

Licensing of Tobacco Retailers and Wholesalers

Desirability and Best Practice Arrangements

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Report to the Commonwealth Department of Health and Ageing
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Preface

“This report is a best practice guide for jurisdictions to inform future policy and legislative development. Endorsement of the report by Intergovernmental Committee on Drugs members does not necessarily represent the endorsed policy positions of individual jurisdictions.”

Keith Evans, Chair of the Intergovernmental Committee on Drugs

Abbreviations

ACT	Australian Capital Territory
BAT	British American Tobacco
CoAG	Council of Australian Governments
DALY	Disability Adjusted Life Year
FCTC	Framework Convention on Tobacco Control
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IGCD	Intergovernmental Committee on Drugs
MCDS	Ministerial Council on Drug Strategy
NCC	National Competition Council
NCP	National Competition Policy
NSW	New South Wales
NT	Northern Territory
NTS	National Tobacco Strategy
PML	Philip Morris Limited
SA	South Australia
US	United States
WA	Western Australia
WHA	World Health Assembly
WHO	World Health Organisation
WTO	World Trade Organization

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Executive summary

‘Licensing’ is somewhat of a dirty word in policy circles at present. The combined forces of ‘red tape reduction’ and National Competition Policy (NCP) have resulted in considerable pressure to reduce the number of business licences where they exist, and to oppose calls for new business licensing schemes.

In this hostile environment there is nevertheless a strong case, based on economic and public health rationales, to introduce licensing of tobacco sellers.

- tobacco is unlike all other products where licensing has been criticised (eg, alcohol, gambling, taxis etc) — there is no safe level of consumption. While people can gamble and drink in moderation (ie, without doing permanent harm) there is no safe level of tobacco use. This alone justifies a stronger (ie, more restrictive) regulatory response; and
- the sheer magnitude of the harm caused by tobacco clearly justifies the need for differential treatment of tobacco — tobacco is the single largest preventable cause of premature death, disease and disability in Australia. It causes the deaths of over 19,000 Australians a year, creates an enormous burden on public health systems and costs the community over \$12.7 billion per annum.

Given this important differentiating characteristic, the overriding rationale for the support of licensing arrangements is that it facilitates the enforcement of a number of tobacco control measures (eg, prohibitions on sales to minors, mandated point of sale regulations, etc). In this light, licensing is seen as a way of:

- reinforcing the understanding that selling tobacco is a privilege, not a right;
- providing health authorities with the addresses of sellers, and in the process:
 - facilitating monitoring of their compliance with tobacco control laws;
 - enabling authorities to communicate directly with tobacco sellers (ie, to inform them of changes to the law, etc); and
- providing a regulatory mechanism that allows conditions to be placed upon the manner in which sales are made and a mechanism by which authority to sell can be revoked.

While most tobacco control officers in jurisdictions without tobacco seller licensing schemes view licensing as the key avenue to identifying the addresses of tobacco sellers, there is increased scope for more effective monitoring in the absence of a licensing regime. For example:

- a reasonably comprehensive database of tobacco sellers can be generated from food seller lists and from public sources such as phone books (ie, newsagents almost always sell tobacco). While this requires a (possibly significant) commitment of resources, as is demonstrated by Victoria’s actions, the resource commitment may go a long way to meeting the desire for better information about where tobacco sellers operate; and

-
- in the meantime, we suggest that those jurisdictions without licensing who are eager to generate a list of tobacco retailers should approach the major tobacco companies for such a list. The mere discussion of licensing *may* be a sufficient stimulus for them to operate in a more co-operative manner and voluntarily supply retailer lists. However, even with complete industry cooperation, which is by no means assured, such lists will only identify approximately half of all retailers and wholesalers, and entail significant ongoing costs that will be borne by government.

As would be expected, there are mixed views on the efficacy of licensing tobacco sellers, and in some cases views differ in public and private:

- there is close to universal support from public health officials and the tobacco control advocates for the licensing of tobacco sellers;
- governments differ in their support of licensing. While three jurisdictions currently licence tobacco sellers (South Australia (SA), Tasmania and the Australian Capital Territory (ACT)), the degree of opposition of governments in other jurisdictions varies considerably;
- tobacco companies are likely to oppose licensing, particularly when it is not consistent across jurisdictions. There are however, some differing views between companies. For example:
 - Philip Morris Limited (PML) favours negative licensing with disclosure of retailers to authorities;
 - British American Tobacco (BAT) favours licensing if it is administered by revenue authorities, but not if it is administered by health authorities;
- generally retailers publicly oppose licensing, but may be inclined to be less publicly opposed in the following circumstances:
 - the major chains that operate nationally are likely to be more supportive of licensing if there is a national standard rather than a jurisdiction by jurisdiction approach; and
 - larger tobacco retailers (eg, tobacconists, etc) are likely to be more supportive of licensing if they perceive that there will be increased enforcement to drive out sellers illegally supplying minors, or if the licensing fees drive smaller operators out of the market.

This study has identified three alternative but related licensing *loci*, each of which can be considered as best practice in at least one context:

- *licensing of wholesalers* — this would be on the condition that wholesalers provide the authorities with information as to whom they supply their tobacco products. The advantage of this approach is that it improves authorities' access to information, and does so at a relatively low compliance and administration cost;
- *licensing of retailers* — this approach provides for improved public health outcomes, but does so at significantly higher administration and compliance costs; or

-
- *licensing of wholesalers and retailers* — joint licensing should increase public health outcomes by providing a layer of information checking (ie, the names supplied by the wholesalers can be cross-checked with the licensed retailers), at minimal additional cost above the licensing of retailers alone.

Of these three options, best practice licensing involves the licensing of both wholesalers and retailers. However, licensing of wholesalers alone, because of the significantly lower administrative and compliance costs, may be an important stepping-stone for jurisdictions that are reluctant to embrace licensing.

This study further suggests that best practice licensing involves the following elements:

- Licences should be held by all tobacco wholesalers and retailers.
- Each separate licence should apply to a particular venue or vending machine. However, the licence should also stipulate the contact details for the person responsible for the sale of tobacco at that venue or from the vending machine.
- Parties applying for a licence should be required to confirm that the designated responsible person has read, understood, and agreed to abide by, the applicable laws regarding tobacco sales.
- A licence should be able to be refused or withdrawn if the responsible person, or any person in a position of power with respect to the sale of tobacco at the licensed premises, has been found to have contravened any tobacco control laws.
- Compliance with general tobacco control laws should be the minimum operational standard required by a licence holder.
- There should be scope for conditions to be applied to licences where this supports compliance with tobacco control laws.
- Wholesale tobacco sellers should be required:
 - to sell only to licensed retailers or wholesalers; and
 - to provide the regulatory agency with a list (either at request or on a periodic basis) of those licensed wholesalers or retailers to whom they have supplied tobacco.
- Retail tobacco sellers should be required to purchase solely from licensed tobacco wholesalers unless purchasing from other retailers at the listed retail prices.
- The current licence should be prominently displayed at each tobacco premises.
- Licence fees should be set to recover only those costs associated with:
 - the actual administration of the licensing regime;
 - the enforcement of the licences — this may include inspections; and
 - the provision of information to applicants and licensees to ensure their continued and future compliance.

-
- Tobacco sales licensing should be seen as a health issue and hence should be controlled by health officials. This does not preclude health officials contracting out elements of the scheme (eg, licensing, inspections, enforcement, etc) to third parties.
 - There should be a graduated penalty structure that includes warnings, administrative penalties, prosecutions and scope for licence withdrawal.

Of the three Australian jurisdictions with licensing schemes, schemes in Tasmania and the ACT most closely incorporate these principles, although there are nevertheless key omissions.

This suggested approach is broadly consistent with best practice guidelines issued in the United States (US):

“For tobacco control laws and regulations to be adequately enforced, universal licensure of tobacco outlet sources is necessary. A graduated system of civil penalties on the retailer, including temporary revocation of the tobacco license in areas where tobacco retail licenses are required, has been shown to be an effective enforcement strategy. Fees from licensing of tobacco vendors can be used to fund enforcement activities and to develop and maintain active, large-scale programs. States currently without licensure provisions are encouraged to require licensure of retail tobacco outlets and to revoke licenses for repeated sales to minors.”

Centers for Disease Control and Prevention 1999, p. 18

While this suggested best practice approach has been developed in order to maximise public health outcomes, there may also be benefits associated with increased tax compliance (ie, reducing the potential for sales of ‘chop chop’).

The major impediments to acceptance of these best practice principles are generally perceived to be:

- *industry concerns about the costs of the schemes* — to some degree this is an intractable barrier in that businesses would almost always prefer a lower cost option to a higher cost option. However, such concerns can be alleviated by having a staged phase in of fees (as in the ACT). This allows business time to adjust and reflects a ‘no surprise’ policy;
- *general jurisdictional hesitancy* — some jurisdictions have been particularly reluctant to adopt licensing schemes. In different jurisdictions this hesitancy can reflect a number of different policy drivers such as: concerns about the costs to industry (see above); the administrative costs; and that there may be alternative means of capturing most (but not all) of the retailing data through other means (eg, as per the Victorian approach); and
- *the general regulatory move away from licensing* — the NCP legislative review programme, driven by the National Competition Council (NCC), has been a catalyst for the deregulation of numerous licensing schemes and the opposition of proposed schemes. As such, calls for the introduction of a new licensing scheme tend to be countered by concerns that they would be opposed on NCP principles. The analysis in this report clearly demonstrates that there is a public interest case, justified in economic terms, for the introduction of a tobacco licensing scheme.

Chapter 1

Introduction

In June 1999, the Ministerial Council on Drug Strategy endorsed the *National Tobacco Strategy (NTS)*.¹ The *NTS* comprises a range of tobacco control initiatives that aim to improve the health of all Australians by eliminating or reducing their exposure to tobacco in all its forms. Actions under the *NTS* are organised under six key strategy areas that include ‘reducing the availability and supply of tobacco’.

In November 1999 the Intergovernmental Committee on Drugs endorsed an agreed set of national priorities for action. One of the national priorities for this key strategy area includes research into the feasibility and potential benefits of registration schemes for tobacco retail outlets and the legality of imposing such schemes. This priority forms part of the national response to reduce availability and supply of tobacco products, especially to persons under the legal age of purchase (18 years).

From this groundwork, a best practice guide to tobacco control was published in 2000 — *National Approach for Reducing Access to Tobacco in Australia by Young People under 18 Years of Age*.² This document did not, however, consider licensing as an alternative to prosecution, as further consideration of licensing was considered necessary before its inclusion in a best practice guide.

Correspondingly, the Commonwealth Department of Health and Ageing commissioned the preparation of this report to review the feasibility, cost-effectiveness, and public health benefits of registration and/or licensing schemes for tobacco retail outlets in Australia.³ The aim is to assist in the development of tobacco control policy and legislation by making recommendations on an effective model (or models) for implementation at national, state and territory levels.

The remainder of this report is set out in the following manner:

- Part A (Chapters Two to Three) provides an overview of the Australian tobacco distribution industries, including current and past licensing arrangements, and also notes calls for the introduction of licensing;
- Part B (Chapters Four to Six) defines the regulatory objectives underlying licensing. This task is undertaken in some depth because it is a necessary step under NCP (see Chapter Eleven) and under Commonwealth, state and territory regulatory impact assessment guidelines. The analysis frames the potential role for licensing and hence significantly shapes the boundaries of the best practice principles;

¹ Commonwealth Department of Health and Aged Care 1999a, *National Tobacco Strategy 1999 to 2002-03: A Framework for Action, Endorsed by the Ministerial Council on Drug Strategy (MCDS)*, Canberra.

² National Expert Advisory Committee on Tobacco & National Tobacco Policy Officers Group 2000, *A National Approach for Reducing Access to Tobacco in Australia by Young People Under 18 Years of Age*, AusInfo, Canberra.

³ The term ‘tobacco retail outlets’ includes retail outlets that sell tobacco products, or a range of products, some of which are tobacco products. The scope of the project is primarily tobacco retail outlets, however, the merits of registration and licensing schemes for tobacco wholesalers is also considered.

- Part C (Chapter Seven) considers alternative licensing models and identifies the elements of a best practice tobacco licensing scheme;
- Part D (Chapters Ten and Eleven) addresses the possible hurdles to the implementation of best practice tobacco selling licensing; and
- Part E (Appendices A to C) provide additional supporting material such as the review's terms of reference, a list of consulted stakeholders and the sources used in the report.

Part A

Overview of the Australian tobacco
distribution industry

Chapter 2

The Australian tobacco distribution industries

“In most countries, statistics on the distribution channel of tobacco products and tobacco share of the total sales is poor.”⁴ This general observation can also be validly made in an Australian context. Despite such limitations, this chapter provides an overview of Australia’s wholesale and retail tobacco industries.

2.1 Tobacco wholesaling

The wholesale tobacco industry is comprised of two sectors:

- the ‘formal’ wholesale tobacco sector; and
- the ‘informal’ wholesale tobacco sector.

These are discussed in turn.

The ‘formal’ tobacco wholesaling sector

This formal tobacco wholesaling sector is comprised of businesses whose principal activity is tobacco product wholesaling. Tobacco wholesalers distribute to:

- retail distributors — retail distributors include retail groups such as Coles Myer and Woolworths. Stock is supplied by the wholesale distributor to the group’s central warehouse(s). The retail distributor then supplies its individual retail outlets using its own distribution system, consisting of its own trucks and/or contracted delivery services. Other retail distributors are buying groups such as Davids Holdings and Foodland. Again, retail outlets obtain their supplies from a central warehouse into which tobacco products are supplied by the wholesaler; and
- retailers — the more traditional customers of the wholesale distributor of tobacco products are the retail stores. Supply to this group is referred to as the route trade (or the van sales) part of the wholesaling business.⁵ This involves the distribution by wholesale of goods to individual retail outlets through regular visits or contacts with the operator of the retail outlet. These retail outlets include newsagents, service stations, tobacconists, hotels, convenience stores and mixed businesses.

Alternatively, the formal tobacco wholesaling sector could be segmented into:

- the wholesaling operations of the tobacco companies — as an example of the scale of this sector, BAT wholesales to approximately 17,000 businesses; and
- the wholesaling of products obtained from these suppliers to retailers.

⁴ Czart, C & Chaloupka, F 2001, *Data for Economic Analysis — Tool 2: Tobacco Data*, World Bank, viewed 6 February 2002, <<http://www1.worldbank.org/tobacco/toolkit.asp>>.

⁵ Some retail distributors compete with wholesale distributors in the route trade. For example, AC Campbell Cash and Carry (part of Davids Holdings) operate a van distribution service.

Although there is no formal data available as to the relative significance of the two forms of operation, IBISWorld estimates that it may well be around 60 percent by the former and 40 percent by the latter.⁶

Table 2.1 shows a series of key statistics for the total formal tobacco wholesaling sector.

⁶ IBISWorld 2001, *F4718 - Tobacco Product Wholesaling in Australia*, IBISWorld, Sydney.

Table 2.1

KEY INDUSTRY STATISTICS FOR THE FORMAL TOBACCO WHOLESALING SECTOR

	<i>1995-96</i>	<i>1996-97</i>	<i>1997-98</i>	<i>1998-99</i>	<i>1999-00</i>	<i>2000-01</i>
<i>Industry Turnover</i>						
Current prices (\$m)	1,221.0	1,275.0	1,262.0	1,243.2	1,184.0	1,211.0
Constant prices (\$m)	1,359.9	1,401.1	1,386.8	1,349.4	1,255.2	1,211.0
<i>Industry Gross Product</i>						
Current prices (\$m)	292.0	302.0	297.0	292.4	275.0	279.0
Constant prices (\$m)	325.2	331.9	326.4	317.4	291.5	279.0
<i>Number of Establishments (Units)</i>	85.0	85.0	80.0	76.0	72.0	70.0
<i>Employment (Units)</i>	2,676	2,700	2,650	2,570	2,400	2,300
<i>Total Wages</i>						
Current prices (\$m)	131.9	136.4	133.8	130.3	123.0	124.5
Constant prices (\$m)	146.9	149.9	147.0	141.4	130.4	124.5

Source: IBISWorld 2001

The formal wholesale tobacco sector is comparatively dispersed. However, half of all management units (ie, head offices) are headquartered in New South Wales (NSW) — see Table 2.2.

Table 2.2

GEOGRAPHIC DISTRIBUTION OF FORMAL WHOLESALERS' HEAD OFFICES (1999)

<i>Jurisdiction</i>	<i>Percentage of Head Offices</i>
Australian Capital Territory	0.0%
New South Wales	50.0%
Northern Territory	0.0%
Queensland	16.7%
South Australia	11.0%
Tasmania	0.0%
Victoria	16.7%
Western Australia	5.6%

Source: IBISWorld 2001

The 'informal' tobacco wholesaling sector

In addition to the formal wholesaling sector there also exists the 'informal' wholesaling sector which is comprised of tobacconists, supermarkets and other major retailers who supply (in some cases, unknowingly) smaller retailers.

The informal sector has developed because small retailers:

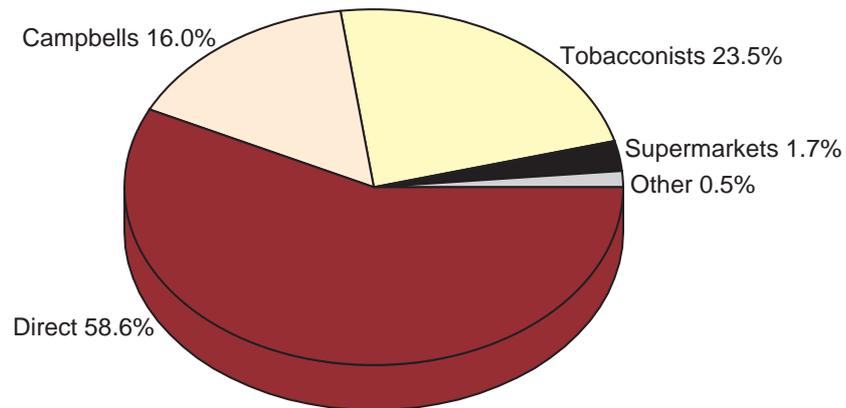
- want to place very small orders that cannot be provided with the frequency with which they wish (often in order to minimise stock levels); or
- are unable to obtain volume discounts because of their small sale.

By purchasing from these informal wholesalers small retailers are able to rely on the informal wholesalers' purchasing power.

It is difficult to get a sense of the scale of the informal wholesaling sector. However, some insight as to the relative market shares of the formal and informal sectors can be discerned from a survey of the Retail Confectionery & Mixed Business Association's (CAMBA's) 'local food shop' members in this survey. 117 of 180 members identified their total average weekly buy, and where it was sourced from — see Figure 2.1.

Figure 2.1

ANALYSIS OF TOBACCO BUYING HABITS



Source: Retail Confectionery & Mixed Business Association 2001

2.2 Tobacco retailing

Tobacco product retailing includes a vast range of retail outlets, including:

- supermarkets and grocers;
- tobacconists;
- petrol stations;
- mixed businesses;
- convenience stores;
- newsagents;
- hotels and clubs;
- liquor stores; and
- other retailing premises.

While it is difficult to get a precise estimate of the number of retailers; industry participants suggest that there are in the vicinity of 39,000 outlets nationally (although the total estimated by stakeholders on a state-by-state basis is considerably higher — see Table 2.3).

Table 2.3

ESTIMATED TOBACCO RETAILER NUMBERS

<i>Jurisdiction</i>	<i>Estimated Number of Tobacco Retailers</i>
Australian Capital Territory	488 (and 16 wholesale outlets)
New South Wales	17,000
Northern Territory	800
Queensland	12,000
South Australia	2,700 (but may have multiple sites)
Tasmania	1,200
Victoria	12,000
Western Australia	6,000
TOTAL	52,200 (approximately)

Note: The SA estimate may be an underestimation given that Revenue SA observes that (a) several hundred outlets may be selling tobacco without a licence as licencees who have not renewed their licence in the last few years have not been followed up, and (b) the number of licence holders has been progressively going down.

Source: Various stakeholder consultations

The importance of tobacco sales to the retail industry can be discerned by looking at:

- the margins obtained for tobacco products — while tobacco has an average gross margin of 10.6 percent,⁷ the margins that each sector takes from tobacco sales vary considerably.⁸ As would be expected, supermarkets operate at the lowest margin, reflecting the volume nature of supermarket trade. Importantly, the size of the margin is more significant for convenience stores, petrol stations and mixed businesses such as milk bars and delis. Indeed, for many of these smaller businesses the sales and margins available from tobacco products are of critical importance to the viability of the store;⁹ and

⁷ Australian Bureau of Statistics 2000, *Retail Industry, Commodity Sales Australia, 1998-99*, Cat.No.8624.0, Canberra.

⁸ PricewaterhouseCoopers 1999, *The Significance of Cigarettes and Tobacco Products to Retailers: An Analysis of Retail Sales*, Canberra.

⁹ Ibid.

- the relative importance of tobacco revenue to the business — tobacco is of vital importance to many businesses financial well-being. At a retail level, tobacco has sales of \$4.7 billion.¹⁰ As shown in Table 2.4, tobacco sales are very important to a range of retail outlets. Reinforcing the importance of tobacco is that tobacco is the fourth most important product for supermarkets and grocery stores, and newsagents, and the second most for takeaway food retailers.¹¹ Given claims that there has been a reduction of one-third of retail tobacco outlets during the period 1965-1995,¹² and that total tobacco consumption has remained relatively constant over the same period, this implies that retailers are receiving higher average sales from tobacco, and hence the relative importance of tobacco sales is growing for individual firms.

Table 2.4

RETAIL SALES OF TOBACCO PRODUCTS (1997)

	<i>Value of Tobacco Sales</i>		<i>Gross Margin from Tobacco Product Sales</i>	
	\$ million	per cent	\$ million	per cent
Supermarket and grocers	2,485	7	248	11
Tobacconists	1,425	95	85	71
Petrol stations*	1,140	30	228	20
Mixed businesses	1,050	10	210	8
Convenience stores*	363	33	54	17
Newsagents	329	8	53	5
Hotels and clubs	133	1	33	1
Liquor stores	94	2	19	2
Other premises	39	1	12	1
TOTAL	7,058	9	942	7

Note: * figures in each of these segments are based on non-petrol sales

Source: PricewaterhouseCoopers 1999, p. 3

Given the apparent importance of tobacco from a margin and volume perspective, PriceWaterhouseCoopers argue that the tobacco trade is the key driver of profitability for many stores, including petrol station franchisees, and that in the absence of tobacco sales the survival of many stores would be in doubt.¹³ Given the importance of tobacco to retailers their concern about moves to restrict tobacco sales (even if indirectly) is understandable.

¹⁰ Australian Bureau of Statistics 2000, *Retail Industry, Commodity Sales Australia, 1998-99*, Cat.No.8624.0, Canberra. Indeed, tobacco sales outstrip all other household commodities, and tobacco brands constitute seven of the top ten brands in Australia

¹¹ Ibid.

¹² See House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition: Report of the Inquiry Into Aspects of the National Competition Policy Reform Package*, AGPS, Canberra.

¹³ See PricewaterhouseCoopers 1999, *The Significance of Cigarettes and Tobacco Products to Retailers: An Analysis of Retail Sales*, Canberra.

