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A NATIONAL COMPENSATION TRIBUNAL

The Cauvin Tobacco Litigation Template

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INTRODUCTION

The Dalkon Shield and Copper 7 IUD's, defective heart pacemaker and breast implants, international pharmaceutical price-fixing and asbestos liability, all illustrate the difficulties which arise in obtaining compensation and addressing liability issues in cases of widespread harm covering a long period of time and involving trans-national responsibility. Recent reported concerns over inadequate provision for future asbestos claims add an additional dimension to the issues involved.[1]

Tobacco kills one in two smokers who use cigarettes as intended by the manufacturer. Twenty-two per cent of people in Australia aged fifteen years and over smoke. Of these, 50% will die prematurely from tobacco related illness, half in middle age with an average loss of life expectancy of 20 - 25 years (8 years over all ages). This means that nearly 2 million people or almost 10% of the existing population will die from smoking:

- 27% from lung cancer;
- 24% from heart disease;
- 23% from chronic obstructive lung disease, emphysema or bronchitis;
- 26% from other diseases including other circulatory disease (18%) and other cancers (8%).

The current rate of death is in the order of 19,500 a year at a cost of $21 Billion annually.[2]

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[1] *"Victims of asbestos left $800m short"* The Sydney Morning Herald 30 October 2003, p5.
[2] *"Counting the cost: estimates of the social costs of drug abuse in Australia in 1998-9."* Commonwealth of Australia, National Drug Strategy, Monograph Series No. 49.

No other consumer product in the history of the world has come even close to inflicting this degree of harm. If anything else posed a threat to life of this magnitude, there would be an immediate call for accountability and compensation, including from trans-national parent corporations of local subsidiaries that may be held responsible. Due to the latency in the development of disease from smoking, and government dependency on tobacco taxes, regulatory authorities, including consumer protection agencies, have been slow to respond to the tobacco epidemic which has been a phenomenon of the twentieth century.

In this paper, the historical background to the smoking pandemic of the 20th century is recorded together with an examination of the response to this phenomenon both in public health policy terms and, more especially, by way of litigation in Australia against the background of the tobacco industry's conduct internationally over the last 50 years. In keeping with the theme of this Conference to "react, recreate, reform", the Cauvin[3] tobacco litigation is examined, as is a suggestion for the establishment of a National Tobacco Compensation Tribunal which could be a template for application in other areas.

[3] *Cauvin v Philip Morris & Ors,* NSW SC Common Law Division No. 11301 of 2002

BACKGROUND

Whilst there have been warnings about the harmful effects of smoking dating back to James I of England's "Counterblaste to tobacco" in 1604,[4] it was only with the publication of five medical studies in 1950 that a scientific basis for linking smoking with death and disease was established.[5,6,7,8,9] The first of these, by Ernst Wynder, was published in the Journal of the American Medical Association on 27 May 1950. Another by Richard Doll and Austin Bradford Hill, "Smoking and Carcinoma of the Lung. A Preliminary Report" appeared in the *British Medical Journal* of 30 September 1950. In time, these studies became the leading references on their respective sides of the Atlantic and, jointly, throughout the world.

Later knighted for his work in the field, Sir Richard Doll went on the publish numerous papers recording, with ever-increasing certainty, the link between smoking and various diseases based on following the health of a cohort of British doctors and establishing the correlation between smoking habits and disease outcomes. Indeed, Doll's most recent contribution, "Smoking, Smoking Cessation and Lung Cancer in the UK Since 1950: Combination of National Statistics with Two Case – Control Studies", appeared in a special commemorative issue of the *British Medical Journal* on 5 August 2000, 50 years on from his first publication on the topic.[10]

Meanwhile, Ernst Wynder went on to conduct further research and publish additional findings, including one appearing in Cancer Research in 1953[11] reporting the development of cancerous tumours on mice whose backs had been experimentally

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[4] [James I, King of Great Britain]. A counter blast to tobacco. London. R[obert] B[arker], 1604. Cited in *Tobacco Control*; 1:3-4, 1992.

[5] Wynder EL, Graham, EA. "Tobacco Smoking as a possible etiologic factor in bronchogenic carcinoma." *Journal of the American Medical Association,* 1950; 143:329-36.

[6] Levin ML, Goldstein H, Gerhardt PR. "Cancer and tobacco smoking." *Journal of the American Medical Association,* 1950;143:336-8.

[7] Doll R, Hill AB. "Smoking and carcinoma of the lung. Preliminary report." *British Medical Journal,* 1950;ii:739-48.

[8] Mills CA, Porter MM. "Tobacco smoking habits and cancer of the mouth and respiratory system." *Cancer Res,* 1950;10:539-42.

[9] Schrek R, Baker LA, Ballard GP, Dolgoff S. "Tobacco smoking as an etiological factor in disease." *Cancer Res,* 1950; 10:49-58.

[10] Peto R, Darby S, Harz D, Silcocks P, Whitley E, Doll R. "Smoking, smoking cessation, and lung cancer in the UK since 1950: combination of national statistics with two case-control studies." *British Medical Journal,* 2000; 321:323-329 (5 August).

[11] Wynder, E. Graham E, Crosinger A. "Experimental Production of Carcinoma with Cigarette Tar." *Cancer Res,* 1953:13:855-864.

painted with a condensate of cigarette tar, which precipitated a course of events, the repercussions of which are still reverberating around the world today.

