

## Vaping - An inquiry into reducing rates of e-cigarette use in Queensland

**Submission No:** 49

**Submitted by:** Professor Matthew Rimmer, Australian Centre for Health Law Research,  
Queensland University of Technology

**Publication:**

**Attachments:** See attachment

**Submitter Comments:**

**HEALTH AND ENVIRONMENT COMMITTEE  
THE QUEENSLAND PARLIAMENT**

**A SUBMISSION ON VAPING AND REDUCING RATES OF E-  
CIGARETTE USE IN QUEENSLAND**



Gold Coast Public Health Unit, Confiscated Vapes from a Gold Coast store

<https://www.abc.net.au/news/2022-09-28/vapes-and-illegal-tobacco-seized-gold-coast-dalby-police-qld/101481586>

**DR MATTHEW RIMMER**

PROFESSOR OF INTELLECTUAL PROPERTY AND INNOVATION LAW

AUSTRALIAN CENTRE FOR HEALTH LAW RESEARCH

FACULTY OF BUSINESS AND LAW

QUEENSLAND UNIVERSITY OF TECHNOLOGY

Queensland University of Technology

2 George Street GPO Box 2434

Brisbane Queensland 4001 Australia

Work Telephone Number: (07) 31381599

## EXECUTIVE SUMMARY

The Health and Environment Committee has been asked by the Queensland Parliament to inquire into and report to the Legislative Assembly by 31 August 2023 on reducing rates of e-cigarette use in Queensland. The Committee is focusing on (1) the prevalence of e-cigarette use, particularly amongst children and young people; (2) opportunities to increase ‘awareness of the harmful effects of e-cigarette use (with and without nicotine) to an individual’s health, and the effectiveness of preventative activities’; (3) ‘waste management and environmental impacts of e-cigarette products’ and (4) ‘a jurisdictional analysis of other e-cigarette use inquiries, legislative frameworks, policies and preventative activities (including their effectiveness in reducing e cigarette use).’ This submission primarily focuses on the final question – namely, conducting ‘a jurisdictional analysis of other e-cigarette use inquiries, legislative frameworks, policies and preventative activities (including their effectiveness in reducing e cigarette use).’

As a researcher in intellectual property and innovation law, it has been striking that there has been a sharp rise in intellectual property applications dealing with the subject matter of e-cigarettes.<sup>1</sup> This has been indicative of tremendous investment and speculation in these new technologies. E-cigarette companies have been seeking to develop their portfolio of patents, trade marks, and other forms of industrial property in this new field. Big tobacco companies – such as British American Tobacco, Imperial Brands, Japan Tobacco International, and Altria – have been filing patent applications in respect of e-cigarettes, as well as developing trademark protected brands and

---

<sup>1</sup> IFI Claims, ‘IFI CLAIMS Announces 2017 Top US Patent Recipients’, 8 January 2018, <https://www.ificlaims.com/news/view/press-releases/ifi-claims-announces-3.htm>

marketing material.<sup>2</sup> There has been significant intellectual property litigation in the field of e-cigarettes.<sup>3</sup> This is indicative of a struggle for market power in the area. Some jurisdictions, though, such as India have been reluctant to grant intellectual property rights in this field, because of concerns that the technology lacks utility and social benefit.<sup>4</sup>

This submission highlights Australia's National Tobacco Strategy 2023-2030 and its application to the regulation of e-cigarettes and vaping. This submission provides an analysis of how Federal, State, and Territory Governments in Australia are responding to the regulation of e-cigarettes and vaping. Furthermore, this submission offers a comparative study of how the United States, the United Kingdom, and New Zealand are dealing with the regulation of e-cigarettes and vaping. Finally, the submission considers the advice of the World Health Organization in dealing with the regulation of e-cigarettes and vaping.

This submission supports the plans of the Albanese Government to introduce a new regulatory regime for e-cigarettes and vaping. The Health Minister Mark Butler has proposed a package of proposals - including border controls on non-prescription vapes; minimum quality standards for vapes restrictions on flavours, colours, and other ingredients; pharmaceutical-like plain packaging; reduction of the allowed nicotine

---

<sup>2</sup> Tobacco Tactics, 'E-Cigarettes', 2 February 2023, <https://tobaccotactics.org/article/e-cigarettes/>

<sup>3</sup> See for instance Blake Brittain, 'Philip Morris wins \$10 million from R.J. Reynolds in e-Cigarette Patent Case', Reuters, 16 June 2022, <https://www.reuters.com/legal/litigation/philip-morris-wins-10-million-rj-reynolds-e-cigarette-patent-case-2022-06-15/>

<sup>4</sup> 'The Nationwide Ban on E-Cigarettes and Its Impact on E-Cigarette Patent Applications', *Intepat*, 18 April 2020, <https://www.intepat.com/blog/the-nationwide-ban-on-e-cigarettes-patent-applications/>

concentrations and volumes; and a ban on all single use, disposable vapes. There will also be a public health information campaign to discourage Australians from vaping and smoking. There will be heightened enforcement action to close down the illicit sale of e-cigarettes in convenience stores and other retail settings.

This submission highlights that e-cigarettes and vaping have had various adverse effects upon public health, education, and the environment in Queensland. Accordingly, the Queensland Government to raise its ambition in respect of the regulation of e-cigarettes and vaping. As was introducing a new package of legislative restrictions on e-cigarettes and vaping, the Queensland Government should boost its education campaign, and take enhanced enforcement action over the illicit sale of e-cigarettes and vaping.

This submission notes that other states and territories face parallel challenges in respect of the public health crisis in respect of e-cigarettes and vaping. The Queensland Government could draw upon the expertise and experience of its counterparts. VicHealth, in particular, has long been a public health leader in the field of tobacco control. The State and Territory Governments have an important role to play in ensuring a comprehensive system for the enforcement of e-cigarette regulation in Australia.

This submission highlights the litigation by States, school districts, Indigenous communities, and others in the United States courts against the e-cigarette company, Juul – resulting in major billion-dollar settlements. It notes that this litigation has documented that e-cigarette companies have caused extensive harms to public health, education, children’s rights, consumer rights, and Indigenous rights in the United States. This submission examines the push for greater legislative and regulatory action

in respect of e-cigarettes and vaping by Federal regulators – such as the United States Federal Trade Commission, and the United States Food and Drug Administration. This submission observes that Australian policy-makers and legislators should learn from the United States experience, and take a proper precautionary approach to the regulation of e-cigarettes and vaping in Australia, as a result.

This submission also explores the debate over the regulation of e-cigarettes and vaping in the United Kingdom. It questions whether the laissez-faire approach of the United Kingdom Government to the regulation of e-cigarettes has been at all effective.

This submission explores the approach of New Zealand to the regulation of e-cigarettes and vaping. It highlights how New Zealand policy-makers and legislators are currently reconsidering whether a tougher, stronger approach to the regulation of vaping and e-cigarettes.

This submission also showcases the position of the World Health Organization in respect of the regulation of e-cigarettes and vaping. The *WHO Framework Convention on Tobacco Control* 2003 provides a useful set of policy tools, which could be used for the prohibition and the restricted regulation of e-cigarettes and vaping. The World Health Organization has been particularly alarmed by the rise of electronic nicotine delivery systems, calling for the ban or restrictive regulation of such technologies.

The Health and Environment Committee of the Queensland Parliament is conducting a separate inquiry into a new anti-smoking bill. The author of this submission has made a separate submission on the topic of the anti-smoking bill.<sup>5</sup>

---

<sup>5</sup> Matthew Rimmer, 'A Submission on the *Tobacco and Other Smoking Products Amendment Bill* 2023 (Qld)', Health and Environment Committee, the Queensland Parliament. Health and Environment Committee, the Queensland Parliament, 2023, <https://eprints.qut.edu.au/239155/>

## RECOMMENDATIONS

### **Recommendation 1**

**Australia's National Tobacco Strategy 2023-2030 provides a useful and helpful framework for the restricted regulation of e-cigarettes and vaping by the Commonwealth, and State and Territory Governments.**

### **Recommendation 2**

**The Albanese Government's new policy approach to the regulation of e-cigarettes and vaping is to be welcomed. The measures include border controls on non-prescription vapes; minimum quality standards for vapes restrictions on flavours, colours, and other ingredients; pharmaceutical-like packaging; reduction of the allowed nicotine concentrations and volumes; and a ban on all single use, disposable vapes. There will also be a public health information campaign to discourage Australians from taking up vaping. There will be heightened enforcement action to close down the illicit sale of e-cigarettes in convenience stores and other retail settings (outside pharmacies).**

### **Recommendation 3**

**The Queensland Government needs to provide for enhanced legislative regulation of e-cigarettes and vaping given the adverse impacts upon public health, children's rights and education, and the environment. The Queensland Government should look to enhance its education campaign on vaping. The Queensland Government should take co-ordinated enforcement action to deal with the state-wide problem of the illicit sale of e-cigarettes in convenience stores and other retail settings.**



**Recommendation 4**

**Other Australian State and Territory Governments have been facing similar challenges in respect of the public health crisis of e-cigarettes and vaping. The Queensland Government should work with its counterparts to develop a comprehensive plan for the regulation of e-cigarettes and vaping.**

**Recommendation 5**

**Australian policy-makers should take note of the massive litigation taken against e-cigarette company Juul by States, School Districts, Indigenous Communities, and others – resulting in billions of dollars in settlements thus far. Such litigation has extensively documented the adverse impacts of e-cigarettes upon consumer rights, public health, education, children’s rights, and Indigenous rights. Australian policy-makers should also take note of further legislative moves by the Biden Administration and the United States Congress, and regulatory action by the US Food and Drug Administration, and the Federal Trade Commission.**

**Recommendation 6**

**The United Kingdom’s laissez-faire approach to the regulation of e-cigarettes and vaping has been problematic. There has been a backlash within the Conservative Party to this approach, with MPs raising concerns about the adverse impact of e-cigarettes upon public health and the environment.**

**Recommendation 7**

**In light of the Albanese Government’s announcement of its policy on e-cigarettes, New Zealand policy-makers are currently reconsidering their approach to the regulation of e-cigarettes and vaping. Both the New Zealand Labor Party and the National Party have expressed a willingness**

**to explore tougher regulations and legislation in respect of e-cigarettes and vaping.**

**Recommendation 8**

**The World Health Organization has expressed concerns that e-cigarettes are harmful to public health, and deleterious to the environment. The *WHO Framework Convention on Tobacco Control 2003* provides a range of public health measures, which could be applied to the regulation of e-cigarettes. The World Health Organization supports bans or, at the very least, tight regulations on Electronic Nicotine Delivery Systems.**

## 1. AUSTRALIA'S NATIONAL TOBACCO STRATEGY 2023-2030

Australia's National Tobacco Strategy 2023-2030 has a chapter dedicated to the topic of the regulation of e-cigarettes and vaping.<sup>6</sup>

The Strategy observes: 'During the period of the 2012–2018 Strategy, rates of e-cigarette use among children and young people increased markedly in numerous markets globally.'<sup>7</sup> The Strategy comments: 'Normalisation of e-cigarette marketing and use is undermining population health and has the potential to disrupt the significant achievements Australia has made in tobacco control to date.'<sup>8</sup> The Strategy observes: Reducing the use of tobacco products, e-cigarettes and novel products will necessarily reduce the profits of commercial actors that market them.'<sup>9</sup> The Strategy cautions: 'Industry resistance to evidence-based measures cannot be allowed to undermine government efforts to protect population health and reduce tobacco-attributable death and disease.'<sup>10</sup>

The Strategy recommends that 'there is a need to ensure sufficient controls are in place to protect the Australian community from the range of tobacco, nicotine and other drug

---

<sup>6</sup> Department of Health and Ageing, National Tobacco Strategy 2023–2030, Canberra Australian Government, 2023, <https://www.health.gov.au/resources/publications/national-tobacco-strategy-2023-2030>

<sup>7</sup> Ibid., 7.

<sup>8</sup> Ibid., 7.

<sup>9</sup> Ibid., 7.

<sup>10</sup> Ibid., 7.

delivery systems that may be marketed by the tobacco industry, the e-cigarette industry and their associated interests.’<sup>11</sup>

The Strategy highlights the need for a national, harmonised, and comprehensive approach to the regulation of e-cigarettes and vaping in Australia:

Commonwealth and state and territory ministers have agreed to national guiding principles for e-cigarettes. The principles affirm the need to maintain and, where appropriate, strengthen and make consistent across jurisdictions the current controls that apply to the marketing and use of e-cigarettes in Australia. The principles also affirm that the primary focus and goal of any change to the regulation of e-cigarettes in Australia will be protecting children and young people.<sup>12</sup>

Recommendation 9.1 is to ‘develop and implement additional measures to further restrict the marketing, availability, use, and end-of-life disposal of all e-cigarette components in Australia, regardless of their nicotine content.’<sup>13</sup> The responsibility for this recommendation is Australian Government, state and territory governments.

Recommendation 9.2 is to ‘develop and implement measures to prohibit the sale of flavoured e-cigarettes, regardless of their nicotine content.’<sup>14</sup>

---

<sup>11</sup> Ibid., 24.

<sup>12</sup> Ibid., 25.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

Recommendation 9.3 is to ‘raise awareness about the marketing and use of e-cigarettes and their immediate and long-term impacts on individual and population health.’<sup>15</sup>

Recommendation 9.4 calls on Australian Governments to ‘develop and implement an evidence-based comprehensive regulatory framework for e-cigarettes and all novel and emerging products that pose risks to tobacco control and population health.’<sup>16</sup>

Recommendation 9.5 asks the Australian Governments to ‘prohibit the use of e-cigarettes and novel and emerging inhaled products such as shisha in areas where smoking is prohibited.’<sup>17</sup>

Recommendation 9.6 requests Australian Governments to ‘prohibit advertising, promotion and sponsorship relating to e-cigarettes and other new and emerging products’.<sup>18</sup>

Recommendation 9.7 wants Australian Governments to ‘explore the feasibility of having a consistent licensing scheme in place covering all aspects of the e-cigarette supply chain in Australia.’<sup>19</sup>

Recommendation 9.8 asks Australian Governments to ‘Continue to monitor the supply and use of illicit e-cigarettes and other novel and emerging products in Australia;

---

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

continue enforcement efforts to prevent illegal importation and supply; and enhance technology and staff capability to identify and respond to illicit trade.’<sup>20</sup>

Recommendation 9.9 calls on Australian Governments to ‘strengthen research, monitoring and surveillance activities pertaining to the marketing and use of e-cigarettes and novel and emerging products.’<sup>21</sup>

It is worthwhile exploring the various roles of the Federal Government and State and Territory Governments in the regulation of e-cigarettes and vaping in light of Australia’s National Tobacco Strategy 2023-2030.

**Recommendation 1**

**Australia’s National Tobacco Strategy 2023-2030 provides a useful and helpful framework for the restricted regulation of e-cigarettes and vaping by the Commonwealth, and State and Territory Governments.**

---

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

## **2. FEDERAL GOVERNMENT**

### **A. Regulatory Enforcement**

At a Federal level, there has been legal action taken by the Australian Competition and Consumer Commission (ACCC) against e-cigarette companies over misleading and deceptive conduct.<sup>22</sup> The ACCC commissioned independent testing, which identified the presence of carcinogens and toxic chemicals, such as formaldehyde, acetaldehyde and acrolein in the products of Joystick, Social-Lites and Elusion. The independent testing also identified acetone in Social-Lites' products.

The Federal Court of Australia ordered three online e-cigarette retailers The Joystick Company Pty Ltd (Joystick), Social-Lites Pty Ltd (Social-Lites) and Elusion Australia Limited (in liquidation) (Elusion) to pay penalties for breaching the Australian Consumer Law. In separate proceedings against each of these companies, the Federal Court of Australia found that each of Joystick, Social-Lites and Elusion contravened the Australian Consumer Law by making representations that their products did not contain harmful carcinogens and toxins, when this was not the case. The Federal Court of Australia also found that the directors of Joystick and Elusion, and the CEO of Social-Lites, were knowingly concerned in the contravening conduct of their respective companies.

---

<sup>22</sup> Australian Competition and Consumer Commission, 'ACCC takes Action against e-Cigarette Suppliers for Alleged Misleading "No Toxic Chemicals" Claims', Press Release, 20 June 2016; and Australian Competition and Consumer Commission, 'E-cigarette Companies to Pay Penalties', Press Release, 8 May 2017, <https://www.accc.gov.au/media-release/e-cigarette-companies-to-pay-penalties>

The Federal Court of Australia ordered Joystick pay a pecuniary penalty of \$50,000, and its director a penalty of \$10,000. The Federal Court of Australia ordered Social-Lites pay a pecuniary penalty of \$50,000, and its CEO a penalty of \$10,000. The Federal Court of Australia ordered Elusion pay a pecuniary penalty of \$40,000, and its director a penalty of \$15,000.

ACCC Acting Chair Delia Rickard commented: ‘Consumers were led to believe by this conduct that when using these e-cigarette products, they would not be exposed to the harmful chemicals found in ordinary cigarettes.’<sup>23</sup> She noted that consumers ‘were exposed to the same chemicals, including a known carcinogen that has no safe level of exposure.’<sup>24</sup> Rickard commented: ‘Businesses must ensure that they provide accurate information to customers, and have a reasonable basis for making any representations.’<sup>25</sup> Rickard noted: ‘This is particularly important for products that may cause harm to the health of consumers.’<sup>26</sup>

In the wake of this litigation, the ACCC has written to over 30 Australian e-cigarette suppliers reminding them of their obligations under Australian consumer law, in particular to ensure information provided to consumers is accurate.

There have been calls for the Australian Competition and Consumer Commission to take further enforcement action. Barrister Neil Francey has argued that marketing strategies used to promote vaping to children, deficiencies in age verification

---

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.



requirements, easy payment and delivery methods, and false and misleading marketing claims by many vaping companies are in contravention of consumer law.<sup>27</sup> He said this marketing amounts to ‘unconscionable conduct.’<sup>28</sup> Francey noted that while ‘the ACCC should urgently consider enforcement action, the practicability of securing compliance with the law is another matter’.<sup>29</sup> He observed: ‘Prosecuting false representations and seeking injunctions to restrain misleading statements and unconscionable conduct can only be on a case by case basis.’<sup>30</sup>

There has been a debate about the division of responsibilities for enforcement at a federal level. The Australian Competition and Consumer Commission has asked whether the Therapeutic Goods Administration or the Department of Health should instead be the lead agency in respect of the regulation of e-cigarettes.<sup>31</sup> There still seems to be a debate within the Federal Australian Government as to the allocation of responsibilities in respect of enforcement. In 2023, an ACCC spokesperson said that vaporiser products require ‘a tailored regulatory approach ... best managed by the

---

<sup>27</sup> Melissa Davey, ‘Melbourne Principal says Schools Struggling to Combat Vaping as Minister blasts “Public Health Menace”’, *The Guardian*, 10 April 2023, <https://www.theguardian.com/australia-news/2023/apr/10/melbourne-principal-says-schools-struggling-to-combat-vaping-as-minister-blasts-public-health-menace>

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Australian Competition and Consumer Commission, ‘ACCC submission to the Therapeutic Goods Administration Consultation on Vaporizer Nicotine Products’, 29 March 2021, <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Therapeutic%20Goods%20Administration%20consultation%20on%20vaporiser%20nicotine%20products.pdf>

Department of Health and Aged Care under the Therapeutic Goods Administration regime'.<sup>32</sup>

## **B. Federal Inquiries**

As Coalition Health Minister, the Hon. Greg Hunt MP established a regime for the regulation of vaping and e-cigarettes, which required prescription.<sup>33</sup> He expressed concerns about the impact of vaping and e-cigarettes upon public health.<sup>34</sup> However, Hunt delayed and then abandoned plans to ban importation of devices after a revolt from libertarians and Nationals within the Coalition ranks.<sup>35</sup>

In 2018, the House of Representatives Standing Committee on Health, Aged Care and Sport published a report on the use and marketing of electronic cigarettes and personal

---

<sup>32</sup> Melissa Davey, 'Melbourne Principal says Schools Struggling to Combat Vaping as Minister blasts "Public Health Menace"', *The Guardian*, 10 April 2023, <https://www.theguardian.com/australia-news/2023/apr/10/melbourne-principal-says-schools-struggling-to-combat-vaping-as-minister-blasts-public-health-menace>

<sup>33</sup> Hon. Greg Hunt MP, 'Prescription Nicotine Based Vaping', Department of Health and Aged Care, Federal Government, 26 June 2020, <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/prescription-nicotine-based-vaping>

<sup>34</sup> Hon. Greg Hunt MP, 'Preventing Nicotine uptake by young Australians with Prescription Based Vaping', Department of Health and Aged Care, Federal Government, 21 December 2020, <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/preventing-nicotine-uptake-by-young-australians-with-prescription-based-vaping>

<sup>35</sup> Paul Karp, 'Greg Hunt delays ban on liquid nicotine imports after backlash from Coalition MPs', *The Guardian*, 26 June 2020, <https://www.theguardian.com/australia-news/2020/jun/26/greg-hunt-delays-ban-on-liquid-nicotine-imports-after-backlash-from-coalition-mps> and Paul Karp, 'Vaping: Greg Hunt abandons plans to ban importation of devices after Coalition revolt', *The Guardian*, 22 December 2020, <https://www.theguardian.com/australia-news/2020/dec/22/vaping-greg-hunt-abandons-plans-to-ban-importation-of-devices-after-coalition-revolt>

vaporisers in Australia.<sup>36</sup> The majority report asked the NHMRC and the Department of Health to undertake an independent and comprehensive review of the health and economic impacts of e-cigarettes. The Committee recommended a national approach be taken to the regulation of non-nicotine electronic cigarettes. The Committee recommended that the Therapeutic Goods Administration continues to oversee the classification of nicotine and relevant exemptions, and the assessment of any electronic cigarette product as a therapeutic good. The Committee recommended that the Australian Government establish a regulatory process for assessing and, if necessary, restricting colourings and flavourings used in electronic cigarettes. There were dissenting reports by Trent Zimmerman, Tim Wilson, and Andrew Laming – which called for more laissez-faire approaches to regulation.

