

## SPECIAL COMMUNICATION

## A strategy for controlling the marketing of tobacco products: a regulated market model

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*Tobacco Control* 2003;12:374–382**Objective:** To outline a novel strategy for controlling the tobacco market.**Arguments:** More comprehensive controls over the tobacco market are essential and long overdue. Effective controls need to encourage the development of less harmful products; control commercial communication to ensure that potential harms are highlighted relative to any benefits; and provide mechanisms to move consumers away from tobacco use, or at least towards less harmful alternatives. Achieving this by regulating the existing industry is one strategy. This paper puts the case for an alternative: to have marketing controlled by an agency (called here the Tobacco Products Agency, or TPA) which tendered to manufacturers for product and which distributed to retailers in ways that reduce incentives to bend or break the law. The TPA would be backed by legislation that made tobacco a controlled substance with possession sale and use only allowed as permitted by the regulations, which in reality would be only as provided by the TPA.**Conclusions:** The overall effect of such a model, which we call a “regulated market model”, would be to eliminate most of the incentives and remaining opportunities for commercial promotion of tobacco and to create incentives to encourage the development of less harmful tobacco products. Such a model preserves the competition inherent in a free market, but directs it towards the challenge of reducing the harm from tobacco use.

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Tobacco smoking causes so much disease<sup>1,2</sup> that it is estimated to kill approximately half of its regular long time users.<sup>3</sup> There is no known safe exposure level to smoked tobacco products, although some forms of smokeless tobacco product (for example, the Swedish product called snus) are notably less harmful than smoked products.<sup>4</sup> The harm caused by tobacco products is predominantly due to long term exposure to tobacco related toxins. The world community is currently in the process of ratifying a Framework Convention on Tobacco Control (FCTC) to help control the problem.<sup>5</sup>

The challenge of minimising the social costs from tobacco use can be encapsulated in four major tasks: discouraging people from using tobacco, encouraging existing users to quit, protecting non-smokers from exposure to harmful tobacco smoke, and reducing exposures to tobacco related toxins among any continuing users. The challenges involved in preventing tobacco use and facilitating smoking cessation will be minimised if we can eliminate activities of the tobacco industry that make the task more difficult by making tobacco use more attractive than it intrinsically is. This effectively means exercising control over the tobacco market.

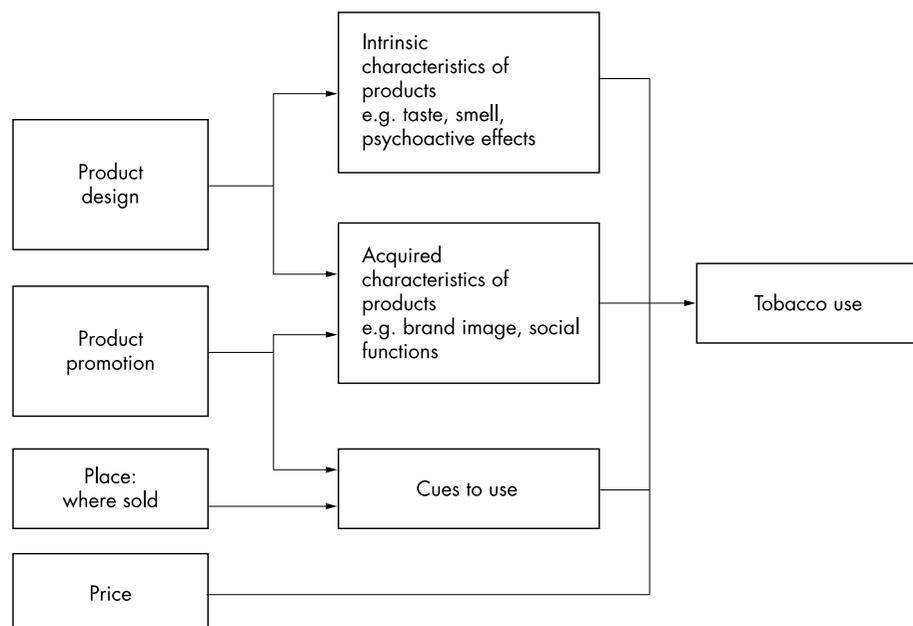
Recently, Liberman and Clough<sup>6</sup> have canvassed arguments about the possible illegality and certain immorality of many current tobacco industry practices. They make a compelling case that many current industry practices may not only be subject to civil sanctions, but may also break criminal laws. In Australia, this includes laws to prevent conduct endangering life and corporate manslaughter. Liberman,<sup>7</sup> in a related paper to this one, argues that the fundamental problem is the nexus between profitability and the harm caused by tobacco: the more you sell, the more profit you make, the more people you harm nexus needs to be broken by changing the incentive structures for operating in the tobacco business. He goes on to suggest the desirability of government control over both manufacturers and retailers.

This paper explores the viability of controlling the tobacco market by focusing on controlling two main ways tobacco companies influence tobacco use: through designing products to be more attractive to consumers, and by promoting them in ways that add extrinsic value (fig 1). By promoting their products and by adding ingredients to their products to make them more attractive to consumers, tobacco companies are increasing the value of engaging in an inherently dangerous habit, one that is highly addictive.

