

About that alcohol advertising ban...

 By [Gaelyn Scott](#)

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Will it work? What impact will it have on sports sponsorships? In this article, however, the question is asked: Will such a ban be constitutional?

There's been much talk about what's described as the alcohol advertising ban. The measures that are being discussed do indeed include a total ban on the advertising of alcohol products, as well as a ban on alcohol brand sponsorship. In addition, there's talk of various restrictions on usage. It will, for example, become illegal to have alcohol brand names or logos appearing on delivery vehicles. There will also be limitations on what can appear on licensed premises - notices, which must not be visible from the outside of the premises, will simply be allowed to show the price, brand name, type, strength and composition of the product, together with a health warning. Like alcohol, it's strong stuff!

Lots of questions are being raised. Will a ban in fact reduce alcohol consumption? Does alcohol advertising actually affect consumption or does it simply influence brand choice? Will a ban make it impossible for new brands to enter the market? How will a ban affect the advertising and media industries? What will the impact be on sports and the arts, which are both dependent on sponsorship?

I'll leave these questions to the experts. But I would like to discuss one question that's been raised: will such a ban be constitutional? This raises issues of both freedom of expression and property rights. As these issues have already been considered in the context of tobacco, it makes sense to look at that industry.

A *verboden* subject

The advertising of tobacco products has been *verboden* for a number of years. This ban is contained in section 3(1) (a) of the Tobacco Products Control Act 1993. The constitutionality of this section was considered by the Supreme Court of Appeal in 2012 in the case of BAT v Minister of Health and National Council Against Smoking. The company argued that the section did not stop it from conducting one-to-one communications with adult smokers, for example by approaching smokers in restaurants. This, argued the company, would amount to an undue limitation of the right of freedom of expression contained in section 16 of the Constitution.

The court disagreed. Section 36(1) of the Constitution provides that any constitutional right can be limited to the extent that the limitation is reasonable and justifiable, and the court held that the prohibition on tobacco advertising was a justified limitation of the right of freedom of expression. It referred to a decision of the Constitutional Court where it was held that a limitation can be reasonable even if there isn't clear proof that it will be effective. In that case the court said this: "If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify actions taken to address them."

Health considerations

The court in the BAT case said this: "There are powerful public health considerations for a ban on advertising and promotion of tobacco products... (other countries) have accepted the link between advertising and consumption as incontrovertible and have imposed restrictions on the advertising and promotion of tobacco products." It went on to say: "The right to commercial speech ... is indeed important...but it is not absolute...Weighed up against the public health considerations that must necessarily have been considered when imposing the ban on advertising and promotion of tobacco products it must, I think, give way." The court felt that it wasn't possible to carve out an exception in respect of consenting tobacco users: "In the circumstances a blanket ban on advertising and promotion is, to my mind, the only way to address the issue."

So much for a ban on advertising. What about limitations on use, such as a ban on names and logos on delivery vehicles, and restrictions on usage on licensed premises. Would such measures amount to a unconstitutional restriction of property rights?

Again the tobacco example is interesting. There is speculation that we will get plain tobacco packaging legislation, as in Australia. The Australian Tobacco Plain Packaging Act 2011 requires all brands of cigarettes to be sold in identical packs featuring graphic health warnings, and the brand name (without logo) in very small print. Tobacco companies challenged the legislation, arguing that it was an unlawful expropriation of (intellectual) property, because the Australian constitution says that any acquisition of property must be "on just terms". But in 2012 the Australian High Court held that the legislation was constitutional because there was no acquisition of property, merely an "extinguishment of rights".

And here is SA?

What about South Africa? Some argue that a law that requires tobacco companies to use unbranded packs will contravene section 25 of the Bill of Rights, which says that no-one can be deprived of property and that, in the case of an expropriation, compensation must be paid. It's argued that - because trademark law says that if a trademark owner doesn't use its trademark for five years the registration can be cancelled - plain packaging legislation will involve a loss of trademark rights, entitling the trademark owner to compensation (trademarks are, of course, valuable assets!). The counter-argument, however, is that plain packaging legislation simply restricts the way in which tobacco companies can use their trademarks, it doesn't deprive them of ownership. A name registration doesn't become open to attack, because the name does still appear on the pack (albeit in small print). And even if a logo trademark cannot be used at all, the law excuses non-use through special circumstances.

The former Deputy President of the Supreme Court of Appeal, Louis Harms, entered the debate recently. In a paper, Harms accepted that the counter-argument will prevail, and that plain packaging legislation would pass constitutional muster. He made the point that, although trademarks are "socially and commercially important", no rights are absolute. He reminded us that in 2005 the Constitutional Court held that trademark rights can "be trumped by other rights" - in that case SAB's rights to its Carling Black Label trademark were trumped by Justin Nurse's right to comment on the brand on t-shirts. He confirmed that a trademark registration would not become open to attack for non-use because of the special circumstances. And he said that plain packaging legislation would not contravene the expropriation provision of the Constitution, because it "does not deprive the trademark owner of any trademark right, but only regulates or limits the exercise of that right".

Commercial reality might see ban blocked?

So how does the tobacco experience affect the measures that are being discussed for alcohol? On the issue of an advertising ban, it's interesting that the court in the BAT case did accept that there's a link between advertising and consumption, that a limitation of a right can be constitutional even if there's no clear proof that it will work, and that a blanket ban on advertising is reasonable. It also accepted that there is a clear health risk with smoking - I suspect that this is one area where the alcohol industry may try to draw a distinction. As regards usage restrictions, it seems to me that if plain

tobacco packaging legislation is constitutional then the restrictions contemplated for alcohol must be too. But we'll have to wait and see. With all that's at stake here, I suspect that these issues will eventually end up in court.

It's interesting that Harms ended his lecture by suggesting that the only thing that might stop the government from enacting plain tobacco packaging legislation is the commercial reality, the "tension between health and state income". He said this: "Without being too cynical, the reason why (government does not ban tobacco) is because government does not wish to forego the resultant income". Is it possible that the commercial reality may also prevent the alcohol advertising ban from coming into effect?

ABOUT GAELYN SCOTT

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