

Cabinet Social Policy Committee

'Plain packaging' of tobacco products

Proposal

- 1 This paper reports back on the regulatory impact of 'plain packaging' of tobacco products, the implications under trade and investment agreements, and the options for New Zealand following Australia's recent adoption of the measure. It seeks agreement in principle to introduce a plain packaging regime in alignment with Australia, subject to a public consultation process before final decisions are made.

Executive summary

- 2 There is good evidence that plain packaging will be an effective measure to reduce the appeal of tobacco products and strengthen the impact of mandatory pictorial health warnings. It would be an important and logical next step in New Zealand's tobacco control programme.
- 3 Plain packaging would build on and support other measures to reduce the death toll and costly disease burden from smoking, and would be a significant step towards our 2025 goal of a smoke-free New Zealand. Working alongside other initiatives such as tobacco excise increases and the Health Target driving better help for smokers to quit, plain packaging has an important role to play in a comprehensive approach to lowering smoking rates and particularly youth uptake.
- 4 Introducing plain packaging is consistent with New Zealand's international commitments and would enhance our global reputation. Plain packaging of tobacco products is a recommended action for countries to give effect to their international treaty obligations under the Framework Convention on Tobacco Control (FCTC). New Zealand's tobacco labelling regulations are currently harmonised with Australia, and continued alignment would be consistent with both the Smoke-free Environments Act 1990 and the Trans-Tasman Mutual Recognition Arrangement (TTMRA).
- 5 Tobacco producing countries can be expected to use World Trade Organisation (WTO) processes to challenge plain packaging (as Ukraine has done against Australia) [withheld s9(2)(h)] We would also be open to challenge from tobacco companies using investor-state dispute resolution provisions in trade and investment agreements, as Australia has also already experienced.
- 6 [withheld s9(2)(h)] Public consultation, and consideration of any new concerns or evidence that come to light, is an important next step before deciding to introduce legislation to implement the proposal.

Background

- 7 In September 2011 Cabinet agreed to actively consider the introduction of plain packaging in 2012 and sought this report back with further advice on the regulatory impacts and the implications under trade and investment agreements, and on the options, including the option of introducing plain packaging in New Zealand [CAB Min (11) 34/6A refers].

- 8 This followed the Māori Affairs Committee inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori, which recommended that plain packaging be adopted in New Zealand, harmonising with Australian decisions. The Government Response adopted the goal of making New Zealand essentially smoke-free by 2025 and agreed to consider plain packaging.
- 9 The December 2011 relationship accord and confidence and supply agreement between National and the Māori Party reaffirmed the commitment to work on the introduction of plain packaging and other anti-smoking initiatives. This commitment also featured in the February 2012 Speech from the Throne.
- 10 Plain packaging of tobacco products is a recommended option to give effect to FCTC obligations. There are two main reasons, relating to Articles 11 and 13 of the treaty:
 - 10.1 to ensure that tobacco packaging does not create any erroneous impressions about health hazards and/or undermine the impact of graphic health warnings
 - 10.2 to further reduce the appeal of tobacco products (as part of achieving a truly comprehensive ban on tobacco advertising, promotion and sponsorship).
- 11 Australia's tobacco plain packaging legislation was passed in November 2011 and will come fully into force from 1 December 2012. A number of other countries are known to be contemplating plain packaging of tobacco products, but the Australian scheme is the first in the world to progress to the point of legislation.
- 12 The Australian legislation removes the ability for tobacco companies to promote their products through branding imagery and other marketing devices on the tobacco products themselves, or on any form of packaging. The packs will not be so much 'plain' as standardised in every aspect of their appearance. They will continue to carry health warning messages and graphic images. These are being increased to cover 75 per cent of the front of the pack, and all other colours and design elements of the pack will be standardised to maximise the impact of the health warnings. Brand names will continue to be permitted, but these may only be printed in a small, prescribed font. All other trade marks, logos, colours and graphics will be prohibited.