The analysis in this paper is grounded in the science base concerning the composition and formulation of tobacco products and the behavioural implications of how that information is communicated.<sup>8,9</sup> It adapts ideas from others<sup>8,10,11</sup> and from the work of our group.<sup>7,12</sup> There is now an emerging consensus that tobacco products need to be more strongly controlled,<sup>8,13</sup> but no clear consensus as to how to do this. Currently, no country has anything approaching a comprehensive regulatory framework in place: one that can effectively control both product composition and product promotion. One aim of this paper is to broaden thinking towards alternative models of control by outlining one possibility that minimises the role for a formal regulator.

Major gains have been made in tobacco control in countries like Australia that have taken the issue seriously.<sup>14,15</sup> There is good evidence that strong restrictions on the promotion of tobacco products and other counter measures reduce smoking.<sup>16</sup> However, even among the most effective and best resourced jurisdictions, anything from around 15% of the adult population continue to smoke on a daily basis and in most countries many more do so.<sup>14</sup> It is also proving extremely difficult to prevent young people becoming

**Abbreviations:** FCTC, Framework Convention on Tobacco Control; RMM, regulated market model; TPA, Tobacco Products Agency



**Figure 1** Tobacco marketing and major ways it can affect tobacco use.

addicted.<sup>17</sup> The tobacco industry has been remarkably successful in undermining public health efforts, probably because only short periods of experimentation are needed for dependence to develop, and in part because countries have not consistently invested the resources needed to overcome the effects of tobacco industry marketing. It is inefficient to spend public money to overcome company activity, rather than more effectively controlling it.

Better controls will not eliminate tobacco use. At least some smoking is due to dependence and experienced benefits (independent of any debate about whether these experiences reflect any enduring benefit). There is likely to be a continuing demand for tobacco products, and as a result prohibition will not eliminate use, and could create social harm by making lawbreakers of otherwise good citizens. That said, tobacco should not be treated as an ordinary consumer product. If tobacco products are to be legally available, there need to be controls to ensure that they do not have value added to them, and are as harm reduced as possible. It is also critical that any reductions in the harmfulness of individual products do not have unwanted effects such as encouraging greater use, or acting as a conduit to use of more dangerous forms.

If controls are to be effective, they need to be framed with an understanding of the realities about tobacco. Inhaling cigarette smoke is currently the most efficient way of delivering nicotine in a psychologically desirable way, making cigarette smoke the most addictive form of tobacco. Most of the harm from tobacco use comes from chemicals other than nicotine. Many of the harmful chemicals are created by combustion. Cigarette smoke is particularly harmful in this regard. Thus the most attractive form of nicotine delivery also happens to be one of the most toxic. Past attempts to break this nexus between attractiveness/addictiveness and harmfulness have failed. This may be partly because of constraints the industry has imposed on itself by trying to pretend that smoking is not really harmful or addictive.

After decades of deceit and denial some tobacco companies have admitted that their products are harmful, and now claim to be diligently moving towards developing less harmful products.<sup>18</sup> However, there is currently no tobacco

product which has both a lower harm profile and will be used as a substitute for cigarettes by most tobacco users.

Tobacco companies, like all corporations, exist to maximise shareholder value. Monetary profits are an important part of this, but other less tangible benefits, such as pride in owning shares (or in the case of tobacco companies, shame), contributes to share and thus company value. Tobacco companies get no benefit from killing half their long term customers. Unfortunately, without less harmful products, they are caught in a dilemma: to keep making money, they have to cause harm and can do little to reduce that harm.

Tobacco companies have little alternative than to search, or at least seen to be searching, for less harmful products. Currently some tobacco companies, like Philip Morris,<sup>19</sup> are seeking regulative protection. This is presumably mainly to protect them from endless litigation, but this is not inconsistent with facilitating the search for less harmful products. Any such regulation should give priority to the goals of public health and broader social wellbeing. A key challenge for tobacco control is to avoid allowing products that appear to have harm reduction properties, only to find that they provide little or no benefit to health. The false harm reduced innovations such as filters and light cigarettes<sup>9</sup> have fuelled scepticism about the value of harm reduction. However, failure to regulate effectively is the surest way of allowing these mistakes to be repeated. The possibility of less harmful products is one important reason for urgently needing a comprehensive regulatory framework.

## COMPREHENSIVE REGULATION OF THE TOBACCO INDUSTRY

The rationale for controlling the tobacco market, as part of a comprehensive tobacco control strategy, is to minimise population harm from tobacco use by controlling the form and contents of, and information about, tobacco products in ways that minimise population exposures to tobacco related toxins.

In principle, the harmfulness of a tobacco product can be reduced in three ways: by making it less toxic per unit used; by making it less addictive per unit used; and/or by making it less palatable. The first of these reduces harm directly, unless

there is compensation by increased use; while the latter two should reduce motivation to use and/or continue use, thus reducing lifetime exposures. The regulatory framework needs to allow progress on all three.

The ways in which the products are used affects their harmfulness. Use is affected by characteristics of the product, experiences of using, and by beliefs about the consequences of use. Consumer beliefs and behaviours are affected by what is communicated to them, including by the ways tobacco is marketed.

