

Chapter 2

Key issues

2.1 The retail sale of legal tobacco products is a lawful economic activity. However, the committee received evidence that high levels of federal and state regulation are impeding business and leading to adverse outcomes that particularly affect small retailers. This chapter examines some of the issues raised in that evidence, including reduced sales and loss of market share, with consequent impacts on the viability of small businesses.

Impact of tobacco regulation on small business

2.2 The National Retail Association told the committee that there is an 'excessive red tape burden on retailers in each state' that has added 'real complexity to a category that isn't warranted'.¹ According to the National Retail Association, for retailers operating within and between jurisdictions, the complex and sometimes inconsistent regulation has created an onerous compliance burden. As one retailer told its representative body, 'I feel like I'm in the business of compliance and I do a little bit of retailing on the side'.²

2.3 MGA Independent Retailers (MGA) said that the high level of regulation is a disincentive to tobacco retailers, who are burdened in the day-to-day operation of their businesses:

A substantial number of MGA members in the independent supermarket and liquor sector have been adversely affected by the imposition on them of many tobacco sales regulations that have become an unnecessary burden in their day to day business operations...Such barriers to the freedom to do business without restrictions acts as a disincentive, particularly for small business owners, and also has the added disadvantage of driving an element of criminality into an industry that previously traded without fear of any such impediment.³

2.4 The Australian Lottery and Newsagents' Association also expressed concern at regulation that complicates business operations and which exposes employees to higher levels of risk through inadvertent non-compliance:

Tobacco is often the category where this occurs through regulatory interventions across multiple jurisdictions. These create further uncertainty and onerous difficult new obligations for our members and their staff to

1 National Retail Association, *Submission 7*, p. 1.

2 Quoted by Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 14.

3 MGA Independent Retailers, *Submission 9*, p. 2.

navigate. This increases risk for them and inequitably impacts member small businesses.⁴

Variation in regulation

2.5 The National Retail Association observed that national retailers must comply with multiple regulatory regimes that differ with respect to signage, storage, licensing, ticketing, definitions of tobacco products, and sales to minors.⁵ Sands Fourth Estate Pty Ltd referred specifically to the absence of standard regulations for price boards, highlighting the importance of the information presented thereon:

...there is no standard size price board between all the states. Each state has [its] own size requirements. The price board is the only visual way to retail tobacco products to customers. When it is small, it is hard for the customers to select tobacco products...customers are extremely price conscious. They rely on the price board to determine the cheapest and best value tobacco products. The size of the price board also makes it very difficult to display all the prices of all the products. This means customers are asking for the prices of products that are not on display. This requires us retailers to look up the price in a folder or in the computer which means it adds to time and labour costs.⁶

2.6 In another example, submitters and witnesses stated that there is variance across jurisdictions in the number of cash registers from which an outlet can sell tobacco products. The National Retail Association considered New South Wales to be the worst example of this red tape, as that state only allows for a single point of sale at each outlet: 'This impacts retailers' ability to serve their customers in an efficient manner...it often forces customers to wait in a queue for no good reason'.⁷

Effect on customer service

2.7 Among the many regulations, submitters and witnesses argued that the efficacy of tobacco retail is most affected by plain packaging and display bans. Jos de Bruin, Chief Executive Officer from MGA, said that these two measures made it difficult to expeditiously serve customers, which can create staff/customer tension:

The 'going dark', if you like, displays were rolled out by individual states...it has made it more difficult to serve customers. Being dark, you do not know where certain tobacco products are located. You then have to find them, and of course you are limited to how long that door can be opened, because you are not allowed to display the tobacco inadvertently. Then,

4 Australian Lottery and Newsagents' Association, *Submission 10*, p. 2. Also see: National Retail Association, *Submission 7*, pp. 4–5.

5 National Retail Association, *Submission 7*, p. 3.

6 Sands Fourth Estate Pty Ltd, *Submission 6*, p. 1. Also see: National Retail Association, *Submission 7*, pp. 3–4.

7 National Retail Association, *Submission 7*, p. 4. Also see: Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 14, who added that customers might also have to change queues part-way through being served at another cash register.

since plain tobacco packaging...that has made it even more problematic, because we are actually slowing our service to customers, which is annoying them, and consequently we do have disgruntled customers, and at times we are at risk of losing them to other businesses.⁸

2.8 According to Cignall Specialist Tobacconist, plain packaging has also had a more general effect on business operations:

Retailers for the past five years have had to use additional resources through both time and staffing as it has become more difficult to place an order or unpack a delivery and check against the invoice, purely because it is hard to see the brand/variant of each item. This leads to higher error rates for suppliers, distributors and retailers when dealing with tobacco products.⁹

Compliance costs

2.9 Most submitters and witnesses said that federal and state regulation imposes significant and expensive compliance costs on tobacco retailers. Much of this cost arises from the inability to readily identify specific products. For example, Sands Fourth Estate Pty Ltd estimated that it takes about 30 per cent extra time to unpack/check stock at the time of delivery, and the same amount of time to sequentially store tobacco products ready for customers:

[Still] it takes longer to find the requested products for customers. The size of the price board and the plain packaging adds approximately 40% to time and labour costs.¹⁰

2.10 MGA said that the inability to readily identify tobacco products has also increased the incidence and cost of 'shrinkage':

The introduction of plain packaging has also resulted in a higher number of incorrect products being provided to customers. This has increased levels of shrinkage where customers have received a higher valued product for the incorrect monetary sum and resulted in an increase in returned products, where customers have returned an incorrectly provided product, often making it unable to be resold. It is difficult to quantify these losses in financial terms.¹¹

2.11 Submitters identified fitout—such as display cabinets, registers and database upgrades—as another area in which tobacco retailers incur significant compliance costs.¹² MGA said, for example:

8 Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 14. Also see: Cignall Specialist Tobacconist, *Submission 14*, p. 1.