Chapter 3

Past and current licensing arrangements

This chapter provides a brief overview of tobacco licensing arrangements in Australia since the 1970s.

3.1 Business franchise licences

In 1974 the Victorian Government introduced a state tobacco licence fee, with all states and territories following suit between 1975 and 1989. These fees pertained to wholesalers as well as retailers of tobacco products, each of whom were to pay a set licence fee at prescribed intervals. Wholesalers were also required to pay a percentage of the wholesale value of tobacco sold and, if retailers purchased tobacco other than from a licensed wholesaler, they were required to pay this percentage levy.¹⁴

When the state business franchise fees were first introduced, the fees were quite low (possibly just providing revenue sufficient to cover administrative costs). By 1996 however, the fees had become so high that they were clearly an important source of government revenue, and not merely a levy to cover the cost of regulation (ie, up to 100 percent of the value of wholesale sales).

The constitutional validity of these franchise fees was subject to several legal challenges.¹⁵ The state tobacco licence fees has always been somewhat tenuous given constitutional limitations prohibiting Australian states from raising revenue from the sale of products.¹⁶ The wording of the various state business franchise legislation attempted to ensure that the fees were not regarded as excises, based as they were on the value of sales in a previous period rather than on the quantity or volume of products currently being transacted.

In 1997 the High Court ruled that licensing fees levied under the NSW *Business Franchise Licences (Tobacco) Act 1987* were duties of excise and as such were constitutionally invalid.¹⁷

While the *Ngo* case was not a ruling against licence fees *per se* — the particular fee was found to be, “manifestly a revenue-raising tax imposed on the sale of tobacco” — but it has proven to be a factor that has hindered the introduction of tobacco licensing based on public health objectives.

3.2 Current licensing arrangement

Since the *Ngo case* there has been no nationally consistent approach to the licensing of tobacco sellers in Australia.

¹⁴ See Winstanley, Woodward & Walker 1995, *Tobacco in Australia: Facts and Issues 1995*, Victorian Smoking and Health Program, Melbourne.

¹⁵ See *Philip Morris Limited v The Commissioner of Business Franchises (Victoria)* (1989) 167 CLR 399; *Capital Duplicator Pty Ltd v Australian Capital Territory* (1993) 178 CLR 561.

¹⁶ Section 90, *Constitution*.

¹⁷ *Ngo Ngo Ha v New South Wales* (1997) 146 ALR 355.

Three jurisdictions — ACT, Tasmania and SA — currently have tobacco licensing schemes in place. However, the operation of the schemes differs somewhat between jurisdictions — see Table 3.1.

Table 3.1

CHARACTERISTICS OF EXISTING LICENSING ARRANGEMENTS

	<i>Tasmania</i>	<i>South Australia</i>	<i>Australian Capital Territory</i>	
Relevant authority	Department of Health and Human Services	RevenueSA	Department of Health and Community Care	
Licence applies to	Retail and wholesale operations	Retail operations	Retail operations	Wholesale operations
Licence fee	\$78.75 per premise per annum	\$11.40 per annum or \$2.25 per month for 1 to 5 months	\$200 per premise per annum	\$200 per annum
Applications can be made by	Individuals only	Individuals, partnerships or companies	Individuals, partnerships or companies	Individuals, partnerships or companies
Must applicants be over 18 years of age?	Yes	No	No	No
Must the licence be displayed at the premises?	Yes	No	Yes	Yes

Source: Stakeholder consultations and associated legislation and application forms

Licence application forms can be obtained from the relevant authorities, and through the relevant online business licence portals.

3.3 Calls for reform of current licensing arrangements

Licensing of tobacco retailers has been a matter for considerable discussion, even prior to the *Ngo* case.

A tobacco retail licensing system linked to compliance with health legislation was a recommendation of the Senate Community Affairs References Committee (the Herron Committee) in 1995.¹⁸ The Committee recommended that licensing systems in all states and territories should provide for the suspension or revocation of a licence where retail outlets sell tobacco products to minors. The Committee noted that:

“reducing the availability of tobacco products to minors is important for a number of reasons ... [and that] ... controlling the sale of tobacco products to minors ... emphasises the dangerous nature of tobacco products. These control measures also reinforce the messages about the potentially harmful nature of tobacco that young people receive in school and other settings”.

Senate Community Affairs References Committee 1995, p. 84

Subsequently, the *NTS* stated that the most efficient way in which to monitor restricted sales is through a licensing regime which conveys an authority and which can be ultimately withdrawn. It argued that best-practice models for tobacco supply control now encourage the use of a licensing system as an effective mechanism for achieving retailer/wholesaler compliance with tobacco control legislation.¹⁹ In June 1999, the Ministerial Council on Drug Strategy endorsed the *NTS*.

In 1999, the Commonwealth Department of Health and Ageing, under the auspices of the *NTS*, commissioned an update of a NSW Health Department review of strategies for reducing youth access to tobacco. A national model identifying a best practice approach to reducing sales to minors was developed as an outcome of that review. The report gives consideration to registration and/or licensing schemes for tobacco outlets, but provided no firm views beyond in-principle support for a licensing/registration scheme.²⁰

In 1999, the former WA Minister for Health established an Advisory Committee on Tobacco Sales to Minors to make recommendations on strategies for reducing the illegal sale of tobacco to young people under 18 years of age. The Committee in its report to the Minister considered the feasibility and public health benefits of registration and/or licensing schemes for tobacco outlets. However, the *2001 Action Plan* states that a recommended action is:

“Investigating the implementation of a tobacco licensing system, including investigation of provisions that allow the withdrawal of licences from persons convicted of offences under appropriate legislation and for legislative requirements for all tobacco licences to be displayed at the point of sale.”

Western Australia Department of Health 2001, p. 22

¹⁸ Senate Community Affairs References Committee 1995, *Inquiry into the Tobacco Industry and the Costs of Tobacco Related Illness*, Parliament of Australia, Canberra.

¹⁹ Commonwealth Department of Health and Aged Care 1999a, *National Tobacco Strategy 1999 to 2002-03: A Framework for Action, Endorsed by the Ministerial Council on Drug Strategy (MCDS)*, Canberra.

²⁰ See National Expert Advisory Committee on Tobacco & National Tobacco Policy Officers Group 2000, *A National Approach for Reducing Access to Tobacco in Australia by Young People Under 18 Years of Age*, AusInfo, Canberra.

Indeed, the *Action Plan* concluded by stating, “that a licensing system for tobacco retailers be introduced and that legislation be considered to penalise those making misleading statements regarding the effects of tobacco use”.²¹ Whether the current WA Government supports this position is unclear.

New impetus to the debate about the licensing of tobacco sellers has arisen because of discussions regarding the development of the World Health Organization (WHO) *Framework Convention on Tobacco Control (FCTC)*.²² An overview of the background to the *FCTC* is provided in Box 3.1.

Box 3.1

THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

In May 1996, the World Health Assembly (WHA) adopted a resolution calling upon the Director-General of the WHO to initiate the development of a Framework Convention on Tobacco Control (FCTC) in accordance with Article 19 of the WHO Constitution (Resolution WHA49.17). The FCTC will be an international legal instrument intended to circumscribe the global spread of tobacco and tobacco products. The WHA is aiming for the development and adoption of the FCTC by May 2003.

Current negotiations centre on a draft text issued in July 2002. While earlier drafts have dealt specifically with the licensing issue, the present draft simply says, “Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.” If adopted, this wording would not, of itself, mandate change in current Australian policy.

If, following negotiations, a more specific requirement were to be reinserted with respect to licensing, Australia would have to consider its position in the light of the views of states and territories on the matter. In some instances an international agreement can create a power (under the external affairs head) for the Commonwealth to legislate in an area that would otherwise be held by the States and Territories. It is not clear to what extent, if any, this would apply to the FCTC. The Commonwealth Government will need to consider such ramifications before making a decision to sign the FCTC. At this stage the Commonwealth negotiations have assumed that there is no intention to use the FCTC to alter the balance of responsibilities currently held by states and territories.

²¹ Western Australia Department of Health 2001, *Western Australian Tobacco Action Plan 2001-2004: Taking the Lead*, Perth.

²² See World Health Organization 1999, *Elements of a WHO Framework Convention on Tobacco Control: First Meeting of the Working Group on the WHO Framework Convention on Tobacco Control, Provisional Agenda Item 7*, World Health Organization, Geneva.

Part B

Clarifying the regulatory objectives and the possible role of licensing

Chapter 4

Economic rationales for the regulation of tobacco sales

The Council of Australian Governments (CoAG) has publicly stated that government interventions in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.²³ This view is not foreign to discussions as the need for regulation of tobacco.

“smoking is voluntary and is not illegal for adults, so the existence of an enormous health problem is not, *prima facie*, sufficient to justify interference with people’s choice to smoke. An *economic* rationale for such intervention requires that failures in tobacco markets are sufficiently large to justify the costs of such interference.”

Jha et al. 2000, p. 154

Economic theory assumes that consumers know best and that privately determined consumption will most efficiently allocate society’s scarce resources. Thus, if smokers know their risks and internalise all their costs and benefits, there is no justification, on the grounds of inefficiency (ie, market failure), for governments to interfere.²⁴

However, these assumptions may not hold for several reasons. In particular, when referring to tobacco, regulation can be said to address the twin market failures of:

- information asymmetries — consumers, particularly minors, may have inadequate information about all the costs and benefits about smoking and hence may make non-maximising (ie, sub-optimal) decisions about the decision to begin smoking and to continue smoking (ie, because of its addictive nature); and
- negative externalities — smoking has negative impacts on unrelated third parties directly through passive smoking and indirectly through higher community health costs.

The following sections discuss in some detail how these market failures provide a rationale for government regulation of tobacco sales. This analysis is a necessary first step in justifying or not justifying licensing.

²³ Council of Australian Governments 1991, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, Canberra.

²⁴ Pekurinen, M 1991, *Economic Aspects of Smoking: Is There a Case for Government Intervention in Finland?*, Vapok-Publishing, Helsinki.

4.1 Information asymmetries

Information asymmetries tend to occur when people are young. As a result, and not surprisingly, people typically start smoking during their teen years.²⁵ From the standpoint of economics, the early typical age of smoking commencement is relevant because the standard economic concept of consumer sovereignty, which holds that the consumer knows what is best for him or her, may not apply so forcefully to adolescents as to adults.

The early age of onset has a direct bearing on individuals' health risks. The risk of lung cancer is far higher in individuals who start smoking at age 15 and smoke one pack a day for 40 years than among those who start at age 35 and smoke two packs a day for 20 years.²⁶

There are two forms of information asymmetries that are considered in the following sections:

- incomplete information about health consequences; and
- inadequate information about addiction.

Incomplete information about health consequences

Poorly-informed smokers often underestimate the risks of their action.²⁷ Since people usually react to known risks by reducing the risky consumption, incomplete information means more smoking than would otherwise occur.

There are two principal reasons why smokers tend to be inadequately informed:

- the market participants have hidden or distorted information for consumers — the tobacco industry, like other industries, has no financial incentive to provide health information that would reduce consumption of its products;²⁸ and
- the significant delay between starting to smoke and the onset of obvious disease obscures the link between the two — consumers tend to derive information on the costs and benefits of smoking primarily from their own experience and what happens to their peers. However, the obvious health damage from smoking usually emerges at least 20 to 30 years after exposure. This differs from most other risky behaviours where the costs and benefits are more readily and immediately appreciated.

²⁵ Hill, D, White, V & Segan, C 1994, *Preliminary Report: Prevalence of cigarette smoking among Australian secondary school students in 1993*, Centre for Behavioural Research in Cancer, Melbourne; United States Department of Health and Human Services 1994, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Atlanta.

²⁶ Peto, R 1987, 'Influence of Dose and Duration of Smoking on Lung Cancer Rates', in D Zaridze (ed.), *Tobacco: A Major International Health Hazard*, Oxford University Press, Oxford, pp. 23-34.

²⁷ Weinstein, ND 1998, 'Accuracy of Smokers Risk Perceptions', *Annals of Behavioral Medicine*, vol. 20, no. 2, pp. 135-40.

²⁸ There have been allegations that the industry has consistently hidden product information on the negative effects of smoking — Sweda, EL & Daynard, RA 1996, 'Tobacco Industry Tactics', *British Medical Bulletin*, vol. 52, no. 1, pp. 183-92.

The long delay between exposure and effect has also impeded the growth of scientific knowledge. For example, in the US, 1960s evidence suggested that only one in four smokers died from smoking. When risks were re-assessed decades later, the evidence showed that the risks were actually much higher; one in two long-term smokers die from smoking.²⁹ Anyone who considered starting or continuing smoking 20 or 30 years ago would, therefore, have under-estimated the risks, even if he or she had based the decision on the best available information.

Furthermore, there are a number of other factors that indicate the existence of information deficiencies regarding the health consequences of smoking:

- consumers may not clearly internalise the risks of smoking, even when they have been informed about them, nor may they accurately judge the risks of smoking relative to other environmental exposures. For example in the US, where young people might be expected to have received more information, almost half of 13-year-olds today think that smoking a pack of cigarettes a day will not cause them great harm;³⁰ and
- teenagers, even those with good understanding of the risks of smoking, may have a limited capacity to use information wisely. Teenagers behave myopically, or short-sightedly. It is difficult for most teenagers to imagine being 25, let alone 55, and warnings about the damage that smoking will inflict on their health at some distant date are unlikely to reduce their desire to smoke.

Inadequate information about addiction

The other major information failure in the tobacco market involves inadequate information about nicotine addiction. Smokers acquire:

- psychological addiction to the act of smoking itself — psychological addiction to cigarettes is hardly different from habit formation with respect to other products or practices; and
- physical addiction to nicotine — nicotine addiction is not simply a matter of choice or taste reinforced by repetition, such as choosing to listen to certain music or keeping company with dangerous friends.³¹

As with all biologically addictive goods, many people can change their behaviour and quit using tobacco. However, the costs of quitting are significant, and some people find quitting virtually impossible. Most smokers who quit have to make several attempts before they succeed, and former smokers remain vulnerable to resuming smoking (eg, at times of stress).³²

²⁹ Doll, R, Peto, R, Wheatley, K, Gray, R & Sutherland, I 1994, 'Mortality in Relation to Smoking: 40 Years Observations on Male British Doctors', *British Medical Journal*, vol. 309, no. 6959, pp. 901-11; Peto, R, Chen, ZM & Boreham, J 1999, 'Tobacco: the Growing Epidemic', *Nature Medicine*, vol. 5, no. 1, pp. 15-17.

³⁰ National Cancer Policy Board 1998, *Taking Action to Reduce Tobacco Use*, National Academy Press, Washington.

³¹ Kessler, DA, Barnett, PS, Witt, A, Zeller, MR, Mande, JR & Schultz, WB 1997, 'The Legal and Scientific Basis of FDA's Assertion of Jurisdiction Over Cigarettes and Smokeless Tobacco', *Journal of the American Medical Association*, vol. 277, pp. 405-09.

³² United States Department of Health and Human Services 1990, *The Health Benefits of Smoking Cessation: A Report of the Surgeon General*, US Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Rockville.

There is clear evidence that young people under-estimate the risk of becoming addicted to nicotine, and, therefore, grossly under-estimate their future costs from smoking. For example:

- among high-school seniors in the US who smoke but believe that they will quit within five years, fewer than two out of five actually do quit, and the rest are still smoking five years later;³³ and
- in high-income countries, about seven out of ten adult smokers say they regret their choice to start smoking and two-thirds make serious attempts to quit during their life.³⁴

Thus, it is the combination of imperfect information about addiction and myopia that results in significant under-estimation of the risks of future health damage.

It might be argued that young people are attracted to risky behaviour, (eg, fast driving or alcohol binge-drinking) and that there is nothing special about smoking. However:

- few other risky behaviours carry the high risk of addiction that is seen with smoking, and most others are easier to abandon or modify, and are abandoned or modified in maturity;³⁵ and
- with smoking, there is no comparable way to behave more prudently, except to quit; even cutting back somewhat on consumption does not reduce the risks proportionally. Also, compared with other risky behaviours, such as alcohol use, new smokers face a very high probability of premature death.

These factors combined create a probability of addiction and premature death that is higher than for other risk behaviours.

Thus, at best, nicotine addiction greatly weakens the argument that smokers should exercise consumer sovereignty. Given the myopia of young consumers and the likelihood of information failure for all smokers, it is inappropriate to regard an addiction-induced demand as representing genuine welfare gains to the smoker.

4.2 Externalities

Consumers and producers may impose costs or benefits on others, which are known as externalities. The costs imposed by smokers on others are of three principal types:

- the direct physical costs for non-smokers who are exposed to others' smoke;
- the financial externalities that cause monetary loss for non-smokers, whether or not they are exposed to smoke; and

³³ See Institute of Medicine 1994, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*, National Academy Press, Washington.

³⁴ United States Department of Health and Human Services 1989, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General*, US Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Rockville.

³⁵ Bachman, JG, Wadsworth, KN, O'Malley, PM, Johnston, LD & Schulenberg, J 1997, *Smoking, drinking, and drug use in young adulthood: The impacts of new freedoms and new responsibilities*, Lawrence Erlbaum Associates, Mahwah; O'Malley, PM, Bachman, JG & Johnston, LD 1988, 'Period, Age and Cohort Effects on Substance Use Among Young Americans: A Decade of Change, 1976-86', *American Journal of Public Health*, vol. 78, no. 10, pp. 1315-21.

- the ‘caring externalities’ related to smoking, whereby non-smokers suffer emotionally from the illness and death of smokers unrelated to them personally.

Physical externalities

Physical externalities from smokers involve both health effects for non-smokers, such as a higher risk of disease or death, and other effects, such as the nuisance of unpleasant smells, physical irritation, and smoke residues on clothes, and the greater risks of fire and property damage. The health effects include:

- for children born to smoking mothers, low birth-weight and an increased risk of various diseases;³⁶ and
- an increased risk of various diseases in children and adults chronically exposed to environmental tobacco smoke either at home or in the workplace.³⁷

Financial externalities

Financial externalities are costs that are imposed by smokers but at least partly financed by non-smokers. In Australia, where there is a significant proportion of publicly financed healthcare, these smoking-related medical costs may include:

- costs not fully internalised by smokers;
- the costs of treating the newborns of mothers who smoke during pregnancy and others who suffer from the effects of passive smoking; and
- the damage from fires and the higher maintenance costs of workplaces and homes where smokers are present.

Caring externalities

The third group of externalities — ‘caring’ externalities — are the most difficult to assess.³⁸

There is evidence that people are willing to pay for another’s well being, even if they do not know the person and even if they do not benefit directly themselves. Public spending on health partly reflects such externalities. Existence value is most readily applied to children, whom society typically protects more than adults. In contrast, caring externalities for adults almost directly contradict the notion of consumer sovereignty.

³⁶ Charlton, A 1996, 'Children and Smoking: the Family Circle', *British Medical Bulletin*, vol. 52, no. 1, pp. 90-107; United States Department of Health and Human Services 1986, *The Health Consequences of Smoking For Women*, US Department of Health and Human Services, Public Health Service, Office of the Assistant Secretary for Health, Office on Smoking and Health, Rockville.

³⁷ Environmental Protection Agency 1992, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, EPA/600/6-90/006F, EPA.

³⁸ Krutilla, JV 1967, 'Conversations Revisited', *American Economic Review*, vol. 57, pp. 776-86.

Clearly, caring externalities differ across cultures and countries, depending among other things on the importance society assigns to individual sovereignty. Non-smokers may be willing to subsidise efforts to prevent people taking up smoking or efforts to help smokers quit. They may also be prepared to contribute towards the care of sick smokers, even when these represent a financial burden. However, their attitudes may change over time as knowledge about the health effects of smoking becomes more widespread and non-smokers' tolerance for smokers may decline.³⁹

In any case, there is little solid information of such willingness, so it is difficult to use it to formulate public policies.

Conclusion ■

In principle, the regulation of tobacco can be justified on the basis of the twin market failures of information asymmetries (ie, where people lack adequate information to make optimal decisions) and negative externalities (where the costs of smoking are borne by non-smokers).

³⁹ Gorovitz, E, Mosher, J & Pertschuk, M 1998, 'Pre-emption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and Tobacco', *Journal of Public Health Policy*, vol. 19, no. 1, pp. 36-50.

Chapter 5

Broad policy responses to the identified market failure

Ideally, government interventions should address each identified market failure with a specific intervention tailored to solve that particular problem. This chapter discusses the two principal interventions adopted by governments to address the market failures identified in Chapter Four.

5.1 Principal regulatory responses

In a regulatory sense, governments in Australia have responded to the twin market failures of information asymmetries and externalities by regulating tobacco sales in two principal ways. These ways are discussed in the following sections.

Restrictions on sales to minors

The analysis presented in Chapter Four suggests that government intervention in the tobacco market is most easily justified to deter children and adolescents from smoking, and to protect non-smokers.

The protection of children is the most compelling economic argument for government intervention.⁴⁰ Governments can choose to protect children for several interrelated reasons:

- childhood is when nicotine addiction is likely to begin — about 90 percent of smokers begin using tobacco before they are out of their teens.⁴¹ Furthermore, the younger a person is when they start to smoke the less likely it is that he or she will ever cease;⁴²

⁴⁰ See, for example, Warner, KE, Chaloupka, FJ, Cook, PJ, Manning, WG, Newhouse, JP & Novotny, NE 1995, 'Criteria for Determining an Optimal Cigarette Tax: the Economist's Perspective', *Tobacco Control*, vol. 4, pp. 80-86.

⁴¹ Hill, D, White, V & Segan, C 1994, *Preliminary Report: Prevalence of cigarette smoking among Australian secondary school students in 1993*, Centre for Behavioural Research in Cancer, Melbourne; United States Department of Health and Human Services 1994, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Atlanta.

⁴² Bjartveit, K 1990, 'Fifteen Years of Comprehensive Legislation: Results and Conclusions', paper presented to Seventh World Conference on Tobacco and Health, Perth.

- the earlier people start to smoke the greater the health consequences — early onset of smoking is associated with an increased risk of smoking-related disease and a lower likelihood of quitting smoking. About half of all children who take up smoking and continue to smoke on a regular basis will die prematurely as a result.⁴³ A child who starts smoking at age 14 or younger is five times more likely to die of lung cancer than a person who starts smoking at the age of 24 or more, and is 15 times more likely to die of lung cancer compared to someone who never smokes. It is now known that cardiovascular damage from smoking begins at an early age, and cancers may begin to occur in people in their 30s if they commenced smoking in their early teens⁴⁴ or have been smoking for 15-20 years.⁴⁵ In smokers aged 35-44, nearly three-quarters of coronary heart disease deaths are due to smoking, and heart attacks among people in their 30s and 40s are five times more common in smokers than in non-smokers;⁴⁶
- children are not yet sovereign adults making informed choices, so the principal argument for not intervening does not apply to them as strongly as to adults;
- compared with many consumer goods that may appear desirable to children, cigarettes are generally affordable and accessible. Thus, the market does not spontaneously protect children from them; and
- children have no way to become better or safer smokers as they mature, except by quitting.

Of course, were adults (and particularly parents) always willing and able to protect children from tobacco then there would be little need for governments to intervene.⁴⁷ However, such adult direction is often not perfect because some adults:

- may smoke themselves, thereby modelling this behaviour for the children; and
- may fail to adequately educate their children about the risks of smoking.

