

Submission

No 62

INQUIRY INTO TOBACCO SMOKING IN NEW SOUTH WALES

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Summary

S U B M I S S I O N

to the

Inquiry into Tobacco Smoking in New South Wales

by the

Joint Select Committee on Tobacco Smoking

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EXECUTIVE SUMMARY

Member organizations of the National Alliance of Tobacco Retailers represent retailers operating 7165 stores in New South Wales, either independently owned or franchises.

NATR members do not advocate or promote smoking. We also support restrictions on the sale of tobacco products to minors.

NATR's main focus since its establishment in 2004 has been on proposals to ban or severely restrict the exposure of tobacco products for sale in shops, just as all other products are exposed for sale.

While we welcome the recent announcement that New South Wales will not move to ban or further restrict display of tobacco products, we believe it is instructive to examine the processes and arguments which were put forward to attempt to justify the proposed ban.

We assume that the policy objective was to reduce the incidence of smoking.

Yet *no evidence whatsoever* was produced to demonstrate a causal relationship between exposure of tobacco products for sale and decisions to buy or use them. Indeed, common sense and experience show us that many purchasing decisions are made many kilometres away from the nearest shop, when people are watching television, driving their cars or engaged in numerous other activities in which they have no exposure to tobacco product displays.

Nor was *any evidence* produced to support the proposition that a ban or restriction on display would cause an overall reduction in tobacco use. In our view, a shift in market share from small family-owned and operated businesses to the major supermarket chains would be the most likely result.

Exposure of product for sale is not "advertising", as some claim. Advertising of tobacco products has been banned for almost a decade.

NATR members are concerned at the willingness of governments to confiscate commercially valuable retail space in shops for the purpose of displaying anti-smoking signs, posters and other information, while the same information is communicated through expensive paid advertisements in the commercially valuable space and time of magazines, newspapers, radio and television.

A paternalistic "it's for their own good" approach is not a justification for the diminishment of personal freedoms through tobacco control programs. Adults are entitled to make their own decisions about smoking or any other legal behaviour.

Finally, this submission demonstrates that flawed and failed tobacco-control policies have led directly to the growth of the illegal "chop chop" market, with consequent loss of revenues, increased health risks and greatly increased enforcement costs and

suggests ways in which regulatory proposals might be more effectively based and evaluated.

WHO WE ARE

The National Alliance of Tobacco Retailers is a group of industry associations whose members include tobacco retailers across all market sectors and distribution channels.

These organizations represent 15,000 retail outlets nationally, with more than 200,000 employees and combined sales of \$30 billion, including tobacco product sales of about \$8 billion.

Our current Supporter Associations include:

- Australasian Association of Convenience Stores (AACS)
- National Association of Retail Grocers of Australia (NARGA)
 - Retail Traders and Shopkeepers Association of NSW
 - Queensland Retail Traders and Shopkeepers Association (QRTSA)
 - Western Australia Independent Grocers Association
 - Tasmanian Independent Retailers
- National Independent Retailers Association (NIRA)
 - The Retail Confectionery and Mixed Business Association (CAMBA)
- Newsagents of Australia
 - Queensland Newsagents Federation (QNF)
 - Victorian Authorised Newsagents Association
 - New South Wales Authorised Newsagents Associations
- Service Station Association (SSA)
- Motor Trades Association of Queensland (MTAQ)
- Victorian Automobile Chamber of Commerce (VACC)
- Motor Trade Association of South Australia (MTASA)

Our Principal Supporters include:

- 7 Eleven
- BP
- British American Tobacco Australia
- Caltex
- Imperial Tobacco

NATR does not in any way promote the use of tobacco products, acknowledges that tobacco use may be a risk to health and believes that if people do use tobacco products they should probably quit.

Tobacco remains, however, a legal product from which Australian governments collect \$6 billion a year in revenue, directly from smokers.

