Legal does not mean unaccountable: suing tobacco companies to recover health care costs

It is time for legal action to recover health care costs from the tobacco industry

Australia's 2011 precedent-setting plain packaging legislation[1] reinforced the country's reputation within the tobacco industry as "the darkest market in the world".[2] The country's commitment to tobacco control, and a declining national smoking rate that is among the lowest in the world should not, however, mislead the public or policy makers into a mistaken belief that tobacco is done.

Pivotal achievements such as plain packaging may feed complacency and policy inertia. Unless the momentum of tobacco control is maintained with further innovative approaches, the industry will inevitably develop new strategies to undermine measures in place, and public health gains will be at risk. We have seen this before in Australia, during the period of relative regulatory inactivity after the introduction of tobacco advertising bans at state and national levels in the 1980s and early 1990s.

But tobacco is far from done. An estimated 2.6 million adult Australians were smokers in 2014, and smoking remains the country's leading preventable cause of death and disease.[3] It causes 15 000 deaths annually and is likely to kill two-thirds of current users.[4] Annual health, social and economic costs of smoking[5] were estimated at more than $31.5 billion in 2008,[6] and are now considered to be substantially greater.[7]

It is clear that there remains much to do. As Australia's National Tobacco Strategy 2012–2018 moves into its latter stages, advocates and researchers have identified further key objectives, including evidence-based levels of government funding for mass media campaigns; greater focus on disadvantaged groups,[8] particularly Indigenous people and people with mental health problems; product regulation,[9] such as banning ventilated filters and menthol in cigarettes; and further smoke-free measures.

One course of action, however, has received conspicuously limited attention: legal action against tobacco companies aimed at recovering the health care costs associated with treating smoking-related diseases.[10] Unlike most tobacco control measures, which are typically prospective and aimed at protecting Australians in the future, litigation explicitly deals with past industry wrongs. Yet, pairing retrospective accountability with prospective limits on the actions of cigarette manufacturers can play a crucial role in recognising and addressing the continuum of harm caused by the industry. Further, successful litigation could reduce its financial capacity to engage in future activities and undermine any remaining credibility it may have in the policy arena.

Recent developments have made legal action to recover health care costs in Australia worth serious consideration. First, tobacco industry misconduct is now widely acknowledged. The continuing public release of millions of previously confidential industry documents as a result of legal action in the United States in the 1990s, and subsequent litigation[11] and investigative journalism[12,13] have provided crucial insights into pervasive industry misconduct.

Second, the industry has been losing some important battles, including failed legal challenges to plain packaging in Australia, the United Kingdom, Ireland and France; dismissal of a related challenge regarding a Hong Kong–Australia bilateral investment treaty; defeat in its efforts to intimidate the government of Uruguay; and losses in the European Court of Justice and the International Centre for Settlement of Investment Disputes and, reportedly, the World Trade Organization.[14-16]

Third, litigation is increasingly recognised as a valuable tobacco control approach. The World Health Organization Framework Convention on Tobacco Control urges parties to the convention, which has been ratified by 181 countries (including Australia), to consider legal recourse "to deal with criminal and civil liability, including compensation where appropriate".[17] Finally, while legal action to recover health care costs has historically been pursued almost entirely in American courts, lawsuits recently filed by Canadian provinces may provide insights and lessons more relevant to Australia, as our legal system is more similar to Canada's. Notably, the American system is characterised by large financial awards to plaintiffs, contingency fee arrangements for lawyers (lawyers receive an agreed percentage of the amount they recover for clients) rather than time-based fee structures, and determinations of legal costs that include all expenditure by the successful party.

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The context of Canadian litigation

British Columbia faced a number of obstacles when it became the first Canadian province to file a health care cost recovery lawsuit in 1998. Most immediate was the tobacco industry's challenge to the constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act*. The ensuing legal and legislative process was resolved in 2005, when the Supreme Court of Canada unanimously upheld British Columbia's right to sue the tobacco industry under revised legislation that was enacted in 2000.[18]

Moreover, Canadian courts had not dealt with the sort of dollar sums associated with recovery of tobacco-associated health care costs, and many believed that neither judges nor juries would make awards comparable in scale to the US trials. Many Canadian jurisdictions also lacked the US tradition of contingency fees for lawyers, meaning that potentially large upfront litigation costs would be borne by plaintiff provinces.

