



Government of South Australia

NATIONAL COMPETITION POLICY REVIEW

PROPOSAL TO LICENCE HYDROPONIC EQUIPMENT RETAILERS

REPORT OF THE REVIEW PANEL

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January 2002

NCP REVIEW HYDROPONIC EQUIPMENT RETAILER LICENSING PROPOSAL

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EXECUTIVE SUMMARY

On 25 July 2001, the South Australian Government announced changes to the drug laws aimed at reducing commercial cultivation of cannabis in South Australia. Included in the announcement was a review to consider licensing hydroponic equipment retailers.

A Review Panel was established and charged with evaluating the licensing proposal, and reporting on appropriate arrangements for these retailers, if any. The review was conducted in accordance with National Competition Policy requirements. An Issues Paper on the proposal was produced and was the subject of public consultation. Twenty-nine submissions were received. This report is the result of the Review Panel's deliberations.

The hydroponics industry is the fastest growing sector of the horticultural industry. Over the past ten years, the Australian hydroponics industry has developed from a small, alternative industry into an important contributor to the horticultural sector. In 2001, hydroponic production was valued at \$400 million at the farm gate. In South Australia, the industry is poised for further expansion, including into international markets. The hydroponic equipment industry supports this production. In South Australia, annual turnover generated by hydroponic specialist retailers is estimated at \$52.4 million annually.

While a significant proportion of growth in the hydroponics industry can be attributed to legitimate commercial or small-scale production of fruit, vegetables and flowers, South Australian Police (SAPOL) believe that the increase in the number of specialist hydroponic retailers in the last decade is a reaction to the current legislation which allows the offence of producing cannabis to be expiated if the number of plants is under a certain level and if they are being grown for personal use (as a result of the changes announced on 25 July 2001, the plant limit is currently one). SAPOL considers the expiation system has assisted the development of growing syndicates operated by organised crime and the proliferation of hydroponically cultivated cannabis.

The proposal in the Issues Paper was based on a SAPOL suggestion and SAPOL intelligence about the extent of criminal activity in specialist hydroponics retailers. The proposal envisaged licensing hydroponic retailers who were of good repute, assessed by whether they passed a police integrity test (no criminal convictions, not having been issued with an expiation notice, and no associations with known criminals); and requiring purchasers to fill out an end use certificate and provide proof of identity. The proposal was aimed at specialist hydroponic retailers, as this was the area where SAPOL intelligence showed that both retailers and customers have connections with cannabis trade.

The objective of the proposal, as stated in the Issues Paper, was to reduce or eliminate the production of cannabis on a commercial basis. The Review Panel concludes that this objective is based on a number of assumptions, and is too broad to be achieved by licensing hydroponic retailers. The Review Panel recommends an alternative objective, against which the proposal can be properly evaluated, which is to remove from or prevent from entering into the hydroponic equipment retail industry persons who are associated with cannabis trade.

A scheme to licence hydroponic equipment retailers raises the question of what is "hydroponic equipment"? A wide range of items are used in hydroponics, including fertilisers, growing media, pots, plastic pipes, heaters, fans, electric timers, pumps and lights. These items are available from hardware, gardening, lighting, aquarium, pool, pump, irrigation and other shops. For the purposes of the licensing proposal, the Issues Paper defined hydroponic equipment as pumps, electric lights and ballast boxes. These items were chosen because they were considered to be essential for growing cannabis indoors and would restrict the impact of the licensing proposal to the smallest

range of retailers possible. The Review Panel considered whether these items were appropriate, whether the list of items should be extended, what other items were appropriate, and whether another approach, such as a definition based on the primary intention of the business, would be more effective.

For the purposes of this review, the Review Panel recommends the following definition, which focuses on electrical lighting items, as these are necessary for indoor growing and are essential stock for specialist hydroponic retailers.

Hydroponic equipment is any two or more of:

- Electric lights of 250 watts or more;
- Fluorescent lights which combine the red and blue part of the light spectrum in a way which enhances plant growth, also called grolux lamps;
- Units comprising high intensity discharge lamps, control gear, ballasts, lamp mounts and reflectors, also called ballast boxes.

The idea of specifying two or more of the items is to restrict the application of the definition to the smallest range of retailers possible. Nevertheless, in addition to specialist hydroponic shops, aquarium shops and lighting shops are likely to be caught by the definition. This could be addressed by an exemption mechanism.

The Review Panel is of the view that the scheme would require the owner, operator or employee of, or director of a company which owns, a business selling hydroponic equipment, to be licensed. The scheme is not intended to apply to manufacturers or wholesalers. Employees must be included for the scheme to be effective. If not, a person with no convictions could be set up as an owner or director, and people with criminal records could be employed in the business.

The Review Panel recommends that good repute, in the case of specialist hydroponic retailers, should be assessed on the basis of lack of convictions for offences for possession, production or sale of drugs of dependence and prohibited substances under the Controlled Substances Act, committed in the previous five years.

The licensing proposal in the Issues Paper was given extensive consideration in light of the submissions and other information received. The Review Panel concludes that although it would achieve the alternative objective of removing persons with connections with cannabis trade from the hydroponics retail industry, the costs would exceed the benefits. Such costs include administrative burdens for both business and government; reduction in hydroponic equipment sales; reduction of the number of specialist hydroponic equipment suppliers; a detrimental effect on employment; and the possibility of increased crime resulting from purchaser ID information being illegally accessed and used to find cannabis crops to steal. The licensing proposal is not recommended by the Review Panel.

Four alternative regulatory arrangements were considered - two involving industry participation (self-regulation by code of practice; and co-regulation using the example of retail industry association membership as a requirement to authorise manufacturers and wholesalers to sell hydroponic equipment); business notification and negative licensing. Based on the evidence available to it, the Review Panel concludes:

- a voluntary code of practice would not achieve the alternative objective of removing persons with connections with cannabis trade from the hydroponics retail industry because it could

not ensure the cooperation of the very people it was trying to control. Such a scheme is not recommended by the Review Panel.

- the form of co-regulation considered was a retail industry association operated scheme requiring a retailer to be a member in order to purchase hydroponic equipment, backed up by legislation making it an offence for a wholesaler or manufacturer to sell to a retailer who was not an approved member (approved on the basis of no drug offence convictions). This would not achieve the alternative objective unless it was a national scheme, as retailers would be able to obtain their hydroponic equipment from interstate, making membership of the association irrelevant. Such a scheme needs further consideration by industry, and is not recommended by the Review Panel at this time.
- a business notification scheme (without end use certificate) would achieve the alternative objective; and if the scheme could be restricted to specialist hydroponic retailers only, the benefits would outweigh the costs. Even if this was the case, this scheme is not preferred by the Review Panel because the net public benefit produced would be less than with a negative licensing scheme. It is therefore not recommended.
- a negative licensing scheme (without end use certificate) would achieve the alternative objective, and the benefits would outweigh the costs. Of all the schemes that meet the alternative objective, negative licensing would have the least impact on the industry as a whole and would produce the greatest net public benefit. This scheme is therefore recommended by the Review Panel

The Review Panel's final recommendation relates to its concern that the recent and proposed amendments, which were announced at the same time as the licensing proposal, may impact on the proposal and make it unnecessary. Hydroponic retail industry sources state that the reduction of the number of expiable plants from ten to three in 1999 had a dramatic effect on the industry. If this is so, the recent changes to the legislation which reduced the number of expiable plants from three to one, and the Bill to remove hydroponically grown cannabis from the expiation scheme are likely to have similar impacts on the industry.

The Review Panel recommends delaying the introduction of the recommended negative licensing scheme for specialist hydroponic retailers until the effects of the legislative amendments on these retailers and the broader hydroponic industry can be assessed.

The Review Panel is concerned that it has not been able to consider the broader issue of reducing the commercial production of cannabis. Its terms of reference are confined to evaluating the licensing scheme and reporting on arrangements for hydroponic equipment retailers. Nevertheless, the Review Panel suggests that the Government establish a body to conduct a broad investigation into this issue, particularly ways to reduce demand, and the development of nationally consistent or supportive strategies.

1 INTRODUCTION

1.1 Background

On 25 July 2001, the Government announced changes to the cannabis laws to reduce the number of cannabis plants which can be grown under the expiation scheme from three to one, and to remove hydroponically cultivated cannabis from the expiation scheme altogether. A person growing cannabis using hydroponics or growing more than one cannabis plant outdoors will now face prosecution. At the same time, the Government announced a review to consider licensing specialist hydroponic retailers.

The need for the legislative amendments was attributed to South Australia having become a major supplier of cannabis to interstate markets, where it is used as a currency for harder drugs which are transported back to SA, and to a strong move to growing cannabis hydroponically. Hydroponic growing allows for the production of up to four crops a year. SAPOL reports that assaults, violence and home invasions associated with hydroponic crops have increased.

The number of specialist hydroponic retailers increased from ten in 1992 to approximately 90 in 2000 - the highest number per head of population in the country, and SAPOL advised the Government that about 75 per cent of specialist hydroponic retailers have connections with cannabis trade.

It was thought that a licensing system for specialist hydroponic retailers aimed at eliminating those in the industry who are associated with cannabis trade may reduce the quantity of cannabis grown hydroponically. A Review Panel was appointed by the Government and charged with evaluating the proposed licensing system and reporting on appropriate arrangements, if any, for these retailers.

The purpose of this report is to explore the costs and benefits of such a licensing scheme and of any alternative controls; to assess whether there is a net public benefit in restricting specialist hydroponic retailers; and to make recommendations to the Premier for his consideration.

It is not part of the scope of the review to examine other mechanisms for reducing the commercial production of cannabis.

1.2 Requirement For Review

The proposal is required to be reviewed as one of the Government's National Competition Policy obligations.

On 11 April 1995 the Council of Australian Governments entered into three inter-governmental agreements to facilitate the implementation of national competition policy objectives.

One of these agreements was the Competition Principles Agreement ("the Agreement"). As part of its obligations under the Agreement, State and Territory governments gave an undertaking to ensure that new legislation should not restrict competition unless –

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition.

The procedure for reviewing legislation is contained in clause 5(9) of the Agreement and requires the Review Panel to -

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result including non-legislative approaches.

Many laws restrict competition and these restrictions may be essential in order to achieve a significant community benefit. However, the Agreement requires that all laws restricting competition should be identified, so that those community benefits and the necessity for the restriction can be reviewed in an objective fashion.

Where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective, the following matters should be taken into account where relevant:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

These criteria contain a clear expectation that more than strict economic criteria will be considered.

1.3 Types of restriction on competition

Restrictions generally fall into three types:

- conduct requirements (carry out business in certain ways)
- barriers to entry (licensing, good conduct)
- discrimination between market participants

1.4 Classification of Restrictions

Restrictions on competition will not be of uniform effect, with varying degrees of impact on competition inherent in each particular restriction. The Review Panel has adopted a categorisation of serious, intermediate or trivial.

A ‘**trivial**’ restriction on competition imposes, at most, an insignificant cost upon business. It has no practical adverse impact on relevant markets.

An **‘intermediate’** restriction upon competition imposes a cost upon the competitive process that is, at least, more than nominal or trivial. It has a measurable effect such that it is capable of altering, in an identifiable way, the dynamic characteristics of a market, or the level of economic activity in a market.

A **‘serious’** restriction upon competition imposes high costs on market participants and/or on consumers.

1.5 Independent review and public consultation

The review was conducted by a review panel consisting of representatives from the following organisations –

- Department of the Premier and Cabinet (expertise in competition policy issues)
- The Australian Retailers Association (operator of a small business, not a hydroponic equipment retailer due to the potential for a conflict of interest)
- Department of Human Services (pharmaceuticals section expertise in controlled substances)
- Department of Primary Industries and Resources (horticulture area with expertise in commercial crops including those hydroponically grown).

The Review Panel is guided by terms of reference reproduced at Appendix 1.

An Issues Paper was prepared on the proposal and public submissions on the Issues Paper were invited through advertisements in The Advertiser on 10 and 17 November 2001, with a closing date of 21 December 2001. Letters inviting comments on the Issues Paper were sent to 300 hydroponic equipment, pump and hardware shops, and industry groups at the end of October (see Appendix 2). A consultant was engaged to operate a project information phone-line (including toll free access) to receive oral submissions. Late submissions were accepted and considered.

In total, twenty-nine oral and written submissions were made (see Appendix 3). Eight responses to the Government’s July announcement of the proposal were also passed on to the Review Panel and were considered. A summary of the submission responses to the Issues Paper questions is attached at Appendix 5.

The Review Panel wishes to thank all those who made submissions for their time and for the information they provided.

2 THE INDUSTRY AND CURRENT LEGISLATION

2.1 Description of the Hydroponics Industry

Hydroponics is a branch of horticulture, where plants are grown in a medium to which nutrients are added. Heat and light may also be applied. Hydroponics is sometimes called accelerated plant growth because heat, light, air and nutrients are applied in a controlled way to promote quicker growth and higher yields than can be achieved in open field conditions.

Hydroponics is an environmentally friendly and sustainable method of cultivation. It is usually applied in a contained environment which enables the crop to be kept disease and weed free (fewer insecticides or pesticides are needed). It also enables water to be used more effectively and reduces the consumption required for the same output using traditional means of cultivation. Because plants are grown intensively, less space is required. This allows crops to be grown close to cities and points of export, which enables more efficient product distribution.

The hydroponics industry is the fastest growing sector in the horticulture industry. In 1997 the Australian Hydroponics Association industry survey valued hydroponic production at around \$150 million annually at the farm gate (HRDC Project HG530, "Report on a Survey of the Australian Hydroponic Growing Industry", Horticultural Research and Development Corporation, September 1998). In 2001 the estimated value was \$400 million (RIRDC Project No HAS-9A, "Hydroponics as an Agricultural Production System", Hassall and Associates Pty Ltd, Sydney, December 2001). Australia is the world's largest producer of hydroponic lettuce. The major crops grown hydroponically are lettuces, tomatoes and cut-flowers. Hydroponic growers are also moving into cucumbers, strawberries, fresh herbs and Asian vegetables. As well as exporting produce, Australia exports equipment and technology.

In Australia, commercial hydroponic cultivation is least developed in South Australia, with one commercial grower per 61,666 head of population compared to one per 18,464 nationally (RIRDC Project No HAS-9A, December 2001). However, the industry in South Australia is becoming more important as a result of a number of factors.

In relation to export markets, Adelaide is already a major consolidation and departure port for fresh vegetables and flower exports to Malaysia. South Australia's position as a leader in research and development of cold chain management practices, including handling, training and freight forwarding logistics for domestic and export (funded by State and Federal governments), puts the hydroponics industry in an ideal position to take further advantage of export markets.

Hydroponics is an important technology for waste water management and horticultural development (supported by State and Federal funds).

South Australia is a world leader in research in slow sand filtration to eliminate pathogens from the hydroponic growing system. The research translates into better quality, higher yields and greater economic returns.

The hydroponic industry is a growth area which has the potential to generate large economic benefits for the State.

2.2 Hydroponics Retailers in South Australia

Hydroponics shops are specialist shops. They range from small, independently owned shops to national chains. Some outlets combine hydroponics with another specialisation, for example aquariums or home brew products. They are a convenient one-stop shop for customers who wish to grow hydroponically, stocking all the items necessary for hydroponic growing, including starter kits, lights, ballast boxes, pumps, growing media, fertilisers, nutrients, testing kits, air filters, fans, pots, plastic piping and hydroponic how-to books. They also offer advice on setting up and operating hydroponic systems. Their prices are competitive with other non-specialist retailers.

The retail equipment supply market is well developed, with an increasing number of retailers servicing commercial growers. This connection is strengthened by the fact that many commercial

growers start as back shed enthusiasts or hobby farmers who after acquiring sufficient expertise move into commercial production. Competition between the specialist hydroponic stores has also led to product innovations which benefit both small and commercial growers.

The equipment used in hydroponics is also sold in hardware and gardening shops, aquarium shops, irrigation and pump shops, pool and spa suppliers, lighting and electrical shops and large supermarkets. Customers interested in hydroponic equipment may find their requirements in these shops but will have to visit more than one and are unlikely to be able to obtain advice on how to establish a hydroponic garden.

The 2001 Yellow Pages for South Australia lists 61 businesses located in South Australia under the heading Hydroponic Equipment and Supplies. The SAPOL submission estimates the number of specialist hydroponic shops in South Australia to be 105.

The Hydroponic Gardening Society of SA includes 34 specialist hydroponic businesses among its members. It estimates the retail industry to number about 60. In response to the Issues Paper, the Society conducted a survey of these businesses. It provided the following results:

- 60 specialist hydroponic shops, employing approximately 230 staff, with 60% indicating they intended to employ more staff in the next financial year.
- Over \$11.3 million paid in wages and salaries, with over \$1.37 million in payroll tax.
- Annual turnover estimated at \$52.4 million.
- Approximately 200,000 square metres of retail premises rented each year.
- Linkages with 211 wholesalers in South Australia and 126 interstate and 15 overseas companies.

2.3 Regulatory Arrangements

Because SAPOL has linked the increase in the number of specialist hydroponic retailers in the last decade to changes in the drug laws, it is necessary to describe the regulatory arrangements.

2.3.1 Other jurisdictions

No jurisdiction of Australia currently requires specialist hydroponic retailers to be licensed or singles out this segment of the retail industry for special regulation.

2.3.2 South Australia

The Controlled Substances Act contains the relevant drug offences. Cannabis is a prohibited substance under the Act.

Possession

Section 31 prohibits the possession of drugs of dependence and prohibited substances or possession of equipment for use in connection with the consumption of the drug or substance. The smoking or consumption of cannabis in a public place (including a motor vehicle) carries a maximum fine of \$500 and is accompanied by a criminal conviction.

Manufacture, production and sale

Section 32 prohibits the manufacture, sale and supply, or possession for the purpose of sale or supply of drugs of dependence and prohibited substances.

A penalty of a fine up to \$50,000 and/or 10 years imprisonment applies to the offence of selling, supplying or commercially producing less than 10 kilograms of cannabis, less than 2.5 kilograms of cannabis resin, or less than 100 cannabis plants. However, where a person is found guilty of an offence involving cultivation of more than the expiable number of plants, and the court is satisfied that the person cultivated the plants solely for his or her own use, the person is liable only to a penalty not exceeding \$500.

For amounts over these limits the penalty is a fine up to \$500,000 and 25 years imprisonment. More severe penalties apply to the sale or supply of cannabis to children under 18 years of age or the possession of cannabis for the purpose of sale or supply to another person within a school zone.

