

“World Health Organisation

Framework Convention on Tobacco Control”

A Commentary and Analysis by

The Australian Chamber of Commerce and Industry

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The WHO Says	The Chamber Says
<p>B: Definitions</p> <p>“(to be formulated at a later session of the Intergovernmental Negotiating Body)”</p>	<p>B: Definitions</p> <p>Commerce and industry considers robust and transparent definitions of key concepts and terms to be essential.</p> <p>Proposal.</p> <p>Self-evidently, the breadth and depth of the definitions will set the boundaries for the Convention, and the commitments made by national governmental Parties. Comment.</p> <p>Such definitions should be developed at the earliest, and not deferred until the closing, stages of the negotiations.</p> <p>Proposal.</p>
<p>C: Objective</p> <p>“The ultimate objective of this Convention and of the related protocols is to provide a framework for integrated tobacco-control measures to be implemented through the engagement of the Parties in order continually and substantially to reduce the prevalence of tobacco use and thus protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.”</p>	<p>C: Objective</p> <p>Commerce and industry does not have any committed position within the debate over the health consequences of the use of tobacco.</p> <p>However, insofar as democratic governments wish to intervene in the freedom of the individual to exercise lifestyle choices, they should be accountable for such interventions to the electorate. Comment.</p>

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	<p>Commerce and industry prefers more moderate text, ahead of emotive terms such as “devastating”. Insofar as a term is required, then ‘net costs’ is preferred. Proposal.</p>
<p>D: Guiding Principles - Information and Protection</p> <p>“2. Every person should be fully informed about the addictive and lethal nature of tobacco consumption, and non-smokers should be adequately protected from exposure to tobacco smoke.”</p>	<p>D: Guiding Principles - Information and Protection</p> <p>Commerce and industry questions a number of the concepts set down in this guiding principle.</p> <p>What constitutes “fully informed”; who has primary responsibility for such public information (presumably, government); and, what constitutes “adequately protected”? Clarification required.</p> <p>Further, what are the nature and the extent of the liabilities attached to failure by the responsible party(ies) to meet these obligations? Clarification required.</p>
<p>Guiding Principles - Trade Consistency</p> <p>“5. Tobacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.”</p>	<p>Guiding Principles - Trade Consistency</p> <p>Commerce and industry welcomes the intent of this Guiding Principle, but considers the wording to be inadequate.</p>

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	<p>The better text would be: “Tobacco-control measures shall be in full conformity with the principles and rules of the World Trade Organisation.”</p> <p>Proposal.</p>
<p>Guiding Principles - Liability of Tobacco Industry</p> <p>“6. The tobacco industry should be held responsible for the harm its products cause to public health and the environment, with each Party determining the scope of such responsibility within its jurisdiction.”</p>	<p>Guiding Principles - Liability of Tobacco Industry</p> <p>Commerce and industry does not accept the ‘automatic assumption of guilt’ prescribed in this Principle.</p> <p>Oppose.</p> <p>The existence, nature and extent of any liability should be determined solely through due legal process, taking into account robust medical-scientific evidence, of relevant legal jurisdictions. Comment.</p> <p>Further, where the tobacco industry operates within a framework of laws and regulations set down by States-Parties, does this mean such States-Parties shall be jointly liable for any failure to meeting such responsibilities? Clarification required.</p>

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<p>Guiding Principles - Role of Civil Society</p> <p>“7. The participation of all elements of civil society is essential in achieving the objective of this Convention.”</p>	<p>Guiding Principles - Role of Civil Society</p> <p>Commerce and industry objects to the use of the term “civil society”, as it confers upon some elements of society a moral legitimacy to which they are not necessarily entitled. Comment.</p> <p>Commerce and industry also challenges the standing of some of these self-appointed representatives of community interests, seriously questioning whom they purport to represent, the robustness of their foundations and their sustained commitment to the issues at hand. Comment.</p> <p>We would also question whether this principle could be used by some elements of ‘civil society’ to claim government financial support for anti-tobacco industry activities. Opposed.</p> <p>Insofar as terminology is required, the better text would be “broader community”. Proposal.</p> <p>Taken as a whole, and reflecting the treaty-nature of the Convention and the direct responsibility of States-Parties to meet any commitments thereunder, commerce and industry would prefer to see this Guiding Principle deleted. Proposal.</p>

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<p>“... each Party shall, to the extent possible within the means at its disposal and its capabilities:</p> <p>(a) establish or , where it already exists, reinforce, and adequately finance a national co-ordinating mechanism for tobacco control, with inputs from relevant government and civil society sources.” (General Obligations, Clause E.2.).</p>	<p>Any role for the broader community in meeting any obligations made under the Convention should be at the sole discretion of States-Parties. Proposal.</p> <p>This provision bears out the concerns of commerce and industry at the special status to be afforded to the misnomered ‘civil society’ representatives in implementation of this Convention. Comment.</p>
<p>Guiding Principles - De Minimus</p> <p>“8. The provisions of this Convention should be recognised as minimum standards, and Parties are encouraged to implement measures beyond those required by the Convention.”</p> <p>“The provisions of the Conventions shall in no way affect the right of Parties to adopt domestic measures in addition to those referred to above, nor shall they affect measures already taken by a Party, provided that such measures are compatible with its obligations under this Convention and the</p>	<p>Guiding Principles - De Minimus</p> <p>Commerce and industry recognises such de minimus style provisions are generally standard within such international instruments. Agree.</p>

