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2 September 2005

Chairman
Bills Committee on Smoking (Public Health)
Amendment Bill 2005
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Sirs,

Smoking (Public Health) (Amendment) Bill 2005 (the "Bill")

We act for Japan Tobacco Inc. and refer to our letter to you dated 13 June 2005 (LC Paper No. CB(2)2097/04-05(02)) and the enclosed Reply Slip.

We hereby notify you that our client will attend the public hearing on 6 October 2005 to make representation. They will be represented by Mr. Michael Thomas QC and Ms. Winnie Tam of Counsel in the oral presentation. Please note that certain representatives of our client from their Tokyo headquarters as well as their Hong Kong subsidiary, and representative(s) of Baker & McKenzie (the instructing solicitor) will also attend the session in person.

As we mentioned in our previous letter, we are preparing a written submission and shall submit the same to the Bills Committee as soon as it is ready. Our oral presentation will focus on the proposed amendment to Section 10(3) of the Ordinance (concerning descriptors) and on the many issues to be raised in our written submission in relation to, *inter alia*, the applicability of the Framework Convention of the World Health Organization, the possible violation of the Basic Law, the Bill of Rights and certain international treaties, and the possibility of judicial review. Owing to the importance of these issues and their complexity, it is expected that the oral presentation, not to include any questioning time following the oral presentation, will take between 45 minutes and an hour.

We would also like to inform you that Mr Michael Thomas Q.C. is now stationed

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*Notary Public

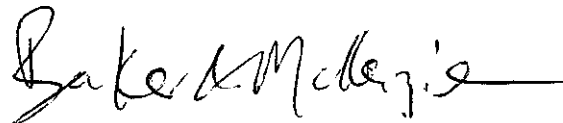
**China-Appointed Attesting Officer

in the United Kingdom and he has to fly in from London to make the oral presentation. He also has to plan in advance for this oral presentation in light of his busy commitments. We would therefore be grateful if you could take this into consideration and try to allocate a specific time slot to our client on 6 October 2005. To avoid any delay, our client would appreciate being allocated the first or second time slot (early morning) on the day.

We do understand that there may be a lot of oral representations to be made under the Bill on other subject areas but we would be grateful if you could try your best to accommodate us.

We thank you for your attention and look forward to your confirmation of the timing and arrangements.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Baker & McKenzie", with a long horizontal flourish extending to the right.

Baker & McKenzie

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26 September 2005

Chairman
Bills Committee on Smoking (Public Health)
Amendment Bill 2005
Legislative Council Building
8 Jackson Road
Central
Hong Kong

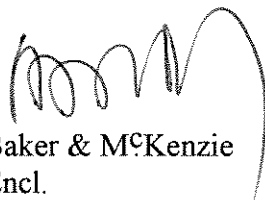
Dear Sir,

Smoking (Public Health) (Amendment) Bill 2005 – Descriptor ban

We refer to our letter of 23 September 2005 enclosing the written submission made on behalf of Japan Tobacco Inc.

We further enclose herewith a Chinese translation of the English Submission for your attention.

Yours faithfully,



Baker & McKenzie
Encl.

cc: Mr. Kazuhito Yamashita /Mr. Haruhiko Yamada, JT (by email)
Ms. Susie S.Y. Ho, J.P., Deputy Secretary for Health, Welfare & Food
Government Secretariat, 19/F., Murray Building, Garden Road, Hong Kong

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**China-Appointed Attesting Officer

Submission to the Bills Committee
In Relation to the Proposed Amendment to Section 10(3) of the Smoking (Public Health) Ordinance under the Smoking (Public Health) Amendment Bill 2005

On Behalf of Japan Tobacco Inc.

23 September 2005

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Clause 11 of the Bill would apparently ban the use of the word ‘mild’ (and other ‘descriptors’) on cigarette packets. Though this may not be intended, such a ban would at a stroke destroy the value in Hong Kong of the well-established brand-name ‘MILD SEVEN’ that Japan Tobacco Inc. (“JT”) since 1977 has promoted at great expense in order to make it now the second most popular cigarette in the world.

- The bill targets descriptive words, such as “light”, “mild” or “low tar” (referred as ‘descriptors’ in the trade), which are used as extension to a brand name (as in ‘CAMEL Lights’ or ‘MILD SEVEN Lights’.) ‘MILD SEVEN’ is however a recognised and long established brand name that marks the product’s origin and is a unitary two word registered trademark. In this context, ‘MILD’ is not a descriptor. The added word ‘Lights’ is.
- To ban the ‘MILD SEVEN’ brand may breach Articles 6 and 105 of the Basic Law. It may unlawfully deny JT’s use of its property. JT has been advised that that such a ban would be an unlawful deprivation of its property without compensation.
- It could unlawfully discriminate against the intellectual property and trading rights of one particular cigarette supplier, contrary to Article 22 of Hong Kong’s Bill of Rights.
- It could put Hong Kong in breach of its obligation as a member of the World Trade Organisation not to discriminate against foreign imported goods, and it would damage Hong Kong’s international reputation as the world’s freest economy.
- It could offend against Article 5(1) of the bilateral agreement between Hong Kong and Japan for the Promotion and Protection of Investment signed on 15 May 1997.

Clause 11 would apparently ban any use of ‘mild’ and ‘light’ and ‘low tar’ as descriptive words on packets, affecting JT and many other suppliers. The ban is ill-conceived and unjustified.

- Since the early 1980s, cigarette packets in Hong Kong have been required to state the tar and nicotine yields as measured by internationally accepted ISO methods. In 1997, however, the government amended the law to regulate the use of descriptors i.e. only products whose tar yield is 9mg or below are allowed to carry descriptors. The 1997 amendments also lower the permissible tar yield in cigarettes from 20mg to 17 mg. The Hong Kong Government has not shown cause to reverse that policy.
- The ban would deny a consumer an objective indication of the taste or flavour of a low tar cigarette that he is accustomed to expect on the packet. It would be an unjustified interference with the consumer’s right to be informed about a product’s characteristics. Absence of ‘mild’ or ‘light’ or ‘low tar’ descriptors could confuse consumers who may end up buying a higher tar cigarette than they would wish.
- If use of descriptors does create misunderstanding, the ban does nothing to cure that. The solution is to provide more, not less (as in the case of a ban), information and guidance e.g. a notation to be printed on package that lower tar cigarettes are not necessarily less harmful.

