

A hard sell in a dark market

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"As with other industries, tobacco companies are careful to groom allies with powerful connections."

The tobacco industry is prepared to fight hard against a new wave of regulation, writes Nick O'Malley.

The parliamentary interrogation began badly for the tobacco executive. After the briefest of greetings, the first question was asked: "I'd just like to read you something," he said. "It's a quote. 'We don't smoke this shit, we just sell it. We reserve the right to smoke for the young, the poor, the black and the stupid.' That's a quote attributed to a tobacco company executive. Was that a quote from one of your company executives?"

The question was put last month. The executive in the hot seat was Graeme Amey, the head of the New Zealand arm of British American Tobacco Australia. Of course, he had never said any such thing. The line is commonly attributed to an actor in a commercial for Winston cigarettes, recounting what he was told by an R.J. Reynolds Tobacco Company executive on set in the 1980s.

Still, the question set the tone for the whole bruising parliamentary hearing in New Zealand, one which may soon be replayed in Canberra. The Family First senator, Steve Fielding, has proposed legislation that would see cigarettes sold in Australia in plain packets, stripped of all branding and imagery. Imagine plain white packets - save for gruesome health warnings and brand names in generic font. Submissions for an inquiry on the legislation close next week. More ominously for the \$9 billion Australian industry,

the Rudd government's own Preventative Health Taskforce has recommended plain packaging.

On the record, Australian tobacco companies contacted by the *Herald* responded only via email and in the most politic language. Off record, it was made clear they would fight for their brands to the end.

The stakes are almost immeasurable. Last year, Marlboro, owned by Philip Morris, was said to be the 17th most valuable brand in the world, worth \$US19 billion, far more than household names such as Apple, Nike and Ikea.

A report for tobacco investors in Britain published in January by the investment bank Citigroup made it clear how crucial the issue was.

"The most important issue is plain packaging, but there is no advance here - we have always said that, for investors, the No. 1 regulatory issue is plain (or generic) packaging: we believe greying out all packs would lead to rapid down-trading," it said.

"However, the [British] government is no further along with this idea, saying it believes the evidence needs to be 'carefully examined'. For the first time, it says it needs to give weight to the legal implications of plain packaging."

Tobacco companies know that when countries introduce new regulations others follow suit. Canada introduced the first graphic health warning on cigarette packets in 2001. Today, 35 countries mandate them and more introduce them each year.

This domino effect has been accelerated since the World Health Organisation established its 2005 Framework Convention on Tobacco Control, which 168 nations have signed.

As long as companies can wrap their products in these brands they still reap the residual benefits of the untold hundreds of millions of dollars they spent on advertising to create them in the century before advertisements were banned.

So powerful are these brands that when images of people smoking were first outlawed from cigarette advertisements, tobacco companies were able to simply use their brands' distinctive colours to continue advertising. It is this vast unquantifiable benefit they still receive that the anti-smoking lobby wants to kill.

Simon Chapman, a professor of public health at the University of Sydney who holds a PhD on the semiotics of cigarette advertising, has no doubt that the industry will launch a legal attack on the first jurisdiction that tries plain packaging.

"The industry really is shitting itself in Australia and internationally that there will be countries that start taking off [on the packaging issue]."

He notes that in Uruguay, where to the misfortune of the tobacco industry the health minister is an oncologist, a vicious legal dispute has already erupted. Philip Morris is suing the government, which wants graphic health warnings to take more than 80 per cent of the packaging.

In any legal battle that does arise over plain packaging, the industry will argue that the state is acquiring its intellectual property.

Jonathan Lieberman, a senior legal adviser to the International Union Against Cancer, argues that Uruguay is in a tougher position than countries like Australia and Canada because it has a bilateral trade agreement with Switzerland, where Philip Morris is based, and because it has limited legal resources. "They just don't have the same capacity as we do to stare down a threat from the industry."

He believes that, for a number of reasons, Australia is well positioned to be the first country to introduce plain packaging.

"The first is our domestic constitution; it gives government a lot of scope to regulate corporate behaviour in the public interest. Our government also has very strong legal resources to stare down a threat. It can go to the best legal minds in the country on substantive issues, it can assess the threat and it can defend it when it comes to that.

