

# Breaking Bad



*A reply to the Regulation Impact  
Statement on banning the importation of  
substances which mimic the effects of  
illicit drugs*

## PREAMBLE

Politicians and public servants, who create black markets in illicit drugs by ignoring available evidence, may soon be held accountable for their culpability in the courts and other forums.

This association and a number of other NGOs, are currently preparing dossiers on persons involved in formulating drug policy; the level of drug usage and general availability of drugs at the time of new policy initiatives; and retrospective updates at yearly intervals of usage and availability. These figures can be relatively easy to compile using official data from police and customs seizures, media reports, drug expert's evaluations at street level and of course, industry sources.

Over the last 100 years, politicians and public servants have tried to regulate illicit drug use in Australia by using only one mechanism. Prohibition.

All the evidence suggests that it has been a monumental failure and that, in fact, prohibition has actually increased illicit drug use through a variety of ways. The least understood of these is that prohibition directly causes an underground pyramid sales system to develop, similar to the one that Amway uses and that Tupperware and a host of extremely successful pyramid sales companies still use. These pyramid selling structures are as extensive and sophisticated as any police or other enforcement agency but operate without a paper trail, through codes of silence and under cover. The more enforcement that is brought to bear on these pyramid selling structures, the better and more lucrative they become.

Police seizure figures over the past decade consistently prove that this is true. The number of people taking illicit drugs is increasing and the amount of drugs circulating in the community is also increasing. These are facts that are well documented and well known by policy makers and regulators and do not need to be documented here.



## THE PROPOSAL TO BAN THE IMPORTATION OF SUBSTANCES THAT MIMIC THE EFFECTS OF ILLICIT DRUGS

*Breaking Bad* is widely regarded as one of the greatest television series of all time. In 2014, *Breaking Bad* entered the Guinness Book of Records as the highest rated show of all time. On one level it is a 'morality play' about a high school chemistry teacher, Walter White, who is diagnosed with inoperable lung cancer. He turns to a life of crime producing methamphetamine from a mobile laboratory in the form of a caravan, in order to ensure his family is looked after when he is gone. On another level, the program offers policy makers a compelling and fascinating account of how the prohibition of illicit drugs makes organized crime rich and casts misery on average families. We would strongly advise policy makers to watch the first series before escalating any prohibition on illicit drugs.

Banning the importation of substances that mimic the effects of illicit drugs, will simply kick-start the large-scale production of these drugs in Australia. The fact that this logical sequence of events seems to have escaped the view of politicians and policy-makers, is a terrible indictment on the lack of creativity and intelligence that Australia brings to bear on drug policy. Banning imports will create thousands of Walter Whites in mobile labs and secret production houses around the country. It will turbo-charge the amount of illegal drugs in the country. Bans on imports do nothing to address the desire and the market for drugs at home. If they can no longer be bought in from overseas, there are tens of thousands of chemistry graduates who have the know-how to produce synthetic cannabinoids and a host of other drugs in their backyards. If we think the country is already awash with illegal drugs, this proposal to ban imports will see Australia looking like Mexico within a few short years. It is the most regressive drug policy ever considered in Australia since the decision to criminalise cannabis in the 1920s. (Between 30-50% of Australians now use cannabis.)



## THE EROS ASSOCIATION: OVERVIEW

The Eros Association is Australia's adults only retail industry association and has been active in putting industry issues to government since 1992. Our members sell many of the products that may be captured by the proposed import ban -mostly through age-restricted premises and including adult stores, tobacconists and herbal retailers. A number of our members also manufacture and/or import these substances.

The Association and its members do not agree with the conclusion in the Regulation Impact Statement that "An import ban will have the highest net benefit of the options canvassed in this RIS."

Eros believes that regulation, testing and control is the best option to achieve the objectives which are to reduce the impact of NPS on public health and make existing criminal laws more effective in responding to this emerging issue.

It is naïve at best to consider that further bans on NPS will achieve these outcomes. They have not in the past and they will not in the future. If the government is serious about the objective of reducing health impacts then other options must be considered.

The reasons for this position are:

- *Prohibition and the wide variety of analogue laws that have been introduced, have not reduced demand or supply of NPS in Australia or internationally.*
- *The negative impacts and dangers of NPS have been overstated with little or no evidence produced.*
- *There has been little research done on the actual health impact of NPS. On this note we are concerned that the Alcohol and Drug sector have not been consulted and are not aware of the RIS.*
- *The market is large and growing in Australia and internationally. A ban on these products will not stop its growth.*
- *Regulation will be far more effective in controlling NPS.*
- *The industry has established a self-regulatory model that has been more effective than any government bans and with government support would be most effective.*
- *Criminalising this market will simply create new market opportunities and new criminal activity.*

- *The proposed regulatory regime invests unworkable powers with the ACBPS to determine if a substance has a legitimate use.*
- *It is unfair to allow the agency that seized the NPS in the first place to then consider whether or not that decision was correct.*
- *The issue of what is or is not a 'legitimate use' is value-laden and therefore should not be the subject of regulatory power but rather should be included in an Act of Parliament.*
- *The New Zealand Psychoactive Substances Act was very effective in reducing the availability and range of NPS.*
- *An import ban will create a large and unregulated local manufacturing industry.*



