31 May 2021

Ministry of Health
Smokefree 2025 Consultation
PO Box 5013
WELLINGTON 6140

Email: smokefree2025@health.govt.nz

Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Proposals for a Smokefree Aotearoa 2025 Action Plan: discussion document* and the *Impact Summary: Proposals for a Smokefree Aotearoa 2025 Action Plan.*

Yours sincerely

Katherine Rich
Chief Executive

Proposals for a Smokefree Aotearoa 2025 Action Plan: discussion document
and
Impact Summary: Proposals for a Smokefree Aotearoa 2025 Action Plan

Submission by the New Zealand Food & Grocery Council

31 May 2021

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (**NZFGC**) welcomes the opportunity to comment on *Proposals for a Smokefree Aotearoa 2025 Action Plan: discussion document* (the **Discussion Document**), the *Impact Summary: Proposals for a Smokefree Aotearoa 2025 Action Plan* (the Regulatory Impact Statement or **RIS**).

2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over $40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over $34 billion in export revenue from exports to 195 countries – representing 65% of total goods and services exports.

OVERARCHING COMMENTS

3. NZFGC is concerned that the policy proposals in the Discussion Document and the associated RIS are high risk, for smoking harm reduction in general, to retailers and their employees and to Māori and Pasifika as a population group.

4. From 2011 to 2019, over just eight years, smoking prevalence has fallen by over 28% for all adults while Action for Smokefree 2025 (**ASH**) [sic] data shows that in 2019, Year 10 students including Māori boys were 'smokefree.' This prevalence rate would likely to have improved still further in 2021. Instead of reinforcing success such as through vaping, the suite of proposals risks igniting an illicit trade while entrenching smoking in reaction to a population scale experiment in tobacco control and intergenerational proposals that carry human rights and other concerns.

5. NZFGC recommends consideration be given to the prospect that less regulatory interventions will achieve greater harm reduction outcomes. Vaping emerged as a market-led solution to smoking harm and has disrupted conventional tobacco, much more so than other policies.

6. In summary, we consider the policy proposals taken together represent prohibition. They lack evidence, contain flawed assumptions, will put the greatest pressure on Māori and Pasifika, whilst turning the New Zealand population into laboratory subjects. Only South Africa has tested some of the 'prohibition' options, with disastrous results in relation to criminality and inequality.

7. Overall, NZFGC is generally not supportive of the proposals pending the conduct of community level trials before putting the whole population at risk. We also believe that Smokefree 2025 as an aim now needs to shift out to best accommodate all trials and for the resultant data to be reflected in future decisions and measures. The goal needs to change or the Government is set up for failure at best and significant population inequality (especially for Māori and Pasifika) and criminalisation at worst.

DETAILED COMMENTS

Introduction

8. It is a decade since the government of the day announced a Smokefree Aotearoa goal by 2025. While the word 'goal' is defined as 'an aim or purpose,' this consultation is no longer about the aim of 2025 but about a hard target. This distinction is fundamental to the issues and flaws in the policy proposals that we identify in the following.

9. NZFGC opposes rashly adhering to a date this current Government did not create and for which it has only had a limited time to influence. If there is to be amendment to the

Smokefree Environments and Regulated Products Act 1990 (the **Smokefree Act**) then this should be limited to correcting anomalies from 2020 to give society a chance to demonstrate we are still tracking in the right direction. This could be coupled with community-level pilots of a range of options.

10. To put this latest round of reform into context, there is just over three and a half years between the consultation closing on 31 May 2021 and 2025. It is unrealistic to suggest that we will legislate, regulate, implement and generate societal buy-in to achieve a target of Smokefree Aotearoa 2025. The Budget documents confirm this with forecasts of limited revenue decreases in tobacco excise to 2025. The goal needs to change or the Government is set up for failure at best and significant population inequality and criminalisation at worst.

11. NZFGC recommends consideration be given to the prospect that less regulatory interventions will achieve greater harm reduction outcomes. Vaping emerged as a market-led solution to smoking harm and has disrupted conventional tobacco, much more so than other policies.

12. In summary, we consider the policy proposals taken together represent prohibition. If prohibition is the intent, then it must be disclosed openly rather than obliquely. It greatly concerns us that it reads as a collection of theoretical experiments applied at a population level, which will lead to the loss of livelihoods, increased criminality and could set back smoking harm reduction. The proposals lack of evidence, contain flawed assumptions, will put the greatest pressure on Māori and Pasifika, whilst turning the New Zealand population into laboratory subjects. Only South Africa has tested some of the 'prohibition' options with disastrous results in relation to criminality and inequality.

1. STRENGTHEN THE TOBACCO CONTROL SYSTEM

Strengthen Māori governance of the tobacco control programme

(a) What would effective Māori governance of the tobacco control programme look like?

13. This question should be set aside in light of the wide-ranging reform of the health system earlier this month that includes a proposed new Māori Health Authority and in the absence of evidence around the impact on Māori and Pasifika.

