



Public Health Association
AUSTRALIA

Submission on the Public Health (Tobacco and Other Products) Bill 2023

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Preamble

The Public Health Association of Australia

The Public Health Association of Australia (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia.

The PHAA works to ensure that the public's health is improved through sustained and determined efforts of the Board, the National Office, the State and Territory Branches, the Special Interest Groups and members.

The efforts of the PHAA are enhanced by our vision for a healthy Australia and by engaging with like-minded stakeholders in order to build coalitions of interest that influence public opinion, the media, political parties and governments.

Health is a human right, a vital resource for everyday life, and key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

All members of the Association are committed to better health outcomes based on these principles.

Vision for a healthy population

A healthy region, a healthy nation, healthy people: living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health for all.

The reduction of social and health inequities should be an over-arching goal of national policy and recognised as a key measure of our progress as a society. All public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

Mission for the Public Health Association of Australia

As the leading national peak body for public health representation and advocacy, to drive better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health.



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Introduction

PHAA welcomes the opportunity to provide input to this very important consultation.¹

PHAA strongly supports the essential modernisation of the ageing suite of Commonwealth tobacco control legislation. This review responds to the announcement of policy decisions by the Government in November 2022, but policy work predates that announcement following the earlier expiry of the *2012-18 National Tobacco Strategy*,² and the sun-setting after 10 years of specific 2012 legislative provisions.³

The work done by the Department over the past few years, culminating in the Consultation Paper and draft legislation, has resulted in a comprehensive review and proposed modernisation of the legislation, and is to be commended. PHAA looks forward to supporting the Government through the process of enacting and implementing these reforms.

We also note that the Department's review work has to a considerable extent been expanded by the announcements of new high-level policy directions by Health Minister Butler in May this year.⁴ The Government has committed to a range of measures regarding tobacco control and a related vaping response, together with new revenue to fund these initiatives, which will go a long way to restoring Australia's reputation as a world leader in limiting the disastrous impact of tobacco and other nicotine-based harmful products. This sets the political and policy climate in which the Department's work on modernising the legislation will take place.

It is essential that the current legislative reform exercise be understood as one component of the integrated *National Tobacco Strategy 2023-30 (NTS)*,⁵ released in May 2023 and agreed by all Australian governments. This Strategy sets the vision for reducing, ideally eliminating, the harm caused by tobacco and associated products. The elements of this Strategy, including strong regulation, workplace safety measures, cessation support, information and behaviour change campaigns, revenue measures, focuses on priority populations including Aboriginal and Torres Strait Islander people, and the protection of policy-making from commercial interference, are all interlocking and mutually supporting. The NTS should remain a guiding framework for policy work through the current decade. The NTS is also aligned with relevant parts of the *National Preventive Health Strategy 2021*.⁶

PHAA works within a network of public health organisations which consult together on issues such as this legislative reform. Australia is fortunate to have strength and depth in the advice available to government from the non-government sector and from our research and academic institutions. PHAA has worked closely with Cancer Council Australia on these issues, and we are aware that Cancer Council Australia is developing a very detailed submission to you on this consultation. The expertise within Cancer Council, supported by the sector and research network with which it consults, is a major asset to the Department in policy development, and we urge the Department to consider Cancer Council recommendations very positively. We commend the Department on maintaining open channels to receive advice from these trusted sources.

We also welcome the Department's recognition of the obligations under the WHO Framework Convention on Tobacco Control.⁷ For the strongest of population health reasons, governments and their agencies must remain vigilant for any influence on policy-making of the tobacco/nicotine industries, in any form. Such influence efforts are to be anticipated during the process of preparing this Bill and progressing it through Parliament.

Overview of the reforms

Streamlining tobacco-related laws, regulations, instruments, and court decisions

Question: *Is the legislation package appropriate and adapted to consolidate these instruments?*

The proposed consolidation legislation appears to be very comprehensive and appropriate. It is welcome that the regulatory legislation will now be in one clear, modern piece of legislation that will assist all actors to deal with the law and reduce any room for confusion about, or evasion of, Australia's tobacco control policy.

