

RESEARCH PAPER

“Conclusions about exposure to ETS and health that will be unhelpful to us”\*: How the tobacco industry attempted to delay and discredit the 1997 Australian National Health and Medical Research Council report on passive smoking

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Background: Major reviews of the health effects of passive smoking have been subjected to tobacco industry campaigns to refute the scientific evidence. Following the 1992 US Environmental Protection Agency review, the Australian National Health and Medical Research Council (NHMRC) initiated a review of the health effects of passive smoking. At the time of this review, evidence that environmental tobacco smoke causes disease was being increasingly accepted in courts of law and voluntary adoption of smoking restrictions was rapidly growing.

Objective: To demonstrate how the tobacco industry attempted to delay and discredit the publication of a report on passive smoking that the tobacco industry anticipated to contain recommendations that would be unfavourable to their business.

Methods: A search of tobacco industry documents on the Master Settlement Agreement websites was conducted using the terms and acronyms representative of the NHMRC review.

Results: The tobacco industry sought to impede the progress of the NHMRC Working Party by launching an intensive campaign to delay and discredit the report. The main strategies used were attempts to criticise the science, extensive use of Freedom of Information provisions to monitor all activity of the group, legal challenges, ad hominem attacks on the credibility of the Working Party members, rallying support from industry allies, and influencing public opinion through the media.

Conclusions: The Australian tobacco industry deliberately impeded the NHMRC Working Party’s progress and successfully prevented the publication of the report’s recommendations. The tobacco industry’s motivation and capacity to disrupt the advancement of scientific knowledge and policy in tobacco control should be recognised and anticipated.

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The emergence of environmental tobacco smoke (ETS) as a significant platform of tobacco control has been of major concern to the tobacco industry since the mid 1970s because of its potential to legitimise smoking as a public health problem, create grounds for litigation, and justify smoking restrictions. An increase in smoking restrictions in workplaces and public places poses a commercial threat to the industry because of the consequent reduction in sales volume when smoking opportunities are constrained. The tobacco industry thus has had strong motivation to prevent, discredit, or otherwise subvert the acceptance of evidence that passive smoking can cause disease. In the 1980s, convincing evidence that passive smoking causes disease began to mount. Major reviews of this evidence became a target for industry-wide discrediting campaigns, despite having the knowledge from their own research that sidestream smoke can be harmful.

Two landmark reports, published in the USA in 1986, concluded that second hand smoke causes disease and, in 1992, the US Environmental Protection Agency (EPA) classified ETS as a carcinogen which led to laws restricting smoking indoors. In Australia, the National Health and Medical Research Council (NHMRC) published a report on

the effects of passive smoking on health in 1986 and a working party was formed in June 1993 to update this report. This paper reviews the tobacco industry’s efforts to stymie the progress of the NHMRC Working Party and its report.

By the time the Working Party was established, acceptance of the evidence that ETS causes disease had increased dramatically, as had the voluntary introduction of smoking restrictions in Australian workplaces and many homes. In 1991, the Federal Court of Australia judged that the Tobacco Institute of Australia (TIA) had engaged in misleading advertising because they said that “there is little evidence and nothing that proves that passive smoking is harmful to health”. In the late 1980s and early 1990s, the public service and many large corporations introduced smoke-free indoor work environments. These decisions were prompted by a series of successful claims for compensation by employees against employers for discomfort or disease caused by exposure to ETS smoke in the workplace. Globally, the tobacco industry began to ratchet up its efforts to attack the science of ETS, promote “courtesy” as a solution to accommodating both smokers and non-smokers, and later,

Abbreviations: AHA, Australian Hotels Association; EPA, Environmental Protection Authority; ETS, environmental tobacco smoke; IWG, Independent Working Group; MSA, Master Settlement Agreement; NHMRC, National Health and Medical Research Council; PMA, Philip Morris Australia; TIA, Tobacco Institute of Australia

\*Staunton D. [Letter to H. Goldberg, Managing Director, Philip Morris Australia]. Tobacco Institute of Australia. 16 March 1994. Philip Morris. Bates No. 2504200226/0229. http://legacy.library.ucsf.edu/tid/emj29e00.

