

## Better Retail Controls on Tobacco

### Agency disclosure statement

This Regulatory Impact Statement has been prepared by the Ministry of Health.

It provides an analysis of options to deal with the problems caused by continuing to allow tobacco displays in retail outlets. Some related issues with the current regulatory controls for tobacco retail are also considered.

The preferred option is a package of amendments to the Smoke-free Environments Act to:

- prohibit the retail display of tobacco products
- prevent the use of trading names in a way that advertises tobacco products
- provide smoke-free enforcement officers with stronger powers of information discovery to aid their investigation of compliance with the regulatory controls on tobacco retailing
- provide smoke-free enforcement officers with infringement notice powers to issue fines to retailers who sell tobacco products to people under 18 of age.

The analysis assesses these proposals within the wider context of:

- the continued high level of harm caused by tobacco and the significant health, social and economic burden it causes
- the Government's international commitments to introduce a coherent set of policies to address the harm caused by smoking, including a comprehensive ban on all forms of tobacco advertising
- the role the proposals can play in supporting the effectiveness and value for money of other measures already taken to both reduce smoking initiation by young people and also encourage and support smokers to quit
- the extensive consultation undertaken on the proposal to prohibit retail tobacco displays since 2007, most recently through a detailed consultation letter issued in March 2010.

Within this wider context, the level and type of analysis undertaken on the specific issue of retail tobacco displays is commensurate with the implications of taking this additional step at this time. The weight of submissions and evidence received during the consultation, together with other research evidence, overseas experience and indications of public opinion, provides sufficient analytical support to warrant progressing with the proposal.

The major regulatory impact of the proposal arises from the costs that removing existing tobacco displays in retail outlets would impose on those businesses, primarily the need to modify shop-fittings in order to comply. Representative costs have been assessed and analysed for a range of situations.

A key aspect of the proposal is to further assess and minimise these costs by working with retailers to identify workable solutions and allow for flexibility over compliant methods and timeframes for implementation. These refinements to the proposal would be introduced through subsequent regulations to be promulgated under the amended Act. This process will ensure that any gaps or uncertainties in the assessment of business impacts and compliance costs are addressed before the final regulatory details are confirmed.

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Deputy Director-General

12 October 2010

## Status quo and problem definition

1. The specific issue addressed by this regulatory impact statement is the adequacy of current regulatory controls on the marketing and retail supply of tobacco, and in particular the restrictions on the display of tobacco products at point of sale.
2. First, some brief introductory discussion is warranted to clearly establish the high social costs caused by smoking and the range of mutually supporting initiatives that make up the Government policy response. This context is important because the case for taking action on retail tobacco displays rests in part on how this interacts with the wider package of measures addressing the wider smoking problem.

### *Context*

3. Smoking is the single leading preventable cause of early death in New Zealand. Half of all long-term smokers die of a smoking related illness losing an average of 15 years of life. An estimated 5000 New Zealanders die each year due to direct smoking or exposure to second-hand smoke.
4. Smoking causes around 85% per cent of lung cancers, which are the leading cause of cancer death in New Zealand, and is linked to many other types of cancer. It is a major cause of heart attacks, strokes, other cardiovascular diseases, major respiratory diseases such as emphysema, bronchitis, and asthma, and also a range of other conditions including blindness and infertility. The Ministry's current estimate of the additional health system cost that can be attributed to smoking related disease is \$1.9 billion per annum.
5. Smoking rates have been falling since the 1970s as successive Governments have increasingly taken a comprehensive approach to addressing the harm caused by smoking. Currently the key components of tobacco control policy are:
  - raising the price of tobacco through excise tax increases (most recently in April 2010)
  - adopting 'Better Help for Smokers to Quit' as one of the six priority targets for the health sector in 2009. This target is driving clinicians to systematically assess and address the smoking status of hospital patients. The approach is now being extended into the primary health care sector
  - significant government-funded smoking cessation services such as Quitline and subsidised nicotine replacement therapy (gums, lozenges and patches) and other pharmaceuticals
  - media campaigns, such as the Health Sponsorship Council's *Smoking Not Our Future* campaign targeted at preventing young people from taking up smoking and the *Face the Facts* campaign aimed to encourage smokers to quit, particularly among target populations such as Māori and pregnant women
  - the legal protections from second-hand smoke and controls on tobacco in the Smoke-free Environments Act 1990 and subsequent amendments and regulations (SFEA).
6. Despite all these measures, about 650,000 New Zealanders, or one in every five people over the age of 15, continue to put their health and lives at significant risk by smoking on a daily basis.
7. The persistence of these high levels of smoking is directly related to the highly addictive properties of the nicotine contained in tobacco. However, unlike other similarly dangerous addictive substances, tobacco is a legal product and smoking a socially entrenched behaviour. This is in large part due to decades of concerted and sophisticated commercial marketing by tobacco companies.

