



Submission to the Senate Inquiry into Personal Choice and Community Impacts

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Introduction

Australia has a long history of paternalism. We invented the word ‘wowsers’ to describe everything from early closing to restrictions on mixed-sex bathing.¹ Historically, paternalism has been justified on mixture of moral, religious and social grounds. Today those arguments are now framed under the banner of public health.

It is the view of the Institute of Public Affairs that individuals should be free to live their lives according to their values and their preferences. The only activities that can be legitimately constrained are those which have a direct, material impact on the rights of others.

This is the perspective which we apply to paternalist public policy, also known colloquially as ‘Nanny State’ public policy. These policies consist of regulatory and taxation interventions aimed at restricting or influencing individual choices that affect primarily those individuals themselves. Formally, paternalism refers to regulatory interventions where ‘X acts to diminish Y’s freedom, to the end that Y’s good may be secured’.²

It is important to note that such interventions need not be *solely* justified on this ‘self-harm’ basis to be considered paternalistic. Many policies described as paternalistic today are sometimes rhetorically justified on the basis of their externalities. For instance, it is often argued that political action on obesity is necessary because of the costs that obesity imposes on the publicly-funded health care system. Such arguments, in our view, constitute the most policy relevant justifications for restricting freedom and choice.

However, closer attention to moral hazard dynamic here would suggest the appropriate approach would be to reduce taxpayer liability for unhealthy eating, rather than attempt to prevent unhealthy eating. Regulatory constraints such as community rating prevent the market from creating incentives for healthy eating choices. Such a ‘keyhole’ response would be both more direct and respectful of an individuals’ right to make choices about their own lives.³ Yet the fact that such policy responses are not on the cards is a clue that it is not a strict concern with externalities that is driving this debate. Hence the description of paternalism can be applied.

¹ Keith Dunstan, *Wowzers; Being an Account of the Prudery Exhibited by Certain Outstanding Men and Women in Such Matters as Drinking, Smoking, Prostitution, Censorship and Gambling* (Melbourne: Cassell Australia, 1968).

² John Kleinig, *Paternalism* (Oxford: Clarendon Press, 1984).

³ Tim Harford, *The Undercover Economist*, Rev. ed. (New York, NY ; Oxford, UK: Oxford University Press, 2012).

About this submission

This submission collates excerpts from a large amount of published work on the economics, philosophy and practicalities of paternalistic policies by Institute of Public Affairs researchers. It is not intended to be a comprehensive account of all policies that might be described as paternalistic, nor a complete collation of all work done by the Institute of Public Affairs in this area. Nevertheless, it hopefully gives a strong sense of the complicated ethical and practical issues raised by public policy that attempts to override or influence people's choices about risk.

The case against paternalism

The case against paternalism in public policy rests on two pillars. The normative case concerns philosophical issues with constraining freedom in order to save us from ourselves. The positive case concerns the practical consequences of specific policy interventions.

It is important to distinguish between 'hard' and 'soft' paternalism. While the distinction between the two is often blurry, soft paternalism refers to policy interventions that attempt to inform consumers about their choices while leaving those choice sets unchanged. These can include things like labelling requirements or information campaigns about harmful activity. So-called 'libertarian paternalism' or 'nudge theory' tries to rearrange choice hierarchies and influence consumers into choosing the (for instance) healthier option while retaining freedom of choice.⁴

Hard paternalism actively constrains choices, by regulating the circumstance in which a choice may be made, the availability of those choices, and the legality of the choices. For instance, smoking bans and bicycle helmet requirements are examples of hard paternalism.

The degree to which a paternalist intervention is objectionable depends on the degree to which it restrains freedom. Yet soft paternalism can also limit freedom. Labelling requirements impose a regulatory burden on firms that will likely be passed onto consumers, raising the cost of choices within a given choice set. Too often soft paternalistic interventions do not meet utilitarian standards of public policy efficacy.

There is also a very real risk of 'slippery slope' regulatory creep, as the introduction of one intervention establishes a coalition of political support for further, 'harder' interventions. It is often claimed that slippery slope arguments are fallacious in the context of paternalistic policy, but the recent proposals to introduce graphic warning labels and even plain packaging on alcohol should hopefully put those claims to rest.

In a liberal country there is a normative assumption that individual choices are the domain of individuals not the state. The choice of whether to consume a certain product - to drink, to smoke, to overindulge - is the business of the individual alone. The classical liberal model of the role of government is to provide public goods and correct market failures. It is not to control the lifestyles of individual citizens.

Paternalistic policies limit individual liberty in a number of ways. Hard paternalism prevents or constrains the exercise of choice, by prohibiting the consumption of certain goods or certain forms of conduct. Soft paternalism also has costs for liberty as well, involving higher regulatory burdens or higher taxation. Regulatory costs can also be used by firms to prevent competition and reduce consumer choice.

Paternalism violates one of the core ethical constructs at the heart of our liberal democracy: the claim that we are each capable of exercising rational and self-regarding decision making, and have the right to make such decisions at the ballot box. If we believe that claim holds true for voting, why do we not believe it holds true for market choice? It is important that policymakers understand the

⁴ Richard H. Thaler and Cass R. Sunstein, *Nudge : Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

full significance of their assertion that individuals are unable to make decisions on their own behalf, and that they require the assistance of higher authorities. This is in fact a radical anti-democratic argument which elevates policy-makers above the station of those from whom they derive their political legitimacy.⁵

The case for paternalism presents an interference in the liberty of the subject in order to assure the subject's own good. But it is not self-evident what that 'good' constitutes. There is a widespread normative assumption within the vast majority of paternalistic argument that a fully rational consumer would share the same matrix of preferences and values as the paternalist.

Yet as John Stuart Mill argued, '[W]ith respect to his own feelings or circumstances, the most ordinary man or woman has means or knowledge immeasurably surpassing those that can be possessed by anyone else'.⁶ An individual's preferences as to the trade-off between, for instance, longevity and hedonism, are the ultimate 'tacit knowledge', known only to the individuals themselves. No paternalist could hope to uncover the full arrangement of preferences in the society they seek to regulate. Paternalistic policies impose the preferences of the regulators over the regulated; that is, rather than restricting liberty for the good of the subject, they are restricting liberty for what they assume that good is.

Even if we grant that one cannot know one's own mind – that is, an individual cannot fully divine their own ultimate preferences – it is a heroic leap to suggest that those external to the individual have a better idea of an individual's preferences.

Finally, as Jeremy Bentham pointed out;

It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislator must know more? It is plain, that of individuals the legislator can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage.⁷

⁵ This argument is spelled out more fully in Chris Berg, *Liberty, Equality & Democracy* (Ballan, Vic.: Connor Court Publishing, 2015).

⁶ John Stuart Mill, *On Liberty* (London: J. W. Parker and Son, 1859).

⁷ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907).

The economics of paternalism

The case for paternalism has been given intellectual strength in recent years by the increased interest in behavioural economics. This branch of study focuses on systemic cognitive errors that cause the human mind to misjudge costs and benefits. Under the banner of ‘bounded rationality’, for instance, it has been demonstrated that humans weigh loss much greater than gain, lack self-control, favour the status quo, pay more attention to information that affirms their prior beliefs, and misjudge the long term costs of short term choices.

Nevertheless, the behavioural economics case for paternalism has been vastly overstated. When the findings of behavioural economics are applied to both sides of the policy divide, they urge not paternalism but modesty in what governments can and cannot do. It is indicative in this context that one of the earliest theorists of bounded rationality was Friedrich Hayek, the Austrian economist who saw market processes and individual liberty as a mechanism to overcome the limits of human knowledge and rationality.⁸

Policymakers are similarly vulnerable to systemic cognitive errors as consumers. For instance, Slavisa Tasic has shown how policymakers are susceptible to action bias – which encourages change over the status quo – the focusing illusion – in which we over-identify single factors as determinant – motivated reasoning – by which we rationalise preferred opinions, and the illusion of competence – which encourages us to overstate our capacity to impose change.⁹

A behavioural approach to policy making is more than simply discounting cognitive errors on both regulators and regulated individuals. While individual consumers may be susceptible to error, the consequences of those errors are limited to their own selves. By contrast, cognitive error on behalf of policy makers affects all those who live within their jurisdiction. Therefore, even it were possible to demonstrate that policymakers are more rational than consumers, it would have to be shown that their lingering irrationality would not create more harm than if choices were left to individuals themselves. This is the argument mounted by Don Bourdeaux and Eric Crampton:

[A] person has incentive to become adequately informed about impending choice situations only when that person is both decisive in, and personally impacted by, the decision. Stripping decisiveness or personal stakes from a decision maker moves him from the realm of rational ignorance, where there are real-world consequences attached to choices, to the realm of rational irrationality. Observed choices under such circumstances do not reveal the chooser's true preferences—i.e., the preferences the chooser would reveal if his choice were decisive.¹⁰

Nick Evans, in the *IPA Review*, noted that one manifestation of behavioural economic theory, ‘nudge theory’, is particularly paternalistic, if not dehumanising, as it treats citizens as mere consumers in a market-place only:

⁸ Roger S. Frantz and Robert Leeson (eds), *Hayek and Behavioral Economics (Archival Insights into the Evolution of Economics)* (London: Palgrave Macmillan, 2013).

⁹ Slavisa Tasic, 'Are Regulators Rational?' (2011) 17(1) *Journal des Economistes et des Etudes Humaine* article 3.

¹⁰ Donald J Boudreaux and Eric Crampton, 'Truth and Consequences: Some Economics of False Consciousness,' (2003) 8(1) *Independent Review* 27.

Like many sinister concepts, the idea of governments 'nudging' people may seem on first glance somewhat innocuous. Rather than relying on coercion such as using bans, fines and regulation to achieve social change, nudge employs a supposedly more subtle and, seemingly, less intrusive technique. It can involve stressing social norms, like pointing out most of your neighbours have paid their tax on time, to altering the environment by making it easier to find the stairs than the lifts.

But look a little deeper and you are left with an approach that could be considered deceptive, manipulative and lacking in transparency. In short, everything a democratic government should steer clear of...

The approach is based on the book, *Nudge: Improving Decisions about Health, Wealth and Happiness*, which was published by two US academics in 2008. It argues the public does not always act in their best interests, but often reacts badly when the state tries to point this out. A much better approach, it goes on to say, is to use behavioural science techniques to give people a little prod.

In many ways nudge is not a revolutionary concept. After all, individuals do it all the time in their interactions with family, friends and work colleagues. In business it is routinely deployed to influence the choices customers make. For example, any successful shop will spend time planning where and how they display their products to maximise the chance of people buying them. Of course, our interactions with businesses as consumers are entirely voluntary. Our interactions with the state are most certainly not.

To the supporters of nudge it is appealing because it provides the benefits of top-down regulation while avoiding many of the drawbacks: politicians can guide people to make the 'right choices' without dictating them and leaving themselves open to the dreaded accusations of acting like a Nanny State.