Even if the use of descriptors were shown to be a source of misunderstanding of consumers and hence needs to be regulated, other more proportionate measures (such as printed notation) should first be considered.

- Hong Kong has no obligation to legislate the proposed ban. The ‘Framework Convention’ adopted by the World Health Organisation in May 2003 leaves it to individual nations to find their own lawful solutions to what they may find to be false or misleading packaging or labelling.
- Furthermore, to comply with WTO rules, trade restrictive measures introduced by Hong Kong must not be more restrictive than necessary. The Bill is unnecessarily drastic.

Recommendations

1. To protect ‘MILD SEVEN’ from disproportionate damage and unintended consequences, a form of amendment is proposed that would allow the use of a banned word (such as ‘mild’) where it has been used without interruption for at least 20 years as an integral part of a unitary brand name relied upon by the public to distinguish goods as coming from a particular supplier.
2. There is a better alternative to banning descriptors, namely requiring a printed notation on packets, as is already adopted by Japan and Mexico as well as the United States Federal Trade Commission.

DETAILED SUBMISSIONS

Part 1 : Introduction

A. Introduction

- (a) This submission is made on behalf of Japan Tobacco Inc. (“JT”). JT is a global tobacco company whose products are sold in over 120 countries. JT’s subsidiary in Hong Kong is Japan Tobacco (Hong Kong) Limited, which is a holder of the tobacco import/export licence issued by the Customs and Excise Department of Hong Kong. A cigarette brand in the name of *Mild Seven*, which is also marketed and sold in Hong Kong, is owned by JT.
- (b) This submission relates to the proposed amendment to Section 10(3) of the Smoking (Public Health) Ordinance under clause 11 of the Smoking (Public Health) (Amendment) Bill 2005 (the “Bill”). The proposal, it seems to us, is to ban words such as *Lights*, *Super Lights* and *Low Tar* which are used as extension of the cigarette brand names and are commonly referred to in the tobacco industry as “descriptors”.
- (c) Firstly, the proposed amendment is based on a number of misconceptions which we seek to demonstrate in this submission. We also seek to illustrate the serious implications of the Bill on the well-established brand name *Mild Seven* and the adverse legal implications for the Hong Kong Government if the Bill were passed in its present form.
- (d) Those misconceptions behind the drafting of the Bill include:-
- (i) descriptors may give the “false impression” that the tobacco products concerned are less harmful than others;
 - (ii) the WHO’s Framework Convention on Tobacco Control (“FCTC”)’s restriction on descriptors is mandatory on Hong Kong; and
 - (iii) the Bill will achieve its desired result to reduce smoking in Hong Kong by banning descriptors.
- (e) Secondly, the Hong Kong Government appears to have overlooked the fact that the wording of Clause 11 of the Bill is open to the interpretation that the use of the brand name *Mild Seven* is also to be banned (because of its incidental use

of the word ‘Mild’), an interpretation which (if correct) would result in substantial financial loss to JT (but not to other cigarette suppliers). This matter must be addressed.

- (f) *Mild Seven* is a brand name, a trademark, a trade name and a logo comprising of two words. The word *Mild* is an integral part of this brand name and is different from those actual descriptors, such as *Lights* and *Super Lights* in Mild Seven Lights and Mild Seven Super Lights, respectively.
- (g) *Mild Seven* is the second most popular cigarette brand in the world¹. *Mild Seven* cigarettes are primarily sold in the premium price segment. JT has put massive investment into promoting the brand worldwide including Hong Kong since its launch in Japan in 1977. We are instructed that JT is the owner of more than 600 trademark registrations (counting only the tobacco-related registrations) for *Mild Seven* in over 140 countries, including 7 registrations in Hong Kong in class 34 (for cigarettes).

Part 2 : The Descriptors Issue and The Proposed Amendment

B1. What are descriptors?

B1.1 Terms used to describe the taste characteristics of cigarettes, such as “light”, “lights” and “low tar”, which are added to the cigarette’s brand names, are referred to in the tobacco industry as “**descriptors**”. The issues at hand are:

- (a) Clause 11 of the Bill has the effect of prohibiting the use of descriptors on cigarette packaging altogether. Specifically, it is proposed to amend Section 10 of the Smoking (Public Health) Ordinance (Cap. 371) as follows:

Section 10 Offences under Part III

- (3) Any manufacturer of cigarettes or his agent and any wholesale distributor of cigarettes who sells, offers for sale or possesses for the purpose of sale any cigarettes to which section 8 applies which have on their packet or their retail container the words "light", "lights", "mild", "milds", "low tar", "醇", "焦油含量低" or other words which imply or suggest that the cigarettes are less

¹ Source: The Maxwell Report "Top World Cigarette Market Leaders" (2003)

harmful than others, commits an offence and is liable on summary conviction to a fine at level 4.

(the “**Amended Section 10(3)**”)

- (b) We understand that the objective of removing the descriptors in the proposed Amended Section 10(3) is to address the misunderstanding held by some smokers as the descriptors allegedly creates an impression of lesser harm to health. The Legislative Council Brief on the Bill (File Ref: HWF CR 52/581/89 Pt.56), para 14, states that:

“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.”

