

The war on tobacco - the global spread of litigation against the tobacco companies

Tobacco Litigation - an Australian perspective
Neil Francey, Sydney

Background

The history of the smoking pandemic of the 20th century can be traced back to the invention of the mechanical cigarette machine in the late 1800s. Until that time cigarettes were rolled by hand, production was low and smoking was not overly prevalent. Also, of course, not much was known about the harmful effects of smoking although generalised warnings date back to James the 1st of England's "Counterblaste on Tobacco" in 1604. The cigarette machine meant that millions of cigarettes could be produced each day at a lower cost and distributed more widely.

The result was that cigarette smoking increased, firstly during the first World War when cigarettes were distributed with rations and then further in the 'free and easy' 1920s. Even during the depression of the 1930s cigarettes were smoked as a solace and there was another boost to consumption during World War II, such that by the late 1940s over 70% of adult males smoked in North America, Great Britain and Australia, with smoking rates amongst adult females being about 25%.

By 1950, studies began to be published in medical journals linking the increased consumption of cigarettes with disease. Two of the most famous studies were by British researchers, Doll and Hill and American researchers, Wynder and Graham. These and other studies published in the 1950s resulted in a Report by Britain's Royal College of Physicians in 1962 and a Report of the American Surgeon General in 1964, both linking cigarette smoking with cancer of the lung. Meanwhile, the tobacco industry was responding to these developments. A meeting was convened on December 15, 1953 at the Plaza Hotel in New York City attended by the Presidents of all the major

American tobacco companies except, ironically in the light of contemporary developments, the President of Liggett & Myers. At that meeting it was resolved to establish a Tobacco Industry Research Committee (TIRC) and in January 1954 advertisements were published headed "A Frank Statement to Cigarette Smokers" in which the attending tobacco industry representatives announced the establishment of the TIRC and the intention to conduct research into the matter on the basis that the industry represented "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business".

In reality, the tobacco industry conspired to suppress research and placed their own short term commercial interests ahead of peoples' health. Even after the release of the US Surgeon General's report in 1964, when there was another opportunity to "come clean" about the matter, Liggett & Myers joined the TIRC and the conspiracy of denial and disputation was continued and expanded.

Australia was not overlooked in the campaign. Documents now being released under the "Thirty Year Rule" reveal that tobacco companies lobbied the Menzies Government to prevent smoking restrictions and controls. Legislation proposed in 1969 to mandate a health warning on cigarette packages was not implemented until 1973 when the simple message "Warning - Smoking is a Health Hazard" first appeared. In the early 1980s this general warning was replaced with more specific warnings but, as a direct result of industry lobbying, the warning "Smoking is Addictive" was replaced with "Smoking Reduces Your Fitness" and the attribution "Heath Authority Warning" was added,

leaving the tobacco industry able to distance itself from the warnings as the industry maintained its campaign of disputation and denial. Ultimately, in 1994 the current, more comprehensive, health warnings were proposed in legislation effective from 1 January 1995. The warnings include a telephone number for more detailed information. Again, however, the attribution statement "Government Health Warning" followed each warning and explanatory message.

Litigation in the United States

In the meantime, litigation against the tobacco companies in the United States has resulted in documents being disclosed which reveal tobacco industry knowledge about the harmful effects of smoking and addictive properties of nicotine dating back to the early 1960s. These documents also expose deliberate marketing efforts to attract young smokers to replace older generations dying from smoking-related disease.

Tobacco litigation in the United States has been described as comprising, to date, "three waves". The first wave covered the period from 1954 to about 1973 involving numerous individual law suits, all of which were unsuccessful. The second wave of tobacco litigation covered the period from 1983 to roughly 1992. Again, this was litigation by individuals which was also, largely, unsuccessful. An exception was the *Cipollone* case which was successful at first instance but overturned on appeal: *Cipollone v Liggett Group Inc.* 55 US 504 (1992).

The third wave of tobacco litigation in the United States commenced in 1993 with an avalanche of law suits being filed in recent years.



Neil Francey

The first was a national class action on behalf of addicted smokers to reimburse the costs of monitoring their health and encouraging them to quit: *Castano v American Tobacco*. This action was decertified as a class action but similar suits have been commenced in individual States and, in the main, are progressing slowly.

