List of chapters available at tobaccoinAustralia.org.au

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Tobacco litigation in Australia

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Introduction

The purpose of this chapter is to describe the progress of tobacco litigation in Australia over the past two decades.

The role of litigation in tobacco control

Litigation is important in tobacco control because it has significant potential as a regulatory tool that complements more traditional regulation by government.

The use of litigation as a tobacco control regulatory tool may be directed toward reducing smoking rates, reducing the burden of tobacco use on the state—by fixing the burden on industry—or changing social norms and expectations about smoking. These functions may be secondary purposes of litigation brought for another reason or reasons, such as compensation for personal injuries, or the very reason for the initiation of litigation.

Using litigation in this way is not new. The High Court of Australia has acknowledged that important effects flow from the assignment of responsibility to persons or companies that impose unreasonable risks and/or cause harm. These effects include: compensating persons for loss caused by such conduct; deterring unreasonably hazardous conduct in the future; and encouraging innovation in product design, packaging and advertising to reduce the risk of injury or disease.

Litigation involving the tobacco industry spans many different types of legal proceedings, including: personal injury claims made by smokers or claims relating to money spent treating sick smokers; claims by asbestos manufacturers or their insurers seeking contribution from tobacco manufacturers for the damages they have paid to sufferers of asbestos related diseases; and claims by either the tobacco industry or the tobacco control movement seeking to change or restrict the conduct of the other. In addition, litigation against employers and occupiers of public venues over the harms caused by secondhand smoke has played an important role in tobacco control, both in Australia and overseas.

In the United States, litigation against the tobacco industry has brought significant achievements. It has resulted in access to millions of internal industry documents; added to the industry's loss of legitimacy; helped change the industry's previously intractable stance that smoking has not been proved to cause disease; and added about $10 billion a year to the industry's costs, forcing substantial price increases that have contributed to declines in US smoking rates.

It has seen courts make significant findings against the tobacco industry, expressing strong condemnation of its behaviour over the years. In a 1600-page judgment handed down in August 2006, in a case brought by the US Department of Justice against the US tobacco industry, Judge Kessler of the US District Court found that the industry had falsely denied the health effects and addictiveness of smoking, manufactured products so as to create and sustain addiction, fraudulently marketed 'low tar' and 'light' cigarettes, marketed to young people including children under the age of 18 and concealed and suppressed information to protect against litigation and to avoid regulation.

The value of tobacco litigation as a public health tool is recognised in the Framework Convention on Tobacco Control. In its guiding principles, the FCTC declares that ‘[i]ssues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control’. Article 19.1 requires Parties, ‘[f]or the purpose of tobacco control’, to ‘consider taking legislative action or promot[e] their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate’.

Although tobacco control advocates in the United States have made significant progress in achieving their aims through litigation, even in the US, tobacco litigation has not been easy or always successful. The tobacco industry

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has spent vast sums (estimated at up to $900 million per year)\(^5\) in defending litigation, and itself launches litigation in order to restrict the activities of tobacco control advocates. One aspect of the industry’s defence approach is a deliberate litigation strategy to argue every point of law available to the industry. Tobacco companies have preferred to try to avoid scrutiny of their actions and the effects of their actions on smokers and the community more generally. With such a strategy, ‘winning’ involves draining the plaintiff’s resources in preliminary proceedings so that they cannot afford to continue claims to judgment. In the words of one tobacco industry document: ‘the way we won was not by spending all [the company’s] money, but by making the [plaintiff] spend all his’.\(^5\)

Such tactics have been adopted in Australia, with the result that, though a number of personal injury claims against the tobacco industry over the harm caused by smoking have been commenced, only one has progressed to trial.

**Action by government against tobacco industry: a Canadian example**

In 2001, shortly after the commencement of the British Columbian *Tobacco Damages and Health Care Costs Recovery Act 2000* (which authorised such proceedings), British Columbia commenced court action against numerous tobacco manufacturers for the recovery of health care expenditure incurred as a result of the treatment and care of individuals with diseases due to exposure to tobacco smoke and products.\(^7\)

In April 2008 the Supreme Court of British Columbia heard an application to strike-out a third party notice, by which the tobacco companies wanted to bring an additional party into the proceedings, namely Canada.\(^8\)

What the tobacco companies wanted to achieve through the application was:
- a declaration that they committed no ‘tobacco related wrong’; or
- a declaration that if they did, any associated costs were contributed to by the conduct or breach of duty by Canada and so the tobacco companies’ liability should be reduced accordingly; or
- a declaration that damages against Canada be measured by the extent of any liability of the Defendant to British Columbia; or
- an order that Canada indemnifies in part or whole the Defendants re liability to British Columbia; or
- contribution or indemnity based on Canada’s liability as a manufacturer of tobacco within the meaning of the Act.

The Supreme Court refused the application. In deciding this matter, the Court looked at whether Canada was immune from liability due to ‘Crown Immunity’, whether British Columbia could bind the Federal Crown through legislation and whether such immunity (if it did exist) defeated the application for declaratory relief by the Defendants. The Court held that Canada was immune to liability under the province’s Act and this immunity also applied to declaratory relief. The tobacco companies appealed this decision.

The appeal was heard in December 2009 in the Court of Appeal for British Columbia and the Supreme Court’s decision was overturned with one Judge dissenting. The majority decision turned on whether Canada had a duty of care in relation to tobacco products, particularly due to its role in developing low tar, light and mild cigarettes. On this basis the Judge held that the third party application should not have been struck out but rather be amended to cover the following:
- the tobacco companies are entitled to contribution and indemnity from Canada on the basis that the Costs Recovery Act does apply to Canada;
- Canada owed the tobacco companies a duty of care with respect to the design of the tobacco strains used in light and mild cigarettes;
- Canada is liable in connection with a failure to warn;
- the tobacco companies are entitled to be indemnified by Canada on the basis of the doctrine of equitable indemnity.

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Chapter 16: Tobacco litigation in Australia

One striking example of the use of such tactics was the response by WD & HO Wills (Australia) Ltd, predecessor to British American Tobacco Australia, to a claim for $1000 brought in the Consumer Claims Tribunal of New South Wales by Sarah Hodson. The claimant, a doctor, sought damages for the costs associated with overcoming her addiction to nicotine. Wills, which manufactured the cigarettes that Dr Hodson smoked, challenged the Tribunal’s jurisdiction to hear the claim and the legitimacy of the damages claimed. Wills lost at first instance, appealed, and lost again.9 Then, before the case went to hearing, Wills’ solicitors hired a private investigator to look into the claimant’s private life.10

In its report to the Government released in September 2009, Australia’s Preventative Health Taskforce recommended that the Government should

5.5 Investigate the feasibility of legal action by governments and others against tobacco companies to recover health and other costs.

5.5.1 Investigate the legal implications of continuing sales of tobacco products and principles that should guide future regulation.

5.5.2 Investigate possible mechanisms for recovery of costs.11

In its response to the Preventative Health Taskforce’s recommendation concerning litigation by government against tobacco companies, in May 2010 the Labor Government stated ‘The Commonwealth Government notes this recommendation and will keep its legal options open.’

Outline of this chapter

This chapter has three parts. Part One will examine claims against the tobacco industry over the harms of smoking. Those who have followed developments in tobacco control over the last decade will be aware of the multi-million dollar verdicts handed down by US Courts against the tobacco industry and the $206 billion Master Settlement Agreement reached between the US States and the US tobacco industry in 1998.12 The question may arise why such judgments and settlements have not been replicated in Australia.

Part One attempts to answer this question. Personal injury claims against the tobacco industry share common traits relating to the way that claims are argued and the decisions that courts eventually make. These features make claims against the tobacco industry more difficult to prosecute than ordinary claims over personal injury. Part One will set out these features in order to show why, as at the time of writing, claims brought against tobacco manufacturers in Australia have not been successful. (The only verdict against a tobacco manufacturer in Australia was overturned on appeal—see the discussion of the McCabe case in Attachment 16.1 to this chapter.)

Part Two will provide a brief outline of the other forms which tobacco litigation has taken in Australia. These include litigation initiated by the tobacco industry and litigation other than personal injury claims brought against the tobacco industry. One interesting aspect of litigation involving the tobacco industry is that its tactics tend to be the same regardless of the type of legal claim or the identity of the opposing party. The rules of litigation that are outlined in Part One apply equally to other types of claims. These consistencies mean that tobacco control advocates have to be prepared to invest significant resources into litigation, if they wish ultimately to be successful. Part Two also outlines the rise of litigation funding, which may provide a means by which such resources can be accessed.

Part Three will discuss claims brought against employers and occupiers of public venues over the harms of exposure to secondhand smoke.

12 This was preceded by a $40 billion settlement with Minnesota, Mississippi and Texas, so a total figure of $246 billion is often used. See Rabin R L ‘The Third Wave of Tobacco Tort Litigation’ in R Rabin and S Sugarman (eds) Regulating Tobacco, Oxford University Press (2001) 192.
Personal injury claims against the tobacco industry

The process of litigation

To put personal injury claims in their context, this Part will be structured to follow the overall process of civil litigation. First, it is appropriate to consider the plaintiff. The history of smoking in Australia means that different plaintiffs will face different obstacles in their claims. Second, the process of pleading a claim is examined. The difficulty involved in articulating the claim has been an obstacle for plaintiffs in Australia. Third, if pleading meets the requirements imposed by the courts, there are a series of additional preliminary stages. These include the process of obtaining evidence from the tobacco industry. Difficulties have arisen as a result of the document ‘retention’ policies adopted by at least one member of the Australian tobacco industry. Finally, if the claim makes it to a substantive hearing and the plaintiff is successful, the court must determine what damages to award against the tobacco company defendant.

Choosing a plaintiff

Many personal injury claims are relatively simple. Person A does something wrong, and—due to various circumstances—Person B falls victim to the wrongdoing. This description is appropriate for injuries sustained when falling down poorly constructed stairs, receiving sub-standard medical treatment or eating contaminated food. Even if there is a delay between A’s actions and the convergence of circumstances (B walking down the stairs, A missing a diagnosis, B eating the food), there is usually a direct link between the circumstances and the injury. The connection between wrongdoing and injury is clear and easy to explain. In addition, B cannot usually avoid the injury.

In tobacco claims, the link is usually less immediate. There are two reasons for this. First, the choice to start and continue smoking is at least partially voluntary. While most smokers begin smoking in childhood and most find it hard to quit because of addiction, not everyone in the community takes up smoking and not all smokers are unable to quit. This means that the link between the wrongdoing and the illness is less direct than in many other types of cases.

Second, smokers usually smoke over a considerable period of time, and there is usually a long period between commencing smoking and developing a smoking-related illness. The duration of smoking and the long time delay before injury mean that a range of factors may have contributed to the decision to continue smoking, and that the illness itself may be argued to have been caused by other factors.

The delay and the lack of a direct connection mean that variations in each smoker’s history of smoking can be important. For example, prior to 1974 there were no health warnings on cigarette packs. The first warnings that were introduced were extremely muted when compared to today’s health warnings. They simply stated that ‘Smoking is a Health Hazard’. Over time, the warnings became more explicit and communicated more easily understood consequences. And, at the same time, more information became available to the general community about the dangers of smoking.

