

## Appendix

**Supplementary Table 1:** Key for interviewees interviewed in New Zealand in June 2015.

<b>Name of interviewee</b>	<b>Initials for interviewee</b>	<b>Date of interview</b>	<b>Location of interview</b>
Anonymous interviewee at Ministry of Foreign Affairs and Trade	AI	18 June 2015	Wellington, New Zealand
Barbara Stewart	BS	18 June 2015	Wellington, New Zealand
Chris Bullen	CB	11 June 2015	Auckland, New Zealand
David Shearer	DS	18 June 2015	Wellington, New Zealand
Louise Delany	LD	16 June 2015	Wellington, New Zealand
Edward Cowley	EC	10 June 2015	Auckland, New Zealand
Fletcher Tabuteau	FT	17 June 2015	Wellington, New Zealand
George Laking	GL	12 June 2015	Auckland, New Zealand
Ian Lees-Galloway	ILG	17 June 2015	Wellington, New Zealand
James Shaw	JS	16 June 2015	Wellington, New Zealand
Jane Kelsey	JK	12 June 2015	Auckland, New Zealand
Kevin Hague	KH	17 June 2015	Wellington, New Zealand
Louisa Ryan	LR	10 June 2015	Auckland, New Zealand
Louisa Wall	LW	18 June 2015	Wellington, New Zealand
Marama Fox	MF	16 June 2015	Wellington, New Zealand
Matthew Everett	ME	18 June 2015	Wellington, New Zealand
Prudence Stone	PS	16 June 2015	Wellington, New Zealand
Robert Beaglehole	RB	11 June 2015	Auckland, New Zealand
Scott Simpson	SS	18 June 2015	Wellington, New Zealand
Shane Bradbrook	SB	17 June 2015	Wellington, New Zealand
Simon O'Connor	SO	16 June 2015	Wellington, New Zealand
Stephanie Erick	SE	10 June 2015	Auckland, New Zealand
Te Ururoa-Flavell	TUF	17 June 2015	Wellington, New Zealand

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016).

Event	Time-frame	Response to tobacco industry trade threats	Key statements
Māori Affairs Select Committee Recommendation	November 2010	Acknowledged the threat but did not address the risks	<b>Committee:</b> "Tobacco companies have indicated they will legally challenge the plain packaging proposal. Imperial Tobacco told us that banning branded packaging was an infringement of their intellectual property, and they along with two other tobacco companies in New Zealand, opposed the move." <sup>17</sup>
Cabinet review and proposal	November 2010 -April 2012 (17 months)	Same	<b>Prime Minister John Key:</b> "There are lots of things we need to consider—I wouldn't say it's a slam dunk by any chance that plain packaging will take place but nor would I rule it out. It really is, genuinely, a true consultation period. As the National Party, we haven't made the decision yet about whether we would support that any further." <sup>22</sup> <b>Trade Minister Tim Groser:</b> "I think it's getting a bit ahead of the play here because there are some complexities around this. Plain packaging could remove the tobacco companies' intellectual property. We need to listen carefully, especially to other companies that would be very concerned if we were setting a precedent on this. That might actually go against our own interests. We know what the real target is, but we need to consult the public and then we'll need to have some very careful decisions to make sure that if we are going to move forward with legislation in this area, is properly designed to deal with those legitimate concerns. I'm really thinking outside tobacco." <sup>23</sup>
Ministry of Health consultation	July 2012–November 2012 (4 months)	Same	<b>Health Ministry consultation report:</b> "Areas that submitters considered required attention in the RIS [Regulatory Impact Statement] included the need to...assess the actual impact of a WTO challenge, and that this should be focused broadly on the impacts for all of New Zealand's traded products (not just tobacco)." <sup>29</sup>
Cabinet reports formal introduction	November 2012–December 2013 (13 months)	Acknowledged high risk of potential litigation, and estimates of trade challenges	<b>Regulatory Impact Statement (11/24/12):</b> "The Ministry of Foreign Affairs and Trade (MFAT) considers that there is a reasonably high risk that if New Zealand implements plain packaging legislation, a World Trade Organization (WTO) dispute settlement case or investment arbitration may be brought against New Zealand. There is also the potential for challenges to be brought under regional or bilateral trade and investment agreements, particularly those containing investor-state dispute settlement clause. If a legal challenge was mounted against New Zealand by a tobacco company in relation to alleged breaches of international investment agreements, the remedy sought would include payment of compensation. Any claim for compensation would be based on the loss in value of the company's investments including its trademarks. The potential loss to tobacco companies, if any, is presently unable to be quantified and the consultation process was not able to shed any further light on this matter. However, it is expected that data will emerge from Australian disputes that will be useful in quantifying any potential losses." <sup>30</sup> <b>Cabinet paper (11/27/12):</b> "There is a further risk of an international arbitration challenge from tobacco companies under bilateral investment treaties, such as that faced by Australia from Philip Morris Asia under Australia's bilateral investment treaty with Hong Kong. Regardless of the strength of New Zealand's case, the possibility of international dispute proceedings are a risk for New Zealand and defending them would require significant investment of resources. However, these risks will be significantly mitigated if the Australia disputes conclude prior to the enactment of New Zealand's legislation. In that regard, it is possible that the WTO cases will conclude in time but the investment arbitration is likely to take a longer period of time...There will also be financial implications for the Government if New Zealand is forced to defend a WTO challenge or international investment arbitration, as happened in Australia's case. The cost of defending such legal challenges is not known at this stage, but has been estimated to be in the order of \$1.5 million–\$2 million for a WTO challenge and \$3–6 million for an investment arbitration...If necessary, New Zealand could delay the making of regulations until the Australia cases conclude and certainty regarding WTO legal implications is obtained." <sup>31</sup> <b>Cabinet paper (8/21/13):</b> "Once the bill is introduced, its passage through the House can adhere to standard timelines. This allows time for greater legal certainty over Australia's plain packaging disputes at the World Trade Organization to emerge. As previously agreed, enacting the legislation, or at least bringing it into force through the subsequent regulations, could be delayed if necessary...Cabinet also noted that: the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but that greater legal certainty may be evident by the time that legislation is enacted in New Zealand if World Trade Organization (WTO) disputes against Australia advance in good time. If necessary, the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained." <sup>33</sup>

