

In Confidence

Office of the Associate Minister of Health (Hon Tariana Turia)

Cabinet Legislation Committee

Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill: Approval for introduction

Proposal

1. I propose that the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill be approved for introduction to the House of Representatives.

Executive Summary

2. This paper proposes that the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill be approved for introduction to the House of Representatives. The Bill creates a plain packaging regime for tobacco products in New Zealand. It is designed to ensure that tobacco products can only be manufactured, packaged and sold in New Zealand if they comply with plain packaging requirements in this Bill. The detailed requirements, including those for larger and more effective graphic warnings, will be set out in regulations including some regulations the Bill enables to be made.
3. The Bill also proposes the creation of new offences with significant penalties to deter non-compliance and an infringement scheme to deal with low level offending. It also proposes increasing some existing maximum penalties for breaches of the Smoke-free Environments Act 1990 to the same levels as the new offences.
4. The legislation is drafted to be brought into force either by Order in Council or at latest 18 months after Royal assent. This is to allow for adequate time to develop and consult on the detailed regulations. The Bill also provides for the ability to delay either the bringing into force of the legislation or the promulgation of the regulations under it, to take into account the progress of legal proceedings at the World Trade Organization (WTO). Similar Australian plain packaging legislation which has been in place since December 2012 has been challenged by five WTO member countries.
5. It is proposed the Bill should be referred to the Health Committee for a four month period and be enacted by 31 August 2014.
6. I propose to issue a media statement at the time of the introduction of the Bill to Parliament and, at an appropriate time, to make the papers relating to the decision publicly available, but withholding any information that would not be released under the provisions of the Official Information Act 1982.

Policy

7. The Bill creates a plain packaging regime for tobacco products in New Zealand, similar to that now in place in Australia since December 2012.
8. The decision to proceed with plain packaging was taken on 18 February 2013 [CAB Min (13) 4/16 refers]. Cabinet noted the need for enabling legislation to establish the plain packaging regime and subsequent regulations to implement it.
9. On 28 August 2013 Cabinet approved the policy recommendations for inclusion in the Bill, and agreed that the legislation needs to include wide regulation-making powers of both a restrictive and a permissive nature to ensure that every aspect of the

appearance and all other designed features and sensory impacts of tobacco products and tobacco product packaging can be controlled [SOC Min (13) 19/6 refers].

10. The Bill gives effect to these decisions. The key provisions are designed to:

- ensure that tobacco products can only be manufactured, packaged and sold if they comply with plain packaging requirements
- make the graphic warnings on the packs larger and more effective
- enable regulations to be made to set out the detailed requirements for tobacco product design, appearance, packaging and labelling (including the improved graphic warnings)
- allow a brand name and certain other manufacturer information to be printed on the pack, but with tight controls (eg, over the type font, size, colour and position)
- prohibit the use of tobacco company branding imagery and all other marketing devices on tobacco product packaging, or on tobacco products themselves
- create new offences with significant penalties to effectively deter and punish any non-compliance, and also allowing lower penalties and an infringement notice scheme to deal with any instances of small scale or low level offending
- lift the maximum penalties for some existing and related tobacco advertising and health warning offences to the same levels as the new offences, for consistency.

Additional policy

11. In the course of drafting, some additional matters that were not explicitly addressed in the approved policy have been identified and incorporated in the Bill. These are:

- widening the enabling powers for health warnings so that regulations might also require positive images and messages designed to encourage people to quit smoking to be displayed on some tobacco packages
- widening the enabling powers for packaging regulations so that these can set standardised quantities, for example the number of cigarettes in a pack or the weight of loose tobacco in pouches (but still subject to the existing minimum quantities of 20 cigarettes in a pack and 30 grams of loose tobacco in a pouch).