Other factors to consider are the smoker’s age at initiation and attempts to quit. A common claim is that, had accurate and sufficient information about the dangers of smoking been made available, the smoker would not have taken up smoking, or would have quit earlier. A jury is less likely to believe this claim if it is made by a smoker who has not tried to quit than if it is made by a smoker who has tried to quit on multiple occasions after becoming better informed of the health consequences of smoking. Among plaintiff lawyers, a claim from a smoker who commenced smoking prior to the introduction of health warnings, at a young age (when he or she could not have been expected to know better), at a time of saturation advertising of tobacco products, and who has since tried unsuccessfully to quit, is considered to have the greatest prospects of success.
Class actions

In order to reduce the costs of bringing individual claims against the tobacco industry, attempts are often made to have cases heard together. Such cases are known as class actions, or representative proceedings. Class actions allow many individuals’ claims against the same defendant to be heard, but only where the individuals’ claims arise out of the same or similar circumstances. This would allow, for example, a generic discussion of whether particular aspects of tobacco advertising had the potential to be deceptive, before considering whether any particular person was in fact deceived. By discussing such matters generally, an assessment of the tobacco industry’s conduct can be made. This separates the general evidence about the industry’s actions and failures to act from the specific evidence about the individual. As will be discussed later, the general evidence about the industry’s actions needs to be extremely detailed. Adducing such evidence in each claim would be extremely costly.

In Australia, class actions can involve both multiple plaintiffs and multiple defendants. Class actions against multiple defendants are especially relevant for tobacco litigation where smokers have switched brands during their smoking lives. If a smoker had switched brands, and was claiming against a single manufacturer, the manufacturer may be able to argue that its individual actions were not responsible for the plaintiff’s choices or the plaintiff’s disease. Other manufacturers’ actions, it would be argued, would themselves have caused the decision to smoke and the subsequent illness.

Class actions are attractive for a range of reasons. Especially in tobacco litigation, the preliminary stages of cases may run for years and involve many days or weeks of legal argument. The elements of the action relevant to the behaviour of the tobacco industry are likely also to take significant time and involve multiple witnesses for both the plaintiff and defendant. As such, the more plaintiffs there are, the more people there are to absorb the costs of litigation. In addition, the more plaintiffs there are, the greater the exposure faced by the defendant and the greater the pressure to settle.

16.1.3 Pleading a case

Once a plaintiff has decided on the precise claim that he or she wishes to make against the defendant, it is necessary to set this claim out in a way that the court will accept. This process is known as pleading, and is the beginning of the litigation process.

Pleading is considered necessary on the grounds of procedural fairness. Without proper pleading, a defendant does not know the nature of the claim that is brought against it, and is unable to defend the claim. To be successful, pleading requires assertion of the facts that the plaintiff intends to rely on to prove his or her case. The plaintiff must also set out the general rules of law which the court would apply to the facts in order to find in the plaintiff’s favour.

Pleading requires the plaintiff to set out:

- The circumstances during which the harm was caused. (e.g. the smoker began smoking at the age of 13 and smoked ‘full-strength’ X Cigarettes for 10 years. He was concerned about the effects of smoking ‘full-strength’ cigarettes and so he switched to X Lights, which he smoked for another 20 years.)

- The defendant’s breach of a legal obligation. (e.g. Company A knew that smokers such as the plaintiff were concerned about the effects of smoking full-strength cigarettes and marketed ‘light’ cigarettes to health-conscious smokers such as the plaintiff in ways designed to persuade smokers that ‘light’ cigarettes were less harmful than full-strength cigarettes. Company A knew that X Lights were, in fact, no less harmful than full-strength cigarettes and that smokers such as the plaintiff believed that they were. Company A breached the Trade Practices Act 1974 (Cth) (by engaging in misleading or deceptive conduct) and its duties under common law negligence.)

- What the defendant should have done and should not have done. (e.g. Company A should have provided its customers with all information in its possession regarding the comparative health effects of smoking full-strength cigarettes and X Lights. It should not have marketed ‘lights’ in a misleading way. This would have enabled its customers to make an informed decision about whether to continue smoking.)
How the harm was caused. (e.g. the plaintiff developed lung cancer at the age of 48. If the plaintiff were properly informed of the comparative health effects of smoking X Lights, he would have quit smoking altogether instead of switching to X Lights and he would have been less likely to contract lung cancer.)

The nature of the harm suffered by the plaintiff. (e.g. the extra medical costs the plaintiff has incurred to treat the cancer, loss of wages, and damages for pain and suffering.)

The sufficiency of pleading is determined by examining the specificity of the plaintiff’s allegations (i.e. what, when, where and by whom). Pleadings are sufficient if they allow the defendant to understand the claims that are being made against it.

## 16.1.4

**Pleading tobacco litigation**

In many circumstances, sufficiency of pleading is straightforward. This is the case, for example, where the claim is that the defendant's actions were in breach of a legal duty it owed and caused direct harm to the plaintiff's interests, which the plaintiff was unable to remedy. However, as noted above, claims against the tobacco industry involve less immediate consequences than are alleged in the more usual, run of the mill personal injury cases. The less immediate the connection between the defendant's action and the plaintiff's harm, the greater the level of detail required to satisfy the court that the defendant understands the claim made against him or her.

Given the nature of the allegations made against the tobacco industry, it is necessary to set out in detail the nature of the relationship between the smoker and the manufacturer, including how the tobacco industry's actions affected the plaintiff's decision to commence and continue smoking. For example, plaintiffs are required to plead in detail the basis on which it is alleged the tobacco companies owed a duty to inform their customers of relevant information and when the duty to inform customers arose.

In addition to these general requirements, class actions present their own challenges. Class actions are harder to plead than single person claims, because the court must be satisfied that there is a common question of fact or law that is applicable to each individual claim, as well as being satisfied that it is more convenient to answer the question (or questions) in a general way than at a single hearing.

Pleading claims against the tobacco industry is already difficult. Where a class action is brought, it allows the tobacco industry to argue not only that the pleadings are insufficient in themselves, but also that they are insufficient for a class action. The courts have, until very recently, consistently adopted very stringent tests regarding the level of pleading that is sufficient for a class action, making it difficult to satisfy the court that the pleadings are sufficient.

## 16.1.5

**Preliminary interlocutory arguments**

The nature of tobacco litigation means that the tobacco industry has many opportunities to complain that pleadings are insufficient. The usual manifestation of such complaints is that the plaintiff has not adequately set out the facts on which the plaintiff relies in order to justify a claim. The specifics of some objections have more merit than others. In one case, Philip Morris challenged a statement of claim because it did not specify whether Philip Morris Ltd or Philip Morris (Australia) Ltd was the direct manufacturer of the brand of cigarettes smoked by the plaintiff.

Another manifestation of such complaints is that the plaintiff has not adequately set out the claim that is made against the defendant. That is, the claim does not specify why the tobacco industry's actions were in breach of a legal obligation and how this alleged breach caused the plaintiff injury.

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Such complaints are accompanied by applications to have the claim thrown out or diminished as much as possible. These applications involve a series of standard arguments. In addition to arguing that the claim is unclear, other criticisms are often made including:

- The threshold requirements for commencement of a representative proceeding have not been met. As noted above, a representative proceeding may only be heard where there are sufficiently similar questions of fact or law. The threshold requirements for commencement of the proceeding will be met if a prima facie case is made in the pleadings. A defendant may argue that the claim, when applied to individual plaintiffs, does not involve sufficiently similar questions of fact or law.

- The claim lies outside the jurisdiction of the court. If the court is set up by legislation (such as the Federal Court of Australia, the New South Wales Dust Diseases Tribunal and the Consumer Claims Tribunal), the legislation will describe the types of dispute that the court is authorised to decide. If one part of the claim falls squarely within the jurisdiction of the court, it is appropriate for the rest of the claim to be heard at the same time. A defendant may argue that none of the claims made by the plaintiff fall within the authorised types of dispute.

### 16.1.6 Document discovery

After all the preliminary challenges to a claim have been heard (a process which can take several years), the claim can continue toward the substantive hearing.

Before the hearing occurs, both the defendant and the plaintiff have to marshal the evidence they will use to prove their case. Evidence comes from a variety of sources. One source is from the parties themselves. Parties to litigation have an obligation to make available to the other side all documents in their possession that may tend to prove or disprove either side’s claim. This obligation is known as discovery.

As with pleadings, discovery obligations are based on the need to ensure both parties receive procedural fairness. It would obviously be extremely unfair if a plaintiff (defendant) were to bring (defend) a claim while denying the other side access to documents that would be fatal to the claim (defence). In most courts, discovery obligations extend to requiring a representative of each party to provide a list of all documents sought by the other party, and to swear on oath that the list is comprehensive.

As with all other aspects of tobacco industry legal defence, the practice of the tobacco industry has been to make discovery as difficult as possible for the plaintiff. Standard practices include: withholding documents by taking extremely narrow interpretations of requests for discovery; making tenuous claims of legal privilege over documents; and, at the other extreme, deluging the plaintiff with thousands of irrelevant documents which will be extremely costly and time-consuming for the plaintiff’s legal advisers to examine. A more remarkable approach to discovery—destroying documents such that they are unable to be discovered when the time for discovery arrives—was revealed in the case of *McCabe v British American Tobacco*, which is outlined in detail in Attachment 16.1.

### 16.1.7 The substantive hearing

Once all the preliminary matters have been decided and all the documents obtained, the claim is finally ready for a substantive hearing. This will involve the examination of the actual questions in dispute such as knowledge, deception, intention and conspiracy (for the tobacco companies) and reliance, addiction and causation of disease (for the smoker).

Based on previous cases, it appears likely that a tobacco company defendant would engage in sustained argument on all relevant factual and legal issues. The tobacco company defendant would likely argue that the plaintiff’s condition was not actually caused by smoking, and would likely lead evidence of any conceivable alternative.

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3 *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453 at [59] per Wilcox J.

4 Ibid at [39].
contributor to the plaintiff’s condition. It would also either deny or refuse to concede that smoking causes disease or that it is addictive.

The tobacco company defendant would also seek to show that smoking was entirely the plaintiff’s responsibility. It would argue that everyone, including the plaintiff, has always known that smoking is harmful. In cases in the United States and Scotland, this has involved leading evidence of virtually every newspaper article or television news story about smoking and health that the plaintiff might ever have seen. Using this basis, the tobacco company would argue that the plaintiff voluntarily assumed the risks of smoking. It would seek to dismiss any suggestion that its marketing caused or contributed to the plaintiff’s smoking, that the plaintiff was not sufficiently aware of the risks of smoking, or that the company was responsible for the addictiveness of its products that ultimately kept the plaintiff smoking.

