[2014] WASC 226

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CITATION	**:**	HAWKINS -v- VAN HEERDEN [No 2] [2014] WASC 226
CORAM	**:**	PRITCHARD J
HEARD	**:**	24 JUNE 2014
DELIVERED	**:**	24 JUNE 2014
PUBLISHED	**:**	26 JUNE 2014
FILE NO/S	**:**	SJA 1131 of 2013
BETWEEN	**:**	BRUCE MICHAEL HAWKINS Appellant AND VINCENT ADAM VAN HEERDEN Respondent

ON APPEAL FROM:

Jurisdiction	**:**	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	**:**	MAGISTRATE J HAWKINS
File No	**:**	JO 1683 of 2013

Catchwords:

Sale of products designed to resemble a tobacco product - Electronic cigarettes - Sentence to be imposed - Fine - Whether spent conviction order should be made

Legislation:

Sentencing Act 1995 (WA)
Tobacco Products Control Act 2006 (WA)

Result:

Respondent fined $1,750

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:

Brewer v Bayens [2002] WASCA 271; (2002) 26WAR 510
Hawkins v Van Heerden [2014] WASC 127
M v O'Neill [2013] WASC 187
R v Tognini [2000] WASCA 31; (2000) 22 WAR 291
Riggall v The State of Western Australia [2008] WASCA 69; (2008) 37 WAR 211

(This judgment was delivered extemporaneously and has been edited from the transcript.)

1 **PRITCHARD J**: Vincent Adam Van Heerden, you have been found guilty of one charge,[1] namely that on dates unknown between 24 November 2011 and 2 December 2011 you sold products designed to resemble a tobacco product, namely electronic cigarettes, contrary to s 106(a) of the *Tobacco Products Control Act 2006* (WA) (the Act).

2 By virtue of s 115 of the Act, the maximum penalty for this offence, in the case of an individual who commits this offence for the first time, is a fine of $10,000.

The facts

3 The facts concerning the commission of the offence were as follows. On 2 December 2011 you were found to have in your possession 69 packages of electronic cigarettes. An electronic cigarette is an electronic inhaler that vaporises a liquid solution into a mist or vapour for inhalation.

4 At the trial you admitted that between 24 November 2011 and 2 December 2011, together with some other persons, you operated a business named Heavenly Vapours. In the course of that business you sold electronic cigarettes via a website. The website offered for online sale electronic cigarettes and nicotine-free 'e-Juice'.

5 You kept the stock for the Heavenly Vapours business at your home, and on occasion you fielded orders placed on the website from the stock at your home, and posted those orders to customers.

6 At the trial, you admitted that of the 69 electronic cigarettes found in your possession, 58 of those were in your possession for sale. The appellant has submitted that you should be sentenced on that basis. I accept that submission.

The seriousness of the offence

7 Section 6 of the *Sentencing Act 1995* (WA) requires that the sentence imposed on an offender must be commensurate with the seriousness of the offence, which is to be determined by taking into account the statutory penalty for the offence, the circumstances of the commission of the offence, any aggravating factors and any mitigating factors.

[1] ***Hawkins v Van Heerden*** [2014] WASC 127.

8 The statutory penalty for an offence against s 106 of the Act is $10,000. I note that that penalty is the same as the penalty imposed by the Act for a large number of other offences under the Act, including offences as varied as selling tobacco products to children (s 6), selling tobacco products by way of wholesale sale without a licence (s 17), contravention of certain prohibitions on the promotion of sale of tobacco products (see, for example, s 33(1)) and failure to comply with a condition or restriction attaching to a licence under the Act (s 51). On the other hand, the penalty for an offence under s 106 of the Act is not the highest maximum penalty imposed on individuals under the Act (cf, for example, the penalty for the offence of selling a tobacco product by way of retail sale without a retailer's licence, under s 16(1) of the Act). Although not the most serious kind of offending conduct prohibited by the Act, it is nevertheless apparent that the Parliament regarded the offence under s 106 of the Act as a serious offence.

9 That is also apparent when regard is had to the purposes of the Act. These include restricting the promotion of smoking. Section 106 is directed to the achievement of that purpose, by prohibiting the sale of products designed to resemble tobacco products. The sale of those products may promote smoking by creating the perception that smoking is a commonly pursued and desirable activity.

