

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

Cabinet Social Policy Committee

**TOBACCO PLAIN PACKAGING: APPROVAL FOR DRAFTING**

**Proposal**

1. This paper sets out matters for inclusion in the legislation for tobacco product plain packaging, and seeks approval for drafting instructions to be issued.

**Executive summary**

2. I intend to introduce legislation to implement plain packaging for tobacco products. A Smoke-free Environments Amendment Bill is on the legislative programme with priority level 5 (to be referred to a select committee in 2013).
3. The key features of the proposed legislation are to:
  - ensure that tobacco products can only be manufactured, packaged and sold in compliance with plain packaging requirements
  - enable regulations to be made to set out the detailed requirements for tobacco product design, appearance, packaging and labelling (including some improvements to the existing provisions with respect to health warnings)
  - create new offences with significant penalties
  - clarify that intellectual property rights to register, own and enforce trade marks and copyright in designs will continue to be protected – it is only the use of trade marks and copyrighted designs as promotional devices on tobacco products and packaging that is being restricted.
4. The model for the legislation is Australia's legislative package for tobacco plain packaging, modified to fit New Zealand circumstances. The intended result is alignment of the tobacco plain packaging schemes in the two countries, consistent with the Trans-Tasman Mutual Recognition Arrangement (TTMRA).
5. My intention to introduce the legislation this year has already been widely publicised and it is important that the legislative process commence on track as a signal of the Government's commitment to implement plain packaging. A first reading and referral to select committee before the end of 2013 will achieve this. Once a bill is introduced, its passage through the House can adhere to standard timelines. This allows time for greater legal certainty over Australia's plain packaging disputes at the World Trade Organisation to emerge. As previously agreed, enacting the legislation, or at least bringing it into force through the subsequent regulations, could be delayed if necessary.
6. Tobacco plain packaging is not the only step needed to enhance New Zealand's comprehensive suite of tobacco control measures in pursuit of the Smoke-free 2025 goal.

**Background**

7. Following an extensive public and international consultation process in 2012, on 18 February 2013 Cabinet [CAB Min(13) 4/16 refers]:
  - agreed to introduce a plain packaging regime for tobacco products and packaging in New Zealand which is in alignment with Australia

- noted that plain packaging of tobacco products will require the introduction of enabling legislation providing for a plain packaging regime and subsequent development of regulations to implement the regime
  - invited the Associate Minister of Health (Hon Tariana Turia) to report to SOC with detailed proposals for a plain packaging regime and associated health warnings, including proposals for legislative amendment.
8. Cabinet also noted that:
- the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but that greater legal certainty may be evident by the time that legislation is enacted in New Zealand if World Trade Organisation (WTO) disputes against Australia advance in good time
  - if necessary, the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained.
9. Plain packaging makes an important additional contribution to the Government's wider, comprehensive package of tobacco control measures based on educating people about the health risks from smoking, preventing young people from starting to smoke, encouraging smokers to quit, and protecting people from the dangers of second-hand smoke, particularly in the workplace.
10. Other recent initiatives include the ongoing programme of annual 10 percent tobacco excise tax increases over 2010-2016, and the use of Government Health Targets to drive the health system to provide better help for smokers to quit. The Government funds Quitline and a range of other smoking cessation support services. Nicotine replacement gums, patches and lozenges and a number of prescription smoking cessation medicines are fully subsidised and readily available.
11. The Government's Smokefree 2025 goal requires significant and ongoing reductions in smoking prevalence. Further measures will continue to need to be considered. Officials are currently working on proposals to reduce or remove the personal excise tax exemptions, including the duty-free entitlement for incoming passengers.

