

Briefing 14:02

PLAIN PACKAGING – QUESTIONS THAT NEED ANSWERING

By Christopher Snowdon
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Summary

- 'Plain' or 'standardised' packaging bans the use of company logos, colours and trademarks on a product's packaging and allows governments to design the outward appearance of goods. On tobacco products in Australia, this has meant the vast majority of tobacco packaging is taken up by large graphic images of tumours, gangrene and other diseases.
- The UK's Department of Health (DoH) launched a public consultation into plain packaging for tobacco products in 2012. After 64% of respondents opposed the policy, the proposed implementation was put on hold. The Government cited wishes to monitor the impact of the policy in Australia as key in this decision.
- Following severe criticism from the Labour party, the Department of Health commissioned Sir Cyril Chantler to conduct a limited review of plain packaging in November 2013, focusing solely on the potential effect of plain packaging on smoking prevalence. Newspaper sources suggested the decision to commission the report was made with political considerations in mind.
- With no new evidence in the intervening period, even from Australia, the Chantler report used the very same evidence that the government found unpersuasive in 2013 to argue for plain packaging. Most of these studies ask smokers and young people whether they find 'plain' packs less attractive than conventional packs. This tells us little about whether anyone starts smoking as a result of seeing a cigarette pack of any particular design.

- A significant amount of evidence from Australia now suggests unintended consequences of plain packaging, however. Sales of cigarettes rose by 0.3 per cent in 2013. A study by the global accounting firm KPMG reported a 154 per cent rise in the sale of illicit, branded cigarettes. Official Australian government figures also show that the number of seizures of illicit tobacco rose by 60 per cent between 2011/12 and 2012/13.
- There is significant opposition to plain packaging on the international stage due to its undermining of intellectual property. Several countries have filed complaints with the World Trade Organisation against Australia, with a further 35 countries prepared to join the dispute as third parties. These legal challenges remain unresolved. Experts believe that the British government could be liable for compensation claims estimated to amount to as much as £5 billion.
- A survey conducted by Roy Morgan Research in 2013 found that plain packaging is putting a strain on small retailers in Australia. 78% experienced an increase in the time taken to serve adult smoker customers and 62% report additional time is spent communicating with these customers about tobacco products. It is unclear how plain packaging would fit into the declared hope for deregulation.
- Following the 'success' of the plain packaging campaign, others are now seeking to lobby for plain packaging for certain food products, alcohol and even gambling machines.
- Australia remains the only country in the world to have enacted a plain packaging law. Similar proposals have been rejected in South Africa, Mexico, Germany and other countries. After two years' deliberation on the Tobacco Products Directive at an EU level, a unilateral decision by Britain to move to plain packaging is not in the spirit of market harmonisation.
- Given that the Chantler review only examined patchy evidence of the possible effects of plain packaging on smoking prevalence, the government can only seriously consider proceeding if it undertakes extensive reviews on the effects on intellectual property, counterfeiting, smuggling, tax evasion and trade disputes.

Context

October 2008: Action on Smoking and Health (ASH) conducts a survey which finds that plain packaging is the least popular of twelve anti-tobacco policies it is considering.¹

November 2011: Australia passes the Tobacco Plain Packaging Act 2011, to be introduced in December 2012.

16 April 2012: The UK's Department of Health (DoH) launches a public consultation into plain packaging for tobacco products, to end on 10 July 2012.

1 December 2012: Plain packaging law comes into force in Australia.

12 July 2013: The results of the DoH's public consultation are announced. Of the 665,989 people and organisations who responded, 64 per cent oppose the policy. The government decides to put plain packaging on hold, saying it wishes to monitor the impact of the policy in Australia. The Minister for Public Health, Anna Soubry, says that the government had 'decided to wait until the emerging impact of the decision in Australia can be measured'. A Whitehall source is quoted as saying: 'Plain packaging may or may not be a good idea, but it's nothing to do with the Government's key purpose. The PM is determined to strip down everything we do so we can concentrate all our efforts on voters' essentials. That means growth, immigration and welfare reform.' Some Labour MPs accuse the

1 Action on Smoking and Health (2008), 'Beyond Smoking Kills', October: 37

government of having been influenced by Lynton Crosby (a campaign consultant to the Conservative Party), whose company has provided public affairs advice to the tobacco company Philip Morris. No evidence is provided to support this claim and it is explicitly denied by both the Prime Minister David Cameron and Lynton Crosby himself.

