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Chapter 1

Introduction: regulating Australian alcohol markets in the interest of public health and safety

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This book is concerned with the regulation of retail marketing of alcoholic beverages in Australia. This is approached from the public-interest perspective of preserving public health and safety, with attention also to broader issues of community amenity. These issues are usually discussed as ‘liquor licensing’, and the book includes much attention to legislation and regulation under that heading. But the book also attends to other laws and regulations which govern or affect the retail marketing of alcoholic beverages, such as community planning laws, criminal laws and sanitary and noise regulations. The aim is to provide a handbook for policymakers, public health advocates, researchers, and community groups and members which is informative about historical and current trends – how we got here, the current situation and where things are going – and about the state of research evidence on what is effective in what circumstances for public health purposes, and on what is not.

Liquor licensing’s historical rationale and development

From a public health perspective, alcohol is ‘no ordinary commodity’ (1). Alcohol plays a causal role in many chronic and infectious diseases and in injuries (2), ranking fifth as a cause of death or disability in the most recent study of the global burden of disease (3). Alongside these harms to the drinker, alcohol causes much social and health harm to others (4) – a major factor in its high rating in comparisons of the intrinsic harms from consumption of psychoactive substances (5). From any political perspective, the substantial burden of harm to others from drinking tends to be a strong argument for societal regulation of drinking.

While much of the detailed knowledge of alcohol's adverse health and social effects is recent, the recognition that alcohol carried special dangers as a commodity is not new. Restrictions on alcohol as a special commodity are ancient (6), and in Britain in particular the increase in availability and affordability of alcoholic beverages in a developing and industrialising society was increasingly seen as a major social problem. The requirement of a licence to sell alcoholic beverages had first been established in England in 1552, and in response to the 'gin epidemic' of the 18th century, as distilled spirits became cheaply available, British parliaments passed a series of laws intended to mitigate the harms, culminating in 1753 in a Licensing Act requiring that licensees be "of good fame and sober life and conversation" (7:80).

British colonisation of Australia thus occurred when British per capita alcohol consumption was substantially higher than today (8), and after British alcohol licensing legislation had been strengthened in attempts at response. British licensing approaches and laws were carried over into the Australian colonies, becoming the forerunners of the licensing systems in effect today.

In both Britain and Australia, there was a further response to the heavy alcohol consumption of the early 19th century in the form of substantial popular temperance movements (9, 10). In the century after the 1830s, these had substantial effects on popular behaviour and customs, and eventually also on liquor licensing legislation. In Victoria, for instance, a Licences Reduction Board was set up to oversee compulsory state purchase of the most noxious hotels (public houses or 'pubs'); it closed 1054 hotels between 1907 and 1916 (11). The best-known licensing law change of the temperance era was the adoption by popular referendum during the First World War of 6 o'clock closing for all alcohol sales in four Australian states, a change which lasted until the 1960s in Victoria and South Australia (see Chapter 15). The cumulative result of the strength of temperance sentiment, the licensing restrictions, and the Great Depression was that Australian alcohol consumption per capita in 1933 was only about one-quarter what it is today (12).

As is detailed in Chapters 3 and 4, there have been two general waves of change in Australian liquor licensing since the temperance era. Particularly at the political level, the reaction against the 'wowsers' of temperance was strong and long-lasting (13), and provided a rationale for alcohol being put in much the same status as any other commodity in the push for unfettered markets and competition which culminated in the National Competition Policy era after 1995. Chapter 3 shows the extent to which public health and safety had been subordinated in the avowed objectives of liquor licensing legislation by 1995. The chapter also provides evidence of the turnaround at the level of avowed objectives which has happened since 1995, with the wide adoption of the public health-oriented objective of 'harm minimisation' in today's liquor licensing laws. This turnaround at the symbolic level can be seen as in part a delayed response to rises in rates of alcohol consumption and problems, and in part as reflecting a turnaround in public opinion on public health-oriented alcohol control policies (14). However, at the operational level of licensing provisions and actions, the trends of increased numbers of licensed outlets, of extended hours of availability, and of removal of restrictions on concentration in the industry has generally continued, pushed on by competition policies and market forces.

These trends are increasingly contested in the interests of public health and order and community amenity, and Chapter 5 provides guidance on how the elevation of harm minimisation as a goal of liquor licensing can be used to push forward the public health interest in licensing cases. But it is

clear, both from that chapter and from others in this book, that the turnaround towards using liquor licensing and other regulations in the public health interest has so far been partial and patchy. Harm minimisation now gets lip service as a goal, but preserving and promoting commercial interests in increased market availability presently remains a strong inclination in the interpretation and implementation of Australian liquor licensing laws and regulations.

