A SUBMISSION TO THE NEW ZEALAND MINISTRY OF HEALTH

PROPOSALS FOR A SMOKEFREE AOTEAROA 2025 ACTION PLAN

New Zealand Tobacco Packaging Warning

DR MATTHEW RIMMER

PROFESSOR OF INTELLECTUAL PROPERTY AND INNOVATION LAW

FACULTY OF BUSINESS AND LAW

QUEENSLAND UNIVERSITY OF TECHNOLOGY

Queensland University of Technology

2 George Street GPO Box 2434

Brisbane Queensland 4001 Australia

Work Telephone Number: (07) 31381599

EXECUTIVE SUMMARY

Recommendation 1

As part of building upon Helen Clark's legacy in respect of the *Smoke-Free Environments Act 1990* (NZ), Jacinda Ardern's New Zealand Government should pass bold and ambitious proposals for the Smokefree Aotearoa 2025 Action Plan.

Recommendation 2

The New Zealand Government should learn from the legal disputes and the public policy debate over the plain packaging of tobacco products. This pioneering tobacco control measure was recognised as being an expression of the *WHO Framework Convention on Tobacco Control 2003*, and being consistent with the *TRIPS Agreement 1994*, the *TBT Agreement 1994*, and *GATT 1994*. The New Zealand Government should seek to make use of such flexibilities in international law in its development of tobacco control measures under the Smokefree Aotearoa 2025 Action Plan.

Recommendation 3

The New Zealand should implement a bold and ambitious Smokefree Aotearoa 2025 Action Plan in order to implement the *WHO Framework Convention on Tobacco Control 2003*, and protect public health in New Zealand.

Recommendation 4

The New Zealand Government should support enhanced Indigenous-led tobacco control measures – taking into account the *Treaty of Waitangi 1840*, the *WHO Framework Convention on Tobacco Control 2003*, the *United Nations Declaration on the Rights of Indigenous Peoples 2007*, and the establishment of the new Maori Health Authority.

Recommendation 5

The New Zealand Government should support social marketing campaigns to promote the Smokefree Aotearoa 2025 Action Plan.

Recommendation 6

As part of its increased regulation of digital platforms, the New Zealand Government should seek to engage in enhanced regulation of social media advertising by tobacco companies and e-cigarette companies. As well as targeting the tobacco companies, the New Zealand Government should focus on the behaviour of advertisers and the Internet influencers, and regulate the role of intermediaries, such as digital platforms, social media sites, and other Internet sites.

Recommendation 7

The New Zealand Government should invest in research, evaluation, monitoring and reporting of the Smokefree Aotearoa 2025 Action Plan.

Recommendation 8

The New Zealand Government should provide for effective compliance and enforcement mechanisms for tobacco control measures in respect of the Smokefree Aotearoa 2025 Action Plan. The New Zealand Government should explore the need for law reform in respect of civil liability and criminal liability for tobacco companies.

Recommendation 9

New Zealand should establish a licensing system for all retailers of tobacco and vaping products. New Zealand should also encourage retailers to shift towards the sale of healthy products.

Recommendation 10

The New Zealand Government should reduce the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density.

Recommendation 11

The New Zealand Government should reduce the retail availability of tobacco by restricting sales to a limited number of specific store types.

Recommendation 12

The New Zealand Government should follow the lead of the United States and Singapore, and introduce a smokefree generation policy.

Recommendation 13

The New Zealand Government should encourage retailers and small businesses to stop selling smoked tobacco products, and instead diversify into the sale of healthier products.

Recommendation 14

The New Zealand Government should support reducing the nicotine in smoked tobacco products to very low levels. The New Zealand Government should also prohibit the use of menthol in tobacco products.

Recommendation 15

The New Zealand Government should support prohibiting filters in smoked tobacco products.

Recommendation 16

The New Zealand Government should have the flexibility of prohibiting tobacco product innovations through regulations.

Recommendation 17

The New Zealand Government should increase the tobacco tax rate, establish a new tax on e-cigarettes, as well as set a minimum price for tobacco products. The New Zealand Government should also look to take action in respect of any tax evasion by tobacco companies and e-cigarette companies.

Recommendation 18

The New Zealand Government should include smoke-free policies in its Smokefree Aotearoa 2025 Action Plan.

Recommendation 19

The New Zealand Government, the corporate sector, and civil society should further expand tobacco divestment policies.

Recommendation 20

The New Zealand Government needs to ensure that its tobacco endgame measures – and its proposals for Smokefree Aotearoa 2025 Plan - are safeguarded against the threat of tobacco interference.

1. HELEN CLARK'S LEGACY OF THE *SMOKE-FREE ENVIRONMENTS ACT 1990 (NZ)*

As Minister for Health, the Hon. Helen Clark introduced the *Smoke-Free Environments Bill* into the New Zealand Parliament on the 17 May 1990. It is worthwhile recalling the aims and ambitions of this initiative. Clark observed: 'This Bill will ensure that New Zealand takes its proper place in the global efforts against the death and suffering that are being caused by tobacco.'¹ She discussed the scope of the bill:

The Bill aims to protect young people from being exposed to false images of tobacco as a healthy and desirable product. The Bill will create a social environment that encourages young New Zealanders to remain non-smokers and protects non-smokers from the effects of tobacco smoke. It will also set up a new health sponsorship council that is specifically established to promote health and healthy life-styles through the sponsorship of sport, the arts, and cultural or recreational events. It will provide alternative sources of funds for those groups currently reliant on tobacco.²

Clark observed: 'Experience here and abroad shows that a multipronged strategy is needed to succeed, and educational, fiscal, and legislative strategies reinforce and complement each other.'³

Clark highlighted the death and disease attributable to smoking in New Zealand:

¹ Helen Clark, 'Speech on the *Smoke-Free Environments Bill*', New Zealand Parliament, 17 May 1990.

² Ibid.

³ Ibid.

Every year more than 4000 New Zealanders are dying from diseases directly attributed to their smoking of tobacco, and 273 of them do not smoke at all but are dying from other people's smoke. That clearly makes tobacco-smoking by far the biggest single preventable cause of death and chronic illness in New Zealand.⁴

Clark said that the New Zealand Government was 'appalled by the suffering, not just of those with smoking-related illnesses, but also of their families and friends who watch helplessly as lung cancer and emphysema take their toll.'⁵

Clark commented that the legislation would bring a number of public health benefits to New Zealand:

The public health will be greatly improved by effective measures to reduce the leading cause of preventable death in New Zealand. Hospital beds will be freed for people with less preventable diseases. Workers will benefit from breathing cleaner and less smoky air. Employers will benefit from having cleaner work-places and workable policies on smoking in the workplace that establish clear guidelines on where and when people may smoke. Sports, arts, recreational, and cultural groups will benefit from having access to health sponsorship consistent with their own objectives. Families will be able to enjoy sports, arts, recreation, and culture free of incompatible tobacco disease messages. Children will grow up free of commercial pressure to smoke. With this bill, the children of 1990 have a real chance of being the first true smoke-free generation.⁶

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

She observed: ‘Inaction on this issue would be as irresponsible as doing nothing in the face of any other public health epidemic.’⁷

Reflecting upon her political career in 2020, former Prime Minister Helen Clark singled out her work on tobacco control as one of the political achievements, which she was most proud of.⁸ She reflected: ‘Thirty years ago, New Zealand dreamed a big dream – to prevent the harm and death caused by tobacco smoking.’⁹ Clark noted the danger posed by smoking at that period to the public health of New Zealand: ‘At the time, one in three adult New Zealanders – adults and youth – smoked regularly.’¹⁰ Clark observed that smoking was an exceptional danger: ‘In comparison to other health risks we face, smoking is uniquely harmful to the health of individuals, whānau, the health services and society as a whole.’¹¹ She noted: ‘When used as directed by the manufacturers, up to two-thirds of people who smoke die early from smoking tobacco, and one-third of those deaths are in middle-aged people who lose, on average, more than twenty years of life.’¹²

⁷ Ibid.

⁸ Helen Clark, ‘New Zealand's Smoke-free Gains Among My Proudest Achievements, But There's More Work To Do’, *Stuff*, 23 August 2020, <https://www.stuff.co.nz/national/health/300087854/helen-clark-new-zealands-smokefree-gains-among-my-proudest-achievements-but-theres-more-work-to-do>

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

Helen Clark explained the legislative design of the regime:

The *Smoke-free Environments Act* was passed under my leadership as Minister of Health thirty years ago this week in 1990. It required things we now take for granted: it banned smoking on public transport, banned sales to under-sixteen year olds, required disclosure of ingredients, restricted smoking in indoor workplaces, banned tobacco advertising and sponsorship, and established the Health Sponsorship Council (now the Health Promotion Agency) to replace tobacco sponsorship.¹³

Helen Clarke noted that ‘a private members bill extended the Act in 1995’ and ‘with policy advances also stemming from the 2011 government inquiry into the impact of smoking on Māori, New Zealand continues to have among the most advanced tobacco control measures in the world.’¹⁴

Helen Clark reflects upon the smoke-free goal of New Zealand legislators: ‘An ambitious, but achievable, goal was set in 2011, to be tobacco smoke-free by 2025, defined as there being fewer than five per cent of adults who smoke tobacco.’¹⁵ She was heartened by the progress which had been made in this field:

New Zealand’s smoking rate has plummeted to one in eight adults. This major achievement has prevented thousands of early deaths from cancer and heart and lung diseases, and has contributed directly to our increasing lifespan. Very few young people now take up smoking.¹⁶

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

Nonetheless, Clark was disturbed by the persistent fraction of the New Zealand community who still engaged in smoking: ‘Yet, despite all these efforts, approximately 500,000 New Zealanders still smoke, and more than 4,000 die every year from smoking – that’s twelve deaths every single day.’¹⁷

Clark called on New Zealand legislators to take action ‘to complete our smoke-free journey.’¹⁸ She observed: ‘Most people who smoke often try to quit but find it difficult to do so; they smoke for the nicotine but die from the toxic chemicals in the smoke.’¹⁹ Clark commented: ‘We need to encourage more quit attempts and to reduce relapse to smoking cigarettes with encouragement from mass and social media campaigns under the leadership of the Health Promotion Agency.’²⁰ She suggested: ‘We need to scale up successful community quit smoking programmes.’²¹ In her view, ‘Incentives for quitting, especially for pregnant women, are strongly supported by scientific evidence.’ Clark called for a comprehensive plan to get to Smoke Free 2025: ‘A multi-pronged approach will be a win-win-win for individuals, whānau, the health service, and our nation.’²² She stressed: ‘The stark reality is that to achieve the Smoke Free 2025 goal, we need to encourage and support some 60,000 people to transition away from smoking

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

tobacco each year for the next five years.’²³ Helen Clark recognised that such an initiative ‘will require a huge public health effort.’²⁴ She noted that the New Zealand community had shown a concerted commitment to the protection of public health: ‘Our current Covid-19 experience shows that we are capable of collective and concerted public health efforts.’²⁵ Helen Clark was hopeful that Jacinda Ardern’s government could build upon this substantive legacy: ‘New Zealand could realise the dream of thirty years and complete our journey to becoming a smoke-free nation.’²⁶

Recommendation 1

As part of building upon Helen Clark’s legacy in respect of the *Smoke-Free Environments Act 1990* (NZ), Jacinda Ardern’s New Zealand Government should pass bold and ambitious proposals for the Smokefree Aotearoa 2025 Action Plan.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

2. THE PLAIN PACKAGING DEBATE IN NEW ZEALAND

The New Zealand Parliament considered the adoption of plain packaging of tobacco products with the introduction of the *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ). There has been strong support for the measure amongst the major parties – including the National Party; the Maori Party; the Labor Party; and the Greens. The New Zealand parliamentary debate has considered matters of public health and tobacco control; the role of intellectual property law; and the operation of international trade and investment law.

