

# Regulatory Impact Statement: Plain Packaging of Tobacco Products

## Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Health.

It updates the overview of the analysis of options to address the problems resulting from the continued ability of the tobacco industry to use marketing devices on tobacco product packaging in a way that effectively advertises and promotes tobacco products prepared in March 2012. Public consultation was conducted from 23 July to 5 October 2012 and this report incorporates the result of that process. Allowing continued advertising and promotion of tobacco products on tobacco product packaging undermines the effectiveness of other steps already taken to ban tobacco product promotion and advertising, and therefore also undermines the effectiveness of other measures in New Zealand's tobacco control programme.

This analysis was conducted in light of the Government's commitment to consider plain packaging of tobacco products in New Zealand, in alignment with Australia. It focuses on interventions in the area of packaging and promotion of tobacco products, to address the specific policy problem. Therefore, it does not seek to analyse the wider set of mutually-supportive interventions in New Zealand's comprehensive tobacco control programme, or how these might be enhanced over time, for example by further increasing the rate of tobacco excise tax. (The existence and possibility of other tobacco control measures is part of the status quo, for the purposes of this regulatory impact statement.)

As plain packaging of tobacco products is a novel tobacco control intervention, the evidence used to assess its expected effectiveness comes from model studies and surveys, as well as extrapolating evidence from previously implemented interventions.

To introduce plain packaging of tobacco products would impose some costs to the tobacco industry, including manufacturers, importers and retailers. These costs have been identified, but have not been able to be quantified or assessed in detail. Public consultation on the proposal raised concerns but did not provide any detailed information regarding the costs and other implications for business and other stakeholders.

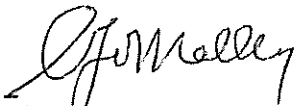
The compliance costs of moving to plain packaging would fall mainly on the tobacco industry. It is thought that such costs would be similar in magnitude to the cost of implementing mandatory pictorial health warnings in 2008. There will be offsetting savings over time as the industry will no longer need to invest resources in innovating and refreshing its brand marketing devices and imagery on tobacco products and packs. In the consultation process, some submitters felt there could be compliance costs but the costs were not quantified. In comparison to the potential benefits of avoided health costs and quality life years gained any additional compliance costs are considered to be minor.

There will also be implications for firms that provide marketing, packaging design and printing services or supply packaging materials to the tobacco industry. However, most tobacco products sold in New Zealand are imported, and so these impacts are likely to be mainly experienced overseas. The consultation process provided claims about on-going costs but the magnitude of such costs to New Zealand firms was not quantified. Again, these are likely to be minor compared to the potential benefits in reducing the costly harms caused by smoking.

The loss of tobacco company sales revenue is difficult to estimate. However, it can be expected that the benefits of plain packaging (in terms of avoided health costs and quality life years gained) will be roughly proportional to, and far greater than, the ultimate fall in sales as smoking is effectively discouraged and lives saved.

Tobacco products differ from other commercially available goods in that it is Government policy, consistent with its stated goal of making New Zealand essentially smoke-free by 2025, to reduce the commercial availability of tobacco products to the minimum possible.

Plain packaging carries with it a reasonably high risk that litigation, such as a World Trade Organization (WTO) dispute settlement case or an international investment arbitration, may be brought against New Zealand. Australia is in WTO disputes with Ukraine, Honduras and the Dominican Republic who argue that the measure is discriminatory and more trade restrictive than necessary. Also an international tobacco company has already brought a trade investment case against Australia for implementing the measure proposed in this regulatory impact statement. Estimates of the costs of defending legal challenges have been included in the analysis.