It is remarkable that so much is known with such precision about how the tobacco industry conspired to perpetrate a fraud on the world community which has persisted for half a century. On 15 December 1953, directly as a result of the Wynder tar painting experiment, the chiefs of all the US tobacco companies (excepting Liggett) met at the Plaza Hotel in New York City to devise a response. It is now notorious that the response was to hire a publicity relations firm, Hill & Knowlton, representatives of whom in fact attended the 15 December meeting, to embark on an elaborate subterfuge to conceal or distort the scientific evidence linking smoking with death and disease. The strategy commenced with the "Frank Statement" advertising campaign which was initiated by way of full-page advertisements on 4 January 1954 appearing in 448 newspapers in 258 cities throughout the US reaching an estimated 43,245,000 readers.[12]

The advertisement entitled "A Frank Statement to Cigarette Smokers", stated:

> Recent reports on experiments with mice [conducted by Wynder, Graham, and Croninger, who found that painting mice with tobacco tar caused cancer] have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings ...
>
> Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:
>
> 1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health ...
> 2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
> 3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry ...
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> This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

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[12] Pollay RW. *A Scientific Smokescreen: A Documentary History of Smoke Public Relations Efforts for and by the Tobacco Industry Research Council (TIRC), 1954-1958.* Vancouver, Canada: History of Advertising Archives, 1990. Tobacco Industry Promotion Series.

The "Frank Statement" also sets out the tobacco industry's claimed concern for the health of its smokers:

> We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business.

Contrary to this voluntary and public undertaking, through the Tobacco Industry Research Centre (TIRC) and, later, the renamed Council for Tobacco Research (CTR), the participating tobacco companies deliberately distorted scientific fact for their own commercial gain. The activities of TIRC and CTR in this regard are well documented. A small sample of documents, largely from Brown and Williamson, formed the basis of an insightful analysis in a series of articles published in the 19 July 1995 issue of the *Journal of the American Medical Association*. As summarised in a paper by University of California Professor of Medicine, Stan Glantz and others, styled "Looking Through a Keyhole at the Tobacco Industry", these documents reveal a deliberate course of deception over several decades in which public statements by the tobacco industry on such topics as nicotine and addiction, smoking and disease, environmental tobacco smoke, and even the role of TIRC/CTR, can be seen to be demonstrably false and misleading by reference to internal research results and private statements.[13]

These documents, and what they reveal, are the subject of an even more detailed analysis in the 529 page text "The Cigarette Papers" by Glantz and others published by University of California Press in 1996. Many more documents were uncovered and used in various tobacco litigation cases in the US, starting in the 1980s and especially in the 1990s, as described in various books on the subject.[14,15,16,17,18]

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[13] Glantz SA and Ors. "Looking Through a Keyhole at the Tobacco Industry." *Journal of the American Medical Association*, 1995; 274 N° 3: 219-224 (19 July).

[14] Kluger R. *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris*, Alfred A. Knopf : New York, 1997.

[15] Pringle P. *Cornered: Big Tobacco at the Bar of Justice*, Henry Holt and Co. : New York, 1998.

[16] Mollenkamp C, Levy A, Menn J and Rothfeder J. *The People vs. Big Tobacco: How the States Took On the Cigarette Giants*, Bloomberg Press : Princeton, 1998.

[17] Zegart D. *Civil Warriors: The Legal Siege of the Tobacco Industry*, Delacorte Press : New York, 2000.

[18] Ryback DC and Phelps D. *Smoked: The Inside Story of the Minnesota Tobacco Trial*, MSP Books : Minneapolis, 1998.

Moreover, two of the major world tobacco companies, being the two which primarily operate in Australia, have effectively admitted that the public stance they have taken over the decades is at odds with the overwhelming consensus in the world scientific community.[19,20] Indeed, the Philip Morris website cites a catalogue of US Surgeon Generals' Reports on smoking and health dating back to 1964 as references to support the admission that there is an overwhelming consensus in the scientific community that smoking causes lung cancer and other serious diseases. Even more candid admissions were made by the same companies at the October 2000 WHO Public Hearings prior to further FCTC negotiations – they now effectively admit not only that there is overwhelming evidence but that smoking is in fact addictive and does cause serious disease.

Further, documents now available on the worldwide web as a result of tobacco litigation in the US evidence the formation of a formal conspiracy between seven of the world's major tobacco companies, including BAT and Philip Morris, to promote a false "controversy" over smoking and disease and to implement strategies of "smoker reassurance" to allay smokers' concerns over the link between smoking and disease.[21]

Suffice to say at the moment that the conduct of the tobacco industry in the US has comprehensively been demonstrated to be fraudulent and deceitful and, to the extent that it can be shown to have been engaged in elsewhere, this applies in other places throughout the world. What remains is to devise the means whereby the tobacco industry worldwide can be made accountable for its conduct and for an appropriate public policy response to be implemented in an effort to prevent or reduce the incidence of smoking related disease and to ensure the availability of appropriate compensation.

Over the past 50 years governments have reacted to the emerging death toll from tobacco but these efforts have been retarded by the tobacco industry's deceit and deception and the various projects, exercises and operations engaged in by the tobacco industry have been exposed in previously secret internal documents which are now

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[19] Philip Morris. Cigarette Smoking. Health Issues for smokers, 13 Oct 1999. www.philipmorris.com/tobacco_bus/tobacco_issues/health_issues.html.

[20] Fernandes E. "FOCUS – "No safe cigarette," say UK Tobacco firms" *Reuters* 2000: Jan 13.

