FEDERAL COURT OF AUSTRALIA

Philip Morris (Australia) Ltd v Nixon [2000] FCA 229

PHILIP MORRIS (AUSTRALIA) LTD AND OTHERS

v MICHAEL CHRISTOPHER NIXON AND OTHERS

N 188 of 1999

SPENDER, HILL AND SACKVILLE JJ
13 MARCH 2000
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 188 OF 1999**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **PHILIP MORRIS (AUSTRALIA) LTD (ACN 004 316 901) AND PHILIP MORRIS LTD (ACN 004 694 428)**
APPLICANT FOR LEAVE TO APPEAL/FIRST APPELLANT

W D & H O WILLS HOLDINGS LTD (ACN 003 763 291) AND W D & H O WILLS (AUSTRALIA) LTD (ACN 004 069 649)
APPLICANT FOR LEAVE TO APPEAL/SECOND APPELLANT

ROTHMANS HOLDINGS LTD (ACN 002 717 160) AND ROTHMANS OF PALL MALL (AUSTRALIA) LTD (ACN 000 151 100)
APPLICANT FOR LEAVE TO APPEAL/THIRD APPELLANT

AND: **MICHAEL CHRISTOPHER NIXON, ALEX TALAY, ROBERT MILNE, VICTOR BRUCE WILLIAMS, SANDRA SHEPHERD AND GREGORY DURKIN (for themselves and as representing the persons referred to in paragraph 1 of the Statement of Claim)**
RESPONDENTS TO THE APPLICATIONS FOR LEAVE TO APPEAL/RESPONDENTS

JUDGES: **SPENDER, HILL AND SACKVILLE JJ**

DATE: **13 MARCH 2000**

PLACE: **SYDNEY**

CORRIGENDUM

Please note that the proceeding number was incorrectly shown as N 188 of 1999 and should be amended to read **N 326 of 1999**.

I certify that this is a true copy of the Corrigendum made to the Reasons for Judgment of the Court in this matter.

Associate:

Date: 27 March 2000

FEDERAL COURT OF AUSTRALIA

Philip Morris (Australia) Ltd v Nixon [2000] FCA 229

PRACTICE AND PROCEDURE – **REPRESENTATIVE PROCEEDINGS** – application for leave to appeal from interlocutory orders – primary judge dismissed application for summary dismissal and granted leave to file amended application and statement of claim – threshold requirements in s 33C(1) in Part IVA *Federal Court of Australia Act* 1974 (Cth) for representative proceedings that every applicant have a claim against every respondent – level of generality acceptable in pleading claims of group members – whether material facts pleaded established contravention of s 75B *Trade Practices Act* 1976 (Cth) – whether range of circumstances too broad to satisfy s 33C(1)(b) – whether any common questions of fact and law (s 33C(1)(C)) – pleading requirements for representative proceedings in s 33H(1)– whether pleadings afforded respondents a fair opportunity to meet the case and define the issues for litigation

Federal Court of Australia Act 1976 (Cth), Part IVA
Trade Practices Act 1974 (Cth), s 52, s 75B, s 82
Federal Court of Australia Amendment Act 1991 (Cth)
Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)
Acts Interpretation Act 1901 (Cth), s 23(b)

Nixon v Philip Morris (Australia) Ltd (1999) 165 ALR 515 disapproved
Wong v Silkfield Pty Ltd (1999) 165 ALR 373 applied
Yorke v Lucas (1985) 158 CLR 661 applied
Décor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397 applied
Symington v Hoechst Schering Agrevo Pty Ltd (1997) 78 FCR 164 cited
Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd (1993) 45 FCR 457 cited
Silkfield Pty Ltd v Wong (1998) 90 FCR 152 cited
Cameron v Qantas Airways Ltd (1993) ATPR 41-251 cited
Harrison v Lidoform Pty Ltd (Hely J, 24 November 1998, unreported) cited
Dare v Pulham (1982) 148 CLR 658 applied
Zhang v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 384 cited
Bass v Permanent Trustee Co Ltd (1999) 161 ALR 399 applied

Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, 1988

PHILIP MORRIS (AUSTRALIA) LTD AND OTHERS v
MICHAEL CHRISTOPHER NIXON AND OTHERS

N 188 of 1999

SPENDER, HILL AND SACKVILLE JJ
13 MARCH 2000
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

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AND: **MICHAEL CHRISTOPHER NIXON, ALEX TALAY, ROBERT MILNE, VICTOR BRUCE WILLIAMS, SANDRA SHEPHERD AND GREGORY DURKIN (for themselves and as representing the persons referred to in paragraph 1 of the Statement of Claim)**
RESPONDENTS TO THE APPLICATIONS FOR LEAVE TO APPEAL/RESPONDENTS

JUDGES: **SPENDER, HILL AND SACKVILLE JJ**

DATE OF ORDER: **13 MARCH 2000**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The applicants for leave to appeal be granted leave to appeal against Orders 1(b), 2, 4, 5 and 6 made by the primary Judge on 13 August 1999 and the Orders made by the primary Judge on 1 September 1999.

2. Orders 1(b), 4, 5 and 6 made on 13 August 1999 be set aside.

3. Orders 1, 2, 3, 4, 5, 7 and 8 made on 1 September 1999 be set aside.

4. In lieu of the orders made by the primary Judge the following orders and directions be made:

   (a) The Court declares that it is inappropriate that the claims of the applicants in the principal proceeding be pursued by means of a representative proceeding.

   (b) That the proceedings no longer continue under Part IVA of the *Federal Court of Australia Act.*

   (c) That each applicant in the principal proceeding presently a party to the representative proceeding file and serve on or before a date to be fixed with the legal representatives of the parties an application and statement of claim relating to that applicant's claim against the respondents in the principal proceeding or any of them.

   (d) That the applicants in the principal proceeding pay the costs of the application to date (including reserved costs) of the respondents in the principal proceeding.

5. The respondents to the application for leave to appeal pay costs of each of the applicants for leave to appeal of the motions for leave to appeal and of each appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 188 OF 1999**

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RESPONDENTS TO THE APPLICATIONS FOR LEAVE TO APPEAL/RESPONDENTS

JUDGES: **SPENDER, HILL AND SACKVILLE JJ**

DATE: **13 MARCH 2000**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

SPENDER J

1 I have had the benefit of reading in draft form the Reasons for Judgment prepared by Sackville J. I agree with those Reasons and, in general, with the orders that his Honour proposes, save that I would not grant leave to file a Further Amended Application and a Further Amended Statement of Claim in the proceedings, as representative proceedings.

2 The current pleadings are fundamentally flawed. Should leave to replead be granted? I think that before leave to replead as representative proceedings be granted, there should be some basis for believing that a repleading will comply with Part IVA of the *Federal Court of*

Australia Act 1976 ("the Act") and the rules of pleading. In my opinion, there is no such basis. I will hereafter refer to the applicants in the principal proceeding as "the applicants", and the respondents in the principal proceeding as "the respondents".

3 While there are three sets of respondents, there are six named companies. In order to satisfy the requirements imposed by s 33C(1) of the Act, described by the High Court in *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373 at 381 as "threshold requirements", the applicants accept, amongst other things, that their pleading has to allege facts that would establish that each applicant and each member of the represented class has a claim against every respondent.

4 The "*Broad Canvas*" case that the applicants wish to allege is one that relies on "collective conduct" of all respondents as being a cause of each applicant and class member failing to cease smoking after 1 October 1974. While the term "collective conduct" is disarmingly seductive, on analysis, in the context of causation, it has to involve one of two assertions: either every piece of persuasion, every lobbying effort and every statement was part of a single campaign to which each of the six respondent companies was a party, and moreover, that campaign was causative of each class member's loss or damage; or alternatively those particular parts of the claimed "collective conduct" which influenced any particular applicant or group member (while the conduct of only one or more of the respondent companies) was conduct for which each of the other respondent companies shared causal responsibility, because, for example, those companies were parties to a giant joint plan with the other companies, or aided or abetted or were knowingly concerned in the conduct of that company or those companies which was or were engaged, as principal or principals, in the particular influencing conduct.

5 As to the first alternative, it simply cannot be that all of the conduct of all of the respondents (since either 1960 or 1974) was a cause of each applicant and group member's failure to cease smoking: such a case is so manifestly untenable as to fall within O 20 r 2 and O 11 r 16 of the Federal Court Rules.

6 As to the second alternative, being the assertion that some part of the alleged campaign of deceit and misinformation, in which each of the respondents is said to have been involved, had a causal effect on the decision by each applicant and group member to fail to cease

smoking after 1 October 1974, the questions posed by Sackville J in paragraph 135 of his Reasons (while asked in a difficult context) are highly material on whether leave to replead a representative proceedings should be granted. There, his Honour asks:

> *"Would it be possible to particularise such a case in a manner that makes it clear how class members are said to have been influenced by advertisements or public statements they may never have seen? Is it feasible to contemplate continuing representative proceedings when the smoking history of and factors influencing members of the represented class are likely to vary so substantially?"*

7 Such a case as that for which the applicants contend would require a detailed examination of every instance of advertising, promotion, lobbying and other public statement by each respondent over four decades. Once it be accepted that the case is founded on a causal connection with some part of the conduct of some of the respondents (albeit said to be part of a "collective" campaign) it would be necessary to consider the separate circumstances of each of the thousands of claims, claims which would involve different parts of the conduct of the various respondents. Such a case, in my view, would not satisfy the requirement that the claims of each of the applicants and class members arise out of "similar or related" circumstances. Disparate claims of deception caused by different statements are not properly to be described as arising out of the same, similar or related circumstances, in my opinion.

8 Multiple respondents seriously compound the difficulties, but even in a case without that complication (of which this is not one), in my view the proceeding would not satisfy the requirement of s 33C(1) of the Act. To take an hypothetical example: suppose one company, Widget Retailing Ltd ("Widget") had distributed its goods by road throughout Australia over four decades. Suppose further that various individual members of the public were injured by the negligent driving of different employees of Widget, as follows: A in Melbourne in 1960; B in Townsville in 1974; C in Sydney in 1984; and … Z in Perth in 1996. Claims for damages by each injured individual against Widget, in my opinion, would not properly be described as claims arising out of the same, similar or related circumstances. This is so, even if it be the position that on each occasion the negligence consisted of, say, driving at an excessive speed. In my opinion, a representative proceeding against Widget could not properly be brought under Part IVA of the Act, on those assumed facts. The ALRC reports (which led to the introduction Part IVA) do not suggest that it was intended that such

disparate claims could properly be brought in representative proceedings.

9 Closer to the present case, if each of A, B, C …and Z had suffered loss or damage in reliance on a particular deceptive advertisement by Widget at the times and places posed, with the advertisements in each case being different (including, for instance, advertising different products), but each one being part of Widget's campaign over the years to persuade people to buy its products, again the claims, in my opinion, would not arise out of "the same, similar or related circumstances", within the proper meaning of those words in s 33C(1)(b) of the Act.

10 Having regard to the numerous opportunities that the applicants have had to plead a representative case, and the formidable difficulties that attend any attempt to plead the case foreshadowed by the applicants as that which they wish to make, I would order that the present proceedings not continue as representative proceedings. Each of the applicants should be permitted the opportunity to replead: s 33P of the Act. Some of the applicants have died since the filing of the application and I think it right that the actions of all six applicants be permitted to continue (if that is possible), although not as representative proceedings.

11 If those supporting the various attempts to bring representative proceedings against the present respondents are minded to make yet a further attempt to formulate a claim which satisfies the requirements of Part IVA of the Act and the rules of pleading, in my opinion they should commence fresh proceedings.

12 For the above reasons, I would order:

1. The applicants for leave to appeal be granted leave to appeal against Orders 1(b), 2, 4, 5 and 6 made by the primary Judge on 13 August 1999 and the Orders made by the primary Judge on 1 September 1999.
2. Orders 1(b), 4, 5 and 6 made on 13 August 1999 be set aside.
3. The orders made on 1 September 1999 be set aside.
4. In lieu of the orders made by the primary Judge the following orders and directions be made:
    (a) The Court declares that it is inappropriate that the claims of the applicants in the principal proceeding be pursued by means of a representative proceeding.
    (b) That the proceedings no longer continue under Part IVA of the *Federal Court*

of Australia Act.

(c) That each applicant in the principal proceeding presently a party to the representative proceedings file and serve on or before a date to be fixed with the legal representatives of the parties an application and statement of claim relating to that applicant's claim against the respondents in the principal proceeding or any of them.

(d) That the applicants in the principal proceeding pay the costs of the application to date (including reserved costs) of the respondents in the principal proceeding.

5. The respondents to the application for leave to appeal pay costs of each of the applicants for leave to appeal of the motions for leave to appeal and of each appeal.

I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 13 March 2000

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 188 OF 1999**

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JUDGES: **SPENDER, HILL AND SACKVILLE JJ**

DATE: **13 MARCH 2000**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

HILL J

13 I too have had the benefit of reading in draft form the Reasons for Judgment prepared by Sackville J and agree with his Honour that the statement of claim in the amended form it took when the matter was before the learned primary Judge and in the form to which the learned primary Judge suggested it be amended should be struck out, for the reasons which Sackville J has advanced.

14 The question whether the respondents to the present application for leave to appeal, the applicants in the proceedings (they are herein, unless otherwise indicated, referred to as "the

applicants"), should be given leave to replead is a difficult one. Because there is the possibility that, once the application is stuck out and the suspension of the limitation period is lifted, there could be persons who fail to learn that the proceedings are at an end and who thereby might be prejudiced by their claim becoming statute barred, I have given anxious consideration to the question. This anxiety is compounded by the fact that potential applicants may die before proceedings are commenced either as individual proceedings or as representative proceedings.