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<p>protocols to which it is a party.” (General Obligations, Clause E. 6).</p>	
<p>General Obligations – Capabilities</p> <p>“2. ... each Party shall, to the extent possible within the means at its disposal and its capabilities...”</p> <p>This text, or text much like it, is used elsewhere in the draft Convention.</p>	<p>General Obligations – Capabilities</p> <p>Commerce and industry considers this qualification to the obligations of Parties to be little short of extraordinary. Opposed.</p> <p>Such text compromises the integrity and robustness of any Convention finally agreed, by permitting selective and optional adherence against self-assessed capacities. Comment.</p> <p>In short, if any Party wishes to qualify its obligations to the Convention they can claim incapacity.</p> <p>Commerce and industry considers such texts, wherever found in the draft Convention, should be deleted. Proposal.</p> <p>Where the Parties wish to give special consideration to the capacities of developing countries to meet their obligations, these should be set down in substance and with time-limits, in a dedicated part of the Convention. Proposal.</p>

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<p>General Obligations - Export Prohibition</p> <p>“3. The Parties shall undertake to adopt legislative, executive and administrative measures to regulate and to prohibit the export of tobacco products that do not conform to the exporting country’s own domestic standards.”</p>	<p>General Obligations - Export Prohibition</p> <p>Commerce and industry considers this provision should be qualified to ensure such export controls do not impair or impede the country’s obligations under the World Trade Organisation.</p> <p>Comment.</p> <p>As such, the text could be amended to read “... own domestic standards, providing such measures do not impair or impede the country’s obligations under the World Trade Organisation.”</p> <p>Proposal.</p>
<p>Price and tax measures to reduce the demand for tobacco</p> <p>“1. The Parties recognise that price measures are an effective mechanism to reduce tobacco consumption ...”</p> <p>“2. Each Party shall, to the extent possible within the means at its disposal and its capabilities, adopt legislative, executive and administrative measures, and co-operate with other Parties in harmonising appropriate tax policies, in order to reduce tobacco consumption and exposure to tobacco smoke.”</p>	<p>Price and tax measures to reduce the demand for tobacco</p> <p>Commerce and industry considers these provisions to be inconsistent with provision D2 of the Convention, which states tobacco consumption is addictive. Comment.</p> <p>Addictive products are less likely to be price/tax responsive, and hence price/tax measures (other than those of an extreme nature) are not likely to be effective in delivering other than marginal reductions in tobacco consumption. Comment.</p>

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<p>“Such measures shall include the following: ...</p> <p>(b) imposition of taxes on tobacco products so as to achieve a stable and continuous reduction in tobacco consumption.</p> <p>(c) adoption of other price and tax measures that may be recommended by the Conference of the Parties.”</p>	<p>Commerce and industry regards price/tax measures imposed on tobacco consumers as primarily revenue-raising measures, with any net public policy impact being determined by the uses to which such monies are put. Comment.</p> <p>Commerce and industry is opposed as a matter of principle to the inclusion of such open-ended, and uncertain, provisions in treaty-style instruments. Opposed.</p> <p>Such provisions, wherever found, should be deleted from the text. Proposal.</p> <p>Where States-Parties wish to address matters relating to the subject of the Convention, they should be expressly included in the text of the instrument. Proposal.</p>
<p>G: Non-price measures to reduce the demand for tobacco</p> <p>“1. Each Party shall, to the extent possible within the means at its disposal and its capabilities, adopt legislative, executive and administrative measures, and co-operate with other Parties in harmonising appropriate non-price policies, in order to reduce tobacco consumption and exposure to</p>	<p>G: Non-price measures to reduce the demand for tobacco</p>

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<p>tobacco smoke.”</p> <p>“Such measures and policies shall include the following:”</p> <p style="text-align: center;">(Passive smoking)</p> <p>(a) implementation of legislation and other effective measures at the appropriate governmental level that provide for systematic protection from exposure to tobacco smoke in indoor workplaces, enclosed public places, and public transport, with particular attention to special risk groups such as children and pregnant women.” ...</p> <p style="text-align: center;">(Regulation of tobacco-product disclosures)</p> <p>“(c) implementation and taking necessary steps to enforce measures for tobacco-product disclosures by all manufacturers, including all ingredients and additives, and major constituents of tobacco smoke, and promotion of availability of such information to the public.”</p>	<p>Commerce and industry interprets this provision as meaning governments are accepting responsibility, and hence liability, for the protection of all persons from tobacco smoke.</p> <p>Comment.</p> <p>Commerce and industry would be concerned that such disclosure requirements are incompatible with the basic tenets of intellectual property protection. Criticism.</p> <p>As such, the text could be amended to read “...of such information to the public, providing such measures do not impair or impede the country’s obligations under international intellectual property instruments.”</p> <p>Proposal.</p>