[21] Francey N and Chapman S. "'Operation Berkshire': The international tobacco companies' conspiracy." *British Medical Journal*, 2000; 321:371-374. See also Operation Berkshire in THE GLOBAL CONTEXT, below.

publicly available.[22] In a number of countries throughout the world multi-faceted tobacco control policies have been implemented with varying degrees of success. These include countries such as Australia where a high level of taxation on cigarettes has impacted on demand but, at the same time, has resulted in governments being "addicted" to tobacco taxes, thereby creating a further impediment to an appropriate public policy response in the regulation of the tobacco industry.

As in the United States, and elsewhere, litigation has been used in Australia to fill the void between the level of action undertaken by government and the public policy response which is appropriate to curb the tobacco epidemic.[23]

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[22] *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organisation*. Report of the Committee of Experts on Tobacco Industry Documents, July 2000.
[23] Daynard RA, Bates C and Francey N. "Tobacco Litigation Worldwide." *British Medical Journal*, 2000; 320:111-113 (8 January). See also Francey N, "The war on tobacco – the global spread of litigation against the tobacco companies." *Plaintiff*, Feb 1999, 22-25.

TOBACCO LITIGATION IN AUSTRALIA

7 February 2001 marked the tenth anniversary of the decision being handed down by Justice Morling of the Federal Court of Australia in *Australian Federation of Consumer Organisations v Tobacco Institute of Australia*[24] in which tobacco industry advertisements disputing the harmful effects of passive smoking were comprehensively exposed to be misleading and deceptive in contravention of Section 52 of the *Trade Practices Act* 1974 (Cth), one of Australia's most comprehensive and effective pieces of consumer protection legislation.

The Morling Judgment, as the decision became known, generated an enormous amount of publicity in Australia and elsewhere in the world and has contributed significantly to an improved public understanding of the dangers of environmental tobacco smoke and the need for a smoke-free environment.[25] This has resulted in Australian States and Territories enacting progressively more stringent smoking restrictions with a high degree of public acceptance.[26]

It has been well known for some time that the tobacco industry has been concerned about the passive smoking issue because of its potential to cause a reduction in cigarette consumption.[27] Initially this was thought to be due to restrictions on the opportunity to smoke but recent research suggests that awareness of the dangers of secondhand smoke now also has a general deterrent effect on the uptake of smoking, especially among teenagers.[28]

What is now known about the conduct of the international tobacco industry, especially over the last 25 years, including in its response to the passive smoking issue, reveals that the advertisements the subject of the *AFCO v TIA* proceedings were nothing but a manifestation in Australia of a highly developed and tightly coordinated conspiracy by

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[24] (1990-1991) 27 FCR 149.

[25] Woodward S and Everingham R, *Tobacco Litigation: The Case Against Passive Smoking AFCO v TIA.* An Historic Australian Judgment. Legal Books : Sydney, 1991. See also Chapman S, Woodward S. "Australian court rules that passive smoking causes lung cancer, asthma attacks and respiratory disease", *British Medical Journal* 1991; 302:943-45.

[26] *When Smoke Gets in Your Eyes ... (Nose, Throat, Lungs and Bloodstream). A Guide to Passive Smoking and the Law*, (2nd edition), NSW Cancer Council, 2001.

[27] Chapman S, Borland R, Hill D, Owen N, Woodward S. "Why the tobacco industry fears the passive smoking issue", *The International Journal of Heath Services* 1990;20(3):417-27.

[28] Glantz S, Jamieson P. "Attitudes Towards Secondhand Smoke, Smoking, and Quitting Among Young People" *Pediatrics* 2000; 106: e82 (vol 6, December 2000).

the world's major tobacco manufacturers designed to protect the industry's commercial interests and in particular from attacks both in respect of direct smoking and the emerging passive smoking issue.

Over the years, tobacco litigation has been conducted in Australia and elsewhere in the world without the full knowledge of the sophisticated tobacco industry defensive strategy. Now with the emerging picture becoming clearer through the millions of documents publicly released through litigation in the US it is possible to devise appropriate counter measures which may lead to more successful litigation and public exposure of the tobacco industry's conduct.

As in the United States, where tobacco litigation has been described as being in three "waves", individual cases in Australia have largely been unsucessful.[29] More recently large scale class actions including on behalf of smokers with smoking-related disease have been commenced but discontinued in a manner reminiscent of the second "wave" of US litigation which had limited success but led to the ultimately successful third "wave" of litigation which has dominated the last half of the 1990's.

Recent class action litigation

Since as long ago as July 1995, proposals have existed to replicate in Australia the large-scale litigation in the United States including by way of "class actions" under the provisions allowing representative proceedings in the Federal Court which came into effect on 4 March 1992 by way of amendments to the *Federal Court of Australia Act* 1976 (Cth). Again, the most effective remedy was thought to be based on the prohibition of misleading or deceptive conduct in the *Trade Practices Act* 1974 (Cth) which has been in effect since 1 October 1974. As it turns out this means that the international tobacco companies' conspiracy to distort the truth about direct smoking and passive smoking has at all material times been subject to a prohibition in the main consumer protection statute in Australia. However, because litigation in Australia is conducted on

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[29] **Above, n 22 (reference 2). See also *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (22 March 2002) ; *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002)**

the basis of the loser pays principle, and because there is limited provision in Australia for contingency fees, it took some time before large-scale litigation was in fact commenced. In the meantime, the benefit has been obtained of the US experience and the evidence contained in the documents uncovered in US litigation.

