
IN THE SUPREME COURT OF NEW SOUTH WALES
SYDNEY REGISTRY
EQUITY DIVISION

No. 2625 of 2002

Jurisdiction of Courts (Cross-Vesting) Acts 1987

**AMENDED STATEMENT
OF CLAIM**

Filed on behalf of the Plaintiff, Myriam Cauvin
Pursuant to Order of Hamilton J of 11 June 2002

MYRIAM CAUVIN, on her own behalf
and as representative of the persons
described in Schedule A

Plaintiff

PHILIP MORRIS LIMITED
[ACN 004 694 428]

First Defendant

PHILIP MORRIS (AUSTRALIA) LTD
[ACN 004 316 901]

Second Defendant

MAURICE MAY & CO

Solicitors
78 Liverpool Street
Sydney NSW 2000
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Ref: Maurice May

**BRITISH AMERICAN TOBACCO
AUSTRALIA SERVICES LIMITED**
(formerly known as **W.D. & H.O.
WILLS (AUSTRALIA) LIMITED**)
[ACN 004 069 649]

Third Defendant

**W.D. & H.O. WILLS HOLDINGS
LIMITED**
[ACN 003 763 291]

Fourth Defendant

**BRITISH AMERICAN TOBACCO
AUSTRALASIA LIMITED**
(formerly known as **ROTHMANS
HOLDINGS LTD**)
[ACN 002 717 160]

Fifth Defendant

**BRITISH AMERICAN TOBACCO
AUSTRALIA LIMITED**
(formerly known as **ROTHMANS OF
PALL MALL (AUSTRALIA) LTD**)
[ACN 000 151 100]

Sixth Defendant

**COLES SUPERMARKETS PTY
LIMITED** including as representative of
the persons described in Schedule B
Seventh Defendant

COLES MYER LTD
including as representative of the persons
described in Schedule B
Eighth Defendant

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NOTE: *In this Statement of Claim:*

- (a) *A reference to “TPA” is a reference to the Trade Practices Act 1974 (C’th).*
- (b) *A reference to “FTA” is reference to the Fair Trading Act 1987 (NSW) and relevant Fair Trading legislation in each State or Territory as set out in the Table of Comparative Legislative Provisions comprising Schedule C.*
- (c) *A reference to an equivalent provision or to equivalent provisions in State and/or Territory Fair Trading legislation means a reference to the equivalent provision in such legislation to the relevant provision of the TPA as set out in the Table of Comparative Legislative Provisions comprising Schedule C, and:*
 - (i) *any reference to “FTA” is a reference to the relevant Fair Trading legislation in each State and/or Territory, as appropriate, as and from the commencement date of that legislation; and*
 - (ii) *a reference to the “TPA” extends to include a reference to any relevantly operating FTA; and*
 - (iii) *a reference to a provision or provisions of the TPA extends to include a reference the equivalent provision or equivalent provisions in the relevant Fair Trading legislation in each State and/or Territory, as appropriate, as and from the commencement date of that legislation.*
- (d) *A reference to “the Fund” is a reference to moneys paid by the Seventh and/or Eighth Defendants, and the persons described in Schedule B, to one or other of the First, Second, Third, Fourth, Fifth, and/or Sixth Defendants under the Business Franchise Licences (Tobacco) Act 1987 (NSW) and equivalent legislation in other States and Territories, in respect of the period 1 July 1997 to 5 August 1997, inclusive (“the Relevant Period”), being a sum comprising approximately \$230 million.*
- (e) *A reference to the Business Franchise Licences (Tobacco) Act 1987 (NSW) and equivalent legislation in other States and Territories is reference to the legislation set out in Schedule D.*

