



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

**Reference: Tobacco Advertising Prohibition**

FRIDAY, 25 JUNE 2004

CANBERRA

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**SENATE**  
**COMMUNITY AFFAIRS LEGISLATION COMMITTEE**

**Friday, 25 June 2004**

**Members:** Senator Knowles (*Chair*), Senator Greig (*Deputy Chair*), Senators Barnett, Denman, Humphries and McLucas

**Substitute members:** Senator Allison for Senator Greig

**Participating members:** Senators Abetz, Allison, Bishop, Boswell, Brown, Buckland, Carr, Chapman, Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Hogg, Lees, Lightfoot, Ludwig, Mackay, McGauran, Moore, Murphy, Nettle, O'Brien, Payne, Tierney, Watson and Webber

**Senators in attendance:** Senators Allison, Barnett, Humphries, Knowles and McLucas

**Terms of reference for the inquiry:**

To inquire into and report on:

- (a) the provisions of the Commonwealth Electoral Amendment (Preventing Smoking Related Deaths) Bill 2004;
- (b) the exposure draft of the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004; and
- (c) the adequacy of the response to date of the Australian Competition and Consumer Commission (ACCC) to the orders of the Senate of 24 September 2001, 27 June 2002 and 12 November 2002, which require the ACCC to report to the Senate on various issues concerning tobacco.

The purpose of the Bills is to deny election funding to candidates accepting gifts derived from tobacco smoking; to prohibit the advertising and offering for sale of tobacco products on the internet and to prohibit tobacco product placement in films.

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**Committee met at 9.34 a.m.****FRANCEY, Mr Neil Francis, (Private capacity)**

**CHAIR**—I declare open this public hearing. The committee is taking evidence on the inquiry into the tobacco advertising prohibition. I welcome Mr Neil Francey. In what capacity do you appear today?

**Mr Francey**—I am a barrister with considerable experience in relation to tobacco litigation. I will expand in some more detail about my qualifications and experience in due course.

**CHAIR**—You are reminded that evidence given to the committee is protected by parliamentary privilege. However, the giving of false or misleading evidence may constitute a contempt of the Senate. Also, Mr Francey, in light of your submission and some of your fairly strident and obviously heartfelt comments about the ACCC, I draw your attention to paragraphs 11 and 12 of the privilege resolutions passed in the Senate in February 1998. The paragraphs read:

(11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.

(12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

**Mr Francey**—I understand.

**CHAIR**—I just say that by way of not mentioning names. If we can abide by that, that might be useful. The committee has before it your submission. I now invite you to make an opening presentation, at the conclusion of which senators may ask you questions.

**Mr Francey**—Firstly, thank you for the opportunity to appear before the committee. I am a barrister in practice at Wentworth Chambers, 180 Phillip Street, Sydney. I should state at the outset that I propose to stand as an Independent candidate for the seat of Warringah at the forthcoming federal election. My evidence will be confined to item (c) in the Senate reference of Thursday, 13 May 2004, namely 'the adequacy'—or otherwise, more to the point—'of the response of the ACCC' to various motions of the Senate. I say at the outset that the response, if it can be called that, of the ACCC to date amounts to what I would call a contempt of the Senate, deserving of censure. My submissions will be directed towards the justification of that conclusion.

I have prepared a written statement which I seek to tender and simply speak to rather than go through in some detail. In it I deal with the matters that I would like to mention: (1) who I am; (2) what I have done; (3) what I know; (4) what I am currently doing; and (5) why I am here, leading to some conclusions. I also hand to you a one-page summary of my relevant qualifications and experience. Essentially, relevant to the matter the Senate is considering, I completed a Bachelor of Laws degree at the University of Queensland in 1973; I worked with the then Trade Practices Commission from 1975 to 1980, shortly after the enactment of the Trade Practices Act; I moved to Sydney and worked as a solicitor for a year; and I have been in practice as a barrister since 1981. During that time I completed a Master of Laws degree at the University of Sydney with honours, and a Master of Laws honours paper on consumer class actions was published in 1988.

From 1986 to early 1987, apart from the relevant experience recorded in the document that I have handed to you, I was involved in a piece of litigation concerning passive smoking and misleading statements by the Tobacco Institute of Australia, as it then was, disputing findings of a National Health and Medical Research Council report about that. That litigation was commenced in 1987 after a complaint was made by the Australian Federation of Consumer Organisations to the Trade Practices Commission concerning the advertisement which was compromised by the Trade Practices Commission in January 1987 by the publication of a so-called corrective advertisement. There ensued litigation which I conducted principally through until 7 February 1991 when Justice Trevor Morling handed down a decision which comprehensively found that the advertisement on the part of the Tobacco Institute was misleading or deceptive. That finding was confirmed on appeal in a decision handed down in late 1992-early 1993—there are two decisions referred to in my paper.

That is the beginning of the incompetence of the ACCC in dealing with the question of tobacco. Insofar as it relates to this inquiry, as a result of my involvement in that litigation, I have been involved in a number of court cases involving the tobacco industry or issues arising from tobacco. They are recorded on page 3 of the statement, and I do not need to go into them for present purposes.

As a result of my experience, I did some searching on the Internet in February 2000 of the 30 million or 40 million documents that had been produced in litigation in the United States. I uncovered documents that revealed amongst other things that in January 1975, just months after the Trade Practices Act came into effect,

the three Australian companies of Wills, Rothmans and Philip Morris met and reactivated a cooperative committee to act in complete concert on all matters to do with smoking and health—that is, to lie about them. And they have done so consistently, disputing the harmful effects of smoking, denying that it was addictive and camouflaging some of their other activities until 1999 when, for the first time, Philip Morris admitted that smoking is dangerous, that it is addictive and that people should quit. I notice that an insert in their cigarette packets has been included as an annexure to their submission to this inquiry. The situation is that, as of 1999, the companies have come clean to a degree in a way in which they should have from 1 October 1974 when the Trade Practices Act came into effect.

Moreover, I discovered documents that revealed that, between late 1976 and mid-1977, seven of the world's major tobacco companies met and conspired to engage in a deliberate campaign of promoting a false controversy over smoking and disease. There are documents that evidence the worldwide implementation of that campaign, including in Australia, through the formation of industry associations such as the Tobacco Institute, which was created in December 1978 directly as a result of that meeting. This is contained in an article published in the *British Medical Journal* of 7 August 2000 called 'Operation Berkshire: the international tobacco companies' conspiracy', which I co-authored with Dr Simon Chapman, who is now professor of community medicine at the University of Sydney. The contents of that document and additional documents that implicate the tobacco industry were included in a 25,000-word report I prepared for a World Health Organisation Consultation on Litigation and Public Inquiries as Public Health Tools for Tobacco Control held in Amman, Jordan in February 2001.

I prepared the paper entitled 'Tobacco litigation: the Australian experience in a global context' to reveal how it is that transnational tobacco companies have conspired for over 25 to 30 years to cause considerable harm to the Australian community. Tobacco has been assessed by the Commonwealth Department of Health and Ageing as killing 19,000 people a year and costing the country \$21 billion a year. About \$3 billion is borne by the Commonwealth, \$3 billion is borne by the states, I think about \$6 or \$7 billion is borne by business through lost productivity—sick leave and the like—and the rest is borne by the Australian community. That is \$21 billion a year. That is contained in the National Drug Strategy report entitled *Counting the cost*. There is also a House of Representatives report that was tabled last year *Road to recovery*, dealing with alcohol, other drugs and tobacco which sets out the steps that can be taken to redress that harm, all of which cost a lot of money.

Following the inadequate trade practices commission report, which has deficiencies that I have catalogued in my submission No. 4, I have embarked on a piece of litigation—one of which is still standing, and has been for two years—*Cauvin v. Philip Morris Limited and Ors*, in which a claim has been made, amongst others things, on behalf of a woman now aged 40 and diagnosed with emphysema in her early 30s who had a lung transplant on 11 September 2001 Australian Eastern Standard Time. The removed lung proved to be cancerous. The claim is framed in a way to expose the conduct of the tobacco companies and to expose the fact that they and their parent companies conspired to engage in this conduct in contravention of the Trade Practices Act in a deliberate and concerted way over the last 25 to 30 years.

All of that material was put before the ACCC. None of it appears in the report that they produced to the Senate in April 2002. One of the aspects of the report that I find most astounding is that they were asked to specifically search the documents that are on the Internet to locate evidence implicating the tobacco industry. They did one search, they say in their report, over tobacco and price. They produced a lot of price lists and concluded that there was no evidence that would be of any use in litigation. Nothing could be further from the truth. The material is well documented and catalogued in journals as eminent as the *British Medical Journal* and in my paper for the World Health Organisation. Both were made available to the ACCC and neither were mentioned in any way whatsoever in their report.

The case that I am doing seeks to obtain declarations about the conduct of the industry and obtain injunctive relief, including remedial injunction relief, to correct the adverse effects. Just imagine: if the companies had been truthful from 1 October 1974 and admitted what they now admit, what would smoking rates be? Would they be the 20 per cent that they are or would they be around two or three per cent, which is what they are among doctors, who we might accept as being people in the community who are in a position to make an informed choice about whether or not to smoke, rather than people in the general community who have been deliberately lied to for decades?

Also, the case is structured in a way that enables compensation to be obtained not only for the plaintiff but for any other person who has suffered loss or damage by reason of this conduct, but, more than that, it can



obtain money for measures to prevent or reduce that loss or damage. The other disturbing aspect of the ACCC report is that they said that they basically could not do anything about it because there was a time limit in the Trade Practices Act of three years, which was subsequently changed to six years. That is true of section 82 of the Trade Practices Act, but it is not true of section 87(1) of the Trade Practices Act, which is the remedy that is being pursued in the Cauvin litigation. In that respect, the advice in the report of the ACCC is incompetent in the extreme.

What is more astounding than that is that, after that deficiency was pointed out in my submission, which was prepared in May 2000 and was the subject of cross-examination by Senator Allison in a Senate estimates committee on 6 June 2001—Senate *Hansard*, pages 599 to 661, which includes references to two or three court cases confirming that there was no time limit under that relevant provision—the ACCC most recently furnished to the President of the Senate, in a letter of 28 October 2003, a schedule of matters allegedly responding to the Senate's further motion of 27 June 2002, which required the ACCC to do their job competently rather than incompetently. In their response, on page 3, they say:

Commission staff sought external legal advice from Alan Robertson SC on these issues—  
and that he:

... agreed with the internal legal advice ... except in relation to the issue of limitation periods.

In that respect, they say:

Mr Robertson's advice stated that under section 82 a cause of action accrues when loss or damage is suffered—  
rather than when the contravention occurs. In other respects he confirmed the commission's advice.

The problem with that is that it is dissembling and misleading in the extreme, because the commission—in the provision under which there is no time limit—were specifically advised of the cases which held that there was no time limit. By that annexure to that letter in my submission the commission have engaged in a deliberate act of deception to attempt to persuade the Senate that their previous report was correct in all material respects. Unfortunately, it can be demonstrated to be wholly deficient and incompetent, and I have dealt with that in detail in my submission No. 4 and I have summarised it in the statement that I have handed to you. I think that is all I need to say on the matter. I am happy to answer any questions that you have.

