

Inquiry into tobacco licensing arrangements in Queensland

Report No. 19, 55th Parliament
Health, Communities, Disability Services and
Domestic and Family Violence Prevention
Committee
April 2016

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Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

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¹ Dr Rowan was appointed Deputy Chair on 24 February 2016. Ms Bates was Deputy Chair from 1 April 2015 to 24 February 2016

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Abbreviations

AAR	Alliance of Australian Retailers
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
ARA	Australian Retailers Association
ATO	Australian Taxation Office
BATA	British American Tobacco Australia
COAG	Council of Australian Governments
FLP	fundamental legislative principles
FoodWorks	Australian United Retailers Limited
Heart Foundation	Heart Foundation Queensland
NDSHS	National Drug Strategy Household Survey
NSW	New South Wales
NT	Northern Territory
SA	South Australia
the Act	<i>Tobacco and Other Smoking Products Act 1998</i>
the Committee	Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
the Department	Department of Health
TRN	Tobacco Retailer Notification
WA	Western Australia
WHO	World Health Organization

Chair's foreword

This Report presents a summary of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's inquiry into licensing arrangements that affect the sale and use of tobacco in Queensland.

In undertaking the inquiry, the committee was required to consider the arrangements that currently apply in Queensland with respect to licensing the wholesale and retail supply of tobacco products; what licensing arrangements apply in other states and territories; and the capacity for licensing arrangements for tobacco wholesalers and retailers to support broader public health objectives.

The Committee sought written submissions, held a public departmental briefing, a public hearing, and travelled to Perth and Melbourne to consider their comparative licensing schemes.

This report sets out a summary of the evidence provided to the Committee and articulates the Committee's view in relation to that evidence. The Committee found that there is a strong public health case for implementation of a licensing scheme, for both wholesalers and retailers, in Queensland and has recommended that the Minister consider implementing a positive wholesale and retail tobacco licensing scheme in Queensland, giving weight to appropriate licensing fees and avoiding unnecessary regulatory red tape for small business.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions, met with the Committee and provided additional information during the course of this inquiry.

In particular, the Committee would like to thank representatives from the Western Australian Department of Health, the Victorian Department of Health and Human Services and QUIT Victoria who met with the Committee in Perth and Melbourne. The Committee found the information provided to be invaluable in understanding the comparative schemes.

I would also like to thank the Department of Health for their cooperation in providing information to the Committee on a timely basis. The Committee also wishes to acknowledge the assistance provided by the Queensland Parliamentary Library and Research Service, Hansard and the Committee Secretariat.

Finally, I would like to thank my fellow Committee Members for their determination to critically address the issues that arose during the course of the inquiry.

I commend this report to the House.



Leanne Linard MP
Chair

Recommendations

Recommendation 1

3

The Committee recommends that the Minister for Health and Ambulance Services consider implementing a positive wholesale and retail tobacco licensing scheme in Queensland, while giving weight to appropriate licensing fees and avoiding unnecessary regulatory red tape for business.

1. Introduction

1.1 Role of the Committee

The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the Committee) is a portfolio committee of the Legislative Assembly. The Committee was formerly known as the Health and Ambulance Services Committee which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly.² On 16 February 2016, the Parliament agreed to amend Standing Orders, renaming the Committee and expanding its area of responsibility.³

The Committee's primary areas of responsibility include:

- Health and Ambulance Services;
- Communities, Women, Youth and Child Safety;
- Domestic and Family Violence Prevention; and
- Disability Services and Seniors.

Section 92 of the POQA provides that a portfolio committee is to deal with an issue referred to it by the Legislative Assembly or under another Act, whether or not the issue is within its portfolio area.

1.2 Referral

On 28 October 2015, the Legislative Assembly agreed to the following motion:

That the Health and Ambulance Services Committee inquire into licensing arrangements that affect the sale and use of tobacco in Queensland.

That, in undertaking this inquiry, the committee should consider: what arrangements currently apply in Queensland with respect to licensing the wholesale and retail supply of tobacco products; what licensing arrangements apply in other states and territories for the wholesale and retail supply of tobacco products; and the capacity for licensing arrangements for tobacco wholesalers and retailers to support broader public health objectives.

*Further, that the committee report to the Legislative Assembly by 29 April 2016.*⁴

1.3 Inquiry process

The Committee's consideration of the referral included calling for public submissions, a public departmental briefing and a public hearing. The Committee also sought additional written advice from the Department of Health (the Department).

The Committee also met with representatives from the Western Australia Department of Health, Victorian Department of Health and Human Services and QUIT Victoria.

1.4 Submissions

The Committee advertised the inquiry on its website and wrote to stakeholders and subscribers to inform them of the inquiry and invite written submissions.

² *Parliament of Queensland Act 2001*, section 88 and Standing Order No. 194.

³ Queensland Legislative Assembly, Hon SJ Hinchliffe MP, Leader of the House, *Parliamentary Debates (Hansard)*, 16 February 2016: 18-20

⁴ Queensland Legislative Assembly, Hon SJ Hinchliffe MP, Leader of the House, *Parliamentary Debates (Hansard)*, 28 October 2015: 2460

The closing date for submissions was 12 January 2016. The Committee received 10 submissions. The Committee also sought a written submission from QUIT Victoria. This submission was received on 17 March 2016.

A list of those who made submissions is contained in Appendix A. Submissions authorised by the Committee have been published on the Committee's webpage and are available from the Committee secretariat.

1.5 Public departmental briefing

The Committee wrote to the Department seeking advice on the referral. The Committee received this written advice on 25 November 2015.

The Committee held a public departmental briefing with officers from the Department on 2 December 2015. A list of officers who gave evidence at the public departmental briefing is contained in Appendix B. The transcript of the briefing has been published on the Committee's webpage and is available from the committee secretariat.

Subsequent to the briefing, the Committee sought further written advice from the Department in response to matters raised during the hearing. This response was received on 16 January 2016.

1.6 Public hearing

On 24 February 2016 the Committee held a public hearing with individuals and representatives from organisations who provided submissions. A list of representatives who gave evidence at the hearing is contained in Appendix C. A transcript of the hearing has been published on the Committee's webpage and is available from the committee secretariat.

The Committee also sought additional written information from stakeholders subsequent to the hearing.

1.7 Other information

The Committee travelled to Perth and Melbourne from Monday 29 February to Wednesday 2 March 2016. The Committee met with representatives from the Western Australia Department of Health on Monday 29 February 2016 in Perth and representatives from the Victorian Department of Health and Human Services and QUIT Victoria on Wednesday 2 March 2016 in Melbourne.

A list of representatives who met with the Committee is contained in Appendix D.

1.8 Outcome of committee considerations

The Committee considered a number of questions in relation to the referral including whether to recommend that Queensland implement a tobacco licensing scheme and if so what type of scheme.

The Committee found that there is a strong public health case for implementation of a positive licensing scheme, for both wholesalers and retailers, in Queensland. The Committee also found that such a scheme would facilitate improved compliance and enforcement of tobacco control measures and provide an important source of additional information regarding tobacco retail and usage in Queensland. Additional Committee comments are included in section 7 of this report.

Recommendation 1

The Committee recommends that the Minister for Health and Ambulance Services consider implementing a positive wholesale and retail tobacco licensing scheme in Queensland, giving weight to appropriate licensing fees and avoiding unnecessary regulatory red tape for small businesses.

2. Tobacco control and usage

In their submission to the Committee QUIT Victoria advised:

Tobacco is one of the leading causes of preventable death and disease in Australia. Despite the harmful nature of tobacco and the devastating toll which it imposes upon the community, it remains one of the most widely available consumer products, with tobacco being sold in more retail outlets than milk. This widespread availability can contribute to the idea that tobacco is a normal part of everyday life, is like any other grocery product and is relatively harmless.⁵

They noted that there have been calls from the tobacco control community to regulate tobacco retailing (restrictions on the number and location) to further denormalise tobacco products and smoking, and to reinforce the harmful nature of tobacco.⁶

Governments throughout Australia and around the world have been enacting legislation aimed at reducing the use of tobacco products. As the former Health and Community Services Committee cited in 2014:

Smoking tobacco is recognised as one of the largest preventable causes of death and disease in Australia. Each year, smoking kills an estimated 15,000 Australians and costs Australia \$31.5 billion in social (including health) and economic costs.

The Australian Government and state and territory governments, through the Council of Australian Governments, have committed by 2018, to reduce the national adult daily smoking rate to 10% and halve the Aboriginal and Torres Strait Islander adult daily smoking rate (from 47% in 2008).⁷

In May 2003, the 56th World Health Organization (WHO) Assembly, unanimously adopted the Framework Convention on Tobacco Control. Australia is a party to the convention. Article 15 includes the following:

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.⁸

The Convention commits nations to implementing tobacco control measures including policies on tobacco price and tax increases, prohibiting or restricting tobacco advertising, promotion and sponsorship, requiring labelling with more prominent health warnings, protecting against exposure to second-hand smoke, supporting smoking cessation interventions, education and public awareness activities and combating illicit trade.⁹

As a result of the WHO Convention, Council of Australian Governments (COAG) has facilitated a number of strategies addressing this issue. These strategies are consistent with Australia's obligations as a party to the Convention.¹⁰

⁵ Submission 11, QUIT Victoria: 4

⁶ Submission 11, QUIT Victoria: 4

⁷ Department of Health (Cth), Tobacco Control, <http://www.health.gov.au/tobacco> accessed August 2015, in Health and Ambulance Services Committee, *Tobacco and Other Smoking Products (Extension of Smoking Bans) Amendment Bill 2015*, Report No. 6, 55th Parliament, October 2015, p11.

⁸ World Health Organization, WHO Framework Convention on Tobacco Control, May 2003: 15

⁹ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 8

¹⁰ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 8

The Intergovernmental Committee on Drugs agreed to the latest *National Tobacco Strategy 2012-2018* in 2012. The COAG committed to the following performance benchmark:

*By 2018, reduce the national smoking rate to 10 per cent of the population, and halve the indigenous smoking rate, over the 2009 baseline.*¹¹

The strategy sets out the national framework to reduce tobacco-related harm and reflects best practice in tobacco control and complements existing policy frameworks at the state and territory, national and international levels.¹² The strategy identifies the following nine priority areas:

1. Protect public health policy, including tobacco control policies, from tobacco industry interference;
2. Strengthen mass media campaigns to: motivate smokers to quit and recent quitters to remain quit; discourage uptake of smoking; and reshape social norms about smoking;
3. Continue to reduce the affordability of tobacco products;
4. Bolster and build on existing programs and partnerships to reduce smoking rates among Aboriginal and Torres Strait Islander people;
5. Strengthen efforts to reduce smoking among populations with a high prevalence of smoking;
6. Eliminate remaining advertising, promotion and sponsorship of tobacco products;
7. Consider further regulation of the contents, product disclosure and supply of tobacco products and alternative nicotine delivery systems;
8. Reduce exceptions to smoke-free workplaces, public places and other settings; and
9. Provide greater access to a range of evidence-based cessation services to support smokers to quit.¹³

The Strategy notes that there is overwhelming evidence about the harms of tobacco and an extensive body of evidence on effective interventions to reduce tobacco-related harm and reduce smoking rates.¹⁴

The Cancer Council Queensland advised the Committee:

*One third of smokers die in middle age losing at least 20 years of life (42% of lung cancer deaths occur in the 45–64 year old age group, and 18% of COPD deaths). Current smokers will die an average of 10 years earlier than non-smokers, with mortality rates increasing substantially with the increased intensity of smoking. Smoking accounts for 1 in 7 deaths in Queensland with 3700 Queenslanders dying annually from tobacco related conditions. About one-third of these were of working age. One in 10 people who die from smoking-related diseases have never smoked themselves.*¹⁵

They also advised that smoking is estimated to cost the Queensland economy more than \$6 billion each year through health care costs, impacts on household finances and lost production in the workplace.¹⁶

¹¹ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 2

¹² Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 1

¹³ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 12

¹⁴ Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018*, November 2012: 12

¹⁵ Submission 5, Cancer Council Queensland: 2

¹⁶ Submission 5, Cancer Council Queensland: 9

However, tobacco is a legal product available to adults. Imperial Tobacco advised:

The tobacco industry is an entirely legal business contributing billions of dollars in revenue to Australian governments and employing hundreds of people across the country.¹⁷

They advised that they only sell to adult consumers who exercise their free choice to use tobacco products and support strong regulation to prohibit supply or use by those who are under age.¹⁸

2.1 History of tobacco control

Australian governments and public health organisations have maintained a focus on controlling tobacco usage since the early 1970s. Major milestones include:

- 1973 – health warnings first mandated on all cigarette packs in Australia;
- 1976 – bans on all cigarette advertising on radio and television in Australia;
- 1986 to 2006 – phased in bans on smoking in workplaces and public places;
- 1990 – bans on advertising of tobacco products in newspapers and magazines published in Australia;
- 1992 – increase in the tobacco excise;
- 1993 – Tobacco Advertising Prohibition Act 1992 prohibited broadcasting and publication of tobacco advertisements;
- from 1994 to 2003 – bans on smoking in restaurants;
- 1995 – nationally consistent text-only health warnings required;
- 1998 to 2006 – bans on point-of-sale tobacco advertising across Australia;
- 2006 – graphic health warnings required on packaging of most tobacco products;
- 2010 – 25% increase in the tobacco excise;
- 2011 – first complete State or Territory ban on point-of-sale tobacco product displays
- 2012 – introduction of tobacco plain packaging, and updated and expanded graphic health warnings;
- 2013 – changes to the bi-annual indexation of tobacco excise and a further 12.5% excise increase on 1 December;
- 2014 – second of four 12.5% excise increases on 1 September 2013; and
- 2015 and 2016 – remaining 12.5% excise increases on 1 September each year.¹⁹

In addition, Queensland has recently enacted a number of significant reforms including strengthening and extending smoking bans outside government buildings, at transport waiting areas and pedestrian malls and at public swimming pools and skate parks. Queensland has also banned sales at pop up sales venues. The Parliament is also currently considering issues relating to smoking and tobacco use at universities, technical and further education facilities, and registered training organisations.

¹⁷ Submission 6, Imperial Tobacco: 1

¹⁸ Submission 6, Imperial Tobacco: 1

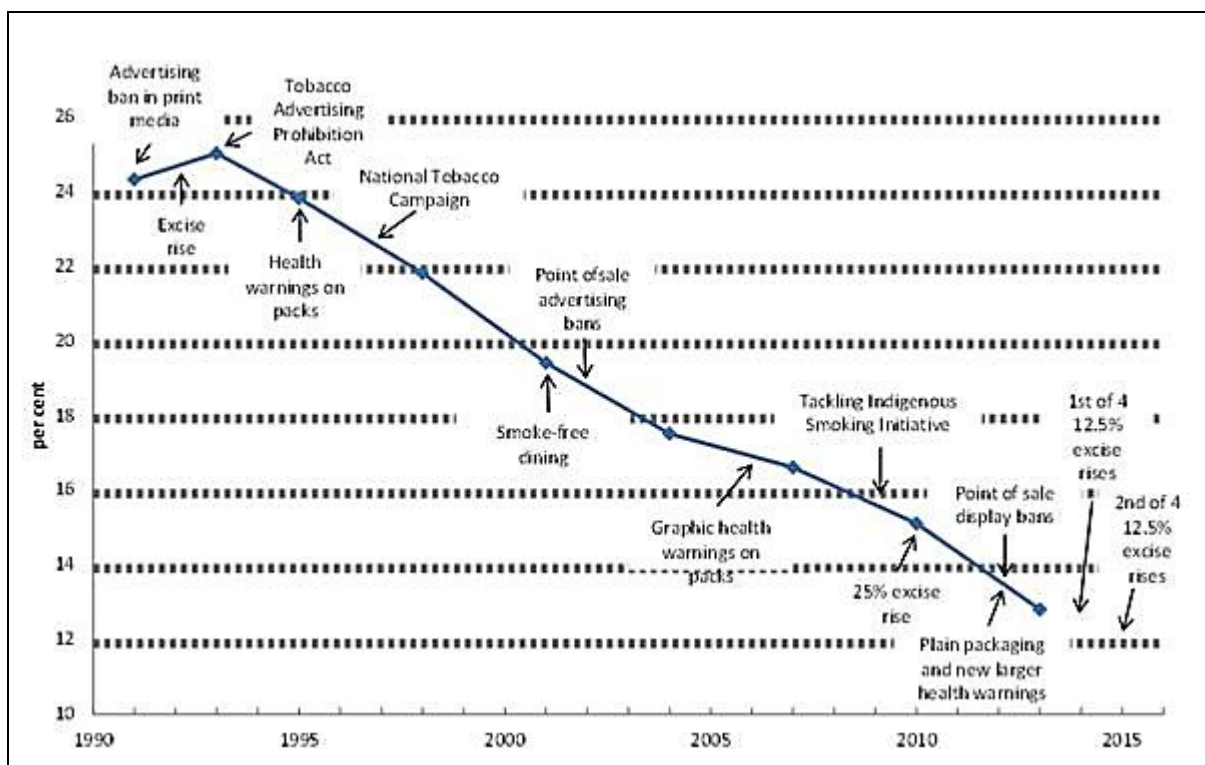
¹⁹ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

This sustained effort has seen a significant reduction in smoking throughout Australia. Recent Australian Bureau of Statistics (ABS) figures show that total consumption of tobacco and cigarettes in the March quarter 2014 is the lowest ever recorded (as measured by estimated expenditure on tobacco products):

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012; and
- \$3.405 billion in March 2014²⁰

Figure 1 below depicts the smoking prevalence rates for 14 years or older against the key tobacco control measures implemented in Australia between 1990 and 2012.

