

Tangi Utikere
Chairperson
Health Select Committee Secretariat
Health Select Committee
Parliament Buildings
Wellington 6160

23 August 2022

Dear Chairperson Utikere,

JTI's response to the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

Japan Tobacco International (**JTI**) is a leading international tobacco company with operations in more than 130 countries.

JTI is the global owner (outside of the USA) of both Winston, the number two cigarette brand in the world, and Camel, and has the largest share in sales for both brands. Its other global cigarette brands include Mevius and LD. JTI is also a major player in the international market for reduced risk products with its heated tobacco brand, Ploom, and e-cigarette brand, Logic. Headquartered in Geneva, Switzerland, JTI employs close to 48,000 people globally and has been awarded Global Top Employer for eight consecutive years. JTI is a member of the Japan Tobacco Group of Companies. For more information, visit <http://www.jti.com>.

JTI's products in New Zealand are distributed by a third party.

Introduction

Tobacco and vaping products carry risks to health, and everyone should be appropriately informed about these risks. Minors should not smoke, or vape, and should not have access to tobacco or vaping products. However, when legal, well-regulated tobacco products are available, adult consumers must be able and free to choose from a range of products that meet their different needs.

As a responsible company, JTI actively seeks dialogue and engagement with government authorities around the world regarding the regulation of tobacco or vaping products that it makes and sells. We are open and transparent in our dialogue.

Our response to this consultation focuses on 3 areas, namely (1) Concerns over the stated policy objectives underpinning the Government's proposed amendments to the Smokefree Environments and Regulated Products Act 1990 and over its approach to reaching them, (2) A critical assessment of the specific policy proposals considered by the Government in its Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill (***the Bill***); and (3) Concluding remarks

(1) Concerns over the Government's Stated Policy Objectives and its Approach to Reaching Them

Prohibition

The Regulatory Impact Statement: Smokefree Aotearoa Action Plan (***the RIS***) states that the untested nature of the policies put forward in this Bill leave “*significant uncertainty in the outcomes*”¹, and the Departmental Disclosure Statement (***the DDS***) notes that the policies have “*not been otherwise tested or assessed in any way to ensure that the Bill's provisions are workable and complete*”², but these are understatements. The policies under consideration amount to prohibition.

There is clear evidence that prohibition has serious negative consequences. Most recently, the South African Government outlawed the sale of tobacco products to adult consumers as part of COVID-19 lockdown restrictions, in an attempt to reduce smoking prevalence. This allowed the illegal trade in tobacco products to find new customers and flourish. Data reported in the British Medical Journal³ showed that 93% of continuing smokers managed to purchase tobacco despite the ban and that large numbers of South Africans began to purchase tobacco from ‘informal’ channels such as friends and family. Since the ban, which also covered alcoholic drinks, was reversed, the Commissioner of the South African Revenue Service has noted that many illegal and criminal operators have “*marketed themselves to previously honest smokers and drinkers.*”⁴ As noted several times in the RIS⁵, the New Zealand Government's proposals are bound to lead to the same outcome as criminals exploit the opportunity created by this Bill.

Illegal tobacco sellers undermine tobacco control efforts because they are more likely to sell to those who are underage and the unregulated products they sell do not comply with legislative standards. The profits made from the illegal trade are also known to fund other activities such as terrorism and people trafficking which harm all of society.

The Bill rightly requires that the Minister considers the potential risks and benefits that such regulations would bring. Given the danger that these regulations could spark a surge in the market for illegal products, it is essential that the Bill be amended to require that the Minister's considerations both be made public and explicitly include an assessment of the risk that criminal gangs could exploit the opportunity to entice otherwise law-abiding New Zealanders into the illegal trade.

Inadequate Impact Statement

The RIS has been instrumental in justifying this Bill to New Zealand's law makers and public, but it is simply inadequate. The modelling presents a misleading picture of how the Bill will impact smoking rates in New Zealand:

¹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 2.

² Departmental Disclosure Statement, Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill, p.8. See [here](#).

³ From: <https://tobaccocontrol.bmj.com/content/early/2021/10/20/tobaccocontrol-2020-056209>

⁴ From: <https://news.bloombergtax.com/daily-tax-report-international/south-africa-booze-tobacco-ban-created-new-criminal-networks>

⁵ For example, Paragraph 111, page 33 of the RIS states that: “*The illicit market has been increasing, and recommended policy changes are likely to exacerbate this*”.

- Tables 2 to 5 claim to show the effect of the policies if they were introduced with immediate effect, and Table 6 claims to show the impact if all the proposals were introduced simultaneously – but none reflect the timeline proposed in the Bill⁶.
- Even taking the modeling at face value and assuming simultaneous implementation, it seems clear that the policy proposals to reduce retailer density and to increase the purchase age to achieve a “smoke-free” generation have an almost negligible effect on any final outcome, even without factoring in any concurrent increase in the existing rates of illicit trade.
- All of the modelling ignores completely any secondary behavioural effects and unintended consequences, such as the increase in the illegal trade, which the Government accepts is likely, and instead naively assumes total compliance.
- Tables 2 and 5 seem to show that low nicotine regulations would affect smokers in each community in a different way, which happens to bring them all to zero smoking prevalence at the same moment, and that retailer density restrictions would lead to a sudden acceleration in smoking decline followed by a slower-than-before rate of decline, such that the effect of the policy will have been fully eroded in around 40 years. It is difficult to imagine what causal mechanisms could lie behind these calculations.