9 Cignall Specialist Tobacconist, *Submission 14*, p. 1.

10 Sands Fourth Estate Pty Ltd, *Submission 6*, p. 1. Cignall Specialist Tobacconist noted that the incidence of theft has increased as staff search for requested products: *Submission 14*, p. 1.

11 MGA Independent Retailers, *Submission 9*, p. 5. Also see: Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, pp. 15–16.

12 See, for example: National Retail Association, *Submission 7*, p. 4.

The imposition of removing smoking products from view has imposed a cost burden on retailers who have been required in many cases to reconfigure the front end and point of sale sections of their stores and retrain staff at a considerable expense...The training of staff not only comes at a significant wages cost to our stores, but also creates a noteworthy rostering disadvantage, removing staff from other areas of the store where they are often required.¹³

2.12 Wick and Wire Co provided similar evidence in relation to its small (vaping) business, which will shortly come within the ambit of Victoria's tobacco legislation:

I estimate that I will now need to spend per store a further:

- up to \$30,000 on custom lockable cabinetry including new displays that fall into the 4 square meters per store currently allocated. With over 1000 items in store we require a large amount of lockable storage to comply
- up to \$18,000 in wages for specialty trainers to retrain staff
- up to \$15,000 in contractor costs for between 150–200 hours per store spent reconfiguring stores to come up to compliance
- \$2000 in costs to frost windows so that products are not available to be seen by the public from the outside
- \$2000 in costs to move existing security cameras, to allow for viewing around frosted areas
- \$4000 in costs to reconfigure existing menus into signboards & digitized versions
- \$1500 in costs for additional signage to the stores and covering up existing cabinetry.¹⁴

Themes in the regulation of tobacco retail

2.13 This section of chapter two examines the following themes in the regulation of tobacco retail: impact on small to medium enterprises; trade in illicit tobacco; government revenue; and ability to retail alternative nicotine delivery systems.

2.14 Submitters and witnesses supported public health objectives but questioned whether retail regulation effectively targets tobacco smoking. For example, the Australasian Association of Convenience Stores Limited said that 'no reduction in smoking can be attributed to the plain packaging laws'.¹⁵

2.15 The Australian Lottery and Newsagents' Association argued that there should be evidence-based outcomes to justify the regulatory burden on small businesses:

13 MGA Independent Retailers, *Submission 9*, p. 4. The submission estimated additional training and service costs for plain packaging and display ban measures: pp. 5–6.

14 Wick and Wire Co, *Submission 13*, p. 1. Also see: Soulblu, *Submission 18*, p. 6.

15 Australasian Association of Convenience Stores Limited, *Submission 1*, p. 4.

...our members operate in a strictly regulated and controlled environment in relation to the sale of tobacco products...They incur significant and expensive time and management burdens in their businesses already to ensure tobacco products sold are all in plain packaging, that tobacco products are kept out of sight behind closed doors, that relevant signage is posted, and, most importantly, that tobacco products are not sold to anyone under the age of 18. The trade-off for these economic burdens born [sic] by small businesses like our members should be a societal outcome that demonstrably reduces the harmful effects of smoking in our community, while not unfairly or unnecessarily impacting the health, safety and economic opportunities available to our members.¹⁶

Impact on small to medium enterprises

2.16 Some peak bodies expressed the view that the regulation of tobacco retail disproportionately impacts small business and impedes fair competition. In particular, the Australian Lottery and Newsagents' Association submitted:

Fair competition means a just, open, and equitable competition between business competitors. By way of comparison, the major retailers have considerably more resources and scale with which to incorporate new compliance costs and process structures, therefore these need to be more carefully designed so as not to have the effect of inequitably impacting small businesses more than their competitors.¹⁷

2.17 Ben Kearney from the Australian Lottery and Newsagents' Association provided the following example of a regulation that impacts smaller retailers more so than larger retailers:

...an example is the flat tobacco licence fee in Tasmania, which will reach \$1,097 next January [from \$306] and which is starting to have the effect of many of our smaller retailers indicating that they will leave the tobacco category. This policy will likely result in gifting this category to the major retailers over time, which is an inequitable approach and unquestionably unfair for our small retailers.¹⁸

2.18 In another example, the committee heard that over-regulation through duty rate increases particularly affects small businesses. CTC Tanilba Bay indicated that small businesses are consequently becoming less viable:

The ever increasing tax on tobacco products is becoming a blatant money grab...The impact is becoming ever more present in our industry as businesses are being forced to reduce trading hours and reduce margins

16 Australian Lottery and Newsagents' Association, *Submission 10*, p. 2; Alliance of Australian Retailers, *Submission 15*, p. 1.

17 Australian Lottery and Newsagents' Association, *Submission 10*, p. 3. Also see: Australasian Association of Convenience Stores Limited, *Submission 1*, p. 1; Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 22.

