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SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Reference: Tobacco Advertising Prohibition

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SENATE
COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Thursday, 12 August 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, Colbeck, Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Hogg, Lees, Lightfoot, Ludwig, Mackay, McGauran, McLucas, Moore, Murphy, Nettle, O'Brien, Payne, Tierney, Watson and Webber

Senators in attendance: Senators Allison, Barnett, Denman, 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 3.59 p.m.**LIBERMAN, Mr Jonathan, Director, Law and Regulation, VicHealth Centre for Tobacco Control; and the Cancer Council Victoria**

CHAIR—I declare open this public hearing. The committee is taking evidence on the inquiry into tobacco advertising prohibition. I welcome Mr Jonathan Liberman from the VicHealth Centre for Tobacco Control. Representatives from the centre appeared at the committee's earlier hearing, and Mr Liberman is now appearing to make some additional comments. Welcome.

Mr Liberman—I am appearing today on behalf of the five organisations that were joint signatories to the submission. Those were: the VicHealth Centre for Tobacco Control, the Cancer Council Australia, the National Heart Foundation of Australia, Action on Smoking and Health Australia, and the Australian Drug Foundation.

CHAIR—I remind you that the giving of evidence is protected by parliamentary privilege. However, the giving of false or misleading evidence may constitute a contempt of the Senate. The committee has before it your submission. Do you wish to make any alterations to that submission?

Mr Liberman—No.

CHAIR—I now invite you to make some comments, at the conclusion of which senators may ask you questions.

Mr Liberman—The organisations on whose behalf I appear today are concerned about the matters that the committee is examining, for two main reasons. The first is the enormous toll of death, disease, and suffering caused by tobacco and the enormous associated costs to the community. These occur through various cancers, including of the lung, kidney, pancreas, bladder, cervix, oesophagus, larynx, mouth and stomach as well as leukaemia, cardiovascular disease, respiratory disease, stroke, emphysema, blindness, miscarriage, reduced fertility, impotence, and a range of other conditions. Over 19,000 Australians die prematurely each year as a result of tobacco. The overall figure since 1950 is about 750,000. Tobacco costs the Australian community over \$21 billion a year. Tobacco use is highly addictive. The overwhelming majority of smokers say they would prefer not to be smoking, and the overwhelming majority of smokers commence in childhood. The second reason is that, in our view, much of this harm has been caused or contributed to by the unlawful conduct of the tobacco industry—that is, both misleading and deceptive conduct in contravention of section 52 of the Trade Practices Act and unconscionable conduct in breach of section 51AB.

While the tobacco industry has begun over the last decade to be held to legal account in the US, this has not yet happened in Australia. This has meant that the law has gone unenforced against the tobacco industry. It has also therefore meant that the enormous damage and costs caused by the tobacco industry are borne by individuals, their families and taxpayers and not at all by the tobacco industry. In our written submission to this inquiry, we pointed to various categories of conduct that we say have contravened and continue to contravene sections 52 and 51AB of the act. I will not go through these in detail now, because they are in the material before you—and I am happy to discuss these later should the committee wish—but, quite generally, they involve: false, misleading and deceptive statements about and false, misleading and deceptive advertising of tobacco; the ongoing failure to inform consumers of the risks of suffering conditions not specifically required by regulations to be disclosed on packaging; the fraud of light and low-tar cigarettes; and the design and precise engineering of products in ways that make them more addictive and harder to quit.

Action against the tobacco industry by the ACCC under the act would, in our view, be enormously significant both from public health and justice perspectives. It could begin to require the industry to bear some of the burden that is otherwise borne by the rest of the community in trying to undo the damage the industry has done, through public education programs in the nature of corrective advertising and assistance to individuals addicted to the tobacco industry's products. In both cases such programs cost money, and money to pay for them ought to come from the tobacco industry. Enforcement action by the commission would also pave the way for the recovery of some of the enormous amount of public expenditure on tobacco related disease that we believe is attributable to the unlawful conduct of the tobacco industry.

As we say in our submission, and amount of nearly \$3.5 billion per year in health care costs is potentially recoverable. This includes Medicare, nursing home expenditure, PBS and hospital expenditure. These amounts should be added to social security payments, such as sickness allowance, disability support pension and age pension. We do not say that every dollar of these amounts would be recovered or that every individual who has a claim will bring one and will do so successfully; rather, we are pointing out that very substantial sums of

public money are potentially at stake and that very significant recovery should be possible through strong, well-resourced legal proceedings.

It is unrealistic under the Australian legal system to leave it to dying individuals and their families to bring action against the tobacco industry to hold it to account for its unlawful conduct. Dying individuals and their families are too easily overpowered by the tobacco industry before claims can even be determined on their merits or any evidence heard. Even in the US, where litigation rules and procedures are much more favourable to individual plaintiffs than in Australia and where many individuals have now brought successful claims, it was not until government resourced litigation was run in the mid-1990s that the tobacco industry began to be forced to pay for its unlawful conduct.

The ACCC's failure thus far to enforce the act against the tobacco industry has been difficult to understand for those with an interest in public health and consumer protection. For anyone familiar with developments overseas—in the courts, in the revelations of former tobacco industry employees turned whistleblowers and through the investigations of the US Food and Drug Administration—or anyone familiar with research conducted in Australia with the evidence that has emerged in the cases that have been attempted in Australia and with trade practices law in this country, it is clear that the commission's failure to enforce the act against the industry cannot be due to either the state of the law or the state of the evidence. No genuine explanations have, however, been given for its lack of action. If it is a question of cost, the amount needed to bring successful proceedings would be a drop in the ocean compared to the scale of the wrongdoing, the scale of the harm that that wrongdoing has caused and the potential benefits of successful proceedings.