I should mention this one other thing. If you take the Department of Health and Ageing estimates of \$21 billion a year, go back 30 years and look at 30 years into the future, because provision can be made for future harm, there would be \$1,200 billion worth of harm caused by tobacco that is capable of being the subject of compensation in these proceedings. I have had an accountant calculate the aggregate net worth of the companies, including the US and UK parent companies, and they are worth about \$216 billion. So they cannot ever be paid 20c in the dollar of the total harm. It is a matter of working out how much of that harm is attributable to this deceptive conduct engaged in in contravention of the Trade Practices Act, determining what are the best measures and the best means of preventing and reducing future harm and compensating people for past harm or harm that is incurred into the future.

You would be well aware of the problems with asbestos and the James Hardie asbestos company. That is the sort of thing that should not happen in relation to tobacco. I can tell you that these figures, while they are big, are no joke. The US Department of Justice, under President Clinton, commenced proceedings against the US tobacco companies for exactly the same sort of conspiracy that I am talking about which, in that case, dates back to a meeting on 3 December 1953 and has been pursued ever since. That claim seeks an amount in the order of \$270 billion—that is the figure I recollect. You could obtain a precise figure from the US Department of Justice web site. Those proceedings, though it was thought they may not be continued under President Bush, are in fact continuing and are being allowed to go ahead by Judge Gladys Kessler. Just as the Cauvin proceedings have been the subject of something like seven or eight motions to date, all of which have been unsuccessful, it has been accepted that there is no time limit that is applicable, and it is accepted that potentially all the companies are jointly and severally liable because they conspire to engage in the conduct that is alleged and the evidence is there to support it.

There are seven appeals on foot from the interlocutory decisions that have all been in favour of the plaintiff, and there is one remaining interlocutory aspect that is the subject of a reserve judgment, but I expect that that will be handed down very shortly in favour of the contention that the plaintiff can claim relief not only on behalf of herself but on behalf of others, including to prevent or reduce harm.

That is who I am. That is what I have done. That is what I know. That is what I am doing. That is why I am here. I have made recommendations at the conclusion of my paper as to the course of action that I suggest this

committee should take in making recommendations to the Senate in order to make the ACCC accountable for their incompetent response to date.

**CHAIR**—Thank you.

**Senator McLUCAS**—I am not a lawyer, and I certainly do not understand trade practice law all that well. Can you explain the difference between section 82 and section 87(1) in very layperson's language?

**Mr Francey**—I can do that. The structure of the Trade Practices Act is like this, relevantly for these purposes. In part V, which deals with consumer protection, there is a general prohibition on misleading or deceptive conduct. There are other specific prohibitions that can be the subject of prosecutions. There are also in part IVA prohibitions of unconscionable conduct. Any contravention of the misleading conduct prohibition can be the subject of injunctive relief under section 80 at the behest of any person, as held by the High Court. Under section 82, there is provision for a person who has suffered loss or damage to make a claim for that loss or damage. In respect of that provision, parliament has provided a time limit that was three years and has been extended to six.

But under section 87 there is a general provision that operates in this way: where in the course of proceedings under the act—for example, seeking remedial injunctive relief under section 80—the court finds that a person or, using the interpretation in the act, persons have suffered or are likely to suffer loss or damage, the court can make whatever orders it considers appropriate to compensate for that loss or damage or to prevent or reduce loss or damage occurring in the future. That provision is mirrored in state and territory fair trading legislation. In New South Wales, a restriction that is unnecessary but exists in section 87, confining the claim to a person who is a party, does not exist. So it is not necessary for the persons to be compensated to be parties.

Moreover, under the representative proceeding provisions of the Federal Court Act, there is a provision that deems represented persons to be parties for the purposes of section 87. It is complicated in a way but suffice to say that the scope exists for compensation to be obtained on behalf of any person—past or future—who has suffered or is likely to suffer harm. Money can be obtained to prevent or reduce harm, including paying for all of the recommendations of the House *Road to recovery* report. Not only that, under section 80—quite apart from section 87—where there is no time limit at all, orders can be made to remedy the effect of the misleading conduct. So if the companies have distorted the public knowledge over the years, they can pay to clarify it.

There is a time limit provision under section 87 similar to the other one of three years, now six years. It is different, I think, for unconscionable conduct, but it only relates to section 87(1A). It does not apply to section 87(1). It has been held by a judge of the Supreme Court, it has been held by the Federal Court, and it has been held by a full bench of the full Federal Court that there is no time limit. And in that respect, unfortunately I have to say, the Trade Practices Commission have misled the Senate in their report, and most recently they have misled the Senate in the annexure to their letter of 28 October 2003.

**CHAIR**—We are running very close to time. We have only got about seven minutes left to give Mr Francey his full time. Are there any further questions?

**Senator ALLISON**—Could I invite you, Mr Francey, to indicate what you think needs to be done by way of providing funds for the ACCC to conduct litigation? Most recently, they have indicated that they are not properly funded to do this work. Can you give us some idea of the amount of money that might be required and where you would recommend the government takes it from?

**Mr Francey**—Put it this way: I have been doing this litigation for the last two years with absolutely no funding. My instructing solicitor, Maurice May, has underwritten the disbursements to the tune of about \$30,000 or \$40,000, I might say—I think it is in that order—simply as a part of spec litigation. That is what we have done in order to demonstrate that it can be done.

There is provision under section 87CA—and I deal with this in my recommendations—for the ACCC to intervene in proceedings, to apply to the court for leave to intervene. It is unnecessary for the ACCC to commence litigation; there is litigation already on foot. It has already substantially progressed. All the ACCC has to do is to intervene in those proceedings. I might say that the investigation they are conducting in relation to 'light' and 'mild' is but symptomatic of the totality of the deceptive conduct of the industry. For them to spend money on an investigation in relation to that matter and commence litigation in relation to that matter and confine what they do to that matter would be an abysmal waste of taxpayers' money. They should be doing the job more competently.

I should say as well that, under the New South Wales Fair Trading legislation, the New South Wales Minister for Fair Trading can intervene in proceedings—under that legislation which is invoked in the Cauvin litigation. We have attempted to have the Labor fair trading ministers—Aquilina and subsequently Meagher—intervene and they have refused. I do not know why.

I have prepared—and I am happy to make it available—copies of what I have called a participation agreement between the states, territories and Commonwealth. It would provide for the establishment of a Tobacco Litigation Support Centre to which appropriate staff could be seconded from the ACCC, as long as they were competent staff, and from state and territory fair trading departments, for provision to establish a Tobacco Litigation Support Fund, which would be contributed to 50 per cent by the Commonwealth and the rest by the states in an appropriate proportion for each of the states. I have also provided for the establishment of a National Tobacco Control Commission and Compensation Fund or, if you like, a Tobacco Damage Compensation Prevention Fund, into which the court can order this money to be paid. I have provided for the creation of a National Tobacco Compensation Tribunal, which could distribute the money, and provision for a National Tobacco Control Commission, which could apply the money to prevent and reduce harm.

A participation agreement of that kind is what underpins another body that I worked on as a trustee for nine years—namely, the Travel Compensation Fund. That body operates at a state and territory level on a national basis to compensate people who lose money when travel agents go broke and then actions are brought against auditors, accountants and delinquent directors. This is modelled on that. My recommendation is that this should be pursued on a whole-of-government approach and it should be bipartisan. It basically involves getting a couple of hundred billion dollars from the US or UK parent companies which have been responsible for the harm inflicted in this country. If we do not do it and do it quickly then the money is going elsewhere. For a start, it is going to the US Department of Justice. Secondly, it is going to US victims, including for punitive damages awards. It is going to monitor the health of smokers in Louisiana under a class action. It is going to smokers in Florida.

**CHAIR**—Mr Francey, we are running very short of time.

**Mr Francey**—I am just making the point that there is an urgency about doing something. My suggestion is that this proposal for a participation agreement between the Commonwealth, the states and the territories be pursued as a matter of urgency. That is within the remit, as they say, of the ACCC in terms of sections 27, 28 and 29, I think. They are provisions about investigating things to do with consumer protection and coordinating them on a national basis.

**Senator ALLISON**—Are you seeking to table that document?

**Mr Francey**—I would be delighted to table a copy of the document.

**Senator ALLISON**—I am just wondering if you could expand on your remarks about industry use of ‘mild’ and ‘light’ in terms of their misleading and deceptive aspects. What do you think the implications are of the current review of terms such as ‘mild’ and ‘light’ which may see them not being used and being banned, effectively? What implications are there for legislation if that occurs?

**Mr Francey**—The situation is this: from the mid-seventies, when health concerns materialised, the tobacco companies have responded by producing cigarettes with varying levels of tar and nicotine and the use of terms like ‘light’ and ‘mild’. If anything, those companies encouraged governments to go down the tar derby road because it meant that their customers could continue to smoke, I would suggest, under the mistaken belief that light and mild cigarettes may not be as harmful. In fact, they admit, as Philip Morris does in its insert, that they are no safer. The World Health Organisation has concluded that they are no safer. In fact, in some respects, they are more dangerous because smokers have to compensate to get the requisite amount of nicotine, so they inhale more deeply and they get different forms of cancer as a result of that. There are a number of problems that have arisen from the use and exploitation of the terms ‘light’ and ‘mild’. Those terms should be abolished.

Not only that: through this litigation, one of the things that a court could do which parliament cannot do is basically remove offending names such as Longbeach, Horizon and other names that over years have developed an imagery of associating an unhealthy activity with a healthy, active lifestyle. The Commonwealth could not appropriate those business names to rub them out without just compensation, but the states could and a court could. They are some of the things that are involved. The light and mild aspect is something like five per cent to 10 per cent of the totality of the wrongful conduct of the tobacco industry over 30 years. To concentrate on the terms ‘light’ and ‘mild’ is to examine the lichen and moss on the base of one tree in a forest of conspiracy that has spread throughout the globe. If it is of any assistance, I can also table two copies of a

book that deals with the earlier litigation that I spoke about concerning passive smoking. It may be of interest to at least some members of the committee.

**CHAIR**—Thank you for that and for your time today.

[10.12 a.m.]

**GALLIGAN, Mr John, Director, Corporate and Regulatory Affairs, British American Tobacco Australia Ltd**

**HAMSHAW-THOMAS, Mr Charles, Head of Legal and Corporate Development, Imperial Tobacco Australia Ltd**

**CHAIR**—I welcome the witnesses, who will be giving evidence via teleconference. I remind you that evidence given to the committee is protected by parliamentary privilege; however, the giving of false or misleading evidence may constitute a contempt of the Senate. Please commence your comments.

**Mr Galligan**—Thank you. They should not take too long. Thank you for the opportunity to present. I am pleased to appear before this committee today, representing Australia's largest tobacco company. British American Tobacco Australia—or, for ease, BAT—represents approximately 45 per cent of the tobacco market in Australia. We have brands such as Winfield, Dunhill, Benson & Hedges, Holiday and Lucky Strike in our portfolio, just to name a few. We employ over 1,200 Australians, supply over 40,000 retailers and provide in excess of \$3 billion each year in excise and taxation revenue to government.

