

**Bills Committee on
Smoking (Public Health) (Amendment) Bill 2005**

**Administration's response to the submission from Baker & McKenzie
on behalf of Japan Tobacco Inc.**

PURPOSE

This paper sets out the Administration's response to the submission from Baker & McKenzie acting on behalf of Japan Tobacco Inc.

BACKGROUND

2. In relation to the Smoking (Public Health) (Amendment) Bill 2005 (the Bill), Baker & McKenzie submitted to the Bills Committee that Clause 11 of the Bill, which proposes to prohibit the use of 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 harmful than others on either the packet or retail container of cigarettes, 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". The laws and conventions referred to by Baker & Mckenzie include the Basic Law, the Hong Kong Bill of Rights, WTO - Non-Discriminatory Principle, and obligations under Hong Kong – Japan Investment Promotion and Protection Agreements.

3. Baker & Mckenzie also submitted that it was an erroneous application of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) as a basis for the proposed amendment.

ADMINISTRATION'S RESPONSE

4. We have consulted the Department of Justice and the Intellectual Property Department on Baker & Mckenzie's submission. In view of the complexity of the legal issues involved, we are mindful of the risk that litigation may follow if Clause 11 is passed in the present form. This will undoubtedly impede the implementation of the relevant provisions. The process could also be costly and time-consuming. On balance, we believe that it is in the public interest to find an alternative means to satisfy the intended policy goal.

5. While we maintain the view that there is a need to retain the prohibition

against the use of misleading words in Clause 11 of the Bill, we propose to amend that Clause to the effect that the prohibition does not prevent the use of a trade mark containing any such misleading word on the packet or retail container **if** two conditions are met -

- (a) the trade mark has, as of the day on which the Amendment Ordinance is enacted, registered with the Trade Mark Registry under the Trade Marks Ordinance (TMO) (Cap. 559); or if the trade mark has not been registered under the TMO, its owner is able to prove that the mark is used in Hong Kong in relation to the sale of / the sale by retail of cigarettes on the day immediately before the enactment of the Ordinance; and
- (b) the packet or retail container bears a notation in the prescribed form and manner.

The purpose of the notation is to bring to the smokers' attention that the use of misleading words does not in any way indicate that cigarettes contained therein are less harmful to health than others.

6. We believe that the notation approach would help smokers beware from having any false impression that a particular cigarette brand is less harmful than other brands. We hope that in the course of time and in conjunction with our other anti-smoking efforts and measures, we could adopt a step by step approach to meet our obligations under FCTC.

7. With regard to Baker & McKenzie's allegation that there is an erroneous application of the application of FCTC as a basis for the proposed amendment, we wish to draw Members' attention to the "Model Legislation for Tobacco Control: A Policy Development and Legislative Drafting Manual" (the Manual), which was published by the International Union for Health Promotion and Education (IUHPE).

8. According to IUHPE, the Manual was developed after studying tobacco control laws and regulations from countries and regions of the world. It then went through a rigorous review process by a diverse group of tobacco control experts with legal, policy, scientific and programming experience to ensure its broad applicability for countries ready for tobacco control legislation¹. It should be further noted that the Framework Convention Allegiance also recommended the Manual for tobacco control efforts.

¹ Information extracted from the following website - <http://fctc.org/modelguide>

9. In the first part of the Manual, it is stated that “Following the Manual should ensure that national tobacco control legislation is FCTC compliant.” Then in the second part, under article 26 of the recommended legislative text, it is provided that:

“26 Prohibition on deceptive or misleading information.

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

10. Furthermore, Members may wish to note that the Australian Competition and Consumer Commission (ACCC) had obtained court-enforceable undertakings from Imperial Tobacco Australia Limited on 7 November 2005 to remove its “light”, “mild” and similar descriptors from its products. The British American Tobacco Australia Limited (BAT) and Philip Morris Limited had already taken the same move in May 2005.

TRADE CONSULTATION

11. We have informed representatives of the tobacco industry of our latest position. Some indicated that they are generally content with the proposed arrangement. Others said that they welcomed this in principle, but would reserve their final position until details of the notation approach is released.

FOLLOW UP ACTIONS

12. The Bills Committee is invited to note the Administration’s response. We will work with the Law Draftsman on the appropriate Committee Stage Amendment (CSA) for Clause 11 and will revert to this Committee in due course.

Health, Welfare and Food Bureau
January 2006