

21 November 2011

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**By email, fax and courier**

Dear Attorney-General and Mr Daley,

**Notice of Arbitration  
Australia / Hong Kong Agreement for the Promotion and  
Protection of Investments**

**Investor: Philip Morris Asia Limited**

We refer to Philip Morris Asia Limited's written notice of claim dated 22 June 2011.

Pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, and Article 3 of the UNCITRAL Arbitration Rules 2010, enclosed by way of service is a notice of arbitration dated 21 November 2011.

Yours faithfully

*Allens Arthur Robinson*

Encl

曼谷	Bangkok
北京	Beijing
北京知識產權	Beijing IP
布里斯班	Brisbane
河內	Hanoi
胡志明市	Ho Chi Minh City
香港	Hong Kong
雅加達	Jakarta
墨爾本	Melbourne
珀斯	Perth
摩爾斯比港	Port Moresby
上海	Shanghai
新加坡	Singapore
悉尼	Sydney

**IN THE MATTER** of the agreement between the Government of Hong Kong and the  
Government of Australia for the promotion and protection of investments  
**AND**

**IN THE MATTER** of arbitration under the Arbitration Rules of the United Nations Commission on  
International Trade Law 2010

**BETWEEN** **PHILIP MORRIS ASIA LIMITED**

**AND** **THE COMMONWEALTH OF AUSTRALIA**

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**NOTICE OF ARBITRATION**

**21 November 2011**

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## 1. INTRODUCTION

- 1.1 This document is a Notice of Arbitration ("**Notice**") pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (the "**BIT**") and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 2010 (the "**UNCITRAL Arbitration Rules**") concerning claims made by Philip Morris Asia Limited ("**PM Asia**") (a Hong Kong domiciled limited liability company) against the Commonwealth of Australia ("**Australia**").
- 1.2 PM Asia's claims arise from the enactment and enforcement of the *Tobacco Plain Packaging Act 2011* (Cth) ("**TPP Act**") and its effect on investments in Australia owned or controlled by PM Asia. These claims were summarised in a Notice of Claim dated 22 June 2011, which PM Asia served on Australia on 27 June 2011 (attached to this Notice as Schedule 1).
- 1.3 PM Asia owns 100% of the shares of Philip Morris (Australia) Limited ("**PM Australia**"), which owns 100% of the shares of Philip Morris Limited ("**PML**"). PM Asia and its wholly owned subsidiaries in Australia (together "**Philip Morris**") manufacture, import, market and distribute for sale tobacco products, principally cigarettes. PML has rights with respect to certain intellectual property in Australia, including registered and unregistered trade marks; copyright works; registered and unregistered designs; and overall get up of the product packaging ("**intellectual property**"). Use of that intellectual property on and in relation to Philip Morris' tobacco products and packaging has generated substantial and valuable goodwill.
- 1.4 Intellectual property is the core of Philip Morris' entire business because it underpins Philip Morris' branded products. Philip Morris' business in Australia (and elsewhere) is built on the recognition of its brands and the consequent commercial advantage that recognition brings, such as denoting the origin of its products, differentiating between its own products, and differentiating its products from those of its competitors and from illicit products. Brands such as *Marlboro*, *Longbeach* and *Peter Jackson* have reached iconic status among consumer brands.
- 1.5 As detailed below, Australia's plain packaging legislation virtually eliminates Philip Morris' branded business by expropriating its valuable intellectual property. The plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming PML from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of PM Asia's investments in Australia – in circumstances where plain packaging will undermine rather than support the purported public health rationale of the legislation.

- 1.6 Through plain packaging legislation, Australia violates the BIT by (i) substantially depriving Philip Morris of the real value of its investments in Australia; (ii) treating PM Asia's investments unfairly and inequitably; (iii) unreasonably impairing the full use and enjoyment of the investments; (iv) failing to provide full protection and security for the investments; and (v) breaching its obligations under other international agreements.
- 1.7 For these reasons, PM Asia gives notice of reference of its claims to arbitration pursuant to the dispute resolution provisions of the BIT. PM Asia seeks orders from the arbitral tribunal requiring Australia to (i) take appropriate steps to suspend enforcement of plain packaging legislation and to compensate PM Asia for loss suffered through compliance with plain packaging legislation; or (ii) compensate PM Asia for loss suffered as a result of the enactment and continued application of plain packaging legislation.

## 2. PARTIES AND COUNSEL

- 2.1 PM Asia was incorporated under the Hong Kong Companies Ordinance on 8 November 1994 and has its registered office at Level 28, Three Pacific Place, 1 Queen's Road East, Hong Kong.
- 2.2 PM Asia has taken all necessary internal actions to authorise the preparation and service of this Notice. PM Asia is represented by solicitors and counsel as follows:

**Solicitors:**

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**Counsel:**

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Email: swbf@simonfoote.co.nz

- 2.3 Australia is represented by the Australian Government Solicitor. Australia's address on which this Notice has been served is:

Australian Government Solicitor  
Level 42, MLC Centre  
19 Martin Place  
Sydney, NSW, 2000  
Australia

Per: Simon Daley, Chief Solicitor Dispute Resolution  
Tel: +61 2 9581 7490  
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**3. ARBITRATION AGREEMENT AND DEMAND FOR ARBITRATION**

- 3.1 The BIT was signed by Hong Kong and Australia on 15 September 1993 and the BIT remains in force.

- 3.2 Article 10 of the BIT provides:

"A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to this dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Arbitration Tribunal shall have power to award interest. The parties may agree in writing to modify those Rules."

- 3.3 Accordingly, by the terms of Article 10, Australia expresses in advance its generic and unilateral offer to submit disputes concerning investments in its territory by Hong Kong investors to arbitration pursuant to the UNCITRAL Arbitration Rules.
- 3.4 PM Asia gave written notification of the claim to Australia in the Notice of Claim on 27 June 2011.
- 3.5 PM Asia engaged with Australia with a view to reaching an amicable settlement or agreeing on procedures for settlement of the claim. A meeting between representatives of PM Asia and Australia took place for this purpose on 12 September 2011 at Canberra, ACT, Australia. However, the claim has not been settled. Australia proceeded to enact plain packaging legislation. Certain procedural matters were agreed as recorded at paragraph 9.1 of this Notice.
- 3.6 More than three months have passed since service of the Notice of Claim. Pursuant to Article 10 of the BIT, the parties are bound to submit the dispute to arbitration under the UNCITRAL Arbitration Rules 2010.
- 3.7 PM Asia hereby gives notice that the dispute that has arisen between it and Australia in connection with PM Asia's investments under the BIT, as summarised above and more particularly set out below in this Notice of Arbitration, be referred to arbitration pursuant to Article 10 of the BIT and the UNCITRAL Arbitration Rules. This Notice of Arbitration complies with and is served in reliance on Article 3 of the UNCITRAL Arbitration Rules.

