



Parliamentary Budget Office

Legalising e-cigarettes in Victoria

Market size, federal reforms, cost and
potential impacts

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OFFICIAL

Parliamentary Budget Office

We provide independent fiscal, economic and financial advice to all members of the Parliament of Victoria. Our objective is to inform policy development and public debate in parliament and the community.

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Contents

In brief	1
Context	5
Size of the Victorian e-cigarette market	8
Consumption of e-cigarettes	8
Expenditure on e-cigarettes per user	9
Value of the e-cigarette market	10
GST collected on e-cigarettes	10
Australian Government reforms	10
Current and proposed Australian Government regulations	12
Implications for Victoria's ability to legalise nicotine e-cigarettes	13
Cost of regulating e-cigarettes	16
Impacts of legalising e-cigarettes	18
Vaping and smoking rates	18
Black market	20
Attachment A – Assumptions and approach	23
Attachment B – Data sources	24

In brief

E-cigarettes are battery-powered devices that heat liquids, producing a vapor that users inhale – a practice commonly known as ‘vaping’. The sale and use of e-cigarettes containing nicotine is illegal in Australia without a prescription.

According to the Cancer Council Victoria, the percentage of Australians 14 years and over who reported the use of e-cigarettes at least once in the last month increased from 1.4% in 2018 to 8.9% by early 2023. Among adult users, the latest Roy Morgan survey results for September 2023 indicated that 7.9% of Australians adults reported the use of e-cigarettes at least once in the last month.

In this advice, requested by David Limbrick MP, we consider the implications of legalising nicotine e-cigarettes in the state. We focus on the size of the Victorian e-cigarette market, the effects of Australian Government legislative reforms, the cost of regulating e-cigarettes similarly to tobacco, and potential impacts on vaping rates, smoking rates, and the black market.

Size of the Victorian e-cigarette market

We estimate the value of the e-cigarette market in Victoria based on the total number of e-cigarette users and the estimated annual expenditure on e-cigarettes per user. We use:

- survey data from the Cancer Council Victoria and Roy Morgan to estimate the number of Victorians who currently use e-cigarettes
- multiple sources to estimate the annual expenditure on e-cigarettes per person in Victoria.

Figure 1 – Value of the e-cigarette market in Victoria

	Unit	2023
E-cigarette users 14 years and over		
Regular users	Number	345,000
Non-regular users	Number	118,000
All current users	Number	463,000
Annual expenditure per user		
Regular users	\$ per user	790 to 1,320
Non-regular users	\$ per user	300 to 420
Market value		
Upper estimate	\$ million	504.9
Lower estimate	\$ million	307.1

Notes: ‘Current’ users were those who reported the use of an e-cigarette device at least once per month. ‘Regular’ users were those who reported daily or weekly consumption. ‘Non-regular’ users were those who reported monthly but less than weekly consumption. Number of users is rounded to the nearest thousand. Annual expenditure per user is rounded to the nearest \$10. Figure may not sum due to rounding.

Source: Parliamentary Budget Office.

Based on Cancer Council Victoria and Roy Morgan survey data, we estimate that in 2023, there were 463,000 Victorians who used e-cigarettes at least once per month. Of these users, we estimate that:

- 345,000 were regular users (daily or weekly consumption), who each spent between \$790 and \$1,320 on e-cigarettes per year, or around 50 refills per year
- 118,000 were non-regular users (monthly but less than weekly consumption), who each spent between \$300 and \$420 per year on e-cigarettes, reflecting our assumption that non-regular users would purchase around 12 disposable e-cigarettes per year (or one a month on average).

We estimate that the value of the Victorian e-cigarette market in 2023 was between \$307.1 million and \$504.9 million:

- The lower estimate reflects the lower range of annual expenditure per user (\$790 for regular users and \$300 for non-regular users).
- The higher estimate reflects the higher range of annual expenditure per user (\$1,320 for regular users and \$420 for non-regular users).

Australian Government legislation and regulation of e-cigarettes

The use of e-cigarettes containing nicotine is currently illegal without a prescription under Australian and Victorian legislation. Nicotine is a Schedule 4 medicine and prohibited with exceptions for prescriptions, therapeutic purposes, and in tobacco products.

The Australian Government is currently reforming legislation for e-cigarettes, and has recently banned:

- import of all disposable e-cigarettes from 1 January 2024
- import of all non-therapeutic e-cigarettes (disposable and reusable) from 1 March 2024.

By December 2024, the Australian Government plans to ban all e-cigarettes except for approved reusable therapeutic e-cigarettes which will be available through a prescription for smoking cessation or the management of nicotine dependence, where clinically appropriate.

Under section 109 the Australian Constitution, federal law overrides state law where there are inconsistencies between them. Any state law that is inconsistent with federal law would likely be invalid under the Australian Constitution, unless exceptions were made in federal law to allow businesses and consumers operating under state or territory law to supply and access e-cigarettes.

Cost of regulating nicotine e-cigarettes as a legal product

In Victoria, councils are responsible for enforcing the provisions of the *Tobacco Act 1987*, which includes regulating the sale, display and use of tobacco and e-cigarette products.

The Victorian Department of Health provides funding to councils for control and enforcement activities via the Municipal Association of Victoria (MAV) using an activity-based funding model. The MAV disburses funds to councils for specific tobacco and e-cigarette enforcement and education activities.

Figure 2 – Funding provided to councils for tobacco and e-cigarette control activities

\$ million	2018–19	2019–20	2020–21	2021–22	2022–23	2023–24
Funding	1.4	1.4	1.4	1.4	1.5	1.5

Source: Department of Health

Department of Health funding for local councils to undertake tobacco and e-cigarette control activities has remained relatively steady since 2018–19, at around \$1.5 million per year.

To regulate nicotine e-cigarettes as tobacco is, it would not necessarily require a greater overall level of enforcement activity. Council enforcement activities already encompass e-cigarettes, including test purchasing and monitoring the sale of banned products. Any adjustments to funding would be at the discretion of the government of the day, and potentially negotiated with the MAV.