Aiding and abetting

Section 41 makes it an offence to aid, abet, counsel, procure, solicit or incite the commission of an offence against this Act with the same penalty as for the offence itself.

Cannabis expiation scheme

The cannabis expiation scheme (CEN) was introduced in 1987 to provide for the expiation of what were defined as "simple cannabis offences". These offences do not include possession of dried cannabis for sale or supply, no matter how small the amount, or possession of more than the expiable number of cannabis plants.

The simple offences are:

- possession of cannabis where the amount is less than 25 grams; or where the amount is 25 grams or more but less than 100 grams
- possession of cannabis resin where the amount is less than 5 grams; or where the amount is 5 grams or more but less than 20 grams
- smoking or consumption of cannabis or cannabis resin (not being an offence committed in a public place or other prescribed place)
- possession of equipment (one or more pieces) for use in connection with the smoking or consumption of cannabis or cannabis resin (not being an offence involving the possession of such equipment for commercial purposes)
- for cultivation of cannabis plants (1987 - 1999, 10 plants; 1999 - 2001, three plants; as of 29 November 2001, one plant only)

The expiation fees range from \$50 to \$150, according to the amount involved. Payment of the expiation fee allows the offender to avoid going to court and risking criminal conviction.

The rationale underlying the scheme was that a distinction should be made between users of cannabis and those who are involved in the production, sale or supply of the drug. It was felt that the CEN scheme would serve to keep private users of cannabis separate from drug dealers and lessen the adverse consequences arising from criminal conviction for otherwise law-abiding cannabis users. By giving minor cannabis offenders the option of avoiding conviction, the scheme was thought to provide penalties which were more in line with the seriousness of the offence.

The distinction between user and producer was emphasised at the introduction of the CEN scheme by the simultaneous introduction of more severe penalties for offences relating to the manufacture, production, sale or supply of all drugs of dependence and prohibited substances, including offences relating to cannabis. The Australian Capital Territory and the Northern Territory implemented similar expiation schemes in the 1990s. Western Australia is currently considering such a scheme.

Research into the CEN scheme

In 1995, the Australian Institute of Criminology completed Phase I of a national research study into the social impacts of the legislative options for cannabis in Australia (McDonald & Atkinson, 1995). The Phase II social impacts research found, among other things, that in South Australia:

- There had been a substantial increase in minor cannabis offence detections since the CEN scheme commenced in 1987 (from around 6,000 to over 16,000 offences in 1996/97). This “net-widening” was attributed to the greater ease with which these matters could be dealt with under the CEN scheme.
- A high proportion (around 45%) of minor cannabis offences were not being expiated. As a result, significant numbers of offenders were receiving criminal convictions for minor cannabis offences. This outcome was against the spirit of the original legislation.
- The reasons for failure to expiate related in many cases to difficulties faced by offenders in paying expiation fees. However, it was also found that many offenders in South Australia did not understand the legal status of personal cannabis use, either not realising that it remained illegal under the CEN scheme, or not understanding that failure to pay expiation fees would be likely to result in a criminal conviction for the offender.
- Cannabis offenders detected under the expiation approach in South Australia and the prohibition approach in Western Australia indicated little or no deterrent effect of their offences on subsequent cannabis use behaviour.
- There was a fairly high level of acceptance in the general South Australian population of personal cannabis use compared with the use of other illicit drugs (Heale, Hawks & Lenton, 1999). The majority believed that cannabis is associated with health and social problems.

The Phase II research also reported that Police had intelligence evidence to show that:

- criminal syndicates were using the 10 plant limit to protect commercial cannabis enterprises, by distributing crops in batches of 10 plants at different sites. (eg. ten hydroponically grown plants may be able to produce an income of around \$40,000, with possibly three or four such crops being produced per year).
- cannabis thus produced was being shipped to the eastern states and exchanged for powder drugs.

Expiation statistics

Of CENs issued for the period from 1991 to 1996, more than 40% were for possession or use of cannabis. Cultivation offences accounted for 20% of all notices issued. Cultivation offences had the

highest rate of expiation (53%) of all the offence types. This may suggest that cultivation offences are viewed as being more serious by offenders, and/or that offenders are more likely to realise that payment of the expiation fee for this offence will clear the matter.

Changes to the Expiation of Offences Act were implemented in March 2000 which affected all expiation notices. Failure to pay expiation fees by the final deadline now results in automatic conviction, whereas previously a summons to appear in court to contest the matter would have been sent out. This is likely to increase the number of expiation notices which are finalised by payment of the fee.

The reduction in the number of plants that can be cultivated under the expiation scheme from three to one may reduce the number of expiation notices issued for this offence, or the number of convictions for this offence may increase.

The Review Panel has no evidence of the effect on expiation rates and convictions of the July 1999 reduction in the number of plants from ten to three. SAPOL figures indicate that there was a small drop in the number of specialist hydroponic shops in 2000.

Recent amendments to the CEN scheme and number of cannabis plants cultivated

In November 2001, as one part of the package of legislative amendments announced by the Government on 25 July 2001, the House of Assembly passed the Controlled Substances (Cannabis) Amendment Bill to exclude from the expiation scheme cannabis cultivated hydroponically. Hydroponic growing is described as “artificially enhanced cultivation” and is defined as:

- Cultivation in a solution comprised wholly or principally of water enriched with nutrients;
or
- Cultivation involving the application of an artificial source of light or heat.

The Bill did not pass through the Legislative Council and with the calling of the State election on 15 January 2002, the Bill lapsed.

The other aspect of the amendments announced in July 2001 was to reduce the number of cannabis plants which can be cultivated under the expiation scheme from three to one. The Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 1987 were amended and the changes came into operation on 29 November 2001.

2.4 The hydroponics retail industry and the cannabis expiation scheme

South Australia has the highest number of specialist hydroponic shops per head of population in Australia. SAPOL research shows that in 1992 there were 10 specialist hydroponic shops in South Australia and now there are around 105.

2.4.1 SAPOL

SAPOL associates this over representation and the rapid increase throughout the nineties with the cannabis expiation scheme. The Review Panel has no evidence about the number of specialist hydroponic shops open in 1986, the year prior to the introduction of the expiation scheme, which would allow base comparisons. Several submissions linked the 1999 amendments (expiable limit for cannabis plants from ten to three) to a decrease in the number of outlets. This is supported by the

SAPOL evidence which shows a drop of 10 to 15 shops from 1999 to 2000. However, the evidence shows a rise in 2001 to slightly higher than the 1999 figure.

Additional support for the connection between the expiation scheme and number of specialist hydroponic shops comes from a hydroponic retailer quoted in Hansard in November 2001 during the debate on the Controlled Substances (Cannabis) Amendment Bill (to remove hydroponically cultivated plants from the cannabis expiation scheme). The retailer claimed that while the 1999 changes had been bad, the proposed amendment would decimate the retail industry.

In fact, the proposed amendments may have already caused further instability in the retail sector. Of letters sent out in October to publicise the consultation period for the Issues Paper, 8 from specialist hydroponic shops were returned, undeliverable.

SAPOL's concerns about the rapid growth in this sector may be satisfied when the amendments come into operation, without the need to regulate retailers. There should be a decrease in demand for hydroponic equipment as people realise they can no longer grow hydroponically and expiate the offence if caught. Some people may continue to grow non-hydroponically, but criminal growing syndicates, involving people who would have grown hydroponically as many plants as the expiable limit allowed, may find it too difficult to recruit members and may decrease.

2.4.2 Other explanations

Other explanations can be offered to explain the increase in the number of specialist hydroponic shops, for example, the increase in hydroponic style cultivation in the horticulture industry and the development of export markets for hydroponically grown fruit, vegetables and flowers.

Although there is no evidence about the size of the commercial vegetable and flower hydroponic industry at the time the expiation scheme was introduced, the industry figures quoted above under "Description of the Hydroponics Industry" show that there was rapid growth in production between 1995 and 2001. SAPOL evidence shows that from 1994 to 1996 there were from 10 to 20 specialist hydroponic retailers. The number increased to about 60 in 1997 and increased steadily to the present number of 105. The increase from 1996 could be related to increased commercial production of vegetables, fruit and flowers.

2.5 Police concerns about hydroponic equipment retailers

2.5.1 Increase in hydroponic cultivation of cannabis

The Australian Illicit Drug report 1999-2000 indicates that the most notable trend in the past 10 years has been the increase in hydroponic and indoor production and a decrease in extensive outdoor cultivation.

Further, hydroponics continues to be the most popular form of cannabis cultivation (Australian Bureau of Criminal Intelligence (2001) Australian Illicit Drug Report 1999-2000. Canberra). In 2001, 96% of plants seized by SAPOL were hydroponically grown. No major outdoor crops were discovered.

The major advantages of hydroponics growing are:

- Better concealment
- Year-round yields (3 to 4 crops per year)
- Higher quality and yield – selective cultivation of female plants (flowering ‘head’)
- Easier management with smaller crops
- No reliance on weather conditions
- The ability to cultivate in a variety of locations
- The loss of one part of the syndicate through police intervention is absorbed within the syndicate.

If the number of plants grown by the syndicate member is kept at the maximum allowed under the cannabis expiation scheme, the risk to the individual is an expiation notice, with a fee of \$150. This is small in relation to the return from one crop.

A recent SAPOL probe into the hydroponic industry stated that there were more than 100 shops servicing the demand for equipment, and of those 75% were associated with cannabis trade. SAPOL has suggested that 90% of all customers grow cannabis, for their own consumption or commercially.

The Australian Bureau of Criminal Intelligence notes that some larger scale syndicates have been growing indoor hydroponic crops taking up an entire house, warehouse, greenhouse, underground room or buried shipping container. It also notes that groups of friends, family and business associates often form small syndicates to grow and distribute cannabis for profit, with each producer being within the expiable limit of plant numbers. If caught the producer expiates the offence and the matter is ended.

2.5.2 Number of cannabis plants under the expiation scheme

It has been estimated that a daily user of cannabis is likely to consume 10 grams of cannabis per week. If one hydroponically grown cannabis plant yields an estimated 500 grams of dried cannabis, this would meet the consumption needs of a daily user for one year (Clements, K. & Daryl, M. *The Economics of Cannabis Consumption*. (1999). University of Western Australia). This amount of cannabis has an estimated sale value of \$3,000 to \$4,000. (SAPOL Drug and Organised Crime Investigation Branch). Hydroponic cultivation creates the opportunity for 3 or 4 crops per year.

The expiable limit applies to the number of plants being cultivated at the time of detection, not per year. Given the potential cash yields, the ability to produce in excess of personal requirements within the expiable limit is a temptation to become involved in commercial production and distribution within the wider community.

Following the reduction of the limit to three plants in 1999, SAPOL remained concerned that while profits were smaller, individuals continued to commercially cultivate up to the limit, potentially growing 9 to 12 plants per year, with an estimated income per annum of between \$36,000 and \$48,000.

SAPOL remains concerned that the recent reduction of the limit to one plant will not eliminate syndicate growing.

2.5.3 Associated risks

SAPOL officers involved in detection and seizure operations risk injury from the anti-theft devices installed by the growers.

SAPOL is concerned that individuals growing cannabis are facing greater risks than being caught by the police. It reports that home invasions targeted at stealing cannabis or the proceeds of cannabis trade have increased. 27 were reported in 2001, and this is believed to be under-reporting because of the victims' fear of drawing police attention to their illegal activities.

Increase in drug use is associated with behavioural problems in users and increased theft and violence, all of which lead to high risk, high stress work for SAPOL officers and have short and long term costs for society.

3 OBJECTIVES

3.1 Objectives of Proposal in Issues Paper

The Issues Paper stated:

The objectives of the proposed legislation are to restrict eligibility to retail hydroponic equipment to persons of good repute or to organisations controlled or operated by such persons and to require purchasers to provide adequate identification and an end use certificate for the purpose of reducing or eliminating the production of cannabis on a commercial basis.

This objective is based on police advice that large quantities of cannabis, mainly grown hydroponically, are exchanged interstate for harder drugs which are brought back to South Australia for sale. SAPOL intelligence suggests that 27% of specialist hydroponic retailers are controlled by organised crime (eg bikie gangs), and only 27% have no connection with organised crime. SAPOL estimates that “up to 90 per cent of customers of hydroponic stores either grow cannabis for their own use or for criminal networks”, and according to the Australian Bureau of Criminal Intelligence (Australian Illicit Drug Report 1999-2000. (2001) Canberra), police in various jurisdictions report that many owners of hydroponic businesses help their customers set up the equipment for cannabis cultivation.

SAPOL considers the lack of regulation of specialist hydroponic retailers in South Australia makes it easier for a wide range of people to grow cannabis.

The Issues Paper objective contains both an objective –

reducing or eliminating the production of cannabis on a commercial basis

and a means to achieve it –

restrict eligibility to retail hydroponic equipment to persons of good repute or to organisations controlled or operated by such persons and to require purchasers to provide adequate identification and an end use certificate

The means is a summary of the proposal in the Issues Paper. It aims to identify specialist hydroponic retailers and ensure they are not criminals and do not have criminal connections, and to identify the purchaser of hydroponic equipment and the intended use of the equipment.

The licensing proposal gives more detail and requires:

- the specialist hydroponic retailers to pass a test of good repute (based on having no criminal association known to SAPOL, not having expiated a simple cannabis offence and not having a criminal record);
- the specialist hydroponic retailers to obtain proof of identity of the customer, identify the goods sold and keep this information with the customer's end use statement;
- the customer to provide proof of identity and complete an end use statement.

This would:

- ensure retailers are of good repute;
- prevent retailers from knowingly supplying hydroponic equipment for use in growing cannabis;
- deter customers from using hydroponic equipment for growing cannabis;
- give SAPOL access to sales information which could be used to target possible cannabis growers.

3.2 Analysis of the effectiveness of the objective

The objective of reducing commercial production of cannabis stems from concern about the negative health effects of cannabis consumption and the connection between cannabis use and hard drugs. There is a large body of research (and argument) on these issues. The social and economic costs of drug abuse in general are very high and widely recognized. These costs are not addressed in this Report, beyond acknowledging that they may be reduced if less cannabis was available. However, several submissions argued that a decrease in cannabis production may in fact lead to an increase in its price, a movement to other illegal drugs (which cannot be “home-grown”) and therefore greater resort to dealers and exposure to organized crime.

The ability of the licensing proposal in the Issues Paper to achieve the objective of reducing commercial production of cannabis is uncertain. It assumes:

- cannabis growers will not obtain equipment from other retail sources in South Australia, or interstate;
- the growth of specialist hydroponic retailers is linked to the introduction of the cannabis expiation scheme; and
- that a licensing scheme will prevent criminals controlling or operating a specialist hydroponic retail shop.

Several submissions argued that the proposal incorrectly linked the sale of hydroponic equipment with the possible use of that equipment for illegal purposes, and that the end user’s intention to utilise the product cannot be controlled at the retail level.

The Review Panel's terms of reference restrict it to examining the licensing proposal, but a licensing scheme is only one of a number of ways to achieve a reduction in the commercial production of cannabis.

Other options might be to:

- Increase police resources for investigations into cannabis cultivation;
- Monitor electricity accounts for unusually high/anomalous consumption;
- Focus enforcement on known criminals, and groups suspected of organising cannabis growing syndicates and being engaged in cannabis production;
- Increase penalties for producers;
- Reduce demand for cannabis by educating users and potential users;
- Legalise cannabis use and license its production and sale, as with tobacco;
- Decrease the number of cannabis plants that can be grown under the cannabis offences expiation scheme;
- Remove plants grown hydroponically from the cannabis expiation scheme.

The last two suggestions have already been acted on in the recent amendments to the Controlled Substances Regulations and those proposed by the Controlled Substances (Cannabis) Amendment Bill. However, there has been no opportunity to assess the effectiveness of these changes in reducing cannabis production, or their impact on specialist hydroponic retailers' associations with cannabis trade. The Review Panel makes a recommendation below under "Recommended Regulatory Arrangement", that this be undertaken before any regulation of hydroponic equipment retailers is implemented.

There is an insufficient nexus between the proposal and the objective. The objective is very worthy, but is too broad in relation to the proposed restriction. Although the cultivation of cannabis is an offence, the sale of hydroponic equipment is a legitimate activity carried out by large numbers of retailers, and the equipment is used by even more customers for a range of legal purposes.

The Review Panel believes an extensive investigation into ways to reduce the amount of cannabis grown commercially would be useful. The Review Panel is particularly interested in ways to reduce demand, and the development of nationally supportive strategies. The Review Panel suggests that the Government consider an inquiry to investigate these matters.

3.3 Alternative objective

An alternative objective, which reflects the SAPOL concern about the connection between specialist hydroponic retailers and criminal activities, might be:

to remove from or prevent from entering into the hydroponic equipment retail industry persons who are associated with cannabis trade.

This more closely reflects the intention of the proposal in the Issues Paper, and is more likely to pass the National Competition Policy test of whether the objectives of the legislation can be achieved by the proposed restriction on competition.

The proposed licensing scheme could achieve the alternative objective by requiring participants to be persons of good repute. The part of the proposal relating to customer end use certificate and proof of identity is unlikely to achieve the alternative objective as it is directed at customers, not

suppliers. Customers may only purchase hydroponic equipment at outlets where identification is not required.

3.4 Public comment

“...[R]educing the number of people who take up and continue to use illicit drugs including cannabis must be a priority. Significantly reducing the amount of cannabis within the community through initiatives such as regulating the hydroponic industry will assist in achieving these aims.” - (SAPOL)

“It tackles the problem at the wrong end. It will send the illegal growing underground....The social cost of driving cannabis growing underground will result in increased criminal activity.” – (Engineer)

One submission drew the connection with the alcohol prohibition period in the USA, saying: "the tighter the legislation and the more severe the penalties became, the more the criminals became organised and ruthless. Fewer people would dare to complain to the authorities for fear on the one hand of criminal revenge and on the other hand, criminal prosecution for being involved or through association. In the end, I believe organised crime even started to infiltrate government and law enforcement agencies."- (South Australian supplier)

“It is illegal to drive a vehicle on the public highways of South Australia faster than 110 kms per hour. There is an expiation system for those people who are caught exceeding this limit but there is no restriction on the manufacturers or sellers of motor vehicles to only sell cars that cannot exceed 110 kms per hour.” - (Industry Association)

“No evidence that SA is cannabis capital or exports more than other states, or of link between specialist hydroponic retailers and organised crime. Get proper statistics before imposing a scheme.” – (Interstate Retailer)

“Hydroponics equipment is available from literally hundreds of outlets, not just hydroponic outlets. If a person purchases hydroponic equipment from any retailer and uses the equipment for unlawful purposes, then it is up to the police to enforce the law.” – (SA Retailer)

The proposal “ignores the fact that the equipment can be purchased over the internet or from every other state in Australia” – (SA Retailer)

3.5 Review Panel Conclusion and/or Recommendation

The objective in the Issues Paper of reducing the commercial production of cannabis is too broad in relation to the proposed restriction.

