

REPORT TO
NEW SOUTH WALES MINISTRY OF HEALTH
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SMOKE-FREE ENVIRONMENT REGULATION 2007



REGULATORY IMPACT STATEMENT





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EXECUTIVE SUMMARY

The *Smoke-free Environment Regulation 2007* (the Regulation):

- requires occupiers of enclosed public places to display certain signs identifying those areas as smoke-free; and
- provides guidelines in relation to determining what is an ‘enclosed public place’ and when a covered outside area is considered to be substantially enclosed for the purposes of the *Smoke-free Environment Act 2000* (the Act).¹

Under the provisions of the *Subordinate Legislation Act 1989*, the Regulation is due for staged repeal on 1 September 2016.

The New South Wales (NSW) Ministry of Health (the Ministry) proposes that the existing Regulation be remade and is exploring the potential inclusion of two amendments to the current version of the Regulation.

The *Subordinate Legislation Act 1989* states that the remaking of a statutory rule (even if it is to be remade without changes) requires the preparation of a Regulatory Impact Statement (RIS) and a period of public consultation (Parliamentary Counsel’s Office, 2014).

Objectives sought to be achieved by the Regulation

There is strong and consistent evidence that breathing of Second Hand Smoke (SHS) by non-smokers can lead to detrimental health consequences (see discussion in Chapter 2). Furthermore, the risks from SHS exposure faced by staff in the hospitality industry are considerably higher than for the community as a whole.

The nature of the unregulated market (i.e. where there exists ‘market failures’ such as significant negative externalities and information asymmetries, as well as institutional failures) means that, without some degree of government intervention, hospitality workers and consumers will be exposed to unacceptably high levels of SHS.

The Act and the Regulation are intended to protect the public by reducing exposure to SHS in enclosed public places. The Act achieves this purpose by outlawing smoking in enclosed public places and covered outside areas, with the Regulation providing guidance as to the interpretation of the boundaries of the Act.

Options considered

The NSW Ministry of health has identified the following options to be considered in this RIS.

¹ For simplicity, reference to guidelines as the definition of ‘enclosed public place’ should also be read as referring to guidelines as to the definition of ‘a covered outside area ... considered to be substantially enclosed’.

- **Base Case** - letting the Regulation sunset so that no specific regulatory guidance is provided with respect to guidelines to define what constitutes an enclosed public place and signage requirements;
- **Option 1** – remaking the existing Regulation without any changes (the status quo option);
- **Option 2** – remaking the existing Regulation with two potential amendments:
 - changes to clarify what ‘opens directly to the outside’ means for determining if a place is enclosed (Clause 6 of the Regulation);² and
 - changes to clarify what ‘gaps in the wall or ceiling’ are for the purposes of Clause 6(5) of the Regulation; and
- **Option 3** – letting the Regulation sunset as it relates to Clause 6 (i.e. guidelines) but retaining the existing signage requirements.

In considering the impacts of these options, it is useful to outline a view of the general implications of some of the proposed changes. These implications are outlined in the sections below.

Base case: Letting the Regulation sunset

This option entails letting the Regulation sunset, which means that both the guidelines to define what constitutes an enclosed public place and the requirements to display certain signs would be eliminated.

Removing the guidelines to determine if a place is enclosed is likely to have the following implications.

- In the absence of guidelines, courts would be left to develop an appropriate definition of what constitutes an ‘enclosed public place’ and a ‘substantially enclosed’ covered outside area.
- Any form of guidance about what constitutes an ‘enclosed public place’ would only be available following the conclusion of each court hearing and will be on a case-by-case basis. Thus, some aspects of the guidance offered through judgements may be open to some degree of interpretation and/or may not be amenable for other venues to use as concrete benchmarks to their own benefit.
- In making decisions on the definition of ‘enclosed public places’, courts would look to the objective of the Act, drawing guidance from case law³ and other legal and technical sources. Furthermore, it could be expected that courts would also look at the guidelines in the repealed Regulation for guidance.
- It is unknown when such cases would eventuate, and thus, guidance on how to interpret/apply aspects of the Act may not be available in the short-to-medium term — interpretations about what constitutes an ‘enclosed public place’ would only be available once enforcement actions are taken.
- Given the weight of evidence regarding the harmful effects of SHS, it is difficult to envisage that court decisions would result in a less restrictive definition of enclosed public places than the one provided by the current guidelines. However, there is no certainty that this would be the case and there is a possibility that the court’s definitions could end up being just as strict as the current guidelines.
- The Ministry would continue to have responsibility for enforcing the Act, and SafeWork NSW would continue to have responsibility for enforcing the *Work Health and Safety Act*.
- Depending on results of enforcement actions, proprietors may be required to modify their venues to meet court-imposed tests if they wish to allow smoking in certain enclosed spaces.

Option 1: Remaking the existing Regulation without changes (status quo)

This option entails remaking the existing Regulation without any changes, which means that both the guidelines to define what constitutes an enclosed public place and the requirements to display certain signs would be retained in a renewed regulation.

Option 2: Remaking the existing Regulation with changes

Option 2 would aim to clarify the definition ‘opens directly to the outside’ and ‘gaps in the wall or ceiling’ for the purpose of Clause 6 of the Regulation. These terms have been open to some degree of interpretation by industry and have caused some confusion in the past. Indeed, the interpretation of

² All the clauses refer to in this RIS relate to the current version of the Regulation due for repeal. The numbering of these clauses may differ from the Regulation released by the Ministry for public consultation.

³ To date there have only been two relevant court cases related to the guidelines in the Regulation, *Blacktown Workers' Club Ltd v. O'Shannessy and Dubbo RSL Memorial Club Limited & Anor v. Steppat & Ors*.

these terms was subject to one of the only two court cases in NSW related to the enforcement of the Act and the Regulation (Blacktown Workers' Club Ltd v O'Shannessy).⁴ The decisions made in this case have provided further guidance about these terms.⁵

Given that the precise wording of relevant sections of Clause 6 is yet to be determined by a legislative drafter, it is not possible to accurately conjecture the implications of adopting Option 2. That said, the adoption of Option 2 would likely lead to one of three possible outcomes.

1. The amendments neither improve nor reduce the stringency and effectiveness of the Regulation compared to Option 1 (i.e. maintaining 'status quo').
2. The amendments lead to a significant reduction in confusion around how to interpret and apply Clause 6, and thus, improves the overall effectiveness of the Regulation compared to the status quo.
3. Contrary to the original aim, the amendments create additional confusion about how to interpret and apply Clause 6, and thus reduce overall effectiveness of the Regulation compared to the status quo.

Which of these three scenarios is most likely to eventuate should Option 2 be adopted, depends on many factors (including how the amendments are drafted). However, noting the insights offered from the Court of Appeals ruling over the Blacktown Workers' Club case, it is reasonable to believe that more likely than not, it will be difficult to provide additional 'clarity' in Clause 6 without at least in some part, compromising the flexibility of the Regulation to cater for unforeseen situations.

Option 3: Letting the Regulation sunset but retaining the existing signage requirements

This option would entail letting the Regulation sunset but retaining the existing signage requirements, which means that the guidelines to define an enclosed public place would be eliminated. The likely general implications of eliminating the guidelines would be the same as those outlined above.

Assessment of cost and benefits of the options

The options outlined above have been assessed in terms of the two main areas dealt by the regulation:

- how to provide guidance as to the definition of 'enclosed public place' — to provide regulatory guidelines (either in their current form or with changes) or let the courts develop a definition; and
- signage requirements — to have or not have the signage requirements.

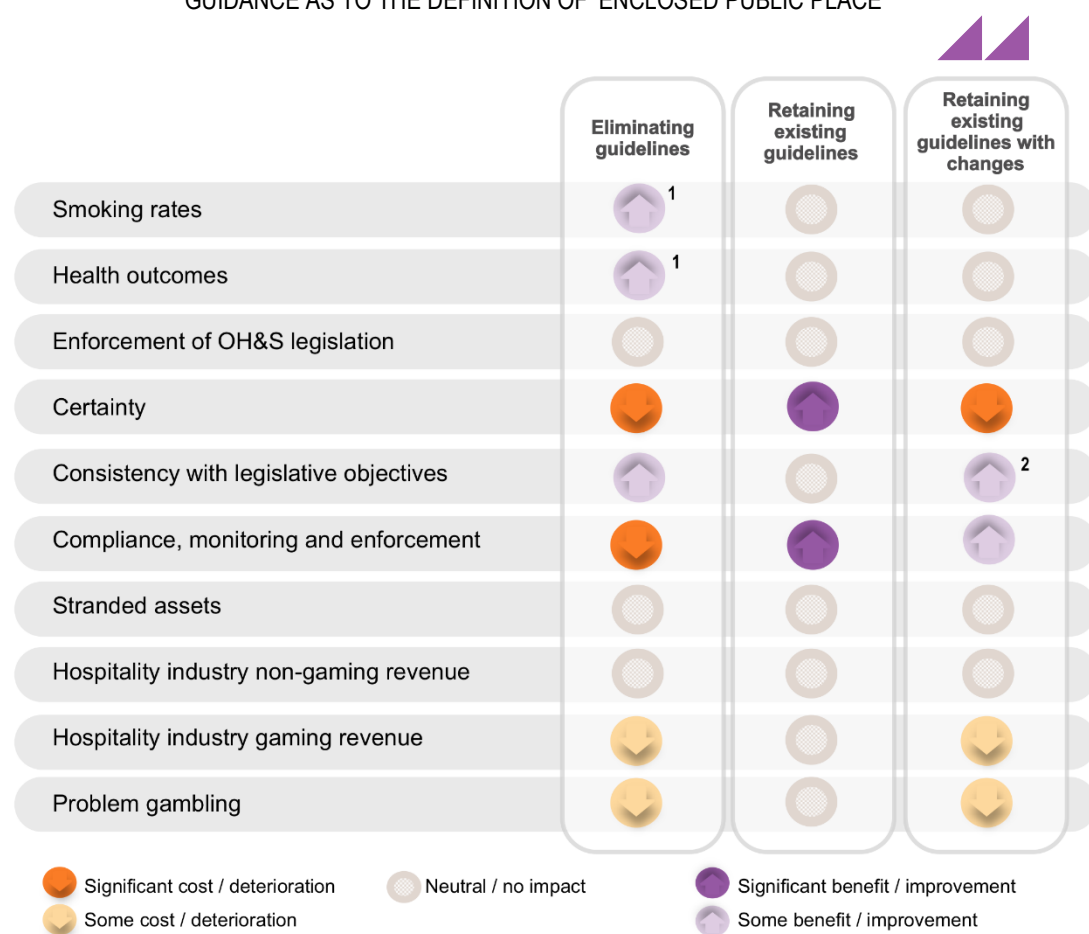
The benefits and costs associated with the alternative options are not amenable to quantification due to the uncertainty associated with the possible changes to the guidelines and the relatively marginal impact of the possible changes (i.e. the impact of the Regulation is dwarfed by the impact of the Act). As such these impacts were assessed qualitatively. In addition, in preparing this RIS, a selected number of stakeholders were consulted to gather their views about the potential impacts of the alternative options being considered. Where relevant, stakeholder views have been included in the discussion. These views need to be further tested during the public consultation period before a decision is made about remaking or removing the Regulation.

Guidelines to define an 'enclosed public place'

The assessment of the different alternative options with respect to the guidelines was done around the types of impacts they would have. These are discussed below and summarised in **Figure ES 1**.

⁴ More details about this case are provided in Section 4.1.1.

⁵ Notably, while there have been only two relevant reported court cases, there have been others in the Local Court that have little or no precedent value.

FIGURE ES 1 SUMMARY OF POTENTIAL RELATIVE IMPACTS OF DIFFERENT OPTIONS TO PROVIDE GUIDANCE AS TO THE DEFINITION OF 'ENCLOSED PUBLIC PLACE'

¹ This benefit is highly uncertain as it would only be achieved if the new definition/guidance of enclosed space developed by the courts is more stringent than the current guidelines and results in significantly fewer venues allowing smoking. It is uncertain if/when this would be achieved.

² This benefit is uncertain as it would depend on the actual drafting of the changes to the guidelines and on whether these changes do in fact result in significant reductions in confusion around how to interpret and apply Clause 6 and thus improve compliance with the Regulation (compared to the status quo).

Note: For ease of comparison, the impacts of eliminating the guidelines and of remaking the guidelines with changes are summarised with respect to the status quo (i.e. retaining the guidelines in their current form), while the impacts of the status quo are summarised with respect to eliminating the guidelines.

SOURCE: ACIL ALLEN CONSULTING.

Smoking rates

- To the extent that eliminating the guidelines could result in a more stringent definition of enclosed public space by the courts, then eliminating the guidelines could potentially result in decreased smoking rates. However, if the definition by the courts is just as strict as the current guidelines, then it is unlikely that the smoking rates would be different than under the current Regulation.
- Retaining the guidelines in their current form would not have any impact on current smoking rates.
- Insofar as the aim of amending the guidelines is to increase 'clarity' about compliance requirements rather than to apply a more stringent definition, impacts on current smoking rates are likely to be negligible under this option.

Health outcomes

- If the courts' guidance result in a more stringent definition of enclosed public space, then eliminating the guidelines could potentially bring additional health benefits from reduced SHS exposure. However, if the courts' definition(s) is just as strict as the current guidelines, then there would not be any additional health benefits. Furthermore, given the uncertainty surrounding the time when the court definitions would be developed, there is a possibility that in the short term some operators may be willing to 'test' the definition of enclosed space and allow smoking in their venues. If this eventuates, then the removal of the guidelines would result in a temporary reduction in health benefits.

- Retaining the guidelines in their current form would not have any additional impacts on health benefits other than what is currently being achieved by their current application.⁶
- Whether additional changes to the existing guidelines would lead to better health outcomes or not depends on the extent to which the existing guidelines generate confusion and consequently expose more people to potentially dangerous levels of SHS. Industry argues that this is not the case (i.e. that the guidelines are sufficiently clear). The ruling in the Blacktown Workers' Club case has also provided additional clarity about the interpretation of the guidelines. As such, it is unclear whether further 'clarifying' Clause 6 would improve health outcomes.

Enforcement of occupational health and safety legislation

Some stakeholders argue that the current guidelines discourage enforcement of occupational health and safety (OH&S) obligations because they deter WorkCover from enforcing a stricter standard.

- If the guidelines are eliminated, this *may* change the way OH&S obligations are enforced in line with the new courts' definitions. If the courts' guidance result in stricter definitions, this *may* result in stricter standards being enforced by WorkCover. However, whether this change would occur is uncertain.
- Retaining the guidelines in their current form is unlikely to have any impacts on the way OH&S obligations are currently enforced by WorkCover.
- Retaining the guidelines with amendments would lead to a transition cost where enforcement bodies will need to adjust to the amended Regulation. Insofar as the aim of the amended guidelines would be to increase clarity rather than to apply a more stringent definition, then this change is unlikely to have any impacts on the way OH&S obligations are currently enforced by WorkCover.

Certainty

While it is acknowledged that the current guidelines are not perfect or precise (which is necessary to allow a degree of flexibility in the assessment of differently configured spaces and circumstances which might not be foreseen), and that when they were first created there were concerns about their clarity, most of the selected stakeholders consulted for this RIS noted that things have 'settled down' and the current guidelines are now accepted and being followed. Against this background:

- it is unclear that a new courts' definition of 'enclosed public places' would provide more certainty to industry and the public than the current guidelines. In fact, it is likely that if the guidelines are removed there would be a period of uncertainty in the short term until the courts have been given an opportunity to provide guidance. Furthermore, it is unclear that the courts' guidance would be applicable to all, if not most, of the venues;
- most of the stakeholders consulted for this RIS noted that after an initial period of adjustment, the guidelines are now understood, accepted and followed. As such, retaining the guidelines in their current form would provide certainty to industry; and
- the additional 'clarity' that could be offered by amending the guidelines is likely to be small, noting that additional guidance about Clause 6 of the Regulation has now been provided by case law. Indeed, there is potential risk that at least in the short term, making changes to the guidelines would lead to a period of increased 'uncertainty' until the changes are well understood.