#### 4. **FACTUAL BACKGROUND**

##### **Philip Morris' brands in Australia**

- 4.1 PM Asia is a limited liability company domiciled in Hong Kong Special Administrative Region. As noted above, PM Asia owns 100% of the shares of PM Australia, a company incorporated in Victoria, Australia on 17 March 1954. PM Australia is a holding company which owns 100% of the shares of PML, a company incorporated in Victoria, Australia on 24 May 1967.
- 4.2 PML is a trading company engaged in the manufacture, importing, marketing and distribution for sale of tobacco products within Australia and for export to New Zealand and the Pacific Islands. Those tobacco products are principally factory made cigarettes, with other products including roll your own tobacco and, more recently, cigars.
- 4.3 PML's tobacco products are sold in eight principal "brand families" (together the "**Brands**");
- (a) *Marlboro*;

- (b) *Longbeach*;
- (c) *Peter Jackson*;
- (d) *Alpine*;
- (e) *Choice*;
- (f) *GT*;
- (g) *Bond Street*; and
- (h) *Wee Willem*.

4.4 There are a number of product lines in each brand family. For example, *Marlboro* currently has 11 product lines. *Peter Jackson* has 16 product lines. *Longbeach* has 24 product lines.

4.5 In respect of each of these brands, PML currently has, whether as owner or licensee, rights to use certain intellectual property on and in relation to tobacco products and packaging:

- (a) Pursuant to a licence agreement, PML is licensed to use registered trade marks and other industrial and intellectual property rights (including unregistered trade marks, copyright, patents, know-how, confidential information, trade secrets and designs) owned by Philip Morris Products SA in respect of the *Choice*, *Wee Willem* and *GT* brands.
- (b) Pursuant to a licence agreement, PML is licensed to use registered trade marks and other industrial and intellectual property rights (including unregistered trade marks, copyright, patents, know-how, confidential information, trade secrets and designs) owned by Philip Morris Brands Sarl in respect of the *Alpine*, *Longbeach*, *Bond Street* and *Marlboro* brands.
- (c) PML is the owner and exclusive user in Australia of registered trade marks and other industrial and intellectual property rights in respect of the *Peter Jackson* brand.

4.6 PML has generated substantial goodwill from the use of the intellectual property on or in relation to Philip Morris' tobacco products and packaging ("**goodwill**"). That intellectual property underpins Philip Morris' entire brand portfolio and is at the core of PM Asia's investments in Australia.

#### **Plain packaging and related legislation**

4.7 The TPP Act was introduced to Australia's Federal Parliament on 6 July 2011, was passed by the House of Representatives on 24 August 2011, by the Senate with proposed

amendments on 10 November 2011, and again by the House of Representatives on 21 November 2011.

4.8 The TPP Act is slated to come into force together with the associated *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth) ("**TMA Act**"). Australia also proposes to promulgate the following regulations under the TPP Act:

- (a) Tobacco Plain Packaging Regulations relating to cigarettes;<sup>1</sup>
- (b) Tobacco Plain Packaging Regulations relating to non-cigarette tobacco products,<sup>2</sup> (together, "**TPP Regulations**").

In this Notice, the TPP Act, TMA Act and TPP Regulations shall be collectively referred to as "**plain packaging legislation**".

4.9 In addition to plain packaging legislation, the manufacture, marketing and sale of tobacco products in Australia are subject to extensive regulation at the Commonwealth, State and Territory levels; most pertinently, the *Tobacco Advertising Prohibition Act 1992* ("**TAP Act**").

4.10 The practical effect of the TAP Act is that tobacco product packaging is the principal remaining means by which PML could use the intellectual property to denote the origin of PML's tobacco products, to differentiate between its own products, and to differentiate its products from competitors' products and illicit products.

4.11 Regulations made under section 65D of the *Trade Practices Act 1974* (Cth)<sup>3</sup> have required since 1 March 2006 that cigarette packaging bear prescribed graphic and text health warnings covering 90% of the back and 30% of the front of the package. A new regulation will increase the size of the graphic health warnings on the front of cigarette packaging from 30% to 75% ("**GHW Regulation**").<sup>4</sup> The GHW regulation itself is tantamount to plain packaging.

4.12 As its name makes clear, the purpose of plain packaging legislation is to eliminate branding. Plain packaging legislation applies to all tobacco products and packaging of tobacco products. It prescribes every aspect of the appearance, size and shape of tobacco packaging, and in

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<sup>1</sup> See Draft Tobacco Plain Packaging Regulations 2011 published on 22 September 2011.

<sup>2</sup> See Department of Health and Ageing Consultation Paper "Tobacco Plain Packaging Proposed Approach to non-cigarette tobacco products" dated 30 September 2011.

<sup>3</sup> In 2010 the *Trade Practices Act 1974* (Cth) was replaced by the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law*. The regulations described here remain in force.

<sup>4</sup> The Hon Nicola Roxon, TPP Bill Second Reading Speech, p 4; Draft Competition and Consumer (Tobacco) Information Standard 2011, in particular Part 9 Division 4, published 14 November 2011.



particular prohibits the use of trade marks, symbols, graphics or images on or in relation to tobacco products and packaging other than the brand, business or company name and variant name<sup>5</sup> in standard font and size in certain positions on tobacco packaging.<sup>6</sup> Plain packaging legislation also prescribes the appearance of cigarette sticks, mandating a specific colour of the wrapping paper and tip, and precluding the use of brand and variant names on individual cigarette sticks.<sup>7</sup>

- 4.13 Compliance with plain packaging legislation's provisions concerning civil penalties and criminal offences for importing, packaging and manufacturing non-compliant products and packaging is required from 1 October 2012, while compliance with those provisions concerning penalties and offences related to selling and purchasing non-compliant products is required from 1 December 2012.<sup>8</sup>

## 5. PM ASIA IS A HONG KONG INVESTOR WITH QUALIFIED INVESTMENTS IN AUSTRALIA

### PM Asia is an "Investor"

- 5.1 Article 1(f) of the BIT defines "investors" in respect of Hong Kong as, *inter alia*, "companies as defined in [Article 1 (b)(i)]."