But that is where the problems start. The idea that politicians are in a position to presume to understand what people need, better than they do themselves, is unquestionably paternalistic. In a free society it is much better to engage in debate and explain to people why something should be so. That means giving people information and allowing them to reach conclusions about their own interests.

However, that is exactly what nudge is set up *not* to do. It treats people like consumers rather than citizens, presenting them with only the information required to lead an individual to a pre-defined conclusion.¹¹

Dr Mikayla Novak summarised the conceptual problems with the various theoretical justifications for behaviour-based taxes of Frank Ramsay, Arthur Cecil Pigou and nudge taxes. Of Ramsay, who proposed that taxes should be levied on commodities which have relatively inelastic demand when prices are changed, Novak writes:

The application of the Ramsay tax may also violate equity norms in taxation. Individuals on equivalent incomes consume different amounts of goods like tobacco, alcohol or food. So to single those goods out for higher taxation is inconsistent with the principle of horizontal equity – that people with an equal ability to pay should pay equal tax liabilities.

¹¹ Nick Evans, 'A "nudge" in the wrong direction' (2012) 64(4) *IPA Review* 16, 17-8.

Further, and as discussed below, it is well known that certain taxes are regressive in their effect, implying that individuals with the least ability to pay are paying relatively more in taxes (hence violating 'vertical equity')...

Indeed, it has been suggested within the public finance literature that the case for Ramsey taxes is significantly weakened if governments can pursue their equity objectives through other means.

There is also a fundamental inconsistency between the revenue-raising and consumption-abating purposes of Ramsey and other specific commodity taxes. According to Shughart, '[t]he underlying rationale for such taxes is that taxation will discourage the consumption of goods and services that the majority finds objectionable. But the Ramsey rule singles out products to be taxed precisely because taxation's impact on consumption is minimal. Hence, the regulatory and revenue-raising justifications for sin taxes work at cross-purposes.'¹²

Of Pigou, who advocated the use of taxes as a tool to correct externalities in the market, such as binge-drinking and passive smoking, Dr Novak argues:

The idea that taxes should be imposed on products that generate externalities remains a highly controversial subject.

The most prominent objection against Pigouvian tax regimes relates to the 'knowledge problem' described by classical liberal economist and political philosopher Friedrich Hayek. Specifically, the calculation of exact social costs generated by all market transactions would undoubtedly place prohibitive informational burdens on policymakers, thereby calling in question the practicality of Pigouvian tax design.

Even Pigou himself conceded in 1954 '[i]t must be confessed ... that we seldom know enough to decide in what fields and to what extent the state, on account of [the differential between private and public costs] could usefully interfere with individual freedom of choice.' When the impacts of special interest lobbying by public health activists on the formation of public policies are considered, it appears even less likely that governments would establish optimal tax rates to internalise the social costs of private consumption activities.¹³

Finally, of nudge taxes, Dr Novak writes:

The idea that governments should force or nudge individuals to make certain consumptive choices is tantamount to the tax policymaker stating to the consumer 'you may or may not know what's best for you, but regardless you choose not to practice what's best for you, so we'll make you do it.' Such paternalistic intervention in turn erodes the legitimacy of individual choice, as well as the exercise of responsibility and trial-and-error learning about individual preferences that accompanies such action.¹⁴

¹² Mikayla Novak, 'Nanny State Taxes: Soaking the Poor in 2012' *Institute of Public Affairs* (April 2012) 15-6.

¹³ Ibid 16.

¹⁴ Ibid 18.

Public health and paternalism

The use of government power is appropriate where it is considered necessary to protect public health. However, the meaning of the phrase 'public health' has become distorted, providing a dubious justification for the state to pursue paternalistic policies. Chris Berg outlined this distortion in 2008, in response to calls from AMA Victoria to the Victorian government to fund bariatric surgery for the chronically obese:

[It] is no doubt motivated by compassion, but illustrates some of the ways the debate about obesity has become severely distorted. Obesity is not a public health problem and should not be treated as one.

Until relatively recently, the phrase 'public health' indicated health problems that were actually public problems - sanitation, the control of epidemics, water quality, airborne pollution and so forth. But increased obesity is not a public health crisis like an outbreak of bird flu would be. Obesity is not contagious - when one person overindulges on fast food, their colleagues and neighbours aren't put at risk. And, in 2008, nobody orders pizza without being fully aware that cheesy crusts can lead to weight gain.

For these reasons, obesity is too often tragic, but it is first and foremost a private problem. Medical campaigners who seek to redefine the parameters of public health are eliminating the crucial policy distinction between public and private health concerns. When every health problem becomes a national crisis, no medical treatment is ineligible for government funding. Bariatric surgery may be an important, even necessary, tool to treat obesity, but it does not automatically follow that it should be paid for directly by the taxpayer.

Of course, the most common objection to this line of reasoning is the simple calculation that the cost of treating obesity now is far less than the cost of treating the consequences in the future - resolving heart disease and diabetes may be more expensive than bariatric surgery.

All public policy should be subject to economic assessment. But this is a slippery slope. Britain's National Health Service shows what can happen when the government makes all health problems its business - those calculations rapidly lose their compassion and become cruel assessments of moral, rather than medical, questions. Last week British PM Gordon Brown hinted that individuals whose lifestyle choices had created their health problems - obesity is the classic example - may be refused treatment in order to cut costs.

The only way to avoid this trap is to drop the conceit that all medical problems are public problems, and to reintroduce the idea that individuals should be responsible for their own health.¹⁵

Obesity and junk food

Proposals to restrict consumption of supposed 'junk food' come in many forms. In a 2008 *IPA Review* article, Louise Staley addressed a number of these proposals:

For some obesity activists the public-spirited response to this is to ban junk food advertising, ban suburban fringe development, build new public transport services, increase labelling requirements,

¹⁵ Chris Berg, 'Tackling obesity – should the public pay?' *The Age*, 6 January 2008
<<http://www.ipa.org.au/news/1523/tackling-obesity---should-the-public-pay-/category/9>>.

ban super-sized servings, tax junk food, and increase the number of bariatric surgeries done on Medicare.

And these are responses to reducing the number of adults who are obese and overweight. There are far more draconian options proposed for childhood obesity.

One commonly seen proposal is the restriction of fast food outlets in low income areas. Supporters of this heavy-handed restriction on civil liberties imply that poor people are incapable of making good food choices, and so the only option is to restrict their choices to good food. Yet recent research shows that while there is a greater preponderance of fast food outlets in low income areas, there are also more supermarkets. The choice is already there.

Another popular proposal is a fat tax - a tax on high calorie dense foods such as soft drinks, confectionary and much fast food.

The idea is if these types of foods are taxed to the point that reduces consumption and the proceeds are used to subsidise 'too expensive' healthy foods, then the poor will be able to eat better.

But beyond the practical problems with this idea - do we really want to make food more expensive for poor people? And do we really want to set individual tax rates for every single food type? There is something deeply repugnant about expecting people to vote, to raise their children, to hold a job or to serve on a jury yet at the same time use policy settings to forcibly change what people eat.

Moreover, it is not clear at all that fast food is the culprit of the obesity 'crisis'. A number of research studies have failed to find a link between fast food consumption and obesity ... The studies show people compensate over the day so that overall very few additional calories are consumed compared to people not eating fast food.

Another claim made by supporters of a fat tax is that supposedly the poor live on soft drink and chips because they are much cheaper than a healthy alternative.

But it does not stand up to scrutiny ... The argument that the poor - perhaps with the exception of those who live in the most remote locations - cannot afford unprocessed fresh food is simply not true.

Policy makers of all political persuasions like to be seen to be doing something, especially when there's an apparent crisis, about the 'obesity epidemic.' Some are open in claiming it is the right and duty of the state to dictate what a good life should look like. Others are more circumspect, hiding behind disputed science and drug company funded reports, to justify a supposed cost-benefit of limiting people's basic life choices.

In either case, Nanny State proposals to solve a crisis that may not exist, with proposals that are known not to work, embodies the worst excesses of the government interventionism in a democratic society.¹⁶

Another public health policy proposal targeting obesity are restrictions on 'super-sized' meals, which James Paterson criticised as elitist in 2012:

There's a lot of competition for the most stupid Nanny State proposal. But if forced to choose, plans to restrict serving sizes would have to take the cake. They should be rejected outright.

¹⁶ Louise Staley, 'Big fat beat up' (2008) 60(5) *IPA Review* 24, 28.

Like all paternalistic attempts to change other people's lives, it is condescending and it is elitist...

Deep down, the idea that the government should restrict how large your hamburger should be comes from people who believe that everyone else is not smart enough to run their own lives.

They target fast food outlets because they think the people who frequent them are incapable of eating in moderation. It's deeply concerning that this kind of elitism pervades much of the public health community...If someone is obese, it's their entire lifestyle that's problematic, not just their weekly excursion for fried chicken.¹⁷

Tobacco and nicotine products

For many people, there is perhaps no greater villain in Australian society than the tobacco industry. This leads to a number of indiscriminate and illogical schemes for tobacco control, which are merely a paternalistic effort of the government to impose their own preferences upon the Australian people.

In particular, the IPA has been vocal in its criticism of mandatory plain packaging of tobacco products since before the concept was first announced by the federal Labor government in 2010. Chris Berg listed the concept as one of the ten worst paternalistic policy proposals in an August 2009 edition of the *IPA Review*:

The argument for plain cigarette packaging is one of the most stark examples of how Nanny State regulations treat individuals as childish automatons. Plain packaging involves the complete removal of any brand logos, special colours or fonts, pictures or any other unique packaging design, to be replaced by only the brand name in a mandatory font, complemented by health warnings.

But would it work? Supporters of plain packaging cite studies which suggest that consumers would find plain packaging boring and dull, and marginally reduce the positive connotations of smoking. This certainly makes sense. But cigarette packages are already plastered with images of rotten lungs and cancer-ridden body parts. How removing brand logos could significantly make these already extraordinarily distasteful packages less appealing is hard to imagine.

Mandatory plain packaging seems to be predicated on the belief that attractive packaging is enough to convince non-smokers to become smokers, or that for smokers trying to quit, a good-looking logo is just too much to bear. Undermining brand identity would no doubt change the attitude that smokers have towards cigarette brands - the public health research has convincingly demonstrated that - but, as to how this would effect the desirability of smoking itself, the evidence just isn't there.

The National Preventative Health Taskforce's discussion paper on tobacco was titled 'Making Smoking History'. This is surely a new stage in the public health movement's war against smoking - an open affirmation that the goal of the government should not be to reduce risk, or to inform consumers of risks they should be aware of, but to eliminate an otherwise totally legal product.¹⁸

¹⁷ James Paterson, 'Should the government restrict super-sizing junk food?' *Herald Sun*, 30 September 2012 <<https://ipa.org.au/news/2759/should-the-government-restrict-super-sizing-junk-food->>.