We fully recognise the concerns involving our industry and our products, and we are committed to operating in a way which balances our commercial interests with the expectations of the broader community. I should also like to make it clear that our business is not about persuading people to smoke but about offering quality brands to adults who have already made the decision to smoke. We strongly believe that smoking should only be for adults who are aware of the real and serious risks, and we are committed to reducing the level of youth smoking. We believe that smoking comes with the real risk of serious disease—such as lung cancer, respiratory disease and heart disease—and that for many people smoking is very difficult to quit. Put simply, smoking is the cause of certain diseases, and it is commonly understood that smoking is addictive. We agree with the public health community that the health impact of smoking should be reduced, and we are committed to working with others to do just that.

In line with the partnership that we and policy makers have in achieving effective tobacco policy, BAT are pleased to accept this invitation to appear today. Currently this committee has before it two bills relevant to how tobacco companies such as ours may engage in both civil society and the commercial sector. While not diminishing the spirit in which these bills were proposed, we would submit that those matters currently canvassed in these bills are peripheral to the needs of contemporary tobacco control policy in Australia. Indeed, we would suggest that focusing on such issues as limiting political freedom of legal corporations or removing the representation of their products from the media merely crowds out the exploration of more fundamental tobacco problems, such as establishing an appropriately funded national program to address youth smoking prevention, the future of risk reduction programs for existing smokers and health related policy to address the hundreds of thousands of smokers currently using illicit tobacco products, which have no health warnings and no ingredient nor delivery information and which currently in estimates evade half a billion dollars in excise and tax each year.

In our opinion recent debates about fast food highlight just how easy it is for legislators to take aim at companies for the products they make. It is much harder to deal with the broader issues underlying the community's preferences and choices for those products, and tobacco is no exception. Certainly we do not believe that the market for tobacco should be unrestrained. Indeed, we continue to work for and support sensible regulation, including controls on marketing and the availability of tobacco products, just to name a few. Moreover, we agree that there needs to be consistent reviews to ensure that these controls remain contemporary and effective. In our view, effective policy is best developed through the input of all relevant stakeholders. Good policy is not simply about apportioning blame or finding fault but about identifying concerns.

Accordingly, given the statements I have just made, we are very pleased to be able to present today. I will state a few caveats, however. While we are pleased to have the opportunity to respond on a range of issues, such as those bills before the committee, I think you would find it appropriate that we feel it is inappropriate for us to comment on those matters which are currently the subjects of inquiries, both legislative as well as those by the ACCC. Moreover, as I am sure you would also appreciate, we are unable to comment on matters which are currently the subject of either inquiries or legal actions before the courts. In the spirit of that I am pleased to be here today.

**Mr Hamshaw-Thomas**—If it would be helpful for the committee to know who we are, Imperial Tobacco Australia are the No. 3 cigarette manufacturer in terms of size and share of the market in Australia. We are the most recent entrant to the Australian market. We entered not yet five years ago, in 1999. We entered at the behest of this government through the ACCC, who were concerned as to the impact on competition as the result of the merger of British American Tobacco and Rothmans. They encouraged us to buy a portfolio of tobacco brands, which we did in 1999. I do not know when it would be appropriate for me to say a few words on Imperial Tobacco's position regarding tobacco regulations. I would be very happy to do that.

**CHAIR**—You may do that now.

**Mr Hamshaw-Thomas**—What I would like to very quickly say is that Imperial Tobacco's position is that we make and supply a legal product that is consumed by adults who are aware of the associated health risks. We acknowledge that there are health risks associated with the use of the product and we acknowledge that regulation is necessary. We would, however, earnestly stress that regulation should be reasonable, balanced and proportionate. For a long time and on many occasions we have pledged our commitment to working with government on the formulation of regulation. It must be the case that the best regulation is that achieved through some degree of consensus.

It does seem clear to Imperial Tobacco that the government has many different tobacco related objectives. It wishes to communicate the public health messages, it wishes to prevent youth smoking, it wishes to reduce overall consumption, it wishes to collect excise revenue, it wishes to control product quality, it wishes to regulate how the product is packaged, it wishes to combat chop-chop and smuggling, and it wishes to ensure competition in the marketplace. In Imperial Tobacco's view, commonsense would suggest that the government should seek to formulate a cohesive and balanced framework of tobacco regulations which not only addresses all of those different objectives, because some of those objectives go in different directions, but also somehow accommodates our rights—that is, Imperial Tobacco's rights, British American Tobacco's rights, Philip Morris's rights; everybody's rights—to compete for sales of a legal product to adults.

At the moment there is absolutely no sign of a coordinated approach. It is completely uncoordinated; it is ad hoc. We see at the moment the current review of health warnings and discussion on proposals to introduce graphic health warnings. We are aware that the ACCC are investigating descriptors. There is press comment that they are looking at suing the industry and there are proposals being talked about to suggest that the product be put under the counter. There is absolutely no coordination and, in our view, there is no constructive dialogue to really attempt to address the issues. Imperial Tobacco's position is quite clear: we would welcome any attempt to get constructive dialogue on these issues. For those purposes we are very happy to be present today, by teleconference. I trust that the members of the committee have seen the submission we have made. Our apologies that it was late in the day, but we were only sent it late in the day. I did not mean to take up that amount of time, but I wanted to make absolutely clear what Imperial Tobacco's position is.

**CHAIR**—Thank you.

**Senator ALLISON**—Mr Galligan, you say that you do not encourage, or that your organisation does not encourage or assist in, the depiction of smoking in film. Does that mean that your organisation does not provide and never has provided any inducements by way of finance or any other form to film-makers directly or indirectly in encouraging smoking in film? Can you give the committee a categorical assurance that this has not ever happened and is currently not happening?

**Mr Galligan**—I cannot give a comment that nothing has ever happened. To the best of my knowledge, since laws have been in place to prohibit such action, we believe the law is pretty firm as it stands and we do not believe it needs any rearticulation.

**Senator ALLISON**—Could you clarify that: you do not believe that there is a need to spell this out in the legislation. You believe that it offends against the act for inducements to be taken or provided for seeing smoking, whether it is product placement or simply smoking scenes in films? You believe that to be contrary to the current act?

**Mr Galligan**—Not depictions of smoking in films—I make the distinction between those—

**Senator ALLISON**—No, the link between inducements for and smoking in films.

**Mr Galligan**—Again, product placement, first and foremost, I can categorically say that since the law has been in place to ensure it does not happen our company have not been involved in that; indeed, we take a very strong stance against that. With respect to inducements for the depiction in films, that is something we are not involved in.

**Senator ALLISON**—Thank you. How do you account for the very significant increase in the number of smoking scenes in film since the Tobacco Advertising Prohibition Act came into force?

**Mr Galligan**—Are you talking about Australian films or foreign films?

**Senator ALLISON**—Both.

**Mr Galligan**—I suppose the competency of the act cannot go beyond the Australian climate; it only—

**Senator ALLISON**—But it is true to say that, in some of the other countries whose films we take, there have also been tobacco advertising restrictions—roughly about the same time as they have been in Australia.

**CHAIR**—But that does not come under the purview of the Australian law.

**Senator ALLISON**—I am not suggesting it does, Chair.

**CHAIR**—It does not come under the purview of the Australian law, so if you could restrict your comments to Australian law.

**Mr Galligan**—Certainly. It is a valid concern you have, Senator. If you were to go back to the 1950s there was also a large depiction of smoking in movies back then, which reflected the community's use of tobacco products back then. I suppose in many ways—this is a personal view—you have to look at the way in which the smoking is depicted and the people involved in smoking. I would not say that there are 20 per cent of people smoking in movies, which should represent approximately the percentage of smokers in the community. But do I believe that smoking is more evident in movies these days? Possibly yes, but it is over to producers and directors to make a judgment about how they want to have reality depicted in those particular media.

**Senator ALLISON**—What do you see as the main benefits to your company—Mr Hamshaw-Thomas, perhaps you could answer this too—of donations to political parties and the benefits of sponsorship of things like opera and other arts events?

**Mr Galligan**—Like any organisation in this country, we are entitled to participate in political debate and the political process. For right or for wrong, participation in the political process in Australia has for some time involved receipts of funds to political organisations. Your political party is no stranger to those, Senator, and neither is any other party represented on the committee today. We are a very political product, as evidenced by our appearance before the committee today, and I think in many ways it is only respectable that we are involved in the political process. If people want to change the way in which organisations across the spectrum involve themselves in the political debate, I think it is a broader question about political funding, not about the complexion of the particular companies that are engaged in that activity. To hive off or excise tobacco companies versus any other company—and I have gone through the returns of a number of parties before this committee today, and we are certainly not the only controversial company to donate—is, I would say, a broader question that potentially the committee on electoral matters may have to look at.

**Senator ALLISON**—In looking at that broader question, we also need to understand what the benefits to your industry are of donating, and that is my question to you. I could put this question to other organisations which make political donations, but this inquiry is about a bill which seeks to prohibit such activity. So it would be useful if you could advise us what the main benefits to your organisation are.

**Mr Galligan**—Again, just to be participants of the political process. We have political parties making law with respect to the way our company will operate. Are people saying that political donations are immoral? That is another question. I suppose what you are asking is whether donations from our company are immoral. If you are suggesting that there is some direct benefit from those donations, I think that is a characterisation of the people receiving the donations, not the ones providing it. I believe that any government minister, both of this current government or of previous governments, would find the suggestion offensive that donations have implicated or affected their decisions.

**Senator ALLISON**—I draw your attention to a study of the United States Congress carried out in the early nineties which found that:

... the more tobacco money a member received, the less likely the member was to support legislation designed to reduce the harm caused by tobacco.

That is from a submission we will be dealing with a little later this morning. Can you comment? Do you agree with that study? Do you think it has implications here in Australia?

**Mr Galligan**—I am not au fait with the study or the voting records of congressional members in the United States. What I can say is that here there certainly has been a volley of regulation against the tobacco industry in the last 10 or 15 years. I suggest that, if anything, there has never been any stoppage of tobacco regulation, whether it be the Tobacco Advertising Prohibition Act or current inquiries by statutory authorities. Also, every state and territory government is currently engaged in tobacco reviews. We have four states currently reviewing their tobacco acts at the moment. I would not say that, in any way, our involvement in the political process through donations has stymied that development.

**Senator ALLISON**—Mr Hamshaw-Thomas, do you have any comments to make on those questions?

**Mr Hamshaw-Thomas**—No, I do not think I have an awful lot to add to what John Galligan said. I am surprised that in a democracy there should be any suggestion that somebody who is engaged in manufacturing and selling a legal product should be in any way denied access to the democratic process.

**Mr Galligan**—As a postscript to that, it is not our way to go out and provide moneys to political parties unsolicited. We receive requests from political parties and individuals right across the spectrum. Of course certain political parties self-regulate in this area, and yours is one of those that has made a decision not to receive political donations. That is your party's prerogative; that is the Labor Party's prerogative, if Mr Latham's comments about political funding are to be taken as part of the ALP platform.

**Senator ALLISON**—I think we understand that, but we are dealing with a bill which seeks to change the status quo.

**Mr Galligan**—I understand that and I was saying that I do not believe that the bill is necessary—it is for political parties to self-regulate. For instance, taken to the logical extreme, it would mean that members of our union here, the Federated Tobacco Workers Union, could not be members of the Labor Party because they receive substantial funding through wages from the sale of tobacco.

**Senator ALLISON**—You argue that there is no special case for tobacco, that there is no reason why it should be singled out. Can you think of any other legal product which is as addictive as the one that you produce and responsible, by any measure, for the death of about 20,000 people a year and probably costs the Australian community \$21 billion a year? Is there another product that is similar to that?

