

Tobacco and Other Smoking Products Amendment Bill 2023

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**HEALTH AND ENVIRONMENT COMMITTEE
THE QUEENSLAND PARLIAMENT**

**A SUBMISSION ON THE *TOBACCO AND
OTHER SMOKING PRODUCTS
AMENDMENT BILL 2023 (QLD)***



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EXECUTIVE SUMMARY

This submission builds upon an earlier submission made during the consultations on tobacco control conducted by the Department of Health of the Queensland Government in 2022.¹ This submission to the Queensland Parliament focuses in particular on the package of legislative proposals contained in the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*. The discussion of the regulation of vaping and e-cigarettes will be left to a separate spin-off inquiry being conducted by the Queensland Parliament.

The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* is an important step towards achieving a tobacco endgame in Queensland. Both the Premier and the Health Minister have shown a strong personal commitment to protecting the public health of Queenslanders from the threat and the scourge of the global tobacco epidemic. The legislative proposal has some strong points in terms of its combination of measures in respect of smoke-free environments, retail licensing, and enforcement. The Queensland model is not, though, quite as ambitious as New Zealand's Tobacco Endgame strategy. There is scope for a future set of more ambitious law reforms, down the track in Queensland.

This submission calls upon the Queensland Government to raise its ambition in respect of tobacco control measures in order to achieve further public health benefits. There has been a commendable commitment to tobacco control by Queensland's present leaders. However, there is currently a mismatch between the extent of the

¹ Matthew Rimmer, *Reducing the Negative Effects of Smoking in Queensland: A Submission to the Queensland Government*. Queensland Government, Queensland Health, 2022, <https://eprints.qut.edu.au/232886/>

problem of smoking in Queensland, and the incremental nature of the public policy proposals proposed by the Queensland Government. The objective of Queensland's tobacco control regime should aim higher than just reducing the negative effects of smoking in Queensland. The system should aim for the elimination of smoking in Queensland – a smoke-free Queensland.

The Queensland legislation has some additional incremental measures to expand smoke-free spaces and environments. This submission contends that the Queensland government should seek to achieve total and comprehensive smoke-free spaces and environments. The Queensland government should seek to eliminate loopholes and anomalies, which allow for smoking enclaves in public spaces.

This submission supports a licensing regime for retailers in Queensland. However, this submission also maintains that there is a need to reduce the density and concentration of smoking retailers – particularly in deprived neighbourhoods in Queensland.

This submission notes the strong focus of the bill and its legislative sponsors on the protection of children and youth from the tobacco industry. This submission also recommends the introduction of further age restrictions on smoking in Queensland to achieve smoke free generations. It contends that Queensland should follow the lead of the United States, Singapore, and New Zealand, and raise the legal age for smoking.

Furthermore, the submission recognises the huge burden of smoking-related death, disease, and disability in Queensland. It recommends that the Queensland Government should consider the prospects of civil litigation and criminal litigation against the tobacco industry to hold them responsible and accountable for such costs.

This submission also highlights the need to put in place further measures to guard against tobacco interference in the Queensland political system. It is

recommended that tobacco companies and related entities should be banned from making political donations in the Queensland political system.

RECOMMENDATIONS

Recommendation 1

The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* represents an important, substantive piece of law reform, which will help reduce smoking rates in Queensland. Given its proud commitment to public health, the Queensland Government should continue to pass bold and ambitious proposals to achieve a tobacco endgame – a smoke-free Queensland.

Recommendation 2

The Queensland Government should update and modernise the objectives of its anti-smoking legislation to better reflect a tobacco endgame strategy (rather than just a smoking reduction objective). The Queensland Government should implement a package of policy reforms in order to implement the *WHO Framework Convention on Tobacco Control 2003*, and protect public health and the environment in Queensland.

Recommendation 3

Queensland's *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* enhances the human rights of Queenslanders. Tobacco control policies are underpinned by a commitment to human rights – including family and children's rights, and the right to life. The bill is compatible with other human rights – such as the right to property, freedom of expression,

and freedom of movement. In the future, the Queensland Government should recognise a full right to health in its human rights framework. The Queensland Government should support enhanced Indigenous-led tobacco control measures.

Recommendation 4

The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* puts forward some further spatial limitations in respect of smoking. The expansion of smoke-free environments in Queensland is welcome. The Queensland Government should seek to develop total and comprehensive smoke-free spaces and environments through its tobacco control policies.

Recommendation 5

Queensland’s plan to establish a licensing system for all retailers of tobacco is an excellent initiative. The Queensland Government should reduce the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density. The Queensland Government should reduce the retail availability of tobacco by restricting sales to a limited number of specific store types. The Queensland Government should encourage retailers to shift towards the sale of healthy products.

Recommendation 6

The Queensland bill has a strong focus on the protection of families, childrens' rights, and youth. However, the legislation stops short of providing for further temporal limitations in respect of the use of tobacco. In the future, the Queensland Government could follow the lead of the United States Singapore, and New Zealand, and introduce a smoke-free generation policy.

Recommendation 7

In the past, the strength of Australia's tobacco control regimes on the books has often been undermined by weak and inconsistent enforcement in practice. A pleasing aspect of the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) is the strong focus upon co-ordinated enforcement of tobacco laws and regulations. In the future, the Queensland Government should explore the need for law reform in respect of civil liability and criminal liability for tobacco companies.

Recommendation 8

The Queensland Government needs to ensure that its tobacco endgame measures are safeguarded against the threat of tobacco interference. As recommended by the Cancer Council Queensland, there should be a prohibition of tobacco donations in the Queensland political system. The

Queensland Government, the corporate sector, and civil society should further expand tobacco divestment policies.

Recommendation 9

Previously, tobacco companies have tested tobacco control measures in domestic courts. The High Court of Australia decision in the plain packaging of tobacco products dispute provides useful guidance to the domestic defence of tobacco control measures. In the past, tobacco companies and their proxies have challenged pioneering Australian tobacco control measures, such as plain packaging of tobacco products, in investment tribunals, and trade disputes. The Queensland Government should work with the Federal Government to ensure that its package of tobacco control measures can be well protected and defended from challenges by Big Tobacco in investment tribunals, and trade proceedings.

1. THE QUEENSLAND DEBATE OVER TOBACCO CONTROL

As Chief Health Officer, Dr Jeannette Young emphasized the need for strong tobacco control measures. In 2015, she gave evidence to the Queensland Parliament:

Smoking remains a leading preventable cause of death and disease in Queensland. For this reason, reducing smoking rates and exposure to second-hand smoke is a priority. The purpose of the bill is to further reduce people's exposure to second-hand smoke; reduce the normalcy and social acceptability of smoking behaviours, particularly for young people; and provide smoke-free environments to help people quit smoking.²

Young was particularly concerned about the impacts of smoking upon children: 'Children are particularly vulnerable to the harmful effects of second-hand smoke.'³ She cautioned: 'Children exposed to second-hand smoke are more likely to have health problems such as bronchitis, pneumonia and asthma.'⁴ Providing a briefing on a 2015 bill, Young noted: 'The bill aims to reduce young people's exposure to second-hand smoke and reduce the numbers of young people taking up smoking by extending smoking bans to public places frequented by children and families.'⁵

² Dr Jeannette Young, 'Public Briefing—*Tobacco and Other Smoking Products (Smoke-free Places) Amendment Bill 2015 (Qld)*', 2 December 2015, 2.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

In 2018, Dr Jeannette Young expressed her desire for Queensland to be tobacco control leader in Australia.⁶ She noted: ‘Queensland’s anti-smoking laws, which are now among the toughest in the world, were also given an honourable mention for protecting both smokers and non-smokers from harm caused by tobacco.’⁷ Young observed: ‘Queensland is increasingly becoming smoke-free.’⁸ She commented: ‘The adult daily smoking rate has halved since 1998 and youth smoking is at its lowest recorded level.’⁹ She stressed: ‘But despite these significant gains, tobacco smoking is still the leading cause of preventable cancer cases, and many other chronic diseases, in Queensland.’¹⁰ Young commented: ‘Queensland Health is committed to protecting the health of Queenslanders and reducing the rate of smoking, which is why we will continue to see action in this area.’¹¹

Departing as Chief Health Officer in 2021, Dr Jeannette Young reflected that, when she was appointed to the role ‘20 per cent of Queensland adults smoked every day.’¹² She was proud of her achievements in tobacco control in that time: ‘We’ve since halved that.’¹³

⁶ Queensland Health, ‘Queensland Tops the Charts for Smoke-Free Efforts’, Press Release, Queensland Government, 31 May 2018, <https://www.health.qld.gov.au/news-events/doh-media-releases/releases/queensland-tops-the-charts-for-smoke-free-efforts>

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Department of Health, ‘Dr Jeannette Young’s letter to Queensland’, Press Release, Queensland Government, 31 October 2021, <https://www.health.qld.gov.au/news-events/doh-media-releases/releases/dr-jeannette-youngs-letter-to-queensland>

¹³ Ibid.

Since becoming governor, Dr Jeannette Young has expressed her ambition for Queensland to become a smoke-free state. She has been a supporter of Queensland adopting tobacco endgame policies.¹⁴ She said: ‘I would love to see Queensland as a smoke-free state.’¹⁵ Young noted: ‘We have smoking rates down to nine per cent and I hope they continue to decrease.’¹⁶ Young encouraged further action: ‘As an individual thing that anyone can do for themselves, that the most important.’¹⁷

Accepting her appointment as Companion of the Order of Australia in 2022, Young highlighted her work in tobacco control: ‘While I’m perhaps most widely recognised for my role in helping lead Queensland through the COVID-19 pandemic, I’m also extremely proud of my achievements in ... halving the rate of adult smokers in Queensland.’¹⁸

The Queensland Premier, the Hon. Anastacia Palaszczuk, has taken a strong personal interest in achieving health outcomes in this field under her governments: ‘We are

¹⁴ Stewart Perrie, ‘Queensland’s Next Governor Wants The State to Become Smoke-Free’, *LadBible*, 22 June 2021, <https://www.ladbible.com/news/latest-queenslands-next-governor-wants-the-state-to-become-smoke-free-20210622>

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Government House Queensland, ‘Governor acknowledges appointment as Companion of the Order of Australia’, 12 June 2022, <https://www.govhouse.qld.gov.au/government-house/office-of-the-governor/news-and-publications/latest-news/governor-acknowledges-appointment-as-companion-of-the-order-of-australia>

delivering on our commitment to take stronger action against smoking.’¹⁹ She added: While I’m pleased to see that smoking rates continue to drop in Queensland, we must do more.’²⁰

As Minister for Health, the Hon. Cameron Dick presented the *Tobacco and Other Smoking Products (Smoke-free Places) Amendment Bill 2015 (Qld)* to the Queensland Government.²¹ He emphasized: ‘This bill is part of a continued multi-strategy approach aimed at reducing the cost of smoking to Queensland individuals, families and the community.’²² Dick commented: ‘To reduce rates of smoking and involuntary exposure to second-hand smoke, the tobacco act has progressively banned smoking in many outdoor public places.’²³ He provided a short history of tobacco control initiatives: ‘Strong smoke-free laws, in conjunction with retail restrictions, quit smoking campaigns and targeted services to help people stop smoking have reduced smoking rates in Queensland by 30 per cent since 2001, when the Beattie Labor government commenced initiatives to expand the number of smoke-free places in Queensland.’²⁴ The Minister noted that the smoking impacts remained grave: ‘Even though that has occurred, every day almost 10 Queenslanders die from a smoking related illness’.²⁵ He

¹⁹ The Hon. Anastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

²⁰ Ibid.

²¹ The Hon. Cameron Dick, ‘Speech on the *Tobacco and Other Smoking Products (Smoke-Free Places) Amendment Bill 2015 (Qld)*’, Hansard, Queensland Parliament, 10 November 2015, 2689-2691.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

observed: ‘One of these 10 people will be a non-smoker who has died from an illness related to inhaling other people’s smoke.’²⁶ Dick stressed: ‘This is why smoking is a key health priority of the government.’²⁷ As the Treasurer of Queensland, Cameron Dick is no doubt sensitive to the impact of smoking upon Queensland’s economy – with both direct and indirect burdens being placed on the system.

The current Queensland Minister for Health Yvette D’Ath has a strong record of public policy action in respect of tobacco control. She played a part in the introduction of plain packaging of tobacco products in Australia.²⁸ As the Federal Member for Petrie, D’Ath contributed to the work of Nicola Roxon in establishing Australia’s pioneering system for plain packaging of tobacco products. She also offered her views on the need for stronger measures to deal with tobacco control – in a debate over tobacco advertising on the internet and in social media:

Smoking kills Australians every day. How can members of this place do anything but work as hard as they can to prevent this? We have heard the statistics listed during this debate and they are grim. Approximately three million Australians smoke every day, and smoking is the leading cause of preventable death in Australia. Not only does smoking kill 15,000 Australians every year; it also costs the economy over \$31 billion. Smoking leaves a horrendous trail of

²⁶ Ibid.

²⁷ Ibid.

²⁸ For accounts of this law reform, see Becky Freeman, Simon Chapman, and Matthew Rimmer, 'The Case for the Plain Packaging of Tobacco Products' (2008) 103 (4) *Addiction* 580-590; Simon Chapman and Becky Freeman, *Removing the Emperor’s Clothes: Australia and Tobacco Plain Packaging*, Sydney: Sydney University Press, 2014, <https://sydneyuniversitypress.com.au/products/78678> and Matthew Rimmer (ed.), *The Plain Packaging of Tobacco Products*, Special edition of QUT Law Review (Vol. 17 (2)), Brisbane: QUT, 2017, <https://lr.law.qut.edu.au/issue/view/55>

destruction through our lives, at a horrible cost to our society and our economy. I believe it is up to us to take action; we cannot afford not to.²⁹

D'Ath commented: 'When we consider the cost to our economy, estimated at over \$31 billion every year, we are of course motivated not only by consolidating a uniform range of regulatory arrangements but also by the health costs relating to the consumption of tobacco.'³⁰ She stressed: 'These costs not only are an incredibly expensive drain on the health sector and taxpayers but also exact a terrible social cost on families afflicted by smoking related disease and what can be very long and painful periods of illness.'³¹ D'Ath stressed: 'Smoking remains one of the leading causes of preventable death and disease among Australians, and we owe it to them to take the strongest action we can both to help support smokers make a decision to quit for good and to stop new smokers taking up the habit.'³²

As Queensland Minister for Health and Ambulance Services, Yvette D'Ath was proud that Queensland has some of the strongest tobacco laws in the world. She emphasized that there was a need for further policy initiatives in this field: 'In the past 20 years, we've seen the rate of smoking halve in Queensland, but there is more work to be done.'³³ She commented: 'Smoking is the leading preventable cause of death and

²⁹ The Hon. Yvette D'Ath, 'Second Reading Speech on the *Tobacco Advertising Prohibition Amendment Bill 2010 (Cth)*', Hansard, House of Representatives, Australian Parliament, 22 March 2011, 2746.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ The Hon. Yvette D'Ath, 'Queenslanders Invited To Have Their Say On Major Smoking Law Overhaul', Press Release, 31 May 2022, <https://statements.qld.gov.au/statements/95261>

disease in Queensland, so that's why the Palaszczuk Government is delivering on our commitment to strengthen our anti-smoking efforts even further.³⁴

In her 2023 speech on 'Smoking', the Health Minister Yvette D'Ath previewed the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*.³⁵ She explained the long history of tobacco control in Queensland:

Over the past 20 years the number of Queenslanders who smoke daily has halved, but smoking remains the biggest cause of preventable death and disease in Queensland. The decrease in smoking rates over the past 20 years is a great public health success story and has relied on a mix of strategies, including increased public education about the harms of smoking, increased support to help people quit, making it more difficult to promote and advertise tobacco products, using price levers, increasing smoke-free places and stronger regulation.³⁶

D'Ath observed: 'The bill will strengthen, modernise and futureproof the requirements, restrictions and safeguards in our tobacco laws.'³⁷ She stressed that the legislative regime was intended to boost the surveillance of the tobacco industry, and provide proper enforcement of laws and regulations: 'The bill will improve monitoring of the smoking products industry and enable more effective enforcement of existing tobacco laws.'³⁸ The bill 'will also assist smokers to quit, discourage youth uptake of smoking

³⁴ Ibid.

³⁵ The Hon. Yvette D'Ath, 'Smoking', Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

and further protect the community from exposure to second-hand smoke.³⁹ Yvette D’Ath explained the nature of the new measures in the legislative package: ‘Key measures in the bill include establishing a licencing scheme for the sale of smoking products; ensuring there are effective deterrents against supplying illicit tobacco, including stronger penalties; expanding smoke-free public places, including community spaces for children; and stronger measures to protect children from the dangers of smoking.’⁴⁰

In her second reading speech on the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld), Health Minister Yvette D’Ath explained the pressing public health priorities in respect of tobacco control:

The reforms in the bill respond to ongoing and emergent public health concerns and will ensure Queensland’s health legislation remains contemporary and effective. In Queensland, the effects of smoking are a significant public health concern. It is the No. 1 risk factor contributing to preventable death and disease. The annual cost of smoking to Queensland, including hospital and other medical expenses, has been estimated at \$27.4 billion. Smoking also contributes to health inequity. Higher smoking rates, and therefore poorer health outcomes, are more common in First Nations people and in low socio-economic and regional or remote communities.⁴¹

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld)’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

D'Ath emphasized that ‘the bill strengthens public health protections for Queenslanders and particularly for families and children.’⁴² There is a particular concern about the tobacco industry targeting vulnerable and marginalised members of the Queensland community.

Cancer Council Queensland CEO Andrew Donne has highlighted that smoking remains a persistent public health challenge in Queensland.⁴³ He notes that there had been progress: ‘Queensland’s adult smoking rate has more than halved over the past two decades.’⁴⁴ Donne stressed: ‘Yet smoking remains the leading cause of preventable death and disease, with one in five cancers attributable to tobacco use.’⁴⁵ He emphasized: These changes will reduce the supply of tobacco products, particularly illicit tobacco, and increase the number of smoke free venues and give Queensland the opportunity to accelerate the decline in smoking rates and ultimately, save lives.⁴⁶

Anti-smoking legislative reform in Queensland is an opportunity for the Australian Labor Party to build up its legacy of pioneering public health action at a state level in Queensland and a Federal level in Australia. Such action is also in keeping with the Queensland Government’s recent commitment to invest in cancer prevention,

⁴² Ibid.

⁴³ The Hon. Anastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

diagnosis, treatment, and research.⁴⁷ Effective tobacco control will help reduce smoking-related cancer rates in Queensland. The Queensland Government has made a record investment in public health in 2022.⁴⁸ A tobacco endgame strategy will assist the Queensland Government in meeting its objectives ensuring a healthy Queensland.

Recommendation 1

The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* represents an important, substantive piece of law reform, which will help reduce smoking rates in Queensland. Given its proud commitment to public health, the Queensland Government should continue to pass bold and ambitious proposals to achieve a tobacco endgame – a smoke-free Queensland.

