



Australian Government
Department of Health

Guidance for Public Officials on Interacting with the Tobacco Industry

This page is intentionally blank

Executive Summary

Tobacco use remains a leading cause of preventable death and disability in Australia and was estimated to kill almost 21,000 Australians in 2015. Up to two-thirds of deaths in current smokers can be attributed to smoking and current smokers are estimated to die an average of 10 years earlier than non-smokers.

There is a well-established body of evidence that demonstrates that the tobacco industry has operated for decades with the intention of subverting the role of governments in developing and implementing public health policies to combat the tobacco epidemic.

Australia is a Party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), which aims to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.

Article 5.3 of the WHO FCTC requires public officials to protect public health policies in relation to tobacco control *“from commercial and other vested interests of the tobacco industry”*.

Australia’s obligations under Article 5.3 extend to new and emerging products, such as e-cigarettes and heated tobacco products, due to the increasing integration between their manufacturers and the tobacco industry.

This Guide outlines the legal obligations placed on public agencies and officials by the WHO FCTC. It should be viewed as a part of a comprehensive strategy of tobacco control.

Introduction

Article 5.3 of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) requires public officials to protect public health policies in relation to tobacco control “*from commercial and other vested interests of the tobacco industry*”. This Guide outlines the legal obligations placed on public agencies and officials by the WHO FCTC and as such should be viewed as a part of a comprehensive strategy of tobacco control.

The purpose of the Guide is to provide guidance to agencies and public officials on the implementation of Australia’s obligations under Article 5.3 of the FCTC. It is intended as a framework for best practice implementation of these obligations. The Guide is not intended to replace legislative requirements and regulatory frameworks and policies. This includes Government licensing or accreditation programs that manage risk on the Government’s behalf.

This Guidance also is not intended to affect the legal obligations of agencies and public officials, for example, to maintain the secrecy and confidentiality of information or to ensure privacy, nor is it intended to prevent legitimate and necessary engagement with the tobacco industry for the purposes of effectively regulating the tobacco industry, tobacco products and new or emerging products such as e-cigarettes and heated tobacco products.

Interactions with the tobacco industry

The tobacco industry should not be in a position to influence the implementation of tobacco control measures and policies.

Consultation with the tobacco industry should be limited to what is necessary for public officials or agencies to enact effective tobacco control measures. This includes the development of law to enact policy that directly regulates the tobacco industry and tobacco products.

Does this Guide apply to you?

This Guidance is designed to help public officials, other government employees and people acting on their behalf to deliver tobacco control policies in line with Australia’s legal obligations as a Party to the WHO FCTC.

For the purposes of this Guidance, you are a **public official** if:

- You are an official, representative or employee in a Commonwealth government agency, body or entity, for example:
 - a Member of Parliament or their staff
 - an ongoing or non-ongoing Australian Public Service (APS) officer
 - an employee of a statutory authority
 - a member of the Australian Defence Force
 - a posted officer representing Australia overseas
- You are acting on behalf of any branch or level of government, including as:
 - a contractor or consultant

Agencies should consider incorporating this Guidance into staff induction materials.

Background

Impact of tobacco use on public health

The Australian Government, together with state and territory Governments, is committed to reducing the prevalence of tobacco smoking and its associated health, social and economic costs, and the inequalities it causes. Tobacco use remains a leading cause of preventable death and disability in Australia and was estimated to kill almost 21,000 Australians in 2015.¹ The most recent available estimates also show that the social and economic costs of smoking (including health costs) in Australia were \$136.9 billion in 2015-16.²

There is no safe level of tobacco consumption. Tobacco products are highly addictive and dangerous to health, with some tobacco products containing over 7000 chemicals, at least 69 of which are known to cause cancer.³ Up to two-thirds of deaths in current smokers can be attributed to smoking and current smokers are estimated to die an average of 10 years earlier than non-smokers.⁴

By contrast, the aim of the tobacco industry around the world is to increase the amount of tobacco that people use, by dissuading cessation by existing smokers and encouraging new smokers (including young people). Consistent with this aim, a well-established body of evidence has demonstrated that the tobacco industry has operated for decades with the intention of subverting the role of governments in developing and implementing public health policies to combat the tobacco epidemic.⁵ The tobacco industry also tends to be well-funded and well-organised in this regard, and is able to exercise significant lobbying power and influence.

