

An Evaluation of Regulatory Responses Governing the Use of Tobacco Descriptors

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Executive Summary

Industry papers now available from document repositories reveal tobacco companies' knowledge that "light" and "mild" cigarettes do not reduce the risks smokers face dates back to at least the 1970s. The industry's knowledge stands in marked contrast to smokers' own beliefs. Detailed and well-documented research evidence demonstrates that smokers believe they are reducing the risk they face if they use a "light" or "mild" variant. Despite the clear discrepancy between the industry's knowledge and smokers' beliefs, governments and their regulatory agencies have only quite recently begun examining these deceptive practices.

Smokefree agencies within New Zealand have drawn the government's attention to Article 11 of the WHO Framework Convention on Tobacco Control, which calls on ratifying nations to ban the use of misleading descriptors. To assist the government as it considers how to ensure compliance with the FCTC provisions, the Smokefree Coalition, ASH and the Cancer Society have made a formal complaint to the Commerce Commission alleging that the use of "light" and "mild" descriptors on cigarette packaging is misleading and deceptive.

Nations may use one of two approaches to control misleading descriptors: a voluntary approach, where tobacco companies enter into undertakings with a regulatory body, and a legal approach, where governments enact legislation that may prohibit or circumscribe certain activities. Two nations, Australia and Canada, have developed voluntary agreements with tobacco companies. The Australian agreement prohibits the use of specific descriptors, which the industry has replaced with alternatives that arguably generate similar connotations. The Canadian agreement also prohibits specific terms and, although it is too soon to establish how the tobacco industry will respond, the Australian experience gives some insight into what form this response might take.

The tobacco industry often challenges the introduction of legislation and took action against Canadian tobacco control statutes and EU Directive 2001/37/EC. In particular, tobacco companies have alleged that tobacco control measures are unconstitutional, breach free trade agreements, and impinge on their intellectual property rights, which they argue are also protected by international treaties. Since the EU Directive was passed, and subsequently upheld, several EU nations have enacted legislation or introduced additional regulations that bring their national statutes in line with the EU Directive. These have been both general and specific; while some have banned the use of misleading terms without specifying exactly what these are, others have prohibited the use of particular words.

Beyond the EU, signatories to the FCTC have also begun implementing legislation that harmonises existing statutes with the Treaty provisions. Brazil's experience is most informative, since its legislation pre-dated both the EU initiative and the FCTC. Commentaries from Brazilian officials suggest the tobacco industry successfully delayed the introduction of bans on descriptors and used the time available to create colour-variant associations that replaced the prohibited descriptors.

These experiences suggest that the tobacco industry will attempt to circumvent restrictions imposed on specific words and highlights the need to ensure that measures designed to prevent misleading and deceptive behaviour are general and all-encompassing. Guidelines from Canadian public health experts provide a robust framework that could assist New Zealand regulators' response. In particular, the Canadian guidelines stress the importance of regulatory solutions; these are more robust and comprehensive than the voluntary agreements reviewed.

Regulations should anticipate the tobacco industry's response to restrictions on their use of descriptors, such as "light" and "mild", and thus should restrict use of any terms that convey a similar impression, such as synonyms, colours and numbers. Introducing controls on the tobacco descriptors also presents an opportunity to reduce the overall influence packaging is able to exert on both smokers and those at risk of developing a smoking habit. There is compelling evidence that the tobacco industry uses packaging as a means of communicating brand imagery; measures that introduced plain packaging and eliminated retail displays would therefore complement and strengthen regulations controlling the use of misleading and deceptive descriptors.

1. Background

The confusion caused by tobacco descriptors such as “light” and “mild” has been well-documented and has led several countries to ban the use of these terms (see Kozlowski and Pillitteri, 2001; Shiffman *et al*, 2001).¹ In addition, the Framework Convention on Tobacco Control calls on signatories to prohibit descriptors that may mislead smokers (Article 11).

However, although New Zealand regulators have noted the actions taken by other nations, they have not yet developed responses that would restrain the use of misleading descriptors such as “light” and “mild” (Ministry of Health, 2003). Concerned that New Zealand was failing to provide adequate protection to smokers and those at risk of developing a smoking habit, the Smokefree Coalition lodged a formal complaint with the New Zealand Commerce Commission.

The complaint alleged deceptive behaviour on two grounds: claims made on British American Tobacco’s website that questioned the risks posed by environmental tobacco smoke, and the use of terms such as “light” and “mild”, which suggest consumption of cigarettes labelled with these descriptors is less harmful. Tobacco industry documents make clear the importance of these variants in reassuring smokers and providing an alternative to quitting. Kozlowski and Pillitteri (2001) quoted excerpts from documents that illustrate the industry’s aim to “*to reassure smokers, to keep them in the franchise for as long as possible*” and noted the industry’s belief that “*Quitters may be discouraged from quitting, or at least kept in the market longer . . .*” (p. ii2)² by these variants. Exposing the discrepancy between the tobacco company’s knowledge of “light” and “mild” products, and smokers’ beliefs about these, underpinned the decision to lay a formal complaint.

More specifically, the letter of complaint raised the following issues, which had formed the basis of the Australian Competition and Consumer Commission investigation into “light” and “mild” descriptors:

The BAT brand descriptors “light” and “mild” are deceptive in that these products

- *are not necessarily less harmful to the health of a smoker*
- *are not necessarily a safer alternative*
- *are not necessarily less addictive*
- *do not necessarily reduce the risk of smoking-related diseases including lung cancer, cardio vascular diseases and emphysema*
- *do not necessarily reduce the risk of exacerbating asthma and respiratory disease*
- *do not necessarily assist a smoker to quit smoking cigarettes*

¹ Kozlowski, L. T., and Pillitteri, J. L., 2001. Beliefs about “Light” and “Ultra Light” cigarettes: An overview of early efforts and published research. *Tobacco Control*. 10 (Suppl 1), i12-i16.
Shiffman, S., Pillitteri, J., Burton, S., Rohay, J., and Gitchell, J., 2001. Smokers’ beliefs about “Light” and “Ultra Light” cigarettes. *Tobacco Control*, 10, 17-23.

Countries that Have Banned Light and Mild Descriptors for Cigarettes. February 2006.
<http://www.legco.gov.hk/yr04-05/english/bc/bc61/papers/bc610302cb2-1298-1e.pdf>

² Kozlowski, L. T., and Pillitteri, J. L., 2001. Beliefs about “Light” and “Ultra Light” cigarettes: An overview of early efforts and published research. *Tobacco Control*. 10 (Suppl 1), i12-i16.

- *do not necessarily assist the smoker in reducing the number of cigarettes consumed when compared to high yield cigarettes.* (Peck, 2006, page 7).³

To assist the Commerce Commission develop a regulatory response, ASH and the Cancer Society have commissioned a study that examines how other countries have addressed the confusion likely to result from tobacco companies' use of descriptors such as "light" and "mild". The findings from this research will form part of a broader discussion scheduled for November 23, 2006, when a symposium on tobacco descriptors will be held.

2. Objectives

The overall objective of this research was to review regulatory responses to descriptors such as "light" and "mild"; this will inform the development of an evidence-based position on how deceptive tobacco descriptors may be regulated. More specifically, the research was designed to address the following questions:

- How are other countries addressing the use of deceptive descriptors on tobacco?
- How has the tobacco industry responded to regulatory interventions, such as bans on the use of the words "light" and "mild"?
- What policy options could New Zealand regulators consider as an appropriate response to the use of deceptive descriptors on tobacco packaging?

3. Methodology

A search of relevant regulatory actions undertaken to restrain the use of tobacco descriptors, particularly use of the words "light" and "mild", was undertaken using Google, Google Scholar, EBSCO, EMERALD, PubMed and the World Health Organisation International Health Legislation database. In addition, tobacco research websites were searched for news of recent regulatory initiatives and details of actions pursued with regulatory bodies.

Several thousand documents and websites were identified and over 600 papers, decisions, website pages and articles were downloaded and reviewed.

³ Peck, M. 2006. Letter of complaint to the Commerce Commission. Available at: <http://www.sfc.org.nz/pdfs/CCcomplaintBAT.pdf>

4. Results

4.1 Use of Tobacco Descriptors

Although “light” and “mild” are the most commonly recognised tobacco descriptors, evidence suggests that a range of terms and devices are used as descriptors. The following table provides a brief overview of tobacco descriptors, and illustrates how widely these are employed. The fact that the terms “light” and “mild” have featured in so many countries suggests these words have powerful connotations for smokers. Trademark registration of these terms with brand names confirms the marketing importance of the words “light” and “mild”.

Table 1: Sample of Tobacco Descriptors Used Internationally⁴

| Country | Descriptors | Additional Visual Information |
|------------------------------|---|--|
| Argentina | Light, mild, low tar, soft, long, short, blond, black | Different colour and design to accompany each mark |
| Australia | Light, mild | |
| Bangladesh | Light | Different colours used – blue identified light. Different colour tips – white for some light cigarettes |
| Brazil | Light, mild | |
| Cameroon | Agréable au gout (pleasant to taste) | |
| Canada | Light, mild | |
| Democratic Republic of Congo | Legere (light) | Lights are commonly associated with blue colours |
| Uganda | Light, medium, regular | |

This information suggests that light and mild descriptors are widely used, but that they are part of a range of descriptors utilised by tobacco companies seeking to differentiate their brand variants. The use of different colours to identify variants suggests that smokers and potential smokers may continue to be conditioned by the shades used on packs, even in the absence of verbal descriptors.

4.2 Actions Taken to Regulate Tobacco Descriptors

According to the Canadian Cancer Society, the following countries have taken action to ban the use of “light” and “mild” descriptors.⁵

⁴ Source: <http://www.essentialaction.org/tobacco/qofm/0111a.html>

⁵ Countries that Have Banned Light and Mild Descriptors for Cigarettes. February 2006. <http://www.legco.gov.hk/yr04-05/english/bc/bc61/papers/bc610302cb2-1298-1e.pdf>

Countries that Have Banned “Light” and “Mild” Descriptors for Cigarettes

Canadian Cancer Society
February 2006

At least 32 countries are known to have specifically banned the misleading “light” and “mild” descriptors for cigarettes. This includes the 25 countries in the European Community, and seven other countries.

- | | |
|---------------------------|---------------------|
| 1. Australia ¹ | 17. Italy* |
| 2. Austria* | 18. Latvia* |
| 3. Belgium* | 19. Lithuania* |
| 4. Brazil | 20. Luxembourg* |
| 5. Cyprus* | 21. Malta* |
| 6. Czech Republic* | 22. Netherlands* |
| 7. Denmark* | 23. Norway |
| 8. Estonia* | 24. Poland* |
| 9. Finland* | 25. Portugal* |
| 10. France* | 26. Slovakia* |
| 11. Germany* | 27. Slovenia* |
| 12. Greece* | 28. Spain* |
| 13. Hungary* | 29. Sweden* |
| 14. Iceland | 30. Switzerland |
| 15. Ireland* | 31. United Kingdom* |
| 16. Israel | 32. Venezuela |

* member of the European Community

¹ Through court-enforceable undertakings between the Australian Competition and Consumer Commission and Philip Morris Ltd., British American Tobacco Australia Limited, and Imperial Tobacco Australia Limited.

The nations identified above have taken two quite distinct approaches to eliminate the use of “light” and “mild” descriptors. Some have supported a voluntary initiative where tobacco companies enter into undertakings with a government regulatory body, while others have taken a legal approach, where existing tobacco legislation is amended or new legislation or regulations are introduced. The approaches taken have advantages and limitations; the following sections examine these before analysing the range of actions taken.

Voluntary Agreements

Voluntary agreements are typically favoured by the tobacco industry, since they are able to exert greater control over the content, timing and breadth of the agreement. For this reason, public health researchers see voluntary or self-regulatory initiatives as less robust and more open to interpretation. However, the key advantage of voluntary agreements is that they may be negotiated and thus implemented more quickly than a legislative approach, which normally requires at least one consultation round. Because the tobacco industry has not shied away from litigation where it has believed government has encroached on its rights, particularly its intellectual property rights, or its ability to access markets it believes it is legally entitled to reach, voluntary agreements that reduce the risk of litigation may be seen as preferable by governments.

Section 4.2.1 examines the voluntary approaches taken in both Canada and Australia in detail, while Section 6 reviews whether these approaches provide sound frameworks that New Zealand regulators could adopt.

Legislation and Regulation

By contrast, legislative or regulatory solutions may be stricter than the tobacco industry would agree to voluntarily; for example, they may require larger warning labels to be implemented over a shorter time period than tobacco companies have indicated would be optimal. For this reason, although the tobacco industry does not favour this approach, public health researchers have considered it leads to more effective and robust regulatory frameworks. Nevertheless, legislation may take longer to develop and implement, since evidence of proper consultation will be important in defending the legislation from any legal challenges the industry may mount.

4.2.1 Voluntary Approaches

Australia

A well-known and recent example of a voluntary agreement entered into with tobacco companies is the May 2005 agreement the Australian Competition and Consumer Commission (ACCC) negotiated with Philip Morris and British American Tobacco (see Appendix 1 for a copy of the latter company's undertaking). The ACCC is charged with administering the Trade Practices Act 1974; Section 52 of this statute prohibits misleading and deceptive conduct while Section 53 prohibits false or misleading representations.

Beginning in around 2001, the ACCC initiated a lengthy investigation into whether the labelling of cigarettes as "light" and "mild" was misleading or deceptive and concluded that the "*claimed health benefits of low yield cigarettes compared to high yield cigarettes were misleading and likely to breach section 52 of the Trade Practices Act*".⁶ More specifically, the ACCC found that "low yield" cigarettes:

- *are not necessarily less harmful to the health of a smoker*
- *are not necessarily a safer alternative*
- *are not necessarily less addictive*

⁶ Low yield cigarettes 'not a healthier option': \$9 million campaign. Press release 19 December, 2005. <http://www.accc.gov.au/content/index.phtml/itemId/719575>

- *do not necessarily reduce the risk of smoking-related diseases including lung cancer, cardio vascular diseases and emphysema*
- *do not necessarily reduce the risk of exacerbating asthma and respiratory disease*
- *do not necessarily assist a smoker to quit smoking cigarettes*
- *do not necessarily assist the smoker in reducing the number of cigarettes consumed*

when compared to high yield cigarettes.⁷

The ACCC found that tobacco companies had (from at least the early 1990s) been aware of compensatory behaviours engaged in by smokers. These behaviours, which include inhaling more frequently or deeply, and blocking ventilation holes, increase the amount of tar, nicotine and carbon monoxide smokers consume to levels well above those stated on cigarette packages. The ACCC held that tobacco companies had known of the discrepancy between information obtained from smoking machines and smokers' actual behaviour, thus continued use of descriptors such as light and mild was found to be misleading and deceptive. In reaching this view, the ACCC relied on scientific research that documented the range of compensatory behaviours engaged in by smokers.

The agreement between the ACCC and tobacco companies was negotiated under Section 87B of the Trade Practices Act. This section of the Act allows written agreements to be reached to resolve issues in dispute, and sets out mechanisms to enforce the agreements, should these subsequently be breached. The specific details of the agreement were that Philip Morris and BAT would:

- *Remove "light" and "mild" descriptors and related numbers from all cigarettes produced for Australian consumers. BAT's compliance came into effect on 31 May, 2005 while Philip Morris agreed to comply by 31 July, 2005.*
- *Not make claims about the health benefits of low yield cigarettes when compared to high yield cigarettes, and*
- *Pay \$4 million each to the ACCC to fund anti-smoking information and campaigns and programmes concerning low yield cigarettes.*⁸

However, although the ACCC specifically noted that the agreements had enabled their concerns to be resolved quickly⁹, only two of the major tobacco companies agreed to give written undertakings in May 2005 and it was not until November 2005 that a third company, Imperial Tobacco (representing around 20% of the Australian market), agreed to remove "light" and "mild" from its packaging.¹⁰ Because of the voluntary nature of the undertaking, Imperial Tobacco could

⁷ Op. cit.