Figure 1: Smoking prevalence rates for 14 years or older and key tobacco control measures implemented in Australia since 1990



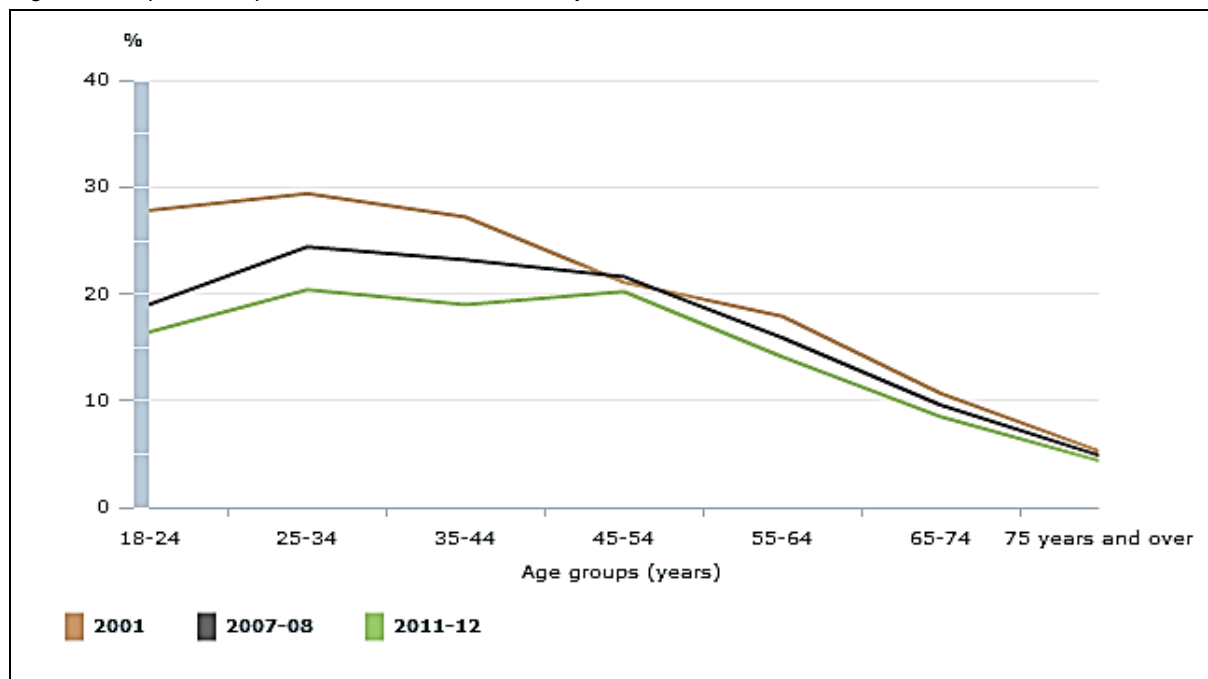
Source: Australian Government, Department of Health, *Tobacco Key Facts and Figures*, <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

²⁰ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

The ABS commenced an Australian Health Survey in 2011 with results released progressively from October 2013 to December 2015. The survey found that in 2011-12, there were 2.8 million Australians aged 18 years and over who smoked daily (16.3 per cent) and this rate has decreased consistently over the past decade, from 18.9 per cent in 2007-08 and 22.4 per cent in 2001. The survey also found that decreases in smoking rates have occurred across all age groups, and particularly amongst people aged under 45 years.²¹

Figure 2 depicts the proportion of daily smokers by age group over the periods 2001, 2007-2008 and 2011-2012.

Figure 2: Proportion of persons who were current daily smokers, 2001, 2007-08 and 2011-12



Source: Australian Bureau of Statistics, *Australian Health Survey: First Results, 2011-12*
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/73963BA1EA6D6221CA257AA30014BE3E?opendocument>

The most recent National Drug Strategy Household Survey (NDSHS)²² found that among people aged 14 and older, daily smoking declined significantly between 2010 and 2013 (from 15.1 per cent to 12.8 per cent) and daily smoking rates have almost halved since 1991 (24.3 per cent).²³

However, among specific population groups the findings were less encouraging:

Aboriginal and Torres Strait Islander

- *Aboriginal and Torres Strait Islander Australians aged 14 years or older were two and a half times as likely as non-Indigenous Australians to smoke daily in 2013: 32% (Indigenous compared to 12.4% (non-Indigenous)).*
- *The proportion of Aboriginal and Torres Strait Islander Australians aged 14 years or older smoking daily declined from 35% in 2010 to 32% in 2013, and the number of cigarettes smoked per week declined significantly, from 154 in 2010 to 115 in 2013.*

²¹ <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/73963BA1EA6D6221CA257AA30014BE3E?opendocument>

²² The NDSHS has been conducted every 2 to 3 years since 1985. The 2013 National Drug Strategy Household Survey collected data from nearly 24,000 people across Australia. The survey was conducted from 31 July to 1 December 2013. Roy Morgan Research was commissioned to conduct the survey fieldwork.

²³ <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/tobacco/>

Remoteness

- *People aged 14 years or older, living in remote and very remote areas, were twice as likely to have smoked daily in the previous 12 months as those in major cities: 22% compared with 11.0%.*
- *The proportion of people aged 14 years or older smoking daily rose with increasing remoteness: 11.0% in major cities; 15.4% in inner regional; 19.4% in outer regional; and 22% in remote and very remote areas.*

Socioeconomic and employment status

- *People (14 years or older) living in areas with the lowest socioeconomic status (SES) were 3 times more likely to smoke daily than people with the highest SES, 19.9% compared with 6.7%, but there were significant declines in daily smoking in both these groups between 2010 and 2013.*
- *The declines in daily smoking seen nationally were also seen among employed people but there were no significant changes in the smoking behaviour of unemployed people who were unable to work between 2010 and 2013.*
- *People aged 14 years or older, who were unemployed were 1.7 times more likely to smoke daily and those who were unable to work were 2.4 times more likely to smoke daily.*
- *Compared to 2010, employed people aged 14 years or older were less likely to smoke daily in 2013, down from 16.1% to 13.5% respectively.²⁴*

Queensland Health advised the Committee that the progressive introduction and strengthening of retail restrictions has contributed to a reduction in smoking rates in Queensland. They advised that in the decade 2004 to 2014, when the majority of retail restrictions were introduced, smoking rates reduced by 26 per cent and there has been a reduction in uptake of smoking in young people with smoking rates for this group halving between 2001 and 2010.²⁵

2.2 Tobacco growing

All manufactured tobacco products are imported into Australia as tobacco leaf or finished products.²⁶

Prior to 1994, tobacco growers in Australia grew and sold tobacco leaf under a quota system. During 1994-95 a major restructuring of the industry occurred. This included financial incentives and other support for growers to exit the industry. In October 2006, a government and industry funded buyout of the leaf growing industry was agreed to and the final outstanding sales transactions were completed by 2009.²⁷

Currently, a licence to grow, produce or deal with tobacco seed, plant and leaf is required. These licences are subject to strict rules and conditions and are rarely granted. Information from the Australian Taxation Office (ATO) indicates there presently is no tobacco manufacturing occurring in Australia and no-one is licensed to grow tobacco for commercial sale or personal use.²⁸

²⁴ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

²⁵ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 2

²⁶ KPMG, Illicit tobacco in Australia, October 2015: 12

²⁷ <http://www.tobaccoaustralia.org.au/10-8-the-tobacco-growing-industry>

²⁸ <https://www.ato.gov.au/business/excise-and-excise-equivalent-goods/tobacco-excise/>

2.3 Tobacco distribution

Queensland Health advised the Committee that it is estimated that there are around 8,000 tobacco retailers in Queensland alone. This number is based on British American Tobacco Australia's (BATA) estimated 40,000 tobacco retailers in Australia and calculating on a pro-rata a population basis.²⁹

Tobacco retailers include the following:

- Supermarkets and grocery stores;
- Tobacconists;
- Convenience stores;
- Mixed businesses;
- Hotels and Clubs (vending machines);
- Newsagents;
- Liquor stores;
- Petrol stations; and
- Other retailers (online stores).³⁰

Whilst other jurisdictions have licensing schemes, the Committee found that it is still difficult to ascertain the number of retailers.

Cancer Council Queensland advised the Committee that there are no zoning restrictions or ordinances that limit the number, concentration, or geographical location of tobacco retailers. They noted that a 2013 study found that cigarettes are more widely available and cheaper in disadvantaged areas compared to more affluent areas. They consider that this contributes to higher rates of smoking in disadvantaged communities.³¹

In 2013, the NSW government convened a taskforce to investigate its tobacco licensing scheme. As part of these investigations, it commissioned a study by researchers at University of Sydney to undertake a review of evidence associated with the regulation of tobacco retailing. That study found that there is a greater concentration of tobacco outlets in lower socioeconomic communities. Tobacco outlet density in NSW was 21.72 outlets per 100,000 people.³²

Queensland Health also advised there are approximately 260 wholesalers of tobacco in Queensland. Tobacco wholesalers include:

- Tobacco companies (three tobacco companies operate in Australia);
- Tobacconists (some also function as wholesalers to smaller businesses not serviced by tobacco companies); and
- Grocery wholesalers (e.g. Metcash).³³

²⁹ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 2

³⁰ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 3

³¹ Submission 5, Cancer Council Queensland: 3

³² Freeman, Dr B, Evidence of the impact of tobacco retail policy initiatives, January 2014: 5

³³ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 3

The three major tobacco manufacturers are BATA, Imperial Tobacco and Philip Morris Limited. BATA has a market share of 37 per cent in manufactured cigarettes which represents a one per cent decline compared to 2014. Philip Morris Limited's market share has remained broadly constant at 34 per cent in 2014 and declining only one per cent to 33 per cent in 2015. Imperial Tobacco's market share increased from 28 per cent to 30 per cent between 2014 and 2015.³⁴

Imperial Tobacco has the largest market share in loose tobacco with three of the top six loose tobacco brands, whilst BATA is the only other major competitor in this market.³⁵

³⁴ KPMG, Illicit tobacco in Australia, October 2015: 11

³⁵ KPMG, Illicit tobacco in Australia, October 2015: 11

3. Background – tobacco licensing

3.1 Purpose of tobacco licensing schemes

3.1.1 Retail schemes

The purposes of tobacco licensing include:

- to track the number of tobacco outlets in order to assist with implementing compliance programs;
- preventing the sale of products to minors; and
- regulating the availability of tobacco products by limiting the number or density, location and type of tobacco outlets.³⁶

In 2002, the Commonwealth Department of Health and Aging commissioned a report on Licensing of Tobacco Retailers and Wholesalers (Allen Report). That report identifies that 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.*³⁷

The report concluded that 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.*³⁸

The Heart Foundation Queensland (Heart Foundation) advised the Committee that the objectives of a tobacco licensing scheme are:

- *To effectively monitor compliance of retailers with legislative restrictions on the sale of tobacco and other smoking products and in so doing reduce sales to minors and other breaches.*
- *Maintain an accurate register list of tobacco suppliers (retailers/wholesalers) for the purpose of education on their obligations and compliance activities.*
- *Undertake suitability checks of retailers and wholesalers to supply tobacco.*

³⁶ See '5.21 Reducing tobacco access and supply' in MM Scollo & MH Winstanley, *Tobacco in Australia: Facts and issues*, Cancer Council Victoria, 2015; B Freeman & S Chapman, *Evidence of the impact of tobacco retail policy initiatives*, January 2014: 9

³⁷ The Allen Consulting Group, *Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements*, December 2002:

³⁸ The Allen Consulting Group, *Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements*, December 2002: 32

- *Suspend licences where retail restrictions are breached and apply penalty fines; as a disincentive for retailers to breach laws.*
- *Reduce the supply of tobacco and other smoking products in Queensland.*³⁹

The Committee sought comment from Queensland Health on whether the introduction of a licensing scheme would add value to what government is currently doing. The Chief Health Officer responded:

*...we have done essentially over the last number of years what you would do if you were going to bring in a licensing scheme. So I am not sure that a licensing scheme would add a lot of value to what we are currently doing other than potentially nudging some people out of the industry. But I am not sure whether filling in the paperwork, the red tape and paying the suggested \$300 fee would be enough to nudge people out who were not going to leave anyway because of the reduced sales that are occurring. I do not know.*⁴⁰

However, the Heart Foundation and the Cancer Council Queensland both commented that Queensland Health does not have a register of retailers and wholesalers and is working with data supplied by BATA and relying on estimates. Both considered organisations considered there is room for improvement.⁴¹

3.1.2 Wholesale schemes

The Allen report noted 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, careless or miscalculate'. Licensing schemes exist to minimise the potential social harm caused by particular products and services.⁴²

The purpose of wholesale licensing schemes includes:

- sending a message that selling tobacco is a privilege and not a right;
- provision of information to regulators;
- make it harder for retailers to avoid being licensed.⁴³

Queensland Health advised that a wholesale licence scheme could be designed to monitor the number and location of wholesalers and ensure that wholesale supply of tobacco products only occurs to those retailers that have a valid retail licence.⁴⁴

They noted that:

*Where a licensing system is established for businesses that wholesale tobacco, the legal obligations will only relate to businesses registered in the State. However, laws could prohibit sale of tobacco in Queensland by entities not possessing a Queensland license.*⁴⁵

³⁹ Submission 9, Heart Foundation Queensland: 1

⁴⁰ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 6

⁴¹ Ms Durham, Heart Foundation Queensland, and Ms Border, Cancer Council Queensland, Public hearing transcript 24 February 2016: 5

⁴² Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 30

⁴³ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 31, 47

⁴⁴ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 5

⁴⁵ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 5

3.2 Types of tobacco licensing schemes

There are basically four alternative forms of licensing available in Australia as follows:

- notification/registration;
- accreditation/certification;
- negative licensing; and
- positive licensing.⁴⁶

The following table depicts the characteristics of each type of licensing scheme:

Table 1: Properties associated with various forms of licensing

PROPERTIES ASSOCIATED WITH VARIOUS FORMS OF LICENSING				
	Notification/ Registration	Accreditation	Negative Licensing	Positive Licensing
Notification	✓	✓		✓
Prior approval		✓		✓
Standards	Optional	✓	✓	✓
Enforcement or compulsion	✓		✓	✓

Source: The Allen Consulting Group, Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements, December 2002: 36

The characteristics are defined as follows:

- *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.⁴⁷

The advantages and disadvantages of the various types of licensing schemes are contained in Appendix E.

⁴⁶ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 36

⁴⁷ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 36

Throughout the inquiry the Committee heard tobacco licensing schemes described as negative or positive. Definitions of these terms are as follows:

Negative tobacco retail licensing scheme:

- *A negative tobacco retail licensing scheme requires tobacco retailers to notify the government if they are selling tobacco through a registration system. They are required to register their details and the details of their retail outlets but do not need to prove their suitability to sell tobacco. Negative tobacco licensing schemes are sometimes called retailer notification schemes.*

Positive tobacco retail licensing scheme:

- *A positive tobacco retail licensing scheme requires tobacco retailers to apply for and receive a licence prior to retailing tobacco products. In most cases these schemes involve an application fee and are valid for a certain period of time, after which they must be renewed.⁴⁸*

⁴⁸ NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 10

4. What arrangements currently apply in Queensland with respect to licensing the wholesale and retail supply of tobacco products

Queensland does not currently operate a tobacco licensing scheme. Tobacco is managed under the *Tobacco and Other Smoking Products Act 1998* (the Act).

