

Victorian Tobacco Control Strategy 2008-2013 Consultation Submission

Front cover sheet

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Confidential ☐ Yes ☒ No

Please indicate if you are:

- ☐ A person under the age of 18
- ☐ A representative group/organisation of businesses that sell tobacco
- ☒ An owner or manager of a business that sells tobacco products
- ☒ An employee of a business that sells tobacco products
- ☐ A professional association or non-government organisation
- ☒ Involved in the tobacco industry other than by retailing
- ☐ A health group or organisation
- ☐ A health or medical professional
- ☐ A teacher, educator or youth worker
- ☐ A union
- ☐ Involved in the advertising industry
- ☐ An interested member of the public (please indicate your smoking status below)
Current smoker ☐ Ex-smoker ☐ Never smoked ☐
- ☐ Other (please specify)

Additional comments included? ☒ Yes (please attach) ☐ No



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Philip Morris Limited's Comments on *Victorian Tobacco Control Strategy 2008 – 2013: Consultation Submission Guide 2008*

Philip Morris began operating in Victoria in 1954. Today, Philip Morris Limited (PML) employs more than 800 people in Australia, including over 500 in Victoria alone. We manufacture and wholesale cigarettes and other tobacco products, which are sold by more than 7200 retailers across Victoria, including our own tobacconist in South Yarra.

We therefore welcome the opportunity to comment on the "*Victorian Tobacco Control Strategy 2008-2013: Consultation Submission Guide 2008*" (the "Consultation Document"). The issues raised cover a wide spectrum of strategies for continuing the Victorian Government's success at reducing the harm caused by tobacco use.

Introduction

PML supports the Victorian Government's objective of reducing tobacco-related harm. Legislation should continue to play an important part in advancing those objectives. While we support comprehensive, effective regulation of the manufacturing, sale, marketing and use of tobacco products, we do not support regulation designed to prevent adults from buying and using tobacco products or to impose unnecessary impediments to the operation of the legitimate tobacco market. Regulation must be based on evidence and should not raise unintended consequences that are neither good for public health nor for the legitimate tobacco industry.

The Consultation Document invites comment on a variety of options. Our input addresses the following issues raised by the proposals briefly outlined in the Consultation Document:

1. Retail tobacco displays should not be banned

- A display ban is inconsistent with the Victorian Government's commitment to "minimum necessary regulation"
- Banning retail display of tobacco products would significantly and needlessly distort competition

- Banning retail display is inconsistent with the Competition Principles Agreement because less restrictive options are available
- Display bans have not been proven effective in other jurisdictions
- Studies do not support display bans
- Proponents of display bans ignore the fact that most youth who smoke do not buy cigarettes from retail shops
- PML supports evidence-based strategies: education, enforcement , penalties and a system of positive licensing
- Further restrictions on tobacco display size, while inconsistent with the Government's commitment to "minimum necessary regulation", would be preferable to a ban

- 2. Retailers should have 1 year to prepare for any regulatory change**
- 3. Specialist tobacconists should continue to be permitted to display their stock-in-trade** – and defining "tobacconist" is therefore important
- 4. Retailers should continue to be permitted to communicate about product availability, attributes and price**
- 5. Adults should be educated and reminded not to smoke around children**
- 6. Cigarette sales at adult-oriented events should not be banned**
- 7. The Minister for Health should be empowered to ban tobacco products or smoking accessories with packaging and characterising flavours that particularly appeal to youth**

Our comments generally follow the structure of the Consultation Document. However, as the Consultation Document outlines a number of potential strategies rather than providing formal legislative or regulatory proposals for which impact assessments or other prerequisites have been undertaken, we have not fully commented on all the listed strategies nor answered each question posed.

For all matters in the Consultation Document, including those on which we have commented (e.g., retail tobacco display bans), we reserve our right to respond in detail when the requisite consultations and impact assessments are undertaken on specific legislative proposals.

1. Tobacco Displays Should Not Be Prohibited

We do not question or object to the Strategy's stated objectives of preventing youth smoking, reducing overall smoking incidence by 20 per cent (and by more than that in target groups) by 2013. But the Strategy's objectives can be achieved in a way that does not remove critical competitive tools used by tobacco product manufacturers.

Although tobacco advertising is banned in Australia, some form of consumer information is both appropriate and necessary to maintain a competitive market. Manufacturers and retailers should be able to compete fairly for market share by using already restricted retail display of tobacco products to communicate to adult smokers about products offered for sale. Requiring retailers to hide the tobacco products they sell would be disproportionate and inconsistent with existing laws because it would unduly restrict competition, it may hinder retailers' businesses, it deprives adult consumers of information about alternative product offerings, its benefit to public health is speculative, and because other less restrictive and, we believe, more effective measures are available.

PML's business success is based upon our ability to get adult smokers of competitors' products to purchase ours instead. This business model can succeed in an environment of declining smoking incidence but it is at significant risk if critical tools of competition are needlessly regulated away.

***A display ban is inconsistent with the Victorian Government's
commitment to "minimum necessary regulation"***

The Victorian Government's *Guide to Regulation 2007* is "the definitive handbook used by the Government to develop regulation and to achieve its vision of well-targeted, effective and appropriate regulation."¹ It commits the Government to following sound processes to develop "well-targeted, effective and appropriate regulation ... that imposes the lowest possible burden on Victorian business ... and the community as a whole."²

¹ Government of Victoria, 2007, *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne (the "*Guide to Regulation*"), at 1-3. The Guide makes clear that it uses the term 'regulation' "in its broader sense, i.e. consideration is given to the full range of regulatory forms and government interventions that impose some form of rule to influence behaviour." Ibid. at ii. We use the term in that same broad sense throughout this submission.

² Ibid.

The *Guide to Regulation* establishes “best practice principles”, subjecting regulatory proposals to “stringent and formalised evaluation processes” in order to avoid “excessive, inefficient or ineffective regulation.”³ Those processes require legislative proponents to:

- Clearly define the government objective
- Carefully consider all feasible forms of regulation and non-regulatory measures to advance the objective
- Carefully assess (and quantify) the costs and benefits of a regulatory proposal for different groups within the community as well as society as a whole
- Ensure that the regulation does not restrict competition unless it can be demonstrated that the benefits outweigh the costs and the objectives can only be met by restricting competition
- Ensure that the regulatory measures are the *minimum necessary* to achieve the objectives
- Provide mechanisms for regularly evaluating the regulation to ensure that it is meeting specified objectives
- Consult with business and the community at all relevant stages of the regulatory development process⁴

Prohibiting retail display of tobacco products would not meet most of those criteria. As we discuss in the next sections, requiring retailers to hide the tobacco products they sell would significantly and adversely affect many businesses; it is unproven; and less restrictive, evidence-based alternatives are available (as discussed in the section beginning on page 10).

<p><i>Prohibiting tobacco product display would significantly distort competition by entrenching dominant brands</i></p>

Competing manufacturers and retailers use display to present their range of brands to adult smokers, who can then select the brand they prefer within that range. Requiring retailers to hide tobacco products would significantly impair opportunities for manufacturers to introduce new brands in the market, let alone future alternative products. Because adult smokers would have no way of knowing that a new brand, new brand variant, or new product is available, a ban on tobacco product display would make it virtually impossible for manufacturers

³ *Guide to Regulation* at 1-5 – 1-6.

⁴ *Guide to Regulation* at 3-3. Any legislative proposal to restrict or prohibit retail tobacco displays should be subject to those processes, and we expect to be afforded the opportunity to provide more detailed information on specific proposals as they are developed.

to introduce new products, an essential element of fair, effective competition in a free marketplace.

It is beyond dispute that a point of sale display ban will adversely impact the ability of manufacturers, importers and retailers to compete. For example, in its proposal to ban tobacco product display, the Norwegian government stated there was no “doubt that ... a [display] ban will remove the use of positioning as a competitive measure between the producers.”⁵

Display has been at the heart of a number of competition disputes and litigation in other jurisdictions.⁶ Retail display of consumer goods is similarly a key factor in competition in the retail marketplace in Australia.