The objective of the proposed legislation should be:

to remove from or prevent from entering into the hydroponic equipment retail industry persons who are associated with cannabis trade

4 DEFINITION OF HYDROPONIC EQUIPMENT

4.1 Definition of hydroponics

One standard definition of hydroponics is “the cultivation of plants without soil, in water impregnated with chemicals” (Concise Oxford Dictionary).

The Issues Paper defined hydroponics as “the process of growing plants in sand, gravel, soil or liquid with added nutrients.” The Review Panel recognises that this definition does not distinguish hydroponic from non-hydroponic growing, and perhaps should have included reference to the application of heat or light. The definition was chosen to include situations commonly found by SAPOL where cannabis plants are cultivated in a hydroponic style, but where soil is used to keep the plants upright in pots or boxes under lights.

The Review Panel has noted, and prefers, the definition of hydroponics in the Controlled Substances (Cannabis) Amendment Bill, cited above under “Regulatory Arrangements, Recent amendments to the CEN scheme”. The Review Panel does not consider the definition of hydroponics used in the Issues Paper to have caused confusion or had a detrimental effect on consideration of the proposed restrictions.

4.2 Definition of hydroponic equipment

4.2.1 Issues Paper

For the purposes of the licensing proposal, the Issues Paper defined hydroponic equipment as:

- electric lights in excess of a specified wattage;
- water pumps of a specified capacities; and
- electrical devices commonly known as ballast boxes of the type used in hydroponic cultivation.

The definition was confined to three pieces of equipment that were considered to be essential for hydroponic cultivation and that were all stocked by specialist hydroponic shops. While considerably more equipment is involved in hydroponics (as several submissions pointed out), the aim was to target equipment that is critical to indoor hydroponic cultivation and available from the smallest range of retailers. For this reason, items such as plastic tubing, pots, growing media, nutrients, fans and materials used to build structures were not included.

In addition, focusing on a small number of items critical to hydroponic growing was a way to reduce the administrative burden of the proposed identification and end use certificate requirements. It was considered that this would make the proposal more, rather than less workable.

4.2.2 Comment on issues

Deciding how to define “hydroponic equipment” so that only specialist hydroponic shops would be captured is a difficult matter and one that has taxed the Review Panel.

The definition in the Issues Paper was incomplete. The Review Panel was anticipating that submissions would provide information to clarify the wattage of electric lights and capacity of water pumps. In fact, many of the submissions criticised the definition as being too narrow and several listed a large number of items that are used in hydroponics.

The Review Panel decided the definition should include items that would be considered essential to a specialist hydroponic retailer, and that were also most likely to be used in commercial indoor production of cannabis (where commercial production of cannabis is defined as more than the expiable limit of plants, which was three at the time the Issues Paper was written). The Review Panel considered the equipment nominated in the Issues Paper fitted this description.

The Review Panel also recognises that in singling out three items from the wide range used, it is possible that other equipment may be adapted or used to replace the specified items, thereby undermining the scheme. This problem could be addressed to some extent in the legislation by referring to “prescribed items” and then defining them by Regulation or gazette notice, both of which are more easily updated than the Act.

4.3 Refined definition of items of equipment

The Review Panel investigated the items of equipment proposed in the Issues Paper in order to provide a more precise description for “ballast box”, and to specify the wattage and capacity of “electric lights” and “water pumps”. The results of this work are described below.

4.3.1 Electric Lights

Plants can be grown hydroponically indoors with any wattage of light globe, including fluorescent tubes and coloured globes. Several submissions pointed out that a higher wattage light source can be substituted for several smaller ones. However, quality and speed of growth can be increased using higher watt globes, and these are considered to be essential stock for specialist hydroponic retailers.

Globes of 250 watts or more were chosen because these lights are essential equipment for a specialist hydroponic retailer and are not commonly used except for specialist purposes (eg lighting warehouses, car park and street lighting).

High wattage lights are less likely to be stocked by hardware/gardening shops, supermarkets, department stores, etc. If stocked, it is likely that the number of units sold by this type of retailer would be small, and would comprise only a small part of total turnover. A decision not to stock such items could be made at relatively low cost. For example, a submission received from a large hardware and gardening supplies store pointed out that it had recently de-listed a number of hydroponic items that were also carried by specialist hydroponic retailers, for both ethical and commercial reasons. These items represented less than 1% of turnover. The items did not include pumps and globes, but included a number of products of a hydroponic manufacturer (accelerant fertilizers, PH adjustors, insulating plastic, and other hydroponic accessories).

Lighting specialists and aquarium shops are also likely to sell 250 watt plus lights.

4.3.2 Water pumps

The type of pumps commonly used in small scale hydroponics are pond or aquarium pumps. These can be very small machines costing as little as \$40 or \$50. The Review Panel was informed that to operate a small aquarium, a pump of 400 litres/hour capacity would be required. To irrigate approximately three plants, 800 litres/hour capacity would be necessary.

Pumps of 800 litres/hour capacity or more are considered to be essential stock for specialist hydroponic retailers and are highly likely to be used by cannabis cultivators.

However, they would also be stocked by hardware and gardening shops, aquarium shops, pool and spa shops, and pump and irrigation suppliers.

4.3.3 Ballast boxes

Ballast boxes are more accurately described as “units comprising high intensity discharge lamps, control gear, ballasts, lamp mounts and reflectors”. These units are necessary to regulate the power supply to the light globes to ensure a constant intensity of light to the plant. They consist of a frame holding globes, usually 400 watts, but occasionally 250 watts; lamp equipment being light holders and reflectors; and control gear being the regulator mechanism. They are sold as units, although the components could be purchased separately. They are considered to be essential stock for specialist hydroponic retailers. They are also likely to be sold by specialist lighting and aquarium shops. They are unlikely to be sold by hardware/gardening shops or pump/irrigation shops.

4.4 Unintended coverage of definition

Even with a definition of hydroponic equipment limited to these three items, the definition would affect a wide range of retailers, including hardware, gardening, lighting, electrical, aquarium, pump, irrigation, pool and spa shops. If more items are added to the definition, more types of retailer are likely to be affected.

The 2001 Yellow Pages for South Australia lists:

- 103 businesses under Hardware Shops – Retail;
- 138 businesses under Garden Equipment and/or Supplies;
- 56 businesses under Aquariums and Supplies;
- 133 businesses under Irrigation and/or Reticulation Systems;
- 143 businesses under Pumps – Manufacturers and/or Merchants; and
- 52 businesses under Lighting and Accessories – Retail.

This is a total of 625 businesses (the figure is indicative only, as some businesses list under more than one category, while other businesses choose not to list in the Yellow Pages at all). In addition, depending on the wattage specified for the lights, supermarkets, general stores, and electrical goods stores could also be affected.

The proposal in the Issues Paper envisaged that a person would be selling “hydroponic equipment” if they sold any one of the described items. After extensive consideration of how to target “one-stop” hydroponic shops without also including shops which sell the same equipment, an alternative approach to the definition is now proposed. This defines hydroponic equipment as two or more of

the three items. In this way, a number of non-specialist hydroponic retailers would be excluded, for example any retailer which sold pumps but not light globes of 250 watt or more, or ballast boxes. Specialist lighting shops would be included, if they sold both high watt globes and ballast boxes.

It would be possible to reduce the range of retailers included by the definition even further by including a mechanism for exemptions for specific retailers or type of retailer (for example, on the basis that the retailer sold no other items than the three described in the definition of "hydroponic equipment"). A power to exempt could be exercised by the Commissioner of Police, who would be in the best position to know or investigate whether the retailer/s could safely be excluded. It may be considered necessary to allow appeals against the exercise of this discretion.

It would be difficult to continue commercially as a "one stop hydroponics shop" without selling at least two of the three items, so it is unlikely that specialist hydroponic retailers would attempt to evade the scheme by not stocking two of the three items.

4.5 Changing the items in the definition

4.5.1 Grow-lux lamps

The Review Panel was advised that GroLux Plant Growth lamps could be used in indoor growing instead of high wattage lights. GroLux is a trade name. GroLux produce blue coloured fluorescent lights (lamps or tubes) which emit more of the red and blue ends of the light spectrum necessary for enhanced plant growth. They are often used for growing cuttings, which need balanced low level light, and in situations where low level supplementary light is needed.

The lights do not produce as much heat as the 250 watt plus globes and are usually used in conjunction with air heating equipment. They also produce a lower intensity light. Customers are likely to prefer high wattage globes to avoid the need for air heating equipment, and give them a simpler, cheaper set up.

This type of light is sold predominantly at specialist hydroponic and aquarium shops (when used for aquariums the lights are called Aquaglo or Powerglo, and they also enhance fish colours). GroLux-type lights are also available at specialist lighting shops, and are possibly sold at larger gardening and hardware supply shops.

4.5.2 GroLux-type lights instead of pumps

The Review Panel considered the feasibility of removing pumps from the definition and instead, adding groLux-type lights. The main reason for this substitution is to focus on equipment which is indispensable for the indoor growing of plants, that is lighting, and to remove an entire group of retailers from inclusion in the scheme.

The two tables below show the difference in which retailers would be affected.

Where “hydroponic equipment” means any two or more of the three items

Effect on range of retailers with pump as part of definition

Items	hardware	gardening	lighting	Pump/pool/spa/irrigation	aquarium
800l/hr plus pumps	√	√	X	√	√
250 w plus lights	√?	X	√	X?	√
Ballast box	X	X	√?	X	√

Effect on range of retailers with gro-lux lights as part of definition

Items	hardware	gardening	lighting	Pump/pool/spa/irrigation	aquarium
Gro-lux-type lights	√?	√?	√	X	√
250 w plus lights	√?	X	√	X?	√
Ballast box	X	X	√?	X	√

(X = does not stock; √ = stocks; √? = may stock; X? = probably does not stock)

Removing pumps and replacing this item with gro-lux-type lights, and using the two or more items definition, has the following effect:

- Hardware shops are less likely to be included
- Pump/pool/spa/irrigation shops are less likely to be included
- Gardening shops are less likely to be included
- Aquarium shops are likely to be included under either option,
- Lighting specialists are more likely to be included

The combination of high wattage and gro-lux-type lights and ballast box is likely to reduce the number of retailers which are unnecessarily included, and should be preferred for this reason, provided it does not make it easier for a specialist hydroponic retailer to avoid coming under the scheme.

A specialist hydroponic retailer which did not stock all of the items discussed, including both pumps and gro-lux-type lights would not be offering the one stop shop advantage it relies on, and may have difficulty remaining in business. On this basis, after accepting high wattage lights and ballast boxes, whether the third item is gro-lux-type lights or pumps may not be important.

4.6 Expanding the items included in the definition

The Review Panel also investigated the idea of an expanded list of items for the definition, but still with a view to restricting the items to those likely to be used in indoor cultivation.

The SAPOL submission suggested the following list of items for a definition of hydroponic equipment:

- specialist lighting
- light shades
- ballast boxes
- electrical timing devices

- literature related to plant growth through artificial medium
- water pumps
- plant nutrients
- artificial soil mediums
- carbon dioxide gas
- carbon dioxide regulators
- air movement or extraction equipment
- air filtering devices or odour control systems
- heating devices

These items are all used in hydroponics. Some would not be used in small scale cultivation (eg carbon dioxide gas, carbon dioxide regulators, air filtering devices or odour control systems). Others would be used in every situation (eg plant nutrients).

The Review Panel considered that adding any items to the existing definition would widen the proposed scheme beyond the intention of the original proposal, which focussed on specialist hydroponic retailers, and would cause the inclusion of too many extra types of retailers. This is unlikely to be justified on a cost benefit assessment.

4.7 Alternative definition

It could be considered that any definition which draws in more retailers than specialist hydroponic retailers is going beyond the proposal in the Issues Paper. Rather than focus on items of hydroponic equipment, another approach would be to define the business. A specialist hydroponic retailer could be defined in one of the following similar ways:

- a business where the major activity is the sale of hydroponic equipment and supplies
- a business whose primary purpose is the sale of hydroponic equipment and supplies.
- a business where 70% of turnover comes from the sale of hydroponic equipment and supplies

These definitions still include the term “hydroponic equipment” and so do not avoid the problem of having to define it.

In addition, they have the disadvantage of requiring the police to prove that the sale of hydroponic equipment is the major activity or primary purpose, or makes up 70% of turnover. This would require access to financial records and lists of stock, amounts sold, etc. A definition of hydroponic equipment, such as that proposed in the Issues Paper, which specifies three types of items, enables the police to establish by quick inspection of a shop, whether or not the retailer should be licensed.

Another difficulty with the “major business” approach to a definition is that a number of specialist hydroponic retailers in South Australia have a second major activity, for example selling aquariums, or home brew supplies.

4.8 Public comment

A number of submissions referred to the narrow definition of hydroponic equipment. One suggested that it was “simplistic, discriminative and clearly unenforceable.” – (Member of Public) Another

said: “The proposal has focussed on items seemingly at random, which falls short of the numerous products involved in hydroponics.” – (Retailer)

“We believe it is impossible to make an appropriate definition. Although some equipment, hardware, water delivery system or structure may be more convenient for hydroponic purposes, it would appear that this equipment could readily be replaced by alternatives outside the range defined.” (Professional Association)

4.9 Review Panel Conclusion and/or Recommendation

The following definition includes equipment that is essential stock for a specialist hydroponic retailer. While plants could be grown hydroponically without this equipment it is unlikely that a person growing cannabis commercially indoors would not use this equipment.

This definition will extend the scope of the proposed scheme to retailers other than specialist hydroponic retailers. However, through specifying that the equipment is any two or more of the defined items, the range of retailers will be minimised. This can be further reduced by an exemptions mechanism for specific businesses or type of business.

For the purpose of the licensing proposal, the Review Panel recommends that hydroponic equipment is any two or more of:

- **Electric lights of 250 watts or more;**
- **Fluorescent lights which combine the red and blue part of the light spectrum in a way which enhances plant growth, also called gro-lux lamps;**
- **Units comprising high intensity discharge lamps, control gear, ballasts, lamp mounts and reflectors, also called ballast boxes.**

5 MARKET

5.1 Description of the market

In general terms, a market is a collection of buyers and sellers that interact, resulting in the possibility of exchange. Buyers include consumers who purchase goods and services, and sellers include firms and individuals who sell their goods and services.

The structure of the market is characterised by a number of factors including the number and size of competitors, the barriers to entry into the market, and the ability for different products to be substituted.

The Issues Paper considered the market to be “the market for the supply or acquisition in South Australia of equipment suitable for hydroponic use.” The Issues Paper defined hydroponic growing as the process of growing plants in sand, gravel, soil or liquid with added nutrients. This definition has been discussed above, and the Review Panel prefers the definition used in the Controlled Substances (Cannabis) Amendment Bill 2001. However, identification of the market has not been adversely affected by the definition used in the Issues paper.

The Issues Paper suggests that supply at the retail level includes specialist hydroponic retailers, hardware/gardening retailers and suppliers of irrigation equipment or specialised lighting. Purchasers include persons buying equipment for their own use or commercially.

Markets are defined in terms of all of the following elements:

- **product**;
- **functional level** – production/manufacture; distribution/ wholesale; and retail;
- **geographic area**; and,
- **temporal aspect** – often markets are not differentiated by time, or to put it another way, there is usually a continuous market.

Using these four elements, the hydroponic equipment retail market is a market:

- for the **product** of hydroponic equipment;
- at the **functional level** of the retailing of hydroponic equipment market;
- with a **geographic location**, determined by the distribution of retail businesses which stock hydroponic equipment, of the whole of Australia; and
- that competes continuously, not intermittently (**temporal aspect**).

While the market does not include manufacturers and wholesalers, because they supply retailers they may be affected by a reduction in the number of specialist hydroponic retailers or a reduction in the amount of hydroponic equipment purchased from retailers. This would be a cost of the proposed restriction.

5.2 Public Comment

Many submissions made the point that the market is wider than indicated in the Issues Paper. This view was based on the impact changes in the retail sector would have on the manufacturing and wholesale markets.

5.2.1 Product

In practical terms, hydroponic equipment is any of the equipment used for growing plants hydroponically, and this can vary according to the location, scale and purpose of cultivation. As a branch of horticulture involving the addition of liquid nutrients, heat and light to a crop, the process uses equipment sold by hardware/gardening shops, electrical, gardening, pump and irrigation shops, other more specialist suppliers, as well as specialist hydroponic stores. If specialist hydroponic retailers are affected, and lose business or are forced to close down, non-specialist retailers are likely to benefit. If there are barriers to buying the equipment in South Australia, it will be purchased interstate.

5.2.2 Functional level

Purchasers may be hobby farmers, individuals (eg recreational gardeners or apartment dwellers), commercial growers, educational or research institutions.

While SAPOL states that there are about 105 specialist hardware stores, the Yellow Pages lists 72 businesses under Hydroponics. 61 of these are located in South Australia, Not all are specialist hydroponic retailers and some are manufacturers or wholesalers. Manufacturers and wholesalers or agents are also located interstate and overseas. Some interstate hydroponic businesses are listed in the South Australian Yellow Pages. While not all businesses choose to list in the Yellow Pages, doing so is an indication that the business wants to deal with the broad public.

The broader market includes manufacturers and wholesalers, but the licensing proposal is not intended to apply to wholesalers or manufacturers as they have not been identified by SAPOL as being associated with cannabis trade or having criminal associations.

5.2.3 Geographic location

Almost all submissions pointed out that with the existence of mail order and the increase in purchasing over the internet, if it became difficult to purchase hydroponic equipment in South Australia, customers would take their business to other states or territories. The success of the ACT X-rated video industry, in supplying the rest of Australia by mail order, was cited in one submission as an example of customers moving their business to the place where they can get what they want, rather than not purchasing the item.

5.3 Review Panel Conclusion and/or Recommendation

The market is the whole of Australia.

The market comprises the retail supply of hydroponic equipment.

The product is the wide range of items which can be used to grow plants hydroponically.

Competition occurs continuously.

5.4 Market failure

5.4.1 General

Competition in markets is usually regarded as the most efficient method of allocating resources. Competition assumes a market is perfect, that is, maximum satisfaction and profit are sought; there are no hidden transaction costs; all parties are completely informed; and there are no costs to other parties. However, unrestricted competition may not provide the best or most appropriate economic or social outcome. Where the potential for market failure or provider failure exists there is a basis for government intervention.