¹⁸ Chris Berg, '10 worst Nanny State policies' (2009) 61(2) *IPA Review* 14 <<http://ipa.org.au/publications/1724/10-worst-nanny-state-policies->>.

Tim Wilson, writing in *The Australian* the day after the policy was announced, noted the legal risks involved with mandatory plain packaging:

Only last year the British government rejected plain packaging, arguing that 'no studies have shown that introducing plain packaging of tobacco would cut the number of young people smoking'.

And while the moral and political arguments for attacking tobacco companies may be sound, there are legal risks involved.

The British government also identified that 'given the impact that plain packaging would have on intellectual property rights, the government would need strong and convincing evidence showing the health benefits'.

Even with strong evidence about the efficacy of plain packaging, the British government could have exposed itself to legal claims by tobacco companies for expropriating their property rights. The Rudd government has ignored this message.

Under Australia's Constitution and international trade agreements, the government cannot strip or devalue property without compensation on 'just terms', and that includes intellectual property rights such as trademarks.¹⁹

The following year, Chris Berg asked whether mandatory plain packaging could actually work, casting doubt on whether plain packaging would actually nudge people away from smoking:

Here's what we know: smokers are influenced by packaging, to a degree. Lighter colours seem to imply less risk. One leaked Phillip Morris document admitted as much. 'Smooth' and 'silver' also suggest safer cigarettes.

Hence the government's proposed new packet design - an unappealing olive green, with unadorned text for the label. But the literature suggests package marketing only influences the choices of existing smokers.

The government's goal for packaging is to stop people becoming smokers in the first place. Roxon argues 'catchy colours' are designed to 'suck in young people'. Her aim is to 'make sure fewer people start on this dangerous habit'. And there's no clear evidence packet design inspires non-smokers to start smoking.

The most that reviews of the scholarly evidence can find are surveys in which teenagers are asked to imagine whether their friends could be duped by shiny packages. You may not be surprised to learn teenagers assume their friends are idiots.

This lack of evidence isn't surprising. People start smoking because they want to try the sensation of smoking, not try the sensation of holding a well-designed package. And what about existing smokers? Let's just say if graphic photos of bleeding lungs haven't inspired you to kick the habit, an olive box probably won't either.²⁰

¹⁹ Tim Wilson, 'Plain packaging ploy likely to go up in smoke' *The Australian*, 30 April 2010
<<https://www.ipa.org.au/news/2111/plain-packaging-ploy-likely-to-go-up-in-smoke/category/29>>.

²⁰ Chris Berg, 'Plain packs pointless when smokes get in our eyes' *The Sunday Age*, 17 April 2011
<<http://www.ipa.org.au/sectors/health/news/2337/plain-packs-pointless-when-smoke-gets-in-our-eyes>>.

In a 2015 paper, Simon Breheny highlighted how mandatory plain packaging of tobacco was an example of elitist paternalism, and would be used to justify plain packaging of other products:

The Nanny State is a concept based on the principle of elitism. It sets up two classes of people. The first class is the self-appointed elite, which makes decisions about acceptable conduct or, in this case, consumption choices, and then uses tools of the state to enforce those decisions. The second class is made up of all those outside the elite. The individuals in this group are stripped of personal autonomy and agency because the elite deem them incapable of making the right decisions about their own lives.

Mandatory plain packaging is an inappropriate use of government power. Claims that the regime has democratic approval are not sufficient to displace the concern that such a regime undermines personal responsibility and self-determination...

A further concern is that it lays a foundation for the application of similar policies in other areas of life... This concern is rooted in the idea of 'creeping normalcy'. This is the idea that previously perceived radical changes can become normal if implemented gradually over time. This would be the hope of many public health sociologists in relation to mandatory plain packaging of tobacco products.²¹

A peer reviewed article co-authored by Professor Sinclair Davidson, of the IPA and RMIT University, published in the journal *Agenda* in 2014, looked at the econometric evidence for claims that plain packaging reduced smoking rates through the proxy of household tobacco expenditure. Professor Davidson concluded:

Ronald Coase famously argued that if you tortured the data long enough they would confess. In this paper we have tortured the data, but there has been no confession. At best, we can determine the plain packaging policy introduced in December 2012 has not reduced household expenditure of tobacco once we control for price effects, or the long-term decline of tobacco expenditure, or even the latent attributes of the data.

To the contrary, we are able to find a suggestion that household expenditure of tobacco has, *ceteris paribus*, increased. In our forecasting exercise the actual data come close to breaking through the 80 per cent confidence interval. While we do not want to over-emphasise these results, we do conclude that any evidence to suggest that the plain packaging policy has reduced household expenditure on tobacco is simply lacking.

There are two very important caveats to our results. In the first instance, data on actual (legal) tobacco consumption (on a per-stick basis) do exist, though not in the public domain. Publicly available data on household tobacco expenditure are an imperfect proxy for tobacco consumption – as the 'Tobacco in Australia' report concedes. In any event, the ABS data are potentially subject to substantial revision and cannot answer well the questions being asked of them.

Establishing the efficacy of the plain packaging policy will take painstaking econometric analysis over a long period of time. This will involve having to untangle the effects of excise increases and changes in smoker behaviour, and substitution to illegal tobacco products. As things stand at the minute, it would be a very brave public-health advocate that claims

²¹ Simon Breheny, 'Plain packaging myth exposed: Submission to the Siggins Miller post-implementation review – mandatory plain packaging of tobacco products' *Institute of Public Affairs* (March 2015) 17.

vindication from one data point (subject to revision) in supporting the plain packaging policy.²²

In 2015, Simon Breheny had a chance to analyse the available data, and determine the efficacy of the plain packaging laws so far:

A KPMG report into illicit tobacco released in October last year found that the prevalence of illegal tobacco or 'chop chop' is on the rise. Between July 2013 and June 2014 KPMG recorded an increase from 13.5 per cent to 14.3 per cent of total tobacco consumption.

Most tobacco consumption rates don't take illegal tobacco into account. Although rates may be decreasing in line with the long-term trend it appears that some consumers are switching to chop chop, meaning that the actual consumption rate has remained relatively stable.

Further analysis showed that this growth in illegal tobacco consumption was driven by higher volumes of unbranded consumption, from 0.8 million kilos to 1.1 million kilos. Notably, the illegal importation of tobacco has increased substantially over recent years, from 0.5 million kilograms in 2012 to 1.3 million kilograms today.

The legal retail market has felt the pinch. The Australian Retailers Association noticed a significant impact just 12 months after the introduction of plain packaging laws. ARA Executive Director Russell Zimmerman said back in November 2013 'the change to plain packaging has been a waste of retailers' time and resources.'

... Meddling public health professionals have been spruiking the benefits of plain packaging for years. But it's time they admitted that they got this one wrong. Plain packaging has failed to reduce tobacco consumption rates, while giving a leg up to the tobacco black market and stripping away commercial and intellectual property rights.²³

The introduction of mandatory plain packaging laws has been accompanied by more extreme calls for tobacco consumer licences, and a 'tobacco-free generation' in Tasmania. Dr Mikalya Novak responded to the former in May 2011, highlighting how the scheme would grossly enlarge the size of the state:

Under the proposal, a license would give the smoker a right to a limited quota of tobacco supply, say 10 cigarettes a day or 20 cigarettes a day and so on. There is a fee payable to government to give the consumer the right to use tobacco. The more tobacco the license holder pre-commits to smoke, the higher the license fee involved.

Under the licensing plan consumers would be asked to pass a test, 'not dissimilar to a driving test' Chapman stated, to qualify for a right to receive a license to legally purchase tobacco.

The public health lobby say that there are precedents to limiting supply of tobacco for paying consumers. As Chapman suggests, prescription medicines are rationed by pharmacists while hoteliers can be prosecuted for selling alcohol to intoxicated patrons.

²² Sinclair Davidson, 'The plain truth about plain packaging: An econometric analysis of the Australian 2011 Tobacco Plain Packaging Act', (2014) 21(1) *Agenda* 27, 39.

²³ Simon Breheny, 'Give cigarette pack laws the chop chop' *The Daily Telegraph*, 14 January 2015 <<https://ipa.org.au/news/3235/give-cigarette-pack-laws-the-chop-chop>>.

Drawing on similar behavioural economic proposals to structure, or nudge, consumer choices, the underlying default assumption for the tobacco license idea is that individuals are blithely unaware of the health effects of smoking.

Based on the questionable notion that smokers lack an awareness of at least three decades of heavily publicised research about health problems that smoking causes, the government would see itself fit to decide for the smoker the amount of cigarettes he or she is allowed to smoke.

This proposal would effectively undercut many years of government-funded marketing campaigns that have sought to raise awareness of smoking's health consequences but based on the respectful premise of letting adults who smoke decide for themselves.

It couldn't be ruled out, either, that quotas of allowable tobacco consumption would be reduced if the government establishes a license renewal regime. Think of it as an ETS for cigarettes, with private choices laid to waste by an increasingly intolerant objective to consign smoking as a habit of the past.

Then there is the question of the test that smokers will be forced to undertake to qualify for a license.

What would this involve? Would it constitute numerous hours of lecturing potential smokers in a Soviet-style re-education campaign urging them not to smoke before they even get started? How much would taxpayers have to pay to fund the so-called smoking qualification test?²⁴

In November 2014, a private members bill introduced into the Tasmanian parliament intended to enact a restriction on the sale of tobacco products to any members of a so-called 'tobacco-free generation'. Morgan Begg noted in 2015 that this proposal, if put into practice, would have the effect of creating, by specific intention, second class citizens:

The effect of conducting this form of phased prohibition is that it entrenches within the law two classes of citizens. One class, consisting of those born on or before 11:59pm 31st December 1999, are forever unaffected by the new laws. The other class, consisting of those born on or after 12:00am 1st January 2000 are forever affected by the laws, and would in effect never be able to lawfully purchase tobacco products.

This absurd result is that two people born on opposite sides of a randomly selected date will have markedly different rights as consumer.²⁵

This overzealous approach to tobacco regulation has led to the same public health activists opposing schemes which might actually assist tobacco consumers to cease smoking. The increasingly popular e-cigarettes are a free market solution for smokers seeking to quit, as Simon Breheny argued in March 2015:

Electronic cigarettes may be the greatest tool in the fight against lung cancer that the world has ever seen. They're cheap, convenient and they're helping smokers everywhere to quit.

And the best part about this health solution? It doesn't involve government.

²⁴ Mikayla Novak, 'Simon Chapman is blowing smoke on smoking' *The Drum*, 26 May 2011 <<https://ipa.org.au/news/2380/simon-chapman-is-blowing-smoke-on-smoking/pg/10>>.

²⁵ Morgan Begg, 'Submission to the Legislative Council Inquiry into the *Public Health Amendment (Tobacco Free Generation) Bill 2014*' *Institute of Public Affairs* (June 2015) 5 <<http://ipa.org.au/publications/2379/submission-to-the-legislative-council-inquiry-into-the-public-health-amendment>>.

