

# Are electronic cigarettes legal in NSW?



## Health

Key facts about electronic cigarettes and the law in NSW:

- The sale of liquid nicotine, including in liquids in electronic cigarettes, is illegal under NSW Poisons legislation (*Poisons and Therapeutic Goods Regulation 2008*) without approval from the NSW Ministry of Health unless the product is listed or registered on the Australian Register of Therapeutic Goods, where other restrictions apply.
- The sale of electronic cigarettes that make a therapeutic claim and are not listed or registered on the Australian Register of Therapeutic Goods is illegal under national and NSW Poisons legislation. There are currently no electronic cigarette products, with or without nicotine, on the Australian Register of Therapeutic Goods.
- From 1 September 2015, it is an offence to sell e-cigarettes and accessories to minors under the age of 18 under the *Public Health Tobacco Act 2008* (the Act). From 1 December, many of the provisions that apply to tobacco products in relation to display and advertising of e-cigarettes and accessories will also apply to e-cigarettes and accessories under the Act.

### The sale of electronic cigarettes which contain nicotine

The sale of liquid nicotine, including in liquids in electronic cigarettes, is illegal under NSW Poisons legislation (*Poisons and Therapeutic Goods Regulation 2008*) without approval from the NSW Ministry of Health unless the product is listed or registered on the Australian Register of Therapeutic Goods, where other restrictions apply. The Ministry has not issued any approvals for the sale of liquid nicotine for use in e-cigarettes.

Nicotine, other than for approved therapeutic use or in tobacco prepared and packed for smoking, is a Schedule 7 dangerous poison under the

national *Standard for the Uniform Scheduling of Medicines and Poisons* (Poisons Standard). This makes nicotine a Schedule 7 dangerous poison in the NSW Poisons List.

The unauthorised supply of a Schedule 7 poison for human use in any product, including electronic cigarettes and e-liquids, is an offence under clause 20 of the *Poisons and Therapeutic Goods Regulation 2008* (NSW). Anyone who sells electronic cigarettes containing liquid nicotine or e-liquids containing nicotine without approval from the NSW Ministry of Health may be prosecuted with fines of up to \$1100 for each offence.

It is important to know that electronic cigarettes often contain nicotine even when they are not labelled as such. It is an offence under clause 7 of the *Poisons and Therapeutic Goods Regulation 2008* (NSW) to sell a Schedule 7 product containing nicotine which is not labelled and packaged as a Schedule 7 dangerous poison. A Schedule 7 dangerous poison must have the strength and quantity of the poison (nicotine) clearly written on the main label of the package and the immediate container/s.

Anyone who sells electronic cigarettes or e-liquids that contain nicotine but are not labelled as such may be prosecuted under both clause 20 and clause 7 of the *Poisons and Therapeutic Goods Regulation 2008* (NSW).

All retailers, suppliers and manufacturers are responsible for ensuring all of their products comply with relevant legislation.

If you see an electronic cigarette or e-liquid that is labelled as containing nicotine, you can report this to the Pharmaceutical Services at NSW Health. Visit [www.health.nsw.gov.au/pharmaceutical](http://www.health.nsw.gov.au/pharmaceutical) for more information.

## The sale of electronic cigarettes which make a therapeutic claim

In Australia, it is illegal to sell anything that makes a therapeutic claim unless the product is listed or registered on the Australian Register of Therapeutic Goods. There are currently no electronic cigarette products, with or without nicotine, on the Australian Register of Therapeutic Goods.

If a claim is made that a product has a therapeutic purpose as defined by the TGA, it must be listed or registered as a 'therapeutic good' with the TGA. A claim such as 'this product will help you to quit or reduce smoking' is considered to be a therapeutic claim. Under the national *Therapeutic Goods Act 1989*, therapeutic claims include claims made on labels, leaflets, websites, promotions, advertisements, posters, verbally or in any other form, whether made directly by the supplier or by quoting testimonials from users. Information about therapeutic goods can be found on the TGA website.

The importation or supply of goods that make a therapeutic claim and that are not registered or listed with the TGA is an offence under both NSW (*Poisons and Therapeutic Goods Act 1966*) and national (*Therapeutic Goods Act 1989*) legislation. The maximum penalty for this offence for importers, manufacturers, suppliers and retailers under national legislation is up to five years imprisonment and/or fines of up to \$440,000.

Information in relation to advertising that makes therapeutic claims should be sought from the TGA. The TGA can be contacted on 1800 020 653 or visit the TGA website.

If you see an electronic cigarette or e-liquid that makes a therapeutic claim, you can report this to Pharmaceutical Services at the NSW Ministry of Health.

## Electronic cigarettes and their relation to NSW tobacco laws

At present, electronic cigarettes do not come under the *Smoke-free Environment Act 2000* (NSW). This is because electronic cigarettes do not emit 'smoke' and are not considered to be 'ignited tobacco products' as defined in section 4 of the *Smoke-free Environment Act*

2000 (NSW). Electronic cigarettes are also considered to fall outside the definition of products resembling tobacco products under section 21 of the *Public Health (Tobacco) Act 2008* (NSW).

The *Public Health (Tobacco) Amendment (E-Cigarettes) Act 2015*, which amends the *Public Health (Tobacco) Act 2008* (the Act), was passed by the NSW Parliament on 25 June 2015. The changes to the Act define e-cigarettes and accessories to be separate from tobacco products. The Act makes many of the provisions that apply to tobacco products also apply to e-cigarettes and e-cigarette accessories.