⁸ ACCC resolves 'light' and 'mild' cigarette issue with B.A.T. and Philip Morris. Press release dated 12 May, 2005. <http://www.accc.gov.au/content/index.phtml/itemId/683533>

⁹ ACCC resolves 'light' and 'mild' cigarette issue with B.A.T. and Philip Morris. Press release dated 12 May, 2005. <http://www.accc.gov.au/content/index.phtml/itemId/683533>

¹⁰ ACCC resolves 'light' and 'mild' cigarette investigation with Imperial Tobacco. Press release dated 07 November, 2005. <http://www.accc.gov.au/content/index.phtml/itemId/713217/fromItemId/2332>. Details of full undertaking available at:

not be required to make a commitment to remove “light” and “mild” and descriptors from their packaging when the other major tobacco companies first signed the agreement.

The Trade Practices Act 1974 also provides for payments to be made to run education campaigns, in this case to correct misleading beliefs created by the terms “light” and “mild”. As noted above, Philip Morris and BAT provided AUD4 million each to the ACCC to run an education campaign to ameliorate erroneous views consumers may hold about the health benefits of “light” or “mild” variants. When Imperial Tobacco gave similar undertakings in November 2005, the agreement it entered into with the ACCC provided for payment of AUD1 million to the ACCC for similar education purposes.¹¹

Canada

On May 31, 2001, World No-Tobacco Day, the Canadian Health Minister Rock requested that Canadian tobacco product manufacturers voluntarily remove descriptors such as ‘light’ and ‘mild’ from cigarette packaging. His request was based on well-documented and long-standing concerns that descriptors such as “light” and “mild” confuse smokers and lead them to mistakenly assume variants marked in this way are less harmful than regular brand variants. According to Joossens (2001), Minister Rock also “*requested that his newly formed Advisory Council suggest a course of action in the event that the industry does not opt for a voluntary withdrawal*” (page 9).¹² Minister Rock gave the tobacco industry 100 days in which to respond to his call for action.¹³

The Ministerial Advisory Council met to review evidence relating to “light” and “mild” and to make recommendations to the Minister. They concluded that:

- *“cigarette descriptions such as 'light' and 'mild' are a major public health problem and have already contributed to the deaths of thousands of Canadians. To reduce tobacco-caused illness and death, this problem must be corrected as quickly and as effectively as possible; and*
- *an end to the 'light' and 'mild' deception can only be achieved through a complete ban on misleading descriptors, accompanied by appropriate public education efforts.”¹⁴*

However, the voluntary approach Minister Rock sought did not result in the desired response from the tobacco industry and a news release from Health Canada dated 28 November, 2001, reported

http://www.accc.gov.au/content/item.phtml?itemId=713957&nodeId=663510d9dd3d7c96e4815f6d71d3a2e1&fn=d05_68710.pdf

¹¹ ACCC resolves 'light' and 'mild' cigarette investigation with Imperial Tobacco. Press release dated 07 November, 2005. <http://www.accc.gov.au/content/index.phtml/itemId/713217/fromItemId/2332>

¹² Joossens, L. (2001). Regulation of tobacco products: An update on European developments 1999-2001. World Health Organization Regional Office for Europe. Copenhagen. <http://www.who.dk/document/e74524.pdf>

¹³ Canada to Ban Marketing Cigarettes as "Mild" or "Light". Press release Canada Online. 23 August, 2001. <http://canadaonline.about.com/od/quitsmoking/a/mildcigarettes.htm>

¹⁴ Ministerial Advisory Council on Tobacco Control Report. Deceptive Cigarette Labelling. Friday, 15 March 2002. http://www.ohpe.ca/index2.php?option=com_content&do_pdf=1&id=163

that he had initiated regulatory action that would require Canadian tobacco manufacturers and importers to remove the words "light" and "mild" from their product packaging.¹⁵ On December 1, 2001, the Government published a Notice of Intent in Canada Gazette, Part I; this sought comment on proposed regulations that would prohibit manufacturers and importers from selling tobacco products in packages displaying the terms "light" and "mild".¹⁶

In a submission in response to this notice, Philip Morris International argued that consumers should not be given messages that imply one brand is safer than another, but claimed they should be allowed to use terms such as "light" and "mild" because these enabled consumers to differentiate between the taste of different brands and variants.¹⁷

Progress on the regulations appears to have stalled when a new Health Minister, Anne McLellan, came into office in 2002. In an interview dated early 2002, Minister McLellan was quoted as saying she had not decided whether to initiate moves to ban misleading descriptors such as light and mild.¹⁸ The news report suggested the Minister felt she needed more information about the scientific evidence available to support a ban on "light" and "mild". She is quoted as saying: "*But it's just a question around what those terms are meant to represent and what the science tells us about those particular cigarettes that are represented as 'light' and 'mild'.*"¹⁹

On May 27, 2002, the Non-Smokers' Rights Association (NSRA) expressed frustration that Minister McLellan had not continued the agenda set by former Health Minister Rock.²⁰ By May the following year, Minister McLellan had still not taken steps to restrict the use of misleading descriptors by tobacco companies. The NSRA began an advertisement campaign to put pressure on the Minister²¹, and argued that she had failed to use the powers given to her by the Tobacco Act 1997 to regulate against deceptive behaviour.

In June 2003, a group of Canadian health researchers made a formal complaint to the Canadian Competition Bureau, alleging that "light" and "mild" descriptors were misleading and deceptive, and that this deception had a material effect on smokers' behaviour. As a result, the

¹⁵ Health Minister begins regulatory process on "light" and "mild" tobacco regulations. Health Canada press release. 28 November, 2001. http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2001/2001_131_e.html

¹⁶ Reed, W. and Blaikie, H. EALA Meeting – Cannes, France, May 2002. <http://www.gala-marketlaw.com/pdf/canadajuly2002.pdf>

¹⁷ Cited in Essential Action, Letter to Gloria Blue dated 12 May, 2006. <http://www.essentialaction.org/tobacco/trade/MalaysianFTAcomments.pdf>

¹⁸ Toronto Star, January 24th, 2002 http://www.nsra-adnf.ca/cms/index.cfm?group_id=1252

¹⁹ Health Minister begins regulatory process on "light" and "mild" tobacco regulations. Health Canada press release. 28 November, 2001. http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2001/2001_131_e.html

²⁰ Health community demands action from Anne McLellan on 'light' and 'mild'. Press release dated 27 May, 2002. <http://www.nsra-adnf.ca/cms/page1227.cfm>

²¹ Why is the health minister back-peddalling on plans to fight the tobacco epidemic? <http://www.nsra-adnf.ca/cms/file/pdf/mcllellan%20ad.pdf>

complainants alleged companies using these descriptors were in breach of the federal Competition Act.^{22, 23} The key details of the complaint are outlined below:

[...] 2. (b) The use of descriptive terms such as “light” and mild” on cigarettes is false and misleads consumers into believing that such cigarettes are a “healthier” alternative to cigarettes, which is untrue;

The complainants presented evidence of consumers’ perceptions as well as scientific evidence relating to tar, nicotine and carbon monoxide intake across different cigarette brands. They also referred to the outcome of a legal challenge to the Canadian *Tobacco Act* (discussed in Section 4.2.2 below), in which the Honourable Justice André Denis concluded that: *“tobacco companies have used marketing campaigns that lead smokers to believe that light cigarettes are better for one’s health than regular cigarettes. [...]”*²⁴

The complainants sought an inquiry under Section 10 of the *Tobacco Act* and asked the Commissioner of Competition to take a wide-ranging approach to assess whether a breach of the Act had occurred. If such a breach was found to have occurred, the complainants asked that the Commissioner of Competition issue an order *“prohibiting any further promotion, labelling and packaging of cigarettes that creates the false and misleading belief and impression that these cigarettes are less harmful than any other tobacco product and the imposition of a fine that would have the effect of deterring such egregious activity from being repeated”*.²⁵

In the interim, Ujjal Dosanjh had become the Canadian Minister of Health; he announced Canada’s ratification of the Framework Convention on Tobacco Control in December 2004 and, in response to media queries, indicated that he intended to make an announcement about the regulation of “light” and “mild” soon.²⁶

However, by 2005, the Commissioner of Competition had yet to deal with the NSRA complaint, leading the complainants to state that they were prepared to file an application with the Federal Court of Canada for a court order that would compel the Competition Bureau to investigate their complaint.²⁷ Their press release expressed their frustration at the delays they had encountered and reiterated the seriousness of the case they had presented. Dr. Rob Cushman, medical officer of health for the City of Ottawa, noted: *“Taking legal action to force a federal agency to protect*

²² Overview of complaint to the Competition Bureau. 16 June, 2003. http://www.nsra-adnf.ca/cms/index.cfm?group_id=1310

²³ Backgrounder on the Competition Act. 16 June, 2003. http://www.nsra-adnf.ca/cms/index.cfm?group_id=1311

²⁴ Overview of complaint to the Competition Bureau. 16 June, 2003; para. 45. http://www.nsra-adnf.ca/cms/index.cfm?group_id=1310

²⁵ Overview of complaint to the Competition Bureau. 16 June, 2003; para. 53. http://www.nsra-adnf.ca/cms/index.cfm?group_id=1310

²⁶ Cigarette package deception and consumer fraud must end. Press release 11 February, 2005. http://www.nsra-adnf.ca/cms/index.cfm?group_id=1353

²⁷ Health experts to ask Federal Court to compel the Competition Bureau to act. 10 January, 2005. <http://www.nsra-adnf.ca/cms/page1352.cfm>

public health from a consumer fraud is an extraordinary action. But it reflects the gravity of the threat that we believe the 'light' and 'mild' deception presents to public health."²⁸

By this stage, the complainants were also aware of tobacco companies' responses to similar regulations introduced in other countries. Thus they also drew the Competition Bureau's attention to the fact that the use of numbers and colours to connote different "risk" levels also perpetuated the incorrect impressions many smokers had formed following exposure to the terms "light" and "mild".²⁹

It is difficult to access details of what investigation, if any, the Canadian Competition Bureau initiated. However, on 09 November 2006, news reports stated that Canadian tobacco companies (including Imperial Tobacco Canada Ltd., Rothmans Benson and Hedges Inc., and JTI-Macdonald Corp.) had reached an agreement with the federal Competition Bureau to remove the words "light" and "mild" from cigarette packages. This decision anticipated a Competition Bureau determination that would have required this outcome.³⁰ The descriptors will be phased out by Dec. 31 and eliminated no later than July 31 2007.³¹

The agreement between Imperial Tobacco and the Competition Bureau is reproduced in Appendix 2. It is clear from the preamble that the agreement has focussed specifically on the terms "light" and "mild". Section G of the agreement reads:

"L/M Descriptors" means the words "light" and "mild", and combinations and variants thereof such as, but not limited to, "extra light," "ultra light," "extra mild" and "ultra mild" as Descriptors on cigarette packages or elsewhere;" (page 6)³²

However, although this move represents progress where none had previously existed, the NSRA has expressed concern that regulators have not heeded their warnings about the use of alternative heuristics, such as colours and numbers, which they argue tobacco companies have used elsewhere to suggest brands are "lower yield" and therefore "healthier".³³ In addition, they have expressed concern that tobacco companies are not being held to account for deceptive

²⁸ Health experts to ask Federal Court to compel the Competition Bureau to act. 10 January, 2005. <http://www.nsra-adnf.ca/cms/page1352.cfm>

²⁹ Health experts to ask Federal Court to compel the Competition Bureau to act. 10 January, 2005. <http://www.nsra-adnf.ca/cms/page1352.cfm>

³⁰ Thorne, S. (2006). Deal to drop 'light' and 'mild' from smokes draws fire. Thursday, November 09, 2006. <http://www.canada.com/topics/news/national/story.html?id=2ab20054-674f-44dd-9c2f-e9f97dd93b42&k=73430>

³¹ Agreement between Imperial Tobacco Canada Limited ("itcan") - and – The Commissioner of Competition ("Commissioner") <http://www.competitionbureau.gc.ca/PDFs/imperial-tobacco-canada-limited.pdf>

³² Op. cit.

³³ Thorne, S. (2006). Deal to drop 'light' and 'mild' from smokes draws fire. Thursday, November 09, 2006. <http://www.canada.com/topics/news/national/story.html?id=2ab20054-674f-44dd-9c2f-e9f97dd93b42&k=73430>

behaviour that has spanned several years. Furthermore, the agreement does not contain provisions that require tobacco companies to contribute to education campaigns that correct erroneous beliefs about “light” and “mild” cigarettes.

Physicians for a Smoke-Free Canada (PSFC) have also expressed concern about the agreement, noting that the WHO recommends “*against governments entering into voluntary agreements with tobacco firms*”.³⁴ Instead, PSFC indicated their very strong preference for formal regulation that is more wide-reaching and that would prevent the development of alternative descriptors or the use of colour or numbers to generate the same connotations created by “light” and “mild”.

³⁴ Op. cit.

4.2.2 Legislative Approaches: North America

Canada

The voluntary agreement reached recently (and described in the previous section) has occurred in the context of legislative developments that specifically prohibited misleading and deceptive behaviour and that could also have formed the basis for action against tobacco companies.³⁵ Legislation was introduced in the form of the Canadian Tobacco Act (1997), which replaced the Tobacco Products Control Act (T.P.C.A.) that, after a series of appeals and cross-appeals, had been declared unconstitutional by the Supreme Court of Canada in 1995.

Section 20 of Tobacco Act (1997) states:

*No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.*³⁶

The Tobacco Act was also challenged by tobacco companies; among other things, the plaintiffs argued that the Act violated the *Canadian Charter of Rights and Freedoms*, although they did not raise any challenge to section 20 of the Act.³⁷ However, Judge Andre Denis dismissed the tobacco companies' case. His Honour drew several conclusions that supported regulation of misleading descriptors. In particular, the following paragraphs recognised the extent to which the tobacco industry had withheld information from smokers, the scientific evidence that "light" cigarettes were equally harmful as regular variants, and the proper intention of regulators to protect citizens from the harm that this misleading information could create.

[235] *The industry has always known that filtered cigarettes are as dangerous as unfiltered ones and that smokers unconsciously change the way they smoke to satisfy their need for nicotine, this despite all their marketing efforts claiming the opposite.*

[528] *Fact: the supposedly less-irritating cigarette is merely the creation of a tobacco company's marketing department; filters allow every single carcinogenic gas contained in cigarette smoke to pass through; and there is no such thing as a "light" or "healthier" cigarette.*

[529] *Fact: tobacco companies "select" the tobacco leaves they use so that they can put less tobacco in their cigarettes while still maintaining the same levels of nicotine.*

[530] *Fact: tobacco companies have been aware of these facts for a long time, in some cases for over 50 years, and have always denied them or refused to disclose them to consumers.*

³⁵ The NSRA press release of 27 May 2002, alluded to the Minister's ability to invoke provisions of the *Tobacco Act* 1997.

³⁶ Tobacco Act 1997, c. 13 [Assented to April 25, 1997]. <http://laws.justice.gc.ca/en/t-11.5/262549.html>

³⁷ Canada, Province of Quebec, District of Montreal. No. 500-05-031299-975; 500-05-031306-978; 500-05-031332-974. 13 December, 2002. Judgement of the Honourable Andre Denis J.S.C. <http://www.jugements.qc.ca/php/decision.php?liste=16124878&doc=455906010C411D0B>

[531] *It should therefore come as no surprise that the government, as fiduciary of public health, would so doggedly pursue a comprehensive policy aimed at curbing smoking and informing Canadians about tobacco's effects. In Canada, the health costs attributed to smoking are in the neighbourhood of \$15 billion, more than the entire national budget of several countries in the world.*³⁸

Unsatisfied, the tobacco companies appealed to the Quebec Court of Appeal. In August 2005, this Court upheld the Act, although some wording in section 20 was held to be of no force. Specifically, the wording: "*or that are likely to create an erroneous impression*", was held to be of no force "*because...[its] vagueness, unlawfully restrict[s] the manufacturers' freedom of expression*" (para 230).³⁹

The Court of Appeal judgement also commented on remarks the initial trial judge made about light cigarettes. The Honourable Andre Denis found that the tobacco industry recognised that light cigarettes were as damaging as regular cigarettes, but had marketed the former in a way that led smokers to assume light cigarettes were less harmful. However, the Appeal judges found that tobacco companies had not suggested that smokers "*should smoke light cigarettes if they are concerned about their health*" (para 207) and, further, that "*the description of a cigarette as mild or not depends on how much it irritates the throat*" (para 207).

