

# **THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?**

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Scholarship**

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## DECLARATIONS

### Statement of originality

I hereby certify that the work embodied in the thesis is my own work, conducted under normal supervision. The thesis contains no material which has been accepted, or is being examined, for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made. I give consent to the final version of my thesis being made available worldwide when deposited in the University's Digital Repository, subject to the provisions of the Copyright Act 1968 and any approved embargo.

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# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## TABLE OF CONTENTS

DECLARATIONS .....	iii
Statement of originality.....	iii
Thesis by publication .....	iii
Copyright permissions .....	iii
TABLE OF CONTENTS .....	v
THESIS ABSTRACT .....	ix
PUBLICATIONS .....	xi
ABBREVIATIONS OF ARTICLES.....	xiii
PAGE NUMBERS, FOOTNOTES, AND REFERENCING .....	xiii
RELATED ACADEMIC CONTRIBUTIONS.....	xv
Published work relevant to the thesis prior to enrolment in PhD.....	xv
Recent research .....	xv
Academic reviews .....	xv
GLOSSARY OF ACRONYMS.....	xvii
ACKNOWLEDGMENTS .....	xix
DEDICATION.....	xxi
PROLOGUE.....	xxiii
Outline of the thesis.....	xxiii
CHAPTER 1: INTRODUCTION.....	1
1.1 Purpose .....	4
1.2 Perspective of the costs of the retail provision of alcohol .....	5
1.3 Effective public health and other interventions to reduce alcohol related harms .....	8
1.4 Overview of the regulation of alcohol in NSW .....	12
1.5 Key stakeholders in the NSW alcohol regulatory process .....	15
1.5.1 Government .....	15
1.5.2 Alcohol industry.....	16
1.5.3 Community – Civil Society Organisations .....	17
1.6 Legal structure and instruments of the regulation of alcohol in NSW .....	18
1.6.1 Objects of the Act .....	20
1.6.2 Specific statutory provisions .....	21
1.7 Addressing alcohol related harms and compliance .....	24
1.7.1 Licensing approvals.....	24

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

1.7.2 Risk-based license fees .....	25
1.7.3 Other components of the NSW licensing process.....	26
The following list includes other key components of the NSW licensing scheme .....	26
1.8 Opportunities for industry influence.....	27
1.8.1 Summary of capture .....	29
1.8.2 Magnitude of capture .....	31
1.9 Research Gaps .....	32
1.10 Primary research questions .....	34
1.10.1 Discussion of the research questions .....	34
CHAPTER 2: CONDENSED LITERATURE REVIEW .....	39
2.1 Introduction .....	39
2.2 Regulatory Theory .....	40
2.2.1 Regulatory capture & related governance concepts.....	41
2.2.2 Engaging with the regulation theory framework on capture and corruption — ownership of the law-making process.....	55
2.2.3 Other regulatory concepts supporting regulatory failure .....	61
2.3 Health-related research, regulatory leniency and chill .....	61
2.4 Public Health orientated research .....	64
2.4.1 Corporate Political Activity (CPA) .....	64
2.4.2 Public Health-Related Literature .....	74
2.4.3 Broader Australian alcohol regulation-related research .....	74
2.5 Power framework and its legitimate use in modern western political thought .....	75
CHAPTER 3: FRAMEWORK FOR RESEARCH .....	81
3.1 Methodology .....	82
3.2 Method .....	85
CHAPTER 4: THESIS ARTICLES .....	88
4.1 Article 1 .....	89
4.1.1 Contribution towards the exegesis.....	89
4.1.2 Relationship with other articles .....	91
4.1.3 Copy of Article 1 .....	93
4.1.4 Copyright declaration .....	115
4.2 Article 2 .....	116
4.2.1 Contribution towards the exegesis.....	116

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

4.2.2 Relationship with other articles .....	117
4.2.3 Copy of Article 2 .....	119
4.2.4 Copyright declaration .....	133
4.3 Article 3 .....	134
4.3.1 Contribution to the exegesis .....	134
4.3.2 Relationship with other articles .....	135
4.3.3 Copy of Article 3 .....	137
4.3.4 Copyright declaration .....	164
4.4 Article 4 .....	165
4.4.1 Contribution to the Exegesis .....	165
4.4.2 Relationship with other articles .....	166
4.4.3 Copy of Article 4 .....	168
CHAPTER 5: CONCLUSION .....	195
5.1 Exegesis .....	195
5.2 Key findings to the primary and supplementary research questions .....	197
5.2.1 Question 1 .....	197
5.2.2 Pattern of capture over time .....	201
5.3 Question 2 .....	202
5.4 Question 3 .....	206
5.5 Desirability and reforms .....	209
5.6 Original academic contributions .....	210
5.7 Conclusion .....	211
APPENDICES .....	214
Appendix 1 Co-author Certificate for Article 2 .....	214
Appendix 2 Co-author Certificate for Article 5 .....	215
REFERENCES .....	216
A. Articles .....	216
B. Books .....	230
C. Reports .....	233
D. Cases .....	238
E. Legislation .....	239
F. Media .....	241
G. Other .....	247

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## THESIS ABSTRACT

This PhD thesis by publications blends the law with public health research, regulatory and political theory to provide a transdisciplinary explication of the controversial regulation of the retail supply of alcohol in New South Wales (NSW) since the commencement of the current *Liquor Act 2007* (NSW) in 2008.

The critical research focuses on the alcohol industry's apparently sustained capacity through political lobbying and other means to direct outcomes, including law-making, outlet approval and enforcement requirements, away from the public interest towards their profit and growth interests.

This phenomenon is defined as regulatory or industry capture. It attaches multiple layers of detrimental public health, legal and governance consequences. Ineffective industry compliance laws and processes can render the best alcohol-related harm-reduction interventions useless.

Significant original academic contributions are achieved by applying a legal phronetic methodology and the synthesis of a capture test. These methods include a micro-level critical analysis of the disproportionate power exercised by alcohol industry elites over the regulatory process. This thesis contributes to the development and application of new methods to better conceptualise regulatory leniency and chill processes.

Three published articles and one submitted for publication, evidence the progressive intensification of capture from multiple perspectives of the regulatory chain. This evidence includes the promulgation of laws weakening the independence from government of the leading quasi-legal tribunal, the commodification of the 'public interest' into 'customer convenience' thereby reducing the objectivity of the outlet approval process, and the weakened effectiveness of an integrated industry legal compliance and enforcement regime.

These NSW outcomes support the argument that regulatory capture by industry is a critical risk of profit-driven management of health, one at odds with the overall public interest. The concept of regulatory capture provides an important lens for explication of the inconsistency between public health research findings and government alcohol supply law 'reforms'.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?



## PUBLICATIONS

**Article 1:** Brown, Tony, 'Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health' (2019) 26 *Journal of Law and Medicine* 764 -785. PMID: 31682356.

**Article 2:** Ziller, Alison and Brown, Tony, 'Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away' (2019) 26 *Journal of Law and Medicine* 786–99. PMID: 31682357.

**Article 3:** Brown, Tony, 'Public Health v Alcohol Industry Compliance Laws: A Case of Industry Capture?' (2020) 27 *Journal of Law and Medicine* 1047–73. PMID: 32880418.

**Article 4:** (submitted for publication): Brown, Tony and John Anderson, 'Securing Industry Compliance: Rewriting the Alcohol Rule Book'.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## ABBREVIATIONS OF ARTICLES

These articles when cited in the body of the text are simply referred to by their number (eg, ‘article 1’). When cited in the footnotes of the thesis, they are referenced as follows: -

‘Brown article 1’ (with original JLM article page numbering)

‘Ziller and Brown article 2’ (with original JLM article page numbering)

‘Brown article 3’ (with original JLM article page numbering)

‘Brown and Anderson article 4’ (with stand-alone page and footnote numbering)

## PAGE NUMBERS, FOOTNOTES, AND REFERENCING

The page numbers and footnotes for articles 1, 2, and 3 are those applied by the *Journal of Law and Medicine*. Article 4 shows stand-alone page and footnote numbering. In this case, two page numbers appear. The page references in the footnotes for article 4 utilise the original page numbering, not the thesis page numbering.

References used in all articles and the thesis are listed in the reference section at the end of the thesis.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## RELATED ACADEMIC CONTRIBUTIONS

### Published work relevant to the thesis prior to enrolment in PhD

Brown, Tony, 'Newcastle, Australia: Tale of Two Cities' in *Preventing Alcohol-Related Problems: Evidence and Community-Based Initiatives*, Norman Giesbrecht and Linda M Bosma (eds) (American Public Health Association, 2017) ch 9.

### Recent research

Ziller, Alison and Tony Brown, 'Using Cumulative Impact Assessment as a Smokescreen in New South Wales Alcohol Harm Reduction Laws: A Commentary' (2022) 29(1) *Journal of Law and Medicine* 203–7. PMID: 35362288.

### Academic reviews

- The thesis author conducted an academic review of a manuscript for the *Drug and Alcohol Review* in 2020.
- The thesis author conducted an academic review of a manuscript submitted to *Preventive Medicine Reports*.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## GLOSSARY OF ACRONYMS

3SS	NSW Liquor Act (former) Three Strikes Disciplinary Scheme
ABA	Alcohol Beverages Australia
Act	Liquor Act 2007 (NSW)
AHA	Australian Hotels Association
AMA	Australian Medical Association
BOCSAR	NSW Bureau of Crime Statistics and Research
CBD	Central Business District
CDAT	Community Drug Action Team
CSO	Civil Society Organisations
CPA	Corporate Political Activity
IISS	Integrated Incentives and Sanctions System
ICAC	NSW Independent Commission Against Corruption
ILGA	NSW Independent Liquor and Gaming Authority
FASD	Fetal Alcohol Spectrum Disorder
FARE	Foundation of Alcohol Research and Education
FCAC	Proposed Framework Convention on Alcohol Control
FCTC	WHO Framework Convention on Tobacco Control
L&GNSW	Liquor and Gaming NSW
NAAPA	NSW, ACT Alcohol Policy Alliance
NCD	Non-Communicable Diseases
NSW	New South Wales
OLGR	(Former) NSW Office of Liquor Gaming and Racing
PIGs	Public Interest Groups
RACS	Royal Australian College of Surgeons
SAPRO	Social Awareness Public Relations Organisations
SDG	United Nations Sustainable Development Goals
SVVRS	The proposed NSW Safe Venues Voluntary Rating Scheme
TNAC	Transnational Alcohol Corporations
UCI	Unhealthy Commodity Industries
VVS	NSW Liquor Act (former) Violent Venues Disciplinary Scheme
WHO	World Health Organisation

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?



## ACKNOWLEDGMENTS

Proust observed that ‘the real voyage of discovery consists, not in seeking new landscapes, but in having new eyes’. My rewarding journey of discovery undertaking PhD research into the contemporary regulation of the supply of alcohol in NSW through a lens of regulatory capture would not have been possible without the invaluable support and enduring encouragement from my family, relatives, dear friends, supervisors, and colleagues.

I acknowledge those grieving parents who approached me during my community engagement opportunities. I recall your anguish of losing a child or having the same suffer irreversible catastrophic injuries from a primarily preventable, alcohol-fuelled incident. As a parent, I heard and responded to your pleas to make a real, sustainable difference. I hope the achievement of a PhD in law from the University of Newcastle will demonstrably enhance my capacity to better represent and advocate for the public interest and for the vulnerable and voiceless in our community.

Goethe observed ‘that none are more hopelessly enslaved than those who falsely believe they are free’. My most recent scholarship confirmed the fundamental inherent *realpolitik* approach to the corrupting influence of illegitimate power is a necessary starting point to address many of society’s issues. I praise my supervisors Professor John Anderson and Professor Julia Quilter for your invaluable constructive support and guidance. John was my lead supervisor, and I am privileged to benefit from his expansive knowledge and experience, wisdom, intellect, and approachability. I also thank my national and international academic colleagues, who collaborated, reviewed, and published my articles and thesis. Thanks to The University of Newcastle staff and fellow students across a broad multi-disciplinary spectrum who continuously provided outstanding mentorship, support, and encouragement as I traversed the challenging journey.

Special thanks to Drs Alison Ziller, John Crozier, John Woodward, Criss Moore, Louise Connors and all those who kindly supported my PhD candidature, including Phillip Boulten SC, Dr Anthony Lynham and Michael Thorn.

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## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

I really appreciated the great assistance from Jo Killmister for her excellent academic copy editing and sage observations. Kylie Lowe also provided outstanding assistance with the formatting and other key important aspects of the production of my thesis.

Finally, I must acknowledge my mate Roger, a red-capped parrot I rescued around 17 years ago. He was literally near me for most of this PhD candidacy. Whilst I was immersed in research, working from home, he would regularly call out 'Whatcha doing?', reassure me by 'Roger's a good boy' and push me through the inevitable challenges with 'Quick, come on'.

It has been a memorable PhD journey, and I humbly thank you all for your kind encouragement, support, assistance and a new set of eyes.

## DEDICATION

I dedicate this thesis to my partner Deborah and daughter Clare who have been by my side whilst I undertook extensive legal scholarship and voluntary community advocacy on evidence-based alcohol harm reduction. Thank you both, and I appreciate the sacrifices you have made in accommodating my research and desire to create a better, safer, and civil society.

In addition, this thesis is dedicated to the memory of my parents and grandparents, whom I am confident would have been proud.

A final acknowledgement of Australia's public education and health systems and all those who appreciate, value and serve the overall greater good of the public interest.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## PROLOGUE

### Outline of the thesis

**Chapter 1** commences with a brief historical background to alcohol supply laws in NSW. It identifies the primary purpose of the blended thesis and places the PhD research in a constitutional setting of the powers that broadly regulate the supply of alcohol across the branches of government. It identifies the relevant key stakeholders involved in the contest of these laws.

The chapter also provides an essential perspective on the contemporary costs and benefits arising from the supply and consumption of alcohol, predominantly in NSW. These include economic, health and political considerations. It provides insight into the underpinning legal and related alcohol-licensing architecture and processes. It defines the term ‘capture’ and concludes with the identification of research gaps and three key research questions.

**Chapter 2** provides a literature review that has been condensed and divided into three main streams of regulatory theory, public health, and a power framework reflective of the blended approach to the research questions.

The chapter is condensed to avoid unnecessary duplication of the progressively updated and expanded literature reviews undertaken for each of the articles in Chapter 4 as well as this thesis. For example, Brown and Anderson article 4 contains a review of regulatory literature relating to the effectiveness of various industry compliance and enforcement interventions to attain an ideal culture of compliance. Chapter 2 expands upon and analyses some of the key governance-related concepts and their interconnections, such as capture, corruption and the public interest in the NSW jurisdiction. It also provides an important overview of the development of the concept of corporate political activity. In addition, the literature review illuminates applied academic research literature relating to the regulatory concepts of ‘leniency’ and ‘chill’.

**Chapter 3** contains a condensed interconnected framework for research comprising a selection of alternative or combined approaches to a ‘philosophical world view’, ‘choices of research approaches’ and ‘designs and methods’. Similar to the preceding Chapter 2, this chapter also incorporates and reproduces the discussion and references relating to the primary foundational

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

legal phronesis methodology contained in Brown article 1 and primarily followed in the subsequent articles.

**Chapter 4** contains the four articles written by the candidate in part, completing the requirements of the conferring of a PhD by publication. Copyright authorisation from Reuters follows each article authorising the reproduction of the three *Journal of Law and Medicine* publications.

Each article is preceded by an overview of the article's connection and contribution to the other articles and the overall thesis. This process contributes to the overall coherence and cohesiveness of this thesis. These overviews are an essential component of the exegesis.

**Chapter 5**, the concluding chapter, contains the exegesis that relies in part upon the overview of each article reproduced in Chapter 4.

Chapter 5 includes the key findings to research questions, recaps the thesis contribution to original academic scholarship and concludes with some commentary.

**References** follow the above chapters, including all references from the thesis and the four articles.

**Appendices** include the authorised co-author declarations of the substantial contribution to articles 2 and 4 by the candidate.

## CHAPTER 1: INTRODUCTION

The greatest challenge to improving health may lie in the tension between wealth- and health-creation<sup>1</sup>

Since the British appropriation of Gadigal land to establish Port Jackson, Sydney, in New South Wales (NSW) as a penal colony in January 1788,<sup>2</sup> the regulatory control of the retail provision<sup>3</sup> and consumption of alcohol, as well as the enforcement of the related laws, was and remains a contentious legal, social, economic, public health, safety and political issue of deadly proportions.<sup>4</sup>

Whilst the political machinations of the infamous NSW Rum Corps and its conflicting associations with the NSW early governors have been well documented,<sup>5</sup> Mindell and others warn that the ‘ultimate prize’ for industry nowadays is to capture and control the regulatory process through determining public policy.<sup>6</sup> However, only limited blended legal and public health research has been undertaken at the grass-roots praxis level of the contemporary regulation of alcohol in NSW and beyond. Such research is critical to better understand, effectively defend against and remediate this critical capture process, its manifestations and broader societal implications.<sup>7</sup>

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<sup>1</sup> Robert West and Theresa Marteau, ‘Commentary on Casswell (2013): The Commercial Determinants of Health’ (2013) 108(4) *Addiction* 686–7.

<sup>2</sup> See City of Sydney webpage <<https://www.cityofsydney.nsw.gov.au/history/aboriginal-histories>>.

<sup>3</sup> The ‘provision’ of alcohol is broadly defined to include a range of physical and psycho-sociological activities including the availability, supply, service, promotion and marketing of alcohol. This extends to reliance on behavioural ‘nudging’ to alter consumers’ patterns of consumption. Petticrew et al provide important insight into industry behavioural economic tactics, Mark Petticrew et al, ‘Dark Nudges and Sludge in Big Alcohol: Behavioral Economics, Cognitive Biases, and Alcohol Industry Corporate Social Responsibility’ (2020) 98(4) *Milbank Quarterly* 1290–328. Outside most of the scope of the thesis is marketing, including on-line marketing and associated rapid home delivery, advertising and promotion of alcohol including social media and the use of health warning labels.

<sup>4</sup> See Rob Moodie, ‘A Brief History of Alcohol Consumption in Australia’, *The Conversation* (25 February 2015) and subsequent ‘Parts’ <<https://theconversation.com/a-brief-history-of-alcohol-consumption-in-australia-10580>>.

<sup>5</sup> Ross Fitzgerald, ‘An Address to the NSW Alcohol Summit [Opening Address Calls for the Formation of an Alcohol Institute]’ *Drugs in Society* (2003) 6–8. See also Matthew Allen, ‘Distilling Liberty: Reconsidering the Politics of Alcohol in Early New South Wales’ (2019) 50(3) *Australian Historical Studies* 339–53.

<sup>6</sup> Jennifer S Mindell et al, ‘All in This Together: The Corporate Capture of Public Health’ (2012) 345 *British Medical Journal* e8082. See also the earlier and greater exploration of corporate capture David Miller and Claire Harkins, ‘Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying And Public Health’ (2010) 30(4) *Critical Social Policy* 1–26.

<sup>7</sup> Lacy-Nichols and Williams provide a timely and insightful broader (macro) strategic perspective of regulatory capture in the food industry. Jennifer Lacy-Nichols and Owain Williams, ‘“Part of the Solution”: Food Corporation Strategies for Regulatory Capture and Legitimacy’ (2021) 10 (Special Issue on Political Economy of Food Systems) *International Journal of Health Policy and Management* 845–56.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The aim of this introductory chapter is to provide the entrée of important background and settings for this blended thesis by publication.<sup>8</sup> This chapter consists of seven interconnected sections.

The first section identifies the key purpose and orientation of the thesis by publication.

The second section establishes the essential impetus and urgency of this novel research. It identifies some key costs of the operations of the retail alcohol industry, particularly in NSW, to better appreciate the magnitude of what are, primarily, preventable harms. These short- and longer-term outcomes directly relate to the extensive array of statutory, policy and resourcing measures the government can choose, or not,<sup>9</sup> to develop and deploy to address alcohol-related harms and maintain an industry culture of effective legal compliance.

Substantial equity issues arise from the recognised social gradient of harms through which alcohol disproportionately disadvantages the poorest, most vulnerable and powerless in our society.<sup>10</sup>

The magnitude of these primarily preventable alcohol harms and the demonstrable<sup>11</sup> capacity of the alcohol and gambling<sup>12</sup> lobbies to effectively capture this critical government decision-making process point to the importance of this thesis and its proposed reform imperatives to address significant public health and governance issues. These latter issues go to the core of our democratic process, public integrity and rule of law.

The third section identifies the most effective evidence-based, demand-and-supply law- based interventions to prevent and reduce these alcohol harms and capture.

The fourth section provides essential insights and reflects, in part, the empirical evidence in the four articles contained within Chapter 4 of the thesis. As such, it presents a critical overview of the alcohol regulatory process in NSW including the key stakeholders, the legal architecture, the 'Objects' of the *Liquor Act 2007* (NSW) (hereafter the Act), and those dual-edged key legal

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<sup>8</sup> Carling identifies eight benefits associated with undertaking a PhD by publications. Jørgen Carling, 'A PhD by Publication Allows You to Write for Real and Varied Audiences, Inviting Intellectual Exchanges That Benefit Your Research', *LSE Impact Blog* (Blog Post, 30 May 2017) <<https://blogs.lse.ac.uk/impactofsocialsciences/2017/05/30/a-phd-by-publication-allows-you-to-write-for-real-and-varied-audiences-inviting-intellectual-exchanges-that-benefit-your-research/>>.

<sup>9</sup> Peter Bachrach and Morton Baratz, 'Decisions and Nondecisions: An Analytical Framework' (1963) 57(3) *The American Political Science Review* 632.

<sup>10</sup> Wayne Hall, 'Socioeconomic Status and Susceptibility to Alcohol-Related Harm' (2017) 2(6) *The Lancet Public Health* e250-e251.

<sup>11</sup> See the articles in chapter 4.

<sup>12</sup> May van Schalkwyk et al, 'Gambling Disorder' [429] (2022) 9(6) *The Lancet Psychiatry*.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

provisions, or ‘levers’, comprising part of the central licensing-related processes. This section also summarises those alcohol law ‘reforms’<sup>13</sup> that create demonstrable opportunities and asymmetrical advantages for the industry elites.

In the fifth section, the concept of ‘capture’ is expanded upon and contextualised within the NSW alcohol regulatory process. The NSW alcohol industry elites’ sustained capacity, through political lobbying and other means, to subtly and covertly direct outcomes, including law-making, outlet approval and enforcement requirements, away from the public interest towards their profit and growth interests is described as regulatory or industry capture.<sup>14</sup> This type of capture incorporates multiple layers of detrimental public health, legal, governance<sup>15</sup> and integrity consequences. Ineffective industry compliance laws and processes can also, for example, render ineffective or useless the best evidence-based alcohol-related harm reduction interventions. The linkages within the NSW jurisdiction between this thesis’ concept of ‘capture’ and other governance-related terms, including ‘corruption’ and ‘public interest’, are analysed in Chapter 2.

Sixthly, research gaps are identified based on the condensed literature review in Chapter 2, given that a literature review was conducted for each article in Chapter 4.

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<sup>13</sup> The common expression of ‘reform(s)’ is a discursive frame or technique commonly adopted by the Government and the industry to provide a gilt edge to successive major changes to the NSW alcohol laws and processes consistently favouring the industry.

<sup>14</sup> The prefixes of ‘industry’, ‘regulatory’ capture are usually interchangeable. Hereafter these two forms are referred to as ‘capture’. The elements of capture are described further in chapter 2, 45–6. Greater elaboration of the concept of ‘capture’ is contained within Brown article 1, 766–9, 770–2. The test for regulatory capture is subsequently refined and applied through successive articles within this thesis.

<sup>15</sup> Governance is defined as ‘both the capacity of a government to develop and implement policies, and the ways in which power is exercised for the purposes of managing a country’s economic and social resources. “Good governance” refers to governance processes that reflect the values and principles that will contribute most effectively to economic and social development, including the progressive realization of the right to health’. Principles of good governance include ‘stewardship, transparency, participation, fairness, accountability and rule of law’. Alexandra Phelan and Roger Magnusson, ‘Update and Summary Guide to the Report: “Advancing the Right to Health: The Vital Role of Law”’ (Research Paper No. 18/80, Sydney Law School, November 2018) 15–6. <<https://ssrn.com/abstract=3292701>>. ‘Parliamentary oversight’, see Inter-Parliamentary Union and United Nations Development Programme (UNDP), ‘Global Parliamentary Report 2017—Parliamentary Oversight: Parliament’s Power to Hold Government to Account’ (Report, 2017) <<https://www.undp.org/publications/global-parliamentary-report-2017>>. See also the governance framework and definition of Australian Government, Australian Public Service Commission, ‘Building Better Governance’ (Website) <<https://www.apsc.gov.au/building-better-governance>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Finally, the same gaps, when integrated with the legal phronetic methodology<sup>16</sup> and Chapter 2, were instrumental in the development of the three research questions and their connections with the rest of the thesis, contained in the final section of this introductory chapter.

### 1.1 Purpose

The key objective of this thesis is to explicate the real nature and magnitude of the alcohol lobby's intensifying influence, interference and, ultimately, capture of the democratic law-making process concerning the regulation of the retail provision and consumption of alcohol in NSW. The primary period of research is from since the current Act commenced on 1 July 2008 until the time of writing. NSW is Australia's first and most populous state or territory. In practical terms, one aim of this work is to determine what capture is, what it looks like, where it is found, how it works and what its direct impacts are on the public interest.

The ultimate reformist aim is the establishment of a sustainable integrity process to prevent the effective capture of the regulation of alcohol in NSW by preventing the commodification of the public interest and affording primacy to alcohol harm prevention, the democratic process, governmental integrity and the rule of law.

This objective is enabled through an original transdisciplinary scholarly research process. The empirical evidence supporting the thesis' conclusions and recommendations is primarily derived from four case studies in the form of articles included within Chapter 4 . This research critically analyses key strategic legal amendments and policies related to pivotal components of the alcohol regulatory chain over a thirteen-year period since the commencement of the Act. It is within these areas of contested alcohol law 'reforms' where opportunities for industry advantages are visible and concentrated.<sup>17</sup>

The extraordinary reported May 2022 claims by a current serving senior NSW Cabinet Minister, who had recently had responsibility for the NSW alcohol and gambling industries removed from his portfolio, that some of his Cabinet colleagues as well as members of the NSW Opposition are unduly influenced by the powerful NSW gambling lobby demonstrates the seriousness of

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<sup>16</sup> Brendan Murphy and Jeffery McGee, 'Phronetic Legal Inquiry: An Effective Design for Law and Society Research?' (2015) 24 (2) *Griffith Law Review* 288–313. Elaborated in chapter 3 and articles 1, 3 and 4.

<sup>17</sup> These opportunities for industry advantage derived from the four case studies are summarised at 27.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

capture.<sup>18</sup> Fuelling the Minister's and the NSW Deputy Police Commissioner's public complaints and warnings was previous public acknowledgement of serious infiltration of organised crime utilising pub and club electronic gambling machines,<sup>19</sup> better known as poker machines, for alleged extensive illegal money laundering of proceeds of crimes including illicit drug trafficking, prostitution and terrorism.<sup>20</sup>

The overarching political and legal imperative of the protection, promotion and sustainability of the public interest,<sup>21</sup> including public health and safety, is a primary reformist purpose of this thesis.

### 1.2 Perspective of the costs of the retail provision of alcohol

This section draws directly from and replicates the alcohol harm statistics relied upon in article 4. These statistics are intended to provide the reader with a sense of the magnitude of the primarily preventable, nature of the harms and the urgency of the need to prevent them. It also establishes the contribution of this thesis topic and the scholarly based opportunities it provides to address the intensifying levels of industry capture of the regulation of alcohol in NSW and other jurisdictions, local to global.

The Commonwealth Government derives revenue from taxes on alcohol sales, including excise levies and the Goods and Service Tax. Some of this revenue is shared with the states and territories.

Around 84 per cent of NSW adults consume alcohol, with 49 per cent having reported drinking to get drunk in the past 12 months.<sup>22</sup> Alcohol Beverages Australia (ABA), an industry association, asserts their industry contributes \$52 billion to the Australian economy each year.<sup>23</sup> An earlier 2013 Report from the Australian Institute of Criminology conservatively estimated that the

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<sup>18</sup> Nick McKenzie, 'Organised Crime Rampant Across Australia, Secret Briefings Reveal', *The Sydney Morning Herald* (13 May 2022) <<https://www.smh.com.au/national/organised-crime-rampant-across-australia-secret-briefings-reveal-20220512-p5akpa.html>>.

<sup>19</sup> Also referred to as EGMs, poker machines or 'pokies'.

<sup>20</sup> Alexandra Smith, 'Criminals Target Poker Machines in NSW Amid Pandemic', *The Sydney Morning Herald* (30 November 2020) <<https://www.smh.com.au/politics/nsw/criminals-target-poker-machines-in-nsw-amid-pandemic-20201129-p56iw0.html>>.

<sup>21</sup> Addressed in greater detail in chapter 2, 52.

<sup>22</sup> FARE (Foundation for Alcohol Research and Education), '2019 Annual Alcohol Poll: Attitudes & Behaviours' (2019) 45 (Webpage) <<https://fare.org.au/wp-content/uploads/FARE-Annual-Alcohol-Poll-2019-FINAL.pdf>>.

<sup>23</sup> Alcohol Beverages Australia <<https://www.alcoholbeveragesaustralia.org.au/>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

national societal cost of the harms arising from misuse of alcohol in Australia exceeded Commonwealth revenue from the sale of alcohol by a ratio of 2:1.<sup>24</sup>

Alcohol is the most significant single cause of death and disablement of Australian males aged between 14 and 44.<sup>25</sup> It is also recognised as the most toxic of all legal and illicit drugs, causing harm to users and others.<sup>26</sup> The consumption of alcohol is implicated as a significant contributing factor in the following types of events: road deaths and serious injuries;<sup>27</sup> depression and suicides;<sup>28</sup> drownings, particularly of young men;<sup>29</sup> domestic violence and homicides<sup>30</sup>; fetal alcohol spectrum disorder (FASD), the most common cause of permanent child developmental disabilities;<sup>31</sup> a range of cancers.<sup>32</sup> The average alcohol-related assault that occurred in Sydney's Central Business District (CBD) and Kings Cross in 2018 was estimated to cost the victim and society around \$85 000.<sup>33</sup>

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<sup>24</sup> Matthew Manning, Christine Smith and Paul Mazerolle, 'The Societal Costs of Alcohol Misuse in Australia' (2013) 454 *Trends and Issues in Crime and Criminal Justice* <[https://research-repository.griffith.edu.au/bitstream/handle/10072/58981/85722\\_1.pdf?sequence=1](https://research-repository.griffith.edu.au/bitstream/handle/10072/58981/85722_1.pdf?sequence=1)>.

<sup>25</sup> See NSW Health Healthstats, 'Commentary' and related alcohol harm information <[http://www.healthstats.nsw.gov.au/indicator/beh\\_alc\\_age](http://www.healthstats.nsw.gov.au/indicator/beh_alc_age)>.

<sup>26</sup> Dirk W Lachenmeier and Jürgen Rehm, 'Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach' (2015) 5 *Scientific Reports* 8126.

<sup>27</sup> NSW Centre for Road Safety estimates one in seven road fatal crashes involves alcohol. New South Wales Government, Transport for NSW, Centre for Road Safety, Staying Safe, 'Alcohol and Driving' (Webpage, 13 December 2018) <<https://roadsafety.transport.nsw.gov.au/stayingsafe/alcoholanddrugs/drinkdriving/index.html>>; Connie Hoe et al, 'Drink, But Don't Drive? The Alcohol Industry's Involvement in Global Road Safety' (2020) 35(10) *Health Policy and Planning* 1328–38.

<sup>28</sup> Daniel Chong et al, 'Acute Alcohol Use in Australian Coronal Suicide Cases, 2010–2015' (2020) 212 *Drug and Alcohol Dependence* 108066; Nicole Hill et al, 'Suicide by Young Australians, 2006–2015: A Cross-Sectional Analysis of National Coronal Data' (2020) 214(3) *Medical Journal of Australia* 133–9. Guilherme Borges et al, 'A Dose–Response Estimate for Acute Alcohol Use and Risk of Suicide Attempt' (2017) 22(6) *Addiction Biology* 1554–61.

<sup>29</sup> Kyra Hamilton et al, 'Alcohol Use, Aquatic Injury, and Unintentional Drowning: A Systematic Literature Review' (2018) 37(6) *Drug and Alcohol Review* 752–73.

<sup>30</sup> NSW Government, NSW State Coroner's Court, 'NSW Domestic Violence Death Review Team Report 2015–2017' (Report, 2020) <[https://coroners.nsw.gov.au/documents/reports/2017-2019\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2017-2019_DVDRT_Report.pdf)>; Peter Miller et al, 'Alcohol/Drug-Involved Family Violence in Australia (ADIVA)' (National Drug Law Enforcement Research Fund (NDLERF) Monograph No 68, Australian Institute of Criminology, 2016) <<https://www.aic.gov.au/publications/ndlerfmonograph/ndlerfmonograph68>>.

<sup>31</sup> Elizabeth Elliott, 'Childproofing Australia's Future Health: Preventing Alcohol Harms' (2020) 59 *EbioMedicine* 102949 <<https://doi.org/10.1016/j.ebiom.2020.102949>>.

<sup>32</sup> The Australian Institute of Health and Welfare estimates expenditure attributed to alcohol related cancers was \$176m. Australian Institute of Health and Welfare, 'Health System Expenditure on Cancer and Other Neoplasms in Australia, 2015–16' (24 March 2021) <<https://www.aihw.gov.au/reports/cancer/health-system-expenditure-cancer-other-neoplasms/summary>>; see also Cancer Council WA, 'Alcohol and Cancer Risks' (22 July 2020) <<https://www.cancerwa.asn.au/prevention/alcohol/alcohol-and-cancer/>>.

<sup>33</sup> Simon Deeming and Kypros Kypri, 'Costing Alcohol-Related Assault in the Night-Time Economy from a Societal Perspective: The Case of Central Sydney' (2021) 40(5) *Drug and Alcohol Review* 779–99 <<https://pubmed.ncbi.nlm.nih.gov/33634524/>>

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

In 2013, the NSW Auditor-General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum, with the cost to each NSW household being \$1535 per annum.<sup>34</sup> The NSW Bureau of Crime Statistics and Research (BOCSAR) found that the annual cost of policing alcohol-related crime in NSW was around \$50 million, equivalent to a thousand new full-time police constables in 2005.<sup>35</sup>

In early 2020, the Guardian newspaper summarised an Australian Electoral Commission report on declared federal political donations. The alcohol and gambling industry was one of the largest political donors, with the various branches of the Australian Hotels Association (AHA) contributing a declared total of \$1.53 million to both major political parties.<sup>36</sup> However, it is estimated that around 40%<sup>37</sup> of federal political donations remain undeclared as they may fall, for example, below the declaration threshold currently indexed at \$14 500 for each individual donation.<sup>38</sup> This suggests that the real level of political donations from the alcohol and gambling lobby could be much higher than those declared.<sup>39</sup>

Political donations by the alcohol and gambling lobby could arguably be included in a cost-benefit analysis of the type discussed immediately above. Such donations represent a significant opportunity cost where the alternative discretionary funding could have been directed to the health and wellbeing of Australian society.

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<sup>34</sup> Audit Office of New South Wales, New South Wales Auditor-General's Report, 'Performance Audit—Cost of Alcohol Abuse to the NSW Government' (Report, 6 August 2013) <[https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013\\_Aug\\_Report\\_Cost\\_of\\_Alcohol\\_Abuse\\_to\\_the\\_NSW\\_Government.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Aug_Report_Cost_of_Alcohol_Abuse_to_the_NSW_Government.pdf)>.

<sup>35</sup> Neil Donnelly et al, 'Estimating the Short-Term Cost of Police Time Spent Dealing with Alcohol-Related Crime in NSW' (NDLERF Research Monograph No 25, Australian Institute of Criminology, 2007) <<https://www.aic.gov.au/publications/ndlerfmonograph/ndlerfmonograph25>>. There are also substantial opportunity costs associated with police resources removed from suburbs and relocated to violent entertainment precincts on weekend nights. Alcohol harm and cost information is reproduced in article 4 submitted for publication.

<sup>36</sup> Paul Karp, Christopher Knaus and Nick Evershed, 'Liberal Party Received \$4.1m in Donations from Property Tycoon's Company', *The Guardian* (3 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/03/liberal-party-donationsproperty-tycoon-company-isaac-wakil>>.

<sup>37</sup> Curtis suggests high proportion of undeclared political donations. Katina Curtis, 'Hidden Money: Political Parties Rake in \$68 Million from Mystery Sources', *The Sydney Morning Herald* (4 February 2022) <<https://www.smh.com.au/politics/federal/hidden-money-political-parties-rake-in-68-million-from-mystery-sources-20220203-p59tg4.html>>.

<sup>38</sup> Australian Electoral Commission, 'Disclosure Threshold' <[https://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/threshold.htm](https://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm)>.

<sup>39</sup> Karp, Knaus and Evershed (n 36).

### 1.3 Effective public health and other interventions to reduce alcohol related harms

The report by the World Health Organisation (WHO) titled ‘Global Status Report on Alcohol and Health 2018’ (WHO 2018)<sup>40</sup> identified three mechanisms by which the consumption of alcohol contributes to health and social harms.<sup>41</sup> These are, firstly, the toxic effects of alcohol on the organs and tissues of the body, resulting in liver cirrhosis, heart disease and a range of cancers; secondly, the development of alcohol dependence and the associated loss of self-control, for example, drink driving and mental health disorders; and, thirdly, intoxication, characterised by ‘psychoactive effects in the hours after drinking’.<sup>42</sup>

The same 2018 WHO report recognises that ‘[state] licensing systems are the commonest means of restricting alcohol availability’. The report also discusses the WHO-based recommended policy interventions — ‘best buys’ to prevent and reduce alcohol harms. These include proposals to ‘increase excise taxes on alcoholic beverages, enact and enforce bans or comprehensive restrictions on exposure to alcohol advertising [across multiple types of media] [and] enact and enforce restrictions on the physical availability of retailed alcohol [via reduced hours of sale]’.<sup>43</sup>

Conversely, the same package of alcohol harm prevention levers has an adverse impact on the profitability and growth of the alcohol industry, which depends on an environment free of such restrictions to generate the outcomes — high rates of returns on investments — necessary to satisfy ‘banks and other financial institutions’.<sup>44</sup> Political donations are possibly funded from these returns.

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<sup>40</sup> World Health Organization, ‘Global Status Report on Alcohol and Health 2018’ (World Health Organization, 2018) <<https://www.who.int/publications/i/item/9789241565639>> xvi. The 75<sup>th</sup> World Health Assembly meeting in late May 2022 approved the latest draft ‘DRAFT ACTION PLAN (2022–2030)’ to effectively implement the global strategy to reduce the harmful use of alcohol as a public health priority’. This plan contains an important overview of alcohol related harms and the latest, most effective measures to address the same. It also includes targets for the reduction in alcohol harms and related sustainable development goals. World Health Organization, ‘Political Declaration of the Third High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases’ (Report, 11 January 2022) <[https://apps.who.int/gb/ebwha/pdf\\_files/EB150/B150\\_7Add1-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/EB150/B150_7Add1-en.pdf)>.

<sup>41</sup> WHO 2018, 3.

<sup>42</sup> WHO 2018.

<sup>43</sup> WHO 2018, 27.

<sup>44</sup> See the significant extract from Justin Hemmes’ submission on the ‘draft’ ‘Night-Time Economy’ Bill involving proposed changes to the Act that articulates the primacy of wealth over health. It was subsequently acknowledged and actioned by the Parliament. Brown and Anderson article 4, (n 28) 8.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The following section, which provides an overview of the NSW alcohol regulatory system, places a strong emphasis on the need to address the health and public safety problem or financial opportunity (depending upon one's perspective) of intoxication.

The 2018 WHO report<sup>45</sup> also relies upon the substantial and growing body of independent scientific evidence to identify alcohol availability, supply and demand-based measures shown to effectively prevent or minimise alcohol-related harms associated with a variety of drinking situations.

From the same public health perspective, Babor<sup>46</sup> and colleagues, among others, distinguished between alcohol demand and supply interventions. Apart from adjustment of the price of alcohol through taxation and the application of other fiscal controls via enforceable interventions designed to influence the demand for alcohol, there is general recognition that enforceable interventions to reduce the availability and provision of alcohol, including, for example, reductions in extended late-trading hours for licensed premises, controls on outlet density and other licensing-related measures discussed above<sup>47</sup> can be effective in harm reduction. The risks of alcohol harm can also be reduced by laws and policies designed to control the promotion and marketing<sup>48</sup> of alcohol by various means, including social media, and the deployment of more graphic and prominent product warning labels. Policy concerning the burgeoning avenue of alcohol promotion is largely outside the main scope of this research.

Attempts to reduce the demand for alcohol through such measures as general education programs, particularly those providing for industry input, are, overall, considered less effective in

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<sup>45</sup> WHO 2018.

<sup>46</sup> Tom Babor et al, *Alcohol: No Ordinary Commodity—Research and Public Policy* (Oxford University Press, 2nd ed, 2010). WHO, '10 Areas Governments Could Work with to Reduce the Harmful Use of Alcohol' (Media Release, 10 July 2019) <<https://www.who.int/news-room/feature-stories/detail/10-areas-for-national-action-on-alcohol>>. Dan Chisholm et al, 'Are the "Best Buys" for Alcohol Control Still Valid? An Update on the Comparative Cost-Effectiveness of Alcohol Control Strategies at the Global Level' (2018) 79(4) *Journal of Studies on Alcohol and Drugs*: 514–22.

<sup>47</sup> See WHO, 'Best Buys' 8.

<sup>48</sup> The impact of social media on the marketing of alcohol is having a profound effect on the demand and supply of alcohol, the risk of alcohol related harms and the effective regulation of alcohol. See WHO, 'Reducing the Harm from Alcohol by Regulating Cross-Border Alcohol Marketing, Advertising and Promotion: A Technical Report' (Report, 10 May 2022) <<https://www.who.int/publications/i/item/9789240046504>>; Marco Zenone, Nora Kenworthy and Nason Maani, 'The Social Media Industry as a Commercial Determinant of Health' (2022) *International Journal of Health Policy and Management*; Movendi International, 'Big Alcohol Bets Big on Metaverse to Push Alcohol Availability', *Policy News* (3 May 2022) <<https://movendi.ngo/news/2022/05/03/big-alcohol-bets-big-on-metaverse-to-push-alcohol-availability/>>.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

harm reduction. Substantial increases in social media<sup>49</sup> and other channels of saturation marketing and glamourising of the consumption of alcohol by industry, particularly amongst younger people, may act as a counterfoil to the effectiveness of industry-preferred demand-related harm-reduction interventions.

The adoption of such scientific based evidence in NSW to address alcohol harms must pass through a politico-legal process, including the balancing of competing interests, before any translation of the research evidence into parliamentary laws capable of being enforced by the executive powers of the state and its various agencies can take place.

For example, in March 2022, the NSW Bureau of Crime Statistics and Research (BOCSAR) released research<sup>50</sup> showing that changes to NSW alcohol laws resulting in later closing times for bottle shops<sup>51</sup> correlated with an increase in reported domestic violence.<sup>52</sup>

The NSW Parliament has the power to make and amend alcohol laws and regulations. Alternatively, ILGA and its departmental delegate, L&GNSW (in certain circumstances) have the power to make or amend individual alcohol licence conditions, including opening and closing times. On rare occasions, ILGA has the power to change opening and closing times for a number of licenced premises in a defined location in response to an undue disturbance complaint<sup>53</sup> from residents, police and local councils.

This thesis argues that those in public health research and even law and policymaking, have a sufficient grasp of the most effective evidence-based interventions and policy tools to prevent or

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<sup>49</sup> Brenda Curtis et al, 'Meta-Analysis of the Association of Alcohol-Related Social Media Use with Alcohol Consumption and Alcohol-Related Problems in Adolescents and Young Adults' (2018) 42(6) *Alcoholism: Clinical and Experimental Research* 978–86.

<sup>50</sup> Joanna J J Wang, Thomas Fung and Suzanne Poynton, 'Takeaway Alcohol Sales and Violent Crime: The Implications of Extended Trading Hours' (2022) (Crime and Justice Bulletin No 247) <<https://www.bocsar.nsw.gov.au/Publications/CJB/2022-Report-Takeaway-alcohol-sales-and-violent-crime-CJB247.pdf>>.

<sup>51</sup> Also known as off-license premises.

<sup>52</sup> In doing so, it provides a useful summary of some research examining the impact of increased and decreased closing times of pubs and clubs known as on-premises alcohol outlets, and its correlation and impact on reported levels of violence. See also the special supplement, Peter G Miller et al, 'Queensland Alcohol-Related Violence and Night-Time Economy Monitoring (QUANTEM): Rationale and Overview' (2021) 40(5) *Drug and Alcohol Review* <<https://pubmed.ncbi.nlm.nih.gov/34008244/>>.

<sup>53</sup> *Liquor Act (2007)* NSW Pt 5 Div 3.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

minimise alcohol-related harms.<sup>54</sup> The above-mentioned<sup>55</sup> recent BOCSAR research on the impact of extended closing times of alcohol outlets provides a substantial example of the continuing research on the impact of laws on public health.

It is suggested that it is not a lack of reliable evidence that inhibits<sup>56</sup> elected law-makers from translating this research on harm caused by alcohol into effective legislative and enforceable alcohol harm-prevention interventions. Realistically, the industry-led demands and excuses for additional evidence will never be satisfied. This thesis argues that a contemporary question that must be resolved through a transdisciplinary approach incorporating normative considerations is why the adoption of these proven –life- and cost-saving measures is being impeded and rejected, in many instances by our democratically elected law makers, and how our society should best resolve these issues?

This section provides a precursor to the following discussion on the legal structure and instruments of the regulation of alcohol in NSW. It identifies those enforceable interventions established as effective in directly reducing alcohol-related harms.<sup>57</sup> Additional information is provided in the following condensed literature review in Chapter 2.

This thesis argues that the traditional reliance on extensive alcohol-harm reduction research alone is insufficient in attaining sustainable reductions in harms. This stance arises from evidence of the inevitable legal-political reality of industry capture and important related regulatory considerations, including the effectiveness of a variety of methods, examined in article 4, to attain a culture of industry compliance. The legal determinants of health must be considered. The important backdrop to this is regulatory capitalism and the dominant neoliberal framework.<sup>58</sup>

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<sup>54</sup> Some scientific alcohol harm reduction research references are contained in ILGA Guidelines 6 and 18 (nn 94, 99) involving social/cumulative impacts assessment processes for alcohol outlets. There has however, been little evidence that this research alone has been sufficiently relied upon to reject a high risk license related application where usually neoliberal ‘customer satisfaction’ criteria located only in the relevant Parliamentary debates (Brown article 3), trump harm reduction considerations contained within the ‘objects’ of the Act.

<sup>55</sup> 10 [2].

<sup>56</sup> See Hoe et al’s interesting approach identifying industry tactics to resist industry controls discussed further in chapter 2 of this thesis. It does not appear to recognise circumstances where industry may have attained effective authorship of such control laws. Connie Hoe et al, ‘Strategies to Expand Corporate Autonomy by the Tobacco, Alcohol and Sugar-Sweetened Beverage Industry: A Scoping Review of Reviews’ (2022) 18(1) *Globalization and Health* 17 <<https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-022-00811-x>>.

<sup>57</sup> See WHO, ‘SAFER—Alcohol Control Initiative’ (2018) <<https://www.who.int/initiatives/SAFER>>.

<sup>58</sup> Brown article 1, Schram (n 22); Brown article 3, Lencucha and Thow (n 16) and Monbiot (n 17).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The encouraged blended approach to sustainable harm reduction by including public health and related regulatory initiatives in a package of enforceable interventions is particularly pertinent in article 4's critical analysis of the new NSW 'integrated incentives and sanction scheme'<sup>59</sup> (IIS). The scheme provides for the early removal of a demerit point for committing a prescribed alcohol-related offence, on the basis of the adoption of measures<sup>60</sup> to reduce the risk of the same or similar circumstances recurring.

The broad NSW alcohol licensing regulatory process plays a crucial mediating role in the attempted prevention and reduction of alcohol-related harms to drinkers and others. It becomes apparent that the demonstrated capacity of the alcohol lobby to influence the design and operation of the above<sup>61</sup> array of statutory and policy levers is a crucial aspect of the profit-driven determinants of health, the emergent democratic process, public integrity, and the rule of law discussed further in Chapter 2.

### 1.4 Overview of the regulation of alcohol in NSW

The historical and contemporary contest between some stakeholders<sup>62</sup> to influence, effectively determine or even author the nature and direction of NSW alcohol laws and policies provides a backdrop and insight into the collision between concentrated, powerful private forces of the NSW retail alcohol industry and a relatively weaker coalition of public interest groups or civil society organisations (CSO). The terminology often used in public health literature, as discussed below, is one of the outcomes of this contest.

This thesis challenges the conception of the state and its institutions as a neutral, pluralist one of mediating or balancing conflicting interests such as the alcohol industry, on one hand, and those concerned with social wellbeing, on the other.

Within the Australian federation, state and territory governments have the primary constitutional responsibility to regulate the provision and consumption of alcohol. The Commonwealth Government possesses budgetary powers to impose various levies and taxes related to the sale of

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<sup>59</sup> Liquor and Gaming NSW, 'Fact Sheet FS3015 Incentives and Demerit Point System' <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0007/946735/fs3015-incentives-and-demerit-point-system.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0007/946735/fs3015-incentives-and-demerit-point-system.pdf)>. See examples of 'measures' on p 7 of this Fact Sheet.

<sup>60</sup> *Liquor Act 2007* (NSW) s144ZE(2)(a)(iii).

<sup>61</sup> 2–3, 8.

<sup>62</sup> See stakeholders 15–18.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

alcohol. The Commonwealth's communications, broadcasting and health powers provide it with the capacity to regulate alcohol promotion and advertising, including health warnings and labelling. However, national regulation of alcohol advertising has largely been left to what is, essentially, industry self-regulation through an industry-dominated body, the Alcohol Beverage Advertising Code (ABAC) Scheme.<sup>63</sup> There are no prominent state-owned and state-operated retail alcohol outlets in Australia. NSW has its own statutory liquor promotion guidelines.<sup>64</sup>

In 2015, the National Competition Inquiry by Harper et al<sup>65</sup> rejected alcohol industry submissions seeking greater deregulation of alcohol laws. It found that it was in the overall public interest to regulate the supply of alcohol through licensing and other statutory controls to limit and prevent recognised alcohol harms that may arise from, for example, an accumulation of outlets within a given area, whilst minimising the potential adverse impacts this may have on national competition.<sup>66</sup>

From a distance, the array<sup>67</sup> of NSW statutory provisions, guidelines, schemes and policies supposedly orientated towards alcohol harm reduction and industry compliance appears comprehensive and formidable. They provide a defensible basis for NSW politicians' and industry

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<sup>63</sup> See Belinda Reeve, 'Regulation of Alcohol Advertising in Australia: Does the ABAC Scheme Adequately Protect Young People from Marketing of Alcoholic Beverages?' (2018) *QUT Law Review* 18(1) 96–123; H Pierce, S Jackson and J Stafford, 'Giving the ok to "Stay In. Drink Up": What Happens When the Alcohol Industry is in Charge of Alcohol Marketing Regulation During the COVID-19 Pandemic' (Report, Cancer Council Western Australia and Cancer Council Victoria, 2021) <<https://www.cancerwa.asn.au/resources/2021-03-22-Giving-the-ok-to-Stay-In-Drink-Up.pdf>>.

<sup>64</sup> Section 102 of the NSW Act provides the power for the NSW Government to establish enforceable liquor promotion guidelines. See Liquor and Gaming NSW (L&GNSW) Guidelines GL4001 <<https://www.liquorandgaming.nsw.gov.au/documents/g/gl4001-liquor-promotion-guidelines.pdf>>. These guidelines are, however, relatively under-utilised as an instrument to address the full gambit of alcohol related harms in NSW. There is a history of substantial industry influence over the wording of these guidelines. See the blatant example of capture in Sean Nicholls and Julie Power, 'Rules on Promotion of Alcohol "Watered Down"', *The Sydney Morning Herald* (19 July 2013) <<https://www.smh.com.au/national/nsw/rules-on-promotion-of-alcohol-watered-down-20130718-2q7bg.html>>.

