

Regulating the tobacco retail environment: Beyond reducing sales to minors

In press Tobacco Control

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Abstract

The Framework Convention on Tobacco Control has little to say about the regulation of tobacco retailing, with most research and policy debate having been restricted to confining sales to adults and removing advertising displays, including packs. Tobacco retailing is largely unregulated, reflecting the historical regulatory trivialisation of tobacco products, now demonstrably anachronistic with the advent of near global support for the FCTC. This situation contrasts markedly with the regulation of pharmaceuticals, and many other goods and services subject to a wide variety of restrictions. This review proposes that the international tobacco control community should open up debate on retail regulation to examine the suitability of principles long accepted in pharmaceutical regulation. These include: restrictions on the number and location of tobacco retail outlets; the banning of tobacco retail displays; floor (minimum) price controls; restricting the amount of tobacco smokers could purchase over a given time; and loss of retail licensure following breaches of any of the conditions of license. It proposes that retail licenses should be heavily restricted and tradable, becoming valuable commercial assets, where the threat of loss or revocation would act as an incentive for strict adherence to the measures proposed.

Comprehensive tobacco control, as embodied in the Framework Convention on Tobacco Control (FCTC), mandates a range of strategies to reduce tobacco use, including taxation, bans on tobacco advertising, labelling products with effective health warnings, regulation of contents and emissions, conducting public awareness campaigns, reducing exposure to secondhand smoke, and promoting cessation.(1) Supply side strategies in the FCTC include articles on preventing illicit trade, providing economic alternatives to tobacco growers, and preventing sales to minors. However, other than banning point of sale advertising and retail pack displays as residual forms of tobacco advertising (2, 3) a supply side strategy that has only been minimally explored is the regulation and licensing of tobacco retailing.

Licensing of tobacco retailers is uncommon in global tobacco control. While there are jurisdictions such as in Canada (4), Australia (see Table 1), the United States (5), and Singapore (6) which require some form of retail licensure, the applicable conditions are minimal, and removal of license for breaching licensing conditions is rare.

Most tobacco retail regulation and licensing is premised on the objective of restricting sales to adults.(7, 8) Consequently, most research on retailing has focused

on monitoring sales to minors and the effects of enforcement practices and threats of fines on underage sales.(7, 9-11) While threats of fines can reduce *sales*, there is little evidence that such reductions translate to reduced *use*, because of the ease with which youth can acquire cigarettes through purchases made by older friends.(12, 13) Even though these jurisdictions sometimes stipulate loss of license as a penalty for multiple violations for sales to minors, there is little evidence that this is ever invoked and no research literature demonstrating the utility of this threat as a deterrent.

Tobacco retailing through the world is today entirely “normalised”: tobacco products can be sold openly, from virtually any business. This paper considers how regulation of tobacco retail environments might be widened from a sole concern to reduce sales to minors in the effort to further denormalise(14) and thereby reduce tobacco use. It is premised on a central concern to send an unambiguous public signal that governments regard tobacco as an exceptionally harmful product, deserving of retail sale restrictions at least as comparable to those that apply to prescribed pharmaceuticals in most countries.

We first summarise the current regulation of tobacco retail licensing in Australia, a nation with advanced tobacco control policy. We then consider licensing provisions and their rationales established by governments for a range of other goods and services. These restrictions are often introduced because of health considerations that have parallels with the goals of tobacco control. We conclude that the major impediment to greater regulation of the tobacco retail environment is the historical regulatory trivialisation of tobacco products compared to assumptions made about other regulated products. We argue that concerted efforts will therefore be needed to change this assumption, if tobacco products are ever to be subject to the same range of serious and enforced regulatory requirements taken-for-granted for many other items of commerce, particularly pharmaceutical drugs. If this was to occur, potential exists for regulatory provisions to be introduced in five broad areas of tobacco retailing in addition to restricting sales to adults:

- restrictions on the number and location of tobacco retail outlets;
- regulating tobacco retail displays;
- floor (minimum) price controls;
- restricting the amount of tobacco smokers could purchase over a given time; and
- loss of retail licensure following breaches of any of the conditions of license.

