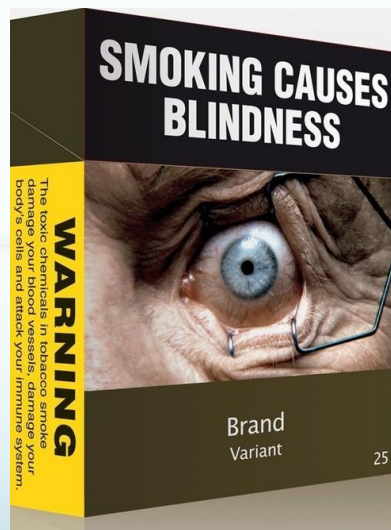


Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Tobacco Plain Packaging



Eric Crosbie, MA
Politics Department
University of California,
Santa Cruz

University of Otago, Wellington
15 June, 2015

Disclosure Statement

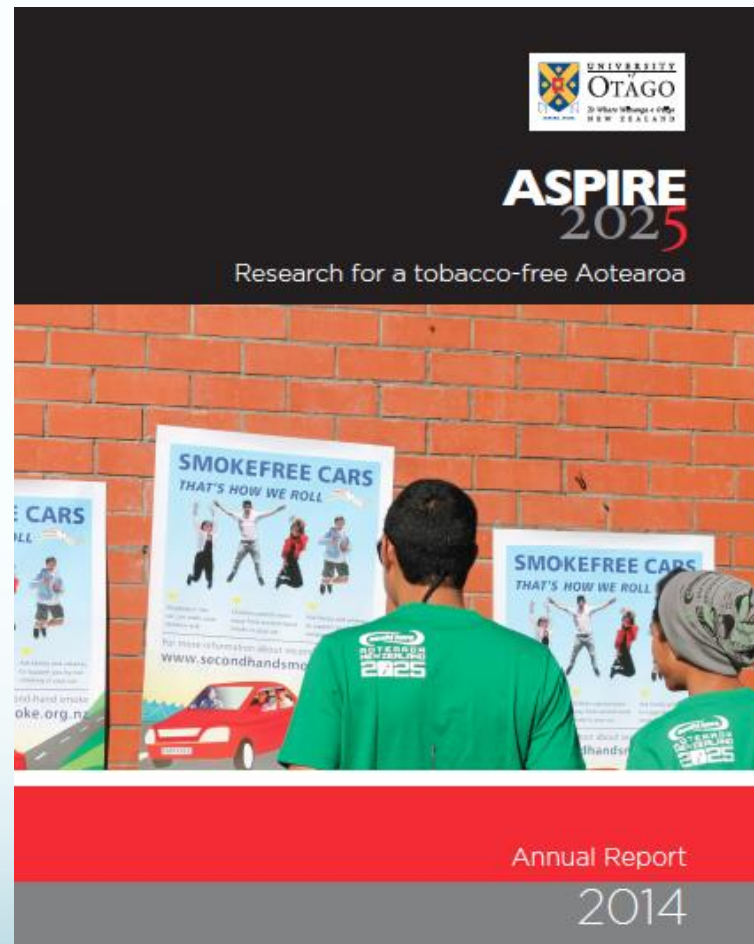
- No funding or support from tobacco companies

Acknowledgements

- University of California Pacific Rim Research Program
- ASPIRE 2015

ASPIRE 2025

Annual Report 2014



ASPIRE 2025 Annual Report 2014

Foreword

T

he 2014 ASPIRE 2025 Annual Report once again showcases a year of intense research activity. As we move closer to 2025, research informing policy measures that can accelerate reductions in smoking prevalence becomes increasingly important. Research from ASPIRE 2025 team members has informed policy measures such as plain packaging and the increasing adoption of smokefree outdoor spaces, and our tobacco endgame studies have sparked international interest.

The last year saw the Health Select Committee consider the Bill that introduces plain packaging. Our comprehensive submission presented our own HRC-funded work, drew together the international evidence base, and outlined areas where New Zealand

We have continued our popular seminar programme and were once again delighted to welcome internationally acclaimed researchers who shared their expertise

We have continued our popular seminar programme and were once again delighted to welcome internationally acclaimed researchers who shared their expertise with us and the wider tobacco control community. These visits provide important opportunities to develop international connections and we are particularly pleased with the research collaborations we have developed and look forward to reporting the outcomes of these in future reports. We have also contributed to international tobacco control through invited presentations, membership of expert advisory groups, and commentary in national and international media. These efforts have further enhanced ASPIRE2025's reputation as a producer of high-quality, policy-relevant research.

Leading ASPIRE2025's initiatives is a wonderful experience because of the many people within and beyond the University of Otago who support our efforts, challenge our thinking and promote translation of our findings. We extend our thanks to our many colleagues in the tobacco control community who work with us and help ensure the on-going relevance of our work. We are grateful to the funding bodies that support our research, and the superb team of support staff who make an enormous contribution to the work we do. Finally, we thank our research participants who willingly share their experiences and keep us strongly focused on how we can best achieve the world-leading Smokefree 2025 goal.



Richard Edwards



Janet Hoek

March, 2015

Collaboration

ASPIRE
2025



CENTER FOR
TOBACCO

CONTROL
RESEARCH &
EDUCATION



Overview

- Background
- Gaps in the Literature
- Research Question
- Case Selection
- Methods
- Early Findings

Inter-Disciplinary Research

- Political Science (International Political Economy)
- Public Health (Tobacco Control)
- Case of transnational corporations vis-à-vis the state (state autonomy and global governance)

Global Governance and Global Business Regulation

- State Autonomy Under Globalization
 - Globalization impact
 - Retreat of the state?
 - Role of non-state actors
- Global Governance
 - International trade
 - Tariffs→Intellectual property and investment
- Global Business Regulation
 - Private authority and public regulation
 - Self-regulation