10 I turn to the circumstances of this particular offending. I have taken into account that the offence was committed for the purpose of selling electronic cigarettes in the course of a business. However, there was limited information before the Court as to the scale of that business. Three aspects of the information before the Court suggests that the Heavenly Vapours business was not a commercially significant one: first, the quantity of stock seized from you (that is, 58 electronic cigarettes for sale), secondly, the value of the stock seized at the time of the offence, which was said to be between $2000 and $3000, and thirdly, the fact that the business was still a relatively new one at the date of the offence. I have also taken into account that you were not operating the business alone, and thus that you would not be the sole beneficiary of any profit made from the sale of electronic cigarettes. I also accept that income from the business was not the sole or main source of your income, but rather supplemented the income you receive from employment, although at the time of the offence, the business had in fact recorded a loss of approximately $7,000 to $10,000.

11 Your counsel submitted that following your acquittal in the Magistrates Court, the electronic cigarettes seized from you on

2 December 2011 were returned, but were not in a saleable condition. The implication of that submission appeared to be that you had borne the financial consequences of the fact that the electronic cigarettes were held for an extended period of time so as to be rendered no longer in a saleable condition. I do not accept that submission. Given the prohibition on the sale of the electronic cigarettes under s 106 of the Act, those items could not have been sold, whatever their condition.

12 It was an admitted fact at the trial that the electronic cigarettes you had were for sale with nicotine-free 'e-juice'. I have taken that into account in assessing the circumstances of the commission of the offence.

13 Finally, I note that the appellant submitted that there is a growing number of people and businesses selling nicotine-free e-juice and electronic cigarettes, so that there is a need for a sentence with a strong deterrent element. No evidence was advanced for that submission, and I do not place weight on it, particularly as it appears that publicity in relation to this offence is likely to have increased public awareness of the operation of s 106 in relation to the sale of electronic cigarettes.

Mitigating factors

14 In his written submissions, your counsel submitted that you co-operated with investigators from the Department of Health during the execution of the search warrant at your premises on 2 December 2011. However, no weight can be given to that submission, as you have accepted that you were not present at the time the search warrant was executed.

15 Your counsel has submitted that you honestly and reasonably believed that it was lawful for you to offer the electronic cigarettes for sale. I accept that submission in view of the fact that there had been no previous prosecutions in Western Australia which might have alerted you to the fact that possessing electronic cigarettes for sale was illegal. While ignorance of the law is no excuse, I accept that this was not a situation where you engaged in conduct while deliberately conscious of the fact that that conduct was contrary to the law.

16 Your counsel has also submitted that at the time of the commission of the offence, you honestly and reasonably believed that the electronic cigarettes you had in your possession for sale were a healthy alternative to smoking cigarettes. In his written submissions, your counsel advanced three bases for that proposition.

17 First, he referred to an open letter dated 26 May 2014 said to have been sent by a number of international specialists and public health policy officials to the Director General of the World Health Organisation, stating that tobacco harm reduction could be achieved by the consumption of nicotine in low-risk, non-combustible form.

18 Secondly, he referred to an article published in a journal in 2011 referring to support in the United States (where the use of electronic cigarettes is unregulated) for the use of electronic cigarettes as an aid to traditional pharmacotherapy to stop smoking.

19 Finally, he referred to testimonials you say you have received from clients and users of electronic cigarettes.

20 With the exception of the 2011 journal article, to which I will return in a moment, there is nothing before the Court to support the conclusion that you were aware of this material, and relied upon it to form your view about the use of electronic cigarettes, before you committed the offence. The open letter was written well after the date of the offence. Likewise, of the testimonials you claim to have received, none of them were provided to the Court, and the only one of those from which you quoted to the Court was, judging from its content, apparently written in 2014, long after the offence was committed. Finally, in relation to the journal article referring to the position in the United States, that article was published in a 2011 journal. However, your counsel acknowledged in the course of his oral submissions today that the material referred to in his written submissions post-dated the offending conduct.

21 Your counsel also referred to a 2013 US study and a 2014 Greek study in support of the proposition that there is no conclusive evidence that electronic cigarettes are unacceptably harmful to the user. The reports from those studies both post-dated the date of the offence by some time. They cannot have affected your thinking in relation to the offending conduct at the time that you committed the offence.

