

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2013 No. 225**

Issued by the Authority of the Minister for Innovation, Industry, Science and Research  
*Trans-Tasman Mutual Recognition Act 1997* and the  
*Tobacco Plain Packaging Act 2011*  
*Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging)*  
*Regulation 2013*

#### **Purpose and Authority**

The purpose of the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013* (the Regulation) is to permanently exempt the *Tobacco Plain Packaging Act 2011* (the TPP Act), the *Tobacco Plain Packaging Regulations 2011* (the TPP Regulations) (together, the ‘TPP legislation’) and the *Competition and Consumer (Tobacco) Information Standard 2011* (the Information Standard) from the operation of the *Trans-Tasman Mutual Recognition Act 1997* (the TTMR Act).

The TTMR Act permits goods imported from New Zealand to be sold in Australia without complying with local Australian sale requirements, so long as the requirements for sale in New Zealand are met.

By permanently exempting the TPP legislation and Information Standard from the operation of the TTMR Act, the Regulation continues to ensure that branded tobacco products from New Zealand cannot be sold legally in Australia.

The Regulation also makes minor, consequential amendments to the TTP Regulations by inserting notes which provide that the TTP legislation was previously temporarily exempt from the TTMR Act but is now permanently exempt from that Act, with effect from the commencement of the Regulation.

Section 45 of the TTMR Act sets out the circumstances in which a permanent exemption may be made under the TTMR Act. Subsection 45(3) provides that the Governor-General may make regulations amending Schedule 2 – Permanent Exemptions, of the TTMR Act. As required by subsections 45(4) of the TTMR Act, all of the participating jurisdictions have endorsed the Regulation and, in accordance with subsection 43(1) of the TTMR Act, have published an official notice to that effect in their gazettes. The making of this Regulation represents the endorsement of the Commonwealth.

#### **Background**

The TTMR Act gives effect to the mutual recognition principles adopted by the Commonwealth, State and Territory Governments of Australia and the Government of New Zealand (the participating jurisdictions), relating to the sale of goods and the registration of occupations. In

respect of goods, a good that can be sold legally in Australia may legally be sold in New Zealand and vice versa.

The TTMR Act overrides any local laws that regulate the manufacture or sale of goods provided that the New Zealand requirements for sale are met. The TTMR Act does provide, however, for circumstances where the mutual recognition principle will not apply. These circumstances are covered by provisions for exclusions, permanent exemptions and temporary exemptions.

The TPP legislation prescribes the requirements for the plain packaging of tobacco products. The TPP legislation aims to reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; increase the noticeability and effectiveness of mandated health warnings; reduce the ability of the retail packaging of tobacco products to mislead consumers about the harms of smoking; and through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.

The TPP Act makes it an offence to sell, supply, purchase, package or manufacture tobacco products or packaging for retail sale, that are not compliant with plain packaging requirements. These offences apply to individuals, manufacturers, packagers, wholesalers, distributors and retailers of tobacco products in Australia who fail to comply with the plain packaging requirements.

With effect from 1 October 2012, all tobacco products manufactured or packaged in Australia for domestic consumption were required to be in plain packaging, and with effect from 1 December 2012, all tobacco products sold, offered for sale or otherwise supplied in Australia were required to be in plain packaging.

The Information Standard prescribes requirements for health warnings to be displayed on tobacco product packaging, to increase consumer knowledge of the health effects relating to the use of tobacco products; to ensure the continuing effectiveness of health warnings on retail packaging of tobacco products and, by ensuring the continuing effectiveness of health warnings on tobacco packaging, to encourage the cessation of the use of tobacco products and to discourage uptake or relapse.

Under the Information Standard, requirements for new, larger health warnings on tobacco products took full effect from 1 December 2012, in line with the plain packaging requirements.

As provided for under section 46 of the TTMR Act, on public health grounds, the TPP legislation and the Information Standard were temporarily exempt from the operation of the TTMR Act for 12 months. The temporary exemption for the TPP legislation was invoked through section 109 of the TPP Act and regulation 1.1.5 of the TPP Regulations. The temporary exemption for the Information Standard was invoked through section 1.6 of the Information Standard.

Under subsection 46(4) of the TTMR Act, temporary exemptions may only operate for a maximum period of 12 months after which the principles of mutual recognition apply. As the temporary exemptions for the TPP legislation and the Information Standard were due to expire on 30 September 2013 and 30 November 2013 respectively, a permanent exemption was sought.

