

Guidelines for Implementing the Prohibition on the Display of Tobacco Products 2012

Information for sellers of
tobacco products and Smoke-
free Enforcement Officers

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Purpose

The purpose of these guidelines is to provide information to sellers of tobacco products to ensure that they understand the new obligations placed on them when the prohibition on tobacco displays comes into force on 23 July 2012.

These guidelines will also assist Smoke-free Enforcement Officers to enforce the new law.

The aim of providing common guidance to both retailers and Smoke-free Enforcement Officers is to maximise compliance with the new requirements and enable a smooth transition to the new regulatory regime. It is also hoped that the guidelines will help avoid any unnecessary compliance costs or other undesirable impacts on retailers.

Introduction

The Smoke-free Environments (Controls and Enforcement) Amendment Act 2011 (the Amendment Act) prohibits the display of tobacco products at any sales outlet. The provision comes into force on 23 July 2012. A copy of the Amendment Act is available here:

www.legislation.govt.nz/act/public/2011/0053/latest/DLM3418508.html?search=ts_act_Smoke_noresel&p=1&sr=1

Sellers of tobacco will need to ensure that tobacco products are not visible to the public, either inside or outside their premises.

The Amendment Act rewrites section 23A of the Smoke-free Environments Act 1990, that is, the section setting out the requirements and restrictions for tobacco product displays that apply until the Amendment Act comes into force.

The new section 23A requires that anyone offering tobacco products for sale (retail or wholesale) must not allow any part of a tobacco product, tobacco package or tobacco carton to be for any reason visible to the public.

There is an important qualification to the display prohibition: the display prohibition does not:

apply to a tobacco product that is visible only to the extent necessary for it to be delivered –

- (a) to the person at the place or, as the case requires, to the machine; or
- (b) to its purchaser at or from the place or, as the case requires, from the machine.

For the purpose of clarity, point (a) above refers to the delivery of tobacco products to the premises where they are being sold or to a permitted vending machine. Point (b) refers to the delivery of a tobacco product to the customer at the point of sale or from a vending machine.

There is no definition in the legislation as to what is meant by ‘visible only to the extent necessary’. This is a pragmatic, common-sense provision to allow stock to be delivered and sales transactions to be completed without undermining the effect of the new law to remove tobacco products from public display.

Ultimately it would be a matter for the courts to determine what constitutes ‘visible only to the extent necessary’ to deliver the tobacco to the premises or vending machine or customer. However, the meaning of ‘visible to the extent necessary’ would only be tested in the courts if a prosecution were to be brought against a retailer. In order to encourage compliance with the new law and avoid the need for prosecutions to be taken, these guidelines discuss options for avoiding unnecessary incidental visibility during the sale of tobacco products.

The Amendment Act does provide for regulations to be made to prescribe acceptable forms of visible delivery. At present, there are no plans in place to make these regulations. However, this could change if the approach outlined in these guidelines fails to ensure that the intent of the Amendment Act is met.

General principles

1 Preventing public exposure of tobacco products at point of sale

The intent of the new law is to remove tobacco products from commercial display.

Retail displays of tobacco products are a promotional tool and a form of advertising. Other forms of tobacco promotion and advertising are already outlawed under the Smoke-free Environments Act 1990. Exposure to branding and marketing imagery (including exposure through point of sale displays) increases the risk of young people taking up smoking, prompts impulse purchases and increases the risk of relapse among smokers who have quit.

It is desirable that no member of the public, especially young people and recent ex-smokers, should be exposed to the sight of tobacco products in everyday retail settings, including during deliveries or sales.

Any retail arrangements that could allow for the prolonged display of tobacco products (that is, beyond the extent necessary) is a potential breach of the new law.

Sellers of tobacco products should therefore minimise the potential for ‘incidental visibility’ of tobacco products from inside or outside their premises.

2 Avoiding unnecessary compliance costs

It is also desirable that changes to shop fittings and retail practices needed to meet the intent of the law do not impose unnecessary costs or other drawbacks to the operation of retail businesses.

3 The retailer is responsible for compliance

It is a matter for the seller to determine the best method for their business to meet the requirements of the display prohibition, including how the tobacco products are stored and in what location(s).

This gives retailers (or their wholesale suppliers) the flexibility to find and implement compliant solutions that best meet the requirements of the new law and also suit their particular business operations.

This is likely to require modifications both to the way tobacco products are stored in the publicly accessible or publicly visible parts of the premises and also to the way tobacco products are handled in the course of making a sale.

Once the tobacco product has been delivered to the customer, it is no longer the responsibility of the retailer to ensure that the product is not displayed.

