

Cabinet Business Committee

## Plain packaging of tobacco products

### Proposal

- 1 This paper seeks approval for the release of the attached documents for consultation on the proposal to introduce plain packaging of tobacco products.

### Executive summary

- 2 Cabinet has agreed in principle to introduce a plain packaging regime in alignment with Australia, subject to the outcome of a public consultation process. A consultation document has been prepared and approval is now sought to release it, and the Regulatory Impact Statement previously considered by Cabinet, for consultation. The information gathered from the consultation process will be evaluated and reported back to Cabinet to inform the final decision-making process on whether to proceed.
- 3 Plain packaging of tobacco products requires tight regulatory control on all aspects of the appearance of tobacco products, and includes increasing the size of existing mandatory health warnings on tobacco packaging. Brand names would be permitted only in printed form in a prescribed type font and maximum size.
- 4 Since Cabinet last considered plain packaging, the United Kingdom has also issued a public consultation on plain packaging. This included publication of a systematic review of the research literature. This is now the most comprehensive published assessment of the evidence on plain packaging. It is a useful reference point for New Zealand's consultation, and is given some prominence in the proposed consultation document. This review confirms there is strong evidence in support of plain packaging.
- 5 The legal challenges brought by tobacco companies and tobacco producing countries against Australia are still in process. A decision is expected *[withheld s6(b)(i)]* on the challenges brought by tobacco companies that plain packaging is a breach of the Australian Constitution. Australia's bilateral investment treaty arbitration and its World Trade Organization (WTO) dispute consultations are progressing on longer time frames. New Zealand is a third party to the WTO consultations.
- 6 Launching the consultation document is likely to generate considerable interest both in New Zealand and internationally, including from news media. Tobacco companies in New Zealand have begun to voice their opposition to plain packaging in advance of the consultation.

### Background

- 7 On 4 April 2012, Cabinet Social Policy Committee agreed in principle to introduce a plain packaging regime in alignment with Australia, subject to the outcome of a public consultation process. Associate Minister of Health Hon Tariana Turia was invited to report back to Social Policy Committee by 30 June 2012 to seek approval for release of the consultation document and to update the Committee on issues faced by Australia and research undertaken in the United Kingdom [SOC Min (12)5/4 refers].

## Comment

- 8 The policy objectives for plain packaging are to reduce the appeal and social approval of smoking; make health warnings more noticeable and effective; and remove impressions that tobacco may be less harmful than it is – through removing the ability of tobacco products and packaging to promote and advertise the product.
- 9 There is good evidence that plain packaging will be an effective measure. Comprehensive literature reviews have been published in Australia and more recently in the United Kingdom that support this policy. As Australia will be the first country to introduce plain packaging, with full effect from 1 December 2012, there is no post-implementation evaluation available.
- 10 As part of the policy development process it is now appropriate to consult with industry, public health groups, trade partners, academia and interested members of the public, and to collect and assess further evidence on the regulatory impact of the proposal.
- 11 There is strong support for plain packaging among public health groups and other NGOs.
- 12 Tobacco companies oppose plain packaging, and have already begun to voice their opposition in New Zealand. They argue that the measure will not be effective and that restricting the use of logos and imagery associated with tobacco brands is contrary to New Zealand's international obligations. These include the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), *Agreement on Technical Barriers to Trade* (TBT Agreement), and other bilateral trade and investment agreements.

13

[withheld s9(2)(h)]

The consultation document acknowledges the risk that WTO disputes or investment treaty arbitration claims could be brought against New Zealand after the introduction of plain packaging, and that such claims would be costly to defend regardless of the strength of New Zealand's arguments and our confidence in the outcome. The Regulatory Impact Statement includes an estimate of the costs of defending such cases.

### *Consultation on Regulatory Impact Statement and alternative options*

- 14 No consultation has yet been undertaken with stakeholders or the public on the regulatory impact analysis that was undertaken as part of the process leading to the Government's decision to consult on its plain packaging proposal.
- 15 It is therefore proposed that the Regulatory Impact Statement becomes an integral part of the proposal being consulted on. This will mean that consideration of alternative options will be part of the consultation exercise.