15 However, there are a number of competing considerations which lead me to the conclusion that the interests of justice require that there be no liberty to replead the application as a representative proceeding, but rather that the present applicants should continue their applications as individual, rather than representative proceedings.

16 First, this is not the first, second, or even the third, fourth or fifth attempt to formulate a pleading which would not merely set out the case which the applicants for leave to appeal, the respondents to the proceedings (they are herein referred to as "the respondents"), are required to meet, but also would comply with the requirements for the bringing of representative pleadings. There have been many more attempts, including changes in the pleadings made orally during the course of the proceedings before the learned primary judge. What is more, when inconsistencies, ambiguities and legal difficulties were, during the course of the appeal pointed out to senior counsel for the applicants as arising from the pleadings at issue in the appeal, several attempts were made to suggest improvements to the pleadings which were themselves likewise fraught with inconsistencies, ambiguities and legal difficulties. Indeed when the suggestion was made that counsel formulate at least an outline of the case which it was sought to plead it was made clear that even this request, falling short of a request for a final formal pleading could not be complied with.

17 Secondly, it is impossible to conceive how a case could be pleaded, consistent with instructions, which would allege that each and every applicant class member suffered loss or damage as a result of misleading and/or deceptive conduct of every respondent as principal, or as a result of negligence on the part of every respondent as principal. For example, it could hardly be suggested that each and every applicant class member could conceivably have been caused to commence to smoke, encouraged to continue smoking or deterred from giving up smoking one brand of cigarettes manufactured by one of the respondents because

of advertising by another respondent of that company's cigarettes. I share the view of Spender J as to the equal impossibility of its being suggested that each and every class member was caused to smoke, discouraged from giving up or encouraged to continue smoking as a result of each lobbying effort being part of a single campaign to which each company was a party.

18 Thirdly, there is a difficulty in representative proceedings being brought where some of the respondents are what may be called principal offenders by virtue of breaches of s 52 of the *Trade Practices Act 1974* committed by those respondents on the one hand and others have an accessory liability on the other. That problem is compounded where the possibility arises that the so-called common issue involves in one case one group of respondents as principals and another group of respondents with accessory liability and in another a quite different group of respondents as principals and another differently constituted group of respondents with accessory liability. It must also be remembered that accessory liability under the *Trade Practices Act* requires proof that the accessory has knowledge of the misleading and/or deceptive conduct of the person with the principal liability: *Yorke v Lucas* (1985) 158 CLR 661. The difficulties are both legal and practical and would suggest that it would be preferable that each case be separately pleaded and tried, rather than that an attempt be made to combine each case into a representative application.

19 Fourthly, the named applicants in the proceedings were requested by the applicants, to give particulars of what conduct of the applicants was relied upon as causing the loss or damage which the applicants alleged they had suffered. They refused to do so. There is an inference that this refusal stemmed from the underlying difficulty reflected in the pleading of a representative class action involving multiple respondents and multiple acts said to constitute the conduct which gave rise to a breach of s 52 of the *Trade Practices Act.*

20 Finally, if the proceedings are permitted to continue as representative proceedings the proceedings will presumably allege, as the present pleadings allege, conduct of the respondents ranging over either 40 years or 24 years, depending upon whether the claims pleaded are common law claims, or claims arising under the *Trade Practices Act*. Clearly there may be members of the class said to exist who may not have been born forty years ago, and obviously members of the class who would not have commenced smoking until a more recent date. For that matter there may be members of the class said to exist who, although

born before 1960 may not have been aware at all of any of the conduct of the respondents until considerably after 1974. It may well be the case that there will be no actual members of the class who were influenced by conduct occurring until relatively recent times. To allow a case to continue which involves investigation of the conduct of all the respondents over such a period of time might well be productive of considerable injustice to them or some of them who will incur enormous costs in giving discovery in respect of matters which may not be relevant at all to any actual applicant. This difficulty would disappear if those applicants who have a genuine case bring individual proceedings where discovery and other interlocutory processes can be limited to what is actually alleged, rather than to what may hypothetically be alleged. The need to ensure that the case is kept in manageable limits by requiring it to proceed by way of individual proceedings rather than representative proceedings is not directly relevant to the question whether the applicants should be permitted to replead. It is certainly relevant to an order that the named applicants be permitted to replead their cases as separate proceedings. However, coupled with the fact that it is impossible to conceive of a case being brought where every member of the class has a claim against all the respondents, it helps me reach the conclusion that it would be not in the interests of justice but indeed actually productive of injustice to the respondents to permit the present proceedings to continue by allowing the applicants once again to attempt to replead their case.

21 For these reasons I am of the view that the applicants should not be permitted once again to replead the application as a representative proceedings. I agree accordingly with the orders proposed by Spender J.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill.

Associate:

Dated: 13 March 2000

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 188 OF 1999**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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RESPONDENTS TO THE APPLICATIONS FOR LEAVE TO APPEAL/RESPONDENTS

JUDGES: **SPENDER, HILL & SACKVILLE JJ**

DATE: **13 MARCH 2000**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

SACKVILLE J

THE PROCEEDINGS

22 Three applications are before the Court for leave to appeal from interlocutory orders made by the primary Judge in the course of representative proceedings brought pursuant to Part IVA of the *Federal Court of Australia Act* 1976 (Cth) ("*Federal Court Act*"). For convenience, I refer in this judgment to the parties by their designation in the proceedings at first instance. Since the applicants for leave are the respondents at first instance, I refer to them as "the respondents". Similarly, since the respondents to the application for leave are the applicants in the proceedings at first instance, I refer to them as "the applicants".

23 The proceedings in their current form are brought by six named applicants, for themselves and as representing the class of persons defined in par 1 of the Further Amended Statement of Claim ("the Statement of Claim"). The three sets of respondents to the representative proceedings each comprise manufacturers or distributors of cigarettes in Australia. The applicants claim that they and each group member have contracted a smoking related disease in consequence of being influenced by the respondents' conduct to begin or continue smoking the respondents' cigarettes. The relief sought by the applicants in the proceedings includes damages under the general law and under the *Trade Practices Act* 1974 (Cth) ("*TP Act*") and exemplary damages.

24 Initially there were two separate sets of proceedings, one commenced on 8 March 1999 and the other on 16 April 1999. Each proceeding made claims on behalf of specified applicant and a class of represented persons, all members of which were said to have suffered damage to their health by reason of smoking cigarettes. The two sets of proceedings were subsequently consolidated.

The Orders and Applications for Leave to Appeal

25 The applicants filed a number of versions of the statement of claim. On 2 July 1999, the first respondents ("Philip Morris") filed a notice of motion seeking to strike out the statement of claim on the grounds, *inter alia*, that the proceedings did not satisfy the requirements of s 33C of the *Federal Court Act*, presented purely hypothetical questions for determination and raised claims that were statute barred. Similar motions were filed by the second and third respondents ("Wills" and "Rothmans" respectively), although Wills and Rothmans also sought an order for summary dismissal.

26 On 26 and 27 July 1999, the primary Judge heard argument in relation to summary dismissal and strike-out applications brought by each of the three sets of respondents. At the hearing, the primary Judge raised with counsel for the applicants some possible difficulties with the then current statement of claim. This led to counsel for the applicants bringing in a draft of a further Amended Statement of Claim which included a revised definition of the represented group. The revised draft was also criticised by the respondents' counsel on a variety of grounds.

27 On 13 August 1999, his Honour delivered a judgment dealing with the respondents' motions.

In that judgment, which is reported (*Nixon v Philip Morris (Australia) Ltd* (1999) 165 ALR 515), his Honour made a number of rulings, including the following:

(i) The non-federal negligence claim pleaded by the applicants (a second negligence claim having been abandoned) fell within the accrued jurisdiction of the Federal Court.

(ii) The common issues of law and fact identified in the Amended Application did not raise merely hypothetical questions. The proceedings therefore did not fall foul of the requirement that only jurisdiction in respect of a "matter" can be conferred on a court exercising jurisdiction under Chapter III of the *Constitution.*

(iii) The respondents' contention that the claims should be struck out on the basis that the causes of action of the applicants and group members were statute barred should be rejected.

(iv) The claim as pleaded satisfied the requirements for representative proceedings specified in s 33C(1) of the *Federal Court Act.* In particular:

- each group member had a claim against all respondents (s 33C(1)(a));
- the claims were in respect of or arose out of the same, similar or related circumstances (s 33C(1)(b)); and
- there were substantial common issues of law or fact identified by the applicants (s 33C(1)(c)).

(v) Exemplary damages could not be claimed in representative proceedings (or in other proceedings) in respect of a contravention of Part V of the *TP Act*, but were available in respect of negligence claims forming part of representative proceedings pursuant to Part IVA of the *Federal Court Act.*

(vi) Any remaining pleading deficiencies were not fatal to the continuation of the proceedings as representative proceedings under Part IVA of the *Federal Court Act*.

28 The primary judge dismissed the respondents' motions, insofar as they sought summary dismissal of the proceedings (Order 2), but he ordered that the then current proceedings be struck out (Order 3). His Honour granted leave to the applicants to file a Further Amended Application (Order 4). The applicants were also directed to provide a draft Further Amended Statement of Claim to the solicitors for each of the respondents and provision was made for each set of respondents, if they wished, to object to the draft. However, the

permissible objections were to be limited to those not previously considered by the primary Judge or which involved inconsistency with his Honour's reasons for judgment (Order 5). In addition to these orders, his Honour made a declaration in the following form:

> *"It be declared that, as a matter of law, exemplary damages:*
>
> *(a) are not available in respect of a breach of Part V of the* Trade Practices Act *1974;*
>
> *(b) are available in respect of negligence claims falling within the jurisdiction of the Court and litigation [sic: litigated] in representative proceedings pursuant to Part IVA of the* Federal Court of Australia Act *1976".*

29 Each of the three sets of respondents duly filed a notice of motion seeking leave to appeal from par (b) of the Declaration made by the primary Judge and from Orders 2, 4 and 5. The motions also challenged the primary Judge's order that costs be reserved.

30 On 20 August 1999, the applicants served a further draft Amended Application and Amended Statement of Claim. These included a new description of the representative class. Each set of respondents made objections to the fresh draft. This prompted the applicants to serve yet a further draft Amended Application and Amended Statement of Claim. The later drafts were the subject of debate at a further hearing held before the primary Judge on 31 August 1999.

31 His Honour delivered a brief *ex tempore* judgment on that day. He stated that a number of the objections taken by the respondents were entirely new. He proposed to disregard these, as he did not wish to allow the process of settling a statement of claim to continue indefinitely. He considered that many of the objections reagitated, in the same or a different form, issues that had been dealt with in the judgment of 13 August 1999. None of the objections, in his view, fell within the permitted categories identified in that judgment.

32 His Honour accordingly made orders on 1 September 1999 granting leave to the applicants to file and serve a Further Amended Application and Further Amended Statement of Claim in the form of drafts previously submitted (Order 1). His Honour fixed 30 November 1999 as the date before which a group member could opt out of the proceedings pursuant to s 33J of the *Federal Court Act* (Order 2). His Honour also directed that the applicants place advertisements in daily newspapers in the form of a draft annexed to the orders (Order 3). Other orders were made in connection with the placing and distribution of the advertisements

(Orders 4 and 5). His Honour also gave further directions for the conduct of the proceedings. Again he reserved the costs of the motions.

33 By separate notices of motion each set of respondents sought leave to appeal from certain of the orders made on 1 September 1999. In substance, the respondents challenged the grant of leave to file the Further Amended Application and Further Amended Statement of Claim and certain directions including those for advertising the representative proceedings.

34 The various motions have been heard together. Full argument has been presented on the substantive issues raised by the grounds of appeal. The Court is therefore in a position to determine the appeals, should leave be granted.

Stays

35 On 14 September 1999, a Full Court of this Court, on the application of the respondents, made orders staying Orders 2, 3, 4 and 5 of the Orders made by the primary Judge on 1 September 1999 pending determination of the applications for leave to appeal and (should leave be granted) of the appeals.

36 In the course of argument before us, an order was made without opposition from the applicants that there be a general stay of the proceedings pending determination of the applications for leave to appeal and (should leave be granted) of the appeals.

Grant of Leave to Appeal

37 Towards the close of the extensive argument in the application for leave to appeal, Mr Nettle QC, who appeared with Mr Forrest QC and Mr Beach for the applicants, indicated that the applicants did not actively oppose the grant of leave to appeal. He maintained a "formal submission" that leave should be refused since the interlocutory orders related to matters of practice and procedure: cf *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 400, *per curiam.* However, he acknowledged that the applications for leave raised important issues of substance.

38 In my view, this is clearly a case in which leave to appeal should be granted. As will become clear, the interlocutory decisions in respect of which leave is sought are (to use the language in *Décor*, at 400) "certainly attended with difficulty, and their correctness is open to

dispute". Moreover, if they are incorrect, the respondents (the applicants for leave) will suffer significant adverse consequences, particularly in having to give discovery in circumstances where the issues are uncertain, yet cover a potentially wide area of inquiry.