14. Given the magnitude of policy proposals in the Discussion Document, NZFGC is concerned at the prospective criminalisation of Māori and Pasifika that could well result if pursued, because they would be driven into the illicit market for choice and availability, especially in rural areas.

Support community action for a Smokefree 2025

(b) What action are you aware of in your community that supports Smokefree 2025? What is needed to strengthen community action for a Smokefree 2025? Please give reasons

15. The RIS (p26), defines community-based action as the Cancer Society, Hāpai te Hauora and Action for Smokefree 2025 (ASH) [sic]. NZFGC recommends public money be made contestable and accessible by employer and employee groups, whanau providers and NGOs. Achieving Smokefree 2025 demands a more expansive community approach than three anti-smoking lobby groups.

16. In the case of vaping, 'community action' has seen unhelpful active advocacy that has resulted in council policies[1] where vaping has been equated to smoking. This undermines vaping as an alternative to smoking promoted as such by the Ministry of Health (the **Ministry**). NZFGC recommends that vaping be delinked from smokefree policies.

Increase research, evaluation, monitoring and reporting

(c) What do you think the priorities are for research, evaluation, monitoring and reporting? Please give reasons

17. NZFGC supports research that would provide evidence for a range of policy options. We are very concerned at the prospect of evidence gathering to support proposals AFTER decisions on proposals are made. Policy decisions should be evidence-based and made after research comprising practical application of community pilots conducted before the 'Team of 5 million' become the laboratory subjects to demonstrate whether theoretical modelling is reflected in reality. The associated RIS (2021, p1) confirms our reservations:

    "Most of the measures that we are considering are not yet widely implemented internationally and, in some cases, New Zealand would be world leading in implementing them. For this reason, there is significant uncertainty of the outcomes. While a strong body of research exists around the likely impacts of these measures, comparable markets have not evaluated them extensively and modelling of their effect is limited.".

18. NZFGC believes the evidence in the Discussion Document and RIS is very weak and unsubstantiated. There are few, or no, real-world validated research examples at a community or population level to support the fundamental policy proposals. It is ethically and legally dubious to treat the New Zealand population as laboratory subjects. In an absence of community-scale pilots with peer-reviewed analysis, the supporting evidence and policy approach is heavily biased and just ideas.

19. NZFGC recommends that population-scale application be delayed until community-scale pilots or trails (with community consent) are conducted, analysed and peer-reviewed. The risks of not doing this are evidenced by a similar South African experiment when, between 27 March and 17 August 2020, for around five months, smoked tobacco and vaping was banned in South Africa as non-essential.

20. Research by Filby et al (20 January 2021, p1[2]) involving 23,631 respondents, found that 93% of those South Africans who continued to smoke, purchased cigarettes despite the sales ban. The average price of cigarettes purchased illicitly in South Africa increased by 250% over pre-lockdown prices. Before the lockdown, 75% of respondents smoked brands made by international tobacco companies (dominated by BAT, Philip Morris International and Japan Tobacco International). In June 2020, their market share had decreased to 17% with local brands filling the void. Sales channels had gone from formal stores to informal shops, street vendors as well as friends/family and 'acquaintances.' This vastly overshadowed the 9% of pre-lockdown smokers who successfully quit smoking.

21. Prohibition grew South Africa's illicit trade and while New Zealand's illicit trade is a third of South Africa's, the illicit trade here has more than tripled in the past decade without such draconian measures.

[1] A rapid NZFGC analysis shows that 18 of New Zealand's 67 territorial local authorities have included vaping as part of their Smokefree policies with others consulting. This includes all of the main centres save for Auckland.

[2] Samantha Filby, Kirsten van der Zee, Corné van Walbeek (20 January 2021). *The temporary ban on tobacco sales in South Africa: lessons for endgame strategies*, Tobacco Control, doi:10.1136/tobaccocontrol-2020-056209

Strengthen compliance and enforcement activity

(d) What else do you think is needed to strengthen New Zealand's tobacco control system? Please give reasons.

22. NZFGC considers that the proposals should not proceed as set out and that what is needed are community-scale pilots or trials to generate evidence of positive effects.

23. NZFGC considers the Discussion Document, does not factor into proposals the illicit trade in tobacco. KPMG (2020, p7[3]) estimated that the volume of illicit tobacco in New Zealand was 230,100 kilograms representing an excise opportunity cost of $287.4m. In 2019, sales of illicit tobacco in New Zealand represented an estimated 11.5% of all tobacco consumption; a 1.3% increase over 2018. This is arguably reflective of tobacco excise tax increases.

