

# TAX AS AN INSTRUMENT OF SOCIAL POLICY

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*This article reviews the history of tobacco taxation in Aotearoa New Zealand and the gradual transition from the use of the tobacco tax as a revenue raising tool to an instrument of social policy and the consequences of that shift. In particular, the article examines the adverse impact of the present-day iteration of the tobacco tax on Māori and other disadvantaged groups.*

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## **I SETTING THE SCENE<sup>1</sup>**

"A person doesn't know how much he has to be thankful for until he has to pay taxes on it."<sup>2</sup>

Taxation has traditionally been seen as a source of revenue to fund public goods and services and as a means of reducing inequality.<sup>3</sup> It is also, however, increasingly being used as an instrument of social policy, designed to influence behaviour and/or ensure the costs associated with activities are

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1 I acknowledge the invaluable assistance of Supreme Court clerks, Don Lye and Maddy Nash, and my associate, Rachel McConnell, with this article.

2 Attributed to Ann Landers. Ann Landers was a pen name created by *Chicago Sun-Times* advice columnist, Ruth Crowley, in 1943 and taken over by Eppie Lederer in 1955. The use of the masculine "he" reflects the era this was written. Contrast the following less light-hearted view of taxation:

Taxes are how we pool our money for public health and safety, infrastructure, research, and services – from the development of vaccines and the internet to public schools and universities, transportation, courts, police, parks, and safe drinking water.

Holly Sklar, American policy analyst and columnist and advocate of a fair minimum wage.

3 Tax Working Group | Te Awheawhe Tāke *Future of Tax: Final Report Vol 1 — Recommendations* (21 February 2019) [Final Report] at 23. It was, however, noted that, overall, the New Zealand tax system is not particularly progressive relative to other OECD countries: at 30–31. It was also said that the inequality-reducing nature of the system had fallen over the last three decades: at 30.

borne by the user. The Tax Working Group elaborated on the aims of taxation in New Zealand as follows:<sup>4</sup>

There are three main ways in which the tax system supports the wellbeing of New Zealanders:

- **A fair and efficient source of revenue.** Taxes provide revenue for the Government to fund the public goods and services that underpin our living standards. The tax system thus represents a way in which citizens come together to channel resources for the collective good of society.
- **A means of redistribution.** Taxes fund the redistribution that allows all New Zealanders, regardless of their market income, to participate fully in society. While much of this redistribution occurs through the transfer system, the progressive nature of the income tax means that the tax system also plays a role in reducing inequality.
- **A policy instrument to influence behaviours.** Taxes can also be used as an instrument to achieve specific policy goals by influencing behaviour. Taxes influence behaviour by changing the price of goods, services, or activities; taxes can discourage certain activities, and favour others. In this way, taxes can complement – or even replace – traditional policy tools such as regulation and spending, depending on which approach reflects the most effective way to achieve society’s goals. This may be particularly important in the environmental sphere.

Examples of taxes fitting into the third category (called corrective taxes by the Tax Working Group)<sup>5</sup> are excise taxes on alcohol and tobacco. There are also various taxes on gambling.<sup>6</sup> Further

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4 Tax Working Group | Te Awheawhe Tāke *Future of Tax: Interim Report* (20 September 2018) [Interim Report] at 4; and Final Report, above n 3, at 23. The Tax Working Group was established by the Government in December 2017 to examine further improvements in the structure, fairness and balance of the New Zealand tax system. It presented its final report in February 2019. The Victoria University Working Group (of which Professor Prebble was a member) postulated only two types of taxes: revenue raising and corrective: *A tax system for New Zealand's future* (January 2010) at 13. The review was focused on the former: see at 14.

5 The Tax Working Group defined corrective taxes as "taxes that are primarily intended to change behaviour that is judged to be undesirable and/or to ensure individuals take into account the costs of their behaviour.": Interim Report, above n 4, at 75. Corrective taxes were contrasted to revenue taxes "which are primarily intended to raise revenue with the least impact on taxpayer behaviour (and accordingly minimise deadweight costs or the economic cost of raising the tax)": at 75.

6 Including totalisator duty, lottery duty, gaming machine duty, casino duty and the problem gambling levy. The Tax Working Group stated that it was unaware of these taxes having been reviewed recently and urged the Government to provide a clearer statement as to the purpose of these taxes relative to other measures such as regulation and education: at 78.

corrective taxes have been mooted, including a tax on unused land and empty residential buildings (to assist with the current housing crisis)<sup>7</sup> and a sugar tax. On the latter, the Tax Working Group said:<sup>8</sup>

If the Government wishes to reduce the consumption of sugar across the board, a sugar tax is likely to be an effective response. If the Government wishes to reduce the sugar content of particular products, regulation is likely to be more effective. In either case, there is a need to consider the use of taxation alongside other potential policy responses.

The Tax Working Group dedicated a whole chapter of its final report to environmental taxes.<sup>9</sup> This is unsurprising given the importance of the environment to New Zealand, including to future generations, the role of kaitiakitanga<sup>10</sup> and the challenges of climate change.<sup>11</sup> In its executive summary, the Tax Working Group said:<sup>12</sup>

18. The Group considers there is significant scope for the tax system to play a greater role in sustaining and enhancing New Zealand's natural capital. New Zealand faces significant environmental challenges that require profound change to existing patterns of economic activity.

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7 The Tax Working Group considered that such taxes would be best levied at a local rather than national level: Final Report, above n 3, at 106. See the Tax Working Group's consideration of housing affordability: at 106; and Interim Report, above n 4, at 53–59.

8 Interim Report, above n 4, at 78. The Tax Working Group considered that:

... a major risk with a sugar tax is that it will encourage consumers to switch to cheaper or untaxed products that are similarly unhealthy. So, while a sugar tax will reduce the consumption of some sugar products, the extent to which it generates any improvement in health outcomes will depend on what individuals decide to consume instead.

9 Final Report, above n 3, at 20–22. The Tax Working Group defines an environmental tax as "an economic instrument that can be potentially revenue-raising for central or local government and that can improve environmental and ecological outcomes": at 39.

10 In modern usage, kaitiakitanga has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources: see further Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105–114.

11 The Intergovernmental Panel on Climate Change Working Group I recently released its contribution to the Sixth Assessment Report. The key findings can be found in: Intergovernmental Panel on Climate Change *Climate Change 2021: The Physical Science Basis – Summary for Policymakers* (IPCC AR6 WGI, 7 August 2021). See António Guterres "Secretary-General Calls Latest IPCC Climate Report 'Code Red for Humanity', Stressing 'Irrefutable' Evidence of Human Influence" (press release, 9 August 2021) accessible at <[www.un.org](http://www.un.org)>.

12 Final Report, above n 3, at 9. In its response, the Government rejected consideration of any new environmental tax proposals beyond the current work program: Grant Robertson and Stuart Nash "Govt responds to Tax Working Group report" (17 April 2019) Beehive <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

Taxation is one tool – alongside regulation and spending measures – that can support and guide this transition.

19. The task for policymakers is to think in terms of systems change and to develop a set of goals and principles that can guide a transition, over many decades, to a more sustainable economy.

20. In the short term, the Group recommends better use of environmental taxes to price negative environmental externalities. Environmental taxes can be a powerful tool for ensuring people and companies better understand and account for the impact of their actions on the ecosystems on which they depend. The immediate priorities should be to expand the coverage and rate of the Waste Disposal Levy, strengthen the Emissions Trading Scheme and advance the use of congestion charging.

21. In the medium term, environmental tax revenue should be used to help fund a transition to a more sustainable economy.

22. In the longer term, environmental taxes could become a much more significant part of the tax base through the development and adoption of innovative new tools to measure and value environmental impacts.

This article examines tax as an instrument of social policy through the prism of the tobacco excise tax. This policy-focused topic seemed appropriate for an issue dedicated to the work of Professor John Prebble, given his longstanding interest in taxation policy and design.

## ***II HISTORY OF TOBACCO USE IN AOTEAROA/NEW ZEALAND***

Smoking is a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless.<sup>13</sup>

Before the arrival of Europeans, Aotearoa was a smoke-free society.<sup>14</sup> Tobacco was introduced by Captain Cook.<sup>15</sup> It appears that Captain Cook had stepped ashore smoking a pipe, giving the impression that his head was burning. Te Ihutakura (a Ngāi Tahu warrior and father of Karetai)<sup>16</sup> doused him with water. Te Ihutakura told his people that, if the fire went out, Cook was a man. If not,

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13 Attributed to King James I of England.

