NSW Taskforce on Tobacco Retailing

Final Report and Recommendations
Table of contents

Executive summary .............................................................................................................. 3
Final recommendations ........................................................................................................ 4

1. Introduction to the NSW Taskforce on Tobacco Retailing ........................................ 6
   1.1 Terms of Reference .................................................................................................. 6
   1.2 Membership ......................................................................................................... 6
   1.3 Meetings .............................................................................................................. 7
   1.5 Overview of this Report ...................................................................................... 7

2. Background .................................................................................................................... 8
   2.1 Approach to tobacco control in NSW ................................................................. 8
   2.2 Evidence base in relation to tobacco control and tobacco retailing in NSW ...... 8

3. Key areas of analysis and recommendations ........................................................... 10
   3.1 Findings in relation to the Terms of Reference .................................................... 10
   3.2 Licensing schemes for tobacco retailers .............................................................. 10
   3.3 Tobacco retailing legislation, monitoring and enforcement .............................. 14
   3.4 Enhancing tobacco retailer compliance through training and education ........ 17
   3.5 Evaluating the impact of an improved TRN, enhanced enforcement and retailer
       education .................................................................................................................. 18
Executive summary

In late 2013 the Minister for Health and Minister for Medical Research, the Hon Jillian Skinner, announced that a NSW Taskforce on Tobacco Retailing (the Taskforce) would be convened to review and make recommendations on tobacco retailing and regulation in NSW to further minimise tobacco-related harms.

The Taskforce was established for a time-limited period (up to six months), culminating with a report outlining findings and recommendations.

The Taskforce included members with expertise in tobacco control, public health, the retail and small business sectors.

The Taskforce’s Terms of Reference were:

The NSW Taskforce on Tobacco Retailing will provide expert advice and recommendations to the Minister for Health and Minister for Medical Research on evidence-based, effective and feasible approaches in relation to tobacco retail availability in NSW.

The role of the NSW Taskforce on Tobacco Retailing will be to:
1. Provide advice on whether the existing Tobacco Retailer Notification Scheme is appropriate to enable NSW Health to ensure retailer compliance with the Public Health (Tobacco) Act 2008;
2. Consider outcomes of the investigations of potential retailer notification breaches undertaken by NSW Health Public Health Units;
3. Consider whether the current strategies to regulate the display of tobacco products and non-tobacco smoking products are appropriate; and
4. Explore options for strengthening retailer compliance with existing tobacco legislation in NSW.

The Taskforce noted that an evidence-based, best practice approach to tobacco retail regulation includes licensing implemented together with strong enforcement and retailer education.

The Taskforce’s overall findings in relation to the Terms of Reference were:

1. The existing Tobacco Retailer Notification Scheme is appropriate and enables NSW Health to ensure retailer compliance with the Public Health (Tobacco) Act 2008, however improvements are necessary to ensure its accuracy, completeness and ease of use by relevant parties.

2. There is high compliance by retailers with the retailing provisions in the Public Health (Tobacco) Act 2008 and further improvements could be made through the collection of more comprehensive data about investigations, publicly reporting of the outcomes of investigations and strengthening investigation protocols to ensure comprehensive and consistent enforcement of legislation across the State.

3. The current strategies to regulate the display of tobacco products are appropriate, however there should be ongoing independent and peer reviewed research about methods that will further reduce smoking rates and prevent the uptake of smoking amongst the population.

4. Options for strengthening retailer compliance with existing tobacco legislation in NSW include improving the TRN Scheme, the issuing of on the spot fines to retailers for display breaches of the legislation and provision of education to retailers and their employees
regarding their obligations. Any changes to tobacco retailing regulations should be reviewed two years following implementation.

Final recommendations

Licensing schemes for tobacco retailers

The Taskforce recommends:

1. That the Tobacco Retailer Notification (TRN) scheme is updated to ensure entries are valid and retailers can update their details online through the Government Licensing Service.

2. That the Public Health (Tobacco) Act 2008 is amended to require tobacco retailers to supply a valid TRN to tobacco wholesalers.

Tobacco retailing legislation, monitoring and enforcement

The Taskforce recommends:

3. That the Public Health (Tobacco) Regulation 2009 is amended to enable Authorised Inspectors to issue on the spot fines for minor (display) retailing offences.