The table of marginal costs and benefits⁷ is also far too weak to support the consideration of such untested policies:

- The RIS does not provide any illustration of the monetary impact on ‘regulated parties’ such as retailers. But this is easy to do using the figures provided in the RIS. Taking the figure of approximately \$3.1 billion of retail sales from tobacco, taking a mid-point of the estimated 5-10% figure for retailer margins, and taking the mid-point of the 5,000-8,000 retail stores, implies that the average impact on tobacco retailers in New Zealand could be more than \$35,000 per year.
- The RIS notes that tobacco excise revenues are around \$1.9 billion annually but declines to consider this as a monetized cost. Whilst the modeling used to calculate the estimated savings in health spending and the estimated income gain from increased productivity is unpublished, even one decade of lost tobacco excise would wipe out any fiscal advantage gained from this policy. This is before any consideration of the greater economic and societal impact of inviting and embedding criminality into New Zealand’s communities.
- The RIS states clearly that the illicit market is likely to increase as a result of these policies but makes no attempt to model this in any greater detail. Even a one percent share of New Zealand’s annual tobacco sales could represent a \$30+ million opportunity – tax free of course – for criminals looking to profit from the passing of these regulations. Once criminal networks are further established to exploit any experimental and prohibitory tobacco control policies, they will not limit their activities to the illegal sales of cigarettes, and the added resources and

⁶ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, pp. 8, 21 and 27.

⁷ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 31.

costs associated with any attempt to deal with this should not be underestimated or ignored.

The analysis presented in the RIS is a gross over-simplification and simply not adequate for the consideration of policies which the Government acknowledges are untested and unjustified by evidence. It is essential that more realistic modelling be developed so that law makers and the public can make a proper appraisal of the costs and benefits of these proposals, including best- and worst-case impacts of the illegal trade, which the Government has already acknowledged as a risk.

New Zealand's International Obligations

The Bill claims that implementing these changes to the Smokefree Environments and Regulated Products Act 1990 “*give effect to certain obligations and commitments that New Zealand has as a party to the WHO Framework Convention on Tobacco Control, done at Geneva on 21 May 2003*”.⁸ While Article 9 of the Framework Convention on Tobacco Control (***the FCTC***) proposes partial guidelines for the regulation of tobacco contents and emissions, including nicotine, these guidelines are not only partial, but are more importantly non-binding on any of the Parties to the Convention. Alleging that New Zealand is in any way under the obligation to implement a nicotine reduction measure by invoking the FCTC is misleading. The same can also be said about the retail reduction and age limitation policy proposals made in the Bill, to which the FCTC does not refer to at all.

Furthermore, the New Zealand Government recognizes that certain measures proposed in the Bill are *technical regulations* in the sense of the WTO's Technical Barriers to Trade Agreement (***TBT***)⁹ as evidenced by its notification to the WTO TBT Committee in December 2021 of its Smokefree Aotearoa Action Plan (***the Action Plan***).¹⁰ TBT Articles 2.9.2 and 5.6.2 require Members to notify products to be covered by the proposed technical regulation and conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced, and comments considered. To the extent the current version of the Bill has not been notified to the WTO, the Government in accordance with WTO rules and processes should notify it to the WTO TBT Committee in a timely manner to allow sufficient time for other WTO members as well as interested parties to pass comment on the Bill.

The Bill's Timeline Does Not Support New Zealand's Smokefree 2025 Goal

The Government claims that the Bill is intended to support the achievement of New Zealand's goal of less than 5% smoking prevalence across all populations by 2025 (***the Smokefree Goal***), as contained in the Action Plan. This is made clear in the Explanatory Note supporting the Bill, the DDS, the RIS, and in the Associate Health Minister's statement during the debate on first reading in late July. However:

⁸ The Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill, p.7. See [here](#).

⁹ The WTO TBT Agreement Annex 1: “*Terms and their Definitions for the Purpose of this Agreement*” defines *Technical regulation* as follows: *Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory*”.

¹⁰ See G/TBT/N/NZL/109, 22 December 2021.

- The restriction on retailer density, however the policy is implemented and notwithstanding that such a policy will not reduce the existing demand for tobacco products in any way, is proposed to come into force in 2024. The Government's own modelling then, in the RIS, shows that this policy will, in no way, be able to have any impact related to a 'smokefree' New Zealand – or anything like it – by 2025¹¹.
- The reduction of nicotine levels in smoked tobacco products, notwithstanding either the impossibility of implementing such a policy within the timetable or the enormous risk of negative consequences, is proposed to come into effect in 2025. There is no chance, then, that this policy could help to achieve the Smokefree Goal by 2025.
- The "smoke-free" generation policy, notwithstanding that this unjustified prohibition again risks huge negative consequences, is not proposed to take effect until 2027, when those born after 1 January 2009 would otherwise have been recognized as adults. There is then, again, no chance that this policy could help to achieve the Smokefree Goal by 2025.