**Mr Galligan**—I am not going to draw comparisons between any consumer good or non-consumer good. I think that tobacco is unique. By the same token, do I think it is illegal? No, I do not. Do I think that it is somehow inappropriate—

**Senator ALLISON**—We all agree that it is legal. I am asking you why you claim that there should be no special case for tobacco. I am suggesting to you that these might be reasons why it ought to be a special case.

**Mr Galligan**—In the last few days we have had a very robust debate about fast food products. I have seen astounding funds allocated towards the potential health risks associated with fast food. I have noticed that McDonald's and James Hardie have contributed to your political party in the past. Should you recuse those particular organisations from contributing? They have health risks associated with their products—maybe, in your mind, not to the same degree as tobacco, but is there a cut-off point?

**CHAIR**—I invite Senator Humphries to ask questions as we are running out of time.

**Senator HUMPHRIES**—Gentlemen, you refer to the capacity to donate to political parties and you make reference, Mr Galligan, to the decisions of the High Court in respect of freedom of political communication powers or rights that have been imputed by the High Court. For example, you quote Justice Brennan in your submission, when he said there should be 'freedom of public discussion of public affairs and political and economic matters among all members of the community', and you say that that is a right which you feel might protect your right to make donations to political parties. Do you have any legal advice to that effect?

**Mr Galligan**—Not to the best of my knowledge. Again, if political organisations wish to stop receiving donations from tobacco companies, certainly ours, there is one way to stop that: stop writing to us asking for it.

**Senator HUMPHRIES**—Yes, I take that point. But could I come back to my question: you say you have no legal advice to that effect?

**Mr Galligan**—Obviously we reflected on the High Court's decision, and we believe that is probably as firm an articulation as possible of where we believe we have rights as an organisation—or where, I suppose, an individual out there has rights—to participate in the political process. I think it is a dangerous precedent to set—with respect to any excising of an individual or an organisation—to force them to not be involved in the



political process. For the political process to change to reflect a change in the way in which financial contributions to political parties are to be made is a separate matter altogether, and we are more than happy to involve ourselves in that debate. However, I do not believe that we should be singled out.

**Senator HUMPHRIES**—How is making a donation—which is disclosed, admittedly, but is still a donation to a political party—engaging in public discussion or participating in the democratic process in any kind of open way?

**Mr Galligan**—Sorry, Senator, can you repeat the question?

**Senator HUMPHRIES**—How is making a donation to a political party, even though it is obviously disclosed, participating in public discussion? You say that you want to participate in—

**Mr Galligan**—I will give you an example. Most of our donations are made in attending political conferences, be they put on by the Labor Party, by The Nationals or by the Liberal Party in different states or federally, and they are literally solicited to companies right across the country for the benefit of engaging with policy makers on policy issues. I am sure you have attended events on that basis as well.

**Senator HUMPHRIES**—I certainly have. But you would not argue that you need to make those payments in order to contribute to political debate in this country, surely?

**Mr Galligan**—No, what I am saying is that, if the political parties through largesse do not want to charge organisations for that, we would be more than happy to still attend, but they do attract a fee—a substantial fee.

**Senator HUMPHRIES**—Yes, but whether or not you need to pay it to participate in the political process is the issue that I am getting at.

**Mr Galligan**—I am participating in the political process today. However, we believe that we might be disadvantaged by not having the same allowances that Coles Myer, BHP or any other organisation that has political issues in front of it. We believe that we are entitled to the same licence that other organisations have.

**Senator HUMPHRIES**—You say on page 9 of your submission:

It is our policy to donate only to registered political parties with published policies and disclosure arrangements with the Australian Electoral Commission.

What parties do not have disclosure arrangements with the Australian Electoral Commission?

**Mr Galligan**—We do not donate to them, so I am not sure. But I am sure there are political organisations out there who do not operate by, I suppose, the spirit and the letter of the law.

**Senator HUMPHRIES**—Can you name any?

**Mr Galligan**—No. Based on the fact that they are not operating within the spirit of the law, I am unaware of them.

**Senator HUMPHRIES**—Okay. Thank you.

**Senator McLUCAS**—Earlier I think Mr Galligan said if the first bill were to be enacted that would deny your company access to the democratic process. Can you tell me how that would happen?

**Mr Galligan**—We are not saying that it would deny us absolutely. I should be a little more clear. It would be prejudicial to us carrying out the same level of political engagement that our competitors or other companies within the business community might enjoy. I do not see why we should be singled out particularly when we have a vast range of political issues on the boil. It is not an issue of efficacy, it is an issue of fairness.

**Senator McLUCAS**—If this bill were to be enacted, all your competitors would be in the same boat.

**Mr Galligan**—When I say ‘competitors’, we are out there competing for consumers right across the spectrum. Regardless of whether they are buying milk, cheese or tobacco products, the consumer has a fixed amount of disposable income and we would like to compete for the dollars of the consumers along with any other fast moving consumer good company.

**Senator McLUCAS**—How would your being precluded from donating to a political party affect your ability to market yourself to consumers? I am not getting the linkage.

**Mr Galligan**—It is about the policy making or decision-making process. In some ways we would not have the same access as other companies who might be seeking to change the environment in which we operate, whether it be the retail environment or the tax environment. We pay over \$3 billion a year in taxation revenue. If companies are out there—be they our suppliers or our retailers—trying to change that paradigm we believe we have a right to be involved. If they get the benefit of having political engagement because of their

arrangements—being able to attend functions or conferences put on by the political organisations—then we would be at a disadvantage.

**Senator McLUCAS**—You are confirming that political donations do give you access to policy making.

**Mr Galligan**—They provide you with opportunities to meet with policy makers. That is something that political parties—both yours and others—make clear when they send invitations to organisations such as ours to attend your national conference, your national conventions or your state based conventions. It is clear in the letters of invitation; it is clear in the paraphernalia. We are simply asking why we should be singled out when we are also a large tax contributor. We have several issues—we may be wishing to encourage legislation with respect to things like youth smoking prevention or taxation regimes. Let us not see this as us simply trying to dispel or defer legislation.

**Mr Hamshaw-Thomas**—It comes back to what I said earlier. Wouldn't a more constructive standpoint be to try and engage more with tobacco companies and understand the issues? We see very little of that. The suggestion that tobacco companies not be allowed to make political donations almost seeks to legitimise an exclusion from the process of formulation of regulation. Imperial Tobacco's position is that the more constructive approach would surely be to try to work with us and around the issues. I have earlier said what all the issues are. We have to talk about those and how we address them.

**Mr Galligan**—People might be thinking that the removal of political donations is going to somehow assist in managing the many issues that we face, and I mentioned three of them in my opening statement—youth smoking prevention, illegal tobacco and harm minimisation. We do not believe those things are going to be advanced by any measure by parliament's attention to this bill. There needs to be a more constructive, holistic view about the way in which tobacco policies can be made, not simply finding fault or picking out areas for small focus when they are going to return very little as far as public health benefit is concerned.

**Mr Hamshaw-Thomas**—Chop chop is a very good example of where the industry has worked with the government and we have had tangible successes. Another example is youth smoking prevention. We are working together as an industry on an initiative and there is nobody in government who shows any desire to speak with us on that issue and in some ways share that work or whatever. That cannot be a constructive approach.

**CHAIR**—The point you make is that political parties invite you to their forums and do not invite you in a different category from that of other organisations by telling you, 'You can come along free of charge.' So, in essence, you are forced to donate to a political party purely and simply to have the right, like any other organisation, to be involved in political debate about policies for the country.

**Mr Galligan**—I think that is a fair assessment. But I would add also that it is a dangerous precedent when you look at, I suppose, the health risks associated with lots of products out there—what is the tolerance test; what is the cut-off? Yes, tobacco has a very visible community impact, and we are not denying that. But we are not the only product out there that would meet the test of having evolved in the political process through donations.

**Senator ALLISON**—Mr Galligan and Mr Hamshaw-Thomas, could you confirm that all donations made to political parties, in the last few years at least, have been for conferences—that the cheque, as it were, has been connected with attendance at a conference?

**Mr Galligan**—No, that is not accurate for us.

**Senator ALLISON**—That is what I thought.

**Mr Galligan**—But, again, the majority of them would be for that purpose, yes.

**Mr Hamshaw-Thomas**—We have not made any political donations.

**Senator ALLISON**—Would it be possible to get a breakdown of political donations over, say, the last two years as to which were prescribed, as it were, for attendance at a conference and which were a straightforward cheque in the mail to go straight in the bank?

**Mr Galligan**—That is in our disclosure documents to the AEC, but we can provide that information to the Senate.

**Senator ALLISON**—Thank you.

**CHAIR**—Have you received requests for donations in recent times from any individual or organisation who claims not to want to accept donations from tobacco companies?

**Mr Galligan**—We understand there is a bit of inconsistency with the application of the ALP's policy—we are not sure whether it is a national policy—in that we are still receiving correspondence inviting us to these types of forums.

**CHAIR**—Could you provide evidence of that to the committee?

**Mr Galligan**—I am happy to send it. These things could be just a glitch in the system, but I am happy to give evidence of that.

**CHAIR**—Thank you very much. Mr Galligan and Mr Hamshaw-Thomas, thank you both for giving us your time today; we are very grateful.

**Mr Galligan**—You are very welcome; thank you.

**Mr Hamshaw-Thomas**—Thank you very much.

[10.48 a.m.]

**KIDD, Professor Michael Richard, President, Royal Australian College of General Practitioners**

**ZWAR, Professor Nicholas, Fellow, Royal Australian College of General Practitioners**

**CHAIR**—Welcome. Is there any additional detail you wish to give us about the capacity in which you appear here?

**Prof. Zwar**—I am involved in working with the college on smoking cessation guidelines for Australian general practice.

**CHAIR**—I remind you that the giving of evidence before the committee is protected by parliamentary privilege; however, the giving of false or misleading evidence may constitute a contempt of the Senate. I now invite you to make an opening statement.

**Prof. Kidd**—Thank you for inviting the Royal Australian College of General Practitioners to speak to you today about our submission supporting the provisions of the bills to deny election funding to candidates accepting gifts derived from tobacco smoking, to prohibit the advertising and offering for sale of tobacco products on the Internet and to prohibit tobacco product placement in films. The RACGP commends the government and all political parties on their pursuit of legislation to address the impact of smoking on the Australian community.

The Royal Australian College of General Practitioners is the largest medical college in Australasia. As the voice of Australia's general practitioners, we define the nature of our clinical discipline of general practice, we set and maintain the standards for high-quality clinical care in general practice and we set and maintain the standards for education and training and assessment for general practice. We also advocate, on behalf of our discipline, on any issue that affects the ability of Australia's GPs to deliver a quality service to the Australian public and we support this country's GPs in meeting the primary medical care needs of the Australian public.

As general practitioners we are the first point of contact for the physical and mental health care of the entire population of our nation, with its many communities. Australia's general practitioners have an extensive role in preventing smoking and addressing its effects. Tobacco is a known or probable cause of at least 25 diseases, including lung cancer and other cancers, heart disease, stroke, emphysema and other chronic lung diseases. Smoking is the risk factor responsible for the greatest burden of disease in terms of loss of health and premature mortality in Australia. It accounts for 12 per cent of the burden of disease for men and seven per cent for women. Smoking is responsible for the death of an estimated 19,000 Australians every year. Approximately one in two regular smokers will die of a smoking related disease, and those who die lose on average 16 years of life.