## HOW TO CREATE A NEW LEGAL HIGH

The Guardian (UK)'s Mike Power wrote an article entitled, 'Drugs Unlimited: How I created my very own legal high' which began like this, "How easy is it to invent and manufacture a recreational drug that does not break any UK drug laws? I just spent the last two months doing exactly that – and the answer might surprise you." Power detailed how he had a new substance made based on some fairly simple steps that would avert the UK legislation. He also notes the tendency for this continuing chemical arms race to throw new, obscure chemicals into the market for NPS. The issue is not that there are new, potentially dangerous drugs continuously piled onto a willing consumer market. Rather, it is that new and potentially dangerous drugs are continuously made to meet an ever-present demand to try and avert the latest round of prohibition legislation that is intended to stop people taking



new, potentially dangerous drugs.

<http://www.theguardian.com/science/2013/oct/31/drugs-legal-high>

## THE MARKET FOR NPS

The size of the Australian market for synthetic cannabinoid-type products alone is estimated at more than \$600 million. If you include other NPS and individual purchases made via the internet, then that figure could be as much as a billion dollars.



Considering the size of the market for synthetic cannabinoid-type products, we can assume that the vast majority of consumers do not suffer any significant negative health effects.

The Eros Association conducted a survey into the consumption and effects of social tonics, many of which contain synthetic cannabinoid-type substances. Our findings show that the vast majority of consumers enjoy these products for positive effects. Of all the respondents to the survey, very few significant negative side effects were reported.<sup>1</sup>

Respondents to the survey also noted that their two biggest concerns with the products are the unknown contents contained and the lack of regulation / pursuit of prohibition by governments.

IN addition:

- 32% of survey respondents purchased a social tonic for relaxation or social reasons, with 20% reporting purchase because of legality,

16% for pain relief and 15% purchased a social tonic as an alternative to another drug such as alcohol.

- Anecdotes collected as part of the survey show that people use social tonics in a wide variety of ways, including to, “Quit harder drugs”, “To quit binge drinking. To have a good time without becoming violent and out of control. They feel safer than the other drugs out there”, “Pain relief for bad back”, “Relaxation, pleasure, intimacy.”
- Survey respondents were most concerned about the effects of prohibitory legislation on the market and the unregulated nature of the market, noting, “That due to constant bans and raids they are getting too strong but there is no alternative” and that it is, “Hard to know what they contain and product's strength as there is very little information on packaging.”

## **CURRENT REGULATION**

NPS refers to many and varied substances that have immeasurable differences in their effect profiles and toxicology. It is impossible to ban such an incoherent set of substances as similarities between them may also represent similarities between benign substances, foodstuffs, industrial chemicals or other naturally occurring chemicals.

**This Association has seen no evidence that recent NPS legislation in the Australian states, has reduced supply or demand.**

There have been very few successful prosecutions and most significant cases are still in the courts and are proving to be a ‘battle of the chemists’.<sup>2</sup>

Many media outlets reported that the interim ban implemented by the NSW Government in 2013 was due to the death of a young Sydney boy. Typical was this report from the ABC. “The New South Wales Government is banning the sale of 18 synthetic drugs for 90 days following the death of a Sydney teenager. Synthetic drugs have come under scrutiny after 17-year-old student Henry Kwan jumped off a balcony while allegedly under the influence of a drug that mimics LSD.”<sup>3</sup> The ban was implemented by the Australian Competition and Consumer Commission. It focused on brand names rather than substances and none of the banned products were related in any way to the substance that Henry Kwan took before his death.

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<sup>2</sup> <http://www.ukdpc.org.uk/wp-content/uploads/Analogue-control-19.06.12.pdf>

<sup>3</sup> <http://www.abc.net.au/news/2013-06-09/nsw-introduces-interim-ban-on-some-synthetic-drugs/4742394>

The list of products banned mostly contained synthetic cannabinoid-type products along with several synthetic cathinone-type products. The substance Henry Kwan took was obtained through black market channels, out of the reach of the ACCC. He took the synthetic phenethylamine 25I-NBOMe, a vastly different substance to any of those listed by the ACCC.

Both Queensland and New South Wales' broad-reaching legislation has been criticised by academics and legal professionals. Registered psychologist and addiction expert, Stephen Bright points out some of the absurd unintended consequences of over-reaching legislation, "Queensland has gone as far as banning any drug or analogue that is structurally similar or has similar pharmacological effects. If you apply this definition, it means that some cheeses and avocado are illegal, which doesn't make sense."<sup>4</sup>



Laws around the country have been unsuccessful in banning NPS. Trying to define whether or not a substance mimics the effects of illicit drugs begs the question of whether or not a certain substance is 'substantially similar' to an illicit substance. Experience has shown that trying to determine this often ends up as a 'battle of experts'.<sup>5</sup>

The Law Society of New South Wales Young Lawyers Criminal Law Committee made very similar points in a submission to the Legislative Assembly Committee on Legal Affairs Inquiry into Law Reform Issues regarding Synthetic Drugs<sup>6</sup>, noting that, "Manufacturers are (and should be) entitled to produce products that are not illegal. The legislation should respond to new SCPs (Synthetic Cannabinoid Products) in a way that is based on evidence and proportionate to the potential harm posed." With relation to the NSW analogue provisions listed above, the Committee also note that, "Without the benefit of expert evidence, the Committee is unable to

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4 "New Drugs: New Problems?" Of Substance, vol 11, no 3 2013, pp 18

6 Submission 05/04/12 – Legislative Assembly Committee on Legal Affairs Inquiry into Law Reform Issues regarding Synthetic Drugs



determine whether the paragraph has the consequences that other SCPs are also prohibited.”