They also held that tobacco manufacturers had advised the government that people who smoke mild cigarettes tended to engage in compensatory behaviours (para 208), and that the government subsequently made this information available to consumers. In addition, the Appeal Court judges commented on the trial judge's interpretation of scientific information about filters. However, despite disagreeing with the trial judge, the Court of Appeal judges found that their points of difference did not affect their final determination.

Overall, although the Appeal Court judgment was not directly concerned with the use of descriptors, the comments quoted suggest it was not sympathetic to arguments that the words "light" and "mild" were misleading. Furthermore, because these words were not prohibited in the Tobacco Act, any case against their use would need to be brought on the grounds that they mislead and deceived consumers, grounds that could be difficult to establish, given the comments in para 207 (cited above).

In March 2006, the Supreme Court of Canada granted applications for leave to appeal and leave to cross-appeal the judgment of the Quebec Court of Appeal. The outcome of these appeals is not yet known.⁴⁰

³⁸ Op. cit.

³⁹ Canada, Province of Quebec, District of Montreal. No. 500-09-013033-030; (500-05-031299-975). Judgement of The Honourable Marc Beauregard J.A.; André Brossard J.A; Pierrette Rayle J.A. <http://www.canlii.com/qc/cas/qcca/2005/2005qcca726.html>

⁴⁰ Quebec Court of Appeal considers the Tobacco Act. http://www.hc-sc.gc.ca/hl-vs/tobac-tabac/legislation/federal/cour/loi-act_e.html

United States

Unlike near neighbours Canada and Brazil, the United States has been very slow to introduce stronger tobacco control measures. Campaign for Tobacco Free Kids commented on the influence the tobacco industry has been able to exert over regulatory initiatives:

The tobacco industry has continually opposed any measure which would restrict its ability to market “light” and “low tar” brands, which constitute 82% of all cigarettes sold in the United States. In the negotiations on the FCTC, the United States has opposed the banning of such terms, despite the evidence from its own U.S. National Cancer Institute and in the face of support for such a ban by the overwhelming majority of countries in the negotiations.⁴¹

However, a news item reported in *Tobacco Control* suggests the tobacco industry has recognised its exposure to litigation and made some efforts to reduce its potential liability in personal damages suits. The Figure below illustrates how the words “Lowered tar and nicotine” were removed from packaging used after 2003. The word “LIGHTS” still featured prominently on both packages, but the voluntary removal of the clearly deceptive claim “Lowered tar and nicotine” may have been a strategic concession that could reduce regulators’ concerns over tobacco labelling and make it more difficult to argue that the terms “light” and “mild” alone create confusion among smokers.⁴²

⁴¹ The United States: No Longer a World Leader in Tobacco Control (undated).
<http://www.tobaccofreekids.org/campaign/global/pdf/Straggler.pdf>

⁴² News analysis. *Tob. Control* 2005;14;6-
<http://tc.bmj.com/cgi/reprint/14/1/6?maxtoshow=&HITS=60&hits=60&RESULTFORMAT=&fulltext=lighter+side&andorexactfulltext=and&searchid=1&FIRSTINDEX=60&sortspec=date&resourcetype=HWCIT>

Figure



USA: Philip Morris (PM) has quietly phased out the "LOWERED TAR & NICOTINE" on packs of Marlboro Lights, apparently starting in 2003. Over several decades, tobacco manufacturers have been strident in their defence of being allowed to print whatever they want on cigarette advertisements and packs, citing the vital necessity of informing customers of important consumer information. Strangely, PM does not appear to have informed its customers about why it dropped the claim from its packs—perhaps one factor was the guilty verdict in a consumer fraud case where a judge concluded in 2003 that PM misled smokers by suggesting light cigarettes were safer than regular varieties. At the appeal hearing last November, PM's lawyer, former Illinois Governor James Thompson, was asked to comment on why the label was removed—after all, if there was no fraud, why remove the statement? He was unable to provide an answer. Although PM has removed the words, the cigarettes still seem to contain filter vents—which were central to the charge of deception.

Redhead and Feder (2004) provided a detailed overview of FDA Regulation of Tobacco Products and noted several Bills that would have strengthened US tobacco control. For example, if passed, the McCain Tobacco Bill 1995 (presented to the 105th Congress) would have required tobacco companies to obtain FDA approval before they could market products using descriptors such as "light" and "mild". However, this Bill was defeated on June 17, 1998.⁴³

Four bills introduced to the 107th Congress took a similar approach to the McCain Bill; according to Redhead and Feder, Senator Kennedy's bill (S.2626) contained virtually identical provisions to the McCain Bill. The other Bills sought to give the FDA the authority to regulate tobacco as a drug-delivery device but, while public health advocates supported this approach, the tobacco industry opposed it.⁴⁴

A further bill, which had bi-partisan support and was bi-cameral (S.2461/ HR 4433) proposed a prohibition on terms such as "light" and "mild" that can mislead consumers into believing some products are safer than others. Further, it would have prohibited manufacturers from marketing "modified risk" products (defined as those using terms such as "light" or "mild" on labelling) without prior FDA approval.⁴⁵ A late 2004 SRNT newsletter noted that this bill had not been passed and provided an explanation of the complex lobbying that had taken place.⁴⁶

⁴³ Redhead, C. S. and Feder, J. (2004). FDA Regulation of Tobacco Products: A Policy and Legal Analysis http://digital.library.unt.edu/govdocs/crs//data/2004/upl-meta-crs-8198/RL32619_2004Dec03.pdf?PHPSESSID=288520c492da19656d54f61598d4c263

⁴⁴ Op. cit.

⁴⁵ Op. cit.

In September 2006, New Jersey Democrat Senator Frank Lautenberg introduced the *Truth in Cigarette Labelling Act of 2006* to the US Senate; this was read twice and referred to the Committee on Commerce, Science, and Transportation.⁴⁷ The proposed Act sets out five reasons supporting a ban on the use of words, graphics or colours that imply some *cigarettes are less harmful than other brands of cigarettes*. It also cited National Cancer Institute research documenting smokers' mistaken belief that cigarettes labelled in these ways are less harmful, and Federal Trade Commission findings that tar and nicotine ratings cannot predict the actual tar and nicotine delivery of a cigarette. The proposed Act also noted that there was no evidence to suggest cigarettes marked in a way that suggested they delivered less tar or nicotine actually reduced the harm caused by smoking. The introduction concluded that the Government should intervene to ensure marketing claims made about cigarettes were truthful and not deceptive.⁴⁸

The proposed Act included the following definition of a descriptor:

“(1) HEALTH DESCRIPTOR- The term ‘health descriptor’ includes the words ‘light’, ‘low’, ‘low tar’, ‘ultralight’, ‘mild’, ‘natural’, or any other word, or any graphic or colour, which reasonably could be expected to result in a consumer believing that smoking such brand may result in a lower risk of disease or be less hazardous to health than smoking another brand of cigarette.”⁴⁹

Senator Lautenberg's accompanying press release cited the August 18 ruling from U.S. District Court Judge Gladys Kessler, who found that tobacco companies had deliberately deceived smokers and ordered that they cease labelling cigarettes as “light,” “low tar,” or with other deceptive descriptors.⁵⁰ However, tobacco companies have appealed Judge Kessler's ruling, and her orders will not come into effect until after the appeal has been heard.

Anticipating a long drawn out court hearing, Senator Lautenberg stated his proposed Act would pre-empt the tobacco companies' legal action and would enable more rapid action to be taken against misleading descriptors. His proposed Act may be assisted by the recent mid-term elections. The results of this have seen the Democrats control both the Senate and the House of Representatives; this may give the proposed legislation the support it requires to be enacted.

⁴⁶ Zeller, M. (2004). The latest on the FDA Tobacco Bill. SRNT Newsletter Nov/Dec. 2004. http://www.srnt.org/pubs/nl_11_04/pdf/SRNT_v10n4.pdf

⁴⁷ Truth in Cigarette Labelling Act of 2006. <http://www.theorator.com/bills109/s3872.html>

⁴⁸ Op. cit.

⁴⁹ Op. cit.

⁵⁰ LAUTENBERG INTRODUCES BILL TO BAN ‘LIGHT’ AND ‘LOW TAR’ CIGARETTES. Press release dated 07 September 2006. <http://www.lautenberg.senate.gov/documents/domestic/TruthinCigLabelingAct/Truth%20in%20Cigarette%20Labeling%20Act%20Press%20Release.pdf>

4.2.3 Legislative Approaches: South America

Brazil

In November 2001, Brazil passed a Resolution that specifically prohibited the use of descriptors such as “light”, “mild” and “ultralight” on cigarette packages. The National Agency for Sanitary Surveillance Resolution 46, dated 26 March 2001, prohibited the use of misleading terms such as mild and light on the packaging and advertising of tobacco products.⁵¹ The wording of the Resolution is as follows:

Article 2. It is forbidden to use any denomination, in packings or advertising material, such as: class(es), ultra low level(s), low level(s), smooth, light, soft, moderate level(s), high level(s), and others that can induce the consumer to misinterpret the levels contained in cigarettes.

The cigarette industries and importers shall be granted a period of 9 (nine) months, as from the date of publication of this Resolution, to adjust to the provisions set forth in this article.⁵²

The resolution was the first in the world to forbid the use of descriptive words such as “light,” “ultra light,” “low levels,” “mild,” “soft,” “moderate levels,” “high levels,” or others that could mislead smokers about the safety of smoking. Tobacco companies were granted nine months from the date of publication of the resolution to comply with its provisions.

However, da Costa and Goldfarb (undated) reported that the industry lobbied strongly to postpone the date on which the law was to take effect and were successful in deferring this until January 2002. As discussed in Section 5, the tobacco industry used the time they had negotiated to develop new marketing campaigns that introduced and reinforced colour-variant associations. These campaigns meant that, when the Resolution came into effect, the colours featured in the advertising had come to convey the same information as the descriptors they replaced (page 56).⁵³

Other South American Jurisdictions

Prior to the launch of the Framework Convention on Tobacco Control, several South American countries signed the Panama Declaration on the Framework Convention for Tobacco Control (FCTC) Panama, August 14, 2001. However, it is not clear from the Declaration itself which countries were signatories. Nevertheless, Article 3 of the document refers to Packaging and Labelling, and states:

⁵¹ Joossens, L. (2001). Regulation of tobacco products: an update on European developments 1999-2001. World Health Organization Regional Office for Europe. Copenhagen. <http://www.who.dk/document/e74524.pdf>

⁵² National Health Surveillance Agency. Resolution RDC n. 46, of March 28, 2001. http://www.anvisa.gov.br/eng/tobacco/rdc_46.htm

⁵³ Luisa M. da Costa e Silva Goldfarb (undated). Government Leadership in Tobacco Control: Brazil's Experience. <http://www1.worldbank.org/tobacco/pdf/2850-Ch03.pdf>

*To provide minimum packaging and labelling regulation that all countries must adopt requiring clear and forceful package warnings in all tobacco products covering at least 50% of the exterior surface of the packages supporting the consumers rights to information. Likewise, to avoid the use of terms such as "light" or "mild" that may create a false perception regarding product safety.*⁵⁴

However, despite this intention, and despite the strong legislative approach taken in Brazil, other South American countries have thus far not implemented what Sebríe *et al* (2005) describe as "strong tobacco control legislation".⁵⁵ In discussing tobacco regulation in Argentina, Sebríe *et al* (2005) concluded that: "*Trans-national tobacco companies have been highly influential in Argentina. Using similar strategies as elsewhere in the world, the tobacco industry successfully blocked, delayed, and diluted meaningful federal tobacco control bills.*"⁵⁶

⁵⁴ PANAMA DECLARATION On the Framework Convention for Tobacco Control (FCTC) Panama, August 14, 2001. <http://www.fac.org.ar/scvc/llave/epi/panama/panamai.htm>

⁵⁵ Sebríe, E.M., Barnoya, J., Pérez-Stable, E. J., and Glantz, S.A. (2005). Tobacco industry successfully prevented tobacco control legislation in Argentina. *Tob. Control* 2005;14;2-. Page 7.

⁵⁶ Sebríe, E.M., Barnoya, J., Pérez-Stable, E. J., and Glantz, S.A. (2005). Tobacco industry successfully prevented tobacco control legislation in Argentina. *Tob. Control* 2005;14;2-. Page 7.

4.2.4 Legislative Approaches – European Union

Tobacco regulation in the European Union (EU) is complex, since it relates to the single internal market that has been created while at the same reflecting the existing policies and interests of member countries. As Joossens, Raw and Godfrey (2004)⁵⁷ noted, the internal market was designed to achieve economic goals, thus tobacco control policies that restrict marketing may conflict with the rationale that guided the development of the EU. Of the six pieces of tobacco control legislation passed by the EU, four have been the subject of a challenge, either by the tobacco industry or by a Member State.

Among the directives passed by the EU, 2001/37/EC banned “descriptors suggesting that one tobacco product is less harmful than another”. Published in the Official Journal of the European Communities on 18 July 2001, article 27 of the Directive, which is binding on EU members, read:

(27) The use on tobacco product packaging of certain texts, such as ‘low-tar’, ‘light’, ‘ultra-light’, ‘mild’, names, pictures and figurative or other signs, may mislead the consumer into the belief that such products are less harmful and give rise to changes in consumption. Smoking behaviour and addiction, and not only the content of certain substances contained in the product before consumption, also determine the level of inhaled substances. This fact is not reflected in the use of such terms and so may undermine the labelling requirements set in this Directive. In order to ensure the proper functioning of the internal market, and given the development of proposed international rules, the prohibition of such use should be provided for at Community level, giving sufficient time for introduction of this rule.⁵⁸

Legislation enacting 2001/37/EC was introduced into national legislation by 15 European Union (EU) Member States on 30 September 2002, thus meeting the timeline set out in the Directive. Countries that joined the EU subsequently must agree to implement the Directive according to a timeline negotiated with the EU.

The Directive was subsequently challenged by tobacco companies, who raised several questions about its scope, the measures outlined, and the ramifications of these. The details of this challenge and the European Court of Justice’s determination are outlined in Section 4.3.2.

⁵⁷ ASPECT Consortium. Tobacco or Health in the European Union. Past, Present and Future. European Commission Directorate-General for Health and Consumer Protection. Luxembourg: Office for Official Publications of the European Communities, 2004. Chapter 3 (Joossens L, Raw M, Godfrey F. The development of European tobacco-control policy).

⁵⁸ DIRECTIVE 2001/37/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 June 2001. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_194/l_19420010718en00260034.pdf

4.2.5 Implementation of the EU Directive – Scandinavian Countries

Denmark

On 6 June 2002, Denmark introduced Act No. 375, the Act on the manufacture, presentation and sale of tobacco products (Tobacco Products Act).⁵⁹ Part 6 of this Act dealt with product descriptions and specified that:

The Minister for the Interior and Health shall lay down specific rules stipulating that specific texts, names, trademarks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products, with the aim of implementing European Community legislative acts on this.

The introduction of Statutory Order No. 817 on 2 October, 2003, brought national legislation further in line with the EU Directive. Part 4 of the Statutory Order contained provisions dealing with product descriptions, and named several descriptors that tobacco companies would no longer be permitted to use. As the section copied below makes clear, the Danes took a literal interpretation of the EU Directive, and banned all terms incorporating the words “light”, “low” or “mild

Product descriptions

§ 7. Without prejudice to the provision of § 7(1) of the Tobacco Products Act on information on the tar, nicotine and carbon monoxide yields of cigarettes, texts, names, trademarks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used.

Subsection 2. The following texts and names shall be covered by subsection 1:

- 1) low tar;*
- 2) low nicotine;*
- 3) low carbon monoxide;*
- 4) light;*
- 5) extra light;*
- 6) super light;*
- 7) ultra light;*
- 8) mild;*
- 9) extra mild;*
- 10) super mild; and*
- 11) ultra mild.⁶⁰*

⁵⁹ The Act on the manufacture, presentation and sale of tobacco products (Tobacco Products Act). <http://www.im.dk/%5Cimagesupload%5Cdokument%5Cact%20on%20the%20manufacture.pdf>

⁶⁰ Statutory Order No. 817 of 2 October 2003. <http://www.im.dk/%5Cimagesupload%5Cdokument%5CEngelsk-Tobaksvarebkg.pdf>

Finland

On 21 December 2004, Finland passed Law No. 1207, which gave effect to the World Health Organization (WHO) Framework Convention on Tobacco Control.⁶¹ This law was implemented through Ordinance No. 156 of 11 March 2005.⁶² Neither the Law nor the Ordinance could be retrieved in an English translation.