Some proponents of display bans have suggested that tobacco product display is unnecessary, because up to 90 per cent of adult smokers know their brands. Even if that number is accurate (and we have no basis to know whether it is), that 10 per cent of adults who smoke but who have not decided on their preferred brand represent the key to our ability to compete and succeed.⁷

It's true that most adult smokers know their preferred brand and, in Australia, the leading tobacco brand is made by one of our competitors. If adult smokers never see Philip Morris Limited's brands when they buy their products, odds are they will never switch to them, and adults who smoke our brands may switch to better-known brands. Banning display of tobacco products would give, in effect, a regulated competitive advantage to brands with existing market shares and established consumer recognition. That would significantly disadvantage PML.

A ban on display of tobacco products also risks distorting competition in the retail universe. Display bans may encourage consumers to shift tobacco purchases to large stores rather than small retailers, as consumers may believe that such retailers are likely to stock a wider range of products.⁸

Under those circumstances, any regulatory proposal to prohibit display would require consultation with manufacturers, retailers and other stakeholders; a

⁵ Norwegian Ministry of Health and Care Services, *Public Hearing of A Proposal on A Ban Against Visible Display of Tobacco Products at Point of Sale, As Well As Certain Other Changes to the Tobacco Damage Act and the Advertising Regulation* (March 2007) (“Norwegian Consultation Document”) at 5.

⁶ In the EU, for example, courts, governments and manufacturers have stressed the importance of access to display in retail to the ability to enter into and compete in a market. See, e.g., European Court of Justice Case C-405/98 *Konsumtombusdmannen v Gourmet International Products Aktiebolag*, Decision of the Court paras 19-21, 38, 39 and Opinion of Advocate General Jacobs, paras 35, 36 .

⁷ PML's business succeeds when adult smokers switch to our brands and don't switch to competitors'. Last year, while adult and youth smoking rates in Australia fell to record lows, we increased our market share by 1% and generated an 8.9% increase in operating revenues.

⁸ We estimate there are approximately 7,300 retailer businesses in Victoria that sell tobacco products. Annex 1, the *Victoria Retail Fact Sheet*, illustrates the differences between different types of tobacco retailers in the State.

Business Impact Statement; and a competition assessment which demonstrates that the benefits of the regulatory proposal outweigh the cost and that the objectives of the regulation can only be met by prohibiting displays. As the next sections demonstrate, proponents of a display ban cannot make that case.

Banning retail display is inconsistent with the Competition Principles Agreement

The Competition Principles Agreement between the Commonwealth and each of the State and Territory Governments requires that regulations not restrict competition unless:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can **only** be achieved by restricting competition.⁹

Recognising that, the *Guide to Regulation* provides that regulations should not restrict competition unless they are demonstrated to be both necessary and effective:

“good policy design requires that legislation should not restrict competition **unless it can be demonstrated** that:

- the benefits of the restriction as a whole outweigh the costs; and
- the objectives of the legislation can **only** be achieved by restricting competition.”¹⁰

It has not been demonstrated that display bans are the only means of reducing smoking and preventing youth smoking. To the contrary: experience does not support a display ban; the estimated effectiveness of a display ban at reducing youth smoking is speculative; and less restrictive, evidence-based options are both available and likely to further advance policy objectives. Competition principles embodied in both Victorian and Commonwealth law therefore suggest pursuing less restrictive options than a complete ban on retail display of tobacco products.

⁹ Clause 5 (emphasis added). The Competition Principles Agreement is one of three intergovernmental agreements that underpin the National Competition Policy (NCP). The three agreements outline the reforms which governments undertook to put in place under the NCP process. For further information see: National Competition Council (2nd edn.), 1998, Compendium of National Competition Policy Agreements, p 13–23, <http://www.ncc.gov.au/>

¹⁰ *Guide to Regulation* at 3-6 (emphasis added).

Display bans have not been demonstrated effective

No Australian State or Territory has implemented a ban on tobacco product display.

Although Iceland, Thailand and Canada have prohibited tobacco displays in most retail outlets, *no* international or domestic jurisdiction has implemented a *total* ban on display of tobacco products. Most of those prohibitions are so new that data are not available which would demonstrate their effectiveness.

The only country that has had a point of sale display ban in place for any significant period of time is Iceland, which introduced a point of display ban in August 2001. The data from Iceland do not prove that a ban is effective. Icelandic data from 1995 to 2007 show that there have been both decreases and increases in the incidence of daily and occasional smoking among minors (15 to 19 year old males and females) in individual years since the ban took effect.

In fact, according to the data, incidence of male smokers aged 15 to 19 were highest in 1997 – four years before the ban – and 2002 – one year after the ban. Incidence for the same group grew marginally from 2004 to 2006 and spiked in 2007 to levels approximately equal to those reported for 1995 and 1999. For females aged 15 to 19, incidence of daily and occasional smokers in 2003 was reportedly above that reported for 2000 and while not reaching that level since has declined and increased every other year from 2004 to 2007.¹¹ Commenting on the data from Iceland, the Norwegian Ministry of Health noted that although overall smoking prevalence in Iceland declined from 2001 to 2005, “there are no indications to prove that this reduction is a result of the ban, more than other tobacco preventive measures introduced at the same time.”¹²

Other jurisdictions have recognised that claims that a retail display ban advances public health objectives better than any other options are speculative and unproven. For example:

- The Tasmania Department of Health stated in 2006 that “the removal of displays may assist some adult smokers trying to quit ... *The numbers who actually quit and do not relapse as a result of this measure is expected to be marginal.*”¹³
- While Canadian provinces were implementing tobacco display bans, the Canadian federal government’s Department of Health (Health Canada) issued a consultation document on the topic. It noted that “It is possible

¹¹ Public Health Institute of Iceland; available at www.statice.is.

¹² Norwegian Consultation Document at 5.

¹³ Tasmania Department of Health and Human Services Discussion Paper *Strengthening Measures to Protect Children from Tobacco* (May 2006) at 14.

that restrictions on tobacco displays will have an impact on this trend [smoking incidence], *but this remains very speculative at this time.*"¹⁴

- The Norwegian Department of Health and Care Services, in considering whether to introduce a display ban in Norway, conceded "there is yet no scientific study published that definitely shows the impact that a ban against public display would have on the number of people who smoke."¹⁵

Moreover, **no** studies have examined the various impacts of display bans on our business or on the diverse retail universe.

It would be unreasonable, and contrary to the Victorian Government's commitments to the Commonwealth and the public, to deprive businesses of a core means of competition if it has not been demonstrated that the regulatory intervention will advance the Government's health objectives better than less restrictive options.

Studies don't support display bans

The Consultation Document cites various studies to support the proposition tobacco displays indirectly "increase...the likelihood that young people will start smoking, encourage smokers to buy more tobacco products and make it harder for quitters to stay quit."¹⁶

The studies do not support that proposition. None of those studies establish that prohibiting retail tobacco display would result in fewer minors starting to smoke or more adults successfully quitting.

For example, a 2006 study cited by the Consultation Document measured 605 teenagers' self-reported "predisposition" to smoke following exposure to photographs of in-store advertising and point of sale displays. After showing 605 teenagers photographs of stores with and without advertising and product display, the researchers concluded that "advertising and bold displays *may* help to pre-dispose them to smoking."¹⁷ It never found that they *were* so predisposed or that tobacco displays actually influenced their beliefs or actions.

In fact the study found the contrary. Although it found higher brand recall and perceived ease of access to tobacco products among students who viewed photos of stores with product display, the researchers concluded: "Exposure to point of sale advertising, *but not display*, tended to weaken students' resolve not to

¹⁴ Health Canada *A Proposal to Regulate the Display and Promotion of Tobacco and Tobacco-related Products at Retail: Consultation Document* (2006).