24. It is why the proposals in the Discussion Document, taken together, would lead to prohibition that would greatly boost the New Zealand illicit trade. This is based on evidence:
    - tobacco has less severe criminal sanctions (the *Customs and Excise Act 2018* (the **Customs Act**)) when compared to the illegal drug classes. There are fewer deterents for new entrants to the illicit tobacco trade
    - New Zealanders are legally entitled to manufacture 5kg of homegrown tobacco for personal consumption under the Customs Act
    - while homegrown tobacco is estimated at 3.9% of supply, this is likely underreported (KPMG, 2020 p66). As full-strength nicotine tobacco seeds are easily available online, home-growing will take off
    - if the package of initiatives like fewer outlets, reduced nicotine, no filters and smokefree generation 'age-gating' proceed, new channels will emerge like South Africa – especially in rural New Zealand. These could become gateways to harder substances
    - over the period of tobacco excise tax increases, since 2010 the illicit trade in New Zealand has more than tripled. These channels to market are now locked-in here and are growing. Further tightening of legal supply enables that market to supplant and/or undercut it
    - the size of the illicit market, hundreds of millions of dollars and growing, is sufficient to attract the interest of organised crime.

25. The 2020 KPMG report also illustrated the difference between engaging with the tobacco industry for good public policy and rigid adherence to the Framework Convention on Tobacco Control (**FCTC**). In New Zealand, this is wrongly read as prohibiting any contact with the trade who could be used as the government's eyes and ears. This is despite a separate FCTC protocol to Eliminate the Illicit Trade.

26. NZFGC's concerns about basing public policy upon limited academically led theory is illustrated by a May 2017[4] decision taken by the then government, to defer joining the FCTC illicit trade protocol. This 2017 decision was based upon out-of-date data, including 2013 (ASH) research and a 2010 estimate by 'the tobacco industry,' which put the illicit trade at 3.3%. 2010 was before the first of 10 consecutive 10% tobacco excise tax increases being implemented over 2011-2020. KPMG[5] data for 2018, on New Zealand's illicit trade, reveals it had more than tripled over just eight years to 10.2%. In the 2019 year, this had grown to 11.5%.

[3] KPMG (26 May 2020). Illicit tobacco in New Zealand, KPMG Strategy Report, London.
[4] Office of the Associate Minister of Health (23 May 2017). Report back on the World Health Organization's Protocol to Eliminate the Illicit Trade in Tobacco Products.
[5] KPMG (24 May 2019). Illicit tobacco in New Zealand, KPMG Strategy Report, London.

2. MAKE SMOKED TOBACCO PRODUCTS LESS AVAILABLE

27. NZFGC considers the evidence supporting the major policy proposals in the Discussion Document is poor and amount to an attempt to realise an end game theory of prohibition at any cost. This is substantiated in the RIS (2021, p1) that: *"Most of the measures that we are considering are not yet widely implemented internationally and … there is significant uncertainty of the outcomes."*

28. Given the prevalence of Māori smokers, it seems ethically wrong to conduct a population-scale policy experiment where tangata whenua will be prominent and potentially criminalised. The policies are inequitable.

29. NZFGC recommends none of the proposals in this section proceed until they have been rigorously tested at a community level, analysed and subjected to robust peer review.

License all retailers of tobacco and vaping products

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

~~*Yes*~~

No

30. There is no need for a completely new licensing bureaucracy. The resources that this would take would be better invested on research and in tackling the $287.4m trade in illicit tobacco (2020, p1[6]), noting that the illicit trade makes up an estimated 11.5% of all tobacco consumption in New Zealand.

31. Militating against adding to the large regulatory burden faced by business, is that the food sector is already regulated and verified. If the Ministry is to add a licensing requirement then this should be incorporated within an existing system which includes national programmes with physical verification. In addition, some food businesses are subject to inspection under the *Sale and Supply of Alcohol Act*. Service stations are further subject to the *Health and Safety at Work (Hazardous Substances) Regulations* in addition to the *Land Transport Act*, *Resource Management Act* and the *Building Act*. Existing systems are already in place and these could be adapted before adding a new one.

Significantly reduce the number of smoked tobacco product retailers based on population size and density

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

~~*Yes*~~

No

32. A market decline of a third over ten years, as has happened with New Zealand cigarette sales, is not what could be defined as 'gradual' as characterised by the RIS (2021, p26). NZFGC provides an analysis of IRI industry data in Figure 1 (next page). This shows that sources of data from academic papers are not current nor necessarily accurate and provides further reasons for policy restraint. It is this quality of data that is accessible from industry if the Ministry engaged with industry earlier in the policy cycle.

