

Japan Tobacco International South Africa (Pty) Limited (“JTI”)

**WRITTEN SUBMISSION TO THE
PARLIAMENTARY PORTFOLIO COMMITTEE ON HEALTH ON THE
TOBACCO PRODUCTS CONTROL AMENDMENT BILL, 2008
[B 7-2008] (“the Bill”)**

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1. Executive summary

- 2.1. Tobacco is a legal, but controversial product. With smoking come real risks. Everyone should be informed of these risks and smokers' and non-smokers' rights should be protected. Accordingly, Government should regulate, and legislate on, tobacco products. We support this and actively work to ensure this is the case.
- 2.2. South Africa's legal framework and Constitution demand stakeholder consultation with regards to the drafting of legislation. This recognises that good, workable legislation that delivers on objectives is more likely to result from an inclusive process. Moreover, our Constitution protects freedom of speech as a fundamental right.
- 2.3. Sadly, the tabled legislative amendments do not give sufficient weight to these important principles.
- 2.4. The consultation process has been ignored and the period for comment before the Portfolio Committee is remarkably short, given the nature of the proposed changes to the legislation and, in our opinion, will mean that a large number of stakeholders will not be in a position to submit meaningful comments, due to the short time allowed for comment.
- 2.5. This has resulted, in our opinion, in draft legislation before the Committee that goes well beyond what is necessary to meet public health objectives (our current legislation is working, by the World Health Organisation's own admission) and in certain cases will have no public health impact at all.
- 2.6. Also, the wide and vague nature of some of the definitions treads on the rights protected by our Constitution, in respect of consumers, retailers and manufacturers alike.
- 2.7. The extremely broad powers given to the Minister to regulate on various issues make the legislation, to some extent, un-readable without having sight of the regulations and therefore make it confusing, unclear and thus difficult to comment on meaningfully.
- 2.8. We believe that through a meaningful consultative approach, we can work effectively with the Government to address tobacco-related health concerns, and that together we can arrive at workable legislation.
- 2.9. As such, we request that the legislation be returned to the Department and that the Department then consults meaningfully with the industry and other stakeholders.

2. Introduction

- 2.1. JTI is a subsidiary of JT International, which is an operating division of Japan Tobacco Inc., handling the international production and sales of the group's cigarette brands. JT International is the 3rd largest international tobacco manufacturer with approximately 24 000 employees around the world. Our headquarters are in Geneva, Switzerland and we have offices in over 60 different locations around the world including South Africa.
- 2.2. In South Africa JTI is a member of the Tobacco Institute of South Africa (“**TISA**”).
- 2.3. JTI believes that cigarettes are legal but controversial products. We accept that smoking involves real health risks. This distinguishes tobacco from most consumer goods and places upon us a real burden of responsibility. It is for this reason that we strongly affirm that smokers should know about the risks of smoking and what they smoke. As a manufacturer of tobacco products we have a responsibility and a right to communicate with adult smokers about our products and the potential risks they carry. Furthermore, JTI remains strongly committed to trying to reduce the risks associated with smoking. JTI believes that taking up smoking should be an informed adult choice and we accordingly do everything we can to prevent people under the age of 18 from smoking. This remains perhaps one of our biggest challenges. We are under no illusion that we could do more in partnership with our Government through the Department of Health (“**the Department**”), with educators, with scientists and other specialists and with any party that has an interest in achieving this goal.
- 2.4. Accordingly, we consider that our industry should be appropriately regulated considering that there are real risks associated with tobacco use. We understand and accept Government's primary health objective of reducing the rate of smoking and reducing the health impact of tobacco use. However, over-regulation and restrictive legislation is not the only, or best, way of achieving this objective. JTI strongly believes that reasonable regulation should be informed by sound scientific research and coupled with appropriate consultation with industry experts and other role players within and outside of the industry. We also believe that this should be complimented with responsible public health education and public health campaigns which will elevate public awareness on the risks of smoking. We remain concerned, however, that in its current form, the Bill over-regulates the tobacco industry to such an extent that it weakens and undermines Government’s objective of reducing the incidence of smoking.

