

FMF
Media background analysis
The facts behind the issue
TOBACCO PLAIN PACKAGING – focus of WORLD NO TOBACCO DAY

“Why do kids need nannies? Because there are certain things which they can’t do for themselves. They need someone to take care of them. We are playing that role...”

Aaron Motsoaledi, Minister of Health

31 May 2016

1. The issue: Tobacco plain packaging proposal

- South Africa is considering the introduction of plain packaging for tobacco products as part of implementing the World Health Organisation’s (WHO) guidelines on tobacco product packaging and labeling.
- The aim is to reduce the use of tobacco products especially amongst young people.
- So far Australia is the only country to introduce plain packaging. France will follow in 2016 and the UK, Norway and Ireland plan to implement similar measures in 2017.
- Meanwhile the Netherlands has been relaxing its tobacco control regulations on the grounds that it is patronising and illiberal to dictate health choices to citizens.
- The FMF position mirrors the Netherlands stance
 - People have a fundamental right to enjoy life. How much risk is a reasonable trade-off for personal happiness is not a choice that ought to be made by a government bureaucrat on a moral crusade.
- Important points
 - Plain packaging is the subject of a dispute at the World Trade Organization brought by four countries, alleging a breach of intellectual property rules (IPW, WTO/TRIPS, 25 February 2015).
 - Australia faces a legal bill of \$50m and rising to defend its plain packaging legislation; other countries could be facing legal claims of US\$ billions for deprivation of property IP rights.

2. What is plain packaging?

Plain cigarette packaging, also known as generic, standardised or homogeneous packaging, refers to packaging that requires the removal of all branding (colours, imagery, corporate logos and trademarks), permitting manufacturers to print only the brand name in a mandated size, font and place on the pack, in addition to the health warnings and any other legally mandated information such as toxic constituents and tax-paid stamps. The appearance of all tobacco packs is standardised, including the colour of the pack.

Plain packaging may be used with Graphic Health Warnings (GHW) which show gruesome images of potential side effects of smoking. This is the Australian example.

3. SIX good reasons why South Africans should resist this

Plain packaging violates:

- a. Individual freedom of choice
- b. Consumer rights
- c. Business rights

- d. Potentially violates the international agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Also,

- e. Is a further step towards the rise of the nanny state by stealth
- f. What's next on the agenda after tobacco? SA on a slippery slope with alcohol, sugar, salt, fat and more on the agenda

a. Individual freedom of choice

- The battle against draconian anti-smoking legislation, including the latest proposals for plain packaging, is part of the war against intolerance and excessive government intervention in our daily lives.
- The FMF continues to highlight the increasingly intrusive nature of government in the lives of private individuals.
- The Department of Health (DoH) says the measures are intended to protect the nation's health which is a fine and reasonable principle.
- However, good health is not the only factor at play in individual happiness. Should we allow politicians to decide for each of us that one factor is preferable to another?
- As adult individuals we may decide that the pleasure derived from smoking is worth the health risk. Very few consumers can be unaware of the risks of cancer and other diseases from tar inhaled from tobacco products. However, that informed decision, to smoke in the face of medical evidence, is one that only we as individuals can and should make. That choice is a freedom and one which once given up, is very hard to regain.
- Informed consumers accept the health risks associated with smoking. It is the government's job to educate and remind us and to provide the latest research data.

b. Consumer rights

- Consumers have a right to know about new products and to be able to identify different products and brands. Plain packaging effectively leaves the consumer "blind" and unable to differentiate between one brand and another.

c. Business rights

- South Africa, like many countries, has already banned all forms of advertising of tobacco products to the public. However, this kind of legislation will be a first in regulating the form in which the products are packaged and sold to the public and will have a serious impact on Trade Marks (TM) and brand value.

Effect on start ups

- Without the ability to market new products through advertising, branding, colour and graphics, the effect will be to keep all new entrants out of the market thus protecting and entrenching existing larger firms.

