a decline which continues in the absence of any show of abatement.

Statistics, properly tortured, will confess to anything. The simple and logical truth underlying the decline in both products has little to do with regulatory largesse – and more to do with the highly developed understanding of Australian consumers. They have recognised the implications – financial, societal and health – of consumption of both products and have chosen to restrict that use. Moreover, the relatively lax regulation of alcoholic beverages shows that adult consumers have made that choice of their own volition in the absence of government requirement. The absence of deviation from trend in respect of tobacco consumption must lead any logical, rational observer to conclude that similar choices are being made by tobacco consumers.

Tobacco trends are not driven by excess regulations – they would be happening in their absence. Adult Australians are demonstrating responsibility with their free choice in the absence of alcohol regulations, yet governments perversely restrict tobacco consumers from exercising their own free choice.

The dramatic difference between the products lies at the regulatory level; tobacco has been the subject of much political posturing and personal aggrandisement whilst alcohol has escaped largely unscathed.

Both products can lead to consequences for consumers; a fact that, for tobacco in particular, is widely understood by users of legal product who exercise free choice.

Gambling has attracted the attention of regulators in Australia over several decades. Regulation has severely restricted the locations in which gambling activity can occur and the license holder under whose authority it can operate. Multinational casino groups have largely been the beneficiary of such regulation.

Such restrictive practice has been a contributor to the veritable explosion of online betting activity in Australia. An attempt to legislate against that natural market consequence has resulted in a shift to the illegal offshore gambling market. The Australian Productivity Commission Report on Gambling noted that by 2010, \$2 out of every \$3 spent by Australians gambling on the internet was with illegal offshore providers. As is the case in any illegal market, the Report concluded that many of the illegal operators have poor harm minimisation features and unscrupulous business practices.

Over-regulation in gambling has created a classic “balloon” scenario – severe restrictions on consumers in one area has simply pushed them to another. An almost identical scenario has played out in tobacco. Purchase of this legal product by adult consumers has become, via excessive regulation, so difficult and expensive that turning to the illicit market has become both acceptable and affordable.

External Jurisdictions

We are not alone in respect of our workability and practicality concerns. Tasmania is not the first jurisdiction to consider extending age-based prohibition beyond the age of majority. It has been considered both overseas and in Australia.

In 2009, the South Australian Parliament rejected a similar proposal based primarily on practical concerns; a significant increase in compliance burden placed upon small business and an increase in the illegal trade of tobacco.

Looking overseas, the Singapore Minister for Health rejected another similar proposal based on concerns of implementing and enforcing a ban. The Minister quite specifically pointed at the ease of circumvention of the measure as a reason for rejecting it.

Whilst the US State of Hawaii has recently introduced an increase to the legal smoking age, it must be noted that this move brought into alignment the age of majority in that State. Moreover, the policy was introduced in the absence of any hard evidence; relying instead on modelling. Tasmania ought, at very least, await significant evidence before proceeding with a measure that will have serious adverse consequences.

Restricting Supply to Reduce Demand

The central tenet of such a proposal is that supply will be restricted which will – contrary to the fundamental principles of economics – result in contraction in demand.

The concept that curtailing supply automatically cancels demand is both logically and factually absurd. Prohibition of alcohol in the United States (and in Russia and Scandinavia) 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.

The President of the Australian Medical Association, Professor Brian Owler, publicly noted in reaction to the Tasmanian proposal that prohibition does not work, saying "prohibition has not been shown to be particularly effective as many young people under 18 still have access (to tobacco)".⁵ It was also suggested that better enforcing the current legal smoking age is required.

[Lawful] Purchase

Underage smokers presumably have three avenues of supply: direct from retailers; from a third party who purchases the tobacco products legally and then supplies to the underage user; or from the illicit tobacco market.

Retailers

ITA believes that most tobacco retailers want to do the right thing. Often issues of non-compliance with regulations 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.