18 Ben Kearney, General Manager, Policy, Government and Stakeholder Relations, Australian Lottery and Newsagents' Association, *Committee Hansard*, 16 May 2016, p. 26.

which is leading to fewer hours for staff and less employment opportunities as overheads increase and profits go down.¹⁹

2.19 The committee heard that tobacco products are an important retail item for many businesses.²⁰ The Australian Lottery and Newsagents' Association said that these products provide 'an important share of revenue and staff hours in many small businesses', in addition to encouraging sales of higher margin products.²¹ A representative from the Australasian Association of Convenience Stores Limited estimated revenue at 38 per cent on average of its members' sales:

It can be up to 40 per cent or greater, but on average it is about 38 per cent, and it has been that figure for many years. Importantly, it is about 25 per cent of a typical store's profitability or their margin...without tobacco, many of those retailers are at risk of going broke.²²

Trade in illicit tobacco

2.20 Overwhelmingly, submitters and witnesses expressed concern at the trade in illicit tobacco, arguing that regulation (including taxation) is increasing the cost of legal products, thereby leading customers to purchase cheaper illegal products.²³ Cristie Bowler, National Operations Manager for Cignall Specialist Tobacconist, said:

Every time there is a price increase consumers are not ready to give up smoking, but what we are seeing is that they have reached a tipping point. Everyone has a unique tipping point where they are not prepared to pay that price any more, and that is when they move to the illicit trade.²⁴

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- 19 CTC Tanilba Bay, *Submission 2*, p. 1. Also see: MGA Independent Retailers, *Submission 9*, p. 4; Cristie Bowler, National Operations Manager, Cignall Specialist Tobacconist, *Committee Hansard*, 16 May 2017, p. 28, who agreed that over-regulation is discouraging long-term participation in the tobacco retail industry.
- 20 Tobacco retail is also important to cashflow: Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 18.
- 21 Australian Lottery and Newsagents' Association, *Submission 10*, p. 1. Also see: Australasian Association of Convenience Stores Limited, *Submission 1*, pp. 1 and 8; National Retail Association, *Submission 7*, p. 5; Alliance of Australian Retailers, *Submission 15*, p. 1; Andrew Gregson, Head of Corporate and Legal Affairs, Australasia, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 6. Also see: Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, pp. 14–15 (for similar comments in relation to larger retailers).
- 22 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 19.
- 23 Australasian Association of Convenience Stores Limited, *Submission 1*, pp. 4 and 8; Imperial Tobacco Australia, *Submission 3*, p. 4; National Retail Association, *Submission 7*, p. 5; Australian Lottery and Newsagents' Association, *Submission 10*, p. 2; Cignall Specialist Tobacconist, *Submission 14*, p. 2; Alliance of Australian Retailers, *Submission 15*, p. 2.
- 24 Cristie Bowler, National Operations Manager, Cignall Specialist Tobacconist, *Committee Hansard*, 16 May 2017, p. 24.

2.21 Imperial Tobacco Australia agreed that restricting supply (through price, tax or other measures) will not reduce demand for tobacco products. Instead, consumers will look to other sources:

The concept that curtailing supply automatically cancels demand is both logically and factually absurd. Prohibition of alcohol in the United States (and in Russia and Scandinavia) famously didn't work. The achievement of excess tobacco regulation has been to remove the free choice of adult consumers and to increase the demand for illicit tobacco. Demand is not affected by a reduction in one channel of supply. Consumers simply search either for a new method of supply or, more likely, avail themselves of an existing alternative.²⁵

2.22 Jos de Bruin (MGA) highlighted that the loss of trade adversely affects tobacco retailers' legal sales:

A number of our members have already complained that their sales year-on-year are down not because the consumer is smoking less or using tobacco products less; they are actually buying illicit tobacco from other sources. You can buy 100 sticks for \$30 or you can buy chop-chop.²⁶

2.23 Submitters and witnesses told the committee that the increased cost of legal tobacco products has also resulted in criminal elements increasingly targeting retail outlets.²⁷ Although data appears difficult to obtain, anecdotally there is a rising incidence of tobacco-related crime. Cignall Specialist Tobacconist submitted, for example:

Many stores have been victim to burglaries either at night or assault and robberies during the day, due to the high cost of tobacco products and the ease [with] which you can move this stolen product. Retailers have had to spend thousands of dollars increasing security in their stores, while thieves continue to become either more creative or more aggressive.²⁸

2.24 Jeff Rogut, Chief Executive Officer of the Australasian Association of Convenience Stores Limited, illustrated the problem among its members:

I do have one example that I called for—just to get a snapshot—from one retailer, who is reasonably organised. In the last four years—and they run just over 100 stores—they have lost about \$50,000 worth of tobacco to robberies. Whilst the robbery, of itself, is an issue, and the tobacco is an issue, the bigger issue is the people and the trauma that is being caused to

25 Imperial Tobacco Australia, *Submission 3*, p. 5. Also see: MGA Independent Retailers, *Submission 9*, p. 6.

26 Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 16.

27 Australasian Association of Convenience Stores Limited, *Submission 1*, pp. 6–7; MGA Independent Retailers, *Submission 9*, pp. 3–5 and 7–8; Australian Lottery and Newsagents' Association, *Submission 10*, p. 2; Alliance of Australian Retailers, *Submission 15*, p. 2.