28 November 2013: Sir Cyril Chantler is commissioned by the DoH to conduct a review into the potential effect of plain packaging on smoking prevalence. From the outset, Chantler makes it clear that his review is 'not concerned with legal issues such as competition, trade-marking and freedom of choice', but will look only at 'any public health effects'. Newspapers quote an anonymous government source who suggests that the issue was being revived for political reasons: 'This will nail Labour's ridiculous smears. Now the pressure will be on Labour to get behind this amendment to enable the introduction of standardised packaging.'²

3 April 2014: Chantler's review concludes that plain packaging may contribute towards a 'modest but important reduction in smoking prevalence' if combined with other measures.³

2 Carter, C. (2013), 'Plain cigarette packaging could be brought in by 2015', *Telegraph*, 27 November

3 Chantler, C. (2014), 'Standardised packaging of tobacco', April: 40

Evidence: smoking prevalence

Advocates of plain packaging say that the policy is intended to dissuade young people from taking up smoking. There are no data showing smoking trends in the 16 months since Australia introduced the policy and none will appear until October 2015 at the earliest.⁴ The evidence put forward by campaigners to suggest that plain packaging will reduce smoking rates remains entirely hypothetical.

Campaigners have consistently lowered expectations of any short term effect in Australia. Nicola Roxon, the Australian minister who led the plain packs campaign, said of the UK's Department of Health, 'These people are asking for evidence that can't exist yet'.⁵ If there is any benefit from the policy, she said, it will 'most likely be seen much further into the future.' The British Lung Foundation says that plain packaging 'won't make smokers quit. We know that'.⁶

In the absence of any evidence of the impact on smoking rates, and without finding any new evidence in Australia, Sir Cyril Chantler reviewed the same theoretical studies and surveys that were in the public domain before he was commissioned by the DoH. Most of these studies involve variations of the theme of asking smokers and/or young people whether they find 'plain' packs to be less attractive than conventional packs. Most do, of course, leading activist-researchers to conclude that consumers will be deterred

4 Chantler, C. Comments at press conference, Department of Health, 3 April 2014

5 <http://theconversation.com/i-have-more-faith-in-people-than-tobacco-lobbyists-18307>

6 <http://www.edinburghnews.scotsman.com/news/opinion/plain-packs-offer-a-smoke-free-future-1-3259434>

from smoking by the pack design. However, no evidence has been produced - because none exists - that anyone starts smoking as a result of seeing a cigarette pack of any particular design, and so the suggestion that abolishing logo and trademarks will have any impact on smoking rates is entirely speculative.

Similarly bold claims were made by campaigners about the likely reduction of smoking prevalence if graphic warnings on cigarettes were introduced several years ago, but it has since been concluded that these warnings 'have not had a discernible impact on smoking prevalence'⁷ and '[a]mongst young people, the impact of picture health warnings was negligible'.⁸

