

ALCOHOL POLICY COALITION

Liquor Licensing Decisions in the Victorian Civil and Administrative Tribunal

The Alcohol Policy Coalition (“the Coalition”) is a coalition of health agencies – Australian Drug Foundation, Cancer Council Victoria, Turning Point Alcohol and Drug Centre, and VicHealth - who share a concern about the level of alcohol misuse and the health and social consequences in the community.

The Coalition seeks to develop and promote policy responses that are evidence-based and known to be effective in preventing and reducing alcohol related problems.

The Coalition’s long-term goal is to reduce the negative health and social consequences of alcohol.

Executive Summary

In relation to the President’s review of the Victorian Civil and Administrative Tribunal (“VCAT”), the Coalition submits that:

1. there is a significant positive relationship between alcohol outlet density and assault rates; and
2. VCAT is failing to give full regard to harm minimisation principles in the objects of the *Liquor Control Reform Act 1998* (“the Act”) and limiting the applicability of the term “amenity” under the Act; and
3. a VCAT member with public health expertise should sit on all liquor licensing applications so that proper regard can be given to the complex issues of harm minimisation and the effect of outlet density on alcohol related harm.

Background

The Coalition welcomes the opportunity to make a submission to the President's review of VCAT. The impetus for the Coalition is the need for a consolidated and coordinated approach and effort by key agencies in preventing and reducing alcohol related problems.

Alcohol is "no ordinary commodity".¹ Nearly half of all Victorians over the age of 14 years are daily or weekly drinkers, making alcohol the most widely used drug in Victoria.² Misuse of alcohol can lead to a range of negative social and health effects such as violence, injuries, hospitalisations and alcohol related diseases.³ The annual tangible net cost to the Australian community from harmful drinking is estimated to be about \$15 billion.⁴

The Coalition believes that finding a solution to the problem of alcohol misuse requires governments, the community, individuals and the alcohol industry to all play a part.

Liquor licensing and the prevalence of alcohol related harm

Almost every planning decision has an impact on human health, and liquor-licensing decisions are no different in this regard. There is a growing body of evidence that supports a significant association between the density of liquor outlets, and an increased incidence of alcohol related harm.

Necessarily, liquor licensing decision makers need to take into account not just the commercial and planning aspects of an application, but also harm minimisation principles and the effect of liquor-licensing decisions on the community and public health.

¹ T. Babor et. al. (2003). *Alcohol: No ordinary commodity: research and public policy*. Oxford University Press: Oxford, p. 8.

² Australian Institute of Health and Welfare. *2007 National Drug Strategy Household Survey: State and territory supplement*. Drug Statistics Series, Number 21, August 2008, p. 5

³ Campbell, Elissa 'Submission on Regulatory Impact Statement – Review of Liquor Licensing Fees' (Alcohol Policy Coalition, 2008) 2

⁴ D. Collins & H. Lapsley. *The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004 / 05*. (2008). Canberra: Department of Health and Ageing

<http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/mono64-l>

Outlet density

In *Nardi v Director of Liquor Licensing (Occupational Business Regulation)* [2005] VCAT 323, VCAT stated that "...an additional outlet for the sale of packaged liquor would [not] detract from or be detrimental to the amenity of the area, or be conducive to, or encourage the misuse of alcohol."⁵

Respectfully, the Coalition submits that this position and its value as a precedent statement, is damaging to future alcohol policy developments. This is because there is a growing body of research that supports the proposition that, in specific circumstances and localities, an additional outlet for the sale of packaged liquor would in fact cause a detrimental effect to the local community in which the license is granted.

