
We didn't start this fireless vapour: E-cigarette legislation in Australia

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Electronic cigarettes (or e-cigarettes) are devices that heat a cartridge containing a solution that becomes a vapour for the user to inhale. The vapour may or may not contain nicotine. E-cigarettes do not contain tar and other toxins, which traditional cigarettes do, so they may be less damaging to people's health than smoking traditional cigarettes. However, no studies exist about the long-term effects of using e-cigarettes yet. It is illegal to sell e-cigarettes with nicotine in Australia, though Australians may import a three-month supply from overseas. It is legal to sell e-cigarettes with nicotine in some other jurisdictions, such as the United Kingdom and the European Union. This article argues that the Australian government should consider legalising the sale of e-cigarettes with nicotine in Australia for health, safety and economic reasons and to protect youth. If the sale of e-cigarettes with nicotine becomes legal, the Australian government must strictly regulate it.

INTRODUCTION

Consider this: an instructing solicitor has briefed a certain barrister many times over a number of years. Each time they meet, the barrister must leave the instructing solicitor's office at least twice for a cigarette break. Last week, the barrister did not leave the instructing solicitor's office when the two met. Instead, the barrister appeared to start smoking in the instructing solicitor's office. The instructing solicitor was surprised. She said "Ben, shouldn't you go outside to smoke your cigarette?" "No", responded the barrister, "this is an electronic cigarette. There's no smoke, so I can use it indoors." The instructing solicitor was even more surprised, because the electronic cigarette looked very similar to a cigarette that one would smoke. The instructing solicitor also thought that it was illegal to smoke cigarettes indoors. Was it illegal to use a smoke-free product that looks like a cigarette indoors too?

Welcome to the world of electronic cigarettes (or e-cigarettes), their potential to improve traditional smokers'¹ health and the issues surrounding the Australian legislation of the product. People who use e-cigarettes are commonly referred to as "vapers" and using e-cigarettes is commonly referred to as "vaping".² This article will use those terms accordingly.

Traditional smoking is an addiction with well-known negative impacts upon smokers' health.³ It kills a significant number of Australians.⁴ Over the past 30 years, a substantial market has materialised for products that may help people quit traditional smoking, for example, gums that contain nicotine and nicotine patches.⁵ Many traditional smokers do not attempt to cease inhaling nicotine completely.

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¹ In this article, smoking cigarettes or cigars is referred to as "traditional smoking" to differentiate between that type of smoking and using e-cigarettes.

² Pepper JK et al, "'Adolescent Males' Awareness of and Willingness to Try Electronic Cigarettes" (2013) 52(2) J Adolescent Health 144 at 144.

³ Paradise J, "No Sisyphean Task: How the FDA Can Regulate Electronic Cigarettes" (2013) 13(2) Yale J Health Pol'y L & Ethics 326 at 330.

⁴ Australian Government, Department of Health, *Easy Guide to the Tobacco Advertising Prohibition Act 1992* (last updated 11 January 2013), <http://www.health.gov.au/internet/main/publishing.nsf/Content/egtap>.

⁵ Paradise, n 3 at 330.



Instead, they look for ways to inhale nicotine without the negative health impacts, expense and social isolation that may result from traditional smoking.⁶ Vaping may be exactly what they are searching for.

E-cigarettes are devices that heat a cartridge containing a nicotine or a flavoured solution. When a vaper puffs on the e-cigarette, the solution is heated and vapourised and the vaper inhales it.⁷ E-cigarettes were originally designed to “closely approximate the sensory experience of smoking conventional cigarettes”.⁸ Some studies have shown that vaping is not as dangerous to one’s health as traditional smoking.⁹ An e-cigarette “starter kit” costs between US\$20 to US\$150 and replacement nicotine cartridges cost approximately US\$12 for a container of five.¹⁰ Vaping is usually cheaper than purchasing traditional cigarettes for the same number of uses.¹¹

Vaping is becoming increasingly popular in Australia and internationally, with thousands of Australians switching from traditional smoking to vaping.¹² Many Australians buy e-cigarettes from overseas online.¹³ This is because it is illegal to sell e-cigarettes with nicotine in Australia (as discussed later), so it is difficult, but not impossible, for vapers to buy nicotine e-cigarette cartridges in Australia.¹⁴ The number of vapers in the United Kingdom increased “sixfold” from 2011 to 2013.¹⁵ There are approximately 700,000 Vapers in the United Kingdom.¹⁶ E-cigarette sales in the United States have tripled annually since 2007.¹⁷ Thirty-seven per cent of people who smoke in Europe have vaped at least once.¹⁸ Millions of people have purchased e-cigarettes worldwide.¹⁹ In 2013, approximately US\$2 billion worth of e-cigarettes were sold internationally.²⁰ It has been predicted that by about 2023, more e-cigarettes will be purchased than typical cigarettes.²¹ The governments of several countries and the people who work in the tobacco control industries are divided on whether e-cigarettes are “dangerous or a promising harm reduction strategy for adult smokers”.²²

⁶ Hardin DF, “Blowing Electronic Smoke: Electronic Cigarettes, Regulation, and Protecting the Public Health” (2011) (2) U Ill JL Tech & Pol’y 433 at 435.

⁷ Sutfin EL et al, “Electronic Cigarette Use by College Students” (2013) 131(3) Drug Alcohol Depend 214 at 214; Riker CA, “E-cigarettes: Promise or Peril?” (2012) 47(1) Nurs Clin North Am 159 at 160.

⁸ Sutfin et al, n 7 at 214.

⁹ Odum LE, O’Dell KA and Schepers JS, “Electronic Cigarettes: Do They Have a Role in Smoking Cessation?” (2012) 25(6) J Pharm Pract 611 at 611.

¹⁰ Paradise, n 3 at 355.

¹¹ Etter JF, “Electronic Cigarettes – the Holy Grail of Nicotine Replacement” (2012) 107(9) *Addiction* 1550 at 1551.

¹² Stark J, “Banned E-cigarettes May be a Health Hazard, but Buying Them’s a Wheeze”, *The Age* (12 December 2010), <http://www.theage.com.au/national/banned-ecigarettes-may-be-a-health-hazard-but-buying-thems-a-wheeze-20101211-18ti7.html>.

¹³ May J, “No Smoke Without Fire”, *The Sydney Morning Herald* (25 October 2013), <http://www.smh.com.au/national/no-smoke-without-fire-20131024-2w47s.html>.

¹⁴ May, n 13. For an example of a physical Australian store which sells e-cigarettes without nicotine, see, for example, Thompson A, “Electronic Cigarettes Store’s Star Attraction”, *Illawarra Mercury* (6 January 2012), <http://www.illawarramercury.com.au/story/638819/electronic-cigarettes-are-stores-star-attraction>.

¹⁵ Britton J and McNeill A, “Nicotine Regulation and Tobacco Harm Reduction in the UK” (2013) 381(9881) *Lancet* 1879 at 1879.

¹⁶ Medicines and Healthcare Products Regulatory Agency, *The Regulation of Nicotine Containing Products: Questions and Answers*, <http://www.mhra.gov.uk/home/groups/comms-ic/documents/websitesresources/con286835.pdf>.

¹⁷ Etter JF and Bullen C, “A Longitudinal Study of Electronic Cigarette Users” (2014) 39(2) *Addict Behav* 491 at 491.

¹⁸ AFP, “E-cigarettes the New Market for Big Tobacco”, *The Australian* (2 October 2013), <http://www.theaustralian.com.au/media/marketing/E-cigarettes-the-new-market-for-big-tobacco/story-fna12mff-1226731436710>.

¹⁹ Bullen C et al, “Electronic Cigarettes for Smoking Cessation: a Randomised Controlled Trial” (2013) 382(9905) *Lancet* 1629 at 1629.

²⁰ May, n 13.

²¹ Etter and Bullen, n 17 at 491.

²² Pepper et al, n 2 at 145.



This article argues that the Australian government should consider legalising the sale of e-cigarettes with nicotine and enact legislation regarding e-cigarette advertising as soon as possible. In support of this argument, the article first provides a brief history and explanation of e-cigarettes. It then discusses the regulation of traditional cigarettes through legislation enacted by Australian federal, State and Territory governments, followed by a discussion of current legislation as it applies to e-cigarettes. The article also discusses the regulation of traditional cigarette advertising in Australia and examines e-cigarette advertising. The article then examines the regulation of e-cigarettes and e-cigarette advertising in other countries, focusing briefly on the Swedish government's regulation of snus (a smokeless way to consume nicotine in Sweden).²³ In light of legislation in other countries, the article provides arguments about whether the sale of e-cigarettes with nicotine should be legalised in Australia, and if it were legalised, provides a list of potential content that could be included in such legislation.

A BRIEF HISTORY AND EXPLANATION OF E-CIGARETTES

Hon Lik, a Chinese pharmacist, created modern-day e-cigarettes²⁴ in 2003.²⁵ He obtained a patent for the e-cigarette in the European Union and then one in the United States.²⁶ E-cigarettes were first sold in the European Union in 2006 and the United States in 2007.²⁷ The first international patent for e-cigarettes was granted in 2007²⁸ in China.²⁹

Most modern-day e-cigarettes are comprised of a tube that contains a battery, an airflow sensor, a vaporiser and a cartridge.³⁰ The e-cigarette heats the cartridge (containing a nicotine or a flavoured solution),³¹ which becomes a vapour for the vaper to inhale.³² E-cigarettes can heat fluids in many different flavours that do not contain nicotine,³³ including chocolate, strawberry, mint³⁴ and different types of alcohol.³⁵ Some vapers may be attracted to e-cigarettes because of the wide variety of flavours available that may taste better than traditional cigarettes' tobacco flavour. Vapers can refill the e-cigarettes' cartridges with a solution sold in a bottle.³⁶ Vapers can also buy accessories to add to their e-cigarettes.³⁷ E-cigarettes (with or without nicotine) do not emit smoke³⁸ or burn tobacco,³⁹ nor

²³ Polosa R et al, "A Fresh Look at Tobacco Harm Reduction: the Case for the Electronic Cigarette" (2013) 10(1) *Harm Reduct J* 1 at 3.