Instead, this Bill is a prohibition of tobacco products and carries with it all the associated negative consequences for New Zealand's people and communities.

(2) The Bill's Flawed Policy Proposals

Reducing the Appeal and Addictiveness of Smoked Tobacco Products

The proposed measure to mandate very low nicotine cigarettes (**VLNCs**) is flawed on several fronts:

- **There is no scientific evidence to demonstrate that reducing the nicotine content of cigarettes to a very low level would prevent people from becoming smokers or drive smoking cessation**

There is no evidence from clinical, human, or real-life studies, which demonstrates that reducing the nicotine content of cigarettes to a very low level would prevent people from becoming smokers. One of the co-authors of the original paper that introduced the concept of a reduction in nicotine content in cigarettes in the 90's wrote that "... *taking the nicotine out of cigarettes alone is not likely to eliminate the initiation of social cigarette smoking.*"¹² Even the WHO acknowledged that "*the literature provides no quantified estimates of the potential impact of a reduced-nicotine policy on smoking initiation among adolescents.*"¹³

It is also unclear whether smoking VLNCs would offer any advantage in promoting smoking cessation. The 2020 US Surgeon General's Report on Smoking Cessation for example states that "*the evidence is suggestive but not sufficient to infer that very-low-nicotine-content cigarettes can reduce smoking and nicotine*

¹¹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 21. See [here](#).

¹² Henningfield, J.E., Benowitz, N.L., Slade, J., *et al.* (1998). Reducing the addictiveness of cigarettes. Council on Scientific Affairs, American Medical Association. *Tobacco control* 7: 281

¹³ WHO Study Group on Tobacco Product Regulation, [Advisory Note: Global Nicotine Reduction Strategy](#), World Health Organization 2015, p. 23.

*dependence and increase smoking cessation when full-nicotine cigarettes are readily available”.*¹⁴

Even in a scenario where full nicotine cigarettes are not available, the current research is not enough to determine whether a nicotine reduction policy would be effective at sustaining long-term smoking cessation and preventing people from becoming smokers. This is because smoking constitutes a multifaceted behavior that cannot be explained simply by the psychopharmacological effects of nicotine, including the amount of nicotine a smoker obtains. Smokers begin smoking, continue to smoke, and quit smoking for various and very individual reasons. For example, the sensory, social, tactile, and ritualistic aspects of cigarette smoking are extremely important and likely represent key factors in the smoking behavior of many individuals¹⁵.

In summary, smokers do not smoke only for the nicotine and are often unwilling to quit smoking regular cigarettes, despite the wide availability of alternative products delivering nicotine (e.g., e-cigarettes, heated tobacco products) to which they would have likely switched had they been solely seeking nicotine.

- **The evidence put forward to suggest that dramatically reducing nicotine content in cigarettes would result in public health benefits is speculative**

It is widely accepted that the harmful effects of smoking are attributable to the substances that are generated when tobacco is burnt – and not to the nicotine itself – and the purported public health benefits of VLNCs that are combusted in the same way as smoked tobacco products are therefore highly questionable. This concern is confirmed by a paper authored by an internationally recognized expert on tobacco use, that reads: *“the research on the low nicotine-reduction recommendation is until now preliminary and suggestive and not on representative samples of smokers. We have no direct evidence showing that it works to promote public health in any community anywhere.”*¹⁶ In other words, *“any smoking, even smoking low nicotine cigarettes, can have serious health effects-regardless of nicotine content.”*¹⁷ VLNCs take away the nicotine, whilst leaving all the harm and risks associated with smoking ‘regular’ cigarettes.

Worryingly, a mandated nicotine reduction policy could blur the perception consumers have of smoking and lead them to falsely believe that switching to VLNCs is less harmful than using conventional cigarettes. This danger is echoed in a report that finds that a significant proportion of smokers *“held the potentially inaccurate beliefs that LNCs [low nicotine cigarettes] would be less harmful and addictive than typical cigarettes.”* It further notes that, *“[t]his is problematic, as switching to LNCs does not reduce exposure to constituents that cause tobacco-related diseases, and some studies found that LNCs previously on the market were not less addictive than typical cigarettes.”*¹⁸

¹⁴ U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General. [Smoking Cessation: A Report of the Surgeon General](#). 2020, p. 11.

¹⁵ Rose, J. (2006). Nicotine and nonnicotine factors in cigarette addiction. *Psychopharmacology (Berl)* 184 (3-4):274-285

¹⁶ Kozlowski, L.T. (2017). Cigarette prohibition and the need for more prior testing of the WHO TobReg's global nicotine-reduction strategy. *Tob Control* 26: e31-e34.