The Minister for Health, Tony Ryall, a member of the National Party, has been proud of the New Zealand Government's work in respect of tobacco control and plain packaging: 'We have created a turning point in the campaign against tobacco with more effective action than ever before on an unprecedented scale - annual tobacco excise increases, systematic screening and cessation support, the end of retail displays, and the inevitability of plain packaging.'²⁷

The Associate Minister for Health, Tariana Turia, an MP for the Maori Party, has been a driving force behind the introduction of the legislative regime.²⁸ In her first reading

²⁷ Hon. Tony Ryall, 'Speech on the *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ)', New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

²⁸ Hon. Tariana Turia, 'Speech on the *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ)', New Zealand Parliament, 11 February 2014,

speech, she emphasized the need to address the brand imagery deployed by Big Tobacco to recruit consumers to use their addictive product:

In essence, the decision to introduce plain packaging for tobacco products in New Zealand is all about the branding. It takes away the last means of promoting tobacco as a desirable product. When tobacco manufacturers push tobacco, they are not simply selling a stick of nicotine; they are selling status, social acceptance, and adventure. The design and appearance of tobacco products and, in particular, the way they are packaged influence people's perceptions about these products and the desirability of smoking. Brand imagery demonstrably increases the appeal of tobacco brands, particularly to youth and young adults, helping to attract new smokers and also implying wider social approval for tobacco use.²⁹

Tariana Turia observed: 'For too long tobacco companies have been creating brands in advertising to persuade us to think that smoking is glamorous, fun, cool, sophisticated, and a part of life, knowing that they had to sell only the myth, and the nicotine addiction would take over.'³⁰

In her speech, Tariana Turia emphasized that the introduction of plain packaging would protect the 'health of future generations while at the same time taking prudent responsibility for the use of taxpayer funds.'³¹ She stressed that plain packaging would

https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

support and complement existing tobacco control measures as part of a comprehensive public health strategy:

This bill is about sending a very clear message to tobacco companies that this Government is serious about ending unnecessary debts and poor health outcomes related to tobacco use. The intent of the legislation is to prevent the design and appearance of packaging and of products themselves from having any visual or other effect that could serve to promote the attractiveness of the product or increase the social appeal of smoking. The plain packaging regime will tightly control the design and appearance of tobacco product packaging and of the products themselves by allowing the brand name and certain other manufacturer information to be printed on the pack, but with tight controls—for example, on the font used, its size, its colour, and its position on the pack. It will standardise all other design elements of tobacco product packaging, such as the materials, colours, and type fonts that may be used. It will require the packaging to carry larger, more prominent, and more pertinent warning messages and graphic images, controlling the design and appearance of individual cigarettes and other products. The colouring and wording used on tobacco packaging has been charred to create misconceptions that tobacco products are less harmful and that it is easier to quit than is in fact the case.³²

Tariana Turia noted the global tobacco epidemic identified by the World Health Organization: ‘Internationally, smoking remains the largest cause of preventable death’.³³ She was concerned that tobacco use ‘contributes to profound health and social inequalities, and outcomes for Māori and Pasifika peoples’.³⁴ Tariana Turia

³² Ibid.

³³ Ibid.

³⁴ Ibid.

emphasized: ‘There is no other consumer product that is so widely used and that directly poses such a high level of health risk to users, particularly long-term users.’³⁵

Moreover, the Associate Minister for Health emphasized that the legislative regime was consistent with New Zealand’s international obligations: ‘This bill will support New Zealand in meeting its international obligations and commitments under the *World Health Organization Framework Convention on Tobacco Control*, and it will align the tobacco plain packaging legislation in Australia consistent with the *Trans-Tasman Mutual Recognition Agreement*’.³⁶

Dr Paul Hutchison – of the National Party – added that ‘the purpose of this legislation indeed is to introduce plain packaging for tobacco products, but particularly the aim is to reduce the tobacco uptake particularly among young people.’³⁷ He noted: ‘As the Hon Tariana Turia mentioned in her speech, branding can be very appealing to young people in its many forms and sorts, and in fact it can be very appealing to all people’.³⁸ Hutchinson emphasized: ‘The whole aim of the tobacco companies is to induce that Pavlovian dog reflex whereby the person who sees the brand just cannot help but get

³⁵ Ibid.

³⁶ Ibid.

³⁷ Hon. Paul Hutchinson, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

³⁸ Ibid.

stuck into the goodies, and the whole idea of this legislation is indeed to help reduce the glamorisation of packaging that the tobacco companies have been just so very happy to use, despite the harm tobacco causes.’³⁹ Dr Paul Hutchison emphasized that his party would defend the tobacco control measures in international trade debates: ‘We have clearly signalled that we will not compromise our sovereign right to protect the public health of our people.’⁴⁰ He stressed: ‘This legislation is another step in protecting the public’s health from the proven harms of tobacco.’⁴¹

Iain Lees-Galloway – representing Labour for Palmerston North – welcomed that the introduction of plain packaging of tobacco products.⁴² He emphasized that the Labour Party had a proud record on public health and tobacco control: ‘It goes right back, of course, to 1989-90, when the *Smoke-free Environments Act*, the Act that this bill amends, was first passed by the Labour Government under then health Minister Helen Clark’.⁴³ He noted: ‘This is just another step in a long line of measures that have over the last three decades moved us towards a smoke-free future, but now we have the

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Hon. Iain Lees-Galloway, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

⁴³ Ibid.

absolute goal that we want New Zealand to be smoke-free by 2025’.⁴⁴ Lees-Galloway commented that plain packaging would be a useful, effective measure:

There is no reason for branding to be used to differentiate cigarettes, because tobacco is tobacco is tobacco. It does not matter what you wrap it up in; it kills. Five thousand people are killed every year as a result of tobacco-related diseases. It kills around half its users. That is not a normal product that ought to be treated normally like any other consumable. It does not belong in dairies next to the bread and the milk and the lollies. And it does not deserve to have branding designed to entice young people to use this lethal product.⁴⁵

Lees-Galloway observed: ‘The tobacco industry wails and cries every time a measure like this is implemented, and the more it wails, the more I am convinced that we are doing the right thing’.⁴⁶ He supported the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill* 2014 (NZ): ‘What it seeks to do is to get rid of the last bastion of tobacco advertising.’⁴⁷

Lees-Galloway emphasized the need for transparency in respect of the *Trans-Pacific Partnership*: ‘The real concern is that the *Trans-Pacific Partnership* will foist upon New Zealand rules and regulations that stop us from doing exactly this, which is to legislate in the best interests of the public health of New Zealanders’. He warned of the danger of investor-state dispute settlement regimes: ‘We are watching Australia closely, but I want New Zealanders to understand that the agreement that Australia has with

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

Hong Kong was poorly drafted in this area and left Australia exposed to the type of litigation that it is facing'.⁴⁸ Lees-Galloway observed: 'We need to know whether the *Trans-Pacific Partnership* will have any bearing on the implantation of this legislation, and we on this side of the House are concerned that the reason the Government does not want this legislation to be implemented as soon as it is passed by Parliament, and instead is handing that right over to itself, the Government, is that it wants to keep in the back pocket the opportunity not to enforce this legislation, in the event that it sells off to American interests that are pushing their agenda through the Trans-Pacific Partnership our right—our Sovereign right—to legislate in the interests of the public health of New Zealanders.'⁴⁹ He concluded: 'New Zealand is a Sovereign nation that ought to be able to say that we do not accept that 5,000 of our citizens are killed every year by tobacco, and that we do not accept that the tobacco industry has the right to push its product on to youngsters to try to get them hooked at an early age so that when they do make the decision that they want not to smoke any more, they are addicted to nicotine and unable to get away from the habit'.⁵⁰ The politician stressed: 'We do not want the tobacco industry to be able to do that, and we do not want to give up our right to regulate in the interests of New Zealanders.'⁵¹

In a powerful speech, Clare Curran – representing Labour in Dunedin South – noted the insidious influence of marketing by the tobacco industry: 'That is why we have so many people in our country and in our world who smoke—because of the really clever

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

marketing and because the product is so addictive.’⁵² She applauded the introduction of plain packaging of tobacco products in Australia, and the ruling of the High Court of Australia that the regime was constitutional. Clare Curran offered a devastating critique of Big Tobacco’s arguments about trade and intellectual property:

I want to say that the argument that is used by big tobacco—the apologists that pretend that this is a debate about intellectual property rights or removing barriers to trade—is wrong and that that has been proven. The sovereign right of Parliament to make its own laws on matters of public interest should be something that we should all fight for. I want to refer quickly to a paper called “Packaging phoney intellectual property claims. How multinational tobacco companies colluded to use trade and intellectual property arguments they knew were phoney to oppose plain packaging and larger health warnings. And how governments fell for their chicanery.” I urge everybody to track down this paper and to read it, because it shows that the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate.⁵³

Highlighting the ruling of the High Court of Australia, Clare Curran concluded: ‘We should not be taking notice of Big Tobacco’s argument that this is an intellectual property argument, because it is not. There is no basis in law for that argument.’⁵⁴

⁵² Hon. Clare Curran, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment and https://youtu.be/rPr_ISkAVlc

⁵³ Ibid.

⁵⁴ Ibid.

Phil Goff – representing Labour in Mt Roskill – provided a critique of the trade arguments of Big Tobacco and its fellow travellers:

It is a condemnation of not only the tobacco industry but the fellow travellers and the apologists for that industry, who would pretend that they can dictate to this country about what we should do in terms of tobacco promotion. It is a long list: the Emergency Committee for American Trade, the National Association of Manufacturers, the National Foreign Trade Council, the US-ASEAN Business Council, the US Chamber of Commerce, and the United States Council for International Business. Shame on those groups, which in many other aspects of their work do responsible work, that they should act as apologists for a product that kills people. They may pretend that the debate is about intellectual property. They may pretend that the debate is about removing barriers to trade. I am a believer in reasonable protection for intellectual property and I am a strong believer that we should remove barriers to trade, but neither argument stacks up to defend the promotion of a product that kills people if used as the manufacturer intends. Neither argument stands up. They are red herrings. Those councils, those vested interest groups, should butt out of our debate. New Zealand, as every country does, must have the sovereign right to legislate and to regulate for the public good.⁵⁵

Goff encouraged the New Zealand Parliament: ‘We should not lack the courage to confront the vested interests that promote for their own material benefit the peddling of tobacco as a lethal product.’⁵⁶ He emphasized that the regime is aligned with the *World*

⁵⁵ Hon. Phil Goff, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

⁵⁶ Ibid.

Health Organization Framework Convention on Tobacco Control: ‘We should not be frightened to bring this legislation in on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization.’⁵⁷ He was rightly sceptical of challenges to Australia’s plain packaging regime under the World Trade Organization: ‘I do not believe for a moment that another international body, the World Trade Organization, would in the end defend the right of companies to kill people with their products.’⁵⁸ Goff highlighted the need to ensure that tobacco control measures – such as the plain packaging of tobacco products – were not undermined by the *Trans-Pacific Partnership*.

Metiria Turei – the co-leader of the New Zealand Greens – expressed her concern about the health impacts of tobacco: ‘For every person I love who smokes cigarettes, that cigarette is a direct threat to their life’.⁵⁹ She observed: ‘That cigarette increases their chances of dying of some horrible disease much, much younger than they would otherwise’.⁶⁰ She was also concerned that tobacco had a particularly significant and

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Hon. Metiria Turei, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

⁶⁰ Ibid.

harmful impact on Maori communities. Turei commented: ‘What is most important to me about this legislation is that it controls the industry.’⁶¹ She emphasized:

We do have controls on advertising and other forms of regulatory control over the industry, but more is needed and this is a great first step. We—the country, the Government, the community—are being threatened by the tobacco industry. We saw it in today’s paper that there are further threats by the tobacco industry for the consequences of this policy. We are quite right in saying that if that is it, so be it, bring it on. We are in the job of making good policy for the health and well-being of our country, and none of us make any apologies for that whatsoever. If that causes a cost to an industry that peddles a drug that kills, well, then so be it. They bear that cost. They are in that industry. That is a cost that they have to take.⁶²

Turei dismissed the arguments of Big Tobacco about plain packaging of tobacco products. She noted: ‘Actually, the argument by them really was: we want to keep our branding, we want to keep control of the industry.’⁶³

Kevin Hague – the spokesperson on Health for the New Zealand Greens – emphasized that nothing is ‘more fundamental to the role of a Government than to prevent the death

⁶¹ Ibid.

⁶² Ibid.

⁶³ Hon. Kevin Hague, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

of its citizens'.⁶⁴ He hoped that the New Zealand Government implemented plain packaging of tobacco products, without delay or hesitation:

In the face of the size of this problem and the role that this measure can play in solving that problem I do not believe that that kind of delay can possibly be acceptable. Tobacco companies are scared of this bill. They are scared of this measure. Indeed, it falls into a pattern that has existed for every one of the tobacco control measures that has been implemented in every country every time. Tobacco companies have fought them tooth and nail and the ferocity of their fighting has been proportional to the likely effectiveness of the measure being considered. Their sole motivation is profit maximisation. That is not a goal that our State, our Parliament ought to share.⁶⁵

Kevin Hague stressed that 'every nation has the sovereign right to protect the health of its people.'⁶⁶ He warned that 'Delaying implementation is caving in to the threats, extortion, and delaying tactics of an evil industry.'⁶⁷

Barbara Stewart of NZ First expressed uncertainties about the legislation, and its impact upon public health.⁶⁸ She noted: 'This is a very thought-provoking piece of legislation.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Hon. Barbara Stewart, 'Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*', New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

I am not a smoker.’⁶⁹ She observed: ‘It is important, we believe, to get the views of the submitters on a bill such as this, because it can have unintended consequences, both positive and negative.’⁷⁰

John Banks – the leader of ACT – provided some opposition to the introduction of plain packaging of tobacco products.⁷¹ He asserted (incorrectly given the precedents) that the plain packaging of tobacco products violated the intellectual property rights of tobacco companies:

This bill guts the intellectual property rights of tobacco companies, and someone will say: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? Because KFC and Red Bull sugar drinks are putting this country’s level of obesity up at the top of the OECD. They help to contribute to that. It may be seen as a long bow, but the removal of intellectual property rights of tobacco companies and the names and brandings of their products without compensation is wrong, because which international company selling products that are bad for our health will be the next target? The State is effectively seizing their property because it does not like health effects of their still lawful business.⁷²

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Hon. John Banks, ‘Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 11 February 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140211_00000028/smoke-free-environments-tobacco-plain-packaging-amendment

⁷² Ibid.