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016) (continued).

<p>Parliament First Reading of Bill</p>	<p>11 February 2014</p>	<p>A majority of MPs rejected arguments against SPP and a few MPs addressed concerns</p>	<p><b>Hon. Tariana Turia (Māori):</b> “We are convinced that plain packaging is a really important step on our path to being a smoke-free country by 2025, and that it will stack up against our World Trade Organization obligations. That is why we are pushing forward to take the legislation through the parliamentary processes without delay.”</p> <p>“New Zealand takes all of its international obligations seriously. Our plain packaging regime has been developed to be consistent with our trade obligations, and our approach to negotiating new trade agreements continues to protect our ability to take public health measures such as plain packaging. The agreements and treaties can, and should, work together to boost both international trade and public health, and this is a good example of where we can achieve both objectives.”</p> <p>“Although the tobacco industry may have laid down a threat if this legislation is passed, my message to it is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land. Five thousand New Zealanders die from smoking a year, and that death toll places a responsibility on every politician to pass legislation in our land that will help save lives and increase well-being—legislation that makes a tangible, enduring impact on the lives of the people of this country. I commend this bill to the House for its first reading.”<sup>35</sup></p> <p><b>Ian Lees-Galloway (Labour):</b> “Effectively, the Government gets to decide when this legislation comes into force. The reason for that, of course, is concerns around being sued by the tobacco industry as a result of a potential breach of trade agreements. The real concern is that the Trans-Pacific Partnership will foist upon New Zealand rules and regulations that stop us from doing exactly this, which is to legislate in the best interests of the public health of New Zealanders. We must be vigilant. We must be vigilant and ensure that any trade agreements we sign up to do not allow us to fall into that trap. We are watching Australia closely, but I want New Zealanders to understand that the agreement that Australia has with Hong Kong was poorly drafted in this area and left Australia exposed to the type of litigation that it is facing. New Zealand’s trade agreements, generally speaking...our right—our sovereign right—to legislate in the interests of the public health of New Zealanders. New Zealand is a sovereign nation that ought to be able to say that we do not accept that 5,000 of our citizens are killed every year by tobacco.”<sup>35</sup></p> <p><b>Dr Paul Hutchinson (National):</b> “The issues around the World Trade Organization (WTO) are that every country has the sovereign right to protect the health of its people. I do not believe the problem is so much about free trade and the WTO; I believe it is much more about scurrilous tobacco companies colluding with tobacco-producing countries to bring in expensive, delaying court action.”<sup>35</sup></p> <p><b>Hon. Annette King (Labour):</b> “I would have to say that I am a little disappointed that we have to wait for the passage of this legislation and that we are waiting to see what happens in the Australian court case. I think it is good on the Australians for having the courage to say to those big tobacco companies: ‘Bring it on.’ I am glad that they have got the money to be able to fund their legal—interruption—Well, that is a good point, Mr Banks. He just asked why we are waiting. It is a question that you need to put to the Prime Minister. The Prime Minister wants to wait to see what happens in the court case in Australia. I think the fear is probably that the tobacco companies might then take us to court. Well, I would give them the two-finger salute and say ‘Bring it on,’ because we as a Parliament will first of all want to protect the health of New Zealanders.”<sup>35</sup></p> <p><b>Kevin Hague (Green):</b> “It is deeply disturbing, therefore, that the Government is proposing to delay the implementation of this bill until such time as the various court cases and actions against the Australian Government are settled...I agree with Dr Paul Hutchison, who said that every nation has the sovereign right to protect the health of its people. I agree with that, and the Greens say that if that sovereign right is threatened, then there is all the more reason for the Government to stand up and protect that sovereign right...Delaying the implementation of this legislation is caving in to the threats, extortion and delaying tactics of an evil industry.”<sup>35</sup></p> <p>Metiria Turei (Green): “We—the country, the Government, the community—are being threatened by the tobacco industry. We saw in today’s paper that there are further threats by the tobacco industry for the consequences of this policy. We are quite right in saying, so be it, bring it on. We are in the job of making good policy for the health and well-being of our country, and none of us make any apologies for that whatsoever.”