Tobacco and Trade

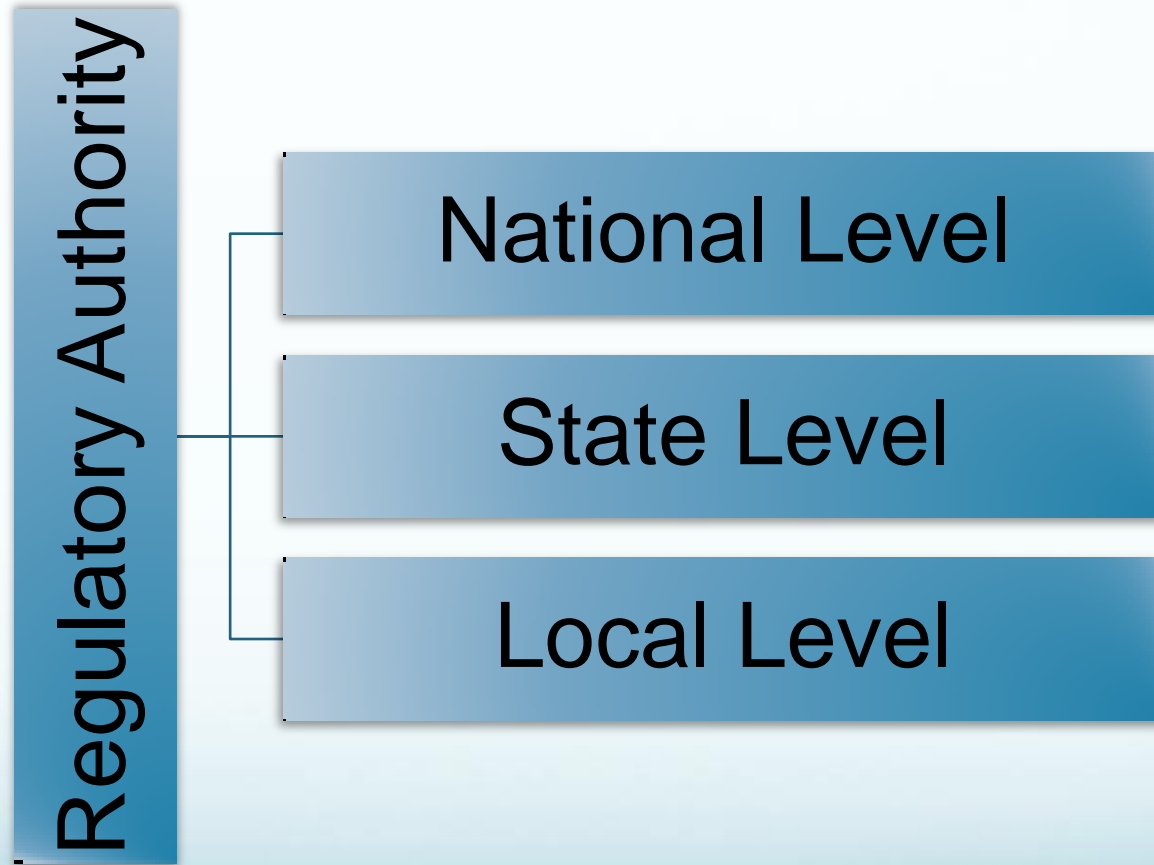
- Trade liberalization
 - Lower tobacco tariffs
 - Access to new markets
 - Increased tobacco consumption
- Health versus trade debate
 - WHO versus WTO
 - Right to health
- Intellectual property and investment arguments
 - Legal weapon to intimidate governments



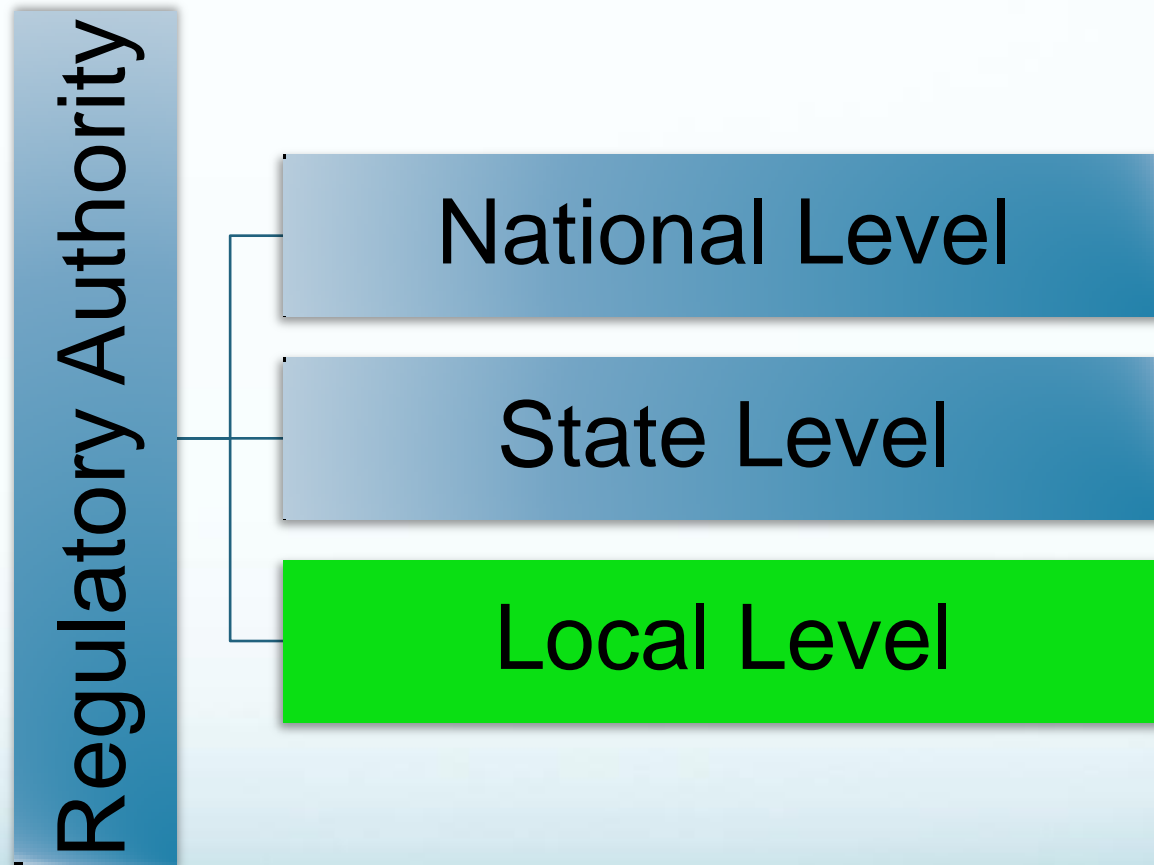
Preemption & Global Preemption

- Preemption
 - Removing authority from subordinate jurisdictions
 - Preempting strong local laws with weak state laws and strong state laws with weak national laws
- Global Preemption
 - Shifting authority to international regulatory bodies
- Venue Shifting and Forum Shopping
 - International trade dispute settlement bodies
 - Policy space