4 Simple attempts to cover up existing displays may not be the best option

When considering changes to shop-fittings or business practices, retailers are encouraged to look afresh at the way they retail these products, thus giving retailers the opportunity to ensure that any new storage facilities and retail practices comply with the law while minimising any impact on the business.

Storage options and retail practices should allow the retailer to readily identify and handle tobacco products without exposing the branded imagery on the packs to the public.

For example, the need for a shop assistant to be able to readily identify the particular tobacco product requested without exposing that product to public view could be met by the use of small labels or other codes or marks that:

- are visible and intelligible to the sales assistant, but
- do not constitute display or advertising of the product to the customer or any other member of the public whether on the premises or outside the premises.

5 Showing customers a range of products is no longer permissible

If a customer intends to purchase a tobacco product but is unsure which tobacco product they wish to purchase, it will no longer be permissible to show them the range of products available in their packaging.

The product selection will have to be made from a product and/or price list that can be made available on request from a customer. See below for further information under Price Notices for Tobacco Products.

Suggestions

This section discusses possibilities for compliant storage of tobacco products that the Ministry of Health is aware of from initial discussions with tobacco retailers and groups representing tobacco retail interests.

To best ensure compliance, a tobacco retail storage and delivery system needs to deliberately set out to remove the display component and focus instead on ease of use by shop assistants using techniques that do not display the tobacco company branding and imagery on the packs, and/or allow only fleeting glimpses of a small number of packs at any one time.

In many retail settings the size of the existing tobacco cabinets has been driven by the '2 packs per variety; 100 packs in total, per point of sale' allowance of the old regime. Now that displays are becoming illegal, many retailers will find they do not need such large tobacco units taking up valuable space in their premises.

There are a number of ways that retailers can reduce the risk of non-compliance with the tobacco display prohibition.

1 Under-the-counter storage

If all tobacco products are stored out of customer sight under the counter, for example, in drawers, this would very likely meet the new legal requirements.

2 New purpose-built storage facilities

It may suit some retailers, especially if they have shop refits already planned, to consider installing new purpose-built facilities to handle tobacco products in a way that ensures no products are visible. As noted above, these could potentially be smaller, more efficient and more cost effective than existing tobacco cabinets (which were designed to maximise the impact of tobacco displays).

3 Modified existing cabinets

If under-the-counter drawers or new purpose-built storage units are not a feasible option, then many existing tobacco display cabinets can be satisfactorily modified. If existing cabinetry is retrofitted with doors or other types of coverings (and is in the public view), then using self-closing mechanisms (for example self-closing hinges) would greatly reduce the chances of the cabinetry being left open with tobacco products on display.

If sellers continue to have large display units with simple coverings that are required to be closed by hand after each transaction, the risk of non-compliance will be much higher.

Many existing tobacco display cabinets have transparent strips at the front of the trays or shelves in which the products are placed. These could be replaced with opaque plastic strips that would cover the facing of the tobacco product, ideally ensuring that at most only a portion of the graphic health warning at the top of the pack is still visible while the doors are open.

Other cabinets may suit the use of self-closing flaps covering each shelf or line of product. These could be hinged at the top and lifted to retrieve the requested pack and then allowed to fall back in place under gravity.

A key issue for displaying more tobacco products than the 'extent necessary for it to be delivered' will be how many individual product facings and how much of those product facings are visible at any stage during the process. Clearly, the smaller the number of products visible and the smaller the amount of each that is visible, the greater the chance of compliance with the intent of the law.

For the purposes of obtaining a tobacco product to complete a customer purchase, sellers should ensure that the tobacco storage unit (if in view of customers) is only opened briefly to the extent necessary to retrieve the selected tobacco product and then closed immediately.

As is clear from the discussion in this section, compliance can be readily achieved if the tobacco retailer gives priority to achieving the intent of the law – that is, not allowing the parts of tobacco packages that have branding and promotional imagery to be visible and/or keeping the number of packs that might be briefly visible to a very small number and for only a very brief moment of time.

It will very quickly become evident to the general public and to Smoke-free Enforcement Officers if tobacco retailers are operating in a way that does not attempt to reduce incidental visibility to 'only the extent necessary' to deliver the product.

A customer's selection or purchase of a tobacco product

Sellers should make arrangements to minimise exposure of tobacco products during a transaction. Tobacco products can only be exposed when the staff member (or customer in a legally compliant self-service environment) removes the packet from a cabinet to complete a sale. The cabinet needs to be closed immediately once the tobacco product has been removed.

In other words, cabinets should only be opened to the extent necessary to retrieve the selected tobacco product.