Demands for governments to identify and solve problems are a recipe for disaster. They lead to higher taxes and less freedom. A cure administered by the Nanny State is worse than the disease.

Meanwhile, free markets are coming up with innovative ways to tackle some of our most deep-seated problems.

Take lung cancer. According to Cancer Australia, lung cancer was responsible for 8,114 deaths in Australia in 2011. Smoking increases the risk of cancer. The government response is regulation, taxes, advertising and sponsorship restrictions and bans.

A better response involves opening up markets and allowing individuals to make choices about their own lives.

There are a range of cigarette substitutes already on the market. Electronic cigarettes are the most prominent, and they're currently taking the world by storm. E-cigarettes are battery-powered nicotine vaporisers. They do not contain tobacco or produce smoke. E-cigarette users inhale vapour, which produces a similar effect to smoking without the health risks caused by the carcinogenic and toxins of combustible tobacco products.²⁶

Despite this, the Therapeutic Goods Association prohibits the sale of e-cigarettes in some situations. Mr Breheny continued by saying:

E-cigarettes and reduced risk products should be seen for what they are - the latest in cutting-edge tobacco quitting devices.

It's against the law to sell these products by claiming they have a therapeutic benefit. But the science is clear - e-cigarettes save lives.

The Therapeutic Goods Administration should recognise the medical benefits of these products and immediately approve their use for thousands of Australians trying to quit smoking.

Governments should be making room for life-saving innovations. Markets for new products that allow individuals to make better choices must be allowed to flourish.

Where governments have failed the free market will succeed.²⁷

The culmination of these policies (alongside tobacco taxation, which will be discussed later), in the idealised smoke-free Australia would lead to unintended consequences. Dr Mikayla Novak predicted this in 2011 in response to proposals to introduce consumer licencing:

For a start many existing smokers will resent having to seek a license to exercise personal choice, with license fees set on top of already significant federal excises that are well in excess of the costs of medical treatment for tobacco-related illness.

In the last financial year alone the Australian Customs Service seized 68 million counterfeit cigarettes, with an active black market for tobacco likely to increase substantially if consumer tobacco licensing is introduced.

Then there would be the issue of growing Customs and federal and state police enforcement costs, all

²⁶ Simon Breheny, 'A cigarette that could actually save lives' *The Daily Telegraph*, 11 March 2015 <<https://ipa.org.au/news/3264/a-cigarette-that-could-actually-save-lives>>.

²⁷ Ibid.

funded by the taxpayer, to crack down on the sale of tobacco products that manage to escape the consumer licensing net.²⁸

Alcohol

The prevalence of binge drinking, alcoholism and street fighting has led to a conclusion among public health activists that alcohol, and an Australian drinking 'culture', is itself an evil that needs to be targeted. Chris Berg, in a September 2009 article for *The Sunday Age*, pushed back against this reasoning:

My point isn't to downplay the very real negative consequences regular excessive drinking can have. Or to ignore the damage some drunk idiots can do, like drink-driving or street-fighting.

But Australian public health activists and the Health Department have decided the small minority of chronic alcoholics or our inadequate late-night policing isn't the problem - it's our drinking culture in general.

Traditional Australian mateship rituals like shouting a round of drinks are now seen as a form of peer pressure, and allowing staff to go out for after-work beers is seen as employer negligence.²⁹

At the time, the federal Health Department updated the national alcohol guidelines to define binge drinking as the consumption of more than two standard drinks:

So if you are one of those couples who like to spend their Saturday evenings with a serve of fettuccine marinara, a DVD box set of *SeaChange*, and a bottle of Clare Valley Riesling, you are now part of Australia's booze problem.

Sure, the harmful drinking guidelines are just that - guidelines - but they fly so dramatically in the face of normal human behaviour they are almost completely meaningless. All they reflect is the steady ratcheting-up of claims about how we're drinking, eating and smoking towards our demise. Never mind the fact that on practically every measure we are much healthier than our ancestors.

The vast majority of people have an overwhelmingly positive relationship with alcohol. Drinking is an important social lubricant. All this discussion about the harmful impact of drinking seems to forget alcohol is a key part of almost every adult social engagement held after 5pm. And for good reason. We enjoy alcohol's effects and how it helps us relate to others. In almost every situation where alcohol is consumed - even consumed above what the health department has declared as risky - the effects of drinking are benign and, well, pretty enjoyable.³⁰

Alcohol-fuelled violence

What is becoming more common are government policies which force licenced venues to adopt earlier closing hours and restrictions on when a venue can serve can serve drinks. This is typically justified on the basis that alcohol is sparking violent episodes, and that venues which serve liquor have some responsibility for this.

²⁸ Mikayla Novak, 'Simon Chapman is blowing smoke on smoking' *The Drum*, 26 May 2011.

²⁹ Chris Berg, 'Alcohol is good – so let's drink to that' *The Sunday Age*, 20 September 2009
<<http://www.ipa.org.au/sectors/health/news/1952/alcohol-is-good---so-let's-drink-to-that/pg/3>>.

³⁰ Ibid.

This misses the obvious fact that violent people, not alcohol, are the problem. As Mr Berg wrote in *The Age*:

If there is one lesson to be drawn from all this political outrage, it is that pouring a pot of beer has suddenly become the moral equivalent of throwing that pot at somebody's face. But the problem with 'alcohol-fuelled crimes' isn't the alcohol — or the liquor licence holders who are legally allowed to sell it — it's the 'crimes'.

Contrary to the animated moral panicking of our more aggressive talk-radio hosts, alcohol is not the primary contributing factor behind the recent increase in late-night street fighting. Drinking doesn't cause violence. Idiots cause violence.

After all, how many readers of *The Sunday Age* reach the end of a bottle of wine or their third beer and decide that their evening will only be complete if they can find somebody to sucker punch?

... Every so often, dubious research tries to blame violence on something else. Facebook, YouTube, mobile telephones and the internet in general have all recently been proclaimed to 'cause' teen aggression. Melbourne City Council recently commissioned a report that claimed rising temperatures caused by climate change would turn Melbourne into a wretched hive of scum and villainy.

So by disingenuously trying to link Melbourne's problem of violence with the Federal Government's anti-binge-drinking morality tale, the State Government has done the city a disservice.

The idea that alcohol directly causes violence has become just another talking point in the political assault on the demon drink — wrapped up in the breathless moral outrage that characterises the supporters of the Nanny State.³¹

Hugh Tobin noted in a 2008 *IPA Review* article that violence is a symptom of a broader cultural problem:

There have been numerous calls across the country to restrict how people order their drinks and restrict drink promotions in bars that are said to encourage excessive consumption. A Senate inquiry is investigating banning alcohol advertising before 9pm on television and radio. Family First Senator Steve Fielding has proposed extending NSW laws which target adults who supply alcohol to visiting children in their home. And the Rudd government has not ruled out raising the legal drinking age above 18.

Drinkers risk falling into the legislative twilight zone occupied by smokers-their activity remains technically legal, but is also a plaything for politicians and regulators who want to appear tough on public health.

But the strategies currently being implemented or proposed are unlikely to achieve the ambitious aims that have been set.

Certainly, alcohol fuelled violence and alcohol-related health problems are a major problem, but they are bound together with a larger cultural problem, particularly associated with young males who feel the need to intoxicate themselves with anything they can: from alcohol, to large doses of caffeine, ecstasy, or prescription drugs.³²

³¹ Chris Berg, 'Get off the turps – idiots are the problem, not alcohol', *The Age*, 14 September 2008 <<http://ipa.org.au/news/1678/get-off-the-turps---idiots-are-the-problem-not-alcohol/pg/9>>.

³² Hugh Tobin, 'How long until the pubs run out of beer?' (2008) 60(3) *IPA Review* 25.

Lockouts

The 'moral panic' of supposed alcohol-fuelled violence is perhaps best epitomised in recent years by policies that enact a mandatory closing time for licenced venues, called 'lockouts'. The IPA recognised as early as 2008 that such a policy response is a distraction from actually tackling late night violence. In the *IPA Review* Tim Wilson said:

According to politicians and the press, late at night, Australian cities are transformed into 'warzones', where alcohol is fuelling violence and thuggery around urban pubs, bars and clubs.

The response of state governments across the country has been to impose 'lockouts' upon licensed venues - bans on entering venues after a certain hour. The venues may remain open, and those inside can still purchase alcohol, but no new patrons can enter.

But lockouts don't work. They needlessly hamper late night businesses and the freedom to trade without having any significant impact on late night violence ...

The first job of any government is to secure its citizens' personal security. But security is not justification for overzealous crackdowns on civil liberties, particularly when there it is not clear that doing so will actually ensure security.

Certainly, there are legitimate concerns behind each government's enthusiasm to introduce a lockout. And there is some evidence that violent assaults are increasing in urban areas. In Melbourne, Victorian Police data shows that the number of assaults has, indeed, increased over the last five years, although the data also points out that assailants are also more likely to be identified and caught after the incident occurs.

Unfortunately, state governments' focus on the regulatory framework governing alcohol sales obscures what should be the first policy response to a law and order problem - increased resources directed towards policing. Alcohol is at most a contributing factor to violent acts. Many high-profile incidents of urban violence have involved no alcohol at all, or the police and prosecutors have pointed out that alcohol consumption had only a minor involvement.

There are already laws against violence; Australia's urban centres don't need more laws, they need more enforcement.

The threat of arrest, prosecution and imprisonment is supposed to discourage illegal behaviour. An increased police presence should be able to tackle assaults directly. And more cops on the beat would have no negative impact on law-abiding late-night drinkers. Nevertheless, in many cities the police are under-manned and under-resourced-the Victorian Police Association claims that it is as much as 3000 officers short.

The problem of street violence is going to be solved by more and better equipped police, not amendments to liquor regulations.³³

Vivienne Crompton noted in 2013 that the myriad of logical problems associated with proposals to implement a state-wide 3 a.m. curfew on licenced venues:

The curfew only applies to smaller venues. Casinos with their 24-hour licences are exempt, so ... it will simply transfer the problem to a different location. You will simply see a mass exodus of drunken

³³ Tim Wilson, 'Cops, not liquor regulations, reduce street violence' (2008) 60(5) *IPA Review* 29.

patrons having to cross town to the new venue. Instead of being dispersed across many different venues and locations, people will be funnelled into the one casino in town. This simply concentrates the revellers and will increase the likelihood of brawls breaking out during their journey or at the casino itself.

... Without a curfew, partygoers will naturally leave or change venues at their own pace. An arbitrary closing time of 3am will likely see a huge spike of orders at 2.45am, with patrons quickly sculling drinks before they have to leave. The six o'clock swill didn't work the first time and I have a feeling the negative effects will only be compounded if it is reinstated at 3am.