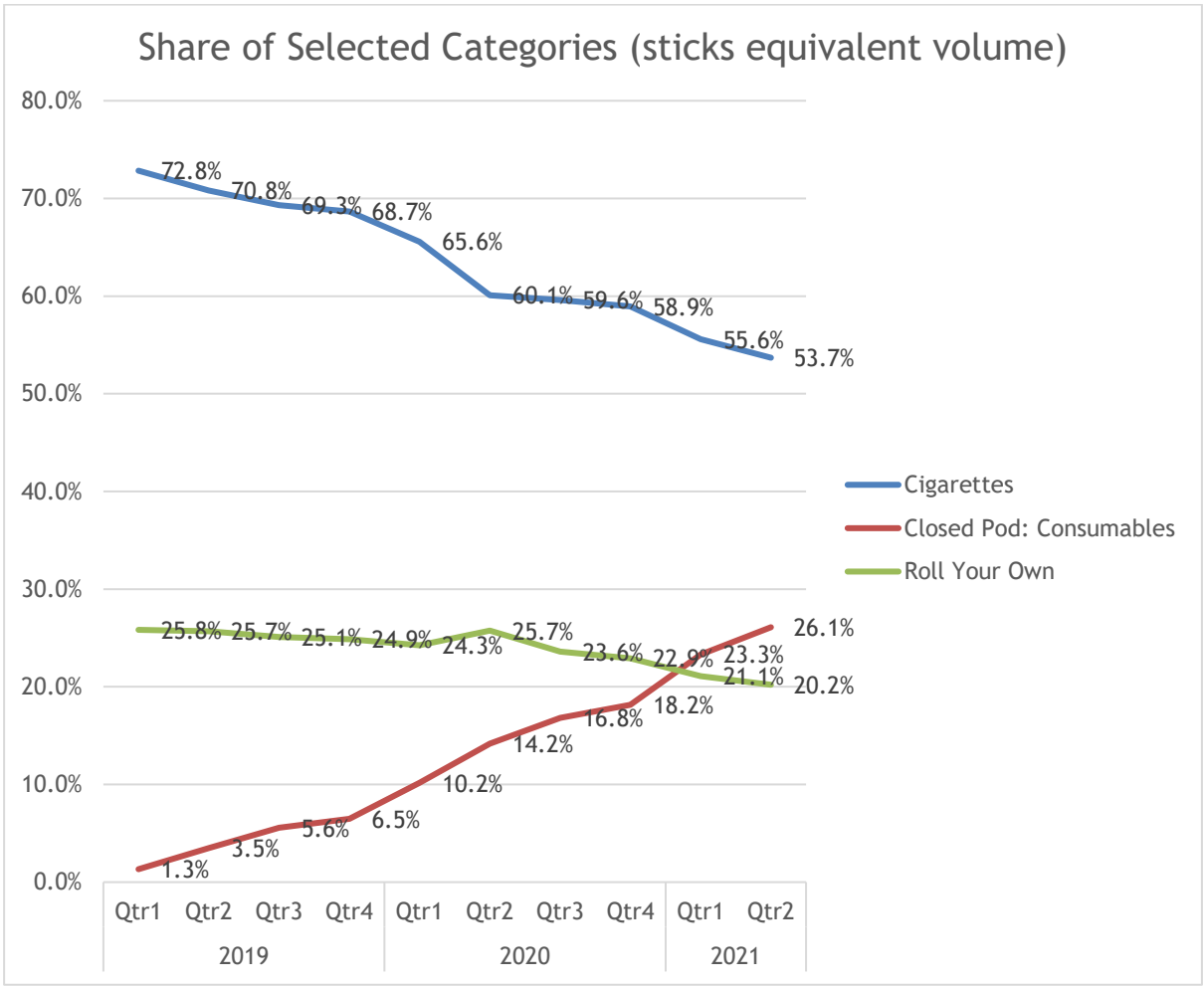
33. The Ministry, in the RIS, has based the policy proposals on models such as contained in *"Theoretical impacts of a range of major tobacco retail outlet reduction interventions:*

[6] KPMG (26 May 2020).

modelling results in a country with a smoke-free nation goal" (Pearson et al, 2015[7]). The proposals have not been tested at a pilot level let alone a population one. Aside from Pearson et al conceding there is substantial uncertainty, it contains an assumption that cigarette sales would be limited to one 20-cigarette pack, per person, per day. This assumption has no basis in fact.

34. While Pearson et al concedes substantial uncertainty, the balance of the literature referenced is poor with about nine papers in the Discussion Document and RIS for a reduction in retail. Of these, there is only one survey of retail and that involved an poor attempt to analyse what people purchased from dairies through observation. There is no empirical store (SKU) or industry (eg IRI) data, to justify why the number of outlets need to be dramatically reduced when tobacco sales are in decline.

Figure 1 IRI Data Trends – Tobacco Sales



Notes: Data is sourced from IRI New Zealand and the graph assumes:

- Cigarettes (Raw data Volume in (000) sticks times 1,000)
- *Roll Your Own (*Raw data Volume in (000) grams (* 1000) assuming 0.8g per hand rolled stick using OECD statistics
- Closed pod consumables (Raw data Volume in (000) ml, assumed 1.5 ml pod = 30 sticks (manufacturer Alt claims "each pod is approximately equivalent to 1.5 packs of cigarettes) sourced for getalt.co.nz FAQ

[7] Amber L Pearson, Frederieke S van der Deen, Nick Wilson, Linda Cobiac, Tony Blakely (2015). *Theoretical impacts of a range of major tobacco retail outlet reduction interventions: modelling results in a country with a smoke-free nation goal*, Tobacco Control, 24, pp32–38, doi:10.1136/tobaccocontrol-2013-051362.