In our view, the conduct of the tobacco industry represents both a public health disaster and a consumer protection scandal. Unless public law enforcement agencies, such as the ACCC, whose job it is to enforce the Trade Practices Act, do their job, the tobacco industry will be allowed to get away with everything it has done and continues to do, to the great cost of the rest of the community.

Senator ALLISON—Could you inform the committee about some of the legal action that has been successfully mounted in other countries?

Mr Liberman—There has been an enormous amount of litigation in the US in particular over the last 10 years or so. The best known cases were probably the ones brought in the mid-nineties by the US state governments, which sought to recover public health expenditure on tobacco related disease. Those claims were ultimately settled for approximately \$US246 billion, with the industry agreeing to pay that money to the states over 25 years. The US Department of Justice is now bringing similar proceedings against the major tobacco companies. That is supposed to go to trial in September of this year.

Broadly speaking, those cases have involved claims of a similar nature to the claims that we say could be brought here. They were based on false and misleading advertising and misleading conduct about the harm and addictiveness of tobacco. They were also based on what we call the light and low tar fraud, where the industry has set out to encourage consumers to continue to use products with this perception that certain products are less harmful than others. The evidence shows that not to be the case. The evidence also shows that the industry has developed ways of engineering its products so that the results that are shown by standard machine testing are quite different from actual intakes of smokers. Also, evidence has emerged about the deliberate manipulation of products to ensure that they are more addictive. So they are the standard claims that have been made overseas.

In addition to those proceedings brought by states, there are currently hundreds of cases of individuals before the courts. As I understand it, there are about 15 that have been successful and that have not been overturned on appeal. There have been payouts already in a couple of those cases. There have also been a couple of class actions. The most recent one was a jury in Louisiana that required the tobacco industry to pay over \$US500 million that was to be used to help addicted smokers quit and stop using their products. There was another one that delivered a verdict of about \$7 billion. That related to the light and low tar fraud.

Senator ALLISON—Are the major differences between our laws and the US laws over trade practices, unconscionable behaviour, misleading advertising and so forth?

Mr Liberman—There are certainly differences between the laws in the two jurisdictions. But, having looked at the claims that have been made overseas and the law here, it seems to me to be quite clear that you could bring similar cases under both section 52 and section 51AB of the Trade Practices Act. It seems to me from looking at the law that the ACCC is the more obvious candidate to bring proceedings, rather than what

has occurred in the US, where state governments and the US Department of Justice have taken on those proceedings.

Senator ALLISON—I think it was the ACCC that suggested to the committee at a previous hearing that there was almost too much evidence out there—too many documents, too much on the Net—to be able to wade through. Do you agree with that? Is the evidence that is available internationally also the evidence that would be used in Australia?

Mr Liberman—Some of the evidence that is available internationally would be used here. Primarily, that evidence relates to the US companies; although we know that the Australian companies have always been part of the international group of companies that include the US companies. You would use some of that evidence to show knowledge within the Australian companies of similar material. Ultimately, there would need to be discovery in Australia, where the Australian tobacco companies were required to provide their evidence—their documents, what they knew, what they did with their knowledge, how they have gone about manufacturing their products and so on. If it is a large case, the only reason it is a large case is that the scale of the unlawful conduct has been so extraordinary—the scale of the harm, the number of people that that conduct has affected has been so enormous. It seems to me that it is hardly a reason not to bring proceedings against a company or an industry that its wrongdoing is just too great.

Senator ALLISON—In fact, you suggest that the ACCC is not reluctant to take action against other kinds of manufacturers or businesses in this country and you question why it is that tobacco has been excluded from its actions thus far.

Mr Liberman—As I said in my opening, it is something that those of us with an interest in public health and consumer protection have never understood. It was clear from the commission's first report to the Senate. We had written a very comprehensive submission to the ACCC before it provided its first report to the Senate. It was clear on reading that first report that it had not dealt with the main complaints that we had made, that it mischaracterised some of the complaints and that it had some basic legal errors in it. We have not yet been told why the commission has taken the view that it has. It may be a funding issue; that is one of the things that has been raised recently. If it is a funding issue, as I said before, the amount of funding that would be required would be a drop in the ocean compared to the scale of the wrongdoing, the scale of the harm and the potential benefits of proceedings.

Senator ALLISON—It is often said that tobacco is a legal product. Do you think that makes a difference in terms of the ACCC's attention to this issue?

Mr Liberman—The only issue for us is whether the tobacco industry, in manufacturing and marketing its product, has acted unlawfully or not. The fact that individuals are able to purchase the product lawfully makes no difference to whether the companies have acted unlawfully or not. There is something in the ACCC's original report to the Senate that says that, because of health warnings, it cannot be said that the industry has represented that its products are safe. That is simply not the issue. It is not whether they have tried to tell people that this is safe; it is whether they have acted in ways that contravene the act. We have been through a number of examples of that sort of conduct which have been the basis of litigation overseas. I cannot answer that question—I do not know why we have come up against that block that we have come up against.

