EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT**
**AT WELLINGTON**

**CRI-2017-085-001107**
**[2018] NZDC 4478**

**MINISTRY OF HEALTH**

v

**PHILLIP MORRIS (NEW ZEALAND) LIMITED**

| | |
|---|---|
| Hearing: | 5, 6 and 7 March 2018 |
| Appearances: | S Carter and Ms Abbott for Prosecution<br>D Boldt and M Sumpter for Defendant |
| Judgment: | 12 March 2018 |

---

**JUDGMENT OF JUDGE P J BUTLER**
**[Judge-alone Trial]**

---

## The Charge

[1] Phillip Morris (New Zealand) Limited ('the defendant'), is charged by the Ministry of Health ('the Ministry'), with selling, on or about 3 March 2027, a tobacco product called *"Heets"* labelled, or otherwise described as suitable for chewing, or for any other oral use (other than smoking) contrary to s 29(2) of the Smoke-free Environment Act 1990 ('the Act').

[2] In bold print in the Statute Book alongside the numerals 29 appear the words *"Tobacco product not to be advertised or labelled as suitable for chewing etc"*.

[3] It is not disputed that on 3 March 2017 the defendant sold 'Heets' to [an employee of the Ministry].

[4] It is not disputed that 'Heets' is a *"tobacco product"* within the meaning given to those words by s 2 of the Act.

[5] It is not disputed that 'Heets', when it is used, is not ignited, but is heated in a device referred to as an IQOS and that the process produces an aerosol instead of smoke. Smoke, of course, is the ordinary by-product of an ignited cigarette and there is a point of difference between inhaling aerosol from heated 'Heets' and inhaling smoke from a lit cigarette. 'Heets', like a cigarette, is inhaled through the mouth.

[6] Section 29(2) of the Act reads:

> 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 (other than smoking).

[7] *"To smoke"* is defined n s 2 of the Act and obviously *"smoking"* would derive its meaning from this definition. The definition includes reference to an **ignited** tobacco product or other **ignited** product or thing whose customary use is or includes the inhalation from it of the smoke produced from its combustion – (emphasis mine).

[8] The Ministry's argument is that the words *"(other than smoking)"* refer, by definition, to ignited product so that any exception provided by the words in parenthesis is not available to the defendant because 'Heets', when it is used, is not ignited but heated.

[9] The Ministry also argues that because 'Heets', when it is used, is inhaled through the mouth then it falls squarely within the words *"or for any other oral use"* as they are used in s 29(2) of the Act.

[10] The Ministry argues that if it is correct in these two submissions then, on the plain and unambiguous words in the Statute the charge is made out.

[11] The defence submits that s 29 is a ban on advertising or labelling and it was originally enacted to control the sales of chewing tobacco and other tobacco products consumed orally. The defence says s 29 was never meant to capture inhalation-based products.

[12] This summary of the defence submission outlines the principal issue to be decided in the case.

**The Ministry's Argument**

[13] The words *"or for any other oral use"* must include 'Heets' because the aerosol it emanates is inhaled through the mouth and the history of the Act makes it clear that the words should be given their normal and natural meaning of including products that are inhaled through the mouth.

[14] The Ministry refers to the definition of *"toxic substance"* in the Toxic Substances Act 1979 which included *"any tobacco prepared for smoking, chewing or snuffing"*.

[15] That definition was enlarged by the Law Reform (Miscellaneous Provisions) Bill 1986 by the addition of the words *"or any other oral use"* so that thereafter the definition of *"toxic substance"* included *"any tobacco for smoking, snuffing, chewing, or any other oral use"*.

[16] The Ministry argues that the history of the legislative changes show that Parliament intended to capture products for *"any other oral use"* by the expansion of the definition of *"toxic substance"* which related only to chewing tobacco or other tobacco products placed in the mouth. This expanded definition ultimately made its way into s 29 of the Act.

[17] The Ministry argues that any tobacco product consumed by inhalation falls squarely within the words *"any other oral use"* in s 29.

[18] Next the Ministry contends that if one applies the ordinary principles of statutory interpretation, then it is clear that 'Heets' would be caught by s 29.

[19] Relying on the Court of Appeal decision in *Teddy v Police* [2014] NZCA 422, it is argued for the Ministry that the following principles of statutory construction are relevant:

(i) the Court must focus on both the text and the purpose of the Statute;

(ii) when considering purpose the Court must have regard to both the immediate and general legislative context and any wider objectives of the enactment;

(iii) the scheme of the legislation may also be a useful consideration;

(iv) legislation should be interpreted in a realistic and practical manner in order to ensure it works as intended;

(v) the legislative history of a provision may also be relevant to its interpretation.

[20] Section 29 appears in Part 2 of the Act which is headed *"Control of smoking products"* and, in itself, is one of the sections under the heading *"Promotion and advertising"*.

