IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-085-001107

MINISTRY OF HEALTH

v

PHILIP MORRIS (NZ) LTD

CLOSING SUBMISSIONS ON BEHALF OF THE MINISTRY OF HEALTH

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(41701)

MAY IT PLEASE THE COURT

INTRODUCTION

1. The Court is familiar with the facts of this case now and so these closing submissions focus solely on what the Ministry of Health ("the Ministry") submit are germane to the court's determination of whether the Ministry have proved the case to the standard of beyond reasonable doubt.

2. As the Court is aware there is no issue that there was a sale to Vicki Blake on 3 March 2017.

3. There is also no issue that the HEET sticks under consideration are a tobacco product. Whilst the defendant company has attempted to draw analogies with e-cigarettes, there is a fundamental distinction between e-cigarettes and the HEET product. You heard from Vicki Blake that she did a controlled sale in respect of an e-cigarette, she was investigating a potential prosecution under the Smoke-free Environments Act 1990 ("the Act") but she was advised by ESR that the Ministry could not prove the nicotine in e-cigarettes was manufactured from tobacco. Therefore the Ministry could not prove one of the fundamental elements of the charge.[1]

4. As advised by Mr Boldt, in his closing, he will seek to rely on an article by Murray Laugesen but as your Honour will see when you read that article, it is based on a fundamental error, that is that e-cigarettes are (or perhaps more accurately can be proved to be) a tobacco product.

5. Ultimately, in any event, the issue under consideration is whether the HEETS product is captured under the s29(2) of Act and ultimately the issue in this case is whether the prosecutor has proved beyond reasonable doubt that HEETs is a "tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking)".

6. Consequently these submissions will focus solely on this issue.

7. In summary the prosecutor says that the words of the section should be given their ordinary and natural meaning. There is no room for ambiguity and looked at in that light, the Court can be sure that the case has been proved.

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[1] NOE p14 line 25 onwards. Confirmed by Mr Baker p29 NOE

8. The unchallenged evidence of Ben Rumsey confirming that the HEETS product does not ignite is confirmative that the HEETS product does not fall with the exemption of "smoking". The defendant has not contended otherwise. The definition of "to smoke" is set out in s2 of the Act:

> **to smoke—**
>
> (a) means to smoke, hold, or otherwise have control over an ignited tobacco product, weed, or plant; and
>
> (b) includes to smoke, hold, or otherwise have control over an ignited product or thing whose customary use is or includes the inhalation from it of the smoke produced from its combustion or the combustion of any part of it; but
>
> (c) does not include to hold or have control over an ignited product or thing customarily used as incense

9. The HEETS product is not "ignited" at any stage and therefore is not saved by the parenthesis of "other than smoking"

10. The product is clearly for oral use: the user inhales the tobacco product through their mouth and the product is described as being suitable for oral use.

11. We anticipate an argument that the defence will say, that even given its ordinary meaning, the HEET product is not captured under the Act because there is no such wording on the box, i.e. the packaging doesn't say it is used for oral use. I will deal with this issue later on in my submissions, but in short the Ministry submits that a) the wording on the box is sufficient; and further b) the section does not require the wording to actually be on the box, it is sufficient for the product to be generally described by the Defendant company as a product for oral use.

WHY DOES THE MINISTRY OF HEALTH SAY THE WORDS OF THE SECTION CAN BE GIVEN THEIR ORDINARY AND NATURAL MEANING?

History of the Act

12. Firstly the Ministry submits that, contrary to the defence submission, the history of the Act makes it clear that the Act should be given its normal and natural meaning of including products that are inhaled through the mouth.

13. The definition of "toxic substance" in the Toxic Substances Act 1979 included "any tobacco prepared for smoking, chewing or snuffing".[2]

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[2] http://www.nzlii.org/nz/legis/hist_act/tsa19791979n27227/ at page 453.