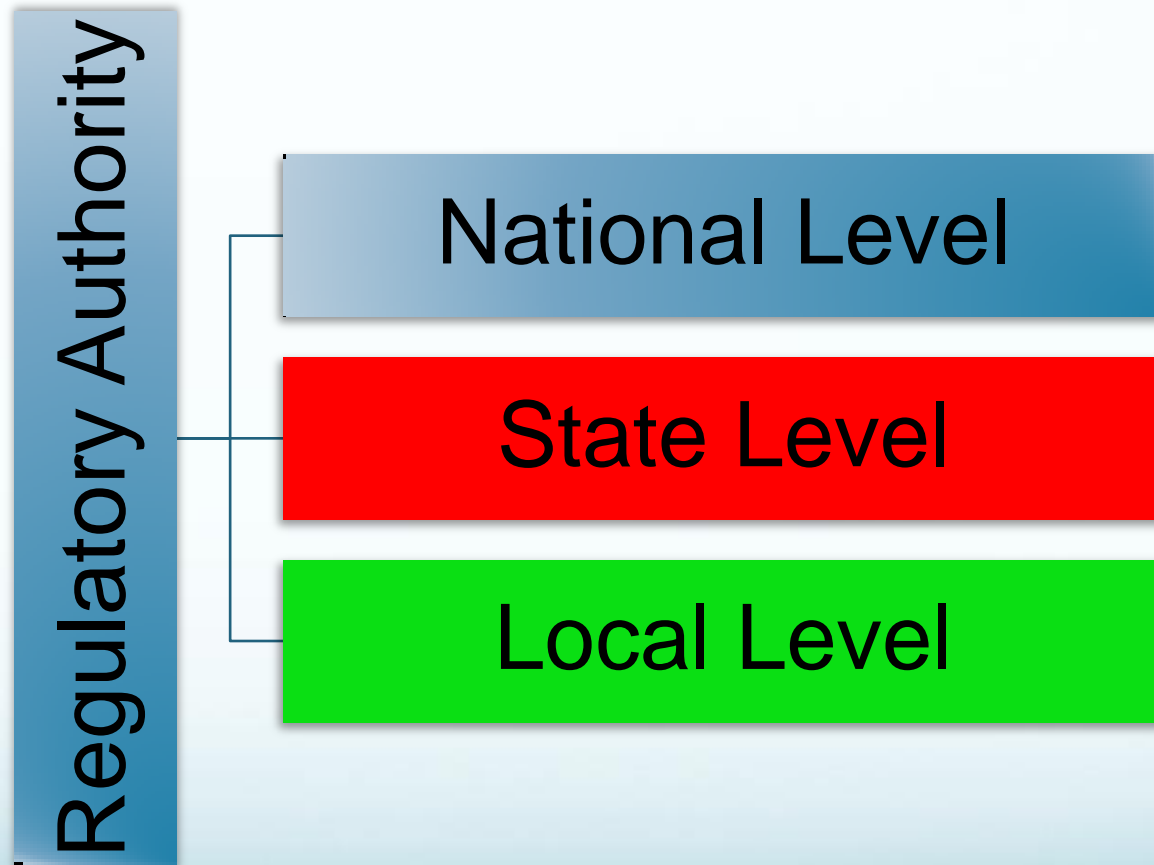
Preemption



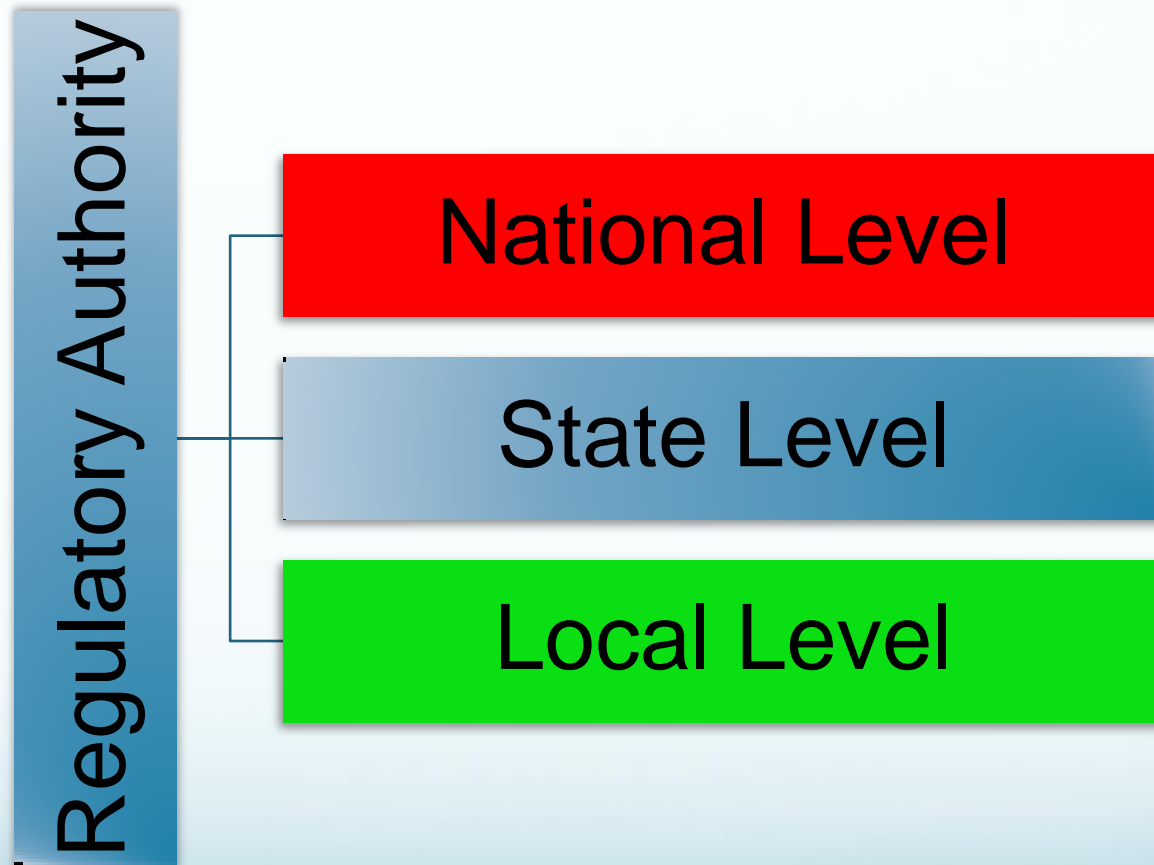
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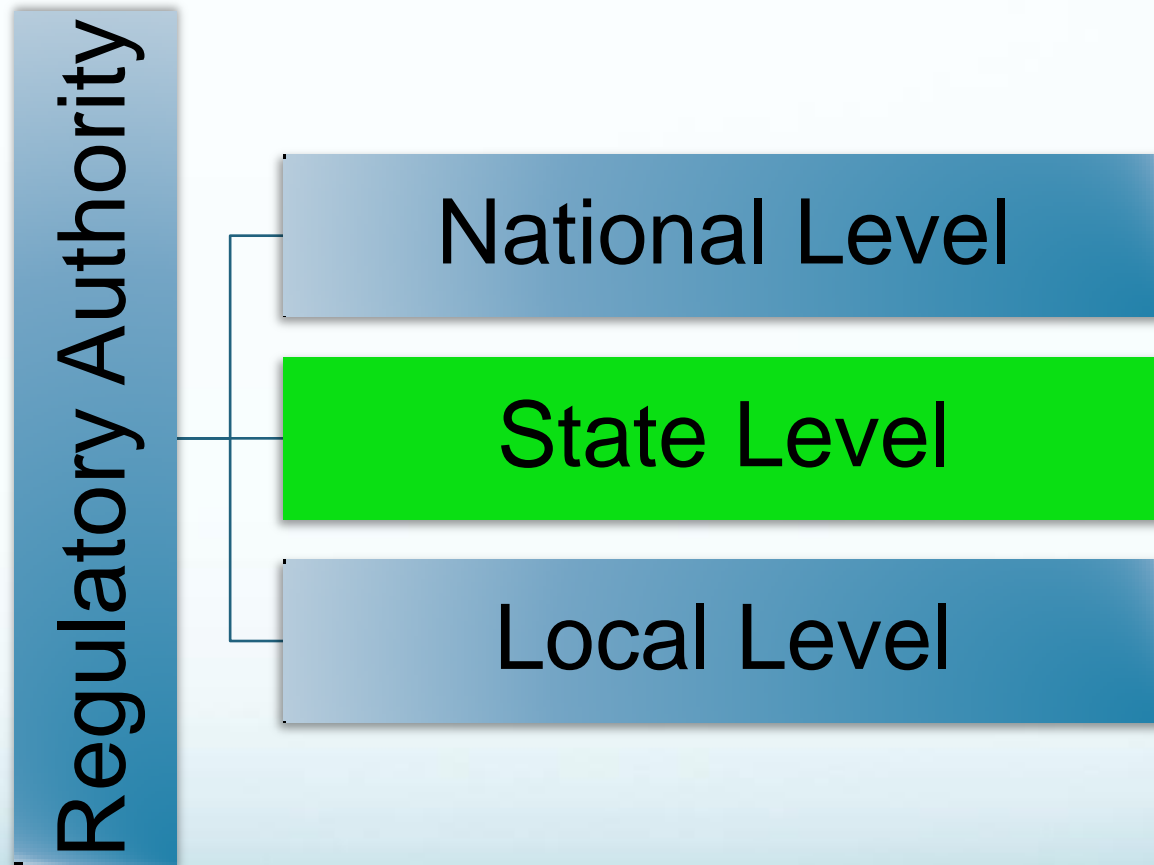
