

Parliament of Tasmania

Joint Select Committee: Preventative Health Care - Submission by Neil Francey

The National Preventative Health Taskforce 2009 Report Australia: The Healthiest Country by 2020 – National Preventative Health Strategy the roadmap for action canvassed a range of measures that could be taken to prevent or reduce the incidence of adverse health outcomes, including a recommendation to investigate the feasibility of legal action to recover health and other costs from tobacco companies: Action 5.5, page 186

This recommendation arises against the following background:

1. In December 1953 US tobacco companies met at the Plaza Hotel, New York, and resolved to dispute evidence that smoking was harmful, with subsequent adverse implications for Australia: Kluger, R 'Ashes to Ashes' Knopf Publishing 1997
2. In June 1977 the major international tobacco companies met at Shockerwick House, England, and resolved to promote “smoker reassurance” as to the adverse health effects of smoking and to dispute that passive smoking was harmful: "Operation Berkshire": the international tobacco companies' conspiracy" BMJ v.321: 371-374; Aug 5, 2000)
3. Australian subsidiaries of the overseas tobacco companies immediately proceeded to implement the Operation Berkshire “philosophy”: Letter W.D. & H.O. Wills (Australia) Pty Ltd to Philip Morris Limited 11 July 1977
4. Implementation of Operation Berkshire extended to the formation of the Tobacco Institute of Australia and misleading 1986 advertisements disputing the harmful effects of passive smoking: Re Australian Federation of Consumer Organisations Inc v the Tobacco Institute of Australia Limited [1991] FCA 17; (1991) 13 Atp 41-079/98 ALR 670; 27 FCR 149 (7 February 1991)
5. It is likely that subsequent activities of the tobacco industry in Australia extend to deceptive actions of the Alliance of Australian Retailers Pty Ltd (<http://www.australianretailers.com.au/>) opposing the introduction of “plain packaging” of tobacco products and more recently efforts to cover up health warnings on plain packaged tobacco products.

All of this has had an enormous impact on smoking related disease and addiction of individuals to nicotine which could be prevented or reduced by litigation or an inquiry into potential litigation against tobacco companies. Against this background the following documents are attached:

Attachment A - outlining how litigation against tobacco companies may be pursued.

Attachment B - setting out how preliminary investigations may be undertaken as to the feasibility of such litigation.

Neil Francey

PROPOSED LITIGATION AGAINST TOBACCO COMPANIES

Background

On 27 April 2012 South Australian Health Minister John Hill raised at a Ministerial Council a proposal for litigation by Australian States against tobacco companies to compensate governments for health costs associated with smoking: <http://www.adelaidenow.com.au/south-australia-mounts-lawsuit-against-tobacco-companies/story-e6frea6u-1226341665930>

This proposal has now been referred to the Commonwealth but has also been canvassed in Tasmania: http://www.themercury.com.au/article/2012/12/04/367567_tasmania-news.html

Legal Issues

This proposed litigation has the potential (although with difficulty) to recover health costs for significant loss and/or damage that has been incurred, or is likely to be incurred, in Australia on account of the tobacco companies conspiring to engage in misleading or deceptive conduct since 1 July 1977 in contravention of the former Trade Practices Act 1974 (Cth) ("TPA"). It may also provide (more easily) for payments to prevent or reduce such harm. [Comparable provisions were contained in Fair Trading Acts ("FTA") of the various States and Territories. Both the TPA and FTA provisions are now contained in the Australian Consumer Law ("ACL"). Some combination of these provisions may need to be relied upon e.g. as to before and after the ACL]

Evidence to support such litigation can be found as set out in the article: "Operation Berkshire": the international tobacco companies' conspiracy *BMJ* 2000; 321 An analysis of how such claims could be advanced is contained in: TOBACCO LITIGATION: The Australian Experience in a Global Context - WHO Consultation on Litigation & Public Inquiries as Public Health Tools for Tobacco Control Kingdom of Jordan, Amman, 5-7 February 2001