Such arguments are misconceived and ill-founded. In a decisive 6-1 majority, the High Court of Australia emphasized that intellectual property was designed to serve larger public interests – such as the protection of public health. The High Court of Australia emphasized that plain packaging did not constitute an acquisition of property. The High Court of Australia also emphasized that its decision was focused upon tobacco control, rather than any other field – such as food labelling or soft drink labelling.

The legislative bill was sent off to a Select Committee on the 5th August 2014. Then there seemed to be a hiatus with the progress of the New Zealand legislative bill. Professor Jane Kelsey of the University of Auckland was critical of this delay – expressing concern that international trade and investment action had caused a regulatory chill.⁷³ She commented:

Why has the New Zealand government been so reticent to follow Australia's lead? There is unlikely to be a definitive answer until enough time has elapsed for politicians and officials to speak frankly. This article explores the most likely factors. It starts by developing a typology of specific and systemic forms of regulatory chill, expanding on work done in the context of international trade and investment agreements. The working hypothesis is that three elements related to those agreements combined to chill a government that was already luke-warm on a plain packaging law: perceived risks associated with New Zealand's free trade and investment treaties; the agency of politically influential industry lobbyists who articulated those risks; and the bias in the regulatory management regime that favours minimal intervention and empowers the tobacco industry, which is reinforced by international trade and investment rules.⁷⁴

⁷³ Jane Kelsey, 'Regulatory Chill: Learnings From New Zealand's Plain Packaging Tobacco Law' (2017) 17 (2) *QUT Law Review* 21-45.

⁷⁴ Ibid. 22.

Kelsey lamented that the delayed implementation of plain packaging of tobacco products in New Zealand was regrettable from a public health perspective. She concluded that there was a need to take action to prevent tobacco interference in New Zealand: ‘Outside strategies are needed to neutralise the specific and systemic elements of regulatory chill, such as active campaigning to prevent new international agreements that constrain health policy, including tobacco control; rallying the health community to challenge the subordination of health policy to international trade and investment rules; strengthening the backbone of the Ministry of Health to contest the dominance of MFAT; and conducting alternative impact assessments of proposed agreements to expose the negative consequences.’⁷⁵

There was a second reading debate on the bill on the 30th June 2016. The Associate Minister of Health – the Hon. Peseta Sam Lotu-Iiga observed: ‘A number of countries have taken similar steps to standardise tobacco products and packaging, so we are in good company. Progressing the bill through its next stage today is showing that New Zealand is committed to putting tobacco into plain, standardised packaging.’⁷⁶ He commented:

Tobacco products kill New Zealanders. Every year 4,500 to 5,000 people die prematurely.

Smoking is a leading, avoidable cause of premature deaths in New Zealand, so we want to

⁷⁵ Ibid. 45.

⁷⁶ Hon. Peseta Sam Lotu-Iiga, ‘Second Reading Speech on the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*’, New Zealand Parliament, 30 June 2016, https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20160630_20160630_20

stop New Zealanders from smoking, and we are going to take every practical step to achieve that. Most people in society will know a friend or a family member who has died prematurely. I think the good thing about this bill is that it will also prevent young people—and others—taking up smoking, through standardised packaging of tobacco.⁷⁷

The Associate Minister of Health said: ‘Tobacco products already carry large, graphic health warnings, and cigarettes and tobacco can no longer be displayed at point of sale or advertised in any media.’⁷⁸ He stressed: ‘Now we are removing the last marketing tool, and consigning the cigarette pack to a plain green-brown colour, stripped of its bright packaging and brand imagery’.⁷⁹ The Associate Minister of Health acknowledged: ‘A lot of time and money goes into designing products and packs to appeal both to existing smokers and also to the next generation’.⁸⁰ He said: ‘Allowing tobacco products to be advertised or promoted in any way is inconsistent with our Government’s wider goal of making New Zealand smoke-free by 2025.’⁸¹ The Associate Minister of Health observed: ‘The bill is intended to tightly control the design and the physical appearance of cigarettes and tobacco products and any packaging used or intended to be used with those products.’⁸²

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

The bill was considered by the Committee of the whole house on the 23rd August 2016. The bill was subject to a third reading on the 8th September 2016. The *Smoke-free Environments (Tobacco Standardised Packaging) Amendment Bill* passed by 108 to 13. The bill received Royal Assent on the 14 September 2016. The Government announced that the legislation would come into force in October 2018.

Big Tobacco's threats of challenging New Zealand's plain packaging of tobacco products in court did not seem to eventuate in the end.⁸³ Given the failure of Big Tobacco to invalidate Australia's plain packaging of tobacco products in various arenas, there seems little likelihood of Big Tobacco ever successfully mounting a case against New Zealand's regime for plain packaging of tobacco products.

Recommendation 2

The New Zealand Government should learn from the legal disputes and the public policy debate over the plain packaging of tobacco products. This pioneering tobacco control measure was recognised as being an expression of the *WHO Framework Convention on Tobacco Control* 2003, and being consistent with the *TRIPS Agreement* 1994, the *TBT Agreement* 1994, and *GATT* 1994. The New Zealand Government should seek to make use of such flexibilities in international law in its development of tobacco control measures under the Smokefree Aotearoa 2025 Action Plan.

⁸³ Sophie Boot, 'Tobacco firm ponders challenge as plain packaging bill passes', *NZ Herald*, 10 September 2016, <https://www.nzherald.co.nz/business/tobacco-firm-ponders-challenge-as-plain-packaging-bill-passes/UX6E7VOMFJENA6PITE7GZBNXXE/>

3. PROPOSALS FOR A SMOKEFREE AOTEAROA 2025 ACTION PLAN

Building upon her predecessor Helen Clark’s legacy, New Zealand Prime Minister Jacinda Ardern is contemplating a tobacco endgame in New Zealand. The Ministry of Health in New Zealand has been running a six-week consultation *On Proposals for a Smokefree Aotearoa Action 2025 Plan*. The New Zealand Government is considering a number of options – including raising age limits for smoking; setting a minimum price for tobacco; increasing taxes for tobacco; limiting the availability of tobacco products; regulating nicotine and filters in tobacco products; and strengthening the tobacco control system. There is also a focus on providing targeted support for tobacco control for Maori and Pacific communities. In its 2021 Budget, the New Zealand Government committed to spend \$NZ 36.6 million to spend on the Smokefree 2025 Goal. The Associate Minister for Health, Hon Dr Ayesha Verrall, observed:

We want to make sure that New Zealanders, particularly our underserved communities, don’t continue to suffer the disastrous effects of smoking tobacco. If we are to have a chance of achieving the smokefree goal, we need to change our approach. Our proposals for a Smokefree 2025 Action Plan scale up current initiatives such as mass media campaigns. They sit alongside new policy options, including the introduction of a smokefree generation and making smoked tobacco products less available, less addictive and less appealing. Over 75 percent of smokers have tried to quit but smoking is primarily driven by addiction. This makes quitting extremely difficult even though most smokers want to do so. The discussion document

has new initiatives that, if adopted, will change the environment to make it much easier to quit, rather than only focusing on individual smokers.⁸⁴

In my view, the bold initiative of Jacinda Ardern's Government could help make smoking history in New Zealand. Moreover, the Smokefree Aotearoa 2025 Action Plan could show the way for many other nations. Mike Daube and Raglan Maddox have reflected:

Tobacco kills 4500 people each year in New Zealand, but more than 8 million globally. Minister Verrall and the New Zealand Government deserve great praise for their excellent, world-leading plan. Their exemplar role can be crucial in saving thousands of lives in their own country and millions of lives around the world.⁸⁵

This submission provides feedback on focus areas in this inquiry – particularly drawing upon some of the experiences of tobacco control in Australia. This submission addresses the key themes raised by the discussion paper - including strengthening the tobacco control system; making smoked tobacco products less available; making smoked tobacco products less addictive and less appealing; and making tobacco products less affordable.

⁸⁴ The Hon. Dr Ayesha Verrall, 'Fresh approach proposed to Smokefree 2025', Press Release, New Zealand Government, 15 April 2021, <https://www.beehive.govt.nz/release/fresh-approach-proposed-smokefree-2025>

⁸⁵ Mike Daube and Raglan Maddox, 'Impossible Until Implemented: New Zealand Shows The Way', (2021) *Tobacco Control* <https://tobaccocontrol.bmj.com/content/early/2021/05/23/tobaccocontrol-2021-056776>

Recommendation 3

The New Zealand should implement a bold and ambitious Smokefree Aotearoa 2025 Action Plan in order to implement the *WHO Framework Convention on Tobacco Control* 2003, and protect public health in New Zealand.

FOCUS AREA 1: STRENGTHEN THE TOBACCO CONTROL SYSTEM

a). What would effective Māori governance of the tobacco control system look like? Please give reasons.

The *United Nations Declaration on the Rights of Indigenous Peoples* 2007 provides useful guidance in respect of Indigenous-led policy-making.⁸⁶ Article 21 (1) provides: ‘Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of ...health.’ Article 21 (2) provides: ‘States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.’⁸⁷ Article 21 (2) also notes: ‘Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities’. In passing, Article 17 highlights the importance of the protection of the health of

⁸⁶ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by the General Assembly Resolution 61/295 on 13 September 2007; See Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*, London and New York: Routledge, 2016 and Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015.

⁸⁷ Ibid.

Indigenous children.⁸⁸ Article 23 provides: ‘Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development’.⁸⁹ Article 23 notes: ‘In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions’.⁹⁰ Article 24 (1) provides: ‘Indigenous individuals also have the right to access, without any discrimination, to all social and health services.’⁹¹ Article 24 (2) provides: ‘Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health.’⁹² Article 29 (3) provides: ‘States shall also take effective measures to ensure, as needed, ... programmes for monitoring, maintaining and restoring the health of indigenous peoples.’⁹³

There has been significant discussion about policy options to address high levels of smoking amongst Aboriginal and Torres Strait Islander communities in Australia.⁹⁴ The

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ The discussion of tobacco control and Indigenous communities in Australia comes from a recent submission - Matthew Rimmer, *The Uluru Statement from the Heart and Indigenous Intellectual Property*, Indigenous Voice Inquiry, Australian Government, April 2021,

Australian Government has been a world leader in tobacco control. The Gillard Labor Federal Government passed plain packaging of tobacco products – which incidentally has been of benefit in addressing tobacco consumption in Indigenous communities.⁹⁵ Australia's pioneering plain packaging of tobacco products has been successfully defended in the High Court of Australia; an investment tribunal; and the World Trade Organization. It was hoped by the policy-makers that plain packaging of tobacco products would not only address the tobacco epidemic in the general community – but it would also dampen the levels of smoking in Indigenous communities.⁹⁶

<https://haveyoursay.voice.niaa.gov.au/submissions/list>

and

<https://app.converlens.com/niaa/voice/submissions/view/2854>

⁹⁵ Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360; Matthew Rimmer (ed.), *The Plain Packaging of Tobacco Products*, Special edition of *QUT Law Review* (Vol. 17 (2)), Brisbane: QUT, 2017, <https://lr.law.qut.edu.au/issue/view/55>; Matthew Rimmer, 'The Global Tobacco Epidemic, the Plain Packaging of Tobacco Products, and the World Trade Organization' (2017) 17 (2) *QUT Law Review* 131-160; and Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products and the Trans-Pacific Partnership', (2017) 7 (1) *Victoria University Law and Justice Journal* 76-93.

⁹⁶ Raglan Maddox, Sarah Durkin and Ray Lovett, 'Plain packaging implementation: perceptions of risk and prestige of cigarette brands among Aboriginal and Torres Strait Islander people' (2016) 40 (3) *Australian and New Zealand Journal of Public Health* 221-225.

There has been new research into tobacco smoking and mortality among Aboriginal and Torres Strait Islander adults in Australia.⁹⁷ This new research found:

Around half of all contemporary deaths of Aboriginal and Torres Strait Islander adults aged ≥ 45 years are caused by smoking, according to this study. Over the past decade, this amounts to >10 000 preventable premature deaths. Never-smokers were around twice as likely to survive to age 75, and had over an extra decade of life expectancy, compared with current-smokers. These findings highlight the magnitude of smoking-related harms, and the urgent need to prevent smoking initiation and to support Aboriginal and Torres Strait Islander smokers to quit.⁹⁸

ANU associate professor Raymond Lovett has observed that high rates of smoking stemmed from colonial practices of paying Aboriginal and Torres Strait Islander workers in rations, which included tobacco.⁹⁹ He commented that there was a need to promote Indigenous-specific health responses: ‘I have seen it ... where people are using those colonial process as an intervention to say: this is colonial resistance, this is a part of colonisation and we don’t want this in our community.’¹⁰⁰

⁹⁷ Katherine A Thurber, Emily Banks, Grace Joshy, Kay Soga, Alexandra Marmor, Glen Benton, Sarah L White, Sandra Eades, Raglan Maddox, Tom Calma, and Raymond Lovett, ‘Tobacco smoking and mortality among Aboriginal and Torres Strait Islander adults in Australia’, (2021) *International Journal of Epidemiology* <https://academic.oup.com/ije/advance-article/doi/10.1093/ije/dyaa274/6118443?login=true>

⁹⁸ Ibid.

⁹⁹ Calla Wahlquist, ‘Smoking causes half of Indigenous Australian deaths over 45, study shows’, *The Guardian*, 25 January 2021, <https://www.theguardian.com/australia-news/2021/jan/25/smoking-causes-half-of-indigenous-australian-deaths-over-45-study-shows>

¹⁰⁰ Ibid.