*Retail tobacco displays*

8. The SFEA restricts the promotion of tobacco and prohibits advertising of tobacco products in all media, including both inside and outside retail outlets.
9. However, tobacco products available for sale may still be legally displayed in retail premises, subject to a number of restrictions, including:
  - tobacco products must not be visible from public places outside the retail premises
  - at each point of sale, the tobacco display is limited to a maximum of 100 cigarette packets and 40 cartons
  - each tobacco display may include a maximum of two packets of the same variant
  - tobacco products may not be displayed within one metre of certain products such as confectionery and ice cream, soft drinks and products that are marketed primarily for children
  - tobacco products may not be displayed on a counter top or similar surface
  - if tobacco products are displayed within two metres of a point of sale, a sign stating 'SMOKING KILLS' must be displayed in clear view of the customer at the point of sale (the Ministry of Health supplies free signage).
10. At issue is the continued adequacy and effectiveness of these regulatory restrictions on retail displays in light of both:
  - the way the industry has responded to these restrictions over time, and
  - new understandings of the role of retail tobacco displays in promoting smoking and undermining other elements of the Government's tobacco control initiatives.
11. Retail tobacco displays are a common feature in some 10,000 dairies, convenience and grocery stores, supermarkets and petrol stations.
12. With the prohibition of other forms of tobacco advertising and promotion, tobacco companies have responded by channelling their marketing efforts into maximising the impact of the allowable retail displays.<sup>1</sup> In most retail outlets the tobacco displays have been designed, specified or supplied free of charge by tobacco companies as part of a sophisticated marketing approach designed to maximise awareness of the existence and ready availability of tobacco products.
13. In many retail settings the spatial separation of one metre from children's products still allows a visual impression of 'normality' alongside displays of snack foods, confectionery, magazines and other so-called 'impulse' purchase items. Retailers with more than one point of sale often put shelving units side by side to create a visually larger display, sometimes referred to as a 'power wall'. These prominent tobacco displays are a feature particularly of larger convenience stores and petrol stations.
14. There is reasonable body of research evidence about the role retail tobacco displays play in 'normalising' tobacco, increasing the likelihood that children and young people will start smoking, and prompting impulse purchases among ex-smokers and smokers trying to quit. (see **Summary of evidence of the problems presented by retail tobacco displays** which is attached as an appendix.)
15. The research evidence concerning tobacco displays is open to the criticism that it is largely based on surveying people's responses to tobacco displays. The influence of tobacco displays on young people's smoking has been more researched than the

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<sup>1</sup> For example, the number of brand variants available for sale in New Zealand increased by 21% from 152 in 2002 to 184 in 2006. The restriction to display only two packs of each brand variant at each point of sale was introduced in 2003.

impact of displays in hampering quit attempts. In both cases it is difficult to prove cause and effect. However, most of the research points in the same direction, and supports the identification of retail tobacco displays as a regulatory problem.

16. In summary, the key problems with existing tobacco displays are :

- children and young people are regularly exposed (in around 10,000 retail outlets) to prominent commercial display of a product that is not an ordinary consumer good, but a highly addictive and harmful substance
- smokers who are trying to quit or who have successfully quit are similarly regularly exposed to the prominent visual cue of tobacco displays, potentially triggering relapse
- displays present tobacco products in a way that disguises and reduces the effectiveness of the graphic pictorial warnings required on tobacco packaging to show the variety of dangerous health consequences of smoking
- tobacco displays are an exception to the general ban on tobacco advertising in New Zealand. As the main residual form of advertising open to them, tobacco companies have invested considerable resources into designing, placing and furnishing the displays in a way that maximises their promotional impact.

17. Retail tobacco displays are also problematic in terms of New Zealand's international commitments. Current tobacco policy settings reflect the objectives, principles and key elements of the World Health Organization's Framework Convention on Tobacco Control (FCTC), which New Zealand has ratified and which came into force in 2005. Amongst other commitments under the FCTC, 170 participating countries including New Zealand have agreed to comprehensively prohibit all forms of tobacco advertising. Subsequent guidelines developed by participating countries to assist in implementation have clarified that retail displays are considered to be a form of tobacco advertising.

*Related issues with current regulatory controls on advertising*

18. The SFEA currently also allows some terms that effectively advertise the availability of tobacco to be used as part of a retailer's trading name, including in signs on the exterior of a retail business. This was intended to allow retailers to continue trading under their established names, but it has also resulted in new trading names being adopted. Continuing to allow exterior advertising through tobacco-related business names would look increasingly anomalous if retail displays are prohibited, and this could be exploited.

19. There has been a recent increase in the number of businesses trading under names suggesting cheap tobacco or holding themselves out as specialist tobacconists (as reported by smoke-free enforcement officers). References to discount tobacco are a particular concern because selling tobacco at temporarily reduced or discount prices is not permitted. The increase in these names appears to be linked to the tobacco excise increase in April 2010, in the same way as the tobacco companies have absorbed some of the excise rise on lower cost brands marketed to lower income and price sensitive smokers (who have higher rates of smoking than the general population). Increased use of the term "tobacconist" appears to be linked to the recent consultation on the proposal to remove tobacco displays from retail outlets. The current point of sale display limits do not apply to "tobacconists" and some businesses appear to be positioning themselves for possible exemptions from tighter display controls.

20. There are also provisions in the Smoke-free Environments Act that regulate the advertising of smoking accessories (as a potential avenue for marketing imagery suggestive of smoking), display and signage requirements for automatic vending machines, rules for 'Smoking Kills' signs, price lists etc. While not currently problematic of themselves, these provisions would need to be kept relevant and internally consistent in conjunction with any amendment to the regulations on retail displays.

*Enforcement and compliance issues*

21. The SFEA provides for the appointment of smoke-free enforcement officers to enforce its provisions through investigation of complaints and the collection of evidence. These officers are employed by the Public Health Units of the District Health Boards.
22. Smoke-free enforcement officers respond to complaints of alleged breaches of the legislation, and also undertake proactive enforcement and compliance work such as controlled purchase operations, where a young volunteer under the age of 18 attempts to purchase tobacco.
23. Anyone who supplies tobacco or herbal smoking products to a person under the age of 18 years commits an offence punishable by a fine up to \$2,000. Prosecutions of this offence are cumbersome and costly, with more than \$50,000 spent in 2009 on Crown Solicitor fees alone. The average penalty imposed by the Courts was \$300, and total fines amounted to less than \$5000. In a number of cases involving young defendants or first-time offenders the Courts have discharged the defendant without conviction. Prosecutions are not taken against anyone under the age of 17.