promote air conditioning solutions as alternatives to smoke-free workplaces.<sup>14 15</sup>

## METHODS

This analysis is based on document searches conducted on the Master Settlement Agreement (MSA) websites. Between May 2001 and December 2002 industry documents concerning Australia were collected. From this set, 1979 documents were identified as pertaining to ETS and these were analysed for relevance to the NHMRC review of the 1986 passive smoking report. Further systematic keyword searches were conducted on the MSA sites using terms representative of the NHMRC. The Philip Morris site contained the most coverage and 826 additional documents were collected in June 2002. More details about the search strategy can be found at: <http://tobacco.health.usyd.edu.au/site/gateway/docs/research.htm#search>.

## RESULTS

### Tobacco industry concern

As early as 1976, Philip Morris Australia (PMA) documented their concerns about the increasing focus on the health effects of passive smoking and potential government legislation or restrictions to ban smoking in public places. A confidential document identified two main problems as being: "a) the threat that smoking could become anti-social and unfashionable; b) passive smoking...In Australia, as in other developed countries, the main thrust of the anti-smoking movement has veered away from strict health matters to those of a social nature."<sup>16</sup>

Philip Morris documents show that there was concern about the anticipated NHMRC report findings, the expectation being that the report would reach similar conclusions to the 1992 US EPA report. The TIA's chief executive officer, Donna Staunton, advised PMA's CEO, Henry Goldberg: "I believe that the NH&MRC report which is due to be published later this year will reach conclusions about exposure to ETS and health which will be unhelpful to us. The NH&MRC's revised report will no doubt tend to reflect the conclusions reached in the EPA report. The TIA will continue to manage this matter."<sup>17</sup> On the publication of the draft report, a PMA staffer concluded: "The report is largely unfavourable and will generate a significant amount of media interest in Australia."<sup>18</sup>

### Delay progress

The tobacco industry has often sought to thwart progress in tobacco control by using delaying strategies. Under the heading "Past strategy and tactics" a 1976 document stated:

"The fundamental policy of the Industry up until 1974 was to buy time and avoid where possible confrontation with Governments or anti-smoking organizations on strictly medical arguments. The basic strategies were: – To encourage those Governments known to be lukewarm about uniform repressive legislation, which in Australia is essential to the most important aspects of anti-smoking activity, to refrain from agreeing to such legislation. ...The Industry has achieved a high degree of access to government on the relevant [issues] and a considerable ability to delay and/or amend proposed restrictive legislation and regulation...We aim to preserve this situation."<sup>16</sup> (emphasis in original).

Nearly 20 years after that analysis, the Australian tobacco industry used this buying time tactic to slow down the progress of the NHMRC passive smoking report. In large part because of industry legal challenges, the Working Party took

29 months to publish its draft report (June 1993 to November 1995) and a further two years (November 1995 to November 1997) to finalise the report because of a legal challenge by the TIA and the three Australian tobacco companies against the NHMRC in the Federal Court of Australia regarding procedural fairness.<sup>19</sup> This litigation was not only successful in delaying publication of a final report, but also prevented the NHMRC from acting on the draft report recommendations. This outcome is discussed in a later section.

Soon after the announcement of the formation of the Working Party, the TIA and its solicitors Clayton Utz began to question the Working Party's terms of reference.<sup>20-23</sup> This exercise succeeded in requiring the NHMRC to reframe its terms of reference to broaden the criteria for admissible evidence beyond epidemiological reports.

Within three months of the public press notice being placed by the NHMRC announcing the establishment of a working party, the TIA began using the provisions of the Freedom of Information Act to request documents<sup>24</sup> on the Working Party's deliberations.<sup>25 26</sup>

Initially it requested relevant documents going back to as far as 1936<sup>27</sup> and at the same time as the government health department sought to narrow the scope of this outlandish request, the TIA chastised the NHMRC for being tardy in responding to their requests by suggesting the degree of consultation did not meet a high standard: "...the degree of consultation and examination of submissions must be seen to meet a high standard. This would include reasonably prompt responses to Freedom of Information requests."<sup>20</sup>

The limited resources of the NHMRC were substantially diverted as a result of the tobacco industry requests and correspondence, slowing the wheels of the bureaucracy considerably.

