



Getting the Marketing Mix Right: A Commentary on NZ's Forthcoming Vaping Regulations

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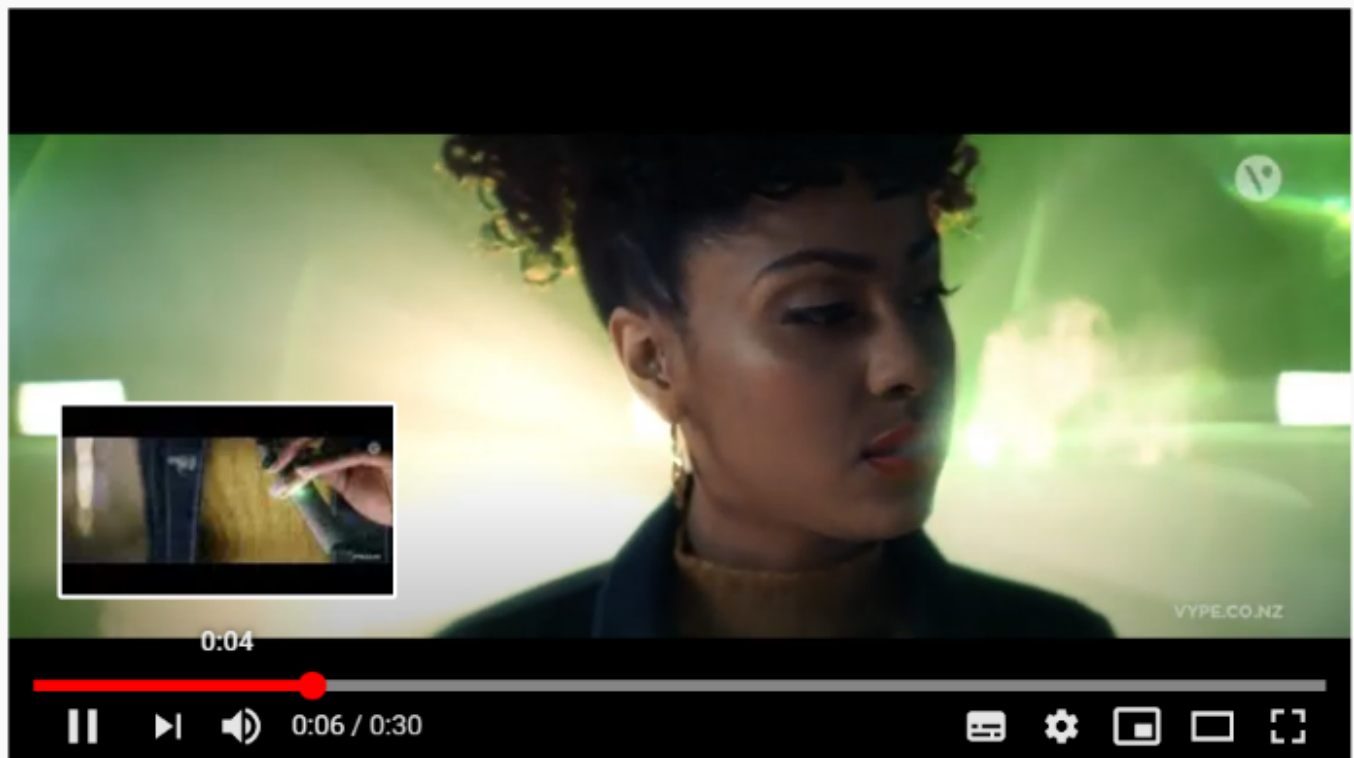
On August 11 2020, the NZ Parliament passed legislation that extends existing regulation of tobacco and herbal smoking products to vaping products (or electronic nicotine delivery systems [ENDS] and heated tobacco products (HTPs). The new Act represents an important step in managing access to ENDS and HTPs, and regulating how these are marketed. In this blog, we summarise some of the Act's key provisions before exploring how the regulations, still to be made available for consultation, could further strengthen the Act's ability to protect young people. We also consider how other countries considering similar legislation could extend the approach taken in NZ.

For several years, public health researchers, parents and school principals have expressed concerns that young people are experimenting with ENDS,^{1,2} attracted by the novel flavours,³⁻⁵ expressive clouds,^{6,7} and slick marketing.^{8,9} However, ENDS proponents argue marketing is necessary to encourage smokers to switch to ENDS, and ensure sustained and complete transition. The new Act attempts to balance these competing imperatives. For example, Section 3A (d) includes among the Act's overall purposes a goal of supporting smokers and encouraging switching from smoking to regulated products that pose fewer risks. Section 22 recognises the need to reduce social approval of smoking, and discourage use of vaping and tobacco products among non-smokers, particularly children and young people, by controlling the sale, advertising and promotion of regulated products.