We discuss each of these and additionally, explore the idea that tobacco retail licenses could become valued, tradable commodities in a policy environment premised on the objective of limiting the number of tobacco retail outlets. Such a reduction could reduce both the convenience of purchasing tobacco products and the frequency that smokers and ex-smokers would encounter tobacco supplies in their communities, a factor known to cue thoughts of purchase and smoking in both smokers and ex-smokers(15).

Tobacco licensing in Australia

As in all nations, tobacco retailing in Australia has always enjoyed minimal regulation. Current provisions vary by state and territory jurisdiction, but address only three issues: prohibitions on selling tobacco products to minors, displaying a health warning at point of sale, and in four states, complete bans (implemented and pending) on the retail display of tobacco products. In 2002, a report was prepared for the Commonwealth Department of Health and Ageing on the desirability and best practice arrangements for licensing of tobacco retailers.(16) It endorsed the value of consistency in licensing of tobacco retailers but did not consider a national approach likely, stating “the most complete way to achieve uniformity ... is for the Commonwealth to legislate to provide for a licensing regime that overrides all such state and territory regimes. Clearly, an appropriate head of power would need to be found for such an approach. It is not clear that the Commonwealth currently has a head of power that would enable it to absolutely ‘cover the field’.”(16)

While the report(16) was endorsed by the national Intergovernmental Committee on Drugs, today there is not yet a consistent approach to tobacco licensing across Australia’s six states and two territories. Table 1 summarises the current inconsistencies. There are few provisions to limit the ability of any potential retailer to obtain a license. Provided the appropriate form is completed and the fee paid, the required inexpensive, lifetime license is granted. We know of no instances where evidence that any Australian tobacco retailer has ever had their tobacco license suspended or revoked.

This situation contrasts markedly with the ways in which therapeutic goods (pharmaceuticals) are retailed(17). The regulatory paradox here is that the government formally acknowledges that while tobacco products cause unparalleled harm to health, it minimally regulates their sale. By contrast, pharmaceutical products designed to *enhance* health are heavily regulated so that the possibility of harm is reduced. Virtually every aspect of pharmaceutical retailing is subject to government regulation: from which products can be sold, to where a pharmacy can be located, which staff can dispense certain pharmaceutical categories, where products can be stored and displayed, the amount of product that can sold to each customer, and what the pharmacist must communicate to customers about some dispensed products. (18-20). The cost of pharmaceuticals partly reflects these regulatory costs. Below we consider how such conditions might be applied to tobacco retailing.

Table 1 Australian state/territory tobacco licensing requirements (as of September 2008)

State/Territory	Licence requirements	Fee	Special Conditions
Australian Capital Territory [ACT]	offence to sell tobacco products unless a person holds a wholesale tobacco merchant’s licence or	\$200	licences can be suspended or cancelled for up to 5 years for violations

	a retail tobacconist's licence(21)		
New South Wales [NSW]	a licensing scheme will be introduced for tobacco retailers (announced July 2008)(22)	\$100 or \$250 for specialist tobacconists (est. 400 of these)	shops caught selling cigarettes to children or breaching other regulations will be stopped from selling tobacco(23)
Victoria [VIC]	no license needed; however the right to sell can be removed by a court for selling to minors	n/a	third offence of selling to a minor is punishable with a five year mandatory removal of the ability to sell tobacco from the premises(24)
Queensland [QLD]	No licensing requirements(25)	n/a	on-the-spot and court ordered fines for violating tobacco sales regulations
Tasmania [TAS]	any premises selling tobacco products must have a tobacco seller's licence	\$180	retailers who are found to have sold cigarettes without a tobacco seller's license face immediate prosecution and a maximum fine of \$5,000 for a first offence and \$10,000 for a subsequent offence (26)
Northern Territory [NT]	all vendors must be licensed	none	a licence will only permit the sale of tobacco at the specified premise, i.e. roaming cigarette sales are banned, but vehicles can act as mobile vendors at outdoor events(27)
Western Australia [WA]	Anyone who sells a tobacco product either by retail sale, wholesale sale or indirect* sale requires a licence(28)	\$200, \$500 for a wholesale license	searchable public register of all tobacco retail licenses(29)
South Australia [SA]	all tobacco retailers must hold a Retail Tobacco Merchant's Licence	\$215 (as of July 2008, indexed annually)	On-the-spot fines (\$315) apply for the sale or supply of tobacco products to children. Inspectors are also able to proceed with prosecutions in court if deemed appropriate. Maximum penalty \$5000(30)