Iceland

Iceland brought in Regulation No. 236 on 24 March 2003; this Regulation addresses warning labelling on tobacco products and the measurement and maximum yields of harmful substances. The Regulations cover Warnings of the harmfulness of tobacco and information on harmful substances (Sections 3-11), and Article 11 reads:

*It is entirely prohibited to use, on the packaging of tobacco products, texts, names, trademarks, images and figurative or other signs suggesting that a particular tobacco product is less harmful than others.*⁶³

Norway

Norway introduced Regulation No. 141 on 6 February 2003; this regulation contained new provisions for the content and labelling of tobacco products and were designed with reference to Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001. Section 3 of the Regulations deals with the labelling of tobacco products, but an English version of the Regulation was not able to be located.⁶⁴ However, amendments to the Tobacco Act in 2002 that banned the descriptors 'light' and 'mild' and are due to come into effect from 1 January 2004.⁶⁵

⁶¹ (Finland's Författningssamling, 27 December 2004, Nos. 1205-1209, p. 3244)

⁶² No English translation of the statutes could be located. <http://www3.who.int/idhl-rils/results.cfm?language=english&type=ByCountry&strRefCode=Fin&strTopicCode=XA>

⁶³ Regulations No. 236, 24 March 2003 on warning labelling on tobacco and measurement and maximum yields of harmful substances. <http://eng.heilbrigdisraduneyti.is/media/Reglugerdir-enska/tobacco%20regulations.pdf>

⁶⁴ English version unable to be located. <http://www3.who.int/idhl-rils/frame.cfm?language=english>

⁶⁵ Hakala, K. and Waller, M. (2003). Nordic tobacco control: Towards smokefree societies. http://www.norden.org/pub/velfaerd/social_helse/sk/Nordictobaccocontrol.pdf

4.2.6 Implementation of the EU Directive – Central and Southern Europe

Belgium

A Royal Decree of May 29, 2002 implemented EU Directive 2001/37/EC. This Decree banned the use of descriptors that suggest one tobacco product is less harmful than another (page 255).⁶⁶

Germany

Germany passed The Tobacco Product Ordinance on 20 November 2002; this incorporates the EU Directive 2001/37/EC. An English translation of the Ordinance could not be located.⁶⁷

Lithuania

A new Law on Tobacco Control brought Lithuania in line with EU Directive 2001/37/EC and included a ban on misleading descriptors such as “light” and “mild”. This Law was effective from May 1, 2004.⁶⁸

Luxembourg

Luxembourg remodelled tobacco control legislation enacted in 1990 to accommodate the EU Directive. According to the Journal Officiel du Grand-Duché de Luxembourg, Part A, 23 September 2003, No. 142, Regulations of the Grand Duke were issued on 16 September 2003. The key provisions of the Regulations appear to correspond to setting maximum tar yields, to specifying the size of warning labels, and to providing toxicological data. As an English version of the Regulations could not be located, it is not clear what specific provisions these contain about the use of tobacco descriptors such as “light” and “mild”.⁶⁹

Malta

In 2004, Malta introduced the Tobacco (Smoking Control) Act, which set out the Labelling of Tobacco Product Regulations. Section 8 reads:

- (1) No texts, names, trade-marks and figurative or other signs may be used on the packaging of a tobacco product in order to suggest that that particular product is less harmful than others.*
- (2) It shall be an offence to label any tobacco product as “light” or “mild”.⁷⁰*

⁶⁶ TOBACCO OR HEALTH IN THE EUROPEAN UNION PAST, PRESENT AND FUTURE http://www.ifeh.org/magazine/ifeh-magazine-2005_v7_n1.pdf

⁶⁷ No English translation could be located. <http://www3.who.int/idhl-rils/frame.cfm?language=english>

⁶⁸ Op. cit.

⁶⁹ English version unable to be located. <http://www3.who.int/idhl-rils/frame.cfm?language=english>

⁷⁰ CAP 315 Tobacco (Smoking Control) Act. <http://www.ba-malta.org/LEGISLATION/CHAPT315.pdf>

Montenegro

The Law on Limiting Use of Tobacco Products was passed on 5 April, 2006. Article 13 of this Law states:

*It is prohibited to print labels on tobacco products that smoking that particular type or class is less harmful than any other, that the filter or other substances of the tobacco product make it less harmful than products, which do not contain similar substances.*⁷¹

Netherlands

On 6 February 2003 the Netherlands adapted an existing statute, the Tobacco Law, to incorporate Directive 2001/37/EC. More specifically, the Tobacco Law 1988 was amended to include sections on definitions (Sec. 1); and the duties of manufacturers and importers to provide information on the ingredients of tobacco products and on the measurements and analyses carried out to determine the tar, nicotine, and carbon monoxide content of such products (Secs. 3b and 3c).⁷²

Poland

A Law on the Protection of Public Health against the effects of Tobacco Uses was passed by the Polish Parliament on November 9, 1995. An amendment to this law was passed on November 28, 2003 to ensure harmonisation with the EU Directive. Among other things, the amendment bans the use of the terms “mild”, “light”, “ultra light”, etc. and symbols that suggest a product is less harmful than others.⁷³

Spain

Spain passed Crown Decree No. 1079/2002 on 18 October 2002; this Decree regulated the maximum nicotine, tar and carbon monoxide yields of cigarettes as well as setting out provisions describing the labelling of tobacco products, and measures concerning the ingredients and descriptions of tobacco products.⁷⁴ An English translation of the Crown Decree could not be located.

Sweden

The Swedish Tobacco Act was introduced in 1993 and replaced earlier legislation on health warnings and a partial ban on advertising. This Act has had several amendments, most recently in 2002 to ensure Swedish national legislation is consistent with EU Directive 2001/37/EC has been implemented. The 2002 amendment brings into effect rules that apply to labelling

⁷¹ Law on Limiting Use of Tobacco Products. <http://www.gom.cg.yu/files/1130510037.doc>

⁷² <http://www3.who.int/idhl-rils/frame.cfm?language=english>

⁷³ Tobacco Or Health In The European Union Past, Present And Future http://www.ifeh.org/magazine/ifeh-magazine-2005_v7_n1.pdf

⁷⁴ Ministerio De Sanidad Y Consumo <http://www.boe.es/boe/dias/2002/10/19/pdfs/A36814-36817.pdf>

(health warnings) and content, and prohibits misleading labels such as “light” and “mild”.⁷⁵

Switzerland

The Swiss Regulation on Tobacco and Tobacco Products (which extended the 1995 Federal Law on Food Products) became effective on January 1, 1998 and imposed partial restrictions on advertising and point of sale activities. These regulations were revised in 2004 to ensure compliance with EU Directive 2001/37/EC. Among other issues, the revisions banned the use of misleading descriptors such as “light” and “mild” that do not relate to the actual nicotine (e.g. “low in nicotine” or “nicotine-free”) are banned, although statements about the nicotine content still appear to be permitted.⁷⁶

South-East European countries are not yet members of the EU, but some, such as Bulgaria, which hopes to gain EU accession in the near future, have introduced legislation that would bring national laws in line with the EU Directive 2001/37/EC. For example, Bulgaria has introduced a Draft Law on Tobacco and Tobacco Products. Others countries have various tobacco control bodies, but none has yet introduced or implemented legislation that would ban use of misleading descriptors.⁷⁷

4.2.7 Implementation of the EU Directive – United Kingdom

United Kingdom

The Tobacco Product Regulations provide stronger health warnings on tobacco packs and prohibited misleading terms such as "low-tar", "mild" and "light" from tobacco packs.⁷⁸ Section 11 of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 states:

Product descriptions

11. - (1) No person shall supply a tobacco product the packaging of which carries any name, brand name, text, trademark or pictorial or any other representation or sign which suggests that that tobacco product is less harmful to health than other tobacco products.

⁷⁵Tobacco Or Health In The European Union Past, Present And Future http://www.ifeh.org/magazine/ifeh-magazine-2005_v7_n1.pdf

⁷⁶ Op. cit.

⁷⁷ Bozicevic I, Gilmore A, Oreskovic S. (2004). The Tobacco Epidemic in South-East Europe: Consequences and Policy Responses. Health, Nutrition and Population Discussion Paper, Economics of Tobacco Control Paper No. 18. Washington DC: World Bank, 2004. <http://www1.worldbank.org/tobacco/pdf/Bozicevic-Consequences%20of-whole.pdf>

⁷⁸ UK Department of Health. Regulating Tobacco Products. http://www.dh.gov.uk/PolicyAndGuidance/HealthAndSocialCareTopics/Tobacco/TobaccoGeneralInformation/TobaccoGeneralArticle/fs/en?CONTENT_ID=4083845&chk=t4FwbW

*(2) Paragraph (1) does not apply where a tobacco product is or is to be supplied for consumption outside the United Kingdom.*⁷⁹

Ireland

Ireland responded to the EU Directive 2001/37/EC by introducing The EC (Manufacture, Presentation and Sale of Tobacco Products) Regulations, 2003, which prohibited the use of misleading terms such as 'light', 'low-tar' and 'mild'.⁸⁰

Subsequent to this, *The Public Health (Tobacco) (Amendment) Act 2004* was introduced on 11 March, 2004.⁸¹ Section 13 of this Act reads:

"42.—(1) Where the packaging of a tobacco product or any printed material attached to or accompanying a tobacco product or such packaging bears an assertion that—

(a) smoking does not cause life threatening diseases,

(b) the smoking or consumption of one brand or class of tobacco product is less harmful than the smoking or consumption of others,

(c) the smoking of tobacco products is not addictive,

(d) filters attached to, or additives to or other ingredients of, a tobacco product render it less harmful than tobacco products that do not have filters attached, or do not contain such additives or ingredients,
*the manufacturer, importer and distributor of the tobacco product concerned shall each be guilty of an offence".*⁸²

This wording is comprehensive and does not prohibit specific words, such as "light" and "mild", but instead focuses on the "assertion" made (although this may be subject to dispute).

⁷⁹ Statutory Instrument 2002 No. 3041. The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002. <http://www.opsi.gov.uk/si/si2002/20023041.htm#11>

⁸⁰ Environment and Health International Magazine of the International Federation of Environmental Health. (2005). http://www.ifeh.org/magazine/ifeh-magazine-2005_v7_n1.pdf

⁸¹ Public Health (Tobacco) (Amendment) Act 2004. <http://www.oireachtas.ie/documents/bills28/acts/2004/A0604.pdf>

⁸² Public Health (Tobacco) (Amendment) Act 2004. <http://www.irishstatutebook.ie/ZZA6Y2004S13.html>

4.2.8 Legislative Approaches – Africa

Eritrea⁸³

Eritrea issued a Proclamation (No. 143 of 2004) that set out tobacco control measures. Article 4 of the Proclamation included the following section:

Packaging and labelling of tobacco products

(1) No person shall manufacture, sell, or import a tobacco product unless the packing and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than any other tobacco products. These may include terms such as "Low tar"; "Light", "ultra-light", or "mild".

South Africa

South Africa published the Tobacco Products Control Amendment Bill earlier this year. Section 4e (13) states:

*"No person shall package or label a tobacco product in any way that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions, including any term, descriptor, trademark, figurative or other sign that directly or indirectly creates that impression that a particular tobacco product is less harmful than another tobacco product, and this includes, inter alia, terms such as "low tar", "light", "ultra-light", or mild."*⁸⁴

Submissions on this Bill closed on 13 October and hearings were scheduled for late October⁸⁵

⁸³ Eritrea. A Proclamation (No. 143 of 2004) to provide for tobacco control. Dated 23 August 2004. (Gazette of Eritrean Laws, 23 August 2004, Vol. 13/2004, No. 7, 10 pp.) <http://www3.who.int/idh/rils/frame.cfm?language=english>

⁸⁴ Tobacco Products Control Amendment Bill <http://www.pmg.org.za/bills/060913b24-06.pdf>

Tobacco Control: The South African Experience. Undated. http://kharahais.gov.za/index.php?option=com_content&task=view&id=19&Itemid=32&PHPSESSID=cb7205d2c1e09fdd7bbb9a78d8226d75&date=2003-05-01&PHPSESSID=cb7205d2c1e09fdd7bbb9a78d8226d75

⁸⁵ Requests For Public Input, Submissions & Hearings. <http://www.pmg.org.za/programmes/hearings.htm>

4.2.9 Legislative Approaches –Asia and South East Asia

India

On 5 July 2006, the Government of India notified *The Cigarettes and Other Tobacco Products (Packing and Labelling) Rules*, which will come into effect on 01 February, 2007. Section 3 (g) of these rules prohibits the display of information that may lead consumers to form mistaken impressions about the safety of cigarettes. More specifically, the section reads:

(g) no tobacco product package or label shall contain any information that is false, misleading, or deceptive, or that is likely or intended to create an erroneous impression about the characteristics, health effects, or health or other hazards of the tobacco product or its emissions. This prohibition includes, but is not limited to, the use of words or descriptors, whether or no part of the brand name, such as "light", "ultra light", "mild", "ultra mild", "low tar", "slim", "safer" or similar words or descriptors, any graphics associated with, or likely or intended to be associated with, such words or descriptors; any product package design characteristics, associated with, or likely or intended to be associated with, such descriptors.⁸⁶

The notification period allows tobacco manufacturers and retailers over six months in which to comply with the new regulations.

Myanmar

The Control of Smoking and Consumption of Tobacco Products Law, was adopted on 4 May, 2006 as State Peace and Development Council Law 5/2006.⁸⁷ The key provisions of this Law are as follows:

Chapter II

Objectives

3. The objectives of this Law are as follows;

(a) to convince the public that health can be adversely affected due to smoking and consumption of tobacco product and to cause refraining from the use of the same;

(b) to protect from the danger which affects public health adversely by creating tobacco smoke-free environment;

(c) to obtain a healthy living style of the public including child and youth by preventing the habit of smoking and consumption of tobacco product;

(d) to uplift the health, economy and social standard of the public through control of smoking and consumption of tobacco product;

⁸⁶ Cigarettes and Other Tobacco Products Packing & Labelling Rules. Press Release dated 18 July, 2006. <http://www.indlawnews.com/1514544CCCCFF209BDBA1A215AF887D9E>

⁸⁷ Author unknown. (2006). Tobacco: Deadly in any form or disguise. <http://www.mrtv3.net.mm/open/010606for.html>

*(e) to implement measures in conformity with the international convention ratified by Myanmar to control smoking and consumption of tobacco product;*⁸⁸

Although the Law does not specifically mention tobacco descriptors such as “light” and “mild”, Chapter 5, Section 8, entitled “The Functions and Duties of the Ministry of Health”, includes a responsibility for “*laying down and carrying out the necessary arrangements to enable implementing effectively the measures for control of smoking and consumption of tobacco product*”.⁸⁹ In addition, the Law specifically allows for the introduction of additional regulation recommended by the Ministry of Health.

Philippines

The Philippines introduced The Tobacco Regulation Act on June 23, 2003.⁹⁰ The key provisions of this legislation were to:

- a. Promote a healthful environment;*
- b. Inform the public of the health risks associated with cigarette smoking and tobacco use;*
- c. Regulate and subsequently ban all tobacco advertisements and sponsorships;*
- d. Regulate the labelling of tobacco products;*
- e. Protect the youth from being initiated to cigarette smoking and tobacco use by prohibiting the sale of tobacco products to minors;*
- f. Assists and encourage Filipino tobacco farmers to cultivate alternative agricultural crops to prevent economic dislocation; and*
- g. Create an Inter-Agency Committee on Tobacco (IAC-Tobacco) to oversee the implementation of the provision of this Act.*⁹¹

Although this legislation introduces strong control mechanisms that will culminate in advertising, promotion and sponsorship bans, it did not contain any provisions that related to the use of tobacco descriptors.

The FCTC was ratified on April 26 2005,⁹² and on 27 September 2006 the FCAP, the Framework Convention on Tobacco Control Alliance – Philippines, signed the Hanoi Declaration on Graphic

⁸⁸ The Union of Myanmar The State Peace and Development Council. The Control of Smoking and Consumption of Tobacco Product Law (The State Peace and Development Council Law No 5/2006) (The 8th Waxing Day of Kason, 1368 ME) (4 May, 2006). <http://www.myanmarembassy Canberra.com/newsandviews/Tobacco%20Product%20Law.doc>

⁸⁹ Op. cit.

