JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : HAWKINS -v- VAN HEERDEN [2014] WASC 127

CORAM : PRITCHARD J

HEARD : 25 MARCH 2014

DELIVERED : 10 APRIL 2014

FILE NO/S : SJA 1131 of 2013

BETWEEN : BRUCE MICHAEL HAWKINS
Appellant

AND

VINCENT ADAM VAN HEERDEN
Respondent

ON APPEAL FROM:

For File No : SJA 1131 of 2013

Jurisdiction : MAGISTRATES COURT OF WESTERN AUSTRALIA

Coram : MAGISTRATE J HAWKINS

File No : JO 1683 of 2013

Catchwords:

Appeal - Statutory construction - *Tobacco Products Control Act 2006* (WA) - Meaning of 'designed to resemble' and 'other product' in s 106 - Whether electronic cigarettes 'designed to resemble' a tobacco product - Whether learned Magistrate erred in excluding evidence of appearance during use

Legislation:

Criminal Appeals Act 2004 (WA)
Interpretation Act 1984 (WA)
Misuse of Drugs Act 1981 (WA)
Poisons Act 1964 (WA)
Sales Tax (Exemptions and Classifications) Act 1935 (Cth)
Supreme Court (Court of Appeal) Rules 2005 (WA)
Tobacco Products Control Act 2006 (WA)

Result:

Appeal allowed

Category: B

Representation:

Counsel:

Appellant	:	Ms M J Elliott
Respondent	:	Mr M A Perrella

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	Perrella Legal

Cases referred to in judgment:

AB v Western Australia [2011] HCA 42; (2011) 244 CLR 390
Beckwith v The Queen [1976] HCA 55; (1976) 135 CLR 569
CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384
Commissioner of Taxation v Thomson Australian Holdings Pty Ltd (1989) 25 FCR 481
Director of Public Prosecutions v United Telecasters Sydney Ltd [1990] HCA 5; (1990) 168 CLR 594
Ex Parte Zietsch; Re Craig (1944) 44 SR (NSW) 360
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

Investments (WA) Pty Ltd v City of Swan [2012] WASC 278
Lacey v Attorney-General (Qld) [2011] HCA 10; (2011) 242 CLR 573
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
R v Lavender [2005] HCA 37; (2005) 222 CLR 67
R v Regos [1947] HCA 19; (1947) 74 CLR 613
Re Beautiful Day Pty Ltd and Collector of Customs (Qld) (1977) 1 ALD 206; (1977) 1 ALN 8
Re Fibre Hulls Pty Ltd and Collector of Customs (1987) 12 ALD 75
Re Gissing and Collector of Customs (1977) 1 ALD 144
Re James North (Australia) Pty Ltd and Collector of Customs (1979) 2 ALD 476
Sondo Pty Ltd v Federal Commissioner of Taxation [1991] FCA 32; (1991) 102 ALR 362
Thiess v Collector of Customs [2014] HCA 12
Van der Feltz v City of Stirling [2009] WASC 142
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
Waugh v Kippen [1986] HCA 12; (1986) 160 CLR 156

1 **PRITCHARD J**: On 2 December 2011, Mr Van Heerden was found to have in his possession 60 packages of 'electronic cigarettes' (the items). He was charged with an alleged contravention of s 106 (a) of the *Tobacco Products Control Act 2006* (WA) (the Act), which offence was alleged to have occurred on dates unknown between 24 November 2011 and 2 December 2011. Section 106(a) of the Act provides that:

> 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 … .

2 The definition of 'tobacco product' in the Act includes a cigarette or cigar or any other product the main or a substantial ingredient in which is tobacco, which is designed for human consumption.[1]

3 Mr Van Heerden pleaded not guilty to the charge. Following a trial in the Magistrates Court, Mr Van Heerden was acquitted. The learned Magistrate concluded that while the items were 'other products' for the purposes of s 106, the items were not 'designed to resemble a tobacco product' and consequently that the charge had not been proved.

4 The appellant appeals against the learned Magistrate's decision, pursuant to a grant of leave on 9 December 2013.

5 In these reasons the decision I deal with the following matters:

1. The agreed facts and the evidence at the trial;
2. The grounds of appeal, and Mr Van Heerden's contention on the appeal;
3. Why the learned Magistrate was correct to find that the items were an 'other product' for the purposes of s 106;
4. Ground of Appeal 1: the proper construction of the words 'designed to resemble a tobacco product';
5. Ground of Appeal 2: why the learned magistrate erred in excluding evidence of the appearance during use of the items;

[1] The term 'tobacco product' is defined in the Glossary to the Act. It also includes tobacco in a form prepared for human consumption or use, and products prepared for smoking that contain other herbs or plant matter, whether or not tobacco, but does not include nicotine subject to the *Poisons Act 1964* (WA) or plants or drugs prohibited under the *Misuse of Drugs Act 1981* (WA) or products containing those things.

6. Ground of Appeal 3: why the learned magistrate erred in concluding that the items were not designed to resemble tobacco products; and

7. The orders which should be made.

1. The agreed facts and the evidence at the trial

6 Some of the elements of the offence were the subject of admissions at the trial. Mr Van Heerden admitted that the items were not a tobacco product. He also admitted that he was selling the items, having regard to the extended definition of 'sell' in the Act,[2] which includes to 'keep or have in possession for sale'.

7 In addition, a statement of admitted facts was tendered at the commencement of the trial. Those admitted facts relevantly included the following:

> 1. An electronic cigarette is an electronic inhaler that vaporises a liquid solution into a mist for inhalation.
>
> …
>
> ***Heavenly Vapours***
>
> 4. Between 24 November 2011 and 2 December 2011 the accused with others operated a business named 'Heavenly Vapours'.
>
> 5. The accused sold the electronic cigarettes via [a website (the website)].
>
> 6. On 25 November 2011 the website offered for online sale:
>
>   (a) electronic cigarettes; and
>
>   (b) nicotine-free 'e-Juice'.
>
> 7. The accused kept stock for heavenly vapours at [his address].
>
> 8. On occasion the accused fielded orders placed on the website from the stock at his home and on occasion posted those orders to customers.
>
> ***2 December 2011***
>
> 9. On 2 December 2011 the accused had in his possession:
>
>   (a) 60 packages of electronic cigarettes;

[2] *Tobacco Products Control Act 2006* (WA) Glossary.

(b) nine electronic cigarette atomisers;

(c) roles of stickers with the 'HV' logo;

(d) one document entitled 'shipping details'; and

(e) one business card for Heavenly Vapours bearing his name.