Article 5.3 of the WHO FCTC

Australia is a Party to the WHO FCTC, which aims to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.

¹ Australian Institute of Health and Welfare 2019. Australian Burden of Disease Study: impact and causes of illness and death in Australia 2015. Australian Burden of Disease Study. Canberra: AIHW.

² Identifying the social costs of tobacco use to Australia in 2015/16, National Drug Research Institute, May 2019.

³ U.S. Department of Health and Human Services, The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General, 2014; U.S. Department of Health and Human Services, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General; National Toxicology Program, Report on Carcinogens, Thirteenth Edition, U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, 2014.

⁴ Banks et.al. Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence. *BMC Medicine*, 2015. Available at: <http://www.biomedcentral.com/1741-7015/13/38>

⁵ For example, see: Savell E, Gilmore A and Fooks, G. How Does the Tobacco Industry Attempt to Influence Marketing Regulations? A Systematic Review. *PLoS*. 2014. Available at: <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0087389>

Under the FCTC, Australia must adopt and implement effective measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

The FCTC also obliges Australia to take steps to protect its tobacco control policy setting and implementation from interference from the tobacco industry and its interests. This obligation comes from Article 5.3 of the FCTC, which states:

“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”

The Australian Government and the tobacco industry are pursuing conflicting goals – there is a fundamental and irreconcilable conflict between the tobacco industry’s interests and the Government’s public health policy interests.⁶ For these reasons, and in line with the Australian Government’s declaration to the Secretary General of the United Nations, public officials should interact with the tobacco industry only when and to the extent strictly necessary to achieve effective regulation and policy development.

To help Parties to the FCTC in interpreting and meeting their legal obligations under Article 5.3, the WHO has published ‘Guidelines for Implementation’ of Article 5.3. This publication states that there is a need for Parties to ensure that the tobacco industry is prevented from influencing tobacco control initiatives.

The Guidelines contain the following Guiding Principles:

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.

Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.

Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.

Principle 4: Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses.

Inclusion of new and emerging products in Article 5.3 obligations

In recent years, there has been increasing integration between the tobacco industry and manufacturers of other products, such as e-cigarettes and heated tobacco products.

Australia supports the decision of the Sixth Conference of the Parties to the WHO FCTC, which invited parties to consider taking measures to: *“protect tobacco-control activities from all commercial and other vested interests related to ENDS/ENNDS [ie*

⁶ WHO Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, Principle 1, p.2: *‘There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests’.*

e-cigarettes or electronic nicotine delivery systems/electronic non-nicotine delivery systems], *including interests of the tobacco industry*".⁷

It is consistent with the requirements of Article 5.3 for Australia to extend the obligation to protect tobacco control policies from commercial and other vested interests of the tobacco industry to new and emerging products, such as e-cigarettes and heated tobacco products.

What constitutes 'public health policy' in relation to tobacco control?

At its simplest, any general tobacco control policy or program, including compliance activities and other activities associated with the regulation of the tobacco industry, constitute a public health policy in relation to tobacco control if it fulfils the aim of improving the health of the population by reducing tobacco prevalence.

Such tobacco control policies and programs could include:

- strategies, regulation or policies to reduce tobacco supply and demand
- strategies, regulation or policies to eliminate or reduce consumption of tobacco products
- strategies, regulation or policies to eliminate or reduce exposure to tobacco smoke
- strategies, regulation or policies relating to consumer law and competition policies
- taxation, excise and price programs
- trade facilitation
- retail and other licensing arrangements
- law enforcement strategies and activities for the detection, interception and reduction of illicit tobacco

Limiting interactions with the tobacco industry

Agencies and officials must note the position of the Australian Government in relation to interactions with the tobacco industry.