... Transport is already limited after midnight and an artificial 3am rush will compound the problem. Instead of people leaving in small groups, hundreds of people will need a taxi at the same time. Taxis and public transport will be unable to cope with such a spike in demand. And there are only so many police officers who will be able to patrol. Not all will be available at 3am. The same goes for ambulances and emergency rooms - resources are already stretched to breaking point...

The proposed curfew will result in thousands of people on a Saturday night being forced from venues by bouncers fearing that they will be sluggish with a fine if the doors are still open at 3.01am. The buses will have stopped and there is likely to be too few taxis. Bored patrons who have just downed their drinks will be left milling around trying to figure out how to get home. The revellers who have spilled on to the street are likely to pick a fight. This is the perfect recipe for mayhem and exactly what the designers of the curfew want to prevent.

Increased police presence is the only way we can hope to reduce fighting on our streets. The proposed curfew is just a nanny-state, knee-jerk response that has no hope of stemming the violence.³⁴

In a 2014 article on *The Drum*, Chris Berg was critical of the policy, suggesting the policy is an example of 'neo-prohibition', and blaming the violence of a few on society in general:

Let's lay aside whether it is fair to restrict the liberties of all because of the idiocy of a few. It is utterly and despicably perverse that our immediate reaction to a highly publicised violent assault is to blame public policy, or market forces, or 'culture' in general.

It's classic guilt displacement, shifting the responsibility from the perpetrators of violence and onto society. That is, it's not totally their fault they were violent. Alcohol vendors were plying them with liquor! Lazy politicians were neglecting their regulatory duties! Music videos have been glorifying drinking!

What does this imply for the moral responsibility of the perpetrators? After all, to punish somebody for an act they had little control over would be a travesty of justice.

Perhaps the number of bottleshops in a suburb should be a mitigating factor in sentencing. Of course, none of our latter-day prohibitionists have taken their logic this far. But such perverse reasoning is implicit when we seek social explanations for individual criminal acts...

[R]egardless of whether it is trending up or trending down, it remains the case that the Australian public consumes a large quantity of alcohol, and gets into very few fights.

³⁴ Vivienne Crompton, 'The 3am curfew plan simply won't work' *Brisbane Times*, 24 October 2010 <<https://www.ipa.org.au/news/2983/the-3am-curfew-plan-simply-won't-work>>.

There are, as there have always been, brutal thugs who take pleasure from violence. The correct - and most direct - response is to target the thugs, not to fiddle with tax policy.

The relationship between alcohol and violence is not as clear cut as you might expect. Yes, much violent crime is caused by intoxicated people. The doctors and police are right. But figuring out whether alcohol actually causes the violence is quite hard.

Correlation, as we all know, is not causation ... So the idea that we would be trying to blur the responsibility of violent offenders with alcohol regulation is utterly, utterly repugnant.

It's exactly what the thugs, and their lawyers, want us to do.³⁵

Alcohol price floors

In a 2012 article, Tim Wilson responded to claims that alcohol should be combatted by way of a price floor, by saying it was inequitable and immoral:

If all alcohol is forced to a minimum price, bottles already at the new minimum price level will increase their prices to differentiate themselves.

We also know that once these price floors are in place they only head in one direction - up.

But the biggest issue is that they act as a tax on the poor. Political progressives have argued against consumption taxes because the poor pay a greater share of their income on consumables than the rich.

Under floor prices, more tax will be paid on cleanskin wine families drink with a cheap bowl of pasta, than French champagne popped at top-of-the-town cocktail parties. That's not just inequitable, it's immoral.

And it's a demonstration of the sneering elitism that minimum price floor advocates have to average Aussies.³⁶

Labelling

The IPA identified as early as December 2011 that tobacco packaging laws would lead to similar policy proposals in other areas. In the *Herald Sun*, James Paterson explained how proposals for mandatory health warnings treated Australians 'as if they are too stupid to look after their own health, and are unlikely to work':

It's firmly from the 'government knows best' school of policy. It stems from an outdated notion that a group of experts is better placed to judge what is good for us than we are.

³⁵ Chris Berg, 'Neo-prohibition isn't the answer to violent crime' *The Drum*, 21 January 2014
<<https://ipa.org.au/news/3039/neo-prohibition-isn't-the-answer-to-violent-crime>>.

³⁶ Tim Wilson, 'Should there be a minimum price floor for alcohol?' *Herald Sun*, 27 August 2012
<<http://ipa.org.au/news/2735/should-there-be-a-minimum-price-for-alcohol->>>.

Of course, advocates of this world view are careful to couch their arguments in more sympathetic terms.

We're told that alcohol warning labels are necessary to protect children, particularly during pregnancy, as if parents are too dumb and careless to exercise caution when starting a family.

Mothers and fathers who don't care about the risks of alcohol consumption to their kids are not going to change their behaviour because of a warning label. No law can protect children against bad parenting.

And just as we have seen with tobacco, what seems like an innocuous proposal at first to help 'inform the public' or to 'protect children' almost always subsequently morphs into something much more draconian and oppressive.

Australians aren't stupid. Most of us know how to enjoy a drink or two without harming our health. And those who don't won't change because of a government warning label.³⁷

Tim Wilson answered the question of whether packaged alcohol should carry mandatory health warnings in a March 2012 article in the *Sydney Morning Herald*. In his response, Mr Wilson identified the illiberal and paternalistic nature of such a proposal:

Mandated alcohol warning labels don't work and perpetuate the government-sponsored drift away from individual choice and responsibility that fuels alcohol abuse.

Our society is built on principles protecting our rights to choose our own life. That requires us to accept responsibility for our actions. Every time the government steps in we promote a Nanny State that infantilises individuals.

Compromise on these principles requires evidence that good intentions will work. Alcohol warning labels don't fit the bill.

We all know there are health consequences from heavy drinking.

People choose to drink alcohol; and sometimes it is to the point of abuse to get drunk.

If that is someone's objective, they won't slow down from a warning label.

The objective of such regulations is to de-normalise consumption, placing government preference above individual choice.

It is straight out of the regulatory playbook targeted at another product disliked by public health campaigners ...

Warning labels are only one more step down the Nanny State path of government directing behaviour.

No one disputes that alcohol consumption has consequences. We've known that for at least 2000 years. Anyone who has had a few glasses of wine within an hour has figured that out.

³⁷ James Paterson 'Should alcohol carry warnings?' *Herald Sun*, 18 December 2011
<<https://ipa.org.au/news/2555/should-alcohol-carry-warnings->>.

The right direction is to create a culture of responsibility where people are free to choose, make mistakes and learn from them - not look to government for permission when it fosters a culture of us not taking responsibility.³⁸

Gambling

Recreational gaming is a popular target for proponents for advocates for government intervention. A 2009 report by Dr Mikayla Novak and Richard Allsop outlined an opposition to government intervention in the gaming industries, noting that gaming is an activity that individuals voluntarily participate in for enjoyment.³⁹

This followed a similar argument Mr Allsop made in a 2008 article in *The Drum*, saying the problems of the few should not outweigh the consenting participation of the many:

While there is no doubt that problems have been caused by gambling and by poker machines, these negatives do not justify stopping the 97.9 per cent, or more likely 99 per cent, of non-problem gamblers, from consuming a product they enjoy. A 2003 survey in Victoria found that only 4 per cent of people had found gambling had a negative impact on their lives, compared to 21 per cent who found it had a positive impact (and 75 per cent for whom it made no difference). Why should the needs of the 4 per cent outweigh the 21 per cent?⁴⁰

In a 2011 report which reviewed the evidence justifying electronic gaming regulations, these position were endorsed again by Dr Novak and Tim Wilson, who said:

Life is full of risk. And learning to manage risk is a component of the education of productive individuals. Government attempts to blind individuals from risk and its consequences is not a desirable public policy objective.

No one disputes that there is gambling that occurs where some people bet beyond their reasonable means. But a problem doesn't justify government intervention, in and of itself.⁴¹

³⁸ Tim Wilson, 'Should packaged alcohol display health warnings?' *Sydney Morning Herald*, 10 March 2012 <<http://ipa.org.au/news/2622/should-packaged-alcohol-display-health-warnings->>.

³⁹ Mikayla Novak and Richard Allsop, 'Free to gamble: The roles of the gambling industry and policy in a modern Australian society' *Institute of Public Affairs* (February 2009) <http://www.ipa.org.au/library/publication/1235604569_document_free_to_gamble.pdf>.

⁴⁰ Richard Allsop, 'Pokies unfairly stigmatised' *The Drum*, 29 September 2010 <ipa.org.au/news/1693/pokies-unfairly-stigmatised/category/26>.

⁴¹ Mikayla Novak and Tim Wilson, 'Gambling away perspective? A review of the evidence justifying electronic gaming regulations' *Institute of Public Affairs* (October 2011) <<http://www.ipa.org.au/sectors/nanny-state/publication/1948/gambling-away-perspective-a-review-of-the-evidence-justifying-electronic-gaming-regulations>>.

Paternalism and speech

In his book *In Defence of Freedom of Speech*, Chris Berg argued that many limits on freedom of speech are deeply paternalistic:

The response of governments to obscenity in the age of mass media has been to wind back outright censorship, and replace it with regulation.

Film and television content is now subject to classification and time slot restrictions that act to fence content off from what legislators and regulators believe to be sensitive audiences. This is a more subtle form of censorship but is a restraint on freedom of speech and the press nonetheless. Classification can act as outright censorship. In Australia, films and videogames which are refused classification are illegal to distribute. They are, in most cases and in most states, nevertheless still legal to possess.

The history of freedom of speech provides important insights here ... Classification is a form of prepublication censorship, of the kind that was eliminated for printed materials at the end of the seventeenth century. It is a pre-1695 approach to freedom of speech. Publications 'which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety' are refused classification ...

The classification guidelines purport to represent community standards. Even if it was possible to determine what the 'community's' standards about excessive violence were, freedom of speech cannot be not dependent on group, rather than individual, standards. When Mill argued that free speech was essential to protect the interests and values of minorities, he was arguing specifically against the concept of common standards. Pierre Bayle argued that state censorship based on community standards was redundant: if the community was that outraged, they would do the censoring themselves. ...

The freedom of speech implications of these sorts of arbitrary and subjective criteria are clear when we consider how they are liable to be captured by political activists. Anti-smoking campaigners around the world have sought to make depictions of smoking grounds for higher classifications. In early 2012, the Australian Advertising Standards Bureau banned an insurance advertisement that depicted a man using a laptop and hands free phone earpiece in a spa. The bureau ruled that it 'potentially unsafe behaviour'. Never mind that the scenario was obviously a comic fantasy: the bather was wearing a full suit and tie.⁴²

Classification

Classification, at its most censorious, presents an imposition on suppliers and businesses such as cinemas, in order to protect consumers from viewing or reading entertainment products that are in some way harmful to the morals of the viewers – in other words, classification for a paternalistic purpose. Chris Berg questioned in 2013 the appropriateness of a government classification regime:

Films shown at film festivals are exempt from the usual classification processes. But if [an Australian Classification Board] director believes that a festival film might be rated X 18+ (pornographic, and

⁴² Chris Berg, *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt* (Institute of Public Affairs & Mannkal Economic Education Foundation, 2012) 164-166.

therefore only available in Canberra or the Northern Territory) or RC (refused classification: available nowhere) the exemption is not granted...

