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Your Ref:

Our Ref: GLA:2021/731

3 July 2021

[REDACTED]
[REDACTED]
[REDACTED]

BY EMAIL: [REDACTED]

Dear Sir/Madam

Advice

We have been contacted by you to provide a Legal Letter of Opinion for the business

[REDACTED]

Your platform/business model

You have advised us that:

1. [REDACTED] is an e-liquid manufacturer and retailer specialising in the sale of e-liquid and other vaping related products.
2. [REDACTED] is a business name registered in [REDACTED]
[REDACTED] is the registered company running the [REDACTED] business name.
3. In terms of the business, [REDACTED] advises that:
 - a. They have been in operation since 2016;
 - b. Their customer base is all Australian currently;
 - c. No products that are sold by [REDACTED] contain nicotine.
4. [REDACTED] have a website [REDACTED] note that you are not asked for age verification upon entering the website. We are unsure of whether [REDACTED] ask for age verification (I.D) at their physical stores.

MANLY | EIGHT MILE PLAINS | MURARRIE | STONES CORNER | FORTITUDE VALLEY

GLR t/a GLR Law ABN 84 855 295 796

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Legal Advice/Opinion on Business Model in relation to associate laws and regulations

Your business is the sale of goods (online) relating to and associated with e-cigarettes and non-nicotine vaping juice. E-cigarettes, and the associated products for e-cigarettes were previously regulated by the Therapeutic Goods Administration ("TGA") as they are sold and promoted as "therapeutic goods" by wholesalers and resellers. This function has now been taken over by the ACCC (Australian Competition and Consumer Commission).

The TGA is Australia's regulatory authority for therapeutic goods within Australia. The TGA carries out a range of assessment and monitoring activities to ensure therapeutic goods available in Australia are of an acceptable standard with the aim of ensuring that the Australian community has access, within a reasonable time, to therapeutic advance. The ACCC has taken over the abovementioned functions from the TGA in relation to e-cigarettes and other vaping products, and take action in Court against non-compliant operators.

The ACCC, TGA, and various State and Federal Laws, have been made in relation to E-Cigarettes and the sale of their associate products. Currently:

1. It is legal to import nicotine containing e-cigarettes (or nicotine liquids for use in e-cigarettes) under the pursuant to the personal importation scheme. As are a reseller of e-cigarettes and associated products, it would not be legal for [REDACTED] [REDACTED] to import or sell e-cigarettes or e-liquids containing nicotine. [REDACTED] [REDACTED] advise that they do not sell nicotine containing products or import e-cigarettes from overseas so therefore are not in breach of any federal laws relating to importation.
2. In most cases, e-cigarettes that do not contain nicotine are legal however, this does vary between states:
 - a. In Western Australia it is an offence under the WA Tobacco Products Control Act 2006 to sell products that resemble tobacco products, regardless of whether they contain nicotine or not. In practice, the Tobacco Control Department of the WAHD (Western Australian Health Department) advise it is only illegal to sell a complete, working device with all components from the one outlet. It is not however illegal to sell the individual parts, or to sell all

parts, provided it is between two separate outlets. We are advised [REDACTED] [REDACTED] comply with this requirement.

- b. Other States and Territories have amended their tobacco control laws to treat advertising, sale and use of e-cigarettes in a similar manner as most conventional tobacco products;
3. If you want specific advice on other states and whether you comply with those laws please advise.
4. Subject to which States in Australia [REDACTED] sells products in, and also whether they seek age verification, it is our view that [REDACTED] are in compliance with the current TGA and state health requirements in respect of the sale of e-cigarettes and related products. We note there is no legislation in Western Australia that make it illegal to sell to under 18s however, you do not sell products to under 18s and are strictly in compliance relating to other states which are governed by the Tobacco Control Act (in their various states).

If you wish to clarify any of the above advice please do not hesitate to contact us.

Yours faithfully
GLR Law

G. Robson

Gemma Adams
Principal Solicitor



Electronic cigarettes in Western Australia

What are electronic cigarettes?