Consistency with legislative objectives

Stakeholders have argued that the current guidelines facilitate the creation of areas for smoking that, while compliant with the Regulation, may be in contravention of the spirit of the Act.

- If the guidelines are eliminated, it is possible that when making a decision about what constitutes an 'enclosed public place' courts would look to give more weight to the objective of the Act and adopt a more restrictive definition that is more consistent with the objectives of the Act.
- Retaining the guidelines in their current form is unlikely to have any impacts in terms of consistency with the Act.
- Key insights from the Blacktown Workers' Club case suggest that it is unclear that making changes to the current guidelines would improve its alignment with the Act. There are practical limitations to how

⁶ However, it is worth noting that some health advocates remain concerned that the current guidelines are flawed as they still allow exposure to second-hand smoke that has significant health impacts.

terms used in the legislation could precisely specify its intent/purpose. As such, at best, changes to the guidelines would likely have a small impact on the alignment of the regulation with the Act.

Compliance, monitoring and enforcement

- If the guidelines are eliminated it is likely that some aspects of the guidance provided to industry through court rulings may be open to some degree of interpretation and/or may not be amenable for other venues to use as concrete benchmarks to their own benefit. This would likely result in difficulties in both achieving and monitoring compliance, and possibly result in an increase in enforcement actions (which can take a long time to be resolved and result in substantial costs to all parties).
- While it is acknowledged that the current guidelines are not without flaws, they provide some specific definitions to test compliance and are now generally understood and followed by industry (resulting in generally high levels of compliance across NSW). As such, retaining the current guidelines is unlikely to result in lower compliance and/or further enforcement actions (and related costs).⁷
- Whether additional changes to the existing guidelines would lead to improved compliance outcomes depends on the extent to which the existing guidelines generate confusion. Any improvements to compliance outcomes is contingent on the actual drafting of the changes and on whether these changes do in fact result in significant reductions in confusion around how to interpret and apply Clause 6 of the Regulation.

Stranded assets

One of the key issues raised by the hospitality industry with regards to changes to the current Regulation is that investments have been made on the basis of the existing guidelines. The industry's concern is that if a different approach to the current guidelines is adopted, then the venues' renovated and/or new areas may not be suitable for use as smoking areas. In effect, the concern is that these investments would become stranded assets.

To the degree that different options to provide guidance about the meaning of 'enclosed public place' entail greater construction and operational costs for operators, these additional costs should not be attributed to the legislative regime. Those are costs voluntarily incurred in the normal course of business as there is no obligation to seek to construct spaces that can accommodate smoking per se.

Hospitality industry non-gaming revenue

The hospitality industry remains concerned that tightening the interpretation of enclosed public places would have a detrimental impact on their revenues. However, national and international evidence suggest that smoking bans do not have a negative impact on non-gaming revenues of the hospitality industry (and in fact, that it could have a positive impact).

- In light of the evidence, on average, the hospitality industry is unlikely to suffer any decline in non-gaming revenue in the medium to long term from the elimination of the guidelines and the development of a more stringent definition of enclosed spaces by the courts.
- Everything else being equal, retaining the guidelines in their current form would not have any impacts on the hospitality industry non-gaming revenue.
- It is unlikely that changes to the current guidelines would result in any decline in non-gaming revenue.

Hospitality industry gaming revenue

Evidence on the impact of smoke-free policies on the hospitality industry's gaming revenue is not clear cut, with some studies pointing to negative impacts and others to the contrary.

- Considering the findings in the literature and the fact that smoking restrictions and the guidelines have been in place for a significant amount of time (and hence both industry and patrons have already adjusted to the restrictions), then:
 - if the elimination of the guidelines result in a more stringent definition of enclosed public places, then it is likely that the industry would experience a slight short term decline in gaming revenue; but

⁷ Nevertheless, it is worth noting that some health advocates argue that the current guidelines are difficult to enforce because of the manner in which they are drafted. These views need to be further tested during the consultation period that will be undertaken by the Ministry before a decision is made about remaking or removing the Regulation.

- if the definition developed by the courts is just as strict as the current guidelines, then it is unlikely that there would be any changes to gaming revenue.
- Everything else being equal, retaining the guidelines in their current form would not have any impacts on the hospitality industry gaming revenue.
- If retaining the existing guidelines with additional changes results in a reduction in venues where smoking is allowed (which is unlikely given that the intention is to increase clarity, not stringency), then the industry may experience a slight short term decline in gaming revenue. However, if the changes made do not have substantial implications on the number of venues that allow smoking on its premises, then there would be no material impact on gaming revenue.

Problem gambling

- As mentioned above, if the guidelines are eliminated and more stringent definitions are developed, the impact on gambling expenditure is likely to be minor and transitory and hence any benefits from reduced social costs associated with problem gambling would also be minor and transitory.
- To the extent that retaining the guidelines in their current form would not have any impact on gambling expenditure, they would not result in any additional benefits from problem gambling either.
- Similarly to the expected outcomes of eliminating the guidelines altogether, if amendments were made to the existing guidelines, the impact on problem gambling is likely to be negligible.

Conclusion

The analysis above suggest that, of the options considered, remaking the guidelines in their current form is the preferred option.

Signage requirements

The signage requirements specified in the Regulation are considered a low cost means of facilitating compliance with the Act. The costs are borne almost entirely by the Ministry, which provides complying signs free of charge to industry, and the requirements appear to have the support from stakeholders. Given this, letting the existing Regulation sunset in its entirety is not considered appropriate.

Preferred option

All the potential options analysed in this RIS have current and potential shortcomings and as such the overriding conclusion from the analysis is that none of the specified alternative approaches to defining what constitutes an 'enclosed public place' deliver an optimal outcome.

Although at face value, letting the existing Regulation 'sunset' (Base Case) may seem to have the potential to improve health outcomes by reducing public exposure to SHS, it is important to recognise there is significant uncertainty as to whether this would actually occur.

- There is no guarantee that guidance and definitions offered by court rulings would indeed be more stringent than that offered by the current guidelines.
- There is also no guarantee that even if the guidance offered as a result of court rulings is more stringent than the existing guidelines, that this would in turn directly lead to a substantial decrease in the number of venues that allow smoking or to the reduction in the intensity of SHS exposure at venues that do comply with the Act.
- Given the uncertainty surrounding the timeline for when the guidance offered by court rulings would be developed, there is a possibility that in the short term, without the guidelines some operators may be willing to 'test' the definition of enclosed public places and allow smoking in their venues. If this eventuates, then the removal of the guidelines would temporarily result in reduced health benefits.

Moreover, letting the Regulation sunset will almost certainly result in a period of increased business uncertainty until enough court cases go through the judicial system to offer guidance as to how to interpret and apply the Act. This will also result in significant legal costs both for industry and government.

Given this, and taking into account that adopting the option to renew the guidelines with amendments made to Clause 6 would likely result in more costs than benefits compared to the retention of the existing Regulation in its current form, the preferred regulatory option is to maintain status quo – Option 1.



The *Smoke-free Environment Act 2000* (the Act) is intended to promote public health by reducing exposure to tobacco and other smoke in enclosed public places. The Act achieves this purpose by prohibiting smoking in enclosed public places.

The *Smoke-free Environment Regulation 2007* (the Regulation) supports the Act by:

- requiring occupiers of enclosed public places to display certain signs identifying those areas as smoke-free and prescribing the manner in which such signs are required to be displayed; and
- providing guidelines in relation to determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of the Act (the Guidelines).

Under the Regulation:

- a public space is defined as substantially enclosed if the total area of the ceiling and wall surfaces (the total actual enclosed area) are more than 75 per cent of its total notional ceiling and wall area;
- in determining the total notional ceiling and wall area, any door, window or moveable structure that is, or is part of, a ceiling or wall is taken to be closed whether or not the door, window or structure is open;
- windows and doors may be counted as open space only if they are fully locked open with a key to the outside for the duration of trading hours; and
- any gap in the wall or ceiling that does not open directly to the outside is considered part of the total actual enclosed area.

Since 2007 there have been minor amendments to the regulation in response to changes to the Act which prohibited smoking within a certain distance of the entry to buildings. The changes to the Regulation clarified how this prohibition was to be applied to certain outdoor areas.

Under the provisions of the *Subordinate Legislation Act 1989*, the *Smoke-free Environment Regulation 2007* is due for staged repeal on 1 September 2016.

The New South Wales (NSW) Ministry of Health (the Ministry) proposes that the existing Regulation be remade and is exploring the potential inclusion of two amendments to the current version of the Regulation.

The *Subordinate Legislation Act 1989* states that the remaking of a statutory rule (even if it is to be remade without changes) requires the preparation of a Regulatory Impact Statement (RIS) and a period of public consultation (Parliamentary Counsel's Office, 2014). The primary purpose of a RIS is to ensure that the costs and benefits of regulatory proposals are examined fully so that affected stakeholders can be satisfied that the benefits of the regulations exceed the costs. To achieve these ends, the *Subordinate Legislation Act 1989* requires a RIS to contain certain information including:

- an analysis of the nature and extent of the problem sought to be addressed by the regulation and establishing the need for regulation;
- a statement of the objectives sought to be achieved by the regulation;

- the identification of the alternative options by which those objectives can be achieved;
- an assessment of the costs and benefits of the impacts of the alternative options;
- an assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community, and
- a statement of the consultation program to be undertaken.

In addition to the *Subordinate Legislation Act 1989*, the introduction of regulations in NSW is also governed by “Better Regulation Principles”. The principles (**Box 1.1**), introduced in 2008, are intended to be a best practice guide for policy development and regulatory design process and must be followed in the development of every regulatory proposal.

In light of this, the chapters in this report are structured around the RIS content requirements and the application of the Better Regulation Principles.

BOX 1.1 THE BETTER REGULATION PRINCIPLES

- **Principle 1:** The need for government action should be established
- **Principle 2:** The objective of government action should be clear
- **Principle 3:** The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options
- **Principle 4:** Government action should be effective and proportional
- **Principle 5:** Consultation with business and the community should inform regulatory development
- **Principle 6:** The simplification, repeal, reform or consolidation of existing regulation should be considered
- **Principle 7:** Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

SOURCE: [HTTP://WWW.DPC.NSW.GOV.AU/PROGRAMS_AND_SERVICES/BETTER_REGULATION/REGULATORY_IMPACT_ASSESSMENT](http://www.dpc.nsw.gov.au/programs_and_services/better_regulation/regulatory_impact_assessment)



In reviewing the Regulation due for repeal in September 2016, it is important to provide a clear demonstration that the Act and associated Regulation are still relevant.

As discussed in Chapter 1, the intent of the Regulation is to support the objective of the Act – i.e. to promote public health by reducing exposure to tobacco and other smoke in certain public places. The Regulation does this by providing guidelines on the definition of an ‘enclosed public space’, and specifying requirements for venues to display signs to indicate smoking and non-smoking areas.

This chapter discusses the nature of the problem the Regulation was intended to address, and whether there are grounds to justify ongoing and/or additional Government intervention.

2.1 Nature and extent of the problem

This section discusses the nature and extent of the problem that the Regulation is intending to address.

2.1.1 Health consequences of smoking

The health consequences of active smoking have been well established. The seminal report, *Smoking and Health* released by the United States Surgeon General’s Advisory Committee in 1964 concluded that smoking was a cause of lung cancer, laryngeal cancer and chronic bronchitis. Since then, there have been a number of additional chronic and acute health conditions causally linked with smoking. These include: leukaemia, stomach and pancreatic cancer, ischaemic heart and vascular disease, diabetes, respiratory illness, reproductive dysfunction, among many others (USDHHS 2014).

Similarly, the damaging health effects of exposure to environment tobacco smoke (ETS), also referred to as ‘second-hand smoking’ (SHS) and ‘involuntary smoking’, have become more apparent in recent decades (USDHHS 2006 and USDHHS 2014). Since the first official recognition of a causal link between SHS and lung cancer (USDHHS 1986), SHS has also been shown to have adverse impacts on non-smoking adults and children, and have been linked to numerous illnesses including: stroke, coronary heart disease, impaired lung function, middle ear disease and sudden infant death syndrome (USDHHS 2014).

According to Scollo and Winstanley 2012 (Chapter 3, p.141), the estimated mortality from tobacco use in 2004-05 was 14,901. Of these, 14,790 were attributable to active smoking and 113 occurred in adults due to exposure to SHS. Further, it has been estimated that 41 per cent of these deaths were caused by lung cancer, 27 per cent by chronic pulmonary disease, 13 per cent by coronary heart disease, with stroke and other cancers and diseases responsible for the remaining deaths (ibid).

p.142). Many other studies establish a clear link between tobacco smoking and cases of cancer incidents and deaths.⁸

In 2006-07, the net cost of healthcare as a result of smoking-related diseases in New South Wales was estimated to be \$115.8 million (Collins and Lapsley 2010). A more recent review of international literature on the economic costs of smoking estimates that between five to 15 per cent of aggregate healthcare expenditure in high income countries can be attributed to smoking (Ekpu and Brown 2015).

2.1.2 Impact of Second Hand Smoke (SHS)

For non-smoking staff and patrons of public venues, the potential health risks from exposure to indoor SHS is considerable. For example, a 2004 study measuring the content of inhalable indoor pollution in hotels and clubs in NSW found that SHS contributed to 71 per cent of the inhalable indoor pollution in non-smoking areas of the venue, and 86 per cent to the smoking areas (Cains et al. 2004). This is comparable to findings in international studies, where hospitality venues have been reported to have the highest levels of carcinogenic indoor air pollution compared with other smoke free indoor spaces (Fromme, Kuhn and Bolte 2009 and Lopez et al. 2012).

There is also substantial literature on the economic cost of SHS as it relates to health care cost, loss of productivity, and damage to property as a result of fire (see **Box 2.1** for details).

BOX 2.1 ECONOMIC COST OF SHS – LITERATURE SUMMARY

There are many academic studies that have attempted to estimate the economic cost of SHS:

- Waters et al (2009) looked at health insurance data to study the annual cost of treatment in the US state Minnesota for conditions for which there is sufficient evidence to conclude a causal link with exposure to second-hand smoke, and found that it cost \$228.7 million in 2008 dollars or \$44.58 dollars per resident.
- Similar studies have placed SHS-attributable annual healthcare costs at:
 - \$241 million in California (Max, Sung and Shi 2015);
 - \$293 million in North Carolina (Plescia and Wansink et al. 2011); and
 - \$110 million for resident populations in US public housing (Mason, Wheeler and Brown 2015).
- There is also mounting evidence of considerable indirect costs of SHS resulting from:
 - loss of productivity (Collins and Lapsley 2008, Wacker et al, 2013 and Ekpu and Brown 2015) due to:
 - workplace absenteeism as a result of illness;
 - loss earnings as a result of premature death and disability; and
 - workforce reduction;
 - litigation arising from work place health and safety and negligence claims (Scollo and Winstanley 2012); and
 - damage to property as a result of fire (Collins and Lapsley 2008 and Ekpu and Brown 2015).