"Then there are the political reasons. We have a government that is committed to prevention [in health] and it has public support."

The Health Minister, Nicola Roxon, said the government was "actively" considering the recommendations of the Preventative Health Taskforce, though some doubt Fielding's proposal could stand as drafted.

A spokeswoman for British American Tobacco Australia told the *Herald* the company would mount a legal challenge. It would "take every action necessary to protect its valuable intellectual property rights and its right to compete as a legitimate commercial business selling a legal product".

The company argues there is no proof that plain packaging "would deliver public health objectives" and said it would increase illegal sales of so-called chop chop.

The director of corporate affairs at Philip Morris, Chris Argent, said in a statement: "Plain packaging would represent an unconstitutional expropriation of valuable intellectual property and violate a variety of Australia's international trade obligations, such as the agreement on trade-related aspects of intellectual property rights, the Paris convention, the technical barriers to trade agreement and the US-Australia free trade agreement. It may also give rise to actions from other countries or private investors under various bilateral investment treaties."

Both companies have made submissions along these lines to the Preventative Health Taskforce. Professor Mike Daube, from Curtin University, considers the submissions handy guides. "Anything they object to is good for public health. The more virulently they object to it, the better it is."

Philip Morris has even set up a website in an apparent effort to win public support for its opposition to plain packaging. It names Australia, Canada and Britain as countries considering the move.

While the Australian government considers its response to the taskforce recommendations, the industry continues probing the boundaries of the existing regulations on tobacco sales.

Since the government pockets 70 per cent of the sale price of every packet sold, selling cigarettes is a high-turnover, low-margin business. Laws dictate that tobacco companies can set any price they want, but they cannot use discount promotions. So they have to be innovative.

Some high-profile premium brands are now sold in what the companies call "40 packs" - two packets of 20 cigarettes in a cardboard sleeve, sold at a discount to dodge prohibitions of multi-pack promotions.

One supermarket counterhand told the *Herald* of occasions when the store was short of sleeves ran out. When a sale was completed customers were asked to remove the packets and return the sleeve.

Documents obtained by the *Herald* show how hard Coles works with its tobacco suppliers to maintain sales while abiding by the law.

One memo dated January 22, 2008, and titled "Suspension of Tobacco Multi-buys" warns staff: "Please be advised we have received a legal challenge of the verbal upsell of the tobacco multi-buys offer. Appropriately we are suspending this activity

immediately pending advice from our lawyers." A memo from November says: "Ensure all team members are aware of state-specific offers & upsell to customers purchasing smokes."

From June, tobacco products may not even be displayed at the point of sale, making the relationships that tobacco companies have with retailers even more crucial.

Larger companies contacted by the *Herald* would not discuss their marketing strategies but the directors of the tiny fledgling of the industry, Richland Express, gave some insight.

Richland Express has broken industry taboos by creating cheap house brands on contract for sale exclusively by Coles. The directors say that in a dark market - one without

advertising - cigarettes brands thrive or wither by the support of the retailer. Richland Express is the only new company in recent times to have won shelf space alongside the big three existing companies.

As the companies probe the boundaries of the dark market, they are maintaining links with the politicians that govern it.

Despite a WHO protocol stating that governments should have no contact with tobacco companies aside from that needed to regulate the industry, tobacco maintains its relationships.

While Labor doesn't accept donations from tobacco, since the last election the NSW Liberal Party has accepted \$301,000 from the industry, according to the Greens' project Democracy4sale.

The industry enlists lobbyists to act on its behalf federally and in all states except Tasmania. In Canberra, Intermediary Consulting acts on behalf of British American Tobacco Australia (BATA), Jackson Wells acts for Imperial Tobacco and InsideOut Strategic acts for Philip Morris. Intermediary Consulting and Jackson Wells are also at work at Macquarie Street.

And despite Labor's stance, campaigners still criticise the party for accepting money from the industry indirectly through donations from tobacco retailers and pubs and clubs.

The Independent Retailers of NSW & ACT donated \$77,820 to NSW Labor between 2003 and last December and a further \$89, 820 to the Liberal Party over the same period.