TOBACCO USE IN PUBLIC PLACES

NATR is retailer-focused. We therefore have no direct interest in issues relating to smoking in public places, such as hotels and clubs and do not wish to comment on the terms of reference which deal with those issues.

NATR'S RETAILER CONCERNS

As an alliance of small retailer organizations across several sectors, NATR's interests focus on issues which directly affect retailers who sell tobacco products.

Our concerns therefore relate to:

- The ability of retailers to conduct business transactions with customers in the most efficient and cost-effective way possible, regardless of product category
- The protection of commercially valuable retail space as the basis upon which retailers generate income
- The freedom to sell legal products to legally eligible categories of customers without undue interference from governments
- The avoidance of unnecessary costs or compliance burdens on retailers
- Our strong belief that policies which do generate costs and compliance burdens should be based on demonstrable need and objective, verifiable data and logical argument and will clearly achieve the policy objectives sought
- Conversely, the avoidance of regulation and compliance burdens based on ideology, faulty thinking and bad advice
- Our strong commitment to personal freedom and choice on the part of our customers and to satisfying customer requirements
- The avoidance of adverse outcomes from flawed policies based on faulty thinking and bad advice.

NATR's responses to the *Terms of Reference* for this Inquiry, therefore, are limited to matters relating mainly to "*the effectiveness of strategies to reduce tobacco use*" and matters related to such strategies.

NATR's **key focus** since its establishment has been to campaign vigorously against proposals to ban or severely restrict the maximum allowable area for exposure of tobacco products at point of sale - because such ban or restriction would be ineffective, fail to achieve any valid policy goal, and damage the legitimate business of NATR members.

Such restrictions **would not reduce overall use of tobacco**. They would shift market share from small businesses to the major supermarket chains and undermine the viability of those small businesses. They would impose inefficiencies and additional costs on small businesses and delay the service of all customers, including non-smokers.

While the Minister Assisting the Minister for Health (Cancer), Mr Sartor, announced in 2004 and later reconfirmed his intention that tobacco product displays should be banned and notwithstanding his recent concession that no such ban or restriction would occur, the issue remains important for several reasons.

First, the governments of Queensland and Western Australia have introduced restrictions on display of tobacco products in retail outlets. Those restrictions have no valid basis and should be removed.

Second, although the proposal has been abandoned in New South Wales at this time, there is no guarantee that it will not be revived in the future.

Third, it is instructive to understand how such a demonstrably flawed proposal can have been taken seriously and the process toward legislation begun.

Recent newspaper reports quoting advice to the government prepared by NSW Health are disturbing in that they reveal that the government was receiving very poor advice which could not be substantiated on the basis of empirical evidence. If it has been accurately reported, the advice also reveals that an ideological mindset exists within NSW Health and, we believe, other departments of health and the anti-smoking lobby, which clouds their advice.

Since the committee is considering issues relating to tobacco smoking in New South Wales, there is an opportunity to consider the *process* which was being followed, with the possibility of identifying flaws in the way the proposed display bans were considered, so that, if the idea is raised again, it may be quickly set aside.

With that in mind, we wish to put before the Committee our views on several issues which have been raised by various parties in relation to this matter since 2004.

“ADVERTISING” VERSUS “DISPLAY”

Anti-tobacco campaigners inside and outside the NSW Health bureaucracy like to pretend that exposure of product at point of sale - commonly called “display” - is, in fact, “advertising” of the product. This deliberate reference to advertising (which has been banned in Australia since 1976 on radio and television and since 1989 for print media) is intended to mislead and put doubt into the minds of anyone considering the issue.

“Advertising” and “display” are not synonyms and to claim they are, as some do, is disingenuous at best. Insofar as the words can be used interchangeably, the area of semantic overlap is marginal. *Words and Phrases Legally Defined*¹, a compendium of words and phrases defined by legislation or in judicial findings, does not indicate that the word “advertisement” has been taken to include the concept “display” in the Australian legal context.