- (c) The tar and nicotine yield of a cigarette (which is currently used in Hong Kong to determine which cigarettes, being of 9mg or less tar yield, can use a descriptor) is determined by the International Organization for Standardization (“**ISO**”) methods. The ISO methods are recognized in most countries. It is accepted by JT that a smoking machine cannot replicate exactly individual smoking behaviour. Smokers puff on cigarettes in different ways - just as petrol consumption in cars depends on each person's driving habits. The ISO methods therefore do not and cannot give individual smokers a precise figure for how much tar and nicotine they will inhale each time they smoke that brand.
- (d) We further recognise that it has been claimed that products with descriptors encourage “deeper inhalation and increased daily consumption by smokers” (an effect also known as “compensation”). However, we note also that such allegation has not been conclusively demonstrated to the Council.

B2. Proposed Amendment Is Drastic But Will Not Achieve The Desired Result And Are Unnecessary

B2.1 Drastic Amendment

- (a) Descriptors have not been proven to create misunderstanding in smokers' mind in and of themselves in Hong Kong. The claim that descriptors may give consumers the "false impression" about the health effects of certain cigarette products (see **paragraph B1.1(b)** above) is not substantiated because we understand that there has been no published evidence that descriptors used in Hong Kong would create an impression in the mind of the Hong Kong consumers that the particular product poses less risk to health. On the contrary, a recent consumer survey in Hong Kong shows that hardly anyone in Hong Kong spontaneously associates descriptors such as 'light' or 'mild' with 'less harm to health'².
- (b) It is respectfully submitted that the Government should have research evidence in Hong Kong on this issue before it takes the stance that descriptors universally give consumers the "false impression" of lesser health risk. The Government should disclose the evidence, if any, on which they rely in this regard for the benefit of the public to ensure transparency.
- (c) The proposed Amended Section 10(3) is capable of being interpreted as a "ban" without differentiation upon use of any of the words "light", "lights", "mild", "milds" and "low tar", regardless of their context or meaning. It would have the effect of infringing private property rights, and is drastic, unnecessary, and raises serious legal implications. This may result in protracted litigation between the Hong Kong Government and tobacco manufacturers. Therefore, we respectfully urge that the proposed amendment in the Amended Section 10(3) be carefully reconsidered.

² A consumer study in Hong Kong (dated September 2005) conducted by Research/Strategy/Management, Inc. ("R/S/M") of 11908 Holly Spring Drive, Great Falls, VA 22066, United States of America (the "**R/S/M Hong Kong Consumer Study**").

B2.2 Objectives Will Not Be Achieved By the Current Bill

- (a) The proposed Amended Section 10(3) would instead create confusion in a consumer's mind, which will only hinder and certainly not achieve the objectives outlined in **paragraph B1.1(b)** due to the following:
- (i) Descriptors enable existing smokers to distinguish specific taste characteristics of the different products within the same brand family. Cigarettes are a legal product and smokers should have the right to information just like any consumer of other products.
 - (ii) A descriptor ban will confuse smokers who cannot obtain adequate information that they have got used to, and therefore may end up inadvertently purchasing a product with higher measured tar value than they would wish to smoke.
 - (iii) It seems that the rationale for the proposed Amended Section 10(3) is that low tar cigarettes are alleged to be equally or perhaps even more harmful than high tar cigarettes. We understand that this contention has not yet been conclusively proven or demonstrated to the Council. This contention is contrary to the policy of many governments, including the earlier Hong Kong Government, which has advocated and encouraged tar reduction in its 1997 legislation (see **paragraph B2.2(b)** below).
- (b) It is our respectful submission that the legislative objectives outlined above will not be achieved by the proposed Amended Section 10(3) for the following reasons:
- (i) Following a bill introduced by the Hong Kong Government in 1991, the Smoking (Public Health) (Amendment) Ordinance 1992 sets out a statutory ceiling on the maximum tar content in cigarette products which is 20mg. In 1997, further amendments were introduced to the Smoking (Public Health) Ordinance to reduce the maximum permissible tar content of cigarette products to 17mg. It was said that:

“To follow the trend overseas, we propose to lower the maximum permissible tar yield in cigarettes from 20 mg to 17 mg. At the same time, we will change the existing requirement to indicate the

tar group on cigarette packets and advertisements to requiring indication of the tar and nicotine yields instead. This again follows overseas practice. In addition to these, use of words like “mild”, “light”, “low tar” and so on which suggest that the cigarette has a low tar yield will be prohibited for any brand which has a tar yield higher than 9 mg.”

(Speech by the Secretary for Health & Welfare made in LegCo)³

- (ii) Further, cigarette manufacturers are permitted to use descriptors to identify the lower tar and nicotine content of that particular version of cigarettes within the larger brand family. The existing regulations oblige cigarette manufacturers to disclose the tar and nicotine yield numbers on the cigarette packets, and if a descriptor is used, the tar yield of that cigarette must be 9 mg or less.
 - (iii) It can also be seen that the Hong Kong Government was acknowledging as recently as 1997 that descriptors such as “light” and “mild” were acceptable, and can be used to indicate the tar strength (amongst other taste characteristics) of the cigarette products when coupled with the statutory requirement of disclosure of the measured tar and nicotine levels. The proposed ban of descriptors in the Bill represents an about turn in the Hong Kong Government’s rationale behind the legislation introduced in 1997, and is likely to leave consumers in a state of confusion.
- (c) The Bill does not propose to remove the current mandatory requirement that all cigarette packaging must disclose the tar and nicotine yield numbers, while it proposes to ban the use of descriptors. Even if descriptors were banned with a view to countering the alleged misunderstanding of smokers, the tar/nicotine yield numbers on the cigarette packaging could have the same effect about smokers’ misunderstanding as what the descriptors are alleged to have. Consumers may still choose products with lower tar/nicotine yield numbers believing that these are less risky to health. Even if we accept (which we do not) for the moment that the Government’s allegation that a “false impression” exists, we submit that more information, not less, should be given to smokers to rectify any misunderstanding that they

³ The Legislative Council’s Official Record of Proceedings, 23 April 1997.

have about descriptors. Banning (hence resulting in less or no information) will only perpetuate, and will not rectify, the smokers' existing misunderstanding.