<sup>65</sup> See Ian Harper et al, 'Competition Policy Review' (Final Report, March 2015) 47, 127, 145 <<https://treasury.gov.au/publication/p2015-cpr-final-report>>; Ziller and Brown, article 2, 796.

<sup>66</sup> The previous NSW Liquor Act (1982) primary criteria for approval of alcohol outlets was on a 'needs' basis. The majority of objectors in the former Licensing Court against a new license application were usually existing hotel owners in a town. The National Competition Council found the 'needs' test anti-competitive. This provided a catalyst for the new NSW Liquor Act (2007) that (then) incorporated a 'rigorous and comprehensive social impact assessment process'. Ziller and Brown article 2, 786–8.

<sup>67</sup> See 21-6 of the thesis.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

representatives' narrative that asserts, numerically, at least, that the NSW alcohol retail jurisdiction has the 'toughest' laws<sup>68</sup> and is the most regulated in the nation.

However, as Flyvbjerg contends, those with power get to determine reality.<sup>69</sup> A combination of Flyvbjerg's method of social inquiry with the legal doctrinal method provides a helpful blend of methodology that uses the legal phronetic approach to ascertain at a granular level the magnitude of systemic industry influence over the interlinked alcohol law-making and compliance-and-enforcement regulatory processes in NSW, Australia's dominant alcohol jurisdiction.

With the assistance of the development and application of a prototype regulatory test of capture,<sup>70</sup> the thesis explicates successive NSW alcohol law reforms and their accompanying frames and narratives from when the Act commenced on 1 July 2008. The application of the capture test combined with the legal phronetic methodology provides the capacity to discern with much greater clarity what really lies behind the front stage of the application power or influence.

The explication of the regulatory framework or chain through a lens of capture exposes a systematic and intensifying pattern; in some cases, this pattern applies to the authorship of the important liquor promotion guidelines<sup>71</sup> and the IISS.<sup>72</sup> This has been to the pecuniary advantage of the industry's largest providers of discounted alcohol and most popular night-time pubs and clubs.

The critical analysis in the last two articles of Chapter 4 also reveals how some deterrent effects of compliance laws have been, or are likely to be, cancelled or diminished by effectively increasing complexity, exemptions, leniency and loopholes including, in the first instance, quarantining the owners and controllers of the largest, most violent hotels from sanctions. The loss of sufficiently skilled and experienced government compliance staff<sup>73</sup> and levels of competition within some

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<sup>68</sup> Former Deputy NSW Premier Troy Grant, 'Liquor Laws Have Never Been Tougher'. Emma Partridge, 'NSW Government Shakes Up Alcohol and Gaming Regulation', *The Sydney Morning Herald* (9 October 2015). <<https://www.smh.com.au/national/nsw/nsw-government-shakes-up-alcohol-and-gaming-regulation-20151009-gk54ta.html>>.

<sup>69</sup> Bent Flyvbjerg, *Rationality and Power Democracy in Practice* (University of Chicago Press, 1998) 37. Reproduced Brown article 1, 778; Brown and Anderson article 5, 30–1.

<sup>70</sup> Development of test for capture, 45–6, Brown articles 1 and 3.

<sup>71</sup> Liquor Promotion Guidelines (n 64).

<sup>72</sup> Ibid.

<sup>73</sup> L&GNSW were unable to provide when requested by a formal application, the substantive number of alcohol compliance officers over the previous five years.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

segments of the alcohol market are also critical factors impacting on the industry culture of compliance.

### 1.5 Key stakeholders in the NSW alcohol regulatory process

#### 1.5.1 Government

The first key stakeholder is the bicameral NSW Parliament, consisting of the Legislative Assembly and the Legislative Council, with the latter traditionally considered the house of review. The Constitutional separation of the legislature from the executive and judiciary was intended to prevent the dangerous over-concentration of powers that would result from there being one branch of government.<sup>74</sup> Parliament acknowledges the dangers of such concentration as ‘absolutism’ and ‘corruption’.<sup>75</sup> The second form of safeguard to theoretically reduce the risks of absolutism and an over-concentration of powers is the traditional political separation between government and opposition political parties. Total reliance upon these governance<sup>76</sup> processes and democratic safeguards, to prevent legislative capture is problematic.

The executive branch of government is responsible for applying and administering the laws approved by the legislature. In NSW, there is limited practical distinction between these two branches. The primary public agencies in NSW responsible for regulating alcohol and gambling are

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<sup>74</sup> The NSW Constitution provides for no formal distinction between the executive and legislative arms of government. The Parliament of NSW website acknowledges that ‘this separation does not fully exist and the doctrine is not exemplified in the constitutions of the Australian states... since the ministry (executive) is drawn from and responsible to the parliament (legislature) there is a great deal of interconnection in both personnel and actions. The separation of the judiciary is more distinct’. Parliament of New South Wales, ‘Separation of Powers’ (March 2000) <<https://www.parliament.nsw.gov.au/about/Pages/Separation-of-Powers.aspx>>.

<sup>75</sup> Ibid.

<sup>76</sup> See definition of ‘good governance’ (n 15). Contrary to these governance type distinctions, there is a theme of two-way political bipartisan support for the alcohol lobby in NSW. See eg the application of the capture test to the *Gaming and Liquor Administration Amendment Bill 2015* (NSW) (‘Fit for Purpose’ reforms) in Brown article 1, 782–6; a (former) Minister’s acknowledgement of the AHA NSW’s ‘incredible’ work behind the scenes with both major political parties to get their best deal for their members (782); and a former NSW Minister responsible for alcohol and gambling in NSW emphasis placed on the ‘bipartisan’ support to remove Newcastle’s package of successful alcohol harm controls. See Victor Dominello, NSW (then) Minister for Customer Service, ‘Trial of Easing Lockouts is the Best Way Forward for Newcastle’, *Newcastle Herald* (3 April 2021) <[https://www.newcastleherald.com.au/story/7194244/trial-is-the-best-way-forward-for-smart-city/?fbclid=IwAR1tbXMHRh1qhWQB27Yf-xGwUHvKpNfjN5FqIzOJtrqWV\\_ZOx30Kg-1j7c](https://www.newcastleherald.com.au/story/7194244/trial-is-the-best-way-forward-for-smart-city/?fbclid=IwAR1tbXMHRh1qhWQB27Yf-xGwUHvKpNfjN5FqIzOJtrqWV_ZOx30Kg-1j7c)>. The Government’s action initially lacked local Police support, see Michael Parris, ‘“Absolute Lunacy”: Newcastle Police Chief Slams Push to End Lockouts’, *Newcastle Herald* (3 February 2021) <<https://www.newcastleherald.com.au/story/7109660/absolute-lunacy-newcastle-police-chief-slams-push-to-end-lockouts/>>. Publicly expressed police concerns were subsequently, retracted.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

the NSW Independent Liquor and Gaming Authority (ILGA)<sup>77</sup> and the NSW Department of Enterprise, Investment and Trade's (DEIT) agency, Liquor and Gaming NSW (L&GNSW). They fall within the portfolio of the Minister for Hospitality and Racing.<sup>78</sup> The NSW Police Force (Police), under the control of the Minister for Police and Emergency Services, also shares responsibilities relating to industry compliance and enforcement.

### 1.5.2 Alcohol industry

The second key group of stakeholders is the retail alcohol industry. The articles contained within this thesis provide some details of the most visible key alcohol industry stakeholders.<sup>79</sup> The research identifies a pattern of bifurcation<sup>80</sup> between the powerful and wealthy industry elites with substantial investments in 'bricks and mortar'<sup>81</sup> and the rest of the industry. The former group

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<sup>77</sup> Brown article 1, 778–85 former ILGA Chairperson's reported observations regarding changes to ILGA; see also Brown article 1, 'Nicholls' 785. The powers of ILGA are defined within the *Gaming and Liquor Administration Act 2007* (NSW). Much of their licensing approval powers have been delegated to the Government agency L&GNSW.

<sup>78</sup> For the first time since the Act commenced in 2008, 'Liquor' and 'Gaming' has been dropped from the relevant Minister's portfolio title. It has now morphed into 'Hospitality' from around the beginning of 2022. The associated discourse has also emphasised a fun, safe and vibrant 24 hour Sydney economy promoted by a Government appointed '24 hour Economy Commissioner' (Sydney's Night Mayor) located with the Premier's Department. An industry dominant advisory committee has been established to support the strategy. No community resident representative appear to have been appointed to the committee. Arguably, the Ministerial name change may represent a discursive tactic to further normalise the extended sale and consumption of alcohol and gambling under the more favourable term of 'hospitality'. Investment NSW, 'Greater Sydney's 24-Hour Economy' <<https://www.investment.nsw.gov.au/living-working-and-business/greater-sydneys-24-hour-economy/>>.

<sup>79</sup> On some occasions, submissions from large international alcohol producers including Diageo on key alcohol regulatory proposals are publicly released. See Diageo Australia, 'Diageo Australia Response to Joint Select Committee Review on Sydney's Night-Time Economy', Submission in Sydney's Night Time Economy, Submission No 458, 2 July 2019 ('Lockout laws'). <<https://www.parliament.nsw.gov.au/ladocs/submissions/63155/Submission%20458%20-%20Diageo%20Australia.pdf>>. The local influence of these transnational alcohol corporations (TNAC) producers and their relationship with local alcohol industry groups appears significantly under-estimated. It can be envisaged how these TNACs have the financial resources to unduly influence NSW political parties directly or through local industry lobby groups. The AHA website identifies, Diageo, Lion, Asahi owners of Carlton United Breweries and other major gambling companies as 'corporate partners'. <http://aha.org.au/corporate/diageo-2/>. British American Tobacco are listed as an AHANSW 'Gold' partner <https://ahansw.com.au/partners/>. These local vertical and horizontal cross-connections between UCIs is consistent with the findings in Cécile Knai et al, 'The Case for Developing a Cohesive Systems Approach to Research Across Unhealthy Commodity Industries' (2021) 6(2) *BMJ Global Health* e003543 <<http://gh.bmj.com/content/6/2/e003543.abstract>>.

<sup>80</sup> Lauren Snider, 'Accommodating Power: The "Common Sense" of Regulators' (2009) 18(2) *Social & Legal Studies* 17997. See Brown and Anderson article 4 (n 43).

<sup>81</sup> This is a common reference relied upon by NSW industry and political representatives to generally describe the physical assets of especially the elites' licensed premises, presumably relied upon as financial collateral for loans from financial institutions. It became a prominent reference around 2015 following a successful prosecution against one elite, when it was inaccurately alleged by the industry and subsequently acknowledged by most NSW politicians, that it was not the initial intentions of the three strikes disciplinary scheme (3SS) to put at risk the cancellation of a venue's liquor license of the proprietors. This is critically analysed further in Brown article 3.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

includes individuals and supermarket chain corporations<sup>82</sup> with a demonstrated capacity to disproportionately influence the law-making process in their favour making them ‘law influencers’. They are also likely to employ or contract licensee-managers. The latter grouping in the alcohol industry is comprised of many smaller operators who may also be the owner of the alcohol outlet for which they hold the licence. This latter group has been described as ‘law-takers’.<sup>83</sup> This distinction is important to avoid any preconception or generalisation that all alcohol retailers in NSW have the same individual capacity or power to influence the regulatory process.

The NSW alcohol industry encompasses peak bodies based on the type of licence their members hold. These peak organisations include the Australian Hotels Association NSW Branch (AHA) and its close allies, Clubs NSW and Alcohol Beverages Australia (ABA). This last industry organisation describes itself as ‘the pan-industry body created to highlight the positive social, cultural and economic contribution of alcohol beverages in Australia’.<sup>84</sup> Members of this peak lobby group include Australia’s two largest off-premises packaged alcohol retail providers, Woolworths Group, Coles Supermarkets Australia Pty Ltd and some of the world’s largest multinational alcohol producers.

### 1.5.3 Community – Civil Society Organisations

The third group of key stakeholders are those individuals and groups claiming to represent the public interest; these are various civil society organisations (CSO). Ayres and Braithwaite’s seminal *responsive regulation* theoretical model<sup>85</sup> recognises public-interest groups (PIGs) as critical stakeholders. PIGs are theoretically capable of exercising a countervailing<sup>86</sup> force or power to effectively minimise the risk of collusion or corruption between the regulator and those subject to

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<sup>82</sup> Roy Morgan, Brown article 1 (n 62); Brown article 4, 1068.

<sup>83</sup> This expression borrows from the economic term of price ‘makers and ‘takers’. Price makers possess market power to influence the price of their product. See also David Jernigan and Craig S Ross, ‘The Alcohol Marketing Landscape: Alcohol Industry Size, Structure, Strategies, and Public Health Responses’ (2020) Supp 19 *Journal of Studies on Alcohol and Drugs* 13–25. See Petticrew et al (n 3).

<sup>84</sup> Alcohol Beverages Australia (ABA) <<https://www.alcoholbeveragesaustralia.org.au/about/>>. ABA has provided submissions to the NSW government concerning the regulation of alcohol.

<sup>85</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) ch 3 ‘Tripartism’ 56. In effect, PIGs were perceived as a third force under a theoretical tripartism model keeping the regulator and regulatee honest. The thesis repeats some earlier elements of the literature and methodology reviews undertaken in Brown article 1, 766–70 and Brown article 3 1057–8, 1063, 1072.

<sup>86</sup> See John Kenneth Galbraith, *American Capitalism* (Houghton Mifflin, 1952) regarding countervailing power.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

regulation, the regulatees. There is minimal evidence of public-interest stakeholders in NSW attaining such status.

In NSW, public-interest stakeholders, around the time of the adoption of the current NSW Liquor Act in 2008, formed a coalition group called the NSW, ACT Alcohol Policy Alliance or NAAPA. It included the NSW Police Association and other emergency worker unions; a raft of professional medical organisations whose members had a connection with alcohol harm prevention, such as the Royal Australian College of Surgeons (RACS) and the NSW Branch of the Australian Medical Association (AMA); the Foundation Alcohol Research and Education (FARE), a CSO; several charitable organisations whose clients were adversely impacted by alcohol; the Newcastle Community Drug Action Team (CDAT); and resident groups and citizens.

The competing stakeholder paradigm is applied to different components of the regulatory processes of the retail supply of alcohol in NSW. This is critical to the design and scope of the research contained within this thesis. To ensure the important overall cohesiveness and coherency of the body of research incorporated within the thesis, each article contributes a different perspective of the regulatory chain where capture may exist. This establishes a structural mechanism to triangulate the location and nature of such occurrences to eliminate one-off benign aberrations and determine whether the presence of capture, if any, may be more systemic and corrosive.

### **1.6 Legal structure and instruments of the regulation of alcohol in NSW**

The following section provides an overview of the legal architecture of the regulation of alcohol in NSW that is sometimes grouped under the general heading of 'licensing'. The complex interconnected regulatory processes of applying for alcohol licenses, the evaluative approval process and the ongoing actions to sustain industry compliance and enforcement must be consistent with the 'Objects' section of the Act. Here, alcohol harm minimisation is, notably, only one of four considerations to which a person must afford due regard when exercising authority under the Act.

The following description of key components of the NSW licensing system identifies a non-exhaustive range of windows where the alcohol industry has the capacity to influence the design and direction of these laws, guidelines, and policies. The case studies within the thesis identify a



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

number of circumstances where the same windows were not open for any substantive input by the broader community,<sup>87</sup> including public health researchers. This resonates with those various frameworks of power identified in Chapter 2, including one form of power described by Lukes<sup>88</sup> as being the capacity to set the agenda and exclude relevant stakeholders for example, the community and public health advocates, by ‘nondecisions’.<sup>89</sup>

These windows exist whenever the NSW alcohol regulatory authorities have the capacity to exercise discretion consistent with the objects of the alcohol laws.

This thesis explicates the regulation of the retail provision of alcohol in NSW from the commencement of the Act. Section 7 of the Act makes it an offence to sell alcohol to a person unless the seller is a person who is authorised by a liquor licence to do so.

This section of Chapter 1 also concentrates on those aspects of the regulatory framework that relate to the Act’s object of reducing alcohol-related harms as well as industry compliance matters, including the evolution and ultimate demise of the former statutory disciplinary schemes such as the Violent Venues Scheme (VVS), the Three Strikes Scheme (3SS) and the Minors Scheme analysed in article 3.<sup>90</sup> Key features of these schemes that particularly favoured the industry were absorbed into the current IISS. These changes provided key insights into stakeholders’ underpinning assumptions, values and themes contained within the narrative associated with the alcohol law ‘reforms’. This regulatory scrutiny contributes to the body of empirical research and critical analysis incorporated into the case studies.

The Liquor Act and its associated regulations are the primary legislation governing the regulation of alcohol in NSW.<sup>91</sup> The *Gaming and Liquor Administration Act 2007* (NSW) and its regulations complement the Act and establish certain powers of ILGA and its relationship with executive

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<sup>87</sup> See for example Brown article 1, 779–80 where the community were denied any substantive input to key changes to the Act in 2017 including significant restrictions to effectively oppose liquor license applications.

<sup>88</sup> Steven Lukes, *Power: A Radical View* (Macmillan Education UK, 1974). For application of this model of power, see Joana Madureira Lima and Sandro Galea, ‘Corporate Practices and Health: A Framework and Mechanisms’ (2018) 14(1) *Global Health* 21.

<sup>89</sup> Bachrach and Baratz (n 9).

<sup>90</sup> Brown article 3, 1050, Brown and Anderson article 4, 17–18.

<sup>91</sup> The impact of the *Environmental Planning and Assessment Act 1979* (NSW) on the licensing approval process is considered at 25.

government. It also provides the capacity for the responsible minister to make certain directions to ILGA.<sup>92</sup>

### 1.6.1 Objects of the Act

Critical components of the Act are its objects, which are amended to reflect Parliament's changing priorities and intent with respect to regulating alcohol in NSW. They provide an important yard stick for ILGA and L&GNSW in their respective decision-making processes where they are required to exercise their discretion to (subjectively) balance<sup>93</sup> competing interests. The latest amendments to the objects, as of June 2022, have incorporated consideration of broader economic activities including live music, the arts, tourism and the cultural sector. This ongoing asymmetrical balancing process of the objects by the NSW alcohol authorities and Parliament is the subject of critical transdisciplinary analysis in the case studies.

#### 3. Objects of the Act

##### (1) The objects of this Act are as follows—

- (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
- (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
- (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

##### (2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following—

- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
- (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
- (c) the need to ensure that the sale, supply and consumption of liquor, and the operation of licensed premises, contributes to, and does not detract from, the amenity of community life,
- (d) the need to support employment and other opportunities in the—

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<sup>92</sup> *Gambling and Liquor Administration Act 2007* (NSW) s6(3).

<sup>93</sup> See for example ILGA Guideline 18 GL4028—Cumulative Impact Assessment—Sydney CBD Entertainment and Kings Cross Precincts extract '3.4. With the lifting of the licence freeze, there is a need for the Authority to also take a balanced approach as part of the licensing application process to manage risks specific to the Precincts...'.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

- (i) live music industry, and
- (ii) arts, tourism, community and cultural sectors.

A Delegations Manual<sup>94</sup> articulates the allocation of approval powers between ILGA and L&GNSW. For example, following ‘fit for purpose’ reforms<sup>95</sup> to the Act in 2015, the Delegations Manual is understood to have been amended so that most of the approvals of liquor licence- related applications were delegated to L&GNSW, part of a state government department directly answerable to a minister of the Crown. Only a small number of higher risk applications such as hotel and packaged liquor licence applications are determined by ILGA, based on recommendations from L&GNSW.

The 2015 ‘fit for purpose’ law reforms, which effectively reduced ILGA’s independence from government, coincided with an increase in the approval rate of higher risk applications, including those seeking an extension of trading hours analysed further in articles 1 and 2.<sup>96</sup>

### 1.6.2 Specific statutory provisions

Section 57 of the Act empowers ILGA to ‘establish administrative policies and procedures in relation to licensing matters’. These usually take the form of quasi-statutory enforceable ‘guidelines’<sup>97</sup> on a range of topics directly related in part to the capacity of the agencies to address alcohol-related harms and levels of industry compliance.

These topics include consideration of social impact for higher risk licence applications,<sup>98</sup> sale of alcohol in supermarkets,<sup>99</sup> changes to existing licensing conditions and boundaries,<sup>100</sup> imposition

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<sup>94</sup> See ILGA Delegations Manual <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0004/1043815/ILGA-Regulatory-Delegations-Manual.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0004/1043815/ILGA-Regulatory-Delegations-Manual.pdf)>.

<sup>95</sup> Critically analysed in Brown article 1 and, Ziller and Brown article 2.

<sup>96</sup> Alison Ziller, ‘Eroding Public Health Through Liquor Licensing Decisions’ (2018) 25(2) *Journal of Law and Medicine* 489 <<https://pubmed.ncbi.nlm.nih.gov/29978649>>. Ziller and Brown article 2, 795–9.

<sup>97</sup> The Guidelines articulate the administrative steps and other considerations ILGA must take when exercising its powers. It also provides for example the steps licensees must take to recognise and reduce the risks of intoxication.

<sup>98</sup> GL4010 ILGA Guideline 6 ‘Consideration of Social Impact Under Section 48(5) of the Liquor Act 2007’ <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0009/863244/ILGA4421\\_GL4010\\_ILGA\\_Consideration-of-social-impact-under-Section-48-5-of-the-Liquor-Act-2007\\_guideline-6\\_FA-5.PDF](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0009/863244/ILGA4421_GL4010_ILGA_Consideration-of-social-impact-under-Section-48-5-of-the-Liquor-Act-2007_guideline-6_FA-5.PDF)>.

<sup>99</sup> GL4019 ILGA Guideline 10 ‘Sale of Liquor in a Supermarket Under Section 30 of the Liquor Act’ 2007 <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0005/860441/181218-sale-of-liquor-in-a-supermarket-under-section-30-of-the-liquor-act-2007.pdf.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0005/860441/181218-sale-of-liquor-in-a-supermarket-under-section-30-of-the-liquor-act-2007.pdf.pdf)>.

<sup>100</sup> GL4025 ILGA Guideline 14 ‘Applications to Change Existing Authorisations, Conditions or Boundaries’ <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0012/862698/ILGA6413\\_GL4025\\_Guideline-14\\_Applications-to-change-existing-authorisations-conditions-or-boundaries\\_FA-2.PDF](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0012/862698/ILGA6413_GL4025_Guideline-14_Applications-to-change-existing-authorisations-conditions-or-boundaries_FA-2.PDF)>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

and removal of demerit points from licensees,<sup>101</sup> and cumulative impact assessments for high-risk violent locations in Sydney.<sup>102</sup>

Some of these ILGA guidelines are analysed in the case studies forming part of this thesis.

Section 45(3)(b) of the Act requires ILGA to be satisfied that:-

practices will be in place at the licensed premises as soon as the licence is granted that ensure, as far as reasonably practicable, that liquor is sold, supplied or served responsibly on the premises and that all reasonable steps are taken to prevent intoxication on the premises, and that those practices will remain in place.

Section 73 (5A) requires the 'the Secretary [of the relevant NSW government Department] to issue guidelines relating to the prevention of intoxication on licensed premises'.<sup>103</sup>

These guidelines on the prevention of intoxication on premises in conjunction with the related following licensing offence under the Act are emblematic of the entrenched influence of the alcohol lobby and the uneven contest between wealth versus health creation.<sup>104</sup>

73 Prevention of excessive consumption of alcohol on licensed premises

(1) A licensee must not permit—

(a) intoxication, or

(b) any indecent, violent or quarrelsome conduct,

on the licensed premises.

Ostensibly, the offence of permitting intoxication and violence on premises— appears unambiguous. However, the primary purpose of this industry is the profitable provision of alcohol complemented by very substantial profits from poker machines in hotels and licensed clubs — a known addictive and harmful product to the consumer and others. In highly competitive market places with a fickle younger audience who value their freedom and oppose constraints on the

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<sup>101</sup> GL4026 ILGA Guideline 17, 'Guidelines on the Imposition and Removal of Demerit Points by the Authority Under Part 9A of the Liquor Act 2007' <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0006/953592/gl4026-guideline-17-incentives-and-demerit-point-system.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0006/953592/gl4026-guideline-17-incentives-and-demerit-point-system.pdf)>.

<sup>102</sup> GL4028 ILGA Guideline 18, 'Cumulative Impact Assessment—Sydney CBD Entertainment and Kings Cross Precincts' <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0010/980389/gl4028-cumulative-impact-assessment-sydney-cbd-and-kingscross-precincts.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0010/980389/gl4028-cumulative-impact-assessment-sydney-cbd-and-kingscross-precincts.pdf)>.

<sup>103</sup> L&GNSW GL4002 'Prevention of Intoxication on Licensed Premises Guidelines' <<https://www.liquorandgaming.nsw.gov.au/documents/gl/gl4002-prevention-of-intoxication-on-licensed-premises-guidelines.pdf>>. This power is derived from section 5 (3),(4) of the Act.

<sup>104</sup> West and Marteau (n 1).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

unfettered right to consume alcohol, it is foreseeable that owners of the same on-licence premises would seek to maximise the volumes and strength of alcohol served as a core component of the profit-maximisation imperative. High levels of demonstrable intoxication are not only a product of both the industry profit-maximisation motive and failed governance processes but also a generator and accelerant of primarily preventable alcohol-related harms. The industry's view is that high levels of intoxication reflect their patrons' lack of individual responsibility – a core narrative frame of the NSW alcohol and gambling industries.

With the help of substantial legal input at a forum witnessed by the author, the enforceable NSW intoxication prevention guidelines<sup>105</sup> were predominantly shaped by the industry to the private chagrin of some senior agency officers. These guidelines have become largely a tick-the-box' exercise, whereby following some basic 'practicable steps' such as licensees ensuring availability of free drinking water, food<sup>106</sup> and monitoring of patrons can satisfy the legal defence<sup>107</sup> that particular licensees took 'reasonable' steps to prevent demonstrable levels of intoxication.

Compounding the asymmetrical nature of regulation of alcohol in NSW, including the essential industry compliance process, was the introduction of the 'size matters' defence, so that larger licensed premises could rely on their size and level of patronage to defend against the detection of intoxicated patrons on their licensed premises and a complaint to ILGA.<sup>108</sup>

Section 99 of the Act is a key legislative provision concerning the overall 'responsible sale, supply, service or promotion of liquor'. Included within these provisions is the power to restrict or prohibit irresponsible alcohol promotion. Before the Secretary can take action to ban irresponsible alcohol promotions, there must be published related liquor promotion guidelines.<sup>109</sup>

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<sup>105</sup> Ibid.

<sup>106</sup> See copy of report by Alison Branley, 'Pizzas Help Fanny's Avoid Conviction', *Newcastle Herald* (12 March 2013) of unsuccessful prosecution of a Newcastle nightclub that was at some stage, the most violent licensed premise in NSW <<https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:c582a7fc-ca39-4a2e-a150-2b59b3a68971>>.

<sup>107</sup> Liquor Act (2007) NSW s73(4)(a1).

<sup>108</sup> See Brown article 3, 1066–7. ILGA Guideline 17 (n 101) 2. 'The size and patron capacity of the licensed premises and any impact those factors have on the ability of the licensee or manager to prevent or manage the acts or circumstances forming the grounds for the prescribed complaint'.

<sup>109</sup> L&GNSW GL4001 'Liquor Promotion Guidelines' <<https://www.liquorandgaming.nsw.gov.au/documents/gl/gl4001-liquor-promotion-guidelines.pdf>>. The power to make such guidelines is prescribed in s102(4) of the Act.

These promotion guidelines are, however, relatively under-utilised as an instrument to address the full gambit of alcohol-related harms in NSW. Earlier, 2013, investigations revealed that the departmental recommendations supporting prohibition of heavy discounting practices detrimental to public health, such as two bottles for the price of one, were overturned with few, if any, substantive reasons given by the departmental secretary, a former business leader. The largest packaged liquor outlet corporations were then exclusively invited to contribute to the rewording of the promotion guidelines line by line.<sup>110</sup> This example of explicit capture is not, however, further addressed in this thesis.

There is also a requirement to establish standards to prevent the ‘misuse or abuse’ of alcohol on licensed premises, and undertake responsible service of alcohol training.<sup>111</sup>

## 1.7 Addressing alcohol related harms and compliance

The architecture of the package of NSW alcohol laws provides the following main direct and indirect means to address alcohol-related harms and assert disciplinary compliance powers over owners and controllers of licensed premises.<sup>112</sup>

### 1.7.1 Licensing approvals

The statutory approval or licensing of alcohol outlets in NSW includes legal provisions and subsequent considerations relating to their size, location, trading hours, surrounding outlet density and associated concentration of patrons as well as the character of owners and operators. Various licensing conditions and authorisations on alcohol can be attached to licences in order to proscribe, for example, trade beyond normal closing times, known as ‘extended trading authorisations’,<sup>113</sup> and allowing patrons to consume alcohol in restaurants without the requirement to consume food, known as ‘primary service authorisations’<sup>114</sup>. Other licensing conditions can be imposed as part of the approval process to, theoretically, mitigate any identified

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<sup>110</sup> See Nicholls and Power, ‘Rules on Promotion of Alcohol “Watered Down”’ (n 64).

<sup>111</sup> Section 99 (3) of the Act is of concern. It provides for ‘the regulations may adopt with or without modification the standards contained in an industry code of practice as standards to be observed on licensed premises in the sale, supply, service and promotion of liquor’.

<sup>112</sup> The evolution of the shifting priorities of NSW alcohol laws from a ‘needs’ basic, a brief focus on violence reduction to the contemporary concentration on economic outcomes is summarised in Brown article 1, 773–6.

<sup>113</sup> See for example *Liquor Act 2007* (NSW) s14.

<sup>114</sup> *Liquor Act 2007* (NSW) s22.

potential risks and related harms. This can include, for example, drink strengths and the quantity of alcohol served to patrons on single occasions with a view to reducing levels of intoxication.

An important caveat to the approval of alcohol licences is s 45 3(c) of the Act. This requires the applicant to have the appropriate consent approval, usually from the local council under the *Environmental Planning and Assessment Act 1979* (NSW). In effect, there is a de facto dual-planning licensing approval process in NSW. The relevant consent authority under the NSW Planning Act has a similar requirement to assess, amongst a range of considerations, the likely net environmental, social and economic impact and, expressly, the public interest. They can also impose various development conditions to mitigate likely negative alcohol harms.

Across NSW, local government's planning powers to prevent and address alcohol-related harms in any coordinated and effective manner appear to be significantly under-utilised. The scope of this thesis does not extend to an analysis of the NSW planning laws and their effectiveness in reducing alcohol-related harms.

The NSW alcohol laws provide for seven main categories of alcohol licences, comprising: hotel, club and on-premise licences, including restaurants, cafes, cinemas, cruise boats, packaged liquor licences; take-away alcohol including on-line purchases and rapid home delivery, small bar licenses, producer (wholesale) licences and limited licenses for special events and catering.<sup>115</sup> Some of these licenses prescribe standard trading hours where additional authorisations are required to trade outside these hours.

Special provisions have been introduced for micro-brewers and small distillers to allow customers to consume alcohol on their premises.<sup>116</sup>

### 1.7.2 Risk-based license fees

'Risk-based' annual licensing fee arrangements include components relating to risk factors associated with size of patronage, extended trading hours and compliance record. The IISS system, introduced fee-reduction incentives for retention of clean compliance records. Limited research has been undertaken on the effectiveness of such incentive schemes in reducing alcohol-related

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<sup>115</sup> See *Liquor Act 2007* (NSW) Pt 3.

<sup>116</sup> See Liquor and Gaming NSW Fact Sheet FS3149 <<https://www.liquorandgaming.nsw.gov.au/documents/fs/fs3149-special-licensing-for-micro-breweries-small-distilleries.pdf>>.

harms. Nepal et al<sup>117</sup> suggested more ‘demonstrably effective strategies’ than reliance on risk-based licensing practices, including reduced trading hours, were available to reduce alcohol-related violence. Article 4 examines the more effective regulatory approaches to promoting industry compliance.<sup>118</sup>

### 1.7.3 Other components of the NSW licensing process

The following list includes other key components of the NSW licensing scheme

- Prescribe a range of offences and regulatory controls,<sup>119</sup> including, for example, section 73 of the Act relating to the ‘prevention of excessive consumption of alcohol on licensed premises’.
- Provide a limited opportunity for nearby persons including residents, to oppose some proposed license and related applications.<sup>120</sup>
- Provide legal mechanisms for a very limited range of those aggrieved with an alcohol license approval to seek an external independent review of the same by the NSW Civil and Administrative Tribunal (NCAT).<sup>121</sup>
- Prescribe minimum drinking age and controls on secondary supply to minors.<sup>122</sup>
- Provide a theoretical legal conduit for the NSW Government to introduce further evidence-based alcohol-harm prevention statutory initiatives — for example, minimum unit pricing (MUP), which was recently adopted in the Northern Territory and Ireland.<sup>123</sup>
- Create a complex ‘integrated incentives and sanctions (compliance) scheme’.<sup>124</sup>

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<sup>117</sup> Smriti Nepal et al, ‘Effects of a Risk-Based Licensing Scheme on the Incidence of Alcohol-Related Assault in Queensland, Australia: A Quasi-Experimental Evaluation’ (2019) 16(23) *International Journal of Environmental Research and Public Health* 1 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6926782/>>.

<sup>118</sup> *Liquor Regulation 2018* (NSW) Part 2. See L&GNSW, ‘Risk-Based Loadings and Exemptions’ <<https://www.liquorandgaming.nsw.gov.au/operating-a-business/liquor-licences/liquor-licence-fees/risk-based-loadings-and-exemptions>>.

<sup>119</sup> *Liquor Act 2007* (NSW) Part 6.

<sup>120</sup> *Liquor Regulation 2018* (NSW) Pt 3 div 1.

<sup>121</sup> See ILGA <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/ncat-decisions>> and Gaming and Liquor Administration Act 2007 (NSW) s 13A.

<sup>122</sup> *Liquor Act 2007* (NSW) Part 7. Section 4 of the Act ‘definitions’ define a minor as a person under the age of 18 years.

<sup>123</sup> The Northern Territory Government also provides the following webpage on MUP: <<https://alcoholreform.nt.gov.au/milestones/floor-price>>.

<sup>124</sup> Parts 9 and 9A of the Act prescribe the ‘Disciplinary action’ and the ‘Demerits point scheme’ respectively. The evolving industry disciplinary schemes and other key reforms since the commencement of the Act, provide important



## 1.8 Opportunities for industry influence

These opportunities include, for example, strategic amendments through a neoliberal<sup>125</sup> frame<sup>126</sup> to the alcohol outlet approval (licensing) processes (articles 1, 2, 3, 4), the weakening of the social-impact assessment process (article 2), effectively reducing the autonomy of the independent approval authority from government (articles 1 and 2), marginalising effective community input into the decision-making process (articles 1, 2, 3), commodifying the concept of the ‘public interest’ (article 1), reliance on a narrow range of alcohol harm and social disadvantage indicators to justify widespread relaxation of licensing conditions (article 3) and systematically weakening the deterrence impact of industry compliance disciplinary schemes via greater leniency and complexity (articles 3 and 4).

Consistent with these legal reforms favouring the industry elites was the devolution of the primary responsibility of regulatory compliance to staff subordinate to the powerful elite owners of larger licensed premises (article 1, 3 and 4), the capacity for the earlier removal of a demerit point arising from a serious licensing offence on the basis that it ‘did not result in serious harm to any person’<sup>127</sup> (article 4) and, finally, the taking into account of the size and patronage of a venue before a demerit point can be issued, referred to in this thesis as the ‘size matters’ excuse<sup>128</sup> (articles 1, 3 and 4).

The research adopts a more normative, praxis-orientated approach consistent with the legal phronetic methodology discussed in Chapter 3 of the thesis and the research articles. This methodology blends the traditional legal doctrinal approach with social inquiry. This methodology is also consistent with the overall law-, regulatory- and public health-reform goals of the thesis.

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insights to the relative nature and magnitude of industry influence. They are the subject of substantial critical analysis within particularly Brown article 3 and, Brown and Anderson article 4 contained within this thesis.

<sup>125</sup> See for example Raphael Lencucha and Anne Marie Thow, ‘How Neoliberalism Is Shaping the Supply of Unhealthy Commodities and What This Means for NCD Prevention’ (2019) 8(9) *International Journal of Health Policy and Management* 514–20 <[https://www.ijhpm.com/article\\_3646.html](https://www.ijhpm.com/article_3646.html)>, and their subsequent response to commentaries: R Lencucha and A M Thow, ‘Developing a Research Agenda for the Analysis of Product Supply: A Response to the Recent Commentaries’ (2020) 9(12) *International Journal of Health Policy and Management* 539 <[https://www.ijhpm.com/article\\_3761.html](https://www.ijhpm.com/article_3761.html)>.

<sup>126</sup> Maani et al provide an exposition of the key concept of ‘framing’ by industry actors in the health discourse. Nason Maani et al, ‘The Pollution of Health Discourse and the Need for Effective Counter-Framing’ (2022) 377 *BMJ* o1128 <<https://pubmed.ncbi.nlm.nih.gov/35508319/>>.

<sup>127</sup> *Liquor Act 2007* (NSW) s144ZE(2)(a)(ii).

<sup>128</sup> Brown article 3, 1079–80, Brown and Anderson article 4, 14, 18, 22, 27, 28.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The important demonstrable outcomes of the operation of the NSW alcohol regulatory process can be measured in terms of a wide variety of primarily preventable alcohol-related harms, industry profitability and growth of public trust and confidence in the regulation of alcohol in NSW, the democratic process and the rule of law.

This research has immediate applicability to other national and international alcohol regulatory jurisdictions as well as those of other unhealthy commodity industries' (UCI)<sup>129</sup>.

Underscoring the thesis is the centrality of the legal framework, the body of alcohol-related laws, policies,<sup>130</sup> procedures and practices (that is, the instruments or levers) and public institutions . These include the NSW Independent Liquor and Gaming Authority, Liquor and Gaming NSW (L&GNSW) and the NSW Police. Their operations directly and indirectly impact<sup>131</sup> on the nature and levels of alcohol-related harms. These regulatory levers are one key mechanism of influencing the demand and supply of alcohol and industry's behaviour building a culture of compliance.

Through the NSW Parliament, key elements within the industry have effectively achieved an operating compliance environment where the risk of industry elites being successfully prosecuted for breaches of the alcohol laws is increasingly unlikely.<sup>132</sup> Any subsequent demerit points can be relatively easily and cheaply remediated with measures that do not necessarily adversely impact on provision of alcohol. Reputational damage to the owners and controllers of prominent licensed venues is also unlikely.

The new incentives and sanctions scheme (IISS) provides for a reduction in annual license fees if retail outlets maintain a clean record over a period of time.<sup>133</sup>

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<sup>129</sup> Cécile Knai et al (n 79) define UCI as 'industries or groups of corporations where a significant share of their product portfolio comprises unhealthy commodities with high profit margins aimed at, and easily accessible to, large numbers of consumers'.

<sup>130</sup> Public Health literature appears to adopt the more generic term 'policy' to include statutory instruments such as Acts, Regulations and other forms of legally enforceable instruments – particularly as it relates to the nature and UCI to unduly influence the same. This thesis does not support this omnibus description. From a legal perspective, there are important fundamental distinctions between 'laws' and 'policy' that are particularly pertinent when evaluating the consequences of related concepts of undue influence, capture and corruption. Laws derive their authority primarily from and determined by democratically elected governments that embody structural governance type safeguards. Their compliance can be enforced by legitimate state sanctions.

<sup>131</sup> For example, the number, skills and experience of alcohol compliance officers employed by government to ensure ongoing industry compliance.

<sup>132</sup> Through control on the number and locations of specialist public alcohol compliance officers and complex compliance laws creating greater leniency. See Brown and Anderson article 4, 12–4, 28–9 (n 94).

<sup>133</sup> See Brown and Anderson article 4 that examines the IISS in much greater detail. See for example 19–24.

### 1.8.1 Summary of capture

The NSW alcohol industry elites' long-time ability through political lobbying and other means to direct outcomes—including laws, outlet approvals and enforcement requirements—away from the public interest towards their profit and growth interests is described as regulatory or industry capture.<sup>134</sup> It triggers multiple layers of detrimental public health, legal and governance<sup>135</sup> consequences. Ineffective industry compliance laws and processes can, for example, render the best evidence-based alcohol-related harm-reduction interventions, ineffective or useless.

Chapter 2's literature review provides more detail of the forms of capture and their connections with other governance-related concepts applied in this thesis, such as corruption, undue influence and the public interest. It also outlines the development of the concept of corporate political activity (CPA)—a broader framework encompassing a spectrum of dynamic industry strategies and tactics to shape government policy in ways favourable to them.<sup>136</sup>

Allied with the CPA taxonomy are the Commercial Determinants of Health (CDoH) described by Kickbusch, Allen and Franz as 'strategies and approaches used by the private sector to promote products and choices that are detrimental to health'.<sup>137</sup>

This thesis develops a prototype test for the presence of capture. It was synthesised from the regulatory literature and applied, with subsequent refinements, in four critical case studies of different significant aspects of the regulation and reforms of NSW alcohol laws since 2008. The final three essential elements of the capture test derived from this research are, firstly, the establishment of mutually advantageous 'connected conduct' between the regulator and regulatee, secondly, the diversion of outcomes away from the public interest to private or political

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<sup>134</sup> The prefixes of 'industry', 'regulatory' capture are usually interchangeable. Hereafter these two forms are referred to as 'capture'. The elements of capture are described further in chapter 2. Greater elaboration of the concept of 'capture' is contained within Brown article 1, 766–9, 770–2. The test for regulatory capture is subsequently refined and applied through successive articles within this thesis.

<sup>135</sup> Governance is defined by Phelan and Magnusson (n 15). 'Parliamentary oversight' is discussed by the Inter-Parliamentary Union and UNDP (n 15). See also Australian Government, Australian Public Service Commission (n 15).

<sup>136</sup> Amy J Hillman, Gerald D Keim and Douglas Schuler, 'Corporate Political Activity: A Review and Research Agenda' (2004) 30(6) *Journal of Management* 837–57.

<sup>137</sup> Ilona Kickbusch, Luke Allen and Christian Franz, 'The Commercial Determinants of Health' 2016 4(12) *Lancet Global Health* e895–e896. For greater elaboration of CDoH see Cassandra de Lacy-Vawdon and Charles Livingstone, 'Defining the Commercial Determinants of Health: A Systematic Review' (2020) 20(1) *BMC Public Health* 1022.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

sectional interests and, thirdly, that these deleterious relationships and outcomes, over time, represent a pattern of conduct and not are not one-off incidents.

It must be emphasised from the start that the alcohol lobby's demonstrable capacity to disproportionately influence law makers at all levels of government is indicative of a sustained and mutually advantageous relationship —or, as this thesis prefers to describe it, 'connect conduct'<sup>138</sup> —between the regulator and the regulatee. However, a risk emerges in the application of the regulatory process of capture or the broader, more encompassing, concept of CPA, that attention is primarily focused on industry actions. The same scrutiny should ideally include similar consideration of the methods and motivations of elected law makers to recruit and cultivate financial benefactors and the price paid by these same law makers for financial and other types of support for them, the law makers, to remain in or be challenged for office.

The fact that political parties and individual politicians continue to receive large direct or indirect political donations from the Australian alcohol lobby and the related gambling one is prima facie evidence that such donations<sup>139</sup> and other forms of industry investment must, according to dominant market principles, be providing a substantial return.

From this premise can be established at least two conclusions drawn from the research within this thesis.

Firstly, the concept of CPA recognises political lobbying as one of many processes through which commercial interests can shape government policy to their advantage. (This is expanded upon in Chapter 2.) Use of descriptors such as 'influence', or even 'undue influence',<sup>140</sup> in respect of the alcohol industry's effect on the devising and enforcement of laws concerning the commercial provision and consumption of alcohol in NSW is, in the circumstances, a form of understatement.

Arguably, a more definitive description reflecting the evidence of an intensifying pattern of industry elites' effective authorship<sup>141</sup> of pivotal and strategic legislative changes to their

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<sup>138</sup> See n 134 where connected conducted is analysed in the articles in chapter 4.

<sup>139</sup> Julie Walton, 'The Ways of the World: Implications of Political Donations for the Integrity of Planning Systems' (Report, Henry Halloran Trust, 10 November 2015) <<http://doi.org/10.4225/50/576B80F32B3C9>>.

<sup>140</sup> The descriptive term of 'undue industry influence' is considered problematic especially where the normative descriptors are poorly defined and, the possibility of such alleged action is insufficiently analysed to determine any potential breach of statutory governance requirements including corruption.

<sup>141</sup> Industry capacity to author alcohol law and policy first raised at 12 [3] then 14.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

commercial advantage is to call it capture, that is the industry capture of the process of its own regulation. This regulatory sway on the part of industry not only hampers the successful advancement of evidence-based alcohol-harm prevention, effective sustained industry compliance and public safety initiatives but also our society's democratic processes, capacity to prevent corruption and maintenance of the rule of law.

In this context, the term 'authorship' (immediately above) refers to a stakeholder, or group of stakeholders, who exerts a dominating influence over the meaning, intent and actual wording of alcohol policy made law and its likely subsequent application. It is suggested that with respect to the related concepts of capture and CPA that an initial inquiry regarding a proposed amendment or deletion to an industry rule book must be 'Who are the real authors?'

### 1.8.2 Magnitude of capture

The effective 'capture' of democratically elected NSW law makers and the majority of their opposition colleagues by industry and its demonstrable ability to effectively author key NSW alcohol laws and related policies as evidenced in Chapter 4<sup>142</sup> of this thesis is arguably a likely impediment to the local-to-global<sup>143</sup> adoption of WHO alcohol and other unhealthy commodity industries' (UCI) harm prevention targets.<sup>144</sup>

A second conclusion drawn from this research is the failure of traditional anti-corruption<sup>145</sup> internal defences to protect the public against vested commercial interests' incursions on the traditional public interest guardianship role of the state.<sup>146</sup> This is occurring under the guise of

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<sup>142</sup> See also n 64.

<sup>143</sup> See Pepita Barlow et al, 'Industry Influence Over Global Alcohol Policies Via the World Trade Organization: A Qualitative Analysis of Discussions on Alcohol Health Warning Labelling, 2010–19' (2022) *The Lancet Global Health* and related commentary Maristela Monteiro and Zila M Sanchez, 'How Can We Get Sober from the Influence of the Alcohol Industry?' (2022) *The Lancet Global Health*.

<sup>144</sup> WHO Regional Office for Europe, 'Policy in Action—A Tool for Measuring Alcohol Policy Implementation' (Booklet, 2017) <[http://www.euro.who.int/data/assets/pdf\\_file/0006/339837/WHO\\_Policy-in-Action\\_indh\\_VII-2.pdf](http://www.euro.who.int/data/assets/pdf_file/0006/339837/WHO_Policy-in-Action_indh_VII-2.pdf)>; Alex Plonsky, *New WHO Factsheets Reveal Europe Struggles to Implement Policies to Reduce Alcohol Consumption* (European Centre for Monitoring Alcohol Marketing, 5 February 2019) <<http://eucam.info/2019/02/05/new-who-factsheets-reveal-europe-struggles-to-implement-policies-to-reduce-alcohol-consumption/>>.

<sup>145</sup> David Kaufmann identifies corruption can occur when vested interests ensure through their influence (power) the removal of public policy from democratic scrutiny—the 'privatisation of public policy'—with or without an exchange of a bribe.

<sup>146</sup> Consider John Locke's distinction between the 'public good' and 'private actions' when defining legitimate power exercised by the Sovereign in Barry Hindess, *Discourses of Power: From Hobbes to Foucault* (Blackwell Publishers, 1996) 16. See also Richard Horton, 'Offline: Defending the Left Hand of the State' (2018) 391(10139) *The Lancet* 2484.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

concern about profit, growth, employment and other economic imperatives as well as what is represented as the absolute imperative of a vibrant 24 hour night-time economy.

These conclusions about the magnitude of capture in NSW affirm the importance of acknowledging and including essential regulatory considerations, such as effective industry compliance provisions, in any package of evidence-based public health initiatives to achieve sustainable reductions in alcohol<sup>147</sup> and other UCI harms. Such regulatory considerations are a relatively under-explored legislative determinant of health.<sup>148</sup>

This chapter concludes with the identification of relevant research gaps and consideration of the research questions.

### 1.9 Research Gaps

This section provides a summary of the major research gaps arising from the condensed literature review contained within Chapter 2 of this thesis. The purpose of the summary is to provide some background or context to the following research questions intended, in part, to fill the research gaps.

The original review of the public health literature concerning the regulation of alcohol in Australia found little reliance on the regulatory theory concept of regulatory ‘capture’ widely accepted elsewhere, although it is understood that there may have been more use of this concept in some other unhealthy commodities including tobacco and breast milk substitutes. The concept of capture underscores the deviation from the public interest of outcomes achieved by commercial interests in collaboration with law makers as well as the deeper impact of capture on the democratic process and rule of law.

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<sup>147</sup> WHO, ‘Making the European Region Safer developments in Alcohol Control Policies 2010–2019’ (2021) <<https://www.euro.who.int/en/health-topics/disease-prevention/alcohol-use/publications/2021/making-the-european-region-safer-developments-in-alcohol-control-policies,-20102019-2021>>. Also known as the ‘SAFER’ initiatives.

<sup>148</sup> This is consistent with de Lacy-Vawdon et al expanded conception of the commercial determinants of health and the application of power. Cassandra de Lacy-Vawdon, Brian Vandenberg and Charles Livingstone, ‘Recognising the Elephant in the Room: The Commercial Determinants of Health’ (2022) 7(2) *BMJ Global Health* e007156.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Public health researchers<sup>149</sup> have identified research gaps relating to the role and contribution to industry compliance and enforcement by a range of interventions shown to be effective in reducing alcohol-related harms.<sup>150</sup> One primary purpose of this blended thesis is to provide a timely original scholarly contribution towards bridging this research gap.

Research by Hawkins and others<sup>151</sup> comparing global tobacco and alcohol policy paradigms made the following observation:

It appears that much closer scrutiny of the alcohol industry's involvement in policy-making is warranted.<sup>152</sup>

In their systematic review of alcohol industry involvement in policymaking, McCambridge, Mialon and Hawkins made this suggestion:

Knowledge of the alcohol industry's putative influence on policy could be strengthened with evidence from studies that investigate the involvement of industry actors in policymaking.<sup>153</sup>

Encouragingly, research by Hoe and others<sup>154</sup> regarding tobacco, alcohol and sugar-sweetened beverage (SSB) industries' corporate activities to achieve autonomy from government controls concluded with the desire to build an evidence base of alcohol and SSB industry tactics.

The literature review also found a substantial gap in research relating to the exploration and analysis of legal determinants of health, especially at the individual jurisdictional level.<sup>155</sup> Additionally, there appeared to be limited work incorporating and contextualising important regulatory concepts, including regulatory leniency, chill, capture and corruption in the same analysis.<sup>156</sup>

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<sup>149</sup> Tanya Chikritzhs et al, (National Drug Research Institute (NDRI) Curtin University of Technology, 2007); Peter Miller et al, 'Interventions for Reducing Alcohol Supply, Alcohol Demand and Alcohol-Related Harm' (NDLERF Report Monograph Series No 57, 2015).

<sup>150</sup> See Dan Chisholm et al (n 46), WHO (n 46), Tom Babor et al (n 46).

<sup>151</sup> Benjamin Hawkins et al, 'Reassessing Policy Paradigms: A Comparison of the Global Tobacco and Alcohol Industries' (2018) 13(1) *Global Public Health* 1–19.

<sup>152</sup> Ibid 13.

