

Cabinet Social Policy Committee

Plain packaging of tobacco products

Proposal

- 1 It is proposed that Cabinet agree to introduce a plain packaging regime for tobacco products in alignment with Australia.

Executive summary

- 2 Cabinet Social Policy Committee (SOC) agreed in principle, on 4 April 2012, to introduce a plain packaging regime in alignment with Australia, subject to the outcome of a public consultation process [SOC Min (12) 5/4 refers]. On 2 July 2012, Cabinet Business Committee approved the release of the consultation document, *Proposal to introduce plain packaging of tobacco products in New Zealand*, and the annexed Regulatory Impact Statement [CBC Min (12) 5/6].
- 3 The consultation began on 23 July 2012 and ran until 5 October 2012. The Ministry of Health received 293 substantive individual submissions addressing a set of questions posed in the consultation document. The Ministry also received over 20,000 expressions of support for, or opposition to, the proposal in the form of postcards, petitions and standardised emails and letters.
- 4 Opinions on the proposal were polarised. There was strong support from public health groups, academia, other non-governmental organisations (NGOs) and individuals. Those opposed to the proposal were tobacco companies and associated industries, retailers and international business associations, several tobacco producing countries including Nicaragua, Dominican Republic and Indonesia, and individuals.¹
- 5 The consultation feedback provides a good basis on which to proceed to develop a plain packaging regime. The submissions provided information on certain elements of plain packaging that can be addressed in the development of the details of the proposal. Overall, however, the arguments both for and against the proposal were largely those anticipated, and considered in the policy development to date. There was no significant new information or evidence provided to support claims in opposition to the proposal not already considered when Government agreed in principle to adopt a plain packaging regime.
- 6 The risk that World Trade Organization (WTO) disputes and international investment arbitration cases could be brought against New Zealand if it legislates for plain packaging remains. There would be costs and resourcing implications for Government to defend these. It is possible that the WTO cases against Australia's tobacco plain packaging law will have been completed before New Zealand's

¹ Tobacco producing countries were concerned that the proposals needed to consider New Zealand's obligations under World Trade Organization agreements such as the *Trade Related Aspects of Intellectual Property Rights* and *Technical Barriers to Trade*. An analysis of comments made by submitters is contained in Annex 2 *Submissions analysis on the proposal to introduce plain packaging of tobacco products in New Zealand*.

legislation enters into force, enabling New Zealand to proceed with legal certainty from a WTO law perspective. However it is unlikely that the investment arbitration against Australia will have proceeded sufficiently by the time of enactment of New Zealand's legislation to provide legal certainty from an international investment law perspective.

- 7 It is therefore proposed that the Government agree to introduce a plain packaging regime for tobacco products in alignment with Australia, and proceed to develop policy details to enable legislation to be considered for introduction by August/September 2013.

Background

- 8 On 4 April 2012, Cabinet Social Policy Committee (SOC) agreed 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. It invited the Associate Minister of Health (Hon Tariana Turia) to report to SOC by 30 November 2012, following consultation, with recommendations for final policy decisions on plain packaging [SOC Min (12) 5/4 refers]. On 2 July 2012 Cabinet Business Committee approved the release of the consultation document *Proposal to introduce plain packaging of tobacco products in New Zealand* and the annexed Regulatory Impact Statement [CBC Min (12) 5/6].
- 9 The Ministry of Health's consultation process began on 23 July 2012 with the release of the consultation document *Proposal to introduce plain packaging of tobacco products in New Zealand* (the consultation document). The consultation was open to any interested individuals and attracted submissions from industry, public health groups, trade partners, academia and members of the public.
- 10 By the close of the consultation period, the Ministry of Health had received 293 substantive individual submissions; 239 from within New Zealand and 54 from overseas. Of these 63% were in favour of plain packaging and 37% against. In addition, over 20,000 individuals expressed either support for, or opposition to, the proposal on various standardised form letters, postcards, emails and petitions promoted by industry and public health advocates. Of these 41% were in favour of the proposals and 59% were against. Those in favour were mainly individual members of the public. Those opposed included retailers and tobacco industry representatives (16% of the total) and individuals (43% of the total). Submissions were analysed by an external consultant whose report is attached as annex 2 to this paper².
- 11 Both the tobacco industry and public health NGOs organised activities to encourage opposition to, or support for, the proposal. A group of NGOs circulated postcards and a petition in support of the proposal and created a support website. The three major tobacco companies in New Zealand produced a postcard and a template for retailers to sign and send in opposition to the proposal. A number of retailers used a similar form letter of undeclared origins. A mass media advertising campaign was conducted by British American Tobacco with the tag line 'agree2disagree'. Philip Morris also ran a website campaign. Standard postcards and emails were received from large numbers of individuals generated by these websites.