The changes that commence on 1 September 2015 include:

- It is an offence to sell e-cigarettes and accessories to minors under the age of 18.
- It is an offence for adults to buy e-cigarettes and accessories on behalf of minors.
- It is an offence to operate or use a vending machine that dispenses e-cigarettes on behalf of a minor.

Vending machines are only able to be placed in a bar or gaming machine area of a hotel, club or casino restricted to over 18s. No exemptions for staff amenity areas are allowed.

The operation of e-cigarette vending machines need to be controlled by members of staff, either through activation by remote control or some other means; or the supply of tobacco vending machine tokens.

NSW Police have the power to seize an e-cigarette that is in the possession of a person under the age of 18.

The changes that commence on 1 December 2015 include:

- It will be an offence to use e-cigarettes in cars with children under 16 present.
- New provisions will apply to the display and advertising of e-cigarettes and accessories as follows:

### Display of e-cigarettes and accessories

Retailers will need to ensure that e-cigarettes and accessories cannot be seen by the public from inside or outside the premises. This applies to vending machines in the same fashion as all other storage solutions.

Retailers will be restricted to selling e-cigarettes and accessories from a single point of sale in each retail outlet. This means that these products can only be sold from one cash register at a time in each retail outlet (although it does not mean that the same cash register must be used all the time).

A person will not be able to carry an e-cigarette or accessory in any public place for the purpose of selling these products to persons in that place.

E-cigarettes and accessories will not be able to be sold from any booth, tent or other temporary enclosure (including a market stall or stand), whether or not part of the booth, tent or enclosure is permanent, or from any mobile structure, vehicle or vessel.

### **Advertising and Promotion of E-cigarettes and accessories**

A person will not be able to give out free samples of e-cigarettes and accessories.

A person will not be able to display an e-cigarette advertisement so that it can be seen or heard from a public place. An e-cigarette advertisement means writing or any still or moving picture, sign, symbol or other visual image or audible message that gives publicity to or is intended to promote the purchase of an e-cigarette product. This excludes radio or television broadcast as the current tobacco legislation for these mediums is under national legislation.

### **Sponsorship**

A person will not be able promote or publicise an e-cigarette product or a trademark or brand name of an e-cigarette product through sponsorship, which includes a scholarship, prize, gift or other benefit, and any financial arrangement for the direction, promotion or publicity of e-cigarette products through the medium of sporting, arts, youth, educational or other like activities.

### **Shopper Loyalty Programs**

Retailers will need to ensure that e-cigarettes and accessories are excluded from shopper loyalty programs. This means that under the Act, the following programs will not be permitted:

- Any program under which a gift or other benefit could be obtained by the purchaser of e-cigarettes and accessories (regardless of whether the program extends to the purchase of other products); or

- Any program under which a purchaser of goods or products may be entitled to a gift of e-cigarettes and accessories (regardless of whether the purchaser may choose to accept another type of gift instead).

### **Confectionary or products that resemble toys**

A person will not be able to sell any confectionery or other food or any toy, amusement or other product that resembles an e-cigarette or accessory.

### **Vending Machines**

Only one e-cigarette and accessories vending machine per licensed premises will be allowed. E-cigarette and accessories vending machines do not constitute a “point of sale” under the *Public Health (Tobacco) Act 2008*. Therefore, licensed premises will still be able to sell e-cigarette and accessories from one vending machine and may also sell e-cigarette and accessories from one cash register.

E-cigarette vending machine owners and lessees will need to ensure that:

- E-cigarette and accessories in a vending machine cannot be seen by members of the public; and
- there is no information about or representations of E-cigarette and accessories or packages displayed on the vending machine (except permissible information).

### **Penalties**

The sale of e-cigarettes and accessories to a minor is subject to the same maximum penalty as the sale of a tobacco product to a minor – that is, \$11,000 for an individual or \$55,000 for a corporation and, for repeat offenders, \$55,000 for an individual and \$110,000 for a corporation. Penalties for all other offences relating to e-cigarettes will also be in line with existing penalties for tobacco products. See <http://www.health.nsw.gov.au/tobacco/Factsheets/penalties-and-enforcement-factsheet.pdf> for further information.

## The use of electronic cigarettes in public places

The use of electronic cigarettes, whether they contain nicotine or not, is not against the law under the *Smoke-free Environment Act 2000* (NSW). This means it is not against this law to use them in indoor and outdoor public places where it is against the law to smoke.

This does not prevent individual establishments and workplaces from developing their own policies to ban patrons and staff using electronic cigarettes on their premises.

From 1 December 2015, the offence to use e-cigarettes in cars with children under 16 present will commence. Although this relates to where you can use e-cigarettes, this will come under the *Public Health (Tobacco) Act 2008*.

## Electronic cigarettes and national consumer legislation

Under the national *Competition and Consumer Act 2010* (the Act), suppliers of consumer goods such as electronic cigarettes are responsible for ensuring the products they supply are safe, fit for purpose and comply with all applicable legal requirements. Potential suppliers of electronic cigarettes should ensure that the product, as well as the chemicals that their users are exposed to, are safe before they are marketed.

The Act also requires that all representations or claims made in relation to the supply of consumer goods are truthful.

Further information on Australian Competition and Consumer requirements can be found on the Product Safety Australia Website.