The result

Accordingly, it was held that the complainant needed to be advised personally under s167 rather than through the agent for the time period to commence to run. The critical requirement of s167(4) is that the complainant is asked a question and the complaint must respond to that question within 28 days of being asked.

The Court qualified the requirement for the complainant to be asked a question in that the complainant can be asked through an agent, but time will only begin to run when the complainant has been asked. That is, the time limit will not begin to run until the request has reached the complainant personally.

Hence, the 28 day limitation period was held to run only from the time that the complainant received notice of the requirement to refer the matter to the Tribunal. Accordingly the appeal failed and the matter was successfully referred through to the Tribunal.

What this means for respondents

The implications of this decision lie primarily with the Commission who should now ensure that the complainant themselves are made aware of the necessity to refer the matter to the Tribunal if a s167 notice is received. This places respondents in the unenviable position where the benefits of a s167 notice where it is sent to an agent of a complainant may be eroded. After all, if an agent wished to engage in delaying tactics, they could merely not inform the complainant of the existence of the s167 notice. There appears to be no unilateral conduct a respondent may undertake to avoid the situation of *Goodwin*.

What this means for complainants and their agents

Agents should ensure that complainants are fully informed of any s167 notice received and the requirement for the notice to be answered within 28 days of being informed of the notice. It is not clear from the decision of *Goodwin* whether for the 28 days to begin to run the agent may orally inform the complainant of the notice or whether the complainant must receive a copy of the notice. To err on the side of caution, agents should ensure the complainant responds within 28 days from the time the agent informs the complainant of the notice no matter in what form. It appears that it will not be sufficient for the agent to respond to the notice without the complainant's instructions. ■

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Smoke, mirrors and death in a question of class action

Thousands of Australians are ready to sue tobacco companies over the toll their addiction has taken on their health. But it's too late for one man, Malcolm Brown report

GREG Durkin, lead claimant in a proposed class action by Australian smokers against tobacco companies, gave videotaped evidence at a bedside hearing at Westmead Hospital last week. He was so gravely ill with lung cancer it was obvious his days were numbered.

Durkin died last weekend, before he could carry through the class action with five other claimants or know whether it would survive legal moves by the tobacco companies to stop it going to court.

Federal Court Justice Murray Wilcox, who last month dismissed an application by the tobacco companies to have the proposed class action struck out, was aware of the urgency of Durkin's situation. He ordered evidence be taken and held for possible later presentation.

Another claimant, Michael Christopher Nixon, seriously ill in Melbourne, was in a similar situation. On Tuesday, when Durkin's death was announced in the Federal Court, the tobacco companies were ready with criticisms of his status as a claimant.

Jeff Sher, QC, for Philip Morris Ltd, cast doubt on whether Durkin fitted the class action, restricted to people whose medical condition – which they claim to be smoking-related – was diagnosed between April 16, 1996 and April 16 this year. Durkin, 51, of Shalvey in the western suburbs, was diagnosed in October last year.

But he had not smoked for five years and, as Sher pointed out, had given up "cold turkey"; from the tobacco company's point of view that militates against the addiction claim.

Opposing the class action are Philip Morris, British and American Tobacco (Australasia) Ltd (a recent merger between Rothmans of Pall Mall Australia Ltd and WD & HO Wills Pty Ltd), and an entity called WD & HO Wills that has been preserved for the purposes of the present legal proceedings.

The companies have applied for a hearing before the Full Bench of the Federal Court to appeal against Justice Wilcox's decision not to strike out the application for a class action.

The companies are arguing that while individuals claiming they have smoking-related conditions can take individual civil actions, a class action is not the appropriate way of proceeding.

Philip Morris has said recent United States court decisions that have gone against tobacco companies should be seen in perspective.

In Washington in July a Superior Court judge ruled out class-action status in a smoking and health case on the grounds that there were too many complexities and individual differences. Lifestyle, general health, and how much and what an individual smoked were significant factors.

"The current trend in US court decisions is that these [smoking and health] cases should not be treated as class actions," says the corporate relations manager for Philip Morris, Nerida White.

But the anti-smoking lobby looks askance at such moves. It believes they are merely a result of the tobacco industry using its enormous financial resources to defend itself against claims that companies have engaged in misleading and deceptive conduct over decades, and have encouraged people to take up a highly addictive habit. The chief executive officer of Action on Smoking and Health (ASH), Anne Jones, says tobacco companies have gone global and prepared for ever-expanding markets.

In Australia her organisation hopes to reduce smoking to 15 per cent of the population by 2005. But the multinational tobacco companies, seeking a 30 per cent increase in consumption of their products, are looking for new smokers in the Pacific Islands and the Third World.

If the lawsuit proceeds, the most likely date is June 13 next year. If successful, it will clear the way for thousands of Australians to join further class actions. Slater and Gordon, representing claimants, has about 2,500 people on its books who fit into the three-year diagnosis period.

One of those is Bill Ryan, 51, a retired plumber of Stanmore. He took special note of last Thursday, August 26. It was the third anniversary of the dreadful day when he went to his doctor complaining of back ache and discovered that one of his lungs was riddled with cancer.

Ryan, who had the lung removed on December 12, 1996, changing his life forever, says he had no inkling when he began smoking after leaving school that it was a dangerous habit. "None at all, none whatsoever," he says. "You felt a bit out of place if you didn't smoke. I ended up smoking 1½ packets a day and, if I had a drink, two packets.

"You see the tobacco ads and you think it is all right. It is the most addictive thing, really. I will certainly be watching what happens with these court cases."

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