Impacts of legalising nicotine e-cigarettes

Vaping rates

The extent to which legalising nicotine e-cigarettes in Victoria would impact vaping rates is unclear at this stage and may depend on the Australian Government's ability to restrict their supply.

Currently, e-cigarettes remain widely available in retailer stores despite recent Australian Government reforms restricting imports of certain e-cigarette products. In this context, legalising e-cigarettes may be unlikely increase vaping rates as these products are already widely accessible to the public.

However, if the Australian Government's proposals to ban the sale of all e-cigarettes (except for approved reusable therapeutic e-cigarettes) are successful in restricting supply, a subsequent legalisation would reasonably be expected to increase in e-cigarette use within Victoria.

Drawing comparisons from other jurisdictions that legalised a previously prohibited good, increased accessibility of nicotine e-cigarettes through legalisation may lead to increased vaping rates. For example, the cannabis usage rates in the United States and Canada increased post-legalisation from:

- 7% to 17% in the United States between 2013 and 2023
- 22% to 26% in Canada between 2017 and 2023.

Smoking rates

The impact of legalising nicotine e-cigarettes would have on smoking rates is not clear.

Data from the Cancer Council Victoria showed that as vaping rates increased from 1.4% to 8.9% from 2018 to 2023, smoking rates slightly declined from 12.3% to 11.8%. However, it is unclear whether the decline in smoking rates was due to increased e-cigarette use, or from consumers quitting smoking in response to the rise in tobacco prices over the same period.

There is not yet consensus on if and how effective e-cigarettes are as a smoking cessation aid. A 2021 study by the Australian National University concluded that there is not enough evidence to show that nicotine e-cigarettes are effective in helping people to stop smoking. However, a subsequent systematic review conducted by Cochrane in 2024 found evidence that nicotine e-cigarettes are effective in smoking cessation compared to other aids.

E-cigarette and tobacco black market

According to the National Drug Strategy Household Survey 2022–2023, some consumers reported using e-cigarettes because they are cheaper than tobacco products, and some because e-cigarettes are a higher quality product compared to tobacco in that they taste better, are healthier, or are an effective tool in quitting smoking.

The illicit e-cigarette market could potentially be eliminated if e-cigarettes were legalised. However, this would require:

- the Australian Government to allow imports of e-cigarettes into Victoria to compete with the price of goods on the black market which largely comprises cheap untaxed imports
- the Victorian regulations to allow consumers to purchase nicotine e-cigarettes from retail stores, increasing accessibility and deterring consumers from purchasing from the black market
- the variety of e-cigarette products offered in the legal market to be comparable to the black market.

However, the legalisation of e-cigarettes in Victoria would not eliminate the illicit tobacco market. The illicit tobacco market is primarily driven by the price discrepancy between legal and illicit tobacco, stemming from the imposition of tobacco excise duty. As the price of legal tobacco continues to rise, some tobacco users may quit or reduce smoking, substitute to e-cigarettes, or choose to satisfy their demand through the illicit tobacco market where cheaper tobacco products exist.

Context

Request

On 29 June 2023, Mr David Limbrick, Member for the South-Eastern Metropolitan Region, asked the Parliamentary Budget Officer to provide independent advice about the implications of a scenario where the Victorian Government legalised nicotine e-cigarettes in the state, specifically:

- the size of the Victorian e-cigarette market
- the cost of a regulatory system akin to cigarette regulation
- potential second-round effects of e-cigarette regulation
- the impacts of federal government policy on the Victorian vaping market and retailers.

Scope

In this advice, we consider:

- the value of the e-cigarette market in Victoria
- planned Australian Government reform of e-cigarette legislation, and its impact on Victoria's ability to legalise and regulate e-cigarettes
- the cost of regulating e-cigarettes similarly to tobacco in Victoria
- the potential impacts of legalising and regulating e-cigarettes, including effects on smoking and vaping rates, and on the black market.

Limitations

We have relied on publicly available information to derive our estimates of the value of the Victorian e-cigarette market. However, there is significant uncertainty around the value of the e-cigarette market as limited information is available on the price and volume of sales of e-cigarettes in Australia. Current research on e-cigarette use consumption relies heavily on self-reporting through surveys. Determining a standard annual expenditure on e-cigarettes is difficult due to differences in consumption behaviour which would affect the cost per user. Our estimate of the value of the Victorian e-cigarette market may differ from other research and literature.

We prepared this advice on 30 May 2024.

Background

E-cigarettes are battery-powered devices that heat liquids into an aerosol which is inhaled into the lungs. That aerosol is often called 'vapour' and inhaling it from an e-cigarette is known as 'vaping'. When smoking an e-cigarette, the user inhales and exhales the vapour, which can look similar to cigarette smoke. The liquid inside the e-cigarette contains a complex mix of chemicals and may include nicotine and flavouring.

E-cigarettes that contain nicotine simulate smoking without burning any tobacco. The Australian Institute of Health and Welfare (AIHW) reports that in 2023, 73% of Victorian e-cigarette users primarily used nicotine e-cigarettes, of which 13% reported having a prescription.

Prohibition of nicotine e-cigarettes in Australia and Victoria

In Australia, it is illegal to sell, possess or use e-cigarettes that contain nicotine outside of those prescribed by a doctor. The Poisons Standard, which is a national standard prepared by the Therapeutic Goods Administration, lists nicotine in preparation for human use in Schedule 4 (Prescription Only Medicine), except where it occurs in:

- preparations for oromucosal or transdermal administration for human therapeutic use as an aid in withdrawal from tobacco smoking (such as nicotine patches); or
- tobacco prepared and packed for smoking.