4.1 *Tobacco and other Smoking Products Act 1998*

The objective of the Act is to improve the health of members of the public by reducing their exposure to tobacco and other smoking products.⁴⁹ The Act achieves this by:

- restricting the supply of tobacco and other smoking products to children; and
- restricting the advertising and promotion of tobacco and other smoking products; and
- reducing public exposure to smoke from tobacco and other smoking products; and
- establishing a framework for monitoring, investigative and enforcement activities.⁵⁰

There are significant penalties that can be applied for various infringements of the Act. In particular, section 10 contains penalty provisions of 140 penalty units (currently equivalent to \$16,492) and up to 420 penalty units (currently equivalent to \$49,476) for a third or later offence, for supplying a smoking product to a child.⁵¹

Section 11 requires that a supplier must ensure an employee of the supplier does not supply a smoking product to a child. Equivalent penalties apply to the supplier whether irrespective of whether it was an employee who supplied the smoking product to a child.⁵²

Section 13 of the Act also allows the court when sentencing a supplier for an offence to, on its own initiative or the application of the prosecutor, make an order prohibiting the supply of all or stated smoking products or imposing conditions or restrictions on the supply of smoking products by the supplier.⁵³

Section 13A of the Act gives the Chief Executive the power to seek contact information, including name, address and contact numbers and addresses, for each supplier to which a manufacturer or supplier has supplied smoking products.⁵⁴

Queensland Health advised that the Act imposes strict controls on the retail sale, display and promotion of tobacco products including:

- prohibition on the sale of tobacco products to children under 18 years of age
- complete display bans of tobacco products at retail outlets and on vending machines
- requirement for retail suppliers of tobacco products to train staff in understanding their legal obligations under the Tobacco Act.⁵⁵

⁴⁹ *Tobacco and other Smoking Products Act 1998*, section 3

⁵⁰ *Tobacco and other Smoking Products Act 1998*, section 3A

⁵¹ *Tobacco and other Smoking Products Act 1998*, section 10

⁵² *Tobacco and other Smoking Products Act 1998*, section 12

⁵³ *Tobacco and other Smoking Products Act 1998*, section 13

⁵⁴ *Tobacco and other Smoking Products Act 1998*, section 13A

⁵⁵ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 1

They considered that there is strong evidence for the effectiveness of display restrictions and bans on the sale of tobacco to minors on reducing smoking rates. They advised that the progressive introduction and strengthening of retail restrictions has contributed to a reduction in smoking rates and that in the decade 2004 to 2014, when the majority of retail restrictions were introduced, smoking rates reduced by 26 per cent. They noted that there has been particular success in reducing the uptake of smoking in young people with smoking rates for this group halving between 2001 and 2010.⁵⁶

Queensland Health advised that in order to maintain retailer compliance with the restrictions contained in the Act enforcement officers undertake scheduled surveillance activities. State-wide representative samples of retail outlets show a high level of adherence with tobacco retail restrictions.⁵⁷

They advised that enforcement teams maintain localised lists of retailers based on history of alleged breaches of retail restrictions, public complaints, and in accordance with specific criteria such as proximity of retailer to a school. They advised that lists are maintained and updated to assist with planning of surveillance and enforcement operations.⁵⁸

Queensland's tobacco laws are primarily enforced by Queensland Health Environmental Health Officers (EHOs) who have the power to:

- issue individuals warnings and on-the-spot fines;
- issue businesses improvement notices, warnings and on-the-spot fines;
- initiate legal proceedings for breaches of tobacco laws;
- respond to complaints;
- inspect premises; and
- provide advice about tobacco laws.⁵⁹

Police officers also have powers to address tobacco sales to children. Police are responsible for enforcing smoking bans in vehicles where children under 16 years are present. Local government are responsible for enforcing the laws they make regarding banning of smoking in public places.⁶⁰

4.2 Feedback on current legislation

Queensland Health advised the Committee that Queensland's tobacco legislation is strong and based on evidence and best practice. They advised that the tobacco retailing measures have been progressively introduced and strengthened as part of a broader tobacco control approach. They consider that this has contributed to significant reductions in smoking and in particular in reducing youth smoking.⁶¹

⁵⁶ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 1

⁵⁷ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 3

⁵⁸ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 3

⁵⁹ Queensland Health, Tobacco laws in Queensland – Penalties, fines and enforcement, <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/penalties/default.asp>

⁶⁰ Queensland Health, Tobacco laws in Queensland – Penalties, fines and enforcement, <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/penalties/default.asp>

⁶¹ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 1-2

The Australian United Retailers Limited (FoodWorks) advised the Committee that there needs to be a recognition that Queensland's tobacco legislation is strong and there are well-established restrictions on the sale and supply of smoking products, including:

- a complete ban on the display, promotion and advertising of tobacco in retail outlets;
- restrictions on the sale of tobacco to children under 18 years of age;
- restrictions on the location of vending machines;
- measures to capture electronic cigarettes as smoking products;
- education advice for retailers and staff about their legal obligations;
- requirement for retailers to train their staff about asking for identification and not selling to children;
- investigation and enforcement by Queensland Health EHOs; and
- formal warnings and penalties for breaches of the retail provisions.⁶²

BATA advised that there are significant measures in place to ensure retailers are held accountable should they be found in breach of the strict tobacco control measures already in place. They also advised that monitoring enforcement activity is undertaken by EHOs, including planned compliance audits and responding to alleged breaches, formal warnings and penalties for breaches of up to nearly \$50,000.⁶³

BATA confirmed that under the Act, a court, when sentencing for a breach involving tobacco sales to minors, can make an order prohibiting the retailer from selling tobacco products. BATA stated:

*BATA believes enforcement and prosecution of retailer breaches of current legislation to be a suitable measure which does not require the introduction of an additional compliance burden on small business.*⁶⁴

BATA advised the Committee that the key purpose of tobacco licensing in Australia is to monitor compliance and to maintain a list of those able to supply tobacco. They consider that this is already effectively achieved in Queensland by EHOs and has been successful in maintaining retailer compliance.⁶⁵

Master Grocers Australia advised the Committee that the implementation of a licensing scheme in Queensland would be justified if the existing provisions were not available. However, they considered that Queensland's existing legislative arrangements already address all of the areas that a licensing scheme would. They consider that there has been high compliance rates and a demonstrated statistical decrease in daily smoking amongst adults.⁶⁶

They advised that statistical results demonstrate that Queensland's existing tobacco legislation has been highly effective in supporting the reduction of adult daily smoking rates. They highlighted that Queensland's reduction in smoking rates has been almost on par with other states that have implemented a licensing scheme.⁶⁷

⁶² Submission 2, Australian United Retailers Limited: 2

⁶³ Submission 4, British American Tobacco Australia: 3

⁶⁴ Submission 4, British American Tobacco Australia: 3

⁶⁵ Submission 4, British American Tobacco Australia: 4

⁶⁶ Submission 7, Master Grocers Australia: 4-5

⁶⁷ Submission 7, Master Grocers Australia: 14

The Heart Foundation advised the Committee that the current system in Queensland is a reactive model that responds to problems after they occur.⁶⁸

The Cancer Council Queensland advised that whilst the prevalence of tobacco usage has decreased by 26 per cent over the decade since 2004, the rate of decrease has slowed over recent years. They consider that new measures are now urgently required to continue historical rates of progress.⁶⁹

⁶⁸ Submission 9, Heart Foundation Queensland: 3

⁶⁹ Submission 5, Cancer Council Queensland: 2

5. What licensing arrangements apply in other States and Territories for the wholesale and retail supply of tobacco products

The Committee was tasked with considering the licensing arrangements in other jurisdictions. The Committee also considered international research where relevant to the Australian context. This section contains the results of that analysis.

5.1 Licensing arrangements in other jurisdictions

The Committee considered the licensing arrangements in other jurisdictions in Australia. Appendix F contains a summary of the arrangements in those jurisdictions. There is no federal legislation in relation to licensing the wholesale or retail supply of tobacco products. All states and territories, except Queensland and Victoria, have introduced some form of tobacco licensing system. However, there is a lack of consistency between the jurisdictions.

Tasmania, the Northern Territory (NT) and South Australia (SA) operate positive retailer only licensing schemes. Western Australia (WA) and the Australian Capital Territory (ACT) have positive retailer and wholesaler schemes and New South Wales (NSW) operates a legislated notification scheme for retailers only.⁷⁰

A number of submissions referenced the NSW scheme and noted that the NSW government convened a task force to investigate the effectiveness of its licensing rules in 2014. The task force articulated the view that:

...an evidence-based, best practice approach to tobacco retail regulation includes licensing implemented together with strong enforcement and retailer education.⁷¹

Part of the task force's remit was to provide advice on whether the existing Tobacco Retailer Notification Scheme was appropriate to enable NSW Health to ensure retailer compliance the Act. The task force considered the scheme to be appropriate and able to ensure compliance, however, improvements were necessary to ensure its accuracy, completeness and ease of use by relevant parties.⁷² They identified issues with the accuracy of the scheme, including the potential doubling up of retail premises or retailers which have ceased trading but not notified of this.⁷³

The task force's recommendations included:

- The scheme be updated to ensure entries are valid and retailers can update their details on-line;
- The Act be amended to require tobacco retailers supply a valid registration number; and
- The provision of regular communication to tobacco retailers regarding their obligations, emerging issues and public health alerts.⁷⁴

⁷⁰ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 3

⁷¹ NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 3

⁷² NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 3

⁷³ NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 12

⁷⁴ NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 4-5

The following table provides a summary of the schemes in Australian jurisdictions:

Table 2: Comparison of Australian jurisdictions

Jurisdiction	Type of scheme	Wholesale/Retail	Cost of licence	Limits on number of licences?
Queensland	No scheme	N/A	N/A	N/A
ACT	Positive	Wholesale and Retail	Retail \$306; Wholesale \$360	No
NSW	Negative	Retail	No fee	No
NT	Positive	Retail	\$230	No
SA	Positive	Retail	\$266	No
Tas	Positive	Retail	\$360.89	No
Victoria	No scheme	N/A	N/A	N/A
WA	Positive	Wholesale, retail and indirect resellers	Retail \$240; Indirect resellers \$240; Wholesale \$600	No

The Committee sought additional information from the department regarding the rates of smoking in jurisdictions with and without licensing schemes. Queensland Health provided the following information:

Table 3: Adult smoking prevalence in Australian jurisdictions by tobacco licensing schemes and date commenced

	Adult daily smoking 2013 (%)	Licensing scheme/ commenced
Northern Territory	22.2	2003
Tasmania	16.7	2000
Queensland	15.7*	No scheme
South Australia	13.6	1998
Australia	13.3	Not applicable
Victoria	12.6	No scheme
Western Australia	12.5	2007
New South Wales	12.2	No scheme (retailer notification scheme)
Australian Capital Territory	9.9	2000

Source: Adult daily smoking prevalence: Australian Institute of Health and Welfare (2014) *National Drug Strategy Household Survey Detailed Report 2013*. Drug Statistics Series No 28. Cat No. PHE183. Canberra: AIHW.

* Note: Queensland adult daily smoking rate for this national survey is different to the 14% adult daily smoking rate reported for the state-based 2014 Preventive Health Survey. This difference is due to sampling methodology and is not statistically significant.

Source: Correspondence to HASC from Director-General, Queensland Health, dated 13 January 2016: 3

The Cancer Council Queensland advised:

Different types of licensing schemes currently exist in all states and territories but Queensland and Victoria. South Australia, Tasmania, and the Northern Territory have tobacco licensing schemes for retailers, Western Australia and the Australian Capital Territory have tobacco licensing schemes for retailers and wholesalers, and New South Wales has a legislated retailer notification scheme whereby retailers must provide their details to the State Government.

The introduction of licensing, along with other tobacco control measures, has been associated with falls in smoking prevalence and uptake in other jurisdictions internationally (such as California), underpinning monitoring and compliance, enabling targeted communication to retailers on regulatory matters, and providing an effective mechanism for revoking retailing licenses as necessary.

The introduction of a tobacco licensing regime is in line with world's best practice tobacco control and would support other actions to reduce the prevalence of smoking in Queensland.⁷⁵

5.2 International research

A study by the Tobacco Control Legal Consortium in 2010 noted that in the United States, every state taxes cigarettes and other products and it is an important source of revenue for the states. Many states also have licensing programs but these are designed primarily to aid in collecting taxes and to prevent tax evasion and to a lesser extent to help ensure compliance with other applicable laws.⁷⁶ That study found that licensing rests on the simple concept that retailers engaging in tobacco sales must comply with all relevant laws or risk losing their licence to sell the product.⁷⁷

The study noted that many of the tobacco retailer licensing programs in the United States also allow for more efficient enforcement against the licensee than do other enforcement actions. This enforcement can be accomplished through a civil or criminal court proceeding or an administrative action.⁷⁸

The study also noted that:

...licensing laws that require retailers to comply with all federal, state and local tobacco control laws are dynamic and automatically incorporate newly adopted tobacco control laws. For example, in June 2009, President Obama signed the federal Family Smoking Prevention and Tobacco Control Act (the "FDA Law"), which gave the FDA jurisdiction to regulate tobacco products and instituted sweeping new regulations. Existing licensing laws that require licensees to comply with all federal tobacco control laws now automatically require retailers to comply with the new FDA Law.⁷⁹ QUIT Victoria advised that most states in the USA and many provinces in Canada require licensing of tobacco retailers and sub-national policies govern tobacco retailer licensing. They noted that some jurisdictions issue licenses without a fee.⁸⁰

⁷⁵ Submission 5, Cancer Council Queensland: 3

⁷⁶ McLaughlin, I, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*, April 10: 3

⁷⁷ McLaughlin, I, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*, April 10: 8

⁷⁸ McLaughlin, I, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*, April 10: 8

⁷⁹ McLaughlin, I, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*, April 10: 8

⁸⁰ Submission 11, QUIT Victoria: 8-9

QUIT Victoria advised:

- *In California, tobacco licensing is regulated at the community level by local governments. As a result, a wide range of provisions and restrictions are placed on Californian tobacco retailers, including type of retailer, limits on location and density of retailers, who can sell tobacco, smoking restrictions within and near the premises, fees and sales conditions. The fees range from \$30 to \$655 annually.*
- *In New York, licensing is similarly regulated at the community level. Researchers in New York have also developed a model ordinance (yet to be fully implemented) which includes a detailed strategy to gradually reduce the total number of tobacco retailers by restricted licence availability. In this case, local level action on licensing results in much stronger laws than those managed at a state level. They recommend that the licence fee is high enough to cover administration and enforcement.*
- *In Singapore, tobacco licensing laws are strictly enforced: tobacco retailer licences are suspended and completely revoked for infractions, with a publicly accessible online listing published of all tobacco retailers with licences suspended or revoked. For example, as of April 2014, fourteen retailers had licences completely revoked and more than twelve had a licence suspension for six months in the past year.⁸¹*

5.3 Stakeholder preferred schemes

Imperial Tobacco advised the Committee that, if a tobacco retailer scheme were to be implemented, they would support the current NSW negative licensing scheme to be the optimal choice. They advised:

The scheme is administratively easy for retailers to navigate; no cost impost accrues to the retailer which means cost does not serve as a disincentive from registering; it is a once-off process which provides practical benefits since it is not a process which must be completed annually; and multiple sites can be registered under the one TRN, again, a practical aspect which does not impose administrative burden on retailers.