28 Cignall Specialist Tobacconist, *Submission 14*, pp. 1–2.

staff in these stores. Most of our stores trade 24 hours, so we do not really have as much happening with the ram raids. What we are seeing is the huge costs that retailers are putting in for security. That is for personal alarms, reinforcing glass and lockable doors. They are now putting fog or smoke devices in the stores that envelop the store in smoke if they are attacked and robbed. That on its own cost about \$7½ thousand. But, to protect their people and their customers, it is a cost that our members are actually investing in their businesses.²⁹

2.25 In addition to heightened security costs and issues, the committee heard that it is increasingly difficult for tobacco retailers to obtain insurance that covers the theft of tobacco stock. Jos de Bruin said that insurance costs are higher and stock levels are subject to caps.³⁰ However, Cristie Bowler from Cignall Specialist Tobacconist indicated that it might not always even be possible to get insurance:

Every company is different. We are finding that a lot of underwriters will not touch tobacco as we are dealing with certain insurance companies. They have had to then search for other underwriters. This is only going on their hearsay. But every time we try to get an insurance policy for stores it becomes very difficult.³¹

Government response to the illicit trade

2.26 Submitters and witnesses expressed frustration with the Australian Government's commitment to tackling the trade in illicit tobacco.³² Sami Hakim from Imperial Tobacco Australia indicated that the Department of Immigration and Border Protection had 'cracked down' on importers but 'the retail end of the equation has not seen significant or sufficient attention'.³³ Jeff Rogut agreed, saying 'Yes, Border Force do a terrific job at the border, but it is not happening at street level'.³⁴

2.27 The committee heard that prohibitions on the retailing of illicit tobacco are not being enforced. Jeff Rogut suggested this might be due to confusion about responsibilities:

29 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 20. Cignall Specialist Tobacconist noted that expensive security measures are increasingly a condition of insurance: answer to question on notice (received 30 May 2017), p. 1. Also see: Alliance of Australian Retailers, *Submission 15*, p. 2.

30 Jos de Bruin, Chief Executive Officer, MGA Independent Retailers, *Committee Hansard*, 16 May 2017, p. 16.

31 Cristie Bowler, National Operations Manager, Cignall Specialist Tobacconist, *Committee Hansard*, 16 May 2017, p. 25. Also see: Ben Kearney, General Manager, Policy, Government and Stakeholder Relations, Australian Lottery and Newsagents' Association, *Committee Hansard*, 16 May 2016, p. 26.

32 Action 6.3.6 of the *National Tobacco Strategy 2012–2018*.

33 Sami Hakim, Government and Stakeholder Relations Executive, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 1.

34 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 22.

...our members will put up actual addresses of where they know this product is being sold, and there is very little action, because Border Force suggests that it is a Victoria Police issue, just using that as an example. Victoria Police say it is a Department of Health issue...There just seems to be total confusion in terms of who should be policing it. So, where our retailers will be mystery shopped to make sure they are not selling to underage kids, the fines are enormous for selling one packet of product that is not in a plain pack—\$220,000. I have not seen one retailer, one market operator, receive such a fine. So I think it is farcical on the ground to say that enforcement is working. It is not.³⁵

2.28 Cristie Bowler shared a view that government departments and agencies simply don't want to take responsibility for enforcing tobacco legislation, and retailers of illicit tobacco are acting with impunity:

...there is no responsibility with regard to penalties. Retailers [of illicit tobacco] are openly selling this anywhere and everywhere, but no-one wants to know. We have raised it with police, councils, the health department and the [Australian Taxation Office]. No-one wants to take responsibility. It seems to be that, although there are penalties in the legislation, we do not see anyone being penalised for selling this product. Retailers are very frustrated, because they are the ones doing the correct thing.³⁶

2.29 Andrew Gregson from Imperial Tobacco Australia described a specific proposal from the tobacco industry to boycott these 'retailers who [are] doing the wrong thing':

One of the key factors of the illicit tobacco market in Australia is that, to a significant extent, it is embedded within the legal supply chain and it is not particularly difficult to buy...This measure we proposed would not be the silver bullet to solve illicit tobacco, but it would seriously impact the retail side of the equation. It would stop those retailers who are currently operating both a legitimate and an illegitimate business from doing so. They would need to choose, and it is pretty obvious which side they would choose.³⁷

35 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 22.

36 Cristie Bowler, National Operations Manager, Cignall Specialist Tobacconist, *Committee Hansard*, 16 May 2017, p. 24. Also see: Australasian Association of Convenience Stores Limited, *Submission 1*, pp. 8–9, which argued that 81 per cent of Australians believe there should be tougher penalties for selling illicit tobacco.

37 Andrew Gregson, Head of Corporate and Legal Affairs, Australasia, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 4. Also see: Imperial Tobacco Australia, *Submission 3*, p. 5; Australian Competition and Consumer Commission, 'British American Tobacco Australia Limited & Ors – Authorisation – A91550', <http://registers.acc.gov.au/content/index.phtml/itemId/1198125/fromItemId/278039> (accessed 13 June 2017).

