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PROPOSED SMOKEFREE AOTEAROA 2025 ACTION PLAN

SUBMISSION BY
BRITISH AMERICAN TOBACCO (NEW ZEALAND) LIMITED

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This submission by British American Tobacco (New Zealand) Limited ("**BAT**") responds to the consultation on *"Proposals for a Smokefree Aotearoa 2025 Action Plan, Discussion Document"* as proposed by the Ministry of Health in the Government's consultation portal, on 15 April 2021.

1.2 We recognise the Government's public health goals of achieving a Smokefree Aotearoa 2025. We would like to emphasise that achieving this ambitious smoke-free target will require a careful balance amongst three important policy areas:

1.2.1 lawful, proportionate and *evidence-based* tobacco control policies;

1.2.2 optimising tobacco harm reduction and the regulatory framework which enables smokers to access alternative nicotine products; and

1.2.3 robust illicit tobacco elimination strategy.

1.3 Without these policies working in harmony, smokefree efforts will fail to significantly reduce smoking rates and result in foreseeable, if unintended, negative consequences.

1.4 In this context, we recommend that the Government analyse all tobacco control measures and smokefree policies by taking into consideration the overall impact on reducing smoking incidence across both the legal and illicit market, while increasing access and switching behaviour by existing adult smokers to alternative nicotine products.

1.5 As we will set out below, it is widely accepted that most of the harm associated with cigarettes is caused by inhaling the smoke produced by the combustion of tobacco, and that cigarette smoking is therefore the most dangerous way of consuming tobacco. While smokers have historically had very few alternatives to combustible cigarettes, innovation is now providing a greater choice of smokeless tobacco and nicotine products that are defined in New Zealand's legislation as "significantly less harmful" alternatives to cigarettes.

1.6 In this context, we recommend that the Government should look beyond implementing further punitive tobacco control measures that will be ineffective in achieving the Government's public health goal, further incentivising the illicit market. Instead, the Government should continue the significant strides in public health it has made to date by furthering development of a regulatory regime that supports the vaping market and the market for other smokefree products. It is this which will support Smokefree 2025 by existing consumers having access to, and awareness of, a wide range of smokefree nicotine alternatives to combustible tobacco products.

1.7 As we will set out below, we recommend that tobacco control policies be balanced with immediate action against illicit tobacco while introducing new tools in the tobacco harm reduction toolkit to achieve a Smokefree Aotearoa 2025.

1.8 We commend the Ministry of Health's work in acknowledging the emergence of vapour products as a means for smokers to transition from cigarettes to what it describes *as 'significantly less harmful'* products.

1.9 The 're-orient' of the tobacco control programme should aim to optimise the regulatory framework around vaping and other smoke free alternatives to cigarettes such as oral nicotine pouches which are currently banned. Vaping is already proving to be a viable alternative for a great many adult smokers, and with greater support and options focused on hard to reach adult smokers, it is more likely that public health goals will be achieved without exacerbating the illicit market.

1.10 We consider that Focus Areas 1 and 5 must be considered with due care and based on the strategic, balanced approach we have set out above. Focus Area 2 *Make Smoked Tobacco Products Less Available* must be weighed against the same considerations, being that:

1.10.1 any proposed measures must be lawful, proportionate and evidence-based;

1.10.2 alternatives such as vaping must remain more widely available; and

1.10.3 the illicit market cannot become the default option for smokers.

1.11 Restrictions need to be undertaken in close coordination with retailers whose livelihoods are impacted, and after expanding the coverage and availability of alternative smokefree nicotine products (particularly as it relates to access and flavours) giving retailers reliable revenue sustainability. Restrictions also need to take into account the very real risks around failing to focus on specific anti-illicit trade measures.

1.12 We consider that the proposals under Focus Areas 3 and 4, if implemented in the extreme form proposed, are flawed and would manifest as contradictory to the Government's public health goals of Smokefree Aotearoa 2025. These proposals lack the necessary scientific and evidential justification to demonstrate that they would support the Government's public health goals. Proceeding with these proposals will result in fuelling the already present and serious unintended consequences of illicit tobacco. Another real impact will be the loss of livelihoods of many small businesses and for those who do remain and who retail traditional tobacco products, an increase in crime.

1.13 With all of this framing in mind, we comment below on what we believe would support the Government's Smokefree 2025 in being a more positive, balanced and supportive approach to each Focus Area.

1.14 In order to put our specific comments regarding the proposals into context, we have also set out at section 2 below, a brief overview of the evidence in favour of the use of alternative smokeless nicotine products (including vaping products, smokeless tobacco products, and oral nicotine pouch products) to support tobacco harm reduction. In sections 3 to 7 of this submission, we then provide our detailed comments regarding the proposals. In section 8 we highlight the very real unintended consequences of the proposals in driving up the demand of illicit tobacco and recommendations on addressing this unregulated industry.

2. Tobacco Harm Reduction: At the forefront of Tobacco Control

2.1. It is widely acknowledged that the majority of the health risks associated with smoking can be attributed to the toxic substances in tobacco smoke that are produced when tobacco is burned - and not to the nicotine itself.[1] This has been widely recognised, including by the UK Royal College of Physicians when it states that "*as most of the harm caused by smoking arises not from nicotine but from other components of tobacco smoke, the health and life expectancy of today's smokers could be radically improved by encouraging as many as possible to switch to a smoke free source of nicotine*".

2.2. Alternative nicotine delivery systems, including vaping products, smokeless tobacco products, and oral nicotine pouches expose consumers to substantially lower levels of toxicants than combustible cigarettes:

2.2.1. As vaping products do not contain tobacco and there is no combustion, the vapour from these products contains far fewer and substantially lower levels of the toxicants found in the smoke produced when tobacco is burned. There is increasing agreement amongst health experts that exclusive use of e-cigarettes exposes consumers to significantly reduced toxicants and is estimated to pose reduced risks of harm as compared to continued smoking of cigarettes.[2]

2.2.2. While Tobacco Heating Products (THPs) contain tobacco, their properties and mode of operation mean that they are very different to conventional combustible tobacco products, including cigarettes. As the tobacco is only heated, there is no combustion and no smoke, and the aerosol produced by THPs contain far fewer and lower levels of toxic

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[1] Royal College of Physicians. Nicotine without smoke: Tobacco harm reduction. London: RCP, 2016, at p184; Tobacco: Harm reduction approaches to smoking, a report by the UK National Institute for Health and Care Excellence (NICE), 2013; Niaura (2016), *Re-thinking nicotine and its effects*. Truth Initiative, Washington, DC.; Abrams et al., (2017) *Harm Minimization and Tobacco Control: Reframing Societal Views of Nicotine Use to Rapidly Save Lives* Annual Review of Public Health 2018 39:1, 193-213.

[2] See e.g. List of scientific and public health organizations that have concluded that nicotine vaping is safer than smoking, available here.

chemicals than conventional cigarette smoke. There is growing scientific evidence that suggests that exclusive use of THPs is likely to be less risky than continued smoking of traditional combustible cigarettes.[3]

2.2.3. Oral nicotine pouches are a type of nicotine product which are pre-portioned porous pouches containing nicotine (but no tobacco). The user puts a pouch between the upper lip and gum and leaves it there (without chewing or sucking) while the nicotine and taste is released. No combustion is involved. Oral nicotine pouches are different from Swedish-style snus (an oral smokeless tobacco product) because they do not contain tobacco, but they share the same nicotine exposure route, i.e. oral mucosal absorption. Epidemiological studies have shown snus to be a significantly reduced risk product relative to smoking[4] and that it plays a constructive role in a tobacco related harm reduction strategy.[5] In particular, data indicates that snus use confers no increased risk of lung cancer or Chronic Obstructive Pulmonary Disease, the two largest contributors to health risks specific to cigarette smoking.[6] Oral nicotine pouches can be expected to have an even greater impact on tobacco harm reduction relative to snus, given that they do not contain tobacco. Tobacco-free, nicotine products contain substantially lower levels of toxicants than combustible tobacco products like cigarettes, and oral tobacco products such as snus.

2.3. The findings of the 2007 report of the UK Royal College of Physicians were unequivocal: "[i]*n this report we make the case for harm reduction strategies to protect smokers. We demonstrate that smokers smoke predominantly for nicotine, that nicotine itself is not especially hazardous, and that if nicotine*

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[3] For example, in its 2018 report, Public Health England concluded that "[t]he available evidence suggests that heated tobacco products may be considerably less harmful than tobacco cigarettes." and that "[c]ompared with cigarettes, heated tobacco products are likely to expose users and bystanders to lower levels of particulate matter and harmful and potentially harmful compounds (HPHC). The extent of the reduction found varies between studies." McNeill A, Brose LS, Calder R, Bauld L & Robson D., *Evidence review of e-cigarettes and heated tobacco products 2018*. A report commissioned by Public Health England. London: Public Health England, 2018

[4] For example, see Royal College of Physicians. Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians. London, United Kingdom; 2007; WHO (2008), The scientific basis of tobacco product regulation: second report of a WHO study group (WHO technical report series; no. 951); Broadstock (2008) Systematic review of the health effects of modified smokeless tobacco products. NZHTA Report 2007; 10(1).

[5] See for example Royal College of Physicians. Nicotine without smoke: Tobacco harm reduction. London: RCP, 2016, at p6.

[6] Lee PN,. Summary of the epidemiological evidence relating snus to health (2011) Regul Toxicol Pharmacol. Mar;59(2):197-214. doi: 10.1016/j.yrtph.2010.12.002; Lee P. N. (2013). Epidemiological evidence relating snus to health--an updated review based on recent publications. Harm reduction journal, 10, 36. doi:10.1186/1477-7517-10-36.

could be provided in a form that is acceptable and effective as a cigarette substitute, millions of lives could be saved."[7]

2.4. A model risk continuum of tobacco and nicotine products can be used to inform the regulation of these products, with many public health experts agreeing that different regulatory approaches should be adopted for each product category, corresponding to their risk profile.