¹⁵ Norwegian Consultation Document at 5.

¹⁶ Consultation Document at 5.

¹⁷ Wakefield M., et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point of Sale Cigarette Advertising and Pack Displays* Health Education Research 21:338-347 (15 May 2006) at 338 (emphasis added).

smoke in the following year. Findings also indicate that exposure to advertising, *as opposed to pack display on its own*, influenced whether students would accept a cigarette from one of its friends if they offered.”¹⁸ The same researchers found that product display had *no impact* on peer approval of smoking, positive attributes being ascribed to smokers, or perceptions about overall harm from smoking.¹⁹

Similarly, although another study cited in the Consultation Document found that some adult smokers may make “impulse” purchases when they see tobacco products displayed, the study never suggests that those adults would not have purchased those same tobacco products otherwise.²⁰

Our own experience confirms that the size of tobacco display areas has no clear link to the volume of sales in a retail outlet. In fact, there are several reasons why some stores sell more cigarettes than others, none of which relate to the size of the display area. Contributing factors to sales figures include: (1) location of the store in a high traffic zone (e.g., a large train station); (2) proximity of store competitors; (3) operating hours compared to other stores; (4) store business practices (e.g. inventory management and product distribution to meet customer demand); and (4) the store’s customer base.

There is an insufficient evidence base to support a prohibition on tobacco displays rather than less restrictive, evidence-based options.

Proponents of tobacco display bans ignore the fact that most youth who smoke do not buy cigarettes from retail shops. Broad community initiatives are therefore needed to prevent youth smoking

If the Government’s aim is to reduce youth smoking, banning retail tobacco displays misses the mark.

Australian government research indicates that minors obtain cigarettes significantly more frequently from friends, siblings or even parents than they do from retail shops. For example, the *2004 National Drug Strategy Household Survey* found that “two in three (68.8%) smokers and three in four (73.9%) ex-smokers aged 12-15 years obtained their first cigarette **from a friend or acquaintance**.”²¹ Another study, *Smoking behaviours of Australian secondary students in 2005*, found that 77% of adolescents identified as “current smokers”

¹⁸ Ibid. at 345 (emphasis added).

¹⁹ Ibid. (emphasis added). It is worth noting that point of sale advertising has been banned in Victoria since 1 January 2002. Tobacco (Amendment) Act 2000 sec. 9.

²⁰ See Wakefield et al. *The effect of retail cigarette pack displays on impulse purchase*, *Addiction*, 103:322-28 (2007).

²¹ The Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey – Detailed Findings*, Canberra, October 2005, p 108.

did not buy their last cigarette.²² While 12% of those surveyed had obtained tobacco products from parents (8%) and siblings (4%) and 5% had taken tobacco products from home, most adolescents had acquired their cigarette from friends (41%) or by asking someone else to buy it for them (16%).²³

Although those surveys highlight the need for stronger enforcement of existing laws (since it is illegal to sell tobacco products to – or purchase tobacco products on behalf of – a person aged less than 18 years), ***they also demonstrate that retail regulations are only part of the equation.*** While preventing youth access to tobacco at the point of retail remains vital, the responsibility for preventing youth smoking needs to be shared across different sections of the community: parents, friends, siblings, doctors, teachers and the individuals themselves.

<i>PML supports evidence-based strategies rather than a prohibition</i>
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The Victorian Government has made great strides in reducing smoking incidence and preventing youth smoking: rates in Victoria are among the lowest in the world. We support further, evidence-based actions in order to meet government objectives.

According to the U.S. Centers for Disease Control, “Evidence-based strategies that can increase the rate of decline in youth smoking include greater exposure to effective media campaigns, comprehensive school-based tobacco-use prevention policies and programs in conjunction with supportive community activities, and higher retail prices for tobacco products.”²⁴ We fully support such measures.

Educational programmes and communication

While the Consultation Document explores the effect of adults smoking outside government schools on youth perceptions about smoking,²⁵ it never addresses what happens *inside* the schools. We would support further measures to educate young people about not smoking.

While we could suggest educational programs, in our experience, the public health community has been critical of suggestions made by tobacco companies

²² Drug Strategy Branch, Australian Government Department of Health and Ageing, *Smoking behaviours of Australian secondary students in 2005*, Centre for Behavioural Research in Cancer, Cancer Control Research Institute, The Cancer Council Victoria, June 2006, p 20. [http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/E1B70590AD4EF56DCA257225000EDCE9/\\$File/mono59.pdf](http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/E1B70590AD4EF56DCA257225000EDCE9/$File/mono59.pdf)

²³ Ibid. at 19.

²⁴ Office on Smoking and Health, Division of Adolescent and School Health, National Center for Chronic Disease Prevention and Health Promotion, CDC. *Cigarette Use Among High School Students --- United States, 1991—2005* Morbidity and Mortality Weekly Reports 55(26); 724-726 (7 July 2006).

²⁵ Consultation Document at sec C.3.3, p. 12.

on youth smoking and there are ample guides from public health authorities on best practices which are available.

Enhancing compliance, enforcement and penalties

We fully support the proposal to “identify opportunities to improve legislative compliance and determine whether the penalties prescribed in the Tobacco Act are at an appropriate level to deter non-compliance.”²⁶

We agree that additional legislative measures should be considered to enhance retailer understanding of and compliance with laws. We would support legislation requiring retailers to request proof of age for people who appear to be under 25 years of age. In our experience many retailers routinely check proof of age identification for people who appear to be under 25 years of age; laws requiring that would encourage doing that routinely.

Controlled purchase operations are being conducted in most States and Territories, but they are established by legislation only in Tasmania, Western Australia and the ACT. That has resulted in some uncertainty about their legality in some states.²⁷ We would support amending legislation to clearly permit such enforcement measures.

Licensing

Victoria’s system of “negative licensing”, implemented in 2000, is a good basis for addressing non-compliance, but we believe a *positive licensing system* would better foster a culture of compliance and provide other benefits as well.

We suggest that a positive license scheme would be far more effective because:

- licensed retailers are easily identified by law enforcement agents;
- retailers who are required to pay for a licence are more likely to comply with the law;
- additional funds from payment of a licence could be devoted to enforcement; and
- withdrawal of the license following evidence of sales to minors would be simpler to enforce, assuming that retailers would have to post a license to indicate that he or she were permitted to sell cigarettes.

Others share our view. For example, the British Medical Association wrote in 2007, “A positive licensing scheme, already in place for shops that wish to sell alcohol, would bring tobacco sales in line with alcohol sales. It would be more likely to be taken seriously than a negative licensing scheme.”²⁸ Similarly, the US

²⁶ Consultation Document at 7.

²⁷ See *Robinson v Zhang* [2005] NSWCA 439.

²⁸ British Medical Association, *Breaking the Cycle of Children’s Exposure to Tobacco Smoke* (April 2007) at 38.

Centers for Disease Control advocates licensing of retailers in its "*best practices*" guide to tobacco control.²⁹

We recognise that this would entail a greater administrative burden and costs for government and for the licensed enterprises. But experience from other Australian jurisdictions demonstrates that positive licensing schemes are feasible.³⁰

Further restrictions on display size are preferable to a ban on all display

The Consultation Document seeks input on whether stakeholders would prefer a ban on tobacco product display or restricting display size to 1 square metre. We do not believe that either option is consistent with the Government's commitment to "minimum necessary regulation" expressed in the *Guide to Regulation*.³¹ Restricting displays to 1 square metre in shops (other than specialist tobacconists) has, however, proven feasible in other Australian jurisdictions. For example, Queensland amended its law to limit display size to 1 square metre in tobacco retailers (other than tobacconists, which can display 3 square metres).³² Restricting along those lines would be preferable to a total ban on product display.