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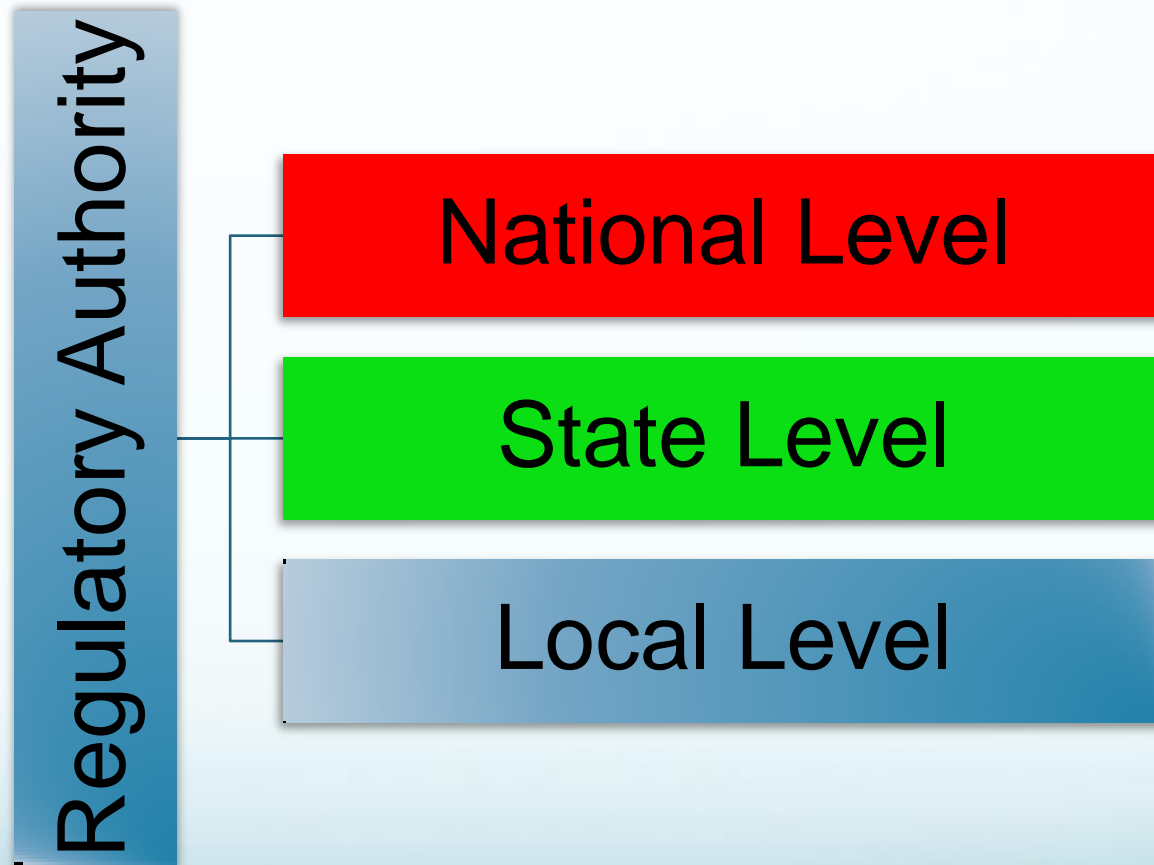
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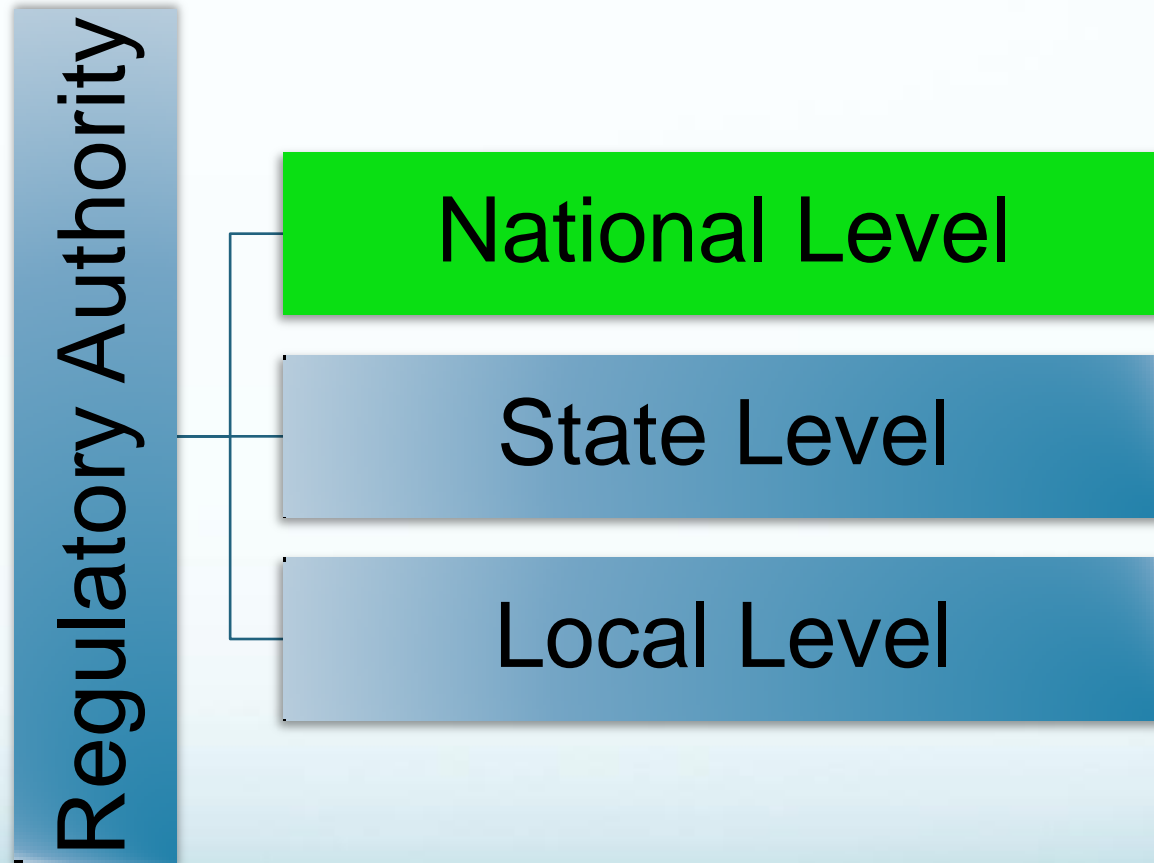
Preemption