“Advertising” of tobacco products has been banned for many years. “Display” has not. A product is not in and of itself “an advertisement”. In practical terms, display is the passive exposure of the product for sale, whereas advertising is a process intended to actively motivate the customer to purchase the product. Retailing would be a very bizarre process indeed if every product considered harmful by some lobby group or other was required to be hidden. Indeed, the display of product has for centuries

¹ *Words and Phrases Legally Defined*, John B. Saunders, ed., Third Edition, London, 1988, pp. 49-50

been taken as the mechanism by which a customer can see and sometimes touch and smell or even, on occasion, taste a product in the process of making up his or her mind to buy.

In meetings between NATR representatives and NSW Health, there seemed to be general bureaucratic acceptance that the concepts were interchangeable.

THE POLICY OBJECTIVE

We take it that the policy objective behind the proposal to ban display of tobacco products was to reduce their use.

Banning or restricting exposure of such products at point of sale cannot be shown to achieve any such reduction.

Indeed, the entire “display ban” proposal makes sense only if it can be demonstrated that reduction in use would occur if display were banned (or restricted, as has occurred in Queensland).

In other words, to validate the regulatory process, it is necessary to demonstrate a causal relationship between the display of product and a decision to buy and use that product.

No such causal relationship has been or can be demonstrated.

Products exposed for sale in shops show customers what lines are available and help retail staff meet customers’ requirements as quickly and efficiently as possible. That keeps costs down for the benefit of all customers and helps make customers service as quick as possible.

Restricting the display area slows the process because both the customer and the staff member take longer to locate and identify the preferred brand and size and thus imposes inefficiencies and increases costs for *all* customers, not just smokers. It also raises occupational health and safety issues for staff, particularly those working alone at night, if restricted display space forces the retailers to store product in a position where the staff member must bend down or turn away from a customer who is a potential threat.

NATR asked NSW Health on numerous occasions during 2004 and 2005 for the evidence they claimed to have supporting a *causal relationship between exposure of tobacco products for sale and decision to purchase and use*. After several months, they were unable to produce a single piece of relevant evidence.

Some of the “evidence” similarly quoted in the Queensland Government discussion paper released prior to introduction of its amendments to the *Tobacco and Other Smoking Products Act* was also less than convincing. One example illustrates the point:

Equally important as how packages look, is where they are positioned in the retail environment. Shelf displays, often positioned at eye level at the

checkout counter, are designed to increase the attractiveness of cigarettes and to remind consumers of the opportunity to purchase the product. Faced with this promotion, the motivation not to smoke of an ex-smoker or a smoker trying to quit is inevitably weakened (Cunningham and Kyle, 1995).

Remembering that tobacco products are located at a single point of sale by government requirement, no evidence is adduced to support the proposition that such location can in any way “increase the attractiveness” of cigarettes as a category, let alone distinguish between highly competitive brands. The implication that smokers or would-be quitters become helpless morons at sight of tobacco packages and that their resistance is “inevitably” weakened is simply nonsense. Nor does this “evidence” explain how or why tobacco products are in any way different from the 30,000 other product lines on display in a large store.

The attribution of such unique powers to the tobacco category, powers which oddly do not affect more than 80 per cent of the population, is an indication of the mystical irrationality of much of the “evidence” relating to product display.

Nevertheless, on the basis of no evidence, Queensland introduced a maximum area of one square metre for the exposure of tobacco products at point of sale - an area the former Queensland Health Minister, Mr Gordon Nuttall, admitted he had chosen at random.

SIGNIFICANCE OF TOBACCO SALES TO SMALL RETAILERS

The tobacco category is one of the most important categories to many small retailers, contributing up to 50 per cent of total sales and 25 per cent or more of store profits. Restrictions on tobacco display would have a devastating affect on many small businesses, as it would reduce sales, add costs and impose inefficiencies.

If customers who choose to smoke were unable to view their selected brands at their local small retailer, they would be more likely to go to a large supermarket where consumers know the full range of brands would be available.