14 John Broughton *Puffing up a Storm: Volume 1 – 'Kapai te torori!'* (Te Roopu Rangahau Hauora Māori o Ngāi Tahu | The Ngāi Tahu Māori Health Research Unit, 1996) at 8. None of the Māori words for smoke/vapour have been used to describe smoking of tobacco – all language associated with smoking are transliterations of English words: at 13.

15 The story was told by Teone Taare Tikao of Te Waipounamou: at 14.

16 See Harry C Evison "Karetai" (1990) Te Ara | The Encyclopedia of New Zealand <teara.govt.nz>.

he was an atua, a demon, and should be killed.<sup>17</sup> The water did put the pipe out thus, as Dr Papaarangi Reid said, sparing Captain Cook from becoming the first tobacco-related death in Aotearoa.<sup>18</sup>

Unfortunately, Māori took to tobacco and it rapidly became a standard trading tool.<sup>19</sup> In the early years, it was usually smoked by Māori in clay pipes or chewed and its use was not limited by gender or even age.<sup>20</sup> By 1850, smoking of tobacco by Māori was widespread. The overall national smoking rates in New Zealand, however, remained low until World War One, when soldiers were given free cigarettes.<sup>21</sup> The mass production of cigarettes vastly increased the accessibility of smoking and, in the period up to 1961, it is estimated that over 50 per cent of men and 35 per cent of women smoked, with the figure likely higher for Māori.<sup>22</sup>

By the time of the Second World War, smoking had become normalised in New Zealand society and in particular among Māori. Both the general public and the Government were generally unaware of the dangers of smoking in this period<sup>23</sup> and tobacco companies were aggressively advertising their products, often to youth.<sup>24</sup>

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17 Note that "atua" is an "inherently ambiguous term" with many meanings: see Benton, Frame and Meredith, above n 10, at 49. "Demon" is, however, the meaning as was told in the story: see Broughton, above n 14, at 14.

18 Broughton, above n 14, at 14.

19 At 15–30. It also played an important part in social rituals.

20 In the 19th century, there was widespread publication of photographs showing Māori, both men and women, smoking a pipe: at 40–41, 53 and 57–58. Even children were pictured with pipes: at 78–79. See also Megan Cook "Māori smoking, alcohol and drugs – tūpeka, waipiro me te tarukino" (5 September 2013) Te Ara | The Encyclopedia of New Zealand <teara.govt.nz>. There was, however, some opposition to the use of tobacco amongst Māori. For example, in the early 20th Century, the Tūhoe prophet, Rua Kēnana, banned it from his community, Maungapōhatu. Judith Binney, Gillian Chaplin and Craig Wallace *Mihaia: The Prophet Rua Kenana and His Community at Maungapohatu* (Oxford University Press, Wellington, 1979) at 59.

21 Scott Trainor *Tobacco Control in New Zealand: A History* (Te Kaunihera Whakahaere Mate Pukupuku o Aotearoa/Cancer Control Council of New Zealand, 2008) at 9.

22 At 9.

23 Knowledge of scientific evidence about the dangers of tobacco was largely confined to the medical profession then: at 5.

24 In 1962, the tobacco industry agreed not to target youths with their advertising, although they continued to subtly market to youths with flavoured tobacco and free giveaways: at 18.

### III CONTROL MEASURES<sup>25</sup>

"Gift your lungs oxygen, not tar. Gift your body exercise, not bad health. Gift your lips kisses not cigarette butts. Gift yourself a life, not death." (Anon)

In the years following the Second World War, policymakers were confronted with mounting scientific evidence on the harms of tobacco consumption. However, this information ran largely under the public radar until the release in 1962 of a report from the Royal College of Physicians on the serious health issues linked to smoking,<sup>26</sup> followed by the United States Surgeon General's report of 1964.<sup>27</sup>

These reports were influential in changing the views of the public and Government on smoking. Measures to restrict advertising were taken from 1963.<sup>28</sup> The first health warnings were displayed on cigarette packets in 1974. The most substantial legislative change was the Smoke-free Environments Act 1990 which restricted smoking in many indoor workplaces and hospitality areas, banned it on public transport, regulated the marketing and advertising of tobacco products and banned the sale of tobacco products to those under the age of 16.<sup>29</sup> The age was raised to 18 in 1998.<sup>30</sup> The 1990s also saw the introduction of several anti-smoking campaigns and programmes, including the national Quitline | Me Mutu in 1999.<sup>31</sup>

In June 2003, New Zealand signed the World Health Organization Framework Convention on Tobacco Control (FCTC), the world's first public health treaty designed to reduce the health and economic effects of tobacco.<sup>32</sup> From December 2004, all licensed premises (bars, restaurants, cafes, sports clubs, casinos) and all other workplaces (including offices, factories, warehouses, lunch rooms)

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25 For a timeline of tobacco use and control in New Zealand, see Ahuahi kore | Smokefree "History of Tobacco Control" (21 September 2020) <[www.smokefree.org.nz](http://www.smokefree.org.nz)>.

26 *Smoking and Health: A report of The Royal College of Physicians on smoking in relation to cancer of the lung and other diseases* (Pitman Medical Publishing, 1962).

27 *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (United States Department of Health, Education and Welfare, 1964).

28 Cigarette advertising was banned on New Zealand television and radio after pressure by the medical profession: Trainor, above n 21, at 14.

29 See also the Toxic Substances Act 1979 which defined tobacco as a toxic substance (subsequently replaced by the Hazardous Substances and New Organisms Act 1996).

30 See the Smoke-free Environments Amendment Act 1997.

31 See Quitline | Me Mutu <[www.quit.org.nz](http://www.quit.org.nz)>.

32 World Health Organization Framework Convention on Tobacco Control 2302 UNTS 166 (opened for signature 16 June 2003, entered into force 27 February 2005). New Zealand ratified the Convention on 27 January 2004.

became smoke-free.<sup>33</sup> In February 2008, regulations requiring graphic health warnings covering 30 per cent of the front and 90 per cent of the back of cigarette packets came into force.<sup>34</sup>

In 2009, the Māori Affairs Select Committee began an inquiry into the tobacco industry and its effect on Māori. The motivation for the inquiry was described as follows:<sup>35</sup>

Tobacco is an addictive and hazardous product which, if used as recommended by the manufacturer, results in the premature death of half of its long-term users. In New Zealand, tobacco kills about 5,000 people annually, and is our greatest preventable cause of death and illness. With smoking rates amongst Māori double that of the general population, tobacco has a particularly devastating impact on Māori, and accounts for a significant portion of the life expectancy differential between Māori and non-Māori. More than 600 Māori die prematurely each year from smoking-related illnesses, and this loss, as well as the preceding addiction, erodes economic, social, and cultural wellbeing, and hinders Māori development aspirations and opportunities. Tobacco smoking delivers a major insult to whānau ora.

The Committee spent over a year gathering evidence on the use of tobacco in New Zealand and considering possible policy and legislative measures to address its findings. In its report, it recommended the Government commit to an ambitious goal:<sup>36</sup>

We recommend to the Government that it aim for tobacco consumption and smoking prevalence to be halved by 2015 across all demographics, followed by a longer-term goal of making New Zealand a smoke-free nation by 2025.

The Committee made a swathe of recommendations to help achieve this goal, including stopping all types of tobacco advertising, increased accountability of the tobacco industry, improving smoke-free campaigns, extending mandatory smoke-free environments and providing more support for those trying to stop smoking. It considered that these (including the tobacco excise tax increases discussed below) were all "phase one" strategies, as after a significant reduction "the environment ... may require different strategies" given that "the smoking population will be different, consisting mainly of heavily addicted smokers concentrated in certain socio-cultural or economic groups".<sup>37</sup>

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33 See the Smoke-free Environments Amendment Act 2003.

34 Smoke-free Environments Regulations 2007 (replaced by Smoke-free Environments Regulations 2017).

35 Māori Affairs Committee *Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori* (3 November 2010) [Māori Affairs Committee Report] at 10.

36 At 5.

37 At 10. As noted below, at Part V, it also supported increases in excise taxes as part of this.

In March 2011, the Government responded to the report by adopting the 2025 goal.<sup>38</sup> This goal is generally understood to mean reducing the prevalence of daily smoking to below five per cent of the population.<sup>39</sup> Additional control measures were introduced to further this aim.