Senator McLUCAS—Have you had any discussions or correspondence with the ACCC? In your submission, on page 13, you talk about presuming it is the cost of litigation. Do you have any evidence to go further than a presumption?

Mr Liberman—There have been some discussions. After the initial report by the ACCC to the Senate, we wrote to the ACCC and we pointed out what we thought were the flaws in the report and there were a few meetings that followed that. There has been some correspondence at intervals over the last couple of years but nothing recently, as far as I am aware. The only reason I come to funding as a possible reason is that that has been discussed in the media. I understand that the current chair has spoken about the issue of funding in the media; I think that was in the *Age* some months ago. There have also been reports of the ACCC writing to the health minister to see whether there could be dedicated funding for litigation of this sort. So I do not have any evidence from inside. It is difficult to work out what else it might be.

Senator McLUCAS—Do you see any parallels between the sort of action that you are requesting the ACCC undertake and other actions that they have taken?

Mr Liberman—They are always talking about taking proceedings for misleading and deceptive conduct and unconscionable conduct. It seems to me that the difference in this case is the scale of the unlawful conduct

and the scale of the harm. That does make it more complex litigation than simple litigation over, for example, a statement or a particular advertisement that has been run. But, as I was saying before, the fact that the conduct has been so extraordinary over such a long period of time, and of such breadth, is no reason for not taking proceedings against a company that has contravened the act.

Senator McLUCAS—I suppose one difference I see is that the action would not be against one company; it would be a broad group of companies. That is the parallel that I am asking you about; do you see any parallels in other sorts of actions the ACCC have taken?

Mr Liberman—Not a direct parallel. What has also been unusual about this industry—and the evidence that has come out of the United States is very clear—is that dating back to the early 1950s there has been a conspiracy, which lasted for about 40 or 45 years, where the companies got together and said: ‘None of us is going to break ranks. We’re all going to maintain the line that there is no evidence that smoking is harmful, no evidence that nicotine is addictive.’ That lasted well into the end of the 1990s. It only fell apart once the documents came out in the US and making those claims was no longer tenable. So it might be that what is unusual about it is that there was an industry-wide conspiracy to do what each of the companies has done.

Senator HUMPHRIES—There was previous consideration given by the committee as to whether the Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill would have the effect of preventing the showing in Australia of overseas-produced films in which placement of tobacco products occurred. There was a question of what level of knowledge, say, a television station in Australia would need to have about product placement before they put a particular movie, for example, to air. I assume that the organisations that you represent would not go so far as to say that, if there was a film available or proposed to be shown in Australia in which placement of tobacco products had occurred, you would advocate the legislation banning that film from being shown.

Mr Liberman—Could I preface the answer by saying that I have come to talk about the ACCC part of the submission rather than the other parts. I might be able to give a better answer in writing. If you would like that, we might be able to put it in a supplementary submission that deals with that particular issue. I do not have the legislation in front of me and have not prepared for that.

Senator HUMPHRIES—Sorry, I missed the start of your remarks. If you could respond to that in writing, we would be grateful.

Senator DENMAN—I am not sure if my question is appropriate because I was not here until last week or so. Do you have any evidence of the amount of advertising on the Internet, particularly by Australian providers?

Mr Liberman—I do not have any of that information available today. Again, if that is something that you would like further information about then we might be able to put it in a supplementary submission.

Senator DENMAN—Yes, please.

CHAIR—Thank you very much, Mr Liberman. We appreciate you giving your time this afternoon.

[4.21 p.m.]

CASSIDY, Mr Brian David, Chief Executive Officer, Australian Competition and Consumer Commission

McKERNAN, Ms Karen, Senior Project Officer, Australian Competition and Consumer Commission

SAMUEL, Mr Graeme Julian, Chairman, Australian Competition and Consumer Commission

CHAIR—Welcome. As you probably heard earlier, I always remind people that the giving of evidence is protected by parliamentary privilege but the giving of false or misleading evidence may constitute a contempt of the Senate. Mr Samuel, I now invite you to make an opening statement.

Mr Samuel—Given that we have had an introduction during Mr Liberman's evidence, it might be more productive if we went straight to questions.

CHAIR—That is fine.

Senator ALLISON—I will start with the consultations that you have had on this issue since you have been in the chair, as it were. Have you talked with the tobacco industry and the non-government organisations? Could you spell out what your work has been on this issue?

Mr Samuel—The work has concentrated on the 'light' and 'mild' descriptors issues. I will categorise it in three areas. We have had consultations with the industry—that is, with senior representatives of the industry in each of the tobacco companies concerned; some discussions with stakeholder groups—that is, with interest groups in this area; and there has been a continuation, to near completion, I would say, of the investigation that we have undertaken in relation to the 'light' and 'mild' issues.

Senator ALLISON—Are referring to just 'light' and 'mild'?

Mr Samuel—Yes, that has been the primary focus at this point.

Senator ALLISON—So you have met with the industry. Can you give us some details on that? With whom did you meet?

Mr Samuel—With the chief executive of Philip Morris Australia, the chief executive of British American Tobacco and the chief executive of Imperial Tobacco.

Senator ALLISON—Was that to discuss only the 'mild' and 'light' issues?

Mr Samuel—It was to primarily focus on the 'mild' and 'light' descriptors and to express our views with respect to those descriptors and what industry might do.

Senator ALLISON—Who was included in your consultations with interest groups?

Mr Cassidy—Our consultations with the interest groups, in accordance with the Senate motion, followed the publication of our report. A number of comments were made—

Senator ALLISON—What report was that?