In 1999, two representative proceedings on behalf of smokers were commenced in the Federal Court. These proceedings were consolidated but ultimately not allowed to proceed as a class action with the Full Federal Court ruling that the claim did not satisfy the requirements for representative proceedings under Part IVA of the *Federal Court of Australia Act* (1976) (Cth),[30] despite it being held at first instance by Justice Murray Wilcox that the case could proceed.[31] The High Court, by majority, refused special leave to appeal.[32] The claims on behalf of the original six named applicants have been permitted to proceed as individual cases but the solicitors acting in the matter, Slater & Gordon, have written to group members advising them that they will need to pursue their cases individually and to obtain their own separate legal representation.

A separate representative proceeding in the Federal Court in 1999, *Tobacco Control Coalition Inc. v Philip Morris (Australia) Ltd. and Ors* N° N1089 of 1999, was commenced on 21 September, after Justice Wilcox had permitted the *Nixon* proceedings to go ahead but before the Full Federal Court appeal. The TCC proceeding was designed to "dovetail" with the *Nixon* proceeding in so far as it did not purport to represent smokers with disease but rather was brought on behalf of health and medical organisations and smokers not yet diagnosed with smoking-related disease in order to establish a fund under Section 87 of the *Trade Practices Act (1974) (Cth)* generating about $500 million annually for tobacco control measures to prevent or reduce the incidence of disease caused by smoking. It was later sought to amend the application to make a claim on behalf of all organisations and entities (including the States and Territories) who incur costs on account of smoking-related disease, but, again, no claim was made on behalf of smokers with disease so as not to conflict with the *Nixon* proceeding. Also, it was hoped that the *Nixon* proceeding, which had been allocated a trial date before Justice Wilcox in June 2000, would establish the contraventions of the *Trade Practices Act* upon

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[30] *Philip Morris (Australia) Ltd. and Ors v Nixon and Ors* (2000) ATPR 41-759.
[31] *Nixon and Ors v Philip Morris (Australia) Ltd. and Ors* (1999) ATPR 41-707.
[32] *Nixon and Ors v Philip Morris (Australia) Ltd. and Ors* S38/2000 (21 June 2000).

which the TCC claim for relief could be based whether or not the claim for damages on behalf of smokers in the *Nixon* proceeding was successful or not.

As it turned out, the respondents and the Court required the TCC to file and serve a statement of claim, which was done on 2 December 1999 by way of a 547 page document comprising 133 pages of pleading and a further 414 pages of schedules. By this stage, the *Nixon* appeal had been heard but not determined and, despite severe criticism of the *Nixon* pleading by the Full Federal Court, including by two Judges who suggested it was impossible to plead a case satisfying the requirements of Part IVA of the *Federal Court Act*, the TCC pleading proceeded on the basis that those concerns had been adequately addressed. Thereafter, and only after weeks spent preparing the statement of claim, the respondents indicated their intention to apply for security for costs, with Philip Morris at least threatening to obtain costs orders against the solicitors acting for the TCC and subsequently against individual members of the TCC and even counsel appearing for the TCC. Following the threat being made against them, the solicitors for the TCC sought clarification as to whether the threat was seriously being made and would be pursued or whether it would be withdrawn and would not be relied upon. An assurance was also sought from the other respondents that they would not seek costs orders against the legal representatives. The solicitors for Philip Morris, Arthur Robinson & Hedderwicks, maintained an entitlement to seek orders for the recovery of costs including from "relevant non-parties". The solicitors for the other respondents likewise reserved their rights to do so. In these circumstances, the solicitors then acting for the TCC terminated their retainer and ceased to act in the matter. Because the date for hearing any security for costs application had already been set, an application was made to have that heard without the intervention of a solicitor.

The argument over security for costs and the TCC's application to amend was heard on 21 February 2000, the threats in writing to individual members of the TCC and counsel being written by solicitors Arthur Robinson & Hedderwicks on behalf of Philip Morris after that date. Then, the Full Federal Court decision in *Nixon* was handed down on 13 March 2000.

Essentially, the Full Court held that the *Nixon* pleading was fundamentally flawed, largely because it failed to make a claim on behalf of the named applicants and all group

members against all of the respondents, there being a large number of individual issues involved in each person's claim. Further, an attempt to invoke section 75B of the *Trade Practices Act* by alleging that each tobacco company had aided, abetted or was knowingly concerned in or was a party to the contravention by each other tobacco company was deficient in that it was necessary to show that each company intentionally participated in the other's conduct and this had not been done in the statement of claim. In addition, it was held that the statement of claim did not plead the case found by the primary judge to the effect that the tobacco companies had embarked individually and collectively on a course of conduct designed to create a false community perception about the risks of smoking. Accordingly, Section 33C(1)(a) of the *Federal Court Act* had not been satisfied. Justices Spender and Hill were not prepared to grant leave to further re-plead, consistent with their view expressed during the hearing of the appeal that they thought it was impossible to plead a case which satisfied the requirements of section 33C(1)(a). Justice Sackville would have permitted re-pleading[33].

The parties in the TCC proceeding were invited to make submissions to the court on the implications of the *Nixon* appeal decision for the TCC case. The TCC argued that the deficiencies perceived by the Full Court were overcome in so far as the TCC pleading sought, in the first instance, declarations and injunctive relief which were common to the applicant and all group members against all of the respondents. Further, the statement of claim contained an elaborate pleading of a conspiracy between the various companies so that the acts of any one of them in furtherance of the conspiracy were acts on behalf of them all, thereby pleading essentially the case as found by Justice Wilcox but not pleaded in the *Nixon* statement of claim.