* An indirect sale is where the seller and the purchaser are not in the same place at the same time, for example, a sale by telephone, fax, mail order or Internet.

Regulation of other goods and services Consumers and the business sector are very familiar with the concepts of licensing and registration through a wide variety of requirements. All motor vehicle drivers and boat owners are required to be licensed and vehicles and seacraft registered. All dogs must be registered to licensed owners, and those who wish to keep exotic animals like reptiles must be licensed. In many countries firearms can only be sold by licensed operators to those with firearm licences under very strict conditions. In Australia for example, it is illegal to trade firearms through the mail. Food preparation and sales are also commonly subject to stringent licensing and safety inspections. In order to protect the health and safety of the public, many service professions and occupations must be licensed in order to legally carry out their tasks: doctors, dentists, pharmacists, electricians, plumbers, pesticide services, civil engineers, taxi drivers and tattoo and body piercing artists are just a few examples. In this light, tobacco retailing stands out as being a curiously unregulated commercial enterprise.

The licensing of purveyors of other potentially harmful products and services is premised on a far wider range of concerns than simply preventing youth access. Protecting personal and public health, safety and welfare; controlling provision and limiting availability; monitoring sales; and ensuring quality and accountability are all considerations which are routinely declared relevant when regulating and licensing a wide variety of goods and services. Much licensing and regulation is premised on better ensuring that consumers are not harmed by the products or services they purchase.

It has often been observed that tobacco's status as a product sold with few restrictions reflects the historic, gradual emergence of knowledge of its harms and the unwillingness of governments to respond to these harms in the way they would to any newly developed product known to cause such harm, by refusing to allow such a new product onto the market. But with tobacco having no safe level of use, and now 164 governments being parties to the FCTC with its central goal of reducing tobacco use, the historic laissez faire attitude toward the regulation of tobacco retailing is anachronistic and incompatible with this broad goal.

Pharmaceutical retailing as a model

The Australian Standard for the Uniform Scheduling of Drugs and Poisons (SUSDP) contains the decisions of the National Drugs and Poisons Schedule Committee regarding the classification of all drugs and poisons into nine possible Schedules.⁽³¹⁾ These Schedules serve as recommendations to Australia's States and Territories for inclusion in relevant legislation. As each State and Territory has its own drug and poison control legislation, the SUSDP promotes uniform scheduling of substances and uniform labelling and packaging requirements throughout Australia. Pharmaceutical retailing restrictions do not just apply to prescribed medicines. To sell scheduled drugs, pharmacists must have a pharmacy degree, maintain their registration and would face severe penalties, including possible imprisonment if they

were found to be selling some categories of drugs without being presented with a valid doctor's prescription.(32)

By contrast, there are no restrictions on who can sell tobacco products nor on where they can be sold. Accordingly, the retailing of tobacco products is ubiquitous, from all supermarkets and almost every corner store through to suburban barbers who typically keep a few packs adjacent to gum and hair care products. The sub-text of the current way tobacco products are sold is that they are in every way unexceptional, ordinary items of commerce, treated in the same way that everyday grocery items are sold, and undeserving of special restrictions. This view is inconsistent with the way that tobacco is regarded under many other aspects of tobacco control policy and may undermine public understanding of how seriously tobacco damages health. For example, in 1991 when tobacco advertising remained legal in Australia, 32% of smokers agreed with the proposition that "If smoking was really harmful, the government would ban tobacco advertising."(33) It is possible that the unrestricted retailing of tobacco may send a parallel message.