Nature of electronic cigarettes

10. The electronic cigarettes referred to in par 9(a) function in the following manner:

(a) each electronic cigarette is composed of three parts:

(i) a part housing the battery, a button to operate the electronic cigarettes, and associated circuitry;

(ii) a part housing a heating element that vaporises the 'e-juice' so that it can be inhaled; and

(iii) a cartridge or mouthpiece, which houses the 'e-juice' to be inhaled.

(b) The cartridge is designed so that vaporised liquid can float past the container housing the 'e-juice' to reach the user's mouth.

(c) The cartridge can be refilled or replaced once the liquid 'e-juice' is exhausted.

(d) To use an electronic cigarette:

(i) the user places the cartridge and of the electronic cigarette into his or her mouth and presses down the button;

(ii) pressing the button activates the heating element, which heats the liquid 'e-juice' to a vapour;

(iii) the user inhales the vapour from the end of the cartridge, removes the electronic cigarette away from his or her mouth, the vapour is then inhaled and exhaled.

8 The items in Mr Van Heerden's possession were described either as model number '510-T' or as model number 'eGo-T'. The appellant tendered in evidence two of those items (namely, one each of the model 510-T and eGo-T), a roll of Heavenly Vapours stickers which were also

found in Mr Van Heerden's possession, and copies of six pages from the website dated 25 November 2011 (the website pages).

9 The model 510-T in evidence was described by the learned Magistrate as 'made up of two components one measuring 6 cm in length the other approximately 2 cm in length and when screwed together measured 8 cm. The 510-T is metallic to touch and at one end there is a grey plastic rounded end.'[3] The model 510-T which was in evidence was contained in a package together with a User Manual for the 510-T.

10 The model eGo-T in evidence was described by the learned Magistrate as being of a black greyish colour, with a silver end and band in the middle, which felt metallic to the touch, and which comprised three components including a clear plastic end or mouthpiece, which when assembled measured approximately 13 cm in length.[4] The model eGo-T which was in evidence was contained in a package together with a User Manual for the eGo-T.

11 The website pages comprised 6 pages of text and photos. On each page in the bundle there appears text referring to 'Hardware' including the eGo-T. On page 1 there is a reference to 'Heavenly Vapours E-Cigarettes' and text which says:

> Get the satisfaction of smoking with no smell, no butts, no smoke, no tar. E-cigs are great value with e-juice available in a range of flavours, with or without nicotine. It's time to make the switch![5]

12 Page 1 also bears a picture of a woman smoking what looks like a white cigarette, and what looks like smoke is emanating from the cigarette. On page 3 of the website pages, there are references to the strength of the 'e-Juice' a user would require, if switching from using tobacco cigarettes to electronic cigarettes.

13 The appellant (who is a compliance officer with the Department of Health) gave evidence, as did Ms Jillian Murphy (a senior investigator for the Department of Health). Mr Hawkins gave evidence that he was familiar with electronic cigarettes (which in the course of the trial were also referred to as 'e-cigarettes') and described what it looked like when someone was smoking an electronic cigarette:

> … It looks exactly like someone who is smoking a normal cigarette, a cigarette that contains tobacco. There is almost no difference, I would

[3] Reasons for decision, page 7.
[4] Reasons for decision, page 7 - 8.
[5] Exhibit 4.

suggest, between someone smoking a normal cigarettes and someone smoking an electronic cigarette.

> … [T]he actual product is – is quite similar in – in shape and - that a cigarette is. The actual hand and mouth actions are very similar. You put the electronic cigarette in your mouth. The way they are designed, you inhale and – and when you exhale there is a vapour comes out of these things, reminiscent of the cigarette smoke that comes out when you exhale cigarettes, so there – and some of these electronic cigarettes have an LED lights at the end of them which may turn orange to also again simulate the burning of a cigarette. So – so they their nature, it is very much the same as a – as a normal cigarette.[6]

14 Mr Hawkins admitted, however, that he had not seen either the model 510-T or the eGo-T being used.[7]

15 Mr Hawkins also said that some of the colours of electronic cigarettes resembled cigarettes or cigars. He accepted that electronic cigarettes came in a range of colours, and shapes and sizes,[8] from something about the size of a cigarette to something like the size of a fountain pen or a large cigar,[9] and that some models had LED lights on the end, and others did not.[10]

16 Ms Murphy also gave evidence that she was familiar with electronic cigarettes, and that when a person was using an electronic cigarette 'most of them look very much like a cigarette. They - they are shaped like a cigarette, with the steam especially, it looks like smoke.'[11] Ms Murphy admitted, however, that she had not seen either the model 510-T or the eGo-T being used.[12]

17 Ms Murphy confirmed that some electronic cigarettes which were sold did not contain nicotine, and were used with nicotine free 'e-juice'.[13]

18 Mr Van Heerden did not give evidence but relied on the evidence of another witness, Mr Di Rado, who said that he had used both the 510-T and the eGo-T models of electronic cigarettes.[14] Mr Di Rado said that he was a former smoker who had switched to electronic cigarettes, and preferred them because they were not 'dirty or smelly' like tobacco

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[6] ts 20 (11 September 2013).
[7] ts 26, 27 (11 September 2013).
[8] ts 26 (11 September 2013).
[9] ts 31 (11 September 2013).
[10] ts 26 (11 September 2013).
[11] ts 33 (11 September 2013).
[12] ts 38 (11 September 2013).
[13] ts 34 (11 September 2013).
[14] ts 40 (11 September 2013).

cigarettes and did not impose a cost on others,[15] and he considered them a superior nicotine delivery system.[16]

2. The grounds of appeal, and Mr Van Heerden's contention on the appeal

19 The grounds are appeal are:

1. The learned magistrate erred in law in determining the meaning of the phrase 'designed to resemble' in s 106 of the Act by:

   (a) failing to construe the phrase as an entirety;

   (b) confining resemblance to the products' 'physical appearance';

   (c) failing to have regard to the appearance during use of the 510-T and eGo-T products;

   (d) failing to have regard to marketing material in relation to the 510-T and eGo-T products, in particular material on the 'Heavenly Vapours' website; and

   (e) failing to have regard to the overall character and intended purpose of the 510-T and eGo-T products, rather than individual characteristics of the products.

2. The learned Magistrate erred in fact and in law in excluding evidence of the appearance during use of the 510-T and eGo-T products.

