

Supplementary File 1: ENDS Regulation in New Zealand

The Smokefree Environments Act 1990 (SFEA), Section 29 (2) of which reads: “No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking)” was initially assumed to cover ENDS products.

Yet despite this assumption, sales of e-liquid containing nicotine occurred and were not prosecuted by the NZ Ministry of Health because of the difficulty in establishing the e-liquids sold contained nicotine manufactured from tobacco, as required by the Act. Online e-liquid purchases (for personal use) from international sites were permitted, with three months’ supply assumed to imply personal use rather than on-selling. Vaping was not illegal in New Zealand and vaping uptake became established, albeit more slowly than in countries without similar legislation.

In 2018, the NZ Ministry of Health prosecuted Philip Morris International (PMI) for advertising iQOS and alleged sales of iQOS breached Section 29(2) of the SFEA. PMI responded by arguing Parliament did not intend the SFEA to apply to products consumed via inhalation. The judge agreed and held that the SFEA was not intended to apply to a product such as HEETS; his decision has subsequently been interpreted to mean that the SFEA does not cover ENDS or e-liquids containing nicotine.

The Ministry of Health has summarised the implications of this decision on their website (<https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>):

“The Medicines Act 1981 and the Smoke-free Environments Act 1990 (SFEA) regulate the sale, advertising and use of vaping products, including nicotine liquids.”

Nicotine is a scheduled substance under the Medicines Act. It is illegal to sell a vaping product (with or without nicotine) while making a therapeutic claim, unless the product has been approved for that purpose by Medsafe.

Vaping products are tobacco products, regulated under the SFEA, if they are manufactured from tobacco.

In *Philip Morris v Ministry of Health* [2018] NZDC 4478, the District Court found that all tobacco products (except types that are chewed or otherwise absorbed through the oral mucosa e.g. snus) may be lawfully imported, sold and distributed under the SFEA. The Crown has not appealed the decision.

An implication of the Court's decision is that the same SFEA regulatory controls apply to smoked tobacco, heated tobacco and vaping products that are manufactured from tobacco. This includes the ban on sales to minors and restrictions on advertising.

Despite assuming the restrictions on advertising that apply to smoked tobacco also apply to heated tobacco and vaping products manufactured from tobacco, it has been difficult to establish whether promoted products are 'manufactured from tobacco'. This ambiguity has seen marketing for vaping products increase since the 2018 judgment; these products are now promoted via mass and social media, and at the point of sale, and use alliances with influencers and events popular with young people.

The NZ Government is currently preparing legislation that will regulate ENDS marketing and sales and hopes to introduce a new Bill in 2019. Information about ENDS has been made available from a new website: "Vaping Facts", developed and co-hosted by the NZ Health Promotion Agency (a crown entity) and the NZ Ministry of Health, and online since mid-2019. The introduction to the site is available here: <https://www.hpa.org.nz/vaping> and the information site is here: <https://www.vapingfacts.health.nz/>.