Comment

Policy rationale

- 13 Standardising all elements of tobacco product packaging and appearance, i.e. 'plain packaging', targets a specific gap in New Zealand's current tobacco control policies.
- 14 Plugging this regulatory gap is necessary to ensure those policies as a whole adequately address the wider public health imperative of reducing the harmful effects of tobacco consumption on individual and population health, and lowering the resulting social and economic costs to New Zealand.
- 15 Smoking is the single biggest cause of preventable death and disease in New Zealand. More than 4,500 New Zealanders die each year from smoking or exposure to second-hand smoke.
- 16 In line with our FCTC commitments, New Zealand implements a multi-faceted and comprehensive tobacco control programme with the aim of achieving significant and ongoing reductions in smoking prevalence. Recent initiatives have included substantial tobacco excise tax increases over 2010-2012 and the use of Government Health Targets to drive the health system to provide much better help for smokers to quit.
- 17 Almost all forms of tobacco-related promotion and advertising have been banned or restricted under the Smoke-free Environments Act 1990. Since 2008 there have been regulatory requirements for written and pictorial health warning messages on tobacco packaging. Retail displays of tobacco products become illegal from 23 July 2012.

- 18 There remains only one outlet for tobacco companies to focus their advertising and promotional efforts: the use of colour, trademarks, branding, etc. on product packaging. This use of tobacco products packaging undermines the effectiveness of other tobacco control initiatives and in particular counters the effect of graphic health warnings.
- 19 The specific policy objective for plain packaging is to prevent tobacco promotion and advertising from occurring on tobacco products and packaging, in order to:
- 19.1 reduce the appeal of smoking, particularly for young people,
 - 19.2 reduce the social approval of tobacco use,
 - 19.3 increase the noticeability and effectiveness of mandated health warning messages, and
 - 19.4 reduce the likelihood that consumers may be influenced or misled about the harms of tobacco products.
- 20 Combined with the existing package of tobacco control measures, this specific objective contributes to the broader policy objective of improving public health by:
- 20.1 discouraging people from taking up smoking, or using tobacco products,
 - 20.2 encouraging people to give up smoking, and to stop using tobacco products,
 - 20.3 discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing,
 - 20.4 reducing people's exposure to smoke from tobacco products, and
 - 20.5 helping New Zealand meet its international commitments and obligations under the FCTC, particularly in relation to the guidelines developed to support implementation of Articles 11 and 13.
- 21 There is good evidence¹ that plain packaging of tobacco products will be an effective measure to address these objectives. There is a body of research that shows the use of standard colours and wording on tobacco packs reduces false beliefs about the harmfulness of tobacco products, compared to packs with tobacco brand marketing. There is also substantial research evidence that tobacco products in plain packs are perceived as less appealing, less palatable, of lower quality, and less socially desirable. Other studies have tested the interaction between packaging and health warnings, and show that plain packaging featuring larger graphic health warnings will both reduce the appeal of the pack and strengthen the impact of the warnings.
- 22 These well-studied effects are all important factors for reducing youth uptake and increasing the number of smokers who permanently quit. Lowering the number of smokers in this way directly reduces the harms caused by smoking and second-hand smoke, and improves population health.
- 23 The regulatory impact statement attached to this Cabinet paper provides further detail on the policy rationale and the evidential basis.²

Analysis of options

- 24 Three options have been assessed in detail, including a 'status quo' option, as summarised in the following table:

¹ The regulatory impact statement attached to this document includes a list of the key sources referenced. A good summary of the relevant evidence can be found in *Plain packaging of tobacco products: a review of the evidence*, Quit Victoria, Cancer Council Victoria, May 2011.