In 2020, the Senate Select Committee on Tobacco Harm Reduction focused on the regulation of e-cigarettes and vaping.<sup>37</sup> The majority of the committee recommended that the Australian Government outline concrete measures to meet the target of reducing smoking rates to below 10 per cent by 2025 and beyond. The committee recommended that the Australia Government continue to invest in evidence-based strategies that are proven to reduce tobacco use and take-up, and in particular, consider renewed investment in a new national anti-smoking campaign.

---

<sup>36</sup> House of Representatives Standing Committee on Health, Aged Care and Sport, Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia, Canberra: Australian Parliament, 2018, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Health\\_Aged\\_Care\\_and\\_Sport/ElectronicCigarettes/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/ElectronicCigarettes/Report)

<sup>37</sup> Senate Select Committee on Tobacco Harm Reduction, *Report on Tobacco Harm Reduction*, Canberra: Australian Parliament, 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Tobacco\\_Harm\\_Reduction/TobaccoHarmReduction/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Tobacco_Harm_Reduction/TobaccoHarmReduction/Report)

The committee recommended that the Therapeutic Goods Administration continue to oversee the classification of nicotine, and the assessment of any e-cigarette product as a therapeutic good, and that the Australian Government and Parliament accept the Therapeutic Goods Administration's advice. The committee recommended that the Australian Government support the implementation of any prescription pathway as recommend by the Therapeutic Goods Administration

The committee recommended that the Australian Government implement national evidence-based regulations regarding nicotine and e-liquids and e-cigarette devices with respect to: minimum standards for manufacture and safety, child-resistant containers, appropriate health warnings, prohibited access for youth, appropriate restrictions on advertising, mandatory standards for labelling, clear guidelines about public vaping, a notification scheme for pre-market registration, a system for reporting harmful effects and recall of unsafe products and other related issues.

The committee recommended that the Australian Government implement an evidence-based regulatory process, involving the appropriate statutory body, to assess, regulate, and if necessary, restrict the use of colourings and flavouring in e-cigarettes. The committee recommended that the Australian Government continue to support independent research into e-cigarette use and related products, particularly in relation to the: health impacts of long term e-cigarette use; impact of Australia's tobacco control measures on smoking rates and patterns and use of e-cigarettes by adults and young people; effectiveness of e-cigarettes as an aid to help people quit smoking combustible cigarettes; short and long term health effects of ingredients commonly used in e- liquids,

including but not limited to: vaporiser nicotine, propylene glycol and vegetal glycerine; and safety of e-liquid flavours for inhalation

Research commissioned by the Lung Foundation has raised further questions as to whether there should be further litigation against e-cigarette companies over product safety and labelling.<sup>38</sup> The research highlights a widespread failure to accurately label products in e-liquids and e-cigarettes.

Research by the ANU National Centre for Epidemiology and Population Health has raised further concerns about the health impacts of e-cigarettes.<sup>39</sup> The report found: ‘There is strong or conclusive evidence that nicotine e-cigarettes can be harmful to health and uncertainty regarding their impacts on a range of important health and disease outcomes.’<sup>40</sup> The report concluded: ‘Based on the current worldwide evidence, use of nicotine e-cigarettes increases the risk of a range of adverse health outcomes, including: poisoning; toxicity from inhalation (such as seizures); addiction; trauma and burns; lung injury; and smoking uptake, particularly in youth.’<sup>41</sup> The report observed: ‘Nicotine e-cigarettes are highly addictive, underpinning increasing and widespread use

---

<sup>38</sup> Lung Foundation, ‘Ground-breaking Australian Study Confirms Major Concerns Over E-Cigarette Safety’, Press Release, 3 December 2020, <https://lungfoundation.com.au/news/ground-breaking-australian-study-confirms-major-concerns-over-e-cigarette-safety/> and Alexander Larcombe, Sebastien Allard, Paul Pringle, Ryan Mead-Hunter, Natalie Anderson and Benjamin Mullins, ‘Chemical Analysis of Fresh and Aged Australian e-Cigarette Liquids’ (2022) 216 (1) *Medical Journal of Australia* 27-32.

<sup>39</sup> Emily Banks et al., *Electronic Cigarettes and Health Outcomes: Systematic Review of Global Evidence*, ANU National Centre for Epidemiology and Public Health, 2022, <https://openresearch-repository.anu.edu.au/handle/1885/262914>

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

among children and adolescents in many settings.’<sup>42</sup> The report also noted: ‘Less direct evidence indicates adverse effects of e-cigarettes on cardiovascular health markers, including blood pressure and heart rate, lung function and adolescent brain development and function. Environmental impacts include indoor air pollution, waste and fires’.<sup>43</sup> The report found: ‘The commonest pattern of e-cigarette use is dual e-cigarette use and tobacco smoking, which is generally considered an adverse outcome’.<sup>44</sup> The report noted: ‘There is limited evidence of efficacy of freebase nicotine e-cigarettes as an aid to smoking cessation in the clinical setting.’<sup>45</sup> The report found: ‘Current evidence supports national and international efforts to avoid e-cigarette use in the general population, particularly in non-smokers and youth.’<sup>46</sup>

In June 2022, the National Health and Medical Research Council (NHMRC) issued a warning in respect of the growing use of e-cigarettes.<sup>47</sup> NHMRC's chief executive, Professor Anne Kelso, said: ‘E-cigarettes deliver substances directly to the lungs, and those substances can be harmful.’<sup>48</sup> She observed: ‘Based on the review of the evidence that our committee has undertaken, we found that e-liquids can contain nicotine, even

---

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> National Health and Medical Research Council, ‘Australia’s National Health Council Delivers Assessment on Electronic Cigarettes’, Press Release, 24 June 2022, <https://www.nhmrc.gov.au/about-us/news-centre/australias-national-health-council-delivers-assessment-electronic-cigarettes> and National Health and Medical Research Council, ‘2022 CEO Statement on Electronic Cigarettes’, June 2022, <https://www.nhmrc.gov.au/health-advice/all-topics/electronic-cigarettes/ceo-statement>

<sup>48</sup> Niki Burnside, ‘Growing Use of E-cigarettes Could Lead To Increase in Tobacco Smoking, Australia's Peak Medical Body Warns’, *ABC News*, 23 June 2022, <https://www.abc.net.au/news/2022-06-23/warning-vaping-could-lead-to-increase-in-cigarette-smoking/101177676>

if they're labelled nicotine free.’<sup>49</sup> Kelso commented: ‘More than 200 chemicals have been identified in these e-liquids used in e-cigarettes and they have the potential to harm people's health.’<sup>50</sup> She stressed: ‘So for people who do not currently smoke there are no health benefits of using e-cigarettes.’<sup>51</sup> Kelso commented: ‘There's the very big concern of the so-called gateway effect, that it leads people on to feel familiar with smoking and then to think of taking up tobacco cigarettes, so there are multiple levels of harm.’<sup>52</sup> She recommended that the public avoid vaping and use other, more effective, methods to quit smoking instead. Kelso commented: ‘Researchers found that when smokers use nicotine with e-cigarettes it was more common for them to become dual users of e-cigarettes and tobacco cigarettes than to quit.’<sup>53</sup>

In light of such NHMRC advice, there should be heightened regulation of e-cigarettes and vaping in Australia – at a Federal level, as well as at state and territory levels.

### **C. Therapeutic Goods Administration Inquiry**

The Therapeutic Goods Administration commented to the Australian that it had undertaken 20000 investigations into nicotine vaping products between October 2021 and March 2023.<sup>54</sup> The regulator had issued 111 infringement notices to 27 entities for a total of \$769,896 – 101 for advertising offences, and 10 for import offences. There

---

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

had two civil proceedings started in the Federal Court of Australia for advertising offences.

There have been concerns about tobacco lobbyists seeking to influence Australia's public policy position in respect of e-cigarettes and vaping.<sup>55</sup> Australia is a signatory to the *WHO Framework Convention on Tobacco Control* 2003, which requires governments and politicians to protect healthcare policies 'from commercial and other vested interests of the tobacco industry'.<sup>56</sup> A spokesperson for the Therapeutic Goods Administration said: 'The Department of Health, including the TGA, operates on the principle that all such dealings should be public, accountable and transparent.'<sup>57</sup> The Therapeutic Goods Administration observed: 'Any submissions from persons or bodies with links to the tobacco industry or those working to further the interests of the tobacco industry will not be automatically disregarded, but will be considered through the lens of their competing interests.'<sup>58</sup> There were concerns that a number of tobacco-linked organisations and executives failed to declare their interests to the Therapeutic Goods Administration inquiry.<sup>59</sup>

---

<sup>55</sup> Melissa Davey, 'Pro-Tobacco Lobbyists Circle Australian Government's Proposed Vaping Reforms', *The Guardian*, 20 March 2023, <https://www.theguardian.com/australia-news/2023/mar/20/pro-tobacco-lobbyists-circle-australian-governments-proposed-vaping-reforms>

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Melissa Davey, 'Tobacco-linked Organisations and Executives Fail to Declare Interests to TGA Vaping Inquiry', *The Guardian*, 24 March 2023, <https://www.theguardian.com/australia-news/2023/mar/24/tobacco-linked-organisations-and-executives-fail-to-declare-interests-to-tga-vaping-inquiry>



The Therapeutic Goods Administration summarized feedback to proposed reforms on the regulation of nicotine vaping products in March 2023.<sup>60</sup> Feedback was sought on changes to border controls for Nicotine Vaping Products; pre-market TGA assessment of Nicotine Vaping Products against minimum quality and safety standards; minimum quality and safety standards for Nicotine Vaping Products; and clarifying the status of Nicotine Vaping Products as ‘therapeutic goods’. The Therapeutic Goods Administration received 4,000 submissions. On border controls, ‘TGA’s preferred option was to strengthen border controls by requiring importers to obtain an import permit and by closing off the personal importation scheme.’<sup>61</sup> On product standards, ‘TGA’s preferred option was to require pre-market TGA assessment of NVPs against a product standard specifying certain quality and safety requirements.’<sup>62</sup> On quality standards, ‘There was strong support for TGA’s preferred option from State and Territory governments, health professional bodies, individual health professionals, public health associations and university researchers to strengthen Therapeutic Goods (Standard for Nicotine Vaping Products) (TGO 110) Order 2021 to introduce warning statements (although this was opposed by some), require pharmaceutical-like packaging, lower the maximum allowable nicotine concentrations, prohibit/restrict flavours and certain other ingredients and limit NVP volume and overall nicotine content.’<sup>63</sup> The Therapeutic Goods Administration commented: ‘There was general support for the proposal to clarify that all vaping products containing nicotine are

---

<sup>60</sup> Therapeutic Goods Administration, ‘Proposed Reforms to the Regulation of Nicotine Vaping Products: Feedback’, March 2023, <https://consultations.tga.gov.au/medicines-regulation-division/proposed-reforms-to-the-regulation-of-nicotine-vap/>

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

therapeutic goods from all categories of submitters except individual vapers, vaping retailers, vaping manufacturers/importers, and pro-vaping associations.’<sup>64</sup>

In April 2023, there has been discussion of the possibility of regulatory action and private litigation against a company running a website called Ethically Enhanced, which advertised and sold bubblegum-flavored cannabis vape products.<sup>65</sup> The Therapeutic Goods Administration is investigating the content and owners of the Ethically Enhanced website, which sells vapes containing cannabidiol under the name Temple CBD Australia. The social media site TikTok banned the account for breaching its policies. The confectionary company Mars – which makes Hubba Bubba chewing gum – is reportedly ‘considering legal action’ against the company.<sup>66</sup> A spokesperson for Hubba Bubba’s parent company, Mars Wrigley Australia, commented: ‘We are taking this matter extremely seriously and investigating legal options given this is a clear misuse of our brand.’<sup>67</sup> They lamented: ‘It is disappointing to see it being leveraged for these types of unregulated products in Australia.’<sup>68</sup> Mars could bring action for trademark infringement and passing off.

#### **D. Albanese Government**

---

<sup>64</sup> Ibid.

<sup>65</sup> Matilda Boseley and Melissa Davey, ‘Company Advertising and Selling Bubblegum-Flavoured Cannabis Vape Products in Australia under Investigation’, *The Guardian*, 17 April 2023, <https://www.theguardian.com/society/2023/apr/17/company-advertising-and-selling-cannabis-vape-products-in-australia-under-investigation>

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

The new Albanese Government has been exploring policy options in respect of a crackdown on e-cigarettes. In December 2022, new Health Minister Mark Butler expressed his alarm about the magnitude of the public health problem of youth e-cigarette use: ‘We’re going to deal with the same legacy of nicotine addiction through vaping that we dealt with for many decades through cigarettes.’<sup>69</sup> He reflected: ‘I don’t think anyone in the health sector is well prepared for this.’<sup>70</sup> Butler noted: ‘It’s been brewing for some years, but it’s really taken off in the last few.’<sup>71</sup> Butler commented: ‘Parents are deeply worried about it, school communities are deeply worried about it.’<sup>72</sup> Butler observed: ‘It’s gone on for too long without action.’<sup>73</sup>

In February 2023, Health Minister Mark Butler highlighted that vaping purveyors were targeting children and youth, and the impact was negative upon education: ‘School principals now - primary school principals, as well as high school – say that vaping is now the number one behavioural issue in their schools, which is just extraordinary.’<sup>74</sup>

In April 2023, Health Minister Mark Butler has lamented that the use of vaping had ‘exploded over the last couple of years’ in largely a black market.<sup>75</sup> He commented: ‘It

---

<sup>69</sup> Melissa Davey, “‘Lives are at stake’: Australia returns to the Nicotine Frontline with Vaping Reform”, *The Guardian*, 3 December 2022, <https://www.theguardian.com/society/2022/dec/03/lives-are-at-stake-australia-returns-to-the-nicotine-frontline-with-vaping-reform>

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Rayane Tamer, ‘As Australia faces a vaping ‘epidemic’, this is the warning from experts’, *SBS News*, 24 February 2023, <https://www.sbs.com.au/news/article/as-australia-faces-a-vaping-epidemic-this-is-the-warning-from-experts/aw5gwrxa>

<sup>75</sup> Ellen Whinnett, ‘Vaping’s Wild West Days Draw To An End’, *The Australian*, 20 March 2023, 1, 6-7.

is being imported illegally, sold illegally, in most cases to children and adolescents.’<sup>76</sup> Butler maintained: ‘The status quo is completely unacceptable.’<sup>77</sup> He highlighted, under laws introduced by the Coalition Government, nicotine vapes were restricted by law to those older than 18 who buy them from a pharmacy, on a doctor’s prescription. However, the situation has been that millions of nicotine vapes are being sold from small convenience stores. The Albanese Government has been exploring options in respect of the regulation of e-cigarettes – including new forms of taxation, plain packaging, border checks, and civil and criminal enforcement action.

Having received recommendations from the TGA, the Federal Government is contemplating a ban on vaping flavors, and an import permit under a proposed crackdown.<sup>78</sup> Health Minister Mark Butler commented: ‘The only legal way to sell a nicotine vape in Australia is through a prescription provided by a doctor to a pharmacy.’<sup>79</sup> He observed that there was a widespread black market: ‘Yet convenience stores, petrol stations routinely are selling nicotine vapes pretending that they don’t have nicotine in them, and more insidiously, selling them to children.’<sup>80</sup> Butler commented: ‘That’s why we’ve got such a problem in this country and state Health Ministers – as much as I – are determined to take action to stamp this out.’<sup>81</sup> He observed

---

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Natassia Chrysanthos, ‘Vape Flavours would be Banned and Import Permit Required under Crackdown’, *The Sydney Morning Herald*, 23 March 2023, <https://www.smh.com.au/politics/federal/vape-flavours-would-be-banned-and-import-permit-required-under-crackdown-20230323-p5culh.html>

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

that there would be a need for collective action by Australian Governments on vaping and e-cigarette regulation.

In April 2023, Butler noted that regularly receives reports of concerns about vaping from schools and families. He reflected on the disruptions caused across Australia:

This has become a very serious public health menace. We're determined to take really strong action against it. All health ministers are committed to strong reform in this area but also recognise that it can't just be done at a commonwealth level or at a state level alone. We need to do it together.<sup>82</sup>

Butler again underlined the need for co-ordinated action by Federal, state, and territory governments to tackle the problems of vaping.

In 2023, Australia's Environment Minister Tanya Plibersek encouraged Australians to give up vaping – not only on health grounds, but because of environmental concerns: 'Obviously it's bad for your health, but it's also terrible for the environment.'<sup>83</sup> Plibersek observed: 'Every vape that goes into landfill dumps plastic, poisons, nicotine salts, heavy metals, lead, mercury, and flammable lithium-ion batteries into the environment.'<sup>84</sup> She called for Australians to 'stop a new generation from picking up a

---

<sup>82</sup> Melissa Davey, 'Melbourne Principal says Schools Struggling to Combat Vaping as Minister blasts "Public Health Menace"', *The Guardian*, 10 April 2023, <https://www.theguardian.com/australia-news/2023/apr/10/melbourne-principal-says-schools-struggling-to-combat-vaping-as-minister-blasts-public-health-menace>

<sup>83</sup> Josh Butler, 'Australia is "Losing the Public Health Battle" against Vaping, AMA says', *The Guardian*, 17 January 2023, <https://www.theguardian.com/australia-news/2023/jan/17/australia-is-losing-the-public-health-battle-against-vaping-ama-says>

<sup>84</sup> Ibid.

habit that is even worse for the environment than tobacco'.<sup>85</sup> Environmental groups have supported this call, asking for urgent action on hazardous waste from e-cigarettes.<sup>86</sup>

Bill Shorten - the Minister for the NDIS, Minister for Government Services and Federal Member for Maribyrnong – has also lent his support for regulatory action in respect of vaping.<sup>87</sup> He observed that ‘we have a rapidly developing public health crisis, and it is our children who are at the centre of it.’<sup>88</sup> Shorten noted: ‘Because vapes have been so easy for young people to get their hands on, it’s boomed before parents have even had a chance to catch up’.<sup>89</sup> He observed: ‘The companies marketing them are looking to hook a whole new — and young — generation on their products.’<sup>90</sup> Shorten stressed how the vaping industry have deliberately and purposely targeted children and youth: ‘Why else would they make vapes so cheap and easy to use; in flavours that taste like desserts, energy drinks, and bubble gum; and be made to look like unicorns and teddy bears?’<sup>91</sup> He highlighted the need for national action in respect of vaping regulation: ‘At the health ministers meeting last month, ministers from all Australian governments agreed to establish a national e-cigarette working group to review the increasing

---

<sup>85</sup> Ibid.

<sup>86</sup> Henry Belot, ‘Environment Groups call for Urgent Action on Hazardous Waste from E-cigarettes’, *The Guardian*, 13 February 2023, <https://www.theguardian.com/australia-news/2023/feb/13/environment-groups-call-for-urgent-action-on-hazardous-waste-from-e-cigarettes>

<sup>87</sup> Hon. Bill Shorten MP, ‘Previous Government stuck its head in the sand on Vaping, but the Albanese Government will not’, *The West Australian*, 22 March 2023, <https://thewest.com.au/opinion/bill-shorten-previous-government-stuck-its-head-in-the-sand-on-vaping-but-the-albanese-government-will-not--c-10109992>

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

availability, appeal, and uptake of vaping products, and advise how we protect young people from their harms.’<sup>92</sup>

Associate Professor Becky Freeman of the University of Sydney has called for the total elimination of direct sales of vaping products in Australia.<sup>93</sup> She writes: ‘Distinguishing between a legal non-nicotine vaping product and an illegal nicotine-containing device requires laboratory testing, which hampers effective enforcement of the regulations.’<sup>94</sup> Freeman recommends: ‘Stopping the importation of all vaping products into Australia, regardless of nicotine content, unless bound for a pharmacy, would simplify and increase the effectiveness of enforcement and stop the flood of illicit products.’<sup>95</sup> She suggests: ‘This would also end young people’s easy access to vaping products.’<sup>96</sup>

#### **E. National Press Club Address**

At a National Press Club address on the 2<sup>nd</sup> May 2023, Australia’s Federal Health Minister Mark Butler outlined the Albanese Government’s new approach to the

---

<sup>92</sup> Ibid.