2.5. In its announcement on July 28, 2017[8], the FDA noted "*A key piece of the FDA's approach is demonstrating a greater awareness that nicotine — while highly addictive — is delivered through products that represent a continuum of risk and is most harmful when delivered through smoke particles in combustible cigarettes.*"

2.6. McNeill and Munafò (2013)[9] placed a number of nicotine and tobacco products on a model risk continuum, stating that: "[t]*obacco and nicotine products vary in the levels of harm associated with their use. The most harmful products are those consisting of tobacco which is burned (e.g., cigarettes). Smokeless tobacco products are likely to be less harmful than smoked products, although there is very wide variation in harms associated with the different smokeless products available worldwide. Nicotine products which are not burned, such as nicotine replacement therapies (NRTs) are the least harmful.*"

2.7. In 2014, a group of tobacco researchers examined 12 different tobacco and nicotine products using 14 harm criteria. The result placed non-tobacco nicotine products including e-cigarettes, oral nicotine delivery products, nasal sprays and patches as the least harmful products in a model comparative risk continuum (see below). The authors concluded that "[c]*igarettes are the nicotine product causing by far the most harm to users and others in the world today. Attempts to switch to non-combusted sources of nicotine should be encouraged as the harms from these products are much lower.*"[10]

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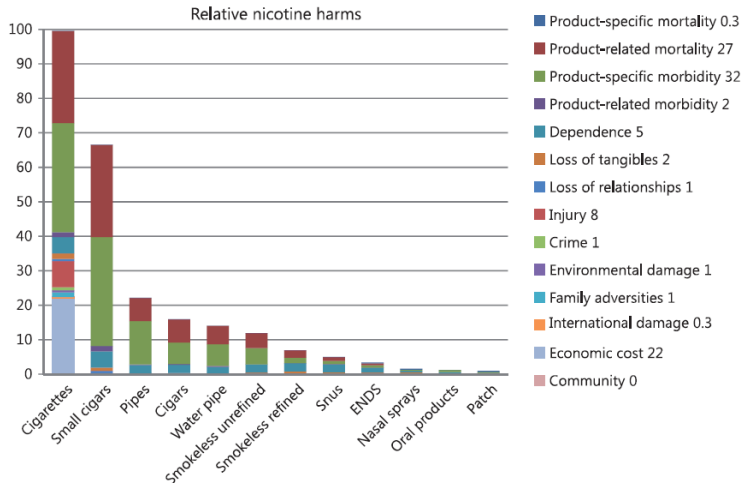
[7] Royal College of Physicians. Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians. London, United Kingdom; 2007 at Preface (emphasis added).

[8] FDA News Release (28 July 2017). FDA announces comprehensive regulatory plan to shift trajectory of tobacco-related disease, death. Available at: https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm568923.htm

[9] McNeill A, Munafò MR (2013). Reducing harm from tobacco use. *Journal of Psychopharmacology*, *27*(1), 13–18. https://doi.org/10.1177/0269881112458731

[10] Nutt, David J., et al. "Estimating the harms of nicotine-containing products using the MCDA approach." *European addiction research* 20.5 (2014): 218-225.



2.8. Abrams et al (2018),[11] present a harm minimization continuum which posits that nicotine-containing products range from exceptionally low harm (e.g., NRT) to exceptionally high harm (e.g., combusted cigarettes). E-cigarettes are presented as having 5% of the harm of cigarettes and are grouped at the low end of the harm continuum along with NRT products. The author's state: *A core harm minimization principle is that policy, regulation, and advocacy be science-based and proportional to the degree of product harm, with the most restrictive strategies applying to the most harmful product. For example, much less harmful products like e-cigarettes could help displace cigarettes on a larger scale than NRT, because of greater appeal, lower cost, and ease of access. A regulatory scheme that places the most burdensome standards on the most harmful products, while ensuring safety and quality of the least harmful products, supports harm minimization*.

2.9. Experience from markets where smoke-free alternative products have been available for some time also supports the concept that smokers can transition to alternative nicotine delivery systems, with associated decreases in smoking prevalence.

2.10. For example, the evidence from randomized controlled trials, observational studies, and population data indicate that e-cigarettes are a satisfactory alternative to conventional cigarettes for many smokers and that they have contributed to substantial reductions in smoking prevalence following their introduction. In April 2021, the *Cochrane Collaboration* published an update to its ongoing review into the effect and safety of using e-cigarettes to help smokers achieve long-term smoking abstinence.[12] This version of the report assessed the results of 56 studies, representing 12,804

[11] Abrams, David B et al. "Harm Minimization and Tobacco Control: Reframing Societal Views of Nicotine Use to Rapidly Save Lives." *Annual review of public health* vol. 39 (2018): 193-213. doi:10.1146/annurev-publhealth-040617-013849.

[12] Hartmann-Boyce et al (2021), Electronic cigarettes for smoking cessation, Cochrane Systematic Review – Intervention: https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD010216.pub5/full

participants, of which 29 studies are randomized controlled trials. The authors found that *"[m]ore people probably stop smoking for at least six months using nicotine e-cigarettes than using nicotine replacement therapy (3 studies, 1498 people), or nicotine-free e-cigarettes (4-cigarettes, 1057 people)."* The authors concluded that *"[w]e are moderately confident that nicotine e-cigarettes help more people to stop smoking than nicotine replacement therapy or nicotine-free e-cigarettes. However, these results might change if further evidence becomes available"*. They did note that they were *"less confident about how nicotine e-cigarettes compare with no support, or behavioural support, to stop smoking."* [13]

2.11. The UK has experienced a significant decline in smoking prevalence following the introduction of e-cigarettes, where there are reasonable means of product distribution and communication, and no restriction on flavours above and beyond regulation that governs the use of ingredients, coupled with the support of the Government and public health authorities. The 2021 Public Health England evidence update of e-cigarettes[14] found that nicotine vaping products were the most popular aid used by smokers (27.2%) trying to quit in England in 2020, and it is estimated that in 2017, more than 50,000 smokers who would otherwise have carried on smoking stopped smoking with the aid of a vaping product. The PHE report states "[a]*s suggested in previous evidence reviews, combining vaping products (the most popular source of support used by people making a quit attempt in the general population), with stop smoking service support (the most effective type of support), should be an option available to all people who want to quit smoking*". A factsheet by UK Action on Smoking and Health ("**ASH**") on the use of vaping products among adults in Great Britain found that in 2020: "*for the first time, current e-cigarette use has declined year-on-year, from 7.1% to 6.3% of the adult population in Great Britain, amounting to 3.2 million people… Over half (58.9%) of current vapers are ex-smokers and the proportion has grown year-on-year*" and "[a]*s in previous years the main reason given by ex-smokers for vaping is to help them quit (41%) and prevent relapse (20%).* The report also noted: "*The Annual Population Survey found that smoking prevalence among adults aged 18 and over in England declined by 5.9 percentage points from 2011 to 2019. In 2011, 19.8% of adults smoked, falling to 13.9% in 2019; equivalent to a drop from 7.7 million smokers in 2011 to 5.7 million in 2019*."[15]

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[13] Hartmann-Boyce et al (2021), Electronic cigarettes for smoking cessation, Cochrane Systematic Review – Intervention: https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD010216.pub5/full
[14] McNeill, A., Brose, L.S., Calder, R., Simonavicius, E. and Robson, D. (2021). Vaping in England: An evidence update including vaping for smoking cessation, February 2021: a report commissioned by Public Health England. London: Public Health England.
[15] ASH (2020), Use of e-cigarettes (vapes) among adults in Great Britain.

2.12. Zhu *et al*., (2017)[16] assessed the relationship between e-cigarette use and smoking cessation in a representative sample of the US population. They found that e-cigarette users were more likely than non-users to make a quit attempt (65.1% v 40.1%), and 70% more likely to succeed in quitting (8.2% v 4.8%); and the overall population smoking cessation rate increased between 2010-2011 (4.5%) and 2014-15 (5.6%) representing approximately 350,000 additional US smokers who quit in 2014-15. More recently, Kalkhoran *et al*., (2019)[17] found in a longitudinal cohort study of U.S. adult cigarette smokers, that daily e-cigarette use was associated with higher odds of prolonged cigarette smoking abstinence over two years, compared to no e-cigarette use. The authors concluded: "*Daily use of e-cigarettes may help some smokers to stop smoking combustible cigarettes.*"

2.13. In Japan, THPs have also emerged as a potentially strong tool for reducing smoking prevalence. Analysis by Cummings *et al.* (2020)[18] found that there was a five-fold increase in the annual percentage decline in cigarette sales in Japan following the introduction of THPs in late 2015. The authors stated: "*[b]etween 2011 and 2015, cigarette sales in Japan were declining at a slow but steady pace. However, the pace of decline in cigarette sales accelerated beginning in 2016, corresponding to the introduction of HTPs into the marketplace*."

2.14. In the March 2017 Eurobarometer survey on the attitudes of Europeans towards tobacco and electronic cigarettes, Sweden reported daily smoking prevalence of 5%, by far the lowest national level in Europe in comparison with EU wide daily smoking prevalence of 24%. This low smoking rate has been contributed to by the availability of snus in Sweden. As one study reports: "[s]nus has both contributed to decreasing initiation of smoking and, when used subsequent to smoking, appears to facilitate smoking cessation. All these effects suggest that the availability and use of snus has been a major factor behind Sweden's record-low prevalence of smoking and the lowest level of tobacco-related mortality among men in Europe." Data published by the World Health Organisation in 2018 also indicated that Sweden had the lowest rate of tobacco-related mortality and the lowest incidence of male lung cancer in Europe. As noted above, due to the absence of tobacco, oral nicotine pouch products are expected to be significantly reduced risk compared to snus, let alone to cigarettes.

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[16] Zhu *et al*., (2017) E-Cigarette use and associated changes in population smoking cessation: evidence from US current population surveys.

[17] Sara Kalkhoran, Yuchiao Chang, Nancy A Rigotti, Electronic Cigarette Use and Cigarette Abstinence Over 2 Years Among U.S. Smokers in the Population Assessment of Tobacco and Health Study, *Nicotine & Tobacco Research*, , ntz114, https://doi.org/10.1093/ntr/ntz114

[18] K. Michael Cummings, Georges J Nahhas and David T Sweanor., "*What Is Accounting for the Rapid Decline in Cigarette Sales in Japan?*" Int. J. Environ. Res. Public Health 2020, *17*(10), 3570.

