COMPLIANCE REGIME CONTAINED IN PART 6A OF THE TOBACCO ACT 1927

1. Part 6A of the *Tobacco Act 1927* provides for a regime of "controlled purchase operations" allowing the government to use young persons to attempt to purchase tobacco products from a tobacco license-holder.

Legal and policy implications

Entrapment

2. Prima facie, Part 6A provides the legally sanctioned entrapment of tobacco licensees. The Part presents problems surrounding the ethical use of entrapment.

3. The term 'entrapment' has a unclear and controversial history in British, and thus also Australian, law. There is no precise definition of entrapment, but at its simplest it involves

> [t]he act of a law enforcement agent of inducing a person to commit an offence which the person would not have, or was unlikely to have, otherwise committed.[1]

4. In the Unites States, entrapment is a complete defence to a criminal charge. There is often confusion as to what exactly constitutes the defence of entrapment. Under U.S. law, two elements must be shown for the entrapment defence to be made out:

> 1) The government induced the commission of the crime; and
> 2) the defendants had a lack of predisposition to engage in the criminal conduct other than that instilled by the governments conduct.[2]

[1] *Re Sloane* (1990) 49 A Crim R 270
[2] *Mathews v. United States*, 485 U.S. 58, 63 (1988).

5. Inducement is the threshold issue in the entrapment defence. Inducement requires a showing of at least persuasion or mild coercion. The courts have taken similar, but varying approaches in when exactly inducement has occurred. Some courts have said that "inducement shown only if government's behaviour was such that 'a law-abiding citizen's will to obey the law ***could*** have been overborne.'"[3] Other courts have held that inducement occurs "if government created a substantial ***risk*** that an offence would be committed by a person other than one ready to commit it."[4] This has been held to include pleas based on need, sympathy, or friendship, or extraordinary promises of the sort "that would blind the ordinary person to his legal duties."[5]

6. Put simply, under U.S. law a government agent must do more than give a person an opportunity to commit an offence – they must induce or encourage the commission of an offence.

7. To put this in the context of a "controlled purchase" under Part 6A, it would not be enough to make out the defence of entrapment under U.S. law for a young person to walk into a place of tobacco retail and merely ask for a packet of cigarettes. That would probably only constitute an opportunity to commit an offence. It would show that the retailer already had an underlying pre-disposition to sell cigarettes to underage persons. If, however, that young person was refused service and then started to whine, protest or plead with the retailer, this would be likely to constitute a "plea based on need, sympathy, or friendship" and would constitute entrapment.

Philosophical reasons for the entrapment defence.

8. The defence of entrapment exists in the U.S. because the courts have inferred that the congress does its criminal statutes to be used to entrap otherwise innocent citizens. The purpose of the criminal law is to maintain the peace and

[3] *United States v. Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984)
[4] *United States v. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989)
[5] *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991)

good order of society. If someone does not have an underlying pre-disposition to commit a given offence, then they are not a threat to the peace of good order of society. It therefore makes no sense for the state to entice someone who is not a threat to society to become such a threat, only to then prosecute them.

Entrapment under Australian Law

9. Unlike the United States, the common law of Britain and Australia does not recognise a defence of entrapment. Rather, entrapment related issues are dealt with under evidence laws and procedures, principally the discretion to exclude illegally or improperly obtained evidence. Although there is no 'defence' of entrapment to speak of, entrapment related issues are still relevant in legal proceedings in Australia, although they proceed on a different conceptual basis.