To illustrate these arguments, one can examine the defences lodged by tobacco companies in *Scanlon v American Cigarette Company* and *Laurie v Amaca*, two cases that commenced in 1986 and in 2006 respectively. The defences are almost identical. The defendant in both cases denied that there is any link between smoking and disease. However, in both cases, the defendant also went on to plead that during the relevant periods, the plaintiff knew that:

- smoking could cause lung cancer and other diseases;
- smoking was hazardous to the smoker’s health;
- smoking was an activity that was difficult to quit; and
- in order to avoid the health risks associated with smoking, it was necessary for him or her to quit smoking tobacco.

In such cases the defence pleads that, even if the plaintiff’s injuries were caused by smoking, the plaintiff voluntarily accepted the risks referred to above. The defence argues that tobacco manufacturers, in complying with mandatory warning legislation, should be deemed to have done all that they could do to bring the health effects of smoking to the smoker’s attention. According to the tobacco companies, if the smoker chooses not to believe what she is told, she cannot for that reason say that she did not fully appreciate the risk.

At the hearing of these issues, the tobacco company defendant would be likely to engage in lengthy cross-examination of the plaintiff and his or her witnesses and to call multiple witnesses of its own. Any factual findings or legal decisions adverse to the defendant can then be expected to be appealed to higher courts.

### 16.1.8 Damages

Once all the preliminary matters have been decided, all the documents obtained and the substantive hearing has taken place, judgment will be handed down.

If the plaintiff is successful, the defendant or defendants will be required to pay damages to the plaintiff. Ordinarily, the amount to be paid is that which is required in order to compensate the plaintiff for his or her loss. The courts acknowledge that this is a difficult process, and that money is an artificial means of providing compensation for such an unquantifiable value as loss of enjoyment of life.

In the US, large awards of damages result from three considerations. The first is a large sum for pain and suffering. The second is the aggregation of claims in a class action (discussed above). The third is the award of punitive (in Australia, called exemplary) damages.

Awarding damages only as compensation limits the amount of money that a defendant may be required to pay. If the damages awarded to a plaintiff go beyond that which is necessary to compensate the plaintiff for his or her loss, they will be struck down by an appeal court. Exemplary damages are an exception to this general principle. They are awarded to punish the defendant, to deter any similar conduct in the future and to evidence the community’s opprobrium of the defendant’s conduct.

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5 *Scanlon v American Cigarette Company (No. 3) [1987] VR 287.*
6 *Donald Laurie v Amaca Pty Ltd and Ors (2) [2006] NSWDoT 35 (28 September 2006), [3].
7 Ibid at 291.
There are significant limits on exemplary damages in Australia. For example, they cannot be awarded if the plaintiff is dead (even if the plaintiff’s death is a result of the defendant’s conduct). Even where exemplary damages are available, the amounts that are awarded are, as a matter of practice, typically much lower than those awarded in the US.

16.1.9

Exposure to both smoking and asbestos

The New South Wales Dust Diseases Tribunal has jurisdiction to hear claims by plaintiffs who are suffering ‘dust-related conditions’, such as asbestosis, byssinosis and mesothelioma. The Dust Diseases Tribunal has heard a number of claims that relate to the interaction between tobacco and asbestos. Such claims are brought either by smokers, smokers’ families or asbestos companies.

One such case is Laurie v Amaca. The case involves a claim brought by a former smoker who worked in the navy (and carried on by his wife since his death on 29 May 2006) against both British American Tobacco and Amaca (the corporation that was previously James Hardie). Laurie claimed that British American Tobacco Australia Services had breached its duty of care owed to Mr Laurie and had intentionally destroyed documents that tended to prove its knowledge that its tobacco products could cause lung cancer, with the intention of depriving potential litigants from access to these documents. The issue of document destruction was similar to that which emerged in the McCabe v BAT case. This was an important issue as it allowed the plaintiff to claim for aggravated damages, a claim not usually permitted in negligence actions for personal injury. At the time of writing, the substantive claim of this case had not been determined.

16.1.10

Key differences between Australian and US litigation

Many of the difficulties of personal injury litigation against the tobacco industry outlined above are not unique to such litigation brought in Australia. The difference between the success of US tobacco litigation and the position so far in Australia can perhaps best be explained by differences in the rules and procedures that govern litigation in the two legal systems.

Most important is the fact that, in Australian litigation, the ‘loser pays’ principle generally applies, meaning that an unsuccessful plaintiff will ordinarily be ordered to pay the legal costs of the defendant. This is an enormous disincentive to bringing a claim against the tobacco industry. An unsuccessful plaintiff can expect to end up owing the tobacco company defendant or defendants millions of dollars. In light of the difficulties of tobacco litigation discussed above, this is a possibility that can be expected to weigh heavily on the mind of a potential plaintiff.

Second, in Australia, law firms cannot recover US-style ‘contingency fees’, which allow lawyers to act on the basis that they will not charge if the case is unsuccessful, but will be paid a certain proportion (such as 33%) of any damages ultimately awarded. With large punitive damages verdicts available in the US, tobacco litigation is a much more lucrative prospect for US lawyers than Australian lawyers.

The combination of these factors—and the relative sizes of the two countries—means that many more cases have been brought in the US than in Australia. As more cases are brought, more become successful, and this tends to have a snowballing effect, with evidence emerging in one case then being used in subsequent cases, economies of scale developing, judgments against the tobacco industry becoming more commonplace, and more law firms

8 Dust Diseases Tribunal Act 1989 (NSW) ss 10, 11.
9 Ibid at Schedule 1.
10 See for example Amaca Pty Ltd v Ellis as executor of the estate of Cotton (Dec) & Ors [2010] HCA 5, where the claim was only in relation to exposure to asbestos causing lung cancer. The High Court found that his exposure to asbestos may have been a cause of lung cancer but was not a probable cause, which was likely to be tobacco smoke.
11 Donald Laurie v Amaca Pty Ltd and ors (1) [2006] NSWDDT 34; Donald Laurie v Amaca Pty Ltd and ors (2) [2006] NSWDDT 35.
12 Donald Laurie v Amaca Pty Ltd and ors (1) [2006] NSWDDT 34.
13 However, see Claudia Jean Laurie v Amaca Pty Ltd and others [2009] NSWDDT 14 where British American Tobacco Australia Services made an application to disqualify Curtis J from hearing the matter on the basis of bias. This application was rejected at first instance and also on appeal: British American Tobacco Australia Services Ltd v Laurie & Ors [2009] NSWCA 414.
recognising the potential commercial benefits of taking on the tobacco industry. This kind of momentum has been generated in the US, but not so far in Australia.

**Relevant cases**

*Nixon v Philip Morris, WD & HO Wills and Rothmans*  

*Re Mowbray; Brambles Australia v British American Tobacco Australia*  

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**Exemption of tobacco-related claims from changes to negligence and trade practices law**

In 2003 and 2004, the Commonwealth, the States and the Territories undertook law reform designed to address the so-called ‘public liability insurance crisis’. Changes were made to negligence law and trade practices law that included imposing caps on damages recoverable in personal injury litigation and introducing ‘long-stop’ rules, i.e. rules that provide that claims cannot be brought more than a certain period of time (here 12 years) following the act or omission alleged to have caused damage unless the period is extended by a court. ‘Long-stop’ rules would obviously affect cases in which there is a significant period of time between the conduct alleged to have caused harm and the suffering of harm—cases involving tobacco-related disease being an obvious example.\(^\text{14}\)

The changes were proposed for reasons that had no application to claims against the tobacco industry. For example, the Victorian Premier, Steve Bracks, spoke of the need to protect ‘the right of all Victorians to have access to adequate insurance coverage’, and the concern that ‘[r]ising payouts and worldwide pressure on the insurance industry have created an environment of unaffordable premiums … These premiums are becoming unaffordable not just for doctors, but for tourism operators, small business and community and sporting associations like pony clubs and local football clubs… We have a responsibility to strike the right balance between protecting people’s rights and ensuring a viable insurance industry.’\(^\text{14}\)

Similarly, Senator Helen Coonan, then Commonwealth Minister for Revenue and Assistant Treasurer, who had carriage of the relevant Commonwealth legislation, referred to ‘the problems community groups, sporting clubs, small businesses and others have faced with public liability insurance … [I]n the absence of a strong, affordable and sustainable public liability insurance market, the broad range of consumer protections that have been built up over the years are, really, worthless. The legislation seeks to balance the need for affordable public liability insurance with appropriate protections in the event of personal injury or death.\(^\text{15}\)

Much of the legislation would, however, in the absence of exceptions, make claims in respect of tobacco-related disease more difficult, because it is drafted very generally and would apply to such cases, even if only inadvertently.\(^\text{16}\) This has been recognised by a number of legislatures, with specific exceptions relating to tobacco included in the *Trade Practices Act 1974* (Cwlth) (sections 82, 87, 87D, 87E and 87F), the *Civil Liability Act 2002* (NSW) (section 3B), the *Wrongs Act 1958* (Vic) (sections 19, 281, 45, 69 and 81), the *Limitation of Actions Act 1958* (Vic) (section 27B), the *Civil Liability Act 2003* (Qld) (section 5), the *Civil Liability Act 2002* (WA) (section 3A) and the *Civil Liability Act 2002* (Tas) (section 3B).

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\(^\text{15}\) Senate Hansard, 1 December 2003.

\(^\text{16}\) Relevant submissions are available on request from the VicHealth Centre for Tobacco Control.
Section 16.2 discussed claims seeking damages for personal injury, many of which involved allegations that the tobacco industry engaged in misleading and deceptive conduct. Misleading and deceptive conduct is prohibited under trade practices and fair-trading legislation. The prohibition can be used as a trigger for damages, or invoked to obtain court orders that certain actions were misleading and deceptive, and to order that no similar conduct occur again in the future or that a defendant undertake corrective action.

The process of obtaining such orders can be difficult and involved, though not ordinarily as difficult and involved as cases where damages are sought. There are two important examples of this process in Australia. One is a recent dispute in relation to the tobacco industry’s adoption of ‘light’ and ‘mild’ cigarettes, which did not ultimately involve litigation, but resulted in a court-enforceable settlement between the Australian Competition and Consumer Commission and the three major Australian tobacco manufacturers. The other is a claim brought by the Australian Federation of Consumer Organisations against the Tobacco Institute of Australia in the late 1980s and heard in the early 1990s for misleading and deceptive conduct in advertisements about secondhand smoke.

