

Regulatory Impact Statement

Better Retail Controls on Tobacco: Regulations to implement reforms arising from the Smoke-Free Environments (Control and Enforcement) Amendment Act 2011.

Agency disclosure statement

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

It provides an analysis of options for regulations proposed to assist in implementing the Smoke-free Environments (Controls and Enforcement) Amendment Act 2011 (the “Amendment Act”). The specific aims of the Amendment Act are to:

- prohibit the retail display of tobacco products
- prevent the use of trading names in a way that advertises tobacco products
- provide smoke-free enforcement officers with infringement notice powers to issue fines to retailers who sell tobacco products to people under 18 years of age.

The high-level objectives of the Amendment Act are to:

- address the high level of harm caused by tobacco and the significant health, social and economic burden it causes
- comply with Government’s international commitments to introduce a coherent set of policies to address the harm caused by smoking, including a comprehensive ban on all forms of tobacco advertising.

The proposed regulations give effect to three different provisions in the Amendment Act. They concern:

- information about tobacco availability and price to be provided on request (section 23(1)(a))
- notices that may be displayed inside tobacco places of business about tobacco products that are available (section 23(1)(b))
- infringement fees.

The costs and benefits associated with any reduction in tobacco consumption and prevalence that may result from these regulations were assessed during the legislative process and have not been included in this regulatory impact assessment.

The direct costs to businesses stemming from the regulations for tobacco information (section 23(1) (a)), and section 23(1) (b)) are minimal. There will be no costs relating to the infringement fees for businesses that comply with the provisions of the Smoke-free Environments Act 1990.

Ashley Bloomfield

Acting Deputy Director-General of Health, Sector Capability and Innovation

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Status quo and problem definition

The Smoke-Free Environments Amendment Act 2011 has new provisions relating to consumer information on tobacco products, notices, and infringement offences. These new provisions would be given full effect by new regulations, to be made under the Act's regulation-empowering provisions. This Regulatory Impact Statement is about the proposed new regulations.

There are three provisions in the Amendment Act for which regulations are proposed. This regulatory impact statement summarises the aims of each of the provisions in the Amendment Act which the proposed regulations would implement. Options for each set of regulations are identified, along with their respective costs and benefits.

Status quo

The status quo therefore is that:

- new legislation has been enacted – the Amendment Act;
- the policy objectives of the Amendment Act can only be given full effect through new regulations; and
- these regulations have not yet been made.

The status quo for each of the sets of regulations is the same: that is, to not make any regulations.

Problem definition

The problem for the first two sets of regulations is the lack of clarity for tobacco retailers and enforcement agencies that would result if regulations are not made. The problem definition for the third set of regulations on infringement penalties is that the infringement regime cannot operate unless fees are set by regulation.

Objectives

These regulations have one overall objective and three specific objectives.

The overall objective is to develop regulations that would be effective in implementing the policy objectives of the relevant provisions of the Amendment Act. The overall aims of proposed Regulations are those of the Amendment Act. As stated in the Regulatory Impact Statement for the Amendment Bill:

“the over-arching policy objective is to ensure that the regulatory controls on the commercial marketing and retail supply of tobacco support the Government’s overall policy goal of reducing smoking, are consistent with New Zealand’s international commitments, and do not undermine the effectiveness of other key initiatives ...”.

More specifically, the objectives of the Regulations are to ensure that:

1. tobacco retailers and enforcement agencies are clear on what is needed to ensure compliance with the Amendment Act.
2. communication is effective
3. the requirements address needs for information about both tobacco product availability and the effects of tobacco consumption.