- 5.2 Article 1 (b)(i) defines "companies" in respect of Hong Kong as, *inter alia*:

"... corporations incorporated or constituted or otherwise duly organised under the law in force in its area, regardless of whether or not the entities referred to in this subparagraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability".

- 5.3 PM Asia was incorporated in Hong Kong pursuant to the Hong Kong Companies Ordinance on 8 November 1994. It therefore satisfies the BIT's definition of an "investor", and is entitled to the protection of the BIT in respect of any investments it owns or controls in Australia.

### PM Asia owns qualifying "Investments" in Australia

- 5.4 Article 1(e) of the BIT defines "investment" as "every kind of asset, owned or controlled by [an investor]" and expressly includes:

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<sup>5</sup> As these terms are defined in the TPP Act.

<sup>6</sup> The relevant provisions are contained in Part 2, Divisions 1 and 2 (sections 18-26 inclusive) of the TPP Act and in the TPP Regulations.

<sup>7</sup> Tobacco Plain Packaging Bill 2011, s26 and Draft Tobacco Plain Packaging Regulations, Regs. 3.1 and 3.3.

<sup>8</sup> Section 2, TPP Act.

- (a) shares in a company and any other formal participation in a company – Article 1(e)(ii);
- (b) intellectual property rights including rights with respect to copyright, trade marks, trade names, industrial designs and goodwill – Article 1(e)(iv); and
- (c) licences and other rights conferred by law or under contract including concessions to manufacture, use and sell products – Article 1(e)(v).

5.5 Article 1(e) provides that a company shall be regarded as controlling a company or an investment if the company has a substantial interest in the company or the investment.

5.6 PM Asia owns or controls a number of assets in Australia that are plainly "investments" for the purposes of the BIT (together the "*Investments*"):

- (a) shares in PM Australia;
- (b) shares in PML; and
- (c) the intellectual property and goodwill.

## 6. GENERAL FACTORS RELEVANT TO THE BREACHES OF THE BIT

### **The interference caused by plain packaging legislation is certain and profound**

6.1 As noted, plain packaging legislation prescribes every aspect of the appearance, size and shape of tobacco packaging and the appearance of cigarette sticks. The effect of plain packaging legislation on PM Asia's Investments in Australia is therefore extraordinary and severe:

- (a) PML's intellectual property and associated goodwill are effectively eliminated, fundamentally altering PML's business in Australia from that of a branded to a commoditized business;
- (b) PML's ability to compete with other tobacco product manufacturers is limited almost entirely to differentiation on price;
- (c) the legitimate tobacco market will face increasing competition from illicit tobacco products; and
- (d) the value of PM Asia's Investments in Australia will be substantially diminished.

**The rationale for plain packaging legislation is contradicted by the facts**

- 6.2 The objects of the TPP Act are set out in section 3 of that Act. It proposes to improve public health and to give effect to “*certain obligations that Australia has as a Party to the Convention on Tobacco Control*” by regulating the packaging and appearance of tobacco products.
- 6.3 Plain packaging eliminates branding. Without brands, competition will be based primarily on price and, as the relative price of cigarettes decline, consumption will increase. In addition, due to the lack of branding, the market likely will be penetrated by even cheaper illicit tobacco products. Consequently, plain packaging legislation will increase smoking prevalence – the complete opposite of what Australia claims it will do.
- 6.4 Even the evidence cited by Australia fails to support the claimed public health benefits. There is no credible evidence that plain packaging will reduce smoking prevalence. Nor is there credible evidence that plain packaging will increase the effectiveness of health warnings or improve consumers’ understanding of the health effects of smoking.
- 6.5 Moreover, other effective and proven means of reducing smoking prevalence are available to Australia which do not interfere with PM Asia’s Investments.

**PM Asia made its Investments with the legitimate expectation that Australia would comply with its international trade treaty obligations**

- 6.6 World Trade Organisation Member States, including Australia, are subject to international obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (“*TRIPS*”) (to which Australia has been a party since 1 January 1995); the Agreement on Technical Barriers to Trade (“*TBT*”) (to which Australia has been a party since 1 January 1995); and the Paris Convention for the Protection of Industrial Property (“*Paris Convention*”) (to which Australia has been a party since 10 October 1925). Plain packaging legislation contravenes Australia’s obligations under these treaties.
- 6.7 Most pertinently, Article 20 of TRIPS provides that:

*“The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.”*

- 6.8 Plain packaging legislation encumbers PML’s trade marks in an unjustifiable way in that the legislation requires use in a special form, and it is clearly detrimental – significantly so – to the capability of PML’s trade marks to distinguish PML’s tobacco products from the products of other tobacco manufacturers: a matter that goes to the heart of the purpose of a trade mark. There is no exception or carve out in TRIPS for tobacco trade marks.

- 6.9 Article 2(2) of TBT prohibits technical regulations that create obstacles to international trade that are more trade-restrictive than necessary to achieve a legitimate objective such as public health. Plain packaging legislation is a technical regulation that is not necessary to fulfill the objective of protection of public health: there is no credible evidence that it will reduce smoking prevalence, and there is evidence suggesting that it will have an adverse effect on that objective. Neither is plain packaging legislation “*necessary*” as less restrictive measures are available to Australia to reduce smoking prevalence.
- 6.10 Article 10*bis* of the Paris Convention obliges Australia to take effective action to prevent “*unfair competition*” and, *inter alia*, act to prohibit “*acts of such a nature as to create confusion by any means whatever*” with the goods of a competitor. Plain packaging legislation by its very nature makes it difficult for consumers to distinguish between different brands and thereby compels acts that will create confusion amounting to unfair competition, so contravening the Paris Convention.
- 6.11 Article 7 of the Paris Convention and Article 15(4) of TRIPS provide that the nature of the goods or services to which a trade mark is to be applied shall not form an obstacle to the registration of a mark. Use is inextricably linked to registration: there is no purpose to registration without a corresponding right to use. Plain packaging legislation dictates that the nature of the good forms an obstacle to the use of the mark, so contravening the Paris Convention and TRIPS. Similarly, Article 6 *quinquies* (B) of the Paris Convention provides that trade marks registered in any States which are Contracting Parties to the Paris Convention cannot be denied registration or invalidated except for one or more of three very narrowly defined reasons, none of which is applicable in the context of tobacco trade marks. Again, there is no purpose to registration without a corresponding right to use, and so plain packaging legislation also contravenes this Article of the Paris Convention.
- 6.12 Accordingly, in all the above ways, plain packaging legislation breaches Australia’s obligations pursuant to international trade treaties. Neither the Framework Convention on Tobacco Control nor its Guidelines mandate measures that contravene these fundamental international trade treaty obligations.