Restrictions on the number and location of tobacco retailers Numerous precedents exist for the government imposing restrictions on the number and location of various commercial activities. These restrictions are imposed for reasons including urban aesthetics, public amenity, to limit competition for certain retail activities deemed important to remain economically viable in local communities and delivered at a high standard to consumers, or (as might be argued for tobacco) to reduce the proliferation of businesses deemed less socially desirable (eg: nightclubs which might attract large, noisy crowds in residential area, firearms dealers, brothels, X-rated video outlets). Urban areas are often zoned residential or industrial, and from this flow restrictions on the types of business which can operate in residential zones. A person cannot decide to turn their residence into (for example) a restaurant, a brothel or a child-care centre without the permission of zoning and licensing authorities. In Australia it is common for newsagents to be restricted, so commonly there is only one agency servicing each suburb.

Were the principle of restricting the number of tobacco retailers to be accepted, challenges would arise over how this could be implemented in the current environment where any retailer can now choose to sell tobacco, and the likelihood high of many retailers arguing that they had an inalienable "right" to sell a "legal product". Possible models might range from the nationalisation of tobacco retailing involving a single network of government controlled outlets (as with alcohol in Sweden) to a model where a highly restricted number of licenses based on an agreed number of tobacco retail outlets per 100,000 population could be auctioned to the highest bidder. Objections from current sellers unable to compete for such licenses could be met with precedents such as the longstanding decision to ban the unrestricted sale of fireworks in most states of Australia following years of injury caused by explosions and burns(34). Shopkeepers who previously derived substantial income from firework sales suddenly had to do without this income because of public interest.

This raises the interesting possibility that if tobacco retail licences were to be similarly limited, and the conditions pertaining to the conduct of a tobacco retail business strictly regulated, a tobacco retail licence could become a highly valued commodity promising restricted, profitable retailing access. The issuing of taxi licence plates in Australia is similarly strictly limited and these plates are traded at prices many times higher than the value of the actual taxi itself. Retailers who risked having their retail licence revoked by breaching any condition of license would thus risk losing a valuable asset. Provided governments acted against such breaches, this would seem to hold potential as a way of introducing large incentives to obey the law on matters like restricting sales to adults and enforcement of display bans.

Globally, alcohol retailing is subject to many such controls. These may include: nationalisation of alcohol distribution, limiting hours and or days of sale, banning or restricting home deliveries, restrictions at community events, restricting the location, density and types of alcohol outlets, mandatory server training and licensing and server liability.⁽³⁵⁾ In Australia, some similar policies apply to tobacco retailing. For example, in Victoria tobacco cannot be sold at events where the majority of those attending are underage⁽³⁶⁾ and Tasmania and the ACT have banned self-serve tobacco vending machines. However, how, when, and where tobacco is sold is subject to few restrictions (although restrictions on advertising and display of tobacco products at point of sale in Australia are considerably more comprehensive than for alcohol).⁽³⁷⁾

When granting liquor sales licenses, community and social factors are often considered. For example, in New South Wales when applying for a liquor license applicants must include a National Police Certificate, a community impact statement, a scaled plan of the proposed licensed premises and a copy of the local council's development consent or approval for the proposed premises.⁽³⁸⁾ The community impact statement summarises the results of consultation by applicants with local councils, police, health, Aboriginal representatives, community organisations and the public.⁽³⁹⁾

In a 2007 review of the density of alcohol outlets to reduce alcohol-related problems,⁽⁴⁰⁾ the authors found that increased outlet density leads to an increasingly competitive alcohol market-place, possibly resulting in lower prices which would be expected to increase alcohol consumption. Additionally, they found that socially marginalised drinkers are more likely to be influenced by changes in alcohol availability than other drinkers. Changes to alcohol outlet density could then markedly affect the consumption and long-term health problems of some population subgroups, without noticeable changes in population-level consumption. This same phenomenon could be true for tobacco retail outlet density and is worthy of further investigation.⁽⁴¹⁾ A recent US study found that the prevalence of current smoking was significantly higher in schools that were located in neighbourhoods which had more than five tobacco outlets when compared to neighbourhoods with no tobacco outlets.⁽⁴²⁾