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## Status quo and problem definition

[1] The harms from tobacco are well established. There is a wealth of evidence illustrating the dangers of this highly addictive and harmful substance. Smoking is the single biggest cause of preventable death and disease in New Zealand, with approximately 5000 deaths each year from smoking or exposure to second-hand smoke. It is estimated that half of all long-term smokers die of a smoking related illness, losing on average 15 years of life.<sup>1</sup>

[2] To combat the harms from smoking, New Zealand has a well-established, multi-faceted tobacco control programme. The Smoke-free Environments Act 1990 establishes the overarching statutory framework to control the use and supply of tobacco products. A comprehensive suite of tobacco control initiatives (both regulatory and non-regulatory) have been implemented over the last 20 years to achieve the purposes of the Act and meet wider Government tobacco control policy aims. Examples of such initiatives include decreasing the affordability of cigarettes, health education campaigns, a ban on smoking in public indoor spaces, restricting tobacco displays and tightening controls on tobacco retail sale, and prohibiting almost all forms of tobacco promotion and advertising (except via tobacco packaging, and several minor exceptions).

[3] The specific problem this regulatory impact statement seeks to address may be defined as the continued ability of the tobacco industry to use packaging in a way that allows

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<sup>1</sup> See the Source List for a list of references relied upon in this analysis.

advertising and promotion of tobacco products. This undermines the effectiveness of other measures already taken to ban tobacco product promotion and advertising.

[4] Almost all forms of tobacco-related promotion and advertising have been banned or restricted in New Zealand by the Smoke-free Environments Act 1990 and regulations made under that Act. Examples of such restrictions include advertising bans for radio, television, movies and print media; requiring written and pictorial health warning messages on tobacco packaging; retail display bans; and requiring the display, on tobacco packaging, of qualitative information on constituents in tobacco products. Beyond these restrictions, however, there are currently no legal requirements as to the form of tobacco packaging beyond general consumer protection legislation requirements. Tobacco companies may use their own colouring, branding, and trademarks etc.

[5] Since advertising and promotion for tobacco products have been outlawed under the Smoke-free Environments Act 1990, the residual ability to use colour, trademarks, branding, etc. on product packaging is the only direct channel for tobacco companies to focus their product promotion and advertising efforts.

[6] Tobacco packaging has been demonstrated to be a highly effective form of tobacco marketing. Research has indicated that current tobacco packaging glamorises smoking, and can mislead consumers as to product safety. Research has shown that the primary role of tobacco packaging is to promote brand appeal, particularly to youth and young adults. With increasing restrictions on tobacco advertising, promotion and sponsorship throughout the world, tobacco packaging has become the tobacco industry's key marketing tool to attract and retain customers.<sup>2</sup>

[7] The impacts of allowing residual promotional activity via tobacco packaging in New Zealand include:

- Diluting the noticeability and effectiveness of written warnings and pictorial warnings. Evidence shows that current tobacco packaging colours and imagery counter the deterrent effect of graphic health warnings, as the warnings are perceived by users as less serious than when the same warnings are presented on plain packs.
- Influencing or misleading some consumers about the harms of tobacco products. The colouring and wording used on tobacco packaging has been shown to contribute to consumers' misperceptions that certain tobacco products are safer options. For instance, certain colours on packaging (such as gold, blue, silver or purple), have been shown to create the perception that the product is less harmful and easier to quit than other tobacco products (such as those with red and black colouring). Even the use of terms "gold" and "silver" can create a similar perception.
- Attracting new smokers, especially young people, as attributes of packaging enhance the appeal of and perceptions of social approval for tobacco use. The appeal of tobacco products has two key features: perceptions about the sensory appeal of the product (taste, smoothness, etc.), and perceptions about the characteristics of people likely to use particular brands. The tobacco industry uses cigarette pack design to

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<sup>2</sup> See the Source List for a list of references relied upon in this analysis – in particular Moodie et al 2012 and the summary in *Plain packaging of tobacco products: a review of the evidence*, Quit Victoria, Cancer Council Victoria, May 2011.

influence users' perceptions of both of these features, with a particular focus on creating a perception of the brand's relationship to personality and social status.

[8] Cumulatively, these effects undermine the effectiveness of other tobacco control initiatives. Accordingly, this regulatory impact statement considers policy options to address the problems caused by residual tobacco advertising and promotion (through the tobacco packet), as one element of the wider approach to tobacco control in New Zealand.