## 7. AUSTRALIA’S BREACHES OF THE BIT

- 7.1 According to its preamble, the BIT seeks, *inter alia*, to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other and promote economic cooperation by providing reciprocal protection for investments by investors from one Party in the area of the other Party. Plain packaging legislation fundamentally contradicts these aims.

7.2 Specifically, Australia has breached its obligations to:

- (a) refrain from depriving PM Asia of its Investments or subjecting those Investments to measures having effect equivalent to such deprivation, except under due process of law, for a public purpose related to the internal needs of the host state, on a non-discriminatory basis and against compensation (Article 6(1) of the BIT - **Expropriation**);
- (b) provide fair and equitable treatment to PM Asia's Investments in Australia (Article 2(2) of the BIT - **Fair and Equitable Treatment**);
- (c) refrain from impairing by unreasonable measures the management, maintenance, use, enjoyment or disposal of PM Asia's Investments in Australia (Article 2(2) of the BIT – **Unreasonable Impairment**);
- (d) provide full protection and security for PM Asia's Investments in Australia (Article 2(2) of the BIT – **Full Protection and Security**); and
- (e) observe any obligation Australia may have entered into with regard to investments of Hong Kong investors such as PM Asia (Article 2(2) – **"Umbrella" clause**).

### **Expropriation**

7.3 Plain packaging legislation is plainly equivalent to deprivation of PM Asia's Investments in Australia in that it substantially deprives PM Asia of the following:

- (a) The value of its shares in PM Australia and consequently PML, which is heavily dependent upon the ability to use the intellectual property on or in relation to tobacco products and packaging. Australia has effectively undermined the economic rationale of the Investments and the impact of plain packaging legislation on PML is such that its enterprise will be significantly impaired.
- (b) The intellectual property and the goodwill derived from the use of that intellectual property. Loss of commercial use of the intellectual property substantially interferes with PML's ability to denote the origin of its tobacco products, to differentiate between its own products, and to differentiate its products from those of its competitors and from illicit products. Plain packaging legislation destroys the commercial value of the intellectual property and goodwill.

7.4 Moreover, plain packaging legislation:

- (a) has patently been implemented in the absence of compensation; and

(b) is not for a proven public purpose related to the internal needs of Australia.

- 7.5 In these circumstances, plain packaging legislation amounts to an unlawful expropriation. Even if the expropriation were in fact lawful, Australia's adoption and implementation of plain packaging nevertheless requires payment of compensation to PM Asia in terms discussed in Section 8 of this Notice below.

#### **Fair and Equitable Treatment**

- 7.6 The obligation to accord investments fair and equitable treatment pursuant to Article 2(2) of the BIT involves a balancing of the investor's legitimate and reasonable expectations on the one hand and the host State's legitimate regulatory interests on the other.<sup>9</sup>
- 7.7 Plain packaging legislation frustrates PM Asia's legitimate interests and expectations given the fundamental and adverse impact on the value and profitability of its Investments in circumstances where plain packaging will actually undermine rather than support the purported public health rationale of the legislation and where the measures violate international law. As detailed above, plain packaging legislation deprives PML of the intellectual property and its goodwill, effectively reducing it to a manufacturer of an undifferentiated commodity and undermining the economics of its business model. Balanced against that is Australia's sovereign right to regulate, but where a regulation has no demonstrable utility to improve public health, violates international law, and effective alternative measures are available (all of which is the case here), then the State cannot justify the imposition of the regulation on the investor.
- 7.8 In these circumstances, the balance between the interference with PM Asia's rights as an investor and Australia's right to regulate is weighted heavily in the favour of PM Asia. The claimed public health benefits of plain packaging legislation (which are contradicted by the facts) are entirely disproportionate to its harm and accordingly not fair and equitable in any sense.

#### **Unreasonable Impairment**

- 7.9 Article 2(2) of the BIT provides that neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party. This provision of the BIT restricts the host State's discretion to regulate to those measures which are demonstrably reasonable.

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<sup>9</sup> *Saluka Investments BV v Czech Republic (Partial Award)* (UNCITRAL, 2006, Watts C, Fortier and Behrens) at 306.

- 7.10 PM Asia's Investments, in particular the use and enjoyment of the intellectual property and PML's goodwill, and the profitability, management and disposal of the shares it holds in PM Australia and by virtue of that holding, PML, are impaired by the plain packaging legislation.
- 7.11 For the reasons detailed above – the rationale for plain packaging is contradicted by the facts, the existence of effective alternatives, and violation of international law – plain packaging legislation is an unreasonable impairment of PM Asia's Investments in Australia. This is particularly so given the availability of alternative measures that are proven to reduce smoking prevalence while not interfering with PM Asia's Investments.

#### **Full Protection and Security**

- 7.12 Article 2(2) also provides that the investments of qualifying investors shall enjoy full protection and security in the host State.
- 7.13 Australia's actions in enacting plain packaging legislation have deprived PM Asia of its Investments. The concept of full protection and security encompasses an obligation to exercise due diligence to prevent damage to qualifying investments.
- 7.14 The reasons detailed above – the rationale for plain packaging is contradicted by the facts, the existence of effective alternatives, and violation of international law – evidence Australia's failure to conduct due diligence prior to inflicting damage on PM Asia's Investments in Australia.

#### **“Umbrella” Clause**

- 7.15 Article 2(2) of the BIT further requires each Contracting Party to observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.
- 7.16 This obligation is broader than specific obligations or representations made by the host State to investors from the other Contracting State. It also encompasses other international obligations binding on the host State that affect the way in which property is treated in Australia, regardless of the nationality of the owners of that property.
- 7.17 Here, the relevant obligations are those enshrined in TRIPS, the Paris Convention and TBT. PM Asia as an owner of the Investments is entitled to expect Australia to comply with its obligations pursuant to these treaties. By adopting and implementing plain packaging legislation, Australia has failed to observe and abide by those obligations.

## **8. RELIEF SOUGHT**

8.1 Plain packaging legislation has caused, and will continue to cause, significant financial loss to PM Asia.

8.2 PM Asia seeks an order for the suspension of enforcement of plain packaging legislation and compensation for loss as a result of enactment of the legislation including:

- (a) loss of revenue and profit in the period between the date plain packaging legislation came into force and the suspension or revocation of plain packaging legislation;
- (b) costs incurred in complying with plain packaging legislation while it is in force; and
- (c) loss of the value of the intellectual property and PML's goodwill as a result of PML's inability to use that intellectual property in the marketplace.