To give a film either of these classifications is censorship in every relevant way.

Yes, in 21st century Australia our government still censors 'obscene' culture - we still employ a descendant of the system that banned James Joyce's *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover*. We still have bureaucrats who decide what we can and cannot watch.

It has been decided we cannot watch *I Want Your Love*. The film features a 'six-minute montage of friends, housemates and partygoers' having their intimate way with each other... The film's supporters say the six-minute scene is a critical part of the film's narrative. The classification board says it serves no narrative purpose. The broader question of why we want a government bureaucracy doing contextual analysis of story structure is unclear.⁴³

Internet filters

Many paternalistic policies find their justification as part of a response to a serious problem. For instance, the mandatory internet filtering regime was justified in order to combat child pornography. But as Chris Berg explained in a 2009 article in the *IPA Review*, this was a blunt effort which missed the target:

The primary justification for the internet filter, like so many Nanny State measures, is the protection of children - protecting children from 'inappropriate' internet content, like legal pornography or violent websites, as well as the policing of child pornography. But these are two totally separate issues, demanding two separate approaches. Protecting children against inappropriate content is the sort of task parents can easily perform-apart from basic supervision of what children look at online, there is an extremely wide variety of filtering software that can be installed on computers which children may access.

Child pornography is however an issue for police. Because child pornography is not generally trafficked on openly accessible websites, a filter will do nothing to disrupt child pornography networks.

Nevertheless, the government has deliberately fudged the distinction between the two issues. Indeed, Communications Minister Stephen Conroy argues that 'if people equate freedom of speech with watching child pornography, then the Rudd Labor Government is going to disagree.'

The dangers of the internet have long been an electorally potent issue-the 2007 election saw the Coalition rest a lot of their electoral hopes on a campaign for internet safety. But while many parents may be concerned about what their children come across online, the capacity for those parents to monitor and control internet access has never been greater.⁴⁴

Carolyn Popp made a similar case in a 2009 article in the *Daily Telegraph*, while also noting that the paternalistic policy in this case sought to operate as a muzzle, limiting freedom of speech:

⁴³ Chris Berg, 'Censorship standards come from a personal place' *The Drum*, 26 February 2013 <<https://www.ipa.org.au/news/2852/censorship-standards-come-from-a-personal-place>>.

⁴⁴ Chris Berg, '10 worst Nanny State policies' (2009) 61(2) *IPA Review* 15 (<http://ipa.org.au/publications/1724/10-worst-nanny-state-policies>).

The proposed legislative amendments to the Broadcasting Services Act will require all Internet Service Providers to block Refused Classification content materials. Most material that has been refused classification is not actually illegal to possess or access.

Although RC content includes child pornography material it also includes content that has nothing to do with child pornography. Some examples of RC range from content involving fetish activity between consenting adults to images demonstrating safe drug use and even certain video games ...

Depending on how it is implemented, the proposed internet filter might also accidentally block a lot more web pages than it is intended to. This could lead to some extensive, if unintended, censorship.

There are more than 1 trillion web pages on the internet. If 2.44 per cent are blocked - and that's the percentage of sites that even the best filters unintentionally cut - it will mean the loss of 24 billion sites.

But the biggest problem is that the proposed legislation threatens to seriously impinge on our freedom of communication.

A mandatory online censorship program is incompatible with a liberal democratic society.⁴⁵

Cyber-bullying

In 2015, the federal government passed the *Enhancing Online Safety for Children Act 2015* which established the Children's e-Safety Commissioner to facilitate, *inter alia*, a complaints and removal regime where cyber-bullying material is targeted at children. Simon Breheny recognised in *The Australian* that this new watchdog takes public policy down a dangerous and unprecedented path:

The new powers (of the Commissioner) are part of an attempt by the Abbott government to tackle the very real problem of cyber-bullying. But the idea that it is the role of government to compel a child to say 'I'm sorry' to another child is one of the most disturbing ideas this parliament has debated.

The extraordinary powers of the Children's e-Safety Commissioner are the latest example of the role that the state has acquired for itself in matter that rightly belong in the realm of civil society. In the case of the new cyber-bullying regulator, the state has inserted itself into the relationships between children and between parent and child.⁴⁶

Advertising restrictions

Calls are frequently made to ban advertisements of products deemed inherently harmful, such as fast food, or junk food. In a 2008 article for *The Age*, Chris Berg responded to claims that the information contained in advertising was too challenging for individuals to process safely, and could lead to 'self-harm' among consumers:

This view does not just reduce us to the level of dumb automatons, passively waiting for advertising executives to beam their instructions directly into our brains, it also creates a profound dilemma for

⁴⁵ Carolyn Popp, 'Filter our freedom of speech right' *Daily Telegraph*, 18 December 2009
<<http://www.ipa.org.au/news/2031/filter-our-freedom-of-speech-right->>.

⁴⁶ Simon Breheny, 'New bullying watchdog takes nanny state too far' *The Australian*, 17 April 2015
<<https://ipa.org.au/news/3277/new-bullying-watchdog-takes-nanny-state-too-far>>.

democratic politics. If we don't have free will in the shopping centre, we certainly don't have free will in the voting booth. And figuring out which political party would be better for interest rates is far more complex than figuring out which brand of shampoo to buy.

Nevertheless, most people acknowledge that adults are sensibly sceptical about marketing claims. What is surprising is just how advertising savvy children are.

Minors are depicted by policy-makers as unable to defend themselves against a well-planned onslaught of marketing. However, as the new book *Prohibitions* published by Britain's Institute of Economic Affairs shows, children as young as five form preferences about their favourite TV programs. And by the age of 11, children demonstrate a pronounced scepticism about claims made in ads.

During the [2007] federal election campaign, anti-advertising rhetoric took a decidedly surreal turn. In response to the Labor Party's dislike of Shrek-themed merchandising, the Howard government promised to fund a new ABC channel for children completely free of junk food ads. It was a bizarre train of thought that led Liberal policy-makers to think that the best way to combat childhood obesity was to make sitting on the couch and watching TV more appealing.

The belief that an individual's free will is crushed under the jackboot of catchy advertising jingles is, of course, nonsense. We have just as much autonomy over our personal decisions as we did before an ad break.⁴⁷

⁴⁷ Chris Berg, 'Nanny State ad bans won't stop kids liking junk food' *The Age*, 23 March 2008 <<http://www.ipa.org.au/sectors/nanny-state/news/1623/nanny-state-ad-bans-won't-stop-kids-liking-junk-food/pg/9>>.

Fiscal aspects of paternalism

Paternalism is embedded in the taxation system. The imposition of taxes on commodities that the government deems harmful amounts to a form of sin-tax, in order to make the harmful product unaffordable.

In a 2012 paper, Dr Mikayla Novak calculated that sin-taxes, comprising alcohol excise, tobacco excise, and GST on processed goods, amounted to \$13 billion in revenue for the government in 2010-11. Dr Novak said of such taxes:

The idea that governments should force or nudge individuals to make certain consumptive choices is tantamount to the tax policymaker stating to the consumer 'you may or may not know what's best for you, but regardless you choose not to practice what's best for you, so we'll make you do it.' Such paternalistic intervention in turn erodes the legitimacy of individual choice, as well as the exercise of responsibility and trial-and-error learning about individual preferences that accompanies such action.⁴⁸

In the same paper, Dr Novak identified a number of practical problems with these taxes, including that they a) rarely achieve their goals, b) change behaviour in unpredictable ways, c) encourage black market activities, d) are convenient revenue-raisers for spendthrift governments, e) disproportionately affect the poor, and f) hurt small businesses.⁴⁹

More recently, a paper by Aaron Lane questioned the efficacy of 'behavioural taxes' as the tool by which governments attempted to influence individual behaviour. He concluded:

Behavioural taxes, notably excise taxes, are a blunt instrument that is assumed to be an effective tool to influence behaviour. As a blunt instrument behavioural taxes are imposed on the public consistently, but the consequences on consumers are not always consistent.

The most perverse, unintended consequences of behavioural taxes appear to result from alcohol taxation. The perverse consequences of alcohol behavioural taxation are likely a result of the nature of the product –it is broadly consumed and there is a complex matrix of applied excise taxes.

Recent data from the imposition of the Rudd government's 2008 alcopops tax provides a clear indication of how a well-intended policy can lead to highly undesirable consequences.

The claimed objective of the alcopops tax was to cut consumption rates of RTDs amongst women. While there was a decline in the consumption of RTDs, consumers substituted with privately mixed straight spirits and white wine, which saw an immediate consumption spike...

The unintended consequences are not just limited to the application of the alcopops tax. The generally rising price of alcohol at venues, which is heavily influenced by behavioural taxes, is leading young people to engage in risky 'preloading' by consuming large volumes of cheaper alcohol in private homes before going to a bar or club.

Similarly, behavioural taxes for alcohol appear to be less effective on young people who have higher disposable incomes, and recent data suggests that they are effective in changing the behaviours of moderate drinkers, but not heavy drinkers. Increasing behavioural taxes can lead consumers to switch

⁴⁸ Mikayla Novak, 'Nanny State taxes: Soaking the poor in 2012' *Institute of Public Affairs* (April 2012) 18.

⁴⁹ Ibid 19-29.

from fewer, expensive products to consuming higher volumes of cheaper products, prompting a rise in the consumption of products that are intended to be reduced.

By comparison food-specific, non-sales taxes are relatively recent and governments are only starting to experiment with them, though so far with limited or no 'benefit'.

The Danish experiment with a 'fat tax' did not deliver the claimed benefits proposed when it was originally introduced. There was no significant, identified reduction in the behaviour that the government sought to target – a reduction in the consumption of saturated fats. However there were unintended changes in behaviour such as a decline in the competitiveness of Danish food manufacturing and a rise in the number of consumers who shopped across-borders to avoid paying the tax. Unsurprisingly the consumers in the best position to shop across national borders are also those who are less likely to be price sensitive.

There are clear unintended consequences from tobacco behavioural taxes. The highly-regulated nature of the sector and declining consumption rates show that the principle concern is on the switch from a very expensive and highly-regulated legal product to less-expensive and illegal or counterfeit product.⁵⁰

Tobacco excise

An instance of the tax system being utilised for paternalistic ends is the application of a tax on Australian-made and imported tobacco products. Also known as tobacco excise, this form of taxation hurts the poorest the hardest, and enables the growth of illicit tobacco markets.