35. One of the motivations for this unprecedented approach seems to be concern over the proximity of schools to 'tobacco outlets,' which we read as meaning dairies. This fear is shown to be unfounded by the New Zealand Health Survey (NZHS) and ASH's 2009-2019 ten year snapshot. These both show that youth are already 'smokefree' (according to the Ministry's definition) at 3%, down from 14% in 2006/07 (NZHS). Even if 6.8% of Year 10 Māori girls smoked daily according to the Discussion Document (p1), they too were trending towards smokefree in 2019 because in 2009, this figure was 17.9%[8].

Restrict sales of smoked tobacco products to a limited number of specific store types

(c) Do you support reducing the retail availability of tobacco products by restricting sales to a limited number of specific store types (e.g., specialist R18 stores and/or pharmacies)? ~~*Yes*~~ **No**

36. An internet search of 'R18 stores' shows that most are sex shops and cigarettes in pharmacies seems unrealistic. The proposal appears in part based on a two-page letter by van der Deen and Wilson (2018, pp219-220[9]). This involved a 2015 'survey' of 31 pharmacies in central Wellington (comprising approximately 3.5% of pharmacies in New Zealand). Even then, only a minority indicated they were very likely to sell tobacco rising to a majority *if part of an endgame strategy*. NZFGC is concerned this has been proposed without first testing it at a community scale.

37. Currently, the legal retail sale of tobacco is worth some $2.5 billion annually. Reducing outlets to only 300 and 500 'sites' would see the annual sales at each 'site' average $5-8m. This provides a powerful financial driver to secure a 'license' given the Ministry proposes to upend market equilibrium. As a result, proposals (b) and/or (c), could see the Ministry subject to significant numbers of appeals and litigation, given the vast sums potentially at stake. This is market intervention on a grand scale and reducing retail availability is another unproven hypothetical proposal.

38. Restricting outlets will also massively boost illicit, illegal informal distribution channels. That is the lesson from South Africa's five-month total sales ban. If there is an absence of outlets this will not lead to an absence of supply. It could elongate, rather than drive down, smoking prevalence.

Introduce a smokefree generation policy

(d) Do you support introducing a smokefree generation policy? ~~*Yes*~~ **No**

39. This option presents significant and major human rights implications. We suggest it would be impossible to enforce without intrusion into business and personal lives. In concert with other proposals, it contributes towards prohibition.

40. Starting with business operations, liability for selling tobacco products to underage persons is rightly and currently with the business involved. Physical appearance is an initial indicator

[8] ASH (2009). National Year 10 ASH Snapshot Survey, 1999-2009: Trends in Tobacco Use by Students Aged 14-15 Years, ASH, Auckland.

[9] Frederieke Sanne Petrović-van der Deen and Nick Wilson (2018). Restricting tobacco sales to only pharmacies as an endgame strategy: are pharmacies likely to opt in? Australian and New Zealand Journal of Public Health, vol. 42 no. 2.

for those aged 18+ (ie alcohol, vaping and tobacco) and 20+ (ie casinos), reinforced by photo identification. Generational prohibition upends this.

41. Someone in their 20s, 30s, 40s or 50s could not be told apart from a smokefree generation legal age user and someone who, by an accident of birth, was not. This creates an operational need to ask EVERY tobacco purchaser for identification and that becomes a major intrusion of the state into its citizenry while disrupting business operations. It is invasive and impractical.

42. In relation to human rights, this policy could breach of Article 7 of the *Universal Declaration on Human Rights* because it redefines the notion of legal adulthood in New Zealand, which is 20, creating inequality before the law. An arbitrary date would prohibit legal adults from consuming a legal product. This also creates precedent for other regulated industries let alone any product or service that a future government may deem unacceptable.

43. There are also significant *Bill of Rights* implications given how experimental these proposals are. The RIS plays down the magnitude of what is proposed. NZFGC points to Section 10 of the *Bill of Rights* (Right not to be subjected to medical or scientific experimentation). This is relevant because what is proposed is a population scale experiment involving half a million New Zealanders and especially Māori and Pasifika. This includes the proposal to remove filters and mandate low nicotine tobacco.

44. NZFGC maintains that a reduction in smoking prevalence by a third over the past decade, shows that market and policy solutions are working. The 2020 amendment should be allowed to have influence too. A tripling of the illicit trade in response to tobacco excise tax increases shows that society is hitting its limits.

