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The Tobacco Endgame Avengers: Strategies for a Smokefree Future in Australia

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Strategies for a Smokefree Future in Australia**

Matthew Rimmer*

Abstract

This chapter explores contemporary issues and challenges in respect of tobacco control in Australia. It considers the role of Australia as a pathfinder in respect of developing and defending pioneering public health laws and regulations, which have then been adopted and adapted elsewhere around the world. This chapter examines the successful introduction and defence of plain packaging of tobacco products in the High Court of Australia. It highlights the ramifications of this decision for other fields of public health. This chapter considers the need to update tobacco control regulation to deal with social media and digital communication. It explores the challenges to tobacco advertising regulations posed by tobacco companies and e-cigarette companies in respect of the use of social media and Internet influencers. This chapter examines and evaluates the prospect of tobacco-endgame strategies. In particular, it looks at the T21 proposal in Tasmania, and spatial limitations and restrictions on smoking in Queensland. This chapter explores civil litigation against tobacco companies in Australia, and highlights the vulnerability of e-cigarette companies to legal action. It also investigates the potential of criminal liability for tobacco companies in Australia. This chapter considers the campaign for tobacco divestment, and the persistent problem of tobacco interference in policy-making in Australia. It concludes with the recommendation that Australia should pursue a tobacco endgame policy – much like its neighbour, New Zealand.

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Introduction

The *WHO Framework Convention on Tobacco Control* 2003 provides a comprehensive list of tobacco control measures to address the global tobacco epidemic.¹ The World Health Organization (WHO) has been considering the prospects of a tobacco endgame.² Adriana Blanco Marquizo of WHO has made several points about the design of a tobacco endgame.³ First, ‘endgame strategies should be supported by science, as would any other measure in the WHO FCTC.’⁴ Secondly, ‘the strategies should be adequate and feasible, taking into consideration what might be appropriate tobacco control measures in a particular culture.’⁵ Thirdly, ‘it is very important that we ensure that the endgame is not a trap for poor or minority populations, which are becoming an increasingly large percentage of global tobacco users.’⁶ Fourth, Marquizo highlights ‘the need for a multisectoral approach that engages all sectors – not only the health sector – and ensures a whole-of-society approach, with civil society as the

¹ *WHO Framework Convention on Tobacco Control* 2003, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) (FCTC). For a history of the agreement, see Gro Harlem Brundtland, *Madam Prime Minister: A Life in Power and Politics*, New York: Farrar, Straus and Giroux, 2002; Heather Wipfli, *The Global War on Tobacco: Mapping the World’s First Public Health Treaty*, Baltimore: John Hopkins University Press, 2015.

² AB Marquizo, ‘Tobacco Endgame’, World Health Organization, 11 February 2021. <https://www.who.int/fctc/secretariat/head/statements/2020/tobacco-endgame-ash-webinar/en/>

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

catalytic force behind this effort.’⁷ Tobacco endgame strategies certainly present a range of challenges in ethics and law.⁸

This chapter considers a collection of tobacco control strategies and policies in order to achieve a smoke-free Australia. Part 1 examines the landmark precedent in respect of plain packaging of tobacco products, and its ramifications for other tobacco control action, and public health measures. Part 2 considers some of the challenges in dealing with online tobacco advertising and Internet influencers. Part 3 explores age limitations and restrictions on smoking – with a case study of Tasmania’s T21 bill. Part 4 considers spatial limitations and restrictions on smoking – focusing upon the experience of Queensland. Part 5 reviews civil litigation against tobacco companies in Australia. It also raises the possibility of criminal action against tobacco companies and their directors in Australia. Part 6 focuses upon the movement for tobacco divestment in Australia. Part 7 considers the threat to tobacco interference to the achievement of public health goals in Australia. It is argued that Australia’s needs to develop a national tobacco endgame strategy – much like its neighbour, New Zealand, which has established the Smokefree Aotearoa 2025 Action Plan.⁹

⁷ Ibid.

⁸ B Thomas and L Gostin, ‘Tobacco Endgame Strategies: Challenges in Ethics and Law’ (2013) 22 *Tobacco Control* 155-157.

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

1. The Plain Packaging of Tobacco Products

Article 11 of the *WHO Framework Convention on Tobacco Control* 2003 highlights the need to take action in respect of the packaging and labelling of tobacco products.¹⁰

As Australia's Minister for Health, and later as Attorney-General, the Hon. Nicola Roxon introduced plain packaging of tobacco products in 2011. She explained the intent of the initiative in the Australian Parliament:

This is a world-first initiative, designed to remove the last vestige of glamour from tobacco products. The bill will require that tobacco products be sold in plain, drab dark-brown packets. The Gillard government is absolutely committed to reducing death and disease brought about by smoking. We want to help protect Australians. That is why we are prepared to lead the world on tackling smoking. Once enacted, these plain packaging laws will be the world's toughest laws on tobacco promotion. We are taking this action because tobacco is not like any other legal product. When used as intended, it is lethal.¹¹

¹⁰ *WHO Framework Convention on Tobacco Control* 2003, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) (FCTC).

¹¹ The Hon. N. Roxon, 'Second Reading Speech on *Tobacco Plain Packaging Bill* 2011 (Cth)', House of Representatives, Australian Parliament, 6 July 2011, 7708, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1874cb21-d37a-4c79-b92a-33a8298c9cbe%2F0028%22>

The Australian Government had to defend the public policy measures in multiple fora – including in the High Court of Australia; an investor tribunal; and the World Trade Organization.¹²

The High Court of Australia considered challenges by a number of tobacco companies to the introduction of plain packaging of tobacco products on constitutional grounds.¹³ By a 6-1 majority, the High Court of Australia found that the Commonwealth had not engaged in an acquisition of property of the tobacco companies. First, the High Court of Australia observed that there was a long history of the Commonwealth regulating the information of packaging. Kiefel J observed:

Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm. The labelling required for medicines and poisonous substances comes immediately to mind. Labelling is also required for certain foods, to both protect and promote public health.¹⁴

Second, the High Court of Australia emphasized that tobacco companies could not ignore government regulations merely because they held and exercised intellectual property rights. Third, the High Court of Australia found that there had not been an acquisition of property by the Commonwealth. Finally, the High Court of Australia noted that it did not need to engage

¹² For a history of Australia's plain packaging initiative, see S Chapman and B Freeman, *Removing the Emperor's Clothes: Australia and Tobacco Plain Packaging*, (Sydney University Press, 2014).

¹³ *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012). For a portrait of the litigation, see: M Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in T Voon, A Mitchell, and J Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014), 337-360.

¹⁴ *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012) [316].

with other forms of packaging – such as packaging for food, alcohol, and medicine. Such matters would have to be considered in future cases. There was a sole dissenting judgment by Heydon J.

Subsequently, there was a further challenge to Australia’s plain packaging of tobacco products under an investor-state dispute settlement proceeding by Philip Morris.¹⁵ The tobacco company argued that there had been an adverse impact on its foreign investment in respect of intellectual property relating to tobacco packaging. This action was dismissed on the grounds that it was an abuse of process. It was found that the tobacco company had moved its assets to Hong Kong to take advantage of the investor-state dispute settlement process, after learning that Australia was going to introduce plain packaging of tobacco products.

¹⁵ *Philip Morris Asia Ltd v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015). <http://www.pcacases.com/web/view/5> Ruling <http://www.pcacases.com/web/sendAttach/1711>; and M 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.

Furthermore, Australia defended its system of plain packaging of tobacco products¹⁶ against a number of countries,¹⁷ and then once again on appeal in the World Trade Organization.¹⁸

There has also been debate about the status of tobacco control measures under the *Trans-Pacific Partnership* 2015 and the *Comprehensive and Progressive Agreement on the Trans-Pacific Partnership* 2018.¹⁹

The evidence would suggest Australia's plain packaging of tobacco products has had a positive public health impact – alongside other tobacco control measures. Dr Catherine Bond has reported that there have been enforcement and compliance issues in policing Australia's plain packaging of tobacco products regime.²⁰ There is a need for suitable resources for enforcement and compliance to ensure that tobacco control measures are effective.