During the second reading of NSW's Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013, the Honorable John Kaye clearly articulated the problems of banning everything broadly, “When one states that everything is banned, except for that which is not banned, one must then create exemptions for sensible things and then one is back to where one started – categorising. In this situation, when one categorises, inevitably it fails because one creates loopholes that inevitably will create opportunities for drug manufacturers to walk straight through.”<sup>7</sup>

What we have seen as a result of legislation is the emergence of a criminal element in the market place. When these substances came onto the market they were only sold from legitimate businesses that regulated who they sold to, paid GST and other taxes. Now criminal organisations are involved and the current proposal promises to cause this criminal involvement to explode.

## **INDUSTRY SELF REGULATION**

The Eros Association is a member-based organisation and represents many retailers and wholesalers of products containing certain synthetic cannabinoid-type substances. We have implemented self-regulatory schemes in order to ensure that products which cause harm are removed from the market immediately. We also consult with law enforcement and health authorities where possible to ensure the regulatory scheme is understood and useful.

As part of our self-regulatory program, we have implemented a secure holographic sticker program where each sticker is individually numbered and details about the product listed in our database. This allows us to react to any health concerns that may arise. In late 2013, there were three hospitalisations that resulted from people consuming a product called 'Marley' that appears to have been poorly manufactured.

Chief Health Officer Dr. Michael Ackland was quoted in a Victorian health warning, “While all three appear to have purchased the product from the same sex shop, I am very concerned that this product is more widespread across Melbourne and the rest of Victoria, and that other hospitals or health professionals may have seen patients with severe drug overdose reactions without realising the link. I strongly urge anyone who has Marley or any synthetic drug in their possession to refrain from using it, as it poses a significant risk to their health and wellbeing. I also call on outlets stocking

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<sup>7</sup> Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013, Second Reading 18/09/13

Marley and any synthetic cannabis products to immediately stop selling them, as these drugs are dangerous to users.”<sup>8</sup>

Although the product was not part of our regulatory program, we were able to issue a warning about the product and get the message out to retailers to remove this product from sale. This process was quick and efficient and ensured that no other consumers were harmed by this product.

We have not had to recall any of the products that are in our program due to adverse health effects but would be able to quickly do so if a situation arose.

Before businesses can become an Eros member they must agree to a Code of Ethics which is included in the appendix to this submission. Retailers of social tonics must also agree to a Code of Practice, which includes a point noting that our members will not sell products deemed to have an unacceptable risk to health, which we determine from evidence-based authoritative bodies, such as academic research showing the harms of a substance or if there have been severe reactions causally linked to the substance. As a result of this our members do not sell products in a powder form.

As an industry body with limited funding, we have a limited capacity to regulate the market, especially when state and federal legislators continuously pursue prohibition. The government effectively hands the market over to criminal operators and gangs when they prohibit substances sold by our members.

### **Option 1: Implement a ban on the importation of substances which mimic the effects of illicit drugs that are otherwise unregulated**

This problem is not overcome through prohibition. Former Australian Federal Police Commissioner, Mick Palmer commented that, “The reality is that, contrary to frequent assertions, drug law enforcement has had little impact on the Australian drug market. This is true in most countries in the world. In Australia the police are better resourced than ever, better trained than ever, more effective than ever and yet their impact on the drug trade, on any objective assessment, has been minimal.”<sup>9</sup>

Ireland implemented similar legislation yet they have not seen the results that the policy sets out to achieve. Although Ireland did manage to stop bricks and mortar retailers from operating, they have shifted the market online and to street-level dealers.<sup>10</sup>

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<sup>8</sup> <http://www.health.vic.gov.au/media/synthetic-drugs-november-2013.htm>

<sup>9</sup> <http://www.smh.com.au/federal-politics/society-and-culture/after-33-years-i-can-no-longer-ignore-the-evidence-on-drugs-20120606-1zwpr.html>

<sup>10</sup> <http://www.irishexaminer.com/ireland/eu-warning-over-relentless-supply-of-synthetic-drugs-232642.html>

In fact, data from Ireland has shown that despite the new legislation, consumption of NPS among the 15-24 demographic is the highest in the EU.<sup>11</sup>

The Beckley Foundation notes, “The primary factor in the emergence of a global market in NPS is the attempt to circumvent United Nations international drug control conventions and national laws through the supply of substances that are neither controlled nor regulated.”<sup>12</sup>

The London School of Economics has just completed perhaps the most thorough account of the war on drugs done to date. The conclusion, backed by five Nobel Prize-winning economists: it has done more harm than good.<sup>13</sup>

### **Local Industry**

The RIS states that this option will be successful due to the lack of domestic production. According to the 2014 Global Synthetic Drugs Assessment Australia is sitting in the production epicentre of NPS.<sup>14</sup> The pre cursor chemicals required to make NPS are readily available in the Asia Pacific region.