In Victoria, the state Poisons Code lists nicotine as a Schedule 4 substance, in line with the national Poisons Standard, with the same exceptions. Nicotine e-cigarettes are subject to the same laws that apply to other Schedule 4 medicines, and it is illegal for:

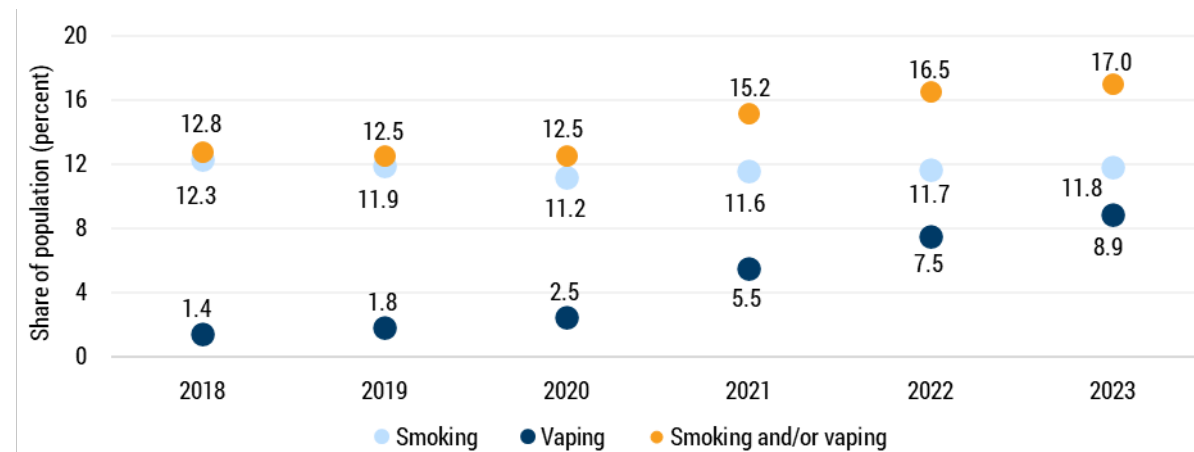
- businesses other than pharmacies to sell nicotine e-cigarettes
- anyone to possess nicotine e-cigarettes unless they have a prescription.

The use of e-cigarettes that do not contain nicotine is currently legal under Australian and Victorian legislation. Since 1 August 2017, the Victorian Government has regulated e-cigarettes and vaping in the same way as tobacco products. Changes made to the *Tobacco Act 1987* harmonised the restrictions placed on tobacco and e-cigarettes with respect to their display, advertising, sale and use. By including vaping within the definition of smoking, smoke-free areas that apply to tobacco use also apply to e-cigarette use, and the restrictions on the sale of tobacco (such as the illegal selling to minors) also apply to e-cigarettes.

Recent rise in e-cigarette use

There has been a significant rise in the reported use of vaping in Australia since 2018.

Figure 3 – Prevalence of current smoking and vaping among Australians 14 years and over



Note: In this survey, the Cancer Council Victoria defined 'current' users as those who reported the use of an e-cigarette device at least once in the last month. 'Current' tobacco smokers were those who now smoke factory-made cigarettes, or in the last month have smoked any roll-your-own cigarettes of tobacco. 'Smoking and/or vaping' accounts for and removes the effects of double-counting on overall prevalence from dual users who currently vape and smoke.

Source: Cancer Council Victoria.

According to Cancer Council Victoria, 11.8% of Australians 14 years and older reported smoking, and 8.9% reported vaping in March 2023. Between 2018 and 2023, vaping grew by an average of 44.8% per year while smoking fell by 0.8% per year on average.

The fastest-growing groups among smokers and vapers were those who:

- only vape — 5.2% in 2023, up from 0.5% in 2018
- dual users (those who both smoke and vape) — 3.7% in 2023, up from 0.9% in 2018.

Rapidly rising vaping rates have more than offset a generally slow decline in smoking. The uptake in e-cigarette use in Australia is primarily driven by a mix of users who:

- have taken up the use of e-cigarettes and are exclusively vaping
- were previously exclusive tobacco smokers but were now dual users.

Size of the Victorian e-cigarette market

In this section

In this section, we estimate the size of the vaping market in Victoria. This involves estimating the:

- total number of Victorians 14 years and over who use e-cigarettes
- average annual expenditure per user on e-cigarettes.

Consumption of e-cigarettes

The latest Roy Morgan survey for September 2023 indicated that 7.9% of adult Australians reported the use of e-cigarettes at least once in the last month. This prevalence differs from the Cancer Council Victoria's reported rate of 8.9% due to:

- the Cancer Council Victoria survey including respondents 14 years and older, while the Roy Morgan survey only including adults 18 years and older
- different reporting periods (Cancer Council Victoria: March 2023, Roy Morgan: September 2023).

For our analysis, we use the Roy Morgan estimates as it is the latest data available. We assume that the rate of vaping amongst Victorian adults would be in line with the national average.

We define 'current' vapers as those who reported the use of e-cigarettes at least once per month. We differentiate current users by:

- regular users, which were those who reported daily or weekly consumption
- non-regular users, which were those who reported monthly but less than weekly consumption.

Figure 4 – Prevalence of current vaping among Victorian adults

Total users	2023
Regular users	5.9%
Non-regular users	2.0%
Current users	7.9%

Source: Parliamentary Budget Office.

In 2023, we estimate that around 7.9% of Victorian adults used e-cigarettes at least once per month. Most were regular users who reported daily or weekly consumption. Regular users accounted for 5.9% of Victoria's adult population or around 75% of all adult users.

Based on national survey data, adult vapers represent around 92% of the e-cigarette market. Although it is illegal for minors to purchase both nicotine and non-nicotine e-cigarettes, consumers between 14 to 17 years of age account for around 8% of the market, indicating that there is some illegal selling of e-cigarette products to minors.

To estimate the total number of Victorians who currently use e-cigarettes, we have included the number of users between 14 to 17 years of age as they represent a material share of the market.

Figure 5 – Estimated number of Victorians 14 years and over who currently vape

Total users	2023
Regular users	345,000
Non-regular users	118,000
Total current users	463,000

Note: Number of users is rounded to the nearest thousand.