There is accordingly a need to find more funding to boost culturally appropriate smoking cessation services.¹⁰¹ Deadly Choices is a good example of an Indigenous-led public health program.¹⁰² The organization notes: ‘We aim to empower Aboriginal and Torres Strait Islander peoples to make healthy choices for themselves and their families – to stop smoking, to eat good food and exercise daily.’¹⁰³ The community group observes: ‘Deadly Choices also encourages our people to access their local Community Controlled Health Service and complete an annual ‘Health Check’.’¹⁰⁴

An Indigenous voice will help promote an Indigenous led public health response to tobacco control.

The *Treaty of Waitangi* 1840 provides an important framework for the Crown to protect and promote the health of Maori.

¹⁰¹ David Thomas and Tom Calma, ‘Tackling Indigenous smoking: a good news story in Australian tobacco control’, (2020) 30 (3) *Public Health Research and Practice* <https://www.phrp.com.au/issues/september-2020-volume-30-issue-3/tackling-indigenous-smoking-a-good-news-story-in-australian-tobacco-control/>

¹⁰² Deadly Choices, <https://deadlychoices.com.au/>

¹⁰³ Ibid.

¹⁰⁴ Ibid.

In her 1990 speech on the *Smoke-Free Environments Bill*, Helen Clark highlighted the impact of smoking upon Maori communities.¹⁰⁵ She noted: ‘Tobacco use is also a major contributor to ill health among Maori, who have smoking rates and lung cancer rates approximately twice that of the non-Maori population – among the highest in the world for any population world.’¹⁰⁶ She noted: ‘Deaths from lung cancer have now overtaken deaths from breast cancer among Maori women.’¹⁰⁷

It was notable that Maori political and community leaders have often been leaders of the debate over tobacco control in New Zealand. Hone Harawira, Tariana Turia, Pita Sharples and Te Ururoa Flavell of the Maori Party contemplated a tobacco ban at one stage in 2006.¹⁰⁸ The Maori Party were champions of the plain packaging of tobacco products in New Zealand. Discussing New Zealand’s tobacco control achievements, Turiana Turei commented:

As a nation we must continue to support interventions which can support Māori, young adults and people with lower socio-economic status to become smokefree. There is more that we can do in enacting the Smokefree Environments Act. I have been impressed by the efforts of some local government bodies to make public outdoor spaces smokefree. I have loved the efforts in

¹⁰⁵ Helen Clark, ‘Speech on the *Smoke-Free Environments Bill*’, New Zealand Parliament, 17 May 1990.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ainsley Thomson, ‘Ban smoking anywhere, any time, says Maori Party’, *NZ Herald*, 21 February 2006, <https://www.nzherald.co.nz/nz/ban-smoking-anywhere-any-time-says-maori-party/2HCRA5IWQHIAUYD4DSBM45JZ6A/>

Wainuiomata to encourage their community to think about the children before they light up. All of us can become wellbeing champions in our own homes, our marae, and our communities.¹⁰⁹

As a Minister, Tariana Turia was awarded the World Health Organisation Western Pacific Region award for work on tobacco control on 31 May 2014, World Smokefree Day

The New Zealand College of Public Health Medicine has noted that new Indigenous-led public health institutions in New Zealand will help tobacco control promotion:

The recent announcement of the formation of the Māori Health Authority as the principal advisor to Ministers and the Ministry of Health on all Hauora Māori issues provides an opportunity for high level partnership in tobacco control governance. The further announcement that Te Huringa Hauora/ The Health Promotion Agency will move into Health New Zealand and become a shared service across Health NZ and the Māori Health Authority provides further opportunities for partnership in health promotion campaign planning and delivery.¹¹⁰

¹⁰⁹ The Hon. Tariana Turei, 'Tobacco Achievements', <https://www.health.govt.nz/system/files/documents/pages/tobacco-control-achievements-summary-report-aug14.docx>

¹¹⁰ New Zealand College of Public Health Promotion, 'Submission to the Ministry of Health: Proposals for a Smokefree Aotearoa 2025 Action Plan', 2021 https://nzcphm.org.nz/media/145241/nzcphm_submission_smokefree_2025_action_plan.pdf

The establishment of the Maori Health Authority will play an important role in Indigenous-led tobacco control policy and practice in New Zealand.¹¹¹

Recommendation 4

The New Zealand Government should support enhanced Indigenous-led tobacco control measures – taking into account the *Treaty of Waitangi* 1840, the *WHO Framework Convention on Tobacco Control* 2003, the *United Nations Declaration on the Rights of Indigenous Peoples* 2007, and the establishment of the new Maori Health Authority.

b). What action are you aware of in your community that supports Smokefree 2025?

In a classic paper in *The Lancet* in 2010, Professor Melanie Wakefield and her colleagues have highlighted the importance of mass media campaigns to change health behaviour.¹¹² They observed: ‘Mass media campaigns can directly and indirectly produce positive changes or prevent negative changes in health-related behaviours across large populations.’¹¹³ Nonetheless, they noted that there are various hindrances to the success of mass media campaigns: ‘Pervasive marketing for competing products or with opposing messages, the power of social norms, and the drive of addiction

¹¹¹ The Hon. Andrew Little and the Hon. Peeni Henare, ‘Establishment of new Māori Health Authority takes first big step’, Press Release, New Zealand Government, 7 May 2021, <https://www.miragenews.com/establishment-of-new-maori-health-authority-556048/>

¹¹² Melanie Wakefield, Barbara Loken and Robert Hornik, ‘Use of Mass Media Campaigns to Change Health Behaviour’ (2010) 376 (9748) *The Lancet* 1261-1271.

¹¹³ Ibid.

frequently mean that positive campaign outcomes are not sustained.’¹¹⁴ Wakefield and her colleagues recommended: ‘Greater and longer-term investment will be required to extend effects.’¹¹⁵

The WTO Panel Decision and the WTO Appellate Body Decision dealing with Australia’s plain packaging of tobacco products discussed the utility of mass media campaigns, supporting a smokefree message.¹¹⁶

Professor Janet Hoek and her colleagues have discussed the importance of social marketing in strengthening community action for a Smokefree 2025 in New Zealand.¹¹⁷ They observed that social marketing could play a useful role in a number of ways:

Social marketing has several important roles. First, it may deter people from unhealthy behaviours, such as smoking, by promoting alternative new behaviours; as these become

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, (28 June 2018); and *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R, (9 June 2020).

¹¹⁷ Janet Hoek, Andrew Waa, Nick Wilson, Lindsay Robertson, Phil Gendall, George Thomson, ‘Social Marketing for Smokefree Aotearoa 2025: Reminding, Reinforcing, and Changing Social Norms’, Public Health Expert, 21 May 2021, <https://blogs.otago.ac.nz/pubhealtheexpert/social-marketing-for-smokefree-aotearoa-2025-reminding-reinforcing-and-changing-social-norms/#more-13938>

established, they embed new social norms. Second, it may sway opinion by exposing industry practices, such as how tobacco companies deceived and then blamed people who smoke for the harms they experienced; this reframing may increase support for policy measures. Third, in line with the Ottawa Charter on Health Promotion, social marketing may help build supportive environments that support behaviour change. Fourth, social marketing can create opportunities to work more effectively with communities affected by unhealthy products.¹¹⁸

They supported increase expenditure in social marketing campaigns: ‘Social marketing can facilitate and reinforce population-level behaviour change introduced by new policies, thus modifying social norms, which also support long-term improvements in health outcomes.’¹¹⁹

The work of behavioral nudge economists such as Cass Sunstein has also highlighted the importance of social marketing in the context of tobacco control. In his book, *On The Ethics of Influence*, Cass Sunstein comments: ‘If graphic warnings can save significant numbers of lives, they should not be ruled out of bounds.’¹²⁰ He observes: ‘These are at most mild forms of manipulation, to be sure, and it is important to see that mild forms might well be acceptable and benign (and a bit fun) if they promote the

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Cass Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science*, Cambridge: Cambridge University Press, 2016.

interests of those people at whom they are aimed.’¹²¹ Cass Sunstein has supported such measures as graphic health warnings in the United States.¹²²

Recommendation 5

The New Zealand Government should support social marketing campaigns to promote the Smokefree Aotearoa 2025 Action Plan.

**c). What is needed to strengthen community action for a Smokefree 2025?
Please give reasons.**

As a result of increasing regulation of mass media, Big Tobacco has increasingly used social media to target various parts of the population. The work of Dr Becky Freeman provided an early warning of the threat and danger posed by social media advertising and the use of Internet influencers by tobacco companies and e-cigarette companies.¹²³ Recent investigative journalism has revealed that the problem has worsened – with

¹²¹ Ibid.

¹²² Cass Sunstein, ‘The FDA’s new graphic cigarette labels are smart’, *Pittsburgh Post-Gazette*, 20 August 2019, <https://www.post-gazette.com/opinion/Op-Ed/2019/08/20/Cass-R-Sunstein-FDA-cigarette-labels-health-risks-smoking/stories/201908200017>

¹²³ See for instance - Becky Freeman and Simon Chapman, ‘Is “YouTube” telling or selling you something? Tobacco content on the YouTube video-sharing website’ (2007) 16 (3) *Tobacco Control* 207-210; Becky Freeman, Marita Hefler, and Daniel Hunt, ‘Philip Morris International’s use of Facebook to undermine Australian tobacco control laws’ (2019) 29 *Public Health Research Practice* e2931924; and Lucy Hardie, Judith McCool and Becky Freeman, ‘Online retail promotion of e-cigarettes in New Zealand: A content analysis of e-cigarette retailers in a regulatory void’, (2021) *Health Promotion Journal of Australia*.

tobacco companies and e-cigarette companies engaging in global social media campaigns.¹²⁴

The United States Congress has recently highlighted that tobacco companies and e-cigarette companies have been engaged in abusive promotions on social media during the COVID-19 pandemic.¹²⁵ The lawmakers led by Senator Elizabeth Warren wrote: ‘These advertisements are a blatant exploitation of a pandemic that has killed nearly two million people across the world and devastated the lives of countless more.’¹²⁶ The lawmakers stressed: ‘They are reckless and endanger millions, especially as countries

¹²⁴ Rob Davies and Matthew Chapman, ‘Tobacco giant bets £1bn on influencers to boost ‘more lung-friendly’ sales’, *The Guardian*, 21 February 2021, <https://www.theguardian.com/business/2021/feb/20/tobacco-giant-bets-1bn-on-social-media-influencers-to-boost-lung-friendlier-sales>; Matthew Chapman, ‘New Products, Old Tricks? Concerns Big Tobacco is Targeting Youngsters’, *The Bureau of Investigative Journalism*, 21 February 2021, <https://www.thebureauinvestigates.com/stories/2021-02-21/new-products-old-tricks-concerns-big-tobacco-is-targeting-youngsters>; and Conor Duffy, ‘Facebook approves Alcohol, Vaping, Gambling and Data Ads Targeting Teens, Lobby Group Finds’, *ABC News*, 28 April 2021, <https://www.abc.net.au/news/2021-04-28/facebook-instagram-teenager-targeted-advertising-alcohol-vaping/100097590>

¹²⁵ Senator Elizabeth Warren, ‘Extensive Use of Social Media Indicates Abusive Promotions Are Aimed at Youth “Exploiting the COVID-19 pandemic of a respiratory disease to promote a product that increases risk for the very same disease is unconscionable”’, Press Release, United States Congress, 22 December 2020, <https://warren.senate.gov/newsroom/press-releases/warren-blumenthal-durbin-krishnamoorthi-and-degette-question-tobacco-companies-exploitative-e-cigarette-advertisements-during-the-covid-19-pandemic>

¹²⁶ Ibid.

around the globe are experiencing yet another surge in cases.’¹²⁷ The lawmakers commented: ‘This attempt to profit off the back of a global health crisis, reminiscent of decades of false and misleading advertising about cigarettes by tobacco companies, represents a callous indifference to the lives and well-being of millions of people across the world.’¹²⁸ The lawmakers called upon the Food and Drug Administration and the Federal Trade Commission to take action in respect of such unfair, deceptive, and potentially harmful advertisements.

Given such use and abuse of social media, the New Zealand Government should ensure that Big Tobacco does not use social media advertising to undermine its Smokefree Aotearoa 2025 Action Plan.

Recommendation 6

As part of its increased regulation of digital platforms, the New Zealand Government should seek to engage in enhanced regulation of social media advertising by tobacco companies and e-cigarette companies. As well as targeting the tobacco companies, the New Zealand Government should focus on the behaviour of advertisers and the Internet influencers, and regulate the role of intermediaries, such as digital platforms, social media sites, and other Internet sites.

¹²⁷ Ibid.

¹²⁸ Ibid.

c). What do you think the priorities are for research, evaluation, monitoring and reporting? Please give reasons.