4. That NSW Health’s internal tobacco compliance monitoring and enforcement protocol is strengthened to support consistent application of the legislation, including the issuance of on the spot fines, offering positive reinforcement to tobacco retailers who comply with tobacco legislation and providing explicit feedback to tobacco retailers close to the time of inspection. Standard communication about the expectations of compliance monitoring and enforcement should be provided to retailers and inspectors.

5. That an improved reporting system is implemented to collect and collate information on tobacco compliance monitoring and enforcement.

6. That public reports detailing overall retailer compliance with tobacco legislation are periodically released.

Tobacco retailer compliance training and education

The Taskforce recommends:

7. That the Tobacco Retailer Notification (TRN) scheme is strengthened by providing regular communication to tobacco retailers regarding their obligations, emerging issues and public health alerts.

8. That training for retail staff is developed to support compliance with the Public Health (Tobacco) Act 2008, particularly regarding sales to minors, tobacco display and signage requirements and notification under the TRN scheme. The training should also include topics to increase tobacco retailer education and awareness about the harms of smoking and approaches to smoking cessation.
Evaluating the impact of an improved TRN, enhanced enforcement and retailer education

The Taskforce recommends:

9. That a review of changes to retail compliance, enforcement and education occurs two years after any changes are implemented.

10. That ongoing independent and peer reviewed research into tobacco retailing is facilitated, including data acquisition and sharing between Ministry of Health, the retail sector and researchers.
1. Introduction to the NSW Taskforce on Tobacco Retailing

The NSW Government is committed to reducing smoking rates in NSW and has in place strong and comprehensive tobacco control legislation which includes display and advertising bans; penalties for sales of tobacco products to minors; and Tobacco Retailer Notification (TRN) Scheme.

In late 2013 the Minister for Health and Minister for Medical Research, the Hon Jillian Skinner, announced that a NSW Taskforce on Tobacco Retailing (the Taskforce) would be convened to review and make recommendations on tobacco retailing and regulation in NSW to further minimise tobacco-related harms.

The Taskforce was formed in response to issues raised in the Cancer Council NSW report, Selling Tobacco Anywhere Anytime: Harmful Not Helpful, e.g.:
- concerns about the accuracy of the TRN Scheme database and the number of tobacco retailers in NSW;
- complaints about a lack of compliance with the TRN Scheme and retailing provisions in the Public Health (Tobacco) Act 2008; and
- few publicised successful prosecutions for offences under the Public Health (Tobacco) Act 2008.

1.1 Terms of Reference

The Taskforce had the following Terms of Reference:

The NSW Taskforce on Tobacco Retailing will provide expert advice and recommendations to the Minister for Health and Minister for Medical Research on evidence-based, effective and feasible approaches in relation to tobacco retail availability in NSW.

The role of the NSW Taskforce on Tobacco Retailing will be to:
1. Provide advice on whether the existing Tobacco Retailer Notification Scheme is appropriate to enable NSW Health to ensure retailer compliance with the Public Health (Tobacco) Act 2008;
2. Consider outcomes of the investigations of potential retailer notification breaches undertaken by NSW Health Public Health Units;
3. Consider whether the current strategies to regulate the display of tobacco products and non-tobacco smoking products are appropriate; and
4. Explore options for strengthening retailer compliance with existing tobacco legislation in NSW.

1.2 Membership

Dr Kerry Chant, Chief Health Officer and Deputy Director General, NSW Ministry of Health, chaired the Taskforce and representatives were as follows:

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Name</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW Ministry of Health</td>
<td>Dr Jo Mitchell</td>
<td>Director, Centre for Population Health</td>
</tr>
<tr>
<td>Cancer Institute NSW</td>
<td>Ms Claudine Lyons</td>
<td>A/Manager, Cancer Prevention</td>
</tr>
<tr>
<td>Cancer Council NSW</td>
<td>Dr Andrew Penman</td>
<td>Consultant</td>
</tr>
</tbody>
</table>
1.3 Meetings

Three Taskforce meetings were held between January 2014 and June 2014.

1.5 Overview of this Report

This report summarises the key deliberations of the Taskforce. In addition, it provides background on the measures that have been undertaken in NSW in relation to tobacco control and provides a summary of national and international best-practice evidence regarding tobacco control.