<sup>93</sup> Becky Freeman, ‘Reigniting Tobacco Control: Returning Australia to the Front of the Pack’ (2023) 33 (1) *Public Health Research and Practice* <https://www.phrp.com.au/issues/march-2023-volume-33-issue-1/reigniting-tobacco-control/> and Michelle Blowes, ‘Calls for Total Elimination of Direct Sales of Vaping Products’, the University of Sydney Opinion, 17 March 2023, <https://www.sydney.edu.au/news-opinion/news/2023/03/17/calls-for-total-elimination-of-direct-sales-of-vaping-products.html>

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid

regulation of e-cigarettes and vaping.<sup>97</sup> This announcement has received a significant amount of media attention.<sup>98</sup> According to *The Guardian*'s medical editor, Melissa Davey, 'The Australian government will ban the importation of nonprescription vaping products – including those that do not contain nicotine – in the most significant tobacco and vaping control measures in the country in a decade.'<sup>99</sup> There will also be product regulation: 'To tackle youth vaping, minimum quality standards for vapes will be introduced including restricting flavours, colours and other ingredients... [and] the allowed nicotine concentrations and volumes will be reduced.'<sup>100</sup> There will be a ban on recreational vaping products: 'All single-use, disposable vapes will be banned.'<sup>101</sup>

E-cigarettes and vaping products have sought to circumvent the tight plain packaging restrictions in place in relation to tobacco in Australia. Associate Professor Becky Freeman from the University of Sydney comments:

---

<sup>97</sup> Hon. Mark Butler, 'National Press Club Address', Australian Government, 2 May 2023, <https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/minister-for-health-and-aged-care-speech-national-press-club-2-may-2023?language=en>

<sup>98</sup> Melissa Davey, 'Australia's Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping', *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>; ABC News, 'Vapes to be Banned for Recreational Use, "Pharmaceutical" Packaging to be Required under Crackdown', *ABC News*, 2 May 2023, <https://www.abc.net.au/news/2023-05-02/vapes-recreational-use-banned-government-crackdown/102290248> and Natassia Chrysanthos, "'This Must End": Butler to Ban Disposable Vapes as part of Black Market Crackdown', *The Sydney Morning Herald*, 1 May 2023, <https://www.smh.com.au/politics/federal/this-must-end-butler-to-ban-disposable-vapes-as-part-of-black-market-crackdown-20230501-p5d4o6.html>

<sup>99</sup> Melissa Davey, 'Australia's Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping', *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.



In 2012, Australia was the first nation in the world to require tobacco products to be sold in plain packaging with only graphic health warnings to grab your attention. A whole generation of Australian children, who are about to become teenagers, have never known that cigarettes used to be sold in colourful boxes with sleek and shiny finishes. These same children have been exposed to a tidal wave of eye-catching vape products that have left them vulnerable to lifelong nicotine addiction.<sup>102</sup>

It is completely anomalous that e-cigarette and vaping products have been adorned with such targeted, seductive, alluring packaging – while tobacco products have been subject to plain packaging.

Health Minister Mark Butler highlighted that e-cigarette products have deliberately targeted children: ‘Just like they did with smoking, Big Tobacco has taken another addictive product, wrapped it in shiny packaging and added flavours to create a new generation of nicotine addicts.’<sup>103</sup> The Australian Government will require new ‘pharmaceutical-style’ packaging and labelling rules in respect of vaping and e-cigarettes.<sup>104</sup> Butler told the ABC’s 7:30 Report:

---

<sup>102</sup> Becky Freeman, ‘The Vaping Industry has Preyed on Young Australians’, *The Guardian*, 2 May 2023, <https://www.theguardian.com/commentisfree/2023/may/02/the-vaping-industry-preyed-on-young-australians-with-a-flood-of-dangerous-products-change-was-much-needed>

<sup>103</sup> Melissa Davey, ‘Australia’s Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping’, *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>

<sup>104</sup> ABC News, ‘Vapes to be Banned for Recreational Use, “Pharmaceutical” Packaging to be Required under Crackdown’, *ABC News*, 2 May 2023, <https://www.abc.net.au/news/2023-05-02/vapes-recreational-use-banned-government-crackdown/102290248>

No more bubblegum flavours, no more pink unicorns on the wrappers. They've got to be pharmaceutical-style with plain flavours and not disposable.<sup>105</sup>

Such an initiative builds upon Australia's pioneering plain packaging of tobacco products. There was a strong case for the introduction of standardized tobacco packaging.<sup>106</sup> It is worthwhile recalling that the Federal Government successfully defended its plain packaging of tobacco products regime in the High Court of Australia against several tobacco companies.<sup>107</sup> Moreover, the Federal Government also successfully defended its plain packaging of tobacco product products framework against several countries in the World Trade Organization.<sup>108</sup> The Federal Government

---

<sup>105</sup> David Speers and Marina Freri, 'Not a Single Vaping Product Containing Nicotine has TGA Approval', ABC 7:30 Report, 2 May 2023, <https://www.abc.net.au/news/2023-05-02/no-nicotine-vapes-have-tga-approval-says-mark-butler-730/102294204>

<sup>106</sup> Becky Freeman, Simon Chapman, and Matthew Rimmer, 'The Case for the Plain Packaging of Tobacco Products (2018) 103 (4) *Addiction* 580-590.

<sup>107</sup> *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](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.

<sup>108</sup> *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). For commentary, see 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

also successfully demonstrated in an investment tribunal that Philip Morris was seeking to abuse the investor-state dispute settlement system to challenge Australia's plain packaging of tobacco products.<sup>109</sup> There has been efforts to protect tobacco control measures in new regional trade agreements – such as the *Trans-Pacific Partnership*.<sup>110</sup> There has been discussion about the application of plain packaging to other fields of health regulation.<sup>111</sup> The extension of plain packaging to e-cigarettes and vaping is logical and rational – especially given the packaging, labelling and get-up of e-cigarettes and vaping is designed to attract and retain consumers (much like traditional tobacco packaging and labelling used to).

On ABC's Q&A on the 1 May 2023, Federal Health Minister Mark Butler, said that the tobacco industry was trying to create a 'new generation of nicotine addicts' through vaping and that he was 'determined to stamp out this public health menace'.<sup>112</sup>

---

Matthew Rimmer, 'Plain Packaging of Tobacco Products: Landmark Ruling' (2018) 6 *WIPO Magazine* 38-42.

<sup>109</sup> *Philip Morris Asia Ltd v. Australia*, PCA Case No. 2012-12 (17 December 2015) See also the parallel dispute of *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016). For commentary, see 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.

<sup>110</sup> 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.

<sup>111</sup> Alberto Alemanno and Enrico Bonadio, *The New Intellectual Property of Public Health: Beyond Plain Packaging*, Cheltenham and Northampton (Ma.): Edward Elgar Publishing, 2016.

<sup>112</sup> ABC, 'Health, Privilege and Swearing Allegiance', Q&A, ABC, 1 May 2023, <https://www.abc.net.au/qanda/ep14-may-1/102217198>

In his National Press Club address, Federal Health Minister Mark Butler reflected: ‘Vaping was sold to governments and communities around the world as a therapeutic product to help long-term smokers quit.’<sup>113</sup> He observed: ‘It was not sold as a recreational product – especially not one for our kids’.<sup>114</sup> Butler observed that the primary use of vaping seems to be recreational use, particularly by youth and children: ‘But that is what it has become: the biggest loophole in Australian history.’<sup>115</sup> He highlighted: ‘This is a product targeted at our kids, sold alongside lollies and chocolate bars.’<sup>116</sup>

In his National Press Club address, Federal Health Minister Mark Butler commented:

Vaping has become the No 1 behavioural issue in high schools. And it’s becoming widespread in primary schools. Over the past 12 months, Victoria’s poisons hotline has taken 50 calls about children under four becoming sick from ingesting or using a vape.<sup>117</sup>

He observed that those who vape are three times as likely to take up smoking, ‘which explains why under-25s are the only cohort in the community currently recording an increase in smoking rates’.<sup>118</sup> Butler concluded: ‘This must end.’<sup>119</sup>

---

<sup>113</sup> Hon. Mark Butler, ‘National Press Club Address’, 2 May 2023.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

Butler foreshadowed significant public health investments in anti-smoking and anti-vaping campaigns in the Federal Budget.<sup>120</sup> Overall, the Federal Budget will include \$234m in funding for tobacco and vaping reforms, the biggest since plain packaging of tobacco products was introduced. The Federal Government will commit \$63m for an evidence-based public health information campaign to discourage people from taking up smoking and vaping and encourage more people to quit. The Federal Government will invest \$30m in support programs to help Australians quit, and education and training in smoking and nicotine cessation among health practitioners. The Federal Government will allocate \$140m to the Tackling Indigenous Smoking program, so that it can help reduce smoking and vaping among First Nations people.

The Federal Government will also raise taxation rates for the sale of cigarettes to help fund its public health initiatives.<sup>121</sup> Health Minister Mark Butler observed that taxation was an effective means of discouraging smoking: ‘We know that a higher price cigarette is a more unattractive cigarette.’<sup>122</sup> He observed: ‘We will also align the tax treatment of tobacco products so that products like roll- your-own tobacco and manufactured

---

<sup>120</sup> Melissa Davey, ‘Australia’s Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping’, *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>

<sup>121</sup> Melissa Davey, Paul Karp, and Adeshola Ore, ‘Albanese Government to Raise Tobacco Tax by 5% a Year to Make Smoking “More unattractive”’, *The Guardian*, 2 May 2023, <https://www.theguardian.com/australia-news/2023/may/02/albanese-government-to-raise-tobacco-tax-by-5-a-year-to-make-smoking-more-unattractive> and SBS News, ‘“This Must End”: Tobacco Tax Hiked to Stamp out Vaping and Smoking’, SBS News, 2 May 2023, <https://www.sbs.com.au/news/article/this-must-end-tobacco-tax-hiked-to-stamp-out-vaping-and-smoking/7o20ld544>

<sup>122</sup> Melissa Davey, Paul Karp, and Adeshola Ore, ‘Albanese Government to Raise Tobacco Tax by 5% a Year to Make Smoking “More unattractive”’, *The Guardian*, 2 May 2023, <https://www.theguardian.com/australia-news/2023/may/02/albanese-government-to-raise-tobacco-tax-by-5-a-year-to-make-smoking-more-unattractive>

sticks are taxed equally.’<sup>123</sup> Health Minister Mark Butler said that the tobacco tax would be raised by five per cent a year over the next three years, starting from September.<sup>124</sup> Professor Emily Banks of the ANU has emphasized that such tax measures are an effective means of reducing overall smoking rates.<sup>125</sup> The Federal Government aims to reduce the number of daily smokers to below 10% of the population and below 5% by 2030.<sup>126</sup>

Public health advocacy groups were pleased by this package of measures. The Public Health Association of Australia’s CEO, Terry Slevin, said vaping was a ‘public health disaster’.<sup>127</sup> He commented: ‘The ubiquitous and aggressive marketing of vaping products, particularly to children, is a worldwide scourge.’<sup>128</sup> Slevin observed: ‘For smokers who are legitimately trying to quit using vapes, a pathway is and should be in place.’<sup>129</sup> He stressed ‘that should not be at the cost of creating a new generation of

---

<sup>123</sup> Ibid.

<sup>124</sup> SBS News, “‘This Must End’’: Tobacco Tax Hiked to Stamp out Vaping and Smoking’, SBS News, 2 May 2023, <https://www.sbs.com.au/news/article/this-must-end-tobacco-tax-hiked-to-stamp-out-vaping-and-smoking/7o20ld544>

<sup>125</sup> Josh Nicholas and Cait Kelly, ‘Australia’s Tobacco Tax is Among the Highest in the World and It’s About To Get Higher’, *The Guardian*, 4 May 2023, <https://www.theguardian.com/news/datablog/2023/may/04/australia-tobacco-tax-is-among-the-highest-in-the-world-and-is-about-to-get-higher>

<sup>126</sup> Ibid.

<sup>127</sup> Melissa Davey, ‘Australia’s Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping’, *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

nicotine addicts among the young.’<sup>130</sup> Slevin said Butler should be congratulated for ‘responding to the evidence and standing up to a powerful and wealthy industry’.<sup>131</sup>

Likewise, Australian Council on Smoking and Health’s co-CEO, Laura Hunter, observed: ‘We also acknowledge the commitment to end the sales of vapes from retail settings which have mushroomed in every city and suburb, and gone a long way to normalising vaping culture.’<sup>132</sup> She stressed that ‘the focus on strong action to support the medical prescription model, further education on both smoking and vaping, and increased cessation support is a breath of fresh air in a crisis situation clouded by murky operators peddling misinformation at the expense of our health.’<sup>133</sup>

There was also a positive reaction from the community of academics, scholars, and researchers working in the field of tobacco control.<sup>134</sup> Matthew Peters, a Professor of Respiratory Medicine at Macquarie University, commented:

The product is the problem and needs to be eliminated from shops and streets. At the current time, the level of nicotine exposure, dependence and associated harms in young Australians is unprecedented in our history. The actions mooted by the Minister for Health are a first step to addressing it. The readily available fruit-flavoured, high-nicotine disposable devices are at the

---

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Melissa Davey, ‘Australia’s Health Minister Mark Butler Promises a Crackdown on E-cigarettes and Vaping’, *The Guardian*, 1 May 2023, <https://www.theguardian.com/australia-news/2023/may/01/australia-to-ban-non-prescription-vapes-in-biggest-smoking-reforms-in-a-decade>

<sup>133</sup> Ibid.

<sup>134</sup> Scimex, ‘Expert Reaction - Government to Crack Down on Vaping in Australia’, *Scimex*, 2 May 2023, <https://www.scimex.org/newsfeed/expert-reaction-government-to-crackdown-on-vaping-in-australia>

core of the current problem. They are inherently dangerous and have no place in a civil society that is protective of the welfare of children and young adults. It is welcome that the Minister recognises considerable healthcare provider educational needs that need to be rapidly and practically addressed.<sup>135</sup>

Peters observed: ‘Knowledge enhancement and support will also be important for the education sector – school leaders, teacher, student support staff.’<sup>136</sup> Peters added: ‘The Medicinal Access Framework will be effective in helping the group of smokers motivated strongly to quit smoking with the assistance of electronic cigarettes.’<sup>137</sup>

Associate Professor Becky Freeman from the School of Public Health at the University of Sydney reflected:

The vaping industry has lured Australian kids with bright packages, fruity flavours, and addictive nicotine. I applaud the Federal Government’s announcement to end easy access to vapes designed to appeal to young people. These new reforms will both protect children and enable access to vapes only by adults smokers seeking to quit.<sup>138</sup>

Freeman observed: ‘Our Generation Vape research shows that teens prefer cheap, disposable, vaping products that are laced with nicotine and smell and taste like sweets.’<sup>139</sup> She emphasized: ‘The proposed reforms ban these kid-friendly products and prioritise public health.’<sup>140</sup> She stressed: ‘Today is a victory for public health and is in

---

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.



keeping with Australia's leadership in tobacco control.'<sup>141</sup> Freeman has elaborated on her concerns about how the vaping industry have preyed on young Australians in an opinion-editorial.<sup>142</sup>

Professor Brian Oliver leads the Respiratory Molecular Pathogenesis Group at the University of Technology Sydney and the Woolcock Institute. He commented: 'We know that many vaping products labelled as nicotine-free contain nicotine, and that youth vaping has led to an increase in cigarette smoking.'<sup>143</sup> He stressed: 'The news of an impending ban on electronic cigarettes (vapes) without a prescription is a move in the right direction to limit cigarette smoking in Australia.'<sup>144</sup>

Jonine Jancey, a Professor of Health Promotion and Public Health at Curtin University commented: 'These new laws will be instrumental in tackling the increase in youth vaping across the nation.'<sup>145</sup> Jancey maintained: 'Vaping has become a major health concern, especially amongst young Australians who are commonly using the products.'<sup>146</sup> Jancey concluded: 'These reforms are a major step forward in reducing the incidence of vaping and limiting the exposure of the vaping industry.'<sup>147</sup>

---

<sup>141</sup> Ibid.

<sup>142</sup> Becky Freeman, 'The Vaping Industry has Preyed on Young Australians', *The Guardian*, 2 May 2023, <https://www.theguardian.com/commentisfree/2023/may/02/the-vaping-industry-preyed-on-young-australians-with-a-flood-of-dangerous-products-change-was-much-needed>

<sup>143</sup> Scimex, 'Expert Reaction - Government to Crack Down on Vaping in Australia', *Scimex*, 2 May 2023, <https://www.scimex.org/newsfeed/expert-reaction-government-to-crackdown-on-vaping-in-australia>

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

## F. Coalition Response

There seem to be tensions within the Coalition as to their position on the regulation of e-cigarettes and vaping. The Federal Leader of the Liberal Party Peter Dutton Opposition Leader Peter Dutton offered cautious support of the proposal but said he wanted to see more detail.<sup>148</sup> He commented: ‘I do think there is a significant problem in our country and it needs to be addressed, and we would support the government in sensible measures which saw a reduction in vaping rates’.<sup>149</sup> He added: ‘I don’t want to see vaping as a gateway into smoking.’<sup>150</sup> Dutton added: ‘I don’t want to see those smoking rates go back up.’<sup>151</sup> He observed: ‘We will support sensible measures, but we haven’t seen anything yet by way of detail.’<sup>152</sup> Although the exact detail of the Liberal Party’s position is not yet apparent, it would appear that the leader of the Opposition – a former Health Minister - shares community concern about the vaping public health crisis. Given past debates within the party, there could be a spectrum of positions amongst backbenchers in the Liberal Party. Liberal Party Members, with a health and

---

<sup>148</sup> The Hon. Peter Dutton, ‘Doorstop Interview’, ABC News Radio, 2 May 2023.

<sup>149</sup> Jake Evans and Tom Lowrey, ‘Vapes to be Banned for Recreational Use, “Pharmaceutical” Packaging to be Required under Crackdown’, *ABC News*, 2 May 2023, <https://www.abc.net.au/news/2023-05-02/vapes-recreational-use-banned-government-crackdown/102290248>

<sup>150</sup> Ibid.

<sup>151</sup> Melissa Davey, Paul Karp, and Adeshola Ore, ‘Albanese Government to Raise Tobacco Tax by 5% a Year to Make Smoking “More unattractive”’, *The Guardian*, 2 May 2023, <https://www.theguardian.com/australia-news/2023/may/02/albanese-government-to-raise-tobacco-tax-by-5-a-year-to-make-smoking-more-unattractive>

<sup>152</sup> Ibid.

a medical background, tend to be strong supporters of tobacco control measures – whilst the libertarian wing of the party is much more hostile to such public health initiatives.

By contrast, the Federal Leader of the National Party, the Hon. David Littleproud, has wanted to relax regulations on e-cigarettes and vaping.<sup>153</sup> The National Party has received political donations from Big Tobacco (in spite of political donations being a key means of tobacco interference).<sup>154</sup> The National Party’s leader David Littleproud has been directly lobbied on the topic of vaping regulation by the Australian leaders of Philip Morris and British American Tobacco.<sup>155</sup> The Nationals have called for easing of vaping rules for adults.<sup>156</sup> Nationals Senator Ross Cadell has maintained that Australia had already ‘lost this war’, and that prohibition would only further grow the vaping black market.<sup>157</sup>

The position of the National Party is peculiar – given regional and rural Australians have been disproportionately adversely affected by smoking and vaping. In light of the

---

<sup>153</sup> Joanna Guelas, ‘Nationals Back Vaping Access Despite Health Experts’, AAP, 21 March 2023, <https://www.perthnow.com.au/news/health/health-experts-slam-vaping-as-use-by-teens-rises-c-10101388>

<sup>154</sup> ‘Tobacco giant Philip Morris declared donations of \$55,000 each to both the Nationals and the Liberal Democrats’, wrote 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>

<sup>155</sup> ‘Nat Leader Met With Tobacco Companies Before Endorsing their Vaping Position’, *The Australian*, 26 March 2023, <https://www.theaustralian.com.au/nation/nat-leader-met-with-tobacco-companies-before-endorsing-their-vaping-positions/news-story/75e3f96f8b388f84df3959e82fa12156>

<sup>156</sup> ABC News, ‘Nationals Propose Easing of Vaping Rules for Adults, Arguing it is a “Common Sense Approach”’, *ABC News*, 21 March 2023, <https://www.abc.net.au/news/2023-03-21/nationals-propose-easing-vaping-rules-or-adults/102122406>

<sup>157</sup> The Hon. Peter Dutton, ‘Doorstop Interview’, ABC News Radio, 2 May 2023.

deadly ill effects of smoking and vaping upon its country constituencies, the National Party should reconsider accepting political donations from Big Tobacco, and reconsider its position on smoking and vaping.