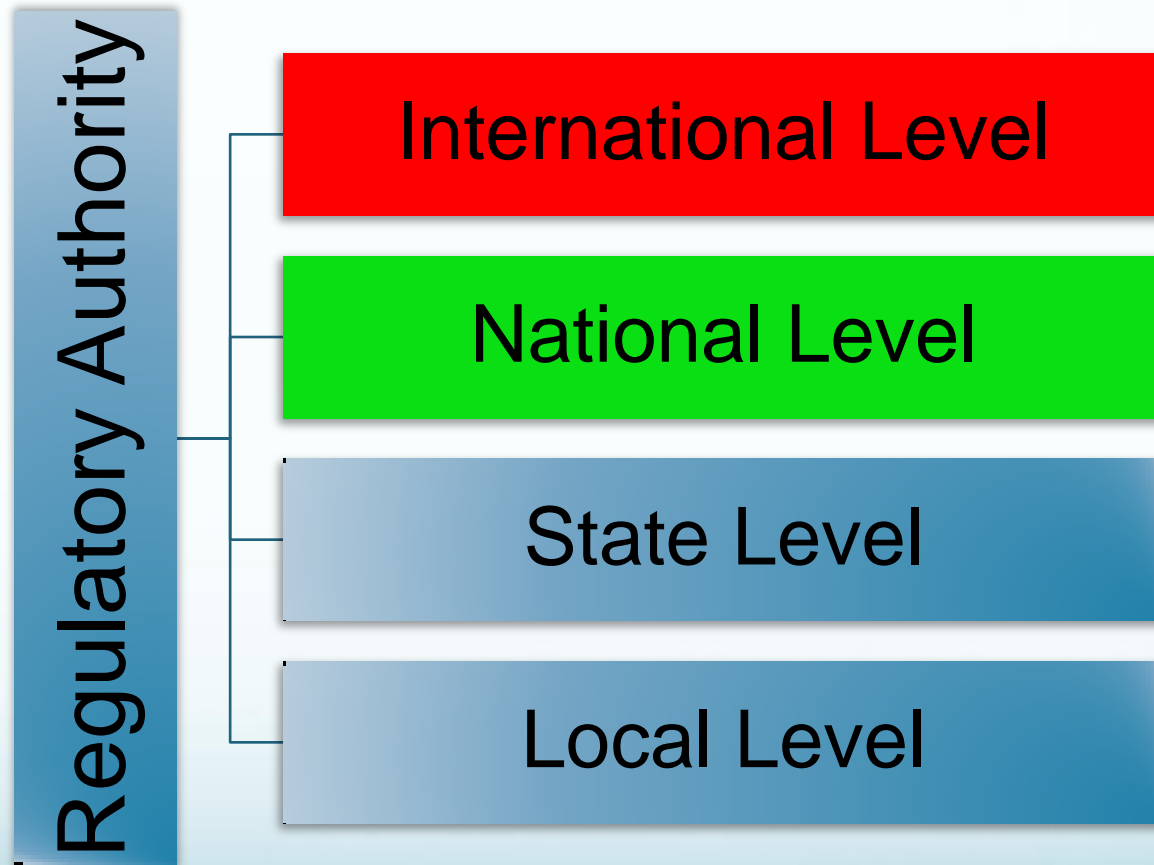
Preemption



Preemption



Global Preemption

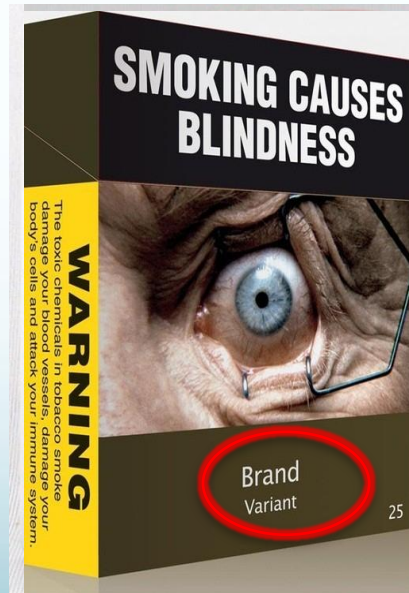


Research Questions

- Under what conditions and to what extent are transnational corporations constraining government regulatory authority?
- To what extent are transnational tobacco companies using trade agreements to constrain governments from implementing public health policies?
- What are the *political implications* of these legal trade threats and challenges?

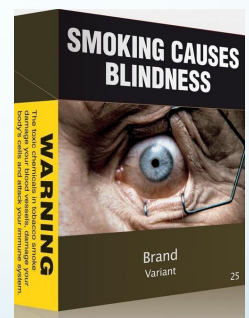
Cigarette Package Health Warning Labels (HWLs)

- Evolution of HWLs: Textual to pictorial warnings
- Larger, more graphic HWLs are more effective
- Package: One of the last forms of advertising



Cigarette Package Health Warning Labels (HWLs)

- Evolution of HWLs: Textual to pictorial warnings
- Larger, more graphic HWLs are more effective
- Package: One of the last forms of advertising



Case Selection

- 67 countries require pictorial HWLs (most 50%)
- 4 countries: New Zealand, Jamaica, Uruguay, and Australia have attempted to implement 75%





New Zealand (2008)	Jamaica (2013)	Uruguay (2010)	Australia (2012)
			
Health message covering 30% of the front of pack	Health message covering 60% of the front of pack	Health message covering 80% of the front of pack	Health message covering 100% of the front of pack

Methodology

- Mix-Method Approach
- Comparative Method
- Archival Research
- Interviews

Comparative Method

- Most-different and most-similar systems design

Variables	Developed Countries		Developing Countries	
Countries	New Zealand	Australia	Uruguay	Jamaica
HWLs (Dependent Variable)				
System of government	Parliamentary	Parliamentary	Presidential	Parliamentary
Legislature	Unicameral	Bicameral	Bicameral	Unicameral
Gross Domestic Product (PPP)	\$33,000 (#29)	\$43,000 (#14)	\$18,000 (#58)	\$4,500 (#127)
Tobacco prevalence rate	Low (15%)	Low (18%)	Moderate (26%)	Moderate (24%)
Political parties	2000-2005: Labor Party 2005-2010: Labor Party 2010-2015: National Party	2005-2005: Coalition Party 2005-2010: Labor Party 2010-2015: Coalition Party	2000-2005: Colorado Party (President), Broad Front Party (Congress) 2005-2015: Broad Front Party	2000-2005: National Party 2005-2010: Liberal Party 2010-2015: National Party
Transnational tobacco companies (market share)	BAT (70%), Imperial (18%), PMI (11%), Other (1%)	BAT (46%), PMI (33%), Imperial (20%), Other (1%)	Monte Paz (80%), PMI (16%), Other (4%)	BAT (96%), PMI (3%), Other (1%)
Notable trade agreements	WTO, New Zealand-Hong Kong BIT, NZ-China	WTO, Australia-Hong Kong BIT, AUSFTA*	WTO, Uruguay-Switzerland BIT, Mercosur*	WTO, Honduras-Switzerland BIT, DR-CAFTA
WHO FCTC (signature, ratification, entry date)	06/16/2003, 01/27/2004, 02/27/2005	12/05/2003, 10/27/2004, 02/27/2005	06/19/2003, 09/09/2004, 02/27/2005	06/18/2004, 02/16/2005, 05/17/2005
Tobacco control activism	Action on Smoking and Health Australia	Action on Smoking and Health New Zealand	Investigation Center for Tobacco Epidemic	Honduran Anti-Tobacco Alliance
International support	-Legal advice	-Legal advice	-Legal advice, financial and technical support	-Financial and technical support
*Does not include an investor-state dispute settlement provision. AUSFTA-Australia-United States Free Trade Agreement, BAT: British American Tobacco, BIT: Bilateral Investment Treaty, DR-CAFTA: Dominican Republic-Central America Free Trade Agreement, FCTC: Framework Convention on Tobacco Control, FTA: Free Trade Agreement, PMI: Philip Morris International, WHO: World Health Organization, WTO: World Trade Organization				

Archival Research

- University of California, San Francisco (UCSF) Legacy Library (legacy.library.ucsf.edu)

UNIVERSITY OF CALIFORNIA, SAN FRANCISCO
LEGACY TOBACCO DOCUMENTS LIBRARY



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A Digital Library of Tobacco Documents

The Legacy Tobacco Documents Library (LTDL) contains more than 14 million documents (80+ million pages) created by major tobacco companies related to their advertising, manufacturing, marketing, sales, and scientific research activities.