## **Proposals for tobacco plain packaging legislation**

### *Overview of legislative scheme*

13. The proposed tobacco plain packaging regime comprises both primary legislation and secondary regulations. The primary legislation will clearly set out the purpose of the legislation, establish the core plain packaging requirements, create offences and penalties, and clarify that the impacts on intellectual property rights are limited to those that occur as a result of achieving the public health objectives.
14. The key elements are:
- prohibiting the use of tobacco company branding imagery and all other marketing devices on any form of tobacco product packaging, or on tobacco products themselves
  - standardising all other design elements of the pack, such as the colours and type fonts that may be used
  - requiring tobacco product packaging to carry larger, more prominent, and more pertinent health warning messages and graphic images
  - allowing the 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)
  - controlling the design and appearance of individual tobacco products (including cigarettes) to prevent any special treatments and marketing devices, such as embossing or textured materials or unusual shapes and sizes, that might increase their attractiveness or desirability.

### *Clear purpose of legislation*

15. The purpose statement of the legislation needs to clearly reflect the agreed policy objectives for plain packaging, as set out in previous Cabinet papers and the consultation document.
16. The specific purpose of the amendment legislation is to prevent tobacco products and tobacco product packaging from having any effect that might serve to promote or advertise tobacco products or smoking behaviour, so as to:
  - reduce the appeal of tobacco products and smoking, particularly for young people
  - further reduce any wider social acceptance and approval of smoking and tobacco products
  - increase the noticeability and effectiveness of mandated health warning messages and images
  - reduce the likelihood that consumers might acquire false perceptions about the harms of tobacco products.
17. The broader purpose of amending the legislation is to improve public health through the contribution of tobacco plain packaging, in combination with the other elements of New Zealand's comprehensive set of tobacco control measures, to:
  - discourage people from taking up smoking or using tobacco products
  - encourage people to give up smoking and to stop using tobacco products
  - discourage people who have stopped smoking, or no longer use tobacco products, from resuming smoking or tobacco use
  - reduce people's exposure to smoke from tobacco products
  - support New Zealand to meet its international commitments and obligations under the WHO Framework Convention on Tobacco Control (the FCTC).

### *Extensive regulation-making powers*

18. Plain packaging requires tight regulation to remove any opportunity for tobacco companies to use the design and appearance of tobacco products or packaging to promote the products, or smoking behaviour in general, as being in any way desirable or attractive.
19. The regulation-making powers need to be of sufficient scope 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.
20. Restrictive and permissive elements are needed. Regulations will be needed to specify both what features of tobacco products and tobacco packaging will be prohibited and also what will be allowed and under what conditions (eg, specifying what may be printed on the packs and the colours and type fonts that may be used). This includes future-proofing against possible novel marketing gimmicks that tobacco companies may develop to try and enhance the appeal of their products, despite plain packaging.
21. It will also be important for the legislation and regulation-making powers to deal with practical issues relating to supply chain logistics and delivery at point of sale. Examples include being able to allow for bar codes to be displayed and/or covered to the extent necessary as an inventory control device, for example when tobacco cartons are wrapped in cellophane for transport or warehousing in bulk.

### *Avoiding any unwarranted impact on intellectual property*

22. Tobacco plain packaging is not intended to have any detrimental impact on intellectual property rights other than to the extent necessary and warranted to achieve the health purposes set out in paragraphs 16 and 17 above. For example, printed brand names will still be permitted to appear on tobacco packaging, subject to tight controls.
23. There is no intention to limit or otherwise restrict a person's ability to own, register or enforce trade marks and copyright in designs applied to tobacco products and tobacco packaging. The legislative and regulatory package may need to include provisions to confirm that a person may register a trade mark or design even if their use on tobacco products and

packaging is restricted or prohibited. Existing protections in the Trade Marks Act 2002 and the Designs Act 1953 may be adequate, but it may still be helpful to clarify the overall intent of the law.

24. As in the Australian tobacco plain packaging scheme, it is also proposed that regulations will specifically allow for anti-counterfeiting devices to be used, for example so that legitimate tobacco products can be tracked and traced throughout the supply chain.