<sup>153</sup> Jim McCambridge, Melissa Mialon and Ben Hawkins, 'Alcohol Industry Involvement in Policymaking: A Systematic Review' (2018) 113(9) *Addiction* 1571–84.

<sup>154</sup> Hoe et al (n 56).

<sup>155</sup> See for example Adam J Milam et al, 'Evaluation of a Local Ordinance to Prevent Any Underage Purchases in Liquor Stores: The Need for Enforcement' (2021) 82(2) *Journal of Studies on Alcohol and Drugs* 219–27.

<sup>156</sup> The regulatory terms of 'leniency' and 'chill' and are further developed within the capture model and applied to the NSW 2021 alcohol law reforms in Brown and Anderson article 4, 12–3, 30.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Coinciding with these observations was the seeming incoherency<sup>157</sup> at the praxis level between those alcohol harm prevention state interventions proven to effectively reduce alcohol-related harms and those adopted and implemented by successive NSW governments with little or no successful challenge by most opposition political parties and NSW members of parliament.

This thesis' unique critical research, spanning the last thirteen years of major alcohol law reforms in NSW since the commencement of the *Liquor Act 2007* (NSW) provides unprecedented insight at the granular level into the alcohol regulatory process dominated by the industry elite and associated legal and political determinants of public health.

### 1.10 Primary research questions

**Question 1.** Has the regulation of the retail supply of alcohol in NSW since the commencement of the current Liquor Act on 1 July 2008 been the subject of capture and if so, what does capture look like, where it is found, how does it work and, what are its direct impacts on the public interest?

**Question 2.** What are the fundamental underpinning assumptions, values and themes driving changes in the regulation of the retail supply of alcohol in NSW, including industry compliance and enforcement?

**Question 3.** What, if any, are the main implications of the presence of capture in respect of who gains and who loses in the ongoing regulation of the retail supply of alcohol in NSW and by which mechanisms of power and, is this desirable, and if not, what reforms may remediate the situation on a sustained basis?

#### 1.10.1 Discussion of the research questions

These three questions go directly to the key aim of this research reflected in the thesis introduction, articles and exegesis. That aim is the explication of the real nature and magnitude of the alcohol lobby's apparently intensifying capture of the democratic law-making process concerning the regulation of the retail provision and consumption of alcohol in NSW.

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<sup>157</sup> Lencucha and Thow (n 125) 514 and series of commentaries. See Samantha Battams and Belinda Townsend, 'Power Asymmetries, Policy Incoherence and Noncommunicable Disease Control—A Qualitative Study of Policy Actor Views' (2018) 29(5) *Critical Public Health* 596–609. This thesis seeks to avoid the use of the word 'incoherency'. It is considered readily understandable and logical that there is a disconnection between independent scientific evidence of effective alcohol harm prevention interventions and those developed and applied by governments within the context of regulatory capitalism and industry capture.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This key aim is accompanied by a reformist goal to unwind and prevent the documented effective capture of the regulation of alcohol in NSW and afford primacy to the concepts of public interest, alcohol-harm prevention, the democratic process and the rule of law.

The legal phronetic methodology<sup>158</sup> adopted in this thesis and applied in the associated case studies represents a blend of the traditional doctrinal approach to legal research with Flyvbjerg's method of phronetic social inquiry. Flyvbjerg recommends a series of research questions to ascertain the sources, application and nature of power that is normally concealed by existing institutions and dominating narratives. His method of inquiry, similar to both Foucault's<sup>159</sup> concept of dispersed micro-power and the *realpolitik* of Nietzsche<sup>160</sup> and Machiavelli,<sup>161</sup> examines the minutia of everyday and back-stage occurrences and the capacity of those with power to define and determine reality.

The doctrinal component of the blended methodology is appropriate to the first research question. The response requires a very detailed critical doctrinal analysis of key amendments to NSW alcohol laws since the commencement of the Act. It also brings to bear the synthesis of a novel dynamic theoretical framework to conceptualise and contextualise the well-known regulatory phenomenon of capture in the first article<sup>162</sup> and subsequent regulatory leniency and chill in the fourth article.<sup>163</sup> These capture concepts were successively applied via separate case studies to successive significant alcohol law reforms across the regulatory chain, including the all-important alcohol-outlet licensing approval process, social-impact assessment and industry compliance and enforcement statutory schemes.

Explication of the series of alcohol law reforms is also enabled by the second research question. The process of response has included analysing all the publicly available data concerning the key law reforms from the perspective of all major stakeholders to identify and articulate any consistent 'underpinning frames and other assumptions, values [and] trends'. This included bills,

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<sup>158</sup> Murphy and McGee (n 16).

<sup>159</sup> Bent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How it Can Succeed Again* (Cambridge University Press, 2001) 88–92.

<sup>160</sup> Flyvbjerg, 'Phronetic Planning Research: Theoretical and Methodological Reflections' (2004) 5(3) *Planning Theory and Practice* 283–306. Nietzsche and Machiavelli's contributions to *real politik*, rationality and democracy discussed 2–3, 5–7, 27, 37.

<sup>161</sup> *Ibid.*

<sup>162</sup> Brown article 1, 766–9, 770–2.

<sup>163</sup> Brown and Anderson, article 4, 7, 12–5, 28–38.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

parliamentary debates, reports and public submissions, and media reports. The identification of underpinning frames —for example, the dominant neoliberal frame and the diversion of responsibility of alcohol harms onto ‘irresponsible’ consumers’ (articles 1 and 3),<sup>164</sup> assumptions and values —was supported by the evolving and diffuse literature on power from a public health, CDoH and regulatory perspective.

Apprehending the underlying frames and values is a necessary part of the adopted phronetic method of social inquiry requiring immersion<sup>165</sup> in the context and materials, use of critical case studies and, in this research, documentary analysis. As Murphy and McGee<sup>166</sup> observe, it moves beyond the positivist approach of the doctrinal method. Flyvbjerg’s approach places power at the core of this analytical process. His sixth concept of power is encapsulated as follows:

The central question is how power is exercised, and not only who has power, and why they have it; the focus is on process in addition to structure.<sup>167</sup>

It is from this contested discourse, reflecting some competing and coinciding values and frames, that the dynamic regulation, including self-regulation and, importantly, non-decision-making<sup>168</sup> of various aspects of the regulatory chain, including the provision, promotion, consumption of alcohol and industry compliance, arises.

The analytical process adopted in the thesis and associated with the above research questions<sup>169</sup> was fruitful. Parliamentary debates, inquiries, submissions and media reports revealed that the common motivating factor of industry elites was financial success underpinned by unresolved and persistent serious conflicts of interest.<sup>170</sup> In one instance, the desire to amend the regulatory environment was apparently motivated in part by the successful prosecution of an alcohol industry elite for a serious breach of alcohol laws resulting in possible reputational damage.<sup>171</sup>

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<sup>164</sup> Brown article 3, 1053–5.

<sup>165</sup> Murphy and McGee (n 16) 305.

<sup>166</sup> Ibid, 292, 301.

<sup>167</sup> Flyvbjerg (n 159) 131–2.

<sup>168</sup> See Peter Kamuzora, ‘Non-Decision Making in Occupational Health Policies in Developing Countries’ (2006) 12(1) *International Journal of Occupational and Environmental Health* 65–6.

<sup>169</sup> 34.

<sup>170</sup> See for example the intriguing media disclosure of the AHA’s national defence agenda exposing its disruptive tactics to undermine the introduction of earlier last drinks conditions precedent in Newcastle NSW 2007/8. This package of licensing conditions was an evidence-based response by a former licensing tribunal to the city having the highest levels of alcohol fuelled non-domestic violence in NSW in 2007/8. Brown article 3 (n 71).

<sup>171</sup> See reference to Mr Laundry in Brown and Anderson article 4, 18; reference to Mr Hemmes and the Ivy hotel, Brown article 3, 1063, 1076.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Identifying, locating, understanding and appreciating the diverse range of short- and long-term consequences of capture required micro-level research immersion in the parliamentary law-making process. For example, this research found very limited, if any, hostile questioning of industry witnesses by parliamentarians during any inquiry regarding the future of a package of evidence-based alcohol harm controls in Sydney.<sup>172</sup> Noticeably, elected representatives were sympathetic to the industry's dystopian<sup>173</sup> allegations of the 'devastating' consequences of the 2014 modest reductions in late trading and other statutory interventions designed to reduce alcohol violence associated with the operations of late-trading hotels and clubs in Kings Cross and Sydney CBD.

Senior public servants had little opportunity to publicly disclose their views independent of those of their political masters. There was, however, one instance where a senior departmental official before a parliamentary inquiry expressed a slight reservation<sup>174</sup> concerning the 'size matters' defence against the provisions of a demerit point. This concern was not apparently reflected in the subsequently amended Act.

Most notable was the high correlation between the elites' submissions and the sweeping amendments to the Act, particularly the reversal of the 2014 alcohol harm reduction initiatives and the new IISS. Conversely, the only substantive proposals adopted from public health-related submissions comprised a small component of the new online purchasing and rapid-home-delivery-of-alcohol laws.

The four articles identify and reproduce additional examples of narrative that exemplify significant frames and values at key junctures of the ongoing alcohol law reforms in NSW.

This second research question also establishes the epistemological relationship and conceptual linkage between the abstract concept of regulatory capture and its 'real world referents'.<sup>175</sup>

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<sup>172</sup> Transcripts of the three days of public hearings in August 2019 can be found online <<https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=260#tab-hearingsandtranscripts>>.

<sup>173</sup> For discussion of the dystopian approach see Selda Ulucanlar, Gary J Fooks and Anna B Gilmore, 'The Policy Dystopia Model: An Interpretive Analysis of Tobacco Industry Political Activity' (2016) 13(9) *PLoS Medicine* e1002125. See also Maria Margarida Paixão and Melissa Mialon, 'Help or Hindrance? The Alcohol Industry and Alcohol Control in Portugal' (2019) 16(22) *International Journal of Environmental Research and Public Health* 4554.

<sup>174</sup> Brown and Anderson article 4 (n 97).

<sup>175</sup> [University of Wisconsin–Madison, School of Journalism and Mass Communication](https://tinyurl.com/dxhfmeyw). Glossary of explication terms <<https://tinyurl.com/dxhfmeyw>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The final essential normative research question is consistent with Murphy and McGee's<sup>176</sup> incorporation of Flyvbjerg's phronetic methodology of social inquiry<sup>177</sup> into legal doctrinal approach. Murphy and McGee assert<sup>178</sup> that it is appropriate to pose normative questions despite some apparent reservations from scientific method proponents with respect to who may be the winners and losers and, whether such outcomes may be in the overall public interest. This perspective is reflected in the final research question here. By inviting the reasoned identification of law reform (and other kinds) to address the empirical evidence of intensifying levels of capture and the associated profoundly negative consequences, these research questions provide an important segue into the reformist approach of the thesis.

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<sup>176</sup> Murphy and McGee (n 16), discussed further in chapter 3.

<sup>177</sup> Flyvbjerg (n 159).

<sup>178</sup> Murphy and McGee (n 16) 308.

## CHAPTER 2: CONDENSED LITERATURE REVIEW

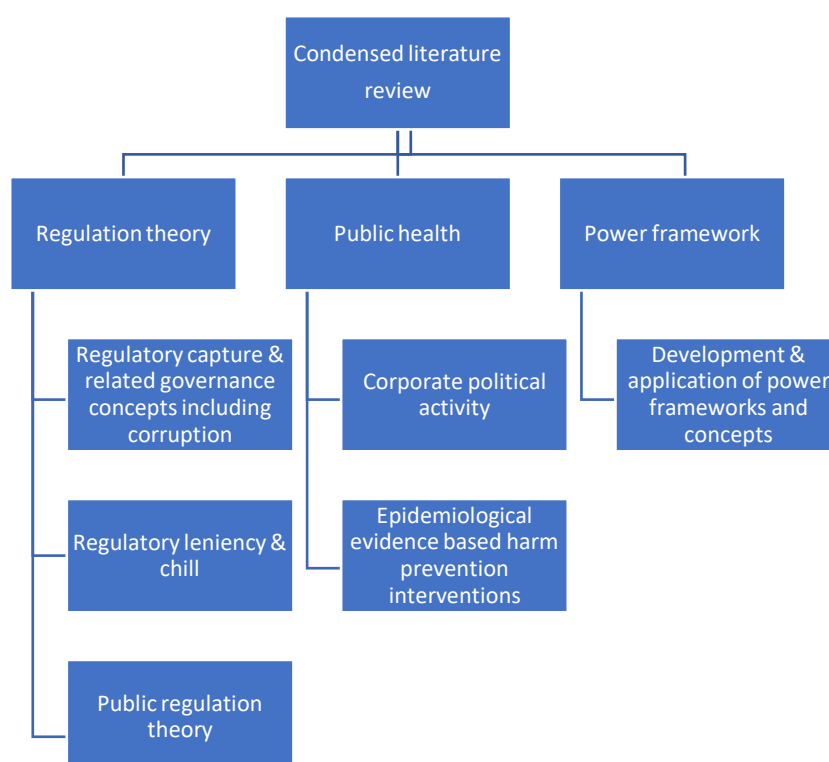
### 2.1 Introduction

The purpose of this chapter is to provide a condensed review of the academic literature and related key concepts that contributed to the development of the research questions and the progress and amplification of the research reflected in Chapter 4.

Each of the four articles in Chapter 4 contains its own references, background and development of some key concepts. This results in some unavoidable duplication between this thesis and the articles, but this is kept to a minimum. The literature relied upon in this thesis embraces and, in some cases, integrates several disciplines, including law, regulatory and political theory, public health, and economics in both the alcohol and broader unhealthy commodity industries (UCI).

The following framework subdivides the literature and concepts between the predominantly regulatory and public health approaches whilst devoting a third arm of the review to a ‘power’ component that has a capacity to transcend both these two disciplinary fields.

*Figure 1 Literature Review Framework*



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The Australian Guide to Legal Citation 4 (AGLC 4) legal referencing style was adopted for the articles contained within this thesis, excluding the final article, which is based on the alternative style of the journal to which it was submitted.

This thesis by publication adopts a blended approach to the literature review and methodology. The key focus of the research is the praxis of the legal regulation of alcohol in Australia's most populous State, NSW, and the consequential regulatory mechanisms and outcomes that have received relatively little academic attention.

The key regulatory mechanism under scrutiny by this research is that of industry or regulatory capture<sup>179</sup> along with its relationship with other key governance concepts including corrupt conduct in the NSW jurisdiction.

The critical examination of the regulatory process and outcomes is not just confined to population health and harm prevention as this may risk disciplinary siloing. The research focus includes the broader political and governance implications of capture, including the detrimental impact on the public interest, governmental integrity, the democratic process and the rule of law. These considerations appear to receive less primary attention in the public health focused research on the allied concept of corporate political activity (CPA) discussed further into the chapter.

Knai defines CPA as 'corporate strategies to shape government policy in ways favourable to them'.<sup>180</sup>

### 2.2 Regulatory Theory

The regulatory process of capture is detailed below. As the literature establishes, the concept of capture in political theory tradition extends back to ancient Roman and Greek scholars and is synonymous with corruption or usurpation<sup>181</sup> of the public interest or common wealth by vested private interests. CPA, whilst not necessarily inconsistent with the regulatory concept of capture, does not appear to have the same lineage and does not automatically involve broader considerations of impact on the democratic process and the rule of law. It is this impact, evident

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<sup>179</sup> Hereafter referred to as capture.

<sup>180</sup> Cécile Knai et al (n 79).

<sup>181</sup> Hindess (n 146). Chapter 3 of the book provides an analysis of Locke's Second Treatise on Government a source for the concept of 'legitimate' power. John Locke, *Two Treatises of Government* (Cambridge University Press, 1988).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

in the regulation of alcohol in NSW and the excessive power of the alcohol industry from a lay perspective, that the thesis aims to explicate through a scholarly transdisciplinary lens.

CPA remains a critically important process or explanatory tool in defining and categorising the expanding array of unhealthy commodity industries' (UCI) relatively common but sophisticated strategies and tactics to maximise their profits and growth, to the apparent detriment of public health and equity considerations.

Capture is a specific, or perhaps the ultimate, form of CPA. As the following literature review suggests, however, the useful and broadly accepted regulatory concept of capture appears to have received relatively little in-depth academic attention in public health research of the form and extent provided in this thesis. This thesis' primary reliance on the regulatory concept of capture has been materially assisted by the complementary adoption of the legal phronetic methodology detailed further in Chapter 3.

### 2.2.1 Regulatory capture & related governance concepts

This thesis argues that a lack of good or effective governance contributes to the NSW alcohol lobby's disproportionate exertion of power over the regulatory process. In respect of any countervailing response to offset or balance the power of the alcohol lobby, there appears to be a lack of general understanding and agreement on key governance related terms, a commensurate failure of contemporary governance processes to safeguard against profound and subtle conflicts of interest, capture and corruption and a reluctance by some researchers<sup>182</sup> to either address important normative values and rational considerations or describe persistent patterns of undue industry influence as 'capture' and 'corruption'.

Governance is defined by Phelan and Magnusson as 'both the capacity of a government to develop and implement policies, and the ways in which power is exercised for the purposes of managing a country's economic and social resources'.<sup>183</sup>

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<sup>182</sup> Smith identifies a traditional hesitancy within health scholarship to engage in political analysis. Julia Smith, 'Towards Critical Analysis of the Political Determinants of Health; Comment on "How Neoliberalism Is Shaping the Supply of Unhealthy Commodities and What This Means for NCD Prevention"' (2020) 9(3) *International Journal of Health Policy and Management* 121–3.

<sup>183</sup> Phelan and Magnusson, 'Update and Summary Guide to the Report' (n 15). See also <<https://www.ipu.org/our-impact/strong-parliaments/setting-standards/global-parliamentary-report/global-parliamentary-report-2017-parliamentary-oversight-parliaments>>. See also Australian Government, Australian Public Service Commission (n 15).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The same authors suggest

Good governance refers to governance processes that reflect the values and principles that will contribute most effectively to economic and social development, including the progressive realization of the right to health.' Principles of good governance include 'stewardship, transparency, participation, fairness, accountability and rule of law'.<sup>184</sup>

Public health-related CPA research on predominantly alcohol-related harms,<sup>185</sup> reviewed in a following section<sup>186</sup> of this chapter, contains some limited governance- and law-related terms and concepts. The terms include 'influence', 'undue influence', 'capture', 'conflicts of interest', the 'public interest' and the 'rule of law'. However, gaps remain in the consolidation and deeper exploration of the linkages between these terms at an individual jurisdictional level. For convenience purposes, these terms are incorporated under the umbrella description of 'governance' and discussed below.

The following section seeks to add some clarity to and connection between these governance terms, which are integral to the processes of capture.

### Capture

This thesis relies upon the core components of Carpenter and Moss's<sup>187</sup> definition of regulatory capture with their book *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*. The OECD also broadly adopted the Carpenter and Moss definition of capture.<sup>188</sup> They expanded upon the definition to emphasise capture undermines democratic values. I have included capture also undermines the rule law and an underpinning assumption that laws are derived by a democratic and transparent process with the state having the legitimate power to enforce its own laws.

The first chapter of this thesis defines capture as consistent or repeated direction of public policy law-making decisions away from the public interest towards the interests of a specific interest

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<sup>184</sup> Ibid Phelan and Magnusson n 15, 15–6.

<sup>185</sup> The thesis recognises the high degree of commonality of industry frames and tactics across a range of UCIs.

<sup>186</sup> Cp 2.4.1, 64.

<sup>187</sup> Daniel Carpenter, 'Detecting and Measuring Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013).

<sup>188</sup> OECD, 'Preventing Policy Capture: Integrity in Public Decision Making' in *OECD Public Governance Reviews* (OECD Publishing, 2017) 9 <<http://dx.doi.org/10.1787/9789264065239-en>>.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

group or person. Capture is the opposite of inclusive and fair law-making and always undermines core democratic values and the rule of law.

Carpenter & Moss distinguish between ‘weak’ and ‘strong’ capture, finding the latter more likely to be present. They define these terms as

### Weak capture

special interest influence compromises the capacity of regulation to enhance the public interest, but the public is still being served by regulation, relative to the baseline of no regulation. In other words, weak capture prevails when the net social benefits of regulation are diminished as a result of special interest influence, but remain positive overall.<sup>189</sup>

### Strong capture

violates the public interest to such an extent that the public would be better served by either (a) no regulation of the activity in question – because the benefits of regulation are outweighed by the costs of capture, or (b) comprehensive replacement of the policy and agency in question.<sup>190</sup>

Locating the evidence of capture within this thesis is problematic with respect to the above criteria of weak and strong capture. The public necessity of regulating the availability and supply of alcohol in NSW has been confirmed.<sup>191</sup> However, the magnitude and duration of industry infiltration of the NSW alcohol regulatory and democratic political processes and the associated persisting serious conflicts of interest documented in Chapter 4 of this thesis also confirm the urgent necessity of broad-ranging law, political and institutional reforms.

### Corrosive capture

In defining the concept of ‘corrosive’ capture, Carpenter distinguishes this form of capture from Stigler’s<sup>192</sup> earlier description of a collusive form of capture between the regulator and big business involving regulation that limits entry of competitors into the market and promotes the formation of cartels. Carpenter suggests that corrosive capture promotes deregulation; it ‘pushes the regulatory process in a “weaker” direction, not with the aim of reducing entry, but with the aim of reducing costly rules and enforcement actions that reduce firm profits’.<sup>193</sup> In the same vein,

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<sup>189</sup> Carpenter (n 187) 11.

<sup>190</sup> Ibid.

<sup>191</sup> Harper et al (n 65).

<sup>192</sup> George Stigler, *The Citizen and the State: Essays on Regulation* (University of Chicago Press, 1975).

<sup>193</sup> Daniel Carpenter, ‘Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation’ in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2013) 154.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Carpenter describes corrosive capture as ‘the weak application (or nonapplication) of regulatory tools’.<sup>194</sup> This ‘weak application’ is manifested in phrases such as ‘revolving doors’, phenomena such as political donations and also in what Kwak<sup>195</sup> describes as cultural capture, discussed below.

Most of the empirical evidence of capture identified in the case studies in Chapter 4 conforms with this description of corrosive capture.

### Cultural capture

James Kwak,<sup>196</sup> another of the authors of *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*, identified the presence of cultural capture in the US financial industry. The editors’ introduction to the book describes cultural capture as a form ‘that is hard to prove but that seems to us increasingly relevant’.<sup>197</sup> It involves mechanisms ‘shaping assumptions, lenses and vocabularies’. This tactic is similar to those of ‘frame setting’ and ‘shifting perceptions’ identified by a number of authors in a following section relating to CPA in this chapter.

As the following summary shows, recent research of CPA, predominantly in the alcohol industry, found that the concept of capture<sup>198</sup> was seldomly explicitly utilised and there was no common definition and detailed exploration of the concept.

Through use of the definition of capture given above, based on the Carpenter and Moss description, a transdisciplinary test for the presence of capture was progressively synthesised, modified and applied in articles 1, 3 and 4 to successive key reforms of the NSW alcohol laws. Chapter 4’s articles provide additional explanation of each of the following original five elements of this capture test.

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<sup>194</sup> Ibid Carpenter 154

<sup>195</sup> James Kwak, ‘Cultural Capture and the Financial Crisis’ in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2013) 71–98. See also Supran and Oreskes’ exposition of the fossil fuel industry’s use of rhetoric and language like the tactics of the tobacco industry to shape public discourse. Geoffrey Supran and Naomi Oreskes, ‘Rhetoric and Frame Analysis of ExxonMobil’s Climate Change Communications’ (2021) 4 *One Earth* 1–24. <<https://doi.org/10.1016/j.oneear.2021.04.014>>.

<sup>196</sup> Ibid.

<sup>197</sup> Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013) ‘Introduction’ 20.

<sup>198</sup> From a global human rights perspective of the definition of corporate capture, the International Network for Economic, Social and Cultural Rights (‘ESCR-Net’) describe it as ‘the many ways that economic elites exert influence to shape domestic and international decision-making spaces in order to maximize profits—at the cost of human rights and environmental justice’ <<https://www.escr-net.org/corporateaccountability/corporatecapture/manifestations-corporate-capture>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

1. Identification of 'connected conduct' between the regulator and regulatee. This relies upon the presence of reciprocating beneficial conduct, most likely taking the form of favourable amendments to the alcohol laws and related policies in return for political donations and other forms of support including, for example, 'revolving doors'.
2. Public interest considerations in relation to the connected conduct (PIC). These involve establishing that the alleged reciprocating conduct of favouring a specific interest group or individual was not in the PI. This can be achieved through examination of the conduct concerned from the perspectives of 'inputs', 'outcomes', 'procedures' and 'conduct'.<sup>199</sup>
3. Temporal links between the instances of connected conduct. This requires an ongoing pattern of conduct — not 'one-off' instances.
4. 'Separation of power considerations in relation to the connected conduct (SoPC): regarded as an important constitutional "check and balance" of a concentration of powers in one branch of government that may lead to a usurpation of the PI'.
5. 'Intention and motivation allied to the connected conduct (IMC): this element also implies mutuality of interests — an implied contract in the reciprocating conduct'.

The original capture test was subsequently reviewed and modified for its second application in article 3,<sup>200</sup> the modification involving the critical analysis of significant amendments to the NSW alcohol industry statutory compliance schemes favouring the industry. The modifications included removing the 'Separation of Powers' element of the capture test as the statutory Violent Venues Scheme (VVS) under review came into effect via the release of a non-statutory departmental 'fact sheet'. A second reason for its removal was the insignificant degree of practical separation of powers in NSW between the executive and the legislature.<sup>201</sup>

The second set of test elements removed were the 'intention' and 'motivation' criteria, as it was considered more expedient for these to be absorbed within the existing 'connected conduct' and 'public interest' criteria. The new 'capture test' elements for articles 3 and 4 were

1. Connected conduct

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<sup>199</sup> Chris Wheeler, 'How Do Public Interest Considerations Impact on the Role of Public Sector Lawyers?' (Conference Paper, Public Sector In-House Counsel Conference, Canberra, 30 July 2012) 40. <<http://classic.austlii.edu.au/au/journals/AJAdminLawF/2013/5.html>>.

<sup>200</sup> Brown article 3, 1050–1.

<sup>201</sup> See Parliament of New South Wales (n 74) 13.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

2. Public interest
3. Temporal requirement – a pattern of conduct.

This simplified version of the capture test enhances its capacity to facilitate national and international interjurisdictional comparisons at more granular levels of law-making and compliance/enforcement.

### Corruption

The question of whether the extensive evidence of the pattern of systemic and intensifying levels of capture may satisfy the NSW legal definition of corrupt conduct when such conduct is suspected is not within the scope of this research.

The definitions of corrupt conduct can be found within sections 7, 8 and 9 of the *NSW Independent Commission against Corruption Act 1998* (NSW). Its summary version is ‘deliberate or intentional wrongdoing, not negligence or a mistake. It has to involve or affect an NSW public official or public sector organisation’.<sup>202</sup>

In Australia, the states and territories have the primary legal carriage for anti-corruption institutions and laws. The previous federal coalition government has received sustained criticism for deferring and then withdrawing their proposed adoption of federal anti-corruption laws and establishment of a related public institution.<sup>203</sup>

### Forms of corruption

In a case involving a challenge to the constitutional validity of NSW political donation laws that prohibited political donations from those in the alcohol, tobacco, gambling (except ClubsNSW) and development industries, the High Court<sup>204</sup> identified a number of forms of corruption applied in the US jurisdiction. These included ‘**quid pro quo**’ corruption, which the Court illustrates as follows: ‘[a] candidate for office may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the

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<sup>202</sup> See ICAC <<https://www.icac.nsw.gov.au/about-corruption/what-is-corrupt-conduct>>.

<sup>203</sup> Serena Lillywhite, ‘Transparency International Australia Address to National Press Club 1 December 2021’ <<https://transparency.org.au/national-press-club-the-case-for-a-federal-icac/>>.

<sup>204</sup> *McCloy v New South Wales* [2015] HCA 34, 13–14, 62. See also Walton (n 139), 16.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

election campaign' [38]<sup>205</sup>. They also identified a more 'subtle' form of corruption associated with the 'the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.' The Court identified this form of corruption as '**clientelism**' corruption. They observed that both quid pro quo and clientelism forms of corruption 'threaten the quality and integrity of governmental decision-making' [38].

A third form of corruption, '**war chest**' corruption, arises where power of money may also pose a threat to the electoral process itself. Here the High Court referenced the US Supreme Court decision *Federal Election Commission v Beaumont* [2003] USSC 4455; 539 US 146 at 154–155 (2003), which included the obiter dicta '[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators'.<sup>206</sup>

Walton<sup>207</sup> provides further elaboration of the above and additional forms of legally defined corruption. The High Court's identification of the different forms of corruption, whilst not binding on NSW courts and laws, is significant because the forms of corruption so identified arguably characterise some of the descriptions of capture contained within Chapter 4, including the connected conduct element involving political actors and the industry as well as the large declared,

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<sup>205</sup> In *Buckley v Valeo*, 424 U.S. 1 (1976), the Supreme Court observed, 'To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one' [29].

<sup>206</sup> It is understood a 2010 US Supreme court decision *Citizens United v Federal Election* freed corporations to fund political candidates. See Dorothy Lund and Leo Strine, 'Corporate Political Spending Is Bad Business: How to Minimize the Risks and Focus on What Counts' (January–February 2022) *The Magazine Harvard Business Review* <<https://hbr.org/2022/01/corporate-political-spending-is-bad-business>>.

<sup>207</sup> Walton (n 139).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

and likely undeclared,<sup>208</sup> political donations that have correlated with government decisions persistently favouring the alcohol and gambling industries.<sup>209</sup>

Transparency International defines **political** corruption as the

manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.<sup>210</sup>

Kaufmann contends that corruption can occur when vested interests ensure the removal of public policy from democratic scrutiny through their influence (power) – behaviour encapsulated by the phrase ‘privatisation of public policy’ – with or without an exchange of a bribe. He suggests that a narrow and antiquated legalistic view of corruption as a form of bribery occurring mainly in poor countries’ governments obscures more subtle and costly forms of ‘misgovernance’ across richer and poorer nations. This includes the capture of the ‘rules of the game’ by the elite. Kaufmann suggests this conduct may be labelled as ‘**legal** corruption’.<sup>211</sup>

To overcome this conundrum where the compromised public law makers have the constitutional power to shape laws and institutions defining which conduct can be deemed as corrupt, Kaufmann<sup>212</sup> proposes a more neutral definition of corruption to include the process whereby vested interests ensure, through their influence or power, the removal of public policy from democratic scrutiny – the ‘privatisation of public policy’ – with or without an exchange of a bribe. This is very similar to the Carpenter and Moss<sup>213</sup> version of capture. The important advantage of this neutral definition, ensuring its incorporation within this thesis’ multi-factor regulatory capture test, is that it can be applied to most state and international jurisdictions.

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<sup>208</sup> See Christopher Knaus, ‘Australia’s Weak Donation Laws Allowed \$1bn in Dark Money to Go to Political Parties Over Two Decades’, *The Guardian* (1 February 2021) <<https://www.theguardian.com/australia-news/2021/jan/31/australias-weak-donation-laws-allowed-1bn-in-dark-money-to-go-to-political-parties-over-two-decades>>; Christopher Knaus, ‘In the Dark: Almost 40% of Coalition Funds in Past 20 Years Came from Unknown Donors’ (15 February 2021) <<https://www.theguardian.com/australia-news/2021/feb/15/in-the-dark-almost-40-of-coalition-funds-in-past-20-years-came-from-unknown-donors>>.

<sup>209</sup> See Kypros Kypri et al, “‘If Someone Donates \$1000, They Support You. If They Donate \$100 000, They Have Bought You’”. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties’ (2019) 38(3) *Drug and Alcohol Review* 226–33 <<https://pubmed.ncbi.nlm.nih.gov/30474155>>

<sup>210</sup> Transparency International, ‘What is Corruption?’ <<https://www.transparency.org/what-is-corruption#define>>.

<sup>211</sup> Daniel Kaufmann, ‘Corruption, Governance and Security: Challenges for the Rich Countries and the World’ (Natural Resource Governance Institute (NRGI), The Brookings Institution, 2004) <<https://ssrn.com/abstract=605801>>.

<sup>212</sup> Ibid.

<sup>213</sup> Carpenter and Moss (n 187).

### Political lobbying – what is corrupt conduct?

Both the ICAC's investigation into political lobbying in NSW — 'Operation Eclipse' —and the broader consideration in this thesis of undue alcohol industry influence in NSW benefited from the ICAC 'interim paper'<sup>214</sup> of October 2019. The paper addressed some key legal issues, providing a potential pathway for the finding of corrupt conduct against those involved in certain incidents of political lobbying. Of particular resonance with this thesis' research findings was the paper's acknowledgement in its appendix of the key importance of the obligations of public officials, including law makers, to exercise their powers in an 'honest and impartial'<sup>215</sup> way. These are crucial criteria to bear in mind when discerning patterns of industry- and government-connected conduct and behaviour, such as apparent deviation from the public interest regarding the regulation of alcohol as elucidated in Chapter 4.

Produced below are two key extracts from *Greiner v ICAC* (1992) 28 NSWLR 125, which were relied upon in the ICAC's interim paper regarding Operation Eclipse.<sup>216</sup> This NSW Court of Appeal decision concerned a legal challenge against a finding of corruption against a (then) NSW premier by the ICAC.

These extracts emphasise the essentialness of impartiality in public decision-making. They are reproduced here, given their significance to the thesis' research findings regarding the systematic presence of capture and the coinciding pattern of poor governance over a thirteen-year period identified in Chapter 4 of the thesis. The first two lines of the extract's second paragraph below referring to 'competing claims' are apposite to the competition between the interests of the profit-driven<sup>217</sup> NSW alcohol lobby and those of stakeholders supporting evidence-based approaches to alcohol harm prevention and minimisation.

[T]he proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or at least, directly involved. It may be used to influence improperly the way in which public power is exercised, eg, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve.

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<sup>214</sup> ICAC Operation Eclipse: Lobbying, Access and Influence—An Interim Paper (October 2019) <[https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19\\_FINAL.pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19_FINAL.pdf.aspx)>.

<sup>215</sup> The requirement for public official to act honesty and impartially when exercising power is emphasised throughout the paper.

<sup>216</sup> Ibid 13.

<sup>217</sup> Hemmes/Merivale submission to draft Bill 2020, cp 5 (n 568).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that “partial” and similar terms in the Act are essentially directed<sup>218</sup>

First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims ... Second, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Third, **for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no-one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally.** Fourth, what was done in preferring one over the other was done for that purpose, **that is, the purpose of giving a preference or advantage to that one.** And, finally, **the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power.**<sup>219</sup>

(Emphasis in original citation)

In respect of political lobbying, in its final report of Operation Eclipse, the ICAC observed as follows:

Lobbying that involves corrupt conduct can include the conduct of any person that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official or any public authority. It may also involve, in certain circumstances, conduct that impairs or could impair public confidence in public administration.<sup>220</sup>

It is suggested that the above extracts from a number of ICAC reports associated with their investigation into political lobbying are particularly relevant and applicable to current and future transdisciplinary capture and CPA research. It is also relevant to the WHO’s approach and recommended governance safeguards for engagement with non-state actors,<sup>221</sup> particularly those with records of adverse CPA. It is argued that such legal-based research establishing the likely presence of statutory corrupt conduct can only complement and add to the potency of such research and strengthen the argument for the imposition of a domestic and international Framework Convention on Alcohol Control (FCAC).<sup>222</sup>

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<sup>218</sup> ICAC *ibid* 13, *Greiner v ICAC* (1992) 28 NSWLR 125 per Mahoney JA at 162.

<sup>219</sup> *Ibid* 161.

<sup>220</sup> ICAC (Final) Report, ‘Investigation into the Regulation of Lobbying, Access and Influence in NSW, April 2021’ <[https://www.icac.nsw.gov.au/ArticleDocuments/884/Investigation\\_into\\_the\\_regulation\\_of\\_lobbying\\_access\\_and\\_influence\\_in\\_NSW-Eclipse\\_Jun21.pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/884/Investigation_into_the_regulation_of_lobbying_access_and_influence_in_NSW-Eclipse_Jun21.pdf.aspx)>.

<sup>221</sup> See <<https://www.who.int/about/collaboration/non-state-actors>>.

<sup>222</sup> Robin Room and Jenny Cisneros Örnberg, ‘A Framework Convention on Alcohol Control: Getting Concrete about Its Contents’ (2021) 12(2) (2020/11/09) *European Journal of Risk Regulation* 433–43. See the argument for more exclusionary controls against alcohol industry CPA similar to those applying to the tobacco industry. Ben Hawkins et al, ‘Reassessing Policy Paradigms: A Comparison of the Global Tobacco and Alcohol Industries’ (2018) 13(1) (2016/03/22) *Global Public Health* 1–19.



## Undue influence

In his presentation of the final NSW ICAC report to the NSW Parliament concerning Operation Eclipse, its investigation into the corruption risks involving political lobbying, the Chief Commissioner observed in the report's introductory chapter<sup>223</sup> that the capacity of citizens to make representations to their elected representatives is a key aspect of our democratic system.

While lobbying is a central and legitimate activity for the functioning of a democratic system, in practice there are inherent corruption and other undesirable risks associated with it. As the OECD has noted:

Lobbying ... has the potential to promote democratic participation and can provide decision makers with valuable insights and information, as well as facilitate stakeholder access to public policy development and implementation. Yet, lobbying is often perceived as an opaque activity of dubious integrity, which may result in undue influence, unfair competition and regulatory capture to the detriment of fair, impartial and effective policy making.<sup>224</sup>

The expression 'undue influence' is common within the public health-related literature on CPA considered further into this chapter. It is indicative of a process whereby a certain normative or legal line is crossed into unlawful conduct. Central ideas from the perspective of this thesis' research in the ICAC definition of corrupt political lobbying given above are, firstly, the legal requirement that the exercise of official public functions be impartial and, secondly, lobbyist conduct that may or could initially be construed as lawful, may nevertheless 'directly or indirectly' adversely affect a public official's honest and impartial exercise of their powers and be identified as corrupt.

Acs and Coglianese provide, from a US regulatory perspective, evidence of politically well-connected businesses' 'influence by intimidation' of regulators. They suggest that regulators weigh up the risk of antagonising such businesses and consequential sanctions against them by their political masters. The authors suggest that such business influence contributes to regulatory

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<sup>223</sup> ICAC (Final) Report, 'Investigation into the Regulation of Lobbying, Access and Influence in NSW, April 2021. <[https://www.icac.nsw.gov.au/ArticleDocuments/884/Investigation\\_into\\_the\\_regulation\\_of\\_lobbying\\_access\\_and\\_influence\\_in\\_NSW-Eclipse\\_Jun21.pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/884/Investigation_into_the_regulation_of_lobbying_access_and_influence_in_NSW-Eclipse_Jun21.pdf.aspx)>.

<sup>224</sup> OECD, Lobbyists, Government and Public Trust: Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying, 2014, 3.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

chill that can ‘derail’ regulatory plans and a ‘retreating effect, where opposition to published regulatory proposals leads to their withdrawal’.<sup>225</sup>

It is argued that the governance-related terms of ‘undue influence’, ‘capture’ and the broader definition of corruption, including Kaufmann’s<sup>226</sup> approach are fairly indistinguishable.

### Public interest

Wheeler considers the elusive definition of public interest in the Australian legal context. He suggests that it incorporates the concepts of transparency, procedural and substantive fairness and ethical considerations.<sup>227</sup> Having considered a variety of Australian legal cases involving, in part, the consideration of the public interest, he provides his own definition to the effect that the purpose of the public interest concept ‘is to direct consideration towards matters of broad public concern and away from private, personal, parochial or partisan interests’.<sup>228</sup>

Ng and Tham noted in their informative discussion paper<sup>229</sup> heading up the information-gathering process for the ICAC inquiry Operation ‘Eclipse’ into political lobbying in NSW:

The preamble to the New South Wales Ministerial Code of Conduct stipulates that New South Wales Ministers should ‘pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest’. Independent Commission Against Corruption Regulation 2017 (NSW), Appendix, NSW Ministerial Code of Conduct, cl 1. Similarly, the preamble of the code of conduct for Members of the New South Wales Legislative Assembly states that these parliamentarians should use ‘their influence to advance the common good of the people of New South Wales’: New South Wales Legislative Assembly, Code of Conduct for Members (Adopted 5 May 2015...).

### Conflicts of Interest

Fundamental conflicts of interest between the commercial interests of the alcohol lobby and that of public health are highlighted throughout the literature reviewed in this thesis. At the

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<sup>225</sup> Alex Acs and Cary Coglianese, ‘Influence by Intimidation: Business Lobbying in the Regulatory Process’ (Public Law Research Paper No 20-40, University of Pennsylvania Law School, 8 February 2022) <<https://ssrn.com/abstract=3710856>>.

<sup>226</sup> Kaufmann (n 211).

<sup>227</sup> Wheeler (n 199).

<sup>228</sup> Ibid 6.

<sup>229</sup> Yee-Fui Ng and Joo-Cheong Tham, ‘Enhancing the Democratic Role of Direct Lobbying in New South Wales A Discussion Paper Prepared for the New South Wales Independent Commission against Corruption’, ICAC Report, ‘The Regulation of Lobbying, Access and Influence in NSW: A Chance to Have Your Say’ (April 2019) 7 (n 8). <[https://www.icac.nsw.gov.au/ArticleDocuments/884/The%20regulation%20of%20lobbying%20access%20and%20influence%20in%20NSW%20-%20a%20chance%20to%20have%20your%20say%20\(April%202019\).pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/884/The%20regulation%20of%20lobbying%20access%20and%20influence%20in%20NSW%20-%20a%20chance%20to%20have%20your%20say%20(April%202019).pdf.aspx)>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

jurisdictional level, the NSW ICAC has produced a report regarding the management of conflicts of interest in the NSW public sector.<sup>230</sup>

As discussed in Chapter 1 of this thesis, the objects of the NSW Liquor Act have been expanded to incorporate a broader range of commercial interests. There has been no commensurate expansion of public health and safety related considerations. The legislation does not afford any primacy for the harm-minimisation object. The public officials exercise their discretion to balance these competing interests and occasionally make note of their interpretations of the intentions of Parliament regarding the prioritisation of the statutory objects.

This lack of statutory prioritisation of the Act's objects provides a convenient opportunity to defeat potential allegations of bias, partiality and possible conflicts of interest.

### Rule of law

The definition of the rule of law by Gostin and others given below highlights the critical linkages with the concept of capture relied upon in this thesis and the attainment of health equities.

To earn and maintain the trust of the public, law makers—including legislatures, administrative agencies, courts, and international bodies—must create, enforce, and interpret the law impartially. These actions are the fundamental precept of the rule of law. Under the rule of law, no individual, business, institution, or government official is above the law: governments and public officials must be held legally accountable to act in the public interest.<sup>231</sup>

Developments and observations arising from the conduct and relationship between the NSW alcohol industry and elected law makers examined in this thesis (Chapters 4 and 5), support the proposition that capture could theoretically be recognised as an additional form of corruption consistent with Kaufmann's definition above. These observations are listed as follows:

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<sup>230</sup> NSW Independent Commission against Corruption, 'Managing Conflicts of Interest in The NSW Public Sector' April 2019. The WHO have also produced a 'Framework' which 'endeavours to strengthen WHO engagement with non-State actors (NGOs, private sector entities, philanthropic foundations, and academic institutions) while protecting its work from potential risks such as conflict of interest, reputational risks, and undue influence' <<https://www.who.int/about/collaboration/non-state-actors>> (May 2016). See also Belinda Reeve and Lawrence Gostin, "'Big" Food, Tobacco, and Alcohol: Reducing Industry Influence on Noncommunicable Disease Prevention Laws and Policies; Comment on "Addressing NCDs: Challenges From Industry Market Promotion and Interferences"' (2019) 8(7) *International Journal of Health Policy and Management* 450–4.

<sup>231</sup> Lawrence Gostin et al, 'The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development' (2019) *The Lancet* 6.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

- The current NSW legal definition does not appear to reflect or acknowledge the contemporary nature of corruption acknowledged by the High Court of Australia<sup>232</sup> and other international courts (USA)
- NSW alcohol industry political donations after December 2010 were likely inconsistent with NSW electoral political donation laws,<sup>233</sup> conduct recognised within the NSW Independent Commission Against Corruption (ICAC) Act as a form of corruption. However, it appears no prosecutions were initiated on this basis
- The conduct was consistent with Locke's<sup>234</sup> definition of corruption of the sovereign power by private interests inconsistent with the common-wealth
- The conduct was arguably inconsistent with the NSW Public Service code of conduct relating to objectivity, transparency, impartiality and sustaining the public interest<sup>235</sup>
- It is arguably morally and ethically corrupt to receive political donations and other in-kind support derived from the promotion and sale of an addictive and toxic product, such as alcohol, with no safe limit of consumption. Alcohol also has the highest burden of harm of all legal and illicit substances.<sup>236</sup>

Found throughout the regulatory literature and, to a much lesser extent, public health theme research, is the enduring connection between expressions of capture and corruption. Novak<sup>237</sup> established that earlier American political thinkers and regulators were more familiar with the term 'corruption' than the term 'capture' within the context of private infiltration of the public realm. He traces this concept of capture back to Ancient Roman and Greek political thought.

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<sup>232</sup> *McCloy v New South Wales* [2015] HCA 34, 13 -14, 62. See also Walton (n 139).

<sup>233</sup> See reference to 'Mr Yabsley', Brown article 1, 782 [b].

<sup>234</sup> Locke (n 181).

<sup>235</sup> See NSW Public Service Commission <<https://www.psc.nsw.gov.au/culture-and-inclusion/workplace-culture/behaving-ethically>>. See also Peter Martin, 'Game of Mates: How Billionaires Get Rich at Our Expense', *The Sydney Morning Herald* (28 May 2017) <<https://www.smh.com.au/opinion/game-of-mates-how-billionaires-get-rich-at-our-expense-20170526-gwe0dp.html>>. The Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Regulation 2014 provides a Ministerial Code of Conduct <<https://arp.nsw.gov.au/sites/default/files/2014-546%5B1%5D.pdf>>. Arguably, the ethical and integrity standards of Ministers should be no less than their subordinate public servants.

<sup>236</sup> See Melissa Cunningham, 'Alcohol Causes Most Overall Harm of Any Drug, Says Study', *The Sydney Morning Herald* (22 June 2019) <<https://www.smh.com.au/national/alcohol-causes-most-overall-harm-of-any-drug-says-study-20190620-p51zo3.html>>.

<sup>237</sup> William Novak, 'A Revisionist History of Regulatory Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and how to Limit It* (Cambridge University Press, 2013).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The words ‘capture’ and ‘corruption’ import a range of normative, legal, political, historical and moral considerations that may not always sit comfortably with the positivist and objective scientific method. The health-related CPA literature, reviewed later in this chapter, suggests a spectrum of corporate political influence on government, ranging from benign to malevolent intent and from the lawful to the unlawful—including for example, bribery. Some researchers, such as Hernandez-Aguado and Chilet-Rosell,<sup>238</sup> distinguish between ‘hard’ and ‘soft’ and ‘direct’ and ‘indirect’ means or tactics of influence or interference.

From a reformist perspective, the lack of common agreement on and application of these governance concepts is a problem when responding to industry capture on a local, national or global scale. In Australia, we appear to have little appreciation, if any, of the magnitude of financial and other support Australian peak alcohol lobby groups receive from the transnational alcohol corporations. The powerful Australian alcohol lobby is strategic and well connected and coordinated. There is no effective national governance process for the alcohol industry.

### 2.2.2 Engaging with the regulation theory framework on capture and corruption — ownership of the law-making process

Two researchers remind us that the concept of political capture has been a component of political discourse since ancient Roman and Greek classical republican thought. Ardito<sup>239</sup> found that the terms ‘capture’ and ‘corruption’ were synonymous in circumstances where private interests intruded into the public sphere. Novak refers to both Socrates (in Plato’s *Republic*) and Aristotle in his work *The Politics* as having ‘decried the corrupting effects of private interests and private vice on the commonwealth’.<sup>240</sup>

Novak also provides a useful, more contemporary, history of the concept of capture and the related ideological arguments of the relative merits of public regulatory intervention in the US. In

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<sup>238</sup> Ildelfonso Hernández-Aguado and Elisa Chilet-Rosell, ‘Pathways of Undue Influence in Health Policy-Making: A Main Actor’s Perspective’ (2018) 72(2) *Journal of Epidemiology & Community Health* 155.

<sup>239</sup> Alissa Ardito, ‘Regulatory Capture, Ancient and Modern’ 30 June 2016 part of a series of essays Rooting Out Regulatory Capture’, *The Regulatory Review* (13 June 2016) <<https://www.theregreview.org/2016/06/13/rooting-out-regulatory-capture/>>.

<sup>240</sup> Novak (n 237) 39.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

contrast to the public-interest<sup>241</sup> approach to regulatory intervention, Stigler<sup>242</sup> found regulatory intervention primarily served the financial interests of large businesses. Kolko<sup>243</sup> held a similar view (albeit from the opposite side of politics to Stigler's), contending that big business had captured the government regulator to control market entry and pre-empt potentially harsher interventions from other jurisdictions.

Morgan and Yeung suggest the above approaches to public regulation and capture assume the existence of an 'inviolable public sphere'<sup>244</sup> where conflicting private vested interests should not intrude. They suggest that such 'cultural' delineations of 'public' and 'private' roles are 'unhelpful' given the de-centring of regulation<sup>245</sup> and the emerging dominance of organisations and corporations, so that 'advanced capitalism' is already blurring the distinction between public and private institutions and attributes.

Tony Prosser<sup>246</sup> relied on Habermas's 'ideal speech situation'<sup>247</sup> to evaluate some UK public utilities. Prosser suggests that two prerequisites for working towards attaining the ideal situation that inhibits the opportunity for regulatory capture are legitimate and informed *civil participation* and ex post facto *accountability*.<sup>248</sup> The articles in Chapter 4 of this thesis provide examples of a pattern of deficiencies in his two criteria for attaining an ideal speech situation. The most cogent of these examples was the public's exclusion from any scrutiny or subsequent substantive input into key and sweeping amendments to the Act in 2015. This exclusion is critically analysed in greater detail in article 1. The analysis found that the changes to the NSW alcohol laws unilaterally favour the alcohol industry. It is understood that some senior departmental officials may also have

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<sup>241</sup> Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007).

<sup>242</sup> Stigler (n 192). See also Cary Coglianese, 'Assessing Stigler's Economic Theory of Regulation' (2021) *The Regulatory Review* 23 August 2021 <<https://www.theregreview.org/2021/08/23/coglianese-assessing-stiglers-economic-theory-regulation/>>.

<sup>243</sup> Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916* (Quadrangle Books, 1963) 2–3.

<sup>244</sup> Morgan and Yeung (n 241) 62.

<sup>245</sup> Julia Black, 'Regulatory Conversations' (2002) 29(1) *Journal of Law & Society* 191–2.

<sup>246</sup> Tony Prosser, 'Nationalised Industries and Public Control: Legal, Constitutional, and Political Issues' (B. Blackwell, 1986) reproduced in part in Morgan and Yeung above (n 241) 37.

<sup>247</sup> The ideal situation exists where two conditions are met. Participants have equal opportunity to initiate a dialogue, ask questions and provide answers and secondly, are free from constraints arising from any disparities in power.

<sup>248</sup> Morgan and Yeung (n 241) 39–40.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

been excluded from scrutiny of the Bill to enact the changes before it came before NSW Parliament.

In contrast to Habermas's theoretical 'ideal speech situation' scenario, David Levi-Faur's 'Regulatory Capitalism'<sup>249</sup> declares that regulatory capitalism is the 'elephant in the room'<sup>250</sup> of scholarly literature. 'Regulatory processes condition the operation, manipulation and deployment of political, social and economic power'.<sup>251</sup> The concept of regulatory capitalism comfortably accommodates the de-centring<sup>252</sup> or delegation of the formal state rulemaking process to a range of powerful private actors. It still, however, retains a claim to the exclusive use of coercive power through the regulatory process.