Mr Cassidy—The report responding to the first Senate motion in April 2002. We then had a series of consultations with the interest groups, relating to—

Senator ALLISON—Who was involved in those and what sort of format did they take?

Mr Cassidy—I would have to take that on notice and give you a list. We had individual meetings. There was a group meeting that I can recall. In order to go through the exact form and who was involved, I would have to take it on notice, check our records and give you a list. Those consultations, as required by the second Senate motion, were in relation to our report and what were seen by those groups as being some deficiencies in our report. We discussed with them the reasons why we took the views that we did. That was when we were consulting the interest groups. As the chairman said, the more recent discussions have focused on our 'light' and 'mild' investigation, and they have tended to be more with the companies.

Senator ALLISON—With respect to these consultations with the groups that you were asked by the Senate to conduct, it sounded a bit like you told them why you did the report the way you did rather than consult with them about what was wrong with it.

Mr Cassidy—Let me be clear. We heard what they had to say was wrong with it. We put our view on why we took the view we did. We put all their comments to senior counsel and he came back and said there was only one point on which he thought we erred. That was on the issue of limitation periods.

Senator ALLISON—Is it possible to give the committee a copy of your report that summarises what you learned from the groups?

Mr Cassidy—We have individual notes that were taken on the meetings. We have not done a report.

Senator ALLISON—I thought you said you had made a report to the counsel.

Mr Cassidy—No, we approached an external senior legal counsel.

Senator ALLISON—I see.

Mr Cassidy—The senior legal counsel came back and said he agreed with us on every point other than one.

Senator ALLISON—You must have provided some material to senior counsel—that is what I am asking for.

Mr Cassidy—Indeed we did—the report and the comments that had been made. He looked at all that.

Senator ALLISON—I think that would be useful to the committee.

Mr Cassidy—To give you what?

Senator ALLISON—What you provided to counsel which then resulted in advice to you that you were correct.

Mr Cassidy—Okay, we can do that. I thought you might be asking for the actual legal advice that we received from counsel.

Senator ALLISON—I am sure that would be useful as well but I am also sure that you will tell us that we are not entitled to that.

Mr Cassidy—I am prepared to take that on notice. The problem there is that, given we are in an investigation, I will need to check with our legal advisers. Once we hand over legal advice, we lose privilege on it.

Senator ALLISON—I understand. All I am saying is that it would be useful for the committee to know what you heard.

Mr Cassidy—Let us look at all that and we will give as much as we can.

Senator ALLISON—Thank you. A letter was written recently by you on the question of taking action which talked about the fact that this would be a very costly thing to do. I think that was your letter to the minister. Is that correct?

Mr Cassidy—That is right.

Senator ALLISON—Could you explain that? That would suggest that there was a case to be made but that the funding to do so was not available. How does that sit with the act itself? Does that suggest that, if funding is the issue, we have a problem with the act? In other words, you can only act under the act if you have the money to do so. Is that the conclusion that we must draw from that statement of yours?

Mr Cassidy—The letter that the chairman sent to the Minister for Health and Ageing and the Treasurer, which was spoken about in other committees, basically said that we have a number of tobacco issues that we have been involved in monitoring and have sought legal advice on. They included the McCabe case and the Cauvin case, the substantial volume of evidence which has come out of the action in the US by a number of US states and which flows into the master settlement agreement which came from that action, and also the ‘light’ and ‘mild’ investigation. What the chairman basically said in his letter was that the action in the US by most US states—and the broad claims that are made in relation to the conduct of tobacco companies over a number of years—was quite a substantial investigation and that, depending on where that investigation got to, it would be quite protracted litigation. We did not see, within our existing resources, that we had sufficient resources to be able to undertake that sort of action. In relation to that, it is relevant that out of the US action there are currently some 26 million pages of evidence to be scrutinised and it is being scrutinised by various academics, amongst others.

It is also relevant that, when the Clinton administration in the US commenced their action against the tobacco companies, they earmarked an amount of about \$US26 million for the action. We are talking about quite substantial amounts of money, bearing in mind the overall funding for the commission on an annual basis is about \$65 million or \$70 million. So what we said in our letter to the government was in relation to those very general claims—not ‘light’ and ‘mild’, not McCabe, not Cauvin—of conduct over a number of years. We said that, if we were to undertake the sort of investigation which we feel would be necessary, and subject to

where that got to—and there are no guarantees on what the outcome of the investigation would be—if we were then to commence litigation, we would be looking at a very substantial resource cost which we just could not accommodate within our existing budget.

Senator ALLISON—Does that suggest that somebody in this country can get away with offending against the Trade Practices Act provided they have got deep pockets?

Mr Cassidy—Perhaps if we generalise a bit, it is certainly not common but it is not unknown for there to be situations where the litigation involved in a particular matter is such that there is some sort of special provision that needs to be made in order to pursue that. Not in the last budget but in the budget before, the government provided such a special allocation in relation to the HIH matter. Across areas of law, it is the case that from time to time you do get an investigation and potential litigation which, because of its nature, magnitude or whatever, is simply out of the scope of what might be the normal investigation and litigation activity of the agency or agencies concerned. It is something that, as I say, does occur from time to time in various areas of the law, and then it becomes an issue for government as to whether they believe the issue is such that the necessary resources should be provided.

Senator ALLISON—What did you calculate would be necessary to undertake this action in dollar terms?

