International Treaty Examination of the World Health Organization Framework Convention on Tobacco Control

Report of the Foreign Affairs, Defence and Trade Committee

Contents

Recommendation 2
Introduction 2
Ratification and trans-Tasman mutual recognition 2
Capacity building in Pacific countries 3
The Smoke-free Environments Amendment Act 2003 4
Appendix 5
Recommendation

The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the World Health Organization Framework Convention on Tobacco Control and recommends the House take note of this report.

Introduction

The World Health Organization estimates that the current global death rate from tobacco use (4 million people per annum) will increase to 10 million people per year by 2030. It has identified an international response to tobacco use as crucial if the rise in tobacco use and tobacco-related diseases is to be slowed and ultimately reversed.¹

The World Health Organization Framework Convention on Tobacco Control represents an important step towards addressing the rise in tobacco use and tobacco-related diseases. The objective of the Convention and its protocols is to protect present and future generations from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures. The framework is to be implemented by parties at the national, regional, and international level in order to reduce continual and substantial tobacco use and exposure to tobacco smoke.²

New Zealand signed the Convention in Geneva on 16 June 2003. The Convention would enter into force for New Zealand 90 days after the date of deposit of its instrument of ratification or, if the Convention is not in force at that time, 90 days after the date of deposit of the fortieth instrument of ratification.³ We examined the Convention pursuant to Standing Order 384 and draw the following matters to the attention of the House. The National Interest Analysis of the Convention is appended to this report.

Ratification and trans-Tasman mutual recognition

We received correspondence from British American Tobacco New Zealand that we accepted as a submission. In relation to trans-Tasman mutual recognition, British American Tobacco New Zealand expressed concern that New Zealand should not be at variance with Australia. Section 10(2) of the trans-Tasman Mutual Recognition Act 1997 implements the general trans-Tasman recognition principle in relation to goods, that:

A good that may legally be sold in Australia may be sold in New Zealand; and a good that may legally be sold in New Zealand may be sold in Australia.⁴

Section 5 of the Act overrides laws that regulate the manufacture or sale of goods unless the Act, or any laws, expressly states the trans-Tasman mutual recognition arrangement does not apply. As noted by British American Tobacco New Zealand, examples of laws

² World Health Organization Framework Convention on Tobacco Control, Article 3.
⁴ Advice from the Minister of Health dated 7 November 2003, p.1.
overridden include requirements relating to packaging and labelling (section 10(2)(b)).
British American Tobacco New Zealand believes ratification of the Convention could be
problematic if Australia does not ratify by the time the specific packaging and labelling
requirements in Article 11 of the Convention have legal effect for New Zealand.
Accordingly, British American Tobacco New Zealand argues that ratification should not be
considered by New Zealand until Australia is also ready to ratify the Convention.5

However, the British American Tobacco New Zealand’s submission has not taken into
account section 77(Exclusions) of the Act, which states:

This Act does not affect the operation of any law, or any provision of any law,
specified or described in a category in Schedule 1.

Category 3 of Schedule 1 relates to laws derived from ‘international obligations’. We are
advised that such laws may be ‘excluded’ under Schedule 1 to the extent that those laws
would be affected by the general principle in relation to goods. These ‘exclusions’ would be
relevant if the operation of the general principle in relation to tobacco labelling placed New
Zealand in breach of its international obligations. We are further advised that action could
be taken by regulation to implement such an ‘exclusion’ under section 78(3)(a).6

As noted in the National Interest Analysis, under the worst-case scenario (that Australia
reversed its current efforts to enhance its tobacco health warnings and ratify the
Convention), there is scope under the Act to exclude Australian products from mutual
recognition arrangements that do not comply with packaging and labelling requirements
under the Convention.7 We note that the need to take such a step should not arise if
Australia implements the Convention’s provisions by the time the Article 11 obligation
takes effect for New Zealand.