*Suspected misuse of 'normal' trade discount and rebate provisions*

24. The SFEA prohibits inducements such as reward schemes, free gifts, cash rebates and supplying tobacco at a reduced charge. However an exception is made for a "normal trade discount or normal trade rebate".
25. It is apparent that rebate schemes operated by tobacco companies for retailers and linked to sales volumes are commonplace. The Ministry suspects these rebates breach the law, but has been unable to fully investigate or take action because it lacks the power to require tobacco companies to disclose details of the schemes. The industry and retailers claim the terms of their agreements are subject to confidentiality provisions, and that disclosure would put them in breach of contract.

**Objectives**

1. The over-arching policy objective is to ensure that the regulatory controls on the commercial marketing and retail supply of tobacco support the Government's overall policy goal of reducing smoking, are consistent with New Zealand's international commitments, and do not undermine the effectiveness of other key initiatives such as tobacco excise increases, graphic pictorial warnings, media campaigns and the Government's priority health target (Better Help for Smokers to Quit).
2. In particular, a specific objective is to counter the impact of retail displays of tobacco which:
  - increase the susceptibility of young people to start smoking
  - can trigger relapses among smokers attempting to quit
  - provide a means for tobacco companies to effectively advertise their product, despite international agreements and New Zealand law to ban tobacco advertising
  - contribute to perceptions of tobacco as a 'normal' or even desirable consumer good, undermining the effectiveness of health warnings to inform the public of the risks of smoking and media campaigns designed to discourage it.

## Regulatory Impact Analysis

### *Options*

#### **A The proposed option:**

26. The proposed option is to implement a comprehensive package of improvements to the current regulatory arrangements for the retail supply of tobacco products.
27. The package would include a combination of amendments to the Smoke-free Environments Act, and subsequent regulations to be promulgated under the amended Act, covering:
  - Preventing the display of tobacco products in everyday retail settings
  - Preventing trading names with terms like “discount tobacconist” from being displayed in a manner akin to advertising (eg. on signs or hoardings)
  - New powers to improve enforcement and compliance with existing regulatory controls on tobacco retailing, including:
    - infringement notice powers for sale of tobacco to under-18s
    - a requirement for retailers to provide enforcement officers with information or records, including enhanced powers of entry, search, and seizure to discover information and records where necessary
    - resolution of the “normal trade discount/rebate” issue.

#### *Retail displays*

28. The central proposal in this package is to extend the current controls on the advertising and promotion of tobacco products by prohibiting visual display for sale. This would be implemented by a combination of amendments to the Act and subsequent regulations.
29. It is proposed to work the subsequent regulations up with input from retailers and smoke-free enforcement officers to ensure effective and workable solutions that achieve the policy goal but minimise as far as possible the regulatory impacts and compliance costs, relative to the size of the businesses affected.
30. This will require amending the current regulation-making powers under the Act to ensure resulting regulations can provide appropriate flexibility over complying options for different types of business, and also allow for adequate lead-in time for compliance.

#### *Restrict trading names to avoid tobacco advertising*

31. The SFEA would be amended to enable certain terms in trading names to be prohibited by regulation, with reasonable timeframes to recognise existing use.
32. Regulations would also be used to deal with a number of related details such as display of smoking accessories (which could otherwise provide an avenue for tobacco companies to portray general marketing imagery suggestive of smoking), display and signage requirements for automatic vending machines, rules for Smoking Kills signs, price lists etc.

#### *Infringement offence scheme for illegal sale of tobacco products to under-18s*

33. It is proposed to amend the SFEA to enable smoke-free enforcement officers to issue infringement notices to first-time offenders. An infringement notice is a proportionate response to first time offending. It would be a more efficient and cost-effective method of encouraging compliance with the Act by imposing a set financial penalty, while holding

the defendant accountable for their action, and avoids the formality of court proceedings.

#### *Powers to obtain information*

34. It is proposed that where a smoke-free enforcement officer has reasonable cause to suspect that any person has information or records in their possession relating to the sale, manufacture, or promotion of tobacco products and which may be relevant to the operation or enforcement of the Act, or the investigation of a suspected breach of the Act, that person be required to furnish any information or records in their possession. It would be an offence not to furnish the information without reasonable cause, and enforcement officers would be given the necessary powers to search for and examine, take possession or make copies of records.

#### *Removal of 'normal' trade discounts*

35. There are a number of options to deal with this issue, including using the new powers proposed above to obtain information, together with an amendment to provide that any contract that provides for rebate schemes is void. Additionally the Act could be amended to remove the current exemption for "normal" trade discount and rebate schemes. Further analysis is required to determine whether this is warranted over and above the additional investigative and remedial powers outlined above.

#### **Other options:**

36. The other potentially feasible options considered for the purposes of this regulatory impact statement were:
- A. Take no further action at this time
  - B. No regulatory change, but rather invest additional fiscal resources into countering commercial marketing of tobacco with government-funded anti-smoking advertising
  - C. A combination of minor regulatory change and investing additional fiscal resources to improve compliance and enforcing the current display controls

#### **Analysis of costs, benefits and risks**

37. There is a reasonably large body of material available to analyse the proposal to ban retail tobacco displays. The analysis presented here makes use of material presented in submissions received during formal consultation (see Consultation section below).
38. The consultation focussed on the issue of removing retail displays, and did not explicitly cover the other elements of the package being proposed here, ie. the improved enforcement and compliance powers for smoke-free officers and the consistent treatment of other forms of display akin to advertising. However the submissions did contain some comment relevant to these issues.
39. The consultation generated considerable input on the question of compliance costs, and the Ministry also engaged an independent consultancy specialising in retail interiors and construction to assess the likely changes need to comply with the proposal to remove tobacco displays from sight, and the costs involved.
40. The alternative options A, B and C have not been the subject of formal consultation in the same way, and so the analysis of these alternative options had less information to draw on. However, some of the information used to analyse the proposed option has also been useful in assessing the alternatives. The analysis of the proposed option compared to the alternative options is presented in a summary table further below.