²⁴ Odum et al, n 9 at 611.

²⁵ Bell K and Keane H, "Nicotine Control: E-cigarettes, Smoking and Addiction" (2012) 23(3) *Int J Drug Policy* 242 at 242.

²⁶ Paradise, n 3 at 352.

²⁷ Riker, n 7 at 160.

²⁸ Bell and Keane, n 25 at 242.

²⁹ Kumar G, Sharma I and Kabir Z, "Noncigarette Smoking Patterns, Their Health Effects and Policy Options" (2012) 7(2) *Global Heart* 175 at 175.

³⁰ Sutfin et al, n 7 at 214.

³¹ Freeman B, "E-cigarettes Aren't a Solution – They're Part of the Problem", *The Conversation* (12 April 2011), <http://theconversation.com/E-cigarettes-arent-a-solution-theyre-part-of-the-problem-423>.

³² AAP, "US Unis Take up Fight Against E-Smoking", *The Australian* (27 November 2013), <http://www.theaustralian.com.au/higher-education/us-unis-take-up-fight-against-esmoking/story-e6frgcjx-1226769765408>.

³³ Branswell H, "E-cigarettes Take Social Scene by Storm; Pose Headaches for Regulators", *CTV News* (23 December 2013), <http://www.ctvnews.ca/health/e-cigarettes-take-social-scene-by-storm-pose-headaches-for-regulators-1.1605665>.

³⁴ Sutfin et al, n 7 at 25.

³⁵ Grana RA, "Electronic Cigarettes: A New Nicotine Gateway?" (2013) 52(2) *J Adolescent Health* 135 at 135.

³⁶ Riker, n 7 at 160.

³⁷ Daily Mail Reporter, "Meet the 'Vapers': E-Cigarette Craze Inspires Bizarre New Sub-Culture", *Daily Mail Australia* (15 May 2013), <http://www.dailymail.co.uk/news/article-2324697/Meet-vapers-E-cigarette-craze-inspires-bizarre-new-sub-culture.html>.

³⁸ Quit South Australia, *E-cigarette Fact Sheet*, http://www.quitsa.org.au/cms_resources/E%20cigarette%20fact-sheet_updated%20October_FINAL.pdf.



do they contain the tar or other toxic chemicals contained in traditional cigarettes.⁴⁰ Some e-cigarettes look like pens and USBs, though others look similar to traditional cigarettes.⁴¹ There are over 300 different brands of e-cigarettes available.⁴² Some large companies sell e-cigarettes, such as “Blue eCigs”, but many smaller, independent businesses do also.⁴³ Some traditional cigarette companies own or are in the process of buying e-cigarette companies.⁴⁴ Most vapers buy e-cigarettes online,⁴⁵ but some buy e-cigarettes in person from retailers.⁴⁶

The University of Queensland's Centre for Clinical Research has received funding from the National Health and Medical Research Council for a research project involving e-cigarettes.⁴⁷ The researchers are seeking to learn if vaping with nicotine is an effective method for traditional smokers to use to quit smoking. It will compare vaping to other products designed for that purpose, such as nicotine gum.⁴⁸ Additionally, the Australian government is the first in the world to sponsor a vaping trial to obtain evidence about whether e-cigarettes can be a “safer, permanent replacement for tobacco”.⁴⁹

Increases in the taxation of traditional cigarettes have encouraged some Australians to start vaping.⁵⁰ Paul Medarov, the chief executive of the New Zealand based company Elusion, which sells e-cigarettes in Australia, states that his company's sales increased 200% after the Australian government announced that it would raise taxes on traditional cigarettes by 25%.⁵¹ The potential taxation of e-cigarettes is discussed later.

There are vaping subcultures in Australia.⁵² Members of these subcultures post information about their experiences and thoughts about e-cigarettes on forums online⁵³ and on social media.⁵⁴ Some members of vaping subcultures are “obsessed with the customizable wizz-bang technology of electronic cigarettes”.⁵⁵ Some attend vaping conventions.⁵⁶

³⁹ Riker, n 7 at 159.

⁴⁰ Odum et al, n 9 at 611.

⁴¹ Riker, n 7 at 159.

⁴² Riker, n 7 at 161.

⁴³ Paradise, n 3 at 355.

⁴⁴ Britton and McNeill, n 15 at 1879.

⁴⁵ Etter and Bullen, n 17 at 492.

⁴⁶ Hardin, n 6 at 438. To read research about e-cigarette retailers in the United Kingdom, see Hsu R et al, “An Observational Study of Retail Availability and In-store Marketing of E-cigarettes in London: Potential to Undermine Recent Tobacco Control Gains?” (2013) 3(12) *BMJ* 1 at 3. In the United States, some grocery store staff position e-cigarettes close to checkouts, see, for example, Walker G, “Electronic Cigarettes Provide Alternative” (2013) 30(1) *MMR* 75.

⁴⁷ O'Leary K, “UQ E-cigarettes Research Misrepresented in the Media”, *UQ News* (16 September 2013), <http://www.uq.edu.au/news/article/2013/09/uq-e-cigarettes-research-misrepresented-media>.

⁴⁸ O'Leary, n 47.

⁴⁹ Saitta D, Ferro GA and Polosa R, “Achieving Appropriate Regulations for Electronic Cigarettes” (2014) 5(2) *Therapeutic Advances in Chronic Disease* 50 at 55.

⁵⁰ Stark, n 12.

⁵¹ Stark, n 12.

⁵² Park A, “The Feed: The Subculture Around E-Cigarettes”, *SBS* (26 August 2013), <http://www.sbs.com.au/news/article/2013/06/18/feed-subculture-around-E-cigarettes>.

⁵³ Park, n 52. For an example of an Australian online vaping forum, see, for example, AussieVapers, <http://forums.aussievapers.com/forum.php>.

⁵⁴ Paradise, n 3 at 331.

⁵⁵ Daily Mail Reporter, n 37.

⁵⁶ See, for example, “Texas' Largest Vaping Convention Held in Lewisville”, *CBS* (16 March 2014), <http://dfw.cbslocal.com/2014/03/16/texas-largest-vaping-convention-held-in-lewisville>.



Some of the other reasons why e-cigarettes are popular are: (1) vapers are exposed to e-cigarette marketing;⁵⁷ (2) vapers may vape in some areas where traditional smoking is forbidden; and (3) vapers believe that e-cigarettes will not damage their health as much as smoking traditional cigarettes.⁵⁸

HOW AUSTRALIAN GOVERNMENTS HAVE REGULATED TRADITIONAL CIGARETTES

The Australian federal government has legislated in several areas related to traditional cigarette smoking. It legislated to forbid smoking on aeroplanes.⁵⁹ It also legislated against smoking on interstate buses, requiring them to display signs that smoking is forbidden on board.⁶⁰ It passed legislation to allow airports to have non-smoking areas⁶¹ and banning people from smoking traditionally in areas marked with a no smoking sign.⁶² The federal legislation does not define the word “smoke”. Vaping does not produce smoke,⁶³ so vapers may assume that they can vape on airplanes, in airports and on buses.

The States and Territories have legislation that bans smoking in enclosed public places.⁶⁴ They also forbid selling traditional cigarettes to minors⁶⁵ and traditional smoking in motor vehicles when young people are passengers.⁶⁶ If the Australian government legalises the sale of e-cigarettes with nicotine, it could similarly legislate that vaping in motor vehicles when young people are passengers is illegal. The Australian government’s legislation in relation to traditional cigarettes is very different from its legislation in relation to e-cigarettes.

THE AUSTRALIAN FEDERAL GOVERNMENT’S LEGISLATION CONCERNING E-CIGARETTES

Selling e-cigarettes with nicotine is currently illegal in Australia. The *Poisons Standard 2013* (Cth) lists nicotine as a Sch 7 poison, with exceptions that include when it is “in preparations for human therapeutic use” or part of traditional cigarettes, cigars, etc. A person may not possess, sell or supply a Sch 7 poison for domestic or domestic garden purposes.⁶⁷ As a result, e-cigarettes cannot be used, sold or supplied unless they are part of traditional cigarettes (which they are not) or they are part of “preparations for human therapeutic use”.

⁵⁷ Benowitz NL and Goniewicz ML, “The Regulatory Challenge of Electronic Cigarettes” (2013) 310(7) JAMA 685 at 686.

⁵⁸ Saitta et al, n 49 at 51.

⁵⁹ *Air Navigation Regulations 1947* (Cth), reg 25.

⁶⁰ *Interstate Road Transport Regulations 1986* (Cth), reg 51B.

⁶¹ *Airports (Control of On-Airport Activities) Regulations 1997* (Cth), reg 141.

⁶² *Airports (Control of On-Airport Activities) Regulations 1997* (Cth), reg 142.

⁶³ *Quit South Australia*, n 38.

⁶⁴ See, for example, *Smoke-free Environment Act 2000* (NSW), s 6; *Tobacco and Other Smoking Products Act 1998* (Qld), s 26R(1); *Tobacco Products Regulation Act 1997* (SA), s 46(1); *Tobacco Control Act 2002* (NT), s 7(1)(a); *Smoke-Free Public Places Act 2003* (ACT), s 6; *Public Health Act 1997* (Tas), s 67C(1); *Tobacco Act 1987* (Vic), ss 5A-5RA; *Tobacco Products Control Regulations 2006* (WA), reg 10(1).