From July 2012, tobacco retailers had to ensure that tobacco products were not visible to the public.<sup>40</sup> From November 2014, the duty free allowance was cut from 200 to 50 cigarettes.<sup>41</sup> On 14 March 2018, regulations requiring standardised packaging (often referred to as plain packs) for all tobacco products came into force. The new regulations standardised branding, colour, images, health warnings, and pack sizes.<sup>42</sup> Standard packaging had been announced in April 2012, but had been delayed because of threatened litigation by tobacco companies.<sup>43</sup> The Government waited until two legal challenges against Australia's similar laws were resolved before it enacted the amending legislation in September 2016.<sup>44</sup>

In February 2020, a Bill was introduced (and passed in August) to amend the Smoke-free Environments Act to make it more comprehensive and, among other things, include vaping.<sup>45</sup> On 28 May 2020, the Act was again amended to prohibit smoking in motor vehicles carrying children and young people under 18 years of age. This law took effect in November 2021.<sup>46</sup>

It is worth mentioning that not all smoking promotion is necessarily or realistically within the control of the New Zealand Government. It has been alleged that tobacco companies, deprived of their

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38 *Government Response to the Report of the Maori Affairs Committee on its Inquiry into the tobacco industry in Aotearoa and the consequences for tobacco use for Māori* (14 March 2011) at 4. The response stated that "the Government agrees with a longer term goal of reducing smoking prevalence and tobacco availability to minimal levels, thereby making New Zealand essentially a smoke-free nation by 2025".

39 Ernst & Young *Ministry of Health: Evaluation of the tobacco excise increases as a contributor to Smokefree 2025* (27 November 2018) [EY report] at 9.

40 This included prohibitions on the advertising of tobacco products (both print and broadcast) as well as prohibitions on the display of tobacco products: *Smoke-free Environments (Controls and Enforcement) Amendment Act 2011*, ss 22 and 23A.

41 *Tariff (Concessions) Amendment Order 2014*.

42 *Smoke-free Environments Regulations 2017* (replaced by *Smokefree Environments and Regulated Products Regulations 2021*).

43 Eric Crosbie and George Thomson "Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand" (2018) 131(1473) *NZMJ* 25 at 27.

44 At 28.

45 *The Smokefree Environments and Regulated Products (Vaping) Amendment Act 2020* commenced on 11 November 2020, amending the *Smoke-free Environments Act 1990* and also renaming it the *Smokefree Environments and Regulated Products Act 1990*. It is beyond the scope of this article to discuss vaping.

46 *Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Act 2020*.

traditional direct advertising channels, continue to spend millions on putting tobacco imagery into movies, television and other media to promote tobacco use and, as some put it, "glamorize addiction".<sup>47</sup>

In 2012, the United States Surgeon General's report concluded that there was a causal relationship between exposure to onscreen smoking in movies and the initiation of smoking among young people.<sup>48</sup> A subsequent 2014 report projected that, if current initiation rates continue, 5.6 million of youth then alive would die from tobacco-related diseases.<sup>49</sup> It also concluded that giving an R (restricted) rating to future movies with smoking would be expected to reduce the number of teen smokers by some 18 per cent, preventing up to 1 million deaths from smoking among children alive at that time.<sup>50</sup>

Despite this, as at 2020, neither of the bodies<sup>51</sup> that assign ratings to movies and television programmes in the United States treat tobacco as an explicit rating factor.<sup>52</sup> To put the significance of tobacco movie advertising in perspective, in 2019, 51 per cent of top-grossing movies in the United States, including 23 per cent of G (general) and PG (parental guidance) movies and 43 per cent of PG-13 movies, showed smoking or other tobacco use.<sup>53</sup> Although, overall, the number of movies showing smoking had decreased by 32 per cent from 2002 to 2019, 41 per cent of all movies

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47 See Healthy Children "Glamorizing Addiction: The Problem with Smoking in Movies" (9 May 2018) <[www.healthychildren.org](http://www.healthychildren.org)>.

48 *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (US Department of Health and Human Services, 2012) at 602.

49 *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* (US Department of Health and Human Services, 2014) at 12.

50 At 873.

51 Motion Picture Association (MPA) nor TV Parental Guidelines (TVPG).

52 Jonathan R Polansky and Stanton A Glantz *What is Hollywood Hiding? How the entertainment industry downplays the danger to kids from smoking on screen* (UCSF Center for Tobacco Control Research and Education, April 2020) at 27. The equivalent New Zealand legislation is the Films, Videos and Publications Classification Act 1993. This Act does not include any reference to tobacco or smoking, although s 3B provides that a publication may be age-restricted if likely to be injurious to public good, such as where it depicts "conduct that, if imitated, would pose a real risk of serious harm to self or others or both."

53 Jonathan R Polansky, Danielle Driscoll and Stanton A Glantz *Smoking in top-grossing US movies: 2019* (UCSF Center for Tobacco Control Research and Education, May 2020) at 3.

depicting smoking in 2019 were youth-rated (G, PG, PG-13).<sup>54</sup> Tobacco incidents,<sup>55</sup> in PG-13, R and in top-grossing movies overall, doubled between 2015 to 2019.<sup>56</sup>

In terms of streaming services, there has been little control or warning of smoking content until recently. Netflix only added smoking notifications to its original content in March 2020,<sup>57</sup> while Disney+ sometimes mentions whether its content contains tobacco but only after it has started playing.<sup>58</sup> A survey of nine popular video-on-demand services in the United States found that none of them inform users that smoking is harmful.<sup>59</sup> Given the clear connection between exposure to onscreen tobacco imagery and youth smoking, together with the fact that internet-based streaming services are the fastest-growing part of the entertainment sector,<sup>60</sup> streaming services should be an area of particular focus for regulators.

#### **IV LITIGATION**

"Giving up smoking is the easiest thing in the world. I know because I've done it thousands of times."<sup>61</sup>

Before examining the tobacco excise tax in more detail, I digress somewhat to discuss what seems to be the sole case in New Zealand dealing with a claim for damages for smoking related injuries; *Pou v British American Tobacco Co (New Zealand) Ltd*.<sup>62</sup> Mrs Pou had been a heavy smoker since the age of 17 and claimed damages from the defendant tobacco companies for negligently causing her lung cancer. Her case failed after the High Court made the following findings of fact:

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54 At 7.

55 A "tobacco incident" is one occurrence of smoking or other tobacco use in a movie.

56 At 8.

57 Polansky and Glantz, above n 52, at 17, n 59.

58 At 17.

59 At 1.

60 At 30.

61 Attributed to Mark Twain.

62 *Pou v British American Tobacco Co (New Zealand) Ltd* HC Auckland CIV-2002-404-1729, 3 May 2006 (Lang J). For a discussion, see Kate Tokeley "Case Note: *Pou v British American Tobacco Co (NZ) Ltd* – A Comprehensive Win for the New Zealand Tobacco Industry" (2006) 14 Wai L Rev 136. For a database containing tobacco laws and litigation around the world, including New Zealand, see Tobacco Control Laws (2021) <[www.tobaccocontrollaws.org](http://www.tobaccocontrollaws.org)>.

- (a) that the dangers of smoking were common knowledge in 1968;<sup>63</sup>
- (b) that Mrs Pou would have become aware of the warnings about the dangers of smoking at latest by 1974 when warnings were first placed on cigarette packets;<sup>64</sup>
- (c) that Mrs Pou's personal traits, as well the fact she was an adolescent in an environment where smoking was the norm, meant that she would have been likely to take up smoking, even in the face of health warnings;<sup>65</sup> and
- (d) that Mrs Pou had continually brushed off repeated exhortations by family members to stop smoking.<sup>66</sup>

The judgment, therefore, concentrated very much on individual responsibility rather than addiction. Furthermore, it arguably discounted the major effect of tobacco company advertising on youth, conducted despite the tobacco industry's knowledge of the health risks (including addiction).<sup>67</sup>

The Court's reasoning seems to have reflected the prevailing public mood at the time. A study found that, among the general public, 65 per cent of interviewees considered that the tobacco companies rightfully won the case.<sup>68</sup> The most common reasons the interviewees gave for siding with the tobacco companies were that information about smoking risks was widely available and that it was Mrs Pou's personal choice to smoke.<sup>69</sup> By contrast, the majority of media coverage about the trial was largely in favour of Mrs Pou or neutral.<sup>70</sup> The authors of the study considered that there were several possible reasons for the public viewpoint, including a "limited understanding of several key

63 *Pou v British American Tobacco*, above n 62, at [199].