The RACGP supports evidence based strategies to prevent smoking uptake and to increase smoking cessation. This includes legislation, public education campaigns and smoking cessation resources to assist general practitioners and other health professionals to assist their patients. Our policies cover the strengthening of health warnings on tobacco products as part of a comprehensive program to reduce the prevalence of smoking in the Australian community, advocating for smoke-free workplaces and the ban of smoking in all pubs and clubs in Australia, and the endorsement of the national smoking cessation guidelines for general practitioners, which, as you are probably aware, were released this week by the parliamentary secretary for health and which were developed under contract to the federal government by the RACGP education and training company, General Practice Education Australia. Professor Zwar is one of the authors of those guidelines, which we have brought with us today. We will table them for your interest at the end.

Our submission to this inquiry supports the provision of both bills but does not address the issues regarding the ACCC. Firstly, denying election funding if tobacco sponsorship is being received shows the Australian community, tobacco companies and other countries that our governments are serious about tobacco control. We believe this is an ethical, moral and economic issue that needs the full support of all our political parties if we are serious as a nation about reducing the single largest preventable cause of death and disease in Australia. Secondly, on prohibiting advertising, sale and product placement in electronic media and films, we would like to focus on the findings of research. Research shows that tobacco advertising not only leads to an increase in consumption but that young people, the source of replacement smokers, are heavily influenced by that advertising. Research shows that programs to help adults quit, restrictions on smoking in public places, efforts to restrict access to and the affordability of tobacco products, and outlawing commercial inducements to smoke have all been demonstrated to reduce smoking, including among young people.

Research shows that antismoking advertising may have its most powerful effects on pre-adolescents or early adolescents by preventing the commencement of smoking. These effects can be dampened by the presence of tobacco marketing or enhanced by antismoking media coverage. This is particularly relevant for young people who increasingly use new electronic media and videos. Research shows that bans on tobacco advertising also reduce tobacco consumption, smoking prevalence and smoking uptake, provided that bans extend to all forms of media. Research shows that bans have been demonstrated to have no negative impact on industries apart from the tobacco industry, and that bans do reduce the uptake of smoking by young people.

Senators, we have three take-home messages for you today: (1) evidence supports the importance of banning all direct and indirect tobacco marketing, promotion and product placement in new media, especially in preventing the uptake of smoking by young Australians; (2) the cost to individuals and the Australian community of smoking far outweighs the economic considerations of the impact on the tobacco industry and retailers—this is a moral and ethical issue in deciding about funding for political parties; and (3) the evidence shows that reductions in the level of smoking, both uptake and quitting, are directly related to the level of antismoking campaigns, legislation and resources. We urge you to support these measures. The enacting of this legislation presents a significant opportunity to combat the single largest preventable cause of disease and death in Australia today.

**CHAIR**—Thank you. Professor Zwar, do you wish to add anything further?

**Prof. Zwar**—Just to add a little to that. In terms of the arguments that we have heard from the tobacco industry prior to us coming before the committee that tobacco companies should not be singled out, clearly the tobacco industry is not like other industries. We have heard Senator Allison say that it is a product which, if used precisely as directed, will be responsible for the deaths of approximately half its users. I think it is an important message for the Australian community that our political leaders are not associated with an industry which brings about such a level of death and disability to our community. I think that would go a long way to addressing a degree of cynicism in the Australian community about the government's commitment to tobacco control. It is not the same as other industries, and I contend that singling it out is quite reasonable in the context of the effect it has on health and the costs of that to our community.

**CHAIR**—Thank you.

**Senator ALLISON**—The vexed question of whether there are inducements being paid, received and asked for in the film industry is something I want to particularly focus on. You heard earlier that the tobacco companies say they do not provide these inducements. Anecdotally, at least, we know that the film-making industry depends on substantial donations as do, by all accounts, individual actors. Given the difficulty of tracking some of this money—I think I hear you say this, but I wonder if you could expand on it—to counter that we need antismoking programs and advertisements perhaps in cinemas which could simply alert people to the exposure of smoking in that venue. Could you talk about the importance of publicly funded ads which would do that?

**Prof. Zwar**—I think there is evidence that, despite what the tobacco industry has said, the amount of visible advertising and visible tobacco products in films, particularly in US films, is increasing rather than decreasing. Stan Glantz from the University of California, Los Angeles, has shown that and published that in the work he has done. How you track that, I agree, is a difficult problem. It seems to me that a clear message needs to go out that that is not acceptable. Therefore, I would contend that the law needs to make it very explicit that that is not an acceptable thing and that the law needs to be strengthened along the lines set out in this bill. The other issue you raise about whether there should be warnings to the public about tobacco depiction in films I think is an issue that does need exploring. It has been put forward as an idea by Professor Glantz and others in the US that, really, if tobacco products are going to be depicted in a glamorous way in films, people should be warned about that when they enter a cinema. I think there needs to be some discussion and debate about exactly how to take that forward. I do not think that has had much discussion as yet in tobacco control circles in this country, but other people such as VicHealth, who are talking to you later, may have more to say about that in terms of their advocacy on that issue.

**Senator ALLISON**—On another not quite related subject, nonetheless, one you have put forward as a key priority is that of banning smoking in pubs and clubs. Would you like to expand on that and indicate how, if at all, you think the Commonwealth could be involved in encouraging the earlier banning than might otherwise be the case?

**Prof. Kidd**—The college has recently developed a policy and issued media statements calling for a national ban on smoking in bars and clubs. We are particularly concerned, as general practitioners, about the impact of

smoking on our patients who are the employees working in bars and clubs. We believe that this is an occupational health and safety issue. This is the only group in our community who are still not protected and work in an environment where they are exposed to the very significant risks of passive smoking. So we would like to see a coordinated effort by all governments and all political parties to support bans on smoking in bars and clubs.

**Senator ALLISON**—And—if I can prompt you—the use of federal industrial relations laws?

**Prof. Zwar**—We would encourage government to look at the means available to it to make that happen.

**Senator ALLISON**—As GPs can you give the committee some idea of the likely impact, particularly on young people, of the more subtle advertising that is still allowed by tobacco companies? The opportunities are still there for tobacco companies to sponsor all sorts of events. We still have exemptions, although they are going in a year or so. How influential are those means of advertising?

**Prof. Zwar**—Anything that glamorises smoking and is depicted as cool and acceptable and as making a young person more attractive encourages young people to experiment and perhaps very easily become addicted to cigarettes. There is evidence from the National Institute on Drug Abuse in the US that as few as seven cigarettes may be enough to create an addiction to nicotine. It is a highly addictive chemical and it does not take a lot to transfer experimentation into dependence. New South Wales Health were active in exposing sponsorship of a web site about fashion parades in nightclubs which was supported by the tobacco industry without it being declared. That was some years ago, but it is an example of how the link between glamorous industries—the fashion industry being another example—and tobacco products makes young people in particular see smoking as something that is still desirable. We need to do our best to make smoking be seen as not a desirable thing to do. I think that youth are particularly vulnerable to the image of smoking as something that will give them a passport—and that is a term that used to be used by the tobacco industry—into the adult world.

**Senator ALLISON**—Could you comment on the current level of federal budgeting for programs for antismoking and perhaps indicate, if we were to take on the film industry and even television and their depictions of smoking, what size budget would be necessary? Maybe that is an unfair question for a doctor!

**Prof. Kidd**—We are certainly very grateful for the significant amount of funding that has been contributed by the Australian government to a number of initiatives to support Australian general practitioners to support our patients in preventing tobacco smoking in the first place and in the cessation of smoking when they come to us seeking that advice, or indeed to assist us in proactively recommending that advice to our patients. However, it is clearly not enough, given the size of the problem and the cost that smoking incurs on our health budget on an annual basis. It is an extraordinary amount. If we put in a commensurate level of funding then we would obviously have a very significant impact through education.

**Prof. Zwar**—I cannot give a budgetary figure either, but I think what is clear from the evidence—and David Hill has said this too—is that unless you keep activity going in smoking control and antitobacco measures then prevalence will tend to jump up again. He has described it as a spring that you have to hold down; if you take your hand off the spring it will tend to come up again. And that is shown if you look at evidence on spending by government on antitobacco measures versus prevalence. In the early 1990s, when spending dropped off per capita, rates of smoking stopped going down and the rates in our community stabilised. When somewhat more money was devoted, the rate started to go down a little bit again. I think, though, compared to many other comparable developed countries, particularly the United States, our spending is very small.

**Senator ALLISON**—I think there was a study recently which showed that only about half of GPs tackle patients, as it were, who smoke and raise the issue of smoking when they present. What sort of assistance would help doctors, do you think, to broach the subject with their patients?

**Prof. Kidd**—There are a number of initiatives—and I will let Nick outline some of them—but the RACGP produce preventive care guidelines which support Australia's general practitioners to keep our population well. We have had recent support from the Australian government to develop and distribute the RACGP SNAP guidelines, which look at smoking, nutrition and the safe use of alcohol and promote physical activity to assist Australia's general practitioners to assist all of our patients to adopt and maintain a healthy lifestyle.

Similarly, we now have computers on the desktops of the majority of Australia's general practitioners. Our computer systems do have the capacity to prompt general practitioners about patients who either are recorded as being smokers or have had no details recorded as to whether they were a smoker or a non-smoker. That is

one very simple way for the doctor to bring up the issue of whether a person is smoking—at the time somebody attends their GP. That then provides the GP with the opportunity to engage in either brief or more extensive interventions to assist that person to cease smoking.

**Prof. Zwar**—I will echo what Professor Kidd has said. There has been a number of documents and tools prepared to help GPs and others in their practice, such as practice nurses, to do more in this area. The smoking cessation guidelines fall under that umbrella of the Smoking, Nutrition, Alcohol and Physical Activity Framework. I think there could be and should be more discussion about how to structure incentives for GPs to get involved in evidence based preventive activities and how to do that in a way that is not overly bureaucratic and does not create more red tape—the senators are probably aware of the Red Tape Task Force and efforts to try to reduce red tape in general practice—but encourages GPs to spend time on things which are shown to be of benefit, such as changing lifestyle behaviours which contribute to major burdens of disease in this community, and the SNAP Framework packages up the major ones. So I think there does need to be more discussion about creating an environment where GPs are given encouragement and incentives to do this.

**Senator HUMPHRIES**—I want to clarify something in your written submission. On the second page, the fourth dot point does not seem to quite make sense. You start that paragraph by saying:

They—

and I assume you mean the Cancer Council—

recommend reducing commercial inducements for uptake of smoking by children by: ...

- including advertising at point-of-sale and purchase inducement, direct marketing and

I do not know if you want to correct what you are saying there; I assume you mean by banning advertising at point of sale?

**Prof. Kidd**—Yes.

**Senator HUMPHRIES**—I do not know if you have seen this, but in the submission made by the VicHealth Centre for Tobacco Control they make comments about the difficulty or the unworkability of a straight ban on Internet advertising or trading in tobacco products, and they suggest an alternative regime. Have you got a view about their comments?