Plain packaging regulations and the effects on trade mark rights

- Plain Packaging makes copying and the introduction of counterfeit products easier and less obvious. IPR holders will face even more difficulty in protecting their rights.
- For registration purposes, a TM must be capable of distinguishing the products from others in the market. Often simple TMs struggle to overcome this hurdle and applicants get over it by adding visual elements and colour to add a distinct look to make the product easily recognizable.

- Plain packaging diminishes brand recognition. A competitor could apply to have the TM removed from the record.

Plain packaging and brand value

- Tobacco companies like all major businesses invest in their brands and brand value has a place on the balance sheet. If the effect of plain packaging is to diminish this value, this has the effect of expropriation of an asset without compensation.
- The SA government does not appear to have foreseen the possible legal challenges ahead. Australia's legal bill for defending its cigarette plain packaging legislation is set to hit \$50 million as it battles to contain a case before a tribunal in Hong Kong.

Retailers and suppliers will carry the responsibility – and consumers the costs

- If SA follows the Australian model, then retailers and suppliers will be liable to ensure that all tobacco products comply with the requirements of the legislation or face a fine and / or criminal charge. This extends to imported cigarettes from sources where plain packaging is not mandatory.
- Again, the consumer will carry any costs associated with compliance with plain packaging.

d. *Potentially violates the international agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

- The four countries (Dominican Republic, Cuba, Honduras and Indonesia) that have initiated disputes at the WTO repeatedly requested at the WTO Council of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that countries interested in plain packaging should wait for the outcome of the dispute at the WTO before engaging further in their legislative process.
- The Dominican Republic in a statement made at the TRIPS Council in February said, “By stripping all design elements from tobacco packaging and standardizing other packaging features, plain packaging measures undermine the basic features of trademarks and geographical indications (“GIs”) as protected under the TRIPS Agreement.”
- The country also challenged the positive effect of plain packaging on smoking, arguing that in Australia where packaging does not distinguish brands but prices still vary, consumers have shifted to cheaper low-end licit and illicit tobacco products.

e. *Is a further step towards the rise of the nanny state by stealth*

“Why do kids need nannies? Because there are certain things which they can’t do for themselves. They need someone to take care of them. We are playing that role...” Aaron Motsoaledi, Minister of Health.

Do we really want politicians deciding what is and isn’t in our best interests in our private lives?

Minister Motsoaledi has also declared war on alcohol, salt, sugar, fat, fast food, baby formula and anything else that might under some circumstances be described as unhealthy, or less healthy than alternatives.

Motsoaledi is building the path towards nanny-state fascism and has started with tobacco products. Once the precedent is set, he can do this with anything, on almost any grounds.

It is not the DOH's role to make that choice for us by taking away factors which play a part in forming individual decisions.

In a free society, freedom of choice and market forces are equally important.

The Nanny State is not yet with us – but is hovering on the horizon while SA sleep walks towards it by allowing politicians to take away the right and ability for individuals to think for themselves, to assess the information and to make personal lifestyle choices.

However, the nanny state problem is not confined to just puritanism and prohibition, it is much larger.

If we persist in thinking people cannot make simple decisions about what to eat, when to drink or what games to play, why then do we think they can do something as complicated as choosing between different political visions? If people are so stupid, should they even be allowed to vote?

There is a serious contradiction in supporting individual choice in the political sphere but not in the commercial sphere.

The government might think they know better than we do what's best for us, but they don't.