Search the Documents

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Getting Started:

-  [Popular Documents](#)
 - Marketing to Youth
 - Marketing to Women
 - Secondhand Smoke...
-  [Collection Highlights](#)
-  [Tobacco Documents Bibliography](#)
-  [Research Examples](#)
-  [Podcasts and Videos](#)



VIDEOS

PMI Workshop (October 1985)

Chairman's Remarks

INFOTAB Workshop
Concluding Document

"The tendency is for each country to think its problems are unique. The fact is that tobacco issues have always been international.... Rotating labels came to us from Sweden—and the furor about environmental tobacco smoke was started in Japan. As one of our Australian colleagues puts it, 'a sneeze in one country today causes international pneumonia tomorrow!'"

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Generic/Plain Packaging

- NZ Toxic Substances Board proposal (May 1989)
- Beede, Lawson, & Shepherd study (Dec 1989)
- Smokefree Environments Act (August 1990)



BAT NZ Concerns Over Packaging (January 1993)



"I believe that the latest moves to introduce packaging changes heralds the biggest battle to be fought by the industry. "

Dear David

I have just received a copy of the Tobacco Control regulations gazetted in Perth in late December which makes for alarming reading. If past experience is anything to go by, similar initiatives in New Zealand cannot be far away.

Therefore it was timely that early in December the Business Objectives for the Tobacco Institute of New Zealand were reviewed. During this process high priority was given to the issues of labelling/plain or generic packaging. In part this decision was reached because of the attack against brands in Australia and latterly the publication in the UK "Public Health 1992" of the study "The effect of plain packages on the perception of cigarette health warnings" by Otago University (NZ) researchers, Head and Lawson.

"In the past, our opponents have worked on a domino theory of picking upon country after country in terms of smoking restrictions and advertising and other restrictions. I believe that we should shift the playing field by taking an international approach to brand protection which will allow us to protect our major assets, our brands."

business.

#2...

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Plain Pack Group

- **Members**

- British American Tobacco (BAT)
- Rothmans International
- RJ Reynolds
- Philip Morris
- Imperial Tobacco
- Reemtsma & Gallaher



- **First meeting**

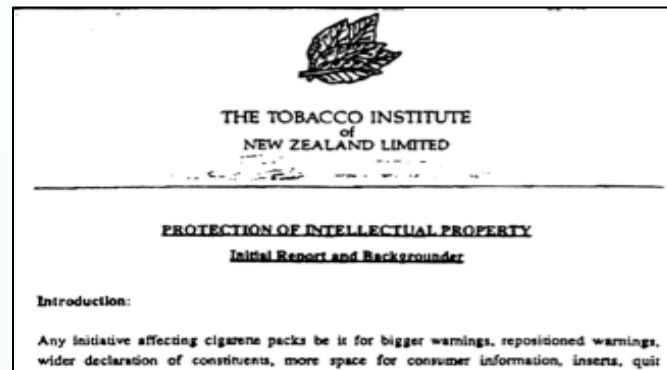
- September 1993

- **Objective**

- Coordinate internationally on issues of plain packaging



BAT NZ Letter to London Headquarters (May 1993)



“Any initiative affecting cigarette packs should not be concerned as a health issue. It should be treated as expropriation of Intellectual Property and contested on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position.”

Since the last Board meeting the following action has taken place.

- The Executive Directors of TINZ and TIA have met and developed a co-ordinated approach to the issue.
- the Executive Director has met with a Board Member of TDC and expressed concern at the apparent lack of international co-ordination and co-operation on the issue.
- We have succeeded in having the item placed on the agenda for a meeting this week in Switzerland of international tobacco company lawyers. Both the Rothmans and BAT representatives at this conference have indicated strong support for the proposal.

Plain Pack Group-Slide Presentation (July 1994)



Findings

- **Current conventions & treaties afford little protection**
- **GATT/TRIPS little joy**
- **Other industry groupings little support**

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Australia and Canada Caving Into Trade Threats

Australian Health
Minister-July 1995

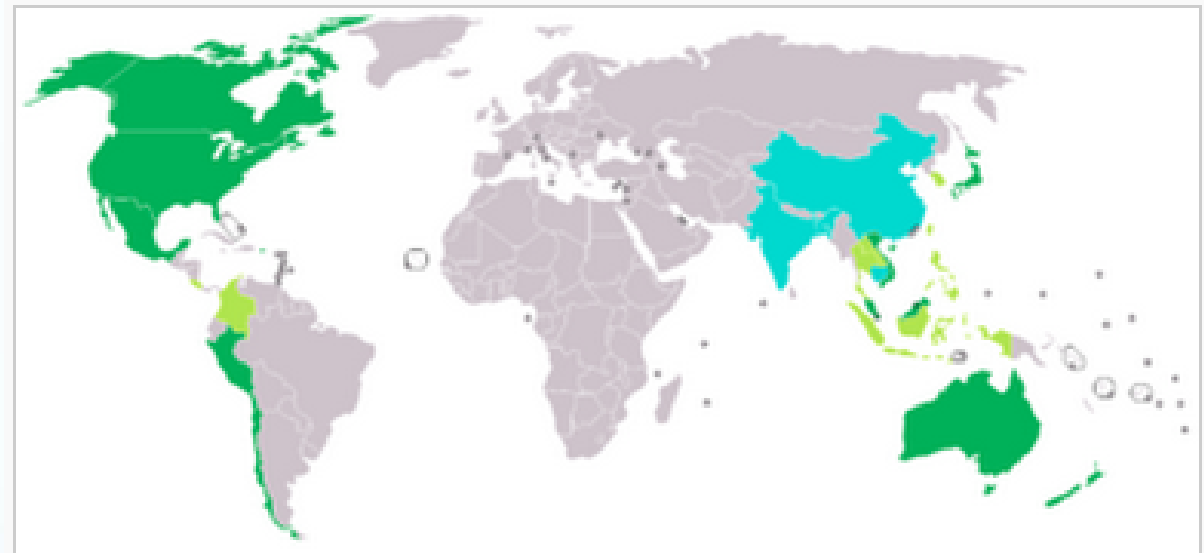
“Unfortunately [generic packaging] is just not feasible. We would have to buy tobacco companies’ trademarks and that would cost us hundreds of millions of dollars.”




Canadian Health
Minister-August 1996

“We would be in violation of trademark and the Charter of Rights and Freedoms because the product is not deemed to be an illegal product.”