- 2.5. The Bill makes it very difficult for JTI and/or any other tobacco manufacturer in this country to communicate with consumers of tobacco products. Similarly, it makes it very difficult for consumers to receive information concerning tobacco products. Government has a duty to compel manufacturers of consumer products to inform their respective consumers about their products, their use and potential risks. Regrettably, the Bill takes this important Government function away by disempowering tobacco manufacturers from communicating with their consumers. We therefore submit that wide and vague definitions such as “advertisement”, “promotion”, “brand element”, and “organised activity” should be reconsidered.
- 2.6. At the same time, we believe that regulation without due process and hastily crafted legislation aimed at dealing with this complex challenge could result in unintended consequences for both the industry and the State, at the expense of the smoking public. This is why we are dissatisfied with the engagement process that has led to the introduction into Parliament of the Bill in its current form. JTI believes that South Africa has been denied an opportunity for the Department, industry and other stakeholders to engage in a robust discussion on tobacco regulation in order to determine how best the industry should be regulated going forward.

3. Procedural issues

- 3.1. The Committee invited comments on the Bill by way of advertisements published in the press on Sunday, March 09, 2008. Initially, interested parties were given until Thursday, March 20, 2008 to submit written comments. At its meeting on March 18, 2008 the Committee decided to give an extension for written submissions on the Bill (until April 11, 2008) and to postpone public hearings until May 06 and 07, 2008.
- 3.2. It is pursuant to this invitation that these comments are addressed to the Committee.
- 3.3. At the outset, JTI wishes to place on record its objection to the manner in which the Department has administered this process leading to this invitation by the Committee to submit written comments on the Bill. It is our considered view that the Bill has major implications for both the tobacco industry and the State in a number of ways. JTI accepts that the Department has strong views on how the tobacco industry should be regulated in this country. Our concern in this regard relates to the manner in which the Department has engaged with JTI and the tobacco industry on these matters. There is the perception that the industry is obstinate and unconstructive in relation to

the Department's objective of regulating tobacco products. This perception is inaccurate. It is in fact in JTI's interest to work in partnership with the Department and other organs of State to advance fair policies and legislation on tobacco control. It wouldn't make any social and/or economic sense for an industry which contributes 2% towards the total Government revenue (Gross Domestic Product - GDP) to reduce engagement that could influence and/or affect its existence and future prospects. It is for this reason that we would like to request the Committee to ask the Department to go back and engage the industry on the proposed provisions of the Bill in order to find some common ground on how regulation should be structured going forward.

- 3.4. The second issue that should be placed on record relates to the short time period that has been allowed for comment on the Bill. As the Committee is well aware, the contents of the Bill are controversial and will (if enacted in its current form) have a dramatic impact on the tobacco industry as well as the hospitality industry and charitable institutions. Notwithstanding the extension granted by the Committee, to allow a short period for the submission of public comments on a Bill of this nature undermines informed law-making.
- 3.5. A final procedural matter that we wish to point out at the outset is that a number of the provisions of the Bill contemplate that they will be fleshed out by regulations. It is, in some respects, difficult to comment on these provisions of the Bill in an informed manner without having sight of the regulations that it is envisaged will be promulgated in due course.

4. JTI's position on tobacco regulation

- 4.1. JTI recognises that cigarettes are a legal but controversial product. Accordingly, we believe that the tobacco product industry should be appropriately regulated and we are committed to working constructively with governments to work out clear, effective regulations that fulfil public policy objectives, maintain competitive environments and serve the legitimate interests of adult consumers.
- 4.2. In this context, JTI believes that it is necessary to introduce relevant, adequate and effective regulations pertaining to these products, upon obtaining the contributions and views of all concerned parties. Consultation is fundamental in this regard.

- 4.3. JTI supports the regulation of tobacco products, developed in accordance with the principles of proportionality, consistency, transparency and efficiency in keeping with internationally accepted principles of good regulation.
- 4.4. For legislation to correspond with these principles, it needs to be clear, consistent, accessible and appropriate or necessary for achieving the intended purpose. In effect, the impact of regulations should be proportional to the purpose they seek to achieve.
- 4.5. In relation to the important issue of tobacco advertising and promotion, JTI is unequivocally committed to responsible marketing practices. We point out that the JT Group and its affiliated companies is a signatory and founding member of the International Tobacco Marketing Standards, a self-regulatory document that sets out standards for responsible tobacco marketing worldwide and imposes substantial restrictions on marketing activities. The cornerstones of the Standards are:
- 4.5.1. ensuring that our marketing has no particular appeal to youth;
 - 4.5.2. restricting youth exposure to tobacco marketing;
 - 4.5.3. ensuring that adult smokers are informed about the risks of smoking;
 - 4.5.4. recognising that it is appropriate to restrict tobacco marketing, given the nature of the product; and
 - 4.5.5. encouraging other companies to join us.