*Cost (retail displays)*

41. The consultation document specifically addressed the costs to retailers, including the potentially significant up-front of costs refitting their premises to remove tobacco from display. By and large the information provided in submissions on the costs of implementing the proposed option was less detailed than had been hoped.
42. The estimates of refitting premises provided by manufacturers and retailer organisations varied considerably. Figures of around \$3,000 to \$12,000 were given for placing tobacco products under the counter, though one retailer currently uses a \$10 curtain. Specialist cigar retailers and duty-free stores argued they would face higher costs to comply with the proposed removal on retail tobacco displays.
43. The Ministry engaged a shop fit-out specialist company to provide independent advice on the costs of altering tobacco retail premises to comply with any legislation placing tobacco products out of sight. Eleven retailers, including four dairies, a convenience store, three petrol stations and three supermarkets were assessed for current levels of compliance, ease of altering existing displays, limiting factors in accommodating the changes, and likely impact on the business from the act of carrying out these changes.
44. The costs of complying were found to range between \$300 and \$3,300. This sample of different types of retailers gives an objective indication of the likely compliance costs for most retailers. Of the 11 sites surveyed it was found the vast majority of tobacco retailers would have to make changes to comply with the proposed display changes, and would incur costs in doing this.
45. Across the sites, the following points were observed:
  - the average cost of implementing a solution to comply was likely to be around \$1,520.00 (excl. GST) with an upper quartile of \$2,130.00 (excl. GST)
  - most small and medium size sites would face very little disruption in the operation of their business in the process on implementing changes.
  - stores that had custom joinery faced the highest compliance costs
  - in stores that had existing tobacco company display units the best solution was generally to fully replace them with new units with doors to conceal contents
  - stores with large tobacco displays or high turnover of product would require more extensive management and after hours work to ensure minimisation of impact on business operations - this contributed significantly to the cost for those stores
  - the cheapest and easiest satisfactory solution was to modify existing under counter drawers where available to suit the storage and sale of tobacco. Unfortunately this solution was often not appropriate or available on the site due to the difficulty of altering old and worn out existing joinery to suit. A refit with new counters, not an easy option at some of the stores visited, would be more expensive
  - under counter drawers may have the added benefit that shop staff would not need to turn away from the customers, helping reduce opportunist shoplifting
  - of the 11 sites surveyed, one currently complied with the proposed changes, and therefore faced nil compliance costs. However it is thought this is not representative of the market
  - it was observed that tobacco product displays often took up all of the available wall space behind the service desks.
46. Although the analysis was constrained by the small sample size, enough information was gained to be able to comment on the likely upper quartile limits that the respective tobacco retailer types, and tobacco retailers as a sector, are likely to face.



**Assessed costs for various types of retail outlet to remove retail tobacco displays**

<i>Type of site assessed</i>		<i>Estimated Cost</i>	<i>Average for category</i>	<i>Estimated Upper Quartile</i>	<i>Estimated Upper Quartile (excluding nil cost sites)</i>
Dairy	1	466.00	1,283.00	1,691.50	1,691.00
	2	2,100.00			
Large Dairy	1	1,650.00	1,650.00	1,650.00	1,650.00
	2	1,650.00			
Supermarket	1	2,785.00	1,328.33	1,992.50	2,388.75
	2	1,200.00			
	3	nil			
Service Station	1	1,050.00	1,183.33	1,625.00	1,625.00
	2	2,200.00			
	3	300.00			
Convenience Store	1	3,300.00	3,300.00	3,300.00	3,300.00
Averages (n=11)		\$1,520.00	\$1,520.00	\$2,051.80	\$2,130.95

47. By type, convenience stores with large displays are likely to face the greatest costs in gaining compliance, followed by supermarkets (excluding those that already comply), large dairies, smaller dairies and lastly service stations facing the lowest costs on average. The consultants noted the upper quartile over all sites of \$2,130.00 + GST is possibly overstated, as convenience stores represent a far smaller proportion of the tobacco retail sector than is represented by this sample.
48. The consultants concluded the upper quartile values shown fairly represent the likely cost implication each type of retailer will face in complying with the proposed changes, so long as each retailer employs a reasonable quality at a reasonable cost approach to their solution. Potential exists for retailers to employ low cost, poor quality solutions that will comply with the proposed changes such as keeping stock loose in a drawer or cupboard, or providing a curtain across existing displays. Sites that have tobacco company display units as stand alone display generally will have lower costs to face to replace them with appropriate joinery, or alter other existing joinery to allow use for tobacco sales.
49. All sites could be modified to accept under counter secure tobacco storage, but this was considered likely to be a more expensive option in most cases. The expected cost to each retailer should they chose this option to comply with the proposed changes would be in the region of \$1,700-2,300 (excl. GST) for smaller retailers and \$2,800-4,500 (excl. GST) for convenience stores and other retailers with higher turnover or larger premises. Modifying or replacing this joinery in this way would also create a greater disruption to the business' normal operations than the other solutions.
50. All these estimates included an allowance for all cleaning, hoarding, refuse disposal, management and contractor's margin, as well as other overheads likely to be attributable to working on a particular site. This may include an out of hours work premium, more extensive dust control measures, callout fees and the like.
51. The report found that for the majority of sites the construction activities associated with implementing changes to displays will have only a minor impact on normal business

operations and should not adversely affect normal daily trade. On sites where it appears that it would be impossible to conduct work during normal hours without adversely affecting business operations or customer's experience, costs were based on work occurring during business close hours, or later at night when the business would usually expect to be quieter.