Because availability is a key feature of tobacco marketing, and because children's easy access to tobacco products can serve to undermine health messages, initiatives are needed to control availability consistent with tobacco's status as a product which is harmful to health.

The risk that young people will make unwise decisions is not unique to choices about smoking. For example, governments restrict young people's power to make certain decisions, and so:

⁴³ Doll, R, Peto, R, Wheatley, K, Gray, R & Sutherland, I 1994, 'Mortality in Relation to Smoking: 40 Years Observations on Male British Doctors', *British Medical Journal*, vol. 309, no. 6959, pp. 901-11.

⁴⁴ McGill, HC, McMahan, CA, Malcolm, GT, Oalman, MC & Strong, JP 1997, 'Effects of Serum Lipoproteins and Smoking on Atherosclerosis in Young Men and Women', *Arteriosclerosis, Thrombosis and Vascular Biology*, vol. 17, no. 1, pp. 95-106.

⁴⁵ Holman, CDAJ, Armstrong, BK, Australia. Dept. of Community Services and Health. & National Campaign against Drug Abuse (Australia) 1990, *The Quantification of Drug Caused Morbidity and Mortality in Australia 1988*, AGPS, Canberra.

⁴⁶ McGill, HC, McMahan, CA, Malcolm, GT, Oalman, MC & Strong, JP 1997, 'Effects of Serum Lipoproteins and Smoking on Atherosclerosis in Young Men and Women', *Arteriosclerosis, Thrombosis and Vascular Biology*, vol. 17, no. 1, pp. 95-106; United States Department of Health and Human Services 1994, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Atlanta.

⁴⁷ Musgrove, P 1999, 'Public Spending on Health Care: How are Different Criteria Related?' *Health Policy*, vol. 47, no. 3, pp. 207-03.

- prevent minors from voting;
- make education compulsory up to a certain age;
- prevent gambling, the consumption of alcohol, sex and driving before certain ages; and so on.

These and other restrictions reflect the view that some decisions are best left until certain ages (normally adulthood). Likewise, the freedom of minors to choose to become addicted to tobacco is restricted.

Access to tobacco products is an important factor in the uptake of smoking.⁴⁸ Indeed, in Australia in 1996, 46.7 percent of 12-17 year old smokers had purchased their last cigarette as a result of illegal sales.⁴⁹ This, coupled with the fact that smoking behaviour is well established before the end of teenage years, means that reducing access to tobacco products is likely to contribute to reducing the overall prevalence of smoking. Efforts to reduce children's access to tobacco products in Australia have included:

- increasing the minimum age of purchase to 18 years in all jurisdictions (with penalties imposed for those selling or in some cases supplying to minors); and
- restricting the location of vending machines in most jurisdictions.

Similarly, according to WHO in 1997, 43 countries ban the sale of cigarettes to minors, typically by:

- establishing a minimum legal purchase age for cigarettes; and
- restricting the distribution of free samples of to underage youth.⁵⁰

It is generally accepted by public health authorities that, unless effective measures are implemented to ensure that minors are not able to access tobacco products from retail outlets, such access (and perceptions of it) may serve to undermine efforts to discourage smoking in this age group. It is therefore important to examine the role of registration and/or licensing schemes in achieving retailer compliance with sales to minors laws (and other relevant restrictions).

Education and information control

In order to address the information asymmetries advertising is regulated at the point of sale and elsewhere to:

- reduce the attractiveness of tobacco products and to reduce the perception that it is a normal every-day item; and
- reflect the true costs of smoking to actual and potential smokers.

⁴⁸ United States Department of Health and Human Services 1994, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, Atlanta.

⁴⁹ Hill, D, White, V & Letcher, T 1997, *Tobacco Use Among Australian Secondary Students in 1996*, Centre for Research in Cancer, Anti-Cancer Council of Victoria, Melbourne.

⁵⁰ World Health Organization 1997, *Tobacco or Health: A Global Status Report*, World Health Organization, Geneva.

While information campaigns have had an important impact on overall declines in smoking,⁵¹ information campaigns targeted at children are likely to be less effective than those targeted at adults, because children discount the future more, and have difficulty considering consequences of today's behaviour that may not take effect for three or four decades. Indeed, individual youth-centred programs (including school health programs) have often been found to be ineffective on their own (and therefore need to be integrated into a comprehensive tobacco control strategy).⁵²

5.2 The effectiveness of such regulation

Most studies have found that tobacco control laws can be effective in significantly reducing the rate of cigarettes sold by merchants to minors.

However, some commentators have argued that attempts to impose restrictions on the sale of cigarettes to youths in high income countries have mainly been unsuccessful.⁵³ This has been attributed to the fact that:

- the enforcement of bans is difficult — for example, several studies have shown how easily minors can purchase cigarettes.⁵⁴ Indeed, in Australia in 1996, around 38 percent of school children purchased their last cigarette from a retailer, and 47 percent of 12 to 17 year old smokers had purchased their last cigarette as a result of illegal sales;⁵⁵ and
- the restrictions have relatively high administrative costs.⁵⁶

More concerning, many commentators have questioned the effectiveness of retail tobacco controls to actually limit smoking by youths. For example, the World Bank argues that:

“There have been a number of attempts to impose restrictions on the sale of cigarettes to teenagers in high-income countries. *In their existing form*, such restrictions have not been shown to be successful. In general youth restrictions are difficult to enforce, especially given that young teenagers often obtain cigarettes from their older peers, and sometimes, from their parents.”

Prabhat & Chaloupka 1999, p. 58

The limited effectiveness of restrictions on sales to youths has been attributed to two principal factors:

⁵¹ See Commonwealth Department of Health and Aged Care 1999b, *Australia's National Tobacco Campaign: Volume One Evaluation Report*, AusInfo, Canberra.

⁵² See Reid, D 1996, 'Tobacco Control: Overview', *British Medical Bulletin*, vol. 52, no. 1, pp. 108-20.

⁵³ Siegel, M, Biener, L & Rigotti, NA 1999, 'The Effect of Local Tobacco Sales Laws on Adolescent Smoking Initiation', *Preventative Medicine*, vol. 29, pp. 334-42.

⁵⁴ DiFranza, JR & Brown, LJ 1992, 'The Tobacco Institute's "It's the Law" Campaign: has it halted illegal sales of tobacco to children?' *American Journal of Public Health*, vol. 82, pp. 1271-73. See also Radecki, TE & Zdunich, CD 1993, 'Tobacco sales to minors in 97 US and Canadian communities', *Tobacco Control*, vol. 2, pp. 300-05.

⁵⁵ See Hill, D, White, V & Letcher, T 1997, *Tobacco Use Among Australian Secondary Students in 1996*, Centre for Research in Cancer, Anti-Cancer Council of Victoria, Melbourne; ---- 1999, 'Tobacco Use Among Australian Secondary Students in 1996', *Australian and New Zealand Journal of Public Health*, vol. 23, no. 3, pp. 252-59.

⁵⁶ Reid, D 1996, 'Tobacco Control: Overview', *British Medical Bulletin*, vol. 52, no. 1, pp. 108-20.

- evidence suggests that youth access programs may not reduce teen smoking prevalence or consumption.⁵⁷ While many of the provisions are a good idea, it is important to remember that teens only buy about half their cigarettes and other tobacco products; they are equally likely to ‘bum’ or steal cigarettes than to purchase them themselves;⁵⁸ and
- there is also the theory that such laws actually increase youth desire to smoke. Whether this is under a scarcity theory or ‘forbidden fruit’ analysis, there is some support that smoking may become more attractive as a rebellious activity for some youth with increased enforcement.⁵⁹ Indeed, the high teenage drug and alcohol rates suggest that supply-side laws are not a complete solution to youth consumption.

Given these factors, a number of studies have found little impact on youth smoking, even with high compliance by retailers,⁶⁰ and a series of econometric studies have examined the impact of these limits on youth tobacco use in the US, generally finding little or no impact on youth cigarette smoking and other tobacco use.⁶¹

Despite such a volume of criticism on the effectiveness of access controls, a few studies have found that raising retailer compliance with the minimum age laws reduces the prevalence of youth smoking.⁶² Indeed, the best of these studies provides compelling evidence that policies designed to reduce youth access to tobacco can have a significant effect on reducing adolescent smoking rates.⁶³ This study tested the hypothesis that adoption and implementation of local policies regarding youth access to tobacco can affect adolescent smoking. Each intervention community passed a comprehensive youth access ordinance. Intervention communities showed less pronounced increases in adolescent daily smoking relative to control communities. Tobacco purchase success declined somewhat more in intervention than control communities during the study period, but this difference was not statistically significant. Similarly, a recent study in Australia concluded that maintaining a high level of tobacco retail compliance has been an effective strategy in reducing adolescent smoking rates.⁶⁴

⁵⁷ Rigotti, NA, DiFranza, JR, Chang, YC, Tisdale, T, Kemp, B & Singer, DE 1997, 'The Effect of Enforcing Tobacco Sales Laws on Adolescents' Access to Tobacco and Smoking Behavior', *New England Journal of Medicine*, vol. 337, no. 15, pp. 1044-51.

⁵⁸ Cismoski, J & Sheridan, M 1994, 'Tobacco acquisition practices of adolescents in two Wisconsin communities', *Wisconsin Medical Journal*, vol. 93, pp. 585-91.

⁵⁹ Glantz, SA 1996, 'Preventing Tobacco Use — The Youth Access Trap [editorial]', *American Journal of Public Health*, vol. 86, pp. 156-58.

⁶⁰ Rigotti, NA, DiFranza, JR, Chang, YC, Tisdale, T, Kemp, B & Singer, DE 1997, 'The Effect of Enforcing Tobacco Sales Laws on Adolescents' Access to Tobacco and Smoking Behavior', *New England Journal of Medicine*, vol. 337, no. 15, pp. 1044-51.

⁶¹ Chaloupka, FJ & Grossman, M 1996, *Price, Tobacco Control Policies and Youth Smoking*, National Bureau of Economic Research Working Paper No. 5740; Chaloupka, FJ & Pacula, RL 1998, *Limiting Youth Access to Tobacco: The Early Impact of the Synar Amendment on Youth Smoking*, Working Paper, University of Illinois at Chicago, Chicago; Wasserman, J, Manning, WG, Newhouse, JP & Winkler, JD 1991, 'The Effects of Excise Taxes and Regulations on Cigarette Smoking', *Journal of Health Economics*, vol. 10, no. 1, pp. 43-64.

⁶² Forster, JL, Murray, DM, Wolfson, M, Blaine, TM, Wagenaar, AC & Henrikus, DJ 1998, 'The Effects of Community Policies to Reduce Youth Access to Tobacco', *American Journal of Public Health*, vol. 88, no. 8, pp. 1193-98; Jason, LA, BILlows, WD, Schnopp-Wyatt, DL & King, C 1996, 'Long-term Findings from Woodridge in Reducing Illegal Cigarette Sales to Older Minors', *Evaluation and the Health Professions*, vol. 19, pp. 3-13.

⁶³ Forster, JL, Murray, DM, Wolfson, M, Blaine, TM, Wagenaar, AC & Henrikus, DJ 1998, 'The Effects of Community Policies to Reduce Youth Access to Tobacco', *American Journal of Public Health*, vol. 88, no. 8, pp. 1193-98. A randomised community trial was conducted in 14 Minnesota communities. Seven intervention communities participated in a 32-month community-organising

The difficulty is explaining the divergent views as to the effectiveness of retailer restrictions. Chaloupka and Grossman attribute this divergence of findings to the relatively weak enforcement of these laws in some jurisdictions.⁶⁵ This conclusion was drawn from their examination of the impact of enforcement of and compliance with the limits on youth access on youth smoking using data collected in a special 1994 survey of state activities related to the Synar amendment.⁶⁶ This amendment requires US states to establish minimum purchase ages for tobacco products and to demonstrate that these laws are being enforced by conducting random, unannounced compliance checks of retailers selling tobacco products. Failure to do so can lead to the loss of state block grant funds for substance abuse prevention and treatment programs. Chaloupka and Pacula's estimates suggest that when the limits on youth access are comprehensively and aggressively enforced and highly complied with, they significantly reduce the prevalence of youth smoking.

The body of evidence examining the effects of active enforcement on youth smoking suggests that it is an important and essential element of a comprehensive effort to reduce young people's use of tobacco.⁶⁷ This is because youth access restrictions are not susceptible to self-enforcement, largely because there are strong economic incentives associated with completing the transaction.

Indeed, numerous published studies have claimed to show that the combination of enforcing laws that restrict tobacco sales to minors and educating merchants can reduce illegal sales of tobacco to minors.⁶⁸ Importantly, studies have also indicated that:

- community education without enforcement is also inadequate. For example, Feighery, Altman and Schaffer examined the effects of combined community education and enforcement efforts in four Northern California communities.⁶⁹ They found that the combined enforcement and education approach resulted in reduced tobacco sales to minors, but that education efforts had only a limited effect; and

effort to mobilise citizens and activate the community. The goal was to change ordinances, merchant policies and practices, and enforcement practices to reduce youth access to tobacco. Outcome measures were derived from surveys of students before and after the intervention and from tobacco purchase attempts in all retail outlets in the communities. Data analyses used mixed-model regression to account for the clustering within communities and to adjust for covariates.

⁶⁴ Tutt, Bauer, Edwards & Cook 2000, 'Reducing Adolescent Smoking Rates. Maintaining High Retail Compliance Results in Substantial Improvements', *Health Promotion Journal of Australia*, vol. 10, no. 1, pp. 20-24.

⁶⁵ Chaloupka, FJ & Grossman, M 1996, *Price, Tobacco Control Policies and Youth Smoking*, National Bureau of Economic Research Working Paper No. 5740. See also Feighery, E, Altman, DG & Schaffer, G 1991, 'The Effects of Combining Education and Enforcement to Reduce Tobacco Sales to Minors', *Journal of the American Medical Association*, vol. 266, no. 22, pp. 3168-71.

⁶⁶ Chaloupka, FJ & Pacula, RL 1998, *Limiting Youth Access to Tobacco: The Early Impact of the Synar Amendment on Youth Smoking*, Working Paper, University of Illinois at Chicago, Chicago.

⁶⁷ Ibid; Feighery, E, Altman, DG & Schaffer, G 1991, 'The Effects of Combining Education and Enforcement to Reduce Tobacco Sales to Minors', *Journal of the American Medical Association*, vol. 266, no. 22, pp. 3168-71; Forster, JL, Murray, DM, Wolfson, M, Blaine, TM, Wagenaar, AC & Hennrikus, DJ 1998, 'The Effects of Community Policies to Reduce Youth Access to Tobacco', *American Journal of Public Health*, vol. 88, no. 8, pp. 1193-98.

⁶⁸ Chaloupka, FJ & Pacula, RL 1997, 'Limiting Youth Access to Tobacco: The Early Impact of the Synar Amendment on Youth Smoking', paper presented to 3rd Biennial Pacific Rim Allied Economic Organizations Conference, Bangkok, 14 January; Forster, J & Wolfson, M 1998, 'Youth Access to Tobacco', *Annual Review of Public Health*, vol. 19, pp. 203-35. See also Chaloupka, FJ & Pacula, RL 1998, *Limiting Youth Access to Tobacco: The Early Impact of the Synar Amendment on Youth Smoking*, Working Paper, University of Illinois at Chicago, Chicago.

⁶⁹ Feighery, E, Altman, DG & Schaffer, G 1991, 'The Effects of Combining Education and Enforcement to Reduce Tobacco Sales to Minors', *Journal of the American Medical Association*, vol. 266, no. 22, pp. 3168-71.

- retailer education is an inadequate measure without enforcement (see Box 5.1).

Box 5.1

WILL EDUCATION ALONE ACHIEVE THE OBJECTIVES?

The potential of education and information-based mechanisms to achieve high levels of retailer compliance with tobacco sales requirements has been extensively studied, both within Australia and overseas. Although retailer education plays an important role in increasing the effectiveness of legislation, research has consistently shown that merely educating retailers about the law compliance with legislation can be low, and has little long-term impact on reducing tobacco sales to minors. For example:

- following an intensive two year retailer education campaign among retailers on the NSW Central Coast, compliance surveys still revealed an illegal selling rate close to 31 percent;
- other Australian studies have examined the impact of information kits, local media campaigns and warning letters sent to retailers who had sold cigarettes to minors during compliance monitoring operations. One 1995 study found that 26 percent to 55 percent of retailers (the proportion increasing with increased purchase attempts) still sold cigarettes to children. This study also reported no change in students' perceptions of ease of purchase at various types of retail outlets;
- following a September 1999 compliance check of SA retailers, those complying with the law were sent congratulatory letters and those non-complying retailers were sent a letter telling them of their responsibilities under the law. In June 2000 a compliance check was again undertaken (largely of the same stores). Despite the intervening provision of information to retailers, non-compliance increased from 20 percent to 35 percent in metropolitan areas, and from 35 percent to 52 percent in country SA; and
- a US study involving education and positive feedback to complying retailers in four communities resulted in illegal sales still occurring in 17 percent to 35 percent of outlets.

Source: Altman et al. 1991; Cook 1998; DiFranza & Brown 1992; Feighery, Altman & Schaffer 1991; Rowley & Miller 2000; Schofield, Gulliver & Sanson-Fisher 1995; Schofield, Sanson-Fisher & Gulliver 1997; Skretny et al. 1990; Staff et al. 1997

Conclusion |

Restrictions on under-age access to tobacco are a key regulatory response, but will only be effective if they are adequately enforced.

Chapter 6

The role of licensing

Drawing upon the analysis from the previous chapter (ie, the discussion of the rationales for the regulation of tobacco sales), this chapter addresses the specific role of licensing.

6.1 Licensing should address the identified market failures

It is sometimes argued that the purpose of licensing suppliers of goods and services is to secure a minimum level of quality or safety to protect some consumers who are gullible, preoccupied or careless or who miscalculate. Kleinig puts it this way:

“The end is not to eliminate choice (or the lessons that may be learned from misguided choices), but to remove from the market choices that will more than likely be made only by those who are susceptible to non maximising considerations. ... given the comparative advantage that sellers have with respect to knowledge about their products, and given the weaknesses and vulnerabilities of potential customers, minimum quality and safety standards (and occupational licensing) represent an attempt to overcome the worst effects of exploitation.”

Kleinig 1983, pp. 183-84

In effect, licensing schemes exist to minimise the potential social harm caused by particular products and services. The liquor and gaming industries are two industries which are subject to comprehensive licensing systems, designed as part of the strategies to minimise the social ill-effects of alcohol abuse and problem gambling. There are numerous other activities that have licensing schemes in place to ensure public safety and public health, including food retailing, tattoo and body piercing, and so on.

However, the general view of regulatory economists is that except in a few possible cases it is unlikely that business licensing can be justified on the grounds of addressing externalities.⁷⁰ There are two exceptions to this general view:

- where licensing is a cheap and effective means of avoiding externalities which would otherwise be difficult or costly to reverse.⁷¹ This is the case with tobacco and its addictive properties (see sections 10.2); and
- where there is an important fixed component of an externality which is unrelated to the scale of the business's activity.⁷² Tobacco may be seen in this way in that there is no safe level of usage, and so control at the provision level is a better solution than management of on-going risks. Licensing or some other form of direct regulation may be the only effective means of addressing such an externality.

Conclusion

Licensing is a legitimate regulatory response to the existence of externalities related to tobacco consumption.

⁷⁰ See Moore, TG 1961, 'The Purpose of Licensing', *Journal of Law and Economics*, vol. 4, pp. 93-117.

⁷¹ See, for example, Ogus, AI 1994, *Regulation: Legal Form and Economic Theory*, Clarendon Press, Oxford.

⁷² See Starrett, D 1972, 'Fundamental Non-Convexities in the Theory of Externalities', *Journal of Economic Theory*, vol. 4, pp. 180-99.

Licensing is less directly a response to information asymmetries. However, it is to the degree that licensing sends a message that selling tobacco is a privilege and not a right.

6.2 What role can tobacco seller licensing play?

Many expert groups and tobacco control advocates have agreed on the need for a licensing system as part of a model tobacco access regime.⁷³ The elements that constitute proposed model laws have generally been described in these terms:

“a tobacco sales licensing system that allows tobacco retailers to be identified and informed of their legal responsibilities. Revenues generated from licensing can fund a government’s enforcement program so that it is self-supporting and therefore does not depend on the annual allocation of state funds from the legislative or executive branches of government. This approach increases the cost-effectiveness of enforcement as a tobacco control strategy.”

Rigotti, Nancy A 2001, p. 151

Similarly, Jackson and Wasserman note that:

“We also believe that licensing cigarette vendors at the local level is a critical ingredient to an effective enforcement program, for two reasons. First, as we observed in several Minnesota locales, license fees can be used to finance regular compliance checks, thus making the enforcement effort economically self-sufficient. This, in turn, will ensure its long-run survival. Second, license suspension for varying periods of time, depending on the number of prior offences, should be an integral component of the ordinance’s penalty structure, because even substantial fines may, in some instances, fail to provide a substantial deterrent to illegal sales. For chronic offenders, license revocation should also be an option.”

Jacobson & J 1997, pp. 19-20

However, some studies have noted that enforcement can be undertaken without licensing if there is adequate commitment:

“It is possible to achieve 100 percent compliance by combining retailer education, regular compliance testing and prosecutions. This has been demonstrated in New South Wales (NSW) in 1998/99, where the NSW Health Department declared a strong commitment to monitoring compliance and active enforcement of section 59 of the Public Health Act 1991 (NSW).”

Rowley & Miller 2000, p. 8⁷⁴

We suggest that the overall objective related to licensing is to facilitate improved enforcement of regulations that gain their justification from the rationales advanced in Chapter Four. It is important to stress that licensing should not be judged solely on the basis of whether or not sufficient information is provided to consumers, or that sales to minors do not occur; it should be judged on the marginal benefit provided by licensing in achieving these ultimate goals, and the marginal costs associated with the scheme.

Thus, the relevant objectives related to tobacco seller licensing are to *facilitate* the provision of:

⁷³ See Advocacy Institute 2000, 'Policies to Reduce Youth Access to Tobacco', in *Making the Case: State Tobacco Control policy briefing papers*, Advocacy Institute, Washington; Forster, J & Wolfson, M 1998, 'Youth Access to Tobacco', *Annual Review of Public Health*, vol. 19, pp. 203-35; Institute of Medicine 1994, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*, National Academy Press, Washington; Jacobson, PD & J, W 1997, *Tobacco Control Laws: Implementation and Enforcement*, RAND, Santa Monica; Working Group of State Attorneys General 1994, *No sale: Youth, tobacco and Responsible Retailing — Developing Responsible Retail sales Practices and legislation to Reduce illegal tobacco Sales to Minors*, National Association of Attorneys General, Washington.

⁷⁴ See also Purcell, K & O'Neill, C 1999, *A National Approach for reducing the Sale of Tobacco to Children in Australia: Report to the Ministerial Council on Drug Strategy*, Canberra.

- adequate knowledge/information to enforcement officials to enable them to adequately enforce the law's regulating tobacco sales;
- appropriate and adequate information to retailers regarding their obligations; and
- efficient and effective sanctions for use against retailers who contravene relevant tobacco point of sale laws.