During this period, the association lobbied against the introduction of new bans on displaying cigarettes in shops, and when the regulations were passed, it won concessions by having them phased in.

Pubs and clubs associations have donated \$1,384, 548 to the major parties since the 2007 election and both groups have opposed greater smoking restrictions.

And tobacco has funded these organisations through sponsorship of journals and annual conventions.

One of the sponsors of last year's Australian Hotels Association convention was an organisation called Butt Free, described as an "environmental product stewardship organisation focused on reducing cigarette-butt littering by changing the behaviour that causes it".

Butt Free was formed in 2003 by BATA. It says on its website that BATA "is still our major contributor, and that we actively seek funding from the tobacco industry".

That year, the AHA boasted registration fees for the event had been kept at only \$695 "thanks to the generous support of our industry partners", including British American Tobacco.

The 2008 annual report of Clubs NSW mentions both Kraft (owned by Philip Morris) and a company called Outdoor Inn Smoking Room Consultants.

In 2006 it was revealed the NSW government had invested \$12 million in Philip Morris's parent company. Morris Iemma, then premier, did not bow to pressure to sell the shares. "Where do you stop? The next target then are the coalmines? Oil companies or other investments?" he said on the ABC.

The tobacco cause in Australia has also been championed by the nation's two leading conservative think tanks, the Centre for Independent Studies (CIS) and the Institute of Public Affairs (IPA), both of which have ideological stances against regulation. It is known both groups have accepted tobacco money in the past, but when contacted by the *Herald* this week, the CIS denied it still did.

The director of the IPA's deregulation unit, Dr Alan Moran, said he neither knew nor cared to know whether the organisation accepted funding from tobacco companies, but maintained the IPA's stance against increasing regulation, noting that smokers were fully aware of the dangers associated with tobacco.

As with other industries, tobacco companies are careful to groom allies with powerful connections. Rupert Murdoch famously served simultaneously on the boards of Philip Morris International and of the Cato Institute, one of the most influential think tanks in Washington.

In Australia, the former NSW premier Nick Greiner was the chairman of BATA between 1999 and 2004. Today he chairs the Nuance Group, one of the world's largest owners of duty free outlets.

Nuance is the subject of a complaint by the group Action on Smoking and Health for allegedly breaching bans on displaying cigarettes. International duty free retail associations are fighting moves to have tobacco discounting scrapped from duty-free outlets.

Bede Fennell, a former head of public affairs for BATA, has taken a position in the company's London office. He was once a director of the NSW branch of the Liberal Party.

The company's regional director of corporate and regulatory affairs, Andreas Vecchiet, is a former diplomat and was an adviser to the Hawke and Keating governments.

A member of BATA's board of directors is Duncan Fischer. As a one-time chief executive of the gambling giant Tattersalls, he is a man with some experience in marketing a heavily regulated product.

He attracted controversy in 2008 when another Tattersalls executive accused him of shutting down a problem gambler tracking system that might have led to costly legal action.

The executive, Phil Ryan, reportedly told a Victorian parliamentary inquiry that Fischer had said, "and I quote, 'screw the problem gamblers' for as long as he could until he was forced to stop by government legislation".

Fischer denied the allegation.

Anne Jones, the chief executive of Action on Smoking and Health, says that unless Australian governments end the tobacco industry's interference in policy making, and ban all promotion of the industry's product, the declining smoking rate will stall and more people will die.

The late Professor Konrad Jamrozik, whose expertise included epidemiology, estimated that in 2013, 63 years after the publication of the first evidence of the dangers of smoking, tobacco will claim its one millionth Australian victim.

Tobacco's iron grip

Three big companies in the Australian market are British American Tobacco Australia (42 per cent); Philip Morris (40 per cent); and Imperial (18 per cent).

More than 960,000 Australians have died from smoking since the first evidence of the dangers was published in 1950.

About one in two long-term smokers will die of a smoking-related illness.

One in five Australians smoke.

About 23 billion cigarettes are sold in Australia each year, or 1300 packets of 25 per minute.

Sources: Cancer Council Victoria, Professor Konrad Jamrozik