A concurrent process is underway to review the Public Health (Tobacco) Act 2008. The recommendations put forth by the Taskforce will be considered in conjunction with this Statutory Review. In addition, the Statutory Review is the most appropriate means of documenting and responding to broader regulatory issues that were outside the scope of the Taskforce’s Terms of Reference.
2. Background

2.1 Approach to tobacco control in NSW

Preventing and reducing smoking in NSW is a key priority for the NSW Government, particularly among young people. The NSW 2021 plan sets robust targets about smoking in order to decrease chronic disease and combat rising health costs. The NSW 2021 plan states that that the NSW Government will:

- Reduce smoking rates by 3% by 2015 for non-Aboriginal people and by 4% for Aboriginal people by 2015; and
- Reduce the rate of smoking by 0.5% per year for non-Aboriginal pregnant women and by 2% per year for pregnant Aboriginal women.

To support the achievement of these targets, the NSW Government has in place two key pieces of tobacco control legislation, the Public Health (Tobacco) Act 2008 and the Smoke-free Environment Act 2000. Provisions relating to tobacco retailing are covered by the Public Health (Tobacco) Act 2008.

Furthermore, the NSW Government has in place a comprehensive NSW Tobacco Strategy 2012–2017 (the Strategy), which outlines the actions the NSW Government will take to reduce the harm which tobacco imposes on the community and to achieve the NSW 2021 targets. The Strategy includes regulatory measures, as well as a range of education campaigns, policy, programs and services that are aimed at reducing exposure to second hand smoke, supporting smokers to quit and limiting smoking uptake, particularly among young people.

A number of measures in the Strategy aimed at restricting the advertising, promotion and availability of tobacco are relevant to tobacco retailing, for example the Strategy requires the:

- monitoring and enforcement of the Public Health (Tobacco) Act 2008;
- collection and reporting of data concerning compliance with the Public Health (Tobacco) Act 2008;
- implementation and review of the TRN Scheme; and
- implementation of retailer education to raise awareness about obligations under the law and increase compliance with legislation.

2.2 Evidence base in relation to tobacco control and tobacco retailing in NSW

Tobacco retailing laws primarily address three issues: prohibitions on selling tobacco products to minors, display of required health warnings at the point of sale and a complete ban on the retail display of tobacco products.

In forming its recommendations, the Taskforce considered a review of the evidence about tobacco retailing compiled by researchers at the University of Sydney’s School of Public Health (Appendix).

While research on sales to minors has a long history, other supply-side factors – such as licensing, the role of the retailer in tobacco sales and promotion, the number of retail outlets where tobacco is sold, and how and where tobacco is sold – is far less developed.

In light of the available evidence, the Taskforce determined that a best practice approach to tobacco retail regulation includes licensing, implemented together with strong enforcement and retailer education. This approach appears to be particularly useful in decreasing sales to
minors and can serve as a means of permanently removing non-compliant retailers from the market.

The following summary provides information on the evidence for key tobacco control measures for the retail sector.

**Licensing**

The greatest strength of a tobacco licensing system is that it provides a more effective way to ensure retailer compliance with existing tobacco control laws. There is a lack of research in this area and no consistent published evidence on the effect positive licensing has on smoking rates. Anecdotally, the introduction of positive licensing and other retailing regulation coincided with a decline in youth smoking rates in Tasmania.

**Tobacco product displays**

NSW and all other Australian states and territories have now banned retail displays of tobacco products. Full display bans are easy to enforce and achieve high compliance whereas partial bans or complicated restrictions are not well enforced nor do they serve to protect youth from exposure.

**Sales to minors**

The research findings are clear in this area. In order to maximise the effect of sales to minors legislation, there is a need for a comprehensive retailer enforcement and compliance program. This must include monitoring and reporting of violations and make use of underage undercover shoppers.

**Type of outlet**

Australian research suggests that supermarkets and tobacconists (which discount tobacco products more than other tobacco retailers) encourage larger purchases, meaning they are likely to contribute to higher levels of consumption by the most price sensitive smokers. Venues such as bars, pubs and clubs and convenience stores are favoured much more by lighter smokers, suggesting these types of outlets may contribute to impulse purchasing and smoking and that social consumption of alcohol leads to increased tobacco purchases.

**Retail density, distance and location of outlet**

Because there has been so little regulatory action globally to limit where tobacco is sold, there is not yet a convincing body of evidence that can be drawn on to show whether such legislation affects tobacco consumption. No jurisdiction has yet implemented and evaluated the effect of reducing the number and/or type of tobacco retail outlets.