8.3 In the alternative, should the Tribunal decline to order suspension of enforcement or revocation of plain packaging legislation, PM Asia seeks compensatory damages for the loss suffered by means of damage to its Investments as a result of the enactment and enforcement of the plain packaging legislation in an amount to be quantified but of the order of billions of Australian dollars.

8.4 In addition, PM Asia respectfully requests the arbitral tribunal to order:

- (a) Australia to pay all costs of, and all costs incurred in connection with, this arbitration;
- (b) Australia to pay interest as damages and at a rate to be established on the amount of the Award; and
- (c) such other and further relief as the arbitrators shall deem just and proper in the circumstances.

8.5 PM Asia reserves the right to amend or supplement the present Notice, and to request such additional or different relief as may be appropriate including conservatory, injunctive or other interim relief.

## **9. PM ASIA'S PROPOSALS CONCERNING ARBITRATION**

9.1 The parties have agreed (without prejudice to any arguments as to jurisdiction or other preliminary objections that Australia may make) that:

- (a) this arbitration shall be governed by the UNCITRAL Arbitration Rules 2010;



- (b) the Appointing Authority under the UNCITRAL Arbitration Rules 2010 shall be the Secretary-General of the Permanent Court of Arbitration at The Hague;
- (c) the number of arbitrators be three; and
- (d) the language of the arbitration be English.

9.2 In accordance with Article 3 of the UNCITRAL Arbitration Rules, PM Asia proposes that the seat of the arbitration be Singapore.

9.3 PM Asia notifies Australia that in accordance with Article 9 of the UNCITRAL Arbitration Rules, it appoints Professor Gabrielle Kaufmann-Kohler as an arbitrator.

Central, Hong Kong. 21 November 2011

**Philip Morris Asia Limited**

  
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SCHEDULE 1  
WRITTEN NOTIFICATION OF CLAIM  
by  
PHILIP MORRIS ASIA LIMITED  
to  
THE COMMONWEALTH OF AUSTRALIA  
pursuant to  
AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF  
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

1. Philip Morris Asia Limited ("*PM Asia*") hereby gives notice of a claim (the "*Claim*") pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments ("*Hong Kong-Australia BIT*").
2. If the Claim is not admitted, PM Asia advises, pursuant to Article 10, that it is willing to meet and confer with representatives of the Commonwealth of Australia (the "*Government*" or "*Australia*") with a view to negotiating an amicable settlement or, if an amicable settlement is not concluded, to endeavour to agree on procedures for settlement.
3. If an amicable settlement has not been achieved, nor procedures for settlement agreed, the parties are bound to submit the dispute between them to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 2010. If the dispute is submitted to arbitration, PM Asia proposes Singapore as the seat of the arbitration and the place of hearing, since Singapore is the nearest neutral State with legal and logistical resources appropriate to support the arbitration. PM Asia further proposes that the number of arbitrators be three and proposes the Permanent Court of Arbitration at the Hague as the appointing authority. PM Asia requests Australia to advise whether it agrees with these proposals if the Claim proceeds to arbitration.
4. Service of any correspondence may be effected through PM Asia's solicitors, Allens Arthur Robinson, 10/F Jardine House, 1 Connaught Place, Central, Hong Kong, per Simon McConnell, Partner, telephone +852 2840 1202, facsimile +852 2840 0686, email [simon.mcconnell@aar.com.au](mailto:simon.mcconnell@aar.com.au).
5. PM Asia's Claim is detailed below.

## Introduction and summary of Claim

6. On 7 April 2011, the Government released an Exposure Draft of the Tobacco Plain Packaging Bill 2011 ("*the TPP Bill*") together with a Consultation Paper. The Consultation Paper makes it clear that the TPP Bill, once it is formally introduced by the Government and passed by Parliament, will be used to introduce regulations prescribing every aspect of the appearance, size and shape of tobacco products and packaging, in particular, prohibiting the use of intellectual property on or in relation to tobacco products and packaging other than the product brand name and line extension on the top, front and base of the pack in standard font and size (defined more fully in paragraph 18 below, "*plain packaging legislation*"). According to the Government, the TPP Bill is to be formally introduced in the winter session of Parliament with the legislation scheduled to be in place by 1 January 2012.<sup>1</sup>
7. By separate regulation, the size of graphic health warnings on the front of cigarette packs is to increase from 30% to 75% ("*GHW regulation*"). Graphic health warnings are already mandated to cover 90% of the back of cigarette packs.<sup>2</sup>
8. PM Asia is an investor protected by the Hong Kong-Australia BIT. PM Asia owns 100% of the available shares in Philip Morris (Australia) Limited ("*PM Australia*"), which owns 100% of the available shares in Philip Morris Limited ("*PML*").
9. PM Asia and PM Australia, through PML (together "*Philip Morris*") manufacture, import, market and distribute for sale in Australia and elsewhere, tobacco products, principally cigarettes. PML has, whether as owner or licensee, rights to use registered and unregistered trade marks; copyright works; registered and unregistered designs; know-how; trade secrets; and overall get up of the product packaging ("*intellectual property*") on and in relation to Philip Morris' tobacco products and packaging. Philip Morris has generated substantial goodwill from the use of the intellectual property on or in relation to Philip Morris' products and packaging ("*goodwill*").
10. PM Asia's investments in Australia – PM Australia, PML, the intellectual property, and goodwill – are all investments Australia has undertaken to protect by the Hong Kong-Australia BIT. Plain packaging legislation and the GHW regulation contravene these investor protections. In particular:

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<sup>1</sup> Consultation Paper, p.2. The winter legislative session runs between May and July 2011.

<sup>2</sup> *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004 (Cth)*. Another warning will continue to be required on one of the side panels of the pack. The Consultation Paper, p.14, states that the GHW Regulation is to coincide with plain packaging legislation.

- (a) Plain packaging legislation will result in the expropriation of PM Asia's investments due to the substantial deprivation of the intellectual property and goodwill, the consequent undermining of the economic rationale of its investments and substantial destruction of the value of PM Australia and PML.

Plain packaging legislation will effectively prohibit Philip Morris from using the intellectual property on or in relation to its tobacco products and packaging. Without the use of the intellectual property, Philip Morris' products will not be readily distinguishable to the consumer from the products of its competitors; consequently, competition will be based primarily on price. PML will be reduced to a manufacturer of an effectively undifferentiated commodity, an entirely different enterprise and business model to that currently pursued by PML.

