

Office of the Associate Minister for the Environment

Chair

Cabinet Economic Growth and Infrastructure Committee

Prohibiting the sale and manufacture of wash-off products containing plastic microbeads

Proposal

1. This paper seeks policy decisions to prohibit the sale and manufacture of certain consumer products containing plastic microbeads.

Executive summary

2. In January 2017, the Government released a public consultation document on a proposal to ban the manufacture and sale, under the Waste Minimisation Act 2008, of plastic microbeads in personal care products like facial cleansers and toothpastes [CAB-16-MIN-0626 refers]. Microbeads are designed to be washed directly down the drain where they are only partially captured by waste water treatment systems. They are harmful to marine life and are inessential to consumers because there are alternative ingredients that are not harmful.
3. A total of 16,223 submissions were received and all supported the proposed ban or supported it in part. None were opposed. Many submitters urged the Government to broaden the scope of the proposed ban to include other products containing microbeads.
4. Submitters suggested that various products could contain plastic microbeads such as household, car, and industrial cleaning products. The Ministry for the Environment made enquiries and found no such products currently for manufacture or sale on the New Zealand market, although there has been in the past. In order to ensure all present and future products are captured equitably, I propose widening the scope of the proposed ban to include all “wash-off” cleaning products containing plastic microbeads for visual appearance, exfoliating, cleansing or abrasive cleaning purposes. This includes household, car or other cleaning products as well as personal care products.
5. Although it has a wider scope, the impact of the ban on industry will be similar to bans in the USA, Canada, Australia and elsewhere.

Background

6. In January 2017, the Government released a public consultation document on a proposed ban of the sale and manufacture of plastic microbeads in personal care products like facial cleansers and toothpastes.
7. The consultation document set out the rationale for the proposed ban, summarised below:

- plastic microbeads are a problem because they are too small to be retrieved, are cumulative and do not biodegrade.
- recent studies have shown that microbeads can be mistaken by marine life as food, causing long-term damage to aquatic animals like fish and mussels. This in turn poses a potential threat to human health.
- there are suitable alternatives to plastic microbeads in personal care products that do not have adverse impacts on the environment
- the products are designed to be washed straight down the drain, and are only partially captured by the waste water treatment system.
- this initiative is part of wider global efforts to reduce the amount of plastic waste in the oceans. The New Zealand ban parallels similar initiatives in the United States of America (USA), United Kingdom (UK), Canada, Europe and Australia (by industry self-regulation in Australia).

8. A total of 16,223 submissions were received as outlined in Table 1.

Table1: Submitters to the proposal to ban plastic microbeads

Submitter	Number
Individuals	16,184
Business/Industry	22
NGOs	7
Local government	4
Others	4

9. In terms of general stance, the proposal was supported by all submitters. Submissions from 25 individuals, six from business/industry and one other supported the proposals in part. A summary of submissions is attached as Appendix One.

Proposed policy

10. Having considered the feedback from submitters and the advice of the Waste Advisory Board and the Ministry for the Environment, I propose that the products to be prohibited be as follows:

- 10.1. Products – “Wash-off” cleaning products containing plastic microbeads for visual appearance, exfoliating, cleansing or abrasive cleaning purposes. This would cover all such products designed to wash down the drain (including stormwater drains) or directly into aquatic systems. The main products affected are wash-off cosmetics such as facial and body exfoliants, toothpastes and heavy-duty hand cleansers. It would also capture any abrasive cleaning products containing plastic microbeads, including household, car or industrial cleaning products. The ban will not affect cosmetic make-up because these are “wipe-off” products. The ban would be designed to exclude therapeutic products.

- 10.2. Specified material – intentionally added, solid plastic particles less than 5mm in size. This is consistent with widely-used definitions of microbeads.
11. In total, the above policies are broadly consistent with the USA and Canadian laws. If agreed, the law would prevent microbead-containing products from being manufactured or sold in New Zealand (including New Zealand-based internet sites). Most of such products for sale in New Zealand are manufactured overseas.