## **Consultation**

In April 2013, the Commonwealth sought the agreement of the Standing Council on Health (SCoH) to permanently exempt the TPP legislation and the Information Standard from the operation of the TTMR Act. SCoH agreed and, in May 2013, the SCoH Chair wrote to inform the Chair of the Ministerial Council for the Treasury Portfolio, the COAG Legislative and Governance Forum on Consumer Affairs (CAF), of the SCoH policy decision. This reflects the fact that the Health Portfolio has policy responsibility for the health warnings on tobacco product packaging, and that the Information Standard is administered within the Treasury Portfolio.

The SCoH Chair also wrote to the Prime Minister in May 2013, requesting that Heads of Government endorsement be sought for the permanent exemption. The Prime Minister wrote to Heads of Government of the participating jurisdictions on 30 May 2013, requesting that they endorse the Regulation implementing the permanent exemption. In accordance with subsection 43(1) of the TTMR Act, the designated person for each participating jurisdiction has endorsed the Regulation, and notices endorsing it have been published in the official gazette of all participating jurisdictions. The making of this Regulation represents the endorsement of the Commonwealth.

The Regulation implements the Heads of Government decision to permanently exempt the TPP legislation and the Information Standard from the operation of the TTMR Act.

### **Regulation Impact Statement**

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required as the exemption is machinery in nature. The reference number is 14582.

### **Details of the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013***

#### Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013*.

#### Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

#### Section 3 – Authority

This section provides that the regulation is made under subsection 45(3) of the TTMR Act and section 109 of the TPP Act.

#### Section 4 – Schedule(s)

This section provides that each instrument or Act specified in the Schedule to the Regulation is amended or repealed as set out in the applicable items of the Schedule.

#### Schedule 1 – Amendments

*Tobacco Plain Packaging Regulations 2011*

#### **Item [1] – At the end of regulation 1.1.5**

Item [1] amends the *Tobacco Plain Packaging Regulations 2011* to add two notes at the end of regulation 1.1.5.

Note 1 explains that the *Tobacco Plain Packaging Act 2011* (the TPP Act) and the *Tobacco Plain Packaging Regulations 2011* (the TPP Regulations) were initially temporarily exempt from the operation of the Act. The note further provides that this exemption operated from 1 October 2012 until the commencement of the Regulation.

Note 2 explains that the TPP Act and TPP Regulations are permanently exempt from the operation of the Act and that this exemption begins on the commencement of the Regulation.

*Trans-Tasman Mutual Recognition Act 1997*

**Item [2] – Clause 3 of Schedule 2 (at the end of the table)**

Item [2] amends Schedule 2 of the TTMR Act to provide that the Information Standard and the TPP Act are permanently exempt from the operation of the TTMR Act.

It is important to note that subsection 4(2) of the TTMR Act provides that a reference to a law specified or described in a Schedule of the TTMR Act (unless otherwise stated in the Schedule) includes a reference to any regulations or statutory instruments made under that law. This means that the reference to the TPP Act will also include the TPP Regulations. Consequently, the TPP Regulations will be permanently exempt from the operation of the TTMR Act.

It is also important to note that if the TPP Act, TPP Regulations or the Information Standard are amended (or in the case of the Information Standard, revoked and remade), subsection 4(3) of the TTMR Act would operate to ensure that the exemption from the TTMR Act provided by the Regulation would apply to the amendment or replacement as long as the amendment or replacement does not restrict the scope of the TTMR Act.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013*

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Legislative Instrument

The purpose of the Regulation is to permanently exempt the *Tobacco Plain Packaging Act 2011* (the TPP Act), the *Tobacco Plain Packaging Regulations 2011* (the TPP Regulations) (together, the ‘TPP legislation’), and the *Competition and Consumer (Tobacco) Information Standard 2011* (the Information Standard) from the operation of the *Trans-Tasman Mutual Recognition Act 1997* (the TTMR Act)

The TTMR Act permits goods imported from New Zealand to be sold in Australia without complying with local Australian sale requirements, so long as the requirements for sale in New Zealand are met.

By permanently exempting the TPP legislation and Information Standard from the operation of the TTMR Act, the Regulation continues to ensure that branded tobacco products from New Zealand cannot be sold legally in Australia.

The TPP legislation prescribes the requirements for the plain packaging of tobacco products. The TPP legislation aims to reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; increase the noticeability and effectiveness of mandated health warnings; reduce the ability of the retail packaging of tobacco products to mislead consumers about the harms of smoking; and through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.

The TPP Act makes it an offence to sell, supply, purchase, package or manufacture tobacco products or packaging for retail sale, that are not compliant with plain packaging requirements. These offences apply to individuals, manufacturers, packagers, wholesalers, distributors and retailers of tobacco products in Australia who fail to comply with the plain packaging requirements.