Part VII of the *WHO Framework Convention on Tobacco Control* 2003 highlights scientific and technical cooperation and communication of information.¹²⁹ Article 20 focuses on research, surveillance and exchange of information.¹³⁰ Article 21 looks at the reporting and exchange of information.¹³¹ Article 22 deals with co-operation in the scientific, technical, and legal fields, and provision of related expertise.¹³²

Accordingly, New Zealand Government should invest in research, evaluation, monitoring and reporting of the Smokefree Aotearoa 2025 Action Plan. The New Zealand Government should support inter-disciplinary research in respect of tobacco control – particularly as the field spans the disciplines of public health, law and justice, behavioral economics and marketing. Such research will help ensure that the package of proposals are evidence-based. The New Zealand Government should evaluate the operation of the Smokefree Aotearoa 2025 Action Plan. In terms of international law, it is important that tobacco control measures are demonstrated to be effective. The New Zealand Government should monitor the regime – particularly in respect of compliance and enforcement issues. The New Zealand Government should report on the operation

¹²⁹ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

of the Smokefree Aotearoa 2025 Action Plan, and consider further law reform if need be.

The *WHO Framework Convention on Tobacco Control* 2003 highlights the importance of ‘the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry, including health professional bodies, women’s, youth, environmental and consumer groups, and academic and health care institutions, to tobacco control efforts nationally and internationally and the vital importance of their participation in national and international tobacco control efforts.’¹³³ John Key’s Government made the regrettable decision of defunding civil society organisations, such as ASH and the Smokefree Coalition.¹³⁴ Moreover, there have been controversies over the use of money by the Quit group.¹³⁵ Jacinda Ardern’s New Zealand Government should also support civil society work in respect of tobacco control – as community-led action is critical.

¹³³ Preamble of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹³⁴ Simon Collins, ‘Smokefree Lobbyists Face Chop’, *NZ Herald*, 27 June 2016, <https://www.nzherald.co.nz/nz/smokefree-lobbyists-face-chop/IBELIY2YUMRTN2FYHDC2MI2RUA/>

¹³⁵ RNZ, ‘Quit Group Payments A “Shocking Waste”, ASH says’, *RNZ*, 10 March 2020, <https://www.rnz.co.nz/news/national/411348/quit-group-payments-a-shocking-waste-ash-says>

Recommendation 7

The New Zealand Government should invest in research, evaluation, monitoring and reporting of the Smokefree Aotearoa 2025 Action Plan.

d). What else do you think is needed to strengthen New Zealand's tobacco control system? Please give reasons.

The proposed Smokefree Aotearoa 2025 Action Plan recommends the need to strengthen compliance and enforcement activity. However, this item is underdeveloped in the discussion paper. The proposed Smokefree Aotearoa 2025 Action Plan needs to further explore the scope of civil litigation and criminal litigation versus tobacco companies and e-cigarette companies. There is a need to consider law reform in New Zealand in order to provide accountability for tobacco liability.

Article 19 of the *WHO Framework Convention on Tobacco Control* 2003 highlights the role of tobacco liability.¹³⁶ Article 19 (1) provides: 'For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.'¹³⁷ Article 19 (2) states: 'Parties shall cooperate with each other in exchanging information through the Conference of the Parties in accordance with Article 21 including: (a) information on the health effects of the consumption of tobacco products and exposure to tobacco smoke in accordance with Article 20.3(a); and (b)

¹³⁶ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹³⁷ Ibid.

information on legislation and regulations in force as well as pertinent jurisprudence.’¹³⁸

Article 19 (3) provides: ‘The Parties shall, as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements, afford one another assistance in legal proceedings relating to civil and criminal liability consistent with this Convention.’¹³⁹ Article 19 (4) provides: ‘The Convention shall in no way affect or limit any rights of access of the Parties to each other’s courts where such rights exist’.¹⁴⁰ Article 19 (5) states: ‘The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article.’¹⁴¹ There have been recent discussions and webinars about the use of the judicial system to fight Big Tobacco.¹⁴²

There has been a pattern of Big Tobacco companies trying to circumvent, or exploit loopholes in respect of tobacco regulation. Dr Catherine Bond has reported that there have been enforcement and compliance issues in policing Australia’s plain packaging

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² ASH, ‘Tobacco Liability – WHO FCTC Article 19: Using the Judicial System to Fight Tobacco’, YouTube, 10 November 2020, <https://youtu.be/FWGI-roPTVk>

of tobacco products regime.¹⁴³ There is a need for suitable resources for enforcement and compliance to ensure that tobacco control measures are effective.

There has been notable civil litigation against tobacco companies. In Canada, there has been successful class actions against Big Tobacco in Quebec.¹⁴⁴ The trial judge condemned three cigarette manufacturers to pay moral and punitive damages under the regimes of extracontractual liability under the general law, the provisions of the Charter of human rights and freedoms, the Consumer Protection Act, the regime of manufacturer's liability.¹⁴⁵ The Court of Appeal upheld this landmark decision.¹⁴⁶ In response, the tobacco companies have sought to seek protection under the *Companies Creditors Arrangement Act*.

Given such developments, there is a need to consider whether there are adequate remedies for tobacco liability in New Zealand. In light of the tobacco companies response to litigation in Canada, there is also a need to ensure in New Zealand that tobacco companies cannot seek to avoid liability through the use and abuse of the bankruptcy system. There could also be scope for sanctions in respect of tobacco interference in New Zealand.

¹⁴³ Catherine Bond, 'Tobacco Plain Packaging in Australia: *JT International v Commonwealth and Beyond*', (2017) 17 (2) *QUT Law Review* 1-20.

¹⁴⁴ *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382; and on appeal *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

¹⁴⁵ *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382

¹⁴⁶ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

In addition to the civil liability of tobacco companies, there has also been a growing interest in criminal liability in respect of tobacco companies, and their directors.¹⁴⁷ The expansion of criminal offences – particularly under corporate law – raises interesting questions about the criminal responsibility of tobacco companies.¹⁴⁸

There has been waves of new litigation in respect of e-cigarettes and vaping in the United States.¹⁴⁹ Attorney-Generals in the United States have launched a series of actions against Juul over misleading and deceptive conduct; targeting youth and children; and defective products. For instance, in 2020, Massachusetts Attorney-General Maura Healey sued JUUL Labs Inc. for creating a youth vaping epidemic by intentionally marketing and selling its e-cigarettes to young people.¹⁵⁰ She commented:

JUUL is responsible for the millions of young people nationwide who are addicted to e-cigarettes, reversing decades of progress in combatting underage tobacco and nicotine use.

¹⁴⁷ ASH, 'Update: Dutch Criminal Case Against Tobacco Industry', 2019, <https://ash.org/update-dutch-criminal-case2019/>

¹⁴⁸ Australian Law Reform Commission, *Corporate Criminal Responsibility*, Sydney: Australian Law Reform Commission, Report 136, 2020.

¹⁴⁹ Lauren Etter, *The Devil's Playbook: Big Tobacco, JUUL, and the Addiction of a New Generation*, New York: Penguin Random House, 2021.

¹⁵⁰ Maura Healey, 'AG Healey Sues JUUL for Creating Youth Vaping Epidemic, Reveals New Facts About Campaign Targeting Young People: AG's Lawsuit Demands JUUL Pay for Cost of Public Health Crisis in Massachusetts', Press release, 12 February 2020, <https://www.mass.gov/news/ag-healey-sues-juul-for-creating-youth-vaping-epidemic-reveals-new-facts-about-campaign>

Our lawsuit sheds new light on the company's intent to target young people, and we are going to make them pay for the public health crisis they caused in Massachusetts.¹⁵¹

According to the lawsuit, JUUL's misconduct constitutes a public nuisance for which JUUL is liable to the state. The Attorney-General has sought restitution, damages, and penalties for JUUL's illegal conduct and an order requiring JUUL to abate the harm it has caused in Massachusetts. Moreover, there is a multi-district litigation taking place against Juul Labs.¹⁵² A laissez-faire approach to the regulation of e-cigarettes and vaping is inadvisable.

The *WHO Framework Convention on Tobacco Control* 2003 may also play a useful role in defending legal challenges to tobacco control measures.¹⁵³ Suzanne Zhou and her colleagues observed: 'The way the WHO FCTC has been cited in court decisions suggests that it has made a substantial contribution to courts' reasoning in tobacco control legal challenges and has strengthened governments' arguments in defending litigation'.¹⁵⁴

¹⁵¹ Ibid.

¹⁵² In re: Juul Labs, Inc. Marketing, Sales Practices & Products Liability Litigation
3:19-md-2913-WHO

¹⁵³ Suzanne Zhou, Jonathan Liberman and Evita Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2019) 28 *Tobacco Control* s113-s118 https://tobaccocontrol.bmj.com/content/28/Suppl_2/s113

¹⁵⁴ Ibid.

Recommendation 8

The New Zealand Government should provide for effective compliance and enforcement mechanisms for tobacco control measures in respect of the Smokefree Aotearoa 2025 Action Plan. The New Zealand Government should explore the need for law reform in respect of civil liability and criminal liability for tobacco companies.

FOCUS AREA 2: MAKE SMOKED TOBACCO PRODUCTS LESS AVAILABLE

a). Do you support the establishment of a licensing system for all retailers of tobacco and vaping products (in addition to specialist vaping retailers)?

X Yes ☐ No

Please give reasons:

The tobacco industry has often sought to oppose new tobacco control measures on the basis that such measures would allegedly have an adverse impact upon small businesses and retailers. Such rhetoric was apparent during the various legal and public policy debates over plain packaging of tobacco products. It was evident that the claims of Big Tobacco and its front claims were wildly exaggerated and overstated. Likewise, the tobacco industry has often made overblown claims about the threat of illicit trade in tobacco products – during the debate over tobacco control measures.

Lindsay Robertson and colleagues have sought to provide counter-arguments to the industry claims about the Smokefree Aotearoa 2025 Action Plan.¹⁵⁵ They conclude: ‘The NZ Government’s bold and world-leading proposals to reduce tobacco retail availability give us a realistic prospect of achieving the Smokefree 2025 goal.’¹⁵⁶

¹⁵⁵ Lindsay Robertson, Janet Hoek, Richard Edwards, George Thomson, and Louise Marsh, ‘Reducing tobacco retail availability: counterarguments to industry claims’, *Public Health Expert*, 10 May 2021, <https://blogs.otago.ac.nz/pubhealthexpert/reducing-tobacco-retail-availability-counterarguments-to-industry-claims/>

¹⁵⁶ Ibid.

Robertson and company comment: ‘Independent evidence suggests retail associations have exaggerated claims of tobacco’s importance to small retailers; this evidence casts doubt on claims that most small retailers rely on being able to sell tobacco.’¹⁵⁷ Robertson and colleagues observe: ‘Unlike tobacco companies, many retailers could benefit from reductions in tobacco availability, which would reduce their risk from crime and provide them with opportunities to transition to products that make stronger contributions to their businesses and their communities.’¹⁵⁸

The reduction of tobacco retail availability will help small businesses and retailers to transition to selling healthy products.

Recommendation 9

New Zealand should establish a licensing system for all retailers of tobacco and vaping products. New Zealand should also encourage retailers to shift towards the sale of healthy products.

b). Do you support reducing the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density?

X Yes ☐ No

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

The work of Becky Freeman and Suzan Burton has highlighted the need for policy innovation in reducing tobacco retail density.¹⁵⁹ Freeman and Burton stressed: ‘It is essential to challenge the existing retail sales environment, which sees tobacco sold ubiquitously alongside everyday household items’.¹⁶⁰ They observed: ‘Framing tobacco retail policies as assisting former smokers to remain abstinent is entirely in line with the highly successful approaches Australia already employs to reduce the health burden of tobacco use.’¹⁶¹

The New Zealand College of Public Health Medicine strongly supported the proposal to establish a licensing system for retailers of tobacco and vaping products as part of the strategy to reduce tobacco product availability:

We note that the unregulated sale of tobacco products in New Zealand means that tobacco products are widely available, including at locations that are close to schools, with the highest concentration in areas of high deprivation. Evidence shows that availability of retail outlets supplying tobacco may be a factor influencing smoking: for example, amongst adolescents, and those attempting to quit. Controlling the number of retailers may help reduce smoking in these groups.¹⁶²

¹⁵⁹ Becky Freeman and Suzan Burton, ‘Tobacco Retail Density: Still The New Frontier in Tobacco Control’ (2018) 208 (5) *The Medical Journal of Australia* 203-204.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² New Zealand College of Public Health Promotion, ‘Submission to the Ministry of Health: Proposals for a Smokefree Aotearoa 2025 Action Plan’, 2021 https://nzcphm.org.nz/media/145241/nzcphm_submission_smokefree_2025_action_plan.pdf

The college observed that ‘Licensing will allow for caps to be placed on the number of retailers able to service a particular area’.¹⁶³ Moreover, the College commented: ‘Licensing will help to ensure compliance with age restrictions on purchase, as a retailer can be threatened with loss of licence for non-compliance, and will allow for research into tobacco availability and distribution.’¹⁶⁴

Recommendation 10

The New Zealand Government should reduce the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density.

c). **Do you support reducing the retail availability of tobacco by restricting sales to a limited number of specific store types (eg, specialist R18 stores and/or pharmacies)?**

X Yes ☐ No

The New Zealand College of Public Health Promotion also called for a reduction in the retail availability of tobacco:

We strongly support measures to reduce the number and density of tobacco retailers aimed at reducing availability of and exposure to smoked tobacco products. This is an essential component in the Action Plan, and could result in rapid, profound and sustained reductions in smoking prevalence. We note that research published in 2020 showed a total of 5243 tobacco retail outlets in New Zealand. This is the equivalent of one tobacco outlet per 800 residents,

¹⁶³ Ibid.