### 16.2.1 ACCC action on ‘light’ and ‘mild’ cigarettes

In 2005, the Australian Competition and Consumer Commission (ACCC) accepted court-enforceable undertakings from the three major Australian tobacco manufacturers, Philip Morris (Australia) Limited, British American Tobacco Limited and Imperial Tobacco Australia Limited, under which the companies agreed to stop using terms such as ‘light’ and ‘mild’ and to provide a total of $9 million for corrective advertising to be run by the ACCC. Philip Morris also agreed to stop using machine-tested cigarette yield information other than when used in a brand name. Neither BAT nor Imperial agreed to stop using machine-tested yield information derived from ISO (International Standards Organisation) testing procedures. The undertakings were given in exchange for an assurance that the ACCC would not take legal action against the companies under the Trade Practices Act 1974 (Cth) over the use of the terms. The undertakings can be viewed at:

- [http://www.accc.gov.au/content/index.phtml/itemId/683582](http://www.accc.gov.au/content/index.phtml/itemId/683582) (BAT),
- [http://www.accc.gov.au/content/index.phtml/itemId/683563](http://www.accc.gov.au/content/index.phtml/itemId/683563) (Philip Morris) and

Complaints that the use of the terms was misleading and deceptive were first made to the ACCC in 2001. After investigating the complaints, the ACCC reached the conclusion that the companies had contravened the Trade Practices Act by marketing ‘light’ and ‘mild’ and similarly named products, and other products without these descriptors but with ISO machine-tested deliveries of 8mg or less, as less harmful to health than other cigarettes. The ACCC’s conclusions are set out in the formal undertakings documents (see links above). The ACCC had been provided with evidence that approximately 55% of Australian smokers believed that light cigarettes (covering light, mild or low in tar) offered some health benefit compared to regular cigarettes and that 77.5% of Victorian regular smokers (likely to be similar across Australia) smoked cigarettes labelled either ‘light’ or ‘mild’.

The agreement between the ACCC and the tobacco companies contained no element of liability for the harm done by the companies’ conduct. The ACCC does not have power to impose penalties upon, or make compensation orders against, those it considers to have breached the Trade Practices Act. Rather, its power is to institute court proceedings, with only a court ultimately able to make such orders. Here the ACCC decided to settle the matter with the companies, rather than take them to court to seek penalties or damages.

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In making this decision, the ACCC was clearly influenced by its recognition of how protracted and expensive court proceedings against the tobacco industry were likely to be. In January 2004, the Chairman of the ACCC, Graeme Samuel, when asked about the Commission’s investigation into the industry’s behaviour, told The Age newspaper:

‘A case like this is resource-intensive because of the nature of the evidence that is being brought … we would be fighting powerful companies with enormous resources and we have to consider that. … If we take on a case like this we have to have the evidence and we have to have the resources … On one analysis this could exhaust all our resources in one go.’

In August that year, Mr Samuel gave evidence to the Senate Community Affairs Legislation Committee which was inquiring into what the ACCC planned to do with respect to the complaints that had been made against the industry. Mr Samuel said:

‘[I]t is very substantial litigation. For obvious reasons, it would be defended vigorously. Then we are talking about an extensive gathering of evidence, including scientific evidence, expert witnesses, a lengthy case, lengthy appeals and the whole question of the resources of the ACCC to deal with that. … [I]f we were to institute proceedings of this nature, it would require a substantial vote of our litigation budget towards these particular proceedings. That would then impact significantly on the ability of the commission to deal with other enforcement activities that are within the scope of its jurisdiction.’ The transcript of the hearing before the Senate Committee can be viewed at http://www.aph.gov.au/hansard/senate/commttee/S7866.pdf

The ACCC’s corrective advertising campaign ran in December 2005 and January 2006 and again in June 2006. It included advertisements on television, radio, internet and online, in newspapers and magazines, and outdoor (at the cricket and on buses and trams).

After agreeing not to use terms such as ‘light’ and ‘mild’ any more, the companies began using terms such as ‘rich’, ‘classic’, ‘smooth’, ‘fine’, ‘ultimate’, ‘refined’ and ‘chilled’.

16.2.2

**Australian Federation of Consumer Organisations v Tobacco Institute of Australia**

The tobacco industry is politically active in Australia as it is throughout the world. In 1978 the Tobacco Institute of Australia (TIA) was formed. It ceased operations in 1997—see Chapter 10, Section 10.20.6.1. Its aims included:

- Promoting ‘understanding of the tobacco industry in Australia by the public, by all levels of the Government and of public administration’;
- Representing and assisting ‘the tobacco industry in Australia in the legitimate maintenance, support and furtherance of its interests’; and
- Engaging ‘in discussions and negotiations with and determining or assisting in the determination of matters of policy by or for all or any authorities, institutions or associations, whether Governmental, public, or private’.

In the 1980s, the TIA commissioned a series of advertisements about the effects of smoking. One advertisement was the subject of a claim that it amounted to misleading or deceptive conduct. The claim was brought by the Australian Federation of Consumer Organisations (AFCO). The advertisement featured in the major daily newspapers of Sydney and Melbourne in 1986 and took place in the context of public debate about whether secondhand smoke caused disease. The advertisement stated ‘there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers’. AFCO applied to the Federal Court seeking an injunction against further such statements.

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The trial judge, Justice Morling, found that there was compelling scientific evidence that cigarette smoke causes lung cancer in non-smokers.\(^5\) The statement made in the advertisement was erroneous when published and remained so at the time of judgment.\(^6\) His Honour made the same findings in respect of cigarette smoke and respiratory disease in infants under 12 months of age,\(^7\) as well as cigarette smoking and asthma\(^8\) (his Honour did not distinguish between the general disease of asthma and its manifestation in an asthmatic attack).\(^9\) His Honour declined to make such a finding in respect of otitis media.

On the basis of these findings, Justice Morling held that the TIA had breached the *Trade Practices Act*, and ordered an injunction preventing the further publication of the statement in the future. The TIA appealed.

The Full Court of the Federal Court upheld Justice Morling’s findings that the TIA had breached the Trade Practices Act, though each of the three judges took a different interpretation of what needed to be proved in order to find the advertisement misleading or deceptive.\(^10\) The Full Court nevertheless quashed the injunction granted by Justice Morling. The Court held that an indefinite injunction was inappropriate because of the possibility, however slight, that further scientific evidence might be created at a stage in the future, which cast doubt on the link between cigarette smoking and disease. If this occurred, the restraint would operate to prevent the TIA engaging in full and free discussion about the matter.

### 16.2.3 Other cases

*Cauvin v Philip Morris, British American Tobacco and Imperial Tobacco*


*Tobacco Control Coalition Inc v Philip Morris, WD & HO Wills and Rothmans*


### 16.2.4 The tobacco industry as claimant

In addition to defending actions, the TIA has initiated litigation that aims to assist the tobacco industry or to reduce the capacity of those working in tobacco control. The same aggressive tactics are adopted in relation to initiation of claims as are used in the defence of claims. Two cases illustrate this process.

#### 16.2.4.1 Tobacco Institute of Australia v National Health & Medical Research Council

In 1986, the National Health and Medical Research Council (NHMRC) published a report on *The Effects of Passive Smoking on Health*. In 1993, a working party was established to update the report, and the NHMRC invited public comment. The initial terms of reference for the updated report were:

1. To review the epidemiological evidence linking passive smoking with disease in adults and children.
2. To assess the burden of illness due to passive smoking in Australia.

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5 Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd (1991) ATPR 41-079 para [313].
6 Ibid at [322].
7 Ibid at [413].
8 Ibid at [456].
9 Ibid at [461] – [462].
3. To make recommendations to reduce the burden of illness.

The TIA objected to the terms of reference on the basis that they assumed that passive smoking did cause disease. The TIA contended that such a link had not been found definitively to exist. After initial negotiations broke down, the TIA commenced proceedings in the Federal Court. Those proceedings were subsequently settled, with both parties agreeing to amended terms of reference. The amended terms of reference were:

1. To review the relevant scientific evidence linking passive smoking to disease in adults and children.
2. To estimate the extent and impact of any illness found likely to be due to passive smoking in Australia.
3. To make recommendations to reduce any illness found likely to be due to passive smoking in Australia.

In subsequent correspondence, the NHMRC informed the TIA that ‘the working party will consider in the review all relevant scientific evidence, including all relevant scientific evidence submitted’ to the NHMRC by the TIA.

After the NHMRC published its draft report, the TIA brought proceedings in the Federal Court, alleging that the NHMRC, when writing the report, only considered papers published in the peer-reviewed scientific press. The NHMRC did not deny the allegation. The TIA argued that, as a result of this decision, the NHMRC had failed to comply with its statutory obligations, and failed to meet the promises made in the correspondence discussed above. This meant that the NHMRC had failed to accord procedural fairness to the TIA and the report did not comply with the requirements imposed by the Parliament.

Justice Finn noted that the legislation that created the NHMRC required the NHMRC, when preparing draft reports, to have ‘regard to any submissions received.’ On this basis, his Honour found that the NHMRC had a statutory obligation to ‘positively consider’ the submissions made by the TIA. This obligation was supplemented by a common law obligation, which arose from the promise made by the NHMRC to consider all evidence submitted by the TIA.

The duty to provide ‘positive consideration’ precluded the adoption of an a priori criterion which excluded parts of the TIA’s submission from actual consideration. Instead, ‘positive consideration’ involved an active intellectual process directed at the submission. The practical effect of this was that the NHMRC ‘at least collectively, should have been fully aware of the actual contents of all or virtually all submissions received’. Although those assisting the working party had actually reviewed and summarised the TIA’s submissions and attachments, this was insufficient. The decision to exclude from consideration papers that were not published in peer-reviewed scientific press breached this obligation. On this basis, Justice Finn held that the NHMRC did not give genuine consideration to the TIA’s materials, and had therefore denied the TIA procedural fairness. The recommendations made by the working party had to be withdrawn.

16.2.4.2

Tobacco Institute of Australia v Woodward

A second example of legal action commenced by the TIA occurred following the Full Court’s decision in the case between the Australian Federation of Consumer Organisations (AFCO) and the TIA (discussed above). This case mirrored the original because here the TIA sought injunctions to prevent a director of the Cancer Council of New South Wales from making public statements about the Court’s decision.

After the Full Court handed down its decision, the defendant (who was also Executive Director of Action on Smoking and Health), held a press conference and gave radio interviews. During these interviews, the defendant

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12 Ibid at 17.
15 Ibid at 13–14.
made a series of statements related to the link between smoking and disease. The statements related to whether the Full Court had overturned Justice Morling's findings in relation to the link between smoking and disease. The basis of the claim was the same as that in the original proceedings; the TIA asked the Court to find that the statements were misleading and deceptive and therefore contrary to the New South Wales *Fair Trading Act* (the state equivalent to the *Trade Practices Act*).

The Supreme Court of New South Wales refused to hear the application, on the basis that the defendant's statements did not take place 'in trade or commerce', but rather as Executive Director of ASH. The claim was therefore dismissed as the Act only applied to conduct engaged in 'trade or commerce'.

### 16.2.5 Litigation funding

As should now be clear, tobacco litigation requires pleadings that survive rigorous challenges by the tobacco industry. This in turn requires rigorous investigation of relevant facts before the statement of claim is filed, because plaintiffs cannot expect to use the discovery process to fill gaps in their factual understanding. The investigation and drafting process is likely to be very expensive, as is the court hearing itself. One possible source of funding might be litigation funders, who finance a plaintiff's claim in return for a share in the damages that are awarded if the claim is successful.