64 At [281].

65 At [316].

66 At [291]–[300].

67 It has been suggested that the focus on individual responsibility has similarly been the case in the United Kingdom and Europe, which partially explains the lack of litigation success in those jurisdictions compared to the United States: Andrei Sirabonian "Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom" (2005) 25 *Northwestern Journal of International Law and Business* 485 at 505. For an overview of the history of tobacco litigation in the United States, see *Reducing Tobacco Use: A Report of the Surgeon General* (US Department of Health and Human Services, 2000) at 223–260.

68 Judith P McCool and others "Public and media responses to the first tobacco litigation trial in New Zealand" (2009) 34 *Social Policy Journal of New Zealand* 152 at 157. The paper was based on a national telephone survey and a content analysis of media reactions to the trial. Interviewees showed a moderate level of awareness about the trial and verdict.

69 At 157.

70 At 156.

features of tobacco use (such as the irresponsible behaviour of tobacco companies) and the considerable pressure on youth to take up smoking."<sup>71</sup>

## V *EARLY BEGINNINGS OF TOBACCO TAX*

"The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least amount of hissing."<sup>72</sup>

The concept of a tobacco tax is not new for New Zealand. Customs duties on tobacco entering New Zealand were first provided for by Ordinance in 1841.<sup>73</sup> Since then, aside from a brief period between 28 September 1844 and 8 April 1845, New Zealand has always had customs duties on tobacco.<sup>74</sup> In 1879, the Government added a duty on tobacco manufactured and grown in New Zealand,<sup>75</sup> and in 1885, it extended this to all tobacco manufactured here regardless of its origin.<sup>76</sup> The original objective of these taxes appears to have been primarily to raise revenue.<sup>77</sup> demand for tobacco products was considered relatively inelastic, such that increasing taxes would not result in a corresponding decrease in demand, thereby generating significant tax revenue.<sup>78</sup> In other words, at genesis they were not intended as corrective taxes.

As the health risks of smoking began to be understood, the accepted policy rationale for the tobacco excise tax began to extend beyond the primary revenue raising objective. In his 1970 *Economic Statement*, the then Minister of Finance, the Rt Hon Robert Muldoon, said that:<sup>79</sup>

Of all the products at present subject to indirect taxation, it is clear that cigarettes and tobacco can be subjected to additional tax without harming in any way the general welfare of the community. In fact it is

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71 At 161.

72 Attributed to Jean-Baptiste Colbert, French statesman in the court of Louis XIV.

73 Customs Act 1841 4 Vic 3. The Ordinance imposed duties on spirits, wine, tobacco, cigars and snuff, sugar, flour, meal, wheat, rice and other grain and pulse, and "other goods": see further *Taxation in New Zealand: Report of the Taxation Review Committee* (Wellington, October 1967) [Taxation Review Committee Report] at 63.

74 At 63. In the five years up to 1880, duties on tobacco amounted to almost 13 per cent of all government revenue from custom and excise: Stevan Eldred-Grigg *Pleasures of the Flesh. Sex and Drugs in Colonial New Zealand* (Reed, Wellington, 1984) at 98, as cited in Broughton, above n 14, at 87.

75 Tobacco Act 1879. See Taxation Review Committee, above n 73, at 67.

76 Customs and Excise Duties Act 1885, s 3.

77 *A Review of Tobacco Taxation: Prepared by Douglas James (Research Economist) – for the Public Health Commission* (NZ Institute of Economic Research, 28 February 1995) [Report for the Public Health Commission] at 14.

78 At 6.

79 (27 October 1970) 369 NZPD 4329.

increasingly argued that discouraging the consumption of these commodities is likely to make a positive contribution to our general health.

This marked an important shift in government attitude from tax as a means of raising funds to tax as an instrument of public policy. But, this change of attitude was not reflected in the tax rates. Relatively infrequent adjustments to the excise tax, as well as increases in the prices of other goods, meant that the real price of tobacco products fell by 42 per cent between 1960 and 1979.<sup>80</sup> In 1979, the Planning Council recommended an increase in excise taxes to attain a 25 per cent retail increase in the price of tobacco.<sup>81</sup> However, this was met with a lukewarm response from the Government which enacted a much-lower-than-recommended 15 per cent cigarette sales tax in its 1979 Budget.<sup>82</sup>

The reprieve for tobacco users and tobacco companies in terms of excise tax was, however, fleeting. The 1980s saw the emergence of a serious and dedicated tobacco control programme in New Zealand.<sup>83</sup> By then, the important role that tax had to play in decreasing consumption had begun to be fully recognised. Notable tax increases occurred in 1986, when the Fourth Labour Government increased the sales tax on tobacco products from 40 per cent to 105 per cent of the wholesale value,<sup>84</sup> and in 1988 to 1989 when the tobacco tax was increased in three steps over a 10-month period, each increase being 50 cents.<sup>85</sup> Also significant was the decision in 1989 that excise tax should be indexed to movements in the Consumer Price Index to fix the real price of tobacco.<sup>86</sup>

In 1995, the Public Health Commission released a report by research economist, Douglas James. The report considered that there remained considerable confusion about the objectives of intervention and the form and level of any taxation response. In particular, there was some confusion between a "demerit good objective" (to discourage production or consumption that is deemed to have undesirable

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80 Te Kaunihera Whakakaupapa mo Aotearoa | New Zealand Planning Council *The Welfare State: Social policy in the 1980's* (June 1979) at 35–36.

81 At 36: "The higher prices would be a means of recouping some of the costs attributable to the use of ... tobacco and would also discourage their consumption."

82 Report for the Public Health Commission, above n 77, at 10.

83 See generally at 11–13. Although it appears that between 1979 and 1983, the regular tax increases only succeeded in maintaining the real cigarette prices at around their 1979 level. In the period from 1963, however, tobacco consumption had nevertheless declined. By contrast between 1982 and 1993, the real price of tobacco increased by around 120 per cent.

84 At 12.

85 Nick Wilson and George Thomson "Tobacco tax as a health protecting policy: A brief review of the New Zealand evidence" (2005) 118(1213) NZMJ at 6.

86 Report for the Public Health Commission, above n 77, at 12.

effects) and the "external cost objective" (to meet external costs associated with production or consumption activities).<sup>87</sup>

The report concluded that, if the external cost objective is the justification for imposing tobacco taxes, then the imposition of the tax can only be justifiable up to the point where the price paid by the smoker covers the social (external and internal) costs of smoking.<sup>88</sup> These external costs would include the health costs of smokers as well as the financial and emotional stress imposed on friends and relatives and the lost production and incomes as a result of tobacco-related illness and death.<sup>89</sup> The direct health costs had been estimated in 1992 as being \$185.4 million or \$370 per smoker per annum (1989 prices).<sup>90</sup> In 1993 dollars, this would be around \$578 per smoker.<sup>91</sup> Yet in 1986, the average smoker is estimated to have paid \$586 by way of excise tax and in 1993, \$815 (40 per cent increase).<sup>92</sup> This suggests that smokers were at that time more than paying their way in terms of direct health costs as defined.<sup>93</sup>

## **VI THE MODERN-DAY TOBACCO TAX**

"Taxation with representation ain't so hot either."<sup>94</sup>

By 2010, when the Excise and Excise-equivalent Duties Table (Tobacco Products) Amendment Bill 2010 was being debated, the shift in attitude as to the purpose of increasing excise taxes had been well established. The Bill provided for increases of 25 per cent on the excise on loose tobacco<sup>95</sup> and 10 per cent on all other tobacco, with further 10 per cent increases in subsequent years.<sup>96</sup> It received overwhelming support in Parliament, passing 118–4.

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87 At 14–16 and 40–41. The report outlines the concepts of demerit good objective and external cost objective at 6–10. External costs are costs not borne directly by the individual consumer but that fall on third parties and are therefore not reflected in the market price: at 7.

88 At 41–42.

89 At 7.

90 At 15.

91 At 15.

92 At 15.

93 At 15. Although some health costs were not included (such as hospital outpatient costs or those associated with passive smoking in enclosed areas).