⁴⁷ Australian Associated Press, ‘New \$750m Cancer Centre Announced for Queenslanders Ahead of State Budget’, *The Guardian*, 13 June 2022, <https://www.theguardian.com/australia-news/2022/jun/13/new-750m-cancer-centre-announced-for-queenslanders-ahead-of-state-budget>

⁴⁸ Queensland Government, ‘Investing in Our Health: Queensland 2022 Budget’, 2022, <https://budget.qld.gov.au/highlights/investing-in-our-health/>

2. OBJECTIVES

A. Objectives of the Queensland Regime

At present, Queensland’s smoking legislation has a relatively short and curt objective. The *Tobacco and Other Smoking Products Act 1998 (Qld)* provides: ‘The object of this Act is to improve the health of members of the public by reducing their exposure to tobacco and other smoking products.’⁴⁹ Reading the Queensland’s Government regulatory impact statement, there seemed to be a wider array of objectives and purposes being sought by the Queensland Government. The executive summary highlighted the health and economic impacts of smoking in Queensland. The executive summary also stressed the impact of smoking upon vulnerable groups – including Aboriginal and Torres Strait Islanders, people in low socio-economic circumstances, and people living in rural, regional, and rural areas. The executive summary also noted the new challenges brought about the development of new products such as e-cigarettes by the tobacco industry. The objectives of Queensland’s legislative framework should reflect these concerns of the government. The objectives of Queensland’s regime should also be updated to reflect a shift from a focus on reducing the negative effects of smoking in Queensland to eliminating smoking in Queensland altogether to achieve a smoke-free Queensland. It would also be worthwhile noting that the legislation seeks to implement the *WHO Framework Convention on Tobacco Control 2003*.⁵⁰

⁴⁹ Section 3 of the *Tobacco and Other Smoking Products Act 1998 (Qld)*

⁵⁰ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

However, the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) does not really change the objectives of the legislation. There is an additional clause added as to how the objective is to be achieved – ‘establishing a licensing scheme for the sale of smoking products, including a disciplinary scheme for licensees.’⁵¹

The explanatory notes for the bill have much more detailed discussions of the policy objectives and the reasons for them. The explanatory notes elaborate: ‘The policy objective of the Bill is to strengthen, modernise and future-proof the requirements, restrictions and safeguards in the *Tobacco and Other Smoking Products Act 1998* (the Act).’⁵² The explanatory notes emphasize: ‘These reforms are needed to continue reducing the smoking rate in Queensland and provide the Queensland community with further protections from second-hand smoke and the illicit tobacco trade.’⁵³ The explanatory notes comment: ‘The object of the Act is to improve the health of the public by reducing exposure to tobacco and other smoking products.’⁵⁴ The explanatory notes comment: ‘Initiatives implemented under the Act have included restricting the supply of smoking products to children, limiting their advertising and promotion, reducing public exposure to second-hand smoke and establishing a framework for compliance monitoring and enforcement activities.’⁵⁵

⁵¹ New section 3A of *Tobacco and Other Smoking Products Act 1998* (Qld)

⁵² Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵³ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵⁴ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵⁵ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

The explanatory notes observe: ‘The effects of smoking products are a significant public health concern in Queensland’.⁵⁶ They emphasize the exceptional impact of smoking: ‘No other single risk factor contributes as greatly to the burden of preventable health and disease.’⁵⁷ The explanatory notes emphasize the inequalities in respect of health care: ‘Smoking also contributes to health inequity’.⁵⁸ The notes emphasize how smoking places greater health burdens upon already vulnerable and disadvantaged communities: ‘Higher smoking rates, and therefore poorer health outcomes, are more common among Aboriginal and Torres Strait Islanders and persons in low socio-economic circumstances or living in regional and remote areas.’⁵⁹

The Minister for Health has added: ‘Too many people in Queensland die preventable deaths due to smoking’.⁶⁰ She emphasized: ‘We have to do what we can to continue to reduce rates of smoking.’⁶¹ The Minister for Health focused on reduction of smoking rates: ‘We’re delivering the reforms that stakeholders have said they need to be able to take further appropriate action to reduce smoking rates.’⁶²

⁵⁶ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵⁷ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵⁸ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁵⁹ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld).

⁶⁰ The Hon. Anastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

⁶¹ Ibid.

⁶² Ibid.

Arguably, the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) should update the objectives of the legislative framework to better reflect the objectives of the bill, and the intentions of its legislative sponsors.

B. Objectives of the Federal Regime

At a Federal level, there has been discussion of the aims and objectives of national legislation in respect of tobacco control.

The Commonwealth *Tobacco Advertising Prohibition Act 1992* (Cth) has an objects clause. Section 3 (1) provides: ‘This Act is intended to limit the exposure of the public to messages and images that may persuade them: (a) to start smoking, or to continue smoking; or (b) to use, or to continue using, tobacco products.’⁶³ Section 3 (2) states: ‘The object is to improve public health.’⁶⁴

The Commonwealth *Tobacco Plain Packaging Act 2011* (Cth) seeks to (a) to improve public health by: (i) discouraging people from taking up smoking, or using tobacco products; and (ii) encouraging people to give up smoking, and to stop using tobacco products; and (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and (iv) reducing people’s exposure to smoke from tobacco products; and (b) to give effect to certain obligations that Australia has as a party to the *Convention on Tobacco Control*.⁶⁵

⁶³ Section 3 (1) of the *Tobacco Advertising Prohibition Act 1992* (Cth).

⁶⁴ Section 3 (2) of the *Tobacco Advertising Prohibition Act 1992* (Cth)

⁶⁵ Section 3 of the *Tobacco Plain Packaging Act 2011* (Cth).

The *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018* (Cth) was introduced to deal with the trade in illicit tobacco, and provide for offences.

The new Health Minister for the Albanese Government, the Hon. Mark Butler MP, has promised to implement a new package of Federal law reforms in respect of tobacco control.⁶⁶ He has emphasized that ‘Australia needs to reclaim its position as a world leader on tobacco control because, quite frankly, lives are at stake’.⁶⁷ Butler noted: ‘Disadvantaged Australians are paying the price for Big Tobacco’s profits.’⁶⁸

The press release emphasized: ‘Australia needs to reclaim its position as a world leader on tobacco control, which is why the Albanese Government plans to introduce new legislation to bring down smoking rates.’⁶⁹ The press release observed: ‘Australia’s current patchwork quilt of eight different tobacco-related laws, regulations, instruments and court decisions is convoluted, outdated and full of loopholes.’⁷⁰ The Albanese Government has promised that ‘The Government’s Reignite The Fight Against Tobacco Addiction reforms will bring together all of Australia’s current tobacco measures -- along with 11 new measures – into a single streamlined and effective Act

⁶⁶ The Hon. Mark Butler, ‘Ten Years of World-Leading Reforms and Reigniting the Fight against Tobacco Addiction’, the Department of Health, Australian Government, 30 November 2022, <https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/ten-years-of-world-leading-reforms-and-reigniting-the-fight-against-tobacco-addiction>

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

of Parliament that will re-ignite the fight against tobacco and nicotine addiction.⁷¹ As part of this process, it would be helpful and useful to have a consolidated set of aims and objectives for Australia’s tobacco control regime.

The Albanese Government vowed: ‘We will pursue measures to update and improve the graphic warnings on tobacco products and – for the first time – will look to make individual cigarettes dissuasive with unattractive colours or printed warnings like “smoking kills”.⁷² The reforms will also move to remove the loopholes that have allowed tobacco companies to promote and market their products. The reforms will also require health promotion inserts in packs and pouches – and update advertising regulation to capture e-cigarettes.

The Albanese Government have a broad palette of policy options to choose from, as they develop a comprehensive package of tobacco law reforms.⁷³

The Federal Environment Minister Tanya Plibersek (who previously was a Federal Health Minister) has also expressed concerns about the negative impact of smoking and tobacco upon the environment.⁷⁴ She has also been seeking advice from her Department

⁷¹ Ibid.

⁷² Ibid.

⁷³ Matthew Rimmer, ‘The Tobacco Endgame Avengers: Strategies for a Smokefree Future in Australia’ in Belinda Bennett and Ian Freckelton (ed.), *Australian Public Health Law*, Sydney: Federation Press, 2023.

⁷⁴ Henry Belot, “‘War on Cigarette Butts’: Coalition Plan to Reduce Pollution “Never Existed”, Tanya Plibersek says’, *The Guardian*, 8 February 2023, <https://www.theguardian.com/australia-news/2023/feb/08/war-on-cigarette-butts-coalition-plan-to-reduce-pollution-never-existed-tanya-plibersek-says>

as to policy options: ‘I’ve been clear in my public statements that the Albanese Labor government stands prepared to regulate if industry is unable to achieve results by themselves.’⁷⁵ Plibersek has also expressed concerns about the impact of vaping upon health and the environment: ‘Every vape that goes into landfill dumps plastic, poisons, nicotine salts, heavy metals, lead, mercury, and flammable lithium-ion batteries into the environment.’⁷⁶ The World Health Organization has long been concerned about the environmental impact of the tobacco industry.⁷⁷ The World Health Organization published a substantive report in 2022 entitled, *Tobacco: Poisoning our Planet*.⁷⁸

Such incoming Federal reforms on tobacco control should further encourage the Queensland Government to be bold and ambitious in articulating its objectives, and setting its targets for tobacco control in the state.

C. New Zealand

New Zealand’s *Smokefree Environments and Regulated Products Act* 1990 (NZ) – as updated – has the following purposes: ‘(a) to reduce the exposure of people who do not

⁷⁵ Ibid.

⁷⁶ Jack Mahony, ‘AMA President and Several Doctors support Tanya Plibersek’s Health and Environmental Warning about e-cigarettes’, *Sky News*, 2 January 2023, <https://www.skynews.com.au/australia-news/ama-president-and-several-doctors-support-tanya-pliberseks-health-and-environmental-warning-about-ecigarettes/news-story/1288584689ebfe3944f99e83452c7a8b>

⁷⁷ World Health Organization, ‘WHO Raises Alarm on Tobacco Industry Environmental Impact’, Press Release, World Health Organization, 31 May 2022, <https://www.who.int/news/item/31-05-2022-who-raises-alarm-on-tobacco-industry-environmental-impact>

⁷⁸ World Health Organization, *Tobacco: Poisoning Our Planet*, Geneva: World Health Organization, 29 May 2022, <https://www.who.int/publications/i/item/9789240051287>

themselves smoke to any detrimental effect on their health caused by smoking by others; (b) to prevent the normalisation of vaping; (c) to regulate and control the marketing, advertising, and promotion of regulated products (whether directly, including through the appearance of regulated products and packages, or through the sponsoring of other products, services, or events) in order to improve public health by— (i) discouraging people, especially children and young people, from taking up smoking; and (ii) discouraging non-smokers, especially children and young people, from taking up vaping or using smokeless tobacco products; and (iii) encouraging people to stop smoking, vaping, or otherwise using regulated products; and (iv) discouraging people who have stopped smoking, vaping, or otherwise using regulated products from resuming smoking, vaping, or using regulated products; and (d) to support smokers to switch to regulated products that are significantly less harmful than smoking; and (e) to regulate the safety of vaping products and smokeless tobacco products; and (f) to monitor and regulate the presence of harmful constituents found in regulated products and their emissions; and (g) to 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.’⁷⁹

New Zealand’s Ardern Government has enunciated a clear objective: ‘Our vision is to eliminate the harm smoked tobacco products cause our communities by transforming

⁷⁹ Section 3A of the *Smokefree Environments and Regulated Products Act 1990* (NZ), and see also *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

Aotearoa New Zealand to a smokefree nation by 2025.’⁸⁰ New Zealand’s Ardern Government has this tobacco endgame goal: ‘Our 2025 goal is for a daily smoking prevalence of less than five percent for all population groups.’⁸¹ New Zealand’s Government hopes to ‘Eliminate inequities in smoking rates and smoking-related illnesses’; ‘Create a smokefree generation by increasing the number of children and young people who remain smokefree’; and ‘Increase the number of people who successfully quit smoking.’⁸²

The Hon. Dr Ayesha Verrall observed of the *Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022* (NZ): ‘This legislation accelerates progress towards a smokefree future.’⁸³ She emphasized the many benefits from a smoke-free New Zealand: ‘Thousands of people will live longer, healthier lives and the health system will be \$5 billion better off from not needing to treat the illnesses caused by smoking, such as numerous types of cancer, heart attacks, strokes, amputations.’⁸⁴

⁸⁰ New Zealand Ministry of Health, *Smokefree Aotearoa*, Wellington: New Zealand Ministry of Health, 2021, https://www.health.govt.nz/system/files/documents/publications/hp7801_-_smoke_free_action_plan_v15_web.pdf

⁸¹ New Zealand Ministry of Health, ‘Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025’, 9 December 2021, <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

⁸² Ibid.

⁸³ Hon. Dr Ayesha Verrall, ‘Thousands of Lives and Billions of Dollars to be Saved with Smokefree Bill Passing’, Press Release, New Zealand Government, 13 December 2022, <https://www.beehive.govt.nz/release/thousands-lives-and-billions-dollars-be-saved-smokefree-bill-passing>

⁸⁴ Ibid.

The Queensland Government should consider whether its anti-smoking legislation should also subscribe to such objectives.

D. United Kingdom

The Khan Review in the United Kingdom discussed the importance of aiming for a smokefree society.⁸⁵ In the foreword, Dr Javed Khan OBE discussed the need for policy-makers to embrace high ambitions in tobacco control – seeking not just to reduce smoking, but to make smoking obsolete:

To truly achieve a smokefree society in this great country of ours, smoking should be obsolete. I cannot, in all conscience, endorse a strategy that settles for anything less. So, I am asking the government to go further than its current ambitions. It needs to go faster. It needs to be bolder. It needs to do more to protect future generations from this highly addictive and deadly product. Along the way, the government should do all it can to dissuade the tobacco industry from selling tobacco products. The ambition for tackling smoking should aim for ‘net zero’ – to make smoking obsolete.⁸⁶

Khan commented that comprehensive tobacco control laws ‘would improve the health and wealth of our country’s most disadvantaged communities more than any other measure.’⁸⁷ He emphasized the need for urgent action: ‘There is no room for

⁸⁵ Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* (‘the Khan Review’), United Kingdom Government, 9 June 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

⁸⁶ Ibid., 5.

⁸⁷ Ibid., 5.

complacency, delay, or under-investment’.⁸⁸ Khan concluded: ‘Action now will save lives, save money, address health disparities and increase productivity.’⁸⁹ Such sentiments are certainly applicable as well in this context of Queensland’s debate over tobacco control.

Recommendation 2

The Queensland Government should update and modernise the objectives of its anti-smoking legislation to better reflect a tobacco endgame strategy (rather than just a smoking reduction objective). The Queensland Government should implement a package of policy reforms in order to implement the *WHO Framework Convention on Tobacco Control 2003*, and protect public health and the environment in Queensland.

⁸⁸ Ibid., 5.

⁸⁹ Ibid., 5.

3. HUMAN RIGHTS

A. International Human Rights Law and the Global Tobacco Epidemic

As United Nations Special Rapporteur on the Right to Health, Dainius Puras has reflected that ‘the death, disability and impoverishment caused by the tobacco epidemic also raises many concerns from a human rights perspective.’⁹⁰ Marie Elske Gispen comments: ‘The “tobacco epidemic”, as the harm caused by tobacco is often referred to, also raises questions from a human rights perspective, including the right to health and, for children in particular, the right to life, survival and development.’⁹¹ Oscar Cabrera and Andres Constantin comment that human rights and tobacco control are mutually reinforcing frameworks: ‘Not only do the right to health and their health-related rights provide the normative basis for the protection of people from the hazards derived from tobacco products, they also contribute to shaping and clarifying the foundations for governmental action and regulation.’⁹²

The *WHO Framework Convention on Tobacco Control* 2003 stresses in its preamble that the parties to the convention are ‘determined to give priority to their right to protect

⁹⁰ Dainius Puras, ‘Foreword’, in Marie Elske Gispen and Brigit Toebe (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, xv.

⁹¹ Marie Elske Gispen, ‘Introduction’ in Marie Elske Gispen and Brigit Toebe (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 2.

⁹² Oscar Cabrera and Andres Constantin, ‘Tobacco Control in International Human Rights Law’, Marie Elske Gispen and Brigit Toebe (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 45.

public health.’⁹³ The preamble recalls ‘Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, adopted by the United Nations General Assembly on 16 December 1966, which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁹⁴

The preamble also expresses concerns about children’s rights, noting ‘the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages.’⁹⁵ The preamble recalls ‘the *Convention on the Rights of the Child*, adopted by the United Nations General Assembly on 20 November 1989, provides that States Parties to that Convention recognize the right of the child to the enjoyment of the highest attainable standard of health.’⁹⁶

The preamble flags the impact of smoking upon women’s rights, expressing alarm about ‘the increase in smoking and other forms of tobacco consumption by women and young girls worldwide and keeping in mind the need for full participation of women at all levels of policy-making and implementation and the need for gender-specific tobacco control strategies.’⁹⁷ The preamble invokes ‘the *Convention on the Elimination of All Forms of Discrimination against Women*, adopted by the United Nations General

⁹³ Preamble of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

⁹⁴ Ibid. See also *International Covenant on Economic, Social and Cultural Rights* 1966.

⁹⁵ Ibid.

⁹⁶ Ibid. See also *Convention on the Rights of the Child* 1989.

⁹⁷ Ibid.

Assembly on 18 December 1979, provides that States Parties to that Convention shall take appropriate measures to eliminate discrimination against women in the field of health care.’⁹⁸

The preamble also highlights the impact of smoking upon Indigenous rights, highlighting ‘the high levels of smoking and other forms of tobacco consumption by Indigenous peoples.’⁹⁹ The preamble also refers back to ‘the preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.’¹⁰⁰

The civil society group ASH has called for a human rights approach to tobacco control: ‘At ASH, we believe that a human rights approach, encouraging governments to take action to protect their citizens, is an essential catalyst towards a world free from tobacco.’¹⁰¹ ASH has stressed: ‘Smoking negatively impacts the right to life, right to health, right to education, children’s rights, women’s rights, and many others.’¹⁰² ASH noted that ‘the tobacco industry often targets their marketing to specific populations based on gender, race, sexual identity and age.’¹⁰³ ASH has sought to elevate tobacco

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ ASH, ‘A Human Rights Approach To Tobacco Control’, <https://ash.org/human-rights/>

¹⁰² Ibid.

¹⁰³ Ibid.

as a human rights issue. ASH has been exploring human rights-based litigation against the tobacco industry.

B. Queensland’s Human Rights Framework

Queensland has adopted a human rights framework, which is increasingly informing its public policy decision-making. Queensland’s regulatory regime should be informed by such larger questions around human rights.¹⁰⁴

In its regulatory statement, the Queensland Government highlighted ‘poor health outcomes from smoking are unequally distributed in the community, with higher smoking rates among Aboriginal and Torres Strait Islanders, people in low socio-economic circumstances and people living in regional and remote areas’.¹⁰⁵ The Queensland Government noted: ‘Addressing the burden of smoking is key to narrowing the gap in health outcomes for these groups’.¹⁰⁶ The Queensland Government recounted: ‘For Aboriginal and Torres Strait Islanders smoking related illness causes half of all deaths of those aged over 45 and one third of all deaths.’¹⁰⁷

It should be noted that the Queensland Government has adopted the *Human Rights Act* 2019 (Qld). It is worthwhile considering tobacco control in light of Queensland’s

¹⁰⁴ Marie Elske Gispén and Brigit Toebe (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020.

¹⁰⁵ Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022, 4.

¹⁰⁶ *Ibid.*, 4.

¹⁰⁷ *Ibid.*, 4.

human rights framework. Section 16 of the *Human Rights Act 2019* (Qld) recognises the right to life – ‘Every person has the right to life and has the right not to be arbitrarily deprived of life.’¹⁰⁸ The right to life certainly underpins life-saving tobacco control measures.

Section 21 of the *Human Rights Act 2019* (Qld) concerns freedom of expression.¹⁰⁹ Courts have sceptical about commercial free speech claims by tobacco companies. La Forest J noted in the Supreme Court of Canada that ‘the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression... far from the "core" of freedom of expression values’.¹¹⁰ La Forest J observed: ‘It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process.’¹¹¹ La Forest J stressed that tobacco advertising was driven by profit motive: ‘Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it.’¹¹²

Section 24 of the *Human Rights Act 2019* (Qld) deals with property rights.¹¹³ It is worth noting that the majority of the High Court of Australia rejected a challenge to the

¹⁰⁸ Section 16 of the *Human Rights Act 2019* (Qld).

¹⁰⁹ Section 21 of the *Human Rights Act 2019* (Qld).

¹¹⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 SCR 199.

¹¹¹ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 SCR 199.

¹¹² *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 SCR 199.

¹¹³ Section 24 of the *Human Rights Act 2019* (Qld).

Federal Government's plain packaging of tobacco products, denying that the tobacco control measure amounted to an acquisition of property.¹¹⁴

Section 26 of the *Human Rights Act 2019* (Qld) concerns the protection of families and children.¹¹⁵ Subsection (2) provides that 'Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.'¹¹⁶ Politicians have been concerned about the impact of smoking upon children's rights. Scholars have recognised that tobacco control plays an important role in the protection of children's rights.¹¹⁷ Wilkinson comments: 'Children are particularly vulnerable to a range of negative impacts directly and indirectly associated with tobacco consumption that engage human rights protection.'¹¹⁸ There has been concern that Big Tobacco and e-cigarette companies have tried to recruit children and youth to the use of their products.

Section 28 of the *Human Rights Act 2019* (Qld) focuses upon cultural rights of Indigenous communities.¹¹⁹ Queensland Health has observed that smoking is a grave threat to Indigenous health:

¹¹⁴ *JT International SA v. Commonwealth of Australia* [2012] HCA 43; for commentary, see Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360.

¹¹⁵ Section 26 of the *Human Rights Act 2019* (Qld).

¹¹⁶ Section 26 of the *Human Rights Act 2019* (Qld).

¹¹⁷ Genevieve Wilkinson, 'Using Tobacco Plain Packaging to Protect the Human Rights of Children', (2022) 45 (1) *UNSW Law Journal* 370-400.

¹¹⁸ *Ibid.*, at 400.

¹¹⁹ Section 28 of the *Human Rights Act 2019* (Qld).

Smoking is a leading contributor to health inequities based on socioeconomic status, geographical location and Aboriginal and Torres Strait Islander status. The daily smoking rate of Aboriginal and Torres Strait Islander peoples is almost three times that of non-Indigenous Australians. Twenty-three per cent of the health gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians is attributable to tobacco smoking.¹²⁰

Queensland Health runs targeted services for priority populations, including Aboriginal and Torres Strait islanders. Indigenous-led initiatives such as Deadly Choices have been important in preventative health programs in Queensland.¹²¹ There have been some scholarly assessments of tobacco initiatives in Indigenous health care settings in Queensland.¹²²

The Federal Government also runs the Tackling Indigenous Smoking program, which aims to reduce smoking rates by First Nations Australia.¹²³ This program aims to ‘reduce the use of smoking and e-cigarettes, and prevent uptake; promote ‘smoke-free’ communities, homes, cars, workplaces and other shared spaces; improve the life

¹²⁰ Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022, 50.