Source: Parliamentary Budget Office.

In 2023, we estimate that around 463,000 Victorians were current users who used e-cigarettes at least once per month, with 345,000 regular users.

Expenditure on e-cigarettes per user

Determining a unit price for e-cigarettes is difficult due to:

- there being multiple e-cigarette devices that vapers use (i.e. disposable cartridges, vape pens, customisable vape devices, etc.), each with differing prices
- different nicotine concentrations, which influence the number of times a person would need to purchase a refill; however, the prices of refills are largely driven by the volume of the refill rather than the nicotine concentration levels.

We provide estimates of the annual expenditure on e-cigarettes per user, differentiated by regular and non-regular users.

Figure 6 – Estimated annual expenditure per e-cigarette user in Victoria

\$ per user	2023
Annual expenditure (upper estimates)	
Regular users	1,320
Non-regular users	420
Annual expenditure (lower estimates)	
Regular users	790
Non-regular users	300

Note: Expenditure per year is rounded to the nearest \$10.

Source: Parliamentary Budget Office.

We estimate that:

- regular users spent between \$790 and \$1,320 each on e-cigarettes in 2023. This is based on current prices, consistent with Australian Parliamentary Budget Office estimates, and amounts to around 50 refills per year.

- non-regular users spent between \$300 and \$420 each on e-cigarettes in 2023. This is based on the cost of disposable e-cigarettes being between \$25 and \$35 per device. Given the infrequent purchasing patterns of non-regular e-cigarette users, we assumed these users would only consume disposable e-cigarette products. These users would purchase around 12 disposable e-cigarettes per year (or one per month on average).

Value of the e-cigarette market

There is significant uncertainty around the value of the e-cigarette market, as limited information is available on the price and volume of sales of e-cigarettes in Australia.

We estimated a range for the value of Victoria's e-cigarette market in 2023 based on:

- our estimate that around 463,000 Victorians were current e-cigarette users – comprising 345,000 regular users and 118,000 non-regular users
- the upper and lower estimates of our range estimate for expenditure per user in 2023.

Figure 7 – Estimated value of the e-cigarette market in Victoria

\$ million	2023
Market value (upper estimate)	504.9
Market value (lower estimate)	307.1

Source: Parliamentary Budget Office.

We estimate that the value of the e-cigarette market in Victoria in 2023 was between \$307.1 million and \$504.9 million.

Our lower estimate reflects the lower annual expenditure estimates of \$790 for regular users and \$300 for non-regular users. Whereas our higher estimate reflects the higher annual expenditure estimates of \$1,320 for regular users and \$420 for non-regular users.

GST collected on e-cigarettes

We estimate the amount of GST that would be collected on the sale of e-cigarettes based on the total market value in 2022–23.

We report on a financial year basis here, which aligns with how the Australian Government typically reports their GST revenue. As such, Figure 7 is not directly comparable to Figure 8 as the latter is presented on a financial year basis (2022–23), which includes a portion of e-cigarettes sold in 2022. The e-cigarette usage rate in 2022 was materially lower than in 2023 due to the growth in e-cigarette use over this period.

Figure 8 – GST collected on e-cigarettes

\$ million	2022–23
Upper estimate	138.3

\$ million	2022–23
Lower estimate	84.2

Source: Parliamentary Budget Office.

We estimate that the amount of the GST that would be collected on the sale of e-cigarettes in 2022–23 is between \$84.2 million and \$138.3 million.

Australian Government reforms

In this section

In this section, we consider current and planned Australian Government reforms to e-cigarette legislation, and how these regulations would impact the ability of the state to legalise the sale of e-cigarettes.

Current and proposed Australian Government regulations

In response to the rise of vaping in Australia, in 2023 the Australian Government announced measures to limit the supply of both nicotine and non-nicotine e-cigarette products and restrict consumer access to these products.

Import restrictions

The Australian Government banned imports of all disposable e-cigarettes from 1 January 2024, irrespective of nicotine content or therapeutic claims. This meant that patients could not import disposable e-cigarettes online from overseas, even if they had a prescription. The ban applied to e-cigarettes ordered before 1 January 2024 that had not yet arrived in Australia.

From 1 March 2024, the Australian Government prohibited imports of all non-therapeutic e-cigarettes (disposable and reusable), even if importers ordered those e-cigarettes before 1 March. In addition, the importation of all e-cigarettes under the Personal Importation Scheme was also prohibited from 1 March 2024. As such, patients are no longer able to legally order e-cigarettes directly from overseas, even if they have a prescription.

Reusable e-cigarettes imported into Australia or manufactured in Australia before 1 March 2024 may continue to be lawfully supplied, subject to state or territory law and the following requirements:

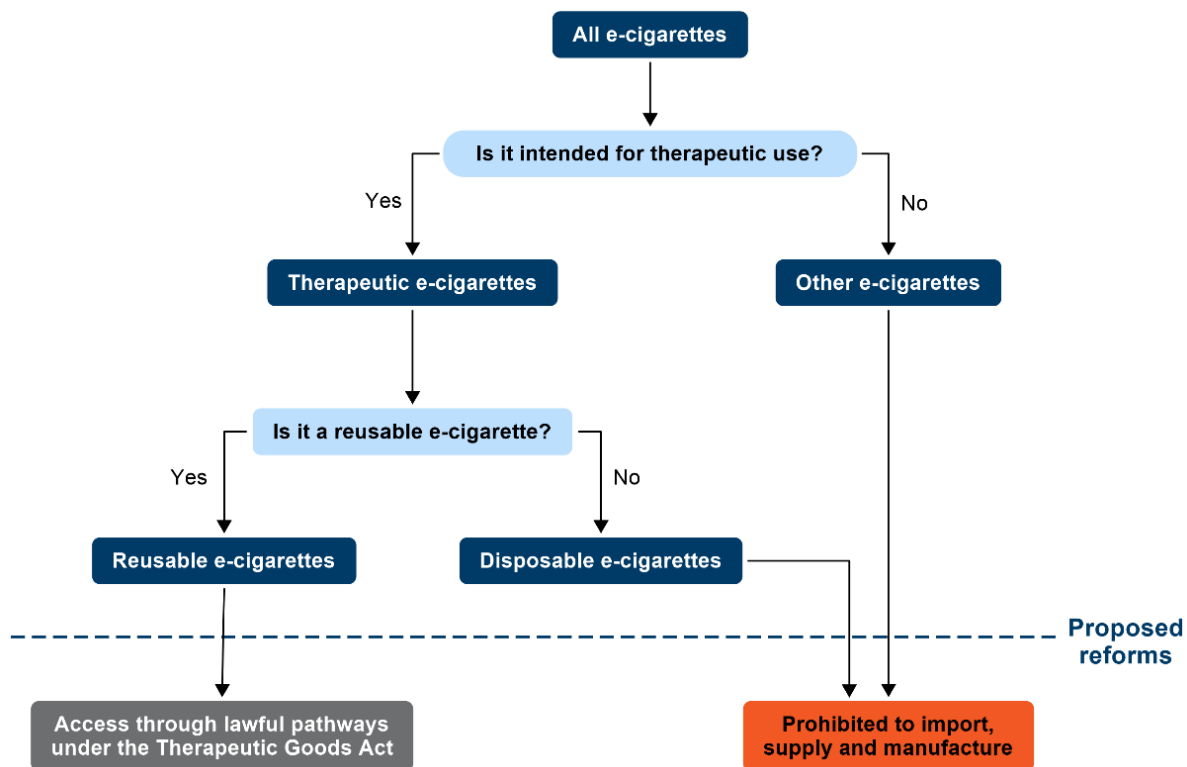
- Reusable e-cigarettes containing nicotine may continue to be lawfully supplied in pharmacies to a patient with a prescription.
- Reusable e-cigarettes that do not contain nicotine may be supplied by retailers generally.

Further planned legislative reform

The Australian Government plans to implement further legislative reform by December 2024. Under these planned changes, consumers will only be able to access reusable therapeutic e-cigarettes through a prescription for smoking cessation or the management of nicotine dependence, where clinically appropriate. All other e-cigarettes (non-therapeutic and disposable e-cigarettes) will effectively be prohibited.

Therapeutic e-cigarettes refer to e-cigarettes that may help some users to quit smoking or manage their nicotine dependence. Therapeutic e-cigarettes are considered unregistered or 'unapproved' therapeutic goods, meaning that the Therapeutic Goods Administration has not evaluated them for quality, safety and efficacy in smoking cessation or managing nicotine dependence.

Figure 9 – Australian Government proposed reforms on e-cigarettes



Source: Therapeutic Goods Administration, Parliamentary Budget Office.

Subject to legislative approval, the Australian Government also plans to ban the domestic manufacture, advertisement, supply, and commercial possession of non-therapeutic and disposable e-cigarettes by mid-2024. It will also be illegal to import, manufacture or supply e-cigarettes that are not registered on the Australian Register of Therapeutic Goods or do not meet the regulatory requirements. Therapeutic e-cigarettes would remain available through pharmacies.

Implications for Victoria's ability to legalise nicotine e-cigarettes

Australian Government legislation generally overrides state legislation. Section 109 of the Australian Constitution states that:

when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

As a result, the Victorian Government's ability to legalise the importation, manufacture, supply and possession of e-cigarettes would be highly dependent on the progress of the Australian Government's legislative reforms. Exceptions would need to be made in Australian Government legislation to allow businesses and consumers operating under state or territory law to supply and access e-cigarettes.

We provide 3 examples in Figure 10 to illustrate how contradictions between federal, and state or territory law have played out in the past in Australia.

Figure 10 – Case studies of conflicts between federal and state or territory law**Case study 1 – Northern Territory's voluntary assisted dying legislation in 1995**

In 1995, the Northern Territory was the first jurisdiction in Australia to introduce voluntary assisted dying, which included an application process to determine mental competence and a terminal illness. To access the scheme, 3 independent medical practitioners needed to assess the case, including a specialist to confirm the terminal illness and a psychiatrist to determine that the patient was not clinically depressed.

In 1997, The Australian Government passed the *Euthanasia Laws Act 1997* (Cth). The legislation removed the Northern Territory Legislative Assembly's power to make any law relating to voluntary assisted dying. The removal of this power also applied to the Australian Capital Territory (ACT) and Norfolk Island.

On 1 December 2022, The Australian Senate passed the *Restoring Territory Rights Act 2022* (Cth) which repealed the 1997 amendment, which allowed the Northern Territory to enact legislation relating to voluntary assisted dying.

Source: Northern Territory Government, Parliamentary Budget Office.

Case study 2 – Invalidation of ACT's same-sex marriage law in 2013

On 22 October 2013, the ACT Legislative Assembly passed the *Marriage Equality (Same Sex) Act 2013* (ACT) which established Australia's first same-sex marriage laws. The legislation provided an avenue for same-sex couples to be married in the ACT where they were not able to do so under the *Marriage Act 1961* (Cth).

At the time, the *Marriage Act 1961* (Cth) (Marriage Act) defined marriage as "the union of a man and a woman to the exclusion of all others".

On 23 October 2013, a day after the passage of the legislation, the Australian Government confirmed that it would challenge the law in the High Court. In court, the ACT Government argued that the territory's same-sex marriage legislation could operate concurrently with federal law.

On 12 December 2013, the High Court ruled that the Marriage Act invalidated the territory's same-sex marriage laws on that basis that:

- an absence of same-sex marriage laws in the Marriage Act did not mean that the territory could concurrently operate laws permitting same-sex marriage; and
- so long as the Marriage Act defined marriage as a union of a man and a woman, the provisions of the ACT legislation that provided for same-sex marriage would remain inoperative.