94 Attributed to Gerald Barzan, American humourist.

95 This higher increase was to make the cost of roll-your-own tobacco the same as that of cigarettes.

96 Excise and Excise-Equivalent Duties Table (Tobacco Products) Amendment Act 2010.

The Minister responsible for the Bill, the Hon Tariana Turia, stated that: "The rationale for increasing the tobacco excise is ... purely and simply about saving lives".<sup>97</sup> The Hon Ruth Dyson, declaring the Labour Opposition's support for the Bill, similarly said: "The aim of this legislation is not to get more revenue, although that will be the accusation levelled."<sup>98</sup> While acknowledging that "on its own [increasing taxes] will be a health promotion" in reducing consumption of tobacco, she noted that the Labour Party would be "watching where the money goes" to ensure the raised tax revenue would be "directed into health promotion".<sup>99</sup>

The Māori Affairs Committee inquiry outlined above had endorsed increased tax on tobacco products as part of its phase one measures and had recommended further incremental tax increases over and above the annual adjustment for inflation. A key part of the policy response to that report was the annual increases in tobacco excise of 10 per cent, on top of the inflation adjustment.<sup>100</sup> The last scheduled 10 per cent increase took place in January 2020, taking an average pack of cigarettes to around \$33.<sup>101</sup>

For an international comparison, total tax share (including GST) on a pack of 20 cigarettes in New Zealand is 82.21 per cent compared to 77.52 for Australia, 39.47 for the United States and 64.05 for Canada.<sup>102</sup> It has been claimed that, adjusted for income levels, tobacco tax in New Zealand is the highest in the OECD, the tax on a packet of cigarettes in 2017 being equivalent to 1.5 per cent of the average weekly income of New Zealanders.<sup>103</sup> Further, a pack-a-day smoker would be poorer by nearly \$3,000 a year in real terms compared to 2010, when the Government began significantly increasing the tobacco excise.<sup>104</sup>

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97 (28 April 2010) 662 NZPD 10559.

98 (28 April 2010) 662 NZPD 10561.

99 (28 April 2010) 662 NZPD 10561.

100 The 10 per cent increases on top of the adjustment for inflation were applied each year from 2010 to 2020.

101 The most recent 1.4 per cent rise in excise tax on 1 January 2021 was considerably smaller than previous years and seems to have been an inflation adjustment only: "New year, more tax: Price of cigarettes goes up 1.4%" *New Zealand Herald* (online ed, Auckland, 1 January 2021) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>. This was presumably motivated by equity concerns: see Cabinet Paper "1 January 2020 Tobacco Excise Tax Increase" (26 February 2020) at 5–7.

102 OECD *Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues* (3 December 2020) at [3.4]. See also Annex Table 3.A.5. The WHO recommended percentage is above 75 per cent: at [3.4].

103 Taxpayers' Union *Ka Tukuna Atu, Ka Tukuna Mai: How the Government gives from one hand, takes from another* (February 2019) [Taxpayers' Union report] at 6.

104 At 6.

## VII EFFECT OF POLICIES

"A cigarette is the only consumer product which, when used as directed, kills its consumer."<sup>105</sup>

The Government's mid-term targets for 2018 were to reduce the national daily smoking prevalence to 10 per cent and to halve the Māori and Pasifika user rates to 18.9 per cent and 11.3 per cent respectively.<sup>106</sup> However, New Zealand fell short of these targets, with 2018 figures showing 13.1 per cent of all New Zealanders, 31.2 per cent of Māori and 20.0 per cent of Pasifika continued to smoke daily.<sup>107</sup>

Notwithstanding that the 2018 targets were not met, it is undeniable that New Zealand's tobacco programme (including the tobacco excise taxes) has had some success. Smoking rates have declined markedly from the 1961 rates which were estimated at over 50 per cent of men and 35 per cent of women.<sup>108</sup> By 1993, 28 per cent of men over the age of 15 and 26 per cent of women smoked.<sup>109</sup> The proportion of the adult population using tobacco daily fell from 18.3 per cent to 13.8 per cent between 2006 and 2007 and 2016 and 2017.<sup>110</sup> For 15–17-year-olds, the decline has been even more pronounced, dropping from 13.7 per cent to 3.2 per cent over the same period.<sup>111</sup> Smoking rates continue to reduce: there were 11.6 per cent (464,000) of daily adult smokers in 2020. For Māori, the

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105 Attributed to Gro Harlem Brundtland, a former Prime Minister of Norway and the Director-General of the World Health Organization from 1998 to 2003. According to the World Health Organisation, tobacco kills more than 8 million people worldwide each year. More than 7 million of those deaths are the result of direct tobacco use, while around 1.2 million are the result of non-smokers being exposed to second-hand smoke: see "Tobacco" World Health Organization (26 July 2021) <[www.who.int/news-room](http://www.who.int/news-room)>.

106 ASPIRE2025 *Smokefree Aotearoa 2025 Progress Report 2017* (August 2017) at 8; and Clive Bates and others *A Surge Strategy for Smokefree Aotearoa 2025: The role and regulation of vaping and other low-risk smokefree nicotine products* (ASH New Zealand and End Smoking New Zealand, October 2019) at 2.

107 Manatū Hauora | Ministry of Health "Annual Update of Key Results 2018/19: New Zealand Health Survey" (14 November 2019) <[www.health.govt.nz](http://www.health.govt.nz)>. See also Glenn Hardingham *Progress towards a Smokefree Aotearoa 2025* (Parliamentary Library, 5 November 2020) at 3.

108 See above at Part II, particularly, at n 22.

109 Rangapu Hauora Tumatani | Public Health Commission *Our Health, Our Future/Hauora Pakari, Koiora Roa* (November 1994) at 41. That same report (at 41) indicated that the rate of smoking prevalence differed between ethnicities. For example, the report recorded that 54 per cent of the Māori population smoked and 34 per cent of the Pasifika population smoked.

110 EY report, above n 39, at 11.

111 At 11. Reducing the prevalence of smoking among young people has been a main goal of the tobacco control programme: Cabinet Office Circular "Report back on New Zealand's Tobacco Control Programme" (8 April 2016) at [5].

daily smoking rate is 28.7 per cent, compared to 39 per cent in 2006 and 2007, and for Pasifika, 18.3 per cent compared to 25 per cent in 2006 and 2007.<sup>112</sup>

Smoke free Aotearoa by 2025, nevertheless, seems unlikely to be achieved at 2018 cessation rates. A 2018 University of Otago report predicted that to achieve a below five per cent smoking prevalence rate by 2025, there would need to be additional averages of 8,400 Māori long-term quitters per year (5.2 times the then level) and 8,800 additional non-Māori long term quitters (1.9 times the then current average). The estimate was that the Quitline and funded face-to-face smoking cessation programs were then generating 2,000 Māori quitters and 6,100 non-Māori quitters per year: only 19 per cent of Māori and 34 percent of non-Māori quitters that would be needed to meet the goal.<sup>113</sup>

Extrapolating from the then current trajectory of declining tobacco consumption, the 2018 University of Otago report predicted that 17.4 per cent of Māori would still be smoking in 2025.<sup>114</sup> Indeed, without a tailored approach for vulnerable Māori and Pasifika communities, another 2018 report concluded that targets for "Smoke-free Aotearoa 2025" would be missed by a wide margin.<sup>115</sup> The zero-point for Māori would only be reached in 2061.<sup>116</sup>

Clearly, additional measures are needed. A draft action plan to achieve "Smokefree Aotearoa 2025" was released for consultation in April 2021.<sup>117</sup> Proposed measures include reducing the number and type of retail outlets that can sell tobacco products (eventually phasing out sales altogether), reducing nicotine in cigarettes and tobacco to very low levels, banning filters<sup>118</sup> and removing flavours and other design features that could appeal to young persons.<sup>119</sup> There are also proposed changes to the tobacco control system, including strengthening Māori governance.<sup>120</sup> Enhancing

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112 "What are our smoking rates and how are they changing?" (18 December 2020) Smokefree <[www.smokefree.org.nz](http://www.smokefree.org.nz)>.

113 Nick Wilson and others "Modelling the number of quitters needed to achieve New Zealand's Smokefree 2025 goal for Māori and non-Māori" (2018) 131(1487) NZMJ 30 at 34–35.