**Capacity building in Pacific countries**

We note that in the 2003/04 financial year, the New Zealand Agency for International
Development committed $230,811 to a 2-year initiative to build regional capacity for
tobacco control in the Pacific.8 The overall objective of the initiative is to strengthen the
response to tobacco-related harm by Government and non-governmental organisations in
the Cook Islands and Tonga. In 2002/03 the New Zealand Agency for International
Development provided the balance ($18,000) of funding required to enable New Zealand
to fund an inter-sessional meeting for small Pacific countries to discuss the framework.9

We are advised by the Ministry of Health that the initiative for inter-sessional meetings
came from the Pacific countries, which requested the World Health Organization’s
Western Pacific Regional Office to arrange an inter-sessional meeting prior to the meeting

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5  Submission of British American Tobacco New Zealand, p.6.
6  Advice from the Minister of Health dated 7 November 2003, p.2.
7  National Interest Analysis of the Framework Convention on Tobacco Control, p.11.
8  Ministry of Foreign Affairs and Trade response to financial review supplementary questions, 13 November 2003,
   Annex C.
9  Ibid.
of the Inter-Governmental Negotiating Body. We are also advised that health sector capacity building is a key focus for the New Zealand Agency for International Development's Regional Pacific Health Programme. Other examples of capacity building supported by the New Zealand Agency for International Development are:

• a Fiji school of medicine staff professional training programme
• a paramedical medical training centre
• capacity building for research: a five year project to support the development and operation of a Pacific Health Research Council
• a capacity building programme for Pacific people with disabilities
• capacity building for primary eye care projects, such as the Fred Hollows Foundation blindness prevention programme, and
• building the capacity of the Samoan health sector to develop and implement policies relating to child health.

The Smoke-free Environments Amendment Act 2003

We are advised by the Associate Minister of Health that the Smoke-free Environments Amendment Act 2003, which was passed by the House on Wednesday 3 December 2003, imposes no constraints on New Zealand’s ability to ratify the Convention and contains no provisions that are at odds with the provisions of the Convention. Rather, we are advised that the Act strengthens New Zealand’s compliance with some of the non-mandatory provisions of the Convention, such as Article 8 – protection from exposure to tobacco smoke, and Article 16 – sales to and by minors.

10 Ministry of Health response to information requested by the committee concerning ratification of the Convention, received 2 December 2003, p.1.
11 Ibid. p.2.
Appendix

Committee process
The World Health Organization Framework Convention on Tobacco Control was tabled in the House on 7 October 2003 and was referred to us for examination. We received correspondence, which we accepted as a submission, from British American Tobacco New Zealand and advice from the Minister of Health, Associate Minister of Health and the Ministry of Health.

Committee membership
Hon Peter Dunne (Chairperson, United Future)
Luamanuvao Winnie Laban (Deputy Chairperson, Labour)
Tim Barnett (Labour)
Martin Gallagher (Labour)
Keith Locke (Green)
Ron Mark (New Zealand First)
Simon Power (National)
Hon Matt Robson (Progressive)
Dr the Hon Lockwood Smith (National)
The Framework Convention on Tobacco Control

National Interest Analysis

Date of Proposed Binding Treaty Action

New Zealand signed the Framework Convention on Tobacco Control (“the Convention”) in Geneva on 16 June 2003. The Convention will enter into force 90 days after the date of deposit of the fortieth instrument of ratification. As at 31 August 2003, 47 States had signed the Convention and one (Norway) had ratified the Convention.

It is proposed that New Zealand deposit its instrument of ratification this year, subject to the completion of the international treaty examination process. The Convention would enter into force for New Zealand 90 days following the date of deposit of its instrument of ratification, or if the Convention is not in force at that time, 90 days after the date of deposit of the fortieth instrument of ratification.

Reasons for New Zealand to Become Party to the Convention

While smoking in many developed countries has reached a peak and is now declining (including in New Zealand), the World Health Organization (WHO) has estimated that the current global death rate from tobacco use (four million people per annum) will increase to 10 million people per year by 2030. The WHO has identified an international response to tobacco use as crucial if the rise in tobacco use and tobacco-related diseases is to be slowed and ultimately reversed.

New Zealand is seen internationally as a leading player in international tobacco control efforts, and has been an active participant in negotiations for the Convention. While New Zealand has implemented a progressive and comprehensive tobacco control programme, it still stands to benefit from international tobacco control efforts. Trans-border issues such as tobacco smuggling and tobacco advertising and marketing pose risks to domestic tobacco control efforts. Regional and global efforts to improve on tobacco control will also encourage New Zealand to continue to strive for the “gold standard” in terms of its domestic efforts to combat tobacco use and protect non-smokers from exposure to tobacco smoke.