Furthermore, submissions were made to the effect that the TCC pleading had even increased public interest in so far as it could not only be expanded to include a claim on behalf of government agencies and entities but also on behalf of smokers and ex-smokers who may contract disease including those who already had disease but were out of court in the *Nixon* proceeding. Moreover, it was pointed out that in so far as the TCC claim sought to establish a fund for compensation under Section 87(1) of the Trade

[33] The Full Federal Court has since disapproved of the decision in *Nixon* saying that Full Court proceeded on an assumption based on a misunderstanding by Wilcox J at first instance as to the requirements of a representative proceeding: *Bray v Hoffman-La Roche Ltd & Ors* [2003] FCAFC 153.

Practices Act, there was no statutory time limit (as is imposed by Section 87(1)(CA)) in respect of section 87(1A), as to which there is Supreme Court and Full Federal Court authority for that proposition.[34]

In the event, Justice Wilcox handed down reasons for judgment on the application to file an Amended Application and for security for costs on 27 July 2000 refusing leave to file the proposed draft Amended Application and ordering security for costs of $100,000 in respect of each of the three sets of respondents, $300,000 in total, by 30 September 2000 or the proceedings stand dismissed with costs.[35] In his reasons for judgment, Justice Wilcox said he thought that the TCC claim was too broad and did not identify the group members with sufficient precision. As to Schedule A group members, being health and medical groups and organisations, he thought that the attempt to expand the definition to make it non-exhaustive introduced a number of uncertainties. As to the Schedule B group members, being smokers and future smokers without disease, he felt the inclusion of future smokers produced difficulties. In each case he took the view that it was "fundamental to the proper management of a representative proceeding that the Court insist upon an identification of group members that will leave people in no doubt as to whether or not it is appropriate for them to claim to fall within the group". His Honour felt that none of the versions of the Application yet supplied by the TCC supplied such an identification.

On a separate matter, because the TCC tried to save time and expense by having the Australian companies named as respondents represent other companies including their overseas parents as part of the pleading of a conspiracy, his Honour seems to have developed the misconception that the TCC was seeking to make the named Australian companies liable for the conduct of their overseas parents. On the contrary, all the TCC was seeking to do was to have the named Australian respondents represent other related companies pursuant to Part 6 Rule 13 of the *Federal Court Rules.* As a matter of case structure and pleading in the statement of claim, the allegation is that the overseas companies conspired to procure the contraventions in Australia by the Australian companies and therefore had a liability on their own account for involvement in the

[34] *Tanzone Pty Ltd. v Westpac Banking Corporation and Ors* (1999) ATPR 46-195; *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] FCA 669; *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* [2001] FCA 1620.
[35] *Tobacco Control Coalition Inc. v Philip Morris (Australia) Ltd. and Ors* [2000] FCA 1004.

contraventions by the named respondents, a classic pleading of liability as an accessory under Section 75B of the *Trade Practices Act* which does not require ministerial consent under Section 5 of the *Trade Practices Act* in respect of this particular overseas element.

As a practical matter the TCC would always have to obtain leave from the court to have the respondents represent the other companies and would have to obtain the leave of the court to enforce any judgment against any represented company. Accordingly, and especially as now any action must proceed on its own account rather than relying on the findings of fact in the *Nixon* proceeding, and especially given the documents implicating the international tobacco companies in a formal conspiracy dating from 1977, just years after the commencement of the *Trade Practices Act* on 1 October 1974, there is every reason to include them as named parties.

As to the definition of group members, a question could be raised as to whether it is in fact essential for the identification to be as precise as Justice Wilcox asserts. In so far as the relief being sought was to establish a fund to prevent or reduce harm it would seem there is hardly any adverse consequence if a person does not opt out as a fresh cause of action would arise in respect of any damage which did occur. It may be that an issue estoppel arises in the event that contraventions of the *Trade Practices Act* were not established, but this is a matter of assessing the risk of that occurring.
A number of the areas of concern identified by Justice Wilcox were in fact never raised by the respondents and the TCC was never given the opportunity to answer those concerns. Just as an illustration Justice Wilcox wrongly assumed that there was a pleading of the common law tort of conspiracy, when this was not the case. Rather, the allegation of conspiracy was simply the means of pleading that all of the various companies were involved in the various contraventions as part of their concerted action. Further, Justice Wilcox observed that there was no claim for relief in respect of the allegation of conspiracy, which is true in so far as there was no pleading of a conspiracy per se, but this overlooks the fact that relief was sought against the various companies for their involvement in the contraventions by the other companies.

In the course of his judgment, Justice Wilcox made some observations about threats of costs orders being made against legal representatives. By way of background, the "loser pays" costs principle generally applies in Australia and in *Knight v F P Special Assets*

Ltd[36] the High Court made observations to the effect that the need to consider costs orders against third parties will normally be avoided by a timely application for security for costs saying that it was preferable for the issue of costs be dealt with in that context rather than in the context of costs orders being made against non parties after the event. In there circumstances Justice Wilcox said that, on account of their propensity to create conflicts of interest and cut off access to the courts, threats of costs orders against legal practitioners may amount to contempt of court, citing *Orchard v South Eastern Electricity Board*[37] and *Levick v Deputy Commissioner of Taxation.* [38] This would seem to be especially so, having regard to the comments of the High Court in *Knight's* case, in a context in which the option of pursuing a security for costs application is being exercised and is as yet unresolved.