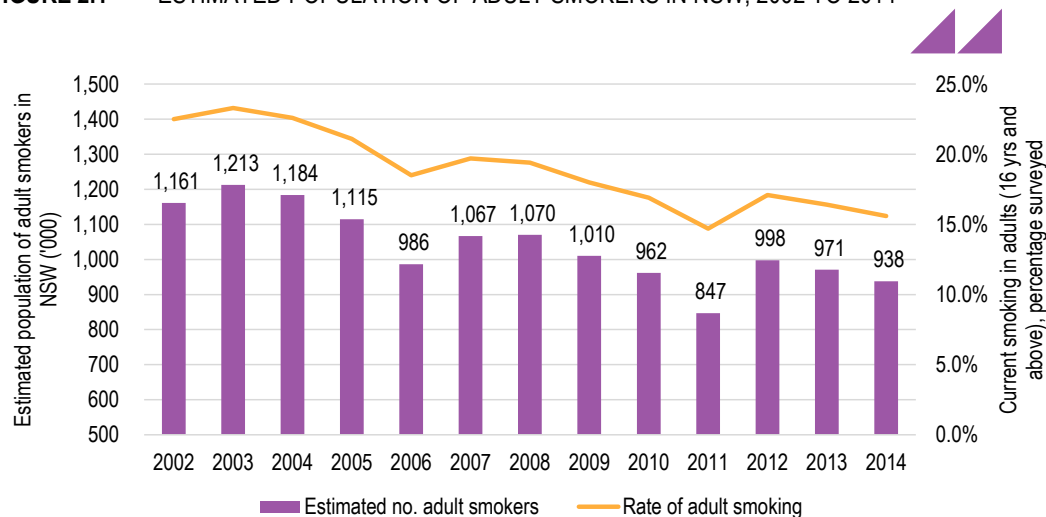
SOURCE: ACIL ALLEN CONSULTING.

2.1.3 Rates of Smoking in New South Wales

Figure 2.1 provides the estimated population of adult smokers in NSW for the years 2002 to 2014. The adult smoking population for persons '16 years old and above' was estimated combining the NSW Ministry of Health's Population Health Survey data on rates of adult smoking and ABS population statistics for NSW.

As shown, the estimated population of adult smokers has been on a declining trend since 2002. Whilst there were approximately 1.2 million smokers in 2002, this number has declined by almost 20 per cent (or 223,000 smokers) to around 938,000 by 2014. Noting that the adult population (16 years old and above) in NSW increased by 16.5 per cent from around 5.2 million to 6.0 million during the same period, it is evident that the fall in the adult smoking population has been substantial.

⁸ See, for example, AIHW (2012), Park et al (2014) and U.S. Department of Health and Human Services (2014).

FIGURE 2.1 ESTIMATED POPULATION OF ADULT SMOKERS IN NSW, 2002 TO 2014

Note: estimated population is for adults, 16 years old and above.

SOURCE: NSW POPULATION HEALTH SURVEY AND ABS CAT.3101.

Notwithstanding this decline in the prevalence of smoking in adults, there is still a sizeable population of smokers in NSW (above 900,000 people as at 2014), who may inadvertently affect non-smoking patrons and venue staff through SHS, and thus potentially impose significant economic costs to society.

2.1.4 Venues and proprietors potentially affected by smoking regulation

The sector of the economy largely affected by indoor smoking bans is predominantly the gaming and hospitality industry. Whilst it is difficult to ascertain the actual size of this industry, the following statistics provide some indication:

- according to ClubsNSW (2016):⁹
 - there are currently 1,400 registered clubs across NSW, ranging from bowling clubs to social and sporting clubs, most of which (if not all) are likely to have some amount of ‘enclosed public place’ on their premises. This represents a small decline from 1,471 clubs club venues registered five years ago, as reported in the NSW Club Census of 2011 (ClubsNSW 2012);
 - the club industry employs approximately 42,000 workers across the State;
 - 44,000 volunteers support the industry each year; and
 - the membership base is estimated to be around 5.7 million;
- according to the NSW Independent Liquor and Gaming Authority (2015):
 - in 2014-15, there were 2,207 hotels who held liquor licences in force, and 2,092 hotels who held active gaming licences, indicating that there are approximately 2,100 to 2,200 hotels in operation each year. Most of these venues are likely to have some amount of ‘enclosed public place’ on its premises; and
 - the broader NSW hospitality industry is estimated to employ over 200,000 people.

Whilst the above data do not reveal any information about the actual extent of the problem of SHS exposure in enclosed public places (that is, whether any or how many of these venues provide spaces where patrons are exposed to SHS at a level that would have health implications), to the extent that the majority of these venues (and many others) are allowed to provide smoking areas for their patrons and/or are visited by smokers, it could be stated that the problem of SHS exposure in enclosed public places is potentially substantial, and thus, warrant Government attention.

⁹ ClubsNSW 2016, ClubsNSW homepage: ‘About the club industry’, available at <http://www.clubsnsw.com.au/our-industry/the-club-industry/about-the-club-industry>, accessed 26 April 2016

2.2 The case for government intervention

The NSW Government Better Regulation Office's *Guide to Better Regulation* (2009) states that demonstrating that a problem exists (in this case, health risks associated with SHS) by itself is insufficient to justify regulation. Rather, the case for government intervention would need to be established on the basis that the problem is either created by market failure and/or institutional failure, and that it is unlikely to be resolved without intervention.

Importantly, where government action is required, it is not necessarily so that regulation is the most appropriate course of action. A well-designed regulation can help deliver significant economic and social benefits. On the other hand, a poorly designed regulation could inadvertently create further inefficiencies in a market as well as impose administrative and compliance burdens for businesses, consumers and government.

The remainder of this chapter explores the various types of market failure that are related to SHS and whether there are non-legislative means for addressing them.

2.3 Market failure

When markets are unable to function efficiently to produce and allocate goods and services desired by consumers at the quantities demanded, it is generally the consequence of 'market failures'.

Broadly speaking, market intervention, either directly or indirectly through government (or regulators), is considered acceptable when aimed at addressing the following four market failures: public goods, externalities, information asymmetries and natural monopolies (see **Box 2.2**).

In the context of tobacco smoking regulation, the economic and policy rationale for government intervention is most likely to be justified on the following grounds:

1. information asymmetry/failure about the health risk of SHS;
2. negative externalities (health cost) of tobacco as a result of exposure to SHS; and
3. institutional failure.

These are discussed in the following sections.

BOX 2.2 EXAMPLES OF MARKET FAILURE**Information asymmetries**

In some markets it can be difficult for consumers to be certain about the quality of a good or service before they consume it (Office of Fair Trading, 2009). This can disadvantage suppliers of better quality products because they will find it difficult to convince customers to pay the higher prices, which are necessary to cover any additional costs the producers have incurred.

Another way in which information asymmetry may manifest is when consumers purchase/consume a good or service without fully being aware of the consequences of their decisions/actions. High sugar diets and obesity-related health issues are good example, where the quantity of unhealthy food consumed by an individual may be more than they otherwise would if they were aware of the illnesses such diets are known to cause.

Externalities

Externalities exist when the welfare of some agent, or group of agents, depends on the activity of another. When the effects of one economic agent on another are not taken into account, market prices will not reflect the true marginal cost/benefit of the good or service traded. A common example is pollution, where unless a producer is required to compensate society for the pollution they generate (by internalising the cost of mitigating/remediating in their production cost), they would produce more of that good than at the socially optimum level.

Public goods

Examples of public goods include, roads, public parks, national security, public schools and other intangible goods such as clean air and waterways. These goods are unique in that they are both non-excludable and non-rivalrous. Unlike private goods where non-paying consumers can be prevented from accessing it, both paying and non-paying consumers can access a public good. The non-rivalrous nature of public goods also means that use/consumption of the good by one agent (typically) does not reduce the ability for others to use/consume it. As a result, an unregulated market will lead to an undersupply of public goods at the detriment of social welfare, and thus, require governments to intervene in their provision.

Natural monopolies

Natural monopolies exist in industries that are more efficient when only one (or few) firm(s) produces a good rather than multiple firms. This typically occurs where there are large initial costs associated with setting up the infrastructure needed for production and delivery; for example, water and energy networks. Where there is a single monopoly firm, governments may also choose to regulate market power more directly – for example, through ex-ante price controls.

SOURCE: ACIL ALLEN CONSULTING.

2.3.1 Information asymmetry/failure

The risk of prolonged exposure to SHS in enclosed public places is often not fully understood by smokers and non-smokers. As a result of information asymmetries/failures, the market for tobacco smoking and those affected by smoking behaviour and SHS exposure is unlikely to be efficient in this context.

Information asymmetries for smokers

In the first instance, smokers are not fully informed about the consequences of smoking on their *own* health. There are many studies documenting the ‘gap’ in smokers’ understanding of the likely impact of tobacco on their health, despite there being almost universal recognition that tobacco has some amount of undesirable health implications.

For example, Scollo and Winstanley 2012 (Chapter 17) note the following.

- Only 44 per cent of smokers surveyed in a 2010 Australian research agreed that smoking causes stomach cancer (Brennan and Durkin 2007)
 - in the same study, the number of survey participants who agreed that other diseases were caused by smoking were similarly low (for example, only 30 per cent agreed smoking caused pancreatic cancer, 28 per cent for gangrene, and 27 per cent for kidney cancer); and

- the same study also found that only one in two smokers in Australia were aware of the link between smoking and miscarriage, still birth or sudden death.
- Weinstein (1998, 2004) found that young smokers were unaware of critical facts about the consequences of smoking that would make a difference to their assessment of the risks of smoking. These studies also found that young smokers often were not aware of how early in life smoke-related illnesses could strike, nor how poor their prognosis could be.
- There is information failure about the psychologically and physically addictive nature of smoking. This means that when people start smoking for the first time, decisions are made without full regard to the physical and mental challenges of giving up smoking at a later date. Crucially, studies have found that younger brains are even more sensitive to nicotine than the brains of older adults and that they may be more susceptible to becoming dependent on tobacco-delivered nicotine.

The evidence suggests that whilst smokers have some amount of recognition that tobacco has negative implications on their health, for many it is unlikely that their decisions are based on a full understanding of the actual risks of smoking. Therefore, the amount of tobacco demanded in an unregulated market is likely to be higher than the equilibrium amount that would be demanded in markets with perfect information. As such, the tobacco market suffers from some degree of market failure.

Crucially, as a result of this 'gap' in knowledge, smokers have been found to underestimate the health risks they pose on *others* through SHS (Evangelista et al. 2003 and Lonergan et al. 2014). As such, if smokers had *full awareness* of the true health risks they imposed on venue staff, relatives, friends and others from SHS, it is a possible that they would change their behaviour so as to reduce this risk where they can (for example, by not smoking in the presence of non-smokers).

Information asymmetries for non-smokers

Similarly to smokers, non-smokers are typically not fully informed about the potential risks associated with inhaling second-hand smoke.

There are several dimensions of information asymmetries that relate to non-smokers.

- Non-smokers have historically been provided with inadequate information about the costs of SHS and hence may have exposed themselves to it more than otherwise would if they had sufficient knowledge.
- The paucity of information for non-smokers is particularly problematic because the significant delay between exposure to SHS and the onset of obvious disease obscures the link between the two; much like the knowledge gaps that exist for smokers.
- This issue is more pronounced for younger adults (i.e. the age that tends to disproportionately attend licensed premises such as hotels, bars and nightclubs) because information asymmetries tend to be more pronounced when people are young. As a result, the economic concept of 'consumer sovereignty', which assumes that a consumer knows what is best for him or her, may not be readily applicable to adolescents. Consequently, young people may permit themselves to be exposed to greater levels of SHS than an older adult would.
- Non-smokers may also have inadequate information about the health risks associated with specific venues.
 - With respect to SHS at venues, the appropriate signals about acceptable levels of smoke concentration and SHS exposure are not available to consumers. If consumers can ascertain the level of safety or risk associated with SHS exposure in an enclosed space prior to its entry, then they could make informed decisions on which venue to patron. In doing so, consumers could signal their willingness-to-pay for a venue for ensuring varying levels of safety. Under these conditions, a market for safety attributes would exist, with the cost of safety (including the 'personal' costs of taking precautions) balanced against its value to consumers.
 - However, safety information is usually not attainable, or easily ascertainable, when it comes to SHS exposure at venues. Given that concentrations of smoke and the health consequences of SHS exposure is variable even within the same venue, let alone across different venues (for instance, as a result of the number of smokers in a venue at a given point in time), it is difficult for venues to provide air quality information to existing or potential customers in real-time. As a result,

- consumers are unable to make optimal decisions with full regard to the potential health risks of SHS exposure when entering a venue, even if they were conscious about it.
 - Moreover, even if they become ill from being exposed to SHS, consumers may have difficulty making the link between the illness and its cause/source. If consumers could make the appropriate link between their illness and the level of SHS exposure at a venue, they may be willing to pay a premium for those venues who ensure higher levels of air quality safety (a venue may, for example, invest in ventilation systems to maintain a certain level of air quality within its enclosed areas). However, in the absence of appropriate signals being sent from consumers to proprietors, there is little incentive for greater levels of safety to be provided at increased cost.
 - Some non-consenting consumer groups (e.g. children) may nevertheless be exposed to SHS.
- Evidently, there is significant information asymmetry on the risks of SHS exposure for non-smokers, thus suggesting there is some degree of market failure at play.

Information asymmetries for proprietors (venues)

The third information asymmetry relate to proprietors. The challenge for proprietors is to assess the likely impact of banning smoking in enclosed public spaces on their business, given limited information around potential revenue effects of such regulation.

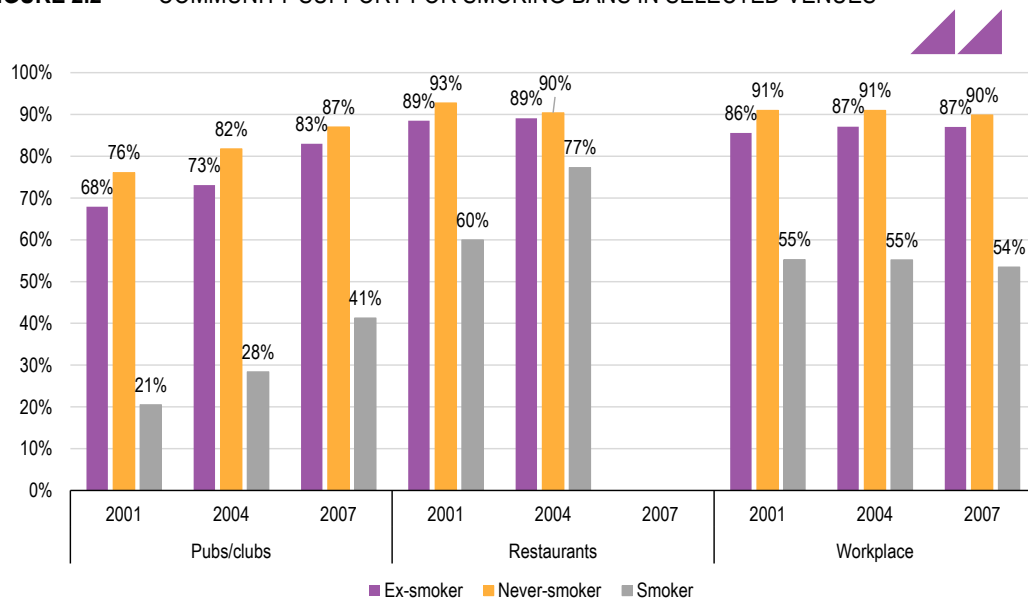
In particular, there exists information asymmetry with respect to two key revenue-related concerns that are typically voiced by proprietors.

Non-gaming revenue

The first is the impact of smoking bans on non-gaming revenue. Submissions made by stakeholders representing proprietors in the RIS for the *Smoke-Free Environment Regulation 2007* (ACG 2007) suggests that there was significant industry concern about the possible implications on business turnover following smoking bans in enclosed public spaces. However, survey data on community attitudes to smoking bans suggest this concern may have been overstated.

Figure 2.2 shows results from the National Drug Strategy Household Survey (NDSHS) for community support for smoking bans in selected public spaces, for the years 2001, 2004 and 2007.

FIGURE 2.2 COMMUNITY SUPPORT FOR SMOKING BANS IN SELECTED VENUES



SOURCE: TOBACCO IN AUSTRALIA (2011), TABLE 15.2.1

As shown, even in 2001 when the survey was first conducted, support for restricting smoking in public places was high for ex-smokers (68 per cent in pubs/clubs and 89 per cent in restaurants) and never-smokers (76 per cent in pubs/clubs and 93 per cent in restaurants). The proportion of ex-smokers and

never-smokers supporting bans at these venues have increased over the years to 83 per cent and 87 per cent for pubs/clubs, and 89 per cent and 90 per cent for restaurants, respectively.