The literature suggests that even after adjusting for higher smoking prevalence, there is a greater concentration of tobacco outlets in communities with a lower socio economic status (SES) than in more affluent areas. The evidence on whether tobacco retailers target these communities or respond to higher demand is inconclusive. It may be that the geography of lower SES areas encourages a higher number of smaller retailers to be established.

Studies from overseas suggest that both density of retailers and proximity of retailers to schools influence smoking behaviour and tobacco purchasing by youth. In NSW, although there are no limits on the proximity or number of tobacco retailers near schools, tobacco is required to be out of sight at all retailers. It is not known if tobacco outlets are concentrated near schools in lower SES communities.
**Distance to retailer and smoking cessation attempt**

While very little has been published on the association between proximity and density of retail outlets and smoking cessation attempts, there is some evidence suggesting that living close to a tobacco retailer negatively affects cessation efforts.

### 3. Key areas of analysis and recommendations

#### 3.1 Findings in relation to the Terms of Reference

The Taskforce’s overall findings in relation to the Terms of Reference were:

1. The existing Tobacco Retailer Notification Scheme is appropriate in enabling NSW Health to ensure retailer compliance with the Public Health (Tobacco) Act 2008, however improvements are necessary to ensure its accuracy, completeness and ease of use by relevant parties.

2. There is high compliance by retailers with the retailing provisions in the Public Health (Tobacco) Act 2008 and further improvements could be made through the collection of more comprehensive data about investigations, publicly reporting of the outcomes of investigations and strengthening investigation protocols to ensure comprehensive and consistent enforcement of legislation across the State.

3. The current strategies to regulate the display of tobacco products are appropriate, however there should be ongoing independent and peer reviewed research about methods that will further reduce smoking rates and prevent the uptake of smoking amongst the population.

4. Options for strengthening retailer compliance with existing tobacco legislation in NSW include improving the TRN Scheme, the issuing of on the spot fines to retailers for display breaches of the legislation and provision of education to retailers and their employees regarding their obligations. Any changes to tobacco retailing regulations should be reviewed two years following implementation.

#### 3.2 Licensing schemes for tobacco retailers

Licensing schemes for tobacco retailers are described as negative or positive:

- A negative tobacco retail licensing scheme requires tobacco retailers to notify the government if they are selling tobacco through a registration system. They are required to register their details and the details of their retail outlets but do not need to prove their suitability to sell tobacco. Negative tobacco licensing schemes are sometimes called retailer notification schemes.
- A positive tobacco retail licensing scheme requires tobacco retailers to apply for and receive a licence prior to retailing tobacco products. In most cases these schemes involve an application fee and are valid for a certain period of time, after which they must be renewed.

In Australia, the main purpose of licensing schemes is to track the number of tobacco outlets in order to assist with implementing tobacco compliance monitoring and enforcement programs. Other purposes of existing retailer licensing schemes include:
prosecuting tobacco retailers and revoking their tobacco licence for a period of time should retailers breach tobacco legislation, such as sales to minors (positive and negative);

- vetting potential tobacco retailers (positive);

- using revenue generated from the licence fee to fund tobacco enforcement activities (positive).

Both positive and negative schemes are capable of providing accurate information about tobacco retailers, provided they are properly implemented and maintained. Both types of schemes may involve penalties, such as on the spot fines, for retailers who do not register or obtain a licence and keep their details up to date.

**NSW Tobacco Retailer Notification Scheme**

The TRN Scheme is used to ensure that NSW Health is aware of where tobacco retailers are located, and that in turn NSW Health Authorised Inspectors can monitor compliance with tobacco retailing legislation.

Section 39 of the *Public Health (Tobacco) Act 2008* introduced from 1 July 2009 a requirement for tobacco retailers to notify NSW Health of tobacco retailing activities. Under the *Public Health Tobacco Act 2008*, tobacco retailers are required to register their details and the details of their retail outlets. Retailers do not need to prove their suitability to sell tobacco.

Regulation 20 of the *Public Health (Tobacco) Regulation 2009* provides that the manner of giving notice of tobacco retailing activities is via the online NSW Government Licensing Service (GLS). Since 1 July 2009, more than 10,000 tobacco retailers have notified via the GLS.