¹⁷ Strasser, A.A., Lerman, C., and Cappella, J.N. (2006). Lower nicotine cigarettes may not lower harm. *LDI issue brief* 12: 1-4.

¹⁸ O'Brien, E.K., Nguyen, A.B., Persoskie, A., et al. (2017). U.S. adults' addiction and harm beliefs about nicotine and low nicotine cigarettes. *Prev Med* 96: 94-100.

The counterproductive potential of such a policy from a harm as well as a cessation perspective is again made eminently clear in several studies that find that “47% of smokers incorrectly thought that smoking these [VLNC] cigarettes is less likely to cause cancer than smoking current cigarettes. A quarter reported that they would be less likely to quit smoking if the USA enacted a VLNC standard”¹⁹ and that “approximately 80% of adults in the U.S. mistakenly believe that nicotine causes the diseases associated with smoking. If VLNCs were mandated by the FDA, smokers may believe these products are less harmful than regular cigarettes and continue to smoke instead of quitting”.²⁰

It should lastly be noted that the concept of nicotine reduction is also controversial among global health authorities who concluded after a meeting in 2018 gathering experts from all WHO regions that “there was no consensus among the participants about the merits or demerits of a nicotine or tobacco addictiveness reduction policy”.²¹

- **The historical lack of consumer acceptance of VLNCs**

The lack of consumer acceptance of VLNCs is historically proven and none of the VLNCs developed to date have met consumer preferences, resulting in these products being removed from the market shortly after their launch. Early indications based on up-to-date volumes data²² of the latest attempt to commercialize VLNCs made by 22nd Century Group Inc. confirm the rejection of these products by consumers, despite these products having inexplicably obtained a reduced exposure claim by the US FDA.²³

Most of the literature available regarding nicotine reduction confirms this consumer acceptance issue as “[l]ow-nicotine content cigarettes were rated as being of lower quality and less satisfying than the ... usual brand.”²⁴ More recently, a study reported that the findings “may indicate potential difficulties with consumer acceptance of RNCs [reduced nicotine content] should a nicotine reduction policy be implemented.”²⁵

Moreover, the vast majority of participants using VLNCs in clinical trials were confirmed biochemically to be using some of their usual brand of conventional cigarettes, which suggests that even when some smokers are able to reduce their

¹⁹ Byron, M.J., Jeong, M., Abrams, D.B., and Brewer, N.T. (2018). Public misperception that very low nicotine cigarettes are less carcinogenic. *Tobacco Control*.

²⁰ Sweitzer, M.M., Pacek, L.R., Kozink, R.V., et al. (2021). Reactions to reduced nicotine content cigarettes in a sample of young adult, low-frequency smokers. *Psychopharmacology*.

²¹ World Health Organization (WHO) (2018). Report: Consultation on Tobacco Addictiveness Reduction Measures, Berlin, Germany, 15-16 May 2018. Geneva, WHO. Available [here](#).

²² Management Science Associates Inc data for the sale of VLN Kings in Illinois, where they have initially been made available, shows a more than 90% drop in sales-out between April 2022 and July 2022.

²³ The US FDA authorized the marketing of VLN™ King and VLN™ Menthol King tobacco products as modified risk tobacco products with reduced exposure claims, including: 1. “95% less nicotine”; 2. “Helps reduce your nicotine consumption”; 3. “...greatly reduces your nicotine consumption”.

²⁴ Benowitz, N.L., Jacob, P., 3rd, and Herrera, B. (2006). Nicotine intake and dose response when smoking reduced-nicotine content cigarettes. *Clinical pharmacology and therapeutics* 80: 703-714. See also Benowitz, N.L., Dains, K.M., Hall, S.M., et al. (2012). Smoking behavior and exposure to tobacco toxicants during 6 months of smoking progressively reduced nicotine content cigarettes. *Cancer epidemiology, biomarkers & prevention* 21: 761-769.

²⁵ Mercincavage, M., Souprontchouk, V., Tang, K.Z., et al. (2016). A randomized controlled trial of progressively reduced nicotine content cigarettes on smoking behaviors, biomarkers of exposure, and subjective ratings. *Cancer Epidemiol Biomarkers Prev* 25: 1125-1133.

daily nicotine intake substantially, they may be motivated to supplement with additional nicotine. In short, if VLNCs are mandated, a significant proportion of consumers will look to obtain unaltered cigarettes from alternative sources to maintain their nicotine intake levels with their preferred product.

- **The nicotine reduction policy is a *de facto* prohibition on conventional cigarettes and will have dire consequences**

In light of the above, and given tobacco leaf in its natural form does not contain exceptionally low levels of nicotine and that a dramatic reduction of nicotine in cigarettes would therefore constitute a *de facto* ban on the sale of conventional cigarettes currently available on the market, adult smokers are bound to turn to the illicit market to obtain the cigarettes they wish and choose to smoke.²⁶ This drastic downside to any nicotine reduction policy was highlighted by an internationally recognized tobacco control expert in a recent commentary: “[i]f legal cigarettes have the nicotine reduced so they are no longer satisfying, smokers will stop using them, some will quit (at least temporarily), while others will either seek acceptably satisfying alternative products, either legally or via black markets. As there are a lot of smokers who cannot quit or still do not want to, the numbers forced towards the latter two options are likely to be large, and disproportionately the dispossessed and mentally ill, making this in part an issue of equity.”²⁷

As a result, and in addition to the many issues linked to enforcing this measure, such a development would create a huge opportunity for the illicit cigarette suppliers, who are notably less discerning about selling their products only to adults, and who are likely to use the vast revenues that this policy will bring them to fund other criminal activities. This could hand a new product portfolio to drug dealers, for whom illicit cigarettes would present a low risk – high reward opportunity.