As discussed under General Principles above, relying on the retail assistant being able to see the branded component of the tobacco products themselves in order to identify them increases the risk of excessive exposure to the public. It would be preferable to use an alternative solution, such as a small label in plain text that can be seen by the retail assistant behind the counter but is too small to be seen by customers.

Alternatively, some other system of codes or marks (for example, brand variant initials) could be used to signal the product to the shop assistant without causing it to be displayed. Another option is simply to have a plan of where the tobacco products are stored under the counter, which the retail assistant could easily refer to (many stores already use such 'planograms' to determine where products are stored or situated).

Price notices for tobacco products

Tobacco price notices will no longer be able to be openly displayed. Information that does no more than identify what tobacco products are available and their price can be provided to a person over the age of 18 upon request. This information can only be provided in the form of printed, written or spoken words. When not in use, the printed lists must be kept out of sight – under the counter or in a folder.

Further restrictions and requirements for these printed lists may be subject to future regulation. Regulations could prescribe, among other things, the size, colour and font allowable.

Any other information about tobacco products, unless explicitly allowed by the Act or regulations, could be deemed to be a breach of the tobacco product advertisement provisions.

Restocking/merchandising

To reduce the chances of non-compliance, retailers should consider restocking when the premise is closed or during quiet times.

If restocking is completed during busy times, there is an increased risk that tobacco products will be left in the customers' view.

It would not be acceptable to leave the restocking process to serve customers or do other tasks, unless the tobacco products are removed from sight and any cabinetry closed. Therefore, it is likely to be more convenient to schedule restocking and related activities, such as checking stock, for when the shop is closed or quiet.

Cabinetry should only be opened to the extent necessary to complete the restocking of the products, and the cabinet should be closed immediately once the restocking has occurred (if the cabinet is in customers' view).

Product identification tags

Tags intended to help a seller locate a particular tobacco product contained in a cabinet are permitted as long as the customers cannot easily read these tags.

The use of tags is meant as a practical way for a seller to locate specific products not as a way of advertising or promoting tobacco.

Signage

Tobacco sellers are able to display inside their place of business a sign that indicates that tobacco products are available for sale and their location in the store.

This sign may be subject to future regulation that could prescribe, among other things, the size, colour and font allowable.

Any other references to tobacco or smoking will be deemed to be advertisements and will be prohibited unless they are permitted or required by any subsequent regulations.

The current 'SMOKING KILLS' and 'No Sales to Under 18s' signs will become tobacco product advertisements after 23 July 2012.

Retail or trading names that include references to tobacco

Any display of a retail or trading name that contains words, phrases, trademarks or company names that have the effect of advertising the availability of tobacco products will be prohibited from 23 July 2012. Any business that continues to display these types of names after this date will be liable for prosecution and a fine of up to \$10,000.

Tobacco sales via the internet

The display prohibition includes the sale of tobacco products via the internet. Anyone selling tobacco via the internet in New Zealand must not display tobacco products or any other tobacco-related information on the website or any other electronic document or media.

Offence and penalty for a breach of the tobacco display prohibition

A person who, without reasonable excuse, allows a tobacco product, tobacco package or tobacco carton to be visible in contravention of section 23A(1) or section 23A(2) of the Amendment Act commits an offence and is liable to a fine of up to \$10,000.

Enforcement

Smoke-free Enforcement Officers based in district health boards' public health units are generally responsible for enforcing the smokefree legislation. Smoke-free Enforcement Officers undertake compliance checking and respond to complaints from the public over alleged breaches of the smokefree legislation.

Immediately after the new retail display legislation comes into effect on 23 July 2012, there is likely to be considerable public and media interest in seeing the changes in practice. Smoke-free Enforcement Officers will encourage and support retailers to comply with the legislation and instigate prosecution for cases of deliberate and persistent non-compliance. The Smoke-free Enforcement Officers will take the guidance in this document into account and may discuss interim arrangements to improve the situation until full compliance can be achieved.

It is in everyone's best interests for retailers (and their trade suppliers) to take all necessary steps to comply with the law and avoid public complaints and potential investigation by Smoke-free Enforcement Officers.

Smoke-free Enforcement Officers will also continue to carry out controlled purchase operations where volunteers who are under the age of 18 attempt to purchase tobacco products from retailers. Retailers who sell to a minor are liable for prosecution through the courts and a fine of up to \$10,000 (for a body corporate) or \$5,000 (for an individual). A result of the Amendment Act is that, after 23 July 2012, any person selling tobacco products to a person under 18 years of age could receive an instant fine of up to \$1,000 as an alternative to court proceedings.