In 2017, following the Australian Marriage Law Postal Survey, the Australian Government passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) which amended the Marriage Act to legalise same-sex marriage in Australia.

Source: Parliament of Australia and Parliamentary Budget Office.

Case study 3 – Cannabis decriminalisation in the ACT in 2019

In 2019, the ACT decriminalised the personal consumption of cannabis up to a certain prescribed limit through the passage of *The Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019* (ACT). This legislation amended the *Drugs of Dependence Act 1989* (ACT) to remove penalties for

Case study 3 – Cannabis decriminalisation in the ACT in 2019

adults to possess up to 50g of dry cannabis material, 150g of wet material and cultivate up to 2 plants per person of cannabis for personal use in private, with a maximum of 4 plants per household. The passage of this legislation created some uncertainty regarding its validity given that it conflicted with federal law, specifically section 308.1 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) which makes it a criminal offence to possess a controlled drug.

However, section 313.1 of the Criminal Code provides a defence for those in breach of section 308.1 if “a person engages in the conduct in a state or territory and the conduct is justified or excused by or under a law of that state or territory”.

At the time, Attorney-General Christian Porter did not rule out the possibility of the Australian Government legislating to override the ACT law and stated that he expected the Australian Federal Police to continue to enforce federal law. On 23 September 2019, Sarah Chidgey, Deputy Secretary at the Attorney-General's Department agreed that the ACT law could provide a defence under section 308.1 but suggested that the ACT legislation may need to be more explicit in its ‘justification or excuse’. Ultimately, the Australian Government chose not to intervene legislatively or through a High Court challenge.

Source: Melbourne Law School, The Guardian, and Parliamentary Budget Office.

If a state or territory government enacts legislation to implement a regulatory system that legalises the production and supply of e-cigarettes, this would be in direct conflict with current and proposed Australian Government legislation.

Currently, under Reg 5A of the Customs (Prohibited Imports) Regulations 1956, made under the *Customs Act 1901* (Cth), the importation into Australia of vaping goods is prohibited unless the person importing the vaping goods is the holder of a licence and has written permission to import the goods. This means that Customs Officers can seize prohibited imports of e-cigarettes that do not comply with the regulations. However, some exceptions exist under the regulations, particularly where ministerial approval has been granted to a person or a class of persons.

The Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024, which is currently being debated in the Australian Parliament, will amend the *Therapeutic Goods Act 1989* (Cth) to explicitly ban the importation, manufacture, supply or possession of vaping goods in Australia, subject to some exceptions such as through a valid prescription or ministerial approval. It will specifically ban all vaping goods that are not registered on the Australian Register of Therapeutic Goods or do not meet the regulatory requirements. Under the *Customs Act 1901* (Cth), the Therapeutic Goods Administration can seize any imports it assesses as being unlawful under the *Therapeutic Goods Act 1989* (Cth).

Cost of regulating e-cigarettes

In this section

In this section, we consider the cost regulating nicotine e-cigarettes similarly to tobacco, if it were to legalise their sale and use.

The Victorian Government amended the *Tobacco Act 1987* in August 2017 to regulate non-nicotine e-cigarettes and vaping the same way as tobacco and smoking. This means that the restrictions imposed on the supply, advertising and use of tobacco also apply to non-nicotine e-cigarettes. By extension, vaping is prohibited in all designated smoke-free areas. Legalised e-cigarettes containing nicotine could be regulated under the same regime.

Victorian councils are responsible for enforcing the provisions of the *Tobacco Act 1987*. As such, costs related to regulating tobacco and e-cigarette products mainly focus on enforcing compliance with these laws and regulations. The Victorian Government, through the Department of Health, provides funding to the Municipal Association of Victoria (MAV), which then disburses funds to councils for specific enforcement and education activities.

Under the agreement between the Department of Health and the MAV, councils are required to:

- undertake a designated number of education visits to tobacco and e-cigarette retailers, eating and drinking areas and outdoor locations where smoking bans apply
- undertake test purchases in shops that sell tobacco and e-cigarettes, including testing for the illegal selling of these products to minors.
- respond to complaints made by members of the public.

Environmental Health Officers employed by councils administer and enforce provisions that relate to tobacco and e-cigarette retailers, outdoor dining, and smoking restrictions in enclosed workplaces. The Department of Health determines funding using an activity-based formula based on the hourly labour rate of a mid-level Environmental Health Officer. The department is responsible for providing all funding related to these control activities. Each council's service agreement sets out certain targets that they are required to meet to receive the full allocated funding amounts, such as the target number of days of test purchasing.

Figure 11 – Funding provided to councils for tobacco and e-cigarette control activities

\$ million	2018–19	2019–20	2020–21	2021–22	2022–23	2023–24
Funding	1.4	1.4	1.4	1.4	1.5	1.5

Source: Department of Health.

Department of Health funding for local councils to undertake tobacco and e-cigarette control activities has remained relatively constant since 2018–19, and is around \$1.5 million for 2023–24. The MAV reports annually on the control activities undertaken by councils under the program.

To regulate nicotine e-cigarettes as tobacco is, it would not necessarily require a greater overall level of enforcement activity. This is because council enforcement of e-cigarette regulation already involves relevant activities such as test purchasing. As the government currently uses an activity-based funding model to fund councils for control and enforcement activities, any adjustments to funding (including adjustments to the activity-based model) would be at the discretion of the government of the day, and potentially negotiated with the MAV.

Planned Victorian tobacco licensing scheme

Currently, retailers are not required to have a licence to sell cigarettes and tobacco-related products, meaning that council officers are not responsible for enforcing any such licensing scheme. However, on 28 March 2024, Premier Jacinta Allan announced plans to establish a tobacco licensing scheme in the state. The details of the tobacco licensing scheme, however, remain unclear at this point, including who would be responsible for enforcement. Under a proposed model to regulate e-cigarettes in line with tobacco, any such tobacco licensing scheme would need to be expanded to cover e-cigarettes. However, we are unable to form a judgment on likely costs due to a lack of detail of the proposed reforms.