⁶⁵ See, for example, *Public Health (Tobacco) Act 2008* (NSW), s 22(1); *Tobacco Control Act 2002* (NT), s 42(1); *Tobacco and Other Smoking Products Act 1998* (Qld), s 19(1); *Tobacco Products Regulation Act 1997* (SA), s 38(1); *Public Health Act 1997* (Tas), s 64(1); *Tobacco Act 1987* (Vic), s 12(1); *Tobacco Products Control Act 2006* (WA), s 6; *Tobacco Act 1927* (ACT), s 14(1).

⁶⁶ See, for example, *Smoking in Cars with Children (Prohibition) Act 2011* (ACT), s 7; *Public Health (Tobacco) Act 2008* (NSW), s 30(1); *Tobacco and Other Smoking Products Act 1998* (Qld), s 26VC(b); *Tobacco Products Regulation Act 1997* (SA), s 48(1); *Public Health Act 1997* (Tas), s 67H(2); *Tobacco Act 1987* (Vic), s 5S; *Tobacco Products Control Act 2006* (WA), s 107D(2). The author of this article notes that the State and Territory Acts use different ages in their definitions of the word “child”, but most specify an age that is between 16 and 18.

⁶⁷ *Poison Standard 2013* (Cth), Pt 3, ss 41(1), 42(2).



The *Therapeutic Goods Act 1989* (Cth) regulates therapeutic goods in Australia.⁶⁸ The Act defines a “therapeutic good” as having a “therapeutic use”.⁶⁹ One of the definitions for “therapeutic use” is that the product is used “in or in connection with: (a) preventing, diagnosing, curing or alleviating a disease, ailment, defect or injury in persons”.⁷⁰ If a product claims that it can help someone cease smoking, then it could be a “therapeutic good”.⁷¹ For a product to be used legally as a therapeutic good in Australia, it must be listed on the Australian Therapeutic Goods Register.⁷² Some smoking cessation aids are registered with the Therapeutic Goods Register,⁷³ but e-cigarettes are not.⁷⁴ The Therapeutic Goods Administration has not as yet evaluated the safety and ability of e-cigarettes to be used to help traditional smokers quit smoking.⁷⁵ As a result, e-cigarettes with nicotine cannot be sold legally in Australia as a “therapeutic good”. This means the sale of e-cigarettes with nicotine is illegal according to Australian federal law. While it is good that a high threshold must be met in order for a good to be considered “therapeutic”, it is disappointing that the Therapeutic Goods Administration has not yet evaluated the safety and ability of vaping with nicotine to assist traditional smokers to quit smoking given that e-cigarettes have been available for at least eight years and similar organisations in other countries have managed to do so (as discussed later).

Since many Australians buy e-cigarettes (and particularly nicotine e-cigarette cartridges and solutions) online from other countries,⁷⁶ it is important to consider whether it is legal to import e-cigarettes with nicotine into Australia. According to the Australian Customs and Border Protection Service’s website, there is no “import prohibition” against e-cigarettes.⁷⁷ It further states that e-cigarettes with nicotine and their respective parts are not “prohibited imports under Customs law”.⁷⁸ However, if imported e-cigarettes with nicotine state that they are therapeutic, then they may be referred to the Therapeutic Goods Administration for a decision on whether to confiscate the items.⁷⁹ This means that Australians can legally import e-cigarettes with nicotine from overseas, provided that the products do not make any health claims.

The Therapeutic Goods Administration also permits Australians to import a three-month supply of therapeutic goods that are not listed on the Therapeutic Goods Register provided certain criteria are satisfied, such as the goods are imported for self use or for members of the family and are not otherwise sold.⁸⁰ This means that Australians may import e-cigarettes containing nicotine from

⁶⁸ *Therapeutic Goods Act 1989* (Cth), s 4.

⁶⁹ *Therapeutic Goods Act 1989* (Cth), s 3.

⁷⁰ *Therapeutic Goods Act 1989* (Cth), s 3.

⁷¹ Therapeutic Goods Administration, *Electronic Cigarettes* (12 March 2013), <http://www.tga.gov.au/consumers/ecigarettes.htm>.

⁷² *Therapeutic Goods Act 1989* (Cth), s 9A.

⁷³ See, for example, Therapeutic Goods Administration, *ARTG ID 205211: Nicorette Cooldrops*, http://search-au.funnelback.com/s/search.html?collection=tga-artg&profile=record&meta_i=205211; Therapeutic Goods Administration, *ARTG ID 152894: Nicotinell*, http://search-au.funnelback.com/s/search.html?collection=tga-artg&profile=record&meta_i=152894.

⁷⁴ The author of this article searched the register on 12 February 2014. The register is located at: <http://search-au.funnelback.com/s/search.html?collection=tga-artg>.

⁷⁵ Therapeutic Goods Administration, n 71.

⁷⁶ Duff E, “Deadly Nicotine Blows its Way into E-cigarettes”, *The Sydney Morning Herald* (22 September 2013), <http://www.smh.com.au/national/health/deadly-nicotine-blows-its-way-into-ecigarettes-20130921-2u6n2.html>.

⁷⁷ Australian Customs and Border Protection Service, *Tobacco – Frequently Asked Questions*, <http://customs.gov.au/faq/AlcoholCigTobacco2.asp>.

⁷⁸ Australian Customs and Border Protection Service, n 77. Since this article was submitted for publication, the following statement was added to the relevant webpage of the Australian Customs and Border Protection Service: “The onus is on the purchaser of goods from offshore websites to ensure that any goods they purchase are legal to import and possess under Commonwealth and State and Territory laws.”

⁷⁹ Australian Customs and Border Protection Service, n 77.

⁸⁰ Therapeutic Goods Administration, *Personal Importation Scheme* (21 August 2013), <http://www.tga.gov.au/consumers/personal-importation-scheme.htm#UyvscaaKDkU>.

overseas, though they may only import a three-month supply. It does not make sense that Australians can import a three-month supply of a product that is otherwise illegal to sell in Australia. If the Australian federal government legalises the sale of e-cigarettes with nicotine, then the legislation would make the Australian Customs and Border Protection's stance on the product sensible. Research for this article could not find information from a reputable source about how many e-cigarettes with nicotine would constitute a "three-month supply" for the average vaper. It is possible that there may be disputes about what constitutes a three-month supply of e-cigarettes with nicotine.

In reality, many Australians are importing e-cigarettes with nicotine (or simply the nicotine cartridges and solutions) and either using them personally or selling them on the black market.⁸¹ If the Australian government legalises selling e-cigarettes with nicotine, then the black market demand for the product would probably decrease significantly. Since the Australian government has made it illegal to sell e-cigarettes with nicotine, this may send a message to Australians that e-cigarettes with nicotine are worse for their health than traditional cigarettes, which are widely available. This message would appear to be incorrect (as discussed later).

THE AUSTRALIAN STATE AND TERRITORY GOVERNMENTS' E-CIGARETTE LEGISLATION

Some Australian State and Territory governments have also passed laws that apply to selling e-cigarettes. In New South Wales,⁸² Victoria,⁸³ Tasmania⁸⁴ and the Australian Capital Territory⁸⁵ it is illegal to sell e-cigarettes with nicotine, but it is not illegal in these jurisdictions to sell e-cigarettes that do not contain nicotine.⁸⁶ While these laws permit vapers and traditional smokers to purchase e-cigarettes without nicotine, it is recommended that these jurisdictions modify their legislation to permit e-cigarettes with nicotine to be sold.

In Western Australia and South Australia it is illegal to sell e-cigarettes containing nicotine.⁸⁷ It is also illegal in those States to sell e-cigarettes that do not contain nicotine if they look like a "tobacco product"⁸⁸ or their packaging looks like a "tobacco product".⁸⁹ Theoretically, it may be possible in those States to sell e-cigarettes that do not contain nicotine if they do not look like traditional cigarettes. For example, the e-cigarettes without nicotine that look like pens and USBs could potentially be sold in those States, although it may be difficult for retailers to decide whether certain

⁸¹ Duff, n 76; May, n 13.

⁸² Nicotine is a Sch 7 poison in the *Poisons List 2013* (NSW), except when it is in tobacco and used for smoking, or used for "human therapeutic use", etc. Schedule 7 poisons are "substances of exceptional danger which require special precautions in their manufacture or use" according to the *Poisons and Therapeutic Goods Act 1966* (NSW), s 8.

⁸³ *Tobacco Act 1987* (Vic), s 15.

⁸⁴ *Poison Regulations 2008* (Tas), s 74. See also Population Health Services, *E-cigarette Facts*, http://www.dhhs.tas.gov.au/data/assets/pdf_file/0018/151182/PHS_E-Cigarettes_Final.pdf.

⁸⁵ *Tobacco Act 1927* (ACT), s 17.

⁸⁶ See, for example, Noone R, "Anthony Campo Could Be Fined for Using Quit Smoking E-Cigarette on Gosford Station", *Central Coast Gosford Express Advocate* (4 November 2013), <http://www.dailytelegraph.com.au/newslocal/central-coast/anthony-campo-could-be-fined-for-using-quit-smoking-e-cigarette-on-gosford-station/story-fngr8h0p-1226752538056>; Population Health Services, n 84; Victoria Department of Health, *Electronic Cigarettes Containing Nicotine are Prohibited in Victoria* (25 October 2013), <http://docs.health.vic.gov.au/docs/doc/Electronic-cigarettes-containing-nicotine-are-prohibited-in-Victoria>, which states that selling e-cigarettes containing nicotine is not permitted in Victoria, but it is silent on the issue of selling e-cigarettes that do not contain nicotine.

⁸⁷ *Tobacco Products Control Act 2006* (WA), s 30(1); *Controlled Substances (Poisons) Regulations 2011* (SA), reg 47. Since this article was approved for publication in June 2014, the Queensland government introduced the *Health Legislation Amendment Bill 2014* (Qld). The Bill categorises e-cigarettes like traditional cigarettes. If the Bill becomes law, existing legislation that applies to traditional cigarettes would apply to e-cigarettes. Some of the repercussions would be an inability to vape in public and to sell e-cigarettes to minors.