⁹⁰ Republic Act No. 9211. TOBACCO REGULATION ACT OF 2003. http://www.doh.gov.ph/no_tobacco.pdf

⁹¹ Tobacco Regulation Act 2003. http://fcap.globalink.org/RA9211_b.htm

⁹² Landmark Health Treaty on Tobacco Ratified by Philippine Senate FCAP hails unanimous approval, urges vigilance. FCAP Press Release dated April 26, 2005. http://fcap.globalink.org/FCTCratif_PR.htm

Health Warnings on Cigarette Packs.⁹³ This Declaration called on other ASEAN nations to ratify the FCTC, but, as its name indicates, had as its primary objective the introduction of pictorial warning labels on cigarette and other tobacco packages. At this stage, the tobacco control emphasis in this part of the world appears to be on pictorial warning labels, although FCAP and other alliances are clearly aware of the FCTC's other provisions.

Singapore

Singapore's Control of Advertisements and Sale of Tobacco Act (Chapter 309) was amended in 2002. Part III of the amended Act deals with health warnings and labelling and Section 17 states:

The Minister may by regulations impose requirements for securing that such tobacco products as may be specified in those regulations be marked with, labelled or accompanied by any warning relating to health, information or description as may be prescribed and control or prohibit the supply of tobacco products with respect to which such requirements are not complied with.

Although this does not specifically prohibit the use of "light" or "mild" or other imagery as descriptors, this Section would appear to allow the Minister to intervene to control the use of misleading terms or symbols.⁹⁴

Hong Kong

Hong Kong introduced the Smoking (Public Health) Ordinance, Chapter 371, Smoking (Public Health) (Amendment) Bill on April 19, 2005.⁹⁵ Section 14 of the Ordinance sets out provisions to regulate the use of misleading descriptors:

At present, the use of descriptors on the package of any tobacco product such as "light", "mild" and "low tar" is permitted. There is no scientific evidence indicating that products with these descriptors pose lesser health risks to smokers. On the contrary, the above descriptors may give the false impression that the tobacco products concerned are less harmful than others, thus encouraging deeper inhalation and increased daily consumption by smokers. In line with international practice, we recommend prohibiting the appearance of the words "light", "lights", "mild", "milds", "low tar" or other words that may have similar misleading effects on any package of tobacco product.

However, section 10(3) does not apply to any cigarettes that have a brand name that includes the words "light", "lights", "mild", "milds", "low tar", "醇" or "焦油含量低" or other words that imply the

⁹³ Hanoi Declaration on Graphic Health Warnings on Cigarette Packs. . FCAP Press Release dated 27 September 2006. http://fcap.globalink.org/RPhw_hanoidecl_2006.htm

⁹⁴ Control of Advertisements and Sale of Tobacco Act (Chapter 309). <http://statutes.agc.gov.sg/>

⁹⁵ Smoking (Public Health) (Amendment) Bill 2005. File Ref: HWF CR 52/581/89 Pt.56. http://www.smokefree.hk/content/88/14/1/b24_brf_e.pdf

cigarettes have a low tar yield (though only if the cigarettes have a tar yield of 9 milligrams or less.⁹⁶

However, in a submission on the bill, counsel for Japan Tobacco company submitted that prohibition of the words “light”, “lights”, “mild”, “milds”, “low tar”, “醇”, “焦油含量低”, or other words implying these variants are less harmful than others would be: “*contrary to and in violation of the following laws and conventions, and if carried into legislation would make the legislation open to legal challenge*”.⁹⁷ The laws referred to include the Basic Law, the Hong Kong Bill of Rights, WTO - Non-Discriminatory Principle, and obligations under Hong Kong – Japan Investment Promotion and Protection Agreements.⁹⁸

In January 2006, the Health, Welfare and Food Bureau noted they were mindful of possible litigation and willing to examine alternative means of achieving their intended policy goals.⁹⁹ To this end, the Bureau noted that while they believed the prohibition of misleading words should be retained, they were prepared to allow such words to be used if two conditions were met:

(a) the trade mark has been registered with the Trade Mark Registry under the Trade Marks Ordinance (TMO) (Cap. 559); or its owner is able to prove that the mark is used in Hong Kong in relation to the sale of / the sale by retail of cigarettes on the day immediately before the enactment of the Ordinance;

and

(b) the packet or retail container bears a notation in the prescribed form and manner.

The prescribed form of the notation was not outlined, although the Bureau stated that the intent of this was “*to bring to the smokers’ attention that the use of misleading words does not in any way indicate that cigarettes contained therein are less harmful to health than others*”.¹⁰⁰

The Bureau outlined their view that notations would help dispel any false impressions smokers may have about the relative harm of different brands and variants. Their response noted that the tobacco industry had been advised of their revised position and that some were “*generally content*” with the proposed arrangement while others reserved their position until details of the notation were available.

The use of notations has also been a position negotiated by other Asian nations, notably Japan.

⁹⁶ Letter to Ingrid Yeung from Monna Lai dated 06 June, 2006. <http://www.legco.gov.hk/yr04-05/english/bc/bc61/papers/bc610615cb2-2406-2e.pdf>

⁹⁷ Bills Committee on Smoking (Public Health) (Amendment) Bill 2005 Administration’s response to the submission from Baker & McKenzie on behalf of Japan Tobacco Inc. <http://www.legco.gov.hk/yr04-05/english/bc/bc61/papers/bc610120cb2-901-3e.pdf>

⁹⁸ Op. cit.

⁹⁹ <http://www.legco.gov.hk/yr04-05/english/bc/bc61/papers/bc610120cb2-901-3e.pdf>

¹⁰⁰ Op. cit.

Japan

Feldman (2006) noted Japan's opposition to many of the articles proposed for inclusion in the FCTC. Among other points, Japan won a concession over "mild" or "light" descriptors that ratifying nations only take measures "in accordance with its national law" to ensure that cigarette packets do not carry misleading information. Thus, from 2005, these brands will contain "*will contain a notation indicating that they pose the same health hazards as other cigarettes*" (page 44).¹⁰¹

¹⁰¹ Feldman, E. (2006). The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan. University of Pennsylvania Law School, Paper 113.
<http://lsr.nellco.org/cgi/viewcontent.cgi?article=1117&context=upenn/wps>

4.2.10 Legislative Approaches – Oceania

Tonga

In 2004, Tonga introduced an Act (No. 9 of 2004) that amended the Tobacco Control Act 2000; this was assented to on 23 August 2004 and was known as The Tobacco Control (Amendment) Act 2004).

Section 7B of the Act prohibited misleading labelling (Sec. 7B) and reads:

7B. (1) Any person who packages or labels a tobacco product in a manner that allows a consumer or purchaser of tobacco products to be deceived or misled concerning its characteristics, properties, toxicity, composition, merit or safety commits an offence.

(2) Any person who sells, distributes, or displays for sale or distribution, imports, or exports any tobacco product that displays any words, terms, markings or other identifiers on its package or label that are prescribed by regulations made under this Act as being misleading commits an offence.

(3) Any requirements arising from this section do not exempt a manufacturer, importer or retailer of tobacco products of other obligations or liabilities to warn consumers of the risks of using tobacco products."

4.2.11 Summary of Regulatory Approaches

The measures discussed in the preceding sections reveal that nations have taken quite different approaches to meet their commitments under regional or global tobacco control agreements. While some used voluntary agreements, others have enacted legislation, or other measures that have the force of law. The varied regulatory approaches taken have been paralleled by differing provisions and levels of protection. While some countries have prohibited the use of specific words, such as “light” and “mild”, others have recognised that the tobacco industry is likely to respond by introducing visual heuristics, or numbers, that convey the same meaning as the banned terms and so have aimed at controlling deceptive behaviour in general, rather than the use of specific terms.

While most nations have opted for a legislative response, Australia and Canada have both entered into voluntary agreements with the tobacco industry. Australia’s experience suggests that the industry will rapidly locate and exploit loopholes in the agreements, thus undermining both the purpose and the effect of the agreement. A recent WHO monograph that evaluated tobacco control measures concluded:

“Voluntary agreements are a weak means of controlling the tobacco industry; they are difficult to monitor, and are subject to more differences in interpretation than legislation, as lengthy negotiations are often needed. Voluntary agreements are not considered to be effective” (Siem, 2000) (cited in WHO, p. 58).¹⁰²

Although legislative solutions are considered more robust than voluntary agreements, even these have been weakened by concessions sought, and made, to the tobacco industry. Allowing the use of deceptive terms such as “light” and “mild” in conjunction with warning notations is highly unlikely to reduce smokers’ propensity to associate these variants with reduced health risks. Legislative measures must therefore be both comprehensive, to avoid loopholes, and powerful, to ensure concessions do not undermine the scope or intent of the protection sought.

The following sections first examine the tobacco industry’s response to restrictions on their use of descriptors before outlining issues that should be addressed in regulation and principles that could guide the development of a robust regulatory response.

¹⁰² World Health Organisation (undated). Advancing Knowledge On Regulating Tobacco Products. Available at: <http://fctc.org/documents/WHOproductregulation.pdf>

5 Tobacco Industry Responses to Regulatory Initiatives

5.1 Use of Colour to Evoke Descriptors

Marketers' use of colour to evoke particular emotions extends back over several decades. Indeed, the association between colour and some brands has become so powerful that colours have recently been accepted as trademarks.¹⁰³ As well as representing specific brands, colours may also come to represent particular variants within a product category. Thus "green top" milk is recognised as reduced fat while "yellow top" denotes reduced fat and calcium enriched milk; these colours represent particular variants, irrespective of the brand that produces or markets these.

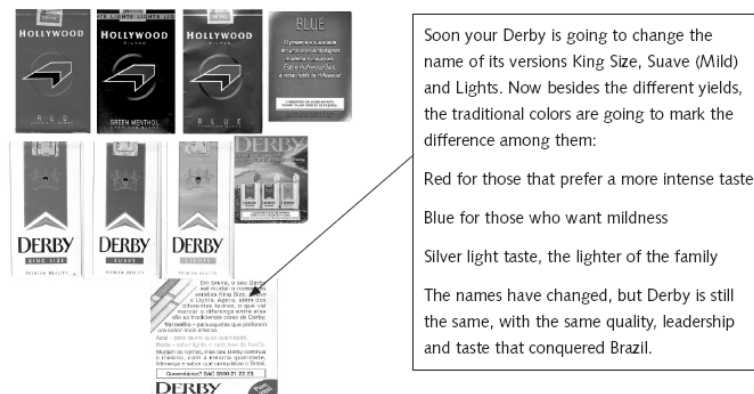
For several years, tobacco companies have also used colour to differentiate brand variants and, in countries where the use of verbal descriptors is no longer permitted, the tobacco industry's reliance on colour to convey similar impressions to the verbal descriptors has increased. For example, Brazilian commentators noted that tobacco companies' use of colour has grown, and that some brands are now using inserts to reinforce the association between colour and particular variants, and that use the words "light" and "mild" to describe the brand. One example tobacco control officials observed stated¹⁰⁴:

BLUE The pleasure and the mildness in a new and modern package. This is Hollywood Blue, a light version of Hollywood.

The image below, copied from Cavalcante's report, illustrates the use of pack inserts to create and reinforce the colour-variant relationship manufacturers hope to develop and exploit once the words "light" and "mild" could no longer be used.¹⁰⁵

Figure 3

Example of brand marketing strategies used in order to create a link between brand descriptors and the color packs variations in a same brand family.



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¹⁰³ See, for example, Cadbury Limited v J H Whittaker & Sons Limited. IPONZ Case T26/2004, 15 November 2004

¹⁰⁴ Tania Cavalcante comments posted to <http://www.essentialaction.org/tobacco/qofm/0111a.html>

¹⁰⁵ Cavalcante, T. (undated). Labelling and Packaging in Brazil. World Health Organisation. http://www.who.int/tobacco/training/success_stories/en/best_practices_brazil_labelling.pdf

As the accompanying text makes clear, the colours are designed to symbolise the words that tobacco companies are no longer permitted to use. Cavalcante (undated) noted that at the same time as tobacco companies began developing strong colour associations with different brand variants, they also included within-pack pamphlets that clearly introduced smokers to the colour-variant relationship. As Cavalcante noted: “*The idea was to prepare the consumers to link the colours of the packs with the notion of light, mild or low yields*” (p. 11).¹⁰⁶

Cavalcante’s report makes it clear that tobacco companies were quite open about their intention to replace verbal descriptors with visual heuristics. She quoted from a letter sent by a manager of a tobacco company to INCA (The National Cancer Institute of Brazil):

...Due to the prohibition of the descriptors use, the company will be using different colours for the different versions of a same brand family, as, for example, the Hollywood family, that has the RED, BLUE and GREEN MENTHOL versions, to allow the consumer to identify his preferred brand. The yields of each version are printed on the lateral side of the packs... (Gava JP, unpublished data, 2001).¹⁰⁷

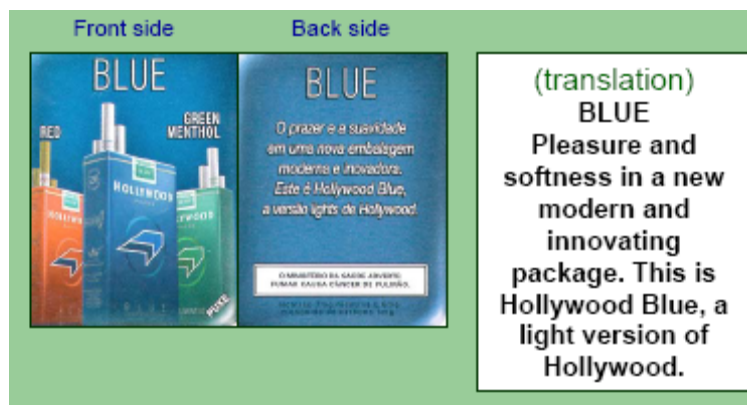
In a presentation given by the Brazilian National Health Surveillance Agency, further examples of the use of colour coded packages and explanatory pack inserts were provided.¹⁰⁸



¹⁰⁶ Cavalcante, T. (undated). Labelling and Packaging in Brazil. World Health Organisation. http://www.who.int/tobacco/training/success_stories/en/best_practices_brazil_labelling.pdf

¹⁰⁷ Cavalcante, T. (undated). Labelling and Packaging in Brazil. World Health Organisation. http://www.who.int/tobacco/training/success_stories/en/best_practices_brazil_labelling.pdf

¹⁰⁸ National Health Surveillance Agency Presentation (undated). Brazilian experience on package warnings and labelling regulation. http://www.who.int/tobacco/ftc/Presentation_franklin.pdf



In commenting on the tobacco industry's response to public health initiatives in Brazil, the WHO stated: "Perhaps the most important lesson learned from the "light and mild" cigarette debacle was that the well intentioned efforts by public health organizations and governments to address the needs of continuing smokers were used by the industry as a marketing tool to stimulate initiation in non-smokers and perpetuate tobacco use in existing smokers" (p.28) ¹⁰⁹

The reports from Brazilian Health Authorities presaged the tobacco industry's response to 2001/37/EC. As McNeill *et al* (2004) reported, documents sourced from the tobacco industry revealed consumer research had been undertaken to test how different colours could connote reduced strength variants. McNeill *et al* wrote: "The main response to the ban on misleading descriptors has therefore been to distinguish brands by the use of colours. For example Imperial Tobacco changed its Lambert & Butler Lights pack to be renamed Lambert & Butler Gold, whereas the Ultra cigarettes were named White. Silk Cut Ultra have been renamed White by Gallaher. Some companies are also using the word smooth instead of the light/low tar descriptors. Philip Morris responded with an advertising and information campaign emphasising the dangers of lower tar cigarettes. The impact of these responses is not known and should be monitored" (page 54). ¹¹⁰

Other countries have also noted tobacco companies' increasing use of colour to differentiate variants formerly labelled "light" or "mild". Legislation that prohibits the use of misleading verbal

¹⁰⁹ WHO (2006). Tobacco: deadly in any form or disguise. http://www.who.int/tobacco/communications/events/wntd/2006/Tfi_Rapport.pdf

¹¹⁰ McNeill, A., Joossens, L. and Jarvis, M. (2004). Review of the implementation of the Tobacco Product Regulation Directive 2001/37/EC. <http://www.ash.org.uk/html/regulation/pdfs/review200137ec.pdf>

descriptors without considering whether images or symbols may replace these creates a loophole that the industry has been quick to exploit.