This would impact not only on small retailers’ tobacco sales but also the flow-on sales of other products bought by smokers.

If market share were to shift from small businesses to the major supermarket chains as a result of such point of sale restrictions, **no overall reduction in smoking would result** and the presumed policy goal would not be achieved.

It is important to remember also that many families and individuals have committed large percentages of their personal financial resources to the purchase of businesses or franchises which depend for their success on tobacco sales. Indeed, those investments were made on the basis that large percentages of total sales (30 per cent for convenience stores, more than 50 per cent in some small mixed businesses) derived from tobacco products.

Any new restrictions would amount to *de facto* retrospective legislation and could be financially damaging for many of those businesses, raising compensation issues.

THE EFFECTIVENESS OF STRATEGIES TO REDUCE TOBACCO USE

We note the implication that reducing tobacco use by banning or reducing display of tobacco products is or should be a policy objective and that it should be brought about by government intervention. The implication is inconsistent with the fact that tobacco products remain legal and the sale of those products raises about \$6 billion a year in revenues for governments in Australia.

NATR cannot support any measure which not only would not achieve a legitimate policy objective, but would also impose costs and inefficiencies on small businesses already burdened with red tape.

NATR members believe that while tobacco products retain legal status, the decision to buy and use those products is entirely a matter for the individual concerned.

Such a position has a long and respectable philosophical history.

We draw the Committee's attention to the writings of the renowned English political philosopher John Stuart Mill:

But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it... All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good... Let not society pretend that it needs... the power to issue commands and enforce obedience in the personal concerns of individuals, in which, on all principles of justice and policy, the decision ought to rest with those who are to abide the consequences... And it is not difficult to show, by abundant instances, that to extend the bounds of what may be called moral police, until it encroaches on the most unquestionably legitimate liberty of the individual, is one of the most universal of all human propensities.

John Stuart Mill, On Liberty, 1859

Mill understood that any diminishment of liberty set a precedent for further such deprivations and that liberty cannot be limited without being lost.

If "it's for your own good" is an adequate excuse for diminishment of freedoms, then there are virtually no limits to the scope of regulation and reduction of freedoms which would be permissible in the views of some group or other.

Should it be argued, instead, that such regulation is about the diminishment of risk, then Mill's arguments still pertain: should risk-reduction regulation then be applied to every other area of human activity?

There is a very long list of human activities which are pleasurable to participants and observers but which entail some sort of risk: eating, drinking, skydiving, scuba diving, motor racing, horse racing, boxing, ballet, football, and so on. What level of risk would trigger the need for governments to intervene to reduce that risk?

In Australia (and around the world) in recent years there has been a tendency to pretend to justify tobacco regulation on amorphous “public health” grounds, supported by flawed, ideologically-motivated “research”, regardless of whether the proposed regulation is demonstrably invalid or could achieve the stated goals. Indeed, as we shall see later in this submission, some such initiatives have had serious adverse results.

From a small retailer perspective, in the past few decades there has been a mass of over-regulation which has become an almost intolerable compliance burden. The recently published report of the Taskforce on Reducing Regulatory Burdens on Business² argues that “a more problematic influence [on the growth of red tape] has been increasing ‘risk aversion’ in many spheres of life. Regulation

In that context, we welcome the intervention of the Mr Christopher Pyne, Parliamentary Secretary to the Commonwealth Minister for Health, whose initiative has resulted in at least one supplier agreeing to make nicotine patches available through retail channels other than pharmacy. The restriction has been essentially anti-competitive and anyone wishing to support tobacco use reduction should welcome the availability of such products through many more outlets.

We welcome also the NSW Government’s decision to establish a thorough and detailed inquiry into the red tape burden borne by business and look forward to working with the ministers and their agencies to reduce compliance burdens and costs. We particularly commend the Minister for Small Business, Mr David Campbell, for his understanding of the issues impacting small businesses in New South Wales.

WHO GOVERNS?