Canadian researchers have measured the effect of tobacco outlet density around schools in Ontario and found that the “more tobacco retailers there were surrounding a school, the more likely smokers were to buy their own cigarettes and the less likely they were to get someone else to buy their cigarettes.”(43) New Zealand research suggests that accessibility to retail outlets selling tobacco may not impact on national smoking rates. The researchers found that after controlling for individual-level demographic and socioeconomic variables, individuals living in neighbourhoods with the best access to supermarkets and convenience stores had higher odds of smoking compared to individuals in the worst access neighbourhoods. However, the association between smoking prevalence and neighbourhood accessibility to supermarkets and convenience stores was not apparent once other neighbourhood-level variables (deprivation and rural location) were included.(44) The authors suggest that restrictions on the number of tobacco outlets in residential neighbourhoods, and area-based restrictions – such as those with a high concentration of workplaces - may influence the consumption of tobacco. Additionally, smokers who face mobility constraints could be affected by local restrictions on cigarette availability.

If tobacco retail outlets were to be limited, causing smokers to have to plan their purchases more, this may reduce “spontaneous” purchases which had not been pre-planned(15). Knowing that a limited number of outlets sold tobacco, smokers would need to plan their purchases. If this policy was implemented in concert with price controls and limits on the number of cigarettes purchased (see both arguments below), this may reduce consumption.

Regulating tobacco retail display Scheduled drugs which either require a doctor’s prescription or which are subject to limited supply mediated through a registered pharmacist (as in the case in Australia of the cough suppressant pseudoephedrine), must be stored in a part of the pharmacy designated as a dispensary. The dispensary is an area in which members of the public are not permitted to enter and therefore are unable to handle (and potentially shoplift) drugs stored there. Many dispensaries store prescription-only drugs out of sight of customers. The same principle should apply to tobacco retailers: products should not be displayed, a development already accelerating around the world (45) and now gazetted for legislative adoption in five Australian states and territories. Research has shown that retail displays of tobacco prompt unplanned purchases and weaken resolve not to smoke(15, 46, 47).

Floor price controls Price controls are often reluctantly imposed by governments in free markets, with retail price competition being regarded as a sacrosanct principle of such markets. However, again there are many precedents for governments imposing minimum price controls in situation where various national interests are invoked. Scotland has recently announced bans on price specials on alcohol, as a response to its alcohol abuse problem.(48) The Queensland government has legislated to restrict price discounted “happy hours” and banned hoteliers offering free drinks.(49) In Sweden, all alcohol is sold via the government monopoly which “exists for one reason: to minimize alcohol-related problems by selling alcohol in a responsible way, without profit motive.”(50)

The notions of floor and ceiling prices (a price specified as the lowest or highest legal purchase price of a good or service that can be charged) exists for many commodities in agriculture, in rent control, and for minimum wages. Prescribed pharmaceuticals are subject to price controls in Australia. In regulating retailing, governments could establish a floor price for tobacco products, below which it would be illegal to sell them. This would limit discounting.

In the USA, 25 states have minimum purchase price laws that apply to cigarette sales. These laws originated to protect small businesses, not public health. Cigarette prices in these states tend not to be any higher than in states without such laws, as price discounts offered to retailers as a promotional incentive programmes are not used to calculate the minimum price.(51) Minimum price policies will be more effective in keeping cigarettes prices high if price discounting to retailers is not permitted.