- (d) Therefore, it is important for the Government to inform and educate smokers so that they understand that the way they smoke is an important factor in the amount of tar and nicotine they inhale. Banning descriptors (and hence not providing the information to the smokers) is not the solution.

B3. Erroneous Application of the WHO FCTC As A Basis For the Proposed Amendment

- (a) Some years ago, the public health community worldwide advocated tar reduction strategy and pressured cigarette manufacturers to produce low tar cigarettes. As mentioned above, the existing Ordinance specifically permits the use of descriptors to identify the lower tar and nicotine content (being 9mg or less) of that particular version of cigarettes within its brand family.
- (b) The Legislative Council Brief on the Bill (File Ref: HWF CR 52/581/89 Pt.56) states that one of the justifications for the proposed amendment is that “[i]nternationally, the adoption of the Framework Convention on Tobacco Control (the “FCTC”) by the World Health Organisation in May 2003 has heightened momentum for tightening tobacco control laws worldwide.” However, we note that the proposed Amended Section 10(3) is not mandatory under the relevant section of the FCTC. The Government may have mistakenly taken it as a mandatory provision.
- (c) Article 11(1)(a) of the FCTC is the relevant provision in respect of packaging and labelling of cigarette products. The full text of this article is set out below:

*Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, **in accordance with its national law,** effective measures to ensure that: tobacco product packaging 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 other tobacco products. These **may** include*

terms such as “low tar”, “light”, “ultra-light”, or “mild”
[Emphasis added]

- (d) The words “in accordance with its national law” in the FCTC Article 11(1)(a) suggests that the member countries need not implement any measures which would be contrary to their existing national law. The proposed Amended Section 10(3), in its present form, we submit, is inconsistent with the Basic Law and other Hong Kong laws (e.g. the Bills of Right), as set out in **paragraphs D to I** of this submission. Hence the proposed Amended Section 10(3) is inconsistent with this requirement in the FCTC.
- (e) In addition, the spirit in the FCTC Article 11(1)(a) is to require each country to ensure that there is no false, misleading or deceptive promotion or giving a false impression of tobacco products with regard to the products’ health effects, not necessarily to ban all use of descriptors. This is in contrast with the earlier draft of the FCTC which required that “no term... such as “mild” ... is used”. This clearly shows that the WHO changed its position from a mandatory requirement to remove descriptors, to the final version which only provides that member countries should have effective measures to avoid false, misleading or deceptive promotion or giving a false impression. Please note that the FCTC states that terms to be regulated *may* but not necessarily include “mild”. It would seem that this amendment was intended to confer discretion on each country as to the most appropriate way to regulate the use of descriptors in the circumstances. It should not be thought that a ban is mandatory.
- (f) The terms “low tar, light, ultra light or mild” should be read and considered in their proper context to determine whether they or any of them directly or indirectly create the “false impression” that a particular tobacco product is less risky to health. As such, the proposed Amended Section 10(3) does not correctly implement the FCTC recommendation.
- (g) The non-mandatory nature of the FCTC is demonstrated by the following overseas experience. In response to the FCTC, Japan has implemented a notation requirement, namely to require tobacco products which carry descriptors to print an additional health warning (or notation) stating that the descriptors on the packages do not mean that those cigarettes pose lower health risks than other cigarettes. Please see **paragraphs J and K** for more details.

Mexico has also adopted this “notation” approach⁴. The notation is also a method accepted by the United States Federal Trade Commission, where a similar notation requirement was imposed in relation to R.J. Reynolds Tobacco Company’s brand of cigarette, namely Winston “no additive” version.⁵ We respectfully submit that Hong Kong should follow the same approach, rather than the blanket ban currently proposed.

Part 3 : Mild in the Mild Seven Name Is Not A Descriptor

C. The Amended Section 10(3) Should Be Clarified

- (a) We respectfully submit that the wording of the proposed Amended Section 10(3) is unclear and may be mis-interpreted to ban the word *Mild* in a brand name such as *Mild Seven* (not being in the nature of a descriptor) by virtue of it having the word *Mild* incidentally built into the brand name.
- (b) The erroneous interpretation of the Amended Section 10(3) and their enforcement would result in serious legal implications as set out in **paragraphs D to I** below, as such interpretation and enforcement will be contrary to the Basic Law, the Hong Kong Bill of Rights, the WTO’s non-discrimination principle and the Hong Kong-Japan Trade Treaty.
- (c) The word “*Mild*” in *Mild Seven* is an integral part of the underlying brand, the logo (please see the *logo* of Mild Seven below) and the “base” trademark: it is not a descriptor, and is not used as a descriptor.

MILD SEVEN

- (i) *Mild Seven* is a unitary trademark which has existed since 1977. Since 1980s, this brand name has been used continuously in Hong Kong and elsewhere in the world. *Mild* and *Seven* are inseparable components of the unitary two-word trademark *Mild Seven*. This has resulted in the

⁴ Agreement between Philip Morris Mexico/British American Tobacco Mexico and the Mexican Government (Art. 5 “Warning or precautionary notice on side. Use of descriptors”)

⁵ In 1999, the US Federal Trade Commission challenged the Winston “no additives” cigarettes campaign on the grounds that it improperly implied to consumers that Winston no additives cigarettes were safer than other cigarettes. A consent order was issued by the FTC that Winston campaign should contain a notation to the effect that no additives does not mean a safer cigarette. (Source: <http://www.ftc.gov/opa/1999/03/winston.htm>)