⁸⁸ *Tobacco Products Control Act 2006* (WA), s 106(a); *Tobacco Products Regulation Act 1997* (SA), s 36.

⁸⁹ *Tobacco Products Control Act 2006* (WA), s 106(b).



e-cigarettes look like a “tobacco product”. The laws, however, do not prevent Australians from buying e-cigarettes without nicotine that look like a “tobacco product” elsewhere and bringing them to these States.

In 2013, the Cancer Council took legal action against Heavenly Vapours, a Western Australian company that sells e-cigarettes without nicotine, in the Joondalup Magistrates Court in Western Australia, alleging that Heavenly Vapours breached the *Tobacco Products Control Act 2006* (WA).⁹⁰ The magistrate acquitted Heavenly Vapours of the offence because insufficient evidence was provided to prove that the company sold e-cigarettes that looked like a “tobacco product”.⁹¹

In New South Wales, Anthony Campo was charged with smoking in a public place and faced a A\$300 fine because he vaped at a train station.⁹² When Campo appeared before Magistrate Railton, his Honour was at first unsure whether an e-cigarette fell under the relevant legislation, but after the prosecutor argued that it did, his Honour agreed.⁹³ The relevant legislation states that “[a] person must not smoke in a smoke-free area”.⁹⁴ It also states that a train station is a “smoke-free area”.⁹⁵ It was the first time the magistrate had dealt with an e-cigarette matter, while the prosecutor had laughed at the mention of an e-cigarette in court.⁹⁶ Research for this article could not find whether the e-cigarette that Campo vaped contained nicotine or not. Since e-cigarettes do not emit smoke, Campo should not have been fined pursuant to the legislation. If the Australian federal government were to legalise the sale of e-cigarettes, then State and Territory governments may be likely to amend their smoking in public legislation to address e-cigarettes. It would be clear then whether a vaper in a situation similar to Campo’s should be fined.

THE AUSTRALIAN FEDERAL GOVERNMENT’S REGULATION OF TRADITIONAL CIGARETTE ADVERTISING

The Australian federal government has taken considerable action regarding traditional cigarette advertising over a lengthy period.⁹⁷ The Australian government legislated to forbid television and radio broadcasters from advertising traditional cigarettes in 1976.⁹⁸ The Australian government believed that by banning smoking advertisements, it would help to reduce the number of people who commenced traditional smoking.⁹⁹ In 1990, the Australian government passed legislation to make it illegal for the print media to advertise cigarettes.¹⁰⁰ In 1992, the Australian government passed the *Tobacco Advertising Prohibition Act 1992* (Cth), which made it more difficult to advertise cigarettes at

⁹⁰ O’Leary C, “Court Defeat Fuels Move to Ban E-cigs”, *The West Australian* (30 October 2013), <http://au.news.yahoo.com/thewest/lifestyle/a/1959753/court-defeat-fuels-move-to-ban-e-cigs>; *Tobacco Products Control Act 2006* (WA), s 106.

⁹¹ O’Leary, n 90. Since this article was approved for publication in June 2014, the judgments in the appeal of this case were handed down. See *Hawkins v Van Heerden* [2014] WASC 127; *Hawkins v Van Heerden (No 2)* [2014] WASC 226. The judgments confirm that s 106 of the *Tobacco Products Control Act 2006* (WA) prohibits the sale of e-cigarettes without nicotine.

⁹² Noone, n 86; *Smoke-Free Environment Act 2000* (NSW), s 7.

⁹³ Noone, n 86.

⁹⁴ *Smoke-Free Environment Act 2000* (NSW), s 7.

⁹⁵ *Smoke-Free Environment Act 2000* (NSW), Sch 1.

⁹⁶ Noone, n 86.

⁹⁷ The author of this article notes that this section was originally published in Krawitz M, “Beauty is Only Photoshop Deep: Legislating Models’ BMIs and Photoshopping Images” (2014) 21 JLM 859. She further notes that some small changes have been made to this section from the original version. For a history of the legislation concerning tobacco advertising in the United States, see Singer JR, “Taking on Tobacco: The Family Smoking Prevention and Tobacco Control Act” (2010) 34(2) *Nova L Rev* 539 at 541.

⁹⁸ National Archives of Australia, *Tobacco Advertising Ban in Australia – Fact Sheet 252*, <http://www.naa.gov.au/collection/fact-sheets/fs252.aspx>. To read the current legislation that forbids advertising cigarettes, see *Tobacco Advertising Prohibition Act 1992* (Cth), ss 13, 15.

⁹⁹ Australian Government, Department of Health, n 4.

¹⁰⁰ Kirby T, “Australia to be the First Country to Use Plain Cigarette Packaging” (2011) 12(5) *Lancet Oncol* 427 at 427.



sporting events.¹⁰¹ In the 1990s, the Australian government started a national advertising campaign to encourage Australians to stop traditional smoking.¹⁰² The campaign helped lower the number of Australians who smoke traditionally.¹⁰³

In 2011, the Australian government passed a law that required plain packaging for traditional cigarettes.¹⁰⁴ It was the first government in the world to pass such a law.¹⁰⁵ If the Australian government legalises the sale of e-cigarettes with nicotine, it should also legislate on e-cigarette packaging. For example, the packages could inform consumers about the amount of nicotine provided and the health repercussions of inhaling nicotine. In 2012, the Australian government modified the *Tobacco Advertising Prohibition Act 1992* (Cth) to make advertising traditional cigarettes on the internet illegal.¹⁰⁶ Since the Australian government has been a leader in legislating the marketing of traditional cigarettes, it could similarly be a leader in legislating the marketing of e-cigarettes with nicotine.

THE MARKETING OF E-CIGARETTES

Large-scale e-cigarette marketing campaigns have been instrumental in increasing the number of vapers.¹⁰⁷ E-cigarette advertising shows men and women in provocative poses,¹⁰⁸ with messages that e-cigarettes are “harmless”, “fun”¹⁰⁹ and good for the environment (because they emit far fewer chemicals than traditional cigarettes).¹¹⁰ E-cigarette companies also advertise their “products as not only socially acceptable but socially superior”.¹¹¹ At the moment, e-cigarette companies in Australia, the United Kingdom and the United States can advertise their products as widely as possible, using whichever methods they choose. Some of these methods include using the advertising strategies that traditional cigarette companies have used.¹¹² The staff of e-cigarette companies are advertising e-cigarettes in these countries notwithstanding that advertising traditional cigarettes on television has been illegal in the United Kingdom since 1965,¹¹³ in the United States since 1971¹¹⁴ and in Australia since 1976.¹¹⁵

It is unethical for e-cigarette companies to advertise vaping in the way that they currently do as they may be misleading the public. While some medical researchers believe that vaping with nicotine does not have as many negative repercussions upon vapers’ health as traditional smoking, vaping with

¹⁰¹ Kirby, n 100 at 427.

¹⁰² Wakefield M, “Anti-Smoking Advertising: Lessons Learned” (Presented at the DrugInfo Seminar and Forum, St James Court Conference Centre, West Melbourne, 7 September 2005), <http://www.druginfo.adf.org.au/druginfo-seminars/mass-media-campaigns-seminar-wakefield>.

¹⁰³ Wakefield, n 102.

¹⁰⁴ *Tobacco Plain Packaging Act 2011* (Cth), ss 18-20.

¹⁰⁵ Kirby, n 100 at 427.

¹⁰⁶ Australian Government, Department of Health, *Tobacco Advertising* (last updated 18 July 2014), <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-advert>; *Tobacco Advertising Prohibition Act 1992* (Cth), s 15A.

¹⁰⁷ Benowitz and Goniewicz, n 57 at 686.

¹⁰⁸ Freeman, n 31.

¹⁰⁹ Freeman, n 31.

¹¹⁰ Hardin, n 6 at 438.

¹¹¹ de Andrade M, Hastings G and Angus K, “Promotion of Electronic Cigarettes: Tobacco Marketing Reinvented?” (2013) 347 *BMJ* 1 at 2.

¹¹² Hodge JG et al, “Reconsidering the Legality of Cigarette Smoking Advertisements on Television Public Health and the Law” (2013) 41(1) *J Law Med Ethics* 369 at 370. It is noted that an argument can be made that marketing e-cigarettes in Australia falls under the *Tobacco Advertising Prohibition Act 1992* (Cth). Consequently, the laws regarding marketing traditional cigarettes would apply to marketing e-cigarettes.

¹¹³ National Archives of Australia, n 98.

¹¹⁴ TaylorMade Marketing, *Did You Know: Tobacco Advertisements?* (20 March 2013), <http://taylormademarketing.wordpress.com/2013/03/20/did-you-know-tobacco-advertisements>.

¹¹⁵ National Archives of Australia, n 98.



nicotine can still have some negative impacts upon vapers' health (from inhaling nicotine).¹¹⁶ If the Australian government legalises the sale of e-cigarettes with nicotine, the legislation should require that e-cigarette advertising provides consumers with correct information about the products, otherwise misleading advertising may continue or potentially become even more widespread.

Many celebrities promote e-cigarettes and e-cigarette advertisers have promoted e-cigarettes at major venues and events.¹¹⁷ Actress Katherine Heigl vaped on *The Tonight Show with David Letterman*. She stated that vaping is similar to drinking coffee. She added that vaping is "not bad for you, so it's a fun addiction".¹¹⁸ Actors Leonardo DiCaprio and Julia Louis-Dreyfus have vaped in public.¹¹⁹ Johnny Depp's character in *The Tourist* movie vaped.¹²⁰ British e-cigarette company E-lites sponsored the British Superbike Championship.¹²¹ An e-cigarette commercial was aired during the 2013 Super Bowl, which over 10 million people watched.¹²² Using celebrities to promote e-cigarettes and e-cigarette companies advertising at events like the Super Bowl shows that e-cigarettes are being promoted to a mass audience. It demonstrates how important it is for governments to ensure that the public receives accurate information about how vaping can affect their health.