### *Health warnings*

- 16 Under the Australian regime, health warnings will be expanded in size to cover 75% of the front of the pack. For New Zealand to harmonise with Australia in this way would

likely require amending existing health warning regulations. The consultation paper therefore also explicitly seeks feedback on this issue.

#### *Update on issues being faced by Australia*

- 17 The Australian Government is currently awaiting a High Court decision on the constitutional challenge brought by four tobacco companies in relation to the introduction of plain packaging. A decision is expected [ *withheld s6(b)(i)* ]. This case relates to Australian constitutional law only and is not directly applicable to New Zealand.

[*withheld s6(b)(i)*]

There has been some progress in the investor-state dispute arbitration following Philip Morris Asia's claim that plain packaging is a breach of the bilateral investment treaty between Australia and Hong Kong, but the process is still expected to take months, if not years, to reach a conclusion. The arbitration is being undertaken under the United Nations Commission on International Trade Law rules. The tribunal was constituted on 15 May 2012 and a first procedural meeting is set down for 15 July 2012 to consider initial matters, such as a timetable for proceedings.

[*withheld s6(a) and s6(b)(i)*]

- 18 The WTO dispute settlement processes between Australia and the Ukraine and Honduras are proceeding, albeit slowly. Consultations have been completed and Ukraine and Honduras are expected to formally request the establishment of panels in due course. New Zealand is a third party in these proceedings. The Dominican Republic has also publicly announced that it will also seek consultations with Australia, which are expected to commence shortly.

#### *Research undertaken in the UK*

- 19 On 16 April the United Kingdom issued its own consultation on 'standardised packaging of tobacco products' (the UK's preferred term for 'plain packaging'). This included publication of a systematic review of the evidence on plain tobacco packaging. The review was commissioned by the Department of Health in England and undertaken by independent expert academics at the University of Stirling, the University of Nottingham and the Institute of Education in London.

- 20 The systematic review is the most current and comprehensive available assessment of the research literature. It found strong evidence to support the role of plain packaging in helping to reduce smoking rates. The authors acknowledged some limitations, such as the fact that, as plain packaging has yet to be introduced in any country, it was not possible to evaluate the impact of the policy in practice. However, the review was able to assess a wide range of diverse studies, and found a high degree of consistency in study findings and therefore confidence about the effects of plain packaging. According to the evidence plain packaging reduces the attractiveness and appeal of tobacco products, increases the noticeability and effectiveness of health warnings and messages, and reduces the use of design techniques that may mislead consumers about the harmfulness of tobacco products. In addition, the studies in the review

showed that plain packaging is perceived by both smokers and non-smokers to reduce initiation among non-smokers, and to increase cessation-related behaviours among smokers. The review also found some evidence, largely from Australian studies, of public support for plain packaging.

- 21 This research strongly supports officials' own conclusions about the benefit of introducing a plain packaging in New Zealand, as presented in the April 2012 Cabinet paper and Regulatory Impact Statement.

### *Consultation process*

- 22 The domestic consultation process will seek written submissions or online questionnaire responses from tobacco companies, non-governmental organisations, public health organisations and interested members of the public. It is not proposed to conduct any face to face meetings. The consultation process will also be notified to the WTO, in accordance with our TBT Agreement obligations. As part of this process, views will also be sought from our trade partners, and some proactive consultation will be conducted.
- 23 The consultation document will be issued on 23 July. The consultation will run for a period of 75 days with submissions closing on the 5 October. Following the analysis of submissions, I will report back to Cabinet Social Policy Committee by 30 November with recommendations for final policy decisions.
- 24 Subject to a final agreement by Cabinet to adopt plain packaging in New Zealand, legislation could potentially be passed by December 2013.
- 25 The consultation package comprises the consultation document and the Regulatory Impact Statement considered by Cabinet in April 2012. These documents set out the plain packaging proposal and why it is considered desirable. The Regulatory Impact Statement identifies other options including incremental changes to the status quo and increased and refreshed health warnings. In addition it briefly considers but discards public education, self-regulation, and Government control. The consultation document summarises the research evidence, including references to Australian and United Kingdom documentation. It also discusses likely controversial issues including concerns over limitation in the use of trade marks, potential litigation by tobacco companies, harmonisation issues with Australia, and New Zealand's commitments under the Framework Convention on Tobacco Control. A number of questions have been posed in the document to elicit specific feedback and provide additional information to assist in the decision-making process.