Direct and indirect expropriation of investments without payment of adequate compensation is contrary to Article 6 of the Hong Kong-Australia BIT.

- (b) Plain packaging legislation will not be fair and equitable, as is required by the Hong Kong-Australia BIT, given the substantial impairment of PM Asia's investments, the lack of credible evidence that the measure will contribute to achievement of the legislation's stated objectives, the availability of effective alternative means of reducing smoking prevalence, and the contravention of Australia's international obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights ("*TRIPS*"), the Paris Convention for the Protection of Industrial Property ("*Paris Convention*") and the Agreement on Technical Barriers to Trade ("*TBT*").

These contraventions include a breach of Article 20 of TRIPS, as plain packaging legislation will be an unjustifiable encumbrance on the use of tobacco trade marks (many of which cannot be used at all), and a breach Article 2.2 of TBT, because it will be a technical regulation more trade restrictive than necessary.

A failure to afford fair and equitable treatment will contravene Article 2(2) of the Hong Kong-Australia BIT.

- (c) Plain packaging legislation will also constitute an unreasonable impairment to the investments, a failure to afford full protection and security to the investments and a failure to observe obligations in respect of the investments, all in contravention of Article 2(2) of the Hong Kong-Australia BIT.

11. As a result of these contraventions, PM Asia will be entitled to orders from an arbitral tribunal for the cessation and discontinuance of plain packaging legislation and the GHW

regulation, and/or an award of damages, which may potentially amount to billions of dollars, and interest.

#### Plain packaging legislation

12. On 7 April 2011, the Government released an Exposure Draft of the TPP Bill which it intends to introduce to Federal Parliament during the 2011 winter legislative session, with the legislation to be in place by 1 January 2012.
13. The TPP Bill permits the promulgation and enforcement of regulations regarding tobacco products and packaging that:<sup>3</sup>
  - (a) prohibit (or specify conditions of) the use of trade marks, logos, brands, business or company names, or other identifying mark on tobacco packaging or products;
  - (b) prohibit (or specify conditions of) the use of any design of packaging or any design of a tobacco product;
  - (c) otherwise relate to the appearance, size or shape of tobacco packaging or tobacco products;
  - (d) relate to the opening and contents of tobacco packaging;
  - (e) relate to the appearance of any words, signs or symbols on tobacco packaging;
  - (f) relate to the content of any information (including prohibition of information of a specified kind) to be included on tobacco packaging; and
  - (g) relate to the materials that may be used in or on tobacco packaging.
14. The TPP Bill defines packaging of tobacco products in a broad way which includes any container for which tobacco products are packaged for retail sale and anything inside, attached to, or forming part of the packaging of tobacco products. A "tobacco product" means processed tobacco or any product that contains tobacco.<sup>4</sup>

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<sup>3</sup> Sections 14 and 94 of the TPP Bill. Regulations may also be promulgated pursuant to section 11(2) governing the use of a trade mark in circumstances where the TPP Bill results in an acquisition of property within the meaning of section 51(xxxi) of the Constitution of the Commonwealth of Australia because it would prevent the use of a trade mark on tobacco products or packaging.

<sup>4</sup> These definitions are found in Section 4.

15. The Exposure Draft of the TPP Bill was accompanied by a Consultation Paper that details anticipated regulations to prescribe the appearance, size and shape of tobacco packaging and products as follows:<sup>5</sup>
- (a) Except as prescribed below, no trade mark, design, branding, colour, logo, or other aspect of livery or get-up is permitted on tobacco products or packaging;
  - (b) The brand name, line extension and quantity of cigarettes are to appear on the top, front and base of the pack. The brand name is permitted to appear in Lucida sans 14 point font below the health warning on the front of the pack. The line extension and quantity is to appear below the brand name, in a font and size yet to be determined;
  - (c) Packages (including foils on the inside of a cigarette pack) will be a prescribed shade of dark olive brown in a matt finish;
  - (d) Cigarette packs will be rectangular rigid cardboard flip-top boxes of a prescribed size and shape and with an opening of a prescribed size. Cigarette packs will contain mandated numbers of cigarettes between a minimum of 20 and maximum of 50;
  - (e) The manufacturer's details will appear on one side of the pack, in a font, size and position to be determined; and
  - (f) Cigarette sticks are to be either all white, or white with an imitation cork filter. No branding, other colours or design features are permitted.
16. By the GHW regulation, the size of graphic health warnings on the front of cigarette packs is to increase from 30% to 75%. Graphic health warnings are already mandated to cover 90% of the back of cigarette packs. The new regulation is tantamount to plain packaging.
17. Power to make regulations pursuant to the TPP Bill (then Act) will commence on 1 January 2012. Offences for importing, packaging and manufacturing non-compliant products and packaging will come into force on 20 May 2012 and offences related to selling and purchasing non-compliant product will come into force from 1 July 2012.<sup>6</sup>

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<sup>5</sup> Consultation Paper, pages 11-15.

<sup>6</sup> Section 2.

18. In this Notice of Claim, the TPP Bill and any regulations promulgated pursuant to it at any time,<sup>7</sup> including but not limited to the anticipated regulations summarised above in paragraph 15, shall be collectively referred to as "*plain packaging legislation*".

#### The Hong Kong-Australia BIT

19. The Hong Kong-Australia BIT was executed by the respective Contracting States on 15 September 1993 and remains in force. According to its preamble, the Hong Kong-Australia BIT seeks, *inter alia*, to create favourable conditions for greater investment by investors of one Contracting State in the area of the other and promote economic cooperation by providing reciprocal protection for investments by investors from one State in the area of the other State.
20. PM Asia (a Hong Kong domicile limited liability company) and its investments in Australia are entitled to the protections of the Hong Kong-Australia BIT. These reciprocal protections include obligations on each Contracting State in respect of investors from the other State:
- (a) not to deprive investors of their investments, nor subject them to measures equivalent to deprivation (Article 6);
  - (b) to accord investments and returns of investors fair and equitable treatment (Article 2(2));
  - (c) to provide investments and returns of investors full protection and security (Article 2(2));
  - (d) not to impair in any way the management, maintenance, use, enjoyment or disposal of investments and returns of investors by unreasonable or discriminatory measures (Article 2(2)); and
  - (e) to observe any obligation it may have entered into with regard to investments of investors (Article 2(2)).
21. The benefit of these substantive provisions is available to "investors" as defined in Article 1(f) of the Hong Kong-Australia BIT. Relevantly, "investors" includes corporations incorporated under the law of Hong Kong who own or control investments in Australia. PM Asia, as it is now known, was incorporated under the Hong Kong Companies Ordinance on 8 November 1994 and since that time has marketed and distributed tobacco products in certain countries in Asia and provided management services to Philip Morris' affiliates in

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<sup>7</sup> Whether under sections 14, 11(2) or 94 of the TPP Bill.