¹²¹ Deadly Choices, <https://www.iuih.org.au/deadly-choices/>

¹²² Desley Harvey et al., ‘An Evaluation of Tobacco Brief Intervention Training in three Indigenous Health Care Settings in North Queensland’ (2002) 26 (5) *Australian and New Zealand Journal of Public Health* 426-431; Sandra Campbell et al., ‘Stages of Change, Smoking Behaviour and Readiness to Quit in a Large Sample of Indigenous Australians Living in Eight Remote North Queensland Communities’ (2013) 10 (4) *International Journal of Environmental Research and Public Health* 1562-1571; and Sandra Campbell et al., ‘Evaluation of a Community-based Tobacco Control Intervention in Five Remote North Queensland Indigenous communities’ (2014) 52 (2) *International Journal of Health Promotion and Education* 78-89.

¹²³ Department of Health and Aged Care, ‘Tackling Indigenous Smoking’, <https://www.health.gov.au/our-work/tackling-indigenous-smoking>

expectancy of First Nations people; and increase the number of healthy birthweights.’¹²⁴ The program uses a network of regional teams who deliver culturally safe and evidence-based activities within their local communities – including community education; youth activities and workshops; awareness-raising campaigns; and smoke-free events. The program also funds national projects, particularly targeted toward priority groups like remote communities, pregnant women, and youth. David Thomas and Tom Calma comment: ‘The achievements in Aboriginal and Torres Strait Islander tobacco control are among the most encouraging stories in Australian tobacco control and in efforts to improve Indigenous health and to Close The Gap between Indigenous and non-Indigenous Australians.’¹²⁵

Section 37 of the *Human Rights Act 2019* (Qld) deals with the right to health services.¹²⁶ Subsection (1) provides: ‘Every person has the right to access health services without discrimination.’ Subsection (2) provides: ‘A person must not be refused emergency medical treatment that is immediately necessary to save the person’s life or to prevent serious impairment to the person.’ Arguably, Queensland should go further and recognise a full right to health – not just a right to access health services. A right to health would provide added support for tobacco control and tobacco endgame policies.

¹²⁴ Ibid.

¹²⁵ David Thomas and Tom Calma, ‘Tackling Indigenous Smoking: a Good News Story in Australian Tobacco Control’ (2020) 30 (3) *Public Health Research & Practice*, <https://www.phrp.com.au/issues/september-2020-volume-30-issue-3/tackling-indigenous-smoking-a-good-news-story-in-australian-tobacco-control/>

¹²⁶ Section 37 of the *Human Rights Act 2019* (Qld).

In *The Medical Journal of Australia*, Dr Claire Brolan has argued that recognition of a broader right to health in Queensland would be beneficial.¹²⁷ She observed: ‘Rights language is part of Australia’s public health vernacular, evidenced by the *Australian Charter of Healthcare Rights*.’¹²⁸ Brolan noted: ‘However, unless such rights are expressed in domestic law, then right to health principles and policies are important words on paper without overt legal consequence for effective monitoring and accountability.’¹²⁹ She recommended: ‘Advancing the right to health for all Queenslanders will not occur in legal silos but in complement with planned educational and promotional activities that help build a culture in the Queensland public sector and broader community that respects and promotes health and human rights, as well as promotes a dialogue about the nature, meaning and scope of health rights for Queensland’s most important asset, its human capital.’¹³⁰ She called for further discussion of human rights and healthcare: ‘This will require the engagement of both government and non-government stakeholders, as well as community members, beyond the health sector.’¹³¹

¹²⁷ Claire Brolan, ‘Queensland’s new Human Rights Act and the Right to Access Health Services’, (2020) 213 (4) *The Medical Journal of Australia* <https://www.mja.com.au/journal/2020/213/4/queenslands-new-human-rights-act-and-right-access-health-services>

¹²⁸ Ibid. See also *Australian Charter of Healthcare Rights* <https://www.safetyandquality.gov.au/consumers/working-your-healthcare-provider/australian-charter-healthcare-rights>

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

It is worthwhile noting that the tobacco industry has sometimes sought to appropriate the language of human rights (the right to property, freedom of commercial speech, for instance) to push for the deregulation of tobacco control measures. In the dispute over plain packaging of tobacco products, the High Court of Australia rejected the arguments of Big Tobacco that the labelling measure constituted an acquisition on property.¹³² In the United Kingdom litigation over the plain packaging of tobacco products, courts rejected Big Tobacco's self-interested constructions of human rights.¹³³

C. Human Rights Statement of Compatibility

The Queensland Government has issued a statement of compatibility of the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* with the Human Rights regime.¹³⁴ There is a much more finely detailed analysis of the particular measures being introduced, and their human rights impact. The Health Minister Yvette D'Ath highlights how smoking impacts the health and well-being of Queenslanders:

The effects of smoking products are a significant public health concern in Queensland. No other single risk factor contributes as greatly to the burden of preventable death and disease. The cost of smoking on the Queensland community is significant, including actual medical and social costs such as hospitalisation, inequitable health outcomes, welfare and funeral expenses, in addition to intangible costs such as pain and suffering, and the value of lives lost.

¹³² *JT International SA v. Commonwealth of Australia* [2012] HCA 43.

¹³³ Jonathan Griffiths, 'The Tobacco Industry's Challenge to the United Kingdom's Standardised Packaging Legislation – Global Lessons for Tobacco Control Policy?' (2017) 17 (2) *QUT Law Review* 66-82.

¹³⁴ Statement of Compatibility for the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*

In recent years, quit smoking campaigns and community education efforts have been successful at reducing the smoking rate. However, the Queensland Government recognises that further reductions in smoking would significantly benefit the health of Queenslanders.¹³⁵

The Health Minister Yvette D’Ath has opined that ‘the Bill is compatible with the human rights protected by the Human Rights Act’.¹³⁶ She observes: ‘The Bill actively supports and promotes several rights, but where rights are potentially limited by the Bill, this is identified and an analysis and justification of any potential limitations is provided.’¹³⁷ She notes that human rights that are relevant to the Bill include the right to recognition and equality before the law (section 15); the right to freedom of movement (section 19); the right to freedom of expression (section 21); the right to property (section 24); the right to privacy and reputation (section 25); the right to the protections of families and children (section 26); and cultural rights (section 27).

The statement of compatibility then analyses the human rights implications of particular measures under the bill. There is a discussion of the human rights implications of strengthening regulatory compliance and acting on illicit tobacco.¹³⁸ There is an analysis of the human rights values at stake in the protection of children from the dangers of smoking and second-hand smoke.¹³⁹ There is a discussion of the human rights

¹³⁵ Ibid., 1.

¹³⁶ Ibid., 1.

¹³⁷ Ibid., 2.

¹³⁸ Ibid., 2.

¹³⁹ Ibid., 7.

dimensions of protecting the health of patrons at licensed venues.¹⁴⁰ There is a discussion of increasing smoke-free public places.¹⁴¹

Health Minister Yvette D’Ath concluded: ‘In my opinion, the *Tobacco and Other Smoking Products Bill 2023* is compatible with human rights under the *Human Rights Act* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.’¹⁴² It could be added that the right to life (section 16) is also implicated by the tobacco control measures. Clearly, the Queensland legislative regime is designed to save lives from the global tobacco epidemic.

As discussed previously, the debate over tobacco control highlights the need for proper recognition of the right of a right to health in the Queensland human rights regime.

In addition to enhancing human rights, tobacco control measures can also help realise the United Nations Sustainable Development Goals – particularly Sustainable Development Goal Number 3, which seeks to ‘ensure healthy lives and promote well-being for all at all ages.’¹⁴³

¹⁴⁰ Ibid., 9.

¹⁴¹ Ibid., 12.

¹⁴² Ibid., 14.

¹⁴³ Matthew Rimmer, ‘The Tobacco Endgame: Intellectual Property, Human Rights, and Sustainable Development’ in Bitu Amani, Caroline Ncube, and Matthew Rimmer (ed.) *Elgar Handbook on Intellectual Property and the Sustainable Development Goals*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2023/ 2024

Recommendation 3

Queensland's *Tobacco and Other Smoking Products Amendment Bill 2023*

(Qld) enhances the human rights of Queenslanders. Tobacco control policies are underpinned by a commitment to human rights – including family and children's rights, and the right to life. The bill is compatible with other human rights – such as the right to property, freedom of expression, and freedom of movement. In the future, the Queensland Government should recognise a full right to health in its human rights framework. The Queensland Government should support enhanced Indigenous-led tobacco control measures.

4. SMOKE-FREE SPACES AND ENVIRONMENTS

A. World Health Organization

Article 8 of the *WHO Framework Convention on Tobacco Control 2003* deals with the protection from exposure to tobacco smoke.¹⁴⁴ Article 8 (1) provides: ‘Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.’¹⁴⁵ Article 8 (2) states: ‘Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.’¹⁴⁶

There has also been promising public policy work in respect of creating smoke-free spaces – as part of a tobacco endgame in Australia. Such an approach could be considered to be part of a larger law and geography framework.¹⁴⁷ Moreover, the

¹⁴⁴ Article 8 of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹⁴⁵ Article 8 (1) of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹⁴⁶ Article 8 (2) of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹⁴⁷ Tayanah O’Donnell, Daniel Robinson, and Josephine Gillespie, *Legal Geography: Perspectives and Methods*, Abingdon: Routledge, 2020.

creation of smoke-free spaces is keeping with the right to a healthy environment recognized by the United Nations.¹⁴⁸

B. Queensland

The Queensland Government has been a public policy innovator in the field of smoke-free spaces. Queensland has banned smoking in a range of outdoor public areas – covering public transport waiting points, pedestrian malls, sporting events and facilities, national parks, outdoor beaches and swimming areas, and government precincts.¹⁴⁹ Queensland also has smoking bans in respect of eating and drinking venues. There are also smoking bans in relation to educational facilities. There are smoking bans in respect of hospitals, healthcare, and residential aged care facilities. There are regulations in respect of smoking bans in some places owned and operated by local governments.

As Chief Health Officer, Jeannette Young called for an expansion of smoke-free spaces. While she supported smoke-free hospitals, schools and workplaces, she believed the ban should extend to the public spaces outside such smoke-free areas. She observed: ‘It

¹⁴⁸ Melanie Montalban, “‘Bold Action’ Required Following Recognition of the Human Right to a Healthy Environment”, Environmental Defenders Office, 19 October 2021, <https://www.edo.org.au/2021/10/19/bold-action-required-following-recognition-of-the-human-right-to-a-healthy-environment/>

¹⁴⁹ Queensland, ‘Smoking Laws in Queensland: Outdoor Public Areas’, <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/outdoor> and *Tobacco and Other Smoking Products Act 1998* (Qld) and *Tobacco and Other Smoking Products Regulation 2021* (Qld).

sounds good having a smoke-free hospital, but if you can smoke on the footpath, it defeats it.’¹⁵⁰

There have been some significant test cases arising in respect of smoke-free spaces in Queensland.

In 2022, there was a landmark decision, barring Queensland unit dwellers from smoking on balconies.¹⁵¹ A unit owner at the Artique Resort in Surfers Paradise on the Gold Coast complained that their downstairs neighbour was a chain smoker on the balcony below. The unit owner labelled the smoking ‘relentless and unbearable’, raising concerns about her health.¹⁵² The Office of the Commissioner for Body Corporate and Community Management's adjudicator held that the eighth-floor owner must no longer smoke tobacco products on the balcony. The Office also held that she could only smoke elsewhere within her apartment if she took reasonable steps to ensure the smoke does not affect any person in another apartment. Kristi Kinast, president of the Strata Community Association of Queensland, the peak voice for body corporates, said the

¹⁵⁰ Janelle Miles, ‘Footpath smoking ban call by Queensland chief health officer Jeannette Young’, *News.com.au*, 27 February 2014, <https://www.news.com.au/lifestyle/health/footpath-smoking-ban-call-by-queensland-chief-health-officer-jeannette-young/news-story/d27fddff48b1d00d2b9294051bcdbdb9>

¹⁵¹ Rebecca Levingston and Antonia O’Flaherty, ‘Queensland Unit Dwellers could be Barred from Smoking on Balconies after Landmark Decision’, *ABC News*, 19 January 2022, <https://www.abc.net.au/news/2022-01-19/gold-coast-unit-owner-banned-from-smoking-on-apartment-balcony/100766448> and Rosanna Kingsun and Ailish Delaney, ‘Queenslanders could be Banned from Smoking on their Own Balconies after Landmark Ruling’, *7 News*, 19 January 2022, <https://7news.com.au/news/qld/queenslanders-could-be-banned-from-smoking-on-their-own-balconies-after-landmark-ruling-c-5371632#:~:text=Australia's%20supply%20chain%20chaos&text=Queenslanders%20living%20in%20apartments%20could,to%20the%20body%20corporate%20commissioner.>

¹⁵² *Ibid.*

decision by the adjudicator was a ‘game changer’.¹⁵³ She observed: ‘Up until now ... the onus has been on complainants to prove that the volume and frequency of smoke is a nuisance, and that is almost impossible to prove.’¹⁵⁴ Kinast noted: ‘This changes things to say that any sort of smoke is a hazard, or any sort of volume and frequency is a hazard, so it will absolutely open the floodgates, we very much expect.’¹⁵⁵ Kinast commented: ‘I think if we look at this in a greater context, in terms of our society, we've seen these changes over the last decade or more where we've seen continued evolving of the restrictions on smokers — can't smoke in airports, restaurants, workplaces — but it hasn't reached, until now, into strata.’¹⁵⁶ Former commissioner of Queensland's Body Corporate and Community Management, Chris Irons, added: ‘This I would think potentially also applies to vaping as well.’¹⁵⁷

The Cancer Council Queensland has been lobbying for further law reform in this field.¹⁵⁸ CEO, Ms Chris McMillan said: ‘The Queensland Government has been praised for its leadership in creating more smoke-free places, however, many Queenslanders are still exposed to the dangers of second-hand smoke – including in their homes.’¹⁵⁹ She observed: ‘Alarmingly, nearly 95% of non-smoker respondents reported they had been affected by smoke-drift from neighbours, with 99% reporting exposure while

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Cancer Council Queensland, ‘Queenslanders are Crying Out for Changes to Smoke-free Laws in Multi-unit Housing’, Press Release, 2021 <https://cancerqld.org.au/blog/queenslanders-crying-changes-smoke-free-laws-multi-unit-housing/>

¹⁵⁹ Ibid.

within their home'.¹⁶⁰ McMillan commented that there was community for support for such law reform: 'Nearly two in three respondents support Queensland laws banning smoking completely in multi-unit housing, while 20% of smokers who responded reported that banning smoking wouldn't have a negative impact on them.'¹⁶¹ McMillan commented: 'We urge the Queensland Government to act, to enable Queenslanders to live safely at home.'¹⁶²

The Cancer Council Queensland has released a longer report on the topic, *Safe at Home: Protecting Queenslanders from Smoke-Drift in Multi-Unit Housing*.¹⁶³ The report observed: 'Cancer Council Queensland believes that people have the right to breathe clean air, especially in their homes, as smoke-drift is both a health hazard and a nuisance.'¹⁶⁴ The Cancer Council Queensland made a number of recommendations for law reform. First, it suggested making 'multi-unit housing smoke-free by introducing a 'no smoking law' in either a. the Tobacco and Other Smoking Products Act 1998 or b. the *Body Corporate and Community Management Act 1997*'.¹⁶⁵ Second, Cancer Council Queensland advocated that the Queensland Government 'Amend the *Body Corporate and Community Management Act 1997* to allow bodies corporate to adopt and enforce a no smoking bylaw, including developing a model bylaw and clarifying how these bylaws can be adopted (we recommend a simple majority (50% +1 in support) rather

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Cancer Council Queensland, *Safe at Home: Protecting Queenslanders from Smoke-Drift in Multi-Unit Housing*, Cancer Council Queensland, 2021, https://publicfileshareprodst01.blob.core.windows.net/resources/CCQ_Survey_findings_and_recommendations_on_smoke-drift_2021.pdf

¹⁶⁴ Ibid., 12.

¹⁶⁵ Ibid., 12.

than a special majority)'.¹⁶⁶ Third, the Cancer Council Queensland recommended that the government 'Lower the extraordinarily high test from *Norbury v. Hogan* which requires that smoke (caused by the respondent) is of such a 'volume and frequency' that it is an 'unreasonable interference' with a resident of 'ordinary sensitivity' before it will be considered 'nuisance' under the *Body Corporate and Community Management Act 1997 (Qld)*.¹⁶⁷

In its 2022 regulatory statement, the Queensland Government proposed a number of new smoke-free proposals. The Queensland Government proposes new designated outdoor smoking area (DOSA) requirements – including (a). Restricting DOSAs to adults; (b). Prohibiting drinking in DOSAs; and (c). Requiring a buffer between DOSAs and enclosed venue areas. The Queensland Government has recommended the introduction of restrictions on smoking-only areas at outdoor eating or drinking places and requiring buffers around the perimeter of outdoor eating or drinking places. The Queensland Government also proposed a prohibition on smoking at outdoor markets, except for smoking only areas. The Queensland Government has also proposed to make carparks adjacent to schools smoke-free. The Queensland Government also proposed to make activities that are organised, outdoor, recreational events for under-18s smoke-free.

Under the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*, the Queensland Government has made some significant reforms in respect of smoke-free

¹⁶⁶ Ibid., 12.

¹⁶⁷ Ibid., 12. *Norbury v Hogan* [2010] QCATA 027.

spaces and environments. The Queensland Government has sought to expand smoke-free public spaces, including community spaces for children.

The Queensland Government has introduced new restrictions in designated outdoor smoking areas (DOSAs) at liquor licensed venues, to prohibit children remaining in a DOSA and require smoke-free buffer zones between a DOSA and the enclosed venue areas. In her second reading speech, Health Minister Yvette D’Ath comments:

The act already allows liquor licensed premises to have a designated outdoor smoking area, otherwise known as a DOSA. To protect patrons from exposure to second-hand smoke, the bill requires a no-smoking buffer zone between the DOSA and any enclosed area of the premises. The bill also requires the liquor licensee to ensure that no child is allowed to remain in a DOSA. Smoking and drinking are often paired behaviours. To prevent recent quitters from relapsing and social smokers from increasing their smoking, the bill restricts the supply of smoking products at liquor licensed premises to a service area. This will mean that smoking product vending machines at premises must not be accessible directly by patrons.¹⁶⁸

The restriction of access to smoking product vending machines is long overdue. The Queensland Government could and should go further, and remove designated smoking areas to liquor licensed venues altogether. Outdoor smoking-specific areas still serve to normalise and legitimise smoking at clubs and pubs.

¹⁶⁸ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

From an occupational health and safety perspective, there has long been deep concern about the impact of smoking upon bar workers.¹⁶⁹ The Cancer Council Australia has highlighted occupational hazards related to environmental tobacco smoke, and the benefits of smoke-free workplaces.¹⁷⁰

The Queensland Government has sought to limit exposure to direct and second-hand smoke at places where families and communities gather, including outdoor eating and drinking places and outdoor markets. The Minister comments in her second reading speech:

Outdoor markets are becoming increasingly common across Queensland. To protect patrons and vendors, the bill introduces specific smoking rules for this type of outdoor place. Smoking will be prohibited at an outdoor market and within a buffer zone from any clearly defined entrance or exit to the market.¹⁷¹

The Minister notes: ‘The bill allows the person in charge of an outdoor eating or drinking place or outdoor market to set aside a smoking area; however, the smoking area must be clearly signed and surrounded by a buffer zone, and no food or drink may be served within either the smoking area or the buffer zone.’¹⁷² She observed: ‘As an

¹⁶⁹ See for instance Sean Semple et al., ‘Bar Workers’ Exposure to Second-Hand Smoke: The Effect of Scottish Smoke-Free Legislation on Occupational Exposure’, (2007) 51 (7) *The Annals of Occupational Hygiene* 571–580.