¹⁶ For a discussion of Australia's arguments at the World Trade Organization, see M Rimmer, 'The Global Tobacco Epidemic, the Plain Packaging of Tobacco Products, and the World Trade Organization' (2017) 17 (2) *QUT Law Review* 131-160.

¹⁷ *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).

¹⁸ *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).

¹⁹ Article 29.5 of the *Trans-Pacific Partnership* 2015; see also the *Comprehensive and Progressive Trans-Pacific Partnership* 2018. M Rimmer, 'Plain Packaging for the Pacific Rim: the Trans-Pacific Partnership and Tobacco Control', in T Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013), 75-105.

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

In the past decade, Australia's pioneering scheme in relation to the plain packaging of tobacco products have been followed by a range of other jurisdictions. The United Kingdom Government has introduced plain packaging of tobacco products, and defended the regime in a number of court cases.²¹ Ireland has passed plain packaging of tobacco products.²² France introduced standardized packaging of tobacco products, and defeated tobacco companies in administrative and constitutional disputes.²³ A challenge to the Tobacco Products Directive in the Court of Justice was dismissed in May 2016.²⁴ The New Zealand Government has adopted

²¹ *R (British American Tobacco & Others) v Secretary of State for Health* [2016] EWHC 1169 (Admin.); [2016] EWVCA Civ 1182 (Appeal). For a commentary see J Griffiths, 'The Tobacco Industry's Challenge to the United Kingdom's Standardised Packaging Legislation – Global Lessons for Tobacco Control Policy?' (2017) 17 (2) *QUT Law Review* 66-82.

²² *JTI v. Minister for Health, Ireland, and the Attorney General* 2015/2530P (Struck out); *Public Health (Standardised Packaging of Tobacco) Act* 2015 (Ireland) and Part 5 of the *Health (Miscellaneous Provisions) Act* 2017 (Ireland); E O'Dell, 'Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation' (2017) 17 (2) *QUT Law Review* 46-65; and E O'Dell, 'A Little Parthenon No Longer: The Proportionality of Tobacco Packaging Restrictions on Autonomous Communication, Political Expression, and Commercial Speech' (2018) 69 (2) *Northern Ireland Legal Quarterly* 175-211.

²³ Decision no. 2015-727 DC, 21 January 2016, Law for the Modernisation of Our Health System (Constitutional Council of France, 2016); CE, 23 December 2016, *Société JT International SA, Société d'exploitation industrielle des tabacs et des allumettes, société Philip Morris France SA and others* (State Council of France, 2016); and F El-Khoury Lesueur et al. 'Plain Tobacco Packaging, Increased Graphic Health Warnings and Adolescents' Perceptions and Initiation of Smoking: DePICT, a French Nationwide Study', (2019) 28 *Tobacco Control* e31-36.

²⁴ *R (Philip Morris Brands & Others) v. Secretary of State for Health* C-547 (2016). B Hawkins, C Holden, and S Mackinder, *The Battle for Standardised Cigarette Packaging in Europe: Multi-Level Governance, Policy Transfer and the Integrated Strategy of the Global Tobacco Industry* (Palgrave Pivot, 2020).

plain packaging of tobacco products, and is further considering other regulatory action to achieve a smoke-free nation.²⁵ A range of other countries have also followed Australia's leadership. At the time of writing in March 2022, 17 countries have adopted plain packaging of tobacco products, and another 3 countries are planning to introduce such measures.²⁶

There remains some disquiet that a good proportion of countries still have not implemented plain packaging of tobacco products. Crawford Moodie and collaborators have commented: 'Tobacco packs will remain an important promotional medium in countries that have not yet implemented plain packaging.'²⁷ Indeed, they warned that 'tobacco companies use the packaging, and whatever innovations are introduced, the marketing power of the packaging is only going to increase.'²⁸

The domestic and international precedents established in respect of the plain packaging of tobacco products will provide a foundation for further tobacco control measures – including those that are a part of tobacco endgame strategies.

2. The Regulation of Mass Media and Social Media

²⁵ J Kelsey, 'Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law' (2017) 17 (2) *QUT Law Review* 21-45.

²⁶ Tobacco Tactics, 'Plain Packaging', University of Bath, 5 March 2022, <https://tobaccotactics.org/wiki/plain-packaging/>

²⁷ C Moodie et al, 'Plain Tobacco Packaging: Progress, Challenges, Learning and Opportunities' (2022) 31 *Tobacco Control* 263-271 at 269.

²⁸ Ibid., 269.

Article 13 of the *WHO Convention on Tobacco Control 2003* calls for a comprehensive ban on advertising, promotion and sponsorship that would reduce the consumption of tobacco products.²⁹

Since the 1970s, Australia has progressively restricted the advertising of tobacco products. The *Tobacco Advertising Prohibition Act 1992* (Cth) was established to improve public health and limit the exposure of the public to messages and images that may persuade them to start smoking, or continue smoking.

With the *Tobacco Advertising Prohibition Amendment Act 2012* (Cth), the Australian Government sought to extend tobacco advertising prohibitions to the internet and social media. The Minister for Health and Ageing, Nicola Roxon, commented:

Since the passage of the *Tobacco Advertising Prohibition Act 1992*, the use of the internet and other electronic means as advertising mediums has become increasingly widespread... Unregulated internet advertising undermines the effectiveness of the *Tobacco Advertising Prohibition Act*. It can weaken tobacco controls by allowing sales to minors, promoting smoking and permitting the purchase of cigarettes without graphic health warnings. These amendments make it a specific offence to advertise or promote tobacco products on the internet and all other electronic media and future technologies unless compliant with state and territory legislation or Commonwealth regulations.³⁰

²⁹ *WHO Framework Convention on Tobacco Control 2003*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) (FCTC).

³⁰ Hon. N Roxon, 'Second Reading Speech on the *Tobacco Advertising Prohibition Bill 2010* (Cth)', House of Representatives, Australian Parliament, Hansard, 22 March 2011, 2749 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-03-22%2F0095%22>

Roxon commented: ‘This is an important additional piece of protection for Australians, at last bringing the internet and new technologies under the same remit as other forms of media.’³¹

Nonetheless, investigative journalism has revealed that tobacco companies have been using social media and Internet influencers to promote their products at an international level. The Bureau of Investigative Journalism identified a number of tactics of tobacco companies – including ‘Presenting nicotine products as cool and aspirational in a glossy youth-focused advertising campaign’; ‘Paying social media influencers to promote e-cigarettes, nicotine pouches and tobacco on Instagram, notwithstanding the platform’s ban on the practice’; ‘Sponsoring music and sporting events, including an F1 e-sports tournament that was streamed live on YouTube and could be watched by children’; and ‘an international free samples offer for nicotine pouches and e-cigarettes that appears to have attracted underage people and non-smokers’.³² Policy-Makers and regulators have been urged to take action against such tobacco advertising, sponsorship, and promotion on social media and the Internet.³³

³¹ Ibid.