² The regulatory impact statement is based on a more detailed and comprehensively footnoted regulatory impact analysis that clearly references the evidence base and will be used as a source document for public consultation and communication.

| Options: | Impacts: | Government | Tobacco industry and related businesses | Smokers and society |
|---|---|--|---|----------------------------|
| <p>A. Status Quo</p> <p>(Does <u>not</u> address specific problem of tobacco branding and imagery undermining health messages and other initiatives designed to reduce smoking prevalence)</p> | <ul style="list-style-type: none"> • Ongoing costs to Vote:Health for status quo tobacco interventions • No additional costs associated with changes to product packaging and labelling regulation • No <u>additional</u> decrease in smoking rates • No risk of WTO challenge (but will depart from alignment with Australia and principles of a single economic market) | <ul style="list-style-type: none"> • No regulatory change and thus no additional compliance or implementation costs for industry • No impact on industry revenue, although gradual decline is expected due to the effect of the ongoing implementation and enhancement of existing tobacco control measures | <ul style="list-style-type: none"> • Smoking rates do not reduce as fast as possible resulting in excess premature death and disease | |
| <p>B. Expanded pictorial health warnings</p> <p>(Only partially addresses problem of tobacco branding and imagery undermining health messages and other initiatives designed to reduce smoking prevalence)</p> | <ul style="list-style-type: none"> • Costs to develop and implement the new regulations, including consultation, monitoring compliance and enforcement (to be met within Vote:Health baselines) • Some additional decrease in smoking rates and contribution towards the 2025 goal, and reduced costs for treating smoking-related illnesses • Cost of defending possible international legal challenge and creating a permanent exemption under TMRA | <ul style="list-style-type: none"> • Initial compliance costs, both to industry in giving effect to the changes and printing companies etc. who may need to retool • Some reduction in sales and/or profits for the tobacco industry and for retailers | <ul style="list-style-type: none"> • Possibility of increased tobacco prices if the cost to the printers/industry is passed on • Some decrease in smoking expected and positive health benefits as a result of refreshed and larger warnings • Consumers would still be misled by tobacco companies' promotional elements on tobacco packaging | |
| <p>C. Plain packaging aligned with Australia</p> <p>(Fully addresses problem of tobacco branding and imagery undermining health messages and other initiatives designed to reduce smoking prevalence)</p> | <ul style="list-style-type: none"> • Costs to develop and implement new legislation and regulations, including consultation, information and education, enforcement etc. (to be met within Vote:Health baselines) • Best possible reduction in smoking rates (of the 3 options) and contribution to the 2025 goal of a smoke-free New Zealand; reduced incidence of illness and premature death, and reduced costs to the healthcare system • Cost of defending possible international legal challenge | <ul style="list-style-type: none"> • Reduced demand for tobacco products leading to lower sales and profits • Compliance costs to tobacco manufacturers and importers (expected to be minor because of cost efficiencies from alignment with Australia) • Reduced income for design and print companies due to standardised requirements and less ongoing redesign work – offset by cost savings to tobacco manufacturers no longer investing in new branding and packaging designs | <ul style="list-style-type: none"> • Uncertain impact on tobacco prices - compliance costs may be passed on; price competition may sharpen in the face of declining sales • Increased quit rates, reduced relapse, reduced youth uptake, reduction in tobacco consumption and smoking prevalence. • Improved health and life expectancy of the population, increased productivity, and reduced costs to the public health system and society as a whole. | |

- 25 The status quo does not address the problem of the continued use of tobacco marketing devices and imagery and the way this undermines the effectiveness of other tobacco control measures. Similarly, although to increase health warning coverage on tobacco packets would reduce the amount of space left on the packet for industry promotions, this only partially addresses the problem. Thus, under either option A or B:
- 25.1 health warning messages on tobacco packages will continue to be diluted,
 - 25.2 some consumers will be misled to underestimate the harmfulness of some tobacco products that give the appearance of being less harmful than others,
 - 25.3 new (and relapsing) smokers, especially young people, may be attracted, and
 - 25.4 wider public perceptions (ie. social approval and acceptance) of smoking will continue to be influenced by the attractiveness of the packs in everyday use.
- 26 Accordingly, and in line with the strength of the supporting evidence as outlined in paragraph 21 above, the regulatory impact statement recommends option C as the preferred option: i.e. regulatory change to require full plain packaging of tobacco products, aligned with Australia.