¹⁷⁰ Cancer Council Australia, ‘Occupational Cancer Risk Series: Environmental Tobacco Smoke’, <https://www.cancer.org.au/assets/pdf/occupational-cancer-risk-series-environmental-tobacco-smoke>

¹⁷¹ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

¹⁷² Ibid.

added safeguard, where the person in charge elects to create a smoking area, they will be held liable for any persons found smoking in the buffer zone'.¹⁷³

The Queensland Government has sought to protect children from direct and second-hand smoke at and near school facilities, and at organised outdoor recreation activities. In her second reading speech, Health Minister Yvette D'Ath notes that 'to protect children from the dangers of second-hand smoke, the bill prohibits smoking at or near organised children's outdoor activities, such as Scouts or Girl Guides, and at carparks adjacent to a school.'¹⁷⁴ The Minister highlights 'the public health imperative to protect the community at places where families gather.'¹⁷⁵

The Public Health Association of Australia CEO Adjunct Professor Terry Slevin has reflected on the need for smoke-free environments:

Smoking tobacco remains one of the most common causes of preventable death for Queenslanders. Unfortunately too many people think tobacco control is "done". It is not, and there is still more to do. Proper controls on how this deadly product is sold, promoted and used are vital pieces of the puzzle. Second hand smoke is still a health issue. All States must step up to play their role in proper local regulation as well as enforcement of the rules.¹⁷⁶

¹⁷³ Ibid,

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ The Hon. Anastacia Palaszczuk and Hon. Yvette D'Ath, 'Stronger Laws to crack down on Illicit Tobacco', Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

Slevin reflected: ‘All of these reforms are essential as we drive down smoking rates, particularly among children.’¹⁷⁷

Rather than maintain some limited smoking areas, the Queensland Government could and should push towards entirely smoke-free spaces and environments.

C. New Zealand

In the New Zealand inquiry into a tobacco endgame, there was significant discussion of smoke-free spaces. A summary and analysis of the consultation noted:

A significant number of submitters strongly advocated for additional mandated smokefree areas and provided evidence of the impact of smokefree areas legislation. The main reasons in support of smokefree areas included reducing exposure to second-hand smoke, denormalising smoking (particularly for youth), reducing cigarette butt litter, increasing quitting attempts and reducing relapses. Several submitters stated the importance of fresh air to Māori, and the right of tamariki and pēpē in particular to have fresh air through smokefree areas.¹⁷⁸

The New Zealand Ministry for Health noted: ‘Submitters cited several other benefits to a consistent national approach to smokefree areas, such as equitable management across

¹⁷⁷ Ibid.

¹⁷⁸ New Zealand Ministry of Health, *Consultation on Proposals for a Smokefree Aotearoa 2025 Action Plan: Analysis of Submissions*, Wellington: New Zealand Ministry of Health, 2021, 23, https://www.health.govt.nz/system/files/documents/publications/consultation_on_proposals_for_a_smokefree_aotearoa_2025_action_plan_analysis_of_submissions.pdf

regions, consistency in messaging between regions and improved efficiency for smokefree measures.¹⁷⁹

D. United Kingdom

The Khan Review in the United Kingdom has called on the United Kingdom Government to increase smokefree places to smokefree the social norm.¹⁸⁰ The Khan Review noted: ‘In 2007, smokefree legislation was introduced, banning smoking indoors and in bars and restaurants.’¹⁸¹ The Khan Review observed that smokefree legislation ‘has been incredibly impactful, not only at preventing second-hand smoke, but also in de-normalising smoking.’¹⁸² The Khan Review maintained: ‘Increasing smokefree spaces in hospitality, hospital grounds and outside public spaces, while protecting non-smokers in social housing, is the natural next step.’¹⁸³ The Khan Review warns against the maintenance of ‘smoking shelters’ in venues.¹⁸⁴

E. European Union

¹⁷⁹ Ibid., 24.

¹⁸⁰ Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* (‘the Khan Review’), United Kingdom Government, 9 June 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

¹⁸¹ Ibid., 34.

¹⁸² Ibid., 34.

¹⁸³ Ibid., 34.

¹⁸⁴ Ibid., 33.

Considering Italy and the European Union, Stefania Negri has observed that ‘exposure to second-hand tobacco smoke (SHS) is a global problem and a major risk factor for health, particularly for vulnerable persons such as children and pregnant women.’¹⁸⁵ Negri observed: ‘Comprehensive smoking bans aimed at establishing 100 per cent smoke-free environments are considered the only effective intervention against SHS.’¹⁸⁶ She concludes that ‘much more could be done, and more ambitious results could be achieved towards 100 per cent smoke-free environments, if additional amendments to the law were passed to impose a total ban on smoking in all indoor public places and in private enclosed places, including vehicles of any kind.’¹⁸⁷

In light of such research, it would be worthwhile Queensland pushing further towards 100 per cent smoke-free environments.

Recommendation 4

The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* puts forward some further spatial limitations in respect of smoking. The expansion of smoke-free environments in Queensland is welcome. The Queensland Government should seek to develop total and comprehensive smoke-free spaces and environments through its tobacco control policies.

¹⁸⁵ Stefania Negri, ‘Smoke-Free Spaces: Lessons from Italy’ in Marie Elske Gispén, ‘Introduction’ in Marie Elske Gispén and Brigit Toebes (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 209.

¹⁸⁶ Ibid., 209.

¹⁸⁷ Ibid., 222.

5. RETAIL RESTRICTIONS

Article 15.7 of the *WHO Framework Convention on Tobacco Control* 2003 encourages parties to the treaty to ‘endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade’.¹⁸⁸ There has been much interest in policy innovation in respect of tobacco retail regulation.¹⁸⁹ There has been concern about a disproportionate concentration of tobacco retail outlets in regional and remote Australia, and areas of greatest socio-economic disadvantage.¹⁹⁰ Queensland’s proposed bill will seek to impose a licensing scheme on tobacco retail. There has been public support for policies to phase out the retail sale of cigarettes in Australia.¹⁹¹ There has been a larger discussion about retail endgame strategies designed to reduce tobacco availability and visibility.¹⁹²

¹⁸⁸ Article 15.7 of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

¹⁸⁹ Simon Chapman and Becky Freeman, ‘Regulating the Tobacco Retail Environment: Beyond Reducing Sales to Minors’ (2009) 18 *Tobacco Control* 496-501; and Colleen Smyth, Becky Freeman, and Audrey Maag, ‘Tobacco Retail Regulation: the Next Frontier in Tobacco Control?’ (2015) *Public Health Research & Practice* <https://www.phrp.com.au/issues/july-2015-volume-25-issue-3/tobacco-retail-regulation-next-frontier-tobacco-control/>

¹⁹⁰ See for instance Shannon Melody et al., ‘The Retail Availability of Tobacco in Tasmania: Evidence for a Socio-economic and Geographical Gradient’ (2018) 208 (5) *The Medical Journal of Australia* 205-208; Lisa Wood et al., ‘Socioeconomic Area Disparities in Tobacco Retail Outlet Density: a Western Australian Analysis’ (2013) 198 (9) *The Medical Journal of Australia* 489-491.

¹⁹¹ Emily Brennan et al., ‘Public Support for Policies to Phase out the Retail Sale of Cigarettes in Australia: Results from a Nationally Representative Survey’ (2021) *Tobacco Control* <https://tobaccocontrol.bmj.com/content/early/2022/05/02/tobaccocontrol-2021-057122>

¹⁹² Amanda Kong and Lisa Henriksen, ‘Retail Endgame Strategies: Reduce Tobacco Availability and Visibility and Promote Health Equity’ (2021) 31 (2) *Tobacco Control* 243-249 <https://tobaccocontrol.bmj.com/content/31/2/243.abstract>

A. Queensland

Queensland also has regulations in respect of smoking product sale, advertising, display, and promotion.¹⁹³

Queensland (along with other states and territories in Australia) should establish a licensing system for all retailers of tobacco and vaping products. They should also encourage retailers to shift towards the sale of healthy products. State and Territory Governments should reduce the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density. Australian Governments should reduce the retail availability of tobacco by restricting sales to a limited number of specific store types. The Australian Governments should encourage retailers and small businesses to stop selling smoked tobacco products, and instead diversify into the sale of healthier products.

In its 2022 regulatory impact statement, the Queensland Government is considering a number of new measures.¹⁹⁴ The Queensland proposes the introduction a licensing scheme for wholesale and retail suppliers of smoking products. The Queensland Government recommends modernising advertising and display and promotion provisions for clarity and consistency. The Queensland Government proposes limiting

¹⁹³ Queensland Health, 'Smoking Laws In Queensland: Smoking Product Retailing', <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/retail> and *Tobacco and Other Smoking Products Act 1998* (Qld) and *Tobacco and Other Smoking Products Regulation 2021* (Qld).

¹⁹⁴ Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022, 8.

the sale of smoking products at liquor licenced venues to a serviced bar or bottle-shop. The Queensland Government also recommends the prohibition of the sale and handling of smoking products by minors in their employment. The Queensland Government also proposes to remove exemptions that allow a responsible adult to supply smoking products to minors.

A central part of the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* is to introduce a licensing scheme for the wholesale and retail supply of smoking products. In 2016, the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee conducted an inquiry into tobacco licensing arrangements in Queensland, and recommended that a wholesale and retail licensing scheme be considered.¹⁹⁵ The Committee recommended that ‘the Minister for Health and Ambulance Services consider implementing a positive wholesale and retail tobacco licensing scheme in Queensland, while giving weight to appropriate licensing fees and avoiding unnecessary regulatory red tape for business’.¹⁹⁶ The Committee found that ‘there is a strong public health case for implementation of a positive licensing scheme, for both wholesalers and retailers, in Queensland’.¹⁹⁷ The Committee also found that ‘such a scheme would facilitate improved compliance and enforcement of tobacco

¹⁹⁵ Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Inquiry into Tobacco Licensing Arrangements in Queensland*, Report No. 19, Legislative Assembly, Queensland Parliament, April 2016, <https://cabinet.qld.gov.au/documents/2016/Jul/RespTabac/Attachments/Report.PDF>

¹⁹⁶ Ibid., 3.

¹⁹⁷ Ibid., 3.

control measures and provide an important source of additional information regarding tobacco retail and usage in Queensland.’¹⁹⁸

The *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) seeks to implement such recommendations.

In her second reading speech, the Health Minister Yvette D’Ath explained some of the problems associated with the lack of tobacco licensing in Queensland: ‘This has limited Queensland Health’s ability to effectively identify and monitor the number, type and location of businesses selling smoking products.’¹⁹⁹ This has adversely impacted health regulation. The Minister explains the regime for tobacco licensing:

The bill introduces a licensing scheme for wholesale and retail sales of smoking products. Both types of licenses authorise sales at one physical premises and one online shop, with additional premises or online shops requiring separate licences. The licenses must be renewed annually. Before granting a licence, the chief executive of the department must be satisfied the applicant is a fit and proper person to hold the licence. This includes consideration of any criminal history and the applicant’s compliance with smoking product laws in Queensland and interstate.²⁰⁰

The Minister observed: ‘The licensing scheme will provide a strong incentive for industry to maintain compliance standards.’²⁰¹ She noted: ‘Where a licensee breaches

¹⁹⁸ Ibid., 3.

¹⁹⁹ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld)’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

²⁰⁰ Ibid.

²⁰¹ Ibid.

the act or otherwise ceases being a fit and proper person, the chief executive may take disciplinary action.’²⁰² The Minister Yvette D’Ath highlights the problems in respect of tobacco retail which have emerged in the absence of licensing: ‘The absence of a licensing scheme in Queensland has contributed to a proliferation of retail shops trading in illicit tobacco.’²⁰³

Key stakeholders have welcomed the new tobacco licensing scheme. Lung Foundation Australia CEO Mark Brooke commented: ‘The tobacco reforms proposed are vital and will help bring Queensland back as a leader in tobacco control.’²⁰⁴ He emphasized: ‘Implementing a positive license scheme is particularly important and Lung Foundation Australia are thrilled that once passed, this can start quickly.’²⁰⁵ Likewise, Heart Foundation’s General Manager in Queensland Sheree Hughes commented: ‘The Heart Foundation welcomes the proposed changes in the Bill that will ensure better licencing and enforcement of tobacco and other smoking products’.²⁰⁶

The Australian Medical Association has also welcomed the announcement: ‘We are particularly pleased the government intends to introduce a licensing scheme, as strongly

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ The Hon. Annastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

²⁰⁵ Ibid.

²⁰⁶ Ibid.

advocated for by AMA Queensland, for wholesale and retail suppliers of smoking products.²⁰⁷

The Queensland Government arguably should go further, and consider how to reduce the intensity and concentration of tobacco retailing – particularly in disadvantaged and vulnerable communities in Queensland.

B. Other States

The Queensland Minister of Health commented that Queensland would be better aligned with other Australian jurisdictions, with similar licensing regimes: ‘South Australia, the Northern Territory and Tasmania license retail suppliers; Western Australia and the ACT license both wholesale and retail suppliers; and New South Wales has a registration scheme for retailers.’²⁰⁸ At present, Queensland does seem to be lagging behind other jurisdictions when it comes to tobacco licensing.

Michelle Scollo has provided a useful analysis of tobacco licensing across Australian states.²⁰⁹ She also observes that licensing has a number of benefits for governments.

²⁰⁷ Australian Medical Association, ‘Reducing the Negative Effects of Smoking in Queensland Community Consultation’, Press Release, 15 December 2022, <https://www.ama.com.au/articles/reducing-negative-effects-smoking-queensland-community-consultation>

²⁰⁸ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

²⁰⁹ Michelle Scollo, ‘11.B Licensing of Tobacco Sellers’. In EM Greenhalgh, M Scollo, and MH Winstanley (ed.). *Tobacco in Australia: Facts and Issues*. Melbourne: Cancer Council Victoria; 2021. <http://www.tobaccoinaustralia.org.au/chapter-11-advertising/>

Scollo observes that licensing enables effective communication with all businesses selling tobacco. She suggests that licensing facilitates compliance monitoring and enforcement of public health laws relating to the sale of tobacco products. Scollo indicates that licensing has the potential to further increase the effectiveness of public health laws discouraging tobacco use. She also observes that licensing could help reduce illicit tobacco sales.

C. New Zealand

There have been calls by public health advocates for the regulation of retail tobacco in New Zealand.²¹⁰ It is worth noting that New Zealand's tobacco endgame strategy has a particular focus on the regulation of retail spaces.²¹¹ The New Zealand Government explains:

Smoked tobacco products are widely available in New Zealand, particularly in disadvantaged areas. There are nearly four times more tobacco retailers in low income communities, where smoking rates are highest, than there are in higher income communities. The widespread availability of smoked tobacco products in retail outlets can encourage young people to experiment with and take up smoking. People trying to quit are at greatest risk of relapse if they live in areas where tobacco is readily available.²¹²

²¹⁰ Lindsay Robertson et al., 'Regulating Tobacco Retail in New Zealand: What Can We Learn from Overseas?' (2016) 129 *New Zealand Medical Journal* 74-79.

²¹¹ New Zealand Ministry of Health, *Smokefree Aotearoa*, Wellington: New Zealand Ministry of Health, 2021, https://www.health.govt.nz/system/files/documents/publications/hp7801_-_smoke_free_action_plan_v15_web.pdf

²¹² *Ibid.*, 24.

The New Zealand Government comments: ‘Actions in this focus area will change the law to restrict who can sell smoked tobacco products and ensure that retailers are not clustered in New Zealand’s most deprived neighbourhoods.’²¹³

The New Zealand Government has passed legislation to only allow smoked tobacco products to be sold by authorised retailers, to significantly reduce the current number of retailers and ensure that retail supply is not concentrated in New Zealand’s most deprived neighbourhoods. Hon. Dr Ayesha Verrall has emphasized the benefits of decreasing the numbers of retailers that sell tobacco: ‘Communities will be free from the proliferation and clustering of retailers who target and sell tobacco products in certain areas.’²¹⁴ She discussed her future ambition: ‘The number of retailers around the country that can sell tobacco will be reduced to a tenth of the 6000 there are now’.²¹⁵ She commented: ‘This legislation mandates a maximum of 600 tobacco retailers by the end of next year.’²¹⁶ Verrall noted: ‘Many retailers around the country have already opted to stop selling tobacco.’²¹⁷ She observed the ‘Ngā Tai Ora Public Health Unit in Northland did a survey looking at 25 retailers who made the choice to end the sale of tobacco, of which 88% experienced either a neutral or positive financial impact.’²¹⁸

²¹³ Ibid., 24.

²¹⁴ Hon. Dr Ayesha Verrall, ‘Thousands of Lives and Billions of Dollars to be Saved with Smokefree Bill Passing’, Press Release, New Zealand Government, 13 December 2022, <https://www.beehive.govt.nz/release/thousands-lives-and-billions-dollars-be-saved-smokefree-bill-passing>

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

D. United Kingdom

The Khan Review in the United Kingdom has recommended the introduction of ‘a tobacco licence for retailers to limit where tobacco is available.’²¹⁹ The Khan Review also recommends: ‘The government should also ban online sales for all tobacco products, ban supermarkets from selling tobacco and freeze the tobacco market to stimulate innovation in tobacco-free alternatives.’²²⁰ The Khan Review explains the nature of the problem:

Currently, anyone and any enterprise can sell tobacco. Retailers need a licence to sell alcohol, but not cigarettes. Most of the public are surprised there is no similar requirement, particularly since tobacco is an even more harmful product. This can mean shops that sell to underage children, or stocking illicit tobacco, can go unnoticed. Unfortunately, it is clear that trading standards and HMRC lack the capacity to effectively tackle the problem.²²¹

The Khan Review observes: ‘A licensing scheme is not just a measure to protect young people.’²²² The Khan Review comments that a licensing scheme ‘protects the honest

²¹⁹ Independent Report, *Making Smoking: Obsolete: Summary*, United Kingdom Government, 2022, <https://www.gov.uk/government/publications/the-khan-review-making-smoking-obsolete/making-smoking-obsolete-summary> For the larger report, see Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* (‘the Khan Review’), United Kingdom Government, 9 June 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

²²⁰ Ibid.

²²¹ Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* (‘the Khan Review’), United Kingdom Government, 9 June 2022, 25-26, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

²²² Ibid., 26.

small businesses up and down the country who sell only tax paid products to adults but are undercut every day by an illicit trade run by criminal gangs who sell smuggled tobacco to anybody who wants it.’²²³

The Khan Review is concerned about the online sale of cigarettes and e-cigarettes:

Online is even worse, with a wild west of products available for purchase at the click of a button. This applies to online purchasing of unregulated vapes too. The government has already cut off some routes for underage sales by banning vending machines, but online sales present a new threat.²²⁴

The Khan Review recommends an end to the online sales of all tobacco products: ‘The government must completely end the online sale of all tobacco products.’²²⁵

The Khan Review comments: ‘Supermarkets should lead the way for retailers, considering the harm tobacco causes to their customers and their families across the country.’²²⁶ The Khan Review notes: ‘The Netherlands is banning the sale of cigarettes in supermarkets from 2024.’²²⁷ The Khan Review observes: ‘Some supermarkets in the UK, such as Lidl and Aldi, are leading the way and do not sell cigarettes, but most supermarkets have not followed suit’.²²⁸ The Khan Review recommends that the United Kingdom Government ban supermarkets from selling tobacco products instore and

²²³ Ibid., 26.

²²⁴ Ibid., 26.

²²⁵ Ibid., 27.

²²⁶ Ibid., 26.

²²⁷ Ibid., 26.

²²⁸ Ibid., 25-26.

online: ‘The government must ban supermarkets across the UK from selling tobacco products instore and online as soon as possible.’²²⁹

The Khan Review also calls on the United Kingdom Government to ‘freeze the tobacco market and allow no new tobacco products’ in order to ‘stagnate the market’.²³⁰

Recommendation 5

Queensland’s plan to establish a licensing system for all retailers of tobacco is an excellent initiative. The Queensland Government should reduce the retail availability of smoked tobacco products by significantly reducing the number of retailers based on population size and density. The Queensland Government should reduce the retail availability of tobacco by restricting sales to a limited number of specific store types. The Queensland Government should encourage retailers to shift towards the sale of healthy products.

²²⁹ Ibid., 27.

²³⁰ Ibid., 27.

6. SMOKE-FREE GENERATIONS

The Preamble to the *WHO Framework Convention on Tobacco Control 2003* expresses concern ‘about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages.’²³¹

The Queensland Health regulatory statement has hundreds of references to smoking by children and youth.²³² In that context, it is curious that the document does not canvass in detail age-related restrictions on smoking. It is worthwhile noting that the WTO Panel Decision and the WTO Appellate Body Decision dealing with Australia’s plain packaging of tobacco products discussed the alternative tobacco control option of age limitations in respect of smoking.²³³ This option has been mooted in Australia. Age-related restrictions on smoking have been implemented in the United States of America, Singapore, and New Zealand, and are currently being considered by the United Kingdom.

²³¹ Preamble of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

²³² Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022.

²³³ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, (28 June 2018); and *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R, (9 June 2020).

The Queensland Government should contemplate age restrictions on smoking in order to achieve a tobacco endgame. The new bill before Parliament does not seek to implement smoke-free generation rules (like New Zealand, Singapore, and the United States). Instead the bill seeks to enhance offences protecting children from the dangers of smoking. Health Minister Yvette D’Ath emphasized that ‘the bill strengthens public health protections for Queenslanders and particularly for families and children.’²³⁴ The Heart Foundation’s General Manager in Queensland Sheree Hughes comments: ‘We must do everything possible to ensure the next generation don’t get hooked on smoking products.’²³⁵ In the future, the Queensland Government may need to contemplate further measures – such as additional age limitations on smoking.