³² M Chapman, ‘New Products, Old Tricks: Concerns Big Tobacco is Targeting Youngsters’, *The Bureau of Investigative Journalism*, 21 February 2021, <https://www.thebureauinvestigates.com/stories/2021-02-21/new-products-old-tricks-concerns-big-tobacco-is-targeting-youngsters>

³³ Rep. R Krishnamoorthi, ‘Warren, Blumenthal, Durbin, Krishnamoorthi And DeGette Question Tobacco Companies Exploitative E-Cigarette Advertisements During The COVID-19 Pandemic’, Press Release, 22 December 2020, <https://krishnamoorthi.house.gov/media/press-releases/warren-blumenthal-durbin-krishnamoorthi-and-degette-question-tobacco-companies>

The World Health Organization has established an intersessional Working Group to develop specific guidelines to address cross-border Tobacco Advertising Promotion Sponsorship and the depiction of tobacco in the entertainment media under Article 13 of the *WHO Framework Convention on Tobacco Control* 2003, taking account of technological advances over the past decade such as the Internet and mobile communications.³⁴

The Australian Government should further consider ways and means of regulating tobacco advertising – particularly in respect of blogging, social media, and other forms of internet distribution. There will also be a need to check whether internet intermediaries are doing sufficient work to ensure that their policies on tobacco advertising are being properly enforced.

3. Tobacco-Free Generations

It should be noted that the WTO Panel Decision and the WTO Appellate Body Decision dealing with Australia’s plain packaging of tobacco products discussed the alternative tobacco control option of age limitations in respect of smoking.³⁵

³⁴ World Health Organization, ‘Second meeting of the Working Group to Develop Specific Guidelines to Address Cross-border TAPS and the Depiction of Tobacco in the Entertainment Media under Article 13 of the WHO FCTC’, 24 February 2021, <https://www.who.int/fctc/secretariat/head/statements/2020/second-meeting-working-group-taps/en/>

³⁵ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, (28 June 2018); and *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R, (9 June 2020).

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

A parliamentary committee published a report on the *Public Health Amendment (Tobacco Free Generation) Bill 2014* (Tas) in 2016.³⁶ The Committee made several findings. First, the committee noted that ‘there does not appear to be any significant legal impediment to the operation of the Bill in delivering the policy intent.’³⁷ Second, the committee observed that ‘the Parliament should take a measured and cautious approach in considering a Bill which could limit or ‘extinguish’ fundamental rights relating to age, equality and liberty.’³⁸ Third, the Committee said: ‘The Bill raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/tourists’.³⁹ Fourth, the Committee noted: ‘Should the Bill be supported, appropriate education programs would be required to effectively implement the Bill.’⁴⁰

³⁶ Legislative Council Government Administration Committee “A”, *Report on Public Health Amendment (Tobacco Free Generation) Bill 2014*, Parliament of Tasmania, 2016, <https://www.parliament.tas.gov.au/ctee/Council/Reports/gaa.inq.tfg.rep.160701.FinalReport.jm.004.pdf>

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

In 2017, the Tasmanian Government responded to the committee report on the bill.⁴¹ The Minister for Health commented: ‘After careful consideration, the Government decided not to proceed with any change to the minimum smoking age.’⁴²

In 2018, the Hon. Ivan Dean introduced a new piece of smokefree generation legislation, the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill* 2018 (Tas). In his second reading speech, Dean discussed his ambitions behind the legislation.⁴³ He commented: ‘This important measure that I am proposing today is an additional tool to prevent the uptake of youth smoking by removing the peer network of tobacco supply out of our schools.’⁴⁴ As can be seen from the speech, the legislation in part was promoted by Tasmania’s comparatively high smoking rates compared to the rest of the country.

In the meantime, a number of United States locations passed T21 laws – including Needham (a town in Boston, Massachusetts), New York, and California.⁴⁵ Senator Elizabeth Warren and a

⁴¹ The Hon. Michael Ferguson, ‘Government Response to *Report on Public Health Amendment (Tobacco Free Generation) Bill* 2014’, Government of Tasmania, 31 January 2017, <https://www.parliament.tas.gov.au/ctec/Council/Reports/gaa.tfg.govtresponse.ne.001.pdf>

⁴² Ibid.

⁴³ The Hon. Ivan Dean, ‘Second Reading Speech on the *Public Health Amendment (Prevention of Sale of Smoking Products to Underage Persons) Bill* 2018’, Parliament of Tasmania, 2018, https://www.parliament.tas.gov.au/bills/Bills2018/pdf/notes/45_of_2018-SRS.pdf

⁴⁴ Ibid.

⁴⁵ A Costelloe, ‘Tasmania Could Become The First State in Australia to Raise Smoking Age to 21’, *ABC News*, 11 January 2021, <https://www.abc.net.au/news/2021-01-11/legal-smoking-age-of-21-in-tasmania-increase-laws/13045672>

number of her colleagues have introduced a federal bill to raise the age of smoking.⁴⁶ Since 2020, the smoking age in all U.S. states, territories and the District of Columbia has been lifted to 21. The Menzies Research Institute in Tasmania examined eight scientific studies on T21 in the US – with five showing reduced smoking rates. Dr Seana Gall commented: ‘It’s quite varied because of the differences in study design.’⁴⁷ She observed: ‘The studies that found that it had a significant effect on smoking prevalence were those that were the most robust.’⁴⁸ Dr Gall said that the research found people aged 21 and over were less likely to supply cigarettes to minors than those aged 18 to 20: ‘It’s creating a bigger gap between those people who are sort of experimenting with smoking and those people who can actually legally purchase the cigarettes.’⁴⁹

However, the Coalition Government in Tasmania refused in the end to support the proposal in 2021. Jeremy Rockliff, the Minister for Mental Health and Wellbeing, commented that ‘the Government will not be supporting Mr Dean’s T21 bill, but will instead create a smoking prevention package targeted at young people in Year 6 and up.’⁵⁰ He instead said the

⁴⁶ Senator E Warren, ‘Sen Warren Joins Sens Schatz, Durbin, Brown, and Colleagues to Introduce Bill To Raise Smoking Age to 21’, Press Release, 30 September 2015, <https://www.warren.senate.gov/newsroom/press-releases/sen-warren-joins-sens-schatz-durbin-brown-and-colleagues-to-introduce-bill-to-raise-smoking-age-to-21>

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ J Rockliff, ‘Youth Focus in Smoking Prevention Package,’ Press Release, Tasmanian Government, 1 March 2021, http://www.premier.tas.gov.au/site_resources_2015/additional_releases/youth_focus_in_smoking_prevention_package

Government would support education campaigns: ‘We know the average age people start experimenting with smoking in Australia is 16, so the package will focus on ensuring young people have the information they need to make an informed decision on all the reasons why they shouldn’t take up the addictive substance by that age.’⁵¹ In the end, both the Liberal Government and the Labor Opposition voted against smokefree generation laws in Parliament.⁵² The bill was voted down 11 to 3 in the Legislative Council. Kathryn Barnsley reflected: ‘An innovative legislative reform in Tasmania, Australia has been defeated, after what appears to be tobacco industry interference via third parties, with support from vaping lobby groups.’⁵³

In a joint statement, Independent Member Ivan Dean, Minderoo Foundation, Lung Foundation Australia, and SmokeFree Tasmania said they were disappointed by the government’s decision to reject T21 law and instead do ‘more of the same’.⁵⁴ Dean commented: ‘Tasmania’s smoking rates remain some of the worst nationally, and it is our responsibility as legislators to take action to protect our youth from a deadly, lifelong addiction.’⁵⁵ Minderoo Foundation’s

⁵¹ Ibid.

⁵² R Inglis, ‘Tasmania’s T21 Bill: Push to Raise Legal Purchasing Age for Cigarettes Fails’, *Examiner*, 24 March 2021, <https://www.examiner.com.au/story/7180475/disappointed-push-to-raise-legal-purchasing-age-for-cigarettes-fails/>

⁵³ K Barnsley ‘Australia: Big Tobacco Wins in Defeat of T21 Age Bill’, *BMJ Tobacco Control*, 2 April 2021, <https://blogs.bmj.com/tc/2021/04/02/australia-big-tobacco-wins-in-defeat-of-t21-age-bill/>

⁵⁴ Minderoo Foundation, ‘Government’s Rejection of Tobacco21 Legislation Puts Young Tasmanians at Risk of Nicotine Addiction’, Press Release, 4 March 2021, <https://www.minderoo.org/tobacco21/news/governments-rejection-of-tobacco21-legislation-puts-young-tasmanians-at-risk-of-nicotine-addiction/>

⁵⁵ Ibid.