Trans-Pacific Partnership Agreement (TPP)

Country/Region
 Brunei
 Chile
 New Zealand
 Singapore
 United States
 Australia
 Peru
 Vietnam
 Malaysia
 Mexico
 Canada ^[16]
 Japan
 Philippines
 Taiwan
 South Korea



-  Currently in negotiations
-  Announced interest in joining
-  Potential future members

Trans-Pacific Partnership Agreement (TPP)

- Negotiations
 - Over 20 rounds of negotiations completed
 - Private (wiki leaks leaked documents)
- Impact
 - Tobacco control
 - Access to medicines
 - Food safety standards
 - Alcohol regulation
 - Environment and climate change

Interviews

- Interview key informants:
 - Policymakers
 - Government officials (health and trade ministry)
 - Health groups (domestic and international)
 - Tobacco control advocates
 - Legal experts

Tobacco Control in NZ

- Tobacco indicators
 - Smoking prevalence 15%, Māori 40%
 - About 5,000 people die per year, 13 people a day
- Tobacco control progress
 - Retail display ban
 - Retailer register
 - Annual above-inflation tobacco taxation increases
 - Smokefree prisons
 - Increased penalties for sales to minors

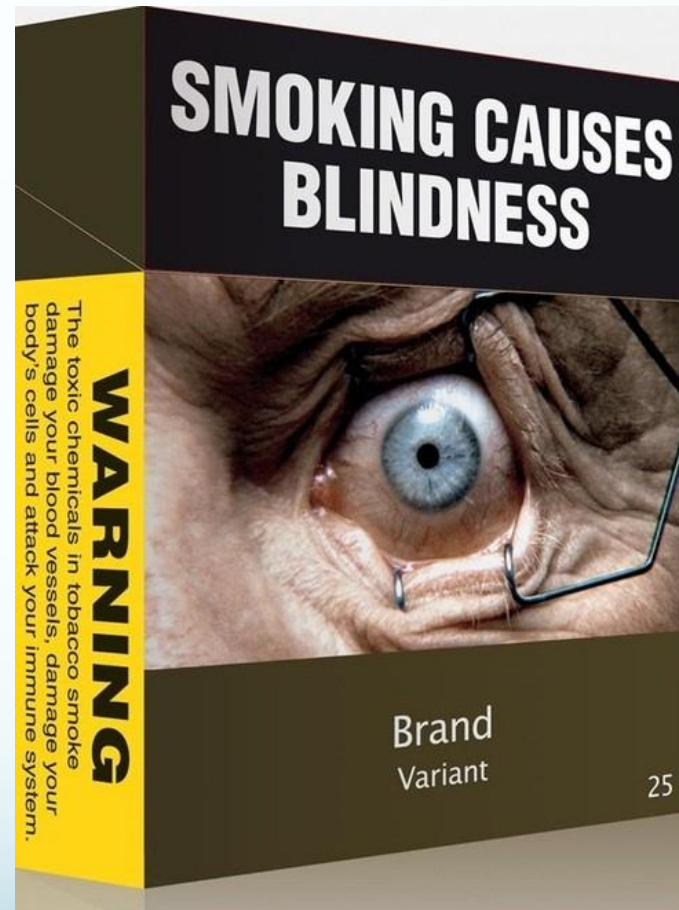
Smokefree 2025

- Smokefree 2020 vision
- Māori Affairs Select Committee inquiry into tobacco industry (2010)
- NZ government 2025 commitment (March 2011)
 - Smoking prevalence less than 5% (not a ban)
 - Plain packaging
- NZ government announces plain packs in principle (April 2012)

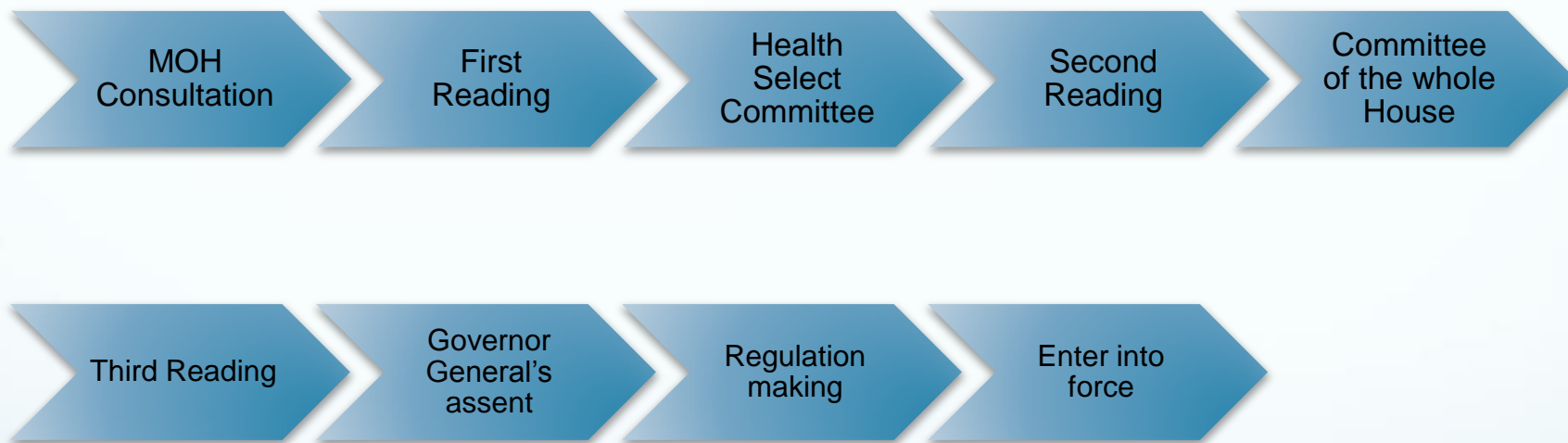


Plain Packaging Goals

- Reduces appeal of tobacco products, especially youth
- Reduces any wider social acceptance of smoking
- Discourages people from taking up smoking
- Encourages people to give up smoking
- Supports NZ's international commitments to the WHO FCTC



Tobacco Plain Packaging Process in NZ



Tobacco Plain Packaging Process in NZ



- MOH consultation process (July-October 2012)
 - 300 submissions from individuals, organizations and businesses
- Health Ministry analyzed submissions and reported back to Cabinet (November 2012)
- Government decided to proceed (February 2013)

The Plain Truth Campaign



Out of the mouths of babes...

Unbranding CIGARETTE PACKS won't stop everyone from smoking. But it will give our kids one less reason to start.

"It looks pretty..." - Nina, Age 5

auahi kore
HE PAKANGA
NEW ZEALAND
2025

Cancer Society
Te Kōwhiri Māhiorahanga
o Aotearoa

PLAIN PACKS
NEW ZEALAND

www.plainpacks.org.nz



Unbranding cigarette packs won't stop everyone from smoking

But it will give our kids one less reason to start

auahi kore
HE PAKANGA
NEW ZEALAND
2025

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PLAIN PACKS
NEW ZEALAND

For more information visit: www.plainpacks.org.nz

BAT Agree-Disagree Media Campaign



Industry Arguments Against Plain Packaging

- No evidence it would work
 - Would not reduce youth smoking or consumption
 - Not working in Australia
- Would increase illicit trade
- Bad precedent for others
- Retailer concerns
- Violates international treaties
 - Breach of WTO and investment treaties



The Revolving Door

- Christopher Bishop, MP for Hutt South
 - Former PMI Corporate Affairs Manager
- Todd Barclay, MP for Clutha-Southland
 - Former PMI Corporate Affairs PR



Government Response

In a television interview in June 2012 when the government was seeking submissions on its plain packaging proposals, Bishop said: "We want to make our views known to the government, and we want

"In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings."