2.15. British American Tobacco has commissioned an expert report from Professor Daniel P. Kessler, a tenured professor at Stanford Law School and the Stanford Graduate School of Business. Professor Kessler's report considers based on the available empirical evidence, whether international public-health law should impose tobacco-like regulatory restrictions or outright bans on the sale of e-cigarettes and other alternative nicotine delivery systems. Professor Kessler explains the importance of implementing balanced regulation to allow smoke-free alternatives to achieve their tobacco harm reduction potential, stating that "*because restrictions on ANDS* [alternative nicotine delivery systems] *generally increase smoking – thereby resulting in net harm to the population – such restrictions should be adopted only after analysis to ensure that their net benefits, in terms of harm reduction, exceed their costs, in terms of restricting access to a proven tool for smoking reduction and cessation*"[19] and finds that "*allowing the sale of ANDS with less-stringent regulations, standards, and taxes than CT* [combustible tobacco] *is a proven way to achieve the goal of improving public health through evidence-based tobacco control.*"[20]

2.16. This is further underscored by the reference to the principle of tobacco harm reduction, which is enshrined in the FCTC. This defines its subject-matter, "tobacco control", as "a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke." [21]

2.17. The danger of the wrong kind of regulation was recognised by the Royal College of Physicians in its 2016 report, in which it stated:
"*A risk-averse, precautionary approach to e-cigarette regulation can be proposed as a means of minimising the risk of avoidable harm, eg exposure to toxins in e-cigarette vapour, renormalisation, gateway progression to smoking, or other real or potential risks. However, if this approach also makes e-cigarettes less easily accessible, less palatable or acceptable, more expensive, less consumer friendly or pharmacologically less effective, or inhibits innovation and development of new and improved products, then it causes harm by perpetuating smoking*."[22]

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[19] Kessler Report at 26.
[20] Kessler Report at 27.
[21] FCTC, Article 1(d).
[22] Royal College of Physicians. Nicotine without smoke: Tobacco harm reduction. London: RCP, 2016.

2.18. Yong et al (2017)[23] compared the real-world effectiveness of e-cigarettes for adult smokers in two countries with restrictive policies towards e-cigarettes (Canada, at the time of the study, and Australia) with two countries with less restrictive policies (USA and UK). The authors found:
"*In the United States and the United Kingdom, which have fewer restrictions on marketing and sale of ECs, smokers who used ECs for their last quit attempts were almost twice as likely to quit for at least 30 days compared to those who quit without using ECs or any approved therapy. By contrast, in Australia and Canada, which have more restrictive EC regulatory environments, those who used ECs to quit were significantly less likely to sustain abstinence for 30 days or more compared to those who quit without help. The effects were striking because they were significant and opposite, suggesting that the impact of the regulatory environment can be either facilitative or inhibitory*."

2.19. The authors concluded:
"In a less restrictive EC regulatory environment, use of ECs during a quit attempt in the real world facilitates, but in a more restrictive environment, where use is lower, it appears to inhibit, short-term sustained smoking abstinence, thus suggesting that the benefits of ECs for smoking cessation may be dependent on the regulatory environment. If so, developing an appropriate regulatory framework for ECs should be a priority so that the benefits of ECs for smoking cessation can be realized, while not neglecting potential risks. Where the regulatory environment supports it, given the popularity of ECs, smokers who are unable or unwilling to quit using current approved methods should be offered the option of quitting with ECs or replacing smoking with ECs for harm reduction purposes."

2.20. This risk of regulation which is overly restrictive was also underscored in a recent independent, peer-reviewed research publication which found that: "[w]*ith a few exceptions, awareness and use of nicotine vaping products varied by the strength of national regulations governing nicotine vaping product sales/marketing, and by country income" and* "[i]*n contrast to many of the* [less restrictive policies] *and* [restrictive policies*] countries, rates of use were quite low in the* [most restrictive policies] *countries (Australia, Uruguay and Brazil), indicating that strict regulation and enforcement of* [nicotine

[23] Hua-Hie Yong, PhD, Sara C Hitchman, PhD, K Michael Cummings, PhD, Ron Borland, PhD, Shannon M L Gravely, PhD, Ann McNeill, PhD, Geoffrey T Fong, PhD, Does the Regulatory Environment for E-Cigarettes Influence the Effectiveness of E-Cigarettes for Smoking Cessation?: Longitudinal Findings From the ITC Four Country Survey, *Nicotine & Tobacco Research*, Volume 19, Issue 11, November 2017, Pages 1268–1276, https://doi.org/10.1093/ntr/ntx056

vaping products] *laws in these countries may have limited smokers' access to these products and/or discouraged smokers from using them*."[24]

2.21. This study thus confirms the relationship between restrictions on potentially reduced risk nicotine and smokeless tobacco products, and the levels of switching to these products by adult tobacco consumers – that is, between highly restrictive regulatory regimes and low uptake on the one hand, and between less restrictive regimes and higher switching on the other.

2.22. Accordingly, we commend the Government's efforts to develop a regulatory framework in which it has stated that vaping and smokeless tobacco products are significantly less harmful than smoking and that these products have the potential to be an important component of a tobacco harm reduction strategy, which we wholeheartedly support.

2.23. Unfortunately, the Government's failure to also include smokefree oral nicotine products in the same regulatory framework as vaping products presents a significant missed opportunity for advancing Smokefree 2025. These products present far greater harm reduction potential than even smokeless tobacco which the Government has permitted. Medicalising smokefree nicotine products is inconsistent with the broader tobacco harm reduction principles of the Act and New Zealand's Smokefree 2025 objectives, as the result is a de facto ban rendering it less likely that smokers would perceive these products as viable alternatives to combustible tobacco products.

2.24. This Government has, to some extent, embraced the concept and role of Tobacco Harm Reduction, and accepts that illicit tobacco is an issue. For it to then take a position that it does not want any other form of nicotine delivery product on the market, products which could rapidly accelerate public health progress and disrupt illicit trade, is an approach which is very difficult to reconcile.

2.25. If one accepts (as implicated by the Smokefree 2025 goal of 5% smoking rate or less, versus zero or prohibition) that there is, and will remain a constituency of consenting adults wishing to use nicotine, and that those adults will choose to obtain it from either alternative smokefree products, the legal tobacco market, or the illicit market – then the most coherent path forward must be to ensure that the alternative and 'significantly reduced harm' options are the most palatable and accessible off ramp for existing smokers.

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[24] Gravely, et al (2019) Prevalence of awareness, ever-use and current use of nicotine vaping products (NVPs) among adult current smokers and ex-smokers in 14 countries with differing regulations on sales and marketing of NVPs: cross-sectional findings from the ITC Project, Addiction. doi: https://doi.org/10.1111/add.14558.

2.26. Indeed, Smokefree Aotearoa 2025 can be achieved without enacting any of these additional tobacco control policies, if instead, access to a greater range of vaping, smokeless tobacco and oral nicotine products is prioritised for adult smokers.

Our Recommendations

2.27. As part of the Governments' review of the proposed regulations under the Act, we make the following recommendations, to support the success of the vaping category and other smokefree alternatives for adult smokers and hasten progress towards Smokefree Aotearoa 2025.

2.28. The Government's policy towards e-liquid flavours should reflect the important role that flavours can play in helping adult smokers' transition to vaping products and contribute to smokers finding vaping products a satisfactory alternative to conventional cigarettes.

2.28.1. We believe the Government should consider allowing the broader sale of flavoured vaping products generally, especially in rural/provincial areas. The current restrictions on the sale of most flavoured products to only specialist vape retailers are too restrictive, particularly in rural and provincial areas (even allowing for the possible application of the lower 60% sales threshold in rural areas) and risks potentially pushing some people back to smoking.

2.28.2. As alluded to earlier, the most up to date data show that adult smokers are switching to vaping organically, at rapid speed, with the existing access to a full range of flavours. The change in policy due to take effect from 11 August 2021 will, sadly, completely hamstring this progress which could have otherwise seen New Zealand achieve its Smokefree 2025 goal simply through facilitating adult switching to vaping products.

2.28.3. It would be concerning, and indeed contrary to Government policy intent if the removal of vaping flavours from generic retailers due to take effect 11 August this year has the same results as other jurisdictions which have enacted similar policies. The most recent evidence of the impact of policies which restrict access to vaping flavours has just recently been published on 24 May 2021. The study from Yale School of Public Health and published in the Journal of American Medical Association found that San Fancisco's ban on vaping flavours other than tobacco and mint was associated with increased smoking.[25]

2.28.4. Accordingly, we urge the Government to allow pharmacies, chemists, and other R18 outlets (such as liquor stores) to qualify for the same

[25] A Difference-in-Differences Analysis of Youth Smoking and a Ban on Sales of Flavored Tobacco Products in San Francisco, California | Adolescent Medicine | JAMA Pediatrics | JAMA Network

exemptions as Specialist Vape Retailers so that they can continue selling the full range of e-liquid flavours after 11 August 2021. This would facilitate greater access for adult smokers in all locations to better support them to switch to vaping while still protecting children and young people from the risks associated with these products.

2.28.5. In addition, we call on the Government to reconsider the restrictions on the sale of flavoured products by generic retailers. The current restriction on General Retail to only three flavours (tobacco, menthol and mint) creates a barrier for adults who currently purchase flavoured vaping products from these channels, and smokers looking to transition to vaping, to purchase flavoured vaping products from a local generic retailer (such as a dairy or a supermarket), potentially pushing some people back to smoking or discouraging smokers from switching.

2.29. The Government should regulate oral nicotine pouches as a 'notifiable product'. These should be permitted to be imported and sold without being subject to the Medicines Act, to ensure their ready availability and affordability.

2.29.1. As with vaping products, oral nicotine pouches are neither intended to have, nor marketed as having, any therapeutic benefit; but offer adult smokers a non-combustible, non-tobacco alternative to smoked tobacco products.

2.29.2. With vaping products now clearly regulated separately to, and exempt from, the Medicines Act, reinstating access to oral nicotine pouches would be consistent with the purpose of the Act to reduce and de-normalise smoking behaviour and would assist with the Government's Smokefree 2025 ambitions.

2.29.3. As set out above, experience from markets where smoke-free alternative products have been available for some time also supports the concept that smokers can transition to alternative nicotine delivery systems, with associated decreases in smoking prevalence. Oral nicotine pouches offer a potential break-through for Maori smoking rates, and support Smokefree Aotearoa 2025 aspirations, as well as supporting the purposes of the recent Vaping Legislation.

2.29.4. Oral nicotine products can only be successfully brought to market without the medical regulatory hurdles in order to make them cost effective for adult smokers. A simple market scan of existing NRT products shows that these are on shelves for anywhere from $40 for Gum, to $70 dollars for Spray; which puts them out of reach and unappealing for most smokers. If oral nicotine pouches were available without the medical hurdles, but with robust product standards, they could be made available to smokers for closer to the subsidised price of gum, and far cheaper than cigarettes, at less than $20.

3. **Focus Area 1: Strengthen the tobacco control system**

3.1. **Comment:**

3.2. We observe that New Zealand already exceeds all of the WHO Framework Convention on Tobacco Control (FCTC) provisions, including a number of measures not required by the treaty such as very high excise taxation, large graphic health warnings, plain packaging, retail display bans and comprehensive prohibitions on any form of marketing or communications.

3.3. We note the Government, following its 2018 Ernst and Young Report, has also acknowledged the negative impact that such high excise has had on both low socio-economic smokers; and the crime of illicit tobacco trade.