Collaborate Against Cancer CEO Dr Steve Burnell, said: ‘Removing easy access from our kids is more important than ever given the tobacco industry’s devious promotion of vaping pens and flavours, which is driving the e-smoking epidemic affecting young people around the world.’⁵⁶ Lung Foundation Australia, CEO Mark Brooke said: ‘There is good reason to rethink the sales age for tobacco and take measures that prevent young people from becoming addicted to nicotine.’⁵⁷ SmokeFree Tasmania’s Dr Kathryn Barnsley commented: ‘With high smoking rates in Tasmania and prevention programs to date not making a dent, it is a great shame that the government is not willing to step up to protect the health of young Tasmanians.’⁵⁸

The mining magnate and philanthropist Andrew Forrest and his Minderoo Foundation have promoted the adoption of tobacco-free laws in Western Australia.⁵⁹ Eliminate Cancer Advisor Bruce Mansfield commented: ‘We have 95 per cent of smokers starting before the age of 21.’⁶⁰ He said: ‘History tells us if they get to 21 without smoking, they are far less likely to start and could avoid becoming lifelong customers of big tobacco.’⁶¹ Mansfield noted: ‘Now is the time for us to protect our children from a lifetime of debilitating and often fatal addiction — to stop smoking before it starts.’⁶² Forrest has also encouraged South Australian politicians to raise the

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ R Titelius, ‘Ban Smoking for Under 21s Says Andrew Forrest’, *The West Australian*, 31 May 2019, <https://thewest.com.au/news/andrew-forrest/ban-smoking-for-under-21s-says-andrew-forrest-ng-b881215833z>

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

minimum smoking age from 18 to 21.⁶³ Forrest has also recommended that the Federal Government should consider raising the smoking age to 21 as well.⁶⁴

Meanwhile, in 2021, Singapore has raised the minimum legal age for smoking to 21.⁶⁵ This is a consequence of amendments to the *Tobacco (Control of Advertisements and Sale) Act*, which were passed in Parliament in November 2017. The Ministry of Health in Singapore noted that ‘Tobacco use is one of the highest contributors to ill health and premature death in Singapore.’⁶⁶ The Ministry observed that tobacco is ‘associated with cancers, ischaemic heart disease, stroke, lung disease and many other diseases.’⁶⁷ The United Kingdom is currently considering raising the legal age for smoking.⁶⁸ Denmark has also been considering tobacco-free generations.⁶⁹

⁶³ “‘Life Smoking Age to 21’ to Save Lives’, *The Advertiser*, 25 October 2017, <https://www.adelaidenow.com.au/news/south-australia/iron-ore-magnate-andrew-forrest-challenges-south-australian-politicians-to-raise-smoking-age-to-21/news-story/b9a2ded8ed40b9a20a20fb4f6c9afdd2>

⁶⁴ A Gartrell, ‘Smoking Age Would Be Raised To 21 Under Andrew Forrest’s New Anti-Cancer Plan’, *The Sydney Morning Herald*, 1 October 2017, <https://www.smh.com.au/politics/federal/smoking-age-would-be-raised-to-21-under-andrew-forrests-new-anticancer-plan-20171001-gys736.html>

⁶⁵ NK Gene, ‘Minimum Legal Age for Smoking raised to 21 from Tomorrow’, *The Straits Times*, 31 December 2020, <https://www.straitstimes.com/singapore/minimum-legal-age-for-smoking-raised-to-21-from-tomorrow>

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ G Jones, ‘The United Kingdom Government has set a Target of Getting the Country to go “Smoke-Free” by 2030’, *Liverpool Echo*, 15 March 2022, <https://liverpoolecho.co.uk/news/uk-world-news/minimum-age-buy-cigarettes-could-23391333>

⁶⁹ AFP, ‘Denmark Considers Ban on Cigarette Sales to Anyone Born after 2010’, *The Guardian*, 15 March 2022, <https://www.theguardian.com/society/2022/mar/15/denmark-considers-ban-on-cigarette-sales-to-anyone-born-after-2010>

In light of the intransigence of the Tasmanian Government, there is an opportunity for the more progressive New Zealand to investigate smokefree generation laws – like the United States and Singapore. Jude Ball and their collaborators contended: ‘The Tobacco Free Generation policy, if implemented as part of a comprehensive tobacco end-game strategy, has enormous potential to help ensure the smokefree goal is not only achieved but maintained long term’.⁷⁰ The researchers commented: ‘Internationally, Tobacco Free Generations is being advocated by grassroots coalitions of doctors, medical students and youth leaders, and has been endorsed by numerous public health bodies including the British and Norwegian Medical Associations and the 16th World Conference on Tobacco Or Health.’⁷¹ As part of its tobacco endgame strategy, New Zealand has been focused on policies, which could achieve smoke free generations.⁷²

Australia reconsider developing policies in respect of smoke-free generations as part of its National Tobacco Strategy.

4. Smoke-Free Spaces

⁷⁰ J Ball, J Berrick, R Edwards, J Hoek, and F Petrovic-van der Deen, ‘Phasing Out Smoking: The Tobacco-Free Generation policy’, *Public Health Expert*, 14 May 2021, <https://blogs.otago.ac.nz/pubhealthexpert/phasing-out-smoking-the-tobacco-free-generation-policy/#more-13842>

⁷¹ Ibid.

⁷² Hon. Dr A Verrall, ‘Historic Step Towards Smokefree Future’, New Zealand Government, 9 December 2021, <https://www.beehive.govt.nz/release/historic-step-towards-smokefree-future> and Department of Health (New Zealand), *Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025*, Wellington: New Zealand Government, 2021, <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

There has also been promising public policy work in respect of creating smoke-free spaces – as part of a tobacco endgame in Australia. Such an approach could be considered to be part of a larger law and geography framework.⁷³ Moreover, the creation of smoke-free spaces is keeping with the right to a healthy environment recognized by the United Nations.⁷⁴

The Queensland Government has been a public policy innovator in the field of smoke-free spaces. Queensland has banned smoking in a range of outdoor public areas – covering public transport waiting points, pedestrian malls, sporting events and facilities, national parks, outdoor beaches and swimming areas, and government precincts.⁷⁵ Queensland also has smoking bans in respect of eating and drinking venues. There are also smoking bans in relation to educational facilities. There are smoking bans in respect of hospitals, healthcare, and residential aged care facilities. There are regulations in respect of smoking bans in some places owned and operated by local governments.

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

⁷³ T O'Donnell, D Robinson, and J Gillespie, *Legal Geography: Perspectives and Methods*, Abingdon: Routledge, 2020.

⁷⁴ M Montalban, “‘Bold Action’ Required Following Recognition of the Human Right to a Healthy Environment’, Environmental Defenders Office, 19 October 2021, <https://www.edo.org.au/2021/10/19/bold-action-required-following-recognition-of-the-human-right-to-a-healthy-environment/>

⁷⁵ Queensland, ‘Smoking Laws in Queensland: Outdoor Public Areas’, <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/outdoor> and *Tobacco and Other Smoking Products Act 1998* (Qld) and *Tobacco and Other Smoking Products Regulation 2021* (Qld).