Electronic cigarettes (e-cigarettes) are battery-powered devices which heat a cartridge containing liquid chemicals and flavouring into a mist which is inhaled through a mouthpiece, and then exhaled by the user as a visible vapour.

They have typically mimicked traditional tobacco cigarettes, cigars or pipes in appearance, but are increasingly available in other styles.

Cartridges may not contain nicotine.

Legal status

In Western Australia, provisions that relate to e-cigarettes are within the Tobacco Products Control Act 2006 and the Medicines and Poisons Act 2014.

Products that resemble tobacco products

In accordance with the Tobacco Products Control Act 2006, a person must not sell any food, toy or other product that is not a tobacco product but is designed to resemble a tobacco product or package.

Manufacturers of e-cigarettes are increasingly making products which diverge from the usual appearance of cigarettes.

In a Western Australian Supreme Court decision on 10 April 2014 e-cigarettes were found to resemble a tobacco product and the seller of these e-cigarettes was convicted of this offence.

The Seller subsequently made application to the Supreme Court to appeal the decision. The appeal was unanimously dismissed in a decision handed down by the Court of Appeal of the Supreme Court of Western Australia on 10 March 2016.

The Court decision highlights that products that resemble tobacco products, regardless of whether they contain nicotine or not, cannot be sold in WA and it is an offence under the Tobacco Products Control Act to sell these products.

E-Liquid/E-Juice/Vape Juice and nicotine

The Western Australian Supreme Court decision does not encompass the sale of E-Liquids/E-Juice/Vape Juice.

The manufacture and/or sale of E-Liquids/E-Juice/Vape Juice products currently does not require a tobacco licence provided they do not contain nicotine. Even if the liquid product does not contain nicotine, it may still be subject to compliance with Customs, drugs and/or poisons legislation with regard to its composition, packaging and labelling.

E-Liquids/E-Juice/Vape Juice products containing nicotine are classified as Schedule 7 poisons under the Medicines and Poisons Act 2014. Nicotine in Schedule 7 can only be supplied for agricultural, industrial, other workplace or bona fide research/education use.

The Australian Therapeutic Goods Administration (TGA) has deemed certain products that do contain nicotine as exempt from the above legislation. These include products that are prepared and labelled for human therapeutic use, such as nicotine replacement gum, lozenges, patches and inhalers. Also exempt from poisons scheduling is nicotine when in a tobacco product (cigarettes, cigars, tobacco leaf).

To date, e-cigarettes, E-Liquid, E-Juice and Vape Juice have not been assessed or approved by the TGA as a safe and effective aid to quitting smoking.

Electronic cigarettes in public areas

E-cigarettes have recently been the cause of disputes in some public places due to the confusion they may cause if used in areas where smoking is not allowed.

Owners/managers may choose to implement a policy applying to their premises which prohibits the use of e-cigarettes wherever smoking is prohibited.

Possible wording for such a policy:

- Electronic cigarettes (e-cigarettes) and other personal vaporisers for delivery of nicotine or other substances are not permitted to be used in any area where smoking is restricted.

From: Kenan Bender <Kenan.Bender@ckb.wa.gov.au>
Sent: Thursday, January 31, 2019 11:16:11 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: Sale of Vaping/E-cigarette Products

Hi [REDACTED]

As discussed yesterday, I've talked with Paul Iriks regarding the *Tobacco Products Control Act 2006* and what would be permitted for sale under this legislation. He advises the following:

1. Sale of E-cigarette components from the same business must be limited to either:

a. Mods

OR

b. Tanks.

The same business must not sell both components.

2. E-cigarette liquids are not regulated, however, as liquid nicotine is illegal in WA, only nicotine free E-cigarette liquids can be sold. Whatever the ingredients or warning label on the product may indicate, the seller must ensure that the product does not contain nicotine. If a product is tested by an enforcement agency and found to contain nicotine, enforcement and prosecution may result.

If you require further information regarding this matter, please feel free to contact me using the details provided below.

Kind Regards,
Kenan Bender
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