

**Proposals for the
Smoked Tobacco
Regulatory Regime**



DAIRY

AND BUSINESS OWNERS GROUP

Submission

15 March 2023



About us

The Dairy and Business Owners' Group Incorporated emerged from and relates to the Crime Prevention Group. We exist to represent superettes, corner shops, convenience stores and owner-operated service stations. Millions of Kiwis buy a lot more than bread and milk. Nielson (2021) revealed that the convenience sector generated \$3.1 billion in sales for 17.34% market share of the entire grocery retail market. New Zealand's estimated 4,000 dairies and 900 independent service stations provide people and families with what they need when they need it. We represent and positively advocate for owner-operated businesses that are at the heart of communities from our biggest cities to the rural heartland.

This continues extremely poor consultation reflecting predetermination that will bite in the courts

The Group has submitted on all aspects of smoked tobacco reform over the past several years. We have found everything was predetermined and this includes this faux consultation.

At no stage have we found the Ministry to be genuine. Despite representing directly affected businesses, not once has the Ministry reached out to meet with us. We speak with other bodies who have found the same thing despite being practitioners ourselves.

Tellingly, we wrote to the Minister of Health on 27 February 2023 asking that due to the Country being in a State of Emergency, that consultation responses be deferred until 5 April. At the beginning of this week the best we got was that she was looking at it.

We can only conclude this is calculated and deliberate. As many small businesses are affected by storm related damage, you have not extended to us, what was extended to others under the Therapeutic Products Bill.

Never, have thousands of small businesses that communities depend upon been put at mortal risk, for so little consultation. Whatever we say as businesses and as a community is to be ignored, whereas what the "anti" groups and mostly Pakeha academics say, is taken as "truth." It has some in the community asking if this is racism. Despite high compliance we must be suspect because of who we are and what we sell.

On top of the physical and mental scars caused by rampant retail crime that claimed another life last year, you have piled this on by refusing to engage, by ignoring hours of work and pushing through with what you planned all along. This adds to the mental health challenges our community face given businesses and lives will be destroyed as you hand a legal market where smoking has fallen dramatically, to the gangs.

Regulatory proposal 1: Smoked tobacco retail application scheme

Commentary:

The Group opposes this approach but note “600” is hard wired in primary legislation. We also note no one from the Ministry has offered to consult with us. We have submitted on all proposals but feel the Ministry denigrates commercial operators to support lobbyists and advocates. This is why this prohibitionist policy will fail at great cost to our sector and public health objectives.

If there are 6,000 outlets, then illegal sellers will have 5,400 locations where the sale of tobacco is commercially viable. You are signposting those sites. We also ask that If 4.3% of the population consume illegal cannabis “weekly or more” according to the NZ Health Survey (2021/22), how hard will “legal” tobacco prove to be?

As vaping and smokeless tobacco products replace cigarettes and RYO smoked tobacco, market forces should be allowed to continue. Retailers are moving away from selling “smokes” as they become too difficult and too expensive to sell. While the tipping point is not yet here, on current progress, it could ironically be by 2025. The risk the Ministry faces with imposing “600” without basis or evidence, is that illegal sellers as per cannabis will fill the void leading to an illegal, unregulated and unreported uptick in smoking.

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1. Proposals 1a to 1c as will be legally challengeable. The lawyers will be kept very busy. There is a linear square peg into round hole approach.
2. The Ministry is missing a trick not asking for retailer Expressions of Interest (Eol) as a pre-requisite for a Request for Proposal (RfP):
 - a. An Eol stage is part of a sorting process that would inform where license demand mostly is and potential allocation. The Eol would enable some applicants to be discarded if they fail a good character test. While an appeal route would be needed this helps to pre-sort applicants.
 - b. An RfP stage then invites retailers to submit proposals for how they will run the license in keeping with wider cessation objectives. For instance, a retailer partnership with a cessation service using ultra-low nicotine tobacco and e-cigarette/smokeless tobacco vaping. Innovation like market forces seems alien.
3. We note there is a statutory obligation to consult with Māori but there is not such obligation to consult with directly affected retailers or smokers themselves. This is inequitable and defies any form of good consultation practice.