3.4. We remain committed to our public offers of 'vape to quit' support for New Zealand's District Health Boards and Smoking Cessation Providers (SCP) to provide free vaping products which already meet or exceed the proposed NZ product standards and welcome more support for these offers.

3.5. **Recommendations:**

3.6. We believe the New Zealand tobacco control strategy could be made more effective by focusing on positivity, support and encouragement for smokers to quit, or, for those smokers that do not quit, to switch completely to smokefree nicotine products, over introducing further punitive and ineffective measures. Some specific examples include:

3.6.1. The reintroduction of more flavours of vaping products for general availability. Vaping flavours other than tobacco, mint and menthol, have already helped transition more than 100,000 former Kiwi smokers[26] and they play a significant role in in helping adult smokers see and experience e-cigarettes as satisfactory alternatives to conventional cigarettes.

3.6.2. Allowing the marketing of oral nicotine pouches as a 'notifiable product'. These products should be permitted to be imported and sold without being subject to the Medicines Act, to ensure their availability and affordability. As many as 10,000 former smokers chose to transition away from smoking to oral nicotine products, prior to being banned last year.[27]

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26 New Zealand adults who are daily e-cigarette users - Figure.NZ

27 Supplementary Order Paper No 537 (released 06 July 2020) Explanatory note – New Zealand Legislation

3.7. These products also provide legitimate alternative revenue streams for the kiwi dairy owners, whose livelihoods are severely jeopardised by the other proposals in this action plan.

3.8. Taking such an approach would ensure that adult smokers are supported and encouraged to switch to smoke-free alternatives to combustible tobacco products.

3.9. In order to fully achieve the Government's public health goals with respect to tobacco control, it is absolutely paramount that policies pay particular attention to combatting the illicit trade of traditional tobacco products. This needs to include direct efforts by the Government to robustly track, monitor and report frequently on smoking incidence of both the legal and illicit markets.

3.10. Enhanced monitoring of the illicit tobacco trade should be much more coordinated between the relevant agencies of Customs, the Inland Revenue, and the Police, with enforcement against suppliers of illicit product made a priority.

3.11. Once a smoker is lost to the illicit market, it is much more difficult to motivate that smoker to return back to the legal, regulated market, including with respect to smoke-free alternatives to combustible tobacco products (including vaping products), as the primary driver for switching, being the cost, is lost when someone is only paying the much lower prices of illicit tobacco.[28]

3.12. The tobacco control system has to be harmonised with the Government's work on the regulatory framework that acknowledges and defines vaping and smokeless tobacco products as "significantly less harmful" alternatives to smoking. Re-orienting the tobacco control system to one that shows adult smokers who would otherwise continue to smoke, another path away from smoking would help the Government achieve its public health objectives.

3.13. To that end, we recommend that tobacco control be looked at through the lens of tobacco harm reduction and be strengthened by adopting a coherent approach that focuses on positivity, support and encouragement for smokers to quit, or, for those smokers who would otherwise continue to smoke, to switch to smokefree nicotine products, over introducing further punitive measures.

[28] UMR Research, March 2020.

3.14. It is vitally important that the development of a tobacco control regime protects against incentivising the illicit market which undermines public health as well as fuels criminal activity. Therefore, we support the Government's plans to research, monitor and report the illicit tobacco in New Zealand. Dedicated action must then be taken to combat illicit trade and, in turn, its negative socioeconomic impact in the markets.

3.15. The legal tobacco industry is heavily regulated, with strict controls in place. The illicit tobacco market, by its very nature, is unregulated. There should be focus on this 'black' economy to avoid growing demand and distribution networks being established.

3.16. Key action that the Government can take would be to remove the personal manufacturing allowance, that allows individuals to manufacture up to 30 cigarettes a day for their personal use. Permitting this is contrary to the goals of Smokefree 2025 and New Zealand is the only OECD country that has a personal use exemption.

3.17. Another key action the Government can take to reduce the incentive for retailers to sell illicit tobacco is to expand the remit of controlled purchase operations to include enforcement action against retailers that sell illicit tobacco, along with the ability to issue an infringement notice. Information collected at retail could also be shared with local enforcement agencies for further monitoring and enforcement.

4. **Focus Area 2: Make smoked tobacco products less available**

4.1. **<u>Comment:</u>**

4.2. As a general point, the Government must be mindful of the impact of its policies on small businesses that work hard to make an honest living every day. Taking away a significant revenue stream from them would surely see many of them close shop, impacting employment and social connection opportunities for the communities they serve.

4.3. For example, the upcoming restrictions mandating that general retail stores such as dairies can only sell tobacco, mint and menthol flavoured vaping products from 11 August 2021, will result in losses of up to $16,000 per store in annual sales (based on 2020 IRI Scan Sales Data) on top of declining tobacco sales.

4.4. These small businesses are the heartbeat of local communities and serve the community in many other ways – helping shift workers who need a phone top up on the way to work, families who cannot afford to do weekly shops in supermarkets, easing loneliness in regular conversations with the elderly, providing general neighbourhood information as well as notice board forums

for local small businesses and networks and providing postage services are just a few of the many ways our local dairies support their communities.

4.5. Tobacco availability will, over time, reduce if there is a compelling alternative offer for adult smokers. As such, rather than introducing further punitive restrictions on smoked tobacco products, the Government should prioritise ensuring that consumers are aware of and can access a range of smoke-free alternatives to combustible tobacco products, including vaping products, smokeless tobacco products, and oral nicotine pouches. The progress the Government has made in regulating vaping is an initial step in the right direction, but products that the Government itself defines as "significantly less harmful alternatives" should be more widely available and afforded greater consumer communication freedoms than combustible tobacco products. Supported by targeted outreach and education programmes, this would further significantly encourage adult smokers to make the switch to these non-combusted alternatives.

4.6. However, in order to give full effect to the public health goals espoused in the discussion document, the Government needs to ensure the general availability of a broad range of products it defines as "significantly less harmful" alternatives. It is with this approch that adult smokers are made aware of them and are able to switch from smoking with readily accessible alternatives. One step that the Government can take in this respect is to reverse the flavour restriction so that all flavours can be sold in general retail stores and ensure that small business' revenue streams are protected.

4.7. Restricting the availability of tobacco without the provision of adequately satisfying alternatives can have perverse unintended consequences beyond just hurting retailers. Without a range of smokefree nicotine products to combustible tobacco products such as vaping flavour options, and oral nicotine products, smokers who lose access to legal products are likely to resort to the already burgeoning market for cheaper and easily accessible illicit tobacco products.

4.8. A reduction in availability of tobacco products can be achieved by offering a range of viable alternatives and without the need for drastic or punitive measures. An approach that upweights investment and incentives for smokers switching to cheaper, satisfying smokefree nicotine products would ensure that retailers continue to have a positive alternative revenue stream to tobacco while supporting public health objectives. Equally, it does not push smokers towards the burgeoning tobacco illicit market.

4.9. **Recommendations:**

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

4.10. We are not opposed to a "negative licensing regime", along with a retailer "registration or notification system" to enable government agencies to maintain data on retailers as required for communication and enforcement purposes. This means any retailer is permitted to sell tobacco but with such a licensing regime, the Government will have powers to revoke the retailer's right to sell tobacco and nicotine products when there is evidence that the retailer is in breach of tobacco sales legislation, such as selling or being a proxy for sales to under-age customers or selling illicit tobacco or vaping products.

4.11. These would provide effective enforcement against retailers that sell tobacco to minors or sell illicit tobacco. This could be strengthened by introducing a similar infringement notice for the sale of illicit tobacco or vaping products as what is currently available if retailers sell tobacco to minors.

4.12. We believe that any system must be relatively simple to manage for all parties.

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

4.13. We do not support reducing the number of retailers based on population size and density. Such a policy is unreasonable and discriminatory in nature by allowing very few locations for retailers to sell tobacco products, which would have the effect of driving up prices, and increasing demand for tobacco on the illicit market. This would in turn heighten the personal threat to these few retailers, as they become targets for criminals, putting their safety and businesses at greater risk.

4.14. The illicit market would be readily served by those targeting thefts from the limited retail stores that are able to sell tobacco products, or smuggling cigarettes from overseas and selling them on the illicit market.[29] Either way, only criminals stand to win. Based on a KPMG report, illicit tobacco constituted approximately 11.5% of total tobacco consumption in New Zealand in 2019, representing an 8.4% increase in volume since 2018.[30] This means that in 2019, one in ten cigarettes consumed was illicit, with an estimated loss of approximately $290 million in Government excise revenue.

4.15. Currently, there are about 5,200 retailers that sell tobacco across New Zealand, of which almost 3,000 are family-owned "corner dairy" businesses. They provide many a service to their local communities and

[29] Organised crime targets tobacco smuggling as prices rise | Stuff.co.nz
[30] KPMG (2020), Illicit tobacco in New Zealand, 2019 Full Year Report. Available here.

removing their ability to sell tobacco will add additional burden of running a small business, including during a Covid-19 stricken economic environment.

4.16. If the "corner dairy" were to close, the knock-on effect on the community would be keenly felt. Families who buy daily or weekly staples because they live on a weekly pay cheque would be impacted. Other suppliers that distribute their products to these dairies would also lose a sales channel which would undoubtedly lead to a reduction in their workforce, if there are fewer stores to visit, risking the jobs of various others across the extended supply chain, including sales representatives and delivery truck drivers.

Do you support reducing the retail availability of tobacco products by restricting sales to a limited number of specific store types (e.g. specialist R18 and/or pharmacies)?

4.17. We do not support restricting sales to a limited number of specific store types. See our responses at 4.13 to 4.16 above.

Do you support introducing a smokefree generation policy?

4.18. We do not support the introduction of a smokefree generation policy.

4.19. Such a policy would amount to an effective ban on this generation purchasing a legal product when they turn 18 years of age, impinging on their rights. It restricts their personal freedoms, their right to autonomy in their private lives, and amounts to age discrimination. If implemented, the policy would also further incentivise the illicit market. In complete contradiction to the Government's objectives, this would facilitate youth access to tobacco products, since the illicit market does not adhere to age restrictions and exposes consumers to unregulated and highly affordable products.

4.20. In New Zealand, by 18, a young person can purchase and drink alcohol in a pub or licensed restaurant, make a will, borrow money from banks, bet on sports or the races, stand as a candidate for election, vote, enlist in the armed forces without parental consent, hold a private pilot's licence, hold a firearms' licence, leave home, exercise bodily freedoms such as having an abortion, elective surgeries or tattoos, and have consenting sex.[4] To permanently ban the purchase of tobacco, an otherwise legal product, for this generation even after they hit the age of majority is discriminatory and counter to the reasonable expectations of basic personal freedoms for adults in New Zealand society.