Regulatory impact analysis

A. First proposed set of regulations – tobacco product information on request (section 23(1) (a))

Section 23(1) (a) states:

“A retailer of tobacco products may do all or any of the following things:

(a) provide, inside that retailer’s place of business, and on a request (however expressed) made for the purpose by a person who has asked to purchase a specified, or any available, tobacco product, any information (in any medium, but only in the form of printed, written, or spoken words) that—

- (i) does no more than identify the tobacco products that are available for purchase in that place and indicate their price; and*
- (ii) complies with any regulations for the time being in force under section 39(1)(ie).”*

Options for regulations made under section 39(1)(ia) to implement s 23(1) are:

A1 The status quo: no regulations

A2 Regulations to specify details of information to guide compliance for retailers and enforcement agencies, and to give effect to the overall objectives of the Act

A3 Regulations to specify details of information to guide compliance for retailers and enforcement agencies without requirements for health warnings or presentational elements to emphasise the adverse effects of tobacco consumption

A4 Regulations to specify details of information to guide compliance for retailers and enforcement agencies; and would include graphic warning images

Option A1 The status quo: no regulations

Summary of option: Section 23(1)(a) envisages, but does not require, regulations to give effect to the section. If no regulations are made in relation to section 23(1)(a) then a tobacco retailer would be able to provide information to any prospective purchaser that ‘does no more than identify the tobacco products that are available for purchase in that place and indicate that price’.

Benefits of this option: the benefit of not regulating is flexibility for retailers who would be responsible for deciding how to develop a notice that complies with s 23(1)(i); ie a notice that does 'no more than identify which tobacco products are available and their price.

Another benefit of a no-regulation option is that drafting resources would not be required.

Costs/risks of this option: The risk of a 'no regulation' option is that retailers would have no guidance in how to comply with section 23(1)(a)(i) and the overall objectives of the Amendment Act. The stipulation that retailers provide information that "does no more than identify the tobacco products that are available for purchase..." is, without additional details, vague and capable of various interpretations. On its face, the requirement that information 'does no more than identify the tobacco products' could be interpreted as allowing information that is no more than business card size; or alternatively could allow information to be presented in a much larger form and/or in a way that suggests that tobacco products are an attractive product. This would be inconsistent with the overall objectives of the Amendment Act. The risks of this option are therefore the difficulties both for retailers and for enforcement agencies in assessing compliance with section 23(1)(a); the fact that both retailers and enforcement agencies (principally the Ministry of Health) will have different interpretations of the section; and the risk of non-compliance with the overall objectives of the Act.

Option A2: Regulations to specify details of information to guide compliance for retailers and enforcement agencies, and to give effect to the overall objectives of the Act

Summary of option

Proposed regulations would require:

1. that if printed or written information is provided it will be limited to a maximum dimension of an A4 sheet of plain white paper with black letters. There will not be a limit to the number of A4 pages that can be provided by a retailer.
2. Health warning messages must appear in plain black ink at the top and bottom of each page provided. The messages "SMOKING KILLS" and "Ka mate koe i te kai hikareti" must appear in separate lines and either message must not be broken over two lines.
3. Printed messages must be in a prescribed font (Helvetica), colour (black), and font size (various).
4. If the material is hand-written the messages must be clearly legible in black ink, and must cover 5cm of the top of the page and 5cm at the bottom of the page.
5. At the bottom of each page a centred message "No sales to people under the age of 18" should appear again in Helvetica 22 font (or if hand-written, in lettering the equivalent of half the height of the SMOKING KILLS message)

6. The only other information that will be allowed to be displayed on the page is the brand of the product, the variant (e.g. menthol), the amount or quantity or size (e.g. 20 cigarettes, 30grams etc) and the price of the product. This information should be printed in black Helvetica font with a maximum 16pt font (or equivalent size if hand-written).
7. If the notice is printed, a solid black border will be required to frame the health warning message and information.
8. The same requirements will apply to sales from a vending machine, and sales over the internet, except that only a printable format (which can also be viewed on screen) will be allowed, and this must be a non-user editable format, such as a locked PDF document.
9. Any tobacco product information must be stored out of customers' view.