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, to assist ensuring that tobacco sales are only to adults.

Furthermore, by placing significant restrictions on legal retailers, illicit suppliers will benefit since the illegal supplies are already available and will quickly fill any gaps created. That means a supply chain with no product control, no compliance with packaging requirements and no qualms in supplying to underage consumers.

Third party supply

As mentioned above, Tasmania's legal framework already provides that a person "must not sell, lend, give or supply or offer to sell, lend, give or supply any tobacco product to, or for the use of, any child".

⁵ <http://www.smh.com.au/national/doctors-say-raising-raising-legal-age-for-smoking-wont-work-20151221-glsocy.html>

Enforcement of these penalty provisions must occur, otherwise it defeats the purpose of the provision and undermines tobacco control regulation. If these existing provisions are not enforced, it would raise serious doubts about the need for, and practicality of, further tobacco regulation.

Illicit tobacco market

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.”⁶

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.⁷ 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.

That data is provided by KPMG LLP in a report commissioned by ITA and other tobacco manufacturers in Australia. Allegations of bias in that report are made by those who seek to downplay the existence of illicit tobacco. However, the KPMG report is considered by the Organisation for Economic Cooperation and Development (OECD) to be the “most authoritative assessment of the level of counterfeit and contraband cigarettes”.⁸

KPMH UK has significant experience in the measurement of illicit tobacco consumption across a number of markets, including Europe, Latin and North America, Asia and the Middle East, as well as Australia.

Tasmania is not exempt from illicit tobacco. The illegal supplies are already available and will quickly fill the gap. That means a supply chain with no product control, no compliance with packaging requirements and no qualms in supplying to underage consumers.

⁶ <http://www.who.int/campaigns/no-tobacco-day/2015/event/en/>

⁷ KPMG “Illicit Tobacco in Australia” 2014 Full Year Report, 30 March 2015

⁸ OECD Taskforce of Charting Illicit Trade, 2013

Affecting Tasmanian Business

There are approximately 970 tobacco retailers in Tasmania, all of whom will be affected by this proposal.

ITA believes that the Government must take evidence from Tasmanian retailers to fully understand the implications for Tasmanian business and Tasmanian jobs. Tobacco sales underpin many of those businesses; without the ability to sell tobacco into the future, many of those businesses will become marginal, at best.

Tasmanian retailers know their business is valued on future profit – which this law would devastate immediately.

Any contention that time is allowed for diversification utterly fails to comprehend the percentage of turnover and profitability that the product accounts for.

Tourism and International Students

China is the biggest growth market for the Tasmanian tourism industry⁹ and the Government's proposal to raise the legal smoking age raises significant practical issues in this respect.

How many Chinese tour groups will excise Tasmania from their list of destinations when it will be illegal for under 25s to carry tobacco products, for instance?

How many Chinese university students will choose to study at a different Australian university when they find out they are no longer able to smoke? NSW and Victorian Health Ministers, for instance, have publicly indicated they do not plan to raise the legal smoking age.¹⁰

Or if the Tasmanian Government were to exempt tourists from the application of this law, how is the law then practically and simply enforced?

Alternative Supply Chains

Purchase from Interstate

Such restriction as the government proposes would create market distortion as consumers will simply choose an alternate location to make their purchases.

⁹ <http://www.abc.net.au/news/2015-11-07/importance-of-china-tourism-recognised-at-tasmanian-awards/6921078>

¹⁰ <http://www.smh.com.au/national/doctors-say-raising-raising-legal-age-for-smoking-wont-work-20151221-glsocy.html>

In recent decades, Australian Governments have moved to harmonise tobacco control laws. The most obvious example was the move by the Commonwealth to align taxation rates to minimise flow of tobacco products across state borders, most notably Queensland into New South Wales. The fact that such a move was considered necessary underscores the ability of tobacco products to freely move across borders.

This proposal moves in precisely the opposite direction and, absurdly, does so at a time when interstate and, indeed, international trade has become dramatically simpler with the rise of online sale and purchase.