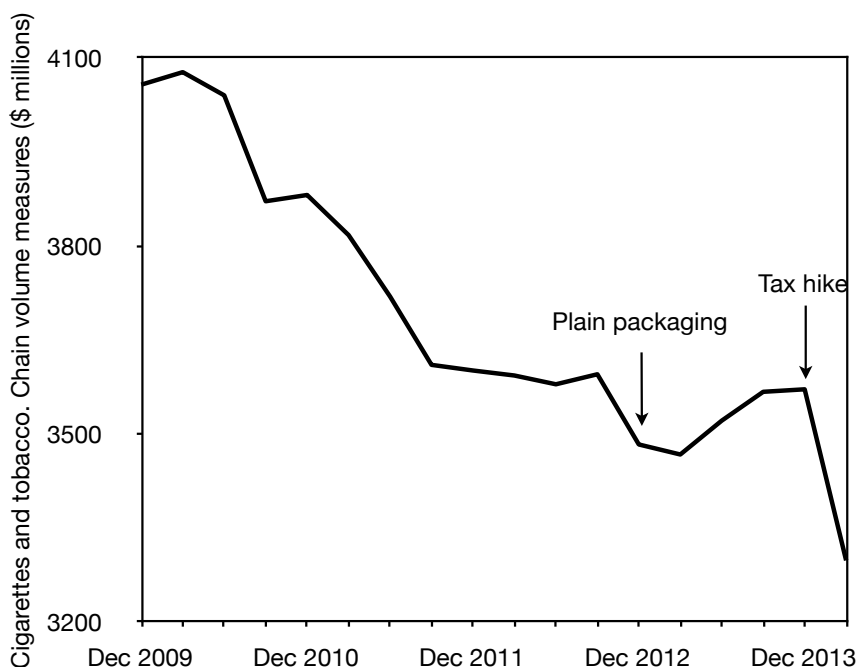
The evidence that Chantler finds persuasive is the very same evidence that the government found unpersuasive in 2013. The contrasting interpretations of this soft, hypothetical evidence indicates the power of subjective opinion and personal bias.

Emerging real world evidence from Australia shows that plain packaging failed to reduce cigarette sales and had no effect on smoking prevalence. Australian Bureau of Statistics' data show a long term decline in the chain volume of tobacco sales going back to the 1970s, but this went into reverse in the first year of plain packaging (see graph below)⁹. In three out four quarters in 2013, sales were higher than they had been in the last quarter before plain packaging was implemented. This unusual rise in chain volume sales only came to end in December 2013 when a large tax rise on tobacco (of 12.5 per cent) was implemented, thereby leading to a fall in the next quarter.

7 Gospodinov, N. and I. Irvine (2004), 'Graphic health warnings on tobacco packaging: Evidence from the Canadian experiment', *Topics in Economic Analysis and Policy*, 4(1), 30

8 Wardle, H., D. Pickup, L. Lee, J. Hall, K. Pickering, K. Grieg, C. Moodie and A. MacKintosh (2008), 'Evaluating the impact of Picture Health Warnings on Cigarette Packets', Public Health Research Consortium: 8

9 <http://abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5206.0Mar%202014?OpenDocument>



Advocates of plain packaging have argued that plain packaging has not been a failure in Australia on the basis that sales in early 2014 - after the tax hike - were lower than before plain packaging was implemented. This is highly disingenuous. The question is whether plain packaging had an effect in its first year, not whether a price rise had an effect thirteen months later. The evidence is quite clear: the long term decline in legal tobacco sales bottomed out and began to rise after plain packaging was enacted.

Perhaps the most desperate attempt to find evidence in support of plain packaging came in July 2014 when ASH claimed that there had been a 'huge drop in Australian smoking rates attributed to standardised packs'.¹⁰ This claim was based on a decline in daily smoking prevalence from 15.1 per cent to 12.8 per cent, but closer inspection revealed that ASH was referring to a three year period between 2010 and 2013, not (as was implied) between December

¹⁰ <http://www.ash.org.uk/huge-drop-in-australian-smoking-rates-attributed-to-standardised-packs>

2012 and the present day. For two-thirds of the period in which ASH claimed that there was a “huge drop”, plain packaging was not in force and could not possibly be a factor.

Furthermore, daily smoking prevalence has fallen every year in Australia since 1993 by 0.4-0.9 per cent per annum. The trend between 2010 and 2013 was in line with this secular decline. There was, for example, a bigger drop between 1998 and 2001 (21.8 to 19.4 per cent) than between 2010 and 2013 (15.1 to 12.8 per cent). Two studies by Dr Ashok Kaul and Dr Michael Wolf have confirmed that there was no impact from plain packaging on the longterm trend in smoking prevalence.¹¹ These statisticians met Sir Cyril Chantler’s team but their evidence was not included in the Chantler Review—a significant oversight.