Advantages and Disadvantages to New Zealand of the Convention Entering into Force

The Advantages are:

- By ratifying the Convention, New Zealand signals its continued strong commitment to tobacco control both domestically and internationally;

- The Convention sets out global tobacco control strategies that will in time reduce global tobacco consumption, as well as change attitudes and beliefs about tobacco and smoking worldwide, with consequent flow-on effects in New Zealand. For example, a reduction in tobacco use in Pacific countries, has flow-on benefits to New Zealand Pacific communities and consequently to health care costs;
The Convention would allow New Zealand to collaborate in the development of best practice policy and guidelines in several areas of tobacco control that New Zealand is not able to progress on its own, for example the regulation of the contents of tobacco products;

New Zealand would benefit from the mechanisms established under the Convention to promote collaboration between law enforcement agencies to address smuggling of tobacco products;

The Convention provides a framework for developing Protocols on cross-border issues including tobacco smuggling and tobacco advertising: issues of direct relevance to New Zealand, and

The Conference of the Parties provides a global forum for discussing new policy challenges and for determining best practice solutions.

The disadvantage is that New Zealand would need to change tobacco labelling requirements, resulting in resource commitments for the Ministry of Health and increased compliance costs for tobacco companies and tobacco retailers.

Ratification of the Convention indicates a commitment to continued improvement in tobacco control activities and opportunities for collaboration internationally to find effective strategies for reducing tobacco use and improving public health. Despite the resource implications and the compliance costs indicated above, therefore, there is a clear net benefit to New Zealand of ratifying the Convention.

**Obligations**

The Convention sets out three types of obligations: general obligations, specific obligations and considerations. The general obligations are primarily overall policy directions, while the specific obligations are mandatory requirements.

**General obligations**

The general obligations in the Convention are consistent with current policy and practice in New Zealand. They include:

- The need to develop and implement national strategies for tobacco control, apply funding to those efforts, cooperate with other Parties, and protect tobacco control policies from the vested interests of the tobacco industry;

- A strong statement that Parties are encouraged to implement stricter measures beyond those required by the Convention (Article 2);

- A requirement to take into consideration the need to take measures to promote the participation of indigenous individuals and communities in the development, implementation and evaluation of tobacco control programmes that are socially and culturally appropriate to their needs and perspectives.

**Specific obligations**

The Convention contains a number of mandatory requirements. However, the majority of these are already met under current New Zealand policy and practice. The key mandatory requirements that New Zealand would be obliged to give effect to are discussed below.
A number of the mandatory provisions are matched with provisions that countries may consider implementing. These are discussed under the following section.

**Tax and pricing policies (Article 6)**

New Zealand would be obliged to take account of its national health objectives concerning tobacco control in the context of setting tax and pricing and duty-free policies. However, there is no obligation on the part of New Zealand to change its tax or duty-free policies unless it determines that it is appropriate to do so.

**Protection from passive smoking (Article 8)**

The Convention acknowledges the clear, unequivocal scientific evidence that exposure to tobacco smoke causes death, disease and disability. New Zealand would be required to “…adopt and implement in areas of existing national jurisdiction … effective legislative, executive administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other places.”

The Smoke-free Environments Act 1990 already provides for (varying levels of) protection for workers and the public from exposure to second-hand smoke in workplaces, some public places and public transport. Officials’ assessment is that as legislation currently stands, New Zealand is in compliance with this Article. Legislation currently before the House (in the form of the Smoke-free Environments (Enhanced Protection) Amendment Bill) if passed, would extend current protections in workplaces and public places, including bars, restaurants, clubs, casinos, and schools. This would ensure a fuller compliance with this Article, however, passage of the Bill is not required to ensure New Zealand’s compliance.

**Regulation of the contents of tobacco products (Article 9) and Regulation of tobacco product disclosures (Article 10)**

The Convention provides for guidelines to be developed for the testing and regulation of the contents of tobacco products. Parties would be expected to implement such testing / regulation, but only where approved by competent national authorities. This provides sufficient discretion for New Zealand to ensure that the guidelines are appropriate. Existing regulation-making powers under the Smoke-free Environments Act 1990 are sufficient for testing and regulatory purposes, and there are regulations already in place for the testing of tar, nicotine and carbon monoxide levels in manufactured cigarettes.

New Zealand would also be obliged to require tobacco companies to disclose, to the government, information about the contents and emissions of tobacco products. New Zealand would also be obliged to disclose information to the public about the toxic constituents of the tobacco products and the emissions that they may produce. The Smoke-free Environments Regulations 1999 already require disclosure by tobacco companies and New Zealand therefore meets the requirements of this Article.
Packaging and labelling of tobacco products (Article 11)

While New Zealand currently complies with the majority of provisions in Article 11 (such as the requirement for large, rotating, clear and legible health warnings, a ban on misleading and deceptive labelling, a requirement for tobacco packaging to display information on relevant constituents and emissions, etc.) the Article states that warnings and messages:

... should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas.