### Discredit report

Tobacco industry strategies used to discredit scientific findings that are unfavourable to the industry's commercial interests are well documented.<sup>2 28-30</sup> The Australian tobacco industry sought to both attack the evidence on ETS and use ad hominem attacks on members of the Working Party.

In addition to commissioning its international consultants to produce submissions to the Working Party (table 1), a key strategy was for the TIA to "set up an Independent Working Party" (also referred to as the Independent Working Group or IWG) that would produce a parallel report addressing the same terms of reference as the NHMRC Working Party which

**Table 1** Parties who made submissions to the NHMRC health effects of passive smoking Working Party supporting tobacco industry position<sup>61</sup>

Dr G Flamm	Flamm Associates, Consulting in Toxicology and Food & Drug Regulations, Reston, VA
Dr GB Gori	Director, The Health Policy Centre, Bethesda, Maryland
HBI	Health Buildings International P/L
Dr Maxwell Layard	Layard Associates, Statistical Consultants, California
Dr Julian Lee	Senior Thoracic Physician, Royal Prince Alfred Hospital Medical Centre, NSW
Mr J Mostyn	Executive Director, Tobacco Institute of Australia Ltd., Sydney
Mr RJ Mulcahy	National Executive Director, Australian Hotels Association, Parkes, ACT
Professor RL Tweedie	Chair, Department of Statistics, Colorado State University, Fort Collins Colorado
Philip Witorsch, Raphael Witorsch	Dept of Medicine, George Washington University Medical Centre, Washington DC; Medical College of Virginia, Richmond, Virginia

it planned to release one month before the scheduled release of the NHMRC Working Party report. It is notable that the timeframe to achieve this task was only six months. The benefits of this were cited in a strategic document as: "a. a de facto extension of time for placing submissions to NH&MRC; b. placing pressure on NH&MRC's Joint Working Party to come up with a 'balanced' view; and c. it will place considerable pressure on NH&MRC if the review of the Independent Working Party and Joint Working Party are substantially different."<sup>26</sup>

The TIA engaged Dr Julian Lee, a Sydney respiratory physician, who had previously appeared as an expert witness in a legal case for Burswood Casino arguing that ETS did not cause harm to health.<sup>31</sup> Perhaps anticipating that Lee might one day be subpoenaed to provide documents demonstrating evidence that his relationship with the TIA was entirely independent, the TIA's Donna Staunton wrote to him:

"The Tobacco Institute shall have no editorial rights with respect to the report. To this end, we do not wish to see drafts of the report prepared by the IWG or have any input whatsoever into the preparation of the report ... The Tobacco Institute proposes to establish a fund with Price Waterhouse to enable fees with respect to the preparation of the report to be paid progressively."<sup>32</sup>

It was arranged that the report be published by University of NSW Press<sup>33</sup> and that all media associated with the release of the report, while organised by the TIA,<sup>34</sup> be presented as originating from "An eminent group of Australian physicians, statisticians and scientists...[who]...conducted an objective evaluation...".<sup>35</sup> The TIA represented themselves in the media as a third party in relation to the IWG and the report and made reference to "Dr Lee's group".<sup>18</sup>

A 1988 account of an inter-company meeting in London to plan recruitment of international consultants to attack the science of ETS described the process of expert witness selection whereby "the consultants should, ideally, be scientists who have no previous association with tobacco companies and who have no previous record on the primary issues."<sup>13</sup> Of nine members of the TIA's Working Party, only one had any track record in epidemiology or tobacco-related research,<sup>36</sup> an observation also made of a 1996 European industry sponsored "expert" committee on ETS.<sup>37</sup>

Despite the apparent independence of the IWG, the TIA assured the three tobacco companies that they should not be concerned about the apparent lack of control over the IWG: "If the suggestion that we set up an Independent Working Party is accepted, we must then recognise that we would have no control over the content of their final report. However, as Glen Eggleton [from Clayton Utz] has pointed out, all of the experts that I suggest be included in the Independent Working Party are known to us, as are their views."<sup>26</sup> (emphasis added).