114 The report also estimated that 7.2 per cent of non-Māori would still be smoking in 2025, at 31.

115 EY report, above n 39, at 173. See also Taxpayers' Union report, above n 103, at 2.

116 EY report, above n 39, at 62.

117 Manatū Hauora | Ministry of Health *Proposals for a Smokefree Aotearoa 2025 Action Plan: Discussion document* (15 April 2021).

118 To reduce environmental harm but also to stop smokers being misled about health risks.

119 For a summary, see at 8.

120 At 11.

smoking cessation support (particularly for priority communities) is also proposed, along with increased research and monitoring.<sup>121</sup>

### ***VIII EQUITY ISSUES***

"In levying taxes and in shearing sheep it is well to stop when you get down to the skin."<sup>122</sup>

While tax can be a tool for social change, it can have far-reaching unintended adverse effects.<sup>123</sup> First, tobacco tax is a regressive tax.<sup>124</sup> This is because, assuming equal smoking prevalence between high-income and low-income groups, low-income groups spend a greater proportion on their income on cigarettes.<sup>125</sup> However, in reality, smoking prevalence is generally higher among low-income groups which further magnifies the regressive nature of the tax.<sup>126</sup>

Despite this, the view has been that the regressive nature of the tax is counterbalanced by the fact that low-income smokers are more likely to be price-sensitive than high-income smokers and thus more likely to stop smoking because of the increased price.<sup>127</sup> From a health perspective, low-income groups would therefore accrue additional health benefits (by stopping smoking) compared to high-income groups. In 2016, a Health Ministry report justified the tax on similar terms:<sup>128</sup>

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121 At 12 and 19–20.

122 Attributed to Austin O'Malley who was a professor at the University of Notre Dame and the author of a book on aphorisms. He died in 1932.

123 This has been well acknowledged since 1937. See Clarence Heer "Taxation as an Instrument of Social Control" (1937) 42 *AJS* 484 at 484. The WHO has cautioned policymakers that tobacco controls are not inherently pro-equity and must be explicitly designed to be so: Belinda Loring *Tobacco and inequities: Guidance for addressing inequities in tobacco-related harm* (World Health Organization, 2014) at 11 [WHO – Tobacco and inequities].

124 A regressive tax is defined as a "tax applied uniformly, taking a larger percentage of income from low-income earners than from high-income earners": EY Report, above n 39, at 7.

125 This would have the effect of crowding out household expenditure on healthcare, food, education and clothing: WHO – Tobacco and inequities, above n 123, at 23. The 2001 tax review concluded that "many New Zealanders of modest means pay as much or more through taxes on alcohol, tobacco and gaming than they pay in GST on all of their other spending.": *Executive Summary – Issues Paper – Tax Review 2001* (20 June 2001) at v.

126 EY Report, above n 39, at 50 and 53; and John Creedy and Cath Sleeman "Excise taxation in New Zealand" (2005) 39 *New Zealand Economic Papers* 1 at 2. See also the Māori Affairs Committee Report, above n 35, at 17.

127 EY Report, above n 39, at 50. By contrast, the Taxpayers' Union report, above n 103, at 4, concludes that the evidence on whether low income groups are more price sensitive is mixed.

128 Ministry of Health *Appendix – Background Information: New Zealand's Tobacco Control Programme* (April 2016) at 11 (footnotes omitted).

However, while low income groups are the heaviest smokers, they are also significantly more price responsive and more likely to reduce consumption as a result of price increases than other interventions. Because lower income groups, and young people in particular, are relatively more price-responsive than other groups, increasing the tobacco excise tax usually has the effect of making the overall incidence of tobacco excise tax less regressive.

At an individual level the negative impacts on people (especially children) in households where smokers do not quit or cut back remain substantial and should be taken into account, for example in ensuring the availability and targeting of stop smoking support services and subsidised stop smoking medicines. However any negative health impacts of tobacco taxation due to financial hardship on the households of those who do not quit are much lower than benefits of avoiding the harm from smoking for those that do quit.<sup>129</sup>

There are also direct and indirect costs of smoking which can be used to justify the tax on tobacco on a "user pays" principle (but this justification has to be on the assumption that the smoker has individual responsibility, taking no account of tobacco company promotion and profit taking from an intrinsically harmful product and addiction issues).

A 2007 study published by the Smokefree Coalition and Action on Smoking and Health (ASH) New Zealand, *Report on Tobacco Taxation in New Zealand*, estimated that the additional public health system costs attributable to smoking are between \$300 million and \$350 million. Comparing this to the \$1 billion raised by tobacco taxes at the time, the study commented that "it appears possible that present taxation rates are in excess of the appropriate rates for correction of externality burdens". However, adding in other costs, such as those from production losses, the study estimated total tangible social costs of tobacco use at \$1.7 billion.<sup>130</sup> Intangible costs were estimated in 2005 to be between \$3.1 and \$11.2 million with 81,650 quality-adjusted life years (QALYs) lost.<sup>131</sup> The New Zealand Burden of Disease study estimated that tobacco was responsible for 86,900 disability-adjusted life years (DALYs) in 2006.<sup>132</sup>

Whatever the justifications, to the extent that low-income communities continue to have high levels of smoking prevalence, the burden of the tobacco excise tax undoubtedly weighs heavier on

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129 N Wilson and others "How much downside? Quantifying the relative harm from tobacco taxation" (2004) 58 JECH 451 at 451.

130 Des O'Dea and George Thomson *Report on Tobacco Taxation in New Zealand – Volume 1 Main Report* (ASH New Zealand, November 2007) at 5 [ASH Report]. Whether it is legitimate to take into account other than direct health costs in performing such as exercise is debatable.

131 The difference in estimates comes from having different values for each QALY. Treasury guidance for value of a QALY is \$38,110 whereas the authors of the 2005 report used \$137,500 per QALY.

132 Ministry of Health, above n 128, at 3.

them and this can only lead to exacerbating inequality.<sup>133</sup> Exacerbated too are financial and budgeting concerns, which in turn may make it harder to quit. For many, smoking is seen as a tool to cope with stress.<sup>134</sup>

Secondly, in addition to financial hardships, smokers have to deal with other consequences such as the social stigma of smoking.<sup>135</sup> While the stigma may be intended by policymakers as part of the campaign against smoking, it may be counterproductive and affect the degree to which smokers engage with smoking cessation programmes, potentially reducing their effectiveness. It also further stigmatises already marginalised groups, like Indigenous peoples or those with mental health conditions, where smoking prevalence is high and many will be addicted thus having little true choice about continued smoking.<sup>136</sup> According to the American Cancer Society, it may be harder to quit smoking than to stop using cocaine or heroin: a 2012 review of 28 different studies of people trying to break an addiction found that about 18 per cent were able to quit drinking, more than 40 per cent were able to quit opiates or cocaine, but only eight per cent were able to quit smoking.<sup>137</sup>

Thirdly, commentators question whether sufficient smoking cessation support is available to smokers.<sup>138</sup> In 2016, the Government collected \$1.7 billion through tobacco tax, but it only spent \$43 million or 2.5 per cent of tobacco tax revenue on smoking cessation initiatives.<sup>139</sup> This is less than half the \$100 million which the 2007 ASH report said was required to ameliorate the equity impacts.<sup>140</sup> In addition, most cessation programmes are targeted at what succeeds for majority

133 See further Philip Alston and Nikki Reichert (eds) *Tax, Inequality and Human Rights* (Oxford University Press, New York, 2019).

134 EY Report, above n 39, at 21.

135 At 15 and 21. The public reaction to the case of Mrs Pou discussed earlier is illustrative of this stigma.

136 Marewa Glover, Pooja Patwardhan and Kyro Selket "Tobacco smoking in three 'left behind' subgroups: indigenous, the rainbow community and people with mental health conditions" (2020) 20 *Drugs and Alcohol Today* 263 at 274.

137 American Cancer Society "Why People Start Smoking and Why It's Hard to Stop" (12 November 2020) <[www.cancer.org](http://www.cancer.org)>.

138 The World Health Organisation says that, without cessation support, only four per cent of attempts to quit tobacco will succeed. On the other hand, professional support and proven cessation medications can more than double the chance of successful quitting: World Health Organization *WHO Report on the Global Tobacco Epidemic, 2021: Addressing new and emerging products* (27 July 2021) at 68.