Mr Cassidy—We have not done a calculation. Indeed, that is part of the problem of it. We would need to do significantly more work before we would even be in a position to scope it.

Senator ALLISON—How much do you need to do the work that would tell you what you need?

Mr Cassidy—We are talking tens of millions. As I say, the US government—

Senator ALLISON—To do the work to understand what you would need to do?

Mr Cassidy—What do we need to do? Firstly, in terms of what is coming out of the US, we would need to commit considerable resources to going through that material and ascertaining how much of it was relevant to Australia. We would need to engage expert witnesses. Our ‘light’ and ‘mild’ investigation at the moment is like a microcosm—

Senator ALLISON—Mr Cassidy, I think you might have misunderstood me. I think you said that you do not know how much you would need because you would need to do some work to discover that. Is that what you are telling me, and is this the kind of work you would need to do?

Mr Cassidy—Yes, but even that work would be quite extensive. I am afraid we are in a position where we could not say—and we have not said—to the government, ‘We need X.’ What we have said is, ‘We would need substantial funding.’ It may be the case that we would start with a certain amount of money, whatever that might be, but we may need to come back for more.

Senator ALLISON—So what response did you get to that letter?

Mr Cassidy—We have had a response from the minister for health which, as I recall, basically noted our letter and noted what we had said about the resource requirements of continuing with that investigation.

Senator ALLISON—How long ago was that?

Mr Cassidy—That was on 2 January this year.

Senator ALLISON—Was there any undertaking to get back to you with a time frame within which the minister for health would consider—

Mr Cassidy—No, that was the entirety of what the letter said.

Senator ALLISON—So the response was noted?

Mr Cassidy—Yes.

Senator ALLISON—And the other minister?

Mr Cassidy—Let me read the letter to you:

Thank you for your letter of 21 November 2003 about the investigation of potential contraventions of the *Trade Practices Act* by tobacco companies. I regret the delay in responding. I have noted the issues that you have raised and you are advised that the commission is unable to advance the investigation at this stage.

Senator ALLISON—That does not suggest that there is another one coming.

Mr Cassidy—No, there is no mention of a further letter coming.

Senator ALLISON—You sent the other letter to whom?

Mr Cassidy—We copied our original letter to the Treasurer.

Senator ALLISON—Did the Treasurer respond?

Mr Cassidy—No, he has not.

Mr Samuel—It was not addressed to the Treasurer. We just sent a copy to him.

Mr Cassidy—It was copied to the Treasurer and he has not contacted us in relation to it.

Senator ALLISON—Have you followed that up with any further correspondence?

Mr Cassidy—With the Treasurer?

Senator ALLISON—With the minister for health.

Mr Cassidy—No, we have not.

Senator ALLISON—There was nothing in the May budget that provided you with further funds?

Mr Cassidy—We got additional funding but not in relation to tobacco.

Senator ALLISON—Could you bring us up to date with your work on ‘mild’ and ‘light’ descriptors?

Mr Samuel—The investigation is all but complete. A brief has been given to senior counsel for final advice on the matter. We are awaiting that advice and expect that to be received within the next few weeks—I hope very shortly.

Senator ALLISON—So you expect the advice fairly shortly?

Mr Samuel—Yes.

Senator ALLISON—Can you tell us anything further about what industry might have said to you with regard to ‘mild’ and ‘light’?

Mr Cassidy—In what sense? Do you mean our view—

Senator ALLISON—Are you able to tell us anything more at all about this?

Mr Samuel—We have discussed this with, as I mentioned before, senior executives of the three major tobacco companies. I think it is fair to say that they have all agreed in one form or another that, at a point in time, the ‘light’ and ‘mild’ descriptors on cigarette packets need to be modified and/or removed. Various proposals have been put to us as to how they might be modified, which we have indicated are not acceptable. I think the indication has come back from industry that they are prepared to work to remove any misleading or deceptive nature of the ‘light’ and ‘mild’ descriptors, as they appear on cigarette packets. The primary issue that we are dealing with in this context is the timing of dealing with it. At least one or two of the cigarette companies would like to defer any changes to the cigarette packaging until the changes to the labelling warning are mooted. That has a possibility of being delayed for at least another 12 or 18 months. Our response to that has been to say that that is an unacceptable time frame.

Senator ALLISON—Do you take that view because ‘mild’, ‘light’, ‘menthol’ and all the rest of the descriptors are misleading?

Mr Samuel—We take that view on the basis that preliminary advice suggests that there is a possible case that they are misleading and deceptive. I do not want to put it any higher than that because we are waiting for final advice from senior counsel as to the strength or otherwise of that case.

Senator ALLISON—As I understand it, some clinical trials have been done on various brands or kinds of tobacco and cigarettes?

Mr Samuel—Yes, but not in Australia. I think they have been done outside Australia. There is a question as to whether the results of those trials would have application in the context of a case that would be brought in respect of Australian cigarettes.

Senator ALLISON—Why? Are the mild and light cigarettes here different from those in other countries?

Mr Cassidy—There is a lot of assertion that we can simply import what is happening and what is being done overseas into Australian cases. In our ‘light’ and ‘mild’ investigation, we have had to rely fairly heavily on the sorts of studies that have been done in the US that you refer to. That also requires us to establish whether the way in which a cigarette is manufactured in the US and the qualities of the cigarette—things that go to the density and the size of the filter and the composition of tobacco—are basically the same as in Australia. Otherwise, we cannot make that link.