The Article provides a three-year period for compliance with this provision.

The effect of current regulations is to require health warnings to take up a minimum of 29.17 percent (in total) of the front and rear panels of cigarettes packets, and there are varying (and generally lesser) requirements for smaller and irregularly-shaped packages, cigars, and products that make up less than 0.2% of the tobacco market. Accordingly, regulations would need to be amended to provide for compliance with this Article of the Convention. Other proposals (under this Article or generally) are entirely discretionary. They are briefly discussed in the next section.

The Government is committing to the making of regulations to ensure that warnings must cover at least 30 percent of the principal display panels of all tobacco products. This will be accomplished within the three-year period before the Convention enters into force for New Zealand.

Education, public awareness, and treatment initiatives (Articles 12 and 14)

As a party to the Convention, New Zealand would be obliged to implement a variety of health promotion, education, public awareness, smoking cessation and diagnosis and treatment initiatives. Officials’ assessment is that New Zealand already complies with the obligations set out in these Articles. In many areas (for example, smoking cessation), New Zealand is a world leader. There is an obligation in the Article to continue to promote and strengthen such activities. This would take place as part of ongoing prioritisation in the health sector.

Tobacco advertising, promotion and sponsorship (Article 13)

Within five years of entry into force of the Convention, Parties are required to implement a comprehensive ban on tobacco advertising, promotion and sponsorship, including cross-border advertising. Those states with constitutional barriers to such a ban are permitted to instead apply restrictions.

Officials’ assessment is that New Zealand currently complies with this Article. Negotiations had originally focussed on the introduction of a “total” advertising ban but that language was rejected because it did not give Parties flexibility to allow some limited exceptions from the ban. New Zealand has a comprehensive ban on tobacco advertising, promotion and sponsorship in place – with the necessary minimum exceptions permitted for such activities as communications within the tobacco trade, communication of price information to consumers, and the ability for individuals to engage in political or social commentary on tobacco-related matters.
Illicit trade in tobacco products (Article 15)

Parties are required to cooperate in attempts to eliminate all forms of illicit trade in tobacco products. Parties are obliged to implement measures to facilitate the identification of the origin of tobacco products, require tobacco packets to carry markings to assist Parties to determine whether the product is legally for sale on the domestic market and consider developing a practical tracking and tracing regime to further secure the distribution system. There are further requirements for collection of data, enactment or strengthening of legislation and penalties, confiscation and disposal of products and equipment used in illegal activity, and for Parties to assist each other in the area of investigations, prosecutions, and legal proceedings. Parties are to endeavour to implement further measures, including licensing, where appropriate.

Officials’ assessment is that current New Zealand legislation and practice ensures compliance with this Article.

Sales to and by minors (Article 16)

Article 16 bans the sale of tobacco products to “persons under the age set by domestic law, national law or eighteen”. It also requires parties to prohibit or promote the prohibition of the distribution of free tobacco products to the public and especially minors. New Zealand already meets these requirements. The Article also provides a series of steps that Parties may take. These are discussed in brief in the following section.

Protection of the Environment (Article 18)

This Article requires Parties in whose jurisdictions tobacco cultivation and manufacture takes place to have due regard to the protection of the environment and the health of persons in respect of the environment. Compliance with this Article poses no difficulties for New Zealand as New Zealand has in place appropriate health and safety in employment, and resource management legislation.

Liability (Article 19)

Under Article 19, for the purposes of tobacco control, Parties are required to consider taking legislative action or promoting existing laws where necessary, to deal with criminal and civil liability, including compensation where appropriate. Parties would also be expected to cooperate in exchanging information and to afford each other assistance in legal proceedings relating to civil and criminal liability. The latter obligation is subject to the limits of national law, policies, legal practice and existing Convention arrangements. This obligation does not pose any difficulties for New Zealand as New Zealand respects such requests for assistance in legal proceedings - subject to such provisos as are listed in the Article and outlined in brief above.