139 Laura Walters "Government divided over national smokefree target" *Stuff* (online ed, New Zealand, 24 July 2018); and Rachel Thomas "\$1.7b in and \$43m out: the Government's 'double standard' on tobacco" *Stuff* (online ed, New Zealand, 18 May 2018). See by contrast the 2014/2015 budget spend of \$61.7 million on tobacco controls: Ministry of Health, above n 128, at 8.

140 ASH Report, above n 130 as cited in EY Report, above n 39, at 54. Note that the amount was not adjusted for inflation nor for tax revenue increases between 2007 and 2018. Further, the ASH Report found that there needed to be targeted support provided to low-income, Māori and Pasifika populations: at 7.

groups.<sup>141</sup> Stakeholders working directly with Māori and low-income communities have also indicated that too few resources were being allocated to address social problems accompanying poverty and disadvantage.<sup>142</sup> The World Health Organisation has cautioned that tobacco tax increases should be associated with smoking cessation support to ameliorate social inequities, especially for low-income groups.<sup>143</sup>

Fourthly, high tobacco prices mean criminal attempts to evade these are becoming pervasive.<sup>144</sup> A 2019 report (admittedly commissioned by Imperial Tobacco) estimated illegal trade in New Zealand amounted to 11.5 per cent of the total market. If consumed legally, these illicit products would have netted the Government \$287 million in excise tax in that year.<sup>145</sup> Attacks on small businesses to steal cigarettes are also of major concern.<sup>146</sup>

The Tax Working Group in its interim report expressed concern about further large increases to the tobacco excise rates for reasons echoing those set out above:<sup>147</sup>

Tobacco excise is regressive. There is a substantially higher prevalence of smoking in the poorest areas of our country. Although increases in the rates of excise may encourage some individuals to cease smoking, the heaviest burden of the excise increases will be borne by low income earners who continue to smoke.

The effectiveness of excise increases appears to be reducing. Regulatory impact analysis prepared by the Treasury in 2016 indicates that reductions in smoking prevalence are expected to be quite small relative to the size of the increases in the excise rates.

High taxes on tobacco appear to be a factor in an increasing number of robberies and criminal activity.

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141 Glover, Patwardhan and Selket, above n 136, at 263.

142 EY Report, above n 39, at 108.

143 WHO – Tobacco and inequities, above n 123, at 23.

144 For example in 2020, a Malaysian syndicate was arrested by Customs for attempting to smuggle cigarettes into New Zealand disguised as a shipment of roofing units: see Te Mana Ārai o Aotearoa | New Zealand Customs Service "Customs arrests Malaysian tobacco smuggling syndicate" (press release, 14 September 2020). See also World Health Organization "Facts and figures on the illicit tobacco trade" (2015).

145 KPMG *Illicit Tobacco in New Zealand: 2018 Full Year Report* (United Kingdom, 24 May 2019) at 7. A Stuff investigation this year alleged that many Auckland dairies are part of that illicit trade: George Block "Auckland black market tobacco: Dairies selling illegal smokes for organised crime groups" *Stuff* (online ed, New Zealand, 2 June 2021).

146 "Dairy industry head says tobacco tax increases making smokes more and more sought after by thieves" *One News* (online ed, New Zealand, 19 March 2018) <[www.1news.co.nz](http://www.1news.co.nz)>.

147 Interim Report, above n 4, at 77 (footnote omitted).

The Tax Working Group, therefore, recommended that the Government prioritise other measures to help people stop smoking (such as educational campaigns and regulatory measures) before considering further large increases in tobacco excise rates. It also recommended that some more revenue from the tobacco taxes should be diverted to smoking cessation programmes.<sup>148</sup> In its final report, the Group reiterated this recommendation:<sup>149</sup>

55. Detailed recommendations on the rates of alcohol and tobacco excise are beyond the expertise of the Group. However, the Group does recommend the Government simplify the schedule of alcohol excise rates and is concerned about the distributional impact of further increases in tobacco excise beyond the increases that have already been scheduled.
56. The Group's preference is that, once the current schedule of tobacco excise increases end, the Government prioritise other measures to help people stop smoking before it considers further large increases in tobacco excises. Some of the revenue from tobacco excise could also be directed towards smoking-cessation programmes.

## ***IX EFFECT ON MĀORI***

"Tobacco is not for our whānau, not for our tamariki, it wasn't our history and it will not be our future".<sup>150</sup>

The gap in smoking rates for Māori as compared to the rest of New Zealand's population remains significant. In 2018, Māori daily smoking rates remained 2.79 times that of non-Māori.<sup>151</sup> In particular, 36 per cent of Māori women smoked daily in 2018, the highest daily smoking prevalence of any ethnic/gender group.<sup>152</sup> In 2020, 31.4 per cent of Māori adults were current smokers.<sup>153</sup> The higher smoking rates mean that the tobacco excise tax has a major impact on Māori communities and

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148 At 77.

149 Final Report, above n 3, at 105.

150 Zoe Hawke as quoted in Emerald Muriwai and Marewa Glover "Smoking, Not Our Tikanga: Exploring representations of Māori and smoking in national media" (2016) 5(1) MAI Journal 33 at 41–42. Smoking has been described by Māori health organisation, Hāpai te Hauora, as the single biggest health issue facing Māori: John Gerritsen "Can New Zealand really be smokefree by 2025?" *Radio New Zealand* (online ed, New Zealand, 28 March 2019) <www.rnz.co.nz>.

151 EY Report, above n 39, at 67.

152 At 11. By contrast only 13 per cent of women, overall, are daily smokers: at 11.

153 Manatū Hauora | Ministry of Health "Annual Update of Key Results 2019/20: New Zealand Health Survey" (19 November 2020) <www.health.govt.nz>.

there have been increasing concerns that it perpetuates inequality for Māori.<sup>154</sup> It has been estimated that, of the \$1.8 billion collected in tobacco tax in 2018, Māori paid approximately \$519.1 million.<sup>155</sup>

Commentators have said that, notwithstanding falling tobacco use among both Māori and non-Māori, insufficient work has been done to reduce the pre-existing disparities and the cumulative effects involving ongoing stigmatisation, institutionalised racism and multiple negative economic and social determinants that present a significant barrier to Māori quitting.<sup>156</sup> Historically embedded disparities between Māori and non-Māori are likely to remain, and possibly be accentuated, by blunt tax increases without more.<sup>157</sup>

Advocates of this view argue that there should be greater recognition that the underlying behavioural change theories behind the excise tax are derived from a dominant Euro-Western perspective and that a culturally based solution for Māori is necessary.<sup>158</sup> It is suggested that smoking cessation among Māori has been undermined by the unintended consequences of the regressive tobacco tax.<sup>159</sup> The excise tax, it is said, is a single piece in a much larger puzzle composed of smoking bans, fines, hiring policies preventing smokers from getting jobs, insurance policies excluding smokers, residential tenancy restrictions preventing smokers from securing housing – all combining to exert tremendous stress and a sense of societal exclusion, perpetuating a downward spiral into further smoking to relieve stress.<sup>160</sup>

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154 EY report, above n 39, at 164–165 and 173.

155 Taxpayers' Union report, above n 103, at 4. This is said to be around 5.8 times the annual average value of Treaty Settlements (about \$89.6 million): at 4. I assume the \$1.8 billion figure is for 2018 given the date of publication of the report.

156 Glover, Patwardhan and Selket, above n 136, at 270. See also Marewa Glover and others "Health consequences of tobacco use for Māori—cessation essential for reducing inequalities in health" (2013) 126 (1379) NZMJ 60.

157 Glover, Patwardhan and Selket, above n 156, at 270.

158 At 271–272. See also Rangapu Hauora Tumatanui | Public Health Commission Maori Smokefree: *Report on the Hui for Maori Smokefree Programme Development* (1994).

159 Glover, Patwardhan and Selket, above n 136, at 273. For a similar conclusion with respect to the vulnerable populations in Canada, see Lorraine Greaves and others "What Are the Effects of Tobacco Policies on Vulnerable Populations? A Better Practices Review" (2006) 97 Canadian Journal of Public Health 310.

160 Glover, Patwardhan and Selket, above n 136, at 273. For a theory of poverty which considers how the cumulative effect of multiple individual laws operate as a mechanism through which poverty is perpetuated, see Sara S Greene "A Theory of Poverty: Legal Immobility" (2019) 96 Washington University Law Review 753.