3. The learned Magistrate erred in fact and in law in concluding:

   (a) that the 510-T and eGo-T products were not designed to resemble tobacco products; and

   (b) that the 510-T and eGo-T products were not designed to resemble tobacco products even when evidence of use of the products was taken into account.

20 At the hearing of the appeal, counsel for Mr Van Heerden indicated that he wished to contend that the learned Magistrate erred in her finding

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[15] ts 41 (11 September 2013).
[16] ts 40 (11 September 2013).

that the items were an 'other product' for the purposes of s 106 of the Act.[17]

21 No notice of contention had been filed on Mr Van Heerden's behalf, nor had the Form 22 Notice of Respondent's Intention entered on Mr Van Heerden's behalf given any indication that he wished to advance this contention by way of cross-appeal (despite the existence of a box on that form for that purpose). However, the written submissions filed on Mr Van Heerden's behalf did address the contention. Counsel for the appellant indicated that she was in a position to address the contention in her oral submissions and did not suggest that there would be any prejudice to the appellant in the contention being advanced at such a late stage.[18] In the circumstances I was content to permit the contention to be dealt with.

22 However, the point remains that if a respondent wishes to raise a contention about an aspect of a decision which is not raised by the grounds of appeal, that contention should be identified from the outset. Although the *Criminal Appeals Act 2004* (WA) does not deal with the issue expressly, the Court of Appeal Rules refer to the use of a notice of contention in appeals before that court.[19] Subject to any directions by the Court, the same procedure can usefully be adopted in single judge appeals.[20]

23 It is convenient to deal first with Mr Van Heerden's contention.

3. Why the learned magistrate was correct to find that the electronic cigarettes were an 'other product' for the purposes of s 106

24 The learned Magistrate concluded that the items fell within the meaning of an 'other product' pursuant to s 106(a) of the Act. In reaching that conclusion she rejected submissions advanced by counsel for Mr Van Heerden that the words 'other product' took their meaning from the words 'food' and 'toy' that preceded them in s 106(a), and that s 106 was aimed at preventing the promotion of tobacco smoking to children.[21]

25 Those submissions were also advanced by counsel for Mr Van Heerden on the hearing of the appeal. He submitted that s 106(a) was essentially directed to toys and food, and the use of the words 'other

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[17] ts 4 (25 March 2014).
[18] ts 5 (25 March 2014).
[19] *Supreme Court (Court of Appeal) Rules 2005* (WA) r 33(4).
[20] See further ***Investments (WA) Pty Ltd v City of Swan*** [2012] WASC 278 [23] (Pritchard J).
[21] Reasons for decision, page 10 - 11.

product' was designed to cover those situations where there may be ambiguity as to whether a product was a food or a toy.

26 The words 'food', 'toy' and 'product' are not defined in the Act. Accordingly, the construction of those words (and, indeed, the construction of s 106(a) as a whole) starts with a consideration of the ordinary meaning of the words used, considered within their context. That context includes matters such as the meaning of the language used within the Act when viewed as a whole, the provisions of the Act as a whole and how they work together, and the purpose to which the Act was directed.[22] A construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.[23]

27 Applying those principles, I am unable to accept the submissions of counsel for Mr Van Heerden, for five reasons.

28 First, the ordinary and natural meaning of the word 'product' includes, most relevantly for present purposes, an 'object produced by a particular action or process; the result of mental or physical work or effort' and 'an article or substance that is manufactured or refined for sale'.[24] The inclusion of the word 'other' suggests that s 106 is directed to anything which constitutes a product apart from food or toys. The ordinary meaning of the words used thus suggests that s 106 is directed to any object which is created by a particular action or process, or which results from work or effort, including items of food or toys, which are designed to resemble a tobacco product.

29 Secondly, the context in which the words 'other product' appear supports the conclusion that the Parliament intended that s 106 have that broad meaning. As the balance of s 106 makes clear, what is prohibited by s 106 is the sale of any things which are designed to resemble a tobacco product (other than tobacco products themselves, the sale of which is subject to other restrictions under the Act). In my view, the references to any 'food' or 'toy' were included as examples of the 'other products' which may be designed to resemble tobacco products, and which are therefore within the purview of the section. The Parliament was

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[22] ***CIC Insurance Ltd v Bankstown Football Club Ltd*** [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ); ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby & Hayne JJ); ***AB v Western Australia*** [2011] HCA 42; (2011) 244 CLR 390, 398 [10], 402 [24] (French CJ, Gummow, Hayne, Kiefel & Bell JJ); see further ***Thiess v Collector of Customs*** [2014] HCA 12 [22] - [23] (the Court); ***Lacey v Attorney-General (Qld)*** [2011] HCA 10; (2011) 242 CLR 573, 591 - 592 [43] - [44] (French CJ, Gummow, Crennan, Kiefel & Bell JJ).
[23] *Interpretation Act 1984* (WA) s 18.
[24] *Oxford English Dictionary, full online edition*, definitions 5(a), 5(c).

clearly concerned to ensure that there was no doubt that food and toys were among those things which, if they were designed to resemble tobacco products, would be the subject of s 106.

30 Thirdly, the argument advanced by counsel for Mr Van Heerden was essentially an argument that the use of the phrase 'other product' in conjunction with the words 'food' and 'toy' signified an intention that only products similar to food and toys (and which also were designed to resemble tobacco products) would be covered by the prohibition in s 106. That submission is contrary to s 17 of the *Interpretation Act 1984* (WA) which provides that the words 'or, other, and otherwise shall be construed disjunctively and not as implying similarity unless the word 'similar' or some other word of like meaning is added'.

31 Fourthly, the submission was essentially that s 106 should be construed having regard to the principle of construction referred to as the *ejusdem generis* rule. However, the application of that rule requires the identification of a single relevant genus from the things listed.[25] The meanings of the word 'toy' include, most relevantly for present purposes, 'a material object for children or others to play with (often an imitation of some familiar object); a plaything',[26] while the meaning of 'food' in the present context is clearly a reference to any substance that people eat to maintain life and growth, and refers also to an item of food, or a particular kind of food.[27] It is not possible to identify some common and dominant feature of food and toys, by reference to which the phrase 'other product' might be limited.[28]

32 Fifthly, I do not accept that the purpose of the Act is directed solely to preventing children from smoking, although that is clearly one of its purposes. The long title of the Act makes clear that it is an Act to prohibit the supply of tobacco products and smoking implements to young persons, but also extends to regulating the sale and promotion of tobacco products, reducing the exposure of people to tobacco smoke from smoking by others, and to prohibit the sale of products that resemble tobacco products. Similarly, the purposes of the Act expressly include reducing the incidence of illness and death related to the use of tobacco products, by discouraging the use of tobacco products, and restricting the promotion of tobacco products and smoking generally, amongst other

[25] ***R v Regos*** [1947] HCA 19; (1947) 74 CLR 613, 624 (Latham CJ).
[26] *Oxford English Dictionary, full online edition*, definition 6.
[27] *Oxford English Dictionary, full online edition*, definitions 1(a), 1(d).
[28] ***R v Regos*** [1947] HCA 19; (1947) 74 CLR 613, 624 (Latham CJ).

things.[29] A construction of s 106 which resulted in its application to all products designed to resemble a tobacco product would promote those purposes of the Act more than a construction which confined the application of the section to food, toys and products similar to food or toys.