The Information Standard prescribes requirements for health warnings to be displayed on tobacco product packaging, to increase consumer knowledge of the health effects relating to the use of tobacco products; to ensure the continuing effectiveness of health warnings on retail packaging of tobacco products and, by ensuring the continuing effectiveness of health warnings on tobacco packaging, to encourage the cessation of the use of tobacco products and to discourage uptake or relapse.

## **Human rights implications**

### *Freedom of expression*

The permanent exemption of this legislation from the operation of the TTMR Act may engage Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR protects the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice.

It is possible that by prohibiting the sale in Australia of branded tobacco products from New Zealand, with New Zealand health warnings, the Regulation limits the right to freedom of expression.

### *Legitimate objective: Regulation is justified under a permitted limitation*

The right to freedom of expression is not absolute. It carries with it special responsibilities, and there are several grounds on which it may be restricted. Article 19(3) of the ICCPR expressly states that the right to freedom of expression may be subject to limitations necessary for the protection of public health.

The limitation (if any) of the right to freedom of expression in the Regulation, aims to achieve a legitimate objective - the protection of public health - by seeking to help maximise the effectiveness of Australia's tobacco plain packaging and health warnings measures. The objectives of the TPP legislation are to reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; increase the noticeability and effectiveness of mandated health warnings; reduce the ability of the retail packaging of tobacco products to mislead consumers about the harms of smoking; and through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.

Smoking is estimated to kill 15,000 Australians each year and to cost the economy and society \$31.5 billion a year.

### *Reasonable and proportionate: Regulation will be effective to achieve the desired ends and does not impinge on freedom of expression to a greater degree than is necessary*

New Zealand has an existing tobacco industry presence. Although the New Zealand Government announced in February 2013 that it will introduce legislation for plain packaging of tobacco products, this will take some time. In addition, it is not certain that any regime implemented by New Zealand will replicate Australia's plain packaging and health warnings requirements. For example, New Zealand legislation requires tobacco product packaging to carry health warnings in Maori text, which Australia's legislation does not allow for, and which would not be appropriately targeted to the Australian population.

By permanently exempting the TPP legislation and the Information Standard from the operation of the TTMR Act, the Regulation continues to ensure that branded tobacco products from New Zealand, with New Zealand health warnings, cannot be sold legally in Australia. The Regulation does not prohibit or restrict the sale of such tobacco products in New Zealand. For these reasons,

the Regulation is reasonable and proportionate in achieving the above mentioned legitimate objective.

*Necessary: no less restrictive means of achieving the desired ends*

Although the TTMR Act allows for the continuation of temporary exemptions for a further period of up to 12 months, as a temporary solution this would not have adequately met the ongoing public health objective of the TPP legislation.

Section 44 of the TTMR Act provides that the TTMR Act does not affect laws specified or described in Schedule 1, to the extent that Schedule 1 indicates that they are excluded from the operation of the TTMR Act. The laws listed in Part 2 of Schedule 1 relate to customs controls and tariffs, intellectual property, taxation and specified international obligations.

Tobacco products with non-compliant packaging and health warnings could have been excluded from the operation of the Act, by adding these to the prohibited imports list via an amendment to the *Customs (Prohibited Imports) Regulations 1956*. However, this is not a less restrictive means of achieving the desired end. The TPP Act permits suppliers and individuals to import non-compliant tobacco products and, where necessary, to repackage them into compliant packaging prior to the first on-supply. If non-compliant tobacco products were added to the prohibited imports list this could not occur. For these reasons, the permanent exemption provided for by the Regulation is the least restrictive means of achieving the above mentioned legitimate objective.

*Right to health*

By ensuring that branded tobacco products from New Zealand, with New Zealand health warnings, cannot be sold legally in Australia, the Regulation engages the right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 12(2)(c) of the ICESCR requires Parties to take steps to achieve the full realisation of the right of everyone to the highest attainable standard of physical and mental health, including those steps necessary for the prevention, treatment and control of diseases. The Committee on Economic, Social and Cultural Rights considers that this “requires the establishment of prevention and education programmes for behaviour-related health-concerns...and the promotion of social determinants of good health”.

The TPP legislation promotes the right to health by aiming, through the achievement of the above aims, and as part of a comprehensive range of tobacco control measures, to contribute to efforts to reduce smoking rates and thereby reduce the significant health and economic effects of tobacco usage.

## **Conclusion**

The Regulation is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

**Kim Carr, Minister for Innovation, Industry, Science and Research**