Health experts have condemned the Nationals' proposal to relax vaping laws.<sup>158</sup> Associate Professor Becky Freeman commented: 'The reason we currently have a black market here in Australia is because importers and retailers are blatantly flouting the law.'<sup>159</sup> She observed: 'Shutting down this illicit market, and ensuring that vaping products are only available through the prescription pathway is not prohibition, it is ensuring controlled access to unsafe, addictive products.'<sup>160</sup>

## **Recommendation 2**

**The Albanese Government's new policy approach to the regulation of e-cigarettes and vaping is to be welcomed. The measures include border controls on non-prescription vapes; minimum quality standards for vapes restrictions on flavours, colours, and other ingredients; pharmaceutical-like packaging; reduction of the allowed nicotine concentrations and volumes; and a ban on all single use, disposable vapes. There will also be a public health information campaign to discourage Australians from taking up vaping. There will be heightened enforcement action to close down the illicit sale of e-cigarettes in convenience stores and other retail settings.**

---

<sup>158</sup> 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>

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

### 3. QUEENSLAND

There seems to be widespread efforts to flout Australia's regulations in respect of e-cigarettes and e-liquids.

In its report, the Queensland Government has highlighted new challenges associated with the development of e-cigarettes. In the executive summary, the Department of Health provide an overview of the regulatory challenges in respect of e-cigarettes:

There are new challenges which threaten to erode success in reducing the negative effects of smoking. E-cigarettes have emerged to broaden the smoking product market and are promoted as less harmful, contained in attractive packaging, and supplied in an array of interesting flavours. While evidence on the safety and efficacy of these products continues to develop there is now sufficient data that e-cigarettes are not without harms to health, and that they pose a significant risk for creating a new generation of Queenslanders for whom smoking and regular nicotine use is normal.<sup>161</sup>

The Queensland Government noted: 'E-cigarette use amongst children is rising, the latest available data (2017) shows that 16% of Queensland secondary school students reported they had used e-cigarettes.'<sup>162</sup> The Queensland Government observed: 'There is now strong evidence that e-cigarettes are a gateway to nicotine addiction and smoking for young people.'<sup>163</sup>

---

<sup>161</sup> Queensland Health, *Reducing the Negative Effects of Smoking in Queensland: Consultation Regulatory Impact Statement*, Brisbane: Queensland Government, 2022, 4.

<sup>162</sup> *Ibid.*, 52.

<sup>163</sup> *Ibid.*, 53.

The Premier Anastacia Palaszczuk discussed the motivations for the parliamentary inquiry into vaping in Queensland.<sup>164</sup> She emphasized that ‘our government will ask the parliament’s Health and Environment Committee to undertake a wideranging inquiry into the increasing and worrying prevalence of vaping in Queensland, particularly among children and young people, but also among adults.’<sup>165</sup> Palaszczuk observed:

I am concerned that teachers are reporting to us that primary school children—I will say that again, primary school children—are taking up vaping in their recess breaks. I am concerned that teenagers are vaping in huge numbers and that they see it as an alternative to smoking cigarettes, when in fact it may be a stepping stone to smoking. I am concerned that otherwise rational and educated adults are swapping cigarettes for vapes because they believe it is a healthier, even harmless, alternative when in all probability it is a dangerous alternative.<sup>166</sup>

The Premier emphasized: ‘This important parliamentary inquiry will look at the prevalence of vaping particularly among children and young people, the approach schools are taking to discouraging uptake, the awareness of the potential health risks associated with vaping and, most critically, what these products actually contain.’ The Premier was particularly concerned about false and misleading representations being made about e-cigarettes and vaping: ‘Does anyone have a fact-based understanding of what they are inhaling? Do these devices contain nicotine or, worse, do they contain dangerous or toxic chemicals? What are the possible health risks and long-term consequences?’<sup>167</sup> She was concerned about the question of consumer rights: ‘All

---

<sup>164</sup> Hon. Anastacia Palaszczuk, ‘Vaping, Parliamentary Inquiry’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

Queenslanders have the fundamental right of choice when they decide what they will consume, but choice should be backed in by fact.’<sup>168</sup>

Queensland’s Attorney-General the Hon. Yvette D’Ath commented: ‘An emerging threat to the health of Queenslanders, particularly young Queenslanders, is the increasing use of e-cigarettes which heat liquids with unknown ingredients into a vapourised mist which is inhaled into the lungs.’<sup>169</sup> She observed: ‘With colourful labels and sickly-sweet flavours, these products are clearly marketed to young people.’<sup>170</sup> Yvette D’Ath was concerned that such products were targeting young people: ‘The evidence shows that people who take up e-cigarettes are three times more likely to take up smoking.’<sup>171</sup> The Hon. Yvette D’Ath stressed: ‘The Palaszczuk government has heard the concerns of parents, teachers, health practitioners and advocates about these products, which is why the Premier will be moving to have the Health and Environment Committee inquire into the prevalence and use of e-cigarettes and measures to prevent the uptake and continuing use of e-cigarettes.’<sup>172</sup> The Health Minister highlighted the need for national action: ‘This work will complement work being undertaken nationally, given the critical role of the Commonwealth in regulating these novel and dangerous products.’<sup>173</sup> She commented: ‘When I hosted the nation’s health ministers in Brisbane last month we agreed to establish a national e-cigarette working group aimed at reviewing and advising on measures to protect young people from the harms

---

<sup>168</sup> Ibid.

<sup>169</sup> Hon. Yvette D’Ath, ‘Smoking’, Hansard, Legislative Assembly, Queensland Parliament, 14 March 2023.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

of e-cigarettes by addressing the increasing availability, appeal and uptake of vaping products.<sup>174</sup> The Health Minister promised law reform in this field: ‘This government is committed to protecting the health of Queenslanders and to reducing the harms posed by traditional smoking products and novel untested technologies like e-cigarettes.’<sup>175</sup> The Health Minister seemed particularly concerned about vaping products containing nicotine and dangerous chemicals.<sup>176</sup>

The Queensland Chief Health Officer has released a report on electronic cigarettes.<sup>177</sup> The report observed that there were various health risks associated with smoking:

A recent Australian review concluded there was strong evidence that non-smokers who vape are three times more likely to go on to smoke combustible tobacco cigarettes. There was limited evidence that vaping is effective for smoking cessation, and when used for this purpose it leads to longer nicotine exposure than other cessation methods. It may also be associated with relapse in ex-smokers. Risks include lung damage, injuries and burns, acute nicotine toxicity, poisoning, and environmental waste. Use has been associated with cardiovascular health markers such as blood pressure and heart rate, lung function, and adolescent brain development. Newer products that contain high concentration nicotine salt and are small and easily concealed, are increasing in popularity, and are a particular concern.<sup>178</sup>

---

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ben Smee, ‘Queensland to Hold Inquiry into Health Risks of E-cigarettes amid Concerns some Contain Toxic Chemicals’, *The Guardian*, 12 March 2023, <https://www.theguardian.com/australia-news/2023/mar/12/queensland-to-hold-inquiry-into-health-risks-of-e-cigarettes-amid-concerns-some-contain-toxic-chemicals>

<sup>177</sup> Queensland Chief Health Officer, ‘Electronic Cigarettes’, <https://www.choreport.health.qld.gov.au/our-lifestyle/electronic-cigarettes>

<sup>178</sup> Ibid.



The report found: ‘In 2022, 19.7% Queensland adults had tried an e-cigarette in their lifetime—5.0% were currently vaping and 1.9% were vaping daily.’<sup>179</sup> The report noted: ‘Current vaping includes any regular or intermittent use of e-cigarettes in the previous 12 months’.<sup>180</sup> The report observed: ‘Adults who currently vaped are more likely to be: male; younger; current tobacco smokers.’<sup>181</sup> The report observed: ‘In 2017, 15.6% of Queensland school children 12 to 17 years had ever used an e-cigarette.’<sup>182</sup> The report observed: ‘Based on trends from 2018 to 2022, current e-cigarette use increased 40% over the time period.’<sup>183</sup>

Queensland’s Chief Health Officer observed: ‘Australian governments have taken an evidence-based and precautionary approach to regulating e-cigarettes based on the risks they pose to tobacco control and population health in terms of gateway to smoking initiation, questions over effectiveness for cessation, increasing youth uptake, and dual use with conventional tobacco products.’<sup>184</sup>

At a state level, in Queensland, there has been disquiet about how e-cigarette retailers have been targeting youth in Queensland schools. The Queensland Teachers’ Union has emphasized that school students engaging in vaping has become a statewide issue.<sup>185</sup>

Queensland Teachers Union president Cresta Richardson commented: ‘Our members

---

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Rachel McGhee, ‘School Students Vaping has become Statewide issue, says Queensland Teachers’ Union’, *ABC Capricornia*, 15 March 2023, <https://www.abc.net.au/news/2023-03-15/school-students-vaping-statewide-issue-qlld-teachers-union/102097996>

have been really professional, and leading the way in the community about educating not only students, but their families about vaping.’<sup>186</sup> She observed: ‘But it is something that we more and more hear about as an issue in our schools.’<sup>187</sup> Queensland University of Technology pharmaceutical sciences researcher Selena Bartlett said ‘students who were vaping at school would be more distracted and found it difficult to learn as addiction affected the prefrontal cortex of the brain.’<sup>188</sup>

The Queensland Department of Education has also provided data about the impact of vaping in the schools sector.<sup>189</sup> The ABC reported that there were 8,654 drug-related suspensions and exclusions in 2022. The education department commented that the increase in suspensions can primarily be attributed to the rise in students vaping or possessing vapes and e-cigarettes – despite the devices being banned in schools: ‘We know vaping is happening in our schools and it's an issue the department takes very seriously.’<sup>190</sup> Pacific Pines State High School principal Mark Peggrem commented: ‘We are on a campaign to educate our parents and our kids, and actually show that in fact, what's on the label is not actually what's in this stuff and it is a highly toxic chemical.’<sup>191</sup>

Much like the global tobacco epidemic, the vaping crisis raises larger questions of human rights. Queensland’s human rights regime specifically has a right to education.<sup>192</sup>

---

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Antonia O’Flaherty, ‘Drug-Related Suspensions in Queensland State Schools Double, Driven by Vaping, says Department’, *ABC News*, 23 March 2023, <https://www.abc.net.au/news/2023-03-23/school-students-suspended-for-vaping/102132046>

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Section 36 of the *Human Rights Act 2019* (Qld).

Queensland’s human rights framework also recognizes the rights of children and families.<sup>193</sup> Queensland’s system acknowledges a right to health access (but not a full right to health).<sup>194</sup> Such human rights seem to be implicated by the vaping epidemic, which has been disrupting education, children and families, and healthcare.

The Queensland Government should consider how best to implement the recommendations of Australia’s National Tobacco Strategy 2023-2030 on the regulation of e-cigarettes and vaping.<sup>195</sup> The Queensland Government should ‘develop and implement additional measures to further restrict the marketing, availability, use, and end-of-life disposal of all e-cigarette components in Australia, regardless of their nicotine content.’<sup>196</sup> The Queensland Government should ‘develop and implement measures to prohibit the sale of flavoured e-cigarettes, regardless of their nicotine content.’<sup>197</sup>

The Queensland Government should ‘raise awareness about the marketing and use of e-cigarettes and their immediate and long-term impacts on individual and population health.’<sup>198</sup> The Queensland Department of Health seems to have started to run a public education campaign – with the help of Dr Karl Kruszelnicki.<sup>199</sup> The Queensland

---

<sup>193</sup> Section 26 of the *Human Rights Act* 2019 (Qld).

<sup>194</sup> Section 37 of the *Human Rights Act* 2019 (Qld).

<sup>195</sup> Department of Health and Ageing, National Tobacco Strategy 2023–2030, Canberra Australian Government, 2023, <https://www.health.gov.au/resources/publications/national-tobacco-strategy-2023-2030>

<sup>196</sup> Recommendation 9.1.

<sup>197</sup> Recommendation 9.2.

<sup>198</sup> Recommendation 9.3

<sup>199</sup> Queensland Government, [www.vapetruths.initiatives.qld.gov.au](http://www.vapetruths.initiatives.qld.gov.au)

Department of Health has engaged in mass media and social media advertising – with advertising like this one:



In partnership with other Australian Governments, the Queensland Government should ‘develop and implement an evidence-based comprehensive regulatory framework for e-cigarettes and all novel and emerging products that pose risks to tobacco control and population health.’<sup>200</sup>

---

<sup>200</sup> Recommendation 9.4 of Department of Health and Ageing, National Tobacco Strategy 2023–2030, Canberra Australian Government, 2023, <https://www.health.gov.au/resources/publications/national-tobacco-strategy-2023-2030>

Building upon its smoke-free spaces policy, the Queensland Government should ‘prohibit the use of e-cigarettes and novel and emerging inhaled products such as shisha in areas where smoking is prohibited.’<sup>201</sup>

The Queensland Government should ‘prohibit advertising, promotion and sponsorship relating to e-cigarettes and other new and emerging products’.<sup>202</sup> The Federal Government has also indicated that it will demand plain packaging of e-cigarettes – in pharmaceutical style packaging.

Building upon its new licensing regime for smoking, the Queensland Government should ‘explore the feasibility of having a consistent licensing scheme in place covering all aspects of the e-cigarette supply chain in Australia.’<sup>203</sup>

The Queensland Government should ‘continue to monitor the supply and use of illicit e-cigarettes and other novel and emerging products in Australia; continue enforcement efforts to prevent illegal importation and supply; and enhance technology and staff capability to identify and respond to illicit trade.’<sup>204</sup> The Queensland Department of Health – along with the police – need to take concerted enforcement action in respect of illicit e-cigarettes.

---

<sup>201</sup> Recommendation 9.5

<sup>202</sup> Recommendation 9.6.

<sup>203</sup> Recommendation 9.7.

<sup>204</sup> Recommendation 9.8.

The Queensland Government should ‘strengthen research, monitoring and surveillance activities pertaining to the marketing and use of e-cigarettes and novel and emerging products.’<sup>205</sup>

In addition to action by the Queensland Government, there could also be scope for legal action in respect of the harm caused by e-cigarettes and vaping to individuals and their families.

In February 2022, ABC 7:30 report produced a feature on the death of a Queensland man, noting that the autopsy found that he most likely died as a result of vaping.<sup>206</sup> The autopsy found the death of the 71-year-old Peter Hansen was due to an acute lung injury. His condition met most of the criteria for EVALI, a new lung illness emerging among vaping and e-cigarette users. Hansen's widow Pam Ashdown said she wanted to warn other vaping users about the possibility of serious lung injuries.

It's just coming out now how harmful it can be, so I think we just need to push and let people know that it can cause death. If somebody does suddenly pass away and they have been vaping, find out why they died ... I don't want his death to be in vain.<sup>207</sup>

This story raises larger questions about whether there will be litigation against e-cigarette manufacturers, distributors, and retailers – much like there has been in the

---

<sup>205</sup> Recommendation 9.9.

<sup>206</sup> Michael Atkin, ‘Autopsy Finds Man Most Likely Died as a Result of Vaping’, *ABC News*, 21 February 2022, <https://www.abc.net.au/news/2022-02-21/autopsy-finds-man-most-likely-died-as-a-result-of-vaping/100800004>

<sup>207</sup> Ibid.

United States. It remains to be seen what test case in Australia will consider questions around the liability of e-cigarette companies.

**Recommendation 3**

**The Queensland Government needs to provide for enhanced legislative regulation of e-cigarettes and vaping given the adverse impacts upon public health, children’s rights and education, and the environment. The Queensland Government should look to enhance its education campaign on vaping. The Queensland Government should take co-ordinated enforcement action to deal with the state-wide problem of the illicit sale of e-cigarettes in convenience stores and other retail settings.**

#### 4. OTHER AUSTRALIAN STATE AND TERRITORY GOVERNMENTS

There have been meetings amongst Australian Governments to ensure a nationally consistent approach to the regulation of vaping and e-cigarettes. As indicated by the National Tobacco Strategy 2023-2030, there is a partnership model in Australia in the field of tobacco control: ‘Governments will work collaboratively to achieve national consistency in tobacco control approaches and the goals under the Strategy.’<sup>208</sup> In a Federal system, State and Territory Governments will have an important role to play in the regulation of

##### A. *Victoria*

The Victorian Government has been a leader in tobacco control in Australia – with VicHealth playing a key role in health promotion. VicHealth CEO Dr Sandro Demaio has called for law reform and policy action in respect of vaping regulation.<sup>209</sup> He highlighted the significant harm vaping was having on Victorian school children. Demaio commented: ‘It is shocking and completely unacceptable that a child wearing a school uniform can walk into a shop and be sold an e-cigarette, containing toxic chemicals which don’t belong in their lungs.’<sup>210</sup> He observed: ‘Our kids are paying the

---

<sup>208</sup> Department of Health and Ageing, National Tobacco Strategy 2023–2030, Canberra Australian Government, 2023, 10, <https://www.health.gov.au/resources/publications/national-tobacco-strategy-2023-2030>

<sup>209</sup> VicHealth, ‘Urgent Action Needed to Support Victorian Kids Targeted by the Vaping Industry’, VicHealth, Press Release, 9 February 2023, <https://www.vichealth.vic.gov.au/media-and-resources/media-releases/urgent-action-needed-to-support-victorian-kids-targeted-by-the-vaping-industry>

<sup>210</sup> Ibid.



price for Big Tobacco's profits'.<sup>211</sup> Demaio commented: 'We are at a crisis point with a new generation at risk of becoming addicted to toxic products.' He observed: 'We've seen strong leadership from the Federal Government in initiating the TGA public consultation on nicotine vaping products and committing to update tobacco advertising laws to include e-cigarettes but we can't stop there'.<sup>212</sup> Demaio maintained: 'The only way to protect young people from the harms of vaping is to stop them being available as consumer products.'<sup>213</sup>

VicHealth called for a number of policy reforms. First, VicHealth asked for an end for the importation of all e-cigarette products unless bound for smokers with a prescription or pharmacy wholesalers. Second, VicHealth asked for a ban of the supply of all e-cigarette products at the national level (regardless of whether they contain nicotine), except by pharmacies to smokers with a prescription. Third, VicHealth wanted stronger enforcement action at the Australian border. Fourth, VicHealth urged the Victorian Government to take strong action against retailers selling vaping products to minors and deliver increased support for young Victorians targeted by the vaping industry. Fifth, VicHealth wants to see a social marketing campaign to inform young people of the harms. Sixth, VicHealth wanted support to encourage those addicted to quit and more resources for schools and teachers to educate their students. Dr Demaio said VicHealth is committed to working alongside the Victorian Government in designing and implementing a response to the crisis: 'Swift action now in the face of this impending public health emergency will ensure a healthier generation of Australians.'<sup>214</sup>

---

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

Demaio has highlighted in particular the negative impact of vaping and e-cigarettes on children and youth.<sup>215</sup> Demaio argued: ‘For the sake of Australia’s young people, 2023 must be the year that the Australian Government implements effective protections when it comes to e-cigarettes.’<sup>216</sup>

In May 2023, VicHealth CEO Dr Sandro Demaio welcomed the landmark announcement of Federal Minister Mark Butler that there would be co-ordinated, comprehensive regulation of e-cigarettes in Australia.<sup>217</sup> He observed: ‘With these groundbreaking reforms, the Australian Government has demonstrated its commitment to prioritising the health and wellbeing of its citizens above the profits of the tobacco and e-cigarette industry.’<sup>218</sup> Demaio warned and cautioned:

E-cigarettes can contain up to 200 toxic chemicals, including those present in paint stripper and weed killer. These substances can cause cancer and impair brain function. They don’t belong in our lungs.<sup>219</sup>

Demaio concluded: ‘We commend Minister Butler for taking action to protect young people from the dangers of e-cigarettes.’<sup>220</sup>

---

<sup>215</sup> Sandro Demaio, ‘Let’s all tackle Vaping Scourge Harming Kids’, *VicHealth*, 15 January 2023, <https://www.vichealth.vic.gov.au/media-and-resources/opinion-pieces/lets-all-tackle-vaping-scourge-harming-kids>

<sup>216</sup> Ibid.