Finally, Canadian systems usually determine legal costs such that the winning party receives a reimbursement short of their actual outlay. So even if a province won, it could expect to be only partially reimbursed for its own legal costs; if it lost, it would be required to pay the legal costs incurred by the defendant tobacco companies. Despite these concerns, British Columbia's tobacco-specific cost recovery legislation established a precedent that changed the legal landscape. The remaining provinces have subsequently filed lawsuits to recover billions of dollars in compensation; Ontario and Quebec, for instance, are seeking CAD$50 billion and CAD$60 billion in damages respectively.

Challenges to provincial legal action in Canada: lessons for Australia

Several key issues relevant to legal action in Australia have arisen during Canadian cases currently in process. Perhaps most importantly, a major recovery in Australian litigation could potentially push an Australian subsidiary of a global cigarette manufacturer into bankruptcy, depriving plaintiffs of the opportunity to recover full damages. This potential risk of bankruptcy would make it imperative that the parent companies remain as defendants in legal actions in order to satisfy the large damage awards necessary to provide just financial compensation.

Predictably, parent tobacco companies have challenged their inclusion as defendants in Canadian provincial cases and, while unsuccessful, these challenges have delayed the progress of litigation. Australian legal action would, therefore, need to be based on a thorough understanding of the evidence documenting the influence and direction that foreign parent tobacco companies exercise over their Australian subsidiaries, in order to hold the parent companies legally responsible for the actions of these subsidiaries.

Tobacco companies have also raised questions regarding the authenticity of previously confidential industry documents now publicly available,[19] which have been crucial in previous legal proceedings. British American Tobacco has argued that there is an onus on plaintiff provinces to prove that industry documents are legitimate and have not been altered, causing further delays. The effect of industry strategies has been to delay the litigation and substantially raise plaintiffs' litigation costs.

Any decision by Australian states to pursue legal action will have to include assessment of how potential damage awards or settlements, legal fee payment mechanisms and, importantly, legal cost allocation would present within the relevant legal system. Canadian provinces have not divulged the amounts spent on hearings, and are unlikely to do so. The decision by some smaller provinces to pool resources may, however, represent a useful strategy for Australian jurisdictions.

Recognising that even if the Canadian situation is instructive, waiting until litigation there is concluded to weigh up the outcome has more potential disadvantages than benefits. Relevant documents may come to light through the Canadian cases, but if the provinces are successful, any subsequent Australian plaintiffs would likely be lower down the list of creditors seeking compensation from the same parent tobacco companies.

Pursuing legal action in Australia

The idea of recovering health care costs through litigation was previously raised by state and Commonwealth governments,[20] but did not progress beyond discussion. Any future action would first require at least one jurisdiction to enact legislation similar to British Columbia's *Tobacco Damage and Heath Care Costs Recovery Act*, which was subsequently adopted by other Canadian provinces. It would also require a coordinated commitment by state, territory and Commonwealth governments, given that Australian health care funding involves areas of Commonwealth, state, territory and joint responsibility. States and territories, as primary providers of hospital care would clearly be potential litigants, but Commonwealth funding contributions could result in the Australian Government becoming a claimant. Legal action would also involve many tobacco control experts and researchers, diverting attention from other initiatives. Further, litigation would inevitably be a protracted and costly process, especially as the tobacco industry would undoubtedly mount a determined and obstructionist defence.

Potential obstacles notwithstanding, public and official support for tobacco control has never been stronger in Australia, as indicated by plain packaging legislation, bipartisan political support for annual tobacco tax increases,[21] and the Prime Minister's 2016 description of tobacco control as "one of the big public health successes in our generation".[22] Further, rising health care costs could make litigation-derived funds attractive to state governments. Estimating the amounts that could potentially be recovered should, therefore, be an early step in evaluating legal action, with calculations involving not only direct costs to health systems, but also related annual health, social and economic costs borne by the jurisdictions. Litigation to recover costs would, of course, be informed by calculating costs over the 70 years that the tobacco industry has continued to promote its brands since it first became aware of the harms of smoking.

Beyond the potential to recover billions of dollars spent on treatment of diseases caused by smoking, publicity around legal action would also emphasise the health and social impacts of tobacco industry corporate behaviour, furthering the denormalisation of smoking in Australia and generating public and political support for further public health measures.

Legal action would clearly pose substantial challenges, but the potential benefits of holding tobacco companies to account through litigation mean that it could play an important role in future Australian tobacco control strategies.

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