4.21. If this proposal is aimed at reducing to a bare minimum the number of underage people taking up smoking, this goal has already been substantively achieved. Based on the Ministry of Health's data, only 3% of youth (15 to 17 years old) smoke.

4.22. A proposed smokefree generation policy would also be unworkable in practice. In particular, it would be costly and challenging for the Government to prevent those impacted by the policy from accessing tobacco products via online sales and other sources. Additionally, the policy may have a detrimental impact on tourism when combined with the strict limits on duty-free tobacco products imported into New Zealand.

4.23. These and similar concerns were raised in Tasmania, Australia, by the State Parliament's Legislative Council Committee, which considered a similar smokefree generation proposal. The Committee published a report in which it found that the proposed Bill *"raises significant considerations in relation to the breaches of (nonbinding) fundamental rights, including age discrimination and raises a question as to whether Parliament is competent to extinguish these rights,"* and *"raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/ tourists."*[31] The report recommended that *"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."* The Tasmanian Government did not to proceed with its 'smokefree generation' policy.

4.24. We note that in Malaysia and Russia, similar legislation was also considered and ultimately rejected.

5. Focus Area 3: Make smoked tobacco products less addictive and less appealing

5.1. **<u>Comment:</u>**

5.2. There is no reliable evidence that the Government's proposals to reduce nicotine to very low levels, prohibit filters, and prohibit innovations through regulation would improve public health. As set out below, these proposals would likely have an adverse impact on public health, including by incentivising illicit trade in tobacco products, which consumers would turn to if they are unable to source their preferred products and/or if it is readily available given its affordability.

5.3. The Government should instead focus on ensuring that adult smokers are aware of the attributes of, and have ready access to, a wide range of smoke-free alternatives to combustible tobacco products.

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[31] Tasmanian Legislative Council Government Administration Committee "A" Report on Public Health Amendment (Tobacco Free Generation) Bill 2014, 2016

5.4. Recommendations:

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

5.5 We do not support reducing the nicotine in smoked tobacco products to very low levels. Indeed, it is important to emphasise that very low nicotine cigarettes are just as toxic as any other cigarettes.

5.6 Nevertheless, the Government proposes to reduce the permitted concentration of nicotine in smoked tobacco products to very low levels putatively to (1) reduce smoking initiation in youth by preventing inhalation of sufficient nicotine to result in nicotine addiction or dependence; (2) prevent current smokers from obtaining their accustomed amounts of nicotine from cigarettes and thus cause them to quit smoking; and (3) make smoking cigarettes less satisfying and enjoyable in general for consumers, by depriving them of legal access to cigarettes containing tobacco with a normal nicotine concentration as has been found in natural tobacco enjoyed by people for centuries all over the world and across many cultures.

5.7 As discussed below, the evidence does not support a policy of making it illegal to sell tobacco products for smoking that contain the traditional concentration of nicotine that New Zealand and the world has known for centuries. It is important to note that the policy of requiring such extreme nicotine reduction has not been adopted by any nation in the world. The US FDA continues to consider the ramifications and possible effects of such a policy, including whether negative consequences would outweigh any public health benefits, and has refrained from taking steps to finalise any such regulations. Moreover, the Government has ample tools at its disposal that would more directly improve public health while imposing less cost, social disruption and risk of negative unintended consequences. Specifically, before even considering such a mandated nicotine-reduction policy, the Government should prioritise ensuring that adult smokers are able to access, and are aware of the attributes of, a wide range of smoke-free alternatives to combustible tobacco products.

The Government should prioritise ensuring that adult smokers are able to access and are aware of the availability and attributes of smoke-free alternatives to combustible tobacco products

5.8 As set out at section 2 above, alternative nicotine delivery systems, including vaping products, smokeless tobacco products, and oral nicotine pouches expose consumers to substantially lower levels of toxicants than

combustible cigarettes. Experience from markets where smoke-free alternative products have been available for some time supports the concept that smokers can transition to alternative nicotine delivery systems, with associated decreases in smoking prevalence. As such, the Government should prioritise ensuring that adult smokers can access and are aware of the availability and attributes of smoke-free alternatives to combustible tobacco products.

5.9 While we commend the Ministry of Health's work in stating that the emergence of vapour products provides a means for smokers to transition from cigarettes to less harmful products, we would encourage the Ministry of Health to do more. As stated above, the Ministry of Health should allow for and regulate oral nicotine pouches in a similar way to vaping products. The evidence demonstrates that these products are also likely to be substantially less risky than cigarettes. The Government should also reverse its flavour restrictions and allow for the full array of e-liquid flavours to be sold in general retail stores to ensure that adult consumers are able to access these easily and that smokers who would continue to smoke are incentivised to switch completely to vapour products.

The existing science is too nascent to support the proposal to require reduction in the levels of nicotine in smoked tobacco products to very low levels, 90-95% less than that in traditional commercial tobacco strains

5.10 There is currently not enough research, particularly on the unintended negative consequences, to support mandating such a low level of nicotine in cigarette blend tobacco. No country has ever mandated that only very low nicotine content cigarettes can be sold.[32] Thus there is no real-world experience from which to assess the feasibility and implications of doing so in New Zealand. Additionally, little is known regarding the impact of

[32] Kozlowski 2017, Cigarette prohibition and the need for more prior testing of the WHO TobReg's global nicotine-reduction strategy.

very low nicotine content cigarettes on youth,[33] former smokers,[34] non-daily smokers,[35] or other special populations.[36]

5.11 The paucity of the available evidence is underscored by the fact that researchers have consistently noted that the study of very low nicotine content cigarettes is "emerging". For example, there is only one clinical study of very low nicotine content cigarettes that qualifies as long-term. [37] Participants in this study smoked cigarettes with progressively lower nicotine content over six months, then continued to smoke the lowest nicotine content cigarettes for an additional six months. The investigators then followed up with the participants after one year of no intervention. The results of this research failed to demonstrate that the very low nicotine content cigarettes promoted smoking cessation. As the authors acknowledged, for *"smokers not interested in quitting, reducing the nicotine content in cigarettes over 12 months does not appear to result in extinction of nicotine dependence, assessed by persistently reduced nicotine intake or quitting smoking over the subsequent 12 months."* Thus, *"[s]imply reducing the nicotine content of cigarettes alone may be insufficient to extinguish smoking behavior."*[38]

5.12 Taken as a whole, the few relevant studies conducted show that forcing daily smokers to switch to very low nicotine content cigarettes does not necessarily result in (1) decreased cigarette use, (2) increased cessation, or (3) reduced smoke/toxicant exposure. In addition, all of the studies reflect extensive non-compliance regarding the use of very low nicotine content

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[33] Donny et al. 2014, 'Reduced nicotine product standards for combustible tobacco: building an empirical basis for effective regulation', Prev Med, 68: 17-22 at 20 ("Little direct evidence addresses the potential impact of nicotine reduction on youths (b18 years of age) initiating smoking or on the progression from initial use to dependence.").

[34] Donny et al., 2014. 'Reduced nicotine product standards for combustible tobacco: building an empirical basis for effective regulation', Prev Med, 68: 17-22., at 20 ("[L]ittle is known about the effects of nicotine reduction in ex-smokers.").

[35] Higgins et al., 2018. 'Response to reduced nicotine content cigarettes among smokers differing in tobacco dependence severity', Prev Med., at 2 ("To our knowledge, there is only a single report in this emerging literature examining whether tobacco dependence severity moderates response to reduced nicotine content cigarettes.").

[36] E.g., Higgins et al. 2017, 'Response to varying the nicotine content of cigarettes in vulnerable populations: an initial experimental examination of acute effects', Psychopharmacology (Berl), 234: 89-98.at 90 ("[T]o our knowledge, th[is] study represents the first effort to experimentally examine response to reductions in the nicotine content of cigarettes in other highly vulnerable populations."); Allen et al. 2017, 'A two-site, two-arm, 34-week, double-blind, parallel-group, randomized controlled trial of reduced nicotine cigarettes in smokers with mood and/or anxiety disorders: trial design and protocol', BMC public health vol. 17,1 100. at 2 ("[I]t is not known whether progressive nicotine reduction is feasible and safe in the large subgroup of smokers with comorbid psychiatric illness."); Pacek et al. 2017, 'Knowledge about nicotine among HIV-positive smokers: Implications for tobacco regulatory science policy,' Addictive Behaviors, 65:81- 86. at 82 ("Little is known about knowledge of smoking and nicotine among smokers living with HIV, a group with a higher prevalence of smoking as well as associated morbidity and mortality than the general population. Data regarding beliefs and misinformation regarding smoking and nicotine are critical for developing appropriate educational and labeling information for nicotine and tobacco products.").

[37] Benowitz et al. 2015, Effect of reducing the nicotine content of cigarettes on cigarette smoking behavior and tobacco smoke toxicant exposure: 2-year follow up at 1674.

[38] Ibid.

cigarettes (discussed further below). Moreover, these studies suffer from significant sample, design and statistical limitations affecting their validity, reliability, and generalisability. Several of these studies employ methodologies that may unduly influence the outcomes being tested. For example, some studies investigating whether very low nicotine content cigarettes may promote smoking cessation use research subjects who were highly motivated to quit smoking,[39] or received regular counselling in addition to the condition they are supposed to be testing,[40] all of which can encourage cessation outcomes[41] and all of which differs markedly from the smoking population at-large.

5.13 Other relevant studies paint a stark picture of the potential negative effects of a nicotine standard. For example, Donny et al. 2015 investigated whether very low nicotine content cigarettes would result in decreased daily cigarette consumption.[42] The results failed to demonstrate any decline in daily cigarette consumption. In addition, the study (a) was "not nationally representative"; (b) did not account for special populations (such as non-smokers, former smokers, non-daily smokers, smokers with clinically significant or unstable psychiatric and medical conditions, etc.); and (c) suffered from extensive protocol non-compliance.

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[39] E.g., Hatsukami 2010, Reduced nicotine content cigarettes: Effects on toxicant exposure, dependence and cessation, at 347, Table 1 (showing the average score among all three groups on a motivation to quit scale of zero to 10 was nine or higher, indicating participants were highly motivated to cessation); Hatsukami 2013, 'Nicotine reduction: strategic research plan', Nicotine Tob Res, 15: 1003-13 at 1019, Table 1 (showing the motivation to quit level of the study population was 8.5 or higher on scale of zero to 10, with 10 representing the strongest motivation to quit).