The Article also states that options for the support of Parties in the area of liability (including possibly international approaches to these issues) may be considered by the Conference of the Parties. Such approaches, if adopted, would either be non-binding in nature, in the form of recommendations by the Conference of the Parties, or binding under a Protocol to the Convention. If the latter, the implications of the Protocol for New Zealand would be assessed before New Zealand decided whether or not to ratify it.
Research, surveillance and exchange of information (Article 20)

Article 20 requires Parties to implement effective measures for tobacco-related research, and to cooperate with other Parties in that research. The Article sets out priorities for research and surveillance and outlines certain information collection requirements. New Zealand already undertakes these functions and a recent community-initiated project to develop a Tobacco Control Research Strategy for New Zealand may provide a useful focus for future coordination and priority setting for research and surveillance activity.

Reporting and exchange of information (Article 21)

Article 21 sets out reporting requirements. It also states that the Conference of the Parties shall determine the frequency and format of such reports. Each Party is required to make its initial report within two years of entry into force of the Convention for that Party. The New Zealand report would be prepared by the Ministry of Health in consultation with other relevant agencies and stakeholders.

Discretionary provisions for consideration

The Convention also provides for a number of other steps that Parties may take. These include the following:

- Article 6(2)(a): the adoption of tax and pricing policies aimed at reducing consumption;
- Article 6(2)(b): the prohibition or restriction of duty-free sales to and/or importations of tobacco by international travelers;
- Article 11: requiring the display on tobacco packages of pictorial health warnings or messages about other effects of smoking, and the banning of specific misleading terms (for example, “light” and “mild”) that imply a safer product. Note: a review of tobacco packaging and labelling options is planned for 2003/04: this will consider, among other matters, some of the non-mandatory options set out in Article 11;
- Article 16: measures to discourage smoking by young people, for example—restrictions on vending machines (already in place in New Zealand) and the display of tobacco products, banning minors from being involved in the sale of tobacco, and banning of products in the form of tobacco products (toys and confectionary, for example).

Such measures, if they were considered in the future, would be subject to the usual policy development processes, including, where appropriate, consultation with affected parties. Accordingly, they are not considered further as part of this National Interest Analysis.

Articles relating to technical and financial assistance

There are a number of articles in the Convention that refer to Parties considering the provision of technical, legal and financial assistance to developing countries and countries
These are largely focussed on assisting those countries’ to meet their obligations under the Convention and for other tobacco control efforts.

Text relating to financial assistance was extensively and carefully debated at all six sessions of the Inter-government Negotiating Body. The key article, Article 26 Financial resources, acknowledges the importance of the provision of assistance to developing countries and countries in transition, and states that Parties agree to assist other Parties in meeting their obligations. The Article also states that the Conference of the Parties will, at its first session, review existing and potential sources and mechanisms of assistance and will consider what financial mechanisms might be required to assist developing countries and countries in transition.

New Zealand has recently funded a project to support the governments of the Cook Islands and Tonga to develop and implement tobacco control programmes. This project has been funded with a view to assisting the two countries to comply with the Framework Convention on Tobacco Control.

Officials’ assessment is that the Articles relating to assistance provide sufficient discretion and do not bind New Zealand to any commitment to provide assistance. New Zealand will continue to fund development aid on a prioritised basis, which will consider, among a range of other factors, the implications of international agreements.

**Reservations**

Under Article 30 of the Convention, reservations are not permitted.

**Economic, Social, Cultural and Environmental Effects**

New Zealand already has a comprehensive tobacco control programme in place. Ratification of the Convention will endorse many of the approaches that have been taken in New Zealand to discourage tobacco use, as well as oblige New Zealand to continue to strive for further enhancements of that programme, and to develop new initiatives.

Tobacco use has contributed to significant inequalities in health status between Maori and non-Maori. A strong statement in the Convention that Parties should develop and implement socially and culturally appropriate tobacco control programmes for indigenous individuals and communities endorses the current approach in New Zealand of supporting programmes run by and for Maori.

There are limited direct economic effects arising from ratification of the Convention. Government policy is that tobacco use should be actively discouraged, notwithstanding an existing tobacco industry in New Zealand. The direct costs to the New Zealand health system arising from tobacco use has been variously estimated, with a 1988 study, adjusted to 1992 dollars, suggesting that this amounts to approximately $202 million per annum, excluding passive smoking healthcare costs and the cost of cigar smoking. A 1997 study estimated the social costs of tobacco use to New Zealand at $22.47 billion in 1990.

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1 Articles 4(3), 4(6), 5(6), 17, 21(3), 22, 25 and 26.
Tobacco tax revenue for the government was approximately $930 million in 2002/03 (GST exclusive). The tobacco trade also provides jobs and revenue in the manufacturing, distribution and retail sectors, and there are export earnings arising from export of tobacco to Pacific and other countries.