In 2022, there was a landmark decision, barring Queensland unit dwellers from smoking on balconies.⁷⁶ A unit owner at the Artique Resort in Surfers Paradise on the Gold Coast complained that their downstairs neighbour was a chain smoker on the balcony below. The unit owner labelled the smoking ‘relentless and unbearable’, raising concerns about her health.⁷⁷ The Office of the Commissioner for Body Corporate and Community Management's adjudicator held that the eighth-floor owner must no longer smoke tobacco products on the balcony. The Office also held that she could only smoke elsewhere within her apartment if she took reasonable steps to ensure the smoke does not affect any person in another apartment. Kristi Kinast, president of the Strata Community Association of Queensland, the peak voice for body corporates, said the decision by the adjudicator was a ‘game changer’.⁷⁸ She observed: ‘Up until now ... the onus has been on complainants to prove that the volume and frequency of smoke is a nuisance, and that is almost impossible to prove.’⁷⁹ Kinast noted: ‘This changes things to say that any sort of smoke is a hazard, or any sort of volume and frequency is a hazard, so it will absolutely open the floodgates, we very much expect.’⁸⁰ Kinast commented: ‘I think

⁷⁶ R Levingston and A O’Flaherty, ‘Queensland Unit Dwellers could be Barred from Smoking on Balconies after Landmark Decision’, *ABC News*, 19 January 2022, <https://www.abc.net.au/news/2022-01-19/gold-coast-unit-owner-banned-from-smoking-on-apartment-balcony/100766448> and R Kingsun and A Delaney, ‘Queenslanders could be Banned from Smoking on their Own Balconies after Landmark Ruling’, *7 News*, 19 January 2022, <https://7news.com.au/news/qld/queenslanders-could-be-banned-from-smoking-on-their-own-balconies-after-landmark-ruling-c-5371632#:~:text=Australia's%20supply%20chain%20chaos&text=Queenslanders%20living%20in%20apartments%20could,to%20the%20body%20corporate%20commissioner>.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

if we look at this in a greater context, in terms of our society, we've seen these changes over the last decade or more where we've seen continued evolving of the restrictions on smokers — can't smoke in airports, restaurants, workplaces — but it hasn't reached, until now, into strata.’⁸¹ Former commissioner of Queensland's Body Corporate and Community Management, Chris Irons, added: ‘This I would think potentially also applies to vaping as well.’⁸²

The Cancer Council Queensland has been lobbying for further law reform in this field.⁸³ CEO, Ms Chris McMillan said: ‘The Queensland Government has been praised for its leadership in creating more smoke-free places, however, many Queenslanders are still exposed to the dangers of second-hand smoke – including in their homes.’⁸⁴ She observed: ‘Alarming, nearly 95% of non-smoker respondents reported they had been affected by smoke-drift from neighbours, with 99% reporting exposure while within their home’.⁸⁵ McMillan commented that there was community support for such law reform: ‘Nearly two in three respondents support Queensland laws banning smoking completely in multi-unit housing, while 20% of smokers who responded reported that banning smoking wouldn’t have a negative impact on them.’⁸⁶ McMillan commented: ‘We urge the Queensland Government to act, to enable Queenslanders to live safely at home.’⁸⁷

⁸¹ Ibid.

⁸² Ibid.

⁸³ Cancer Council Queensland, ‘Queenslanders are Crying Out for Changes to Smoke-free Laws in Multi-unit Housing’, Press Release, 2021 <https://cancerqld.org.au/blog/queenslanders-crying-changes-smoke-free-laws-multi-unit-housing/>

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

The Cancer Council Queensland has released a longer report on the topic, *Safe at Home: Protecting Queenslanders from Smoke-Drift in Multi-Unit Housing*.⁸⁸ The report observed: ‘Cancer Council Queensland believes that people have the right to breathe clean air, especially in their homes, as smoke-drift is both a health hazard and a nuisance.’⁸⁹ The Cancer Council Queensland made a number of recommendations for law reform. First, it suggested making ‘multi-unit housing smoke-free by introducing a ‘no smoking law’ in either a. the Tobacco and Other Smoking Products Act 1998 or b. the *Body Corporate and Community Management Act 1997*’.⁹⁰ Second, Cancer Council Queensland advocated that the Queensland Government ‘Amend the *Body Corporate and Community Management Act 1997* to allow bodies corporate to adopt and enforce a no smoking bylaw, including developing a model bylaw and clarifying how these bylaws can be adopted (we recommend a simple majority (50% +1 in support) rather than a special majority)’.⁹¹ Third, the Cancer Council Queensland recommended that the government ‘Lower the extraordinarily high test from *Norbury vs Hogan* which requires that smoke (caused by the respondent) is of such a ‘volume and frequency’ that it is an ‘unreasonable interference’ with a resident of ‘ordinary sensitivity’ before it will be considered ‘nuisance’ under the *Body Corporate and Community Management Act 1997*’.⁹²

⁸⁸ Cancer Council Queensland, *Safe at Home: Protecting Queenslanders from Smoke-Drift in Multi-Unit Housing*, (Cancer Council Queensland, 2021), https://publicfileshareprod01.blob.core.windows.net/resources/CCQ_Survey_findings_and_recommendations_on_smoke-drift_2021.pdf

⁸⁹ Ibid., 12.

⁹⁰ Ibid., 12.

⁹¹ Ibid., 12.

⁹² Ibid., 12.

Queensland also has regulations in respect of smoking product sale, advertising, display, and promotion.⁹³

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

Queensland's former Chief Health Officer and Governor Jeanette Young has been a supporter of Queensland adopting tobacco endgame policies.⁹⁴ She said: 'I would love to see Queensland as a smoke-free state.'⁹⁵ Young noted: 'We have smoking rates down to nine per cent and I

⁹³ Queensland Health, Smoking Laws In Queensland: Smoking Product Retailing', <https://www.health.qld.gov.au/public-health/topics/atod/tobacco-laws/retail> and *Tobacco and Other Smoking Products Act* 1998 (Qld) and *Tobacco and Other Smoking Products Regulation* 2021 (Qld).

⁹⁴ S Perrie, 'Queensland's Next Governor Wants The State to Become Smoke-Free', *LadBible*, 22 June 2021, <https://www.ladbible.com/news/latest-queenslands-next-governor-wants-the-state-to-become-smoke-free-20210622>

⁹⁵ Ibid.

hope they continue to decrease.’⁹⁶ Young encouraged further action: ‘As an individual thing that anyone can do for themselves, that the most important.’⁹⁷

5. Civil and Criminal Liability

Article 19 of the *WHO Framework Convention on Tobacco Control* 2003 highlights the role of civil and criminal tobacco liability.⁹⁸ There have been recent discussions and webinars about the use of the judicial system in respect of holding Big Tobacco companies to take account.⁹⁹

There has been an array of international litigation in the field of tobacco control.¹⁰⁰ There has been a growth in ‘liability litigation brought to hold the tobacco industry accountable for its actions.’¹⁰¹

In Australia, the most notable civil litigation against the tobacco industry is the McCabe case. Rolah McCabe sued British American Tobacco Australia in the Supreme Court of Victoria, arguing that the company was negligent in its manufacturing and marketing of cigarettes. At

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ *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/>

⁹⁹ ASH, ‘Tobacco Liability – WHO FCTC Article 19: Using the Judicial System to Fight Tobacco’, YouTube, 10 November 2020, <https://youtu.be/FWGl-roPTVk>

¹⁰⁰ For a recent overview, see S Zhou, E Ricafort, D Bressler, and RK Devotsu, ‘Litigation in Tobacco Control: Past, Present and Future’, (2022) 31 *Tobacco Control* 291-295.

¹⁰¹ Ibid.

first instance, Justice Eames struck out British American Tobacco's defence to the proceeding and ordered judgment.¹⁰² The judge found that there had been destruction of documents by the defendant – subverting the process of discovery: 'In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor Clayton Utz, with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful.'¹⁰³ The jury awarded McCabe \$687,560 plus interest and costs. The Court of Appeals overturned aspects of Justice Eames' ruling in respect of discovery.¹⁰⁴

The High Court of Australia refused the daughter of Rolah McCabe special leave.¹⁰⁵ Gleeson CJ noted: 'The central complaint against the respondent was that before the plaintiff's proceedings had been instituted, but at a time when the defendant anticipated that proceedings like those later brought by the plaintiff would be instituted, the defendant destroyed documents relevant to the claim which the plaintiff made.'¹⁰⁶ Gleeson CJ commented: 'In addition to reversing a number of findings of fact of the trial judge, the Court of Appeal expressed the view that where it is alleged that a defendant has destroyed documents before the commencement of a proceeding to the prejudice of a party complaining a court should not strike out the defence of the party who destroyed documents unless destroying the documents

¹⁰² Eames J in *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002)

¹⁰³ Eames J in *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002) [34].