Proposal 1a – Number of smoked tobacco retail premises and their distribution across New Zealand

Commentary:

The maps were counterproductive and made little sense, which is why seeking Expressions of Interest is a better way to go. Our biggest city has fewer outlets than Otago/Southland. Mangere has one outlet that recalls a question from the select committee as to why it had more cigarette outlets than the Eastern Suburbs; that's because there's more smokers in Mangere i.e., market forces. Those smokers will turn to illegal tapaka or malila "chop" that's widespread and often mixed in with legitimate RYO – see the appendix for screenshots taken off Facebook marketplace (14 March 2023). What are YOU doing about this?

Submission

1. 600 sites are not market forces but an imposed artificial figure. History shows that markets find their own equilibrium such as with illegal drugs. The same will happen here except MoH and government would have lost control.
2. The fact this is in primary legislation makes consultation moot on the number, that said, an alternative is not to impose where and how many but to radically ask for Expressions of Interest. This would inform where demand actually is. The criteria for allocation, as noted, denies market forces but the market always wins. Whether that's a legitimate market or not.

Proposal 1b – Minimum requirements for approval as a smoked tobacco retailer

Commentary:

We largely agree with a need for criteria if there is going to be a restriction of outlets including the fit and proper person test. Noting this does not apply to illegal sellers who continue to use Facebook Marketplace or organised criminals supplying bulk “chop”.

We heavily suggest to the Ministry that criteria should be skewed to outlets that are not destination stores; which supermarkets and large company owned petrol stations are. Giving licenses to the supermarkets and Caltex is like allowing them to use plastic bags again. It normalises smoked tobacco sales because these are frequented by families; a policy own goal.

Submission

1. Supermarkets **must not** sell smoked tobacco given this is where most Kiwis do their main family shop. Thus, any person must not become an approved smoked tobacco retailer if they are a designated grocery retailer subject to the *Commerce (Grocery Sector Covenants) Amendment Act 2022*.
2. The big fuel company owned petrol stations **must not** sell smoked tobacco but the independents could. Large company owned petrol stations, as opposed to independents, have emerged as destination shops. Thus, any person who is not an independent reseller, as defined by the *Fuel Industry Act 2020*, must not become an approved smoked tobacco retailer.
3. We mostly agree with the other security requirements as they are or have become industry standard due to a 465% increase in ramraids and 300 incidents affecting retailers every day. What the MoH has not considered is the secured delivery of product and the transportation of vast sums of cash. Each license being worth around \$4m in annual sales (GST inclusive). Security for owners and staff need to be factors too.
4. Again, we suggest that if there was a EoI/RfP process that retailers could come up with innovative proposals, not be boxed in doing what they do today.

Proposal 1c – Approval processes and decision-making criteria

Commentary:

Due to the 2023 General Election, it is likely retailers will know far too late that they are unsuccessful. This is a terrible outcome arising from dates and numbers put into primary legislation.

As licensing must be in place by 1 July 2024, there is also a general election in mid-October. This means the election advertising regulated period, that constrains the advertising of licensing, is affected. This period starts in mid-July. There is the 28-day rule for regulations before they take effect too. If we assume a four-week advertising period, regulations need to be designed, written and the 28-day rule completed by mid-May at the latest. That's unrealistic given the prospect of litigation meaning whatever you write needs to be robust. Good luck with that.

More likely, regulations could come into effect immediately after the General Election at best that would see applications close mid-November (or later). With Christmas and the need to properly assess applications (to reduce litigation), decisions could be issued in February/March 2023. That leaves unsuccessful retailers a matter of weeks to re-engineer businesses.

We have looked at the Northland Health NZ analysis of retailers and doubt many in this self-selecting survey sold tobacco. It would be unusual for takeaways, cafes and an organic shop to sell cigarettes. Yet this survey has been trumpeted as evidence of adaption. It is poor along with poor consultation.

Submission

1. The application process is too rushed and damaging to retailers but is hard wired in the Act.
2. The statements around tobacconists overlooks that they are like a dairy with a different sign outside.