WTO implications

- 27 Tobacco plain packaging has come under scrutiny in WTO committees. Some WTO members - mainly developing country tobacco exporters – have questioned the consistency of Australia’s tobacco plain packaging with its obligations under the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). [withheld s9(2)(h)]
- 28 To be consistent with the TBT Agreement, plain packaging for tobacco needs to treat imported products no less favourably than products of national origin and must not be more trade-restrictive than necessary to fulfil a legitimate objective (such as protection of human health or safety). The TRIPS agreement requires that trade marks shall not be unjustifiably encumbered by special requirements restricting their use in the course of trade. It is also necessary to allow for different brands and types of tobacco products on sale in plain packs to continue to be distinguishable from each other.
- 29 Australia has asserted its regime is consistent with these obligations. On 13 March 2012 Ukraine, which had previously spoken in the TBT and TRIPs Committees against Australia’s decision, requested consultations with Australia regarding its tobacco plain packaging legislation under the WTO dispute settlement system. The Minister of Trade has given officials consent for New Zealand to join the proceeding as a Third Party, which will enable us to both support Australia’s position and gain an early insight into the arguments being advanced by the pro-tobacco lobby.

Implications under other trade and investment agreements

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 clauses. To be successful, any claim by an investor against New Zealand would have to relate directly to a specific breach of an investment obligation. [withheld s9(2)(h)]

- 31 Regardless of the strength of the arguments that plain packaging is defensible in the WTO and under other trade and investment agreements, the risk that a WTO dispute settlement case or investment arbitration would be brought against New Zealand is

reasonably high. Multinational tobacco companies oppose plain packaging. They have shown themselves willing to fight long and complex legal battles on several fronts and have the financial resources to readily absorb any costs of mounting litigation. Tobacco producing countries have an economic and trade interest in ensuring that regulatory measures taken in consuming markets do not adversely affect demand. They may well see advantage in taking WTO legal action against any market in an effort to chill regulation in every market.

- 32 MFAT has estimated it could cost between NZ\$1.5-2 million to defend a WTO case. The costs of defending an international investment arbitration could be higher due to the need for specialist legal and financial advice, possibly in the range of NZ\$3-6 million for an average case. Australia is already involved in such an arbitration process with Philip Morris under its bilateral investment treaty with Hong Kong. That process is likely to take some time, possibly years, to conclude.

Trans-Tasman mutual recognition issues

- 33 The TTMRA is a cornerstone of closer economic relations with Australia, and provides that all goods that can be legally sold in New Zealand may also be legally sold in Australia, and vice versa. In support of this, the purposes of the Smoke-free Environments Act 1990 include facilitating the harmonisation of trans-Tasman laws relating to tobacco product labelling and health warnings. Currently the labelling and health warning regulations are almost identical, and co-exist without problem in a situation of 'mutual recognition'. However, Australia's plain packaging initiative has created new implications under the TTMRA.
- 34 In the September 2011 decisions Cabinet agreed that New Zealand does not wish the TTMRA to create any impediment to Australia's implementation of plain packaging. This was reinforced in the agreement to "look to ensure that no branded tobacco is able to be re-exported from New Zealand to Australia" as set out in the joint Prime Ministers' statement after the annual Australia New Zealand leaders meeting in Melbourne in January 2012.
- 35 There is no immediate issue, as the Australian legislation includes a provision to automatically invoke a temporary exemption for tobacco products from the TTMRA. This removes the defence under the TTMRA that otherwise would allow tobacco products that met New Zealand labelling and packaging requirements to be sold in Australia. There would continue to be no obstacle to product in Australian plain packaging being sold in New Zealand (although tobacco companies are unlikely to encourage this).
- 36 The temporary exemption holds for up to 12 months. The expectation under the TTMRA is that this period is used to find a way of satisfactorily aligning the two regulatory regimes. The temporary exemption could be extended for one further 12 month period to allow New Zealand to implement changes to its regime. If New Zealand does not modify its regime sufficiently to remove the risk of undermining plain packaging in Australia during the temporary exemption period, Australia would need to seek a permanent exemption. This would follow a process requiring the unanimous support of all Australian jurisdictions and New Zealand. Permanent exemptions are considered a last resort because they undermine the effectiveness of the TTMRA.
- 37 The proposals in this paper would avoid any substantive difficulties under the TTMRA, as they would lead to either an identical or nearly identical plain packaging regime being introduced in New Zealand. However, it is likely that the temporary exemption would need to be extended as above to allow time for New Zealand's regime to become fully operational (see Next steps section at paragraph 41 below).