Litigation funding is a relatively new process in Australia, and has only recently been considered by the High Court. The consideration occurred in the case of *Campbells Cash and Carry v Fostif*.16

The circumstances surrounding the consideration involved tobacco retailers seeking compensation from tobacco wholesalers for non-return of payments they had made relating to excise taxes that were subsequently declared invalid by the High Court. After the decision in *Roxborough v Rothmans of Pall Mall Australia*,17 which held that retailers were entitled to reimbursement, tobacco wholesalers settled claims made by large retailers. However, claims made by small tobacco retailers were vigorously opposed. The average amount owed to each small retailer was approximately $1000. In such circumstances, the benefits of pursuing a claim were insufficient to outweigh the potential costs. A company called Firmstones wrote to tobacco retailers asking for authority to act on their behalf in recovering the amounts owed. In return for one third of any money received by the retailers, Firmstones would fund and direct the litigation.

The High Court was asked to decide whether, because the funding came from litigation funders, the proceedings were contrary to public policy. The High Court held that litigation funding was not clearly contrary to public policy,18 and that it was to be welcomed as a means by which access to the courts could be facilitated.19

Litigation funding has become an increasingly important way of facilitating litigation that would otherwise not be brought because of its cost. However, a recent decision by the Full Federal Court found that class action funding and retainer arrangements may constitute a managed investment scheme and require registration pursuant to section 601ED of the *Corporations Act 2001* (Cth).20 The effect of this decision on the availability of litigation funding is not yet known.

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18 (2006) 80 ALJR 1441; [2006] HCA 41 per Gleeson CJ at [1]; Gummow, Hayne and Crennan JJ at [92]; Kirby J at [146].
19 Ibid per Gummow, Hayne and Crennan JJ at [65]; Kirby J at [144].
20 *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147.
16.3

Litigation relating to injury from exposure to secondhand smoke

In the 1980s and 1990s, a substantial number of individuals brought legal claims against employers and hospitality venue operators in Australia after suffering harm from exposure to secondhand tobacco smoke. This increase in litigation relating to exposure to secondhand smoke coincided with mounting scientific evidence of a causal connection between ill health and exposure to secondhand smoke, and growing public awareness of the dangers. The historical development of scientific understanding of the effects of exposure to secondhand smoke has been discussed in Chapter 4.

During the same period, many employers began voluntarily to impose smoking bans in workplaces. More recently, States and Territories have enacted laws that ban smoking in most enclosed workplaces as well as some un-enclosed public places. However, the advent of legislative smoking bans in enclosed workplaces and in some public places does not alter the potential liability of employers and occupiers under the heads of law discussed in this Part. If premises are not subject to a statutory ban on smoking, this does not diminish the legal responsibility of employers and occupiers to ensure workers and members of the public are not subjected to risks to their health and safety, for example from exposure to secondhand smoke.

Cases relating to exposure to secondhand smoke may be brought on several alternative legal grounds. Depending on the circumstances of the case, claims may be based on common law negligence, occupational health and safety law, occupiers’ liability law, contract law or anti-discrimination law. Under statutory compensation schemes, workers may also be entitled to compensation assessed on a no-fault basis. These types of claims are explained in more detail below, together with some examples of successful claims brought by individuals harmed by exposure to secondhand smoke at work or at a public venue. (A more comprehensive list of secondhand smoke exposure cases in Australia, which includes brief details of the claims and their outcomes, if known, is provided in Attachment 16.2.)

16.3.1

Common law negligence:

The common law of negligence relies on the concept of a duty of care, which a defendant may owe either to a particular plaintiff or to a class of plaintiffs. In a personal injury case, the plaintiff may establish a breach of the duty of care by proving that the manner in which a risk of injury eventuated had been reasonably foreseeable, and that the defendant did not act as a reasonable person would have in the circumstances. The plaintiff must also establish that his or her injury was caused by the defendant’s breach of duty.

The categories of relationship that give rise to a common law duty of care include the employer/employee relationship and the relationship between an occupier of premises and an entrant to those premises. Employees and members of the public who are injured by exposure to secondhand smoke may therefore be entitled to sue the relevant employer or occupier, respectively, for common law damages in negligence.

As noted previously, between 2002 and 2004 the Commonwealth, State and Territory governments introduced statutory limits on liability and the quantum of damages available in a negligence action for personal injury. In New South Wales, Queensland, Tasmania, Victoria and Western Australia, special exceptions to these limits were

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1 See Chapter 15 for further information about smokefree laws.
2 The common law is a body of law made up of accepted legal principles that arise out of actual cases. It can be described as ‘judge made’ law, as it evolves through the judgments of the Courts, unlike statute law, which is found in the legislation made by Parliament.
3 See: Civil Liability Act 2002 (WA); Wrongs Act 1958 (Vic); Civil Liability Act 2002 (NSW); Civil Liability Act 2001 (Qld); Civil Liability Act 2002 (Tas); Civil Liability Act 1936 (SA); Civil Law (Wrongs) Act 2002 (ACT); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Trade Practices Act 1974 (Cwlth).
enacted in respect of claims for injuries resulting from smoking or other use of tobacco products. The exceptions enacted in Victoria and Queensland specifically covered claims for injuries resulting from exposure to secondhand tobacco smoke.

In many jurisdictions the duties of employers and occupiers include both common law duties and statutory duties. In secondhand smoke cases, claims for common law negligence may therefore be brought simultaneously with claims based on other legal grounds. An example is provided by the case of Sharp v Stephen Guinery t/as Port Kembla Hotel and Port Kembla RSL Club. In that case, in 2001, a jury in the Supreme Court of New South Wales decided in favour of a plaintiff who had brought a claim against her employer based on common law negligence and breach of an employer’s statutory duty. The plaintiff had worked as a bartender at the Port Kembla RSL between 1984 and 1995 and at the Port Kembla Hotel from 1973 to 1984. In 1995, the plaintiff discovered a lump on the side of her neck, and was diagnosed with cancer of the mouth, throat and neck. The plaintiff claimed that her cancer had been caused by exposure to secondhand smoke during the course of her employment at the Port Kembla RSL and the Port Kembla Hotel. The Port Kembla Hotel settled the plaintiff’s claim against it out of court, for $160,000. The claim against the Port Kembla RSL proceeded to trial before a jury in the Supreme Court of New South Wales.

The jury in this case found that the employer’s negligence had either caused or materially contributed to the plaintiff’s cancer. This finding was based on a series of conclusions reached by the jury. On the balance of probabilities, the jury found that (i) on the information available to the Port Kembla RSL at relevant times, it had been reasonably foreseeable that the plaintiff would suffer physical injury; (ii) there had been a reasonably practicable means of eliminating the risk; (iii) in failing to ban smoking totally or partially or to constantly operate exhaust fans, the employer had by its conduct caused or materially contributed to the plaintiff’s injury; and (iv) the employer had not acted reasonably.

The jury awarded the plaintiff a total of $466,048 in damages, less the amount she had already received from the earlier settlement with the Port Kembla Hotel. The damages were awarded as damages for pain, suffering and loss of enjoyment of life, and past and future medical expenses, domestic assistance and loss of earnings.

16.3.2 Protection for workers—occupational health and safety law and negligence

Each of the States and Territories has passed legislation to protect workers against workplace injuries and diseases. These laws impose certain duties on employers to ensure that the workplace environment is safe and without risks to health. For example, in Victoria the Occupational Health and Safety Act 2004 provides in section 21(1) that:

‘[a]n employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.’

Failure to comply with this provision constitutes an indictable offence punishable by a maximum fine of 9000 penalty units if the employer is a corporation.9

Occupational health and safety legislation may also require employers to take steps to keep third parties safe from injury. For example, section 23(1) of the Victorian Occupational Health and Safety Act 2004 provides that:

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4 A plaintiff’s legal rights are frequently based on a number of different statutory provisions and common law principles. A plaintiff’s statement of claim normally sets out all the legal grounds on which the plaintiff is entitled to pursue the claim, and each of these is normally considered by the court.
5 Bowles v Canton Pty Ltd (Unreported, 13 September 2003, Magistrates Court of Victoria) and Scholem v NSW Department of Health (1992) 3 APLR 45, NSW District Court, 27 May 1992.
6 Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club, Supreme Court of NSW, Case no. 20956 of 1996.
8 An indictable offence is generally of a more serious nature than a summary offence, and triable before a jury. In Victoria, however, some indictable offences, including this one, may in certain circumstances be heard and determined summarily in the Magistrates’ Court, under the Criminal Procedure Act 2009 (Vic), s. 28.
9 For the 2010/2011 financial year, one penalty unit equates to $119.45. Therefore, offenders may face a maximum fine of $1,075,050 for corporations and $215,010 for a natural person.

The State Treasurer revises the value of a statutory penalty unit annually.
‘[a]n employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.’

Even if smoking is not permitted in an enclosed workplace, if smoking is permitted near an entrance, or somewhere from which smoke can drift inside, an employer should consider how this may impact on employees and third parties exposed to secondhand smoke as a consequence, and whether or not its statutory duties are being met. Occupational health and safety legislation in all of the States and Territories, and Commonwealth legislation applying to employers that are Commonwealth agencies, requires employers to provide a means of entering and leaving the workplace that is safe and without risks to health, and provides for the protection of third parties as well as employees. For example, Commonwealth legislation requires Commonwealth employers to:

‘provide and maintain a means of access to, and egress from, the workplace that is safe for the employees and without risk to their health,’

and to

‘take all reasonably practicable steps to ensure that persons at or near a workplace under the employer’s control who are not the employer’s employees or contractors are not exposed to risk to their health or safety arising from the conduct of the employer’s undertaking.’

Comcare has therefore warned employers that they may be in breach of the legislation if they permit employees to smoke near entrances to buildings.

Employees who are injured or who contract a disease because of an employer’s breach of a statutory duty may be entitled to claim damages against the employer. If an employee is injured or contracts a disease because of an employer’s failure to take reasonable steps for the employee’s safety, the employee may also have the right to sue for damages in negligence.

One of the first cases in the world in which an employee successfully sued an employer in relation to lung cancer caused by secondhand smoke in the workplace was the 1988 case of Carroll v Melbourne Metropolitan Transit. The plaintiff, Sean Carroll, was a bus driver who claimed to have developed lung cancer from inhaling tobacco smoke at work. The claim resulted in an out-of-court settlement, in which the Defendant agreed to pay the plaintiff $65,000.

In 1992, another workplace claim resulted in a New South Wales District Court jury awarding an employee $85,000 in damages for common law negligence and breach of the New South Wales legislation on occupational health and safety. In Scholem v NSW Department of Health, the plaintiff had worked as a psychologist at a community health centre from 1974 to 1986, where she had been exposed to secondhand smoke, until the introduction of a smokefree workplace policy in 1984 put an end to smoking by colleagues and patients inside the health centre. This exposure had exacerbated the plaintiff’s asthma, which had formerly been entirely reversible by bronchodilators, but eventually became irreversible, causing the plaintiff considerable disability. The damages awarded by the jury exceeded the amount that the Government Insurance Office had offered in settlement prior to the hearing, which was $60,000. The Court also awarded the plaintiff costs against the Department of Health.
An employee’s ability to pursue damages against an employer may be limited by State or Territory legislation governing entitlements such as sick leave, social security payments or workers’ compensation benefits. These types of benefits are payable in respect of work-related injuries or diseases without the need to establish that an employer has committed a breach of statutory or common law duty. The payments are funded by employers’ mandatory contributions to statutory insurance schemes. The law in this area is complex and differs between jurisdictions. Broadly speaking, however, recovery of both damages and statutory compensation is unlikely. If damages, which are awarded as a lump sum, have been recovered at common law, this generally results in the cessation of statutory workers’ compensation benefits and repayment of benefits already received.