Scope of the proposed ban

12. The scope of the proposed ban was the key issue arising from public consultation. As with overseas campaigns, many Non-Governmental Organisation submitters and members of the public urged the Government to broaden the scope of the proposed ban to include other types of products that contain microbeads and are washed down the drain, such as household and industrial cleaners.
13. Anecdotally such cleaning products are for sale in New Zealand. However, the Ministry for the Environment made some informal enquiries and found no such products currently for manufacture or sale on the New Zealand market, although there has been in the recent past (a toilet bowl cleaner). A survey of the Australian market found a similar result.
14. Nevertheless, in order to ensure all present and future products are captured equitably, I propose that the scope of the ban include products used for exfoliating or scouring any surface, not just cosmetic products, since there are alternative ingredients available, such as pumice.
15. Some submitters wrote that the proposed ban should capture products such as cosmetic make-up and sunscreen. These products and a range of others may contain microscopic synthetic polymers¹ or nanoplastics of widely varying types, properties and uses. Not a lot is known yet about their impacts on the marine environment. These ingredients are too small to be considered microbeads.
16. To ensure the proposed regulations are clear and practical and do not have unintended consequences, I consider it necessary to specify the purposes of the microbeads in the products in scope (that is, for visual appearance, or for exfoliating, cleansing or abrasive cleaning). The proposed approach would capture the vast majority of harmful plastic particles in products designed to wash down the drain.
17. For further avoidance of unintended consequences I also propose that the regulations be drafted to ensure that therapeutic products are not caught by the ban. While the overall trend is for the decreasing use of microbeads there may be therapeutic products for cleansing or exfoliation where there is a genuine need and these products should not be caught by the ban. The Ministry for the Environment will work with the Ministry of Health to ensure that this arrangement is suitably narrow and does not inadvertently enable cosmetic products to be outside the ban.

¹ A polymer is not a plastic. Polymers are the main ingredients of plastics.

Regulation under the Waste Minimisation Act 2008 – statutory requirements

18. The Waste Minimisation Act 2008 empowers the Minister for the Environment to recommend an Order in Council to control or prohibit the manufacture or sale of products that contain specified materials (section 23(1)(b)). In so doing, the Minister must be satisfied that a reasonably practicable alternative to the specified materials is available.
19. In addition, before recommending regulations, the Minister must first consider the advice of the Waste Advisory Board, and must be satisfied that:
 - 19.1. there has been adequate consultation,
 - 19.2. the benefits expected from implementing the regulations exceed the costs, and
 - 19.3. the regulations are consistent with New Zealand's international obligations.

Practicable alternatives

20. Microbeads were originally developed for consumers with sensitive skin or acne. Not all exfoliants meet all the requirements for sensitive skin. However, alternatives have been developed. One submitter from the cosmetics industry indicated that they had reformulated their imported microbead products using jojoba wax and cellulose.
21. For more general exfoliating or cleaning, there are several readily available and competitively priced alternative ingredients including ground nut shells, pumice, glass, salt and baking soda. Some exfoliating products contain lactic acid or enzymes present in pineapple and papaya.

Advice of the Waste Advisory Board

22. The Waste Advisory Board indicated support for the proposal and suggested that the beneficial impact of the ban would be strengthened if the scope of captured products were to be widened. The Board gave useful advice regarding implementation, timeframes and public education. The Board also encouraged the establishment of a broader work programme on the wider issue of marine pollution from microplastics.

Adequate consultation

23. Formal public consultation beginning in January 2017 drew a large number of submissions. Although the scope of the proposal has changed, I am satisfied that there has been adequate consultation because the change has been made in response to views expressed by the majority of submitters and the additional effects of the enlarged scope are very limited. The effect on household or car cleaning products is primarily to prevent such products being reintroduced.

Costs and benefits

24. I am satisfied the benefits of the regulation outweigh the costs. The costs and benefits have not been quantified (which would be difficult to do accurately) but can be described.

25. Microbeads make up only a fraction of total microplastic pollution.² However, the benefits of eliminating them are significant because plastic stays in the environment for a long time and accumulates, harming aquatic creatures.
26. The government of the UK has recently concluded a public consultation on banning microbeads. Bans are in force in the USA and Canada, and many industry bodies have announced voluntary phasing out of the use of microbeads. The proposed New Zealand regulation supports this intent, ensuring the market responds swiftly, mitigating the risk of re-introduction in the future, and encouraging innovation. The proposed ban would prevent New Zealand from becoming a dumping ground for microbead-containing products manufactured elsewhere.
27. There is a compliance cost to suppliers and retailers who may need to remove stocks from sale. We know of at least one manufacturer of affected products in New Zealand, and they will be able to start using alternative ingredients this year. The Ministry for the Environment is endeavouring to identify all the potential affected manufacturers. There is likely to be only a handful of manufacturers at most.
28. The costs to the Government are policy and legal staff time spent developing the regulation, and the cost of enforcement by the Environmental Protection Authority (EPA). These costs will be covered within government agency budgets. Depending on the number of prosecutions involved, the EPA may need additional funding in the future which will be sought from the Budget process. The EPA estimates there would be few, if any, prosecutions, but this is difficult to predict.