Unfortunately, governments often receive advice that is wrong or ill-conceived. This is particularly so in areas of government where ideological views intrude and where the government’s advisers are ideologically self-selected.

People who are likely to be in favour of personal freedom and personal choice are unlikely to apply for jobs in tobacco control units, for example. Conversely, those who do secure such positions are likely to be of a bent to recommend regulation of smokers’ behaviour “for their own good”.

According to a report in the *Sydney Morning Herald* on 17 March 2006 (“Sartor ignored warning about smoking ads”) based on documents received under *Freedom of Information* legislation, an officer of NSW Health, claimed there was “strong evidence” that the storage and exposure of tobacco products at point of sale was likely “to cause children or young adults to experiment with smoking”.³

If we assume “young adults”, means people over 18 years of age, then they are legally entitled to “experiment with smoking” or any other legal activity if they so wish and it is frankly not the business of any bureaucrat or politician, no matter how much he or

² “Ruddock outlines red-tape attack”, *The Australian*, 20 March 2006, p. 5.

³ “Sartor ignored warning about smoking ads”, *Sydney Morning Herald*, 17 March 2006, page 3.

they may wish it otherwise. We shall deal with the issue of under-age smoking later in this submission, but we note that supply of tobacco products to people under 18 is **already illegal** and carries heavy penalties. In what way would display restrictions change that situation?

When advice to governments includes statements such as a reference to “strong evidence”, it should not be taken at face value, but given intense scrutiny. What is this evidence? How is “strong” defined? Can “strong” be quantified or is it entirely subjective?

We do not have access to the particular evidence so described but other research we have seen dealing with related matters amounts to no more than academic theorising.

If the entire tobacco control edifice has been constructed to deter those who **might** “experiment”, what percentage of the population is involved? At what cost could such experimentation be prevented? Is it the role of NSW Health to *prevent* people from experimenting with a legal product? On what authority? Would these people have considered “experimenting” if displays were larger or smaller? What is the strength of the alleged desire to experiment, compared to display size? How is that calculated or objectively demonstrated?

In relation to tobacco, as the overall use of such products continues to decline, it is clear that “experimentation” does not lead to long term use in 80 per cent of the population.

There is a propensity in some quarters to make highly implausible assumptions about tobacco products and the mysterious psychological powers they are supposed to exert over otherwise self-reliant shoppers. Would the same mind-control proposition be taken seriously in relation to any other category *per se*? Would one “experiment” with pegs, or jam, or glucose syrup if one had never used the category before? Product display is simply not a gateway issue.

According to the *Sydney Morning Herald*, the NSW Health officer’s advice was to **ignore** - that is, refuse to acknowledge or deal with - the very strong concerns raised by retailer representatives in relation to business and employment impacts and the personal freedom of smokers to use legal products from which governments extract \$6 billion a year in revenues. The survival of retail businesses and jobs was inconsequential, apparently, when compared with the need to control tobacco users.

Is this considered and impartial advice?

The NSW Cabinet has chosen not to follow such advice at this time in relation to banning or restricting the storage and exposure of tobacco products for sale.

We commend the government’s decision.

However, the entire process brings into sharp focus the question put by the second century Roman writer, Terence: *quis custodiet illos custodies?*: who will guard the guardians? Who is to control the bureaucrats appointed to control us?

MINORS AND SMOKING

The issue of widespread illegal sale of tobacco products by retailers to under age smokers is one of the great frauds promulgated by the anti-tobacco lobby and some regulators.

NATR member associations have no interest in encouraging children to smoke. We shall continue to support effective programs to reduce youth smoking and to deny under age smokers access to tobacco products through retail outlets. We neither support nor defend any retailer who supplies tobacco products to minors.

During 2004, NATR offered to work with Action on Smoking and Health and its supporters to help establish, through the NSW Government and other governments, a system which would provide a 100 per cent proof of age regime.

