

11 July 2006

The Commerce Commission
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Dear Sir or Madam

BREACH OF THE FAIR TRADING ACT 1982 – BRITISH AMERICAN TOBACCO NZ

We are writing to officially complain about two instances of commercial deception by British American Tobacco New Zealand (BAT) regarding the harmful nature of their products. These are: firstly, statements on the BAT website that second-hand smoke (referred to by BAT as “environmental tobacco smoke”) has not been proven to be harmful, and secondly, the deliberate misrepresentation that light or mild cigarettes have health benefits over what are known as regular or “higher yield” tobacco products.

This complaint is supported by a number of key health groups including the Cancer Society, Asthma and Respiratory Foundation, National Heart Foundation, Te Reo Marama (Māori Smokefree Coalition), and The Quit Group.

1. BAT website statements.

We believe the statements made about second-hand smoke are in breach of the Fair Trading Act as they are designed to cause the public “to believe what is false,” and to “mislead as to a matter of fact.”

It is our contention that these statements are deliberately designed to give the false impression that second-hand smoke is not harmful, when evidence, both in New Zealand and internationally has established beyond a doubt, that it is.

The statements

The following statements were taken from BAT’s website on 22 June 2006¹

¹ Retrieved from the British American Tobacco website, on 22 June 2006: on 22 June 2006 (http://www.batnz.com/oneweb/sites/BAT_5LPJ9K.nsf/vwPagesWebLive/80256D0B004C1BC780256ABE005B6B21?opendocument&DTC=20040414)

Based on our assessment of the available science on the whole, we think that many of the claims against environmental tobacco smoke have been overstated.

Specifically, we don't believe that it has been shown to cause chronic disease, such as lung cancer, cardiovascular disease or chronic obstructive pulmonary disease, in adult non-smokers.

The most substantial sources of data on ETS and heart disease are two huge databases of the American Cancer Society's Cancer Prevention Study, and the database of the US National Mortality Followback Survey. Analyses of these have reported no overall association between ETS and heart disease.

Use of flawed methodology

The statements about the analysis of two huge databases reporting no overall association between second-hand smoke and heart disease are misleading. The study using American Cancer Society data was tobacco industry-funded, and used flawed methodology. Specifically, it was based on a small subset of the collected data (10 percent) and was unable to distinguish between people who were exposed to second-hand smoke and those who were not. This is because participants were enrolled in 1959, when second-hand smoke was so pervasive that virtually everyone was exposed to it.

A second study, using a more recent set of data collected by the American Cancer Society found that nonsmokers face a 20 percent increased risk for both heart disease and lung cancer when exposed to second-hand smoke. The data in this study – the Cancer Prevention Study II (CPS-II) – was collected from patients enrolled in the 1980s, when there was much less exposure to tobacco smoke outside the home.²

A 1995 report by M Layard³ (a consultant to the tobacco industry) using the US National Mortality Followback Survey was excluded from later studies on the effects of second-hand smoke because of methodological concerns.⁴

² American Cancer Society media release: American Cancer Society Condemns Tobacco Industry Study for Inaccurate Use of Data: Study part of organised effort to confuse public about second-hand smoke. Retrieved on 22 June 2006 from http://www.acsric.com/docroot/MED/content/MED_2_1x_American_Cancer_Society_Condemns_Tobacco_Industry_Study_for_Inaccurate_Use_of_Data.asp?sitearea=MED.

³ Layard MW. Ischemic heart disease and spousal smoking in the national mortality followback survey. *Reg Tox Pharm* 1995;21:180-3.

⁴ U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. Chapter 8: Cardiovascular Diseases from Exposure to Second-hand Smoke. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

Second-hand smoke has been clearly established as harmful

A large number of national and international studies have clearly established that second-hand smoke is harmful. Second-hand smoke contains a mix of more than 4,000 chemicals, such as arsenic, hydrogen cyanide, ammonia and carbon monoxide. Two hundred are poisons, 43 cause cancer. These facts are not in dispute.