We welcome that the title of the new statute will include the words "Public health", which correctly frames this law as being primarily concerned with health, not commerce or any other field. The human right to health is recognised under international law⁸ and provides a powerful basis for resisting industry litigation against health-promoting legislation, which this Bill most certainly is.

Chapter 1: Introduction

Definitions and Interpretation provisions

Question: *Do you have any feedback on the definitions or interpretation provisions in the package?*

The inclusion in the Bill of a very broad definition of 'tobacco product' is appropriate. The tobacco/nicotine industry has been attempting in recent decades to invent new product lines to maintain its sales of addictive nicotine-based products, as has been clearly seen with the rise of e-cigarette products and other novel products. No doubt the industry will continue to experiment for the purpose of evading any specific terminology in the regulatory systems of Australia and other nations. It is important that the legislative scheme have flexibility to stay ahead of such industry practices and for governments to be able to respond promptly, without time-consuming new legislative measures being needed every few years.

Commencement and Application provisions

Question: *Do you have any feedback on the commencement provisions and anticipated transition timeframes?*

The proposals appear to be appropriate. The sooner the new legislative regime is operative, the better.

Operation of State and Territory Law

Many of the more practical legislative powers in our national tobacco control matrix are at state/territory level, and nothing in the new Commonwealth scheme should in any way detract from those legislative systems. In particular, innovation and leadership by any one or more jurisdictions should not be in any way cast into legal doubt by the revised Commonwealth law. Parliament should not leave room for any argument that because the framing of the Commonwealth law does not specifically prohibit any conduct, or appears in the negative to permit specific conduct simply by not addressing it, that any provision of state law is in any way weakened or overruled. It would be appropriate to ensure that Clause 7 cannot be read as in any way limiting the impact of state/territory law because the Commonwealth legislation appears to be more permissive on a specific subject matter. Sections 6(3) and 7 of the present TAP Act are instructive on this issue.⁹

Chapter 2: Advertising and Sponsorship Regulation-updated to additionally capture e-cigarettes

Question: Do you have any feedback on the proposed advertising and sponsorship provisions in Chapter 2 of the Bill?

The new legislation appears to comprehensively consolidate existing law, while also bringing the regulation of e-cigarette advertisement into the scheme. This reform is appropriate and welcome.

Question: Are the proposed advertising and sponsorship provisions likely to address emerging forms of media through which tobacco or e-cigarettes will be promoted? Are there other types of promotion that need to be considered?

Definition of 'tobacco advertisement'

Noting the capacity of the industry to continue to innovate to evade legal requirements, the provision for the responsible minister to prescribe by regulation any novel marketing technique as a 'tobacco advertisement' for the purposes of the law is also appropriate and welcome.

Social media influencers

We note the policy need to stay ahead of modern marketing techniques in the form of social media influencing, and on this point clauses 18(8)(c) and 41(8)(c) should be amended to ensure that that 'influencers' who have in fact taken payment for acts which are clearly promotion to a wide audience cannot claim that their obvious act of 'publication' was only to a 'personal' audience.

Advertising disguised as political donations and campaigning

We note with concern the needless inclusion of an 'exemption' (in clauses 39 and 66 of the Bill) against the relevant advertising offences that provide that a payment which has the character of being for tobacco marketing or advertising might avoid legislative control if it is claimed to also have the character of being a gift to political parties, or expenditure made for the purposes of influencing an election. The proposal is perverse. If a tobacco industry entity is promoting, marketing or advertising its products through such means, it should be prohibited from doing so. The idea that industry spending in the form of political donations or election-related marketing would be useable as a form of advertising is very odd, but in any case attempts to carry advertising messages to potential 'consumers' through such means should not be permitted.

We also note that the Bill includes provisions (in clauses 25 and 48) aimed at pre-empting any argument that the Bill's provisions inhibit constitutionally protected communications about government and political matters relevant to the community's choice of parliamentary representatives at elections. Such 'constitutionally defensive' clauses are standard in modern legislation which affects public communication. However in this case, the risk of a constitutional limitation on legislative power being found as a result of litigation seems highly improbable in the case of conduct which is in fact intended as a form of product advertising. There is therefore no need to 'protect' the validity (or the application to particular cases) of the offence provisions of the Bill from constitutional challenge on such a basis by including the proposed exemption to the offence.