Australia has seen a steady increase in local meth labs and it can be expected that this option will create opportunities for a local industry in NPS to emerge.

### **Option 2: Explore a pre-market assessment scheme for psychoactive substances.**

Applying a ban represents a decision to opt for a quick fix, where establishing a program for assessing and regulating the wide range of NPS available now and in the future, is far more likely to achieve the objective of reducing the impact of NPS on public health.

Because the market lacks an acceptance from governments that people are demanding psychoactive substances, it goes largely unregulated. This facilitates a chemical arms race situation, where psychoactive demand is fulfilled partly by substances which do not have adequate toxicity data or longitudinal data to show potential for risks.

While New Zealand has suspended their regulation of NPS it had very positive impacts on the control of NPS. The number of outlets that sold NPS reduced

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<sup>11</sup>      *ibid*

<sup>12</sup>      “Pathway to Reform: The New Zealand Initiative As A Global Model”, An Executive Summary

<sup>13</sup> <http://www.lse.ac.uk/IDEAS/Projects/IDPP/The-Expert-Group-on-the-Economics-of-Drug-Policy.aspx>

<sup>14</sup> The 2014 Global Synthetic Drugs Assessment

[http://www.unodc.org/documents/southeastasiaandpacific//2014/05/gsda/2014\\_Global\\_Synthetic\\_Drugs\\_Assessment\\_embargoed\\_Tokyo\\_web.pdf](http://www.unodc.org/documents/southeastasiaandpacific//2014/05/gsda/2014_Global_Synthetic_Drugs_Assessment_embargoed_Tokyo_web.pdf)

from over 3000 to 200. These outlets were licensed and controlled. The number of products available in New Zealand dropped dramatically from about 200 to just 34. The products that were available were registered and their chemical make -up known.

The National Cannabis Prevention and Information Centre drew an excellent analogy in a piece called, “Synthetic Cannabinoids: The Australian Experience.”

“If companies wish to produce 'legal alternatives' to illicit drugs, under the notion that it is important to regulate the market, thus removing the need for a black market, then it is reasonable to expect that all safety aspects need to be considered. Pharmaceutical companies have to follow rigorous testing procedures and safety regulations, as well as comply with labelling laws in order to have their product reach the shelves. We should expect no less from the companies producing their new range of synthetic compounds.”<sup>15</sup>

The RIS notes that the status quo would continue during a period of transition and regulatory development. Despite the lack of longitudinal and toxicological data, there have been very few hospitalisations from NPS and those NPS which do cause hospitalisations can be easily regulated by current controls, with fair evidence to show that emergency scheduling would be appropriate.

The Eros Association and its members do not want products available that will cause harm or have an unacceptable risk of harm attached to them. Attached is a recent letter from one an Australian business that supplies NPS. It gives a unique and personal perspective on how a legal trader operates.

### **Option 3: Education Campaign**

Education campaigns about health risks can be effective when related to a licit and regulated product such as tobacco. In fact tobacco consumption would appear to be the only drug where use is declining in Australia and this can only be attributed to the educational campaigns (and possibly taxation) that are being wrapped around its sale, by government. This is a no-brainer. Education campaigns can be very effective in reducing harm.

### **Option 4: Continue to progressively ban dangerous substances based on chemical structure.**

The Eros Association is entirely supportive of banning dangerous substances.

The term NPS covers a huge variety of unrelated substances with vastly different effect profiles. The proposal put forward in the RIS is to put blanket-

bans on a wide variety of known and unknown substances, without addressing the actual evidence relating to harms.

If alcohol were to be the yard-stick, then according to the multi-criteria analysis published in The Lancet, it doesn't make sense that most of Australia's popular illicit drugs are illegal.

For the sake of this argument, we will assume that an acceptable level of risk ought to be less than the social and personal harms caused by alcohol

## **MORAL PANIC**

The Eros Association is concerned that the RIS has focused on a very limited number of cases as evidence against NPS and that these have been distorted and exaggerated through popular media outlets.

The RIS notes that, "NPS have received significant media attention in Australia..." and then goes on to note that, "These substances are potentially very dangerous."

The significant media attention that NPS have received has not been indicative of the substances' potential for danger nor their actual harms in the community. The attention is due to a social phenomena known as 'moral panic', which has acted to not only advertise NPS to a wider audience but also prime legislators to pursue prohibition - despite a lack of evidence on this being the best option.

An Australian article entitled, "Kronic Hysteria: Exploring the intersection between Australian synthetic cannabis legislation, the media, and drug-related harm" published in the International Journal on Drug Policy concluded, "Policies implemented within the context of 'moral panic', while well-intended, can result in increased awareness of the banned product and the use of new yet-to-be-scheduled drugs with unknown potential for harm. Consideration of regulatory models should be based on careful examination of the likely intended and unintended consequences. Such deliberation might be limited by the discursive landscape."