Benefits of this option

Regulations made as proposed give clear details to retailers and enforcement agencies about how to comply with section 23(1)(a). The maximum size of any written information paper is sufficient to allow information to be clearly read. Details on permitted information would allow essential information to be conveyed to consumers (brand, variant, quantity, and price). Provisions for health warnings will assist in ensuring implementation of the over-arching policy objective of the Amendment Act.

Risks and costs of this option

Tobacco retailers may consider that health warnings about the use of tobacco products are inappropriate for information to be given to tobacco consumers, on the grounds, arguably, that such consumers will have already made their choice.

*Option A3: Regulations to specify details of information to guide compliance for retailers and enforcement agencies **without** requirements for health warnings or presentational elements to emphasise the adverse effects of tobacco consumption*

Summary of this option

This option would be along the lines suggested in Option A2, but without health warnings, or messages noting that sales to people under 18 are not permitted and without a black border.

Benefits of this option

This option would recognise that people are already aware that smoking has adverse health effects, or do not accept the validity of this information; and either have chosen to continue to use tobacco or, given the addictive nature of the product, *cannot* choose not to use tobacco.

Risks of this option

This option would not give full effect to the Amendment Act's "the over-arching policy objective is to ensure that the regulatory controls on the commercial marketing and retail supply of tobacco support the Government's overall policy goal of reducing smoking, are consistent with New Zealand's international commitments, and do not undermine the effectiveness of other key initiatives More specifically, a lack of health warnings would also be inconsistent with other government measures, and would, arguably, neglect governmental responsibility to take all possible steps to reinforce information about the negative effects of tobacco at the important time when a potential purchaser is making the decision to buy or not.

Option A4: Regulations to specify details of information to guide compliance for retailers and enforcement agencies; and would include graphic warning images

Summary of this option

This option would be along the lines suggested in Option A2, but would include graphic warnings with specific health messages relevant to the graphic message, as well as the general 'Smoking Kills' message.

Benefits of this option

This option would emphasise to a fuller extent the adverse effects of tobacco consumption for people at critical decision-making points for tobacco purchase.

Risks of this option

The amount of details in this option could be excessive and inappropriate for effective communication, given that such pictorial warnings are proposed for tobacco availability signage and also requirements on tobacco packaging.

Preferred option

Option A2, as detailed, is preferred because it is most consistent with the objectives of the Amendment Act, and provides clear guidance for both tobacco retailers and enforcement agencies.

B. Second proposed set of regulations – tobacco availability notice (section 23(1)(b))

Section 23(1)(b) says:

A retailer of tobacco products may:

"display inside that retailer's place of business any notice for the public that—

(i) does no more than indicate, using only printed or written words, the fact that, and the location or locations where, tobacco products in general are available for purchase in that place; and

(ii) complies with any regulations for the time being in force under section 39(1)(ib):”

Options for regulations made under section 39(1)(ia) to implement s 23(1)(b) are:

B1 The status quo: no regulations

B2 Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies, and to give effect to the overall objectives of the Act

B3 Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies; with no limit on the number or size of notices, and with no requirements for health warnings

B4 Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies; with very restricted limits on size and number of tobacco notices

Option B1 The status quo: no regulations

Summary of option: Section 23(1)(b) envisages, but does not require, regulations to give effect to the section. If no regulations are made in relation to section 23(1)(b) then a tobacco retailer would be able to provide information to any prospective purchaser that ‘does no more than indicate... the fact that, and the location or locations where, tobacco products in general are available for purchase in that place’.

Benefits of this option: the benefit of not regulating is flexibility for retailers who would be responsible for deciding how to comply with s 23(1)(i)(b).

Another benefit of a no-regulation option is that drafting resources would not be required.

Costs/risks of this option: The risk of a ‘no regulation’ option is that retailers would have no guidance in how to comply with section 23(1)(a)(i) and the overall objectives of the Amendment Act. The stipulation that retailers display notices that do no more than indicate the fact that, and the locations where, tobacco products are available for purchase, without additional details is vague and capable of various interpretations. In particular there is no guidance on *size* or *numbers* of notices in any one business. One risk therefore is that retailers will interpret the statutory provision in various ways, ranging from only one notice per store to 50 or more. This would not assist with ensuring a level playing field and would create incentives for the provision to be given a very wide interpretation with the result that such notices would constitute advertisements, thus being inconsistent with the aims of the Act.