16.3.3 Occupiers’ liability

Occupiers’ liability is an area of the law governed by both legislation and the common law in the Australian Capital Territory, South Australia, Victoria and Western Australia, and by the common law in other Australian jurisdictions. Occupiers’ liability is the liability of an occupier to compensate persons injured on premises because of the premises’ dangerous condition. The common law defines an ‘occupier’ as a person who has a degree of control over premises, such that he or she can prevent injury to entrants, while the South Australian and Western Australian legislation defines occupation in terms of being in control or having control of premises.

An occupier owes a duty of care to all entrants, in respect of the condition of premises and in respect of operations or activities carried out in premises. It is a duty to take such care as is reasonable in the circumstances for the entrant’s safety and to protect entrants from risks of injury that can be foreseen and avoided.

An action based on occupiers’ liability was brought in the case of Bowles v Canton Pty Ltd by a restaurant patron who suffered an asthma attack triggered by her exposure to secondhand smoke in the restaurant. The plaintiff subsequently became ill and had to miss a week of work. Her symptoms did not fully subside for more than six weeks.

The plaintiff’s claim set out three causes of action. They included breach of contract, discussed below, and breach of an occupier’s duty of care under the common law and under section 14B(3) of the Wrongs Act 1958 (Vic), which provides:

‘An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.’

The magistrate hearing the case found that the plaintiff’s injury had been consequent upon the condition of the premises, and that it had been foreseeable to someone in the position of the restaurant manager that there was a class of persons to whom secondhand smoke represented a threat to health. The magistrate held that the restaurant had not observed the required standard of care expected of a reasonable person in its position, and had

19 The relevant workers’ compensation legislation for each jurisdiction (not including legislation that has been repealed but which may still be of relevance to some injuries and diseases arising in the past) is: Safety, Rehabilitation and Compensation Act 1988 (Cwlth), Workers’ Compensation Act 1951 (ACT), Workers Compensation Act 1987 (NSW), Workplace Injury Management and Workers Compensation Act 1998, (NSW), Work Health Act 1986 (NT), Workers’ Compensation and Rehabilitation Act 2003 (Qld), Workers Rehabilitation and Compensation Act 1986 (SA), Workers’ Rehabilitation and Compensation Act 1988 (Tas), Workers Compensation Act 1958 (Vic), Accident Compensation Act 1983 (Vic), Workers’ Compensation and Injury Management Act 1981 (WA).
20 See generally CCH Australia, Australian Workers Compensation Commentary, 2006, 1-040 to 1-140.
21 CCH Australia, Australian Workers Compensation Commentary, 2006, 1-060 and 14-000 to 14-240.
22 Civil Law (Wrongs) Act 2002 (ACT).
23 Civil Liability Act 1936 (SA).
24 Wrongs Act 1958 (Vic).
26 Civil Liability Act 1936 (SA), s. 19 and Occupiers’ Liability Act 1985 (WA), s. 2.
27 See, e.g., Wrongs Act 1958 (Vic), s. 14B(1) and s. 14B(4).
28 Bowles v Canton Pty Ltd (Unreported, 13 September 2003, Magistrates Court of Victoria).
therefore breached its duty of care to the plaintiff both under statutory occupiers’ liability law, and in common law negligence.

In making this finding, the magistrate took into account the inadequate measures that the restaurant had taken to segregate the non-smoking seating area from the smoking area, and the failure of the restaurant to cater for the plaintiff’s particular need not to be exposed to tobacco smoke. When booking the plaintiff’s table, a member of the plaintiff’s party had stipulated that the table should be in the non-smoking area of the restaurant. When inside the restaurant, the plaintiff’s husband had asked for the party to be moved further away from the smoking section. Instead, the restaurant had briefly turned on the air conditioning, which had improved the air, but soon afterwards the air conditioning had been turned off again and the air had become smoky again. The magistrate identified several measures that the restaurant ought to have taken to prevent the harm suffered by the plaintiff, such as segregating the smoking and non-smoking areas of the restaurant more effectively and not seating the plaintiff at a table that was immediately adjacent to at least two smoking tables, even though her particular vulnerability had been communicated to the restaurant.

The plaintiff was awarded $10,000 in damages for pain and suffering, $541 for loss of amenity and $325 in respect of medical and like expenses, as well as the costs of the case. However, the magistrate reduced the plaintiff’s damages by 30% on finding that the plaintiff had been contributorily negligent. The magistrate considered that, after it had become evident that the restaurant manager was unwilling to address the situation, the plaintiff should have been more mindful of her own safety and would have exercised reasonable prudence by leaving the restaurant.

16.3.4

Breach of contract

In the case of Bowles v Canton Pty Ltd, discussed above, the plaintiff also claimed that the restaurant had acted in breach of contract. The plaintiff had made an advance booking for a dining table in the non-smoking section of the restaurant. The magistrate found that it had been an express condition of the contract between the plaintiff and the restaurant that the plaintiff be seated in a non-smoking area. The magistrate also found that there had been additional implied conditions in the contract, with which the occupier had not complied. They were that the premises would be safe for occupation by the plaintiff and not injurious to her health, and that the restaurant would take all reasonable and proper steps to ensure that any exposure to smoke in the non-smoking area was kept to a safe and not discomforting level.

16.3.5

Disability discrimination

Employers or occupiers who fail to take steps to reduce or eliminate secondhand smoke from their premises may also commit a breach of State, Territory or Commonwealth anti-discrimination legislation. In the case of Francey & Ors v Hilton Hotels of Australia Pty Ltd, which was brought under Commonwealth law, the Court held, and the defendant did not dispute, that asthma constituted a disability under the Disability Discrimination Act 1992 (Cth). Under the Act, a person must not be discriminated against on the basis of a disability in the provision of access to premises, or goods and services, or in making facilities available.

The plaintiff, who was an asthma sufferer, had been forced to leave a nightclub after being exposed to secondhand tobacco smoke there. While at the nightclub, the plaintiff had started to wheeze, to struggle to breathe and to feel pain and discomfort. The plaintiff had complained to the staff, but had been reminded that it was the nightclub's...
policy to allow smoking. After leaving, the plaintiff measured her lung function and found that it had decreased. She continued to feel unwell the following day.

The plaintiff’s claim was brought under the *Disability Discrimination Act 1992 (Cth)*, which provides in section 6 that:

‘a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition: (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and (b) which is not reasonable having regard to the circumstances of the case; and (c) with which the aggrieved person does not or is not able to comply.’

The Human Rights and Equal Opportunity Commission had to determine whether, by permitting smoking in the nightclub, the nightclub’s operators could be said to have required the plaintiff to comply with a requirement or condition. The Commission concluded that anyone attending the nightclub had had to endure exposure to secondhand smoke, as an implicit condition of their attendance there. The Commission said that it made ‘a nonsense of the Act’ to argue that ‘a condition was not imposed when a choice not to use the service was available to the complainant’.

The Commission also considered whether this condition had been reasonable, having regard to the circumstances of the case. The Commission acknowledged that one of the main purposes of the Act was to prevent people with disabilities from being excluded. Evidence had been submitted that 10% of the population had asthma. After taking into account the objects of the Act and all the circumstances of the case, the Commission ruled that it was not reasonable to create a barrier to entry for asthma sufferers, by requiring them to breathe secondhand smoke.

Section 23(b) of the Act makes it unlawful for a person to discriminate against another person on the ground of the other person’s disability in the terms or conditions on which the other person is allowed access to, or the use of, certain public premises. Sections 24(b) and (c) similarly make it unlawful to discriminate on the grounds of disability with respect to the provision of goods, services or facilities. Discrimination on the ground of disability is not unlawful, however, if making alterations to premises to provide access, or providing goods or services, would impose unjustifiable hardship on the person who would have to provide that access or those goods or services.

Section 11 of the Act describes the factors to be taken into account in determining what constitutes unjustifiable hardship. They include the financial circumstances of the person claiming unjustifiable hardship.

In *Francey*, the Commission weighed up a wide range of factors, and concluded that a finding that the respondent’s conduct unlawfully discriminated against the complainants would not cause unjustifiable hardship. The Commission remarked that ‘[t]he capacity for all Australians, with or without a disability, to participate as far as possible in all aspects of community life must be the paramount consideration.’

The Commission also found that Hilton Hotels of Australia had unlawfully discriminated against the plaintiff’s companion at the nightclub, because sections 23 and 24 of the Act also make it unlawful to discriminate against a person on the ground of the disability of any of that person’s associates. By way of compensation, the Commission awarded damages of $2000 to the plaintiff and $500 to the plaintiff’s companion.

### Conclusions

In addition to the cases described here, many more secondhand smoke cases have been settled out of court, often for an undisclosed amount, in cases where the parties or their insurers have preferred to avoid the cost and publicity associated with a court hearing, as well as the risk of being ordered to pay a substantial amount in damages.
Cases such as those described here, in which employers and occupiers have been held liable by a court for the consequences of exposing an individual to secondhand smoke, have helped to highlight to the wider community the health risks of exposure to secondhand smoke, and have almost certainly contributed to the adoption by many employers of smokefree workplace policies. Secondhand smoke litigation may also have influenced policy makers in embracing the need to adopt legislative bans on smoking in the workplace and in public places. However, certain industries, such as the hospitality industry, have resisted going smoke-free while this has not been an express legal requirement, with the result that cases have continued to emerge in which staff exposed to secondhand smoke at work have developed serious illnesses. \(^{37}\)

\(^{37}\) See e.g. report by the SmokeFree Australia coalition for clean safe workplaces concerning the 2005 case of a South Australian bar worker who won an award for compensation after he developed tongue cancer, having worked in a smoky pub for three years: [http://www.ashaust.org.au/SF/03/releases/051121.htm](http://www.ashaust.org.au/SF/03/releases/051121.htm), visited 5 February 2007.
McCabe v British American Tobacco and its aftermath

The best known tobacco litigation case in Australia is the McCabe v British American Tobacco case, which has generated significant national and international interest. The McCabe case has led to various investigations into the behaviour of BAT and its lawyers in Victoria and New South Wales and to important legislative change in Victoria, and its revelations have been important in litigation in the US. The various developments are summarised below.

Brief summary of the McCabe case

In late 2001, Rolah McCabe commenced a case against British American Tobacco Australia in the Supreme Court of Victoria. McCabe was a 51-year-old woman dying of lung cancer. She had started smoking in the early 1960s at the age of 12. McCabe sued BAT arguing that it had been negligent in its manufacturing and marketing of cigarettes, and that its negligence had caused her lung cancer. She sought damages. McCabe argued that BAT knew that cigarettes were addictive and dangerous to health, took no reasonable steps to reduce the risk of addiction or the health risks, targeted children in its advertising, and ignored or publicly disparaged research results which indicated the health risks of smoking.