It is certainly imperative to find culturally appropriate and effective ways to diminish the disparities in smoking rates.<sup>161</sup> As the Ministry of Health has pointed out, smoking in itself is a driver of inequality:<sup>162</sup>

**Smoking is a large driver of health inequalities**

Māori have significantly higher smoking prevalence with 35.5 percent of Māori being daily smokers in 2014/15 – compared with 22.4 percent of Pacific Peoples, 13.5 percent of European/Other and only 5.9 percent of Asian people.

Lung cancer was the leading cause of death for Māori females and the second leading cause of death for Māori males. Māori female lung cancer mortality was over four times that of non-Māori females. There are many other smoking related diseases where similar disparities can be shown.

Reducing the harm from smoking remains the single most effective method of improving public health and reducing health inequalities.

***X HOW TO EVALUATE CORRECTIVE TAXES***

"Collecting more taxes than is absolutely necessary is legalized robbery."<sup>163</sup>

The 1995 report for the Public Health Commission considered that the imposition of corrective tobacco taxes can be justified up to the point where the price paid covers all the social costs of smoking.<sup>164</sup> Beyond that point, aggregate welfare may not be improved. If an individual is well informed about the risks of smoking and prepared to pay the price for tobacco products that reflects all the expected costs, then the individual must perceive the benefits of smoking to outweigh the costs and must be said to be making a "rational decision".<sup>165</sup> It was recognised that this might become less clear cut when recognising that some consumers may not be completely rational because of the addictive nature of nicotine present in tobacco products. This was said to require further research, different policy objectives and possibly different responses.<sup>166</sup>

Speaking about excise taxes in general, the 2001 tax review noted that excise and duties on alcohol, tobacco, gaming and petroleum accounted for around 8.3 per cent of the total tax revenue at

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161 It may well be time to move on from the phase one measures as heralded by the Māori Affairs Select Committee (see Māori Affairs Committee, above n 35).

162 Ministry of Health, above n 132, at 7–8. Some of the emphasis in the original has not been replicated and citations have been omitted.

163 Attributed to Calvin Coolidge who served as the 30th president of the United States from 1923 to 1929.

164 Report for the Public Health Commission, above n 77, at 42.

165 At 42.

166 At 42.

that time and commented that, "although they raise a significant amount of revenue, they seem out of step with the low rate, broad base approach taken in respect of our other tax bases."<sup>167</sup> Tobacco tax accounted for 38 per cent of the total excise revenue at that time and yet was paid by only 25 per cent of the adult population.<sup>168</sup> This means that tobacco tax falls more heavily on disadvantaged persons as a higher percentage of such persons smoke. In particular, it falls more heavily on Māori. The review concluded: "Because excises fare so poorly on normal criteria of fairness and efficiency in raising revenue, such taxes require a strong alternative justification."<sup>169</sup>

In terms of whether that alternative justification could be health costs, the review noted that in 2001 it was estimated that tobacco-related health costs were around \$225 million per annum, whereas revenue from tobacco excise was around \$950 million in the 1999/2000 year after GST adjustment.<sup>170</sup> The review concluded that the then current levels of taxation on tobacco and gaming appear indefensible on externality grounds.<sup>171</sup> The review was not in any event convinced that the fact smokers and drinkers mean additional public health costs.<sup>172</sup>

... provides a robust basis for tax policy. It is not easy to justify singling out smokers and drinkers. The same public health rationale applies to other lifestyle choices that impose extra costs on the system.

They said that, on tax policy grounds, "we have a strong preference for the transparent approach to taxation exemplified by GST, which makes tax burdens independent of how New Zealanders choose to spend their money."<sup>173</sup>

In its interim report, the Tax Working Group said that suitable policy responses to limit undesirable behaviour or to ensure that individuals face the full costs of their behaviour might be to regulate directly (for example to ban smoking where third parties are affected), impose tax, or provide better information. The relative effectiveness of each option will depend on:<sup>174</sup>

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167 *Executive Summary – Issues Paper – Tax Review 2001*, above n 125, at iv. See discussion on excise taxes generally at iv–v as well as *Final Report – Tax Review 2001* (October 2001) at [3.78]–[3.106], in particular, at [3.80]–[3.83], [3.87] and [3.99]–[3.106].

168 *Executive Summary – Issues Paper – Tax Review 2001*, above n 125, at v. A person smoking one packet a day would pay over \$2000 a year in GST adjusted tobacco tax.

169 At v–vi.

170 *Final Report – Tax Review 2001*, above n 167, at [3.93]. It was also noted in that paragraph that no account was taken of the long (average) lag between the payment of tobacco taxes and the incidence of health costs.

171 At [3.102].

172 *Executive Summary – Issues Paper – Tax Review 2001*, above n 125, at vi. I note the review did not explicitly consider the role of excise tax in changing behaviour.

173 *Final Report – Tax Review 2001*, above n 167, at v.

174 Interim Report, above n 5, at 75.

- how individuals respond to each option;
- whether policymakers have information on how individuals respond; and
- whether policymakers can tailor each option to individuals' responses.

In its final report, the Taxation Working Group said that it had begun to develop a taxation policy framework that would bring together concepts from the Treasury's Living Standards Framework, Te Ao Māori and the principles of tax policy design.<sup>175</sup> The Living Standards Framework identifies four capital stocks that are crucial to wellbeing: financial and physical capital, human capital, social capital and natural capital.<sup>176</sup> In terms of Te Ao Maori, He Ara Waiora | A Pathway towards Wellbeing draws on the concepts of waiora (wellbeing), manaakitanga (care and respect), kaitiakitanga (stewardship/guardianship), whanaungatanga (relationships and connectedness) and ōhanga (prosperity).<sup>177</sup> The Tax Working Group also considered that the principles of tax policy design, which have been consistently applied through previous tax reviews, remain relevant and useful: efficiency (minimising impediments to economic growth and avoiding distortions to the use of resources), equity and fairness, revenue integrity, fiscal adequacy, compliance and administration costs, coherence, predictability and certainty.<sup>178</sup>

Building off of these principles, the Tax Working Group developed a framework for taxing negative environmental externalities. It outlined the favourable attributes for such taxes, including whether the level of damaging activity is responsive to price signals. It also provided criteria to measure the suitability of a tax as against other policy measures such as regulation. Finally it set out seven design principles warranting particular attention: Māori rights and interests must be acknowledged and addressed; distributional impacts should be assessed and mitigated; the suite of responses should reflect the full cost of externalities; the price should vary locally where there is local variation in impacts; international linkages should be considered; the tax should be integrated with other policy; and intertemporal fairness should be considered.<sup>179</sup>

Some submitters had suggested the development of a framework for deciding when to apply corrective taxes more generally (similar to the framework developed by the Tax Working Group for the use of environmental taxes). The Group supported that suggestion,<sup>180</sup> as do I. A proper framework

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175 Final Report, above n 3, at 25–27.

176 At 25.

177 At 26. The Tax Working Group said that the process, with regard to the development of these principles and their integration into policy design, had only just begun.

178 At 28.

179 At 41. In its response the Government agreed with the framework broadly: Grant Robertson and Stuart Nash, above n 12.

180 Final Report, above n 3, at 22.

will assist in evaluating the efficacy of the various measures to achieve Smokefree 2025, including the proper place and level of tobacco tax.

In developing and applying such a framework, attention should be placed on encouraging research so that there is a sound base for decision making. Consideration should also be given to policy options apart from taxation, including properly funded measures for tackling addiction. Addressing issues of equity and fairness, particularly related to Māori, is vital.<sup>181</sup>

## ***XI CONCLUSION***

What we need to burn on a daily basis are calories and not tobacco. Let us make sure that tobacco is not able to take any more lives by making this world free from it.<sup>182</sup>

The aim of improving the health of New Zealanders by encouraging them to stop smoking is clearly laudable. This particularly applies to children, young persons and traditionally disadvantaged groups. On the other hand, care must be taken to ensure that any measures are applied fairly and equitably and that existing inequalities are not exacerbated. In accordance with the policy considerations discussed above, increased attention to the links between human rights, tikanga values and tobacco tax will mean a greater chance of achieving "Smokefree Aotearoa" through a suite of tailored, culturally appropriate and effective strategies.

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181 The draft action plan released in April 2021 (see Manatū Hauora | Ministry of Health, above n 117) does seem a good start in this regard.

182 World No Tobacco Day quotes 2021.