Option B2: Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies, and to give effect to the overall objectives of the Act

Summary of option

Proposed regulations would require:

1. Any notice displayed by a retailer pursuant to this provision will be limited to a maximum A4 sized sign displaying only the words “TOBACCO AVAILABLE HERE” (maximum 70 pt) and “No sales to people under the age of 18”(maximum 40 pt). This sign may be displayed at either the place where the tobacco is stored or the point of sale where it is sold. If printed the notice must be on white paper with black Helvetica font.
2. Retailers displaying a tobacco availability notice must also display an A4 sized pictorial health warning alongside. The information required on the pictorial health warning message will be based on tobacco packaging warnings currently regulated for in the Smoke-free Environments Regulations 2007.
3. The Ministry of Health plans to produce an A3 sized notice that will incorporate both the “TOBACCO AVAILABLE HERE” sign and an appropriate pictorial health warning message. These notices will be made available to tobacco retailers on request. An example of the notice (not to scale) is contained in Annex 2.
4. The Ministry also plans to produce an A4 pictorial health warning message notice which will be required to be displayed if a retailer decides to produce their own “TOBACCO AVAILABLE HERE” sign. An example of this is contained in Annex 3.
5. Only one sign per premises of under 200m² (contiguous floor area which can be accessed by customers) will be able to be displayed. A premise between 200m² and 500m² may display two signs and premises over 500m² can display up to three signs. Signs must not deliberately be placed so as to be seen from outside of the premises (for example, the sign should not be placed in a window or placed so that it can easily be seen from outside of the premises).
6. The same requirements will apply to sales from a vending machine and from the internet where the size would be limited to a maximum of one third of the screen area.

Benefits of this option

Regulations made as proposed give clear details to retailers and enforcement agencies about how to comply with section 23(1)(b). The maximum size of any notice is sufficient to allow information to be clearly read. This option recognises that the appropriate numbers of notices should depend on the size of the store. Provisions for health warnings will assist in ensuring implementation of the over-arching policy objective of the Amendment Act.

Risks of this option

The main risk is concern that the size and number of notices will not be sufficient to ensure that prospective purchasers are aware of the availability of tobacco products.

Also, arguably, the pictorial warnings will come to act as a form of advertisement for tobacco products.

Option B3 Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies; with no limit on the number or size of notices, and with no requirements for health warnings

Summary of this option

This option would be along the lines suggested in Option B2, but with fewer (or no) restrictions on numbers of signs per premises, no health warnings, no restrictions on size, and with no provisions for pictorial warnings.

Benefits of this option

This option would ensure to a greater extent than option B2 that potential tobacco consumers were aware of tobacco availability in retail businesses.

Risks of this option

This option would not give full effect to the Amendment Act's "the over-arching policy objective is to ensure that the regulatory controls on the commercial marketing and retail supply of tobacco support the Government's overall policy goal of reducing smoking, are consistent with New Zealand's international commitments, and do not undermine the effectiveness of other key initiatives More specifically, a lack of health warnings would also be inconsistent with other government measures, and would, arguably, neglect governmental responsibility to take all possible steps to reinforce information about the negative effects of tobacco. If the number of notices are more than 1 to 3, and are larger than proposed for Option B2, the tobacco availability notices will in effect constitute tobacco product advertisements (and thus breach Section 22 of the Act).

Option B4 Regulations to specify details of tobacco availability notice to guide compliance for retailers, enforcement agencies; with very restricted limits on size and number of tobacco notices

Summary of this option

This option would be along the lines suggested in Option B2, but would allow a maximum of *one* notice per business (irrespective of the size of the retail business), rather than up to *three*. This option could also limit the size of notices, or place limits on *where* the notice might be placed, in particular, regulations could prohibit any notices near the till or check-out counter (where last minute purchase decisions are often made).