4. <u>Ground of Appeal 1: the proper construction of the words 'designed to resemble a tobacco product'</u>

33 The learned Magistrate held that the items were not 'designed to resemble a tobacco product'. She held that the question of what a product was designed for was an objective test, to be inferred from the appearance of the goods, rather than from the subjective intention of the designer of the goods.[30] In that respect the learned Magistrate relied upon authorities concerning different legislation which also contains the word 'designed'.[31] The learned Magistrate accepted that the ordinary meaning of the word 'resemble' meant 'to be like, to have a likeness or similarity to, have some feature or property in common with'. However, the learned Magistrate considered that it was unclear whether the Legislature's use of the word 'resemble' was intended to have regard only to physical appearance or whether it also encompassed the manner of use of any product.[32]

34 The learned Magistrate then concluded that she was not satisfied that when assessing whether the items resembled a tobacco product, that she should have regard to the manner of use nor any marketing material. Rather, she held that the assessment was limited to the physical appearance of the product.[33] (It is apparent from the balance of her Honour's reasons that in referring to the 'marketing material' her Honour was referring to the website pages.)

The proper construction of the phrase 'designed to resemble' in s 106

35 The starting point in construing the phrase 'designed to resemble' in s 106 is to ascertain the ordinary meaning of those words.

36 The word 'resemble' means 'to be like, to have a likeness or similarity to, to have some feature or property in common with (another person or

[29] *Tobacco Products Control Act 2006* (WA) s 3.
[30] Reasons for decision, page 11.
[31] Reasons for decision, page 11. Her Honour referred to ***Re Beautiful Day Pty Ltd and Collector of Customs (Qld)*** (1977) 1 ALD 206; (1977) 1 ALN 8 and to ***Re Fibre Hulls Pty Ltd and Collector of Customs*** (1987) 12 ALD 75.
[32] Reasons for decision, page 11.
[33] Reasons for decision, page 12.

thing)'.[34] Having regard to the words used in s 106, it is clear that Parliament sought to prohibit the sale of products 'designed to resemble' tobacco products, rather than products which were 'identical' to tobacco products in their appearance or operation. That intention is also apparent from the fact that toys and food are specified as examples of products which may be 'designed to resemble' tobacco products. A cigarette is a roll of cut tobacco for smoking, enclosed in paper, while a cigar is a roll of cut tobacco for smoking, enclosed in tobacco leaf or the leaf of another plant.[35]

37 In addition, the comparison which is required is to a 'tobacco product'. The definition of 'tobacco product' in the Act encompasses not just cigarettes and cigars, but tobacco in a form prepared for human consumption or use, and a product prepared for smoking that contains a herb or other plant matter (whether or not including tobacco).[36] Those different forms of tobacco products may look very different from each other. Cigarettes and cigars do not have the same appearance. And one kind of cigarette (or cigar) may look very different from another kind of cigarette (or cigar) in its precise colour, shape or size. The use of the word 'resemble' makes clear that it is not necessary that the offending product be identical to a tobacco product, but rather that it have a likeness or similarity to, or some feature or property in common with, a tobacco product.

38 The word 'design' when used as a verb has various meanings, the most apt of which in the present context is 'to intend for a definite purpose'.[37]

39 Accordingly, given their ordinary meaning, the words 'designed to resemble' refer to a product which was intended to have a likeness or similarity to, or to have some feature in common with, something else, in this case a tobacco product.

40 The next question is to consider how one ascertains whether a product was intended to have a likeness or similarity to, or to have some feature in common with, a tobacco product. Whether one product 'resemble[s]' another product may be determined in a number of ways. The most obvious is by a comparison of the physical appearance of the two products. But the word 'resemble' is not confined in its ordinary

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[34] *Oxford English Dictionary, full online edition*, definition 1(a).
[35] *Tobacco Products Control Act 2006* (WA) Glossary.
[36] *Tobacco Products Control Act 2006* (WA) Glossary.
[37] *Macquarie Dictionary, full online edition*, definition 3.

meaning to similarities in physical appearance. Accordingly, determining if a product 'resemble[s]' another thing may require an examination from other perspectives of whether the products share common features or characteristics, such as by examining the way the two products operate or are used, or by looking at how they were made or produced, to determine whether the products share features or characteristics, or by looking at the essential character[38] of the products rather than at individual characteristics to determine if the products have a likeness or similarity having regard to their essential character.

41 That more than a comparison of the physical appearance of the products is required can be discerned from the context. The Parliament did not confine the criterion for the operation of s 106 to whether a product 'resembled' a tobacco product, but instead adopted the criterion of a product 'designed to resemble' a tobacco product. That additional requirement confirms that more than a comparison of the physical appearance of the two products may be required.

42 Finally, a construction of the phrase 'designed to resemble', which requires an examination of the manner of use of the offending product, as well as the physical appearance of that product, is consistent with the purposes of the Act. As I have already noted,[39] the purposes of the Act include reducing the incidence of illness and death related to the use of tobacco products, including by restricting the promotion of smoking generally. (The word 'smoke' when used as a verb is defined to mean to smoke, hold, or otherwise have control over, an ignited tobacco product.[40]) The purposes of the Act thus direct attention to the use to which tobacco products are put - namely to smoking itself.

43 The promotion of smoking may be restricted in a variety of ways. It is evident that one of those ways is by combating the perception that smoking is a commonly pursued and desirable activity. The prohibition of the sale of products which are designed to be used in a way which is similar to the use of tobacco products - namely, to permit the inhalation of smoke or something similar, such as vapour - as well as of products which are designed to be similar to tobacco products in their appearance, would more effectively promote the purpose or object of the Act than a prohibition of the sale of products which are only similar to tobacco products in their physical appearance.