The RIS continually makes the point that 'legal highs' may be perceived as safe by the general public and this is misleading. Yet Australia's favourite legal high, alcohol, is not dealt with in the same manner, despite alcohol's harms to society and the individual far outweighing that of all currently illicit drugs - according to a recent multi-criteria analysis of drug harms published in The Lancet.<sup>16</sup>

To move forward, attitudes toward people's preferences for psychoactive substances need to be more consistently understood.



The RIS, uses the term, “legitimate use” to try and create a point of demarcation between one group of psychoactive substances and another. The import ban proposed will have exclusions for food, tobacco, alcohol, therapeutic goods, industrial chemicals, agricultural chemicals and veterinary chemicals.

The Eros Association is not suggesting that alcohol ought to be prohibited because it has been proven to be dangerous and kills many young people each year. We are suggesting that the harms caused by substances ought to be treated equally through their evidence-base, not by arbitrary personal opinions and hysteric media reports. We are also suggesting that people can and do make rational, informed decisions about their psychoactive preference and this ought to be accepted rather than fought by ideologues.

If the stated objective of reducing the impact of NPS on public health is to be achieved, then potentials for harm need to be more consistently understood and pragmatic objectives set. Prohibiting NPS is legally challenging and morally inconsistent. Prohibition more broadly does not reduce the harms of psychoactive substances. Instead it allows a criminal black market a new source of income while criminalising those most at risk of harm from the use of psychoactive substances.

## **RISK AND HARMS**

If the broad objective of the policy is to reduce the impact of NPS on public health then policy makers need to be very careful that they are approaching the issue rationally and without prejudice caused by the moral-panic. There are five points listed in the RIS which require empirical data to be valid:

1. Taking the substance would create a risk of death or serious harm
2. Taking the substance would have a physical or mental effect substantially similar to that caused by taking a listed illicit drug
3. The substance has the capacity to cause physiological dependence
4. The substance is banned as an illicit drug in an Australian State or Territory, or in a foreign country, or
5. The substance poses a substantial risk to the health or safety of the public

We have no measure for what constitutes acceptable risk in society. If alcohol were to be the yard-stick, then according to the multi-criteria analysis published in The Lancet, it doesn't make sense that most of Australia's popular illicit drugs are illegal. For the sake of this argument, we will assume that an acceptable level of risk ought to be less than the social and personal harms caused by alcohol.

With this in mind, point two engages in cyclical reasoning.

**A** = *The effect profile of currently illicit drugs presents an unacceptable risk to society.*

**B** = *The effect profile of a substance substantially similar to an illicit drug presents an unacceptable risk to society.*

**A is true because B is true. B is true because A is true.**

This reasoning is accepted, despite the fact that, “a physical or mental effect substantially similar to a currently illicit drug,” does not necessarily indicate a level of harm that ought to be unacceptable in the community. Point four is another kind of cyclical reasoning that avoids evidence in favour of accepting as a precedent, the prohibitory legislation developed by other policy makers.

This leaves points one, three and five, which are all empirical claims relating to the potential for harm of these substances.

## **CONCLUSION**

Achieving the broad objective of reducing the impact of NPS on public health would be better achieved through a pre-market assessment scheme for psychoactive substances. The main issue noted in the RIS is that it will take significant time and energy to get this process setup. There is no avoiding the time and energy it will require to move away from a reactive prohibition model toward a regulatory approach. The evidence for continued prohibitive measures does not show that harms would be reduced, instead it appears they will be shifted to the black market and to alternative substances, whether novel or traditional.

The lesson presented by the evidence is that demand for psychoactive substances will not disappear through legislation. And the potentials for harm will not be reduced through prohibition.

The Eros Association supports the broad objective of reducing the impact of NPS on public health. We believe that the best way to do this is accept that the demand for psychoactive substances exists and regulate it. We believe that experience shows that increasingly complex controls will only shift the market into shadier territories, further from regulation that could save lives and would mean a healthier, safer market overall. All consumers in our society should be able to access the best possible information they can about the products they may wish to consume. An informed consumer will make the most rational decision for them. Consumers of psychoactive substances deserve this right.

We urge legislators to be pragmatic on this issue. The problems have not been and never will be solved through increasingly complex legislative controls around psychoactive substances - despite the strong rhetoric every

time a new Bill is introduced to address the issue. Pragmatism will mean a lengthier process but it will also stop the chemical arms race from continuing. Considering the global shifts in drug policy discussion, it will also prepare Australia for likely changes to the United Nations drug treaties<sup>17</sup> and make it easier to address other problems around prohibition and the lack of evidence to support its continuation.