Conclusion

Tobacco licensing should seek to facilitate the provision of:

- *adequate knowledge/information to enforcement officials to enable them to adequately enforce the law's regulating tobacco sales;*
- *appropriate and adequate information to retailers regarding their obligations; and*
- *efficient and effective sanctions for use against retailers who contravene relevant tobacco point of sale laws.*

6.3 Non-legislative approaches should be demonstrably inadequate

Licensing should generally only be used when there are no suitable non-legislative means of achieving the desired outcomes.

Significant progress appears to have been made in facilitating enforcement in Victoria without the need for a licensing regime:

- a reasonably comprehensive database of tobacco sellers was generated from food seller lists⁷⁵ and from public sources such as phone books (ie, newsagents almost always sell tobacco). However, the changing nature of small, mixed businesses — they change hands, close down, or move with a surprising frequency — means that the accuracy of this list is variable. At present, Victoria relies on a number of sources for the compilation and maintenance of data relating to retailers, including funding local councils to provide this information. This means that rather than being able to recover costs from a licensing scheme, the Department has to expend funds in order to maintain a list of retailers that is only about 90 percent accurate; and
- if found guilty of selling tobacco to people under the age of 18, tobacco retailers may be fined up to \$5,000 and also risk losing their ability to sell tobacco for a period.

Intuitively one would think that companies would provide good data to avoid licensing, however this has not been the case in Victoria.⁷⁶ This makes me question the rigour of the point made about companies being more willing to co-operate if licensing is even discussed.

⁷⁵ The Victorian Department of Human Services estimates that in Victoria 80 percent of food premises sell tobacco.

⁷⁶ Tobacco companies are required to provide data about tobacco retailers to the Secretary of the Department under section 42A of the *Tobacco Act 1987*, although data provided to date has been substandard. While this issue has not been taken up with tobacco companies to date, it is expected that tobacco companies will be pursued with more vigour in the future to ensure the supply of more accurate data

Similarly, compliance in NSW appears to be relatively high because of sustained enforcement and a significant commitment of resources at a regional level.

We suggest that jurisdictions without licensing arrangements can do more to identify the location of tobacco sellers. This can be done by:

- building upon notification and licensing schemes developed for related purposes — we note with interest that under new food safety standards:

“Businesses will be required to provide information regarding the nature of their business in order to comply with the notification requirements of Standard 3.2.2 Food Safety Practices and General Requirements. Some States and Territories have existing mandatory registration or licensing requirements for food businesses. In these jurisdictions the notification process may be incorporated into any existing arrangements. Where registration does not exist, the notification process will need to be established.”

Australia New Zealand Food Authority 2001, p. 3

This food notification/licensing provides an opportunity for tobacco control officers. We suggest that there is a very high (but not perfect) correlation between food businesses and tobacco retailers. A simple addition to such notification arrangements — “Are tobacco products sold at the premises?” — would represent a low cost tobacco notification system without the need for legislative change;

- putting greater pressure on tobacco companies to provide details of their customers. We note that the mere threat of licensing may be useful in encouraging a willingness to supply customer lists:

“We would like to take this opportunity to stress that PML stands ready to work with the Government and the public health community to find effective ways to prevent access by under-age people to tobacco products. In line with this commitment, and to address Government’s concerns about being able to communicate directly with retailers on youth access issues, PML is prepared to provide Government with the business names and addresses of retail outlets to whom it (and its distribution company, Statewide Tobacco Services Limited) sell tobacco products, consistent with our obligations under the Privacy Act 1988, as amended on 21 December 2001. We have provided such lists voluntarily to Western Australia, Queensland and Victoria in the past.”

Philip Morris Limited 2002, pp. 1-2

Because of the existence of non-tobacco company wholesalers and the informal wholesaling sector such lists are likely to be less than complete. For example, BAT only has about 17,000 customers, although there is estimated to be around 40,000 retail tobacco stores in Australia;

- committing greater resources to inspections. Clearly, this option is often not practical.

While these processes will facilitate greater enforcement they are all limited in various ways. For example, they do not necessarily:

- provide the means by which more flexible penalties can be applied (eg, licence withdrawal, licence conditions, etc);
- maximise regulatory oversight of the entire industry; and
- allow authorities to communicate directly with retailers and so on.

Conclusion |

While there are policy options in addition to licensing, these approaches struggle to achieve the objectives considered appropriate for licensing (ie, the provision of: adequate knowledge/information to enforcement officials to enable them to adequately enforce the law's regulating tobacco sales; appropriate and adequate information to retailers regarding their obligations; and efficient and effective sanctions for use against retailers who contravene relevant tobacco point of sale laws).

Part C

Best practice tobacco licensing

Chapter 7

Licensing models

This chapter seeks to identify the optimal form of licensing. In particular, four alternative forms of licensing are explicitly considered:

- notification/registration;
- accreditation/certification;
- negative licensing; and
- positive licensing.

Each of these four alternative licensing approaches involve one or more of the following characteristics:

- *notification* — information is supplied to the relevant regulatory authority. Notification is more likely to be useful when it is important to know the identity of the source of a potential externality in advance;
- *prior approval* — approval from the relevant regulatory authority is obtained before commencing the prescribed business activities. Prior approval may be relevant when externalities are difficult to reverse, or when they are location-specific or unrelated to the activities of a business. It may also be useful when there is limited knowledge about the risks associated with a spillover;
- *standards* — minimum standards are specified and are to be complied with as a prerequisite for obtaining and/or retaining a licence; and
- *enforcement or compulsion* — licensing is not voluntary so that conducting the activities without a licence is unlawful, the standards are legally enforceable, and contravention of them may lead to the suspension or revocation of permission to conduct the activity.

Using these four characteristics, the characteristics underpinning licensing forms assessed in this chapter are outlined in Table 7.1.

Table 7.1

PROPERTIES ASSOCIATED WITH VARIOUS FORMS OF LICENSING

	<i>Notification/ Registration</i>	<i>Accreditation</i>	<i>Negative Licensing</i>	<i>Positive Licensing</i>
Notification	✓	✓		✓
Prior approval		✓		✓
Standards	Optional	✓	✓	✓
Enforcement or compulsion	✓		✓	✓

Sections 7.1 to 7.4 address the costs and benefits of these alternative licensing approaches, with a direct comparison of the alternatives in a control context provided in section 7.5.

7.1 Notification/registration

A notification is an instrument created under government authority requiring all businesses with specified characteristics to provide information about their attributes to a specified agency.

There are a range of features/characteristics that may or may not be identifiable in any particular notification scheme:

- being included on the register (ie, a list of notifiers) is not subject to conditions or restrictions. However, compliance with more general requirements (eg, properly filling in the notification form) may be associated with a notification;
- a notification need not be administered by a government agency, but it must be created under government authority (ie, by legislation, regulation, ministerial order, by-law or similar legal process);
- a notification scheme does not involve any scrutiny of the business and may be implemented mainly to reduce the administrative costs of identifying and locating firms. However, distinguishing between licences and notifications is often difficult in practice. ‘Licences’ may require only the most basic quality standards to be met or involve only the most cursory examination of an application. In these cases, positive licenses are almost indistinguishable from notifications;
- fees may or may not be charged; and
- there may be a requirement to be registered, and an associated penalty for failing to be registered.

Requiring businesses to supply information to an agency means that such agencies obtain a complete list of possible business sources of externalities and information failures within their jurisdiction. This means licensing agencies can better direct inspection and audit resources. For example, agencies may use information about the location and activities of businesses to help target enforcement towards riskier businesses or activities.

However, while the mandatory supply of information helps to reduce agency enforcement costs, it adds to the private costs associated with complying with information requests, completing application forms or engaging consultants to gather data required by agencies. The agency also incurs costs of processing and storing the requested information.

While a notification system will normally impose only a small financial burden on businesses and may provide a record of tobacco retailers and wholesalers, the disadvantages of such a system are similar to those with respect to negative licensing (see section 7.3). In particular, registration:

- is oriented towards the activity being a ‘right’ rather than a conditional privilege;

- does not provide the opportunity to place conditions on those carrying out the activity; and
- is geared to compliance action only after a violation occurs.

7.2 Accreditation/certification

Accreditation (sometimes called certification) schemes amount to non-mandatory licences. They involve prior approval and compliance with minimum standards, and accreditation can be withdrawn for failing to satisfy the standards. However, lack of accreditation does not prevent a firm from lawfully engaging in the relevant business activity.

Many critics of positive licensing systems favour accreditation as an alternative to licensing because it allows free entry into the market and so is less likely to hinder competition.⁷⁷

Because accreditation is non-mandatory, consumers preferring to trade off lower quality for lower price are not disadvantaged. According to Ogus, accreditation, “possesses the additional advantage of preserving freedom of choice: consumers who want to can elect for a lower quality of service at what will be a lower price”.⁷⁸ The trouble is that the implicit aim of licensing is to restrict choice (ie, to stop minors purchasing tobacco from retailers). As such, accreditation is an inappropriate regulatory response.

7.3 Negative licensing

A negative licensing system is one in which no licence or permit is required before commencing operations, but a business committing serious breaches of the required standards may be barred from continuing the activity.⁷⁹

The principal advantages of this system are that:

- there are no fees or compliance costs for businesses;
- public resources which would have been devoted to handling notification and prior approval under alternative licensing approaches can be redirected to enforcement of the required operating standards;
- it provides some level of deterrent for legislative breaches; and
- there is little administration, and hence administrative costs are low.

These advantages lead to PML supporting negative licensing:

⁷⁷ See Moore, TG 1961, 'The Purpose of Licensing', *Journal of Law and Economics*, vol. 4, pp. 93-117; Wolfson, AD, Trebilcock, MJ & Tuohy, CJ 1980, 'Regulating the Professions: A Theoretical Framework', in S Rottenberg (ed.), *Occupational Licensure and regulation*, American Enterprise Institute for Public Policy Research, Washington.

⁷⁸ Ogus, AI 1994, *Regulation: Legal Form and Economic Theory*, Clarendon Press, Oxford.

⁷⁹ Ibid.

“we would support the implementation of a “negative” licensing regime to help prevent access by under age people to tobacco products. We do, however, have some concerns associated with the introduction of a “positive” licensing system that requires tobacco product providers to affirmatively apply for a licence to sell tobacco products.

We propose that the government consider a “negative” licensing regime. Under such a system, if a retailer is found to be guilty of breaching legislation that prohibits tobacco sales to minors, then their right to sell tobacco products would be forfeited temporarily or permanently, and a significant financial penalty would also be incurred. Because of the potential loss of livelihood for a considerable period of time, we believe that this “negative” licensing scheme would operate as an effective deterrent to the sale of tobacco products to minors.

Varying forms of a “negative” licensing system currently operate in Victoria, South Australia, Queensland and New South Wales, where retailers can lose their right to sell tobacco products if they sell to underage persons or if they sell illegal tobacco products. We would encourage the federal government to look to such a model.”

Philip Morris Limited 2002, p. 1

Negative licensing is not normally used in relation to activities which are associated with risks to health. However:

- the Victorian *Tobacco Amendment Act 2000* enables a Magistrate’s Court to suspend a retailer’s (and their associates) ability to sell tobacco products for a set period of time (ie, an implicit negative licensing scheme). For this suspension to occur the retailer must be found guilty of selling tobacco to minors or possessing illegal tobacco;
- the NSW *Public Health Amendment (Tobacco Control) Bill 1999* provided an example of a proposed negative licensing regime for tobacco retailers. The aim was to exclude tobacco retailers from the market where they repeatedly breach public health tobacco control legislation. Fines would have applied to convicted retailers who continued to sell cigarettes following exclusion. Under the proposed negative licensing system:
 - retailers convicted of selling cigarettes to people under 18 years, or who breached advertising guidelines on two occasions within a three year period would be excluded from tobacco retailing for a period of two months;
 - retailers convicted of selling cigarettes to people under 18 years, or who breached advertising guidelines on three occasions within a three year period would be excluded from tobacco retailing for a period of twelve months;
 - any individual retailer convicted of two or three offences found to be continuing to engage in tobacco retailing would incur a maximum penalty of \$22,000 for a first offence and \$44,000 for any subsequent offences; and
 - any body corporate convicted of two or three offences found to be continuing to engage in tobacco retailing would incur a maximum penalty of \$44,000 for a first offence, and \$88,000 for any subsequent offences.

The disadvantages of a negative licensing system are that it:

- is not pro-active and prevention-oriented, but is primarily a system for responding to problems after they occur — in practice, however, this perceived disadvantage is not markedly different to what occurs under current positive licensing regimes. As licensing criteria are low there is minimal up-front vetting of applicants;

- does not provide a comprehensive record of all tobacco retailers — this reduces the ability of the health authorities to undertake targeted education and information campaigns;
- does not provide members of the public with information about who is responsible for selling tobacco products (ie, there is no licence on display);
- may provide a fairly weak message to retailers about the penalty for non-compliance being the ‘loss’ of a licence that has not been issued, and hence perpetuate the view that selling tobacco is a right; and
- will not raise funds to support education, monitoring and enforcement programs.

7.4 Positive licensing

A positive licence is a notification which also requires prior approval as a condition for conducting prescribed business activities, and compliance with specified minimum standards. Breaches of the required standard may result in the suspension or revocation of permission by a specified agency.

A positive licensing system links compliance with tobacco control legislation to the right to sell tobacco products. Such a licensing system, which is similar to that which applies to the sale of alcohol, is generally supported by health groups.

Licensing systems serve as a formal representation of the special care and responsibility that the community expects to be demonstrated by those who choose to sell these products. Studies of retailer compliance conducted in Australia and overseas have concluded that the most effective incentive for legislative compliance is the real threat of a loss of licence, rather than the (more remote) possibility of prosecution and a (relatively small) fine.

By excluding certain suppliers from the market, positive licensing aims to reduce uncertainty about the sales methods of licensed businesses (ie, by requiring that they be aware of tobacco control laws and abide by them).

The advantages of positive licensing system is that it:

- provides an opportunity for targeted education and information for retailers/wholesalers through the licence application process and through the provision of a comprehensive record of all tobacco retailers and wholesalers doing business in the jurisdiction;
- is consistent with the message that selling tobacco — a dangerous product — is similar to other activities which carry a potential health risk in that it is a conditional privilege rather than an unfettered right;
- provides administrative enforcement options (eg, licence conditions, licence withdrawal) which are less costly than legal action through the courts;
- ensures that those who sell tobacco products are aware of their legal responsibilities and, through the offence of selling tobacco products without a licence, prevents unscrupulous sellers from selling tobacco products at markets, sporting events, around schools, etc;

- provides for an appeal system through the through administrative tribunals rather than through the courts — it should be noted that the intention is not to eliminate prosecution as an option, but for the emphasis to be placed on administrative rather than criminal sanctions for licensee non-compliance; and
- provides funding for education, monitoring and enforcement programs.

The disadvantages of a positive licensing system are that it:

- imposes administrative costs on governments — such costs can be reduced by charging a cost-recovery fee, but this merely shifts the costs to industry (and ultimately consumers);
- imposes an administrative cost on businesses in the industry — the 1996 *Small Business Deregulation Task Force* noted that the burden on firms included not only the paperwork but also lost opportunities and disincentives to expand their business. These ‘other aspects of burden’ included, “inefficient and ineffective processes (for example, for licences or applications), resulting in lost time, extra costs and duplication.”⁸⁰ The Industry Commission noted that, “These opportunity costs and disincentives are very hard to quantify.”⁸¹ and
- imposes a licence fee on businesses — PML notes that, “assuming that retailers would have to pay a fee to obtain the license, such a fee would disproportionately burden small businesses as compared to large ones. Small business proprietors are concerned at the level of compliance costs associated with managing their businesses and PML believes that the introduction of a tobacco licence fee would impose an unwarranted additional burden on small business people who rely in part on tobacco product sales for their livelihoods.”⁸²

Some reviews have considered such costs to be significant in aggregate. For example, the review of the WA tobacco control legislation noted that:

“While we have not considered the matter in detail, we would expect that requiring each tobacco retailer to be licensed could not be achieved without significant administrative and financial costs which might well outweigh the anticipated benefits.”

Minter Ellison Northmore Hale 1995, p. 64

Certainly, industry had generally regarded licensing as a net community cost:

“*British American Tobacco* does not believe that licensing of tobacco retailers is an effective way of reducing youth smoking in all markets. Retail licensing is wildly impractical for many countries. Apart from the administrative burden, it fails to consider the political and social enforcement and economic consequences involved in the many countries where there are huge numbers of local small family units and street vendors selling cigarettes.”

British American Tobacco 2001, p. 2 Emphasis in the original.

⁸⁰ See Small Business Deregulation Task Force 1996, *Time for Business*, AusInfo, Canberra.

⁸¹ Bickerdyke & Lattimore 1997, *Reducing the Regulatory Burden: Does Firm Size Matter?*, Staff Research Paper, Industry Commission, Canberra.

⁸² Philip Morris Limited 2002, *Philip Morris Limited's position on Licensing of Tobacco product Providers*, Sydney.

We suggest that the costs of licensing are not significant when compared to the costs of licences for many business activities. Indeed, a number of retailer organisations agreed that the (likely) costs of licensing were not significant in and of themselves. What seems to be more of a concern is the plethora of paperwork and fees. This suggests that if licensing is adopted then care needs to be taken to ensure that compliance burden is minimised.

Licensing carries important implications for competition and market power:

- excessively high standards tend to reduce the net benefits available from licensing. Barriers to entry may be erected by agencies concerned with licensing (especially when they are influenced by industry and professional groups, as in co-regulation systems). Excessively stringent standards may also be applied to licensed products. These restrictions produce transfers of income (in the form of economic rent which exceeds the normal rate of return to a business) to the licensees and permit holders,⁸³ and general efficiency losses from a less competitive economic environment;⁸³ and
- barriers to entry may be indirect; while there may be no specific limits to the total number of entrants, this does not prevent examination standards being raised to restrict entry.⁸⁴

In the UK, the Deregulation Task Force observed that:

“There are currently over 250 different business licences. ... the obligation to obtain a licence before trading is additional to the regulatory regime that applies after trading begins. Even if one accepts the case for regulating each of these economic activities it is hard to see why businesses should have to plead to the authorities for a licence before they can even start. The system advantages existing businesses who hold licences at the expense of those seeking to start up. The requirement to hold a licence is a barrier to market entry, and inhibits innovation, growth and consumer choice. We believe there should be a presumption that each one of these licences should be abolished unless a powerful argument for its retention can be made.”

Deregulation Task Force 1995, p. 9

However, the public health rationale for regulating tobacco products has been well accepted, and governments have acknowledged that an unrestrained competitive market in tobacco products is contrary to the public interest and would not be consistent with efforts to discourage the use of tobacco products.

7.5 Summary assessment

In a review such as this it is necessary to consider a wide range of impacts associated with different reform options. This concern was highlighted in the recent Senate Select Committee report on the socio-economic consequences of NCP:

“The Committee continues to be concerned about the application of ‘public interest’ given the confusion that exists over what the term means or allows under NCP. The confusion, when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive, definition. *The Committee considers that it is important to devise a method of assessment of the policy which attributes a numerical weighting to environmental and social factors to avoid the over-emphasis on dollars merely because they are easy to measure.*”

Senate Select Committee of the 39th Parliament of Australia on the Socio-Economic Consequences of the National Competition Policy 2000, p. 35 Emphasis added.

⁸³ There may also be cases in which a licensing system is clearly intended to discourage the licensed activity. For example, Moore provides the example of itinerant peddlers of drugs in late nineteenth century Chicago who were charged the exorbitant licence fee of \$1,000 per month — Moore, TG 1961, ‘The Purpose of Licensing’, *Journal of Law and Economics*, vol. 4, pp. 93-117.

⁸⁴ Ogus, AI 1994, *Regulation: Legal Form and Economic Theory*, Clarendon Press, Oxford.

For this reason, the ‘balanced scorecard’ approach to assess the current approach versus alternative approaches. The Department of Finance and Administration’s description of the balanced scorecard demonstrates the scorecard’s applicability to a review that incorporates significant non-quantitative, or difficult to quantify, elements:

“The balanced scorecard is an approach to performance management that translates an organisation’s strategic objectives into a useful set of performance measurements. In addition to traditional financial indicators, it incorporates elements of organisational or non-financial performance such as customer satisfaction, internal business processes, and innovation and learning. This is particularly useful in a public sector environment where ‘bottom line’ drivers are not pre-eminent measures of success.”

Department of Finance and Administration, *Specifying Outcomes and Outputs*, Appendix E: Key Strategic Planning Methodologies, available at www.dofa.gov.au.

A common scale of measurement for all variables needs to be found in order to make an aggregate assessment of the wider public costs and benefits associated with the alternative options. While dollar values can be ascribed to some costs and benefits, this is less feasible (but not necessarily impossible) for measures of, for example, ecologically sustainable development, access and other benefits.

The ‘balanced scorecard’ approach overcomes the limitations of conventional (financial) cost-benefit analyses by systematically approaching the central issues in the following manner:

- *First* — a range of criteria are chosen which are likely to reflect the costs and benefits associated with legislation. In this case, the criteria include:
 - licensing compliance costs;
 - licensing administration costs;
 - other tobacco control compliance costs;
 - other tobacco control administration costs; and
 - level of tobacco control enforcement.
- *Second* — each criteria is given a qualitative score that depends on its effects on the variables of interest. In this case we have ranked options between –5 and +5 with zero being to no form of licensing.

Table 7.1 sets out the scores assigned for the four licensing approaches considered in sections 7.1 to 7.4.

Table 7.2

APPLICATION OF THE BALANCED SCORECARD APPROACH

	<i>Notification / Registration</i>	<i>Accreditation / Certification</i>	<i>Negative Licensing</i>	<i>Positive Licensing</i>
Licensing compliance costs	-1	-2	0	-2
Licensing administration costs	-1	-1	0	-1
Other tobacco control compliance costs	+1	+1	+2	+3
Level of tobacco control enforcement	+1	+1	0	+4
TOTAL	+2	0	+3	+5

The results presented in Table 7.2 reflect the observations drawn from the literature review and consultation processes undertaken to support this review (see Appendices B and C). It needs to be stressed that these scores are for representative applicants and licensing schemes, costs and benefits may vary between different schemes and businesses.

The criteria are presented in an unweighted form (ie, each criteria is given an equal weighting). The Group considers that the preferred option (ie, positive licensing) would not change significantly if an alternative weighting were applied. This is because we suggest that the final criteria — ie, ‘level of tobacco control enforcement’ — would be weighted more heavily and so positive licensing would score even more highly.

As would be expected, there are mixed views on the efficacy of licensing tobacco sellers, and in some cases views differ in public and private:

- there is close to universal support from public health officials and the anti-tobacco lobby for the licensing of tobacco sellers;
- governments differ in their support of licensing. While three jurisdictions currently licence tobacco sellers, the degree of opposition of governments in other jurisdictions varies considerably;
- tobacco companies are likely to oppose licensing, particularly when it is not consistent across jurisdictions. There are however, some differing views between companies. For example:
 - PML favours negative licensing with disclosure of retailers to authorities;
 - British American Tobacco (BAT) favours licensing if it is administered by revenue authorities, but not if it is administered by health authorities;
- retailers generally publicly oppose licensing, but may be inclined to be less publicly opposed in the following circumstances:
 - the major chains that operate nationally are likely to be more supportive of licensing if there is a national standard rather than a jurisdiction by jurisdiction approach;
 - larger tobacco retailers (eg, tobacconists, etc) are likely to be more supportive of licensing if they perceive that there will be increased enforcement to drive out sellers illegally supplying minors, or if the licensing fees drive smaller operators out of the market.