- (f) *A reference to the “Tobacco Franchise Legislation” is a reference to the legislation set out in Schedule D.*
- (g) *A reference to "at all relevant times" is a reference to the period from 1997 to date.*
- (h) *A reference to the "Relevant Period" is a reference to the period from 1 July 1997 to 5 August 1997, inclusive.*
- (i) *A reference to:*
- (ii) *the “Philip Morris companies” is a reference to the First and Second Defendants or one or other or both of them;*
 - (iii) *the “Wills companies” is a reference to the Third and Fourth Defendants or one or other or both of them;*
 - (iv) *the “Rothmans companies” is a reference to the Fifth and Sixth Defendants or one or more or both of them;*
- and a reference to the “Manufacturers/Distributors” or to the “ Wholesalers” is a reference to the First, Second, Third, Fourth, Fifth and Sixth Defendants collectively.*
- (j) *A reference to the “Retailers” is a reference to the Seventh and Eighth Defendants and those represented by the Seventh and Eighth Defendants.*
- (k) *A reference to the Defendants or one or more of them and/or the companies represented by the Defendants, or one or more of them:*
- (i) *doing any act;*
 - (ii) *performing any action;*
 - (iii) *engaging in any activity; or*
 - (iv) *engaging in any conduct;*
- extends to any act done, action performed, activity or conduct or engaged in, by that Defendant, by themselves, or a director, servant or agent of that Defendant within the scope of the person’s actual or apparent authority or by any other person at the direction or with the consent or agreement (whether expressed or implied) of director, servant or agent of that Defendant, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director servant or agent.*

1. PARTIES

A. Plaintiff

1.1 The Plaintiff sues on her own behalf and as representative of the persons described in Schedule A, pursuant to Part 8 Rule 13 of the Supreme Court Rules, as persons who purchased cigarettes and other tobacco products from the Retailers in or about mid-1997.

B. Defendants

1.2 The First and Second Defendants at all material times, including during the Relevant Period:

- (a) were, and are, companies incorporated pursuant to the laws of Australia;
- (b) were, and are, Division 2 Companies within the meaning of the Corporations Law.

PARTICULARS

The company registered under the name Philip Morris Limited [ACN 004 694 428] (“**PML**”) was incorporated on 24 May 1967.

The company registered under the name Philip Morris (Australia) Limited [ACN 004 316 901] (“**PMA**”) was incorporated on 17 March 1954 under the name Philip Morris (Australia) Ltd, until 18 March 1954 when its name was changed as and from 19 March 1954 to Philip Morris (Australia) Pty Ltd, until 10 January 1955 when its name was changed to Philip Morris (Australia) Limited as and from 11 January 1955.

- (c) were, and are, liable to be sued in their corporate name and style;
- (d) were, and are, trading and financial corporations within the meaning of paragraph 51(xx) of the Constitution of Australia;

- (e) were, and are, corporations within the meaning of the TPA; and
- (f) at all material times carried on business as a manufacturer and/or distributor of cigarettes and other tobacco products in Australia.

1.3 The Third and Fourth Defendants at all material times, including during the Relevant Period:

- (a) were, and are, companies incorporated pursuant to the laws of Australia;
- (b) were, and are, Division 2 Companies within the meaning of the Corporations Law.

PARTICULARS

The company registered under the name British American Tobacco Australia Services Limited [ACN 004 069 649] (“**BATAS**”) was incorporated on 20 February 1914 under the name The New British-Australasian Tobacco Company Pty Ltd, until 3 April 1914 when its name was changed to The British Australasian Tobacco Company Pty Ltd, as and from 4 April 1914 until 28 December 1936, when its name was changed to The British Australasian Tobacco Company Ltd, as and from 29 December 1936 until 31 August 1958 when its name was changed to W.D. & H.O. Wills (Australia) Limited (“**Wills**”) as and from 1 September 1958 until 30 March 2000 and then as British American Tobacco Australia Services Limited from 31 March 2000.

The company registered under the name W D & HO Wills Holdings Limited [ACN 003 763 291] (“**Wills Holdings**”) was incorporated on 19 April 1989.

- (c) were, and are, liable to be sued in their corporate name and style;
- (d) were, and are, trading and financial corporations within the meaning of paragraph 51(xx) of the Constitution of Australia;
- (e) were, and are, corporations within the meaning of the TPA; and

- (f) at all material times carried on business as a manufacturer and/or distributor of cigarettes and other tobacco products in Australia.