LEGISLATION GOVERNING REPRESENTATIVE PROCEEDINGS

39 Representative proceedings may be commenced in the Federal Court in accordance with Part IVA of the *Federal Court Act* which was inserted by the *Federal Court of Australia Amendment Act* 1991 (Cth), and commenced on 4 March 1992. A proceeding may only be brought under Part IVA in respect of a cause of action accruing after the date of commencement: s 33B.

40 Part IVA of the *Federal Court Act* defines a "representative proceeding" to mean a proceeding commenced under s 33C: s 33A. Section 33C(1) specifies the criteria that must be satisfied at the commencement of the proceeding (see *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373 (HC), at 380). It provides as follows:

> *"33C(1) Subject to this Part, where:*
> *(a) 7 or more persons have claims against the same person;*
> *(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and*
> *(c) the claims of all those persons give rise to a substantial common issue of law or fact;*
> *a proceeding may be commenced by one or more of those persons as representing some or all of them."*

41 The proceeding may be commenced whether or not the relief sought includes claims for damages that require individual assessment and whether or not the relief sought is the same for each person represented: s 33C(2)(a)(iii), (iv). Similarly, the proceeding may be commenced whether or not it is concerned with separate contracts or transactions between the individual group members and the respondents, or involves separate acts or omissions of the respondents done or omitted to be done in relation to individual group members: s 33C(2)(b).

42 Section 33D addresses the question of standing. Section 33D(1) provides as follows:

> *"A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph".*

43 Section 33E(1) states that, subject to presently irrelevant exceptions, the consent of a person

to be a group member is not required. Nor is it necessary for a person under a disability to have a next friend merely in order to be a group member: s 33F(1).

44 A representative proceeding may not be commenced if the proceeding would be concerned only with claims in respect of which the Court would have jurisdiction solely by virtue of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) or a corresponding law of a State or Territory: s 33G. In *Re Wakim; Ex parte McNally* (1999) 163 ALR 270, the High Court held the cross-vesting scheme to be invalid insofar as it involves State legislation which purports to confer jurisdiction on federal courts in respect of matters arising under State law. Thus s 33G states the position that would apply in any event.

45 Section 33H sets out the requirements for the originating process in a representative proceeding. These requirements are designed, as the High Court said in *Wong v Silkfield* (at 375), to show that the criteria in s 33C have been met. Section 33H provides as follows:

> *"33H(1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:*
> *(a) describe or otherwise identify the group members to whom the proceeding relates; and*
> *(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and*
> *(c) specify the questions of law or fact common to the claims of the group members.*
>
> *(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members."*

46 Apart from s 33H, Part IVA of the *Federal Court Act* does not specify what an applicant must include in any initiating process or pleading. However, s 33ZG provides that, except as otherwise provided, nothing in Part IVA affects:

> *"(b) the Court's powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous, or an abuse of process of the Court;…".*

47 Section 33ZG(b) is obviously a reference to the powers conferred by the *Federal Court Rules* ("*FCR*"). *FCR,* O 11 r 16, for example, confers power on the Court to strike out the whole or any part of a pleading on the ground that it discloses no reasonable cause of action, has a tendency to cause prejudice or embarrassment or delay in the proceeding, or is otherwise an

abuse of process. The Court also has power to stay or dismiss a proceeding where it appears that no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious or is an abuse of process: *FCR*, O 20 r 2.

48 Group members have the right to opt out of a representative proceeding in accordance with the procedure laid down by s 33J. If at any stage the number of group members falls below seven, the Court may nonetheless order that the proceeding continue under Part IVA or, alternatively, that it no longer continue under that Part: s 33L.

49 Section 33N(1) empowers the Court to order that a proceeding no longer continue under Part IVA where it is in the interests of justice to do so because:

> *"(a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or*
> *(b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or*
> *(c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or*
> *(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding."*

50 Where the Court makes an order that a proceeding no longer continue under Part IVA, the proceeding may be continued by the representative party on his or her own behalf against the respondent: s 33P(a).

51 Where the determination of issues common to all group members does not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues: s 33Q(1). The directions can include the establishment of sub-groups (s 33Q(2)) or provision for an individual group member to apply for the determination of an issue relating to that member: s 33R(1). If an issue cannot be conveniently dealt with under ss 33Q or 33R, the Court may give directions relating to the commencement and conduct of a separate individual or representative proceeding: s 33S.

52 Section 33Z specifies the powers of the Court when determining a matter in a representative proceeding:

> *"33Z(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:*

(a) determine an issue of law;
(b) determine an issue of fact;
(c) make a declaration of liability;
(d) grant any equitable relief;
(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
(g) make such other order as the Court thinks just.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled."

53 The effect of a judgment is stated in s 33ZB:

"33ZB A judgment given in a representative proceeding:
(a) must describe or otherwise identify the group members who will be affected by it; and
(b) binds all such persons other than any person who has opted out of the proceedings under section 33J."

54 Section 33ZE(1) provides that, upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended. The limitation period does not begin to run again until either the member opts out of the proceeding under s 33J or the proceeding is determined without finally disposing of the group member's claim: s 33ZE(2).

55 Finally, s 33ZF of the *Federal Court Act* provides that in any proceeding conducted under Part IVA, the Court may make any order it thinks appropriate or necessary "to ensure that justice is done in the proceeding".

THE PLEADED CASE

56 Much of the argument revolved around the form of the Further Amended Application and Further Amended Statement of Claim filed by the applicants pursuant to leave granted by the primary Judge on 1 September 1999. It is therefore necessary to consider the terms of those documents in some detail. For convenience I refer to them, respectively, simply as the application and statement of claim.

57 The statement of claim commences by defining some key terms. A reference to "the cigarettes" is said to be a reference to "cigarettes manufactured in Australia and/or distributed

in Australia by one or other of the Respondents, as defined in paragraph 5". This definition suggests that the expression "the cigarettes" is intended to refer to cigarettes manufactured or distributed by any one of the respondents.

58 The expression "relevant period" is defined to mean the period from January 1960 to 16 April 1999. The latter is the date the proceedings were instituted. The significance of January 1960 is not clear. However, that date is some fourteen years before the commencement of the *TP Act* (which commenced on 1 October 1974) and nearly forty years prior to the institution of proceedings.

59 Paragraph 1 of the statement of claim identifies the represented group in the same terms as the application:

> *"1. The Applicants sue for themselves and as representing all persons:*
> *(a) who suffer (and have been medically diagnosed as suffering) from one or more of the following diseases:*
>
> *cancer of the lung, cancer of the larynx, cancer of the pharynx, cancer of the tongue, cancer of the oesophagus, emphysema, chronic airflow obstruction, peripheral vascular disease, coronary vascular disease and/or cerebral vascular disease ('smoking related disease') and*
>
> *(b) who, after 1 October 1974, smoked the cigarettes and who after 1 October 1974, began, continued, or failed to quit such smoking wholly or partly because of:*
> *(i) the conduct of any one or more of the respondents in advertising, marketing and/or promoting the cigarettes as enhancing life and the enjoyment of life; and/or*
> *(ii) the conduct of any one or more of the respondents in advertising, marketing or promoting the cigarettes as*
> *(1) healthy, or healthier than other cigarettes; and/or*
> *(2) safe to smoke, or safer to smoke than other cigarettes; and/or*
> *(iii) The conduct of any one or more of the respondents in making or causing to be made public statements*
> *(1) denying that there existed any or any reliable evidence linking cigarette smoking to any risk to health, and in particular to smoking related disease;*
> *(2) casting doubt on evidence or reports linking cigarette smoking to any risk to health and in particular to smoking related disease;*

> *(3) denying that there existed any or any reliable evidence that the nicotine contained in cigarettes was addictive; and/or*
>
> *(iv) The absence or inadequacy of warnings about the risks associated with smoking the cigarettes; and*
>
> *(c) whose condition;*
>
> *(i) first manifested clinically observable symptoms between 16 April 1996 and 16 April 1999; and*
>
> *(ii) was caused in whole or in part by the person smoking the cigarettes; and*
>
> *(d) who are present in Australia at any time during the month of September 1999 ('the represented persons').*"

60 The respondents made many criticisms of this formulation. It is unnecessary to consider the criticisms at this point. However, it should be noted that par 1(c)(i) is intended to address the three year limitation period imposed by s 82(2) of the *TP Act* for actions for loss or damage by conduct in contravention of s 52. The applicants' contention is that the cause of action of each group member against the respondents accrued when he or she first manifested clinically observable symptoms of one of the ten specified smoking related diseases. The respondents contended that if any group member had a cause of action, it accrued when he or she suffered any injury beyond that which could be regarded as negligible, regardless of whether the group member was or could have been aware of the injury: *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, at 771-772. They contended, therefore, that par 1(c)(i) had been drafted on the basis of a misconception as to the applicable legal principle.

61 It should also be noted that par 1(c)(ii) of the statement of claim limits the represented group to persons whose condition "was caused in whole or in part by the person smoking the cigarettes". In view of the definition of "the cigarettes" this seems to have been intended to embrace persons whose condition was caused by smoking cigarettes manufactured or distributed by any one or more of the respondents.

62 The application identifies, in an endeavour to comply with s 33H(1)(c) of the *Federal Court Act*, the following questions of law or fact common to the claim of the applicants and the group members:

> *"(a) Whether as a matter of fact smoking the cigarettes causes smoking related disease;*
>
> *(b) Whether as a matter of fact smoking the cigarettes increases the risk of contracting smoking related disease;*

> *(c) Whether, as a matter of fact the Respondents individually, and/or collectively possessed the knowledge referred to in paragraphs 11 and 12 of the Further Amended Statement of Claim;*
> *(d) Whether, as a matter of fact, nicotine has the properties and consequences pleaded in paragraph 8 of the Further Amended Statement of Claim;*
> *(e) Whether, as a matter of fact, the Respondents individually and/or collectively conducted themselves as alleged in paragraph 14 of the Further Amended Statement of Claim, and whether each Respondent was aware of the conduct of the other Respondents as pleaded in paragraph 20 of the Further Amended Statement of Claim;*
> *(f) Whether, as a matter of law and fact, the conduct of the Respondents referred to in paragraph 14 of the Further Amended Statement of Claim was misleading or deceptive or likely to mislead or deceive as alleged in paragraph 17 of the Further Amended Statement of Claim;*
> *(g) Whether, as a matter of law and fact, the Respondents aided and abetted or were directly or indirectly knowingly concerned in any of the misleading and deceptive conduct of any of the other Respondents referred to in paragraphs 16 and 17 of the Further Amended Statement of Claim;*
> *(h) Whether, as a matter of law and fact, the Respondents owed the duty of care referred to in paragraph 21 of the Further Amended Statement of Claim;*
> *(i) Whether, as a matter of law and fact, the Respondents breached the said duty of care as alleged in paragraph 23 of the Further Amended Statement of Claim."*

63 Paragraph 5 of the statement of claim pleads that during the relevant period (1960 to April 1999) each of the respondents manufactured and/or distributed for sale to consumers within Australia, including the class members:

> *"cigarettes, which each of the Respondents, intended and knew would be smoked by consumers including the class members in the condition in which they were sold ('the cigarettes')."*

The particulars to par 5 identify cigarette brands manufactured or distributed by each respondent.

64 Paragraph 5 then says that a reference hereafter to "the cigarettes" in relation to a respondent is a reference "to the cigarettes manufactured and/or distributed for sale by that Respondent". It will be seen immediately that this definition is inconsistent with that at the commencement of the statement of claim. Mr Nettle acknowledged the inconsistency and at one point foreshadowed an application to excise the definition in par 5. He did not, however, proceed with the application.

65 Paragraph 6 pleads that during the relevant period smoking "the cigarettes" caused smoking related disease and created a material increase in the risk of smokers contracting such a disease. It is then said that the cigarettes contained the addictive substance nicotine (pars 7, 8) and that as a consequence of smoking the cigarettes the class members inhaled nicotine (pars 9, 10).

66 The statement of claim alleges that during the relevant period each of the respondents

- knew or ought to have known the addictive qualities of nicotine (par 11);
- knew or ought to have known that smoking the cigarettes caused smoking related disease and increased the risk of contracting such disease (par 12).

67 The applicants then plead that

> *"[d]uring the relevant period, the class members smoked the cigarettes"* (par 13).

Particulars provided in respect of each of the named applicants specifies the particular brands of cigarettes he or she smoked during the relevant period. As might be expected, not all applicants smoked cigarettes manufactured by all respondents, although some claimed to have done so.

68 Paragraph 14 pleads conduct engaged in by each of the respondents. It should be set out at length:

> *"14. During the relevant period, each of the Respondents engaged in conduct promoting the benefits and pleasures of smoking and denying or minimising the risks associated with smoking, the purpose of which was to encourage consumers including the class members to smoke the cigarettes ('the conduct'). The conduct comprised the following elements:*
>
> *14(A) Each of the Respondents advertised, marketed and promoted the cigarettes as enhancing life and enjoyment of life of consumers of the cigarettes.*
>
> *...*
>
> *14(B) Each of the Respondents advertised, marketed and promoted certain brands of the cigarettes as:*
>
> *(i) Healthy, or healthier than other cigarettes and/or;*
>
> *(ii) safe to smoke, or safer to smoke than other cigarettes.*
>
> *...*
>
> *14(C) Each of the Respondents made, and/or caused to be made, public statements:*

(i) denying that there existed any or any reliable evidence linking cigarette smoking to any risk to health, and in particular to smoking related disease;

(ii) casting doubt on evidence or reports linking cigarette smoking to any risk to health and in particular to smoking related disease;

(iii) denying that there existed any or any reliable evidence that the nicotine contained in cigarettes was addictive.