#### *Larger and more effective pictorial warnings*

25. The Smoke-free Environments Act 1990 provides for a range of labelling, information and health warning requirements for tobacco products to be specified by regulation. The detailed requirements are set out in the Smoke-free Environment Regulations 2007. These mainly relate to health messages and pictorial health warnings on tobacco product packaging.
26. The health warnings and images are currently required to cover 30 percent of the front of a cigarette pack. Under the tobacco plain packaging regime, the health warning messages and graphic images will now be increased to cover 75 percent of the front of the pack (as in Australia). Revised regulations will be required to increase the size of health warnings.
27. It is important that warnings and messages combined with plain packaging work together, not only to dissuade young people from starting to smoke, but also to encourage people who do smoke to make attempts to quit. There is a risk that effective messages to promote quitting, or to reduce the appeal of smoking, might be ruled out if they are not strictly speaking 'health' messages - for example a message that points out the high financial cost of smoking.
28. Ongoing research into the effectiveness of mandatory messages and warnings shows that conventional health warnings are losing salience for those young adult smokers who adopt self-exempting strategies to dismiss the risks of smoking. For example many young people doubt whether graphic warning images of advanced disease actually represent illnesses caused by smoking, and tend to over-interpret the fact that some people smoke into old age without apparent harm. There is emerging evidence that young adults will often find warnings highlighting adverse social effects of smoking more relevant, especially if these depict smoking as socially unappealing or link it to reduced physical attractiveness. International evidence suggests young adults also respond well to messages about industry manipulation and the effects of second-hand smoke.
29. It is therefore also proposed to widen the scope and subject matter for the warnings and images beyond the current narrow definition of 'relating to the effects of use on health' to include messages relating to other detrimental effects of smoking and tobacco use.
30. Further work with New Zealand data is being undertaken to test the potential effectiveness of different options, including existing health messages. As with other matters requiring regulations, the details of the proposed enhanced warning messages will be brought back to Cabinet for approval.

#### *Offences*

31. New offences, consistent with those created in Australia's plain packaging legislation, will need to be created to deter and punish:
  - manufacturing, distributing, possessing for sale, selling, or supplying non-compliant tobacco products or non-compliant retail packaging for tobacco products
  - packaging tobacco products in non-compliant retail packaging or arranging for tobacco products to be packaged in non-compliant retail packaging.
32. It is proposed to create all offences as both fault-based and strict liability offences, with appropriate penalties. Criminal prosecution under the fault-based offences would be reserved for the serious cases of high-level or repeat offending. The creation of strict liability offences allows an infringement notice scheme to operate with respect to low-level offending, for example by small retailers dealing with rare tobacco products.
33. If necessary, it is also proposed to include additional matters of strict liability to ensure the faults-based offences are workable as a deterrent and to avoid the risk that an otherwise

sound prosecution might fail. As an example, the Australian legislation anticipates the difficulty of proving that a non-compliant item was intended for retail sale. This was made a matter of strict liability so that no intention or state of mind needs to be proved. However, this is just one component of the relevant offences – all other aspects of prosecution still need to be proved beyond reasonable doubt.

34. It is also proposed to provide the same exemption as Australia to allow for commercial exports of tobacco products packaged for other markets, while avoiding any risk of diversion for domestic sale. The export exemption would therefore not extend to retail sales for subsequent export. For example, retail sales to departing passengers at a New Zealand airport would still be required to comply with plain packaging requirements.
35. In creating the new offences for plain packaging, there is also likely to be scope for streamlining the existing offences for health warnings and other labelling requirements.

