

## PHILIP MORRIS (NEW ZEALAND) LIMITED

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Hon Tariana Turia  
Associate Minister of Health  
Parliament Buildings  
Wellington

11 July 2011

Dear Minister

### Plain Packaging of Cigarettes

Philip Morris (New Zealand) Limited (PMNZ) is one of three major tobacco companies operating in New Zealand, with around 5% of the total tobacco market. PMNZ supports effective and evidence-based regulation of all tobacco products. In particular, PMNZ supports effective measures that discourage young people from smoking.

In October 2010, Cabinet directed the Ministry of Health to monitor progress on Australia's proposal to legislate for plain packaging of tobacco products and explore the possibility of New Zealand aligning with Australia. The Ministry was due to report to the Cabinet Social Policy Committee by 30 June.

There is no evidence that plain packaging would reduce smoking rates, particularly amongst youth. Plain packaging is an unprecedented experiment that does not have an empirical foundation. The range of studies relied on by officials in Australia to prove that plain packaging will be effective do not show that. Instead, they suffer from methodological problems and can at best be described as providing speculative evidence.

PMNZ submits that rather than being an effective and legal means of regulating tobacco, plain packaging would encourage the illicit market, remove competition and choice from consumers, raise costs for businesses, expropriate valuable trademarks, and breach international trade rules. PMNZ therefore urges the government to reject plain packaging of cigarettes in New Zealand.

### The studies relied on by proponents of plain packaging do not prove its efficacy

Many of the studies used by proponents of plain packaging are speculative and not based on observed data. At most, they consist of focus groups or opinion polls that asked

participants what they or others might do in another, unknown time and situation if packs were plainer, plain or plainest. The UK Department of Health acknowledged this in 2008 stating that “the research evidence into this initiative is speculative”.

The UK government accordingly rejected the policy, with the responsible Minister saying “no studies have been undertaken to show that plain packaging would cut smoking uptake among young people or help those who want to quit to do so” (the government continues to consider the evidence for plain packaging, but has noted it will need “strong and convincing evidence of the benefits” given the trade and intellectual property problems associated with plain packaging).

Moreover, many studies are subject to inherent biases that render their conclusions unreliable. For example, the studies are based on self-reports – in other words, studies which ask participants to report what they did, what they prefer, or what they believe. Extensive research shows that such studies are plagued by “social desirability” bias; subjects report what they believe the interviewer wants to hear, or the socially preferred option.

A recent review by consultancy firm LECG of thirteen commonly cited studies on plain packaging concluded that “none of the thirteen empirical papers reviewed provides evidence that can be used to evaluate whether imposing generic packaging would be an effective measure to decrease youth smoking uptake”, and the limitations in the studies “are so fundamental that conclusions concerning the relationship between cigarette packaging and youth smoking are likely to be misleading”.

Philip Morris International recently commissioned Professor Richard Mizerski, Chairman of the Marketing Department at the University of Western Australia, to review the available literature relied upon by the Australian Government to support its plain packaging proposal. His conclusion is clear:

*Although the present body of literature on requiring plain packaging is thought-provoking, it does not provide evidence that it will reduce smoking. There is substantial evidence that the use of plain cigarette packaging has no effect on intended trial or quitting in experiments comparing branded and plain packaging.*

**Other countries have consistently rejected plain packaging**

Plain packaging has never been implemented anywhere in the world. In fact, governments have consistently rejected it as a policy option, because there is no credible evidence it will reduce smoking rates. For example:

- An Australian Senate Report in 1995 concluded there was insufficient evidence to demonstrate the efficacy of plain packaging, and the idea was dropped.

- Research in the 1990s in Canada found that “changing the package will not have any major effect on the decision(s) to smoke or not to smoke” and the government subsequently rejected the proposal.
- The United Kingdom government in 2008 rejected plain packaging on the basis that “no studies have been undertaken to show that plain packaging reduces uptake among young people or enable those who want to quit to do so.”
- In March 2010, the Lithuanian parliament rejected a plain packaging proposal, considering it to be contrary to fundamental principles embodied in the Lithuanian Constitution.

### **The Australian government’s policy is driven by politics not evidence**

Documents released to Philip Morris Limited in Australia under freedom of information laws make it very clear that plain packaging has been proposed in Australia *despite*, not because of, the evidence. The timeline around the announcement of government moves to introduce plain packaging in Australia (outlined below) is significantly concerning.

Australian policy on plain packaging was announced in late April 2010. Just one month before the policy was announced, the Department of Health and Ageing advised IP Australia (the government body which administers intellectual property) that it had not yet collected, consulted, shared or analysed evidence on plain packaging with government stakeholders, saying there had been “no developments” in the proposal for plain packaging.