14. The Toxic Substances Act 1979 was amended by the Law Reform (Miscellaneous Provisions) Bill 1986 to extend the definition of "Toxic Substance". The explanatory note recorded the reason for the amendment: "at present, it includes only tobacco prepared for smoking, chewing, or snuffing".

15. The definition of "toxic substance" was therefore amended to read "any tobacco for smoking, snuffing, chewing, or any other oral use".

16. As a consequence of that amendment, and as outlined in a letter by a Department of Health staff solicitor dated 1 December 1986, the proposed Clause 46A of the Toxic Substances Regulations 1983 ("TSR") was extended to include tobacco for chewing and any other oral use. It was inserted by regulation 13 of the TSR, Amendment No. 1:

> **PART VIA: SPECIAL PROVISIONS RELATING TO TOBACCO**
>
> **46A Tobacco for chewing or other oral use:**
>
> ...
>
> (2) No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing or for any other oral use.

17. Part VIA was revoked and substituted by regulation 8 of the TSR 1983, Amendment No. 2 in 1988:

> **8. New Part VIA (relating to tobacco products) substituted in principal regulations** – The principal regulations are hereby amended by revoking Part VIA (as inserted by regulation 13 of the Toxic Substances Regulations 1983, Amendment No. 1), and substituting the following Part:
>
> PART VIA
>
> SPECIAL PROVISIONS RELATING TO TOBACCO PRODUCTS
>
> 46A. **Interpretation** – In this Part of these regulations, unless the context otherwise requires –
>
> Cigar includes cheroot
>
> Cigarette includes cigarillo;
>
> Loose tobacco means pipe tobacco or tobacco prepared for smoking in hand-rolled cigarettes;
>
> Tobacco product means any cigar, cigarette, or loose tobacco.
>
> 46B. **Tobacco product not to be advertised or labelled as suitable for chewing, etc.**
>
> (1) No advertisement for a tobacco product shall directly or indirectly state or suggest that the product is suitable for chewing or for any other oral use.
>
> (2) No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing or for any other oral use.
>
> 46C. **Prohibition of sales of tobacco products to persons under 16** -
>
> (3) No person shall sell any tobacco product to a person who has not attained the age of 16 years.
>
> (4) It shall not be a defence to a charge under subclause (1) of this regulation to prove that the person who sold the tobacco product –

a. Believe on reasonable grounds that the person to whom it was sold was of or over the age of 16 years; or

b. Received from the person to whom the tobacco product was sold evidence purporting to show that that person was of or over the age of 16 years, and that it was reasonable to, and he or she did, accept that evidence as correct.

18. As originally enacted, the Act relevantly repealed the definition of "toxic substance" in the Toxic Substances Act 1979 and revoked part VIA of the TSR.[3] Clause 46B of the TSR was inserted as s 29 of the Act, but with the addition of "(other than smoking)" parenthesis.

19. Put simply the prosecution submits that there is no room for the rather indelicate interpretation of section 29 that the defendant company contends for, namely that section 29 does not cover inhalation products such as HEETs, and instead should be seen as a ban of chewing tobacco and "under the tongue" type products or as expressed in defence submissions tobacco products absorbed through the lining of the mouth.[4]

20. As can be seen from the above legislative history, the phrase "or any other oral use" has always been broad in sense. Indeed, the parenthesis in section 29(2) must mean that ordinarily a tobacco product that is smoked constitutes a tobacco product used for oral use, otherwise there would simply be no need for the parenthesis.

21. Thus a tobacco product consumed by inhalation falls squarely with the ambit of "any other oral use" in section 29.

22. Furthermore, the interpretation contended for by the defence would be absurd because the harm in the consumption of the tobacco product is in some form, whether it goes through the lining of the mouth or directly into the lungs through the mouth – there is no rationale for the distinction.

Applying the general principles of statutory interpretation

23. Secondly it is submitted that applying the ordinary principles of statutory construction the meaning of the Act as stated by the Ministry is clear.