52. In addition to the up-front costs of changing shop fittings to remove retail tobacco displays, the proposals could potentially have wider impacts on retail businesses.
53. The other major costs mentioned in submissions were the possibility of increased time required for training staff, managing stock and retrieving tobacco products for customers from drawers or closed cabinets. Some retailers submitted this could impact on the viability of the business trading in other goods and services. Transaction efficiency and speed of service are seen as key to successful convenience retailing.
54. Several retailers and their representatives pointed to overseas evidence, again principally from Canada, of store closures and a loss of profits. New Zealand retailer organisations expressed concern about the financial effect the policy will have on their members. They provided (unsubstantiated) estimates that 36 to 60 percent of convenience store and other retailers' business is from tobacco.
55. Conversely, several New Zealand retailers, mainly small retailers, who sell tobacco but have moved to store it out of sight, indicated that the change had little impact on tobacco sales to existing smokers. Current smokers "knew what they wanted".
56. One major retailer organisation stated that the additional costs of the proposed policy cannot be estimated at this stage, for example a predicted loss in sales for smaller retailers through customers purchasing elsewhere and potential stock shrinkage.
57. The claims in relation to Canada's experience are generally unconvincing. Other factors such as the global recession and illicit trade, the latter particularly in Ontario and Quebec provinces, appear to have been particularly influential.
58. The financial impact indicated by retailer organisations seems to suggest implicitly that the policy would be effective in reducing tobacco sales. There is a problem with the internal consistency of some of the industry and retailer arguments about the effectiveness of removing retail displays and potential impacts on their financial viability. If the policy would be ineffective at reducing tobacco consumption then it would not impact on sales, and vice versa.
59. The policy proposed is likely to have some impact on revenue from tobacco sales for some retailers and may impact on the financial viability of some retailers. However, other factors seem likely to be more influential both on revenue and financial viability than removing tobacco displays per se. Over the last 30 years retailers have adapted successfully to a significant reduction in average per capita consumer demand for tobacco products – tobacco consumption per adult (15+) per year has fallen from 3154 cigarette equivalents in 1976 to 961 in 2009 – even with the entry into the market of convenience stores as an adjunct to service stations. During this period of declining sales per adult, the number of viable tobacco retailers appears to have increased.
60. In terms of cost to government, the cost of implementing the proposal would be met by reprioritisation of current resources employed to combat smoking. To the extent the proposal helps reduce smoking prevalence, there would be some loss of revenue from reduced tobacco excise tax. This is difficult to estimate, but in any case a fall in tobacco excise revenue due to reduced smoking is consistent with the rationale for the current levels of excise, ie. it has been raised in order to reduce smoking prevalence, not to increase Government revenue.

*Benefits (retail displays)*

61. Retail displays undermine the impact of other Government initiatives such as tobacco excise tax, graphic pictorial warnings on tobacco products, subsidised nicotine replacement therapy and anti-smoking medicines, and promotion of smoking cessation services through media campaigns and the Government's priority health target, which are all designed to encourage smokers to quit.
62. While not readily quantifiable, the benefit of removing displays will therefore be seen in increased cost-effectiveness of the currently around \$57 million per annum of funded support for smokers to quit. It will also support the effectiveness of the increase in tobacco excise in reducing smoking prevalence.
63. There is some emerging evidence from Iceland and Canada of the impact tobacco display bans may have had on smoking prevalence among young people. In Saskatchewan the decline in prevalence rates in 15 to 19-year-olds has accelerated, falling by almost one quarter since the ban was implemented in 2002.<sup>2</sup> The impact of point of sale bans also appears to be positive in Iceland, where the decline in the prevalence rate among 15-year-olds has increased since the ban was enacted in 2001.
64. Submissions opposed to the proposal argue that the removal of tobacco displays overseas, for example, in Iceland and Saskatchewan, has had little or no effect on smoking prevalence. Supporters of the proposal, generally citing the same sources, concluded that removing displays had reduced smoking prevalence, especially among young people.
65. It seems clear that removing tobacco displays as part of an ongoing package of tobacco control measures will contribute to a reduction in smoking prevalence over time by making tobacco's presence at retail outlets less prominent, but it is unlikely that removing tobacco products from sight will have an immediate or decisive impact on smoking prevalence.
66. It is difficult to isolate the impact of other influences such as price changes, education initiatives, or quit campaigns from the effect of removing tobacco displays. The cumulative impact of removing displays is likely to be greatest on young people as tobacco is further 'denormalised'. This influence will feed into prevalence figures over time, particularly by contributing to the ongoing decline in smoking uptake by young people. Reduced smoking prevalence will reduce health costs attributable to smoking (currently estimated to be \$1.9 billion per annum) and smoking-related deaths. Values of statistical life of the order of \$3 million are commonly used in New Zealand settings.

*Risks (retail displays)*

67. The submissions raised concerns about robberies and security problems following removal of tobacco displays. Increased risk of crime is of concern, but there is no clear evidence to support the claim that removing retail displays of tobacco would worsen the underlying risk of robberies. Some retailers who have put tobacco products out of sight have done so at least in part to increase security.
68. Submitters also suggested removing retail displays could lead to an increase in illicit trade in 'black market' tobacco – ie. smuggled or illegal domestically grown products. Any link between removing tobacco displays and illicit trade is tenuous. Illicit trade may be an issue in Canada, which is usually cited as an example, given it shares a long border with the USA where tobacco is cheaper. However, while illicit trade merits (and receives) monitoring and appropriate response in New Zealand, it is not currently a significant problem and more likely to be price driven.