Two weeks later the Department was informed the government was proceeding with plain packaging. Under great time pressure, the Department filled out a Regulation Impact Statement, stating it was “not possible to quantify the impact” of plain packaging. The Statement recognised that plain packaging could facilitate the illicit trade (but gave no impact of the impact or costs), and recognised that plain packaging could cause prices to fall and consumption to rise. The Statement was sent to the Office of Best Practice Regulation on April 27.

The same evening, the Prime Minister’s Office emailed the Department, asking for assistance with media messages: “There is now a chance we might be doing this tomorrow. Shall call to discuss”. By the next day, the Department had prepared a “Budget-in-confidence Q and A” document. In response to the question, “Is there any evidence plain packaging will do anything”, the answer contained a few remarks about speculative opinion research, and concluded with a telling bullet point:

- “Insert more evidence here”.

On April 30, two days *after* the Government’s commitment to plain packaging was announced, and *after* the policy had been through Cabinet, the Minister for Trade, Simon

Crean, jotted the following note on a Ministerial submission to Cabinet: "Have we got the supporting evidence that plain packaging reduces the health risk?"

On May 4, the Office of Best Practice Regulation advised the Department that the Regulation Impact Statement did not satisfy best practice regulation requirements, and that the policy would be reported as "non-compliant".

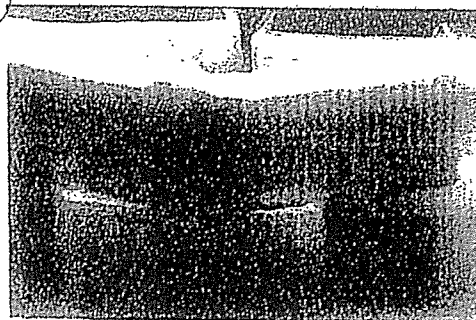
More than one year later, the Australian Minister of Health cannot articulate the evidence for plain packaging. She is on record as admitting that "there is some level of experiment" in the Australian government's plain packaging measures. According to the Minister, "the sort of proof they're looking for doesn't exist when this hasn't been introduced around the world".

### **Plain packaging will encourage the illicit (and non-taxed) tobacco trade**

Tobacco products are the most illegally trafficked legal product in the world. It has been estimated that the global illicit trade represents about 10% of total tobacco sales. Across the Tasman, illicit trade levels are at an all-time high, at around 16% of the total market. The illegal tobacco market in New Zealand is small, but growing. In March 2007, Customs authorities found almost four tonnes of tobacco leaf as well as manufactured tobacco on the property of a Motueka farmer, amounting to millions in lost revenue.

Plain packaging makes counterfeiting of cigarettes much easier and enforcement efforts less effective, and will encourage smokers to switch to cheaper, unbranded illicit tobacco products. Differentiated branded packaging makes it easier to distinguish between legal, regulated products, and illegal, unregulated and untaxed products.

Extensive empirical evidence and experience show that smokers (both adult and youth) are very willing to purchase cigarettes sold in unbranded packaging. In Canada, for example, 33% of the cigarette market is contraband and 60% of that is sold in unbranded plastic bags. In the United States in the 1980s, "no-name" cigarettes very quickly gained significant market share, particularly amongst youth. In Australia, "chop chop" (illegal, hand-rolled tobacco) is sold in unbranded plastic bags and accounts for around 16% of the Australian tobacco market.



These plain-packaged cigarettes are Canada's fastest growing "brand", and the growth in "baggies" has reversed Canada's previously declining smoking rates.

An increase in the illicit tobacco market in New Zealand would have negative consequences for government revenue and for public health. By definition, illicit cigarettes are untaxed. They are also cheaper, and therefore more accessible to youth. Australian research has found that users of illicit tobacco have significantly greater odds of beginning smoking at younger than legal age.

### **Plain packaging is an attack on competition and consumer choice**

While plain packaging is ineffective at reducing smoking rates, it does deprive consumers of the ability to choose between competing brands. Trade marks and other unique visual packaging elements are important competitive tools which enable tobacco manufacturers to differentiate their products from those of competitors. Encouraging consumers to switch brands does not encourage greater consumption of cigarettes overall.

Given the significant restrictions on tobacco advertising in New Zealand, the function of trade marks in the tobacco industry is of utmost importance in terms of ensuring and developing competition among manufacturers. Plain packaging will make it impossible for PMNZ to differentiate its brands and significantly diminish its ability to compete.

### **Plain packaging involves the expropriation by the government of extremely valuable trademarks**

In the absence of any evidence that plain packaging is effective, plain packaging amounts to the unjustified government expropriation of private property. Plain packaging by its very nature removes an owner's ability to own and use many trade-mark properties.