## ATTACHMENTS

1. EROS CODE OF PRACTICE
2. EROS CODE OF ETHICS
3. CORRESPONDENCE FROM IMPORTER/PRODUCER OF SOCIAL TONICS

*This warrants and all correspondence from an importer and wholesaler of social tonics is attached to give an idea of the genuine opinions and discussions that take place within the industry on the topic at hand.*

4. MEMORANDUM OF ADVICE: Greg Barns

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<sup>17</sup> <http://idpc.net/policy-advocacy/the-un-general-assembly-special-session-on-drugs-ungass-2016>

# Eros Code of Practice

## *For Retailers of Social Tonics*

Eros members are responsible traders who:

- a) Sell only to over 18s; demand proof of age where necessary; and display appropriate age warnings.
- b) Do not sell social tonics from service stations, convenience stores, supermarkets or from non-fixed premises such as caravans or street carts.
- c) Sell to and supply from signposted, age-restricted, premises only.
- d) Purchase wholesale wherever possible from Eros members and affix an Eros approved product hologram at retail level.
- e) Sell products that have had due diligence done to ensure that they are legal to sell.
- f) Are responsive to Eros directions generally and especially when Eros is advised by police.
- g) Educate their staff about the nature of the products. This includes making available an educational brochure for customers which identifies any adverse health issues; reinforcing a right of refusal to serve any customer that staff may suspect will be adversely affected by a product; and promotion of a help line phone number for customers.
- h) Require all products to contain warning labels similar to alcohol and tobacco warnings and including warnings against driving or operating machinery following use. Contact details of the manufacturer, date of manufacture and contact for the National Poisons Centre should all be attached.
- i) Do not advertise their products in unrestricted or family areas.
- j) Do not sell MDPV-based products ('bath salts') or other products deemed as having an unacceptable risk to health.

# Code of Ethics

## Promoting Professionalism and Responsibility

Eros members are responsible traders who:

1. Only sell media that features consenting adults with no coercion or degrading material. Eros members will not sell any films that will bring the industry into disrepute, such as films featuring bestiality, simulated rape or intimidation.
2. Only market and sell to adults over the age of 18 years, and only allow adults over the age of 18 years to access their business(es) .
3. Work proactively to fight against child pornography. Any requests for such material are to be IMMEDIATELY reported to the Police. Internet access in shops is monitored.
4. Provide safe, clean and healthy premises for staff and customers.
5. Are good business neighbours.
6. Properly and responsibly label websites and products .
7. Proactively lobby for their business' and customer's rights as an adult.
8. Are innovative, and positively promote their businesses.
9. Respect customer's privacy.
10. Do not abuse copyright law.
11. Do not provide false or misleading information or advertising to staff or customers.



Australian NPS Supplier- 14/5/14

I can't believe that this antiquated, out of touch Government thinks it has the right to deny the basic right of choice. Actually, I shouldn't be surprised.

I guess it would be different if it were one of their mates. I see on Foxtel an ad by the QLD Government asking, almost pleading for help on how to pay for their enormous debt. Tony Abbott, the self-confessed joint smoker, is actually reminding everyone daily how bad the financial situation is since Labor's alleged over spending whilst in power. Hasn't anyone told them about either the amount that can be made from hemp products or from the social tonics? Would this not be the ideal way to regain some of that lost income? We could be that country that great country our parents told us about growing up. "The land of opportunity", well that's what I grew up with, but I'm yet to see. All I see is a building industry which is failing more often than not, an automotive Aussie icon leaving the country & with a tobacco giant following not long after this state's law amendments.

I can't for the life of me figure out how making these products illegal helps anyone. Do they seriously think at all? It really doesn't take a genius to figure out what will happen once the black-market gets hold of these products. Not that this market isn't already plagued with its share of rats.

We actually started making our own, partly because we wanted to at least have some control over the ingredients & the strength of the product we would be consuming. Being more like a boutique winery we produce smaller batches than most. Having total control over the recipes we generally produce 3-4 strengths & are able to fine-tune the blends to the individual's tastes, whether that be stronger or weaker.

Our clients aren't the just out of school, looking to experiment with fake LSD. They vary greatly, from factory workers through to miners & solicitors. All of our clients have chosen to use our products of their own free will. After starting XXXXXX Products approximately 2 years ago we still have many of our original clients returning to use our trusted product. Our clients from step 1 learn that we aren't about a fast buck & that we will go to great lengths to ensure that they are able to select the most suitable of our blends.

We would if possible still be using the original additive we chose which is of course now illegal. In the time we have been operating we have seen many different ingredients disappear. Which is simply making the industry less stable & full of risk. Many of our clients realise this & return to us as we have high quality blends, which they know we sample at every stage until it is sold out. With the use of our detailed recipes we are then able to produce exactly the same product. With consistency a priority we work closely with all our clients to ensure that their purchase is exactly what they are looking for. Right from word go our clients are informed as to the safest & best way to use our

product is when burnt on a charcoal disc in a well vented room. A lot of time is spent getting to know our clients & how our product affects them.

Over the time we have been operating our clients have always complimented us on our quality & customer service. We have even had purchases made by others in the industry such as 1 in QLD, not that he introduced himself, & 1 in NSW who at least introduced himself. Not that they can now, as we are no longer dealing with either of those states due to their laws.

Our packaging has always contained warnings of when caution should be shown, the warnings have also contained the poison line contact details. Basically the requirements you list for the holographic stickers is what we have had printed on our labels from the start, before we had even discovered the EROS association holographic program & letters of compliance.

Our clients are also aware that if they run into anything strange whilst consuming our product they have our contact details so we can talk them through what it is that they are feeling. Luckily, due to our quality control & strict screening of their experiences this has never occurred. In fact the only time it has occurred is when we had a change in laws. We sent out samples using a new chemical, we received one email saying that they suffered a nasty headache whilst consuming the new sample blend. We then removed the blend from production, destroying what had already been produced. We simply don't take the risk.