...

14(D) Each of the Respondents lobbied governments in the various States and Territories of Australia and the Commonwealth Government;

(i) not to restrict the advertising marketing, promotion and sale of cigarettes;

(ii) not to require the placement of warnings as to health risks associated with smoking on cigarette packets and on, or in, cigarette advertising;

(iii) to require warnings of health risks associated with smoking which were to be placed upon cigarette packets and/or in or on cigarette advertising:

(a) to be as small, brief and/or unobtrusive as possible;

(b) not to specify that particular diseases are, or can be caused by smoking;

(c) not to contain adequate information about the risk of lung cancer associated with smoking of which the Respondents, and each of them, were aware;

(d) not to contain any warning of the effect of nicotine, as described in paragraph 8 hereof;

with the result that:

(i) the restrictions on advertising marketing, promotion and sale of cigarettes were introduced later, and were less substantial than would have been the case without the lobbying; and

(ii) the requirements to place warnings as to health risks associated with smoking on cigarette packets and on, or in, cigarette advertising were introduced later, and were less substantial than would have been the case without the lobbying.

...

14(E) Each of the Respondents intentionally remained silent about and/or concealed the knowledge referred to in paragraphs 11 and 12.

14(F) Each of the Respondents took steps to maximise the effect of the conduct pleaded in paragraphs 14(A) to 14(E) and to maximise the opportunities and occasions on which, and the likelihood

that, persons including the class members would be induced and/or persuaded to begin and/or continue to smoke the cigarettes."

69 Paragraph 15 is extraordinarily wide in scope. It pleads that the class members (who were said in argument to amount to some thousands of people):

"were influenced by the conduct:
(a) directly, in that they:
(i) saw and/or
(ii) heard and/or
(iii) were aware of
the conduct and/or

(b) indirectly, in that they were influenced by others who saw and/or heard and/or were made aware of the conduct

and by reason of the conduct
(i) began to smoke the cigarettes and/or
(ii) continued to smoke the cigarettes and/or
(iii) failed to quite smoking the cigarettes."

It will be recalled that the "conduct" is defined by par 14 to mean the conduct described in that paragraph by each of the respondents during the thirty-nine year period from 1960 to 1999.

70 The applicants' claims under the *TP Act* are pleaded in pars 16 to 20 of the statement of claim. Paragraph 16 is as follows:

"16. Between 1 October 1974 and 16 April 1999 each of the Respondents engaged in the conduct referred to in paragraph 14 above in trade or commerce."

The effect of par 16, so far as the *TP Act* claim is concerned, is to limit the relevant conduct of each of the respondents to a period of twenty five years, commencing on the date the *TP Act* came into force.

71 Paragraph 17 alleges that the conduct in par 14 (Mr Nettle said this was a mistake and the reference should have been to par 16) was misleading or deceptive or likely to mislead or deceive smokers or potential smokers including the class members because:

"(a) smoking the cigarettes causes smoking related disease; and
(b) people who smoked the cigarettes, including the class members, had as a consequence of such smoking a material increase in their risk of contracting smoking related disease; and

(c) During the relevant period the cigarettes contained nicotine which is addictive in that when inhaled as a consequence of smoking:
(i) it creates an enduring need in cigarette smokers to continue smoking; and
(ii) the capacity of cigarette smokers to cease or reduce their smoking is impaired; and
(d) The Respondents manufactured and/or distributed the cigarettes with knowledge of the matters referred to in subparagraphs (a) to (c) above."

The expression "the cigarettes" presumably refers to cigarettes manufactured or distributed by one or other of the respondents.

72 Paragraph 18 mirrors par 15. It provides as follows:

"The misleading and/or deceptive conduct referred to in paragraph 16 and 17 hereof caused the class members to:
(a) begin to smoke the cigarettes; and/or
(b) continue to smoke the cigarettes; and/or
(c) fail to quit smoking the cigarettes."

73 Again the reference to conduct is presumably intended to refer to conduct between 1974 and 1999. It will be noted that par 18 does not make clear whether it is referring to the totality of the allegedly misleading or deceptive conduct, or a portion of that conduct, as the causative element inducing the class member to act or refrain from acting in the specified manner.

74 Paragraph 19 pleads that as a consequence of the matters referred to in par 18, the class members have suffered personal injury, loss and damage. The particulars identify that loss or damage as pain, suffering, loss of enjoyment of life and loss of expectation of life as a consequence of contracting one of the smoking related diseases. Thus the loss or damage pleaded flows from the group members having smoked cigarettes manufactured or distributed by one or other (or perhaps all) of the respondents.

75 Paragraph 20, which attracted considerable discussion in oral argument, incorporates the terms of s 75B of the *TP Act.* It pleads as follows:

"20. Further, or in the alternative, between 1 October 1974 and 16 April 1999,
(a) With knowledge of the matters referred to in paragraphs 6 to 10 the Respondents and each of them intentionally engaged in the conduct referred to in paragraph 14;

> *(b) Each Respondent knew that the other Respondents were engaged in the conduct referred to in paragraph 14;*
> *(c) By reason of their knowledge referred to in (a) and (b) hereof, each of the Respondents knew that the conduct of the other Respondents was misleading or deceptive or likely to mislead or deceive smokers and potential smokers;*
> *(d) Each Respondent knew that its own conduct, referred to in paragraph 16 assisted, aided and/or abetted the conduct of the other Respondents referred to in paragraph 14*
>
> *and each of the Respondents thereby aided and abetted, or was directly or indirectly, knowingly concerned in or party to the contravention by each other Respondent of section 52 of the Trade Practice Act."*

(This paragraph continues the confusing practice of referring to par 14, when what is apparently intended is a reference to the limiting effect of par 16).

76 The particulars to par 20 are contained in Schedules C and D to the statement of claim and thus cover some of the same ground as the particulars to par 14. The Schedules identify

- statements attributed to each of the respondents separately;
- statements (from 1964 onwards) attributed to two or all of the respondents jointly (as with a joint announcement in 1969 of the establishment of an Australian Tobacco Research Foundation);
- activities allegedly undertaken by each respondent (such as internal memoranda describing lobbying and political activities); and
- activities allegedly undertaken by two or all respondents jointly (such as reports published by the Tobacco Institute of Australia).

77 The negligence claim is pleaded in pars 21 to 25. Paragraph 21 pleads that by reason, *inter alia*, of the matters in pars 6 to 13 of which the respondents knew or ought to have known, each owed a duty of care to the class members to ensure that they knew and appreciated the risk of contracting smoking related disease. It is then alleged that each of the respondents was aware during the relevant period that its conduct referred to in par 14 would cause smokers or prospective smokers to begin or continue to smoke or to fail to quit smoking (par 22).

78 Breach of duty is pleaded in par 23. It is alleged that each of the respondents, during the relevant period (1960-1999) in engaging in the conduct pleaded in par 14, failed to take

reasonable steps to ensure that class members appreciated the risk of contracting smoking-related disease or the effect of nicotine.

79 Paragraph 24 pleads an alternative case of joint liability for the breaches of duty alleged in par 23. It is said that each of the respondents is jointly liable in that:

> *"(a) they acted jointly in:*
> *(i) seeking to deny the connection between smoking and the risks referred to in paragraph 6;*
> *(ii) seeking not to reveal, and to contradict, the knowledge referred to in paragraphs 11 and 12;*
> *(iii) preventing the dissemination of information which would discourage the smoking of cigarettes;*
> *("the industry conduct")*
>
> *(b) the industry conduct was engaged in for the common purpose of preventing the dissemination of information which would discourage the smoking of cigarettes; and*
> *(c) the industry conduct assisted the furtherance of the said breaches."*

80 The particulars to par 24 are as follows:

> *"The fact that the Respondents acted jointly for the purposes stated is both express and to be implied. Insofar as it is express, it consists in the joint conduct referred to in Schedules C and D. Insofar as it is to be implied, it is to be implied from the fact that each of the Respondents had the knowledge and engaged in the conduct referred to in paragraph 14 knowing that each other Respondent was engaged in the conduct. The conduct of each Respondent referred to in sub paragraphs 14(C), 14(D), 14(E) and 14(F) advanced the interest of all Respondents. Further, the Respondents combined to form the Tobacco Institute of Australia and funded its activities, which activities were designed to advance the interests of all Respondents in relation to the conduct. Further, from time to time, the Respondents formed and funded the activities of other industry committees which had the purpose of advancing the interests of all Respondents in relation to the conduct."*

81 It is then alleged that the breaches of duty pleaded in par 23, or each or some of them, caused or materially contributed to the class members starting or continuing to smoke the cigarettes, or failing to quite smoking the cigarettes. This is said to have materially contributed to the injuries, loss or damage suffered by them (par 25).

82 Finally, the statement of claim alleges that during the relevant period the respondents acted in continuing, deliberate and/or reckless disregard of the health and safety of class members (par 27).

THE JUDGMENT AT FIRST INSTANCE

83 In the judgment delivered on 13 August 1999, the primary Judge addressed the arguments advanced by the respondents on the summary dismissal and strike out motions. Many of those arguments have been repeated or presented in somewhat modified form on the applications for leave to appeal. It is necessary to bear in mind when considering his Honour's reasons that the current form of the pleadings, filed pursuant to leave granted on 1 September 1999, is not the same as that before his Honour when he delivered judgment on 13 August 1999.

The Accrued Jurisdiction Question

84 The primary Judge indicated that but for a passage in the judgment of Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*, at 312, (with which Gleeson CJ and Gaudron J apparently agreed), he would have been inclined to accept the respondents' submission that their alleged conduct prior to 1 October 1974 (the date of commencement of the *TP Act*) was incapable of giving rise to a cause of action within the accrued jurisdiction of the Court. However, the passage in *Re Wakim* suggested that there is but one matter if "different claims are so related that the determination of one is essential to the determination of the other". In his Honour's view, this formulation does not necessarily incorporate a strict common temporal requirement for the purpose of assessing whether a pleaded cause of action is within the accrued jurisdiction of the Court.

85 His Honour held that, provided the represented class were confined to persons who smoked after 1 October 1974, a claim founded on breach of duty by reason of the respondents' pre-1974 conduct would fall within the accrued jurisdiction of the Court. In the case of a person who commenced smoking after 1960 but before 1974 and who continued to smoke after the latter date, it might be difficult to know whether the physiological change that eventually manifested itself in a disease occurred before or after 1 October 1974. Such a person would have alternative claims under the *TP Act* or in negligence for the same damage. Consequently, the determination of the *TP Act* claim would necessitate determination of a major element of any negligence claim, namely the date of the critical physiological change. In his Honour's opinion, this was sufficient to bring the cause of action in negligence within the accrued jurisdiction of the Court.

Hypothetical Questions

86 The respondents had submitted that, because findings on the common issue of law and fact could vary as among particular applicants and group members, the issues were hypothetical and outside the jurisdiction that could be conferred on the Court under Chapter III of the *Constitution.* Since the respondents do not challenge the primary Judge's rejection of this contention, there is no need to consider his reasoning on the point.

Section 33C(1)(a) of the *Federal Court Act*

87 The primary Judge followed his own decision in *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, where he had held (to use his words in the present case, at 528) that par (a):

> *"requires that the applicant, or each one of several applicants, and each group member must have a claim against each respondent; it is not sufficient for one applicant to make a claim against one respondent and another applicant or a group member to make a claim against some other respondent."*

His Honour went on to quote from his judgment in *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457. In that case, he had sought to reconcile the requirement stated in s 33C(1)(a) with s 33H(2) which provides that, in describing or otherwise identifying group members in the application, it is not necessary to name or specify the number of group members. His Honour in *Tropical Shine* had said this (at 462):

> *"I think the only way of making sense of s 33C(1)(a) is to interpret it as restricting the use of Pt IVA to claims that, by their nature and assuming that they have substance, are shared by at least seven persons. I use the word 'shared' in the sense explained by pars (b) and (c); that is, that the claims of all the persons are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial common issue of law or fact. Interpreted in this way, the paragraph fulfils the function of weeding out cases that should clearly not be brought as representative proceedings because it is obvious that less than seven people share the claim, whilst preserving the principle embodied in s 33H."*

88 The primary Judge rejected a submission made by counsel for Philip Morris that an applicant could not satisfy the requirement in s 33C(1)(a) unless he or she demonstrated that at least seven people in fact had a good claim against each respondent. His Honour pointed out that the passage in *Tropical Shine,* which had been quoted with approval in other decisions, was inconsistent with the submission. It was enough for the applicant to plead facts indicating

the likely existence of claims in seven or more persons.

89 His Honour then addressed an alternative submission made by Philip Morris that s 33(1)(a) had not been complied with. This was founded on the contention that some applicants may not have claims against some of the respondents by reason of the fact that they did not smoke the cigarettes of that respondent or the respondent did not manufacture or distribute the cigarettes smoked. Counsel for Philip Morris had pointed out that the Schedule to the pleading made it clear that at least one of the named applicants did not claim to have smoked Philip Morris cigarettes.