[21] Section 21 sets out the purposes for which Part 2 was enacted. In summary form the s 21 purposes are:

(a) To reduce the social approval of tobacco use particularly among young people by imposing controls on the marketing, advertising or promotion of tobacco products. To require health messages and other information to be displayed on tobacco products. To prohibit the sale of toy tobacco products to persons under 18 years of age.

(b) To reduce the harmful effects of tobacco products on the health of users by regulation.

(c) To harmonise the laws of New Zealand and Australia relating to the labelling of tobacco products.

[22] Regard must also be had to s 3A of the Act which sets out the general purposes of the legislation as follows:

(a) To reduce the exposure of non-smokers to passive smoking.

(b) To regulate and control the marketing advertising and promotion of tobacco products.

(c) To monitor and regulate the presence of harm caused by tobacco products and tobacco smoke.

(d) To establish a Health Sponsorship Council.

[23] The Ministry argues that these particular and general purposes support the interpretation it seeks in respect of the 'Heets' product and s 29 of the Act.

[24] The smoking of cigarettes is not prohibited by the Act, nor is the consumption of chewing tobacco. There was evidence about how harmful the use of 'Heets' was in comparison to the use of cigarettes and chewing tobacco. This evidence came principally from the defence expert, Dr Gilchrist, although much of what she said was not in conflict with the expert for the Ministry, Mr Rumsey.

[25] Counsel for the Ministry objected to parts of Dr Gilchrist's evidence on the grounds of relevance, but I consider that her uncontested brief-of-evidence was helpful and relevant to the wider issues under consideration in this case.

[26] Her evidence about relative harm can be summed up by quoting part of paragraph [49] of her brief:

> … smokers who switch completely to … HEETS achieve a level of reduction in their exposure to harmful and potentially harmful chemicals close to the reductions achieved by people who stop smoking altogether.

[27] The Ministry submits that the fact that the 'Heets' product may be less harmful than a cigarette (or, by inference, chewing tobacco) is irrelevant when one regards the plain words of s 29 and the purposes of the Act. The Ministry argues that 'Heets' are harmful or potentially so, even if less so than a cigarette.

**The Defendant's Argument**

[28] Section 29 was enacted to combat a specific mischief, namely chewing tobacco and other kinds of tobacco taken orally, as when tobacco is placed in the user's mouth and the nicotine is absorbed through the lining of the mouth. The section was never intended to apply to a product such as 'Heets' and accordingly a prosecution such as this one is misconceived.

[29] I consider the defence submission just outlined is correct. In forming that view I take into account -

- The words used in the section and the *ejusdem generis* rule.
- The statutory history in which s 29 must be viewed.
- The purposes of the Act together with the text.

**The Ejusdem Generis Rule**

[30] This rule provides that where particular words describing a genus of things are followed by general words, the general words will be confined to things of the same class as the particular words. Thus, where the words *"any tobacco product labelled or otherwise described as suitable for chewing"* are followed by *"or for any other oral use"*, the other oral use means a tobacco product used for chewing or an activity similar to chewing.

**The Statutory History**

[31] The words in parenthesis *"(other than smoking)"* were only added to the regulations in 1987. If the interpretation of s 29 as contended for by the Ministry is correct, then the importation and sale of ordinary cigarettes would have been illegal until the Smoke-free Environment Act was enacted.

[32] The defendant also relies on the bold print alongside s 29 in the Statute, the explanatory note which accompanied the Bill before enactment and a quote from the then Minister of Health made at the time the Bill was introduced.

**The Purposes of the Act**

[33] As detailed earlier they are as set out in s 3A and s 21. The evidence of Mr Rumsay was that no combustion occurs when 'Heets' is used under normal operating conditions, but *"inhalable volatile compounds"* are released. Dr Gilchrist's evidence was to the effect that it is the act of **burning** the tobacco that leads to the formation of the majority of harmful chemicals - (my emphasis). Dr Gilchrist quoted from a UK Royal College of Physicians report which contained the following passage:

> The main culprit is smoke and, if nicotine could be delivered effectively and acceptably to smokers without smoke, most if not all of the harm of smoking could probably be avoided.

[34] Given this advice, it can be said that the use of 'Heets' while it may have associated risks in itself, is not as harmful or potentially harmful as ordinary cigarette use. This finding would fit squarely with the purposes stated in s 3A(1)(a) and (c) and s 21(b) of the Act. The defendant submits that *"the outcome the Ministry is seeking with this prosecution is the opposite of what Parliament sought to achieve when passing the SFEA"*.

[35] I find that the 'Heets' product is not caught within the ambit of s 29(2) of the Act and the charge is dismissed accordingly.

P J Butler
**District Court Judge**