In an email to NATR on 25 November 2004, ASH declined to co-operate on the grounds that some retailers allegedly sold “chop chop”. *The email said:*

For these reasons, combined with the slow decline in smoking prevalence amongst children and percentage of children still purchasing (now 24% but still too high), we are not convinced that a “fool proof” proof of age card will solve the problem. It’s the view of health and medical groups that a comprehensive package of measures is going to be more effective - without inconveniencing smokers who want access to their products.

So, according to ASH and its supporters, 24 per cent of “children” are purchasing tobacco products in retail outlets and that is adequate reason to refuse to deal with them. As we shall see, the claim is nonsense, even accepting that a 190cm, 100 kilogram 17 year old with a detention record qualifies as a “child”.

What are the facts? Do retailers routinely break the law and supply tobacco products to under-age smokers (or under-age experimenters or non-smokers, for that matter)?

Research commissioned by the Commonwealth Department of Health and Ageing demonstrates beyond dispute that the answer is no.⁴

The key facts to emerge from the Australian research are that, even when the number of “smokers” is artificially inflated by defining a smoker as anyone who had ever smoked a single cigarette (inflating the sample by the number of teenagers who “experimented” only a few times and did not smoke again) only nine per cent (accurate to ± three per cent) were “committed smokers” (by the researchers’ definition), including only eight per cent who had smoked 100 or more cigarettes in their lifetimes. Fifty-four per cent had never smoked.

⁴ White, V., and Hayman, J., *Smoking behaviours of Australian secondary students in 2002*, Monograph Series No. 54, prepared for Drug Strategy Branch, Australian Department of Health and Ageing, March 2004.

Only 17 per cent of those who smoked in the week prior to the survey (that is 17 per cent of 14 per cent - 2.38 per cent of the sample) had bought cigarettes. The remainder of those who smoked obtained tobacco products from family and friends.

Yet ASH and its health and medical group supporters refuse to co-operate in developing a system which we believe would have eliminated all inadvertent sales to under age customers.

Since there can be hardly a person in Australia who does not know that supply of tobacco to people under 18 years of age is illegal, one wonders at the efficacy of policies which require retailers to display multiple signs and posters on the topic and the cost of employing an army of inspectors to enforce the requirements.

PRIVATE PROPERTY

NATR has grave concerns about the increasing tendency of government regulators to interfere in private property rights (another of John Stuart Mill's concerns, coincidentally).

Retail premises are commercially valuable spaces - disproportionately so to small businesses, which rely on every square metre of horizontal and vertical space to generate income.

Governments, however, as a matter of course, confiscate parts of such space without compensation and compel retailers to display signs, labels and posters.

In relation to tobacco products, regulators restrict where products may be exposed for sale and the number of locations within that private property at which such exposure may occur. They prescribe the size, shape and colour of labels and signage. In some jurisdictions any product considered to be related to tobacco - such as, say, a lighter or an ash try - is similarly restricted, apparently on the basis of some strange psychological theory (again unsubstantiated) that the mere sight of one of these items, too, might cause somebody to buy and use tobacco.

By contrast, regulators do not feel free to seize control of the commercially valuable space and time of newspapers, magazines, radio or television as vehicles for disseminating the very same messages - instead spending hundreds of millions of taxpayers' dollars on advertisements to that end.

Clearly their willingness to trample on the property rights of small retailers is offset by their rectitude in respecting the property rights of media moguls.

THE PRICING DETERRENT - STRATEGIC POLICY FAILURE

Consistent with the strategies outlined many years ago in the *Framework Convention for Tobacco Control*, developed internationally by the WHO, which Australia has recently ratified, taxes have been used to increase artificially the over-the-counter price of tobacco products as a deterrent to purchasers.

Several points need to be made about this approach.

First, there is a strong odour of paternalism about it. In Australia, middle class, white politicians, bureaucrats and anti-smoking pressure groups apparently feel no embarrassment in deciding they know what is best for smokers, who are reported to be of lower social status, lower income, and lower educational attainment: “it’s for your own good”.