90 The primary Judge rejected the alternative submission in terms that are of considerable significance to the application for leave to appeal:

> *"This submission seems to misapprehend the nature of the applicants' case. The applicants do not seek to make a product liability case, in which it would be essential to relate the injury suffered by a particular claimant to a deficiency in the product of a particular manufacturer or distributor. Neither do they base either their* Trade Practices Act *claim or their negligence claim on the conduct of a particular manufacturer or distributor, acting in that capacity, towards a particular consumer.* ***The applicants' case is painted on a larger canvas. They claim the three sets of respondents – who, they say, at all relevant times dominated the Australian retail cigarette market – embarked individually and collectively on a course of conduct designed to create a false community perception about the risks associated with cigarette smoking.*** *If that claim can be made good, it would seem not to matter that a particular claimant smoked cigarettes manufactured by only one of the respondents; indeed, logically, by none of them, although the present claim is not so wide. The claimant would establish a s 52 claim if he or she established:*
>
> *(a) the publication by a particular respondent or respondents of misleading information;*
> *(b) that this information caused the claimant to commence, or continue, to smoke cigarettes; and*
> *(c) that such smoking – that is, the smoking caused by the misleading conduct of a particular respondent or respondents – caused the claimant to contract a particular disease.*
>
> *For the purposes of the s 52 claim – although perhaps not the negligence claim – it would seem unnecessary for a claimant to establish an identicality between the respondent (if only one) whose promotional material caused him or her to commence or continue smoking and the respondent whose product caused the relevant disease."* (Emphasis added.)

91 Mr Nettle adopted the primary Judge's formulation in this passage as an accurate statement of

the case the applicants intended to plead.

Whether the Causes of Action were Statute Barred

92 The primary Judge next addressed a submission that the representative proceeding should be struck out or dismissed, on the basis that the applicants' causes of action arose outside the three year limitation period specified in s 82(2) of the *TP Act* and outside the limitation periods specified under State laws applicable to the accrued negligence claims. The respondents' submission rested on the proposition that a cause of action for damages in respect of personal injury, whether arising under the *TP Act* or the general law, accrues when the claimant first sustains damage. In accordance with the decision in *Cartledge v Jopling*, the respondents contended that in the case of a progressive disease such as lung cancer damage is first sustained when the claimant suffers injury which is more than negligible, regardless of whether the claimant was or could have been aware of the injury.

93 The primary Judge, after considering the authorities, expressed the view that, although *Cartledge v Jopling* had routinely been mentioned by Australian courts at first instance, it had not been upheld or applied by the High Court or any intermediate court of appeal. In his opinion, there were good reasons why an Australian appellate court might decline to follow *Cartledge v Jopling*, not least the unfairness to claimants who might find themselves statute barred before becoming aware of any symptoms suggesting that they have suffered harm. In any event, he thought it was undesirable to determine whether a claim is statute barred on a strike-out application, in advance of factual findings made at the hearing of the action. Accordingly, his Honour declined to accede to the respondents' submission.

Section 33C(1)(b)

94 His Honour considered that the claims pleaded by the applicants satisfied the requirement imposed by s 33C(1)(b) of the *Federal Court Act*, that the claims of all persons are in respect of or arise out of the same, similar or related circumstances. His Honour accepted that there were differences among individual claims, for example in relation to claimants' smoking histories, their reaction to the respondents' conduct and their habituation to nicotine. But in determining whether the various claims were related, his Honour considered that primary attention was to be paid to "matters of commonality" rather than differences. He continued as follows:

"If the allegation of breach of s 52 or breach of a duty of care succeeds, the

> *claims of all the applicants and group members will be advanced. It will still be incumbent on them to prove important individual issues, notably reliance and damage. But they will have succeeded in relation to a major issue, common to all the claims. If the allegations of breach of s 52 and breach of duty fail, all the claims will fail, regardless of the situation concerning individual elements of the claims. It seems to me the applicants comfortably satisfy the requirement of s 33C(1)(b). The claims made by the applicants arise out of 'related' circumstances, at least."*

Section 33C(1)(c)

95 The primary Judge noted that the test for determining what constitutes a "substantial" common issue for the purposes of s 33C(1)(c) of the *Federal Court Act* had been laid down by a majority of the Full Federal Court in *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152. The test accepted by the majority (at 167) was whether:

> *"determination of the issue or issues common to the claims of all group members is likely to have a major impact on the conduct and outcome of the litigation."*

While his Honour considered that this formulation imposed a more onerous requirement than was justified, he proposed to follow the decision (which was at that time the subject of an appeal to the High Court).

96 In his Honour's view, at least some of the questions identified by the applicants were common to all claims. In particular he identified those questions now specified in sub-pars (c),(e),(f),(g) and (h) of par 5 of the application. He thought that these "comfortably satisfied" the requirements of s 33C(1)(c), even on the restrictive interpretation of the word "substantial" adopted by the Full Court in *Silkfield v Wong.*

Exemplary Damages

97 The respondents had argued that, although an award of exemplary damages in respect of negligent conduct could be made under the general law (albeit in rare circumstances), Part IVA evinced an intention to exclude such an award in representative proceedings. This was said to be so notwithstanding that the claim based on negligence fell within the accrued jurisdiction of the Court. The respondents based their argument on s 33Z of the *Federal Court Act*, which they said was exhaustive of the Federal Court's power to grant relief in representative proceedings. They contended that, as a matter of construction, s 33Z(1) did not provide for an award of exemplary damages.

98 The primary Judge rejected the respondents' argument. He did not accept that s 33Z(1) of the *Federal Court Act* contained any implied confinement of the scope of damages available under the representative procedure. To read s 33Z in this way would impose a serious limitation on claimants' substantiative rights by means of a provision designed to provide an additional procedure for the litigation of claims. In any event, his Honour saw no reason to read down the scope of s 33Z(1)(e), which empowers the Court in a representative proceeding to "make an award of damages for group members". There was nothing to suggest that the paragraph should be construed so as to exclude the award of exemplary damages in a proper case.

Pleading Matters

99 The primary Judge rejected the respondents' contention that the applicants had to make a separate allegation about failure to warn and about each claimant's response to any warning that might have been given. His Honour appears to have accepted the applicants' argument that this was not really a "failure to warn" case, but rather one based on a long campaign of deceit dominated by positive actions.

100 His Honour also rejected a contention that the represented group had been impermissibly defined by reference to subjective criteria. If a person apparently within the group failed to establish the subjective criterion (for example, that he or she was induced to smoke because of the respondents' conduct), it would follow that the person was not in truth a group member and was therefore not bound by the result (see s 33ZB(b)). While he considered that this argument had a "superficial charm", he thought it could not withstand analysis.

101 He pointed out that a person who failed to establish that he or she had been induced to smoke by reason of the respondents' conduct could not maintain the contrary in a future action, since he or she would be bound by an issue estoppel. Moreover, to accept the respondents' argument would prevent the use of the representative procedure in relation to a cause of action the elements of which included reliance. This followed because a court's determination of the question of reliance always requires assessment of a subjective element, namely the effect of the respondents' actions on the mind of a particular person or persons.

102 The primary Judge noted that other pleading matters had been sufficiently ventilated in argument, but he apprehended that the fresh draft statement of claim would deal with them.

However, his Honour drew attention to the need for the applicants' pleading to spell out the basis on which it was said that the respondents had a duty to explain the health risks of smoking. He also pointed to the need, when invoking s 75B of the *TP Act*, to allege that each respondent knew the conduct of the others was misleading, as required by *Yorke v Lucas* (1985) 158 CLR 661.

THE SUBMISSIONS

103 It is not necessary to set out the submissions made on the applications for leave to appeal, since the arguments of the respondents generally followed those put forward to primary Judge. For the most part, the applicants responded to those arguments by supporting the reasoning of the primary Judge. Nonetheless, several points should be made about the argument before us.

104 First, the position of each set of respondents was not identical. While there was considerable overlap among the three sets of written submissions (there was less overlap in oral argument), not all arguments were adopted by all respondents. In the result, nothing turns on this.

105 Secondly, there were differences in emphasis between the arguments advanced on the applications for leave to appeal and those put to the primary Judge. For example, although the second respondents ("Wills") repeated the contention that the proceedings did not give rise to a "substantial common issue of law or fact", as required by s 33C(1)(c), that argument was modified to take account of the more liberal interpretation of the word "substantial" adopted by the High Court on appeal in *Wong v Silkfield.*

106 Thirdly, as the argument before us developed, the pleading issues loomed larger. The respondents emphasised what they said were fatal defects in pleading, including a failure to plead facts establishing that the proceeding complied with the threshold requirements specified in ss 33C and 33H of the *Federal Court Act.* In particular, much argument focussed on whether the applicants' case as pleaded corresponded to the primary Judge's understanding of the case the applicants intended to plead.

PROCEDURES IN REPRESENTATIVE PROCEEDINGS

The Common Ground

107 There was some common ground among the parties on important issues. *First*, it seems to

have been accepted on all sides that the applicants were obliged to plead adequately the case alleged by the applicants on their own behalf **and on behalf of all members of the represented class**. Reference was made to the observation of Beaumont J in *Cameron v Qantas Airways Ltd* (1993) ATPR 41-251, at 41,370, that it is axiomatic that a respondent in a representative proceeding, like the respondent in any proceedings, is entitled to the benefit of a properly pleaded case, so that a proper defence can be filed. According to his Honour, it is no answer to an inadequate pleading to say that the position might be clarified at a subsequent directions hearing. Reference was also made to the holding by Hely J in *Harrison v Lidoform Pty Ltd* (Hely J, 24 November 1998, unreported), that the statement of claim in a representative proceeding "needs to identify what the rights of those represented are claimed to be, and how they are said to arise" (at 14).

108 *Secondly*, Senior Counsel for the applicants expressly accepted that in order to satisfy par (a) of what the High Court has described as the "threshold requirements" imposed by s 33C(1) of the *Federal Court Act* (*Wong v Silkfield*, at 381, *per curiam*), it was necessary that the applicants' pleading allege facts that establish that they and every member of the represented class have a claim against every respondent. For their part, the respondents accepted that the expression "the same person" in s 33C(1)(a) is to be read as including more than one person (see *Acts Interpretation Act* 1901 (Cth), s 23(b)), provided that all applicants and members of the represented class make claims against all respondents to the proceedings.

109 Perhaps because there was no dispute on these questions, the parties did not explore further the relationship between the procedural requirements of Part IVA of the *Federal Court Act* and the general principles governing pleadings in the Federal Court. It is nonetheless important to address these questions, as they have a bearing on the outcome of the present appeals. A useful starting point is the report of the Law Reform Commission ("LRC"), *Grouped Proceedings in the Federal Court* (Report No 46, 1988) ("*Grouped Proceedings*").

The LRC's Report on *Grouped Proceedings*

110 Part IVA of the *Federal Court Act* does not follow precisely the recommendations of the LRC in *Grouped Proceedings.* Nevertheless, Part IVA follows reasonably closely the substance of the LRC's proposals concerning procedural requirements for representative proceedings. (*Grouped Proceedings* included in Appendix A a draft *Federal Court (Grouped Proceedings) Bill* ("*Draft Bill*") that has similarities with the legislation ultimately enacted.) For this reason, the LRC's analysis sheds light on the objectives underlying key provisions now contained in Part IVA.

111 As has been noted, s 33C(1) of the *Federal Court Act* sets out threshold requirements for representative proceedings. Section 33C(1)(a) of the *Federal Court Act* does two things. First, it stipulates that seven is the minimum number of persons who may make claims in a representative proceeding. (In this respect it broadly corresponds to the LRC's proposal: see par 140). Secondly, and more importantly for present purposes, it requires that the seven or more persons "have claims against the same person".

112 The second requirement in s 33C(1)(a) implements the LRC's clearly expressed view that group proceedings should be available only where the applicant and all group members seek relief against the **same respondent.** The LRC saw its task as considering whether there was a need for procedural changes to make it easier and less costly for people to obtain remedies in cases of "multiple wrong[doing]" (par 13). It used the term "multiple wrong" to describe situations:

> *"where a **single respondent** has caused or threatened to cause loss, damage or injury to a number of people in circumstances where there is a legal liability to pay compensation…or where injunctive or declaratory relief is available"* (par 13). (Emphasis added.)

113 The LRC's recommendations were specifically designed to provide an effective procedure to enable people suffering loss or damage in common with others as a result of a wrongful act or omission **by the same respondent** (par 69, 95, 133). It therefore plainly did not envisage that the grouped procedure could be employed to bring a proceeding against more than one respondent, in circumstances where some members of the group make a claim against one respondent only and others make a claim against another respondent.

114 Section 33C(2) of the *Federal Court Act* closely mirrors the LRC's recommendations that the

grouped procedure should be available where group members

- claim damages as a result of a wrongful act or series of wrongful acts by another even though damages might need to be assessed separately (par 64); and
- have different claims for relief against the respondent or rely on different transactions or events to establish their claims (par 134-135).

The LRC saw these recommendations as justifiable extensions of the scope of existing procedures under Rules of Court, such as *FCR*, O 6 r 13, which permit representative proceedings where numerous people have "the same interest" in the proceedings. (*Grouped Proceedings* was published before the decision in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, which gave a liberal construction to an equivalent rule).

115 In view of its recommendations extending the scope of existing representative procedures, the LRC considered that provision should be made to ensure that grouped proceedings involve common issues. Accordingly, it proposed that the various claims brought by the applicant and group members should be based on similar or related facts:

> *"[t]he material facts on which a claim is based [footnote: that is, those that must be pleaded: FCR O 4 r 6(2)] – every fact upon which a party must rely to make out their claim – should therefore have to be the same, similar or related in order to ensure a community of interest between the principal applicant and group members and to prevent disparate matters from being brought together"* (par 134).

This recommendation is reflected in the terms of s 33C(1)(b) of the *Federal Court Act*, which requires that the claims of all applicants and group members be "in respect of, or arise out of, the same, similar or related circumstances".