A recent Victorian study looked at the relationship between alcohol outlet density and levels of reported assaults.⁶ The results of this study suggested that, on average, an increase in 1 outlet corresponded to an increase in approximately 0.9 investigated assaults per year.⁷ The study indicated that hotel licenses are of particular concern in the inner city; while packaged liquor outlets are problematic in suburban areas. The addition of an extra on-premise license in the postcodes examined is estimated to result in an increase of 0.25 assaults per year, while the addition of a general license is estimated to increase assaults by 0.90 per year. A packaged license will increase assaults by 0.39 per year.⁸

A further study from Western Australian looked at alcohol related harms from licensed outlet density. The results indicated that overall total assaults correlated highly with hotels/taverns and liquor stores but less so with restaurants and nightclubs.⁹

According to a NSW study, people living within 0.5 km of a licensed establishment and people living in locales with a high density of licensed premises had the most problems with anti-social drunkenness and property damage.¹⁰

⁵ *Nardi v Director of Liquor Licensing (Occupational Business Regulation)* [2005] VCAT 323 (25 February 2005) para 16 (Judge Bowman)

⁶ Livingston, Michael 'Alcohol outlet density and assault: a spatial analysis' (2008) 103(4) *Addiction* 619-628

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Chikritzhs, Tanya et. al. 'Predicting Alcohol-related harms from licensed outlet density: A Feasibility Study' (National Drug Law Enforcement Research fund, 2007) http://www.ndlerf.gov.au/pub/Monograph_28.pdf

¹⁰ Donnelly Neil et. al. 'Liquor outlet concentrations and alcohol-related neighbourhood problems' (Alcohol Studies Bulletin: Bureau of Crime Statistics & Research 2006) [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/ab08.pdf/\\$file/ab08.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/ab08.pdf/$file/ab08.pdf)

The nature of the relationship between outlet density and social harm is a complex one and has recently received considerable research attention. Based on the available evidence, there is a significant positive relationship between alcohol outlet density and assault rates. As further research is conducted, it is likely that this link will become stronger.

Harm Minimisation

In the majority of all VCAT liquor licensing decisions reviewed for the purposes of this submission, objectors advanced arguments in relation to amenity and based on the harm minimisation object in the Act.

In *Black Lula Evangeline & Cooke Brian v Liquor Licensing Victoria & Green Dragon Pty Ltd* [2000] VCAT 459, VCAT stated that:

We consider that harm minimisation as an objective of the Act cannot be relied upon in a general sense only to defeat any application for a liquor license. If this were so it may well be arguable that few licences of any description other than for the consumption of alcohol in cafes and restaurants should ever be granted in the future...[I]n our opinion, the logical extension of the argument that the increased availability of liquor leads to an increase in youth drinking problems would mean that no new licenses would be granted in order to minimise the harm created by youth underage drinking.

The Coalition agrees that using harm minimisation as a tool to deny all future applications would be an absurd outcome indeed. However, the Coalition respectfully submits that harm minimisation as a concept has been misunderstood and therefore misapplied in liquor licensing applications.

The policy of harm minimisation acknowledges that while alcohol will continue to be a part of Australian society the scale of preventable harm associated with its misuse is such that it is reasonable to place boundaries around its availability and the form and strength of the boundaries may differ according to the nature and circumstances of particular communities.

Harm minimisation is also driven by the precautionary principle, which encourages a decision maker to act to avoid serious or irreversible potential harm, even where there may be limited scientific certainty

as to the likelihood, magnitude or causation of that harm.¹¹ The application of the precautionary principle in liquor licensing decisions would have the effect of placing the burden of proof on those applying for the grant of the license to prove that harm will not ensue, rather than the current system that forces objectors to convince the Tribunal that harm will occur as a result of a decision.

Effective regulation of the sale and supply of liquor is an essential tool for the prevention and reduction of alcohol misuse. In 2003 an authoritative review of the scientific evidence underpinning intervention strategies for the prevention and/or minimization of alcohol-related harm was conducted.¹² The review concluded that the research on limiting alcohol availability demonstrated that reductions in the hours and days of sale, number of alcohol outlets and restrictions on access to alcohol were all associated with a reduction in both alcohol use and alcohol related problems.¹³

The Coalition submits that VCAT is the most appropriate body in which the complex issues relating to public health and liquor licensing decisions can be fully considered; and that having regard to harm minimisation principles when making liquor-licensing decisions will have the effect of appropriately limiting, rather than prohibiting outright, the grant of any future licenses. The effect of this approach – i.e. to limit the proliferation of on-premises and packaged liquor licenses; and to limit the extension and expansion of existing liquor licenses - would be to reduce the availability of liquor and consequently, the incidences of alcohol related harm.