(A copy of the International Tobacco Product Marketing Standards is available at www.jti.com).

- 4.6. Against this background, JTI submits that:
- 4.6.1. the provisions of the existing Act dealing with advertising and promotion as well as point of sale signage more than adequately address the stated health objectives of the Department. Therefore, there is no need to alter the existing regulatory framework for the control of tobacco products in South Africa (save for in relation to certain specific issues such as increasing the smoking age to 18 years, an amendment that JTI fully supports); and
 - 4.6.2. any additional regulation should take into account that adult consumers should be entitled to make informed choices regarding whether to use tobacco products or not and, if so, the brand of tobacco product that they use. The Bill should therefore not unduly limit information from being made available to consumers of tobacco products.

5. The prohibition on advertising and promotion

5.1 General observations

The prohibition on advertising and promotion of tobacco products, brand elements and manufacturers contemplated under the Bill has major implications for JTI and the tobacco industry in South Africa.

This is evident when one has regard to the following:

5.1.1 clause 3(1) prohibits both “*advertising*” and “*promoting*” of tobacco products through “*any direct or indirect means*”;

5.1.2 “*advertisement*” is defined in the following terms:

“any commercial communication or action brought to the notice of any member of the public in any manner, with the aim, effect, or likely effect of -

(a) promoting the sale or use of any tobacco product; or

(b) creating an awareness of a tobacco product, tobacco product brand element or tobacco manufacturer,

and includes product placement, and ‘advertise’ has a corresponding meaning”;

5.1.3 this definition of “*advertisement*” is particularly broad given the wide meaning of “*brand element*”:

“the brand name, trade mark, trade name, distinguishing guise, logo, graphic arrangement, design, slogan, symbol, motto, selling message, print, type-face, recognisable colour or pattern of colours, or any other symbol of product identification, that is likely to be taken as or confused with any brand of tobacco product”;

5.1.4 “*promotion*” is, in turn, defined as follows:

“the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for the purposes of selling the tobacco product or encouraging tobacco use, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, promotion of brand elements by means of related events

and products through any public medium of communication including cinematographic film, television production, radio production or the internet, and 'promote' has a corresponding meaning";

- 5.1.5 the prohibition in clause 3(1) includes a prohibition on advertising or promotion through sponsorship by various means, including sponsorship of an organisation, event, service, physical establishment, programme, project, bursary or scholarship;
- 5.1.6 the Bill proposes the deletion of section 3(3) of the Act, which allows retailers to post signs at the point of sale that indicate the availability and price of tobacco products.

JTI's submissions on this broad prohibition are set out below.

5.2 The prohibition is overly broad

- 5.2.1 The prohibition on advertising and promotion contained in the Bill is very wide, and is effectively a blanket ban extending to all forms of advertising, including advertising which contains objective information about a product's price, availability, appearance and characteristics.
- 5.2.2 This blanket ban is objectionable in light of the fact that tobacco is a lawful product that adults may choose to consume. If adults are free to consume the product, they should be entitled to information in relation to that product which may inform their choice of product. The other consequence of tobacco being a lawful product is that tobacco manufacturers should, like any other consumer goods companies, be entitled to compete for market share by making consumers aware of their brands. In this regard, we reiterate that the ban contemplated in the Bill applies to truthful advertising and promotion of a lawful product.
- 5.2.3 This comprehensive ban on advertising and promotion greatly interferes with the ability of tobacco manufacturers to distinguish their brands, and thus to engage in open competition. It restricts our ability to communicate with existing smokers of competing products in relation to, amongst other things, product development, new products (especially reduced risk products) and other distinguishing features of a particular tobacco product. In so doing, it impedes

our ability to convince smokers to switch to our brands. The Bill thus restricts a tobacco manufacturer's ability to communicate with adults in relation to lawful products, and interferes with adults' rights to receive information relating to those products.

