TOBACCO ENDGAME
NHMRC Centre of Research Excellence

Submission to the Public Health (Tobacco and Other Products) Bill 2023 and the Public Health (Tobacco and Other Products) (Consequential Amendments and Transitional Provisions) Bill 2023

6 October 2023

About the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame

Established in November 2020, the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (Tobacco Endgame CRE) conducts research on a wide range of interventions to reduce tobacco-related disease.

Our research generates evidence on the feasibility, effectiveness and acceptability of tobacco endgame policies and interventions.

The Tobacco Endgame CRE is led by a multidisciplinary team of international experts in health policy, behavioural science, epidemiology, biostatistics, law, environmental health, psychology, Aboriginal and Torres Strait Islander Health, and priority populations, from nine universities across Australia, New Zealand and Canada.

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We are academic researchers from NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame based at The University of Queensland's School of Public Health. We have expertise in public health research and specifically in tobacco control policy. We have made several recommendations to strengthen this proposed legislation.

In particular, we would draw your attention to the need to provide exemptions to many of the offences outlined in Chapter 3 and potentially Chapter 4 for legitimate public health research that is conducted in the public interest. Without such an exemption, important independent research on illicit tobacco products conducted at universities in Australia will be severely impeded. There are exemptions in the bill for 'personal use', but public health research conducted in the public interest does not fall under this exemption. Similarly, there are exemptions related to enforcement of the Act, but research would not fall under that exemption either. We urge the Minister to amend the proposed legislation to include exemptions for public health research conducted by Australian universities to the offences outlined in this Act.

Overall purpose of the legislation

Consolidating this legislation is a sensible approach to streamlining Australia's federal tobacco control laws and, hopefully, achieving a more coherent regulatory model overall. Consideration should also be given to how to create a coherent regulatory approach across all nicotine products. Including products that can be used for cessation of tobacco smoking.

In 2000, The Tobacco Advisory Group of the Royal College of Physicians in the UK published a report titled, "Protecting smokers, saving lives: The case for a tobacco and nicotine regulatory authority" in which a case was made for establishing a government regulatory agency that would have responsibility for all nicotine and tobacco products. As the range of nicotine and tobacco products is growing internationally and in Australia as the tobacco industry diversifies its product lines and non-traditional nicotine product companies enter the market, such an approach of a single national regulatory agency and consolidated legislation could achieve better policy coherence and start the process of regulating tobacco cigarettes in a manner that is more consistent with their addictiveness and harmfulness.

Currently, much focus is taken up with controlling newer products, particularly nicotine vaping products/e-cigarettes. This has diverted attention from the product that causes the vast majority of preventable harm in Australia and globally, combustible tobacco cigarettes. The exemption from the Poisons Standard for nicotine in tobacco prepared and packed for smoking has left the contents of tobacco cigarettes unregulated. The reforms within the proposed laws that apply some restrictions to cigarette ingredients and components is a good first step, however given that tobacco cigarettes

deliver a highly addictive drug along with 7,000-8,000 chemicals, including known carcinogens, consideration should be given to capturing these products under the Poisons Standard.

This would require creating a schedule for non-therapeutic psychoactive substances intended for human use. The benefits would include greater recognition of tobacco cigarettes as an addictive drug rather than a 'consumer product', which is inappropriate because consumer products are expected to be safe when used in accordance with the manufacturer's instructions.

Objects of the Act do not currently adequately address misleading and deceptive aspects of tobacco products

In Section 3 (the Objects of the Act), Subsection 3(2)(c) should also address other aspects of tobacco products in addition to the packaging that mislead or deceive consumers concerning the harmful effects of smoking. For example, cigarette filters are ineffective at reducing the harms of smoking, but they give consumers the perception of reduced risk and have been used to reassure consumers who are worried about the health risks of smoking (Evans-Reeves et al 2022). Similarly, flavours and other ingredients added to cigarettes mask the harshness of the smoke, which is an important signal to consumers that inhaling smoke is harmful (Talhout et al 2006; Gardiner and Clark 2010). Hence, such ingredients mislead consumers.

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Objects do not adequately address protection from commercial interference, lobbying and promotion

Subsection 3(2) should also include protection of public health regulations from commercial interference as a means for achieving the Act's objects. This is consistent with WHO FCTC Article 5.3.

Regulation of the contents, constituents and emissions of tobacco and e-cigarette products should be included in the outline of the Act (S4)

The simplified outline of the Act (Section 4) should include regulation of the contents, constituents and emissions of tobacco and e-cigarette products in the text. Currently, this is missing but is an important part of implementing the WHO FCTC Articles 9 and 10.