Dr Mikayla Novak clarified in 2012 the motivations behind implementing tobacco excise:

While these taxes substantially add to federal government coffers, their policy rationale has gradually transcended the traditional revenue raising grounds for their imposition. Increases are now deemed necessary to make us healthier, reducing the costs on the public health system.

With the 'nudge' theory of behavioural economics still all the rage in policy inner circles, tax increases attempt to redirect the pattern of consumer expenditures in ways more convivial with the preconceived policy preferences. But with Nanny State rationales increasingly used to justify increased rates of tax on consumer products, it is more important than ever to ask the hard questions about their effects.⁵¹

Secondly, Dr Novak showed how this form of taxation inevitably hurts the poor:

The available evidence shows that Australian households in the lowest income brackets pay up to three times as much in taxes on alcohol, food and tobacco as those on high incomes.

Perhaps the most disappointing aspect about this inconvenient tax truth is that social welfare lobby groups, such as ACOSS, have remained silent or even supported these tax increases despite them hitting low income earners hardest.

⁵⁰ Aaron Lane, 'A taxing approach to choice: How behavioural taxes deliver perverse outcomes' *Institute of Public Affairs* (February 2014) 32-33.

⁵¹ Mikayla Novak, 'Nudge nudge, wink wink, nanny soaks the poor to fatten the budget' *The Australian*, 1 May 2012 <<http://ipa.org.au/news/2656/nudge-nudge-wink-wink-nanny-soaks-the-poor-to-fatten-the-budget>>.

Numerous studies have also shown that raising consumer taxes rarely achieves stated health policy objectives.

Taxes often miss their target to assist those with the potentially biggest health problem because habitual drinkers, smokers and junk food eaters tend to be generally unresponsive to tax induced price increases.

People who exercise their consumption in moderation are also punished by higher consumer taxes imposed on health policy grounds.⁵²

Finally, Dr Novak found in a separate 2012 report that taxes such as tobacco excise encourage black market activities:

Particular concerns have been raised internationally about the presence of high taxes on tobacco products in encouraging the development of sophisticated smuggling operations, including with links to organised crime. The Australian Crime Commission says that organised crime has been linked to the illicit tobacco market.

In the United Kingdom it has been estimated that the share of illicit cigarettes was 20 per cent, two-thirds of which can be accounted for by smuggling. A recent UK study found that high taxes contributed to illicit market activities in cigarettes, hand rolling tobacco, beer and spirits, leading to approximately £22 billion of foregone government revenue between 2005-06 and 2009-10.

Similar problems have been observed in the United States. It has been estimated that New York City fails to collect taxes on 50 per cent of cigarettes smoked, as smugglers sell bootlegged cigarette packages and cartons on street corners. Meanwhile, in California, 300 million untaxed cigarette packs a year are smoked due to Internet and cross-border sales, as well as smuggling.

A recent study in Canada suggests that the black market in tobacco constitutes about 27 per cent of that country's tobacco market, and that a 10 per cent increase in the price of tobacco products reduces lawful cigarette sales by between 3-10 per cent.

There is evidence that Australia has not been left untouched by tobacco smuggling activities as Nanny State taxes on these products continue to increase. In general there are three types of illegal tobacco available in Australia:

- Unbranded tobacco (otherwise known as 'chop chop') which is generally sold in clear plastic bags as loose-leaf tobacco
- Counterfeit cigarettes that are manufactured overseas illegally and smuggled into Australia
- Contraband cigarettes, which are legitimately branded products, but with the excise duty having been evaded.

It is difficult to quantify the full extent of the Australian black market in tobacco. It is estimated that the size of the illicit tobacco market represented as a proportion of the legal tobacco market was 15.9 per cent in 2010. Over the past three years to 2010, customs authorities have seized 715 tonnes of tobacco and 217 million cigarettes in sea cargo.

Research suggests that the total illegal tobacco market in Australia has grown to up to 2.3 million kilograms of tobacco consumed (or 12 per cent of cigarettes sold), representing a tax revenue loss to the Commonwealth (excluding GST) of \$624 million. (References omitted).⁵³

⁵² Ibid.

⁵³ Mikayla Novak, 'Nanny State Taxes: Soaking the poor in 2012' *Institute of Public Affairs* (April 2012) 22.

The alcopops tax

The alcopops tax was an initiative of the early Rudd government to target a particular range of alcoholic drinks – canned or bottled spirits premixed with soft drink - for increased taxation. Chris Berg made early predictions in May 2008 that this would not lead to reduced alcohol consumption as conceived:

[T]he Government's policy is based on a big leap of logic. Why will raising the price of alcopops result in healthier teenagers? Invariably, government policies have consequences unintended by the politicians who design them.

Certainly, the tax increase might reduce the amount of alcopops sold. Like most products, the demand for alcopops is elastic - that is, if the price goes up, some people who would have bought the drinks at a lower price may now choose not to. But those customers for whom the pre-mixed drinks are now too expensive can easily replace them with other alcoholic beverages. There is no shortage of choice in your average neighbourhood bottle shop.

After all, for a teenager looking to spend an evening drinking with friends, the choice isn't between alcopops and a healthy glass of water. Would, for instance, the Federal Government prefer teenage children to try to mix their own drinks? It is not easy to estimate the safe ratio of spirits to soft drink while you are at a loud and crowded house party, slightly tipsy and leaning over a kitchen bench trying to pour cheap vodka into a plastic cup.

When alcohol is bottled in premeasured quantities, it is easy for teenagers to gauge just how much they are drinking. The Federal Government might be making it harder for teenagers to regulate their own alcohol consumption. If even a single teenager has to get their stomach pumped because they now have no idea how much they're drinking, this policy will have been an abject failure.

When teenagers are unable to afford pre-mixed drinks, they will move on to their next choice of alcohol. If politicians increase the tax on every alcoholic beverage - as the Government's advisers are publicly recommending - then teens may move to taking other, non-alcoholic drugs when they are socialising ...

But this anti-binge drinking campaign is not very well thought out. Artificially changing people's behaviour isn't that easy. Too often it makes the original problem worse.⁵⁴

With the benefit of hindsight, Aaron Lane wrote in *The Australian* of the failure of the alcopops tax to achieve the desired behavioural outcome:

The Nanny State's experiment with behavioural taxation has failed. Such taxes are causing countless unintended consequences without achieving their original policy aim.

The primary objective of such taxation is to artificially increase the price of a product and thus persuade individuals to consume less of it.

But it is operating under a flawed 'government knows best' assumption. The motivation is, in principle, completely illiberal; the government interferes with the rights and freedoms of individuals

⁵⁴ Chris Berg, 'Put a cork in it, Mr Rudd – you're missing the point' *The Age*, 4 May 2008 <<https://www.ipa.org.au/sectors/nanny-state/news/1556/put-a-cork-in-it-mr-rudd---you're-missing-the-point/pg/9>>.

to make choices about their own consumption. And the efficacy of behavioural taxes is questionable. Although the taxes can change consumer behaviour, they also contribute to perverse and unintended consequences. The taxation of alcohol is the obvious example ...

We were told the 'alcopops' tax would curb heavy binge drinking among young consumers and prevent associated alcohol-related injuries and diseases.

Research shows that significant behavioural taxes may influence moderate drinkers, but not the heavy drinkers that the policy was aimed at. Similarly, such taxes appear to be less effective with young people who have higher disposable incomes. The alcopops tax certainly prompted a rapid decline in consumption of RTDs as they became relatively more expensive.

However, the evidence is that consumers simply substituted privately mixed spirits, white wine and cider. Unsurprisingly, young consumers mixed their own spirits and cocktails to avoid the additional cost of the alcopops tax, allowing them to establish their own alcohol to mixture ratios. This potentially increased the amount of alcohol that they consumed overall.

Increasing the price of alcohol also led young people to 'preloading', or to consume large volumes of cheaper alcohol at home before going out to a bar or a club.

Perhaps more alarming is the evidence to suggest that the alcopops tax led consumers to substitute illicit drugs such as cannabis and ecstasy for the alcohol. Research conducted by the University of Queensland identified that there was no reduction in the consequences associated with alcohol, such as alcohol-related hospital admission rates.⁵⁵

⁵⁵ Aaron Lane, 'Dud tax proves Nanny does not know best' *The Australian*, 20 February 2014
<<https://ipa.org.au/news/3055/dud-tax-proves-nanny-does-not-know-best>>.

Paternalism and civil society

A large quantity of regulations – whether paternalist or non-paternalist in nature – can have a suppressive effect on civil society and the beneficial social order that many paternalists seek to encourage. Often, these regulations facilitate a reliance on the role of the state in our daily lives and the role of civil society and communities is reduced, if not replaced entirely, making human life more difficult and less enjoyable.

Street parties and food handling

Street parties promote social interaction in neighbourhoods, while developing a sense of community, where members are personally concerned for each-others well-being. However, permission is now required to host what is now a heavily bureaucratised process, as Christopher Murn explained in 2008:

Navigating the bureaucratic hurdles that governments place in front of street parties takes a lot of work. Here are some things that must be considered for such an event: council permits, public liability insurance, noise level infringements, traffic management plans, crowd control, food handling regulations, alcohol consumption, risk assessment, police checks, invitations, rubbish disposal, canvassing the street for road closure approval, obtaining road barriers and notification to police, ambulance and fire services.

You will be forced to spend a lot of time corresponding with your neighbours before any event takes place. Approval by at least 75 per cent of the street's residents is required for the road closure. Then guests must be invited and attendance confirmed. Don't forget to ask your fellow residents for a contribution to cover the costs of the party. You may even be required to deliver written safe food-handling instructions, so do not be surprised if your neighbours are 'out' when you come calling.

Not only will you be consuming your time preparing a street party, but your money as well. Most councils require the coordinator to hold a certificate of public liability insurance for at least \$10,000,000 worth of cover. Add to this permit fees, equipment hire, food and drinks, and things are starting to become very costly ...

So by all means go ahead and throw a street party—just don't play any music, tell any jokes and don't let the old lady down the street sell her cakes and cookies. Your local council wants you to have fun but only on their terms; they even go so far as to make condescending suggestions about how to have fun in their street party kits.

Community spirit is invaluable; however it is not something that can be manufactured. If the government would like to increase community participation and involvement, they should first remove the restrictions that inhibit citizens from interacting with each other. ⁵⁶

An aspect of these regulations involve food handling qualification requirements. As Louise Staley discovered in 2006, it is making it very difficult to be a community minded person:

The State Government could ... trial 'community rebuilding zones'. This is something that can be done right now. Exempt voluntary and not-for-profit groups from the myriad of regulations they need to

⁵⁶ Christopher Murn 'Council regulations crash street parties' (2008) 59(4) *IPA Review* 12-3.

comply with and offer State Government public liability insurance. Then people can more easily come together to help others.