116 The LRC recognised that a requirement of "common or related circumstances" would not of itself ensure that there is a single issue or question which arises in all proceedings. Unless such a requirement were imposed, the LRC took the view that the advantages of grouping could be outweighed by diversity and unmanageability of issues (par 136). Therefore it recommended that each group member's proceeding should have to raise at least one question of law or fact that is common to the proceedings of each other group member and the principal applicant (par 138). This recommendation is reflected in the terms of s 33C(1)(c), although the word "substantial" (the significance of which was considered by the High Court in *Wong v Silkfield*) does not appear in the LRC's *Draft Bill* (See App A, cl 12(1)(a)).

117 The LRC specifically addressed the question of pleadings in grouped proceedings. It noted that the originating process for proceedings in the Federal Court is an application and either a statement of claim or an affidavit in support (*FCR*, O 4, rr 1-6). The LRC observed that the application in grouped proceedings would need to include:

> *"· the relief claimed by the principal applicant*
> *· the relief claimed by the group members*
> *· a sufficient description or identification of the group members"* (par 141).

The LRC reiterated that the group members would not have to be named in the application, but would usually be described as persons suffering a particular kind of loss or injury.

118 The LRC proposed that, in order to give the respondent "the appropriate information", the statement of claim or affidavit should set out:

> *"· the nature of the principal applicant's claim or claims and the material facts on which they are based*
> *· the nature of the group members' claims and the material facts on which they are based*
> *· a question or questions common to the principal proceeding (so far as that proceeding is in respect of a federal or Territory matter) and each group member's proceeding"* (par 142).

The LRC also recommended that the statement of claim or affidavit should declare that the material facts in the applicant's proceedings are the same, similar or related to the material facts giving rise to such claim in each group member's proceeding.

119 It is clear from these recommendations that the Commission envisaged that in a grouped proceeding commenced by application and statement of claim, the pleading would specify the material facts on which the claims of the principal applicant and group members were based. However, it seems that the Commission also envisaged that pleadings in grouped proceedings would not necessarily plead in detail the individual case of each group member.

120 This is demonstrated by the sample statement of claim included in an Appendix to *Grouped Proceedings* report (App B). The sample statement of claim pleads a hypothetical case founded on misleading advertising by a vendor of fax machines. The representative group is identified as comprising all persons who purchased a particular brand of fax machine from the respondent. The sample statement of claim pleads precise dates of purchase and installation of a fax machine by the principal applicant. But so far as group members are

concerned, the sample pleading simply alleges that each group member purchased a relevant fax machine after a particular date and prior to the institution of proceedings. Similarly, the sample statement of claim does not identify when each group member saw the misleading advertisement or purchased the fax, but alleges only that each member relied on the advertisement when purchasing the machine.

121 Section 33H of the *Federal Court Act* also has its origins in the LRC's recommendations, although the section does not exactly follow the LRC's proposals. For example, s 33H(1)(c) requires the common questions of law and fact to be specified in the application, rather than in the statement of claim or supporting affidavit, while s 33H(1)(b) requires the application to specify the nature of the claims made on behalf of group members, as well as the relief claimed.

122 Finally, the LRC considered that adequate provision had to be made to ensure that the grouped procedure is not abused or used inappropriately or inefficiently. For this reason, the LRC proposed that the Court's existing powers under *FCR* O 11 r 16 and O 20 r 2(1) should be available in grouped proceedings. To stress this point, the LRC recommended (par 149) that the legislation should specifically refer to the Court's power to stay, dismiss or strike out proceedings. Section 33ZG(b) of the *Federal Court Act* implements this recommendation.

Procedural Requirements for Representative Proceedings

123 It follows from Part IVA of the *Federal Court Act*, when construed in context (including the LRC's report on *Grouped Proceedings*), that representative proceedings must satisfy a number of procedural requirements.

124 *First*, in order for representative proceedings to be properly constituted, the application (or a supporting document) must include the three categories of information specified in s 33H(1). If, for example, the application does not describe or otherwise identify the group members, as required by s 33H(1)(a), the application is liable to be struck out or the proceedings dismissed, pursuant to the Court's powers under the *FCR* specifically preserved by s 33ZG(b).

125 *Secondly*, a proceeding is not properly commenced unless it satisfies each of the three threshold requirements specified in s 33C(1). If the proceeding does not comply with these requirements, for example because seven or more persons do not have claims against the

same person as required by s 33C(1)(a), the proceeding is liable to be dismissed or the applicants' pleading struck out. (An alternative procedure was adopted in *Silkfield v Wong*, where the Full Federal Court made a declaration that the proceedings continue as proceedings brought by the respondents on their own behalf, to give effect to the majority holding that s 33C(1)(c) had not been complied with. The High Court, although allowing the appeal, did not comment adversely on this form of relief.)

126 *Thirdly*, as the parties accepted, s 33C(1)(a) requires every applicant and represented party to have a claim against the one respondent or, if there is more than one, against all respondents. This conclusion follows from the language of s 33C(1)(a) itself and is consistent with the approach taken by the LRC in *Grouped Proceedings.* It is also consistent with the structure of the legislation. For example, s 33D(1)(a) (which provides that a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding **against that person** on behalf of other persons referred to in s 33C(1)(a)) is clearly drafted on the assumption that all applicants and represented persons will have claims against the same person.

127 It follows that s 33C(1)(a) is not satisfied if some applicants and group members have claims against one respondent (or group of respondents) while other applicants and group members have claims against another respondent (or group of respondents). The requirement in s 33C(1)(b), that the claims of all group members are in respect of or arise out of the same, similar or related circumstances, is a necessary but not sufficient condition for the commencement of representative proceedings. Of course, if there are two sets of claims against two sets of respondents, it may well be that each can be the subject of representative proceedings. It may even be that directions can be made for them to be heard together: *Ryan v Great Lakes Council* (1997) 149 ALR 45, at 48, per Wilcox J. But they cannot both be the subject of the same representative proceedings.

128 *Fourthly*, in a representative proceeding commenced by application and statement of claim, the pleading must demonstrate that each of the conditions laid down in s 33C(1) has been satisfied. Since s 33C(1) is concerned with the commencement of proceedings, compliance with its terms can be assessed only by reference to the case pleaded by the applicants (or set out in affidavit form if pleadings are not used). This is consistent with the approach taken by the High Court in *Wong v Silkfield*. Thus, for example, the pleading must make claims on

behalf of the applicant and each member of the represented class against the same respondent or, if more than one, against all respondents. It is not permissible in a representative proceeding to plead a claim on behalf of some group members against one respondent and a separate claim on behalf of other group members against another respondent.

129 *Fifthly*, Part IVA of the *Federal Court Act* does not abrogate the general pleading requirements applicable to proceedings in the Federal Court by virtue of *FCR*, O 11. An inadequately pleaded representative proceeding is liable to be struck out or dismissed in the exercise of the Court's powers under *FCR*, O 11 r 16 or O 20 r 2(1). So much follows from s 33ZG(b) of the *Federal Court Act* which, as has been seen, gives effect to recommendations of the LRC in *Grouped Proceedings*.

130 Unlike the threshold requirements for a representative proceeding specified in s 33C(1) of the *Federal Court Act*, inadequacies in the pleadings do not necessarily mean that the proceeding cannot continue as a representative action. Whether that is the consequence of pleaded deficiencies will depend on the nature of the deficiencies and whether they are curable by amendment. The Court has powers to manage representative proceedings which are no less extensive than its powers to manage other proceedings: *FCR*, O 10 r 1; *Federal Court Act* s 33ZF(1) (empowering the Court to make any order in a representative proceeding that the Court thinks appropriate or necessary to ensure that justice is done).

131 The fact that Part IVA of the *Federal Court Act* preserves the ordinary rules of pleading in representative proceedings does not, however, necessarily mean that the applicant in such proceedings is bound to plead material facts specific to each individual member of the represented class. The principal functions of pleadings are to furnish a statement of the case sufficient to allow the opposing party a fair opportunity to meet it;

- to define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial; and
- to enable the opposing party to understand and assess the pleaded case for the purposes of settling the litigation.

See *Dare v Pulham* (1982) 148 CLR 658, at 664, *per curiam.*

132 The requirement imposed by *FCR* O 11 r 2, that a pleading contain a statement in summary form of the material facts on which the party relies, is to be understood by reference to the

functions of pleadings. Thus it is a well established rule that the permitted level of generality of a pleading must depend on the general subject matter and on what is required to convey to the opposite party the case that is to be met: *Ratcliffe v Evans* [1892] 2 QB 524 (CA). For example, in some circumstances, it may be permissible to plead a conclusion rather than the material facts underlying the conclusion: *Kernel Holdings Pty Ltd v Rothmans of Pall Mall Australia Pty Ltd* (French J, 3 September 1991, unreported); *Queensland v Pioneer Concrete (Qld) Pty Ltd* (1999) ATPR 41-691 (Drummond J), at 42,829.

133 In the context of representative proceedings, it may be sufficient for the applicant to plead the case of each member of the represented class at a reasonably high level of generality. (I use "sufficient" in the sense of adequate to enable the applicant to resist an application to strike out the pleading or dismiss the proceedings.) This is illustrated by the sample statement of claim appended to the LRC's report on *Grouped Proceedings*. As has been explained, the sample statement of claim alleges material facts, such as the purchase of a defective product by group members and their reliance on misleading representations, only in the most general terms.

134 Unless the rules of pleading permit this degree of flexibility, serious inroads would be made into the utility of the representative procedure established by Part IVA of the *Federal Court Act.* The general objectives of the legislation were identified in the second reading speech for the *Federal Court of Australia Amendment Bill* 1991 (*Cth Parl Deb,* HR, 14 November 1991, at 3174-3175), in a passage quoted by the High Court in *Wong v Silkfield,* at 379:

> *"The bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.*
>
> *The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions."*

135 As this extract shows, one of the key objectives of the representative procedure is to provide

a genuine remedy where many people suffer small losses, but the total amount at stake may be large. To achieve this objective it may well be necessary and appropriate for the represented group to consist of a very large number of people. By way of example, a catastrophic event at an electricity or gas plant, causing a loss of services to many thousands of people, may give rise to representative proceedings in which the represented group is very large indeed: cf *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731 (Merkel J), at 733. If the individual claims of each member of the represented group had to be pleaded by reference to specific dates and events, the representative procedure might well be rendered ineffective for the very kind of group claim it is intended to facilitate.

136 Whether proceedings at a relatively high level of generality are permissible will depend on the circumstances of the particular case and the stage it has reached. The facts material to the claims of each member of the represented group might not be necessary to ensure that the respondent adequately understands the case made on behalf of the represented class and has a fair opportunity to meet that case. This may be the position, for example, where representative proceedings are brought in order to provide a mechanism to enable one or more common issues of law or fact to be resolved in a manner that binds the respondent and all class members, rather than to determine finally the claims of each class member. (See *Federal Court Act,* ss 33Q, 33R.)

137 The point can be illustrated by *Carnie v Esanda Finance Corporation Ltd,* a case brought under Part 8, r 13(1) of the *Rules of the Supreme Court of New South Wales.* In that case, some members of the High Court recognised that procedural issues had to be resolved before a decision could be made whether or not the representative action could continue: at 405, per Mason CJ, Deane and Dawson JJ; at 410-411, per Brennan J. But none suggested that the fact that the statement of claim did not identify the dates on which each group member entered into the relevant loan or credit contract or variation agreement presented an obstacle to the case continuing as a representative proceeding. (The relevant portion of the statement of claim is extracted in the report of the decision of the New South Wales Court of Appeal: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382, at 385-386. After the High Court remitted the representative proceedings to the Supreme Court, they were terminated, but not because of any deficiencies in the pleadings: *Carnie v Esanda Finance Corporation Ltd* (1995) 38 NSWLR 465 (Young J), at 473.

REASONING

138 The starting point for addressing the competing submissions must be the case as currently pleaded by the applicants. Unless the applicants can show that they have satisfied the requirements of both ss 33C and 33H, the proceedings cannot continue as representative action in their current form.

139 In my opinion, an analysis of the applicants' pleadings shows that they are affected by fundamental flaws that make it difficult to see how, in the absence of drastic surgery, the case can continue as a representative proceeding. What follows is not intended to be an exhaustive catalogue of the deficiencies, but merely an attempt to identify the major difficulties with the case in its current form.

Flaws in the Pleaded Case

140 The *first* difficulty is that the statement of claim simply does not plead the case the applicants say they intend to make out. At one level, perhaps, this is merely indicative of confusion in the applicants' position. The fact that the applicants have not pleaded the case on which they intend to rely does not as a matter of logic demonstrate that the case actually pleaded must be struck out or the proceedings dismissed. It would hardly be surprising, however, if the confusion in the applicants' camp produced a fundamentally flawed statement of claim.

141 It will be recalled that the primary Judge, in his judgment of 13 August 1999, said that the applicants' case is painted on a "larger canvas" than a claim founded on the conduct of a particular manufacturer or distributor towards a particular consumer. In essence, according to his Honour, the applicants' case is that the respondents embarked individually **and collectively** on a course of conduct designed to create a false community perception about the risks of smoking. In oral argument, Mr Nettle specifically embraced this summary as an accurate statement of the applicants' position. Doubtless he took this course recognising the difficulty that the alternative would present, having regard to the requirement in s 33C(1)(a) of the *Federal Court Act* that every group member must have a claim against the respondent or (if there are more than one) all respondents. He may also have had in mind other requirements for representative proceedings specified in Part IVA.