2. Retailers should have 1 year to prepare for regulatory change

If tobacco displays are restricted or prohibited, retailers will need time to adjust their display hardware. When display sizes were last slightly modified (limiting display to one pack facing per product line),³³ nearly seven months were allowed to implement that change. Given the more extensive changes contemplated by the Consultation Document, we recommend one year be allowed between assent and commencement of legislative provisions on retail display.

3. Specialist tobacconists should continue to be permitted to display their stock-in-trade

²⁹ U.S. Centers for Disease Control and Prevention *Best Practices for Comprehensive Tobacco Control Programs 2007* Appendix C at 113.

³⁰ Western Australia, for example, implemented a retail license system in 2007, and further requires that manufacturers or wholesalers may only sell to licensed retailers and must have systems in place for documenting compliance with that requirement.

³¹ *Guide to Regulation*, sec. 3.2.6

³² Consultation Document at 6.

³³ The Tobacco (Amendment) Act 2005, No 45/2005, assent given 16 August 2005, commenced 1 March 2006.

We agree that retailers who specialise in selling tobacco products should not be required to hide the products they sell from their adult consumers, and we suggest consulting with them on the best way to define and regulate their businesses.³⁴

We note that the concept of “specialist tobacconist” exists in a number of jurisdictions within Australia and internationally.³⁵ Definitions look to a number of factors, including:

- **Percentage of gross revenues** earned from the sale of tobacco products and smoking accessories (ashtrays, lighters, etc). The levels can range from 50% (in Western Australia) to 100% (in Tasmania). We recommend 80%, the number applied in Queensland.
- **Location of business.** A number of states require that tobacconists be located separately from, and not in conjunction with, any other business. We support that approach. Queensland requires that they not be located “within the premises of ... any other business”, which could be impractical or confusing. We believe that the better approach is the one taken by South Australia, which requires that *if* tobacconists are located within another business, that the premises be separated by internal walls or doors; that the tobacconist cannot be used as a thoroughfare to gain entry to the other shop; and the retail display is not visible from outside the tobacconist.

4. Retailers should continue to be permitted to communicate about product availability and price.

As discussed above, it is difficult to imagine how retailers would be able to communicate about brand attributes and availability without product display. They should certainly be consulted on the topic. From our perspective, price tickets and price boards are one possible vehicle, although the law currently requires that such boards have no brand depictions, imagery or descriptions. Retailers should, at a minimum, be permitted to show consumers a list or board which indicates the products available, the price at which they are available, and an image of the package. They should also be permitted to show the package itself (or packages, if the customer wants to compare one to another) on an adult consumer’s request.

It’s important for the law to clearly define what it means by display, to make it clear that *incidental visibility* (for example, when the pack is being handed to the purchaser; or when a storage unit is being opened to retrieve the product) does not constitute display. For purposes of display restrictions or prohibitions, “display” connotes *prominent rather than incidental visibility*. The Random House

³⁴ Tobacconists constitute approximately 2 per cent of all tobacco retailers in the State. Tobacco products and tobacco accessories represent approximately 85 per cent of their revenues, on average.

³⁵ Annex 2 lists, to our best knowledge, the definitions of “tobacconist” established by the Australian States and Territories.

Unabridged Dictionary, for example, defines the noun display as an "arrangement, as of merchandise, art objects, or flowers, designed to please the eye, attract buyers, etc." We would recommend that the law define display as "An arrangement of merchandise which gives prominent visibility to the merchandise."

5. Adults should be educated and reminded not to smoke around children

Public health officials have concluded that secondhand smoke causes or increases the risk of disease in non-smokers, and we agree that people should not smoke around children in cars. The Victorian Government should be seeking input on the best way to achieve that policy outcome. Instead, the only question upon which it is consulting is whether the cut-off should apply at 16 or 18 years of age.

Either option raises challenging issues in terms of striking the right balance between actions to protect health and individual liberty. In our opinion, that balance can be achieved through educational campaigns and health warnings to remind parents and other adults not to smoke around children.

Legislators in other Australian jurisdictions have recognised that “a ban on smoking in cars would...entail a greater encroachment on individual liberties than one on behaviour in public areas.”³⁶ They have also been “persuaded by the concerns of police and advocacy-based inquiry participants about the enforceability” of laws that prevent smoking in cars where children are present.³⁷ Rather than legislation, the Committee recommended education as the preferred approach to the issue. We agree with that recommendation.

³⁶ New South Wales Joint Select Committee on Tobacco Smoking, *Tobacco Smoking in New South Wales*, June 2006, p134

³⁷ Ibid.

6. Sales at adult-oriented events should not be banned

The Victorian Government proposes to ban the sale of cigarettes “from temporary outlets and only allow cigarettes to be sold from permanent retail outlets.” The proposal is apparently based on New South Wales’s similar action last December, justly questioned in the media as an emotion-based rather than evidence-based policy.³⁸ Perhaps for that reason, the New South Wales ban is unique among Australia jurisdictions.

The Victorian Government’s policy in this area should be based on consultation and evidence, not speculation. The proponents of banning all sales from “temporary outlets” have offered *no* evidence or analysis suggesting that the policy would have *any* effect on Government health objectives, and certainly have not made a sufficient case for a total ban on such sales.

PML and its business partners sell cigarettes at events where adults expect to be able to purchase cigarettes. Those adults will either purchase at the event or will bring cigarettes with them to the event. Selling cigarettes at the event allows us to introduce our brands to people who smoke competitors’ cigarettes. Event sales aren’t about advertising or promoting smoking. Doing so is already illegal under Victorian and Federal law, and those laws are rigorously enforced.

PML’s sales kiosks are unbranded, use no brand-related colours, and have displays much smaller than typical retailers. They are at events where the attendees are predominantly if not exclusively adults. They are located within or near areas licensed to sell alcoholic beverages to adults. They are run by staff trained in verifying age and declining sales to minors. Staff must be at least 21 years of age, and staff uniforms are unbranded. Staff are required to obtain identification from anyone who might be considered under the age of 25, and document sales that are declined.

Those steps should be required by law. Thus, as an alternative to the contemplated ban on event sales (whether in ‘temporary’ or ‘permanent’ outlets), we recommend that licenses or approvals to sell tobacco products at events should be granted under the following circumstances:

- Tobacco products should be permitted to be sold at ***adult only*** events, provided tobacco sales units adhere to all legislative requirements.

³⁸ See, for example, Transcript, Interview with Verity Firth, NSW Minister Assisting the Minister for Health (Cancer), Triple J Radio, 5:50 pm, 28 January 2008, attached as Annex 3.

- At events not restricted to adults, the sale of tobacco products should still be permitted ***so long as measures to verify legal age are in place and documented***. Such sales should at least be permitted within areas licensed to sell alcoholic beverages to which access is already restricted to adults.

7. The Minister for Health should be empowered to ban tobacco products with packaging and characterizing flavours determined by the Minister to particularly appeal to youth

PML supports the commitment expressed at the Australian Health Ministers' Conference to take a nationally consistent approach on regulating fruit and confectionary flavoured cigarettes that are flavoured, packaged and marketed in a way that appeals to youth.

In 2006, the South Australian Government passed legislation which authorises the Minister for Health on a case-by-case basis, to "declare that a class of tobacco products specified in the notice are prohibited tobacco products". The Minister can ban the products if satisfied that "the tobacco products, or the smoke of the products, possesses [sic] a distinctive fruity, sweet or confectionary-like character; **and** the nature of the products, or the way they are advertised, might encourage young people to smoke."³⁹ A number of Australian states have already moved to replicate the South Australian provisions.

We recognise that a nationally-consistent approach makes sense, and we agree that a bright-line, prospective standard is not suitable. We therefore would not oppose a law consistent with that of South Australia's, which would empower the Minister on a case-by-case basis to prohibit the sale of predominantly confectionary flavoured tobacco products where the confectionery flavour overwhelms the tobacco taste and the product is sold in a manner inconsistent with a product intended for adult use.

³⁹ S34A Prohibited Tobacco Products, *Tobacco Products Regulation Act 1997*(emphasis added).