Additionally, the requirement that a wholesaler obtain the TRN from a retailer before supplying to retailers is perfectly reasonable, providing a safety check to ensure that tobacco products are only being supplied to legitimate tobacco retailers.⁸²

Alliance of Australian Retailers (AAR) also indicated a preference for the NSW scheme on the basis that it is both workable for retailers and allows government to be aware of who is selling tobacco products for communication and enforcement purposes.⁸³

The Heart Foundation advocated for the introduction of a positive licensing scheme for both wholesalers and retailers.⁸⁴ They noted that Queensland's smoking prevalence remains higher than other states and territories and that Queensland is the most regionalised population in Australia. They advised that smoking prevalence is greater in regional areas compared to urban areas.⁸⁵

⁸¹ Submission 11, QUIT Victoria: 9

⁸² Submission 6, Imperial Tobacco: 2

⁸³ Submission 8, Alliance of Australian Retailers: 2

⁸⁴ Submission 9, Heart Foundation Queensland: 1

⁸⁵ Submission 9, Heart Foundation Queensland: 2

They advised:

The evidence seems to suggest that a positive licensing scheme is best practice, because it has all those components of a fee, a penalty, a registration list. From that point of view, we would support what is recommended as the best practice. Queensland currently has negative licensing where there is no requirement for a register, so we would not have that clear list that I was speaking about. We just do not think it is adequate for such a dangerous product. It seemed like the other options to me were even less efficacious.⁸⁶

The Cancer Council Queensland strongly advocated for a positive wholesaler and retailer scheme, advising:

Evidence says that the positive licensing scheme ...is the best practice. The negative licensing scheme is weak. If you go to the trouble of setting up a licensing scheme, the positive licensing scheme is the way to go.⁸⁷

Both organisations agreed that the WA model is a good example of a positive licensing system.⁸⁸

QUIT Victoria cites the WA and SA schemes as being examples that show a tobacco licensing scheme can be implemented in an efficient and cost-efficient manner and need not impose huge administrative burdens for retailers or governments.⁸⁹ They advocate for the introduction of a positive tobacco retail licensing scheme.⁹⁰

⁸⁶ Ms Durham, Heart Foundation Queensland, Public hearing transcript, 24 February 2016: 3

⁸⁷ Ms Border, Cancer Council Queensland, Public hearing transcript, 24 February 2016: 3

⁸⁸ Ms Durham, Heart Foundation Queensland, and Ms Border, Cancer Council Queensland, Public hearing transcript 24 February 2016: 3

⁸⁹ Submission 11, QUIT Victoria: 5-6

⁹⁰ Submission 11, QUIT Victoria: 19

6. The capacity for licencing arrangements for tobacco wholesalers and retailers to support broader public health objectives

6.1 Advantages of tobacco licensing

The Cancer Council Queensland advised that they support the regulation of the sale of tobacco products under a dedicated licensing scheme.⁹¹ They advised that:

*The introduction of a tobacco licensing regime is in line with world's best practice tobacco control and would support other actions to reduce the prevalence of smoking in Queensland.*⁹²

They advised the Committee:

*The introduction of a tobacco retail licensing scheme in Queensland would be a valuable contribution to the state's comprehensive approach to tobacco control. Specifically, a licensing scheme would strengthen compliance with, and enforcement of, existing tobacco control laws. It would provide important data on the number, type and location of tobacco retail and wholesale outlets, and it would allow for the application of further restrictions to the sale of tobacco; for example, restricting the number of licences granted, reducing the number of licences available in areas with high smoking rates, banning tobacco retailers near education facilities and childcare centres and controlling the types of retailers that are approved to sell tobacco. A licensing scheme would also enable targeted communication to retailers and provide a mechanism through which licences could be revoked as necessary.*⁹³

The Heart Foundation advocated that a positive licensing scheme requires that retailers pay a licence fee to sell products and face fines and licence removal for breaches. They noted that the fees collected fund the scheme and provide a revenue stream to support education, monitoring and enforcement programs.⁹⁴

They consider that a tobacco licensing scheme requires retailers, wholesalers and tobacco companies to be more accountable for the supply and sale of tobacco and other smoking products. They advised that currently there is no requirement to provide sales data which provides more accurate information on sales and consumer behaviour to inform public health policy.⁹⁵

The Heart Foundation also advised that a wholesaler licensing scheme could be used to monitor wholesaler numbers and location and to ensure that wholesalers only supply tobacco products to retailers who have a valid retail licence.⁹⁶

QUIT Victoria advised that one of the feasible next steps in tobacco control is controlling the supply of tobacco by reducing access and availability of cigarettes in order to further support quitting rates and cut smoking-related cancer deaths.⁹⁷

⁹¹ Submission 5, Cancer Council Queensland: 3

⁹² Submission 5, Cancer Council Queensland: 3

⁹³ Ms Border, Cancer Council Queensland, Public hearing transcript, 24 February 2016: 1

⁹⁴ Submission 9, Heart Foundation Queensland: 3

⁹⁵ Submission 9, Heart Foundation Queensland: 3

⁹⁶ Submission 9, Heart Foundation Queensland: 3

⁹⁷ Submission 11, QUIT Victoria: 5

QUIT Victoria cited the following as advantages of a positive licensing scheme:

- *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;*
- *helps ensure that only sellers with a demonstrated record of honesty and compliance with laws are able to sell tobacco (through criteria that identifies whether there are relevant reasons for rejection an application for a licence);*
- *ensures that those who sell tobacco products are kept informed and are aware of their legal responsibilities, providing an opportunity for targeted education and information for retailers/wholesalers through the licence application process as well as on an ongoing basis for all retailers and wholesalers throughout the state;*
- *can create a framework where non-compliance with local, state or federal tobacco control laws can result in licence prohibitions or restrictions in addition to financial penalties, which provides a further incentive to comply with tobacco control laws;*
- *provides funding for education, monitoring and enforcement programs;*
- *provides administrative enforcement options (e.g., licence conditions, licence withdrawal) which are less costly than legal action through the courts;*
- *encourage retailers to carefully consider whether they want to sell cigarettes and the value of selling tobacco, particularly those for whom tobacco sales is a marginal source of income; and*
- *effectively reduces the number of retailers selling tobacco.⁹⁸*

Imperial Tobacco suggested that a tobacco licensing scheme could potentially tackle the illicit tobacco trade. They advised the Committee:

One of our concerns is that the distribution system for illicit tobacco is infiltrating the same distribution infrastructure as legal tobacco. I think it needs to be recognised that we are not here to oppose a licensing scheme. In fact, I do not think our submission at any stage opposed the introduction of a sensible and practical licensing scheme. But a licensing scheme allows you, potentially—well constructed—to tackle illicit trade by letting retailers know that if you are engaged in the illicit trade then your licence for legitimately selling tobacco may well be in jeopardy.⁹⁹

6.2 Disadvantages of tobacco licensing

The major disadvantages of tobacco licensing schemes highlighted by stakeholders included:

- Cost of licensing fees;
- Regulatory burden and red tape; and
- A tobacco licensing scheme will have no impact in terms of reducing tobacco consumption.

⁹⁸ Submission 11, QUIT Victoria: 6-7

⁹⁹ Mr Gregson, Imperial Tobacco Australia, Public hearing transcript 24 February 2016: 11

The Australasian Association of Convenience Stores (AACS) advised the Committee that:

*Ever-changing tobacco regulations such as excise increases and plain packaging legislation have disproportionately impacted small businesses. The major grocery chains which also sell legal tobacco are in a much stronger position to absorb the costs associated with increased regulation as small businesses are left to count the financial cost.*¹⁰⁰

ACCS advised that convenience store owners, operators and employees have proven to be responsible retailers and any proposed licensing scheme must recognise both the importance of legal tobacco to their industry and their ability to responsibly and safely sell restricted products to consumers.¹⁰¹

BATA's submission stated that there is no evidence to suggest tobacco licensing schemes work to lower the rate of smoking. They stated that:

*...it has already been demonstrated in South Australia that increased licensing fees did not meaningfully impact smoking rates.*¹⁰²

BATA referenced a South Australian Health Department report which examined the prevalence of smoking in South Australia between 2001 and 2011.¹⁰³ These statistics have also been used to suggest that the plain packaging policy has failed.¹⁰⁴ The Commonwealth Department of Health considered this issue and noted that the statistics, which indicated that smoking rates increased from 16.7 per cent to 19.4 per cent over 2013-14, coincided with the South Australian state government ceasing all expenditure on social marketing in June 2013 after a period of strong investment.¹⁰⁵

FoodWorks advised the Committee that the sale of tobacco is an important part of their business. They advised that in Queensland tobacco sales account on average for 26 per cent of store sales, taking up a relatively small amount of space in the store. They further advised that for one quarter of their stores, tobacco sales account for over 40 per cent of total store sales.¹⁰⁶

FoodWorks advised the Committee:

*The Federal and Queensland Governments have been successful in reducing the rates of smoking within the community over the last decade. This has been achieved through an array of measures, particularly around reducing demand. Whilst we agree that more can be done to reduce smoking rates, we do not believe that introducing a licensing scheme aimed at the supply side will achieve the Government's public health objectives.*¹⁰⁷

¹⁰⁰ Submission 3, Australasian Association of Convenience Stores: 1

¹⁰¹ Submission 3, Australasian Association of Convenience Stores: 1-2

¹⁰² Submission 4, British American Tobacco Australia: 5-6

¹⁰³ Submission 4, British American Tobacco Australia: 5-6

¹⁰⁴ [http://www.bata.com.au/group/sites/bat_9rnlh.nsf/vwPagesWebLive/DOA3CJ8E/\\$FILE/medMD9R87RB.pdf?openelement](http://www.bata.com.au/group/sites/bat_9rnlh.nsf/vwPagesWebLive/DOA3CJ8E/$FILE/medMD9R87RB.pdf?openelement)

¹⁰⁵ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kf>

¹⁰⁶ Submission 2, Australian United Retailers Limited: 4

¹⁰⁷ Submission 2, Australian United Retailers Limited: 10

FoodWorks advised that they are strongly opposed to any licencing scheme which had the intent or result of preventing independent supermarkets from selling tobacco.¹⁰⁸ They advised:

Independent supermarkets play an important role in the community, yet still rely heavily on tobacco sales to survive. It is our view that action needs to be taken to foster greater competition within the Australian supermarket industry by strengthening and supporting the independent supermarket sector. Creating more administrative burdens and introducing a tobacco licensing system that would likely impact the viability of smaller independent supermarkets is of serious concern to FoodWorks. A growing and prosperous independent supermarket sector will aid the Australian economy and create the necessary competitive tension in the supermarket industry to drive benefits for Australian consumers.¹⁰⁹

The AAR advised the Committee that they are:

...opposed to measures that will unfairly impact on small retailers and policy outcomes that will do nothing for public health except place onerous and unfair restrictions on legitimate retailers, exacerbate the increasing trade in illicit tobacco and encourage the shift of customers especially towards large supermarkets.¹¹⁰

They consider tobacco to be an over-regulated area in Australia and often this over-regulation has led to a burden and cost impost on Australian retailers.¹¹¹ They highlighted the following:

- Ensuring all tobacco products comply with far-reaching retail regulations;
- Dealing with plain packaged products;
- Extreme tax rises that lead to retailer confusion and frustration;
- Placing the operation cost impost onto retailers;
- Increase in retail burglaries for tobacco products; and
- The magnification of the trade in and opportunities for illicit tobacco which have direct negative consequences on the safety of the community and encouraging customers away from legitimate retailers.¹¹²

Master Grocers Australia advised the Committee:

The costs of implementing a licensing scheme in Queensland would not be justified if it results in potentially unintended consequences. Namely, the imposition of the costs of licensing fees and administrative burdens would result in onerous administrative requirements and serious financial hardships to smaller retailers, particularly in Australia's highly concentrated marketplace which is already dominated by larger retailers such as Woolworths and Coles.

In turn, these hardships faced by smaller retailers may result in unintended consequences such as the elimination of smaller retailers from the retail industry, the elimination of competition in the marketplace, the fostered growth of larger retailers and, more pertinently, the concentration of sales of tobacco in the hands of fewer and larger retailers that are able to bear the cost of license fees and the onerous administrative requirements of a licensing scheme.¹¹³

¹⁰⁸ Submission 2, Australian United Retailers Limited: 6

¹⁰⁹ Submission 2, Australian United Retailers Limited: 10

¹¹⁰ Submission 8, Alliance of Australian Retailers: 1

¹¹¹ Submission 8, Alliance of Australian Retailers: 1

¹¹² Submission 8, Alliance of Australian Retailers: 1

¹¹³ Submission 7, Master Grocers Australia: 4

Master Grocers Australia advised:

One of our retailers recently described his business; he said 'I am in the business of compliance and I do a bit of retailing on the side.' I guess we as retailers every day are faced with an enormous burden of regulations across food safety, workplace health and safety, in many states liquor, tobacco and so it goes on. The more costs that are imposed upon our members the less focus they put on their business. We are very protective of our members having to incur those burdens because the less resource, and they are the resource, the less energy they can put into their business. The more energy they have to put into red tape and cost burdens it obviously impacts on their businesses. This is less so the case in the case of the large major supermarket organisations. They have the resource, the dedicated resource, to be able to handle these things.¹¹⁴

With regard to the issue of smaller versus larger retailers, QUIT Victoria noted that, in their opinion, large supermarkets are less likely to be in breach of tobacco legislation as they provide extensive training and are more risk averse with respect to sales to minors. They also consider that impulse purchases are more likely to occur in smaller outlets, particularly when close to the person's home.¹¹⁵

With regard to the issue of whether the introduction of a licensing scheme would discourage retailers from selling tobacco, BATA suggested that tobacco was a major profit stream for small businesses and it would be unlikely that a licensing scheme would discourage retailers from purchasing licences to sell tobacco.¹¹⁶

They advised:

BATA believes the argument that licensing will incentivise retailers to cease selling tobacco products demonstrates a lack of understanding of the sector and the significance that forcibly removing a profit stream for these small businesses will have on the livelihood of many Queenslanders.¹¹⁷

The Committee requested any evidence of small retailers ceased the selling of tobacco in the Australian Capital Territory following the introduction of their licensing scheme. No evidence to support this claim was provided.

Retailers at the Committee's public hearing confirmed that selling tobacco is important to smaller retailers due to the additional higher profit margin purchases that are often made by customers in addition to their tobacco purchases. A representative from AAR provided the following example:

The profit on tobacco in a FoodWorks store like in mine, I am running on 10 per cent gross profit on tobacco products. I think you might find that it runs down in five per cent in some of the FoodWorks stores. The average petrol and convenience would be running on, say, 24 per cent gross profit.

¹¹⁴ Mr de Bruin, Master Grocers Australia, Public hearing transcript 24 February 2016: 16

¹¹⁵ Submission 11, QUIT Victoria: 24

¹¹⁶ Submission 4, British American Tobacco Australia: 4-5

¹¹⁷ Submission 4, British American Tobacco Australia: 5

But the turnover of the tobacco is vitally important because of the other sales that it brings in. A \$300 cost for my particular store—unfortunately, they are not going to like me—I would pay it because I really have to pay it. I cannot afford not to have tobacco in my shop, because it is currently sitting on 20 per cent of my store sales. It is the biggest department in my shop. It is not the biggest profit maker in my shop, but it is the biggest department. The people who come and spend \$30 or \$40 on a packet of cigarettes are really good at spending money on Coca-Cola and all the other stuff that comes in that we make a high margin on.¹¹⁸

QUIT Victoria noted the impact on business but suggested that consideration of this issue should be in the context of the cost to government and society of tobacco use.¹¹⁹ They also suggested to the Committee that they expect that:

...given the low profit margin from cigarettes and the low turn-over of cigarettes, the implementation of any retail licensing fee may result in some taking the business decision to not sell tobacco products. From a public health perspective, this is a good outcome. This could potentially be a good business outcome, too; freeing up prime retail space and the cost of holding expensive low profit stock that can be used to sell more profitable items. A proactive decision by a small business to drop cigarette selling could also be celebrated for its approach to corporate social responsibility.¹²⁰

6.3 What type of Tobacco Licence scheme?

The options available for a tobacco licensing scheme are:

- Retail scheme only
- Wholesale scheme only
- Retail and wholesale schemes

The Allen Report noted that there is no standard approach as to which level of the supply chain should be licensed. They noted that retail licensing as a standalone option is feasible because it directly addresses the issues that licensing is seeking to facilitate including:

- Adequate information to enforcement officials to enable them to adequately enforce the laws regulating tobacco sales;
- Knowledge about who is selling tobacco and where it is being sold;
- Enabling the distribution of appropriate and adequate information to retailers regarding their obligations; and
- Enabling efficient and effective sanctions for use against retailers who contravene relevant tobacco laws.¹²¹

¹¹⁸ Mr Glasby, Spokesperson for AAR and Proprietor of FoodWorks Kenthurst NSW, Public hearing transcript 24 February 2016: 17

¹¹⁹ Submission 11, QUIT Victoria: 21

¹²⁰ Submission 11, QUIT Victoria: 23

¹²¹ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 46

The Allen Report considered that licensing of wholesalers only, whilst not a preferred option, could achieve the goal of provision of information to regulators with respect to who is selling tobacco at a low cost. They noted, however, that limitations of this option include:

- There is no scope for the regulator to use the threat of licence revocation against retailers; and
- The prevalence of informal wholesalers may make it difficult to police.¹²²

The Allen Report suggested that a wholesale licensing scheme could be used to complement a retail licensing scheme. The report noted that:

Such joint licensing should increase public health outcomes by providing a layer of information checking (ie, the names supplied by the wholesalers can be crosschecked 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.¹²³

The Allen Report considered that best practice licensing involves the licensing of both wholesalers and retailers. The study suggested 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;
- 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 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 administration, enforcement and provision of information to applicants and licensees to ensure their continued compliance;

¹²² Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 47

¹²³ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 47

- Tobacco sales licensing should be seen as a health issue and should be controlled by health officials; and
- There should be a graduated penalty structure that includes warnings, administrative penalties, prosecutions and scope for licence withdrawal.¹²⁴

6.4 Tobacco Licence Fees

It should be noted that tobacco licence fees are a state based fee which is separate to the tobacco excise collected by the Commonwealth government.