¹⁶⁴ Ibid.

or one tobacco outlet per every 115 smokers. This widespread availability normalises smoking and undermines smokefree initiative.¹⁶⁵

The college argues that ‘Reducing the availability of tobacco products through reducing the number of suppliers is likely to have a direct impact on smoking prevalence.’¹⁶⁶

Recommendation 11

The New Zealand Government should reduce the retail availability of tobacco by restricting sales to a limited number of specific store types.

d). Do you support introducing a smokefree generation policy?

X Yes ☐ No

It should be noted that the WTO Panel Decision and the WTO Appellate Body Decision dealing with Australia’s plain packaging of tobacco products discussed the alternative tobacco control option of age limitations in respect of smoking.¹⁶⁷

¹⁶⁵ New Zealand College of Public Health Promotion, ‘Submission to the Ministry of Health: Proposals for a Smokefree Aotearoa 2025 Action Plan’, 2021 https://nzcphm.org.nz/media/145241/nzcphm_submission_smokefree_2025_action_plan.pdf

¹⁶⁶ Ibid.

¹⁶⁷ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, (28 June 2018); and *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R, (9 June 2020).

In Australia, there has been a proposal for a smokefree generation law in Tasmania. There was a private member's bill put forward – the *Public Health Amendment (Tobacco Free Generation) Bill* 2014 (Tas). The sponsor of the bill

A parliamentary committee published a report on the *Public Health Amendment (Tobacco Free Generation) Bill* 2014 (Tas) in 2016.¹⁶⁸ The Committee made several findings. First, the committee noted that ‘there does not appear to be any significant legal impediment to the operation of the Bill in delivering the policy intent.’¹⁶⁹ Second, the committee observed that ‘the Parliament should take a measured and cautious approach in considering a Bill which could limit or ‘extinguish’ fundamental rights relating to age, equality and liberty.’¹⁷⁰ Third, the Committee said: ‘The Bill raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/tourists’.¹⁷¹ Rather peculiarly, the Committee noted: ‘The proposer of the Bill may wish to give consideration to amendment of the Bill to avoid negative impacts on tourism.’¹⁷² Fourth, the Committee noted: ‘Should the Bill be supported, appropriate education programs would be required to effectively implement the Bill.’¹⁷³ The

¹⁶⁸ Legislative Council Government Administration Committee “A”, *Report on Public Health Amendment (Tobacco Free Generation) Bill 2014*, Parliament of Tasmania, 2016, <https://www.parliament.tas.gov.au/ctee/Council/Reports/gaa.inq.tfg.rep.160701.FinalReport.jm.004.pdf>

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

Committee commented: ‘This would incur a cost and would be a matter for the Government of the day.’¹⁷⁴

In 2017, the Tasmanian Government responded to the committee report on the bill.¹⁷⁵ The Minister for Health commented: ‘After careful consideration, the Government decided not to proceed with any change to the minimum smoking age.’¹⁷⁶

In 2018, the Hon. Ivan Dean introduced a new piece of smokefree generation legislation, the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill 2018* (Tas). In his second reading speech, Dean discussed his ambitions behind the legislation.¹⁷⁷ He commented:

Its purpose is to raise the minimum legal age to 21 for people to whom tobacco and other smoking products can be sold (T21). This is often referred to as the minimum legal sales age (MLSA). This important measure that I am proposing today is an additional tool to prevent the uptake of youth smoking by removing the peer network of tobacco supply out of our schools. It supports an already impressive tobacco control scheme in Tasmania, that we as legislators have fought for and built up over many years. However, despite our comprehensive

¹⁷⁴ Ibid.

¹⁷⁵ The Hon. Michael Ferguson, ‘Government Response to *Report on Public Health Amendment (Tobacco Free Generation) Bill 2014*’, Government of Tasmania, 31 January 2017, <https://www.parliament.tas.gov.au/ctee/Council/Reports/gaa.tfg.govtresponse.ne.001.pdf>

¹⁷⁶ Ibid.

¹⁷⁷ The Hon. Ivan Dean, ‘Second Reading Speech on the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill 2018*’, Parliament of Tasmania, 2018, https://www.parliament.tas.gov.au/bills/Bills2018/pdf/notes/45_of_2018-SRS.pdf

tobacco control plan, Tasmania still has the second highest smoking rates of any State or Territory in the country. That is why we must continue to take action to reduce tobacco consumption in Tasmania, to move us out of the rut we find ourselves in and protect our next generation from the significant health risks associated with smoking.¹⁷⁸

As can be seen from the speech, the legislation in part was promoted by Tasmania's comparatively high smoking rates compared to the rest of the country.

In the meantime, a number of United States locations passed T21 laws – including Needham (a town in Boston, Massachusetts), New York, and California.¹⁷⁹ Since 2020, the smoking age in all U.S. states, territories and the District of Columbia has been lifted to 21. The Menzies Research Institute in Tasmania examined eight scientific studies on T21 in the US – with five showing reduced smoking rates. Dr Seana Gall commented: 'It's quite varied because of the differences in study design.'¹⁸⁰ She observed: 'The studies that found that it had a significant effect on smoking prevalence were those that were the most robust.'¹⁸¹ Dr Gall said that the research found people aged 21 and over were less likely to supply cigarettes to minors than those aged 18 to

¹⁷⁸ Ibid.

¹⁷⁹ Alison Costelloe, 'Tasmania Could Become The First State in Australia to Raise Smoking Age to 21', *ABC News*, 11 January 2021, <https://www.abc.net.au/news/2021-01-11/legal-smoking-age-of-21-in-tasmania-increase-laws/13045672>

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

20: 'It's creating a bigger gap between those people who are sort of experimenting with smoking and those people who can actually legally purchase the cigarettes.'¹⁸²

However, the Coalition Government in Tasmania refused in the end to support the proposal in 2021. Jeremy Rockliff, the Minister for Mental Health and Wellbeing, commented that 'the Government will not be supporting Mr Dean's T21 bill, but will instead create a smoking prevention package targeted at young people in Year 6 and up.'¹⁸³ He instead said the Government would support education campaigns: 'We know the average age people start experimenting with smoking in Australia is 16, so the package will focus on ensuring young people have the information they need to make an informed decision on all the reasons why they shouldn't take up the addictive substance by that age.'¹⁸⁴ In the end, both the Liberal Government and the Labor Opposition voted against smokefree generation laws in Parliament.¹⁸⁵ The bill was voted down 11 to 3 in the Legislative Council. Kathryn Barnsley reflected: 'An innovative legislative reform in Tasmania, Australia has been defeated, after what

¹⁸² Ibid.

¹⁸³ Jeremy Rockliff, 'Youth focus in smoking prevention package,' Press Release, Tasmanian government, 1 March 2021, http://www.premier.tas.gov.au/site_resources_2015/additional_releases/youth_focus_in_smoking_prevention_package

¹⁸⁴ Ibid.

¹⁸⁵ Rob Inglis, 'Tasmania's T21 bill: push to raise legal purchasing age for cigarettes fails', *Examiner*, 24 March 2021, <https://www.examiner.com.au/story/7180475/disappointed-push-to-raise-legal-purchasing-age-for-cigarettes-fails/>

appears to be tobacco industry interference via third parties, with support from vaping lobby groups.’¹⁸⁶

In a joint statement, Honourable Independent Member Ivan Dean, Minderoo Foundation, Lung Foundation Australia, and SmokeFree Tasmania said they were disappointed by the government’s decision to reject T21 law and instead do ‘more of the same’.¹⁸⁷ The Honourable Independent Member Ivan Dean MLC commented: ‘Tasmania’s smoking rates remain some of the worst nationally, and it is our responsibility as legislators to take action to protect our youth from a deadly, lifelong addiction.’¹⁸⁸ He warned: ‘To do nothing on this issue is robbing our kids of their potential and future’.¹⁸⁹ Minderoo Foundation’s Collaborate Against Cancer CEO Dr Steve Burnell, said: ‘Removing easy access from our kids is more important than ever given the tobacco industry’s devious promotion of vaping pens and flavours, which is driving the e-smoking epidemic affecting young people around the world.’¹⁹⁰ Lung Foundation Australia, CEO Mark Brooke said: ‘There is good reason to rethink the

¹⁸⁶ Kathryn Barnsley ‘Australia: Big Tobacco Wins in Defeat of T21 Age Bill’, *BMJ Tobacco Control*, 2 April 2021, <https://blogs.bmj.com/tc/2021/04/02/australia-big-tobacco-wins-in-defeat-of-t21-age-bill/>

¹⁸⁷ Minderoo Foundation, ‘Government’s Rejection of Tobacco21 Legislation Puts Young Tasmanians at Risk of Nicotine Addiction’, Press Release, 4 March 2021, <https://www.minderoo.org/tobacco21/news/governments-rejection-of-tobacco21-legislation-puts-young-tasmanians-at-risk-of-nicotine-addiction/>

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

sales age for tobacco and take measures that prevent young people from becoming addicted to nicotine.’¹⁹¹ He noted: ‘Local T21 policies are proven to produce a substantive reduction in smoking among 18-to 20-year-olds in jurisdictions which have implemented the policy measure.’¹⁹² SmokeFree Tasmania’s Dr Kathryn Barnsley commented: ‘With high smoking rates in Tasmania and prevention programs to date not making a dent, it is a great shame that the government is not willing to step up to protect the health of young Tasmanians.’¹⁹³

Meanwhile, in 2021, Singapore has raised the minimum legal age for smoking to 21.¹⁹⁴ This is a consequence of amendments to the *Tobacco (Control of Advertisements and Sale) Act*, which were passed in Parliament in November 2017. The Ministry of Health in Singapore noted that ‘Tobacco use is one of the highest contributors to ill health and premature death in Singapore.’¹⁹⁵ The Ministry observed that tobacco is ‘associated with cancers, ischaemic heart disease, stroke, lung disease and many other diseases.’¹⁹⁶

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ng Keng Gene, ‘Minimum legal age for smoking raised to 21 from tomorrow’, *The Straits Times*, 31 December 2020, <https://www.straitstimes.com/singapore/minimum-legal-age-for-smoking-raised-to-21-from-tomorrow>

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

In light of the intransigence of the Tasmanian Government, there is an opportunity for the more progressive New Zealand to investigate smokefree generation laws – like the United States and Singapore. Jude Ball and their collaborators contend:

The Tobacco Free Generation policy, if implemented as part of a comprehensive tobacco end-game strategy, has enormous potential to help ensure the smokefree goal is not only achieved but maintained long term. It is likely to reduce ethnic smoking disparities and provides a straightforward approach to phasing out tobacco sales. Harnessing grassroots support from children and young people who want a tobacco-free future will greatly help in the framing of Tobacco Free Generation as a positive step for Aotearoa/New Zealand.¹⁹⁷

Ball and colleagues comment: ‘Internationally, Tobacco Free Generations is being advocated by grassroots coalitions of doctors, medical students and youth leaders, and has been endorsed by numerous public health bodies including the British and Norwegian Medical Associations and the 16th World Conference on Tobacco Or Health.’¹⁹⁸

Recommendation 12

The New Zealand Government should follow the lead of the United States and Singapore, and introduce a smokefree generation policy.

¹⁹⁷ Jude Ball, Jon Berrick, Richard Edwards, Janet Hoek, and Frederieke Petrovic-van der Deen, ‘Phasing out smoking: The Tobacco-Free Generation policy’, *Public Health Expert*, 14 May 2021, <https://blogs.otago.ac.nz/pubhealthexpert/phasing-out-smoking-the-tobacco-free-generation-policy/#more-13842>

¹⁹⁸ Ibid.

e). Are you a small business that sells smoked tobacco products?

☐ Yes ☒ No

Recommendation 13

The New Zealand Government should encourage retailers and small businesses to stop selling smoked tobacco products, and instead diversify into the sale of healthier products.

FOCUS AREA 3: MAKE SMOKED TOBACCO PRODUCTS LESS ADDICTIVE AND LESS APPEALING

a). Do you support reducing the nicotine in smoked tobacco products to very low levels?

X Yes ☐ No

The New Zealand Government is considering the reduction of nicotine in smoked tobacco products to very low levels.

In his book *Golden Holocaust*, Robert Proctor recommends the reduction of nicotine content of cigarettes:

Nicotine is the sine qua non of all tobacco addiction. And if we can take safrole out of root beer and lead out of paint and asbestos out of insulation, then surely we can take nicotine out of cigarettes. This is not hard from a manufacturing point of view... and few people will continue to smoke without this deadly hooker.¹⁹⁹

Proctor observed that ‘cigarettes with dramatically reduced nicotine in the rod... would no longer have the power to create and sustain addiction.’²⁰⁰

¹⁹⁹ Robert Proctor, *The Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition*, Berkeley: University of California Press, 2011, 553.

²⁰⁰ Ibid. 553.