A. Australia

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

A parliamentary committee published a report on the *Public Health Amendment (Tobacco Free Generation) Bill 2014 (Tas)* in 2016.²³⁶ The Committee made several

²³⁴ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

²³⁵ The Hon. Annastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

²³⁶ Legislative Council Government Administration Committee “A”, *Report on Public Health Amendment (Tobacco Free Generation) Bill 2014*, Parliament of Tasmania, 2016, <https://www.parliament.tas.gov.au/ctee/Council/Reports/gaa.inq.tfg.rep.160701.FinalReport.jm.004.pdf>

findings. First, the committee noted that ‘there does not appear to be any significant legal impediment to the operation of the Bill in delivering the policy intent.’²³⁷ Second, the committee observed that ‘the Parliament should take a measured and cautious approach in considering a Bill which could limit or ‘extinguish’ fundamental rights relating to age, equality and liberty.’²³⁸ Third, the Committee said: ‘The Bill raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/tourists’.²³⁹ Rather peculiarly, the Committee noted: ‘The proposer of the Bill may wish to give consideration to amendment of the Bill to avoid negative impacts on tourism.’²⁴⁰ Fourth, the Committee noted: ‘Should the Bill be supported, appropriate education programs would be required to effectively implement the Bill.’²⁴¹ The Committee commented: ‘This would incur a cost and would be a matter for the Government of the day.’²⁴²

In 2017, the Tasmanian Government responded to the committee report on the bill.²⁴³ The Minister for Health commented: ‘After careful consideration, the Government decided not to proceed with any change to the minimum smoking age.’²⁴⁴

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ The Hon. Michael Ferguson, ‘Government Response to *Report on Public Health Amendment (Tobacco Free Generation) Bill 2014*’, Government of Tasmania, 31 January 2017, <https://www.parliament.tas.gov.au/ctee/Council/Reports/gaa.tfg.govtresponse.ne.001.pdf>

²⁴⁴ Ibid.

In 2018, the Hon. Ivan Dean introduced a new piece of smokefree generation legislation, the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill 2018* (Tas). In his second reading speech, Dean discussed his ambitions behind the legislation.²⁴⁵ He commented:

Its purpose is to raise the minimum legal age to 21 for people to whom tobacco and other smoking products can be sold (T21). This is often referred to as the minimum legal sales age (MLSA). This important measure that I am proposing today is an additional tool to prevent the uptake of youth smoking by removing the peer network of tobacco supply out of our schools.²⁴⁶

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

However, the Coalition Government in Tasmania refused in the end to support the proposal in 2021. Jeremy Rockliff, the Minister for Mental Health and Wellbeing, commented that 'the Government will not be supporting Mr Dean's T21 bill, but will instead create a smoking prevention package targeted at young people in Year 6 and up.'²⁴⁷ He instead said the Government would support education campaigns: 'We know the average age people start experimenting with smoking in Australia is 16, so the

²⁴⁵ The Hon. Ivan Dean, 'Second Reading Speech on the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill 2018*', Parliament of Tasmania, 2018, https://www.parliament.tas.gov.au/bills/Bills2018/pdf/notes/45_of_2018-SRS.pdf

²⁴⁶ Ibid.

²⁴⁷ Jeremy Rockliff, 'Youth focus in smoking prevention package,' Press Release, Tasmanian government, 1 March 2021, http://www.premier.tas.gov.au/site_resources_2015/additional_releases/youth_focus_in_smoking_prevention_package

package will focus on ensuring young people have the information they need to make an informed decision on all the reasons why they shouldn't take up the addictive substance by that age.'²⁴⁸ In the end, both the Liberal Government and the Labor Opposition voted against smokefree generation laws in Parliament.²⁴⁹ The bill was voted down 11 to 3 in the Legislative Council. Kathryn Barnsley reflected: 'An innovative legislative reform in Tasmania, Australia has been defeated, after what appears to be tobacco industry interference via third parties, with support from vaping lobby groups.'²⁵⁰

In a joint statement, Honourable Independent Member Ivan Dean, Minderoo Foundation, Lung Foundation Australia, and SmokeFree Tasmania said they were disappointed by the government's decision to reject T21 law and instead do 'more of the same'.²⁵¹ The Honourable Independent Member Ivan Dean MLC commented: 'Tasmania's smoking rates remain some of the worst nationally, and it is our responsibility as legislators to take action to protect our youth from a deadly, lifelong addiction.'²⁵² He warned: 'To do nothing on this issue is robbing our kids of their

²⁴⁸ Ibid.

²⁴⁹ Rob Inglis, 'Tasmania's T21 bill: push to raise legal purchasing age for cigarettes fails', *Examiner*, 24 March 2021, <https://www.examiner.com.au/story/7180475/disappointed-push-to-raise-legal-purchasing-age-for-cigarettes-fails/>

²⁵⁰ Kathryn Barnsley 'Australia: Big Tobacco Wins in Defeat of T21 Age Bill', *BMJ Tobacco Control*, 2 April 2021, <https://blogs.bmj.com/tc/2021/04/02/australia-big-tobacco-wins-in-defeat-of-t21-age-bill/>

²⁵¹ Minderoo Foundation, 'Government's Rejection of Tobacco21 Legislation Puts Young Tasmanians at Risk of Nicotine Addiction', Press Release, 4 March 2021, <https://www.minderoo.org/tobacco21/news/governments-rejection-of-tobacco21-legislation-puts-young-tasmanians-at-risk-of-nicotine-addiction/>

²⁵² Ibid.

potential and future’.²⁵³ Minderoo Foundation’s Collaborate Against Cancer CEO Dr Steve Burnell, said: ‘Removing easy access from our kids is more important than ever given the tobacco industry’s devious promotion of vaping pens and flavours, which is driving the e-smoking epidemic affecting young people around the world.’²⁵⁴ Lung Foundation Australia, CEO Mark Brooke said: ‘There is good reason to rethink the sales age for tobacco and take measures that prevent young people from becoming addicted to nicotine.’²⁵⁵ He noted: ‘Local T21 policies are proven to produce a substantive reduction in smoking among 18-to 20-year-olds in jurisdictions which have implemented the policy measure.’²⁵⁶ SmokeFree Tasmania’s Dr Kathryn Barnsley commented: ‘With high smoking rates in Tasmania and prevention programs to date not making a dent, it is a great shame that the government is not willing to step up to protect the health of young Tasmanians.’²⁵⁷

The mining magnate and philanthropist Andrew Forrest and his Minderoo Foundation have promoted the adoption of tobacco-free laws in Western Australia.²⁵⁸ Eliminate Cancer Advisor Bruce Mansfield commented: ‘We have 95 per cent of smokers starting before the age of 21.’²⁵⁹ He said: ‘History tells us if they get to 21 without smoking, they are far less likely to start and could avoid becoming lifelong customers of big

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Regina Titelius, ‘Ban Smoking for Under 21s Says Andrew Forrest’, *The West Australian*, 31 May 2019, <https://thewest.com.au/news/andrew-forrest/ban-smoking-for-under-21s-says-andrew-forrest-ng-b881215833z>

²⁵⁹ Ibid.

tobacco.²⁶⁰ Mansfield noted: ‘Now is the time for us to protect our children from a lifetime of debilitating and often fatal addiction — to stop smoking before it starts.’²⁶¹ Forrest has also encouraged South Australian politicians to raise the minimum smoking age from 18 to 21.²⁶² Forrest has also recommended that the Federal Government should consider raising the smoking age to 21 as well.²⁶³

The Queensland Government is certainly very concerned about the impact of smoking and vaping upon children, youth, and families. The *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* is certainly keen to reduce smoking amongst children and youth. (The explanatory notes mention children 49 times, and youth several times). The bill before Parliament, though, does not seek to create smoke-free generations. Instead, the Queensland Government has pushed to enhance offences protecting children from the dangers of smoking. It may be worthwhile contemplating higher age limits for smoking in future legislative reforms in Queensland.

B. United States

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² “‘Lift Smoking Age to 21’ to Save Lives’, *The Advertiser*, 25 October 2017, <https://www.adelaidenow.com.au/news/south-australia/iron-ore-magnate-andrew-forrest-challenges-south-australian-politicians-to-raise-smoking-age-to-21/news-story/b9a2ded8ed40b9a20a20fb4f6c9afdd2>

²⁶³ Adam Gartrell, ‘Smoking Age Would Be Raised To 21 Under Andrew Forrest’s New Anti-Cancer Plan’, *The Sydney Morning Herald*, 1 October 2017, <https://www.smh.com.au/politics/federal/smoking-age-would-be-raised-to-21-under-andrew-forrests-new-anticancer-plan-20171001-gys736.html>

In the meantime, a number of United States locations passed T21 laws – including Needham (a town in Boston, Massachusetts), New York, and California.²⁶⁴

In 2015, Senator Elizabeth Warren and a number of her colleagues have introduced a federal bill to raise the age of smoking.²⁶⁵ Warren commented: ‘Stopping tobacco sales to people under 21 reduces smoking by kids and teens, saves lives, and leads to healthier communities.’²⁶⁶

At a Federal level, United States raised the age of smoking in 2019. On the 20th December 2019, the United States President Donald Trump signed legislation amending the *Federal Food, Drug, and Cosmetic Act*, and raising the federal minimum age for sale of tobacco products from 18 to 21 years. The Campaign for Tobacco Free Kids commented:

Increasing the minimum sale age for tobacco products to 21 has been an important strategy in reducing smoking and other tobacco use among youth. Raising the tobacco age to 21 is part of a comprehensive strategy along with other strong measures, including prohibiting flavored tobacco products, higher tobacco taxes, strong smoke-free laws, and well-funded, sustained

²⁶⁴ Alison Costelloe, ‘Tasmania Could Become The First State in Australia to Raise Smoking Age to 21’, *ABC News*, 11 January 2021, <https://www.abc.net.au/news/2021-01-11/legal-smoking-age-of-21-in-tasmania-increase-laws/13045672>

²⁶⁵ Senator Elizabeth Warren, ‘Sen Warren Joins Sens Schatz, Durbin, Brown, and Colleagues to Introduce Bill To Raise Smoking Age to 21’, Press Release, 30 September 2015, <https://www.warren.senate.gov/newsroom/press-releases/sen-warren-joins-sens-schatz-durbin-brown-and-colleagues-to-introduce-bill-to-raise-smoking-age-to-21>

²⁶⁶ Ibid.

tobacco prevention and cessation programs. Nearly all smokers start as kids or young adults, and these age groups are heavily targeted by the tobacco industry.²⁶⁷

The Campaign for Tobacco Free Kids commented: ‘Increasing the tobacco age to 21 will help to prevent young people from ever starting to smoke and to reduce the deaths, disease and health care costs caused by tobacco use.’²⁶⁸

Since 2020, the smoking age in all U.S. states, territories and the District of Columbia has been lifted to 21. The Menzies Research Institute in Tasmania examined eight scientific studies on T21 in the US – with five showing reduced smoking rates. Dr Seana Gall commented: ‘It’s quite varied because of the differences in study design.’²⁶⁹ She observed: ‘The studies that found that it had a significant effect on smoking prevalence were those that were the most robust.’²⁷⁰ Dr Gall said that the research found people aged 21 and over were less likely to supply cigarettes to minors than those aged 18 to 20: ‘It’s creating a bigger gap between those people who are sort of experimenting with smoking and those people who can actually legally purchase the cigarettes.’²⁷¹

C. Singapore

²⁶⁷ Campaign for Tobacco-Free Kids, ‘Raising the Tobacco Age to 21’, <https://www.tobaccofreekids.org/what-we-do/us/sale-age-21>

²⁶⁸ Ibid.

²⁶⁹ Alison Costelloe, ‘Tasmania Could Become The First State in Australia to Raise Smoking Age to 21’, *ABC News*, 11 January 2021, <https://www.abc.net.au/news/2021-01-11/legal-smoking-age-of-21-in-tasmania-increase-laws/13045672>

²⁷⁰ Ibid.

²⁷¹ Ibid.

Meanwhile, in 2021, Singapore has raised the minimum legal age for smoking to 21.²⁷² This is a consequence of amendments to the *Tobacco (Control of Advertisements and Sale) Act*, which were passed in Parliament in November 2017. The Ministry of Health in Singapore noted that ‘Tobacco use is one of the highest contributors to ill health and premature death in Singapore.’²⁷³ The Ministry observed that tobacco is ‘associated with cancers, ischaemic heart disease, stroke, lung disease and many other diseases.’²⁷⁴ The United Kingdom is currently considering raising the legal age for smoking.²⁷⁵ Denmark has also been considering tobacco-free generations.²⁷⁶

D. New Zealand

There has been an opportunity for the Ardern New Zealand Government to investigate smokefree generation laws – like the United States and Singapore. Jude Ball and their collaborators contend:

The Tobacco Free Generation policy, if implemented as part of a comprehensive tobacco end-game strategy, has enormous potential to help ensure the smokefree goal is not only achieved but maintained long term. It is likely to reduce ethnic smoking disparities and provides a

²⁷² Ng Keng Gene, ‘Minimum Legal Age for Smoking raised to 21 from Tomorrow’, *The Straits Times*, 31 December 2020, <https://www.straitstimes.com/singapore/minimum-legal-age-for-smoking-raised-to-21-from-tomorrow>

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Gemma Jones, ‘The United Kingdom Government has set a Target of Getting the Country to go “Smoke-Free” by 2030’, *Liverpool Echo*, 15 March 2022, <https://liverpoolecho.co.uk/news/uk-world-news/minimum-age-buy-cigarettes-could-23391333>

²⁷⁶ AFP, ‘Denmark Considers Ban on Cigarette Sales to Anyone Born after 2010’, *The Guardian*, 15 March 2022, <https://www.theguardian.com/society/2022/mar/15/denmark-considers-ban-on-cigarette-sales-to-anyone-born-after-2010>

straightforward approach to phasing out tobacco sales. Harnessing grassroots support from children and young people who want a tobacco-free future will greatly help in the framing of Tobacco Free Generation as a positive step for Aotearoa/New Zealand.²⁷⁷

Ball and colleagues comment: ‘Internationally, Tobacco Free Generations is being advocated by grassroots coalitions of doctors, medical students and youth leaders, and has been endorsed by numerous public health bodies including the British and Norwegian Medical Associations and the 16th World Conference on Tobacco Or Health.’²⁷⁸

As part of its tobacco endgame strategy, New Zealand has been focused on policies, which could achieve smoke free generations.²⁷⁹ The New Zealand Government hopes to ‘create a smokefree generation by increasing the number of children and young people who remain smokefree.’²⁸⁰ The New Zealand Government stresses that ‘Stopping our children and young people from ever smoking will reduce future smoking

²⁷⁷ Jude Ball, Jon Berrick, Richard Edwards, Janet Hoek, and Frederieke Petrovic-van der Deen, ‘Phasing out smoking: The Tobacco-Free Generation policy’, *Public Health Expert*, 14 May 2021, <https://blogs.otago.ac.nz/pubhealthexpert/phasing-out-smoking-the-tobacco-free-generation-policy/#more-13842>

²⁷⁸ Ibid.

²⁷⁹ Hon. Dr Ayesha Verrall, ‘Historic Step Towards Smokefree Future’, New Zealand Government, 9 December 2021, <https://www.beehive.govt.nz/release/historic-step-towards-smokefree-future> and Department of Health (New Zealand), *Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025*, Wellington: New Zealand Government, 2021, <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

²⁸⁰ New Zealand Ministry of Health, ‘Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025’, 9 December 2021, 8, <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

rates and smoking related harm.²⁸¹ The New Zealand Government comments: ‘This outcome requires a holistic approach to protecting children and young people, including reducing their exposure to smoked tobacco products and to second-hand smoke, supporting parents and whānau to quit smoking, and ensuring smoked tobacco products are not appealing or addictive.’²⁸² The New Zealand Government maintains: ‘By focusing on stopping new generations of people from ever starting to smoke, we acknowledge that children and young people are our future and put them front and centre.’²⁸³ The New Zealand Government maintains: ‘This action plan contributes to meeting our obligations under the *United Nations Convention on the Rights of the Child* to protect children from the harms of smoking, including from beginning to smoke themselves.’²⁸⁴

As Prime Minister, Jacinda Ardern observed of the policy: ‘For the outside looking in, a Smokefree generation captures the imagination.’²⁸⁵ She commented: ‘When we discussed this in cabinet, it wasn't lost on us that it was groundbreaking.’²⁸⁶ Ardern commented: ‘If you say, "Does anyone object to the idea of preventing children (from) picking up a cigarette?”²⁸⁷ She noted: ‘Would anyone object to the idea of stopping a

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ben McKay, ‘Jacinda Ardern reveals a Major Change to Cigarettes that are Currently on Sale - As She Reveals why she is Pursuing a Ban on Smokes for NZ's Next Generation’, Australian Associated Press, 10 December 2021, <https://www.dailymail.co.uk/news/article-10295157/Jacinda-Ardern-introduced-know-Smokefree-2025-New-Zealand.html>

²⁸⁶ Ibid.

²⁸⁷ Ibid.

young person from taking up something that they had a 50 per cent chance of killing them?’²⁸⁸ Ardern observed: ‘When you present it like that, who wouldn’t want to prevent a child from doing that?’²⁸⁹

Chris Bullen, a public health professor at the University of Auckland, commented: ‘If implemented as outlined, it could just be the single most significant step we take as a nation to reducing preventable death and disease and reducing health inequities in the next few years.’²⁹⁰

E. United Kingdom

The United Kingdom Government has also been contemplating raising the age of smoking to 21.²⁹¹ An independent review commissioned by the health secretary, Sajid Javid, and led by Javed Khan, the former chief executive of the children’s charity Barnardo’s, has recommended that the legal smoking age in England be raised from 18 to 21 to make the country smoke-free by 2030. The minimum age for tobacco purchases was previously raised from 16 to 18 in the United Kingdom in 2007. Sajid Javid has been considering generational anti-smoking policies in the US, where the legal age is 21, and New Zealand, which has been seeking age-related restrictions as part of its smoke-free New Zealand strategy.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Miranda Bryant, ‘Legal Smoking Age in England could be Raised to 21 – Report’, *The Observer*, 21 May 2022, https://www.theguardian.com/society/2022/may/21/legal-smoking-age-in-england-could-be-raised-to-21-report?CMP=share_btn_tw

A Department of Health and Social Care spokesperson commented: ‘Tackling issues such as smoking is a priority for the office for health improvement and disparities and a key part of the government’s levelling up agenda.’²⁹² They observed: ‘This is why we launched the independent review of our bold ambition to make England smoke-free by 2030.’²⁹³ They commented: ‘The review will provide independent, evidence-based advice on potential interventions that will inform our approach to tackling the stark health disparities associated with tobacco use – and we look forward to seeing the report in due course.’²⁹⁴

The Khan review recommended that the United Kingdom government increase the age of sale: ‘The government must stop young people starting to smoke, which is why I recommend increasing the age of sale from 18, by one year, every year until no one can buy a tobacco product in this country.’²⁹⁵

The United Kingdom reviewer Dr Javed Khan, the former chief executive of the children’s charity Barnardo’s, commented: ‘Without immediate and sustained action,

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Independent Report, *Making Smoking: Obsolete: Summary*, United Kingdom Government, 2022, <https://www.gov.uk/government/publications/the-khan-review-making-smoking-obsolete/making-smoking-obsolete-summary> For the larger report, see Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* (‘the Khan Review’), United Kingdom Government, 9 June 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

England will miss the smoke-free target by many years and most likely decades.²⁹⁶ He commented: ‘A smoke-free society should be a social norm – but to achieve this we must do more to stop people taking up smoking, help those who already smoke and support those who are disproportionately impacted by smoking.’²⁹⁷ Khan stressed: ‘My holistic set of recommendations for government will deliver this, whilst saving lives, saving money and addressing the health disparities associated with smoking.’²⁹⁸ He commented: ‘My proposals are not just a plan for this government, but successive governments too.’²⁹⁹ Khan commented: ‘To truly achieve a smoke-free society in our great country, we need to commit to making smoking obsolete, once and for all.’³⁰⁰

There seems to be some factions within the United Kingdom Government, which are opposing the measures. Much will depend upon how the Cabinet and the Prime Minister respond to the recommendations of the Khan review.³⁰¹

If the United Kingdom Conservative Government is considering such options, the progressive Queensland Government should certainly explore age-related tobacco

²⁹⁶ Andrew Gregory, ‘Smoking Age in England Should Rise By A Year Each Year, Review Says’, *The Guardian*, 9 June 2022, <https://www.theguardian.com/society/2022/jun/09/smoking-age-england-should-rise-year-each-year-government-review-says>

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Jessica Elgot, ‘Plan To Raise Smoking Age to 21 to be Unveiled amid UK Government Splits’, *The Guardian*, 8 June 2022, <https://www.theguardian.com/society/2022/jun/07/plan-to-raise-smoking-age-to-21-to-be-unveiled-amid-uk-government-splits> and Andrew Gregory, ‘England Going Smoke-free by 2030 Depends on No 10 Willpower’, *The Guardian*, 9 June 2022, <https://www.theguardian.com/society/2022/jun/08/england-going-smoke-free-by-2030-depends-on-no-10-willpower-khan-review>

restrictions – especially given how the tobacco industry and e-cigarette manufacturers continue to target and recruit young people.

