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Standing Committee on Health, Aged Care and Sport
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To the Committee Secretariat

Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia.

As Australia's competition and consumer protection agency, the ACCC has a role in ensuring products are marketed in a way that is truthful and to encourage the supply of safe consumer products in Australia. The ACCC does not have a specific role in regulating the use, marketing or safety of electronic cigarette and personal vaporiser products in Australia. However, it is responsible for administering and enforcing the obligations imposed on suppliers by the *Competition and Consumer Act 2010* (Cth) (CCA), which includes the Australian Consumer Law (ACL).

In this context, the ACCC has recently undertaken work on issues identified in the Australian electronic cigarette industry. This submission relates to the ACCC's recent activities involving the electronic cigarette industry, and covers the following topics:

- the ACCC's recent enforcement action
- consideration of the regulation and use of e-cigarettes in Australia
- product safety considerations.

Enforcement action

The ACCC took enforcement action against three online electronic cigarette retailers, Elusion Australia Limited (Elusion), The Joystick Company Pty Ltd (Joystick) and Social-Lites Pty Ltd (Social-Lites) for making false and misleading representations that their products did not contain toxins and carcinogens contained in cigarettes when this was not the case.¹

The retailers made representations on their products and websites to the effect that, in general terms, the products did not contain any of the chemicals found in regular cigarettes.

Independent testing commissioned by the ACCC identified the presence of formaldehyde, acetaldehyde and acrolein in the products sold by each of Elusion, Joystick, and Social-Lites, with acetone also identified in Social-Lites' products. The products tested were non-nicotine electronic cigarette products.

The ACCC was concerned that consumers were misled, or were likely to have been misled, into believing that the use of those products would not expose them to harmful chemicals, cancer-causing chemicals or carcinogens, like those contained in conventional tobacco cigarette smoke. The exposure to those carcinogens and toxic chemicals may have caused harm to the health of those consumers who, if they had been informed of the presence of these chemicals in the e-cigarettes, may have chosen not to purchase and use them.

Formaldehyde is classified by the World Health Organisation International Agency for Cancer Research (IARC) as a Group 1A carcinogen, meaning there is sufficient evidence to show it is carcinogenic to humans. Acetaldehyde is classified as a Group 2B carcinogen by the IARC. That classification is applied to a chemical agent that has been evaluated as being possibly carcinogenic to humans. Acrolein is classified by the World Health Organisation as a toxic chemical. It is also listed as a dangerous poison in Schedule 7 of the Poisons Standard of the Therapeutic Goods Act 1989 (Cth). Acetone, a chemical used in nail polish remover, is recognised by the Commonwealth Government's Quit agency as a toxic chemical found in tobacco smoke.

Following admissions made by each of the companies and individuals, the Federal Court of Australia ordered:

- Elusion pay a pecuniary penalty of \$40,000 and its director a penalty of \$15,000
- Joystick pay a pecuniary penalty of \$50,000 and its director a penalty of \$10,000, and
- Social-Lites pay a pecuniary penalty of \$50,000, and its CEO pay a penalty of \$10,000.

While the ACCC's action focussed on the false and misleading representations made by each of the electronic cigarette suppliers, the Federal Court of Australia noted that the ACCC's enforcement action related to serious matters of public health and recognised that the representations made by Elusion, Joystick and Social-Lites had the potential to mislead consumers about the health effects of non-nicotine electronic cigarettes.²

¹ Examples of the representations made can be found at **Attachment A**.

² The Federal Court of Australia's judgments can be found at <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca0398>, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca0397>, and <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca0399>.

At the time the ACCC took action against Elusion, Joystick and Social-Lites, the Australian electronic cigarette industry appeared to be an emerging industry. The ACCC's enforcement action against Elusion, Joystick and Social-Lites followed an assessment of the Australian online electronic cigarette industry. The assessment identified that the electronic cigarette industry is largely made up of small traders, and identified low levels of compliance with the Australian Consumer Law (ACL). The ACCC prioritised Elusion, Joystick and Social-Lites for enforcement action, because we considered they made the most serious representations.

In response to the broader concerns about the low level of ACL compliance in the electronic cigarette industry, the ACCC has written to over 30 Australian electronic cigarette suppliers reminding them of their obligations under the ACL. The outcomes of the court proceedings against Elusion, Joystick and Social-Lites, and related individuals who were knowingly involved in their contraventions, will re-enforce the ACCC message to industry participants about ACL compliance.

Product safety

Product safety regulation in Australia is a shared responsibility between the Australian Competition and Consumer Commission and the states and territories. The ACCC's role is to identify and address the risk of serious injury and death from safety hazards in consumer products.

It is important to note that the ACCC's consumer product safety role does not extend to the development of health policy for electronic cigarettes or personal vaporisers (e-cigarettes) nor does it currently extend to specific regulatory responsibility for the safety of these products.