[40] E.g., Hatsukami 2010, Reduced nicotine content cigarettes: Effects on toxicant exposure, dependence and cessation, at 344 (indicating subjects attended weekly "standardized counseling" sessions while using the test products); Hatsukami 2013 'Nicotine reduction: strategic research plan', Nicotine Tob Res, 15: 1003-13., at 1016 (stating subjects assigned to conditions including reduced-nicotine cigarettes were counseled "to consider the use of these products as a step toward quitting" while using them and received treatment tools recommended by the U.S. Clinical Practice Guideline during the abstinence phase); Benowitz 2015, 'Effect of reducing the nicotine content of cigarettes on cigarette smoking behavior and tobacco smoke toxicant exposure: 2-year follow up' at 1669 (indicating subjects who expressed interest in quitting or had quit smoking between visits were given the Clearing the Air and the American Cancer Society Smart Move stop smoking manuals).

[41] See, e.g., Hammond & O'Connor 2014, 'Reduced Nicotine Cigarettes: Smoking Behavior and Biomarkers of Exposure among Smokers Not Intending to Quit', Cancer Epidemiol Biomarkers Prev October 1 2014 (23) (10) 2032-2040, at 2037 ("Smokers intended to quit may have greater motivation to achieve complete smoking abstinence and may exhibit lower levels of continued use of reduced nicotine content cigarettes compared with individuals less interested in quitting."); Fiore 2008, Clinical Practice Guideline Treating Tobacco Use and Dependence 2008 Update Panel, Liaisons, and Staff. "A clinical practice guideline for treating tobacco use and dependence: 2008 update. A U.S. Public Health Service report." American journal of preventive medicine vol. 35,2 (2008): 158-76 (showing that counseling, including interventions as brief as three minutes, can increase cessation rates significantly).

[42] Donny et al. 2015, Randomized trial of reduced-nicotine standards for cigarettes. N Engl J Med. 2015;373:1340–9 at 1343 (primary study outcome was total cigarettes per day during the sixth week of the study period, regardless of adherence).

5.14 Other researchers have obtained similar results that merit attention. For example, Mercincavage et al. 2016b tested whether progressively reduced nicotine cigarettes would result in reduced daily smoking. Yet "[a]mong the experimental group, relative to baseline, consumption significantly increased by 3.31 (95% CI, 1.97–4.66) and 4.85 (95% CI, 3.02–6.87) [cigarettes per day] during the 0.6 mg and 0.3 mg periods (P's < 0.001), respectively, and was similar to baseline levels (mean increase = 1.22 [cigarettes per day]; 95% CI, -0.84–3.27) during the 0.05 mg period (P = 0.686)."[43] As noted above, very low nicotine cigarettes are just as toxic as any other cigarettes, so such an increase in consumption means an increase in inhaled toxicants for smokers. Thus, as noted by researchers studying the subject, "[s]ome have even boldly stated that VLNC cigarettes are a 'more toxic product' because nicotine reduction would increase the ratio of toxicants to nicotine within a cigarette."[44]

5.15 It is clear that further research is also needed to understand whether mandating very low nicotine content cigarettes would promote other behaviours with adverse health and public welfare implications (e.g., alcohol consumption, marijuana consumption, weight gain, and illicit trade). Further research is also needed to understand how reducing the nicotine in smoked tobacco products to very low levels would impact special populations. Thus, it has been noted that *"given the recognised health disparities in smokers and the connections between smoking, mental illness, and use of alcohol and other substances, it should be important to assess the effects on such groups of restrictions to only very low-nicotine cigarettes, before recommending governmental regulations for all."*[45]

5.16 We also note that one of the Government's objectives in implementing the proposal is to stop the progression of addiction among those who experiment with cigarettes. However, the peer-reviewed literature indicates that the threshold for addiction remains unknown.[46] In addition, the addictive threshold is likely to vary considerably among different individuals. As leading public health researchers have explained, *"[i]t is*

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[43] Mercincavage et al. 2016b, 'A Randomized Controlled Trial of Progressively Reduced Nicotine Content Cigarettes on Smoking Behaviors, Biomarkers of Exposure, and Subjective Ratings', Cancer Epidemiol Biomarkers Prev, 25: 1125-33. at 1128.

[44] Smith, et al., 2018, ' Whether to push or pull? Nicotine reduction and non-combusted alternatives - Two strategies for reducing smoking and improving public health', Preventive Medicine 117: 8-14

[45] Kozlowski, 2017, Cigarette prohibition and the need for more prior testing of the WHO TobReg's global nicotine-reduction strategy, Tob Control. 2017.

[46] Benowitz et al. 2015, 5. 'Effect of reducing the nicotine content of cigarettes on cigarette smoking behavior and tobacco smoke toxicant exposure: 2-year follow up'at 1675 ("The level of reduction of the nicotine content of cigarettes needed to extinguish nicotine dependence is as yet unknown."); see also Hatsukami et al. 2010, Reduced nicotine content cigarettes: Effects on toxicant exposure, dependence and cessation at 353 ("More research should be conducted on the threshold dose for nicotine addiction during the extinction phase and factors that moderate the threshold dose, the effects of reduced nicotine content cigarettes on vulnerable populations and adjunctive methods that might facilitate cessation.").

likely that there is no single threshold that applies to all people" because *"[t]here is considerable individual variability in dose sensitivity to all drugs, including nicotine."*[47] Consequently, the evidence is insufficient to demonstrate that the proposed reduction in nicotine levels would benefit public health.

<u>The proposal would likely result in numerous unintended consequences</u>

5.17 The proposal would likely result in numerous unintended consequences. In particular:

5.17.1 **Increase in illicit trade of tobacco products**. It is highly likely that many consumers would turn to the illicit trade to obtain conventional cigarettes that they are used to. This would likely undermine public health and may well lead to an increase in youth smoking and financial benefits for criminal organisations. Again, even the proponents of a very low nicotine standard have recognized the need to study and consider the inevitable increase in the illicit trade for cigarettes that would result from such a mandated standard, observing that such a "regulation would almost certainly contribute to an increased demand for illicit cigarettes. Like other unintended consequences, the critical question is not whether this would occur, but rather how much harm would likely result and whether regulators could effectively mitigate both the supply of and demand for illicit cigarettes."[48] Also, for all negative consequences that would arise from outlawing tobacco with a natural amount of nicotine, the increased burden placed on law enforcement and consumer health protection needs to be considered.

5.17.2 **Other consumer behaviours**: Many consumers would likely take a variety of steps to avoid the effects of reducing the nicotine in smoked tobacco products to very low levels. Consumers could also add liquid nicotine to their very low nicotine content cigarettes—a simple step that would largely undo any benefits of the proposal while creating

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[47] Benowitz & Henningfield 2013, 'Reducing the nicotine content to make cigarettes less addictive', Tob Control, 22 Suppl 1: i14-7. at i15; see also Perkins et al. 2016, 'Threshold dose for discrimination of nicotine via cigarette smoking', Psychopharmacology (Berl), 233: 2309-17. at 2309 (concluding that the "threshold content for discriminating nicotine via cigarettes may be 11 mg/g or greater for most smokers, but some can discriminate nicotine contents one-half or one-quarter this amount" and that "[f]urther study with other procedures and cigarette exposure amounts may identify systematic differences in nicotine discrimination thresholds"); Donny et al. 2012, 'Impact of tobacco regulation on animal research: new perspectives and opportunities', Nicotine Tob Res, 14: 1319-38. at 1320 ("[T]his seemingly simple concept of reducing nicotine content to reduce the abuse liability and consequent harm from cigarettes is laden with complications.").

[48] Smith et al, 2018, Whether to push or pull? Nicotine reduction and non-combusted alternatives - Two strategies for reducing smoking and improving public health, Prev Med. 2018;117:8-14.

other health risks involving regulatory duties to protect the public.[49] In addition, consumers could engage in compensatory smoking behaviour,[50] such as smoking more cigarettes or smoking cigarettes more intensively, which would actually increase smokers' exposure to carcinogens and toxicants.

5.17.3 **The Public's Perception of Risk**: The proposal could lead the public to believe that cigarettes have been rendered less risky (even though very low nicotine cigarettes are just as toxic as traditional cigarettes), which could lead to increased smoking. Studies show that many people erroneously believe that nicotine is the primary carcinogen in cigarettes. For example, a recent US study concluded that "80% of the public believes nicotine is the carcinogenic substance in cigarettes, and a national survey shows nearly half of smokers believe VLNC [very low nicotine] cigarettes are less carcinogenic to smoke than current cigarettes."[51] Thus, the proposal for mandated reduced nicotine could lead some people to believe that very low nicotine content cigarettes are less risky, which could lead never smokers to initiate cigarette use, former cigarette users to restart, or current smokers to increase their existing use and/or to reduce or delay quit attempts. Also, the proposed law could lead some consumers to believe that cigarettes have been rendered "not addictive at all", which could lead to increased interest in smoking, among both non-smokers, quitters and existing smokers.

5.17.4 **Vulnerable Populations**. The proposal could have an unpredictable but likely detrimental impact on vulnerable populations. For example, studies show that individuals with mental illnesses disproportionately derive psychological benefits from smoking, and would be adversely affected if deprived of their accustomed products.[52] As another example, one study shows that pregnant smokers are especially likely to believe that very low nicotine content cigarettes are safer than

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[49] Smith et al, 2018, Whether to push or pull? Nicotine reduction and non-combusted alternatives - Two strategies for reducing smoking and improving public health, Prev Med. 2018;117:8-14, ("Smokers could try to add nicotine to their cigarettes, possibly by adding e-liquids or other nicotine-containing fluids. The effectiveness of this practice and of its use .are difficult to predict, but would need to be monitored.")

[50] Donny et al., (2014) Reduced nicotine product standards for combustible tobacco: Building an empirical basis for effective regulation. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4253911/

[51] Byron, et al., " Reducing Nicotine Without Misleading the Public: Descriptions of Cigarette Nicotine Level and Accuracy of Perceptions About Nicotine Content, Addictiveness, and Risk", Nicotine Tob Res. 2019 Dec; 21(Suppl 1): S101–S107.

[52] For this reason and several others, the noted anti-tobacco advocate Lynn Kozlowski has cautioned against adoption of a very low nicotine mandate. See Kozlowski, 'Let actual markets help assess the worth of optional very-low-nicotine cigarettes before deciding on mandatory regulations', 2016, Addiction, 112, 3–5 ("The practicability and advisability of moving toward mandatory very-low-nicotine cigarettes has been challenged. For example, such a measure would, in effect, result in a prohibition or ban of traditional nicotine containing cigarettes with probable ill-effect, especially on the heaviest smokers with serious mental health or substance/drug use issues.")

regular cigarettes.[53] To-date, few studies have examined the effect that reducing the nicotine in smoked tobacco products to very low levels might have on these populations. Thus, the Government should examine them more closely before moving forward with the proposal.