Definitions do not currently capture several tobacco and nicotine products (S8)

In Section 8 (definitions), there is no definition for cigarillo. There is also no definition for heated tobacco products and so presumably, these are treated as e-cigarettes. It would be preferable to distinguish between electric devices and the modified tobacco cigarettes intended to be inserted into the device from other e-cigarette products that are only designed for liquids that may contain extracted nicotine. Hence, a separate definition for heated tobacco product would be useful.

The definitions also do not have a category that adequately captures non-electronic products. For example, those that may operate by releasing a pressurised aerosol, or by a non-electric heat source. The Dept could consider including a definition of a non-electronic vaping device.

There are several tobacco and nicotine products are not defined in Chapter 1, including oral snuff, nasal snuff, snus, chewing tobacco, other oral tobacco and nicotine products that are not smoked but that deliver nicotine primarily via the mucosa of the oral cavity. Including definitions of these products may be useful.

Political donations from tobacco and e-cigarette companies should be banned (S18)

It is extremely disappointing to see an exception made to allow political donations from tobacco and e-cigarette companies (S18).

Exceptions regarding political communications should exclude commercial organisations who profit from tobacco and e-cigarette sales from publicly advocating/lobbying regarding public health policies.

The exception for communications about government or political matters in Sections 26 and 67 should be amended to prohibit commercial organisations from publicly or privately lobbying against tobacco control policies and other public health regulations intended to reduce smoking, including communications intended to generate public opposition to public health measures to reduce smoking.

Given the strong endorsement of WHO FCTC Article 5.3 in the National Tobacco Strategy, we were surprised to see the exemptions outlined in Part 2.3 Division 3 for tobacco and e-cigarette companies to make political donations and contribute to electoral expenditure. These activities are clearly intended to influence policy-makers and are in conflict with the intent of Article 5.3. We also note that the FCTC definition of the tobacco industry is as follows: “tobacco industry” means tobacco manufacturers, wholesale distributors and importers of tobacco products; This means that companies involved in the wholesale distribution or importing of tobacco products (including supermarkets) also need to be captured in laws intended to restrict tobacco industry influence on policy-making.

We recommend deletion of these exceptions and instead explicitly prohibit tobacco industry and associated entities, including those acting on behalf of tobacco companies, such as retail trade organisation, from making political donations and contributions to electoral expenditure.

Furthermore, the Act should include provisions that prohibit commercial organisations who benefit from tobacco product sales from meeting with politicians and government public servants. Currently, the Australian Government's Guidance for public officials on interacting with the tobacco industry restricts interactions of public servants with tobacco industry representatives, "but this guidance only requires reporting of explicit interactions with tobacco companies, not those of the broader commercial actors who act in concert with these companies, such as retailers or trade organisations." (Rooney and Gartner 2023)

Laws, rather than just guidelines, to prevent all commercial actors who benefit from maintaining tobacco sales from interfering in the policy-making process for public health measures are needed.

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Advertising and promotion of tobacco and nicotine products

Exposure to online advertising or promotion can influence the use of tobacco and nicotine products (Donaldson et al, 2022), and we support the goal of restricting online advertising (S30(3)), including related to the use of algorithms to target potential consumers. Algorithms are used to capture attention and target what social media users see, including for addictive products (Lyons et al 2022). Direct advertising by tobacco companies is not accepted by most social media platforms, but most do not ban promotion by individual social media users, including "influencers," (Kong et al 2022) and many do not have similar restrictions on online advertising by e-cigarette companies. Social media has also been used by commercial actors to lobby against tobacco control policies (Davey 2023).

The exemptions for tobacco and e-cigarette advertisements during aircraft flight should be removed (S37 and S63). Australia should be setting the standard and advertising on international flights originating in or ending in Australia should be included in the advertising ban.

Promotion of cigarette/e-cigarette delivery services and facilitation of sales through social media/smartphone apps are not addressed. These are emerging channels of supply for both e-cigarette products and traditional tobacco products that need to be addressed in the legislation in addition to websites.

Websites that are hosted in other countries but that target Australian consumers with offers to sell tobacco and e-cigarette products may not comply with the Act and Regulations. It wasn't clear how such international websites would be managed.