(e) Are you a small business that sells smoked tobacco products? ~~*Yes*~~ **No**

45. NZFGC is very concerned at the poor evidence base for proposals (b), (c) and (d) above given the potential impact on individual retailers. The RIS cites Thomson et al (2007, pp14-15[10]), which claims tobacco (in 2007) contributed 37% of convenience store revenue but reportedly contributed a 14% gross profit margin. This in turn references a 2006 BAT document (no longer available online) but the information is significantly outdated and commercial analysis is superficial and naïve.

46. Overseas studies, cited in the RIS, are not relevant to New Zealand in this area. A more relevant study by the NZ Medical Association (**NZMA**) (Witt et al, 2018, p38), albeit with only 62 dairies participating, found tobacco sales were somewhat important to very important for 87.1% of respondents. This, in our view, is likely to be much closer to reality. It is unacceptable that the Ministry has failed to conduct primary commercial research to validate the cost implication upon retailers *before going out to public consultation*.

47. The reality is that tobacco sales represent an important part of small business retail turnover. Even so, New Zealand is trending towards reduced smoking and some retail operators are electing to delete tobacco categories altogether. We contend this is the market working. There is a market-led reorientation underway that will achieve what the

[10] George Thomson, Richard Edwards, Sheena Hudson, Janet Hoek and Heather Gifford (30 November 2007). Out of sight: Evidence on the tobacco retail environment in New Zealand and overseas, Report for the Cancer Society of New Zealand and ASH New Zealand.

Ministry largely seeks by market forces. In this area, we would note that there is no mention of long lease commitments across thousands of sites in urban and rural locations. There is no means to break leases (as was identified during Covid lock down) but it is likely that these proposals will break many businesses who have entered into commercial leases.

3. MAKE SMOKED TOBACCO PRODUCTS LESS ADDICTIVE AND LESS APPEALING

Reduce nicotine in smoked tobacco products to very low levels

(a) Do you support reducing the nicotine in smoked tobacco products to very low levels? ~~*Yes*~~ **No**

48. NZFGC is concerned the policy proposal does not address supply of low nicotine tobacco. Supply globally is non-existent.

49. The arguments behind low nicotine cigarettes rely heavily on the 2015 study of Donny et al published in *The New England Journal of Medicine*[11]. While Donny et al (2017, p38) accurately state that low nicotine cigarettes are technologically feasible, they fail to explain their commercial failure[12]:
    - Phillip Morris International, cited in the RIS with its 'Next' range, was released in 1989 but ceased production in the early 1990s. The brand re-emerged in Malaysia but as a conventional cigarette
    - Liggett Group's 'Quest,' also cited by Donny et al, was launched in the early 2000s but was removed from market in 2010[13].
    - These products were described in supporting evidence as having a "limited market share," yet had not been on the market for years prior to this paper being written.

50. Further in relation to the 2015 study of Donny et al, what is not reported in the RIS were criticisms of this 2015 study also published in *The New England Journal of Medicine,* summarised as follows:
    - Smokers may be misled by the illusion that reduced-nicotine cigarettes are safer than regular ones, and as a result, they may choose reduced-nicotine cigarettes instead of quitting (Chao Cao et al, 28 January 2016[14]);
    - Although none of the participants stated an interest in quitting smoking, a better measure would have been if the participants' intention would have been "no intention to quit smoking in the next 6 months." The majority of current smokers are in this category (Edward Anselm, 28 January 2016[15]); and
    - Donny et al misleadingly report decreased nicotine exposure in participants who were randomly assigned to receive reduced-nicotine cigarettes. As urinary nicotine level scales linearly with the number of cigarettes smoked, participants who smoked cigarettes containing the lowest concentration of nicotine should have had a urinary nicotine level of 0.5 nmol per milligram of creatinine. Instead, the level was

[11] Eric C. Donny, Rachel L. Denlinger, Jennifer W. Tidey, Joseph S. Koopmeiners, Neal L. Benowitz, Ryan G. Vandrey, Mustafa al'Absi, Steven G. Carmella, Paul M. Cinciripini, Sarah S. Dermody, David J. Drobes, Stephen S. Hecht, Joni Jensen, Tonya Lane, Chap T. Le, F. Joseph McClernon, Ivan D. Montoya, Sharon E. Murphy, Jason D. Robinson, Maxine L. Stitzer, Andrew A. Strasser, Hilary Tindle, and Dorothy K. Hatsukami (1 October 2015). Randomized Trial of Reduced-Nicotine Standards for Cigarettes, The New England Journal of Medicine, 373;14, pp1340-1349.

[12] Rital Rubin (14 August 2017). If You Took The Nicotine Out Of Cigarettes, Would Fewer People Want To Smoke? Forbes, (https://www.forbes.com/sites/ritarubin/2017/08/14/if-you-took-the-nicotine-out-of-cigarettes-would-fewer-people-want-to-smoke/?sh=64134288620b)

[13] Office of the Attorney General (30 June 2020). Directory Deletions by Brands, State of California Department of Justice, Sacramento, p6.

[14] Chao Cao, Wen Li and Huahao Shen (28 January 2016), The New England Journal of Medicine, 374;4, p394.