¹⁰⁴ *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002).

¹⁰⁵ *Cowell v British American Tobacco Australia Services Ltd* [2003] HCATrans 384 (3 October 2003).

¹⁰⁶ *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002).

amounted to an attempt to pervert the course of justice or a contempt of court.’¹⁰⁷ Gleeson CJ commented: ‘Having considered the reasoning of the primary judge and of the Court of Appeal and the arguments of the parties, we are not persuaded that the prospects of demonstrating that the plaintiff could not have a fair trial are sufficient to warrant a grant of special leave to argue that there should be judgment without any trial or a rehearing of the application to strike out the respondent’s defence.’¹⁰⁸ There has been further litigation between the parties in 2009.¹⁰⁹ The dispute was settled confidentially in 2011.¹¹⁰ The Victorian Government subsequently passed legislation, clarifying criminal offences in respect of document destruction. The evidence unearthed by the McCabe litigation was raised by the United States Department of Justice in their racketeering litigation against the tobacco industry.¹¹¹

¹⁰⁷ *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002).

¹⁰⁸ *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002).

¹⁰⁹ *British American Tobacco Australia Limited v Gordon & Ors (No 3)* [2009] VSC 619 (24 December 2009).

¹¹⁰ The McCabe Centre for Law and Cancer, ‘The McCabe case’, <https://www.mccabecentre.org/about/the-mccabe-case>

¹¹¹ The McCabe Centre for Law and Cancer, ‘The McCabe case’, <https://www.mccabecentre.org/about/the-mccabe-case>; see also S Eubanks and S Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry* (American Public Health Association, 2012); and *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

There has also been litigation in Australia relating to injury from exposure to second-hand smoke.¹¹² Such disputes have traversed the fields of negligence,¹¹³ breach of contract,¹¹⁴ occupational health and safety,¹¹⁵ and disability discrimination.¹¹⁶

There has also been action taken by the Australian Competition and Consumer Commission under Australian consumer law against tobacco companies (particularly in respect of the use of 'light' and 'mild' descriptors).¹¹⁷ Graeme Samuel explained the intent of the court-enforceable undertakings by the tobacco companies: 'The undertakings address the matters of most concern to the ACCC, that is, the removal of the 'light' and 'mild' descriptors, the prevention of further similar conduct and the provision of significant funds for consumer education programs to deal with claims that low yield cigarette brands are in some way better

¹¹² N Francey, '30th Anniversary of Australian Legal Ruling on Second-Hand Smoke' (2021) 397 (10273) *Lancet* 466-467.

¹¹³ *Bowles v Canton Pty Ltd* (Unreported, 13 September 2003, Magistrates Court of Victoria); *Scholem v NSW Department of Health* (1992) 3 APLR 45, NSW District Court, 27 May 1992; and *Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club*, Supreme Court of NSW, Case no. 20956 of 1996.

¹¹⁴ *Bowles v Canton Pty Ltd* (Unreported, 13 September 2003, Magistrates Court of Victoria).

¹¹⁵ *Scholem v NSW Department of Health* (1992) 3 APLR 45, NSW District Court, 27 May 1992.

¹¹⁶ *Francey & Ors v Hilton Hotels of Australia Pty Ltd* [1997] HREOCA 56, 25 September 1997.

¹¹⁷ ACCC, Philip Morris (Australia) Limited - s.87B undertaking, 10 May 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/philip-morris-australia-limited-s87b-undertaking>; ACCC, British American Tobacco Australia Limited - s.87B undertaking, 11 May 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/british-american-tobacco-australia-limited-s87b-undertaking>; and ACCC, Imperial Tobacco Australia Limited - s.87B Undertaking, 7 November 2005, <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/imperial-tobacco-australia-limited-s87b-undertaking>

for you than higher yield brands'.¹¹⁸ Consumer groups have also invoked consumer law in conflicts with tobacco companies.¹¹⁹ More recently, there has been legal action taken by the Australian Competition and Consumer Commission against e-cigarette companies over misleading and deceptive conduct.¹²⁰ 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.¹²¹ Nonetheless, the Australian Competition and Consumer Commission whether the Therapeutic Goods Administration or the Department of Health should be the lead agency in respect of the regulation of e-cigarettes.¹²² There could be scope for further litigation against Australian consumer law against tobacco companies (and e-

¹¹⁸ ACCC, 'ACCC resolves 'light' and 'mild' cigarette issue with B.A.T. and Philip Morris', 12 May 2005, <https://www.accc.gov.au/media-release/accc-resolves-light-and-mild-cigarette-issue-with-bat-and-philip-morris>

¹¹⁹ *Australian Federation of Consumer Organisations Inc v The Tobacco Institute of Australia Ltd* (1991) ATPR 41-079; *Re Tobacco Institute of Australia Limited and Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1; *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004 (27 July 2000); and *Cauvin v Philip Morris Limited and Ors* [2005] NSWSC 640 (26 August 2005).

¹²⁰ ACCC, 'ACCC takes Action against e-Cigarette Suppliers for Alleged Misleading "No Toxic Chemicals" Claims', Press Release, 20 June 2016; and ACCC, 'E-cigarette Companies to Pay Penalties', Press Release, 8 May 2017, <https://www.accc.gov.au/media-release/e-cigarette-companies-to-pay-penalties>

¹²¹ 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 A Larcombe, S Allard, P Pringle, R Mead-Hunter, N Anderson and B Mullins, 'Chemical Analysis of Fresh and Aged Australian e-Cigarette Liquids' (2022) 216 (1) *Medical Journal of Australia* 27-32.

¹²² ACCC, '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>

cigarette companies) – especially in light of the successful legal action under consumer law in other jurisdictions such as Canada.

There has been notable civil litigation against tobacco companies in other jurisdictions. In the United States, there was a racketeering action brought by the Clinton administration United States Government against tobacco companies.¹²³ In a 2006 judgment, Kessler J found the major U.S. tobacco companies had violated civil racketeering laws (RICO) and engaged in a conspiracy to deceive the American public about the health effects of smoking and their marketing to children.¹²⁴ The judge held that the ‘Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.’¹²⁵ The judge was also critical of the role of lawyers in the history of deceiving the American public about the hazards of smoking: ‘At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes.’¹²⁶ Among her remedies, Judge Kessler ordered the tobacco companies to publish

¹²³ S Eubanks and S Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry* (American Public Health Association, 2012).

¹²⁴ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

¹²⁵ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

¹²⁶ *United States of America v. Philip Morris USA Inc.* (2006) Civil Action No. 99-2496 (GK) https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/FinalOpinion.pdf

‘corrective statements’. There were signs of political interference in the tobacco litigation by the Bush administration.¹²⁷

In Canada, there has been successful class actions against tobacco companies in Quebec.¹²⁸ The trial judge condemned three cigarette manufacturers to pay moral and punitive damages under the regimes of extracontractual liability under the general law, the provisions of the Charter of human rights and freedoms, the Consumer Protection Act, the regime of manufacturer’s liability.¹²⁹ The Court of Appeal upheld this landmark decision.¹³⁰ In response, the tobacco companies have sought protection under the *Companies Creditors Arrangement Act*.