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[3] http://www.nzlii.org/nz/legis/hist_act/sea19901990n108292/ - see page 1678

[4] Paragraph 16 of defence submissions on the admissibility of dr Gilchrist's evidence dated 5 March 2018

24. Ordinary principles of statutory construction apply to criminal statutes as to any other.[5] As the Court of Appeal in *Teddy v Police* summarised:[6]

(a) The starting point is the well-established requirement to focus on the text and purpose of the statutory provisions being interpreted;[7]

(b) In determining purpose, the Court must have regard to both the immediate and the general legislative context. The wider objectives of the enactment may also be relevant.[8]

(c) In considering the text and purpose of statutory provisions it is also useful to look at the scheme of the relevant legislation, including the place of the particular provisions in that scheme and the place of that legislation in the wider legislative landscape. Internal and external consistency will be desirable objectives, even if not always achieved.[9]

(d) Legislation should be interpreted in a realistic and practical manner in order to ensure that it works as intended.[10]

(e) The legislative history of a provision may also be relevant to its interpretation.[11]

25. The prosecution makes the following three points:

(a) Firstly, section 29 is the *only* provision that involves the prohibition of tobacco products. The definition of "tobacco product", is set out in s2 of the Act and relevantly provides:

> Tobacco product means any product manufactured from tobacco and intended for use by smoking, inhalation, or mastication; and includes nasal and oral snuff; but does not include any medicine (being a medicine in respect of which there is in force a consent or provisional consent given under section 20 or section 23 of the Medicines Act 1981) that is sold or supplied wholly or principally for use as an aid in giving up smoking

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[5] *D'Esposito v Ministry of Primary Industries* [2018] NZCA 9 at [24].
[6] [2014] NZCA 422; (2014) 27 CRNZ 1.
[7] At [28].
[8] At [28].
[9] At [29].
[10] At [30].
[11] At [31].

This therefore captures all tobacco products that are intended for use by smoking, inhalation, or mastication. It can be safely inferred that section 29 captures all tobacco products that fall within the definition of tobacco product provided for within the Act; that inference provides for internal consistency. Furthermore, the definitions gives weight to the argument that for a tobacco product to be recognised as exempt from the legislation there needs to be explicit regulated approval.

(b) Secondly, as can be seen from the above legislative history, the phrase "or any other oral use" has always been used in a broad sense, and it was carried over from the TSR. It is axiomatic that "or any other oral use" has a broader meaning than products used for chewing. Otherwise, there would be no need for its inclusion in section 29. If "any other oral use" solely covered other tobacco products used for mastication, then it may be expected to have read "for chewing or for mastication".

(c) Thirdly, and the prosecution submits crucially, the parenthesis in s 29(2) *must* mean that ordinarily, a tobacco product that is smoked constitutes a tobacco product used for oral use; otherwise, there would simply be no need for the parentheses. That interpretation is the plain, common-sense approach to section 29.

26. Likewise, then, a tobacco product consumed by inhalation falls squarely within the ambit of "any other oral use" in s 29. There is no separate carve-out for tobacco products used for inhalation. It would be a curious omission for both ends of the spectrum (i.e. chewing tobacco products and smoking tobacco products) to be covered, but not a "middle ground" of inhalation tobacco products.

Purposes of the Act

27. The Ministry submit that the purposes of the Act are consistent with the plain and natural meaning that the Ministry contends for.

28. The purposes of the Act are outlined in s 3A(1) of the Act. They are:

(a) to reduce the exposure of people who do not themselves smoke to any detrimental effect on their health caused by smoking by others; and

(b) to regulate and control the marketing, advertising, and promotion of tobacco products, whether directly or through the sponsoring of other products, services, or events; and

(c) to monitor and regulate the presence of harmful constituents in tobacco products and tobacco smoke; and

(d) to establish a Health Sponsorship Council.