1.4 The Fifth and Sixth Defendants at all material times, including during the Relevant Period:

- (a) were, and are, companies incorporated pursuant to the laws of Australia;
- (b) were, and are, Division 2 Companies within the meaning of the Corporations Law.

PARTICULARS

The company registered under the name British American Tobacco Australasia Limited [ACN 002 717 160] (“**BATA’a**”) was incorporated on 26 January 1984 under the name Rothmans Holdings Ltd, (“**Rothmans Holdings**”) until 1 September 1999 when its name was changed to British American Tobacco Australasia Limited as and from 2 September 1999.

The company registered under the name British American Tobacco Australia Limited [ACN 000 151 100] (“**BATA**”) was incorporated on 28 April 1955 under the name Rothmans of Pall Mall (Australia) Ltd (“**RPM**”) until 30 March 2000 when its name was changed to British American Tobacco Australasia Limited as and from 31 March 2000.

- (c) were, and are, liable to be sued in their corporate name and style;
- (d) were, and are, trading and financial corporations within the meaning of paragraph 51(xx) of the Constitution of Australia;
- (e) were, and are, corporations within the meaning of the TPA; and
- (f) at all material times carried on business as a manufacturer and/or distributor of cigarettes and other tobacco products in Australia.

1.5 The Seventh and Eighth Defendants at all material times, including during the Relevant Period:

- (a) were, and are, companies incorporated pursuant to the laws of Australia;
- (b) were, and are, Division 2 Companies within the meaning of the Corporations Law.

PARTICULARS

The company registered under the name Coles Myer Supermarkets Pty Limited [ACN 004 189 705] (“**Coles Supermarkets**”) was incorporated on 10 November 1933.

The company registered under the name Coles Myer Ltd [ACN 004 089 936] (**Coles Myer**) was incorporated on 1 July 2001.

- (c) were, and are, liable to be sued in their corporate name and style;
- (d) were, and are, trading and financial corporations within the meaning of paragraph 51(xx) of the Constitution of Australia;
- (e) were, and are, corporations within the meaning of the TPA; and

at all material times carried on business as a retailer of, amongst other things, cigarettes and other tobacco products in Australia, including under the name Coles Supermarkets at corner Waratah and Parke Streets Katoomba in the State of New South Wales at and from at least 16 January 1991..

C. Persons Represented by the Seventh and Eighth Defendants

1.6 The persons represented by the Seventh and Eighth Defendants at all material times, including during the Relevant Period similarly carried on business, amongst other things, as retailers of cigarettes and other tobacco products at various locations in the States and Territories throughout Australia

D. Relationship between the Defendants and the persons Represented by the Seventh and Eighth Defendants.

1.7 At all material times, including during the Relevant Period, the First, Second, Third, Fourth, Fifth and Sixth Defendants carried on business as manufactures and/or distributors of cigarettes and other tobacco products throughout Australia and in that capacity one or other or more of them were Wholesalers of cigarettes for the purposes of the Tobacco Franchise Legislation.

1.8 At all material times, including during the Relevant Period, the Seventh and Eighth Defendants and those represented by the Seventh and Eighth Defendants carried on business, amongst other things, as retailers of cigarettes and other tobacco products at various locations throughout Australia and in that capacity were Retailers of cigarettes and other tobacco products for the purposes of the Tobacco Franchise Legislation.

2. CONDUCT

A. General

2.1 In the course of acting as Wholesalers, as described above, the First, Second, Third, Fourth, Fifth and/or Sixth Defendants included in the price at which they sold cigarettes and other tobacco products to Retailers, a licence fee in order to comply with the Tobacco Franchise Legislation.

2.2 The said licence fee was charged in advance, including during the Relevant Period.

2.3 In the course of carrying on business as Retailers, as described above, the Seventh and Eighth Defendants and the persons represented by them also included in the price at which they sold cigarettes and other tobacco products to the Plaintiff and those represented by the Plaintiff an amount reflecting the licence fee required to be paid in order to satisfy the requirements of the Tobacco Franchise Legislation.