Moreover, support for smoking bans at these venues *by smokers* have also increased between 2001 and 2007. Where roughly one in five smokers surveyed in 2001 supported smoking bans in pubs/clubs, this figure increased to around two out of five smokers participating in the 2007 survey. Further, smokers' support for restricting smoking in restaurants increased by 17 per cent between 2001 and 2004.

The NDSHS also reported that around 85 per cent of non-smokers either always or sometimes took measures to avoid exposure to second-hand smoke in Australia (**Table 2.1**).

TABLE 2.1 AVOIDANCE OF PLACES WHERE SURVEY RESPONDENTS MAY BE EXPOSED TO OTHER PEOPLE'S TOBACCO SMOKE AMONGST NEVER/EX-SMOKERS, AGED 14 YEARS AND OVER, AUSTRALIA

	2001	2007
Yes, always	29.7%	43.5%
Yes, sometimes	44.7%	40.7%
No, never	25.6%	15.8%

SOURCE: AIHW 2001, 2007.

Given that there had always been widespread support to ban smoking in enclosed sections of selected venues, and that some of these supporters (ex-smokers and never-smokers) consciously avoided venues where they would be exposed to SHS, it is highly likely that the indoor smoking ban of 2007 has opened up opportunities for some venues to generate greater volumes of patronage, which are likely to result in increased revenue.

Historically, concerns voiced by proprietors in NSW about the long term effects of smoking bans on their bottom-line have failed to take this into consideration – in part, explained by insufficient information about community attitudes to smoking bans in selected venues. The inclination for proprietors to resist smoking regulation out of concern for their revenue stream may not be as pronounced today as it was leading up to, and the years immediately following the ban. However, it is nevertheless worth acknowledging that this information asymmetry may give rise to market failure, since proprietors may be unwilling to voluntarily create smoke-free spaces in the absence of regulation, despite the potential of capturing a greater segment of the non-smokers' market (as evidenced by the survey results).

Further discussion about the Regulation on the hospitality industry revenue is provided in Chapter 5.

Gaming-related revenue

Proprietors may also resist smoking bans out of concern for implications it may have on their gaming patronage. Revenue raised from patrons who use gaming machines in venues are substantial. For 2014-15, the turnover from gaming machines across NSW was over \$73 billion (NSW Independent Liquor and Gaming Authority 2015). Given that there is high correlation between smokers and gamers (for example, Rodda, Brown and Phillips (2004) found a 40 per cent correlation between smoking and problem gambling), the potential impact of smoking bans on gaming revenue is potentially large.

That said, there are mixed findings about the impact of indoor smoking bans and gaming revenue for proprietors.

Pakko's (2008) econometric analysis of the impacts of Delaware's Clean Air Act (2002), which had the effect of banning indoor smoking in casinos and racing venues, concluded that it was associated with a \$97 million (or 16.5 per cent) decline in annual casino gaming and racing revenue. In a comparable study, Garrett and Pakko (2010) found that similar laws in Illinois were associated with a \$400 million (20 per cent) decline in Illinois casino gaming revenues. Further, an Australian study by Lal and Siahpush (2009) found that smoke-free policies in Victorian electronic gaming venues was associated with a long term decline (14 per cent on average) in revenue from electronic gaming.

In contrast, Mandel, Alamar and Glantz's (2005) analysis of Delaware's Clean Air Act on casino gaming and racing revenue concluded that there was no detectable relationship between the laws and revenue. Similar conclusions have been drawn in relation to the impact of smoke-free laws on charitable gaming and bingo in US state of Massachusetts (Glantz and Wilson-Loots 2003) and Kentuck (Pyles and Hahn 2009).

The main takeaway here is that the potential impact of indoor smoking bans on gaming-related revenue is inconclusive, and thus, proprietors who own gaming machines are unable to make informed and confident decisions about how to approach smoking regulation.

As mentioned above, further discussion about the Regulation on the hospitality industry revenue is provided in Chapter 5.

2.3.2 Externalities

The negative externality that arises from tobacco is represented by the cost imposed on non-smokers as a result of exposure to SHS. The negative externalities that arise from SHS include the following.

- Adverse health consequences borne by patrons and staff, and associated healthcare costs borne by individuals and government. Collins and Lapsley (2008) considers healthcare costs for smoking-associated illnesses for smokers as an external cost, on the basis that smokers are not fully informed about the health risk of smoking, and since they do not personally bear the full cost of smoking (i.e. health care costs) which is effectively subsidised by a general pool of taxpayer's contributions to healthcare funding.
- Risk of work health and safety litigation faced by public venue owners and operators.
 - There have been numerous high profile SHS claims which have found their way before the courts via common law negligence claims, occupational health and safety law, occupiers liability law, contract law or anti-discrimination law (Scollo and Winstanley 2012).
 - Scollo and Winstanley (2012) note that the advent of legislative smoking bans does not alter the potential liability of employers and occupiers.
 - Noting the causal linkages between SHS and a number of respiratory illnesses, it is also worth observing that the median compensation for workplace related respiratory system diseases was \$8,400 for year 2012-12 (Safe Work Australia 2013).
- Nuisance for non-smokers – as discussed above, approximately 85 per cent of non-smokers surveyed in 2007 reported they would either always or sometimes avoid exposure to SHS. Although difficult to quantify in monetary terms, the fact that non-smokers change their behaviour as a result of someone else's activity demonstrates that the market gives rise to externalities.
- Damage to other people's property from smoke absorption (e.g. cost of re-carpeting, re-painting and dry cleaning of clothing and work uniforms).

It is clear that there are negative externalities in the tobacco smoking market which give rise to potentially substantial economic costs in society. These costs are typically not fully reflected in the cost (i.e. price) of tobacco consumption. Without some form of regulation, this market failure would lead to a reduction in aggregate social welfare.

2.3.3 Institutional failure

Institutional failure can arise when the processes and structures relating to the enforcement of laws do not operate efficiently or effectively (Allen Consulting Group 2007). In the case of SHS, institutional failure may be evident as a result of the following.

1. Obstacles experienced by consumers relying on the court system – there are high transaction costs associated with reaching agreement between proprietors and customers/staff on an appropriate level of safety, and the price premium for that safety.
 - Although the current legislative and legal systems may determine who is responsible for the failure to assure safety, the costs of actually deciding who is at fault are often very high.
 - High transaction costs associated with negotiating agreements between proprietors and customers, and among customers/staff and the difficulty of assigning liability mean that private markets likely fail to achieve the preferred level of safety.

2. Inadequate or difficulty with enforcement – this issue may arise if, for example, the relevant institutions' responsibilities are not clear (e.g. the respective roles of WorkCover and the NSW Ministry of Health). Moreover, to the extent that the act of *smoking* itself is legal, enforcement is difficult since the appropriate risk-response measures are hard to ascertain. That is, in the absence of regulation specific to SHS exposure, it is difficult for institutions to know when they should or should not take action on the grounds of existing laws such as Occupational Health and Safety breaches.

Evidently, there is some level of institutional failure at play in the market. Some of these failures are related to the information asymmetries discussed above.

2.4 Can the problem be addressed by non-legislative means?

Having established the existence of market and institutional failures as it relates to exposure to SHS, it is necessary to consider whether:

1. there are market mechanisms that could compensate for these failures without resorting to government intervention; or
2. there are non-regulatory responses that government could pursue to address these failures.

These are discussed herein.

2.4.1 Possible market corrections

It was established that the market for tobacco smoking and exposure to SHS suffers from information asymmetry. There is reason to believe that the overall problem of insufficient information may have declined over time.

- The number of non-smokers in NSW has increased substantially between 2002 and 2014 (see **Figure 2.1**). As the population of non-smokers increase relative to smokers, there is likely to be an even greater demand for non-smoking venues, and proprietors would respond by voluntarily becoming/creating smoke-free environments.
- Media coverage of litigation and regulatory scrutiny by occupational health and safety authorities send signals to the market that proprietors who do not comply with regulation may incur substantial financial costs in terms of workers compensation insurance and litigation expenses.
- Successful advocacy campaigns that help educate the public – government and non-government marketing on the health risks of smoking and exposure to SHS may in part explain the changing community attitude towards supporting smoke bans in public venues as discussed above. That these study findings are now available for the public to access suggests that there is at least the option for proprietors and smokers/non-smokers to access it and be better informed.

In terms of externalities of exposure to SHS, Viscusi and Grayer (2002) suggest that some amount of this may be internalised for workers through higher wages:

The existence of a health risk does not necessarily imply the need for regulatory action. In the case of job safety, for example, perceived risks of job hazards lead to considerable compensating differentials for risk. In a fully functioning market, workers receive wage compensation sufficient to make them willing to bear the risk; the health risk is internalized into the market decision.

Viscusi and Grayer, 2002

Limitations of market corrections

Despite the above, market correction mechanisms may not be sufficient for the market to fully internalise and efficiently allocate the costs of SHS exposure to achieve a socially optimal outcome.

For instance, whilst awareness about the health risk associated with SHS exposure has been increasing, there will always remain a percentage of the population that will not be fully informed about it (e.g. young people).

Moreover, there is technological and practical barriers to providing real-time and accurate data about the smoke-related health risks about a venue. As a result, inefficiency in the market is likely to persist and generate deadweight losses where:

- consumers decide to enter a venue despite the health risk from SHS being higher than that they would permit themselves to be exposed to, if they had the appropriate information; and/or
- venues suffer from low non-smoker patronage despite having invested in design/equipment aimed to lower the levels of SHS in enclosed places, if consumers conclude that there is still a high risk of exposure to SHS as a result of making generalisations about air quality in certain types of venues (for example, pubs/clubs) in the absence of reliable information.

Finally, the cost of mounting and sustaining litigation, the uncertainty of obtaining a favourable outcome, and the fact that these outcomes take a long time to be deliberated in courts means that there are natural barriers to some of these market signals. As such, reducing information asymmetry alone may not be sufficient to correct the market failures prevalent in tobacco smoking and exposure to SHS.

Is there scope for self-regulation or quasi-regulation?

According to the *Australian Government Best Practice Regulation Handbook (2007)*, self-regulation is typically characterised by the industry formulating rules and codes of conduct, with industry itself being solely responsible for monitoring and enforcing them. In contrast, quasi-regulation includes a wide range of rules and/or arrangement where governments influence businesses/industry to comply, but which do not form part of explicit government regulation (Australian Government 2007). Examples of quasi-regulation include accreditation schemes and codes of conduct/practice developed with government involvement.

In the case of self-regulation, the Handbook suggests that this approach should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern;
- the problem is a low-risk event, or low impact or significance; or
- the problem can be fixed by the market itself.

Clearly, self-regulation is not an appropriate approach for responding to the problem caused by SHS exposure based on the discussion in this chapter.

The Handbook provides a checklist for the assessment of quasi-regulation (**Box 2.3**). As shown, one of the issues in this checklist states that quasi-regulation may be considered where “government is not convinced of the need to develop or mandate a code for the whole industry”. The discussion surrounding market failures and institutional failures throughout this chapter suggest this is not the case with respect to the problem at hand.

Furthermore, to the extent that the test for adopting quasi-regulation requires the problem at hand to pass the assessment checklist for self-regulation (i.e. no strong public interest concern, low-risk problem, and market mechanism to fix problem), this approach is clearly not appropriate either.

On balance, there is substantial reason to believe that, left to market mechanisms alone, problems associated with exposure to SHS would not be adequately corrected.

BOX 2.3 CHECKLIST FOR THE ASSESSMENT OF QUASI-REGULATION***Quasi-regulation should be considered where:***

- there is a public interest in some government involvement in addressing a community concern and the issue is unlikely to be addressed by self-regulation
- there is a need for an urgent, interim response to a problem in the short term, while a long-term regulatory solution is being developed
- government is not convinced of the need to develop or mandate a code for the whole industry
- there are cost advantages from flexible, tailor-made solutions and less formal mechanisms
- there are advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme. For this to be successful, there needs to be:
 - a specific industry solution rather than regulation of general application
 - a cohesive industry with like-minded participants, motivated to achieve the goals
 - a viable industry association with the resources necessary to develop and/or enforce the scheme
 - effective sanctions or incentives to achieve the required level of compliance, with low scope for benefits being shared by non-participants
 - effective external pressure from industry itself (survival factors), or threat of consumer or government action.

As in the case of self-regulation, proposed approaches should not restrict competition.

SOURCE: BEST PRACTICE REGULATION HANDBOOK 2007.

2.4.2 Possible non-regulatory government responses

If the key issue associated with the problem arises from information asymmetry in the market, then a possible non-regulatory response by Government might be to increase information disclosure and provision to help proprietors and patrons make more informed decisions. This may include, for example:

- publishing information on entirely smoke-free venues to enable non-smoking consumers to make an informed decision about which venue to patronise (this is already taking place in NSW but in relation to smoke-free sections within a venue);
- publishing the results of an air quality survey of smoking venues may provide a non-regulatory incentive to lower SHS – ‘name and shame’ process. However, as discussed above, there is a limit to how this information could accurately reflect the real-time air quality of a venue;
- publication of guidance material may also promote workplace change; and/or
- in addition, Government could seek to promote values of ‘good citizenship’ and greater consideration for peers through information-based campaigns as an option for achieving a particular end.

However, none of these approaches are likely to be enough to overcome the information asymmetry problem to sufficiently address existing market failures. Whilst they are important approaches Government could, and already do, pursue information disclosure which is at best a complementary approach to direct market intervention.



3

OBJECTIVES OF THE REGULATION

An important goal of a regulatory impact statement is to identify clearly the objective of the regulatory intervention.

From a strictly legal perspective, the objective of the *Smoke-Free Environment Regulation 2007* is set out in the explanatory notes. These explain that the objects of the Regulation are:

- a) to prescribe the signs that occupiers of smoke-free areas are required to display under section 9 (1) of the Act;
- b) to prescribe the manner in which such signs are required to be displayed;
- c) to exempt certain public places from the requirements relating to the display of such signs (the exempt places are public places where persons would be reasonably expected to know that smoking is not permitted and in which persons do not usually smoke); and
- d) to prescribe guidelines in relation to determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of the Act.

There are two schools of thought with respect to the appropriate objective of government with respect to Second Hand Smoke (SHS):

- the first approach adopts the classic economic view that government should be optimising the level of SHS (i.e. allowing it to the degree that marginal benefits exceed marginal costs). The Industry Commission (IC 1994, p. 201) described this approach in these terms:

While there are external costs associated with environmental tobacco smoke, it does not necessarily follow that all environmental tobacco smoke should be removed. Just as there exists a level of smoking that is optimal for society, so there exists an optimal level of passive smoking which, in some situations, is likely to be greater than zero. This would be the case where, for example, the benefits which non-smokers gain from social interaction with smokers, and which smokers gain from being able to interact with each other, outweigh the costs associated with passive smoking.¹⁰

- the second approach is adopted by most health officials and safety regulators. It is that the optimal level of SHS is zero, and hence the elimination of all risk should be the objective of all governments. For example, Safe Work Australia states that ‘there is no recognised safe level of exposure to tobacco smoke’ (Safe Work Australia, 2016) and its predecessor’s (the National Occupational Health and Safety Commission — NOHSC) guidance note on the elimination of SHS in the workplace suggests that ‘The primary objective in controlling employee exposure to SHS in the workplace must lie in eliminating SHS’ (NOHSC 2003, p. 4).

As a matter of policy, the first approach is preferable in defining a legislative objective prior to the preparation of a RIS. In effect, the second approach assumes that the costs must exceed the benefits,

¹⁰ See also Viscusi and Gayer (2002).

whereas this judgement can only be made after the analysis has been considered in the later parts of this regulation impact statement.