Senator ALLISON—Does the tobacco industry argue that the cigarettes in Australia are different from those that were the subject of a test which determined that ‘mild’ and ‘light’ was no different from any other cigarette?

Mr Cassidy—It is not a question of whether they argue it; the problem is we have got to prove it. If we go to court, we have to make the case. Therefore we have to go into court and say, ‘Here’s the material and evidence from the United States and it applies to Australia because we can show that a cigarette in the US is basically the same as a cigarette in Australia.’ The onus is on us to make the case rather than—

Senator ALLISON—Are you doing that in a legal sense or are you doing laboratory work on this?

Mr Cassidy—Both. It is a legal issue in the sense that it has to be argued in court, but we are doing that through scientific and expert witness material as to the similarities between, say, cigarettes in the US and cigarettes in Australia.

Senator ALLISON—Are you also examining the extent to which Australian consumers of cigarettes are persuaded by labels that say they are less harmful than others?

Mr Cassidy—What we need to argue in court—and this is under section 52 of the Trade Practices Act—is not what the actual belief of consumers is but what a reasonable belief might be on the basis of advertising and labelling. We can adduce as evidence that material showing what people believe.

Senator ALLISON—Have you got that material? Have you got that evidence?

Mr Cassidy—We have got some of that material, yes.

Senator ALLISON—That you commissioned in Australia?

Mr Cassidy—This is going into the detail of the investigation. My recollection is that it is Australian based evidence but evidence that was already available to us—in other words, we did not have to commission surveys to do it—so we will be, if this matter goes to court, using some of it in making our case.

Senator ALLISON—So there are two options, as I understand it: one is for what appears to be a somewhat voluntary approach to not using those terms or there is the opportunity for litigation on the basis that the terms are misleading and have been for some time.

Mr Samuel—It may help if I focus on the outcomes, and let me put them into two categories: one is related to past conduct and the other to future conduct. In our view it would be possible—probable—to achieve changes in respect of future conduct in a very short time frame and the changes would relate to the ‘light’ and ‘mild’ descriptors on cigarette packets. It would relate to corrective advertising that advertised to consumers that the ‘light’ and ‘mild’ descriptors were inappropriate and may have misled and deceived, and to community service obligations to provide education to consumers about the harmful impacts of cigarettes—that is, the future conduct. The big issue that is the matter of intensive and senior legal advice at this point of time is whether an action could be brought in respect of past conduct—in other words, to prove that consumers have been misled and deceived. You can imagine that—

Senator ALLISON—So those two options are still open, are they?

Mr Samuel—Absolutely.

Senator ALLISON—One does not preclude the other.

Mr Samuel—No.

Senator ALLISON—Have the tobacco companies said, ‘We’ll stop using those terms if you agree not to sue us for having used them in the past’? That sort of conversation has not been had?

Mr Samuel—No, we have not got into that bargaining situation that you described. We do not think it is appropriate that that would be the subject of discussions at this point in time. I guess I am pointing out that dealing with future conduct is a matter that we believe could be dealt with quickly and effectively and would rectify concerns in respect of the ‘light’ and ‘mild’ descriptors. It would rectify concerns through changes to cigarette packaging, in corrective advertisements and in community service education programs and the like that would be conducted at the expense of the tobacco companies. The big critical issue, in terms of legal advice and the resources of the ACCC, relates to the commencement of litigation to deal with past conduct. I think it is clear that, if those proceedings were instituted, they would be defended vigorously. That is the issue that the ACCC has to focus on.

Senator ALLISON—And this is a bite-sized piece of litigation, is it? You have got the funding to cover such a case.

Mr Samuel—In respect of past conduct?

Senator ALLISON—Yes.

Mr Samuel—No. None of these are bite-sized; it is very substantial litigation. For obvious reasons, it would be defended vigorously. Then we are talking about an extensive gathering of evidence, including scientific evidence, expert witnesses, a lengthy case, lengthy appeals and the whole question of the resources of the ACCC to deal with that. We should point out that, while I think Mr Cassidy mentioned that the commission has an annual budget of some \$65 million, there is an allocated budget in that for litigation. I think you would be aware, Senator, from evidence given at both Senate estimates and other committees of this parliament, that constraints in our budget impacted from early in 2003 on the level of litigation that the commission was able to institute in respect of a whole range of proceedings for breaches of the act. That financial constraint has been substantially eased as a result of the May federal budget and is already reflecting in the activity of the commission in terms of litigation. But, if we were to institute proceedings of this nature, it would require a substantial vote of our litigation budget towards these particular proceedings. That would then impact significantly on the ability of the commission to deal with other enforcement activities that are within the scope of its jurisdiction.

CHAIR—Senator Allison, could this be your last question for the time being, because there are other senators who have questions within the time frame?

Senator ALLISON—Okay. Once you receive your brief from senior counsel, will you then write to the Treasurer or to the health minister requesting additional funds for litigation, assuming that the advice from counsel is that this is an actionable case?

Mr Samuel—I do not want to go into too much detail, because there are other aspects of the funding and of the legal proceeding process that we are also examining at the moment—suffice it to say that, when that advice is received, we will also have advice as to the feasibility of instituting proceedings and the potential cost. The commission will then make a decision as to whether or not it is able to institute proceedings or whether or not it may need to seek additional funding to do just that. I think that is something that will transpire over the next few weeks.