29. It is noted that the Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016 will, when in force, amend s 3A(1)(b) of the Act to read:

> (b) to regulate and control the marketing, advertising, and promotion of tobacco products (whether directly, including through the appearance of tobacco products and packages, or through the sponsoring of other products, services, or events) in order to improve public health by:
>
> (i) discouraging people from taking up smoking or using tobacco products; and
>
> (ii) encouraging people to quit smoking and to stop using tobacco products; and
>
> (iii) discouraging people who have quit smoking, or who no longer use tobacco products, from resuming smoking or tobacco use; and
>
> (iv) reducing people's exposure to smoke from tobacco products;

30. Section 29 is within Part 2 of the Act. The purpose of that Part is outlined in section 21 of the Act:

> (a) to reduce the social approval of tobacco use, particularly among young people, by—
>
> (i) imposing controls on the marketing, advertising, or promotion of tobacco products and their association through sponsorship with other products and events; and
>
> (ii) requiring health messages and other information to be displayed on, or included with, packages containing tobacco products, and on automatic vending machines; and
>
> (iii) prohibiting the sale of toy tobacco products to people younger than 18 years; and
>
> (b) to reduce some of the harmful effects of tobacco products on the health of users by monitoring and regulating the presence of harmful substances in the products and in tobacco smoke; and
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> (c) to facilitate the harmonisation of the laws of New Zealand and Australia relating to the labelling of tobacco products (including, without limitation, requirements relating to the display of health messages).

31. The defendant company will submit that evidence as to the purported "reduced risk" of the HEET product is relevant when considering section 29 in light of the purposes of the Act. On this point the prosecution submits that:

(a) The Act's purpose is not simply to reduce harm caused by tobacco products. There are obviously monitoring and regulatory functions. As the Right Hon Helen Clark noted in the first reading of the SFE Bill:

> ... it is not a punitive Bill. It is not a Bill that outlaws smoking or penalise those who remain addicted to the drug or who just choose to smoke.

(b) By virtue of section 29 the Act expressly permits tobacco products used by smoking.

(c) In other words the Act contemplates the lawful use of a harmful product. That the HEET product may be less harmful than a cigarette is irrelevant when ascertaining the meaning of section 29 from its text and the purposes of the Act.

(d) The Court is required to apply the Act as currently in force and the Act provides for a clear interpretation as mandated by the definitions articulated in section 2 of the Act.

32. As previously submitted, what the defendant company really seeks is legislative change and as previously submitted this is not the forum to seek it.

33. The Ministry submit there is no ambiguity in the language of the Act and consequently for this reason the evidence of Dr Gilchrist explaining why and how Philip Morris developed the IQOS and the research that Philip Morris have conducted showing that the IQOS produces far lower quantities of harmful and potentially harmful compounds than cigarettes has no relevance in determining whether the defendant company have contravened the Act. The Ministry has previously filed submissions dated 27 February 2018 on this issue and thus those submissions are not repeated for the purposes of this closing but are nevertheless relied on.

IN THE EVENT THE COURT DETERMINES THERE IS AMBIGUITY IN THE WORDING OF SECTION 29(2) OF THE ACT

34. In the event the Court is of the view that there is some ambiguity in the wording of the Act, it is anticipated that the defence will submit that by giving the statute its ordinary and natural meaning as submitted by the prosecutor, that will create an absurd result because the lawful sale of cigarette tobacco (the more harmful product) is permitted.

35. The response to this is that at some level HEETs can potentially cause some harm. In saying this, the Ministry do not go behind the evidence of Dr Gilchrist because her evidence implicitly recognises this.

36. The Court is directed to the following parts of Dr Gilchrist's evidence:

(a) At paragraph 15 of her statement Dr Gilchrist acknowledges that plainly the best way to avoid dangers associated with smoking is never to start and for existing smokers the best way to reduce the risk is to stop completely.