Conclusion

The Victorian Government has committed to adopt only regulation that is carefully considered to advance government objectives in a way that minimizes unintended adverse consequences. PML supports the health objectives identified in the Consultation Document. We agree that reducing young people's exposure and access to tobacco and reducing the harm caused by tobacco use are important policy objectives for governments to pursue. But banning the display of tobacco products in retail outlets that sell those products is not warranted. It has not been clearly demonstrated that banning the display of tobacco products will effectively and proportionately advance public health objectives, however its effect on our ability to compete fairly for market share will be significant.

Evidence-based, proven options should be implemented instead: education; rigorous enforcement of tobacco laws; a licensing scheme for wholesalers and retailers; training for tobacco retailers; and community initiatives to address the 70% of youth who obtain cigarettes by means other than tobacco retailers.

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ANNEX 1:
Victoria Retail Fact Sheet

Victoria Retail Fact Sheet



PHILIP MORRIS
LIMITED

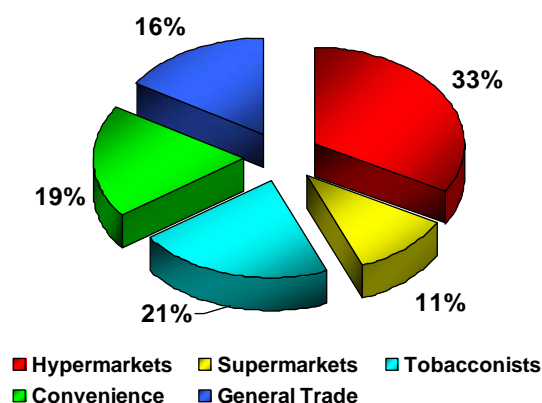
The Victoria Retail Facts sheet is designed to highlight the relevant information for stakeholders in order to better understand the Tobacco Industry at a retail level

Definitions/Examples:

Market Segment	Example Stores
Hypermarkets	Woolworths, Coles
Supermarkets	IGA
Group Specific Tobacconists	Free Choice, Tobacco Station, Cignall, Smokemart
Convenience	Caltex, 7 Eleven
General Trade	Corner Stores, Milk Bars

General Trade represents more than half of all tobacco selling outlets in Victoria.
Hypermarkets & tobacconists represent the greatest sales volume

Market Segment Share of Trade:



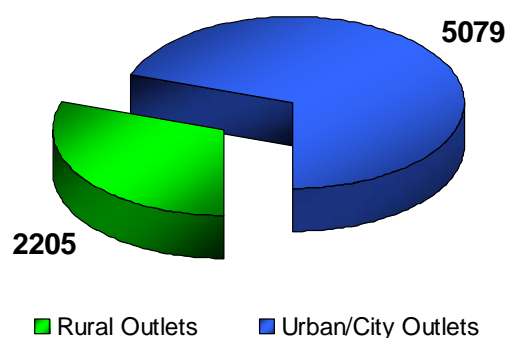
Store Numbers by Market Segment:

Hypermarkets	440
Supermarkets	542
Group Specific Tobacconists	209
Convenience	2168
General Trade	3925
Total Outlets	7284

% of store revenue generated from Tobacco:

Hypermarket	8%
Supermarket	11%
Tobacconists	85%
Convenience (Excl Fuel)	33%
General Trade	33%

Urban & Rural Outlet Split:



ANNEX 2:
State and Territory
Definitions of 'Tobacconist'

LEGISLATIVE DEFINITIONS OF 'TOBACCONIST'

State	Legislation	Definition
Commonwealth	<i>Tobacco Advertising Prohibition Act 1992 (Cth).</i>	The Legislation does not refer to a 'tobacconist', specialist or otherwise.
ACT	<i>Tobacco Act 1927 (ACT)</i>	The Legislation does not refer to a 'tobacconist', specialist or otherwise.
New South Wales	<i>Public Health Act 1991 (NSW)</i>	The Legislation does not refer to a 'tobacconist', specialist or otherwise.
Northern Territory	Section 5 <i>Tobacco Control Act 2002 (NT)</i>	specialist tobacconist means: a person who conducts a business selling tobacco products by retail where (a) 85% or more of the average annual gross turnover of the business is derived from the sale of tobacco products; and (b) the business is conducted separately from, and not in conjunction with, any other business.
Queensland	Schedule Dictionary; <i>Tobacco and Other Smoking Products Act 1998 (Qld)</i>	Tobacconist means a person who conducts a business selling smoking products by retail if – (a) 80% or more of the average gross turnover of the business is derived from the sale of smoking products by retail; and (b) the business is conducted separately from, not in conjunction with, and not within the premises of, any other business.

State	Legislation	Definition
South Australia	Regulation 6(2) <i>Tobacco Products Regulations 2004</i> (SA)	<p>Premises will be taken to be the premises of a specialist tobacconist if –</p> <p>(a) a person sells tobacco products by retail in the premises in the ordinary course of business; and</p> <p>(b) during –</p> <ul style="list-style-type: none"> (i) in the case of a business that has been trading for a period of more than 1 financial year – the immediately preceding financial year; or (ii) in any other case – the period for which the business has been trading, <p>the gross turnover of all tobacco products sold at the premises constitutes 80 per cent or more of the gross turnover of all products sold at the premises during the relevant period; and</p> <p>(c) in the case where premises are situated within another shop –</p> <ul style="list-style-type: none"> (i) the premises are separated from the other shop by means of internal walls or doors; and (ii) a person is not able to use the premises as a thoroughfare to gain entry to the other shop from outside the premises; and (iii) the retail display in the premises is not able to be seen by persons in the other shop. <p>If a premises meets this definition, the tobacco display must follow the provisions outlined in regulation 6(2a).</p>

Tasmania	Section 3 <i>Public Health Act 1997</i> (Tas)	<p>specialist tobaccoconist premises means:</p> <p>(a) premises that are operated independently and apart from any other retail business and where only tobacco, tobacco products, matches and cigarette or pipe lighters are sold; or</p> <p>(b) premises that, under section 72B, are determined to be specialist tobaccoconist premises.</p> <p>The Director, by notice in writing, may determine under section 72B that specified premises are or are not specialist tobaccoconist premises.</p> <p>(2) In making the determination, the Director may take into account whether or not products at the premises are able to be purchased lawfully by a child.</p> <p>(3) A person may apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination of the Director that premises are not specialist tobaccoconist premises.</p>
Victoria	<i>Tobacco Act 1987</i> (Vic)	The Legislation does not refer to a 'tobaccoconist', specialist or otherwise

Western Australia	Section 23 <i>Tobacco Products Control Act 2006 (WA)</i>	<p>The Legislation does not refer to a 'tobacconist.' The relevant terms use are '50% retailer' and 'specialist retailer' as defined below.</p> <p>50% retailer means a person who conducts a business selling tobacco products by way of retail if –</p> <p>(a) the person or any other person has been conducting that business on 1 July 2005; and</p> <p>(b) 50% or more of the average gross turnover of the business for the financial year 2004 to 2005 was derived from the sale of tobacco products;</p> <p>specialist retailer means a person who conducts a business selling tobacco products by way of retail sale if –</p> <p>(a) the person or any other person had been conducting that business on 1 July 2005;</p> <p>(b) 80% or more of the average gross turnover of the business for the financial year 2004 to 2005 was derived from the sale of tobacco products; and</p> <p>(c) the business is conducted separately from, not in conjunction with, and not within the premises of, any other business.</p>
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ANNEX 3:

**Transcript, Interview with Verity Firth,
[former] NSW Minister Assisting the
Minister for Health (Cancer),
Triple J Radio, 28 January 2008**

Transcript

Station: **TRIPLE J** Date: **29/01/2008**
Program: **HACK** Time: **05:54 PM**
Compere: **KATE O'TOOLE** Summary ID: **M00029449185**

Item: **O'TOOLE SAYS VERITY FIRTH, NSW MINISTER ASSISTING THE MINISTER FOR HEALTH, INTRODUCED LEGISLATION TO THE NSW PARLIAMENT THAT MEANT SYDNEY'S WAS THE FIRST BIG DAY OUT TO NOT HAVE ANY CIGARETTES AVAILABLE FOR SALE, THOUGH PUNTERS COULD STILL SMOKE.**

INTERVIEWEES: VERITY FIRTH, NEW SOUTH WALES MINISTER ASSISTING THE MINISTER FOR HEALTH

Demographics:	Male 16+	Female 16+	All people	ABs	GBs
	17000	5000	22000	10000	4000

KATE O'TOOLE: Well Verity Firth is the New South Wales Minister assisting the Minister for Health. She's the one who introduced the legislation to New South Wales Parliament, which meant that Sydney was the first Big Day Out not to have any ciggies available for sale anywhere. You could still smoke, but you just couldn't buy cigarettes at the venue.