The Heart Foundation recommended to the Committee that a positive licensing scheme be introduced and the revenue raised be used to fund tobacco enforcement activities.¹²⁵

Queensland Health advised that, should Queensland introduce a tobacco licensing scheme, fees generated would be used to cover the following:

- Developing and maintain licence data-base systems;
- Day-to-day administration of the licensing scheme (including dedicated staff and on-costs);
- The provision of information to applicants and licensees to ensure their continued and future compliance; and
- Licence compliance checks (including travel).¹²⁶

They advised that the estimated annual income for a retail licensing scheme would raise approximately \$2.4 million based on a fee similar to other jurisdictions of \$300.

FoodWorks also commented on licence fees. They noted that a licensing scheme would unfairly favour particular competitors due to the fact that major chain supermarkets would be able to afford licence fees.¹²⁷

With regard to the level of fees, they suggested that, if a licensing scheme were to be introduced, the cost should be in line with other states and be revenue neutral. They advised that the fee should not be constructed to specifically disadvantage small business.¹²⁸

The Australian Retailers Association (ARA) suggested that the no cost registration used in NSW allows authorities to know who is selling product while not affecting the comparative viability of those businesses through a licensing fee.¹²⁹

Queensland Health suggested that differential or risk based licensing fees could address disproportionate impacts on small business.¹³⁰

¹²⁴ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: ix-x

¹²⁵ Submission 9, Heart Foundation Queensland: 1

¹²⁶ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 4-5

¹²⁷ Submission 2, Australian United Retailers Limited: 7

¹²⁸ Submission 2, Australian United Retailers Limited: 9

¹²⁹ Submission 10,

¹³⁰ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 4

6.4.1 Level of fees able to be charged

Queensland Health advised a licensing scheme can only recoup costs associated with the scheme and would not derive a profit.¹³¹

Section 90 of the Australian Constitution vests the Commonwealth with the exclusive power to impose duties of customs and excise. A series of High Court decisions in the 1990s have defined excise duties to be any levy imposed upon goods at any point in the production and distribution chain. This has had the effect of preventing the states from imposing any form of sales tax on goods.¹³² These court cases rendered as unconstitutional a number of state laws imposing licence fees on retailers and wholesalers of tobacco because they took the form of a tax even though they were called a licence or franchise fee.¹³³

In 1997 the High Court ruled in the case of *Ha v New South Wales*¹³⁴ that licensing fees levied under the NSW *Business Franchise Licences (Tobacco) Act 1987* were duties of excise and as such were constitutionally invalid. While the Ha 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.¹³⁵

To avoid being labelled as a tax, and therefore subject to a Constitutional challenge, the Allen Report advised that as a general principle:

- 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.¹³⁶

The Allen Report concluded:

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.*¹³⁷

¹³¹ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 5

¹³² http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98cib01

¹³³ <http://www.austlii.edu.au/au/journals/SydLRev/1998/7.html>

¹³⁴ *Ngo Ngo Ha v New South Wales* (1997) 146 ALR 355.

¹³⁵ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 11

¹³⁶ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 54

¹³⁷ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: 57

Queensland Health confirmed that Queensland Treasury has a rule that a licensing scheme can only be used to recoup costs.¹³⁸

The Cancer Council Queensland and the Heart Foundation both accepted that the fee charged can only be enough to cover the costs of administering the scheme. While the Cancer Council and the Heart Foundation advocated that if there was an opportunity for this to be increased to provide a disincentive to sell tobacco products they would encourage this to occur, they both recognise that this may not be feasible or permissible.¹³⁹ The Committee heard evidence regarding the limited resources that are required to administer tobacco licensing schemes in other Australian jurisdictions. For example the WA scheme is administered by a staff of four.

6.5 Availability of data

The Heart Foundation advised the Committee that:

*Tobacco products are easily accessible in supermarkets, local convenience stores and in petrol stations, and the lack of a licensing scheme means that Queensland authorities do not have reliable data on who is selling tobacco.*¹⁴⁰

The Heart Foundation recommended that:

- wholesalers and retailers be required to provide the state government with data, including the type and location of tobacco outlets, at least annually;
- an up-to-date searchable public register of current licence holders be established; and
- the tobacco industry be required to report sales data to the government so that accurate aggregate sales data can be easily accessed.¹⁴¹

They considered that these requirements be established irrespective of whether or not a licensing scheme is introduced.¹⁴²

The Heart Foundation highlighted their concern that Queensland Health does not currently have an accurate list of who is supplying tobacco products or where it is being sold. They noted that Queensland Health was only able to provide a pro-rata estimate of retailers based on 2015 BATA data of 40,000 retailers in Australia.¹⁴³

They consider that without an accurate register of tobacco retailers and wholesalers in Queensland it is not possible to provide adequate education, and adequately monitor and enforce tobacco supply restrictions. They consider that fines are not enough of a disincentive to enforce compliance.¹⁴⁴

The Heart Foundation advised that a key benefit of this type of register is that government will know who the retailers are to enable accurate education campaigns, particularly when new legislation commences. They also advised that licensing will overcome the problem of keeping information on retailers up-to-date.¹⁴⁵

¹³⁸ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 8

¹³⁹ Ms Durham, Heart Foundation Queensland, and Ms Border, Cancer Council Queensland, Public hearing transcript 24 February 2016: 6

¹⁴⁰ Submission 9, Heart Foundation Queensland: 1

¹⁴¹ Submission 9, Heart Foundation Queensland: 1

¹⁴² Submission 9, Heart Foundation Queensland: 1

¹⁴³ Submission 9, Heart Foundation Queensland: 2

¹⁴⁴ Submission 9, Heart Foundation Queensland: 3

¹⁴⁵ Ms Durham, Heart Foundation Queensland, Public hearing transcript, 24 February 2016: 3

The Cancer Council Queensland agreed stating:

*Tobacco is such a deadly product but we do not know how it is distributed in our community and by whom. I think having a register of all of those different organisations, knowing who they are and where they are, and having that up to date annually is incredibly important. Having transparency around that register will be very important for organisations like the Cancer Council and the Heart Foundation in terms of driving other public policy objectives or advocacy priorities as well.*¹⁴⁶

QUIT Victoria expressed concern that even in jurisdictions where tobacco retailers are required to be registered, data may be unreliable.¹⁴⁷ They cited research undertaken by the NSW Cancer Council, undertaken in 2013, which found that the Retailer Notification Scheme (RNS) does not accurately record the number, type and location of tobacco retailers.¹⁴⁸

The Cancer Council NSW conducted an audit of 1,739 tobacco outlets in NSW to evaluate data gathered under the RNS and assess retailer compliance with relevant laws and regulations. They also audited a list of retailers, provided by the NSW Ministry of Health, who had provided notification under the RNS. The study found some retailers were not on the list, with one unlisted retailer identified for about every 13 listed retailers. The list of notified retailers provided contained 13,439 retailer records and included a large number of multiple listings and out-of-date retailer records.¹⁴⁹ The study noted that the RNS does not accurately quantify the number of tobacco retailers in NSW and was a cumulative list that did not record entry or exit dates.¹⁵⁰

The study further found:

*More than one in four audited tobacco retailers (26.6%) did not comply with the requirements of the Act, either because they had not notified under the Retailer Notification Scheme or because they failed to comply with in-store signage or display requirements, or both. The most commonly observed breach of the legislation was failure to display a 'Smoking kills' warning sign (11.9% of retailers). Unlisted retailers were more likely to breach in-store provisions of the legislation.*¹⁵¹

QUIT Victoria consider that this research illustrates the importance of an up-to-date data collection and registration system as well as systemic enforcement to ensure compliance and data accuracy.¹⁵²

QUIT Victoria consider that accurate knowledge about the number, type and location of tobacco outlets is essential to monitor tobacco industry activity and to enforce comprehensive marketing restrictions. They consider that this knowledge is best obtained through retailer licensing.¹⁵³

¹⁴⁶ Ms Border, Cancer Council Queensland, Public hearing transcript, 24 February 2016: 3

¹⁴⁷ Submission 11, QUIT Victoria: 5

¹⁴⁸ Fry R, Williams K, Burton S, Egger S, Walsberger S, Soulos G, Tang A, Chapman K, *An audit of tobacco retailers in NSW*, Sydney: Cancer Council NSW, 2013: 1

¹⁴⁹ Fry R, Williams K, Burton S, Egger S, Walsberger S, Soulos G, Tang A, Chapman K, *An audit of tobacco retailers in NSW*, Sydney: Cancer Council NSW, 2013: 1

¹⁵⁰ Fry R, Williams K, Burton S, Egger S, Walsberger S, Soulos G, Tang A, Chapman K, *An audit of tobacco retailers in NSW*, Sydney: Cancer Council NSW, 2013: 8, 11

¹⁵¹ Fry R, Williams K, Burton S, Egger S, Walsberger S, Soulos G, Tang A, Chapman K, *An audit of tobacco retailers in NSW*, Sydney: Cancer Council NSW, 2013: 1

¹⁵² Submission 11, QUIT Victoria: 5

¹⁵³ Submission 11, QUIT Victoria: 6

The Heart Foundation also recommended a mandated requirement for data collected by Queensland Health to be published annually. They advised that there has been a reluctance by the department to make monitoring and compliance data publicly available. They consider that this is needed for the purposes of transparency in reporting.¹⁵⁴

The Committee queried how licensing and enforcement data should be made available. The Heart Foundation advised that in both NSW and WA the information is available on-line and is available to the public.¹⁵⁵

The Committee considered the WA example. They make available on-line detailed information about tobacco licence holders. The data available includes current, cancelled and expired licences. Information available includes:

- Licence Holder
- Licence Number
- Date of Expiry
- Trading Name
- Type of Licence
- Status of Licence
- Premises Address
- Any Conditions/Restrictions
- Details of Convictions¹⁵⁶

Tobacco sales data is not currently publicly available. The Committee sought information from a tobacco wholesaler as to whether they would make their sales data available to government. They advised:

Sales data in a variety of guises is available in Australia, as well as in other jurisdictions. Obviously, all tobacco that is sold in Australia is imported, so customs clearances are available. There are a number of private sector entities that collect and sell data in respect of sales of all sorts of fast-moving consumer goods. The important point to consider is knowing the right question to ask to interpret the data you are given. For instance, if you were to look at a particular type of data known as scan data, you need to understand how that scan data occurs and which section of the entire retail it covers. A number of retailers do not use scan, for instance. The important point to consider is, what is it you are looking for in the first instance to then understand the data that you are requesting and to make sure that you get the correct data. If what you are looking for is total volume of legal tobacco, customs clearances are probably the best data to be using.¹⁵⁷

¹⁵⁴ Submission 9, Heart Foundation Queensland: 3

¹⁵⁵ Ms Durham, Heart Foundation Queensland, Public hearing transcript, 24 February 2016: 3

¹⁵⁶ <http://www.tobaccocontrol.health.wa.gov.au/licensing/>

¹⁵⁷ Mr Gregson, Imperial Tobacco Australia, Public hearing transcript 24 February 2016: 9

6.6 Options to be considered if a tobacco licensing scheme were to be introduced

Queensland Health advised the Committee that the idea of a tobacco licensing scheme had been considered previously by the department and dismissed. They advised the reason for this was:

Because of the other systems that we have put in place we actually do know all of the outlets that sell cigarettes so we do not need to have a licensing scheme to know where it is being sold, and because of the processes in place that people have to educate their staff so that they do not sell to minors, all of that work is already happening that you would potentially put a licensing program in place for.¹⁵⁸

However, they advised:

There is emerging public health research into tobacco licensing schemes being harnessed as a way to achieve broader tobacco control objectives and move beyond current functional use to collect lists of tobacco retail outlets to support the monitoring of compliance with retail restrictions.¹⁵⁹

They advised that it has been suggested that tobacco licensing schemes could be used to strategically reduce the availability of tobacco products by introducing restrictions which:

- Limit the number of licences available;
- Specify the type of retailer who can sell tobacco;
- Reduce the number of licences available in areas known to have higher rates of smoking;
- Prohibit retailing of tobacco near schools or other specific facilities; or
- Place further restrictions on sale of tobacco, for example by placing restrictions on hours of sale.

One example of specifying the type of retailer who can sell tobacco is in San Francisco, which prohibited the sale of tobacco products in pharmacies, including pharmacies in chain drug stores and independent pharmacies, in 2009 under SF Health Code Article 19J.¹⁶⁰

The Committee considered evidence in relation to a number of these proposals were a tobacco licensing scheme to be introduced in Queensland. These options are considered below.

The Heart Foundation advocated for the use of a tobacco licensing scheme to strategically reduce the availability of tobacco products to support broader public health objectives. They suggested that reducing tobacco retail outlets could be achieved by limiting tobacco licences, by specifying where tobacco can and cannot be sold. In addition to the restrictions suggested by Queensland Health, they suggested that sales of tobacco be prohibited in supermarket chains.¹⁶¹

The Committee heard evidence about the significant gains that have been made in terms of reducing tobacco usage. A number of submitters identified areas which could be the next steps towards meaningful reduction strategies.

¹⁵⁸ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 3

¹⁵⁹ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 4

¹⁶⁰ <http://sanfranciscotobaccofreeproject.org/about/>

¹⁶¹ Submission 9, Heart Foundation Queensland: 4

QUIT Victoria highlighted that despite the harmful nature of tobacco it remains widely available. They consider that the widespread availability can contribute to the idea that tobacco is a normal part of everyday life and is like any other grocery product. They noted that the law places few limits on who may sell tobacco, where and when they may sell or the number of outlets. They advised:

The lack of controls on where and how tobacco can be sold stands in contrast to the regulation of other dangerous goods such as pharmaceutical products, poisons, firearms, pesticides and dangerous chemicals which are subject to a wide variety of restrictions.¹⁶²

QUIT Victoria advised that there has been a call in the tobacco control community to regulate tobacco retailing, including restrictions on the number and location of outlets, to further denormalise tobacco products and smoking and to reinforce the harmful nature of tobacco.¹⁶³

QUIT Victoria also identified a range of specific measures that could be put in place to reduce availability of tobacco including:

- *capping the number and location of tobacco retail outlets, for example, restricting or granting no new licences for retail outlets near schools or in low SES areas with a high number of existing tobacco retailers;*
- *limiting the proximity of tobacco outlets to other locations such as hospitals, universities and government buildings;*
- *establishing a minimum distance between tobacco outlets;*
- *prohibiting the sale of tobacco products in establishments where smoking is already prohibited, such as airports and hospitality venues;*
- *reframing the process to place the onus on the retailer to prove a new licence was needed in a particular area, rather than providing an automatic 'right' to a licence;*
- *restricting selling of tobacco by particular types of outlets, and phasing out of particular types of outlets if this were deemed to be desirable at some stage, i.e. petrol stations because of the disproportionately high proportion of impulse buys;*
- *limiting eligibility for a tobacco retail licence to shops permitting entry only to persons over the age of 18 years, i.e. liquor store.¹⁶⁴*

6.6.1 Limiting the number of tobacco licences available

One submission suggested putting in place a legislative requirement that the number of tobacco sellers be progressively reduced over a number of years, to below 20 per cent of the current estimated 8,000 to 12,000 sellers. They considered that this would assist in reducing the availability of tobacco and assist former smokers to remain non-smokers by reducing the likelihood of impulse tobacco purchases.¹⁶⁵

¹⁶² Submission 11, QUIT Victoria: 4

¹⁶³ Submission 11, QUIT Victoria: 4

¹⁶⁴ Submission 11, QUIT Victoria: 21

¹⁶⁵ Submission 1, Mr P Browne: 1

Queensland Health noted that should Queensland use a licensing scheme to reduce the number of outlets, it would be the first state in Australia to do so. The Chief Health Officer advised:

There is absolutely no doubt in my mind that if you decrease the number of places which sell cigarettes, then you will decrease the number of people smoking.¹⁶⁶

Queensland Health advised the Committee that the strategic application of licensing systems to reduce supply of tobacco remains largely untested in the Australian and international contexts and therefore little evidence is available about whether such strategies might contribute to reducing smoking rates.¹⁶⁷

FoodWorks were particularly concerned that the intent of a tobacco licensing scheme would entail the limiting of licences in order to limit the availability of tobacco. They argued that consumers would find alternative sources of supply or change their buying patterns. They suggested:

- Consumers may be encouraged to buy in bulk when they visit a tobacco retailer. This may have an unintended consequence of increasing consumption amongst smokers.
- Consumers will be encouraged to purchase cigarettes when they find them available, rather than when they need to purchase them. This too may increase the level of consumption amongst smokers.
- An increase in the rate of purchasing when travelling overseas.
- Move to online sales / home delivery.
- The purchase of 'black market' tobacco will increase.
- Cigarettes are not impulse purchases. If required, smokers are prepared to travel further for such products.¹⁶⁸

FoodWorks also argued that reducing the number of locations where tobacco can be legally purchased could push smokers to purchase through the black market. The advised that black market outlets sell products in branded package, sell to children and do not abide by other relevant tobacco laws and regulations.¹⁶⁹

The ARA also expressed concern about any plan to restrict market access. They stated:

The main area of concern for convenience, mixed and other retailers is in the suggestion restricting market access could be looked at as a measure through licencing, this could significantly affect the viability of many small to medium retailers.