It is worth noting that the Act does not state as an objective the prevention or regulation of smoking itself. Rather, the object of the Act is 'to promote public health by reducing exposure to tobacco and other smoke in certain public places'.¹¹

The legislative objective of the Regulation should be to promote public health in NSW by reducing public exposure to environmental tobacco smoke in enclosed public places.

¹¹ It is important to acknowledge that regulatory interventions directed at reducing ETS in workplaces may have consequential benefits with respect to smoking.



A RIS should identify and assess the policy options that could achieve the objectives of government action outlines in Chapter 3. The options that have been identified by the Ministry are the following.

- **Base Case** — best practice regulatory impact analysis suggests that a RIS should use as the base case the option whereby there is ‘no Regulation’. As such, the Base Case for this RIS is to let the existing Regulation sunset (i.e. discontinue).
- **Option 1** — this option entails remaking the existing Regulation without any changes (the status quo option).
- **Option 2** — this option entails remaking the existing Regulation with two potential amendments:
 - a) changes to clarify what “opens directly to the outside” means for determining if a place is enclosed (Clause 6 of the Regulation);¹² and
 - b) changes to clarify what “gaps in the wall or ceiling” are for the purposes of Clause 6(5) of the Regulation.
- **Option 3** — letting the Regulation sunset as it relates to Clause 6 (i.e. guidelines) but retaining the existing signage requirements.

These regulatory options are in essence permutations of either including and/or excluding (with or without changes) one of the two main areas that the Regulation deals with:

- guidelines to define what constitutes an ‘enclosed public place’ (i.e. Clause 6);¹³ and
- signage requirements (i.e. Clause 4).

Each of these options are discussed in more detail in the sections below.

4.1 Base case: Letting the Regulation sunset

This options entails letting the Regulation sunset, which means that both the guidelines to define what constitutes an enclosed public place and the requirements to display certain signs would be eliminated.

In considering this option it is useful to outline a view of the likely general implications of such a regulatory change, as this will provide a basis for assessing the range of potential costs and benefits under this scenario.

Removing the guidelines to determine if a place is enclosed is likely to have the following implications.

¹² All the clauses refer to in this RIS relate to the current version of the Regulation due for repeal. The numbering of these clauses may differ from the Regulation released by the Ministry for public consultation.

¹³ For simplicity, reference to guidelines as the definition of ‘enclosed public place’ should also be read as referring to guidelines as to the definition of ‘a covered outside area ... considered to be substantially enclosed’.

- In the absence of guidelines for determining what is an ‘enclosed public place’ and when a covered outside area is considered to be ‘substantially’ enclosed for the purposes of the Act as they are currently referred to, and interpreted by, the industry (including lawyers, architects and local district health inspectors), what constitutes an ‘enclosed public place’ would need to be determined through the judicial system. That is, courts would be left to develop an appropriate definition of what constitutes an ‘enclosed public place’ and a ‘substantially enclosed’ covered outside area. This is not a simple and self-evident determination (see **Box 4.1**).

BOX 4.1 THE CHALLENGE IN DETERMINING WHAT IS AN ‘ENCLOSED PUBLIC PLACE’ IN THE CONTEXT OF SEEKING TO MINIMISE HARM ASSOCIATED WITH SHS

There is no agreed definition across Australian (and overseas) jurisdictions as to how to differentiate between spaces where SHS is and is not likely to be a problem.

The fundamental problem with setting a precise standard is that there is no definitive scientific study which provides a basis for comparison of SHS exposure in differently configured spaces. Indeed, the degree to which SHS is a problem is a function of a myriad of factors including:

- the number of smokers;
- the proximity of non-smokers to smokers;
- the wind velocity;
- the atmospheric stability, and whether the non-smoker is upwind or downwind;
- the number of walls and the presence or absence of a ceiling; and
- whether the source is an area source or a point source.

This complexity suggests that there is no simple formula that is appropriate in all situations.

However, the main characteristics that distinguish a fully enclosed space from a completely open space are the presence of walls and overhead covering. In completely open areas, the lower level of SHS concentration is likely due to:

- the presence of cross ventilation in areas which are not enclosed by walls, which provides greater airflow to dissipate the concentration of SHS; and
- the lack of overhead cover (such as a roof or ceiling), thus allowing SHS to rise upwards, reducing concentration.

It is these characteristics of an enclosed space that increase the level of SHS concentration, and therefore the risk to non-smokers of incurring costs from SHS exposure.

SOURCE: ALLEN CONSULTING GROUP 2007.

- Any form of guidance provided to industry and affected stakeholders about what constitutes an ‘enclosed public place’ would only be available following the conclusion of each court hearing related to this particular aspect of the Act (i.e. cases focusing on interpretation/definition of enclosed public places), and will be on a case-by-case basis. Thus, some aspects of the guidance offered to industry through judgements may be open to some degree of interpretation and/or may not be amenable for other venues to use as concrete benchmarks to their own benefit (whereas the existing guidelines provide some specific definitions to test compliance – such as the ‘75 per cent’ rule to determine substantially enclosed places).
- In making decisions on the definition of ‘enclosed public places’, courts would likely look to the objectives of the Act, drawing guidance from case law and other legal and technical sources. Furthermore, it could be expected that courts would also look at the guidelines in the repealed Regulation for guidance.¹⁴ Key implications of precedents set to date, and how they may influence future court decisions are discussed in Section 4.1.1.
- It is unknown when such cases would eventuate should the Regulation be allowed to sunset, and thus, guidance on how to interpret/apply aspects of the Act may not be available in the short to medium term — interpretations about what constitutes an ‘enclosed public place’ would only be available once enforcement actions are taken (if they are taken).

¹⁴ To date there have only been two court cases related to the guidelines in the Regulation, Blacktown Workers’ Club Ltd v. O’Shannessy and Dubbo RSL Memorial Club Limited & Anor v. Steppat & Ors.

- Given the weight of evidence regarding the harmful effects of SHS (see discussion in Chapter 2), it is difficult to envisage that court decisions would result in a less restrictive definition of enclosed public places compared to that provided by the current guidelines. However, there is no certainty that this would be the case, and there is a possibility that the definition developed by the courts could end up being just as strict as the current guidelines.
- The NSW Ministry of Health would continue to have responsibility for enforcing *the Smoke-free Environment Act*, and WorkCover NSW would continue to have responsibility for enforcement of the *Occupational Health and Safety Act*.
- Depending on results of enforcement actions, proprietors may be required to modify their venues to meet court-imposed tests if they wish to have smoking in certain enclosed spaces.

4.1.1 Insights from Blacktown Workers' Club case

Since coming into effect in 2007, there have been two pertinent cases in NSW which have highlighted the potential shortcomings of the Regulation at providing sufficient clarity to those who rely on it.

Blacktown Workers' Club Ltd v O'Shannessy [2011] NSWCA 265 (the Blacktown Workers' Club case), in particular, provides valuable insight into some of the key considerations made by judges in making their rulings. It is reasonable to assume that these considerations would also be made in future court cases, should disputes arise in the interpretation of the Act and/or associated regulations, and in determining whether breaches to the law have been made.

The Blacktown Workers' Club case was a regulatory compliance dispute between the Blacktown Workers' Club and the NSW Ministry of Health. The case was first heard at Blacktown Local Court in 2007, and then in the Supreme Court in 2010 following an appeal by the Prosecutor (Ministry) on the Local Court decision. This decision was appealed and heard in the NSW Court of Appeals in 2011 where a final ruling was made.

There are a number of important issues raised by Basten JA of the Court of Appeals which are likely to have implications on future decisions made in courts for similar disputes, regardless of whether the existing Regulation is allowed to sunset or not. These are discussed herein.

Meaning and definition of a 'wall'

In relation to the issue of what constitutes a 'wall' as defined in Clause 6(7) of the Regulation, Basten JA reverts to the objective of the Act itself, stating that this objective should be kept in mind when determining the meaning of the language in the statute in a general sense, and with respect to the word 'wall' as it is defined and used in the Regulation.

... walls have many purposes and effects; the Act is concerned with their effect in aggravating the exposure of both smokers and other persons to tobacco and other smoke where they operate to enclose a public place: s 3, Object of Act. That purpose must be borne steadfastly in mind in determining the meaning of the language in the statute, both generally and in relation to the word "wall".

Blacktown Workers' Club Ltd v O'Shannessy [2011] NSWCA 265, [38]

This comment, and the subsequent ruling Basten JA made where he concluded that the Supreme Court judge "was wrong to set aside the decision of the magistrate on the ground that he erred in finding that the mesh security screens were not walls", implies that future decisions would also likely reference the objective of the Act, should parties contend on the interpretation and meanings of words and phrases used in the Act (and associated regulations):

...there is good reason to accept the submission of the Club that a structure or device which does not, in a discernible way, impede lateral airflow, is not a wall for the purposes of the Act.

Ibid. [39]

Meaning and definition of 'any gap in a wall'

The rulings from the case also provide guidance for how to interpret the meaning of 'any gap in a wall' as stipulated in the Regulation:

...with a rectangular space one would usually say that it had four walls, rather than a single wall. The absence of a wall on one side would be just that, and not a gap in a wall. Where a building is partly constructed and a room has three walls of an intended four walls, it may be sensible to speak of a gap in "the walls" but again, not a gap in "a wall". To speak of a gap in "a wall" only makes sense in respect of an area which is partly covered by a wall, although part is absent, either because not yet constructed, or because it contains a door, window, passageway or similar void.

Ibid. [45]

Crucially, in deriving this conclusion, Basten JA stated that the proper interpretation of the phrase 'any gap in a wall or ceiling' is a question of law, and that it would have to give adequate consideration to its statutory context and thus, the objective of the Act:

The proper construction of the phrase "any gap in a wall or ceiling" is a question of law. The phrase can only properly be construed by reference to its statutory context, rather than by identifying the ordinary meaning of each of the words and thus constructing a meaning for the whole phrase.

Ibid. [44]

In reaching his conclusion about 'any gap in a wall', Basten JA took the objective of the Act into consideration, similarly to how the decision was made to rule what constitutes a 'wall' for the purposes of the Act. This lends further support to the view that future disputes about the Act and/or associated regulations would be made by taking account of the objective of the Act itself.

Meaning and definition of 'open directly to the outside'

Although it was not required by the Court of Appeal to determine whether an error of law had been made in the Local Court with respect to the interpretation of the phrase 'open directly to the outside', Basten JA provided comments on some of the issues identified.

First, he agreed with the Supreme Court judge's finding that the proper construction of the words 'opens directly to the outside' was a question of law [48]. Second, he purported that the word 'directly' "may well have different connotations in different contexts", and thus, a precise meaning of the phrase could not be specified:

The context does not permit a precise meaning for the phrase taken as a whole. Clause 6, in common with s 23 of the Act, appears to distinguish between "an enclosed public place" and "a covered outside area": cl 6(1). In relation to a public place within a building, it may be, as the magistrate appears to have assumed, that "the outside" means outside the building. Even if the outside is beyond the limits of a building, there may well be, as the magistrate explained, practical considerations, such as those created by an opening onto a veranda or an area under eaves.

Ibid. [52]

Moreover, it is worth noting that Basten JA conjectured that the drafter of the Regulation likely used a less prescriptive approach in their choice of words/phrases, in order to allow for some amount of flexibility to cater for unforeseen circumstances:

It would appear that the drafter adopted less precise language than might otherwise have been used in order to allow a degree of flexibility with respect to circumstances which might not be foreseen.

Ibid. [54]

These comments suggest that there are practical limitations to how precisely a phrase or word used to draft a legislation or regulation could be specified. As such, future court rulings on disputes in relation to 'opens directly to the outside' (should the Regulation be remade) and/or with respect to the phrase 'enclosed public places' whether they are 'completely' or 'substantially' enclosed, will always, to some degree, remain open to being context-specific.

4.2 Option 1: Remaking the existing Regulation without changes (status quo)

This option entails remaking the existing Regulation without any changes, which means that both the guidelines to define what constitutes an enclosed public place and the requirements to display certain signs would be retained in a renewed regulation.

4.3 Option 2: Remaking the existing Regulation with changes

Option 2 would aim to clarify the definition 'opens directly to the outside' and 'gaps in the wall or ceiling' for the purpose of Clause 6 of the Regulation. These terms have been open to some degree of interpretation by industry and caused some confusion. Indeed, the interpretation of these terms was subject to one of the only two court cases in NSW related to the enforcement of the Regulation mentioned above (the Blacktown Workers' Club case). The decisions made in this case have provided further guidance about these terms.

Given that the precise wording of relevant sections of Clause 6 are yet to be determined by a legislative drafter, it is not possible to accurately conjecture the implications of adopting Option 2. That said, the adoption of Option 2 would likely lead to one of three possible outcomes:

1. The amendments made to Clause 6 of the Regulation neither improve nor reduce the stringency or effectiveness of the Regulation compared to the status quo (Option 1). That is, the impact of these amendments would be negligible, and hence the overall social and economic impact of adopting Option 2 is the same as adopting Option 1.
2. The amendments lead to a significant reduction in confusion around how to interpret and apply Clause 6 and thus, improve the overall effectiveness, compliance and outcomes of the Regulation compared to the status quo.
3. Contrary to the original aim, the amendments create additional confusion about how to interpret and apply Clause 6, and thus reduce overall effectiveness, compliance and outcomes of the Regulation compared to the status quo.

Crucially, whether the relevant sections of Clause 6 currently generate confusion and if so, the extent to which this is a problem is open to discussion, as some stakeholders argue that the current guidelines are sufficiently clear. These issues are explored as part of the impact analysis in Chapter 5 and should be further tested during the consultation period that will be undertaken by the Ministry before a decision is made about remaking or removing the Regulation.

Which of these three scenarios is most likely to eventuate should Option 2 be adopted depends on many factors (including how the amendments are drafted). However, noting the insights offered from the Court of Appeals ruling over the Blacktown Workers' Club case, it is reasonable to believe that more likely than not, it will be difficult to provide additional 'clarity' in Clause 6 without at least in some part, compromising the flexibility of the Regulation to cater for unforeseen situations.

4.4 Option 3: Letting the Regulation sunset but retaining the existing signage requirements

This option entails letting the Regulation sunset but retaining the existing signage requirements in a new regulation, which means that the guidelines to define what constitutes an enclosed public place would be eliminated.

The likely general implications of eliminating the guidelines would be the same as those outlined in Section 4.1 above.



5

IMPACT ANALYSIS

This chapter assesses the impacts of the regulatory options outlined in Chapter 4. As noted before, in a broad sense, the Regulation deals with two main areas:

- guidelines to define what constitutes an ‘enclosed public place’ (i.e. Clause 6); and
- signage requirements (i.e. Clause 4).

The regulatory options being analysed are in essence permutations of either including and/or excluding one of these two areas from the Regulation (with or without changes in the case of the guidelines) — see **Table 5.1**. Given this, the analysis of the impacts of the alternative regulatory options has been structured around the above two areas, rather than around each of the options.

TABLE 5.1 COMPARISON OF ALTERNATIVE OPTIONS

	Base case	Option 1 (status quo)	Option 2	Option 3
Guidelines to define an ‘enclosed public space’	Removed	Retained without changes	Retained with changes	Removed
Signage requirements	Removed	Retained without changes	Retained without changes	Retained without changes

SOURCE: ACIL ALLEN CONSULTING.

Notably, the benefits and costs associated with the alternative options are not amenable to quantification due to the uncertainty associated with the possible changes to the guidelines and the relatively marginal impact of the possible changes (i.e. the impact of the Regulation is dwarfed by the impact of the Act). As such these impacts are discussed qualitatively.

Further, in preparing this RIS, selected stakeholder consultations were conducted with four organisations. Where relevant, key comments made by stakeholders have been included in the discussion. Further information about the stakeholder consulted can be found in Appendix A.