2.4 The said price increase was charged by the Retailers in mid-1997 at or about the time of the Relevant Period.

2.5 In accordance with the manner of carrying on business described above:

(a) the Retailers collected an amount by way of price increase from customers, including the Plaintiff and those represented by the Plaintiff, in or about mid-1997 so as to enable them to make the payments referred to in (b) below

(b) the Retailers paid moneys by way of advance payment of licence fees to the Wholesalers or one or more of them, including in respect of the Relevant Period, such moneys comprising the Fund.

B. Invalidity of the Tobacco Franchise Legislation

2.6 On 5 August 1997 the High Court handed down a decision declaring licence fees of the kind imposed by the *Business Franchise Licences (Tobacco) Act 1987* (NSW) and as a consequence equivalent legislation in other States and Territories are, and are accepted by the Defendants as being, invalid.

2.7 As a consequence of the invalidity of the Tobacco Franchise Legislation as described above, moneys paid by the Retailers to the Wholesalers during the Relevant Period have not been paid by way of a licence fee or otherwise under the Tobacco Franchise Legislation by the Defendants or any of them.

C. Retention of Moneys by the Defendants

2.8 The moneys constituting the Fund, or an amount equivalent to the Fund, has been received by the Defendant in or about the Relevant Period and such monies have been held and/or continue to be held by the Defendants or one or more of them.

Particulars

The Plaintiff will provide particulars of exactly which of the Defendants hold what moneys, once information in that regard is provided to the Plaintiff by the Defendants and/or following discovery.

2.9 On 6 December 2001 the High Court of Australia handed down a decision holding, in effect, that as against the Retailers the Wholesalers are not entitled to continue to retain the moneys constituting the Fund.

D. Money Had and Received

2.10 The money comprising the Fund, or an amount equivalent to the Fund, constitutes:

- (a) moneys had and received by the Wholesalers to the use of the Retailers and to the use of the Plaintiff and those represented by the Plaintiff; and
- (b) moneys had and received by the Retailers to the use of the Plaintiff and those represented by the Plaintiff.

E. Unjust Enrichment

2.11 In the premises, the retention of the moneys comprising the Fund, or an amount equivalent to the Fund, by the Wholesalers or the Retailers would constitute unjust enrichment on their part as against the Plaintiff and those represented by the Plaintiff.

F. The Defendants Conduct in Trade or Commerce

2.12 The conduct referred to above was, or would be, conduct engaged in by the Defendants in trade or commerce.

G. Unconscionable Conduct

2.13 In the premises, and in the further alternative, the retention of the moneys comprising the Fund, or an amount equivalent to the Fund, by the wholesalers and/or retailers is and/or would be unconscionable and is and/or would constitute conduct that is and/or would be, in all the circumstances, unconscionable in contravention of ss.51AA and /or 51AB of the TPA and/or equivalent provisions in State and/or Territory Fair Trading Legislation.

Particulars

The circumstances referred to are those set out in paragraphs 2.1 to 2.12 above.

H. Loss or Damage and/or Likely Loss or Damage

2.14 As a consequence of the matters referred to above, the Plaintiff and other persons being the persons described in Schedule A, have suffered and/or are likely to suffer loss and damage.

PARTICULARS

The Plaintiff and such other persons have paid moneys to the Seventh and Eighth Defendants and those represented by the Seventh and Eighth Defendants so as to enable them as Retailers (as described above) to make payments to the First, Second, Third, Fourth, Fifth and/or Sixth Defendants, and/or one or more of them as Wholesalers (as described above), and such moneys have been retained by the Defendants, or one or more of them, and not repaid to the Plaintiff and the persons

represented by the Plaintiff to be benefit of the Defendants and to the detriment of the Plaintiff and those represented by the Plaintiff. If required, further and better particulars will be provided following the supply of information as to the whereabouts of the moneys constituting the Fund and/or discovery.