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<sup>2</sup> Health Canada: Canadian Tobacco Use Monitoring Survey (CTUMS) ; September 2010

*Costs & benefits of other elements of package*

69. Issue 1 - Preventing trading names with terms like “discount tobacconist” from being displayed in a manner akin to advertising (eg. on signs or hoardings):

- There would be one-off costs in changing signage and any related promotional materials. It is not proposed to require any changes to the legitimate use of existing legal entity names – the prohibition would only be on use of these names in a manner akin to advertising. As with retail displays, to the extent this change is effective at preventing growth in tobacco sales to non-smokers (ie. young people tempted to start and ex-smokers tempted to relapse) this will be a potential loss of revenue, but reducing smoking is Government’s policy goal.
- The general benefit of this measure is the way it supports other tobacco control policy, as discussed for retail displays above. It also removes a possibly attractive alternative outlet for tobacco marketing expenditure once retail displays are prohibited. A further specific benefit is removing the risk of consumers being potentially misled with terms like 'discount tobacco'.

70. Issue 2 - New powers to improve enforcement and compliance with existing regulatory controls on tobacco retailing and resolution of the “normal trade discount/rebate” issue:

- The new powers (such as infringement notices for under-age sale of tobacco) would involve some initial establishment costs – training of smoke-free enforcement officers, production of notices etc. These costs would be relatively minor and would be borne by Government (within existing baselines). They are anticipated to be more than offset by the benefits.
- The benefits of infringement notice powers relate mainly to reducing the current costs of less-efficient prosecution processes, and saving Court time etc. (including costs for defendants). The stronger information discovery powers would ensure that schemes that may be in breach of the Act are able to be properly investigated and appropriate action taken. Again there is an overall benefit of contributing to tobacco control policy in general and helping reduce the incentives for promoting tobacco products in breach of the SFEA.

**Summary comparison of costs, benefits and risks between options:**

<b>Option:</b>	<b>Costs</b>	<b>Benefits</b>	<b>Risks</b>
Preferred Option: Prohibit retail tobacco displays	One-off costs for retailers to modify shop fittings.  Likely to be in a range of \$300-\$3,000 per site with an average of \$1,520 and an upper quartile of \$2,130 (all excl. GST)  Based on 10,000 retailers this is of the order of \$20 million (even the highest cost scenarios identified would total less than \$50 million across the country) and would be spread over 2-4 years – \$10-12m per annum is a reasonable estimate	This is the only option that comprehensively addresses the problems caused by retail tobacco displays, because it removes them.  Expected to save health costs and lives in the medium term (increased quit rates from smokers who manage to avoid relapse) and in the longer term (young people who do not start smoking)	Likely to be adverse reaction by convenience retailer lobby groups (who have funding links with tobacco companies)  (This could increase compliance costs if it delays or reduces the ability of officials to work constructively with retailers to identify options that avoid unnecessary compliance costs.)

Option:	Costs	Benefits	Risks
Alternative A: Take no further action at this time	Reduced cost-effectiveness of existing policies such as tobacco excise increases and Government-funded anti-smoking media campaigns, such as Smoking Not Our Future (resulting over time in additional smoking-related deaths and higher health costs)	None.	Continued advocacy by health groups etc. who advocate removing retail displays, with high level of public support  Reputational risk to NZ in light of FCTC expectations & removal of displays by comparable countries such as Australia, United Kingdom and Canada
Alternative B: Government funded counter-marketing	Retail displays are currently a permanent average 2-3m <sup>2</sup> fixture in 10,000 retail outlets with presentation and effectiveness regularly monitored and maintained by tobacco company sales representatives.  Advertising expenditure with a similar presence would cost >\$100 million per annum <sup>3</sup>	Minimal  This would not avoid the impact of the retail displays but would provide a countervailing anti-smoking message.  (The impact of Government advertising would likely be less effective than retail displays as they can maximise their impact by being eye height and at point of sale – this positioning is not available to other advertisers)	Public exposure to widespread Government advertising might generate criticism  Ongoing presence of tobacco displays viewed by the public as inconsistent with other tobacco control measures eg. recent tax increase.
Alternative C: Improved enforcement and compliance	>\$5 million per annum cost to Government to assess, support & if needed to fully enforce compliance at 10,000 outlets	Minimal, as breaches to current display restrictions tend to be minor infringements	Runs essentially the same risks as Alternative A above  Would also be perceived and criticised as merely increasing bureaucracy without adequately addressing the problem.

### Consultation

71. Government has been considering options for tightening the restrictions on retail displays for some time. Proposals to prevent retailers from openly displaying tobacco were consulted on in 2007, with submissions closing early in 2008. Retail displays were also the subject of two petitions to Parliament's Health Committee in 2008.

72. In February 2009 the new Government dealt with the matter through its formal response to the Health select committee. This stated that the Government did not intend to advance legislation to ban the display of tobacco products at that time, but rather intended to gather further information.