In support of this assertion we reference the recent report by U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*.⁵

Among the findings of the report are the following:

1. Second-hand smoke exposure causes disease and premature death in children and adults who do not smoke.

Supporting evidence

- Second-hand smoke contains hundreds of chemicals known to be toxic or carcinogenic (cancer-causing), including formaldehyde, benzene, vinyl chloride, arsenic, ammonia, and hydrogen cyanide.
 - Second-hand smoke has been designated as a known human carcinogen (cancer-causing agent) by the U.S. Environmental Protection Agency, National Toxicology Program and the International Agency for Research on Cancer (IARC). The National Institute for Occupational Safety and Health has concluded that second-hand smoke is an occupational carcinogen.
2. Children exposed to second-hand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma. Smoking by parents causes respiratory symptoms and slows lung growth in their children.

Supporting evidence

- Children who are exposed to second-hand smoke inhale many of the same cancer-causing substances and poisons as smokers. Because their bodies are developing, infants and young children are especially vulnerable to the poisons in second-hand smoke.
- Both babies whose mothers smoke while pregnant and babies who are exposed to second-hand smoke after birth are more likely to die from sudden infant death syndrome (SIDS) than babies who are not exposed to cigarette smoke.

⁵ U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

- Babies whose mothers smoke while pregnant or who are exposed to second-hand smoke after birth have weaker lungs than unexposed babies, which increases the risk for many health problems.
 - Among infants and children, second-hand smoke cause bronchitis and pneumonia, and increases the risk of ear infections.
 - Second-hand smoke exposure can cause children who already have asthma to experience more frequent and severe attacks.
3. Exposure of adults to second-hand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer.

Supporting evidence

- Concentrations of many cancer-causing and toxic chemicals are higher in second-hand smoke than in the smoke inhaled by smokers.
 - Breathing second-hand smoke for even a short time can have immediate adverse effects on the cardiovascular system and interferes with the normal functioning of the heart, blood, and vascular systems in ways that increase the risk of a heart attack.
 - Non-smokers who are exposed to second-hand smoke at home or at work increase their risk of developing heart disease by 25 - 30 percent.
 - Non-smokers who are exposed to second-hand smoke at home or at work increase their risk of developing lung cancer by 20 - 30 percent.
4. The scientific evidence indicates that there is no risk-free level of exposure to second-hand smoke.

Supporting evidence

- Short exposures to second-hand smoke can cause blood platelets to become stickier, damage the lining of blood vessels, decrease coronary flow velocity reserves, and reduce heart rate variability, potentially increasing the risk of a heart attack.
- Second-hand smoke contains many chemicals that can quickly irritate and damage the lining of the airways. Even brief exposure can result in upper airway changes in healthy persons and can lead to more frequent and more asthma attacks in children who already have asthma.

The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General was prepared by the Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC). The Report was written by 22 national

experts who were selected as primary authors. The Report chapters were reviewed by 40 peer reviewers, and the entire Report was reviewed by 30 independent scientists and by lead scientists within the Centers for Disease Control and Prevention and the Department of Health and Human Services.

New Zealand Studies:

New Zealand studies on the harm caused by second-hand smoke include:

1. How many deaths are caused by second-hand cigarette smoke? (Woodward A, Laugesen M, 2001).⁶

"In New Zealand, deaths caused by past exposures to second-hand smoke currently number about 347 per year. On the basis of present exposures, we estimate there will be about 325 potentially avoidable deaths caused by SHS in New Zealand each year in the future. We have explored the effect of varying certain assumptions on which the calculations are based, and suggest a plausible range (174-490 avoidable deaths per year)."

2. Increased mortality amongst never-smokers living with smokers: evidence from two New Zealand cohorts 1981-84 and 1996-99 (Hill S, Blakely T et al, 2004).⁷

"Among adults who had never smoked we found a modest but consistent association between exposure to second-hand smoke in the home and mortality. This association persisted after adjustment for age, ethnicity, marital status, and socioeconomic position. The finding of about 15 percent excess mortality in never smokers exposed to second-hand smoke at home is consistent with the previous largest study in this area."