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Packaging and product requirements

We agree with making names of colours prohibited terms list in S73, such as 'white'. Colour coding has been used to give the appearance of lower risk, such as associating lighter colours with highly ventilated cigarettes and can therefore also be misleading similar to terms such as 'light' or 'mild' (Greenland 2015). Some colours are universally associated with positive aspects, such as green implying low environmental impact. We also suggest that terms that connote 'environmentally friendly' or 'low carbon emissions' be prohibited terms. Words such as 'clean' and 'fresh' should also be provided as examples at item 1 and 2. Subsection 73(3) should also include the ability to prohibit words or marks that imply reduced environmental impact. The names of gemstones and metals may also confer images of quality (e.g., diamond, sapphire, platinum, gold, and silver) and should be prohibited terms.

We agree that only prescribed health promotion inserts and onserts that comply with the specifications outlined in the regulations should be permitted.

No additional information should be allowed to be added by the manufacturer or other commercial entity in the supply chain (e.g. retailers) should be permitted.

S87 should not allow ingredients other than an approved list to be added to tobacco products. New ingredients are constantly being developed by the tobacco and e-cigarette industries, which will lead to an ongoing need to revise and update the list of prohibited ingredients as new ones are developed that have adverse impacts on public health, leading regulators to be constantly trying to 'catch up' to industry activities. E.g., while menthol is being banned as an additive to cigarettes in some places, synthetic cooling agents may be added to replace the sensation that was previously provided by menthol and there is limited toxicology data on many new chemicals such as these (Jabba et al 2022).

We support Division 5 and particularly prohibition of accessories such as flavoured filters or additives that change the flavour or smell of tobacco products. We agree with the standardisation of tobacco products, such as mandating a set number of tobacco cigarettes in a pack and a set RYO pouch size. Our recent research findings support standardising pack and pouch size. We analysed data from the International Tobacco Control Policy Evaluation Project Australian arm collected from 2007 to 2020, a time period that incorporated regular substantial tobacco tax increases (Cho et al

2023). We observed several changes in purchasing patterns during this time that suggest tobacco companies introduce new products, and use odd pack and pouch sizes to deter consumers from quitting smoking in response to price rises. There was an upward trend in purchasing cheaper tobacco products (RYO, large-sized packs and economy brands) from 2007 to 2020, which may be explained by marketing of a wide range of pack sizes, new economy brands and variants within a brand family that stretch across different market segments (e.g. premium, mainstream, value, super-value). Below is a dot point summary of some of the key findings.

Roll-your-own tobacco:

• The proportion of people purchasing large-sized RYO pouches (50g and 55g) decreased from 74.4% in 2007/2008 to 18.7% in 2020.
• The proportion reporting small-sized pouch purchases (25g and 27g) increased about fivefold from 10.4% in 2013 to 54.7% in 2020.
• In addition to this, purchasing 20g RYO increased from 5.1% in 2016 to 19.0% in 2020.
• The self-reported average RYO price per 0.7g stick significantly increased from $0.35 in 2007/2008 to $1.09 in 2020 (p for trend<0.001). The estimated
average weight of cigarettes rolled significantly decreased from 0.48g in 2007/2008 to 0.38g in 2020 (p for trend<0.001).

Purchasing by the carton:

• Purchasing FMCs in cartons could be a cost-minimising strategy because of the lower unit price than individual packs, but was more likely for those with a high income or high nicotine dependence. Prohibiting volume discounts for tobacco products bought in multi-packs or cartons could encourage quitting rather than moving to bulk-purchasing for these consumers.

Pack size

• The proportion of participants purchasing large-sized packs increased from 22.8% in 2008/2009 to 32.2% in 2013. Purchasing large-sized packs is likely similar to purchasing in cartons to obtain a lower unit price.
• From 2014 to 2020, the proportion purchasing small-sized packs increased from 15.8% to 37.8%, and were the most reported pack size purchased in 2020. This purchasing pattern may indicate that consumers on low incomes are finding the upfront price of larger packs to be cost-prohibitive.

Market segments

• The proportion of participants purchasing FMCs that bought economy brands, including super-value and value brands, increased from 40.6% in 2007/2008 to 59.4% in 2020, with the proportion of participants purchasing FMCs that are super-value brands increasing sharply from 11.3% in 2014 to 25.2% in 2016 before falling to 9.3% in 2020.
• Consumers on a lower income, with higher dependece, and no quit intention were more likely to purchase RYO tobacco and large-sized packs, indicating these were purchasing behaviours that are used to reduce the impact of tobacco tax increases on their tobacco expenditure as an alternative to quitting smoking.