Regulation of tobacco products needs to ensure the provision of both adequate consumer information and effective controls on marketing. However, tobacco users are typically dependent on the product and are severely limited in their capacity to assess long term consequences of use. This extends to low capacity to properly assess harm reduction or exposure reduction claims. Thus, the preferred option for changes in product toxicity is to continually upgrade standards of exposure (or harm) for products, such that the dirtier forms of products are phased out. This brings change under the control of health agencies, rather than relying on consumers who are not able to assess the claims properly.<sup>20</sup> That is, it eliminates the need for claims about relative harmfulness, which have a high capacity to mislead.

Controls over promotion are needed, among other things, to reduce the creation of extra social value for tobacco use. There need to be controls over packaging, product information, and sales. Governments are already moving to mandate increasingly strong and comprehensive warning messages on packages because tobacco companies have failed to act appropriately. Governments also realise that with products as dangerous as tobacco, promotion should be eliminated, but perhaps because some form of promotion is essential while companies market to consumers, have failed to ban it altogether. The fundamental question here is: what residual societal benefit is being retained in maintaining a direct relationship between tobacco manufacturers and consumers? In our view, there is no practical use, it arguably only acts to retain incentives for tobacco companies to subvert the laws that are designed to control their activities.

To be effective, regulators will also need ongoing access to such things as information about the composition and engineering of tobacco products, exposures when used, indicators of harm, patterns of use, effects of price, consumer beliefs, and effects of communication about the product. The regulatory framework should allow for the stable, yet flexible, control of *all* aspects of tobacco products and their manufacture, promotion, and distribution.

Regulation needs to be compatible with the free enterprise system because, through the agreements administered through the World Trade Organization, free enterprise is effectively mandated for ordinary consumer products worldwide. The free enterprise system is one that is extraordinarily dynamic, which uses competition to encourage innovation and efficiency. It is also extremely good at building markets for products. Unfortunately, the latter is not a trait that is desirable for products that society wishes to discourage.

There are a number of other constraints on achieving optimal regulatory control over tobacco use.

- Consumer perceptions and preferences are critical to the success of any strategy to change patterns of use.
- Competition to develop less harmful products is constrained because consumers have poor capacity to identify such products correctly. This historically has allowed the proliferation of products with the appearance of reducing some of the harm, but little of the reality.
- Companies have no natural incentive to reduce the addictiveness of their products because users who become

dependent provide a long term market. Indeed, they have incentives to increase addictiveness and to hide addiction enhancing modifications from regulators.

- The capacity of manufacturers for innovation in product design and their natural advantage in knowledge of the effects of innovations means that regulators will always be trying to catch up. Regulators will be under pressure to be conservative to reduce the risk of allowing innovations which have undesirable effects, but which might otherwise be attractive.
- Companies need to communicate with consumers about positive features of their products to encourage use. They only provide information on harms when required to do so, and they have incentives to try to overshadow such information by spending more resources promoting the positive features.
- Companies need to identify their products, if consumers are to be able to choose them. Proprietary brand names are the main means of achieving this. If companies are expected to compete for the consumer market, then restricting branding by mandating completely generic packaging becomes problematic: there needs to be some residual link to the manufacturer/marketer.
- Where direct means of communication are restricted, companies have incentives to seek out indirect means. It is very difficult to prohibit some forms of indirect promotion while products are branded by manufacturers. Because indirect promotion is often about associating products with desirable lifestyles, it is doubly dangerous as it not only promotes use of the products, but does so in a way that focuses on non-essential elements and not intrinsic (including harmful) aspects.
- Companies compete in part on the basis of the “quality” of the products they produce. Quality includes the sensory experiences of use, largely taste and smell, but also pack imagery and the look of the product. Products with different sensory characteristics that are not immediately obvious before purchase (such as so-called light cigarettes) need to have some labelling to identify them if consumers are to be able to choose them.
- Current regulation makes it harder to market potentially less harmful nicotine products than it does to market cigarettes because the latter are often caught up in therapeutic goods laws. Also in some countries, like Australia, smokeless tobacco is prohibited, even though some of these products are much less harmful than smoked tobacco.

Taken together, these issues mean that regulators are continually in an antagonistic relationship with tobacco manufacturers and distributors because for the most part they do not share common goals. Tobacco markets have incentives to avoid controls that restrict their capacity to influence consumers and have a knowledge advantage over regulators who might wish to stop them. What is the best way to regulate such products? If a system could be devised where the incentives on tobacco companies were consistent with the goal of harm reduction, the challenge of regulation would be greatly simplified. Control over marketing could provide such a solution.

Marketing is where the power lies in the modern tobacco industry. Marketers can determine which products will be sold, and thus can exercise virtually complete control over manufacture (and thus indirectly, growers), because they choose which products to sell. They can also build image on distinguishing characteristics of products, and/or just on the brand names themselves. Ownership of brands and the capacity to exploit them is at the core of their business.