The regulatory impact statement also discusses restricting the use of menthols and other additives. New Zealand elevate this policy issue to part of its package of proposals for a smokefree Aotearoa. The new United States President Joe Biden has been focused upon supporting research and public policy action to address cancer. As part of this strategy, the Biden Administration has promised to introduce product standards to ban menthol as a characterizing flavor in cigarettes; and ban all characterizing flavors in cigars. Acting Food and Drug Administration Commissioner Janet Woodcock observed:

Banning menthol—the last allowable flavor—in cigarettes and banning all flavors in cigars will help save lives, particularly among those disproportionately affected by these deadly products. With these actions, the FDA will help significantly reduce youth initiation, increase the chances of smoking cessation among current smokers, and address health disparities experienced by communities of color, low-income populations, and LGBTQ+ individuals, all of whom are far more likely to use these tobacco products.²⁰¹

Woodcock commented: ‘We believe these actions will launch us on a trajectory toward ending tobacco-related disease and death in the United States.’²⁰² After the lack of progress of the Trump Administration on tobacco control, the focus of the Biden Administration on tobacco control reforms in the United States is pleasing and welcome. As part of its broad mission to reduce the incidence of cancer, the Biden

²⁰¹ United States Food and Drug Administration, ‘FDA Commits to Evidence-Based Actions Aimed at Saving Lives and Preventing Future Generations of Smokers’, Press Release, 29 April 2021, <https://www.fda.gov/news-events/press-announcements/fda-commits-evidence-based-actions-aimed-saving-lives-and-preventing-future-generations-smokers>

²⁰² Ibid.

Administration has a unique opportunity to assist the World Health Organization in tackling the global tobacco epidemic.

The New Zealand Government should also move to regulate flavored tobacco products – such as the characterising flavor of menthol.

Recommendation 14

The New Zealand Government should support reducing the nicotine in smoked tobacco products to very low levels. The New Zealand Government should also prohibit the use of menthol in tobacco products.

b). Do you support prohibiting filters in smoked tobacco products?

X Yes ☐ No

Professor Janet Hoek and her colleagues have discussed the benefits of prohibiting filters in smoked tobacco products.²⁰³ They have observed:

In summary, banning the sale of filters and filtered cigarettes would address a persistent consumer fraud that has deceived generations of smokers, and reduce the tobacco industry's ability to develop product innovations that sustain its profits at the expense of human health. This measure would also remove a ubiquitous source of toxic plastic waste from our

²⁰³ Janet Hoek, Phil Gendall, Tom Novotny, Nick Wilson, Lindsay Robertson, Richard Edwards, and James F Thrasher, 'The Case for Banning Cigarette Filters: Addressing a Consumer Fraud, Smoking Decoy and Environmental Hazard', *Public Health Expert*, 17 May 2021, <https://blogs.otago.ac.nz/pubhealthexpert/the-case-for-banning-cigarette-filters-addressing-a-consumer-fraud-smoking-decoy-and-environmental-hazard/>

environment. Disallowing filters would support the 2025 Smokefree Goal, reinstate New Zealand as a global public health leader, and illustrate a much-needed commitment to protecting our environment.²⁰⁴

Hoek and her collaborators suggest: ‘Recent commentaries suggest treating filters as additives could allow bans to be introduced using existing regulations and would simplify the introduction of this measure.’²⁰⁵

Recommendation 15

The New Zealand Government should support prohibiting filters in smoked tobacco products.

c). Do you support allowing the Government to prohibit tobacco product innovations through regulations?

X Yes ☐ No

Big Tobacco often seek avoid and circumvention tobacco control measures through so-called product innovations, and new marketing strategies and tactics. The New Zealand Government would be wise to retain the flexibility of prohibiting product innovations through regulations. As the regulatory impact statement notes, ‘including a broad regulatory power to prohibit product innovations would substantively remove the ability of manufacturers to innovate or develop ways to sidestep regulatory measures.’ The regulatory impact statement envisages that ‘this power could cover additives,

²⁰⁴ Ibid.

²⁰⁵ Ibid.

ingredients, manufacturing methods, types of wrappers and inclusions on or with cigarettes or designed to be used with cigarettes.'

Recommendation 16

The New Zealand Government should have the flexibility of prohibiting tobacco product innovations through regulations.

FOCUS AREA 4: MAKE TOBACCO PRODUCTS LESS AFFORDABLE

a). Do you support setting a minimum price for all tobacco products?

X Yes ☐ No

Please give reasons:

Article 6 of the *WHO Framework Convention on Tobacco Control* 2003 highlights the importance of price and tax measures to reduce the demand for tobacco.²⁰⁶ Article 6 (1) provides: ‘The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.’²⁰⁷ Article 6 (2) provides: ‘Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include: (a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and (b) prohibiting or restricting, as appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products.’²⁰⁸ Article 6 (3) provides: ‘The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties, in accordance with Article 21.’²⁰⁹

²⁰⁶ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

The Smokefree Aotearoa 2025 Action Plan notes that ‘making all tobacco products less affordable has been an important part of the tobacco control programme and has contributed to the reduction in smoking rates and tobacco consumption.’ The Plan notes that ‘setting a minimum price for tobacco would support existing excise tax measures.’ Such a regime would aim ‘to prevent manipulation of retail margins to reduce the impact of any excise increases on low-end products, thus undermining the impact of price increases on smoking rates.’

Arguably, there should be a greater focus on taxation in the proposals for a Smokefree Aotearoa 2025 Action Plan. While the Regulatory Impact Statement discusses taxation quite a bit, there is surprisingly little focus on the topic in the discussion paper. This is particularly strange given the focus in the *WHO Framework Convention on Tobacco Control* 2003 on economic measures relating to the reduction of demand for tobacco.

The World Health Organization has recently published a technical manual on tobacco tax policy and administration.²¹⁰ This report made the conclusion: ‘The evidence is clear: significant increases in excise taxes that lead to price increases have consistently proven to be the most effective, as well as the most cost-effective, mechanism for reducing tobacco consumption’.²¹¹ The report lamented: ‘Despite this undeniable fact,

²¹⁰ World Health Organization, *WHO Technical Manual On Tobacco Tax Policy and Administration*, Geneva: World Health Organization, 2021, <https://www.who.int/publications/i/item/9789240019188#.YHauDi8COyg.twitter>

²¹¹ Ibid.

tobacco tax increases remain the least implemented policy in the package of effective tobacco control policies globally.’²¹²

In the United States, lawmakers led by Senator Dick Durbin have pressed the Biden administration to support a tobacco tax equity act.²¹³ The legislative bill included measures to close tax loopholes exploited by the tobacco industry, establishing a new tax on e-cigarettes, and increasing the tobacco tax rate. The law-makers observed:

This policy [*Tobacco Tax Equity Act*] would generate tens of billions of dollars that could be used to fund the vital programs outlined in the American Jobs and Families Plans. Further, such a policy change would reduce health care spending and safeguard millions of Americans, especially youth, from tobacco addiction, illness, and death. The policy of raising and rationalizing taxes on tobacco and nicotine products is endorsed by top public health and medical organizations, and presents a win-win opportunity for your agenda. We urge your support for this policy within legislative negotiations.²¹⁴

The lawmakers commented: ‘According to the Centers for Disease Control and Prevention and U.S. Surgeon General, increasing the price of tobacco products is the single most effective way to reduce tobacco use.’²¹⁵

²¹² Ibid.

²¹³ Senator Dick Durbin, ‘Durbin, Wyden, Krishnamoorthi, DeLauro Press Biden Administration To Support Tobacco Tax Equity Act’, United States Congress, 17 May 2021, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-wyden-krishnamoorthi-de-lauro-press-biden-administration-to-support-tobacco-tax-equity-act>

²¹⁴ Ibid.

²¹⁵ Ibid.

There has been growing concern about the issue of the issue of avoidance and evasion of taxes on tobacco products in the Asia-Pacific Region. It is notable that a court in Thailand fined Philip Morris for tax evasion in 2019.²¹⁶ There have been allegations that the big four transnational companies – British American Tobacco, Imperial Brands, Japan Tobacco International and Philip Morris – have engaged in aggressive tax avoidance strategies.²¹⁷ Dr Rob Branston, an economist with the University of Bath's Tobacco Control Research Group and the School of Management observed:

The complicated corporate structures and the tax avoidance methods employed by these giant tobacco companies is astounding. They earn massive profits but very little of that ends up being paid in tax. All governments need to update their tax laws so that these companies, profiting from the sale of a deadly product, can no longer use loopholes to avoid paying tax.²¹⁸

Journalist Stefan Vermeulen from the Investigative Desk in the Netherlands, said: ‘The Big Four have been involved in tax disputes in at least 11 countries over the last decade, leading to claims by tax authorities of up to €1.2bn.’²¹⁹ He noted: ‘So far, the courts, in the main, have found in favour of the companies.’²²⁰ The journalist observed that ‘This

²¹⁶ The Associated Press, ‘Thai Court Fines Philip Morris \$39.7 Million for Tax Evasion’, *ABC News*, 29 November 2019, <https://abcnews.go.com/International/wireStory/thai-court-fines-philip-morris-397-million-tax-67381036>

²¹⁷ University of Bath, ‘Big Tobacco, Big Avoidance’, Press Release, 5 November 2020, <https://www.bath.ac.uk/announcements/big-tobacco-big-avoidance/>

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

suggests that the Big Four are not necessarily breaking the law, but nor are they complying with the spirit of tax laws and the OECD guidelines.’²²¹

The New Zealand Government should undertake an investigation into the tax practices of tobacco companies and e-cigarette companies, and take appropriate law enforcement action, in the case of any tax evasion.

Recommendation 17

The New Zealand Government should increase the tobacco tax rate, establish a new tax on e-cigarettes, as well as set a minimum price for tobacco products. The New Zealand Government should also look to take action in respect of any tax evasion by tobacco companies and e-cigarette companies.

²²¹ Ibid.

FINAL QUESTIONS

- a). **Of all the issues raised in this discussion document, what would you prioritise to include in the action plan? Please give reasons.**
- b). **Do you have any other comments on this discussion document?**

In Australia, there has been much policy innovation in respect of smoke-free spaces. The Cancer Council Queensland and the Queensland Government, for instance, have been very much focused on smoke-free spaces (including public spaces, workplaces, and rental homes).

George Thomson and Nick Wilson have commented that the New Zealand Government should focus on smoke-free outdoor areas.²²² They observed:

The Government's plan needs a fifth specific focus area – smoking denormalisation and smokefree areas. Legally required smokefree outdoor areas are far from 'business-as-usual' for NZ. While many local authorities have tried to fill the void left by central government, existing local smokefree outdoor policies are largely unenforceable, with only a few areas on public land covered by council licence arrangements in some cities. Local Government New Zealand has been asking for national legislation for smokefree outdoor hospitality areas since 2015.²²³

²²² George Thomson and Nick Wilson, 'Smokefree outdoor areas: A missing part of Government's new Smokefree 2025 proposals', *Public Health Expert*, 22 April 2021, <https://blogs.otago.ac.nz/pubhealthexpert/smokefree-outdoor-areas-a-missing-part-of-governments-new-smokefree-2025-proposals/>

²²³ Ibid.

Thomson and Wilson suggest that we could ‘better help those quitting, by providing smokefree outdoor areas.’²²⁴

Recommendation 18

The New Zealand Government should include smoke-free policies in its Smokefree Aotearoa 2025 Action Plan.

²²⁴ Ibid.

4. TOBACCO DIVESTMENT

The *WHO Framework Convention on Tobacco Control* 2003 calls for member states to adopt a comprehensive array of public health measures to address globalisation of the tobacco epidemic.²²⁵ Article 5.3 of the guidelines state ‘Government institutions and their bodies should not have any financial interest in the tobacco industry, unless they are responsible for managing a Party’s ownership interest in a State-owned tobacco industry’.²²⁶

New Zealand has also been a leader in tobacco divestment. In 2007, the New Zealand Superannuation Fund excluded investment from companies directly involved in the manufacture of tobacco products. The Fund published background information for tobacco stocks divestment.²²⁷ The Fund observed:

Based on the Guardians’ assessment, the Board decided to divest tobacco stocks from the Fund. Although the Guardians consider the active use of shareholder rights through engagement and voting to be the main mechanism for responding to responsible investment concerns, in the case of tobacco stocks such efforts would not be cost effective, and would risk the Fund being conflicted. Considering Crown action internationally, and at the domestic level, the unusual characteristics of the tobacco industry, particularly with regard to product safety and ethics, and the effectiveness of different shareholder responses, the Guardians

²²⁵ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

²²⁶ Ibid.

²²⁷ New Zealand Superannuation Fund, ‘Background Information for Tobacco Stocks Divestment’, 23 October 2007 <https://www.nzsuperfund.nz/assets/documents-sys/Responsible-Investment-Background-Information-Tobacco-Divestment-231007.pdf>

concluded that divestment and exclusion of the Fund's tobacco holdings would be the most effective response.²²⁸

The fund noted: 'The main aim of tobacco companies, and indirectly their shareholders, is to grow sales revenue from tobacco products, through expanding and renewing the customer base'.²²⁹ The fund observed: 'This is contrary to New Zealand's objectives under the FCTC which aims to significantly reduce the prevalence of tobacco use.'²³⁰

The New Zealand Superannuation Fund elaborates upon its tobacco divestment in an interview with Tobacco Free Portfolios.²³¹ The Guardians' Former Chief Executive Officer, Mr Adrian Orr, observed: 'In assessing the issue of tobacco manufacture, the Board concluded that the Fund's investment in this sector was inconsistent with our responsible investment standards.'²³² Orr commented: 'This decision was based on product safety issues and New Zealand's commitment to specific international conventions.'²³³

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Tobacco Free Portfolios, *Tool-Kit – Twelfth Edition*, 28 January 2021, <https://tobaccofreeportfolios.org/wp-content/uploads/2021/02/TFP-Toolkit-12th-Edition-January-28-2021-1.pdf>

²³² Ibid.