However, best-case projections by the World Bank, World Health Organization and associated UN agencies see only a slowing in the rising consumption of tobacco products globally, thus there will be a continuing market for tobacco products for some considerable time to come, including in New Zealand. Furthermore, given the modest impact of the Convention on domestic tobacco control efforts, it is highly unlikely that positive or negative economic effects (as set out above) will change significantly in New Zealand as a result of ratification of the Convention.

Costs

Costs to Government

There will be costs to the Government associated with attending and participating in future Conference of the Parties meetings, supplying information as required to the Conference of the Parties, and collaboration in regional and global efforts to reduce tobacco use. Such costs will be met out of existing appropriations. Requests from developing countries for assistance in implementing the Convention or for specific tobacco control initiatives, will be considered through the usual NZAID channels. No further appropriation is sought for this purpose and any requests will be prioritised alongside other requests for assistance.

Tobacco manufacturers and importers

Costs to tobacco manufacturers and importers arise from making the necessary changes to tobacco packaging. Two tobacco manufacturers, British American Tobacco (BAT) and Imperial Tobacco have 95 percent of the New Zealand tobacco market. Philip Morris is the largest importer of tobacco products to New Zealand and there are a small number of smaller, domestic importers who source their products from offshore companies.

The last changes to tobacco packaging (1999) were estimated at the time by the Tobacco Institute as likely to cost the industry approximately $5.7 million. Philip Morris has estimated that the costs to that company of the minimum changes required under the Convention would amount to approximately $500,000 (one-off costs) and stressed the importance of any required changes to packaging taking place all at once to avoid costs relating to subsequent changes. BAT has advised that in its view the changes would be likely to run into “millions of dollars” (but this estimate includes products that fall below the 0.2% threshold – see paragraph below). Based on the Philip Morris estimates provided, and the number of BAT and Imperial brand variants requiring changes to be made, the $5.7 million cost is considered realistic, if on the high side, for the changes to packaging required to give effect to Article 11 minimum requirements.

With respect to smaller importers, consideration would be given to continuation of the “0.2% rule” in the Smoke-free Environments Regulations that allows the importation of products with warnings “substantially to the same effect” as those required by domestic regulations provided they comprise less than 0.2% of the market. The term “substantially to the same effect” could be clarified to relate to those warnings that, among other matters, meet the mandatory requirements under the Convention. As other countries ratify the
Convention and align their labelling with the mandatory requirements of Article 11, this will mean that small domestic importers will continue to be able to source complying products from off-shore.

**Retailers**

Tobacco retailers are unlikely to be affected by the ratification of the Convention to any great extent. With respect to changes in tobacco labelling, there would be a transition period built into the regulations to allow retailers to sell products with old labelling (within the three year period provided for in Article 11).

**Households**

Households are not likely to be directly affected by New Zealand’s ratification of the Convention to any great extent. There are no obligations relating to the setting of tax or price policies, and the only mandatory change to government policy relates to the change in tobacco health warnings. Conceivably the cost to industry of changing warnings on packaging may be passed onto consumers and this could contribute, along with other incentives, to encourage some people to quit smoking, or reduce their consumption.

**Future Protocols**

A range of possible Protocols were identified during the negotiation process. Officials’ assessment is that Protocols that are most likely to be proposed in the foreseeable future are ones relating to tobacco smuggling and cross-border advertising and promotion. There is no obligation for New Zealand to enter into the negotiations for such Protocols, or to become a Party to them. An assessment of the benefits/costs to New Zealand of doing so can be made if and when such protocols are proposed.

**Implementation**

No primary legislation is required to implement any of the obligations under the Convention.

The only regulatory change that New Zealand would need to make to comply with the obligations set out in the Convention relates to the requirement in Article 11 that tobacco products to carry a health warning that takes up a minimum of 30 percent of the principal display areas. Regulation-making powers exist under the Smoke-free Environments Act 1990 for this purpose.