<sup>35</sup></p> <p><b>Barbara Stewart (NZ First):</b> “New Zealand would be the second country in the world to approve plain packaging, after Australia, and we are likely to meet the same legal challenges. I know that the <i>New Zealand Herald</i> article in December last year outlined it clearly: ‘New Zealand was also likely to face legal challenges if it followed Australia’s lead, and officials have estimated the cost of a legal dispute as between \$2 million to \$6 million, not including compensation if a case was lost.’ So that is something else to consider.”<sup>35</sup></p> <p><b>Clare Curran (Labour):</b> “I want to say that the argument that is used by big tobacco—the apologists who pretend that this is a debate about intellectual property rights or removing barriers to trade—is wrong and that that has been proven...the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate. For this reason, they focused their energies on the Intellectual Property agreements governed by WIPO and the investment protection contained in NAFTA agreements...Despite being told repeatedly by WIPO—that they had no legal basis for their arguments, that there was no legal basis for any of those arguments, and—that their analysis was flawed, the companies persisted in telling the government—and this was Canada—and the public that plain packaging would be inconsistent with international intellectual property protections. Following the industry’s misrepresentation of international trade law, new health ministers in Canada and Australia forsook plain packaging as a tobacco control measure they mistakenly believed to be contrary to their countries’ obligations under international trade agreements. Finally, this battle is moving towards a conclusion. We are seeing it in Australia. We should not be taking notice of big tobacco’s argument that this is an intellectual property argument, because it is not. There is no basis in law for that argument.”<sup>35</sup></p> <p><b>Hon. Phil Goff (Labour):</b> “I think that the Philip Morris case against the Australian Government is a disgrace. The Australian authorities tell me that they will succeed in that case. We should not lack the courage to confront the vested interests that promote for their own material benefit the peddling of tobacco as a lethal product. We should not be frightened to confront them. We should not be frightened to bring in this legislation on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization. We would be aligned with the Framework Convention on Tobacco Control. That has been passed internationally by a responsible body, and I do not believe for a moment that another international body, the World Trade Organization, would in the end defend the right of companies to kill people with their products. It just does not stack up. It is not credible. I support this bill. I commend those with the courage to vote for this bill now, and I urge the Government to bring it into effect as soon as possible so we can stop that last bastion of promotion of a lethal product by the vested interests of big tobacco...They may pretend that the debate is about intellectual property. They may pretend that the debate is about removing barriers to trade. I am a believer in reasonable protection for intellectual property and I am a strong believer that we should remove barriers to trade, but neither argument stacks up to defend the promotion of a product that kills people if used as the manufacturer intends.”<sup>35</sup></p> <p><b>Hon. John Banks (National):</b> “I ask my Māori Party and National Party colleagues to carefully consider the precedent they will set with this bill. This bill guts the intellectual property rights of tobacco companies. Some will ask: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? KFC and Red Bull sugar drinks are putting this country’s level of obesity up at the top of the OECD. They help to contribute to that. It may be seen as a long bow, but the removal of intellectual property rights to the names and brandings of their products from tobacco companies without compensation is wrong, because which international company selling products that are bad for our health will be the next target? The State is effectively seizing their property because it does not like the health effects of their still lawful business. It is still a lawful business.”<sup>35</sup></p>
<p>Media statements in response to First Reading</p>	<p>11 February 2014</p>	<p>Some MPs rejected arguments against SPP and some MPs addressed concerns</p>	<p><b>Hon. Tariana Turia (Māori):</b> “While the tobacco industry may have laid down a threat that if this legislation is passed [it will be challenged] my message to them is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land.”<sup>36</sup></p> <p><b>John Banks (ACT):</b> “I don’t believe the State should seize property rights from legitimate companies selling legitimate products.”<sup>36</sup></p> <p><b>Prime Minister John Key:</b> “I don’t really see the point in us finally passing the legislation until we see exactly what happens in the Australian court case. We have a slightly different system, but there might just be some learnings and if there are learnings out of that, it would be sensible to potentially incorporate those in either our legislation or avoid significant costs.”<sup>36</sup></p> <p><b>David Cunliffe (Labour):</b> “If we have a legitimate health regulatory policy step, then we should pursue it in the public interest. The Government should not be running scared of tobacco interests because they’re worried about being sued.”<sup>36</sup></p>