**Prof. Kidd**—We have reviewed the VicHealth proposal, and we do support their position that the sale of tobacco products over the Internet should be regulated, but we think that a strict regulatory framework is required to deal with these sales rather than a total ban on Internet sales.

**Prof. Zwar**—I want to add one more thing in response to what was said by the tobacco industry earlier about Australia's approach to tobacco control being ad hoc—I think that was the term that was used. I would contend that we actually have a very well thought through framework for our tobacco control, which involves things that the World Health Organisation have said are effective—the regulation of access by young people, restriction of smoking in public places, support for prevention, price signals to make tobacco products not too affordable and prevention of sales of illegal tobacco. Clearly there is always room for improvement but the contention that it is ad hoc, not organised and not thought through is just not correct.

With regard to the idea of greater engagement with industry in that process, the track record of the industry has not been wonderful in terms of honesty in political processes over past years. So you would have to be concerned about that and about how to engage with them. I do not believe at all that their not being able to donate to political parties stops the engagement and discussion with industry about tobacco control and tobacco regulation. It simply takes away their ability to donate to political parties. It does not stop them engaging in political processes and discussions with government and regulators about all those other things. So I do not see at all the logic of that contention from the tobacco industry's spokespeople.

**CHAIR**—Thank you, Professor Zwar. Thank you to you both for giving us your time today.

[11.12 a.m.]

**HARPER, Mr Todd, Director, VicHealth Centre for Tobacco Control**

**CHAIR**—Welcome. I remind all witnesses that evidence given to the committee is protected by parliamentary privilege. However, the giving of false or misleading evidence may constitute a contempt of the Senate. I now invite you to make any comments you wish to make. Senators may have some questions for you at the conclusion of that.

**Mr Harper**—We have made a submission to your inquiry on behalf of a number of leading health groups in Australia. Thank you very much for the opportunity to talk to you. I think it is important at the outset to make the point—and I would be surprised if this point has not been made by other speakers, because it is an important one—that tobacco is like no other product. There is no level of safe or optimal use of this product. Not only that, it is a product that is incredibly addictive. Approximately three-quarters to 80 per cent of existing smokers wish they were not smoking and yet they find it incredibly difficult to quit because of the addictive nature of the product—a product that is made, of course, all the more addictive by the manufacturing process of the tobacco industry, which includes additives in that product to make it more addictive.

The other point to make is that tobacco is like no other product—this applies to the range of deliberations you have before you today—in that there is a nexus between recruiting new customers almost entirely under the age of 18 and addicting those customers. Therefore, you have a very strong nexus between the profits of the tobacco industry and addicting customers to this addictive and defective product, on which those profits rest very heavily. It would be remiss of me if I did not remind your committee of the importance of recognising that something like 80 per cent of smokers are actually addicted by the time they are 18. So by the time Australian society recognises these people as being able to exercise an adult choice they are already addicted. In fact, by the time they get to their mid-20s, almost all people who are ever going to smoke have taken up smoking.

That is an important thing to remember in the marketing context of your deliberations because the process of marketing tobacco products to consumers continues up until the mid-20s as being the strongest demographic for the future lifeblood of the tobacco industry. It is therefore important to recognise that we need to tackle this problem in a way that we would tackle no other problem. There is no level of optimal use. There are no positive health benefits from this product. Unlike other products, it needs to be regulated and controlled in that way. I am happy to leave my introductory comments at that so we can get down to any specific questions you may have.

**Senator ALLISON**—I want to ask an administrative question. You have provided the committee with a confidential set of attachments to your main submission. Can I confirm that it is your intention that these should remain confidential? By doing this you have indicated that the committee should not use this evidence. Some of it appears to be on the public record in any case. Can you advise the committee as to what your intention was with regard to this. Is it still confidential?

**Mr Harper**—Yes, that is the case. Taking up your point that some of it may be on the public record, I am happy to review that. If that is the case, I will certainly make it available for your deliberations.

**Senator ALLISON**—That would be useful to us. We are dealing with two bills and looking at the adequacy of the response of the ACCC to possible litigation. I will start with a question about political donations. You say in your submission that the US Congress study—and I think you cite that it was in 1994—showed that the more tobacco money a member received the less likely the member was to support legislation designed to reduce harm caused by tobacco. Do you see political donations in a real sense being influential or having been influential in Australia?

**Mr Harper**—I am sure that that is the case. The tobacco industry, as we know, are very active participants in the process of providing political donations to parties. It is very difficult with the current legislation to be sure that those donations that are disclosed are the only donations that occur. Senators may be in a better position to understand what the loopholes in the legislation may be, but it has certainly been suggested to us that the current regulations do not disclose all of the donations that flow from the tobacco industry.

I note from some of the tobacco industry submissions that they equate donations to political parties as part of the political process. I take issue with that. Certainly everyone, including the tobacco industry, is able to participate in the political process but not everyone is able to make political donations of the same magnitude as the tobacco industry. It is an important point because it goes back to my opening remarks that this is not an



ordinary product. We should not be seeing tobacco through the same eyes we would cast over other products. It needs to be seen in a very particular context. It is important to recognise that some of the most important reforms that we can make in tobacco control in the next 10 years rely very heavily on political leadership—for example, the enactment of legislation to close down remaining forms of tobacco marketing, the introduction of smoke-free laws in all indoor workplaces and adequate funding for tobacco control programs in Australia. These are very real issues that go to the heart of the leading cause of preventable death in Australia. It would serve us all to have a process whereby the influence of the tobacco industry could be removed from these very important public health decisions which our community and political leaders need to grapple with in the next few years.

**CHAIR**—Mr Harper, the Senate is sitting while we are having this inquiry, and we have just been called to the chamber for a division. Are you able to stay on the line for about seven minutes while we go down for the division?

**Mr Harper**—Most certainly.

**Proceedings suspended from 11.20 a.m. to 11.29 a.m.**

**CHAIR**—Mr Harper, are you still patiently sitting there waiting for us?

**Mr Harper**—Yes, I am.

**CHAIR**—Thank you so much.

**Senator ALLISON**—Mr Harper, I ask first of all whether you finished the answer to the last question, which I forget now. We will move on. I ask you to tell the committee what, if anything, you can say with regard to terms of reference (c)—that is, the response to date of the ACCC to orders of the Senate.

**Mr Harper**—I indicated to the staffer arranging this interview that, because of the time schedule you had in place for this hearing, we were not able to address that particular element of your inquiry in this interview. I do apologise for that, but at short notice we were not able to assemble the people with the expertise in this area. They have other commitments. In actual fact, they are at the framework convention on tobacco control. I do apologise for that and did indicate that to the Senate staff.

**Senator ALLISON**—You make some other suggestions about the way in which the Tobacco Advertising Prohibition Act ought to be amended. Can you expand on those suggestions?

**Mr Harper**—It certainly is a very important issue. To put this in context, in the last 10 years we have seen the diminishing effectiveness of the existing Tobacco Advertising Prohibition Act. With the introduction of this legislation we have seen a gradual movement by the tobacco industry of its considerable resources out of the more traditional forms of media, which it had previously been heavily involved in, into areas that were not covered by the TAP Act legislation. It is important that we see it in that context. The spirit of the original TAP Act was to ensure that the tobacco industry was not able to promote its product to new customers and existing customers who may wish to quit.

Since then tobacco advertising has moved its considerable resources into areas that are more non-traditional forms of advertising. In Australia, for example, that has included a range of marketing strategies which focus around events typically focused on young people and putting additional resources into point of sale advertising. It also uses more sophisticated forms of marketing which are known by various tags, including below-the-line guerrilla marketing, buzz marketing and these sorts of things, which rely on creating essentially positive associations with the tobacco product. In our submission we referred to a number of these, including events where the tobacco industry has sponsored nightclub events and fashion events—all very much associated with trying to create a positive association between the tobacco product and the particular environment where tobacco products are marketed.

It is important, therefore, that we protect what I would describe as the original integrity of the TAP Act legislation. That should essentially be this: if it is good enough to ban tobacco advertising and marketing on television, radio and in print mediums—the more traditional forms of media—then the same principle should apply to tobacco no matter how it is marketed—whether it is through the Internet, film, point of sale or events the tobacco industry would sponsor. It is important to protect the integrity of that legislation because what we have seen is simply a transfer of considerable advertising resources away from those traditional forms of advertising and into these emerging areas of marketing opportunity.

**Senator ALLISON**—I want to bring you back to the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill, which is the other part of the reference. We have had two submissions from the media, one from Free TV Australia and one from SBS. Free TV Australia suggests:

It will be very difficult for a broadcaster to ensure it does not screen a film or television program containing a tobacco product placement. Broadcasters have no knowledge or control over tobacco product placement in independently produced program content and do not usually have rights to edit licensed program content. The effect of such an offence would be that many films, series, documentaries and overseas sporting events would not be able to be broadcast in Australia.

Could you comment on the way in which those difficulties for Australian broadcasters could be overcome? I will ask them this as well, but perhaps you could suggest amendments that might be made to the bill which would make it easier for those broadcasters to absolve themselves, if you like, or find a method by which they could ask for certification or some other form of assurance that product placement has not taken place.

**Mr Harper**—It is an important issue, particularly given the exponential growth that we have seen in smoking portrayal in popular films. Of course that is a concern that we would have. One of the difficulties here is that, at the same time, our organisation would not be seeking to in any way limit or control what can be shown in films. Having said that, we would strike an appropriate balance between the public health aims and an ability to portray the culture in an appropriate way. Some of these reforms may in fact be non-legislative. I think that there is a need to look at the ways in which we can better engage the film and television industry in this issue. For instance, that might be looking at ways in which we can educate the industry about the harms of tobacco or exploring ways in which we can achieve the goals that I think both of us would want to achieve. We do not want to be unnecessarily promoting tobacco products in these broadcasts and, at the same time, we do not want to be unnecessarily restricting the products that are screened on television. They are some opportunities that we have.

There may also be the opportunity to look at ways in which antismoking advertisements can be used in conjunction with films or television products that may have an excessive degree of smoking occurring in them. We have recommended setting up a working party with the Department of Health and Ageing, the Office of Film and Literature Classification and the Attorney-General's Department—and perhaps it may include FACTS as well as groups such as ours—to look at the film classification system and see whether that gives us some opportunities to at least provide adequate information to parents, for example, who quite rightly may not wish to expose their children to unnecessary and glamorous depictions of smoking.

**Senator ALLISON**—I think the idea of a rating system is something that ought to be canvassed. Do you have any information about what would appear, at least anecdotally, to be very large sums of money flowing through to the film and television production industry for placement of smoking scenes, if not product placement? Can you advise the committee as to where and how one might get evidence of this? As I said, it is largely anecdotal, but I have heard it said that the industry would collapse if it was not for the indirect funding that comes through from tobacco companies. Could you comment on that?

**Mr Harper**—Certainly. One of the important points is obviously to consider the fact that, in the United States, there is extensive evidence of tobacco industry funding being directed towards films and there is no doubt that that occurs very frequently. In Australia, that is not as readily apparent to us. We are certainly aware of anecdotal instances where there have supposedly been offers and inducements made to film producers. One of the things that I think would benefit us is making sure that the existing legislation is clarified to ensure that there is no capacity for such inducements.