12. Messages urging smokers to quit could arguably be considered to be health warnings, and therefore could possibly have been regulated for without the additional enabling power. Similarly, the previously agreed policy would have enabled regulations that simultaneously control the dimensions of tobacco products and their pack sizes, thereby effectively standardising the quantities that may be sold. However, in both cases it was considered preferable to give greater clarity over the intended scope of the regulations in the primary legislation.

13. The Bill also required a definition of "large retailer" in order to give effect to the tiered penalties agreed by Cabinet for different classes of offender. The threshold for being a large retailer has been set at \$50 million in total annual turnover. This is based on analysis of what would be considered a typical large supermarket in New Zealand. The threshold has been set well above the average supermarket turnover of around \$30 million per year.

Publicity

14. A media release will be issued at the time of introduction of the Bill to Parliament. As with previous Cabinet papers on plain packaging, I propose that this Cabinet paper

and minuted decisions may be proactively released by publication on the Ministry of Health website at an appropriate time, subject to any material being withheld as necessary as if a request for release had been made under the Official Information Act 1982.

Regulatory Impact Analysis

15. The regulatory impact requirements relating to plain packaging were satisfied before Cabinet made the final decision to proceed [CAB Min (13) 4/6 refers]. A Regulatory Impact Statement (RIS) was submitted at the time Cabinet agreed in principle to proceed with plain packaging [SOC Min (12) 5/4 refers] and an updated RIS was submitted to support the final decision, following consultation [CAB Min (13) 4/6 refers]. Both have been published.

Compliance

16. The Bill complies with:

- 16.1 the principles of the Treaty of Waitangi
- 16.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
- 16.3 disclosure statement requirements - a Disclosure Statement is attached to this paper
- 16.4 the principles and guidelines set out in the Privacy Act 1993
- 16.5 relevant international standards and guidelines
- 16.6 Legislation Advisory Committee Guidelines on Process and Content of Legislation.

Consultation

17. This paper was prepared by the Ministry of Health, in consultation with the Ministry of Foreign Affairs and Trade, the Ministry of Business, Innovation and Employment, the New Zealand Customs Service, the Ministry of Justice and the Treasury. The Department of the Prime Minister and Cabinet was informed.
18. Public consultation was undertaken in 2012. A consultation document, *Proposal to introduce plain packaging of tobacco products in New Zealand* was issued, together with the Regulatory Impact Statement, on 23 July 2012. WTO member countries were also informed of the consultation and invited to make submissions. The consultation remained open until 5 October 2012. The Ministry of Health received nearly 300 substantive individual submissions. The Ministry also received over 20,000 expressions of support for, or opposition to, the proposal in the form of postcards, petitions and standardised emails and letters.
19. Opinions on the proposal were polarised. There was strong support from public health groups, academia, other non-governmental organisations (NGOs) and individuals. Those opposed to the proposal were tobacco companies and associated industries, retailers and international business associations, several tobacco producing countries including Nicaragua, Dominican Republic and Indonesia, and individuals. There was no significant new information or evidence provided to support claims in opposition to the proposal not already considered when Government has earlier agreed in principle to adopt a plain packaging regime.

Binding on the Crown

20. As the principal Act (the Smoke-free Environments Act 1990) binds the Crown, the amendments contained in this Bill will also bind the Crown.

Creating new agencies or amending law relating to existing agencies

21. The Bill does not create new agencies or amend the law relating to existing agencies.

Allocation of decision making powers

22. The Bill adds new offences to the existing infringement notice scheme in the Smoke-free Environments Act 1990. This allows for the issuing of infringement notices by smoke-free enforcement officers in relation to small-scale and low level offending.

Associated regulations

23. The Bill brings in a comprehensive scheme enabling all aspects of the design and appearance of any form of tobacco product or tobacco product packaging to be controlled through regulations. In so doing, the Bill amends and adds to the existing provisions in the Smoke-free Environments Act 1990 relating to the labelling of tobacco products.