5.2 Development of Alternative Descriptors

The voluntary undertaking given by Australian tobacco companies prohibited the use of “light” and “mild” as descriptors; the specific wording is shown in the Figure below:

“Descriptors” means the use of any of the following terms or numbers either alone or in combination with each other in a Brand Name or on Cigarette packaging:

- a. “Light”; “Low”; “Medium”; “Mild”; “Ultra Mild”; “Extra Mild”; “Super Mild”; “Special Mild”; “Super Lights”; “Micro”; “Micro Mild”; “Ultra Lights”; “Extra Lights”; and
- b. numbers (including numerals or words) which refer to average levels of machine tested Tar, nicotine, and/or carbon monoxide emitted from Cigarettes.

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While specifying the misleading descriptors currently in use made clear the labelling changes that were required, the agreements did not include general provisions that prohibited the use of other descriptors, thus the replacement of the misleading terms prohibited in the agreement with alternatives was not specifically banned by the ACCC. Even before the ACCC undertakings were signed, the tobacco industry had introduced new variants featuring alternative descriptors. Thus King and Borland (2005), writing in *Tobacco Control* noted: “*We have just discovered (February 2005) a new “premium” sideline of Australia’s second largest selling brand, Peter Jackson. The new members of the Peter Jackson “brand family” come in black, grey, and white packs, respectively, labelled “full flavour”, “smooth flavour”, and “fine flavour”. We believe this is an industry response to a looming ban on “light” and “mild” descriptors*” (page 214).¹¹²

King and Borland went on to discuss the information featured on the recently launched Peter Jackson Select Blend varieties and reported that: “*“Full flavour” is labelled “9 mg or less’, ‘smooth flavour’ is labelled ‘6 mg or less’, and ‘fine flavour’ is labelled ‘3 mg or less’. The backs of the packs describe the varieties as respectively delivering a ‘rich, full flavoured smoking experience’, ‘an extra smooth smoking experience’, and ‘a more refined smoking experience’*” (page 214).

Although they noted that the implied levels of risk reduction were not as overt as “mild”, “extra mild”, and “ultra mild”, King and Borland nevertheless expressed concern that continued

¹¹¹ Undertaking to the Australian Competition and Consumer Commission given for the purposes of Section 87B of the Trade Practices Act 1974 by British American Tobacco Australia Limited CAN 000 151 100. <http://www.accc.gov.au/content/item.phtml?itemId=683582&nodeId=7306af763b82c856e5327b54d21608c0&fn=Undertaking.pdf>

¹¹² King, B. and Borland, R. (2005). What was “light” and “mild” is now “smooth” and “fine”: New labelling of Australian cigarettes. *Tobacco Control*, 14 (3): 214 -215.

association of these terms with varying tar levels will lead smokers to believe that “smooth” and “fine” also imply reduced risk.

The behaviour of tobacco companies in Australia suggests they see descriptors as important marketing tools and efforts to ban the use of these (whether voluntary or legal) will need to include provisions that are both general and comprehensive, rather than specific, to prevent the development and use of alternative terms designed to achieve the same purpose.

5.3 Alignment with Government

To pre-empt the introduction of more rigorous tobacco control regulation, several major tobacco manufacturers have developed stronger relationships with governments. A recent Corporate Accountability International Report (October, 2005), reported on several such developments.¹¹³ The Report cites examples from Guatemala, which voted to ratify the FCTC in summer 2005, and describes arguments advanced by BAT that proposed tobacco control measures are unconstitutional. In addition, the Report outlines efforts made by Philip Morris (Altria) to “*manipulate public policies by leading policymakers to believe that it supports the FCTC while encouraging legislators to advance legislation that often conflicts with the tobacco treaty*” (pp. 8-9).¹¹⁴

The report claims that Philip Morris wrote to Guatemalan legislators “*suggesting a set of ‘efficient and far-reaching tobacco regulations’*” (page 9) and goes on to note that this letter advocated: “*policies that run counter to the WHO FCTC and pose obstacles to enforcing the treaty. These policies include allowing tobacco promotion such as poster advertisements at the point-of-sale, promotional activities, and sponsorship of sporting events; moving warning labels to the back of the package; and permitting the use of terms such as “light” and “mild” on cigarette packages. If Philip Morris/Altria succeeds in convincing Guatemala to pass legislation defending some of the tobacco industry’s most strategic marketing tactics, these new tobacco control laws may conflict with the treaty’s ban on advertising, promotion and sponsorship.*” (page 9).¹¹⁵

The close relationship the tobacco industry has with the government appears to have allowed it to exert considerable influence over policy development. It is difficult to ascertain the extent to which the tobacco industry has influenced policy direction or the nations that now have weaker tobacco control than might otherwise have been achieved. However, the examples provided in this section highlight the importance of ensuring that regulators remain scrupulously independent of the industry. A useful touchstone in this process may be to ensure that public health is the over-riding criterion against which the efficacy of all proposed interventions is assessed.

¹¹³ Corporate Accountability International Report (2005). Big Tobacco’s Attempts to Derail the Global Tobacco Treaty: Cases from Battleground Countries. http://www.stopcorporateabuse.org/files/pdfs/Big_Tobacco's_Attempts_to_Derail_the_Global_Tobacco_Treaty.pdf

¹¹⁴ Op. cit.

¹¹⁵ Op. cit.

A related concern is the tobacco industry's well-documented and powerful use of public relations to challenge opposing views, create uncertainty, and weaken political will. For example, the tobacco industry attempted to undermine the release of a new report by the Canadian Council for Tobacco Control on the use of deceptive terms such as "light" and "mild" on cigarette packaging. The day before the report was due out, industry representatives called selected reporters to tell them that the expert panel had been a "biased" collection of people who were prepared to ignore scientific evidence.¹¹⁶

5.4 Litigation

The tobacco industry has often mounted legal challenges where it believes regulators have encroached on marketing freedoms to which it considers its members are entitled. Cases brought against the introduction of increased regulation are discussed below. Specific litigation against prohibitions on the use of misleading descriptors such as "light" and "mild" reflects the regulations governing the jurisdiction in which action is taken. However, the cases brought tend to refer to two main issues: Expropriation and breach of free trade agreements.

Expropriation refers to breach of intellectual property rights by extending the ambit of regulation further than is arguably required to bring about the public health benefit sought. Thus bans on the use of descriptors may be considered excessive if alternative measures could be used to clarify any confusion smokers may have over the meaning of the terms.

As Weissman (2003) noted, free trade agreements set out rules that cover a wide range of commercial activities, including trademark protections to vehicle safety standards. Signatories to the agreements must bring domestic laws in line with the provisions of the agreement or risk facing sanctions for non-compliance (p. 3).¹¹⁷ Weissman and others have noted that although litigation on these grounds has been uncommon, what they refer to as the "*chill factor*" may deter governments from enacting more rigorous tobacco control policies.

Litigation Opposing 2001/37/EC

Following the introduction of 2001/37/EC in June 2001, British American Tobacco, Imperial Tobacco and Japan Tobacco challenged the UK government's obligation to implement the Directive. The companies claimed that the Directive was outside the competence of the European Union and had no legal basis, and that the EU had not justified the measures either on scientific or public health grounds. According to a BAT press release, the core argument was that BAT believed "*the EU has no constitutional power to harmonise the laws of member states on health policy when there is no internal market need.*"¹¹⁸

¹¹⁶ INFAC (undated). Dirty dealings: Big tobacco's lobbying, pay-offs, and public relations to undermine national and global health policy <http://www.infact.org/dirtyd.html>

¹¹⁷ Weissman, R. (2003). International trade agreements and tobacco control: Threats to public health and The case for excluding tobacco From trade agreements. <http://www.essentialaction.org/tobacco/trade/tobacco.trade.v02.backgrd.pdf>

¹¹⁸ British American Tobacco Challenges EU Product Directive. Press release dated 24 August 2001. http://www.bat.com/oneweb/sites/uk__3mnfen.nsf/vwPagesWebLive/C06027359A179C7680256BF400033152?opendocument&DTC=&SID=

In addition, BAT claimed that 2001/37/EC contained clauses it considered “counter-productive”. In particular, BAT noted that: “*The Directive imposes lower maximum tar yields and, for the first time, introduces limits on nicotine and carbon monoxide content. Yet it also prohibits the continued use of descriptors such as “light” or “mild” which signal to consumers the different tastes within the same brand family. This provision runs counter to the apparent aim of the Directive to encourage consumers to switch to lighter products and it impairs tobacco manufacturers’ ability to inform consumers*”.¹¹⁹

Japan Tobacco, which had joined the case filed by BAT and Imperial Tobacco, specifically introduced the trademark issue and argued that the words “light” and “mild” were inextricably linked to particular brand names. Philip Morris also argued that a ban on “light” and “mild” or other descriptors would restrict their ability to use their trademarks, as descriptors are often registered as marks in conjunction with brand names.¹²⁰ If the use of descriptors were prohibited or restricted, Philip Morris argued that manufacturers may be unable to differentiate their brand variants from each other. Basing their claim on the argument that terms such as “light” and “mild” convey information about the taste of cigarettes, Philip Morris argued that imposition of a ban would breach Article 20 of the TRIPS agreement, which provides that: “*The use of trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in special form or use in a manner detrimental to its capability to distinguish the goods or services of undertaking from those of other undertakings*”.¹²¹

On 3 September 2001, proceedings were brought to the UK High Court of Justice, which referred the case to the European Court of Justice in December 2001 and posed seven questions raised by BAT in its initial application. On 10 September, 2002, Advocate General Leendert Geelhoed ruled that the EU could ban the use of terms such as 'light' and 'mild' and rejected arguments that this breached tobacco companies' intellectual property.¹²² A press release from the Advocate General noted that *the ban applies to a limited number of common designations which may cause confusion among consumers, particularly in regard to the harmfulness of the product*.¹²³ The release also noted “*the serious doubt as to whether a change by consumers to cigarettes having a lower tar yield is beneficial in health terms*”.¹²⁴

¹¹⁹ Op. cit.

¹²⁰ Examples given of brand name-descriptors trademarks included Benson & Hedges Lights and Rothmans Extra Light. Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, (undated), p. 4. Note 38 cited by Weissman (2003).

¹²¹ Weissman, R. (2003). International trade agreements and tobacco control: Threats to public health and The case for excluding tobacco From trade agreements. <http://www.essentialaction.org/tobacco/trade/tobacco.trade.v02.backgrd.pdf>

¹²² The ruling is at: <http://www.curia.eu.int/en/cp/aff/cp0270en.htm>

¹²³ PRESS RELEASE No 70/02, 10 September 2002, Opinion of Advocate General Geelhoed in Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. <http://curia.europa.eu/en/actu/communiqués/cp02/aff/cp0270en.htm>

¹²⁴ Op. cit.

On 12 December, 2002, the European Court of Justice delivered its determination; this clarified the purpose of paragraph 27 (quoted above, page 6) and its relationship to Article 7 of the Directive, which aimed to ensure that consumers received “*objective information concerning the toxicity of tobacco products*”.¹²⁵ In paragraphs 138-139 the European Court of Justice held that:

“As the Advocate General has pointed out in paragraphs 241 to 248 of his Opinion, those descriptors are liable to mislead consumers. In the first place, they might, like the word mild, for example, indicate a sensation of taste, without any connection with the product’s level of noxious substances. In the second place, terms such as low-tar, light, ultra-light, do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco products, is liable to encourage smoking.

Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products. The requirement to supply information is appropriate for attaining a high level of health protection on the harmonisation of the provisions applicable to the description of tobacco products.”¹²⁶

However, the European Court of Justice noted that it was not governed by TRIPS in its determination, thus the decision issued was not a determination of the TRIPS-legality of the European ban on descriptors.¹²⁷ Nevertheless, an implication of this outcome appears to be that while tobacco companies may not manufacture and market products bearing misleading descriptors in nations that prohibit these descriptors, they may produce and export brands featuring prohibited terms.

¹²⁵ Judgment of the Court, 10 December 2002. *R v ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by Japan Tobacco Inc. and JT International SA.* <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79978789C19010491&doc=T&ouvert=T&seance=ARRET&where>

¹²⁶ Op. cit.

¹²⁷ Op. cit.

Canada

The development of Canadian tobacco regulation has been described in Section NNN. However, opposition to Canadian tobacco control work has also drawn on free trade agreements to support the claim that marketing restrictions would violate these. More specifically, Philip Morris argued that barring use of the terms “light” and “mild” “*would violate Canada’s obligations under the WTO and NAFTA*”.¹²⁸

Philip Morris has argued that a ban on the words “light” and “mild” is not the least restrictive measure that could be used to avoid smokers being misled or deceived about the relative harm posed by cigarettes labelled in this way.¹²⁹ Furthermore, Philip Morris has argued that a ban on the terms “light” and “mild” is: “*tantamount to an expropriation of tobacco trademarks containing descriptive terms [e.g., ‘light’] which would be prohibited under NAFTA’s Chapter 11*”.¹³⁰ The use of free trade and intellectual property agreements to counter tobacco control initiatives is discussed in more detail in the following section.

Free Trade Agreements

Trade agreements deal with a range of topics, including tariffs and what are described as “technical barriers to trade”, which include government policies that affect trade. The World Trade Organisation (WTO) administers several trade agreements, including Trade Related Aspects of Intellectual Property Rights (TRIPS). The North American Free Trade Agreement (NAFTA) is also a large regional agreement. In addition to these agreements, the United States has free trade agreements with several nations.

Tariff provisions may apply to cigarettes and other tobacco products, and result in lower prices, since the removal of tariffs creates stronger price competition. Other trade agreements require member countries to protect intellectual property, including trademarks and trade secrets. Tobacco companies in Canada, Brazil and Thailand have argued that moves to introduce plain packaging, ban descriptors such as “light” and “mild” would violate their trademark rights.¹³¹

Essential Action noted that trade agreements often include technical regulations covering health and consumer issues, and that these regulations may not be more restrictive than necessary to achieve particular goals. Philip Morris has used provisions such as these to argue that bans on the words “light” and “mild” would violate WTO agreements such as the Technical Barrier to Trade Agreement, as there are less restrictive means of ensuring consumers are not misled (for example, through notation, as proposed in Hong Kong and Japan).¹³²

¹²⁸ Letter to Gloria Blue on Proposed U.S.-Malaysia Free Trade Agreement <http://www.essentialaction.org/tobacco/trade/MalaysianFTAcomments.pdf>

¹²⁹ Op. cit.

¹³⁰ INFAC (undated). Dirty dealings: Big tobacco’s lobbying, pay-offs, and public relations to undermine national and global health policy <http://www.infact.org/dirtyd.html>

¹³¹ Essential Action Factsheet. International Trade Agreements and Tobacco Control. <http://www.essentialaction.org/tobacco/trade/factsheet.html>

¹³² Op. cit.

Philip Morris used TRIPS, which specifically protects intellectual property rights, to argue that a ban on their use of the words “light” and “mild” would violate Article 20 of the Agreement, which states:

“the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings”¹³³

Several advocacy and health groups have expressed concern that the provisions used by tobacco companies to oppose strong tobacco control measures mean trade rules are taking precedence over public health concerns. They believe potential conflict between the agreements and health objectives may deter governments from enacting strong legislation, since the tobacco industry may challenge proposed rules in the courts. Weissman (2004) argued that this “chilling effect” could result in much weaker public health regulation and less effective protection of consumers’ interests.¹³⁴

Essential Action presents a strong argument for excluding tobacco products from free trade agreements so that the protection afforded to other types of trade no longer applies to any tobacco product. They note that WTO agreements already exclude military products and cite the United States - Vietnam trade agreement as one that already excludes tobacco from the tariff regulation and reduction scheme.¹³⁵

¹³³ Cited in Harmonisation Alert (2002). Vol. 9 (2), 2. <http://www.citizen.org/trade/harmonization/alerts/>

¹³⁴ Weissman, R. International Trade Agreements and Tobacco Control: Threats to Public Health and the Case of Excluding Tobacco from Trade Agreements. <http://www.essentialaction.org/tobacco/trade/tobacco.trade.v02.backgrd.pdf>

¹³⁵ Essential Action Factsheet. International Trade Agreements and Tobacco Control. <http://www.essentialaction.org/tobacco/trade/factsheet.html>

6. Policy Options for New Zealand Regulators

6.1 Approach to Eliminating Deceptive Practices

The WHO Framework Convention recommends that Articles 9 to 11 are considered as one set of regulations. These articles cover the regulation of tobacco product contents, emissions, design and labelling.¹³⁶ Regulators considering how to control the use of misleading descriptors should thus locate their decision in the broader context of related Articles.