[15] Edward Anselm (28 January 2016), The New England Journal of Medicine, 374;4, p395.

approximately 15 nmol per milligram (Goldstein and Goldstein, 28 January 2016[16]). They conclude that the most plausible explanation were participants supplementing low nicotine with regular cigarettes. They estimate 11 regular-cigarettes for a daily total of 26 cigarettes being smoked to deliver observed nicotine levels. Participants received less nicotine but more smoke — the thing causing lung cancer.

51. The evidence of Donny et al also turns on low nicotine cigarettes 'marketed in Europe and Australia' under the brand name 'Magic'. Another brand is provided, 'Spectrum'. Both Magic and Spectrum are owned by 22nd Century Group, a US company listed on the New York Stock Exchange (NYSE) as XXII. Net sales revenue for 22nd Century Group, sourced from NYSE, show that over the past three-years it has generated these annual revenues: 2020 (US28m); 2019 (US$25m) and 2018 (US$26m), for tobacco and cannabinoids.

52. 22nd Century Group is a small American biotech company supplying genetically engineered (**GM**) tobacco. It could not scale up production for a modest (in world-terms) New Zealand market.

53. Another option would be to grow GM tobacco here under license from 22nd Century. That would require a lengthy Environmental Protection Agency approvals process which has not to date been successful for any other product. What is clear is the consumer reaction to 'GM' tobacco especially key Māori and Pasifika communities. These are real world issues that demand answers before we get to biological timelines, brands and distribution etc. The absence of engagement with industry has resulted in the presentation of implausible proposals.

54. Finally, nicotine while addictive, does not cause cancer as smoking most certainly does. The Ministry is here endorsing a new generation of smoked cigarettes based on the mythology that smoking is safer than nicotine. Harm comes from smoking. Period.

55. It would be injurious to decades of public health work if this was to be undermined, by the Ministry. Any endorsement of 'low nicotine' tobacco is a huge retrograde step that only reinforces another mythology; that of "Light" and "Ultra Light" cigarettes[17]. Low nicotine cigarettes may have a role in cessation but they are just as harmful as full nicotine ones.

Prohibit filters in smoked tobacco products

(b) Do you support prohibiting filters in smoked tobacco products?

~~*Yes*~~

No

56. This proposal is not supported because the removal of filters in tandem with low nicotine tobacco (not being produced in volumes capable of meeting our market), would lead to prohibition, a move that would supercharge the illicit trade.

57. While the Discussion Document and RIS dismiss the utility of filters, the supporting literature is weak on medical research underpinning this. The cited references are from a tobacco control perspective and a literature review of tobacco manufacturers. NZFGC points the Ministry to research using secondary data analysis of 14,123 National Lung Screening Trial participants in the United States (2002-2004). A preliminary research letter wrote that unfiltered cigarettes are the most dangerous type and individuals who smoke them should be targeted for aggressive tobacco treatment interventions (Tanner et al,

[16] Jeffery A. Goldstein and Lila K.S. Goldstein (28 January 2016), The New England Journal of Medicine, 374;4, p395-396.

[17] Lynn T Kozlowskia and Janine L Pillitterib (2001). Beliefs about "Light" and "Ultra Light" cigarettes and efforts to change those beliefs: an overview of early efforts and published research, Tobacco Control,10: i12-i16.

December 2019 p1710[18]). The published research paper (Tanner et al, November 2020 p2187[19]), found that there was no difference in abstinence rates between unfiltered and filtered cigarette smokers and that lung cancer mortality is increased when smoking unfiltered cigarettes.

58. Even if the reduction in harm by filters is minimal, there is need to independently verify filter efficacy before they are banned as a baseless bright idea. The risk of this 'experiment' could exacerbate disease and increase mortality.

Prohibit innovations aimed at increasing the appeal and addictiveness of smoked tobacco products

(c) Do you support allowing the Government to prohibit [smoked] tobacco product innovations through regulations? **Yes** ~~No~~

59. While NZFGC broadly supports this proposal, among the few in the Discussion Document, it needs clarification as to scope and must be restricted to smoked tobacco innovations only. Smokeless tobacco has been transformative in Japan with Cummings et al (May 2020, p220) demonstrating results not dissimilar to the IRI data presented above in Figure 1 for New Zealand.

60. NZFGC is nonetheless concerned at what is not written in the Discussion Document but is included in the RIS. In the RIS, there is a lengthy commentary on menthol, banned in some countries but not New Zealand and now subject to a product standard process by the United States Food and Drug Administration (**USFDA**). If the intention is to follow suit and remove menthol as a characterising flavour, then that should be stated in the Discussion Document.