In April 2002, McCabe became the first person outside of the US to obtain a verdict against the tobacco industry in a personal injury claim, though the verdict was overturned on appeal later that year. McCabe obtained the verdict in her favour after the trial judge, Justice Geoffrey Eames, struck out BAT’s defence to the proceeding and ordered judgment for McCabe, after finding that ‘the process of discovery in this case was subverted by the defendant and its solicitor … with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful.’ Justice Eames found that this outcome could not ‘now be cured so as to permit the trial to proceed on the question of liability.’ The subversion of the process of discovery had, according to Justice Eames, involved the deliberate destruction of thousands of relevant documents to keep them from prospective plaintiffs such as McCabe; misleading the court about what had become of the missing documents; and the ongoing ‘warehousing’ of documents to keep them from the court. Justice Eames sent the case to trial before a jury solely on the issue of quantum of damages. The jury awarded McCabe $687,560 plus interest and costs.

BAT appealed against Justice Eames’ decision, and the Court of Appeal (Justices Phillips, Batt and Buchanan) unanimously allowed the appeal. In its decision, the Court of Appeal overturned a number of Justice Eames’ major findings of fact and conclusions relating to the purpose and propriety of BAT’s so-called ‘document retention policy’, preferring an ‘innocent’ explanation of the policy and the destruction of documents under the policy. The Court of Appeal also disagreed with Justice Eames about the appropriate means of intervention by courts in cases affected by the unavailability of relevant documents.

The Court of Appeal overturned the judgment that had been made in McCabe’s favour, and sent the case back to trial. McCabe died before the Court of Appeal’s decision was handed down. Her daughter sought special leave to

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2 Ibid.
3 Ibid at [385].
4 Ibid.
5 Ibid [324]. Eames J described ‘warehousing’ as the tactic of having third parties hold documents relevant to issues in the trial so that those documents would be available to be called on to rebut the plaintiff’s witnesses or to be used by the defendant’s witnesses, whilst not being required to be discovered by the defendant because they would be said to be not under its possession, custody or power.
7 Ibid at [192].
When the hold order was lifted in 1998, BAT destroyed thousands of documents. The Court of Appeal explained Justice Eames had held that BAT considered that 'further proceedings were not merely likely, but a near certainty'.

complaining that her ill health was a direct result of misconduct on the part of one tobacco company or another'.

could still be anticipated of the sort now brought by the plaintiff in this instance, litigation, that is, by a smoker in Australia was discontinued.

While the trial judge and the Court of Appeal in the McCabe case took very different views of the evidence presented, a number of facts were not in dispute. At all times between November 1990 and March 1998, litigation against BAT concerning smoking-related disease was underway in at least one Australian jurisdiction. While such litigation was underway, BAT imposed what it called 'hold orders', preventing the destruction of documents under its internal document policies.\(^8\) In March 1998, the final hold order was revoked, when the last case then underway in Australia was discontinued.\(^9\) It was not in dispute before the Court of Appeal that, at this time, 'litigation could still be anticipated of the sort now brought by the plaintiff in this instance, litigation, that is, by a smoker complaining that her ill health was a direct result of misconduct on the part of one tobacco company or another'.\(^10\) Justice Eames had held that BAT considered that 'further proceedings were not merely likely, but a near certainty'.\(^11\)

When the hold order was lifted in 1998, BAT destroyed thousands of documents. The Court of Appeal explained:\(^12\)

Perhaps the best example of what happened in March–April 1998 was the destruction of documents which had been discovered in the Cremona litigation [a previous case] … In that litigation, general discovery had been required and, as already described by reference to Mr Maher’s [a former in-house counsel at BAT] affidavit, the task of discovery for the defendant was enormous, very costly and in the end not very productive for the plaintiff … [A]n image of some 30 000 documents was placed on computer discs and, in addition, documents were indexed and in most instances summarised for easier retrieval … [T]he documents had also been rated on the scale of 1 to 5, according to how damaging each was likely to be to the defendant in any litigation, or how beneficial. All records of the summaries and rating of the documents had, however, been destroyed before the commencement of the present litigation … Not only were the documents discovered in the Cremona litigation destroyed, at least in the main, so too was the database, denying the defendant the ability to describe the documents in question.

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\(^12\) British American Tobacco Australia Services Limited v Cowell [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) at [137]


Thus, there was no dispute that in March and April of 1998:
(a) BAT destroyed thousands of documents which were, or may have been, relevant to McCabe’s proceeding, as well as records of such documents; and
(b) BAT destroyed such documents at a time when it anticipated that proceedings such as those ultimately commenced by McCabe would be brought against it.

As noted above, the primary difference between the trial judge and the Court of Appeal on factual matters related to the purpose and propriety of the document destruction.

Evidence about the purpose of document destruction that has emerged since the McCabe hearing

Since the hearing took place, evidence has emerged that supports Justice Eames’ version of events, namely that the purpose of BAT’s document retention policy was to keep incriminating documents out of court. Most prominently in Australia, Fred Gulson, a former company secretary and legal counsel of WD & HO Wills (predecessor to BAT), has come forward to tell his story about his experiences at the company in 1989–90. Gulson’s sworn allegations were first reported in *The Age* on 19 July 2003. The article by William Birnbauer, who had received a copy of Gulson’s sworn affidavit, stated:

‘A tobacco company insider has detailed for the first time how his company destroyed sensitive internal documents to cleanse files of damaging smoking and health information.’

‘Frederick Gulson, secretary and legal counsel of W.D. & H.O. Wills Ltd [predecessor to BAT] in 1989-90, was responsible for preparing the company for an expected wave of litigation.’

‘In an affidavit, which was issued to *The Age* newspaper, Mr Gulson says: ‘It was obvious to everyone ‘in the know’ what the strategy was. That is, its purpose was to get rid of all the sensitive documents but do so under the guise of an innocent housekeeping arrangement and to ensure that all relevant documents that were not destroyed or removed from the jurisdiction were properly (legally) privileged.’

‘It involved getting “rid of everything that was damaging in a way that would not rebound on the company or the BAT group as a whole’.

‘Mr Gulson said the company had many documents that were considered sensitive and could be damaging if produced in smoking and health litigation, or if they became public. They included what W.D. & H.O. Wills and the BAT group knew about addiction and the relationship between smoking and disease.’

‘The documents included reports on the companies’ use of “nicotine technology to make cigarettes more addictive and their marketing strategies, including marketing strategies directed at all age groups.”

‘Mr Gulson agreed with the findings in April last year of the former Victorian Supreme Court judge Geoffrey Eames in the case involving Rolah McCabe, a lung cancer sufferer who sued BAT for damages.’

‘Justice Eames concluded that BAT had deliberately destroyed documents so they would not have to be produced in health-related court cases, and struck out its defence.’

Gulson’s evidence became important in the large racketeering case brought by the United States Department of Justice against the US tobacco industry. He gave evidence in that case, reiterating the version of events that had been recounted in *The Age* newspaper. Extracts of the transcript of Gulson’s evidence are reproduced below:

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Q: What was the Document Retention Policy?
A: It was the official title for what was more commonly known as the 'Document Destruction Policy'. The Policy was a program to ensure that all sensitive documents, all documents that if made public or discovered in litigation could potentially damage Wills, or Wills’ affiliate companies in the BAT group, were sanitised.

Q: What do you mean by sanitised?
A: Destroyed or otherwise made undiscoverable.

Q: What was the purpose of the Document Retention Policy?
A: The purpose of the Document Retention Policy was twofold, to protect the litigation position of Wills, and to protect the litigation positions of other BAT Group companies, especially our US affiliate Brown and Williamson, by ensuring that potentially damaging documents would not be discovered from Australia.

Q: What did the written Document Retention Policy say?
A: I don’t recall the specific language of the Policy. The written document’s primary purpose was to provide cover for the actual document destruction enterprise, to ascribe an innocent housekeeping justification for the widespread destruction of sensitive documents. The Document Retention Policy wasn’t simply the written policy itself, but the corporate knowledge of how the Policy was to be applied apart from the written language. My recollection of the Document Retention Policy comes not from the written document, but how it was explained to me by Nick Cannar [then senior counsel for BATCo, the parent company], Andrew Foyle [a UK lawyer for the BAT group], Brian Wilson, a partner at Clayton Utz, and others, rather than from the document itself, since the written document was incomplete in terms of describing the actual workings and purpose of the Document Retention Policy.

Q: What do you mean by incomplete?
A: The Document Retention Policy, as written, required widespread destruction of documents, including the elimination of all scientific reports after a certain time period, but only at certain specified time periods and without regard to whether a document was helpful or harmful. The Document Retention Policy itself—and by that I mean the actual BATCo, BAT Industries, Wills Document Retention Policy, not the piece of paper—was specifically designed to destroy potentially dangerous documents: documents that could be used against the BAT Group in litigation. Because of the possibility that the written Document Retention Policy itself could be discovered, it wasn’t written that way.

Q: Other than the destruction of documents, are you aware of any other aspect of the Document Retention Policy?
A: Yes. Another important component of the Policy was routing of documents through lawyers for the purpose of ‘privileging’ the documents, that some documents should include a notation to the effect of ‘for the purpose of legal advice’ and be routed through a lawyer, so that a document which would not otherwise attract privilege would now attract privilege.

The Document Retention Policy was a contrivance designed to eliminate potentially damaging documents while claiming an innocent ‘housekeeping’ intent. While I was uncertain about whether the ruse was legal or not, I knew that it was a ruse and that made me uncomfortable. The policy didn’t pass the smell test. The whole purpose was to keep evidence out of the courts.

Q: At the time you started working at Wills did you discuss the implementation of the Document Retention Policy with anyone?
A: Yes. It was part of the initial discussion about the Document Retention Policy that I had with Nick Cannar and Andrew Foyle. When I first started, I was told by Nick Cannar that the Document Retention Policy had been implemented by the law firm of Clayton Utz, and that all
documents at Wills that were potentially damaging to the BAT Group had been destroyed or otherwise put beyond the reach of discovery.

Q: Why did you come to question the effectiveness of the implementation of the Document Retention Policy when you visited Wills Scientific Research Group?

A: During the course of this visit, I examined some of the documents in the [scientific] library. What I saw alarmed me, because it was immediately apparent that the Document Retention Policy had not been fully implemented despite assurances to the contrary.

Q: How was it apparent?

A: The research facility at Pagewood was where many of the scientific research reports prepared by our overseas affiliates, including BATCo and Brown and Williamson, as well as our own reports, were kept. Just taking a quick look at the documents, I became fairly certain that these documents included the kind of sensitive smoking and health documents that were supposed to have been destroyed under the policy, so it was clear to me that the policy had not been completely adhered to.

Q: What do you mean by sensitive?

A: That the documents would be damaging to the BAT Group if they ever had to be produced by Wills in smoking and health litigation, or if they became public.