The Australian Constitution provides for free trade between states as a clear and unequivocal right in Australia. Add to that right the existence of the internet providing the capacity for retail supply without geographical restriction and the proposal falls flat in an instant.

In short, Tasmanian consumers will purchase from interstate defeating the purpose of the proposal whilst unfairly punishing lawful, tax paying, Tasmanian businesses which employ Tasmanians.

Illicit Tobacco Market

Noting that the illegal trade in tobacco was identified by both South Australia and Singapore as key reasons for rejecting the proposal in those jurisdictions, further consideration of the subject is warranted.

As intimated earlier, demand will not be affected by a reduction in one channel of supply. Consumers search either for a new method of supply or, more likely, avail themselves of an existing alternative.

Ignoring the existence of the illicit trade in tobacco has become solely the realm of anti-tobacco zealots who have convinced themselves to ignore reality.

Indeed, Australian policy experts have confirmed that illicit tobacco is a serious problem in Australia.

In Senate Estimates earlier this 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.¹¹

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.¹²

By shifting demand from legal to already existing illicit channels, Tasmania seriously risks embedding organised crime in the state. Moreover, an inability to purchase or practically acquire tobacco products via legal channels will normalise illicit trade in the state which will in turn circumvent the simplest method to deter underage smoking. It would be absurd at best to believe that criminal gangs are deterred by the prospect of supplying product to underage consumers.

It is an unfortunate fact that the regularly evolving nature of illicit supply has proven the illicit tobacco trade to be a highly flexible and responsive business phenomenon. The supply of illicit tobacco routinely evolves to take advantage of perceived “loopholes”, or in reflexive response to government activity.

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

- **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

¹¹ <https://www.crimecommission.gov.au/sites/default/files/FINAL-ACC-OCA2015-180515.pdf>

¹² <https://www.crimecommission.gov.au/sites/default/files/FINAL-ACC-OCA2015-180515.pdf>

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*.

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.

TASMANIA

The Tasmanian legislation does not prohibit the sale or possession of illicit tobacco. The TAS provisions may only apply to illicit tobacco where:

- it involves the supply of cigarettes otherwise than in a package;
- it is not packed or labelled in accordance with the Commonwealth legislation;
- it is confectionery or fruit flavoured or scented.

VICTORIA

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, Section 11A should 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'.

According to the Report, the Ministry of Health had received a number of reports concerning an 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 unlawful.

In October 2015, during the passing of amendments, the Hon Sarah Mitchell, Parliamentary Secretary, stated that *"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."*¹³

CONCLUSION

The Government must seriously, and genuinely, consider the practicability and unintended consequences of the proposal to raise the legal smoking age. ITA contends this measure is simply not practical, and raises implementation issues regarding:

- alternate sources of supply, both legal and illegal
- the costs to Tasmanian businesses, which cannot be justified based on the simple fact that this measure is not practical

¹³ Hansard, NSW Legislative Council, Wednesday 21 October 2015, Health Legislation Amendment Bill 2015

- workability issues regarding tourists and international university students

ITA submits that the existing legislative framework in Tasmania adequately deals with the concerns the Government has as raised in the consultation draft. However, penalties must be enforced for the legislation to be effective and to generate results.

Furthermore, the illicit tobacco trade represents an opportunity for the Tasmanian Government. Illicit trade also results in lost government revenue, undermines public health initiatives to curb tobacco consumption and is often linked to organised crime.

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.

The Government should 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.

Imperial Tobacco Australian supports sensible, rational and practical regulation of tobacco products. This proposal is none of these things. It represents an ideological objective to restrict the free choice of Tasmanians that is unnecessary, impractical and potentially even counterproductive.

The demand for tobacco products is better met by well governed, tax-paying and responsible businesses that will work in partnership with stakeholders, rather than criminals who operate in the illicit market.

ENDS