It is not known for certain whether Justice Wilcox's approach to the case was adversely affected by the absence of solicitors, or whether he was overreacting to the fact that his own decision at first instance in the *Nixon* case had been overturned by the Full Federal Court after argument had concluded in the TCC case. What is clear, however, is that Justice Wilcox simply did not understand the TCC pleading and did not give the TCC a fair opportunity to explain it. In his concluding remarks in the judgment, Justice Wilcox suggested that the TCC claim was "prolix and confused." Earlier in the judgment Justice Wilcox had merely observed that the pleading was lengthy and complex. Perhaps the pleading was so complicated and dealt with such a complex issue that it was potentially confusing, but rather than the TCC claim being "confused", it is suggested that it was Justice Wilcox who allowed himself to become confused by reflecting on imaginary concerns invented by himself without the benefit of explanation from those who were responsible for devising the claim.

Part of Justice Wilcox's confusion appears to derive from the fact that the Statement of Claim included, as a Secondary Pleading, a modified version of the Complaint filed on 22 September 2000 (co-incidentally the same day as the TCC v PM proceedings were commenced) by the U.S. Department of Justice in United States of America v Philip Morris & Ors. This was done by way of background to show the international context in

[36] (1992) 174 CLR 178
[37] [1987] 1 QB 565
[38] [2000] FCA 674

which the conduct in Australia occurred since the U.S. Complaint traces the industry's conduct back to the early 1950's and contains an allegation that the various companies conspired to engage in misleading conduct in the United States and elsewhere in the world. The TCC Secondary Pleading specifically extended these allegations to Australia where appropriate but excised the formal causes of action pleaded in the U.S. Complaint as it was never intended to rely on this section of the TCC Statement of Claim as a substitute for the Primary Pleading which was based solely on Australian legislative provisions prohibiting misleading or deceptive and unconscionable conduct. The relevant Australian legislation requires the Court to take into account all relevant circumstances and specifically permits the Court to look at facts occurring before the particular prohibition came into effect. It was hoped to rely on evidence adduced in the U.S. Department of Justice case to provide some historical background to the conduct in Australia. Despite the fact that this was explained in the pleading, and despite the fact that the U.S. Complaint was in evidence under cover of a letter to the Respondents explaining it's relevance, Justice Wilcox seems to have thought that the Secondary Pleading was some attempt to plead the tort of civil conspiracy (which was pleaded in the U.S. Complaint but excised from the TCC pleading) instead of appreciating that it was merely background to the conspiracy to engage in trade practices contraventions in Australia which was pleaded in the TCC Statement of Claim (it was thought that with the election of George W. Bush as President of the United States, the U.S. Department of Justice action would be discontinued but it is still proceeding with a claim for some US$700 Billion). Given this, and the discovery of the Operation Berkshire documents subsequent to the drafting of the TCC Statement of Claim, it is now possible to be more specific on the international tobacco companies conspiracy confining the impugned conduct to the period dating from the mid-1970's.

Ultimately, other solicitors and counsel were retained and an application was made to extend the time in which to provide security for costs. As it turns out, security for costs was not provided in the extended time of 15 December 2000 and TCC action stands dismissed for failure to provide security.

The Cauvin Tobacco Litigation

In the event, the opportunity arose to expand the scope to establish a Fund to compensate smokers (and ex-smokers) who have smoking related disease and make

provision for smokers (and ex-smokers) who have not yet contracted disease, as well as take steps to prevent or reduce harm[39], in the context of pursuing an individual claim in the Cauvin litigation.

An outline of the Cauvin litigation is set out in Annexure "A".

[39] Recommendations for harm prevention and cessation in respect of tobacco are contained in Parliament of Australia House of Representatives Standing Committee on Family and Community Affairs Report on the inquiry into substance abuse in Australian Communities *"Road to Recovery"*, August 2003.

THE CASE FOR A NATIONAL TOBACCO COMPENSATION TRIBUNAL

Given the breadth of compensation potentially obtainable in comprehensive tobacco litigation there are serious questions which arise about case management and judicial administration beyond those normally arising in class action litigation. In Australia alone, proceedings could conceivably involve the establishment of a fund of up to $AUD 10 billion in order to generate $500 million for tobacco control purposes. A claim could also be made for costs incurred in treating people with smoking-related disease and enabling payment of compensation to persons with smoking-related disease or who may contract smoking-related disease in the future. Given that the annual cost of smoking-related disease in Australia is in the order of $21 billion and compensation could be ordered extending back 25 years and extending into the future for up to 25 years, there is the potential for a lump sum order of up to $AU 1050 billion. It may be that not all the damage incurred by smoking-related disease would be recoverable and it may be that compensation for the future would need to be scaled down on account of effective tobacco control measures reducing the prevalence of disease caused by smoking. Nevertheless, the total sum could be huge. Whatever the size, the sheer scale of the compensation in monetary terms is of such magnitude as to dwarf any piece of litigation hitherto conducted in Australia and, indeed, with limited exceptions, tobacco litigation conducted in the United States.

Also, as there are almost 2 million million people in Australia likely to contract smoking-related disease there are a huge number of individual claims potentially involved. Perhaps as many as 100,000 people already have smoking-related disease and the rest will contract it in the future. Allowing for the fact that the group members in the *Nixon* proceeding were estimated to number 30-40,000 and given the concerns expressed by the Full Federal Court about the individual issues involved in that claim, there is even more need to address those concerns in the Cauvin litigation even though the technical impediments in Nixon and perceived to exist in the TCC proceedings do not now arise.