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[38] ***Commissioner of Taxation v Thomson Australian Holdings Pty Ltd*** (1989) 25 FCR 481.

[39] See [32].

[40] *Tobacco Products Control Act 2006* (WA) Glossary.

44 If the question whether a product was designed to resemble a tobacco product fell to be judged solely by reference to the physical appearance of the products, the application of the section to food (for example) would be limited, because few items of food are made of paper and filled with something that looks like plant material. Yet Parliament clearly contemplated that food may be among the products 'designed to resemble' tobacco products.

45 Counsel for Mr Van Heerden submitted that the purpose of the Act was to discourage the smoking of tobacco products, and s 106 should thus be understood as directed to products designed to resemble a tobacco product only if they actually encouraged the use of tobacco products. He submitted that the items in this case did not involve the smoking of tobacco at all, and so were not within the contemplation of Parliament in s 106.[41] I am unable to accept that submission. Section 106 is not directed to items which contain tobacco or promote the smoking of tobacco per se. The section does not prohibit the sale of tobacco products. (The sale of those products is regulated under Pt 2 div 2 of the Act.)

46 Furthermore, the requirement in s 106 is that the product sold must be designed to resemble a 'tobacco product'. The definition of 'tobacco product' includes a product prepared for smoking that contains a herb or other plant matter, whether or not that product also includes tobacco.[42] The intention behind s 106 is expressly directed to products which are not tobacco products, and I do not see any reason why it should be confined in its operation so as to apply only to the sale of products which encourage the consumption of tobacco.

47 In addition, it is not difficult to see how the act of smoking (or otherwise consuming, by inhalation through the mouth) a substance other than tobacco smoke may nevertheless be associated with smoking tobacco products. For that reason, it is not difficult to envisage how the smoking (or the consumption by inhalation through the mouth) of substances other than tobacco smoke might be used to promote smoking tobacco products.

48 It is appropriate to mention a further argument that was touched on in argument by counsel for Mr Van Heerden. He submitted that the evidence of Mr Di Rado constituted evidence that the items could be used as nicotine replacement therapy, which purpose was consistent with the Act, and which would be stymied if the sale of the items was prohibited

[41] ts 34 (25 March 2014).
[42] *Tobacco Products Control Act 2006* (WA) Glossary.

by s 106.[43] There was no evidence as to what is required in order for a product to be sold as a replacement for nicotine, but counsel for Mr Van Heerden acknowledged that such a product would require approval as a therapeutic good under relevant Commonwealth legislation.[44] Absent evidence as to what is required for a product to be sold for the purposes of nicotine replacement therapy, and as to the interaction between any relevant federal legislative regime and the Act, the submission cannot be accepted.

49 Finally, counsel for Mr Van Heerden submitted that s 106 is a penal provision and the Court should be cautious about a construction of that section which would extend criminal liability beyond the strict terms of the section.[45] In days past a strict approach was taken to the construction of penal provisions, so that if it were possible to do so, the Court would adopt any reasonable interpretation which was open which avoided the penalty.[46] The modern approach to statutory construction involves approaching the construction of penal provisions, as with all other provisions, by employing ordinary principles of statutory construction, so as to ascertain and give effect to the purpose of the Parliament as expressed in the language used. However, as a matter of last resort, if any ambiguity or doubt remains, that may be resolved in favour of the subject by refusing to extend the category of criminal offences.[47] This is not a case for the application of that rule. I am not persuaded that ambiguity remains in the meaning of s 106 after the application of the principles of construction I have outlined above.

Where the learned Magistrate fell into error

50 In my respectful view the learned Magistrate fell into error in the process of identifying how a product was 'designed to resemble' a tobacco product in two ways.

51 First, she addressed herself to the question whether the items resembled a tobacco product, rather than whether they were designed to resemble a tobacco product, and that appears to be the reason why she confined her analysis to the physical appearance of the items.

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[43] Respondent's written submissions, 18 March 2014 [26]; ts 42 (25 March 2014).
[44] ts 35, 42 (25 March 2014).
[45] Respondent's written submissions, 18 March 2014 [28]; ts 32, 34 (25 March 2014).
[46] See for example ***Ex Parte Zietsch; Re Craig*** (1944) 44 SR (NSW) 360, 365 (Jordan CJ).
[47] ***Beckwith v The Queen*** [1976] HCA 55; (1976) 135 CLR 569, 576 (Gibbs J); ***Waugh v Kippen*** [1986] HCA 12; (1986) 160 CLR 156, 164; ***R v Lavender*** [2005] HCA 37; (2005) 222 CLR 67, 95 - 98 (Kirby J).

52 Secondly, the learned Magistrate appears to have placed reliance upon two authorities - ***Re Beautiful Day Pty Ltd and Collector of Customs***[48] and ***Re Fibre Hulls Pty Ltd and Collector of Customs***[49] - which she read as indicating that what a product was designed for was an objective test to be inferred from the appearance of the goods.[50] Three things may be said about the authorities to which the learned Magistrate made reference. First, neither of them are directly applicable to the present case, and neither of them constitute binding authority in relation to the construction of s 106. Secondly, neither case established a general principle that whether a product was 'designed to' meet some criterion should be ascertained solely by reference to the physical appearance of the product. Thirdly, some caution is warranted in relying on conclusions reached about the construction of different legislation in a different factual context.

53 In ***Re Beautiful Day Pty Limited and Collector of Customs***[51] the application of a lower rate of customs tariff depended upon whether items of clothing were goods 'designed exclusively for use by men'. The Administrative Appeals Tribunal observed that ascertaining what a product was designed for involved an objective test, rather than an enquiry as to the subjective intention of the designer. The Tribunal held that the purpose for which the clothes were designed was to be inferred from their appearance, judged by reference to the modes of dress adopted by men and women in Australia at the time of the importation of the goods. In drawing that inference, the Tribunal held that the material, colour, cut, decoration and get-up of the garments would be relevant.[52] In other words, although the appearance of the clothing was relevant, so too was the way in which clothing was being worn by men and women at the relevant time.