### Policy objectives

[9] The overarching purpose of New Zealand's tobacco control policy is to ultimately reduce smoking prevalence in New Zealand, and in doing so, to improve population health outcomes. The Government has stated its desire that New Zealand be essentially smoke-free by 2025.

[10] The specific policy objective of this regulatory impact assessment is to further reduce the ability of the tobacco industry to market tobacco products, and in particular, to prevent tobacco promotion and advertising from occurring on tobacco products and tobacco product packaging, in order to:

- reduce the appeal of smoking, particularly for young people,
- reduce the social approval of tobacco use,
- increase the noticeability and effectiveness of mandated health warning messages, and
- reduce the likelihood that consumers may be influenced or misled about the harms of tobacco products.

[11] Combined with the existing package of tobacco control measures, this specific objective contributes to the broader policy objective of improving public health by:

- discouraging people from taking up smoking, or using tobacco products,
- encouraging people to give up smoking, and to stop using tobacco products,
- discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing,
- reducing people's exposure to smoke from tobacco products, and
- supporting New Zealand to meet international commitments and obligations under the WHO Framework Convention on Tobacco Control (the FCTC), particularly in relation to the guidelines developed to support implementation of Articles 11 and 13 of the FCTC.

Also informing the policy objectives outlined above are other relevant international instruments including the Trans-Tasman Mutual Recognition Arrangement (TTMRA), and other international trade and investment agreements.

### Authoritative basis for this regulatory impact analysis

[12] The New Zealand Government has specifically selected plain packaging of tobacco products as a public health intervention it will consider in its current term.

## Regulatory impact analysis

[13] The following three options have been assessed against the problem identified and the broader objective of New Zealand's tobacco control regime: the status quo, increased and refreshed health warnings, and regulatory change to require plain packaging. In addition, a brief overview is given to several other options, though these are not considered realistic options at this time.

[14] Much of the evidence provided in the analysis is qualitative. The consultation process sought quantitative data but there was very little information provided to enable the analysis to be developed more fully.

### Option 1: Status quo

[15] Under the status quo, the current suite of tobacco control initiatives will continue and will be built on incrementally. The Government may want to consider updating the current set of graphic warnings that feature on cigarette packs but for the purpose of this RIS, the status quo option does not include refreshing the current warnings. Currently, there are 14 graphic warnings that appear on cigarette packs, in both English and te reo Māori, which are rotated on an annual basis (two sets of seven displayed on tobacco packs in alternate years). It is important that these images are reviewed and refreshed over time, to ensure the images retain their impact on the consumer.

[16] However, even under this potential incremental change, the status quo would not see changes to the laws around promotional content featured on tobacco packaging. Under the status quo, tobacco companies would continue to use brand names, logos, and colouring on tobacco packaging as advertising tools for the tobacco products.

[17] This option would have the following likely impacts:

#### Impacts for Government

- On-going costs to Vote:Health for tobacco control interventions
- No costs associated with changes to regulation
- Decrease in smoking rates over time (however at an insufficient rate to meet the 2025 goal without further interventions)
- Maintaining New Zealand's current tobacco product labelling and health warning regime while Australia introduces plain packaging would create difficulties for Australia under the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Under the TTMRA all goods that can be legally sold in New Zealand may also be legally sold in Australia, and vice versa. In time, Australia would need to seek a permanent exemption from the TTMRA for tobacco products. It would be preferable to align the regulatory regimes to support the principles of a single economic market.

#### Impacts for the tobacco industry and printing and design companies

- No regulatory change and thus no additional compliance or implementation costs for industry

- No impact on industry profits, although gradual decline is expected due to the effect of the ongoing implementation and enhancement of existing tobacco control measures.

#### Impacts for smokers and society

- There would be an anticipated gradual decline in smoking rates, but this would be slow without new interventions
- Existing consumers may continue to be misled by packaging and its promotional branding elements, and new consumers may be attracted to smoking through promotional elements on tobacco packaging. Wider public perceptions (i.e. social approval and acceptance) of smoking would continue to be influenced by the attractiveness of the packs in everyday use.