### *Penalties*

36. Penalties for tobacco plain packaging offences need to be set at an appropriately high level to provide a strong deterrent and bring the penalty regime closer to that of comparable consumer laws. The move to tobacco plain packaging reflects another step towards regulating an ultimately lethal product in a way that is commensurate with the harm it causes. Comparability with Australia is also a factor.
37. The maximum penalties for any existing offences under the Smoke-free Environments Act are \$50,000 for bodies corporate and \$10,000 for individuals. Where applicable, the penalties for retailers – many of whom are small businesses – are set considerably lower than for manufacturers, importers and distributors. The highest penalties are reserved for breaches of advertising and sponsorship bans. Breaches of health warning label requirements currently attract a maximum fine of \$10,000 for manufacturers, importers and distributors and \$4,000 for retailers.
38. The levels of penalties under the Smoke-free Environments Act have not increased since it was passed over 20 years ago. Compliance with health warning requirements has been good, and there have been no prosecutions. However, two important factors have changed:
  - retailers are no longer permitted to display tobacco products, so breaches are no longer immediately evident to the public and smoke-free enforcement officers
  - there has been a high level of concerted opposition to plain packaging from the tobacco industry, both domestic and international.
39. Benchmarking of penalties under New Zealand law can be problematic. The Consumer Law Reform Bill currently awaiting its third reading would increase Fair Trading Act fines for offences relating to misleading and deceptive conduct (including in advertising) and product safety from \$60,000 to \$200,000 for individuals, and from \$200,000 to \$600,000 for bodies corporate. The new offences for tobacco plain packaging are similar in substance, including the strict liability component. There is also a similar risk that large traders might factor in any lower level of fines as a cost of doing business rather than seeing it as a sufficient deterrent.
40. In contrast, the Sale and Supply of Alcohol Act 2012 establishes a maximum penalty of a \$20,000 fine for manufacturing, selling or supplying banned alcohol products. The maximum penalty for breaching workplace health and safety requirements (a breach of which is likely to cause direct harm or create a real risk to employees) is \$250,000.
41. The Australian legislation sets maximum penalties for tobacco plain packaging offences of 2000 penalty units (currently A\$340,000) for individuals and 10,000 penalty units (currently A\$1.7 million) for bodies corporate. These are very high by New Zealand standards, although they are consistent with similar offences under Australian competition and consumer law. High penalty levels were already in place in Australia for tobacco health warning requirements before plain packaging, as these are regulated under general consumer law, not under specific 'smoke-free' legislation as in New Zealand.
42. Taking all these factors into account, officials assessed two options for maximum penalties as set out in the table below.

	Option 1	Option 2
Maximum penalty for manufacturers, distributors and large retailers	\$150,000	\$600,000
Maximum penalty in other cases	\$30,000	\$200,000
Comparison with other penalty levels	<ul style="list-style-type: none"> <li>• lower than new Fair Trading Act penalties for similar product promotion offences</li> <li>• much lower than Australian penalties for plain packaging</li> <li>• sizeable increase of current maximum penalties under the Smoke-free Environments Act</li> <li>• lower than workplace health and safety penalties</li> <li>• penalty for small retailers closer to sale of liquor penalties</li> </ul>	<ul style="list-style-type: none"> <li>• same level as Fair Trading Act penalties for similar offences</li> <li>• lower than Australian penalties for plain packaging</li> <li>• very large increase of current maximum penalties under the Smoke-free Environments Act</li> <li>• higher than workplace health and safety penalties</li> <li>• much higher than sale of liquor penalties</li> </ul>
Other considerations	<ul style="list-style-type: none"> <li>• sends a more muted signal of the relative seriousness of plain packaging</li> <li>• could attract adverse comment in contrast with Australian penalty levels</li> <li>• may not be treated as an adequately strong deterrent</li> <li>• smaller penalties for retailers may be seen as more appropriately matched to the scale of most tobacco retail outlets</li> <li>• less powerful signal of commitment to Smokefree 2025 goal</li> </ul>	<ul style="list-style-type: none"> <li>• sends a strong signal of the seriousness of the problem plain packaging is addressing</li> <li>• likely to be welcomed internationally as a serious tobacco control response</li> <li>• same rationale as Australia of comparability with other consumer law offences (even if NZ levels are different)</li> <li>• strong deterrent effect on tobacco industry</li> <li>• lends more weight to the seriousness with which the Government is pursuing the Smokefree 2025 goal</li> </ul>