3. RELIEF

A. Preliminary

3.1 In the premises:

- (a) as against the Retailers the Wholesalers are not entitled to retain the moneys comprising the Fund, or an amount of money equivalent to the Fund; and
- (b) As against the Plaintiff and those represented by the Plaintiff, neither the Retailers nor the Wholesalers are entitled to retain the moneys comprising the Fund, or an amount of money equivalent to the Fund.

B. Prayer for Relief

3.2 The Plaintiff claims relief including Orders jointly and severally against the Defendants and those represented by the Seventh and Eighth Defendants as follows:

I. Declaratory Relief

3.3 A declaration or declarations, in such terms the Court thinks fit, to the following effect:

- (a) That as against the Seventh and Eighth Defendants and the persons described in Schedule B, the First, Second, Third, Fourth, Fifth and Sixth Defendants (and any one or more of them), are not entitled to retain the moneys described below as “the Fund”, or an amount of money equivalent to the Fund.

- (b) That as against the Plaintiff and the persons described in Schedule A the Seventh and Eighth Defendants and the persons described in Schedule B (or any one or more of them), are not entitled to retain the sum of \$153,589.48, nor any of the balance of moneys constituting the Fund, or an amount of money equivalent to the Fund.
- (c) That the retention of the Fund, or an amount of money equivalent to the Fund, by the Defendants, or any one of them, or any of the persons described in Schedule B is and/or would be conduct that is and/or would be, in all the circumstances, unconscionable, including in contravention of s.5AA and/or s.51AB of the *Trade Practices Act 1974* (Cth) and/or equivalent provisions in State and/or Territory Fair Trading Legislation.
- (d) That the Plaintiff and/or other persons, including the persons described in Schedule A, have suffered, or are likely to suffer, loss or damage by the said conduct that constitutes or would constitute a contravention of s.51AA and/or s.51AB of the *Trade Practices Act* and/or equivalent provisions in State and/or Territory Fair Trading legislation, the subject of the foregoing declarations.
- (e) That the moneys constituting the Fund, or an amount of money equivalent to the Fund, should be paid into Court to abide the further order of the Court, including pending the determination of the issues between the parties, as follows:
- (i) the sum of \$153,589.48, plus interest; and
 - (ii) the balance of the Fund, or an amount of money equivalent to the balance of the Fund plus interest;
- and/or the Fund should be preserved in such manner as the Court thinks fit.
- (f) That there ought be an inquiry into the precise amount of money that constitutes, or constituted the Fund.

- (g) That the Fund, or an amount of money equivalent to the Fund, should be held for the benefit of the Plaintiff and the persons described in Schedule A, in a manner to be determined by the Court

II. Injunctive Relief

3.4 An injunction or injunctions, including on an interlocutory basis, in such terms as the Court determines to be appropriate in respect of the Defendants' contravening conduct including an injunction or injunctions to the following effect:

- (a) an order restraining the Defendants, and any of them, from disposing of or dissipating the sum of \$153,589.48, and any balance of the Fund held by them, and/or requiring that the Fund, or an amount equivalent to the Fund be held in such manner as the Court determines to be appropriate;
- (b) an order requiring the Defendants to submit to an inquiry as to the precise amount of money that constitutes or constituted the Fund.

III. Other Orders

3.5 An Order that the Fund, or an amount equivalent to the Fund, plus interest, be paid in such manner as the Court directs for the benefit of the Plaintiff and those described in Schedule A.

3.6 Such other order or orders under s.87 of the Trade Practices Act and/or equivalent provisions in State and/or Territory Fair Trading Legislation, as the Court thinks appropriate as will compensate the Plaintiff, and other persons, in whole or in part for any loss or damage that has been suffered by them or will prevent or reduce any loss or damage that is likely to be suffered by them by the contravening conduct the subject of the foregoing declarations.