Retail support

Commentary:

We have provided Z Energy audited data and offered more at Select Committee for no reply. You have instead trusted self-selecting data and others with volunteer bias, when IRI could provide you hyper accurate SKU data based on actual sales. Take the Northland smokefree retailers survey. The map is offline and the 25 retailers when it did work comprised cafes, takeaways, campground kiosks, an organic shop and even a hardware store(!) Some petrol stations had moved away from retailing but it is unknown whether this was a move to self-service fuel. Not a convincing list.

As we said, we are seeing stores give up smoked tobacco such as the Four Square in Remuera Auckland. This is market forces at work not wishful thinking. For most stores and both the MTA and RetailNZ concur, smoked tobacco is associated with 40%+ of store revenue. That is an almighty hole in any balance sheet.

Having said this, there are some major things that you could do to materially assist thousands of small businesses.

Submission

1. That 5.4% of the 2023/24 tobacco excise tax be ring-fenced as a Just Transitions fund to be managed by MBIE aided by retailer representatives like ourselves. A \$100m fund would help individual businesses but also macro aids to make businesses profitable and sustainable. As convenience is thought to sell 50% of smoked tobacco, we have generated billions for the Crown.
2. That the *Property Law Act 2007* be amended with a time-limited clause to make failure to secure a smoked tobacco license, a “future event.” For a period of 1 July 2024 to 30 June 2026, unsuccessful stores could, on 90-days notice, quit leases. Many retailers have long leases and with little prospect of selling as a going concern, or someone taking the lease, without this provision people will be ruined. We don’t write this lightly as we have landlords among us. We are not blagging about the cataclysm the loss of smoked tobacco represents.
3. Furthermore, parking needs to be protected around where dairies/stores are. This was highlighted by a former dairy that became a vape store because the parking fatally compromised their cashflow. Passing trade is stock in trade.

Regulatory proposals 2-4: Low nicotine requirements

Commentary

This is of a technical nature and again we feel legislated limits are dangerous.

We would point out to the Ministry, that you need to ask basic questions to avoid de facto prohibition. If that is the objective then look at how it worked in South Africa. Oh, we asked that in an OIA and the Ministry hadn't:

- Who will manufacture and when?
- How much will they make by way of cigarettes, RYO and pipe tobacco?
- What will the price points be?
- Who will be the importer and distributor?
- What will the brands be?
- When will it be available for retail?
- Will the same excise apply?

You have arrived at a target but as KiwiBuild showed, unless there are solid foundations, the entire policy implodes. We feel you expect the big tobacco companies will provide. What happens if they don't?

New Zealand is reliant on one company mentioned in all the consultation documents. Single source supply is dangerous.

We remind the Ministry that it is legal under the *Customs and Excise Act 2018*, to "manufacture" 5 kilograms of tobacco per annum. That's around 300 packs worth. Seeds and seedlings are sold on Trade Me but best of all, "grow it your own" does not apply to your smokefree generation as we pointed out in our submission on the Bill.

We suggest that tobacco taxes and GST pushing \$1,930 a kilogram now, but will be over \$2,000 next year, is a huge incentive to grow and to supply illegal sellers. Especially when massively excised, near 0% tobacco becomes the only "legal" game in town. This will be a disaster.

Regulatory proposal 5: Youth Vaping

We largely support what is proposed as it recognises the role, our sector has played in making it easier for smokers to convert to e-cigarette and smokeless tobacco vapes. That's the prize some have lost sight of due to fear-mongering, not fact. "Epidemic" claims are deliberately and intentionally emotive. Coming from health professionals it is irresponsible.

ASH NZ found, regular vaping in fact fell for the first time in 7-years, while in the US, where it began, youth vaping has more than halved since 2019. ASH NZ also says most youth vapers get them from friends, families and acquaintances. The shame is that some "health bodies" and academics want to upend that success. This is why spoke to leading Australian expert, Dr Colin Mendelsohn and agreed a joint statement:

