



Note of Oral Submissions of Michael Thomas S.C. to LegCo Panel - 6 October 2005

I hope you all have our written submissions. I hope to summarise those arguments in making three broad points.

First, the problems with this bill do not concern our personal attitudes to smoking. There is freedom to smoke or not to smoke. It is as lawful to buy cigarettes as to supply them. And FS cheerfully pockets two billion dollars each year from tobacco taxes.

Clause 11 proposes to criminalise the use of particular words on a cigarette packet. At the foot of page 2, we have set out the text of the proposed new section 10(c) of the Ordinance. The debate is over how far legislation can affect the minds of those who choose to smoke who know –and anyhow the packet reminds them - that no cigarette is safe. The real question is this: would Clause 11 be a lawful, proportionate and effective piece of legislation?

Second, Clause 11 of this bill creates one major problem for Japan Tobacco Inc. It assumes that the word “mild” - in whatever context - is both descriptive and misleading. This would ban the brand name of the world’s second best selling cigarette MILD SEVEN - though ‘mild’ in that context is just part of the brand name - not a descriptor - not even part of the Chinese name.

Brand names help consumers to distinguish one brand from another. On the packet, it may be followed by words like ‘light’ or ‘ultra lights’ (what the trade calls ‘descriptors’). You will see the point at once from page 11 of our submission. The bill is obviously targeting use of descriptors, not brand names. Anyhow, our own research shows that hardly anyone in Hong Kong thinks ‘Mild’ when seen as part of ‘Mild Seven’ means less harm to health. So in that context, it can scarcely mislead.

To ban the use of a brand name would be a ‘first’ for Hong Kong. Not one of 40 countries where MILD SEVEN is sold has passed legislation like this to ban it.

And it would be a very bad ‘first’ - arguably unconstitutional and unlawful. Hong Kong has a raft of legal obligations to protect intellectual property rights. Yet by a side-wind, the enjoyment of rights of property would be lost without compensation. And that is unlawful, whether the loss is big or small.

And worse still, untold damage would be done to Hong Kong’s reputation as a beacon of free trade – the world’s freest and fairest economy. It would certainly give support to those, like the World Economic Forum, who claim that that reputation is no longer deserved.

Third, the clause makes little sense.

Whatever the harmful habits of some smokers, we have seen nothing from Health and Welfare to prove that descriptors on the whole do more harm than good. The Leg Co brief (quoted at page 3) is tentative.



“There is no scientific evidence indicating that products with these descriptors pose lesser health risks. (Well that’s quite neutral.) On the contrary, they may (I repeat may) give the false impression... (and so on).”

Hardly the proof of a real mischief.

But there is another side. For years now Hong Kong law has encouraged suppliers to use words like ‘low tar’ ‘mild’ and ‘lights’ for cigarettes with less than 9 milligrams of tar yield. Consumers who want to avoid higher tar are accustomed to look for such words. The trend is to lower permitted tar and nicotine levels. Industry has followed suit with products at lower levels still. The bill seems to reverse that policy. Even the word ‘low tar’ on a low tar product is to be banned.

Anyhow, if there is scope for misunderstanding, smokers should be given more information, not less. Public health education is the right way to tackle the problem, especially if aimed at young people. Modern parents must have their own ideas why the young take up smoking, or use much more harmful drugs. Is it weakly to follow fashion or peer pressure or an attraction to risk? Or is it a determined rejection of parental guidance, and a rebellious bid for freedom? It is expensive – and increasingly seen to be unsocial behaviour. Whatever explanations may come to mind, I would suggest that few would put it down to the use of these descriptors on cigarette packets.

To conclude –

You will not be bucking a worldwide trend if you reject Clause 11. The Framework Convention whose suggestions have been taken up by this bill puts the responsibility on each country to decide for itself what packaging or labelling might mislead, and whether it can be lawfully regulated in accordance with the law, as we point out at pages 7 to 9.

If you cannot bring yourselves to do the right thing and to reject Clause 11, at least don’t ban an established brand name. That would open up a can of worms that would keep lawyers busy for years. We have suggested a simple way out - a form of amendment at page 21 to permit the word ‘MILD’ where it is an integral part of an underlying brand name that has been continuously used in Hong Kong for a suitably long period.

That is not to favour one out of the many suppliers. It simply recognises the right to property in the goodwill of an established brand name. And it provides no loophole for others to abuse.

And finally, if you were convinced that something had to be done about the use of conventional descriptors, please consider our suggestion for an amendment to require the kind of notation that has been approved in Japan, Mexico and the USA. This would satisfy the WTO rule by being less trade restrictive than a ban of words familiar to consumers. We have suggested a suitable form of words at the bottom of page 21. You might want to suggest even stronger words, ‘these cigarettes are less harmful’ or ‘less dangerous’. That is a matter for you.