142 It is not essential to the applicants' case, as Mr Nettle explained it, to allege that group members began or continued to smoke cigarettes manufactured or distributed by one or more

of the respondents. What is central is the allegation that the group members were induced by the respondents' misleading conduct to begin or continue smoking cigarettes, regardless of who manufactured or distributed them. It would seem, therefore, that allegations that group members were induced to smoke the respondents' cigarettes, contained in pars 13, 15, 18 and 19 of the statement of claim, are unnecessary and confusing and, therefore, embarrassing.

143 More importantly, despite Mr Nettle's efforts to persuade the Court to the contrary, the statement of claim simply does not plead a case of collective conduct on the part of all three respondents. Paragraph 14 (including its six sub-paragraphs) pleads advertising, marketing and other conduct by **each of the respondents**. It is the conduct of each of the respondents which is said in par 15 to have influenced the group members to smoke or continue to smoke "the cigarettes". Paragraphs 16 and 17 mirror pars 14 and 15. There is nothing in those paragraphs, central as they are to the applicants' case, which alleges a collective course of conduct on the part of the respondents.

144 It is true that the particulars to par 14(C) (which alleges that public statements were made by each of the respondents) identify, *inter alia,* some statements which are said to be attributable to the respondents (or two of them) jointly. So, too, the particulars to par 14(D) (which alleges certain lobbying activities by each of the respondents) identify activities attributable to the respondents (or two of them) jointly. But these are merely particulars of the allegation that each respondent individually engaged in misleading or deceptive conduct. Collective conduct is not one of the material facts pleaded in the statement of claim. The absence of such a pleading is not a purely formal omission. Had the statement of claim included allegations that the respondents had collectively engaged in a campaign of disinformation about the effects of smoking cigarettes, it would have been necessary to identify the manner in which group members were influenced by that collective conduct (as distinct from other conduct influencing their behaviour).

145 Nor is the nature of the applicants' pleaded case altered by par 20 of the statement of claim. Despite Mr Nettle's contention to the contrary, par 20 does not plead collective conduct by the respondents. It merely alleges that each respondent had knowledge of certain matters and that, in some way not explained in the pleading, it thereby aided and abetted or was knowingly concerned in the contravention of s 52 of the *TP Act* by each of the other respondents. Mr Nettle ultimately came very close to conceding that par 20 does not attempt

to plead collective or joint activity by the respondents. He maintained, nonetheless, that the deficiency was cured by the particulars. But the fact that the particulars refer to specific examples of what is said to be joint conduct cannot alter the nature of the case pleaded in the body of the statement of claim.

146 Paragraph 24 pleads, in the alternative, a case of joint liability for the individual breaches of duty pleaded in par 23. This section of the statement of claim pleads a case founded on the negligence of each respondent in not taking reasonable care to alert consumers or potential consumers of **its** cigarettes (see pars 21(a), 22). The inclusion of the alternative claim founded (apparently) on each respondent's negligence does not constitute an allegation of collective conduct on the part of all respondents designed to create a false community perception about the risks associated with cigarette smoking.

147 *Secondly*, the statement of claim contains numerous internal contradictions and errors. While some (such as the apparently erroneous reference in par 17 to the conduct in par 14, rather than the conduct in par 16) can easily be corrected, others are not so readily overcome. As has been noted, the definition of "the cigarettes" at the commencement of the statement of claim is inconsistent with the definition in par 5. The inconsistency was productive of considerable confusion in the course of argument and makes aspects of the statement of claim very difficult to follow. An example is the ambiguous reference to "the cigarettes" in par 14. Faced with these difficulties, Mr Nettle foreshadowed an application to amend the statement of claim yet further. In the result he made no such application and the internal contradictions and errors remain.

148 *Thirdly*, portions of the statement of claim appear to be designed to obfuscate the issues rather than elucidate them. Paragraph 14 alleges that during the "relevant period" (the thirty-nine year period from 1960 to 1999) each of the respondents engaged in conduct promoting the benefits smoking and denying or minimising the risks, the purpose of which was to encourage consumers, including group members, to smoke the cigarettes ("the conduct"). Paragraph 15 alleges that the group members were influenced by the conduct, either directly or indirectly, to smoke, continue to smoke or to fail to quit smoking "the cigarettes" (that is, depending on which definition is chosen, cigarettes manufactured or distributed by one or other of the respondents or by a particular respondent).

149 There is no indication in the pleading of which respondent's conduct influenced particular class members to take the action, let alone which conduct of a particular respondent allegedly influenced particular group members. The difficulty is compounded because, according to par 15(b), it is enough that a group member was influenced by the conduct indirectly, in that he or she was influenced by others who said, heard or **were made aware** of the conduct. Since a given member might have commenced smoking at any time (it is enough to come within the group that the person **failed to cease** smoking after 1974 by reason of the conduct of any one or more of the respondents), a particular group member might have been influenced by the conduct of any one or more of the respondents at any time since 1960. For example, one group member might claim to have been influenced by an advertisement or series of advertisements in 1965 to continue smoking after 1974; another might claim to have taken up smoking in the late 1970s because she was influenced by another smoker who, in turn, had been persuaded by the public statements made by one of the respondents in the 1960s. Some group members might claim to have been influenced by "the conduct" of all three respondents; others might claim to have been influenced by the conduct of only one or two of the respondents. The possible combinations of factual circumstances are virtually limitless.

150 The position has not been clarified by further and better particulars. For example, the applicants responded to a request for particulars of the allegations in par 15 as follows:

> *"Specific examples of the conduct which the Applicants saw and/or heard and/or of which they were aware, are a matter for evidence, due notice of which will be provided to the Respondents by means of witness statements in respect of each of the named Applicants, in the form of the Statement of Mr Durkin, which has been provided to the Respondents."*

151 As I have noted, par 18 of the statement of claim mirrors par 15. It alleges that the misleading or deceptive conduct referred to in pars 16 and 17 caused the class members to begin to smoke, continue to smoke or fail to quit smoking the cigarettes. In the course of argument it was pointed out that it is unclear whether par 18 is intended to allege that all of the conduct influenced each class member, or that some of the conduct influenced each class member. If the latter, par 18 does not give any clue as to which conduct over the twenty-five year period is said to have influenced particular class members or (if there are sub-classes) particular sub-classes. Nor is it clear whether the allegation is that each member of the class has been influenced by the conduct of all three respondents, or whether some members of the

class are alleged to have been influenced by the actions of only one or two of the respondents. Mr Nettle appeared to acknowledge difficulties with par 18 and at one stage indicated that he proposed to seek leave to amend it. However, that application was not pursued.

152 Paragraph 20 of the statement of claim is apparently intended to invoke s 75B of the *TP Act*, by alleging that each respondent aided and abetted or was knowingly concerned in or a party to the contravention by each other respondent of s 52 of the *TP Act*. But par 20, in its present form, does not plead material facts capable of establishing that the terms of s 75B of the *TP Act* have been satisfied. In order to establish that one respondent (B) has aided and abetted the contravention by another (A) of s 52 of the *TP Act*, it is necessary to show that B intentionally participated in A's conduct: *Yorke v Lucas*, at 667-668, per Mason ACJ, Wilson, Deane and Dawson JJ. In order to establish that B was knowingly concerned or party to A's contravention, it is also necessary to show that B was an intentional participant in the contravention: *Yorke v Lucas*, at 670.

153 In terms, par 20 simply pleads that each of the respondents engaged in their respective conduct intentionally, knowing that

- nicotine has addictive properties;
- the other respondents were engaging in similar conduct;
- the conduct of the other respondents was likely to mislead smokers and potential smokers; and
- (in some way not identified in the pleading) its own conduct would assist the others in their conduct.

154 Paragraph 20 does not plead material facts that are capable of establishing that, where respondent A has contravened s 52 of the *TP Act*, respondents B and C aided and abetted or were knowingly concerned in that contravention. The mere fact that B and C knew of A's conduct and knew that it was misleading and deceptive cannot establish intentional participation by them in A's conduct. Paragraph 20 does not allege that B and C counselled, encouraged or procured A's contravention of s 52. Paragraph 20(d) does not advance the applicants' position, since it is merely a "bootstraps" allegation. It simply asserts that B and C knew that their respective conduct assisted or aided and abetted A's conduct. The pleading does not explain how B and C's conduct in fact assisted or aided and abetted A's conduct and, in particular, how B and C's actions amounted to intentional participation in A's

contravention of s 52.

Consequences of the Flaws

155 The *first* consequence of these flaws is that, in my opinion, the statement of claim does not establish that the requirements of s 33C(1)(a) of the *Federal Court Act* have been met. As I have explained, the applicants do not plead a case based on the collective conduct of all three respondents. What is alleged, in essence, is that each of the respondents, over a period of twenty-five years or more, engaged separately in misleading or deceptive conduct. Each group member is said to have been influenced to smoke, continue smoking or fail to quit smoking by the conduct of one or other of the respondents. This does not constitute the pleading of a claim by all applicants and group members against all respondents, as s 33C(1)(a) requires. Rather, the statement of claim pleads that some applicants and group members have claims against one respondent, while others have claims against the other individual respondents. The statement of claim also alleges negligence on the part of the respondents over a period of some forty years.

156 It perhaps might be possible to plead a case that every member of a represented class was influenced to commence or continue smoking by the separate conduct of all three respondents and, for that reason, has a claim against all three respondents. Such a case may well encounter formidable factual difficulties, since the circumstances of each group member will vary greatly and it might be thought unlikely that every one of them was influenced to begin or continue smoking by the conduct of each of the three respondents. For present purposes, however, the question is whether the statement of claim actually pleads a case of this kind.

157 Mr Nettle argued that it does. He relied particularly on par 15, which he said is intended to plead that each class member was indeed influenced by the conduct of each respondent. (I put to one side the fact that this submission is difficult to reconcile with the applicants' principal contention that they intended to plead a case based on the collective conduct of the respondents.) As I have already said, par 15 seems to me to be designed to obfuscate the issues, rather than elucidate them. It alleges that "the class members" (not "every class member") were influenced, directly or indirectly, by "the conduct" (that is, the separate conduct engaged in by each of the respondents) to begin or continue smoking. The ordinary meaning of the language used in par 15 is that it is intended to allege that class members were influenced by the conduct of one or other of the respondents, not that each class member was

influenced by the conduct of each respondent. It would be quite wrong, in my view, to interpret the apparently deliberately vague language of par 15 as making an allegation that seems to fly in the face of the rest of the pleading.

158 If the statement of claim clearly pleaded that each class member was influenced by the conduct of each respondent (bearing in mind that the allegations under the *TPA Act* relate to smokers who took up or continued smoking over a twenty-five year period), further pleading and endless management issues would be raised. Would it be possible to particularise such a case in a manner that makes it clear how class members are said to have been influenced by advertisements or public statements they may never have seen? Is it feasible to contemplate continuing representative proceedings when the smoking history of and factors influencing members of the represented class are likely to vary so substantially? It is not necessary to resolve these questions, as I do not think that the applicants have pleaded such a case.

159 As a fall-back position, Mr Nettle relied on par 20 of the statement of claim. For reasons I have given, I do not accept Mr Nettle's submission that par 20 alleges collective conduct by all three respondents. Mr Nettle said that, even so, par 20 satisfies s 33C(1)(a) of the *Federal Court Act.* The reason (so he argued) is that par 20 invokes s 75B of the *TP Act* and alleges that each respondent aided and abetted, or was knowingly concerned in or party to, the contravention by each other respondent of s 52 of the *TP Act.* According to Mr Nettle, it follows that every class member has a claim under s 82 of the *TP Act* against a least one respondent for its contravention of s 52 and also has a claim under s 82 against the remaining respondent or respondents by reason of its or their involvement in the "principal" contravention. Thus every class member has a claim against all other respondents. It is not to the point (so he argued) that the claim against one respondent might be based on its contravention of s 52 as a "principal", while the claim against the other respondents might rest on the "secondary" liability created by s 75B (in combination with s 82) of the *TP Act*. Mr Nettle pointed out that s 33C(2) of the *Federal Court Act* makes it clear that the liability of each respondent could be founded on separate acts or omissions.

160 The flaw in Mr Nettle's fall-back position is that par 20, as I have explained, does not plead material facts capable of establishing that the terms of s 75B of the *TP Act* have been satisfied. A statement of claim that otherwise does not plead claims on behalf of all applicants and group members against all respondents does not overcome that fatal deficiency

by the addition of a spurious pleading that is itself liable to be struck out.

161 I should add that there may be a further question raised by the applicants' contentions. It is by no means clear that s 33C(1)(a) can be satisfied where the statement of claim pleads that some group members have claims under the *TP Act* against one respondent (A) and others against another respondent (B), even if A and B are each alleged to have aided and abetted the other's contravention of the *TP Act*. It is not, however, necessary to resolve that question.