VCAT: roles and responsibilities in liquor licensing

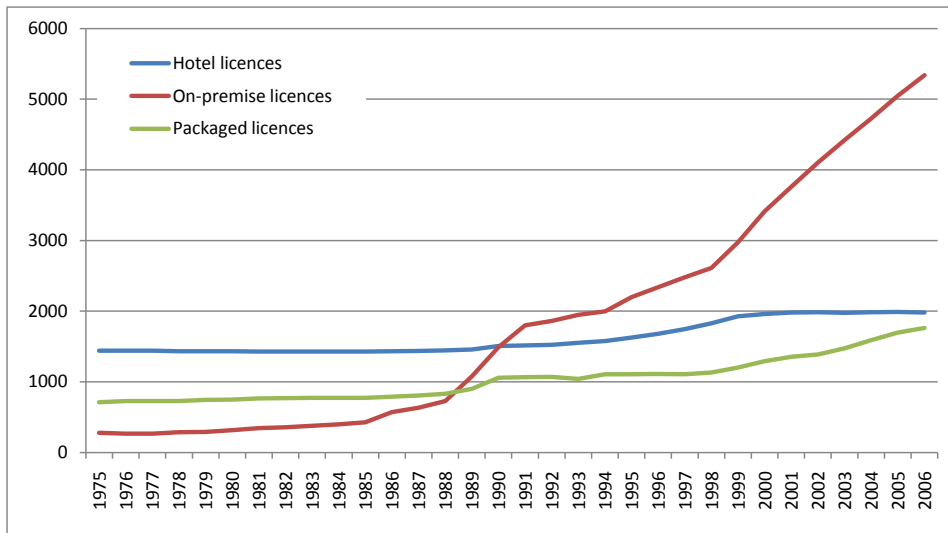
The Coalition believes that VCAT has an integral role to play in enhancing measures to address the problem of alcohol related harm in our community, arising from VCAT's responsibility for reviewing decisions in relation to liquor licensing applications.

A review of licence numbers in the period 1975 - 2006, showed a marked increase in the number of hotel, packaged and on-premise licences in Victoria

¹¹ European Commission 'Commission adopts Communication on Precautionary Principle' (2000) Europa: Gateway to the European Union
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/96&format=HTML&aged=0&language=EN&guiLanguage=en> 5 June 2009

¹² Babor, above n 1

¹³ Ibid. at 8



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The Director of Liquor Licensing, and VCAT on review, has the discretion to refuse an application in any case where the grant would be detrimental to the amenity of the area in which the subject premises are granted, or where the grant would be conducive to or encourage the misuse or abuse of alcohol. “Amenity” in accordance with section 3A of the Act, is not a limited term; regard can be had to any of the matters stated in the Act, as well as any other matter that would affect the quality that the area has of being pleasant and agreeable. Any decision made by the Director may be reviewed by VCAT upon application by either an applicant or objector.

The Coalition has reviewed VCAT liquor licensing decisions where objections were lodged on the grounds of amenity and harm minimisation. Twenty-four decisions were reported. The applications covered a variety of liquor licence types, with the majority being for on-premises and packaged liquor licence applications. Of these 24, the Director granted 17 licenses and refused eight in the first instance. Upon review, VCAT affirmed the decision of the Director in all 17 applications where the license was granted; and in two further matters affirmed the decision by the Director to refuse a license. Five applications, where arguments in favour of harm minimisation and amenity were

¹⁴ Livingstone, Michael, Research Fellow, AER Centre for Alcohol Policy Research, Turning Point Alcohol and Drug Centre

accepted by the Director to refuse a license, were subsequently set aside and a license granted by VCAT.