<sup>3</sup> Based on pricing rates per m<sup>2</sup> for static billboards in shopping centres <http://www.oab.co.nz/index.php?page=shopping-centres-b> (accessed 11 October 2010)

73. In September 2009 the Māori Affairs Select Committee launched an inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori, with public submissions closing in late January 2010. Calls for removal of retail displays are a feature of many submissions.
74. On 22 March 2010 Cabinet approved the release of a Ministry of Health consultation letter (*Proposal to ban tobacco retail displays in New Zealand*) and sought a report back on the outcome of the consultation process and proposals on whether or not to proceed with the removal of tobacco displays in retail outlets.
75. Public consultation took place between 31 March and 21 May 2010. Over 1000 submissions were received. Many were substantial although about 850 were form or template letters promoted by interested parties.
76. About 85 percent of submitters supported the proposal (112 individuals, 753 form letters). Supporters included all the health sector submissions, submissions from young people, the majority of submissions from the general public and a significant proportion of the retailers who submitted as individuals - about a quarter of these retailers.
77. Opponents comprised 28 individual submissions and 107 form letters. All the tobacco industry submissions opposed the proposal along with the majority of submissions from retailers and retail organizations, a small proportion from the general public and one submission from an overseas (UK) private research institute.
78. The consultation primarily sought comment from affected parties on options for removing displays and their costs. New information on the health evidence was welcome, but this evidence had generally been considered in previous consultation.
79. As might be expected, views were polarised with strong views expressed both for and against the proposal. Opponents of removing tobacco retail displays focussed on:
- compliance costs with estimates up to \$12,000 per retailer were provided (The Ministry of Health commissioned an independent assessment which indicates that in practice average costs would be much lower, in a range from \$330-\$3,300.)
  - business viability - there were assertions that tobacco makes up a significant proportion of general convenience retail turnover, especially convenience stores and petrol stations. (However, any resulting impacts on business viability were not quantified, with one major retailer organisation stating this cannot be estimated at this stage.)
  - claims of large scale closures of retailers, robberies and security problems resulting from the proposed change (generally not substantiated with supporting evidence)
  - inconsistency with the general Government approach on business regulatory policy
  - strong assertions that impacts on smoking and health benefits from removing displays would be negligible (including challenges to studies and the evidence used by supporters)
  - if the retail display proposal is progressed, a strong preference for flexible requirements allowing existing displays to be modified rather than forcing retailers to put all tobacco “under the counter”
  - support for alternative measures such as tighter enforcement of existing retail restrictions and in particular the ban on sales to people under 18.
80. Supporters of removing retail displays focussed on:
- new research adding to the evidence that tobacco displays encourage youth smoking uptake and undermine quit attempts
  - the need to set the costs to retailers, which are likely to be exaggerated, against the cost to the country of tobacco harm

- the strong public support for the proposal, including among smokers who have recently quit or intend quitting
- the need to send a consistent message that tobacco is not a normal product, but dangerous and different from other consumer goods
- international precedents and successes which support removal of retail displays and
- the experience of retailers who have removed displays and say it did not cost much or harm sales and had other business benefits, for example, improved security and space to display higher margin products.

### **Conclusion and recommendations**

81. This polarity of opinion was characteristic of previous regulatory initiatives to reduce smoking, notably the 2003 introduction of fully smoke-free indoor public and workplace environments. Ultimately, the issue comes down to a judgment over what weight should be given to the Government's health policy goal versus the likely reduction in sales by and costs to tobacco retailers. Retailer and industry groups argue the health benefits are minimal or non-existent and the costs overwhelming, while supporters of the proposal argue the benefits are potentially considerable and the costs minimal or irrelevant in comparison with the health and social costs from smoking.
82. Categorical evidence of the impact of retail display bans on smoking initiation and prevalence rates will take some years to emerge, and is complicated by interactions with other policy measures. But what evidence there is supports the case for the removal of retail displays.
83. The rationale for removing tobacco products from visible retail display does not depend solely on evidence that removing retail displays significantly lowers smoking prevalence. Removing tobacco displays will help reduce perceptions of tobacco as a 'normal' consumer good and will contribute to reducing the harm caused by smoking. No sudden or dramatic drop in smoking prevalence is likely solely because of this measure. But it will, in conjunction with other policies, contribute to reducing tobacco uptake over time, particularly among young people, and also support smokers to quit. Reducing smoking prevalence will save lives and health costs.
84. The main downside to the proposal is that there will be costs for retailers as they adjust their shop fittings to comply - particularly for small retailers, such as the typical corner dairy. These costs will vary according to the options and timeframes made available for removing displays from sight, and may well be absorbed by the tobacco companies as they have in the past. The lives saved and reduced health costs from even a small drop in smoking prevalence would easily outweigh these costs.
85. The proposal to remove retail displays would be further enhanced by consistently addressing other avenues for potentially promoting and advertising tobacco, eg. through prominent display of trading names. It also makes sense to take steps to improve enforcement and compliance with other retail controls, such as only allowing sales to people aged 18 and over. (These measures have not been assessed to the same level of detail as retail displays, but are unlikely to impose high costs.)
86. It is therefore recommended that the Government implement a package of new and improved controls on the retailing of tobacco products, including:
  - i. prohibiting the display of tobacco products for sale;
  - ii. tightening controls on the display of trading names that include terms signifying the availability or price of tobacco for sale;
  - iii. taking a consistent approach to the regulation of related matters such as the retail display of smoking accessories, display and signage requirements for automatic

- vending machines, requirements for health warnings and “Smoking Kills” signs, and display of tobacco product price lists;
- iv. providing smoke-free enforcement officers with stronger powers of information discovery, search and seizure to aid their investigation of compliance with the controls on tobacco retailing;
  - v. providing smoke-free enforcement officers with infringement notice powers to issue instant fines to first offenders who sell tobacco products to people under 18 of age during controlled purchase operations.
87. It would best to implement this package by a combination of amending the Smoke-free Environments Act 1990, and developing further regulations under the Act. The combination of amended legislation and developing further regulations would allow for flexibility over options and timeframes for compliance in order to avoid unnecessary compliance costs and impacts on small retail businesses.