11 <http://www.econ.uzh.ch/static/workingpapers.php?id=844>
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460704

Evidence: illicit trade

Since July 2013, when the UK government put the plain packs proposal on ice, a significant amount of evidence has been published that suggests that the policy is having perverse unintended consequences in Australia, including a rise in counterfeit cigarettes, a rise in illicit cigarette seizures and a rise in legal cigarette sales.

Cigarette sales in Australia had been falling for four successive years before plain packaging was introduced, but in 2013 sales of cigarettes rose by 0.3 per cent.¹²

A study by the global accounting firm KPMG reported a 154 per cent rise in the sale of illicit, branded cigarettes in Australia, including Manchester, a brand that is produced legally in the United Arab Emirates before being smuggled into the country by boat. This brand has never been legal in Australia. It is unregulated and its packaging contains no health warnings. Despite this, Manchester now makes up 1.2 per cent of the entire market, in terms of consumption. Overall, illicit tobacco now represents 13.3 per cent of the Australian tobacco market.¹³

Official Australian government figures show that the number of seizures of illicit tobacco rose by 60 per cent between 2011/12 and 2012/13, with 183 tonnes of tobacco and 200 million cigarettes

12 Geller, M. (2014), 'Australia tobacco sales edge up despite plain packaging - industry', *Telegraph*, 23 March

13 KPMG (2013), 'Illicit tobacco in Australia', October

detected.¹⁴ Australian newspapers report that illicit tobacco is widely available both on the black market and in retail shops.¹⁵ In January 2014, Australian authorities seized 71 tonnes of illegal tobacco and 80 million cigarettes in a single shipment - the largest seizure in the country's history.¹⁶ Two months later, more than 35,000 tobacco plants were seized from a crime syndicate in Melbourne. The gang were also involved in the trafficking of drugs and guns.¹⁷

In the UK, HMRC estimates that the illicit share of the tobacco market in 2011/12 was between 2 and 12 per cent for cigarettes and between 30 and 41 per cent for rolling tobacco. It estimates that the tax evaded in illicit sales amounted to between £800 million and £2.4 billion.¹⁸

The Government has not commissioned a review into the impact of plain packaging on black market activity, organised crime and the economic costs of further tobacco tax evasion.

In June 2014, the Sun newspaper sent journalists to Indonesia to secretly film a meeting with a major cigarette counterfeiter. The recorded conversation left little doubt that illicit traders see plain packaging as a boon:

'Indonesian forger Faus Firdaus said his profits would soar when he no longer has to copy the complex packaging and embossing on popular makes like Marlboro and Regal.

He even punched the air as he mocked PM David Cameron, cheering: "Plain packaging... I support the UK government! ...We will make more money. We can make it cheaper but sell for the same price. It's good for you, good for me."

14 Australian Government (2013), '*Australian Customs and Border Protection Service: Annual Report 2012-2013*', Sydney: 91

15 Howe, A. (2013), 'Illegal cigarettes run hot across Melbourne', *Herald Sun*, 3 November

16 McArthur, G. (2014), 'Fines quadrupled for selling illegal tobacco or counterfeit cigarettes', *Herald Sun*, 14 January

17 Gannon, G. and M. Iaria (2014), 'Vic gang leaders face drug, weapon charges', *7 News*, 18 March

18 HMRC (2013), 'Tobacco tax gap estimates 2012-13'

He added that plain packaging would also lower the profile of forgeries, making them easier to ship without suspicion.’¹⁹