### **Consultation**

- 26 The Treasury, the Ministries of Foreign Affairs and Trade, Economic Development, and Justice, were consulted. The Ministries of Consumer Affairs, Youth Development, and Pacific Island Affairs; Te Puni Kōkiri, the New Zealand Customs Service and the Department of the Prime Minister and Cabinet were informed.

### **Financial implications**

- 27 There are no fiscal implications arising directly from the proposals in this paper. Funding for the public consultation phase is covered by existing appropriations and will be undertaken within departmental baselines.

### **Human rights**

- 28 Officials consider the plain packaging proposal is consistent with the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. Restricting the use of tobacco

brand marketing elements on packaging will impact on freedom of expression relating to commercial activity. However this would be a justified limitation arising from the significant public health harm being addressed and the relatively less significant type of commercial expression involved. The consultation process will provide an opportunity for any alternative views to be aired and assessed.

### **Legislative implications**

29 There are no legislative implications from this paper. Any legislation required for plain packaging will be developed at a later stage.

### **Regulatory impact analysis**

30 Additional regulatory impact analysis is not required for approval of the consultation document. A Regulatory Impact Statement was prepared and considered by Cabinet in April when it made the decision in principle to adopt plain packaging subject to consultation. The Regulatory Impact Statement was not consulted outside government at the time. It is now being publicly released for comment as part of this consultation process – subject to any deletions necessary in accordance with the Official Information Act 1982.

### **Gender Implications**

31 There are no specific gender implications of the proposals in this paper.

### **Disability Perspective**

32 There are no specific implications for people with disabilities associated with the proposals in this paper.

### **Publicity**

33 I will release a media statement advising of the consultation process and how to participate. In addition the tobacco industry, non-governmental organisations and other stakeholders will be contacted directly.

### **Recommendations**

34 The Associate Minister of Health (Hon Tariana Turia) recommends that the Committee:

1 **Note** that in April 2012 Cabinet agreed in principle to introduce a plain packaging regime in alignment with Australia, subject to the outcome of the public consultation process to be undertaken before final decisions are made [SOC Min (12) 5/4 refers];

2 **Note** that in April 2012 Cabinet invited the Associate Minister of Health (Hon Tariana Turia) to report to Cabinet Social Policy Committee by 30 June 2012 seeking approval for the release of the consultation document, and with an update on the issues faced by Australia in relation to its plain packaging regime and research undertaken in the United Kingdom on plain packaging [SOC Min (12) 5/4 refers];

3 **Agree** to the release of the consultation document *Proposal to introduce plain packaging of tobacco products in New Zealand* and the annexed Regulatory Impact Statement;

4 **Authorise** the Associate Minister of Health (Hon Tariana Turia) to make editorial changes to the text and layout of the consultation document before its release;

- 5 **Note** that the consultation will run for a period of 75 days from 23 July 2012 to 5 October 2012;
- 6 **Note** that the release of the consultation document can be expected to attract considerable interest both in New Zealand and internationally, including from news media;
- 7 **Note** that in the United Kingdom, a collaboration of universities has completed a comprehensive systematic review of the research literature on plain tobacco packaging and that this confirms there is strong evidence to support the role of plain packaging in reducing smoking rates;
- 8 **Note** that a High Court of Australia decision on the constitutional challenge to plain packaging in Australia [withheld s6(b)(i)], but that progress is slower on both the WTO dispute consultations with tobacco producing countries and the bilateral investment treaty arbitration against Australia;
- 9 **Note** that Cabinet has invited the Associate Minister of Health (Hon Tariana Turia) to report to Cabinet Social Policy Committee by 30 November 2012, following the consultation, with recommendations for final policy decisions [SOC Min (12) 5/4 refers].

Hon Tariana Turia  
**Associate Minister of Health**

\_\_\_\_/\_\_\_\_/\_\_\_\_

Released under the Official Information Act