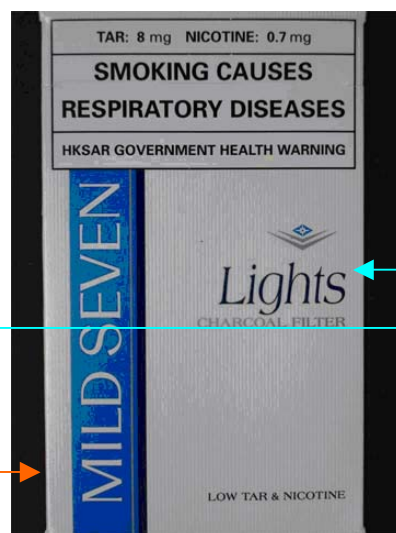
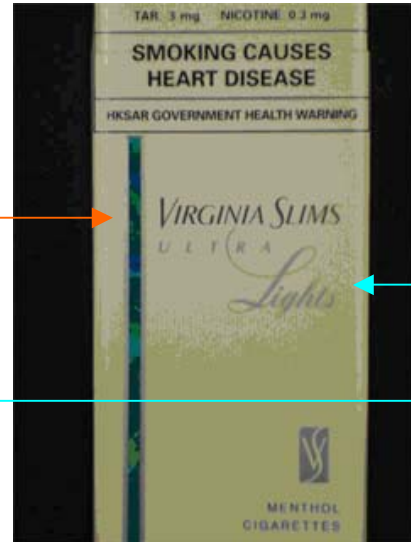
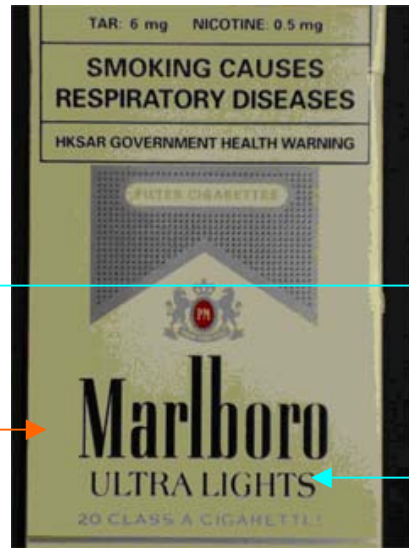
words *Mild* and *Seven* in the brand having lost any literal meanings as individual words but they are seen only as a highly distinctive and unitary two-word brand name *Mild Seven*, identifying cigarettes originating from one particular company.

- (ii) It is respectfully submitted that consumers recognise *Mild Seven* as a completely distinctive brand name, and the word *mild* as an integral part of this brand name is not likely to be seen as a descriptor of the products. This is supported by a recent consumer survey in Hong Kong showing that hardly anyone in Hong Kong spontaneously associates the words “mild seven” or the word “Mild” in *Mild Seven* with less harm to one’s health⁶.
- (iii) In Hong Kong, 萬事發 is the Chinese name of Mild Seven. As the said three Chinese characters are not descriptive (they literally translate into “everything is prosperous”), it shows that the name in English (*Mild Seven* as a whole) is also not seen as containing any descriptor and not intended to contain any descriptor. Otherwise, there would have been a translation of the specific intended word of description into Chinese (i.e. the Chinese word for “mild” (“醇”). This demonstrates that each of the words “Mild” and “Seven” in *Mild Seven* has totally lost its original meaning in plain English.
- (iv) It is clear if one looks at the various cigarette packaging designs that the actual descriptor is clearly distinguishable from the underlying brand name by their **visual presentation** (as the two are presented in different font or style and often in different location or lines on the packaging). As one can see, *Mild Seven* as the two-worded brand name is clearly the underlying brand as opposed to a descriptor. Please see the examples in the next page.

⁶ Source: R/S/M Hong Kong Consumer Study, 2005.

Underlying Brands

descriptors



- (v) In accordance with accepted trade usage, a descriptor appears after the brand name (as an extension to the actual brand name), as in the case of “Lights” in *Salem Lights*, or “Menthol” in *Salem Menthol*. However, *Mild* appears as the first word in the brand name *Mild Seven*, as opposed to “*Seven Mild*”, if *Mild* were to be intended as or having the effect of a descriptor.
- (vi) *Mild Seven* also has its own descriptors, including “Lights” in *Mild Seven Lights* and “Super Lights” in *Mild Seven Super Lights* that are sold in the Hong Kong retail market. The trademark *Mild Seven* is applied across the full range of *Mild Seven* “extension” products (i.e. those with descriptors) and therefore *Mild Seven* is itself a true brand name (underlying brand name) and not a descriptor or part thereof.

Part 4 : Adverse Consequences of Banning “Mild Seven”

The proposed Amended Section 10(3) does not make the distinction between underlying brand names (such as *Mild Seven*) and actual descriptors clear, and therefore is capable of being misinterpreted so as to ban *Mild Seven* (not being a descriptor). Such a misinterpretation 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.

D. The Basic Law

- (a) *Mild Seven* is a registered trademark in Hong Kong. Under Sections 10 and 27 of the Trade Marks Ordinance (Cap. 559), a registered trademark is a personal property. In addition, *Mild Seven* represents extremely valuable goodwill of the trade which is also recognised as a form of alienable personal property of JT.
- (b) Article 6 of the Basic Law stipulates that the Hong Kong Special Administrative Region shall protect the right of private ownership of property with law. Article 105 of the Basic Law further stipulates that:

“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. ...

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

- (c) If the Bill is passed in its present form, JT’s valuable property rights as evidenced and vested in the brand *Mild Seven* will in effect be denied or dissipated. The brand name and trademark *Mild Seven* without the word *Mild* will be totally valueless to JT in Hong Kong. The potential financial loss for JT is incalculable – see **paragraph I** below. JT will in effect be deprived of its legal rights that flow from the registration of *Mild Seven* as a trademark and the intellectual and intangible property right that subsists in the brand name itself. This constitutes expropriation of JT’s property without compensation by the Government, and contravenes Articles 6 and 105 of the Basic Law.
- (d) It is trite law that any legislation which contravenes or is inconsistent with the Basic Law will be held invalid and unconstitutional (see e.g. *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315). If it is unconstitutional, a law confers no rights and is inoperative: it is as though it had never been passed (see *Lau Kong Yung v Director of Immigration* [1999] 2 HKLRD 516 citing in support *Norton v Shelby County* (1886) 118 US 425).