¹⁹ Flynn, B. (2014), ‘Sun smokes out Mr Big’, The Sun, 4 June 2014

Intellectual property/trade

Since plain packaging prohibits companies from using their own branding and trademarks on their products, many experts believe that it infringes intellectual property rights and violates international trade agreements. The US Chamber of Commerce, National Association of Manufacturers, United States Council for International Business, National Foreign Trade Council, Emergency Committee for American Trade, US-ASEAN Business Council and TransAtlantic Business Dialogue have all opposed plain packaging because it 'risks establishing a precedent of IP destruction for an entire industry'.²⁰

Expert opinion, including that of the European Communities Trade Mark Association, the British Brands Group and the International Trademark Association, says that plain packaging is an infringement of intellectual property rights and a violation of international free trade agreements to which the UK is a signatory. It has been estimated that compensation payments could amount to £500 million in Scotland alone.²¹ In the UK, Citigroup's tobacco analyst estimates the value of tobacco branding, which would be lost under plain packaging, to be £5 billion.²²

20 *PR Newswire*, 'Leading Business Organizations in the U.S. Issue Joint Statement in Opposition to Australian Government's Proposed Tobacco Plain/Standardized Packaging Legislation', 8 June 2011

21 Hulme, C. (2014), 'Scotland may pay for tobacco intervention', *Scotsman*, 31 March

22 Adam Spielman (2008), "Submission on the future of tobacco control".

Three trade agreements are particularly relevant: the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Technical Barriers to Trade (TBT). Several countries, including Ukraine, Zimbabwe, Honduras, Cuba, the Dominican Republic, Nicaragua and Indonesia have filed complaints with the World Trade Organisation against Australia, with a further 35 countries prepared to join the dispute as third parties. These legal challenges remain unresolved.

The government has not commissioned a review into the impact of plain packaging on intellectual property, international trade and the economic costs of trying to resolve these issues.

In June 2014, investment analysts Exane BNP Paribas published a report about tobacco regulation which concluded that deprivation of intellectual property is 'the strongest of the legal arguments' against plain packaging.²³ Article 17 of the EU Charter of Fundamental Rights states that 'Intellectual property shall be protected' and that 'No-one may be deprived of his or her possessions, except in the public interest and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for a general interest.'

Noting that there is 'no public health override which would avoid compensation, merely an override that allows the government to deprive property in the first place', Exane BNP Paribas estimates that compensation from the British government to the tobacco industry could certainly be 'in the billions' and could possibly reach as high as £9-11 billion.

23 Bushnell, J., J. Stent, E. Ferry and J. Wyatt (2014), 'Equities: Tobacco Regulation', *Exane BNP Paribas*, 23 June

Impact on retailers

A survey conducted by Roy Morgan Research in 2013 found that plain packaging was putting a strain on small retailers in Australia.²⁴ Amongst its findings were the following:

- 78% experienced an increase in the time taken to serve adult smoker customers and 62% report additional time is spent communicating with these customers about tobacco products.
- 62% of small retailers have faced increased frustration from adult smoker customers and 65% have seen an increase in the frequency of staff giving the wrong products to customers (primarily due to difficulty in recognising/distinguishing between brands).
- 34% of retailers have experienced increased frequency of attempted product returns predominantly due to customers being given a product they did not ask for.
- 44% of small retailers consider that plain packaging has negatively affected the level of service they are able to provide to their non-tobacco customers.
- 75% of small retailers find it takes more time to order stock. 45% claim it takes much more time.

²⁴ Roy Morgan Research (2013), 'Impact of plain packaging on small retailers - wave 2', Melbourne, 17 October

In 2010, Nick Clegg said: 'For too long, laws have taken away your freedom, interfered with your life and made it difficult for businesses to get on ... We'll get rid of the unnecessary laws – and once they're gone, they won't come back.'²⁵ David Cameron had previously promised that the 'era of big, bossy, state interference, top-down lever pulling is coming to an end'.²⁶ The government has not explained how plain packaging advances this deregulatory, pro-business agenda.