The GLS manages licence processing across NSW through a single integrated system. The GLS covers approximately 1.7 million licences across 45 different licence types. The GLS provides online services to the public and assists NSW Government agencies in managing regulatory business processes. The GLS is managed by the NSW Department of Finance and Services.

The TRN Scheme contains the following information for each tobacco retailer:

- Business address of the person intending to engage in tobacco retailing;
- Address of the premises at which the person intends to engage in tobacco retailing;
- Registered Australian Business Number (ABN) of the relevant business and, if the business is incorporated, the Australian Company Number (ACN); and
- Names, addresses and email details of the owners and directors of the tobacco retailing business.

Retailers are not required to renew their notification on a regular basis. However, The *Public Health (Tobacco) Act 2008* requires tobacco retailers to notify the Ministry within 28 days of a change to:

- the retailer’s business address;
- the address where tobacco retailing takes place;
- the name and address of any owner or director of the business; or
- ownership of the business.

Changes can be advised via email or over the phone via the Tobacco Information Line.
Under the TRN Scheme retailers can face penalties up to $11,000 for failing to notify the NSW Ministry of Health of their tobacco retailing activities.

As of end of February 2014 there were close to 8,000 retailers registered on the TRN Scheme representing approximately 13,400 individual retail premises. However it is noted that this figure may in fact be lower due to current issues with the accuracy of the TRN Scheme, including the potential doubling up of retail premises or retailers which have ceased trading but have not yet notified the Ministry to amend the TRN Scheme.

Retail tobacco licensing in other States and Territories

The Australian Capital Territory (ACT), Tasmania, Northern Territory, Western Australia and South Australia have positive licensing schemes. Queensland and Victoria have no licensing scheme.

The Northern Territory requires retailers to prove that they are ‘fit and proper’ persons to sell tobacco before they are issued with a licence, typically by requiring a criminal record check prior to issuing a licence. Other positive licensing schemes place no requirements on licensees other than payment of an annual fee.

In positive licensing schemes, fees and charges often apply to obtain and renew a tobacco retail licence. Across Australia, these fees range from $200 (ACT) to $302 (Tasmania). Some states and territories require tobacco wholesaling licences, which are generally more costly than retail licences.

The ACT Government has recently released a discussion paper, Options for restricting access to tobacco, which raises a range of measures to further restrict tobacco licences, such as fees, caps and suitability assessments for retailers. The public consultation closed on 12 May 2014.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Type of scheme</th>
<th>Cost of licence</th>
<th>Requirements prior to obtaining licence</th>
<th>Limits on number of licences</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>Positive</td>
<td>$200</td>
<td>No suitability assessment, however refusal possible if applicant does not understand his or her obligations or has been convicted for the sale of tobacco to minors.</td>
<td>X</td>
</tr>
<tr>
<td>NSW</td>
<td>Negative</td>
<td>NA</td>
<td>No requirements prior to registering as a tobacco retailer.</td>
<td>X</td>
</tr>
<tr>
<td>NT</td>
<td>Positive</td>
<td>$214</td>
<td>Police criminal history check.</td>
<td>X</td>
</tr>
<tr>
<td>Qld</td>
<td>No scheme</td>
<td>NA</td>
<td>NA</td>
<td>X</td>
</tr>
<tr>
<td>SA</td>
<td>Positive</td>
<td>$253</td>
<td>No suitability assessment, but may fix conditions, vary, suspend or cancel a licence if the holder of the licence has contravened the legislation.</td>
<td>X</td>
</tr>
<tr>
<td>Tas</td>
<td>Positive</td>
<td>$302</td>
<td>No mandatory suitability assessment, but legislation states the Director should be satisfied the applicant is over 18 years old and likely to comply with the legislation.</td>
<td>X</td>
</tr>
<tr>
<td>Vic</td>
<td>No scheme</td>
<td>NA</td>
<td>NA</td>
<td>X</td>
</tr>
<tr>
<td>WA</td>
<td>Positive</td>
<td>$204 - $510</td>
<td>No requirements prior to obtaining a licence. Once licensed, employees on the licensed premises must be trained about not selling tobacco products and smoking implements to minors.</td>
<td>X</td>
</tr>
</tbody>
</table>
**Findings**

The strength of a tobacco licensing system is that it provides a way to monitor retailer compliance with tobacco control laws. There is no published evidence available that positive licensing per se contributes to reducing smoking rates. Therefore, the Taskforce was of the view that introducing a positive licensing scheme in NSW may be premature. It was suggested that the focus should be on improving the current TRN Scheme.