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<p style="text-align: center;">(Advertising, promotion and sponsorship)</p> <p>“3. The Conference of the Parties shall initiate the preparation of a protocol setting out appropriate rules and procedures in the area of tobacco advertising, promotion and sponsorship.”</p> <p>“4. The Conference of the Parties shall initiate the preparation of a protocol setting out appropriate rules and procedures in the areas of regulation of the contents of tobacco products, tobacco-product disclosures, and packaging and labelling of tobacco products.”</p>	<p>Commerce and industry is opposed as a matter of principle to the inclusion of such open-ended, and uncertain, provisions in treaty-style instruments. Opposed.</p> <p>Such provisions, wherever found, should be deleted from the text. Proposal.</p> <p>Where States-Parties wish to address matters relating to the subject of the Convention, they should be expressly included in the text of the instrument. Proposal.</p>
<p>J: Compensation and liability</p> <p>“[Chair’s note: As announced during the first session of the Intergovernmental Negotiating Body, WHO is convening a panel of legal experts to make recommendations to the Negotiating Body on the nature and scope of potential liability and compensation provisions.”</p>	<p>J: Compensation and liability</p> <p>Commerce and industry considers the text on compensation and liability to be an extremely important element of the Convention. Comment.</p> <p>We are particularly concerned at the existence, nature and extent of liability, and the allocation of responsibility for compensation between government and industry (given the tobacco industry operates under restrictive regulatory framework). Clarification required.</p>

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<p>“M. Conference of the Parties”</p> <p>“1. A Conference of the Parties is hereby established. The first session of the Conference shall be convened by the Director-General of the World Health Organisation not later than one year after the entry into force of this convention.”</p> <p>“Thereafter, ordinary sessions of the Conference shall be held every year [and convened in conjunction with the World Health Assembly] unless otherwise decided by the Conference.”...</p> <p>“4. The Conference of the Parties shall keep under regular review the implementation of this convention and its protocols and take decisions necessary to promote the effective implementation of these instruments [and may adopt protocols, annexes and amendments to the convention, its protocols and annexes in accordance with Article [Development of the convention]].”</p> <p>Clause 4 goes on to set out activities in which the Conference of the Parties can usefully engage, largely dealing with exchanges of information and</p>	<p>“M. Conference of the Parties”</p> <p>Commerce and industry is opposed to the creation of a Conference of the Parties which has the potential to in anyway alter the text of the Convention. Any Conference of the Parties should not be a de facto instrument-making mechanism or engage in treaty-making by stealth. Opposed.</p> <p>Any amendments to the Convention should be the sole prerogative of States-Parties properly convened in formal session as the Intergovernmental Negotiating Body. Proposal.</p> <p>Commerce and industry considers the exchange of information and</p>

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<p>experiences between Parties.</p>	<p>experience to be a reasonable function for the Conference of the Parties, and its activities should be limited to such. Agree.</p>
<p>P. Reporting and implementation</p> <p>“1. In accordance with guidelines agreed upon by the Conference of the Parties, each Party shall submit to the Conference”</p> <p>The draft text then sets out a range of information for reporting, such as tobacco control institutions, strategies, and policies, and measures planned by Parties to implement the convention.</p> <p>“3. To assist the Conference of the Parties in the monitoring, assessment and review of the effective implementation of this Convention, the Conference may establish a subsidiary body which shall report regularly to the Conference.”</p>	<p>P. Reporting and implementation</p> <p>Commerce and industry reiterates we do not consider it appropriate for the Conference of the Parties to have a de facto instrument making role, this being the proper and sole prerogative of the Intergovernmental Negotiating Body. Disagree.</p> <p>Any guidelines on reporting and implementation must be included in the text of the instrument. The Conference of the Parties must not engage in treaty-making by stealth. Proposal.</p> <p>Commerce and industry, while recognising such bodies are becoming increasingly common features of international instruments, has reservations about such mechanisms where they operate in an inquisitorial manner, subjectively and/or without full analytical rigour. Comment.</p>
<p>S. Development of the Convention</p> <p>“[To be formulated at a later session of the Intergovernmental Negotiating Body]”</p>	<p>S. Development of the Convention</p> <p>Commerce and industry, reflecting our concerns with a number of aspects of the draft Convention, awaits with keen interest the provisions dealing with the Development of the Convention.</p>

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	Clarification required.
<p>T. Final Clauses</p> <p>“[To be formulated at a later session of the Intergovernmental Negotiating Body]”</p>	<p>T. Final Clauses</p> <p>Commerce and industry, reflecting our in-principle support for transparency in international treaty-making, awaits with keen interest the provisions dealing with Final Clauses. Clarification required.</p> <p>An additional Part, dealing with Entry into Force, should be included, and set a high threshold.</p>