We think that is probably covered, but it has been suggested to us by others that in fact the existing legislation is not clear. If that were the case, then we would certainly welcome amendments which would clarify that situation and make it very explicit that accepting inducements for tobacco placement was illegal. But, as I said, one of the things that we also need to do is look at an education program that looks at the industry as well. That could happen in parallel to those legislative amendments to ensure that such legislation was given the best chance of being successful. Some of the discussions we have had with the film industry on this issue have been positive. I sense that they see this as an important issue; an issue where they have some broader responsibilities to the community. The combination of the carrot and stick would be an appropriate step forward in that context.

**CHAIR**—Unfortunately, Senator Allison has had to go down for yet another division. Senator Humphries and I are still here and Senator Humphries has a question for you.

**Senator HUMPHRIES**—I do not know if you have seen any of the other submissions that the committee has before it at the moment, particularly the submissions from British American Tobacco and Imperial Tobacco. They made some comments which I want to get your reaction to. Mr Kerr's bill raises some problems about determining who may be considered as deriving substantial revenue from the sale of tobacco products, the impact a ban on such people making donations to political parties would have and the implications that ban would have on other people. For example, the tobacco company submission argues that 'many small and mixed businesses derive up to 40% of their total sales from cigarettes and tobacco products' and that the figure is 30 per cent or so for convenience stores and petrol stations. You might also find, for example—and this is not their suggestion but mine—that there is a self-funded retiree or two whose income derives principally from shares in tobacco companies. All of these people would be banned from making donations to political parties, local candidates or whatever. What is your reaction to that comment?

**Mr Harper**—That is an important point you have raised. One of the things that needs to be understood is that, at face value, we would not want to restrict many of those groups that you have identified as having a part or a substantial proportion of their income derived directly from the commerce associated with tobacco products. But, having said that, I think an important principle needs to be established here: the tobacco industry, both in Australia and internationally, has shown itself to be very adept at circumventing partial restrictions. What I mean by that is amplified by the previous discussion we had about the Tobacco Advertising Prohibition Act. The existing TAP Act does not ban all forms of tobacco marketing, so we saw a redirection of resources into other areas where the law was not quite so explicit. One of the concerns that would need to be addressed by any legislation in this area is how that could be addressed. Again, there is an important balance that needs to be maintained regarding not unnecessarily restricting the rights and freedoms of those who have some distance from the tobacco industry but at the same time not allowing any backdoor arrangements that would unduly interfere with the political process through political donations.

**Senator HUMPHRIES**—But you accept that the thrust of this process should be to target tobacco companies rather than to target individuals in the community who are engaging in commerce or otherwise going about their business who might happen to have revenue indirectly or directly from the sale of tobacco products?

**Mr Harper**—Certainly the tobacco industry would be a primary target. We would then need to look at the next level. Presumably that would be retailers who derive a substantial proportion of their revenue from the tobacco industry. In many cases we have seen these groups—and quite large entities—adopting very similar approaches to the tobacco industry, having similar concerns and similar policy approaches. The point that I am making, again, is that we need to make sure that we are not transferring the advocacy and donation process from the tobacco companies down to the very substantial tobacco retail groups which could then have quite substantial influence on the political process too. There obviously needs to be a balance here. Certainly the tobacco companies are a tick—you would definitely want to make sure that they were not able to influence that process—but you then need to look very closely at the retail level, because this is a group whose interests are essentially the same as those of the tobacco industry. The interest test is probably a substantial one that we need to grapple with and that should be at the centre point of the deliberations about where you draw the line.

**Senator HUMPHRIES**—I did not catch all of the comments you made about restrictions on product placement in TV shows, films and so on. You may or may not have answered this question already. Is there a danger if you establish, for example, that a movie made in the United States featured product placement of tobacco products—I can think of one or two that I have seen in recent years that would probably fall into that category—and then say to Australian consumers: 'You aren't allowed to see this movie because it breaches our rules about product placement. Although you'll see it referred to on programs about what's happening in the entertainment world and so on and you can see incidental advertising about it, you can't actually see the movie in Australia'? Do you feel that that might alienate some people from the process of excluding access to messages about tobacco and drive people to feeling that we have gone too far and that censorship has reached unacceptable levels?

**Mr Harper**—Thanks for the question—it gives me an opportunity to clarify something. I certainly would not be advocating a position whereby the public were not able to see films because a judgment was made that they had too much smoking. In some contexts, with particular creative works, smoking might be extremely relevant. We need to recognise that. We need to ensure that, where these films and TV products are shown, we look at a couple of options that are open to us to reduce the harm excessive portrayal of cigarette smoking may do. The first is looking at the possibility of screening antismoking ads in conjunction with these products when they are displayed. The other is to use the ratings system to inform consumers, and particularly to give parents

important information that they need to help their decision-making process about what their children should be exposed to. As you would be aware, the ratings system currently deals with adult themes and drug use. We would see some opportunities to use that format as the starting point for some discussions on whether that would be an appropriate tool to reduce unwanted exposure to smoking of a younger population in particular.

**Senator HUMPHRIES**—I have no further questions. I thought your submission was a very good one. Thank you very much for it.

**CHAIR**—Mr Harper, what would you do with cigarette companies that have a number of other interests and other companies? Would you also seek to exclude them purely and simply because their parent company is a tobacco company?

**Mr Harper**—Are you looking at, for example, a Kraft type situation—where Kraft is owned by Philip Morris?

**CHAIR**—That is right.

**Mr Harper**—Our submission dealt primarily with specific aspects of tobacco advertising. I do not see that that would affect a company like Kraft in that situation. I am not sure if I have understood you.

**CHAIR**—Yes, you have. Mr Harper, thank you for your tolerance during our division and thank you for joining us today.

[11.52 a.m.]

**LONGSTAFF, Ms Pamela, Director, Legal and Broadcasting Policy, Free TV Australia**

**EISENBERG, Miss Julie, Head of Policy, Special Broadcasting Service**

**CHAIR**—I welcome Ms Longstaff and Miss Eisenberg to the committee hearing via teleconferencing. I remind all witnesses that evidence given to the committee is protected by parliamentary privilege, and the giving of false or misleading evidence may constitute a contempt of the Senate. Ms Longstaff, I invite you first to make some opening comments to the committee, at the conclusion of which senators may have some questions for you.

**Ms Longstaff**—I would like to start today by assuring the committee that broadcasters treat compliance with the tobacco advertising prohibitions very seriously. Compliance with the prohibition is a condition of a broadcaster's licence, so a breach not only attracts penalties under the Tobacco Advertising Prohibition Act but also a penalty of up to \$2.2 million under the Broadcasting Services Act and the potential suspension or cancellation of a licence.

Broadcasters also comply with the spirit of the act. Broadcasters regularly broadcast community service announcements and programs with antismoking messages. The submission by Free TV Australia comments on the proposed widening of the definition of 'advertising' and the two new offences that affect broadcasting: the offence of knowing or recklessly screening a film or television program containing a product placement and the offence of knowing or recklessly accepting a benefit for the inclusion of tobacco product placement. In relation to the latter, we would simply say that it is unnecessary. Broadcasters in Australia do not accept tobacco product placement. Acceptance of tobacco product placement would be against the existing offences in the TAPA of broadcasting a tobacco advertisement. The existing prohibitions under the act are extremely comprehensive. The definition of 'tobacco advertising' is already very wide. We submit that case law shows that it is flexible enough to capture any new activities that are genuine tobacco promotions.

The issue that I would like to concentrate on today is the new prohibition against broadcasting a film made after 1 July containing a product placement of a tobacco product. This causes some concern to broadcasters, primarily because we acquire program content from a variety of providers, including Hollywood studios, independent producers, other broadcasters, cable providers and distributors. It will be near impossible for broadcasters to know whether there is tobacco placement in independently produced content. This is particularly the case in relation to the purchases that we make from Hollywood studios. Broadcasters generally are offered a package of films put together by the studios and priced according to their box office success. Broadcasters pay for all films in the package, even the ones they do not want or cannot broadcast.

The difficulty that we see with this particular prohibition is that it will be near impossible for broadcasters to know or find out whether there is tobacco product placement in a film. They will be left in a position where, if there is any depiction of smoking in a film, without being able to find out whether it is the result of a tobacco product placement arrangement, broadcasters may be held to be reckless in broadcasting that film. That will also apply to overseas sporting events. Some overseas sporting events—and the most obvious one is the international Grand Prix—are sponsored by tobacco companies. Broadcasters simply will not be able to show those sporting events.

The effect of the prohibition, we think, will be to make broadcasters extremely nervous about broadcasting any product which depicts cigarette smoking at all. Broadcasters have in place procedures which assess program content and, as I have said, we do regard prohibitions very seriously. But I think this new offence, which encapsulates the concept of recklessness and also imposes a much higher penalty than exists for other TAPA offences, will mean that broadcasters will have no choice but to err on the side of extreme caution and simply not show the material.

In conclusion, I would like to say that Australia does have extremely comprehensive tobacco advertising prohibitions. I guess that any legislation has to be considered in relation to whether the incremental benefit of additional prohibitions is justified by, in this case, the very onerous burdens placed on broadcasters in complying with the legislation, the uncertainty as to whether broadcasters will be able to achieve compliance with the legislation and the effect on the public, which will not see a proportion of foreign programming.

**CHAIR**—Thank you. Miss Eisenberg, would you like to make any comments?

**Miss Eisenberg**—Yes. Thank you for the opportunity to make these oral submissions this morning. I would firstly like to say that, in broad terms, SBS supports the general propositions that were put this morning by Free TV and also those in their written submission. Our position in terms of the practical impact of the proposed section 13A is slightly different, so I thought it would be useful to perhaps draw the committee's attention to that in understanding where our concerns come from.

Unlike commercial broadcasters, because of the nature of our charter SBS does not tend to buy from big Hollywood studios or buy films and programs in the same way. SBS buys from more sources than any other broadcaster in Australia and we are dealing literally with hundreds of different distributors of films and programs in many countries all over the world. For that reason the imposition of an additional requirement that would require us to make inquiries not just of the distributors but also going layers further back to the filmmakers themselves would make this process extremely impractical.

I would like to say from the outset that because of the existing restrictions under the other various pieces of legislation and under the SBS codes of practice which are developed by our board, SBS obviously has processes in place to assess programs to ensure that they do not contain tobacco advertisements, and those processes are taken very seriously and are reflected in the output that you see on our service. Our concern is that the proposed new provisions would require us to go beyond these rigorous processes and, as I said, make inquiries which could be extremely impractical when we are dealing with filmmakers in far-flung countries—it might be Africa or other parts of the world. It potentially imposes a cost burden which would make it impossible for us to make programming decisions to include films from those countries. The purpose of this was really to demonstrate that the impact on SBS is slightly different from the other broadcasters but the principles are the same. We are very supportive of the current restrictions in legislation and in our codes of practice and we believe that these adequately protect the Australian public.

I would like to conclude with the point that Pam Longstaff made: in analysing this proposal we tried to identify what the policy base was, the additional harm that would result from this conduct, and what the impact would be on the Australian public and, as has been put by Free TV Australia, we think that the proportionality between the burden on the broadcasters and the potentially marginal benefit to the public is not justified. We believe that the public benefit is served by the existing restrictions.