No doubt there is scope for further civil litigation against tobacco companies in Australia – but there is a need to ensure that such endeavours are properly supported and resourced by government. Inspired by the example of Canada, the Australian philanthropist Andrew Forrest has sought legal advice from a number of Queen’s Counsel about the prospects of civil tobacco litigation.¹³¹ He commented: ‘This society-critical initiative is still in its infancy but the end game is to reduce this dreaded disease to an illness not a death sentence’.¹³² Forrest was

¹²⁷ S Eubanks and S Glantz, *Bad Acts: The Racketeering Case Against the Tobacco Industry* (American Public Health Association, 2012).

¹²⁸ *Létourneau v JTI-MacDonald Corp.*, 2015 QCCS 2382; and on appeal *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

¹²⁹ *Létourneau v JTI-MacDonald Corp.*, 2015 QCCS 2382

¹³⁰ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358.

¹³¹ J Ramli, ‘Billionaire Sues Tobacco Industry on Behalf of Smokers’, *Daily Mail*, 30 September 2017, <https://www.dailymail.co.uk/news/article-4935356/Billionaire-sues-tobacco-industry-behalf-smokers.html>

¹³² Ibid.

hopeful: 'We want to prove it works in Australia first and then immediately spread it globally.'¹³³

The Australian Council on Smoking and Health was supportive of the move to put the burden of health costs back on the tobacco industry. President Maurice Swanson observed: 'The biggest impact of a successful legal action would be to hasten the demise of the tobacco industry in Australia.'¹³⁴ He noted that such an action would help support a tobacco endgame strategy: 'We're aiming for a smoke-free Australia by 2025 and this sort of action by Andrew Forrest would put another nail in the coffin of the tobacco industry.'¹³⁵ Swanson commented: 'The most compelling reason we're calling for this sort of action is that taxpayers are the group that picks up the tab for the treatment of smoking caused diseases.'¹³⁶ He lamented: 'The tobacco industry itself, the most lethal industry in the world, contributes nothing to compensate governments for the healthcare costs that are incurred by the consumption of their lethal product.'¹³⁷

Cancer Council chief executive Sanchia Aranda emphasized that there was a need for financial support and resources to challenge Big Tobacco: 'Most countries haven't gone down this way

¹³³ Ibid.

¹³⁴ J Carmody, K Lambe, and D Weber, 'Mining Billionaire Andrew Forrest Plotting "Assault" on the Tobacco Industry', *ABC News*, 30 September 2017, <https://www.abc.net.au/news/2017-09-30/andrew-forrest-cancer-centre-to-take-on-tobacco-industry/9004204>

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

because the tobacco industry has very deep pockets.¹³⁸ Aranda noted: ‘The tobacco industry has been negligent in its duty to governments and individuals who contract smoking-related illness and we must hold them to account for continuing to market and sell this product.’ Aranda argued: ‘The tobacco industry has known for over 50 years that its product kills and yet they continue to manufacture and promote this product and market it to unsuspecting young people worldwide.’¹³⁹

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

In addition to the civil liability of tobacco companies, there has also been a growing interest in criminal liability in respect of tobacco companies, and their directors.¹⁴⁰

Back in 2002, Jonathan Liberman and Jonathan Clough wrote a piece for the *Criminal Law Journal* on the criminal liability of tobacco manufacturers.¹⁴¹ They outlined a number of specific criminal law offences against which the conduct of tobacco manufacturers should be examined. The more recent expansion of criminal offences in Australia – particularly under

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ ASH, ‘Update: Dutch Criminal Case Against Tobacco Industry’, 2019, <https://ash.org/update-dutch-criminal-case2019/>

¹⁴¹ J Liberman and J Clough, ‘Corporations that Kill: The Criminal Liability of Tobacco Manufacturers’ (2002) 26 *Criminal Law Journal* 1-12.

corporate law – raises interesting questions about the criminal responsibility of tobacco companies, and their directors.¹⁴²

6. Tobacco Divestment

The *WHO Framework Convention on Tobacco Control* 2003 calls for member states to adopt a comprehensive array of public health measures to address globalisation of the tobacco epidemic.¹⁴³ Article 5.3 of the guidelines state ‘Government institutions and their bodies should not have any financial interest in the tobacco industry, unless they are responsible for managing a Party’s ownership interest in a State-owned tobacco industry’.¹⁴⁴

Australia has engaged in tobacco divestment. After much pressure from public health organisations and civil society groups, Australia’s Future Fund divested itself of tobacco stocks.¹⁴⁵ The chair of the Future Fund, David Gonski, commented:

The board noted tobacco’s very particular characteristics including its damaging health effects, addictive properties and that there is no safe level of consumption. In doing so the board also considered

¹⁴² Australian Law Reform Commission, *Corporate Criminal Responsibility*, Sydney: Australian Law Reform Commission, Report 136, 2020.

¹⁴³ *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/>

¹⁴⁴ Ibid.

¹⁴⁵ M Rimmer, 'No Future?: End the Future Fund's Affair with Big Tobacco', *The Conversation*, 13 September 2012, <https://theconversation.edu.au/no-future-end-the-future-funds-affair-with-big-tobacco-9315>; and M Rimmer, 'Future Fund Drops Tobacco: Should Fossil Fuels be Next?', *The Conversation*, 28 February 2013, <https://theconversation.edu.au/future-fund-drops-tobacco-should-fossil-fuels-be-next-12337>

its investment policies and approach to environmental, social and governance issues. As a result, the board determined that in this instance it is appropriate to exclude primary tobacco product manufacturers.¹⁴⁶

There has also been a push to encourage superannuation funds and health funds to adopt tobacco divestment policies. Dr Bronwyn King and her civil society organisation Tobacco Free Portfolios have been persuasive in encouraging the finance sector to commit to tobacco divestment policies.¹⁴⁷

In 2020, VicHealth and Tobacco Free Portfolios launched a new tool to help Australians locate tobacco-free superannuation funds.¹⁴⁸ VicHealth CEO Dr Sandro Demaio commented on the initiative:

Many Australians would be horrified to know that their hard-earned super is helping tobacco industry tactics to increase their profits at the expense of people's health and lives. With Dr Bronwyn King and Tobacco Free Portfolios we can diminish the power and influence of tobacco companies, by hitting them where it hurts – their bottom line.¹⁴⁹

¹⁴⁶ J Ireland, 'Future Fund Quits Tobacco Investment', *The Sydney Morning Herald*, 28 February 2013, <https://www.smh.com.au/politics/federal/future-fund-quits-tobacco-investment-20130228-2f7yb.html>

¹⁴⁷ B King, C Payne, and E Stone, 'Tobacco-Free Investment: Harnessing the Power of the Finance Industry in Comprehensive Tobacco Control' (2017) 17 (2) *QUT Law Review* 161-174, and Tobacco Free Portfolios, <https://tobaccofreeportfolios.org/>

¹⁴⁸ VicHealth, 'New Tool to Help Australians Choose Tobacco-free Super Fund', Press Release, 11 November 2020, <https://www.vichealth.vic.gov.au/media-and-resources/media-releases/new-tool-for-ethical-super-choice>

¹⁴⁹ Ibid.

Super fund member, Tony Wolfe, commented about the plan: ‘As someone who knows first-hand the true impact of tobacco, and has battled cancer, it makes sense to have a tobacco-free super fund.’¹⁵⁰

7. Tobacco Interference

The *WHO Framework Convention on Tobacco Control* 2003 also emphasizes the importance of policy-making being free from tobacco interference.¹⁵¹ Article 5 (3) provides: ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’¹⁵²

There has been concern about tobacco interference in Australia’s federal politics – as well in state politics as well. There has been a number of pieces of investigative journalism by Neil Chenoweth, highlighting links and connections between tobacco companies, e-cigarette manufacturers, and Australian politicians.¹⁵³ While the Liberal Party of Australia no longer accepts donations from tobacco industry, there is a group of libertarian politics within the

¹⁵⁰ Ibid.