The Convention allows three years for Parties to the Convention to comply with the Article 11 requirement for minimum size health warnings. This three-year time period commences 90 days following the date of deposit of New Zealand’s instrument of ratification, or 90 days after the date of deposit of the fortieth instrument of ratification, whichever occurs last. Accordingly, if New Zealand ratified the Convention in December 2003, and under a best case (but highly unlikely) scenario, 40 countries have ratified the Convention by the same time, New Zealand would be obliged to implement regulations relating to minimum size requirements for health warnings by April 2007. This is considered more than sufficient time for the development and implementation of regulations (including an appropriate transition period decided after consultation with industry) to give effect to the obligation.
A discussion document setting out policy options and evidence on wider tobacco labelling options is proposed for release in late 2003. Consultation with industry, health groups and other interested parties will take place in early 2004, with policy decisions to be taken in mid 2004, and regulations expected to be in place as early as late 2004. If there were any delays in this wider review, the Government could move to introduce the minimum steps required to ensure compliance with the Convention (size of warnings), while still proceeding with the wider review.

Consultation

The following departments have been consulted and agree with the proposals outlined in this paper: Agriculture and Forestry, Economic Development, Environment, Foreign Affairs and Trade, Health, Consumer Affairs, Customs Service, Justice, Pacific Island Affairs, Treasury, Te Puni Kokiri.

The Ministry of Health has sought comment from health groups, tobacco companies, retailer groups and duty-free sellers in preparation for developing this NIA. Commentary below relating to the views of stakeholders focuses largely on comments made in relation to areas of the Convention that, if ratified, will alter New Zealand practice (for example, areas where regulatory change is required to give effect to obligations under the Convention).

The New Zealand Retailers Association has presented the view that “… provided the Convention says what is required under current New Zealand law then it would be acceptable”. The Association stressed the need for consultation if law changes are required.

Health groups

Health groups have strongly supported New Zealand’s ratification of the Convention, calling for health warnings to take up at least 50 percent of tobacco packets, the elimination of misleading terms on packaging such as ‘light’ and ‘mild’, and passage of the Smoke-free Bill currently before the House to provide for greater protection from exposure to second-hand smoke. Health groups have also called for increases in tobacco taxation and removal of the duty-free allowance for tobacco, funding of further tobacco control programmes (especially in the smoking cessation area), regulations to require fuller disclosure of tobacco constituents, and increased efforts to reduce tobacco smuggling.

Duty-free suppliers

Duty-free suppliers have strongly opposed any move to restrict or prohibit duty-free sales of tobacco products, arguing that this would significantly adversely affect their businesses. They argue that a ban or further restrictions would reduce sales of other goods as well because a large proportion of ‘other goods’ transactions are associated with tobacco purchases (one estimate puts tobacco sales at 13 percent of total turnover, and sales with tobacco as a component as high as 50 percent). Duty-free retailers argue that restricting or banning duty-free sales could affect tourism, is not required because it would not assist with reducing youth smoking, and that it would not assist with reducing smuggling. They have stressed the need for consultation if in the future there is any suggestion of taking such steps.
There was also concern expressed by duty-free sellers over a non-mandatory provision in Article 16 that suggested banning sales of tobacco in a manner whereby they are directly accessible by purchasers (eg directly from shop shelves). This was strongly opposed.

**Tobacco companies**

Tobacco companies *British American Tobacco*, *Philip Morris*, *Imperial Tobacco* and *Swedish Match* made submissions to the Ministry of Health on the Convention and the development of this NIA. The following paragraphs summarise comments that relate either: 1) to the merits or otherwise of ratification of the Convention; or 2) to specific measures that New Zealand would be required to take in order that it might ratify the Convention. This NIA does not include comments made on the merits or otherwise of tobacco control measures already in place in New Zealand, or focus to any great extent on any possible future measures that are not being considered at this time. Any future policy options for tobacco control, whether related to measures flagged in the Convention or not, would be subjected to the usual policy consideration processes, including consultation with interested and affected parties.

**General comments on the Convention**

*Imperial Tobacco* argued that the Convention goes beyond reasonable objectives for tobacco control, and that rules should not be set globally in areas that can be regulated effectively at regional, national or local levels.

*British American Tobacco (BAT)* suggested that the Convention is barely relevant for New Zealand, being focussed on problems elsewhere in the world, and implied that one motivation for early ratification might be to pressure other countries. BAT argued that New Zealand has already addressed most of the issues covered by the Convention. BAT also stated that it is “… not in the national interest that New Zealand should be at variance with our Trans-Tasman partner … ratification should not be considered until Australia is also ready to take that step”.