On 5 January 2015 via a communication to the Secretary General of the United Nations, the Australian Government declared its view that the FCTC "*...does not recognise any right to non-discriminatory treatment of the tobacco industry*". The Australian Government also declared its understanding that it "*...should interact with the tobacco industry only when and to the extent strictly necessary to enable [it] to effectively regulate the tobacco industry and tobacco products, and should ensure that any such interactions are conducted transparently*".⁸

⁷ Conference of the Parties to the WHO Framework Convention on Tobacco Control. Decision: FCTC/COP6(9), p.2. Available at [http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6\(9\)-en.pdf](http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6(9)-en.pdf)

⁸ United Nations Treaty Collection. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en

The tobacco industry should not be in a position to influence the implementation of tobacco control measures and policies.

Consultation with the tobacco industry should be limited to what is necessary for public officials or agencies to enact effective tobacco control measures. This includes the development of law or policy that directly regulates the tobacco industry and tobacco products.

Any consultations should wherever possible be public (unless prohibited at law), accountable and transparent. Unless prohibited by existing legislation, high-level information (such as the date of the meeting, the organisations represented and a broad description of the issue discussed) may be disclosed on the relevant agency website.

Levels of interaction with the tobacco industry will vary from agency to agency. For some agencies, interactions would be highly unusual and can be managed appropriately with a high level of attention to this Guidance and the circumstances of the interaction, for example:

- A minimum of two officials should be present at all times in any meeting or interaction.
- For email interactions, copy in at least one other official to all communications.
- Ensure all meetings or interactions are recorded, with sufficient detail to establish, at a minimum:
 - the date, location, nature and method of the interaction or contact
 - the names of the parties and individuals involved
 - the matters discussed or considered and any decisions taken
 - any follow up activity planned or anticipated
- **Do not** agree to side meetings or accept invitations to social events or hospitality, such as offers for lunch, product or gifts.
- **Do not** engage in any interaction that creates the perception of partnership or cooperation.

Other agencies will need to have ongoing contact with the tobacco industry, for example, to ensure the effective administration of and compliance with legislation. These agencies should ensure that interactions are limited to those that are necessary by applying the principles outlined in this Guidance as appropriate, for example:

- Limit the opportunities that the tobacco industry has to influence, undermine or defeat tobacco control policies.
- Stay mindful that the tobacco industry may have disguised objectives in conducting otherwise routine interactions.
- Stay mindful that entities may have disguised connections to the tobacco industry.
- Ensure other members of your team are kept aware of meetings and interactions with the tobacco industry.

These agencies should also ensure staff members are aware of Article 5.3 and monitor any interactions that are out of the ordinary.

This Guidance does not replace or detract from existing legislative and regulatory requirements on government agencies and individual public officials to maintain secrecy, confidentiality and privacy.

Avoiding and managing conflicts of interest with the tobacco industry

No organisation or individual with a commercial or vested interest in the tobacco industry should be involved in developing or implementing public health and related policies/programs on tobacco control.

Consistent with the APS Code of Conduct, avoid all real and perceived conflicts of interest with respect to the tobacco industry.

What should you declare?

You should declare any current, previous or proposed connection, involvement or relationship with the tobacco industry by you or a close family member, including:

- occupational activity with the tobacco industry, whether gainful or not
- any and all contributions from the tobacco industry, including research funding
- any intention to engage in an occupational activity within the tobacco industry within one year after leaving service as a public official

Requiring information provided by the tobacco industry to be transparent and accurate

Information that is offered by the tobacco industry outside of disclosures required by law should be treated with caution and carefully scrutinised to minimise opportunities for the tobacco industry to manipulate information, cause confusion among the public and government, and undermine public health policies in relation to tobacco control.

Rejecting partnerships with the tobacco industry

Partnerships between any level of the Australian government and the tobacco industry – whether formal or informal – have the potential to be problematic. There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests. Creating the perception of cooperation between government and the tobacco industry can bolster the tobacco industry's reputation and generate goodwill and public acceptance for tobacco companies.