25 <https://www.gov.uk/government/news/your-freedom--6>

26 Sparrow, A. (2006), 'David Cameron's press conference - live', *Guardian.com*, 23 June

Mission creep

After the plain packaging law was passed in Australia, Senator Cory Bernadi recalled that ‘on the very first day they moved onto drinking. People who were advocating plain packaging were saying “We should have this for alcohol. We should have it in fast food.” Where does it end? The nanny state will never end because there is always another cause to advocate for.’

As predicted, there have been numerous calls for plain packaging to be extended to other products, notably alcohol and certain foods. Some politicians have even called for plain packaging for gambling machines.²⁷ In July 2013, the president of the Australian Institute of Food Science Technology suggested that government intervention on obesity needed to follow the anti-tobacco model. “Ultimately,” she said, “it may come to plain packaging.”²⁸

Research has already been published to suggest that packaging influences children’s food preferences - with obvious implications.²⁹ In March 2012, a UK government consultation on its alcohol strategy requested views on whether plain packaging should be applied to alcoholic beverages. The newly formed Action on Sugar campaign group has suggested plain packaging for sugary drinks.

27 Black, Z. (2012), ‘Booth calls for plain package pokies’, *The Examiner*, 22 April

28 Rawson, S. ‘Graphic images, plain packaging on agenda in bid to combat growing obesity problem’, *The Australian*, 16 July

29 Elliott, C., R. Hoed and M. Conlon (2013), ‘Food branding and young children’s taste preferences: A reassessment’, *Canadian Journal of Public Health*, 104(5)

As campaigners have been quick to realise, plain packaging for tobacco sets a precedent for similar legislation on other products, particularly those that cannot legally be sold to minors.

The Indonesian government has already expressed interest in putting alcohol in plain packaging.³⁰ As an Islamic country, Indonesia has religious reasons to clamp down on alcohol, but its government has also intimated that the policy would be “retaliation” for Australia bringing in plain packaging for tobacco.³¹ This is exactly the kind of tit-for-tat war that trade agreements are designed to prevent and it illustrates the predicted consequences of plain packaging - the slippery slopes and trade dispute.

30 Kerr, C. (2014), 'Mums the word', *The Australian*, 12 May

31 Maddox, D. (2014), 'Cigarette packs "could see whisky in trade war"', *The Scotsman*, 12 May

The global picture

Australia remains the only country in the world to have enacted a plain packaging law. Similar proposals have been rejected in South Africa, Mexico, Germany and other countries. It was recently rejected in Belgium (12 March 2014) because of problems encountered in Australia and potential legal disputes regarding intellectual property rights and trade. New Zealand has no immediate plans to proceed with plain packaging. Only Ireland has announced its intention to move forward with plain packaging in the near future.

The EU has recently passed the wide-ranging Tobacco Products Directive which mandates many severe restrictions on tobacco packaging, including graphic warnings on 65 per cent of the front and back of cigarette packs. Plain packaging was mooted on several occasions during the negotiations for the Tobacco Products Directive but was rejected after being voted down by all five of the EU Parliament's opinion-giving committees. After two years' deliberation on the Tobacco Products Directive, a unilateral decision by Britain to move to plain packaging is not in the spirit of market harmonisation and represents an extreme version of 'gold plating'.

Conclusion

Chantler's review looks at only one aspect of the plain packaging policy and brings no new evidence to the table. In the absence of any data on smoking prevalence and smoking initiation since Australia began its experiment, his interpretation of the theoretical evidence can only be subjective - it is arguably mere wishful thinking.

Other important issues such as intellectual property, counterfeiting, smuggling, tax evasion and trade disputes were outside of Chantler's remit and now require careful reviews before the government can seriously consider proceeding. Costly legal action from the tobacco industry is certain, with many experts predicting payouts of up to £5 billion. Other trade disputes and intellectual property cases are on the horizon. Basing policy on speculative benefits without reviewing economic and social costs is a reckless way to legislate. The minister for public health has said that 'we have to look at everything in the round'.³² To do this, the government must commission similar reviews - from independent experts - into these other important aspects of plain packaging.

³² Jane Ellison MP in House of Commons, 3 April 2014

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