² Due to timing issues the Ministry analysed three submissions separately.

Comment

12 The policy objective of plain packaging is to augment the current suite of tobacco control measures and further reduce the ability of the tobacco industry to market tobacco products. A particular focus is to prevent tobacco promotion and advertising on tobacco products and tobacco product packaging, in order to:

- reduce the appeal of tobacco products and smoking, particularly for young people;
- reduce the wider social acceptance and approval of smoking and tobacco use;
- increase the noticeability and effectiveness of mandated health warning messages and images; and to
- reduce the likelihood that consumers might acquire false perceptions about the harms of tobacco products.

Combined with the existing package of tobacco control measures, this specific objective contributes to the broader objective of improving public health by:

- discouraging people from taking up smoking or using tobacco products;
- encouraging people to give up smoking and to stop using tobacco products;
- discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
- supporting New Zealand to meet its international commitments and obligations under the WHO Framework Convention on Tobacco Control (the FCTC), particularly in relation to the guidelines developed to support implementation of Article 11 on packaging and labelling, and Article 13 on advertising, promotion and sponsorship.

13 The consultation document and regulatory impact statement set out the evidence demonstrating that plain packaging would meet these objectives. Since the consultation document was prepared two new studies have been published that reinforce the evidence base in support of the contention that branded packs promote tobacco appeal and hamper health warnings. One of these studies included a survey of public opinion in New Zealand showing strong support for plain packaging.^{3,4}

14 Although the consultation process showed strongly polarised opinions, it has provided reasonable confidence in the proposal and a good basis on which to proceed to detailed development. Submitters in favour, including public health groups, academia, other NGOs and individuals, confirmed arguments set out in the consultation document in favour of plain packaging.

³ Hoek, J. et al. Strong public support for plain packaging of tobacco products *Australian and New Zealand Journal of Public Health*. 36:405-407 doi:10.1111/j.1753-6405.2012.00907.x.

⁴ White, C.M. et al. 2012. "The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study". *BMC Public Health* 2012, 12:737 doi:10.1186/1471-2458-12-737