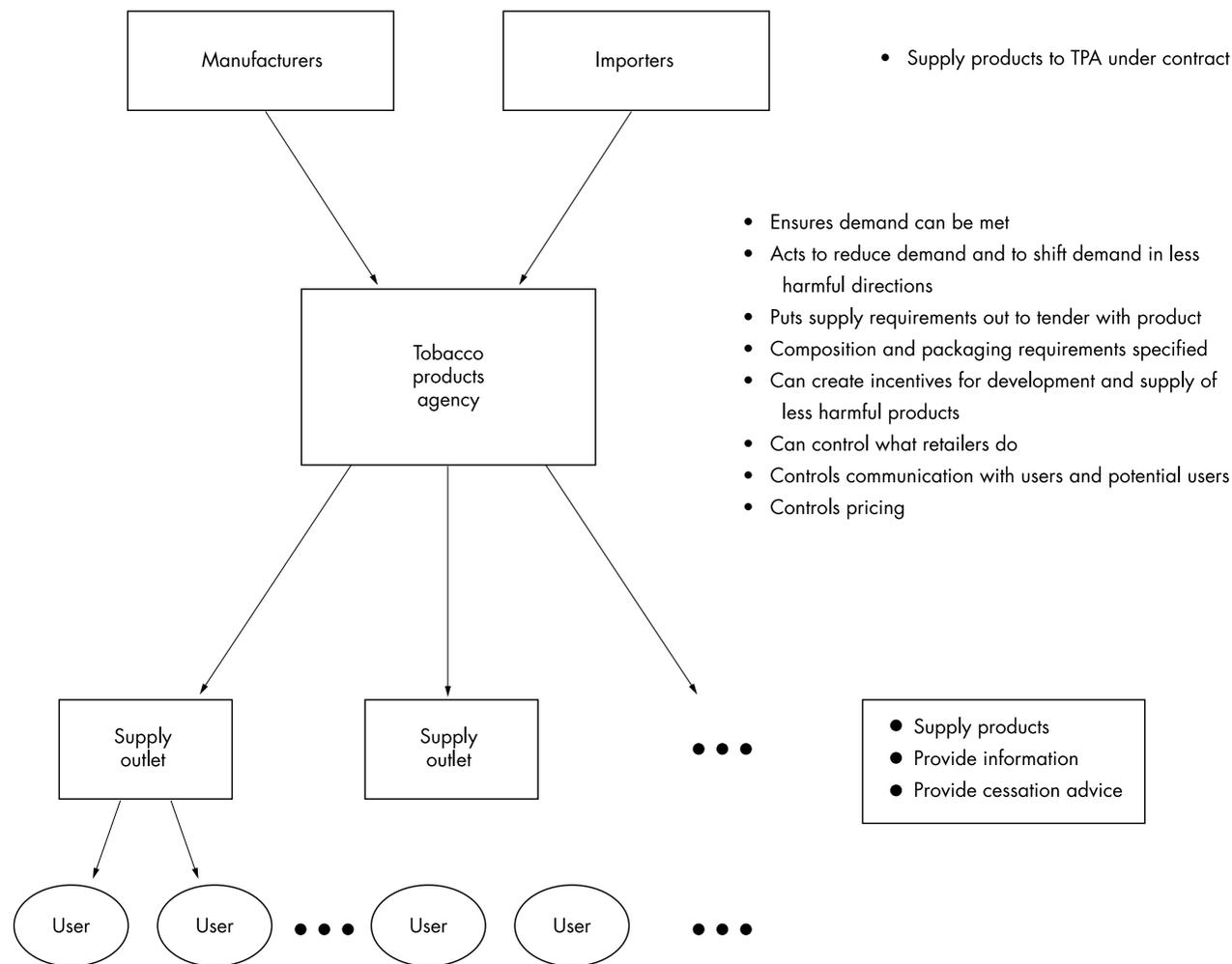


Figure 2 The regulated market model.

Marketers also have considerable influence over retail activity, and can influence retail prices through setting wholesale prices. They need to communicate with consumers about their products, although in the case of tobacco, most remain stonily silent about the harmful side of the ledger. Control over marketing provides levers to change incentives to facilitate more effective tobacco control regulation.

### A REGULATED MARKET MODEL

The proposed model to control tobacco marketing is a version of what we call a regulated market model (RMM). Under the RMM, free enterprise companies would retain the right to manufacture, but a monopsonistic agency would be set up to market tobacco products. This agency, which we call the Tobacco Products Agency (TPA), would need a charter that specifies that it will service the existing market, but shape it to minimise harm. The TPA becomes the sole customer of manufacturers and importers. The TPA would require capacity to assess performance characteristics of products to allow it to make informed choices. Free enterprise growers would sell to licensed manufacturers who would tender for market share from the TPA. The TPA would control wholesale distribution to retailers. The TPA could allow the current practice of for-profit private retailers to continue with retailers having contractual arrangements with the agency rather than with the manufacturers. Figure 2 is a schematic diagram of the model. This is a fundamentally different

model to a government monopoly. It is similar in many respects to the way alcohol is marketed in Scandinavia, most Canadian provinces, and some US states, where the government controls distribution and sales. The key difference from the US and Canadian alcohol distribution monopsony is that the focus of the TPA is on control of marketing rather than of distribution, and it does not necessarily require that the retail outlets are government run. This distinction is critical. Control over marketing means the TPA can control communication about the products including branding.