2.30 The Australian Competition and Consumer Commission rejected the proposal, on the basis of competition concerns, in a draft determination issued in December 2016.³⁸ Imperial Tobacco Australia emphatically denied that the proposal is attempted collusion aimed at enhancing its proponents' market share (already in excess of 95 per cent). Andrew Gregson said:

...in this instance our interests and those of the public health agencies, including the health department, are aligned. It is their job to oversee the plain packaging legislation. It is their job to tackle illicit tobacco, and they are, in our opinion, spiking an opportunity to do it by removing it from the legitimate tobacco trade.³⁹

2.31 Imperial Tobacco Australia suggested that the Department of Health does not consider illicit tobacco to be a serious problem in Australia. However, 'there are no reports of which we are aware that say illicit tobacco in Australia sits at zero. Clearly it does not'.⁴⁰

Government revenue

2.32 The tobacco industry is a significant contributor to government revenue. In 2016–2017, tobacco excise and customs duty is expected to amount to \$10.16 billion.⁴¹ Submitters—such as Imperial Tobacco Australia and the Australasian Association of Convenience Stores Limited—highlighted that the industry contributes also through the payment of other taxes and through its employment of Australian workers.⁴²

2.33 In contrast, illicit tobacco sales could account for as much as 14.0 per cent of total tobacco consumption (equivalent to an additional \$1.49 billion in revenue).⁴³

38 Australian Competition and Consumer Commission, 'British American Tobacco Australia Limited & Ors – Authorisation – A91550', <http://registers.accc.gov.au/content/index.phtml/itemId/1198125/fromItemId/278039/display/accDecision> (accessed 13 June 2017).

39 Andrew Gregson, Head of Corporate and Legal Affairs, Australasia, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 4. Also see: p. 5; Imperial Tobacco Australia, *Submission 3*, pp. 6–8.

40 Andrew Gregson, Head of Corporate and Legal Affairs, Australasia, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 5. Mr Gregson noted that any tobacco manufacturer is able to participate in the boycott. Also see: Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 23.

41 *Budget 2016–17*, http://budget.gov.au/2016-17/content/bp1/html/bp1_bs4-02.htm (accessed 13 June 2017).

42 Australasian Association of Convenience Stores Limited, *Submission 1*, p. 3; Imperial Tobacco Australia, *Submission 3*, pp. 1–2; Alliance of Australian Retailers, *Submission 15*, p. 1.

43 KPMG UK, *Illicit tobacco in Australia, 2015 Full Year Report*, 15 April 2016, p. 6, <https://home.kpmg.com/content/dam/kpmg/pdf/2016/04/australia-illicit-tobacco-2015.pdf> (accessed 13 June 2017). Also see: Department of Health (WA), *Submission 4*, p. 3, which stated that the methodological approach has previously been controversial.

2.34 The Australasian Association of Convenience Stores Limited commented on this 'lost' revenue, stating that it is in the Australian Government's interests to enforce tobacco legislation and to support small businesses that retail legal tobacco products, thereby providing employment and contributing in the form of taxes.⁴⁴

Refund of duty (drawback)

2.35 Imperial Tobacco Australia raised a specific issue related to tobacco control measures. Its submission identified refund of duty (drawback) as a specific area of red tape involving a 'complex, burdensome and redundant' process that incurs unnecessary business costs.⁴⁵

2.36 Imperial Tobacco Australia stated that a measure temporarily introduced by Customs Amendment Regulation 2012 (No. 8)—to simplify the drawback process—was 'extremely effective and praised by government officials and the industry'.⁴⁶ Imperial Tobacco Australia (ITA) argued that the unnecessary red tape should be eliminated with the permanent re-introduction of this measure:

Making the process permanently available is a relatively straightforward task, carries demonstrable benefits for government, Australian businesses, the environment and the Australian public. ITA understands that there is cross-party support for the measure.⁴⁷

2.37 Andrew Gregson speculated that the reason for the continued existence of this example of red tape is due to antipathy toward the tobacco industry:

Let's face it: we are the tobacco industry. Taking up any sorts of cudgels for the tobacco industry rarely provides you with a great deal of public exuberance...by the same token, for governments or indeed parliaments that are serious about removing red tape, this is one that can be done swiftly and efficiently and...without any opposition whatsoever.⁴⁸

44 See, for example: Australasian Association of Convenience Stores Limited, *Submission 1*, pp. 4 and 6–7.

45 To claim a refund of customs duty, unsaleable stock must first be re-exported to the point of manufacture. In 2015–2016, Imperial Tobacco Australia re-exported 10 shipping containers at a cost of \$50 000 (excluding capital costs) to claim \$15.8 million drawback: *Submission 3*, p. 3.

46 This measure allowed for imported tobacco products to be destroyed in Australia on the implementation of plain packaging. However, it was an interim measure only that expired on 30 April 2013. Also see: Imperial Tobacco Australia, answer to question on notice (received 30 May 2017), p. 2.

47 Imperial Tobacco Australia, *Submission 3*, p. 9.

48 Andrew Gregson, Head of Corporate and Legal Affairs, Australasia, Imperial Tobacco Australia, *Committee Hansard*, 16 May 2017, p. 2. Also see p. 3, where Mr Gregson reflects on the current rationale for having two drawback processes (one for local and one for imported tobacco products).