From a consumer's point of view, inefficient market outcomes will result in high transaction costs, information asymmetry or externalities. Where such situations occur, there may be justification for regulatory intervention. However, conventional forms of market failure do not account for the failure of service providers to honour their obligations, for example, financial loss through dishonesty, or insolvency; sub-standard work; health and safety; and criminal activity. While these may not be related to market failure, the public benefit justifies regulatory intervention.

Many occupational licensing schemes in Australia address potential provider failure risks to consumers. Restrictions either impose barriers to market entry (for example imposing standards, qualification or fit and proper person requirements) or restrictions on competitive conduct (for example mandatory codes of practice).

Irrespective of whether there is provider failure, a government may choose to intervene to address an issue of detriment to society.

Any regulation imposed must be appropriate to the identified concern and must be subject to close scrutiny to ensure that any anti-competitive effects can be justified as being in the best interests of the public.

5.4.2 Specialist Hydroponic Retailers

The Government media release of 25 July 2001 identified the production of cannabis on a commercial basis using hydroponics and the involvement of criminal networks in the hydroponic equipment industry as evidence of market failure providing a basis for intervention.

The Review Panel has no evidence about how much of all produce from hydroponic cultivation is cannabis, or the value of the produce.

Provider failure in terms of criminal activity has been used to justify occupational licensing in the security and investigation business where agents may be working in the customer's home, or in circumstances of trust and reliance. This is also the justification where the business involves dealing with articles which may be stolen and the customer may suffer loss if the article is repossessed, for example second-hand dealers.

In the case of specialist hydroponic retailers, the market is buying and selling equipment used in hydroponics. This market appears to be working well. With competition between specialist hydroponic retailers and other retailers who stock the same equipment, and among the specialist hydroponic retailers themselves, the result for customers is lower prices and improved services. In this sense, there is no need for occupational licensing, as there is no failure from which the customers needs protection.

There is however, police evidence of some retailers encouraging criminal activity by helping their customers to set up the equipment for cannabis cultivation (Australian Bureau of Criminal Intelligence (Australian Illicit Drug Report 1999-2000. (2001) Canberra), and suggestions that customers may be buying hydroponic equipment to cultivate cannabis (SAPOL estimates that “up to 90 per cent of customers of hydroponic stores either grow cannabis for their own use or for criminal networks”).

Drug abuse has significant costs to the community, through policing drug abuse; drug-associated crime; treating and rehabilitating drug addicts; and the loss of economic productivity of the people affected by drugs. However, the relationship of these costs to the transaction between a retailer of hydroponic equipment and a customer is not clear.

Whether the Government intervenes because there has been provider failure or to achieve some other policy goal, careful consideration needs to be given to the type and severity of restrictions imposed on the relevant market to ensure they will be effective and no more restrictive than necessary.

5.5 Public comment on market failure

“Market failure all stems from the inability of government, the legal system and policing to control the end product, it is not the failure of the supply and demand chain up to that point.” (SA Retailer)

“How many items purchased from hardware shops are used to commit crimes? Are the owners of those establishments responsible because they sold those items?” – (Member of public)

5.6 Review Panel Conclusion and/or Recommendation

There is no market failure or provider failure in the hydroponic equipment industry.

Provider failure is only one example of a detriment to society where Government intervention is justified; a concentration of specialist hydroponic retailers with connections with cannabis trade may be another.

6 RESTRICTIONS IN THE ISSUES PAPER

6.1 Licensing schemes generally

The purpose of occupational licensing in general is to establish standards of integrity and service to protect consumers where market forces will not adequately regulate certain types of provider behaviour.

Licensing schemes usually involve fulfilling some requirement, possessing a qualification or experience; or being a fit and proper person. The proposal in the Issues Paper incorporates a requirement for a SAPOL integrity check.

6.2 Description of proposal in the Issues Paper

The proposal was originally suggested by SAPOL. It calls for legislation that –

- defines “hydroponic equipment” as electric lights in excess of a specified wattage, water pumps of a specified capacities and electrical devices commonly known as ballast boxes of the type used in hydroponic cultivation;
- prohibits the sale of hydroponic equipment by persons or corporations who are not licensed;
- restricts the licensing of retailers who sell hydroponic equipment to those who can demonstrate that they are persons of good repute. Corporations must be owned, operated or managed by such persons;
- requires applicants to pass a police integrity test in order to demonstrate that they are persons of good repute. Persons with criminal records or who associate with known criminals, or persons recorded as having cultivated cannabis will be deemed not to pass this test; and

- requires retailers to obtain adequate identification and an end use certificate from purchasers of hydroponic equipment.

Hydroponic Equipment

The scheme defines hydroponic equipment as pumps, lights and ballast boxes. The equipment selected for the definition was considered to be essential stock for a specialist hydroponic shop, and necessary for the commercial, indoor production of cannabis. If more items of equipment are added to the list, the types of businesses involved will increase. The Review Panel has made a recommendation on the definition above under "Definition", which defines hydroponic equipment as two or more of the lights of 250 watts or more; grolux-type lights and ballast boxes.

Retail sales

The proposal in the Issues Paper was directed at specialist hydroponic retailers, because this is where SAPOL sees the connections with cannabis trade. These retailers would apply to the Government to be licensed. A condition of the licence would be that the retailer was of good repute, evidenced by passing a SAPOL integrity check. This would indicate the absence of connections with cannabis trade.

It is clear that the proposal was not intended to affect wholesalers or manufacturers. These groups have not been identified by SAPOL as having connections with the cannabis trade. Any legislation to implement the licensing proposal could make this clear by specifying that it only applied to persons who make retail sales (that is sales of relatively small quantities, usually not for resale, to the public).

Employees

The Issues Paper intended to “restrict eligibility to retail hydroponic equipment to persons of good repute or to organisations controlled or operated by such persons.” This was intended to capture directors of companies selling hydroponic equipment, and owners, operators, and employees of such businesses.

For licensing to be effective, all employees of the business would have to be of good repute. This is the only way to remove all the people in the business who are associated with cannabis trade. For example, if employees were not included, it would be easy to evade the intention of the scheme by setting up a company with a director who passed the test, but employing as managers or staff, people who did not; or an employee who was not of good repute could give customers advice but not actually sell the specified items, and would still be able to sell other items in the shop.

To make this clear, the Review Panel therefore suggests a formulation of the proposal as follows:

a person who is not licensed is prohibited from owning, operating, being the director of, or being employed in, a business or company which sells hydroponic equipment.

Sell

While not specifically referred to in the Issues Paper, the Review Panel suggests the following definition of sell, based on the definitions in the Controlled Substances Act and the Second Hand Dealers and Pawnbrokers Act. This definition could apply to any regulatory scheme for hydroponic equipment retailers.:

" sell " includes-

- (a) supply, barter or exchange; or
- (b) offer, or expose, for sale, supply, barter or exchange; or
- (c) cause or permit to be offered, or exposed, for sale, supply, barter or exchange,

Customer requirements

The purchaser end use certificate and identification requirements are not specified in the Issues Paper, but the example of the Controlled Substances (Poisons) Regulations 1996, dealing with precursor chemicals (used to make amphetamine type drugs), was given. These regulations include record keeping requirements.

Costs and Benefits

The Issues Paper indicated that costs of the proposal would have both social and economic costs, including:

- Reduction in the number of specialist hydroponic equipment suppliers resulting from the failure of operators to show they are of good repute;
- Reduction in hydroponic equipment sales due to the customer end use certificate and identification requirement.

The Issues Paper indicated that benefits would have both social and economic benefits, including:

- Reduction in the use of hydroponic equipment purchased for commercial cultivation of cannabis;
- Reduction in the “irreparable damage to families and individuals” from the commercial production of cannabis.

The Issues Paper did not quantify these costs and benefits.

6.3 Licensing based on a Police Integrity Test

6.3.1 Description of restriction

The requirement for a person who sells hydroponic equipment to be licensed is a barrier to entry. The licensing proposal would prevent the owner, operator or director of a specialist hydroponic business who was not of good repute from being licensed to sell hydroponic equipment. Any person with a criminal record, who had expiated a minor cannabis offence or had known criminal associations would not be considered to be a person of good repute. SAPOL would make this assessment.

A register of licensed persons would need to be established. The Review Panel is of the view that the scheme would be most conveniently administered by SAPOL.

The Review Panel assesses the police integrity test as a condition for licensing as a serious restriction on competition.

6.3.2 Criminal record

The proposal in the Issues Paper does not detail particular offences, but to exclude a person from a business activity because of a conviction for an offence unconnected with the objective of the restriction would be unjustifiable. Other occupational licensing specify particular offences, for example where the provider holds funds on behalf of a customer, offences of dishonesty and fraud are relevant. Following this logic, for specialist hydroponic retailers, where a large number are connected with the cannabis trade, drug offences would be relevant.

Although SAPOL developed the scheme proposed in the Issues paper, SAPOL's submission to the Review Panel proposed not licensing, but a business notification scheme, with purchaser end use certificate and identification, similar to that governing Second Hand Dealers. It also suggests a more moderate set of conditions for licensing. This is "drug convictions", defined as:

Any conviction under the Controlled Substances Act or any interstate conviction which would have been an offence under the Controlled Substances Act if committed in this State, including any offence where a Cannabis Expiation Notice was issued, and any offence against the legislation which established the licensing scheme.

The Review Panel believes that using any offence under the Controlled Substances Act goes further than necessary to achieve the objective. It has investigated the number of convictions under the Controlled Substances Act generally and for drug possession; selling, manufacturing and producing drugs and aiding and abetting an offence in the last ten years. The figures, based on information from the Justice Technology Division of the Attorney-General's Department, are:

Number of Convictions for Offences under sections 31, 32 and 41 of the Controlled Substances Act between 1992 and 2002

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Convictions	7,989	9,244	10,685	10,759	10,598	6,759	2,254	1,988	3,646	4,288
Total:	68,210									

In terms of individuals, **35,525** have been convicted of offences against the Controlled Substances Act since 1 January 1992; and **34,701** have been convicted of offences against sections 31, 32 and 41 of the Controlled Substances Act since 1 January 1992. The difference is 824.

It may be argued that it therefore makes no difference which criterion is used. However, it is an important principle to make a restrictive criterion only as broad as necessary to prevent the harm. In the case of hydroponic retailers' associations with cannabis trade, section 31 and 32 (the offences of possession, sale and manufacture of drugs of dependence and prohibited substances), and section 41 (the general aiding and abetting offence) are the relevant offences.

For the purposes of achieving the alternative objective of reducing specialist hydroponic retailers' connections with cannabis trade, the Review Panel is of the view that absence of convictions for drug offences is an acceptable criterion for deciding that a person is of good repute.

The Review Panel is of the opinion, that the principle of limiting the restriction to what is necessary to achieve the objective should be followed, and only the following offences are relevant:

- **Section 31 - possession or consumption of drug of dependence and prohibited substance;**
- **Section 32 - manufacture, sale etc., of drug of dependence or prohibited substance;**
- **Section 41 - aiding and abetting an offence against the Controlled Substances Act.**

The Review Panel accepts the SAPOL suggestion to extend this to include any interstate conviction which would have been an offence against these sections if committed in this State; and to include any offence against the legislation which establishes the licensing scheme.

However, the SAPOL submission does not limit how long ago the offence was committed. This would deny the possibility of rehabilitation and limit some peoples' choice of career for life. This would be a greater restriction than necessary to achieve the alternative objective of eliminating from the industry people with associations with cannabis trade. Other occupational licensing schemes generally do not exclude a person with a relevant conviction forever. Most of the schemes specify five to ten years, depending on the offence. In the case of licensing hydroponic equipment retailers, the Review Panel believes five years since a previous conviction is long enough to indicate that the connection with cannabis trade has been broken.

This restriction would have a serious impact on those employed in, or owning businesses which sell hydroponic equipment when the licensing scheme commenced. These people would suffer consequences that were unforeseen at the time they were convicted of the offence. It may be that the circumstances of an offence were such that it is not warranted to preclude a person from selling hydroponic equipment.

There are two options to alleviate the impact of this condition.

- Only offences committed after the legislation came into operation would be taken into account. Persons already working in a hydroponic equipment retail business who had a drug offence conviction would be able to continue in the business.
- The Commissioner of Police could be given a discretion to waive the need to satisfy the no drug offences requirement (eg if the police had no record that the person associated with known criminals, or the person had only one conviction for small quantities for cannabis). There would be a right of appeal from the exercise of the discretion to the Administrative and Disciplinary Division of the District Court. This would enable a person with a conviction to argue that the nature and circumstances of the offence were such that it is appropriate to waive the condition.

Given the alternative objective of removing persons with criminal associations from the hydroponic equipment retail industry, the Review Panel is of the opinion that the discretion and appeal option is preferable because it will give immediate effect to the alternative objective. It will also allow a mechanism for individuals with unusual circumstances to put their case.

New legislation often provides transitional arrangements to allow people who may be affected to make appropriate arrangements. In the case of the licensing proposal, people selling hydroponic equipment could be given six months to apply for a licence (this provision is included in the Second Hand Dealers and Pawnbrokers Act).

The Review Panel recommends that conviction of one of the above offences within the previous five years is an appropriate limitation on the restriction.

6.3.3 Expiation of a simple cannabis offence

The Expiation of Offences Act 1996 states that payment of an expiation notice is not an admission of guilt. To prevent a person who has expiated a simple cannabis offence (these are offences of possession, sale or cultivation of small quantities of prohibited substances) from obtaining a licence would breach the fundamental principle of natural justice that a person is innocent until proven guilty. It is also contrary to the intention of the cannabis expiation notice scheme, which was to keep small users and growers for personal use out of the criminal justice system.

Since the CEN scheme was introduced in 1987, there has been a dramatic increase in the number of people charged with cannabis offences from 6231 in 1988 to 16,321 in 1995-1996. This rate fluctuated in the following years – in 1996/97 it was 18,015; in 1997/98 it was 16,007 and in 1998/99 it was 13,562.

The proposals in the Issues Paper and the SAPOL submission would lead to large numbers of people who have expiated simple cannabis offences being excluded from selling hydroponic equipment.

The Review Panel is of the view that the proposed licensing condition of not having been issued with an expiation notice for a simple cannabis offence, is against the intention of the Expiation of Offences Act and the principle that a person is innocent until proved guilty. This option is not recommended.

6.3.4 Associates with known criminals

This is a very broad criterion which does not specify the type of criminal. There are no known examples of other licensing schemes requiring such a broad condition. It discriminates against released offenders and infringes rights of association of a hydroponic equipment seller. It is not known how many people could be affected.

While this criterion would allow SAPOL to apply intelligence from any source, it is subjective and lacks transparency for the public and specialist hydroponic retailers. It could lead to high numbers of appeals. This requirement is not part of the SAPOL submission which proposes a business notification scheme.

The Review Panel is of the view that the costs associated with the proposed licensing condition of not having associations with criminals outweigh the benefits. This option is not recommended.

6.3.5 Other Legislation

In forming the views above, the Review Panel has considered other legislation. For example, the exclusion of second-hand dealers under the Second-hand Dealers and Pawnbrokers Act 1996, which regulates an area where stolen goods are often traded, occurs on:

- conviction of an offence of dishonesty
- breach of the Act
- becoming bankrupt
- winding up of a company of which the person was a director.

Apart from breach of the Act, the conditions are related to financial probity, and fraud or dishonesty. The Review Panel considers the conditions for hydroponic equipment retailer licensing proposed in the Issues Paper are unnecessarily stringent for a situation where the customer/seller transaction does not involve illegal items or activities.

If disqualified, a second-hand dealer or pawn broker may appeal the decision to the Administrative and Disciplinary Division of the District Court. Excluding a person from the ability to work in a certain field is a serious step. For this reason, many licensing schemes include an appeals mechanism, so that a person whose application for a licence is unsuccessful has the opportunity to have this decision reviewed. It entails additional costs to the Government.

The Review Panel recommends similar appeal mechanisms to those in the Second-hand Dealers and Pawnbrokers Act for any scheme in relation to specialist hydroponic retailers.

6.3.6 Costs

Reduction in the number of specialist hydroponic equipment suppliers

The Issues Paper made no attempt to quantify the cost of the likely reductions in retail outlets or of hydroponic equipment sales. However, based on SAPOL's estimate that 75% of specialist hydroponic shops are associated with cannabis trade and 27% are connected with established organised crime, it may be expected that the number of these shops will be reduced by between 27% and 75%, or on SAPOL figures for 100 such shops, to between 25 and 73 shops.

The Hydroponic Gardening Society of SA estimates that there are 60 specialist hydroponic stores with an annual turnover of \$52.4 million. In light of SAPOL's estimate, the number of shops would drop to between 15 and 44, and turnover of between \$14.2 million and \$39.3 million would be lost. This money may be spent in non-specialist stores, or in the remaining specialist hydroponic retail stores which obtain licences. It may also be lost to interstate operations.

Competition amongst specialist hydroponic retailers would be likely to be reduced if this many were forced out of the industry, resulting in higher prices and reducing incentives for innovation and improved customer service.

Requiring an integrity test of specialist hydroponic retailers would not prevent criminals from establishing a specialist hydroponic business employing a person who passed the SAPOL integrity test. According to SAPOL information, this has occurred in the liquor licensing area. Licensing specialist hydroponic retailers will not prevent the beneficiaries or shareholders of a specialist hydroponic retail business from being criminals or having criminal associations. Purchasers may then be misled into thinking that the retail industry had no associations with criminals even though this was not the case.

Impact on employment

The proposal would have a detrimental impact on unemployment in South Australia, as employment opportunities in the hydroponics industry would be reduced, and existing employees could lose their jobs. The Hydroponic Gardening Society of SA estimates that 230 people are employed by specialist hydroponic shops. Another industry participant estimated 500. On the basis of 500 employed, the SAPOL estimates would translate to direct losses of 125 to 375 staff.

Impact on other parts of the industry

The submissions emphasised the proposal would have a negative impact on the hydroponics industry both directly and indirectly. If less hydroponic equipment was sold overall, negative effects in the hydroponic equipment manufacture and wholesale sectors would also be felt. The specialist hydroponic retailers have linkages to approximately 211 South Australian manufacturers and wholesalers. Further, the horticulture and other related industries including commercial production, and research and development would be impacted.

Scope of the scheme

The costs of the system would vary depending on the definition of hydroponic equipment, and how many types of retailers are affected as a consequence. If the scheme cannot be confined directly to specialist hydroponic retailers, the impact will be much greater.