- 5.2.4 It should be emphasised that this prohibition will have a particularly dramatic effect on those tobacco manufacturers with relatively small market shares in South Africa (such as JTI and Phillip Morris) since it will make it difficult for us to expand our market share and will greatly undermine brand switching. It will operate particularly harshly against new entrants (and the launching of new brands) who will be unable to make their brands known and to compete with established participants in the industry. One likely impact of the undermining competition in the tobacco products market, is that it will serve to entrench BAT's current dominance. In doing so, the Bill is antithetical to the provisions of the Competition Act.
- 5.2.5 For these reasons, we submit that the Bill is not only objectionable but that it amounts to an unconstitutional infringement of the right to freedom of expression contained in section 16 of the Constitution. It interferes with the rights of tobacco manufacturers (and other industry participants) to communicate with adult consumers, and the adult consumers' rights to receive that information, to such an extent that the infringement of the right to freedom of expression is not reasonable and justifiable (as contemplated in section 36 of the Constitution).
- 5.2.6 This submission finds considerable support in the decision of the Canadian Supreme Court in *RJR-MacDonald Inc v Attorney General of Canada* (1994) 31 CRR 2(d) 189, in which the majority of the Court struck down a blanket ban on tobacco advertising as an unconstitutional infringement of the right to freedom of expression contained in section 2(b) of the Canadian Charter on Fundamental Rights and Freedoms, 1982 (**"the Canadian Charter"**). The Court held that the advertising ban contained in the Tobacco Products Control Act, S.C. 1988 infringed the right to freedom of expression. As McLachlin J, who delivered the judgment on behalf of the majority, noted:

"Tobacco consumption has not been banned in Canada. Yet the advertising ban deprives those who lawfully choose to smoke of information relating to price, quality and even health risks associated with different brands" (para 170)

5.2.7 The Court found that the purpose that the prohibition in the Canadian legislation sought to achieve was to reduce tobacco consumption. Although the Court expressed the view that there is probably a connection (based on reason or logic rather than empirical evidence) between so-called lifestyle advertising and tobacco consumption, a link had not been shown between all forms of tobacco advertising and increased consumption (nor did such a link follow as a matter of reason or logic) (paras 159 to 164). The Court remarked, in particular, that such a link had not been shown between brand-preference and informational advertising, on the one hand, and tobacco consumption, on the other. As McLachlin J stated:

“[The advertising ban] extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of product appearance, advertising for new brands and advertising showing relative tar content of different brands – all of these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban.... A full prohibition [on advertising] will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s.1 [the limitations clause] to save the violation of free speech is not established.” (paras 162-3)

5.2.8 This finding of the Canadian Supreme Court should be taken very seriously, particularly in light of the fact that our courts regularly have regard to the approach of Canadian courts on constitutional issues. This is largely because of the similarities between the structure of our Constitution and the Canadian Charter (most importantly, both documents contain a list of fundamental rights that are subject to limitation in terms of a self-standing limitations clause).

5.2.9 We now set out some of the specific aspects of the advertising and promotion prohibition to which JTI objects.

5.3 Definition of “advertisement”

5.3.1 “*Advertisement*” is defined as a commercial communication “*with the aim, effect or likely effect*” of promoting the sale of tobacco products or creating awareness of a tobacco product, tobacco product brand element or a tobacco manufacturer. The phrase “*with the aim, effect or likely effect*” is too vague and wide and may lead to transgressions based on subjective assessments as to whether a particular effect is “*likely*”.

5.3.2 Paragraph (b) of the definition of “advertisement” extends the scope of the prohibition to “*creating an awareness of a tobacco product, tobacco product brand element or tobacco manufacturer*”. JTI submits that this paragraph extends the prohibition on advertising beyond that which is appropriate or justifiable (and is thus an unconstitutional infringement of freedom of expression). Moreover, this prohibition goes well beyond that contemplated in the World Health Organisation’s Framework Convention on Tobacco Control, 2003 (“**the FCTC**”), which defines “*tobacco advertising and promotion*” as a commercial communication or action “*with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly*” (i.e. very similar wording to paragraph (a) of the Bill’s definition of “advertisement”). The objectionable aspects of paragraph (b) include the following:

5.3.2.1 the prohibition on simply creating awareness of a “*tobacco product*” may have the unintended consequence of hitting many beneficial communications; such as reporting on the affairs of a tobacco manufacturer in which the name of the manufacturer’s products are mentioned or conducting a research survey or questionnaire which discloses product names. The latter prohibition would interfere with a manufacturer’s ability to improve and enhance its product and to compete fairly in the marketplace. We note that the draft Tobacco Products Control Amendment Bill, 2003, as published by the Department on 17 October 2003 (“**the draft Bill**”) specifically included “*questionnaires and surveys*” in the definition of prohibited “*promotions*” and that this phrase has been deleted in the Bill. We assume therefore that the drafters of the Bill do not intend to prohibit the conducting of surveys and questionnaires. The problem is that, while this specific reference has been deleted in the Bill, the effect of the wide definition in

paragraph (b) of "*advertisement*" suggests that such activities are in any event prohibited;