43. To preserve consistency, it would also be desirable to lift the maximum penalties for other serious advertising and promotion offences already in the Smoke-free Environments Act (ie, those that currently attract a \$50,000 maximum fine) to the same levels. It would be a logical extension to also lift the maximum penalty for not complying with health warning requirements to the same maximum levels. Compliance with health warnings requirements will become an integral part of overall tobacco plain packaging compliance.
44. Officials have therefore concluded it would be possible to combine most of the advantages of both options, and also ensure the maximum penalties for all relevant offences are consistently set at a minimum of \$50,000 for the lowest tier of offender. This paper therefore recommends a hybrid approach:
- Maximum penalty for manufacturers and distributors (ie. tobacco companies) - \$600,000
  - Maximum penalty for large retailers (defined by turnover or tobacco sales) - \$200,000
  - Maximum penalty in all other cases (ie. for small retailers and individuals) - \$50,000
45. It is also proposed to create infringement notice offences with appropriate penalty levels with respect to the new offences. As these are intended to deal with low-level offending only, they can be more easily benchmarked to existing levels in the Smoke-free Environments Act

and other legislation (ie, not normally over \$1000). The maximum penalties would be much lower than Australia<sup>1</sup>, but comparability with Australia is less important when dealing with low level offending through an infringement notice scheme.

#### *Investigation, search and seizure powers*

46. It is proposed to ensure that there are sufficient powers to investigate suspected breaches and obtain evidence, together with appropriate safeguards and obligations that authorised officers need to adhere to when exercising their powers. This may require some amendment to the stand-alone provisions in the Smoke-free Environments Act relating to enforcement officers. Alternatively, these powers may be better legislated for by reference through to the Search and Surveillance Act.

#### *Transitional provisions*

47. [

] However, in the last fortnight Ukraine has taken a procedural step which suggests an intention to get the process moving again.

48. Given the uncertainty about when Australia's WTO challenges may be resolved, it is desirable to provide for entry into force of relevant provisions by Order in Council.
49. The legislation will also include a number of transitional provisions required to bring the scheme into effect smoothly, for example the timeline for bringing into effect the different offences relating to different points in the supply chain. As in Australia, manufacturing will be outlawed some months before retail sale, in order to allow old product to 'wash through'.
50. The regime will need to deal effectively with any product that is legally manufactured before the law comes into force, but not sold in time. Ideally, the transition arrangements will encourage swift compliance with the new regime and not lead to large-scale (re-)exports or excise refunds. At the same time, the administrative burden on the New Zealand Customs Service should be minimised and the tobacco industry should be afforded some reasonable opportunity to adjust to the new regime. This may require some time-limited discretionary powers for the Director-General of Health, or equivalent head of another agency, to manage compliance and enforcement issues in support of a smooth implementation.

#### **Next steps**

51. I wish to proceed with a Smoke-free Environments Amendment Bill including the proposals in this paper before the end of 2013. The intention to introduce the legislation this year has already been widely publicised, and it is an important signal, both domestically and internationally, of a strong commitment to implement plain packaging. (Recently Ireland has announced it intends to legislate for plain packaging, and become the second country in the world to do so. The United Kingdom has postponed a decision on plain packaging, but the Scottish government has stated it intends to legislate for plain packaging in Scotland.)
52. Following introduction, the Bill should continue to progress through Parliament as normal. The timing for enactment of the Bill, the date(s) its provisions would come into force, and the development of subsequent regulations have yet to be determined. This timeline will depend in part on emerging clarity over the possibility of having to defend the legislation against legal challenge from tobacco companies or tobacco-producing countries. Further developments in Australia's WTO challenges while the Bill is progressing through Parliament should help inform this assessment.