Second, there is an air of the punisher about it: if you want to smoke, regulators will make it economically painful for you because *they* don’t like it: “it’s for your own good”.

Third, the strategy is a demonstrable failure from many perspectives. Indeed, it fails on health, economic and public administration grounds.

The pricing mechanism was intended to place tobacco products out of the range of many people - but only those on low(er) incomes. The well-to-do have no problem.

The first direct consequence of this has been to place tobacco products at pricing levels where they become very attractive targets for theft and robbery, putting retail staff at risk of physical or psychological trauma or death.

Tobacco products are generally stolen not for the use of the criminal, but for resale at below-retail prices. Government tobacco control policy has created that market and the related crimes and injuries.

The second direct consequence of this policy has been the massive growth of the illegal tobacco or “*chop chop*” market, currently said to be worth \$500 million a year in Australia.

Chop chop is tobacco which has been illegally supplied by or stolen from tobacco growers. Its distribution is generally considered to be controlled by organized criminal gangs through public bars and informal chains of intermediaries and end-users.

It is therefore untaxed, unregulated, not subject to quality control and consequently likely to be contaminated with chemicals, fungi and bacteria.⁵

Consumption of *chop chop* has been associated with a significant increase in the incidence of *aspergillosis*, a fungal infection of the lung, and other serious respiratory tract infections.⁶

⁵ “Cheap tobacco’s additives a health risk”, *Sydney Morning Herald*, 9 December 2002.

⁶ Bittoun, R., “The Medical Consequences of Smoking ‘Chop Chop’ Tobacco”, prepared for the Commonwealth Department of Health and Aging, December 2004.

Thus, those whom the pricing strategy was intended to dissuade from smoking are simply funneled into the criminal networks and exposed to other health risks from unregulated tobacco.

Additionally, Australian Tax Office and Federal and State police resources are diverted to dealing with this growing criminal problem at a cost unknown to NATR.

There can be little doubt that the pricing deterrent subscribed to by Australian governments has been a significant strategic failure - except insofar as it has been a massive revenue earner for governments, but that money comes directly from the pockets of those smokers who abide by the law.

The \$500 million *chop chop* market caters to those who do not and its revenues are not only lost to government but incur a substantial administrative cost burden for enforcement agencies.

Nevertheless, we do not anticipate any imminent announcement that the failed policy has been abandoned or that adequate enforcement budgets have been allocated to stamp out the criminal activity.

CoAG REQUIREMENTS FOR REGULATION IMPACT ASSESSMENT

NATR members believe that the regulatory process which was followed by NSW Health in the development of the proposed ban/restriction on display of tobacco products in shops was flawed on many grounds.

It was in breach of NSW obligations for regulation impact assessment as a member of the Council of Australian Governments in that from 2004 until the recent announcement that display restrictions were no longer being pursued, no draft regulation or discussion paper had been developed (or at least made publicly available) and the "consultation" on the subject was originally intended to be a single 90 minute round table discussion with retail industry representatives.

The guidelines for Regulatory Impact Statements (RIS) issued by the Office of Regulation Review note that *while much regulation is necessary and beneficial this is not always the case. In some circumstances, regulation may not be the best means of achieving relevant policy objectives.*

A RIS has seven key elements which set out:

- 1. the problem or issues which give rise to the need for action;*
- 2. the desired objective(s);*
- 3. the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);*
- 4. an assessment of the impact (costs and benefits) on consumers, business, government, the environment and the community of each option;*
- 5. a consultation statement;*
- 6. a recommendation statement; and*
- 7. a strategy to implement and review the preferred option.*

The CoAG Principles and Guidelines require an assessment of the need for regulation. The process commences with the question, “What is the problem that needs addressing?” and the proposed regulation should be demonstrably capable of delivering the solution - not indulging in speculative social experimentation.