Whilst Levi-Faur's original publication on regulatory capitalism (2005)<sup>253</sup> makes no express reference to regulatory capture, his (2017)<sup>254</sup> co-authored article incorporates the vital role of intermediaries into the regulatory process and includes the key concept of capture. His later joint article also acknowledges how this theorising on the role of intermediaries resonates with the concept of regulatory capitalism.

This thesis argues that the research evidence reveals, from multiple perspectives of the regulatory chain, that alcohol regulation has been captured by powerful elements within the alcohol industry via connected conduct<sup>255</sup> with elected lawmakers. This casts serious doubt on the neutrality or impartiality of government agencies when they are required to balance the interests of competing stakeholders. This concern is not targeted at individual agency employees obliged to follow the directions of more senior officials.

The consideration of regulatory capitalism is essential. This thesis suggests it is the dominant driving force of and influence on regulation of the retail supply of alcohol in NSW since the

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<sup>249</sup> David Levi-Faur, 'Regulatory Capitalism' in P Drahos (ed) *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017).

<sup>250</sup> Ibid 291. Also cited in Brown article 1, 768.

<sup>251</sup> Ibid.

<sup>252</sup> Black (n 245).

<sup>253</sup> David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' [2005] 598 *Annals of the American Academy of Political and Social Science* 12.

<sup>254</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670(1) *The ANNALS of the American Academy of Political and Social Science* 14–35.

<sup>255</sup> 'Connected conduct' is a critical element of the test for industry or regulatory capture developed and applied within this thesis; see for example Brown article 1, 770; Brown article 3, 1068–9.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

inception of the current Act. It also provides a straightforward and compelling explanation of the so-called 'incoherency'<sup>256</sup> between scientific evidence-based research findings and the lack of their adoption. Power defines rationality. Evidence-based research findings<sup>257</sup> regarding the efficacy of various harm-reduction measures no longer appear to be the preferred currency in NSW.

It also provides a straightforward and compelling explanation of the incoherency between scientific evidence-based research findings that recognise the reduction of the availability and supply of alcohol as one of the most effective means of minimising alcohol harms and current alcohol regulatory practices.

Hancher and Moran's<sup>258</sup> 'organising regulatory space' theory suggests that the concept of regulatory capture is redundant under advanced capitalism, given the power of large firms and the blurring of distinctions between public and private activity and related economic and social impacts. Their geographic notion of regulation being a contested multi-stakeholder *space* or arena, begging indulgence of a reliance on sporting metaphors, provides a major contribution. This contested space sets the deliberative boundaries regarding what issues are decided and which parties are included and excluded.<sup>259</sup> This is particularly applicable to the case studies in this thesis, illustrates the unevenness of the alcohol regulatory playing field and the consistent shifting of the goalposts to favour the most powerful stakeholders.

The theoretical model in Ayres and Braithwaite's seminal *Responsive Regulation*<sup>260</sup> recognises the inevitable risk of capture of the regulator by the regulatee in the ideal state of high levels of cooperation and closeness between the two parties, especially where the regulator has high levels of discretion. The authors' civic-republican type response was the promotion of third-party public interest groups (PIGs) to countervail the risk of collusion or capture between the regulator and regulatee.<sup>261</sup>

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<sup>256</sup> Lencucha and Thow (n 157); Battams and Townsend (n 157).

<sup>257</sup> Minimising alcohol harms (nn 46–7, 149–150).

<sup>258</sup> Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in L Hancher and M Moran (eds), *Capitalism, Culture and Regulation* (Clarendon Press, 1989) reproduced in part in Morgan and Yeung (n 241), 62–3.

<sup>259</sup> Connects with Lukes' concept of a second face of 'agenda setting' power (n 88).

<sup>260</sup> Ayres and Braithwaite (n 85).

<sup>261</sup> See Brown article 1, 766–9.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The most strident critique of Ayres and Braithwaite's *Responsive Regulation*<sup>262</sup> theoretical model comes from critical scholars. Tombs and Whyte traced the development of UK workplace safety laws and found a 'logical affinity' with the theoretical approach by Ayres and Braithwaite. They described the process as 'regulatory degradation'<sup>263</sup> — the entrée for neoliberal regulatory settlement with an emphasis on industry self-regulation, reliance on the market as a distributive force and the degradation of the welfare state.

Laureen Snider's study of white-collar crimes in the Canadian corporate sector<sup>264</sup> suggests that the regulation process is effectively owned by the capitalist elites within the sector. This goes to the heart of the concept of capture. Significantly for the case studies in this thesis, Snider identifies one manifestation of enforcement capture as the 'bifurcation'<sup>265</sup> of the subjects of regulation between 'stakeholders' and 'rogues',<sup>266</sup> the latter being the 10 per cent of non-complying businesses that lacked economic, legal and political resources and power to prevent or frustrate legal proceedings.<sup>267</sup> Snider stresses the related false assumption underpinning this delineation — that the elite firms' compliance behaviour is all in good faith.<sup>268</sup>

Arguably, these three scholars' studies can be located within the critique of regulation that perceives it as part of the capitalist superstructure. Within capitalism, various hegemonic forces or techniques are applied to disguise power imbalances<sup>269</sup> that disadvantage the weakest, most vulnerable and powerless groups in society, including public-good interests.<sup>270</sup> The clash between neoliberal and socialist as well as other welfare ideologies and narratives personified by respective commercial and public health interests becomes evident in the contested regulation of the retail supply of alcohol in NSW.

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<sup>262</sup> Ayres and Braithwaite (n 85).

<sup>263</sup> Steve Tombs and David Whyte, 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK' (2012) 7(1) *Regulation & Governance* 61–79.

<sup>264</sup> Snider (n 80).

<sup>265</sup> Ibid 191.

<sup>266</sup> An identical narrative of 'rogues' is deployed by the NSW government against less powerful licensed premise operators who graphically contravene alcohol supply laws.

<sup>267</sup> See also Laureen Snider, 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1986) 9(1) *Law and Policy* 37–67.

<sup>268</sup> Snider (n 80) 187. See also Brown and Anderson article 4, 11–2.

<sup>269</sup> This concept aligns Luke's third face of power adopted by Madureira and Galea in their framework (n 239).

<sup>270</sup> Parker defends the responsive regulation model noting the authors' qualification of their 'theoretical' concept. She provides valuable reflection on the weaknesses and strengths of this changing model of regulation. Christine Parker 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) *Regulation & Governance* 2–13.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The Victorian Independent Broad-based Anti-corruption Commission (IBAC) Report on Corruption Risks Associated with Public Regulatory Authorities (July 2018) acknowledges regulatory capture is a key corruption risk and defines capture as

the process by which regulatory agencies or their employees inappropriately identify with the interests of the client or the industries they are tasked with regulating.<sup>271</sup>

Arguably, the above definition of ‘capture’ could be extended to include members of the legislature and quasi tribunals. With similar reasoning to Ayres and Braithwaite above, IBAC contends that the increasing reliance upon the private sector to deliver once-public services and the increasing capacity in the discretion of compliance officers to negotiate organisational responses to identified non-compliance increases the risk of corruption. Associated factors are an increase in delegation, a lower level of government oversight and degrees of scrutiny and action consistent with neoliberal government agency cost-cutting imperatives to achieve a ‘smaller’ government, especially when confronted by looming record budget deficits associated with COVID-19 financial stimulus recovery and health funding.<sup>272</sup>

Appointing the fox to guard the hen house by delegating policymaking and regulation to commercial interests arguably represents a dereliction of government responsibility that will inevitably raise suspicions of undue influence.<sup>273</sup>

The explication of the regulation of the retail supply of alcohol in NSW since 2008 provided in this thesis validates Mindell’s concerns.<sup>274</sup> What is surprising is that the public health-related research on CPA shows apparent reluctance to engage more deeply with the regulatory theories and concepts identified above.<sup>275</sup>

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<sup>271</sup> Independent Broad-Based Anti-Corruption Commission, State of Victoria *Report on Corruption Risks Associated with Public Regulatory Authorities* (2018).

<sup>272</sup> Brown and Anderson, article 4, 29.

<sup>273</sup> Ibid, 3.

<sup>274</sup> Thesis 1.

<sup>275</sup> See *The Regulatory Review*, ‘Rooting Out Regulatory Capture’ (13 June 2016) containing a number of essays on the topic of capture from a more US perspective. <<https://www.theregreview.org/2016/06/13/rooting-out-regulatory-capture/>>. See also discussion paper by the World Bank, ‘State Capture Analysis: How to Quantitatively Analyze the Regulatory Abuse by Business-State Relationships’ 2 June 2019. <<https://openknowledge.worldbank.org/handle/10986/33094>>.

### 2.2.3 Other regulatory concepts supporting regulatory failure

The explication of the presence of industry capture from multiple perspectives of the regulatory chain is a dominant theme running through each of the articles contained within the thesis. Article 4, in key respects, represents a capstone or culmination of the ongoing development and application of regulatory theory. This article enhances the concept of capture by augmenting the same with a broadened definition of *regulatory chill* adopted by Jane Kelsey<sup>276</sup> and expansion of the concept of *regulatory leniency*.<sup>277</sup> These terms are discussed below. The consolidation of regulatory leniency and chill with capture enhances the critical analysis of the NSW government's novel integrated incentives and sanctions system (IISS).

## 2.3 Health-related research, regulatory leniency and chill

Article 4 provides a unique critical analysis at the granular levels of key industry-driven amendments to NSW alcohol industry compliance and enforcement laws. Recognised research gaps exist in this area of study. Ineffective industry compliance requirements can render the best evidence-based alcohol harm reduction interventions useless.

Industries seek business environments with high degrees of certainty but low costs of compliance and reduced risks of being caught for non-compliance (Chapter 4). As mentioned in Chapter 1, the identification of those stakeholders who exert the dominant influence or authorship over the law-making process is an obvious crucial factor in the subsequent relative effectiveness of the same laws to sustainably prevent or minimise alcohol related harms. The effective authorship of the alcohol laws is also likely to shape the opportunity of business investment, improved profits and growth.

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<sup>276</sup> Jane Kelsey, 'Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law' (2017) 17(2) *QUT Law Review* 21–45 <<https://lr.law.qut.edu.au/article/view/701>>. Substantial litigation by the tobacco industry caused a direct and indirect dampening effect on the New Zealand government to introduce health related reforms. Brown and Anderson article 4 (n 48).

<sup>277</sup> For a more economic approach to regulatory leniency see Jonas Heese et al, 'Regulator Leniency and Mispricing in Beneficent Nonprofits'. *Academy of Management Proceedings* 2015(1): 11998. See also Sara Kerosky, 'Relaxing Federal Rules: Political Determinants of Targeted Leniency' (UC San Diego, PhD Thesis, 2018). Retrieved from <<https://escholarship.org/uc/item/6w24v8c3>>. The ordinary meaning of 'leniency' is applied within a regulatory context of an industry and government's compliance and enforcement obligations and, related sanctions. This is further elaborated in Brown and Anderson article 4 (n 50) 13–4, Figure 1, where a distinction is developed between direct and indirect forms of regulatory leniency.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

To better analyse industry influence concerning these new laws and their likely impact, this thesis reviewed the literature relating to the processes of regulatory leniency and chill. There appeared to be relatively little CPA research into alcohol industry leniency pertaining to industry compliance and enforcement.

The 'Summary of forms and indicators of regulatory leniency' contained in Figure 1 in article 4,<sup>278</sup> differentiates between direct and indirect forms of leniency identified from the body of research conducted in Chapter 4 and the condensed literature review. The basis of differentiation between direct and indirect leniency was intuitive and did not rely upon any previously known research.

This thesis more broadly defines regulatory chill as a phenomenon occurring 'where law makers are reluctant to initiate, for example, public health or climate reforms because of factors extraneous to the actual merits of the potential action'.<sup>279</sup> This definition is based on Kelsey's<sup>280</sup> helpful summary of the emergence of the concept and its relevance (her involvement) in New Zealand legal proceedings concerning an industry challenge against the adoption of tobacco plain-packaging laws. A brief review of recent articles in *The Regulatory Review* found the term 'chill' to be commonly used to simply denote some form of intervention or change that would have an impeding, contracting, slow-down effect on the subject matter in question.

Previously, Tienhaara<sup>281</sup> had identified a lack of clarity over the use of the term 'regulatory chill' in investor-state disputes in the early 2000s when it became recognised that the 'institution' of international arbitration 'may influence the course of policy development'.<sup>282</sup> She advances a working hypothesis concerning chill that

[i]n some circumstances, governments will respond to a high (perceived) threat of investment arbitration by failing to enact or enforce bona fide regulatory measures (or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished).<sup>283</sup>

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<sup>278</sup> Brown and Anderson article 4, 14.

<sup>279</sup> Ibid 12.

<sup>280</sup> Kelsey (n 276).

<sup>281</sup> Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration A View from Political Science', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law And Arbitration* (Cambridge University Press, 2011).

<sup>282</sup> Ibid 606.

<sup>283</sup> Ibid 610.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

In some parallels with public health research, Tienhaara encourages a broader range of disciplinary involvement in frameworks for international investment protection.

Hawkins and Holden<sup>284</sup> expressed concern with growth in international investor agreements (IIAs) and associated new veto points that provide opportunities for international investors to threaten and legally challenge health-related policies that have the potential to infringe upon their investor rights in the same trade instruments. They observe that investor-state dispute settlement (ISDS) mechanisms

institutionalise and embed the practices and assumptions central to neoliberal forms of political economy, privileging the interests of transnational corporations (TNCs) over those of other actors.<sup>285</sup>

Article 4 also contains a figure (2)<sup>286</sup> identifying numerous points in the new NSW alcohol regulatory compliance and enforcement disciplinary process where public officials can exercise discretion to discontinue or water down prosecutions against licensees for alleged non-compliance with the NSW alcohol laws.

Associated with these concerns are the threat and adverse impact of regulatory chill. Hawkins and Holden note that the mere threat of the instigation of very costly and resource-straining international disputes, has resulted in the withdrawal or diluting of public-interest reforms in the environment and public-health sectors.<sup>287</sup>

This thesis seeks to extend the application of the chill effect beyond that of international investor disputes. In NSW, relative power disparities exist between the largest alcohol corporations such as the Woolworths Group<sup>288</sup> and cash-strapped local, state and territory governments and their alcohol regulatory bodies. Kelsey<sup>289</sup> identifies other risk factors for regulators, including costs and loss of reputation. A broader form of regulatory chill appears to be common in NSW.

The development of regulatory chill theory is advanced in this thesis. It is suggested that from a front-line compliance officer's perspective, a deliberate increase in the complexity of industry-

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<sup>284</sup> Benjamin Hawkins and Chris Holden, 'A Corporate Veto on Health Policy? Global Constitutionalism and Investor-State Dispute Settlement' (2016) 41(5) *Journal of Health Politics, Policy and Law* 969–95.

<sup>285</sup> Ibid 2.

<sup>286</sup> Brown and Anderson article 4, 'Figure 2: Synthesis of institutional complexity and discretion in the IISS, 23'.

<sup>287</sup> Ibid 10, 17.

<sup>288</sup> See Woolworths sales data Brown article 1 (n 62), 722; Brown article 3, 1070.

<sup>289</sup> Kelsey (n 276).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

compliance laws and reduction of the risk of a successful prosecution by new legal loopholes and exemptions, such as the ‘size matters’ and ‘lack of serious injury’ defences<sup>290</sup> authored by the industry, provide a chilling effect or impediment to important compliance and enforcement regulatory practices inconsistent with the public interest.

Conversely, the process of weakening industry compliance laws inconsistently with the overall public interest is defined in this thesis as ‘regulatory leniency’. This does not include, for example, situations where lessening of compliance sanctions on the industry may be demonstrably in the overall public interest.

### 2.4 Public Health orientated research

#### 2.4.1 Corporate Political Activity (CPA)

Public health-oriented literature is increasing attention on the drivers of capitalism,<sup>291</sup> neoliberalism<sup>292</sup> and the tactics<sup>293</sup> and capacity<sup>294</sup> of the globalised UCI to unduly influence<sup>295</sup> public health law and policymakers. This literature also identifies that the same industries’ unhealthy products contribute to a significant proportion of the modifiable international non-communicable diseases (NCDs).<sup>296</sup> There is also an increasing willingness of public health research

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<sup>290</sup> See Brown and Anderson article 4, 22, 27, figure 1, item 5.

<sup>291</sup> Kasi Whitaker, Douglas Webb and Natalia Linou, ‘Commercial Influence in Control of Non-Communicable Diseases’ *British Medical Journal* (2018) <<https://doi.org/10.1136/bmj.k110>>.

<sup>292</sup> See Gerard Hastings, ‘Public Health and the Value of Disobedience’ (2015) 129(8) *Public Health* 1046; Richard Horton, ‘Offline: Defending the Left Hand of the State’ (Pt Elsevier) (2018) 391(10139) *The Lancet* 2484.

<sup>293</sup> See for example A Rob Moodie, ‘What Public Health Practitioners Need to Know About Unhealthy Industry Tactics’ (2017) 107(7) *American Journal of Public Health* 1047–9.

<sup>294</sup> Hernández-Aguado and Chilet-Rosell, n 238. See also Benjamin R Hawkins and Jim McCambridge, ‘Partners or Opponents? Alcohol Industry Strategy and the 2016 Revision of the UK Low-Risk Drinking Guidelines’ (2021) 82(1) *Journal of Studies on Alcohol and Drugs* 84–92; Benjamin Hawkins and Jim McCambridge, ‘“Tied Up in a Legal Mess”: The Alcohol Industry’s Use of Litigation to Oppose Minimum Alcohol Pricing in Scotland’ (2020) 29(1) *Scottish Affairs* 3–23; McCambridge, Mialon and Hawkins (n 153).

<sup>295</sup> Jeff Collin et al, ‘Can Public Health Reconcile Profits and Pandemics? An Analysis of Attitudes to Commercial Sector Engagement in Health Policy and Research’ (2017) 12(9) *PLoS ONE* e0182612.

<sup>296</sup> Whitaker (n 291). Brown article 1 (nn 5, 6 and 7) acknowledges alcohol is a significant contributor to modifiable non communicable diseases (NCDs) and industry capture may provide one impediment to the attainment global NCD reduction targets.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

publications to embrace other scholarly disciplines, including law<sup>297</sup> and political science,<sup>298</sup> to enhance public health law and policymaking. The CPA-based public health-related literature complements and reinforces the regulatory theory literature considered earlier.

The Australian alcohol industry does not share the same concerns as public health advocates relating to the health and public safety risks associated with the promotion, sale, and consumption of their products.<sup>299</sup> The industry purports to focus on better consumer education to promote the responsible consumption of alcohol and other well-documented distractive, disruptive, delay and denial techniques.<sup>300</sup>

Critical public health research has relied upon unprecedented releases of information regarding US tobacco industry litigation. This has exposed the magnitude of the industry's deception in hiding damaging evidence of the magnitude of harms involved in tobacco use, the tactics it used and the extent to which it had infiltrated the government process.<sup>301</sup> Some of the following summarised research, primarily involving CPA in the alcohol industry, has found the adoption of similar tobacco-industry tactics across the spectrum of unhealthy industries.

Given the magnitude of multidisciplinary regulatory theory,<sup>302</sup> the following review concentrates on the alcohol health-based CPA literature considered to be the most pertinent to the analysis of the praxis of regulating the provision and consumption of alcohol, including industry compliance

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<sup>297</sup> See Janani Muhunthan et al, 'Judicial Intervention in Alcohol Regulation: An Empirical Legal Analysis' (2017) 41(4) *Australian New Zealand Journal of Public Health* 365; Niamh Fitzgerald, Jo Winterbottom and James Nicholls, 'Democracy and Power in Alcohol Premises Licensing: A Qualitative Interview Study of the Scottish Public Health Objective' (2018) 37 *Drug and Alcohol Review* 607–15.

<sup>298</sup> See Patrick Fafard, 'Beyond the Usual Suspects: Using Political Science to Enhance Public Health Policy Making' (2015) 69 *Journal of Epidemiology and Community Health* 1129–32. <<http://jech.bmj.com/content/jech/69/11/1129.full.pdf>>. See also Eduardo Gómez, 'Enhancing Our Understanding of the Commercial Determinants of Health: Theories, Methods, and Insights from Political Science' (2022) 301 *Social Science & Medicine* 114931.

<sup>299</sup> See Foundation for Alcohol Research and Education (FARE) 'National Alcohol Strategy Analysis of Alcohol Industry Submissions' (July 2018) <<http://fare.org.au/wp-content/uploads/National-Alcohol-Strategy-Industry-Submissions-Report-Revised-25-July-2018.pdf>>. See also Lachenmeier and Rehm (n 26).

<sup>300</sup> See Collin et al (n 295), summary industry tactics; Hawkins and McCambridge (n 294) analysing industry-initiated delays and other disruptive tactics involving Scotland's introduction of minimum unit pricing of alcohol initiative.

<sup>301</sup> Lisa Bero, 'Implications of the Tobacco Industry Documents for Public Health and Policy' (2003) 24 *Annual Review of Public Health* 267–88. Benjamin Hawkins and Jim McCambridge, 'Can Internal Tobacco Industry Documents Be Useful for Studying the UK Alcohol Industry?' (2018) 18(1) *BMC Public Health* 808.

<sup>302</sup> Morgan and Yeung (n 241), provide a comprehensive analysis of regulation theory and related elements including enforcement. The authors group regulatory theories under 'Private interest', 'Public Interest' and 'Institutional' multidisciplinary approaches. This thesis is also assisted by unpublished notes from a lecture by Professor Fiona Haines delivered to the University of Newcastle's Law School in 2013.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

in NSW. It does not detract from the importance and usefulness of other UCI research relating to CPA and other profit-driven determinants of poor health across a range of other UCIs.<sup>303</sup>

A primary focus of this thesis is the apparent asymmetrical regulation of the alcohol industry in NSW given the magnitude and costs of preventable harms and the matching substantial body of scientific research in reducing the same harms discussed in Chapter 1. What should be indivisible from this public health focus are the broader adverse implications of the interrelated governance, equity, integrity and regulatory failure for the democratic process and the rule of law.

### Emergence of CPA in alcohol-harm and related research

Farnsworth and Holden (2006)<sup>304</sup> emphasise the driving force of capitalism mentioned above and through the rest of the thesis. This approach resonates with the findings of this research. Their article seeks ‘to place corporate power and influence centre-stage by outlining and critically reflecting on the place of business within contemporary welfare states, with a particular focus on the UK’.<sup>305</sup> They go on to assert

states must try to induce corporations to invest through pursuing policies which are favourable to the pursuit of profit ... the decisions of policy makers are structurally framed by the imperative to induce companies to invest. Other actors also exercise agency within this environment which, in turn, impacts on their own strategies to attempt to influence.<sup>306</sup>

Miller and Harkins’ (2010)<sup>307</sup> research relied upon the term ‘corporate capture’. They focus on the political lobbying activities of the food and alcohol industries to dominate the information environment in order to significantly influence the decision-making process. Their breadth of capture extends beyond ‘communicative agency’ to embrace the capture of science, civil society and the media. However, this research does not deeply explore the contribution of established regulatory theory of capture.<sup>308</sup>

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<sup>303</sup> See for example Melissa Mialon, ‘An Overview of the Commercial Determinants of Health’ (2020) 16(1) *Globalization and Health* 74; Hacer Tanrikulu et al, ‘Corporate Political Activity of the Baby Food Industry: The Example of Nestle in the United States of America’ (2020) 15(1) *International Breastfeeding Journal* 22.

<sup>304</sup> Kevin Farnsworth and Chris Holden, ‘The Business-Social Policy Nexus: Corporate Power and Corporate Inputs into Social Policy’ (2006) 35(3) *Journal of Social Policy* 473–94.

<sup>305</sup> Ibid 473.

<sup>306</sup> Ibid 475.

<sup>307</sup> Miller and Harkins (n 6).

<sup>308</sup> Regulatory theory of capture.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Hawkins and Holden (2013)<sup>309</sup> provide a helpful contribution, the use of framing, to better analyse the actions and outcomes of competing stakeholders in the regulation of alcohol. Relying in part on earlier academic studies, they observe

Frames provide an ordering logic that renders issues comprehensible... Once on the agenda, the framing of that issue opens the way to certain policy responses, while precluding others; it identifies legitimate participants in policy debates and shapes coalitions of interests.<sup>310</sup>

The identification of competing frames adopted by the major stakeholders of the general type identified in Chapter 1 of this thesis is embodied in the second research question. Importantly, as both Hawkins and Holden<sup>311</sup> and Murphy and McGee observe,<sup>312</sup> it is from contestation between competing frames that law and policy emerge with the ultimate sanction of the state.

The articles contained within Chapter 4 examine and evidence a range of frames, most notably the dominant neoliberal frame that privileges the capitalist economic imperative of profits and growth over that of public health.<sup>313</sup> Other key frames of industry, with support from politicians, include evocation of the sacrosanct nature of the elites' 'bricks and mortar'<sup>314</sup> and targeting of associated 'unintended' changes to earlier compliance laws later represented as placing industry assets under threat as well as the creation and, most recently, revival of the notion that a 'fun' and 'vibrant'<sup>315</sup> 24-hour night-time economy is essential to business and society well-being.

Savell, Gilmore and Fooks' (2016)<sup>316</sup> systematic review of the political activity of the alcohol industry, associated with the marketing of alcohol, found such activity as being broader than

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<sup>309</sup> Benjamin Hawkins and Chris Holden, 'Framing the Alcohol Policy Debate: Industry Actors and the Regulation of the UK Beverage Alcohol Market' (2013) *Critical Policy Studies* 7(1) 53–71.

<sup>310</sup> Ibid 55.

<sup>311</sup> Ibid.

<sup>312</sup> Murphy and McGee (n 16) 307–9.

<sup>313</sup> One of the most explicit industry statements reinforcing this view can be found at n 217. See also the reported extractions of a speech by then Minister responsible for the regulation of alcohol at an AHA awards night promote the industry – Brown article 3 (n 47), Brown and Anderson article 4 (n 69) 19. From the framing theory literature Hawkins and Holden (n 309) suggest that the political actors articulate their frames in such a way to gain maximum support from politicians.

<sup>314</sup> Hemmes (n 568).

<sup>315</sup> In the 2020 Parliamentary debates involving the amendment Bill, the terms 'vibrancy' or 'vibrant' were relied upon around fifty-one times whilst 'fun' was used five times. It appears no populist NSW Parliamentarian wishes to be labelled a member of the 'fun police'. See Parliamentary debates in the NSW Legislative Assembly 23 September 2020.

<sup>316</sup> Emily Savell, Gary Fooks and Anna B Gilmore, 'How Does the Alcohol Industry Attempt to Influence Marketing Regulations? A Systematic Review' (2016) 111(1) *Addiction* 18–32.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

previously suggested. The research<sup>317</sup> identified five strategies and related industry tactics comprising the following: ‘information’, such as direct and indirect lobbying; ‘constituency building’, including media advocacy; ‘policy substitution’, including development and implementation; ‘legal’, including regulation development; and ‘financial incentive or disincentive’. The five frames or arguments mostly relied upon by the alcohol industry representatives included the redundancy of regulation; ‘legal’ arguments, alleging regulations contradicted laws and treatises; the likelihood of ‘negative unintended economic consequences’; references to its being a ‘complex policy area’; and ‘insufficient evidence’.<sup>318</sup>

Many of these same industry political activities are identifiable in the empirical evidence contained within Chapter 4 of this thesis. However, it appears that this categorisation of CPA tactics and arguments may not specifically account for the sustained embedded nature of the NSW alcohol lobby’s demonstrable authorship of key alcohol reforms over the last thirteen years since the commencement of the Act.

The systematic review concluded by finding similar political activities on the part of the tobacco and alcohol industries with only the former subjected to international restrictions such as the framework convention in tobacco controls (FCTC)<sup>319</sup> and the tobacco industry’s involvement in the policy-setting process.

Research by Hawkins and others<sup>320</sup> (2018) comparing global tobacco and alcohol policy paradigms identified similar market and political strategies, including funding of political campaigns<sup>321</sup> by the two industries that shaped policy outcomes and the regulatory environment.

Hernandez-Aguado and Chilet-Rosell’s research<sup>322</sup> (2017) involving semi-structured interviews of key public health actors in Spain found widespread evidence of both ‘hard’ and ‘soft’ levels of

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<sup>317</sup> Relying in part of the previous categorisation of political activity by Amy Hillman and Michael Hitt, ‘Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions’ (1999) 24(4) *Academy of Management Review* 825–42.

<sup>318</sup> Savell et al (n 316) 23.

<sup>319</sup> Jim McCambridge and Stephanie Morris, ‘Comparing Alcohol with Tobacco Indicates That It Is Time to Move Beyond Tobacco Exceptionalism’ (2019) 29(2) *European Journal of Public Health* 200–1.

<sup>320</sup> Hawkins et al (n 151) 1–19.

<sup>321</sup> Hawkins et al, *ibid*, 6.

<sup>322</sup> Hernández-Aguado and Chilet-Rosell (n 238) 154–9.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

undue influence by industry, which they recognised as forms of avoidable ‘policy including cultural<sup>323</sup> capture’ stretching to ‘corruption’.

McCambridge, Mialon and Hawkins’ (2018)<sup>324</sup> systematic review of alcohol industry involvement in policy-making concluded ‘Alcohol industry actors are highly strategic, rhetorically sophisticated and well organized in influencing national policymaking’.<sup>325</sup> They found that this was achieved through an exclusionary framing process that sidelined other narratives not consistent with dominant commercial interests and addressed threats to such commercial interests by establishing short but preferably longer term relationships with key decision-makers.

McCambridge, Mialon and Hawkins’<sup>326</sup> review categorised two forms of industry policy-influencing strategies which are pertinent to this research. They include ‘adopt[ing] multiple organisational forms’ and, ‘engag[ing] policy actors’ through various mechanisms, including sustaining long-term relationship building and provision of political donations.

Relying in part on the bibliography of McCambridge, Mialon and Hawkins’ research, Barlow and others (2022)<sup>327</sup> extend the analysis of alcohol industry influence on policymaking to the World Trade Organisation’s (WTO) Technical Barriers to Trade (TBT) committee meeting discussions concerning alcohol health warning labels. Their research divided the examples of industry political influence into two categories, policy positions and discursive strategies.<sup>328</sup> They found that the WTO TBT committee meetings were a key global forum subjected to direct and, particularly, indirect political influence. Industry arguments disrupting the adoption of evidence-based harm interventions were similar to those advanced in the domestic regulatory setting.

What Madureira and Galea (2018) found missing from the corporate influence research in the unhealthy industries referred to above was an overarching theoretical framework to ‘systematically study commercial interests as distal, structural, societal factors that cause disease and injury’.<sup>329</sup> In developing their comprehensive framework they incorporated Luke’s three

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<sup>323</sup> Kwak (n 195).

<sup>324</sup> McCambridge, Mialon and Hawkins (n 153).

<sup>325</sup> Ibid 1571.

<sup>326</sup> Ibid.

<sup>327</sup> Barlow et al (n 143).

<sup>328</sup> Ibid 3.

<sup>329</sup> Joana Madureira Lima and S Galea, ‘The Corporate Permeation Index—A Tool to Study the Macrosocial Determinants of Non-Communicable Disease’ (2019) 7 *SSM Population Health* 100361, 1–2.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

dimensions of power model. This comprises the first dimension of power, decision over the political agenda; the second, defining what is an issue; and the third, the power to avert or conceal observable conflict – a hegemonic process.<sup>330</sup>

Their framework subsequently relies upon five ‘vehicles of (commercial) power’ through which the dimensions of power are expressed. These range from the ‘political environment’, ‘preference shaping’ or frame making and ‘knowledge environment’ to the ‘legal’, including governance processes, and on to ‘extra-legal environments’. These vehicles of power can be further divided into constituent components of the ‘practices of power’, including, along with other mechanisms, the following, of particular relevance to this thesis: ‘political tactics: state and institutional capture’, donations and direct industry participation in government.<sup>331</sup> The combination of the ‘commercial practices of power’ impact on the ‘macrosocial’ determinants of health, risk factors and down to population health.

The quantifiable manifestation of the above theoretical framework was Madureira and Galea’s<sup>332</sup> (2019) development of the Corporate Permeation Index (CPI). They define ‘corporate permeation’ as a ‘capacity’ or,

‘the extent to which corporations penetrate all aspects of society, from macrosocial and political aspects such as corporate donations’ ... (to) for example encourage the consumption of unhealthy foods.<sup>333</sup>

The authors recognise ‘(t)his capacity often relies on collusion between both the private and the public sector’.<sup>334</sup> Continuing this broader theme, they conclude with an observation:

The CPI is a novel tool that captures country level dimensions of the interaction between corporations and the wider society that are neglected by popular measures of quid pro quo corruption, traditionally employed by the World Bank or by Transparency International, with a focus on the public sector.<sup>335</sup>

This thesis illustrates and emphasises the inherent sustained closeness between the industry elite and both sides of NSW Parliament. This is reflected in part by the development of the concept of connected conduct in the typology of capture between the regulator and the regulatee — the

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<sup>330</sup> Ibid 2.

<sup>331</sup> Ibid Fig. 1 Diagram of Dimensions, Vehicles, Practices and Outcomes of Power, 2–9.

<sup>332</sup> Lima and Galea (n 329).

<sup>333</sup> Ibid 1.

<sup>334</sup> Ibid 1.

<sup>335</sup> Ibid 10.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

legislature and the industry — as one essential element of the thesis’ capture test. Whilst Madureira and Galea, along with others, note the apparent association of collusion, in some instances, with CPA, there appears to be more of a focus in their work on the strategies and tactics of the industry than the reciprocal actions of political, that is, government, actors.

McCambridge, Mialon and Hawkins’ systematic review applied a similar conclusion<sup>336</sup> regarding the highly strategic tactics of industry. These tactics were similar to the efforts of the NSW alcohol lobby in securing the following pivotal legal amendments evidenced in Chapter 4 of the thesis. These included minimising the risk of community objections<sup>337</sup> against new license applications, crowding the objects of the Act with primarily commercial considerations, justifying greater industry compliance and ensuring enforcement leniency based on a narrow sample of alcohol harm indicators that excluded increasing rates of reported domestic violence<sup>338</sup> and, alcohol-related hospital admissions.

Ulucanlar and others<sup>339</sup> provide a pertinent analysis of industry’s reliance on a dystopian model of influence. This consists of scare tactics of images of impending and unqualified gloom and doom through loss of economic liberty and personal amenity, a form of political activity that was apparently originally deployed by the tobacco industry. This tactic was also successfully deployed by the NSW alcohol industry for an extended period in Sydney around 2018–19 to remove statutory controls in designated locations of high levels of alcohol-related non-domestic violence (articles 3 and 4).<sup>340</sup> The same tactic was also used in Newcastle NSW in the form of description of the 2008 adoption of a life-saving package of evidence-based licensing conditions, including earlier closing times, as ‘draconian conditions that would devastate Newcastle’.<sup>341</sup>

Research by Kypri and others<sup>342</sup> identifies key grooming strategies in the Australian alcohol, gambling and tobacco industries, where aspiring political leaders and potential ‘rainmakers’ who can generate substantial funding for the party, on both sides of the political divide, are targeted

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<sup>336</sup> McCambridge, Mialon and Hawkins (n 153).

<sup>337</sup> Brown article 1, 779—failure of transparency.

<sup>338</sup> Brown article 3 graph, 1050.

<sup>339</sup> Ulucanlar, Fooks and Gilmore (n 173).

<sup>340</sup> Brown article 3, 1065; Brown and Anderson article 4, 18, 20–1, 26–7.

<sup>341</sup> Michael Parris, “‘Absolute Lunacy’: Newcastle Police Chief Slams Push to End Lockouts”, *Newcastle Herald* (3 February 2021) <<https://www.newcastleherald.com.au/story/7109660/absolute-lunacy-newcastle-police-chief-slampush-to-end-lockouts/>>. Publicly expressed police concerns were subsequently, retracted.

<sup>342</sup> Kypri et al (n 209).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

for favoured treatment and political support. This dubious Australian political practice further exemplifies the industry's likely local-to-global key strategic investment in fortifying long-term relationships with law makers.

Research by Hoe and others (2022)<sup>343</sup> provides an interesting, slightly different, perspective on CPA in the tobacco, alcohol and sugar-sweetened beverage (SSB) industries to attain or retain corporate autonomy from the possibility or reality of regulatory controls having adverse impacts on their profits and growth. They rely on a definition of 'corporate autonomy' as the ability of a corporation to:

establish its internal and external decision rules, its freedom to act according to its own rules, and its power to sanction non-conformist behaviour in its sphere of influence ... it allows corporations the freedom to prioritize their interests at the expense of public interests, including public health.<sup>344</sup>

Of particular relevance to this thesis, in addition to the above reference to 'public interest', was the finding of 'policy capture' by Hoe and colleagues as one of several types of action influencing government lawmaking and implementation. These included examples of industry capturing one branch of government to create conflict between ministries and assisting governments with the drafting of legislation.<sup>345</sup>

Not all corporations seek autonomy from regulatory controls. This thesis suggests that deliberately designed ineffective laws authored by the industry can assist in shaping an ideological facade or perception of a highly regulated industry. In addition, Stigler<sup>346</sup> identified market failure (rent taking) by powerful commercial interests colluding with law makers to create barriers to entry to inhibit market competition.

Arguably, in one sense echoing back to Flyvbjerg's<sup>347</sup> conception of power adopted in this thesis, the ultimate form of corporation autonomy relied upon by Hoe et al<sup>348</sup> is not so much the freedom to set their own rules at the expense of the public interest but the power to define what *is* the public interest<sup>349</sup> and reality. This is dependent upon the support and assistance of subservient

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<sup>343</sup> Hoe (n 56).

<sup>344</sup> Ibid 2.

<sup>345</sup> Ibid 6.

<sup>346</sup> Stigler (n 192)

<sup>347</sup> Flyvbjerg (n 69).

<sup>348</sup> Hoe et al (n 56).

<sup>349</sup> Concept of public interest considered in chapter 2.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

democratically elected lawmakers at all levels of government, including international trade treatise negotiations.

The literature discussed above, relating to the continually evolving identification and establishment of a typology and analysis of the methods, actions and consequences of alcohol industry involvement in the regulatory process of alcohol industry CPA, is of substantial benefit. It is not, however, necessarily inconsistent with the approach adopted in this thesis that relies upon a legal phronetic methodology that incorporates the doctrinal approach and values, phronesis-based interpretation and validity-ensuring procedures<sup>350</sup> that are embodied in the research questions.

This thesis advances the argument that the sheer scale and magnitude of the systematic and intensifying pattern, discussed in this chapter, of industry's effective capture of the regulation of alcohol in NSW and the associated implications for public health, governance, the democratic process and the rule of law, warrant a new category of industry involvement in the above schema of the variety of forms of CPA in UCIs.

Based on the evidence assembled in this thesis, it may no longer be sufficient to describe industry involvement in the regulation of alcohol in NSW as the exertion of influence, undue influence or lobbying. The latest NSW alcohol law reforms critically examined in article 4, which impacted on the compliance and enforcement of the industry and reversed the evidence-based alcohol harm minimisation controls, by, for instance, increasing the availability of alcohol, appear to have been predominantly shaped and authored by the industry elite<sup>351</sup> to their commercial and personal benefit.

Arguably, there now exists in NSW a proxy form of alcohol industry self-regulation that hides behind the wall of the parliamentary process for legitimacy and integrity purposes.

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<sup>350</sup> Flyvbjerg (n 159, 130).

<sup>351</sup> See Farnsworth and Holden (n 304, 475). This includes an examination of elite theories: 'For elite theorists, business leaders and senior politicians occupy identical elite networks which reinforce social ties and privilege and, most importantly, serve to quell opposition to business (Scott, 1991, 137). Such networks develop, not only out of shared class positions, but the dependence of political parties on private finance which, in turn, buys access to senior politicians and often favourable policy outcomes for business. Corporate funding of other bodies, such as think-tanks and research institutes, is also important to shaping political debate' <<https://www.cambridge.org/core/terms>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The above exploration of CPA in, predominantly, the retail alcohol sector and, to a lesser extent, other unhealthy industries, has identified a diverse array of common industry tactics of influencing law makers and other areas of government and society. There appears, however, to be relatively little extension of such research to the more granular level of this thesis' critical analysis of the core elements of the capture process in a significant retail alcohol jurisdiction over a thirteen-year period. This includes evidence of a pattern of connected conduct between industry and government and the associated demonstrable deviation of outcomes from the public interest to those of vested commercial and political sectional interests.

### 2.4.2 Public Health-Related Literature

This thesis relies on alcohol-related medical scientific literature to serve the essential purpose of infusing the thesis with the scientific evidence relating to the magnitude and nature of alcohol-related harms and those interventions proven to minimise and prevent the same. The literature provides a de facto relative measure of the public good with respect to alcohol-harm prevention. As such, the inclusion and reference to summarised scientific evidence contributes a greater appreciation of the potential improvements or opportunities for best practice and cost savings that could be attained by the effective, impartial and objective regulation of the retail provision of alcohol in NSW, including industry compliance and enforcement. Evidence of the impact of acute and chronic harms arising from the supply and consumption of alcohol on the drinker and harm to others is given in Chapter 1 of the thesis.<sup>352</sup>

References and consideration of some independent peer-reviewed epidemiological studies and systematic reviews that establish the most effective measures to reduce alcohol-related harms can also be found in Chapter 1 and the articles contained in Chapter 4. These interventions relate to limiting the availability and supply of alcohol<sup>353</sup> via law and policy levers.

### 2.4.3 Broader Australian alcohol regulation-related research

Also contributing to the non-exhaustive body of Australian academic scholarship drawn upon in this thesis' overall research is Belinda Reeve,<sup>354</sup> who examined the regulation of alcohol advertising in Australia, which is based on a voluntary industry code of conduct. She found serious

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<sup>352</sup> 'Alcohol costs and benefits' are reproduced in Brown and Anderson article 4, 6–7.

<sup>353</sup> See WHO report to World Health Assembly May 2022 (n 40).

<sup>354</sup> Reeve (n 63).



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

deficiencies and omissions in the process of industry self-regulation. Her research draws upon a line of work characterising UCIs, including alcohol, as ‘vectors of the “industrial epidemic” of chronic disease due to their influence on unhealthy consumption patterns and public health policy’.<sup>355</sup>

Sandra Davoren, with Paula O’Brien,<sup>356</sup> Janani Muhunthan<sup>357</sup> and Claire Wilkinson,<sup>358</sup> amongst others, have also contributed to a better legal perspective on various aspects of alcohol regulation in Australia. Megan Cook and others<sup>359</sup> examined a range of alcohol-outlet approval cases in Australia to evaluate the level of reliance upon scientific evidence for alcohol-related harm.

Continuing the theme of the appropriateness of empowering the Australian alcohol lobby to contribute to alcohol harm reduction policy initiatives, Julia Stafford et al research found:

[approximately] (91%) of industry submissions denied the effectiveness of evidence-based strategies; the most common denial practices were making unsubstantiated claims about adverse effects of policies (76%) and promoting alternatives without evidence (71%). The misuse of scientific evidence was apparent in 66% of submissions. Trade associations, producers, and retailers were most likely to use such practices.<sup>360</sup>

### 2.5 Power framework and its legitimate use in modern western political thought

Levi Faur acknowledges ‘regulatory processes condition the operation, manipulation and deployment of political, social and economic power’.<sup>361</sup>

The phronetic method of social inquiry, which combines with the legal doctrinal method to form the blended legal phronetic methodology adopted in this thesis, places power, especially concealed power, at the core of its analysis. Power is also embodied in the research questions that particularly focus on the praxis and minutiae of the alcohol regulatory process in NSW.

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<sup>355</sup> Ibid 101.

<sup>356</sup> Sandra Davoren and Paula O’Brien, ‘Regulating to Reduce Alcohol-Related Harm: Liquor Licensing and the Harm Minimisation Test’ in Elizabeth Manton, Robin Room, Caterina Giorgi, Michael Thorn (eds), *Stemming the Tide of Alcohol: Liquor Licensing and the Public Interest* (Foundation for Alcohol Research and Education in collaboration with the University of Melbourne, 2014).

<sup>357</sup> Muhunthan (n 297).

<sup>358</sup> Claire Wilkinson et al, ‘Barriers to Addressing Alcohol-Related Harm Through Planning and Licensing Systems: A Case Study from Victoria, Australia’ (2020) 39(7) *Drug and Alcohol Review* 781–4.

<sup>359</sup> Megan Cook et al, ‘Alcohol Industry vs. Public Health Presentations at Judicial Reviews of Liquor Licence Applications in Australia’ (2020) *International Journal of Drug Policy* 82.

<sup>360</sup> Julia Stafford, Kypros Kypri and Simone Pettigrew, ‘Industry Actor Use of Research Evidence: Critical Analysis of Australian Alcohol Policy Submissions’ (2020) 81(6) *Journal of Studies on Alcohol and Drugs* 710–8.

<sup>361</sup> Levi-Faur (n 249) 289.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The capacity of private vested interests to exert undue influence on legislators, their subordinate agencies, or both, relates to their power relative to competing stakeholders. The critical analysis of power in the praxis of the regulation of the suppliers of alcohol in NSW is central to this thesis. The different dimensions and origins of power require some theoretical consideration.

The previous summation of the alcohol-related CPA literature in this chapter touched upon some evolving research that incorporates theoretical issues of power.

Flyvbjerg<sup>362</sup> also charts the more contemporary traditions of power theory in the social and political sciences. These comprise the ‘community power’ theories, including those of Dahl and Hunter; the ‘two faces of power’ and, the ‘nondecision’ and elitist theories of Bachrach and Baratz; the three dimensions of power by Lukes; and, finally, the Marxist power theory of Poulantzas.<sup>363</sup>

Hay<sup>364</sup> reviews Dahl, Bachrach and Baratz, and Lukes’ contributions, from the simplest single face or dimension of power<sup>365</sup> to the three dimensions of Lukes’ conception of power; the last theory appears to be the most commonly adopted in the CPA research cited above and below.<sup>366</sup> Of particular relevance to this research was Bachrach and Baratz’s contribution of emphasising non-decision-making (hidden) power, a reference to ‘the practice of limiting the scope of actual decision-making to “safe” issues by manipulating the dominant community values, myths, and political institutions and procedures’.<sup>367</sup>

Increasingly, academic journal articles examining the influence of UCIs on the governing process are considering the definition, possession, and application of power. Jennifer Lacy-Nichols and Robert Marten<sup>368</sup> provide a helpful precis of power within the commercial determinants of health and reference other valuable sources. They rely in part upon Lukes’ typology of three faces of

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<sup>362</sup> Flyvbjerg (n 159), 116.

<sup>363</sup> Ibid.

<sup>364</sup> Colin Hay, ‘State of the Art: Divided by a Common Language: Political Theory and the Concept of Power’ (1997) 17(1) *Politics* 45–52.

<sup>365</sup> Robert A Dahl, ‘The Concept of Power’ (1957) *Behavioural Science* 2, 201–15.

<sup>366</sup> See alcohol orientated CPA ‘power’ research 64–78.

<sup>367</sup> Bachrach and Baratz (n 9).

<sup>368</sup> Jennifer Lacy-Nichols and Robert Marten, ‘Power and the Commercial Determinants of Health: Ideas for a Research Agenda’ (2021) 6(2) *British Medical Journal Global Health* e003850. See also Patrick Harris et al, ‘A Glossary of Theories for Understanding Power and Policy for Health Equity’ (2020) 74(6) *Journal Epidemiology Community Health* 548–52.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

power.<sup>369</sup> Benjamin Wood and others<sup>370</sup> ambitiously advance the application of various frameworks and theories of power, especially those of Foucault, Lukes and Fuchs<sup>371</sup> when considering the critical question of the nature, form and extent of corporate influence.

Lacy-Nichols and Marten observe

‘with few exceptions, power has been overlooked in conceptualisations of the commercial determinants of health (CDoH), yet attention to and analysis of power are crucial to future research and advocacy efforts ... A power lens offers insights into the sources and consequences of corporate actors’ market and political influence, as well as illuminates opportunities to challenge or diminish this power<sup>372</sup>

In a subsequent article, de Lacy, Vandenberg and Livingstone<sup>373</sup> identify Fuchs’s<sup>374</sup> three categories of business’s political power as the most applicable to CDoH. These include instrumental- or political-type influences; structural power, for example, agenda setting; and discursive influences, including the shaping of values and norms. All three categories are immediately applicable to the manifestations of capture reflected in this thesis’ research.

Of further interest are Fuchs’s<sup>375</sup> earlier observations and warnings that the greater the size, reach and intrusion of transnational corporations (TNCs) into the traditional public space by mechanisms such as self-regulation and public private partnerships (PPP) the greater the risk of corporate political legitimacy being undermined by, for example, corporate scandals and exposure of illegal acts. More recently exposed corporate criminality in the Australian banking-financial industry and

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<sup>369</sup> See Lucy Reynolds, ‘Not Up for Discussion: Applying Lukes’ Power Model to the Study of Health System Corruption; Comment on “We Need to Talk About Corruption in Health Systems” (2019) 8(12) *International Journal of Health Policy and Management* 723–6.

<sup>370</sup> Benjamin Wood, Phillip Baker and Gary Sacks, ‘Conceptualising the Commercial Determinants of Health Using a Power Lens: A Review and Synthesis of Existing Frameworks’ (2021) *International Journal of Health Policy and Management* 1–11 <<https://doi.org/10.34172/ijhpm.2021.05>>. Their power model included an updated version of Fuchs’s model that rationalised ‘material’ and ideational sources of power. See Doris Fuchs and Katharina Glaab, *Material Power or Normative Conflict: Determinants of the Interaction Between Global and Local Agrifood Governance* (Social Science Open Access Repository, 2010).

<sup>371</sup> Doris Fuchs, ‘Commanding Heights? The Strength and Fragility of Business Power in Global Politics’ (2005) 33(3) *Millennium* 771–801.

<sup>372</sup> Lacy-Nichols and Marten (n 368).

<sup>373</sup> de Lacy-Vawdon, Vandenberg and Livingstone (n 148).

<sup>374</sup> Fuchs (n 371).

<sup>375</sup> Ibid 773, 795, 800.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

large casinos suggests that some corporations may be too large, wealthy and politically connected to be allowed to fail.<sup>376</sup>

Whilst Foucault and Lukes' concepts of power are gaining greater prominence in this public health-related literature, they require some critical consideration.<sup>377</sup> Flyvbjerg notes an important distinction in the concepts of power between Foucault and Lukes.<sup>378</sup> Foucault focuses on power as force — a series of ubiquitous, dynamic, and nuanced relationships extending beyond the issue of the possession, locus or institutionalisation of power. On the other hand, Lukes' concept of power, according to Flyvbjerg, is one of power as an entity. Foucault, according to Flyvbjerg,<sup>379</sup> turns away from theories of power and rigid methodologies to favour the analytics of power and rejects the conventional view of power as negative, top-down, visible, dominating and creating obedience. Foucault observes, 'power is the process, via struggles and confrontations transforms, supports or reverses these force relations'.<sup>380</sup>

Hindess<sup>381</sup> makes a substantial contribution to the discussion of power in the context of modern western political thought. He extracts from Locke's social contract theory two core conceptions of power: power as a quantitative force, also known as a 'capacity' to assert one's aims individually or collectively over another, and sovereign power as a 'right' that requires the consent of subjects and in doing so adds a sense of 'legitimate' power — exercised for the overall good of the commonwealth.<sup>382</sup> A notional contract or covenant exists between the sovereign or government and the people, which is predicated on consent. The polity is represented as a community of rational, autonomous individuals possessed of inalienable rights and endowed with a faculty of reason.

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<sup>376</sup> Australian examples of serious corporate non-compliance were identified in the 2019 Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and, the ongoing Inquiries into the unlawful operations of the Crown and Star casinos; See Snider (n 80).

<sup>377</sup> See Hay's critique of Luke's theory (n 364).

<sup>378</sup> Flyvbjerg (n 159, 116–21).