New Zealand's subject to Philip Morris International has been mobilising opposition to plain packaging around the world, notably in Australia where it has manoeuvred subsidiary Philip Morris Asia to launch investor-state dispute arbitra-

"To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes."

plain packaging of tobacco products, but buried in the government media release were concerns regarding the risk of legal challenges from the tobacco industry, and the government acknowledged that to manage the risks 'the government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be

announcement about plain packaging in the UK from the Queen's speech to parliament on 8 May caused a storm of condemnation, particularly given that the policy had been expected for some time.

In the days that followed, it emerged that the government had appointed Australian lobbyist Lynton Crosby as a political advisor. Mr Crosby's longstanding links to the tobacco industry through

ters, including the prime minister, are not publicly disclosed.

Mr Crosby's company was active in the unsuccessful fight to prevent the introduction of plain packaging in Australia, including being on a retainer from British American Tobacco. While that battle was fought from outside the government, perhaps the tobacco industry has now decided it will have more

Tobacco Plain Packaging Process in NZ



- First Reading (February 2014)
 - MPs reiterating industry concerns
 - MPs also emphasizing importance of FCTC and public health
 - First Reading passes (only 1 vote against)

Tobacco Plain Packaging Process in NZ



- Bill referred to committee (February-March 2014)
 - 15,682 submissions from interest groups/individuals
 - Changed title to “standardised” tobacco packaging
- MOH report to Health Committee (June 2014)
 - 61% supported bill, 31% opposed, 8% not clear
 - Opposition mostly from tobacco industry & retail
 - Evidence for plain packs & not to wait

Tobacco Plain Packaging Process in NZ



2508 (2015). Hon Annette King to the Associate Minister of Health (13 Mar 2015): Will the Government proceed with the Smoke-free Environments (Tobacco Plain Packaging) Bill this year, if not, why not?

Order Paper and questions

Order Paper
Questions for oral answer
Questions for written answer

2015: Will the Government proceed with the Smoke-free Environments (Tobacco Plain Packaging) Bill this year, if not, why not?

Hon Peseta Sam Lotu-liga (Associate Minister of Health) replied: The Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill is on the order paper, awaiting its second reading. The Government has a busy legislative programme for 2015, and a decision on when the Bill will be brought up for its

Hon Peseta Sam Lotu-liga (Associate Minister of Health) replied: The Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill is on the order paper, awaiting its second reading. The Government has a busy legislative programme for 2015, and a decision on when the Bill will be brought up for its second reading has not yet been made.

Tobacco Plain Packaging In Comparison

- Australia (19 months)
 - Proposal April 2010, Approval November 2011
- Ireland (22 months)
 - Proposal April 2013, Approval February 2015
- United Kingdom (35 months)
 - Proposal April 2012, Approval March 2015
- New Zealand (38+ months)
 - Proposal April 2012, Approval pending...

Tobacco Plain Packaging In Comparison

2010

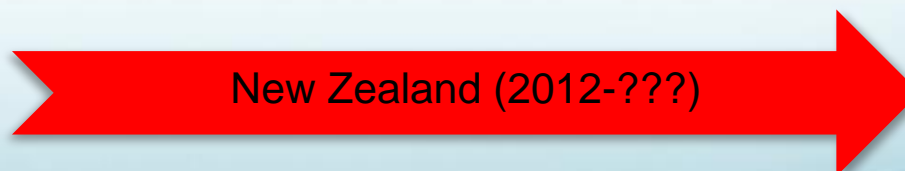
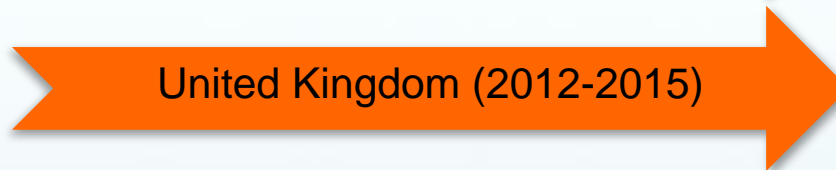
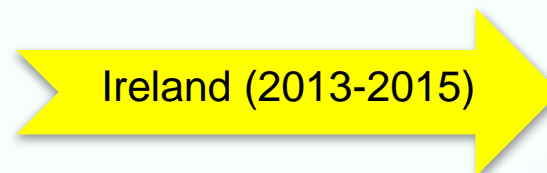
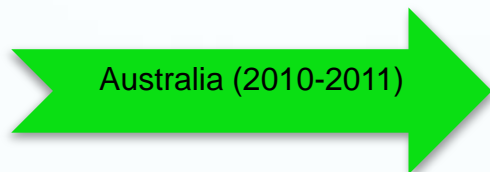
2011

2012

2013

2014

2015



Preliminary Results

- Regulatory Chill
 - New Zealand government taking a “wait and see approach” before proceeding due to the trade lawsuits against the Australian government
- 2014 Elections
 - Political campaigning and change in MPs
- New Coalition Government
 - Loss of Māori political leadership at national level

Conclusion

**SMOKEFREE 2025: TEN YEARS AND COUNTING.
REPORT FROM THE PUBLIC HEALTH SUMMER
SCHOOL, 2015**

SCALE UP SUCCESSFUL LOCAL INITIATIVES

the tobacco control community at national and local levels, and included researchers, advocates, public health practitioners and others. Slides from presentations given by participants will be made available on the ASPIRE 2025 website (www.aspire2025.org.nz).

The day was organised around the following themes:

- A review of the current status of Smokefree 2025 including trends and projections for smoking prevalence, current tobacco control activities and strategies; levels of public support and understanding; and Māori and Pacific perspectives.
- A review of current developments and possible future directions of existing approaches to achieve Smokefree 2025 including: packs and health warnings; mass media; smoking cessation; smokefree policies; and tobacco taxation.
- A review of the place of new and more radical approaches to achieve Smokefree 2025 including: retailer and supply focused interventions; product modification; and alternative nicotine delivery devices (e.g. e-cigs).
- Information on cutting-edge locally-based Smokefree 2025 interventions and strategies from Northland and Mid-Central.
- A discussion of priorities for next steps that would revitalise progress towards the Smokefree 2025 goal.

Note that this report records the views of participants as at Feb 9 about the status of Smokefree 2025 at the time, and future priorities to ensure it is achieved. There have been developments in the few weeks since then, for example the Ministry of Health's announcement about the realignment and re-rendering of Ministry-funded tobacco control and cessation services. At the time of writing, the implications of this realignment are unclear. Another new development is the launch of the National Smokefree Working Group's *Action Plan 2015-2018*.¹

CURRENT STATUS OF SMOKEFREE 2025

Since the recommendation of the Smokefree 2025 goal by the Māori Affairs Select Committee in 2010² and its adoption by the Government in 2011, some very positive developments have occurred that directly support the Smokefree 2025 goal. These include:

Ngā Mihi



**AOTEAROA
NEW ZEALAND**

2025