Nevertheless, the scale of the potential damages is simply a reflection of the extent of harm caused by smoking and the fact that the conduct involved has been engaged in over several decades and its continuing effect will be ongoing for several decades into the future. Also, tobacco litigation in the US has demonstrated that claims of this size can be handled by the court system. Of the cases brought by US State Attorneys

General, the longest running case in Minnesota involved a population of about 6 million or approximately one-third of the Australian population. The cases brought on behalf of the other states were sometimes smaller, for example Mississippi, and sometimes greater for example Texas, Florida and California. It must be said, however, that these cases were confined to state reimbursement except in the case of Minnesota where the action included two major health funds Blue Cross and Blue Shield.

As to tobacco class actions for individuals in the United States, the original case of *Castano v American Tobacco*, was a national class action on behalf of smokers to obtain compensation for their addiction and to monitor their health. *Castano* was decertified as a class action on a national level and replica class actions confined to each individual state have generally not been allowed to proceed. In Florida a class action for damages on behalf of smokers throughout the US, *Engle v R J Reynolds Tobacco Co. et al*, ultimately was confined to smokers in Florida, which has a comparable population to Australia (1999: Florida 15 million, Australia 19 million) and provides a model which could be followed in Australia. There, the judge ordered the *Engle* case to proceed in several phases. The first phase involved findings as to liability and whether tobacco caused particular diseases as well as the liability for punitive damages. The second phase involved hearing the damages claims of a number of individual claimants and this resulted in a verdict in the order of $US 1 million for each claimant. A further phase involved calculating the amount of punitive damages which was assessed at $US 241 billion. It has been suggested that it would take up to 75 years for all of the *Engle* class action claims to be determined but if the punitive damages award alone is enforced it would be enough to bankrupt at least the US tobacco companies and this is another good reason why any action in Australia should seek to establish a global fund with minimum possible delay (although the Engle case has now been de-certified as a class action).

Putting aside the claim for a tobacco control fund to prevent or reduce harm and compensation for individuals who already have smoking-related disease, it is obvious that providing compensation for smokers and ex-smokers who have not yet contracted disease involves making some assessment of the fund required and devising a means for its distribution. Part IVA of the *Federal Court Actt* provides for the constitution of such a fund in Section 33ZA including for the restitution of any residue in a representative

proceeding context but Section 87 of the *Trade Practices Act* (and equivalent provisions in State and Territory Fair Trading legislation) gives the court a broad discretion to make such orders as it thinks appropriate if the court considers that order or orders concerned will compensate in whole or in part for damages suffered or will prevent or reduce loss or damage.

Accordingly, it would be feasible for the court to determine, first, whether the defendants have engaged in conduct in contravention of the *Trade Practices Act* and, secondly, whether or not a person or persons are likely to suffer loss or damage by the conduct of the respondents. Thereafter it would be a matter of assessing the global fund which should be established and ordering the respondents to pay that amount. The orders could then provide for the means whereby the fund was distributed and this could be by way of a National Tobacco Compensation Tribunal.

In addition to the fund to compensate smokers and ex-smokers who have not yet been diagnosed with smoking-related disease, a similar fund could be established for persons with existing smoking-related disease although the court would need to determine that that person has suffered, or is likely to suffer, loss or damage by the conduct of the respondents on account of that smoking-related disease. The question arises here as to whether there are two separate claims which can be advanced, one in respect of loss or damage already suffered and another in respect of loss or damage likely to be suffered in the future. Since there is no time limit applying there seems to be little reason not to permit claims of both types to be advanced. This would more effectively secure full compensation and make the respondents more fully accountable for the consequences of their conduct. The former type of claim may need to be determined by a judge assessing individual cases, or at least assessing the aggregate amount, but the latter could conveniently be handled by the National Tobacco Compensation Tribunal.

The claim for a fund for tobacco control measures to prevent or reduce loss or damage from smoking-related disease could be constituted by a single fund or perhaps for supervisory and accountability purposes, administered on an annual basis by the proposed National Tobacco Compensation Tribunal and/or a National Tobacoo Control Commission.

Benefits and Advantages of a National Compensation Tribunal

The benefits of a National Tobacco Compensation Tribunal extend to include benefits for plaintiffs and the wider community not the least because of the potential which exists for such a tribunal to relieve the Court of the need to assess individual claims and to make a general contribution to judicial administration which could well provide a model for other sorts of class actions.

Advantages for claimants extend to include all of the well recognised benefits of class actions[40] as well as a number of other advantages depending on the way a case is structured and the particular application in relation to tobacco related disease. These include:

- *Improved opportunity for relief.*

  Depending on the scope of the proceeding, all persons who currently suffer from smoking-related disease or are likely to suffer from smoking-related disease have the opportunity to obtain relief. In the first instance, there is the potential for loss or damage to be prevented or reduced so that persons who otherwise may contract smoking-related disease avoid that consequence. This may be because part of the relief includes the provision of smoking cessation counseling, nicotine replacement therapy and other measures. In the case of persons who do not yet have smoking-related disease but do get in the future, the procedure for making a claim in the proposed National Tobacco Compensation Tribunal on the contemplated Tobacco Compensation Fund could do so by satisfying a fairly non-contentious range of requirements since the generic liability issues will have already been determined by a judge. Claims by persons who already have smoking-related disease could be dealt with similarly although the aggregate amount of compensation and at least some causation issues would need to be established beforehand in the Court but then simply referred to the Tribunal for orders of compensation.

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[40] *Newberg on Class Actions*, 3rd ed., Vol 1, Ch5. See also Francey N. *Consumer Class Actions*, Australian Federation of Consumer Organisations Inc., March 1988.

- *Avoidance of inconsistent results.*

  Assuming the contraventions are established in Court and orders made for the establishment of a fund, all eligible persons would get compensation according to the orders made. This means that individual cases would not fail for reasons relating to the way in which the particular individual's case was presented or determined.

