

**Submission
No 52**

E-CIGARETTE REGULATION AND COMPLIANCE IN NEW SOUTH WALES

Organisation: NSW Small Business Commissioner

Date Received: 6 November 2023



E-cigarette regulation and compliance in New South Wales
Legislative Assembly
Committee on Law and Safety

By email: lawsafety@parliament.nsw.gov.au

To whom it may concern

Thank you for the opportunity to provide feedback to the inquiry: *E-cigarette regulation and compliance in NSW*. The NSW Small Business Commission (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

Reports and complaints received by the NSW Small Business Commission (Commission) attest to serious concerns regarding the growth in illicit tobacco and e-cigarette sales. It is alleged the illicit supply of illicit tobacco and e-cigarettes undermines activity and the investment made by governments to reduce smoking and nicotine addiction. Many small businesses which legally supply these products have contacted the Commission to report their concerns that a lack of enforcement and/or targeted regulation has seen the establishment of thriving 'black market' which they are unable to compete with. This is a concern because the illicit supply of tobacco and nicotine e-cigarettes not only reduces tax revenue that could be invested in health and related services, but undermines the efficacy of regulation which intends to ensure responsible supply and minimise harm.

Small businesses selling tobacco and related products that comply with relevant laws and regulation face a serious disadvantage relative to those operations not remitting tax or complying with other laws and regulations. While current regulatory settings establish a framework for the supply of tobacco and nicotine products, suppliers operating within this framework perceive a lack of robust and effective enforcement which threatens their viability. The Commission is aware of specific examples where businesses operating within the law have closed citing 'black market' competition as the key factor behind their decision.

While accepting the paramount importance of achieving public health objectives, the Commission encourages consideration of the role that responsible suppliers can play in improving public health outcomes. This includes greater contemplation of any unintended consequences associated with policy interventions, and attention to the commercial realities of suppliers that operate within the rules.

Effectiveness of the current regulatory framework

The sale and use of illegal tobacco products is regulated at both state and federal levels of government. In NSW the retail of tobacco and e-cigarettes is regulated by NSW Health under the *Public Health (Tobacco) Act 2008* and the *Public Health (Tobacco) Regulation 2022* by a notification-based licensing scheme for tobacco retailers. NSW Health are authorised to carry out random and complaint-based inspections to ensure enforcement of the law.

The NSW Health website states that information collected through the tobacco complaint reporting channels helps to guide the enforcement of tobacco and e-cigarette retailing laws by NSW Health inspectors. Representations to the Commission from small businesses claim that they have lodged

multiple reports to NSW Health's Tobacco Complaint online form and Tobacco information Line with information including location and shopfront of alleged illicit sales. Their representations indicate a perception that reports have not resulted in compliance or enforcement action outcomes.

The NSW Small Business Commissioner (the Commissioner) has also raised concerns with the NSW Department of Health regarding compliance activity and the sale of illegal tobacco and the impact on small business. Enforcement efficacy may in part be hindered by a patchwork of regulators which are concerned with only those aspects of the problem relating to their regulatory objectives.

The Commission is aware that at a federal level, an interagency taskforce, the Illicit Tobacco Taskforce, targets organised crimes operating multimillion dollar crime syndicates, with Police in NSW playing a supporting role.

E-cigarettes as a tobacco alternative

The Commission understands that consumers of traditional smoking products are increasingly looking to nicotine e-cigarettes as a tobacco alternative.

Except for tobacco and nicotine replacement therapies, all nicotine is a Schedule 4 medicine (prescription only) under the Commonwealth *Therapeutic Goods Act 1989*. For e-cigarettes and vaping products to be dispensed in a pharmacy, a prescriber must have either Authorised Prescriber approval or Special Access Scheme Category B approval for individual patients. In NSW, pharmacists must also be registered with NSW Health to be able to supply e-cigarettes and nicotine vaping products.

All e-cigarettes and nicotine vaping products supplied within Australia must comply with *Therapeutic Goods (Standard for Nicotine Vaping Products) (TGO 110) Order 2021* (TGO 110) which regulates the permitted active ingredients, prohibited ingredients, labelling and packaging. Detailed prescriptive labelling requirements are set out in Schedule 2 and require details of the concentration of nicotine contained in the products.

So while traditional tobacco products can be supplied by businesses in accordance with regulatory requirements, these same businesses are unable to supply nicotine e-cigarettes which are perceived as a tobacco alternative.

While the Commission does not advocate for any change to current regulatory requirements in this regard, it encourages policymakers to consider the extent to which this arrangement establishes an incentive to supply of nicotine e-cigarettes on an illegal basis. The effectiveness of current policy settings may be undermined if they are not robustly enforced. Compounding the detrimental impact this may have on public health objectives is that 'black market' suppliers may be less likely to follow other practices of responsible supply (such as sales to minors and the safety of products).

Clarity for suppliers of non-nicotine vapes

Registered tobacco retailers who supply non nicotine e-cigarettes and vapes have been cautioned by NSW Health that products imported or supplied (even with a licence or prescription) may not be correctly labelled as containing nicotine. Where there are reasonable grounds to suspect they contain nicotine, these can be intercepted and tested for nicotine by the Therapeutic Goods Administration (TGA) to assess if they meet the requirements specified in the TGO 110. TGA enforcement action is taken on products that fail to comply. Products not containing nicotine do not need to comply with the requirements.

The Commission is aware that NSW Health has advised retailers that it is their responsibility to ensure any e-cigarette or e-liquid products they sell do not contain nicotine, and suggested products are independently tested by an authorised facility. Retailers were cautioned they cannot rely on the labelling of e-cigarette products to know whether products contain nicotine.

The Commission acknowledges that 'black market' suppliers may knowingly supply mislabelled nicotine vapes or fail to take reasonable actions to ensure vapes are nicotine-free. However, a concern for legitimate suppliers is that the law effectively holds them liable for any failure of the manufacturer to correctly label their products.

The Commission is aware of concerns as to whether it is reasonably practicable to expect retailers to have their products independently tested given the cost of testing may exceed the value of the product and there is little information available as to how retailers can have products tested. Instead, it could be more useful to advise retailers as to the availability of existing information such as the TGA's own testing report found at: <https://www.tga.gov.au/resources/publication/tga-laboratory-testing-reports/testing-nicotine-vaping-products>, and providing guidance as to potential actions they could take to ensure the integrity of their supply chain.

While the Commission accepts there may be a need to provide a clearer statement of expectations and responsibilities, the Commission is aware the advice caused significant angst among legitimate retailers businesses.

More generally, the Commission would welcome exploration of policy approaches which target the source of any mislabelled products rather than retailers who unintentionally resupply mislabelled nicotine vapes. Apart from circumstances where retailers are complicit in the supply of mislabelled vapes, it would be better to work with suppliers to support them to ensure vapes are nicotine-free and safe.

Options to improve e-cigarette regulation and compliance

The Commission observes that overlapping regulatory frameworks and regulatory authorities can complicate effective enforcement of offences under the tobacco and e-cigarette control laws. Enforcement responsibilities span the domains of health, customs, product safety and organised crime. The Commission encourages more coordinated and effective enforcement of existing regulatory requirements and restrictions. This may require additional resourcing but would have the dual benefit of meeting public health objectives and reducing the extent to which small business suppliers of a sanctioned product do not have their livelihoods threatened by an enlarged 'black market'.

Thank you for the opportunity to make a submission. If you require further information, please contact my Executive Officer, Megan Bennett at either [REDACTED] or [REDACTED].

Yours sincerely

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Chris Lamont
Commissioner
NSW Small Business Commission

Date: 06/11/23