A frequent argument that has been used by the tobacco industry in regard to the health effects of direct smoking is that research is inconclusive because there is no proof of causality and interpretation of findings varies among scientists.<sup>38</sup> The TIA's 34 page submission made to the NHMRC Working Party on the health effects of passive smoking drew heavily on this argument. It comprised mostly opinions and references to many studies that had not been peer reviewed. Gregory Fowler of PM Australia summarised the submission in a letter as follows:

"The central theme to the Submission is that the epidemiologic data available on the possible relationship between ETS and disease, at best, provide a basis for

inference and judgment, but do not resolve the scientific issues, including cause and effect. The TIA Submission insists that divergence of opinion in the scientific and medical community be reflected in the draft report."<sup>39</sup>

### Ad hominem attacks

Concern about the potential for bias and conflict of interest among Working Party members was expressed by the TIA from the beginning.<sup>20</sup> In response to tobacco industry requests, members of the Working Party were asked by the NHMRC to disclose any interest in matters being considered by the working committee.<sup>40</sup> The TIA continued to maintain that some of the Working Party members were biased and had "socially or politically correct" motives that would preclude them completing an objective review.<sup>41</sup> In the TIA submission to NHMRC commenting on the Working Party's draft report, a chapter was devoted to the "Conduct of members of the working party". In this chapter, a case was made for four of the Working Party members, including the chair, to be removed: "unfit to continue as members of the Working Party ... The inadequacies of the draft report are so great, and its science is so poor,...the Working Party consciously decided to depart from the accepted scientific standards in order to further their agenda...it is difficult to avoid the conclusion that it [the report] is based largely on anti-tobacco sentiment and politically correct view of life. ...members of the Working Party have allowed their anti-tobacco views to overwhelm their scientific objectivity in order to prepare a report to justify their agenda of eliminating exposure to ETS." One member was accused of using "his membership of the Working Party as an opportunity to further his career as an anti-tobacco advocate and to pursue his anti-tobacco goals". Similar charges were made against a number of the members of the Working Party.<sup>42</sup>

The idea of challenging the credibility of the Working Party was documented by the TIA in their strategy documents. In a document authored by the TIA's Donna Staunton, she said: "The proposed legal challenge [in an earlier strategy paper] to the credit of NH&MRC's Joint Working Party on the grounds of bias was not pursued. I believe considerations should be given to raising this issue in the media context once the draft report has been published or even later when its final report is published."<sup>26</sup>

### Prevent action on recommendations

The industry realised that they could not stop publication of the results of the NHMRC draft report,<sup>26</sup> but believed that "it may be possible to prevent the Council accepting all of the working group's recommendations",<sup>43</sup> a hope that came to fruition.<sup>44</sup>

Preventing adoption of the recommendations was initially attempted through efforts to influence public opinion in the media and finally through a legal challenge. An excerpt from a Philip Morris International "World Strategy Plan" declares a strategic goal to "Prevent the recommendations from becoming legislation or regulation, encouraging a public debate against the recommendations so as to render them politically unworkable".<sup>45</sup> The primary strategy recommended for achieving this was through media briefings and releases. The release of the NHMRC draft report on 23 November 1995 drew significant media attention around the country and the tobacco industry responded with three main arguments: that the scientific evidence was flawed, there would be a community backlash, and that business would be damaged.<sup>46-58</sup>

The tobacco industry encouraged other industry groups to support their arguments: "In addition to responding to the draft report itself, the industry is continuing to work with

relevant interest groups building opposition to calls for public place smoking bans.<sup>43</sup> The Australian Hotels Association (AHA) was one of these groups and was particularly vocal about the economic effects on their industry. For example, Richard Mulcahy, executive director of the AHA and previously CEO of the TIA, said in the *Canberra Times* that “We have seen the effect of blanket bans being voluntarily imposed by hotels...and the results have been extremely damaging to business”.<sup>47</sup> The hotel industry claimed that “smoking bans in pubs and clubs would seriously hit profits and jobs”.<sup>49</sup> The AHA’s opposition is not surprising given its known affiliation with the tobacco industry.<sup>15</sup> The Crown Casino also expressed opposition to the recommendations in Melbourne’s newspaper, *The Age*.<sup>52</sup>