Regulators may follow one of two general approaches: the development of voluntary agreements or the institution of regulation. The Canadian voluntary agreement has only recently been signed, thus tobacco industry's response is not yet clear. However, attempts to develop alternative descriptors must be monitored carefully, particularly given the Australian experience.

The ACCC voluntary agreement was very specific and required the withdrawal of particular words, apparently without considering the wider array of devices that create connotations linked to these words. The use of colour on packaging and the development and introduction of alternative descriptors suggests smokers may soon associate brands featuring these heuristics with lower risk. The ACCC has yet to comment on or respond to the tobacco industry's response, which would appear to subvert the intention of the undertakings they gave.

Formal regulation is favoured by public health experts and opposed by the tobacco industry; in my assessment, this option is likely to result in more robust measures. However, regulation must be comprehensive and must anticipate the responses already developed by the tobacco industry. It should therefore ban a range of deceptive practices.

6.2 Ambit of Regulation

Physicians for a Smoke-Free Canada (PSFC) reviewed tobacco industry research that highlights the role of packaging in influencing smokers' perception of brand strength (and thus risk). According to PSFC, Imperial Tobacco/BAT concluded that: "*Brand name does have connotations which may shift product perception. However the more important influences appear to be the product itself and the pack in which it is presented. Subjective evaluation can be manipulated by imagery variables.*"¹³⁷

PSFC also analysed cigarette labelling and packaging and noted several variables that influence how smokers perceive the riskiness of the brand they smoke. For example, they summarised research findings that many smokers believe tar and nicotine information indicates how much smoke they will inhale, even though machine readings may vary greatly from smokers' actual behaviour.¹³⁸ The PSFC also noted the importance of qualifiers (such as strong, medium, and

¹³⁶ WHO (2006). Tobacco: deadly in any form or disguise.
http://www.who.int/tobacco/communications/events/wntd/2006/Tfi_Rapport.pdf

¹³⁷ Op. cit. page 8

¹³⁸ Op. cit. page 3

light), used on packaging. They developed a case analysis of two brand variants: Player's Medium and Player's Light to illustrate their concerns. Although the reported tar level of these two brands is very similar, (14 vs 13), PSFC reported that the variants are perceived to be significantly different on strength (6.4 versus 5.1).

Although the use of colour as a risk heuristic has been discussed in an earlier section, PSFC's analysis of the Player's cigarette brand family is comprehensive and revealing, and highlights the issues regulators need to consider when developing tobacco control measures. The Player's case shows how imagery using:

- different styles of boats
- different intensities of the chevron
- different amount of white on the package
- different descriptors, and
- different intensities of blue



is used to imply the variants differ. They stress that eliminating deceptive words, such as “light” and “mild” would not fully eliminate the danger that smokers might be deceived about the relative risk these variants pose and they present a strong argument for the prohibition of colours, imagery and other devices that also create misleading connotations.

The PSFC develop the compelling argument that, if smokers see a wide range of brand variants, they will assume these differ in some material sense. Furthermore, the PSFC conclude that smokers will ascribe meaning to the differences they perceive. Thus, because cigarette variants are marketed in such a way that implies a hierarchy of strength or harmfulness exists, smokers will apply this meaning to the variants they see. The PSFC conclude that the Player's imagery illustrates how removal of misleading words will not be sufficient to counter the overall misleading and deceptive impressions created by other packaging elements.¹³⁹



¹³⁹ Op. cit. Page 5.

6.3 Industry Accountability

The evidence reviewed in this report suggests the tobacco industry has known that “light” and “mild” cigarettes offer no health advantages, yet has allowed smokers to believe they are reducing the risk they face. Evidence from industry documents suggests this deception has been practised for at least three decades.¹⁴⁰

This evidence raises the question of how the tobacco industry should be held to account for perpetuating mistaken beliefs that have resulted in serious health consequences for the deceived individuals. The Australian voluntary agreement included provisions that saw industry signatories provide funding for education campaigns, designed to dispel the mistaken beliefs that their actions created and sustained.

However, while requiring the industry to compensate those it has deceived is logical, corrective campaigns would need substantial funding over a sustained period of time to have any chance of altering smokers’ beliefs or behaviour. Furthermore, social marketers consider efforts undertaken by the tobacco industry to develop education campaigns to have been unsuccessful, serving to create confusion over the companies’ need to recruit new smokers.¹⁴¹ As a result, the evidence to date suggests the best means of holding the industry to account for deceptive behaviour is through court action, where the evidence should be made public and available for scrutiny, and where legally binding control measures are set out.

¹⁴⁰ Philip Morris, 1975. LF Meyer inter-office memorandum to B. Goodman. Philip Morris USA. 17th September 1975. Minnesota Trial Exhibit 11,564. Accessed 15 June, 2005.

Imperial Tobacco, 1978. Exhibit AG-30A in RJR-MacDonald v. Attorney General of Canada. Cited on Cancer Research UK website. Available from <http://www.lowtarexposed.org.uj/thespin/whattheindustryknew>.

¹⁴¹ Philip Morris Philanthropy Counter Arguments Overview. <http://www.tobaccofreekids.org/reports/smokescreen/philanthropy.shtml>

6.4 Specific Principles

As well as providing a detailed analysis of the tobacco industry's development of imagery that complements and reinforces impressions created by words such as "light" and "mild", PSFC outlined a set of principles they suggested should guide the development of regulatory responses to Articles 9 – 11 of the FCTC. The remainder of this section draws heavily on these principles and recommends that these form the basis of New Zealand's regulatory response to the tobacco industry's use of misleading descriptors and heuristics.

The regulatory response should prohibit:

1. The use of misleading descriptors that incorrectly imply differences in the relative strength or risk of different brands or variants. These descriptors include terms such as "light", "ultra-light", "mild", "ultra-mild", "smooth", "fine", but are not limited to these specific words.
2. The use of colour on brand packaging or in brand livery to imply misleading and incorrect differences in the relative strength or risk of different brands or variants. In particular, the use of lighter colours to imply lower levels of harm would be prohibited, but this section would also need to anticipate other variant-colour associations and ensure these are also prohibited.
3. The use of numbers on brand packaging or in brand livery to imply misleading and incorrect differences in the relative strength or risk of different brands or variants. In particular, the use of numbers to imply differences in the content and nature of material inhaled by smokers.
4. Regulation should also anticipate how retail displays and point of purchase containers could be used to convey the impression that some cigarette brands or variants are less harmful than others. Coloured dispensing units, for example, could imply that some brands were "lighter" and thus less harmful than others.
5. The development of brand extensions that imply some variants within an overall brand family are less harmful than others.
6. The use of brand livery or imagery that creates or contributes to an incorrect impression that some brands or variants are less harmful than others.¹⁴²

¹⁴² These suggestions are based on material produced by Physicians for a Smoke-Free Canada (2005). A comprehensive plan to end the 'light' and 'mild' deception. January 2005. http://www.smoke-free.ca/pdf_1/Endingthedeception-2005.pdf

6.5 Future Issues

The introduction of regulations that incorporate the principles outlined above raises other important issues that could be addressed at the same time. In particular, the use of retail and point of purchase display units to create impressions about particular tobacco brands would not be possible if retail displays were banned. Regulations that included a ban on retail displays would thus complement and support moves to prohibit the use of misleading descriptors and imagery.

It is clear that packages are powerful marketing devices and the Player's example illustrates the variety of package components that are used to communicate with smokers. A move to require tobacco companies to use plain packaging, that featured only a brand name, would help limit the potential for other aspects of cigarette packages to be used to communicate misleading harm reduction messages to smokers.

Appendix 1: Excerpts from British American Tobacco Undertaking to the ACCC



UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B OF THE TRADE PRACTICES ACT 1974 BY BRITISH AMERICAN TOBACCO AUSTRALIA LIMITED ACN 000 151 100

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GLOSSARY

In this Undertaking, unless the contrary intention appears, the following definitions apply:

"Act" means the *Trade Practices Act 1974*.

"Brand Names" includes but is not restricted to trademark brand names of Cigarettes and includes any words forming part of such Brand Name or trademark.

"Cigarette" means a roll of cut tobacco for smoking which is enclosed in paper and has a filter.

"Commission" means the Australian Competition and Consumer Commission.

"Company" means British American Tobacco Australia Limited ACN 000 151 100.

"Descriptors" means the use of any of the following terms or numbers either alone or in combination with each other in a Brand Name or on Cigarette packaging:

- a. "Light"; "Low"; "Medium"; "Mild"; "Ultra Mild"; "Extra Mild"; "Super Mild"; "Special Mild"; "Super Lights"; "Micro"; "Micro Mild"; "Ultra Lights"; "Extra Lights"; and
- b. numbers (including numerals or words) which refer to average levels of machine tested Tar, nicotine, and/or carbon monoxide emitted from Cigarettes.

"High Yield Cigarettes" means Cigarettes that are not Low Yield Cigarettes.

"Inserts" means any paper or other material on which Descriptors or a Representation could be published or otherwise displayed.

ISO Measures means the average levels of machine tested Tar, nicotine and/or carbon monoxide emitted from Cigarettes as determined using the standard methods published from time to time by the International Standards Organisation.

"Low Yield Cigarettes" means Cigarettes that:

- a. have a machine tested average Tar delivery of 8mg or less; or
- b. have a machine tested average Tar delivery in excess of 8mg and which bear the Descriptors or any one of them.

"Related Body Corporate" means, in relation to a body corporate, any other body corporate which would be deemed to be related to it by the operation of section 4A(5) of the Act.

"Smoker's Compensation" means, in the view of the Commission, the behaviour of smoking Cigarettes in a way that results in a smoker inhaling higher levels of Tar, nicotine and/or carbon monoxide than those stated in Yield Information. Such behaviour may include inhaling more deeply, inhaling more frequently, smoking more often and occluding the perforations in a Cigarette.

"Tar" means the weight of all chemicals less water and nicotine found in tobacco smoke, some of which chemicals expose the smoker to risk of disease.

"Yield Information" means any statement in the form of words, numbers or both as to the average levels of machine tested Tar, nicotine or carbon monoxide produced by a Cigarette as determined in accordance with a standard method, including but not limited to, the standard methods published from time to time by the International Standards Organisation and which is required by Regulation 20 of the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004*.

The singular includes the plural and vice versa. Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.

BACKGROUND

1. This Undertaking is given to the Commission by the Company pursuant to section 87B of the Act.
2. The Company is a duly incorporated company engaged in trade or commerce in Australia with respect to the manufacture, promotion and sale of Cigarettes.

3. On or about 31 March 2000 and consequent upon the merger of W.D & H.O Wills (Holdings) Limited and Rothmans Holdings Limited, Rothmans of Pall Mall (Australia) Limited changed its name to British American Tobacco Australia Limited ACN 000 151 100.
4. On or about 31 March 2000 and consequent upon the merger referred to in clause 3, W.D & H.O Wills Australia Limited (**Wills**) changed its name to British American Tobacco Services Limited (**BATAS**).
5. British American Tobacco Australasia Limited is/was the holding company of the Company and BATAS.
6. The Cigarettes identified in:
 - a. section 1 of Annexure A were marketed or sold by the Company during the period from at least the early 1990's to date;
 - b. section 2 of Annexure A were marketed or sold by:
 - 1) the Company during the period from 1 January 2001 to date; and
 - 2) Wills during the period from at least the early 1990s to 31 December 2000;
 - c. section 3 of Annexure A were marketed or sold by:
 - 1) the Company and/or Wills during the period from at least the early 1990's until 3 September 1999; and
 - 2) Imperial Tobacco Australia Limited from on or about 3 September 1999.
7. Since at least 2001, the Commission has been investigating allegations that, among other things, the Company has, in trade or commerce, made representations about Low Yield Cigarettes in contravention of the Act (**the Commission's Investigation**).
8. The Commission has concluded the Commission's Investigation and is satisfied by reason of the Commission's Investigation that:

- 8.1. since at least the early 1990's, Smoker's Compensation and its effects have been known; and
- 8.2 in marketing, advertising and selling Low Yield Cigarettes in Australia, the Company, in trade or commerce:
 - a. has used Descriptors in combination with Yield Information (without adequate qualification or condition including as to Smoker's Compensation); and
 - b. by the means described in subclause a., has represented that Low Yield Cigarettes:
 - i are less harmful to the health of a smoker compared to High Yield Cigarettes;
 - ii reduce the risk of smoking-related diseases including lung cancer, cardio vascular diseases and emphysema compared to High Yield Cigarettes;
 - iii reduce the risk of exacerbating asthma and respiratory diseases compared to High Yield Cigarettes;
 - iv will assist a smoker quit smoking Cigarettes;
 - v will assist a smoker in reducing the number of Cigarettes consumed;
 - vi are a safer alternative to High Yield Cigarettes; and/or
 - vii are less addictive than High Yield Cigarettes;
- 8.3 The representations described in subclause 8.2 b., or any one or more of them, together with, but not separately from, the matters described in subclause 8.2 a. constitute the "Representations".
9. The evidence gathered by the Commission in the course of the Commission's Investigation has led the Commission to form the view that Low Yield Cigarettes:

- a. are not necessarily less harmful to the health of a smoker compared to High Yield Cigarettes;
 - b. do not necessarily reduce the risk of smoking relating diseases including lung cancer, cardio vascular diseases and emphysema compared to High Yield Cigarettes;
 - c. do not necessarily reduce the risk of exacerbating asthma and respiratory diseases compared to High Yield Cigarettes;
 - d. do not necessarily assist a smoker quit smoking Cigarettes;
 - e. do not necessarily assist a smoker in reducing the number of Cigarettes consumed;
 - f. are not necessarily a safer alternative to High Yield Cigarettes; and/or
 - g. are not necessarily less addictive than High Yield Cigarettes.
- i. The Commission considers that by making one or more of the Representations the Company has:
- a. engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of section 52 of the Act;
 - b. falsely represented that Low Yield Cigarettes are of a particular standard, quality, value, grade, composition, style or model, in contravention of section 53(a) of the Act;
 - c. represented that the Low Yield Cigarettes have performance characteristics or benefits which they do not have, in contravention of section 53(c) of the Act; and/or
 - d. misled the public as to the characteristics of Low Yield Cigarettes in contravention of section 55 of the Act.
- In response to the Commission's views and without admission:
- a. that any of the Commission's views, including but not limited to the matters referred to in clause 8.1 are correct;
 - b. that any one or more of the Representations, if made, were made in contravention of the Act; and

- c. of any liability arising by reason of the Commission's views as expressed in this Undertaking,

the Company has offered to give this Undertaking to the Commission pursuant to section 87B of the Act.

- 12. The Commission is satisfied that the Undertaking addresses, without the need for litigation, the Commission's concerns with respect to the conduct the subject of the Commission's Investigation in that the Undertaking:
 - a. stops the Company from making the Representations;
 - b. establishes an obligation on the Company to fund the publication of advertisements addressing the Commission's concerns about the Representations;
 - c. establishes an obligation on the Company to contribute financially to health programmes that are related to the health issues associated with Cigarette use and, to the extent possible, the alleged health issues associated with Low Yield Cigarettes in particular; and
 - d. brings the Commission's Investigation to an end.
- 13. The Commission also acknowledges that the Company has co-operated with the Commission in bringing the Commission's Investigation to an end.

COMMENCEMENT OF UNDERTAKINGS

- 14. This Undertaking comes into effect when:
 - a. the Undertaking is executed by the Company; and
 - b. the Commission accepts the Undertaking so executed by the Company.