The Act sets out an important framework, though many details will be finalised in Regulations likely to be available [for public consultation in late 2020 or early 2021, ahead of implementation by August 11, 2021](#). In this blog we explore key provisions within the Act that could help protect young people from ENDS uptake before discussing how the Regulations could put in place additional protective measures.

Important new provisions

The new Act will regulate marketing of regulated products (defined as “a tobacco product, vaping product or herbal smoking product”), from the promotions undertaken to the product flavours able to be sold in specific outlets. More effective control of the highly permissive marketing environment could help reduce ENDS use among non-smokers, particularly young people. From [11 November 2020](#), the aggressive marketing that has targeted young people and positioned ENDS products as [recreational, lifestyle devices](#) will be prohibited. This provision means use of music, art and fashion imagery to connect with young people (e.g., the campaign run for Vype (now Vuse), illustrated below), will no longer be possible.



Charge beyond with the new Vype ePod



Source: <https://www.youtube.com/watch?v=oszeWMxuKuU>

Part 2 (Subpart 2) of the Act prohibits sponsorship, thus ending liaisons with [dating sites](#) and influencers used to reach young people,¹⁰ and prohibiting “brand-stretching” where brand trademarks may be used on unrelated products. Sponsorship of music and sporting events, such as the activities shown below, will no longer be possible; Section 33 prohibits supply of free products (except for specialist vape stores and allowing for in-store sampling at approved premises), and Section 36 prohibits use of reward schemes for regulated products, though allows specialist retailers to use sales promotions, such as competitions and loyalty schemes in relation to vaping products.



Importantly, the Act restricts flavours available from “generic” retailers (e.g., dairies, supermarkets and service stations). The fruit and confectionary flavours popular with children and young people will no longer be available from these outlets, which will be permitted to sell tobacco, menthol and mint flavours. Specialist vape retailers (e.g., R18 vape stores) will continue to be able to sell a more diverse flavour range. However, while this measure will reduce young people’s exposure to fantastical flavours such as [Sicker](#)

Than Most (strawberry, blueberry, tangerine and cream) and Catatonic (a blueberry cheesecake with a cinnamon crumble base), it will not come into effect until 11 August 2021.

Although the Act restricts the e-liquid flavours that may be sold at generic retailers, it allows dairies, petrol stations, and supermarkets to continue selling ENDS devices and to use point of sale (POS) displays featuring vaping products. This provision means children and young people's exposure to these products will be higher than if only R18 outlets could sell these products.

Key areas for regulation: Retailers, Packaging, and Messaging

Specialist Vape Retailers

Part 1 of the Act defines specialist vape retailers, who may allow vaping in their store. To qualify as an approved specialist vape retailer, store owners must ensure their premises are R18 and at least 70% of their sales (or 60%, under special circumstances) must come from the sale of vaping products. The regulations allow for other criteria, which we suggest should include retailer training in smoking cessation or requirements to provide information about smoking cessation support. Smokers switching to vaping benefit from advice about the product(s) they should purchase and strategies to transition from smoking,¹¹⁻¹³ and may be more likely to become smokefree if they receive behavioural support.¹⁴

Countries considering similar legislation could extend New Zealand's approach by requiring all retailers selling ENDS **or tobacco** products to undergo training that equips them to provide brief smoking cessation advice, either verbally, via a leaflet, or by displaying appropriate resources at the POS.¹⁵ Support to smokers hoping to switch to ENDS use could be fostered if specialist vape retailers were required to offer people purchasing ENDS devices information about smoking cessation services. Alternatively, they could be required to display information about where smokers may access these services, which could provide on-going behavioural support, including support to cease nicotine use.

POS Displays

Part 2 of the Act sets out restrictions on the advertising, promotion, sale, and distribution of regulated products. Section 24(g) exempts point of sale displays featuring vaping products from the general advertising prohibition set out in Section 23, but provides for regulations that define these displays. While displaying vaping products may arouse smokers' interest, Section 24(g) presents potential risks to young people. There is strong evidence that the more frequently New Zealand young people (14 to 15 year olds) were exposed to POS displays of tobacco products, the greater their risk of smoking experimentation.¹⁶ An evaluation undertaken following the ban on POS displays in New Zealand found this risk had decreased markedly.¹⁷ These findings suggest exposure to POS displays of vaping products may increase the risk of experimentation with ENDS among young non-smokers, and support regulations that would reduce this risk.