Impacts of legalising e-cigarettes

In this section

In this section, we discuss the potential impacts of legalised and regulated e-cigarettes, including the effects on:

- smoking and vaping rates
- the black market.

Vaping and smoking rates

Vaping rates

The extent to which the legalisation of nicotine e-cigarettes would affect vaping rates in Victoria is unclear at this stage, and ultimately depends on the efficacy of the Australian Government's reforms in restricting their supply:

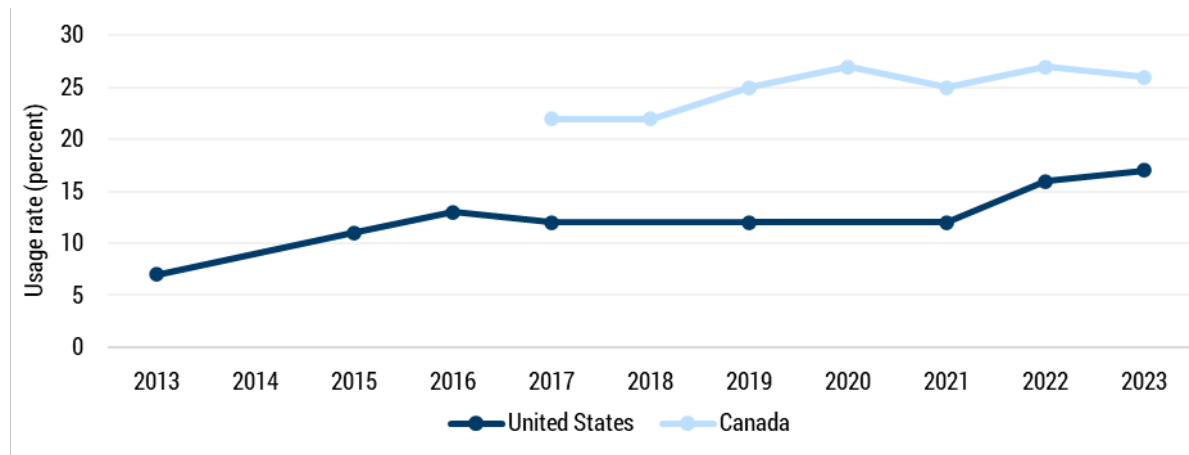
- In the current context, legalising e-cigarettes in the state would unlikely increase demand as these products are already widely accessible to the public despite recent Australian Government reforms.
- If the Australian Government's proposed regulations are successful in restricting the access and availability of e-cigarettes, legalisation would reasonably be expected to result in a larger increase in e-cigarette use.

We can look to examples in other jurisdictions to assess the effects on consumption rates from legalising a previously prohibited good.

The Australian Capital Territory (ACT) passed legislation in 2019 which decriminalised the personal consumption of cannabis (within certain limits) from 31 January 2020, with wastewater analysis showing no significant increase in reported cannabis use over the following year. However, the ACT's example is not directly comparable here because the sale of cannabis products is still prohibited in the territory, indicating that this model more closely resembles a decriminalisation framework rather than legalisation. Furthermore, there are inherent deficiencies in wastewater testing of cannabis use due to inaccuracies in measuring the tetrahydrocannabinol (THC) metabolite in the water.

The examples of Canada and the United States may be more comparable.

Figure 12 – Cannabis usage rates in Canada



Note: Cannabis usage rates in Canada measures the proportion of Canadians 16 years and older who reported using cannabis for non-medical purposes in the past 12 months. Participants in the United States survey were asked the following the question: "Keeping in mind that all of your answers in this survey are confidential, do you, yourself, smoke marijuana?". Gallup, who conducted the United States survey, did not report cannabis usage rates in 2014, 2018 and 2020.

Source: Government of Canada, Gallup.

Canada legalised the use and sale of cannabis on 17 October 2018. Since then, cannabis consumption rates increased from 22% to 26%. Similarly in the United States, reported cannabis usage rates increased across the country following the legalisation of recreational cannabis in multiple states beginning in 2012. Cannabis consumption rates more than doubled from 2013 to 2023, increasing from 7% to 17%.

Smoking rates

There is ongoing investigation into the relationship between e-cigarettes and traditional tobacco cigarette use.

The 2023 Cancer Council Victoria report showed that the prevalence of smoking among the Australian population aged 14 and above slightly declined from 12.3% in 2018 to 11.8% in 2023. Over the same period, the prevalence of vaping amongst this cohort increased from 1.4% to 8.9%.

The extent to which the decline in smoking rates can be attributed to e-cigarette use is indeterminable at this stage. This is because over the same period the price of tobacco in Australia grew significantly due to the increase in tobacco excise. Therefore, it is unclear whether the overall decline in smoking rates was due to the uptake in e-cigarettes or from consumers quitting smoking in reaction to the rise in tobacco prices.

It is still unclear as to whether e-cigarettes are an effective smoking cessation aid; however, the latest research suggests that e-cigarettes may provide some benefits over conventional quitting aids.

In 2021, an Australian National University systematic review of the health impacts of e-cigarette use concluded that:

there is insufficient evidence that nicotine e-cigarettes are efficacious for smoking cessation, compared to non-nicotine e-cigarettes or that non-nicotine e-cigarettes are efficacious for smoking cessation compared to counselling or approved nicotine replacement therapy.

The report stated that one of the primary reasons for reaching this conclusion was that the evidence on the efficacy of nicotine and non-nicotine e-cigarettes for smoking cessation was limited, particularly outside the clinical setting. Furthermore, there were not enough clinical trials conducted, nor were the studies conducted over a long enough period to allow a more robust conclusion.