Government expropriation of trade-marks is analogous to acquisition of land by the government. A property owner must be compensated for the acquisition. PMNZ's brands are amongst the most valuable in the world, and expropriation of those brands will require appropriate compensation.

### **Plain packaging breaches World Trade Organisation rules regarding the use and protection of intellectual property**

As a member of the World Trade Organisation, New Zealand is bound to comply with the provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and of the Paris Convention for the Protection of Industrial Property. Both set minimum mandatory standards for the protection of trade marks, copyright and other intellectual property rights. By preventing trade mark owners from registering and using valuable trade marks and thereby installing a dual class system of trade marks (one for tobacco products and one for other goods), a plain packaging law would be in conflict with New Zealand's international legal obligations arising from these treaties.

Implementation of plain packaging would send a negative message to New Zealand's trading partners; suggesting that New Zealand does not respect intellectual property, and it would undermine our reputation as a reliable destination for international trade and

investment. Member states of the WTO that violate TRIPS also expose themselves to dispute settlement proceedings initiated by other members within the WTO framework.

In Australia, the government body charged with administering intellectual property (IP Australia) has warned the government that plain packaging may not be consistent with Australia's treaty obligations, and that restrictions like plain packaging should only be introduced if there is a clear public interest based on strong empirical evidence.

A briefing note by IP Australia to the Australian Parliamentary Secretary for Information noted that Australia had rejected plain packaging in 1995, and stated it is "unaware of any subsequent evidence that establishes that the public interest would be better served by plain packaging."

#### **Plain packaging will raise costs for businesses**

Plain packaging will undoubtedly make life harder for tobacco retailers, particularly small businesses. A 2010 report by Deloitte on the potential impact on Australian retailers due to the introduction of plain packaging found that plain packaging could cost small business retailers up to A\$34,000 annually in lost time, through increased time on stock management, sales transaction times, and product selection errors.

These costs are *in addition* to the costs imposed on businesses through the forthcoming point of sale display ban. Retailers who are already financially constrained will be put under further pressure.

#### **Plain packaging breaches the government's own regulatory principles**

PMNZ strongly agrees with the government Statement on Regulation that the government should look "to introduce new regulation only when the government is satisfied that it is required, reasonable and robust".

PMNZ submits that the introduction of plain packaging is not required to achieve public health outcomes (as there are other ways to reduce smoking harm that are actually effective) and is neither reasonable nor robust.

PMNZ also strongly agrees with the government's statement that it will "require there to be a particularly strong case made for any regulatory proposals that are likely to:

- impose additional costs on business during the current economic recession;
- impair private property rights, market competition, or the incentives on businesses to innovate and invest; or
- override fundamental common law principles.

PMNZ submits that as shown above, plain packaging will do exactly all these things.

## Conclusion

Tobacco products are legal products that cannot be used in virtually any public place; cannot be advertised; are sold in packs dominated by graphic health warnings; are subject to higher taxes than any other consumer good; and are the subject of significant public health campaigns. Today, use of tobacco trade marks is effectively limited to the package containing the product.

Plain packaging is not supported by the evidence, has been repeatedly rejected by governments around the world, is an attack on consumer choice and competition, will encourage the illicit tobacco trade, and constitutes an expropriation of intellectual property in violation of international treaties.

PMNZ urges you and the Cabinet to reject plain packaging of cigarettes.

I would be happy to discuss this letter with you at any stage, or provide further information on the points above (including the various studies referred to). Please contact PMNZ's New Zealand Corporate Affairs Manager, Christopher Bishop, for further information on (09) 531 0533 or 027 585 3669, or [christopher.bishop@pmi.com](mailto:christopher.bishop@pmi.com).