2. BAT's marketing of "light" or "mild" cigarettes

BAT markets a wide range of tobacco products in New Zealand with the words "light" or "mild" in the brand name.

We believe that such labelling is in breach of the Fair Trading Act as it designed to cause the public "to believe what is false," and to "mislead as to a matter of fact."

It is our contention that these statements are deliberately designed to give the false impression that light or mild brands are less injurious to health than so called regular brands when evidence, has clearly established that this is not the case.

⁶ Woodward A, Laugesen M. (2001). How many deaths are caused by second-hand cigarette smoke? *Tobacco Control*, 10, 383-8.

⁷ Hill S, Blakely T, Kawachi I, Woodward W. (2004) Increased mortality amongst never-smokers living with smokers: evidence from two New Zealand cohorts 1981-84 and 1996-99. *British Medical Journal: Original Research - Short Paper*.

The following list has been retrieved from the 2005 Tobacco Return filed by British American Tobacco New Zealand pursuant to section 35 of the Smoke-free Environments Act 1990:

Benson & Hedges Extra Mild
Benson & Hedges Golden Mild 20
Benson & Hedges Golden Mild 25
Benson & Hedges Lights 20
Benson & Hedges Lights SP 20

Freedom Mild 2 x 20
Freedom Mild 2 x 25
Freedom Mild 20
Freedom Mild 25
Freedom Mild 30
Freedom Super Mild 20
Freedom Super Mild 25

Dunhill KS Super Mild 20
Dunhill KS Super Mild 20 (OLD)
Dunhill KS Super Mild 25
Dunhill KS Super Mild 25 (OLD)
Dunhill Lights 20
Dunhill Menthol Mild 20
Dunhill Ultra Mild 20
Dunhill Ultra Mild 20 (OLD)

Holiday Extra Mild 2 x 20
Holiday Extra Mild 2 x 25
Holiday Extra Mild 20
Holiday Extra Mild 25
Holiday Extra Mild 30
Holiday Extra Mild 4 x 25
Holiday Menthol Mild 2 x 20
Holiday Menthol Mild 2 x 25
Holiday Menthol Mild 20
Holiday Menthol Mild 25
Holiday Menthol Mild 30
Holiday Menthol Mild 4 x 25
Holiday Super Mild 20
Holiday Super Mild 25
Holiday Super Mild 30

Pall Mall Extra Mild 20
Pall Mall Extra Mild 25
Pall Mall Super Mild 20

Winfield Extra Mild 2 x 20
Winfield Extra Mild 2 x 25
Winfield Extra Mild 20
Winfield Extra Mild 25
Winfield Extra Mild 4 x 25
Winfield Super Mild 20
Winfield Super Mild 25

Sportsman Low Tar 25

Taylors Mild 20

Rothmans Special Mild 20

Park Drive Mild 50gm (loose tobacco)
Park Drive Mild 30gm (loose tobacco)
Holiday Mild 30gm (loose tobacco)

Havanna Mild 20 (cigars)
Mini Cigar Mild 20 (cigars)
Mini Cigar Mild 10/50 (cigars)
Mercator Jupiter Mild (cigars)
Cubero Mild 20 (cigars)

The words "light" and "mild" are used to describe tobacco products where lower levels of machine tested tar, nicotine and/or carbon monoxide are emitted from

products in comparison to those marketed as regular or higher yield cigarettes. However, the terms are deliberately deceptive.

Since at least the early 1990s BAT and others have known that certain smoking behaviour (known as smokers' compensation) delivers to the body higher levels of tar, nicotine and carbon monoxide than those levels produced by smoking testing machines. BAT is aware that it is dealing in an addictive product and that scientific studies indicate that smokers are likely to compensate for such 'light' cigarettes by inhaling more deeply, holding smoke in the lungs for longer, covering manufactured cigarette ventilation holes with the fingers or mouth, or smoking more frequently.

Some of these behaviours, particularly deeper inhalation and holding smoke in the lungs for longer can increase the already harmful effects of smoking.