Do you support prohibiting filters in smoked tobacco products?

5.18 We strongly oppose a ban of filters in smoked tobacco products (including cellulose acetate filters ("CA Filters"). As discussed below, a proposal to ban filters would ignore the clear evidence that filters significantly reduce the exposure of cigarette smokers to toxic substances in cigarette smoke as compared to unfiltered cigarettes, as reflected in studies finding lower health risks from filtered as compared to unfiltered cigarettes, described below.

5.19 A cigarette filter is an important component for testing requirements. In New Zealand, it is a legislative requirement for all tobacco products to be tested for the constituents of each brand of the product sold and a test for the constituents of any emissions.[54]

5.20 The Government's regulatory impact summary (RIS) refers to studies suggesting that filters have no health benefits, can result in greater harm, and are associated with increased health risks for smokers.[55] However, these concerns over efficacy of filters in reducing smokers' health risks arise regarding the comparative health risks posed by different types of *filtered* cigarettes with varying tar and nicotine deliveries. Some studies have indicated that filtered cigarettes with lower measured standard tar and nicotine yields are not less risky than other filtered cigarettes with higher measured yields. But there is agreement that in general filtered cigarettes confer reduced health risks as compared to unfiltered cigarettes. For example, according to a 2019 US Veteran Administration's study of secondary data analysis of 14 123 National Lung Screening Trial participants, unfiltered cigarettes have been shown to pose greater risks of both lung cancer and mortality than do filtered cigarettes. According to the study: "After adjustment, unfiltered cigarette smokers were nearly 40% (hazard ratio, 1.37; 95% CI, 1.10-1.17) more likely to develop lung cancer and nearly twice (hazard ratio, 1.96; 95% CI, 1.46-2.64) as likely to die of lung cancer compared with those who smoked filtered cigarettes. Additionally, all-cause mortality was nearly 30% (hazard ratio, 1.28; 95% CI, 1.09-1.50)

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[53] Andersen et al., (2013) 'Reduced Nicotine Content Cigarette Knowledge, Attitudes, and Practices of Patients at a Perinatal Substance Abuse Treatment Center', ADDICTIVE DISORDERS & THEIR TREATMENT, 12

[54] Section 56, Smokefree Environments and Regulated Products Act 1990

[55] Impact Summary: Proposals for a Smokefree Aotearoa 2025 Action Plan, pp. 9-10.

higher [for unfiltered cigarettes]."[56] This study confirmed findings of previous studies.[57]

5.21 The RIS characterises filters or 'butts' as being made of 'non-biodegradable' cellulose acetate.[58] However, this is inaccurate. Unlike products produced from petrochemicals ("plastics" in the true sense), BAT's filters are made primarily from cellulose acetate which is derived from sustainably sourced, bio-based, wood pulp and which makes up more than 90% of a cigarette filter. As a result, the degradation profile of CA Filters means a much lower environmental impact than that of true 'plastic's, since the products can degrade in a matter of months or a few years, as opposed to the decades, even centuries, that traditional petrochemical plastics take to degrade. For this reason, we urge that a more accurate and purposeful definition of "plastic" be used in framing any proposals, and the exclusion of products such as CA Filters.

5.22 The Government's claim that tobacco companies also use various design features in cigarette filters to make tobacco more palatable (e.g., "flavoured crush balls") is also inaccurate and unsupported by the weight of the scientific evidence. Cigarettes with "flavoured crush balls" are neither more harmful or more toxic than cigarettes without them nor does the evidence establish that such products increase smoking prevalence generally or specifically among adult smokers under 30 years old. These products are not marketed or perceived as being less harmful. All filtered cigarettes have similar inherent health hazards and are equally harmful; and carry the same health warnings.

5.23 For decades, BAT and other participants in the tobacco industry have conducted extensive research into the possibility of using alternative materials to cellulose acetate in cigarettes filters. BAT alone has commissioned more than twenty different research projects exploring the potential development of such alternatives. However, to-date, cellulose acetate has remained the only viable filter material and its intrinsic filtration characteristics and efficacy have not been able to be matched by other materials. While there is currently no feasible commercial alternative to cellulose acetate for filters, BAT is absolutely committed to continuing the search for such alternatives and continues to invest and innovate to test and develop alternative materials, both internally and with third party suppliers.

5.24 We acknowledge that irresponsible disposal of CA Filters (often referred to as "butt litter") is an undesirable environmental issue. However, preventive

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[56] Tanner, et al., "Association of Cigarette Type With Lung Cancer Incidence and Mortality"

[57] See, for example, Harris, et al., 2004 ' Cigarette tar yields in relation to mortality from lung cancer in the cancer prevention study II prospective cohort, 1982-8', BMJ, 10;328(7431):72 (large scale study of data from the American Cancer Society prospective study of over 800,000 smokers found that cancer "risk was higher in those who smoked non-filter cigarettes" in comparison to filter cigarette smokers.)

[58] Impact Summary: Proposals for a Smokefree Aotearoa 2025 Action Plan, p. 10

measures such as consumer education and awareness, coupled with consumer fines, are the most effective way to reduce the impact of litter on the environment. These are currently available under the Litter Act 1979, where an infringement notice of up to $400 can be issued by local councils, through their local litter policies.

5.25 While we support the intention of the taxpayer-funded littering audit conducted by Keep New Zealand Beautiful to provide baseline data on littering in New Zealand, some of the conclusions made as a result of extrapolating the figures are simply implausible. The report concludes that over 10,269,090,000 cigarette butts are littered across New Zealand based on the baseline data. For this to be true the 535,000[59] New Zealanders who smoke would have smoked 8 years' worth of cigarette sales and littered every single one. Extrapolating figures has its uses, but in this instance, it has clearly resulted in incorrect data.

5.26 Finally, we note that prohibiting filters in tobacco products could result in a number of unintended consequences. For example, a prohibition of filters could result in smokers purchasing cigarette mouthpieces/holders. These would most likely be constructed of durable plastic that would be thrown away following a period of use, and result in the same – if not worse – environmental impact. A filter ban could also result in a number of smokers migrating across to the illicit market to procure their preferred products. As discussed elsewhere in this submission, this would expose smokers to unregulated products and deprive the Government of revenue.

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

5.27 We believe that any regulation on tobacco products should be subject to a legislative process. Matters such as these can sometimes have broader political, economic and social impacts and it is important that there is robust consideration of the evidence, consultation and debate on any proposals. Care must be taken not to extend this to reduced harm (non-combustible) alternatives.

6. Focus Area 4: Make tobacco products less affordable

6.1. <u>Comment:</u>

6.2. We do not support setting a minimum price for all tobacco products, for the reasons set out in the next section.

[59] Facts & figures | Health Promotion Agency Smokefree

6.3. However, improvements to customs and excise administration should be implemented in order to ensure that excise and GST is remitted on all tobacco products (as has always been the case for legally sold tobacco products). The question should be, therefore, refocused on how the Government can monitor domestic tobacco growers and enforce against smugglers who, through avoiding remitting taxes, most definitely do sell at prices below the excise plus GST.

6.4. **Recommendations:**

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

6.5. No, we do not support setting a minimum price for all tobacco products.

6.6. Our opinion is for several reasons, including, *inter alia*:

6.6.1. The current excise system, comprised of a fully specific tax, together with GST, already places a clear floor on the price of legal cigarettes. The Government's policy objectives, such as reducing the affordability of legal tobacco products, is achieved through the current tax system.

6.6.2. A minimum price on cigarettes in New Zealand would unnecessarily inhibit competition between legal operators, while having no real additional upside *vis-à-vis* meeting the Government's stated policy measures.

6.6.3. Very few countries have a minimum price for cigarettes, and those that do either display significant differences in their excise system to that operated in New Zealand, or have not implemented them successfully, and these have instead contributed to a growing illicit trade problem.

6.7. We now explain the rationale for each of these points in turn.

6.8. The current tax system already places a clear floor on the price of cigarettes. Under the current system, an excise duty of $20.92 is levied on each pack of 20 cigarettes (i.e. a specific duty of NZD $1,045.78 per 1,000 cigarettes). In addition, a 15% GST (equivalent to 13% of the retail price) is levied per pack, including on the excise component. Even if there were no mark-up over and above the taxes levied, the lowest possible retail price of cigarettes would, therefore, be $24.05 / pack (comprised of only excise plus GST). Since there is a mark-up over and above taxes to cover manufacturing, distribution and retailing costs, the actual GST component is even higher than that. Therefore, taxes place a clear high minimum on the prices that can be charged for cigarettes.

6.9. A minimum price on cigarettes in New Zealand would unnecessarily inhibit competition between legal operators.

6.10. The Ministry of Justice conducted a review on the lawfulness of a minimum retail price regime in New Zealand for alcohol products and made the following conclusions:

6.10.1. Harmful drinkers purchase across the price spectrum so targeting only low-price beverages would only have a modest effect on harmful consumption.

6.10.2. If a minimum price is imposed, more money would be going into the pockets of the alcohol industry, suppliers and retailers.

6.10.3. A minimum price will result in significant excise losses for the Government, which could have been used to offset the costs of alcohol-related harm.

6.10.4. There are implementation issues associated with the imposition of a minimum price regime, particularly the need for ongoing monitoring and enforcement.

6.11. The evidence from the alcohol industry should be carefully considered, given that the identical concerns would be in issue if a minimum price were to be considered for tobacco products. For example, a minimum price regime could promote an increase in locally grown activity, which would be unregulated, unmonitored, and would avoid excise duties (if the amount exceeds the current allowance of 5kg). Furthermore, there would also be an increase in illicit cross border trade as New Zealand becomes a more lucrative market to sell illicit tobacco due to the nature of its prices. Other considerations need to be taken into account for example, the difficulty in enforcing a minimum price and the compliance manpower required.

6.12. There is precedent for such a legal ruling on the use of a minimum price for cigarettes in other jurisdictions. For example, in the early 2000s, several European Member States, including Austria, France, Italy and Ireland, introduced legislation which imposed minimum prices corresponding to a certain percentage of the average price of cigarettes. In 2010, after the Court of Justice of the European Union ruled that the legislation fixing minimum retail prices for cigarettes infringed European Union law. It was felt that excise was sufficient to meet policy measures without inhibiting competition.