Which leads us to the key issue in relation to exposure of tobacco products at point of sale: can it be objectively demonstrated that restricting or banning display of tobacco products would lead to the desired policy objective, which we take to be a reduction in tobacco use? The answer is clearly and unambiguously **no**, in which case it would be regulation for regulation’s sake, based on the false proposition that display “causes” consumption. Unless that causal relationship can be demonstrated, there is no valid basis for any such display bans. And that holds true for Queensland and Western Australia, despite the fact each of those States has proceeded with such restrictions.

The RIS process requires that consideration be based on sound science and economic rigor. Neither was the case in relation to tobacco product displays.

While the process in New South Wales has reached the correct conclusion in relation to display of tobacco products, neither the government nor NSW Health publicly announced that the “ban” proposal had been abandoned until the *Sydney Morning Herald* obtained documents under FOI and Mr Sartor was obliged to make a statement.

The CoAG Principles and Guidelines require that quantitative analysis is needed to support any new regulation. A systematic examination of all the advantages and disadvantages of each practicable alternative way of achieving the objective is the basic feature of the economic appraisal that is required to be carried out.

Regulation already costs the Australian economy approximately \$86 billion per year⁷ and acts as a tax on business and the community. New regulation is required to deliver **real and measurable beneficial outcomes** and avoid perverse consequences. As we have seen, NSW Health’s approach was to ignore NATR’s concerns about the impacts of such a display ban/restriction on small business throughout the State.

A MORE RIGOROUS MODEL OF REGULATION IMPACT ASSESSMENT

The RIS process as it currently stands is not effective. Assessment of impacts is often haphazard and sometimes appears to be no more than box-ticking: impact assessments are required but that they be substantive and valid is not. It is clear that some RISs are written to justify the intended course of action.

NATR commends for the consideration of the Committee whether the adoption of a system similar to that required by the United States *Data Quality Act* would strengthen the regulatory process in New South Wales.

The *DQA* was introduced as part of the financial year 2001 *Consolidated Appropriations Act (Public Law 106-554 section 515)*.

⁷ *Holding Back the Red Tape Avalanche*, November 2005, Australian Chamber of Commerce and Industry

It required the US Office of Management and Budget to develop government-wide standards for the quality of information used and disseminated by the United States government. The legislation seeks to ensure and maximize the quality, objectivity, utility and integrity of information (including statistical information) disseminated by US federal agencies and upon which government decisions might be based.

The legislation directed the OMB, in implementing the data quality provision, to issue guidelines for data quality which would define four key terms - “quality”, “objectivity”, “utility” and “integrity” and for other agencies to issue their own conforming guidelines in response.

The intention of the *DQA* is to base government decision-making on information which is objectively accurate and valid. This would be likely, in our view, to promote decision-making which is transparent, based on sound science which would be the basis of rational regulation. Obversely, it would help avoid the introduction of bad or opportunistic policy (that is, policy unsupported by objective facts, so far as they can be established).

In passing, it is also more likely, in our view, to be able to take into account the likely regulatory impacts of government decisions and result in a more comprehensive cost-benefit evaluation of any proposed government regulation.

CONCLUSION

Although the proposal to ban display of tobacco products in shops in New South Wales is no longer under consideration, there is no guarantee that such a proposal might not be raised again at some point.

NATR commends for the consideration of the Joint Select Committee the need for more rigorous assessment of proposed regulations, based on objectively verifiable data and demonstrable logic.

In the instance of the proposed ban on display of tobacco products, no causal relationship between ban and policy objective was demonstrated, nor could the achievement of reduced tobacco consumption overall be shown to result from the proposed ban.

Tobacco-control policies and programs appear to us to be ideologically driven and contrary to the personal freedoms of adults and the entitlement of small businesses to use their commercially valuable private property space as they see fit.

Other areas of tobacco-control - such as the artificial inflation of the over-the-counter price of tobacco products - can be demonstrated to have had contrary and very deleterious effects.

All of the above leads us to urge the stringent application of the principles which already exist in CoAG requirements for regulation assessment. Such principles might be strengthened by the adoption of legislation similar to the United States’ *Data Quality Act*.