E. The Hong Kong Bill of Rights

- (a) *Mild Seven* is unique in the industry in the sense that, as we understand, no other underlying and well-established brand of any other cigarette manufacturers includes any word which, standing alone, may be subject to the proposed descriptor ban.
- (b) *Mild Seven* is the second most popular brand of cigarette after *Marlboro* based on global sales⁷. If the descriptor ban is enacted, the business of JT, who is owner of the brand *Mild Seven* in Hong Kong, will be disproportionately harmed when compared with other cigarette brands’ owners. JT’s rights in Hong Kong as an owner of the brand are alone effectively expropriated.
- (c) Article 22 of the Hong Kong Bill of Rights as encapsulated in Section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBRO**”) provides that:-

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

⁷ Source: JT’s Annual Report For the Fiscal Year Ended March 31, 2004, as published on http://www.jti.co.jp/JTI_E/IR/04/annual2004/annual2004_E_all.pdf

*shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.*

[Emphasis added]

- (d) Section 7 defines “persons” to include both natural and legal persons.
- (e) It is respectfully submitted that the proposed Amended Section 10(3) would clearly have the effect of discriminating against JT as the owner of a dominant cigarette brand, which effect will not be felt or suffered by other cigarette brand owners. The proposed Amended Section 10(3) would thus be inconsistent with the HKBRO.

F. WTO – Non-Discrimination Principle

- (a) Hong Kong has been a WTO member since 1 January 1995. Non-discrimination is a fundamental principle of the World Trade Organization (“WTO”). Hong Kong is therefore obliged to grant “most-favoured nation” (“MFN”) and “national treatment” (“NT”) to imported cigarettes as well as intellectual property rights of different WTO Members on a non-discriminatory basis.
- (b) We respectfully submit that if the proposed Amended Section 10(3) extends to a ban on JT’s right to use *Mild* in the *Mild Seven* trademark, this would discriminate against JT and would be in violation of Hong Kong’s WTO MFN and NT obligations. This is because whilst other cigarette brands are only required to remove the descriptors in their trademarks, JT is required to remove an integral part of their *Mild Seven* brand name and trademark.
- (c) More significantly, the proposed descriptor ban would effectively prohibit the sale, offering for sale and distribution of *Mild Seven* cigarettes in Hong Kong. In contrast, the sale, offering for sale and distribution of other cigarette brands would still be permitted albeit without their descriptors. The discriminatory end result is that JT would be the only brand owner to suffer the full force of the prohibition.

G. Obligations under Hong Kong-Japan Trade Treaty

- (a) The Hong Kong Government has negotiated a number of trade treaties generally known as Investment Promotion and Protection Agreements (IPPAs).

The Hong Kong Government has stated that “inward investment has played and will continue to play an important role in sustaining Hong Kong’s economic growth, and in fostering Hong Kong’s development as an international trade, financial and business centre.”⁸ It is thus in Hong Kong’s best interest that the provisions of the IPPAs are complied with.

(b) We refer to the Agreement between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment signed by Hong Kong and Japan on 15 May 1997 (the “**HK-Japan IPPA**”). The HK-Japan IPPA came into force on 18 June 1997⁹ and was gazetted on 26 June 1998¹⁰.

(c) Article 5(1) of the HK-Japan IPPA provides that:

*Investments and returns of investors of either Contracting Party shall not be subjected to deprivation **or any measure having effect tantamount to such deprivation** (hereinafter referred to as “deprivation”) in the area of the other Contracting Party except under due process of law, for a public purpose, on a non-discriminatory basis, and against compensation.*

[Emphasis added]

(d) The term “investment” is defined in Article 1(3)(d) to mean “every kind of asset and in particular, ... intellectual property rights including undisclosed information, and trade names ...”. The term “returns” is defined in Article 1(5) to mean “the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees”.

(e) Under Articles 1(2) and 1(4), JT being a company incorporated or constituted under the laws and regulations of Japan and “having its seat” within Japan, is accorded the status of an investor from Japan within the meaning of the HK-Japan IPPA. Accordingly, *Mild Seven*, the trade name of JT and registered trade marks in Hong Kong, and the associated investments and returns of JT, fall within the scope protected by the HK-Japan IPPA.

(f) We have set out in **paragraphs D(c) above, I(a) and I(b)** below why the proposed Amended Section 10(3) would have the practical “effect tantamount

⁸ Source: Government website: <http://www.info.gov.hk/info/proagree.pdf>

⁹ Source: Information from the International Law Division of the Department of Justice, Hong Kong Government. (<http://www.legislation.gov.hk/table2ti.htm>, 5 May 2005)

¹⁰ Special Supplement No. 5 to Gazette No. 26 Vol. 2 page E241-E281.

to” a deprivation of the intellectual property rights of JT in *Mild Seven*. It is submitted that where the state interferes in the use of the property or with the enjoyment of benefits therefrom, even where the property is not seized and the legal title is not affected, the act would still amount to an expropriation (see: *Metalclad Corporation v. United Mexican States* (Tribunal Decision 30 August 2000, a case decided under the North American Free Trade Agreement)). Therefore, we submit that the current wording in the proposed Amended Section 10(3) will subject JT’s investment and returns to “deprivation” within the meaning of Article 5(1) of the HK-Japan IPPA.

- (g) The deprivation occasioned to JT in respect of *Mild Seven* is not permitted under the HK-Japan IPPA, because the proposed Amended Section 10(3) cannot be implemented on a non-discriminatory basis (due to the unique circumstances of JT) and there is no due compensation granted or offered for the deprivation. It is our respectful submission that the “descriptor” ban, if it applies to the word *Mild* in the integral trade mark *Mild Seven*, will cause the Hong Kong SAR Government to be in breach of its treaty obligations under the HK-Japan IPPA.

H. Hong Kong as a free economy

Hong Kong has always promoted itself as a trading and financial hub. In 2005 Hong Kong was chosen once again as the world's freest economy¹¹. It is respectfully submitted that discriminatory treatment of JT as a result of the Bill is inconsistent with the notion of true economic freedom and will severely undermine Hong Kong’s reputation and standing in this regard.