E-cigarette companies also offer discounts on social media.¹²³ E-cigarettes are often sold by a type of "affiliate marketing scheme", which involves e-cigarette companies paying vapers to recruit new vapers.¹²⁴ This could significantly increase the number of vapers. Vaping is considered "innovative and reactive" because it often offers new products and it offers different products for different types of consumers (for example, e-cigarettes that are specifically promoted to women).¹²⁵ Traditional smokers may find this exciting and it could influence them to commence vaping.

E-cigarette marketing could be mistaken for traditional cigarette marketing,¹²⁶ which could become a significant problem if it were to encourage the general public to commence traditional smoking. Studies have found that when traditional smokers see smoking advertisements, it can increase their cravings to smoke and make it harder for them to cease smoking.¹²⁷ Fewer people smoke when it is illegal to advertise traditional cigarettes.¹²⁸ This would support the idea that if the Australian government legalises the sale of e-cigarettes with nicotine, it should strictly regulate advertising for e-cigarettes, making it clear that e-cigarettes are different from traditional cigarettes. It could also legislate to require e-cigarette advertisements to discuss the potential health benefits of vaping, but also warn people of the potential harm that vaping with nicotine can have upon their health. Since celebrities appear unaware of the health dangers from vaping, it is possible that the general public may be similarly unaware. Admittedly, it would take government funds to monitor vaping advertisements and sanction breaches of the law.

¹¹⁶ Hardin, n 6 at 446.

¹¹⁷ de Andrade et al, n 111 at 1.

¹¹⁸ Freeman, n 31.

¹¹⁹ Jourdan A, "'Vaping' a Slow Burner in China, World's Maker of E-Cigarettes", *Reuters* (15 January 2014), <http://www.reuters.com/article/2014/01/15/us-china-smoking-idUSBREA0E1JX20140115>.

¹²⁰ Bell and Keane, n 25 at 242.

¹²¹ de Andrade et al, n 111 at 2.

¹²² Hodge et al, n 112 at 369.

¹²³ de Andrade et al, n 111 at 2.

¹²⁴ Hardin, n 6 at 438.

¹²⁵ Etter, n 11 at 1551.

¹²⁶ de Andrade et al, n 111 at 2.

¹²⁷ Hsu R et al, "An Observational Study of Retail Availability and in-Store Marketing of E-cigarettes in London: Potential to Undermine Recent Tobacco Control Gains?" (2013) 3(12) *BMJ* 1 at 4.

¹²⁸ Sweanor DT, "Effective Beats Dramatic: A Commentary on Australia's Plain Packaging of Cigarettes" (2011) 30(6) *Drug Alcohol Rev* 683 at 683.



One might also argue that no e-cigarette advertisements should be allowed as people who do not smoke traditionally would not be encouraged to commence vaping.

REGULATION OF E-CIGARETTES AND E-CIGARETTE MARKETING IN OTHER COUNTRIES

In the United Kingdom in June 2013, the Medicines and Healthcare Regulatory Agency (MHRA) announced e-cigarettes with nicotine would be regulated as medicines.¹²⁹ This decision was made to ensure that e-cigarettes with nicotine are safe for consumers and work properly.¹³⁰ The decision was made after consultation with the general public, and relied on scientific and market research.¹³¹ The MHRA found:

[t]he consistent evidence from a variety of sources is that most electronic cigarettes use is to support stop smoking attempts or for partial replacement to reduce harm associated with smoking. This is comparable to other nicotine replacement products (eg gums, patches, inhalator), which are licensed as medicines. The current evidence is that electronic cigarettes have shown promise in helping smokers quit tobacco but the quality of existing NCPs is such that they cannot be recommended for use.¹³²

The MHRA believes that the quality and safety of e-cigarettes will improve by regulating e-cigarettes so that they can be used to help traditional smokers reduce the amount that they smoke or else quit traditional smoking.¹³³ The MHRA intends to regulate the conditions that are required to sell e-cigarettes, and how e-cigarettes are advertised, promoted and sold.¹³⁴ The MHRA's stance will be of great assistance to current vapers in the United Kingdom and to traditional smokers who seek to vape in the future.

The European Union has also made moves to regulate the sale of e-cigarettes with nicotine. A detailed directive setting out new rules governing cigarettes, including e-cigarettes,¹³⁵ is due to take effect in 2016.¹³⁶ Part of the directive discusses e-cigarette packages. E-cigarette packages must be childproof.¹³⁷ They must have a "cuboid" shape and cannot state any "lifestyle benefits" or refer to the taste or flavour of the e-cigarettes or their lack of flavour or taste, such as being "free of additives".¹³⁸ The top front and back 65% of e-cigarette packages must have a health warning or show photographs of the health repercussions of vaping.¹³⁹ Fifty per cent of the sides of e-cigarette packages require a health warning.¹⁴⁰ E-cigarettes cannot be sold in packs that look like lipstick, to specifically appeal to

¹²⁹ Medicines and Healthcare Products Regulatory Agency, "UK Moves Toward Safe and Effective Electronic Cigarettes and other Nicotine-Containing Products" (Press Release, 12 June 2013), <http://www.mhra.gov.uk/NewsCentre/Pressreleases/CON286855>. The MHRA regulates "all medicines and medical devices" in the United Kingdom: Medicines and Healthcare Products Regulatory Agency, *About Us*, <http://www.mhra.gov.uk/Aboutus/index.htm>.

¹³⁰ Medicines and Healthcare Products Regulatory Agency, Press Release, n 129.

¹³¹ Medicines and Healthcare Products Regulatory Agency, Press Release, n 129.

¹³² Medicines and Healthcare Products Regulatory Agency, *Nicotine Containing Products*, <http://www.mhra.gov.uk/Safetyinformation/Generalsafetyinformationandadvice/Product-specificinformationandadvice/Product-specificinformationandadvice/E2%80%93M%E2%80%93T/Nicotinecontainingproducts/index.htm>.

¹³³ Medicines and Healthcare Products Regulatory Agency, n 132.

¹³⁴ Medicines and Healthcare Products Regulatory Agency, n 16. For further discussion of the MHRA's stance on e-cigarettes, see Solyst J, "Toward a Comprehensive Policy on Nicotine Delivery Products and Harm Reduction" (2012) 67(4) *Food & Drug LJ* 393 at 403.

¹³⁵ European Union, "Statement by Commissioner Borg following the Vote in Parliament on the Revision of the Tobacco Products Directive" (Press Release, 26 February 2014), http://europa.eu/rapid/press-release_STATEMENT-14-30_en.htm.

¹³⁶ European Union, *Questions & Answers: New Rules for Tobacco Products* (26 February 2014), http://europa.eu/rapid/press-release_MEMO-14-134_en.htm viewed 3 March 2014.

¹³⁷ European Union, n 136.

¹³⁸ European Union, n 136.

¹³⁹ European Union, n 136.

¹⁴⁰ European Union, n 136.



women.¹⁴¹ E-cigarette packages must provide information on the addictiveness, toxicity and amount of nicotine contained in the e-cigarettes plus a list of all their ingredients.¹⁴²

The directive also states a maximum amount of nicotine allowed in e-cigarettes.¹⁴³ E-cigarette manufacturers will have to report to a European Union health organisation about the ingredients in their e-cigarettes, including information about the amount of nicotine and carbon monoxide they contain.¹⁴⁴

The new directive is aimed at reducing the number of people in the European Union who start traditional smoking,¹⁴⁵ and in particular, stopping teenagers and children from being enticed to start traditional smoking.¹⁴⁶ The directive also will help vapers by requiring increased information and labelling on e-cigarette packages.¹⁴⁷

The directive was originally intended to be stricter, but e-cigarette companies and vapers successfully lobbied for a more relaxed stance.¹⁴⁸ Nevertheless, the directive provides a reasonable amount of assurance to vapers. Since legislators in the United Kingdom and the European Union are satisfied that e-cigarettes are sufficiently safe for the public to use and have legislated accordingly, the Australian government could do the same. If it does, it can consider the British and European Union legislation for assistance to draft its own legislation. It is possible that similar lobbying by e-cigarette companies and vapers may occur in Australia, so the Australian government should be prepared for intense debate about the content of the legislation regarding e-cigarettes with nicotine should it decide to legalise them.

In the United States, the Food and Drug Administration (FDA) has stated that further research is necessary on e-cigarettes as consumers do not know what risks e-cigarettes may pose to vapers' health, how many chemicals vapers ingest when they vape and the potential health benefits that vaping may provide.¹⁴⁹ The FDA Center for Drug Evaluation and Research currently only regulates e-cigarettes that are promoted as having "therapeutic purposes".¹⁵⁰ In April 2014, the FDA proposed a new rule that would result in it regulating all e-cigarettes.¹⁵¹ The rule would require e-cigarette manufacturers to register their products with the FDA, provide information about the ingredients of those products and abide by certain marketing requirements.¹⁵² The FDA's proposed rule makes sense. If the FDA can regulate all e-cigarettes, it can ensure consistency among all e-cigarette products. This would be positive for e-cigarette manufacturers and for vapers.

Also in the United States, Senator Barbara Boxer introduced the *Protecting Children from Electronic Cigarette Advertising Act* in Congress on 26 February 2014. The Bill has been read twice

¹⁴¹ European Union, n 136.

¹⁴² European Union, n 136.

¹⁴³ European Union, n 136.

¹⁴⁴ European Union, n 136.

¹⁴⁵ European Union, n 136.

¹⁴⁶ European Union, n 135.

¹⁴⁷ European Union, n 136.

¹⁴⁸ Jolly D, "European Union Approves Tough Rules on Electronic Cigarettes", *The New York Times* (26 February 2014), http://www.nytimes.com/2014/02/27/business/european-union-approves-tough-rules-on-electronic-cigarettes.html?_r=0.

