

Australian court ruling against Big Tobacco

Neil Hodge
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Just months after the revelations of document shredding by accountancy firm Andersen on behalf of its now bankrupt client Enron; British American Tobacco (BAT) has come under attack for destroying documents in an Australian lawsuit launched by a dying grandmother.

In a ruling published on April 11, Justice Geoffrey Eames struck out BAT's defence against a suit for lung cancer damages because the company had destroyed documents. The jury awarded \$700,000 (\$US372,000) compensation to 51-year-old grandmother Rolah McCabe. The US Department of Justice has now asked to see evidence of the company's document destruction programme to examine whether BAT has embarked on a worldwide programme of pulping potentially embarrassing material in an attempt to influence courtroom battles with terminally ill smokers.

McCabe, who smoked BAT's *Capstan* and *Escort* brands for nearly 40 years, was diagnosed with lung cancer in 1999. She is not expected to live beyond the year. Her compensation was relatively modest because she dropped a claim for exemplary damages due to the advanced state of her illness. Her case was based on arguing that the tobacco group knew that smoking was addictive and dangerous but targeted its advertising at children nonetheless.

Justice Eames found that the world's second-largest tobacco company had systematically destroyed evidence crucial to the lung-cancer sufferer's civil suit against it. He refused to hear arguments from BAT denying liability for 51-year-old McCabe's terminal lung cancer. Instead, he found that BAT's "document retention policy"—a quaint euphemism for the destruction of sensitive material—had already ensured that McCabe would never receive a fair trial. A six-person jury then ordered BAT to pay McCabe, who has been told she will not live to see Christmas, the \$A700,000 in damages.

BAT is to appeal against the ruling. The company, which makes Lucky Strike, Kent, Dunhill and Pall Mall brands, is the subject of over 600 suits for damages outside the United States. Three previous suits for

damages filed against tobacco firms in Australia have failed. In March, Philip Morris was ordered to pay \$US150 million (£105 million) to the estate of a woman who died of lung cancer after smoking low-tar cigarettes. Last June, the company was forced to pay \$US3 billion to a terminally ill smoker after a Los Angeles jury found Philip Morris guilty on all eight of Richard Boeken's claims, including negligence, fraud, misrepresentation and selling a defective product.

The world's second largest tobacco group was forced to defend its conduct in the case at its recent annual general meeting (AGM) of shareholders in London on April 16. BAT chairman Martin Broughton claimed there was "no litigation current or pending at the time" the documents had been destroyed and reassured his investors that the Australian judge had said the ruling would not set a precedent for other cases. He boasted, "2001 was another year of growth—in profits, earnings, dividend, and brand strength."

Since listing as a "stand alone" tobacco company in 1998, BAT has had a remarkable three years. In 2001, operating profit was up by 8 percent to almost £2.8 billion. In those three years, the company has increased operating profits by 79 percent. Earnings per share last year were up 9 percent—an increase in the three years of 34 percent. Since the landmark ruling in the US in 1997 that cost the world's largest tobacco firms \$US236 billion in exchange for sharp limits on their liability in court cases, Big Tobacco has spent millions of dollars worldwide on getting its message across.

Broughton argued at BAT's AGM that the company was committed to "constructive dialogue and cooperation between governments and the legitimate tobacco industry" which created a "win-win scenario" of more profits for the tobacco companies, coupled with "gradually declining total consumption for health ministries" and "higher tax collection for finance ministries". Last year Philip Morris, the firm that makes Marlboro cigarettes, was forced to make a public apology for a report issued by its Czech Republic subsidiary. The

report claimed that smoking was good for the economy because smokers pay a lot of tax and then die early, so they lower state expenditure on health care and pensions.

Dying smokers who take court action should not expect any sympathy from Big Tobacco, which will ensure the battle is as nasty and prolonged as possible. In 1988, an American tobacco company's lawyer summed up the industry's "scorched earth" litigation strategy by borrowing the words of General George Patton. Patton famously argued during World War II that wars were won not by dying for your country, but by making "the other son of a bitch die for his". Big Tobacco lawyer J. Michael Jordan believed the same principle could be applied in court.

"The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners," Jordan explained in a confidential memo. "To paraphrase General Patton, the way we won these cases was not by spending all our money, but by making that other son of a bitch spend all of his." One tried and tested method of running up an opponent's costs is to make the standard pre-trial process of "discovery", in which parties exchange all relevant information, as complicated and time-consuming as possible.

Hundreds of legal cases have been brought against tobacco companies, mainly in the US, since the 1950s, but only a handful have managed to penetrate a firewall of legal intimidation and obfuscation before running out of money.

McCabe's experience is not unlike that of Jeffrey Wigand, a Big Tobacco whistle-blower played by Russell Crowe in the movie *The Insider*. Wigand, a research director with tobacco firm Brown & Williamson was fired for "poor communication skills" when he voiced concerns that his employer was deliberately suppressing evidence of the dangers of smoking. He then went to federal authorities, precipitating one of the largest class actions in history, which eventually led to a record US\$236 billion settlement.

As soon as the Australian judgement was announced, McCabe's lawyers, Slater & Gordon, said they had been contacted by law firms in the US, Canada and the UK, seeking copies of the Eames judgement for reference. The same day, the Australian Competition and Consumer Commission (ACCC) announced it would conduct an investigation into whether BAT had engaged in "misleading, deceptive or unconscionable conduct" by

destroying documents. Law firm Clayton Utz faces four separate investigations over Justice Eames' findings in the McCabe and BAT case, a controversy that senior lawyers are describing as "Australia's Enron". As a result of the finding by Justice Eames that Clayton Utz was involved in BAT's document destruction program to subvert Mrs McCabe's case for damages, the firm's behaviour is to be reviewed by the ACCC to see if the law firm was in breach of the Trade Practices Act as well as law institutes in two states and the Victorian government solicitor. In his judgement, Justice Eames pointed the finger squarely at Clayton Utz for helping BAT devise its discredited policy.

McCabe's success in court has also triggered a wave of calls for Australian class actions against Big Tobacco. Tobacco companies show no sign of backing down. After the ruling, BAT spokesman Scott Hailstone said the company would appeal against the Melbourne decision, insisting it had done nothing wrong by destroying its own documents.

A recent health study in the US found that smoking costs the nation more than \$US157 billion annually in extra medical care and lost productivity, or about \$US7.18 per pack of cigarettes sold, according to estimates by federal health officials. Researchers at the Centers for Disease Control and Prevention (CDC) said that the smoking-related costs of lost productivity from premature deaths were \$US81.9 billion annually from 1995 to 1999. Smoking caused additional medical expenditures of \$US75.5 billion in 1998, the agency said. Together, those numbers along with infant-related medical costs total \$US157.7 billion annually. The CDC said this amounted to about \$US3,391 per smoker per year. In the US about 46.5 million adults smoked in 1999.



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