Verity Firth says that even though they didn't have any specific data linking underage smoking with music festivals, she said they did need to crack down on tobacco companies getting around marketing restrictions for cigarettes.

VERITY FIRTH: They'd sponsor a music festival and then they'd have a DJ in the tent, they'd have sort of attractive cigarette girls selling cigarettes and we just - it was something that was pretty problematic considering

that smoking is as dangerous as it is. Considering the fact that one in two lifetime smokers will actually die from their habit. And also considering the fact that 80 per cent of smokers said that they started in their teenage years.

So the idea of having big marketing gimmicks at youth musical festivals, sponsored by tobacco, was something that we really, really thought was objectionable and we moved against it.

KATE O'TOOLE: Were people smoking underage?

VERITY FIRTH: Well we don't know, but I tell you what, they were probably more likely to be able to, because cigarettes were on sale there. It wasn't so much about underage smoking, although that also obviously concerns us, it was about - it's a marketing gimmick, it was about promoting tobacco in a way that flouted all the laws that we have about tobacco advertising, and in a way that they couldn't promote it in this way, anywhere else.

KATE O'TOOLE: If the problem was a marketing problem, why not crackdown on the marketing issue, rather than just completely ban the selling?

VERITY FIRTH: Yeah, look that's a good question. And the answer is because it was a marketing issue that was very deliberately flouting our current laws about tobacco advertising.

Now you've got to remember with tobacco is that it's not as if the jury's out on tobacco. They're actually is no safe level of tobacco consumption. One in two lifetime smokers will die, because they're a smoker. Every - 10 new cases, every 10 new cases of lung cancer, eight of them are people who are smokers...

KATE O'TOOLE: Yeah, but the stats are horrific, but you were talking about it being a marketing problem, so why not just deal with the marketing issue?

VERITY FIRTH: Well I suppose the answer to that is we have dealt with the marketing issue, which is to ban it you know.

KATE O'TOOLE: For example though, at Splendour in the Grass Festival in Byron Bay last year, there was a very small tent that was selling cigarettes. I didn't know what it was about actually and walking past, the biggest thing I saw was, I think, something like a smoking kills sign. So I - walking past I thought I won - I thought it could have been like an anti-smoking...

VERITY FIRTH: Yeah, yeah.

KATE O'TOOLE: ...tent. So this is an example where they were selling cigarettes, but it wasn't, you know, there weren't hot chicks walking around with no clothes on...

VERITY FIRTH: Yeah, yeah.

KATE O'TOOLE: ...in that particular tent. What's wrong with that?

VERITY FIRTH: Well I suppose our argument is, when people go to music festivals and say you drink a lot, or whatever it is, you are more likely to want to smoke. So it's about conven - it's essentially encouraging people, who may just suddenly decide they want to smoke because they're a little bit drunk, or whatever, as opposed to - we're not outlawing people smoking, you know, it's still a free world. If people want to smoke, they can still smoke.

But, you know what, you're just going to have to plan. You know, if you're a smoker and you're going to a music festival, you're not outlawed from smoking, you're just going to have to take your packet of cigarettes with you. And we're not going to allow big tobacco to be - to essentially be pushing cigarettes on young people at music festivals.

KATE O'TOOLE: That's Verity Firth, she's the New South Wales Minister, assisting the Minister for Health. She was explaining why new legislation was introduced into New South Wales Parliament, which made it illegal to sell cigarettes in music venues - well actually it's more about mobile and temporary selling. So if there was a permanent selling structure in a place where a music festival was going to be, they could continue selling, but erecting temporary tents or

mobile sellers, is now illegal. And it looks like other States are considering similar legislation.

* * END * *

TRANSCRIPT PRODUCED BY MEDIA MONITORS
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AGENCY REPORT For private research and not to be disseminated. Every effort made to ensure accuracy for the benefit of our clients but no legal responsibility is taken for errors or omissions. (*) - Indicates unknown spelling or phonetic spelling. Metro TV demographics are supplied by OzTAM, Radio and Non-Metro TV demographics are supplied by Nielsen Media Research.

ABs = Managers, administrators, professions. GBs = Grocery buyers.

**Philip Morris Limited's Comments on the
Tobacco Products Control Amendment Bill
Western Australia Legislative Assembly
Education and Health Standing Committee**

Introduction

The Standing Committee is analysing the *Tobacco Products Control Amendment Bill 2008*, which would prohibit retailers from displaying tobacco products and ban smoking in cars where children are present.

The Standing Committee published a notice on 17 January seeking stakeholders' views on "the adequacy of the proposed actions in the bill to protect children and adults from the harmful consequences of passive smoking" and "the adequacy of the proposed actions in the bill to protect children and adults from tobacco promotion."

The Committee allowed nine working days for stakeholders to discover that notice, collect relevant information, and provide their views to the Committee. That timing may suggest to some that the Committee is not interested in meaningful consultation or good regulatory practice. That is unfortunate, since the measures proposed by the bill would affect thousands of businesses and individuals in the State.

Philip Morris Limited (PML) manufactures and wholesales cigarettes and other tobacco products to approximately 1700 retailers across Western Australia. PML supports the bill's objective of reducing tobacco-related harm. While we support comprehensive, effective regulation of the manufacturing, sale, marketing and use of tobacco products, we do not support regulation designed to prevent adults from buying and using tobacco products or to impose unnecessary impediments to the operation of the legitimate tobacco market. Regulation must be based on evidence and should not raise unintended consequences that are neither good for public health nor for the legitimate tobacco industry.

1. Tobacco Displays Should Not Be Prohibited

We do not believe that banning tobacco displays is necessary or effective at reducing the harm caused by tobacco products.

Although tobacco advertising is banned in Australia, some form of consumer information is both appropriate and necessary to maintain a competitive market. Manufacturers and retailers should be able to compete fairly for market share by using already restricted retail display of tobacco products to communicate to adult smokers about products offered for sale. Requiring retailers to hide the tobacco products they sell would be disproportionate and inconsistent with existing laws because it would unduly restrict competition, it may hinder retailers' businesses, it deprives adult consumers of information about alternative product offerings, its benefit to public health is speculative, and because other less restrictive and, we believe, more effective measures are available.

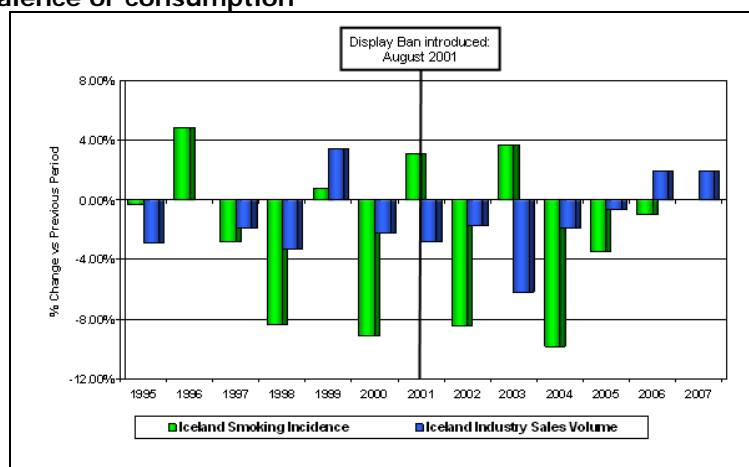
PML's business success is based upon our ability to get adult smokers of competitors' products to purchase ours instead. This business model can succeed in an environment of declining smoking incidence but it is at significant risk if critical tools of competition are needlessly regulated away.