It was a legal challenge that caused the recommendations to be omitted from the final report. In July 1996, the TIA, Philip Morris (Australia) Ltd, and Rothmans of Pall Mall (Australia) Ltd jointly commenced litigation in the Federal Court of Australia. They claimed that the NHMRC had failed to perform its statutory duties of public consultation which would require the NHMRC to consider any submissions received. The court found that the procedures had not been followed because papers not published in the peer reviewed scientific press had been excluded and the public was not informed of this exclusion. Judgment was handed down against the NHMRC in December 1996.<sup>59</sup> The tobacco industry took full advantage of this decision to discredit the report. For example, the TIA said in a news story entitled “Fed: Judge slams tobacco research” that “The draft report stands condemned by the court’s findings...It is inappropriate for regulatory bodies even to contemplate restrictions based on the discredited draft report.”<sup>60</sup> Yet the judge made it clear in his judgment that: “My concern is not with the science of the Draft Report nor with the public policy recommendations made. It is with the legality of the procedures adopted by, and of the decision making process of, the NH&MRC in this particular matter.”<sup>59</sup> In the end, the court prevented the recommendations being adopted by ordering that the NHMRC be restrained from further acting on the draft regulatory recommendations and proposed guidelines.<sup>44</sup>

## DISCUSSION

Internal documents show that the tobacco industry in Australia was extremely concerned about the ETS issue and had particular concerns about the likely outcome of the NHMRC review of the health effects of passive smoking. The extent of this concern was highlighted by the intensity of their involvement in the Working Party review. The documents indicate that the tobacco industry anticipated that the findings and recommendations of the NHMRC review would be unfavourable to their commercial interests and show how they attempted to impede the progress of the Working Party by launching an intensive campaign to delay and discredit the report.

The main strategies used were attempts to criticise the science, extensive use of Freedom of Information provisions, legal challenges, questioning the impartiality of the Working Party members, rallying support from industry allies, and influencing public opinion through the media. Advocates in other countries, especially developing countries, can benefit from knowing about these strategies, and future attempts by the tobacco industry to interfere with the progress of ETS science and policy can be anticipated and countered.

The US EPA report<sup>9</sup> which concluded that ETS causes lung cancer in adults and respiratory problems in children was seen by tobacco industry executives in Australia as an indication of the likely findings of the NHMRC report. In the USA, the tobacco industry submitted a selective and

## What this paper adds

Evidence of the tobacco industry’s high level of concern over environmental tobacco smoke has been exposed by document research. Industry strategies to refute science by participating in scientific reviews, funding research, and using consultants have also been reported in the literature.

This research provides a case study that shows the extent of the tobacco industry’s capacity and motivation to disrupt the work of a scientific review. It also describes strategies that were used to delay the progress of the review and discredit the report.

distorted evaluation of the scientific evidence in favour of their position during public comment on the draft EPA report.<sup>3</sup> A similar, but more elaborate, strategy was used in Australia with the formation by the TIA of an “independent” working party which was promoted as impartial and able to provide a balanced view.

Legal challenges and Freedom of Information requests were the most damaging strategies used by the industry. A legal challenge prevented action on the report recommendations<sup>59</sup> and gave the tobacco industry an opportunity to misrepresent the court decision in the press. The Working Party and the NHMRC were faced with an unusually large task in responding to the objections and requests of the tobacco industry, which consumed a large part of their limited resources. The NHMRC was swamped by correspondence including onerous Freedom of Information requests, objections to the Working Party composition, claims of bias, and unreasonable criticism of their responsiveness to requests.

The internal documents provide evidence that the tobacco industry deliberately impeded the NHMRC Working Party’s progress and successfully prevented the adoption of the report recommendations. This case study shows the great extent of the tobacco industry’s motivation and capacity to disrupt the advancement of scientific knowledge and policy in tobacco control. It also adds to the mounting evidence of strategies pursued by the industry to counter ETS science and policy initiatives worldwide.<sup>2-4 14 15 19 28</sup>

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