5.3.2.2 the prohibition on creating awareness of a "*brand element*" takes the breadth of the prohibition even further, particularly given the very broad definition of the phrase "*brand element*" (discussed below at paragraph 5.4). This phrase should be deleted from the Bill;

5.3.2.3 the prohibition on creating an awareness of "*tobacco manufacturer*" is also extremely wide, and goes well beyond what is envisaged in the FCTC. The effect of this prohibition is further extended by the fact that a "*manufacturer*" is defined as including the manufacturer's holding company, subsidiary or another subsidiary of the manufacturer's holding company. This prohibition would seem, on the face of it, to prohibit corporate branding of a tobacco manufacturer (and its affiliates), including innocuous signage on a building occupied by the manufacturer, as well as, for example, reporting on the financial performance of a manufacturer. It would also seem to prevent a manufacturer that is a listed company from publishing notices that it would, from time to time, be required to circulate in accordance with the Listings Requirements. This would, we submit, be absurd; and

5.3.2.4 it is not understood in what manner the simple mention of a tobacco manufacturer's name (or the name of another company within the group of companies of which the manufacturer is the member) will promote tobacco products or smoking behaviour. In circumstances where such corporate communications do not encourage tobacco use, they should not be prohibited.

5.3.3 Accordingly, JTI submits that paragraph (b) of the definition of "*advertisement*" should be deleted or, at the very least, dramatically reduced.

5.4 Definition of "*brand element*"

The definition of "*brand element*" is overly broad and vague. The use of the word "*includes*" suggests that the list contained in this definition is not a closed one, and that other communications not listed in the definition may amount to "*brand elements*". In addition, it is unclear whether the final phrase of this definition ("*that is likely to be taken as or confused with any brand of tobacco product*") qualifies the whole definition of

"brand element" or whether it only qualifies the final phrase *"any other symbols of product identification"*. This definition accordingly fails to comply with the principle of the rule of law, which provides that laws (particularly a law which creates a criminal offence) must be formulated in a sufficiently clear manner so that those who are regulated by them know what is and what is not prohibited by the law.

5.5 Definition of "promotion"

5.5.1 *"Promotion"* is defined in the following broad terms: *"the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for the purposes of selling the tobacco product or encouraging tobacco use, through various means ..."*.

5.5.2 The most fundamental problem with this definition is that it is not confined to promotions aimed at the public. The effect of this is that promotions (i.e. simply fostering awareness and positive attitudes towards a tobacco product or a manufacturer) aimed at *wholesalers* and *retailers* with whom a tobacco manufacturer trades, will be prohibited. JTI submits that, in light of the fact that tobacco products are lawful, manufacturers must be free to communicate with wholesalers and retailers (who are not members of the public) in order to get their products to market. We assume, in this regard, that the exclusion of a reference to the public in the definition is simply an oversight.

5.5.3 The other difficulty with the definition of *"promotion"* is that, for the reasons set out above, the concept of a *"brand element"* is too vague and uncertain and should be deleted from the Bill.

6. Organised activities

Our comments on the definition of “*organised activity*” are as follows:

- 6.1. the definition of “*organised activity*” read with section 3(2) of the Act effectively prohibits a tobacco manufacturer, importer, distributor or retailer from organising, promoting or making a financial contribution in respect of an activity or event where a tobacco product, brand element or “*tobacco manufacturer’s company name*” is used in the name of or portrayal of the activity or event. As stated above, a “*manufacturer*” includes the manufacturer’s holding company, subsidiary or another subsidiary of the manufacturer’s holding company;
- 6.2. it is not understood in what manner the simple mention of a tobacco manufacturer’s name (or the name of another company within the group of companies of which the manufacturer is the member) as a sponsor of a particular event or activity will promote tobacco products or smoking behaviour. Furthermore, it is submitted that tobacco manufacturers, as suppliers of a legal product, are entitled to make contributions to events and activities as responsible, ordinary corporate citizens. In the circumstances where such contributions do not encourage tobacco use, they should not be prohibited.