<sup>217</sup> VicHealth, ‘VicHealth welcomes Landmark Reforms on Vaping’, VicHealth, 2 May 2023, <https://www.vichealth.vic.gov.au/vichealth-welcomes-landmark-reforms-vaping>

<sup>218</sup> Ibid

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

In 2021, the ABC’s medical reporters highlighted the case of Dakota Stephenson who was hospitalized, as a result of vaping.<sup>221</sup> Eli Dabscheck, a respiratory physician at The Alfred Hospital in Melbourne, commented that the case clearly met the US Centre for Disease Control (CDC) definition of EVALI. He said that Dakota's symptoms were ‘highly unusual’.<sup>222</sup> As yet, there does not seem to be a legal proceeding in respect of the liability for e-cigarette companies for the health injuries sustained by Dakota Stephenson.

The Victorian education sector has been particularly concerned about the impact of vaping and e-cigarettes on schools.<sup>223</sup> A Melbourne High School principal told The Guardian of how schools have been disrupted by vaping use:

When they’re experiencing withdrawal or experiencing a craving for nicotine, [students] experience tiredness, irritability, restlessness and appetite changes. We get reports from teachers of young people leaving class and being found vaping. I think that’s a really big challenge for a young kid addicted to vaping, to be able to get through a one-hour period.<sup>224</sup>

---

<sup>221</sup> Alison Branley and Sophie Scott, ‘Dakota's Doctors Thought She Might Have COVID, but it was Vaping that put her in ICU’, *ABC News*, 4 October 2021, <https://www.abc.net.au/news/2021-10-04/vaping-warnings-after-teenager-lung-injury-icu-visit/100508090>

<sup>222</sup> Ibid.

<sup>223</sup> Melissa Davey, ‘Melbourne Principal says Schools Struggling to Combat Vaping as Minister blasts “Public Health Menace”’, *The Guardian*, 10 April 2023, <https://www.theguardian.com/australia-news/2023/apr/10/melbourne-principal-says-schools-struggling-to-combat-vaping-as-minister-blasts-public-health-menace>

<sup>224</sup> Ibid.

*The Guardian* reported the results of a survey of school staff members– which ‘found nearly half (46%) reported finding a student with an e-cigarette on campus at least monthly, and one-third of principals who responded reported suspending or expelling students at least monthly for e-cigarette possession or use.’<sup>225</sup>

*B. New South Wales*

In 2022, the Department of Health in New South Wales issued a press release, regarding its action in respect of e-cigarettes and e-liquids.<sup>226</sup> NSW Health reported that it had ‘seized more than \$1 million worth of illegal e-cigarettes and liquids containing nicotine since January 2022.’<sup>227</sup> NSW Health observed: ‘The seizures so far this year bring the total amount of illegal product seized since 1 July 2020 to more than \$3 million.’<sup>228</sup> NSW Chief Health Officer, Dr Kerry Chant, commented: ‘We are cracking down on the illegal sale of nicotine e-cigarettes and liquids and taking a zero-tolerance approach to those who sell them.’<sup>229</sup> She observed: ‘NSW Health regularly conducts raids on retailers across the state to protect young people from these harmful devices.’<sup>230</sup> Chant warned retailers: ‘You will be caught, illegal items will be seized, and you could face prosecution, resulting in being fined or even jailed.’<sup>231</sup> She stressed: ‘The harmful impacts of vaping on young people cannot be underestimated.’<sup>232</sup> Chant commented:

---

<sup>225</sup> Ibid.

<sup>226</sup> NSW Health, ‘NSW Health seizes more than \$1 million of Illegal Nicotine Vapes’, Press Release, NSW Health, 16 May 2022, [https://www.health.nsw.gov.au/news/Pages/20220516\\_00.aspx](https://www.health.nsw.gov.au/news/Pages/20220516_00.aspx)

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

‘People think they are simply flavoured water but in reality, in many cases they are ingesting poisonous chemicals that can cause life threatening injuries.’<sup>233</sup> The maximum penalty for illegally selling e-cigarettes or e-liquids containing nicotine is \$1,650 per offence, six-months in prison or both, under the *Poisons and Therapeutic Goods Act* 1966 (NSW).

### C. South Australia

In 2019, South Australia updated the *Tobacco Products Regulation Act* 1997 (SA) – with the *Tobacco and e-Cigarette Products Act* 1997 (SA). SA Health explained: ‘The regulation of e-cigarette products in South Australia is focused on protecting the community from the potential harms of e-cigarettes, and reducing the likelihood that children will be attracted to these devices, while still allowing adults to access these products.’<sup>234</sup> Health Minister Chris Picton has called for national action on the regulation of vaping and e-cigarettes: ‘We want to do what we can at a state level to protect our children and reduce the harms caused by e-cigarettes.’<sup>235</sup>

---

<sup>233</sup> Ibid.

<sup>234</sup> SA Health, ‘New e-Cigarette Laws and Other Changes to Tobacco Laws in South Australia’, 2019,

<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/public+health/tobacco+and+e-cigarette+laws+and+businesses/new+e-cigarette+laws+and+other+changes+to+tobacco+laws+in+south+australia>

<sup>235</sup> Tim Dornin, ‘SA Calls for National Action on Vaping’, AAP, 27 July 2022, <https://thewest.com.au/news/education/sa-calls-for-national-action-on-vaping-c-7657426>

South Australia's Commissioner for Children and Young People, Helen Connolly, made a submission, drawing upon comments from teenagers surveyed by her office.<sup>236</sup> She highlighted that youth have urged the Australian government to help them break their nicotine addiction acquired through vaping. Connolly recommended that nicotine and non-nicotine vaping products should be banned from importation unless bound for pharmacies. She also wrote they should be tested, labelled properly and certified; come in plain packaging; and that all flavours – except tobacco and colouring agents - should be prohibited. Connolly argued: 'Such a response must avoid punishing children and young people, while ensuring there is information and support available for all children, with particular support for those who may be dependent or addicted to nicotine vapes and may struggle with withdrawals.'<sup>237</sup>

In April 2023, the South Australian state government proposed further bans of smoking and vaping in outdoor public spaces in South Australia.<sup>238</sup> The ABC reported:

The state government said the laws would extend smoking and vaping bans to areas near schools, shopping centres, beaches, buildings and sporting grounds. Cigarette vending machines in licensed venues would be outlawed, and fines for selling or supplying tobacco to minors would be doubled. Smoking and vaping would be banned within 10 metres of a school and child care centre and within 5 metres of a shopping centre or government or commercial building entrance. Bans would also apply outside hospitals and aged care facilities.

---

<sup>236</sup> Melissa Davey, 'Australian Teenagers urge Government to Help them Break Vaping Addiction', *The Guardian*, 26 March 2023, <https://www.theguardian.com/australia-news/2023/mar/26/australian-teenagers-urge-government-to-help-them-break-vaping-addiction?>

<sup>237</sup> Ibid.

<sup>238</sup> ABC News, 'Vaping, Smoking Bans Proposed for More Outdoor Public Spaces in South Australia', ABC News, 13 April 2023, <https://www.abc.net.au/news/2023-04-13/vaping-smoking-bans-proposed-in-more-public-spaces-sa/102216556>

Consuming a cigarette or vape at an outdoor public swimming pool, near an organised children's sporting event and at beaches would be banned.<sup>239</sup>

The ABC noted: 'The government said some sites already banned smoking in these areas, but the bans were not enforceable by law and often did not cover vaping.'<sup>240</sup>

South Australia's Health Minister Chris Picton (who used to work for Nicola Roxon, when she was a Minister in the Gillard Government) observed of the legislative changes: 'Some of those fines, particularly for selling to underage people, we believe need to be much higher ... to send a clear message about selling cigarettes and vapes to young people is absolutely prohibited.'<sup>241</sup> He emphasized: 'Sending a clear message to stop selling to kids those vape products is absolutely important.'<sup>242</sup> Picton foreshadowed that there could be further legislative and regulatory action in South Australia over vaping: 'These are one of a number of measures that we're looking at over the next few weeks of taking more action in relation to smoking and vaping in South Australia.'<sup>243</sup>

#### D. *Western Australia*

In May 2022, WA Health seized 950 vaping products and two cartons illicit tobacco in a joint operation with the WA Police Force.<sup>244</sup> WA Health's Environmental Health

---

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> WA Health, 'WA Health Seizes Hundreds of Illegal Nicotine Vapes', Press Release, 23 May 2022, <https://ww2.health.wa.gov.au/Media-releases/2022/May/WA-Health-seizes-hundreds-of-illegal-nicotine-vapes>

Executive Director Dr Michael Lindsay said the Department had ramped up surveillance on the illegal sale of e-cigarettes. He had sent letters to 3000 retailers, putting them on notice reminding them of the ongoing restrictions regarding the sale of e-cigarette devices and vaporiser nicotine products under the *Tobacco Products Control Act 2006 (WA)* and the *Medicines and Poisons Act 2014 (WA)*. Lindsay commented: ‘The use of e-cigarettes and vapes by young people is on the rise causing increased health risks.’<sup>245</sup> He emphasized: ‘There are many harmful impacts of vaping, some of which we may not even see for another decade or so.’<sup>246</sup> Lindsay observed: ‘People are often under the impression the liquid in vapes is flavoured water but the reality is, in many cases people are ingesting poisonous chemicals that can cause life-threatening illnesses.’<sup>247</sup>

Social marketing campaigns have long been deployed to counter the tobacco epidemic.<sup>248</sup> Some similar strategies are being developed in relation to e-cigarettes and vaping. In 2023, the McGowan Government has funded the Cancer Council Western Australia to develop a digital education campaign highlighting the risks of using e-cigarettes.<sup>249</sup> Health Minister Amber-Jade Sanderson commented: ‘This funding is the

---

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> For a history of anti-smoking social marketing, see the new ACMI exhibition - Sophie Kesteven and Ann Arnold, ‘Dr Nigel Gray was Determined to stop Tobacco Advertising in Australia. Eventually his Efforts Paid Off’, *ABC News*, 15 April 2023, <https://www.abc.net.au/news/2023-04-15/anti-smoking-tobacco-dr-nigel-gray-acmi-melbourne/102166884>

<sup>249</sup> Government of Western Australia, ‘Funding to help Cancer Council WA Stop Vaping by Young People’, Press release, 23 February 2023, <https://www.mediastatements.wa.gov.au/Pages/McGowan/2023/02/Funding-to-help-Cancer-Council-WA-stop-vaping-by-young-people.aspx>



latest step in the State Government's fight to help protect our young people from the dangers of vaping.'<sup>250</sup> She was concerned about the health impact of vaping: 'Not only is vaping harmful, it often contains harmful substances found in cleaning products, weed killer, nail polish remover and bug spray.'<sup>251</sup> Sanderson warned: 'Emerging research has found that non-smokers who use e-cigarettes are three times more likely to go on to smoke tobacco cigarettes.'<sup>252</sup> She observed: 'This important campaign will complement our other initiatives including the WA Schools Anti-Vaping Toolkit.'<sup>253</sup>

There has been discussion in 2023 about the adequacy of enforcement efforts in respect of illicit e-cigarettes and vaping in Western Australia.<sup>254</sup> Health Minister Amber-Jade Sanderson has emphasized: 'The message is clear, that selling vapes is illegal, no matter how you do it, unless you are doing it as a pharmacist with a prescription.'<sup>255</sup>

The Western Australian Department of Health have inspected almost 2,000 premises for tobacco and vapes and formal warnings were issued to about 50 retailers. Where vapes were located, they were seized and destroyed, but no retailers have been fined. A Health Department spokesperson commented: 'The relevant legislation does not provide for fines in these cases, but where retailers are repeatedly found with vapes, prosecution is a possible penalty.'<sup>256</sup> They added: 'The department is considering legal

---

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> James Carmody, 'Parent Pleads for Vape Dealer Fines, as Governments Promise to Step Up Action after 3,000 Retailers Warned', *ABC News*, 4 May 2023, <https://www.abc.net.au/news/2023-05-04/parent-pleads-for-help-to-deal-with-vaping-teens-as-governments/102296538>

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

action against a number of more serious offenders but cannot make any comment on matters that are in progress.’<sup>257</sup>

*E. Tasmania*

In Tasmania, there has long been concern about the high rates of smoking and vaping in the state.<sup>258</sup> Premier Hon. Jeremy Rockliff MP commented: ‘We know we need to do more to improve the health of Tasmanians and I look forward to seeing these initiatives implemented and smoking rates reduce further in our State.’<sup>259</sup> The Tasmanian Government sees e-cigarettes as a threat:

The majority of e-cigarette use is not for smoking cessation. Evidence shows that e-cigarettes have the potential to reverse recent gains made to reduce smoking rates and tobacco related harms, and “re-normalise” smoking within the community. Non-smokers, including young people, are more likely to take up traditional cigarettes after trying e-cigarettes. The Tasmanian Government continues to assert that the use of e-cigarettes should not be encouraged, particularly in relation to young people.<sup>260</sup>

The Tasmanian Government recognized: ‘Vaping and e-cigarette products have been associated with immediate harms including E-cigarette or Vaping Use -Associated Lung Injury (EVALI), other respiratory illness, and death.’<sup>261</sup>

---

<sup>257</sup> Ibid.

<sup>258</sup> Department of Health, *Tasmanian Tobacco Action Plan: Reducing the Use of Tobacco and Related Products, 2022-2026*, Hobart: Government of Tasmania, 2022.

<sup>259</sup> Ibid., 6.

<sup>260</sup> Ibid., 9.

<sup>261</sup> Ibid., 9.

The Federal Health Minister Mark Butler has been consulting with the Tasmanian Government in respect of a co-ordinated approach to the regulation of e-cigarettes and vaping.<sup>262</sup> He commented: ‘I need to work very closely with state and territory Health Ministers as well, so, we’ve committed as a group, including Premier Rockliff, who is also your Health Minister to having a discussion very soon, making sure we are working together, we can’t just do this alone.’<sup>263</sup> Butler said: ‘We need state and territory ministers to come along with us’.<sup>264</sup> He observed: ‘This is a very serious public health menace.’<sup>265</sup> Butler concluded that ‘there is an obligation, I think, on all governments to take considered, strong action in this area and to do that as soon as we practicably can.’<sup>266</sup>

*F. Australian Capital Territory*

In November 2022, the ACT Government boosted its regulation of e-cigarettes.<sup>267</sup> The *Health Legislation Amendment Bill 2022* (ACT) was passed, with the support of the Australian Labor Party, the Greens, and the Liberal Party of Australia. Health Minister Rachel Stephen-Smith said that the government was ‘aiming to minimise the harm

---

<sup>262</sup> Department of Health and Ageing, ‘Radio interview with Minister Butler and Leon Compton’, ABC Hobart Mornings, 18 April 2023 <https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/radio-interview-with-minister-butler-and-leon-compton-abc-hobart-mornings-18-april-2023?language=en>

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Lottie Twyford, ‘ACT Cracks Down on e-Cigarettes with New Laws allowing “Sting Operations”’, *RiotAct*, 25 November 2022, <https://the-riotact.com/act-cracks-down-on-e-cigarettes-with-new-laws-allowing-sting-operations/616266>

caused in our community from smoking and vaping, particularly for young Canberrans.’<sup>268</sup> She stressed: ‘Reducing supply is a critical component of minimising harm.’<sup>269</sup>

#### G. Northern Territory

The Northern Territory has long faced challenges in respect of tobacco control – given that the region has the highest rates of prevalence of smoking in Australian states and territories. The Northern Territory amended the *Tobacco Control Act 2002 (NT)* to include e-cigarettes and their accessories as regulated products.<sup>270</sup> The Northern Territory Government advises: ‘Like traditional tobacco products, the sale of e-cigarettes requires a Tobacco Retail Licence and the same restrictions that apply to the sale and consumption of tobacco applies to e-cigarettes.’<sup>271</sup>

#### **Recommendation 4**

**Other Australian State and Territory Governments have been facing similar challenges in respect of the public health crisis of e-cigarettes and vaping. The Queensland Government should work with its counterparts to develop a comprehensive plan for the regulation of e-cigarettes and vaping.**

---

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Northern Territory Government, ‘Tobacco’, <https://health.nt.gov.au/professionals/alcohol-and-other-drugs/tobacco,-volatile-substances-and-others-drugs/tobacco>

<sup>271</sup> Ibid.

## 5. THE UNITED STATES OF AMERICA

Australian policy-makers could learn much from the massive litigation in the United States, which has been undertaken against the e-cigarette company, Juul. It is worthwhile considering the policy responses of the Biden Administration, the United States Congress, and regulators, the Food and Drug Administration, and the Federal Trade Commission to the public health crisis in respect of e-cigarettes and vaping. The situation in the United States provides a cautionary tale for the need for prompt and effective enforcement action in the field of e-cigarettes and vaping.

### A. Litigation

In the United States, there has been significant litigation taken against e-cigarette companies. The investigative journalist Lauren Etter has written a useful corporate biography of Juul, called *The Devil's Playbook*.<sup>272</sup> She has discussed the origins of e-cigarette company, Juul; its business practices and its dubious marketing strategies (targeting youth); the role of tobacco company Altria; and its massive legal and regulatory problems.<sup>273</sup> Lauren Etter observed of the ambitions and pretensions of Juul:

Juul was selling a highly addictive product and they treated it like an iPhone or a watch or some other gadget. I think that they should have recognized what they were selling instead of trying to make it be something that it isn't. I mean, it's both of those things, but I think that

---

<sup>272</sup> Lauren Etter, *The Devil's Playbook: Big Tobacco, Juul, and the Addiction of a New Generation*, New York: Crown, 2021.

<sup>273</sup> Nilay Patel, 'Juul and the Business of Addiction', *The Verge*, 30 June 2021, <https://www.theverge.com/22554477/juul-lauren-etter-interview-e-cigarettes-addiction>

they should have had a higher level of care and I think that businesses probably could benefit from that. In the long run, I think that they realize that's not the way that you grow fast. So I think that there's a very big tension between those and I understand that, but I do think that Juul would have bought itself longevity had it not just crushed the market like it did.<sup>274</sup>

There have been thousands of legal cases taken against the company JUUL over its marketing of e-cigarettes.

In 2019, New York Attorney-General Letitia James alleged that JUUL had engaged in the deceptive and misleading marketing of its e-cigarettes, leading to an ongoing youth vaping epidemic in New York state.<sup>275</sup> She commented: 'There can be no doubt that JUUL's aggressive advertising has significantly contributed to the public health crisis that has left youth in New York and across the country addicted to its products.'<sup>276</sup> Attorney General James observed: 'By glamorizing vaping, while at the same time downplaying the nicotine found in vaping products, JUUL is putting countless New Yorkers at risk.'<sup>277</sup> She noted: 'I am prepared to use every legal tool in our arsenal to protect the health and safety of our youth.'<sup>278</sup>

---

<sup>274</sup> Nilay Patel, 'Juul and the Business of Addiction', *The Verge*, 30 June 2021, <https://www.theverge.com/22554477/juul-lauren-etter-interview-e-cigarettes-addiction>

<sup>275</sup> Letitia James, 'Attorney General sues JUUL Labs', Press Release, State of New York, 19 November 2019, <https://ag.ny.gov/press-release/attorney-general-james-sues-juul-labs#:~:text=NEW%20YORK%20%E2%80%93%20New%20York%20Attorney,epidemic%20in%20New%20York%20State>

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

The lawsuit alleged that JUUL’s conduct violates *General Business Law* §§ 349 and 350, which prohibit deceptive acts and practices and false advertising; Common Law Public Nuisance; and Executive Law § 63(12), which prohibits repeated and persistent fraud and illegality, based on violations of the *New York Public Health Law* prohibiting underage sales of tobacco products to minors. The lawsuit also alleged that JUUL violated the *Federal Trade Commission Act* §5 prohibiting unfair business practices that substantially injure consumers, and the *Food, Drug & Cosmetic Act* 21 U.S.C. § 387k, prohibiting the introduction into interstate commerce of any modified risk tobacco product without an order from the Secretary of Health & Human Services.

In 2020, Massachusetts Attorney General Maura Healey brought a legal action against JUUL, alleging that the company illegally advertised and sold nicotine products to underage youth and created an epidemic of nicotine addiction among young people.<sup>279</sup> The lawsuit demands that JUUL pay for the costs associated with combating this public health crisis affecting young people across Massachusetts. The AG's lawsuit detailed JUUL’s original marketing plan, which showed that JUUL chose advertising that appealed to young people, that the company advertised its products on websites geared toward kids, and that JUUL shipped e-cigarettes online to underage youth.