A 2024 Cochrane systematic review, however, found evidence that nicotine e-cigarettes are effective in smoking cessation compared to other aids, concluding that:

There is high certainty that nicotine [e-cigarettes] increases quit rates compared to nicotine replacement therapy...There is moderate-certainty evidence, limited by imprecision, that nicotine [e-cigarettes] increases quit rates compared to non-nicotine [e-cigarettes]...Due to issues with risk of bias, there is low-certainty evidence that, compared to behavioural support only/no support, quit rates may be higher for participants randomized to nicotine [e-cigarettes].

Black market

Current black market activity

When governments enact laws or regulations that prohibit or restrict certain goods or activities, it creates an opportunity for black market supply. Currently, illicit nicotine e-cigarettes are sold alongside legal non-nicotine e-cigarettes. The Australian Government's regulations will ban all e-cigarettes except through a prescription.

There are currently 2 factors that are driving consumers towards illicit nicotine e-cigarettes: price driven and quality driven substitution.

Price driven substitution

Illicit e-cigarettes are a substitute for legal tobacco products because they contain nicotine and are untaxed. This makes these products cheaper than they would be in a legal and regulated market if they were taxed at the federal level.

As increases in tobacco prices outpace that of e-cigarettes, it will become increasingly attractive for consumers to substitute to illicit nicotine e-cigarettes. However, e-cigarettes are not a perfect substitute because some consumers may have a taste preference for tobacco products or may be uncomfortable or unwilling to engage with an illicit market.

Quality driven substitution

According to the National Drug Strategy Household Survey 2022–2023, some consumers report that they feel e-cigarettes are a superior product to tobacco. These consumers report that e-cigarettes either tastes better, they are less harmful than smoking tobacco, or provide a relatively inexpensive option to quit smoking. According to the Therapeutic Goods Administration, the efficacy of e-cigarettes for smoking cessation is currently mixed and requires further research.

Figure 13 – Reasons for using e-cigarettes amongst current users 14 years and older

Reasons	2022–23 (Percent)
Out of curiosity	38.5

Reasons	2022–23 (Percent)
I think they taste better than regular cigarettes	37.4
To help me quit smoking	31.0
They are cheaper than regular cigarettes	27.0
I think they are less harmful than regular cigarettes	24.6
To try to cut down on the number of cigarettes I smoke/smoked	24.4
To try to stop me going back to smoking regular cigarettes	22.2
They seem more acceptable than regular cigarettes	21.4
You can smoke in places where regular cigarettes are banned	17.8
Other	8.8

Note: In this survey, current user includes people who reported using e-cigarettes daily, weekly, monthly or less than monthly. Respondent could select more than one response.

Source: Australian Institute of Health and Welfare.

Nonetheless, consumers continue to perceive some benefits in increasing their e-cigarette consumption relative to tobacco. These consumers may prefer e-cigarettes to tobacco products if the cost of satisfying their demand was the same for each product or even if e-cigarettes were more expensive. For these consumers, other than by prescription, there is no legal nicotine e-cigarette market to switch to.

Potential impacts on the black market

If e-cigarettes were legalised in Victoria (and assuming the Australian Government chose not to intervene), Victorian retailers would be allowed to sell e-cigarettes and access legitimate supply chains. Under this regulatory system, nicotine e-cigarettes would remain untaxed because state or territory governments cannot impose excise on goods. However, the Australian Government would likely charge GST on e-cigarettes sold in Victoria as this tax can still apply to goods or services that are illegal at the federal level. Nonetheless, it is likely that e-cigarettes, particularly nicotine e-cigarettes, would remain relatively cheaper compared to tobacco despite the imposition of GST.

For the e-cigarette black market to be eliminated, the price discrepancy between the legal and illicit markets would need to be marginal and immaterial to influence consumer behaviour. For this to occur, certain conditions would need to be met within the domestic market:

- The Australian Government would need to allow the importing of e-cigarettes into Victoria from overseas markets. It is likely that the domestic production of e-cigarettes would not be competitive against imports from overseas markets where labour and input costs are considerably lower compared to Australia. The illegal importation of e-cigarettes would undercut the local market by providing cheaper products to consumers. Additionally, illegally imported goods would not attract GST, which would further drive down their price relative to domestic goods.
- The regulations would need to allow consumers to purchase nicotine e-cigarettes from retail stores and tobacconist shops. Increasing their accessibility would deter consumers from substituting to the black market to access e-cigarette products that contain nicotine.

- The product offerings between the legal and illicit markets would need to be comparable so as not to induce substitution across markets. The legal market would need to offer a variety of flavours and device types (disposable and reusable), all of which are currently offered in the illicit market.

Despite potentially eliminating the illicit e-cigarette market, regulating and legalising e-cigarettes would not eliminate the illicit tobacco market. The illicit tobacco market is primarily driven by the price discrepancy between legal and illicit tobacco stemming from the imposition of excise of tobacco, which is subject to indexation and periodic discretionary increases. As prices in the legal tobacco market continue to grow, more smokers are faced with a price they either cannot or will not pay. For some, it will drive them to quit or reduce smoking, but for others, it will push them into the illicit market. Others may choose to substitute completely away from tobacco towards e-cigarettes which are untaxed and provide a relatively cheaper way for consumers to access products that contain nicotine.

Attachment A – Assumptions and approach

Assumptions

When preparing this advice, we made the following assumptions:

1. The annual expenditure per regular user of e-cigarettes would increase in line with Melbourne CPI.
2. Non-regular users would only consume disposable e-cigarette products and would purchase 12 disposable e-cigarettes per year.

Approach

When preparing this advice, we:

- determined the number of people aged 14 years and over who use e-cigarettes in Victoria on a regular and non-regular basis
- estimated a range for the annual average expenditure per regular and non-regular user of e-cigarettes in Victoria
- estimated the lower range of the value of the e-cigarette market in Victoria by applying the estimated number of regular and non-regular users to the respective lower range of annual average expenditure per user
- estimated the upper range of the value of the e-cigarette market in Victoria by applying the estimated number of regular and non-regular users to the respective upper range of annual average expenditure per user.

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