[18] This option does not address the gap in tobacco advertising, which undermines the effectiveness of other tobacco control measures. As a result, the Government will continue to see smoking rates and consequent morbidity and mortality associated with smoking at a higher level than may be otherwise achieved with more direct intervention. This will also translate to a continued cost to the public health system of treating those with smoking-related illnesses.

#### Option 2: Increased and refreshed health warnings

[19] This option proposes to increase existing health warning coverage on tobacco packaging from 30 per cent of the front of cigarette packs to 80 per cent, as is the case in Uruguay. The health warning coverage of the back of the packs would remain at 90 per cent. The sides, top and bottom of the packaging would be left without warning images or text, except for one side which would continue to carry qualitative information on the constituents of tobacco. The health warnings would also be refreshed to feature new images.

[20] This option would have the following likely impacts:

#### Impacts for Government

- Costs involved in the development and implementation of new regulations, consultation with industry, education of industry and retailers on the regulatory requirements, and monitoring for compliance.
- The likely decrease in smoking rates will extend the lives and improve the quality of life of those who cease smoking, those who reduce consumption, and those who never start as a result of the changes; there would be a contribution towards the 2025 goal; and there would be benefits for the public health system through reduced (but hard to quantify in aggregate) costs for treating smoking-related illnesses.
- There would still be difficulties under the TTMRA (as for Option 1) as Australia would likely need to seek permanent exemption to avoid branded tobacco products from New Zealand being sold in Australia.

### Impacts for the tobacco industry and printing and design companies

- Initial compliance costs, both to industry in giving effect to the changes and the printing companies who may need to retool. Manufacturers, importers and retailers of cigars will likely be the most significantly affected by the changes, as there are more types of cigars and thus the changes will be more difficult to implement. Costs to printing companies are likely to be passed to the tobacco industry and ultimately to the consumer.
- The industry may seek to increase prices to retain margin, although price competition may also be enhanced. To the extent the intervention is successful in reducing tobacco consumption, this will lead to a reduction in sales revenue for the tobacco industry and for retailers as the market decreases.

### Impacts for smokers and society

- Possibility of increased initial cost to the consumer if the cost to the printers/industry is passed on. This would disproportionately impact upon smokers with lower incomes, however this is also likely to act as a driver to quit smoking, thus decreasing smoking rates (and ultimately resulting in health improvements and savings for individual smokers).
- There would be an expected decrease in smoking. This is not able to be quantified, as the effect cannot be separated from other measures. There would also be positive health benefits as a result of refreshed and larger warnings.
- Consumers may still be misled by the tobacco companies' promotional elements on tobacco packaging. Wider public perceptions of smoking would continue to be influenced by the residual attractiveness of the packs in everyday use.

### Risks

- There could conceivably be a legal challenge mounted, along the same lines as that described under the plain packaging option below. Trade-related concerns around alleged expropriation of trademarks have been raised each time health warnings on tobacco packaging in New Zealand have been enlarged.

[21] Under this option, the amount of space left on the tobacco packet for industry promotions would be reduced, however it does not fully address the gap in the ban on tobacco advertising, which undermines the effectiveness of other tobacco control measures.

### Option 3: Regulatory change to require plain packaging of tobacco products

[22] Under this option, new legislation would be implemented to require packaging to be standardised across all tobacco products. The tobacco package would be required to be a standard colour, with the brand name printed in a small, prescribed font. All other trademarks, logos, colours and graphics would be prohibited, both from the outer packaging of tobacco products (e.g. cigarette cartons and roll-your-own casing) and the products themselves (e.g. individual cigarettes and cigars). Tobacco packaging would continue to carry health warning messages and graphic images, which will be increased to cover 75 per cent of the front of the pack and 90 per cent of the back of the package, as is the case in Australia.