Recommendation 6

The Queensland bill has a strong focus on the protection of families, childrens’ rights, and youth. However, the legislation stops short of providing for further temporal limitations in respect of the use of tobacco. In the future, the Queensland Government could follow the lead of the United States Singapore, and New Zealand, and introduce a smoke-free generation policy.

7. TOBACCO LITIGATION

Article 19 of the *WHO Framework Convention on Tobacco Control* 2003 highlights the role of tobacco liability.³⁰² Article 19 (1) provides: ‘For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.’³⁰³ Article 19 (2) states: ‘Parties shall cooperate with each other in exchanging information through the Conference of the Parties in accordance with Article 21 including: (a) information on the health effects of the consumption of tobacco products and exposure to tobacco smoke in accordance with Article 20.3(a); and (b) information on legislation and regulations in force as well as pertinent jurisprudence.’³⁰⁴ Article 19 (3) provides: ‘The Parties shall, as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements, afford one another assistance in legal proceedings relating to civil and criminal liability consistent with this Convention.’³⁰⁵ Article 19 (4) provides: ‘The Convention shall in no way affect or limit any rights of access of the Parties to each other’s courts where such rights exist’.³⁰⁶ Article 19 (5) states: ‘The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request,

³⁰² Article 19 of the *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

the Parties in their legislative and other activities in accordance with this Article.³⁰⁷

There have been recent discussions and webinars about the use of the judicial system to fight Big Tobacco.³⁰⁸

A. Civil Liability

There has been an array of international litigation in the field of tobacco control.³⁰⁹

There has been a growth in ‘liability litigation brought to hold the tobacco industry accountable for its actions.’³¹⁰

In Australia, the most notable civil litigation against the tobacco industry is the McCabe case. Rolah McCabe sued British American Tobacco Australia in the Supreme Court of Victoria, arguing that the company was negligent in its manufacturing and marketing of cigarettes. At first instance, Justice Eames struck out British American Tobacco’s defence to the proceeding and ordered judgment.³¹¹ The judge found that there had been destruction of documents by the defendant – subverting the process of discovery: ‘In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor Clayton Utz, with the deliberate intention of denying a fair trial to the

³⁰⁷ Ibid.

³⁰⁸ ASH, ‘Tobacco Liability – WHO FCTC Article 19: Using the Judicial System to Fight Tobacco’, YouTube, 10 November 2020, <https://youtu.be/FWGI-roPTVk>

³⁰⁹ For a recent overview, see Suzanne Zhou, Evita Ricafort, Davi Bressler, and Rachel Kitonyo Devotsu, ‘Litigation in Tobacco Control: Past, Present and Future’, (2022) 31 *Tobacco Control* 291-295.

³¹⁰ Ibid.

³¹¹ Justice Eames in *McCabe v. British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002) <http://www.austlii.edu.au/au/cases/vic/VSC/2002/73.html>

plaintiff, and the strategy to achieve that outcome was successful.’³¹² The jury awarded McCabe \$687,560 plus interest and costs. The Court of Appeals overturned aspects of Justice Eames’ ruling in respect of discovery.³¹³

The High Court of Australia refused the daughter of Rolah McCabe special leave.³¹⁴ Gleeson CJ noted: ‘The central complaint against the respondent was that before the plaintiff’s proceedings had been instituted, but at a time when the defendant anticipated that proceedings like those later brought by the plaintiff would be instituted, the defendant destroyed documents relevant to the claim which the plaintiff made.’³¹⁵ Gleeson CJ commented: ‘In addition to reversing a number of findings of fact of the trial judge, the Court of Appeal expressed the view that where it is alleged that a defendant has destroyed documents before the commencement of a proceeding to the prejudice of a party complaining a court should not strike out the defence of the party who destroyed documents unless destroying the documents amounted to an attempt to pervert the course of justice or a contempt of court.’³¹⁶ Gleeson CJ commented: ‘Having considered the reasoning of the primary judge and of the Court of Appeal and the

³¹² Justice Eames in *McCabe v. British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002) [34] <http://www.austlii.edu.au/au/cases/vic/VSC/2002/73.html>

³¹³ *British American Tobacco Australia Services Limited v. Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html>

³¹⁴ *Cowell v. British American Tobacco Australia Services Ltd* [2003] HCATrans 384 (3 October 2003) <http://www.austlii.edu.au/au/other/HCA/Trans/2003/384.html>

³¹⁵ *British American Tobacco Australia Services Limited v. Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html>

³¹⁶ *British American Tobacco Australia Services Limited v. Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html>

arguments of the parties, we are not persuaded that the prospects of demonstrating that the plaintiff could not have a fair trial are sufficient to warrant a grant of special leave to argue that there should be judgment without any trial or a rehearing of the application to strike out the respondent's defence.'³¹⁷ There has been further litigation between the parties in 2009.³¹⁸ The dispute was settled confidentially in 2011.³¹⁹ The Victorian Government subsequently passed legislation, clarifying criminal offences in respect of document destruction. The evidence unearthed by the McCabe litigation was raised by the United States Department of Justice in their racketeering litigation against the tobacco industry.³²⁰

³¹⁷ *British American Tobacco Australia Services Limited v. Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html>

³¹⁸ *British American Tobacco Australia Limited v Gordon & Ors (No 3)* [2009] VSC 619 (24 December 2009) <http://www.austlii.edu.au/au/cases/vic/VSC/2009/619.html>

³¹⁹ The McCabe Centre for Law and Cancer, 'The McCabe case', <https://www.mccabecentre.org/about/the-mccabe-case>

³²⁰ The McCabe Centre for Law and Cancer, 'The McCabe case', <https://www.mccabecentre.org/about/the-mccabe-case>; see also Sharon Eubanks and Stanton Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry*, Washington: American Public Health Association, 2012; *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

There has also been litigation in Australia relating to injury from exposure to second-hand smoke.³²¹ Such disputes have traversed the fields of negligence,³²² breach of contract,³²³ occupational health and safety,³²⁴ and disability discrimination.³²⁵

There has also been action taken by the Australian Competition and Consumer Commission under Australian consumer law against tobacco companies (particularly in respect of the use of 'light' and 'mild' descriptors).³²⁶ Graeme Samuel explained the intent of the court-enforceable undertakings by the tobacco companies: 'The undertakings address the matters of most concern to the ACCC, that is, the removal of the 'light' and 'mild' descriptors, the prevention of further similar conduct and the provision of significant funds for consumer education programs to deal with claims that

³²¹ Neil Francey, '30th Anniversary of Australian Legal Ruling on Second-Hand Smoke' (2021) 397 (10273) *Lancet* 466-467. Retrieved from <https://www.ncbi.nlm.nih.gov/pubmed/33549183>

³²² *Bowles v. Canton Pty Ltd* (Unreported, 13 September 2003, Magistrates Court of Victoria); *Scholem v. NSW Department of Health* (1992) 3 APLR 45, NSW District Court, 27 May 1992; and *Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club*, Supreme Court of NSW, Case no. 20956 of 1996.

³²³ *Bowles v. Canton Pty Ltd* (Unreported, 13 September 2003, Magistrates Court of Victoria).

³²⁴ *Scholem v. NSW Department of Health* (1992) 3 APLR 45, NSW District Court, 27 May 1992.

³²⁵ *Francey & Ors v. Hilton Hotels of Australia Pty Ltd* [1997] HREOCA 56, 25 September 1997.

³²⁶ Australian Competition and Consumer Commission, Philip Morris (Australia) Limited - s.87B undertaking, 10 May 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/philip-morris-australia-limited-s87b-undertaking>; Australian Competition and Consumer Commission, British American Tobacco Australia Limited - s.87B undertaking, 11 May 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/british-american-tobacco-australia-limited-s87b-undertaking>; Australian Competition and Consumer Commission, Imperial Tobacco Australia Limited - s.87B Undertaking, 7 November 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/imperial-tobacco-australia-limited-s87b-undertaking>

low yield cigarette brands are in some way better for you than higher yield brands'.³²⁷

Consumer groups have also invoked consumer law in conflicts with tobacco companies.³²⁸

There has been concern that the tobacco industry is still trying to circumvent plain packaging laws, and that there is a need for greater government enforcement.³²⁹

In 2000, Queensland's then Attorney General, Labor's Matt Foley, raised the issue of tobacco liability: 'We believe that the great loss and damage suffered by the community through tobacco related illness is something that governments have a duty to investigate.'³³⁰ The matter of civil litigation is certainly a question that the Queensland Government should reconsider in 2022. The executive summary of the 2022 regulatory impact statement stresses: 'Queensland has the second highest smoking rate for current adult smoking in the country and smoking is the single most preventable cause of morbidity and premature mortality in Queensland, no other single risk factor contributes

³²⁷ Australian Competition and Consumer Commission, 'ACCC resolves "Light" and "Mild" Cigarette Issue with B.A.T. and Philip Morris', 12 May 2005, <https://www.accc.gov.au/media-release/accc-resolves-light-and-mild-cigarette-issue-with-bat-and-philip-morris>

³²⁸ *Australian Federation of Consumer Organisations Inc v. The Tobacco Institute of Australia Ltd* (1991) ATPR 41-079; *Re Tobacco Institute of Australia Limited and Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1; *Tobacco Control Coalition Inc v. Philip Morris (Australia) Ltd* [2000] FCA 1004 (27 July 2000); and *Cauvin v. Philip Morris Limited and Ors* [2005] NSWSC 640 (26 August 2005).

³²⁹ Catherine Bond, 'Tobacco Plain Packaging in Australia: *JT International v. Commonwealth and Beyond*' (2017) 17 (2) *QUT Law Review* 1.

³³⁰ Christopher Zinn, 'Australia to consider a Class Action against Tobacco Industry' (2000) 320 (7239) *British Medical Journal* 894.

as greatly to the burden of preventable death and disease, or to health inequity.³³¹

Queensland Health observed:

There are profound costs from the negative effects of smoking on smokers, their loved ones and health services. In 2015–16, the total cost of smoking in Queensland was estimated to be \$27.4b. This includes tangible costs associated with premature death, hospitalisations, other medical and social care costs, workplace absenteeism and tobacco spending. It also includes significant intangible costs including the value of life lost, pain and suffering.³³²

It remains problematic that the tobacco industry has externalised the negative effects of smoking – leaving the Queensland government and the Queensland community to bear the burden of these costs. There is a need to ensure that the tobacco industry is held responsible and accountable for the negative effects of smoking in Queensland.

There could be scope for further litigation against Australian consumer law against tobacco companies (and e-cigarette companies) – especially in light of the successful legal action under consumer law in other jurisdictions such as the United States and Canada.

There has been notable civil litigation against tobacco companies in other jurisdictions. In the United States, there was a racketeering action brought by the Clinton administration United States Government against tobacco companies.³³³ In a 2006

³³¹ Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022, 4.

³³² Ibid.

³³³ Sharon Eubanks and Stanton Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry*, Washington: American Public Health Association, 2012.

judgment, Kessler J found the major U.S. tobacco companies had violated civil racketeering laws (RICO) and engaged in a conspiracy to deceive the American public about the health effects of smoking and their marketing to children.³³⁴ The judge held that the ‘Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.’³³⁵ The judge was also critical of the role of lawyers in the history of deceiving the American public about the hazards of smoking: ‘At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes.’³³⁶ Among her remedies, Judge Kessler ordered the tobacco companies to publish ‘corrective statements’. There were signs of political interference in the tobacco litigation by the Bush administration.³³⁷

In Canada, there has been successful class actions against tobacco companies in Quebec.³³⁸ The trial judge condemned three cigarette manufacturers to pay moral and punitive damages under the regimes of extracontractual liability under the general law, the provisions of the Charter of human rights and freedoms, the Consumer Protection

³³⁴ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

³³⁵ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

³³⁶ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

³³⁷ Sharon Eubanks and Stanton Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry*, Washington: American Public Health Association, 2012.

³³⁸ *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382; and on appeal *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

Act, the regime of manufacturer's liability.³³⁹ The Court of Appeal upheld this landmark decision.³⁴⁰ In response, the tobacco companies have sought protection under the *Companies Creditors Arrangement Act*.

No doubt there is scope for further civil litigation against tobacco companies in Australia – but there is a need to ensure that such endeavours are properly supported and resourced by government. Inspired by the example of Canada, the Australian philanthropist Andrew Forrest has sought legal advice from a number of Queen's Counsel about the prospects of civil tobacco litigation.³⁴¹ He commented: 'This society-critical initiative is still in its infancy but the end game is to reduce this dreaded disease to an illness not a death sentence'.³⁴² Forrest was hopeful: 'We want to prove it works in Australia first and then immediately spread it globally'.³⁴³

The Australian Council on Smoking and Health was supportive of the move to put the burden of health costs back on the tobacco industry. President Maurice Swanson observed: 'The biggest impact of a successful legal action would be to hasten the demise of the tobacco industry in Australia.'³⁴⁴ He noted that such an action would help support a tobacco endgame strategy: 'We're aiming for a smoke-free Australia by 2025 and this

³³⁹ *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382.

³⁴⁰ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

³⁴¹ June Ramli, 'Billionaire Sues Tobacco Industry on Behalf of Smokers', *Daily Mail*, 30 September 2017, <https://www.dailymail.co.uk/news/article-4935356/Billionaire-sues-tobacco-industry-behalf-smokers.html>

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ James Carmody, Kate Lambe, and David Weber, 'Mining Billionaire Andrew Forrest Plotting "Assault" on the Tobacco Industry', *ABC News*, 30 September 2017, <https://www.abc.net.au/news/2017-09-30/andrew-forrest-cancer-centre-to-take-on-tobacco-industry/9004204>

sort of action by Andrew Forrest would put another nail in the coffin of the tobacco industry.³⁴⁵ Swanson commented: ‘The most compelling reason we’re calling for this sort of action is that taxpayers are the group that picks up the tab for the treatment of smoking caused diseases.’³⁴⁶ He lamented: ‘The tobacco industry itself, the most lethal industry in the world, contributes nothing to compensate governments for the healthcare costs that are incurred by the consumption of their lethal product.’³⁴⁷

Cancer Council chief executive Sanchia Aranda emphasized that there was a need for financial support and resources to challenge Big Tobacco: ‘Most countries haven’t gone down this way because the tobacco industry has very deep pockets.’³⁴⁸ Aranda noted: ‘The tobacco industry has been negligent in its duty to governments and individuals who contract smoking-related illness and we must hold them to account for continuing to market and sell this product.’³⁴⁹ Aranda argued: ‘The tobacco industry has known for over 50 years that its product kills and yet they continue to manufacture and promote this product and market it to unsuspecting young people worldwide.’³⁵⁰

However, since this expression of enthusiasm about civil tobacco litigation back in 2017, this idea has not progressed further to the point of an active piece of legal action. It has also been unclear what species of tobacco litigation was being advocated by Andrew Forrest.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

As part of a comprehensive smoking reduction reform package, the Queensland Government is considering penalties and improved enforcement options for the supply of illicit tobacco (tobacco that does not meet Commonwealth packaging and warning requirements). The Queensland Government has become increasingly concerned about retail and trade in illicit tobacco.³⁵¹ The Minister Yvette d’Ath emphasized: ‘The bill will improve monitoring of the smoking products industry and enable more effective enforcement of existing tobacco laws.’³⁵² The explanatory notes explain that the bill will ‘empower Queensland Health to monitor compliance with Commonwealth requirements for smoking products and improve intelligence-sharing with other state, territory and Commonwealth law enforcement agencies.’³⁵³ The explanator notes stress that the bill will ‘enhance monitoring and enforcement activities, by introducing new offences and high penalties, and by giving authorised persons expanded powers to make enquires, share information with other enforcement agencies and take immediate action to prohibit unlawful activities.’³⁵⁴ The explanatory notes observed that ‘the Queensland retail sector strongly supports more state-based enforcement action to prevent the supply of illicit tobacco in a retail environment.’³⁵⁵ There is a discussion in the

³⁵¹ Paula Doneman and Allyson Horn, ‘Illicit Tobacco Trade in Queensland ‘exploding’ with Authorities Powerless to Stop It, Industry Groups Say’, *ABC News*, 20 November 2021, <https://www.abc.net.au/news/2021-11-20/queensland-tobacco-black-market-police-cigarettes/100622012>

³⁵² The Hon. Yvette D’Ath, ‘Smoking’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

³⁵³ Explanatory Notes for the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld), 1.

³⁵⁴ *Ibid.*, 2.

³⁵⁵ *Ibid.*, 7.

explanatory notes about the merits of a licensing scheme as compared to a registration scheme and the status quo.

Discussing the importance of tobacco litigation, Brigit Toebes comments: ‘NGOs, victims and legal practitioners must not relax their vigilance and must continue their efforts to hold the tobacco industry accountable for their flagrant disregard of human rights.’³⁵⁶ She concludes: ‘In doing so they can create important precedents for litigation all over the world.’³⁵⁷

B. Criminal Liability of Tobacco Companies

In addition to the civil liability of tobacco companies, there has also been a growing interest in criminal liability in respect of tobacco companies, and their directors.³⁵⁸

Back in 2002, Jonathan Liberman and Jonathan Clough wrote a piece for the *Criminal Law Journal* on the criminal liability of tobacco manufacturers.³⁵⁹ They outlined a number of specific criminal law offences against which the conduct of tobacco manufacturers should be examined. Liberman and Clough conclude: ‘Whether or not criminal prosecutions are ultimately pursued, we argue that the current situation cannot

³⁵⁶ Brigit Toebes, ‘Conclusions’ in Marie Elske Gispen and Brigit Toebes (ed.) *Human Rights and Tobacco Control*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 275.

³⁵⁷ Ibid., 275.

³⁵⁸ ASH, ‘Update: Dutch Criminal Case Against Tobacco Industry’, 2019, <https://ash.org/update-dutch-criminal-case2019/>

³⁵⁹ Jonathan Liberman and Jonathan Clough, ‘Corporations that Kill: The Criminal Liability of Tobacco Manufacturers’ (2002) 26 *Criminal Law Journal* 1-12.

be allowed to continue.’³⁶⁰ They contend: ‘Not only does it take an unconscionable number of lives and years away from individuals and their families, and impose massive social costs on the community, but it is also offensive to, and makes a mockery of, the ordinary operation of the law.’³⁶¹ The more recent expansion of criminal offences in Australia – particularly under corporate law – raises interesting questions about the criminal responsibility of tobacco companies, and their directors.³⁶²

In the Netherlands, there was a provocative but ultimately unsuccessful effort to charge tobacco firms and companies – including Philip Morris International, British American Tobacco, Japan Tobacco International and Imperial Tobacco Benelux - with attempted murder. In 2016, Anne Marie van Veen, a Dutch lung cancer patient, and an Amsterdam lawyer, Bénédicte Ficq, filed a criminal complaint, accusing major tobacco companies of intentionally aiming to turn smokers into addicts and of causing ‘deliberate damage to public health’.³⁶³ She alleged the multinationals were guilty of ‘attempted murder, alternatively attempted manslaughter and/or attempted and premeditated severe physical abuse and/or attempted and premeditated injuring of health’.³⁶⁴ She also accused the companies of forgery, arguing that they had ‘for years declared on tobacco product packaging levels of tar, nicotine and carbon monoxide that were lower than the actual levels’.³⁶⁵

³⁶⁰ Ibid., 10.

³⁶¹ Ibid., 10.

³⁶² Australian Law Reform Commission, *Corporate Criminal Responsibility*, Sydney: Australian Law Reform Commission, Report 136, 2020.

³⁶³ Jon Henley, ‘Dutch Effort to Charge Tobacco Firms with Attempted Murder Fails’, *The Guardian*, 22 February 2018, <https://www.theguardian.com/world/2018/feb/22/dutch-attempt-to-take-tobacco-firms-to-court-for-manslaughter-fails>

³⁶⁴ Ibid.

³⁶⁵ Ibid.