It's really like we work in two different industries. With the Government claiming it to be so addictive & dangerous, it is as though it is another product completely. I have several clients who purchase what I would classify a large amount of this product who travel on regular occasions. They have all been asked by us on more than one occasion if they suffer any withdrawal symptoms, the response is a puzzled no.

To be honest Xxxxxx & I both would agree also, as when the bans came in we were left without our deliveries as customs had detained them. If it were true, wouldn't the hospitals be over run with people withdrawing in such discomfort that they think they are going to die. Surprisingly the only negative reports we ever hear seem to be linked with retail outlets. To be honest, this is the very reason we haven't pursued the many enquiries we have received. Whilst we agree with the industry requiring regulation we will always be hesitant to supply another party to distribute our product as we believe that in the wrong hands some of the stronger products aren't suitable for inexperienced or those with a low tolerance. As we control all the sales we are able to ensure that the client has a full understanding of what they are purchasing & what intensity they should expect. As with everything product knowledge is of the utmost importance. Unfortunately, when those who have know idea try to make the laws they tend to make the out come 10 times more dangerous.

Whilst the knee jerk polities make decisions on products they don't understand

based on false representation from the media, they fail to see the good that this product can bring to the individuals or couples who participate in this product. I have many emails contain detailed accounts of how it has helped clients (Xxxxx included) in giving up smoking, how it has helped with their depression management whilst the mainstream anti-depressant medications don't work or have horrible results. I have other clients who have used our product to assist in rehabilitation of other stronger mainstream illicit drugs being used (Heroin, Speed). Honestly, with a regular client base that was initially spread right across Australia numbering up to 500, along with casual clients.

I feel we have a lot of helpful statistics. Including many positive outcomes in pain relief, depression & the bedroom. We just aren't sure what exactly to forward to you, as many who have commented are now reluctant due to the current industry instability. It seems that the information we would be able to provide would be a waste of time, with many uneducated claiming it's rubbish, it can't be good, it must be made lies. The process will be time consuming but possible as long as it will be used & received by those of less opinion with an open mind. If time is permitting I'm sure I would be able to pursue a few of the reluctant.

I know we should be used to it by now but we have had nothing but bad news after bad news in one form or another for the time we have been operating. I guess we are a little nervous of where the industry is heading. I can't see the future I could 2 years ago.

Since beginning we have had to suffer a lifetime ban from PayPal for advertising on E Bay, a temporary ban due to a couple of experimenting kids playing with fake LSD from a less than reputable dealer, negative media on a couple who was just simply misusing one of these products, countless law changes which only causes anything learned from one product to be simply no longer relevant. Causing major risks to be taken on an unsuspecting market.

We just don't understand why the government can't see that people want to be able to choose. I'm sure you are well aware of the negatives involved with alcohol, tobacco & simply driving a car yet these aren't banned. The financial gain these products would generate is endless.

What hope do we have? With customs playing games by holding deliveries how are we meant to run our business without being disadvantaged? With all the laws changing what hope do we ever have of producing a product to the standard that would be required? It seems to us that once the proposed federal document goes through we will no longer be able to produce the products we do. Opening the Australian market up for all the rubbish that comes with black market drugs. Unknown ingredients being the least of the problems that will emerge.

The government has to be aware that we would be better to produce it all here so that we have regulations that won't cause more risk to the Australian public. Is it not the right of every Australian to have freedom of choice? Why is it not possible to make them aware that they are endangering Australians when they force them to deal with overseas suppliers & scammers over the internet? The unfortunate incident in NSW wouldn't have happened if we had our own regulated industry, just as the couple, one of which died whilst injecting a product that just wasn't designed to be injected. Better education may have stopped that one. What about the fact that we have had 18 different blends using different products within them, 18 months trading, whilst being able to only trade properly without bans & law changes for a total of 12, with a period of 6 months (closer to 8 months) of not being able to trade, does this not count for anything?

Unfortunately our destiny will be decided late this week, early the following with a delivery of a legal substance. However if this one happens to just not be delivered as the last delivery did we will most likely abandon the idea as a bad joke thanks to the constant unfair hurdles that the government continues to put in the way. If you are aware of any permits we should have in place that we don't already know about, that will allow us to import this without the games we experience please let us know. Because it has cost us a fortune in parcels that "just don't get delivered"

**MEMORANDUM OF ADVICE**  
**EROS ASSOCIATION and ATTORNEY GENERAL'S DEPARTMENT**  
**REGULATION IMPACT STATEMENT ON BANNING IMPORTATION OF**  
**NPS**

I am asked to provide comment and advice in relation to the Commonwealth Attorney-General's Department (May 2014) Regulation Impact Statement: Banning the importation of substances which mimic the effects of illicit drugs ('the Statement'). These substances are also known as NPS.