In 2019, the Attorney-General for Illinois, Kwame Raoul, filed a lawsuit against JUUL Labs, alleging that JUUL’s marketing targeted minors and deceptively advertised

---

<sup>279</sup> Maura Healey, ‘Attorney-General’s Office Lawsuit against JUUL’, Press Release, State of Massachusetts, 12 February 2020, <https://www.mass.gov/lists/attorney-generals-office-lawsuit-against-juul>

products as smoking cessation devices.<sup>280</sup> Raoul commented: ‘This lawsuit is part of a comprehensive approach to addressing a public health epidemic, particularly one impacting young people.’<sup>281</sup> He observed: ‘JUUL has intentionally targeted minors and, after being criticized for its intentionally youthful marketing, marketed its product as a smoking cessation device – without having FDA approval to do so.’<sup>282</sup> Raoul maintained: ‘This lawsuit is a step toward holding companies accountable, and I am committed to continuing to partner with advocates, lawmakers, and state and federal regulators to enact policies that protect minors from e-cigarettes and other addictive tobacco products.’<sup>283</sup>

In 2019, Californian Attorney General Xavier Becerra and Los Angeles Leaders announced a lawsuit against JUUL for deceptive marketing practices targeting underage Californians and endangering users of its vaping products.<sup>284</sup> Xavier Becerra commented: ‘We’ve worked too hard, committed our hard-earned money for too long combatting harmful tobacco use to stand idly by as we now lose Californians to vaping and nicotine addiction.’<sup>285</sup> He observed: ‘JUUL adopted the tobacco industry’s infamous playbook, employing advertisements that had no regard for public health and

---

<sup>280</sup> Kwame Raoul, ‘Attorney General Raoul Alleges JUUL’s Marketing Targeted Minors and Deceptively Advertised Products as Smoking Cessation Devices’, Press Release, State of Illinois, 12 December 2019, [https://illinoisattorneygeneral.gov/pressroom/2019\\_12/20191212.html](https://illinoisattorneygeneral.gov/pressroom/2019_12/20191212.html)

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Xavier Becerra, ‘Attorney General Becerra and Los Angeles Leaders Announce Lawsuit Against JUUL for Deceptive Marketing Practices Targeting Underage Californians and Endangering Users of Its Vaping Products’, Press Release, State of California, 18 November 2019, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-los-angeles-leaders-announce-lawsuit-against-juul>

<sup>285</sup> Ibid.



searching out vulnerable targets'.<sup>286</sup> Becerra noted: 'Today we take legal action against the deceptive practices that JUUL and the e-cigarette industry employ to lure our kids into their vaping web.'<sup>287</sup> He vowed: 'We will hold JUUL and any other company that fuels a public health crisis accountable.'<sup>288</sup> In 2021, Xavier Becerra was promoted to the role of United States Secretary of Health and Human Services in the new Biden Administration.

In 2019, North Carolina Attorney General Josh Stein took e-cigarette Maker JUUL to Court for designing, marketing, and selling its e-cigarettes to attract young people and for misrepresenting the potency and danger of nicotine in its products in violation of North Carolina's *Unfair and Deceptive Trade Practices Act*.<sup>289</sup> Stein commented:

JUUL targeted young people as customers. As a result, vaping has become an epidemic among minors. JUUL's business practices are not only reckless, they're illegal. And I intend to put a stop to them. We cannot allow another generation of young people to become addicted to nicotine.<sup>290</sup>

The press release stressed: 'JUUL deliberately designed flavors, the product, and its chemical composition to appeal to young people.'<sup>291</sup> The press release observed: 'The company marketed its products to youth on social media platforms and through the use

---

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Josh Stein, 'Attorney General Josh Stein Takes E-Cigarette Maker JUUL to Court', Press Release, State of North Carolina, 15 May 2019, <https://ncdoj.gov/attorney-general-josh-stein-takes-e-cigarette-make/>

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

of youth-oriented sponsors and social media influencers’.<sup>292</sup> The press release noted: ‘JUUL used lax age verification techniques for online purchases that allowed purchasers to avoid or circumvent age requirements.’<sup>293</sup>

## **B. Settlements**

In 2021, Juul agreed to pay \$US 40m to the state of North Carolina to settle a lawsuit that accused the e-cigarette maker of marketing its products to minors.<sup>294</sup> The North Carolina Attorney-General Josh Stein has started investigating Juul after ‘hearing from friends about the devastation that this product had visited on kids’ lives – addiction, depression, bad grades, switching schools, medical treatment and more’.<sup>295</sup> He observed: ‘Juul sparked and spread a disease, the disease of nicotine addiction’.<sup>296</sup> Stein stressed: ‘They did it to teenagers across North Carolina and this country simply to make money.’<sup>297</sup> He commented: ‘Their greed is not only reprehensible, it is unlawful.’<sup>298</sup> Juul did not admit wrongdoing in the settlement of the lawsuit.

Juul also subsequently reached the settlement of lawsuits in Arizona, Louisiana, and Washington.

---

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Dominic Rushe, ‘Juul, Accused of Marketing to Teens, Settles Vaping Case for \$40m’, *The Guardian*, 29 June 2021, <https://www.theguardian.com/us-news/2021/jun/28/juul-north-carolina-marketing-teens-vaping>

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

In 2022, Juul Labs agreed to pay \$550 million to settle to a two-year investigation by 33 states (and Puerto Rico) into the marketing of its high-nicotine products.<sup>299</sup> William Tong, the Connecticut attorney general, commented on the settlement:

We think that this will go a long way in stemming the flow of youth vaping. I'm under no illusions and cannot claim that it will stop youth vaping. It continues to be an epidemic. It continues to be a huge problem. But we have essentially taken a big chunk out of what was once a market leader, and by their conduct, a major offender.<sup>300</sup>

Juul has agreed to refrain from a host of marketing practices as part of the settlement.

In April 2023, Juul agreed to pay \$462 m to settle claims by six further states including New York, California, Colorado, Illinois, Massachusetts and New Mexico as well as the District of Columbia over claims that it unlawfully marketed its products to children.<sup>301</sup>

The Illinois Attorney-General Kwame Raoul reflected upon the settlement:

Juul has intentionally targeted minors for the sale of its e-cigarettes. After inappropriately marketing its product as a smoking cessation device, Juul products actually served as a gateway to cigarette use for youth who had never smoked before. This settlement is a step

---

<sup>299</sup> Associated Press, 'Juul to pay \$440m after years-long investigation into teen vaping', *The Guardian*, 7 September 2022, <https://www.theguardian.com/us-news/2022/sep/06/juul-teen-vaping-settlement-us-states>

<sup>300</sup> Ibid.

<sup>301</sup> Reuters, 'E-cigarette maker Juul agrees to pay \$462m to settle claims by six US states', *The Guardian*, 13 April 2023, <https://www.theguardian.com/us-news/2023/apr/12/juul-settlement-e-cigarette-vape-minors>

toward holding Juul accountable, and I am committed to continuing to partner with advocates, lawmakers, and state and federal regulators to enact policies that protect minors from e-cigarettes and other addictive tobacco products.<sup>302</sup>

Raoul has also taken regulatory action: ‘In 2021, the Illinois Legislature passed Raoul’s legislation that prohibits companies from marketing e-cigarettes to minors, misleading advertising and the sale of adulterated e-cigarettes.’<sup>303</sup> There has been other litigation against e-cigarette companies: ‘In 2020, Raoul entered into a consent decree with Juice Man LLC to resolve a lawsuit filed by Raoul over allegations the company developed and marketed its products to attract minors.’<sup>304</sup>

The California Attorney General Ray Bonta also discussed the significance of the settlement:

Today is another step forward in our fight to protect our kids from getting hooked on vaping and nicotine. By using advertising and marketing strategies to lure young people to its products, JUUL put the health and safety of its vulnerable targets and the California public at risk. Today’s settlement holds JUUL accountable for its actions and puts a stop to its harmful business practices. What’s more, it will bring millions in funding to help California abate and prevent the harms of e-cigarettes and nicotine addiction. As a father and as our state’s top law

---

<sup>302</sup> Kwame Raoul, ‘Attorney General Raoul Announces \$462 Million Settlement with E-Cigarette Manufacturer Juul Labs’, Office of the Illinois Attorney-General 12 April 2023, <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-announces-462-million-settlement-with-e-cigarette-manufacturer-juul-labs>

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

enforcement official, I remain committed to protecting the health, quality of life, and future of California's children.<sup>305</sup>

Los Angeles County District Attorney George Gascón added: 'The company opted to illegally market its products to our children and now JUUL is going to pay a steep price for its mistakes.'<sup>306</sup> Los Angeles County Supervisor and Board Chair Janice Hahn observed: 'This settlement holds JUUL accountable for knowingly targeting our kids to hook them on flavored nicotine vaping products simply to boost their bottom line.'<sup>307</sup>

New York State Attorney General Letitia James added her thoughts about the settlement:

JUUL lit a nationwide public health crisis by putting addictive products in the hands of minors and convincing them that it's harmless — today they are paying the price for the harm they caused. Too many young New Yorkers are struggling to quit vaping and there is no doubt that JUUL played a central role in the nationwide vaping epidemic. Today's agreement will help young New Yorkers put their vapes down for good and ensure that future generations understand the harms of vaping.<sup>308</sup>

---

<sup>305</sup> Rob Bonta, 'Attorney General Bonta Announces \$462 Million Multistate Settlement with e-Cigarette Maker Juul', State of California Department of Justice, 11 April 2023, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-462-million-multistate-settlement-e-cigarette>

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

<sup>308</sup> Letitia James, 'Attorney General James Secures \$462 Million from JUUL for Its Role in the Youth Vaping Epidemic: JUUL to Pay \$462 Million to Six States and D.C., New York to Receive \$112.7 Million', Office of the New York State Attorney General, 12 April 2023, <https://ag.ny.gov/press-release/2023/attorney-general-james-secures-462-million-juul-its-role-youth-vaping-epidemic>

Assemblymember Linda B. Rosenthal observed: ‘From the outset, JUUL had ripped a page straight from big tobacco’s playbook, spending millions of dollars to market their new product to youth and hook a new generation on nicotine.’<sup>309</sup> Manhattan Borough President Mark Levine commented: ‘For too long, JUUL has gotten away with deceptively hooking young people on nicotine.’<sup>310</sup> He was pleased by the settlement: ‘Today’s settlement puts an end to those nefarious practices and invests in a healthier New York’.<sup>311</sup> State Senator Brad Hoylman-Sigal hoped that there would be further regulatory action: ‘I’m hopeful that this historic settlement by the Attorney General will be a precursor to the FDA once and for all banning JUUL vaping products altogether due to the overwhelming safety concerns and extraordinary rise in youth vaping.’<sup>312</sup>

The new Massachusetts Attorney-General Andrea Campbell Joy observed: ‘Today’s settlement marks the next chapter in holding JUUL accountable for inciting a youth vaping epidemic that rolled back decades of progress to combat underage tobacco and nicotine use.’<sup>313</sup> She said: ‘This settlement, which includes funds for treatment and prevention and places firm restrictions on youth marketing and sales, will help us combat vaping addiction and continue to protect the health and safety of young people.’<sup>314</sup>

---

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Andrea Joy Campbell, ‘AG’s Office Reaches \$462M Multistate Settlement with JUUL, Secures \$41M for Massachusetts: AG Campbell’s Office Holds JUUL Accountable for Company’s Role in Nationwide Youth Vaping Epidemic’, Office of the Attorney-General of Massachusetts, 12 April 2023, <https://www.mass.gov/news/ags-office-reaches-462m-multistate-settlement-with-juul-secures-41m-for-massachusetts>

<sup>314</sup> Ibid.

The State of Colorado’s Attorney-General Phil Weiser observed: ‘While no amount of money or new restrictions on Juul’s business practices can undo the harms caused by the teen vaping epidemic, this settlement will make great strides towards reducing it and can support young people who are hurting now more than ever.’<sup>315</sup> Governor Maura T. Healey was pleased by the outcome: ‘As Attorney General, I sued JUUL to hold them accountable for their role in creating the youth vaping epidemic and to protect the health and wellbeing of our young people.’<sup>316</sup> Margaret Cooke, MA Public Health Commissioner commented: ‘We have important work to do to continue to protect our young people from the dangers of nicotine addiction and to help those who are addicted, to quit.’<sup>317</sup>

The New Mexico Attorney-General Raul Torrez observed of the settlement: ‘I will fight to protect children from harmful advertising and products and ensure that companies who target and sell products to children through social media platforms are held accountable for their dangerous messaging.’<sup>318</sup> He noted: ‘Today’s settlement is another reminder that I will continue to investigate and work for the people of New Mexico to protect their health and wellbeing, especially when it involves our children.’<sup>319</sup>

---

<sup>315</sup> Sean O’Donnell, ‘Colorado AG Settles Lawsuit Against Juul, State to Receive \$31.7M’, *KDVR*, 12 April 2023, <https://kdvr.com/news/local/colorado-ag-settles-lawsuit-against-juul-state-to-receive-31-7m/>

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Raul Torrez, ‘Attorney General Raúl Torrez Reaches Settlement with JUUL Labs Inc. for their Unlawful Advertising Practices Targeting New Mexico Youth’, New Mexico Attorney-General, 12 April 2023, <https://www.nmag.gov/attorney-general-raul-torrez-reaches-settlement-with-juul-labs-inc-for-their-unlawful-advertising-practices-targeting-new-mexico-youth/>

<sup>319</sup> Ibid.

The District of Columbia Attorney-General Brian Schwalb commented on the settlement:

JUUL preyed on children for profit, implementing an intentionally deceptive, manipulative marketing campaign targeting underage users with the intention of creating addicted customers. JUUL knew how addictive and dangerous its products were and actively tried to cover up that medical truth. The Office of the Attorney General prioritizes protecting District children's health and safety and ensuring our kids can live healthy, hopeful lives.<sup>320</sup>

Brian L. Schwalb concluded: 'Thanks to the diligent work by our legal teams, JUUL has ended its harmful, illegal conduct and must put millions of dollars towards mitigating the public health damage it caused.'<sup>321</sup>

Reuters noted: 'With the deal, Juul Labs Inc will have settled with 45 states for more than \$1bn'.<sup>322</sup> There remains action on foot against Juul: 'Juul is still facing a lawsuit by Minnesota, where a trial is currently under way, as well as lawsuits or open investigations by Florida, Michigan, Maine and Alaska.'<sup>323</sup> Reuters also commented: 'In addition to the state settlements, the company last year agreed to pay \$1.7bn to settle thousands of lawsuits by local government entities and individual consumers.'<sup>324</sup>

---

<sup>320</sup> Brian L. Schwalb, 'AG Schwalb Secures \$15.2 Million from JUUL for Preying on District Children and Lying to Consumers about its Dangerous E-Cigarette Products', Press Release, 12 April 2023, <https://oag.dc.gov/release/ag-schwalb-secures-152-million-juul-preying>

<sup>321</sup> Ibid.

<sup>322</sup> Associated Press, 'Juul to pay \$440m after years-long investigation into teen vaping', *The Guardian*, 7 September 2022, <https://www.theguardian.com/us-news/2022/sep/06/juul-teen-vaping-settlement-us-states>

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.



### C. School Districts Litigation

There has been concern about the statistics in respect of e-cigarette use among middle and high school students in the United States.<sup>325</sup>

Meredith Berkman and Dorian Fuhrman were Cofounders of Parents Against Vaping E-Cigarettes (PAVE).<sup>326</sup> They noted: ‘In early 2018, we discovered that a JUUL representative had entered our then teenage sons’ high school through an outside anti-addiction group and—without the school’s knowledge—told an assembly of 9th graders that JUUL was “totally safe”.’<sup>327</sup> They reflected: ‘This led three moms around a kitchen table to found Parents Against Vaping E-cigarettes, a grassroots movement that has since become the first national parent voice in the fight against the tobacco industry’s targeting of kids.’<sup>328</sup> PAVE pushed for legal action and regulatory action against Juul.

---

<sup>325</sup> Cooper M, Park-Lee E, Ren C, Cornelius M, Jamal A, Cullen KA. Notes from the Field: E-cigarette Use Among Middle and High School Students — United States, (2022) 71 *MMWR Morb Mortal Wkly Rep* 1283–1285. DOI: <http://dx.doi.org/10.15585/mmwr.mm7140a3>.

<sup>326</sup> Andrea Joy Campbell, ‘AG’s Office Reaches \$462M Multistate Settlement with JUUL, Secures \$41M for Massachusetts: AG Campbell’s Office Holds JUUL Accountable for Company’s Role in Nationwide Youth Vaping Epidemic’, Office of the Attorney-General of Massachusetts, 12 April 2023, <https://www.mass.gov/news/ags-office-reaches-462m-multistate-settlement-with-juul-secures-41m-for-massachusetts>

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

Hundreds of school districts in the United States have brought legal action against vaping and e-cigarette companies because of concerns about the impact of vaping on the health and education of children.<sup>329</sup>

The Ava R-1 School District in Missouri filed an action against Juul in 2019.<sup>330</sup> The District accused Juul of racketeering related to marketing to minors, being a public nuisance, and gross negligence. The lawsuit complained that schools have had to spend ‘significant resources to combat skyrocketing use of Juul products by students’.<sup>331</sup> The complaint lamented: ‘Because JUUL’s marketing to youth was so effective and the resulting rise in student vaping was so quick, little research exists on the effectiveness of prevention and cessation methods.’<sup>332</sup> The complaint observed: ‘Schools are, thus, forced to attack the epidemic from multiple angles, each requiring significant expenditures of their limited resources.’<sup>333</sup> The Missouri complaint accused Juul of ‘viral marketing’ campaigns and advertising using influencers, which were targeted at young people. The complaint highlighted that students ‘would not fully realize the dangerous and addictive nature of JUUL products and the long-term complications nicotine addiction can present, or that, due to their youth, inexperience and/or immaturity of judgment, would recklessly disregard such risks.’<sup>334</sup>

---

<sup>329</sup> Jessy Edwards, ‘Almost 300 School Districts Join Class Action Lawsuit Against Juul’, *Top Class Actions*, 18 June 2021, <https://topclassactions.com/lawsuit-settlements/consumer-products/ecigarette/almost-300-school-districts-join-class-action-lawsuit-against-juul/>

<sup>330</sup> Kari Paul, ‘More than a Dozen US School Districts sue Juul and other Vape Companies’, *The Guardian*, 1 December 2019, <https://www.theguardian.com/society/2019/dec/01/juul-vape-lawsuits-e-cigarettes-smoking-health>

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

The school district lawsuits were consolidated in the Federal District Court in San Francisco, and a representative matter is scheduled for trial. Jonathan P. Kieffer, a partner with the Kansas City, Mo., law firm of Wagstaff & Cartwell, has organised many of the school district suits and represents the San Francisco district in the bellwether case.<sup>335</sup> The lawsuit alleged that Juul and certain other defendants ‘targeted kids as their customer base.’<sup>336</sup> The lawsuit explained:

JUUL products were designed to appear slick and high-tech like a cool gadget, including video-game-like features like ‘party mode.’ [Juul] offered kid-friendly flavors like mango and cool mint, ... all because defendants knew that flavors get young people hooked. Under the guise of youth smoking prevention, [Juul] sent representatives directly to schools to study teenager e-cigarette preferences.<sup>337</sup>

Further, the lawsuit alleged that ‘JLI, the Management Defendants and Altria engaged in a campaign of deceit, through sophisticated mass media and social media communications, advertisements and otherwise, about the purpose and dangers of JUUL products.’<sup>338</sup> The lawsuit emphasized: ‘JUUL products’ packaging and

---

<sup>335</sup> Mark Walsh, ‘School Districts’ Legal Battle With Juul Isn’t Over’, *Education Week*, 8 September 2022, <https://www.edweek.org/policy-politics/school-districts-legal-battle-with-juul-isnt-over/2022/09>

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Loeff Cabraser Files Federal RICO, Negligence, and Nuisance Lawsuit Against JUUL and Altria on Behalf of the Boulder Valley (Colorado) School District for Deceptive and Misleading Youth Targeting and Devastating Injuries from JUUL E-Cigarettes, <https://www.businesswire.com/news/home/20200918005556/en/Lieff-Cabraser-Files-Federal-RICO-Negligence-and-Nuisance-Lawsuit-Against-JUUL-and-Altria-on-Behalf-of-the-Boulder-Valley-Colorado-School-District-for-Deceptive-and-Misleading-Youth-Targeting-and-Devastating-Injuries-from-JUUL-E-Cigarettes>

advertising grossly understates the nicotine content in its products.’<sup>339</sup> In addition to the RICO claims, the lawsuit included causes of action for negligence, negligence per se, and violations of public nuisance law.

The settlement between Juul and 30 states does not necessarily resolve the separate litigation brought by hundreds of school districts.<sup>340</sup> Heidi Li Feldman, a professor at Georgetown University Law Center, commented: ‘Settlements occur party by party, so settling with the states is not going to affect litigations brought by other entities such as school boards and cities, because the other entities are asserting different harms.’<sup>341</sup> She observed: ‘I think the legacy of the tobacco litigation prompted municipalities and school boards to be more on their toes to make sure that harms particular to them were addressed by resolution of any lawsuits against a business.’<sup>342</sup>

However, it should be noted that some school districts have reached settlements with Juul. For instance, the San Francisco Unified School District has announced that it had reached a settlement with Juul Labs – (but did not reveal the exact nature of the settlement).<sup>343</sup>

---

<sup>339</sup> Ibid.