The permission stipulated in lines 6-8, page 23 of the Bill that allows a person to grow ‘non-VLN’ tobacco leaf to manufacture, for personal use, smoked tobacco products up to an annual mass of 5kg - the equivalent of about 13 cigarettes per day for the year - would also be problematic against the backdrop of the proposed nicotine reduction measure and represent another opportunity for illegal traders to exploit in the event VLNCs are mandated.²⁸

The fact that these negative ramifications of a nicotine reduction policy are acknowledged by the RIS on several accounts makes the Ministry’s consideration of such a policy even more perplexing. Indeed, paragraph 32 of the RIS says that the VLN policy “*is likely to incentivise imports of illicit tobacco products*” because it would mean that illegal products were much more attractive to consumers than the legal ones, “*making illegal sales a more appealing proposition for organized crime*”. The comparison table on page 11 repeats this, and paragraph 96 again acknowledges this risk. The marginal cost-benefit analysis on page 30 goes further, saying that the “*illicit market [is] likely to increase*” and acknowledging the risk of

²⁶ New Zealand Customs officials estimate the current size of illegal tobacco market to represent between 10 and 20 per cent of the total tobacco market in the country: Hansard transcript, 2022/23 Estimates for Vote Customs Foreign Affairs, Defence and Trade Committee, 23 June 2022, p.3. See [here](#).

²⁷ Borland, R. (2017). Paying more attention to the ‘elephant in the room’. *Tob Control* 26: e35-e36.

²⁸ According to reports, New Zealand’s illicit loose leaf tobacco market is already well established and is growing. See [here](#).

encouraging law-abiding citizens to engage with organized crime and become criminals themselves.

Moreover, the fact that the RIS notes in paragraph 111 that “*the illicit market has been increasing, and recommended policy changes are likely to exacerbate this*” and that “*customs will need more resource to enforce border control*” as a result, but then goes on to say in paragraph 132 that “*research will be carried out on the baseline size of the black market and measure changes to it **once the policies are implemented** [emphasis added]*” would not only appear to be a very risky approach to policy-making, but also an irresponsible one, since it would knowingly create a fertile soil for the development of illegal trade and for the many negative implications it has for society as a whole.

- **The Government underestimates the technical challenges of a nicotine reduction policy and the proposed timeline for its implementation is unworkable**

Producing VLNCs represents very real technical challenges as tobacco leaf in its natural form does not contain exceptionally low levels of nicotine. These technical challenges are acknowledged by the MoH in the RIS when it refers to its nicotine reduction policy as being a “*technically challenging measure with difficulties that may not yet be understood*” and ‘grades’ it as “*much worse than doing nothing/the status quo/counterfactual*” for “*ease and cost of implementation*” for this reason.²⁹ Furthermore, and although nicotine reduction is technologically feasible, achieving a very low nicotine level in natural tobacco leaf is virtually impossible without chemically or genetically modifying crops (**GMOs**). Let alone the estimated timings and costs required to develop GMO tobacco crops – making the 2025 implementation date referred to on page 32 of the RIS as well as any application of the measure in the short- to mid-term impossible to comply with – the use of GMOs is highly controversial, with many countries having prohibited farmers from growing genetically modified crops.

In the case of New Zealand, the legal environment for GMOs is tightly regulated and controlled. GMOs are regulated under the Hazardous Substances and New Organisms Act 1996 (**HSNO**), and they cannot be imported, developed, field tested, or released in New Zealand unless an approval is issued by the Environmental Protection Authority (**EPA**). The EPA’s approval process requires an applicant to submit a significant amount of information about the GMO product itself and include an assessment of the possible adverse effects of the product, in this case on existing smokers in New Zealand. This will generally require an applicant to undertake rigorous testing before applying to import, develop, or release a GMO product in New Zealand, making the 2025 enactment date proposed in the Bill for the reduced nicotine requirement very unlikely to be achievable.

Regardless of the above, the EPA can only approve a GMO product if it meets minimum standards set out in the HSNO. To meet this minimum standard, and among other requirements, the GMO product must not be likely to “*cause any significant adverse effects on human health and safety*”.³⁰ Given the lack of

²⁹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 11.

³⁰ Hazardous Substances and New Organisms Act 1996, Section 36(c), p. 58.

research and of evidence to date about the health risks posed specifically by VLNCs made of genetically modified tobacco leaf, it would be unclear whether their import, development, or release is at all permissible under New Zealand's current legal framework.

