



HIGH COURT OF AUSTRALIA

Public Information Officer

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CAMPBELLS CASH AND CARRY PTY LIMITED v FOSTIF PTY LIMITED
AUSTRALIAN LIQUOR MARKETERS PTY LIMITED v DALE LESLIE BERNEY
IGA DISTRIBUTION (VIC) PTY LIMITED v WHELAN & HAWKING PTY LIMITED
QUEENSLAND INDEPENDENT WHOLESALERS PTY LTD v SYDNEY RICHARD VEITCH
MURRAY AND LINDA MURRAY
IGA DISTRIBUTION (SA) PTY LIMITED v PAUL ASHLEY NEINDORF AND JO-ANNE
GAIL NEINDORF
COMPOSITE BUYERS PTY LIMITED v BARRY GEORGE WILLIAMSON AND LYN
MARGARET WILLIAMSON
IGA DISTRUTION PTY LIMITED v JOANNE MARGERET GOW, IAN RODGER GOW,
PHILLIPA COMINO, LYNETTE MAREE GREEN, PETER LAURENCE GREEN

Action to recover tobacco licence fees brought in the name of seven tobacco retailers could not continue as representative proceedings in the New South Wales Supreme Court because it did not comply with Supreme Court Rules, the High Court of Australia held today.

Campbells Cash and Carry and the other tobacco wholesalers sued by the seven retailers supplied 21,000 supermarkets and other retailers and paid licence fees pursuant to legislation in each State and the ACT. In 1997, the High Court held in *Ha v New South Wales* that the licence fees were excise duties within section 90 of the Constitution and hence invalid. (Only the Commonwealth can impose excise.) In 2001, in *Roxborough v Rothmans of Pall Mall Australia Ltd*, the Court held that, provided certain conditions were fulfilled, retailers who had had the licence fee passed on to them could recover the amount from their wholesaler even if they had passed the fees on to customers. Amounts that could be claimed were often fairly small but potentially totalled many millions of dollars. Of the retailers involved in the case, the amounts claimed ranged from \$657.57 by the Murrays to \$22,939.58 by the Gow group of plaintiffs.

In 2002, litigation funder Firmstones Pty Ltd encouraged retailers to claim a refund of tobacco licence fees which they had paid but which wholesalers had not passed on to taxing authorities following the *Ha* decision. Firmstones sought authority to act on the retailers' behalf to recover the money. It would take one-third of the refunds. Firmstones arranged for summonses instituting the seven proceedings to be issued in June 2003. Each was commenced as representative proceedings under the Supreme Court Rules but the summonses did not list retailers to be represented by the named plaintiffs, instead providing for opt-in procedures for other affected retailers and seeking to discover wholesalers' lists of retailers. The wholesalers sought orders that the proceedings be dismissed or stayed as an abuse of process or that they be struck out as representative proceedings. Firmstones had already signed up 2,100 retailers to be added in. Justice Clifford Einstein ordered that the proceedings not continue as representative proceedings, and dismissed applications for discovery of the names of other retailers and for joinder of additional plaintiffs. The Court of Appeal allowed the appeals from the seven retailers and ordered that the representative proceedings continue. The wholesalers appealed to the High Court, arguing that the proceedings were not covered by the Supreme Court Rules or alternatively that they constituted an abuse of process.

The Court, by a 5-2 majority, allowed the appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*