The legal action was supported by more than 20 civil society groups including the Dutch family doctors' association, the city of Amsterdam and the Netherlands' main cancer hospital.³⁶⁶

For their part, the Dutch association of cigarette and tobacco manufacturers had argued that the demand for criminal prosecution was little more than a publicity stunt. The association was 'confident the sale of a legal, heavily regulated product is not a crime'.³⁶⁷

In 2018, the prosecutors said in a written statement that within current Dutch legislation they could see no prospect of a successful prosecution against tobacco companies.³⁶⁸ They observed that smoking was 'deadly, and the design of cigarettes contributes to that, but the tobacco producers do not ... act in breach of the laws and rules'.³⁶⁹ As a result, the prosecutors declined to open a criminal investigation on the basis that it 'would not succeed'.³⁷⁰

There was an appeal against that decision of the prosecutors. The Hague Court of Appeal held that the complaint in the Article 12 proceedings against the tobacco

³⁶⁶ Jon Henley, 'Dutch Effort to Charge Tobacco Firms with Attempted Murder Fails', *The Guardian*, 22 February 2018, <https://www.theguardian.com/world/2018/feb/22/dutch-attempt-to-take-tobacco-firms-to-court-for-manslaughter-fails>

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

industry was unfounded.³⁷¹ The Court of Appeal held that ‘the disputed decision not to prosecute is well-founded, since the description of the offences in the sections of the Dutch Criminal Code mentioned in the lawsuit and in the complaint cannot be applied to the actions of the defendants.’³⁷² The Court of Appeal also said that it ‘sees no violation of any other penal provisions that could provide any legal basis for criminal prosecution.’³⁷³ The Court of Appeal maintained: ‘It is therefore the opinion of the Court of Appeal that it is not feasible to pursue criminal prosecution of the tobacco manufacturers with any chance of success, in view of current Dutch and European laws and regulations, nor does the court expect that further investigation would yield sufficient legal basis for initiating successful criminal prosecution of the defendants.’³⁷⁴

The Hague Court of Appeal suggested that ‘the complainants have chosen to place a societal problem regarding public health in the framework of criminal law.’³⁷⁵ The Hague Court of Appeal maintained that it ‘shares the opinion of the Dutch Public Prosecution Service that criminal law cannot provide a solution in the matter.’³⁷⁶ The Hague Court of Appeal observed: ‘Radical measures, such as a ban on the production

³⁷¹ ASH, ‘Update: Dutch Criminal Case’, 2019, <https://ash.org/update-dutch-criminal-case2019/>
The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷² The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷³ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷⁴ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷⁵ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷⁶ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

and sale of tobacco that has been manufactured according to the Directives, can only be decided by the legislator – after due consideration of all interests.’³⁷⁷ The Hague Court of Appeal asserted: ‘The ultimate goal pursued by the complainants, specifically to eradicate cigarettes, and create a smoke-free generation, will not be achieved through criminal law, regardless of how societally relevant that pursuit is.’³⁷⁸ The Hague Court of Appeal insisted: ‘To pursue that goal, they will have to appeal to the national and European legislators.’³⁷⁹ The Hague Court of Appeal concluded: ‘In short, since criminal prosecution of the defendants is not feasible in these proceedings, the complainants will have to look elsewhere for their complaint to be addressed.’³⁸⁰

There have also been efforts to bring criminal action against tobacco companies in France.³⁸¹ The Comité National Contre le Tabagisme (National Committee for Tobacco Control or CNCT) has challenged the liability of tobacco manufacturers under criminal law, focusing on the responsibility of the corporation, and also the responsibility of a natural person through the company’s CEO. The complaint asserts that Philip Morris was being deceptive by introducing micro-perforations in cigarette filters and falsified the measurements conducted by the National Testing Laboratory. On 19 November

³⁷⁷ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷⁸ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁷⁹ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁸⁰ The Hague Court of Appeal, Case Number K18/220231 <https://2bark924ef5o2dk1z21reqtf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Beedigde-vertaling-Hof.pdf>

³⁸¹ Kelsey Romeo-Stuppy, Emmanuelle Béguinot, and Wanda De Kanter, ‘Criminal Liability for Tobacco Corporations and Executives’ (2022) 31 *British Medical Journal* 355-357 <https://tobaccocontrol.bmj.com/content/31/2/355>

2019, the deputy prosecutor requested the dismissal of the complaint on the basis that an association like CNCT could not make a claim for a personal injury. There has since been a new complaint filed by an individual against Philip Morris – but that matter is still progressing.

In spite of these setbacks in the Netherlands and France, there remains much interest in the topic of the criminal liability of tobacco companies. The noted international jurist Philippe Sands has discussed the potential for criminal law action in respect of tobacco companies:

I think the specific added value is the fear of criminal investigation or prosecution. The criminal law ‘concentrates the mind’. It is really interesting, I had to do an opinion some years ago on smoking and the tobacco industry and the jurisdiction of the ICC. It was interesting how company directors, once you put the focus on individuals rather than on companies or states, all of a sudden think ‘wow wow wow, this could be me!’ It make you think about what you are doing. It is one thing if a community could be indicted for something, it’s quite another thing when you yourself are at risk of criminal investigation.³⁸²

Sands concluded: ‘The risk of criminal liability can concentrate the mind of the decision-maker, and that’s the group of people that you really want to go for.’³⁸³ There has been interest in another dozen countries about the prospects of legal action for the criminal liability of tobacco companies.³⁸⁴

³⁸² Justine Batura, Philipp Eschenhagen, and Raphael Oidtmann, ‘Defining Ecocide: An Interview with Philippe Sands’, *Völkerrechtsblog*, 24 April 2021, <https://voelkerrechtsblog.org/defining-ecocide/>

³⁸³ Ibid.

³⁸⁴ NL Times, ‘Dutch “Smoking is Murder” Case Goes Global; Lawsuits in 17 countries’, *NL Times*, 4 July 2017, <https://nltimes.nl/2017/07/04/dutch-smoking-murder-case-goes-global-lawsuits-17-countries>

Kelsey Romeo-Stuppy and her colleagues argue: ‘Pursuing criminal liability brings in not only the judicial system, but the criminal justice system, which has been underused in public health and tobacco control.’³⁸⁵ She and her team conclude: ‘Criminal liability is not the only path towards a tobacco endgame, but by further delegitimising the industry, it is one way to accelerate progress towards the end of the tobacco epidemic.’³⁸⁶

The Queensland Government should consider how the tobacco industry could be dealt with under the criminal justice system.

³⁸⁵ Kelsey Romeo-Stuppy, Emmanuelle Béguinot, and Wanda De Kanter, ‘Criminal Liability for Tobacco Corporations and Executives’ (2022) 31 *British Medical Journal* 355-357 <https://tobaccocontrol.bmj.com/content/31/2/355>

³⁸⁶ Ibid.

c. Illicit Tobacco

In the context of Australia, there has been increasing criminal action in respect of illicit tobacco. There have been a number of recent investigations in Queensland.

In May 2021, the Australia Tax Office and Queensland Police seized \$40 million in illegal tobacco in the Toowoomba region.³⁸⁷ Assistant Commissioner Ian Read commented: ‘The trade of illicit tobacco products in Australia has widespread negative consequences across the community.’³⁸⁸ He observed: ‘Organised criminals who deal in illicit tobacco rob the Australian community by using their profits to fund their criminal behaviour well beyond the sale of illegal tobacco.’³⁸⁹

In June 2021, the Australian Tax Office, Queensland Health, and Queensland Police took action in respect of illegal tobacco trading in Logan and South Brisbane in Operation Romeo.³⁹⁰ Acting Superintendent Tod Reid commented: ‘Operation Romeo Serge has been a successful partnership between Queensland Police, Queensland Health and the Australian Taxation Office.’³⁹¹ He observed: ‘Through this operation, 2.7 million cigarettes and more than 4,675 kg of loose tobacco worth approximately \$10.42

³⁸⁷ Australian Tax Office, ‘\$40 million in Illegal Tobacco Seized from QLD Toowoomba Region’, Press Release, 14 May 2021, [https://www.ato.gov.au/Media-centre/Media-releases/\\$40-million-in-illegal-tobacco-seized-from-QLD-Toowoomba-region/](https://www.ato.gov.au/Media-centre/Media-releases/$40-million-in-illegal-tobacco-seized-from-QLD-Toowoomba-region/)

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Australian Tax Office, ‘Illegal Tobacco Trading (Operation Romeo Serge), Logan and South Brisbane’, Press Release, June 2021, [https://www.ato.gov.au/Media-centre/Media-releases/Illegal-tobacco-trading-\(Operation-Romeo-Serge\)-Logan-and-South-Brisbane/](https://www.ato.gov.au/Media-centre/Media-releases/Illegal-tobacco-trading-(Operation-Romeo-Serge)-Logan-and-South-Brisbane/)

³⁹¹ Ibid.

million in lost excise revenue has been seized.³⁹² ATO Assistant Commissioner Ian Read noted that the tobacco operations are ‘run by organised criminal syndicates who use the proceeds to fund their criminal behaviour well beyond the sale of illegal tobacco’.³⁹³ He observed: ‘Retailers choosing to become involved in the sale of illegal tobacco gain an unfair price advantage over small business.’³⁹⁴ Read noted: ‘Removing illicit tobacco from crop to shop creates a level playing field and also helps to stop organised crime syndicates from funding other activities.’³⁹⁵

In March 2022, the Australian Tax Office and Queensland Police officers uncovered 291,000 cigarettes and 3,026 kilograms of loose lead tobacco in three properties in Logan.³⁹⁶ Acting Assistant Commissioner Megan Croaker commented:

This is a significant result. Close to 300,000 cigarettes is a lot of illicit and unregulated tobacco that’s been taken off our streets. Illicit tobacco is not victimless. It significantly deprives the community of taxes that could otherwise fund essential community services such as health and education, and it gives dodgy retailers an unfair price advantage over the majority of business who do the right thing. Selling illicit tobacco might be a temptation but it’s simply not worth the risk. We are committed to protecting legitimate retailers and the community by applying the full force of the law.³⁹⁷

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ Australian Tax Office, ‘\$5.1 Million in Illicit Tobacco Smoked Out’, Press Release, 21 March 2022, [https://www.ato.gov.au/Media-centre/Media-releases/\\$5-1-million-in-illicit-tobacco-smoked-out/](https://www.ato.gov.au/Media-centre/Media-releases/$5-1-million-in-illicit-tobacco-smoked-out/)

³⁹⁷ Ibid.

Under Australian law, penalties for growing, selling, possessing, and storing illicit tobacco are significant. The *Treasury Laws Amendment (Illicit Tobacco Offences) Act 2018* (Cth) provides for both civil penalties and criminal penalties.³⁹⁸ If convicted, parties may face up to 10 years' imprisonment, a fine of at least \$333,000, or both.

In September 2022, Dalby detectives raided a number of local businesses in the Dalby area, finding more than 30 kg of loose tobacco, as well as a significant quantity of imported cigarettes and tobacco vapes.³⁹⁹ A 28-year-old man and 36-year-old man, both from Toowoomba, have been charged with the commercial sale of excisable goods (tobacco products).

In December 2022, the ATO, the Queensland Police Service, and the Queensland Department of Health executed search warrants against businesses suspected of supplying illicit tobacco on the Sunshine Coast.⁴⁰⁰ The ATO seized over 270,000 illicit cigarettes and 33 kilograms of loose-leaf tobacco from 3 retail tobacconists in Maroochydore, Dicky Beach and Currimundi and a storage facility in Maroochydore. The Queensland Department of Health seized over 9,000 illegal vape products. Three individuals were arrested and charged by Queensland Police. Acting Deputy Commissioner of the ATO Jade Hawkins commented: 'Retailers choosing to become

³⁹⁸ Australian Tax Office, 'The Fight against Tax Crime: Illicit Tobacco', <https://www.ato.gov.au/general/the-fight-against-tax-crime/our-focus/illicit-tobacco/>

³⁹⁹ Queensland Police, 'Men Arrested over the Sale of Illegal Tobacco', Press Release, 28 September 2022, <https://mypolice.qld.gov.au/news/2022/09/28/men-arrested-over-sale-of-illegal-tobacco-dalby/>

⁴⁰⁰ Australian Tax Office, 'ATO takes the shine out of Sunshine Coast illicit tobacco trade', Press Release, 8 December 2022, <https://www.ato.gov.au/Media-centre/Media-releases/ATO-takes-the-shine-out-of-Sunshine-Coast-illicit-tobacco-trade/>

involved in the sale of illegal tobacco gain an unfair price advantage over honest businesses who are doing the right thing.’⁴⁰¹ She observed: ‘This was a co-ordinated illegal enterprise, and the ATO is committed to disrupting those who produce and supply illicit tobacco for sale in the shadow economy in Australia.’⁴⁰²

In January 2023, the Queensland Police reported that a New Zealand woman has been charged after the execution of two search warrants in Innisfail uncovered more than 150kg of illicit tobacco and cigarettes.⁴⁰³ The woman was charged with one count each of possession of tobacco (100 kgs or above), offence to buy or possess S4 or S8 medicines or hazardous poisons, selling or supplying tobacco products in non-compliant retail packaging and possess tainted property. Far North District Acting Detective Inspector Jason Chetham commented: ‘These products can have serious health implications for innocent members of the public who purchase them trusting they are compliant.’⁴⁰⁴

Queensland Premier Annastacia Palaszczuk has hoped that the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) will improve enforcement and compliance in respect of the tobacco control regime: ‘This new legislation will

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Queensland Police, ‘Tobacco Charges, Innisfail’, 20 January 2023, <https://mypolice.qld.gov.au/news/2023/01/20/tobacco-charges-innisfail/>

⁴⁰⁴ Ibid.

streamline the approach to compliance and enforcement, so that agencies can get on with the job of reducing access to illicit tobacco.’⁴⁰⁵

The new *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* is focused upon the prohibition of the supply and possession of illicit tobacco. Health Minister Yvette D’Ath explains the approach of the new legislative framework:

To provide more effective deterrence and enforcement, the bill makes it an offence under Queensland law for a person to supply smoking products not complying with Commonwealth requirements. Because the covert nature of the illicit tobacco trade may make it difficult to obtain evidence of an actual supply, it will also be an offence to store illicit tobacco at a retail premises as it presumes this product is intended as stock rather than for personal use. The bill also allows the illicit tobacco offence to be extended by regulation to include any new Commonwealth smoking product laws. This futureproofs the bill and anticipates the possibility of tighter national requirements being introduced, for example in relation to e-cigarettes.⁴⁰⁶

The Minister is concerned: ‘By seeking to profit from the evasion of standard retail requirements, this growing trade in illicit tobacco is causing significant detriment to compliant businesses and to public health.’⁴⁰⁷

⁴⁰⁵ The Hon. Annastacia Palaszczuk and Hon. Yvette D’Ath, ‘Stronger Laws to crack down on Illicit Tobacco’, Press Release, Queensland Government, 13 March 2023, <https://statements.qld.gov.au/statements/97346>

⁴⁰⁶ The Hon. Yvette D’Ath, ‘Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

⁴⁰⁷ Ibid.

Moreover, the Minister has sought to enhance enforcement action against the supply of illicit tobacco and the offence of unlicensed sale of smoking products:

To assist Queensland Health to enforce the new offence of supplying illicit tobacco and the related offence of unlicensed sale of smoking products, the bill deems police officers to be authorised persons. Where police take compliance action using these new powers, Queensland Health will still be responsible for commencing any subsequent prosecution. While police officers are authorised persons, it is intended that Queensland Health officers will have the primary and predominant role of enforcing the provisions of this act. These additional powers will not divert police officers from their usual duties, including to protect the community from serious crime. Instead, this important amendment will clarify and formalise the role that police already perform in assisting, at both state and Commonwealth levels, with combating high-level smoking product offences.⁴⁰⁸

Such reforms are intended to enhance enforcement of Australia's rules in respect of illicit tobacco.

The Khan Review in the United Kingdom has called for enhanced illicit tobacco monitoring and enforcement.⁴⁰⁹ The Khan Review notes: 'Illicit tobacco preys on the most disadvantaged in our community, stealing health and hope.'⁴¹⁰ The Khan Review comments: 'Illicit tobacco undermines the work that the government is doing to regulate

⁴⁰⁸ The Hon. Yvette D'Ath, 'Second Reading Speech on the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)*', Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

⁴⁰⁹ Javed Khan, *Making Smoking Obsolete: Independent Review into Smokefree 2030 Policies* ('the Khan Review'), United Kingdom Government, 9 June 2022, 27, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081366/khan-review-making-smoking-obsolete.pdf

⁴¹⁰ *Ibid.*, 27.

the tobacco industry and protect public health.’⁴¹¹ The Khan Review observes: ‘Efforts to reduce disparities will fall flat if this is permitted to continue by government inaction.’⁴¹²

Recommendation 7

In the past, the strength of Australia’s tobacco control regimes on the books has often been undermined by weak and inconsistent enforcement in practice. A pleasing aspect of the *Tobacco and Other Smoking Products Amendment Bill 2023 (Qld)* is the strong focus upon co-ordinated enforcement of tobacco laws and regulations. In the future, the Queensland Government should explore the need for law reform in respect of civil liability and criminal liability for tobacco companies.

⁴¹¹ Ibid., 28.

⁴¹² Ibid., 28.

8. TOBACCO INTERFERENCE

The *WHO Framework Convention on Tobacco Control* 2003 highlights the need for governments to guard against the threat of tobacco companies interfering in policy making.⁴¹³ Article 5 (3) provides: ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’⁴¹⁴

There has been concern about tobacco interference in Australia’s federal politics – as well in state politics as well. The Hon. Nicola Roxon recalls the various tactics employed by the tobacco industry to try to derail the introduction of plain packaging of tobacco products: ‘Lobbying, donations, advertising campaigns, threats, dodgy research, front groups, overblown claims and legal action dominated our political debate.’⁴¹⁵

There has been a number of pieces of investigative journalism by Neil Chenoweth, highlighting links and connections between tobacco companies, e-cigarette manufacturers, and Australian politicians.⁴¹⁶ While the Liberal Party of Australia no

⁴¹³ *World Health Organization Framework Convention on Tobacco Control*, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) <http://www.who.int/fctc/en/>

⁴¹⁴ Ibid.

⁴¹⁵ The Hon. Nicola Roxon, ‘Editorial’, (2017) 17 (2) *QUT Law Review* i-iii https://lr.law.qut.edu.au/article/view/697/642/view_html

⁴¹⁶ Neil Chenoweth, ‘The Secret Money Trail behind Vaping’, *Australian Financial Review*, 20 February 2021, <https://www.afr.com/policy/health-and-education/the-secret-money-trail-behind-vaping-20210217-p573bi> and Neil Chenoweth, ‘Senators claim Retail Lobby Group “Misled” E-

longer accepts donations from tobacco industry, there is a group of libertarian politics within the Liberal Party of Australia – with links to the tobacco-funded Institute of Public Affairs – who advocate for the de-regulation of tobacco products and e-cigarettes.⁴¹⁷ The National Party of Australia still accepts political donations from the tobacco industry, and frequently echoes the policies of tobacco companies and e-cigarette companies.⁴¹⁸ There has been controversy over the opposition of the National Party of Australia to stronger models of regulation of tobacco and vaping.⁴¹⁹ The Liberal Democrats have accepted tobacco donations, and have argued against tobacco control measures, such as plain packaging of tobacco products.⁴²⁰ The tobacco industry has also made extensive use of front groups and consultants during the debate over tobacco control in Australia.⁴²¹ There are also concerns about Dark Money in the Australian political system – with tobacco companies making donations, which are not reported.

cigarette Inquiry’, *Australian Financial Review*, 7 May 2021, <https://www.afr.com/policy/health-and-education/senators-claim-retail-lobby-group-misled-e-cigarette-inquiry-20210303-p577e7>

⁴¹⁷ Simon Chapman, *Smoke Signals: Selected Writing*, Sydney: Sydney University Press, 2016, 255-259.

⁴¹⁸ Adam Gartrell, ‘Nationals MP Breaks Ranks on Tobacco Donations as Party figures Agitate for Ban’, *The Sydney Morning Herald*, 29 October 2016, <http://www.smh.com.au/federal-politics/political-news/nationals-mp-breaks-ranks-on-tobacco-donations-as-party-figures-agitate-for-ban-20161029-gsdm7n.html>

⁴¹⁹ Melissa Davey, ‘“Shocker”: Health Experts Condemn Nationals proposal to relax Vaping Laws’, *The Guardian*, 21 March 2023, <https://www.theguardian.com/australia-news/2023/mar/21/shocker-health-experts-condemn-nationals-proposal-to-relax-vaping-laws>

⁴²⁰ Michael Safi, ‘“Thank You for Smoking”: Leyonhjelm Confirms Philip Morris Backing’, *The Guardian*, 2 October 2014, <https://www.theguardian.com/australia-news/2014/oct/02/thank-you-for-smoking-leyonhjelm-confirms-philip-morris-backing>

⁴²¹ Tobacco Tactics, ‘Australia: Funding Think Tanks and Hiring Independent Experts’, 2021, <https://tobaccotactics.org/wiki/australia-funding-think-tanks-and-hiring-independent-experts/>

Dr Sarah White of Quit Victoria has called for legislation to ban political donations to political parties, candidates, and associated entities by the tobacco industry in Australia.⁴²² The Australian Greens have proposed a bill to ban political donations from tobacco companies (as well as property developers, and alcohol, gambling, and mining industries).⁴²³ There has also been further proposals to prevent state capture by corporations in Australian politics.⁴²⁴

There remains much concern about the ability of Big Tobacco to ward off the introduction of tobacco control measures in United States politics.⁴²⁵ There have been a number of proposals by scholars such as Lawrence Lessig and Zephyr Teachout to address the corruption of Dark corporate money in the United States political system.⁴²⁶

⁴²² Quit Victoria, 'Big Tobacco Buying Influence Through Political Donations', Press Release, 8 June 2018, <https://www.quit.org.au/news/big-tobacco-buying-influence-through-political-donations/>

⁴²³ Australian Greens, 'Greens Bill to Ban Political Donations from Developers, Tobacco, Alcohol, Gambling and Mining Industries', Press Release, 4 December 2014, <https://greensmps.org.au/articles/greens-bill-ban-political-donations-developers-tobacco-alcohol-gambling-and-mining>

⁴²⁴ Australian Democracy Network, *Confronting State Capture*, February 2022, <https://australiandemocracy.org.au/statecapture>; Scott Ludlam, 'The Scourge of State Capture', *The Monthly*, February 2022, <https://www.themonthly.com.au/issue/2022/february/1643634000/scott-ludlam/scourge-state-capture#mtr>; and Phillip Adams with Saffron Zomer and Scott Ludlam, 'Undue Influence: How Industry Is Undermining Our Democracy', Late Night Live, Radio National, 16 February 2022, <https://www.abc.net.au/radionational/programs/latenightlive/how-industry-is-undermining-our-democracy/13757678>

⁴²⁵ Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke To Global Warming*, New York: Bloomsbury Press, 2010.