[23] This option would have the following impacts:

#### Impacts for Government

- Combined with other mutually-supporting measures in a comprehensive tobacco control programme, plain packaging will lead to a reduction in smoking rates, improvements to the health and well-being of the public, reduced incidence of illness and premature death, and reduced costs to the healthcare system associated with treating those with smoking-related illnesses. The precise quantum of these savings is not readily quantifiable. This would also contribute to the Government's goal of a smoke-free New Zealand by 2025.
- One-off cost for implementation, including development of an information package for tobacco companies on plain packaging requirements, costs of consultation, policy development and supporting the passage of legislation. This would be met within Vote:Health, but is estimated at approximately \$200,000, comprising policy analysis, legal advice and technical support.
- Costs of monitoring end enforcement (to be managed as part of the Ministry of Health's budget).
- Loss of tobacco excise revenue, to the extent that smokers quit as a result of the changes. (There is also a possibility of increased counterfeiting and black market sales of tobacco. However, this is considered unlikely, and identification codes and anti-counterfeiting markings would be allowed on packaging (as in Australia), which would negate these issues.)
- Increased general taxation from increased activity of healthier, more productive non- and ex-smokers.
- Possible Bill of Rights Act 1990 implications. Some submitters to the consultation process highlighted restriction of choice for consumers but other submitters felt that violation of the Bill of Rights Act was unlikely since the proposal was about standardisation and not a ban on tobacco products. Officials consider that the proposal is consistent with the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.
- Possibility of a legal challenge mounted against New Zealand if plain packaging legislation is introduced (see Risks section below). If so, there would be a cost to Government of defending a case.
- Potential positive reputational impact for the New Zealand Government in implementing a bold and innovative tobacco control measure. There is potentially a negative reputational impact in the global investment market for interference with intellectual property. However, the latter will be seen in the context of an industry that internationally is being intentionally targeted by domestic governments and international bodies for increased restriction and discouragement.
- Harmonisation of packaging and labelling requirements with Australia is consistent with TTMRA and avoids any need for tobacco products to be permanently exempted.
- Enhances New Zealand's compliance with its international obligations under Articles 11 and 13 of the FCTC and alignment with guidelines developed by the FCTC Conference of the Parties in relation to Articles 11 and 13. Though difficult to quantify, there is value



to the New Zealand Government in complying with its international obligations and commitments.

#### Impacts for the tobacco industry

- Lower revenues, to the extent that there is reduced demand for tobacco products and smokers quit as a result of the change in packaging.
- Compliance costs to tobacco manufacturers, importers, and (to a lesser extent) retailers will arise from learning and understanding the changes to packaging controls, and from organising the changes to packaging. These costs were acknowledged in the consultation process but not able to be quantified. Investment towards some of these costs will have already begun for the same measures in Australia, which will result in lesser implementation costs to the industry to implement the same changes in New Zealand, as well as efficiencies in production. This is also expected to be more than offset by the expected cost savings to tobacco manufacturers over time, as they would no longer invest in devising and introducing regular new branding and packaging designs. For this reason it is considered that compliance would be manageable. During implementation, the Ministry of Health would work closely with tobacco companies to make the new requirements clear.
- Smaller importers may experience some stress and anxiety resulting from uncertainty as to whether the cost of new packaging for products with small markets will prevent continued importation of the products. If this was to occur, there would be financial loss for those small importers. It is not possible to quantify these effects as the consultation process did not provide data to enable this.
- Again, manufacturers, retailers and importers of cigars in particular felt they would be more significantly affected by the changes, as there are more types of cigars and thus the changes will be more difficult to implement. However, cigars are a very small market compared to cigarettes and loose smoking tobacco.
- For completeness (in terms of standard regulatory impact assessment methodology) it is a possible effect of plain packaging that it may lessen competition between tobacco companies (for example if they reduce the number of brands on the market or new entrants have difficulty establishing a market presence). However, in practice these impacts can be discounted for two reasons. First, it is a deliberate aim of Government policy to reduce smoking prevalence and tobacco consumption, and so the overriding market conditions (for both the status quo and under plain packaging) is reducing overall demand, which is likely to lead to companies and brands leaving the market and/or competing more sharply on price in any case. Secondly, the normal benefits from enabling greater product differentiation and market competition, such as the incentive to innovate, are much less relevant for tobacco products as there is no potential to create a safe tobacco product. Any new tobacco product that could have a positive health benefit (e.g. in supporting smoking cessation) would be more appropriately brought to market and regulated as a smoking cessation treatment, rather than as a consumer tobacco product.
- Plain packaging will create difficulties for new entrants to the tobacco retail market, as newcomers will have no way to visually differentiate their product at point of sale

(although newcomers may compete on price). This protects the incumbent tobacco companies, and discourages switching between products.