Where nicotine is present, the regulation of e-cigarettes is shared between Commonwealth, state and territory governments. The Department of Health plays a leadership role in tobacco control measures. The Therapeutic Goods Administration (TGA) regulates all such goods that make a therapeutic claim, including e-cigarettes that claim to help people cease smoking tobacco. Therapeutic goods are listed on the Australian Register of Therapeutic Goods which involves the TGA assessing the safety, quality and efficacy of the good. Currently there are no e-cigarette devices registered by the TGA. The TGA also administers the Poisons Standard³ which lists nicotine as a Schedule 7 dangerous substance and restricts its availability, possession, storage and use. This includes restrictions on nicotine e-liquids used in a number of e-cigarettes. Some states and territories also regulate the sale and possession of e-cigarettes.⁴ A number of these laws draw upon the Poisons Standard and include controls on advertising, sales to minors and where individuals can use e-cigarettes.

Consistent with the Government's Statement of Expectations,⁵ the ACCC seeks to avoid regulatory duplication. Where a matter relates to a specialist regime, such as the TGA, the ACCC will refer it to that agency for consideration. The ACCC does not hold the same level of technical expertise as the TGA in relation to the safety, quality or efficacy of e-cigarettes, or the availability, possession, storage or use of nicotine e-liquids.

³ 'Poisons Standard' is the Standard for the Uniform Scheduling of Medicines and Poisons, a legislative instrument under the *Therapeutic Goods Act 1989*. It is intended to be referenced under state and territory laws to control access to classified chemicals.

⁴ South Australia and Western Australia prohibit retail sale of products that resemble tobacco products. Queensland, NSW and the ACT ban the retail sale of e-cigarettes to persons under 18 years of age and, from 1 August 2017, Victoria will do the same.

⁵ Australian Government Statement of Expectations – Australian Competition and Consumer Commission, http://www.treasury.gov.au/~media/Treasury/Policy%20Topics/Public%20Policy%20and%20Government/Statements%20of%20Expectations/Downloads/PDF/ACCC_Statement_of_expectations.ashx.

The market for e-cigarettes is growing rapidly, with a wide range of products readily available for purchase online. In addition, nicotine e-liquids can be purchased from overseas suppliers and imported by consumers for personal use. Given the complexity and narrowly defined scope of the current regulatory framework, the regulation of these products largely falls to the states and territories. This is the case for both chemical content and electrical safety issues. Cumulatively, the framework is not consistent nationally and nor is it uniformly enforced. As a result, a number of emerging safety hazards associated with e-cigarettes and nicotine e-liquid may need to be addressed.

The ACCC is concerned about two emerging safety hazards from e-cigarettes:

- injuries resulting from e-cigarette fires and explosions
- injuries to children from ingesting nicotine e-liquid.

E-cigarettes contain interchangeable parts, often including extra-low voltage lithium batteries. Failure of these parts has been linked to ignition of e-cigarettes, with a number of incidences of burns injuries reported overseas. Many have been linked to overcharging and overheating of batteries, causing the device to ignite or explode in close proximity to the user. The ACCC is yet to receive any reports of injuries from e-cigarettes igniting or exploding in Australia. However, the ACCC has received reports of fires and injuries from other extra-low voltage lithium batteries and has taken action. The ACCC is separately advocating greater scrutiny of these batteries by state and territory electric safety regulators, and this in time will improve battery quality and consumer safety.

E-cigarettes require a replaceable cartridge containing e-liquid. If this liquid contains high levels of nicotine and is ingested by a child, it could lead to serious illness or death. At least one death overseas has been linked to a child ingesting nicotine e-liquid. No injuries have been reported to the ACCC, but NSW Health has published anecdotal reports of harm to children. Children are vulnerable consumers and may be attracted to e-liquids marketed as containing novelty flavours, such as chocolate or bubble-gum.

The ACCC recognises there are challenges in ensuring the regulation of e-cigarettes and nicotine e-liquids is consistent nationally and uniformly enforced. However, it is the ACCC's view that significant progress towards this would be achieved by:

- the TGA ensuring that products claiming to be smoking cessation devices are not supplied until they are assessed as therapeutic goods with known safety, quality and efficacy specifications
- consistent enforcement of state and territory poisons laws to reduce the illicit trade of nicotine e-liquids
- further consideration of any national level import controls to assist in the reduction of the illicit trade of nicotine e-liquids.

The ACCC expects that a reduction in the availability of illicit nicotine e-liquids will mitigate the risk of ingestion by children.

The ACCC also notes that the Productivity Commission recently examined the interaction between ACL and specialist safety regulators, and found that while the interaction generally works well, some changes are warranted, including the expansion of the regulatory tools and remedies available to specialist safety regulators to enable them to effectively enforce the law.⁶

⁶ Productivity Commission (April 2017) Study of Australian Consumer Law Enforcement and Administration, Final Report, Finding 5.1.

If you would like to discuss the ACCC's submission further, please contact

Yours sincerely

Rod Sims
Chairman

Attachments

Attachment A – Photographs of electronic cigarette products

Attachment A