APPLICATION

- 15. Subject to clause 16, this Undertaking applies only to the manufacturing, marketing, advertising and sale of Cigarettes by the Company in Australia.
- 16. Nothing in this Undertaking shall be read as applying to:

- a. any contract, manufacturing agreement or arrangement between the Company and Imperial Tobacco Australia Limited and/or Imperial Tobacco New Zealand Limited; and
- b. any manufacture of Cigarettes by the Company for export.

UNDERTAKINGS

The Company not to make the Representations

- 17 The Company undertakes that, subject to the operation of clauses 19, 20, 21 and 22 of this Undertaking, it will, whether by itself, its directors, servants, agents or otherwise howsoever, not make, or cause to be made, the Representations:
- a on the packaging of its Cigarettes (including Inserts and the Cigarettes themselves) manufactured or imported for supply in Australia; and
 - b on material intended to be disseminated to members of the general public in Australia in relation to the marketing, advertising or sale of Cigarettes.

The Company will cease using Descriptors

- 18 The Company undertakes that, subject to the operation of clauses 19, 20, 21 and 22 of this Undertaking, it will, whether by itself, its directors, servants, agents or otherwise howsoever, cease using, publishing or displaying, or causing to be used, published or displayed, the Descriptors by 31 May 2005:
- a on the packaging of its Cigarette products (including Inserts and the Cigarettes themselves); and
 - b in relation to the marketing, advertising, or sale of Cigarette products (including any form of advertising or communication of information intended for the public).
- 19 Nothing in this Undertaking shall prevent the Company or any one on its behalf from:

- a selling Cigarettes bearing Descriptors after 31 May 2005, provided the Cigarettes were manufactured or imported by the Company in the ordinary course of its business before 31 May 2005;
 - b. selling Cigarettes bearing Yield Information after 1 March 2006, provided the Cigarettes were manufactured or imported by the Company in the ordinary course of its business before 1 March 2006;
 - c including inserts in the form attached at Annexure B, with its Cigarette packaging for Cigarettes manufactured or imported by the Company before 31 May 2005; or
 - d until 1 December 2005, making any statements or communicating in any way about a matter the subject of this Undertaking (including by using Descriptors) with any persons involved in the manufacture, marketing, distribution and/or sale of tobacco products (other than members of the general public); or
 - e until 1 December 2005, providing information to members of the public who contact the Company which explains the changes to Cigarette packaging arising out of the obligations in this Undertaking.
- 20 Subject to clause 21, the Company undertakes that from 1 March 2006 it will, whether by itself, its directors, servants, agents or otherwise howsoever, cease using, publishing or displaying, or causing to be used, published or displayed, Yield Information:
- a on the packaging of its Cigarettes (including Inserts) manufactured or imported for supply in Australia; and
 - b. on material intended to be disseminated to members of the general public in Australia in relation to the marketing, advertising or sale of Cigarettes.
- 21 Nothing in this Undertaking shall be read so as to prevent the Company from using, publishing or displaying or causing to be used, published or displayed ISO Measures.

22. For the avoidance of doubt, clauses 17, 18, 19 and 20 do not extend to communications within the Company or between the Company and its Related Bodies Corporate or between the Company and any company not incorporated or resident in Australia, a proportion of the shares of which company are owned directly or indirectly by BAT Plc.

Funding contribution to cessation and education programs

- 23 The Company will, within 21 days of this Undertaking coming into effect, pay to the Commission the amount of AUD four million dollars (\$AUD4,000,000) with the intention that the Commission will in good faith exercise reasonable endeavours to direct these funds:
- a to an advertising campaign designed to include information that will draw to the attention of consumers that Low Yield Cigarettes are not necessarily less harmful to consumers than High Yield Cigarettes; and
 - b to new or existing programs delivered or endorsed by the Australian Government related to the alleged health issues associated with the use of Low Yield Cigarettes.
- 24 For the avoidance of doubt, the Commission acknowledges that the funding referred to in clause 23 is not an acceptance or adoption by the Company of any publication funded by reason of the operation of clause 23.

Variation of Undertaking

- 25 If the Company is unable to comply with its obligations under this Undertaking, or believes variation is indicated due to changed circumstances, the Company and the Commission will review this Undertaking and negotiate in good faith the withdrawal or variation of all or a part of this Undertaking pursuant to section 87B(2) of the Act.
- 26 The Commission acknowledges that a variation of this Undertaking may be indicated in the future to take account of further research or technological progress. In particular, the Commission will consider the variation of this Undertaking in circumstances where the Commission is satisfied that the Company has sufficient and reasonable grounds to make statements

otherwise prevented by the operation of this Undertaking, including reliable scientific evidence which is approved or endorsed by governmental or internationally recognised and credible organisations.


Trade Practices Compliance Program

27. The Company undertakes that it will continue its existing Trade Practices Compliance Programme at a national level and will, where appropriate, update that programme to incorporate matters arising from the Commission's Investigation.

ACKNOWLEDGEMENTS AND GENERAL

- 28 The Company acknowledges that the Commission will make this Undertaking available for public inspection.
- 29 The Company further acknowledges that the Commission will, at its absolute discretion, from time to time, publish and publicly refer to this Undertaking.

EXECUTED by the Company by its)
authorised officers pursuant to section)
127(1) of the Corporations Act 2001:)



Signature

DAVID FELL

Print name

MANAGING DIRECTOR

Office held

This TENTH day of MAY 2005



Signature

JOHN L HANLEY

Print name

SECRETARY

Office held

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE
PRACTICES ACT 1974



Graeme Julian Samuel
Chairperson

This 11th day of May 2005

Appendix 2: Excerpts from Canadian Agreement

AGREEMENT BETWEEN
IMPERIAL TOBACCO CANADA LIMITED

("ITCAN")

- and -

THE COMMISSIONER OF COMPETITION

("Commissioner")

WHEREAS the Commissioner is responsible for the administration and enforcement of the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Act*");

AND WHEREAS ITCAN is engaged throughout Canada in the manufacture and distribution of cigarettes and other tobacco products ("Tobacco Products") for sale to the public, described as "light" and "mild" and variants thereof, such as, but not limited to, "extra light", "ultra light", "extra mild" and "ultra mild" ("L/M Descriptors");

AND WHEREAS the Commissioner commenced an Inquiry pursuant to s. 10 of the *Act* with respect to the use of L/M Descriptors in regard to Tobacco Products in Canada;

AND WHEREAS during the course of the Inquiry the Commissioner has requested that ITCAN discontinue use of L/M Descriptors in connection with Tobacco Products sold in Canada;

AND WHEREAS the position of ITCAN is that the introduction to the market of Tobacco Products bearing L/M Descriptors was at the request of Health Canada;

AND WHEREAS the Commissioner and ITCAN acknowledge that they have differing views of the circumstances surrounding the introduction to the market of Tobacco Products bearing L/M descriptors;

AND WHEREAS Health Canada has begun the process of introducing regulations to require discontinuance of L/M Descriptors;

AND WHEREAS in these circumstances ITCAN is prepared to cooperate with the Commissioner's request.

NOW THEREFORE THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

1. Application of this Agreement

1.1 The provisions of this Agreement are subject to the definitions set forth in Appendix "A."

1.2 The provisions of this Agreement shall apply to ITCAN and each of its Subsidiaries and Affiliates which are engaged in the sale or distribution of Tobacco Products in Canada.

1.3 Nothing in this Agreement is intended to modify ITCAN's obligations under the *Tobacco Act*.

2. Cessation of Use of the L/M Descriptors

2.1 Commencing no later than December 31, 2006, ITCAN will discontinue manufacturing and packaging Tobacco Products using L/M Descriptors according to a schedule for their discontinuance agreed upon between the Parties. A list of ITCAN's Brand Names covered by this Agreement and the schedule for their removal are contained in Appendix "B".

2.2 Subject to the limitations of the *Tobacco Act* and the other terms of this Agreement, ITCAN may provide information to persons involved in the manufacture, packaging, distribution or sale of Tobacco Products and to members of the public in Canada which explains the changes to the packaging arising out of the obligations in this Agreement.

3. Sale of Existing Stock

3.1 Nothing in this Agreement shall prevent ITCAN from selling or distributing any Tobacco Products in Canada bearing L/M Descriptors provided that such products were manufactured and packaged in the ordinary course by ITCAN before the dates set out in the schedule agreed upon by the parties pursuant to clause 2.1 of this Agreement.

4. Public Notice

4.1 ITCAN shall have published at its own expense a Public Notice. The Public Notice will be published in accordance with the arrangements agreed to by the Commissioner and ITCAN as set out in Appendix "C".

4.2 All information obtained by the Commissioner during the Inquiry that is not already in the public domain will remain confidential except: (a) as required by law or (b) as required to enforce the *Act* or this Agreement.

5. Other Manufacturers and Distributors

5.1 The Commissioner shall use reasonable best efforts to obtain from other manufacturers and/or distributors in Canada of Tobacco Products, comparable commitments to discontinue their use of L/M Descriptors not later than December, 2007.

6. General

- 6.1 This Agreement is entered into without any admission of liability on the part of ITCAN, its Subsidiaries or Affiliates, or any admission that it has engaged in any conduct which is in contravention of the *Act* including, without limitation, s.52(1) thereof, or any conduct which could form the basis for the issuance of any Order by the Competition Tribunal under any of the civil reviewable provisions of the *Act* including, without limitation, s. 74.01(1) thereof.
- 6.2 This Agreement does not constitute a finding of fact or law on any issue as against ITCAN, its Subsidiaries or Affiliates and shall not be read or construed as constituting, directly or indirectly, a finding of fact or law against ITCAN, its Subsidiaries or Affiliates on any issue in any Court, administrative tribunal, or in any proceeding.
- 6.3 Nothing in this Agreement shall be taken, directly or indirectly, as any kind of admission of any kind by ITCAN, its Subsidiaries or Affiliates now or in the future, nor shall it constitute a waiver of any rights or defences available to ITCAN, its Subsidiaries or Affiliates in any civil or penal proceeding at common law or Quebec civil law or under the *Act* or any other laws of Canada or a province, or otherwise.
- 6.4 This Agreement is entered into by ITCAN solely for the purpose of voluntarily cooperating with a request by the Commissioner to discontinue the use of L/M Descriptors and in anticipation of regulatory changes under the *Tobacco Act*.
- 6.5 This Agreement resolves all outstanding issues between the Commissioner and ITCAN, its Subsidiaries and Affiliates and its or their respective directors and officers in respect of the Commissioner's Inquiry into its use of L/M descriptors. Provided that ITCAN carries out its obligations under this Agreement, the Commissioner will not commence any proceedings in respect of the subject of this Inquiry against ITCAN, its Subsidiaries or Affiliates and its or their respective directors and officers.
- 6.6 This Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.
- 6.7 This Agreement may be executed in counterpart and by facsimile and each such counterpart shall constitute an original and all of which taken together shall constitute one and the same instrument, dated as of the date set forth below.

7. Modification or Default

- 7.1 If ITCAN believes that some modification of this Agreement is justified due to changed circumstances, ITCAN and the Commissioner agree to engage in good faith efforts to resolve the matter.

- 7.2 In the event of any dispute between the Parties as to the interpretation or application of this Agreement, including a dispute as to whether there has been a default in the performance of any of the obligations in this Agreement, the Parties agree to first engage in good faith efforts to resolve such dispute, before taking any other steps to resolve the dispute. In the event that ITCAN does not cease use of the L/M descriptors in accordance with clause 2.1 of this Agreement, or does not publish the Public Notice in accordance with clause 4.1 of this Agreement, the Commissioner may deliver a notice of default to ITCAN. ITCAN shall have 30 days to remedy any default. If the default has not been remedied during such 30 day period the Commissioner may, following the expiry of the 30 day period, file this Agreement with the Competition Tribunal for registration as a Consent Agreement between the Commissioner and ITCAN, pursuant to s.74.12 of the *Act*. ITCAN irrevocably consents to the registration of this Agreement as a Consent Agreement in such case and to the filing of the signed consent form which is attached as Appendix "D."

8. Term of this Agreement

- 8.1 This Agreement shall remain in force from the date of its signing until such time as regulations pursuant to the *Tobacco Act* come into force prohibiting the use of L/M Descriptors in regard to Tobacco Products, and/or their packaging, whereupon this Agreement will terminate automatically.

9. Notice

- 9.1 Any notice required to be given pursuant to any terms of this Agreement is valid if given by facsimile transmission or registered mail to:

a. The Commissioner:

Sheridan Scott
Commissioner of Competition
Competition Bureau Canada
Place du Portage, Phase I,
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: 819-997-5300
Facsimile: 819-953-5013

With copies to:

Jim Marshall
Senior Counsel
Competition Law Division

Justice Canada
Place du Portage, Phase I,
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: 819-997-2834
Facsimile: 819-953-9267

b. **ITCAN:**

Donald R. McCarty
Vice President, Law
Imperial Tobacco Canada Limited
3711 Sainte-Antoine Street West
Montreal, Quebec H4C 3P6

Telephone: 514-932-6161
Facsimile: 514-932-0169

With copies to:

Tim Kennish and Deborah Glendinning
Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West
Suite 6100
Toronto, ON M5X 1B8

Telephone: 416-862-6432 (Tim Kennish)
Telephone: 416-862-4714 (Deborah Glendinning)
Facsimile: 416-862-6666

Dated at Gatineau, Quebec, this _____ day of November, 2006.

Sheridan Scott
Commissioner of Competition

Dated at Montreal, Quebec, this _____ day of November, 2006.

Donald R. McCarty
Vice President, Law
Imperial Tobacco Canada Limited

Appendix "A"

Definitions

In accordance with Clause 1.1 of this Agreement, the following definitions shall apply:

- A. "Affiliate" shall have the meaning ascribed to it in subsection 2(2) of the *Act*;
- B. "Agreement" means this Agreement as entered into by ITCAN and the Commissioner;
- C. "Brand Name" means word(s) used by ITCAN to identify its products to consumers and includes, but is not limited to, trademark names of cigarettes and any words forming part of such trademark names;
- D. "Commissioner" means the Commissioner of Competition, appointed pursuant to section 7 of the *Act*, and authorized representatives of the Commissioner;
- E. "Descriptors" means the words used by ITCAN, either alone or in combination with each other, on its cigarette packages;
- F. "ITCAN" means Imperial Tobacco Canada Limited, a company incorporated under the laws of Canada;
- G. "L/M Descriptors" means the words "light" and "mild", and combinations and variants thereof such as, but not limited to, "extra light," "ultra light," "extra mild" and "ultra mild" as Descriptors on cigarette packages or elsewhere;
- H. "Parties" means the Commissioner and ITCAN;
- I. "Person" includes a partnership, firm, corporation, association, trust, unincorporated organization, or other entity;
- J. "Subsidiary" shall have the meaning ascribed to it in subsection 2(3) of the *Act*.
- K. "Tobacco Products" means cigarettes, tobacco sticks and fine cut tobacco currently distributed by ITCAN;

Appendix "C"

Public Notice

In accordance with Section 4.1 of this Agreement, ITCAN's Public Notice will read as follows:

NOTICE BY IMPERIAL TOBACCO CANADA LIMITED
RE: "LIGHT" AND "MILD" CIGARETTES

At the request of the Commissioner of Competition, Imperial Tobacco Canada Limited has voluntarily agreed to discontinue the manufacture and distribution of tobacco products using the words "light" and "mild", or variants of these terms, as brand-type descriptors, for the sale of tobacco products in Canada. Imperial Tobacco Canada Limited has agreed to accelerate removal of these terms from its tobacco products in advance of planned regulations requiring their removal, and to discontinue use of the terms, commencing no later than December 31, 2006, and ending no later than July 31, 2007.

ITCAN will publish the Public Notice on three occasions. The Public Notice will be published in the Wednesday and/or Saturday editions of the following newspapers. On the first occasion of publication, the Public Notice will be a one-sixth page format. On the second and third occasions of publication, the Public Notice will be a one-eighth page format. ITCAN may arrange the schedule for publication with another company or companies required to publish a similar notice provided that the initial publication of the Public Notice will be no later than 10 days following signing of this Agreement; that the Public Notice will be published on consecutive Wednesdays and Saturdays; and that the Public Notice of not more than one company will appear in a newspaper at one time. In the event a newspaper does not publish on Saturday, the Public Notice will be published in the next edition of that newspaper.