¹⁴⁹ US Food and Drug Administration, *Electronic Cigarettes (E-Cigarettes)*, <http://www.fda.gov/newsevents/publichealthfocus/ucm172906.htm>.

¹⁵⁰ US Food and Drug Administration, n 149.

¹⁵¹ US Food and Drug Administration, n 149.

¹⁵² Office of Information and Regulatory Affairs, Office of Management and Budget, "Tobacco Products" Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act (2013), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=0910-AG38>. For further discussion of the FDA's stance on e-cigarettes, see Solyst, n 134 at 400.



since and referred to the Committee on Commerce, Science and Transportation.¹⁵³ The Bill states that the potential negative repercussions of using e-cigarettes are unknown.¹⁵⁴ It further states that e-cigarettes can be a “gateway” for young people to start traditional smoking and e-cigarette companies are promoting e-cigarettes to young people in cartoons and event sponsorship.¹⁵⁵ The Bill forbids people from advertising e-cigarettes (whether or not they contain nicotine) in a way that could encourage people under 18 to commence vaping.¹⁵⁶ The American Federal Trade Commission and State Attorneys General can enforce the advertising ban and fine people who breach it.¹⁵⁷ This Bill is an excellent idea and it is to be hoped that it becomes law in the United States. Young people should not vape and it is unethical for e-cigarette companies to target young people with their advertising.

Some American States and cities have also legislated regarding e-cigarettes, generally forbidding vaping in public places. New York City was the first major American city to pass legislation restricting vaping,¹⁵⁸ followed by Chicago, which has passed legislation forbidding vaping in offices, indoor public areas and within a specific area outside of the entrances to buildings.¹⁵⁹ In Utah, vaping with or without nicotine is forbidden in public and private places, including restaurants, shopping malls, libraries, sports centres, hotels and museums.¹⁶⁰

In Los Angeles, a law will soon come into effect banning vapers from vaping in public places.¹⁶¹ The law permits vaping in films, lounges and stores that sell e-cigarettes.¹⁶² In New York City, vaping is forbidden in restaurants, bars and clubs.¹⁶³ Research for this article could not find that city councils in Australia had banned vaping in public. It is possible that these councils may consider whether vaping in public should be permitted in the future. At the moment, however, Australian business owners may be unsure about whether they can permit vapers to vape in their premises.

In Singapore, it is illegal to sell or import e-cigarettes.¹⁶⁴ Anyone who does so could be fined \$5,000 for a first offence and \$10,000 for a second or greater offence.¹⁶⁵ The Singapore Health Promotions Board states that e-cigarettes are “a health risk to users”.¹⁶⁶ While it is submitted that selling e-cigarettes with nicotine should be legal, it is conceded that the laws in Singapore are straightforward and unlikely to confuse people. This is in contrast to the current situation in Australia. Considering other countries’ legislation on e-cigarettes and their marketing is helpful to evaluate the Australian government’s stance on the issue. Another consideration that may be helpful concerns the Swedish government’s snus legislation.

¹⁵³ *Protecting Children from Electronic Advertising Act*, S Res, 113th Congress (2014).

¹⁵⁴ *Protecting Children from Electronic Advertising Act*, S Res, 113th Congress § 2(a) (2014).

¹⁵⁵ *Protecting Children from Electronic Advertising Act*, S Res, 113th Congress § 2(a)(5), (6) (2014).

¹⁵⁶ *Protecting Children from Electronic Advertising Act*, S Res, 113th Congress § 3(b) (2014).

¹⁵⁷ *Protecting Children from Electronic Advertising Act*, S Res, 113th Congress § 3(c), (d) (2014).

¹⁵⁸ Frizell S, “Chicago Bans E-Cigarettes Indoors”, *Time* (15 January 2014), <http://nation.time.com/2014/01/15/chicago-bans-E-cigarettes-indoors>.

¹⁵⁹ AP/CBS, “Chicago Votes to Ban E-Cigarettes”, *CBS News* (15 January 2014), <http://www.cbsnews.com/news/chicago-votes-to-ban-E-cigarettes>.

¹⁶⁰ *Amendment to Definition of Smoking in Utah Indoor Clean Air Act*, HB 245, Utah Laws (2012).

¹⁶¹ Whitcomb D and Gorman S, “Los Angeles Moves to Ban E-Cigarettes, Joining NY, Others”, *Reuters* (4 March 2014), <http://www.reuters.com/article/2014/03/05/us-usa-ecigarettes-california-idUSBREA2324920140305>; “E-Cigarette Ban for Los Angeles”, *BBC* (5 March 2014), <http://www.bbc.com/news/technology-26452778>.

¹⁶² Whitcomb and Gorman, n 161. It is unknown whether this legislation applies to vaping with or without nicotine. To read a discussion about why no-smoking laws should not apply to theatrical productions, see Freiberg M, “Poor Player: Exempting Theatrical Productions from Smoke-Free Laws, A” (2010) 21(3) *U Fla JL & Pub Pol’y* 399.

¹⁶³ Branswell, n 33.

¹⁶⁴ *Tobacco (Control of Advertisements and Sale) Act* (Singapore, cap 309, 2011 rev ed), s 16(1).

¹⁶⁵ *Tobacco (Control of Advertisements and Sale) Act* (Singapore, cap 309, 2011 rev ed), s 16(2).

¹⁶⁶ Singapore Government, Health Promotion Board, *Get the Facts Right! Learn More about Tobacco Products*, <http://www.hpb.gov.sg/HOPPortal/health-article/674>.



A BRIEF EXPLANATION OF SNUS AND ITS REGULATION IN SWEDEN

Snus is a “finely ground moist snuff” that contains nicotine.¹⁶⁷ It is usually sold in small pouches that look like tea bags.¹⁶⁸ One places snus in one’s mouth between one’s gum and upper lip.¹⁶⁹ It is legal to sell snus in Sweden and has been used there since the mid-19th century,¹⁷⁰ though it is illegal to sell it elsewhere in the European Union.¹⁷¹ Snus has played a crucial role in decreasing the number of traditional smokers in Sweden.¹⁷² In fact, among Western nations, Sweden has the lowest number of deaths as a result of traditional cigarette smoking.¹⁷³ Medical evidence has proven that the dangers from traditional smoking are far greater than those from using snus.¹⁷⁴ Using snus is unlikely to result in lung cancer and chronic obstructive pulmonary disease, as opposed to traditional smoking,¹⁷⁵ but it may cause gingival recession, “adverse outcomes” to pregnant women¹⁷⁶ and pancreatic cancer.¹⁷⁷ Snus is an important part of Swedish culture and many Swedish celebrities use it.¹⁷⁸

The Swedish *Food Act* categorises snus as a “food”.¹⁷⁹ The Act gives the Swedish government the ability to regulate the labelling of snus and the ingredients used to make it.¹⁸⁰ The Swedish government may also approve any retailer who wishes to sell snus¹⁸¹ and may require retailers to be registered.¹⁸² If the Australian government were to legalise the sale of e-cigarettes with nicotine, it could similarly pass laws to require retailers who sell e-cigarettes to be registered.

Given this background information, the article below considers the arguments for and against legalising the sale of e-cigarettes with nicotine in Australia.

ARGUMENTS ABOUT THE LEGALISATION OF E-CIGARETTES WITH NICOTINE IN AUSTRALIA

There are several reasons why the Australian government should permit e-cigarettes with nicotine to be sold in Australia and why it should ensure that e-cigarettes are regulated comprehensively. These reasons can be organised into four main areas: health, protecting young people, safety and economic.

Health reasons

If the Australian government legalises the sale of e-cigarettes with nicotine, then more traditional smokers may cease smoking.¹⁸³ A study of over 200 vapers found that 66.8% smoked fewer traditional cigarettes once they started vaping and 48.8% did not smoke traditional cigarettes for the

¹⁶⁷ Polosa et al, n 23 at 3.

¹⁶⁸ Freiberg M, “Options for State and Local governments to Regulate Non-Cigarette Tobacco Products” (2012) 21(2) *Ann Health Law* 407 at 414.

¹⁶⁹ Freiberg, n 168 at 414.

¹⁷⁰ Haydon P, “In Sweden, Smokers Have Another Option – Snus”, *The Guardian* (30 October 2012), <http://www.theguardian.com/commentisfree/2012/oct/29/sweden-smokers-option-snus>. See also Livsmedelslagen (SFS 2006:804), s 3(2).

¹⁷¹ Foulds J and Kozlowski L, “Snus – What Should the Public-Health Response Be?” (2007) 369(9578) *Lancet* 1976 at 1977.

¹⁷² Polosa et al, n 23 at 3.

¹⁷³ Polosa et al, n 23 at 3.

¹⁷⁴ Polosa et al, n 23 at 3.

¹⁷⁵ Foulds and Kozlowski, n 171 at 1977.

¹⁷⁶ Foulds and Kozlowski, n 171 at 1977.

¹⁷⁷ Holmes D, “You Snus You Lose” (2007) 7(6) *Nature Reviews* 406.

¹⁷⁸ Datruf LC and McNamara JM, “Tobacco Control and Snus: Time to Take a Stand” (2008) 11(1) *Health Care L & Pol’y* 127 at 136. For a brief discussion about the potential results of legalising snus in Australia see, for example, Holmes, n 177.

¹⁷⁹ Livsmedelslagen (SFS 2006:804), s 3(2).

¹⁸⁰ Livsmedelslagen (SFS 2006:804), s 6.

¹⁸¹ Livsmedelslagen (SFS 2006:804), s 7(1).

¹⁸² Livsmedelslagen (SFS 2006:804), s 7(3).