7. Charitable financial contributions or sponsorships

- 7.1. JTI’s position in relation to sponsorship and charitable contributions is that tobacco manufacturers, as suppliers of a lawful product, should be able to make contributions to events and activities, make charitable donations and engage in other forms of corporate social responsibility as responsible, ordinary corporate citizens. Where such contributions do not encourage tobacco use, they should not be prohibited.

- 7.2. Clause 3(3) of the Bill reads as follows:

“A manufacturer or importer of a tobacco product shall not make any charitable financial contribution or sponsorship unless such contribution or sponsorship is made anonymously.”

- 7.3. Uncertainty is created by the use of the word “*anonymously*” in this clause. It is not clear whether this clause envisages that the public should not be made aware of the identity of the entity which had made the financial contribution or sponsorship, or whether the party to whom the financial contribution or sponsorship is made should also be unaware of the identity of the contributor. If it is the former, there is no need to

include clause 3(3) because the general prohibition on advertising or promotion would provide adequate protection (i.e. if the Committee accepts JTI's submission above, the publication of the contribution or sponsorship would be prohibited if it promotes smoking behaviour). If the latter meaning is intended, this is, we submit, nonsensical as it is practically impossible in most circumstances to make contributions or sponsorships anonymously. In addition, withholding the identity of the donor from the recipient of the donation would mean that the donor would unfairly be prevented from claiming a tax deduction in respect of that donation (see section 18A (2) of the Income Tax Act, 1962). In any event, it is, we submit, extremely unlikely that a donation that is made to a charity (in circumstances in which the charity is aware that a tobacco manufacturer has made the donation) has the effect of promoting a tobacco product or smoking behaviour.

7.4. Accordingly, JTI submits that clause 3(3) should be deleted.

8. Display of tobacco products by wholesalers

- 8.1. Clause 3(9) of the Bill states that a wholesaler must display a tobacco product at its premises in the prescribed manner. In other words, it is intended that the Minister will promulgate regulations specifying the manner in which product must be displayed at the wholesale level.
- 8.2. JTI does not understand the reason for this regulatory intervention, as it seems to us that there is no rational link between the regulation of wholesale displays and the Department's objective of reducing tobacco consumption. There would seem to be no need to regulate the manner in which product is displayed by one player in the supply chain (a wholesaler) to another (a retailer). We therefore suggest that this clause should be deleted.

9. Point of sale notices

- 9.1. Section 3(3) of the Act provides that a retailer may post signs at the point of sale that "*indicate the availability of tobacco products and their price*". Such provisions are common in other tobacco legislation around the world (see, for example, section 30(2) of the Canadian Tobacco Act, 1997).

- 9.2. The Bill deletes this provision, and appears to simply replace it with section 3(10)(a) of the Bill, which reads as follows:

"A retailer shall display ... a notice at his or her place of business that contains the prescribed information regarding any tobacco product available at his or her place of business."

- 9.3. Clause 6(1)(b) then states that the Minister may make regulations regarding signs at the point of sale and the information to be included on those signs, including: health warnings; size, format and location of the signs; and the legal age for the purchase of tobacco products.
- 9.4. While the appropriateness of the manner in which point of sale notices are regulated is a matter which we will obviously only be in a position to assess once we have had sight of the draft regulations to be promulgated under this section, it is, in JTI's submission, unacceptable for tobacco manufacturers' (and retailers') right to indicate availability and price, and the consumers' right to receive such information, to only flow from what the Minister may or may not include in the regulations.
- 9.5. JTI thus submits that section 3(3) of the current Act should not be deleted. Point of sale signage is vitally important for manufacturers and retailers to be able to communicate with their consumers (and potential consumers to switch from competitors' brands) and to make it clear what brands are available in the market. In so doing, point of sale signage encourages open competition and informed consumer choice. We note in this regard that the point of sale is one of the few remaining channels available to consumers to obtain information about a tobacco product so as to make informed purchasing choices based on availability, price and product characteristics. Moreover, restrictive regulation of communications at the point of sale will undermine competition, and will thus operate particularly harshly against those players with relatively small market shares (such as JTI).
- 9.6. JTI submits that the current regime in respect of point of sale signage, in which limited, brand-preference (and informational) point of sale advertising is allowed, provided that it bears the requisite age and health warnings, adequately balances the rights of tobacco manufacturers', retailers' and consumers' freedom of expression, on the one hand, and the public health objectives, on the other. It also reduces the scope for the sale of contraband as it makes consumers aware, at the point of sale, of the appearance of each tobacco product.