The primacy of the state and territory level in alcohol licensing and control

Chapter 2 gives an overview of the current framework of liquor licensing legislation in the six states and two territories in Australia. Implicit in this presentation is the fact that alcohol licensing and the majority of the controls on the alcohol market are a matter of state (and territory) jurisdiction in Australia. The federal level has primary responsibility for quality and other controls on the production of alcoholic beverages, for sales and excise and corporate taxes, and for controls on advertising, promotion and labelling of products – though for advertising and labelling the jurisdiction is shared with the state level and to some extent with New Zealand. Both in liquor licensing and in planning and other relevant state laws, some roles in regulation are delegated by the states to local government, although usually with a right of appeal from the local level to a state agency or court. Both for liquor licensing and its enforcement and for city planning and other relevant controls on commercial activity, the state and territory level has final responsibility, although for matters like planning the local government often has initial responsibility. Chapter 3 documents the relatively recent rise of harm minimisation as a major objective in licensing laws. This issue is also picked up in later chapters. For instance, in Victoria, harm minimisation has been given primacy among objectives in amendments to the liquor licensing law, and Chapter 5 documents how appeals courts decisions have applied this in Victoria, setting precedents which, it is argued, can be used more widely in Australian licensing cases.

Many of the chapters in this book are concerned with experience in a particular state or territory. Given this is the level of government at which liquor licensing occurs, a concrete analysis needs to be anchored in this level – and as a practical matter, often authors have the most detailed knowledge concerning their own jurisdiction. But the reader needs to keep in mind, as tables in Chapters 3, 4, 14 and 15 illustrate, that there are substantial variations between states and territories in the relevant laws, regulations, and means and processes of implementation.

Alcohol licensing and regulation: issues and processes for applications for new outlets

Chapters 4-11 are concerned with how public health and safety issues are addressed in liquor licensing legislation, and with how these issues have fared in practice in planning and licensing decisions in recent years. The section starts with two chapters on objectives in liquor licensing legislation and their implementation in case law. The records of adjudications of relatively recent

cases drawn on in Chapter 4 suggest how much needed the application of a harm minimisation criterion is in appeals of licensing decisions, which in most states are still tilted quite strongly in favour of the commercial interests at stake.

The case considered in Chapter 5 actually concerned an attempt by the Victorian state agency to impose limits on an existing liquor licence. But this is unusual, in that the primary focus of controversies over liquor licensing (illustrated by the nature of the majority of the cases reviewed in Chapter 4) is on applications for new licences or for extensions on existing licences. De facto, disputes over the existence of or conditions on liquor outlets have tended to be focused on applications for further extensions of an already densely-populated market of alcohol outlets, and not on efforts to limit or eliminate existing outlets. Weakness of enforcement of licensing provisions, a theme in many of the later chapters, is one reason for this imbalance. Another seems to be a tendency to regard an existing licence as a property right of the licence holder, rather than a permit conditioned on fulfilling conditions laid down in the law. This tendency is reinforced where, as currently in Victoria, licences are held indefinitely rather than being subject to renewal at regular intervals.

Public health-oriented representations in battles over new licences are hampered by two aspects of the situation. One is that many tribunals or courts have held to the position that the arguments against a licence must point to the occurrence of a concrete harm – an impossible case to make where the licence has not yet been granted. This is the importance of the Victorian court decision reviewed in Chapter 5: that it points a way to making arguments that a tribunal or court in future should accept evidence about probable harm. The other impediment is the confusion that often exists about the existence of two parallel processes, the general planning process and the liquor licensing process, which are routine in the approval of a newly-built alcohol outlet, and often for an alcohol outlet to be located in repurposed space.

Chapters 6-9 are concerned with public interest and public health-oriented interventions in one or both of these dual processes. The authors bring their substantial experience to bear, each from a different vantage point, on the nature of these processes, and the issues that community and other actors need to take into account in participating in the processes. While the experience drawn on is from New South Wales, there are substantially parallel processes in every jurisdiction. The chapters thus offer not only analysis but also useful advice for anyone seeking involvement in the planning and/or the licensing processes.

Chapter 10 considers issues which are raised for city and regional planning by the goal of minimisation of alcohol problems. While the chapter's primary focus is on how harms arising from high density of outlets may be mitigated in planning decisions, the chapter also considers more general issues of harm reduction as a matter of "public realm design".

Chapter 11 points to the importance of more attention to planning and licensing decisions concerning off-sale outlets. While primary attention in public media and often in the laws has been given to planning and licensing decisions about on-sale outlets, the chapter notes that around 80 per cent of alcohol sales are made through off-sale outlets, and points to recent analyses which have found that changes in the number of off-sale outlets in a neighbourhood have more effect on most indicators of alcohol-related harm than changes in the number of on-sale outlets. In this light, the

recent change in Victoria to requiring specific planning approval for off-sale as well as on-sale outlets is a step in the right direction.

Specific strategies for harm reduction in licensing and planning requirements

The middle section of this book, Chapters 12-19, considers one by one a range of potential tools which have potential for reducing alcohol-related harm, and which can be or have been applied through liquor licensing or planning regulations or processes. Chapter 12 considers the available evidence of the potential for harm reduction in an area which has not received enough attention: architectural and design features in licensed premises which have potential for harm reduction. This was an area of focus, for instance, in Britain between the wars (15), but has not received much emphasis in current research or professional literature. Chapter 13 looks to the entrance rather than the interior of the on-premise drinking place, exploring how regulation of door staff and its implementation can result in reductions in alcohol-related harm. Chapter 14 considers options and evidence concerning implementation of the prohibition in every Australian jurisdiction on serving alcohol to someone who is already intoxicated. There is clear evidence that this requirement is honoured much more in the breach than in the observance, and the chapter considers ways in which this situation could be changed.