¹⁵¹ *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/>

¹⁵² Ibid.

¹⁵³ N Chenoweth, ‘The Secret Money Trail behind Vaping’, *Australian Financial Review*, 20 February 2021, <https://www.afr.com/policy/health-and-education/the-secret-money-trail-behind-vaping-20210217-p573bi> and N Chenoweth, ‘Senators claim Retail Lobby Group “Misled” E-cigarette Inquiry’, *Australian Financial Review*, 7 May 2021, <https://www.afr.com/policy/health-and-education/senators-claim-retail-lobby-group-misled-e-cigarette-inquiry-20210303-p577e7>

Liberal Party of Australia – with links to the tobacco-funded Institute of Public Affairs – who advocate for the de-regulation of tobacco products and e-cigarettes.¹⁵⁴ The National Party of Australia still accepts political donations from the tobacco industry, and frequently echoes the policies of tobacco companies and e-cigarette companies.¹⁵⁵ The Liberal Democrats have accepted tobacco donations, and have argued against tobacco control measures, such as plain packaging of tobacco products.¹⁵⁶ The tobacco industry has also made extensive use of front groups and consultants during the debate over tobacco control in Australia.¹⁵⁷ There are also concerns about Dark Money in the Australian political system – with tobacco companies making donations, which are not reported.

Dr Sarah White of Quit Victoria has called for legislation to ban political donations to political parties, candidates, and associated entities by the tobacco industry in Australia.¹⁵⁸ The Australian Greens have proposed a bill to ban political donations from tobacco companies (as

¹⁵⁴ S Chapman, *Smoke Signals: Selected Writing* (Sydney University Press), 2016, 255-259.

¹⁵⁵ A Gartrell, 'Nationals MP Breaks Ranks on Tobacco Donations as Party figures Agitate for Ban', *The Sydney Morning Herald*, 29 October 2016, <http://www.smh.com.au/federal-politics/political-news/nationals-mp-breaks-ranks-on-tobacco-donations-as-party-figures-agitate-for-ban-20161029-gsdm7n.html>

¹⁵⁶ M Safi, "'Thank You for Smoking': Leyonhjelm Confirms Philip Morris Backing', *The Guardian*, 2 October 2014, <https://www.theguardian.com/australia-news/2014/oct/02/thank-you-for-smoking-leyonhjelm-confirms-philip-morris-backing>

¹⁵⁷ Tobacco Tactics, 'Australia: Funding Think Tanks and Hiring Independent Experts', 2021, <https://tobaccotactics.org/wiki/australia-funding-think-tanks-and-hiring-independent-experts/>

¹⁵⁸ Quit Victoria, 'Big Tobacco Buying Influence Through Political Donations', Press Release, 8 June 2018, <https://www.quit.org.au/news/big-tobacco-buying-influence-through-political-donations/>

well as property developers, and alcohol, gambling, and mining industries).¹⁵⁹ There has also been further proposals to prevent state capture by corporations in Australian politics.¹⁶⁰

There remains much concern about the ability of Big Tobacco to ward off the introduction of tobacco control measures in United States politics.¹⁶¹ There have been a number of proposals by scholars such as Lawrence Lessig and Zephyr Teachout to address the corruption of Dark corporate money in the United States political system.¹⁶²

Tobacco interference remains a major international problem – in terms of the adoption of measures under the *WHO Framework Convention on Tobacco Control* 2003, and the

¹⁵⁹ Australian Greens, ‘Greens Bill to Ban Political Donations from Developers, Tobacco, Alcohol, Gambling and Mining Industries’, Press Release, 4 December 2014, <https://greensmps.org.au/articles/greens-bill-ban-political-donations-developers-tobacco-alcohol-gambling-and-mining>

¹⁶⁰ Australian Democracy Network, *Confronting State Capture*, February 2022, <https://australiandemocracy.org.au/statecapture>; S Ludlam, ‘The Scourge of State Capture’, *The Monthly*, February 2022, <https://www.themonthly.com.au/issue/2022/february/1643634000/scott-ludlam/scourge-state-capture#mtr>; and P Adams, ‘Undue Influence: How Industry Is Undermining Our Democracy’, Late Night Live, Radio National, ABC News, 16 February 2022, <https://www.abc.net.au/radionational/programs/latenightlive/how-industry-is-undermining-our-democracy/13757678>

¹⁶¹ N Oreskes and E Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke To Global Warming* (Bloomsbury Press, 2010).

¹⁶² Z Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* (Harvard University Press, 2014); and L Lessig, *They Don’t Represent Us and Here’s How They Could: A Blueprint for Reclaiming Our Democracy* (Dey Street, 2019).

implementation of pioneering new measures for tobacco control, such as plain packaging of tobacco products.

Conclusion

Jacinda Ardern's New Zealand Government has been pressing ahead with its tobacco endgame strategies.¹⁶³ The Associate Minister for Health, the Hon. Dr Ayesha Verrall, commented: 'Smoking is still the leading cause of preventable death in New Zealand and causes one in four cancers.'¹⁶⁴ She was concerned that 'smoking related harm is particularly prevalent in our Māori, Pacific and low income communities.'¹⁶⁵ Verrall commented: 'We want to make sure young people never start smoking so we will make it an offence to sell or supply smoked tobacco products to new cohorts of youth.'¹⁶⁶ She also stressed: 'We are also reducing the appeal, addictiveness and availability of smoked tobacco products.'¹⁶⁷ The Smokefree Aotearoa 2025 Action Plan seeks to eliminate inequities in smoking rates and smoking-related illnesses; creating a smokefree generation; increasing the number of people who successfully

¹⁶³ Hon. Dr A Verrall, 'Historic Step Towards Smokefree Future', New Zealand Government, 9 December 2021, <https://www.beehive.govt.nz/release/historic-step-towards-smokefree-future> and Department of Health (New Zealand), *Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025*, Wellington: New Zealand Government, 2021, <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

¹⁶⁴ Hon. Dr A Verrall, 'Historic Step Towards Smokefree Future', New Zealand Government, 9 December 2021, <https://www.beehive.govt.nz/release/historic-step-towards-smokefree-future>

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

quit smoking.¹⁶⁸ The Smokefree Aotearoa 2025 Action Plan has six focal points – including Maori leadership and decision-making; health promotion and community mobilization; evidence-based smoking cessation services; reductions of the addictiveness and appeal of smoked tobacco products; the reduction of the availability of smoked tobacco products; and legal obligations for manufacturers, importers, and retailers.¹⁶⁹ There remains academic debate about the best combination of policy options to achieve a smoke-free New Zealand.¹⁷⁰

As part of its next National Tobacco Strategy, Australia should follow suit and develop its own comprehensive tobacco endgame policies to make Australia smoke-free by 2030. Such an initiative should build upon Australia's previous public health successes – such as its pioneering plain packaging of tobacco products. There is a need for stronger regulation of tobacco advertising and sponsorship – particularly in respect of new media. Australia could introduce age-related limitations and restrictions in respect of smoking. The government could also pass spatial limitations and restrictions in relation to smoking. Furthermore, the Australian Government could take civil litigation against tobacco companies. There is also scope for an investigation of criminal action against tobacco companies. Australia needs to encourage tobacco divestment. There is also a need to guard against tobacco interference during the development of tobacco endgame strategies. Australia should strive to be a smoke-free state.

¹⁶⁸ Department of Health (New Zealand), *Smokefree Aotearoa 2025 Action Plan - Auahi Kore Aotearoa Mahere Rautaki 2025* (New Zealand Government, 2021), <https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025>

¹⁶⁹ Ibid.

¹⁷⁰ M Rimmer, *Proposals for a Smokefree Aotearoa 2025 Action Plan: A Submission to the New Zealand Ministry of Health*, New Zealand Ministry of Health, 2021, <https://eprints.qut.edu.au/210833/>