These offence exemptions should therefore be omitted from the Bill. At a minimum, the proposed clauses should be adjusted to ensure that any component of communications which is in fact a form of product advertising, not political discourse, cannot take advantage of the exemptions intended in the Bill.

On the wider issue of industry donations to political parties or candidates, PHAA takes the view that donations from tobacco industry entities should be entirely prohibited, but we note that the proper forum to decide such legislative policy should be through the provisions of the Commonwealth Electoral Act, and are revised regularly through the processes of Parliament's Joint Standing Committee on Electoral Matters. Such a process is unfolding now, and a live debate about banning donations from tobacco and several other unhealthy

business sectors is ongoing.¹⁰ The project to create the *Public Health (Tobacco and Other Products) Act* should not cut across that policy debate by presenting to Parliament the perverse offence exemption clause currently in the draft Bill.

'Public interest' exemption

The 'public interest' exemptions in clauses 26(b) and 49(b) are also too loosely worded as currently stated, given that the term 'public interest' is open to broad interpretation. If these exemptions remain in the Bill then more detailed identification of the kinds of 'public interest' intended to be picked up should be specifically stated, such as for example public health-related research, or public information campaigns with a health-promoting focus.

Journalism

The clauses relating to 'journalism' as an exemption from advertising controls (clauses 27 and 50) should also be tightened, given the propensity of marketing campaigns to pay media organisations and publications as a concealed channel for conveying marketing messages to potential consumers. These provisions could include tighter definitions of real journalism, as well as ensure that any communication which is done for payment, even where disguised as a form of journalism, may not avail itself of these exemptions if charged with a tobacco advertising offence.

Corporate brands

The clauses (38 and 65) relating to sponsorships which promote the brand of a corporation should also be tightened, to ensure that promotion exercises that are not related to specific products, but which nonetheless by positively promoting corporate identities or brands have the effect of promoting tobacco or other products uptake or sales, are captured by the legislation.

Online product selling

Clauses 31 and 57 contemplate the continued sale of tobacco products online. Online sales allow two forms of evasion of the scheme of the legislation: sales to underage buyers, and conveying of advertising and marketing messages at online point-of-sale sites. It is pragmatically difficult to prevent either of these mischiefs. For that reason, consideration should be given to a clear policy decision being taken, and applied through the Bill, to ban all online sales of tobacco products.

Pre-empting future advertising innovations

Mechanisms for online promotion will continue to mutate as industries seek to evade whatever provisions are included in legislation. A power for the responsible minister to make regulations to define novel marketing techniques as constituting 'advertising' for the purposes of the Act will assist in securing the policy goals of the legislation without the need to enact detailed legislative amendments in response to every evolving technique of achieving the same advertising by novel means.

Chapter 3: Product Regulation and Standardisation

PHAA is aware of detailed comments being prepared for the Department by Cancer Council Australia in relation to this Chapter, and we support their proposals.

We particularly raise the issue of penalties for breach of the detailed regulatory provisions of the new Act. The actors in this space are very large corporations, and penalties to control their product design choices must accordingly be very large if they are to have the deterrent and punishment impact needed to support the policy goals of this Bill. Inadequate penalties can simply be absorbed as a business cost if they are less than the revenue value of breaching the law.

Chapter 4: Permanent bans on certain regulated tobacco items

Question: Do you have any feedback on the permanent ban on certain regulated tobacco items provisions set out in Chapter 4?

The harms associated with commercial tobacco products have been well established for more than 70 years, and our understanding of tobacco harms has continued to grow. Australia banned chewing tobacco and snuffs intended for oral use over 30 years ago, due to their harmful properties, via a notice under trade practices law. The Bill continues and reinforces this policy, giving it clearer legislative form. This is welcome.