- **The Australian prescription-only approach is a lesson in what not to do**
In June 2020, Jody Morgan, an Associate Research Fellow at Australia's University of Wollongong warned "...the ban on nicotine vape fluid will do more harm than good." Last September, Dr Colin Mendelsohn, one of Australia's leading experts on smoking cessation, wrote in *Spectator Australia*: "Like most prohibitionist policies it has created a thriving black market, poor compliance and detrimental health outcomes." Even the new Australian Government knows it is a 'dog with fleas.'
- **Vaping in NZ is to cigarettes, what Netflix was to United Video**
Since vaping and smokeless tobacco were regulated here in August 2020, daily smoking has dropped a full third from 11.9% to 8.0% (-3.9%) in the latest NZ Health Survey (2021/22). Just two years. By comparison, Australian daily smoking in its Bureau of Statistics report for 2021/22 was 10.1%. This rate is 23% higher than New Zealand's. The UK's respected *Cochrane Review*, in November 2022, concluded that vaping was more effective than prescribed nicotine replacement therapies.
- **The growth of Australian illegal vaping is outpacing New Zealand's legal market**
As Dr Mendelsohn says, "the regulations were intended to prevent youth vaping while allowing access for adult smokers to use vaping as a smoking cessation aid. It is clear that they have achieved neither of those goals. In fact, they have had the opposite effect."

A 2022 Roy Morgan Survey for the Australian Association of Convenience Stores found:

- While 5.3% of Australian adults vape compared to 10.3% in NZ, Australian vapers grew 259% between June 2018 (315,000) and June 2022 (1.1 million).
 - *The NZ Health Survey for 'monthly of more' vapes here, over a similar period, shows a growth rate well less than half of Australia's - vapers growing from 190,000 to 430,000.*
- Since the restrictive prescription model took effect, on 1 October 2021, Australian vaping numbers in 9-months have surged 43% (+350,000).
 - *The NZ Health Survey for 'monthly of more' vapers recorded a 41% increase (+90,000) between 2020/21 and 2021/22 (12-months).*
- New South Wales likely has more vapers than in all of New Zealand:
With 486,000 vapers, New South Wales is estimated to have more vapers than New Zealand's 430,000 ('monthly of more' vapers from the 2021/22 NZ Health Survey).

- **Australians are bypassing prescriptions thanks to a lucrative blackmarket that NZ doesn't have as there's no equivalent price or policy driver here**

A 2022 Convenience Measures Australia survey found that the complex, costly and onerous prescription model in Australia resulted in:

- Only 12% of Australian vapers purchased legally with a prescription (meaning 88% didn't)
- Pharmacies across the Tasman sold only 2% of all vapes
- Only 200 of Australia's 31,000 general practitioners are listed 'nicotine prescribers'. That does not tally with having 1.1 million vapers.

- **Taking vapes out of Kiwi dairies and service stations, on top of cigarettes from mid-2024, will slow New Zealand's progress towards Smokefree Aotearoa 2025**

It is Retail 101 to be in the places that smokers are, who for generations, have purchased cigarettes from dairies, service stations and other stores. If vapes are pulled from our shelves as naïve, misguided theory, it removes access to cheaper and safer cigarette alternatives, compounding the planned 90% reduction in cigarette outlets from mid-2024. Doing both will quickly establish a NZ vape blackmarket building off what exists for cigarettes that Newshub found in 2022 (this is the tip of the iceberg as most illegal chop is sold person to person).

Crime is transnational and a blackmarket thrives in Australia, so would quickly and easily spread to NZ. Chemists are also in fewer places and are not open the hours dairies and service stations are. It would see them targeted for serious crime too. Instead, dairies and service stations ought to be brought into the smoking cessation tent. We should be able to actively sell vapes and smokeless tobacco to smokers in reaction to a request for cigarettes or RYO. This creates 6,000 motivated stop smoking sellers and it needs training. We are up for it.

- **Despite Australia’s restrictive approach, studies suggest youth vaping is increasing faster than NZ**

Comparing the superb ASH NZ annual Year-10 survey with a 2022 University of Sydney study among youth vapers in New South Wales (aged 14-17), we find:

- NSW youth never vapers were slightly higher at 68% than 59.9% recorded by ASH NZ, noting ASH respondents are mostly aged 15
- NSW youth regular vapers (daily/weekly/monthly) were higher at 19%, than ASH New Zealand’s 18.2%. Please note that ASH NZ, in November 2022, said it had reported a drop in regular vaping for the first time in 7-years suggesting “peak vape”. In the US youth vaping has halved .
- Only 20% of NSW youth vapers knowingly used a non-nicotine vape.
- In keeping with ASH NZ research, most youth vapers in NSW accessed product from informal sources like friends and family.

