

28 February 2011

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Dear Dr Hutchinson

SUPPLEMENTARY MATERIAL - SUBMISSION ON THE SMOKE-FREE ENVIRONMENTS (CONTROLS AND ENFORCEMENT) AMENDMENT BILL

1. The New Zealand Retailers Association ("**NZRA**") would like to thank the Health Committee ("**Committee**") for the opportunity to speak to our submission during the Committee hearings, held on 16 February 2011.
2. An important topic of discussion was our concern regarding the drafting of new section 23A (under clause 7), namely, the uncertainty as to what extent, if any, section 23A(4) permitted the incidental visibility of tobacco products.
3. The Committee indicated that it was not certain what NZRA's precise concerns were. In particular, it was suggested that section 23(A)(4) already provides the necessary protection, as that section provides an exception to the retail display ban by allowing visibility to the extent necessary for delivery of the tobacco product to the consumer.
4. While we acknowledge that this does provide an important clarification, in our view it does not cover the situations we are concerned about. That is, under the Bill as currently drafted, it appears that the visibility of tobacco products while re-stocking storage units and the incidental visibility of other tobacco products within storage units when opened to retrieve a product for a customer would be a breach of the display ban.
5. Our understanding is that the Bill intends to provide flexibility as to the type of cabinet that can be used to comply with the display ban. Accordingly, in our view, for this intent to be achieved and be workable in practice, it will be important for the Bill to allow minimal incidental visibility of products in situations other than when the product is being delivered to the customer.
6. We emphasise that we are not seeking any form of "relaxation" of the Bill. Rather, we are seeking further clarification of a provision under the Bill, which as currently drafted, will not achieve the intended outcome. As section 23A is currently drafted, a retailer will be inadvertently vulnerable to committing an offence every time he or she opens a storage unit to retrieve a tobacco product (unless the storage unit is under the counter or in a back room). There also appears to be no ability to restock cabinets during business

hours, which would impose compliance costs that appear not to have been considered during the formulation of the Bill.

7. We therefore recommend that a new subsection 4A be inserted into section 23A, as follows:

7 New sections 23 to 23B substituted

...

23A Display of tobacco products in or from sales outlets or vending machines generally prohibited

(1) A person who offers tobacco products for sale (whether by retail or wholesale) must not allow any part of a tobacco product, tobacco package, or tobacco carton at the exterior of or inside the person's place of business to be for any reason visible—

- (a) from outside the place; or
- (b) from an area inside the place to which members of the public are allowed access.

(2) A person who offers any tobacco product for sale (whether by retail or wholesale) by way of an automatic vending machine must not allow any part of a tobacco product, tobacco package, or tobacco carton to be for any reason visible from outside the machine.

(3) Subsection (1) does not limit or affect, and is not limited or affected by, subsection (2).

(4) Subsections (1) and (2) do not, however, apply to a tobacco product, tobacco package, or tobacco carton that is visible only to the extent that is necessary for it to be delivered—

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

(4A) Subsections (1) and (2) do not, however, apply to a tobacco product, tobacco package, or tobacco carton, that is visible—

- (a) as a direct consequence of a purchaser requesting that a tobacco product be retrieved for sale, and the visibility lasts no longer than is reasonably necessary to allow removal of the requested tobacco product from the storage unit in which the tobacco product, tobacco package or tobacco carton is located; or**

(b in the course of a storage unit being restocked, and the visibility lasts no longer than is reasonably necessary to allow the storage unit to be restocked.

(5) Subsections (1) and (2) do not, however, apply to a tobacco product, tobacco package, or tobacco carton that is visible in a way that complies with any relevant temporary transitional exemption regulations for the time being in force under section 39(1)(ic).

8. We note that the draft amendments will not encourage or provide an opportunity for retailers to exploit the exceptions to the prohibition under section 23A. For example, concerns have been raised that such provisions may encourage retailers to leave cabinet doors open for prolonged periods of time. However, as both section 23A(4A)(a) and (b) would not allow tobacco products to be visible for any longer than is **reasonably** necessary to allow a product to be retrieved or cabinets to be restocked, retailers' conduct will be judged by an objective standard and they will remain in breach if they are lax in their conduct. Put another way, leaving a cabinet door open would breach the provisions of the Bill as drafted, and would also be a breach under our proposed amendment.
9. We therefore urge the Committee to adopt these amendments, which help to clarify an ambiguous provision of the Bill that could prove to be unduly onerous for all retailers in practice.

Yours sincerely



Louise Evans McDonald
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