10. Evidence law in ACT Court proceedings is governed by the *Evidence Act 1995* (Cth). Section 138(1) of that Act provides that:

> *Evidence that was obtained:*
> *(a) improperly or in contravention of an Australian law; or*
> *(b) in consequence of an impropriety or of a contravention of an Australian law;*
> *is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*

11. In Australia, the courts have excluded evidence obtained as a result of entrapment under section 138 and its common law equivalent, known as the *Bunning v Cross* discretion. The evidence may be excluded on the basis that the act of a law enforcement official in inciting someone to commit an offence is an offence in itself. Section 47(1) of the *Criminal Code Act 2002* (ACT) provides that "If a person urges the commission of an offence, the person commits the offence of incitement. For example, if a police officer incites someone to purchase drugs, then two offences have been committed: the person who purchases the drugs commits and offence of purchasing drugs, and the police officer commits a separate offence of inciting someone to purchase drugs. Clearly the person has purchased drugs as a consequence of the police officers crime of incitement to purchase drugs. Consequently, at trial the defence

counsel would move that any evidence of the accused purchasing drugs not be admissible as, per section 138(1)(b) of the *Evidence Act,* that evidence was obtained as a consequence of the police officers breach of an Australian law. Thus the rules of evidence can be used as a *defacto* defence of entrapment.

12. It should be noted that section 138 only provides a judicial discretion to exclude, it does not require it. Therefore a judge could accept that a police officer did in fact entrap someone, i.e. they did in fact commit an offence of incitement, but choose to admit the evidence notwithstanding if he or she thinks it's in the public interest to do so. That said, in the past when confronted with evidence of entrapment, many judges have decided to exclude the evidence: see *Ridgeway v The Queen* (1995) 184 CLR 19.

Philosophical reasons for exclusion under section 138.

13. The reasons for the discretion were articulated well by Justice Spender in *Pressler v Holzberger* (1989) 44 A Crim R 261, 271-72 when he said that:

> "To condone unlawful conduct may subtly, or not so subtly, encourage it… Where the legislature has defined the circumstances in which a person's liberties might be infringed or their rights curtailed, it should not readily be concluded that conduct outside the defined authorisation is to be tolerated or excused. Judges ought not, by a wink and a nod, weaken the protection which the law gives to the rights and liberties of citizens.

14. Likewise, in dealing with the exclusion of illegally obtained evidence in the United States (which is mandatory there), the courts have justified on the basis that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."[6]

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[7]

[6] *Olmstead v United States,* 277 US 438, 470 (1928).
[7] *Mapp v Ohio,* 367 US 643, 658 (1961).

Part 6A and section 138 of the Evidence Act.

15. *Prima facie,* it might be argued that evidence of "compliance testing" is illegally obtained evidence and should therefore be excluded pursuant to section 138 of the *Evidence Act.* Section 14(1) of the Tobacco Act provides that " A person shall not sell a smoking product to a person under 18 years old. - Maximum penalty: 50 penalty units."

16. In conducting a 'compliance test' it might be argued that the young person involved is committing an offence under section 47(1) of the *Criminal Code Act,* namely the offence of inciting someone to commit an offence under section 14(1) of the *Tobacco Act.* As such, during a prosecution, a defendant would argue that any evidence of an illegal sale is inadmissible as it was obtained as a consequence of the young persons offence of incitement.

17. Such an argument would probably fail. This is because section 42F of the Tobacco explicitly provides that in conducting a compliance test, the conduct if not unlawful and does not constitute an offence. Specifically, section 42F of the Act provides that:

> *1) Despite any other territory law, conduct engaged in honestly by an authorised officer is not unlawful, and is not an offence by the officer, if the conduct is engaged in for the purpose of carrying out a compliance test in accordance with an approved program and the approved procedures.*
>
> *2) Despite any other territory law, conduct engaged in honestly by a purchase assistant is not unlawful, and is not an offence by the assistant, if—*
>
> *(a) the conduct is engaged in for the purpose of carrying out a compliance test; and*
>
> *(b) the assistant acts in accordance, or substantially in accordance, with the instructions (if any) of an authorised officer supervising the compliance test.*

18. Effectively, therefore, in light of section 42F, it could not be said that the young person has committed an offence of incitement, as this section explicitly deems them not to have, and as such there are no grounds for invoking section 138 of the *Evidence Act.*

Other possible 'defences' and Human Right Act Compliance

19. As previously mentioned, there is no defence of entrapment in Australia or the ACT. However, section 21 of the *Human Rights Act 2004* (ACT) guarantees an accused the right to a fair trial. In interpreting the meaning of this right, section 31(1) of the Act states that "International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right."