Australia can minimise tobacco industry interference by rejecting any partnership of any kind with the tobacco industry and limiting interactions with the tobacco industry.

Partnerships with the tobacco industry are inappropriate, including:

- legal and voluntary agreements with the tobacco industry, including contracts or memoranda of understanding

- accepting offers from the tobacco industry or agents of the tobacco industry to assist with the development of tobacco control legislation or policy, or to participate in industry-sponsored tobacco control measures
- accepting, supporting or endorsing any voluntary code of conduct or regulatory instrument drafted by the tobacco industry or agent
- engaging in a 'joint operation' with the tobacco industry on any aspect of law development or law enforcement
- supporting or endorsing the tobacco industry organising or promoting any youth or public education initiative

Consideration of the requirements of Article 5.3 contributed to the decision by the Australian Competition and Consumer Commission (ACCC) in June 2017 to deny authorisation to tobacco companies to engage in joint and coordinated action against suppliers of tobacco products to counter illicit tobacco.

In making its decision, the ACCC considered that the proposed arrangements would *“give the Applicants a quasi-regulatory role ...[which] may be inconsistent with the WHO Guidelines for implementation of Article 5.3, because it constitutes an instrument drafted by the tobacco industry, offered as a substitute for legally enforceable tobacco control measures, and could create a community perception of a partnership between the Australian government (and government agencies) and the tobacco industry”*.⁹

Avoiding preferential treatment

The WHO Guidelines for implementation of Article 5.3 of the FCTC provide that because their products are lethal, the tobacco industry should not be granted incentives to establish or run their business. Any preferential treatment of the tobacco industry would be in conflict with tobacco control policy.¹⁰

Avoiding granting preferential treatment (including perceptions of such treatment) supports the implementation of Article 5.3.

- **Report** any attempt at any level to accept contributions from the tobacco industry or an agent of the tobacco industry, except for compensation due to legal settlements, mandated by law or pursuant to legally binding agreements.
- **Do not** provide preferential tax exemptions to the tobacco industry.
- **Do not** grant incentives, privileges or benefits to the tobacco industry.
- **Do not** give any awards or accolades to the tobacco industry.
- **Do not** engage with foreign governments in their capacity as representatives of their state-owned tobacco interests.

⁹ Australian Competition and Consumer Commission Determination, 23 June 2017, paragraph 186. <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/british-american-tobacco-australia-limited-ors-authorisation-a91550>

¹⁰ WHO, 'Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control' (2008), Principle 4.

There may however be situations where it is necessary to engage with the tobacco industry with some kind of preferred treatment as it will have the effect of better managing the risk associated with tobacco and the tobacco control function of the government. This engagement should only occur where strictly necessary and should respect the Australian Government's commitments on tobacco control.

De-normalising the tobacco industry's 'socially responsible' activities

The tobacco industry undertakes corporate social responsibility activities that are intended to promote, enhance or market the corporate brand, product, public relations or related image. These may include any youth, public education, political, social, financial, educational or community contribution, such as:

- voluntary marketing codes
- financial contributions to non-government organisations
- promoting or encouraging activities to work with governments, for example to address the illicit trade in tobacco or supporting environmental projects
- promoting products purportedly claiming to be less harmful than conventional tobacco products
- providing scholarships
- organising or endorsing youth smoking prevention programmes

If you are approached about, or become aware of, any tobacco industry 'corporate social responsibility' initiatives:

- **Emphasise** in internal and external communications that you and your agency will not deal with the tobacco industry and will take active measures to avoid interactions with the tobacco industry other than those necessary to effectively regulate the tobacco industry and tobacco products.
- **Do not** endorse, support, form partnerships with or participate in activities of the tobacco industry described as 'socially responsible'.
- **Act to correct** any perceptions of support for or participation in the tobacco industry's 'corporate social responsibility' activities.
- **Be cautious** of any claims of 'socially responsible' activities.

Review

In order to best achieve the objectives of Article 5.3, any need to review this Guidance will be a matter for the Tobacco Control Interdepartmental Committee.