The second type of litigation, which has proved to be highly successful, has involved actions by individual States or State Attorneys General, either individually or in conjunction with health funds, suing to recover the costs of medical treatment incurred by the State in respect of smoking related illness. To date, about 40 States have filed suit and four have been settled including the first State to commence proceedings, Mississippi, followed by Florida, Texas and, most recently, Minnesota. The Minnesota settlement, a State with a population of 4.5 million, involves payment of \$6.1 billion over the next 25 years, the disclosure of tobacco industry documents, restrictions on marketing and funding for cessation programs. Thirdly, actions have been commenced on an individual basis throughout the United States including a large number by one attorney in Florida who has already obtained two jury verdicts in excess of \$1 million: *Carter v Brown & Williamson* and *Maddox v Brown & Williamson*, although the first of these has been overturned on appeal.

Fourthly, actions have been commenced by lawyers acting for trust funds set up to distribute compensation to

asbestos victims claiming contribution from tobacco companies.

Fifthly, actions have been commenced seeking reimbursement for health costs by health funds and trade unions.

This litigation resulted in a (now abandoned) proposal for a multi-billion dollar settlement and vastly greater restrictions on the sale and distribution of cigarettes. Nevertheless, a vast amount of information is being published about the industry's knowledge of disease, addiction and marketing, and one tobacco industry chief, Bennett LeBow, the head of the Liggett company, has admitted that smoking is addictive and causes diseases such as lung cancer, heart disease and emphysema.

Litigation in Australia

Despite all this, the Australian tobacco industry has maintained its strategy of distortion and denial. Numerous examples of statements by representatives of the tobacco industry in Australia as part of this strategy of distortion and denial are collected in a booklet published in 1997 by ASH Australia entitled "Diary of Denial - An Australian History of tobacco industry denials about the health effects of smoking, addiction of nicotine and marketing of tobacco products to children".

As recently as 23 August 1997, W D & HO Wills (Australia) Ltd published an advertisement regarding smoking and health, including the following assertion: "Here are the facts ... W D & HO Wills consistently acknowledges that smokers

have a high incidence of lung cancer for non-smokers, but the mechanisms and causes of the disease are still being researched. Scientists, the medical community and the tobacco industry worldwide are continuing their efforts to resolve these fundamental questions." However, the Chairman of W D & HO Wills (the Australian subsidiary of British American Tobacco whose American subsidiary Brown & Williamson has joined in the US settlement), former NSW Premier Nick Greiner has admitted in a recent newspaper interview that "It is all a charade" and that his job as Chairman of a tobacco company involves him in "hypocrisy".

Phillip Morris has traditionally distributed in Australia cigarettes manufactured by the Liggett Group. Given the admissions by Bennett LeBow on behalf of the Liggett company, it is difficult to see how liability can be avoided, at least in respect of those



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DR JOHN LAWSON

M.B.B.S. (Uni of Sydney)
F.R.A.C.P.

CONSULTANT PHYSICIAN

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Sydney

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Photo courtesy Federal Dept. Health

The Judgement in *Australian Federation of Consumer Organisations Inc. v Tobacco Institute of Australia Ltd* (1991) reviewed a vast amount of scientific literature demonstrating that environmental tobacco smoke has significant adverse health effects on young children.

products. Furthermore, Phillip Morris has joined in the US settlement as has the R J Renolds Tobacco Company whose products have traditionally been distributed in Australia by Rothmans. Accordingly, all three major tobacco companies in Australia have to face up to the fact that damaging evidence and admissions now exist.

Australia has not yet seen litigation in respect of direct smoking on the scale which has occurred in the United States. This is partly because contingent legal fees are not available to the same extent as in America, partly because there is limited legal aid funding and partly because Australia has a rule that costs follow the event so that if proceedings are unsuccessful plaintiffs potentially would have a heavy costs liability. Also, direct individual smoking claims have historically been unsuccessful, largely because of tobacco industry attacks on the plaintiff's smoking history. These considerations have lead to the failure of two individual direct smoking claims brought in Australia. In *Scanlan v Rothmans of Pall Mall*, the action was withdrawn during preliminary hearings in 1986 due to the

