



Electronic Cigarette Legislation in Australia

Drawn up by

Dr Marilyn Krawitz, Senior Lecturer, the University of Notre Dame Australia

(Fremantle Campus), Lawyer, CMS Legal

- May 2015 -

Electronic cigarettes are a relatively recent and highly important product that millions of people worldwide use. Several governments internationally are finding it challenging to decide how to modify legislation to apply to electronic cigarettes, or whether they should introduce new legislation regarding electronic cigarettes. In Australia, the laws that apply to electronic cigarettes are inconsistent among the Federal and State Governments and among State governments themselves. This article will give a brief summary of the Australian laws that apply to electronic cigarettes. It does not contain all the relevant detail necessary to analyse this issue in depth.

Federal Legislation

At the Federal level, it is currently illegal to sell, supply or possess electronic cigarettes containing nicotine. *The Federal Poisons Standard 2013* (Cth) states that nicotine is a Schedule 7 poison. It cannot be sold, supplied or possessed unless it is 'in preparations for human therapeutic use' or it is part of traditional cigars, cigarettes, etc². For nicotine to be part of 'preparations for human therapeutic use', it must satisfy the definition of therapeutic good in the *Therapeutic Goods Act*³. The product must also be registered on the Therapeutic Goods Register⁴. A sponsor must complete an application form and pay a fee for the product to be assessed so that it can be added to the therapeutic goods register⁵. A recent search of the Therapeutic Goods Register does not list any electronic cigarettes⁶.

It is possible for Australians to import electronic cigarettes with nicotine from other countries. Electronic cigarettes 'are not prohibited imports under Customs law'.⁷ If the packaging on electronic cigarettes makes no therapeutic claim, then the imported electronic cigarettes are provided to the relevant recipient in Australia, subject to any relevant Australian laws.⁸

If the packaging of electronic cigarettes that are imported claim that the electronic cigarettes provide therapeutic benefits, then the Therapeutic Goods Administration will seize the goods and inform the relevant parties whether further action is necessary.⁹

The Therapeutic Goods Administration permits Australians to import therapeutic goods that are not listed on the Therapeutic Goods Register (a three month supply) without its permission, if certain criteria are satisfied, e.g. the recipient of the goods does not sell or supply them to anyone else.¹⁰ There have been significant problems with some of the imported electronic cigarettes. Some leak nicotine or contain amounts of nicotine that are different from the amount stated on the products.¹¹

State Legislation

Existing legislation in all Australian States and Territories forbids the sale and possession of electronic cigarettes with nicotine.¹² The State of Queensland also recently passed legislation so that existing laws that apply to traditional smoking apply to vaping electronic cigarettes.¹³ As a result, several new limitations apply to electronic cigarettes in that State: they cannot be sold to children, they cannot be used in various public places and no smoking areas and their advertising is restricted.¹⁴ In Western Australia and South Australia it is also forbidden to sell electronic cigarettes without nicotine if they resemble a 'tobacco product'.¹⁵

Conclusion

Due to researchers frequently producing ground breaking research about electronic cigarettes and Queensland's recent Australia first legislation (among other reasons), it is possible that the Australian legislation that applies to electronic cigarettes will change in the near future. As well, the Australian Federal Government recently requested a tender to 'identify and analyse policy options regarding electronic nicotine delivery systems and electronic non-nicotine delivery systems in Australia'.¹⁶ This may also result in the Australian Government changing electronic cigarette legislation after careful consideration.

References

- 1 The author notes that this article is adapted from the article, Marilyn Krawitz, 'We Didn't Start this Fireless Vapour: E-Cigarette Legislation in Australia' (2014) 22 *Journal of Law and Medicine* 462.
- 2 *Poison Standard* 2013 (Cth), Pt 3 ss 41(1), 42(2).
- 3 *Therapeutic Goods Act 1989* (Cth) s 3.
- 4 *Therapeutic Goods Act 1989* (Cth) s 9A.
- 5 Department of Health, Therapeutic Goods Administration, Overview of Supplying Therapeutic Goods in Australia (12 February 2014) <https://www.tga.gov.au/overview-supplying-therapeutic-goods-australia>.
- 6 The search of the Therapeutic Goods Register occurred on 9 April 2015, found on <https://www.tga.gov.au/australian-register-therapeutic-goods>.
Note: Elise Worthington, 'E-Cigarettes Accidentally Approved, Left on the Therapeutic Goods Administration Register for Two Months', ABC News (online), 14 November 2014 <http://www.abc.net.au/news/2014-11-14/e-cigs-accidentally-approved-by-the-tga/5891906>.
- 7 Australian Government, Australian Customs and Border Protection Service <http://www.customs.gov.au/faq/AlcoholCigTobacco2.asp#Q365>.
- 8 *Ibid.*
- 9 *Ibid.*
- 10 Australian Government, Department of Health, Therapeutic Goods Administration, Personal Importation Scheme (15 March 2015) <https://www.tga.gov.au/personal-importation-scheme>.
- 11 Australian Government, Department of Health, Therapeutic Goods Administration (30 March 2015) Electronic Cigarettes <https://www.tga.gov.au/community-qa/electronic-cigarettes>.
- 12 See, e.g. *Poisons Regulations 2008* (Tas) r 74(11).
- 13 *Health Legislation Amendment Act 2014* (Qld) s 67. The author notes that the legislation changed the definition of various words, such as 'smoking product' so that it includes both traditional cigarettes and electronic cigarettes.
- 14 Explanatory Memorandum, *Health Legislation Amendment Act 2014* (Qld).
- 15 *Tobacco Products Control Act 2006* (WA) s 106(a); *Tobacco Products Regulation Act 1997* (SA) s 36. Also see *Hawkins v Van Heerden* [2014] WASC 127.
- 16 Australian Government, AusTender Identification and analysis of policy options for electronic nicotine delivery systems Health/058/1415 <https://www.tenders.gov.au/?event=public.atm.showClosed&ATMUUID=85AA342C-0D70-0660-2F5AFB30868Aafb7>.