<sup>379</sup> Flyvbjerg suggests that Foucault 'explicitly distances himself from the traditional focus of power thinking on "theories" of power' (n 159, 119).

<sup>380</sup> Foucault, *History of Sexuality*, vol 1, 92.

<sup>381</sup> Hindess recognises that 'far from being idiosyncratic, the treatment of power as resting on consent has played a central part in Western political thought throughout the modern period' (n 146) 12.

<sup>382</sup> Based on the Lockean use of 'Common-wealth'—a political community formed for the common good. See Hindess (n 146, 48) regarding Locke's definition of political power '...only for the Publick Good'.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Hindess also identifies a third manifestation of power. Locke's notion of the independent free will of equal individuals becoming malleable opens the space for subsequent critical theorists<sup>383</sup> to describe an 'illegitimate and insidious' manipulative power adversely impacting the citizens' thinking and capacity to provide informed consent to the way they are governed.<sup>384</sup> Foucault, in contrast, rejects the dominance of power vested in a sovereign and provides a complex alternative whereby less visible power circulates through networks to embrace 'strategic games between liberties', the states of 'domination' and 'government technologies'.<sup>385</sup> Power is diffuse and operates at the micro-level through techniques and devices including discipline, the discursive order and authority. Foucault suggests power can also possess a productive and creative capacity.

Hindess provides a detailed analysis of Foucault's and Lukes' conceptions of power, tracing their and other views of power antecedents back to Marx, Locke and Hobbes. Some of the elements of these theories of power are reflected in the emerging public health-related literature on CPA. Arguably, scholars in this field could consider Hindess' emphasis on the legitimate characterisation of sovereign power depending upon the genuine informed consent of the citizens.<sup>386</sup>

### Recap

This thesis argues that the retail supply of alcohol in NSW since the commencement of the current package of alcohol laws in 2008 is the subject of sustained and intensifying industry capture.

Chapter 1 identifies the main objectives of the thesis. It contextualises the issue of capture in a historical and legal background and identifies the key stakeholders. It then provides an essential and concise contemporary perspective of the benefits and harms associated with the supply and consumption of alcohol, including the magnitude of industry political donations. This chapter identifies the regulatory/legal architecture and associated inventory of legal mechanisms and processes available to the NSW Government to address alcohol-related harms and industry compliance. The dual edge of the same architecture and rules also provides the alcohol lobby with opportunities and avenues of influence and advancement. The scale and diversity of the direct

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<sup>383</sup> See Hindess's analysis of critical theories of power including Steven Lukes (n 88) and Antonio Gramsci's discussion of bourgeois hegemony. Hindess (n 146) ch 4, and 5–6, 81.

<sup>384</sup> Hindess (n 146, 140).

<sup>385</sup> Ibid 100. Michel Foucault, *Power/Knowledge*, Colin Gordon (ed) (Harvester Press, 1980).

<sup>386</sup> Alemanno stresses the importance of ensuring accountability and inclusiveness in the government decision-making process. Alberto Alemanno, 'Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy' (2014) 39(1) *European Law Review* 72–90.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

and indirect harms and their primary preventability support the case for their urgent, sustained, and systemic remediation.

Chapter 2 contributes a condensed literature review. The review is segmented into regulatory theory, an account of the public health approach and a framework of approaches to power. The review provides the opportunity to expand upon the central concepts of governance, capture, corruption and CPA as well as identifying their connections. A test for capture was synthesised from the fertile blend of academic literature and subsequently applied to a succession of key amendments to the NSW alcohol laws associated with different aspects of the regulatory process. The results of these case studies are contained within the articles in Chapter 4. The accent of this developmental research process is on praxis as a means to ultimately derive effective law and institutional reforms to address the problems of industry capture and the failure of traditional governance controls. Such reforms must reflect the realpolitik and the more hidden faces of power.

Chapter 3 establishes the 'Framework for Research' that includes the methodology and methods in undertaking the research.

Chapter 4 consists of four articles and forms the basis of the empirical research evidence.

Chapter 5 gives the conclusion, which includes the exegesis and reform proposals and draws upon the interconnected body of empirical research found primarily in Chapter 4.

## CHAPTER 3: FRAMEWORK FOR RESEARCH

This chapter provides the crucial framework of the research.

Creswell and Creswell<sup>387</sup> provide a valuable approach to research design and implementation, presenting an intersecting framework for selecting alternative or combined approaches to the philosophical world view and choices of research approaches, designs and methods.<sup>388</sup>

This thesis includes a blended methodology and evidence bases consisting in part of scientific evidence relating to alcohol harms and interventions established to be effective in preventing and reducing the same, critical legal analysis of the contested narrative of successive significant alcohol law reforms and related governance/public integrity considerations. As such, varying components of all four ‘philosophical world views’ — advocacy/participatory, pragmatism, constructivism and post-positivism — can be identified within this thesis.<sup>389</sup>

Arguably, the most overt philosophical view reflected in the thesis is the ‘advocacy/participatory’ view closely followed by ‘pragmatism’. Creswell and Creswell identify the chief characteristics of the advocacy/participatory view as ‘transformative’; that is, it constitutes a ‘reformist’ approach, ‘political, power and justice orientated, collaborative and change orientated’.<sup>390</sup> They associate the pragmatic approach as ‘consequences of actions, problem-orientated, pluralistic and real work practice orientated’.<sup>391</sup>

Components of ‘constructivism’<sup>392</sup> are also evident in this thesis, especially in the development and synthesis of contextualised regulatory theory and related instruments. This approach contributes to the explanation, identification, and adaptation of the emergence of the phenomenon of regulatory capture, leniency, and chill, progressively developed and articulated in the articles in Chapter 4.

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<sup>387</sup> John Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 2017).

<sup>388</sup> Ibid, figure 1.1, 5.

<sup>389</sup> Ibid, 6.

<sup>390</sup> Ibid 9.

<sup>391</sup> Ibid, 10.

<sup>392</sup> Ibid 7.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Finally, ‘post-positivism’<sup>393</sup> is evident in article 1 that, in part, represents an important guiding philosophical foundation stone for subsequent critical research and publications revolving around the ‘subsonic drumbeat’ of regulatory capitalism<sup>394</sup> and its variant neoliberalism.<sup>395</sup> It is also reflected in the reliance on several published articles of epidemiological public health quantitative evidence reflecting the range and scale of primarily preventable alcohol-related harms. Notably, it also identifies those public health-related interventions independently established as proving the most effective in preventing and reducing alcohol-related harms. In contrast are the many value-laden normative considerations throughout the research, including defining and applying the ‘public good or interest’, ‘undue’ industry influence, ‘conflicts’ of interest and even ‘corruption’.

Creswell and Creswell find:

Pragmatism is not committed to any one system of philosophy or reality...[it] opens the door to multiple methods, different worldviews, different assumptions [and] different forms of data collection and analysis.<sup>396</sup>

The research framework of this blended thesis can be summarised as a mixed-methods qualitative approach relying primarily on a novel legal phronetic methodology blending doctrinal and phronesis approaches consistent with a pragmatic and transformative philosophical worldview.

### 3.1 Methodology

The definition, application and rationalisation of power are core considerations of this thesis, which uses phronetic research methodology. The thesis relies upon a new phronetic legal research methodology developed by Murphy and McGee<sup>397</sup>. It constitutes a blend of the more traditional legal doctrinal methodology and Flyvbjerg’s<sup>398</sup> ‘phronetic social inquiry’ process.

Hutchinson defines doctrinal research as providing

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<sup>393</sup> Ibid 6.

<sup>394</sup> Brown article 1, 768 with acknowledgement of David Levi-Faur’s concept of regulatory capitalism (n 63).

<sup>395</sup> See Schram’s summation of key features of neoliberalism in Brown article 1 (n 28) and Monbeil’s description referenced in Brown article 4 (n 17).

<sup>396</sup> Creswell and Creswell (n 387) 10–1.

<sup>397</sup> Murphy and McGee (n 16). Flyvbjerg summarised phronetic social science as ‘an approach to the study of social phenomena based upon a contemporary interpretation of the classical Greek concept phronesis which means practical judgment, practical wisdom, common sense or prudence’. LinkedIn 25 May 2016.

<sup>398</sup> Flyvbjerg (n 160) Rationality and Power Democracy in Practice.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

[A] systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.<sup>399</sup>

Doctrinal research is the starting point of most of the published articles contained in this thesis. Each involves the examination and exposition of different legal aspects of the NSW alcohol supply regulatory chain. These aspects include the evolution of a second layer of industry disciplinary statutory schemes, initially in response to high levels of alcohol-related non-domestic violence, the move toward less reliance upon the rational process of social impact assessments such as the 2015 'Fit for Purpose' amendments to the Act and related laws and, discussed in the final article, concentration on legal amendments introducing a novel statutory 'incentivised' industry compliance and enforcement regime in January 2021.

However, Hutchinson also acknowledges the constrictive nature of a purely doctrinal approach to legal research and encourages a more eclectic adoption of additional multidisciplinary methodologies and sources of evidence to enhance reformist opportunities.<sup>400</sup> The inadequacy of reliance upon the doctrinal approach alone in respect of this thesis is self-evident. The doctrine, by itself, fails to address critical issues of the location, application and the apparatus of real power.

Murphy and McGee contribute to filling this methodological gap in legal research. They contend:

Phronetic social inquiry involves a case-based, in-depth analytic applied to specific problems, which is sensitive to value choices and power relationships, and directed to finding pragmatic solutions<sup>401</sup>.

Flyvbjerg identifies the phronetic research method drawn from the third Aristotelian intellectual virtue or knowledge, *phronesis*, which is variously identified with prudence, ethics, common sense and qualities related to praxis —qualities that value rationality.<sup>402</sup>

Phronetic knowledge provides a moral or ethical framework to align epistemic knowledge, including public health information relied upon in the published articles, with the normative considerations of what may be reasonably regarded as just, right or both.<sup>403</sup>

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<sup>399</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co., 4th ed, 2018) 7.

<sup>400</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review* 130.

<sup>401</sup> Murphy and McGee (n 16) 288.

<sup>402</sup> Bent Flyvbjerg (n 160) 283–306.

<sup>403</sup> Murphy and McGee (n 16) 302.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Flyvbjerg prefers a 'strategies and tactics'<sup>404</sup> approach to the analysis of power, which resonates with the purpose of this thesis. He observes in his study of the planning process in the Danish city of Aalborg, 'Power... is a dense and dynamic net of omnipresent relations...'.<sup>405</sup> His methodology focuses on the 'less visible' – what is occurring 'back stage',<sup>406</sup> the everyday, ordinary and different, the 'modus operandi of power' and the distinction between formal politics and the *Realpolitik*.<sup>407</sup>

Flyvbjerg's micro-analysis of power, which draws upon Machiavelli, Nietzsche and Foucault, enabled him to conclude in his study that those public organisations vested with protecting the public interest were 'deeply embedded in the hidden exercise of power and the protection of special interests'.<sup>408</sup>

Flyvbjerg's phronetic research methodology asks four basic questions:

1. Where are we going?
2. Who gains, who loses and by which mechanism of power?
3. Is the outcome desirable?
4. What, if anything, should we do about it?

Murphy and McGee contextualise the above four fundamental inquiries within an environmental law scholarship to illustrate how a legal phronetic approach can:

excavate beneath the surface of doctrinal descriptions of the law to show how various actors ... use discourse to shape and change doctrinal rules and the institutions in which they are embodied.<sup>409</sup>

A key research consideration in this thesis is the capacity and mechanism of stakeholders directly or indirectly involved in the contest to influence or dominate the discourse<sup>410</sup> leading to the changes in the law and institutions. The final normative question above (4) is consistent with the

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<sup>404</sup> Flyvbjerg (n 69) 5.

<sup>405</sup> Ibid 6.

<sup>406</sup> Ibid 98. See also Brown article 1, 769.

<sup>407</sup> Ibid 6.

<sup>408</sup> Ibid 225. This suggested inverse relationship or 'mismatch' between visible seriousness of undue influence or corruption and the amount of public discourse was considered by Lucy Reynolds (n 369). See Flyvbjerg's comparison between Lukes' and Foucault conceptions of power (n 159) 116.

<sup>409</sup> Murphy and McGee (n 16) 308.

<sup>410</sup> Kwak (n 195) identifies a process of cultural capture. The editors' introduction to the book describe cultural capture as 'difficult to prove but 'increasingly relevant'. It involves mechanisms 'shaping assumptions, lenses and vocabularies' (20). See also Supran and Oreskes' exposition of the fossil fuel industry's use of rhetoric and language like the tactics of the tobacco industry to shape public discourse. Supran and Oreskes (n 195).

social inquiry approach outlined by Murphy and McGee<sup>411</sup> and adopted in this thesis. It also reflects the transformative philosophical view of the research framework adopted in this thesis.

### 3.2 Method

Flyvbjerg is critical of traditional sociology's alleged disdain of the use of case studies and the doubt associated with their reliability.<sup>412</sup> Murphy and McGee endorse Flyvbjerg's reliance on immersive case studies as a primary method or vehicle for research.

Flyvbjerg argues that because human expertise requires immersion in context in order to free itself from the limits of context-independent rules, the case study (or small number of case studies) is the location where social inquiry excels. The presence of a body of 'case exemplars' provides the foundations from which a host of ideas and knowledge systems about a range of behaviours and contexts may be inferred and tested<sup>413</sup>

Murphy and McGee advise that the first step in this phronetic method involves a purposive selection of a critical case(s). The second step requires the researcher's immersion in contextual and source materials as close to the sources as possible. These steps are naturally constrained by access to private and public information and the state of the prevailing governance environment. The next step requires almost forensic scrutiny of the roles and practices of the participants and institutions with particular attention to the values and exercise of power or influence disclosed by a contested discourse analysis. This evaluation may require distinct passages of the narrative contained within the research product. Considering both the minutiae and the bigger picture is essential to effectively answering the research question and related considerations identified in Chapter 1.

Critical analysis of the contested discourse is a crucial research method deployed in the legal phronetic methodology and this thesis. A core component of this process is the explication of a two-way relationship between knowledge and power and similar linkages between rationalisation (legitimation) and power.

One of the privileges of power, and an integral part of its rationality, is the freedom to define reality. The greater the power, the greater the freedom in this respect, and the less need for power to understand how reality is constructed. The absence of rational argument and factual documentation in support of certain actions may be just as important indicators of power as the

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<sup>411</sup> Murphy and McGee (n 16).

<sup>412</sup> Flyvbjerg (n 159) ch 6 'The power of example'.

<sup>413</sup> Murphy and McGee (n 16) 305.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

arguments and documents produced. A party's unwillingness to present rational argument or documentation may quite simply indicate the freedom to define reality.<sup>414</sup>

Each of the five following published articles in Chapter 4 embodies distinct but inter-related case studies that provide a coherent and consistent approach to unpacking and attempting to answer the research questions. Each article also reveals specific government and industry rationalisation and legitimisation within the discourse for the adoption and application of changes to statutory schemes and processes. In some cases, the reforms are inconsistent with the body of independent scientific evidence relating to sustained alcohol harm prevention and reduction.<sup>415</sup> Some of the same reforms have excluded any effective CSO input. The results of each of the critical case studies, on a successive basis, brings into sharper relief and question the capacity, neutrality and motive of the state and its institutions in balancing the interests of competing stakeholders in the overall public interest of the commonwealth.

### Recap

In summary, this thesis explicates the regulation of the retail supply of alcohol in NSW through a lens of industry or regulatory capture. Chapter 1 provides the introduction and background, identifies the key stakeholders, provides a perspective on the benefits and costs of the supply and consumption of alcohol and identifies the research questions. Chapter 2 provides a multidisciplinary literature review complemented by subsequent consideration of the literature and key governance related terms, including corruption, contained within the thesis. This chapter provides the essential framework for research, commencing with a 'philosophical world view' approach. This thesis represents a blend of all such approaches. The dominant approaches are the 'pragmatism' and the 'reformist' approaches. The methodology adopted for the thesis is consistent with the overall philosophical approach. The legal phronetic approach consists of a blend of traditional legal doctrinal approaches complemented by the phronetic method of social inquiry. This combination provides the vital capacity to address issues of power imbalances, the fundamental nature or faces of power and respond to normative considerations regarding the desirability of the research outcomes.

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<sup>414</sup> Flyvbjerg (n 69) 37. Reproduced Brown article 1, 778; Brown and Anderson article 4, 30–1.

<sup>415</sup> Thesis (nn 40–41). See also Brown and Anderson article 4 explicating the IISS. It establishes an inconsistency between the promulgated legal reforms and practices and, the regulatory literature that identifies the more effective interventions to secure ongoing industry compliance.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The research data are derived from primary and secondary sources, including parliamentary debates, media reports, reports and submissions from various stakeholders and multidisciplinary academic literature. This material is scrutinised to discern any consistent and dominating themes. A limited amount of quantitative data is included in these articles.

Consistent with the phronetic social inquiry method, the thesis relies in part on case studies of a variety of NSW alcohol law reforms impacting a range of different regulatory functions. These case studies critically analyse the legislative reforms, their antecedents, rationale, effectiveness and outcomes from multiple stakeholder perspectives. These case studies are transformed into academic journal articles and a peer-reviewed conference paper presented in Chapter 4.

Chapter 5 presents the research results and includes the exegesis, responses to the research questions, the original academic contributions, proposed legal and other reforms and a concluding commentary.

## CHAPTER 4: THESIS ARTICLES

This chapter reproduces the academic articles and conference paper that form the basis of the empirical evidence to substantiate the form, nature, and extent of the industry's capture of the retail supply of alcohol in NSW.

Preceding each article is an 'overview' identifying the article's contribution to the thesis' exegesis that includes its relationship with the other articles.

The relevant copyright authorisation can be found after each article (ie, articles 1, 2, and 3).

## 4.1 Article 1

Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health (2019) 26/4 JLM 2019 764–785.

**AUTHOR:** Tony Brown.

**CITATIONS:** Melissa Mialon, ‘An overview of the commercial determinants of health.’ (2020) 16(1) *Globalization and Health* 74.

Benjamin Wood et al, ‘Conceptualising the Commercial Determinants of Health Using a Power Lens: A Review and Synthesis of Existing Frameworks’ (2021) *International Journal of Health Policy and Management* 17(1).

McHardy, Juliette, ‘The WHO FCTC’s lessons for addressing the commercial determinants of health’ (2021) 36(Supplement\_1) *Health Promotion International* i39-i52.

Wood, Benjamin et al, ‘Maximising the wealth of few at the expense of the health of many: a public health analysis of market power and corporate wealth and income distribution in the global soft drink market’ (2021) 17(1) *Globalization and Health* 138

de Lacy-Vawdon, Cassandra, Brian Vandenberg and Charles Henry Livingstone, ‘Recognising the elephant in the room: the commercial determinants of health’ (2022) 7(2) *BMJ Global Health* e007156

### OVERVIEW:

#### 4.1.1 Contribution towards the exegesis

The primary focus of the first article is the explication of the November 2015 ‘fit for purpose’ amendments to the NSW liquor laws, especially the *Gambling and Liquor Administration Act 2007* (NSW). This Act determines the important legal relationships and divisions between the Executive arm of government and ILGA. Its amendment resulted in greater influence of the Executive over the ‘independent’ quasi-legal tribunal. More subtle changes also occurred to the package of NSW alcohol laws, which significantly curtailed the capacity of the community, in comparison with that of industry stakeholders, to object to, and appeal on the merits of, a range of decisions by ILGA, including higher risk liquor licence applications and subsequent variations.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The article critically analyses the under-researched association between a state's authorship and application of a package of commercial retail alcohol supply laws and the real potential for the regulatory process to be effectively captured or, arguably, 'bought' by the regulatee. This imports the concept of some mutually beneficial extrinsic or intrinsic exchange over time between the regulator and the regulatee — referred to in this thesis as 'connected conduct'.<sup>416</sup> The regulatory process includes the development, application, enforcement and interpretation of these laws and practices. Their subordination to private commercial interests is likely to have a detrimental impact on public health outcomes, the rule of law, the underpinning democratic process, and the public interest.<sup>417</sup>

It becomes apparent that each successive asymmetrical amendment to the State's alcohol laws explicated in this thesis has its own narratives justifying and legitimising the changes. The catchcry for the November 2015 amendments to the package of NSW alcohol supply laws was the necessity to ensure the legislative system was 'fit for purpose' — a common but relatively meaningless description inconsistent with the actual outcomes. Unlike more recent critical amendments to the NSW alcohol laws critically analysed in the following articles, the public and CSOs were excluded from any real input into the legislative amendments under the false assertion that the law changes had 'no policy implications'.<sup>418</sup>

Finally, this published article contains within its Appendix a detailed summary of media and other reports that identify a demonstrable pattern of sustained undue influence and potentially unlawful relationships,<sup>419</sup> corrupt relationships, or both<sup>420</sup> between some industry stakeholders, on one hand, and public officials or political parties or both on the other.

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<sup>416</sup> Brown, article 3, 1068 -71.

<sup>417</sup> Brown article 1 (n 11). See also Brown article 3, 1071-3.

<sup>418</sup> Brown article 1 (n 116). The public's inclusion in a consultative process does not imply they are afforded any genuine involvement or, their proposals are given any weight relative to those of the alcohol industry elite.

<sup>419</sup> See Brown article 1, Appendix 782-5 including reported admission by a senior NSW political official accepting prohibited political donations from the NSW alcohol industry, 782. Some of the examples of capture and connected conduct reflected in the media articles include revolving doors between senior government officials and senior positions within the alcohol industry and, industry favours to a retired Minister responsible for the regulation of alcohol and gambling.

<sup>420</sup> The issue of corruption within the context of the alcohol supply regulatory process is analysed in chapter 2 of the thesis, Brown article 3, 1072-3 and, Brown and Anderson article 4, 4 (n 56).



#### 4.1.2 Relationship with other articles

This first published article establishes the essential methodological and research foundations and trajectory of the author's subsequent scholarly articles relied upon in this thesis. A common thread binding each of the articles is the explication of different components and factors impacting the alcohol regulatory chain to identify and critically analyse the potential reach and manifestations of industry capture.

The commencing article recognises a neoliberal ideological frame<sup>421</sup> and its associated discourse as underpinning the ongoing critical asymmetrical changes to the NSW alcohol regulatory framework. The changes consistently favour the commercial interests of alcohol industry elites to the arguable detriment of the public interest. The first article reveals how the longstanding concept and usual legal requirements and constitutional safeguards relating to sustaining the public interest has been undermined, captured and corporatised into the goal of 'customer convenience'<sup>422</sup> — which functions as a euphemism for industry profits.

This article introduces the legal phronetic methodology based on Flyvbjerg's<sup>423</sup> phronetic approach to social inquiry. He found that the most powerful can define reality and, in doing so, create their own legitimisation or rationality for the process and outcomes of the decision-making process. The legitimising narrative for changes to NSW alcohol laws includes the role of government and agencies in 'balancing the interests of stakeholders', reforming alcohol laws to ensure that they are 'fit for purpose' and prioritising the convenience of alcohol consumers, all behind a mask of government neutrality. This mask aims to disguise or conceal the real exercise of power associated with the connected conduct between the government and industry. Flyvbjerg posits that the greater the power disparity, the less likely the need to rely upon rationality.<sup>424</sup> This power disparity, in the context of the NSW regulation of the supply of alcohol, is established in this article.

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<sup>421</sup> Brown article 1 (n 22).

<sup>422</sup> Brown article 1 775-7.

<sup>423</sup> Murphy and McGee (n 16).

<sup>424</sup> Flyvbjerg (n 69) 2, 36-7.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The first article introduces and develops relevant aspects of regulatory theory to synthesise an embryonic multi-dimensional regulatory capture test.<sup>425</sup> This is modified and contextualised in subsequent case studies of other ongoing critical asymmetrical changes or 'reforms' to the State's evolving package of alcohol supply laws and regulatory schemes.

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425

### 4.1.3 Copy of Article 1

## Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

Tony Brown\*

*Contemporary public health literature contains an increasing emphasis on the commercial determinants of health including the influence of unhealthy food, beverage and tobacco industries on government harm prevention policy agendas and global sustainable development goals. Effective capture by the industries of the crucial legislative process associated with the harm prevention initiatives would have a detrimental impact on public health. This article proposes a qualitative multi-spectrum prototype legislative capture test with broad application to a range of industries and jurisdictions at all levels of government where legislative capture may be suspected. It is predicated on a finding of significant encroachment of the public interest (PI) by special interest groups and reciprocating beneficial conduct between the lawmakers and the group. The test is populated from a critical case study of key New South Wales (NSW) alcohol industry statutory amendments within a doctrinal and social inquiry/power framework. It relies upon parliamentary records and secondary data to analyse critically the 2015 “fit for purpose” (FFP) reforms to NSW alcohol supply laws and their consistency with the PI and other constitutional safeguards. It aligns the reforms with other research relating to the magnitude of alcohol and gambling industry political donations and the operation of the alcohol outlet post reform approval process. The application of the test to the case study finds that the 2015 FFP amendments are indicative of legislative capture and associated clientele corruption – critical new considerations in the commercial determination of health. It also identifies the commodification of the PI.*

**Keywords:** commercial determinants of health; legislative capture; clientele corruption; public interest; separation of powers; neoliberalism; alcohol

### I. INTRODUCTION

According to the Australian Burden of Disease Study, “Excessive alcohol consumption is the leading contributor to the burden of illness and deaths in Australia for people aged up to 44 years”.<sup>1</sup> It is estimated that on average there are four deaths, 40 Emergency Department admissions and 137 hospitalisations from alcohol each day in New South Wales (NSW).<sup>2</sup> While the overall consumption level of alcohol

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<sup>1</sup> C Gao et al, *Alcohol's Burden of Disease in Australia* (2014) Canberra: FARE and VicHealth in Collaboration with Turning Point <<https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/alcohol-misuse/Alcohols-burden-of-disease-in-Australia.pdf?la=en&hash=4E3FAB0E6DDF78C2DB4A3BBC83D5DD46A6149C4F>>.

<sup>2</sup> Centre for Epidemiology and Evidence, NSW Ministry of Health, *Health Statistics New South Wales* (2018) <<http://www.healthstats.nsw.gov.au>>.



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in Australia is declining slightly,<sup>3</sup> alcohol contributes to a broad range of acute and chronic harms<sup>4</sup> on individual consumers and others.<sup>5</sup>

Contemporary public health literature contains an increasing recognition of the role unhealthy food, beverage and tobacco industries play in contributing to, and importantly impeding the prevention of, non-communicable diseases (NCDs)<sup>6</sup> and related sustainable development goals (SDGs). Addressing NCDs requires the effective regulation of those industries including alcohol, that profit from the supply of unhealthy and unsafe products.<sup>7</sup> Such regulation<sup>8</sup> occurs at all levels of government from transnational/global to the local setting.

Attempts by the unhealthy industries to influence regulation and the policymaking environment by the exertion of political power is reflected by the Australian Hotels Association (AHA) in February 2019 being recorded as the second largest federal political donor in Australia increasing its level of political donations from \$153,000 in 2016–2017 to \$1.1 million in 2017–2018.<sup>9</sup> The literature reveals the nature and magnitude of unhealthy food, beverage and tobacco industries' capacity to influence the public health policymaking process.<sup>10</sup>

This article, based upon a case study of the NSW Australia alcohol supply lawmaking jurisdiction, provides new insights and tools that can be applied more broadly to identify legislative capture and the commodification of the public interest (PI)<sup>11</sup> with those nations that have some regard to the concept of the overall "public" interest, welfare or good.

<sup>3</sup> See Australian Bureau of Statistics, *Summary of Apparent Consumption of Alcohol, Australia, 2016–17* <<http://www.abs.gov.au/ausstats/abs@.nsf/latestProducts/4307.0.55.001Media%20Release12016-17>>; K Sexton-McGrath, *Demand for Non-alcoholic Beverages on the Rise as Australians Drink Less* (19 January 2019) <<https://www.abc.net.au/news/2019-01-19/demand-for-non-alcoholic-beverages-rise-australians-drink-less/10727172>>. NSW Health statistics show a rise in the risky levels of consumption of alcohol since 2015 <[http://www.healthstats.nsw.gov.au/Indicator/beh\\_alc\\_age/beh\\_alc\\_age?&topic=Alcohol&topic1=topic\\_alcohol&code=beh\\_alc\\_age/](http://www.healthstats.nsw.gov.au/Indicator/beh_alc_age/beh_alc_age?&topic=Alcohol&topic1=topic_alcohol&code=beh_alc_age/)>.

<sup>4</sup> Including high level of regional road fatalities, a significant proportion of domestic, non-domestic assaults, inland adult drownings and the State's road toll. In 2013, the NSW Auditor General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum with the cost to each NSW household being \$1,535 per annum: <[https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013\\_Aug\\_Report\\_Cost\\_of\\_Alcohol\\_Abuse\\_to\\_the\\_NSW\\_Government.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Aug_Report_Cost_of_Alcohol_Abuse_to_the_NSW_Government.pdf)>.

<sup>5</sup> AM Laslett et al, *The Hidden Harm: Alcohol's Impact on Children and Families* (2015) Foundation for Alcohol Research and Education <<https://fare.org.au/wp-content/uploads/01-ALCOHOLS-IMPACT-ON-CHILDREN-AND-FAMILIES-web.pdf>>.

<sup>6</sup> NCDs account for 71% of all deaths globally. World Health Organisation, *Fact Sheet: Noncommunicable Diseases* (1 June 2018) <<https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>>. See also B Hawkins et al, "Reassessing Policy Paradigms: A Comparison of the Global Tobacco and Alcohol Industries" (2016) 13 *Global Public Health* 1: for an examination of strategy and tactics deployed by some unhealthy industries to influence decision-makers. This paper however, concentrates on the lawmaking industry/political interface.

<sup>7</sup> See J Collin et al, "Can Public Health Reconcile Profits and Pandemics? An Analysis of Attitudes to Commercial Sector Engagement in Health Policy and Research (2017) 12(9) *PLoS ONE* e0182612.

<sup>8</sup> Regulation is defined as lawmaking, its application, enforcement and, interpretation. This research also acknowledges the concept of "decentring" regulation and the capacity of large corporations to exercise some quasi-regulatory functions. See J Black, "Regulatory Conversations" (2002) 29(1) *Journal of Law & Society* 170. It also considers industry self-regulation within the context of neoliberalism.

<sup>9</sup> See Australian Electoral Commission (AEC) "2017-18 Annual Financial Disclosure Returns Published Today" (Media Release, 02/01, 1 February 2019) <<https://www.aec.gov.au/media/media-releases/2019/02-01.htm>>. Most of the AHA's donations were reportedly provided to the incumbent Liberal (Conservative) party in the small State of Tasmania to successfully campaign against the opposition Labor party that was seeking to ban poker machines from hotels. See also D Wood, "Tasmania's Gambling Election Shows Australia Needs Tougher Rules on Money in Politics", *The Conversation*, 1 February 2019 <<https://theconversation.com/tasmanias-gambling-election-shows-australia-needs-tougher-rules-on-money-in-politics-110977>>.

<sup>10</sup> See, eg, I Rossow and J McCambridge, "The Handling of Evidence in National and Local Policy Making: A Case Study of Alcohol Industry Actor Strategies Regarding Data on On-premise Trading Hours and Violence in Norway" (2019) 19(1) *BMC Public Health* 44; J McCambridge, M Mialon and B Hawkins, "Alcohol Industry Involvement in Policy Making: A Systematic Review" (2018) 113 *Addiction* 1565–1764; M McKee, S Steele and D Stuckler, "The Hidden Power of Corporations" (2019) 364 *BMJ* 14; I Gilmore, L Bauld and J Britton, "Public Health England's Capture by the Alcohol Industry" (2018) 362 *BMJ* k3928.

<sup>11</sup> No exhaustive legal definition of PI is recognised in Australia given in part the situational/contextual aspect of this concept. Wheeler differentiates between the procedural and substantive (outcomes, objectives) aspects of PI. Unsurprisingly, the procedural component includes adherence to principles of natural justice, impartiality, integrity, transparency, accountability and fairness.

Brown

This article critically analyses through a regulatory lens key amendments to the NSW alcohol supply laws introduced into the NSW Parliament in November 2015. The *Gaming and Liquor Administration Amendment Bill 2015* (NSW) provided for “Fit for Purpose” (FFP) reforms that materially shifted the power balance of competing stakeholders and significantly reduced the distance (independence) between the lead regulator – Independent Liquor and Gaming Authority (ILGA) and the executive branch of government.

From an instrumental perspective, the *Liquor Act 2007* (NSW), the *Gaming and Liquor Administration Act 2007* (NSW) and the associated regulations (NSW alcohol supply laws) represent the “rule book” for the contestation between a range of private commercial interests in the alcohol industry, police, public health, local community interests and a State open to lobbying and manipulation particularly by commercial imperatives. The legislative process and the associated discourse and commentary including parliamentary debates, establishes and reflects the objectives, rationale, normative and ideological framework for the regulation of alcohol and gambling. This regulatory process and the associated discourse ultimately determine the gradient and symmetry of the playing fields and even who is allowed onto the field and when they can enter the contest. Substantive changes to the rules and their application associated with legislative amendments that impact upon alcohol harm outcomes, therefore provide a window to analyse critically with the assistance of the development of a qualitative multi-spectrum legislative capture<sup>12</sup> test, the relative power, ideological and governance mechanisms<sup>13</sup> underpinning the legislative changes and associated outcomes to determine who is really calling the shots.

The analysis consists in part of an examination of the front and backstage, the choreographed script, actors and props of this contested regulatory space or intersection where PIs collide with regulatory capitalism<sup>14</sup> and the “free market” imperative of neoliberalism. It relies upon a law-in-action approach. Ultimately, it confirms that the concepts of legislative capture and synonymous corruption are a primary but relatively overlooked consideration in the commercial determinants of health.<sup>15</sup> A deeper understanding of legislative capture mechanisms underpins policy evaluation programs and can contribute to the elimination of the undue influence of unhealthy industries on the public health harm prevention agenda.

## II. THE NATURE OF LEGISLATIVE CAPTURE

Regulatory/legislative capture is defined as:

[T]he process of consistently or repeatedly directing public policy (law-making) decisions away from the public interest towards the interests of a specific interest group or person. Capture is the opposite of inclusive and fair policy-making, and always undermines core democratic values.<sup>16</sup>

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In terms of outcomes being in the PI and the overarching obligation of public officials to act in the PI, this article relies upon the Lockean concept of public interest being the “public good” derived by the exercise of legitimate sovereign power such as making laws with the informed consent of the people in the best interests of the common-wealth. C Wheeler, “How Do Public Interest Considerations Impact on the Role of Public Sector Lawyers” (Paper presented at Public Sector In-House Counsel Conference, Canberra, 30 July 2012) <[https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf)>.

<sup>12</sup> Given the level of Ministerial control in NSW, it would be unlikely for capture of the alcohol regulatory agencies to occur in any systemic way without the imprimatur of the executive level of government. Within the Australian constitutional setting there is no clear separation between the executive and legislative branches of government.

<sup>13</sup> These mechanisms might also be termed “checks and balances”. See W Novak, “A Revisionist History of Regulatory Capture” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013) 40.

<sup>14</sup> D Levi-Faur, “Regulatory Capitalism” in P Drahoš (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017).

<sup>15</sup> See I Kickbusch, L Allen and C Franz, “The Commercial Determinants of Health” (2016) 4 *The Lancet* e895.

<sup>16</sup> Adapted version of definition of D Carpenter, “Detecting and Measuring Capture” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013), reflected in OECD definition, “Preventing Policy Capture: Integrity in Public Decision Making” in *OECD Public Governance Reviews* (OECD Publishing, 2017) 9 <<http://dx.doi.org/10.1787/9789264065239-en>>. See also essay of E Warren, *Corporate Capture of the Rulemaking Process* (June 2016) *The Regulatory Review* <<https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/>>.

The author has inserted “law-making” into the above definition to specify “legislative” capture. This is regarded as a more specific and potent form of broader regulatory capture that can occur in all branches of government – executive, legislative and judicial as well as within government agencies.

Novak’s “Revisionist History of Regulatory Capture”<sup>17</sup> argues with respect to the concepts of capture and corruption “there is simply no older theme in the Western legal and political tradition than the one highlighted by capture”.<sup>18</sup> This is dependent upon the clear delineation between public and private interests. Within the three branches of government –the executive, legislature and judiciary, Madison (1787) warned of the dangers of not separating the powers between the three arms<sup>19</sup> given that even “enlightened statesmen” would be likely unable to resist the innate force of factionalism.<sup>20</sup>

The institutional and political response to concentrations of power is one of “checks and balances” as a “countervailing force” to offset endemic private corruption and public law capture. Novak concludes with the observation that capture theory has gone “somewhat astray” under the influence of economics and Private Interest Theory.<sup>21</sup> This however, cannot be solved, according to Novak, by invocation of an imaginary laissez-faire past in the frame of neoliberalism that embraces industry self-regulation.<sup>22</sup>

One of the most influential contemporary regulatory theories is Ayres and Braithwaite’s *Responsive Regulation*.<sup>23</sup> These authors consider regulatory capture and corruption as inevitable by-products of the ideal state of close distance, co-operation and regulator discretion in engaging with their targeted industries. Above this ideal relationship situation exists an ascending order of more stringent, regulatory “strategy” (commands) and “enforcement” (penalties) interventions as disincentives for non-compliance.<sup>24</sup>

Ayres and Braithwaite rely on civil republican tripartism inclusive of independent third-party interests, as a counterbalance to resolve the conundrum of attaining high levels of co-operation and closeness between the regulator and the regulated without this evolving into capture/corruption. The authors’ solution was empowering “Public Interest Groups” (PIGs)<sup>25</sup> – who should actively participate in the regulatory process as a “countervailing force”<sup>26</sup> and enjoy similar powers to the regulator including access to information and prosecutor powers – in effect, to keep them honest.<sup>27</sup>

Tombs and Whyte provide a strident critique of the *responsive regulation* approach. They traced the development of United Kingdom Workplace Safety laws and found a “logical affinity” with the

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<sup>17</sup> Novak, n 13.

<sup>18</sup> Novak, n 13, 38ff.

<sup>19</sup> Montesquieu (1748) drew upon ancient Greece and the Roman Republic to elaborate an important constitutional “check and balance” to the illegitimate use of sovereign power. James Madison, “The Federalist No. 10: The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued)”, *Daily Advertiser*, 22 November 1787.

<sup>20</sup> Novak, n 13, 39ff.

<sup>21</sup> B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP, 2007). See also R Chen and J Hanson, “The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law” (2014) 103(1) *Michigan Law Review* 1 for a thorough critique of the neoliberal economic, political and legal script. See also Novak, n 13.

<sup>22</sup> Ashley Schram provides a summary of some key aspects of neoliberalism within the context of public health values. These include: (1) “competition” being the defining characteristic of human relations; (2) redefines citizens as consumers; (3) the primacy of the “morally neutral” free market produces better results than the public sector hence the necessity for reducing the size of government, attainment of budget surpluses, deregulation, industry self-regulation and privatisation; (4) reducing competition and government intervention is “inimical” to liberty; (5) classic liberalism posits “there is no collective ‘public interest’ beyond the interests of the individuals who comprise that community”; and (6) negative externalities are ignored and all goods treated as ordinary commodities. A Schram, “When Evidence Isn’t Enough: Ideological, Institutional, and Interest-based Constraints on Achieving Trade and Health Policy Coherence” (2018) 18(1) *Global Social Policy* 62.

<sup>23</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992).

<sup>24</sup> Ayres and Braithwaite, n 23. See also B Reeve, “Regulation of Alcohol Advertising in Australia: Does the ABAC Scheme Adequately Protect Young People from Marketing of Alcoholic Beverages?” (2018) 18(1) *QUT Law Review* 96.

<sup>25</sup> Ayres and Braithwaite, n 23. Public interest groups themselves are not immune from industry capture.

<sup>26</sup> See JK Galbraith, *American Capitalism* (Houghton Mifflin, 1952).

<sup>27</sup> See extract from Ayres and Braithwaite reproduced in Morgan and Yeung, n 21, 57.

Brown

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theory of responsive regulation. They also described this process as “regulatory degradation”<sup>28</sup> – the entrée for neoliberal regulatory settlement. They observed that the base of Ayres and Braithwaite’s enforcement strategy hierarchy model being “self-regulation” is ideologically appealing to capitalism and neoliberalism. It provides those with a predilection for budget surpluses, further legitimisation for reductions in public compliance and enforcement resources under the guise of “risk management”.

David Levi-Faur’s chapter “Regulatory Capitalism”<sup>29</sup> declares that regulatory capitalism is the “elephant in the room”<sup>30</sup> of scholarly literature:

Regulatory processes condition the operation, manipulation and deployment of political, social and economic power.<sup>31</sup>

The above short analysis of the regulatory theory literature and nature of legislative capture suggests that we cannot rely upon a fictitious “invisible hand”<sup>32</sup> or other constructs including the goal of industry self-regulation<sup>33</sup> and PIGs – that assumes an unrealistic symmetry of power with the regulator and industry, to simply eliminate the innate drive of individuals and organisations to form factions and exert illegitimate power for self-gain and greed. Second, as the size of industry finances invested in commercial alcohol advertising and political donations<sup>34</sup> confirm, the citizenry is susceptible to brainwashing.<sup>35</sup> This goes to the heart of the Lockean Government legitimacy, theoretically dependent upon the informed, independent and authentic consent of citizens. It elevates the importance of sustaining effective and transparent checks and balances within Western and global democratic and governance processes.

Flyvbjerg’s case study analysis of the planning system in Aalborg Denmark found that those organisations vested with protecting the PI were “deeply embedded in the hidden exercise of power and the protection of special interests”.<sup>36</sup> Laureen Snider’s study of white collar crimes in the Canadian corporate sector<sup>37</sup> suggested that this regulation process was effectively owned by the sector controlled by the ruling elite. She found that real progress to address these crimes and associated ineffectiveness of punishment was only achieved through the mobilisation of the proletariat and its allies and challenging hegemony at the ideological level. The law in comparison, was a relatively weak instrument to achieve genuine and effective reforms:

Class and rights struggles, by increasing the price the dominant class must pay for legitimacy, create interstices within capitalism whereby meaningful and beneficial change can occur.<sup>38</sup>

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<sup>28</sup> S Tombs and D Whyte, “Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK” (2012) 7(1) *Regulation & Governance* 61.

<sup>29</sup> Levi-Faur, n 14.

<sup>30</sup> Levi-Faur, n 14, 291.

<sup>31</sup> Levi-Faur, n 14, 291.

<sup>32</sup> Adam Smith, *The Wealth of Nations* (W. Strahan and T. Cadell, 1776); R Chen and J Hanson, “The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law” (2004) 103(1) *Michigan Law Review* 1, 28ff identify Hayek and other Chicago “schoolers” ideology that human freedoms were inextricably tied to private property and capitalism and that regulation detracted from these qualities. They also note at p 129ff that this famous “invisible hand” metaphor had more sinister deceptive connotations. Smith also wrote (p 130ff) “no other sovereigns ... could be so perfectly indifferent about happiness or misery of their subjects [as] the proprietors of such a mercantile company are, and necessarily must be”.

<sup>33</sup> See McCambridge, Mialon and Hawkins, n 10.

<sup>34</sup> See K Kypri et al, “‘If Someone Donates \$1000, They Support You. If They Donate \$100 000, They Have Bought You’. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties” (2018) 38 *Drug and Alcohol Review* 226.

<sup>35</sup> See B Hindess, *Discourses of Power: From Hobbes to Foucault* (Blackwell Publishers, 1996) See for discussion of various expressions of power including the manipulative face of power, false consciousness, Marx’s ideological power. See also the “anaesthetisation” of critical public discourse by commercial media in R Collins and D Skover, “The First Amendment in the Age of Paratroopers” (1990) 68(6) *Texas Law Review* 1087.

<sup>36</sup> B Flyvbjerg, *Rationality and Power Democracy in Practice* (University of Chicago Press, 1998) 225.

<sup>37</sup> L Snider, “Accommodating Power: The ‘Common Sense’ of Regulators” (2009) 18(2) *Social & Legal Studies* 179.

<sup>38</sup> Snider, n 37, 59.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

### Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

Findings from the research of Kypri et al<sup>39</sup> provide an important contribution bridging the critical evidentiary gap in the determination of capture within the Australian tobacco, alcohol and gambling supply industries. A sophisticated and responsive industry political donation environment in Australia was a key finding:

The alcohol and gambling industries make substantial (political) donations to influence particular decisions in the short term and build relationships over the long term.<sup>40</sup>

A 2011 NSW media exposé of the connections between the AHA, NSW political parties, bureaucrats and the media revealed among other things:

The AHA bragging in its private annual report about successful lobbying of government and secret deals with media representatives to counter negative press.<sup>41</sup>

The research findings of Flyvbjerg, Snider and Kypri and other pragmatic approaches suggest the means by which to address and reverse corporate regulatory capture ultimately lie with those governance-based public watchdogs<sup>42</sup> and independently informed citizenry (including effectively networks of public lobby groups)<sup>43</sup> with the power to change governments and mobilise honest media and public opinion.

### III. METHODOLOGY

The application and rationalisation of power that includes stakeholder “influence” mediated by the law are core considerations of this research. This lends itself to the adoption of Flyvbjerg’s phronetic research methodology.<sup>44</sup> The article relies upon a new variant methodology *legal phronesis*.<sup>45</sup> It constitutes a blend of the more traditional legal doctrinal methodology and the process of “phronetic social inquiry”. The latter is case/praxis-driven and focused on the “less visible” – what is occurring “backstage”,<sup>46</sup> the common, ordinary and different, the “modus operandi of power” and, the distinction between formal politics and the *Realpolitik*.<sup>47</sup> It has a strong normative focus based on the Aristotelian intellectual virtue of phronesis that reflects the concept of practical wisdom, public “interest”, “welfare” or “good”.

A content analysis of mainly publicly available documentation was initiated. This included primary data – the *Gaming and Liquor Administration Amendment Bill 2015* introduced into the NSW Parliament and associated Parliamentary Debates,<sup>48</sup> supporting explanatory memoranda and secondary data including communications between government officers and community stakeholders.

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<sup>39</sup> Kypri et al, n 34.

<sup>40</sup> Kypri et al, n 34, 1.

<sup>41</sup> J Hansen, “Questions Are Being Asked about the Connections between the O’Farrell Government and the Australian Hotels Association”, *The Sunday Telegraph*, 18 December 2011 <<https://bit.ly/2H7oCoJ>>. Hansen’s “backstage” investigation reveals possible examples of corruption involving both of NSW’s major political parties and the bureaucracy. See *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34. The hotel lobby’s alleged capture of both major political parties ensures unprecedented power to effectively control the alcohol regulatory agenda with the reciprocal disempowerment of the public health lobby. This however is not simple crude reductionism. A number of concessions are made and rhetoric deployed to emphasise the alleged “toughness” of its alcohol laws, the elimination of “rogue” operators from the industry and the protection of the “community’s interest”. This is important to preserve the pluralist, neutrality of the State facade of “balancing” the interests of stakeholders in the regulation of alcohol in NSW.

<sup>42</sup> Reliant upon government funding and support.

<sup>43</sup> With effective “agency” and “structure” – see “power” discussion by D Hudson and A Leftwich, “From Political Economy to Political Analysis” (Research Paper No 25, Developmental Leadership Program, June 2014) 82ff <<https://res.cloudinary.com/dlprog/image/upload/research-paper-25-from-political-economy-to-political-analysis>>.

<sup>44</sup> B Flyvbjerg, “Phronetic Planning Research: Theoretical and Methodological Reflections” (2004) 5(3) *Planning Theory & Practice* 283.

<sup>45</sup> B Murphy and G McGee, “Phronetic Legal Inquiry: An Effective Design for Law and Society Research?” (2015) 24 (2) *Griffith Law Review* 288.

<sup>46</sup> Flyvbjerg, n 36, 98.

<sup>47</sup> Flyvbjerg, n 36, 6.

<sup>48</sup> See New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2015; New South Wales, *Parliamentary Debates*, Legislative Council, 10 November 2015, esp 116, 124ff.



Brown

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Documentation providing insight into the alcohol supply regulatory climate and practices preceding and following the amendments were also analysed including departmental annual reports, disciplinary decisions of the Authority against some industry businesses, industry publications and media reports. The post-reform impact analysis of the legislative amendments relied in part on recent research conducted by Alison Ziller relating to variations and inconsistencies in the NSW alcohol regulators' approach to the alcohol outlet licensing approval process.<sup>49</sup>

#### IV. DEVELOPMENT AND APPLICATION OF A MULTI-SPECTRUM LEGISLATIVE CAPTURE TEST

A review of regulatory capture theory and related governance and constitutional aspects of "public interest/good/welfare", "separation of powers" and forms of "corruption" was undertaken. This was then synthesised to create a broadly applicable prototype multi-spectrum<sup>50</sup> legislative capture test with the capacity to be applied in other jurisdictions that retain similar constitutional considerations.

Capture also implies mutuality of complementary interests. This involves acquiescence or collusion of a sovereign (government) entity or related individuals for some mutual benefit or quid pro quo with a private interest group whose power is enhanced by undue influence over a public regulatory process. This process is referred to as "reciprocal conduct".

The existence of legislative capture is a key consideration of the commercial determination of health and an essential prerequisite in any analysis of the likely effectiveness of alcohol and other unhealthy and unsafe products harm reduction and prevention interventions at all levels of government.

For the purposes of this article, the test analyses the NSW legislative amendments, the associated broadly construed narrative and the enduring relationship between the alcohol industry and politicians. It has been developed for multi-jurisdictional application.

The following five main elements were derived from the definition of legislative capture<sup>51</sup> relied upon in the design of the test.

- (1) **Identification of connected conduct:** identifying reciprocating conduct in association with the lawmaking process and its application alleged to have directed attention away from the PI to favour a sectional group or special interest. Donations buy privileged private access to politicians drowning out countervailing rational arguments and testing industry assertions. This also requires the identification of the PI allegedly impinged.
- (2) **Temporal link between connected conduct:** a temporal element requires the alleged conduct to be consistent or repeated over a moderate time period.
- (3) **Public interest considerations in relation to the connected conduct (PIC):** key normative consideration of establishing the alleged reciprocating conduct of favouring a specific interest group or individual was not in the PI. This can be examined from a "process and procedures" and "objectives and outcomes" perspective. In some cases, elements of both considerations may exist within the specific conduct under scrutiny.
- (4) **Separation of power considerations in relation to the connected conduct (SoPC):** regarded as an important constitutional "check and balance" of a concentration of powers in one branch of government that may lead to a usurpation of the PI. Separation of power (SoP) doctrine also promotes greater independence of quasi-judicial bodies. Some indicia of a lack of SoPs may include the capacity of the executive arm of government to directly and indirectly influence the operation of another branch of government including quasi-judicial tribunals, the composition and independent representative

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<sup>49</sup> This article relied in part on the evidence and analysis contained in A Ziller, "Eroding Public Health through Liquor Licensing Decisions" (2018) 25 JLM 489; A Ziller, "Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice" (2018) 36 *Impact Assessment and Project Appraisal* 383; A Ziller and T Brown, "Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away" (2019) 26 JLM 786.

<sup>50</sup> The test incorporates a range of recognised constitutional type safeguards and concepts. It also adopts a combination of a doctrinal and phronetic methodology.

<sup>51</sup> See references mentioned in n 16.

expertise of personnel constituting decision-making bodies and, an examination of decisions to determine impartiality, independence, consistency and an evidence-based (rational) approach.

- (5) **Intention and motivation allied to the connected conduct (IMC):** this element also implies mutuality of interests – an implied contract in the reciprocating conduct. It involves acquiescence or collusion of a government entity or related individuals for some mutual benefit or quid pro quo with a private interest group whose power is enhanced by sustained undue or potentially corrupt influence over a public lawmaking regulatory process including forms of industry self-regulation.<sup>52</sup>

The literature also identifies additional factors indicative of or reducing the risk of capture. Those that are indicative of capture include existence of “revolving doors” between industry and government;<sup>53</sup> the appointment<sup>54</sup> of current or former industry representatives to government boards and quasi-judicial bodies; the location of a regulator within a broader government portfolios with the primary responsibility for serving the interests of industries and related commercial type developments; the level of industry donations to politicians and political parties. Factors promoting a reduction in the risk of capture include rigorous transparency<sup>55</sup> in the decision-making and policy application processes; equality/symmetry of power and influence<sup>56</sup> between stakeholders; integrity, honesty and truthfulness; consistent fairness, objectivity and impartiality; and, indirectly, whether the outcomes are “just or right”.<sup>57</sup> These factors become more apparent when considering individual indicia contained within the Appendix matrix drawn from the following section’s case study of the impact of the “Fit for Purpose” 2015 amendments to the NSW alcohol supply laws.

