



Tobacco Control
Department of Health and Human Services
GPO Box 125
HOBART TAS 7001
By Email: tobacco.control@dhhs.tas.gov.au

27 January 2017

Dear Sir/Madam,

RE: Regulatory Impact Statement – Proposed New Laws for Personal Vaporisers (Electronic Cigarettes), Tobacco Licensing, and Smoking Bans

Please find enclosed a submission from the Heart Foundation and Cancer Council Tasmania in regard to the impact of the proposed new laws for personal vaporisers (e-cigarettes), tobacco licensing, and smoking bans.

As previously outlined in the [Heart Foundation's](#)¹ and [Cancer Council Tasmania's](#)² responses to the discussion paper on options for a public health response to electronic cigarettes in Tasmania (in July 2015), we called for the Government to ban the promotion and sale of e-cigarettes, until such a time as they have been approved to be safe and effective by the Therapeutic Goods Administration – a view recommended by the National Medical Health and Research Council. We are disappointed that the Government has not made this their preferred option and request that this be reconsidered given the precedent set in Western Australia.

The Heart Foundation and Cancer Council Tasmania:

- 1. support and call for the Government to adopt Option 2 – ban the sale and use of e-cigarettes, and**
- 2. call for e-cigarette licence fees to be set at the same amount as tobacco licence fees, moving towards a full cost recovery model (should Option 2 – ban the sale and use of e-cigarettes not be adopted).**

Please note, the Heart Foundation, Cancer Council Tasmania and Quit Tasmania do not have any tobacco industry links or vested interests, and do not require any comments made in this submission to be confidential.

We thank the Department of Health and Human Services for the opportunity to provide comment on the proposed legislation. Please do not hesitate to contact Graeme Lynch on 6220 2204 or at graeme.lynch@heartfoundation.org.au if you would like to clarify any matters raised in this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Graeme Lynch".

Graeme Lynch
Chief Executive Officer
Heart Foundation

A handwritten signature in black ink, appearing to read "Penny Egan".

Penny Egan
Chief Executive Officer
Cancer Council Tasmania

Submission to the Department of Health and Human Services from the Heart Foundation and Cancer Council Tasmania

Regulatory Impact Statement (RIS) – Proposed New Laws for Personal Vaporisers (Electronic Cigarettes), Tobacco Licensing, and Smoking Bans

Introduction

The Heart Foundation is Australia's leading heart health charity with a purpose to reduce premature death and suffering from heart, stroke and blood vessel disease (cardiovascular disease). In Tasmania, the Heart Foundation has been very active in the area of tobacco control, given that tobacco contributes significantly to the development of cardiovascular diseases.

Cancer Council Tasmania is a not-for-profit organisation working to minimise the incidence and impact of cancer on all Tasmanians through advocacy, raising awareness of cancer prevention and offering support and information for anyone affected by the disease.

Quit Tasmania is managed by Cancer Council Tasmania with funding from the Department of Health and Human Services. Quit Tasmania undertakes social marketing campaigns to educate people on the dangers of smoking and provides information and support to those who want to quit smoking through the Quitline telephone support service.

Background

While it is widely acknowledged that electronic cigarettes are likely to be less dangerous than tobacco products, the health effects of their use remain unknown³. Products inhaled directly to the lung are normally only approved after extensive safety and efficacy evaluation due to the serious issues that can potentially arise with this form of substance delivery⁴. A formal approval process also ensures that consumers are provided with specific guidance on safe and appropriate use⁴. Electronic cigarettes currently on the market in Australia have not gone through these kinds of assessment processes.

Many electronic cigarette products differ in contents and manufacturing processes, so studies on individual varieties cannot be generalised across products^{3,4,5}. The World Health Organization (WHO) and other researchers are concerned about the safety of the chemical combinations used across the variety of products available. These chemical combinations have not been evaluated for either short-term or long-term safety; and manufacturers have not fully disclosed the chemicals used^{4,6}. Recent research (yet to be formally published) gives rise to concerns that electronic cigarettes may cause or worsen acute respiratory diseases among youth. The study found that up to 40 per cent of particles emitted by an electronic cigarette can deposit in the deepest areas of youth's lungs, and that chemicals contained in these particles may irritate airways or worsen pre-existing respiratory conditions such as asthma and bronchitis⁷.

In addition, testing conducted by New South Wales Health found 70% of e-liquids sampled contained high levels of nicotine despite the fact that the retail sale of electronic cigarettes containing nicotine is currently unlawful⁸.

Research also demonstrates that a number of products are unlikely to meet basic consumer product safety standards (including around design features, packaging, accuracy and clarity of labelling and quality of instruction on use)⁹.

Given the tobacco industry's history of deceptively promoting "safer" tobacco products¹⁰, it is important to note that a number of major tobacco companies have recently entered the global electronic cigarette market. This includes Philip Morris with the brand 'Mark10'¹¹;

British American Tobacco with the brand 'Vype'¹²; Lorillard with the brand 'blu eCig'¹³; Reynolds American with the brand 'Vuse'¹⁴; Japan Tobacco International with the brand 'Ploom'¹⁵; and Imperial Tobacco with the brand 'Puritane' (and the purchase of patent rights and subsequent litigation to enforce those rights against multiple product competitors)^{16,17}.

Both nicotine and non-nicotine electronic cigarette products are often promoted to be "safer" than tobacco products as well as fun recreational products that can be used 'anywhere'^{18,19,20}. This is the case, even though the products have not passed through the kinds of formal safety assessment processes that are normally undertaken with lung delivery products.