- *Improved and more equitable recovery*

  If cases are dealt with individually there may be delays in some cases being heard and in the meantime at least some of the tobacco companies may be bankrupted by proceedings in the United States. Under the proposal for a National Tobacco Compensation Tribunal, a fund would be established at an earlier point in time and the money secured to pay claims which may arise many years in the future. Also, if the claim is unfettered by time limits at least until 1 October 1974 claims which might otherwise be statute-barred are able to be pressed. Further, all of the issues relating to contraventions can be dealt with in aggregate thereby relieving individuals of the stress and difficulty involved in advancing an individual case.

Advantages for the community are also numerous including as follows:

- *Comprehensive compensation.*

  Depending on how the proceeding is structured, there is the potential to obtain comprehensive compensation for the full cost imposed on the Australian community by the tobacco industry's conduct. This can extend to include the cost of preventing or reducing smoking-related disease, reimbursing the cost of treating smoking-related disease and compensating individuals and their families for loss or damage.

- *Economic benefits.*

  There are significant economic benefits that flow from the fact that comprehensive compensation including from the overseas companies which procured the

contraventions in Australia. This means that the bulk of the proposed Tobacco Compensation Fund to be administered by the proposed National Tobacco Compensation Tribunal would come from the enforcement of judgments against overseas companies effectively by way of reparations being paid from foreign capital being injected into the Australian economy without a corresponding debit in the Balance of Payments. Indeed, for decades money has gone out of Australia in the form of profits to foreign companies whilst Australia has borne a severe burden of damage caused by unlawful conduct which overseas companies have conspired to procure. Thus, the past imbalance is redressed and corrected for the future consideration in the global context.

- *Elimination of unlawful conduct.*

The sanction involved in being made liable for comprehensive compensation and the exposure of the tobacco industry's conduct to date should have the effect of deterring any such conduct in the future by this or any other industry. The fact that companies can be made accountable for contraventions of the *Trade Practices Act* has a deterrent value for all those engaged in trade or commerce.

- *Judicial economy*

In addition to the advantage of having all claims determined in one set of proceedings, hiving off individual compensation entitlement to a National Tobacco Compensation Tribunal relieves the Court from much of the workload which might otherwise be imposed by individual cases or by the need for a Judge to assess individual damages claims.

- *Increased access to justice.*

It is self-evident that a wrong without a remedy does not provide justice and the procedure for class actions or representative proceedings are intended to increase access to justice. Section 87 of the *Trade Practices Act* confers on the court broard discretionary powers to ensure that comprehensive and effective remedies are available to make companies that engage in misleading or deceptive or

unconscionable conduct accountable for their actions. If this means inventing new procedures and even new Tribunals as part of the structure of remedies to be implemented, including some arbitrary features, then so be it: as has been said, rough justice may be better than no justice at all.

Significantly, funding for a National Tobacco Compensation Tribunal may come from the defendants as part of the compensation scheme ordered by the Court.

A diagrammatic representation of the Cauvin tobacco litigation template for a National Compensation Tribunal is set out in Annexure “B”.

ANNEXURE "A"

CAUVIN LITIGATION OUTLINE

1. **Background**
   AFCO v. TIA
   Wills Issues Paper
   BMJ Article "Operation Berkshire: The international tobacco companies' conspiracy".

2. **The Problem**
   Each year smoking kills 19, 000 Australians and costs the nation $21 Bn.
   Cth DoH&A TAP Act Issues Paper August 2003.

3. **What needs to be done about it**
   WHO FCTC/Tobacco Litigation Report; House F&CAC Substance Abuse Report

4. **How it can be done** –
   Tobacco industry accountability: $200 Bn Compensation + $20 Bn Prevention
   Cauvin Common Law proceedings – Bell J. Judgement, SASoC and Cauvin Briefing Paper.
   Note: The Commonwealth, States & Territories could impose a levy to "regulate" the industry and provide services and compensation, but this would be paid for by future smokers. The only way to obtain comprehensive compensation for past harm, including from overseas parent and related companies, is through litigation.
   Commonwealth tobacco taxes = $4.6 Billion p.a.

5. **The way forward** –
   (a) Preparation of further **ACCC Report to Senate** after appropriate consultation.
   See: inadequate ACCC Report to Senate
   (b) States & Territories to prepare **Participation Agreement** providing for:
   (i) Tobacco Litigation Support Fund;
   (ii) Tobacco Litigation Support Centre;
   (iii)Uniform Tobacco Control Act;
   (iv)Tobacco Control & Compensation Fund;
   (v) National Tobacco Control Commission;
   (vi)National Tobacco Compensation Tribunal
   (or National Compensation Tribunal – Tobacco Claims Division).
   (c) **Intervention** by NSW Fair Trading Minister under FTA s.86 and ACCC to seek leave to intervene under TPA s.87CA as appropriate.
   (d) **Intervention by AGs** on 78B Notice and **removal to High Court**.

See:Co-operative Scheme for the Uniform Regulation of Travel Agents Participation Agreement between the States and Territories and "Travel Compensation Fund Trust Deed" under the **Travel Agents Act, 1986 (NSW)** and Regulations;

"Alcohol Education and Rehabilitation Foundation" Memorandum of Understanding between the Government and the Democrats; **Alcohol Education and Rehabilitation Account Act 2001 (Cth).**

WHO Paper and Comments by Professor Greg Reinhardt, AIJA.

Annexure "B"