Conclusion |

Positive licensing is the preferred approach to licensing.

Chapter 8

Preferred licensing details

While Chapter Seven identified positive licensing as the most appropriate form of licensing, this chapter identifies the elements that may make up a best practice positive licensing scheme.

8.1 The licence holder

A fundamental question is: who holds (or needs to hold) the licence, and at what level in the supply chain? This double-barrelled question is addressed in the following sections.

What level(s) of the supply chain should be licensed?

There is no standard approach as to which level of the supply chain should be licensed. For example, in the US:

“Forty-seven states and the District of Columbia require the licensing of parties that sell tobacco products. ... Licensing regulations range from requiring only distributors, or the party responsible for payment of excise taxes, to have licenses (Illinois), to requiring wholesalers, distributors, manufacturers, retailers, and vending machine operators to obtain licenses (Alaska and Maine).”

Welch 2002, p. iii

This divergence of approaches is also evident in Australia:

- the Commonwealth, through the *Excise Amendment (Compliance Improvement) Act 2000*, licenses the whole tobacco industry (ie, the system for the growing, transporting, trade, manufacture and storage of tobacco) but not retail sales.
- in the three Australian states and territories that have licensing schemes there are two differing approaches:
 - one is to licence each company selling tobacco whether at the wholesale or retail level — this is the Tasmanian and South Australian approach; and
 - the other is to separately licence retailers and wholesalers — this is the ACT approach.

The following sections consider the advantages and disadvantages of licensing just retailers, just wholesalers and retailers and wholesalers jointly.

Retail licensing as a standalone option

Relying solely on retail licensing is a feasible option because it directly addresses the issues that licensing is seeking to facilitate:

- adequate knowledge/information to enforcement officials to enable them to adequately enforce the law’s regulating tobacco sales — licensing retailers means that authorities know exactly who is selling tobacco, and where it is being sold (see section 8.1);

- appropriate and adequate information to retailers regarding their obligations — by licensing retailers authorities can establish a direct relationship with those people actually selling tobacco. This is considered important so as to avoid the potential for intermediaries (ie, tobacco companies, peak representative bodies, etc) to filter communications; and
- efficient and effective sanctions for use against retailers who contravene relevant tobacco point of sale laws — licensing retailers means that penalties can be levied directly against them when a contravention of the tobacco control laws has been identified.

It is for these reasons that stakeholders initially (and many times, exclusively) think of licensing retailers when discussing licensing options.

Licensing of retailers must be included in a best practice tobacco control model.

Wholesale licensing as a standalone option

While not a preferred option in tobacco control circles, reliance solely on wholesale licensing is potentially feasible.

Licensing of tobacco wholesalers can be structured to achieve one goal of regulation – the provision of information to regulators with respect to who is selling tobacco. That is, a requirement of a wholesaler obtaining a licence could be to provide the relevant regulator with a current and complete list of all the parties to which it supplies. This would be a relatively costless compliance requirement and would need to be imposed on only a few firms. It would enable the regulator to then target retailers to ensure that they are not selling to minors.

It is important to note, however, that total reliance on the licensing of tobacco wholesalers has a number of limitations:

- there is no scope for the regulator to use the threat of licence revocation against retailers; and
- because of the prevalence of informal wholesalers the licensing of wholesalers:
 - there may be many more licences than initial inspection suggests;
 - some businesses may be wholesaling tobacco (ie selling to a firm for resale) without their knowledge (ie, they may be unaware that smaller retailers are purchasing tobacco from them for resale).

Joint wholesale and retail licensing

Rather than relying on retail licensing alone, a wholesale licensing regime could be implemented as a complement to a retail licensing regime.

Such joint licensing should increase public health outcomes by providing a layer of information checking (ie, the names supplied by the wholesalers can be cross-checked with the licensed retailers), at minimal additional cost above the licensing of retailers alone. That is, a condition of a wholesaler's licence could be that they could only supply licensed retailers. This approach would likely increase the coverage of the retail scheme, and make it harder for retailers to avoid being licensed.

Furthermore, some commentators explicitly support licensing of wholesalers as a way of reducing the financial burden on retailers created by licensing:

"Tobacco wholesaler, manufacturer and importers' licence: Governments could consider imposing fees on others involved in the production and distribution of tobacco products. This revenue could then be used to reduce retailer licence fees and to help finance the rest of the state's control strategy."

Martin, Cotter & Moodie 2001, p. 50

Conclusion

Licences should be held by all wholesalers and retailers of tobacco.

Who should hold the licence?

In the three jurisdictions that currently have licensing schemes there are two differing approaches as to who should hold a licence:

- one is to licence each company or individual selling tobacco — this is the Tasmanian and South Australian approach; and
- the other is to licence individual premises at which tobacco is sold — this is the ACT approach.

Licensing a company, person or other legal entity

Under this approach a company, person or other legal entity (eg, a partnership, unincorporated joint venture, etc) would apply for a licence to sell tobacco throughout the jurisdiction.

This is the approach employed in Tasmania and SA. Even though these schemes license firms, the firms are required to state the locations where they operate.

This approach has the advantage of reducing compliance costs for multiple-premises businesses as only a single licence is required.

However, this approach also has a number of significant problems:

- there is a reduced risk of licence revocation. We suggest that courts and administrative law tribunals would be loathe to withdraw a licence to operate state-wide simply because of infractions at a single store. Thus, the threat of licence revocation is reduced, possibly significantly; and
- smaller firms argue that the Tasmanian and South Australian approach is inequitable because a single corner store pays the same licensing fee as a major supermarket chain.

The Group considers these problems to be significant.

If this approach is adopted we suggest that where the applicant is not a real person the licensing process should nevertheless require the specification of the person responsible for the sale of tobacco.

Licensing sales staff

Another possible approach is to establish an occupational licensing scheme and licence staff (eg, all sales staff, key sales staff, or a combination); only licensed staff would be able to sell tobacco.

We are unaware of any tobacco licensing scheme that has been established on an occupational basis, most probably because of the voluminous number of staff who would need to be licensed (at great cost to governments and business). These costs make this approach unfeasible.

Licensing premises

Under this approach each wholesale and retail premises would need to be licensed.

The clear advantage of this approach is that the location of all tobacco-related premises is known to the regulating authority and hence enforcement is facilitated. Furthermore, this approach more directly provides a link between the fee structure and the nature of enforcement (ie, inspections are based on the number of stores, not the number of owners).

The disadvantage of this approach is felt most acutely by multi-store businesses (including vending machine operators) which would be required to have multiple licences.

We suggest that where the premises is licensed the licensing process should nevertheless require the specification of the person responsible for the sale of tobacco at that premises.

Conclusion

Each licence should apply to a particular venue or vending machine. However, the licence should also stipulate the contact details for the person responsible for that venue or vending machine.

8.2 Minimum age requirements

An applicant for a licence in Tasmania has to be able to demonstrate that they are at least 18 years old.⁸⁵ This requirement is particularly odd for a number of reasons:

- there is no requirement to be 18 years of age to sell tobacco; and
- the licence is held by a company, yet the person applying on behalf of the company must demonstrate that they are above 18 years of age.

As a result of these anomalies, minimum age requirements are viewed as an administrative burden that has little, if any, commensurate public health benefit.

Conclusion

Minimum age requirements should not be included as part of a tobacco licensing regime.

8.3 Capability standards

A number of tobacco policy officers expressed the need for a test of suitability for people selling tobacco. The precise nature of the suggested tests ranged from:

- a positive test of fitness; through to
- negative tests that could generally be described as ‘fit and proper person’ tests.

The efficacy of these approaches is discussed in the following sections.

⁸⁵

There are no age requirements under the ACT and South Australian schemes.

A positive test of fitness

Under a positive test of fitness each applicant would have to prove they are fit and suitable, effectively reversing the burden of proof. This could be done, as is with drivers' licences, by requiring a test of the applicant's knowledge of the relevant tobacco control laws.

We consider that there is little to be gained from the application of a test of competence prior to the issuance of a licence. This is particularly because such a process would be administratively burdensome.

That said, an obligation on a party applying for a licence should be that they have read, understood, and agree to abide by, the applicable laws regarding tobacco sales. For this to be effective applicants should be provided as early as possible in the licensing process with material such as the relevant legislation, relevant guidelines and other explanatory material.

Conclusion

Parties applying for a licence should be required to confirm that they have read, understood, and agree to abide by, the applicable laws regarding tobacco sales.

A 'fit and proper' test

'Fit and proper' tests tend to be negative in character (eg, a person must not have done something). Two alternative 'fit and proper' tests are considered in the following sections.

Application of a 'fit and proper' test to the designated responsible manager

There are two general types of fit and proper person tests:

- a precautionary approach that would bar entry to those with many types of convictions. While most people supporting this approach thought that this would apply to people convicted for tobacco-related offences or loss of a tobacco-related licence (ie, as occurs under the current ACT scheme), some stakeholders argued that a broader approach is necessary and any convictions (even general fair trading offences) should be considered as a bar to obtaining a licence; and
- a general power to prohibit the issuance of a licence when there is a belief that the law will not be followed — such a power is provided in the Tasmanian legislation.

Fit and proper person tests are always controversial and have routinely been criticised during NCP reviews.⁸⁶ This is principally because such checking requirements have the potential for negative or unintended consequences in a number of areas, including, for example:

- an over-reliance on checks at the recruitment stage which could lead to a relaxation in ongoing supervision, monitoring and complaints arrangements and, consequently, to a net increase in risk;

⁸⁶ See, for example: The Allen Consulting Group 1998b, *Surveyors Act 1967: A National Competition Policy Review*, ACT Department of Urban Services, Canberra.

- adverse economic effects due to the creation of barriers to employment and labour mobility, particularly given the flexibility of the labour market in those sectors where fit person regimes are being introduced; and
- increased or compounded social exclusion, if individuals are arbitrarily barred from large areas of employment on the basis of criminal convictions (bearing in mind the numbers of people with some form of minor conviction and the extent to which this and other societal pressures already impact on their ability to gain employment).⁸⁷

Indeed, a UK study of the appropriateness of fit and proper person tests concluded that:

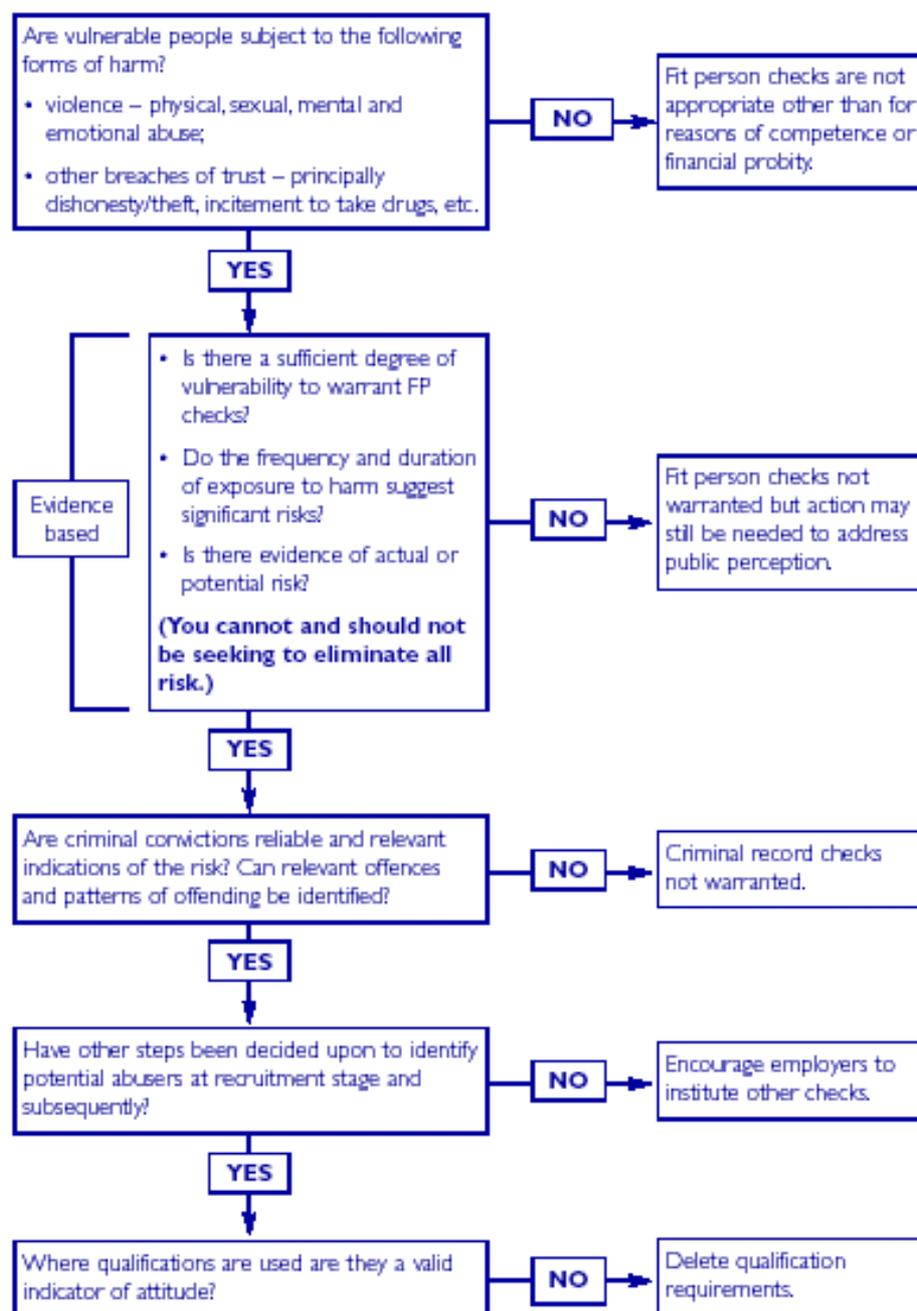
“Our findings and recommendations have demonstrated the need for a balance to be struck between the level of fit person checks, particularly criminal record checks, and their effectiveness. If such checks are not carefully targeted on specific forms of harm or are not proportionate to the risk, they can be ineffective or even counter-productive in meeting the objectives of Government, employers and society more widely.”

Better Regulation Task Force 1999, p. 27

To assist policy-makers the UK Better Regulation Task Force suggested a decision tree to guide the assessment as to the need for a fit and proper person test — see Figure 8.1.

⁸⁷ Better Regulation Task Force 1999, *Review of Fit Person Criteria*, Central Office of Information, London.

Figure 8.1

DECISION TREE FOR CONSIDERATION OF FIT PERSON CRITERIA AND CHECKS

Of course, almost every step in the Figure 8.1 decision tree is arguable. Allowing for the fact that Figure 8.1 was developed for application to real persons, but the proposed tobacco licensing may also relate to businesses, we suggest that the questions in Figure 8.1 should be answered in the following manner:

- while there is not an incitement to take drugs, the sale of tobacco to minors is a breach of trust to parents generally — the first box is answered ‘yes’;

- there is evidence of actual or potential risk given the prevalence of sales to minors, and the low level of smoking that needs to be undertaken by minors in order to establish an addiction — the second box is answered ‘yes’; and
- convictions for previous sales to minors (and possibly even sales of chop chop) are likely to be good indicators of an unwillingness to operate within the boundaries of the tobacco control legislation.

This suggests that it is reasonable to assess whether the applicant is fit to hold a licence, principally by asking whether the applicant or any people in a position of power with respect to the applicant’s business — this may be so broad so as to include a spouse of the proprietor — have previously been convicted for previous sales to minors (and possibly even sales of chop chop).

Conclusion

A licence should be able to be refused or withdrawn if the responsible person, or any person in a position of power with respect to the sale of tobacco at the licensed premises, has been found to have contravened any tobacco control laws.

Application of a ‘fit and proper’ test to particular types of stores

Another approach is to assess whether the nature of the store (ie, the type of business, the nature of the ownership structure of the business, etc) is more susceptible to selling tobacco to minors. If it can be determined that there is such a susceptibility there may be a case for not allowing those types of businesses to obtain a licence.

Research suggests that larger stores are less of a problem with respect to under-age sales.⁸⁸ For example, one study has shown that the most common outlets for self reported illegal purchase of cigarettes by minors in NSW were small general stores (31 percent), petrol stations (23 percent), milk bars (18 percent), and supermarket chains (14 percent).⁸⁹ This can be explained by a number somewhat inter-related factors:

- it is reasonable to draw the conclusion that the greater the reliance on tobacco sales, the greater the willingness to take risks and sell to minors;
- the busier a store is at a particular time (ie, where an individual cashier is under pressure) then the greater the likelihood that due care may not be taken; and
- the increasing stigma of tobacco is providing a disincentive for larger firms given the advent of ‘corporate social responsibility’⁹⁰ and ‘triple-bottom-line’⁹¹ reporting — for example, it is claimed that in some cases grocery cigarette sales have lagged in recent years because grocers have been taking down signs

⁸⁸ Schofield, MJ, Gulliver, S & Sanson-Fisher, RW 1995, ‘Retailer Attitudes on Tobacco Sales to Minors in New South Wales, Australia’, *Tobacco Control*, vol. 4, pp. 362-66.

⁸⁹ Sanson-Fisher, RW & other 1992, ‘Availability of Cigarettes to Minors’, *Australian Journal of Public Health*, vol. 16, no. 4, p. 356.

⁹⁰ See Centre for Corporate Public Affairs & Business Council of Australia 2000, *Corporate Community Involvement: Establishing a Business Case*, Centre for Corporate Public Affairs, Melbourne.

⁹¹ Global Reporting Initiative 2000, *Sustainability Reporting Guidelines on Economic, Environmental, and Social Performance*, Global Reporting Initiative, Boston.

and merchandise and hiding the category away behind service counters in response to the negative publicity that the tobacco industry is attracting.⁹²

While the studies listed above provide evidence about tendencies for sales to minors to occur in certain types of stores, there is insufficient evidence at this point upon which clear boundaries/guidelines could be drawn. If licences were to be restricted to certain types of businesses there would need to be a detailed analysis of where under-age sales are occurring. Such evidence would be necessary to address the concerns of those businesses who could be denied the ability to sell tobacco and to meet any NCP concerns (see Chapter Nine).

Conclusion | *While there may be some justification in denying licences to certain types of premises/businesses, there is insufficient information to draw appropriate boundaries at this point in time.*

8.4 Operating standards

Licensing is a means of ensuring that sellers of tobacco do so in a manner consistent with tobacco control laws. Transgression of this expectation should trigger appropriate penalties (see section 8.7).

Conclusion | *Compliance with general tobacco control laws should be the minimum operational standard required by a licence holder.*

In some cases additional conditions could be applied to licences to regulate the sale of tobacco at particular premises. For example, if there is found to be a rogue employee, rather than a formal penalty it may be appropriate to impose a condition that excludes that employee from selling tobacco, being associated with the store, or similar. This approach has been employed in Tasmania.

Conclusion | *There should be scope for conditions to be applied to licences where this supports compliance with tobacco control laws.*

There may be a need, however, to apply additional operational standards at the wholesale level. In particular, wholesalers should be required:

- to sell only to licensed retailers or wholesalers;
- to provide the regulatory agency with a list (either at request or on a periodic basis) of those licensed wholesalers or retailers to whom they have supplied tobacco. While this is a slight administrative burden, it is not considered excessive. Furthermore, it facilitates tracking of tobacco from production to the retail store and hence may be useful in minimising the sale of illegal tobacco (ie, chop chop).

⁹² Hartnett, M 2000, 'Up in Smoke?' *Supermarket Business*, vol. 55, no. 4, pp. 115-16.

Conclusion

Wholesale tobacco sellers should be required: to sell only to licensed retailers or wholesalers; and to provide the regulatory agency with a list (either at request or on a periodic basis) of those licensed wholesalers or retailers to whom they have supplied tobacco.

Retail tobacco sellers should be required to purchase solely from licensed tobacco sellers unless purchasing from other retailers at the listed retail prices.

An advantage of a licensing scheme is that the actual licence provides information that may be useful to inspectors and the public. For example, by designating a responsible person and a licence number, members of the public can seek to complain about inappropriate sales directly to the responsible manager or to the responsible authorities.

Conclusion

A current licence should be prominently displayed at each tobacco premises.

8.5 Fee arrangements

The nature of the licence fee

It is important, given the decision in *Ngo Ngo Ha v The State of New South Wales* (see section 3.1), to identify the rationale for any licensing fee, and how it is to be structured.

There are three possible ways that a licence fee may be perceived:

- as a tax, which can validly be imposed by the States/Territories. Taxation is defined as, “A compulsory exaction of money by public authority for public purposes, enforceable by law, and is not a payment for services rendered”;⁹³
- an excise duty, which can only be imposed by the Commonwealth pursuant to section 90 of the *Constitution*; or
- a fee for service.

The key is that States and Territories can validly charge the tobacco industry a fee for services, or impose taxes (provided they are not excise duties). The remainder of this section addresses some issues that may arise when categorising tobacco licensing fees.

Under section 90 of the *Constitution*, the power to impose duties of customs and excise is exclusive to the Commonwealth. The High Court ruled in 1997 that a tax applied anywhere in the production and distribution chain is a ‘tax on production’, and hence an excise. If this is the case, the legislation imposing the fee could be open to constitutional challenge. To avoid being labelled as tax on production the general principle is that:

- fees must reflect the actual costs of a service provided;
- the service must be rendered to, or at the request of, the party paying the account; and
- the charge must be ‘proportionate’ to the cost of the service rendered.

⁹³ *Matthews v Chicory Marketing Board* (1938) 60 CLR 263.

This approach was based on a statement in *Air Caledonia International v Commonwealth*⁹⁴ suggesting that there had to be a ‘discernible relationship’ between the fee and the ‘value’ of what is acquired (by way of service) and that, to the extent that the fee exceeds that value, the fee could be seen to be a tax (as opposed to fee for service).

This is not to say that fees must precisely equal the costs of the service. In its review of cost recovery the Productivity Commission identified that several Commonwealth agencies charging fees for service have sought legal advice on the distinction between fees and taxes. For example:

- the Space Licensing and Safety Office received advice that it was not imperative for fees to exactly equal costs, as if the fees were calculated in good faith they would not amount to taxation. However, should revenue exceed costs in one period, fees should be adjusted in the next period to achieve balance; and
- the Australian Quarantine and Inspection Service received legal advice that over-recovery by ten percent or more would result in a charge being construed as a tax.

Indeed, in advice to the PC the Australian Government Solicitor stated that in relation to the most recent High Court case (ie, *Airservices Australia v Monarch Airlines*⁹⁵), “the main significance of the decision is in indicating a more flexible approach to cost recovery than was previously thought acceptable”.⁹⁶ It recognised that:

“at least in some circumstances, a charge that discriminates between users of a service, and recovers the costs of maintaining a network of services, not all of which may be used by particular users, may still be a fee for service, at least where the services are highly integrated. Other factors which may be relevant to the characterisation of a charge as a fee for services include the commercial context in which the charge is imposed, and whether it has a revenue raising purpose.”