Senator ALLISON—Sorry, Chair—if I could just clarify that question: will it be a letter, again, to the health minister? Who will you approach with that request?

Mr Samuel—I think it has to be the health minister and, I would assume, the Treasurer.

Senator ALLISON—We hope next time he does more than note it.

Mr Samuel—I think this time around we will be in a far better position to provide some detailed advice on the prospects of success in respect of the proceedings and the prospective costs as well.

Senator ALLISON—Chair, could I just have one more?

CHAIR—No, we will come back to you, Senator, if there is time left over.

Senator HUMPHRIES—I assume that, before the ACCC undertakes litigation, it does a cost-benefit analysis of that litigation. I think you mentioned it would take into account the potential to negotiate a solution to a problem it was encountering rather than litigate to achieve that solution.

Mr Samuel—That is absolutely right, Senator, yes.

Senator HUMPHRIES—In general, when the ACCC litigates, taking into account that any litigation is expensive and even an award of course may not cover the actual costs that you have incurred, does it tend to win? Does it tend to recover the majority of its costs in litigation it undertakes?

Mr Samuel—Yes, but, even where it recovers its costs, the ACCC does not receive them. The recovery of costs goes straight into consolidated revenue. So, essentially, if we institute legal proceedings, the costs are a direct charge against our budget and that is money spent, whatever the outcome of the litigation.

Senator HUMPHRIES—I see.

Mr Samuel—And, if we lose the case and costs are awarded against us, that is also a charge against our budget.

Senator HUMPHRIES—Right.

Senator ALLISON—That is called lose-lose.

Senator HUMPHRIES—So you lose either way.

Mr Cassidy—I suppose I should be fair in a sense: where we lose, we do have a special fund to pay other-party costs, which is called our litigation contingency fund. Basically, the reason for that is that we find other-party costs are usually a multiple of at least twice ours. Recently, in the Boral case, which is well known in the context of the discussion of misuse of market power in the Trade Practices Act, our costs were of the order of about \$3 million. Other-party costs were \$6 million, and that is not uncommon. That \$6 million came out of our litigation contingency fund. Following the May budget, there is an arrangement for that fund to be replenished as need be, so we do get help, if you like, where we lose and have to meet other-party costs. But, as the chairman said, our own costs are just a charge on our budget, and, if we win and recover part of those, that goes back to consolidated revenue.

Senator HUMPHRIES—I take it from reports in the newspaper that you tend to win more often than you lose. Would that be right?

Mr Cassidy—Overall, if you look over the last 10 years, we have a success rate which is above 90 per cent. We are running at about 93 or 94 per cent. In the last two years, we have had a couple of high-profile losses which have gone all the way to the High Court. That has generated a number of headlines that we are losing it or that somehow we are not getting it right. But they are still the exception—we do win the bulk of our cases.

Senator HUMPHRIES—Do you use in-house counsel, or do you tend to go to the bar?

Mr Cassidy—No, we always go to the bar. Under the government's legal services directions, we are not allowed to conduct our own litigation so, if we litigate, we use external legal firms. We have a panel of external legal firms that are set up on a tender basis, and we also use external counsel.

Mr Samuel—We have internal counsel to supervise the litigation proceedings—our General Counsel Unit.

Senator BARNETT—Based on the weight of the evidence, it would appear that the descriptors 'light' and 'mild' should be removed. But you indicated that the response from the industry was that it would be 12 to 18 months before there would be some probability that they would be willingly removed. Are you getting a level of resistance to an immediate removal and action on that front?

Mr Samuel—I would say that that was an opening offer, Senator, but it was rejected before the offer could be completed. I think that the tobacco industry understands that that is not an acceptable course of action as far as we are concerned. I should make it clear that we have not reached a final conclusion on the issue of litigation. It may well be, as a result of senior counsel advice and other advice that we are obtaining in terms of costs of litigation, that litigation becomes the course of action that we pursue. That is in respect of past conduct; the future conduct issue is a matter that I think could, if it were treated on its own and segmented, be dealt with very speedily.

Senator BARNETT—That gets to the point about future conduct action, if we can have a look at that. Is there an unwillingness on behalf of the industry to negotiate with you the future conduct approach to these descriptors—to getting them off and getting something on that is appropriate?

Mr Samuel—No, there is not. Issues are raised about the costs of printing new packaging and the like, but I think it is fair to say that the industry understand our view that the descriptors need to be removed and that some alternative form of descriptor needs to be used that is not capable of misleading or deceiving consumers. They understand that our view is that this will have to be attended to quickly. We are both—that is, industry and ourselves—in the position of waiting for this final legal advice, because that will determine whether or not we are going to proceed to litigation.

Senator BARNETT—I know. But I am looking at the future action, notwithstanding the legal advice which is coming. Is there not a willingness to act forthwith in terms of the future action and say, 'Yes, we need to get these off, given the future position we want to be in' and come to a mutually agreeable arrangement such that they are off and something else is on? What is the level of unwillingness there, why is it there and what can be done about it?

Mr Cassidy—I think it would be fair to say that the opening position of the tobacco companies is that they would like to remove the 'light' and 'mild' descriptors at the same time as they are changing their packaging for the new health warnings.

Senator ALLISON—In 2005?