Given the evidence from smoked tobacco products, we remain concerned that the Act allows generic retailers to display vaping products in POS displays. Allowing only specialist vape retailers to use POS displays would align with the R18 sales restriction set out in Section 22 (2c) and provide greater protection to young people who do not smoke.

Countries looking to implement a more protective approach could develop legislation that

differentiated more clearly between retailers. In practice, this approach could restrict POS displays to specialist vape retailers and not allow POS marketing in generic retail outlets. Stronger legislation could also differentiate between products with differing risk profiles, such as heated tobacco products (HTPs), which appear more harmful than vaping products,¹⁸ though could potentially be less harmful than smoked tobacco. For example, laws could allow only specialist vape retailers to sell HTPs.

Packaging

Part 3 of the Act sets out packaging, labelling and constituents requirements; Section 50 provides for standardised packaging while Section 52 provides for regulations that require packages to feature specific information and messages. Standardised packaging has reduced the appeal of smoking to young people;¹⁹ replacing evocative and aspirational brand imagery with a dirty, unappealing colour exposes smoking as a toxic practice.²⁰ The same approach could deter ENDS uptake among non-smokers and avoid innovations currently being promoted.



Source: vuse.co.nz

Standardised packaging would ensure vaping products did not use alluring packaging that could pique non-smokers' interest. It would also prevent product merchandising that has recently emerged, such as "vape skins" (see example right). This merchandising appeals particularly to young people wishing to personalise their device by creating opportunities for them to personalise their device, thus stimulating interest from others and increasing the social cachet ENDS use offers.

As with POS displays, countries looking to implement stronger provisions could differentiate between the packaging generic retailers and specialist vape retailers are required to use.

For example, legislation could require products sold in generic retailers to be presented in standardised packaging. This measure would recognise that non-smokers represent the highest proportion of shoppers frequenting generic retail outlets, yet would enable smokers and ENDS users who visit specialist outlets to view more diverse and visually appealing products. While this approach would require manufacturers wishing to sell via both generic and specialist retailers to prepare products in two sets of packaging, tobacco companies' innovation with packaging suggests this requirement would not be onerous.²¹ Smaller vape product manufacturers may experience a greater burden but could simplify compliance by selling their products via either generic or specialist retailers. Laws that differentiate between nicotine products could require HTPs, like smoked tobacco, to use standardised packaging and prohibit POS displays that feature HTPs.

Messaging

Section 52 of the Act allows for messages and visual elements that communicate “the harmful health, social, cultural or economic effects, or other harmful effects, of using the regulated product”. Developing information messaging for vaping products presents challenges, given people who smoke could reduce the harm they face if they switch completely from smoking to ENDS use.²² Regulators must thus aim to promote switching among smokers while at the same time deterring ENDS uptake among non-smokers. On-pack messaging can play an important role in communicating these dual messages. Our recent work identified warning messages that would reduce ENDS use among non-smokers as well as a different set of messages that could promote uptake among a group of smokers.²³

Where countries have enacted legislation that allows for stronger differentiation between retail outlets, they could require generic outlets to sell vaping products that feature messages designed to prevent uptake among non-smokers. Products sold in specialist outlets could use messages that promote the benefits of switching. This approach would enable manufacturers to have two clear production strategies with products in standardised packaging and featuring uptake deterrence messages prepared for generic stores, and branded products with messages fostering switching for specialist stores.

In summary, New Zealand's new Act covers all regulated products and will provide for much more effective management of the widespread, aggressive marketing that has occurred over the last two years. The Regulations also offer important opportunities to provide further protection, particularly through the introduction of standardised packaging. However, countries planning legislation that regulates vaping products and HTPs could extend New Zealand's approach by introducing measures that differentiate more effectively between the most harmful product – smoked tobacco – and those presenting fewer risks, namely vaping products. More fine-grained approaches could also enable vaping products to be treated differently to heated tobacco products, which studies suggest pose more risks than vaping products.¹⁸ Legislation that recognises retailers will differ in their skills and expertise, and that tailors the marketing permitted accordingly, could also better support people wishing to switch from smoking to ENDS while protecting non-smokers.

Irrespective of the approaches implemented, the considerable uncertainty about how vaping products will impact population health means on-going monitoring of purchase patterns and marketing practices is essential. Regular monitoring will enable nimble regulatory responses to a rapidly evolving marketplace so these manage the fine balance between protecting non-smokers, particularly young people, while supporting switching among smokers.

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