22 Your counsel also submitted that you conducted other research of your own prior to selling electronic cigarettes, and on the basis of that research, you concluded that electronic cigarettes were a healthy alternative to smoking tobacco. The nature or content of that research was not disclosed to the Court, and I am therefore unable to place any weight on that submission.

23 In any event, the offence is committed irrespective of whether the product sold is, of itself, harmful to human health.

24 Your counsel went on to submit that 'there is no conclusive scientific or medical evidence that electronic cigarettes are unacceptably harmful to the user'. He referred to the 2013 US study, and the 2014 Greek study, which I have already mentioned, in support of that proposition. The appellant disputed the submission that there is no conclusive scientific or medical evidence that electronic cigarettes are harmful to the user, and put before the court a number of reports from scientific studies which suggest that electronic cigarettes may be harmful to human health.

25 It is not possible to resolve these differences in viewpoint for the purpose of sentencing you for the offence. More importantly it is not necessary to do so.

26 Insofar as your belief at the date of the offence is concerned, all of the reports put before the Court, with one exception, post-date the offence. They are of no assistance to me in ascertaining the reasonableness of your belief at the time. The exception was a report prepared by the World Health Organisation in 2009, entitled 'Report on the Scientific Basis of Tobacco Product Regulation: Third Report of a WHO Study Group', to which reference was made by the appellant. However, that report was concerned almost exclusively with electronic cigarettes that delivered nicotine. Insofar as the report referred to the possible effects of 'lung delivery of medications, independent of the effects of nicotine' the conclusion reached was that these must be addressed in scientific studies.

27 For the purposes of sentencing, I accept that at the time of the offence, you honestly believed that electronic cigarettes were a healthy alternative to smoking cigarettes. As no material has been put before me to support the conclusion that you formed that view on the basis of reasonable information, I place no weight on that part of the submission.

28 To the extent that both parties sought to rely upon available scientific studies in order to found submissions in relation to the seriousness of the offence, and to your moral culpability for the offence Mr Van Heerden, I have not placed weight on those scientific reports for the reasons I have already set out.

29 In addition, I note that it is not an element of the offence under s 106 that the product sold was harmful to human health. The purpose to which the offence in s 106 is directed is discouraging the promotion of tobacco products and smoking generally by prohibiting the sale of products which are designed to resemble tobacco products, and thus which may contribute to normalising the activity of smoking or making that activity appear more

desirable. I accept that the sale of electronic cigarettes, which are designed to be used in a way which is similar to the use of tobacco products, namely to permit the inhalation of something which appears similar to smoke, namely vapour, is capable of creating or contributing to the perception that smoking is a commonly pursued and desirable activity. That is because the result of the use of those electronic cigarettes is that users are seen to be engaging in a practice which resembles the smoking of tobacco products.

30 Counsel for the appellant has submitted that you have shown a lack of remorse, by virtue of the fact that you have been campaigning in favour of electronic cigarettes, in that you have spoken to media outlets, and have established a webpage, with the objective of raising funds to appeal my decision,[2] so as to achieve the outcome that it will not be unlawful to sell electronic cigarettes in this State. You do not dispute that you have spoken in the media about the use of electronic cigarettes and that you have made the comments attributed to you in the media reports provided to the Court by the appellant. You claim that you were simply seeking to raise debate and awareness about the law. In my view, your comments went further than that: it is clear that you do not consider that the sale of electronic cigarettes should be prohibited. The appellant has submitted that your expression of those views in the media undermines your claim to remorse for the commission of the offence. I accept that submission. However, I temper that conclusion by observing that, like all other citizens, you are entitled, through lawful means, to advocate a change in the law if you think that warranted, and ultimately I have viewed the media interviews you have given in that light.

31 Having regard to the circumstances of the offending in this case, and taking all of the matters to which I have referred into account, I have concluded that this offence was towards the lower end of the spectrum of offending covered by s 106 of the Act but it was by no means at the lowest end of the spectrum, and it certainly could not be described as a trivial offence.

32 I turn to consider your antecedents. You are 33 years of age, in a de facto relationship, and have a child.

33 You have no prior criminal offences.

34 I have also taken into account the four character references you have provided to the Court. Three of those are from friends who have known

[2] ***Hawkins v Van Heerden*** [2014] WASC 127.

you through the pursuit of sport or recreational pursuits. These referees have referred to your positive personal characteristics, to the fact that you are a role model for others, and to the fact that you are an honest and trustworthy individual.