20. The European Court of Human Rights has determined in *Teixeira de Castro v Portugal* that the guarantee of fairness under international human rights law is not limited to the trial, but underpins proceedings as a whole including "the way in which evidence was taken." It concluded that police incitement to commit an offence posed a clear threat to the right to a fair trial.[8] The court held that the prominent consideration must be the administration of justice, and although the entrapment might be orchestrated to deal with a pressing and compelling problem (in that case drug smuggling, here underage smoking), it is not acceptable to sacrifice justice for the sake of expedience.

21. As such, where a young person goes beyond giving a tobacco retailer an opportunity to break the law but incites or entices them to, section 21 of the *Human Rights Act* might be violated.

Analysis

22. Section 42B(1)(c) of the Tobacco defines a "compliance test" to include conduct as engaged in by the sales assistant and authorised officer and :

> *The purchase assistant and authorized officer engaging in conduct that would, apart from section 42F (lawfulness of compliance testing), be an offence against a territory law.*

[8] *Teixeira de Castro v Portugal* (9 June 1998).

23. By defining a compliance test as including conduct which would otherwise be illegal, it is pretty clear that the government intends compliance testing to go beyond merely providing an opportunity to illegally sell Tobacco, to actual incitement.

24. I can see the purpose in catching out retailers who have an underlying pre-disposition to sell tobacco to young people. As such, I have no in principle objection to compliance testing that only gives a retailer the opportunity to commit the offence.

25. But I see no value in inciting people, as Part 6A allows, who have no such underlying pre-disposition. Such people are not a threat to the health of young people, so I question the value in attempting to convert an otherwise honest retailer into someone who breaks the law solely for the purpose of prosecuting them, when they would not have been a threat to young people's health but for the encouragement of the government.

26. The government may respond that not only is it in the public interest to catch those people with a pre-existing disposition to illegally sell tobacco, it is also in the public interest to catch those that they can incite because, although they may not have underlying pre-disposition to do the wrong thing, if the government can entice them, then so will other young people. Under such logic you are essentially not punishing the retailer for the offence committed during the controlled test *per se,* rather you are punishing them to deter/prevent future wrongdoing – in effect the government is punishing 'future crime'. This is clearly unacceptable, as obvious injustice will result when a person is subject to unfavourable treatment based on what they *might* do in the future, not on what you *know* they have done in the past.

27. Clearly Part 6A allows actual incitement. The government may respond that even though the Part may allow incitement that we should trust them as they wouldn't abuse their power and go around inciting people. Such an argument should be rejected. If legislation has the potential to create abuse, it is not a sufficient warrant to retain it on the strength of government assurances that they

can be trusted not to abuse it. The best way to prevent abuse is to remove the legislative provisions that provide for it in the first place. To this end, I note the comments of Justice Thomas in *Re Gold Cost City Council By-Laws* {1994] 1 Qd R when he stated that:

> I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement 'trust us'. Wills J expressed a similar sentiment in 1904: "I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that is as bad a ground for defending legislation as one could well have. (*Stiles v Galinski* [1904] 1 KB 615 at 625).

Other considerations

28. During debate in the Assembly at the time of Part 6A's passage, the Minister promised that "every effort will be made to stop any harm befalling the young people who act as personal assistants." The fact remains that, as the purchase assistant is pivotal to a controlled operation, defence counsel for an accused tobacco licensee may well want to call that young person and challenge their evidence in court. One would have to question the mental effect on that young person of the rigorous cross-examination that might entail.

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This analysis of what CLA believes is 'entrapment' contained in tobacco legislation was prepared for a CLA submission. It is not legal advice, and should not be relied upon by any party. It is provided here as an optional background point-of-view for those interested in the issue.

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