In addressing the “motivate” and “intent” element of the capture test, a search identified 21 media articles from 2007 that related to the connections between the NSW alcohol industry, government and their officials including some indicia of regulatory capture such as the government/industry “revolving door”.<sup>58</sup> This research was fortified by Kypri et al<sup>59</sup> study that examined the nature and impact of alcohol, gambling and tobacco industry federal political donations in Australia on the government decision-making process.

Most of the evidence relied upon in applying the legislative capture test is likely to be indirect or circumstantial – in nature, that is an identification of individual strands of information which combine building strength towards a particular inference as to the intention behind the reciprocating conduct. This type of reasoning is often compared to the individual strands in a length of rope that are entwined to present a coherent whole. Parties benefiting from legislative capture would not normally make any public admissions or leave “smoking guns” lying on boardroom tables. This may prima facie represent a form of clientele corruption identified by the High Court of Australia<sup>60</sup> relying upon a United States

<sup>52</sup> See “Corrosive capture”: Carpenter, n 16.

<sup>53</sup> For example Hansen, n 41. See also S Nicholls, “Another Former Labor Staffer Joins Hotels Lobby”, *The Sydney Morning Herald*, 21 August 2010 <<https://www.smh.com.au/national/nsw/another-former-labor-staffer-joins-hotels-lobby-20100820-138yt.html>>; S Nicholls “She’s Back! Meagher Returns as Lobbyist for Pubs”, *The Sydney Morning Herald*, 10 May 2010 <<https://www.smh.com.au/national/nsw/shes-back-x2026-meagher-returns-as-lobbyist-for-pubs-20100509-ulqi.html>>.

<sup>54</sup> For example S Nicholls, “O’Farrell Left Exposed over Lobbyist Laws”, *The Sydney Morning Herald*, 10 September 2011 <<https://www.smh.com.au/politics/federal/ofarrell-left-exposed-over-lobbyist-laws-20110909-1k1n9.html>>.

<sup>55</sup> See European Union consideration of statutory transparency: A Alemmeno, “Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy” (2014) 39(1) *European Law Review* 72. See also N Ries and K Kypri, “Government-funded Health Research Contracts in Australia: A Critical Assessment of Transparency” (2018) 40 *Sydney Law Review* 367.

<sup>56</sup> See D Wood, K Griffiths and C Chivers, *Who’s in the Room? Access and Influence in Australian Politics* (2018) Grattan Institute <<https://grattan.edu.au/report/whos-in-the-room/>>.

<sup>57</sup> Flyvbjerg identifies this question as a normative consideration: Flyvbjerg, n 44.

<sup>58</sup> See J Kwak, “Cultural Capture and the Financial Crises” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013).

<sup>59</sup> See Kypri et al, n 34.

<sup>60</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 204 [36], 205 [38]; [2015] HCA 34: “the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder ... quid pro quo and clientelistic corruption threaten the quality and integrity of governmental decision-making, but the power of money may also pose a threat to the electoral process itself. This phenomenon has been referred to as ‘war-chest’ corruption.”

Brown

decision.<sup>61</sup> As the application of the proposed test to the information provided in the following case study and Appendix reveals however, direct evidence relating to reported admissions and documented industry political donation irregularities can arise. Incriminating direct evidence is most likely to emanate from disenchanted political, agency and industry informants.

All above elements of the test must be reasonably satisfied to reach a finding of legislative capture. Partial satisfaction would signal an environment conducive to capture and potential corruption. It is suggested this would necessitate timely, impartial and effective remedial action. In the case of the Australian alcohol and gambling industry this may include for example, public intervention of an independent preferably national government agency. The agency would require sufficient funding, inquisitorial, and inter-jurisdictional powers to effectively remediate the risk or presence of capture given the national market dominance of a small number of large alcohol and gambling industry corporations.<sup>62</sup> The independent authority would also require the capacity to investigate certain executive government, political party and industry/lobby group activities including political donations and other individual and organisational favours – given the inherent reciprocating conduct necessary to establish capture.<sup>63</sup> Public industry groups' capacity to initiate complaints and join proceedings should not be impeded.

Given the serious implications of capture, it is suggested a positive duty be placed on lawmakers and agencies to ensure a maximum level of genuine and timely openness and transparency in all decision-making processes commencing with the development and application of the law and all related written and unwritten policy instruments.<sup>64</sup> Accompanying the duty of openness and transparency must be genuine and symmetrical stakeholder inclusiveness and governance. Consistent with the demonstrable duty to ensure genuine openness, inclusiveness and transparency would be a reverse onus of proof upon those accused of enabling or ignoring suspected legislative capture, to reasonably satisfy they had met their above positive duties. While those industries accused of participating in legislative capture may argue that the democratic electoral process cycle validates or legitimates government decisions and responsible government, the same assertion becomes far more problematic when the same industries make large political donations to both major political parties. Having all bases covered by the industry, reflects the pervasive *realpolitik*.

The following case study of transformative amendments to NSW alcohol supply laws was relied upon to populate the test to illustrate its application to a situation. This has been transferred into a prototype multi-spectrum legislative capture test matrix in the Appendix for ease of reference.

## V. CASE STUDY: 2015 “FIT FOR PURPOSE” ALCOHOL LAW REFORMS

Evaluating the full impact and purpose of the 2015 FFP law reforms in terms of outcomes, power balances and narratives necessitates a comparative analysis of the approval system before and after the promulgation of the legislative reforms. It also requires close examination of the passage of the reforms through Parliament.

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<sup>61</sup> *McConnell v Federal Election Commission*, 540 US 93, 153 (2003).

<sup>62</sup> Roy Morgan reported for the year ended September 2018 that the Woolworths group controlled 52.1% (\$7.9bn) of Australia's packaged alcohol market estimated to be \$15.1 bn. The Coles group controlled the second largest market share of 15.4% (\$2.3bn): <<http://www.roymorgan.com/findings/7753-supermarkets-continue-to-take-alcohol-market-share-from-bottle-shops-201811080408>>. Woolworths group also owns or leases the largest number of pubs and poker machines via a joint venture in the nation. See N O'Malley and N Gladstone, "Fresh Food Jackpot: How Woolies Became the Biggest Pokie Owner in the Country", *The Sydney Morning Herald*, 17 February 2018 <<https://www.smh.com.au/national/fresh-food-jackpot-how-woolies-became-the-biggest-pokie-owner-in-the-country-20180216-h0w7v5.html>>.

<sup>63</sup> This would require a review of *Evidence Act 1995* (NSW) s 130(1) public interest immunity balancing test regarding release of materials relating to "matters of state".

<sup>64</sup> *Government Information (Public Access) Act 2009* (NSW) s 14 provides for public interest considerations against disclosure of requested information if the same may have an adverse impact on "Responsible and effective government" that includes "deliberative processes". Arguably, this is where the greatest need for transparency exists with respect to the process examined in the following case study. The NSW Department of Industry (L&GNSW) in a 2017 submission to ILGA opposing the imposition of harm mitigation conditions on a small bar licence application refer to the government "policy" on the same. They were however unable to provide the public on request, a written version of that policy.

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Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

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The following description of the development, promulgation and application of the FFP reforms provides insight into any switch and/or morphing in the narrative, the pace of the alcohol law reforms through the NSW Parliament, the veracity and reliability of various government assertions, the retention of independence/SoP from the executive branch of government by the lead regulator and the level of genuine consultation and engagement with those stakeholders who could be construed as third-party PIGs but without similar powers of the regulator.

Four emergent themes became evident from the case study. These are presented in the final section of this Part.

## **A. Overview NSW Alcohol Supply Regulatory System**

A dual regulatory system determines the approval of alcohol outlets and related conditions of operation in NSW. The first step usually requires development consent approval from the local consent authority (Council), its planning panel or on appeal to the NSW Land and Environment Court consistent with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW).

Having satisfied this prerequisite, the proponent is then required to apply for a liquor licence consistent with the provisions of the *Liquor Act 2007*. Approvals are split between Liquor and Gaming NSW (L&GNSW) within the NSW Department of Industry (DOI) and the ILGA<sup>65</sup> based on the type of licence sought. The bulk of licences including on-premise and limited event licences are normally dealt with by DOI staff unless there is some contention or controversy such as media interest. Higher risk applications relating to hotels, clubs and packaged liquor licences are referred to ILGA who then consider reports from the DOI staff (acting under ILGA delegation) relating to each of these higher risk categories of licence. In most instances, ILGA accepts the recommendations from DOI. There are very limited rights of review from first instance decisions from ILGA to the NSW Commercial and Administrative Tribunal (NCAT).<sup>66</sup> The public has far less capacity to seek a similar review of an alcohol outlet approval decision.<sup>67</sup>

## **B. Antecedents to the 2015 NSW “Fit for Purpose” Alcohol Law Reforms**

### **1. Aims of the Original Liquor Act 2007**

The current *Liquor Act 2007* (NSW) took effect on 1 July 2008. It was introduced by the (then) Labor Government and removed the “needs” criteria for liquor licensing approvals that offended the National Competition Principles.<sup>68</sup> This criterion provided a ground for objection of an existing outlet against a proposed new entrant on the basis an additional alcohol outlet was not needed. It was replaced by a “rigorous and comprehensive” social impact assessment process.<sup>69</sup> The new Act also placed an emphasis on reducing alcohol harms as reflected in the following extracts from the responsible Minister’s Second Reading Speech:

Importantly, the liquor laws must continue to send a clear message to industry and the community about the need for responsible service and consumption of alcohol. Those who have responsibilities under the law ... must consider the need to minimise alcohol related harm. The law must ... support the need for alcohol consumers to be responsible in their decisions and behaviour.

These new liquor laws strike a *balance* between community and industry needs, now and into the future

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<sup>65</sup> ILGA is also primarily responsible for disciplinary matters involving licensed premises. This responsibility is not closely examined in this article.

<sup>66</sup> See <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gns-w-decisions/ncat-decisions>>.

<sup>67</sup> Prior to the commencement of the *Liquor Act 2007* (NSW), the alcohol outlet approval process was under the jurisdiction of the NSW Licensing Court and its Liquor Administration Board.

<sup>68</sup> Additional information on the Competition Policies can be found at <<http://ncp.ncc.gov.au/pages/about>>.

<sup>69</sup> Alison Ziller and Tony Brown proposed article – “Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away” submitted for publication March 2019.

Brown

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Reforms in the Liquor Bill 2007 support the Government's program to reduce harm associated with alcohol abuse, and promote a culture of responsible service and consumption of alcohol. ... The bill requires that liquor regulators *must be guided by harm minimisation principles*.<sup>70</sup>

The above passage signifies an initial overt pluralist orientation of the Act represented by reliance upon the phrase “striking a balance”. It also placed an emphasis on the imperative of being “guided by harm minimisation principles”. The language of “balancing interests” may be deployed to mask the dominant rule of the elite by the occasional concession to competing stakeholders.<sup>71</sup>

## C. A New Government – A New Order?

In March 2011, the Liberal and National Coalition parties gained power in NSW.<sup>72</sup>

In November 2011, the predecessor to ILGA (in name only) the Casino Liquor and Gaming Authority, delayed 20 major packaged liquor outlet applications from the leading suppliers to further consider the impact of the promotion and sale of heavily discounted alcohol:

Greater weight will be given to the potential social impact of alcohol pricing on groups vulnerable to alcohol-related harm, taking into account density of licensed venues, alcohol-related crime statistics and socio economic factors... The Authority is particularly concerned about the potential social impact of alcohol pricing on groups at greater risk of harm stemming from violence and anti-social behaviour, public drinking and underage drinking.<sup>73</sup>

The Authority subsequently determined,<sup>74</sup> based on a lack of “conclusive” evidence, that only one of the applications would be refused with several subject to “conditions” and additional considerations. The delay, if not the outcome, was an unprecedented level of activism exercised by a NSW alcohol regulator.

Until the November 2015 “Fit for Purpose” reforms, ILGA enjoyed clearer statutory separation and independence from Ministerial direction and control. The Authority's exercise of independence was in part, reflected in their rejection rate of higher risk venues estimated to be around 40%.<sup>75</sup> In the 12 months preceding the approval of the alcohol law reforms in November 2015, ILGA considered 20 applications for bottle shops and refused nine in part because of likely detrimental social impact, including family and domestic violence. For the same period, ILGA considered 14 applications to extend late trading hours (post-midnight/ mainly for hotels). All but one was refused because of the likely detrimental social impact in entertainment type precincts with existing high levels of violence and related harms.

In comparison, for the first six months of 2018, a total of 146 decisions of alcohol outlet applications (Decisions of Interest)<sup>76</sup> were published by ILGA. Of these 72% were determined by DOI staff “under delegation” from ILGA with a 100% approval rate for valid applications. Of the remainder (40) applications determined by ILGA, nine were refused. This provided an overall approval rate of alcohol outlets in the first six months of 2018 of 94%.

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<sup>70</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4637–4646 (Graham West) (emphasis added).

<sup>71</sup> See Snider, n 37, 58. Ziller, “Eroding Public Health through Liquor Licensing Decisions”, n 49, identified significant inconsistencies and bias in ILGA decision-making post FFP reforms that favoured the industry. There does not appear to be consistent reasoning in the small number of ILGA licence application refusals.

<sup>72</sup> The Liberal Party reportedly received a large amount of political donations from the hotel industry immediately before such donations were prohibited. See A Clennell, “Liberals in a Big Shout from Australian Hotels Association”, *The Daily Telegraph*, 8 November 2011 <<https://bit.ly/2TtUVEC>>.

<sup>73</sup> Casino Liquor and Gaming Authority, “Statement on Supermarket Bottleshops and Alcohol Pricing” (Media Release, 26 January 2012).

<sup>74</sup> Casino Liquor and Gaming Authority, n 73.

<sup>75</sup> Unpublished analysis based on ILGA Annual Reports and online decisions since removed from ILGA website.

<sup>76</sup> See <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/liquor-decisions>>.

Prior to the FFP reforms, ILGA was subjected to increasing industry pressure. One could rationally infer from the tenor of the Chairperson's following report in the NSW ILGA 2013–2014 Annual Report, industry concerns translated into political pressure on the Authority:

[Major investigations] and the day to day regulation of the liquor and gaming industries, all demonstrate the importance of having an *independent* regulator to ensure that liquor and gaming in the State are provided with *integrity* and a minimum of harm. Policy concerning these industries is properly a matter for the political processes of Government and Parliament but *implementation and administration of the law are best done independently*. ... Independence is at the heart of the Authority's nature and functioning. It is clearly provided in the law we administer. It is enhanced through the appointment of statutory office holders to lead the Authority. It is made possible through *staff who are accountable only to the Authority and resources under the control of the Authority*.<sup>77</sup>

An interventionist ILGA with its relatively high rejection rate for more risky licence applications and a failed Court of Appeal challenge<sup>78</sup> by a late trading nightclub penalised by ILGA for being a violent premise, appears to have left only one other recourse for the alcohol industry to create a regulatory environment more conducive to its profit-making imperative. The well-trodden political influence pathway expounded by the media articles relating to the industry/government relationship since 2007 identified by this author and more broadly in Kypri's et al research,<sup>79</sup> paints an alternative route for the industry to pursue its discontent with the NSW independent regulator.

#### D. Introducing the New “Fit for Purpose” Alcohol Regulatory Order

A seismic reorientation of the NSW alcohol supply laws and regulatory organisational relationships occurred in November 2015. These impacted significantly upon the independence of ILGA from the executive branch of government, the rights of the public to pursue appeals for a limited number of alcohol outlet approvals and alcohol outlet approval rates.

On 28 September 2015 “Key stakeholders” including some community representatives received an email from the Secretary of the Department of Justice advising that the NSW Liquor and Gaming regulatory system was to be reformed to “improve efficiency, *reduce confusion*, and enhance service quality and *customer convenience*. It will also deliver a strengthened focus on minimising alcohol and gambling-related harm in the community” (emphasis added).

It also identified the following objectives – the origins of which were not fully explained:

The reform focuses the establishment of a new *fit for purpose* regulator, as well as *improving processes and transparency*. It *does not change the policy settings* for the regulated sectors. (emphasis added)

The government refused public health lobby consultation requests relying on the assertion that there was no “policy impact”. When the Minister was questioned by the media about the ILGA changes, he responded on 9 October 2015 “Liquor laws *have never been tougher*, and we need a regulator that is equipped to effectively enforce these laws”.<sup>80</sup> No further explanation was provided by the government how ILGA may not have been acting consistently with its alcohol harm prevention agenda.

#### E. Passage of the FFP Bill through Parliament

The *Gaming and Liquor Administration Amendment Bill 2015* was introduced into the Legislative Assembly on 27 October 2015 by the (then) Deputy Premier, leader of the National Party<sup>81</sup> and Minister responsible for alcohol, gambling and racing regulation among other portfolios. This was the first time the public had the opportunity to read the details of the proposed changes to the alcohol laws.

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<sup>77</sup> NSW Independent Liquor & Gaming Authority, *Annual Report 2013-14: Chairperson's Report* (emphasis added).

<sup>78</sup> *La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority* [2014] NSWSC 1798.

<sup>79</sup> Kypri et al, n 34.

<sup>80</sup> E Partridge, “NSW Government Shakes Up Alcohol and Gaming Regulation”, *The Sydney Morning Herald*, 9 October 2015 <<https://www.smh.com.au/national/nsw/nsw-government-shakes-up-alcohol-and-gaming-regulation-20151009-gk54ta.html>>.

<sup>81</sup> The first three Ministers responsible for the regulation of alcohol and gambling in NSW since the coalition gained power in 2011 to April 2019 were members of the National Party with their electorates in country NSW.

Brown

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On the same day it passed the Lower House (29 October 2015) it was introduced into the Legislative Council. It was adjourned to the next working day 10 November 2015. The Second Reading Speech for the Bill commenced at 12.12am the following morning at which time the media were no longer present. It passed the Upper House later the afternoon of 11 November 2015 with no amendments.

In an unusual occurrence, the instigator of the Bill in the Lower House the Deputy Premier, oversaw the passage of the Bill in the Upper House as a “visitor”. At 12.42am he interrupted proceedings from the gallery and challenged the Greens party leader who was speaking against the Bill critical of the loss of independence of ILGA.<sup>82</sup>

### F. Key Changes to the Alcohol Laws

Amendments to the *Gaming and Liquor Administration Act 2007* provided for the Chief Executive position of ILGA to be abolished and all its employees subsumed by L&GNSW within the DOI under direct government control. The Minister responsible was also granted the power to make administrative directions<sup>83</sup> to the ILGA board which also was compelled to take “*particular* consideration”<sup>84</sup> of submissions made to them by the Secretary of the DOI. This is an unusual statutory prescription whose symbolism would not have been lost on the Authority or the alcohol industry.

Despite these above amendments, the Minister advised Parliament in his Second Reading Speech:

The bill also preserves the *independent* decision-making of the Independent Liquor and Gaming Authority in relation to contentious licensing proposals and disciplinary matters.<sup>85</sup>

While members of the community were granted the capacity to appeal a very limited number of adverse licensing approval decisions to the NCAT,<sup>86</sup> what the government did not reveal before the Bill entered Parliament was that this remedy was limited to only those persons who had lodged an original objection and occupied a premise within only a 50m or 100m radius<sup>87</sup> of the applicant’s proposed venue<sup>88</sup> depending upon the type of licence required. It bears no correlation with the likely footprint of harms arising from the proposed alcohol outlets.

The amendments also prescribed which type of decisions could be either internally reviewed by ILGA or ILGA’s first instance decisions reviewed by NCAT.<sup>89</sup> There appeared to be no logical (rational) basis for these decisions (or at least none was provided). This effectively granted some owners of certain classes of liquor licences (those of perceived lower risk) effective immunity from an external third-party review application of the approval decision.

### G. Emergent Themes Indicative of Legislative Capture Derived from Case Study

#### 1. Dilution of the PI by Alcohol Industry’s “Customer Convenience”

The clash between public health<sup>90</sup> and private commercial interest is no better exemplified in the government’s alcohol agencies affording primacy to “consumer convenience” (though this term was

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<sup>82</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 November 2015, 5625 (Dr John Kaye) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-63721/HANSARD-1820781676-63667>>.

<sup>83</sup> *Gaming and Liquor Administration Act 2007* (NSW) s 6. While the Minister cannot direct ILGA on individual licence-related applications, there is no statutory bar on the Minister hypothetically making directions to ILGA regarding classes of licences and overall approaches to all disciplinary matters.

<sup>84</sup> *Gaming and Liquor Administration Act 2007* (NSW) s 37A (emphasis added).

<sup>85</sup> Deputy Premier Troy Grant, New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2015 <<https://www.parliament.nsw.gov.au/bill/files/888/2R%20Gaming.pdf>>.

<sup>86</sup> *Gaming and Liquor Administration Act 2007* (NSW) s13A.

<sup>87</sup> *Liquor Regulation 2008* (NSW) regs 6–7 provide a statutory distance for notifications of a liquor licence application.

<sup>88</sup> For additional commentary see following article <<http://drinktank.org.au/2015/11/alcohol-law-backward-step/>>.

<sup>89</sup> See *Gaming and Liquor Regulation 2007* (NSW) cl 5A.

<sup>90</sup> The National Competition Council identified in 2004 they had “no doubt that harm minimisation should be the key objective of liquor regulation”. ABC Radio National, *Perspective*, Wendy Craik (17 February 2004) <<https://www.abc.net.au/radionational/programs/>>

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

### Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

not incorporated into the actual provisions of the alcohol laws) in approving higher risk alcohol outlets, particularly when the same proposed outlets correspond with locations of higher levels of violence and social dislocation and disadvantage.<sup>91</sup> Wheeler suggests the duty upon all arms of government and their public officials is to always act in and preserve the PI:

[G]overnments act, or at all events are constitutionally required to act, in the public interest.<sup>92</sup>

The concept of the PI represents a key safeguard or bulwark against legislative capture and clientele corruption. The government's reliance upon the vague concept of "customer convenience" particularly in contested cases where it is a key determinative consideration<sup>93</sup> is subjective and problematic. Such consideration does not take into account at the policy level, medical evidence that around 17–25% of people will at some stage develop a diagnosable (DSM-V)<sup>94</sup> alcohol use disorder.<sup>95</sup> Nor does it inquire into the familial circumstances of each of the outlet's proposed customers, especially when alcohol is involved in 34% of intimate partner violence incidents, 29% of family violence incidents<sup>96</sup> and 47% of intimate partner homicides.<sup>97</sup> The government determination process also gives weight<sup>98</sup> in some applications to unauthenticated petitions produced by the applicant from alleged prospective customers for a new alcohol outlet.

The continuing reliance by the government on the "consumer convenience" script risks it being perceived as a disingenuous proxy or code word by the authors of the (FFP) reforms for alcohol industry profits. It also raises some difficulties with establishing the coherency of the primacy of this criterion in a traditional "public" interest discourse and framework of responsible government and alcohol harm reduction.

A study of the parliamentary debates and subsequent government documentation revealed a key mechanism to legitimate or rationalise the primacy of "customer convenience". It relies upon a neoliberal "trickle down" and unitarist narrative to blur the distinction between public and private commercial interest. It resembles the frame of the proposed reductions in company taxes, inferring that what is good (in this case) for the alcohol industry – must be equally good for the public – with most adults (a "community") being alcohol industry customers.

The Government, through this bill, will help the hospitality industry by reducing red tape and *improving the approval process*. ... This bill will provide greater support for the industry to the benefit of the community.<sup>99</sup>

This arguably shows a unitarist-fusion shift in rhetoric – what is good for the alcohol industry must be good for the community – from a government member in the parliamentary debate. As Flyvbjerg observed in his phronetic case study:

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[archived/perspective/wendy-craik/3409144](http://archived/perspective/wendy-craik/3409144)>. They also observed in a related media report "The public interest is served by restrictions being placed on the availability of alcohol in certain circumstances" <<http://ncc.gov.au/images/uploads/PR03Liq-001.pdf>>.

<sup>91</sup> See Ziller, Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice, n 49; Brown and Ziller, n 49 for specific decisions including those that were also opposed by police and public health agencies. See also P Klarenaar, Northern Sydney Local Health District Health Promotion, *Northern Sydney Local Health District Health Promotion Submission Regarding the Regulatory Impact Statement and the Proposed Liquor Regulation 2018*, 19 July 2018 <[http://www.nslhd.health.nsw.gov.au/HealthInformation/HealthPromotion/Documents/Projects/Alcohol/Reducing%20Access%20To%20Alcohol/Examples/NSLHD\\_SubmissionCIS\\_Review19Jul17.pdf](http://www.nslhd.health.nsw.gov.au/HealthInformation/HealthPromotion/Documents/Projects/Alcohol/Reducing%20Access%20To%20Alcohol/Examples/NSLHD_SubmissionCIS_Review19Jul17.pdf)>. NSW Coroner's report into domestic homicides recommended a rebuttable presumption against approval of alcohol outlets in areas associated with high levels of domestic violence. No action by government to date. NSW Coroner's Office, *Domestic Violence Deaths Review Team Report for 2015-2017*, xvii, Recommendation 14 <[http://www.coroners.justice.nsw.gov.au/Documents/2015-2017\\_DVDRT\\_Report\\_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)>.

<sup>92</sup> Wheeler, n 11.

<sup>93</sup> See Ziller, Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice, n 49; Brown and Ziller, n 49 provides examples of decisions.

<sup>94</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5<sup>th</sup> ed, 2013).

<sup>95</sup> C Chapman et al, "Delay to First Treatment Contact for Alcohol Use Disorder" (2015) 147 *Drug & Alcohol Dependence* 116.

<sup>96</sup> See <[http://www.ndlrf.gov.au/publications/monographs/monograph-68 Alcohol/Drug-Involved Family Violence in Australia](http://www.ndlrf.gov.au/publications/monographs/monograph-68%20Alcohol/Drug-Involved%20Family%20Violence%20in%20Australia)>.

<sup>97</sup> Australian Institute of Criminology, *Alcohol and Homicide 2017* <<https://aic.gov.au/publications/tandi/tandi372>>.

<sup>98</sup> One of the many indicators of the disparity in the evidentiary standards and onus of proof between applicants and objectors in the NSW alcohol supply jurisdiction.

<sup>99</sup> Reflected in a government member's observation in New South Wales, *Parliamentary Debates*, Legislative Assembly, 27, 29 October 2015 (emphasis added).



Brown

One of the privileges of power ... is the freedom to define reality. ... A party's unwillingness to present rational argument or documentation may quite simply indicate the freedom to define reality.<sup>100</sup>

The Department of Justice's 2016/2017 Annual Report also perpetuated this narrative of blurring the distinction between public and private interest, conflating "public" with "community" interest and failing to identify the obvious substantial "primary purpose" pecuniary benefits derived by the alcohol industry from the FFP law reforms:

This reporting period saw the first full year of reforms to Liquor & Gaming NSW, with notable *improvements delivered to the community*. *Customer timeframes for licensing* were significantly reduced to under 120 days.<sup>101</sup>

It contributes to the process of normalising the alleged benefits of decreasing approval time of alcohol outlets. The dominant narrative is not offset with recognised risks associated with increasing outlet density and downward pressure on alcohol pricing arising from increased competition. The apparent disproportionate promotion of the alleged benefits to alcohol consumers of the FFP reforms by the NSW Government with little acknowledgment of potential negative public health consequences, may risk the perception that this could be adversely construed as a form of corporate social responsibility promoted by the State for the alcohol industry.<sup>102</sup>

What the Annual Report does not disclose is the reduction in processing time was in part achieved by the apparent unpublished performance goal of seeking a virtual 100% approval rate<sup>103</sup> for valid key categories of licence applications by DOI – L&GNSW with all legitimate concerns addressed through harm mitigation licence conditions.<sup>104</sup> This also served the purpose of discouraging genuine community members and police and health agency objectors from expending efforts opposing problematic outlet applications.<sup>105</sup>

## 2. Loss of Independence of ILGA – SoP

Twelve months before the FFP reforms were introduced into NSW Parliament in November 2015, the then Chairperson of ILGA cautioned the NSW Deputy Premier and Minister responsible for the regulation of alcohol that "Independence is at the heart of the Authority's nature and functioning. It is clearly provided in the law we administer".<sup>106</sup> However, prior to the introduction of the FFP Bill to Parliament, the government had already sealed the fate for a truly independent ILGA when advising the reforms would ensure:

[A]ll decision making and processes are aligned with the government's goals and properly support government harm reduction policy settings.<sup>107</sup>

No evidence was provided by the government supporting its inference that ILGA had acted inconsistently with its harm reduction policy.

In early 2016 the Chairperson of ILGA reportedly resigned because of concerns that the independence of ILGA had been compromised.<sup>108</sup> A loss of particularly senior employees with high levels of corporate

<sup>100</sup> Flyvbjerg, n 36, 37.

<sup>101</sup> NSW Department of Justice, *Annual Report 2016-17*, 22. This illustrates an example of the power of State narrative (emphasis added).

<sup>102</sup> See TF Babor et al, "Is the Alcohol Industry Doing Well by 'Doing Good'? Findings from a Content Analysis of the Alcohol Industry's Actions to Reduce Harmful Drinking" (2018) 8(10) *BMJ Open* e024325.

<sup>103</sup> See n 49.

<sup>104</sup> This goal was expressed to several community members in different forums by L&GNSW representatives following approval of the FFP reforms. There is no apparent written confirmation of this position.

<sup>105</sup> Butler and Crawley in considering the production of neoliberal authority observed "Just as neoliberal states have sought to deregulate and liberalise their economies, they have been intimately involved in imposing the logic of the market on areas of decision-making and service delivery which had previously been guided (however inadequately) by principles of the public good (Honig 2013)". C Butler and K Crawley, "Forms of Authority Beyond the Neoliberal State: Sovereignty, Politics and Aesthetics" (2018) 29 *Law and Critique* 265.

<sup>106</sup> NSW Independent Liquor & Gaming Authority, n 77.

<sup>107</sup> NSW Department of Justice, *Liquor and Gaming Reform* <<https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx>>.

<sup>108</sup> S Nicholls, "Liquor and Gaming in 'Chaos' before Lockout Laws Review", *The Sydney Morning Herald*, 5 April 2016 <<https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html>>.

“memory” in licensing and compliance occurred. In June 2016 all nine Newcastle (NSW) licensing inspector positions were removed and the local office effectively closed without any public or police consultation.<sup>109</sup> The inspection services were centralised in Sydney approximately 160km away.

Despite the government’s assurances to Parliament<sup>110</sup> regarding the independence of ILGA, it appears that the ILGA’s original Chairperson’s caution for preserving the SoPs may well have been overlooked in the formulation of the FFP reforms.<sup>111</sup>

So, what transpired between 12 November 2014 when the ILGA Annual report was presented to the Deputy Premier and almost 12 months later when the FFP law reforms were presented to the NSW Parliament for their approval?<sup>112</sup> On 28 March 2015, the NSW Coalition Government was re-elected and the NSW Deputy Premier retained his liquor, gaming and racing portfolio. In March 2016 after the FFP reforms took effect, a Liberal Party insider<sup>113</sup> alleged that his Party had received illegal political donations from the alcohol industry and other prohibited donors in the 2011 State election. The receipt of suspicious or unlawful donations in general, was apparently confirmed by the NSW Electoral Commission and a reported \$586,992 in illegal donations was withheld from the Liberal Party by the Commission after initially withholding \$4.4m in publicly funded electoral funding.<sup>114</sup> It is understood the Party refused to disclose the identity of the individual donors and that no prosecutions followed these specific breaches of the election funding laws.

### 3. Transparency

Transparency is an essential ingredient in preserving the PI and preventing capture and corruption. Timely public scrutiny enables the identification of actors and the real backstage machinations occurring between all three arms of government and all interest groups. It is an essential element of accountability, integrity, probity and governance. The Minister in his Second Reading Speech claimed that the amendments were in part, necessary to remedy a “lack of transparency in decision-making”.<sup>115</sup>

The lack of transparency and community inclusiveness that enhances the scope for transparency associated with the development of the FFP reforms before and during its introduction to Parliament appears inconsistent with the government’s advice to Parliament that the reforms had no policy implications.<sup>116</sup> The lack of genuine consultation also appears to have been inconsistent with the NSW Government’s requirements for “Regulatory Impact Assessments”.<sup>117</sup>

The seven principles of Better Regulation should be applied when designing and developing regulatory proposals. This ensures that each proposal is required, reasonable and responsive to the economic, social, and environmental needs of business and the community. ... (Principle 5.) *Consultation* with business and the community should inform regulatory development

<sup>109</sup> A De Lore, “MP Tim Crakanthorp Alleges Newcastle Office of Liquor and Gaming Has Been Closed by Stealth”, *Newcastle Herald*, 25 July 2016 <<https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305>>.

<sup>110</sup> “The bill also preserves the independent decision-making of the Independent Liquor and Gaming Authority in relation to contentious licensing proposals and disciplinary matters” (Second Reading Speech n 85).

<sup>111</sup> It is understood that senior ILGA officials may not have been provided with any advanced opportunity to consider the proposed Bill well before it was introduced into Parliament.

<sup>112</sup> In August 2014, the NSW Government provided a detailed response to the 2013 (Foggo) Review of the NSW Liquor Act recommendations. These contained no references to the 2015 FFP reforms. See <[https://www.liquorandgaming.nsw.gov.au/documents/reports/GovernmentResponse\\_StatutoryReview\\_LA\\_GALAA.pdf](https://www.liquorandgaming.nsw.gov.au/documents/reports/GovernmentResponse_StatutoryReview_LA_GALAA.pdf)>.

<sup>113</sup> Hansen, n 41.

<sup>114</sup> S Gerathy, “NSW Liberal Party Received Almost \$600,000 in Unlawful Donations before 2011 Election, Electoral Commission Finds”, *ABC online news*, 22 September 2016 <<https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824>>.

<sup>115</sup> Grant, n 85.

<sup>116</sup> Grant, n 85; Email from Department of Justice Secretary on 28 September 2015 to stakeholders.

<sup>117</sup> See <<https://www.finance.nsw.gov.au/better-regulation/regulatory-impact-assessments>>.

Brown

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Wheeler's second stage of PI application involves scrutiny of the objectives and outcomes of government action.<sup>118</sup> Ziller identifies a pattern of the denial of procedural and substantive fairness to objectors in the alcohol outlet approval process.<sup>119</sup> This includes denial of scrutiny by objectors of some submissions and evidence relied upon by the applicant in support of their application.<sup>120</sup>

Legislative capture of the regulation of the supply of alcohol in NSW would pose a greater detrimental impact upon the most disadvantaged and disaffected communities, families and their public health supporters. In emphasising the disproportionate vulnerability experienced by the socially and economically disadvantaged, a NSW Bureau of Crime Statistics and Research (BOCSAR) study found:

[T]hat the odds of being a repeat victim of intimate partner violence (IPV) within 12 months are 10 times higher in the most disadvantaged 20 per cent of the Australian population than in the least disadvantaged 20 per cent.<sup>121</sup>

The government's adoption of a meticulous level of openness, transparency and informed public inclusiveness concerning the development, ratification and application of its FFP reforms (and all subsequent amendments) to alcohol regulations, would be in the PI.

## 4. Winners and Losers

This research establishes that the NSW alcohol supply industry has benefited<sup>122</sup> the most from the 2015 FFP reforms relying upon the measure of the success rate of alcohol outlet applications. Though more difficult to establish in the short term, a media review undertaken as part of this research and Kypri et al's study into industry political donations, suggests that there has been a mutual flow of benefits between the industry and the politicians as an exercise in illegitimate power.<sup>123</sup>

The NSW alcohol industry's overt power<sup>124</sup> is its access to significant financial resources to make large political donations and call in favours despite the existence of political donation laws in NSW prohibiting the same. Its kinetic power lies in its latent capacity to also influence and mobilise its many patrons (voters) and related third-party vocal interest groups to oppose any proposed laws<sup>125</sup> that may inhibit their drinking patterns – a crucial factor in industry profits. The 2018 Tasmanian election demonstrated the capacity of the alcohol and gambling industry to invest very large sums to reportedly thwart the risk of the Tasmanian Labor Party's aim to reduce the number of poker machines.<sup>126</sup> This outcome projects a sober message to any other emboldened political party or candidate contemplating challenging the Australian alcohol and gambling industry to redress their related public health harms.

The NSW Government has a Liquor Authority that regularly asserts its "independence". This serves the useful political purpose of distancing the government from its decisions including the exceptionally high alcohol outlet approval rate and affording primacy to commercial interests over those of alcohol harm minimisation and prevention.

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<sup>118</sup> Wheeler, n 11. See Alcohol Focus Scotland, *Community Toolkit: "Alcohol Licensing in Your Community: How You Can Get Involved"* <<https://www.alcohol-focus-scotland.org.uk/media/133477/Community-licensing-toolkit.pdf>>.

<sup>119</sup> See Ziller, *Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice*, n 49; Brown and Ziller, n 49.

<sup>120</sup> Unlike developments in Scotland n 118, the capacity of the public including community objectors to attend ILGA Board meeting determinations save for a small number of on-site public hearings by ILGA, appears more constrained.

<sup>121</sup> S Rahman, "Assessing the Risk of Repeat Intimate Partner Assault" (Crime and Justice Bulletin No 220, NSW Bureau of Crime Statistics and Research, 2018) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/cjb220-Assessing-the-risk-of-repeat-intimate-partner-assault.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_news/cjb220-Assessing-the-risk-of-repeat-intimate-partner-assault.aspx)>.

<sup>122</sup> Flyvbjerg's methodology encourages the examination of "winners and losers": Flyvbjerg, n 44.

<sup>123</sup> S Lukes, *Power: A Radical View* (Macmillan, 1974).

<sup>124</sup> See S Battams and B Townsend, "Power Asymmetries, Policy Incoherence and Noncommunicable Disease Control – A Qualitative Study of Policy Actor Views" (2018) *Critical Public Health* 1–14.

<sup>125</sup> For example, laws reducing trading hours and impose other conditions such as one-way doors, drink strengths and other availability supply measures on high-risk precincts. See "Keep Sydney Open" Policy <<https://www.keepsydneyopen.com/policy#h11>>.

<sup>126</sup> An alleged \$5m spent on attacking poker machine harm reduction proposals. See <[https://www.abc.net.au/news/2018-03-05/tasmanian-liberals-reject-\\$5-million-campaign-spend-claim/9510156](https://www.abc.net.au/news/2018-03-05/tasmanian-liberals-reject-$5-million-campaign-spend-claim/9510156)>.

The biggest losers arising from the 2015 alcohol reforms are the recognised principles protecting our democratic process and public health – the “public interest” concept and the “separation of powers” doctrine. This translates in a diminution of power of the public health lobby, local disaffected communities and the police to have their voices and evidence considered and accepted at the NSW alcohol lawmaking table. The continuation of the approval of especially large discount alcohol stores (packaged liquor outlets) within or close to communities with high levels of violence and social disadvantage, may contribute to the intractability of alcohol violence and related harms to consumers and others.

## VI. CONCLUSION AND RECOMMENDATIONS

Consideration of the case study and its application to the prototype legislative capture test satisfies all elements of the test as readily demonstrated in the matrix in the Appendix. The reported admissions by politicians that the purpose of large industry political donations was to buy influence extends the finding of capture into the realms of clientele corruption.<sup>127</sup>

The search for the solutions to prevent legislative capture and related corruption can be contextualised within regulatory capitalism. This provides the subsonic (felt but not heard) drumbeat to drive the unhealthy food, beverage and tobacco industry to maximise profits and shareholder value. It is also dependent upon the creation at all levels of government environments conducive to its accumulation and reproduction of capital/wealth.

This case study of the regulation of the supply of alcohol in NSW explicates how the capitalist imperative<sup>128</sup> appears to have commodified the PI, democracy and authorship of the rule book. Legislative capture and equivalent clientele corruption of government is as an essential ingredient in this process. It is also an important new consideration in the commercial determination of health. Determining who effectively is in control of lawmaking and application of backstage levers for the effective regulation of NCDs, and the upstream unhealthy food and beverage industries, is a critical primary consideration. Any analysis and comparison of public health policy development and implementation at the global, national, regional and local levels may benefit from this inquiry and recognition of the central role of law as a public health policy collaborator.<sup>129</sup> Additional critical research into other statutory schemes within the NSW alcohol regulatory system would assist to determine the magnitude of systemic industry legislative capture.

Not only does legislative capture lubricated by substantial bipartisan political donations impact upon elected representatives’ willingness and capacity to serve the PI by preventing and minimising alcohol harms and other NCDs, it exposes deep fissures in democratic systems and consequential low levels of the public’s trust and confidence in the same.

An opportunity exists for the re-animation of the concept of the PI and to assert what is just and right – to bring back phronesis.<sup>130</sup> The revitalisation of structural safeguards, public anti-corruption and similar governance type organisations<sup>131</sup> can support this reformative process. Constitutional safeguards

<sup>127</sup> See *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.

<sup>128</sup> Peters considers neoliberalism functions as a “secular religion – one which intensifies liberal individualism and involves a blind faith in the market redefining all social interactions in terms of contract”. TD Peters, “Corporations, Sovereignty and the Religion of Neoliberalism” (2018) 29 *Law and Critique* 271, Abstract.

<sup>129</sup> WHO European Office for the Prevention and Control of Noncommunicable Diseases, *Policy in Action – A Tool for Measuring Alcohol Policy Implementation 2017* <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0006/339837/WHO\\_Policy-in-Action\\_indh\\_VII-2.pdf](http://www.euro.who.int/_data/assets/pdf_file/0006/339837/WHO_Policy-in-Action_indh_VII-2.pdf)>; A Plonsky, *New WHO Factsheets Reveal Europe Struggles to Implement Policies to Reduce Alcohol Consumption* (5 February 2019) Eucam <<http://eucam.info/2019/02/05/new-who-factsheets-reveal-europe-struggles-to-implement-policies-to-reduce-alcohol-consumption/>>; see K Buse, S Tanaka and S Hawkes, “Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-communicable Diseases and Identifying Options for Reducing Risk Exposure” (2017) 13 *Globalization and Health* 34; N Fitzgerald et al, “Exploring the Impact of Public Health Teams on Alcohol Premises Licensing in England and Scotland (ExILEnS): Protocol for a Mixed Methods Natural Experiment Evaluation” (2018) 18(1) *BMC Medical Research Methodology* 123; RS Magnusson et al, “Legal Capacities Required for Prevention and Control of Noncommunicable Diseases” (2018) 97(2) *Bulletin of the World Health Organization* 108.

<sup>130</sup> Flyvbjerg, n 44. See also R Horton, “Offline: Defending the Left Hand of the State” (2018) 391 *The Lancet* 2484.

<sup>131</sup> See Wood, Griffiths and Chivers, n 56.

Brown

as part of the Maginot line defending the PI are however, dependent upon Parliament providing such independent inquisitorial public organisations and accompanying legal process with sufficient statutory powers and resources to effectively prevent capture and related corruption.

## Appendix: Prototype Multi-spectrum Legislative Capture Framework Test

Development and application of Gaming and Liquor Administration Amendment Bill 2015 (NSW)

Component of Test	Factors and Evidence	Source
1. Identification of reciprocating conduct suggestive of alleged legislative capture	<p>a. Development and application of the <i>Gaming and Liquor Administration Amendment Bill 2015</i> and related legislation favouring the NSW alcohol supply industry</p> <p>b. Reported admission by Mr Yabsley former Federal Treasurer of Liberal Party of unlawful, potentially corrupt political donations from the within the NSW alcohol industry to the NSW Liberal Party (May 2016). “We’re talking about property developers, owners of certain licensed premises. I don’t think it was a great secret about the fact that that was happening. It struck me as being something that had been happening over a long period of time”</p> <p>c. NSW Electoral commission withholds \$586,992 in political donations to the Liberal Party from their refusal to identify the source of the donations</p> <p>d. Mr Toole previous NSW Minister responsible for alcohol, gambling and racing reported (Nov 2017) statement to a NSW Australian Hotels Association (AHA) awards ceremony “I would like to acknowledge (senior AHA representatives) for the work that (they do) in advocating for the industry ... the incredible work that you do behind the scenes with Parliament and with the Opposition in raising the industries concerns, to ensure that you are getting the best deal from whoever is in government. ... As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry”</p> <p>e. “If someone donates \$1,000, they support you. If they donate \$100,000, they’ve bought you”. Quote from politician interviewed in research project</p> <p>f. The NSW alcohol outlet licensing process “favour(s) the applicant, demonstrate inconsistencies, fail to use health statistics, misinterpret other statistics, make inconsistent use of reputable health research findings and treat legal obligations as mitigations. The cumulative effect is a low refusal rate. Of 168 applications, 15 were refused. Review and appeal for objectors have been severely restricted in NSW”.</p>	<p>See “Part V. Case Study” of this article. Hereafter “Case Study”. M Koziol “Former Liberal Party Treasurer Admits He Knew of Illegal Donations”, <i>The Sydney Morning Herald</i>, 23 May 2016 &lt;<a href="https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html">https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html</a>&gt; S Gerathy, “NSW Liberal Party Received almost \$600,000 in Unlawful Donations before 2011 election, Electoral Commission Finds”, <i>ABC online news</i>, 22 September 2016 &lt;<a href="https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824">https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824</a>&gt; A Young, “Minister Promises More Pub Reforms: NSW Minister for Racing Has Promised More Pub Reforms That Will Be Good for the Industry”, <i>The Shout</i>, 27 November 2017 &lt;<a href="https://www.theshout.com.au/news/minister-promises-pub-reforms/">https://www.theshout.com.au/news/minister-promises-pub-reforms/</a>&gt;. Note the above extract from the original article was subsequently removed from the online publication after it is understood inquiries were made from a major media source. The original heading of the article “Minister Promises More Pub Reforms” however remains in the URL. K Kypri et al, “‘If Someone Donates \$1000, They Support You. If They Donate \$100 000, They Have Bought You’. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties”. (2019) 38 <i>Drug and Alcohol Review</i> 226. Hereafter “Kypri et al 2018”. A Ziller, “Eroding Public Health through Liquor Licensing Decisions” (2018) 25 <i>JLM</i> 489. Hereafter “Ziller 2018”.</p>

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

Component of Test	Factors and Evidence	Source
2. Alleged consistent and repeated capture conduct	<ul style="list-style-type: none"> <li>a. Demonstrable shift in narrative towards a neoliberal script from November 2015 to current period</li> <li>b. Published evidence of a pattern of alcohol outlet decisions exhibiting bias favouring the industry since the introduction of the FFP reforms</li> <li>c. Increase in ILGA approval rate of outlets following FFP amendments in November 2015</li> <li>d. Relationship between government and industry establishes consistent and repeated pattern of undue influence “‘If you join the dots, you will find policy decisions were made when very substantial donations were made by the AHA ...’. There has been a lot to answer for between political donations and policy outcomes,” he adds about the general nature of political lobbying</li> <li>e. A pattern of persistent political donations and related irregularities before and after the same were banned</li> </ul>	<p>Case study Ziller 2018 Ziller 2018 J Hansen, “Questions Are Being Asked about the Connections between the O’Farrell Government and the Australian Hotels Association”, <i>The Sunday Telegraph</i>, 18 December 2011 &lt;<a href="https://www.dailytelegraph.com.au/news/opinion/questions-are-being-asked-about-the-connections-between-the-ofarrell-government-and-the-australian-hotels-association/news-story/75bd55de6b4b73b9234651f04296088c">https://www.dailytelegraph.com.au/news/opinion/questions-are-being-asked-about-the-connections-between-the-ofarrell-government-and-the-australian-hotels-association/news-story/75bd55de6b4b73b9234651f04296088c</a>&gt;. Media analysis contributing to case study See above article and related contained within this table</p>
3. Public Interest (PIC) – Above alleged conduct was not in the public interest		
A. Process & procedure	Insufficient public notice of statutory amendments. Only made publicly available after Bill was introduced into Parliament for (it is understood) the Second Reading Speech	Timetable of passage of Bill. See Case Study.
	No opportunity for public input for example Parliamentary Committee to review Bill	Timetable of passage of Bill. See Case Study.
	Questionable assertion Bill had no “policy” implications thereby negating consultation requirements with public	Government correspondence to stakeholders preceding passage of Bill through NSW Parliament 28 September 2015
	Prima facie inconsistency with NSW Better Regulation Principles requiring business and community consultation	NSW Department Finance, Services and Innovation
B. Objectives and Outcomes	Public health and safety is a core public interest consideration. Industry profits and their consumers’ “convenience” are primarily private commercial interests and rate lowly as a non-excludible “public good”. Retaining democratic processes, public corruption prevention and public confidence in government administration are also fundamental public interest considerations. The current reality is that only the alcohol industry has sufficient access to resources to finance any Supreme Court challenges to the alcohol regulation system in NSW.	See Ian Harper et al, <i>Competition Policy Review Final Report</i> (March 2015) 47, 127, 145ff < <a href="http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf">http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf</a> >

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Brown

Component of Test	Factors and Evidence	Source
	Reliance on neoliberal narrative emphasising “customer convenience”, “reducing red tape”, “regulatory burden” and “confusion”. While not incorporated into statutes, became a primary consideration factors in operation of outlet approval process.	Minister’s Second Reading Speech and Parliamentary Debate See ILGA decisions identified by Ziller 2018
	Post 2015 reform increase in ILGA outlet approval rate for higher risk outlets	Case Study
	Blurring of the narrative distinction between public and private interest. Consumer convenience conflated into public interest.	Department of Justice Annual report 2016/2017 Parliamentary debate. See also case study analysis
	Arbitrary limitations on public objectors to appeal certain outlet approval decisions confined to those within 100m of proposed outlet. This and the following item are examples where conduct may fall in both subcategories of public interest examination “process” and “outcomes”	“Fit for Purpose” 2015 Statutory amendments contained within Gaming and Liquor Administration Amendment Bill (2015) detailed in Case study. Hereafter “Statutory amendments”
	Unexplained inconsistencies between which types of licence applications can be externally appealed to the NSW Civil and Administrative Tribunal	Statutory amendments
	Alcohol industry provided prohibited political donations to government	Attributed to former Treasurer of the Liberal Party
	NSW Electoral Commission reportedly withheld over \$500,000 from Liberal Party as they refused to acknowledge source of donations. See item 1 “c” above	< <a href="https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824">https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824</a> > and < <a href="https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gplzsh.html">https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gplzsh.html</a> >
	Size of industry donations to political parties influence their decision-making/reform processes	Kypri et al 2018
	Closure of Newcastle OLGR inspector office in June 2016 with loss of all 9 positions. No consultation with the public or police. A hotel in Newcastle’s suburb of Hamilton subsequently became the most violent premise in NSW	< <a href="https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305">https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305</a> >
4. Separation of Powers (SoPC) regarded as “check and balance” to prevent concentration of power in one branch of government. Promotes independence, objectivity, impartiality and fairness	All ILGA employees as part of a former Independent Statutory Authority absorbed within government Department of Industry	Statutory amendments

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

## Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

Component of Test	Factors and Evidence	Source
	Abolition of ILGA Chief Executive position	Statutory amendments
	ILGA subjected to Ministerial Direction with exceptions relating to individual licensing approval matters and disciplinary action under the Act. Nothing however appears to prevent the Minister from making directions regarding a class of licences and an overall approach to disciplinary matters	Statutory amendments
	ILGA <i>must</i> consider advice from Secretary of the Department	Statutory amendments
	Unitary alignment of all decision-making with the government's goals. No scope for ILGA effective independence "all decision-making and processes are aligned with the government's goals and properly support government harm reduction policy settings".	NSW Department of Justice website, "Liquor and Gaming Reform" < <a href="https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx">https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx</a> >
	Resignation of ILGA's first chairperson after introduction of measures alleging loss of independence of the Authority	Sean Nicholls, "Liquor and gaming in 'chaos' before lockout laws review", <i>The Sydney Morning Herald</i> , 5 April 2016 < <a href="https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html">https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html</a> >
	Post reform outlet approval process subject to bias, inconsistency, lack of procedural and substantive fairness and transparency.	Ziller 2018
5.Intention and Motivation allied to conduct (IMC)	Admission in media by former Liberal Party Treasurer that party had received unlawful political donations from the alcohol industry that influenced policymaking in test 1 above. Hansen in "2 d" above also reveals the alleged influence of the AHA over the government decision-making process and the reciprocating relationship between governments and industry with donations exchanged for the creation of a legislative environment conducive to industry profitability and development. The closeness of the mutually beneficial relationship between industry and government is further highlighted by the reported 2017 statement of the NSW Minister Toole at "1 d" above.	
	Admission by anonymous interviewee that large sums of political donations would effectively enable the donor to "buy" the party	Kypri et 2018
	Reported comment (2007) from former President NSW AHA to the effect "who said democracy was cheap"	A Clennell, "Politicians Sup at the Table with Hoteliers", <i>The Sydney Morning Herald</i> , 13 February 2007 < <a href="https://www.smh.com.au/national/politicians-sup-at-the-table-with-hoteliers-20070213-gdpglx.html">https://www.smh.com.au/national/politicians-sup-at-the-table-with-hoteliers-20070213-gdpglx.html</a> >
	See reported comment (2017) from Mr Toole, previous NSW Minister responsible for alcohol, gambling and racing in test "1 d" above	



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## 4.2 Article 2

Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away (2019) 26/4 Journal of Law and Medicine 786–99.