**Senator McLUCAS**—In your submission you say that it would be extremely difficult for SBS to introduce a new process to ensure that proper investigation of product placement essentially was not occurring. In a practical sense, as you review all of those films, wouldn't it just be another assessment that the person reviewing the film would have to do? It is pretty clear to me when I see a film whether that is just incidental to the storyline or whether there is smoking and it is usually the fact that the labels are shown fairly prominently. Wouldn't it simply be an assessment process and then that would trigger a process of going back to the producer of the film to ascertain whether there had been any financial relationship between the producer and the tobacco company?

**Miss Eisenberg**—The sort of assessment you are talking about is the assessment that happens currently. Obviously, if something is patently an advertisement then we cannot broadcast it. If it were disclosed in the credits or in any other way obvious and not incidental then clearly that program would be unsuitable for broadcast under the existing restrictions. As you said, if you are alerted to the issue and it is that obvious then the program will not be suitable for broadcast. If it is more subtle than that, if it is something that appears to be incidental and you have to go further back and make inquiries, it really depends on how far back you have to go and what the legislation requires of us.

Our concern is that the concept of knowingly or recklessly potentially requires us to go to a very large number of people, because there is not a single decision maker in putting together a film; there are myriad individuals and corporations involved in the making and the distribution of cinema: actors, directors, producers, financiers and distributors. The product placement potentially occurs at any point in that chain. That is what concerns us. It is not a simple matter of the person at the very beginning of the chain being able to give you the tick of health. The concern is that the obligation of not recklessly screening a film would require a level of inquiry that goes beyond what is practical and imposes a cost burden, which then makes it impossible to justify that film. Certainly from SBS's perspective, we acquire material on a very low-cost basis compared to the rest of the industry. That is the only way we can broadcast the quantity of material that we do.

**Senator McLUCAS**—Are you saying that the process that I somewhat described is actually happening now?

**Miss Eisenberg**—That is right, because currently we are prohibited from broadcasting a tobacco advertisement. So if it were obvious on the face of the film, or from the credits or the surrounding material, that there was a product placement, that would be prohibited—in fact, for us not only under the various tobacco restrictions but indeed under the SBS Act, which prohibits advertisements within a program. It would currently be prohibited on a number of different grounds.

**Senator McLUCAS**—In previous times have you decided not to broadcast film that you thought contained product placement?

**Miss Eisenberg**—I would have to take that question on notice and get a specific response from our programming area.

**Senator McLUCAS**—That might be handy.

**Senator ALLISON**—On that point, I see two contradictions in your submissions in some ways, because you say that you take compliance with the TAP Act seriously and, on the other hand, you say there is no need to change it. I do not know that there is anything in the TAP Act which would indicate that disclosure in the credits is the only thing that requires consideration in understanding whether it is an ad or not. Could you give the committee some sort of frank understanding, from your point of view, of the extent of the problem we are dealing with? Anecdotally it has been suggested, and you hint at it, that you acquire material at low cost, which might suggest that a film has had to have tobacco industry funding in order to get off the ground. That may or may not be the case; you might want to clarify that. What is the word in the industry in terms of the extent to which money is offered and provided by the tobacco industry at various stages, most of it indirectly, I understand? Is it the case that it is widespread? Perhaps you could give us some advice on that.

**Miss Eisenberg**—Before we come to that, perhaps I could address the issue of why the programs that SBS purchases are low cost—and the relationship between that and tobacco companies would be completely irrelevant. The reason that a lot of the programs we purchase are low cost is that they are in languages other than English and there is no natural competitor for that material in the Australian market. All those countries—African and European countries—are not selling to Australian competitors and so they are prepared to enter into deals to get their programs shown in Australian territories at a reasonable cost. That is part of the story, and the other part of the story is obviously the budgetary constraints on SBS which prevent us from bidding for higher cost material; we tend to be in that part of the market. But, generally speaking, it is because the countries that this material is coming from are not selling into other parts of the Australian market. Pam Longstaff may want to address the broader question initially.

**Ms Longstaff**—I have just a couple of comments to make. The proposed new prohibition imposes a much higher penalty on broadcasters. So, although broadcasters do already comply with the existing prohibitions, we believe that with the new offence it will be very difficult for broadcasters to ensure they are complying with an act. As you would understand, operating a corporation in an industry where there are offences with very high penalties, you want to ensure that you are complying with those requirements. I think Julie already made the point that an awful number of people are involved in making product. This offence specifically requires broadcasters not to be ‘reckless’; from a practical point of view, it is very difficult to know how many inquiries you have to make and how far you have to go back in the chain to ensure that you will not be guilty of committing the offence.

**Senator ALLISON**—But isn’t it the case that you make no inquiries at the present time?

**Miss Eisenberg**—No, that is not correct. The case is, I think, that a program is assessed and if it is clear that it contains an advertisement for tobacco products then it would not be suitable for broadcast—at least, not on any of our networks. The issue is, I suppose, whether the new provision is in effect saying: if there is smoking in the course of this program or film, that alone should be sufficient to trigger a requirement that you make a series of further inquiries. Obviously, if something is clearly on the face of it a tobacco advertisement then it is not suitable for broadcast and it will not be broadcast. The question is how far you go in regulating programs where the use of cigarettes appears to be incidental and legitimate in a story-line and does not have anything obvious in it that suggests it is an advertisement—and, if that is the situation, whether you then have to embark on a chain of inquiries to absolutely satisfy yourself that it is not a tobacco advertisement.

**Senator ALLISON**—So, if an inducement were taken by a film-maker, wherever, for them not to place a product or put in an advertisement as such, so you would not see the Marlboro sign or logo, but to make sure that the most glamorous, youngest, coolest key character in the film was smoking throughout, you would not regard that as an offence against the current TAP Act?

**Miss Eisenberg**—No, I do not think that is what we are saying. I think we are saying that, if it were known that that person was paid to promote that activity and there was an obvious brand then I think—if that knowledge existed—it would clearly be a tobacco advertisement under the current act. As you said, there is a concern that some of these practices are not obvious, and the questions for the legislators or the regulators are: if these practices exist, how do we address them; and who bears the penalties for that behaviour? It is our submission that it is not appropriate to impose that burden on broadcasters where it puts an unreasonable burden on them to find out whether or not those behaviours exist. I think there are other places at which the legislation could be directed.

**Senator ALLISON**—The point I am trying to make is that some say that you can interpret the TAP Act as requiring that of you in any case such that, if inducements were taken for the placement of products related to smoking in a film then that is, by virtue of that act, a tobacco advertisement.

**Ms Longstaff**—Certainly, you cannot broadcast something that gives publicity to or otherwise promotes the smoking, purchase or use of a tobacco product et cetera. As we said, the existing prohibition is very wide and has been shown to be quite flexible. I cannot really add anymore to what Julie Eisenberg just said. It is firstly a question of the penalty. The penalty for this new offence is much higher than the existing offence. It is also a question of how many inquiries, and how far back, broadcasters have to go to satisfy themselves that they will not be in breach of this new offence.

**Senator ALLISON**—Your key concern seems to be the penalty that is applied, which is so much higher than the current penalty.

**Ms Longstaff**—Certainly, that is one concern. The other concern is simply having some certainty about whether you are or are not complying with the obligations and whether or not you are going to commit an offence.

**Senator ALLISON**—Have you seen reports, mostly coming out of the United States, that have looked at the connection between inducements and the number of scenes in which there is smoking and the style of that smoking—never showing butts or people coughing and that sort of thing? Your industry must be aware of that work. Does that give you any concerns in terms of your responsibility to your viewers?

**Ms Longstaff**—As I said, we do treat our obligations very seriously and I think broadcasters comply with both the letter and the spirit of the prohibition. There are a number of programs and storylines that have antismoking messages. A current example is in Network Ten's *Big Brother*. In the *Big Brother* house smoking is banned—in fact, Nicabate is a sponsor of the *Big Brother* house—and people in the house are offered help to quit smoking. Sarah-Marie, who was one of the more memorable participants in the *Big Brother* house in the past, is a spokesperson for Nicabate now, because she quit while she was in the *Big Brother* house and has remained committed to non-smoking since then.

The classifiers at the networks tell me that most US programs in G and PG timeslots will contain at least one episode with an antismoking message. One of the classifiers put it to me that the reason for that may be that there are subsidies in the US for producing programs with antismoking messages. They also said to me that it was very difficult in Australian programs to include antismoking messages. The prohibition legislation is so broad that they would rather keep away from any depiction of smoking whatsoever in a G and PG program, even if the intention is an antismoking message, because it is just very difficult to pitch a message without being open to accusations that you might be promoting smoking in some way. For example, you might have a character who smokes and you might have all the other characters saying: 'Don't smoke. It's a terrible habit and very bad for your health. You're killing yourself.' But a young person watching that program might think that the character who is smoking is rebellious and is therefore someone to follow.

So the comments that I got from the network classifiers, and one in particular, was that our legislation was so broad that it was very difficult in Australian programs to include antismoking messages, although they certainly do try in other ways. I have given you *Big Brother* as an example. They did also say that most US programs for a teenage and children time slot do contain antismoking messages. That may be because there is a subsidy arrangement in the US.

**Senator ALLISON**—There has been evidence of tobacco companies purporting to be pushing those antismoking messages but, in just the way you suggest, it has a reverse effect. I do not know that we can be altogether comfortable with that. It really depends on where the money is coming from at the end of the day. Do you have a view about a ratings system that might be an alternative to what is being proposed here? There is a ratings system for violence, sex, bad language and so forth. Should there be a ratings system for smoking



simply based on a formula of the number of smoking scenes in the film as a proportion of the total, or something of that sort? Would your industry be in favour of that kind of ratings approach?

**Ms Longstaff**—The commercial television industry code of practice divides each broadcast day into classification zones. The aim is to ensure that only material appropriate to those zones is broadcast. In relation to the G and PG zones, the classification already requires that the use of legal drugs be handled with care. That would certainly include tobacco and alcohol. The G classification also requires that imitable dangerous behaviour only be shown when absolutely justified by the storyline and then only in ways which do not encourage dangerous imitation. So there are certainly those safeguards already in place in the commercial television industry code of practice.

**Miss Eisenberg**—The SBS codes of practice similarly adopt the classification guidelines from the OFLC, which contain similar requirements.

**Senator ALLISON**—Would *Lost in Translation*, which has only recently been out, be a film which would fit within any of those categories you have just mentioned as showing harmful products?

**Miss Eisenberg**—I am not sure what the classification for that film was. I suspect that it was neither G nor PG but I could not be certain.

**Senator ALLISON**—The reason I raise it is that the depiction of smoking appears to be fairly benign but it is a classic in that smoking is shown throughout the film and the smoker is young, glamorous and attractive, particularly to very young women, I would argue. My guess is that that would not get caught up in the sort of ratings system you are talking about.

**Senator McLUCAS**—Miss Eisenberg, if it is the case that SBS has made decisions not to broadcast certain films because of the process we previously talked about, could you tell us the names of those films that SBS has decided not to broadcast? That is just a way for me to get an understanding of the processes that you are working through.

**Miss Eisenberg**—I would have to refer that to our television programming department but obviously we will assist the committee as best we can.

**Senator McLUCAS**—Thank you.

**CHAIR**—Thank you very much, Ms Longstaff and Miss Eisenberg. We really do appreciate you joining us today.

**Committee adjourned at 12.25 p.m.**