35 I place greatest weight, however, on a reference from a person who appears to have been in an employer or supervisor-type role when you worked in an information technology position for a private hospital in the past. That person spoke of you as a hardworking and conscientious individual whom he would be pleased to work with again.

The sentencing options available

36 I note that by virtue of s 44 of the *Sentencing Act* the sentencing options available to the Court are those in sections 39(2)(a), (b) or (c), namely to impose no sentence, to impose a conditional release order or to impose a fine. In each case that may be done with or without making a spent conviction order.

37 Having regard to the seriousness of the offence I have concluded that the appropriate sentencing disposition in this case is the imposition of a fine.

38 I have taken into account your capacity to pay a fine.

39 You are employed in a full time job in the information technology field. According to your counsel, you earn a modest income, and you have only approximately $200 per month left over paying your general living expenses. However, you are paying a mortgage to fund the cost of purchasing land and building a home. Nevertheless, I accept that after the payment of your expenses, your monthly surplus of income over expenditure is not significant.

40 There was some information before the Court which indicated that you have established a webpage to seek donations from members of the public to assist you to fund an appeal against my decision.[3] You accepted that you established that web page. According to the information on that web page, you have raised a significant sum. Although you have submitted that that money is to be used solely to fund an appeal, I do not accept that submission. You have submitted that you intend to establish a trust fund governing the use of the money, but that trust fund has not yet been established. According to your own comments on the webpage, the money raised is also to be used to pay for your existing legal costs. Such

[3] ***Hawkins v Van Heerden*** [2014] WASC 127.

monies as you have raised may assist to ameliorate the financial effects of any orders made by this court for the imposition of a fine or for the payment of costs.

41 Having regard to the circumstances of the offence as I have outlined them, the number of electronic cigarettes in your possession for sale, the fact that you were selling the electronic cigarettes in the course of operating a business, and the size of the business involved, your antecedents including your financial means and your ability to pay a fine, I have concluded that the appropriate quantum of the fine which should be imposed is $1,750.

Whether a spent conviction order should be made.

42 You have made an application for a spent conviction order. The principles in relation to the making of spent conviction orders pursuant to s 45 of the *Sentencing Act* are well established. They have been referred to in a number of cases, particularly by the Court of Appeal in ***R v Tognini***,[4] ***Riggall v The State of Western Australia***,[5] ***Brewer v Bayens***,[6] and also in ***M v O'Neill***.[7]

43 Under s 45 of the Sentencing Act, the discretion to make a spent conviction order is enlivened by the satisfaction of two pre-conditions. First, the court must consider that the offender is unlikely to commit an offence of the kind in question again. Secondly, the offence must be trivial, or alternatively, the offender must previously have been of good character.

44 However, even if these pre-conditions are satisfied, that does not mean that the court should proceed to make a spent conviction order. On the contrary, the discretion is to be exercised sparingly. The starting point is that ordinarily a conviction will be a matter of record with all of the consequences that that may entail. There must be some particular circumstance to show that it would be desirable, from the point of view of the offender, and (having regard to the offender's rehabilitation) the community, why the adverse effect of the conviction should be set aside.

45 In this case, I find that it is unlikely that you will commit an offence under s 106 of the Act again, having regard to the absence of a criminal record (which suggests that you have not displayed any tendency to ignore

[4] ***R v Tognini*** [2000] WASCA 31; (2000) 22 WAR 291.
[5] ***Riggall v The State of Western Australia*** [2008] WASCA 69; (2008) 37 WAR 211.
[6] ***Brewer v Bayens*** [2002] WASCA 271; (2002) 26WAR 510.
[7] ***M v O'Neill*** [2013] WASC 187.

the law in any other area of the law in the past), and to the references you have provided to the Court, which are testament to your stable employment, and to your honesty and trustworthiness.

46 While you have spoken out publicly against the operation of s 106 of the Act insofar as it prohibits the sale of electronic cigarettes, as I have observed, you are entitled as a citizen to participate in debate about the merits of the laws that the Parliament enacts. To do so does not necessarily suggest that you are likely to commit the same offence again. On the contrary, it may indicate that you are likely to take whatever means are available to you (for example, by appealing my decision[8]) to bring about a situation where the law does not prohibit the conduct, rather than that you will simply flout the law.