(b) At paragraph 27 she confirms that the aerosol that is generated (from HEETs) contains significantly lower levels of harmful or potentially harmful constituents than cigarette smoke. Thus whilst they may be significantly lower there is still some level of harm.

(c) At paragraph 37 she states that while the gas and liquid droplet still contain harmful and potentially harmful chemicals, they are present at far lower levels than in cigarette smoke. Thus again there is an acknowledgment that there are still some harmful chemicals present.

(d) Further at paragraph 37 Dr Gilchrist recognises that there are three compounds in the aerosol that are not present in reference cigarette smoke. She indicates that the Philip Morris research ***to date*** indicates that they are not harmful. Clearly her evidence is that this is not conclusive.

(e) At paragraph 51 Dr Gilchrist references the UK committee on Toxicity of Chemicals in Food, Consumer products and the Environment which released its findings on 12 December 2017. She acknowledges that those findings conclude that HEET not burn products pose some risk to public health but concluded the exposure to compounds of concern is reduced by 50-90% compared to that from concentrated cigarette smoke. Thus whilst the harm may be reduced from somewhere between 50-90%, there is still some harm. Significantly the evidence of Mr Baker is informative in this regard where he points out that the reduction in harm is relative to the numbers of people who may be using the product and that harm itself is not measured simply by toxicity but by behavioural issues as well. Thus there is a potential concern, as expressed by Mr Baker, that people might think "that's pretty cool, I might try that" with the end result that although less harmful it is more widely used and

more people are exposed to tobacco.[12] Specifically the launch party of HEETS, as noted by Mr Baker, took place on New Year's Eve at a winery on Waiheke island[13]. Furthermore, when expressed in numbers Mr Baker informed the court that there are 4,500 to 5000 deaths a year caused by tobacco[14] and thus a 50% reduction still equates to 2000 deaths[15].

f) At Paragraphs 54-56 Dr Gilchrist acknowledges that the Tobacco Product Scientific Advisory Committee which advises the US food and drug administration whilst accepting that switching completely from cigarette to IQOS significantly reduces smokers' exposure to harmful and potentially harmful chemicals rejected Philip Morris's proposition that:

(i) Switching completely from cigarette to IQOS can reduce the risk of tobacco-related disseise; and

(ii) That switching to IQOS presents less risk of harm than continuing to smoke cigarettes.

37. Of note, as Dr Gilchrist has confirmed the HEETs product has also not yet been approved in the US under the Pre-Market Tobacco application where Philip Morris must demonstrate the product is "appropriate for the protection of public health".

38. The court also heard evidence from Mr Baker in this regard, confirming the observations of Dr Gilchrist that USA have not endorsed the product to date.[16]

39. It is submitted it is not for the Court to, in effect, simply re-write the legislation with no safeguards in place. For example whilst Philip Morris have to date in New Zealand targeted only actual smokers, in the event the Court determines that the HEET product is not caught under the Act, then there is nothing to stop the company (and indeed other heat not burn products) from marketing to anybody over 18. Moreover, as Mr Baker expressed "if we didn't do something about immediately stopping this sale, the sale of this product , New Zealand could potentially be flooded by a whole range of other such devices."[17]

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[12] NOE p26
[13] NOE p33
[14] NOE p23
[15] NOE p 26
[16] NOE p25 and p33
[17] NOE p26

40. The defence contend that the HEETS product would still be regulated by other sections of the Act, but that misses the point that the effect would be that another tobacco product would be on the market (albeit less harmful than tobacco).

