



Submission to the Parliamentary Joint Committee on Law Enforcement initiated inquiry into illicit tobacco.— from Dr John Coyne

This submission does not reflect an Australian Strategic Policy Institute (ASPI) perspective but is the opinion of the author: Dr John Coyne Head of Border Security Program, ASPI.

Overview

The Australian Strategic Policy Institute welcomes the opportunity for one of its staff to make a submission to the Parliamentary Joint Committee on Law Enforcement (PJCLE) initiated inquiry into illicit tobacco. This submission addresses the following specific terms of reference:

- *‘the nature, prevalence and culture of illicit tobacco use in Australia, including in indigenous, regional and non-English speaking communities’; and*
- *‘the role of Commonwealth law enforcement agencies in responding to the importation, use, manufacture, distribution and domestic growth of illicit tobacco’.*

The nature, prevalence and culture of illicit tobacco use in Australia, including in indigenous, regional and non-English speaking communities

There should be little doubt that tobacco companies, and their representatives, have a vested interest in lobbying Australia’s legislators, bureaucrats and law enforcement officials to disrupt the illicit tobacco market. The sale of counterfeit tobacco products is an infringement of their intellectual property and erodes their bottom line profit. And the trade in illicit loose leaf tobacco (chop-chop) places the regulated tobacco industry in an uncompetitive position. While some people are unlikely to care about a tobacco company’s loss of profit, the illicit tobacco market in Australia has real impacts on the safety and security of our communities. Not the least of which it is reducing the demand reduction impacts of tobacco consumption taxes.

Estimating the size and scope of any illicit market is a difficult proposition. In the case of illicit tobacco a number of different methods are used, but quantifying the market accurately is still not possible. For this reason alone, the PJCLE should be cautious in the conclusions it draws from quantitative research.

Quantitative research of the illicit tobacco market, and the conclusions drawn from it, are often contradictory. The tobacco industry’s discarded packet surveys have led to assessments that the Australian market for illicit tobacco products is surging.¹ In contrast, Department of Immigration and Border Protection (DIBP) analysis of seizure data argues that the market is relatively stable: although smuggling patterns continue to evolve in response to enforcement operations.

Regardless, there are sufficient seizures at, and inside, Australia’s borders to reveal that the illicit tobacco market is alive and profitable. Similarly, evidence from the US and UK reveals strong domestic market for cheap tobacco products.

¹ KPMG, (2015), *Illicit Tobacco in Australia: 2015 Half Yearly Report*.

It would appear that the illicit tobacco market exists as a result of a strong demand for cheaper products. And arguably this may be an unintended consequence of increased taxation of tobacco products. Libertarians in the US have used this hypothesis to argue for complete deregulation of the tobacco industry. But, this not likely to be the primary influencing factor on the nature, prevalence and culture of illicit tobacco use in Australia.

Unlike most other illegal or illicit markets, the importation, distribution, sale and consumption of illicit tobacco is most likely not viewed by most participants and users as a crime. Tobacco companies such as British American Tobacco Australia have argued that many smokers view the use of illicit tobacco as a victimless crime, but the scope of the problem might actually be more complex.

Arguably the current legislation and enforcement regime encourage the importation, distribution, sale and consumption of illicit tobacco to be viewed as a regulatory misdemeanour: and most definitely not a crime. Anecdotally, this seems plausible when some organised crime groups have use illicit tobacco products in ‘dummy’ smuggling runs before sending illicit drugs.

The challenge in dealing with the use of illicit tobacco products is shaping public opinion around its seriousness. Whilst discussions of lost profits and taxes may have some sway on user opinion, the organised crime impacts may be the most effective counter narrative for government.

The role of Commonwealth law enforcement agencies in responding to the importation, use, manufacture, distribution and domestic growth of illicit tobacco;

By definition the manufacture, importation, distribution and sale of illicit tobacco is a transnational organised crime. The trade generally involves two or more people or entities and the movement of illicit tobacco across one or more international borders: especially with respect counterfeit products.

In general, every stage of the illicit tobacco trade—manufacture, importation, wholesale and retail sales—involves a number of enabling crimes from intellectual property offences, fraud, corruption, tax evasion to money laundering. Enforcement officials should continue disrupt the illicit tobacco market by investigating these offences.

From the UK, to the US to Australia the trade in illicit tobacco is an increasingly attractive market for organised crime groups. There are few barriers for those seeking to enter the illicit tobacco market, and a large demand for products. For organised crime the illicit tobacco market has high profits and low risk.

The Commonwealth’s law enforcement agencies continue to play an important role in responding to the importation, manufacture, domestic growth and distribution of illicit tobacco. The Federal Government’s expectations of this strategy need to be tempered by what can and should be achieved by law enforcement in this space. Disrupting the illicit tobacco market is no easy task and the allocation of new resources in a tight fiscal environment is unlikely. But also the allocation of resources to this problem needs to be tempered by its overall priority against other crime types.

Australia needs a whole-of-government illicit tobacco strategy that integrates regulatory, enforcement and health strategies.

As a start point, any national illicit tobacco strategy should recognise that criminalisation of its personal use is unlikely to have any marked impact on the problem: and arguably may have a number of unintended consequences. Law enforcement’s experience with domestic illicit drug use more broadly has revealed that the targeting of users has little practical deterrence value especially where addiction is involved. And the targeting of illicit tobacco use should be proportionate with the targeting of the use

of more dangerous drugs such as methamphetamine and heroin. Philosophically a national strategy focussed on reducing use of illicit tobacco should be focussed on demand reduction through reward not enforcement incentives.

While the complete disruption of the illicit tobacco market is in the interest of tobacco companies, it is likely that such a goal is aspirational at best. With the competing priorities presented to Commonwealth law enforcement agencies, a national illicit tobacco strategy will need to prioritise its efforts. Arguably the greatest level of effort should be focussed on disrupting organised crime's involvement in the illicit market as it presents the most likely potential for success. Such an approach should target the profits of market participation through such mechanisms as proceeds of crime legislation.