47 I do not regard the offence as trivial for the reasons I have already outlined, but I do accept that until the commission of this offence, you have been of good character, by virtue of the absence of any prior convictions. In forming this view, I have taken into account the references you have provided to the Court, including, in particular, the reference provided by a former supervisor in your employment, who described you as a hardworking and conscientious individual.

48 However, even though I am satisfied of these pre-requisites for the grant of a special conviction order, I am not persuaded that this case constitutes a clear instance where a spent conviction order should be made.

49 Your counsel has submitted that you would like to work at a private hospital, for which you will need to provide a national police certificate clearance, and that a conviction under the Act will be detrimental to your prospects of employment at a private hospital. There was evidence that you had previously worked at a private hospital, but that you no longer work there. Given that you are presently in employment, there was nothing to indicate the particular significance for you of securing a job at a hospital in the future.

50 I note that one of the references provided to the Court was from a person in the position of a supervisor at a private hospital at which you worked previously, who indicated that his organisation requires all individuals to have police clearances. It was not clear whether that meant that a criminal conviction of any kind would preclude employment. The effect of your counsel's submission was that an employer in a hospital

[8] ***Hawkins v Van Heerden*** [2014] WASC 127.

would prefer a prospective employee without a criminal conviction to one with a criminal conviction. Furthermore, however, the employer-referee indicated that he knew you and you would be welcome back if you were to apply. It is not, therefore, clear that a conviction for this offence would inevitably preclude your work at a private hospital, were you to seek employment in a private hospital again in the future.

51 Furthermore, I have taken into account the fact that you have, by participation in interviews with the media, sought publicity so as to generate public debate in relation to the operation of the law. In those circumstances, the effect of a spent conviction order in alleviating you of the adverse consequences of a conviction - which would include, amongst other things, publicity of your conviction for the offence - has been significantly undermined by your own conduct.

52 Having regard to the seriousness of the offence generally and in the circumstances of its commission, and to your circumstances, I am not persuaded that this is a case in which you should be relieved immediately of the adverse effect that the conviction may have on you.

Whether an order should be made for the destruction of the electronic cigarettes

53 Counsel for the appellant seeks an order for the destruction of the items seized, pursuant to s 119(1) of the Act. The Act does not contain a power to order the destruction of seized items, but does permit an order for the forfeiture of seized items.

54 Although the electronic cigarettes seized (apart from the two tendered in evidence at the trial below) were returned to you, the Court is empowered to make an order for forfeiture under s 119(1) even if the seized things have been returned to their owner.

55 The Court clearly has a discretion as to whether to make an order for forfeiture. I am not persuaded that this is an appropriate case for the making of such an order, other than in respect of those items which are exhibits in evidence. In this case, the balance of the seized items were returned to you, Mr Van Heerden, some time ago. I accept your counsel's submission that you have disposed of some of them, and dismantled others. You also possess some of the same model of electronic cigarettes because you have them for personal use. In circumstances where there would be some considerable uncertainty about precisely what items you have, which were seized items, and in ultimately being able to establish that those seized items had in fact been forfeited, I would make an order

for forfeiture only in respect of the two electronic cigarettes which are in evidence before the Court.

Costs

56 Counsel for the appellant sought an order that you pay the costs of the appeal, fixed at $8,500, and of the trial in the Magistrates Court, fixed at $5,578.80. You do not dispute the amount of the costs sought for the trial or of the appeal.

57 Having regard to the *Legal Practitioners (Official Prosecutions) (Accused's Costs) Determination 2012* (WA) and to the amount of costs which the learned Magistrate was prepared to award in your favour when you were acquitted at first instance, I accept that the amount of $5,578.80 sought by the appellant for the costs of the trial is reasonable.

58 Having regard to the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* (WA) and to the totality of the costs which were incurred by the appellant in the appeal, of which only $8,500 in costs is now sought, I accept that the total amount of costs sought in the appeal - of $8,500 - is reasonable.

Sentencing and orders

59 I will now proceed to formally impose the sentence and make the costs order.

60 I sentence you to a fine of $1,750 for the offence.

61 There will also be an order that you pay the appellant's costs of the appeal, fixed at $8,500 and of the trial, fixed at $5,578.80.

62 There will also be an order pursuant to s 119 of the Act for the forfeiture to the Crown, of the two electronic cigarettes which were tendered in evidence at the trial.