**AUTHORS:** Alison Ziller and Tony Brown (substantial contribution).

### OVERVIEW:

This article was researched and written contemporaneously with Article 1.

#### 4.2.1 Contribution towards the exegesis

The November 2015 amendments to the NSW package of alcohol supply laws analysed in article 1 also significantly altered the key alcohol outlet regulatory approval process. This represents a second major site of the collision of public interest, in the form of alcohol harm reduction objectives, with the commercial profit-driven interests of the alcohol industry to increase the availability and supply of alcohol whilst reducing alleged red tape and regulatory burden.

This article is more praxis-orientated than the first article. It relies in part on quantitative evidence to demonstrate an increase in the approval rates of alcohol outlets arising from structural and procedural amendments to the outlet approval process. This is achieved in part by less reliance on a thorough and independent rational social impact assessment (SIA) process. SIA is an important symbol for the rational, evidence-based approach to regulatory decision-making with the overarching goal of satisfying the public interest.

The NSW alcohol laws prescribe a process to assess the likely social impact and, where necessary, reject the application or impose certain licensing conditions to mitigate likely harms. As such, this central alcohol regulatory public process can deliver substantial financial rewards to the private alcohol and related gambling industry interests and, therefore, is potentially exposed to potential undue industry influence, capture and corruption.<sup>426</sup>

From a broader perspective of other NSW unhealthy and unsafe industries comes a realisation that each of these regulatory areas have developed, over time, unique models of regulation,

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<sup>426</sup> Similar potential risks of capture arise in the regulation of other NSW industries where windfall gains can be made including for example, land speculation and property development, water (irrigation) rights etc.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

including laws, structures, approval, and compliance and enforcement mechanisms. Whilst the sheer functional differences between each industry jurisdiction may preclude the relative value of superficial comparisons, the same differences may provide important markers of underlying common regulatory phenomena such as capture, leniency and chill developed further by critical analysis in the following articles in this chapter.

### 4.2.2 Relationship with other articles

The second article illustrates the invasive nature of capture beyond the scope of the research contained with the first article. This included the reorientation of the ideological narrative conflating the objective of the public interest with that of consumer convenience.

The second article deviates slightly from the other articles relied upon in this thesis by taking a longer-term critical perspective on the evolution of liquor licensing approval criteria contained within the current and preceding NSW Liquor Acts.

The critical structural changes to the Liquor Act in November 2015 resulted in less autonomy of ILGA – the primary government body responsible for approving liquor licenses — from the minister responsible for the regulation of alcohol and gambling in NSW. This coincided with the delegation of the approval of most license applications that no longer required a rational SIA to the (then) NSW Department of Industry’s Office of Liquor, Gaming and Racing (OLGR), with only the higher risk venue applications being considered by ILGA.<sup>427</sup>

For the first six months of 2018, a total of 40 liquor licence applications were reportedly considered by ILGA with a 78 per cent approval rate.<sup>428</sup> Twenty-eight of the forty higher risk applications reviewed by IUGA were hotel and packaged liquor licence applications. Eight of the 11 hotel approvals were located within or adjacent to medium to high domestic-violence hotspots (Table 1), as were 9 of 11 packaged liquor licence approvals.<sup>429</sup>

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<sup>427</sup> It is understood the only rejections were based on technical issues such as the incorrect form. It was the Department’s view expressed orally at several briefings, that any risk concerns could be effectively dealt with by the imposition of certain license conditions to mitigate potential harms. ILGA heavily relies on recommendation reports provided by the Department. ILGA does not directly employ staff. The staff assisting ILGA are primarily drawn from the Department.

<sup>428</sup> See Table 3 of this article (Ziller and Brown) 794.

<sup>429</sup> Ziller and Brown Table 2, 793.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This evidence provides a vital tangible measure to respond to the supplementary thesis questions relating to the desirability and manifestations of regulatory industry capture by industry.

The discourse examination undertaken in this research established a dominant expressed desire by the industry for a quick, easy and cheap approval process for liquor licence applications and related matters. This was based on the almost exclusive reliance on the commercial objects of the Act.<sup>430</sup> The rational SIA approach, with a greater likelihood of attaining the public-interest alcohol-harm reduction objects of the Act, had been effectively marginalised into a tokenistic expression by industry expediency with the endorsement of both sides of the NSW Parliament.

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<sup>430</sup> Liquor Act 2007 (NSW) s79.

#### 4.2.3 Copy of Article 2

## Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away

Alison Ziller and Tony Brown\*

*In 2004 legislators in New South Wales relied on Australia's National Competition Policy to change the reason for determining alcohol outlet approvals from a "needs" to a "harm minimisation" basis. This was predicated on the application of a rational social impact assessment (SIA) process. Within a short time, however, the volume of liquor licence applications began to erode that intention and the delays that applicants encountered placed politicians under pressure to fast-track the process. Subsequent liquor legislation retained the statutory obligation on decision-makers to ensure no overall detrimental social impact associated with the approval of an alcohol outlet licence. However, legislative amendments to the approval process reduced the number and kinds of licences and authorisations to which the social impact test applied and encouraged other shortcuts which undermine the validity of these assessments. The resulting statutory approval system in practice relegates SIA to an exception rather than the rule and has revealed the relative weakness of SIA as a public health safeguard.*

**Keywords:** public health; alcohol regulation; social impact assessment

### I. MANAGING QUANTITY OF SIAs – A CASE STUDY HISTORY

Much has been written about the history of liquor licencing laws in New South Wales, an Australian State which began as a convict settlement displacing the Indigenous population, and in which supply of liquor was controlled by the government of the colony.

Early conservative estimates indicate that in the 1830s in New South Wales, 13.6 litres of pure alcohol in the form of spirits were consumed each year by each inhabitant, predominantly males.<sup>1</sup>

Various efforts were made to reduce levels of alcohol consumption, including early closing times and legislation prohibiting Aboriginal people from drinking alcohol. Nonetheless "[a]nnual alcohol consumption in Australia reached a peak of 9.8 litres per capita in 1982",<sup>2</sup> the year in which the then New South Wales Attorney-General, Frank Walker, introduced a new Liquor Act noting:

The Liquor Act, 1912 has been amended on at least forty-five occasions, and it is more the fault of governments than of the draftsman that only a seasoned mariner, closely familiar with its shoals and reefs, would hazard the risk of escorting his client through the murky waters of its provisions.<sup>3</sup>

The *Liquor Act 1982* (NSW) established a central Licencing Court of New South Wales (replacing a licencing court for every licensing district in NSW) and the New South Wales Liquor Administration Board (replacing the Licenses Reduction Board). Mr Walker further noted:

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<sup>1</sup> Ministerial Council on Drug Strategy, *Alcohol in Australia Issues and Strategies* (July 2001) 1 <[http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/%24FILE/alcohol\\_strategy\\_back.pdf](http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/%24FILE/alcohol_strategy_back.pdf)>.

<sup>2</sup> Ministerial Council on Drug Strategy, n 1, 2.

<sup>3</sup> New South Wales, *Hansard*, Legislative Assembly, 24 November 1982, 2981.

Many applications which now go before the court will be dealt with by informal proceedings before the board.<sup>4</sup>

Liquor licences and permits, he said, now numbered “almost 8000”.

By 30 June 2003 there were 12,638 licences in operation, and some 3,717 liquor licence applications had been processed in the previous 12 months.<sup>5</sup> Despite these numbers and the known relationship between the availability of alcohol and alcohol-related harm<sup>6</sup> and despite the opportunity to exempt liquor licencing from the National Competition Policy on public interest grounds,<sup>7</sup> the State Government commissioned a National Competition Policy Review by Gaming and Racing NSW. In 2003 this Review recommended the Government

29. Establish a tiered Social Impact Assessment process, to apply before a new liquor licence can be granted. A comprehensive SIA would be required for any proposed new hotel, club or bottle shop, while restaurants and other venues that are not traditionally associated with excessive anti-social behaviour, would be required to undertake a less detailed process.
30. Provided public interest issues are adequately addressed through the Social Impact Assessment process, there is no need to retain a formal right to object to a liquor licence.<sup>8</sup>

At the time, a tiered approach was already in use in some local government authorities in New South Wales in response to requirements to consider social impacts when evaluating development applications including alcohol outlets. The usual strategy in that jurisdiction is to require a social impact assessment (SIA) for larger developments and a social impact statement for everything else.<sup>9</sup>

The Premier, Bob Carr, introduced the *National Competition Policy Amendments (Commonwealth Financial Penalties) Bill* the following February (2004) noting:

[T]he National Competition Council continues to hold that the current needs test in the Liquor Act restricting the number and location of liquor outlets is being used by existing liquor licensees to restrict competition.

Therefore, this bill will make changes to the Liquor Act’s licensing provisions that we think will be sufficient to satisfy the Commonwealth while hopefully maintaining the integrity of our liquor licensing system. The bill will replace the needs test with a rigorous and comprehensive social impact assessment process.<sup>10</sup>

The *Liquor Act 1982* (NSW) was duly amended by the inclusion of a new Div 6A social impact assessment process which required an SIA to be submitted for a hotelier’s licence and for an “off-licence to sell liquor by retail”<sup>11</sup> (s 62B). This took effect on 1 August 2004. A liquor licence application could not be granted unless the Board had approved the SIA (s 62C(1)(b)) and the Board could only approve a liquor licence application if it was satisfied that “the overall social impact of the application being granted by the court will not be detrimental to the local community or to the broader community”<sup>12</sup> (s 62F(1)(b)).<sup>13</sup>

<sup>4</sup> New South Wales, *Hansard*, Legislative Assembly, 24 November 1982, 2981.

<sup>5</sup> NSW Liquor Administration Board, *Annual Report 2002–2003*, NSW Government, Appendix 1 (2003) <<https://www.opengov.nsw.gov.au/searches?query=&agencyId=25838&page=1&size=10&fullAgencyId=25838&maxPages=1>>.

<sup>6</sup> World Health Organisation (WHO), Regional Office for Europe, *Evidence for the Effectiveness and Cost Effectiveness of Interventions to Reduce Alcohol-related Harm* (2009) 65–67 <[www.euro.who.int/\\_data/assets/pdf\\_file/0020/43319/E92823.pdf](http://www.euro.who.int/_data/assets/pdf_file/0020/43319/E92823.pdf)>.

<sup>7</sup> Council of Australian Governments, *Competition Policy Agreements* (1994) 15 <<https://www.pc.gov.au/inquiries/completed/access/files/ncpagreement.pdf>>.

<sup>8</sup> Gaming and Racing, *National Competition Policy Review, NSW Liquor Act 1982 and Registered Clubs Act 1976* (October 2003) 71 <<http://ncp.ncc.gov.au/docs/NSW%20Liquor%20Act%201982%20%26%20Registered%20Clubs%20Act%201976%2C%20review%202003.pdf>>.

<sup>9</sup> Liverpool City Council, *Social Impact Assessment Policy* (October 2015) 7 <[https://www.liverpool.nsw.gov.au/\\_data/assets/pdf\\_file/0017/112931/Social-Impact-Assessment-Policy-Adopted-by-Council-26-August-2015-PDF-Version.pdf](https://www.liverpool.nsw.gov.au/_data/assets/pdf_file/0017/112931/Social-Impact-Assessment-Policy-Adopted-by-Council-26-August-2015-PDF-Version.pdf)>.

<sup>10</sup> New South Wales, *Hansard*, Legislative Assembly, 17 February 2004, 1 <<https://www.parliament.nsw.gov.au/bill/files/2324/National%20Com%20Amdts.pdf>>.

<sup>11</sup> Now known as a packaged liquor licence.

<sup>12</sup> The NSW Liquor Board established a Social Impact Assessment Panel in 2002 to review gaming machine SIAs but did not adopt this strategy for liquor licence matters.

<sup>13</sup> The same provision was replicated in the *Liquor Act 2007* (NSW) s 48(5) <[http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol\\_act/la2007107/s48.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/la2007107/s48.html)>.

However, within three years, difficulties in managing “a rigorous and comprehensive social impact assessment process” for a large number of liquor licence applications were already apparent. Introducing a new Liquor Bill in the New South Wales Legislative Assembly on 28 November 2007, Mr Graham West, noted there were now to be “six liquor licence categories” requiring social impact assessment,<sup>14</sup> but at the same time

One area of the current liquor laws that is in need of reform is social impact assessments. These assessments have been criticised for being costly, time consuming, subjective, incomplete, and bewildering to residents and other stakeholders. A more efficient, less costly, and better targeted process is needed. The Liquor Bill 2007 therefore introduces a new community impact statement. The object is to facilitate consideration by the authority of the impact that the granting of certain applications will have on the local community...

Community impact statements [CIS] apply in different formats to low-impact licence applications. However, the authority will require that a statement be prepared with any application detail that it considers necessary... One aim of the new process will be to minimise time and costs...

The new community impact statement process will relieve applicants from having to obtain **large amounts of data** and prepare **complex and costly assessments**, so they can focus on consultation with the local community. Bringing the assessment process in-house will **facilitate a more objective process** that can better meet the needs of the authority. The Government believes that this type of process is essential for high-impact liquor licence applications. The bill requires that liquor regulators **must** be guided by harm minimisation principles.<sup>15</sup> (emphasis added)

Unlike the previous focus on “the integrity of the liquor licence system”, these changes aimed to:

- i save the applicant time and money;
- ii improve efficiency;
- iii replace all social impact assessments provided by applicants with community impact statements;
- iv have different formats for these statements depending on the perceived level of social risk of liquor licence applied for;
- v make the liquor regulators responsible for obtaining “large amounts of data” and preparation of “complex and costly assessments” and
- vi facilitate “a more objective process”.

The *Liquor Act 2007* (NSW) (the Act) also created the Casino Liquor and Gaming Control Authority, renamed, in 2012, the Independent Liquor and Gaming Authority (ILGA), responsible for determining liquor licence applications.

Thus, in a sequence of legislative changes apparently designed to reduce the time taken to process liquor licence applications, the Act shifted the administrative burden onto the public regulator by making it responsible for the collection and presentation of a significant amount of material<sup>16</sup> which had previously been required from the applicant.

By 2015 the Authority was still dealing with 2,475 liquor licence applications (year to 30 June 2015),<sup>17</sup> and the processing of these was still considered too slow by the New South Wales Government which introduced further administrative changes, as described by the Department of Justice:

<sup>14</sup> (a) an application for a hotel licence, club licence, small bar licence or packaged liquor licence; (b) an application under section 59 for approval to remove a hotel licence, club licence, small bar licence or packaged liquor licence to other premises; (c) an application for an extended trading authorisation in relation to a hotel licence, club licence, small bar licence or packaged liquor licence; (d) an application for an extended trading authorisation in relation to an on-premises licence (but only if the authorisation will result in trading at any time between midnight and 5 am); (e) an application for an extended trading authorisation in relation to a producer/wholesaler licence (but only if the authorisation will result in retail trading at any time between midnight and 5 am) – as subsequently set out in s 48(2) of the *Liquor Act 2007* (NSW).

<sup>15</sup> New South Wales, *Hansard*, Legislative Assembly, Liquor Bill 2007, 28 November 2007 <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-39810/HANSARD-1323879322-80171>>.

<sup>16</sup> As described in guidelines available at the time, such as F Vanclay, “International Principles for Social Impact Assessment” (2003) 21 *Impact Assessment and Project Appraisal* 1; P Harris et al, *Health Impact Assessment: A Practical Guide* (Centre for Health Equity Training, Research and Evaluation (CHETRE), Sydney, 2007). Part of the UNSW Research Centre for Primary Health Care and Equity, UNSW.

<sup>17</sup> ILGA, *Annual Report for 2014–15* (2015) 14 <<https://www.liquorandgaming.nsw.gov.au/documents/ilga/media-annual-reports-done/ILGA-2014-15-Annual-Report.pdf>>.

During 2015–16 the NSW Government undertook a reform to improve the regulation of the liquor and gaming industries...

To ensure timely and transparent decision making, the Authority is subject to ministerial directions on administrative matters. As part of the ministerial directions, the Authority board can be directed on the frequency of meetings to allow them to make decisions quickly.

The work of the Authority has been refocused on **high-risk** licence applications, such as new bottle shops or night clubs, and disciplinary matters ... In addition, Liquor and Gaming NSW was established within the Department of Justice as a new fit-for-purpose regulator undertaking the work previously performed by the Office of Liquor, Gaming and Racing and Authority staff. Administrative and processing functions have been transferred to Liquor and Gaming and the Authority has delegated **low-risk, non-contentious** decisions to Liquor and Gaming NSW.<sup>18</sup> (emphasis added)

This change did not reduce the number of liquor licence applications requiring a social impact assessment but did reduce the number being determined by ILGA members. This was achieved by delegating several categories of application such as small bars<sup>19</sup> and online-only packaged liquor<sup>20</sup> to public servants in Liquor and Gaming NSW to determine under delegation from ILGA. In the first six months of 2018, 106 of 146 (72.6%) published liquor licence decisions in New South Wales were made by delegates with the remainder being determined by ILGA. By designating delegated categories of liquor licence applications as “low risk” this strategy also appears to have permitted a formulaic assessment of social impacts, as will be shown below.

Thus by 2015, the tiered approach to SIA envisaged by the National Competition Policy Review in 2003 had been structured so as to minimise the number of applications requiring this level of assessment and maximise the number processed by public servants – now in the Department of Industry. At the same time, the burden of preparing information for assessment had been almost entirely removed from applicants. Currently a Category A community impact statement (CIS) is required for licence types considered low risk, and a Category B CIS for licence types more likely to be “high risk”.<sup>21</sup> Both CISs are short questionnaires chiefly about notification and consultation procedures. Neither CIS is a social impact assessment. In addition, applications for an on-premises liquor licence or for a small bar not in a prescribed precinct (with automatic provision for the sale of alcohol to 2.00 am<sup>22</sup>) do not always require a CIS.<sup>23</sup> Small bars comprised 32% of decisions in the first six months of 2018.

However, at the time of writing, Liquor and Gaming NSW is considering a new regulation that may exempt high-risk liquor licence applications that currently require a CIS from “the requirement that the application is accompanied by a community impact statement” as currently required under s 48(3) of the *Liquor Act 2007* (NSW).<sup>24</sup>

Following submissions from a number of public health agencies<sup>25</sup> opposing the proposed amendments, this change was not included in the Liquor Regulation that came into effect on 1 September 2018

<sup>18</sup> NSW Department of Justice, *Annual Report 2015–16*, Ch 11, Independent Liquor and Gaming Authority, Chairperson’s Report (2017) 137 <<https://www.justice.nsw.gov.au/Documents/Annual%20Reports/JusticeAnnualReport2015-16.pdf>>.

<sup>19</sup> ILGA, *Regulatory Delegations Manual, Liquor Act 2007* (2016) s 20A, 88 <<https://www.liquorandgaming.nsw.gov.au/documents/ilga/publications/ilga-regulatory-delegations-manual.pdf>>.

<sup>20</sup> ILGA, n 19, s 45(1), (2), 97.

<sup>21</sup> NSW Legislation, *Liquor Regulation 2007*, Clause 10 <<https://legislation.nsw.gov.au/#/view/regulation/2008/240/historical2016-07-01/part3/div2/sec10>>.

<sup>22</sup> *Liquor Act 2007* (NSW) s 20B(2) <<https://www.legislation.nsw.gov.au/#/view/act/2007/90/part3/div3a/sec20b>> and s 49A <<https://www.legislation.nsw.gov.au/#/view/act/2007/90/part4/div2/sec49a>>. All other types of alcohol outlets seeking to trade after midnight require an ETA accompanied by a CIS (B) given the well documented higher risks of harm associated with the extended availability and supply of alcohol.

<sup>23</sup> Liquor and Gaming NSW, *Small Bar Licence* <<https://www.liquorandgaming.nsw.gov.au/operating-a-business/liquor-licences/liquor-licence-types/small-bar-licence>>.

<sup>24</sup> Liquor & Gaming NSW, *Regulatory Impact Statement, Liquor Regulation* (August 2018) 18 <<https://static.nsw.gov.au/nsw-gov-au/1530242467/Regulatory-Impact-Statement-Liquor-Regulation-2018.pdf>>.

<sup>25</sup> For example from the Northern Sydney Local Health District on 19 July 2018 <<https://www.liquorandgaming.nsw.gov.au/documents/submissions/liquor-regulation-2018/northern-sydney-local-health-district-health-promotion.pdf>>; from St Vincent’s



with the Department noting that further refinement was needed before introducing changes to the CIS requirements.<sup>26</sup>

Should the requirement for a CIS be withdrawn, and in the absence of an alternative requirement, decisions about the likely social impacts of granting a liquor licence will likely rely on three sources of information: the application, any submissions received, and any social research data provided (eg by public servants) to the Authority or its delegate. The scope of such social research data would be at the discretion of the decision-makers. It is unlikely to include a history of notification of stakeholders by the applicant, as this information is currently only provided to the Department via a CIS,<sup>27</sup> although with little independent check of veracity.

In this situation, the social impact safeguard introduced to accompany competition reforms would take place almost wholly out of public view:

- there would be no CIS on the public record;
- submissions to Liquor and Gaming are not currently published; and
- the scope of the social research relied on by the decision-maker, if current practice is continued, may only become apparent (if at all) after the Decision is published.<sup>28</sup>

## A. High Risk in the Context of Administrative Burden

Section 48(5) of the Act places the following statutory obligation on ILGA with respect to the consideration of higher risk applications. It “**must not** grant” an application unless it is satisfied that the “overall social impact ... will not be detrimental to the well-being of the local or broader community”.<sup>29</sup> (emphasis added)

The current tiered system relies on two factors to identify which liquor licence applications should receive the most attention in terms of the statutory requirement to consider social impacts. These are the presence of high risk and the type of liquor licence. The tiered system correlates high risk with licence type.

### 1. High Risk Identified by Social Indicators

In September 2018, ILGA re-published *Guideline 6 Consideration of Social Impact under Section 48(5) of the Liquor Act 2007*.<sup>30</sup> This Guideline listed research which “assists in identifying risk factors” and “features of communities” relevant to “consideration of social impacts”. It notes:

The Authority may apply the following general propositions from the available literature.

- High levels of outlet-density have been shown to be positively associated with higher levels of alcohol-related harm (Campbell, 2009).
- High levels of packaged liquor outlet-density have been shown to be positively associated with higher rates of alcohol-attributable morbidity and mortality (Richardson, 2015).
- Socio-economically disadvantaged communities are at greater risk of alcohol-attributable chronic disease or accident or injury (NSW Chief Health Officer, 2016).
- High levels of packaged liquor outlet-density have been shown to be positively associated with higher rates of alcohol-related DV assault (Donnelly, Menendez & Mahoney, 2014).

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Health Australia on 27 July 2019 <<https://www.liquorandgaming.nsw.gov.au/documents/submissions/liquor-regulation-2018/st-vincent-health-australia.pdf>>; the Centre for Population Health, NSW Ministry of Health on 18 July 2018 <<https://www.liquorandgaming.nsw.gov.au/documents/submissions/liquor-regulation-2018/nsw-ministry-of-health-submission.pdf>>.

<sup>26</sup> Liquor and Gaming NSW, n 23.

<sup>27</sup> Liquor & Gaming NSW, *Community Impact Statements (CIS)* <<https://www.liquorandgaming.nsw.gov.au/Pages/liquor/community-involvement/community-impact-statements.aspx>>.

<sup>28</sup> A Ziller, “Eroding Public Health through Liquor Licensing Decisions” (2018) 25 *JLM* 489.

<sup>29</sup> See <[http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol\\_act/la2007107/s48.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/la2007107/s48.html)>.

<sup>30</sup> ILGA, *Guideline 6, Consideration of Social Impact under Section 48(5) of the Liquor Act 2007* (September 2018) <[https://www.liquorandgaming.nsw.gov.au/documents/ilga/guidelines/ILGA-Guideline-6\\_3-September-2018.pdf](https://www.liquorandgaming.nsw.gov.au/documents/ilga/guidelines/ILGA-Guideline-6_3-September-2018.pdf)>.

- High levels of hotel outlet-density, and highly concentrated clusters of hotels in an area, have been shown to be positively associated with higher rates of alcohol-related non-DV assault (Livingston M, 2008).<sup>31</sup>

This list of propositions from the literature is incomplete since the risks of harm associated with extended trading hours (past midnight) are also well established.<sup>32</sup> However, Guideline 6 establishes that ILGA recognises outlet density and socio-economic disadvantage as risk factors for alcohol-related harm which is reflected in socio-economic, health or crime statistics. Further, many published decisions by the Authority refer to crimes rates and indicators of relative disadvantage. The crime rates usually referred to are domestic and non-domestic assaults, and less frequently, malicious damage to property. Crime data are derived from incidents reported to the police and published quarterly.<sup>33</sup>

However, the pattern of decisions by ILGA in the period January to June 2018 does not reflect the risk of social harm indicated by the crime data. In this six-month period, the Authority approved five new hotel licence applications notwithstanding that three of them were located in both a high-density domestic assault hotspot and a high-density non-domestic assault hotspot or postcode with high rates. The Authority also approved 10 of 11 applications from hotels for extended trading authorisations (ETAs). Six of these hotels are located in high-density domestic assault hotspots and one is in a medium-density domestic violence hotspot or postcode. Five hotels are in high-density non-domestic assault hotspots or postcode (Table 1).

**TABLE 1. Analysis of ILGA Liquor Decisions re. Applications for new hotels and extended trading hours in hotels by two risk factors for the period 1 January–30 June 2018**

Hotel name and address	New hotel?	ETA approved/refused	In a high-density domestic violence hotspot	In a medium-density domestic violence hotspot	In a high-density non-domestic hot spot	In a medium-density non-domestic hot spot
The Station House Hotel removal to 203 Beamish St, Campsie		Withdrawn	Yes		Yes	
Bath Arms Hotel, Parramatta & Burwood Roads BURWOOD NSW 2134		Approved				
Padstow Park Hotel 31 Howard Rd, PADSTOW 2211		Approved	Yes			

<sup>31</sup> ILGA, n 30, Annexure A, citing CA Campbell et al, “The Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol Consumption and Alcohol-related Harms” (2009) 37 *American Journal of Preventative Medicine* 556; EA Richardson et al, “Is Local Alcohol Outlet Density Related to Alcohol-related Morbidity and Mortality in Scottish Cities?” (2015) 33 *Health Place* 172; NSW Department of Health, *Trends in Alcohol Use and Health-related Harms in NSW, Report of the Chief Health Officer* (2016) <<https://www.health.nsw.gov.au/hsnsw/Publications/chief-health-officers-report-2016.pdf>>; D Donnelly, P Menendez and N Mahoney, “The Effect of Liquor Licence Concentrations in Local Areas on Rates of Assault in New South Wales”, *BOCSAR, Crime and Justice Bulletin*, No 181, December 2015 <<https://www.bocsar.nsw.gov.au/Documents/CJB/CJB181.pdf>>; M Livingston, “Alcohol Outlet Density and Assault: A Spatial Analysis” (2008) 103 *Addiction* 619.

<sup>32</sup> S Moffatt and D Weatherburn, “Trends in Assaults after Midnight”, *Crime and Justice Statistics*, Issues Paper 59 (April 2011) <<http://www.bocsar.nsw.gov.au/Documents/BB/bb59.pdf>>; C Wilkinson, M Livingston and R Room, “Impacts of Changes to Trading Hours of Liquor Licences on Alcohol-related Harm: A Systematic Review 2005–2015”, (2016) 26 *Public Health Research and Practice*.

<sup>33</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), *Crime tool* <<http://crimetool.bocsar.nsw.gov.au/bocsar/>>.

# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Ziller and Brown

**TABLE 1.** *continued*

Nick and Nora's 45 Macquarie Street PARRAMATTA 2150	Yes	Approved	Yes		Yes	
Panania Hotel 63 Anderson St PANANIA NSW 2213		Approved		Yes		
Copper City Hotel removal to 40 Lewis Street, Cobar		Approved				
Lakes Hotel – The Entrance 201 The Entrance Road, The Entrance 2261		Approved	Yes		Yes	
Marrickville Ritz Hotel, 252-254 Illawarra Rd, Marrickville 2204		Approved	Yes		Yes	
Finley Country Club Hotel Motel, 167-177 Murray Street FINLEY NSW 2713	Yes	Not applied for				
Mullane's Baulkham Hills, 34/36 Brookhollow Avenue BAULKHAM HILLS NSW 2153	Yes	Refused				
Four Points by Sheraton Sydney Central Park, Block 4N, 88 Broadway CHIPPENDALE NSW 2008	Yes	Approved	Yes		Yes	
Cookies Lounge Bar, 1-11 George Street NORTH STRATHFIELD NSW 2137		Approved				
Broken Hill Outback Resort, Mount Gipps, Barrier Highway, Mount Gipps NSW 2880	Yes	Approved	No* Postcode rate: 1085.5 NSW rate: 370.0		No* Postcode rate: 854.4 NSW rate: 413.2	

Source: ILGA Liquor Decisions January – June 2018 as published in September 2018, NSW Bureau of Crime Statistics and Research (BOCSAR) crime maps data for July 2017–June 2018.<sup>34</sup> \*This out of town venue is not in a hotspot but is in a postcode in which reported rates of domestic violence and non-domestic assault (per 100,000 population) are more than twice the comparative NSW rate.

The relationship between alcohol-related harm, relative disadvantage, outlet density and extended trading hours was well documented in literature published before 2018 – as ILGA noted in the reference list attached to Guideline 6.

In the case of packaged liquor licences for the same period of analysis, the Authority approved 15 of 23 applications (Table 2). The NSW Coroner's Office, Domestic Violence Deaths Review Team

<sup>34</sup> ILGA, *Liquor Decisions* (ILGA LD) are published on the Liquor and Gaming NSW Website <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/liquor-decisions>>; BOCSAR, n 33.

recommended a rebuttable presumption against approval of new liquor licences in domestic violence hotspots.<sup>35</sup> Research suggests that the density of packaged liquor licences is of particular concern regarding domestic violence.<sup>36</sup> Again these sources (and others) have been available for some time.

However, nine of the approved packaged liquor licences were for premises located within or very close to a high- or medium-density domestic assault hotspot. Published crime data show that domestic violence assault hotspots tend to persist, year after year.

**TABLE 2. Co-location of approved packaged liquor licence premises and domestic violence hotspots**

Packaged liquor licence approvals 1 January–30 June 2018	In a high-density hotspot	In a medium-density hotspot
David Jones Pty Ltd, Corner Keira & Burelli Street WOLLONGONG	Yes	
DC/SIA Mart 155 Peats Ferry Road HORNSBY		
Rostrade Pty Ltd 2/4 Homepride Avenue WARWICK FARM 2170	On edge of a large hotspot	
ALDI Riverwood 247-263 Belmore Road RIVERWOOD	Yes	
BWS Shellcove Corner of Harbour Boulevard & Cove Boulevard ShellCove		
Southside Liquor Shop 7, 94 Bent Street SOUTH GRAFTON	Close to a small hotspot	
Envy Liqueurs, Wines and Spirits 347 Bong Bong Street, BOWRAL		
BWS (Merimbula) Removal to 107-113 Main Street Merimbula		
BWS (N Sydney) 100 Miller Street NORTH SYDNEY		Yes
BWS (Lindfield) 23-41 Lindfield Avenue Lindfield		
Le Pont Wine Store (removal to 88 Alfred Street MILSONS POINT)		Yes
Friendly Grocer Supermarket, cnr Yala and Menai Roads, Bangor 2234		
Bayswater Fine Wines, 69-77 Bayswater Road Rushcutters Bay NSW 2011	Yes	
Henlee Supa Supermarket 27-31 Belmore Street BURWOOD 2134		Yes
ALDI Wetherill Park, Corner The Horsley Drive & Rossetti Street WETHERILL PARK NSW 2164		Yes

Source: ILGA Liquor Decisions. January–June 2018 as published in September 2018, BOCSAR crime maps data for July 2017–June 2018.<sup>37</sup>

The Authority also cites relative socio-economic disadvantage as a risk factor for alcohol-related harm and uses a Social and Economic Index for Areas (SEIFA) prepared by the Australian Bureau of Statistics to indicate the presence of relative disadvantage in an area. However, rather than using the SEIFA Index

<sup>35</sup> NSW Coroner's Office, *Domestic Violence Deaths Review Team Report for 2015–2017*, Recommendation 14, xvii <[http://www.coroners.justice.nsw.gov.au/Documents/2015-2017\\_DVDRT\\_Report\\_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)>.

<sup>36</sup> M Livingston, "A Longitudinal Analysis of Alcohol Outlet Density and Domestic Violence" (2011) 106 *Addiction* 919; JL Connor et al, "Alcohol Outlet Density, Levels of Drinking and Alcohol-related Harm in New Zealand: A National Study (2011) 65 *Journal of Epidemiology and Community Health* 841.

<sup>37</sup> ILGA, n 34; BOCSAR, n 33.

Ziller and Brown

of Relative Disadvantage (IRSD) prepared precisely for this purpose, the Authority uses the SEIFA of Relative Advantage and Disadvantage (IRSAD). In this index, areas of disadvantage are minimised where there are also areas of relative advantage in the area selected. That is, in a local government area the presence of relatively advantage areas can effectively “white out” the presence of disadvantaged areas when the IRSAD index is reported for the local government area as a whole.<sup>38</sup> Since alcohol-related harm is clearly associated with relative disadvantage,<sup>39</sup> there are no good public interest grounds for avoiding the purpose-built IRSD social index.

The published decisions therefore do not suggest that in practice “high risk” is determined by social indicators.

## 2. High Risk Identified by Licence Type

On the other hand, licence type almost always accounts for which decision-maker, ILGA or a Delegate, determines likely social impact. This is reflected in the Authority’s Regulatory Delegations Manual,<sup>40</sup> Guideline 6,<sup>41</sup> and the pattern of delegation in the first six months of 2018 as shown in Table 3. Table 3 shows that in the first six months of 2018, 100% of online-only packaged liquor licences (OPLL) (55 applications), 100% of producer/wholesaler licences (Prod/W) (seven applications) and all but four on-premises, small bars and clubs determinations were approved by Delegates, that is staff in the NSW Department of Industry.<sup>42</sup>

**TABLE 3: Distribution of published decisions between ILGA and delegates by licence type for the period 1 January–30 June 2018**

Premises type decision	On-premises	PLL	OPLL	Small bar	Hotel	Club	Prod/W	Total	% all decisions
ILGA approved	1	15	0	1	13	1	0	31	21.2%
ILGA refused	1	8	0	0	0	0	0	9	6.2%
Delegate approved	37	0	55	7	0	0	7	106	72.6%
Delegate refused	0	0	0	0	0	0	0	0	0%
Total	39	23	55	8	13	1	7	146	100%

Source: ILGA Liquor Decisions 2018 as published in September 2018.<sup>43</sup>

Of the four on-premises applications, one refusal was due to a procedural failure, one decision also concerned gaming machines and one decision had strong police opposition to one part of the application (minors authorisation). The fourth, an application for a small bar in Wagga Wagga suburb may have been referred by staff to the Authority because of the following licence density and alcohol-related crime data:

<sup>38</sup> Australian Bureau of Statistics 2016, *SEIFA Technical Paper* <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/756EE3DBEFA869EFC258259000BA746/\\$File/SEIFA%202016%20Technical%20Paper.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/756EE3DBEFA869EFC258259000BA746/$File/SEIFA%202016%20Technical%20Paper.pdf)>.

<sup>39</sup> SV Katikireddi et al, “Socioeconomic Status as an Effect Modifier of Alcohol Consumption and Harm: Analysis of Linked Cohort Data”, (2017) 2 *The Lancet Public Health* e267.

<sup>40</sup> ILGA (NSW Independent Liquor and Gaming Authority), *Regulatory Delegation Manual* (11 April 2018) <<https://www.liquorandgaming.nsw.gov.au/documents/ilga/publications/ilga-regulatory-delegations-manual.pdf>>.

<sup>41</sup> ILGA, n 30.

<sup>42</sup> In 2016, Liquor and Gaming NSW was transferred from the NSW Department of Justice to NSW Department of Industry.

<sup>43</sup> ILGA, n 34.

**TABLE 4. Licence density in Wagga Wagga suburb and LGA compared with NSW**

Area Rate	NSW	Wagga Wagga LGA	Wagga Wagga suburb	Suburb rate compared with NSW rate
Hotel licences per 100,000 persons	28.37	43.28	197.07	Seven times greater
Club licences per 100,000 persons	17.45	12.82	70.38	Four times greater
On-premises licences per 100,000 persons	113.71	133.4	957.21	Eight times greater

**TABLE 5. Alcohol-related crime rates in Wagga Wagga suburb and LGA compared with NSW**

Area Rate	NSW	Wagga Wagga LGA	Wagga Wagga suburb	Suburb rate compared with NSW rate
Incidents of alcohol-related domestic assault per 100,000 persons	114.4	199.7	286.0	2.6 times greater
Incidents of alcohol-related non-domestic assault per 100,000 persons	130.4	201.3	667.3	Five times greater
Incidents of malicious damage to property per 100,000 persons	779.5	1,515.2	3,173.1	Four times greater

Source: Tables 4 and 5, ILGA Rabbit Books Arthouse decision.<sup>44</sup> Comparative rates by the authors.

Despite these comparative rates, which are readily identifiable from the data provided in the decision, ILGA approved the small bar licence.

The pattern of decisions documented in Tables 1–5 shows that high risk as evidenced in alcohol-related crime data, rarely interrupts the pattern of liquor licence application approvals.

## II. CONSEQUENCES FOR PUBLIC HEALTH

### A. Proliferation of Licensed Premises

The cumulative effect of broad-scale delegation, minimisation of social impact assessment and an apparent reluctance to rely on social data is a proliferation of liquor licences. While there were 12,638 liquor licences in 2003, by 30 June 2018 there were 16,295,<sup>45</sup> an increase of 29%.<sup>46</sup> During this time the population of NSW increased by approximately 18%.<sup>47</sup>

Proliferation of outlets increases the availability and supply of alcohol which is recognised as a major contributor to alcohol-related harm. Reducing supply is an important counter-measure.<sup>48</sup> According to the Australian Burden of Disease Study, in 2011 alcohol was the leading contributor to the burden of

<sup>44</sup> ILGA Liquor Decision re Rabbit Books Arthouse Studio Gallery Art School on 21 June 2018 <[https://www.liquorandgaming.nsw.gov.au/documents/ilga/decisions/Rabbit-Books\\_statement-of-reasons.pdf](https://www.liquorandgaming.nsw.gov.au/documents/ilga/decisions/Rabbit-Books_statement-of-reasons.pdf)>.

<sup>45</sup> NSW Government, NSW Department of Industry Annual Report for 2017–18, 150 <<https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/75063/Dept%20Industry%202018.PDF>>.

<sup>46</sup> This figure is likely to be an underestimation of the true increase in alcohol outlets given a new licensing fee regime which has reduced the number of non-operational licenses.

<sup>47</sup> Australian Bureau of Statistics 2006, *Population by Age and Sex, New South Wales, Jun 2003* <<http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/0AFB778A107EABAFCA25702F0071FA07?OpenDocument>>; Profile.id, 2018, *NSW, Estimated Residential Population* (30 June 2017) <<https://profile.id.com.au/australia/about?WebID=100>>.

<sup>48</sup> R Burton and N Sheron, “No Level of Alcohol Consumption Improves Health” (2018) 392 *The Lancet* 987; GBD 2016 Alcohol Collaborators 2018, “Alcohol Use and Burden for 195 Countries and Territories, 1990–2016: A Systematic Analysis for the Global Burden of Disease Study 2016” (2018) 392 *The Lancet* 1015; WHO, n 6; P Miller et al, *Interventions for Reducing Alcohol Supply*,

Ziller and Brown

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disease for people aged 0–44 in Australia.<sup>49</sup> According to the Chief Health Officer, in New South Wales the overall impact of alcohol on health is high.<sup>50</sup>

The risks of liquor outlet proliferation have also been recognised in reviews of competition policy, most recently in the Harper report:

restrictions on opening hours, or planning and zoning rules, or liquor licensing regimes, or gaming licensing, should not be designed to benefit particular competitors or classes of competitors, but only to achieve the stated public policy benefits.<sup>51</sup>

More competition can reduce price and increase availability of alcohol and thus alcohol-related harm. Alcohol-related harm is not a public policy benefit.

## **B. Inadequate Constraint on Pressures from Industry**

Ambiguity within the Act's objects is also a significant enabler of outlet proliferation and increased harm.

Section 3(1) "Objects" of the Act are:

- (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
- (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
- (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

The first objective to be "consistent with the expectations, needs and aspirations of the community" is open to as many interpretations as there are points of view in the community, and so is unclear. The remaining objectives concern benefits to the alcohol and related industries. The absence of promoting and sustaining public health and safety as an objective of the Act is a significant omission.

In securing the above objects of the Act, s 3(2) requires the decision makers to "have due regard to" the following provisions:

- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
- (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
- (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

Minimising alcohol harm enjoys the same level of consideration as encouraging responsible attitudes of alcohol suppliers, promoters and drinkers and, the positive contribution of alcohol to the "amenity of community life". There remains however, an overarching whole of government obligation to ensure all decisions under a statute take into account the overall public interest that is not constrained by the objectives of individual statutes.<sup>52</sup>

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*Alcohol Demand and Alcohol-related Harm* (Research Bulletin 3, National Drug Law Enforcement Research Fund, 2016) <<http://www.ndlerf.gov.au/sites/default/files/publication-documents/bulletins/research-bulletin-03.pdf>>; WHO, "Harmful Use of Alcohol Kills More than Three Million People Each Year, Most of Them Men" (News release, 21 September 2018) <[http://www.who.int/substance\\_abuse/publications/global\\_alcohol\\_report/en/](http://www.who.int/substance_abuse/publications/global_alcohol_report/en/)>; World Economic Forum and World Health Organisation, *From Burden to "Best Buys": Reducing the Economic Impact of Non-communicable Diseases in Low and Middle-income Countries* (2011) <[https://www.who.int/nmh/publications/best\\_buys\\_summary.pdf](https://www.who.int/nmh/publications/best_buys_summary.pdf)>.

<sup>49</sup> Australian Institute of Health and Welfare, *Impact of Alcohol and Illicit Drug Use on the Burden of Disease and Injury in Australia, Australian Burden of Disease Study 2011* (29 March 2018) <<https://www.aihw.gov.au/reports/burden-of-disease/impact-alcohol-illicit-drug-use-on-burden-disease/related-material>>.

<sup>50</sup> NSW Department of Health, n 31.

<sup>51</sup> I Harper et al, "Competition Policy Review" (Final Report, Commonwealth of Australia, March 2015) 146 <[http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf)>.

<sup>52</sup> See *Minister for Planning v Walker* (2008) 161 LGERA 423, [39]; [2008] NSWCA 224, cited in *La La Land Byron Bay Pty Limited v The Independent Liquor and Gaming Authority* [2015] NSWCA 254, [15].

The objects of the Act confuse and potentially contradict the otherwise unequivocal requirement of s 48(5) of the Act to ensure that a licensing decision must not be “detrimental to the wellbeing of the local or broader community”. This establishes a broad scope of subjective discretion open to potential undue direct and indirect industry influence for the decision-makers whose determinations are not made in public view. The objectives’ contribution to undermining a more rational approach to alcohol outlet determinations is evidenced by the way in which these contradictions have been interpreted. For example:

This past year for the Authority has been shaped by further growth and transformation as the first full year of reforms to liquor and gaming regulation in NSW have been in operation. In line with these reforms the Authority has implemented a number of improvements to provide greater certainty for industry and the community in relation to licensing matters ... The Authority has also been working closely with Liquor & Gaming NSW to ensure decisions are made in a timely manner and in accordance with the determination timeframes outlined in the ministerial directions.<sup>53</sup>

And as the Authority’s Guideline 6 notes:

Applicants are reminded that whether or not the overall social impact test applies to an application, all Authority liquor decisions will be informed by an assessment of the statutory objects and considerations prescribed by section 3 (“Objects”) of the Act.<sup>54</sup>

That is, the obligatory social impact test outcome has then to be considered against statutory objectives which focus on industry interests and a vague community expectations requirement. Harm minimisation, and presumably public safety, is just one consideration alongside responsible “promotion, sale, supply, service and consumption of liquor” and amenity of community life (often interpreted as mere customer convenience).

Pressure on politicians from industry stakeholders tends to be strong and persistent.<sup>55</sup> The above pattern of decision making, and the transfer of Liquor and Gaming NSW to the NSW Department of Industry in early 2016, suggest that the interests of the industry and their customers (objective 3(1)(b)) have been weighed favourably against requirements to reject applications likely to have an overall adverse social impact (s 48(5)) or contribute to increased harm (s 3(2)(a)).

Thus, the statutory requirement for a social impact assessment required to determine the yardstick of no detriment, has effectively been erased by administrative strategies to deal with a large number of applications and encourage and promote “a flexible and practical regulatory system with minimal formality and technicality” (s 3(1)(b)).

### C. No Basis for Authority Satisfaction as to Likely Social Outcomes

The several administrative strategies described above have shortened the time taken to consider most liquor licence applications. This too has resulted in apparent inadequate scrutiny of social impacts for the majority of decisions falling within the scope of s 48(5) of the Act as shown for the period under review (January–June 2018). This is particularly evident for those licence types dealt with under delegation where all applications are approved and the assessment, as reported in the decisions, is formulaic. For example, in the first six months of 2018, Delegates approved 55 online-only packaged liquor licenses relying upon the following identical reasoning.

**Negative impacts:** The nature of the licence sought means that there are unlikely to be any amenity impacts on the local community.<sup>56</sup>

or more descriptively

**Negative impacts:** No objections were received and no concerns were raised in respect of the application. This licence application is for a home office at which orders will be processed, with liquor to be stored and

<sup>53</sup> NSW Department of Justice, *Annual Report 2016–17*, Chapter 11, Independent Liquor and Gaming Authority, Chairperson’s Report (2018) 320 <<https://www.justice.nsw.gov.au/Documents/Annual%20Reports/justice-nsw-annual-report-2016-17.pdf>>.

<sup>54</sup> ILGA, n 30, 1.

<sup>55</sup> D Wood and K Griffiths, *Whose in the Room, Access and Influence in Australian Politics* (Grattan Institute, September 2018) <<https://grattan.edu.au/wp-content/uploads/2018/09/908-Who-s-in-the-room-Access-and-influence-in-Australian-politics.pdf>>. See also T Brown “Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health” (2019) 26 JLM 764

<sup>56</sup> ILGA Liquor Decision re 7 Pelangi Pty Ltd (11 January 2018) <<https://www.liquorandgaming.nsw.gov.au/documents/ilga/decisions/decision-online-packaged-liquor-licence-7-pelangi-pty-ltd-11-01-18.pdf>>.



dispatched at from a separate location. Customers will not be attending the premises to browse, purchase or taste products. The nature of the licence sought means that there are unlikely to be any amenity impacts on the local community.<sup>57</sup>

The customer catchment of an online retail outlet has nothing to do with local amenity. The blanket repetition of summary statements such as these suggests in the absence of any evidence to the contrary, that the question of negative impacts has not been adequately considered.

While alcohol outlet density and relative disadvantage have been identified by ILGA as indicators of risk for alcohol-related harm, the social data must be seen to be applied for the criteria to be credible. The pattern of decisions in the first half of 2018 considered vis-a-vis significant crime data (Tables 1 and 2 above) and SEIFA indexes, does not support the proposition that the social data are given consistent and due weight.

Inconsistent use of social data has flow-on consequences such as continuing unfamiliarity with applying social research and/or a willingness to be convinced that industry-proposed strategies such as a Plan of Management,<sup>58</sup> or requirements for responsible service of alcohol are effective mitigations of risk. Neither of these requirements are realistically enforceable.<sup>59</sup> As such they are not credible mitigations. Misunderstanding and misapplying social data fundamentally undermines social impact assessment and erodes the duty of care owed to the public with detrimental public health and crime outcomes.

### III. CONCLUSION

The 2004 amendment to the *Liquor Act 1982* (NSW) made social impact assessment a requirement for decisions concerning higher risk liquor licence applications. But social impact assessment is not suited to rapid consideration of a large number of applications with “minimal formality and technicality”. All available guidelines, including the Authority’s Guideline 6, make it clear that well-considered social impact assessments take time. When the number of applications exceeds assessment capacity, there is likely to be strong industry pressure to reduce the number of applications requiring assessment and find short cuts with supporting narrative justification to make the remaining assessments manageable. When these administrative devices result in 94% of all valid applications being approved, the system of determining social costs and benefits via social impact assessment can be regarded as failed. The important safeguard has slid away.

Social wellbeing and public health and safety are fundamental public interest considerations in comparison to the private commercial interests of the alcohol industry. Alcohol-related harm is a major public health issue and the regulation of liquor licences is an important control on the availability and supply of alcohol.

Because of these important public duties, the answer to the problem of quantity of licence applications is not to enfeeble or emasculate social impact assessment or cease using it altogether. Burdened licensing authorities could take other “upstream” steps to reduce the quantity of applications requiring assessment. These steps could include raising the criteria to be satisfied for a liquor licence to be granted, for example by setting density limits, refusing new licences and extended trading hours in and near violence hotspots, and raising licencing fees to reflect the true cost of alcohol misuse to the public.<sup>60</sup> These steps would assist

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<sup>57</sup> ILGA Liquor Decision re Dirt Candy Wine Online (16 April 2018) <<https://www.liquorandgaming.nsw.gov.au/documents/ilga/decisions/decision-packaged-online-liquor-licence-dirt-candy-wine-online.pdf>>.

<sup>58</sup> ILGA, n 30, 2.

<sup>59</sup> J Brick and CK Erickson, “Intoxication Is not Always Visible: An Unrecognized Prevention Challenge” (2009) 33 *Alcoholism: Clinical and Experimental Research* 1489; N Donnelly, “Young Adult’s Experience of Responsible Service Practice in NSW: 2011 Update” *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice* (April 2012) 162 <<https://www.bocsar.nsw.gov.au/Documents/CJB/cjb162.pdf>>.

<sup>60</sup> NSW Auditor General, Report to Parliament, *Cost of Alcohol Abuse to the NSW Government*, Key Findings (August 2013) <<https://www.audit.nsw.gov.au/our-work/reports/cost-of-alcohol-abuse-to-the-nsw-government>>.

an appropriately skilled and resourced fully accountable public licensing authority give the necessary time and due diligence to its social impact assessment statutory obligations.