I. Potential Losses Caused to JT If *Mild Seven* is Affected

- (a) A ban on the use of the word *Mild* in the brand name *Mild Seven* will effectively mean that *Mild Seven* cigarettes could no longer be sold in Hong Kong. The loss and damage expected to be suffered by JT in this regard would be incalculable. The loss includes direct as well as indirect and future projected loss and damage.
- (b) In addition, JT’s ability to compete in the global market will also be seriously set back given the dominant position of *Mild Seven* in the market. This loss of

¹¹ Source: Wall Street Journal Index of Economic Freedom 2005, published by the Heritage Foundation. (Website: <http://www.heritage.org/research/features/index/downloads.cfm>)

competitive advantage will lead to significant revenue loss not only in Hong Kong but also in the global marketplace where JT's products compete directly with other brands. JT's long term goal and ambition will be frustrated particularly when none of its competitors would face similar loss of a global brand name.

- (c) The harmful effects on JT will be discriminatory and irreversible. JT will be left with no choice but to protect its own legal rights through the Courts in Hong Kong by seeking judicial review and other suitable legal remedies including the recovery of financial damages if the descriptor ban in the Bill were enacted in its present form. It is suggested that clarification in this regard in the Bill is necessary. Please see our suggested drafting changes at paragraph L.

Part 5 : For Descriptors, Notations Can Achieve Legislative Objectives

J. Notation In respect of Actual Descriptors, Instead of Ban of Descriptors

- (a) The object of the proposed amendment is to avoid misunderstanding by the smokers that the use of certain words on cigarettes packaging (i.e. the descriptors) may mean that that particular type of cigarettes is less risky to health than others. Conversely, the object is not to overreach, least of all to limit freedom of expression and consumer's right to information, by banning the use of certain words on packaging *regardless of* what the public may perceive as the meaning of those words in the context of the packaging as a whole.
- (b) We respectfully submit a ban on descriptors is neither necessary nor appropriate in Hong Kong. If the Council feels that the existing legislation on descriptors needs to be changed, there is a more satisfactory way to regulate descriptors and achieve the legislative objectives. Please note that such method has been adopted in another jurisdiction. Regulation 36 of the "Enforcement Regulations for the Tobacco Business Law" of Japan provides that if a company intends to indicate on the container/package a phrase that could give an impression on the health effects and consumption of tobacco products such as "low tar", "light", "ultra light" or "mild", the company is required to indicate on the container/package that the phrase does not imply that the adverse health effects of the tobacco products are diminished. The regulation requires the notation to be printed or affixed by label clearly and legibly on the surface of

the container/package. Mexico and the United States Federal Trade Commission have both adopted this “notation” approach (see the references to Mexico and US regulators in **paragraph B3(g)** above).

- (c) An example of a statement of notation is “The word[s] (i.e. *those descriptors*) on this pack do[es] not mean that these cigarettes pose lower health risks than other cigarettes.” This directly addresses the problem alleged to arise from the use of descriptors, and would dispel any misunderstanding. A recent consumer survey in Hong Kong shows that such a notation is clear on first encounter to an overwhelming majority of those polled¹².
- (d) Furthermore, legislative restriction by itself is not the only way of addressing the descriptor issue. We submit that an effective public awareness campaign and public health education, with greater transparency and disclosure requirements on descriptors to give more and accurate information concerning the products and health implications, are more important. Certain key messages may include:
 - (i) no cigarette has been scientifically proven to be less risky than any other;
 - (ii) the amount of tar and nicotine that smokers inhale varies depending on how they smoke; and
 - (iii) the use of tar-level or other descriptors does not indicate that a product is harmless or less harmful than other products.

K. WTO – TBT Agreement – Trade Restrictions

- (a) Since Hong Kong is a Member of the WTO, the WTO’s Agreement on Technical Barriers to Trade (the “**TBT Agreement**”) obliges Hong Kong to observe the various prescribed procedural and substantive requirements set out in the TBT Agreement.
- (b) We respectfully submit that the regulation of descriptors must not be more trade restrictive than necessary, as otherwise Hong Kong may breach its obligations under the TBT Agreement.

¹² Source: R/S/M Hong Kong Consumer Study, 2005.

- (c) Technical regulations, standards and conformity assessment procedures in respect of all products, including industrial and agricultural products are subject to the disciplines of the TBT Agreement. Annex 1.1 of the TBT Agreement defines “technical regulation” as:
- document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method ...
- (d) The term “product characteristics” has been further elaborated by the Appellate Body in the case of European Community - Asbestos (Case No. WT/DS135) to include any objectively definable “features”, “qualities”, “attributes” or other “distinguishing mark” of a product. The descriptors ban proposed in the Bill falls within the above criteria.
- (e) Article 2.2 of the TBT Agreement provides that WTO members “shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”. For this purpose, technical regulations shall *not be more trade-restrictive than necessary* to fulfil a legitimate objective, taking account of the risks that non-fulfilment would create.
- (f) The determination of whether the descriptor ban in the Bill is not more trade-restrictive than necessary involves a consideration of whether alternative measures are reasonably available and are less restrictive of trade. (see: *Thailand- Cigarettes* DS10/R-378/200 adopted on 7 November 1990).
- (g) Since less trade restrictive measures such as a notation requirement (as set out in **paragraph J(a)** above) are reasonably available and such alternative measures will achieve the same objectives in the context of human health, the proposed ban of “descriptors” will be more “trade-restrictive than necessary” and is inconsistent with the TBT Agreement.