Mr Cassidy—Somewhere into 2005; we are talking about 12 or 18 months. We have said to the industry that, in the context of this investigation, we would not be prepared to wait that long. We have not taken it any further with them, because we made the strategic decision that, before we discuss the matter further with the industry, we need our further legal advice and we need to know where we are going with possible litigation. It would be a bit high to say that the industry are unwilling, but we could say that their opening bid certainly is not acceptable to us. We have not yet tested them to see how willingly they will come back from that in terms of bringing forward the timing of their change.

Mr Samuel—I think it is appropriate to say that they have not stormed out when we have rejected their opening bid.

Senator BARNETT—You can express it in all the ways you like. You call 12 to 18 months an opening bid, but it could be seen as unwillingness. It could be summarised in all sorts of ways. Sitting here, it seems to be totally unacceptable and not in the public interest.

Mr Samuel—That has been our view, and that has been expressed to the companies concerned.

Senator BARNETT—How far away is the legal advice?

Mr Samuel—I would like to think—and I will use words that will not assist you—that it will be within a very short period. We are talking weeks, not months.

Senator BARNETT—Hypothetically, that will come in, you will get your advice, you will go back to the table and you will then negotiate an outcome regarding future conduct and past actions?

Mr Samuel—That is correct. It has to go to the commission first, and that legal advice will be accompanied by some further advice to us on the potential costs of litigation. That is the point at which the commission will make its final decision as to whether or not to proceed with litigation and how far it should press that course of action.

Mr Cassidy—I know—and I can understand this—that whenever we talk about this it all seems very long and drawn out. In this particular investigation, we have used our statutory powers to obtain information and documents from the tobacco companies. We have 97 boxes of documentary material that we have obtained from the tobacco companies. In addition, we have substantial empirical epidemiological evidence, particularly out of the US. We have also engaged a number of expert witnesses, whom we are using and will certainly use in court proceedings. So talking to senior counsel and getting advice on various matters is not just a matter of going in with a folder and saying, ‘Could you have a look at this and give us your advice?’ There is quite a substantial volume of material that needs to be dealt with and absorbed. I am afraid that is the nature of this sort of complex litigation. Any step in it does not proceed all that quickly. Nonetheless, we are told by counsel that he is literally within a week or two of being able to give us the further advice that we are waiting on.

Senator BARNETT—If you cannot negotiate a mutually agreeable outcome with these people, what are the other options? Is legislation another option to get a response? If 12 to 18 months is totally unacceptable, what other options do we have?

Mr Samuel—Regulation, or legislation, is obviously the alternative course. Let us not presume at this point that we cannot get a satisfactory outcome in respect of future conduct. That depends on the legal advice we receive and the financial advice on the cost of instituting proceedings. I have some degree of confidence that we can get a satisfactory outcome in respect of future conduct. It is the past conduct that is the big hurdle.

Senator ALLISON—In your response to the Senate motion, you talked about a focus of the commission’s investigations being the systematic destruction of documents relevant to tobacco litigation. How is that investigation going?

Mr Cassidy—We were looking into that particularly in the context of the McCabe case. Since then the McCabe case, which was originally heard in the Victorian Supreme Court, has been overturned by the full bench of the Victorian Supreme Court and leave to appeal to the High Court has been refused. Our assessment now is that it would be very difficult for us to establish that the shredding of documents by tobacco companies was misleading and deceptive conduct—which was the issue we were looking at—basically because we now have a superior court determination that there is a legitimate commercial reason why documents might be disposed of. So that now looks very difficult.

Senator ALLISON—Have you done a report on that?

Mr Cassidy—We have not done a report on it. We have had internal discussions. We have had reports and assessments on the progress of the McCabe matter and the implications of the court decisions. The way the

commission works is that we do not proceed by writing conclusive reports on things; we proceed by assembling the relevant evidence and advice. Then the commission takes all of that into account in reaching a decision.

Senator ALLISON—But you have reached some conclusion. I think it would be useful to the committee if there is more to be told than what you have just said.

Mr Cassidy—Okay. I will take that on notice as well.

Senator ALLISON—The other response you made was that the commission was monitoring legal developments in the United States and was currently not aware of documents produced in US litigation that constituted evidence of contraventions of Australian trade practices law. You heard Mr Liberman talk on this issue earlier. What conclusions have you reached with regard to US litigation?

Mr Cassidy—I will make two comments. The first comment is about the great volume of documentary evidence which has come out of the action by most of the US states against the tobacco companies to recover associated health costs. That goes to what we were talking about earlier—the letter that we have sent to the minister for health and the Treasurer. Given we are talking currently about 26 million pages of that evidence—and that is still increasing, because they are still entering it—to pursue that further gets us into a resource issue.

The second comment I would make, with regard to various references being made to the US and what is happening in the US, is that our counterpart agency in the US, the Federal Trade Commission, which administers similar legislation to what we do, has not taken any action against tobacco companies in the US. The action that has been taken has been either by individual plaintiffs or by state governments under legislation which we do not have in Australia—quite often the Racketeer Influenced and Corrupt Organisations Act. As I said, our counterpart agency in the US, the Federal Trade Commission, has not taken any action against tobacco companies in the US.

Senator ALLISON—What about other countries, such as Canada and the UK? Have you looked at their litigation activities?

Mr Cassidy—I am not aware that any of our counterpart agencies have taken action against the tobacco companies in those countries either. But, again, let me take that on notice. We will come back to you on that.

CHAIR—Thank you for giving us your time this afternoon. It is very much appreciated.

Committee adjourned at 5.05 p.m.