Yours faithfully



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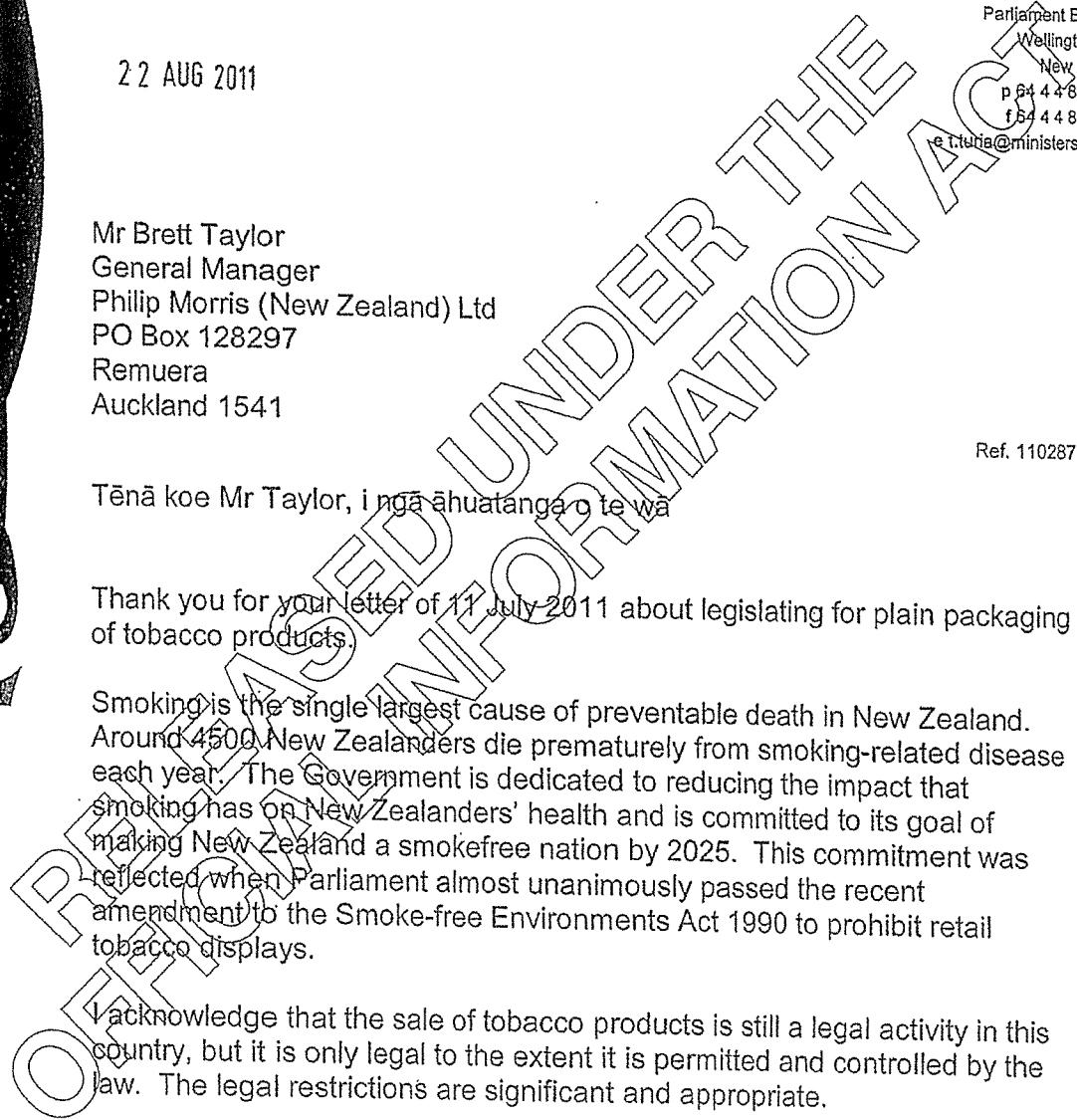
Tēnā koe Mr Taylor, i ngā āhuatanga o te wā

Thank you for your letter of 11 July 2011 about legislating for plain packaging of tobacco products.

Smoking is the single largest cause of preventable death in New Zealand. Around 4500 New Zealanders die prematurely from smoking-related disease each year. The Government is dedicated to reducing the impact that smoking has on New Zealanders' health and is committed to its goal of making New Zealand a smokefree nation by 2025. This commitment was reflected when Parliament almost unanimously passed the recent amendment to the Smoke-free Environments Act 1990 to prohibit retail tobacco displays.

I acknowledge that the sale of tobacco products is still a legal activity in this country, but it is only legal to the extent it is permitted and controlled by the law. The legal restrictions are significant and appropriate.

During debates in the House about further action that could be taken to reduce the harmful effects of tobacco in New Zealand, Members made mention of plain packaging for all tobacco products. The New Zealand Government is very supportive of the Australian Government's decision to legislate for the plain packaging of tobacco products. I expect that New Zealand will eventually align legislation with Australia on plain packaging. However, the Government is yet to decide on its next steps for tightening tobacco controls.

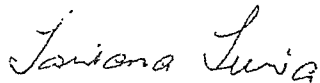




As you are aware, Cabinet will consider a report on Australia's progress with legislating for plain packaging of tobacco products and the implications this has for New Zealand. Any proposals will take into account a number of factors, including New Zealand's international trade obligations and, most importantly, the overall impact on public health. Cabinet will also consider industry stakeholder views on this issue.

I am serious about continuing to tighten tobacco controls, and there is strong public and political support for more action in New Zealand to reduce the harmful effects of smoking.

Heoi anō



nā Hon Tariana Turia  
Associate Minister of Health

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