rapid decline in the health of the plaintiff in the face of intensive tobacco industry investigation of her personal life. In January 1998, a similar claim *Cremona v Philip Morris*, was discontinued after cost orders were made against the plaintiff on interlocutory issues. One claim which has not yet been resolved, but has been successful to date on jurisdictional issues, *Hodson v WD & HO Wills*, involves a claim in the Consumer Claims Tribunal of New South Wales to recover the damages and costs involved in quitting smoking. The New South Wales Court of Appeal has ruled that such claims may be brought against a cigarette manufacturer or distributor up to the jurisdictional limit of the Consumer Claims Tribunal (currently \$25,000) including for general damages in addition to money actually expended on quitting smoking: *WD & HO Wills (Australia) Limited and Anor v The Consumer Claims Tribunal of New South Wales and Ors*, New South Wales Court of Appeal, 23 July 1998.

Passive smoking

In respect of environmental tobacco

smoke (ETS) the tobacco industry has pursued a similar policy of distortion and denial. As long ago as 1978, the United States Tobacco Institute commissioned a report from the Roper Organisation which said of the passive smoking issue "This we see as the most dangerous development to the viability of the tobacco industry that has yet occurred" and suggested that "the strategic and long-run antidote to the passive smoking issue is ... developing and widely publicising clear-cut, credible, medical evidence that passive smoking is not harmful to the non-smoker's health".

In Australia, the tobacco industry's attempts to distort the truth about the dangers of ETS have been exposed in cases like the *Australian Federation of Consumer Organisations Inc. v Tobacco Institute of Australia Limited* (1991) 27 FCR 149, in which Justice Morling of the Federal Court found that a Tobacco Institute advertisement disputing the health effects of passive smoking was misleading or deceptive and catalogued much of the extensive medical and scientific literature as it existed on 7 February 1991. The Judgement reviewed a vast amount of scientific litera-

ture demonstrating that ETS can cause lung cancer and asthma attacks as well as having significant adverse health effects on young children. Nothing has happened since then in the medical and scientific world to change the validity of Justice Morling's findings. On the contrary, further studies have merely served to confirm, reinforce and expand the link between passive smoking and disease, including to heart disease.

In these circumstances, extensive measures have been implemented on both a voluntary and Governmental level to restrict smoking in public places and especially in work places. Moreover, successful claims for damages under workers' compensation legislation and under the general law have given even greater impetus to the need to take steps to avoid the entirely unnecessary risk of exposure to ETS. Just last year, the Hilton Hotel chain in Australia was held to have engaged in unlawful discrimination by failing to provide a smoke-free environment, having regard to the 10% of the Australian population who are asthmatic and experience adverse health effects from exposure to

cigarette smoke. The Human Rights and Equal Opportunity Commission is now issuing Terms of Reference for an Inquiry into what further orders should be made to require the Sydney Hilton Hotel to provide smoke-free areas in addition to the award of compensation it made in 1997: *Meeuwissen v Hilton Hotels of Australia Pty Ltd* (HEROC H97/50 - H97/51).

International implications

It has been estimated that 50% of smokers will die prematurely from smoking related disease, half in middle age. In Australia, this means that smoking kills around 18,000 people a year and costs the nation \$12.7 billion annually. The current world population is about 5.8 billion of whom around 1.1 billion are smokers. Tobacco deaths are currently 3 million a year and this is estimated to rise to 10 million by the year 2025. About half a billion (500 million), or about 10%, of the current world population will die from smoking related disease.

No other consumer product in the history of the world has come anywhere near inflicting this degree of harm on the world

community. Indeed, if anything else caused this extent of mortality - be it world war, ethnic cleansing, genocide, natural disaster or disease - it would be a cause for immediate international concern. That this has occurred through the deliberate concealment of the harmful effects of smoking, the cynical exploitation of the addictive properties of nicotine, and marketing strategies calculated to prey on the young, the poor and the uneducated is an indictment of the tobacco companies involved, the tobacco industry executives behind those companies, lawyers who have aided and abetted tobacco companies in achieving their goals and governments and politicians of all persuasions who have allowed this to happen.

There could be no other issue deserving of higher priority in the legal sphere than bringing about the full accountability of the law to all those involved in the marketing of this pernicious product. ■

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Neil Francey is a Barrister and the Chair of the APLA Tobacco Special Interest Group, **phone** 02 9232 4466, **fax** 02 9223 4204, **email** neilfrancey@onaustralia.com.au

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