The most extreme market access outcome would be in the form of licence registration leading to restrictions limiting access to tobacco or substantial fees. This move would be anti-competitive in the context of driving all tobacco retail trade to major retail outlets with small to medium retailers not being able to afford the costs and administration around a licence application or competitive licence processes. We could foresee a monetarisation or commoditisation around tobacco market access when the market is restricted, reducing competition and creating additional growth in the black market.¹⁷⁰

¹⁶⁶ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 8

¹⁶⁷ Correspondence to HASC from Director-General, Queensland Health, dated 25 November 2015: 4

¹⁶⁸ Submission 2, Australian United Retailers Limited: 7

¹⁶⁹ Submission 2, Australian United Retailers Limited: 8

¹⁷⁰ Submission 10, Australian Retailers Association: 3

Imperial Tobacco submitted:

...that options for restricting access to tobacco via restrictive tobacco licensing schemes is anti-competitive, will cause negative consequences (such as a shift to purchases of illicit tobacco), are unjustified on public health grounds, and will unfairly impact smaller retailers hardest.

We would discourage an approach that is based more heavily on regulation than on education. With such an approach, rather than educate people about the health risks associated with smoking, there is a fundamental assumption that more intensive regulation will drive behavioural change. There is also an assumption that people can be driven to quit smoking, through increasing regulation, to force behavioural change.¹⁷¹

They argued that there is no credible evidence to support the view that limiting the number of retail outlets would reduce the consumption of tobacco products or smoking initiation.¹⁷²

They further argued:

The suggestion that restrictive licensing of retailers will curtail supply of tobacco, hence cutting smoking rates, is unfounded. The central tenet of the argument is that people will be unable to access tobacco products if legal supply is restricted. But should restrictive licensing measures be implemented, as with other restricted products, demand for tobacco will remain and a black market will open up to fill it.

Furthermore, it would be a misguided and naïve policy to think that licensing conditions would reduce illicit trade, as those who import and who sell illicit product are criminals, often associated with organised crime. These groups do not obey the law, they do not pay excise or duty and will not be bound by mandated licensing requirements.¹⁷³

Queensland Health advised the Committee:

...a 2014 New South Wales task force on tobacco retailing found no evidence of licensing being used in Australia to restrict the number, type and distribution of tobacco retail outlets. It also found no evidence internationally to show whether this outlet reduction approach works to reduce smoking rates. However, there are examples in other industries, for example, the liquor industry, where there are restrictions on the hours liquor can be sold and a limit on the number of detached bottle shops which can attach to the main licensed premises.¹⁷⁴

6.6.2 Limiting the number of tobacco licences available in specified geographical locations

The Cancer Council Queensland and Heart Foundation Queensland both advocated for reducing the number of tobacco licences in specified geographical locations. The Cancer Council Queensland advised that there is correlational evidence that low socio-economic areas have a higher density of tobacco retailers and a much higher rate of smoking.¹⁷⁵

¹⁷¹ Submission 6: Imperial Tobacco: 3

¹⁷² Submission 6: Imperial Tobacco: 4

¹⁷³ Submission 6, Imperial Tobacco: 4

¹⁷⁴ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 2

¹⁷⁵ Ms Border, Cancer Council Queensland, Public hearing transcript, 24 February 2016: 4

Studies have shown that high smoking prevalence is strongly associated with social disadvantage¹⁷⁶ and the most disadvantaged experience poorer health and shorter life expectancy.¹⁷⁷ International studies have examined tobacco retailer density and found that lower median household income is inversely associated with increased retailer density.¹⁷⁸

A study in 2013 of South-East Queensland suburbs and published in the Australian and New Zealand Journal of Public Health found there is greater tobacco retailer density in the most socioeconomically (SES) disadvantaged suburbs compared to the most advantaged suburbs. The study also found that tobacco prices were lower in low SES suburbs which is consistent with traditional economic theory which suggest greater competition results in lower prices.¹⁷⁹

A study, published in January 2015, which explored the association between the density of tobacco outlets and neighbourhood socioeconomic status, between neighbourhood tobacco outlet density and individual smoking status and the density of tobacco outlets around primary and secondary schools in NSW, found more disadvantaged areas were significantly more likely to have higher tobacco densities. It also found that the median of tobacco outlet density around schools was significantly higher than the state median.¹⁸⁰

FoodWorks advised the Committee that they consider that using tobacco licensing to reduce tobacco consumption rates in specific geographic areas or amongst particular socioeconomic groups is discriminatory. They considered that consumers in these areas would be made to travel further to purchase tobacco whilst others would not.¹⁸¹

BATA advised the Committee that they consider that the suggestion of restricting licences to a capped number or restricting the number of licences in certain areas with high smoking rates, would simply have an unfair effect on small business without any guarantee smoking rates would decrease.¹⁸²

They advised:

*If smokers want to buy cigarettes, it is unlikely they will be dissuaded to buy them by their local convenience store being unable to sell the product. It is more likely smokers will simply purchase cigarettes when visiting larger chains such as supermarkets and petrol stations or move to purchasing online. This may also provide an additional opportunity for sellers of illegal tobacco to profit from punitive legislative measures...*¹⁸³

Master Grocers advised that there is very little research evidence that proves a causal link between the proximity, density and location of retail outlets and patterns of smoking behaviours, rates of smoking and smoking cessation efforts.¹⁸⁴

¹⁷⁶ Siahpush, Dr M, *Smoking and social inequality*, Australian and New Zealand Journal of Public Health, Vol 28 No 3, June 2014: 297

¹⁷⁷ Dalglis, E, McLaughlin, D, Dobson, A and Gartner, C, *Cigarette availability and price in low and high socioeconomic areas*, Australian and New Zealand Journal of Public Health, Vol 37 No 4, August 2013: 371

¹⁷⁸ Dalglis, E, McLaughlin, D, Dobson, A and Gartner, C, *Cigarette availability and price in low and high socioeconomic areas*, Australian and New Zealand Journal of Public Health, Vol 37 No 4, August 2013: 371

¹⁷⁹ Dalglis, E, McLaughlin, D, Dobson, A and Gartner, C, *Cigarette availability and price in low and high socioeconomic areas*, Australian and New Zealand Journal of Public Health, Vol 37 No 4, August 2013: 371-376

¹⁸⁰ Marashi-Pour, S, Cretikos, M, Lyons, C, Rose, N, Jalaludin, B and Smith, J, *The association between the density of retail tobacco outlets, individual smoking status, neighbourhood socioeconomic status and school locations in New South Wales, Australia*, Spatial and Saptio-Temporal Epidemiology, Vol 12, January 2015: 1-7

¹⁸¹ Submission 2, Australian United Retailers Limited: 8

¹⁸² Submission 4, British American Tobacco Australia: 4

¹⁸³ Submission 4, British American Tobacco Australia: 4

¹⁸⁴ Submission 7, Master Grocers Australia: 13

The NSW task force report identified:

Because there has been so little regulatory action globally to limit where tobacco is sold, there is not yet a convincing body of evidence that can be drawn on to show whether such legislation affects tobacco consumption. No jurisdiction has yet implemented and evaluated the effect of reducing the number and/or type of tobacco retail outlets.

The literature suggests that even after adjusting for higher smoking prevalence, there is a greater concentration of tobacco outlets in communities with a lower socio economic status (SES) than in more affluent areas. The evidence on whether tobacco retailers target these communities or respond to higher demand is inconclusive. It may be that the geography of lower SES areas encourages a higher number of smaller retailers to be established.

Studies from overseas suggest that both density of retailers and proximity of retailers to schools influence smoking behaviour and tobacco purchasing by youth. In NSW, although there are no limits on the proximity or number of tobacco retailers near schools, tobacco is required to be out of sight at all retailers. It is not known if tobacco outlets are concentrated near schools in lower SES communities.¹⁸⁵

6.7 Is tobacco licensing compatible with National Competition Policy?

The issue of National Competition Policy (NCP) and its impact on a tobacco licensing scheme was raised by a number of stakeholders during the course of the inquiry. The Committee considered this issue to be important, particularly if restrictions on tobacco licences are ever to be considered in the future.

6.7.1 History of competition policy in Australia

Australia's core competition law provisions are contained in Part IV of the *Competition and Consumer Act 2010* (Cwlth) which was previously named the *Trade Practices Act 1974* (Cwth).¹⁸⁶ Competition policy has been the subject of numerous reviews over the past two decades.

In 1993, the Hilmer Report on the review of NCP was published. This review followed agreement by Australian governments on the need for such a policy.¹⁸⁷

In regard to competition policy Professor Hilmer noted:

Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds.

*Australian competition policy is sometimes seen as solely comprising the provisions of Part IV of the *Commonwealth Trade Practices Act 1974* (TPA). While laws of that kind are an important part of competition policy, the relevant field of policy interest is much wider. In its broadest sense, competition policy encompasses all policy dealing with the extent and nature of competition in the economy. It permeates a large body of legislation and government action that influences permissible competitive behaviour by firms, the capacity of firms to contest particular economic activities and differences in regulatory regimes faced by different firms competing in the one market.¹⁸⁸*

¹⁸⁵ NSW Taskforce on Tobacco Retailing, *Final Report and Recommendations*, 2013: 9

¹⁸⁶ <http://www.australiancompetitionlaw.org/overview.html>

¹⁸⁷ Hilmer, Prof FG, *National Competition Policy Review*, August 1993: iii

¹⁸⁸ Hilmer, Prof FG, *National Competition Policy Review*, August 1993: xvi

The Hilmer Report identified six specific elements of competition policy to be supported by laws, policy and/or government action as follows:

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering ‘competitive neutrality’ between government and private businesses when they compete.¹⁸⁹

Subsequent to the Hilmer review, in 1995, Australian governments committed to a set of agreements under the NCP, which:

- extended the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- established independent price oversight of state and territory government businesses;
- corporatised and applied competitive neutrality principles so that government businesses did not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reformed public monopolies to separate out industry regulation and, where possible, further disaggregated potentially competitive parts of the monopoly;
- established a third-party access regime for significant bottleneck infrastructure;
- reviewed all legislation restricting competition;
- applied the competition agreements to local government;
- established the National Competition Council (NCC);
- imposed conditions on governments seeking to exempt conduct from the competition law; and
- provided financial assistance to the States and Territories conditional on progress implementing the NCP.¹⁹⁰

The Allen Report in 2002 noted:

‘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.

¹⁸⁹ Hilmer, Prof FG, *National Competition Policy Review*, August 1993: xvii

¹⁹⁰ Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 16

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.¹⁹¹*

During 2014-15 a further review of NCP was conducted by Professor Ian Harper. The Final Report was published in March 2015. The Harper Review was tasked with examining whether Australia's competition policy, laws and institutions remain fit for purpose, especially in light of changing circumstances likely to face the Australian economy.¹⁹²

The Harper Review considered that:

Competition policy, like other arms of government policy, is aimed at securing the welfare of Australians. Broadly speaking, it covers government policies, laws and regulatory institutions whose purpose is to make the market economy better serve the long-term interests of Australian consumers. Properly applied, it can improve the quality and range of goods and services, including social services, available to Australians.

Strengthening the competitiveness of enterprises is a necessary national economic challenge. However, competition policy concerns the competitiveness of markets as a whole, not individual enterprises. Nonetheless, the disciplines of a competitive market compel efficiencies in business conduct, which in turn contributes to the productivity and competitiveness of enterprises.

Policies that strengthen our competition landscape are crucial for Australia as a small, open economy, exposed to competitive forces that originate beyond our borders. Australia's economic development has been propelled by exposure to opportunities elsewhere in the world, with Australian living standards reflecting the beneficial impact of international trade in goods and services — both exports and imports.¹⁹³

It found that NCP reforms reduced the amount of anti-competitive regulation and that governments had made a concerted effort to examine and reform regulation that restricted competition where those restrictions were not in the public interest.¹⁹⁴ The Review found that many regulations are essential for other policy reasons and considered that better regulation was needed rather than no regulation at all.¹⁹⁵

¹⁹¹ Allen Consulting Group, Report to Commonwealth Department of Health and Ageing, Licensing of Tobacco Wholesalers and Retailers, December 2002: vii

¹⁹² Harper, Professor I, Competition Policy Review – Final Report, March 2015: 23

¹⁹³ Harper, Professor I, Competition Policy Review – Final Report, March 2015: 15

¹⁹⁴ Harper, Professor I, Competition Policy Review – Final Report, March 2015: 42

¹⁹⁵ Harper, Professor I, Competition Policy Review – Final Report, March 2015: 43

The Review Report states:

...regulation serves the public interest in a range of areas, for example, to protect public safety. The goal is to ensure that regulation does not restrict competition, except to the extent required to meet other overriding policy objectives. Pro-competitive regulation, combined with governments' general deregulation agendas, will provide a more efficient and effective marketplace that offers consumers better value and choice.¹⁹⁶

The Review Report further noted that:

Australia has a range of restrictions on the supply of goods. As in the provision of services, many of them are worthwhile for policy reasons, such as health and safety. However, they can also create barriers to entry. Any necessary restrictions on the supply of goods should be implemented in a way that does not unduly restrict competition.¹⁹⁷

Whilst the Harper Review did not consider the issue of tobacco licensing specifically, it made a number of comments that are relevant to the Committee's inquiry. The Review considered the liquor and gambling sectors which the Committee considered were comparable to tobacco and are heavily regulated for public health reasons.

The Harper Review considered that the risk of harm to individuals, families and communities from problem drinking and gambling provides a clear justification for regulation. In particular, the Review found that the risk of harm from liquor provides a clear justification for liquor regulation, any review of liquor licensing regulations against competition principles must take proper account of the public interest in minimising this potential harm.¹⁹⁸

The Review Report states:

Some restrictions on the sale of alcohol (and on gambling) appear to favour certain classes of competitors to the detriment of consumers. All regulations must be assessed to determine whether there are other ways to achieve the desired policy objective that do not restrict competition. However, it is certainly not the Panel's view that the promotion of competition should always trump other legitimate public policy considerations.¹⁹⁹

In December 2012, the Queensland Government committed to a National Compact on Regulatory and Competition Reform. The Compact sets out principles and commitments to the Commonwealth, State and Territory governments in their approach to productivity enhancing regulatory and competition reform. Principle 1 includes the commitment to:

...ensure regulation does not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.²⁰⁰

¹⁹⁶ Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 116

¹⁹⁷ Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 139

¹⁹⁸ Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 145

¹⁹⁹ Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 146

²⁰⁰ Council of Australian Governments, *National Regulatory and Competition Reform Compact*, December 2012: 1

6.7.2 Stakeholder comments regarding competition policy

FoodWorks cites the Harper Review findings and acknowledged that the Review found that there is a place for regulation to achieve harm minimisation objectives, such as those that apply to the sale of liquor, but that such restrictions should be designed to achieve the stated public policy benefits and not benefit particular competitors.²⁰¹

However, they noted that Recommendation 8²⁰², below, recommended the adoption of a 'public interest' test when contemplating new laws that would impede competition.²⁰³

Recommendation 8 — Regulation review

All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and should not restrict competition unless it can be demonstrated that:

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

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition law (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Recommendation 43) with a focus on the outcomes achieved rather than processes undertaken. The Australian Council for Competition Policy should publish an annual report for public scrutiny on the progress of reviews of regulatory restrictions.

6.8 Does tobacco licensing have an impact on illicit trade

British American Tobacco Australia Limited, Philip Morris Limited and Imperial Tobacco Australia Limited commissioned KPMG to undertake a study of illicit tobacco in Australia. KPMG's modelling of the illicit tobacco market estimated that for the 12 months to 30 June 2015 it was 14.3 per cent as a proportion of total consumption.²⁰⁴

Queensland Health noted the studies about illicit tobacco commissioned by tobacco wholesalers. They also noted that accurate data on illicit tobacco use in Australia is limited due to its illegal status. They advised that the Australian Government's NDSHS has also examined illicit tobacco use, which they consider to be more reliable. The NDSHS reported very low and stable levels of use.²⁰⁵

²⁰¹ Submission 2, Australian United Retailers Limited: 5

²⁰² Harper, Professor I, *Competition Policy Review – Final Report*, March 2015: 121

²⁰³ Submission 2, Australian United Retailers Limited: 5

²⁰⁴ KPMG, *Illicit tobacco in Australia*, October 2015: 30

²⁰⁵ Correspondence to HASC from Director-General, Queensland Health, dated 13 January 2016: 6

Queensland Health advised:

Chop chop, or illegal tobacco, is tobacco that has not paid its excise. So it is tax evasion, and the Australian government is very serious about tax evasion and are very effective in both the border force, customs, watching illegal imports as well as movement domestically with product that has not paid its excise or its taxation. So in the ATO there is absolutely a task force and it is a key area. You will see them on TV because when they have a successful prosecution or capture of illegal tobacco it is heavily advertised, and there are jail penalties absolutely that usually apply. So the ATO does that work and some tobacco companies have different views about the amount of chop chop in the system. We work from the intelligence of the ATO and customs, and their view is that the levels of chop chop in Australia have not changed that much over recent years.²⁰⁶

Imperial Tobacco supported the KPMG study and advised the Committee:

The OECD recognises KPMG as the foremost expert on measuring illicit trade on the planet, which is one of the reasons that we went to KPMG in the first instance. The methodology that they use to estimate the illicit trade in Australia is the same that they use in Project Sun across Europe and that is the project that is recognised by the OECD. So the work that they do is quite extensive. The methodology that they use is very well recognised, hence the results of that survey, we believe, deserve to be taken seriously.