More worryingly, and considering the above lack of data, the experimental nature of the measure is clear, and it would be irresponsible for the Government to make these products mandatory. Whether such a mass experiment is compatible with Article 10 of the New Zealand Bill of Rights Act 1990 which enshrines that "*every person has the right not to be subjected to medical or scientific experimentation without that person's consent*"³¹ is also highly questionable and should be carefully taken into account before any further consideration is given to such a policy.

- **The Government's proposed nicotine reduction policy may have serious implications on international trade.**

Article 2.2 of the TBT provides that technical regulations may not be adopted with a view to, or with the effect of, creating unnecessary obstacles to trade. A regulation can form an 'unnecessary obstacle' when it (i) does not fulfil a legitimate objective, or (ii) is more restrictive than necessary to fulfil a legitimate objective, taking account of the risks of that objective not being fulfilled. Given one of the 'legitimate objectives' specifically identified by Article 2.2 of TBT is the 'protection of human health or safety', and that as shown above there is no reliable evidence that VLNCs would achieve this objective as smokers are more likely to turn to the illegal market to obtain products providing the desirable level of nicotine, we believe that the policy proposal to reduce the levels of nicotine naturally present in tobacco leaf is in fact contrary to TBT Article 2.2.

Amending the Age Limits for the Sale of Smoked Tobacco Products

This policy proposal does nothing to address youth smoking uptake, but instead removes the freedom to choose from a section of New Zealand's adult population through discriminately disqualifying a certain group of adults from ever purchasing these products legally. Such a measure is not only excessive and disproportionate, but also has many unintended consequences and is destined to fail in fulfilling its intended purpose.

- **There is no data suggesting that a generational ban will be effective**

The MoH's proposal will not come into effect until 2027 and there will therefore be no reliable 'real life' data to suggest the success and effectiveness of the measure for many years to come. The RIS confirms the speculative nature of this proposal in paragraph 52 when it notes that "*increasing the purchase age limit may be [emphasis added] effective in stopping young people from starting smoking*".³² It is worrying to note the RIS also indirectly refers to issues with enforcing the current minimum purchase age as it finds in paragraph 45 that "*currently 3 percent of those*

³¹ New Zealand Bill of Rights Act 1990, Article 10. See [here](#).

³² Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 13.

in the 15–17 age group smoke daily”³³ but fails to offer any explanation for this, instead perplexingly proposing a measure the enforcement of which will be extremely problematic and will make ‘underage smoking’ a much greater issue than it is today.

Rather, the existing research strongly shows that banning cigarette sales has no measurable impact on smoking rates, with one study in fact finding that “*the prohibition of tobacco sales to teens does overall not statistically significantly reduce the prevalence of smoking among teens*”.³⁴ In Bhutan, banning the import and sales of tobacco products did not help bring down overall smoking incidence, but rather increased tobacco use, especially among youth.³⁵ A similar analogy can be made with the ban on alcohol during the prohibition in the United States in the 1920’s during which it was ironically easier to obtain alcohol compared to today in a regulated industry.³⁶

The fact the proposed measure will do very little to address the social supply of tobacco products to youth, which according to the RIS in paragraph 46 “*plays a much greater role than commercial supply in youth access to tobacco*”³⁷, also confounds its potential effectiveness and in fact risks making it worse moving forward given social supply among adults – some of which are allowed to smoke and some of which are not based arbitrarily on their date of birth – will likely be more widespread than it is currently.

- **A generational tobacco ban will have unintended consequences**

While there is little evidence to show that a generational tobacco ban will have any impact on smoking rates, it will on the other hand likely lead to the further development of illegal trade and to a thriving black market.

For many retailers the revenue from tobacco products constitutes a significant part of their income and livelihoods. The fact retailers already bear the brunt of many other restrictive tobacco control measures in New Zealand (e.g., retail display bans) only compounds the issue further. Moreover, demand for tobacco products is often a driver for other purchases, especially in dairies, small convenience stores and kiosks, meaning they will not only face a loss of sales and revenues from tobacco products but also a reduced turnover in other product categories. Moreover, threatening the future viability of these stores will have a direct impact on the communities and societies they serve.

Adding to these already significant downsides and in addition to having to check the identity of their young adult customers when unsure of their age, retailers would also be heavily burdened by having to verify the age of *all* their adult customers for *all* their tobacco sales. For example, in 2047, retailers will be asked to be able to differentiate between a 39-year-old customer, to whom it is legal to sell tobacco

³³ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 13.

³⁴ A.N. Meier, R. Odermatt, A. Stutzer, *Tobacco sales prohibition and teen smoking*, Journal of Economic Behavior and Organization, June 2021, p. 999. See [here](#).

³⁵ From: [With deep regrets | Kuensel Online](#)

³⁶ From: [US Prohibition at 100: The Failed Attempt to Ban Alcohol \(voanews.com\)](#)

³⁷ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 13.

products, and a 38-year-old, to whom it is illegal to do so. Regarding the enforcement of the measure, the RIS notes that *“an important part of the new regulatory regime will be ensuring that there are enough Smokefree Enforcement Officers in place to enforce these new requirements”*³⁸. This is an underestimate for a measure which risks becoming unenforceable moving forward.