<sup>340</sup> Mark Walsh, ‘School Districts’ Legal Battle With Juul Isn’t Over’, *Education Week*, 8 September 2022, <https://www.edweek.org/policy-politics/school-districts-legal-battle-with-juul-isnt-over/2022/09> and San Francisco Unified School District, ‘SFUSD Announces Settlement in Lawsuit with Juul’, Press Release, 8 December 2022, <https://www.sfusd.edu/about-sfusd/sfusd-news/press-releases/2022-12-08-sfusd-announces-settlement-lawsuit-juul>

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> CBS Bay Area, ‘San Francisco Unified settles Federal Lawsuit against Juul’, *CBS Bay Area*, 8 December 2022, <https://www.cbsnews.com/sanfrancisco/news/sfusd-juul-federal-lawsuit-settlement-youth-vaping/>

PAVE observed that, while encouraged by legal settlements, there remained much greater work to do in containing the public health crisis caused by vaping and e-cigarettes: ‘By enormously profiting from peddling a market-disrupting tobacco product to kids, JUUL and its ruthless investors spawned thousands of bad actors who have followed their example.’<sup>344</sup> They observed: ‘Companies including Puff Bar, Elf Bar, Air Bar, Myle, and many others continue to target children with flavored products that continue to evade regulation and exploit loopholes, greatly benefiting from the lack of enforcement.’<sup>345</sup> PAVE highlighted ‘the ongoing adolescent public-health crisis of youth vaping with more than 2.5 million teens using these products on a regular basis.’<sup>346</sup> PAVE called for greater regulatory action: ‘We need to do much more to address the root causes of youth vaping, such as aggressive marketing and easy availability; FDA’s continuing delays of its regulatory process; and the need for effective prevention and cessation programs.’<sup>347</sup>

#### **D. First Nations Action**

There have also been lawsuits relating to how e-cigarette companies have targeted Indigenous First Nations in the United States.

---

<sup>344</sup> PAVE, ‘Final Multi-State JUUL Settlement: Statement from Parents Against Vaping e-cigarettes Regarding Today’s Announcement’, Press Release, 12 April 2023, <https://www.parentsagainstvaping.org/final-multi-state-juul-settlement>

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

In a product liability case in Oklahoma, Cherokee Nation sued Juul for preying on Native American youth.<sup>348</sup> The lawsuit alleged: ‘A particularly insidious marketing practice of Juul’s was to use Native Americans as a testing ground for its products.’<sup>349</sup> The Cherokee Nation noted that there was evidence that Juul used Native American tribes as ‘guinea pigs’ for test their products and marketing methods. Juul sold vaping ‘starter kits’ to various tribes and encouraged tribal governments to provide the kits free of charge to their citizens. Principal Chief Chuck Hoskin, Jr commented: ‘Juul created a vaping epidemic throughout this country, but Native American teenagers in the Cherokee Nation and others were used by these companies in a way that was truly evil.’<sup>350</sup> The lawsuit sought injunctive relief, compensatory damages, disgorgement, restitution, punitive damages, and any other relief allowed by law against the defendants.<sup>351</sup>

In 2022, a California federal judge has denied JUUL’s motion to dismiss two bellwether lawsuits filed by First Nations in multidistrict litigation challenging the company’s marketing of its e-cigarettes to youth.<sup>352</sup> Saint Regis Mohawk Tribe and the Grand Traverse Band of Ottawa and Chippewa Indians have argued that Juul has breached the *Racketeer Influenced and Corrupt Organizations Act* (RICO).

---

<sup>348</sup> Beasley Allen, ‘Cherokee Nation Sues Juul for Preying on Native American Youth’, Press Release, 15 September 2020, <https://www.beasleyallen.com/article/cherokee-nation-sues-juul-for-preying-on-native-american-youth/>

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

<sup>351</sup> *The Cherokee Nation v. JUUL Labs, Inc. et al* (2020), 6:20-cv-00345

<sup>352</sup> Anne Bucher, ‘Tribes’ JUUL MDL Survives Dismissal Bid’, Top Class Actions, 3 February 2022, <https://topclassactions.com/lawsuit-settlements/consumer-products/ecigarette/tribes-juul-mdl-survives-dismissal-bid/>

## E. Federal Action

In 2019, Senator Richard Durbin – and 10 US Senate colleagues – launched an inquiry into Juul Labs.<sup>353</sup> The Senators wrote: ‘While JUUL has promised to address youth vaping through its modest voluntary efforts, by accepting \$12.8 billion from Altria—a tobacco giant with such a disturbing record of deceptive marketing to hook children onto cigarettes—JUUL has lost what little remaining credibility the company had when it claimed to care about the public health.’<sup>354</sup> The Senators warned: ‘While you and your investors may be perfectly content with hooking an entire new generation of children on your tobacco products in order to increase your profit margins, we will not rest until your dangerous products are out of the hands of our nation’s children.’<sup>355</sup>

In 2020, Senator Elizabeth Warren and a number of other politicians questioned the publication of exploitative e-cigarette advertisements by tobacco companies during the COVID-19 pandemic.<sup>356</sup> The United States politicians highlighted a study by public health experts from Stanford University which revealed that tobacco subsidiaries had

---

<sup>353</sup> Senator Richard Durbin, ‘Durbin & Senators To Juul: You Are More Interested In Profits Than Public Health’ Press Release, 8 April 2019, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-and-senators-to-juul-you-are-more-interested-in-profits-than-public-health>

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Senator Elizabeth Warren, ‘Warren, Blumenthal, Durbin, Krishnamoorthi and DeGette Question Tobacco Companies Exploitative e-Cigarette Advertisements During the COVID-19 Pandemic’, Press Release, 22 December 2020, <https://www.warren.senate.gov/newsroom/press-releases/warren-blumenthal-durbin-krishnamoorthi-and-degette-question-tobacco-companies-exploitative-e-cigarette-advertisements-during-the-covid-19-pandemic>

‘chosen to exploit a global pandemic for marketing purposes.’<sup>357</sup> Warren and her colleagues wrote: ‘These advertisements are a blatant exploitation of a pandemic that has killed nearly two million people across the world and devastated the lives of countless more.’<sup>358</sup> The politicians commented that the advertisements are ‘reckless and endanger millions, especially as countries around the globe are experiencing yet another surge in cases.’<sup>359</sup> The politicians commented: ‘This attempt to profit off the back of a global health crisis, reminiscent of decades of false and misleading advertising about cigarettes by tobacco companies, represents a callous indifference to the lives and well-being of millions of people across the world.’<sup>360</sup>

In 2021, Senator Warren and her colleagues called for regulatory scrutiny of Juul by the Food and Drug Administration, and the Federal Trade Commission.<sup>361</sup> Senator Warren wrote: ‘The FDA and FTC should use their authority to swiftly investigate, and put an end to, the tobacco industry’s disturbing PR tactics and ensure that Juul can no longer deceive the public.’<sup>362</sup> Senator Blumenthal commented: ‘Protecting communities clearly requires that the FDA remove Juul from the market and FTC immediately pursue an investigation and enforcement measures.’<sup>363</sup>

---

<sup>357</sup> Ibid. Divya Ramamurthi, Cindy Chau, and Robert K Jackler, ‘Exploitation of the COVID-19 Pandemic by e-Cigarette Marketers’ (2020) *Tobacco Control* <https://tobaccocontrol.bmj.com/content/30/e1/e56>

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

<sup>361</sup> Senator Elizabeth Warren, ‘Warren, Blumenthal Blast Juul’s Deceptive Practices, Call for Close FDA and FTC Scrutiny’, Press Release, 5 August 2021, <https://www.warren.senate.gov/newsroom/press-releases/warren-blumenthal-blast-juuls-deceptive-practices-call-for-close-fda-and-ftc-scrutiny>

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.



In June 2022, the Biden Administration sought to stop Juul from selling its e-cigarettes.<sup>364</sup> Dr Robert Califf, Food and Drug Administration commissioner, observed: ‘The agency has dedicated significant resources to review products from the companies that account for most of the US market.’<sup>365</sup> He noted: ‘We recognize these make up a significant part of the available products and many have played a disproportionate role in the rise in youth vaping.’<sup>366</sup> The Food and Drug Administration has observed that Juul had failed to provide sufficient evidence that its devices helped people quit smoking. The United States Court of Appeals for the D.C. Circuit issued a temporary administrative stay of the marketing denial order for Juul Labs.<sup>367</sup>

In 2023, members of the United States Congress called on the Biden Administration to take further action to prevent the marketing and sale of e-cigarette products to middle and high school-aged children.<sup>368</sup> U.S. Rep. Sheila Cherfilus-McCormick commented: ‘These cigarettes are marketed and targeted towards children [and] many of our kids are smoking them.’<sup>369</sup> She has introduced a bill in the House of Representatives, which

---

<sup>364</sup> United States Food and Drug Administration, ‘FDA Denies Authorization to Market JUUL Products Currently Marketed JUUL Products Must Be Removed from the US Market’, Press Release, 23 June 2022, <https://www.fda.gov/news-events/press-announcements/fda-denies-authorization-market-juul-products>

<sup>365</sup> Dominic Rushe, ‘E-cigarettes: FDA bans Market-Leading Juul in Blow to US Tobacco Industry’, *The Guardian*, 24 June 2022, <https://www.theguardian.com/society/2022/jun/23/e-cigarettes-fda-bans-juul-vaping>

<sup>366</sup> Ibid.

<sup>367</sup> *Juul Labs Inc. v. United States Food and Drug Administration* No. 22-1123, 24 June 2022 (United States Court of Appeals for the District of Columbia Circuit).

<sup>368</sup> Gerren Keith Gaynor, ‘Congress calls on Biden administration to Better Regulate Flavored Disposable E-cigarettes to Protect Youth’, *Yahoo! News*, 26 February 2023, <https://news.yahoo.com/congress-calls-biden-administration-better-182538281.html>

<sup>369</sup> Ibid.

seeks to compel the federal government to better regulate e-cigarette manufacturers. The *Disposable ENDS Product Enforcement Act* of 2023 would direct HHS, which runs the Food and Drug Administration, to update its guidance on enforcing electronic nicotine delivery systems – or e-cigarettes – and ‘other deemed products.’<sup>370</sup>

Senator Dick Durbin of Illinois also raised his concerns about the use of e-cigarettes among young people in a letter addressed to FDA Commissioner Robert Califf.<sup>371</sup> In a February 2023 letter, Durbin challenged Califf to act more decisively:

To my dismay, and contradicting federal law, FDA has allowed unauthorized e-cigarette products to enter, and remain on the market for years. And just recently, on your watch, FDA stated that it will not finish review of applications for the most popular e-cigarettes until December 31, 2023 – more than two years past a court order deadline to finalize review of these products. That is stunning.<sup>372</sup>

Durbin’s letter despaired of the impact of regulatory delays: ‘We can estimate that between now, and FDA’s projected timeline, up to 1 million children are at risk of starting to use e-cigarettes.’<sup>373</sup>

---

<sup>370</sup> *Disposable ENDS Product Enforcement Act* of 2023 (US) <https://www.congress.gov/bill/118th-congress/house-bill/901?s=1&r=11>

<sup>371</sup> Gerren Keith Gaynor, ‘Congress calls on Biden administration to Better Regulate Flavored Disposable E-cigarettes to Protect Youth’, *Yahoo! News*, 26 February 2023, <https://news.yahoo.com/congress-calls-biden-administration-better-182538281.html>

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

Journalist Lauren Etter has discussed the role of the US Food and Drug Administration.<sup>374</sup> She has reflected on the challenges facing the regulatory body:

This is one of the most politicized products in the world. You have the tobacco industry right now, as we speak, going to great lengths to try to influence the FDA to reeducate Americans about nicotine. Altria has told the FDA that they believe that some of the funding that they've been using on anti-vaping campaigns should also be used on teaching Americans that nicotine isn't unhealthy. So the FDA is under huge pressure by the industry to go in this direction of harm reduction. And, of course, you have the anti-vaping people, the youth tobacco prevention people who want to see less of these products on the market because they continue to pose a threat to young people. I think the FDA is in an impossible position. If they do not approve Juul, I think there's going to be lawsuits all around. It would look terrible for the FDA to single-handedly put an American company out of business, which is what would happen if they don't grant this regulatory authorization.<sup>375</sup>

Etter noted: 'So it's a very complicated, controversial issue that has so many different facets to it that there's absolutely all kinds of political pressure and lobbying going on right now.'<sup>376</sup>

## **F. Federal Trade Commission**

---

<sup>374</sup> Nilay Patel, 'Juul and the Business of Addiction', *The Verge*, 30 June 2021, <https://www.theverge.com/22554477/juul-lauren-etter-interview-e-cigarettes-addiction>

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

In a study of competition law and policy, David Dayen focuses upon the monopolistic practices of tobacco companies in the United States.<sup>377</sup> As a case study, Dayen discusses the tobacco company Altria, which has had close links to Juul:

Altria had already navigated a tobacco market in the United States that over time was winnowed down from seven major companies to two (the other is Reynolds American). Together they control 80 percent of all tobacco sales. Consolidation has made the tobacco business viable despite fewer smokers, as the duopoly can raise prices without losing market share.<sup>378</sup>

Dayen highlights how Altria has sought to expand into other markets: ‘Altria’s other strategy has been to become a full-service vice factory, offering a variety of mind- and body-altering substances.’<sup>379</sup> He noted that ‘Altria completed its sweep of Big Sin with a 35 percent stake in Juul, another example of an industry trending to a monopoly from a standing start.’<sup>380</sup> Dayen noted that ‘the limitless resources and lobbying heft of an established merchant of death could rescue an upstart nicotine addiction device under federal attack.’<sup>381</sup> He feared that ‘monopoly could save Juul, as an escape hatch for an old Big Sin power to buy in on the next Big Sin wave.’<sup>382</sup>

---

<sup>377</sup> David Dayen, *Monopolized: Life in the Age of Corporate Power*, London and New York: The New Press, 2020.

<sup>378</sup> Ibid., 137.

<sup>379</sup> Ibid., 137.

<sup>380</sup> Ibid., 138.

<sup>381</sup> Ibid., 139.

<sup>382</sup> Ibid., 139.

The Federal Trade Commission has taken legal action to unwind Altria’s \$12.8 billion investment in competitor JUUL.<sup>383</sup> The Federal Trade Commission alleged that Altria’s acquisition of JUUL shares and the associated agreements together constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 5 of the *Federal Trade Commission Act*, and substantially lessened competition in violation of Section 7 of the *Clayton Act*.

In March 2023, Altria announced that it had given up its investment in Juul in exchange for some of Juul’s intellectual property.<sup>384</sup> Billy Gifford, Altria’s Chief Executive Officer observed: ‘We believe exchanging our JUUL ownership for intellectual property rights is the appropriate path forward for our business.’<sup>385</sup> He commented: ‘JUUL faces significant regulatory and legal challenges and uncertainties, many of which could exist for many years.’<sup>386</sup>

### **Recommendation 5**

**Australian policy-makers should take note of the massive litigation taken against e-cigarette company Juul by States, School Districts, Indigenous Communities, and others – resulting in billions of dollars in settlements thus far. Such litigation has extensively documented the adverse impacts of e-cigarettes upon consumer rights, public health, education, children’s rights, and Indigenous rights. Australian policy-makers should also take**

---

<sup>383</sup> Federal Trade Commission, ‘FTC Sues to Unwind Altria’s \$12.8 Billion Investment in Competitor JUUL’, Press Release, 1 April 2020, <https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul>

<sup>384</sup> Altria, ‘Altria Exchanges Minority Stake in JUUL Labs for Heated Tobacco Intellectual Property Rights’, 2023, <https://investor.altria.com/press-releases/news-details/2023/Altria-Exchanges-Minority-Stake-in-JUUL-Labs-for-Heated-Tobacco-Intellectual-Property-Rights/default.aspx>

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

**note of further legislative moves by the Biden Administration and the United States Congress, and regulatory action by the US Food and Drug Administration, and the Federal Trade Commission.**

## 6. THE UNITED KINGDOM

In the United Kingdom, the Conservative Government has taken a laissez-faire approach to the regulation of e-cigarettes and vaping. The United Kingdom Government has promoted e-cigarettes as a tobacco cessation aid in the United Kingdom.<sup>387</sup> There has been a pretty heated debate as to whether this approach will be helpful for England's plan to achieve a smoke-free generation.<sup>388</sup>

There have been similar concerns as elsewhere about the marketing of vapes to children in the United Kingdom. England's Chief Medical Officer Chris Whitty has advised MPs:

I think everyone agrees that marketing vaping, an addictive product, with ... unknown consequences for developing minds, to children is utterly unacceptable. Yet it is happening. There's no doubt it's happening because, although from a low base, the rates of vaping have doubled in the last couple of years among children. So that is an appalling situation.<sup>389</sup>

---

<sup>387</sup> See for instance NHS, 'Using E-Cigarettes to Stop Smoking', <https://www.nhs.uk/live-well/quit-smoking/using-e-cigarettes-to-stop-smoking/> and ABC News, 'Britain to encourage smokers to Swap Cigarettes for Vapes in World-first Health Initiative', ABC News, 11 April 2023, <https://www.abc.net.au/news/2023-04-11/britain-to-encourage-smokers-to-swap-cigarettes-for-vapes/102209174>

<sup>388</sup> United Kingdom Government, *Towards a Smoke-Free Generation: A Tobacco Control Plan for England*, <https://www.gov.uk/government/publications/towards-a-smoke-free-generation-tobacco-control-plan-for-england>

<sup>389</sup> Andrew Gregory, 'Marketing of Vapes to Children "Utterly Unacceptable", Says Chris Whitt', *The Guardian*, 22 February 2023, <https://www.theguardian.com/uk-news/2023/feb/21/chris-whitty-calls-for-urgent-action-over-marketing-of-vapes-to-children-in-england>

Whitty commented: ‘We need to be much more serious, in my view, that trying everything we can to reduce vaping in children, as well as smoking in children.’<sup>390</sup>

Action on Smoking and Health (ASH) has submitted to the United Kingdom Government that vapes should be taxed and displayed in plain packaging behind the counter to reduce their popularity among children.<sup>391</sup> ASH chief executive, Deborah Arnott, argued that the United Kingdom government should tighten regulation and increase enforcement because vaping is ‘not risk free’:

Children who vape mainly use cheap disposables, which can be bought for under a fiver. Making them less affordable by adding a specific tax for single-use disposable vapes in the March budget would be a simple first step, reducing child vaping and the vast quantities of single-use vapes being thrown into landfill.<sup>392</sup>

The Local Government Association also called for a tightening of regulations on the display and marketing of vaping products – in line with restrictions on tobacco marketing.

The United Kingdom Advertising Standards Authority has brought a number of actions against e-cigarette companies over false and misleading advertising.<sup>393</sup> In 2023, the ASA found that the VPZ VapeClinic made medicinal claims for smoking cessation

---

<sup>390</sup> Ibid.

<sup>391</sup> Rachel Hall, ‘UK campaigners call for tighter regulations on vapes to match tobacco’, *The Guardian*, 12 February 2023, <https://www.theguardian.com/society/2023/feb/11/uk-campaigners-call-for-tighter-regulations-on-vapes-to-match-tobacco>

<sup>392</sup> Ibid.

<sup>393</sup> Advertising Standards Authority, ‘Vaping, Smoking and Drugs’, [https://www.asa.org.uk/topic/vaping\\_smoking\\_and\\_drugs.html](https://www.asa.org.uk/topic/vaping_smoking_and_drugs.html)



which were prohibited by the CAP code: ‘We told CCHG Ltd not to make smoking cessation claims about their e-cigarette products in the absence of a relevant MHRA licence’.<sup>394</sup>

In 2023, the ASA took action over Facebook advertising by Kick Ash Vapes: ‘We told Kick Ash Vapes Ltd that marketing communications with either the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components, which were not licensed as medicines, should not be made on their website or from a public Facebook account in future, unless they had taken steps to ensure they would only be distributed to those following their account and would not be seen by other users.’<sup>395</sup>

In mid 2022, ASA took action against an Instagram story on Geordie Shore star Louis Shaw’s account, seen on 20 December 2021, showed a hand holding two boxes of e-cigarettes.<sup>396</sup> The ASA warned that the advertising could not appear again in the form complained of: ‘We told Relx (UK) Ltd and Louis Shaw to ensure that marketing communications with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components that were not licensed medicines should not be made from a public Instagram account in future, unless they had taken steps to ensure they would only be distributed to those following their account and would not be seen by other users.’<sup>397</sup>

---

<sup>394</sup> ASA Ruling on CCHG Ltd t/a VPZ, 15 February 2023, <https://www.asa.org.uk/rulings/cchg-ltd-a22-1168157-cchg-ltd.html>

<sup>395</sup> ASA Ruling on Kick Ash Vapes Ltd, 1 February 2023, <https://www.asa.org.uk/rulings/kick-ash-vapes-ltd-a22-1146970-kick-ash-vapes-ltd.html>

<sup>396</sup> ASA Ruling on Relx (UK) Ltd, 29 June 2022, <https://www.asa.org.uk/rulings/relx--uk--ltd-a21-1138382-relx--uk--ltd.html>

<sup>397</sup> Ibid.