54 In ***Re Fibre Hulls Pty Ltd and Collector of Customs***[53] a bounty was payable in relation to the construction of a ship only if the ship was a fishing boat, which was defined to mean a vessel designed for commercial fishing operations. The Administrative Appeals Tribunal concluded that the test was 'an objective one to be inferred from the appearance of the vessel and not to be ascertained by enquiring from the designer as to his

[48] ***Re Beautiful Day Pty Ltd and Collector of Customs (Qld)*** (1977) 1 ALD 206; (1977) 1 ALN 8.
[49] ***Re Fibre Hulls Pty Ltd and Collector of Customs*** (1987) 12 ALD 75.
[50] Reasons for decision, page 11.
[51] ***Re Beautiful Day Pty Ltd and Collector of Customs (Qld)*** (1977) 1 ALD 206; (1977) 1 ALN 8. See also ***Re Gissing and Collector of Customs*** (1977) 1 ALD 144, 147 - 148 and ***Re James North (Australia) Pty Ltd and Collector of Customs*** (1979) 2 ALD 476, 478 - 479.
[52] ***Re Beautiful Day Pty Ltd and Collector of Customs (Qld)*** (1977) 1 ALD 206; (1977) 1 ALN 8.
[53] ***Re Fibre Hulls Pty Ltd and Collector of Customs*** (1987) 12 ALD 75.

intentions'.[54] However, the Tribunal also held that whether the test was satisfied was to be judged by looking at the vessel at the time of its construction and asking whether it was designed for the purposes of commercial fishing in the sense of its physical appearance and layout. This would require a consideration of plans and other information showing the layout of the vessel such that it would be appropriate for commercial fishing operations to be conducted from it. Again, it was not only the physical appearance which was relevant, but a consideration of the purposes for which the ship could be used, having regard to its layout.

55 One case to which the learned Magistrate was not referred, but which reflects an approach to construction similar to that which I consider applicable here, is ***Sondo Pty Ltd v Federal Commissioner of Taxation***.[55] In that case, a question arose as to whether amusement arcade machines, made to operate with a push button electrical operation, but subsequently modified to operate by the use of coins, were assessable at a higher rate of sales tax, by virtue of the application to them of a provision of the *Sales Tax (Exemptions and Classifications) Act 1935* (Cth).[56] That provision referred to machines 'designed to depend upon the insertion of money or tokens' and machines 'designed for use in connection with the use of goods of a kind used for the purpose of gambling, entertainment or amusement'.

56 Burchett J, with whom Sheppard J and Lee J agreed, observed:[57]

> The goods are not, by the statute, characterised only by their state at sale, but by a feature of how they should be said to have been designed. The addition of that aspect of the item must have been deliberate, so that it cannot be construed as if it merely referred to the operation of the machines in fact. The appellant's argument seeks to eliminate, from the statutory language, any flavour of purpose. That is impossible. When the operation of a machine is said to be designed to do something, the statement made says more than that the machine does it. ... Since design involves purpose, Item 60(1), which refers to design, cannot be understood in the way the appellant proposes.
>
> And if purpose is an element, must the tribunal blind itself to evidence indicating purpose, simply because that evidence travels beyond the machines to the history of their manufacture, to what is done with them, and to the nature of the uses to which they are put? … In my opinion, the tribunal was entitled to look at the whole of the circumstances. …

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[54] ***Re Fibre Hulls Pty Ltd and Collector of Customs*** (1987) 12 ALD 75, 81.
[55] ***Sondo Pty Ltd v Federal Commissioner of Taxation*** [1991] FCA 32; (1991) 102 ALR 362.
[56] Item 60(1) of the Second Schedule to that Act.
[57] ***Sondo Pty Ltd v Federal Commissioner of Taxation*** [1991] FCA 32; (1991) 102 ALR 362, 362 - 365 (Burchett J, Sheppard & Lee JJ agreeing).

> Another way the appellant's argument was put was to say the goods must be considered at the instant of sale, and they then operated by push-button. But the past participle, 'designed' cannot be confined to the instant of sale. It looks at what had been purposed and planned.

57 I should make clear that, in my view, the learned Magistrate was correct to conclude that whether a product is designed to resemble a tobacco product should be determined objectively, rather than by reference to the subjective intention of the designer of the product. Neither party to the appeal advanced a different view. (However, in so far as the website pages were concerned, counsel for Mr Van Heerden emphasised that it was the intention of the designer (or the manufacturer) of the product, and not of the retailer, which was of relevance.[58] I deal further with that argument below.)

58 In summary, ascertaining whether a product is designed to resemble a tobacco product involves a comparison between the product and tobacco products, to ascertain whether the product was intended to have a likeness or similarity to, or to have some feature in common with, a tobacco product. That comparison will take into account all of the features and essential characteristics of the product, such as its physical appearance or the manner in which it is used (because that will permit an inference about what the product is designed to resemble).

59 Accordingly, ground 1 of the grounds of appeal should be upheld.

60 I turn to consider the learned Magistrate's conclusions about the use which could be made of the evidence before the court.

5. Ground of Appeal 2: why the learned magistrate erred in excluding evidence of the appearance during use of the electronic cigarettes

61 Ground 2 contends that the learned Magistrate erred in excluding evidence of the appearance during use of the items. This ground of appeal is concerned with the Magistrate's conclusions in relation to parts of the Statement of Admitted Facts and as to the evidence of Mr Hawkins and Ms Murphy.

62 At the outset, I note that the learned Magistrate did not conclude that evidence as to the appearance of the items during their use could not be admitted. Rather, the learned Magistrate declined to take into account certain evidence, which had been admitted, in ascertaining whether the items were designed to resemble tobacco products. That evidence was

[58] ts 41 - 42 (25 March 2014).

contained in the Statement of Admitted Facts, and in the evidence of Mr Hawkins and Ms Murphy. The learned Magistrate concluded that that evidence did not constitute evidence of the appearance of the items while they were being used. Accordingly, even if evidence as to the use of the items could be considered in determining whether they were designed to resemble tobacco products, the learned Magistrate concluded that that evidence was of no assistance in that determination.

63 The learned Magistrate accepted that the Statement of Admitted Facts referred to the components of an electronic cigarette and to how it was used. However, she held that this was not evidence of how the items appeared to an observer when they were used.[59] She also found that there was 'no evidence that when observed [the vapour emitted from an electronic cigarette] looks like tobacco smoke'.[60] The learned Magistrate also concluded that the evidence of Mr Hawkins (and, by implication, Ms Murphy) as to the appearance during use of electronic cigarettes did not assist because they had not actually seen electronic cigarettes of the same model as the items being used.[61]

64 Turning first to the Statement of Admitted Facts, par 10 of that document contained admissions in relation to how electronic cigarettes were used. Significantly, it was admitted that the electronic cigarettes so described were the items Mr Van Heerden had in his possession for sale.[62] Mr Van Heerden thus admitted that the items were used by placing the cartridge end of the electronic cigarette (that is, one of the items) into the user's mouth, pressing down on the button (which vapourised the e-juice), inhaling that vapour from the end of the cartridge, removing the electronic cigarette (that is, that item) from the user's mouth and exhaling the vapour.