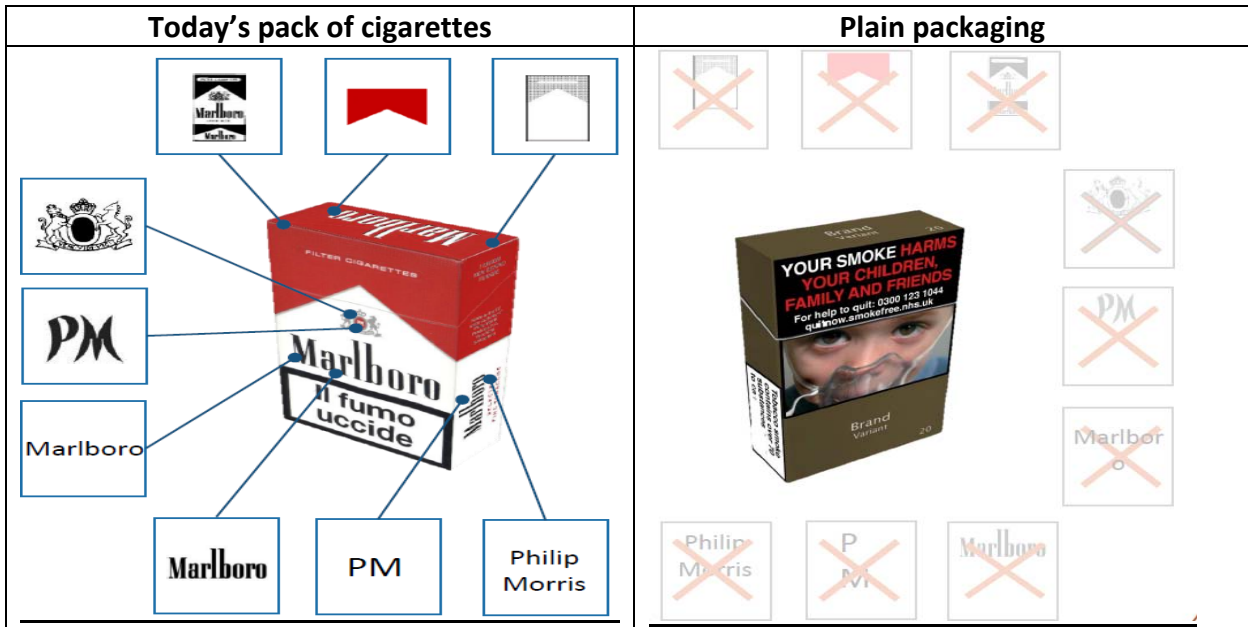
f. What's next on the agenda after tobacco? Slippery slope...

1. Graphic warnings and visuals on cars showing mangled bodies, blood and gore?
2. Pictures of diseased livers on wine bottles?
3. Burst arteries on red meat packaging?
4. Mounds of quivering flesh on chocolate bars?
5. Rotting teeth on cans of fizzy, sugary cool drinks?
6. Broken limbs and dead bodies on dangerous sports equipment?

Far fetched? No, merely the logical conclusion of plain packaging with graphic health warnings.

- The anti-smoking culture which is being encouraged and developed by the state is profoundly worrying because it discriminates against a significant minority of the population. What next? Whose craving and pleasure will be the next target? Fat people? Those who like a drink after work? That's already happening.
- The Minister of Health may decide certain individuals are too fat and need to take compulsory exercise, perhaps at the weekend. Perhaps those with high blood pressure and heart disease will be prohibited from attending braais to curb their intake of red meat.
- This further example of legislation to curb individual choice and behaviour together with the DTI's proposed liquor policy should alarm South Africans who care about individual liberty and freedom and fill us with foreboding.

Illustration of before and after plain packaging



Potential plain packaging?



Is this what your next Valentine's Day gift will look like?



Is this what you will offer your daughter as a birthday treat?



Is this the bottle of wine you will gaze lovingly over into the eyes of your soon-to-be-spouse?

ENDS

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Note

The FMF is an independent, non-profit, public benefit organisation, created in 1975 by pro-free market business and civil society national bodies to work for a non-racial, free and prosperous South Africa. As a policy organisation it promotes sound economic policies and the principles of good law. As a think tank it seeks and puts forward solutions to some of the country's most pressing problems: unemployment, poverty, growth, education, health care, electricity supply, and more. The FMF was instrumental in the post-apartheid negotiations and directly influenced the Constitutional Commission to include the property rights clause: a critical cornerstone of economic freedom.

The FMF has a wealth of information in papers, articles and opinion pieces available on the website which can influence the public debate and present alternative policies to the people of South Africa. Please look at our website www.freemarketfoundation.com. Also see [Facebook](#) and [Twitter](#).