¹⁸³ Hooper C, “Vaping Could be a Trojan Horse for Real Cigarettes”, *The Conversation* (19 February 2014),



period while they vaped. This prompted the study's researchers to state that "E-cigarettes may hold promise as a smoking-cessation method".¹⁸⁴ Internet surveys and clinical trials have found that vaping can help traditional smokers to quit smoking or smoke fewer traditional cigarettes, while suffering fewer negative consequences.¹⁸⁵

Dr Jean-Francois Etter of the Faculty of Medicine at the University of Geneva states that the health risks from vaping are less than those from smoking traditional cigarettes.¹⁸⁶ If Australians switch from smoking traditional cigarettes to vaping, it could "bring substantial public health gains".¹⁸⁷ Vaping can be a "more effective" way for traditional smokers to cease smoking than using smoking cessation medications (such as nicotine patches),¹⁸⁸ because e-cigarettes with nicotine provide a similar experience to physically smoking traditional cigarettes. This may have a "psychological 'placebo' effect".¹⁸⁹ Research for this article could not find another product in existence that provides people with a method to inhale nicotine that is physically similar to smoking traditional cigarettes. Since vaping may be of great assistance to traditional smokers to quit smoking, it makes sense that the Australian government should consider legalising the sale of e-cigarettes with nicotine.

It has been argued that e-cigarettes can potentially encourage traditional smoking because some look like traditional cigarettes.¹⁹⁰ However, some studies have shown that most vapers smoked traditionally before they commenced vaping.¹⁹¹ "It is difficult to understand how use of ECs [e-cigarettes] would imply that cigarettes are also acceptable. The two are clearly different. Availability of a safer alternative to cigarettes is likely to strengthen rather than weaken denormalisation of smoking."¹⁹² To reduce the chances that vaping could encourage people to commence traditional smoking, the Australian government could modify existing laws against traditional smoking in public to apply to vaping. Vapers may argue that this is unfair, because e-cigarettes with nicotine do not emit smoke nor is there evidence that vaping can negatively impact upon bystanders' health.¹⁹³ If the Australian government were to legalise the sale of e-cigarettes with nicotine, then perhaps these e-cigarettes could contain a specific symbol, so that they could be readily identified as e-cigarettes when used in public places and not traditional cigarettes that emit smoke. The Australian government could then start an advertising campaign to inform the public about this symbol so that e-cigarettes are not confused with traditional cigarettes. Admittedly, some Australians may be encouraged to smoke traditionally by seeing others vape, irrespective of their knowing that the vapers are using e-cigarettes and not traditional cigarettes.

According to the World Health Organization, the ability of e-cigarettes to help traditional smokers cease smoking has not been scientifically proven, stating that until e-cigarettes are "deemed safe and effective and of acceptable quality by a competent national regulatory body, consumers should be strongly advised not to use" them.¹⁹⁴ A spokesperson for the Australian Department of Health has similarly stated, "[t]he impact of wide-scale use of these devices on tobacco use generally is not

<http://theconversation.com/vaping-could-be-a-trojan-horse-for-real-cigarettes-21776>.

¹⁸⁴ Siegel MB, Tanwar KL and Wood KS, "Electronic Cigarettes as a Smoking-Cessation Tool Results from an Online Survey" (2011) 40(4) *Am J Prev Med* 472 at 472.

¹⁸⁵ Saitta et al, n 49 at 50.

¹⁸⁶ Etter, n 11 at 1551.

¹⁸⁷ de Andrade et al, n 111 at 2.

¹⁸⁸ Saitta et al, n 49 at 50.

¹⁸⁹ Hardin, n 6 at 447.

¹⁹⁰ de Andrade et al, n 111 at 2.

¹⁹¹ Hajek P et al, "Should E-cigarettes be Regulated as a Medicinal Device?" (2013) 1(6) *Lancet Respir Med* 429 at 430.

¹⁹² Hajek et al, n 191 at 430.

¹⁹³ Hardin, n 6 at 453.

¹⁹⁴ World Health Organization, *Questions and Answers on Electronic Cigarettes or Electronic Nicotine Delivery Systems* (3 June 2014), http://www.who.int/tobacco/communications/statements/electronic_cigarettes/en/index.html.



known, and the outcome on the community could be harmful".¹⁹⁵ He added that the Australian Therapeutic Goods Administration has not stated that e-cigarettes are "safe nor effective", nor have e-cigarette manufacturers given evidence to prove that they are "safe" or "effective".¹⁹⁶ Research for this article could not find the Australian Medical Association's official stance on e-cigarettes, although two articles are posted on its website that state concerns about e-cigarettes.¹⁹⁷ Other health organisations and academics also consider that more research is necessary before vaping as an alternative to traditional smoking is encouraged.¹⁹⁸

In contrast, there are several health organisations and academics who support widespread vaping.¹⁹⁹ Studies and two trials have found that vaping can assist traditional smokers to cease traditional smoking or to smoke fewer traditional cigarettes.²⁰⁰

Professor Wayne Hall from the University of Queensland argues that e-cigarettes with nicotine should be sold in Australia because traditional cigarettes are sold legally but are more detrimental to the public's health.²⁰¹ Some health researchers have found that vaping causes fewer health problems than smoking traditional cigarettes.²⁰² Most of the health problems that traditional smokers suffer come from the tar, chemicals and other compounds found in traditional cigarettes, not the nicotine.²⁰³ Devices that administer nicotine, without smoke, tar and the other compounds found in traditional cigarettes have 1% or less of the "health risks of [traditional] smoking".²⁰⁴ E-cigarettes are unlikely to cause lung cancer or chronic obstructive pulmonary disease.²⁰⁵ The British Royal College of Physicians stated that e-cigarettes are "10 – 1000 times less hazardous than smoking depending on the product".²⁰⁶

Some academics argue that e-cigarettes with nicotine should not be widely used because there is no research on the long-term effects of vaping to date.²⁰⁷ While e-cigarettes have not existed long enough for researchers to study their long-term effects, there have been studies about their short-term effects. For example, clinical studies that followed vapers six to 12 months after they vaped did not find "known adverse consequences" to the vapers' health.²⁰⁸ By the time that information about the long-term effects of vaping is known, it is possible that many Australians will die as a result of their traditional smoking.

¹⁹⁵ May, n 13.

¹⁹⁶ May, n 13.

¹⁹⁷ Australian Medical Association, "Fake Puff Could Be Deadly" (25 March 2013), <https://ama.com.au/ausmed/node/4619>; Australian Medical Association, "World Medical Body Calls for Universal Plain Packaging" (5 November 2012), <https://ama.com.au/ausmed/node/3991>.

¹⁹⁸ See, for example, Berlin I and Sasco AJ, "Regulation of Smokeless Tobacco Products" (2008) 371(9623) *Lancet* 1504; Polosa et al, n 23 at 5; Bell and Keane, n 25 at 242.

¹⁹⁹ See, for example, Polosa R and Caponnetto P, "Time for Evidence-Based E-cigarette Regulation" (2013) 14(13) *Lancet* e582; Siegel MB, Tanwar KL and Wood KS, "Electronic Cigarettes as a Smoking-Cessation Tool Results from an Online Survey" (2011) 40(4) *Am J Prev Med* 472 at 472; Dawkins L et al, "The Electronic-Cigarette: Effects on Desire to Smoke, Withdrawal Symptoms and Cognition" (2012) 37(8) *Addict Behav* 970; Saitta et al, n 49.

²⁰⁰ Etter and Bullen, n 17 at 491.

²⁰¹ Baker H, "Regulation of Electronic Cigarettes" (2013) 14(8) *Lancet* 301 at 301.

²⁰² Sutfin et al, n 7 at 215.

²⁰³ Saitta et al, n 49 at 53.

²⁰⁴ Saitta et al, n 49 at 53.

²⁰⁵ Kozlowski LT, "Effect of Smokeless Tobacco Product Marketing and Use on Population Harm from Tobacco Use" (2007) 33(6) *Am J Prev Med* S379 at S379.

²⁰⁶ Kozlowski, n 205 at S379.

²⁰⁷ Sutfin et al, n 7 at 214; Etter J, "Commentary on Goniewicz et al (2014): If Wisely Regulated, Electronic Cigarettes Can Make Cigarettes Obsolete" (2014) 109(3) *Addiction* 508.

²⁰⁸ Etter, n 207.



It is noted that the nicotine present in e-cigarettes is addictive, and that nicotine can cause tumours. Vapers may suffer from heart problems if they are exposed to nicotine over a long period. Large quantities of nicotine can be deadly, especially to children.²⁰⁹ However, a 2012 study found that vaping can reduce vapers' compulsion to smoke after 20 minutes.²¹⁰ It also found that vaping with nicotine can assist vapers' working memory.²¹¹ They can also help traditional smokers to quit traditional smoking without suffering from nicotine withdrawal.²¹² While it is possible that some traditional smokers may commence vaping with nicotine, and then never cease inhaling nicotine (as opposed to switching from traditional smoking to not using any substance with nicotine at all), it may still be less harmful to people's health to inhale nicotine from e-cigarettes than to inhale nicotine with many other toxins (from traditional cigarettes).

People may argue that vaping with nicotine can result in vapers consuming more nicotine than if they used traditional cigarettes, but a study has found that vapers generally have lower amounts of nicotine in their blood than traditional smokers.²¹³ If the Australian government were to legalise the sale of e-cigarettes with nicotine, it could specifically regulate the amount of nicotine contained in the products to try to ensure that vapers continue to have lower amounts of nicotine in their blood than people who smoke traditional cigarettes.

People may also argue that it is not necessary for the Australian government to legalise the sale of e-cigarettes with nicotine, because it is possible to sell e-cigarettes that do not look like tobacco products in some parts of Australia. However, because it may be more likely for traditional smokers to use e-cigarettes to cease smoking if they contain nicotine, legalising the sale of e-cigarettes without nicotine is insufficient.

If the Australian government does not legalise the sale of e-cigarettes with nicotine due to a lack of medical evidence, it should consider undertaking the research as soon as possible to acquire the necessary evidence. Importantly, the Australian government may be able to ban traditional cigarettes outright in the future if it legalises the sale of e-cigarettes with nicotine, because e-cigarettes with nicotine could be the best realistic substitute to smoking traditional cigarettes.