New Zealand graphic health warning regulations

- 38 The evidence is clear that it is the combination of plain packaging elements and graphic pictorial health warnings that is effective in reducing the appeal of cigarettes to young people. There is also evidence that health warnings need to be continually and carefully tailored to reach specific market segments. For example, young people can have difficulty relating to the advanced symptoms of long-term smoking diseases as something that could happen to them, whereas they tend to respond more strongly to images that resonate with values such as maintaining an attractive youthful appearance.
- 39 Mandatory graphic warnings on tobacco packages under the Smoke-free Environments Regulations 2007 have been in force since early 2008. The labels and messages are in two sets of seven warnings required to appear in equal number over the course of a year, the sets rotating at 12 month intervals. All the images have now been used for at least two rotations.
- 40 Australia has revised its pictorial health warning images to coincide with the introduction of plain packaging, in order to maximise its effectiveness. Similarly, it is desirable to reassess the ongoing adequacy of the health warnings and images required under current tobacco labelling regulations in New Zealand, with a view to updating and improving them.

Next steps

- 41 Public consultation, including allowing for the views and concerns of the tobacco industry and other business interests to be considered and factored in, is an important next step. This will also allow further detailed evidence to be collected and assessed to fill any remaining gaps in the regulatory impact analysis.

42

[withheld s9(2)(h)]

It is also important to consult with international trade stakeholders including developing country exporters, for example by notifying the WTO TBT Committee at an early appropriate stage and allowing reasonable time for WTO members to make comments in writing.

- 43 The proposed timeline is:
- 43.1 Development of consultation paper for release (April – June 2012)
 - 43.2 Consultation period (July – August 2012)
 - 43.3 Analysis of submissions and policy development (September – October 2012)
 - 43.4 Cabinet policy approval (November 2012)
 - 43.5 Legislative drafting - assuming a decision to proceed (November 2012 – February 2013)
 - 43.6 Legislation introduced (March 2013).
- 44 Subject to a final agreement by Cabinet to adopt plain packaging in New Zealand, legislation could potentially be passed by December 2013 and come into force in 2014. This timeline would allow for the TTMRA issues to be readily resolved, as a solution would have been identified and progressed before the initial 12 month temporary exemption period expires, although it would require an extension of up to a further 12 months before the two regimes became fully aligned.

Progressing other tobacco control initiatives in 2012

45 In addition to plain packaging, the Government has also agreed to consider further, new interventions for achieving the goal of an essentially smoke-free New Zealand by 2025. Plain packaging addresses only the specific problem of residual tobacco advertising and promotion (although it would also increase the effectiveness of other areas of tobacco control). It is my intention to bring other proposals to Cabinet this year to further strengthen our tobacco control policies, for example proposals for additional tobacco excise tax increases. The Government Response to the Māori Affairs tobacco inquiry committed us to setting hard, mid-term outcome targets for reducing smoking prevalence over time to ensure we track to smoke-free 2025.

Consultation

46 This paper was prepared by the Ministry of Health, in consultation with the Ministry of Foreign Affairs and Trade, the Ministry of Economic Development and the Treasury. The Ministries of Justice, Consumer Affairs, Youth Development, and Pacific Island Affairs, Te Puni Kōkiri and the New Zealand Customs Service were also consulted. The Department of the Prime Minister and Cabinet was informed.