<sup>1</sup> The maximum penalties for the tobacco plain packaging strict liability/infringement notice offences in Australia are 60 penalty units (A\$10,200) for individuals and 300 penalty units (A\$51,000) for bodies corporate. These are very high by New Zealand standards.

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### **Consultation**

60. 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, the Treasury, the New Zealand Police, the

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<sup>2</sup> Second-hand smoke refers to the mix of both the smoke from the burning end of a cigarette and the smoke blown into the air by the person smoking. It contains more than 200 known poisons and carcinogens.

Ministry of Pacific Island Affairs and Te Puni Kōkiri. The Department of the Prime Minister and Cabinet was informed.

### **Financial implications**

61. The proposal to proceed to drafting the tobacco plain packaging legislation has been built into departmental baselines and has no additional fiscal implications.

### **Human rights**

62. The proposals in this paper are considered to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Restricting tobacco product design, appearance, packaging and labelling does engage the right to freedom of expression provided for in section 14 of the Bill of Rights Act. However, it is highly likely that the restriction is, under section 5 of the Bill of Rights Act, a justified limitation on the right to freedom of expression. The design, appearance, packaging and labelling being restricted is commercial expression, which may be limited more readily than expression that relates to public decision-making as to political, social, and other public issues.

### **Legislative implications**

63. The proposals in this paper will enable legislation to implement tobacco plain packaging to be drafted and introduced to Parliament this year, as anticipated. A Smoke-free Environments Amendment Bill is on the legislative programme with priority level 5 (ie, to be referred to a select committee in 2013).

### **Regulatory impact analysis**

64. 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.

### **Gender Implications**

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

### **Disability Perspective**

67. The proposals in this paper have no specific implications for people with disabilities.

### **Publicity**

68. As with previous Cabinet papers on plain packaging, I propose that this Cabinet paper and minuted decisions 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.

### **Recommendations**

69. The Associate Minister of Health (Hon Tariana Turia) recommends that the Committee:
1. **note** that on 18 February 2013 Cabinet [CAB Min(13) 4/16 refers]:
    - 1.1. agreed to introduce a plain packaging regime for tobacco products and packaging in New Zealand which is in alignment with Australia;
    - 1.2. noted that plain packaging of tobacco products will require the introduction of enabling legislation providing for a plain packaging regime and subsequent development of regulations to implement the regime;

- 1.3. invited the Associate Minister of Health (Hon Tariana Turia) to report to SOC ... with detailed proposals for a plain packaging regime and associated health warnings, including proposals for legislative amendment;
- 1.4. noted that the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but that greater legal certainty may be evident by the time that legislation is enacted in New Zealand if World Trade Organisation (WTO) disputes against Australia advance in good time;
- 1.5. noted that, if necessary, the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained;

#### Policy objectives for tobacco plain packaging legislation

2. **note** that the policy objectives for plain packaging have been previously set out in SOC (12) 20 and in the July 2012 consultation document: *Proposal to introduce plain packaging of tobacco products in New Zealand*;
3. **confirm** the specific policy objectives for tobacco plain packaging are to:
  - 3.1. reduce the appeal of tobacco products and smoking, particularly for young people;
  - 3.2. further reduce any wider social acceptance and approval of smoking and tobacco products;
  - 3.3. increase the noticeability and effectiveness of mandated health warning messages and images;
  - 3.4. reduce the likelihood that consumers might acquire false perceptions about the harms of tobacco products;
4. **confirm** the wider policy objective for tobacco plain packaging is to improve public health by contributing, in combination with the other elements of New Zealand's comprehensive package of tobacco control measures, to:
  - 4.1. discourage people from taking up smoking or using tobacco products;
  - 4.2. encourage people to give up smoking and to stop using tobacco products;
  - 4.3. discourage people who have stopped smoking, or no longer use tobacco products, from resuming smoking or tobacco use;
  - 4.4. reduce people's exposure to smoke from tobacco products;
  - 4.5. support New Zealand to meet its international commitments and obligations under the WHO Framework Convention on Tobacco Control (the FCTC);