Some public health proponents argue that positive licensing schemes could be used to restrict the number, type and distribution of retail outlets for tobacco products, leading to reduced smoking rates. However, the Taskforce found no evidence of this having occurred in Australia and no evidence internationally to show whether this approach works to reduce smoking rates. There was also no evidence that any Australian tobacco retailer has ever had their tobacco licence suspended or revoked, under either positive or negative licensing schemes. The jurisdictions that require a proof of suitability from retailers prior to obtaining a tobacco licence were not able to show that this limits the number of tobacco retailer licence applications.

The evidence on whether tobacco retailers target communities with lower SES or respond to higher demand in areas of lower SES is inconclusive, therefore no clear findings were made in relation to using positive licensing to control the density of retailers. This should be an area of ongoing research.

The Taskforce noted deficiencies in the accuracy of the current TRN Scheme. In addition, a number of retailers have indicated that updating their details on the TRN Scheme over the phone or via email, rather than online, is time consuming and acts as a deterrent to keeping their details current.

In order to improve and maintain accuracy and currency of the present TRN Scheme, the Taskforce considered that the Ministry of Health should:

- seek the assistance of Public Health Units to ensure the details of tobacco retailers within their Local Health District are accurate;
- issue email updates using contact details from the TRN, and filtering out non-respondents as a means of maintaining accuracy of tobacco retail numbers; and
- enable retailers to access and update their TRN records online.

The Taskforce noted that should a positive licensing scheme be introduced in the future, the licence fee could be used primarily to, in part, fund additional tobacco enforcement or for public health behavioural campaigns.

**Recommendations**

The Taskforce recommends:

1. That the Tobacco Retailer Notification (TRN) scheme is updated to ensure entries are valid and retailers can update their details online through the Government Licensing Service (GLS).

   *N.B. The Ministry of Health has progressed negotiations with the NSW Department of Finance and Services to allow retailers to update their details online through the GLS.*

2. That the Public Health (Tobacco) Act 2008 is amended to require tobacco retailers to supply a valid TRN to tobacco wholesalers.
3.3 Tobacco retailing legislation, monitoring and enforcement

Tobacco retailing legislation, monitoring and enforcement

Under the *Public Health (Tobacco) Act 2008* it is illegal to sell tobacco products to people under the age of 18. It is also illegal to sell non-tobacco smoking products such as herbal cigarettes to people under the age of 18. There are no restrictions on the age of a person who can sell tobacco.

A range of ‘point of sale’ provisions also exist, which cover restrictions on tobacco advertising, promotions, packaging, display and sale locations.

NSW Health Authorised Inspectors within Local Health District Public Health Units across NSW undertake ongoing compliance monitoring and enforcement activities in relation to the *Public Health (Tobacco) Act 2008*. Authorised Inspectors:

- provide education to support retailers to comply with the law;
- conduct inspections of retail outlets to check for appropriate signage, product display, sales to minors and registration with the TRN Scheme;
- counsel non-compliant retailers to rectify breaches on the spot where appropriate;
- provide warning letters; and
- initiate prosecutions for non-compliance.

Point of sale and sales to minors inspections

Tobacco retailers are largely compliant with the sales to minors and point of sale provisions in the *Public Health (Tobacco) Act 2008*. Approximately 30% of all retailers undergo inspection in a year:1

- In the 2012/13 financial year, 1044 sales to minors inspections were conducted.
  - Of these, 977 retailers (93.5%) were compliant with sales to minors provisions.
  - Of the 67 retailers (6.5%) who were non-compliant with sales to minors provisions in the Act, 23 retailers (34.5%) received follow up visits and prosecution briefs were prepared for 40 retailers (60%).

- In the 2012/13 financial year, 3018 point of sale inspections were conducted.
  - Of these, 2691 retailers (89%) were compliant with point of sale provisions in the Act.
  - Of the 327 retailers (11%) who were non-compliant with point of sale provisions in the Act, 64 (19.5%) received follow up visits, 58 (18%) were issued with warning letters and prosecution briefs were prepared for four retailers (2%).