- 9.7. Alternatively, clause 3(10)(a) read with clause 6(1)(b) should make it clear that the prescribed information to appear on the sign *must* include the availability of tobacco products and their price.

10. Sale of tobacco products at places of education or training

- 10.1. Clause 4(4)(b) prohibits the sale of tobacco products at any place “*where a person under the age of 18 years receives education and training*”.

10.2. While JTI strongly supports the Department’s objective of reducing tobacco consumption amongst the youth and discouraging young people from smoking, we submit that the prohibition in clause 4(4)(b), as currently drafted, amounts to a disproportionate interference with the freedom of adults to choose to use and purchase tobacco products. JTI accepts that tobacco products should not be sold at educational institutions in which the majority of students are under 18. Nevertheless, it goes too far to prohibit the sale of tobacco products at such institutions where only a small number of persons are under 18. At a typical university, the overwhelming majority of students are over 18 years of age, with only a handful of students being less than 18 years (particular given that the average school starting age is 7 years old). It cannot be correct that the freedom of all other students (and others who are present at such institutions) should be restricted because of the presence of this minority.

10.3. There does not seem to be any reason why adults who are lawfully entitled to purchase tobacco products from a tobacco retailer should be prohibited from doing so on the campuses of educational and training institutions (and why persons who trade at these locations should not be able to sell tobacco products) simply because of the presence of a few persons under the age of 18.

10.4. JTI therefore submits that this prohibition should be redrafted to only prohibit the sales of tobacco products at educational and training institutions where the majority of persons receiving education and training are under 18 years. We note, in this regard, that the equivalent provision in the draft Bill prohibited the sale of tobacco products at educational and training institutions, to the extent that this included: primary and secondary schools; and educational institutions where more than 50% of the learners are under the age of 18 years.

11. Attendance of events

- 11.1. Clause 4A(2) expands the existing provision of the Act to prohibit a person from offering a right to attend a sporting, cultural, social or recreational event in consideration for "*the confirmation of use of a tobacco product*". At its briefing to the Committee on 11 March 2008, the Department stated that this clause extends to inviting a person to participate in events "*for being a smoker*".
- 11.2. This provision is objectionable because it is not limited to public events. JTI submits that it is an unjustifiable infringement of the right to privacy (entrenched in section 14 of the Constitution) as well as the right to freedom of association (section 18 of the Constitution) to prohibit persons from inviting others to a private function on the basis that they are smokers. The State cannot interfere in the private sphere to such an extent that it, for example, prevents someone from inviting another to his or her house for a party because that person is a smoker.

12. Regulations

- 12.1. In relation to clause 6(1)(b), we refer to our comments at paragraph 9 above.
- 12.2. Clause 6(1)(bA)(v) envisages that the Minister will make regulations as to descriptors, package design characteristics, graphics and terms "*considered to be*" false, misleading or deceptive. The phrase "*considered to be*" is unduly subjective and is out of keeping with the modern practice in legislative drafting of framing discretions in objective terms. This phrase should thus be amended to read "*that are*".

13. Offences and penalties

- 13.1. Clause 7 read with sections 2(2), 2(5), 2(6) and 5 of the Act and clause 4(2) of the Bill, effectively criminalise a failure by an employer, owner or person in control of premises to "*ensure*" that certain events do not take place (e.g. that no person smokes in the place where smoking is prohibited). This can operate harshly in circumstances in which the particular event takes place despite the owner or person in charge of the premises not being at fault. The ambit of the criminal offence should therefore be limited to a situation when the person in charge of the premises "knowingly or intentionally permits" prohibited smoking or, at the very least, fails to take reasonably practicable steps to ensure that the relevant event does not occur.

13.2. We note that there is an error in the amendments to sections 7(2) and (3), as they both list a breach of section 4(4) as an offence falling into these sections. The position should be clarified by the deletion in one of the subsections. It appears to us that the reference in section 7(3) should be deleted, in light of the fact that the offence of selling or offering to sell tobacco products at a health establishment or certain forms of educational institutions would seem to be similar to the other offences of selling tobacco products in the circumstances that are covered in the remainder of section 4, and a breach of which is listed in section 7(2).

14. Conclusion

14.1. We trust that these comments will be of assistance to the Committee in considering the Bill.

14.2. Finally, please note that JTI would welcome the opportunity to make oral representations on the Bill at the Committee's public hearings to be held on May 06 and 07, 2008.

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