5.1 Guidelines to define an ‘enclosed public place’

This section discusses the impacts of remaking the guidelines in the existing Regulation as they currently exist (the status quo) or with additional changes, compared against the base case of not having specific guidelines following the sunset of the Regulation.¹⁵ The discussion has been structured around types of impacts, which include the following ten categories:

¹⁵ Notably, a challenge when thinking about these options is that some benefits and costs are actually transfers. That is, there will also be distributional impacts because the costs and benefits centre around the uncertainty created by the ambiguity of the definition of ‘enclosed spaces’ and the industry participants’ response to that ambiguity. For industry, there are benefits from keeping the definition ambiguous for those operators who are willing to test the enforcement of the Regulation and the Act. There are costs for those operators who are more risk

1. smoking rates;
2. health outcomes;
3. regulatory enforcement;
4. certainty;
5. consistency with legislative objectives;
6. compliance, monitoring and enforcement;
7. stranded assets;
8. hospitality industry non-gaming revenue;
9. hospitality industry gaming revenue; and
10. problem gambling.

It should be noted that whilst some of these regulatory impacts can be discussed in terms of their direct costs and benefits to the economy, others cannot. For instance, a reduction in smoking rates, does not mean there is a direct benefit to the economy *per se*. Rather, the reduction in smoking rates has the *potential* to reduce SHS-related illnesses, which in turn, would lead to the reduction in healthcare costs. Hypothetically speaking, if none of the current smokers ever smoke in the presence of a third-party and/or ever smoke in a 'substantially enclosed public place' (and as such, they are not exposed to SHS themselves), then a reduction in smoking rates would not have any impact on healthcare costs as it relates to SHS-related illnesses.

As such, the analysis of regulatory impacts in this section has been discussed either in terms of economic costs/benefits, or as general improvements/decline in the effectiveness of indoor smoking regulation under each of the options considered.

5.1.1 Smoking rates

One of the key claimed benefits of smoke-free legislation is that reducing the availability of places where smoking is permitted 'de-normalises' the act of smoking and so reduces the likelihood that smoking will be taken up (or sustained).

A significant number of domestic and overseas studies have looked at the impact of smoke-free legislation. Many studies have found that smoking bans:

- reduce exposure to tobacco toxins (IARC 2009, Callinan et al. 2010);
- reduce respiratory symptoms in workers (IARC 2009, Callinan et al. 2010);
- reduce the amount smoked among continuing smokers (IARC 2009, Chapman et al. 1999, Fichtenberg and Glantz 2002);
- encourage smokers to quit and to remain abstinent (IARC 2009, Fichtenberg and Glantz 2002);
- lower rates of relapse (Chapman et al. 1999); and
- decrease the number of cigarettes consumed (Chapman et al. 1999).

While the evidence of the effects of smoke-free legislation on health outcomes due to reductions in population exposure to SHS is strong, there remains some debate about the impact of the legislation on smoking behaviour. In particular, while some studies have reported a reduction in smoking prevalence and consumption, others challenge some of these results and suggest that there is no firm evidence of such an effect (e.g. Adda and Cornaglia 2010 and Jones et al. 2011). Indeed, in 2010, a Cochrane review of 23 studies of smoke-free laws assessing measures of active smoking reported that there was no consistent evidence of a reduction in smoking prevalence attributable to these laws but that however, total tobacco consumption was reduced in studies where smoking prevalence decreased (Callinan et al. 2010 cited in CDC 2016).

Another important point to make is that the benefits of de-normalisation do not seem to be spread evenly throughout all sectors of the community. Evidence presented by Buddelmeyer and Wilkins (2005, p. 18) suggests that results are mixed in an Australian environment:

averse, who are not willing to test the definition. This represents a net transfer of benefits within the industry towards less risk averse operators.

Our empirical research shows that the tightening of legislation does increase quit probabilities and reduces starting probabilities, but that these effects do not hold for everyone. The increased quit probability applies only to teenagers and seniors, is non-existent for all others, and for the group of 18 to 24 year olds this effect is even reversed, which we interpret as a rebellion effect. Working in the hospitality sector strengthens the effects of tightening smoking regulations on quit and starting probabilities, which is consistent with a more intense exposure to the regulations for individuals employed in the sector that is most affected by the regulations.

Impact of eliminating the guidelines (Base Case, Option 3)

Any reduction in smoking has consequential health benefits for smokers and for people who would have otherwise been exposed to SHS (see health outcomes discussion in the next section). To the extent that eliminating the guidelines could result in a more stringent definition of enclosed public space by the courts (and hence less places where smoking is allowed), then eliminating the guidelines could potentially result in decreased smoking rates (and an increase in the associated health benefits of reduced exposure to SHS). However, if the definition developed by the courts is just as strict as the current guidelines, then it is unlikely that the smoking rates would be different than under the current Regulation.

Impact of retaining the existing guidelines (Option 1)

Retaining the guidelines in their current form would not have any impact on current smoking rates.

Impact of retaining the existing guidelines with additional changes (Option 2)

Insofar as the aim of amending the guidelines is to increase 'clarity' about compliance requirements rather than to apply a more stringent definition, impacts on current smoking rates are likely to be negligible under this option (this would be the likely outcome assuming that amending the guidelines would actually lead to better clarity).

5.1.2 Health outcomes

As noted in Chapter 2, there is strong and consistent evidence that breathing SHS by non-smokers can lead to detrimental health consequences.

Smoking regulation in NSW has been increasingly tightened over time, with bans now in place for smoking in enclosed public areas, outdoor public areas, cars carrying children under the age of 16 years and commercial outdoor dining areas.

Regulation of smoking in enclosed public areas has been based on scientific evidence suggesting that, while there are considerable variables at work, the concentration of SHS exposure is greater in fully enclosed spaces than in completely open spaces. For example, in a study on nicotine concentrations in a range of outdoor settings, the concentrations were consistently lower than for those in indoor areas (Repace 2002 and Repace 2004). This suggests that there are characteristics of fully enclosed spaces that increase SHS concentration and exposure.

There is, in practice, a range of different premises which would be considered anywhere along the scale between fully enclosed and completely open. For example, to take an outdoor dining area on a footpath and cover it with an awning would increase the degree to which that space is enclosed. There is evidence that SHS exposure increases along this scale. Therefore, there is a relationship between what can be termed the 'degree of enclosure' and the risk of SHS exposure. What is uncertain is the relativities in this relationship.

In the past, there were concerns that the guidelines in the Regulation were arbitrary and not based on any actual evidence of impact of SHS in that environment. These concerns were voiced at the time when the current Regulation was due for staged repeal (2007) after having been in place for just around 18 months, and reflected in the RIS for the *Smoke-Free Environment Regulation 2007* (ACG 2007). Concerns were raised by health advocates about measurable levels of smoke being detected in areas which were even more open than provided by the guidelines and the significant health impacts of this level of exposure.

Most of the selected stakeholders consulted for this RIS noted that, while it is acknowledged that the definition of 'enclosed public space' was a contentious aspect of the Regulation and there was a period of uncertainty in relation to the guidelines when they were first introduced, things have 'settled down' and the current guidelines followed and accepted.¹⁶ These views need to be further tested during the consultation period that will be undertaken by the Ministry before a decision is made about remaking or removing the Regulation.

Impact of eliminating the guidelines (Base Case, Option 3)

As mentioned before, the removal of the guidelines has the potential to lead to a regulatory environment that imposes a more stringent definition of 'enclosed public places' by the courts compared to what is reflected in the current guidelines. However:

- there is no certainty that this would indeed be the case (the definition provided by the courts could end up being just as strict as the current guidelines); and
- there is no certainty about when the court definitions or guidance would be developed — interpretations about what constitutes an 'enclosed public place' would only be available once enforcement actions are taken (if they are taken).

In light of this, in assessing the potential health impacts of removing the guidelines several points need to be made.

- To the extent that eliminating the guidelines could result in a more stringent definition of 'enclosed public space' by the courts (and hence less places where smoking is allowed), then eliminating the guidelines could potentially bring additional health benefits from reduced exposure to SHS. However, if the definition developed by the courts is just as strict as the current guidelines, then it is unlikely that there would be any additional health benefits than under the current Regulation.
- Given the uncertainty surrounding the time when the new court definition would be developed, there is a possibility that in the short term, without the guidelines some operators may be willing to 'test' the definition of enclosed space and allow smoking in their venues. If this eventuates, then the removal of the guidelines would result in reduced health benefits in the short term.

Impact of retaining the existing guidelines (Option 1)

Retaining the guidelines in their current form would not have any additional impacts on health benefits other than what is currently being achieved by their application.

However, it is worth noting that some health advocates remain concerned that the current guidelines are flawed as they still allow exposure to second-hand smoke that has significant health impacts. Furthermore, it has been argued that, based on the existing guidelines consumers may wrongly assume that the areas and venues where smoking is permitted are safe, or safer than they really are.

Impact of retaining the existing guidelines with additional changes (Option 2)

Whether additional changes to the existing guidelines would lead to better health outcomes or not depends on the extent to which the existing guidelines generate confusion and consequently expose more people to potentially dangerous levels of SHS than otherwise would be the case.

If the level of confusion surrounding the interpretation/application of sections of Clause 6 is indeed significant and amendments to it could provide better clarity (the difficulty of achieving this has already been discussed at length) and thus increase regulatory compliance, then there may be some scope to improve health outcomes associated with SHS exposure. However, noting the precedent set by the Blacktown Workers' Club case and the insights offered from the rulings, the extent of 'confusion' in relation to the interpretation of certain terms in the Regulation has arguably declined.

In light of the above it is unclear whether 'clarifying' Clause 6 would lead to improved health outcomes, noting that much of this guidance has now been provided by case law.

¹⁶ The organisations consulted for this RIS are outlined in Appendix A.

5.1.3 Enforcement of occupational health and safety legislation

Some stakeholders argue that the standard embedded in the current guidelines puts a floor in the market (i.e. an artificial barrier) and so deters enforcement by WorkCover, even if the level of SHS exposure is unsafe for employees. That is, WorkCover appears to defer to the guidelines, even though the guidelines are not binding on it when seeking to enforce its powers under the *Occupational Health and Safety Act*.

Impact of eliminating the guidelines (Base Case, Option 3)

If the guidelines are eliminated and new definitions are developed by the courts, this *may* change the way occupational health and safety obligations are enforced in line with the new courts' definitions. If the guidance provided by the courts result in stricter definitions, then this *may* result in stricter standards being enforced by WorkCover in relation to workplace smoking-related hazards. In either case, eliminating the guidelines would likely entail a transition cost where, in the short term, enforcement bodies will need to adjust to a new approach.

Impact of retaining the existing guidelines (Option 1)

Retaining the guidelines in their current form is unlikely to have any impacts on the way occupational health and safety obligations are currently enforced by WorkCover.

Impact of retaining the existing guidelines with additional changes (Option 2)

Retaining the guidelines with amendments would lead to a transition cost where enforcement bodies will need to adjust to the amended Regulation. Insofar as the aim of the amended guidelines would be to increase clarity rather than to apply a more stringent definition, then this change is unlikely to have any impacts on the way occupational health and safety obligations are currently enforced by WorkCover.

5.1.4 Certainty

When the guidelines were first created in 2006 and their impacts assessed in the RIS for the *Smoke-Free Environment Regulation 2007*, several stakeholders argued that they had concerns about the lack of clarity in the guidelines, the difficulty for proprietors to determine the compliance of their venues with the Regulation and hence the certainty that the guidelines provided.

While it is acknowledged that the current guidelines are not perfect or precise (which is necessary to allow a degree of flexibility in the assessment of differently configured spaces and circumstances which might not be foreseen), stakeholders consulted for this RIS noted that:

- it is unclear that removing the guidelines is a desirable approach because they have now (for the most part) been accepted by industry and some health advocates;
- industry considers them sufficient and acceptable and they serve a purpose in providing guidance on design requirements to industry. However, some health advocates believe that there are better regulatory responses that would more effectively protect the health and safety of workers and patrons;¹⁷
- industry prefers that the current guidelines stay and remain consistent than to have them abolished or changed, as this would create significant uncertainty for venues;
- there was also agreement among industry stakeholders that the two court cases in relation to the Regulation provide supplementary guidance to interpret it, and that they didn't see a need for the guidelines to be amended with the aim to provide additional clarity; and
- both industry and health advocates think that there is risk that the courts may not provide much certainty in relation to venue design. In addition, court cases are costly for all parties involved.

¹⁷ Such a response could include, for example, prescribing distances between areas where smoking is permitted and non-smoking areas (notably, this change would likely require a change to the Act and not the Regulation) and banning smoking in any place that has an impervious ceiling or other structure that impedes the upward dispersal of smoke.

Impact of eliminating the guidelines (Base Case, Option 3)

In light of the observations above, it is unclear that a new definition of enclosed spaces by the courts would provide more certainty to industry or the general public than the current guidelines. In fact, it seems likely that if the guidelines are removed there would be a period of uncertainty in the short term until the courts have been given an opportunity to provide guidance. Furthermore, even if some guidance is provided through court cases, it is unclear that this guidance would be applicable to all, if not most, of the venues.

Impact of retaining the existing guidelines (Option 1)

As mentioned before, most of the selected stakeholders consulted for this RIS noted that after an initial period of adjustment, the guidelines are now understood, followed and accepted. As such, retaining the guidelines in their current form would provide certainty to industry about how to comply with the Regulation if they wish to have areas where smoking is permitted in their venues.

During consultations for this RIS, venue operators also noted that investments have been made on the basis of the applicability of the current guidelines, that the guidelines are seen as an important compliance signal and that the hospitality industry would prefer a period of stability in the regulatory environment (rather than continuously changing the Regulation).

Impact of retaining the existing guidelines with additional changes (Option 2)

The additional 'clarity' that could be offered by amending the guidelines is likely to be small, noting that additional guidance about Clause 6 of the Regulation has now been provided by case law. Indeed, there is potential risk that at least in the short term, making changes to the guidelines would lead to a period of increased 'uncertainty' until the changes are well understood.

5.1.5 Consistency with legislative objectives

The object of the *Smoke-free Environment Act 2000* is 'to promote public health by reducing exposure to tobacco and other smoke in certain public places'. Continuing to allow smoking in areas that may comply with the guidelines yet which expose staff and patrons to unacceptable levels of ETS (Klepeis et al. 2007), would appear inconsistent with the health focus of the Act.

In particular, the current guidelines facilitate the creation of areas for smoking that, while compliant with the Regulation, may be in contravention of the spirit of the Act. The intention of the Regulation according to Section 23 (e) of the Act is to provide (amongst other things) 'guidelines in relation to determining what is an 'enclosed public place' and when a covered outside area is considered to be substantially enclosed for the purposes of this Act'. The intention of the Act was to prohibit smoking enclosed public spaces and the intention of the Regulation was to assist hotel and club owners to determine what is an 'enclosed public space'. However, many venues have now built smoking areas which may comply with the guidelines but which promote smoking in non-outdoor areas.

Impact of eliminating the guidelines (Base Case, Option 3)

If the guidelines are eliminated, it is possible that when making a decision about what constitutes an 'enclosed public space' courts would look to give more weight to the objective of the Act and adopt a more restrictive definition than the current guidelines that is more consistent with the objectives of the Act.

Impact of retaining the existing guidelines (Option 1)

Retaining the guidelines in their current form are unlikely to have any impacts in terms of consistency with the Act.

Impact of retaining the existing guidelines with additional changes (Option 2)

Key insights offered by the Blacktown Workers' Club case suggest that it is unclear if making changes to Clause 6 of the Regulation would improve its alignment with the Act. There are practical limitations to how terms used in legislation could precisely specify its intent/purpose. As such, at best, changes to

the guidelines would likely have a negligible impact on the alignment of the regulation with the Act. This issue could be explored further during the consultation period following this RIS.

