

LITIGATION RELEVANT TO REGULATION OF NOVEL AND EMERGING NICOTINE AND TOBACCO PRODUCTS

CASE SUMMARIES



**World Health
Organization**

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INTRODUCTION




Novel and emerging tobacco products have presented a number of challenges for regulators, including the risk that regulation may lead to litigation. The report titled 'Litigation Relevant to Regulation of Novel and Emerging Nicotine and Tobacco Products' analyses litigation concerning tobacco and nicotine product regulation across jurisdictions, with the aim of highlighting the legal arguments advanced and the reasoning of courts relevant to novel and emerging nicotine and tobacco products. In this regard, 89 cases between 2008-2020 were identified as relevant.

The report identifies two broad categories of litigation. The first concerns measures addressing product characteristics and disclosures. This group of cases concerns legal challenges against measures which prescribe the form that a product may or may not take, including, classification of these products under national legislation, proportionality of product prohibitions, and flavour bans. The second category of cases concerns health claims and advertising, promotion and sponsorship. These concern application of laws to different products, including enforcement actions concerning misleading conduct and restrictions on advertising, promotion, and sponsorship.

This document contains summaries of the cases identified as relevant, including those described in the report. This document describes the facts, legal issues, arguments advanced, and reasoning of the courts.

AUSTRALIA

1. Hawkins v Van Heerden¹

 Facts	 Issue	 Arguments Advanced
<p>60 packages of electronic cigarettes were found with Mr. Van Heerden (accused) and he was charged under s 106 (a) of the Tobacco Products Control Act 2006 (Act), which states:</p> <p><i>'A person must not sell any food, toy or other product that is not a tobacco product but is: (a) designed to resemble a tobacco product....'</i></p> <p>The accused pleaded not guilty to the charge and was acquitted before the Magistrate Court.</p> <p>The Ld. Magistrate held that the items were 'other products' for the purposes of s 106 but not designed to resemble a tobacco product and thus the charge had not been proved. Against this order, an appeal was filed by the Department of Health (Appellant) before the Supreme Court of Western Australia.</p>	<p>Whether the overall characteristics of the items resembled a tobacco product and the Ld. Magistrate erred in interpreting the phrase 'designed to resemble' in s 106 of the Act?</p>	<p>The Appellant contended that the Ld. Magistrate failed to construe the phrase 'designed to resemble' in its entirety and confined the analysis to the products' physical appearance.</p>

Decision/Status

'Other Product': It was held by the Ld. Magistrate that the items fell within the ambit of 'other product' as per s 106 of the Act. This finding was challenged by the accused in the appeal filed as a cross appeal.

The Supreme Court was unable to accept the contentions raised by the accused. It was held that a construction of s 106 of the Act which resulted in its application to all products designed to resemble a tobacco product, advanced the purposes of the Act better than a narrow construction which confined it to products similar to food or toys.





'Designed to resemble': It was noted that this phrase in s 106 of the Act referred to a product which was intended to have a likeness or similarity to, or to have some feature in common with a tobacco product. Further, the provision was expressly directed to products which were not tobacco products. Whether the product was intended to have a likeness or similarity to, or common features with a tobacco product would be ascertained by taking into account all the features and essential characteristics of the product. The Magistrate's Court erred in focusing only on the physical appearance of the items to ascertain whether the product was 'designed to resemble' a tobacco product under s 106 of the Act.

The Court by placing reliance on the evidence of the accused came to the conclusion that the items were essentially electronic inhalers that vaporize a liquid solution into a mist for inhalation, akin to smoke from a cigarette. Reliance was also placed on the user manual of the items where a comparison was drawn with cigarettes. The appeal was allowed and the decision to acquit the accused of the charge was set aside.

Status: Decided | 10 April 2014

¹ Supreme Court of Western Australia, *Hawkins v Van Heerden*, [2014] WASC 127, (https://www.tobaccocontrolaws.org/files/live/litigation/1754/AU_Hawkins%20v.%20Van%20Heerden.pdf, accessed 15 September 2020)

2. Australian Competition and Consumer Commission v The Joystick Company²

 Facts	 Issue	 Arguments Advanced
It was alleged that the Joystick Company Pty Ltd. (Joystick), in contravention of the provisions of the Australian Consumer Law (ACL), engaged in misleading or deceptive conduct for the sale of its e-cigarettes. Joystick represented on its website that the e-cigarettes: (a) did not contain carcinogens and toxic substances; (b) did not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes; (c) did not contain Formaldehyde; and (d) all flavours had received approval from the Australian Competition and Consumer Commission (ACCC), when that was not the case.	Alleged violation of the Australian Consumer Law.	Joystick and Mr. McDonell (Director of Joystick) accepted the allegations and prayed for a consent order to be passed.
 Decision/Status		
Joystick and Mr. Alexander McDonell (Director of Joystick) were directed to pay \$50,000 and \$10,000 respectively. Further, Mr. McDonell gave an undertaking that for a period of three years he would not engage in the supply, possible supply, sale or promotion of e-cigarette products.		
Status: Decided 2 May 2017		
Similar Cases³: The Australian Competition and Consumer Commission (ACCC) filed similar complaints against Social-Lites Pty Ltd. and Burden. In both these cases, the companies accepted the allegations. The ACCC imposed penalties and restrained the companies from selling e-cigarettes similar to the Joystick case.		

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