²³³ Ibid.

As of 2021, the New Zealand Superannuation Fund provides for exclusions of companies directly involved in the following activities: the manufacture of cluster munitions; the manufacture or testing of nuclear explosive devices (NEDs); the manufacture of anti-personnel mines; the manufacture of tobacco; the processing of whale meat; recreational cannabis; and the manufacture of civilian automatic and semi-automatic firearms, magazines, or parts.²³⁴

Australia has engaged in tobacco divestment as well (often lagging behind New Zealand).²³⁵

There has also been a push to encourage superannuation funds and health funds to adopt tobacco divestment policies. Dr Bronwyn King and her civil society organisation Tobacco Free Portfolios have been persuasive in encouraging the finance sector to commit to tobacco divestment policies.²³⁶ The New Zealand branch of ANZ ceased investing in tobacco in 2016. The Bank of New Zealand ceased lending to and investing

²³⁴ New Zealand Superannuation Fund, 'Exclusions', <https://www.nzsuperfund.nz/how-we-invest/responsible-investment/exclusions/>

²³⁵ Matthew Rimmer, 'No Future?: End the Future Fund's Affair with Big Tobacco', *The Conversation*, 13 September 2012, <https://theconversation.edu.au/no-future-end-the-future-funds-affair-with-big-tobacco-9315>; and Matthew Rimmer, 'Future Fund Drops Tobacco: Should Fossil Fuels be Next?', *The Conversation*, 28 February 2013, <https://theconversation.edu.au/future-fund-drops-tobacco-should-fossil-fuels-be-next-12337>

²³⁶ Bronwyn King, Clare Payne, and Emily Stone, 'Tobacco-Free Investment: Harnessing the Power of the Finance Industry in Comprehensive Tobacco Control' (2017) 17 (2) *QUT Law Review* 161-174, <https://lr.law.qut.edu.au/article/view/699> and Tobacco Free Portfolios, <https://tobaccofreeportfolios.org/>

in tobacco in 2017. ASB Bank – the New Zealand Bank – ceased investing in tobacco in 2018. Asset managers – Russell Investments – adopted tobacco-free policies in 2017.

There should be a further expansion of tobacco divestment policies in New Zealand and elsewhere – across the government, the corporate sector, and civil society.

Recommendation 19

The New Zealand Government, the corporate sector, and civil society should further expand tobacco divestment policies.

5. TOBACCO INTERFERENCE

The *WHO Framework Convention on Tobacco Control* 2003 also emphasizes the importance of policy-making being free from tobacco interference.²³⁷ Article 5 (3) provides: ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’²³⁸

In February 2021, Dr Adriana Blanco Marquizo – the head of the WHO Framework Convention on Tobacco Control Secretariat - considered the global push to develop tobacco endgame proposals.²³⁹ She observed:

When the *WHO Framework Convention on Tobacco Control* – the WHO FCTC as we call it – was negotiated and adopted, there were many countries with minimal or non-existent tobacco control plans and regulations. Therefore, at that point, thinking of an endgame seemed like a faraway prospect. Still, Article 2.1 of the *Convention* recognized that some Parties might reach a point at which they would need to go beyond. In fact, some of the guidelines for the implementation of the *Convention* also reflected this reality.²⁴⁰

²³⁷ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

²³⁸ Ibid.

²³⁹ Adriana Blanco Marquizo, ‘Tobacco Endgame – Spain – Webinar by Action on Smoking and Health’, WHO Framework Convention on Tobacco Control, 11 February 2021, <https://www.who.int/fctc/secretariat/head/statements/2020/tobacco-endgame-ash-webinar/en/>

²⁴⁰ Ibid.

Marquizo observed: ‘The tobacco endgame is defined as reaching a prevalence of tobacco use below 5%.’²⁴¹ However, her view is ‘that this goal should be only a first target of an endgame because 5% is still a huge number of people for the biggest countries.’²⁴²

Dr Adriana Blanco Marquizo developed a framework to consider tobacco endgame proposals. First, she said that ‘endgame strategies should be supported by science, as would any other measure in the WHO FCTC.’²⁴³ Secondly, ‘the strategies should be adequate and feasible, taking into consideration what might be appropriate tobacco control measures in a particular culture.’²⁴⁴ She noted: ‘There should not be a one-size-fits-all recommendation, but rather a menu of options that can be tailored as needed.’²⁴⁵ Thirdly, Marquizo stressed that ‘it is very important that we ensure that the endgame is not a trap for poor or minority populations, which are becoming an increasingly large percentage of global tobacco users.’²⁴⁶ She emphasized: ‘We need to focus our efforts on providing those that are in the most vulnerable situations with the means to quit so that no one is left behind’.²⁴⁷ In her view, ‘The WHO FCTC reaffirms the right of all people to the highest attainable standard of health.’²⁴⁸ Fourth, Marquizo comments: ‘My

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

fourth point concerns the need for a multisectoral approach that engages all sectors – not only the health sector – and ensures a whole-of-society approach, with civil society as the catalytic force behind this effort.’²⁴⁹ Fifth, Marquizo warns of the danger of tobacco interference: ‘We cannot allow ourselves to be fooled by the tobacco industry and those who work to further its interests.’²⁵⁰ She warned: ‘The industry will be more aggressive than ever before in trying to stop these initiatives, arguing about the importance of tobacco for economic well-being, a misconception that we all know is simply false.’²⁵¹ Marquizo also highlighted the need for local adaptation of tobacco endgame strategies: ‘My final message is this: think about what the appropriate measures for your country are, and then implement the WHO FCTC to the extent possible – and go beyond it if you can.’²⁵²

Mike Daube and Raglan Maddox have warned specifically of the dangers of tobacco interference in respect of New Zealand’s tobacco endgame proposals: ‘The international tobacco companies are not as powerful there as in many other countries (even though they will inevitably bring in their big battalions); the tawdry tactics of tobacco lobbyists and front groups have recently been well exposed in the media; and even the tobacco companies’ own documents show that nowadays they are having

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

trouble attracting good staff.’²⁵³ Accordingly, the New Zealand Government should contemplate the use of sanctions to deter and ward off tobacco interference.

Recommendation 20

The New Zealand Government needs to ensure that its tobacco endgame measures – and its proposals for Smokefree Aotearoa 2025 Plan - are safeguarded against the threat of tobacco interference.

²⁵³ Mike Daube and Raglan Maddox, ‘Impossible Until Implemented: New Zealand Shows The Way’, (2021) *Tobacco Control*
<https://tobaccocontrol.bmj.com/content/early/2021/05/23/tobaccocontrol-2021-056776>

BIOGRAPHY

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Business and Law, at the Queensland University of Technology (QUT). He has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, Indigenous Intellectual Property, and intellectual property and trade. He is undertaking research on intellectual property and 3D printing; the regulation of robotics and artificial intelligence; and intellectual property and public health (particularly looking at the coronavirus COVID-19). His work is archived at QUT ePrints, SSRN Abstracts, Bepress Selected Works, and [Open Science Framework](#).

Rimmer is a chief investigator of the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (CREATE) (2020-2025). He is a co-director of the legal project of the research network. He is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He is the co-author of the influential article 'The Case for the Plain Packaging of Tobacco Products' (2008), which has been a high impact piece of research and public policy in Australia and the world. Rimmer has undertaken research on intellectual property and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic. He has edited a special issue of the *QUT Law Review* on the topic, *The Plain Packaging of Tobacco Products* (2017). Rimmer has considered the development and implementation of the *WHO Framework Convention on Tobacco Control* 2003. He has been an advocate of tobacco control measures - such as tobacco advertising bans,

graphic health warnings, plain packaging of tobacco products, tobacco divestment, and tobacco endgame strategies.

Over the past two decades, Rimmer has investigated intellectual property and access to medicines in a range of contexts. He has considered conflicts in relation to HIV/AIDS, malaria, tuberculosis, tropical diseases, non-communicable diseases such as cancer, the SARS virus, avian influenza, ebola, and the coronavirus COVID-19. Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010). The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012). Rimmer has undertaken extensive research on intellectual property and access to essential medicines. He has written about the Race to Patent the SARS Virus (*Melbourne Journal of International Law*, 2004). Rimmer has analysed Canada's pioneering regime for the export of pharmaceutical drugs (*Public Health Ethics*, 2008). He has also evaluated the system for priority review vouchers (*WIPO Journal*, 2012). Rimmer has also considered the impact of the *Trans-Pacific Partnership* on access to essential medicines (*IP Journal*, 2017). Rimmer has been providing expert commentary on intellectual property, access to essential medicines, and the coronavirus COVID-19.

Rimmer has undertaken a range of research work and public policy engagement on the relationship between intellectual property, international trade, and globalisation. He has investigated the *TRIPS Agreement* 1994, and considered its implications for various global issues – such as technology transfer, food security, public health, and climate change. Rimmer has undertaken extensive analysis of the *Australia-United States Free Trade Agreement* 2004 – particularly focusing upon its impact upon the duration of the copyright term, and the evergreening of pharmaceutical drugs. He has also considered other bilateral trade agreements – such as the *Chile-Australia Free Trade Agreement*, the *Korea-Australia Free Trade Agreement*, the *Japan-Australia Economic Partnership Agreement*, and the *China-Australia Free Trade Agreement*. Rimmer was a critic of the *Anti-Counterfeiting Trade Agreement* 2011. Rimmer has written extensively about the various iterations of the *Trans-Pacific Partnership*. He has been particularly interested in the relationship between intellectual property and investor-state dispute settlement. He is publishing a research monograph on [*The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*](#) (Edward Elgar, 2020-1). Rimmer has also been exploring other mega-regional trade agreements – such as the *Regional Comprehensive Economic Partnership*, the *United States-Mexico-Canada Agreement* 2020, and the *Trade in Services Agreement*.

Rimmer was a Chief Investigator on an ARC Discovery Project on ‘Inventing The Future: Intellectual Property and 3D Printing’ (2017-2021). This project sought to provide guidance for industry and policy-makers about intellectual property, 3D printing, and innovation policy. It considered the evolution of 3D printing, and examine its implications for the creative industries, branding and marketing, manufacturing and robotics, clean technologies, health-care and the digital economy. The project examined

how 3D printing disrupts copyright law, designs law, trade mark law, patent law and confidential information. The project sought to provide practical advice about intellectual property management and commercialisation, and boost Australia's capacity in advanced manufacturing and materials science. Along with Dinusha Mendis and Mark Lemley, Rimmer is the editor of the collection, [*3D Printing and Beyond: Intellectual Property and Regulation*](#) (Edward Elgar, 2019). He has also engaged in fieldwork on makerspaces, fab labs, tech shops, Maker Faires, and hackerspaces; and has been conducting interviews with members of the Maker Movement.

Rimmer has also a research interest in Indigenous intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015). He has focused upon the adoption and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007. Rimmer has participated in inquiries into the right of resale, inauthentic art, and the design of the Aboriginal Flag.

Rimmer was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well

as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. Rimmer is the editor of the collection, [*Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice*](#) (Springer, 2018). He is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism. Rimmer is interested in the implementation of the *Paris Agreement* 2015 and the *United Nations Sustainable Development Goals* 2015.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions' (2003), and an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). Rimmer has participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is a chief investigator, and co-director of the legal program in the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (2020-2025) – a transnational research network. Rimmer is a member of the QUT Centre for the Digital Economy – which is part of the QUT Centre for Future Enterprise; the QUT Digital Media Research Centre (QUT DMRC), the QUT Centre for Behavioural Economics, Society, and Technology (QUT BEST); the QUT Centre for Justice, the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT Centre for Clean Energy Technologies and Processes (which is based in the Institute for Future Environments). Rimmer was previously the leader of the QUT Intellectual Property and Innovation Law Research Program from 2015-2020 (QUT IPIL).

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer has supervised nine students who have completed Higher Degree Research projects on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere* (2007); *Intellectual Property and Applied Philosophy* (2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines* (2012); *Marine Bioprospecting: International Law, Indonesia and Sustainable Development* (2014); *Social Media Policies and Work: Reconciling Personal Autonomy Interests and Employer Risk* (2017), copyright law and musical sampling (2017), *True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into Practice* (2019), *Community-Based Patent Opposition Model in India* (2020), and *The Theft of Culture and Inauthentic Art and Craft Products: Australian Consumer Law, and Indigenous Intellectual Property* (2020). Rimmer has also supervised sixty-nine Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students. He is currently supervising a post-doctoral researcher working on

intellectual property and 3D printing in the context of the coronavirus public health crisis.

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This submission draws upon a number of pieces of research and policy papers on tobacco control – including:

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[This work includes a chapter on trade and tobacco control]

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SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130435, and BePress Selected Works https://works.bepress.com/matthew_rimmer/310/

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