#### Protection of intellectual property

5. **note** that tobacco plain packaging legislation is not intended to have any detrimental impact on intellectual property rights other than to the extent necessary and warranted to achieve the health purposes set out in paragraphs 2 to 4 above;
6. **agree** that the legislation may include a provision to clarify that a person may continue to be able to own, register and enforce trade marks and copyright in designs applied to tobacco products and packaging, even if their use is restricted or prohibited by tobacco plain packaging;

#### Proposals for tobacco plain packaging legislation

7. **agree** that the purpose statements of the tobacco plain packaging legislation need to clearly set out the established policy objectives in paragraphs 2 to 4 above;
8. **agree** 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 (including how approved anti-counterfeiting measures, brand names and other legitimate manufacturer information may be printed);

9. **agree** that the enabling provisions for the regulations relating to health warnings be amended to allow warnings that relate to wider social and economic impacts of smoking to be used, as well as warnings of specific health effects;
10. **agree** to the creation of new offences for tobacco plain packaging that deter and punish:
  - 10.1. manufacturing, distributing, possessing for sale, selling, or supplying tobacco products or retail packaging for tobacco products that does not comply with the tobacco plain packaging requirements;
  - 10.2. packaging tobacco products in non-compliant retail packaging or arranging for tobacco products to be packaged in non-compliant retail packaging;
11. **agree** that tobacco products that are exported from New Zealand in commercial quantities may be exempt from the offences in paragraph 10 above, but that all the offences should still apply in respect of tobacco products that are sold at retail in New Zealand, even if these are subsequently exported;
12. **agree** that the new tobacco plain packaging offences should be created as both fault-based criminal offences with strict liability elements, and also as strict liability offences incorporated into the infringement notice scheme already provided for by the Smoke-free Environments Act 1990 to deal with low-level offending;
13. **agree** that maximum penalties for the new offences be set at:

Manufacturers and distributors	\$600,000
Large retailers	\$200,000
Otherwise (ie. small retailers and individuals)	\$50,000

14. **agree** that existing penalties under the Smoke-free Environments Act 1990 for breaches of tobacco advertising offences that currently attract maximum penalties of \$50,000 be raised to the same levels as in the table in paragraph 13 above, and that penalties for breaches of health warning requirements also be raised to the same levels;
15. **agree** that authorised officers should have sufficient powers to investigate suspected breaches and obtain evidence, together with appropriate safeguards and obligations to adhere to when exercising their powers;
16. **agree** the transitional provisions in the tobacco plain packaging legislation should set a staged timetable for bringing different aspects into effect, including by subsequent Order in Council where appropriate to manage timing matters such as legal risk;
17. **agree** the transitional provisions in the tobacco plain packaging legislation should also ensure that matters such as 'wash through' of non-compliant product are adequately addressed;

#### Authorisation of drafting instructions

18. **invite** the Associate Minister of Health (Hon Tariana Turia) to authorise the issuing of drafting instructions to Parliamentary Counsel Office to amend the Smoke-free Environments Act 1990 to introduce a tobacco plain packaging regime in alignment with Australia and giving effect to the decisions in paragraphs 1 to 17 above;
19. **note** that the tobacco plain packaging Amendment Bill will be submitted to Cabinet Legislative Committee in time for it to be introduced and referred to a select committee in 2013;

Release of Cabinet paper

22. **note** the Associate Minister of Health (Hon Tariana Turia) intends to authorise the proactive release of this Cabinet paper and minute on the Ministry of Health website in due course, subject to any deletions necessary and consistent with the Official Information Act 1982.

Hon Tariana Turia  
Associate Minister of Health

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