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016) (continued).

Ministry of Health report to Health Select Committee	18 June 2014	<ul style="list-style-type: none"> <li>Rejected industry legal arguments</li> <li>Acknowledged government may delay passage of the Bill</li> </ul>	<p>P.7 “The Government has announced that it wishes to take account of the implications of Australia’s legal cases at the WTO before deciding to pass the Bill. The Government is confident that tobacco plain packaging can be implemented in a way that is consistent with trade agreement obligations, and New Zealand is supportive of Australia’s defense of the challenges it is facing at the WTO. However, the timing of these international legal processes is beyond the Government’s control. The Bill is now likely to become a matter for the next Parliament to consider. If the WTO process progresses sufficiently or if the international litigation risks are reassessed, it is possible the Bill could be passed early in the term of the new Parliament. Equally the passage of the Bill may be significantly delayed, if that is found to be necessary.”<sup>38</sup></p> <p>P.14 “The weight of expert legal opinion was that the international legal challenges against plain packaging were unlikely to succeed.”<sup>38</sup></p> <p>P.19 “The Bill provides for regulations to be promulgated that will significantly limit tobacco companies’ ability to use their trade marks on tobacco packaging. However, any such restrictions would be in accordance with domestic and international law.”<sup>38</sup></p> <p>P.20 “Officials consider that plain packaging will be shown to meet its intended objective and that it does not impair freedom any more than necessary for the achievement of public health objectives. This view has been confirmed by the Ministry of Justice.”<sup>38</sup></p> <p>P.25 “Officials agree with the submissions of the academic and NGO legal experts that the Bill is consistent with New Zealand’s WTO obligations. Tobacco company Philip Morris’s submission, which annexes a report by Professor Christopher Gibson, is the only submission by an opponent of the Bill that attempts a thorough analysis of the compatibility of tobacco plain packaging measures with New Zealand’s WTO obligations. It is noteworthy that Professor Gibson’s report does not conclude that the Bill violates the TRIPS Agreement or the TBT Agreement...The WTO analysis submitted by the other opponents of the Bill is incomplete and appears selective, and those submitters did not provide clear evidence to support their claims. Those submissions failed to refer the Committee to relevant WTO jurisprudence that does not support their interpretation of New Zealand’s WTO obligations.”<sup>38</sup></p> <p>P.26 “Officials agree with the academic legal expert submissions that indicate tobacco plain packaging is consistent with New Zealand’s investment obligations under the trade and investment agreements that New Zealand is a party to. Tobacco plain packaging is nondiscriminatory and is a legitimate exercise of sovereign regulatory power that restricts certain uses of trade marks in order to protect public welfare, namely public health. Philip Morris’s two paragraph submission on this issue focuses on the risk of litigation rather than providing analysis or evidence to support their view. BAT alleges plain packaging violates New Zealand’s investment obligations, but the analysis is incomplete and BAT does not provide credible evidence to support their claims.”<sup>38</sup></p>
Parliament Health Select Committee report	5 August 2014	Rejected industry legal arguments	<p>“The bill would not have any effect on intellectual property rights to register, own and enforce trademarks and copyright in designs; it is only the use of trademarks and copyrighted designs as promotional devices on tobacco products and packaging that would be controlled.”<sup>39</sup></p>
Parliament Second Reading of Bill and statements to the media	November 2014–June 2016	A few MPs complained the threats delayed the process	<p><b>Prime Minister John Key:</b> It was waiting, and I think the view I initially took was, given Australia was in the middle of this court case it probably didn’t make sense for us to embark on that, and then potentially face exactly the same costs for the taxpayer in defending another legal action. Last year I asked for advice on that matter, and the advice I got back was that they felt we were on very firm ground and didn’t feel there was really any issues. A number of others have moved on plain packaging and were doing so without court cases being brought against them. We’re feeling a lot more confident about that and the bill’s now progressing through and it’s my expectation it will become law at some point.<sup>51</sup></p> <p><b>Hon. Pesea Sam Lotu-Liga (National):</b> Our stance remains the same that it is prudent to await the World Trade Organization decision.