The figures that are provided by the Australian government through the Institute of Health and Welfare are based on a survey, as I understand it, that, let us be honest, is the government asking individuals, 'Have you done anything illegal?' which in itself is going to represent a biased result. The KPMG methodology involves both survey data and also an empty pack survey, which involves going to quite a range of destinations around Australia in each of the survey operations that they undertake to collect empty packs and to measure from that number of packs those that are compliant and those that are not and then using a methodology to remove, for instance, those that may have been legitimately imported through duty-free travel channels, and to calculate what the eventual result is both for illicit white manufactured cigarettes and also loose tobacco, or, as it is more commonly known, chop-chop.²⁰⁷

With regard to the quantum of illicit tobacco usage increasing due to tobacco control measures, Queensland Health advised:

I know the Commonwealth was very concerned about that with the plain paper packaging and there were a lot of allegations around at that stage. They did a lot of work and showed there was no increase. I do not know exactly what it is, but it is less than five per cent of the total cigarettes smoked in this country, so it is small. It is still a problem and it is something that the Commonwealth takes very, very seriously because you are absolutely right. If people move from legitimate cigarettes to cigarettes that are the same but they just have not had the tax applied and they are cheaper, there are major problems there. So they are keeping a very good eye on that, and they are managing that at our borders because it is brought in from overseas.²⁰⁸

The issue of illicit tobacco usage increasing was raised by a number of stakeholders.

²⁰⁶ Mr West, Queensland Health, Public departmental briefing transcript, 2 December 2015: 7

²⁰⁷ Mr Gregson, Imperial Tobacco, Public hearing transcript 24 February 2016: 9

²⁰⁸ Dr Young, Queensland Health, Public departmental briefing transcript, 2 December 2015: 7

The AACS advised:

*The rise in the market for illegal tobacco has coincided directly with the increase in regulation governing the sale of legal tobacco products. The introduction of tobacco licensing will not deter those who sell illicit tobacco products, and will instead encourage criminals to fill any potential gaps in the legal tobacco market with non-compliant products of dubious quality.*²⁰⁹

BATA also highlighted the issue of illicit trade. They advised:

*High tobacco excise rates and regulatory burdens applicable to the sale of legal tobacco products already provide incentive enough for some retailers to sell illegal products. Adding further restrictions and potentially prohibiting a number of retailers from selling tobacco legally will only make the option of selling highly profitable illegal tobacco products more attractive.*²¹⁰

Imperial Tobacco argued that:

*...there is a considerable danger that consumers unable to conveniently purchase tobacco products in their local area could turn to illicit products.*²¹¹

They advocated for a further action by government in this area.²¹² They advised:

*Various State courts and tribunals as well as Government departments and agencies enforce the laws applying to illicit tobacco. There has been no court reported enforcement of any of these Australian State and Territory laws (not including Commonwealth legislation) insofar as they apply to illicit tobacco.*²¹³

Imperial Tobacco advised the Committee that illicit trade results in lost government revenue, undermines public health initiatives and is often linked to organised crime. They recommended that:

*Before any further restrictive measures are taken in relation to legal tobacco products, the government should instead target available resources towards stemming the growth of illegal, unregulated tobacco products.*²¹⁴

The Australian Crime Commission noted in 2015 that organised crime remains entrenched within the illegal tobacco market in Australia and it continues to perceive involvement in this market as a low risk, high profit enterprise.²¹⁵

AAR also raised the issue of the illicit trade. They suggested the following measures be considered to address the issue of illicit trade:

- *reviewing the existing suite of Queensland legislation of their effectiveness in identifying and combating illicit tobacco sales and distribution channels;*
- *emulating the Victorian Parliament who have enacted standalone legislation specifically to penalise possession of smuggled tobacco products (see Part 2, s11A of the Victorian Parliament's Tobacco Act 1987);*
- *the inclusion in Queensland's Tobacco and Other Smoking Products Act 1998 to give authorised personnel the power to seize illegal tobacco found in any businesses;*

²⁰⁹ Submission 3, Australasian Association of Convenience Stores: 1

²¹⁰ Submission 4, British American Tobacco Australia: 5

²¹¹ Submission 6, Imperial Tobacco: 4

²¹² Submission 6, Imperial Tobacco: 6

²¹³ Submission 6, Imperial Tobacco: 7

²¹⁴ Submission 6, Imperial Tobacco: 11

²¹⁵ Australian Crime Commission, *Organised Crime in Australia 2015*, May 2015: 68

- *leveraging the Commonwealth's plain packaging legislation to impose significant penalties on individuals and businesses who are selling and distributing non-compliant tobacco products;*
- *introducing a well publicised telephone and/or Internet-based platform to attract anonymous information about individuals, wholesale and retail businesses who sell and distribute illegal tobacco;*
- *introducing significant penalties on wholesale and retail businesses who sell illegal tobacco; and*
- *greater enforcement and harmonisation between Australian Customs and Border Protection, the Australian Federal Police, the Australian Crime Commission, the Commonwealth's and Queensland's Departments of Health, and the Queensland Police.*²¹⁶

The ARA also cited the KPMG report data and stated:

*There is ample evidence that illegal unregulated untaxed branded product is being sold via multiple channels to overcome restrictions in the market. With margins so high on illegal product, serious crime has moved into selling in the market place where there is no regulation or restriction on product sales to children, health warnings or diversionary products. Recent seizures have shown product worth tens of millions of dollars is being shipped by the same organised crime syndicates who ship other illegal products.*²¹⁷

²¹⁶ Submission 8, Alliance of Australian Retailers: 3

²¹⁷ Submission 10, Australian Retailers Association: 5

7. Committee Comments

Following consideration of the submissions received, evidence tendered at the hearing and discussions with WA and Victorian government tobacco licensing authorities, the Committee found that there is a strong public health case for implementation of a positive licensing scheme, for both wholesalers and retailers, in Queensland.

National and State policy and legislative tobacco reform has seen significant reductions in smoking rates. However, tobacco related illnesses and deaths continue to have a significant financial and emotional impact on the Queensland community.

It is the opinion of the Committee that Queensland would benefit from the introduction of a licensing scheme owing to the improved data on the number and location of retailers in Queensland, which would facilitate improved compliance and enforcement of tobacco control measures.

While opinion differed on the type of scheme that should be adopted, the Committee found support from stakeholders from a variety of sectors.

7.1 Should Queensland adopt a tobacco licensing scheme?

As one of the objectives of tobacco licensing is to limit the availability of tobacco products and hence reduce the prevalence of smoking, the Committee considered whether tobacco licensing contributes to this objective. The Committee found there is no published evidence that licensing on its own contributes to reduced smoking rates.

Studies have found that the prevalence of smoking is highest among people who are disadvantaged and there are greater retailer densities in disadvantaged socioeconomic areas. As yet, no jurisdiction has enacted legislation to restrict location, proximity or density of tobacco retail outlets. Therefore, there is little information available about the effect that reducing the number and type of tobacco retail outlets would have on tobacco consumption and prevalence rates.

The Committee found support from stakeholders from a variety of sectors. However, opinion differed on the type of scheme that should be adopted. The Committee has considered all of the evidence and considers, on balance, that a positive wholesaler and retailer tobacco licensing scheme should be adopted.

7.2 Availability of data

The Committee considered that one of the advantages of introducing a positive retail licensing scheme would be the ability to obtain accurate information on the number, location and type of tobacco retail outlets. It considered that one of the advantages of introducing a positive wholesale licensing scheme would be the ability to obtain accurate information on the volume of tobacco product sales.

The Committee noted- that Queensland Health was only able to provide an estimated, rather than an actual number of retail outlets. Whilst the Committee acknowledges the education and enforcement activities undertaken by Environmental Health Officers, it believes that this work could be more effectively targeted if additional retail outlet data was available. The Committee considers that the availability of data will enable Queensland Health to be better informed to allow for the development of better public health policy in the future.

Both the Heart Foundation and the Cancer Council Queensland have advocated that the retailer information be made available publically. Given the availability of this information in both NSW and WA, the Committee considers it appropriate that this information be made available in an easily accessible format.

The Committee considers that requiring wholesalers to provide sales data to Queensland Health is an essential component of a wholesale licensing scheme. However, the Committee is conscious of the sensitivity of sales data and considers that whilst Queensland Health should have access to this information, it should only be made available publically in an aggregated form.

7.3 Competition policy

After analysing the various arguments about the impact of national competition policy on a tobacco licensing scheme, the Committee concluded that a tobacco licensing scheme could be justified under these arrangements.

However, the impact on competition hinges largely on the design of any licensing scheme. The Committee considers that when designing the scheme government should be mindful of any unintended consequences.

The Committee was very conscious of not wishing to increase the regulatory burden on retailers in particular and recognises the compliance difficulties raised by stakeholders. The Committee was also very conscious of not wishing to adversely impact any particular sector within the industry. An example, cited by stakeholders, was the ability of larger retailers being in a better position to afford licence fees over smaller retailers.

The Committee considers that the benefits of having a positive tobacco licensing scheme outweighs the cost, particularly in the area of information to enable relevant education and to assist in enforcement.

7.4 Licensing Fees

The Committee accepts that any proposed tobacco licensing scheme would need to have fees set at a level sufficient to recoup the costs of the scheme. Queensland Health suggested that differential or risk based licensing fees could address disproportionate impacts on small business. The Committee considers that this issues is worthy of further investigation by the Department.

7.5 Options to be considered if a tobacco licensing scheme were to be introduced

The Committee has highlighted the issues and suggestions raised by stakeholders during the course of the inquiry. These issues would need to be considered subsequent to the implementation of a tobacco licensing scheme. The Committee considers that the data to be obtained from the licensing scheme will help inform public health policies to allow consideration of these issues in the future.

7.6 Illicit trade

The Committee accepts that there is some dispute over the amount of illicit trade in Australia with estimates ranging between four and 14 per cent. The Committee considers that currently policing of the illicit trade is a Federal responsibility and outside the scope of this inquiry.

However, the Committee considers that the suggestion promoted by Imperial Tobacco that laws regarding possession of illicit tobacco by tobacco licence holders be included as part of licensing conditions has merit and is worthy of further consideration.

Appendix A – List of Submissions

Sub #	Submitter
001	Mr Phil Browne
002	Australian United Retailers Limited (FoodWorks)
003	Australasian Association of Convenience Stores
004	British American Tobacco Australia
005	Cancer Council Queensland
006	Imperial Tobacco Australia Limited
007	Master Grocers Australia
008	Alliance of Australian Retailers (AAR)
009	Heart Foundation Queensland
010	Australian Retailers Association (ARA)
011	QUIT Victoria

Appendix B – Officers appearing on behalf of the department at the public departmental briefing – Wednesday 2 December 2015

Ms Kaye Pulsford, Executive Director, Preventative Health Branch, Prevention Division, Department of Health

Mr Mark West, Director, Preventative Health Branch, Prevention Division, Department of Health

Dr Jeannette Young, Chief Health Officer and Deputy Director-General, Prevention Division, Department of Health

Appendix C – Witnesses appearing at the public hearing – Wednesday 24 February 2016

Witnesses
Ms Nicole Border, Manager, Policy and Advocacy, Cancer Council Queensland
Ms Alison Durham, Advocacy Manager, Heart Foundation Queensland
Mr Andrew Gregson, Head of Corporate and Legal Affairs, Imperial Tobacco Australia
Ms Rachel Elliott, Government and Stakeholders Relations Manager, Imperial Tobacco Australia
Mr Chian Lim, General Manager, Alliance of Australian Retailers
Mr Craig Glasby, Spokesperson for Alliance of Australian Retailers and Proprietor of FoodWorks, Kenthurst, NSW
Mr Luke La, Member of Alliance of Australian Retailers and Proprietor of newsXpress, Darra, Qld
Mr Tim Health, Business Development Manager, Australian United Retailers Limited
Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia
Ms Marie Brown, National Legal Counsel, Master Grocers Australia

Appendix D – Representatives who met with the Committee in Perth and Melbourne – Monday 29 February 2016 and Wednesday 2 March 2016

Monday 29 February 2016 - Perth
Mr Jim Dodds, Director, Environmental Health Directorate, Public Health Division, Western Australia Department of Health
Mr Matthew Lester, Manager, Licence and Policy Unit, Public Health Division, Western Australia Department of Health
Wednesday 2 March 2016 – Melbourne
Ms Judith Abbott, Director, Prevention, Population, Primary and Community Health, Victoria Department of Health and Human Services
Mr Colin Sindall, Director, Population, Health and Prevention Strategy, Victoria Department of Health and Human Services
Mr Darryl Kosch, Victoria Department of Health and Human Services
Dr Sarah White, Chief Executive Officer, QUIT Victoria
Ms Kate Hagan, Media Manager, QUIT Victoria

Appendix E – Advantages and disadvantages of different types of licensing schemes

Type of Scheme	Characteristics of scheme	Advantages	Disadvantages
Notification / registration	<p>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.</p> <p>There are a range of features / characteristics that may or may not be identifiable in any particular notification scheme:</p> <ul style="list-style-type: none"> ▪ 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 	<p>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.</p>	<p>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.</p> <p>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. In particular, registration:</p> <ul style="list-style-type: none"> ▪ 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

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.	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”. 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.
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.	<p>The principal advantages of this system are that:</p> <ul style="list-style-type: none"> ▪ 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. 	<p>The disadvantages of a negative licensing system are that it:</p> <ul style="list-style-type: none"> ▪ 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 upfront 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 noncompliance 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.