Asian and Australasian countries including Australia. Accordingly, it is entitled to the protection of the Hong Kong-Australia BIT in respect of any investments it owns or controls in Australia.

22. PM Asia owns 100% of the shares of PM Australia, a company incorporated in Victoria, Australia on 17 March 1954. PM Australia is a holding company that owns 100% of the shares of PML, a company incorporated in Victoria, Australia on 24 May 1967. PML is a trading company that employs approximately 740 staff in Australia engaged in the manufacture, marketing and distribution for sale of tobacco products.
23. PML is the owner or licensee of the intellectual property. The intellectual property includes trade marks that relate to a number of brand "families" - that is the core brands and line extensions within those brands. The principal core brands are *Marlboro*, *Alpine*, *Longbeach*, *Peter Jackson*, *Choice*, and *GT* (together the "*Brands*"). Philip Morris' business relies on the Brands to compete with other tobacco manufacturers. PML's use of the intellectual property for the development, improvement, manufacture and sale of tobacco products has generated substantial goodwill in PML.
24. The Hong Kong-Australia BIT encompasses a broad range of investments. Article 1(e) prescribes relevant investments to mean "*every kind of asset owned or controlled by investors*" and, more particularly, expressly includes:
  - (a) shares in a company and any other form of participation in a company;
  - (b) intellectual property rights including rights with respect to copyright, patents, trade marks, trade names, industrial designs, trade secrets, know how and goodwill; and
  - (c) licences and other rights conferred by law or under contract including concessions to manufacture, use or sell products.
25. Accordingly, by virtue of its shareholding in PM Australia, PM Asia owns and/or controls a number of investments in Australia that qualify for protection of the substantive provisions of the Hong Kong-Australia BIT, specifically:
  - (a) shares in PM Australia;
  - (b) shares in PML; and
  - (c) the intellectual property and goodwill (together, the "*Investments*").



26. Article 10 of the Hong Kong-Australia BIT concerns settlement of disputes between an investor of one Contracting Party (such as PM Asia) and the other Contracting Party (here, Australia). Article 10 provides:

*A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.*

27. As stated above, this Notice of Claim is "written notification" of PM Asia's Claim pursuant to Article 10.

#### Contraventions of the Hong Kong-Australia BIT

28. Plain packaging legislation and the GHW regulation jointly and severally contravene the substantive protections in the Hong Kong-Australia BIT in that they expropriate the Investments, are unfair and inequitable, unreasonably impair the use of the Investments, amount to a failure to afford full protection and security for the Investments and contravene obligations Australia has entered into with regard to investments of investors, specifically international trade treaty obligations. These contraventions derive from the degree to which plain packaging legislation and the GHW regulation interfere with the Investments, the lack of credible evidence that plain packaging legislation will achieve its stated goals, and violation of international trade treaties by plain packaging legislation. These factors are addressed below, followed by an explanation of the specific contraventions of the Hong Kong-Australia BIT.
29. While PM Asia does not deny Australia its sovereign right to legislate, its treaty obligations (such as pursuant to the Hong Kong-Australia BIT) fetter its discretion; it cannot breach the Hong Kong-Australia BIT without consequences.
- (a) **General factors: interference with PM Asia's Investments, lack of credible evidence and violation of international law**
30. Philip Morris uses the intellectual property and goodwill to manufacture, market and distribute for sale tobacco products, principally cigarettes, in Australia and elsewhere in accordance with all applicable laws and regulations.
31. The manufacture, marketing and sale of tobacco products in Australia is already subject to extensive regulation at the Commonwealth, State and Territory levels; most pertinently, the *Tobacco Advertising Prohibition Act 1992* ("TAP Act"). The practical effect of the TAP Act

is that tobacco packaging is the principal remaining means by which Philip Morris can utilise the intellectual property. Plain packaging legislation and the GHW regulation will, jointly and severally, effectively prohibit the use of the intellectual property on or in relation to tobacco products and packaging with the exception of the brand name in government-mandated font and type size thereby stripped of virtually all recognition. Philip Morris' business in Australia will be severely affected as a result.

32. The intellectual property plays a critical part in distinguishing Philip Morris' products from competitors' products and illicit products. Over time, the use of intellectual property on or in relation to Philip Morris' products has contributed to the generation of substantial goodwill in respect of those products. Philip Morris' business in Australia and elsewhere is built on the recognition of its brands and the consequent commercial advantage that recognition brings. PML's Brands have a history spanning more than 50 years. Some of the Brands, for example, *Marlboro* and *Peter Jackson*, have reached iconic status among consumer brands. Philip Morris and its affiliates in Australia and worldwide make every effort to protect its intellectual property and goodwill.
33. Plain packaging legislation (and, jointly and severally, the GHW regulation) manifestly deprives PML of the intellectual property and the commercial utility of its Brands: this is the central purpose of the legislation. Irrespective of whether legal title to the intellectual property is affected by plain packaging legislation, PML's brands will effectively be eliminated. The commercial value of the intellectual property and the goodwill generated by the intellectual property is substantially destroyed. This in turn affects the value of PM Australia and PML in a devastating manner.
34. Without branding, PML's products are not readily distinguishable to the consumer from the products of its competitors; consequently, competition will be based primarily on price. PML is reduced from a manufacturer of branded products to that of a manufacturer of an effectively undifferentiated commodity. This is an entirely different enterprise and business model to that currently pursued by PML; the enterprise will be significantly impaired given the expected loss in value of the business.
35. The stated purpose of plain packaging legislation is, essentially, to reduce smoking prevalence.<sup>8</sup> However, there is no credible evidence that plain packaging will reduce smoking prevalence. Moreover, the likely reduction of price and likely increase in availability and relative desirability of cheap illicit tobacco products mean the measure may be counter-productive. The connection between plain packaging and reduced smoking

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<sup>8</sup> Sections 3(1) and 3(2).

prevalence is speculative at best; the Government is legislating without regard to credible evidence.