1.1 Display bans have not been demonstrated effective

Although a number of Australian jurisdictions have passed laws that will prohibit retail display of tobacco products, none of those laws has been implemented yet. There are therefore no Australian data on the purported effectiveness of a display ban.

Experience and data from the only country to have implemented a national display ban, Iceland, does not demonstrate that retail display bans are effective at reducing smoking prevalence in adults or in youth, as illustrated in **Figure 1**.

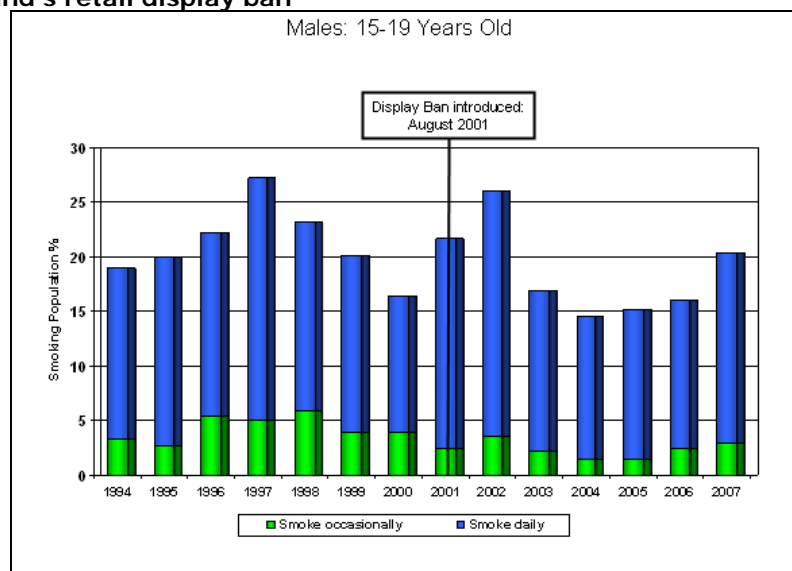
Fig. 1: Iceland's retail display ban has had no clear effect on smoking prevalence or consumption



Source: Sales Data: Icelandic Alcohol and Tobacco Monopoly. Smoking Incidence: Statistics Iceland - Statistical Yearbook of Iceland 2007

Iceland has seen both decreases and increases in the incidence of daily and occasional smoking among minors (15 to 19 year old males and females) in individual years following its display ban. In fact, as **Figure 2** illustrates, incidence of male smokers aged 15 to 19 was highest in 1997 – four years before the ban – and 2002 – one year after the ban. Incidence for the same group grew marginally from 2004 to 2006 and spiked in 2007 to levels approximately equal to those reported for 1995 and 1999. For females aged 15 to 19, incidence of daily and occasional smokers in 2003 was reportedly above that reported for 2000 and while not reaching that level since has declined and increased every other year from 2004 to 2007.¹

Fig. 2: Male youth smoking prevalence increased in the year following Iceland's retail display ban



Source: Smoking Incidence: Statistics Iceland - Statistical Yearbook of Iceland

Commenting on the data from Iceland, the Norwegian Ministry of Health noted that although overall smoking prevalence in Iceland declined from 2001 to 2005, "there are

¹ Public Health Institute of Iceland, Statistical Yearbook of Iceland 2007, Table 17.18, [Smoking habits of 15–79 years old by sex 1987–2006](#).

no indications to prove that this reduction is a result of the ban, more than other tobacco preventive measures introduced at the same time."²

Other jurisdictions have recognised that claims that a retail display ban advances public health objectives are speculative and unproven. For example, while Canadian provinces were implementing tobacco display bans, the Canadian federal government's Department of Health (Health Canada) noted that "*It is possible that restrictions on tobacco displays will have an impact on this trend [smoking incidence], **but this remains very speculative at this time.***"³

Moreover, **no** studies have examined the various impacts of display bans on our business or on the diverse retail universe.

It would be unreasonable, and contrary to Western Australia's commitments to the States, Territories and the public, to deprive businesses of a core means of competition if it has not been demonstrated that the regulatory intervention will advance the Government's health objectives.

1.2 Studies don't support display bans

Some tobacco control advocates suggest that tobacco displays indirectly increase the likelihood that young people will start smoking, encourage smokers to buy more tobacco products and make it harder for quitters to stay quit.

In fact, none of the studies cited by tobacco control advocates establishes that prohibiting retail tobacco display would result in fewer minors starting to smoke or more adults successfully quitting.

For example, a 2006 study frequently cited by display ban advocates measured 605 teenagers' self-reported "*predisposition*" to smoke following exposure to photographs of in-store advertising and point of sale displays. After showing those teenagers photographs of stores with and without advertising and product display, the researchers concluded that "*advertising and bold displays may help to pre-dispose them to smoking.*"⁴ It never found that tobacco displays actually influenced their beliefs or actions.

In fact, the study found the contrary. Although it found higher brand recall and perceived ease of access to tobacco products among students who viewed photos of stores with product display, the researchers concluded: "*Exposure to point of sale advertising, **but not display**, tended to weaken students' resolve not to smoke in the following year. Findings also indicate that exposure to advertising, **as opposed to pack display on its own**, influenced whether students would accept a cigarette from one of its friends if they offered.*"⁵ The same researchers found that product display had *no impact* on peer

² Norwegian Ministry of Health and Care Services, *Public Hearing of A Proposal on A Ban Against Visible Display of Tobacco Products at Point of Sale, As Well As Certain Other Changes to the Tobacco Damage Act and the Advertising Regulation*, March 2007, p. 5 (Norwegian Consultation Document).

³ Health Canada, *A Proposal to Regulate the Display and Promotion of Tobacco and Tobacco-related Products at Retail: Consultation Document*, 2006.

⁴ M Wakefield, et al., "An Experimental Study of Effects on Schoolchildren of Exposure to Point of Sale Cigarette Advertising and Pack Displays", *Health Education Research*, vol. 21, 15 May 2006, pp. 338-347, 338 (emphasis added).

⁵ Ibid., p. 345 (emphasis added).

approval of smoking, positive attributes being ascribed to smokers, or perceptions about overall harm from smoking.⁶

Similarly, although another study cited in by tobacco control advocates found that some adult smokers may make “impulse” purchases when they see tobacco products displayed, the study never suggests that those adults would not have purchased those same tobacco products otherwise.⁷

There insufficient evidence to support a prohibition on tobacco displays rather than less restrictive, evidence-based options.

1.3 Proponents of tobacco display bans ignore the fact that most youth who smoke do not buy cigarettes from retail shops. Broad community initiatives are needed to prevent youth smoking

If the bill’s aim is to reduce youth smoking, banning retail tobacco displays misses the mark.

Australian Government research indicates that minors obtain cigarettes significantly more frequently from friends, siblings or even parents than they do from retail shops. For example, the *2004 National Drug Strategy Household Survey* found that “two in three (68.8%) smokers and three in four (73.9%) ex-smokers aged 12-15 years obtained their first cigarette **from a friend or acquaintance**.”⁸ Another study found that 77% of adolescents identified as “current smokers” did not buy their last cigarette.⁹ While 12% of those surveyed had obtained tobacco products from parents (8%) and siblings (4%) and 5% had taken tobacco products from home, most adolescents had acquired their cigarette from friends (41%) or by asking someone else to buy it for them (16%).¹⁰

Although those surveys highlight the need for stronger enforcement of existing laws (since it is illegal to sell tobacco products to – or purchase tobacco products on behalf of - a person aged less than 18 years), **they also demonstrate that retail regulations are only part of the equation**. While preventing youth access to tobacco at the point of retail remains vital, the responsibility for preventing youth smoking needs to be shared across different sections of the community: parents, friends, siblings, doctors, teachers and the individuals themselves.