Productivity Commission 2001, p. D17

This suggests a more liberal approach to the establishment of fees for an integrated system, be it air traffic control or tobacco enforcement.

Many tobacco control officials see licensing fees as a way of funding broad-ranging tobacco control programs (ie, funding enforcement activities and developing and maintaining active, large-scale programs).⁹⁷ For example:

“Significant government commitment is necessary in order to achieve anything like the US declines in smoking prevalence. However, these costs could be offset by savings in avoidable health care costs and by the introduction of tobacco retailer licence fees. For example, an annual fee of around \$A500 in Victoria would raise \$A5 million, which could be used for monitoring, enforcement and education.”

Martin, Cotter & Moodie 2001, p. 50

The trouble with such discussions is that they focus on the revenue, and then decide what to spend the funds on. This may start to take on the appearance of a tax. While there can be restrictions on the potential use of funds from a fee for service, these restrictions would not apply to a simple tax on the activity of retailing tobacco that was not classed as an excise duty.

⁹⁴ (1988) 165 CLR 462.

⁹⁵ (1998) 152 ALR 656.

⁹⁶ Productivity Commission 2001, *Cost Recovery: Draft Report*, AusInfo, Canberra.

⁹⁷ Forster, J & Wolfson, M 1998, 'Youth Access to Tobacco', *Annual Review of Public Health*, vol. 19, pp. 203-35.

A number of industry representatives suggested that tobacco control should not be funded from licence fees as tobacco control is either:

- a community-wide public health issue and as such should be paid for from general taxation; or
- a benefit for actual or potential smokers and hence should be funded, through hypothecation, from existing tobacco taxes.

We disagree with these industry views. In this context, we prefer the application of the ‘polluter pays’ principle. In a biodiversity context the ‘polluter pays’ principle has been described in these terms:

“Under this principle, impacters are required to contribute to the costs of activities that ameliorate or prevent biodiversity damage in proportion to their impacts on biodiversity. As impacters may pass on some of these costs as higher prices, consumers who benefit from activities that adversely impact biodiversity may also meet a portion of the higher costs.”

Aretino et al. 2001, p. 15

The expenditure on monitoring sales is a result of industry practices and hence is self-generated as so should be borne by the industry itself (even if the licensing fees are ultimately passed on to consumers).

We suggest that, to ensure their legality, licence fees should be set to recover only those costs associated with:

- the actual administration of the licensing regime;
- the enforcement of the licences — this may include inspections;
- the provision of licensing-related information directed to customers and the community; and
- the provision of information to applicants and licensees to ensure their continued and future compliance.

In particular, licence fees should not be set to cover broader tobacco-related education programs.

Conclusion

Licence fees should be set to recover only those costs associated with:

- *the actual administration of the licensing regime;*
- *the enforcement of the licences — this may include inspections;*
- *the provision of licensing-related information directed to customers and the community; and*
- *the provision of information to applicants and licensees to ensure their continued and future compliance.*

General public education about the costs of smoking should continue to be funded from general revenue.

The level of the licence fee

The level of any licence fee is inexorably linked to the nature of the costs that it is set to recover (see section 8.5). However, the cost recovery target discussed in section 8.5 is really an upper bound of the fee, and there is considerable concern within industry that fees could be set on such a full cost recovery basis.

Industry is clearly concerned about the prospect of new (or increased) licence fees set on a full cost recovery basis. There are, however, a number of different views which at various times may or may not be publicly expressed:

- small tobacco retailers are particularly concerned about the costs of licences:
 - one small business representative suggested that a licence fee set at \$2,000 per year per premises would result in a 50 percent reduction in the number of retailers; and
 - in jurisdictions without licences small business representatives often offered (unprompted) that licensing would be around \$1,000 per year (possibly on the basis of fees for other businesses for which they were familiar). When it was pointed out to them that actual licence fees (see Table 3.1) were significantly lower than this assumption the view was put that there is always a risk of fee increases once a scheme is in place. This is not an unreasonable assumption given that current fee levels do not reflect full cost recovery.
- some larger independent retailers are privately supportive of reasonably high licence fees on the basis that:
 - some smaller retailers will exit the industry if the licence fee is a sufficient deterrent (ie, they will receive a competitive advantage); and
 - there is a perception that the legitimate retailers are getting 'value for money' (ie, if enforcement is actively directed at removing retailers who sell in contravention of the tobacco control laws).

Industry concerns about licensing costs have clear political implications.⁹⁸ Some commentators and industry representatives have argued that, "Tobacco licences will not be reintroduced because of the costs involved for an already overstretched health budget, and because, in the present political climate, it would be seen as a revenue-raising ploy."⁹⁹ However, such political concerns can sometimes be overcome — we note that, "In 1990 the Bush administration recommended that tobacco retailers should be required to pay a \$300 annual licence fee."

Acceptance of higher fees can be facilitated by the staged phasing in of fees. This approach has been adopted in the ACT, where fees have been progressively raised by \$50 per year, up to the current level of \$200.

⁹⁸ Editorial: Moving Tobacco Control Beyond 'The Tipping Point', 2000, *British Medical Journal*, vol. 321, pp. 309-10.

⁹⁹ Carruthers, S & McDonald, C 1995, 'The Availability of Cigarettes to Minors in Perth, Western Australia', *Tobacco Control*, vol. 4, pp. 49-52.

Some tobacco control advocates argue that, over time, strong enforcement can be self-funding.¹⁰⁰ That is, if there is a commitment to strong enforcement, and if penalties are hypothecated to future tobacco control, then there may be a case for setting lower initial licence fees in the knowledge that this will be supplemented by future administrative penalties. Of course, as treasuries are loath to support hypothecation there is little scope for self-funding.

Conclusion

The level of any licence fee is clearly a major impediment to the introduction of a licensing scheme. The goal should be full cost recovery, but to facilitate industry acceptance it would be appropriate to consider staged phasing in of fees up to the full cost recovery level.

8.6 Administrative arrangements

‘Red tape’ can be minimised by having responsibility for the licences reside in the same agency that has the relevant information, monitoring and enforcement responsibilities.

This approach takes advantage of efficiencies resulting from licensing responsibilities being vested in the same agency as that:

- with responsibility for other tobacco issues;
- with responsibility for issuing a range of other licences (such as food licences); and
- with public health officers who are trained and experienced in a range of public health compliance measures.

The importance of an integrated licensing approach is demonstrated most clearly by the operation of SA’s licensing regime. RevenueSA undertakes the actual licensing (a throwback to the pre-*Ngo* wholesale licensing regime) and passes on licensee details to the Department of Human Services. The SA licensing approach licences individual firms, although licensees are required to list all outlets from which they intend to sell tobacco. However, the Department of Human services was unaware that the licence form included store locations, and RevenueSA was unaware that store locations would be of use to the health officials; the result was that store locations were never provided to health officials, and they have had to rely on the white pages to identify possible stores when undertaking compliance inspections.¹⁰¹ This lack of communication demonstrates the need for the licensing to be undertaken by health officials, or for health officials to have a more integrated involvement in the licensing process than has been demonstrated in SA.

We are aware that some treasury officials have expressed the view that it would be a conflict of interest for a health department to sanction the sale of tobacco by the issuance of tobacco licences. This view is not credible:

- there is a moral hazard if tobacco licensing is administered through treasuries as they have an incentive to encourage licensing growth for revenue purposes when such growth may not be justified on health grounds; and

¹⁰⁰ Jason, LA, Billows, W, Schnopp-Wyatt, D & King, C 1996, 'Reducing the Illegal Sales of Cigarettes to Minors: Analysis of Alternative Enforcement Schedules', *Journal of Applied Behavior Analysis*, vol. 29, no. Fall, pp. 333-44.

¹⁰¹ See Rowley, D & Miller, C 2000, *The Sale of cigarettes to Minors: compliance Testing 1999-2000*, Department of Human Services, Adelaide.

- to accept this argument would also mean, for example, that environmental departments should not licence hazardous waste transporters because such licensing sanctions the production and transport of such wastes.

Conclusion

Tobacco sales licensing should be seen as a health issue and hence should be controlled by health officials. This does not preclude health officials contracting out elements of the scheme (eg, licensing, inspections, enforcement, etc) to third parties.

8.7 Penalties

There is a tendency in some jurisdictions to rely on prosecution (and associated fines) as the principal means of enforcing tobacco control laws. This approach has costs and benefits:

- the advantage of prosecutions is that they are a serious undertaking and convey the seriousness with which breaches of the law are viewed; but
- prosecutions (and associated fines) can be costly and an insufficient deterrent to retailer non-compliance. Under a prosecution-only system, retailers who sell cigarettes to children will do so as long as they calculate that their chance of being prosecuted is low (due to the time and expense of mounting a prosecution) and, if convicted, the likely penalty will be small (in the hundreds rather than the thousands of dollars).

Experience suggests that, without substantial resources devoted to monitoring and enforcement activities, including the threat of prosecutions from deliberate compliance testing, it is unrealistic and inappropriate to rely on a prosecution-only system to ensure high levels of compliance.

Indeed, there is no clear single penalty that provides for an optimal enforcement outcome:

“The penalty for infringement may also be important, although there is little direct evidence of the relative deterrent effect of different penalties. If fines for offenders are low, retailers may become inured to the threat of a prosecution, diminishing the effect of warnings or prosecutions. Removal of a license to sell tobacco could be more effective, if the licensing itself is strictly monitored. Imposing too harsh a penalty may, however, be counterproductive if community attitudes are not supportive. In one study using enforcement, judges were inclined to give suspended sentences because they felt that imposing a heavy fine or criminal record on the clerks making the sale was inappropriate. Enforcement may produce a backlash against tobacco control activities if the value of reducing sales has not been adequately publicised.”

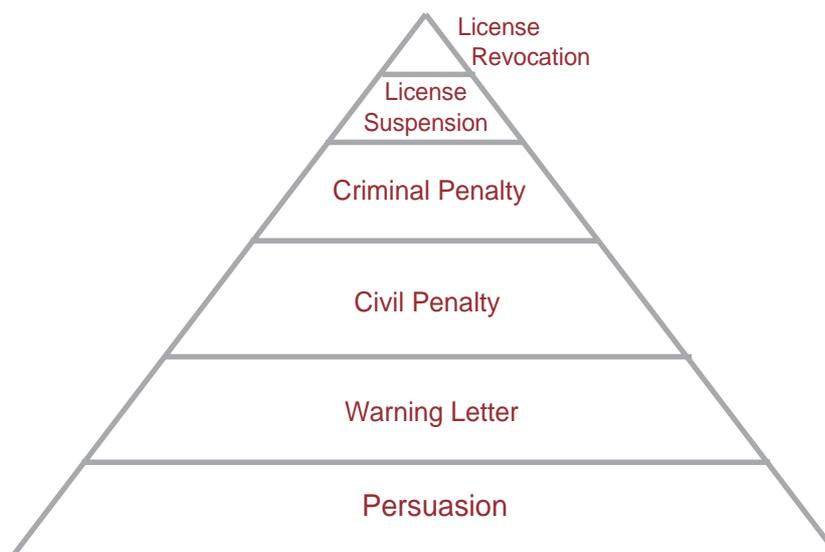
Stead & Lancaster 2000, p. 175 References omitted.

It is because of these limitations (which are not unique to tobacco-related enforcement) that the OECD argues that, “a regulator should have available a range of enforcement mechanisms in order to be responsive to the particular type on non-compliance it faces in any individual situation”.¹⁰² Figure 8.2 shows the enforcement pyramid endorsed by the OECD.¹⁰³

¹⁰² Organisation for Economic Co-operation and Development 2000, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, Paris.

¹⁰³ Ibid.

Figure 8.2

HIERARCHY OF ENFORCEMENT ACTIVITIES

Source: Ayres & Braithwaite 1992, p. 35

Rather, the best approach to penalising vendors is to adopt graduated penalties which could result in license suspension or revocation. This view has been supported in numerous tobacco control studies:

- “A graduated system of penalties from a warning to a fine and then loss of licence may be most appropriate where legal systems allow it.”¹⁰⁴
- A graduated system of civil penalties on the retailer, including temporary revocation of the tobacco license in areas where tobacco retail licenses are required, has been shown to be an effective enforcement strategy.¹⁰⁵
- A questionnaire on how youth access laws should be enforced was sent to 20 experts who had administered and/or evaluated a youth access enforcement program.¹⁰⁶ Amongst other things, respondents agreed on the need for a graduated penalty structure with license revocation. However, respondents also indicated the need for research on the effects of penalty structures.

¹⁰⁴ Stead, LF & Lancaster, T 2000, 'A Systematic Review of Intervention for Preventing Tobacco Sales to Minors', *Tobacco Control*, vol. 9, pp. 169-76. References omitted. See also Alciati, MH, Frosh, M, Green, SB, Brownson, RC, Fisher, PH, Hobart, R, Roman, A, Sciandra, RC & Shelton, DM 1998, 'State Laws on Youth Access to Tobacco in the United States: Measuring Their Extensiveness with a New Rating System', *Tobacco Control*, vol. 7, pp. 345-52.

¹⁰⁵ Forster, J & Wolfson, M 1998, 'Youth Access to Tobacco', *Annual Review of Public Health*, vol. 19, pp. 203-35.

¹⁰⁶ Levy, DT, Chaloupka, FJ & Slater, S 2000, 'Expert Opinions on Optimal Enforcement of Minimum Purchase Age Laws for Tobacco', *Journal of Public Health Management Practice*, vol. 6, no. 3, pp. 107-14.

- On the completion of an extensive study of the enforcement and implementation of tobacco control laws, Jacobson and Wasserman concluded that, “to be effective, local ordinances must have a graduated penalty structure that starts with a moderate fine for the first offence and escalates in severity with each subsequent effect”.¹⁰⁷ They also concluded that local licensure and license removal for vendors who sell tobacco products to minors would further restrict vendors’ willingness to sell cigarettes to minors:

“A third policy implication of our work centres on the need to include graduated penalty systems into public health legislation. In instances where either no penalty was specified in the law or the ordinance or where the penalty appeared to exceed the bounds of reason, we found that, more likely than not, the law would go unenforced. In one case, a city council amended an ordinance to include a graduate penalty structure after it concluded that the local police force was unwilling to cite violators because they believed that the penalty was too harsh. In the case of restricting cigarette sales to minors as well as other public health measures where a policy of licensing vendors of a good service is viable, we also believe that license suspension and revocation should be included in the penalty structure.”

Jacobson & J 1997, p. 94

While the need for graduated penalties is well accepted, some issues are still worth noting.

First, for tobacco control laws to be effective, public health authorities need to consider the locus of enforcement responsibility and the sanctions available to the enforcement agency. So research suggests that failure to specify such mechanisms in the legislation will lead to delays in implementing and enforcing the laws and to a number of compliance problems.¹⁰⁸

Second, while researchers have included the removal of licences for infringements of the law as one of the strategies most likely to successfully reduce sales to minors,¹⁰⁹ there is likely to be a need for personal penalties in addition to licence-related penalties.¹¹⁰

Third, there is scope for increased administrative enforcement such as on-the-spot fines. Administrative penalties are likely to be highly cost effective, with overseas evidence suggesting that the general need for voluminous collection and documentation of evidence required for prosecution is unnecessary as there are few appeals against on-the-spot fines.¹¹¹ However, some tobacco control officials argue that the use of such fines may be seen as a deflecting attention from the health issues and could be perceived as trivialising the offence. With maximum fines set at a few hundred dollars, retailers could decide that it would be in their interest to continue to breach the law and to pay the fines. Unless such fines were combined with publicity and the potential for other penalties, such as licence sanctions, there is little evidence to suggest that such fines would be effective in achieving high levels of retailer compliance.

¹⁰⁷ Jacobson, PD & J, W 1997, *Tobacco Control Laws: Implementation and Enforcement*, RAND, Santa Monica.

¹⁰⁸ Jacobson, PD 1999, 'Implementation and Enforcement of Tobacco Control Laws: Policy Implications for Activists and the Industry', *Journal of Health Politics, Policy and Law*, vol. 24, no. 3, pp. 567-98.

¹⁰⁹ Jason, LA, Yi, PY, Anes, MD & Birkhead, SH 1991, 'Active Enforcement Of Cigarette Control Laws In The Prevention Of Cigarette Sales To Minors', *Journal of the American Medical Association*, vol. 266, no. 22, pp. 3159-61.

¹¹⁰ See DiFranza, JR 2001, 'Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws', *Tobacco Control*, vol. 10, pp. 323-28.

¹¹¹ DiFranza, JR 1999, 'Impediments to the Enforcement of Youth Access Laws', *Tobacco Control*, vol. 8, pp. 152-55. See also Jason, LA, Billows, W, Schnopp-Wyatt, D & King, C 1996, 'Reducing

Conclusion

There should be a graduated penalty structure that includes warnings administrative penalties, prosecutions and scope for licence withdrawal.

8.8 Restricted or unrestricted licence numbers?

The initial point to consider is whether the number of licences should be:

- capped — this approach entails making available only a finite number of licences. The level of the cap is important:
 - if the cap is set below the current level of businesses then there will be an excess of supply over demand. In this circumstance some method of allocating the licences would need to be identified. The most common approach is to auction the licences, ensuring that the licences go to those parties who value them the most, although they could be allocated on a lottery or first-come-first served basis. In such cases the normal approach is to allow licences to be traded between parties (as long as they meet any other licence conditions);
 - if the cap is set above the current level of retailers then licence scarcity is not a problem and the licence is in practice unrestricted (see below);
- unrestricted — this approach provides a licence to anyone who meets the relevant criteria.

The trend in most regulatory fields is a move away from capped to unrestricted licences. This trend is being driven in large part by NCP's presumption against regulatory restrictions on competition. For example, the NCC and others have argued that restrictions on licence numbers are a blunt regulatory instrument.¹¹²

The general criticism is that restrictions on licence numbers force up the price of the licensed product, and restrict consumer access. These outcomes, however, may be seen as producing positive health outcomes.

While there is an aversion to restricting the number of licences, the *OECD Regulation Database* shows that a number of developed countries have restrictive — indeed, monopoly — licensing arrangements for tobacco (see Table 8.1).

the Illegal Sales of Cigarettes to Minors: Analysis of Alternative Enforcement Schedules', *Journal of Applied Behavior Analysis*, vol. 29, no. Fall, pp. 333-44.

¹¹² National Competition Council 2001, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms*, AusInfo, Canberra; The Allen Consulting Group 1998a, *Gambling Legislation in the Australian Capital Territory: A National Competition Policy Review*, Sydney.

Table 8.1

COUNTRY RESPONSES TO THE QUESTION “CAN TOBACCO PRODUCTS ONLY BE SOLD IN RETAIL OUTLETS OPERATING UNDER A LOCAL OR NATIONAL LEGAL MONOPOLY (FRANCHISE)?”

Yes	No	Country is not concerned by the question	No Response
European Commission	United Kingdom	Canada	United States
France	Belgium	Australia	Germany
Italy	Denmark	Greece	Luxemburg
Austria	Finland	Ireland	New Zealand
Iceland	Mexico	Portugal	Poland
Spain	Netherlands	Switzerland	
	Norway	Czech Republic	
	Sweden	Hungary	
	Turkey	Korea	

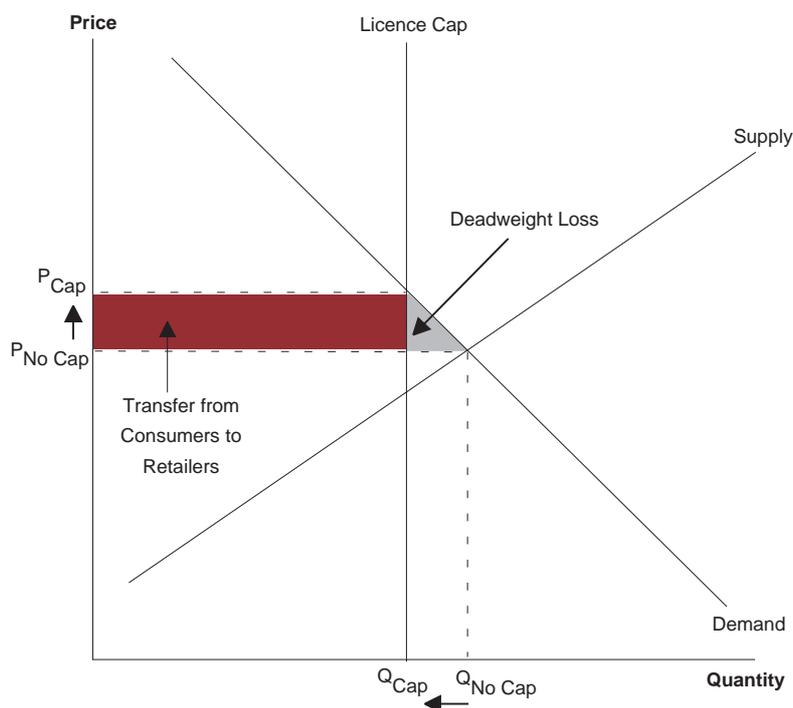
Source: Organisation for Economic Co-operation and Development 2001

During consultations a number of industry representatives favoured a capped licensing arrangement. They argued that by making licences themselves valuable then firms have an incentive to ensure that they operate in a manner that does not threaten their ownership of the licence. Of course, a capped licensing arrangement is likely to drive from the industry smaller players who would not be able to justify the initial cost of the licence.

We are attracted to a cap of licences for a number of reasons, it:

- directly reduces access to products;
- increases tobacco prices. As shown in Figure 8.3, putting a cap in licence numbers will increase the cost of doing business, which in turn drives up tobacco prices. Higher tobacco prices have the benefit of reducing smoking;
- gives license holders greater incentive to comply (ie, the costs of losing the licence are higher);
- may drive from the market those companies that appear to be most likely to breach general tobacco control laws (ie, smaller tobacco sellers);
- may reduce product availability as a marketing tool; and
- sends the same public message as the controls on advertising and display; tobacco is in a special category and should not be regarded as a normal convenience product.

Figure 8.3

THE ECONOMIC IMPACT OF A CAP ON LICENCE NUMBERS

There is some support for a cap on retail numbers from tobacco control advocates. For example, the CEO of the Cancer Council of NSW, argues that governments should:

“take a very long hard look at our approach to retail regulation at the moment. And I believe one of the great anomalies that faces us is that if you want to get clean nicotine, you have to go to a very controlled environment like the pharmacy and receive health advice to get clean nicotine which has very minimal health effects.

But you can go and buy dirty nicotine, dangerous nicotine at every milk bar. I think that the government now should introduce licensing arrangements for cigarette outlets, reduce the number of outlets, reduce their accessibility and put very tight controls on the behaviour and standards of practice in those outlets.”