In light of these issues, non-nicotine electronic cigarettes should be treated in a similar way to nicotine electronic cigarettes and banned from retail sale unless their use has been approved by the Therapeutic Goods Administration (TGA). At the same time, government regulators should be cautious of the possibility that tobacco industry engagement in the electronic cigarette market is part of a broader attempt to re-normalise its community standing so that it can re-establish engagement with policy makers, researchers and other public health stakeholders²¹. Care must be taken so that tobacco industry engagement in the electronic cigarette market in Australia, including under a medicines framework, does not allow the tobacco industry to re-enter the policy space and consumer market in a way that offends Article 5.3 of the WHO Framework Convention on Tobacco Control, which aims to protect public health from the commercial and other vested interests of the tobacco industry²¹.

Further rationale for the Heart Foundation and Cancer Council's call for a ban on the sale and use of e-cigarettes (until such time as they are deemed to be a safe and effective quitting aid by the Therapeutic Goods Administration (TGA)) can be found in our joint position statement on electronic cigarettes, available here:

http://wiki.cancer.org.au/policy/Position_statement_-_Electronic_cigarettes

Preferred Option: Option 2 - Ban the sale and use of e-cigarettes

The Heart Foundation and Cancer Council support Option 2 – that is to ban the sale and use of e-cigarettes in Tasmania until such time as they are deemed to be a safe and effective quitting aid by the TGA. We are disappointed that this is not the Government's preferred option, and request that the Tasmanian Government reconsider, and adopt the precautionary principle in public health (and the advice of the National Health and Medical Research Council²²), to minimise harm until evidence of safety, quality and efficacy can be produced.

We would also like to respond to the claim made in the RIS that states Tasmania would be the only jurisdiction in Australia to introduce such laws. Whilst that statement may be true, the sale of e-cigarettes has been able to be banned in Western Australia (WA) under their existing legislation. In accordance with the *Tobacco Products Control Act 2006* in WA, a person must not sell any food, toy or other product that is not a tobacco product but is designed to resemble a tobacco product or package.

Whilst manufacturers of e-cigarettes are increasingly making products which diverge from the usual appearance of cigarettes, in a WA Supreme Court decision on 10 April 2014, e-cigarettes were found to resemble a tobacco product and the seller of these e-cigarettes was convicted of this offence*. The Seller subsequently made application to the Supreme Court to appeal the decision. The matter was heard by the Court of Appeal of the Supreme Court of WA on 23 November 2015 and the appeal was unanimously dismissed in a decision handed down on 10 March 2016.

* http://ww2.health.wa.gov.au/Articles/A_E/Electronic-cigarettes-in-Western-Australia

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

We call on the government to follow WA's lead in banning the sale of e-cigarettes in Tasmania, and ban their use.

Option 1 – the framework in the RIS

In the event that our preferred option (Option 2) is not adopted, we call for the license fee to sell e-cigarettes to be the same as the license fee to sell tobacco. In the [Heart Foundation and Cancer Council Tasmania's recent submission](#)²³ to the *RIS – Increasing the Tobacco Seller's License Fee*, we reiterated that the Department of Treasury and Finance's *Costing Fees and Charges Guidelines for Use by Agencies* recommend the principle that Government should be operating on a full cost recovery model. We cannot identify any compelling reason why the tobacco licencing or indeed a potential e-cigarette licencing scheme should be treated differently from other licencing schemes that operate on a full cost recovery basis. As noted in the *RIS – Increasing the Tobacco Seller's License Fee*, tobacco retailers are the beneficiaries of a well-regulated tobacco licencing scheme. The government should not be using taxpayers' money to subsidise a licencing scheme which enables them to sell a lethal product, should they choose to do so, nor should taxpayers' money be used to subsidise a licencing scheme to enable the sale of potentially harmful e-cigarettes. The sale of tobacco is not a right and it is reasonable for retailers to carry the cost. The Heart Foundation and Cancer Council Tasmania believe this would be in line with community standards and expectations.

The *RIS – Proposed New Laws for Personal Vaporisers (Electronic Cigarettes), Tobacco Licensing, and Smoking Bans* states that the "costs of regulating e-cigarettes will continue to exceed the income derived from licenses unless there is a substantial increase in uptake of fee-attracting licences by new retailers of e-cigarettes (who do not also sell tobacco)". Increasing the number of fee-attracting licenses should not be a goal of this legislation, as potentially this could lead to increased uptake of a potentially harmful product. The Heart Foundation and Cancer Council Tasmania understand that a full cost recovery model could operate without falling foul of constitutional requirements, and see no reason why this would not be the case for e-cigarette licencing too. Such a model would ensure that the tobacco licence or e-cigarette licence fee is proportionate to the actual cost of administering the scheme, including regulation, enforcement and compliance activities. This would enable the Department to achieve its objective of preventing the supply of tobacco and e-cigarette products to children by targeting licensed sellers.

We also have concerns that the *RIS – Proposed New Laws for Personal Vaporisers (Electronic Cigarettes), Tobacco Licensing, and Smoking Bans* states that "whilst the market for e-cigarettes in Tasmania is relatively small, if left unregulated it has the potential to grow, as it has done in other countries"; yet the RIS also states that "there is no plan to limit the number of licenses issued for e-cigarettes in Tasmania".

Option 3 – do nothing

The Heart Foundation and Cancer Council Tasmania do not support this option.

Option 4 – Regulate retail sale and not smoke-free areas for e-cigarettes

The Heart Foundation and Cancer Council Tasmania do not support this option.

Option 5 – E-cigarette restrictions without a licencing system

The Heart Foundation and Cancer Council Tasmania do not support this option.

References

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