Limitations on number of cigarettes a smoker could buy When a person is prescribed a drug by a doctor, the prescription specifies that a limited supply be released by a pharmacist. Patients requiring further supplies can then return to a doctor for a repeat prescription, allowing the doctor to determine whether further supplies are necessary; to monitor the patient's health; and if necessary change the dose. Similarly with alcohol, hoteliers can be and are prosecuted for continuing to serve alcohol to intoxicated persons.(52)

With tobacco, with the exception of duty free sales, smokers are at liberty to buy unlimited supplies. Under a policy governed by the explicit objective of reducing consumption and encouraging cessation, governments could introduce a regulation stipulating an upper weekly limit to tobacco product purchases. Reducing smoking to even 1-4 cigarettes per day still engenders significant risk(53) but there is no dispute that it lowers risk(54, 55). Many former smokers successfully reduce smoking as a prelude to finally stopping.(56)

To facilitate this, smokers' permits or licenses could be introduced incorporating a sliding scale of fees, with substantially higher fees acting as a disincentive to allow purchase of more than 15 cigarettes a day, just above the current average consumption, and a cheaper but still substantial license allowing purchase of (say) 5 per day.(57) An attractive cash-back provision could be incorporated for people wishing to permanently surrender their licence.

All licensees would be issued with a swipe smart card calibrated to show the number of cigarettes that could be purchased in a given period with an upper limit set to thwart anyone interested in on-selling on a large scale to unlicensed smokers. Smokers wishing to set limits to their own consumption would be free to set their own maximum number of cigarettes able to be purchased over a period. No sales would be possible without a swipe card licence. In Japan, where cigarettes are frequently purchased through vending machines, smokers must insert an identity card to prove they are of legal age to purchase cigarettes. The "Tobacco Access Passport" [TASPO] cards are free but require smokers to send proof of age to the state-owned Japan Tobacco Institute.(58) As TASPO cards are not required to

purchase tobacco products across the counter, this model of “licensing” is far from complete.

The community has long accepted that to obtain a prescribed drug, a person must first attend a doctor; be assessed as requiring the prescribed drug; pay the doctor a fee; obtain a prescription; find a pharmacy; and pay the pharmacist for the drug. We are not suggesting that smokers would have to obtain a doctor’s prescription to buy tobacco, but simply that limitations should be placed upon the ability of smokers to acquire unlimited tobacco products, with the device of a smoker’s permit acting like a *de facto* prescription to obtain a limited supply.

Loss of licensure following breaches of conditions of license. As noted, revocations of tobacco licences are unheard-of in Australia. Occasionally tobacco retailers have been fined for selling tobacco to minors, but the likelihood of this occurring is so rare that some retailers may reason that it is simply part of the cost of doing business with minors. This is not the case for those repeatedly supplying alcohol to minors, where liquor suppliers can lose their license and in the professions where doctors, lawyers, and accountants are delicensed or barred from practice following successful prosecution of breaches of their professional duties. A pharmacist, for example, found to be selling restricted drugs to those without prescriptions would be subject to investigation, leading to possible prosecution and loss of registration as a pharmacist.

By restricting the number of tobacco licenses issued, and allowing them to be tradable, loss of license would loom as a significant disincentive to breach any of the conditions of licensure.

The trivialisation of tobacco retailing lies at the root of why most of the above provisions do not operate in any nation today. None of these provisions will be taken seriously by governments until tobacco retailing is radically reframed in public and political consciousness in the ways analogous with the range of absolutely normal, taken for granted controls that have long applied to pharmaceutical retailing. Concerted and imaginative effort will be needed to successfully reframe tobacco retailing away from its current *laissez-faire* status.

We hope that this paper will stimulate a wider conversation among the international tobacco control community, encouraging advocacy which emphasises the anachronistic way in which tobacco retailing continues to be regarded by governments.

What this paper adds

Licensing and registration are state regulatory instruments used to control the supply, use and standards of a large variety of goods and services in order to promote health, safety and other social goals. The retailing of tobacco products (which cause large scale health problems) has historically been subject to minimal regulation, in contrast to the regulation of the supply of pharmaceuticals (designed to restore and promote health). This paper compares and contrasts tobacco and pharmaceutical regulation, arguing that tobacco retailing should move far more in the direction of controls long considered normal and important in the regulation of pharmaceuticals.

Acknowledgements: Michelle Scollo, Nicole Antonopoulos, and Mike Daube for comments on drafts.

Funding: National Health and Medical Research Council Project grant "The Future of Tobacco Control"-2007-2009

Competing interests: None

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