- 15 Opposition to the proposal came from tobacco companies, retailers, and associated industries as well as from individuals, some tobacco producing countries and international groups. They raised a number of issues, which have been analysed by officials. A summary of the concerns and the responses to them is attached as annex 1 to this cabinet paper. Some of the issues raised represent genuine concerns, but relate to technical implementation which can be addressed through the detail of the regulation. No significant new evidence or information has been raised that would suggest that the Government should not proceed with the proposal.
- 16 There is an on-going risk that New Zealand will face international legal proceedings if it implements the proposal, as Australia has faced with the Ukraine, Honduras and the Dominican Republic alleging breach of WTO obligations, under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), and the *Agreement on Technical Barriers to Trade* (TBT Agreement). WTO dispute panels requested by Ukraine, Honduras and the Dominican Republic are in various stages of establishment to examine the consistency of Australia's plain packaging legislation with these WTO obligations. Typically, WTO disputes take about 18 months from panel establishment to final Appellate Body decision. However due to a combination of the complexity of the issues in this instance, the record number of third party participants, and the likelihood that the three Panels will be combined, MFAT notes that there is a risk that the Australia process may take longer than average. Therefore, results from these challenges are not expected before mid-2014, and could be even later. [
- withheld s.9(2)(h)
- 17 There is a further risk of an international arbitration challenge from tobacco companies under bilateral investment treaties, such as that faced by Australia from Philip Morris Asia under Australia's bilateral investment treaty with Hong Kong. [
- withheld s.9(2)(h)
- 18 Regardless of the strength of New Zealand's case, the possibility of international dispute proceedings are a risk for New Zealand and defending them would require significant investment of resources. However these risks will be significantly mitigated if the Australia disputes conclude prior to the enactment of New Zealand's legislation. In that regard, it is possible that the WTO cases will conclude in time but the investment arbitration is likely to take a longer period of time.
- 19 In order to incorporate any possible changes to the plain packaging regime that might be desirable in light of the final outcome of the WTO challenges to Australia's legislation, it is proposed that regulations, provided for under the proposed amending legislation, not be made until after conclusion of the Australian WTO dispute process.
- 20 Submitters' views were divided on whether a New Zealand scheme should align with Australia, but there were no convincing reasons advanced for a substantially different approach.
- 21 From 1 December 2012 Australia's plain packaging legislation came fully into force. A 12-month temporary exemption under the Trans-Tasman Mutual Recognition Arrangement (TTMRA) preventing sale of New Zealand tobacco

products in Australia will end on 1 October 2013. However if the Australian and New Zealand regulatory regimes are not aligned by then there are provisions to enable the initial temporary exemption to be extended, or made permanent, to prevent 'branded' New Zealand tobacco products from being sold in Australia to circumvent Australian plain packaging legislation. If New Zealand implements a plain packaging regime the need to maintain the exemption can be reviewed.

- 22 The plain packaging proposal set out in the consultation document included increasing the size of health warnings to align with Australia, which has increased the proportion of the front of the pack to be covered by warnings to 75%. It was also proposed to review and update the images used. This paper proposes that the Ministry of Health begin developing policy on the size and content of health warnings, in conjunction with developing plain packaging policy.
- 23 In summary, the consultation process did not uncover substantial new evidence relating to the proposal that was not available to Government when it made its 'in principle' decision to introduce plain packaging. However it did reveal strong feelings both in opposition to and in favour of requiring plain packaging of tobacco products. The arguments that plain packaging would work as intended are strong and no other regulatory or non-regulatory options for effectively meeting the Government's specific policy objective have been identified. There is no additional information provided through the consultation process that would justify any fundamental change in Government's policy. As noted in paragraph 13 above, there is published survey evidence that wider public opinion is supportive of introducing plain packaging. I therefore propose that New Zealand should develop a plain packaging regime. The regime would closely align with Australia – although there would need to be some variations to take account of specific New Zealand requirements such as warning messages in Te Reo Māori and the New Zealand specific Quitline number.
- 24 An amendment to the primary legislation would enable the regime and set offences and penalties, closely modelled on the Australian regime, but consistent with the New Zealand context. The details of the appearance of the packs, including warnings, would be prescribed by regulations.

Consultation

- 25 The Treasury, the Ministry of Foreign Affairs and Trade, the Ministry of Business, Innovation and Employment, the Ministry of Justice, the Ministry of Consumer Affairs, the Ministry of Youth Development, and the Ministry of Pacific Island Affairs, Te Puni Kōkiri and the New Zealand Customs Service were consulted on the paper and the Department of the Prime Minister and Cabinet was informed.