<p>Positive licensing</p>	<p>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.</p> <p>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.</p>	<p>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.</p> <p>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).</p> <p>The advantages of positive licensing system is that it:</p> <ul style="list-style-type: none"> ▪ 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; 	<p>The disadvantages of a positive licensing system are that it:</p> <ul style="list-style-type: none"> ▪ 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.” The Industry Commission noted that, “These opportunity costs and disincentives are very hard to quantify.” 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.
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Source: The Allen Consulting Group, *Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements*, December 2002: 37-41

Appendix F – Licensing schemes in other Australian jurisdictions

New South Wales			
Legislation: <i>Public Health (Tobacco) Act 2008</i> (NSW); Public Health (Tobacco) Regulation 2009			
Who needs to be licensed	Application process and requirements	License conditions	Fees
<p>Retailers</p> <p>A licence is not required.</p> <p>A person must not engage in tobacco retailing unless the person has first notified the Director-General of the Department of Health that they intend to engage in tobacco retailing (s 39).</p> <p>Maximum penalty: 100 penalty units.</p> <p>Tobacco retailing includes:</p> <p>selling tobacco products in a store</p> <p>a NSW liquor licensed premises with a tobacco vending machine</p> <p>supplying tobacco vending machines to NSW liquor licensed</p>	<p>A tobacco retailer notice to the Director General must be provided in the manner prescribed by the regulations and contain the following information:</p> <p>(a) the business address of the person intending to engage in tobacco retailing,</p> <p>(b) the address of the premises at which the person intends to engage in tobacco retailing,</p> <p>(c) the registered business name (if any) of the relevant business and, if the business is incorporated, the ACN,</p> <p>(d) the names and addresses of the owners and directors of the tobacco retailing business (s 39(2)).</p> <p>The manner of giving notice is by electronic communication in accordance with the relevant instructions on the website www.licence.nsw.gov.au (s.20 of the Regulation).</p> <p>Retailers receive a Tobacco Retail Notification (TRN) number for a business and information about how to amend details if they change in the future.</p> <p>A person engaged in tobacco retailing must notify the Director-General of each of the following events within 28 days after becoming aware of the event:</p> <p>(a) a change in the person’s business address,</p> <p>(b) a change in the address of the premises at which the person engages in tobacco retailing,</p> <p>(c) a change in the name or address of any owner or director of the tobacco retailing business,</p>	<p>Conditions include:</p> <p>a ban on the sale of tobacco products and non-tobacco smoking products to anyone under 18</p> <p>a ban on the display of tobacco products, non-tobacco smoking products and smoking accessories in shops</p> <p>all tobacco sold must be packaged correctly with appropriate health warnings</p> <p>a single point of sale for tobacco products and non-tobacco smoking products in retail outlets</p> <p>cigarette vending machines only in licensed venues restricted to over 18s, must be activated by a staff member or by a token which is only available from a staff member and subject to the same product display bans as all other retail environments</p> <p>a ban on tobacco products in shopper-loyalty programs</p> <p>displaying health warnings and a notice regarding sales to minors at the point of sale.</p> <p>Tobacco Compliance Officers inspect premises of tobacco retailers to ensure compliance.</p> <p>A tobacco retailer can be prohibited from selling if they repeatedly breach certain conditions of sale:</p> <p>s33(1) A person who has been convicted of 2 offences against the same provision of this Act or the regulations committed within any 3-year period on the same premises is prohibited from engaging in tobacco retailing for a 3-month period commencing on the day after the later of the 2 convictions.</p>	<p>No fees.</p>

	(d) a change in the ownership of the tobacco retailing business. (s39 (4))	s33(2)A person who has been convicted of 3 offences against the same provision of this Act or the regulations committed within any 3-year period on the same premises is prohibited from engaging in tobacco retailing for a 12-month period commencing on the day after the latest of the 3 convictions.	
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South Australia			
Legislation: <i>Tobacco Products Regulation Act 1997</i> (SA), Part 2; Tobacco Products Regulations 2004 (SA)			
Who needs to be licensed	Application process and requirements	License conditions	Fees
<p>s 6 A person must not</p> <p>(a) carry on the business of selling tobacco products by retail;</p> <p>...</p> <p>unless the person holds a licence under this Part.</p> <p>Maximum penalty: \$10,000.</p> <p>Expiation fee: \$315</p>	<p>Application for licence</p> <p>S 10(1) An application for the issue, renewal or variation of a licence must be made to the Minister in a manner and form approved by the Minister and contain the information required by the Minister.</p> <p>(2) An applicant must provide any further information that the Minister reasonably requires for the purposes of determining the application.</p> <p>(3) An application may not be granted except on payment of the appropriate fee under the regulations.</p> <p>Issue of licence</p> <p>S 7(1) The Minister may, on application by a person, issue or renew, or refuse to issue or renew, a licence under this Part.</p> <p>Decisions by the Minister under Part 2 (grant, refusal, imposing conditions) can be reviewed by the Minister (s 12). Further rights of appeal lie to the District Court (Administrative and Disciplinary Division) (s 13).</p>	<p>Duration of licence</p> <p>A Retail Tobacco Merchant's Licence can only be issued for a period of 12 months.⁴¹</p> <p>Conditions of licence</p> <p>S 9(1) The Minister may fix conditions of a licence.</p> <p>Conditions may include:</p> <p>one licence premises (a separate licence is required for each other place at which the person sells tobacco products)</p> <p>the number of points of sale where tobacco can be sold from is limited.</p> <p>The licence holder must not contravene or fail to comply with a licence condition. The maximum penalty is \$500; expiation fee is \$315.</p> <p>The licence can be suspended or cancelled by the Minister if satisfied that the licence holder has contravened the Act or is no longer a fit and proper person. The decision to suspend or cancel can be reviewed by the Minister and taken on appeal to the District Court (Administrative and Disciplinary Division) (s 13).</p>	<p>\$266</p>

Tasmania			
Legislation: <i>Public Health Act 1997</i> (Tas), Part 4, Division 3; Public Health (Tobacco Seller's Licence) Regulations 2009 (Tas)			
Who needs to be licensed	Application process and requirements	Licence conditions	Fees
<p>S 74A Licence to sell tobacco product</p> <p>A person must not sell a tobacco product unless</p> <p>(a) the person is the holder of a tobacco seller's licence; or</p> <p>(b) the person is an employee [of the licence holder].</p> <p>Penalty: Fine not exceeding:</p> <p>for a first offence, 50 penalty units [\$7 700];⁴³ and</p> <p>for a subsequent offence, 100 penalty units [\$15 400].</p>	<p>Application for licence</p> <p>S 74B (1) A person who is 18 years or older may apply to the Director for a licence to sell a tobacco product.</p> <p>(2) An application is to be –</p> <p>(a) in an approved form; and</p> <p>(b) accompanied by the prescribed fee.</p> <p>The application must be accompanied by photographic identification of proof age.</p> <p>Only individuals can apply, not a body corporate.⁴⁷</p> <p>Issue of licence⁴⁸</p> <p>Under s 74C, the Director of Public Health Services may grant a licence subject to any conditions, or refuse the application.</p> <p>Under s 74C(2) In determining the application, the Director is to –</p> <p>(a) consider whether the applicant is likely to comply with the Act; and</p> <p>(b) be satisfied that the applicant is 18 years of age or older; and</p> <p>(c) have regard to any relevant guidelines.⁴⁹</p> <p>If the licence is granted, it is issued in the approved form endorsed with any conditions (s 74D).</p> <p>Decisions in relation to licences can be reviewed by the Magistrates Court (Administrative Appeals Division) (s 160A).</p>	<p>Duration of licence</p> <p>12 months or another period specified in the licence, whichever comes first (s 74E).</p> <p>Can be renewed on the same basis (s 74F(9)).⁵⁰</p> <p>Conditions of licence</p> <p>As well as any other conditions, s 74C(4) states that a tobacco seller's licence may be granted subject to conditions relating to –</p> <p>(a) the provision of information or returns by the licensee; and</p> <p>(b) the display of the licence.</p> <p>Conditions can also be varied by the Director at any time (s 74G).</p> <p>A tobacco seller's licence may be cancelled if the holder:</p> <p>(a) fails to comply with a condition of the licence; or</p> <p>(b) fails to comply with any relevant guidelines or regulations; or</p> <p>(c) fails to comply with this Part; or</p> <p>(ca) purports to transfer the licence to another person; or</p> <p>(d) is convicted of an offence under this Part. (s 74H)</p> <p>Offences regarding licences are set out in s 74L.</p> <p>Tobacco products must be sold in accordance with licence conditions, and any guidelines and regulations and the Act, Part 4.</p>	<p>\$360.89</p>

Western Australia			
Legislation: <i>Tobacco Products Control Act 2006 (WA)</i> , Parts 2 and 453			
Who needs to be licensed	Application process and requirements	License conditions	Fees
<p>Retailers</p> <p>S 16: A person must not sell a tobacco product by way of retail sale except under the authority of a retailer's licence.</p> <p>Penalty: a fine of \$50 000.</p> <p>Wholesalers</p> <p>S 17 A person must not sell a tobacco product by way of wholesale sale except under the authority of a wholesaler's licence.</p> <p>Penalties</p> <p>Individuals:</p> <p>\$10 000 for a first offence</p> <p>\$20 000 for a second or subsequent offence</p> <p>Body corporates:</p> <p>\$40 000 for a first offence</p> <p>\$80 000 for a second or subsequent offence</p> <p>(s 115)</p>	<p>Application for licence:</p> <p>Under s 37(1) an application for the issue of a licence is to be: made in an approved form lodged in an approved manner accompanied by — proof of the applicant's identity other prescribed evidence the prescribed application fee and the prescribed licence fee.</p> <p>Issue of licence</p> <p>The CEO of the Department of Health can issue licence(s) but no more than one of each type in respect of the same premises.</p> <p>Section 39(1) provides that the CEO is not to issue a licence if the applicant has not reached 18 years of age.</p> <p>Under s 39(3), to determine suitability of the applicant, the CEO is to have regard to whether:</p> <p>the applicant has been refused/disqualified from holding, a licence or it has been suspended</p> <p>the applicant has, at any time been convicted of an offence under the WA Act</p> <p>the applicant has, in the preceding 10 years been convicted anywhere in the world of an offence involving fraud or dishonesty</p> <p>the applicant is likely to carry on activities of a licence holder honestly and fairly</p> <p>the applicant is a fit and proper person to hold a licence</p> <p>there is any other good reason not to issue/renew the licence.</p>	<p>Duration of licence</p> <p>12 months but can be renewed for further 12 months (s 43).</p> <p>Conditions of licence</p> <p>S 41(1) It is a condition of every licence that the holder of the licence does not authorise or allow the sale of tobacco products premises other than the premises specified in the licence.</p> <p>It is a licence condition that employees/agents must be: instructed not to sell to a person under the age of 18 years instructed not to sell to a person unless employee/agent sees a document mentioned in s 15 that satisfies them the person is at least 18 years or has no reason to believe the person is not at least 18 years informed of the licence procedures in Part 2, Div 1 of the Act warned the employee/agent might be charged with an offence if in breach of certain provisions of the WA Act regarding sales to person under 18 years and marking of tobacco products for delivery.</p> <p>The CEO can impose conditions or restrictions particular to the relevant licence or change or remove conditions (s 42).</p> <p>Disciplinary action can be taken against a licence holder under s 47. A licence may be suspend or revoked and a licence holder may be disqualified for a period or permanently (s 48).</p>	<p>From 1 July 2015:</p> <p>Retail licence</p> <p>Application fee: \$60</p> <p>Licence fee: \$180</p> <p>Wholesale licence</p> <p>Application fee: \$150</p> <p>Licence fee: \$450</p>

	<p>The applicant is entitled to receive reasons for any refusal of licence and has review rights to the State Administrative Tribunal under s 40.</p>		
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Australian Capital Territory			
Legislation: Tobacco Act 1927 (ACT)61 Part 7			
Who needs to be licensed	Application process and requirements	License conditions	Fees
<p>Retailers</p> <p>S 63(1) A person commits an offence if the person—</p> <p>(a) carries on tobacco retailing, and</p> <p>(b) is not the holder of a retail tobacconist's licence.</p> <p>Maximum penalty: 50 penalty units.</p> <p>Wholesalers</p> <p>S 62(1) A person commits an offence if the person—</p> <p>(a) carries on tobacco wholesaling; and</p> <p>(b) is not the holder of a wholesale tobacco merchant's licence.</p> <p>Maximum penalty: 100 penalty units.</p> <p>The Commissioner for Fair Trading must keep a</p>	<p>Application for licence⁶⁴</p> <p>S 47(1) A person may apply to the commissioner for a wholesale tobacco merchant's licence or a retail tobacconist's licence.</p> <p>(2) The applicant must give the commissioner any additional information or documents that the commissioner, in writing, requires the applicant to give ...</p> <p>(3) Subject to section 50, the commissioner must, if the applicant has complied with this Act, grant to the applicant the licence applied for.</p> <p>(4) A licence must state the premises that are to be used in relation to the business in relation to which the licence is granted.</p> <p>The licence cannot be transferred (s 47(7)).</p> <p>Issue of licence⁶⁵</p> <p>Under s 50(1), the Commissioner must not grant a tobacco licence if satisfied on reasonable grounds that the applicant:</p> <p>holds another tobacco licence, the variation of which currently prohibits the sale of smoking products at the premises</p> <p>is disqualified under s 58 from holding a tobacco licence</p> <p>holds another tobacco licence that is currently suspended</p> <p>is currently disqualified from holding a tobacco licence for the premises in the application.</p> <p>Under s 30(2), the Commissioner may refuse to grant a tobacco licence if satisfied on reasonable grounds that:</p> <p>the applicant does not sufficiently understand the obligations of a licensee within the period two years before the date of the application, two offences in relating to the sale or supply of smoking products to a person under 18 years have been found proved, whether a conviction was recorded, in the ACT or elsewhere, or</p>	<p>Duration of licence</p> <p>S 49(1) A tobacco licence commences on the date specified in the licence as its commencement date.</p> <p>(2) Subject to this Act, a tobacco licence (including a renewed licence) remains in force until the end of 31 August next following the grant of the licence.⁶⁶</p> <p>Conditions of licence</p> <p>S 48(1) The Commissioner may specify, in a particular tobacco licence, any conditions to which the licence is subject.</p> <p>(2) In particular, the conditions may include, for a retail tobacconist's licence in respect of premises—</p> <p>(a) subject to section 8 (Numbers of points of sale), the maximum number of points of sale permitted on the premises; and</p> <p>(b) the permissible locations, on those premises, of the points of sale.</p> <p>Under s 48(4) the Commissioner can place further conditions on the licence, or vary or cancel conditions.</p> <p>S 49A provides that the commissioner must not grant or renew a tobacco licence that would authorise the use of a vending machine for the sale of tobacco products.</p> <p>S 56 sets out grounds upon which a licensee may be disciplined after application to the ACAT by the Commissioner:</p> <p>contravention of the Act or a licence condition</p> <p>licence was granted to the person in error</p> <p>licence was granted to the person as a result of a false statement or misleading information given by the person</p>	<p>From 8 July 2015:</p> <p>Maximum licence fee \$306 per business.</p> <p>Licence fees are charged on a pro-rata basis depending upon the date the application is lodged.</p> <p>If apply from June to August - \$76 per business.</p>

register of licences (s. 53)	<p>the ACT Administrative Tribunal (ACAT) would have grounds for cancelling the licence, if the applicant already had one.</p> <p>Refusal to grant a licence, imposing conditions on a licence or refusing to renew a licence may be reviewed by the ACAT (see Part 7.6 and Sch 1 of the Act).</p>	<p>the licensee has been convicted of an offence under Part 7 of the Act</p> <p>if the licensee is an individual, he or she is convicted/found guilty of an offence punishable by at least one year's imprisonment or the licensee has become bankrupt/insolvent</p> <p>if the licensee is a corporation, the licensee is being wound up.</p>	
Northern Territory			
Legislation: Tobacco Control Act (NT), Part 469; Tobacco Control Regulations (NT)			
Who needs to be licensed	Application process and requirements	License conditions	Fees
<p>Retailers</p> <p>A person must not sell a tobacco product⁷⁰ by retail unless the person is the licensed tobacco retailer in respect of the premises for which the tobacco retail licence is issued (s 28).</p> <p>An employee or agent of that retailer or any other person authorised under the licence can also sell tobacco products in, on or from the premises.</p> <p>Maximum penalty: 500 penalty units (\$76 500).</p>	<p>Application for a licence⁷³</p> <p>S 29(1) An application for a grant of a tobacco retail licence:</p> <p>(a) is to be in a form approved by the Director-General; and</p> <p>(b) is to specify the premises to which the application relates; and</p> <p>(c) is to be accompanied by the information and fee prescribed by regulation.</p> <p>The prescribed information is a criminal history report (involving a name check only), issued by or on behalf of the Commissioner of Police, about the individual who is proposed to be the manager of the business at the relevant premises (Tobacco Control Regulations (NT), r 25).</p> <p>The Director-General of Licensing may grant a tobacco retail licence subject to the conditions (if any) specified in the licence, or refuse the application (s 29(2)).</p> <p>Issue of licence</p> <p>S 29(3) The Director-General may only grant a tobacco retail licence if:</p> <p>(a) the Director-General is satisfied:</p> <p>(i) if the application relates to liquor licensed premises – that the applicant is the liquor licensee of those premises; and</p> <p>(ii) if the application relates to any other kind of premises – that the applicant is an adult; and</p>	<p>Duration of licence</p> <p>12 months but can be renewed for 12 months (s 32).⁷⁶</p> <p>Conditions of licence</p> <p>S 30 The holder of a tobacco retail licence that is in force must comply with the conditions of the licence.</p> <p>Maximum penalty: 100 penalty units.</p> <p>Conditions can be varied on application of the retailer or on the Director-General's own initiative (s 35).</p> <p>The Director-General may cancel or suspend a licence if:</p> <p>a retailer is found guilty of an offence of selling or supplying tobacco products to children (ss 42-43)</p> <p>a retailer is found guilty of two or more offences against the Act or Regulation (other than ss 42 or 43)</p> <p>two or more retailers are each found guilty of an offence against the Act or Regulation (other than ss 42 or 43)</p> <p>a retailer is issued with two or more infringement notices within 12 months or two or more retailers are each issued with an infringement notice within 12 months</p>	\$230

	<p>(iii) as to the prescribed criteria (if any); and</p> <p>(b) the Director-General is not aware of any other reason to refuse to grant the licence.</p> <p>If the licence or licence transfer is refused or is subject to conditions, the applicant must be invited to show cause why the decision should not be made. There are review rights exercisable before the NT Civil and Administrative Tribunal.</p>	<p>a retailer provided false information or information that was misleading in a material particular in support of a licence application (s 38).</p> <p>There are review rights exercisable before the NT Civil and Administrative Tribunal.</p>	
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