⁴²⁶ Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge (Ma.): Harvard University Press, 2014; and Lawrence Lessig, *They Don't Represent Us and Here's How They Could: A Blueprint for Reclaiming Our Democracy*, New York: Dey Street, 2019.

Tobacco interference remains a major international problem – in terms of the adoption of measures under the *WHO Framework Convention on Tobacco Control* 2003, and the implementation of pioneering new measures for tobacco control, such as plain packaging of tobacco products. In the past couple of decades, there have been concerns about tobacco interference in Australia – both at a Federal level, and at a State level. There has been particular concern about tobacco companies providing direct and indirect support for political parties. In particular, there has been controversy over tobacco companies making donations to the National Party, and the Liberal Democrats, and exercising influence in respect of the public policy positions of those parties around tobacco control and vaping.⁴²⁷

The Australian Government has published guidance for public officials on interacting with the tobacco industry.⁴²⁸ The guidance notes: ‘There is a well-established body of evidence that demonstrates that the tobacco industry has operated for decades with the intention of subverting the role of governments in developing and implementing public health policies to combat the tobacco epidemic.’⁴²⁹ The guidance provides a reminder: ‘Australia is a Party to the *WHO Framework Convention on Tobacco Control* (FCTC), which aims to protect present and future generations from the devastating health, social,

⁴²⁷ ‘Tobacco giant Philip Morris declared donations of \$55,000 each to both the Nationals and the Liberal Democrats.’ Henry Belot and Nick Evershed, ‘Ten Donors gave 77% of Total Political Donations in Lead-up to Last Australian Election’, *The Guardian*, 1 February 2023, <https://www.theguardian.com/australia-news/2023/feb/01/ten-donors-gave-77-of-total-political-donations-in-lead-up-to-last-australian-election>

⁴²⁸ Department of Health, ‘Guidance for Public Officials on Interacting with the Tobacco Government’, Canberra: Australian Government, <https://www.health.gov.au/sites/default/files/documents/2019/11/guidance-for-public-officials-on-interacting-with-the-tobacco-industry.pdf>

⁴²⁹ Ibid.

environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.⁴³⁰ The guidance stresses: ‘Article 5.3 of the WHO FCTC requires public officials to protect public health policies in relation to tobacco control “from commercial and other vested interests of the tobacco industry”’.⁴³¹ The guidance observes: ‘Australia’s obligations under Article 5.3 extend to new and emerging products, such as e-cigarettes and heated tobacco products, due to the increasing integration between their manufacturers and the tobacco industry.’⁴³² The guidance stresses: ‘The tobacco industry should not be in a position to influence the implementation of tobacco control measures and policies.’⁴³³

Queensland has banned political donations from developers and industry bodies.⁴³⁴ A majority of the High Court of Australia held that the Queensland regime was valid in *Spence v Queensland*.⁴³⁵ It was held that the Queensland regime did not infringe the implied freedom of political communication, violate intergovernmental immunities, or intrude on an area of exclusive Commonwealth legislative power.

In 2019, Cancer Council Queensland, the Heart Foundation and the Australian Council on Smoking and Health recommended that the *Electoral and Other Legislation*

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Queensland Election Commission, ‘Prohibited donors scheme’ <https://www.ecq.qld.gov.au/donations-and-expenditure-disclosure/prohibited-donors-scheme#:~:text=Queensland%20law%20bans%20political%20donations,behalf%20of%20a%20prohibited%20donor.>

⁴³⁵ *Spence v. Queensland* [2019] HCA 15.

(Accountability, Integrity and Other Matters) Amendment Bill 2019 (Qld) be amended to prohibit political donations from the tobacco industry in Queensland.⁴³⁶ The public health organisations observed: ‘The tobacco industry has a long history of undermining public health policy through donating to major political parties in Australia, with companies targeting their gifts during critical policy debates or immediately before elections.’⁴³⁷ The submission elaborated that the ‘industry attempts to use political donations for better access and a more favourable response from political parties.’⁴³⁸ The submission notes that such political donations are ‘one of many strategies the tobacco industry has employed over decades in an effort to derail or weaken tobacco control policies.’⁴³⁹

The Queensland Greens have supported a ban on political donations by the tobacco industry, noting: ‘The tobacco industry, big banks, the pokies lobby and fossil fuel companies have no business giving money to politicians.’⁴⁴⁰

There has been increasing concern about the influence of lobbyists in the Queensland political system in 2022 and 2023.⁴⁴¹ In this context, it would be worthwhile revisiting

⁴³⁶ Cancer Council Queensland, Heart Foundation, and ACOSH, ‘Submission on the *Electoral (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Qld)*’, Submission No. 065.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Michael Berkman, ‘Stop Corruption: Ban Corporate Donations’, Queensland Greens, <https://www.michaelberkman.com.au/donationreform>

⁴⁴¹ Australian Associated Press, ‘Lobbying in Queensland Surges, as Risk of Corruption Intensifies: Watchdog’, *The Guardian*, 17 June 2022, <https://www.theguardian.com/australia-news/2022/jun/17/lobbying-in-queensland-surges-as-risk-of-corruption-intensifies-watchdog>

the question of prohibiting tobacco donations, and excluding tobacco industry representatives from policy-making processes.

It is worthwhile noting that socially responsible investment policies are an important part of preventing tobacco interference. There has been a notable tobacco divestment campaign, flowing from the obligations of the *WHO Framework Convention on Tobacco Control* 2003.⁴⁴² After a campaign from public health advocates, the Future Fund divested itself after tobacco investments.⁴⁴³ A number of other State and Territory Governments also implemented tobacco divestment policies.

The Campbell Newman Queensland Government came under criticism from health defenders over tobacco investments in 2013.⁴⁴⁴ The Heart Foundation noted: ‘Sadly Queensland has earned itself the dirty ashtray award and that is because the Queensland Government has divested from education campaigns under the Quit campaign.’⁴⁴⁵ The Heart Foundation observed that the Campbell Newman Government ‘are still investing in tobacco companies through the Queensland Investment Corporation, so we would like them to increase their investment in the good cause and decrease their investment in the tobacco industry.’⁴⁴⁶

⁴⁴² Matthew Rimmer, 'Future Fund Drops Tobacco: Should Fossil Fuels be Next?', *The Conversation*, 28 February 2013, <https://theconversation.edu.au/future-fund-drops-tobacco-should-fossil-fuels-be-next-12337>

⁴⁴³ Ibid.

⁴⁴⁴ Annie Guest, 'Heart Foundation says Qld Government Earns “Dirty Ashtray” Award for Tobacco Industry Investment', *ABC News*, 31 May 2013, <https://www.abc.net.au/news/2013-05-31/heart-foundation-slams-qld-government-for-tobacco-industry-inve/4724666>

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

With a change of government, the Queensland Investment Corporation has revised its investment policy. The 2022 Sustainable Investment Policy provides: ‘[Queensland Investment Corporation] currently excludes securities involved in the manufacture of tobacco and controversial weapons from our investment portfolios.’⁴⁴⁷ The policy notes: ‘Exclusions are applied as far as is practically possible and may not apply to derivative indices and where [Queensland Investment Corporation] invests in pooled investment vehicles via external managers.’⁴⁴⁸ The Queensland Investment Corporation has affirmed the need to align its investments with international frameworks – including the United Nations Sustainable Development Goals, which includes a goal focused on strategies to improve health.

In the private sector, it is also worthwhile noting that there are tobacco exclusion policies. Suncorp has noted: ‘Under our Tobacco and Controversial Weapons Guidelines, we continued to exclude tobacco, recreational cannabis, land mines, cluster munitions, biological and chemical weapons from our portfolios.’⁴⁴⁹

Recommendation 8

The Queensland Government needs to ensure that its tobacco endgame measures are safeguarded against the threat of tobacco interference. As

⁴⁴⁷ Queensland Investment Corporation, ‘Sustainable Investment Policy’, <https://www.qic.com.au/about-qic/corporate-information/responsible-investment>

⁴⁴⁸ Ibid.

⁴⁴⁹ Suncorp, ‘Corporate Responsibility – Sustainable Growth – Responsible Underwriting, Lending, and Investing’, <https://www.suncorpgroup.com.au/corporate-responsibility/sustainable-growth/responsible-banking-insurance-investing>

recommended by the Cancer Council Queensland, there should be a prohibition of tobacco donations in the Queensland political system. The Queensland Government, the corporate sector, and civil society should further expand tobacco divestment policies.

9. TRADE AND INVESTMENT

In the past, tobacco companies have sought to test validity of tobacco control measures in domestic courts in Australia. The precedent set by the High Court of Australia in respect of plain packaging of tobacco products provides useful guidance for the defence of tobacco control measures.⁴⁵⁰

Australia's leadership on tobacco control emboldened a number of other countries to follow suit.⁴⁵¹ Australia's world-leading initiative was followed by a number of other countries concerned about public health – including New Zealand,⁴⁵² Ireland,⁴⁵³ the

⁴⁵⁰ *JT International SA v. Commonwealth of Australia* [2012] HCA 43; for commentary, see Matthew Rimmer, 'Big Tobacco's Box Fetish: Plain Packaging at the High Court', *The Conversation*, 20 April 2012, <https://theconversation.edu.au/big-tobaccos-box-fetish-plain-packaging-at-the-high-court-6518>; Matthew Rimmer, 'The High Court and the Marlboro Man: The Plain Packaging Decision', *The Conversation*, 18 October 2012, <https://theconversation.edu.au/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014>; Matthew Rimmer, 'Cigarettes will Kill You: The High Court of Australia and the Plain Packaging of Tobacco Products' (2013) 1 *WIPO Magazine* 20-23 http://www.wipo.int/wipo_magazine/en/2013/01/article_0005.html and Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360.

⁴⁵¹ Matthew Rimmer, 'The Olive Revolution: Australia's Plain Packaging Leads the World', *The Conversation*, 15 August 2012, <https://theconversation.edu.au/the-olive-revolution-australias-plain-packaging-leads-the-world-8856>

⁴⁵² Matthew Rimmer, 'New Zealand, Plain Packaging, and the Trans-Pacific Partnership', *InfoJustice*, 28 March 2014, <http://infojustice.org/archives/32570>; and Jane Kelsey, 'Regulatory Chill: Learnings from New Zealand's Plain Packaging Law' (2017) 17 (2) *QUT Law Review* 21-45.

⁴⁵³ Matthew Rimmer, 'Ireland, Plain Packaging, and the Olive Revolution', *InfoJustice*, 24 March 2014, <http://infojustice.org/archives/32484>; Eoin O'Dell, 'Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation' (2017) 17 (2) *QUT Law Review* 46-65; and Eoin O'Dell, 'A Little Parthenon No Longer: The Proportionality of Tobacco Packaging Restrictions on Autonomous Communication, Political Expression and Commercial Speech' (2018) 69(2) *Northern Ireland Legal Quarterly* 175-211.

United Kingdom,⁴⁵⁴ Canada,⁴⁵⁵ and France.⁴⁵⁶ A decade on, a score of countries have adopted plain packaging of tobacco products as a standard. There have been a couple of leading countries in South East Asia – Singapore and Thailand – which have adopted plain packaging of tobacco products.⁴⁵⁷ There still needs to be more progress in plain packaging of tobacco products becoming a global norm and standard.

As a postscript, it is worthwhile noting the possibility that the *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) could not only be subject to domestic court disputes by tobacco companies, but it could also be challenged under trade agreements, and investment agreements. It is possible for an Australian regional or provincial government's legislative reforms (like those of the state of Queensland) to be challenged under a trade and investment agreement. In such circumstances, the Federal Government would be responsible for the defence of the measures in a trade proceeding, or an investment tribunal dispute.

The Australian Government successfully defended its plain packaging of tobacco products against complaints by a number of other States before a Panel of the World

⁴⁵⁴ Jonathan Griffiths, 'The Tobacco Industry's Challenge to the United Kingdom's Standardised Packaging Legislation – Global Lessons for Tobacco Control Policy?' (2017) 17 (2) *QUT Law Review* 66-82.

⁴⁵⁵ Becky Freeman, 'Making the Case for Canada to Join the Plain Packaging Revolution' (2017) 17 (2) *QUT Law Review* 83-101.

⁴⁵⁶ Anne Pasquereau et al., 'Plain Packaging on Tobacco Products in France: Effectiveness on Smokers' Attitudes One Year after Implementation' (2022) 20 *Tobacco Induced Diseases* 35.

⁴⁵⁷ Matthew Rimmer, 'The Plain Truth: Australia, Tobacco Control, and South East Asia', *East Asia Forum*, 7 September 2012, <http://www.eastasiaforum.org/2012/09/06/the-plain-truth-australia-tobacco-control-and-southeast-asia/>

Trade Organization, and in front of an appellate body.⁴⁵⁸ The Australian Government was able to establish that the tobacco control measures would be an effective means of promoting public health, and implementing the *WHO Framework Convention on Tobacco Control* 2003. The Australian Government was also able to demonstrate that the plain packaging of tobacco products was consistent with the *TRIPS Agreement* 1994, the *Technical Barriers to Trade Agreement* 1994, and *GATT* 1994. The WTO legal decisions in respect of plain packaging of tobacco products could provide useful guidance for the defence of the proposed *Tobacco and Other Smoking Products Amendment Bill 2023* (Qld) if need be.

There has been controversy over Big Tobacco deploying investor-state dispute settlement as a means of delaying and potentially blocking progressive tobacco control measures. There was a challenge by Philip Morris to the Federal Government's plain packaging of tobacco products in an investor-state dispute settlement process under a trade agreement between Hong Kong and Australia.⁴⁵⁹ The investment tribunal rejected the challenge on the basis that Philip Morris had abused the process through shifting its assets to Hong Kong, so that it could mount a challenge against Australia's plain packaging of tobacco products (which it knew already was going ahead).

There has also been debate about the status of tobacco control measures under the *Trans-Pacific Partnership* 2015 and its successor, the *Comprehensive and Progressive*

⁴⁵⁸ Matthew Rimmer, 'The Global Tobacco Epidemic, the Plain Packaging of Tobacco Products, and the World Trade Organization' (2017) 17 (2) *QUT Law Review* 131-160; and Matthew Rimmer, 'Plain Packaging of Tobacco Products: Landmark Ruling' (2018) 6 *WIPO Magazine* 38-42.

⁴⁵⁹ Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products and the Trans-Pacific Partnership', (2017) 7 (1) *Victoria University Law and Justice Journal* 76-93.

Trans-Pacific Partnership 2018.⁴⁶⁰ The regional trade agreement has both state versus state dispute settlement, as well as investor-state dispute settlement. In the end, the agreements contain a clause, highlighting nation states can elect to avoid investor-state dispute settlement action in respect of tobacco control measures. However, it is still possible that there could be state versus state conflict over tobacco control measures under the *Trans-Pacific Partnership* 2015 and its successor, the *Comprehensive and Progressive Trans-Pacific Partnership* 2018.

There is certainly a need for health-centred trade policies in the future.⁴⁶¹

Recommendation 9

Previously, tobacco companies have tested tobacco control measures in domestic courts. The High Court of Australia decision in the plain packaging of tobacco products dispute provides useful guidance to the domestic defence of tobacco control measures. In the past, tobacco companies and their proxies have challenged pioneering Australian tobacco control measures, such as plain packaging of tobacco products, in investment tribunals, and trade disputes. The Queensland Government

⁴⁶⁰ Matthew Rimmer, 'Big Tobacco and the Trans-Pacific Partnership', (2012) 21 (6) *Tobacco Control* 526-7; Matthew Rimmer, 'Plain Packaging for the Pacific Rim: the Trans-Pacific Partnership and Tobacco Control', in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013, 75-105; and Matthew Rimmer, *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2020.

⁴⁶¹ Raphael Lencucha, 'Tobacco, Trade, and the Right to Health' (2018) 2 *Canadian Human Rights Yearbook* 175-180.

should work with the Federal Government to ensure that its package of tobacco control measures can be well protected and defended from challenges by Big Tobacco in investment tribunals, and trade proceedings.

BIOGRAPHY

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

Rimmer has published four major research monographs. Rimmer is the author of a research monograph, *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim* (Edward Elgar, 2020), *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, 2011), *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008), and *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). His *PhD Dissertation* is on *The Pirate Bazaar: The Social Life of Copyright Law* (UNSW, 2001).

Rimmer has also edited a number of collections. Along with Dinusha Mendis and Mark Lemley, Rimmer is the editor of the collection, *3D Printing and Beyond: Intellectual Property and Regulation* (Edward Elgar, 2019). Rimmer is the editor of the collection, *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice* (Springer, 2018). Rimmer has edited a special issue of the QUT Law Review on the

topic, *The Plain Packaging of Tobacco Products* (2017) - which featured a foreword by former Minister for Health and Attorney-General Nicola Roxon. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015). Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012), and *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010). Rimmer edited the thematic issue of Law in Context, entitled *Patent Law and Biological Inventions* (Federation Press, 2006).

Over the past two decades, Rimmer's research has been supported by a number of nationally competitive research grant applications. Rimmer has been a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions' (2003); an Australian Research Council Linkage Grant, 'Unlocking IP' (2006-2008) and an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. Rimmer was a Chief Investigator on an ARC Discovery Project on 'Inventing The Future: Intellectual Property and 3D Printing' (2017-2021). He is a chief investigator of the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (CREATE) (2020-2025). He is a co-director of the legal project of the research network. Rimmer has experience in directing large-scale collaborative research projects on intellectual property and global challenges.

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

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

THE AUSTRALIAN CENTRE FOR HEALTH LAW RESEARCH (ACHLR)

The Australian Centre for Health Law Research (ACHLR) is a research centre based at the Faculty of Business and Law at the Queensland University of Technology (QUT).

ACHLR is celebrating ten years of making a difference to health law. Health law is critical to support and regulate health systems, the delivery of health services and positive health outcomes for individuals and society. ACHLR is internationally recognised as a leading health law research centre, with 38 academic members, 20 PhD students and 20 esteemed Adjunct Professors in the field of health law from across the globe. ACHLR researchers undertake innovative interdisciplinary research into current and emerging health law challenges in Australia and globally to produce an evidence base to properly address complex problems in the field of health and inform reforms to health law, policy and practice in the context of constant societal change.

ACHLR's research critically evaluates the legal, ethical, policy and regulatory frameworks, both conceptual and practical, which support and regulate the delivery of health services in diverse contexts. It distils the links between historical and current law, and its informing ethical and social realities and principles. We employ a range of research methods, including doctrinal, ethical, and empirical approaches. Our research explains for academic, professional and community audiences why the law takes its current form, how it can be critiqued, and how it might be reformed.

During its ten year history, ACHLR researchers have published 784 articles and book chapters; 25 books or edited collections; produced 82 reports/policy briefings and

submissions to government enquiries or royal commissions; and graduated 30 PhD students. ACHLR researchers have been awarded \$56million in grant funding during this time.

ACHLR's health law researchers draw on disciplines including ethics, philosophy, medicine, nursing, psychology, economics, sociology and social work to address practical problems that arise in the health context. Our researchers have a strong track record of undertaking high impact research in health law, policy, ethics, and regulation. Our focus is not only on quality scholarship, but generating new knowledge, evidence, and insights to enhance health and legal policy and practice, and to improve health outcomes. This research serves the interests of the individuals, communities, and institutions that deliver and benefit from health services and other interventions that aim to improve health locally and globally.

Our research has had significant impact: our recommendations have been adopted by parliaments, courts and tribunals, and law reform commissions. Our work has also influenced state and national policy, prompting changes to clinical education in universities, hospitals and health departments. ACHLR has a strong international focus and presence. We actively continue to build and maintain relationships with external partners to facilitate opportunities for research collaborations, funded and unfunded, and to build and maintain our profile as a leading health law centre globally.