<sup>46</sup></p> <p><b>Hon. Annette King (Labour):</b> What I will be critical of is the time that it has taken to get this bill here. We are talking almost two years—two years waiting to pass a piece of legislation that tightens the screws on tobacco control in New Zealand. Why did we wait two years? We waited because the Government refused to be a leader in the fight for tobacco control, with this measure. It wanted to wait to see what happened in Australia, because Australia had the guts to put in place plain packaging. It said: “We are an independent sovereign nation. We will make our own decisions about what we have in public health law.” And they went ahead, they passed their legislation, they brought in plain packaging, and they were sued by the tobacco companies. So rather than say “We are a sovereign nation. We are prepared to stand up for New Zealanders and pass our legislation.”, we sat there wringing our hands and saying: “We need to wait and see.”<sup>55</sup></p> <p><b>Simon O’Connor (National):</b> I am conscious, too, of some of the counterarguments that have been put forward around intellectual and property rights. Although I can sort of understand that from one point of view, I think it is really important to make the distinction that, in this case, tobacco product owners still own the property rights, or the intellectual rights; they are just not allowed to use them for, I think, very good reason because, ultimately, the public good overrides it.<sup>55</sup></p> <p><b>Ian Lees-Galloway (Labour):</b> Has that Government dragged the chain on this legislation and taken every single possible opportunity to slow the process down. So more than three years—more than three years—after the Government first decided it was going to introduce plain packaging, here we are, not passing the bill, not passing it into law, not actually beginning the regime of plain packaging—but here we are at the second reading... I have to say, of course, all of this is tied up in the business of the Trans-Pacific Partnership and free trade and investor-State dispute clauses, and the threat that the tobacco industry continues to make that it will try to sue the New Zealand Government if this Parliament enacts legislation designed to protect the health of New Zealanders. I have to say that if I was an exponent of the Trans-Pacific Partnership—which I certainly am not. But if I was someone who was a backer of the Trans-Pacific Partnership, and if I was someone who was an enthusiast for investor-State dispute settlement clauses, I would be really hacked off with the tobacco industry right now. This is because the tobacco industry, with its threat to sue the New Zealand Government if this legislation is passed, is actually playing into all the fears people have about what will happen to this country if we sign up to the Trans-Pacific Partnership and if we pass the legislation enabling the Trans-Pacific Partnership. The tobacco industry—the Minister looks confused. The Minister is trying to figure out how this is associated with this bill. He does not do his reading if he does not understand it. This legislation, if it passes, will trigger the tobacco industry’s suing the New Zealand Government under investor-State dispute settlement clauses. That is what people fear—this Parliament not having the sovereign right to legislate in the interests of the public health of New Zealanders because we fear being sued by the tobacco industry, or by any other industry for that matter. Sam Lotu-liga, Associate Minister of Health, this legislation—the tobacco industry is threatening to sue the New Zealand Government if this legislation is passed. I am sure the tobacco industry will sue the New Zealand Government if this legislation is passed. That is why the Government has said that it wanted to put this legislation on the back-burner. It is more concerned about business interests. It is more concerned about the tobacco lobby than it is about the public health of New Zealanders.<sup>55</sup></p> <p><b>David Seymour (ACT):</b> What is in dispute is whether or not smoking cessation is the only value that New Zealand holds. I think that there are a number of other values that are important to New Zealand, including property rights and the right of a business to employ its brand... Nobody wants to defend the tobacco industry, but the principles behind New Zealand’s tradition of property rights, freedoms of trade and the freedom to do as you damn well please so long as you are not harming anyone else are also very important. That is why I am opposed to this bill, which will have a minimal effect on smoking behaviour, as demonstrated in Australia. But it is a major step in eroding our tradition of property rights and freedom to trade. That is something that every legitimate business in New Zealand and every business person listening tonight should be very, very concerned about.<sup>55</sup></p> <p><b>Poto Williams (Labour):</b> This bill also looks at ensuring that the property rights issues that the tobacco companies raised during the submissions are continued, so that the tobacco companies can still have their logos on their tobacco products, but the idea is that they will be standard across all products. All tobacco companies will have the criteria for their logos on packaging determined by this legislation, so that in terms of the percentage or the proportion of the packaging itself the logos of the tobacco companies will be reduced.<sup>55</sup></p>
Final Vote and Approval in Full House	September 2016	N/A	N/A