In summary, the legal basis of these claims under the TPA provisions is as follows:

- Section 52 of the former TPA came into effect from 1 October 1974 prohibiting corporations from engaging in misleading or deceptive or deceptive conduct.
- Section 75B of the former TPA came into effect from 1 July 1977 creating a liability for, amongst other things, conspiring to engage in a contravention in the TPA as a person "involved".
- The TPA provided remedies for a contravention, including against a person "involved", including:
 - Section 80 – Injunctive relief (including mandatory public disclosure orders)
 - Section 82 – Damages (6 year time limit)
 - Section 87 (1) – Other orders to compensate for or prevent or reduce loss or damage (no time limit)
 - Section 87 (1A) - Other orders to compensate for or prevent or reduce loss or damage (6 year limit)

The concept underlying the legal claim described above was successfully being pursued in the long running Cauvin v Philip Morris litigation in the NSW Supreme Court 2002-2006 until replacement solicitors filed a notice of ceasing to act in contentious circumstances.

Conclusion

In essence, the remedies identified above could provide for:

- Funded or subsidised smoking cessation products and/or counseling services etc.
- Funded or subsidised medical treatment for smoking related disease, including early screening/intervention/treatment.

See: USA v Philip Morris USA Inc - Civil Action No. 99-2496 (GK) (+ Appeal and final Judgment)

PROPOSED INQUIRY INTO MATTERS RELEVANT TO POTENTIAL LITIGATION
AGAINST TOBACCO COMPANIES

SUGGESTED DIVISION OF RESPONSIBILITIES

1. The Commonwealth to explore the extra-territorial reach of the former Trade Practices Act 1974 (Cth) - now the Australian Competition & Consumer Act/Australian Consumer Law, the potential to join overseas parent companies of Australian subsidiaries, the scope for enforcing any judgment against overseas parent companies and the likelihood of satisfying any orders having regard to assets and re-structuring of the various corporate entities.

In addition the Commonwealth to investigate what conduct, if any, has been engaged in by tobacco companies to oppose the introduction of and to impede the implementation of "plain packaging" including but not limited to the actions of the Alliance of Australian Retailers Pty Ltd and efforts to cover up health warnings on plain packaging tobacco products.
2. New South Wales to explore what documents exist, or may exist, to implicate the former WD & HO Wills and Rothmans companies now merged into British & American Tobacco in conduct in contravention of the TPA/AC&CA/ACL in relation to smoking and disease - including through industry bodies such as the Tobacco Institute of Australia ("TIA").
3. Victoria to explore what documents exist, or may exist, to implicate Philip Morris companies in conduct in contravention of the TPA/AC&CA/ACL in relation to smoking and disease - including through industry bodies such as the TIA.
4. Queensland to explore what documents exist, or may exist, to implicate Imperial Tobacco companies in conduct in contravention of the TPA/AC&CA/ACL in relation to smoking and disease - including through industry bodies such as the TIA; and devise the strategy which may be adopted in respect of any proposed litigation in respect of conduct of the kind identified above.
5. South Australia to explore the scope to prevent or reduce the incidence of smoking-related disease arising from conduct of the kind identified in 2, 3 & 4 above e.g. by tobacco industry funded smoking cessation measures including distribution of nicotine replacement therapies and associated counselling etc, not just in SA but Australia-wide.
6. Western Australia to explore the extent of costs to the health system of smoking-related disease, not just in WA but Australia-wide, arising from conduct of the kind identified in 2, 3 & 4 above.
7. Tasmania to explore the adequacy of smoke-free places and the extent to which the introduction of smoke-free places has been impeded or delayed by the conduct of tobacco companies of the kind identified in 2, 3 & 4 above, not just in Tasmania but Australia-wide.
8. Northern Territory to explore the disproportionate incidence of smoking by Indigenous peoples, not just in the NT but Australia-wide, arising from conduct of the kind identified in 2, 3 & 4 above.
9. ACT to explore the saving/transitional operation of the TPA/AC&CA/ACL