Benefits of this option

This option would minimise the extent to which tobacco product notices would function as 'advertisements'. The option would, hopefully, limit triggers for last-minute decisions

to buy tobacco. The option would emphasise to a fuller extent the adverse effects of tobacco consumption for people at critical decision-making points for tobacco purchase. The option would assist in ensuring implementation of the over-arching policy objective of the Amendment Act.

Risks of this option

Tobacco retailers may consider that this option would so limit consumer knowledge of tobacco availability that sales would decline to an extent greater than expected.

Preferred option for the second set of regulations

Option B2, as detailed, is preferred because it is most consistent with the objectives of the Amendment Act, and provides clear guidance for both tobacco retailers and enforcement agencies. Although there may be a risk that pictorial warnings may act as tobacco advertisements – albeit designed to have the opposite effect – there is no empirical evidence at this stage to demonstrate that graphic warnings attract tobacco customers.

C. Third proposed set of regulations: infringement notice fees

A feature of the new Amendment Act is provision for infringement offences as well traditional prosecutions. Section 38 B provides:

“A person who is alleged to have committed an infringement offence may either—

“(a) be proceeded against for the alleged offence by the laying of an information under the Summary Proceedings Act 1957; or

“(b) be served with an infringement notice as provided for in section 38C.

The Act specifies those offences which are infringement offences for the purposes of the Act (section 38A); and also (38B (b)) stipulates that infringement fees are those prescribed in regulations (provided for under section 39(1)(ik)), not exceeding the maximum fee specified for that offence in the Act itself.

The effect of this provision is that infringement fees must be specified in regulations (within statutory parameters). If regulations are not made for this purpose, infringement penalties cannot be imposed. This will mean that the enforcement agency will, in respect of an alleged infringement offence, have no choice but to proceed by taking Court action under the Summary Proceedings Act.

Options for regulations to made under section 39(1)(ik) to implement provision for infringement offences are:

C1 The status quo: no regulations

C2 Regulations that set the infringement fee at 10 percent of the maximum penalty of the offence (as proposed, details below)

C3 Regulations that set the infringement fee at less than 10 percent of the maximum penalty of the offence (eg, 5 percent)

C4 Regulations that set the infringement fee at the maximum level for infringement offences specified in the Act for the relevant offence

Option C1: the status quo: no regulations

Summary of this option

With no regulations setting infringement fees, infringement penalties cannot be imposed. This will mean that the enforcement agency will, in respect of an alleged infringement offence, have no choice but to proceed by laying of an information under the Summary Proceedings Act.

Benefits of this option

No benefits can be identified with this option.

Risks of this option

The risks/costs of this option is that the purpose of the new provisions for an infringement scheme in the Amendment Act will be frustrated.

Option C2: Regulations that set the infringement fee at 10 percent of the maximum penalty of the offence (as proposed, details below)

Summary of this option

Under this option the regulations would specify the infringement fee at 10 percent of the maximum penalty for the offence. The Infringement offences are limited to seven offences set out in new Section 38A(a)-(g) of the Act. The proposed infringement fees are set at 10 percent of the maximum penalty for the offence. For example, the maximum penalty for selling a tobacco product to a person under 18 is \$10,000 in the case of a body corporate (company) of \$5,000 in all other cases. The proposed infringement fee is \$1000 for a body corporate and \$500 for all others.

Benefits of this option

This option reflects the policy intent of the Amendment Act. It also takes advantage of the flexibility in the Amendment Act which allows for infringement fees to be set lower than the maximum specified in the Act. Hence the Regulations specify lower infringement fees for offenders who are not manufacturers, importers, distributors, or body corporates.

Risks of this option

The only risk of this option is possible criticism that the fees are too low, given that, for example, while the maximum infringement fee specified in the Amendment Act for offences relating to the sale of tobacco to people under 18 is \$1,000, the infringement

fee proposed for regulations is \$500 in the case of a person who is not a body corporate.