5.1.6 Compliance, monitoring and enforcement

NSW Health Authorised Inspectors conduct regular compliance monitoring and enforcement activities, including issuing cautions or on the spot fines to people seen to be breaching outdoor smoking bans. Authorised Inspectors also provide education to members of the public on smoking bans and work with property and building owners to display smoke-free signage and remove butt bins where appropriate.

Each year, the Ministry receives public complaints about possible breaches to indoor smoking regulation at venues across NSW. The average annual number of public complaints lodged between 2011 and 2013 was approximately 435.¹⁸ The Ministry estimates that upon inspection, up to 75 per cent of the venues reported (i.e. around 325 of complaints) are typically found to be compliant with the Regulation while the remaining 25 per cent (i.e. around 110 of complaints) are found to be non-compliant.¹⁹ Further, the majority of venues that are non-compliant on initial inspection and assessment, are found to be compliant at a follow-up inspection after the issuance of a warning letter.

While this may imply high compliance rates across NSW, it should be noted that venues that are not the subject of a public complaint may not always be compliant with indoor smoking regulations, since possible and actual breaches may go unreported.

Moreover, the Ministry notes that although there have only been two court cases related to the enforcement of the guidelines in the Regulation since its 2007 implementation,²⁰ anecdotally, regulators have been cautious at reaching a 'non-compliant' decision upon inspection unless the breach is particularly obvious or egregious, due to the treatment of the guidelines in the court rulings made for each case.²¹

Impact of eliminating the guidelines (Base Case, Option 3)

As discussed in Section 4.1, if the guidelines are eliminated, then a new definition of enclosed public place would only be available once enforcement actions are taken in the courts and any guidance provided would likely be on a case-by-case basis. As such, some aspects of the guidance provided to industry through judgements may be open to some degree of interpretation and/or may not be amenable for other venues to use as concrete benchmarks to their own benefit. This would likely result in difficulties both achieving and monitoring compliance and in a possible increase in enforcement actions.

Enforcement actions can take long time to be resolved and result in substantial costs to all parties. For example, the *Blacktown Workers' Club Ltd v. O'Shannessy* case was heard at both the Local Court and the Supreme Court (following the appeal made by prosecution on the Local Court decision), before a ruling was made in the NSW Court of Appeals. It took more than three years from the time that Blacktown Workers' Club was first charged with an offence (March 2008) to when a final ruling was made in this case (September 2011).

Impact of retaining the existing guidelines (Option 1)

As mentioned before, while it is acknowledged that the current guidelines are not without flaws:

- they provide some specific definitions to test compliance (such as the '75 per cent' rule to determine substantially enclosed places);
- recorded regulatory compliance rates across NSW are generally very high. However, this figure is likely to be slightly overstated noting potential and actual breaches that may go unreported;

¹⁸ This may include multiple complaints made for the same venue.

¹⁹ Assuming each complaint lodged is for a different venue in NSW.

²⁰ *Blacktown Workers' Club Ltd v. O'Shannessy* (described in more detail in Section 4.1.1) and *Dubbo RSL Memorial Club Limited & Anor v. Steppat & Ors*.

²¹ Notably, while there have been only two relevant reported court cases, there have been others in the Local Court that have little or no precedent value.

- in almost ten years where the guidelines have been in operation there have only been two court cases related to issues with their clarity and enforcement; and
- industry views that the current guidelines are sufficiently clear for them to interpret and comply with (moreover, additional clarity was provided through court rulings in the two cases discussed above).

It is then reasonable to argue that retaining the guidelines in their current form would continue to assist with their monitoring and compliance and that it is unlikely that their continuation would result in lower compliance and/or further enforcement actions (and related costs).

Nevertheless, it is worth noting that some health advocates argue that the current guidelines are difficult to enforce because of the manner in which they are drafted. These views need to be further tested during the consultation period that will be undertaken by the Ministry before a decision is made about remaking or removing the Regulation.

Impact of retaining the existing guidelines with additional changes (Option 2)

Whether additional changes to the existing guidelines would lead to improved compliance outcomes depends on the extent to which the existing guidelines generate confusion. Any improvements to compliance outcomes is contingent on the actual drafting of the changes and on whether these changes do in fact result in significant reductions in confusion around how to interpret and apply Clause 6 of the Regulation.

5.1.7 Stranded assets

One of the key issues raised by the hospitality industry with regards to changes to the current Regulation is that investments have been made on the basis of the existing guidelines. This issue was raised in the RIS for the *Smoke-Free Environment Regulation 2007* and again during the stakeholder consultations undertaken for this RIS.

Impact of eliminating the guidelines (Base Case, Option 3)

The industry's concern is that if the courts develop a different approach to the current guidelines, then the venues' renovated and/or new areas may not be suitable for use as smoking areas. In effect, the concern is that these investments would become stranded assets.

This is an argument that is difficult to support on a number of grounds.

- First, venues' renovated areas that would no longer be able to be used for smoking have alternative uses (e.g. as spaces where alcohol or food can be served and/or consumed). Thus, the investment, while potentially less valuable in the eyes of the proprietor, nevertheless has some (and possibly quite considerable) value.
- Second, given that the number of non-smokers in the population exceeds the number of smokers (as mentioned in Chapter 2 only around 12 per cent of Australians are 'daily smokers') it is possible that any revenue lost from changes in smokers' patronage could be offset by greater revenues from non-smokers increasing their patronage. Indeed, many surveys have documented increasing levels of public support for restrictions on smoking in indoor workplaces and other venues in Australia. According to Scollo and Winstanley 2012 (Chapter 15, p.6):

When adults were asked whether smoking bans would make them more or less likely to visit licensed premises, the vast majority responded that smoking bans would make them either more likely to visit or would make no difference... In New South Wales in 2008, almost 40% of adults reported that they would be more likely, and only 4% would be less likely, to frequent hotels and licensed premises as a result of the total ban on smoking indoors. For more than half of adults (56%), the total ban on smoking indoors in hotels and licensed premises would make no difference... Between 2003 and 2008 in New South Wales there was a significant increase in the proportion of adults who would be more likely to frequent hotels and licensed premises as a result of the total ban on smoking indoors (rising from 24.2% in 2003 to 36.9% in 2007 and 39.5% in 2008)... At the same time, there has been a decline in the proportion of adults who would be less likely to frequent hotels and licensed premises as a result of the total ban on smoking indoors (falling from 9.8% in 2003 to 5.8% in 2007 to 4.3% in 2008).

- Furthermore, according to the Ministry, the 2015 NSW Smoking and Health Survey (unpublished) found around 80 per cent of survey participants supported the banning of smoking in ‘unenclosed’ gaming areas in pubs, clubs and bars.
- Moreover, to the degree that proprietors decide to make additional investments in light of a changed definition of enclosed spaces, such additional costs cannot be attributed to the legislative regime. Those are costs voluntarily incurred in the normal course of business as there is no obligation to seek to construct spaces that can accommodate smoking per se. That is, such additional investments would only be undertaken if they provide proprietors with a return greater than not allowing smoking in the relevant spaces.

Impact of retaining the existing guidelines (Option 1)

While as discussed before any costs incurred by venues to continue to provide smoking areas under the existing guidelines cannot be attributed to the legislative regime, if the guidelines are remade without any changes, it is unlikely that industry would have any concerns about stranded assets and would continue to make investments decisions based on the current guidelines.

Impact of retaining the existing guidelines with additional changes (Option 2)

As discussed above, any costs incurred by venues to continue to provide smoking areas under an option where the existing guidelines are retained with amendments cannot be attributed to the legislative regime.

5.1.8 Hospitality industry non-gaming revenue

The hospitality industry remains concerned that tightening the interpretation of enclosed spaces would have a significant detrimental impact on their revenues.

There are many studies nationally and internationally that have investigated the impact of smoke-free policies on the hospitality industry. These studies use a number of different indicators and methodologies to measure the impact, ranging from subjective measures (such as surveys of public intentions of patronage and proprietor predictions of changes in sales) to objective measures (such as independently collected revenue or unemployment data) and from simple before and after percentage changes to complex statistical modelling.

Scollo et al. (2003) undertook a comprehensive review of studies available up to 2002 that assessed the revenue effects of smoke-free policies on the hospitality industry and found that:

- lower quality studies were much more likely to conclude smoke-free regulations adversely impact the hospitality industry;²²
- weaker studies were much more likely to be funded by the tobacco industry; and
- all of the well-designed studies found that smoke-free restaurant and bar laws had no impact or a positive impact on revenue or jobs.

Scollo and Winstanley 2012 (Chapter 17, p.34) notes that ‘Additional studies have been included in the above [Scollo et al. 2003] analysis and the conclusions remain the same’. Three of the well-designed studies included in these reviews examined the impact of smoke-free laws on sales in hospitality venues in Australia.²³ All three studies found ‘no significant short- or long-term effect on sales’ (Scollo and Winstanley 2012, Chapter 17, p.34).

Furthermore, as mentioned above, some surveys suggest that smoking bans could have a positive impact on attendance to hotels and bars in NSW, with almost 40 per cent of adults reporting in 2008

²² To assess the quality and strength of the studies reviewed the authors used the following criteria. (1) The study should be based on objective data such as actual sales tax data. (2) The inclusion of all data points before and after implementation of the ban and for years before should be included in the analysis. Bias in selecting specific quarters is therefore eliminated. (3) The use of regression or other statistical analysis to control for trend and fluctuation data, so that the significance of any change can be evaluated. (4) Overall economic trends should be controlled for by use of total sales data and data comparison areas. (ACG 2007)

²³ In South Australia, sales turnover in restaurants and cafes was examined in response to the smoke-free law that came into effect on 4 January 1999.7 In Victoria, sales turnover in restaurants and cafes was analysed for the effect of the smoke-free law that came into effect on July 2001. In Tasmania the analysis examined the effect of smoke-free laws in restaurants, cafes, bars and licensed clubs introduced in September 2001 (which mandated smoke free enclosed work and public places with exemptions for bar and gaming areas where meals are not served or consumed).

that they would be more likely, and only 4 per cent would be less likely, to frequent hotels and licensed premises as a result of the total ban on smoking indoors.

Impact of eliminating the guidelines (Base Case, Option 3)

In light of the discussion above, on average, the hospitality industry is unlikely to suffer any decline in non-gaming revenue in the medium to long term from the elimination of the guidelines and the development of a more stringent definition of enclosed spaces by the courts. Furthermore, the risk of even a short term decline in revenue is considered very low because the proprietors have had a significant period of time to adjust (the guidelines have been in existence for over 10 years) and restrictions have been phased in, enabling them to adjust the expectations of their patrons (e.g. by progressively increasing non-smoking spaces, educating patrons, etc.) so that there would be less of a change if there are further restrictions.

Impact of retaining the existing guidelines (Option 1)

Everything else being equal, retaining the guidelines in their current form would not have any impacts on the hospitality industry non-gaming revenue.

Impact of retaining the existing guidelines with additional changes (Option 2)

Even if the outcome of remaking the existing guidelines with additional changes is a reduction in enclosed public places where smoking is allowed, the hospitality industry is unlikely to suffer any decline in non-gaming revenue in the medium to long term. However, as mentioned before, there is no evidence to suggest that clarifying Clause 6 would directly lead to a substantial reduction in venues allowing smoking.

5.1.9 Hospitality industry gaming revenue

While the evidence about the impact of smoke-free policies on non-gaming revenue of the hospitality industry seems to be clear cut, the evidence about impacts on gaming revenue is not. This is because, in contrast to the relatively large literature using objective measures to assess the impact of smoke-free policies on restaurants and bars, there are relatively few studies that have examined the impact on venues offering electronic gaming ('poker') machines.

Two studies conducted in the United States that examined the effect of smoke-free policies on electronic gaming machine expenditure reached mixed conclusions. Mandel et al. 2005 and Pakko 2006 examined the impacts of smoke-free policies on electronic gaming machine expenditure on the same venues but used different alternative methodological approaches. Mandel et al. concluded that the smoking ban had no impact on either total revenues from video lottery machines or on the average revenues per machine. In contrast, Pakko found that the smoking ban reduced gaming revenues by nearly 13 per cent in the year following the implementation of the ban.

More recently two other studies analysed the subject. Lal & Siahpush (2008) studied the effects of Victoria's policy banning smoking in most gaming venues (implemented in September 2002). The authors found that the Victorian policy led to an abrupt, long-term decrease in electronic gaming machine expenditures of about 14 per cent (poker machine expenditure did not return to the level prior to the introduction of the law during the three-year period that was analysed after the law was introduced). Furthermore, in addition to curbing exposure to SHS, the study found that 'Victoria's smoke-free policy was effective in reducing problem gambling, and that the money gamblers did not spend gambling would likely be spent in other sectors of the economy' (IARC 2009, p.83). Garret and Pakko (2009) examined the effect of a smoking ban in all Illinois casinos in 2008 on both casino revenue and attendance and found that revenue declined by more than 20 per cent and total admissions by 10 per cent.

In the NSW context, the RIS for the *Smoke-Free Environment Regulation 2007* (ACG 2007) found the following.

- The dramatic drop in gaming revenue in Victoria following the introduction of Victoria's smoking ban reflected an industry ill-prepared for change, and unaware of what to expect. In contrast, NSW's slower move to smoke-free laws meant that the NSW hospitality industry had time to put in place a

broad suite of strategies to respond to the new regulatory requirements and as such, the impact of the smoking ban was expected to be significantly less troublesome in NSW. This somewhat benign view of the smoking ban in NSW was reinforced by the NSW Department of Treasury and Finance's (NSW Department of Treasury and Finance 2006, p. 3-17) observation that in 2007-08 revenue was expected to decrease slightly due to the impact of smoking bans on club and hotel gaming machine duty and casino duty, but that this dip in revenue was forecast to be almost entirely recaptured in just over two years after the introduction of the new regulatory environment.

- An analysis of gambling turnover in hotels and clubs in response to smoking bans in other jurisdictions showed that, on a seasonally adjusted basis, after the introduction of smoking bans gaming at hotels and clubs did not change appreciably relative to retail turnover more generally. That is, wagering revenue at hotels and clubs have fared no differently to other retail sectors despite the introduction of smoke-free laws.

Impact of eliminating the guidelines (Base Case, Option 3)

Considering the above findings and the fact that smoking restrictions and the guidelines have been in place for a significant amount of time (and hence both industry and patrons have already adjusted to the restrictions), then:

- if the elimination of the guidelines result in a more stringent definition of enclosed spaces by the courts it is likely that the NSW hospitality industry would likely experience a slight short term decline in gaming revenue; but
- if the definition developed by the courts is just as strict as the current guidelines, then it is unlikely that there would be any changes to gaming revenue.

Impact of retaining the existing guidelines (Option 1)

Everything else being equal, retaining the guidelines in their current form would not have any impacts on the hospitality industry gaming revenue.

Impact of retaining the existing guidelines with additional changes (Option 2)

If retaining the existing guidelines with additional changes results in a reduction in venues where smoking is allowed (which is unlikely given that the intention is to increase clarity, not stringency), then it is likely that the industry would experience a slight short term decline in gaming revenue. However, if the changes made do not have substantial implications on the number of venues where smoking is allowed, then it is unlikely that there would be any material impact on gaming revenue.

5.1.10 Problem gambling

The Australian Government estimates that Australians spent more than \$19 billion on gambling in 2008-09 and that problem gambling costs to the community at least \$4.7 billion a year (Australian Government 2016).

There is a clear link between the addictive behaviours of smoking and gaming. In particular, gambling problems and tobacco dependence have similar characteristics (Rodda et al 2004), and smoking is used as a device to sustain the attraction of a gaming session (Harper 2003; Siahpush et al. 2003).

Given the links between smokers and gambling, it is reasonable to suggest that any reduction in access to smoking areas within gaming venues will result in a reduction of social costs associated with problem gambling. Indeed, this had been the experience from the New Zealand smoke-free legislation and smoke-free policies in Victoria.