The Wrong Approach

1. At the outset it is important to note that the Statement states the "broad objective of the policy is to reduce the impact of NPS on public health and make existing criminal laws more effective in responding to this emerging issue."
2. This objective will not be met by a policy of prohibition which is contemplated by the Statement.
3. There is strong evidence to suggest that criminalising drugs creates new market opportunities and new criminal activity.
4. In relation to proposed criminalisation of NPS the US experience is singularly instructive.
5. David Michael Jaros, Assistant Professor of Law at the University of Baltimore Law School in a paper, DM Jaros Perfecting Criminal Markets (2012) 112 Columbia Law Review 1947, argues that demand is created for criminal markets when legislators prohibit or ban goods or activities such as drugs, or unauthorised border entry in countries.



6. Jaros writes, at 1955;

“Second-order crimes are the product of two unfortunate consequences of criminalizing first-order antisocial conduct. First, the criminalization of a first-order activity can create demand for new types of goods and services that impose their own costs on society. For example, by criminalizing unauthorized entry across U.S. borders, Congress created demand for human smuggling services. Second, criminalization can create the opportunity for second-order crimes by pushing the undesirable activity underground, where the government is unable to use regulatory tools that might prevent the crime from occurring. The combination of these two effects serves to multiply the growth of the criminal law as the symptoms of criminalization lead to more criminalization—expanding criminal codes, contributing to the complexity of sentencing guide lines, and, perversely, adding to the enforcement costs associated with preventing the initial first-order crime.”

7. The Statement fails to deal with first –order and second –order crimes that would emerge from prohibition of NPS. There is no recognition and analysis of the cost of creating second-order crime that comes with prohibiting NPS.

8. Jaros observes, at 1975:

“An appreciation of the relationship between first- and second-order crimes is not only essential to the formation of sound criminal justice policy, but it may also help explain the rapid expansion of the criminal code and the growing complexity of federal and state sentencing guidelines. Moreover, the recognition that criminalization has the capacity to actually improve related criminal markets may promote a normative shift in the perception of regulatory alternatives to criminalization.”

9. While this statement is made in the US context it is directly applicable to Australia.
10. The proposal to criminalise NPS importation, sale and possession has attached to it many costs and the major one is improving criminal markets for trafficking and possession of illegal products. Such criminal activity brings with it the apparatus and tools of firearms, fraud, violence and money laundering.
11. The Statement fails to establish a cost-benefit framework despite the value in doing so. There is simply no serious consideration of alternatives to banning NPS such as harm reduction strategies.
12. Yet as Jaros observes, at 1989;

“Focusing on the ways in which the criminalization of one behaviour can facilitate other criminal activity need not undermine the expressive value of criminalizing conduct. The fact that an effort to reduce the harm caused by criminal conduct unintentionally boosts related criminal markets need not dilute the law's moral message. However, it does suggest that alternative policy efforts to reduce harm should similarly be interpreted as not condoning the unlawful activity. If society were to recognize the ways in which criminalization facilitates other criminal activity, creative harm-reduction strategies might come to entail fewer normative costs.”

#### Specific Concerns

13. The Statement proposes a regulatory regime in which there is a judgment made as to ‘legitimate’ and ‘illegitimate’ uses of NPS. It proposes investing powers in Australian Customs and Border Protection Service Officers (ACBPS) to determine if a substance has a ‘legitimate’ use.

14. The ACBPS would also act as ‘judge and juror’ by determining appeals from an importer who believes the NPS should not have been seized.
15. In relation to legitimacy the Statement proposes a power to exclude legitimate uses by regulation.
16. Stephen Morse observes that “definitions that define a substance as a drug in terms of its intended use rather than in terms of its inherent properties obscure important questions of legitimate use” Morse, S. J. (2012). Legal Regulation of Addictive Substances and Addiction in A. Carter, W. Hall & J. Illes (Eds.), *Addiction Neuroethics: The Ethics of Addiction Neuroscience Research and Treatment* p263.
17. The issue of what is or is not a legitimate use is value-laden and therefore should not be the subject of regulation making power, but rather should be included in an Act of Parliament.
18. On the question of the power of the ACBPS it is unfair to allow the agency that seized the NPS in the first place to then consider whether or not that decision was correct. In the same way that police investigating actions of police is inherently unfair and leads to outcomes that clearly favour police versus a citizen who makes a complaint, it is clearly unsatisfactory to allow ACBPS to have a similar power.
19. The impacts of an import ban are grossly understated in the Statement. As noted above there is no cost-benefit analysis examining the second-order criminal activity that will emerge quickly to take advantage of the policy of prohibition.

20. In relation to the criminal justice system and the impact of the proposed ban the Statement appears extraordinarily naïve.

21. Firstly, the impacts of criminal law enforcement should not, the Statement argues, 'be overstated.' The primary focus is not on criminal offences. The experience of criminal defence lawyers acting for individuals currently being prosecuted, or where prosecutions are contemplated, in relation to so called 'legal highs' is that the focus of law enforcement agencies is certainly on prosecution. It has been police lobbying in various jurisdictions in Australia that has led to the flurry of legislative activity to criminalise certain substances.

22. Finally the Statement opines that an import ban on NPS without a legitimate use is a small but important step in reducing the number of people harmed directly or indirectly. One is tempted to say of this opinion that it appears the Commonwealth AG's Department has taken no notice of the monumental failure of the 40 odd year War on Drugs to stem the flow of harm from illicit drugs.

**Greg Barns**

**Salamanca Chambers**

**Hobart**

**16 May 2014**