Feedback from NSW Health Authorised Inspectors indicates that retailers mostly want to comply with the law and are able to rectify in-store point of sale or advertising breaches on the spot, once identified.2

Prosecution for breaches of tobacco legislation

The Ministry of Health has capacity to prosecute both the proprietor and individual retailer with respect to tobacco legislation breaches. The preference is to target the retail proprietor rather than the individual. In the case of small businesses, many retailers are also the

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1 This assumes the number of retailers in NSW is 13,414 and noting that the total number of inspections (4062) may include repeat inspections at one retail outlet.

2 This data was preliminary data presented to the Taskforce in March 2014. The compliance database has since been subject to a quality assurance exercise and the figures have been revised, but they are not significantly different.
owners of the premises and therefore it is difficult to separate the individual and entity in this setting compared with a larger retailer.

If a sales to minors breach occurs by an employee under the age of 18, the prosecution process is directed at the premises rather than the individual.

The Ministry has successfully prosecuted retailers for breaches of the sales to minors laws and selling cigarettes as individual items.

**Findings**

The Taskforce found that the current level of public information in relation to tobacco compliance monitoring and enforcement was limited. More specific information is required regarding:

- compliance monitoring and enforcement of sales to minors and point of sale provisions in the *Public Health (Tobacco) Act 2008* per Local Health District;
- how the NSW data for tobacco retailer inspections compares to other jurisdictions;
- how the sample of retailers undergoing inspection is selected and the type of retailers this represents; and
- whether retailer inspection and enforcement activity is more prevalent for retailers who are non-compliant, and does this vary by regional/rural area, size of the retailer and type of breach and retail premises.

The Taskforce considered evidence which showed enforcement programs are most effective when they include regular compliance checks of retailers. To maximise NSW Health’s investment in compliance monitoring efforts, the Taskforce suggested that the Government should investigate the possibility of implementing a three-year regulatory strategy in which every retailer undergoes inspection within that timeframe, and non-compliant premises are visited more often.

Enforcement programs that significantly disrupt the commercial distribution of tobacco to minors can be expected to reduce the number of youth who use tobacco. In relation to sales to minors legislation, the Taskforce agreed there is a need for a systematic and comprehensive retailer enforcement and compliance program. This must include monitoring and reporting and make use of underage undercover shoppers.

In order to ensure that youth are protected from all tobacco promotions and to minimise the probability that minors will be able to purchase tobacco products, the World Health Organization Framework Convention on Tobacco Control recommends that tobacco products should not be sold by people under age 18. Some Taskforce members were of the view that people under the age of 18 should not be selling cigarettes, as they may be subject to peer pressure to sell to other young people, while other members noted the lack of evidence correlating sales to minors breaches with retail employees under the age of 18. Other considerations included that young people may be better at identifying other minors and banning minors from selling tobacco may place additional pressure on small businesses and prevent youth from obtaining employment. The Taskforce agreed that there was insufficient evidence to justify a legislative change at the present time. However, this should be monitored.

The availability of penalty infringement notices (on the spot fines) are a useful enforcement tool, deterrent and alternative to costly prosecution for minor, strict liability offences. However, there is a need for consistency in decisions on the issuance of on the spot fines (and cautions) for minor tobacco offences. Use of NSW Health’s internal tobacco compliance monitoring and enforcement protocol guidelines would assist with this.
The Taskforce was of the view that the Government should strengthen punitive measures for breaches of tobacco legislation to better reflect the seriousness of tobacco as a health issue. In particular the Taskforce considered that, for repeat offenders, the potential revocation of a tobacco licence may serve as an incentive for adherence to regulatory measures. The *Public Health (Tobacco) Act 2008* currently prohibits persons with repeat convictions from tobacco retailing for specified periods of time. A person convicted of the same offence twice within a three-year period may not retail for three months, while a person convicted on three occasions may not trade for 12 months. Members raised the potential for issuing a more significant penalty at the ‘two strikes’ mark and a complete prohibition upon ‘three strikes’. Advice to the Taskforce was that replacing a time limited prohibition with a complete prohibition at the ‘three strikes’ mark is not likely to pass in Parliament, nor would it be consistent with other ‘three strikes’ laws e.g. in traffic or liquor licensing. In addition, there were insufficient grounds established to make the current repeat offence provisions more severe, given they are rarely enlivened, in part due to the difficulty in securing recorded convictions for first offences. Advice to the Taskforce indicated that the introduction of on the spot fines may alleviate this impediment to some extent; prior penalty infringement notices may be considered a ‘relevant factor’ by a court when determining whether or not to record convictions against retailers.