Implications

• Pricing is an important determinant of smoking patterns and inequalities.
• Standardising pack and pouch sizes may reduce price-related marketing (e.g., 'bulk' buying discounts, appearance of 'bonus' cigarettes, etc) and may especially benefit people on a low household income by encourage quitting.
• Additional policies such as establishing floor and/or ceiling prices, prohibiting discounts for purchasing in bulk (cartons, multi-buys) and limiting the number of packs sold in any transaction

could be considered to limit industry marketing that counteracts the impact of tobacco tax increases.

We welcome the legislation enabling "additional requirements" to be introduced in relation to retail packaging, the contents of tobacco products, tobacco product accessories, and standards for tobacco products. Industry documents show that tobacco companies manipulate ingredients and design features of cigarettes, to increase their addictiveness and appeal (Bero 2003), making smoking difficult to quit and addicting new generations. In Australia, there is little regulation of the contents and design features that make cigarettes addictive and appealing, despite other countries progressing these policies. Regulating cigarette contents and design could substantially increase quitting and protect future generations from tobacco addiction while fulfilling Australia's international obligations as a signatory to the WHO Framework Convention on Tobacco Control (FCTC) (Morphett and Gartner).

While we welcome restrictions on novel or innovative features of tobacco products that may increase appeal, we would also would like to draw attention to more conventional aspects of cigarettes that are designed to increase addictiveness and appeal.

Nicotine is the primary addictive component of tobacco products, and reducing nicotine to non-addictive levels is technically feasible and is due to be introduced in New Zealand in April 2025. The USA is also planning to introduce this policy. Modelling studies suggest that implementing a nicotine standard that reduces nicotine to non-addictive levels would greatly reduce smoking uptake and increase smoking cessation, leading to enormous public health benefits (Ait Ouakrim et al 2023, Levy et al 2021).

Cigarette filters are another feature that has been extensively studied and manipulated by the tobacco industry to increase the appeal and addictive potential of cigarettes (Harris 2011). There is no evidence that cigarette filters reduce the harm associated with smoking at a population level, indeed there is evidence that widespread use of cigarette filters with filter vents may have increased rates of lung adenocarcinoma (Song et al 2017). Cigarette filters are often discarded into the environment once a cigarette is smoked, resulted in billions of cigarette butts entering the environment each year.

These cigarette butts contain chemicals and heavy metals that are toxic to the environment and wildlife (Morphett et al 2022). Cigarette filters have been labelled a "consumer fraud" because consumers mistakenly believe that cigarettes with filters are safer to smoke.

The proposed legislation and regulations address the appearance of cigarette filters by standardising their colour, texture and appearance. We recommend that more fundamental product design features of filters that contribute to the addictiveness and appeal are also addressed. One key feature of filters is filter venting, small holes/perforations in the filter tipping paper. The vents allow air to mix with mainstream smoke at the filter, and this dilutes the cigarette smoke, making it taste milder/smoother, and reducing sensations of harshness in the throat and chest (Kozlowski and O'Connor 2002). Filter venting reduces machine measured tar, nicotine and carbon monoxide, and led to the labelling of filter vented cigarettes as "mild" or "light." However, people who smoke engage in compensatory smoking by blocking vents or inhaling more deeply, meaning that machine

measured readings are misleading (King et al 2003). Recent research from the International Tobacco Control (ITC) Project has shown that many of those in Australia, Canada, the USA and England are not aware of filter ventilation. Those who believed the cigarettes they smoked had filter venting were more likely to believe that they were smoother and less harmful than other brands. The authors conclude that "filter ventilation is inherently misleading to smokers and it is time to ban it." (Morphett et al 2022) It is not clear whether the proposed regulations prohibit filter ventilation. They state that the inside of the filter "be solid without any recessing or perforation." We recommend the filter venting that perforations/holes in the filter tipping paper also be prohibited.

Because of the environmental impacts of cigarette filters, and evidence that they mislead consumers about the health risks of smoking, prohibiting cigarettes with filters being sold should be considered. Furthermore, sale of filters for addition to RYO tobacco should be similarly banned.

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The need for exemptions to be allowed for legitimate public health research that is non-commercial in nature and undertaken in the public interest

There are potential scenarios when research that is in the public interest might be undertaken that could involve an offense under Chapter 3, such as supplying tobacco or e-cigarette products in non-compliant packaging as part of a trial (e.g. testing the efficacy of enhanced warning labels).