Penman, pp. 10-11

There are, however, some costs with capping licence numbers:

- there is a deadweight economic loss (see Figure 8.3);
- increased tobacco prices harm those least able to afford it — while most tobacco control officers correctly argued that increased prices are the greatest deterrent to smoking, one state officer noted that this also has regressive impacts (see Table 8.2) that need to also be acknowledged when formulating policy; and

- if the allocation is applied at all arbitrarily or to limit overseas entrants than there may be World Trade Organization (WTO) concerns. In these circumstances, some parties have argued that, “The GATS [General Agreement on Trade in Services] may be used to challenge government attempts to ... impose licensing requirements for tobacco wholesalers and retailers.”¹¹³

Table 8.2

HOUSEHOLD EXPENDITURE ON TOBACCO PRODUCTS BY TOBACCO PURCHASING HOUSEHOLDS (1998-99)

<i>Gross income quintile (weekly income)</i>	<i>Average weekly expenditure on tobacco</i>	<i>Per cent of weekly consumption expenditure</i>
Less than \$301	\$24.33	6.4%
\$301 → \$551	\$31.66	5.9%
\$552 → \$883	\$32.44	3.9%
\$884 → \$1,373	\$35.64	3.0%
Greater than \$1,373	\$35.64	1.9%

Source: PricewaterhouseCoopers 2001, p. iv

On balance, we consider there to be merit in the principle of a cap on licence numbers, although the market dynamics suggest that such a cap is not necessary at this stage given the already steady decline in the number of retail stores selling tobacco. That is, setting a cap below current levels is unlikely to be a sound longer-term strategy when the number of stores selling tobacco is declining. Rather, it would be better to reconsider the issue of caps in an environment in which the number of retail outlets has stabilized or is increasing.

As a result, a simple cap is not supported at this time.

Conclusion

The ongoing decline in the number of retail outlets alleviates the need to impose a restriction on the number of retail outlets.

A related possibility is to identify types of stores most likely to sell tobacco to minors and place a cap (possibly a very low cap) on the number of licences available for these stores. However, as noted in section 8.3, while there may be some justification in restricting licences to certain types of premises/businesses, there is insufficient information to draw appropriate boundaries at this point in time. This uncertainty is reinforced by definitional issues when setting boundaries around store types.

Conclusion

While there may be some justification in limiting the number of licences available to stores which are most likely to sell tobacco to minors, there is presently insufficient information to accurately define such categories of stores.

¹¹³ Collinshaw, N & Callard, C 2001, 'Trade Agreements and Tobacco Control: How WTO Agreements May Stand in the Way of Reducing Tobacco Use', in P Thomas (ed.), *Tobacco and Development: Critical Issues for the 21st Century*, Development Studies Network, Canberra, pp. 11-14.

8.9 Conclusion

It may seem self-evident, but laws (such as licensing schemes) crafted to prevent youth access to tobacco products with stringent penalties are of little value unless such laws are effectively implemented and properly enforced.¹¹⁴

Numerous studies have found that retailer compliance improves significantly when there is active enforcement of tobacco laws.¹¹⁵ For example:

- Jason *et al* examined the enforcement of laws against selling cigarettes to minors.¹¹⁶ They found that aggressive enforcement and follow-up compliance checks led to 96 percent compliance by cigarette vendors against sales to minors, and a substantial reduction (50 percent) in tobacco use among local junior high school students.
- Stead and Lancaster argued that, “Enforcement, or warnings of it, generally had an effect on retailer behaviour. Sustaining compliance requires regular enforcement, and the existing evidence suggests reduced effectiveness if checking occurs much less than 4–6 times a year.”¹¹⁷
- A survey of six local health departments’ tobacco sales enforcement activities concluded that with limited inspections (three to four times per year), it was not uncommon for merchants to continue illegal sales until multiple violations put them at risk for losing their tobacco sales permits.¹¹⁸
- A questionnaire on how youth access laws should be enforced was sent to 20 experts who had administered and/or evaluated a youth access enforcement program.¹¹⁹ Respondents agreed on the need for a high level of retail compliance, checkers representative of the community, checks at least twice per year, a graduated penalty structure with license revocation, and bans on self-service and vending machines. Respondents indicated the need for research on the effects of ID use, frequency checks, penalty structures, and the effects on smoking rates of youth access policies alone and in conjunction with other tobacco control policies.

These studies reinforce the need to ensure that tobacco licensing is seen as a complement to broader enforcement (see Chapter Six), and not a complete answer to effective tobacco control in and of itself.

¹¹⁴ Institute of Medicine 1994, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*, National Academy Press, Washington; Rigotti, NA, DiFranza, JR, Chang, YC, Tisdale, T, Kemp, B & Singer, DE 1997, 'The Effect of Enforcing Tobacco Sales Laws on Adolescents' Access to Tobacco and Smoking Behavior', *New England Journal of Medicine*, vol. 337, no. 15, pp. 1044-51.

¹¹⁵ Redhead, DS & Austin-Lane, J 1998, *Tobacco Control: Enforcement and Effectiveness of Federal and State Youth Access Laws*, Congressional Research Service Report for Congress, Congressional Research Service, Washington. Rigotti, NA, DiFranza, JR, Chang, YC, Tisdale, T, Kemp, B & Singer, DE 1997, 'The Effect of Enforcing Tobacco Sales Laws on Adolescents' Access to Tobacco and Smoking Behavior', *New England Journal of Medicine*, vol. 337, no. 15, pp. 1044-51.

¹¹⁶ Jason, LA, Yi, PY, Anes, MD & Birkhead, SH 1991, 'Active Enforcement Of Cigarette Control Laws In The Prevention Of Cigarette Sales To Minors', *Journal of the American Medical Association*, vol. 266, no. 22, pp. 3159-61.

¹¹⁷ Stead, LF & Lancaster, T 2000, 'A Systematic Review of Intervention for Preventing Tobacco Sales to Minors', *Tobacco Control*, vol. 9, pp. 169-76. References omitted.

¹¹⁸ DiFranza, JR, Celebucki, CC & Seo, HG 1998, 'A Model for the Efficient and Effective Enforcement of Tobacco Sales Laws', *American Journal of Public Health*, vol. 88, pp. 1100-01.

¹¹⁹ Levy, DT, Chaloupka, FJ & Slater, S 2000, 'Expert Opinions on Optimal Enforcement of Minimum Purchase Age Laws for Tobacco', *Journal of Public Health Management Practice*, vol. 6, no. 3, pp. 107-14.

Conclusion

Licensing alone will not improve public health outcomes. To be effective, licensing must be seen as a complement to an active enforcement strategy.

While there is no single best practice model for tobacco licensing, the following characteristics represent best practice characteristics:

- Licences should be held by all wholesalers and retailers of tobacco.
- Each licence should apply to a particular venue or vending machine. However, the licence should also stipulate the contact details for the person responsible for that venue or vending machine.
- Minimum age requirements should not be included as part of a tobacco licensing regime.
- Parties applying for a licence should be required to confirm that the designated responsible person has read, understood, and agree to abide by, the applicable laws regarding tobacco sales.
- A licence should be able to be refused or withdrawn if the responsible person, or any person in a position of power with respect to the sale of tobacco at the licensed premises, has been found to have contravened any tobacco control laws.
- Compliance with general tobacco control laws should be the minimum operational standard required by a licence holder.
- There should be scope for conditions to be applied to licences where this supports compliance with tobacco control laws.
- Wholesale tobacco sellers should be required: to sell only to licensed retailers or wholesalers; and to provide the regulatory agency with a list (either at request or on a periodic basis) of those licensed wholesalers or retailers to whom they have supplied tobacco.
- Retail tobacco sellers should be required to purchase solely from licensed tobacco wholesalers unless purchasing from other retailers at the listed retail prices.
- The current licence should be prominently displayed at each tobacco premises.
- Licence fees should be set to recover only those costs associated with:
 - the actual administration of the licensing regime;
 - the enforcement of the licences — this may include inspections;
 - the provision of licensing-related information directed to customers and the community; and
 - the provision of information to applicants and licensees to ensure their continued and future compliance.
- Tobacco sales licensing should be seen as a health issue and hence should be controlled by health officials. This does not preclude health officials contracting out elements of the scheme (eg, licensing, inspections, enforcement, etc) to third parties.

- There should be a graduated penalty structure that includes warnings administrative penalties, prosecutions and scope for licence withdrawal.
- The number of licences should not be restricted at this point in time.

Part D

Implementation issues

Chapter 9

Alternative implementation approaches

While Part C assessed best practice arrangements for licensing of tobacco outlets, this chapter addresses possible models for the implementation of the preferred licensing model.

9.1 Implementation models

For ease of understanding and reference, the options available to implement national schemes can be placed on a spectrum of uniformity, covering higher, moderate and lower levels of uniformity. The choice for policy-makers becomes a question of the level of uniformity and coordination which is:

- desired;
- appropriate; and
- achievable.

At each end of the spectrum are the extremes:

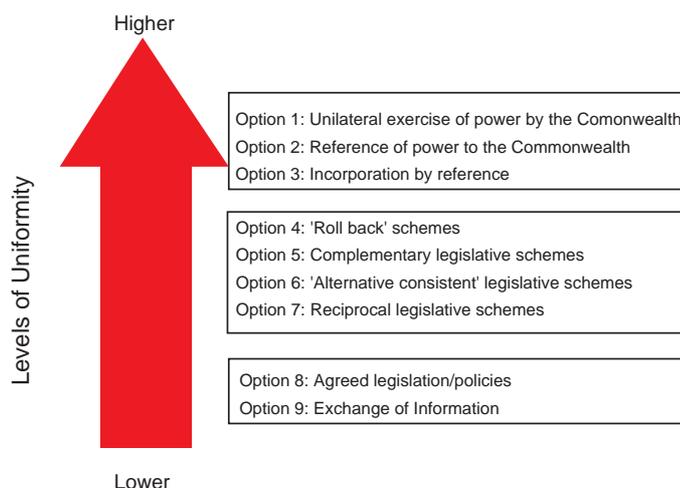
- complete uniformity of law and policy (which might be achieved in a number of ways); and
- no uniformity at all, with states and territories separately pursuing their own policies as far as they can.

In between, the options broadly cover:

- harmonisation;
- reciprocity;
- co-ordination of policy and/or legislation; and
- exchange of information between governments.

Specifically, the options are shown in Figure 9.1.

Figure 9.1

LEVELS OF UNIFORMITY IN ALTERNATIVE NATIONAL LEGISLATIVE SCHEMES

While some options are clearly either politically unfeasible or do not achieve the required degree of uniformity, it is important that they are all considered.

High levels of uniformity

Three options provide for high levels of uniformity:

- *Option 1: Unilateral exercise of power by the Commonwealth* — the most complete way to achieve uniformity, if this was ever adopted as a desirable policy goal, is for the Commonwealth to legislate to provide for a licensing regime that over-rides all such state and territory regimes. Clearly, an appropriate head of power would need to be found for such an approach. It is not clear that the Commonwealth currently has a head of power that would enable it to absolutely 'cover the field';
- *Option 2: Reference of power to the Commonwealth* — sub-section 51(37) of the *Constitution* envisages some or all of the states referring power to the Commonwealth from time to time, or adopting Commonwealth legislation on a reference of power. Once a 'matter' is referred to the Commonwealth, the Commonwealth is able to legislate in the same way as any other head of Commonwealth power. This approach is considered highly unlikely given that:
 - the states have shown a general unwillingness to refer powers to the Commonwealth; and
 - unless all states refer power to the Commonwealth there will still be a non-standard approach to licensing;
- *Option 3: Incorporation by reference* — this scheme is also referred to as 'template', 'co-operative', 'applied', 'adopted complementary' and 'application of laws' legislation. One jurisdiction enacts legislation, which contains all the substantive provisions, and this legislation is adopted and applied in legislation enacted by the other jurisdictions in the scheme. There is no evidence, as yet, that states would be willing to adopt this approach.

If a high degree of uniformity is desired (presumably at a 'best practice' standard) then either Options 1 or 3 could be undertaken if there is co-operation between the states and the Commonwealth, while only Option 1 is feasible (given an appropriate head of power) if the states do not wish to pursue an absolutely standardised licensing approach.

US tobacco retailers have been strong advocates of the view that if there is to be retailer licensing then it should be on a uniform national basis:

"The federal licensing of tobacco retailers for enforcement purposes is objectionable because it fails to address the underlying problem of minors who smoke. If Congress does require licensing, the fees should be minimal — no more than \$10 a store — and the system must be uniform in every state. It must preempt all existing licensing systems, and local jurisdictions must be precluded from adding licensing requirements."

Hammonds 1997, p. 28

Certainly some from both industry and the health profession have been critical of the patchwork approach to regulation:

"the significant point to note is that despite the Commonwealth and State governments' public commitment to improved coordination in jurisdictional policies and regulations which impact on the efficiency and competitiveness of business in Australia, the regulatory practices adopted for the tobacco industry show no signs of this commitment to best practice reform. Rather, what this brief overview has highlighted is that regulatory and policy inconsistencies flourish in the area of tobacco legislation and regulation."

PricewaterhouseCoopers 2001, p. 71¹²⁰

Furthermore, the major retail chains are of the opinion that compliance costs would be greatly reduced if a uniform national approach could be adopted.

While absolute uniformity has the benefit of reduced compliance costs, there is a likelihood that it is at the cost of reduced appropriateness for each state and territory. For example, a nationally consistent approach may limit the range of factors, which may trigger a licence withdrawal. Indeed, some commentators hold the concern that federally imposed schemes will stifle the development of stronger tobacco control laws.¹²¹

Alternatively, some commentators have advocated a more centralised approach to tobacco policy generally (including enforcement) so as to take a comprehensive view of the overall market in nicotine delivery devices and to establish a framework that would deliver maximum health advantages.¹²² In this vein, some stakeholders noted that the *Excise Amendment (Compliance Improvement) Act 2000* provides for licensing of the whole tobacco industry (ie, a licensing system for the growing, transporting, trade, manufacture and storage of tobacco) but not for retail sales.¹²³ They suggested that a logical extension of this chain of licensing could be to retailers, with enforcement powers delegated to state and territory officials. The clear risk is that such an extension of the excise licensing regime will tend to shift the focus away from health to revenue (see section 8.6).

¹²⁰ See also VicHealth Centre for Tobacco Control 2001, *Tobacco Control: A Blue Chip Investment in Public Health*, Anti-Cancer Council Of Victoria, Melbourne.

¹²¹ See Fox, BJ, Lightwood, JM & Glantz, SA 1998, *A Public Health Analysis of the Proposed Resolution of Tobacco Litigation*, Institute for Health Policy Studies, University of California, San Francisco.

¹²² See, for example: Raw, M 1997, *Regulating Nicotine Delivery Systems. Harm Reduction and the Prevention of Smoking-related Disease*, Health Education Authority, London.

¹²³ The Act complements the Illicit Tobacco Strategy (implemented in July 1999) which was developed to address the problems associated with the growing, dealing, distribution and sale of

Moderate levels of uniformity

Moderate levels of uniformity can be achieved in one of four principal ways:

- *Option 4: 'Roll back' schemes* — 'roll back' schemes offer a way of achieving a reasonable level of uniformity through the establishment of minimum standards by the Commonwealth on matters over which the Commonwealth and the states have concurrent power;
- *Option 5: Complementary legislative schemes* — this option relies on the Commonwealth and states working together to achieve legislative coverage of a particular policy area. A typical scenario prompting such a scheme would see the Commonwealth lacking complete control over a policy area, and so needing the state to pass complementary legislation to achieve the desired object. The Commonwealth and all participating states would pass separate, but totally consistent (although not necessarily identical) pieces of legislation. An intergovernmental agreement is likely to be used to set out the terms and understandings on which the scheme is based. The possibility for variation is obviously greater here;
- *Option 6: 'Alternative consistent' legislative schemes* — an 'alternative consistent' legislative scheme is a variation of Option 3. In this version, rather than pass legislation which applies template legislation enacted by a host jurisdiction, participating jurisdictions can pass their own legislation which can be identical to, but can also be less extensive than, the host legislation; and
- *Option 7: Reciprocal legislative schemes* — the next point on the spectrum includes those schemes which recognise other jurisdictions' legislation or undertake not to be inconsistent with them. Reciprocal schemes allows a jurisdiction to recognise, on a reciprocal basis, a status given by another jurisdiction. Their principal purpose is to extend national coverage rather than to achieve uniformity, although in practice they may prove to have an homogenising effect.¹²⁴

These options all entail a high degree of cross-jurisdictional support. Without inducements to facilitate cooperation the options are not considered feasible. In any case, the actual degree of uniformity achievable under these approaches is highly variable.

Lower levels of uniformity

Two general approaches can be employed to stimulate (but not guarantee) uniformity in legislative approaches:

- *Option 8: Agreed legislation/policies* — The second-last point on the spectrum is where governments in question agree to implement similar legislation or policies, which be implemented by local legislation.
- *Option 9: Exchange of information* — such an exchange can take many forms, including:

illicit tobacco. The Strategy was designed to ensure that Government revenues are protected, that the legitimate tobacco industry is not disadvantaged by illegal activity, and to provide safeguards for the community. The Australian Tax Office identified four elements which they believe will assist in achieving these goals: limiting the availability of raw tobacco (ie, 'chop chop'); limiting the availability of smoking mechanisms and accessories; reducing demand by education; and reducing demand by enforcement and penalties.

¹²⁴ The best example of this is the mutual recognition scheme developed in the early 1990s.

- Ministers and/or public servants could meet on a more or less regular basis to exchange information about their relative experiences with policy initiatives and regulatory structures; or
- jurisdictions could publish best practice guidelines with the hope that they will be adopted (implicitly or explicitly) by other jurisdictions. Unlike Option 8, there is no agreement on whether or not to implement such policies or principles.

In effect, Option 9 has been the approach adopted to date. Tobacco control officials in the states and territories see great benefit in the development of best practice guidelines as a way of putting pressure on legislatures to improve their regulation of tobacco sales. This approach, however, leads to a patchwork approach to regulation, and is clearly not preferred by those firms in the retail sector that operate in more than one jurisdiction.

Option 8 is unlikely to be supported by some jurisdictions without some inducement.

9.2 Funding to facilitate reform

A clear trend in Commonwealth–state relations over the past 20 years has been increased reliance on funding withdrawal threats and/or funding increases to facilitate the update of reform. Prominent examples include the agreement to adopt NCP, standardisation of road rules and the acceptance of the Goods and Services Tax.

Similarly, the threats of funding withdrawal have been used in the US to facilitate the adoption of reform — see Box 9.1.

Box 9.1

FUNDING RESTRICTIONS AS AN INCENTIVE FOR TOBACCO CONTROL

“The state of Pennsylvania has been fined \$6.3 million by the federal government because too many stores are selling tobacco products to children

Pennsylvania was fined for failing to comply with sales quotas established under a 1992 federal law that requires states to reduce tobacco sales to children every year. The law, sponsored by the late U.S. Rep. Mike Synar, D-Okla., gave states until this year to reduce the number of stores selling tobacco to children to 20 percent.

States must conduct annual undercover compliance surveys on 10 percent of their tobacco retailers. If quotas are not met, the federal government may withhold 40 percent of a state’s federal Drug, Alcohol and Mental Health Block grants, which fund community programs.

Pennsylvania’s fine is based on the 1999 survey results, which found 41 percent of stores selling tobacco to minors; that year’s goal under the federal law was 30 percent.

The U.S. Department of Health and Human Services could have withheld \$23.2 million of Pennsylvania’s \$58 million block grant. But in its 2001 appropriations bill, Congress allowed states a one-time chance to avoid the penalty by increasing the tobacco enforcement and education budget.

Pennsylvania missed its mark by 11 percentage points, so its fine of \$6.3 million is 11 percent of its \$58 million block grant. The federal government negotiated an agreement with the governor’s office between May and July 2001 on how the money was to be spent, Wilson said.”

Source: Mendenhall 2002

Using threats of funding withdrawal (eg, through the Public Health Outcome Agreements) can be seen as a highly attractive approach for Commonwealth because it is costless (except possibly in a political sense) if it is willing to carry through the threat to withdraw funding. What is not clear, however, is the degree to which states would need to be induced (either positively or negatively) to fall into line.

While this approach is superficially attractive the nature of the *NTS* precludes its adoption because the *NTS* operates under a partnership framework, with the Commonwealth providing States and Territories with best practice tools, which they may choose to implement or use as a best practice guide in policy development. Given this devolved policy approach, it would be inappropriate for the Commonwealth to use funding levers such as the Public Health Outcome Agreements to encourage a nationally consistent or uniform tobacco control regime.

While it may be seen as inappropriate under the *NTS* to use funding levers to mandate particular tobacco control *processes*, it may certainly be appropriate to use funding levers to achieve certain *outcomes*. For example, one state official suggested that it would be reasonable for the Commonwealth to tie funding, either as a reward or as a penalty, to an outcome such as the tobacco-sales-to-minors rate — this would likely encourage the adoption of licensing, but which would not preclude a jurisdiction from seeking alternative measures to achieve the target rate.

Conclusion

There is considerable merit in tying some Commonwealth funding to the achievement of tobacco control outcomes. This, however, is a broader issue than licensing per se and requires further discussion between the Commonwealth Government and the states and territories.

9.3 The preferred approach

Implementation of a best practice licensing regime is somewhat problematic.

At the end of the day, the preferred implementation model will be largely determined by the degree of national uniformity that the Commonwealth (and the states and territories) believe is appropriate.

While we are attracted to the concept of absolutely uniform national licensing (particularly as a complement to the national licensing of tobacco growing and manufacturing),¹²⁵ such an approach is considered relatively unlikely to be adopted. As a result, we suggest that the most practical way to encourage adoption of relatively uniform tobacco licensing is to publish the best practice principles identified in section 8.9; which States and Territories may choose to implement or use as a best practice guide in policy development.

¹²⁵ We note that enforcement is still best controlled at a state, territory or even local level, even if the legislation is Commonwealth.

Furthermore, and irrespective of whether adoption of licensing is universal, the Commonwealth should take steps to facilitate the consistent collection of information regarding who sells tobacco and where, and the nature and location of offences.¹²⁶ This may mean, for example, helping States and Territories to identify the information necessary for best practice policy development (ie, to facilitate cross-jurisdictional benchmarking) and enforcement, and encouraging harmonisation in the collection and publication of such information.

Conclusion |

Some Australian jurisdictions have been reluctant to adopt licensing schemes. While the Commonwealth could seek to legislate to cover the field and over-ride the states this approach is likely to be less than complete. It is unclear whether the proposed Framework Convention on Tobacco Control would create such powers. The present (July 2002) draft wording does not, in any case, mandate licensing schemes. Without voluntary state support the Commonwealth could publish the best practice principles and seek to encourage their adoption through the force of the argument.

¹²⁶ The importance of data collection has been stressed in the US — United States General Accounting Office 2001, *Synar Amendment Implementation: Quality of State Data on Reducing Youth Access to Tobacco Could Be Improved*, GAO-02-74, Washington.

Chapter 10

Is licensing compliant with National Competition Policy?

While debate continues regarding reform of licensing arrangements, it must be remembered that such debate is subject to broader policy drivers from outside the health portfolio. The most pertinent such driver relates to the obligations of the Commonwealth and all states and territories under NCP. This section provides some background on the development and application of the NCP frameworks with which any licensing reforms will need to comply.

10.1 An overview of National Competition Policy

The inaugural Council of Australian Governments (CoAG) meeting commissioned the ‘Hilmer Committee’ to conduct an inquiry into the development of a more nationally focused approach to competition policy. The *Hilmer Report*¹²⁷ was presented to CoAG in August 1993, and formed a major input to micro-economic reform discussions for CoAG.

The *Hilmer Report* described regulation by all levels of government as the greatest impediment to enhanced competition in many key sectors of the economy. It did, however, recognise that there may be a need for some government regulation when market failures occur. As a result, the *Hilmer Report* recommended:

- the reform of regulation that unjustifiably restricts competition; and
- that any restriction on competition that is to remain must be clearly demonstrated to be in the public interest.