Non-specialist hydroponic equipment retailers may feel forced to register just to be sure that if they accidentally stock the defined items they will not be committing an offence. Others may cease to stock the defined items in order not to be included in the scheme. This may result in lost opportunities to sell this equipment.

Administrative Burden

The proposed restrictions will introduce significant administrative and process costs to both industry (licence applications, record keeping and storage, compliance, system changes and staff training), the community (infringement of privacy, additional time for transaction, risk of address being obtained by criminals to break in and steal equipment or crops) and government (assessment, maintaining updating register, monitoring and enforcement).

It is expected that any costs to retailers would be passed on to purchasers in the form of increased hydroponic equipment prices, leading to a competitive disadvantage for South Australian businesses in comparison with interstate hydroponic equipment businesses. This may lead to closure of smaller specialist hydroponic retailers.

However, it is appropriate that enforcement costs be borne by the government, as the major benefit of the regulatory scheme is shared across the community. Initially, enforcement costs may be high as unlicensed hydroponic equipment retailers are identified and prosecuted but should fall as they are removed from the market.

6.3.7 Benefits

Reduction in the use of hydroponic equipment purchased for commercial cultivation of cannabis

A police integrity test for entry will keep some persons predisposed to sell hydroponic equipment to commercial growers of cannabis out of the industry. However, this would not necessarily reduce the sale of hydroponic equipment for commercial cannabis production, as licensed hydroponic retailers dealers or interstate suppliers could satisfy customer demand.

Reduction in the “irreparable damage to families and individuals” from the commercial production of cannabis.

The removal of people who have associations with cannabis trade from hydroponic retail stores will reduce the likelihood that customers are assisted to grow cannabis, and will reduce the amount available. This will bring indirect benefits to the community through the reduction in trade for hard drugs; fewer opportunities for individuals to become involved in drugs; and less drug related crime.

A number of submissions noted that the proposal would not reduce the commercial production of cannabis, but rather, drive the drug market further underground. Cannabis users may switch to hard drugs, or purchase cannabis from commercial growers, increasing their contacts with organised crime.

Exclusion of persons of ill repute

Licensing is a means of screening out persons likely to have criminal connections before they enter the industry.

A licensing scheme would provide the police with a register of specialist hydroponic retailers, on which they could focus enforcement activities.

6.3.8 Public comment

“People will get hydroponic equipment somehow, no matter what is put in place.” – (SA Retailer)

“Costs of licensing will extend up the supply chain to wholesalers and manufacturers, loss of business may be extensive. Business will be lost from SA to other States. This could cause a different kind of ‘irreparable damage to families and individuals’.”– (Retailer)

“Because hydroponic technology is so successful, it has been put to use in a variety of ways, only one of which is cultivation of illegal plants. It would be unconscionable to prohibit the development of new technologies simply because they are attractive to criminal elements.” - (Industry Association)

“More than 1,000 small, medium and large businesses will face a red tape nightmare complying with the requirements.” - (Advocacy group)

“It is...reasonable to assume that the intervention by Government will not unduly impact on retailers who have pro-actively demonstrated that they can in no way be attributed with the market failure.” (Hardware retailer)

“integrity testing...[will] rid us of the bad stigma we are commonly related to” (Hydroponic retailer)

“The police already have sufficient powers to apprehend drug offenders, it is too easily abused to extend it further” – (Member of public).

6.4 Purchaser end use certificate and proof of identity

6.4.1 Description

The proposal in the Issues Paper requires a seller of hydroponic equipment to obtain a signed end use certificate from a purchaser regarding the equipment sold, and to obtain proof of the purchaser's identity in order to verify the name and address given in the end use certificate. The intention of the certificate is to deter customers from buying hydroponic equipment for the purpose of growing cannabis and to enable SAPOL to analyse buying patterns and investigate particular customers if the police suspect cannabis is being grown.

The Review Panel assesses the purchaser end use certificate and proof of identity requirements as an intermediate restriction on competition.

6.4.2 End use certificate

The Issues Paper indicated that the certificate would be modelled on the one required in the Controlled Substances (Poisons) Regulations 1996, (included in Appendix 4). These Regulations require that the end use certificate be completed by, and include the details of, both the purchaser and seller, including:

- product name and quantity purchased
- date of the sale
- name and address of the purchaser/person authorising purchase
- the purchaser's intended use of product
- name, date of birth, address, vehicle registration number (used in collection), and status of the collection agent (ie purchaser or relationship to employer/contractor)
- verification of the collection agent's proof of identity
- details of sales person

The Review Panel envisaged that the hydroponic equipment end use certificate would contain:

- Name and address of purchaser
- Date and place of purchase
- Quantity and description of the equipment
- Purchaser's intended use
- Information about type of ID used to prove identity.

6.4.3 Proof of identity

Proof of identity required in the Controlled Substances (Poisons) Regulations for pre-cursor chemicals is a drivers licence, passport or "other sufficient evidence".

In the Second-Hand Dealers and Pawnbrokers Act 1996, a second-hand dealer must obtain identification from the seller of second-hand goods. The identification is a card or document issued by the Government with the person's photograph and address, or a document issued by the Government without photograph plus another document issued for some official or other proper

purpose by a person or body other than the customer. Dealers are required to keep records of this information and the description of the goods for 5 years.

The Graffiti Control Act 2001, in which a seller cannot sell spray paint cans to a person under the age of 18 unless the seller is satisfied, on the production of proof of age as to the age of the purchaser, does not specify the identification required. The Act will come into operation on 1 April 2002 (section 4) and 1 February 2002 (the remainder).

These models apply to goods and situations which are different to the case of hydroponic equipment. For example, the Graffiti Act model is targeting a particular section of the community (minors) which represents the core group of graffiti offenders. In contrast, the purchasers of hydroponic equipment who cultivate cannabis cannot be so easily identified. Also, the causal connection between the offence of commercial cannabis growing and buying hydroponic equipment is more tenuous than in the case of pre-cursor chemicals, stolen goods or spray cans.

The Proof of Identity restriction should attempt to strike a balance between a standard high enough to be an adequate proof of identity and one which is reasonable and possible to be met by the average customer. In terms of the Issues Paper proposal, this potentially includes customers of gardening/hardware stores, lighting and electrical shops, pump, pool and irrigation shops as well as specialist hydroponic retailers. The Review Panel envisages that the requirements under the Second-Hand Dealers and Pawnbrokers Act would provide sufficient range of documents to enable customers of all of these retail outlets to prove their identity.

6.4.4 Record keeping obligations

Under the Controlled Substances (Poisons) Regulations, sellers have a number of record keeping obligations in relation to the end use certificates, including requirements to:

- keep a record of the product and quantity sold, date of sale, and name and address of purchaser for each sale of certain precursor chemicals
- retain an end user statement for at least five years after the date of the sale to which it relates
- make the record referred to above and the end user statements available for inspection at any time by authorised officers
- inform police should they become suspicious that a purchaser's order/inquiry may be connected to an unlawful use of the product

The form and reporting requirements under these Regulations are detailed and onerous because the substances it regulates are drugs. This level of control would not be necessary in the case of hydroponic equipment, which is not dangerous in itself.

The Review Panel envisaged that the reporting obligations on the hydroponic equipment seller would be to:

- retain the end use certificate (including item and quantity, and name and address of purchaser) for at least five years after the date of the sale to which it relates; and
- make the statements available for inspection at any time by authorised officers.

Application of Commonwealth Privacy Laws to Customer Records

New privacy requirements under the Commonwealth Privacy Act 1998 will apply to businesses with a turnover of \$3 million or more from December 2001 and to all businesses , from 21

December 2002. All specialist hydroponic retailers will be subject to the requirements of the Act by the latter date.

The Act requires private businesses to comply with the national privacy principles (NPP). These regulate the way private sector organizations handle personal information, e.g. information collection and access, data security. All private sector organisations will need to:

- take reasonable steps to ensure that the purchaser providing information is aware of the obligation under the proposed legislation that the retailer collect the required information (NPP Clause 1.3(e));
- take reasonable steps to ensure that the information collected is complete and up to date (NPP Clause 3);
- take reasonable steps to ensure that the information collected is secure, that is, free from unauthorised use, modification or disclosure (NPP Clause 4);
- to set out in a document their policies on the management of personal information (NPP Clause 5); and
- to provide access for individuals to information held about them. However, the hydroponic equipment retailer may refuse access to information where authorised by law to do so, or if it would prejudice an investigation of possible unlawful activity (NPP Clause 6.1).

These requirements will not have an influence on the workability of the licensing proposal. The NPP notes that: “It is not intended to deter organizations from lawfully co-operating with agencies performing law enforcement functions in the performance of their functions.” Further, a number of clauses specifically exempt private organisations from the obligations under the NPPs where they are acting pursuant to a requirement under a law of the jurisdiction.

6.4.5 Costs

Reduction in hydroponic equipment sales

Requiring purchasers to complete an end use certificate is likely to cause them to shop elsewhere (by mail order or the internet interstate or overseas, in the second hand market, through private sales and possibly a black-market). Several submissions stated that this requirement would have a huge negative impact on their businesses. The submissions suggested that customers would rather buy at non-specialist shops, over the internet or by mail order than give their personal information to the police, with the possibility of having their homes searched.

Reduced demand would force job losses and closures of specialist hydroponic retailers, particularly smaller outlets.

Several submissions commented that any reduction in the purchase of hydroponic equipment would be as a result of personal users no longer growing their own plants. These submissions suggested that those criminally involved in commercial cannabis production would already be likely to obtain equipment direct from wholesalers, manufacturers and other sources. Commercial growers would continue their illegal activity and their market would grow as personal users were pushed out.

Cost to industry

It will make the sales transaction more difficult. Non-hydroponic equipment will have to be separated out from hydroponic equipment. This will add to the time for a transaction and may necessitate any

business selling the defined equipment establishing separate procedures, administrative, financial and computer systems. Training of staff will be required for these changes.

Filling out forms and verifying details will be an administrative burden for hydroponic equipment retailers as it will further increase the transaction time and cost of sales.

The cost of finding space to store records, securely storing them for 5 years, and making them available for inspection by authorised officers is an additional cost to hydroponic equipment retailers. SAPOL suggested in its submission that the cost impact of the ID/end use certificate on the suppliers of pre-cursor chemicals was minimal. This may be because there are a relatively small number of suppliers and small quantity of drugs sold. This is not the case for hydroponic retailers, especially large retailers who rely on rapid flow-through of customers. The number of transactions which must be recorded is likely to be very large, perhaps hundreds of thousands each year. This translates into a lot of time and storage space.

If the records were required to be made electronically available to SAPOL, the cost would increase. In the area of second hand dealers, other jurisdictions are moving to a system of requiring compulsory use of a computer modem link between second hand dealers and the police. The estimated cost to dealers is between \$2,500 - \$4, 000 for equipment, with further costs for staff training and software.

These extra costs are likely to be passed on to the customer. This will reduce the hydroponic retailers' competitiveness compared to other retailers who sell the same equipment. This may lead to closure of smaller specialist hydroponic retailers.

Cost to customers

Customers may feel filling in the certificate and showing ID is an unnecessary use of their time and an infringement of their privacy without justification, especially if they are purchasing from a hardware, lighting or pump shop rather than a specialist hydroponic retailer.

Increased Crime

If customers were required to provide identification when purchasing hydroponic equipment, there is a real chance that this information could be accessed illegally and used by criminal networks for the purpose of theft or drug raids. This could lead to an increase in the number of home invasions and in effect, worsen the very problem that this proposal seeks to redress..

The ID requirement may also lead to purchasers providing misleading information such as falsified, forged or stolen IDs.

Cost to government

The Government will bear the cost of inspection or auditing specialist hydroponic retailers for end use statement compliance by authorised officers. It will also bear the cost of prosecutions for non-compliance.

The ID requirement may lead to an increase in the use of forged or stolen IDs. This is generally undesirable, and if it became current in some sections of the community, may make enforcement of motor vehicle infringements particularly, more difficult.

6.4.6 Benefits

Reduction in the use of hydroponic equipment purchased for commercial cultivation of cannabis

The end use certificate will discourage people from buying hydroponic equipment for cannabis cultivation, as they will have to give their name and address and the intended use of the equipment, knowing that this will be accessed by SAPOL.

This assumes customers will not obtain hydroponic equipment from licensed specialist hydroponic retailers on false pretences (false ID or end use certificates), ask friends or relatives to purchase equipment for them, or buy from retailers interstate.

Reduction in the “irreparable damage to families and individuals” from the commercial production of cannabis.

Purchaser identification would assist SAPOL by giving it access to records of hydroponic equipment purchasers. Buying patterns could be analysed and particular customers investigated if SAPOL suspects that the person could be cultivating cannabis. As well as assisting in the apprehension of commercial cultivators, SAPOL would know the particular retailer supplying the equipment and would be able to investigate the individuals in that business for criminal connections.

Reducing the sales of hydroponic equipment may reduce the amount of cannabis produced for sale. In the long term, if less cannabis was available for sale, fewer people would suffer the harmful health effects of cannabis consumption, and fewer may turn to hard drugs. This would reduce drug related crime and self-abuse with consequent human and economic cost savings.

6.4.7 Public comment

“Customers will not want to give details about themselves and will shop elsewhere. Interstate suppliers are setting up mail order catalogues to take advantage of this if ID and end use certificates are introduced.” – (Industry Association)

6.4.8 An alternative to end use certificates

The Review Panel is of the view that the "intended use" part of an end use certificate is unlikely to be filled in correctly by a customer who is purchasing hydroponic equipment for the purpose of growing cannabis, but the costs of such a certificate are high. However, the Review Panel recognises the problems faced by SAPOL apprehending participants in the cannabis trade.

For this reason the Review Panel suggests that as part of any scheme to regulate hydroponic equipment retailers it may be useful to create an offence of selling hydroponic equipment knowing that the customer intended to use the equipment for the production of cannabis. Conviction would lead to loss of licence (or disqualification under negative licensing or business notification).

The police would have a difficult task to prove the retailer’s knowledge of the customer’s intent, but might be useful, for example, where the retailer helps the customer set up the equipment for cannabis cultivation (referred to above under “Objectives”). It would also give retailers a reason for not selling equipment to customers they suspected of using it to grow cannabis.

It should be noted that retailers are currently free to report suspicious customers to the police. This may assist police investigations.

The Review Panel recommends that as part of any scheme to regulate hydroponic equipment retailers it be an offence to sell hydroponic equipment knowing that the customer intended to use the equipment for the production of cannabis.

6.5 Review Panel Conclusion/Recommendation

Licensing based on a Police Integrity Test

Licensing specialist hydroponic retailers would not achieve the objective of reducing the amount of cannabis grown in South Australia. The equipment will continue to be available from other retail outlets and interstate. It is likely that criminals would continue to grow cannabis.

Licensing would assist the achievement of the alternative objective of reducing associations with cannabis trade among specialist hydroponic retailers.

An unknown number of specialist hydroponic retailers would not be able to pass the SAPOL integrity test and would have to sell or close their businesses. This would have implications for employment and may have an impact on the wholesale market.

The costs of the Police Integrity Test proposed in the Issues Paper as a condition for licensing outweigh the benefits and it is not recommended.

The recommended condition for licensing is:

- **no conviction for an offence against section 31, 32 or 41 of the Controlled Substances Act within the previous five years.**

Customer End Use Certificate and Proof of Identity

The requirement for an end use certificate may achieve the objective of reducing the commercial production of cannabis in South Australia. A record of purchasers of hydroponic equipment may assist SAPOL to locate commercial hydroponically grown cannabis crops, and to identify people associated with cannabis cultivation and trade. However, the costs associated with the certificate, the loss of customer privacy and the ease with which the equipment could be purchased from interstate or other retailers outweigh the benefits.

The requirement is unlikely to achieve the alternative objective of removing from specialist hydroponic retail businesses those associated with the cannabis trade because it is directed at customers. Customers engaged in commercial cultivation of cannabis will obtain the equipment they require from retailers where a certificate is not required.

The costs of the proposal for Customer End Use certificate and Proof of Identity outweigh the benefits and it is not recommended.

Conclusion

A licensing scheme, based on the condition of no offences against specified drug offences, but without the proposed end use certificate and proof of identity, would achieve the alternative objective of reducing associations with cannabis trade among specialist hydroponic retailers.

It would provide a net public benefit in terms of the alternative objective if it could be restricted to specialist hydroponic retailers. However, this would not be possible using the recommended definition of hydroponic equipment. Unless the scheme could be restricted to the 60 to 100 specialist hydroponic retail businesses in South Australia, the costs would exceed the benefits.

The benefits of the proposal in the Issues Paper for a licensing scheme for hydroponic equipment retailers comprising a police integrity check and customer end use certificate and proof of identity are outweighed by the costs, and it is not recommended.

7 REGULATORY ALTERNATIVES

7.1 Introduction

A range of strategies could be adopted in meeting the alternative objective of reducing the number of specialist hydroponic retailers who have associations with cannabis trade.

The possibilities mentioned in the Issues Paper are:

- a voluntary code of practice adopted by retailers of hydroponic equipment that includes restricting sales to purchasers who are growing plants that are not prohibited substances or who are involved in legitimate commercial production;
- negative licensing; or
- a business notification scheme.

7.2 Voluntary industry code of practice

7.2.1 Description

A voluntary code of practice is one method of self-regulation in an industry. A code of practice generally describes the types of actions or procedures that the industry or profession believes are acceptable within the industry and to the public. Codes can range from statements of intent to rules of professional conduct.

“For self-regulation to be successful, there must be sufficient market power and commonality of interest within an industry to deter non-compliance. This is because industry self-regulation or voluntary codes have no legal authority to deter non-compliance. In fact, compliance is achieved through the individual’s desire to uphold the reputation of the profession along with the desire to avoid the sanction of peers and colleagues, rather than through threat of legal redress.” (“Regulatory Alternatives”, Office of Regulation Reform, Victoria, undated)

Criteria that an industry would need to demonstrate before self-regulation could be considered are suggested by the Office of Consumer and Business Affairs in “Industry Regulation: The Way Forward” (1996, p. 9). They include:

- the legal basis upon which the industry group operates;
- evidence that the industry as a whole is supportive of the proposed role (as opposed to industry association support alone);
- evidence that the industry group has sufficient coverage of the industry concerned;
- evidence of public and consumer consultation in the development of the proposal;
- proposals for reporting to Government, methods for identifying and reporting on individual industry members and systematic industry problems, and consultative mechanisms;
- evidence that the formal industry agreement and the delegated powers will be applied in a consistent and fair fashion and will not be applied to the detriment of a particular industry sector or non-member in an anti-competitive manner;
- proposals for independent evaluation of the undertaking of the delegated authorities;
- proper funding proposals; and
- evidence of capacity to handle delegations.