41. As Mr Baker observed "we know that young people are smoking at very low rates now. Fifteen to 17 year olds are smoking at 3.2% daily rates in the last 16, 17 New Zealand health survey. Fourteen and 15 year olds are very, very low, under 2.5%. They're doing really well. If this is a product that could potentially be attractive and get those young people who are not now starting smoking into a pathway of addiction then that's probably not a good thing".[18]

42. Furthermore, as acknowledged by Dr Gilchrist, a clinical study to determine the impact on IQOS aerosol on nearby non-users is underway but hasn't yet been completed[19]

43. It is thus submitted that, in the event the court determines there is ambiguity in the legislation (which is refuted by the Ministry) the more cautious interpretation of the Act should be preferred. It is submitted this accords with the purpose of regulating and monitoring of tobacco products and ensuring that more tobacco products are not potentially available which might have the adverse effect of encouraging the use of tobacco (albeit at a less harmful level than cigarette tobacco).

44. Finally in this regard, the Court should not be swayed by the defence argument, as articulated in Dr Gilchrist's evidence, that because IQOS has started to gain a foot hold smokers will be forced to return to the more harmful cigarette. The defendant has not articulated how much of a foot hold it has gained in this country and the court will be balancing the public health of just a few individuals against wider public health concerns.

45. It is not immediately apparent whether the defendant company still proposes to argue that the Ministry's decision to prosecute was an irrational exercise of the discretion to prosecute.[20] If that argument is to be advanced it is submitted that the interpretation given to *Polynesian Spa v Osborne*[21] is misconceived. In a criminal trial any alleged 'irrational exercise of the discretion to prosecute' would need to be founded in an application to stay the charge. It cannot be relevant to the weight of evidence or to an

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[18] NOE p37
[19] Para 57 of Dr Gilchrist's statement
[20] As referenced in defence submissions dated 5 march 2018 at para 26
[21] [2005] NZAR 4

argument regarding the interpretation of the statute. Moreover it is denied that there was any irrationality in the decision making process. There is a clear distinction between the HEETS product and e-cigarettes for the reasons stated in paragraph 3 above.

IS THE HEETS PRODUCT "LABELLED OR OTHERWISE DESCRIBED AS SUITABLE FOR CHEWING, OR FOR ANY OTHER ORAL USE (OTHER THAN SMOKING)"

46. The Court has Exhibit 7 which are the photographs of the product that Ms Blake bought. The HEETS carton is labelled "heated tobacco for true taste". The fact that the carton is reference to "taste" clearly means that the product is intended to be used for oral use as taste is synonymous with the mouth.

47. The Ministry submit that defence exhibit (B) namely the HEETS box with this phrase deleted has no relevance to the case. The Court has to determine what product Ms Blake in fact purchased.

48. In any event the prosecutor submits that section 29(2) of the Act is not restricted to tobacco products sold that are labelled specifically with the words "suitable for chewing or for any other oral use (other than smoking)" (i.e. it is not essential that the wording is on the carton). The issue is whether the product has been labelled ***or otherwise described*** as suitable for chewing etc.

49. There can be no dispute on the evidence that the HEETs product has been described by Philip Morris as being for oral use, in the sense that the product is clearly intended to be put in the mouth and inhaled. Indeed the evidence of Dr Gilchrist supports this. At paragraph 32 of her brief of evidence she references the cellulous acetate mouthpiece filter which provides structural support for the lips of the user; at paragraph 33.3 she references the user can puff on the HEET sticks like he or she would a cigarette and at paragraph 35 she describes that the HEET releases a nicotine containing aerosol that the user inhales.

50. The Court also has the User's Guide to the product which accompanies the sale and has heard evidence from Mr Rumsey, who had not previously come across the IQOS/ HEETs product before and who in following the instructions with the product understood the product to be designed for inhalation through the mouth.[22]

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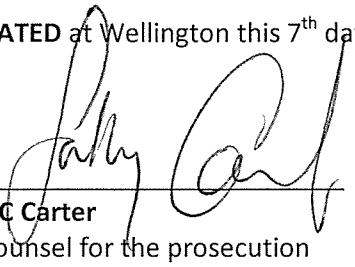
[22] Pages 41-42 NOE.

51. Ultimately the Ministry submit that the Court can be sure that the defendant company is guilty of the charge it faces.

DATED at Wellington this 7th day of March 2018



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