Specific breaches

The statements on the BAT website, and the labelling of certain brands of cigarettes as "light" or "mild" breach the following sections of the Fair Trading Act:

Section 9. Misleading and deceptive conduct generally - No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The BAT website statements give the impression that there is doubt about the harmful effects of second-hand smoke, when there is not.

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
- do not necessarily assist the smoker in reducing the number of cigarettes consumed when compared to high yield cigarettes.

Section 10. Misleading conduct in relation to goods - No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

The BAT website statements mislead about the nature of the product for sale to the public. Tobacco products produce second-hand smoke, which is harmful in its nature.

The BAT brand descriptors "light" and "mild" also mislead about the nature of the product for sale. The words are meant to indicate that the product has health benefits over "regular strength" brands when they clearly do not.

Likelihood of physical harm

We understand that when assessing detriment, the Commerce Commission considers whether consumers or businesses are likely to suffer physical harm and to what extent.

We suggest that second-hand smoke is known to cause serious disease and death. Therefore the statements made on the website of BAT warrant investigation by the Commission.

We also suggest that someone choosing a brand alternative in the belief that it is less dangerous to his or her health, when it is not, also amounts to causing physical harm to the serious extent of sickness and/or premature death.

Seriousness of conduct

We understand that the seriousness of the conduct in question is considered by the Commerce Commission when deciding whether to begin enforcement action.

We suggest the statements made on the website of BAT seriously underplay the harmful effects of second-hand smoke, therefore leading people to believe that second-hand smoke exposure is safe. However, exposure to second-hand smoke will lead to the premature deaths of a significant number of New Zealanders, and the BAT statements are therefore "deliberate, reckless and very careless," and warrant the commencement of enforcement action.

We suggest that deliberately misleading consumers so that they purchase a product thinking it is a safer alternative when it is not, is also deliberate, reckless and careless, warranting the commencement of enforcement action.

In the public interest

We understand the Commission must have regard to a number of factors in the wider public interest and that it considers the following questions:

i. Is there likely to be widespread public interest in the issue?

We believe that there is already widespread public interest in the question of the harmfulness of second-hand smoke. For example, the introduction of smokefree bars and restaurants in December 2004 led to much debate about this issue. A number of New Zealanders are still affected by exposure to second-hand smoke, and they deserve the truth.

That there will be widespread public interest in the issue of misleading descriptors on "light" and "mild" tobacco brands is suggested by the recent

action (November 2005) by the Australian Competition and Consumer Commission (ACCC) which believed these descriptors were likely to have breached the misleading and deceptive conduct provision, and other sections, of the Trade Practices Act 1974.

The result of their action was an undertaking by Imperial Tobacco to remove such branding descriptors from its advertising and brand names and to pay \$1 million to the ACCC towards a consumer education campaign informing that low yield cigarette brands are not likely to offer health or related benefits to consumers compared to higher yield brands.

ii. Would a decision not to commence or continue enforcement action likely undermine public confidence in the law?

We believe so. New Zealanders show a marked concern for fairness and justice, and an obvious disdain for corporate dishonesty. It would appear inconsistent that BAT is allowed to make misleading comments about its products when others in the past have not been allowed to do this, even when the potential harm that might result has been minor in relation to the lethal effects of smoking. We mention, for example, the prosecution in January 2002 of a fish and chip shop that claimed it used cholesterol-free oil when it did not.

Conclusion

We believe, for the reasons outlined above, that it would be appropriate for the Commerce Commission to take action against BAT for the misleading statements found on its website, and in its "light" and "mild" brand descriptors.

We understand that taking action against big industries is expensive and time-consuming. However, the issue is a serious one, and the health of New Zealanders is at stake.

The Fair Trading Act is there to protect ordinary New Zealanders and we are grateful that the Commerce Commission exists with the power to prosecute, as such an action would be exceedingly difficult for members of the public.

We look forward to action being taken and await your response.

Yours sincerely

Mark Peck
Director
Smokefree Coalition