Not all of these criteria have been demonstrated by the industry to date.

7.2.2 Restrictions

A code of practice would be a restriction on competition related to conduct of the business provider, e.g. a restriction on the way the business is carried out. However, a voluntary code would not be a true barrier to market entry as, by its voluntary nature, it would only apply to those who wished to adopt it. Sanctions against those who did not would not be possible, and thus the code would be unenforceable.

7.2.3 Application to the Hydroponic Equipment Industry

The Issues Paper suggested a voluntary code of practice could be adopted and implemented by retailers to ensure that purchases of hydroponic equipment are only for bona fide purposes.

This suggestion focuses on the retailer discovering the customer’s intention, and is one of the purposes of a customer end use certificate. There is nothing to prevent an end use certificate system being incorporated into a voluntary code of practice, but it is doubtful that it would be supported by the industry because of the administrative costs and likelihood of losing customers.

A code of practice may discourage retailers from selling to customers who wish to use hydroponic equipment for illegal purposes, however it is not the role of retailers to regulate or control the way customers use every day products which have many legitimate uses.

Although there are bodies which represent some participants in the hydroponic industry (e.g. the Hydroponic Garden Society of SA represents approximately half the specialist hydroponic retailers in South Australia), there is no body which represents all participants who would have the authority to administer a code of practice. This problem is compounded by the fact that many retailers apart from specialist hydroponic retailers sell equipment that can be used in hydroponics, including gardening, hardware and irrigation shops

As voluntary codes have no legal authority to ensure compliance, successful regulation requires sufficient market power and commonality of interest within an industry to deter non-compliance. Voluntary codes of practice can be useful where improved standards of trader-consumer dealings are desired, however they are not appropriate or effective for dealing with the risk of criminal activity. According to SAPOL information, approximately 75 per cent of specialist hydroponic retailers are associated with criminal activity. It is unlikely that a hydroponic equipment retailer operated by or under the direction of criminals would comply with a voluntary industry code of practice. Self-regulation is therefore unlikely to succeed in an industry with a high proportion of connections with cannabis trade.

The effectiveness of a voluntary code would also depend on the incentive for members to comply. This would depend on how effectively the code is administered, the extent that conduct is scrutinised and sanctions (a costly exercise potentially leading to high membership fees, and a declining membership base).

A voluntary code will be unenforceable if it contravenes the provisions of Section 45 of the Trade Practices Act 1974 which prohibits anti-competitive agreements between competitors.

7.2.4 Hydroponic Gardening Society of SA Code of Practice

The Hydroponic Gardening Society of SA recently developed and adopted a hydroponic retailer accreditation scheme including a Voluntary Code of Conduct (since 25 November 2001) specifically for its merchant members. Key components of the scheme include:

- Members “pledge not to display, sell, promote, advertise, instruct, make available for rent or lend, any product, material or paraphernalia that purports, directly aligns itself to the production or consumption of illegal substances...not to manufacture or allow to be manufactured any material or substances that are of an illegal nature on the Business premises.”
- To ensure the code is upheld by its members, members are required to make available for inspection their relevant business premises by an independent inspection team that has been voted by a member majority, on mutual arrangement with the relevant member no sooner than 24 hours prior to intended inspection.
- Secret shoppers may enter members’ business premises for the purpose of determining compliance with the code.
- Members to display accreditation sticker/code in their store.

As the Society only represents approximately half the specialist hydroponic retailers, the code has a limited effect regulating the marketplace. The Review Panel applauds the initiative and encourages the Society to continue its efforts to improve the image of its retail members and public awareness of hydroponic growing techniques and their value to the economy.

7.2.5 Mandatory code of practice

A mandatory code of practice, although not suggested in the Issues Paper, is an alternative to the voluntary code. The code would be imposed on the industry by legislation.

Governments have been moving away from this model as it represents both a barrier to market entry and a restriction on competitive conduct, and is costly in terms of enforcement.

In addition, insofar as a mandatory code envisaged an agreement to comply with laws under the Controlled Substances Act, it would be repeating the requirements of that law. This would be unnecessary and inappropriate.

7.2.6 Costs

The industry association would be expected to cover the costs of monitoring and enforcing the code. The costs may be high (initial consultation with key stakeholders, implementation and administration, reporting to members and the public, establishing a review/appeals body, dealing with complaints and imposing sanctions).

As those being regulated bear the cost of regulating, retailer membership/compliance costs may be passed on to consumers and lead to price increases in hydroponic equipment.

There are no legal remedies for breaches of a voluntary code of practice. The only remedy is exclusion/suspension from membership of the association or some other penalty, agreed by members as a condition of membership. This may reduce the effectiveness of the code.

7.2.7 Benefits

Voluntary codes maximise flexibility and industry involvement. Industry expertise and experience is better utilised. They are more responsive to change than regulation and allow industry participants to more easily adjust to changes in the industry.

Such codes reduce the need for and cost of government resources spent administering a regulatory framework, as those being regulated bear the cost of regulating. In the context of specialist hydroponic retailers, the extent of this benefit to Government is limited given the level of criminal involvement in the market and the need for police intervention.

7.2.8 Public comment

“unenforceable” – (SA Retailer)

“A voluntary code of practice would help, but that is all. The dollar has a very powerful voice, and would be followed by all except the completely honest.” - (Engineering Society)

7.2.9 Review Panel Conclusion and/or Recommendation

Given the connection of specialist hydroponic retailers with criminal activity, it is questionable whether a voluntary code of practice is likely to be observed by those it seeks to control. Both the objective of the Issues Paper of reducing commercially grown cannabis, and the alternative objective of reducing the number of specialist hydroponic retailers with criminal associations, would be better achieved by threat of legal redress than individual members’ desire to uphold the industry’s reputation and avoid the sanction of peers.

A voluntary code of practice for the hydroponic equipment industry is not feasible at this time, as there is insufficient power and commonality of interest within the hydroponic equipment industry to deter non-compliance and the cost of non-compliance is significant.

A voluntary code of practice is not recommended.

A mandatory code of practice is not recommended.

7.3 Co-regulation

This alternative emerged from the consideration of the voluntary code of practice. Co-regulation involves government and an industry body sharing responsibility for regulating the occupation. It is usually given effect through legislative reference or endorsement of a self-regulating body responsible for the competency assessment of an occupation.

It was suggested to the Review Panel that a retail industry association could play a part in a regulatory scheme in the following way.

- The association (or several associations) would be specified as “an approved association” in the legislation and would monitor and enforce the membership standards.
- The association would have a good repute requirement for membership designed to keep out those with associations with cannabis trade (perhaps based on no drug convictions).
- Wholesalers and manufacturers would be prohibited by legislation from supplying hydroponic equipment to retailers unless they provided a certificate stating they were current members of the association.
- Without the certificate, a retailer could not buy the hydroponic equipment from a wholesaler or manufacturer.

7.3.1 Restriction

Co-regulation is a barrier to entry and a conduct requirement, as people without certain convictions and industry association membership cannot participate.

7.3.2 Costs

All wholesalers and manufacturers of “hydroponic equipment” would have to be notified of the scheme and put in place a system to ensure that the specified hydroponic equipment was only sold to retailers who provided a certificate of membership. Depending on how hydroponic equipment is defined, a large number of wholesalers and manufacturers may become involved. This may cause confusion for the manufacturers and wholesalers of hydroponic equipment which was not part of the definition.

This scheme would involve any retailer who purchases hydroponic equipment, not just specialist hydroponic retailers. These retailers would have to become members of an approved industry association. The annual membership fee would have to be sufficient to cover the usual costs of an industry association - industry promotion, member education; plus costs of operating the scheme – assessing membership applications, regular checks to ensure members remained eligible (ie no drug convictions), prosecuting breaches of the membership conditions, undertaking reviews of decisions on membership, etc.

There would be nothing to stop a retailer obtaining hydroponic equipment from interstate, as the legislation would only apply to wholesalers and manufacturers in South Australia. The major reason for a retailer to become a member of the association would be irrelevant.

7.3.3 Benefits

The hydroponics equipment retail industry would be encouraged to take greater responsibility for the behaviour of its members, and association sanctions would have legislative backing.

It reduces the need for government resources to be dedicated to regulation of the industry.

7.3.4 Review Panel Conclusion and/or Recommendation

It is difficult to see how this scheme could achieve the alternative objective unless it was a national scheme, as non-members would be able to obtain their hydroponic equipment from interstate.

Such a scheme needs further consideration by, and input from, industry.

The co-regulation scheme is not recommended at this time. The Review Panel encourages the specialist hydroponics retailer industry to investigate the feasibility of this type of scheme and put its views to the Government.

7.4 Negative licensing

7.4.1 Description

Negative licensing is a system of market regulation in which legislation simply prescribes conditions for who may or may not operate within a specified market. It becomes an offence to operate in breach of the condition. Negative licensing legislation may preclude persons who do not have specified competencies or have been convicted of certain offences. Individual providers are responsible for ensuring they comply with the requirements. There is no requirement to be registered with a government agency, and therefore no list of businesses exists. This may make enforcement of the conditions more difficult than under licensing or business notification schemes. Customer complaints are generally the way breaches of a negative licensing scheme are discovered.

Examples of the use of negative licensing are the Land Valuers Act 1994 and the Hairdressers Act 1988. Under the Hairdressers Act, it is an offence for a person to carry on the practice of hairdressing without prescribed qualifications. Similarly, under the Land Valuers Act, a natural person must not carry on a business, or hold himself or herself out to be a land valuer unless he or she holds the qualifications required by regulation. This carries a maximum penalty of \$20,000. There is provision for exemptions.

A negative licensing scheme does not, of itself, require customer end use certificates or identification. These are added in some circumstances to assist enforcement of illegal dealing by the customer or the operator with the goods involved in the business activity, for example stolen goods, or drugs of dependence/prohibited substances.

7.4.2 Restrictions

Negative licensing is a barrier to entry and a conduct requirement, as persons without qualifications or certain convictions cannot participate.

7.4.3 Applied to the Hydroponics Industry

A negative licensing system for specialist hydroponic retailers designed to achieve the alternative objective of reducing the number of retailers who have associations with cannabis trade, would focus on criminal convictions for drug offences. Persons with drug convictions could not own, operate, direct or be employed in a business which sells hydroponic equipment.

For the reasons outlined above under "Licensing, Licensing based on a Police Integrity Test", it is proposed to only include convictions under sections 31, 32 and 41 of the Controlled Substances Act which were incurred in the previous five years. This acknowledges the possibility of rehabilitation and allows people to re-enter the industry.

It is necessary to target owners and directors as they are in the best position to control what is stocked, who sells the stock, how it is sold and by whom. It is also necessary to target employees. As discussed above under "Licensing, Description of the Proposal in the Issues Paper", although this is a serious restriction on employment, it is the only way to ensure all people in specialist hydroponic retail businesses who are associated with the cannabis trade are removed. Without the restriction applying to employees, it would be easy to evade the intention of the scheme. Specialist hydroponic retailers could establish companies with directors who have no drug convictions, and employ as managers or staff, people with criminal records.

The scheme would adopt the definition of 'hydroponic equipment' recommended above under "Definition of Hydroponic Equipment", that is, two or more of the following items:

- Electric lights of 250 watts or more;
- Fluorescent lights which combine the red and blue part of the light spectrum in a way which enhances plant growth, also called gro-lux lamps
- Units comprising high intensity discharge lamps, control gear, ballasts, lamp mounts and reflectors, also called ballast boxes.

The problem of capturing a wider range of retailers than intended could be dealt with by an exemptions mechanism, also discussed in "Definition of Hydroponic Equipment".

A customer end use certificate and proof of identity requirement is not proposed as part of a negative licensing scheme for hydroponic equipment retailers. As discussed above under "Licensing, Purchaser End Use Certificate and Proof of Identity", the Review Panel is of the view that the costs of this requirement exceed the benefits.

As with all new legislation, there would be either a transition period or a delay before the scheme came into operation accompanied by publicity, in order to allow businesses to adjust their operations.

The Review Panel assesses negative licensing as a serious restriction on competition.

7.4.4 Costs

Retailers covered

As discussed above under "Definition of Hydroponic Equipment", the definition would result in the capture of more than specialist hydroponic retailers. Negative licensing would impose the lowest

administrative cost on businesses, as no notification of business details or licence applications are involved.

Specialist hydroponic retailers

Retailers who are covered by the scheme and have criminal records are most likely to be in specialist hydroponic retail businesses. The costs will involve ensuring employees do not have a criminal record; dismissing managers and staff who have a criminal record; removing directors who have a criminal record; and making alternative arrangements for the business if the owner has a criminal record.

Criminal Checks

There would be an initial burden upon owners, managers and employees to obtain a copy of their criminal record to ensure they have not been convicted of any of the specified offences within the past ten years. A National Police Clearance Certificate costs \$43.

Difficulty Identifying Industry Participants

In a negative licensing system, there is no register, and no licence. It is difficult for an inspecting body such as SAPOL to know the identity and location of all participants in the industry. The Yellow Pages may offer some assistance but will not necessarily be up to date or complete. However, as SAPOL advise that 75% of hydroponic retailers are connected with cannabis trade, it seems likely that police intelligence can identify those retailers. The negative licensing requirement will be one tool for SAPOL to use to remove people with these connections from the retail industry.

The scheme may be more effective from the point of view of enforcement if businesses were required to notify the Police that they sold “hydroponic equipment.” The scheme would then become a business notification scheme. Under such schemes, it is an offence not to notify the police. The administrative burden is greater under such a scheme.

Prosecution

There would be costs for prosecuting persons with drug convictions who continued to own, operate, direct or be employed in a business which sells hydroponic equipment.

7.4.5 Benefits

Minimal Impact on the Industry as a Whole

Negative licensing offers some control over who participates as a specialist hydroponic retailer, whilst having minimal impact upon the hydroponics industry as a whole.

Retailers would not be subject to the administrative burden of a licensing system.

It would be easy for a retailer to assess whether or not the negative licensing scheme applied, as it would only need to check if it stocked two or more of the items in the definition of hydroponic equipment.

Removal of Persons with Drug Convictions

The scheme would remove persons associated with cannabis trade from the hydroponics industry.

A negative licensing system would impose only small ongoing compliance costs and would enable police to target specific businesses already suspected of criminal associations without spending time on the low-risk businesses.

7.4.6 Public comment

Six submissions supported negative licensing, including one large hardware/gardening store supported the concept of negative licensing, which also suggested the extension of the disqualification to beneficiaries of the illegal activity. No submissions specifically rejected the idea of a negative licensing arrangement.

7.4.7 Review Panel Conclusion and/or Recommendation

A negative licensing scheme (without end use certificate and proof of identity) would achieve the alternative objective of removing people who have connections with the cannabis trade from the hydroponic equipment retail industry.

In the view of the Review Panel, the benefits of negative licensing outweigh the costs. Negative licensing would impose the smallest burden on hydroponic equipment retailers of all the schemes examined by the Review Panel, and is preferred because of the range of retailers included by the definition of hydroponic equipment.

Negative licensing is recommended.

7.5 Business Notification Scheme

7.5.1 Description

A business notification scheme is a more restrictive version of negative licensing which, in addition to the negative licensing requirement to satisfy the conditions for who may or may not operate, also requires the operator to notify a government agency, usually the police, their business details and when they commence or cease to operate the business.

The rationale for a business notification scheme is that there must be a system to identify those operating in the industry, but the establishment of a *licensing* system entailing license applications, fees and associated administrative burdens is not necessary.

Business notification was introduced for the second-hand dealers and pawnbroking industry, after it was recognised that the system of negative licensing that existed at the time provided inadequate means to identify those operating as second-hand dealers, particularly operators of stalls at weekend markets.

The scheme for second-hand dealers also requires the dealer to obtain proof of identity from the seller of the second hand goods, to describe the goods, and to keep the records. This is not an

essential element of a business notification scheme, but is added to the scheme to assist tracing possibly stolen goods and the person who sold them to the dealer. These requirements are not recommended for a business notification scheme for hydroponic equipment retailers for the reasons outlined above under “Licensing, Purchaser End Use Certificate and Proof of Identity”.

7.5.2 Restrictions

Business notification is a barrier to entry and a conduct requirement, as persons without qualifications or certain convictions cannot participate.

7.5.3 Application to hydroponics industry

A business notification scheme would operate in the hydroponics retail industry by specifying that:

- A person must not own, operate, be employed in, or be the director of a company that owns, a business which sells hydroponic equipment if convicted of an offence against section 31, 32 and 41 of the Controlled Substances Act;
- a person carrying on a business which sells hydroponic equipment must provide the police with information such as their name and address, and the name and address of the business.

Hydroponic equipment would be defined as described above under “Licensing”. As discussed, this definition would result in a greater range of retailers being brought within the scheme than specialist hydroponic businesses.

A customer end use certificate and proof of identity are not proposed as part of a business notification scheme for hydroponic equipment retailers, for the reasons discussed above under “Licensing, Purchaser End Use Certificate and Proof of Identity”.

The Review Panel assesses business notification as a serious restriction on competition.

7.5.4 Costs

The costs are similar to those outlined above under “Negative Licensing”, although there is no cost to SAPOL in identifying the businesses involved, because they are obliged to identify themselves. Instead, the Police would have the cost of maintaining the register.

On the other hand, it is an offence for these businesses not to notify SAPOL that they are operating. There would be costs associated with providing the Commissioner of Police with the information required, and ensuring that the information remained current.

These costs, while not substantial, would be higher than under a negative licensing scheme, and multiplied by all the retailers covered, would produce an overall larger cost.

7.5.5 Benefits

As well as the benefits listed above under “Negative Licensing”, a business notification scheme would provide an up to date register of all participants in the hydroponic industry.

7.5.6 Public comment

There was a general confusion about the difference between business notification and negative licensing, and what they mean in practice..

7.5.7 SAPOL Submission

In its submission, SAPOL favours a variation of a business notification scheme which incorporates aspects of both the Second-Hand Dealers and Pawnbrokers Act and the Controlled Substances Act, including the use of police integrity checks and end use statements.

SAPOL introduces the concept of a hydroponic equipment ‘dealer’. Dealing in hydroponic equipment means selling new or second-hand hydroponic equipment. Sell includes supply, trade, exchange or barter. This has the effect of including individuals and wholesalers and a wider range of transactions (for example, private sales through the newspaper).