The Taskforce heard of the practical difficulties some retailers have applying s 10 of the *Public Health (Tobacco) Act 2008*, which requires tobacco to only be sold from one register at each retail outlet. This matter was referred for consideration as part of the Statutory Review of the *Public Health (Tobacco) Act 2008*.

Finally, the Taskforce considered that the Government should offer positive reinforcement to tobacco retailers who comply with tobacco legislation; provide more explicit feedback to tobacco retailers at the time the inspection is being conducted; and investigate all potential breaches at the time of inspection.

**Recommendations**

The Taskforce recommends:

3. That the *Public Health (Tobacco) Regulation 2009* is amended to enable Authorised Inspectors to issue on the spot fines for minor (display) retailing offences.

4. That NSW Health’s internal tobacco compliance monitoring and enforcement protocol is strengthened to support consistent application of the legislation, including the issuance of on the spot fines, offering positive reinforcement to tobacco retailers who comply with tobacco legislation and providing explicit feedback to tobacco retailers close to the time of inspection. Standard communication about the expectations of compliance monitoring and enforcement should be provided to retailers and inspectors.

5. That an improved reporting system is implemented to collect and collate information on tobacco compliance monitoring and enforcement.

6. That public reports detailing overall retailer compliance with tobacco legislation are periodically released.
3.4 Enhancing tobacco retailer compliance through training and education

**Background**

The NSW Ministry of Health utilises the TRN Scheme on an informal basis to communicate with tobacco retailers regarding emerging issues which are of interest and issue public health alerts.

There is currently no requirement in NSW for tobacco retailers to undergo any form of tobacco retail training prior to selling tobacco products.

It has been noted that Murrumbidgee Local Health District has developed a training module for tobacco retailers in NSW.

**Findings**

The Taskforce considers a best practice approach to tobacco retail regulation to include licensing together with enforcement and education.

Training of all retailers and staff on tobacco licensing laws may assist in improving compliance. However there is no evidence that retailer education alone is sufficient in reducing sales to minors.

In developing training for retailers, the Taskforce considered that:

- a training package should not be made compulsory until there is clear evidence that tobacco retail breaches are more likely to occur in premises whose retailers have not undergone tobacco training.
- many small businesses may be more receptive to one-on-one training versus online training, although group training may be more cost-effective. This would particularly be beneficial in areas with a low-level of compliance with tobacco legislation. However, NSW Health has successfully adopted online training for its workforce which may be a cost-effective approach.
- a generic training module may have limitations for those with a culturally and linguistically diverse background and consideration should be given to ensuring the reach of training packages to these groups.
- vignettes should be built into the modules to explain concepts. Literal translations into different languages may require supplemental information to ensure messages are conveyed accurately.
- there is a possibility that retailers who demonstrate due diligence by ensuring all staff complete tobacco retailer training could use this as a defence should the premises be in breach of tobacco legislation.

**Recommendations**

The Taskforce recommends:

7. That the Tobacco Retailer Notification (TRN) scheme is strengthened by providing regular communication to tobacco retailers regarding their obligations, emerging issues and public health alerts.

8. That training for retail staff is developed to support compliance with the *Public Health (Tobacco) Act 2008*, particularly regarding sales to minors, tobacco display and signage requirements and notification under the TRN scheme. The training should
also include topics to increase tobacco retailer education and awareness about the harms of smoking and approaches to smoking cessation.

3.5 Evaluating the impact of an improved TRN, enhanced enforcement and retailer education

In order to evaluate the effectiveness of a strengthened licensing, regulatory and education framework for tobacco retailing in NSW, initiatives introduced as a result of the Taskforce’s recommendations should be reviewed two years after they have been implemented.

In addition, there should be ongoing independent research of academic rigour into effective regulatory mechanisms to reduce tobacco consumption. Some proposed measures were considered by the Taskforce, but were either not within the scope of the Terms of Reference or were considered to be too far in advance of the evidence. For example:

- implementing a positive licensing scheme.
- actively reshaping the tobacco retail sector profile through density, location and type of retailer.

Recommendations

9. That a review of changes to retail compliance, enforcement and education occurs two years after any changes are implemented.

10. That ongoing independent and peer reviewed research into tobacco retailing is facilitated, including data acquisition and sharing between Ministry of Health, the retail sector and researchers.