24. Regulations will need to be developed to specify the detailed requirements for tobacco product design, appearance, packaging and labelling (including improved graphic warnings). The new regulations will replace the Smoke-free Environments Regulations 2007. This is likely to require 30-50 clauses of moderately complex legal drafting, and the development of detailed schedules setting out specific technical requirements and exemplars (for example of materials, images and messages to be used), and also various forms, reports, returns and notices relating to infringement offences and other matters. Consultation with interested parties, including with tobacco manufacturers and importers on the technical aspects, will be required. (The likely timing of the regulations is discussed below, beginning at paragraph 27.)

Other instruments

25. The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

26. The Bill does not contain a definition of Minister, department (or equivalent government agency) or chief executive of a department (or equivalent position).

Commencement of legislation

27. The legislation is drafted to be brought into force either by Order in Council, or at latest 18 months after Royal assent. This is to allow for adequate time to develop and consult on the detailed regulations.

28. The legislation dismantles the existing regulatory framework for tobacco product labelling and health warnings, and replaces it with a new, more wide-ranging tobacco plain packaging regime. Entry into force by Order in Council at such time as all the new regulations are promulgated will enable a smooth transition.

29. The Government wishes to retain the ability, if necessary, to delay either the bringing into force of the legislation or the promulgation of regulations under it, to take into account the progress of legal proceedings at the WTO. The tobacco plain packaging scheme under this legislation is similar to that introduced in Australia through the Australian Tobacco Plain Packaging Act 2011. The Australian scheme has been challenged by a number of WTO member countries with regard to its consistency with certain provisions of the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-related Aspects of Intellectual Property (TRIPS), and the Agreement on Technical Barriers to Trade (TBT).

30. The Bill also includes transitional provisions in a new schedule to the Smoke-free Environments Act 1990. This provides for the new plain packaging requirements and offences to apply to manufacturers, importers, and persons involved in packaging on the date the amendments comes into force, but allows a period of six weeks for distributors to clear old stocks and a further six weeks of 'wash-through' before retailers become liable for non-compliance (ie, a total lead in time of 3 months).

Parliamentary stages

31. I have already announced my intention to introduce the Bill this year. There is considerable public interest, international as well as domestic, in New Zealand's progress on plain packaging and any delay would attract attention.
32. Following introduction, the Bill can progress through the standard parliamentary phases in 2014, starting with a first reading and referral to select committee early in February 2014. It is proposed to shorten the select committee stage down to four months.
33. As previously noted by Cabinet, the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but greater legal certainty will emerge as the WTO disputes against Australia advance. As noted above, the enactment or entry into force of the legislation or regulations may possibly need to be delayed to take account of the WTO legal implications.
34. It is proposed that the Bill be referred to the Health Committee.

Recommendations

35. The Associate Minister of Health (Hon Tariana Turia) recommends that Cabinet Legislation Committee, with Power to Act:
1. note that a Smoke-free Environments Amendment Bill holds priority 5 on the legislation programme (ie, to be referred to a select committee in 2013);
 2. note that the Associate Minister of Health (Hon Tariana Turia) has announced the Government's intention that the Bill be introduced in 2013;
 3. note that the Bill introduces a plain packaging regime for tobacco products and packaging in New Zealand which is in alignment with Australia, and sets out the purpose of the legislation, establishes the core plain packaging requirements, creates offences and penalties, and clarifies that the impacts on intellectual property rights are limited to those that occur as a result of achieving the public health objectives;
 4. approve the introduction of the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill;
 5. note that the Bill be introduced on 17 December 2013;
 6. agree that the government propose that the Bill be:
 - 6.1 referred to the Health Committee for consideration (for a four month period);
 - 6.2 enacted by 31 August 2014;
 7. note that decisions on when to enact the legislation or when the regulations should come into force will need to take into account the progress of legal proceedings at the World Trade Organization.

Tariana Turia

Hon Tariana Turia
Associate Minister of Health

16 / 12 / 13