- **A generational tobacco ban is discriminatory and illiberal**

A generational tobacco ban is clearly discriminatory as it does not provide equal and fair treatment under the law to all adult citizens. It in effect creates two different groups in a society, where one group of adults has fewer rights than another.

The Government acknowledges that a generational tobacco ban risks depriving people of their rights on questionable grounds and in paragraph 49 of the RIS notes that the *“measure will limit rights”* and says that it *“may [emphasis added] be justified under the Bill of Rights Act 1990”*.³⁹ The comparison table on page 17 of the RIS also acknowledges that the smokefree generation policy may be *“more vulnerable to legal challenge”*⁴⁰ and it is clear the legal repercussions of such a measure should be better assessed before any further progress is made.

Furthermore, in liberal societies, the state’s responsibility is to regulate for all its people’s safety, not to make choices *on behalf of* its citizens, nor to tell them how to live their lives. The generational tobacco ban has no place in liberal societies, where the values of autonomy, freedom and tolerance are paramount. State interventions for public health should not discount people’s informed choices.

The harmful nature of tobacco products is widely known by adult consumers and governments have already taken all the necessary steps for consumers to make an informed decision on their use. Hence, disregarding a certain group of adults’ personal decisions and choices, solely based on their age, is an unacceptable practice in liberal states.

The above points were all included in the RIS, which highlights that there was *“dissatisfaction with the vagueness of the policy, concerns raised that this was a type of progressive prohibition, that it could lead to increased crime, or that the policy raised issues for individual rights, tourists and migrant workers as well as how it would work in practice”*.⁴¹ Considering this, it is hard to understand how the MoH can suggest a generational tobacco ban as being *“clear and workable for New Zealand”*.⁴²

- **A generational tobacco ban may have serious implications on international trade**

The generational tobacco ban proposal will lead to a prohibition to legally sell or purchase tobacco products in New Zealand as it gradually extends to all the country’s population over time. Since there is today no more production of tobacco

³⁸ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 33.

³⁹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 13.

⁴⁰ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 17.

⁴¹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 14.

⁴² Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 6.

products in the country, the measure will likewise lead to a gradual ban on importing these products which is inconsistent with Paragraph 1, Article XI of the General Agreement on Tariffs and Trade (Prohibition on quantitative restrictions) as it states that “**no prohibitions** [emphasis added] (...) *shall be instituted or maintained by any contracting party on the **importation** [emphasis added] of any product of the territory of any other contracting party*”. Rather, and understandably, this provision requires WTO Members to prefer duties, taxes or other charges to prohibitions given the highly trade restrictive effect of the latter.

Reducing Retail Availability

The Bill’s proposal to reduce the retail availability of cigarettes by limiting the number of retail outlets is misguided as it misunderstands the reasons underpinning smoking initiation and cessation, which are unrelated to the supply of tobacco products. Indeed, the supply of tobacco products is irrelevant to why people choose to begin, continue, or stop smoking and any measure presuming such a link will have no impact on smoking levels.

This was made clear in a study by NHS Health Scotland that stated that the relationship between tobacco outlet density and smoking rates “*is largely based on correlational evidence which is unable to identify whether outlet density restrictions will lead to reduced smoking rates*”⁴³ and concluded that “*further research is needed in this area [and that] interventions which aim to reduce tobacco outlet density should be robustly evaluated to determine their impacts on smoking prevalence and their ability to improve health and narrow health inequalities.*”⁴⁴ In the Netherlands, a study by the Trimbos Institute looking into this same issue found that “*overall, we must conclude that, at this point in time, the evidence for a reduction of tobacco POS leading to a lower smoking prevalence or incidence is still relatively weak.*”⁴⁵

On the contrary, far from having any meaningful impact on smoking prevalence – as is in fact acknowledged by the RIS in its Table 5⁴⁶ – such a measure would rather have several unintended consequences:

- **It will increase the price of cigarettes, in turn unfairly affecting the poorest groups in society**

If the supply of a product decreases and demand stays the same, the price of the product will tend to increase. This would very likely be the case for smoked tobacco products, all the more since retailers who do eventually get permission to supply them would be free to increase their prices to maximize their profits from such sales. The impact of this decrease in affordability is made clear in paragraph 92 of the RIS that states that “*those who continue to smoke will be impacted financially*” and that “*the additional costs of continuing to smoke will weigh heaviest on low-*

⁴³ Riches E et al. [What is the causal link between tobacco outlet density and smoking prevalence?](#) Edinburgh: NHS Health Scotland; 2018; p. 2.

⁴⁴ Ibid., p. 15.

⁴⁵ K. Monshouwer, J. Verdurmen, T. Ketelaars, M.W. van Laar (2014). [Points of sale of tobacco products: Synthesis of scientific and practice-based knowledge on the impact of reducing the number of points of sale and restrictions on tobacco product displays.](#) Trimbos Institute, Netherlands Institute for Mental Health and Addiction, 2014; p. 92.