61. NZFGC broadly supports removing menthol given declining smoking prevalence but would point out that there is a lack of research as to the ethnicities who smoke variants like menthol in New Zealand. In the US, even the USFDA concedes it will have a disparate impact on African American smokers when banned, nearly 85% of whom smoke menthol cigarettes compared to 30% of White smokers and 35% of Hispanic smokers[21]. Without a level of knowledge, it risks a policy approach that discriminates Māori and Pasifika, then criminalises them if they seek out illegal, unregulated and untaxed illicit tobacco.

[18] Nichole T. Tanner, Nina A. Thomas, Ralph Ward, Alana Rojewski, Mulugeta Gebregziabher, Benjamin Toll and Gerard A. Silvestri (December, 2019). *Association of Cigarette Type With Lung Cancer Incidence and Mortality: Secondary Analysis of the National Lung Screening Trial*, JAMA Internal Medicine, American Medical Association, Volume 179, Number 12.

[19] Nichole T. Tanner, Nina A. Thomas, Ralph Ward, Alana Rojewski, Mulugeta Gebregziabher, Benjamin Toll and Gerard A. Silvestri (November, 2020). *Association of Cigarette Type and Nicotine Dependence in Patients Presenting for Lung Cancer Screening*, Chest, American College of Chest Physicians, 158 #5, Glenview, Illinois.

[20] P Cummings et al (May, 2020). What Is Accounting for the Rapid Decline in Cigarette Sales in Japan? International Journal of Environmental Research Public and Public Health, 17, 3570; doi:10.3390/ijerph17103570

[21] FDA (29 April 2021). FDA Commits to Evidence-Based Actions Aimed at Saving Lives and Preventing Future Generations of Smokers, Media Release, Washington DC, https://www.fda.gov/news-events/press-announcements/fda-commits-evidence-based-actions-aimed-saving-lives-and-preventing-future-generations-smokers

4. MAKE TOBACCO PRODUCTS LESS AFFORDABLE

Set a minimum price for tobacco

(a) Do you support setting a minimum price for all tobacco products? ~~*Yes*~~ **No**

62. NZFGC strongly opposes the introduction of minimum prices because it is highly regressive when New Zealand already has the highest tobacco excise tax increases in the world. What is proposed is the setting of a minimum price for tobacco, a price at which resellers must then on-sell to consumers. Such a proposal would appear to be anti-competitive, resale price maintenance, which is unlawful under the *Commerce Act 1986,* specifically, Section 38 (Resale price maintenance by others prohibited). In New Zealand, the Crown is bound by the *Commerce Act 1986* where it 'engages in trade'. This the Ministry would be doing because it would have to factor in changeable commercial matters (such as tobacco, manufacturing, wholesaling, distribution, branding, excise rates of return) in order to set a minimum price that will constantly change.

63. The Astrazeneca decision is pertinent (Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd High Court, Wellington CP 186- 98, 15 March 2000). The Ministry would, in the words of Judge Gendall "hard-bargain" manufacturers to establish a minimum price. In doing so, it moves into the realm of carrying on trade that makes it subject to the *Commerce Act 1986*.

64. In any event, adding a price floor to counteract smoking's negative externality would only further encourage the illicit trade, which has more than tripled since 2010 off the back of tobacco excise tax increases. NZFGC remains unconvinced if minimum pricing is a solution looking for a problem in the New Zealand market. Given weak commercial assumptions in the Discussion Document and RIS, NZFGC is not confident the Ministry would be in a position to comprehend complex commercial data to set such a price.

65. The reality is smoking prevalence is in long-term decline. A minimum price intervention, which would inflate cost boosting the illicit trade, is counterproductive.

5. ENHANCE EXISTING INITIATIVES

Of all the issues raised in this discussion document, what would you prioritise to include in the action plan? Please give reasons. Do you have any other comments on this discussion document?

66. NZFGC asks the government to consider the prospect that less regulatory interventions will achieve greater harm reduction outcomes. Vaping, as noted earlier, emerged as a market-led solution to smoking harm and has disrupted conventional tobacco, much more so other policies. To reinforce these we suggest the following amendments:

- Amend Part 1 of Schedule 2 in the Smokefree Act so that general retailers may sell flavours to create viable commercial options for trade that allows retailers to exit smoked tobacco sales *under market forces*;
- Reinforce retail options by amending the Interpretation in the Smokefree Act to delete (c) from "vaping substance" to fix the anomaly with heated tobacco and enable it as the closest alterative to smoked tobacco;
- Conduct a minimum of 24-months of research, evaluation, monitoring and reporting on the effects of the *Smokefree Environments and Regulated Products (Vaping)*

Amendment Act 2020, its regulations and any community-level pilot, before further substantive amendments are brought forward for consultation;

- Undertake community level pilots on discrete communities and with consent to pilot some of the initiatives proposed
- Integrate vaping as part of the tobacco control programme and recognise its role in supplanting smoked tobacco;
- Ask territorial local authorities to review the close association of vaping with smoking in smokefree policies to differentiate the reduced risk of vaping;
- Continue and extend the Vape to Quit programme approach to smoking.