IV. Costs

3.7 Awarding the costs of this proceeding, in such manner as the Court thinks fit.

V. Other or Further Orders

3.8 Such other or further orders and/or declarations as may be necessary or appropriate.

To the Defendants:

Philip Morris Limited [ACN 004 694 428] and
 Philip Morris (Australia) Limited [ACN 004 316 901]
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 Solicitors
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British American Tobacco Australia Services Limited
 [ACN 004 069 649] (formerly known as W.D. & H.O. Wills
 (Australia) Limited)
 W.D. & H.O. Wills Holdings Limited [ACN 003 763 291]
 British American Tobacco Australasia Limited
 [ACN 002 717 160] (formerly known as Rothmans Holdings
 Limited)
 British American Tobacco Australia Limited [ACN 000 151 100]
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Coles Supermarket Pty Limited [ACN 004 189 708]
 Coles Myer Ltd [ACN 004 089 936]
 Level 5, Module 4,
 800 Toorak Road, Toornga VIC 3146
 Level 5, Module 4,
 800 Toorak Road, Toornga VIC 3146

DATED: 12 June 2002

.....
MAURICE MAY
 Solicitor for the Plaintiff

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SCHEDULE A

All other persons who, like the Plaintiff, purchased cigarettes in Australia in or about mid-1997 in respect of which an amount was included in the price by the Seventh and Eighth Defendants and/or the persons described in Schedule B being an amount calculated or intended to cover moneys paid by the Seventh and Eighth Defendants and/or the persons described in Schedule A to the First, Second, Third, Fourth, Fifth and/or Sixth Defendants in respect of a fee levied under the *Business Franchise Licences (Tobacco) Act 1987* (NSW) and equivalent legislation in other States and Territories in respect of the period 1 July 1997 to 5 August 1997 as was found invalid by the High Court in *Ha v New South Wales* (1997) 189 CLR 465 and which was the subject of the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68; (2001) 76 ALR 203.

SCHEDULE B

All other persons who, as tobacco retailers, collected moneys for cigarettes from the Plaintiff and the persons described in Schedule A, and paid a fee of the kind described in Schedule A.

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SCHEDULE C

Table of Comparative Legislative Provisions

Legislation	Sec.	Sec.	Sec.	Sec.	Sec.	Sec.	Sec.	Sec.	Sec.
Trade Practices Act, 1974 (Cth)	51AB	51A	52	52A	75B	80	83	84	87
Fair Trading Act, 1987 (NSW) Commencement Date: 01/09/87	43	41	42	43	61	65	69	70	72
Fair Trading Act, 1985 (Vic) Commencement Date: >/12/85	11A	10A	11	11A	31	34	38	39	41
Fair Trading Act, 1999 (Vic) Commencement Date: 01/09/99	8	-	9	8	-	149	157	144	158
Fair Trading Act, 1989 (Qld) Commencement Date: 19/10/89	39	37	38	39	-	-	-	95	100
Fair Trading Act, 1987 (SA) Commencement Date: 26/10/87	57	54	56	57	-	83	-	-	85
Fair Trading Act, 1987 (WA) Commencement Date: 09/09/88	11	9	10	11	68	74	80	82	77
Fair Trading Act, 1990 (Tas) Commencement Date: 19/12/90	15	11	14	15	29	34	38	39	41
Consumer Affairs Fair Trading Act, 1990 (NT) Commencement Date: 01/04/91	43	41	42	43	-	89	92	93	95
Fair Trading Act, 1992 (ACT) Commencement Date: 01/01/93	13	11	12	13	40	44	47	48	50

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SCHEDULE D

Table of State and Territory Legislation

NSW	<i>Business Franchise Licenses (Tobacco) Act 1987 (NSW)</i>
VIC	<i>Business Franchise (Tobacco) Act 1974 (Vic)</i>
TAS	<i>Tobacco Business Franchise Licences Act 1980 (Tas)</i>
SA	<i>Tobacco Products Regulation Act 1997 (SA)</i>
WA	<i>Business Franchise (Tobacco) Act 1975 (WA)</i>
NT	<i>Business Franchise Act 1981 (NT)</i>
QLD	<i>Tobacco Products (Licensing) Act 1988 (QLD)</i>
ACT	<i>Business Franchise (Tobacco and Petroleum Products) Act 1984</i>