In 2021, the ASA took action against the Yoo Delivery Company Ltd’s Facebook page: ‘We told Yoo Delivery Company Ltd to ensure that future ads for their delivery service did not advertise cigarettes, for example, by removing the images of cigarettes and claims about the delivery of cigarettes.’<sup>398</sup>

There has been alarm that Chinese vaping companies have been ignoring United Kingdom advertising rules, and selling and marketing products to children.<sup>399</sup> An investigation by *The Observer* found that ‘Chinese-owned brand Elf Bar is fuelling the boom in e-cigarettes among young people as social media influencers on TikTok promote its goods in an apparent breach of advertising rules’.<sup>400</sup>

In 2023, the United Kingdom Government has enhanced its enforcement action in respect of vaping and e-cigarettes being illegally sold to youth.<sup>401</sup> Trading standards has set up an ‘illicit vapes enforcement squad’, which will conduct test purchases and remove banned products from shops and at borders. Health minister Neil O’Brien commented that the government was ‘concerned about the rise in youth vaping,

---

<sup>398</sup> ASA Ruling on Yoo Delivery Company Ltd, 6 January 2021, <https://www.asa.org.uk/rulings/yoo-delivery-company-ltd-a20-1081828-yoo-delivery-company-ltd.html>

<sup>399</sup> Shanti Das and Jon Ungeod-Thomas, ‘Chinese Vaping Giant Flouting UK Advertising Rules on Selling to Children’, *The Guardian*, 17 July 2022, <https://www.theguardian.com/society/2022/jul/17/chinese-vaping-giant-flouting-uk-advertising-rules-on-selling-to-children>

<sup>400</sup> Ibid.

<sup>401</sup> Shanti Das, ‘Underage Vaping to be Targeted by UK Government’s “Enforcement Squad”’, *The Guardian*, 9 April 2023, [https://www.theguardian.com/society/2023/apr/09/underage-vaping-to-be-targeted-by-uk-governments-enforcement-squad?utm\\_source=dlvr.it&utm\\_medium=twitter](https://www.theguardian.com/society/2023/apr/09/underage-vaping-to-be-targeted-by-uk-governments-enforcement-squad?utm_source=dlvr.it&utm_medium=twitter)

particularly the increasing use of disposable vaping products.’<sup>402</sup> He observed that the measures were designed to ‘clamp down’ on those businesses that were ‘getting children hooked on nicotine’.<sup>403</sup>

Inter Scientific has engaged in testing of vaping and e-cigarette brands to check whether they are following regulations in England and Wales.<sup>404</sup> *The Guardian* summarized the findings of the study:

The data showed that oversized and overstrength vapes are being sold unlawfully in shops. Laboratory analysis of 52 products bought in England showed 73% were above the legal e-cigarette tank capacity of 2ml. More than 40% of those tested had been filled with 5ml of liquid or more. The analysis also showed that eight devices purporting to contain no addictive substances did contain some, with many containing almost 20mg/ml of nicotine – the legal limit in the UK. One vape had levels more than 50% higher than the legal limit.<sup>405</sup>

John Herriman, chief executive of the Chartered Trading Standards Institute, said it continued “to be concerned about the vast amount of illegal and non-compliant vapes available for sale and would urge manufacturers, importers, distributors and retailers to do more to ensure the products they are selling comply with all of the regulations’.<sup>406</sup> A Department of Health and Social Care spokesperson said: ‘We will not tolerate the sale

---

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

<sup>404</sup> Sarah Marsh, ‘Some “Nicotine-free” Vapes High in Addictive Substances, Tests Reveal’, *The Guardian*, 17 April 2023, <https://www.theguardian.com/society/2023/apr/16/some-nicotine-free-vapes-high-addictive-substances-tests-show>

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

of illegal products and will take necessary actions to remove them from shelves and stop them from crossing our borders.’<sup>407</sup>

Conservative MP Dr Caroline Johnson (member for Sleaford and North Hykeham) has proposed in the United Kingdom House of Commons a Bill to prohibit the sale of disposable electronic cigarettes; and for connected purposes.<sup>408</sup> She has been concerned about the growing public health problems in respect of e-cigarettes. Johnson commented that e-cigarettes have predominantly been marketed to youth:

It is therefore crucial that ... we protect children and young people from being lured into a lifetime of addiction. Vaping manufacturers often insist that their products are intended for adults only but, at the same time, their product design appeals to a far more impressionable audience. They come in a range of bright, attractive colours. Some of the most popular flavours include bubble gum, cotton candy and strawberry ice cream. Their price and disposability makes the habit easier to hide from parents and teachers, who are unlikely to approve.<sup>409</sup>

Johnson observed that e-cigarettes were being mainly used as nicotine delivery systems: ‘Chronic nicotine use is linked with a range of diseases affecting the heart, blood and nervous system, as well as impairing brain development in young people and increasing the risk of anxiety disorders.’<sup>410</sup>

---

<sup>407</sup> Ibid.

<sup>408</sup> The Hon. Caroline Johnson, ‘Disposable Electronic Cigarettes (Prohibition of Sale)’, United Kingdom House of Commons, Volume 727: debated on Wednesday 8 February 2023, [https://hansard.parliament.uk/commons/2023-02-08/debates/D9DE57D8-C7FD-4611-B4A4-E74648B6B85C/DisposableElectronicCigarettes\(ProhibitionOfSale\)](https://hansard.parliament.uk/commons/2023-02-08/debates/D9DE57D8-C7FD-4611-B4A4-E74648B6B85C/DisposableElectronicCigarettes(ProhibitionOfSale))

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

Johnson observed: ‘Beyond the health effects of the disposable vapes is significant environmental harm.’<sup>411</sup> She reflected: ‘Disposable vapes have become part of the national embarrassment that we see everywhere, every day, littering our streets, our parks and our rivers like confetti.’<sup>412</sup> Johnson contended: ‘By banning the sale of disposable vapes, we will encourage a more sustainable way of utilising e-cigarettes as quitting aids and make vaping less accessible to children, preventing an epidemic of teenage nicotine addicts and protecting our planet.’<sup>413</sup>

So, from within the ruling Conservative Party in the United Kingdom, there has been a backlash against its laissez-faire approach to the regulation of e-cigarettes and vaping.

#### **Recommendation 6**

**The United Kingdom’s laissez-faire approach to the regulation of e-cigarettes and vaping has been problematic. There has been a backlash within the Conservative Party to this approach, with MPs raising concerns about the adverse impact of e-cigarettes upon public health and the environment.**

---

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

## 7. NEW ZEALAND

Like the United Kingdom, New Zealand has taken a somewhat more permissive approach on e-cigarettes and vaping, because of a hope that such products would have value for tobacco cessation efforts.

New Zealand does have prohibitions and requirements for the sale of notifiable products in respect of e-cigarettes and vaping.<sup>414</sup> There is a prohibition on sales to minors. The New Zealand Government provides enforcement mechanisms for online sales to minors: ‘Under section 40 of the *Smokefree Environments and Regulated Products Act*, it is an offence for a person to sell a notifiable product to a person younger than 18 years or, having sold a notifiable product to a person of any age, to deliver it, or arrange for it to be delivered, to a person younger than 18 years.’<sup>415</sup> There are restrictions on coloring and flavorings on e-cigarettes and vaping in New Zealand. Products need to be notified for sale in New Zealand. There is a prohibition on the advertisement of notifiable products for e-cigarettes and vaping similar to that of tobacco products. There are prohibitions on free, discounted and bundled distribution and supply. There is a prohibition on the sale of products for chewing (or similar oral use). There is a prohibition on the display of certain trading names for general retailers.

---

<sup>414</sup> New Zealand Ministry of Health, ‘Prohibitions and requirements for the sale of notifiable products’, <https://www.health.govt.nz/our-work/regulation-health-and-disability-system/regulation-vaping-herbal-smoking-and-smokeless-tobacco-products/information-retailers-and-distributors-notifiable-products/prohibitions-and-requirements-sale-notifiable-products>

<sup>415</sup> Ibid.

There have been calls for New Zealand to reconsider its approach to the regulation of e-cigarettes and vaping in light of the announcement of Australia's new policy from the Albanese Government. General Practice New Zealand chair Dr Bryan Betty has called for e-cigarettes to be pharmacy-only products in New Zealand. He said there needed to be an urgent debate over what New Zealand could do next: 'Maybe the Australian experience or what's happening there at this point, will give an impetus for those discussions and real thinking about what is done in the New Zealand context.'<sup>416</sup> Betty commented: 'I think we need to start to have a coherent debate about this, a transparent debate about what we need to do, so we're not in a situation in twenty years time looking back and saying we missed the opportunity.'<sup>417</sup>

Health Minister Dr Ayesha Verrall (from the New Zealand Labor Party) admitted the right balance has not been struck between what vaping was intended for, and what was actually happening: 'It is not good that young people are addicted, and vaping does cause addiction.'<sup>418</sup> She said: 'So that's why we do want to move in terms of making them less attractive, less available, and also making sure that the law is enforced and there isn't sales to young people.'<sup>419</sup> Verrall has recently sought consultation on regulatory measures to make vaping less attractive to young people. She observed: 'I think in terms of moving to that step that Australia has done, that would require a legislative change.'

---

<sup>416</sup> Giles Dexter, 'Urgent debate needed on future on vaping in New Zealand – GP', RNZ, 3 March 2023, <https://www.rnz.co.nz/news/political/489147/urgent-debate-needed-on-future-on-vaping-in-new-zealand-gp>

<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

National leader Christopher Luxon said he would support toughening up the legislation: ‘Originally [e-cigarettes] were introduced so they could help people come off smoking, but it's actually created a whole class and a new sector of addiction for young people’.<sup>420</sup> He commented: ‘So I think that it is time that we actually stop and take a look at what's actually going on and what rules are needed.’<sup>421</sup>

New Zealand is due to have an election shortly, so any legislative initiative would depend upon the composition of the next government.

**Recommendation 7**

**In light of the Albanese Government’s announcement of its policy on e-cigarettes, New Zealand policy-makers are currently reconsidering their approach to the regulation of e-cigarettes and vaping. Both the New Zealand Labor Party and the National Party have expressed a willingness to explore tougher regulations and legislation in respect of e-cigarettes and vaping.**

---

<sup>420</sup> Ibid.

<sup>421</sup> Ibid.



## 8. WORLD HEALTH ORGANIZATION

The *WHO Framework Convention on Tobacco Control* 2003 (FCTC) lays down a comprehensive framework for tobacco control.<sup>422</sup> The agreement is clearly relevant to the regulation of e-cigarettes and vaping. The World Health Organization (WHO) has expressed increasing concern about the proliferation of e-cigarettes, and their impact upon public health and the environment.

There has been discussion as to whether the framework should be further expanded to deal with e-cigarettes.<sup>423</sup> Tanya Buchanan, Kylie Lindorff, and Kristin Carson-Chahhoud have commented: ‘The WHO FCTC is not only relevant, but crucial when considering how e-cigarettes should be regulated.’<sup>424</sup> They recommend that ‘all governments who are signatories must urgently accelerate implementation and prioritize health over the tobacco industry’s pursuit of profit.’<sup>425</sup> They observed: ‘As part of their FCTC obligations, governments should take all regulatory measures available to them to prevent e-cigarette use by young people and non-smokers.’<sup>426</sup>

---

<sup>422</sup> *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/>

<sup>423</sup> Tanya Buchanan, Kylie Lindorff, and Kristin Carson-Chahhoud, ‘E-cigarette Regulation: Is it time for a new Framework Convention on Tobacco Control?’ (2023) 28 (3) *Respirology* 220-222 <https://onlinelibrary.wiley.com/doi/full/10.1111/resp.14466>

<sup>424</sup> Ibid.

<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

In 2020, the WHO has emphasized that ‘e-cigarettes are harmful to health.’<sup>427</sup> WHO noted that ‘the long-term effects of using e-cigarettes or being exposed to them are yet unknown’.<sup>428</sup> WHO observed nonetheless:

Nevertheless, the evidence is clear that the aerosols of the majority of electronic nicotine delivery systems (ENDS) contain toxic chemicals, including nicotine and substances that can cause cancer. ENDS on their own are associated with increased risk of cardiovascular diseases and lung disorders and adverse effects on the development of the fetus during pregnancy. ENDS are undoubtedly harmful, should be strictly regulated, and, most importantly, must be kept away from children. Nicotine is highly addictive and found in most e-cigarettes. Both tobacco products and e-cigarettes pose risks to health and the safest approach is not to consume either.<sup>429</sup>

WHO was worried: ‘It is of particular public health concern that increasingly children and adolescents take up the use of e-cigarettes in some countries’.<sup>430</sup> WHO observed that ‘there is a growing body of evidence in some countries that never-smoker adolescents who use ENDS at least double their chance of starting to smoke cigarettes later in life’.<sup>431</sup> WHO warned: ‘Exposing children and adolescents to nicotine can have long-lasting, damaging effects on brain development and lead to nicotine addiction.’<sup>432</sup>

---

<sup>427</sup> World Health Organization, ‘E-cigarettes are Harmful to Health’, 5 February 2020, <https://www.who.int/news/item/05-02-2020-e-cigarettes-are-harmful-to-health>

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

The *WHO Report on the Global Tobacco Epidemic 2021* has a focus on addressing new and emerging products.<sup>433</sup> The report begins with the headline message: ‘Electronic Nicotine Delivery Systems (ENDS) are addictive and not without harm.’<sup>434</sup> The report recommends that new and emerging products should be included in a comprehensive approach to tobacco control. The report highlights how tobacco manufacturers have entered the market for e-cigarettes and vaping. The report recognizes that Electronic Nicotine Delivery Systems vary greatly and are evolving rapidly. Likewise, there is a huge diversity in e-liquids and their contents. The report observes that there is growing evidence of harmful effects of Electronic Nicotine Delivery Systems. It reiterates that Nicotine is ‘highly addictive’ and ‘deleterious to adolescent brain development and poses risks during pregnancy.’<sup>435</sup> Moreover, other e-liquid components can also be harmful to health. The report maintains that the emergence of Electronic Nicotine Delivery Systems presents important threats and challenges to tobacco control.

The World Health Organization highlights that there are many regulatory mechanisms and options to protect populations against Electronic Nicotine Delivery Systems. The report encourages national states to ‘ensure continued focus on comprehensive evidence-based tobacco control measures to reduce nicotine addiction and tobacco use through all provisions of the WHO FCTC.’<sup>436</sup> The international institution observes: ‘Where manufacture, sale and distribution of ENDS is not prohibited, adopt appropriate regulatory options to achieve the key objectives of protecting the population from

---

<sup>433</sup> World Health Organization, *WHO Report on the Global Tobacco Epidemic 2021*, Geneva: World Health Organization, 2021, <https://www.who.int/publications/i/item/9789240032095>

<sup>434</sup> Ibid., 2.

<sup>435</sup> Ibid., 36.

<sup>436</sup> Ibid., 43.

potential health risks; preventing unproven claims being made about ENDS; and protecting tobacco control activities from commercial interests.’<sup>437</sup> The World Health Organization asks nation states to ‘consider prohibiting the sale of ENDS that the user can modify (either its features or e-liquid ingredients).’<sup>438</sup> The World Health Organization observes: ‘Where a ban on manufacture, sale and distribution of ENDS is the preferred regulatory approach to protect the health of a country’s population (in the wider context of tobacco control, and based on the specific domestic regulatory environment), countries should strictly implement the ban without any interference from the industry to ensure a high degree of protection for children and adolescents’.<sup>439</sup> The World Health Organization calls for monitoring and surveillance of Electronic Nicotine Delivery Systems to enable evidence-based policy regulation.<sup>440</sup>

In his foreword to the report, Dr Tedros Adhanom Ghebreyesus – the director-general of the World Health Organization – reflected upon the threat posed by e-cigarettes and vaping.<sup>441</sup> He highlighted: ‘While framing these products as a contribution to global tobacco control, the tobacco and related industries employ the same old marketing tactics to promote new tools to hook children on nicotine and circumvent tobacco legislation.’<sup>442</sup> Dr Tedros observed: ‘At the same time, they continue to fight measures and legislation designed to protect people from the many harms of tobacco across the

---

<sup>437</sup> Ibid., 43.

<sup>438</sup> Ibid., 43.

<sup>439</sup> Ibid., 43.

<sup>440</sup> Ibid., 43.

<sup>441</sup> World Health Organization, *WHO Report on the Global Tobacco Epidemic 2021*, Geneva: World Health Organization, 2021, 15, <https://www.who.int/publications/i/item/9789240032095>

<sup>442</sup> Ibid.

globe.’<sup>443</sup> In other media commitments, Dr Tedros highlighted the harm of e-cigarettes.<sup>444</sup> He observed that ‘Nicotine is highly addictive’ and ‘Electronic nicotine delivery systems (ENDS) are harmful, and must be better regulated.’<sup>445</sup> Dr Tedros recommended: ‘Where they are not banned, governments should adopt appropriate policies to protect their populations from the harms of ENDS, and to prevent their uptake by children, adolescents and other vulnerable groups.’<sup>446</sup>

The World Health Organization is underwhelmed about the utility of e-cigarettes for the purposes of tobacco cessation: ‘To date, evidence on the use of ENDS as a cessation aid is inconclusive.’<sup>447</sup> The institution observed: ‘In part due to the diversity of ENDS products and the low certainty surrounding many studies, the potential for ENDS to play a role as a population-level tobacco cessation intervention is unclear.’ The World Health Organization recommends:

To truly help tobacco users quit and to strengthen global tobacco control, governments need to scale up policies and interventions that we know work. Tried and tested interventions, such as brief advice from health professionals, national toll-free quit lines and cessation interventions delivered via mobile text messaging are recommended. Where economically feasible, governments should also consider promoting nicotine replacement therapies and non-nicotine pharmacotherapies for cessation.<sup>448</sup>

---

<sup>443</sup> Ibid.

<sup>444</sup> France 24, ‘WHO Sounds the Alarm on “Harmful” e-cigarettes’, *France 24*, 27 July 2021, <https://www.france24.com/en/live-news/20210727-who-sounds-the-alarm-on-harmful-e-cigarettes>

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> World Health Organization, ‘Tobacco: E-cigarettes’, 25 May 2022, <https://www.who.int/news-room/questions-and-answers/item/tobacco-e-cigarettes>

<sup>448</sup> Ibid.

The World Health Organization has also warned about e-cigarette purveyors and tobacco companies making false and misleading health and therapeutic claims about their products.

The World Health Organization has also expressed concerns about the environmental impacts of vaping and e-cigarettes – in addition to its worries about the health implications of vaping and e-cigarettes.<sup>449</sup> Dr Vinayak Prasad – programme manager of the WHO Tobacco Free Initiative – and Andy Rowell – a senior research fellow at the University of Bath – have sought to analyse the greenwashing tactics and strategies of Big Tobacco.<sup>450</sup> Prasad and Rowell commented: ‘Vaping, electronic tobacco and nicotine products are creating a new wave of pollution, from the mining of materials for batteries to metal and plastic waste leaching into soil and water.’<sup>451</sup>

### **Recommendation 8**

**The World Health Organization has expressed concerns that e-cigarettes are harmful to public health, and deleterious to the environment. The *WHO Framework Convention on Tobacco Control 2003* provides a range of public health measures, which could be applied to the regulation of e-cigarettes. The World Health Organization supports bans or, at the very least, tight regulations on Electronic Nicotine Delivery Systems.**

---

<sup>449</sup> World Health Organization, *Tobacco: Poisoning Our Planet*, Geneva: World Health Organization, 2022, <https://www.who.int/publications/i/item/9789240051287>

<sup>450</sup> Vinayak Prasad and Andy Rowell, ‘Big Tobacco is Killing the Planet with Plastics. No Smokescreen should be allowed to Hide That’, *The Guardian*, 26 May 2022, [https://www.theguardian.com/global-development/2022/may/26/big-tobacco-is-killing-the-planet-with-plastics-no-smokescreen-should-hide-that-acc?CMP=share\\_btn\\_tw](https://www.theguardian.com/global-development/2022/may/26/big-tobacco-is-killing-the-planet-with-plastics-no-smokescreen-should-hide-that-acc?CMP=share_btn_tw)

<sup>451</sup> Ibid.

## 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.