1.4 Prohibiting tobacco product display would significantly distort competition and impact small businesses

Competing manufacturers and retailers use display to present their range of brands to adult smokers, who can then select the brand they prefer within that range. Requiring retailers to hide tobacco products would significantly impair opportunities for

⁶ Ibid. (emphasis added). It is worth noting that point of sale advertising is prohibited in all States and Territories.

⁷ See M Wakefield et al., “The effect of retail cigarette pack displays on impulse purchase”, *Addiction*, vol. 103, 2008, pp. 322-28.

⁸ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey – Detailed Findings*, Canberra, October 2005, p. 108 (emphasis added).

⁹ Drug Strategy Branch, Australian Government Department of Health and Ageing, *Smoking behaviours of Australian secondary students in 2005*, Centre for Behavioural Research in Cancer, Cancer Control Research Institute, The Cancer Council Victoria, June 2006, p. 20.

¹⁰ Ibid., p. 19.

manufacturers to introduce new brands or alternative products. Because adult smokers would have no way of knowing that a new brand, new brand variant, or new product is available, a ban on tobacco product display would make it virtually impossible for manufacturers to introduce new products, an essential element of fair, effective competition in a free marketplace.

A point of sale display ban will adversely impact the ability of manufacturers, importers and retailers to compete. For example, in its proposal to ban tobacco product display, the Norwegian government stated there was no *"doubt that ... a [display] ban will remove the use of positioning as a competitive measure between the producers."*¹¹ Display has been at the heart of a number of competition disputes and litigation in other jurisdictions.¹² Retail display of consumer goods is similarly a key factor in competition in the retail marketplace in Australia.

Some proponents of display bans have suggested that tobacco product display is unnecessary, because up to 90% of adult smokers know their brands. Even if that number is accurate (and we have no basis to know whether it is), that 10% of adults who smoke but who have not decided on their preferred brand represents the key to our ability to compete and succeed.¹³

It's true that most adult smokers know their preferred brand and, in Australia, the leading tobacco brand is made by one of our competitors. If adult smokers never see PML's brands when they buy their products, odds are they will never switch to them, and adults who smoke our brands may switch to better-known brands. Banning display of tobacco products would give, in effect, a regulated competitive advantage to brands with existing market shares and established consumer recognition.

A ban on display of tobacco products also risks distorting competition in the retail universe. Display bans may encourage consumers to shift tobacco purchases to large stores rather than small retailers, as consumers may believe that such retailers are likely to stock a wider range of products.¹⁴ Businesses where display bans have been implemented have expressed significant concerns about that happening.¹⁵

1.5 Banning retail display is inconsistent with the Competition Principles Agreement

The Competition Principles Agreement between the Commonwealth and each of the State and Territory Governments requires that regulations not restrict competition unless:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and

¹¹ Norwegian Consultation Document, p. 5.

¹² In the EU, for example, courts, governments and manufacturers have stressed the importance of access to display in retail to the ability to enter into and compete in a market. See, e.g., European Court of Justice Case C-405/98 *Konsumtombudsmannen v Gourmet International Products Aktiebolag* (2001), Decision of the Court paras 19-21, 38, 39 and Opinion of Advocate General Jacobs, paras 35, 36.

¹³ PML's business succeeds when adult smokers switch to our brands and don't switch to competitors'. Last year, while adult and youth smoking rates in Australia fell to record lows, we increased our market share by 1% and generated an 8.9% increase in operating revenues.

¹⁴ Approximately 34,000 retail businesses in Australia sell tobacco products.

¹⁵ See, e.g., [Canadian] National Association of Convenience Stores, "Tobacco display ban will close 30% of Canadian c-stores, warns top industry executive", *Global Convenience Store Focus*, 4 November 2008.

- (b) the objectives of the legislation can **only** be achieved by restricting competition.¹⁶

It has not been demonstrated that display bans are the only means of reducing smoking and preventing youth smoking. On the contrary, experience does not support a display ban; the estimated effectiveness of a display ban at reducing youth smoking is speculative; and less restrictive, evidence-based options are both available and likely to further advance policy objectives. Competition principles embodied in State, Territory and Commonwealth law therefore suggest pursuing less restrictive options than a complete ban on retail display of tobacco products.

2. Specialist tobacconists should continue to be permitted to display their stock-in-trade

Retailers who specialise in selling tobacco products should not be required to hide the products they sell from their adult consumers, and we suggest consulting with them on the best way to define and regulate their businesses.¹⁷

3. Retailers should continue to be permitted to communicate about product availability and price.

As discussed above, it is difficult to imagine how retailers would be able to communicate about brand attributes and availability without product display. They should certainly be consulted on the topic. From our perspective, price tickets and price boards are one possible vehicle. Retailers should, at a minimum, be permitted to show consumers a list or board which indicates the products available, the price at which they are available, and an image of the package. They should also be permitted to show the package itself (or packages, if the customer wants to compare one to another) on an adult consumer's request.

It's important for the law to clearly define what it means by display, to make it clear that *incidental visibility* (for example, when the pack is being handed to the purchaser; or when a storage unit is being opened to retrieve the product) does not constitute display. For purposes of display restrictions or prohibitions, "display" connotes *prominent rather than incidental visibility*. The Random House Unabridged Dictionary, for example, defines the noun display as an "arrangement, as of merchandise, art objects, or flowers, designed to please the eye, attract buyers, etc." We would recommend that the law make clear that incidental visibility – for example, of a packet handed to a customer who purchased it, or of stored products when a storage cabinet is opened – does not constitute prohibited "display".

¹⁶ Clause 5 (emphasis added).

¹⁷ Tobacconists constitute approximately 2 per cent of all tobacco retailers in the State. Tobacco products and tobacco accessories represent approximately 85 per cent of their revenues, on average.

4. Adults should be educated and reminded not to smoke around children

Public health officials have concluded that secondhand smoke causes or increases the risk of disease in non-smokers, and we agree that people should not smoke around children in cars. The Committee should carefully consider whether legislation is the *best* way to achieve that policy outcome.

Banning smoking in private places raises challenging issues in terms of striking the right balance between actions to protect health and individual liberty. In our opinion, that balance can be achieved through educational campaigns and health warnings to remind parents and other adults not to smoke around children.

Legislators in other Australian jurisdictions have recognised that “a ban on smoking in cars would...entail a greater encroachment on individual liberties than one on behaviour in public areas.”¹⁸ They have also been “persuaded by the concerns of police and advocacy-based inquiry participants about the enforceability” of laws that prevent smoking in cars where children are present.¹⁹ Rather than legislation, the Committee recommended education as the preferred approach to the issue. We agree with that recommendation.

¹⁸ New South Wales Joint Select Committee on Tobacco Smoking, *Tobacco Smoking in New South Wales*, June 2006, p134

¹⁹ Ibid.

Conclusion

The Western Australian Government should adopt only regulation that is carefully considered to advance government objectives in a way that minimizes unintended adverse consequences. PML supports the health objectives cited by the Bill's author and proponents. We agree that reducing young people's exposure and access to tobacco and reducing the harm caused by tobacco use are important policy objectives for governments to pursue. But banning the display of tobacco products in retail outlets that sell those products is not warranted. It has not been clearly demonstrated that banning the display of tobacco products will effectively and proportionately advance public health objectives, however its effect on our ability to compete fairly for market share will be significant.

Evidence-based, proven options should be implemented instead: education; rigorous enforcement of tobacco laws; and community initiatives to address the 70% of youth who obtain cigarettes by means other than tobacco retailers.

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