The review suggests that, despite Parliament's emphasis on harm minimisation in the Act, and in the face of advice from the Director and objections from the local community based on amenity and harm minimisation, a less than balanced approach is currently applied to liquor licensing matters in VCAT.

The Coalition submits that the approach taken in VCAT to liquor licensing reviews based on amenity and harm minimisation objections, is effectively limiting the applicability of the term “amenity” under the Act, and failing to give full regard to harm minimisation principles in the objects of the Act.

A specialised approach to the decision-making process

The New Zealand Law Commission in *Seeking Solutions: Options for Change to the New Zealand Court System* commented, “[l]awyers or judges are best suited to make decision that involve the interpretation of the law. Elected officers are best suited to make decisions with high policy content. Decision makers who have specialist knowledge are best suited to decide issues that require specialist advice”.¹⁵

In *Tribunals and Access to Justice*, Robin Creyke stated “in areas such as awarding of occupational licences, assessment of entitlement to medical or pharmaceutical benefits, or determination of environmental, and land disputes, technical knowledge and expertise may be necessary”.¹⁶

The Occupational and Business Regulation List at VCAT routinely hears applications for the review of liquor licensing decisions, and its membership includes lawyers and consumer and industry representatives; the Planning and Environment List conversely, has members from a variety of backgrounds, including town planners, lawyers, environmental scientists and architects.

¹⁵New Zealand Law Reform Commission *Seeking Solutions: Options for Change to the New Zealand Court System: Have Your Say: Part 2* (2002) PP52, 198.

http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_89_218_PP52.pdf

¹⁶Creyke Robin ‘Tribunals And Access To Justice’ (2002) 4 *Queensland Law & Justice Journal*
<http://www.austlii.edu.au/au/journals/QUTLJJ/2002/4.html#fn1>

It is submitted that membership of the Occupational and Business Regulation List should be extended to include a member or members with significant public health expertise to preside over all liquor licensing decisions. While consideration is routinely given to commercial, economic and public health issues, in accordance with the requirements of the legislation, the Coalition submits that the available evidence makes a strong argument for the inclusion of a permanent public health member for the specialised treatment of liquor license applications. The Coalition further submits that liquor licensing decisions could be made more fair, more transparent and more accountable with the input of specialist public health members, who could assist and enhance the skills and strengths of existing Tribunal members.

The Coalition submits that liquor-licensing decisions deserve some measure of special treatment, based on the proposition that “alcohol is no ordinary commodity”¹⁷. A VCAT member with public health expertise should sit on all liquor licensing applications so that proper regard can be given to the complex issues of harm minimisation and the effect of outlet density on alcohol related harm.

Conclusion

Limiting the availability of alcohol and restricting the density of alcohol outlets is but one component of an overall strategy aimed at dealing with, and minimising, alcohol-related harm in Victoria. It is a strategy that, by virtue of the complex issue of alcohol consumption and the harmful effects of the same, is necessarily multi-faceted.

Encouraging a more specialised approach to liquor licensing decisions would ensure that harm minimisation principles and the effects of outlet density are given the appropriate level of consideration.

VCAT has the opportunity to establish a decision-making model that recognises the importance of public health and harm minimisation principles in alcohol policy and the corresponding impact in licensing decisions, in accordance with a growing body of evidence that increasingly links the density of outlets with alcohol related harm. Such a model, while not a stand-alone solution, can form part of the matrix of strategies to limit alcohol related harm in the community.

¹⁷ Babor, above n 1, 8

Recommendations

The Coalition submits that

1. there is a significant positive relationship between alcohol outlet density and assault rates; and
2. VCAT is failing to give full regard to harm minimisation principles in the objects of the *Liquor Control Reform Act 1998* (“the Act”) and effectively limiting the applicability of the term “amenity” under the Act; and
3. a VCAT member with public health expertise should sit on all liquor licensing applications so that proper regard can be given to the complex issues of harm minimisation and the effect of outlet density on alcohol related harm.