At the April 1995 CoAG meeting, the Commonwealth, State and Territory Governments agreed to implement a NCP reform agenda based on the *Hilmer Report*’s recommendations.

As a consequence of this commitment, through the *Competition Principles Agreement (CPA)* all State and Territory Governments committed themselves to ensuring that new legislation does not impose undue competitive restrictions:

“(1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
- b) the objectives of the legislation can only be achieved by restricting competition. ...

(5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in subclause (1). ...

(9) Without limiting the terms of reference of a review, a review should:

- a) clarify the objectives of the legislation;
- b) identify the nature of the restrictions on competition;
- c) analyse the likely effect of the restriction on competition and on the economy generally;

¹²⁷

The Independent Committee of Inquiry 1993, *National Competition Policy*, AGPS, Canberra.

- d) assess and balance the costs and benefits of the restriction; and
- e) consider alternative means for achieving the same result including non-legislative approaches.”

Competition Principles Agreement, Sub-clauses 5(1), (5) and (9).

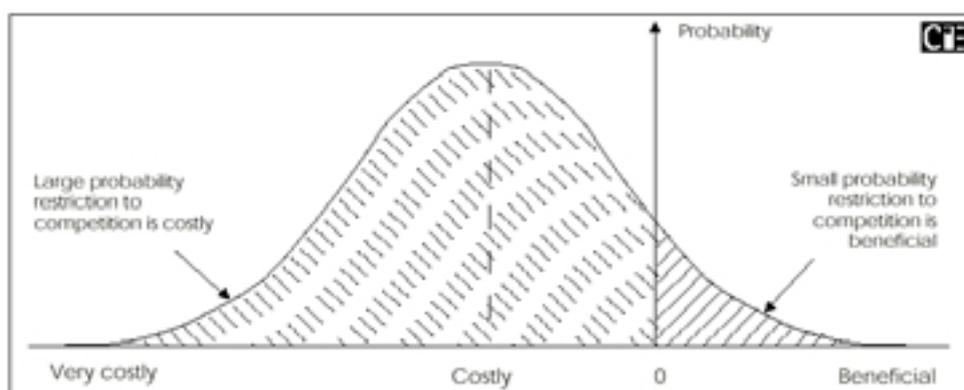
This test — commonly called the ‘competition test’ — establishes whether particular restrictions on competition remain necessary, through an assessment of the costs and benefits of current and alternative means of achieving policy objectives.

The burden of proof is on governments, and those who benefit from competitive restrictions, to establish the public interest case for the retention or enactment of legislation, which restricts competition.

The competition test is built on the presumption that restrictions to competitive economic behaviour impose costs on the community.¹²⁸ However, the competition test also acknowledges that there may be situations where unfettered competition is not appropriate and restrictions to competition may achieve a more efficient outcome for the community. This test is summarised, in terms of a probability analysis, in Figure 10.1.

Figure 10.1

NCP PRESUMES THAT COMPETITIVE RESTRICTIONS ARE MORE LIKELY THAN NOT TO IMPOSE NET COMMUNITY COSTS



Source: Centre for International Economics 1997, p. 24

NCP acknowledges that competition is not an end in itself. That is, while the introduction of competition will generally deliver benefits to the consumer, there are situations where community welfare will be better served by not effecting particular competition reforms. That is, competition is to be implemented to the extent that the benefits that will be realised from competition, outweigh the costs.

NCP recognises that where anti-competitive behaviour is acceptable to achieve a public good, there must be a transparent process for assessing the balance between benefit and costs, and the behaviour must be subject to review.

¹²⁸ In particular, restrictions to competition are presumed to reduce businesses' incentives to: improve their performance; develop new products; and/or respond to changing circumstances.

Sub-clause 1(3) of the *CPA* provides for considerations other than strictly economic criteria in assessing public benefit in circumstances where, on balance, there is a net benefit for the community. Sub-clause 1(3) sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

“Without limiting the matters that may be taken into account, where this Agreement calls:

(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

(b) for the merits or appropriateness of a particular policy or course of action to be determined; or

(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

(a) government legislation and policies relating to ecologically sustainable development;

(b) social welfare and equity considerations, including community service obligations;

(c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(d) economic and regional development, including employment and investment growth;

(e) the interests of consumers generally or of a class of consumers;

(f) the competitiveness of Australian businesses; and

(g) the efficient allocation of resources.”

The ‘public interest test’ (sometimes called the public benefit test) is a shorthand expression to describe the interplay of sub-cl.1(3), 5(1), 5(5) and 5(9) of the *CPA*. Its importance has been noted by the NCC:

“A central feature of the National Competition Policy is its focus on competition reform ‘in the public interest’. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency.”

National Competition Council 1996, p. 2

The NCC went on to note that:

“The aim in applying s.1(3) is to assess any special treatment in a transparent and consistent manner, with the benefits and costs of particular anti-competitive behaviour subject to public scrutiny.”

National Competition Council 1996, pp. 8-9

The NCC emphasises that sub-cl.1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors to look at when considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.¹²⁹

10.2 Is licensing likely to raise NCP concerns?

Does licensing restrict competition?

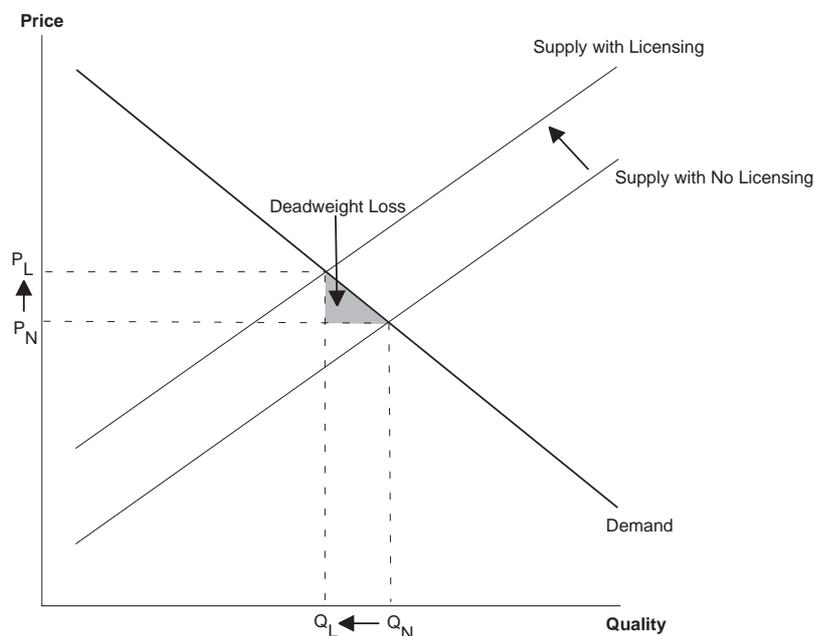
Licensing regimes have, at least in theory, an impact on economic efficiency because they distort underlying supply decisions. As such, licensing has been a key focus of NCP reviews.

¹²⁹ This approach was re-affirmed in House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition: Report of the Inquiry Into Aspects of the National Competition Policy Reform Package*, AGPS, Canberra.

A simple supply and demand model for the supply of tobacco shows the potential efficiency costs associated with a licensing regime — see Figure 10.2.

Figure 10.2

THE IMPACT OF LICENSING ON THE SUPPLY OF RETAIL TOBACCO SELLERS



Source: Derived from Logan, Milne & Officer 1989, p. 127

The current market equilibrium point exists with Q_N tobacco products supplied at price P_N (ie, prices and quantities under with no licensing regulation). If a licensing regime is introduced the supply curve will shift to the left, because entry is more costly, creating a contraction of output (Q_N minus Q_L) at an increased price (P_L).

The move from free entry to licensing creates a ‘deadweight loss’ associated with licensing. The shaded triangle in Figure 10.2 represents a loss (ie, not a transfer between two groups) in efficiency because there are a number of consumers who are willing to pay above the non-licensing market price (P_N) but below the regulated market price (P_R), but are denied tobacco because licensing creates a minimum price of P_R .

The debate then becomes one around whether such an impact is significant. An argument can be made that the competitive impact is not significant because the importance of licensing in the tobacco market may be outweighed by a number of other factors such as:

- pricing policies of various outlets;
- the structure of the industry;
- the decline in the number of tobacco outlets over the years;¹³⁰ and so on

¹³⁰ See Senate Community Affairs References Committee 1995, *Inquiry into the Tobacco Industry and the Costs of Tobacco Related Illness*, Parliament of Australia, Canberra.

While these (and other) additional factors may be more significant, NCP would nevertheless regard licensing as a competitive distortion and hence a restriction on competition.

Is there a sufficient rational for regulating the distribution of tobacco?

There are two general and complementary statements of principle as to when governments should seek to regulate:

- governments should restrict the use of mandatory regulation in product and service markets to the protection of health, safety of the environment. The Commonwealth Quasi-regulation Interdepartmental Committee recommended that explicit government regulation should only be considered where:
 - the problem is high risk or of high impact/significance, for example, major public health and safety issues;
 - the government requires the certainty provided by legal sanctions;
 - universal application is required;
 - there is a systematic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles; and
 - existing industry bodies lack adequate coverage of industry participants are inadequately resources or do not have a strong regulatory commitment.¹³¹
- CoAG has publicly stated that government interventions in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.¹³²

The licensing of tobacco retailers and wholesalers can be seen as consistent with both these general statements:

- tobacco related disease is a highly significant public health issue in which there is a systematic compliance problem and industry is unable to adequately self-regulate; and
- regulation can be said to address the twin market failures of negative externalities (ie, smoking has negative impacts on unrelated third parties directly through passive smoking and indirectly through higher community health costs) and information asymmetries (ie, information imbalances that distort market outcomes).

Do the community-wide benefits of the competitive restrictions outweigh the costs?

For regulatory intervention to be supported the benefits of such intervention must outweigh the costs. The benefits and costs are discussed in turn.

¹³¹ Commonwealth Interdepartmental Committee on Quasi-regulation 1997, *Grey-Letter Law*, Canberra.

¹³² Council of Australian Governments 1991, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, Canberra.

Benefits

The benefits of licensing have been discussed in previous chapters (particularly Chapters Four to Seven).

In general, licensing is seen as:

- reinforcing the understanding that selling tobacco is a privilege, not a right;
- providing the authorities with the addresses of sellers, and in the process:
 - facilitating monitoring of their compliance with tobacco control laws;
 - enabling authorities to communicate directly with tobacco sellers (ie, to inform them of changes to the law, etc); and
- providing a regulatory mechanism that allows conditions to be placed upon the manner in which sales are made and a mechanism by which authority to sell can be revoked.

As a result of these inter-related factors licensing should facilitate increased compliance with tobacco control laws and hence a reduction in under-age smoking. That is, licensing makes it harder for minors to smoke (because enforcement will be stronger). This is of benefit because in communities where it becomes more difficult to purchase tobacco products, adolescents are more reluctant to try to purchase them and smoking rates among adolescents are lower than those in communities where ease of purchase remains unchanged.¹³³

A system which is effective in discouraging the uptake of smoking by young people will deliver substantial benefits:

- in the short term — benefits will occur as more young people avoid the ill health caused by tobacco smoking and as money that would have been spent on tobacco products is re-directed to other areas of the economy; and
- over the longer-term — the greater benefits will be realised over the medium to longer term when these young people, as adults, experience lower levels of smoking-related disease. As acknowledged in the *Background Paper* to the NTS: “Preventing onset of regular smoking in adolescents is an important component of any comprehensive smoking and health strategy, but it often takes decades before prevention has any measurable effect on morbidity and mortality rates.”¹³⁴

It is important to note that the benefits of licensing are the marginal benefits associated with licensing, and not the possible savings if smoking were entirely eradicated. Clearly, it is important to understand the magnitude of costs associated with tobacco use (see Box 10.1), but only a small portion of these costs will be avoided because of licensing. However, even a small decrease in total smoking-related costs is a significant benefit.

¹³³ Forster, JL, Murray, DM, Wolfson, M, Blaine, TM, Wagenaar, AC & Hennrikus, DJ 1998, 'The Effects of Community Policies to Reduce Youth Access to Tobacco', *American Journal of Public Health*, vol. 88, no. 8, pp. 1193-98.

¹³⁴ National Expert Advisory Committee on Tobacco 1999, *Background Paper: A Companion Document to the National Tobacco Strategy 1999 to 2002-03, Prepared for the Ministerial Council on Drug Strategy*, Canberra.

Box 10.1

TOTAL COSTS ASSOCIATED WITH TOBACCO USE

Tobacco use is associated with more than 25 diseases and conditions, including various cancers, ischaemic heart disease and chronic obstructive pulmonary disease. According to the WHO estimates, by the year 2020, the burden of disease attributable to tobacco is expected to outweigh that caused by any single disease, with approximately nine percent of disease worldwide caused by tobacco smoking.

There are various estimates of the burden of disease attributable to Australian tobacco use, although all point to significant costs:

- one study estimated the burden of disease in Australia for 1996 and the proportion of the total burden that is attributable to tobacco smoking. It measured mortality, disability, impairment, illness and injury arising from 176 diseases, injuries and risk factors. This study found that most of the burden of tobacco (72 percent) is due to lung cancer, chronic obstructive pulmonary disease and ischaemic heart disease. For 1996, there were an estimated 242,138 Disability Adjusted Life Years (ie, DALYs, or years of life lost) as a result of tobacco use;
- national estimates for tobacco-related hospital admissions in 1992 range from 98,373 to 125,757;
- The DCIS has estimated that health care costs for tobacco-related disease in Australia were \$672m in 1989-90, representing 4.1 percent of total recurrent public and private hospital expenditure, 1.4 percent of total medical expenditure, 3.4 percent of total pharmaceutical expenditure, 0.8 percent of total allied professional services expenditure and 4.6 percent of nursing home expenditure. The DCIS estimates suggest that, for Australia as a whole in 1989-90, tobacco related disease was associated with: 952,000 hospital bed days; over two million medical consultations; and 5.3 million pharmaceutical prescriptions.
- looking at costs in 1988 and 1992, Collins and Lapsley estimated that the national annual cost of tobacco use (excluding costs of passive smoking) to be \$12.7 billion. This includes health care costs totalling an estimated \$1,597 million. After taking into account savings from premature deaths, the net costs of tobacco use to the health system are estimated to be \$833 million.

For a number of reasons, these estimates are all likely to be conservative.

Source: Australian Institute of Health and Welfare 1996; English et al. 1995; Mathers, Vos & Stevenson 1999, pp. 14-15; Murray & Lopez 1996, p. 30; Williams 1998

Costs

There are few empirical studies of the economic costs of intervening to restrict tobacco use.¹³⁵ However, earlier chapters have highlighted the costs associated with licensing. Generally, these costs include:

- government — administration costs, possible loss of tax income (although these tax losses may be offset if licensing reduces the sale of chop chop);
- tobacco sellers — compliance costs; and
- consumers — at the margin some consumers will be affected if supply avenues are reduced. This cost has not really been discussed in this report, and so is addressed below.

¹³⁵ See Warner, KE 1997, 'Cost-effectiveness of Smoking Cessation Therapies: Interpretation of the Evidence and Implications for Coverage', *PharmacoEconomics*, vol. 11, pp. 538-49.

More effective tobacco control measures as a result of licensing scheme's introduction would cause regular smokers to forego the pleasure of smoking, or incur the costs of quitting, or both. *A priori*, this loss of consumer surplus would appear to be the same as it would be for any other consumer good. However, tobacco is not a typical consumer good with typical benefits. For the addicted smoker who regrets smoking and expresses a desire to quit, the benefits of smoking are largely the avoidance of the costs of withdrawal. Thus, if tobacco control measures reduce individual smokers' consumption, those smokers will face significant withdrawal costs.

Tobacco control measures raise the individual's costs relative to his or her benefits, and prompt some smokers to quit or cut back their consumption. Given that most regular smokers express a desire to quit but few are successful on their own, it seems likely that the perceived costs of quitting are greater than the perceived costs of continuing to smoke, such as damage to health. By making the costs of continued smoking greater than the costs of withdrawal, intervention can induce some smokers to quit.¹³⁶ However, smokers who quit or cut back would face withdrawal costs.

In considering economic costs to smokers, it is important to distinguish between regular smokers and others. For children and adolescents who are either beginners or merely potential smokers, the costs of avoiding tobacco are likely to be less severe,¹³⁷ since addiction may not yet have taken hold and, therefore, withdrawal costs are likely to be lower.

Conclusion

The public health and economic arguments for tobacco control differ in their objectives:

- the public health objective would be to eradicate smoking if possible, given that tobacco hazards increase with increasing exposure and overwhelm any possible beneficial effects on health; but
- the economic argument suggests that the socially optimal level of consumption of tobacco would not be zero. Rather, children would not smoke, but adults who knew their risks and bore their costs entirely themselves could smoke.¹³⁸ Achievement of the economic objectives would result in considerably less smoking than at present, but would stop well short of eradication. Preventing children from smoking could, in theory, eventually lead to the epidemic disappearing. In reality, slightly older cohorts may take up smoking, and it is unlikely that the recruitment of new smokers would cease.

However, a major problem for the economic approach is that nicotine is addictive. This undermines the consumer-sovereignty argument against intervention, because all evidence suggests that the conditions for a rational choice to become addicted are not met, and the addicted smoker is to some degree a different person from the one who decided to start smoking.

¹³⁶ The provision of information about the health consequences of smoking would increase the perceived costs of continuing to smoke, and alert smokers to the benefits of quitting.

¹³⁷ Other costs may include, for example: reduced acceptance by peers; less satisfaction from the thwarted desire to rebel against parents; and the curtailment of other pleasures of smoking.

¹³⁸ Warner, KE 1998, 'The Economics of Tobacco and Health: an Overview', in I Abedian, R van der Merwe, N Wilkins & P Jha (eds), *The Economics of Tobacco Control*, Applied Fiscal Research Centre, University of Cape Town, Cape Town.

Once addiction is taken into account it is possible to see a compromise rationale that is justifiable by both economic and public health grounds; it falls short of eradication, but acknowledges that various competitive restrictions are necessary.

It is this middle ground that licensing supports. Licensing, as recommended in this report (see section 8.9), does not involve the restriction of the number of outlets through caps (although this may be supported with further information, but preferably based on the nature of sales from certain types of stores), but rather seeks to facilitate enforcement of laws prohibiting sales to minors. While this may be a minor restriction on competition, this cost is offset by the expected health benefits (see section 10.2).

While NCP and the NCC have gained a reputation for opposition to licensing, the NCC has clearly demonstrated its understanding of the use of licensing in circumstances when there is a clear public interest case. For example, this is evident in the NCC's discussion of the regulation of drugs and other related substances:

"The potential for harm from the misuse of drugs, poisons and controlled substances justifies restrictions on competition where a clear link between the restriction and the reduction of harm can be established. Best practice regulation seeks to provide a reasonable level of protection while ensuring reasonable access. ...

Restricting the supply of drugs, poisons and controlled substances can involve input or outcome restrictions. Input restrictions include the licensing of wholesalers and controls on who may prescribe and who may dispense. Outcome restrictions govern end use, for example proscribing the misuse of controlled substances. Generally, outcome legislation is preferred to input controls because costs are lower and restrictions on competition are fewer. However, with particularly dangerous goods such as addictive pharmaceuticals, the benefits of multiple controls to prevent harm are likely to justify high costs. Good regulation should differentiate the scope and nature of restrictions based on the potential for harm."

National Competition Council 2001, p. 16.26

Adopting a similar approach to the regulation of tobacco, and given the positive cost-benefit outcome alluded to in this report, and assuming that administration and compliance costs are minimised wherever possible, implementation of the best practice principles identified in Chapter Eight should be NCP compliant.

Part E

Appendices

Appendix A

Terms of reference

This report has been prepared taking into account three key objectives:

- to identify and review the public health benefits of registration and/or licensing schemes for tobacco retail outlets and tobacco wholesalers locally and internationally;
- to investigate the feasibility and justifiability of introducing registration and/or licensing schemes for tobacco retail outlets and tobacco wholesalers in Australia and the legality of imposing such a scheme/s, including any possible initiatives at the national level; and
- to identify key elements of a best practice approach to the introduction of registration and/or licensing schemes for tobacco retail outlets and tobacco wholesalers in Australia.

Appendix B

Consultation

As part of this review a series of consultation face-to-face meetings were held throughout the country, and were complemented where necessary with phone interviews. The consultation list is provided below.

Government officials were consulted on the basis that they were representing their experiences in the development and enforcement of tobacco control legislation, and did not represent the views of their respective governments.

Table B1

CONSULTATION

<i>Organisations and Representatives</i>		<i>Face-to-Face Meeting</i>	<i>Phone Discussions</i>	<i>Written Submission</i>
<i>Queensland</i>				
	Ian Baldock (Queensland Retail Traders & Shopkeepers Association)	✓		
	Mark West (Queensland Health)	✓		
	Doug Kalman (Queensland Retail Tobacco Traders Association)	✓		
<i>Northern Territory</i>				
	Di Rayson (Department of Health and Community Services)	✓		
	Nick Raymond (Department of Health and Community Services (NT))	✓		
<i>Western Australia</i>				
	Denise Sullivan (Cancer Foundation of Western Australia)	✓		
	Lisa Briggs (Health Department of Western Australia)	✓		
	Dishan Weerasooriya, Gino Marinucci and Sue Harding (Quit WA)	✓		
	Julian Nussey (WA Retail Tobacconists Association)	✓		
<i>South Australia</i>				
	John Brownsea (State Retailers Association of South Australia)	✓		
	Wayne Cheney and Natasha Clemow (RevenueSA)	✓		
	Della Rowley, Peter Jarrett and Jim Dadds (Department of Human Services (SA))	✓		
	John Tunney (Charles Tunney & Sons, Tunney's Wholesale)	✓		
<i>New South Wales</i>				
	Peter Jowett (Australasian Association of Convenience Stores Incorporated)	✓		
	James Philbrook (NSW Retail Tobacco Traders' Association)	✓		
	Stan Moore (Australian Retailers Association)	✓		

<i>Organisations and Representatives</i>	<i>Face-to-Face Meeting</i>	<i>Phone Discussions</i>	<i>Written Submission</i>
John Sanders (NSW Health Department)	✓		
Anne Jones (Action on Smoking and Health Australia (ASH))		✓	
Mark Connell, graham Oakley, Geoff Wells, Danielle Waples and Evelyn Moodley (British American Tobacco)	✓	✓	✓
Philip Morris Limited			✓
<i>Australian Capital Territory</i>			
Leanne Wells and Samantha Diplock (Commonwealth Department of Health and Ageing)	✓		
Jenny Dwyer (Commonwealth Office of Small Business)	✓		
Margo Goodin and Craig Davis (ACT Department of Health and Community Care)	✓	✓	
<i>Tasmania</i>			
Marina Sain and Helen Townley (Tasmanian Department of Health and Human Services)	✓		
<i>Victoria</i>			
Allen Roberts (Retail Confectionery & Mixed Business Association)	✓		
Jennifer Hughes (Department of Human Services)	✓		
Professor David Hill and Kate Hassard (Anti-Cancer Council of Victoria)	✓		

Appendix C

Sources

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