The tobacco market would initially consist of most, if not all, of the products that are currently on the market, plus, once the TPA had the capacity to assess new products, a range of potential exposure reduced smoked and smokeless products\*, plus any nicotine replacement products marketed for non-cessation purposes. The TPA would have the capacity to withdraw more harmful products from the market as alternatives emerged and/or discourage their use through higher prices or other mechanisms. The initial emphasis on product modification would be on cigarettes, or their

\*In jurisdictions where smokeless products are banned, it may be worth allowing them onto the market to the extent that they are likely to be substitutes for cigarettes, rather than a largely independent market. The value of doing so would need to be clearly weighed, using the experience of Sweden as a guide.

alternatives, as they dominate the market. It would move to reduce or eliminate additives and features that mask inherent toxicity and/or enhance addictiveness. It would be able to set and revise performance and emission standards for toxic compounds and also be able to introduce new products that both promised to reduce exposures and not appeal unacceptably to non-users of the more harmful products. New products that in reality performed in unacceptable ways could be withdrawn from the market or otherwise discouraged.

The TPA will have a more dynamic and trusting relationship with manufacturers because it is in a customer-supplier relationship, rather than being an independent regulatory apparatus that stands outside the relationship between marketers and consumers. This simplifies the complex process involved in using regulation to progress to less harmful products, while at the same time maintaining controls to prevent unwanted outcomes. In addition to the capacity to set standards (shared with ordinary regulators), the TPA can directly create incentives to better those standards with the offer of increased market share.

Tobacco manufacturers will have incentives to create less harmful products because the TPA will have reasonable capacity to make judgements on the harmfulness profile of products, so that it can act like the ideal informed customer who both wants and recognises less harmful products. Progress to market less harmful products can thus proceed as fast as consumers are prepared to allow. To achieve less harmful versions of a particular product, the TPA could specify maximum levels of undesirable chemicals, and could give competitive advantage to those who did even better than the specified requirements. Changes in tender requirements could be introduced in such a manner, and with such notice, as to allow manufacturers and importers the opportunity to adapt their capacities in order to continue to compete. The TPA would need to take consumer choices into account, and would have incentives to do so, to prevent it having unsold stock and to prevent the development of black markets that would emerge if its policies were too far out of line with consumer requirements.

By keeping manufacture in the hands of free enterprise companies, the model maintains the capacity for innovation that is inherent in free enterprise, provided that it can ensure the operation of competition. Competition could be achieved by having proportional tendering for products done in such a way to ensure that several companies were allocated market share and thus kept in the market. Market share would be considered in terms of both the overall market and of share of particular products. Novel products would initially have only one supplier. If it looked as if such a product would achieve a large share of the total market, or where combinations of innovations from different manufacturers held out the promise of even less harmful, but acceptable products, patented innovations could be licensed to other manufacturers for a negotiated fee or royalty. This would preserve competition, while preserving incentives for innovation.

Such a system actually creates incentives for manufacturers to disclose product information to the TPA. The TPA would be in a position to stipulate that certain, specified information be supplied about particular products, or that research about such products be provided to it. It is also in their interests to provide extra information to convince the TPA of the merits of their tender proposals. That information could be made publicly available to enhance openness of operations. In addition to the information it gets from tobacco manufacturers, the TPA will also need access to independent research, plus the capacity to evaluate critically all the information. Independent research will be important not only to check industry research, but also to monitor the

consequences of decisions the TPA makes: on consumer behaviour, on exposures to harmful constituents, and, in the longer term, on observed health consequences. As surveillance information comes to hand, policies can be modified to maximise the harm reduction capacity of the TPA's activities.

Control of communication and marketing issues is obviously one of the most important parts of any regulatory scheme. Balanced communication is most likely to come from a harm minimising public authority making decisions and acting under a harm minimising statutory charter. The TPA would be the main or only organisation with the right to commercial communication with the public. It would exercise controls over what could be said by retailers about the products they sell.

It is extremely difficult to eliminate positive promotion of products when companies are competing to sell to consumers. The TPA could and probably would market products under its own name. A particular type of cigarettes could be sourced from a number of different manufacturers, with the end consumer not knowing which. Where this was done, it would effectively cut the relationship between manufacturer and consumer, and thus would effectively eliminate any benefits from manufacturers marketing to consumers. Thus manufacturers will lack incentives to break or bend laws restricting promotion of tobacco products (something that they are currently highly motivated to do, as the potential gains are huge). Such a system also makes it easy to ensure drab packaging. While the TPA would use its own generic brands on the more harmful tobacco products (for example, Type 2 cigarettes), less harmful products (if they are ever produced) could be allowed to carry more attractive brands if there was any benefit in doing so. The TPA would also specify the form and content of health warnings and other product information, including provision for regular updates as knowledge advances and/or gaps in knowledge are identified. This overcomes the problem of regulators having limited capacity to rapidly update warning information because of the time taken to introduce or amend regulations.

In summary, the RMM has:

- the innovative capacity of free enterprise to move to less harmful products with safeguards to prevent marketing of products that appeal to consumers regardless of harm
- capacity to remove incentives to over-promote positives of tobacco use and to inform consumers in a realistic way about harms
- capacity to influence price, in particular to prevent price discounting being used to grow markets
- capacity to take control over brands, as they are a major means of adding extrinsic value to tobacco products (as for other consumer products).

