

JT International South Africa (Pty) Limited

SUBMISSION TO THE SELECT COMMITTEE ON SOCIAL SERVICES ON THE TOBACCO PRODUCTS CONTROL AMENDMENT BILL [B24B-2006] ("the Bill")

1. Introduction

1.1. The National Council of Province's Select Committee on Social Services ("**the Select Committee**") has called for written submissions on the Bill. The Bill, which proposes amendments to a number of provisions in the Tobacco Products Control Act, 1993 ("**the Act**"), was passed by the National Assembly on 27 March 2007.

1.2. JT International South Africa (Pty) Limited ("**JTI**") is a South African registered company and an operating division of Japan Tobacco Inc. ("**JT**"), handling the international production, and sales of the group's cigarette brands. We are the third largest international tobacco company, manufacturing three of the world's top five cigarette brands. In South Africa we are the second largest tobacco company with a 6% market share.

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1.3. JTI recognises that, despite cigarettes being a legal product, there are real risks posed by smoking. Accordingly, we believe that the industry should be appropriately regulated. It is for this reason that we accept and support the role of the Select Committee in ensuring that draft legislation is carefully considered and that those who have interest directly and/or indirectly on the proposed provisions of the Tobacco Products Control Amendment Bill, No. 24 of 2006 ("**the Bill**") are given an opportunity to make such submissions to the Select Committee. In principle, JTI has no objection to many of the provisions contained in the Bill because we support reasonable, practical and enforceable regulation of all tobacco products.

1.4. JTI made both written and oral submissions on a previous version of the Bill to the Parliamentary Portfolio Committee on Health ("**the Portfolio Committee**") in January 2007.

- 1.5. The Bill raises particular concerns regarding the disclosure of trade secrets and other confidential proprietary information. Due to the significance of these concerns to JTI's business, it is of the utmost importance that they are highlighted before, and considered by, the Select Committee.
- 1.6. During JTI's oral submission to the Portfolio Committee on 31 January 2007, it became clear that certain members of the Portfolio Committee were of the view that JTI's concerns about the disclosure of trade secrets and confidential proprietary information were without substance because the Promotion of Access to Information Act, 2000 ("**PAIA**") prohibited this disclosure. JTI subsequently obtained legal advice, a copy of which is attached as annexure "**A**", to the effect that PAIA does not in fact prohibit the disclosure of trade secrets and other confidential proprietary information.
- 1.7. The concern relating to the potential disclosure of trade secrets and proprietary confidential information therefore remains. In light of the misapprehension that certain members of the Portfolio Committee laboured under and the importance of the non-disclosure of trade secret and proprietary confidential information, it is important for the Standing Committee to give full consideration to JTI's concerns in this regard. These submissions are accordingly confined to the clauses in the Bill which give rise to JTI's concerns relating to the disclosure of trade secrets and other confidential proprietary information.

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2. Clause 3A: Standards for manufacturing and export of tobacco products

- 2.1. Clause 3A(2) obliges manufacturers to provide information "*about the product*" to the Minister of Health ("**Minister**") "*and the public*" as may be prescribed.
- 2.2. JTI considers that there is a fundamental omission in respect of clause 3A(2) as currently drafted. The clause provides for tobacco manufacturers to be compelled to disclose prescribed information to the Minister and the public without provision being made for the protection of trade secrets, proprietary and confidential information.
- 2.3. To the extent that "*information about the product*" includes information about the product ingredients, it will include trade secret information and

other confidential proprietary information which is protected by national and international laws. Trade secrets, in particular, are fundamental to one's competitive position in the manufacturing industry, and have been specifically recognised by various courts in the European Union and the United States of America. For example, trade secret protection is referenced in Article 6 of EU Directive 2001/37/EC and the EU general principles of law. Indeed, state legislation in the USA providing for ingredient list disclosure without trade secret protection, has been overturned by the courts for breach of property rights. In short, trade secret protection lies at the heart of intellectual property rights and JTI considers this to be of fundamental importance to its business.

2.4. In this regard:

2.4.1. neither JTI, nor any other company, should be obliged to submit trade secrets and other confidential information to the Minister without the appropriate legal protections to preserve their confidential and trade secret nature. The proprietary secrecy to JTI of the information lies at the heart of the property right, and should not be violated by disclosure of any sort;

2.4.2. if disclosure is made to the Minister, the Minister should be under a clear legal obligation: (a) to keep confidential all information designated as such by the company; and (b) to refuse disclosure to anyone of that information without the express consent of the company.

2.5. For these reasons, it is important that the Bill contains provisions safeguarding the confidentiality of the information that is disclosed to the Minister under the Bill. These should at least include provisions to the following effect:

2.5.1. at the time of submitting information to the Minister, the person submitting the information may assert a confidentiality claim on the basis that it is a trade secret or otherwise amounts to business sensitive information;

2.5.2. the Minister and the Department are obliged to respect such a claim of confidentiality, unless the claimant waives its confidentiality claim or a court orders that the information is not in fact confidential; and

2.5.3. a failure to comply with this obligation of confidentiality amounts to a criminal offence.

2.6. It follows from what is stated above that the disclosure of information to "*the public*" as contemplated in clause 3A(2) should not include trade secrets and other confidential proprietary information.

2.7. Clause 6: Regulations

2.7.1. Clause 6 proposes that the Minister may make regulations regarding information that a manufacturer must submit to the Minister and the public in respect of four specified categories (research conducted by the manufacturer, quantities of tobacco product manufactured, marketing expenditure and product information).

2.7.2. For the reasons discussed above, clause 6(1)(f) should not provide for the disclosure of a wide array of information to "*the public*". It is particularly problematic to require public disclosure of the confidential proprietary and trade secret information contemplated in this clause. This information relates to a manufacturer's business methods (much of which would amount to trade secrets), including research conducted by the manufacturer, manufacturing quantities, market expenditure and information relating to product composition. Information relating to product composition and ingredients is particularly sensitive for the reasons set out above.

2.7.3. JTI will, and currently does, provide product information in many jurisdictions and can disclose product information in such a way as to allow public dissemination while protecting confidential, proprietary and trade secret information. The words "*and to the public*" should therefore be deleted in clause 6(1)(f).

3. Conclusion

- 3.1. As discussed above, JTI's primary concern with the Bill is that, as currently drafted, it creates the risk of the disclosure of trade secrets and other confidential proprietary information which is central to JTI's business both in South Africa and internationally.
- 3.2. A few amendments to the Bill will remove this concern. JTI therefore submits that clause 3A(2) of the Bill be amended so that disclosure of information to the public should not include trade secrets and other confidential proprietary information, and the Minister and the Department are obliged to respect the confidentiality of any confidential information submitted to the Minister by manufacturers. JTI further suggests that clause 6(1)(f) be amended so that the Minister may make regulations regarding information to be submitted to the Minister alone (i.e. the reference to the public in clause 6(1)(f) should be removed).
- 3.3. JTI thanks the Select Committee for the opportunity to comment on the Bill, and trusts that these comments will be of assistance to the Select Committee when considering the Bill.

Yours faithfully

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