Financial implications

47 There are no fiscal implications at present. The proposed policy development work, including the public consultation phase, is covered by existing appropriations and will be undertaken within departmental baselines. Any potential future fiscal implications will be assessed in that work. The indicative costs of defending a future WTO case or international investment arbitration are \$1.5-2 million and \$3-6 million per case, respectively.

Human rights

48 The proposals in this paper are not inconsistent with the Human Rights Act 1993 or 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 harm being addressed and the relatively less significant type of commercial expression involved.

Legislative implications

49 Legislation will be required if plain packaging is adopted in New Zealand, by way of amendment to the Smoke-free Environments Act 1990. To change the requirements for tobacco product labelling and graphic health messages within the scope of the current legislation would require new regulations. Policy approvals will be sought later in 2012, following public consultation.

Regulatory impact analysis

50 The regulatory impact requirements apply to this paper, as it is seeking an intermediate policy decision with potential legislative implications. A regulatory impact statement (RIS) prepared by the Ministry of Health is attached to this paper. Key elements have been summarised and reported in the paper.

51 The Treasury's Regulatory Impact Analysis Team has reviewed the RIS and associated supporting material prepared by the Ministry of Health and considers that the information and analysis summarised in the RIS meets the quality assurance criteria. The process to date has not expressly sought public views on alternative options, and so these will need to be set out clearly in the consultation document.

52 I have considered the analysis and advice of my officials, as summarised in the attached RIS and in this paper. I am satisfied that, aside from the risks and uncertainties already noted, and subject to any new information emerging from the public consultation and further policy development work, the preferred option recommended in this paper is required in the public interest, will deliver the highest net benefits of the practical options available, and is consistent with the commitments in the Government statement *Better Regulation, Less Regulation*.

Gender Implications

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

Disability Perspective

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

Publicity

55 I propose to release a short media statement in due course announcing the decisions taken on this paper and outlining the timeframe for consultation and further steps. The RIS will be published in due course, and I anticipate there will be Official Information Act requests to release this paper.

Recommendations

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

1 **note** that in September 2011 Cabinet agreed to actively consider the introduction of plain packaging in 2012, and sought this report back with further advice on the regulatory impacts and the implications under trade and investment agreements, and on the options, including the option of introducing plain packaging in New Zealand [CAB Min (11) 34/6A refers];

2 **note** there is clear evidence that plain packaging would:

2.1 be an effective measure to reduce the appeal of tobacco products and strengthen the impact of mandated pictorial health warnings;

2.2 build on and support other measures to reduce the death toll and costly disease burden from smoking;

2.3 help meet New Zealand's international commitments under the Framework Convention on Tobacco Control; and

2.4 be a significant step towards the 2025 goal of a smoke-free New Zealand;

3 **note** that the regulatory impact statement attached to this Cabinet paper identifies the introduction of a plain packaging regime for tobacco products in alignment with Australia as the preferred option of the practical options available;

4 **note** that the Ministry of Foreign Affairs and Trade considers that:

4.1 [withheld s9(2)(h)]

4.2 [withheld s9(2)(h)]

- 5 **note** that Ukraine has sought WTO dispute consultations with Australia over its introduction of plain packaging, and that the Minister of Trade has given approval for New Zealand to join the consultations as a third party, in support of Australia's position that it has introduced plain packaging in a manner consistent with its WTO obligations;
- 6 **note** that a consultation document is being developed based on the regulatory impact statement attached to this Cabinet paper;
- 7 **agree** in principle to introduce a plain packaging regime in alignment with Australia, subject to the outcome of a public consultation process to be undertaken before final decisions are made;
- 8 **agree** to review the health warnings and images required under current tobacco labelling regulations (as an integral part of developing a plain packaging regime);
- 9 **invite** the Associate Minister of Health (Hon Tariana Turia) to report back to Social Policy Committee:
 - 9.1 by 30 June 2012 to seek approval for release of the consultation document; and
 - 9.2 by 30 November 2012, following the consultation, with recommendations for final policy decisions.

Hon Tariana Turia
Associate Minister of Health

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