### ENSURING THE TPA OPERATES APPROPRIATELY

A major area of concern is whether we could trust an agency such as the TPA to serve the public interest. The TPA would require independent and open governance under a charter that spelled out clearly its objectives. To achieve this, it would need an independent board, with experts in appropriate fields, and sufficient distance from executive government to ensure independence. The deliberations, decisions, dealings, and actions of the TPA would need to be as open as possible. This would reduce the risks of regulatory capture and of corruption of its purpose by forces within government more concerned with revenue than community wellbeing.

A monopsony is likely to be less subject to unbalanced influence than a monopoly. By its nature it cannot be as secretive in its operations. Under the proposed system, smaller tobacco companies are likely to proliferate as they

can be competitive when they do not require the large size necessary for mass marketing. This should result in the big multinationals becoming smaller. This should enhance competition, but in this instance competition that is more closely tied to the community interest. The existence of a larger number of players makes it more difficult for the TPA to do inappropriate deals with some companies without others getting upset and blowing the whistle. Thus, tobacco manufacturers could become key agents for reducing the risks of regulatory capture; something almost inconceivable with respect to today's big tobacco companies. To ensure competition, there will need to be rules governing maximum market share to keep sufficient companies in the market, at least in jurisdictions big enough to sustain multiple providers.

The other main potential for corruption is from within government. It is not too hard to imagine a government in dire financial straits looking at tobacco as a means of raising revenue. In the short term, there is a common interest in price rises for tobacco products as they will reduce demand while increasing total revenue to government. However, if there is pressure to increase demand, which may occur if consumption falls too much, how would it be resisted? Separation of the main revenue related decision making from the TPA is an essential part of the solution to maximise scrutiny of decisions taken. The TPA would need to be set up in such a way that the powers that regulate it are administered by the Health Department (or equivalent) and a different government department (for example, Treasury) collects taxation (or equivalent) revenue. The Treasury would set tax rates after consultation with the TPA and ideally would have the power, on the recommendation of the TPA, to set differential taxes for products of different presumed harm profiles. The TPA, itself, would probably be created as a non-profit (or non-profit maximising) organization, raising its operating costs from the business (although alternatively it could be given a budget from government revenues). This separates the revenue raising capacity from other functions designed primarily to reduce harm. To bolster further the interest of the TPA in public health, it could be given responsibilities for some cessation and prevention programmes. Staff working in these programmes would be motivated to resist any efforts to undermine the agency's integrity. Taken together, this structure should create a balance that minimises the risk of regulatory capture by manufacturers or corruption by revenue raising interests within governments.

One final guard against corruption could be benchmarking against the performance of TPAs in other jurisdictions. In large countries, the model could be adopted at a state level, with between-state competition driving improved performance.

External to the TPA is the problem of preventing any substantial illicit market (largely due to smuggling). Illicit markets develop where there is money to be made. Any system that either acts to drive up price relative to production (for example, taxes), and/or mandates changes to cigarette manufacture that make them less appealing, could make cheaper and/or more appealing illicit products attractive. If states, or countries with permeable borders, acted alone, they would be restricted in the extent of changes they could make because of the difficulty of preventing smuggling if they moved too far ahead of consumer desires. This is a problem for any system, not just an RMM. Change will be limited where there is capacity to import product in large quantities from outside the area controlled by the TPA. However, it would still be possible to implement the basic apparatus. This can be seen by the lack of problems associated with state liquor distributors in some US states operating alongside open markets in neighbouring states. These work well, but

often do little more than reduce the density of retail outlets. To optimise the potential of the model to move towards producing the least attractive and/or least harmful products possible would require it being adopted within a set of jurisdictions which could control smuggling.

A final challenge for the form of regulated market argued for here is to ensure that retailers do not become the de facto marketers. Small retailers have little capacity to add value or otherwise grow the market. Within their locality they can, but as the distributors will be agents of the TPA, there is some scrutiny to prevent these sorts of practices. Of more concern would be if one retailer became big enough to make it worth its while to bend or break laws to try to grow the market. This risk can be managed, perhaps by use of anti-monopolies legislation.

## MERITS OF THE REGULATED MARKET MODEL

In assessing the relative merits of the RMM, it is useful to compare it with plausible alternative models. We initially canvassed three other possibilities: conventional regulation, a monopoly, and a laissez-faire system relying entirely on informed consumers. It immediately became apparent that the laissez-faire model was not viable; government clearly need to be involved in product information (this is acknowledged in the FCTC) and there is insufficient consumer sovereignty for users to make truly informed decisions. Also, we do not believe that a monopoly is viable; however, it is included in the comparisons in table 1, mainly to show readers that the RMM is fundamentally different to either a conventional regulatory authority or a government monopoly, even with both set up with the same goals as a RMM.

The analysis summarised in table 1 suggests that while a conventional regulator is as able to mandate less harmful products as an RMM, it is less clear how it could actively encourage new innovation. Further, an RMM appears to enable effective controls over promotion by removing incentives to promote, something that does not seem possible while manufacturers compete to sell to end consumers.