SAPOL proposes thirteen, very generally described types of item to be included as “hydroponic equipment”, eg heating devices, plant nutrients. The list is reproduced and discussed above under “Definition”, where it is concluded that it was too broad and would result in many more retailers than the targeted specialist hydroponic retailers becoming involved.

SAPOL argues that business notification scheme and the list of equipment is aimed at those persons who intend to deal primarily in hydroponic equipment and at minimising the impact of the restriction on the industry. SAPOL’s submission does not indicate the range of people or businesses which would be affected, or estimate the number of businesses which might be involved.

The submission proposes that a dealer in hydroponic equipment would notify the police, and provide name and address, business name and address, and address where records are kept. The Commissioner of Police could declare a person to be a dealer. As a condition entitling the dealer to operate, he or she would be required to pass a police integrity check. This would mean:

- not having been convicted of any offence under the Controlled Substances Act, or any interstate conviction which would be an offence under the Controlled Substances Act,
- not having been issued with an expiation notice for the production of cannabis
- not having been convicted of an offence against the business notification scheme.

These requirements have been discussed above under “Licensing, Licensing Based on Police Integrity Test”, where first condition above was amended to refer to specific offences under the Controlled Substances Act, the second was rejected, and third accepted.

SAPOL also proposes adopting the end use certificate and proof of identity requirements applicable to suppliers of precursor chemicals under the Controlled Substances (Poisons) Regulations, and similar record keeping provisions. The reasons for not favouring this aspect of the submission are discussed above under “Licensing, Purchaser End Use Certificate and Proof of Identity”.

The greatest deficiency in the SAPOL proposal for business notification is that while it claims the impact on the whole industry will be less than under the licensing scheme in the Issues Paper, it does not show how the two schemes would be different, in terms of obligations on and costs to sellers of hydroponic equipment.

The Review Panel finds that the costs of the business notification proposal in the SAPOL submission outweigh the benefits, and it is not recommended.

7.5.8 Review Panel Conclusion and/or Recommendation

A business notification scheme (without end use certificate and proof of identity) would achieve the alternative objective of removing people who have connections with the cannabis trade from the hydroponics industry.

If the definition of hydroponic equipment could be restricted to specialist hydroponic retailers only, the benefits of a business notification scheme (not including customer end use certificates and proof of identity) would outweigh the costs. However, this scheme is not preferred over negative licensing because the net public benefit would be smaller.

Business notification is therefore not recommended.

8 ALTERNATIVES UNRELATED TO HYDROPONIC RETAILERS

The Review Panel's terms of reference were to evaluate the proposal to require licensing of hydroponics equipment retailers, focussing on aspects of the proposal which restrict competition, or which impose costs or confer benefits on business; and to report on appropriate arrangements for regulation, if any.

The objective of the proposed licensing scheme as stated in the Issues Paper was to reduce the commercial production of cannabis. For the purposes of the review, the Review Panel found that this objective was too broad to be achieved by the proposal, and recommended an alternative objective against which the effectiveness of the proposal could be measured.

Although, the terms of reference did not permit the Review Panel to consider other means than the licensing proposal to achieve the objective of reducing the commercial production of cannabis, the following ideas are proposed for consideration.

8.1 Broad investigation into ways to reduce the commercial production of cannabis

The Review Panel believes an extensive and broad investigation into ways to reduce the amount of cannabis grown commercially would be useful. The Review Panel is particularly interested in ways to reduce demand, and the development of nationally consistent, or cross-jurisdictionally supportive, strategies.

The Review Panel suggests that the Government consider establishing a body to undertake a broad-based investigation into these matters.

8.2 Further Amendment To Cannabis Expiation Notice Scheme

The Review Panel suggests the following as a way to enhance SAPOL's power to prosecute cannabis offences.

Police argue that even with the number of cannabis plants that can be exiated reduced to one at any one time (and not hydroponically grown), several plants could still be grown per year. SAPOL calculates that one plant per year is sufficient for personal use.

SAPOL argues that people will be encouraged to grow (and sell) multiple crops by the lack of any penalty other than an exiation fee. This practice is contrary to the original intent of the exiation scheme which was to only exiate if growing for personal use. SAPOL is also concerned that criminal syndicate groups will continue to operate, and expand their memberships to make up for the smaller amounts people may grow under the exiation scheme.

The Review Panel suggests an option to reduce the likelihood of individuals cultivating multiple crops per year would be to amend the exiation fee to ensure that a person could only exiate a cultivation of cannabis offence if an exiation notice for that offence had not been issued in the previous 12 months. This amendment would seek to ensure that individuals are only cultivating cannabis for personal use, rather than for profit, alone or in association with criminal syndicates.

8.3 Further Education

As stated above, the Review Panel is interested in ways to reduce the commercial production of cannabis by reducing demand. The Review Panel is aware that the Government has already recognised the importance of prevention in fighting drug use. The following suggests a greater focus on a particular section of the community.

In a press release dated 13 November 2000, the State Government announced it would be providing \$18 million for illicit drug programs over the next four years.

The results of the 2000 National Survey of Mental Health and Wellbeing showed that nearly one in 12 Australian had consumed cannabis on more than five occasions in the preceding 12 months. Cannabis use predominated among males and younger adults: use peaked among 18-24 year olds and declined rapidly after age 34. Consumption also appeared to be associated with being unemployed (25%) and having never married (18%) or being divorced/separated (Wendy Swift, Wayne Hall & Maree Teesson, "Cannabis Dependence in Australia: Results from the 2000 National Survey of Mental Health and Wellbeing," *Addiction* (2001) 96, 737-748).

Recent research also indicates that frequent cannabis use may lead to psychotic episodes, although this is still a matter of contention. However, this is of particular concern in relation to younger users and has received noteworthy media attention (Mary-Anne Toy "Cannabis: the not so happy herb", *The Age*, Saturday 20 January 2001; Jayashri Kulkarni, "Cannabis Madness", *The Age*, 27 May 1999; Thea Williams "Cannabis Culture's Curse", *The Weekend Australian*, January 5-6 2002).

It is suggested that consideration be given to increasing funding for drug education regarding the effects of cannabis, to be directed specifically to education in schools. The aim would be to

influence demand for cannabis by influencing the behavioural choices of adolescents before they reach the particularly vulnerable age group of 18-24.

9 RECOMMENDED REGULATORY ARRANGEMENT

The Review Panel is of the view that the recent and proposed amendments to the Controlled Substances Act may eliminate the need for regulation of hydroponic equipment retailers. The Review Panel is of the opinion that it would be prudent to delay the introduction of any restrictions on the hydroponic equipment retailers until there has been time to evaluate the effects of these amendments.

The idea of licensing hydroponic equipment retailers was announced in July 2001 at the same time as amendments to the Controlled Substances Act and Regulations to reduce the number of cannabis plants which could be cultivated under the expiation system from three to one, and to remove hydroponically cultivated cannabis plants completely from the scheme.

The legislative amendments were progressed immediately. The reduction in plant numbers came into effect in November 2001. The other amendment had to be made to the Act, rather than the regulations, and had not passed through Parliament at the time Parliament was prorogued in January 2002. The Bill would have to be re-introduced and pass both Houses to come into operation.

Effectiveness of licensing proposal

The licensing scheme proposed in the Issues Paper imposes restrictions on sellers of hydroponic equipment. By imposing a requirement to be of good repute, it would prevent some people operating and force business closures.

Including a requirement for sellers to obtain and verify the names and addresses of their customers may cause customers to shop elsewhere and could lead to a decrease in business for the remaining retailers. It would still be possible to buy hydroponic equipment from interstate.

In addition, there are significant difficulties defining hydroponic equipment so that only specialist hydroponic retailers are covered by the licensing scheme. A wide range of other retailers also sell items of hydroponic equipment. Even if this problem could be overcome, the Review Panel has significant doubts that any form of regulation of specialist hydroponic retailers would result in a decrease in the amount of cannabis produced commercially.

Effectiveness of recent amendments

Removing persons with connections with cannabis trade from the hydroponics retail industry may be achieved by a reduction in the number of specialist hydroponic retailers, without the need to impose licensing conditions.

SAPOL links the growth in numbers of specialist hydroponic shops to the expiation scheme. It suggests that organised crime promoted the formation of growing syndicates. The syndicates provided a ready avenue for individuals who wanted to produce, and sell, as much cannabis as could be grown under the expiation scheme (that is, without risking criminal conviction). This generated demand for hydroponic equipment among a large number of “commercial” cannabis growers.

This has been discussed above under “The hydroponics retail industry and the cannabis expiation scheme”, and is supported by some parts of the hydroponic retail industry. For example, during the debate on the Controlled Substances (Cannabis) Amendment Bill 2001, an e-mail from members of the hydroponics industry was read out in the House of Assembly by the Honourable Dorothy Kotz, then Minister for Local Government (Hansard, Tuesday 13 November 2001). The e-mail explained that when the Cannabis Expiation Notice scheme was introduced in 1987, “a whole retail and supporting industries evolved.” It stated, “Already hydroponic retailers and manufacturers are experiencing significant downturns in business and have started laying off staff. Sadly, many of these enterprises were established believing, in good faith, that no further legislative changes would occur.” It went on to say, “The reduction of plants from 10 to three was bad enough for our industry. The proposed reduction to a single outdoor plant will result in wholesale closures of shops and other associated business.”

Conclusion

The Review Panel recommends delaying the introduction of the recommended regulatory scheme for specialist hydroponic retailers until the effects of the legislative amendments to the cannabis expiation scheme on specialist hydroponic retailers and the broader hydroponic industry can be assessed.

The Review Panel recommends the negative licensing proposal.

The Review Panel notes that if a definition of hydroponic equipment can be developed which captures only specialist hydroponic retailers, a simple business notification scheme would produce a net public benefit, although less than with a negative licensing scheme.

10 SUMMARY OF REVIEW PANEL CONCLUSIONS/RECOMMENDATIONS

The Review Panel Conclusions/Recommendations, featured in bold throughout the report, are collected and reproduced below.

3. OBJECTIVES

The objective in the Issues Paper of reducing the commercial production of cannabis is too broad in relation to the proposed restriction.

The objective of the proposed legislation should be:

to remove from or prevent from entering into the hydroponic equipment retail industry persons who are associated with cannabis trade

4. DEFINITION

For the purpose of the licensing proposal, the Review Panel recommends that hydroponic equipment is any two or more of:

- Electric lights of 250 watts or more;
- Fluorescent lights which combine the red and blue part of the light spectrum in a way which enhances plant growth, also called gro-lux lamps;

- Units comprising high intensity discharge lamps, control gear, ballasts, lamp mounts and reflectors, also called ballast boxes.

5a. MARKET

The market is the whole of Australia.

The market comprises the retail supply of hydroponic equipment.

The product is the wide range of items which can be used to grow plants hydroponically.

Competition occurs continuously.

5b. MARKET FAILURE

There is no market failure or provider failure in the hydroponic equipment industry.

Provider failure is only one example of a detriment to society where Government intervention is justified; a concentration of specialist hydroponic retailers with connections with cannabis trade may be another.

6.3 POLICE INTEGRITY TEST

The Review Panel assesses the police integrity test as a condition for licensing as a serious restriction on competition.

For the purposes of achieving the alternative objective of reducing specialist hydroponic retailers' connections with cannabis trade, the Review Panel is of the view that absence of convictions for drug offences is an acceptable criterion for deciding that a person is of good repute.

The Review Panel is of the opinion, that the principle of limiting the restriction to what is necessary to achieve the objective should be followed, and only the following offences are relevant:

- Section 31 - Prohibition of possession or consumption of drug of dependence and prohibited substance;
- Section 32 - Prohibition of manufacture, sale etc., of drug of dependence or prohibited substance;
- Section 41 - Aiding and Abetting an Offence against the Controlled Substances Act.

The Review Panel accepts the SAPOL suggestion to extend this to include any interstate conviction which would have been an offence against these sections if committed in this State; and to include any offence against the legislation which establishes the licensing scheme.

The Review Panel recommends that conviction of one of the above offences within the previous five years is an appropriate limitation on the restriction.

The Review Panel is of the view that the proposed licensing condition, of not having been issued with an expiation notice for a simple cannabis offence, is against the intention of the Expiation of Offences Act and the principle that a person is innocent until proved guilty. This option is not recommended.

The Review Panel is of the view that the costs associated with the proposed licensing condition of not having associations with criminals outweigh the benefits. This option is not recommended.

The Review Panel recommends similar appeal mechanisms to those in the Second-hand Dealers and Pawnbrokers Act for any scheme in relation to specialist hydroponic retailers.

The costs of the Police Integrity Test proposed in the Issues Paper as a condition for licensing outweigh the benefits and it is not recommended.

The recommended condition for licensing is:

- no conviction for an offence against section 31, 32 or 41 of the Controlled Substances Act within the previous five years.

6.4 END USE CERTIFICATES AND PROOF OF IDENTITY

The Review Panel assesses the purchaser end use certificate and proof of identity requirements as an intermediate restriction on competition.

The costs of the proposal for Customer End Use Certificate and Proof of Identity outweigh the benefits and it is not recommended.

Review Panel recommends that as part of any scheme to regulate hydroponic equipment retailers it be an offence to sell hydroponic equipment knowing that the customer intended to use the equipment for the production of cannabis.

6.5 LICENSING - CONCLUSIONS

The benefits of the proposal in the Issues Paper for licensing scheme for hydroponic equipment retailers comprised of a police integrity check and customer end use certificate and proof of identity are outweighed by the costs, and it is not recommended.

7.2 VOLUNTARY CODE OF PRACTICE

A voluntary code of practice is not recommended.

A mandatory code of practice is not recommended.

7.3 CO-REGULATION

The co-regulation scheme is not recommended at this time. The Review Panel encourages the specialist hydroponics retailer industry to investigate the feasibility of this type of scheme and put its views to the Government.

7.4 NEGATIVE LICENSING

The Review Panel assesses negative licensing as a serious restriction on competition.

A negative licensing scheme (without end use certificate and proof of identity) would achieve the alternative objective of removing people who have connections with the cannabis trade from the hydroponic equipment retail industry.

In the view of the Review Panel, the benefits of negative licensing outweigh the costs. Negative licensing would impose the smallest burden on hydroponic equipment retailers of all the schemes examined by the Review Panel, and is preferred because of the range of retailers included by the definition of hydroponic equipment.

Negative licensing is recommended.

7.5 BUSINESS NOTIFICATION

The Review Panel assesses business notification as a serious restriction on competition.

The Review Panel finds that the costs of the business notification proposal in the SAPOL submission outweigh the benefits, and it is not recommended.

A business notification scheme (without end use certificate and proof of identity) would achieve the alternative objective of removing people who have connections with the cannabis trade from the hydroponics industry.

If the definition of hydroponic equipment could be restricted to specialist hydroponic retailers only, the benefits of a business notification scheme (not including customer end use certificates and proof of identity) would outweigh the costs. However, this scheme is not preferred over negative licensing because the net public benefit would be smaller.

Business notification is therefore not recommended.

9. RECOMMENDED REGULATORY ARRANGEMENT

The Review Panel recommends delaying the introduction of the recommended regulatory scheme for specialist hydroponic retailers until the effects of the legislative amendments to the cannabis expiation scheme on specialist hydroponic retailers and the broader hydroponic industry can be assessed.

The Review Panel recommends the negative licensing proposal.

The Review Panel notes that if a definition of hydroponic equipment can be developed which captures only specialist hydroponic retailers, a simple business notification scheme would produce a net public benefit, although less than with a negative licensing scheme.

11 APPENDICES

11.1 Appendix 1 - Terms of Reference

HYDROPONIC EQUIPMENT RETAILER LICENSING REVIEW

1. The proposal to require licensing of hydroponics retailers is referred to the Hydroponic Retailer Licensing Review Panel (the Review Panel) for evaluation and report by 1 February 2002. The Review Panel is to focus on aspects of the proposal which restrict competition, or which impose costs or confer benefits on business.
2. The Review Panel is to report on the appropriate arrangements for regulation, if any, taking into account the following objectives:
 - a) legislation/regulation should be retained only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation/regulation can not be achieved more efficiently through other means, including non-legislative approaches.
 - b) in assessing the matters in (a), regard should be had, where relevant, to effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation.
 - c) compliance costs and the paper work burden on small business should be reduced where feasible.
3. In making assessments in relation to the matters in (2), the Review Panel is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report of the Review Panel should:
 - a) identify the nature and magnitude of the social, environmental or other economic problem(s) that the proposed legislation seeks to address.
 - b) clarify the objectives of the proposed legislation.
 - c) identify whether, and to what extent, the proposed legislation restricts competition.
 - d) identify relevant alternatives to the proposed legislation, including non-legislative approaches.
 - e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of proposed legislation and alternatives identified in (d).
 - f) identify the different groups likely to be affected by the proposed legislation and alternatives.
 - g) list the individuals and groups consulted during the review and outline their views.
 - h) determine a preferred option for regulation, if any, in light of objectives set out in (2).
 - i) examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the proposed legislation and, where it differs, the preferred option.
4. In undertaking the review, the Review Panel is to advertise locally, consult with key interest groups and affected parties, and publish a report.
5. Within 6 months of receiving the Review Panel's report, the Government intends to announce what action is to be taken, after obtaining advice from the relevant Ministers and where appropriate, after consideration by Cabinet.