- In New Zealand 'There was evidence of decreased expenditure on gambling and large falls in the numbers accessing the problem gamblers helpline and face-to-face counselling services' (Edwards et al. 2006, p. 14).
- In Victoria, smoke-free policies in gambling venues were found to lead to an abrupt, long-term decrease in electronic gaming machine losses, suggesting that these policies have an impact on slowing gambling losses (Lal and Siahpush 2008).

Impact of eliminating the guidelines (Base Case, Option 3)

As mentioned in Section 5.1.9, if the guidelines are eliminated and more stringent definitions are developed by the courts, the impact on gambling expenditure is likely to be minor and transitory and hence any benefits from reduced social costs associated with problem gambling would likewise be expected to be minor and transitory.

Impact of retaining the existing guidelines (Option 1)

To the extent that retaining the guidelines in their current form would not have any impacts on gambling expenditure, they would not result in any additional benefits from reduced social costs associated with problem gambling either.

Impact of retaining the existing guidelines with additional changes (Option 2)

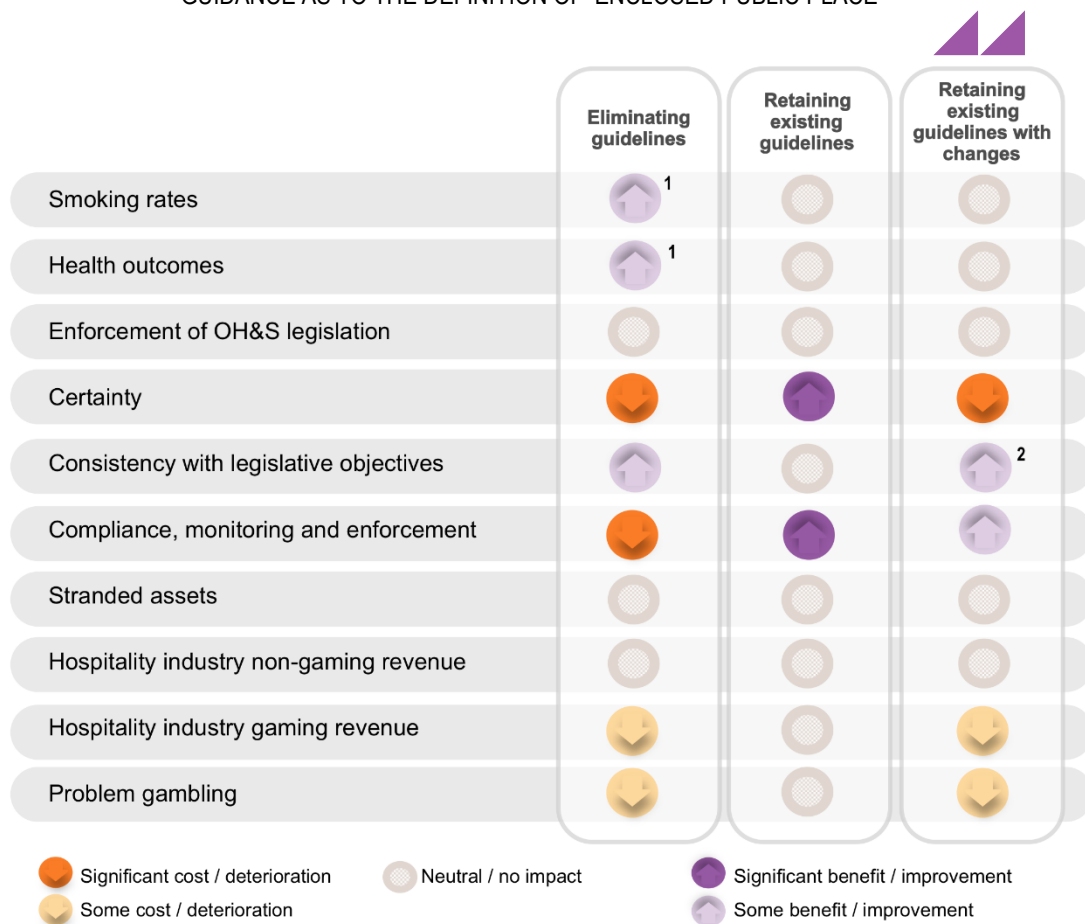
Similarly to the expected outcomes of eliminating the guidelines altogether, if amendments were made to the existing guidelines, the impact on problem gambling is likely to be negligible.

5.1.11 Conclusion

As discussed before, the benefits and costs associated with the regulatory options for defining an 'enclosed public place' are not amenable to quantification due to the uncertainty associated with the possible changes to the guidelines and the relatively marginal impact of the possible changes (i.e. the impact of the Regulation is dwarfed by the impact of the Act).

However, **Figure 5.1** provides a summary of the relative nature of the benefits and costs of the different regulatory approaches analysed.

FIGURE 5.1 SUMMARY OF POTENTIAL RELATIVE IMPACTS OF DIFFERENT OPTIONS TO PROVIDE GUIDANCE AS TO THE DEFINITION OF ‘ENCLOSED PUBLIC PLACE’



¹ This benefit is highly uncertain as it would only be achieved if the new definition/guidance of enclosed space developed by the courts is more stringent than the current guidelines and results in significantly fewer venues allowing smoking. It is uncertain if/when this would be achieved.

² This benefit is uncertain as it would depend on the actual drafting of the changes to the guidelines and on whether these changes do in fact result in significant reductions in confusion around how to interpret and apply Clause 6 and thus improve compliance with the Regulation (compared to the status quo).

Note: For ease of comparison, the impacts of eliminating the guidelines and of remaking the guidelines with changes are summarised with respect to the status quo (i.e. retaining the guidelines in their current form), while the impacts of the status quo/retaining the guidelines in their current form are summarised with respect to eliminating the guidelines.

SOURCE: ACIL ALLEN CONSULTING.

In summary, in relation to guidance as to the definition of ‘enclosed public space’:

- The Base Case option and Option 3 are not considered appropriate as leaving the definition of what constitutes an ‘enclosed public space’ to be developed by the courts it is likely to result in:
 - potentially more venues allowing smoking in the short term while courts develop this guidance (which can potentially result in detrimental health outcomes);
 - short term uncertainty for industry, government and the public about how to interpret and apply the Act; and
 - increased compliance and enforcement costs.

In addition, under these options there is no guarantee that the guidance and definitions offered by court rulings would indeed be different or more stringent than the current guidelines.

- Option 2 is not considered appropriate as the additional clarity that could be offered by amending the guidelines is likely to be small, noting that additional guidance about Clause 6 of the Regulation has now been provided by case law. In addition:
 - there is potential risk that at least in the short term, making changes to the guidelines would lead to a period of increased uncertainty until the changes are well understood;
 - it is not clear that the amendments being considered would improve the effectiveness of the Regulation compared to Option 1. In particular, given the insights offered from the ruling over the Blacktown Workers’ Club case, it is reasonable to believe that more likely than not, it will be difficult

- to provide additional clarity in Clause 6 without at least in some part compromising the flexibility of the Regulation to cater for unforeseen situations; and
- given the high compliance rate with the Regulation and the fact that there have only been two court relevant cases in NSW related to its enforcement in its more than ten years of operation, the case for further amendments to provide additional clarity is not strong.
- Given the above, remaking the guidelines in their current form (Option 1) is the preferred option.

5.2 Signage requirements

By effect of section 9(1) of the *Smoke-free Environment Act*, 'The occupier of a smoke-free area must not fail to display within that area the signs (if any) prescribed by the regulations, in the manner (if any) prescribed by the regulations.'

Clause 4 of the *Smoke-free Environment Regulation 2007* currently supports this provision by providing that:

(1) For the purposes of section 9 (1) of the Act, signs that are clearly legible and contain each of the following are prescribed:

- (a) the smoking prohibited symbol (or an equivalent symbol) with a diameter of at least 90 mm,
- (b) the words "NO SMOKING" in letters of at least 20 mm in height,
- (c) a reference to the name of the Act,
- (d) the words "Penalties may apply".

(2) For the purposes of section 9 (1) of the Act, the prescribed manner of displaying signs within a smoke-free area is:

- (a) in such numbers, and
- (b) in positions of such prominence,

that they are likely to be seen by a person at a public entrance to, or within, the area.

All alternative options under consideration (except the base case) entail remaking these requirements.

A generalised framework of the costs and benefits of consumer protection (e.g. signage requirements) shows that the net benefit of regulation designed to protect consumers depends on the relationship between three cost functions (Terry et al. 1988, pp. 120-121):

- transaction costs to consumers — these costs include the costs of information research in obtaining accurate information, the costs of inappropriate service provision (e.g. exposure to SHS in an enclosed public place), and obtaining redress if services are inappropriate. These costs are assumed to be a declining function of the intensity of the legislative protection. That is, they are wholly borne by consumers in the absence of the protection and they decrease when more protection is provided;
- direct social costs imposed on society (commonly called administrative costs) — these costs, which are borne by the taxpayer, comprise the costs of the support and regulatory regime; and
- indirect costs imposed on specific groups (commonly called business transactions costs, and represent the red tape administrative burden) — these costs are the costs imposed on businesses through compliance with the new requirements (e.g. information provision, higher standards, etc.) and the cost to those people whose choice is restricted if the protection and support requirements cause a reduction in the range of services offered.

The total social costs are derived by the addition of the three types of costs. This framework implies that consumer protection regarding SHS is a trade-off — the more protection government requires in signage, the less effort consumers need to make to protect their own interests, but the greater the compliance and administrative costs.

While there are some compliance costs for businesses associated with the time spent sourcing and erecting complying signs, the Ministry of Health has minimised signage costs by providing complying signs to businesses at no charge. In doing so, the Ministry has transferred compliance costs to administrative (i.e. taxpayer supported) costs.

Data provided by the Ministry for the cost of warehousing and dispatching tobacco-regulation related signage shows that the cost of dispatching these signs to businesses fluctuate from \$4,000 to \$7,000 each month.²⁴ For the purpose of this RIS, we have made a conservative estimate of the monthly signage dispatch cost, as shown in **Table 5.2**.

TABLE 5.2 MINISTRY OF HEALTH COST OF PROVIDING COMPLIANCE SIGNAGE (NOMINAL 2016)

Per month	Per year	10 Years	20 Years
\$	\$	\$	\$
7,000	84,000	840,000	1,680,000

Note: the upper bound estimate of monthly signage dispatch cost was used to take make a conservative estimate of the cost of regulation

SOURCE: ACIL ALLEN CONSULTING BASED ON MINISTRY OF HEALTH DATA

Compliance costs associated with the proposed signage requirements are slight as sign procurement costs have been absorbed by the NSW Ministry of Health.

Clause 5 of the proposed Regulation states:

In accordance with section 9 (2) of the Act, any public place:

(a) in respect of which persons would reasonably be expected to know, by custom or otherwise, that smoking is not permitted, and

(b) in which persons do not usually smoke,

is exempt from section 9 (1) of the Act.

In effect, Clause 5 provides a mechanism whereby signage requirements will cease to be operational when there is no expectation that anyone would smoke in a particular area. In effect, this provides a mechanism to reduce direct and indirect costs as the need for signage declines over time (i.e. as the expectation of being smoke-free increases) as non-smoking expectations are normalised.


5.2.1 Conclusion

The signage requirements are an important but low cost regulatory intervention. As such, the benefits of mandatory signage as specified in the proposed Options 1, 2 and 3 exceed the costs.

Implicit in this conclusion is the assumption that not prescribing signage (i.e. a lower level of consumer protection) will not provide an adequate level of information for consumers. In effect, the assumption is that non-regulatory responses will be inadequate in the absence of the proposed Regulation.

There is a general view that the signs do reduce transaction costs for consumers and are a valuable contribution to ensuring smoke-free environments. In part, this support reflects the industry's view that the signs provide backup for venue operators in enforcing the smoke-free requirements.

²⁴ This service is currently outsourced to a private company. The estimated cost is assumed to include the relevant labour and capital/equipment cost of administering the signage dispatches.



6

CONCLUSION

The NSW Ministry of health has identified the following options to be considered in this RIS.

- **Base Case** - letting the existing Regulation sunset so that no specific regulatory guidance is provided with respect to (1) guidelines to define what constitutes an enclosed public place and (2) signage requirements;
- **Option 1** – remaking the existing Regulation without any changes (the status quo option);
- **Option 2** – remaking the existing Regulation with two potential amendments:
 - a) changes to clarify what ‘opens directly to the outside’ means for determining if a place is enclosed (Clause 6 of the Regulation); and
 - b) changes to clarify what ‘gaps in the wall or ceiling’ are for the purposes of Clause 6(5) of the Regulation; and
- **Option 3** – letting the Regulation sunset as it relates to Clause 6 (i.e. guidelines) but retaining the existing signage requirements.

As discussed in previous chapters, the signage requirements in the Regulation are an important but low cost regulatory intervention such that the benefits of mandatory signage as specified in the proposed Regulation exceeds the costs. Given this conclusion, letting the existing Regulation sunset in its entirety is not considered appropriate.

All the potential options analysed in this RIS have current and potential shortcomings and as such a key insight from the analysis is that none of the specified alternative approaches to define what constitutes an ‘enclosed public place’ (i.e. guidelines as they currently exist or with additional changes, or no guidelines and reliance on judicial interpretation as to what constitutes an ‘enclosed public place’) deliver an optimal outcome.

There is a reasonable degree of uncertainty about the magnitude of the benefits and costs associated with the regulatory options for defining an ‘enclosed public place’ and hence are not amenable to quantification. However, it is reasonable to argue that this uncertainty is over a somewhat narrow set of possible impacts (see **Figure 5.1**).

Although at face value eliminating the guidelines (Base Case and Option 3) may seem to have the potential to improve health outcomes by reducing public exposure to SHS, it is important to recognise that there is significant uncertainty as to whether this would actually be the case. First, there is no guarantee that the definitions offered by court rulings would indeed be more stringent than the current guidelines. Second, there is also no guarantee that even if this is the case, that this would in turn directly lead to a substantial decrease in the number of venues that allow smoking, or to reductions in the intensity of SHS exposure at venues that do comply with the Act.

Moreover, eliminating the guidelines would almost certainly result in a period of increased business uncertainty until enough court cases go through the judicial system to offer guidance as to how to interpret and apply the Act.

Given this, and taking into account that adopting the option to renew the guidelines with amendments made to Clause 6 would likely result in more costs than benefits compared to the retention of the existing Regulation in its current form, the preferred regulatory option is to maintain status quo – Option 1.



The *Subordinate Legislation Act 1989* states that the remaking of a statutory rule (even if it is to be remade without changes) requires the preparation of a RIS and a period of public consultation.

Consistent with the *Subordinate Legislation Act 1998*, a period of public consultation of at least 21 days will be undertaken by the Ministry before a decision is made about the remaking of a statutory rule.

Submissions about the Draft Regulation can be made to:

Centre for Population Health
NSW Ministry of Health
Locked Bag 961
NORTH SYDNEY 2059

Submissions may also be made via email to tobacco@doh.health.nsw.gov.au. Please refer to the NSW Ministry of Health website for submission deadlines.

Individuals and organisations should be aware that generally any submissions received may be made publically available under the *Government Information (Public Access) Act 2009*. The Ministry of Health, in considering the submissions received may also circulate submissions for further comment to other interested parties or publish all, or parts, of the submissions. If you wish your submission (or any part of it) to remain confidential (subject to the *Government Information (Public Access) Act*), this should be clearly stated on the submission.



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**TABLE A.1** STAKEHOLDER CONSULTATIONS

Organisation consulted	Person consulted	Date
Cancer Institute NSW	Anita Dessaix Manager Cancer Prevention	19 April 2016
ClubsNSW	Josh Landis Executive Manager, Public Affairs	20 April 2016
	Anthony Trimarchi Manager, Policy & Government	
Cancer Council NSW	Scott Walsberger Manager Tobacco Control Unit	22 April 2016
Australian Hotels Association (AHA) NSW	John Green Director, Liquor and Policing	22 April 2016
	Chris Gatfield Policy and Research Officer	

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