162 The *second* consequence is that the statement of claim fails to establish that the claims of all applicants and group members are "in respect of, or arise out of, the same, similar or related circumstances", as required by s 33C(1)(b) of the *Federal Court Act*. In *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, French J considered the meaning of s 33C(1)(b). As the primary Judge noted, the facts of *Zhang* are removed from the present case, but French J's comments are a helpful guide to the application of s 33C(1)(b). His Honour said this (at 404-405):

> *"The question whether the claims of the persons who are proposed as members of a group arise out of 'the same, similar or related circumstances' as required by s 33C(1) is not to be answered by an elaboration of that verbal formula. It contemplates a relationship between the circumstances of each claimant and specifies three sufficient relationships of widening ambit. Each claim is based on a set of facts which may include acts, omissions, contracts, transactions and other events. As appears from s 33C(2), the circumstances giving rise to claims by potential group members do not fall outside the scope of the legislation simply because they involve separate contracts or transactions between individual group members and the respondent or involve separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.*
>
> *The outer limits of eligibility for participation in representative proceedings are defined by reference to claims in respect of or arising out of related circumstances. The word 'related' suggests a connection wider than identity or similarity. In each case there is a threshold judgment on whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding. At the margins, these will be practical judgments informed by the policy and purpose of the legislation. At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation."*

163 The primary Judge in the present proceedings took the view that, in determining whether

claims are related, attention should be directed to matters of commonality rather than difference. He acknowledged that there were differences among the claims in the proceedings, but took the view that if the allegations of breach of s 52 of the *TP Act* or of a duty of care succeeded, the causes of all applicants and group members would be advanced. Equally, if the allegations failed, all claims would fail.

164 The difficulty with this analysis is that it overlooks the range and scope of the allegations that the respondents had each contravened s 52 of the *TP Act* and breached a duty of care owed to each of the applicants and group members. This is not a case where the only major differences in the pleaded claims relate to reliance and damage. The allegations made against each of the respondents concern diverse conduct over a period of nearly forty years. As the Rothmans submissions point out:

- pars 14(A) and 14(B) of the statement of claim allege advertising, marketing and promotion by each of the three sets of respondents over a thirty-nine year period in respect of a total of 182 different brands of cigarettes;
- pars 14(C) and 14(D) of the statement of claim allege public statements and lobbying by each of the respondents over the same period, of which some 77 separate items have been particularised in Schedules C and D; and
- par 15 alleges that class members were influenced directly or indirectly by "the conduct" without attempting to identify which part or parts of the conduct of the several respondents influenced particular group members or sub-classes of group members (or, for that matter, other people who, in turn, are said to have influenced the applicants or the group members).

165 The representative procedure provided for by Part IVA of the *Federal Court Act* is plainly designed to accommodate a case where the applicants and group members rely on a series of related but not identical transactions, such as similar representations being made separately to different individuals: *Grouped Proceedings*, par 134. But this case involves vastly different forms of advertising, promotions and other public statements by the three respondents over four decades. It is true that the applicants allege that the various public statements – ranging from a single brand name on a billboard at a sporting match to a submission to a Senate Committee – all make substantially the same representations. Yet to test that allegation it would be necessary to examine each of the public statements made over the four decades in its own context, having regard to the characteristics of the likely audience. This is a far cry

from the kind of case envisaged by the LRC as falling within the purview of the representative procedure.

166 In the end, as the primary Judge acknowledged, a judgment must be made as to whether the circumstances giving rise to each claim are so disparate as to merit their grouping as a representative proceeding. His Honour's judgment that the circumstances of this case are not too disparate for this purpose rested heavily on his view, with which I respectfully disagree, that the applicants' pleaded case included a claim that the respondents engaged in a collective course of conduct designed to mislead or deceive consumers. Once it is accepted that the case is founded on the separate conduct of each set of respondents, the difficulty in concluding that s 33C(1)(b) is satisfied becomes apparent. The circumstances of each of the thousands of claims pleaded in the statement of claim are so disparate and involve such varied conduct on the part of the several respondents that they cannot be said to arise out of related circumstances.

167 The *third* consequence is that it is doubtful whether there are in truth any questions of law and fact common to the claims of all applicants and represented members. (I leave the question of substantiality to one side.) The primary Judge recognised the difficulty with some of the questions identified in what is now par 5 of the application. But he concluded that a number of questions now in par 5 satisfied the description of common questions of law and fact. It followed, in his view, that the requirements of s 33C(1)(c) had been complied with.

168 The difficulty facing the applicants can be illustrated by reference to questions (c) and (e) (reproduced at par 62 above, both of which the primary Judge thought raised questions of fact common to the claims of all group members. Question (c) asks, *inter alia*, whether each respondent individually or collectively possessed the knowledge that nicotine is addictive and that smoking that respondent's cigarettes (or perhaps cigarettes of any of the respondents) caused smoking related disease. It is difficult to understand how the knowledge of an individual respondent can be regarded as the same factual question as the knowledge of an unrelated respondent. More significantly, question (c) poses questions that are not common to all applicants and group members. The knowledge that Wills, for example, individually had of the matters identified in question (c), is not a factual question that is material to those group members whose claim is against Rothmans or Philip Morris. And the question of the

collective knowledge of the several respondents is not common to all group members because the case pleaded is not one of collective conduct.

169 Question (e) presents the same difficulties. It asks, *inter alia*, whether the respondents individually and/or collectively engaged in the extensive conduct over nearly forty years alleged in par 14 of the statement of claim. But whether Wills undertook the advertising or promotional activities alleged against it is not a question which arises in the claims made by those group members whose case is against Philip Morris or Rothmans. And the question of collective conduct, having regard to the pleading, does not arise in claims made on behalf of group members, since par 14 of the statement of claim does not make out a case of collective conduct by the respondents.

170 Because of the conclusions I have already reached, it is not necessary to decide finally whether par 5 of the application contains any questions that can be said to satisfy s 33C(1)(c) of the *Federal Court Act.* It is enough to say that the applicants would encounter serious obstacles in securing an affirmative answer.

171 The *fourth* consequence is that, independently of the requirements of Part IVA of the *Federal Court Act* specifically applicable to representative proceedings, the statement of claim in its present form does not adequately plead the material facts necessary to found the claims of the applicants and group members against the respondents. In terms of the objectives of pleading, the statement of claim neither furnishes a statement of the case sufficient to allow the respondents a fair opportunity to meet it, nor does it define adequately the issues for decision in the litigation.

172 I have already pointed out that the statement of claim contains errors and inconsistencies. Some of these have created serious confusion as to the nature of the case being pursued. The applicants had the opportunity during the hearing to apply to amend further. They chose not to do so. The consequence is that portions of the statement of claim, especially those affected by the inconsistent use of the expression "the cigarettes", remain embarrassing.

173 I have also given reasons for concluding that key paragraphs in the statement of claim appear designed to obfuscate the issues rather than to elucidate them. In particular, pars 15 and 18 plead a virtually limitless combination of factual circumstances that make it impossible to

understand with any degree of clarity the case the applicants intend to make against the respondents or any of them.

174 I have recognised that the pleading in a representative proceeding is not necessarily liable to be struck out merely because the material facts relating to the claims of group members are pleaded at a relatively high level of generality. But a pleading of this kind, if it is to survive scrutiny, requires a considerable degree of commonality in the claims made by or on behalf of group members. That degree of commonality may well be present where, for example, the group members all claim to have bought a defective product in reliance on substantially the same misleading representation or to have suffered loss or damage by reason of a particular event caused by the respondent's negligence.

175 The case pleaded in pars 15 and 18 lacks the required degree of commonality. This is apparent from the range of circumstances encompassed by the pleading. Some groups members may claim that they were influenced by friends or relatives who in turn were influenced by advertisements placed by one of the respondents in the 1960s. Other group members may claim to have commenced smoking in the 1990s on the faith of public statements made by one or more of the respondents at about that time. Yet others may claim to have continued smoking in the 1980s and beyond because the warnings about the dangers of cigarette smoking had been "watered down" by reason of the lobbying of one or more respondents.

176 In truth, pars 15 and 18 plead a great variety of disparate cases. They give the mere appearance of commonality by the use of vague and obscure language. They are liable to be struck out.

177 For reasons I have given earlier, par 20 is also liable to be struck out.

178 It follows that had I concluded that the statement of claim complies with the specific requirements of Part IVA, I would nonetheless have held that key portions of it, if not the whole, were liable to be struck out.

DISPOSITION OF THE APPEALS

The Appropriate Relief

179 It follows from the conclusion I have reached that his Honour should not have granted leave on 1 September 1999 to the applicants to file and serve the application and statement of claim. The consequential orders made on that day in relation to the opting out of group members and advertising the proceedings should also be set aside.

180 The respondents' attitude to the applicants being given liberty to replead varied. Rothmans did not object to that course, while Philip Morris and Wills contended that leave should not be granted. They argued that the representative proceeding could not continue in anything like its present form and that it should be brought to a swift end by an order for summary dismissal.

181 There is considerable force in the submission that the applicants should not be granted leave to replead. They have had numerous opportunities to plead a case that complies with the requirements of Part IVA of the *Federal Court Act* and the rules of pleading. (There have been at least six versions of the pleadings, although not all appear to have been filed.) The applicants have failed on each occasion to plead a sustainable case. The current pleadings are replete with fundamental flaws. It is far from clear that a representative action of the kind the applicants say they wish to mount can be pleaded so as to comply with Part IVA and the rules of pleading. Certainly, there is nothing in the way the applicants have approached the proceeding that generates confidence that the deficiencies will be remedied.

182 Despite these considerations, on balance I have concluded that the applicants should be given leave to replead. The applicants asserted before us that there are significant numbers of seriously ill people who are or may be relying on the current proceeding as the vehicle for pursuing their claims against the respondents. While the running of the limitation period is suspended during the currency of the representative proceeding (*Federal Court Act*, s 33ZE(1)), some of those seriously ill people may be prejudiced if the applicants are denied the opportunity to replead. They may not be aware of the effective termination of the representative proceedings and so not take appropriate action to protect such rights as they may have. It is also necessary to take account of the fact that the applicants say that they wish to plead a case based on the collective conduct of the respondents. While they have not yet pleaded such a case, it cannot be said with certainty that such a case is doomed to failure. I recognise that there is a countervailing risk that the opportunity will merely result in further delays and that the applicants will be no more successful than with their previous attempts to

plead the case. Nonetheless, I think that one further opportunity should be provided to replead the applicants' case having regard to the reasons that have been given for striking out the current pleadings.

Exemplary Damages

183 Since the order granting leave to the applicants to file the application and statement of claim is to be set aside, there is no current pleading claiming exemplary damages from the respondents. On the orders I propose, it is not clear that any further claim for exemplary damages will be made or, if it is, that it will fall within the accrued jurisdiction of this Court.

184 In *Bass v Permanent Trustee Co Ltd* (1999) 161 ALR 399, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ emphasised (at 413-414) that a judicial determination includes:

> *"a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy".*

As the Court pointed out, one crucial difference between an advisory opinion and a declaratory judgment is the fact that the former is not based on a concrete situation and does not amount to a binding decision raising a *res judicata* between the parties.

185 It is arguable whether the exemplary damages issue can properly be described as hypothetical. It may be enough to save it from that description that the issue arose out of the representative proceedings as pleaded and was the subject of argument on the application for leave to appeal: *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, at 304-305. Nonetheless, I think it better to defer dealing with this issue until a properly pleaded representative claim is made in which exemplary damages are sought in the accrued jurisdiction of the Court. *A fortiori,* if the proceedings are not to continue as representative proceedings, as Spender and Hill JJ propose, it is inappropriate to deal with the question of exemplary damages until it arises in a properly pleaded representative claim.

186 Accordingly, I think the appropriate course is to set aside par (b) of the declaration made by the primary Judge. This should not be taken, however, as necessarily implying any disagreement with the reasoning of the primary Judge on this issue.

Limitation Questions

187 It is not appropriate to address the limitation questions unless and until there is a pleading before the Court that complies with the requirements of Part IVA of the *Federal Court Act* and the rules of pleading. I express no view on the limitation questions debated before the Court.

Costs

188 The applicants should pay the respondents' costs of the application for leave to appeal and of the appeals. They should also pay the costs of the respondents' motions of 2 July 1999, including the costs of the hearings on 26 and 27 July 1999 and 31 August 1999.

Orders

189 I propose the following orders:

1. The applicants for leave to appeal be granted leave to appeal against Orders 1(b), 2, 4, 5 and 6 made by the primary Judge on 13 August 1999 and Orders 1, 2, 3, 4, 5, 7 and 8 made on 1 September 1999.
2. Orders 1(b), 4, 5 and 6 made on 13 August 1999 be set aside.
3. Orders 1, 2, 3, 4, 5, 7, 8 and 12 made on 1 September 1999 be set aside.
4. The respondents for leave to appeal be granted leave to file a Further Amended Application and Further Amended Statement of Claim within such further time as the primary Judge directs.
5. The respondents for leave to appeal pay the costs of:
   (a) each of the motions for leave to appeal and of each appeal;
   (b) each of the motions filed by the applicants for leave to appeal on 2 July 1999, including the costs of the hearings on 26 and 27 July 1999 and 31 August 1999.
6. The general stay of proceedings made on 11 November 1999 be discharged.

I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 13 March 2000

Counsel for the First Appellants:	Mr J Sher QC with Mr J Sackar QC and Mr S O'Meara
Solicitor for the First Appellants:	Arthur Robinson & Hedderwicks
Counsel for the Second Appellants:	Mr C Gee QC and Mr D Beach
Solicitor for the Second Appellants:	Mallesons Stephen Jaques
Counsel for the Third Appellants:	Mr S Finch QC and Mr I Jackman
Solicitor for the Third Appellants:	Clayton Utz
Counsel for the Respondents:	Mr J Forrest QC with Mr G Nettle QC and Mr J Beach
Solicitor for the Respondents:	Slater & Gordon
Date of Hearing:	8-11 November 1999
Date of Judgment:	13 March 2000