Option C3: Regulations that set the infringement fee at less than 10 percent of the maximum penalty of the offence (eg, 5 percent)

Summary of this option

The Amendment Act specifies maximum infringement fees; hence it would be legally permissible for regulations to be set at a level lower than those maximums. Under this option, if the fee were set at 5%, the penalty for selling tobacco to people under 18 years could be \$500 in the case of a body corporate and \$250 for a person not a body corporate.

Benefits of this option

The main benefit of this option is that, for retailers, it reduces costs for non-compliance.

Risks of this option

The main disadvantage of this option is that it reduces incentives for compliance with the provisions of the Act, and is not consistent with the policy objectives of the Act.

Option C4: Regulations that set the infringement fee at the maximum level for infringement offences specified in the Act for that the relevant offence

Summary of this option

Under this option the infringement fees would be those specified in the Act as the maximum infringement fee; for example in the case of offences relating to the sale of tobacco to persons under 18, \$1,000 in the case of both bodies corporate and for a person not a body corporate.

Benefits of this option

This option reinforces the serious nature of the offence and is consistent with the objectives of the Amendment Act

Risks of this option

This option would attract the criticism of inconsistency with the flexibility allowed in the Amendment Act, that is, if the Parliament had intended regulations to be made that would be identical with the fees specified in the Act there would have been no need for regulations to be made.

Preferred option

Option C2, as detailed, is preferred because it is most consistent with the objectives of the Amendment Act, and provides clear guidance for both tobacco retailers and enforcement agencies.

Consultation

The Ministry has engaged with retailer groups over the implementation of the Amendment Act, including the proposals made in this paper.

The Ministry has circulated a regulatory proposals document to retailer umbrella groups for comment on two of the proposals. These retailer groups included: New Zealand Retailers Association, NARGON – The Grocery Retailers Association, New Zealand Association of Convenience Stores, Food and Grocery Council, Foodstuffs New Zealand, Progressive Enterprises, JR Dutyfree and Duty Free Stores (DFS) New Zealand.

As a result of feedback some changes have been made to the original proposals as circulated. This involves allowing the date that the price list is applicable to and allowing additional wording on tobacco availability notices to advise that there will be no sales to people under 18. Other suggestions have not been accepted because they are counter to the objective of the Act, not permissible under the Act, or are generally considered to be impractical.

It was not considered appropriate to consult with retailers regarding infringement fee levels.

Conclusions and recommendations

The overall rationale for the preferred options for each of the recommended Regulations is consistency with the objectives of the Amendment Act.

For the first and second set of regulations the preferred options will provide clarity around how to comply with the Amendment Act, will ensure effective communication, and address information needs about both tobacco product availability and the effects of tobacco consumption.

Implementation

Tobacco retailers have been aware in broad terms of the new regulations since enactment of the Amendment Act in July 2011, as that Act provided for a year before the coming into effect of the relevant provisions.

Specific plans have been in development over the last 12 months to ensure smooth implementation. In particular, training packages are being developed for smoke-free officers to ensure upgrading of skills that will be necessary for implementation of the infringement regime. Training days are planned for June 2012 to go over the requirements of the new regulations with smoke-free officers, and training packages are also being developed to ensure on-going support and training. Leaflets and other information media are being developed for tobacco retailers and manufacturers.

Monitoring, evaluation and review

The new Regulations will be monitored and evaluated in several ways. In particular the infringement notice regime, and the performance of smoke-free officers, will be monitored in relation to the numbers of unchallenged infringement penalties, and the numbers of successfully prosecuted infringement penalties (if relevant) as a proportion of offences.

In the longer term, the effects of the new Regulations will be taken into account in monitoring all elements of government's tobacco control policies and their effect on reducing the level of tobacco consumption, prevalence rates, their effects on morbidity and mortality, and any inadvertent effects.