In particular, BAT raised arguments relating to the Trans-Tasman Mutual Recognition Act (TTMRA), arguing that New Zealand would be in breach of its obligations under the Convention if it ratified the Convention and then had to accept (under TTMRA) Australian labelled product that did not comply with the packaging and labelling requirements under the Convention. This eventuality could arise if Australia did not ratify the Convention and/or did not change its packaging and labelling in line with the Convention. BAT also suggested that ratification should also wait until the legislative process for the Smoke-free Bill currently before Parliament is concluded, and until a number of other countries have ratified.

Officials have assessed these arguments. Regarding trans-Tasman mutual recognition arguments, officials are not convinced that there is any reason for New Zealand to align its decision to ratify this Convention with that of Australia’s. Officials are liaising with Australian officials on mutual efforts to develop new tobacco labelling requirements in line with the Convention and aimed at improving public health. However, there is no need under TTMRA to delay New Zealand’s ratification of the Convention until Australia has completed its review of tobacco packaging and labelling or its Convention ratification process. Under the worst case scenario (that Australia reversed its current efforts to
enhance its tobacco health warnings and ratify the Convention), there is scope under the TTMRA Act to exclude Australian products that do not comply with packaging and labelling requirements under the Convention, from mutual recognition arrangements (TTMRA specifically allows for exclusions in order to comply with relevant international obligations). However, the need to consider such a step should not arise in the event that Australia implements the Convention’s provisions by the time that the Article 11 obligation takes effect for New Zealand.

Furthermore, the ability of New Zealand to ratify the Convention does not depend on passage of any of the provisions contained in the Smoke-free Bill currently before Parliament. Accordingly, officials see no reason to delay ratification on account of the Bill. With respect to the suggestion by Imperial Tobacco that certain rules should not be set globally, this was a matter for Parties to the negotiations to determine what was appropriately covered by the Convention, and for individual Parties to make that judgement when deciding whether to ratify or not (see section above on advantages and disadvantages of ratifying the Convention).

Finally, BAT argued that there were international law impediments to ratification. These include a suggestion that terminology used in the Convention in relation to the authority of competent / governmental / national authorities is unclear. However, officials’ assessment is that in the context in which they appear in the Convention the terms “governmental authorities” or competent national authorities” are clear and do not result in any ambiguity for New Zealand in implementing its obligations under the Convention. BAT also argued that Articles in the Convention that referred to the Conference of the Parties proposing guidelines and standards was an “improper delegation of power”. However, it is clear that those Articles relating to guidelines and standards do not mandate that Parties must adopt and implement them. Accordingly, there is no such delegation of power.

Specific comment on steps required for ratification

All companies expressed concern about, and opposition to, requirements under Article 11 of the Convention for Parties to require warnings to take up a minimum of 30 percent (and preferably at least 50 percent) of the principal display areas on tobacco packets. There was also strong opposition to the suggestion that Parties to the Convention consider pictorial health warnings. In particular, companies argued that larger health warnings would be excessive and interfere with trademarks owned by the companies. It was noted that such trademarks are valuable intellectual property and such value is recognised by international agreements to which New Zealand is a party. BAT noted that New Zealand already largely complies with or exceeds Article 11 requirements, and argued that this includes the minimum size requirements. With respect to the latter argument, as described in paragraph 19, it is the assessment of officials that this clearly is not the case. They also raised interpretation concerns about the ban on misleading terms on packaging contained in Article 11, suggesting that the Article is internally contradictory. Officials consider that the intent and scope of this Article, which was the subject of extensive discussion during the negotiations, is clear.
The companies also raised concerns about costs: these issues are discussed above under the section on Economic, Social, Cultural and Environmental effects and in an associated Regulatory Impact Statement.

Swedish Match supported the thrust of most of the Articles of the Convention. It noted its opposition to any further increase in the tax on tobacco products or any move to restrict duty-free sales or importation. The company also argued against certain health warnings for cigars and pipe tobacco on the basis of lesser harms from smoking these products compared with cigarettes.

Imperial Tobacco also expressed concerns about the taking of any further steps to place markings on tobacco packets to aid traceability of product to combat smuggling: such measures, it was argued should be the subject of a separate protocol and/or be led by the World Customs Organization. Imperial opposes the application of any tax and price measures to reduce consumption. Finally, Imperial Tobacco expressed concerns about any moves under Article 19 to take legislative action to hold tobacco companies liable for past actions.

**Withdrawal**

The Convention allows for Parties to the Convention to withdraw at any time after two years from the date on which the Convention has entered into force for that party. Withdrawal takes effect upon expiry of one year from date of receipt by the Depositary of the notification of withdrawal, or any later date as specified in the notification of withdrawal.