Financial implications

- 26 There will be financial implications for the tobacco manufacturing and retail industries resulting from this proposal, which have been analysed in the Regulatory Impact Statement. There will also be financial implications for the Government if New Zealand is forced to defend a WTO challenge or international investment arbitration, as happened in Australia's case. The cost of defending such legal challenges is not known at this stage, but has been estimated to be in the order of \$1.5 million - \$2 million for a WTO challenge and \$3-6 million for an investment arbitration.

Human rights

- 27 The implications of plain packaging for the Bill of Rights Act 1990 were part of the consultation process which produced opposing views. The Ministry of Health also received comment from the Ministry of Justice expressing the view that 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 it is considered 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.

Legislative implications

- 28 The recommendations in this paper require the drafting of legislation. This will most likely be by way of an amendment to the Smoke-free Environments Act 1990.

Regulatory impact analysis

- 29 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached as Annex 3. This is an updated version of the RIS prepared in March 2012, including a summary of the consultation undertaken.
- 30 The Regulatory Impact Analysis Team has reviewed the RIS prepared by the Ministry of Health and associated supporting material, and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.
- 31 I have considered the analysis and advice of my officials, as summarised in the attached RIS and I am satisfied that, aside from the risks and uncertainties already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
- are required in the public interest
 - will deliver the highest net benefits of the practical options available, and are consistent with our commitments in the Government statement *Better Regulation, Less Regulation*.

Gender Implications

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

Disability Perspective

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

Publicity

- 34 The Government's decision on this issue will be of significant public interest. I will release a media statement advising the Government's decision, the reasons for it, and probable timelines for implementation. The timing of this announcement is likely to fall during Round 15 of the Trans-Pacific Partnership negotiations in Auckland (2-12 December 2012). This may generate extra interest in the announcement.

Recommendations

35 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, and invited the Associate Minister of Health (Hon Tariana Turia) to report to SOC by 30 November 2012 with recommendations for final policy decisions on plain packaging [SOC Min (12) 5/4 refers];
- 2 **Note** that the Ministry of Health conducted a consultation process between 23 July 2012 and 5 October 2012, receiving 295 substantive submissions and over twenty thousand postcards, form letters and signatures on petitions either in support of or opposing plain packaging of tobacco products;
- 3 **Note** that opinions submitted in response to the consultation document were polarised on the introduction of plain packaging of tobacco products but that no new evidence has emerged from the consultation process to suggest that Government should reverse its policy commitment in this area;
- 4 **Note** that the weight of evidence is strongly in favour of plain packaging as a means of reducing the appeal and social approval of smoking, making health warnings more noticeable and effective, and removing the impression that tobacco may be less harmful than it is;
- 5 **Note** that plain packaging would make an important additional contribution to the Government's wider, comprehensive package of tobacco control measures, designed to discourage people from taking up smoking or using tobacco products, encouraging people to quit smoking, supporting people who have quit smoking not to relapse, and helping New Zealand meet its international obligations and commitments under the WHO Framework Convention on Tobacco Control (particularly in relation to guidelines for implementing Articles 11 and 13);
- 6 **Note** that no other regulatory or non-regulatory options for effectively meeting the Government's specific policy objective have been identified;
- 7 **Agree** to introduce a plain packaging regime for tobacco products and packaging in New Zealand which is in alignment with Australia;
- 8 **Note** that there will be some minor features such as the warning messages in Te Reo Māori and the New Zealand Quitline number that would be different from Australia;
- 9 **Note** 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;
- 10 **Invite** the Associate Minister of Health (Hon Tariana Turia) to report back to SOC by 31 May 2013 with detailed proposals for a plain packaging regime and associated health warnings, including proposals for legislative amendment.

11 Note that the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but greater legal certainty may be evident by the time legislation is enacted in New Zealand if WTO disputes against Australia advance in good time, so that if necessary, the making of regulations could be delayed until the Australia cases conclude and certainty regarding WTO legal implications is obtained;

12 Note that once Cabinet has made a decision to introduce plain packaging, the Ministry of Health intends to publish on its website the analysis of submissions to the consultation process.