Protect young people

Some researchers argue that vaping with nicotine is a "gateway" for non-smokers to smoke traditional cigarettes.²¹⁴ This means that if vaping with nicotine becomes legal in Australia it could encourage people new to vaping, particularly young people, to use products that are more harmful to them (for example, traditional cigarettes).²¹⁵ This is because some e-cigarettes are sold in candy flavours and are promoted as being healthy.²¹⁶ However, according to Dr Etter, "E-cigarettes are not a gateway to smoking (they are a gateway out of smoking)".²¹⁷ Current data do not support the argument that e-cigarettes are a "gateway" for young people²¹⁸ or others²¹⁹ who are not smokers to start traditional smoking. If the Australian government permits the sale of e-cigarettes with nicotine, then it could legislate to try to reduce the chances that e-cigarettes could become a "gateway" for young people and non-smokers to smoke traditional cigarettes. For example, it could legislate to require containers to be child-proof and for packaging not to be able to refer to taste (similar to the European Union directive).

²⁰⁹ Hardin, n 6 at 446.

²¹⁰ Dawkins et al, n 199 at 972.

²¹¹ Dawkins et al, n 199 at 972.

²¹² Paradise, n 3 at 357.

²¹³ Saitta et al, n 49 at 56.

²¹⁴ Pepper et al, n 2 at 144.

²¹⁵ Bell and Keane, n 25 at 245.

²¹⁶ Hardin, n 6 at 448.

²¹⁷ Etter, n 207 at 508.

²¹⁸ Saitta et al, n 49 at 53.

²¹⁹ Polosa et al, n 23 at 8.



The Australian government permits other substances to be sold legally that can also be potential “gateways” to other unhealthy behaviours, such as alcohol. There is no reason to single out e-cigarettes with nicotine.

This is another reason why the Australian government should legalise the sale of e-cigarettes with nicotine: to require these websites to sell e-cigarettes only to customers of the legal age.

Safety reasons

A common reason why health agencies do not want e-cigarettes with nicotine to be sold involves their safety.²²⁰ Since e-cigarettes are unregulated, some e-cigarettes contain the incorrect amount of nicotine and may not work. Some e-cigarettes may contain chemicals that are toxic when consumed, such as glycerine (though e-cigarettes are not supposed to contain such chemicals).²²¹

If e-cigarettes were regulated, it could help to ensure that e-cigarettes are “safe and effective”.²²² E-cigarette manufacturers could be required to make e-cigarettes with nicotine of a certain quality and purity.²²³ They could also be required to label their products clearly and to manufacture them under appropriate conditions.²²⁴

E-cigarettes are made in independent factories internationally, so there is no effective quality control for them.²²⁵ Professor Robert West of University College London states that if people are concerned about the safety of e-cigarettes, then governments can monitor the chemicals in the vapour to ensure that there are fewer toxins.²²⁶

One may argue that since so many people buy e-cigarettes online from other countries and the quality of the products may be questionable, there is no need to legalise the sale of e-cigarettes with nicotine in Australia because Australians will buy e-cigarettes with nicotine of poor quality online anyway. If the Australian government legalised the sale of e-cigarettes with nicotine and properly promoted it, it is possible that Australians would purposely choose to buy e-cigarettes from Australian retailers because they trusted the product to be safer than those bought online from elsewhere.

Economic reasons

Governments rely heavily on money from taxing traditional cigarettes.²²⁷ If the Australian government legalised the sale of e-cigarettes with nicotine, it could benefit from the taxes that it would raise.²²⁸ Currently, if Australians purchase e-cigarettes with nicotine from other countries and import them, the Australian government would likely not receive any revenue (unless it receives money from tariffs that Australians who import them must pay, which is outside the scope of this article).

Since vaping is expected to increase dramatically in the future (as stated earlier), taxing e-cigarettes with nicotine may provide substantial revenue for the Australian government. However, it is also possible that if e-cigarettes with nicotine are legalised and taxed substantially, it could discourage vaping. If the Australian government were to legalise the sale of e-cigarettes with nicotine,

²²⁰ Bell and Keane, n 25 at 244.

²²¹ Hardin, n 6 at 446. It is possible that e-cigarettes can blow up when used. See, for example, Walsh M, “E-cigarette Explodes in English Pub, Nearly Engulfs Barmaid in Flames”, *The Daily News* (8 April 2014), <http://www.nydailynews.com/news/world/e-cigarette-explodes-sets-fire-barmaid-england-article-1.1749808>.

²²² Etter, n 11 at 1551.

²²³ Britton and McNeill, n 15 at 1879.

²²⁴ Polosa and Caponnetto, n 199 at e583.

²²⁵ Quit South Australia, n 38.

²²⁶ Baker, n 201 at 301.

²²⁷ Polosa R and Caponnetto P, “Regulation of E-cigarettes: The ‘Users’ Perspective” (2013) 1(7) *Lancet Respir Med* e26 at e26.

²²⁸ Baker, n 201 at 301. In South Korea, there’s a “health promotion tax” on e-cigarettes: see Lee S et al, “Public Health Challenges of Electronic Cigarettes in South Korea” (2011) 44(6) *J Prev Med Public Health* 235.



the tax on e-cigarettes should be lower than the tax on traditional cigarettes. Australians may be encouraged to commence vaping and cease traditional smoking because of the lower tax on e-cigarettes with nicotine.

As previously stated, many Australians sell e-cigarettes with nicotine on the black market. The Australian government does not receive revenue from these sales. If the Australian government were to legalise the sale of e-cigarettes with nicotine, it could receive the money that is currently paid to people in the black market.

If the Australian government legalised the sale of e-cigarettes with nicotine, it is possible that the manufacture, sale and marketing of e-cigarettes could become a large industry. This could create a significant number of new jobs for Australians and additional revenue for the Australian government in the form of income tax, etc. Australian businesses could also produce e-cigarettes for international export.

POSSIBLE CONTENT FOR LEGISLATION TO LEGALISE THE SALE OF E-CIGARETTES IN AUSTRALIA

While not an exhaustive list, the following information provides some ideas that may be useful for the Australian government to consider if it was to draft legislation to legalise the sale of e-cigarettes with nicotine.

Legislation could require e-cigarette labels to state that the long-term health repercussions from vaping are unknown.²²⁹ The labels could also state the dangers that vaping may cause and clearly regulate the fluids in each e-cigarette.²³⁰

The legislation could also state the maximum amount of nicotine permitted in e-cigarettes to avoid vapers suffering from nicotine poisoning.²³¹ It could also state that toxic substances are not permitted in e-cigarettes²³² and that e-cigarettes must be produced in sanitary locations.²³³

Legislation could require that the nicotine solution for e-cigarettes is contained in child-proof bottles.²³⁴ It could also forbid the sale of e-cigarettes to minors.²³⁵ To make e-cigarettes less attractive to minors, legislation could state: (1) that no celebrities are allowed to appear in advertisements for e-cigarettes; (2) no cartoons are permitted in e-cigarette advertising; and (3) flavours that may be particularly attractive to children are not permitted (for example, fruit and candy).²³⁶ Legislation could also require e-cigarette manufacturers to inform regulators if someone becomes seriously ill from using their product.²³⁷ The legislation could require regular testing of e-cigarettes to ensure that the product meets minimum safety standards.²³⁸

It may be difficult to enforce legislation against overseas e-cigarette manufacturers from whom Australians purchase e-cigarettes online.²³⁹ Nevertheless, e-cigarette legislation should apply to all e-cigarettes with nicotine, regardless of whether they are manufactured in Australia or imported from

²²⁹ Hardin, n 6 at 449.

²³⁰ Saitta et al, n 49 at 56.

²³¹ Hardin, n 6 at 449.

²³² Hardin, n 6 at 449.

²³³ Polosa et al, n 23 at 9.

²³⁴ Saitta et al, n 49 at 56.

²³⁵ Saitta et al, n 49 at 57.

²³⁶ Sullum J, "Five Senators Demand Unconstitutional Restrictions on E-Cigarette Ads – for the Children", *Forbes* (26 February 2014), <http://www.forbes.com/sites/jacobsullum/2014/02/26/five-senators-demand-unconstitutional-restrictions-on-e-cigarette-ads-for-the-children>.

²³⁷ Saitta et al, n 49 at 56.

²³⁸ Hardin, n 6 at 449.

²³⁹ Hardin, n 6 at 449.



overseas. Perhaps the Australian Customs and Border Protection Service could play a role in enforcing the legislation for imported e-cigarettes with nicotine.

CONCLUSION

E-cigarettes with nicotine offer “a realistic possibility ... that the tobacco problem might get resolved”.²⁴⁰ This article has provided information about e-cigarettes with and without nicotine and how they are legislated in Australia and other countries. Rather than wait while large numbers of Australians import e-cigarettes with nicotine that may be unsafe and more Australians die from smoking traditional cigarettes, this article recommends that the Australian government should consider legalising the sale of e-cigarettes with nicotine. This action could have a significant positive impact upon the health of traditional smokers, protect vapers from potentially vaping with unsafe e-cigarettes, protect young people and have a positive economic impact.

There are many opportunities for further research in this area. These opportunities include: (1) finding out how many Australians import e-cigarettes from other countries; (2) learning how many Australian retailers sell e-cigarettes with nicotine illegally and how easy it is for Australians to purchase e-cigarettes with nicotine from retailers; (3) studying the impact of the European Union and British legislation discussed above; and (4) researching possible legislation concerning vaping in public.

Since Federation, the Australian government has prohibited the sale of many different products that it later legalised (for example, alcohol). It is to be hoped that e-cigarettes with nicotine may also fall under this category at some point in the future.

²⁴⁰ Hajek et al, n 191 at 431.