11.2 Appendix 2 - Public Consultation

Issues papers were sent to the following:

Law Society of SA
Australian Retailers Association
Commissioner of Police
Attorney-General's Department
Small Retailers Association SA Inc
Hydroponic Society SA
Electrical Contractors Association (NECA) SA Chapter
Business SA
Hemp SA
Australian Hydroponic and Greenhouse Association
Hardware Association of SA
Australian Hydroponic Association Inc

Mrs Jackie Smith
Ms Ylaine Gillespie

WH Butler Pty Ltd
Plasflo Irrigation
R and D Pump Equipment
Power Pumps
Rasch Pump Sales

Commercial Hydroponics International Pty Ltd
Mitre 10 Australia Ltd, State Office
Hydroponics Concepts, Salisbury North
Hydroponics Grower Supplies, Norwood
AAA Unley Pawnbrokers, Unley
Ace Hydro Australia Pty Ltd, Holden Hill
Adelaide Hydroponics, Salisbury North
Adelaide Watersmart, Adelaide
Advanced Growth, Hectorville
Advanced Hydroponics, Hendon
Air Purification Advisory Centre, Melrose Park
Amazon Hydroponics, Pooraka
Applied Hydroponics, Prospect
Applied Hydroponics, Hindmarsh
Ascot Park Indoor Garden Centre, Ascot Park
Auspet & Vet (Sa) Pty Ltd, Hindmarsh
Aussie Trough, Wingfield
Bolzon's Home & Garden Improvements, St Agnes
Brighton Irrigation, Brighton
C & D Hydroponics, Woodville North
Complete Hydroponics, Salisbury East
Dr Hydro Supplies, Enfield
Elite Hydro Supplies, Athol Park
Energy Busters, Greenwith
Futchatec Distribution, Royal Park

Gyo Hydroponics, Mount Gambier
Global Hydroponics, Melrose Park
Green Thumb Hydroponics, Port Pirie
Green Than Green Pty Ltd, Port Noarlunga
The Greenhouse Superstore, Royal Park
Gully Hydroponics, Modbury North
Hackham Garden & Building Supplies, Hackham
Home Harvest Pty Ltd, Adelaide
Home Hydro Pty Ltd, Fullarton
Hydro "N" That, Angle Vale
Hydro Warehouse, South Brighton
Hydrocorp Pty Ltd, Beverley
Hydrology, Findon
Hydroponic Sales & Services, Colonel Light
Hydroworld, Northfield
Largs Bay Hydroponics, Largs Bay
Light Mania, Nairn
Lighting Wholesalers Australia, Hindmarsh
M J S Hydroponics, Littlehampton
Martins Road Hydroponics, Parafield Gardens
Medusa Distributors, Salisbury South
Northern Hydroponics, Smithfield
Para Hills Hydroponics, Para Hills
Pirie Plant Nursery, Port Pirie
Professional Hydroponics, Paradise
Rob's Hydro, Klemzig
Southcoast Hydroponics, Christies Beach
Speedy's Hydroponics & Garden Fertilisers, Paralowie
Strathalbyn Hydroponics, Strathalbyn
Switched On Hydroponics, Elizabeth South
Tea Tree Hydroponic Gardening, Modbury North
Techday Systems Pty Ltd, Reynella
Waterworld Hydroponics & Aquarium Supplies, Lonsdale
West Coast Hydroponics & Gardening Supplies, Port Lincoln
BBC Hardware, Richmond
GN & LM Lawson, Pinnaroo
Sheehan's Hardware, Nairn
Bunnings Stores, Cowandilla
Banner Hardware, Norwood
Stratco Stores, Gepps Cross
Wheaton's Ascot Park Mitre 10, Ascot Park
Balhannah Mitre 10, Balhannah
Blackwood Mitre 10, Blackwood
Brighton Mitre 10, Brighton
Broadview Mitre 10, Broadview
Beach Road Hardware, Christies Beach
Craigmore Mitre 10, Craigmore
West Garden Centre, Elizabeth West
Gawler Mitre 10, Gawler
Glenelg Mitre 10, Glenelg
Barrow & Bench, Glenunga
Golden Grove Mitre 10, Golden Grove

Hahndorf Hardware, Hahndorf
Hallet Cove Mitre 10, Hallett Cove
Happy Valley Hardware, Happy Valley
Glynde Mitre 10 Home & Trade, Hectorville
Ingle Farm Hardware, Ingle Farm
Findon Hardware, Kidman Park
Mclaren Vale Mitre 10, Mclaren Vale
Barrow & Bench, Malvern
Drive-In Hardware, Mansfield Park
Wheaton Hardware, Morphett Vale
Mt. Barker Mitre 10, Mount Barker
Alex P. Mann Pty Ltd, Port Adelaide
St. Agnes Mitre 10, St. Agnes
Tranmere Hardware, St. Morris
Salisbury Mitre 10, Salisbury
Kelsey Hardware, Seaton
Stirling Mitre 10, Stirling
Ridgehaven Hardware, Tea Tree Gully
Virginia Mitre 10, Virginia
Aldinga Mitre 10, Aldinga
Sandercock's Mitre 10, Ardrossan
Barmera Mitre 10, Barmera
Berrie Mitre 10, Berri
Spry's Mitre 10, Ceduna
Pink's Mitre 10, Clare
Cleve Hardware & Rural, Cleve
Kennetts Of Kadina, Kadina
Keith Timber & Hardware, Keith
Linden Lea Mitre 10, Kingscote
Loxton Mitre 10, Loxton
Gateway Mitre 10 Home & Trade, Mount Gambier
Murray Bridge Mitre 10, Murray Bridge
Wennerborn & Hoole, Naracoorte
Normanville Mitre 10, Normanville
Peterborough Mitre 10, Peterborough
Better Homes Supplies, Pt Augusta
South Coast Timber & Hardware, Pt Elliot
Pt. Lincoln Mitre 10, Pt Lincoln
Renmark Mitre 10, Renmark
Roxby Traders, Roxby Downs
Waikerie Producers Sales Co-Operative Ltd, Waikerie
Kelly's Hardware, Whyalla Norrie
Hub True Value Hardware & Garden Centre, Aberfoyle Park
Aldgate Hardware, Aldgate
Ashton Co-Operative Society Ltd, Ashton
Campbelltown True Value Hardware, Campbelltown
Kersbrook Hardware, Kersbrook
Richmond Hardware, Richmond West
Royal Park Hardware, Royal Park
Otto & Co Pty Ltd, Stepney
Woodside True Value Hardware & Rural, Woodside
Big O True Value Hardware & Building Supplies, Alice Springs

Whiting's Hardward & Building Supplies, Balaklava
Adkins True Value Hardware, Broken Hill
Ceduna True Value Hardware, Ceduna
Cowell True Value Hardward, Cowell
Stratco True Value Hardware, Goolwa
Smithy's Hardware, Jamestown
Kadina Home & Hardware, Kadina
Lower North Traders, Kapunda
J & B Hardware, Kingscote
Glen R Kelly Hardware, Lameroo
Lagana Bros, Lyndoch
Temme Bros True Value Hardware, Mannum
Iama Agribusiness Pty Ltd, Meningie
Morgan Building & Rural Supplies, Morgan
Naracoorte Hardware & Timber, Naracoorte
Juncken True Value Hardward, Nurioopta
Penola Hardware, Penola
Midstate True Value Hardware, Pt Pirie
Robe Hardware & Building Supplies, Robe
Beck Brothers Hardware, Streaky Bay
Tanunda Garden & Hardware, Tanunda
Tumby Bay Timber & Hardware, Tumby Bay
Victor Harbor True Value Hardware, Victor Harbor
Errington's Hardware, Wallaroo
Heritage Hardware, Willunga
Harris Stores (Yorktown) Pty Ltd, Yorketown
Crossroads Greenery, Clarence Gardens
Hines Hardware, Magill
Cooper's Rural & Hardware Supplies, Mylor
S.E. Waite & Son, Norwood
Pasadena Hardware, Pasadena
Percy Lewis Hardware, Prospect
Two Wells Fodder & General Hardware, Two Wells
Riverfresh International Ltd, Cadell
Afco Building Supplies, Goolwa
Macclesfield Barn, Macclesfield
J H Hardy Pty Ltd, Maitland
Meadows Barn, Meadows
Bridge Building Supplies, Murray Bridge
Field Rural Supplies & Hardware, Port Neill
Pt. Vincent Hardware, Pt. Vincent
Binders Building Co, Renmark
Foodtown Sedan, Sedan
Warooka Hardward, Warooka
Harvies Hardware, Whyalla
Wudinna Trading Co Pty Ltd, Wudinna
Chapman & Rivett, Norwood
Highland Hydroponics, Holden Hill
Hugall & Hoile, Woodville South
Hygrow Distributors Pty Ltd, Keswick
New Age Hydroponics, Hilton
Solodome, Norwood

State Hydroponics & Home Brewing Supplies, Semaphore
Woodlands Hydroponics, Aldinga
Abrasive Belts & Buffs Pty Ltd, Lonsdale
Banner Hardware, Blackwood
Banner Hardware, Beverley
Barb's Disposals, Smithfield
Brighton Hardware, South Brighton
Architectural Hardware Suppliers Pty Ltd, Hindmarsh
Bunnings Warehouse, Mile End
Bunnings Warehouse, Allenby Gardens
Bunnings, KentTown
Bunnings, Marion
Bunnings Warehouse, Parafield
Bunnings, Windsor Gardens
Dependable Thrifty Link Hardware, Elizabeth South
The Colonial Hardware & Lighting Co, Hyde Park
Old Adelaide Restoration Centre, Norwood
Parkholme Thrifty Link, Parkholme
Prospect Road Paint & Hardware, Kilburn
Recollections Solid Brass Hardware, Adelaide
Regency Building Hardware, Croyden Park
St Morris Hardware, St Morris
Semaphore Road Garden Shoppe, Semaphore
South Henley Hardware Service, Henley Beach South
South Road Supplies, Morphett Vale
Thrifty Link Hardware, Port Adelaide
Virginia Steel City, Virginia
Home Timber & Hardware, Dernancourt
Home Timber & Hardware, Westbourne Park
Home Timber & Hardware, Strathalbyn
Home Timber & Hardware, Surrey Downs
Home Timber & Hardware, Prospect
Home Timber & Hardware, Reynella
Home Timber & Hardware, Smithfield
The Greenhouse Superstore, Lonsdale
Hawthorn Sales & Marketing, Ridleyton
Hugal & Hoile, Oara Hills West
Hydro Gear, Brooklyn Park
Munno Para Hardware, Smithfield
O G Hardware, Hampstead Gardens
Summit Hardware & Building Supplies, Mount Barker
Farmhouse Rural Supplies, Verdun
Australian Maintenance & Medical Supplies, Gawler Belt
Easy Grow, Newton
Festive Hydroponics, Evanston
Hardmart Pty Ltd, Norwood
Goodwood Timber & Hardware, Wayville
Handles Plus, Parkside
Hong Kong Discount Hardware, Tools & Auto, Pooraka
Hong Kong Discount Hardware, Tools & Auto, Prospect
Leabrook Hardware, Leabrook
Lenswood Hardware & Building Supplies Pty Ltd, Lenswood

Lobethal Hardware, Lobethal
Mckay Hydroponics, Port Augusta
Musolino's High Tech Hydroponics, Virginia
Professional Hydroponics, Lonsdale
Professional Hydroponics, Fulham Gardens
Professional Hydroponics, Gawler Belt
Richie's Hydro, Broadview
South East Hydroponics, Mount Gambier
W H Butler & Co Pty Ltd, Adelaide
Whyalla Garden Centre Pty Ltd, Whyalla Playford

Undeliverable – return to sender

Professional Hydroponics, Kilkenny
Bayside Hydro, Glenelg
Home Timber & Hardware, Torrensville
Hydro, Rosewater
Erindale Hardware, Erindale
True Value Hardware, Seaford
True Value Hardware, Unley
Proud Earth Manufacturing Distributors Pty Ltd, Edwardstown
SA Hydro Wholesalers, Magill
Adelaide Aqua, Mile End
Undercost Hydroponics Specialists, Elizabeth
Julie's Hydroponics, St Peters
Precision Hydroponics, Modbury

11.3 Appendix 3 - Submissions

Submissions Received for the Proposal to License Hydroponic Retailers

1. Russell Haynes – Morphett Vale - Informal submission
2. Ylaine Gillespie – Meningie - Formal Submission
3. Gateway Hardware – Mount Gambier - Formal Submission
4. Anonymous – Engineer - Formal Submission
5. Lightworld – Salisbury South - Formal Submission
6. Galaxie Manufacturing & Design P/L – Wingfield - Formal Submission
7. Switched on Hydroponics – Elizabeth South - Formal Submission
8. Hydroponic Gardening Society of SA Inc - Interim Submission, Request for Further Information and Formal Submission
9. Hydraspher Technologies P/L – Lithgow (NSW) - Formal Submission
10. Soladome Hydroponics Aquaculture – Norwood - Formal Submission
11. SAPOL - Formal Submission
12. Toughlove SA – Findon - Letter of Support
13. Casper Publications P/L - Formal Submission
14. Home Hardware – Westbourne Park - Formal Submission
15. Australian Retailers Assoc – Adelaide - Informal Submission
16. Tanamera Bush Foods – McLaren Flat - Formal Submission
17. Trevor French – Daw Park - Formal Submission
18. Robs Garden Centre – Windsor Gardens - Formal Submission
19. Illuminating Engineering Society of Aust – Adelaide - Formal Submission
20. Paul Barry – Fairview Park - Formal Submission
21. State Retailers Association – Hindmarsh - Formal Submission
22. Hemp SA – Kent Town - Formal Submission
23. Anonymous - Formal Submission
24. Hydroponic Merchants Assoc – USA - Informal Submission
25. THC – The Hemp Campaign – Goodwood - Informal Submission
26. Ace Hydro Aust P/L - Formal Submission
27. Evins Stores – Norwood – for Hardware Association of SA – Kent Town - Informal Submission
28. Bunnings SA - Formal Submission
29. Hydroworld – Northfield - Formal Submission

Responses Received for the Premier's / Minister's / General Media Release

30. K S Hermann – Letter to Premier - response to press (24 July 2001))
31. Graeme Smith – Australian Hydroponic & Greenhouse Association – Letter to Premier (26 July 2001)
32. Gary Hawke – Adelaide Hydroponics – Letter to Premier - response to Premier's letter dated 25 July (26 July 2001)
33. Charles Cookson – Charles I Cookson Pty Ltd – E-mail to Premier - response to Premier's letter dated 20 July (26 July 2001)
34. Commercial Hydroponics (International P/L) – Hindmarsh – Letter to Premier - response to Premier's Media Release (26 July 2001) and request for Further Information (4 October 2001)
35. P Barry – Gully Hydro – Letter to Premier - response to Premier's letter dated 25 July (31 July 2001)
36. Jason Robinson – Hydroworld – Letter to Premier - response to Premier's letter dated 25 July (12 August 2001)
37. Bob Hall – Clearview – Letter of Support to Minister for Police (12 November 2001)

11.4 Appendix 4 – End User Certificate

Controlled Substances (Poisons) Regulations 1996 Schedule L

CLIENT NOTE

The chemical product for which this statement is required may be used in the manufacture of illicit drugs. This statement, with section A filled in, must be provided to the seller. Cash sale transactions will not be accepted for certain chemicals.

A. (this section to be completed by purchaser)

PRODUCT/CHEMICAL

Product Name: Supplier Catalogue No:

Quantity: Pack Size:

INTENDED USE (tick appropriate box)

Analytical

Manufacturing

Resale

Research and Development

Other (please specify)

PURCHASER

Business/Company/Institution Name:

Address:

Licence Type and No (if relevant): Account No (if relevant):

Name of person authorising purchase:

SIGNED: (person authorising purchase) Date:

B. (this section to be completed by seller)

COLLECTION AGENT

Name: Date of Birth:

Home Address: Vehicle Reg. No. (vehicle used in collection):

Status (tick appropriate box):

Purchaser

Employee of purchaser

Contractor

Employee of contractor

VERIFICATION

I sighted the following proof of identity produced by the above COLLECTION AGENT (tick appropriate box):

Current Driver's Licence No:

Current Passport No: issued at:

Other ID (please specify):

Name of person handling sale:

SIGNED:(person handling sale) Date:

11.5 Appendix 5 – Submissions: Summary of responses to questions in the Issues Paper

Question 1

a. Do you consider that this is an appropriate definition of hydroponic equipment?

Yes - 1

Yes – to an extent - 1

No - 19

No comment - 16

b. If not, what do you consider is an appropriate definition?

No comment – 14

Comment – no alternatives suggested – 9

Comment – alternatives suggested - 14

Question 2

a. Do you agree that these are the objectives of the proposed legislation?

Yes –3

Yes – to an extent - 2

No – 22

No comment - 10

b. If not, what do you consider the objectives should be?

No comment - 11

Comment – no alternative suggested – 12

Comment – alternatives suggested - 14

Suggestions:

- Exclude consumer focus - 3
- Target cannabis producers - 2
- No retailer responsibility – 6
- Need accurate facts – 2
- Focus on product grown not how it is grown – 1

Question 3

a. Do you agree that this is the market likely to be affected by the proposed legislation?

Yes – 5

Yes – to an extent – 10

No – 9

No comment - 13

b. If not, what do you consider the market comprises?

No comment – 16

Comment – no suggestions – 3

Comment – suggestions – 18

Suggestions:

- Substitute products – 1
- Manufacturing sector – 1
- Wider industry / market - 15

Question 4

a. Do you agree that there is evidence of market failure sufficient to provide a basis for intervention?

Yes – 7

No – 26

No comment - 4

b. If not, please state your reasons.

Comment – 27

No comment - 10

Question 5

a. Do you consider these alternatives are likely to be effective in achieving the objectives of the proposed legislation?

No – 9

Voluntary code – Yes (10) No (4)

Negative licensing – Yes (7) No (1)

Business notification scheme – Yes (4) No (2)

No comment – 14

b. Please state your reasons and describe any other alternatives that should be considered.

Comment – no alternatives suggested – 11

Comment – alternatives suggested – 14

No comment – 12

Suggestions:

- no reform
- business notification + integrity check and end-user statement (SAPOL)
- treat as health rather than a legal issue
- further investigation of proposal / study of cannabis - 3

- cannabis purchasers buy annual exemption certificate
- industrial commercial growth trials
- accreditation scheme
- government-industry support - 2
- greater police power - 4
- decriminalisation (regulated availability model) – 3
- national approach
- target large scale crops (indoor and outdoor)

Question 6

a. Do you agree with this assessment of the likely costs?

Yes – 3

Yes to an extent – 7

No – 8

No comment - 19

b. Are there any other costs that are likely to result.

Yes – 21

Comment – no suggestions – 4

No comment – 11

Other costs suggested:

- continued decriminalisation of cannabis (hemp industry contribution to GDP, ecological sustainable development)
- increased crime / criminal activity - 8
- less likelihood of people cutting down/giving up
- unemployment - 5
- to wider industry / trade – 10
- business red tape - 2
- experimentation of other drugs
- larger scale outdoor plantation
- staff training
- civil liberties
- enforcement / police - 2
- ecological sustainable development
- reduced access to technology

c. Can you provide an estimate of these costs?

Yes – 4

No – 2

No comment – 31

Suggestions:

- Millions of dollars in lost sales
- 300-2000 jobs (direct and indirect)

- \$32 million farm gate value
- 20% of vegetable and nursery production

Question 7

a. Do you agree with this assessment of the likely benefits?

Yes – 1

Yes to an extent – 2

No – 15

No comment – 19

b. Are there any other benefits that are likely to result.

Yes – 1

No – 8

Comment – 4

No comment – 24

c. Can you provide an estimate of these?

No – 2

No comment - 35