Inability to retail alternative nicotine delivery systems

2.38 Submitters and witness expressed concern at the inability of tobacco retailers to sell alternative nicotine delivery systems (such as e-cigarettes).⁴⁹ In Australia, the manufacture, sale or supply of liquid nicotine is prohibited in all jurisdictions, meaning that e-cigarettes cannot be sold in any state or territory.⁵⁰

2.39 Philip Morris Limited submitted that this approach actually promotes harmful outcomes for Australian consumers:

...we cannot introduce smoke-free alternatives and Australian retailers cannot make them available to their customers due to government regulation, meaning the policy environment overseen by the Department of Health protects and comparatively promotes only the most harmful products in this category.⁵¹

2.40 Professor Sinclair Davidson concurred: 'in what must be one of the greatest public health failures of all time, harm reduction in Australia is prohibited'.⁵²

2.41 The Australian Lottery and Newsagents' Association submitted that the Australian approach is not good regulatory practice and that, consistent with international practice, Australia should look to develop better regulation of e-cigarettes:

...the approach to restrictions on electronic cigarettes is inconsistent with good regulation and...more available evidence should be considered regarding developing more reliable regulation of e-cigarettes. Approaches in other countries, like [New Zealand] and Canada, who are legalising nicotine e-cigarettes must also be looked at carefully and retailers should not be unfairly restricted.⁵³

2.42 Phillip Morris noted Article 1 of the *Framework Convention on Tobacco Control*,⁵⁴ suggesting that Australia is obliged to support the development and sale of

49 Australian Lottery and Newsagents' Association, *Submission 10*, p. 3; Cignall Specialist Tobacconist, *Submission 14*, p. 2; Alliance of Australian Retailers, *Submission 15*, p. 2.

50 H. Douglas, W. Hall and C. Gartner, 'E-cigarettes and the law in Australia', *Australian Family Physician*, Volume 44 No. 6, 2015, <http://www.racgp.org.au/afp/2015/june/e-cigarettes-and-the-law-in-australia/> (accessed 13 June 2017).

51 Philip Morris Limited, *Submission 17*, p. 2. Also see: Australasian Association of Convenience Stores Limited, *Submission 1*, p. 2; Wick and Wire Co, *Submission 13*, p. 3.

52 Professor Sinclair Davidson, *Submission 5*, p. 7.

53 Australian Lottery and Newsagents' Association, *Submission 10*, p. 3. Also see: Alliance of Australian Retailers Pty Ltd, *Submission 15*, p. 2; Philip Morris Limited, *Submission 17*, p. 3.

54 Article 1 of the World Health Organization Framework Convention on Tobacco Control broadly defines 'tobacco control' as a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke.

'reduced-risk products'.⁵⁵ However, e-cigarette red tape remains the product of an outdated and inappropriate regulatory scheme:

This sort of red tape directly denies the opportunity for tobacco retailers to sell less harmful products, while, in practice, it leaves the market open to companies who are overseas and who can sell e-cigarette style products without complying with local laws and product standards or paying tax. Indeed, it drives retailers out of Australia to set up offshore. It is influenced and driven by the inadequacies of a system designed decades ago to regulate only therapeutic goods or cigarettes, as well as the current approach and attitude of regulators.⁵⁶

Importation of nicotine

2.43 Individuals can import nicotine into Australia for use as an unapproved therapeutic good (such a smoking cessation aid). One import condition is that the individual must hold a prescription from a registered medical practitioner.⁵⁷ However, Mark Powell said that most Australians using 'reduced-risk products' do not satisfy this condition:

...it is highly unlikely that the vast majority of those people have a prescription—even under current law there is a huge illicit market in e-cigarettes and reduced-risk products—the people who are opting out of smoking or quitting smoking and are finding a way to do so are breaking the law to save their own lives. That is the situation that we have right now. As New Zealand and other countries increase the availability and regulation of these products, that problem is going to get much, much worse.⁵⁸

2.44 The committee heard that customers are interested in purchasing alternative nicotine delivery systems from tobacco retailers.⁵⁹ Concurrently, Jeff Rogut advised that small businesses could see opportunities in retailing these products: 'if you are looking at expanding the business or sustainability of the category, it certainly is a very viable alternative'.⁶⁰

55 Philip Morris Limited, *Submission 17*, p. 2.

56 Mark Powell, Manager, Public Policy, Philip Morris Limited, *Committee Hansard*, 16 May 2017, p. 8. Also see: Stuart Singleton, Business Owner, Wick and Wire Co, *Committee Hansard*, 16 May 2017, p. 10.

57 Therapeutic Goods Administration, 'Liquid nicotine and personal importation for use in electronic cigarettes', <https://www.tga.gov.au/behind-news/liquid-nicotine-and-personal-importation-use-electronic-cigarettes#.U7o-O8hiuDQ> (accessed 13 June 2017).

58 Mark Powell, Manager, Public Policy, Philip Morris Limited, *Committee Hansard*, 16 May 2017, p. 11.

59 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, pp. 19–20; Australian Lottery and Newsagents' Association, *Submission 10*, p. 3; Mark Powell, Manager, Public Policy, Philip Morris Limited, *Committee Hansard*, 16 May 2017, p. 10; Cristie Bowler, National Operations Manager, Cignall Specialist Tobacconist, *Committee Hansard*, 16 May 2017, p. 24.

60 Jeff Rogut, Chief Executive Officer, Australasian Association of Convenience Stores Limited, *Committee Hansard*, 16 May 2017, p. 20.