65 In my view, the learned Magistrate's conclusion that the Statement of Admitted Facts did not assist in ascertaining whether the items were designed to resemble tobacco products was erroneous for two reasons. First, underlying the learned Magistrate's reasoning was a focus on the appearance of the items. But as I have concluded, the appearance of a product - either its physical appearance, or its appearance when used - is not the only means by which to ascertain whether that product was 'designed to resemble' a tobacco product under s 106 of the Act. The admissions made in par 10 of the Statement of Admitted Facts were in my

[59] Reasons for decision, page 12.
[60] Reasons for decision, page 13.
[61] Reasons for decision, page 12.
[62] Statement of Admitted Facts [9], [10(a)].

view clearly relevant to the question of whether the items were intended to have similar features or characteristics (including as to their use) as compared with a tobacco product.

66 I deal further below with the evidence relevant to the overall conclusion as to whether the items were designed to resemble a tobacco product. For present purposes, it suffices to say that the admissions in the Statement of Admitted Facts as to the way the items functioned clearly permitted inferences to be drawn about the use to which the items were intended to be put. That intended use was to permit the inhalation of a vapour through the item and into the user's mouth, the item having been conveyed by hand to the user's mouth.

67 Secondly, I am unable to agree that par 10 of the Statement of Admitted Facts was a statement about how to use the items, but that it did not constitute evidence of how the items appeared when they were being used. Counsel for Mr Van Heerden submitted that that was so because the Statement of Admitted Facts did not bear upon whether there was a 'hand to mouth' action during the use of the items, the extent of inhalation of vapour (namely whether it is inhaled in the lungs) and the appearance of the vapour when it was exhaled.[63] I do not agree. It was implicit in the Statement of Admitted Facts that the items were placed in the user's mouth, and removed from their mouth, using their hand. It is not apparent why the extent of inhalation of the vapour into the lungs would be something which could be ascertained by an observer, given that that process takes place inside the user's body. Finally, the appearance of the vapour would be relevant to assessing the extent of the items' similarity to tobacco products, at least in their physical appearance while being used. But the description of the inhalation of vapour through the electronic cigarette into the user's mouth, and its exhalation out of the user's body, is nevertheless a description of the appearance of the items during use.

68 Turning next to the evidence given by Mr Hawkins and Ms Murphy, I have summarised the relevant parts of the evidence of those witnesses at [13] - [17].

69 In my respectful view, the evidence of Mr Hawkins was relevant to the appearance of the items while they were being used. That was because Mr Hawkins' evidence as to the way in which electronic cigarettes were used was entirely consistent with par 10(d) of the Statement of Admitted Facts - that is, the conveyance of the electronic cigarette to the mouth by hand, the inhalation of the vapour through the

[63] ts 38 - 39 (25 March 2014).

cigarette and into the user's mouth, and the exhalation of that vapour out of the body. Furthermore, at par 1 of the Statement of Admitted Facts it was admitted that an electronic cigarette is an electronic inhaler that vaporises a liquid solution into a mist for inhalation.

70 Having regard to these admitted facts, the only inference which was open is that the items operated in the same way as other electronic cigarettes which Mr Hawkins had observed in use. Consequently, Mr Hawkins' description of the appearance of someone using an electronic cigarette could be taken into account as evidence of the appearance of one of the items during use.

71 Accordingly, ground 2 of the grounds of appeal should be upheld.

6. Ground of appeal 3: Why the learned Magistrate erred in concluding that the items were not designed to resemble tobacco products, whether or not evidence of use of the items was taken into account

72 The learned Magistrate concluded that she was not satisfied that when assessing whether the items resembled a tobacco product she should have regard to their manner of use, nor to any marketing material, but rather should confine herself to the physical appearance of the items. Having regard to their colour, their metallic touch, the absence of any paper or material designed to look like a tobacco leaf or the leaf of another plant, the absence of any markings to resemble that the items contained tobacco, the lack of any smell similar to tobacco, the mode of assembly of the items, the presence of a button on the exterior of the items, the absence of evidence that the items required the use of a match or cigarette lighter to ignite, and their resemblance to a fountain pen or metal writing pen, the learned Magistrate was not satisfied beyond reasonable doubt that the items resembled a cigarette or cigar.[64]

73 The learned Magistrate also concluded that even if the manner of use of the items were taken into account, in addition to their physical appearance, she was still not satisfied beyond reasonable doubt that the items resembled a tobacco product.[65] That was because there was no evidence that the vapour emitted from the items looked like tobacco smoke. Further, the learned Magistrate noted that in order to use an electronic cigarette the user placed the product in their mouth, pressed down on a button and inhaled and exhaled any vapour, but she noted that

[64] Reasons for decision, pages 12 - 13.
[65] Reasons for decision, page 13.

there was no evidence that a cigar or cigarette required the depression of a button.

74 Although not stated with complete clarity, it was the prosecution case that the 'tobacco product' by reference to which the comparison had to be undertaken in this case was with a cigarette or a cigar. Counsel for Mr Van Heerden clearly approached the case on that way, and that was clearly the basis upon which the learned Magistrate approached the case.

75 The prosecution did not tender a cigarette or cigar in evidence. Rather, it appears to have been assumed by counsel for the parties, and it is implicit in the learned Magistrate's reasons for decision, that because cigarettes and cigars are so notoriously well known, it was not necessary that there be evidence of their appearance.[66] Some caution should be applied in relation to such an assumption. Although the Act defines 'cigarette' and 'cigar',[67] those definitions are broad enough to accommodate differences in physical appearance, as to the colour and size of cigarettes and cigars, for instance.