This section of the Bill should also include provisions to facilitate other similar bans on related novel products, to avoid evasion of the policy goal of this part of the statute.

Chapter 5: Reporting and information disclosure

Question: Do you have any feedback on the reporting requirements set out in Chapter 5 and the Regulations?

The ongoing history of tobacco products has been characterised by a lack of industrial and commercial transparency that is very different to regimes governing most commercial food and other consumed products. This is extraordinary given the scale of harms directly caused by tobacco products. These classes of products should be subject to a robust transparency regime regarding the nature of the products, how they are manufactured, marketed, distributed and consumed.

The proven propensity of tobacco industry businesses and spokespersons to mislead public officials and institutions over many decades further suggests that such transparency regimes should be very strong in their enforcement. This is not an industry where voluntary 'codes of conduct' would have the slightest impact.

For these reasons the consolidated and new provisions in the Bill are welcome.

We note that the proposed regime covers only manufacturers and importers. It should also cover wholesalers, distributors and retailers, so that the whole of the tobacco supply chain can be better understood.

We also welcome the proposals to report on marketing and promotion expenditures.

These provisions should be the subject of a formal review after, say, 3-4 years of operation, to identify what parts of the reporting chain are not meeting the policy goals of the legislation, with a view to driving continuous improvements. It should be assumed that the industry will seek to undermine and minimise the effectiveness of these transparency proposals.

Chapter 6: Compliance and enforcement

Question: Do you have any feedback on the proposed compliance and enforcement provisions set out in Chapter 6?

The proposed consolidated and simplified penalty regime is welcome.

As noted above, the key actors in this space are very large corporations, and penalties to control their product design choices must accordingly be very large if they are to have the deterrent impact sufficient to support the policies of the Bill. Inadequate penalties can simply be absorbed as a business cost if they are less than the revenue value of breaching the law.

We have seen specific proposals drafted by Cancer Council Australia relating to Court order powers, setting of penalty minimums, powers to disqualify persons from managing corporations upon breaches of the Act, and corrective advertising, proposing to strengthen this section of the Bill, and we support those proposals.

The Department, which will have consolidated regulatory authority, must be resourced adequately to give effect to the goals of the Bill through effective enforcement.

Budget provision should also be made for the significant expense of defending any litigation which may be strategically used by the industry.

Chapter 7: Miscellaneous

Constitutional provisions

While there seem to be multiple adequate constitutional foundations for the Commonwealth Parliament to enact the provisions in this Bill, the industry launching test litigation is predictable. The Government should ensure that careful pre-emptive planning is taken to ensure that any litigation regarding the foundations of the law are defensible, at the lowest possible cost to the public.

Transitional and consequential provisions

Question: Do you have any feedback on the transitional arrangements?

We would simply comment that the faster the consolidated statute commences effect, and the relevant regulatory agencies transition to the new regime, the better. The transitional provisions of the Bill seem reasonable.

Conclusion

PHAA supports the Bill and looks to see it implemented as soon as possible. As far as improvements are concerned we would highlight the following from our discussion above:

- The Bill should anticipate continually mutating efforts by the industry to create new products to evade legislative oversight, and to develop new techniques of marketing and advertising to do likewise. Wherever possible, provisions should be included to allow the Minister to catch and kill such efforts by regulation whenever doing so would give effect to the goals of the Act.
- There are a number of clauses relating to exemption from advertising offences which could benefit from significant tightening.
- In particular, the exemptions to advertising offenses relating to political donations and election expenditure are perverse, and should be deleted.
- Provisions for banning additional novel products similar to chewing tobacco and oral snuff should be included.
- The transparency reporting regime should be broadened to include coverage of wholesalers, distributors and retailers.

Once again, we commend to the Department the expertise and depth of knowledge of Cancer Council Australia, which takes a leading role among the public health sector organisations working to protect the public's health from the extraordinary tobacco and nicotine harms fuelled by the industry.

The PHAA appreciates the opportunity to make this submission, and we will continue to assist the Government to deliver health-promoting policy initiatives such as this Bill.

Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.



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