Chapter 15 considers evidence of the effects of limiting hours of sales, with particular attention to on-premise sales late at night. These late-night sales are leading features of the 'night-time economy', touted originally as a new commercial opportunity for city centres and entertainment districts but now increasingly seen as fostering unacceptable violence and other trouble. The chapter reviews available evidence on the effects of changes in late-night hours of sale. Chapter 16 considers the potential effects on alcohol-related harms of point-of-sale promotions, including price promotions, concluding that this is an under-regulated area.

The last three chapters in this section consider tools more at the community system level for reducing rates of alcohol-related harm. Chapter 17 evaluates the effects of the introduction of a risk-based licensing scheme in the Australian Capital Territory (ACT). Such a scheme charges licence fees differentiated according to characteristics of the licensed facility, taking into account aspects potentially linked to the probability of alcohol-related harm, such as venue capacity and how late the closing-hour. The ACT used the extra fees to finance extra positions for enforcing the liquor licensing regulations, and it can be argued that the added enforcement was the main mechanism for potential reductions in ACT's rates of alcohol-related harm. Next, Chapter 18 considers the evidence on the effectiveness of a community regulatory mechanism very widely diffused in Australia, the Liquor Accord. Typically, such accords involve voluntary participation by licensees in the community, with regular meetings on common issues also involving police and other community actors. Active participation by licensees is often encouraged and sometimes required by state regulators, and public servants and agencies often commit time and resources to fostering the Accord. But the evidence of any effects of these essentially voluntary engagements in reducing rates of alcohol-related harm in the community remains elusive, even though they are often judged 'successful' in

terms of community building. A more promising approach, in terms of the research evidence, is an Alcohol Management Plan, considered in Chapter 19. These Plans, originating primarily in communities with substantial concern about Indigenous drinking, typically involve a more directive role for the local government than Liquor Accords, a wider range of harm-reducing measures, and attention to regulatory enforcement.

Implementation and enforcement of alcohol control regulations

While the primary attention in Chapters 12-19 has been on a set of specific strategies, it will be seen that the issue of implementation and enforcement of the particular interventions has come up repeatedly as a salient issue in effectiveness. This aspect is addressed specifically in Chapters 20-22. Chapter 20 offers the perspectives of police on the enforcement of liquor licensing legislation, and Chapter 21 considers the role of civilian licensing inspectors. Such inspectors returned to the scene in 2009 in Victoria, after an earlier civilian inspectorate had been abolished some years before. In this circumstance of a new beginning, Chapter 21 offers observations and some evidence on the potential of such an inspectorate for enforcing alcohol controls.

In a comparison of events and trends in two cities, Geelong and Newcastle, Chapter 22 considers the effectiveness of differing strategies for reducing rates of nighttime alcohol-related trouble. The evidence is strong that the Newcastle measures, involving a 3:30 am closing time as the centrepiece of several measures including a 1 am lockdown, produced a dramatic reduction in night-time injuries, while for Geelong there is little evidence of any change. Chapter 23 follows up with more recent evidence on levels of intoxication increasing as the night wears on in Geelong and four other cities across three states, pointing to earlier closing-times as a means for reducing alcohol-related harm.

Chapter 24 reproduces the summary conclusions of a report by the Victorian Auditor-General on the overall effectiveness of the diverse activities of Victorian government departments in controlling alcohol sales or responding to alcohol-related problems. The summary gives a picture of the wide diversity of actors involved, reports a lack of coordination in their efforts, and suggests directions to take to attain a more effective response.

Drawing on the evidence and experience from the previous chapters, Chapter 25 considers conclusions on future directions for licensing, planning, enforcement and other governmental activities with promise for effectiveness in reducing rates of alcohol-related problems.

Towards liquor licensing in the interests of public health and community amenity

In some perspectives – for instance, as a specialty in legal practice -- liquor licensing is a highly focused specialist area. The rules and precedents are often arcane and changing and not a matter of general knowledge. On the other hand, issues which the field addresses and seeks to influence – issues such as individual safety, comfort and enjoyment in everyday life, the mediation of diverse

and often conflicting commercial and community interests, and the promotion of collective benefit and community amenity – are key elements in furthering the good society. Accordingly, as the wide array of authorial expertise and of topics in this book illustrate, a consideration of liquor licensing in the interests of public health touches on and involves a variety of academic and professional fields, and reaches across the conventional divisions of societal institutions and government departments. Involving as it does issues of the general good, liquor licensing is too important to be left in the hands only of specialists.

The present book is but a beginning on drawing together what is needed in terms of knowledge about effective measures, and about the politics of implementation, for controlling alcohol markets in Australia in the interests of public health and community amenity. The book will have succeeded in its aims if it provides a foundation for new experiments and initiatives to push forward these interests in the next few years.

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