⁴⁶ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 21.

income groups, which may further increase inequities.” In addition to this direct impact, the RIS also notes that “a retailer reduction strategy would indirectly increase the price of all tobacco products by increasing travel time and cost.”⁴⁷

The fact the MoH is willing to put forward a measure which would have such a discriminatory impact is even more incomprehensible considering paragraph 24 of the RIS that specifically rules out any policy option relating to an increase in excise taxes *“due to concerns about the financial impact further [tax-driven] price increases would have on those who continue to smoke.”⁴⁸* Similarly, the MoH also rejects a minimum price policy as it would *“likely be seen as unfairly targeting people who smoke and are on low incomes, and increasing hardship.”⁴⁹*

- **It will interfere arbitrarily in the market and risk creating a monopolistic retail environment for smoked tobacco products**

Line 5, page 27 of the Bill refers to a *“competitive process”* for retailers to seek approval to sell smoked tobacco products. While the exact meaning and modalities of this will be laid down in subsequent regulations, there are reasons to be worried about this ‘process’ as there is a danger that the country’s larger retailers and retail chains could end up being the only channels that are allowed to sell cigarettes in what would represent an unwelcome drifting towards a monopolistic structure. In other words, a reduction in retail outlets will enhance the concentration of sales at the remaining outlets, leaving the smaller retailers that did not ‘make the cut’ to suffer disproportionately and guaranteeing significant profits to those who do. The wider socio-economic impact of such a measure should also be considered as it could even lead to the arbitrary collapse of some smaller local retailers who are key pillars of their communities. It is also obvious that any reduction in retail outlets will play into the hands of criminals who will fill the void for demand left by such a drastic measure.

The above concerns were all echoed by a corner shop owner in an article dated May 2021 where she explained: *“We understand and appreciate that the Government want to reduce smoking, however this drastic move is just punishment for our business. If we lose the tobacco, we lose the customer for good, then in turn that will ruin our business.”* And she also referred to the illicit market: *“There are already cheap cigarettes being sold illegally from other countries in Waitara. Up to \$10 –\$15 cheaper than the standard ones. The new rule will make it worse. I would say they [black market cigarettes] have taken 15 per cent of sales away from us and the black market will continue to grow if this rule happens.”⁵⁰*

(3) Concluding Remarks

In a recent article, Robert Beaglehole, the Chair of ASH – Action for Smokefree 2025 highlighted that *“data from ASH and the New Zealand Health Survey shows that youth are already almost smoke-free; the most at-risk group is now their (smoking) parents.”⁵¹* In other words, the current tobacco control regulatory regime in New

⁴⁷ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 24.

⁴⁸ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 6.

⁴⁹ Regulatory Impact Statement: Smokefree Aotearoa Action Plan, Ministry of Health, p. 25.

⁵⁰ From: [Ban on selling ciggies will sink corner stores, says Taranaki dairy owner | Stuff.co.nz](#)

⁵¹ From: [Robert Beaglehole: Smokefree by 2025 - fairly and simply - NZ Herald](#)

Zealand is working and underage smoking is basically obsolete, a fact highlighted in the RIS that states that currently only 3% of 15–17-year-olds smoke daily.

Existing adult smokers in New Zealand are fully aware of the risks associated with smoking and still decide to make the informed and free decision to smoke, despite all of the tobacco control policies and restrictions already in place in the country. As highlighted in the pages above, there is very little to suggest that any of the policy proposals considered in the Bill and allegedly assessed in the RIS will do anything to change this. Indeed, attempts to alter tobacco products to render them less satisfying and supposedly less addictive, to arbitrarily decide of an age/birthdate where it is no longer legal to purchase them, or to again arbitrarily reduce the number of stores selling them, will fail to reach their purported health-related objectives. Put differently, *“as ground-breaking as these policies may be, they will not dramatically reduce smoking rates by 2025.”*⁵²

Worryingly, these policy proposals rather represent the actions of a Government that simply cannot understand or accept the free will of certain adults and *“an inevitable consequence of all three “game-changing” policy proposals is an increase in the illicit trade in cigarettes, which is already substantial.”*⁵³ Indeed, and as shown above, it is clear the experimental and arbitrary measures under consideration will each fuel an illegal market for tobacco products. Combined, they not only risk collectively turning New Zealand into a hotbed of criminality, but more importantly will do very little to support New Zealand’s Smokefree 2025 target and risk undermining the commendable work done so far in New Zealand in relation to underage smoking and to supporting existing smokers to choose alternative products with the potential to reduce the risks associated with smoking.

In light of the above, we respectfully request that our above points and arguments are given full consideration by the Health Select Committee and that the various policy proposals considered in the Bill are revised accordingly.

Yours faithfully

Chris Woods

Head of Corporate & Fiscal Affairs, JTI

⁵² From: [Robert Beaglehole: Smokefree by 2025 - fairly and simply - NZ Herald](#)

⁵³ Ibid.