Under the RMM, the role of the regulator is made easier because most of the work a regulator needs to do under the free enterprise system is done by the special customer-supplier relationship between the TPA and the manufacturers or their import agents. The role of regulation is thus little more than the rules setting up the TPA, prohibiting other entities engaging in marketing of tobacco products outside of mechanisms the TPA might permit, and preventing collusion that could undermine the intent of the system. What would normally be complex sets of rules about what is allowed in particular products and what marketing activities are and are not permissible, is simplified to flexible contractual arrangements, or is done by an agency without strong incentives to distort communication. For the alternative of a conventional regulatory approach to work effectively, it will require sufficient powers and flexibility to do its job properly and resources to support and utilise the necessary expertise. The intrinsically antagonistic relationship it has with manufacturers and marketers makes doing this task difficult, and it is likely to be more expensive than doing the same task within an agency that has a more cooperative relationship with manufacturers.

For countries with a current monopoly or near monopoly, the RMM has considerable extra attraction as it probably overcomes World Trade Organization problems with monopolies, while maintaining government control over what is available and how it is promoted. It provides a clear alternative to the privatisations that governments are engaged in or are contemplating in places like Japan and Thailand. As Mark Levin notes (personal communication,

**Table 1** How three possible systems deal with some key issues

Issue	Conventional regulation	Government monopoly	Regulated market model
<b>A. Product composition</b> Ensure that products meet the standards that have been established	Requires regulations that specify the standards. This is something that they can do well, but it also requires monitoring, which can be squeezed in times of budgetary scarcity. Typically can only regulate what is, so limited in capacity to regulate new innovations. Will need to be strong, flexible and vigilant to work	The government simply instructs the production units as to what they can and cannot do. There is no necessary mechanism of review. The process can vary from the soundly based (good) to the capricious (dangerous)	The TPA both specifies minimum standards in tenders for products and rewards companies that exceed (better) those standards with increased market share. The TPA will need independent capacity to test products, but is likely to get good quality information from its suppliers as it is their customer. There is a risk a monopolistic distributor will make poor choices, but international comparison should show this up
Encourage the creation of genuinely harm reduced products	Has innovative potential of free enterprise, but requires capacity to make claims if it is to encourage production of products that better the minimum standards	Monopolies typically are poor at innovation	Can encourage product innovation to reduce potential harm, through capacity to offer increased market share to such products. Does not require capacity to make harm reduction claims. Contracts form a more flexible base for product innovation than regulations Can be achieved, but limited by consumer tolerance
Allow moves to less intrinsically attractive products	Very difficult to achieve. Companies use taste and other differences to compete and will strongly contest any such changes	Can be readily achieved if the will is there, but limited by consumer tolerance	
<b>B. Communication and marketing</b> Ensure balanced communication about the benefits and harms of use	Strong incentives for company communication to understate harms. Governments have taken role in mandating health warnings and in some cases funding anti-tobacco advertising. Governments will need to play an expanded role in mandating provision of basic information about harms as the companies can not or will not do this. While it is profitable to do so, there will be pressure to avoid or even break laws	In principle, less problem with incentives to distort communication, but unless the monopoly has a harm reduction charter, no real incentive to ensure balance	Central to its charter, so should be straight forward. Can effectively remove incentives for tobacco companies to promote to consumers, by selling products under TPA livery. Requirements of transparency and public involvement should produce conditions to get the balance right
Controls to prevent pricing being used to attract new markets	Price controls work, but they require constant vigilance, thus it is costly to ensure they operate where incentives for violation exist	Simple in principle, but incentives to break rules remain	Should operate smoothly. TPA has no incentive, but incentives for retailers remain as for other systems, but probably easier to control as contractual relationships with TPA provides greater oversight
Truly generic packaging	Limited as companies must be able to retain some identifiable link with their products, links that can be used for marketing	Possible as all brands owned by monopoly	Possible as all brands can be owned by TPA. Part of the appeal of the model is that it encourages such innovations
Elimination of capacity to add value to tobacco products through modern marketing techniques	Incentives remain for indirect promotion providing it can be linked to company products. Prohibiting indirect promotion of products is extremely difficult	Should cause no problems, as could be prohibited and even if incentives remained, monopolies tend to be less creative in their marketing	Such activities would be incompatible with the charter of the TPA, and there is little incentive for violations. There is also little incentive for any such promotion to consumers by manufacturers if tobacco products are sold with TPA brands
<b>C. System integrity</b> Legal integrity	Will require making industry activity that meets regulator requirements legal where there currently may be questions	Not permissible under World Trade Organization conventions, thus not viable for WTO member	TPA would be acting legally while it operated within its charter. It would require manufacturer's activity to be made legal if they met TPA and other requirements
Maintaining the integrity of the system—incentives to comply with the spirit as well as letter of the law	Role of regulator will be complex as companies have incentives to bypass regulator and keep information secret where possible. Will require strong and vigilant regulators with strong values of independence. Strong enforcement of laws will be needed to ensure no commercially motivated avoidance or violation of the rules. Has somewhat greater intrinsic limits on potential transparency because of commercial in-confidence requirements. As there is likely to be only a small number of companies in the market, regulatory capture remains a problem	Few incentives exist for a monopoly to impose onerous restrictions on the types of products that they can produce. Oversight will be needed by government agency with interest in public health. Can be totally transparent, but rarely do monopolies feel the need to be. Long history of monopolies being corrupted by desire for money and/or power	Control of product composition and other issues is easier than in the open market because companies have less incentive to hide information from TPA and often have incentives to provide unsolicited information as the TPA is their customer. Competition in producing products for the TPA will minimise risk of regulatory capture by cartels. Separation of revenue raising from regulatory oversight, the latter in health agency hands, will minimise over emphasis of revenue aspects. Transparency should be easier than under regulation, and while it may be more difficult in principle than for a monopoly, there will be a number of affected parties demanding it.