### ***Implementation issues and risks***

88. Engagement and constructive input from retailers in developing detailed regulations could be an implementation risk. However if retailers are not sufficiently motivated to develop low-cost solutions it suggests the costs of compliance have in fact been overstated/are not such a big issue.
89. Risks around enforcement and compliance and the resources and systems required to support this are essentially unchanged as the proposal modifies and if anything simplifies an existing regulatory regime, rather than introducing major new roles for enforcement and compliance. Ensuring that all retailers are complying with the proposed amendments will be resource intensive given the large number of retailers that sell tobacco.
90. There is also a risk that tobacco companies will divert their marketing efforts into unregulated channels, such as internet social networks and product placement in entertainment media, such as Facebook, YouTube, films and video games. Such marketing efforts would not need to be conducted within New Zealand. These cross-border tobacco marketing issues are addressed under the auspices of the FCTC.
91. The main implementation issue relating to enforcement and compliance will be implications for the training of smoke-free enforcement officers relating to the use of their statutory powers, for example, issuing of infringement notices.

### ***Arrangements for monitoring, evaluation and review***

92. Established Ministry processes for monitoring will be used to evaluate and review these proposals. The Ministry of Health has in place good surveillance systems that monitor smoking prevalence at both an adult and youth (Year 10) level. There are other mechanisms such as the Health Sponsorship Council “lifestyle” survey which could help with measuring the denormalisation or people’s attitudes towards tobacco.
93. New Zealand has been part of the International Tobacco Control (ITC) Policy Evaluation Survey, a multi-country study with a New Zealand arm. It is an international collaboration of tobacco control researchers whose mission is to evaluate the psychosocial and behavioral effects of national-level tobacco control policies throughout the world. In particular, the ITC Project is evaluating the policies of the Framework Convention on Tobacco Control (FCTC), including the restrictions or prohibitions of tobacco advertising, promotion, and sponsorship (including removal of tobacco displays). This provides a useful source of information for future evaluation.



# Regulatory Impact Statement

## Summary of evidence of the problems presented by retail tobacco displays

Point of sale advertising, such as retail display of tobacco, is a promotional tool used to generate awareness of products, communicate information, stimulate trial and encourage repurchase.<sup>1,2</sup> As other avenues for promoting and advertising tobacco products have been restricted or banned, retail tobacco displays have become increasingly important to the industry. The tobacco industry is increasingly relying on this type of display as a means of continued advertising in the face of advertising restrictions.<sup>1,2,3</sup> Point of sale displays have been described as 'the industry's most important sphere of influence'.<sup>4</sup>

International evidence from the United Kingdom<sup>1</sup> and the United States has shown increasing incentive payments from tobacco companies to retailers as tobacco companies compete over the location and size of their retail tobacco displays. (In New Zealand, there has been a small number of cases of incentive payments reported but no categorical evidence.<sup>5</sup>)

Tobacco companies have argued that retail displays are intended to inform customers of the products available to them and to promote brand switching. However, research has found that smokers are actually highly brand loyal and generally do not switch brands, each year only about 7% of smokers switch brands.<sup>2</sup> One Australian study has shown that less than 1% of smokers use tobacco displays to inform their brand choice.<sup>6</sup> This suggests that tobacco displays are actually an ineffective means of encouraging brand switching.

### Effect on children and young people

The average age of smoking initiation in New Zealand is 14.6 years, well below the legal minimum age of 18 years. Many young people already regret their decision to start smoking. The New Zealand Tobacco Use Survey 2006 showed that the majority of youth (72.3% of young people aged 15-19 years) would not smoke if they had their lives over again.<sup>7</sup>

Longitudinal studies have shown that children and young people exposed to tobacco advertising and promotion are more likely to take up smoking.<sup>8,9</sup> A study by the Wellington School of Medicine, released in October 2006, found that stores in areas that had a high percentage of youth in the local population were the most likely to be in violation of the current display provisions.<sup>10</sup> Research has also shown that if young people overestimate the use of tobacco products, and perceive that smoking is generally tolerated, they are more likely to start smoking.<sup>11</sup>

A recent systematic review of 12 major studies concluded that, given the addictiveness of tobacco, the severity of the health hazards posed by smoking, the evidence that tobacco promotion encourages children to start smoking, and the consistency of the evidence that point of sale promotion influences children's smoking, ample justification exists for banning point of sale displays of smoked tobacco products in New Zealand.<sup>12</sup>

### Effect on smokers who are trying to quit

Most smokers want to quit but find it difficult to do so due to the highly addictive nicotine contained in tobacco products. The 2009 Ministry of Health Tobacco Use Survey found 23.8% of smokers had quit for at least a week in the past year, and 63.2% had tried to quit in the past 5 years. 80% of smokers said they would not smoke if they had their life over again.

Research has found that point of sale stimuli, in particular bright visual images (such as those on cigarette packages in tobacco displays) encourage unplanned purchases.<sup>2,13,14</sup> Retail tobacco displays have a particular impact on vulnerable consumers, such as people still experiencing nicotine withdrawal symptoms, and can prompt impulse purchases.<sup>15,16</sup> An Australian study interviewed smokers as they left retail outlets after purchasing tobacco and found 22 percent of participants had made unplanned cigarette purchases. Forty-nine percent supported a ban on point of sale tobacco displays versus 12 percent who opposed. Twenty-eight percent agreed that such a ban would make it easier to quit.<sup>17</sup> A New Zealand survey found two-fifths of recent quit attempters agreed that cigarette and tobacco displays in dairies, petrol stations, supermarkets and convenience stores make it more difficult for smokers to quit smoking or stay quit.<sup>18</sup>

**Notes to the summary of evidence of the problems presented by retail tobacco displays**

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