Tariana Turia.

Hon Tariana Turia
Associate Minister of Health

27 / 11 / 12.

Analysis of concerns raised by the consultation process on the plain packaging of tobacco products.

	Claim	Comment
<i>Evidence base.</i>	There is no evidence that plain packaging will reduce the prevalence of smoking.	<p>Plain packaging is expected to complement other measures to prevent (especially young) people starting smoking and helping people to stop.</p> <p>There is a strong body of evidence, based on a variety of peer-reviewed studies and covering different methodologies, that establishes the promotional impact of packaging, and the effectiveness of plain packaging in contributing to reducing the appeal of tobacco products, increasing the impact of warnings and reducing misperceptions by consumers about the harmfulness of smoking.</p> <p>There has not yet been the opportunity to conduct empirical studies on the impact of plain packaging on a wholesale scale. This will only be possible following implementation of the measure. This cannot, however, be used to dismiss the efficacy of the studies that have been undertaken.</p> <p>Australia's measure entered fully into force on 1 December 2012, and will in due course confirm existing evidence of the efficacy of plain packaging on a large scale. However, the total effect may take several years to become fully evident.</p>
	Credibility of the evidence.	<p>The evidence relied upon by New Zealand officials in forming the view as to the efficacy of plain packaging is from peer-reviewed studies. The credibility of the evidence is strengthened by its sources: it is based on studies from a variety of samples and study sites; it is composed of studies of different methodologies; and assessed different types of plain packaging proposals. The consistency of the evidence across studies confirms the credibility of the evidence.</p> <p>Claims to the contrary by the tobacco</p>

		industry are to be expected, but ignore the standard of current research.
	Branded packs are not intended to increase tobacco consumption but are only intended to compete between brands.	Several studies demonstrate that the combined effect of all tobacco companies using branded packaging and the sophisticated marketing treatments is to increase the appeal of tobacco products and counter the effect of public health warnings and other measures designed to discourage tobacco use.
<i>Need.</i>	There is no need for plain packaging, as packaging is already hidden from view in retail stores.	The display controls put in place on 23 July 2012 have been an important step in further restricting the advertising and promotional marketing of tobacco products. However once these products have been purchased there are no controls over their display. Cigarette packets are likely to be taken out many times every day, often in front of children or vulnerable people, and this acts as a significant advertising medium for tobacco products. Plain packaging targets the on-going advertising capacity of the products once they have been purchased by the consumer.
	The effectiveness of display bans should be assessed before introducing new measures.	Tobacco control is based on the interaction of a suite of measures. Plain packaging is expected to complement display bans and does not purport to be an alternative to display bans. It is also targeted at a different problem: the on-going advertising capacity of the products once they have been purchased by the consumer.
	Other tobacco control measures should be enhanced first, e.g. better enforcement of prohibition of sales to minors.	Penalties for sales to minors have been increased and an infringement notice scheme has been introduced to simplify and speed up prosecutions. Reducing smoking initiation by young adults over the age of 18 is also a legitimate and important policy target, given the risk of establishing a long-term addiction that results in serious health problems and risk of premature death.
<i>Competition and consumer issues</i>	Plain packaging would lead to competition based on price	Price competition already exists and will not inevitably increase as a result