#### Impacts for printing and design companies

- Initially there would be a boost in activity for package material suppliers and printers. Any New Zealand-based printers used to produce tobacco packaging would potentially need to retool to meet new packaging requirements. It is unlikely that printers would need to alter their premises to meet requirements. Any costs borne by the printers would likely be passed to the tobacco companies, at least in part, which then would likely be borne by the consumer.
- There would be some reduced income for some design companies as there would be highly standardised printing requirements and less redesign work on an ongoing basis. It is not yet known whether printing is outsourced (companies are known to have historically done this in-house). The consultation process suggested that the situation was mixed in this regard but did not provide any further clarity.

#### Impacts for smokers

- Benefits to consumers are not easily quantifiable, but those who quit are likely to have significantly improved health, longer lives, and lower health costs. The benefits would also include savings by many individuals spending less on purchasing tobacco products. There may be other minor impacts on smokers as they adjust their product recognition and purchase behaviour to the new regime. To the extent these changes may frustrate or inconvenience smokers, this will add to the ultimate effectiveness of the measure at dissuading them from smoking.
- Costs incurred by the tobacco industry are likely to be passed to the consumer. Any increased costs would disproportionately impact smokers on low incomes, which would provide a greater incentive for those on low incomes to quit. Nonetheless, costs passed on are not likely to be considerable. The consultation process identified two opposing views about this. The first being that plain packaging would create price competition resulting in lower prices for smokers, the other that because costs would increase these would be passed on to the consumer. However there was no quantitative data provided that could be used to pursue this further.

#### Impacts for society

- Likely increase in quit rates, reduced uptake, reduced relapse and ultimately a reduction in tobacco consumption in New Zealand. Lower rates of smoking will result in reduced health impacts of second-hand smoke, improved health and life expectancy of the population, increased productivity, and reduced costs to the public health system and society as a whole. This is not quantifiable, as it is not possible to estimate the impact of one intervention alone.
- Informing consumers about the risks of smoking would be assisted as health messages would no longer be diluted, undermined or obscured by promotional techniques on the packet. Wider public perceptions would no longer be influenced by the attractiveness of the packs in everyday use, and thus would more accurately reflect social disapproval and non-acceptance of smoking.

## Risks arising from New Zealand's international trade and investment obligations

- 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. [
 

*Withheld in accordance with section 9(2)(h) of the Official Information Act 1982*

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- 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 [
 

*Withheld in accordance with section 9(2)(h) of the Official Information Act 1982*

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- If a legal challenge was mounted against New Zealand by a country in relation to alleged breaches of international trade agreements, the remedy sought would be to cease implementation of plain packaging, rather than a requirement to pay compensation. 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.
- More material to this analysis are the likely costs of having to defend against legal action, regardless of any assessment of the outcome. MFAT has estimated it could cost between NZ\$1.5-2 million to defend a WTO case. Defending an international investment arbitration would likely be at least as high and potentially substantially higher due to the need for specialist legal and financial advice. Anecdotal evidence suggests that the costs of defending an international investment arbitration range from NZ\$3-6 million per party to the proceeding, for an average case. It is noted that Australia is already involved in such an arbitration process and the ultimate resolution of that may influence whether New Zealand would face a similar challenge.