Purchases undertaken for academic research purposes by university researchers should also be included in the list of exemptions allowed. Such research is in the public interest because it may involve testing illicit products for harmful or prohibited ingredients, understanding the types of illicit tobacco products that are being sold in Australia, or examining the impact of interventions to deter illicit tobacco product sales. Similarly, possession of tobacco products in non-compliant retail packaging or non-compliant regulated tobacco items for academic research purposes should be included in the exceptions to offences under the Act. There should be exceptions for manufacturing or possessing non-compliant packaging that is manufactured or possessed for the purpose of use in academic public health research, such as testing consumer reactions to proposed warning labels, inserts or onserts, or other potential features, or examining packaging features of illicit tobacco products to develop methods of identifying counterfeit products in the marketplace (e.g. see Kurti et al 2017). Similarly, some research projects intended to estimate the size of the illicit tobacco market, such as collecting discarded packs, would involve researchers being in possession of non-compliant packs for a purpose not currently exempted (e.g., Wilson et al 2022). Similar exemptions for academic research for the remaining similar offenses concerning purchasing or possessing non-compliant products or packaging are also needed.

In addition to exceptions for importation and possession for personal use of banned products, there should also be an exception allowed for importation, purchasing, possession and supply of banned products for public health research purposes by academic researchers employed at a university. Exceptions for authorised officers conducting compliance and monitoring operations should also be included in these Sections.

These are serious omissions that will impede public health research.

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Reporting requirements for manufacturers and importers

We welcome new reporting requirements for manufacturers and importers. Making this data routinely available to researchers, where possible, will assist research efforts to monitor and evaluate the impact of new tobacco control policies.

We suggest that distributors should also have reporting obligations and should be required to submit monthly reports of the quantity and type of tobacco products they have distributed by postcode. Reporting needs to be in a standardised format determined by the Department in a way that will enable easy analysis, and also easy de-identification for release for public health research purposes.

Under Section 131, it is not clear why processing aids are exempted from reporting requirements. Such information may be valuable. Similar to sales, reporting of tobacco product ingredients should also be in a standardised format that is determined by the Department.

Regarding reporting of product disclosure information to the public, we note there is little guidance about how to disclose tobacco product ingredients and emissions data to the public in a clear way. Research shows that people who smoke are concerned about constituents that are added to cigarettes.

Some anti-smoking campaigns have used concern about chemical constituents to motivate quit attempts, but an unintended consequence may be that people who smoke will use it to select what they perceive as a “safer” or more “natural” brand of cigarette, rather than quitting smoking (King et al 2021).

Research from the USA shows that viewing a website containing information about tobacco product contents, presented with a visual risk indicator for each constituent, led to higher quit intentions amongst people who smoked. However, the same research also found that this information did not correct the misperception that some cigarettes are safer than others (Lazard et al 2020).

More recently published experimental research conducted in the USA found that when quantitative information about chemicals in cigarette brands was presented side by side, participants were more likely to believe that one brand was less harmful than another, compared to a control group where no quantitative information was provided (Byron et al 2022).

A systematic review of knowledge and perceptions about chemicals in cigarette smoke conducted in 2017 concluded that the area is in "urgent need of behavioural science" exploring whether education about tobacco constituents influences risk perceptions and smoking cessation (Morgan et al 2017). Yet little research in this area has been conducted in the intervening period. Therefore, care should be taken in the format that this information is presented to the public, and research should inform the best way to communicate about tobacco product constituents. However, these issues should in no way be a barrier to requiring the reporting of this information by tobacco companies.

One risk with the reporting requirements is the caveat that "the Minister must not publish trade secrets or information that has a commercial value that would be, or could be, destroyed or diminished if the information were disclosed." (S145). If the trade secrets or information with commercial value relate to ways that the tobacco industry are manipulating their products to make them more addictive or appealing, it is in the public interest to have access to that information. Clarity is needed on what will be classified as "trade secrets or information that has a commercial value." It is likely that the tobacco industry will claim that most information they are required to supply is a trade secret or has commercial value.

We also support the reporting of marketing and promotional activities and expenditures related to these by the tobacco industry. Distributors and retailing organisations that have tobacco companies as their members should also be required to report all expenditures related to tobacco products and their regulation, including lobbying activities (Rooney and Gartner 2023).

In addition to reporting on activities and expenditures as outlined in Section 132, the Bill should go further and ban tobacco companies from participating in corporate social responsibility activities, lobbying, philanthropy, etc.

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