Q: How did you know that they were sensitive?

A: I recall that even just reading the titles and skimming the documents, that the subject matter related to the sorts of topics that Nick had said had been taken care of. While I'm not a scientist, it seemed pretty clear that these documents shouldn't have survived the implementation of the Document Retention Policy.

Q: Do you recall what subjects these documents addressed?

A: I don't remember the specific documents, but they covered a broad range of smoking and health topics including addictiveness of smoking, the relationship between smoking and disease, the use of nicotine technology, among others.

Findings in the US Department of Justice case

Mr Gulson’s evidence was accepted by Judge Gladys Kessler of the US District Court in the Department of Justice’s racketeering case. Judge Kessler found that “[u]pon observation at trial, the Court found Mr Gulson’s demeanour and testimony credible. His testimony was clear, internally consistent, and not impeached. Mr Gulson had no reason to lie and demonstrated no affirmative bias against the defendants … the Court fully credits Mr Gulson’s testimony.”

On the question of document destruction by companies within the BAT Group, Judge Kessler concluded, after hearing Mr Gulson’s evidence and reviewing a large number of documents:

‘Finally, members of the BAT Group, in furtherance of the Policy’s purposes, destroyed documents, routed them from one country or BAT facility to another, erased a useful litigation database as well as the fact that the documents it contained had ever existed as soon as the pre-existing judicial hold was lifted, and constantly exhorted their many employees to avoid putting anything in writing. All these activities were taken for one overriding purpose—to prevent disclosure of evidence in litigation.’

Judge Kessler’s judgment can be viewed at http://www.tobaccolawcenter.org/documents/FinalOpinion.pdf. The relevant portions are in paragraphs 3930–3997.

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Findings in (Re Mowbray) Brambles Australia Ltd v British American Tobacco Australia Services Ltd

BAT’s document destruction policies and practices were also considered by the New South Wales Dust Diseases Tribunal in (Re Mowbray) Brambles Australia Ltd v British American Tobacco Australia Services Ltd. Brambles Australia was being sued by the widow of Mr Mowbray, who claimed that her husband’s lung cancer was caused by exposure to asbestos. Brambles argued that Mr Mowbray’s cancer was also caused by cigarettes manufactured by British American Tobacco, and cross-claimed against it for contributory negligence.

Brambles alleged that BAT had, pursuant to its Document Retention Policies, intentionally destroyed prejudicial documents, both scientific and internal, relevant to its knowledge of issues relevant in the proceedings with the purpose of placing them beyond the reach of litigants and to avoid having to give discovery or inspection of them; and falsely asserted an innocent housekeeping explanation for destruction of prejudicial documents so as to prevent adverse inferences from arising in relation to that destruction.

On 30 May 2006, Judge Curtis found:

‘I am persuaded on the present state of the evidence that BATAS in 1985 drafted or adopted the Document Retention Policy for the purpose of a fraud within the meaning of s125 of the Evidence Act. … The terms of the policy would appear to be so contrived that BATAS may secure legal sanction for the stated policy, while nevertheless selectively destroying prejudicial documents. Those terms permitted BATAS to determine that which was a “valuable business document” entirely without scrutiny or chance that it may be later held accountable to some objective measure contained within the policy. A claimant in subsequent litigation could not compare the identity or content of documents destroyed against the text of the Document Retention Policy to prove that the documents were not destroyed pursuant to the dictates of that policy. Such proof could raise an inference that the destruction of documents was selective and in aid of a forensic advantage, rather than an orderly administration of a policy instituted for the legitimate purpose of records management.

In the absence of evidence to the contrary, I infer that legal advice to the effect that destruction of documents pursuant to the terms of the policy was not contrary to law, was integral to the decision by BATAS to persist with its policy of selective destruction. That advice gave BATAS the confidence that, in the event that the terms of policy were revealed, those terms would give a potential litigant no cause for legal complaint, nor clue as to the manner in which the policy had been implemented. I find that the communications made for the purpose of obtaining that advice were communications in furtherance of the commission of a fraud within the meaning of s125.’

Disclosure of an internal Clayton Utz report into the conduct of the McCabe case

In October 2006, The Sunday Age published contents of a leaked internal inquiry by the law firm, Clayton Utz, BAT’s lawyers in the McCabe case, into the handling of the case. The Sunday Age reported that Clayton Utz had launched internal inquiries after Justice Eames’ decision had been handed down. According to the paper, the internal inquiries found that two of the firm’s partners involved in the case, Glenn Eggleton and Richard Travers, had engaged in serious professional misconduct and that Eggleton had given evidence that was ‘potentially perjurious’. Travers had, according to the internal report, written correspondence that was designed to frustrate the discovery process. The report found: ‘This occurred against the backdrop of uncontradicted evidence that Mrs McCabe had only months to live. It seems clear that it was the intention of Travers to misuse the litigation process to take advantage of that fact.’ The contents of the Clayton Utz report had never been put before a court.

The Sunday Age published only some of the contents of the Clayton Utz report. Both The Sunday Age and Australian Financial Review wished to publish further of the contents. BAT brought an action against the Fairfax media company, of which the two newspapers are part, seeking injunctions preventing further publication of the material on the ground that the documents contained confidential material in the form of legally privileged communications. Ultimately, the claim was settled, with Fairfax agreeing not to publish certain parts of the material. A similar claim for injunctions to prevent use of the documents was also brought against Slater & Gordon, law firm for the McCabe family. Slater & Gordon contested the application. The firm wanted to be able to use the documents to re-open the McCabe case on the ground that the judgment in BAT’s favour had essentially
been procured by fraud. As at the time of writing, these proceedings were still ongoing. BAT also threatened
both the McCabe family and employees of The Cancer Council Victoria with legal proceedings in relation to the
documents.

On 21 December 2006, the Victorian Attorney-General, Rob Hulls, announced that, after receiving advice from
the Victorian Government Solicitor about the contents of the Clayton Utz documents, he had decided to refer
the documents to the Victorian Director of Public Prosecutions 'so he may investigate the allegation of criminal
conduct'. Hulls also announced that he had referred the documents to the Legal Services Commissioners in
Victoria and NSW 'as they are the appropriate bodies to investigate possible misconduct by legal practitioners' and
brought the allegations to the attention of the Federal Attorney-General and state and territory Attorneys-General
in jurisdictions where Clayton Utz has offices.

The seriousness of the destruction of documents

The destruction of evidence can be a criminal offence, if done with the intention of preventing their use in court,
either under the general common law offence of attempting to pervert the course of justice or under specific
statutory provisions dealing with the destruction of evidence. Complaints were made to police by the VicHealth
Centre for Tobacco Control during 2005.

On 24 December 2006, The Sunday Age reported that both Victorian and New South Wales police had been
investigating allegations of criminal behaviour in relation to the matters that had emerged through the McCabe case.

Legislation in the aftermath of the McCabe case

In 2006, the Victorian Government enacted two pieces of legislation responding to matters that had arisen in the
McCabe case. The Crimes (Document Destruction) Act introduced new provisions into the Crimes Act relating to the
destruction of evidence that ‘is, or is reasonably likely to be, required in evidence in a legal proceeding’. While the
destruction of evidence had already been capable of amounting to the criminal offence of attempting to pervert the
course of justice, the new provisions made the law clearer and clarified its operation to corporate entities. In his
Second Reading speech, Hulls explained: ‘It is essential to the rule of law that individuals and corporations cannot
intentionally destroy documents to prevent their use in judicial proceedings with impunity.

The Evidence (Document Unavailability) Act introduced new provisions into the Evidence Act giving courts wide
powers to do justice in civil proceedings affected by the unavailability of relevant documents. Powers under the
new provisions extend to: drawing adverse inferences against a party from the unavailability of documents;
assuming facts in issue between the parties to be true in the absence of evidence to the contrary; ordering that
certain evidence not be adduced; striking out all or part of a defence or statement of claim; and reversing the
evidential burden of proof be in relation to a fact in issue. The new provisions overturn the Court of Appeal’s
ruling on the powers of courts to make orders to ameliorate injustice caused in civil proceedings by the destruction
of documents. In his Second Reading Speech, Hulls explained that the purpose of the new law was to ‘enable
the courts and the Victorian Civil and Administrative Tribunal to intervene in civil proceedings where relevant
documents are unavailable to ensure a fair outcome between parties in civil proceedings.' The importance of the

18 Crimes (Document Destruction) Act 2006 (Vic), s.254.
and+query=true%3A%28members+contains+%22HULLS%22%29+and+activity+contains+%22Second+Reading%22+and+title+contains+%22CRIMES+%28DOCUMENT+DESTRUCTION%29+BILL%22+and+hdate+hdate_3+=+=+2005+&2960a
changes lay in ‘the very basic feature of our civil justice system … that material relevant to civil justice proceedings be available to the court for the proper and fair resolution of those proceedings.’
## Australian cases on exposure to secondhand smoke in which compensation has been paid, 1986 to 2006

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<td>NSW Local Court</td>
<td>Compensation: settlement of $3500</td>
<td>Claim: Misleading conduct—smokefree areas claimed in a promotional brochure not enforced on a cruise ship</td>
</tr>
<tr>
<td>1997</td>
<td>Kolha v Coles Myer</td>
<td>Victoria</td>
<td></td>
<td></td>
<td>Compensation: settlement of $20 000</td>
<td>Claim: Damages for smoke exposure in a shopping centre</td>
</tr>
<tr>
<td>2000</td>
<td>Andrea Bowles v Tien Tien Cafe Bar</td>
<td>Victoria</td>
<td>Common law negligence</td>
<td>Melbourne Magistrates' Court, 13 September 2000</td>
<td>Compensation: more than $7600</td>
<td>Claim: Breach of contract/agreement, breach of duty of care and occupier's liability Patron sued restaurant</td>
</tr>
<tr>
<td></td>
<td>Also referred to as Bowles v Canton Pty Ltd</td>
<td></td>
<td>Occupier's liability (statutory)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>Sharp v Stephen Guinery t/as Port Kembla Hotel &amp; Port Kembla RSL Club</td>
<td>New South Wales</td>
<td>Common law negligence</td>
<td>[2001] NSWSC 336</td>
<td>Compensation: Award of $466 048, including a settlement of $166 000 against another employer defendant prior to the award</td>
<td>Claim: Laryngeal cancer. Exposed during employment Bar worker exposed to environmental tobacco smoke for three years, non-smoker, tongue cancer, partial removal of tongue, years of radiation therapy, speech therapy</td>
</tr>
<tr>
<td>2005</td>
<td>Edge v WorkCover Corporation SA</td>
<td>South Australia</td>
<td></td>
<td></td>
<td>Compensation awarded, sum undisclosed</td>
<td></td>
</tr>
</tbody>
</table>

**Sources**

The information in this table was collated from various internal memoranda at the VicHealth Centre for Tobacco Control and material published on the internet by the following organisations:

- Action on Smoking and Health Australia
- LexisNexis
- The Cancer Council New South Wales
- University of Sydney Tobacco Control Supersite
- Workcover NSW
- Workers Health Centre