Achievement of public health objectives

2.45 The *National Tobacco Strategy 2012–2018* (NTS), policy frameworks and tobacco control measures are directed at achieving public health objectives.⁶¹ However, submitters contended that these objectives are not supported by the current approach to nicotine. Professor Davidson referenced the *International Journal of Drug Policy* in which a recent editorial stated:

Although nicotine is the addictive ingredient in tobacco, the well-documented harms associated with smoking stem from the carcinogens and gases in cigarette smoke rather than nicotine itself. Nicotine does not impair consciousness in the manner of other licit and illicit drugs; indeed, it often enhances it. For these reasons, it is perhaps the clearest instance of a drug where the 'delivery system' (the cigarette) rather than the drug itself causes harm. In light of the distinctive attributes of tobacco and nicotine, harm reduction approaches—in the form of safer nicotine delivery systems—would appear to have a lot to offer tobacco control and public health.⁶²

2.46 Similar to the licit/illicit tobacco market, Professor Davidson said that consumers will turn to illicit sources of nicotine if it cannot be lawfully supplied:

If consumers are unable to satisfy their demand for nicotine from the extant industry they will simply satisfy their demand from other (non-legal) sources. There are excellent reasons why it is preferable that consumers purchase their nicotine (in whatever form) from legal industry sources rather than illegal sources.⁶³

2.47 Some submitters and witnesses speculated about policy makers' aversion to alternative nicotine delivery systems, concluding that there is ideological opposition to the tobacco industry that surpasses all arguments based on public health objectives. For example, Professor Davidson submitted:

...the anti-tobacco lobby specifically does not want to pursue harm reduction strategies as they perceive that this will not result in an end to smoking and that it will not result in the end of the tobacco industry. That ideological choice—and a hatred of the industry itself—leads to individuals continuing to consume nicotine in harmful ways and imposing large health costs upon themselves and the public health system.⁶⁴

2.48 Mark Powell from Philip Morris Limited agreed that tobacco policy may be too focussed on combatting tobacco companies:

...the very influential actors in Australia—people within tobacco control within the department of health and particular tobacco control advocates—

61 Department of Health (WA), *Submission 4*, p. 1; Department of Health, *Submission 16*, p. 1.

62 K. Bell and G. V. Stimson, *International Journal of Drug Policy*, 26 (2015) 533-535, p. 533, [http://www.ijdp.org/article/S0955-3959\(15\)00095-X/pdf](http://www.ijdp.org/article/S0955-3959(15)00095-X/pdf) (accessed 2 June 2017).

63 Professor Sinclair Davidson, *Submission 5*, p. 9.

64 Professor Sinclair Davidson, *Submission 5*, p. 8.

have been very passionate about the fact that they think they are winning a war and suggest to you that their focus is on combating tobacco. Perhaps more appropriately, they would consider themselves, really, to be combating tobacco companies rather than actually supporting public health...it is an ideological fixed position.⁶⁵

2.49 Alternatively, the Australasian Association of Convenience Stores Limited appeared to question the underlying objective of tobacco control measures, stating that the 'actual main purpose' of regulation is not to achieve a reduction in smoking behaviours but to increase government revenue.⁶⁶

Regulatory framework for alternative nicotine delivery systems

2.50 Several submitters and witnesses told the committee that retailers need a regulatory framework for the sale of alternative nicotine delivery systems. Based on national and international growth in e-cigarettes, the Australasian Association of Convenience Stores Limited stated that 'the development of an appropriate legal framework for the sale of these products cannot be delayed'.⁶⁷ Mark Powell added that, commensurate with overseas jurisdictions, such a framework should be risk-based:

...it would be appropriate to set up an entirely new system of regulation...The far better way of looking at this would be to say: 'Look, these products are different. These are not cigarettes. They are a new category.' We would propose...that it would be regulated on the basis of the risk of the product...That is the basis on which tobacco control regulation has been established to date...These reduced-harm products—or what we at Philip Morris call reduced-risk products—are being regulated around the world with a much lighter hand that is appropriate to the risk of those products. It is just Australia, it would seem, that is not even looking at this approach.⁶⁸

2.51 Philip Buisson, Chief Executive Office of Soulblu, emphasised that e-cigarettes should be treated distinct from tobacco products, particularly by enabling product advertising and promotion based on health objectives:

...we have been grouped as a tobacco product and are not seen as an alternative and as a direct competitor against tobacco. Being ruled as tobacco has now limited all the good news that we can share with customers who are smoking and who are addicted. If there is a study saying

65 Mark Powell, Manager, Public Policy, Philip Morris Limited, *Committee Hansard*, 16 May 2017, pp. 12–13

66 Australasian Association of Convenience Stores Limited, *Submission 1*, p. 1.

67 Australasian Association of Convenience Stores Limited, *Submission 1*, p. 10. The submission advised that a survey of 4000 consumers showed significant support for such a measure: pp. 10 and 12. Also see: Stuart Singleton, Business Owner, Wick and Wire Co, *Committee Hansard*, 16 May 2017, p. 9.