Part 6 : Conclusions / Recommendations

L. Recommended Drafting Changes to the Bill

- (a) It is submitted that the word “Mild” in *Mild Seven* is not a descriptor because it is a recognised and long established brand name that marks the product’s origin (in other words, an “underlying brand” just like *Marlboro*, *Salem* or *Camel*) and is a unitary two word registered trademark. The law should preserve JT’s pre-existing right for the underlying brand *Mild Seven*. To protect Mild Seven from disproportionate and discriminatory damage and unintended consequences (including breach of the Basic Law, WTO and trade treaty), it is proposed that an underlying brand, which has been used without interruption for at least 20 years, relied upon by the public to distinguish goods as coming from a particular supplier, should not be caught by the Amended Section 10(3).
- (b) As regard the descriptors, it has been shown that hardly anyone in Hong Kong spontaneously associate the descriptors with less health risk for that particular cigarette. If the legislators are minded to amend the existing legislation regarding descriptors, it is submitted that notation is a more reasonable and fair way to regulate descriptors and is more appropriate than a descriptor ban. Japan and Mexico have already adopted the “notation” approach to regulate descriptors, and this approach is also used by the United States Federal Trade Commission.
- (c) It is submitted that setting out an inexhaustive list of words which are deemed to be a source of misunderstanding in the Amended Section 10(3) is inappropriate for at least two reasons: (1) it tends indiscriminately to ban the use of certain words regardless of whether their use on packaging is likely to cause the misunderstanding the legislation is intended to avoid (which is an unnecessary restriction of freedom of speech and consumer access to information); and (2) it leaves a much wider gap of uncertainty as to whether other words may or may not carry the impression of being less harmful and therefore be banned as well. The fact that a trademark and underlying brand name such as “*Mild Seven*” which has been consistently used for over two decades in Hong Kong to indicate trade origin, *not* level of risk to health, may be mis-interpreted as being banned by the proposed Amended Section 10(3) highlights the unfairness and inappropriateness of the proposed amendment.

(d) For the Council's convenience and reference, our suggested amendments to section 10(3) read as follows:

10(3) Subject to Section 10(3A) hereof, any manufacturer of cigarettes or his agent and any wholesale distributor of cigarettes who sells, offers for sale or possesses for the purpose of sale any cigarettes to which Section 8 applies which have on their packet or their retail container any words which imply or suggest that the cigarettes are less harmful than others commits an offence and is liable on summary conviction to a fine at level 4 unless there is inserted on the packaging a notation¹³ stating legibly that the offending word (to be specifically referred to therein) does not mean that these cigarettes pose lower health risks than other cigarettes.

10(3A) For the purpose of Section 10(3), any word which is an integral part of an Underlying Brand which has been used continuously in Hong Kong on the same goods as those contained in the packaging for 20 years or longer prior to the date of coming into force of this amended legislation and such other words which may be approved by the Secretary of Health, Welfare and Food shall be deemed not to offend Section 10(3).

In the definition Section, it should be provided that:

“Underlying Brand” means a registered trade mark under and by reference to which a number of types of product or products are sold, offered for sale or supplied and which members of the public associate with a single undertaking.

“Trade mark” is as defined by the Trade Marks Ordinance (CAP 559).

¹³ Alternatively, section 10(3) can simply state “commits an offence ... unless there is inserted on the packaging ***a notation in the prescribed form***”, and in a Regulation to be separately enacted, the prescribed form of the notation can be set out as follows:

The word[s] [*the descriptors*] on this pack do[es] not mean that these cigarettes pose lower health risks than other cigarettes.

本包裝上「 *the descriptors* 」[一/等]字並不代表該煙品對健康的危害較其他煙品低。

The intention behind the concept of Underlying Brand is that “*Mild Seven*” of *Mild Seven Lights* shall be construed as an Underlying Brand, whilst “*Lights*” thereof shall not, and shall instead be caught by the regulation under Section 10(3).

Dated this 23rd day of September 2005.

Mr. Michael Thomas SC.
Ms. Winnie Tam
Counsel for Japan Tobacco Inc.

Baker & McKenzie
Solicitors for Japan Tobacco Inc.

*** END OF SUBMISSION ***

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23 September 2005

Chairman
Bills Committee on Smoking (Public Health)
Amendment Bill 2005
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sir,

Smoking (Public Health) (Amendment) Bill 2005 – Descriptor ban

We act for Japan Tobacco Inc. In this matter, our client is also represented by Mr. Michael Thomas Q.C. and Ms. Winnie Tam of Counsel.

We refer to the Smoking (Public Health) (Amendment) Bill 2005 (the “**Bill**”) and our letters dated 13 June 2005 and 2 September 2005. We are instructed to send to you and the members of the bills committee a written submission in relation to the proposal in the Bill to amend Section 10(3) of the Smoking (Public Health) Ordinance. The matter is one of considerable commercial importance to our client, and it raises serious legal questions.

The English version of the written submission is enclosed, and the Chinese version will follow in the next few days.

ANDREW J.L. AGLIONBY
BRIAN BARRON
EDMOND CHAN
ELSA S.C. CHAN
RICO W.K. CHAN
BARRY W.M. CHENG
MILTON CHENG
DEBBIE F. CHEUNG
PEGGY P.Y. CHEUNG
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GRAEME R. HALFORD
WILLIAM KUO
HARVEY LAU
ANGELA W.Y. LEE**
LAWRENCE LEE
NANCY LEIGH
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WINN LEE
(NEW YORK)
FLORENCE LI
(NEW YORK)

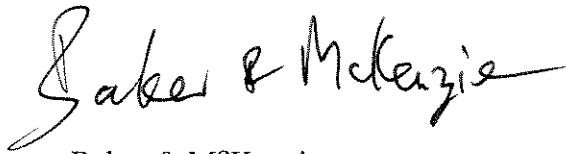
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(WASHINGTON, DC)

*Notary Public

**China-Appointed Attesting Officer

If you require any further information, please feel free to contact us. We would welcome any comments or questions from you and any member of the bills committee.

Yours faithfully,



Baker & McKenzie

Encl.

cc: Mr. Kazuhito Yamashita /Mr. Haruhiko Yamada, JT (by email)
Ms. Susie S.Y. Ho, J.P., Deputy Secretary for Health, Welfare & Food
Government Secretariat, 19/F., Murray Building, Garden Road, Hong Kong