76 At trial, some submissions were made[68] which were premised on an assumption that all cigarettes contain a filter, and that the existence of that filter is evident from an inspection of a cigarette. It is far from apparent that that is necessarily the case, or that knowledge of that fact is so notoriously well known as not to require evidence.[69] For present purposes, however, it is unnecessary to resolve that question because the appellant does not take issue with the learned Magistrate's finding that the items did not resemble tobacco products - that is, a cigarette or a cigar - in their physical appearance. Instead, the appellant's case is that an electronic cigarette is designed and marketed as a replacement for a cigarette and when used, it resembles a cigarette.[70]

77 As I have already pointed out, determining whether the items were designed to resemble a cigarette required a comparison between the items and tobacco products (in this case cigarettes or cigars) to ascertain whether the items were intended to have a likeness or similarity to, or to have some feature in common with, a tobacco product. That comparison should have taken into account all of the features and the essential

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[66] Reasons for decision, pages 11 - 12.
[67] *Tobacco Products Control Act 2006* (WA) Glossary.
[68] See, for example, ts 44 (11 November 2013).
[69] See ***Director of Public Prosecutions v United Telecasters Sydney Ltd*** [1990] HCA 5; (1990) 168 CLR 594, 598 - 599 (Brennan, Dawson & Gaudron JJ) and at 607 (Toohey & McHugh JJ); see also ***Van der Feltz v City of Stirling*** [2009] WASC 142 [119] (Murphy J).
[70] Appellant's submissions, 11 March 2014 [58].

characteristics of the items, including (but not limited to) their physical appearance, and the manner in which they are used.

78 The essential characteristics of a cigarette or a cigar and the manner in which they are used are, in my view, so notoriously well known that evidence is not required to be given of those facts. It is a notorious fact that a cigarette or cigar permits the inhalation of tobacco smoke into the user's body through his or her mouth. The cigarette or cigar is held in the user's hand. The cigarette or cigar is lit, the user places the cigarette or cigar into his or her mouth, and inhales through the cigarette or cigar so as to take the tobacco smoke into his or her body, and then exhales that smoke upon breathing out.

79 Given all other elements of the offence were admitted, and given her conclusion that the items were an 'other product' for the purposes of s 106, the question for the learned Magistrate was to compare the appearance, features, essential characteristics and manner of use of the items with those of cigarettes or cigars, to determine whether it had been proved, beyond reasonable doubt, that the items were designed to resemble a tobacco product.

80 In my respectful view, the learned Magistrate was in error because she did not take into account evidence which was relevant to that question. The admissions in the Statement of Admitted Facts, and the evidence of Mr Hawkins, to which I have already referred, constituted evidence as to how the items were used, and evidence of the appearance of the items when they were used. That evidence supported the conclusion that the items were used for inhaling vapour (whether or not containing nicotine) through the mouth, which was exhaled in a manner reminiscent of the smoke from a cigarette.

81 In addition, the learned Magistrate did not take into account other evidence, namely the User Manual for the 510-T and the User Manual for the eGo-T, and the website pages. As I have observed, the 510-T User Manual and the eGo-T User Manual were contained in the packaging for the items which was in evidence, and it can be inferred that they were produced by the manufacturer of those items. In the course of the appeal hearing, counsel for Mr Van Heerden accepted that that was so. The 510-T User Manual refers to the 510-T as an 'e-cigarette'.[71] A number of other references in that document compare the 510-T with a cigarette: the document indicates that the battery of the 510-T 'enables over 800 puffs per day', and 'five times as many puffs as other normal e-cigarettes'. The

[71] Exhibit 1.

material indicates that 'the 510-T gives a realistic feel and provides lots of vapour'. Identical wording appears in the User Manual for the eGo-T.

82 The User Manuals for each of the items provide very strong evidence that the items were intended to be used in a manner very similar to that of cigarettes, save that vapour and not tobacco smoke would be inhaled by the user. It is clear that the vapour produced by each of the items was intended to be able to be 'puffed' in a manner similar to cigarette smoke. The description of the 510-T and the eGo-T as 'e-cigarettes' reflects that similar intended use.

83 Counsel for Mr Van Heerden submitted that the website pages could not be relied upon in relation to the use of the items, or the appearance of the items when used. Counsel for Mr Van Heerden submitted that the picture depicting a product being smoked was not a picture of the items the subject of the charge (given its different physical appearance) and it was not apparent whether the smoke which was emanating from that product was vapour from an electronic cigarette or tobacco smoke.[72] Secondly, he submitted that the website pages were promotional material generated by the retailer and not by the manufacturer, and so could not assist in determining the objective intention of the manufacturer or designer of the items as to their use.[73] I am unable to accept those submissions.

84 The text set out on the website pages clearly describes the use which is able to be made of the electronic cigarettes sold by Heavenly Vapours, including the eGo-T, which is referred to on each page. That text makes clear that the items are able to be used for smoking in a manner similar to smoking cigarettes containing tobacco. The presence of the picture adjacent to the text confirms the information being conveyed by the text, namely that inhaling vapour through an electronic cigarette is similar in appearance and action to smoking a cigarette.

85 Accordingly, ground 3 of the grounds of appeal should be upheld.

7. The orders which should be made

86 On an appeal, the Court is empowered to make various orders, including to substitute a decision that should have been made by the court of summary jurisdiction.[74] In general, an appellate court is in as good a position as the trial to decide on the proper inference to be drawn from

[72] ts 40 (25 March 2014).
[73] Respondent's written submissions, 18 March 2014 [21]; ts 42 (25 March 2014).
[74] *Criminal Appeals Act 2004* (WA) s 14(1)(d).

facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. That is so in this case. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but should not shrink from giving effect to its own conclusion.[75]

87 In my view, the evidence to which I have referred supports the conclusion that the items were designed to resemble a tobacco product because they were intended to be used to inhale vapour in a manner very similar to the inhalation of tobacco smoke when using a cigarette. That the items were designed to resemble a cigarette in this way can be discerned from the description given to the products by the manufacturer (as electronic cigarettes), from the manner in which the items are used (both having regard to the manufacturer's user manual, to the admissions made by Mr Van Heerden and having regard to the website pages) and from the appearance of electronic cigarettes, such as the items, during use (particularly the conveyance of the electronic cigarette to the user's mouth using their hand, the inhalation and exhalation of the vapour, and the fact that the vapour is reminiscent of the smoke from a cigarette).

88 Having regard to the proper construction of s 106, on the evidence before the learned Magistrate, and in view of the admissions which were made, the charge was proved beyond reasonable doubt.

89 The appropriate disposition of the appeal would appear to require orders to the effect that the appeal should be allowed, the decision of the learned Magistrate to acquit Mr Van Heerden of the charge should be set aside, and there should be substituted a decision that Mr Van Heerden is convicted of the charge.

90 I will hear from counsel as to the orders which should be made, including orders in relation to the sentencing of Mr Van Heerden for the offence.

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[75] ***Warren v Coombes*** [1979] HCA 9; (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs & Murphy JJ); ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118, 126 - 128 [25] - [28] (Gleeson CJ, Gummow & Kirby JJ).