[24] Evidence suggests that plain packaging of tobacco products will be an effective measure to meet the objectives listed above. Research has shown standardising colours and wording on tobacco packaging reduces false beliefs about the harmfulness of tobacco products. Studies have also found that tobacco products in plain packaging were perceived as less appealing, less palatable, of lower quality, and conveying less positive connotations about the typical smoker of the product. Plain packaging featuring larger graphic health warnings (75 per cent front of pack) will both reduce the appeal of the pack and strengthen the impact

of the warnings. These factors have impacts for uptake and cessation of smoking, will have flow-on effects for second-hand smoke, and improved population health outcomes.<sup>3</sup>

#### Other options

[25] The options outlined below do not meet the stated objectives, and are not considered realistic options at this time.

#### Increased public education about the effects of tobacco packaging

[26] This option seeks to expand the existing suite of non-regulatory interventions by providing more education to the public about the effects of tobacco packaging on the consumer. While this would have potentially some marginal (positive) impact and would pose no direct cost to industry, public education campaigns can be costly to ensure good reach to target population groups. Furthermore, there has, and continues to be, a reasonable investment of resources into supporting the development and running of education and health promotion programmes from time to time. Such campaigns are not sufficient in and of themselves to spark behavioural change in the absence of strong environmental changes to motivate individuals' desire for quitting.

#### Voluntary agreements with industry or self-regulation

[27] This option proposes that the industry could either self-regulate or form voluntary agreements with the Government to adopt plain packaging, or reduce design elements of concern to the Government. Due to the high risk of death and disease posed by smoking, and the inherent problems of self-regulatory approaches, self-regulation is not considered a feasible alternative in this instance. Furthermore, entering into voluntary agreements and non-enforceable agreements with the tobacco industry are specifically discouraged under the guidelines developed to guide implementation of Article 5.3 of the FCTC. Regardless, the industry is strongly opposed to plain packaging and all design elements are of concern, making it unlikely that a voluntary agreement could be reached which meets the policy objective of removing the promotional capability of tobacco packaging.

#### Supply control measure: Monopsony

[28] Under this option the New Zealand Government would establish itself as the sole purchaser and supplier of tobacco in New Zealand. This has been mooted recently by some commentators in New Zealand and overseas as a mechanism for controlling what tobacco products are supplied to the market (potentially reducing the harm of tobacco products over time, as well as controlling all marketing, including branding and promotions on the tobacco packet itself). The advantage would be that all tobacco products could be sold in plain packaging at the choice of the regulator. However, there are huge policy issues that remain unresolved with this proposal, not least of all being the Government's role in promoting health being at direct conflict with the sale of tobacco products. This option is not considered feasible for the New Zealand environment.

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<sup>3</sup> See the Source List for a list of references relied upon in this analysis – in particular the summary in *Plain packaging of tobacco products: a review of the evidence*, Quit Victoria, Cancer Council Victoria, May 2011.

## Consultation

[29] The consultation process conducted by the Ministry of Health began on 23 July 2012 with the release of the consultation document *Proposals to introduce plain packaging of tobacco products in New Zealand* (the consultation document). The consultation document outlined the purpose of the consultation, presented a formal statement of Government's health policy objectives and the basis of its 'in principle' agreement to introduce plain packaging, summarised the regulatory impact assessment, and presented a summary of the evidence base for the effectiveness of plain packaging. The consultation document asked a number of questions designed to elicit data that would assist the regulatory impact analysis. In particular specific questions were asked on the impact of a plain packaging regime on manufacturers, exporters, importers and retailers of tobacco products.

[30] The consultation engaged with industry, public health groups, trade partners, academia and interested members of the public and at the cut-off point of 5 October 2012, there were 295 substantive individual submissions received, 242 from within New Zealand and a further 53 from overseas. Sixty three per cent (63%) of these were in favour of plain packaging and 37% against. In addition over 20,000 individuals expressed support for or opposition to, the proposal. Forty-one per cent (41%) of these were in favour of the proposals. Those opposed included retailers and tobacco industry representatives (16% of the total) and individuals (43% of the total).