New Zealand's international obligations

29. The Ministry for Foreign Affairs and Trade (MFAT) has advised that the proposed ban is consistent with New Zealand's international obligations to protect the marine environment. Relevant obligations include marine pollution articles from the United Nations Convention on the Law of the Sea. There are also relevant obligations in the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (the Noumea Convention).

Trans-Tasman Mutual Recognition Arrangement

30. The Ministry for Business, Innovation and Employment (MBIE) and MFAT have advised that, under the Trans-Tasman Mutual Recognition Arrangement (TTMRA), which is codified in New Zealand legislation under the Trans-Tasman Mutual Recognition Act 1997 (TTMR Act), any goods produced in or imported into Australia that may be lawfully sold in Australia may also be sold in New Zealand (and vice versa). Therefore, a good containing microbeads that is legally able to be sold in Australia is legally able to be sold in New Zealand.
31. The majority of submitters expressed concern that the TTMR Act means that microbead-containing products could still enter New Zealand via Australia, despite

² Overseas estimates vary from 4.1% to 0.1%. A New Zealand-based study confirmed that microplastic pollution is present on New Zealand's coastlines at concentrations in the middle range of those measured internationally. Out of 73 particles identified as microplastics, two were microbeads. Clunies-Ross, Smith, Gordon and Gaw (2016): "Synthetic shorelines in New Zealand? Quantification and characterisation of microplastic pollution on Canterbury's coastlines", *New Zealand Journal of Marine and Freshwater Research*.

the ban. Submitters encouraged the Government to explore all options to ensure that products containing microbeads do not enter New Zealand shops via Australia.

32. Despite these concerns, a specific exemption for products from Australia will be included in the regulations to ensure that the effect of the TTMRA, which would otherwise override the sales ban, is transparent.
33. Industry in Australia is phasing out microbeads voluntarily, with the federal Government supporting it with a public statement that it will take action if voluntary efforts prove ineffective. Officials in Australia advise that good progress is being made towards the phase-out target date of 1 July 2018. The Australian market is heading in the same direction as New Zealand and a number of other countries. Therefore the number of goods likely to come into New Zealand from Australia can reasonably be expected to be low.

World Trade Organisation (WTO) framework

34. MFAT has advised that the ban could potentially be seen as a de facto quantitative restriction on imports, which would be inconsistent with New Zealand's obligations under Article XI of the General Agreement on Tariffs and Trade (GATT) 1994. The ban could also be a "technical regulation" falling within the scope of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). However, the risk that the ingestion of microbeads causes to marine life and the potential risks to human health suggest that the sale ban could come within the exception of Article XX(g) of GATT 1994, and there is a strong argument that it could be further justified under Article XX(b). The ban would also be unlikely to be found more trade restrictive than necessary under the TBT Agreement.
35. Following Cabinet's agreement on the policies, the Ministry for the Environment will notify WTO Members of the products to be covered by the proposed regulation (as required by Article 2.9.2 of the TBT Agreement). This is to alert Member countries to the proposed regulation and gather any comments.
36. Article 2.12 of the TBT Agreement states that Members should provide a reasonable interval between the publication of technical regulations and their entry into force. Paragraph 5.2 of the *Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001*, which has been used to help clarify the interpretation of Article 2.12, provides that the phrase "reasonable interval" shall be understood to mean normally a period of not less than six months after gazetting regulations. This is to allow affected industry time to adapt.

Implementation and timeframes

37. The consultation document proposed that the new regulations could enter into force around mid-2018 to allow businesses sufficient lead-in time to prepare. This aligns with the 1 July 2018 enforcement timeframe in the USA, Canada and Australia. The majority of submitters supported this and some encouraged an earlier timeframe. The Waste Advisory Board also encouraged an earlier timeframe but noted that a too-short implementation timeframe for the ban could just result in stocks of imported products being exported offshore.

38. I propose an entry-into-force date as soon as possible after the six month notification period required by the TBT Agreement. I intend this to be 30 May 2018).