July 2003), we should not sit by and let tobacco companies be taken over by interests with no potential interest in public health.

The RMM provides improved capacity to minimise the image creation associated with marketing and capacity to move to reverse some of the engineering that has masked inherent toxicity. It should act to reduce demand. The model could also allow or encourage retail outlets to promote cessation. While in principle this can be done under the current system, many would be extremely worried about the tobacco industry systematically undermining the effort, while being seen to cooperate. The model can also constrain supply, particularly by restricting more harmful products and, if it wished to do so, by gradually restricting the number of retail outlets it contracted to sell its products.

## BARRIERS TO ADOPTION

There is little doubt that the initial reaction of most people to the question of whether an RMM is politically feasible will be "No". Part of the reason for this is the distrust of new ideas. It is more useful to think about what might be more persistent barriers that may remain when the novelty wears off.

For an RMM to become a reality, it needs to be implemented through national laws in ways that are consistent with international law. The FTC is creating unprecedented international focus on tobacco control and forcing all-of-government responses, both of which should be helpful in moving towards the kind of comprehensive solution the model represents. However, this type of control over the tobacco market was not considered in the negotiation of the convention, because the ideas are too new. It will be important to ensure that the absence from the convention of models like the RMM is not used as an excuse to avoid considering new ideas. Indeed, the very fact of the FTC demonstrates the need for concerted international action to do all that is practical to reduce the death and disease tobacco use causes.

The other relevant international law is that governing the World Trade Organization (particularly the TRIPS agreement which deals with intellectual property and trade marks). There appears to be no basic prohibition of monopolies as long as they do not discriminate between national and non-national suppliers in their purchasing of product. The goal of truly generic packaging could run into problem with agreements like TRIPS, particularly if it were to be done without compensation, but this is not clear. More work is needed here, but it needs to be remembered that tobacco related trademarks have monetary value because they add consumer value to these inherently harmful products. Removal of trademarks may be more a problem for some countries than others. In some, it may be enough to make tobacco a controlled substance,<sup>21</sup> moving it outside ordinary commerce. Such legislation would only allow consumer possession of tobacco products marketed by the TPA. Alternative pathways include forfeiture of trademarks either voluntarily, as part of protection against future liability for producing harmful products, or forcefully through successful litigation against such practices.

Another major potential barrier is that governments may see a risk of becoming associated with the residual tobacco problem. This may cause problems as the community comes to forget the benefits that change has provided. In setting up the system, it will be important that there are symbolic as well as practical aspects to the legislation defining tobacco use as socially problematic. The symbolism of making tobacco a controlled substance and constraining its availability should help to send signals of governmental disapproval,

minimising the risk of it being seen to promote something that is socially undesirable.

A final barrier is to convince people that the problem is big enough to warrant such a solution. There is no doubt that vested interests who profit from the current system will oppose the adoption of an RMM and they may gain support from those who are naturally suspicious of government involvement in either commerce and/or in influencing personal choices. For countries like Australia, with strong commitments to free markets, there are challenges of rethinking how the model actually fits within a system that is designed to encourage competition and innovation. However, there are currently major challenges in justifying the preservation of a system that grows demand for products society has decided are harmful.

To get decision makers to focus on the importance of such comprehensive change may require a crisis. This could come from the courts. It is possible that successful litigation, either civil or criminal,<sup>8</sup> could effectively outlaw the current system of for-profit companies marketing tobacco products to consumers. In such a context, governments would be forced to act quickly. An RMM could be an attractive solution.

## CONCLUSIONS

The idea for an RMM arose as a response to the proliferation of new potentially harm reduced tobacco products. It was designed to create a context whereby the forces of competition could be marshalled in the interests of reducing the harmfulness of tobacco products. It is also an extremely effective system for minimising commercial incentives to use tobacco products, and could be used solely for that purpose. The RMM may be the most practical way of ensuring the elimination of inappropriate promotion. These are potent reasons to consider its adoption.

It is important to realise that the version of the RMM articulated here is not the entire solution. There will also need to be controls over retailing, ongoing programmes for prevention and cessation, and more extensive controls over when and where tobacco products are used. At least some of these tasks will be made easier when the powerful forces in the tobacco industry that are systematically undermining these efforts are removed. An RMM may mean we will have to spend less in these other areas to achieve the same result.

Tobacco control needs strategies to minimise forces that encourage the uptake of inherently harmful products and capacity to allow smokers who are currently unwilling or unable to quit to switch to less harmful variants, without discouraging their eventual cessation, or of encouraging new users. The RMM appears to achieve these goals. We are not aware of any alternative proposal that is likely to be as efficient or effective. Tobacco use causes far too much death and disease for any but the most effective strategy to be credible. Research and analysis is needed to test the claims made in this paper. Governments should seriously consider its adoption, or at the very least add it to the mix of strategies they consider when they take the (what seems to us as inevitable) steps towards more comprehensive control of all aspects of the tobacco market.

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# The lighter side



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**TC**

## **A strategy for controlling the marketing of tobacco products: a regulated market model**

R Borland

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