6.13. Although a different conclusion was reached for alcohol in Scotland, after several years of protracted legal challenge, there were some significant differences between tobacco and alcohol. Notably, some retailers in Scotland (especially large supermarkets) were discounting alcoholic products so heavily that they were being legally sold at a price below the taxes levied on them. This pricing policy was reportedly based on the belief that such low prices for certain alcoholic drinks acted as a loss leader, driving the footfall of consumers who bought a bigger basket of profitable groceries. In this instance, taxes were ineffective in placing a price floor on legally sold alcohol. The same was not true in Scotland for tobacco which has not been legally sold below cost (including tax) to act as a footfall driver for other products. Similarly, tobacco products are not – and have never been – sold legally below

cost in New Zealand, which means that taxes are effective in placing a floor on retail prices without any further restrictions to legal firms' pricing freedoms.

6.14. According to the World Health Organisation (WHO), only 16 countries (out of its database of 185 countries[60]) are identified as using some form of minimum price policy for cigarettes. This indicates that a minimum price is not generally seen as best practice. Indeed, the WHO itself says in its "*Report on the global tobacco epidemic 2019*", that it does not identify a minimum price policy as a best practice, but considers it important to report the countries that do impose minimum prices as part of their excise tax policy.[61]

6.15. Of the 16 countries reported by the WHO as using a minimum price on cigarettes, seven (including Bangladesh, China, Indonesia, Lao People's Democratic Republic, Pakistan, Mali, and the Republic of Moldova) use a minimum price as part of a tiered excise system (where price boundaries between tiers have to be defined). Maximum and minimum price levels help, *inter alia*, to determine the tiers within which certain products are priced and taxed. Clearly, any insights into the pros and cons of a minimum price from these countries will apply primarily to other nations employing a tiered excise system. New Zealand does not operate a tiered excise system.

6.16. In other cases, such as Malaysia[62] and Brazil[63], a minimum price on cigarettes is not aligned to the excise system and has contributed to a high and rapidly growing illicit trade problem. This is something that New Zealand should want to avoid emulating.

6.17. In summary, the introduction of a minimum price is not required in New Zealand since the tax system already places a clear – and high – floor below which the price of cigarettes cannot be set. A minimum price would be either ineffective or would unduly inhibit competition, without a corresponding benefit of improving the authorities' ability to pursue their various policy objectives. Moreover, it would also be an additional and unnecessary administrative burden on both Government and legal businesses.

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[60] WHO, Report on the global tobacco epidemic 2019, Table 9.5 Supplementary information on taxation, available at https://www.who.int/publications-detail-redirect/9789241516204t.

[61] WHO, Report on the global tobacco epidemic 2019, p. 141, available at https://apps.who.int/iris/rest/bitstreams/1239531/retrieve.

[62] Oxford Economics, The Economics of the Illicit Tobacco Trade in Malaysia, June 2019, available at https://www.oxfordeconomics.com/recent-releases/the-economics-of-the-illicit-tobacco-trade-in-malaysia (a report commissioned by BAT).

[63] Centro de Analisis y Difusion de la Economia Paraguaya, Tobacco Oversupply in Paraguay and its Cross-Border Impacts, March 2021, available at https://tobacconomics.org/files/research/688/tobacco-report-1-paraguay-final-march-2021-ok.pdf.

7. Focus Area 5: Enhance existing initiatives

7.1 **Comment:**

7.2 We commend the Ministry of Health's work in acknowledging the emergence of vapour products, defined in legislation as a "significantly less harmful" alternative for adult smokers who would otherwise continue to smoke. As stated above, we would encourage the Ministry of Health to extend this approach towards oral nicotine pouches, which the evidence indicates are likely to be substantially less risky than cigarettes.

7.3 To incentivise retailers to move away from selling tobacco, they should be provided with more tools, for example, allowing them to sell more vapour flavours in general retail (i.e. dairies, petrol stations and supermarkets). As part of the Government's tobacco harm reduction strategy, this can be bolstered by allowing the sale of oral nicotine pouches, which do not contain tobacco.

7.4 **Recommendations:**

7.5 We support the Government's investment in mass and social media campaigns to encourage adult smokers to switch completely to non-combusted alternatives from combustible tobacco products; and increase investment in stop smoking services for priority populations.

7.6 We believe that more can be done to enhance the availability of these alternatives to combustible tobacco products to achieve Smokefree 2025.

7.7 We refer to our comments in section 2.

8. UNINTENDED CONSEQUENCES

8.1. Illicit Tobacco

8.2. BAT is extremely concerned that the approach recommended in the *"Proposals for a Smokefree Aotearoa 2025 Action Plan, Discussion Document"* would lead to a significant increase in illicit tobacco.[64] As noted above, a KPMG report[65] found that illicit tobacco constituted approximately 11.5% of total consumption in New Zealand in 2019. This means that in 2019, one in ten cigarettes consumed was illicit, with an estimated loss of approximately $290 million in Government excise revenue.

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[64] When we refer to "illicit" tobacco, this includes counterfeit cigarettes, contraband cigarettes, illicit whites, and unbranded tobacco. Illicit tobacco is either brought into the country illicitly from overseas markets or grown illicitly within New Zealand.

[65] KPMG (2020), Illicit tobacco in New Zealand, 2019 Full Year Report. Available here.

8.3. We commend New Zealand Customs on taking action against criminals who smuggle tobacco and note that this enforcement action has increased over the last few years. For example, the introduction of a tobacco import permit has afforded Customs greater efficiency and enforcement against parcels received in the international mail centre.

8.4. To further address illicit tobacco and to mitigate against it growing further, BAT makes the following submissions regarding actions the Government should consider taking, including:

8.4.1. Repealing sections 67(4)(a) and 67(5) of the Customs and Excise Act 2018 which provides an exemption to Customs-controlled areas and more specifically allows individuals to personally manufacture 5kg of tobacco in any 12-month period. It seems perverse that the proposal did not even address this as an immediate first step which would have far greater impact than other proposals.

8.4.2. Introducing stronger penalties that are consistent with international best practice and supporting enforcement action by Customs against persons involved in illicit tobacco activities in New Zealand.

8.4.3. Introducing infringement notices under the Smokefree Environment and Regulated Products Act 2020 ("**the Act**") that smokefree officers could issue to retailers in respect of tobacco products sold in retail stores that do not comply with the Act.

8.4.4. Amend the Trans-Tasman Mutual Recognition Act 1997 ("**the TTMRA**") that currently permits products that are sold legally in Australia to be sold legally in New Zealand. These Australian packs do not have to comply with the Smokefree Environment and Regulated Products Act 2020.

8.4.5. Research and monitor the illicit market to understand the consumption and distribution of any type of illicit tobacco being sold in New Zealand, so that further action can be taken to put a lid on this black economy, for example taking a greater focus through the Government's *Transnational Organised Crime in New Zealand Strategy, 2020-2025*.[66] To truly address illicit tobacco, the Government must have a dedicated strategy to tackle this illicit commodity, the proceeds of which are used to fund other criminal activities.

8.5. We consider that the personal growing allowance is facilitating the illicit tobacco trade and that this is prejudicial to compliant tobacco industry participants and contrary to tobacco control policies. New Zealand is the only OECD country that has a 'smokefree' goal and contradictory personal use exemption.

8.6. The current allowance permits any person over 18 to grow and manufacture, for personal use, up to 5 kg of tobacco per annum. This is the equivalent of about 30 roll your own (RYO) cigarettes per day, without the payment of excise duty.

[66] Transnational Organised Crime in New Zealand: Our Strategy 2020 - 2025 | New Zealand Police

8.7. The current 'personal allowance' is entirely unworkable and fails to address in any way the increasing illicit trade in home-grown tobacco. Section 67(4)(a) and 67(5) of the Customs and Excise Act 2018 should be repealed as the provisions merely facilitate the semi-commercial scale growing of tobacco that fuels the illicit market in New Zealand. There is little to deter growers who abuse the exemption for personal gain.

8.8. Furthermore, permitting significant amounts of tobacco to be manufactured for personal use significantly undermines tobacco control measures, intended to reduce tobacco consumption. The health risks for home-grown tobacco are no less than for manufactured tobacco. Home-grown tobacco is not subject to any manufacturing controls, carries no health warnings or NZ Government quitline information whatsoever and is readily accessible to underage smokers.

8.9. BAT supports the introduction of stronger penalties and resulting enforcement action by Customs officers against persons involved in illicit tobacco. The introduction of tough penalties for breaking the law should be consistent with international best practice.

8.10. BAT strongly supports tough penalties and legislation that acts as a deterrent to the illicit trade in tobacco products. The harsher the financial penalties, the higher the likelihood it would serve as a deterrent to individual growers who abuse personal use exemptions for commercial gain and at substantial cost to both the economy and tobacco control policy objectives. Harsher financial penalties should also be on par with international best practice to act as a deterrent for smugglers that bring in tobacco from overseas.

8.11. Infringement notices exist as a deterrent for retailers to comply with local laws and regulations. These have been a successful tool as based on the 226 controlled purchase operations conducted in 2017, 2018 and up to June 2019, only 7 retailers were issued an infringement notice.[11] This indicates that retailers are largely compliant and not selling tobacco to minors.

8.12. Currently, compliant Australian-based tobacco products can be sold in New Zealand. These packs do not have New Zealand Quitline and health warnings in Te Reo Maori. Allowing Australian plain packs to be sold in New Zealand goes against the previously held New Zealand consultation on tobacco plain packaging and is at the very least confusing for retailers and enforcement agencies.

8.13. Australia does not allow New Zealand compliant tobacco plain packs to be legally sold in Australia.

8.14. By amending the TTMRA, the Government would be ensuring that tobacco products can only be sold in New Zealand if they comply with the applicable New Zealand laws and regulations. These proposed amendments would also add further practical deterrents for smugglers and illicit tobacco traders by requiring them to invest money in changing their machinery to comply with New Zealand's plain packaging laws.

9. CONCLUSION

9.1. Smokefree 2025 is about reducing smoking prevalence and tobacco-related harm.

9.2. The Government has an opportunity to be progressive and tackle this through a principled approach that focuses on positive encouragement for smokers to quit, or, for those smokers that would otherwise continue to smoke, to switch to smokefree nicotine products, over introducing further punitive and ineffective measures. This approach should include the following points and focus on tobacco harm reduction and anti-illicit trade policies:

9.2.1. Amplifying resources and focussing on less risky alternatives coupled with dedicated efforts and support services for adult smokers that want to switch away from smoking;

9.2.2. Considering the impact of tobacco control policies on local businesses and continuing smokers, and risks in fuelling youth uptake of tobacco products;

9.2.3. Addressing illicit tobacco and mitigate against its growth being driven by tobacco control policies; and

9.2.4. Actively facilitate greater access to vaping or oral nicotine products for Smoking Cessation Programmes, including direct supply from industry participants.

9.3. Thank you for your consideration of our submission to the proposals under the draft Smokefree 2025 Action Plan. We would welcome the opportunity to meet to discuss any of the points we have raised.

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