[31] Both the tobacco industry and public health NGOs organised activities to encourage support for, or opposition to, the proposal. A group of NGOs circulated postcards and a petition in support of the proposal. The Ministry also received a range of standard letters and petitions in favour. British American Tobacco (New Zealand) Limited, Imperial Tobacco New Zealand Limited, and Philip Morris (New Zealand) Limited produced a postcard and a template for retailers to sign and send in opposition to the proposal. Other form letters were received from retailers. Standard postcards and emails were received from individuals opposed to plain packaging. An advertising campaign was conducted by British American Tobacco with the tag line 'agree2disagree'. Websites, both pro and con, where people could access ways to register their views were also setup. Philip Morris also ran a website campaign.

[32] All submissions were analysed by external consultants and were taken into account in preparing this revised RIS. The consultants provided the Ministry with a report *Submissions Analysis on the proposal to introduce plain packaging of tobacco products in New Zealand*. This report identified that there were highly polarised views but no new evidence was revealed that would justify Government reversing its 'in principle' decision to introduce plain packaging.

[33] In addition, the consultation involved discussions with relevant Government agencies, including around:

- Any Bill of Rights Act 1990 implications,
- The implications under the Technical Barriers to Trade Agreement for developing countries, and
- The likelihood and implications of New Zealand being party to any trade or investment processes instituted against Australia.

## Conclusions and recommendations

[34] The status quo does not address the continuing ability of the tobacco industry to use packaging in a way that allows advertising and promotion of tobacco products, despite the ban on tobacco advertising (and other controls). Similarly to increase health warning coverage on tobacco packets would reduce the amount of space left on the packet for industry promotions, it does not fully address this gap. Thus, under either option 1 or 2, the issue would continue to undermine the effectiveness of other tobacco control measures. Specifically:

- Health warning messages on tobacco packages will continue to be diluted,
- Some consumers will be misled to believe that some tobacco products are less harmful than others, and
- New smokers, especially amongst young people, may be attracted.

[35] Evidence<sup>4</sup> suggests that option 3, plain packaging of tobacco products, would be effective at meeting the objectives listed above. Studies have indicated that plain packaging would reduce the likelihood that consumers will be misled about the harmfulness of tobacco products, increase the effectiveness of health warnings, and reduce the appeal of tobacco products and social approval of tobacco use. As a result, there would be likely to be reduced uptake of smoking, increased cessation, and flow-on effects for second-hand smoke, improved public health, and reduced costs to the public health system. This would reduce premature death and contribute to the Government's stated goal of a smoke-free New Zealand by 2025.

[36] Accordingly, this regulatory impact statement recommends that option 3, Regulatory change to require plain packaging of tobacco products, be agreed.

[37] As discussed below, it is proposed that New Zealand put in place arrangements such that it may align its packaging of tobacco products with those of Australia within approximately a year of the passing of Australia's plain packaging legislation.

## Implementation

[38] Indicative timeline:

- Report to Cabinet seeking confirmation of the decision to introduce plain packaging (November 2012)
- Report to Cabinet with detailed proposals and seeking approval to draft legislation (30 March 2012)

## Monitoring and enforcement

[39] Assuming a decision is taken to proceed, the Ministry of Health would be responsible for enforcing the legislation, which would be undertaken within the existing Vote:Health budget. This would include ongoing compliance monitoring to ensure that, following the implementation date, all tobacco products sold are compliant with legislative requirements for plain packaging. Smoke-free officers within Public Health Units would be charged with this

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<sup>4</sup> See the Source List for a list of all reference material consulted in conducting this analysis.

task. The additional enforcement burden is not expected to be large, as tobacco product packaging is implemented at a national level by tobacco companies.

[40] The Ministry of Health would also liaise with the New Zealand Customs Service to ensure imported tobacco products meet legislative requirements, identifying smaller importers to firstly convey the new requirements to and subsequently to monitor and ensure compliance.

## Review

[41] This issue is the subject of great interest to academics who are experts and active in this area of research, both in New Zealand and internationally. The Ministry of Health will promote research reviewing the effectiveness of plain packaging in New Zealand, and will support that research by providing information to researchers.

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