68 Mark Powell, Manager, Public Policy, Philip Morris Limited, *Committee Hansard*, 16 May 2017, p. 11. Also see: p. 12.

that electronic cigarettes are far safer than tobacco cigarettes, it cannot be advertised. We may no longer help a customer who is looking for a safer method of nicotine delivery, or non-nicotine delivery, and we will not be able to help that person make an informed choice. So, therefore, we cannot release publicly any scientific evidence. We will not be able to advise a person on which electronic cigarette they should take. Keep in mind that these are electronic vaporisers; they vaporise a liquid. The only content that can link them to tobacco is nicotine.⁶⁹

2.52 Professor Davidson agreed that tobacco and nicotine products are not the same, and each should have their own regulatory framework:

To the extent that it is now widely accepted that the health risks associated with, say, electronic cigarettes are much lower than combustible cigarettes it is clear that regulating the two products (delivery technologies) in a like manner would be inappropriate. This regulatory approach would not benefit nicotine consumers, nor contribute to government revenue, nor would it target harm...The primary role of regulation should be to target harm.⁷⁰

2.53 E-cigarette retailers strongly supported the creation of a new regulatory framework for e-cigarettes. Philip Buisson highlighted that e-cigarettes do not always contain nicotine:

...the action of smoking has been demonised...the action of e-cigarettes, and what they produce, has also been demonised. All of a sudden, they have been classed as a tobacco product when they are actually a product of propylene glycol, vegetable glycerine, *nicotine at times*, and food flavouring. These liquids are heated to evaporation point, they are inhaled, and it seems like smoking.⁷¹

2.54 Wick and Wire Co, whose business primarily involves retailing e-cigarettes, similarly argued that its products are not in the same category as tobacco products: 'The products that we sell do not contain tobacco, nicotine or any of the other 6000+ chemicals that cigarettes contain'.⁷²

2.55 In these circumstances, the committee is not clear why e-cigarettes are being regulated similarly to tobacco products in some jurisdictions.

Committee view

2.56 Throughout the tobacco inquiry, the committee received substantial evidence of high levels of regulation that adversely affect small businesses which retail legal products. It is the committee's view that a market operates most efficiently when there is limited regulation which has clearly identified policy objectives—such as those connected to public health. The committee recommends that all governments review

69 Philip Buisson, Chief Executive Officer, Soulblu, *Committee Hansard*, 16 May 2017, p. 29.

70 Professor Sinclair Davidson, *Submission 5*, p. 1.

71 Philip Buisson, Chief Executive Officer, Soulblu, *Committee Hansard*, 16 May 2017, p. 29 (emphasis added).

72 Wick and Wire Co, *Submission 13*, p. 2. Also see: Soulblu, *Submission 18*, pp. 1–2.

their tobacco control measures and identify opportunities to refocus it and reduce the red tape burden on small retailers.

2.57 The committee heard that some tobacco control measures are not achieving, and are not likely to achieve, evidence-based public health outcomes. On the contrary, the committee heard that the regulation of tobacco retailing is preventing Australians from accessing less harmful alternatives to smoking, having the undesirable and unintended effect of encouraging criminal activity, while disproportionately affecting employees, employers and businesses that contribute to the national economy. The committee recommends that, in any review of tobacco retail regulation, non-evidence based regulation is identified and eliminated.

2.58 The committee is concerned that tobacco control measures have provided some Australians without the choice to legally purchase products that minimise personal harm. In this regard, the committee notes that the Australian Government appears to have done very little to 'identify the most appropriate policy approach' to alternative nicotine delivery systems (Action 6.7.5 of the NTS). Certainly, no such evidence was provided to the tobacco inquiry.

2.59 In a climate of deregulation and red tape reduction, the committee is reluctant to recommend the creation of a further regulatory framework. However, the committee accepts that there are a significant number of consumers who wish to purchase alternative nicotine delivery systems. Further, this is likely already occurring without the imprimatur of the law. The committee considers that lawful retail of such systems in a regulated environment is preferable to black market or loophole acquisition. The committee is persuaded that all governments should develop and implement an appropriate framework for alternative nicotine delivery systems.

2.60 On the periphery of retail regulation, the committee notes concerns about the drawback process for customs duty on tobacco. On the evidence received, it is not clear what the rationale is for the re-exportation requirement that Imperial Tobacco Australia indicated was expensive and unnecessary red tape. The committee recommends that the Department of Immigration and Border Protection should provide an explanation that justifies this requirement, failing which the red tape should be eliminated in a timely fashion.

2.61 The Parliamentary Joint Committee on Law Enforcement is currently inquiring into illicit tobacco.⁷³ The committee looks forward with interest to substantive recommendations that enable government departments and agencies to combat this trade. In the interim, the committee suggests that the Department of Health specifically note comments in this report regarding responsibility for, and enforcement of, illegal retail activity. As lead agency, the committee expects the Department of Health, assisted by the National Measurement Institute, to take a visibly more active role in enforcement activities.

73 Parliamentary Joint Committee on Law Enforcement, *Inquiry into Illicit Tobacco*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Illicit tobacco45 (accessed 13 June 2017).

2.62 With these comments in mind the committee makes the following recommendations:

Recommendation 1

2.63 The committee recommends that Commonwealth, state and territory governments review their tobacco control measures, with a view to:

- identifying opportunities to reduce the red tape burden on small retailers; and
- identifying and eliminating regulatory measures that are not evidence-based.

Recommendation 2

2.64 The committee recommends that Commonwealth, state and territory governments develop and implement an appropriate framework for alternative nicotine delivery systems.

Recommendation 3

2.65 The committee recommends that the Department of Immigration and Border Protection provide an explanation to justify the requirement for re-exportation of tobacco products on which drawback is claimed, failing which the requirement should be eliminated in a timely fashion.

Senator David Leyonhjelm

Chair