Enforcement

39. If the regulation proceeds, any person knowingly contravening the regulation will be liable (on conviction in court) for a fine not exceeding \$100,000 (section 65(1)(d) of the Waste Minimisation Act 2008). The EPA can enforce the ban in two ways – by seizing goods (under section 82) or by investigating and prosecuting where there is evidence of a sale (section 65(1)(d)).

40. The Secretary for the Environment will need to warrant an EPA enforcement officer to enforce the regulation. The EPA advises that its ongoing activities will primarily consist of responding to complaints from the public and taking appropriate actions.

Consultation

41. The Department of the Prime Minister and Cabinet has been informed of this paper.

42. The following agencies were consulted with during the development of this paper and their feedback incorporated: the Treasury, the Department of Conservation, the New Zealand Customs Service, the Ministry for Primary Industries, MFAT, MBIE, Te Puni Kōkiri, and the EPA. The Department of Conservation supports the proposal and no agencies disagreed with it.

Financial implications

43. No new funding is being sought for this proposal. However, depending on the number of breaches that require investigation and prosecution, the EPA may require additional funding in the future.

Human rights

44. The proposal in this paper and the attached consultation document are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

45. If agreed, the Ministry for the Environment will work with the Parliamentary Counsel Office to draft new regulations under the Waste Minimisation Act 2008. This will be the first time the empowering provision will have been used (section 23(1)(b)), and in a new area of law for New Zealand.

Regulatory impact analysis

46. The Regulatory Impact Analysis (RIA) requirements apply to this proposal. A Regulatory Impact Statement is attached to this paper. The Ministry for the Environment's Regulatory Impact Analysis Panel has reviewed the attached Regulatory Impact Statement (RIS) prepared by the Ministry for the Environment. The Panel consider that the RIS partially meets the quality assessment criteria.

47. The RIS is written clearly and concisely and does enough to analyse the outlined options with the elements of the proposals being clear and the impacts having been identified. The RIS is convincing and compelling in terms of explaining the possible impacts and costs of the preferred option, above and beyond the status quo. The document reflects the range of submissions and feedback elicited

through the consultation process, and has provided information about the various industry and market-led efforts already underway. While the costs to consumers and businesses are not specifically differentiated between the different options, the Panel view the RIS as sufficient to inform decisions on the options and proposals in this paper, and for recommending the Ministry's preferred option.

Gender implications

48. There are no particular gender implications associated with this paper.

Disability perspective

49. There are no particular implications for people with disabilities associated with this paper.

Publicity

50. Should Cabinet agree to the proposal, this Cabinet paper will be released on the Ministry for the Environment's website, together with a media statement, the Regulatory Impact Statement and Summary of Submissions. As noted above, the Ministry for the Environment will also communicate the policy decisions to affected industry.

Next steps

51. If Cabinet agrees to the regulations being drafted, I anticipate taking the regulations to the Legislation Committee in November for approval, followed by notification in the New Zealand Gazette.

Recommendations

52. The Associate Minister for the Environment recommends that the Committee:

1. **Note** that public consultation showed strong support for banning plastic microbeads in personal care products and many submitters encouraged the Government to widen the scope to include all microbead-containing products that wash down the drain.
2. **Agree** to prohibit, under section 23(1)(b) of the Waste Minimisation Act 2008, the sale and manufacture of “wash-off” cleaning products containing plastic microbeads for visual appearance, exfoliating, cleansing or abrasive cleaning purposes.
3. **Agree** to include in the regulations a specific exemption for products from Australia to ensure consistency with the Trans-Tasman Mutual Recognition Act.
4. **Agree** that the ban be drafted with a suitably narrow exemption for therapeutic products used for cleansing or exfoliating (while ensuring cosmetic products are excluded).
5. **Agree** that the proposed regulations enter into force on 30 May 2018 subject to a six month notification period (required by the TBT Agreement) following gazettal of the regulations.
6. **Invite** the Associate Minister for the Environment to instruct the Parliamentary Counsel Office to draft the proposed regulations.
7. **Authorise** the Associate Minister (or Minister) for the Environment to approve changes consistent with the proposals in 2 to 5 above, on any matter that arises during the drafting process.
8. **Agree** that the Associate Minister for the Environment announce the policy and proactively release this paper along with the Regulatory Impact Statement and the Summary of Submissions.

Authorised for lodgement.

Hon Scott Simpson
Associate Minister for the Environment

Appendix One: Summary of Submissions