As a start, the food-handling and registered kitchen rules should be abolished for volunteer groups such as the Red Cross. When I was helping the local Red Cross make lunches for the firefighters, it all had to be done in a registered kitchen and a person who had done the food-handling supervisor's course had to be there at all times. What that means in practice is nobody is allowed to make a slice or biscuits at home. Moreover, the only person with the food-handling certificate worked 18-hour days despite her own home being without power for much of that time. All the old hands told the stories from the Mallee fires of a few years ago, of food being thrown out because there was nobody with a food-handling certificate there when the health inspector came calling.

Allowing people to make a slice at home or abolishing the food-handling supervisor's role would share the load better. This would let more people be part of the community effort. After all, nobody has ever presented evidence that all these rules actually prevented food poisoning. Instead all they do is add hurdles to getting the job done. Similarly, when the time comes to run stalls for fund-raisers, it is ridiculous that every jar of jam or cake must have all the ingredients listed. We can't treat home bakers the same way as Kraft.

And it's not just food regulations. A neighbour told me she has a four-page form at home to create an emergency response plan for a community function she is organising - and this is on top of other paperwork for insurance and funding. No wonder volunteers get tired of doing all this worthless paperwork just so some bureaucrat can point to it and say, 'Look, I made sure all the procedures were followed.'⁵⁷

⁵⁷ Louise Staley, 'Red tape makes things tough for volunteers' *The Age*, 1 February 2006
<<http://ipa.org.au/news/1095/red-tape-makes-things-tough-for-volunteers/pg/2>>.

The 'Nanny State'

It has often been argued that the phrase 'Nanny State' is unfair and inappropriate. A group of Australian public health academics have written that the phrase Nanny State;

is regularly used to attack health groups or governments, especially by interest groups bereft of arguments and journalists in search of a cliché. It has become a special favourite of tobacco companies and their supporters. In the present work we argue that the term should be retired in favour of genuine debate on substantive issues.⁵⁸

However, as Chris Berg argued in *The Drum* in 2011:

Opposition to government paternalism wasn't always a conservative or libertarian thing. Indeed, the use of the word 'nanny' to describe state interference in individual choices originally came from the left.

In a 1960 article in the *New Statesman*, the magazine set up by members of the Fabian Society, nanny was deployed to attack the British Board of Film Censors. 'Novels and the Press get along, not too calamitously, without this Nanny; why shouldn't films?' asked a *New Statesman* columnist William Whitebait. Nanny 'exercises a crippling drag on the growth of a serious and healthy British cinema.'

Eight years earlier, the American journalist Dorothy Thompson (and one time wife of Sinclair Lewis, the Nobel-winning socialist writer) was using nanny to describe British imperialism in the Middle East.

Western empires, Thompson wrote in her syndicated column, have 'filled the role of headmaster, or Nanny-governess'. The West does not treat the inhabitants of its colonies as equals. She continued:

It is an amusing notion that comes to me that, with the retreat of empire, Britons are turning Britain itself into a Nanny-state, perhaps out of a long habit in persuading or coercing natives to do what is good for them.

Anti-censorship and anti-empire. These are not typical conservative positions. But both were drawn from the same anti-paternalism that drives the modern resistance to public health regulation - a belief that a powerful class should not impose their own values on the rest of society.

Colonial masters instructed their subjects in the best way to live their lives - lessons given force by military domination. And 20th century censors claimed to be protecting the less refined from the crude excesses of popular culture - judgements only moral superiors could make. Whitebait made much of the fact the British censors were aging aristocrats. Sir Sidney Harris, 83, was being replaced by Lord Morrison of Lambeth, 72. Who were they to tell Britons what they could or could not watch?

Of course, this is not how public health activists record the history of anti-paternalism. I gullibly took their claims at face value in May last year when I wrote in *The Drum* that 'Nanny State' is first found in the *Spectator* in 1965. This is more than a decade after Thompson used it.

⁵⁸ M Daube, J Stafford and L Bond, 'No need for nanny' (2008) 17(6) *Tobacco Control* 426-427.

According to this story - told by the Australian public health luminary Mike Daube in a 2008 paper in *Tobacco Control* - it was coined by the former Conservative minister of health Iain Macleod, who later died of a heart attack. (Macleod was a deeply ill man, suffering from an inherited weakness for gout, a war wound, and a chronic inflammatory disease. But Daube and his co-authors imply it was just smoking that did him in.)⁵⁹

Tim Wilson has also argued that the phrases 'Nanny State' and 'grandmotherly government' were both 'designed to criticise government that treated people as infants':

It was designed to reject views ... that some people, in this case Australians, are 'so-called adults', who are 'still children emotionally and intellectually and therefore unable to make appropriate decisions regarding risky behaviour'.

It has the same use today.⁶⁰

⁵⁹ Chris Berg, 'The True Origins of Anti-Paternalism', *The Drum*, 31 January 2012
<<http://www.abc.net.au/news/2012-01-31/berg-the-true-origins-of-anti-paternalism/3801154>>.

⁶⁰ Tim Wilson, 'Advocates of a Nanny State assume we are all children' *Courier Mail*, 13 May 2013
<<http://ipa.org.au/news/2894/advocates-of-a-nanny-state-assume-we-are-all-children>>.

Conclusion

Australia has in recent decades fully embraced the Nanny State, and the public health experts are becoming more confident voicing their illiberal ideas. In 2009, Chris Berg said in an article for *The Age*:

We're a lot further down the Nanny State's slippery slope than anybody could have predicted a few decades ago. When restrictions on tobacco were first seriously implemented, those who opposed the measures asked whether fatty food could be the next target. That concern was, of course, dismissed as silly and a little bit shrill. Well, it's government policy now.

There's a big chasm between the medical world and the world of public policy.

Public health activists demonstrate their odd detachment from the mainstream world of politics when they start talking about our 'obesogenic' environment - a term used by reputable groups such as VicHealth and the Australian Heart Foundation to describe a society which apparently makes obesity nearly inevitable.

Like those post-Marxist philosophers who study the 'essential violence' of peaceful capitalism, these public health academics now seek to expose the essential fatness of 21st century Australia. Indeed, many health scholars have moved so far out of the realm of medicine that they seem to be developing a branch of sociology based solely on trans fats.

They may have good intentions. Nobody wants Australia to be needlessly unhealthy. But these medicos with ambitious regulatory proposals rarely consider some critical questions. Will there be unintended consequences? (Such as drinkers changing from alcopops to hard spirits since the tax was increased.) And where is the evidence that it'll even work - will the specific policy being recommended actually fix the problem?

There is an almost unanimous agreement among public health lobbyists and the commentariat that the Government should ban junk food advertising to children. But the *Royal Journal of Medicine* argues there is 'no good evidence that advertising has a substantial influence on children's food consumption'.

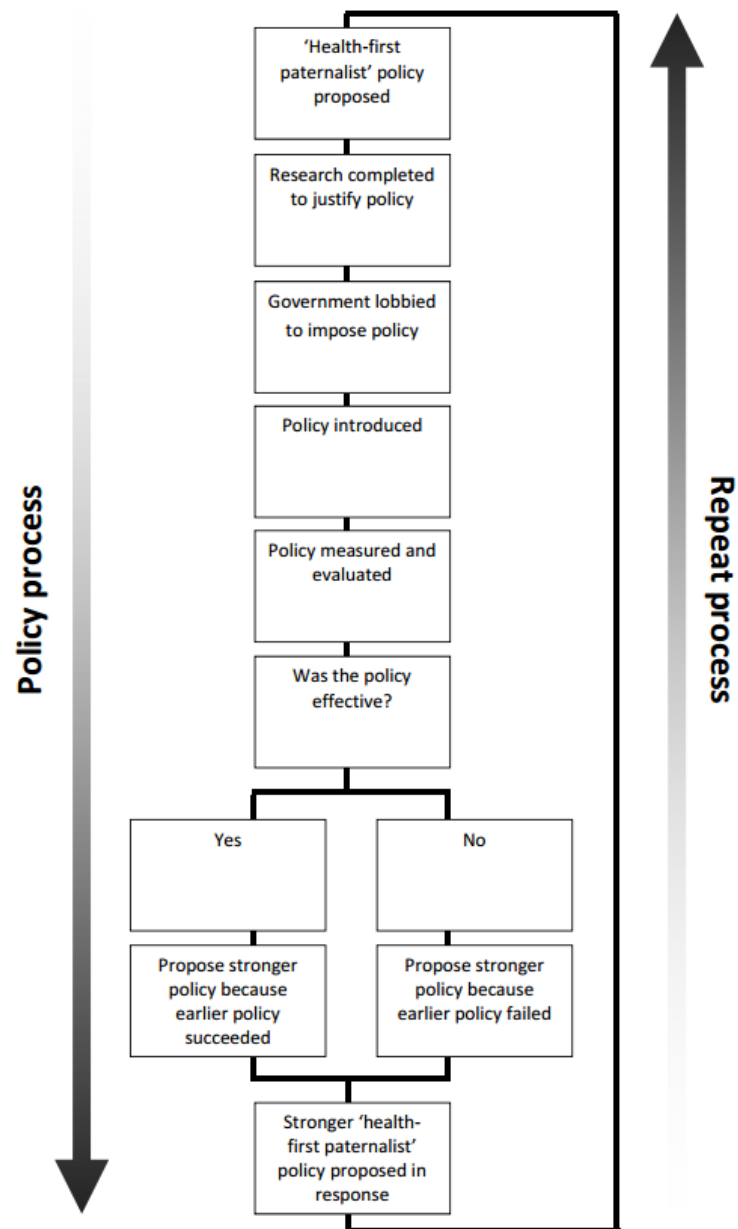
Our peak communications regulator, the Australian Communications and Media Authority, which has repeatedly looked at the issue over the past decade, agrees. Nevertheless, we still get vacuous claims about 'pester-power' - claims which seem to be driven by the belief that only the government can stop kids nagging their parents.

Mark Twain was concerned that giving the government the power to 'meddle with the private affairs of cities or citizens' risked people losing their 'independence of thought and action'. Today, it seems that for many in the public health establishment, this loss of independent thought and action is not so much a warning as an assumption.⁶¹

Alluded to in Berg's article was a disconnect between evidence and the development of public health policy. In a 2013 paper, Tim Wilson illustrated the dynamic of how evidence was adapted to justify further Nanny State policies.

⁶¹ Chris Berg, 'Silly recommendations are very bad for our health' *The Age*, 5 July 2009
<<http://ipa.org.au/news/1895/silly-recommendations-are-very-bad-for-our-health>>.

Figure 1: Self-reinforcing nature of health-first paternalist approach to public policy



This may explain why it is that evidence of various policy failures are routinely ignored. Various policies, from mandatory bike helmets to alcopops taxes and plain packaging of tobacco products have all failed to achieve their objectives. Research conducted by both Mr Lane and Dr Novak on paternalistic taxes, referred to throughout this submission, show that such policies rarely work as expected or desired.

However, where these policies are having an effect is both the diminution of individual liberty, and the erosion of civil society.

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