Instead of cracking down on compliant legal sellers, there needs to be targeting of illegal sellers/re-sellers with real consequences.

- **New Zealand general and specialist vape retailers are inspected. In Australia, this can’t happen**

New Zealand’s general and specialist vape retailers undergo covert and overt inspections by HealthNZ with serious penalties for breaches (vaping and cigarettes alike). From a disappointing 80% compliance recorded in initial 2022 inspections, recent HealthNZ inspections have hit 100% retail compliance (Otago in January). We OIAd the Ministry to find that with smoked tobacco, we sellers were 94% compliant between 2019 and 2021. This also shows that an overwhelming majority of Kiwi retailers follow New Zealand law. This is impossible in Australia because 88% of all nicotine vapes there are sold illegally.

- **Most Australian vapes are illegal, unregistered and unregulated. The opposite of NZ**

Most illegal Australian vapes contain unknown levels of nicotine and unknown ingredients as they are illegal, unregistered and unregulated. In New Zealand, the Vaping Regulatory Authority (VRA) was able to detect, warn and tell manufacturers, who'd breached 5% nicotine limits, to pull affected products by 1 March or they'd pull their 'product notifications.' All products sold must meet regulated safety and quality standards too. While dairies and other sellers here remain in the dark as to what products the VRA will pull, this oversight doesn't happen in Australia since most vapes are illegally imported and sold illegally.

- **Nicotine isn't the enemy, combustion is**

While there's a lot of focus about nicotine, it is relatively benign. Nicotine does not cause cancer or lung disease and only plays a small role in cardiovascular disease. Yes, nicotine causes dependence but it's not like other substances and an increasing number of addicting behaviours. As an addictive substance, is why vapes are only for those 18+ who smoke or vape. Adults should be allowed to make adult choices, not have them imposed.

- **Overseas vape restrictions can be about economics**

China is the world's largest cigarette market, explaining in part, why its State Tobacco Monopoly banned the domestic sale of flavoured vapes (but not for export). The world's second largest cigarette market, India, has completely banned domestic e-cigarettes but being there recently, vapes were not hard to see being used.

- **Vapes aren't "new" and modern medicine can detect harms rapidly**

The modern vape dates from the very early 2000's and has been used by hundreds of millions of people. In New Zealand, vaping has been around for at least a decade and modern medicine no longer needs decades to detect bad health outcomes. Look at the very short-lived regulation of psychoactive substances. Vaping may not be safe but it is substantially safer than cigarettes and many other substances people take.

- **Finally, give Kiwi vape regulations a chance!**

A lot of the issues about NZ vaping date from the "unregulated period." Since August 2020, it has been illegal to advertise publicly, to sponsor events or to put logos onto accessories and of course, specialist stores are licensed. General Vape Retailers, like us, can only confirm price and availability and may only sell

three 'traditional' regulated flavours - mint, menthol and tobacco. We feel general vape retailers should be able to actively sell vapes but only to smokers and in reaction to a request for cigarettes and RYO tobacco.

Illegal Tapaka Tonga sold openly on Facebook Marketplace (14 March 2023)






TPK TGA
NZ\$30
Travelling for sale

Message

Home location




Auckland, Auckland
Location is approximate

Description

No time waiting for 10ks

Seller information

 Jasmine Grace
Joined Facebook in 2021

Report this listing if you think that it discriminates against people.

Send seller a message

Hi Jasmine, is this still available?

Send



TPK TGA
NZ\$10
Property for sale

Message

Home location



Auckland, Auckland
Location is approximate

Description

NO TIME WASTERS!!
DONT ASK IF IT'S AVAILABLE CAUSE IT IS!

Seller information [Seller details](#)

 Herc Oz
Joined Facebook in 2001

Report this listing if you think that it discriminates against people

Send seller a message

Hi Herc, is this still available?

Send