36. The Government has chosen to pursue this course regardless of the existence of other means of reducing smoking prevalence, as the Government itself highlighted in the 2009 National Preventative Health Taskforce report<sup>9</sup>, that do not curtail the property rights of tobacco manufacturers. Coupling plain packaging to other anti-smoking initiatives does not remedy the fact that there is a lack of credible evidence that plain packaging will reduce smoking prevalence.
37. Plain packaging legislation contravenes Australia's obligations under international trade treaties, in particular TRIPS (to which Australia has been a party since 1 January 1996) which explicitly incorporates the minimum standards of protection provided for trade marks by the Paris Convention (to which Australia has been a party since 10 October 1925) and also provides further protections; and the TBT (to which Australia has been a party since 1 January 1995).
38. Most pertinently, Article 20 of TRIPS provides that:

*"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."*
39. Plain packaging legislation encumbers PML's trade marks in an unjustifiable way in that the legislation requires use in a special form, and it is clearly detrimental – significantly so – to the capability of PML's trade marks to distinguish Philip Morris' products from the products of other tobacco manufacturers: a matter that goes to the heart of the purpose of a trade mark. There is no exception or carve out for tobacco trade marks.
40. Article 2(2) of TBT prohibits technical regulations that create obstacles to international trade that are more trade-restrictive than necessary to achieve a legitimate objective such as human health. Plain packaging legislation is a technical regulation that is not necessary to fulfill the objective of protection of human health: there is no credible evidence that it will reduce smoking prevalence, and there is evidence to suggest that it may have an adverse effect on that objective. Neither is plain packaging legislation a "necessary" obstacle in the sense that other, less restrictive, measures are available to Australia to achieve its public health objectives in an effective manner.

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<sup>9</sup> Australian Government Preventative Health Taskforce "Australia – The Healthiest Country by 2020" 30 June 2009.

41. Article 7 of the Paris Convention and Article 15(4) of TRIPS provide that the nature of the goods or services to which a trade mark is to be applied shall not form an obstacle to the registration of a mark. Plain packaging legislation dictates that the nature of the good forms an obstacle to the use of the mark, "use" being a notion inextricably linked to registration: there is no purpose to registration without a corresponding right to use. Similarly, Article 6 *quinquies* (B) of the Paris Convention provides that trade marks registered in any States which are Contracting Parties to the Paris Convention cannot be denied registration or invalidated except for one or more of three very narrowly defined reasons, none of which are applicable in the context of tobacco trade marks.
42. Accordingly, in all the above ways, plain packaging legislation contravenes Australia's obligations pursuant to international trade treaties. Neither the Framework Convention on Tobacco Control nor its Guidelines mandate measures that contravene these fundamental international trade treaty obligations.
43. Plain packaging legislation therefore severely adversely affects PM Asia's Investments and extinguishes the practical utility of intellectual property rights in breach of international trade treaties. There is no credible evidence illustrating any link between plain packaging and reducing smoking prevalence. Yet Australia unreasonably persists with the introduction of plain packaging legislation.

(b) **Specific contraventions of the Hong Kong-Australia BIT**

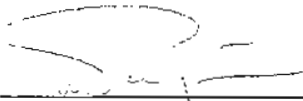
44. The effect of plain packaging legislation, and for the same reasons the GHW regulation, is plainly equivalent to deprivation of title to the intellectual property and goodwill. Moreover, the effect of plain packaging legislation will be substantially to deprive PM Asia of the commercial value of its Investments in Australia. In all these senses, plain packaging legislation breaches Article 6 of the Hong Kong-Australia BIT. Article 6 protects investments from measures by a host State that have an effect equivalent to deprivation, except under due process of law, for a public purpose related to the internal needs of the host State, on a non-discriminatory basis and against compensation. While it is not yet clear if the Government will follow due process in passing plain packaging legislation, it is clear that there is no credible evidence that plain packaging legislation will have the claimed effect of enhanced public health (indeed there is evidence to suggest that it may have the opposite effect) and no compensation has been paid. The effective extinguishment of the intellectual property by way of legislation also manifests a failure by Australia to afford full protection and security to PM Asia's Investments as required by Article 2(2) of the Hong Kong-Australia BIT.

45. Neither is plain packaging legislation (and for the same reasons the GHW regulation) fair and equitable as required by Article 2(2) of the Hong Kong-Australia BIT. Plain packaging legislation will severely curtail the commercial utility of the intellectual property and goodwill and has a severe negative impact on the value of PM Asia's Investments in Australia. It contravenes Australia's international obligations under TRIPS, the Paris Convention, and the TBT. There is no credible evidence that it will reduce smoking prevalence, while other measures that do affect prevalence and do not severely curtail the intellectual property or goodwill are available to the Government. Its contribution to public health is purely speculative and there is, in fact, evidence that it will have a negative effect in this regard. Its promotion and imminent enactment appear to be motivated by political concerns rather than a genuine desire for fair and equitable regulation. In short, the benefits of the legislation (if any) are entirely disproportionate to the harm it will cause to PM Asia's Investments; accordingly, the legislation is not fair and equitable in any sense.
46. For the same reasons, plain packaging legislation and the GHW regulation each constitutes an unreasonable impairment to the management, maintenance, use, enjoyment or disposal of PM Asia's Investments in Australia in breach of Article 2(2) of the BIT. Finally, and also pursuant to Article 2(2) of the BIT, contravention of Australia's international trade treaty obligations results in a failure by Australia to observe obligations it entered into with regard to investments of investors in its territory.
47. For the avoidance of doubt, PM Asia's Claim encompasses the GHW regulation (or any other extension of current regulations concerning graphic health warnings) and the TPP Bill and any regulations promulgated and enforced under it, whether pursuant to section 14, section 11(2) or section 94 and whether in the terms advised in the Consultation Paper or otherwise. PM Asia claims that the erosion of the status quo regarding the use of its intellectual property on or in relation to tobacco products and packaging as a result of the passage of the TPP Bill including promulgation and enforcement of regulations (including the GHW regulation) will severely and adversely affect its Investments and amount to a breach of the Hong Kong-Australia BIT.

#### Loss and relief

48. Enactment of plain packaging legislation and the GHW regulation will cause PM Asia significant financial loss, potentially amounting to billions of dollars.
49. PM Asia requests that the Government cease and discontinue all steps toward enacting plain packaging legislation and issuing the GHW regulation. Failing this, PM Asia will have no option but to initiate arbitration under the Hong Kong-Australia BIT and seek orders from

an arbitral tribunal for the cessation and discontinuance of the plain packaging legislation and the GHW regulation and/or for an award of damages and interest.



**Philip Morris Asia Limited**

Date: 23/6/2011