	<p>alone and a decline in premium brands. This would have the perverse incentive of increasing consumption of tobacco products.</p>	<p>of plain packaging. Excise tax increases will ensure that price remains an effective deterrent for smokers. The level of tobacco excise sets an effective minimum price floor, and tobacco excise is being increased by 10% plus any inflation adjustment for at least the next four years.</p>
	<p>Plain packaging would reduce capacity to compete, leading to difficulty for new brands to enter the market. This would infringe consumer rights to information about products and choice based on branding.</p>	<p>The banning of retail displays already prevents smokers from viewing the product prior to purchasing. Plain packaging is not apparent to the consumer until after purchase has been made so would not result in a significant additional impact on competition.</p>
<i>Illegal activity</i>	<p>There would be a rise in untaxed tobacco products (smuggling) and counterfeit products.</p>	<p>Plain packaging is not literally 'plain' and no evidence has been provided to back up the claim that counterfeiting would become easier following implementation of plain packaging.</p> <p>Under a plain packaging regime, tobacco companies would be permitted to use sophisticated anti-counterfeiting measures, so it is considered unlikely that the plain packaging of products would influence decisions to produce illegal products.</p> <p>If necessary the government can also further reduce illicit trade in tobacco products by other methods, such as increasing its monitoring and policing of illegal tobacco activity and also closing off sources of supply such as the duty-free concessions, including for home-grown/residential manufacture.</p>
<i>Precedent</i>	<p>It would lead to greater regulatory control over other consumer products such as alcohol.</p>	<p>This measure is specifically for tobacco products, and is predicated on the unique harm caused by tobacco.</p>
<i>Retailer issues</i>	<p>It will have an adverse effect on retailers who will not be able to sell the same volume of product.</p>	<p>The objective of all tobacco control measures is to reduce the consumption of tobacco and prevalence of smoking. This may impact on the profitability of some businesses, but this loss is outweighed by the gains to the country from the improved health of New Zealanders.</p>
	<p>Operational costs and transaction times would be increased leading to customer</p>	<p>No evidence was provided to support this claim and there is no reason to believe that plain packaging will</p>

	<p>frustration, risk of shoplifting and loss of personal safety due to spending more time with their backs to customers searching for a particular brand.</p>	<p>necessarily lead to longer transaction times.</p> <p>There has been one academic study⁵ that undertook a simulation experiment to test these claims and found that the average transaction was significantly quicker for plain compared with coloured packs. The authors suggested that this might be because a variety of colours and inconsistent location of brand names were distractions when participants scanned for brands.</p> <p>Security issues can be dealt with by effective design of retail premises.</p>
<i>Manufacturer issues</i>	<p>The proposal is an infringement of the rights of tobacco companies dealing in a legal product, as it would appropriate their intellectual property.</p>	<p>The proposal would extend limitations on the use of trade marks already provided for in the Smoke-free Environments Act 1990. It is not an expropriation of a property right by the Government.</p> <p>Being a legal product does not mean that tobacco products should be insulated from regulation. They are already highly regulated and controlled. Current legislation already abridges commercial rights, e.g. to advertise, in response to the addictive nature of the product, the harm it causes, and the proven dangers of allowing the product to be promoted and marketed like 'harmless' products. Plain packaging is a logical extension to current law.</p> <p>Smoke-free legislation already restricts the use of tobacco company trademarks, logos and related colours, designs etc. Tobacco products need to be tightly controlled in the interests of public health, and in order to fulfil WHO FCTC commitments.</p>
<i>Trade implications</i>	<p>The proposal would lead to a breach of New Zealand's WTO obligations such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Technical Barriers to Trade (TBT Agreement). This would lead</p>	<p>The consistency of plain packaging with the WTO agreements will be confirmed in due course through the WTO dispute settlement processes initiated against Australia's plain packaging requirements. If those processes proceed in reasonable time, such confirmation will be obtained prior to the enactment of New Zealand's</p>

⁵ Carter O, et al 2012 Measuring the effect of cigarette plain packaging on transaction times and selection errors in a simulation experiment, *Tob Control* 2012;21:572-577 doi:10.1136/tobaccocontrol-2011-050087

	to a loss of New Zealand's reputation as a country to do business with.	plain packaging regime. If necessary, New Zealand could delay the making of regulations until the Australia cases conclude and certainty regarding WTO legal implications is obtained.
	The proposal undermines New Zealand's free trade credentials.	The architects of both the WTO and the FCTC regimes anticipated that public health and tobacco control should be consistent with free trade and vice versa.