Finally, the licensing authority could also be supported by an unambiguous enabling clause in the legislation stating that the authority is a public health agency with a primary duty to reduce and minimise alcohol-related harm,<sup>61</sup> rather than an administrative arm of government promoting alcohol industry growth and development.

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<sup>61</sup> Exemplified in the objectives of the Licensing (Scotland Act) 2005 <<https://www2.gov.scot/Topics/Justice/policies/drugs-alcohol/alcohol-licensing>>.

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### 4.3 Article 3

Public Health v Alcohol Industry Compliance Laws: A Case of Industry Capture? 27/4 JLM 2020 1047–73.

**AUTHOR:** Tony Brown.

#### **OVERVIEW:**

#### 4.3.1 Contribution to the exegesis

A fourth site for the presence of stakeholder contestation and the possibility of industry capture are those laws that may seek to impose effective compliance and enforcement obligations on the industry.

This fourth article provides a novel explication of the potential regulatory capture of the secondary layer of NSW retail alcohol industry compliance and legal enforcement schemes from the commencement of the current *Liquor Act 2007* (NSW) on 1 July 2008. Unlike objections to licence applications and residents' 'undue disturbance' complaints against licensed premises,<sup>431</sup> the public and CSOs have minimal direct involvement with this secondary layer of statutory disciplinary schemes. In essence, they rely upon their elected lawmakers and related government agencies to ensure outcomes remain consistent with the concept of the public interest.<sup>432</sup>

Under regulatory capitalism, a key goal of competitive industry<sup>433</sup> is to secure and sustain a regulatory legal and investment environment conducive to ongoing owners' profit maximisation, certainty, and growth. The perception of corporate social responsibility is also a factor in this calculative process. The statutory industry compliance and enforcement process, another critical link in the regulatory chain, can prove a critical disruptor for businesses. It is arguably in their best commercial interests to seek effective control over such risky processes through various means. The same means to such ends can potentially constitute capture and corruption.

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<sup>431</sup> *Liquor Act 2007* (NSW) s79.

<sup>432</sup> This second layer of compliance related regulation is unlike most other similar risky or unhealthy industry regulatory processes for example, the NSW workplace safety, environmental protection, food safety and consumer protection legal framework.

<sup>433</sup> See Brown article 1, Levi-Faur reference (n 14).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The corollary of any effective commercial industry control over their own compliance schemes through capture is the immediate and fundamental conflict of interest that this capture poses. However, such an adverse impact is not isolated to conflicts of interest and less than optimal outcomes for the public-interest stake in harm prevention and reduction. Its pervasiveness extends to undermining the rule of law and our democratic process. These are key findings that contribute to answering the research questions posed in this thesis.

This article commences with an analysis of an industry and government initiative proposed in 2008, the Safe Venues Voluntary Rating Scheme (SVVRS) which was to have been run by the industry but, ultimately, did not eventuate. However, the proposed voluntary scheme unmasked the dominant underpinning ideological frame<sup>434</sup> of neoliberalism that still resonates through subsequent the ‘integrated’ compliance schemes critically analysed in the final article.

These compliance-related schemes underwent a series of reviews and were progressively weakened to favour elite owners of licensed premises.

### 4.3.2 Relationship with other articles

This article contextualises and modifies the multi-dimensional capture test synthesised in the first article. The case study of the statutory compliance and enforcement process for the retail supply of alcohol in NSW provides a valuable additional barometer and perspective for the possible presence of capture. This evidence directly responds to the research questions.

This article confirms a correlation between reported political donations and favourable legislative ‘reforms’ and related practices analysed in article 1.<sup>435</sup> It concludes that sometime after the original development and application of the second layer of statutory disciplinary schemes they became the subject of industry capture. This was likely to inhibit the attainment of stronger and more effective reductions in alcohol-related violence and associated preventable harms. It also attached negative equity and conflict of interest implications.

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<sup>434</sup> See Brown article 1, Schram reference (n 22); Battams and Townsend (n 124).

<sup>435</sup> Brown, article 3, 1068–73.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Importantly, these industry compliance schemes failed to acknowledge and address significant deadly increases in the levels of reported alcohol-related domestic and family violence not confined to Sydney's prime drinking precincts.

This article provides substantial insight into the neoliberal frame and related narrative adopted by the NSW alcohol industry and its political supporters.

The development, application, variation and removal of compliance schemes, along with the accompanying discourse, provides key sentinel vantage points from which to critically analyse the relative nature of stakeholder influence or power, potentially manifested as capture. This contestation and its associated narrative also bring into sharp question the neutrality of the state engaged in 'balancing' stakeholder interests.

This article found the dominant industry discourse supported by the NSW Parliament emphasised the necessity of protecting the financial interests of the industry elites, including financial institution's loans to them. It also revolved around eliminating aspects of the disciplinary schemes, such as those that held the owners of the larger higher risk licensed premises, in particular, primarily accountable for alcohol-related incidents and legal infringements.

This article provides one of the clearest examples of an industry elite bias, a situation where one prominent hotel chain owner was prosecuted for supplying alcohol to two under-aged females.<sup>436</sup> A 2017 amendment to the three strikes scheme<sup>437</sup> devolved the key legal responsibility for ensuring compliance to the licensee or manager of pubs and nightclubs, away from the ultimate (wealthy) owners and controllers where any variation existed. The rationale for this change, supported by both sides of the NSW Parliament, was to protect the income- and employment-generating capital business investments involved, the 'bricks and mortar' of the licensed premises. Employed licensees and managers became dispensable. The related additional justification was that any statutory sanction could threaten the cost, future, or both of any loans from financial institutions.

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<sup>436</sup> Sean Nicholls 'Strikes to be wiped from 100 venues under revised penalty scheme' *Sydney Morning Herald* 25 May 2017 <https://www.smh.com.au/national/nsw/strikes-to-be-wiped-from-100-venues-under-revised-penalty-scheme-20170525-gwd4k1.html> exposes serious conflict of interest.

<sup>437</sup> Brown and Anderson, article 4, (n 66) 18.

### 4.3.3 Copy of Article 3

## Public Health versus Alcohol Industry Compliance Laws: A Case of Industry Capture?

Tony Brown\*

*This article confirms that industry compliance and enforcement processes are an essential consideration in the growing pantheon of legal and commercial determinants of public health. While alcohol control laws vary between individual jurisdictions, their development and application are confronted by a common threat of undue industry influence or capture. This necessitates a greater understanding of this phenomenon to better inform a collective and effective international public health response. New South Wales Australia, has developed a layer of alcohol industry compliance laws in the form of disciplinary schemes. This article critically explicates the first of these, the Violent Venues Scheme (VVS), to determine the nature and extent of any capture. This would significantly compromise harm minimisation statutory objects and disrupt the democratic process and the rule of law. In contrast, an influential industry identity, attributed the earlier last drinks laws, VVS and a related scheme as causing the alleged destruction of Sydney's nighttime economy and fun. The research also analyses the indispensable role of a neoliberal paradigm in legitimising exclusive relationships between governments and industry. This is indelibly imprinted on the alcohol regulatory landscape.*

**Keywords:** alcohol control policy; violent venues scheme; legal determinants of health; capture; compliance and enforcement; alcohol law, governance; corruption; corporate influence; neoliberalism

### INTRODUCTION AND CAPTURE TEST

Western nations' varying attempts to curb the deadly 2019 coronavirus pandemic provide no better and immediate illustration of the importance of legal determinants of public health.<sup>1</sup> These determinants include the regulatory process of law-making, the application and enforcement of the laws to secure their compliance and judicial interpretation.

As Australia's response to COVID-19, including extraordinary social distancing public health orders,<sup>2</sup> demonstrates, effective legal compliance regimes are a critical component to achieve positive public health outcomes.

One result of the forced closures of on-premise alcohol outlets such as hotels (pubs), clubs and restaurants because of COVID-19 restrictions in Australia has been reported to increase social media alcohol promotions<sup>3</sup>

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<sup>1</sup> L Gostin et al, "The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development" (2019) 393(10183) *The Lancet* 1857; R Magnusson et al, "Legal Capacities Required for Prevention and Control of Noncommunicable Diseases" (2018) 97(2) *Bulletin of the World Health Organization* 108.

<sup>2</sup> See, eg, *Public Health (COVID-19 Gatherings) Order (No 3) 2020* (NSW). <[https://www.legislation.nsw.gov.au/\\_emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020.pdf](https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf)>.

<sup>3</sup> A House, "Alcohol Brands Lead Social Media Growth during COVID-19", *drinkstrade*, 14 April 2020 <<https://www.drinkstrade.com.au/alcohol-brands-lead-social-media-growth-during-covid-19>>.



Brown

and the consumption of alcohol in homes.<sup>4</sup> This has coincided with anecdotal reports of increased domestic violence (DV).<sup>5</sup>

While alcohol control laws vary between jurisdictions, this does not diminish the importance of their evaluation to understand better and respond effectively to a common thread of undue influence by the alcohol industry of the regulatory process.

New South Wales (NSW) directly legislates the supply, promotion and consumption of alcohol through the *Liquor Act 2007* (NSW) (the Act) and other related statutory and non-statutory controls. Unlike most other Australian jurisdictions, the Act contains a unique second layer of statutory industry compliance disciplinary schemes.

This article critically explicates the first of these schemes, the Violent Venues Scheme (VVS) to determine the nature and extent, if any, the formulation and application of the scheme has been captured by the alcohol industry.

The VVS commenced in December 2008 and still operates although subject to likely amendments arising from industry lobbying. The deterrence scheme imposes a range of escalating sanctions on on-premise licensed venues whose violent incidents recorded on premises and within a 50-metre radius from the venue in a year fall within successively higher ranges of the number of reported violent incidents. The identity of those “declared” venues are publicly “listed” every six months on an annual rolling basis.

This article builds upon 2019 research<sup>6</sup> involving a critical case study of the 2015 key amendments<sup>7</sup> to the Act and the development of a prototype legislative capture test. This article’s explication of the VVS, relies upon the same legal phronetic methodology,<sup>8</sup> similar research method and capture test for the presence of industry capture. The 2019 test was formulated by a synthesis of regulatory<sup>9</sup> and governance<sup>10</sup> theory and praxis. For the purpose of this article, “capture” is defined as

the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interests of a specific interest group or person. Capture is the opposite of inclusive and fair policy making, and always undermines core democratic values.<sup>11</sup>

The 2019 research found that the amendments to the Act and subsequent policies and practices had shifted the power distribution between competing stakeholder interests further to the alcohol industry. This included the diminished autonomy of the NSW Independent Liquor and Gaming Authority (ILGA) from government, included the dilution of the primacy of “public interest” considerations in the determination of higher risk alcohol outlets in favour of the commercial criteria of “customer convenience” and was

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<sup>4</sup> J Reynolds and C Wilkinson, “Accessibility of ‘Essential’ Alcohol in the Time of COVID-19: Casting Light on the Blind Spots of Licensing?” (2020) 39(4) *Drug and Alcohol Review* 305.

<sup>5</sup> R Morton, “Family Violence Increasing during COVID-19 Lockdown”, *The Saturday Paper*, 4–10 April 2020 <<https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>>. In June 2018, the NSW Bureau of Crime Statistics and Research (BOCSAR) reported a reduction in domestic assaults based on Australian Bureau of Statistics data drawn from crime victim surveys. K Freeman, “Is Domestic Violence in NSW Decreasing?” (Bureau Brief No 134, NSW Bureau of Crime Statistics and Research, 2018). Note these results vary from the BOCSAR rates of DV recorded by NSW Police and reflected in their online report “Domestic Violence Statistics for NSW” <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Domestic-Violence.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx)>. This latter data originating from Police-recorded criminal incidents, was relied upon to construct part of Figure 1 in the article.

<sup>6</sup> T Brown, “Legislative Capture: Critical Consideration in the Commercial Determinants of Health” (2019) 26 JLM 764.

<sup>7</sup> *Gaming and Liquor Administration Amendment Bill 2015* (NSW).

<sup>8</sup> B Murphy and G McGee, “Phronetic Legal Inquiry: An Effective Design for Law and Society Research?” (2015) 24(2) *Griffith Law Review* 288. It constitutes a blend of the more traditional legal doctrinal methodology and the process of “phronetic social inquiry”.

<sup>9</sup> D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013).

<sup>10</sup> D Kaufmann, “Corruption, Governance and Security: Challenges for the Rich Countries and the World” (October 2004) <<https://ssrn.com/abstract=605801>>.

<sup>11</sup> D Carpenter, “Detecting and Measuring Capture” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013). Reflected in OECD definition “Preventing Policy Capture: Integrity in Public Decision Making”, *OECD Public Governance Reviews* (OECD Publishing, 2017) 9 <<http://dx.doi.org/10.1787/9789264065239-en>>. See



characterised by a lack of transparency and independent third-party inclusiveness in the democratic law-making process.

This article addresses an important research gap relating to the explication of the second essential element of the regulatory process – the compliance and enforcement process – by use of a critical case study of the VVS.

The global response to the COVID-19 pandemic also illustrates how different governments trade off the competing goals of public health with predominantly private financial and commercial interests to sustain capital accumulation and reproduction. Inherent in such determinative processes are inescapably normative, social and political–ideological considerations.

A similar mix of public health and commercial considerations is contained within the objects of the Act.<sup>12</sup>

In addressing alcohol-related public health and safety threats, the academic literature suggests the greatest impediment to effective reductions in alcohol-related harms is the corporate political activity (CPA)<sup>13</sup> of the alcohol industry to sustain a politico-legal environment conducive to profit-making<sup>14</sup> and growth. This goal can be effectively achieved through a process of “capture”. It is also inherently problematic given the most cost-effective enforceable regulations to reduce alcohol harms, relate to decreasing its availability, supply and challenging that it is a safe and ordinary consumer product.<sup>15</sup>

Lencucha and Thow<sup>16</sup> caution that it is insufficient to rely on the concept of “capture” alone as an explanation why unhealthy commodity industries, including alcohol, can persuade governments to contravene international obligations relating to reducing harms arising from the promotion and consumption of their unhealthy products.

They argue that a key consideration is the “elusive”<sup>17</sup> neoliberal paradigm predicated on individual liberty and freedom that conditions the policy/law environment and, is “reified” in institutions and structures. These structures are, however, also subject to disruption.<sup>18</sup> This paradigm is perceived as articulating the “proper relationship between government, the market, and society”.<sup>19</sup> It in effect, provides a *raison d’être* to legitimise government decisions and relationships with stakeholders.

This article adopts a micro–macro-level approach to influence and power<sup>20</sup> that is integrally related to the phenomenon of regulatory capture. It suggests an indispensable role of a neoliberal paradigm in the ongoing legitimisation of exclusive relationships between the NSW government and the alcohol

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also essay of Elizabeth Warren, “Corporate Capture of the Rulemaking Process”, *The Regulatory Review* (June 2016) <<https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/>>.

<sup>12</sup> NSW Legislation, *Liquor Act 2007 No 90* <<https://www.legislation.nsw.gov.au/#/view/act/2007/90/part1/sec3>>.

<sup>13</sup> S Ulucanlar, GJ Fooks and AB Gilmore, “The Policy Dystopia Model: An Interpretive Analysis of Tobacco Industry Political Activity” (2016) 13(9) *PLoS Medicine* e1002125. See also M Paixão and M Mialon, “Help or Hindrance? The Alcohol Industry and Alcohol Control in Portugal” (2019) 16(22) *International Journal of Environmental Research and Public Health* 4554.

<sup>14</sup> R West and T Marteau, “Commentary on Casswell (2013): The Commercial Determinants of Health” (2013) 108(4) *Addiction* 686; see also I Pinsky, D Pantani and Z Sanchez, “Public Health and Big Alcohol” (2020) 8(5) *The Lancet Global Health* e645.

<sup>15</sup> DW Lachenmeier and J Rehm, “Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs using the Margin of Exposure Approach” (2015) 5 *Scientific Reports* 8126. See also J McCambridge et al, “Alcohol Harm Reduction: Corporate Capture of a Key Concept” (2014) *PLoS Medicine* 11(12): e1001767.

<sup>16</sup> R Lencucha and AM Thow, “How Neoliberalism is Shaping the Supply of Unhealthy Commodities and What This Means for NCD Prevention” (2019) 8(9) *International Journal of Health Policy and Management* 514 and series of commentaries.

<sup>17</sup> See also G Monbiot, “Neoliberalism – The Ideology at the Root of All Our Problems”, *The Guardian*, 15 April 2020 <<https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot?fbclid=IwAR2riLU4u2r6PBxqIcHW16fa7ANUVKRaOwckEF2nUy7gg-rwtjgJlcfMrbA>>.

<sup>18</sup> R Lencucha and A Thow, “Developing a Research Agenda for the Analysis of Product Supply: A Response to the Recent Commentaries” (2020) *International Journal of Health Policy and Management* DOI: 10.34172/ijhpm.2020.25 <[https://www.ijhpm.com/article\\_3761.html](https://www.ijhpm.com/article_3761.html)>.

<sup>19</sup> Lencucha and Thow, n 16, 515.

<sup>20</sup> For further consideration of power within the context of health equity, see P Harris et al, “A Glossary of Theories for Understanding Power and Policy for Health Equity”, (2020) 74 *J Epidemiol Community Health* 548.

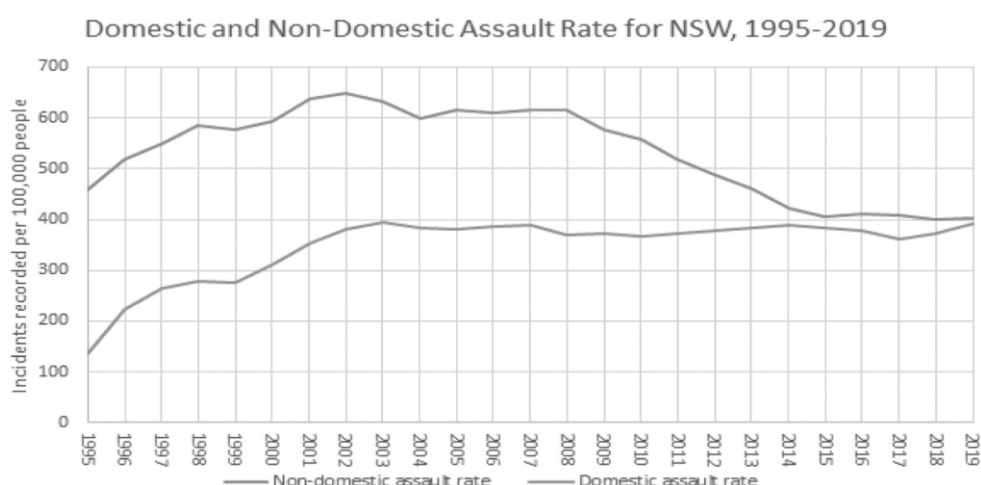
Brown

industry. This is revealed in part by the application of the following capture test to the empirical data derived from a critical case study of the VVS and, its postscript on the outcome of the strong industry lobbying to remove the scheme and further weaken the regulatory environment.

It also raises the contemporary question to what extent the Government's focus on these on-premise regulatory intervention compliance schemes, may serve as a distraction or smokescreen from the off-premise industry's contribution to high rates of DV.

Figure 1 below compares the annual rates of reported DV and non-domestic violence assaults (NDV) in New South Wales for the period 1 January 1995 to 30 December 2019.<sup>21</sup> Since 1 January 1995, the rate of reported DV increased by 288% while the rate of reported NDV fell by 12%.

**FIGURE 1.**



Source: NSW Bureau of Crime Statistics and Research (BOCSAR)

## Capture Test

A legislative capture test was derived from a synthesis of the results of the 2019 case study of the 2015 key amendments<sup>22</sup> to the Act with regulatory and governance literature.<sup>23</sup> It consisted of five elements including “Separation of power considerations in relation to the connected conduct”.

However, for the purposes of detecting the presence of industry capture within the VVS, the initial legislative capture test has been modified into the following three prerequisites. Less reliance is placed on separation of power considerations. One reason is the circuitous origin of the VVS that was not solely derived from an expansive Bill before Parliament. Instead, it evolved from a media release<sup>24</sup> from the NSW Premier and an Office of Liquor, Gaming and Racing (OLGR) “Fact sheet”.<sup>25</sup>

## Prerequisites for Industry Capture (2020)

First, there is a **temporal component** that the conduct or outcomes in question must be ongoing, not a “one-off” instance.

<sup>21</sup> More detailed breakdown of BOCSAR's domestic assault statistics for the years 2015 to, and including, 2019 can be found online “Domestic Violence Statistics for NSW” <<https://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/Domestic%20Violence%20Statistics.xlsx>>.

<sup>22</sup> *Gaming and Liquor Administration Amendment Bill 2015* (NSW).

<sup>23</sup> Carpenter, n 11. Reflected in OECD definition, *OECD Public Governance Reviews*, n 11.

<sup>24</sup> Premier of NSW “Media Release”, 8 July 2009.

<sup>25</sup> Original Fact sheet is unobtainable.

Second, capture requires two or more parties' complementary interests expressed through **connected conduct** by way of action or inaction. There is the expectation of some quid pro quo but not necessarily associated with an immediate exchange of favours. It can include the creation of environment or "cultural" capture<sup>26</sup> conducive to an exchange or expectation of mutual benefit.

This necessitates the acquiescence of a sovereign (government) entity or related individuals for some mutual benefit. It may include for example, government inaction or deregulation defined by Carpenter as "corrosive" capture,<sup>27</sup> with a private interest group whose power is enhanced by undue influence over a public regulatory process and/or desired outcome. Interwoven with this element of the test is the establishment of mens rea – consideration of motive and intent of the connected parties.

Finally, the tangible and intangible outcomes (including the ideological frame<sup>28</sup> that may serve to legitimate the connected conduct) being detrimental to the overall **public interest**. This involves normative considerations.

## CASE STUDY – REGULATING THE SUPPLIERS OF ALCOHOL IN NSW – VIOLENT VENUES SCHEME (VVS)

### Background

The Act prescribes a usual list of statutory offences<sup>29</sup> applying to liquor licensees and others, for example, the prohibition of the service of alcohol to intoxicated and under-aged patrons.<sup>30</sup> However, unlike many other Australian jurisdictions, New South Wales has evolved a second layer of industry compliance controls in the form of "disciplinary" compliance schemes. These impose a range of additional compounding sanctions against licensees and others for non-compliance with their statutory obligations related in part to the sale and service of alcohol. These schemes include the:

- VVS that commenced in December 2008;<sup>31</sup>
- Three Strikes Scheme (3SS) that commenced in January 2012;<sup>32</sup> and
- The Minors Sanction Scheme that took effect in December 2014.<sup>33</sup>

This article explicates the first of these schemes. This necessitates some limited examination of the second scheme, the 3SS. The 3SS has a more detailed statutory origin and has been subject to substantial legal amendments before Parliament<sup>34</sup> following industry lobbying. This scheme imposes additional

<sup>26</sup> J Kwak, "Cultural Capture and the Financial Crisis" in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (CUP, 2013) 71–98.

<sup>27</sup> See discussion on Corrosive or Deregulatory Capture. D Carpenter, "Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation" in D Carpenter and DA Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (CUP, 2013) 152–172.

<sup>28</sup> A Schram, "When Evidence Isn't Enough: Ideological, Institutional, and Interest-based Constraints on Achieving Trade and Health Policy Coherence" (2018) 18(1) *Global Social Policy* 62.

<sup>29</sup> See *Liquor Act 2007* (NSW) Pt 2 "Principal Offences Relating to Sale and Supply of Liquor".

<sup>30</sup> *Liquor Act 2007* (NSW) Pt 7.

<sup>31</sup> *Liquor Act 2007* (NSW) Sch 4 "Special Licensing Conditions for Declared Premises". See also for greater details of the scheme <<https://www.liquorandgaming.nsw.gov.au/resources/violent-venues-scheme>>; Liquor & Gaming NSW, "Fact Sheet FS3006 Violent Venues Scheme" <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0020/202961/fs3006-violent-venues-scheme.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0020/202961/fs3006-violent-venues-scheme.pdf)>.

<sup>32</sup> *Liquor Act 2007* (NSW) Pt 9A "Disciplinary Action – 3 strikes". See Liquor & Gaming NSW, "Fact Sheet FS3015 Three Strikes Disciplinary Scheme" <<https://www.liquorandgaming.nsw.gov.au/documents/fs3015-three-strikes-disciplinary-scheme.pdf>>.

<sup>33</sup> *Liquor Act 2007* (NSW) Pt 7 Div 4 provides for a Minors Sanction Scheme. See also the following L&GNSW explanation <<https://www.liquorandgaming.nsw.gov.au/working-in-the-industry/serving-alcohol-responsibly/managing-under-18s/minors-sanctions-scheme>>. The MSS is not evaluated in this article. The Act also provides disciplinary provisions for repeated non-compliance and reoccurring levels of violent incidents where a range of sanctions can be applied including changes to license conditions, authorisations and cancellation of license. See *Liquor Act 2007* (NSW) ss 51–54.

<sup>34</sup> *Liquor Amendment (3 Strikes) Bill 2011* (No 2) (NSW). The Bill was accompanied by a Liquor & Gaming NSW, "Summary of Changes" <[https://www.customerservice.nsw.gov.au/\\_data/assets/pdf\\_file/0019/502183/Summary-of-Changes-24-hour-Economy-Bill-2020-V7.pdf](https://www.customerservice.nsw.gov.au/_data/assets/pdf_file/0019/502183/Summary-of-Changes-24-hour-Economy-Bill-2020-V7.pdf)>. It will not be evaluated within this article.

Brown

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sanctions in the form of license conditions on licensees convicted with serious prescribed alcohol-related offences.

### **Emergence of NSW Alcohol Industry Disciplinary Laws – NSW Regulatory Context**

The emergence of a second layer of industry compliance schemes in New South Wales commenced shortly after the *Liquor Act 2007* took effect on 1 July 2008. The VVS and 3SS were in part, a response by the NSW Labor Government to the growing public backlash against unabated levels of highly visible alcohol-fuelled street violence (NDV)<sup>35</sup> across late-trading drinking precincts including in Sydney, Newcastle and some other major NSW regional centres.

Within the broader context of a public interest policy objective of reducing the overall rates of alcohol-related violence in New South Wales, Figure 1 above shows that up until 2008, DV and NDV had broadly similar trajectories. After this time, there was a significant divergence where DV remained high while NDV fell away till where the rate of DV in New South Wales may shortly exceed that of NDV.

Compared with the regulatory intervention in the form of the VVS and 3SS impacting on-premise licensed venues to address high rates of NDV, the regulation of the supply of takeaway alcohol in New South Wales reflected in domestic assault rates in Figure 1, remains relatively minimal.<sup>36</sup> This disproportionately impacts<sup>37</sup> upon women and children.<sup>38</sup>

In March 2008, the former NSW Liquor Administration Board (LAB), part of the former NSW Licensing Court,<sup>39</sup> determined an undue disturbance complaint initiated by Newcastle police and subsequently joined by the community. Newcastle was experiencing the highest level of non-domestic assaults in New South Wales.<sup>40</sup> The LAB's landmark decision<sup>41</sup> imposed a precinct-wide package of licensing conditions on all Newcastle central business district (CBD) late-trading (post-midnight) hotels.<sup>42</sup> This included a reduction in trading from 5 am to 3 am, a 1 am curfew and drink controls.

A detailed media investigation into the influence of the NSW alcohol industry on politics and the regulatory process suggested the 2008 Newcastle LAB decision sent reverberations through the national on-premises alcohol supply industry. It found

The (Australian Hotels Association) AHA bragging in its private annual report about successful lobbying of government and secret deals with media representatives to counter negative press; The AHA's great fear of any spread of the "Newcastle system" of 3am closures for licensed venues.<sup>43</sup>

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<sup>35</sup> See New South Wales, *Parliamentary Debates*, 2 December 2008 (Hon Kevin Greene, NSW Labor Minister for Gaming and Racing) *Liquor Amendment (Special Licence Conditions) Bill 2008* <<https://www.parliament.nsw.gov.au/bill/files/1595/LA%2010208.pdf>>.

<sup>36</sup> See, eg, initiatives from Northern Territory government to reduce alcohol harms including Minimum Unit Pricing (MUP). See *Liquor Act 2019* (NT) Pt 5 "Minimum Pricing". The Northern Territory government also provides the following web page on MUP: <<https://alcoholreform.nt.gov.au/milestones/floor-price>>; See also Reynolds and Wilkinson, n 4.

<sup>37</sup> A Curtis et al, "Alcohol Use in Family, Domestic and Other Violence: Findings from a Cross-sectional Survey of the Australian Population" (2019) 38 *Drug and Alcohol Review* 349. See also W Liang and T Chikritzhs, "Revealing the Link between Licensed Outlets and Violence: Counting Venues versus Measuring Alcohol Availability" (2011) 30(5) *Drug and Alcohol Review* 524.

<sup>38</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (Cat no FDV 2, 2018) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/table-of-contents>>.

<sup>39</sup> The *Liquor Act 2007* (NSW) and the *Gaming and Liquor Administration Act 2007* (NSW), provided for the replacement of the Court and LAB with the NSW Casino Liquor and Gaming Authority – later renamed as the NSW Independent Liquor and Gaming Authority (ILGA).

<sup>40</sup> Police evidence provided to the LAB hearing.

<sup>41</sup> DB Armati, *Decision: Liquor Administration Board – s104 Conference*, Newcastle, 14 March 2008.

<sup>42</sup> C Jones et al, "The Impact of Restricted Alcohol Availability on Alcohol-related Violence in Newcastle NSW" (2009) *Crime and Justice Bulletin* 137 <<https://www.bocsar.nsw.gov.au/Publications/CJB/cjb137.pdf>>.

<sup>43</sup> J Hansen, "Questions Are Being Asked about the Connections between the O'Farrell Government and the Australian Hotels Association", *The Sunday Telegraph*, 18 December 2011 <<https://bit.ly/2H7oCoJ>>.

In mid-2008, the Director of Compliance of the NSW OLGR Mr Gardner, was reportedly applying a tough approach with the industry to secure compliance and force down the high level of NDV assaults.<sup>44</sup>

This set of policy/law compliance and enforcement structures in New South Wales in part, reflected the above mix of a new Liquor Act, unsustainably high levels of non-domestic assaults enlivening negative public opinion, a “tough” or “vigorous” approach to compliance by the regulators, divided media and a powerful AHA closely connected with government and opposition political parties.

Lencucha and Thow recognise one symptom of the neoliberal paradigm is the presence of policy inconsistency or incoherency.<sup>45</sup>

Overlaying the emergence of the three NSW industry compliance disciplinary schemes referred to above was the joint industry/government development of a Safe Venues Voluntary Rating Scheme (SVVRS)<sup>46</sup> in late 2008. It appeared to contradict the prevailing interventionist and forceful thrust of NSW industry compliance and enforcement measures at that time.

The SVVRS is evaluated at this stage as to not interrupt the sequencing of the emergence of the VVS.

The following critical exploration of the forerunners of the VVS and the 3SS, including the 2009 SVVRS, provides a rare insight into the neoliberal foundations of the current regulatory process and the likely direction of ongoing law “reforms” favouring<sup>47</sup> the industry.

### Safe Venues Voluntary Rating Scheme (SVVRS) – Revealing the Neoliberal Blueprint

On 1 March 2009, the NSW Labor Minister for Gaming and Racing released a joint Government/ Industry discussion paper<sup>48</sup> on the proposed SVVRS stating a desire to “give patrons a transparent guide to safety standards at licensed venues across NSW”.<sup>49</sup>

The proposed industry voluntary scheme was not implemented despite the production and release of the above joint government/alcohol industry discussion paper and a later document containing suggested practices and strategies.<sup>50</sup> This development needs to be evaluated because like no other NSW alcohol regulatory document, it highlighted the conflicts of interest between the sworn duty<sup>51</sup> of elected public

<sup>44</sup> On 18 May 2008, it was reported that 23 of the State’s most violent premises were pre-emptively requested by OLGR to provide evidence of the measures they were taking to prevent violence. L Silmalis, “State’s Violent Pubs Face Closure”, *The Sunday Telegraph*, 18 May 2008 <<https://www.dailytelegraph.com.au/news/nsw/states-violent-pubs-face-closure/news-story/c44b7163822ee503f8929702dffe5940>>. See also “The New Liquor Hard Man”, *Sydney Morning Herald*, 31 May 2008 <<https://www.smh.com.au/national/the-new-hard-liquor-man-20080531-gdsfy7.html>> (Gardner) and D Proudman, “I’ll Shut Pubs Even Earlier”, *Newcastle Herald*, 16 April 2008 <<https://www.newcastleherald.com.au/story/482244/ill-shut-pubs-even-earlier/>> (Gardner).

<sup>45</sup> Lencucha and Thow, n 16.

<sup>46</sup> NSW Department of Arts, Sport and Recreation, *Safety Rating System for Licensed Venues*, Discussion Paper, March 2009.

<sup>47</sup> At an Australian Hotels Association (AHA) awards night in November 2017, the (then) NSW Liberal/National Party (LNP) Minister for Racing The Hon Paul Toole announced “As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry”. A Young, “Minister Full of Praise for Pubs”, *The Shout*, 27 November 2017 <<https://www.theshout.com.au/news/minister-promises-pub-reforms/>>. The above quotation was removed from the web page sometime after its publication, but reference was retained in this hyperlink.

<sup>48</sup> NSW Department of Arts, Sport and Recreation, *Safety Rating System for Licensed Venues*, Discussion Paper, March 2009 <<https://2011residentsassociation.files.wordpress.com/2009/03/discussion-paper-safety-rating-system-for-licensed-venues.pdf>>.

<sup>49</sup> “The Hon Kevin Greene, NSW Labor Minister for Gaming and Racing, Minister for Sport and Recreation” (Media Release, 1 March 2009). See also the former Minister’s post retirement attendance of AHA function. S Nicholls, “Former Gaming Minister Was Guest of Hotels Lobby on Luxury Break”, *Sydney Morning Herald*, 30 August 2011 <<https://www.smh.com.au/national/nsw/former-gaming-minister-was-guest-of-hotels-lobby-on-luxury-break-20110829-1jieh.html>>.

<sup>50</sup> NSW Government, “Safer Nights Out – Safety Practices and Strategies to Reduce Alcohol-related Violence”, September 2009 <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0007/205549/Safer-nights-out\\_Sep\\_2009.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/205549/Safer-nights-out_Sep_2009.pdf)>.

<sup>51</sup> Possible fiduciary duty: see Exhibit 16 Independent Commission Against Corruption – Operation “Eclipse”; S Gageler, “The Equitable Duty of Loyalty in Public Office” in T Bonyhady (ed), *Finn’s Law: An Australian Justice* (The Federation Press, 2016) Ch 5.

Brown

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officials to make and apply laws in the public interest – and the economic private imperative associated with the operation of a deregulated NSW alcohol retail supply market.

This joint article reflected both the capacity and power of the industry to drive the ideological agenda and, the emergence of policy proposals inconsistent with the high level of State and quasi-tribunal interventionism underway in NSW at that time.<sup>52</sup>

As the following extracts of the SVVRS paper illustrate, in keeping with the neoliberal narrative, alcohol-fuelled street violence was conceptualised in part by the NSW government and industry as symptomatic of inanimate market failure due to a lack of information and was therefore, capable of correction.

Also consistent with the neoliberal theme, a voluntary (non-statutory) scheme is portrayed in the following extracts as preferable to the imposition of restrictive licensing conditions on businesses that may compromise loans or the ability to “obtain loans, damage business reputations and may result in a criminal record for non-compliance”.<sup>53</sup>

Owners and controllers of licensed premises would theoretically compete to attract patrons to those venues that had the highest safety ratings determined by the industry itself.

The nature of the market place is that consumer choice influences industry and business behaviour. Effectively informing consumers about the safety practices of a venue could lead to greater support for businesses with a higher safety rating. This, in turn, would create an incentive for businesses to improve their practices.<sup>54</sup>

Under this unitarist/neoliberal model, the industry was best placed to play a central role in developing, implementing and administering the voluntary safety rating system. In the arena of ideation, no space was left for active involvement by any third-party interest groups representing public health and local community interests.

A system that involves industry in its development, delivery and ongoing operation should also ensure the best safety outcomes are achieved using practical and workable solutions drawn from the experiences of licensees and business that comprise the liquor industry.

An industry operated system would have the benefit of generating confidence amongst participants that it is a system with merit, that has not been imposed by Government and that involves peer review and public recognition that contributes to business prosperity and strengthens perceptions of the liquor industry as a whole.<sup>55</sup>

Following industry and community feedback on the draft proposal, on 1 September 2009, the Government released a guide titled “Safer Nights Out – Safety Practices and Strategies to Reduce Alcohol-related Violence”.<sup>56</sup> The document noted:

Consistent with **better regulation principles**, this resource has been developed to support stakeholders to **voluntarily** implement strategies that will achieve better **safety outcomes** without government imposing additional red tape or licence conditions.<sup>57</sup>

The critical evaluation of the SVVRS proposal reveals it was framed with a positivist view of the law underpinned by the operation of a virtuous guiding hand of a free market promoting venue safety.

The SVVRS narrative appears to shelter the industry from punitive compliance/enforcement measures that may adversely impact on their financial arrangements. The SVVRS could in this sense be construed as an important symbolic correction and affirmation of the close working relationship between the NSW

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<sup>52</sup> This included the March 2008 NSW Liquor Administration Board’s imposition in Newcastle CBD of a package of precinct-wide licensing conditions including earlier last drinks and, the Office of Liquor, Gaming and Racing’s Gaming (OLGR) Director of Compliance’s Mr Gardner’s publicly cautioning violent NSW licensing premises with tough sanctions if the alcohol violence continued. See references to “Gardner”, n 44.

<sup>53</sup> NSW Department of Arts, Sport and Recreation, n 48, 8.

<sup>54</sup> NSW Department of Arts, Sport and Recreation, n 48, 7.

<sup>55</sup> NSW Department of Arts, Sport and Recreation, n 48, 16.

<sup>56</sup> NSW Government, n 50.

<sup>57</sup> NSW Government, n 50, 2 (emphasis in original).

alcohol industry and successive Governments.<sup>58</sup> This was arguably needed at a time when the industry was the subject of “tough” and visible compliance activity from some of the regulators. As such, the above passages from the joint paper in their totality, provide the foundations of a legitimisation pathway for industry capture of the regulatory process.

The voluntary proposed scheme was not implemented, but its neoliberal spirit survived within the evolving NSW regulatory alcohol law making and compliance framework.

### List of the Most Violent Premises in NSW

In 2007–2008, the Sydney Morning Herald (SMH) was involved in lengthy legal proceedings under the *Government Information (Public Access) Act 2009* (NSW) (*GIPAA*)<sup>59</sup> to obtain from the police crime statistics on the number of assaults in and surrounding all NSW hotels reflected in police “linking data”.<sup>60</sup> It was an important public interest consideration that the NSW public and pub patrons should be made aware in a timely manner of the true magnitude, identity and location of the level of alcohol-fuelled violence within all its retail alcohol outlets.

The above *GIPAA* application was opposed by the New South Wales police and the Australian Hotels Association (AHA). The police finally conceded and in March 2008, the SMH provided the public with the first list of the 100 most violent licensed premises in New South Wales.<sup>61</sup> Coincidentally, the most violent identified venue, the “Mean Fiddler Hotel” was also awarded the AHA’s “best” hotel award for two years running.<sup>62</sup> This raises important concerns about the capacity of the industry to self-regulate its own activities as advocated in the above proposed SVVRS.

It was also reported that the senior police officer involved in opposing the SMH *GIPAA* application, left the police and joined the AHA around the same time as the conclusion of the SMH’s legal case. His position with the AHA was tentatively titled “Director of Policing and Regulatory Relations”. He reportedly had been discussing a position with the AHA for some time prior to leaving the police.<sup>63</sup>

The information contained within the list of violent licensed premises was based on police-recorded assaults on premises and were provided by the NSW Bureau of Crime Statistics and Research (BOCSAR). However, the BOCSAR Director advised the SMH

The figures only record assaults inside the hotel and were certain to grossly understate the real level of assaults ... We know from national surveys generally that the vast bulk of assaults are not reported ... These (reported assaults) would be the most serious assaults and probably the tip of the iceberg.<sup>64</sup>

The government’s structural response in December 2008 to the SMH’s initiative was to produce an embryonic VVS – a list of the 48 most violent premises in NSW based on reported assaults recorded

<sup>58</sup> See Brown, n 6. The Appendix of the 2019 article contains media references to the political relationship between the industry and successive NSW governments. More recent examples are provided in following sections of this article.

<sup>59</sup> *Government Information (Public Access) Act 2009* (NSW). A related important benefit of the application was imposing greater transparency and accountability on the alcohol industry and Government.

<sup>60</sup> Origin and purpose of Police linking data <<http://fare.org.au/wp-content/uploads/Adoption-of-the-Alcohol-Linking-Program-into-Routine-Practice-by-New-South-Wales-Police.pdf>>. Several hospitals are also now recording patients’ last place of consumption of alcohol. See C Sibthorpe, “Canberra’s Alcohol Hotspots Targeted as Calvary Hospital Records Booze Intake of Emergency Department Patients”, *Canberra Times*, 6 March 2017 <<https://www.canberratimes.com.au/story/6035672/canberras-alcohol-hotspots-targeted-as-calvary-hospital-records-booze-intake-of-emergency-department-patients/>>.

<sup>61</sup> M Moore, “Revealed: The Most Violent Pubs and Clubs”, *Sydney Morning Herald*, 11 March 2008 <<https://www.smh.com.au/national/revealed-the-most-violent-pubs-and-clubs-20080311-gds4na.html>>. The article also revealed political donations to the NSW Labor Party by interests in one of the most violent premises.

<sup>62</sup> In 2007 the Mean Fiddler hotel was the recipient of the AHA NSW “Hotel of the Year”, “Restaurant of the Year”, “Bottle Shop of the Year – Metro” and “Marketing Campaign of The Year – Metro” Awards for Excellence. In 2008, the hotel won the AHA NSW “Retail Metropolitan and Live Entertainment” Awards for Excellence <<https://www.ahaawardsnsw.com.au/uploads/2012–2007/18>>.

<sup>63</sup> M Moore, “Hazy Start for AHA Lobbyist”, *Sydney Morning Herald*, 13 March 2008 <<https://www.smh.com.au/national/hazy-start-for-aha-lobbyist-20080313-gds4za.html>>.

<sup>64</sup> Don Weatherburn Director BOCSAR in Moore, n 61.

Brown

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by the NSW police. These “listed” venues were subjected to drink controls including a 2 am lockdown preventing patrons entering or re-entering the premise, service of alcohol in plastic containers after midnight to prevent “glassings”, no shots and drink purchase limits after midnight and a 10-minute cessation of the service of alcohol every hour after midnight.<sup>65</sup>

These venues were identified within the *Liquor Regulation 2008* (NSW). However, following the Supreme Court of NSW challenge by nine of the declared premises, the NSW Government quickly relocated the provisions within a new *Sch 4* of the Act.<sup>66</sup>

## Emergence of Violent Venues Scheme

On 8 July 2009, the NSW Labor Premier Mr Rees<sup>67</sup> announced a more nuanced version of the list of the 48 most violent premises in NSW to take effect in December 2009. This change introduced the concept of the most violent licensed premises categorised into three Schedules based on the number of recorded violent incidents on the premise.<sup>68</sup> The Premier observed: –

the community is sick and tired of violence and these new arrangements will target venues that have rising alcohol-related assault rates ... we will **work with** venues to reduce incidents by imposing **strict** rules but also **reward them** for their success ... **strict** requirements will continue to be placed on venues based on the number of assaults **on** premises.<sup>69</sup>

## AHA Response

On the same day (8 July 2008) as the Premier’s above announcement of the new VVS, an unpublished memo<sup>70</sup> from the NSW AHA Chief Executive provided all their members with the Premier’s media release outlining the new violent venues schedules. It also revealed the AHA’s following strategy or “play book” to undermine the adoption of laws such as the VVS, that may impact upon the volumes and strength of alcohol served – a core source of business revenue in addition to poker machine profits for many hotels and registered clubs.

The obvious agenda from here is to continue to **work with** Government and relevant stakeholders in order to ramp up the issues of personal responsibility, concerns about illicit drug use and other off premise solutions such as disbursement around closing time, better allocation of Police resources, sale and promotion of alcohol off premises etc.<sup>71</sup>

The AHA’s strategy designed from the outset to counter strict forms of industry regulation, formed the basis of subsequent national responses<sup>72</sup> from the AHA. They apparently chose to oppose or deflect any attempts by governments to adopt evidence-based alcohol harm prevention initiatives across the country to reduce the availability and supply of alcohol. A key tactic was shifting blame (creating decoys) onto a range of other stakeholders and illicit drugs.<sup>73</sup>

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<sup>65</sup> See description of scheme contained within S Moffatt et al, “Liquor Licensing Enforcement and Assaults On Licensed Premises” [2016] *Current Issue in Criminal Justice* 15; (2016) 28(1) *Current Issues in Criminal Justice* 97 <<https://www.bocsar.nsw.gov.au/Publications/BB/bb40.pdf>> and the first list on the violent venues <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0007/205846/Round-1-List-of-Top-48-venues-pdf.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/205846/Round-1-List-of-Top-48-venues-pdf.pdf)>.

<sup>66</sup> See *Liquor Amendment (Special Licence Conditions) Act 2008 No 102*, Assented to 3 December 2008. “The Hon Kevin Greene Minister for Gaming and Racing, and Minister for Sport and Recreation, Agreement in Principle NSW Legislative Assembly”, 2 December 2007 <<https://www.parliament.nsw.gov.au/bill/files/1595/LA%2010208.pdf>>.

<sup>67</sup> See S Gardiner, “NSW Govt to Stay Tough on Pub Violence”, *Sydney Morning Herald*, 5 November 2009 <<https://www.smh.com.au/national/nsw-govt-to-stay-tough-on-pub-violence-20091105-hz5m.html>>.

<sup>68</sup> The two published lists of declared violent NSW licensed premises first appeared in Round “2” (1 July 2008–30 June 2009) of the VVS. The first round consisted of a list of the 48 most violent premises in NSW. See <<https://www.liquorandgaming.nsw.gov.au/resources/violent-venues-scheme>> (“Previous rounds”).

<sup>69</sup> N Rees, “Premier of NSW ‘Restrictions Continue to Curb Alcohol Violence’” (Media Release, 8 July 2009) (emphasis added).

<sup>70</sup> S Fielke, “CEO Australian Hotels Association NSW ‘Announcement of Top 48’ Memo to All Members”, 8 July 2009.

<sup>71</sup> Fielke, n 70 (emphasis added).

<sup>72</sup> For AHA’s national strategy and relationship with NSW LNP government see Hansen, n 43.

<sup>73</sup> For consideration of alcohol industry tactics see J McCambridge, M Mialon and B Hawkins, “Alcohol Industry Involvement in Policymaking: A Systematic Review” (2018) 113 *Addiction* 1571.



This ability of the industry to effectively coordinate nationally, provides them a capacity to bypass any individual jurisdiction's restrictions<sup>74</sup> on political donations,<sup>75</sup> such as those that came into effect in New South Wales on 1 January 2011 – before the 26 March 2011 NSW election.<sup>76</sup>

OLGR was aware of the AHA's above memorandum informing their members of the aim to direct attention away from their alcohol supply and service practices that were contributing to the high levels of alcohol-related violence. This fundamental difference in the direction of regulation between industry and government undermines the overused pluralist expression of both parties "working with" each other. Arguably it represents a form of concealed antagonism or alternatively, some degree of "corrosive" capture between the two parties.<sup>77</sup> This arises when governments may constrain ("go soft") or compromise their compliance initiatives in lieu of evidence-based approaches<sup>78</sup> – in order not to jeopardise the industry's ongoing political support and funding.<sup>79</sup>

Such an occurrence would challenge the application of the responsive regulation model<sup>80</sup> favoured by government. It would also raise serious governance concerns.<sup>81</sup>

## Legal Framework of the VVS

The VVS relies on statutory and non-statutory sources to give the scheme effect.

### Legislation

Some elements of the VVS are located within Sch 4 – "Special licence conditions for declared premises" of the Act.<sup>82</sup> This provides for two published levels of declared premises without identifying the number of recorded violent incidents constituting each "level". The *Schedule* proceeds to identify the declared premises for the latest round of the VVS including the number of attributable alcohol-related violent incidents after a venue has had an opportunity to obtain a review of any disagreements. It then prescribes the special license conditions (sanctions), additional security measures and other requirements contained in Table 1 of this article.

Regulations<sup>83</sup> under the Act facilitate the six-monthly updating of the published schedules of the most violent licensed premises in NSW for the preceding 12-month period under the regulation making

<sup>74</sup> The NSW *Election Funding and Disclosures Amendment Bill 2010* was subject to successful last-minute amendments by minor party representatives in the Legislative Council to prohibited alcohol industry political donations. See <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=1490>>.

<sup>75</sup> A Clennell, "NSW Liberals in a Big Shout from Australian Hotels Association", *Daily Telegraph*, 8 November 2011 <<https://www.dailytelegraph.com.au/news/nsw/nsw-liberals-in-a-big-shout-from-australian-hotels-association/news-story/fe0540f2cf16ee174031d5cb80fb5a82?sv=693d5af3a2a317b335c515b3bfdec059>>.

<sup>76</sup> Brown, n 6; see Appendix of the 2019 article.

<sup>77</sup> Carpenter, n 27.

<sup>78</sup> "Substantial evidence exists for effective alcohol control policies; those that affect price, availability, and marketing of alcohol are recognised in WHO's 'best buys' for interventions to reduce the harmful use of alcohol". The Lancet, editorial "Alcohol and Health: Time for an Overdue Conversation" (2020) 5(3) *The Lancet Gastroenterology & Hepatology* 229 <[https://www.thelancet.com/journals/langas/article/PIIS2468-1253\(20\)30016-9/fulltext](https://www.thelancet.com/journals/langas/article/PIIS2468-1253(20)30016-9/fulltext)>.

<sup>79</sup> In April 2008, the Daily Telegraph reported that the new AHA NSW President's threat to cease all political donations because of government statistics linking hotels with alcohol violence had panicked the people. Unattributed, "Hotels Boss Sparks Brawl over Political Donations", *Daily Telegraph*, 26 April 2008 <<https://www.dailytelegraph.com.au/news/national/hotels-boss-sparks-brawl/news-story/2b76d9e929e134997353a956556eef59?sv=f357ee82c3fbd4aff63a68170002d911>>.

<sup>80</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992).

<sup>81</sup> The NSW Labor Premier was subsequently deposed on 3 December 2009. See Unattributed, "Former NSW Premier Nathan Rees to Quit Politics at 2015 State Election", *ABC News*, 29 March 2014 <<https://www.abc.net.au/news/2014-03-28/former-nsw-premier-nathan-rees-to-quit-politics/5351890>>; Nathan Rees, "Ten Years after Labor Dumped Me as Premier, It's High Time It Cleaned Up Its Act", *Sydney Morning Herald*, 7 December 2019 <<https://www.smh.com.au/national/nsw/ten-years-after-labor-dumped-me-as-premier-it-s-high-time-it-cleaned-up-its-act-20191206-p53hk1.html>>.

<sup>82</sup> *Liquor Act 2007* (NSW). See also *Liquor Act 2007* (NSW) s 11(1A). See *Liquor Amendment (Special Licence Conditions) Act 2008 No 102*, assented to 3 December 2008.

<sup>83</sup> See, eg, *Liquor Amendment (Special Licence Conditions) Regulation (No 3) 2019*.

Brown

powers of the Act.<sup>84</sup> Simultaneously, those licensed premises whose recorded levels of violent incidents have fallen below the thresholds for the schedule, are removed from the lists and associated application of a sliding scale of sanctions.

### **Departmental Fact Sheet**

The operation and definitions relied upon for the VVS can be found in Liquor & Gaming NSW (L&GNSW) “Violent Venues Scheme Fact Sheet FS3006”.<sup>85</sup> It provides a broad overview of how the scheme operates including the number of recorded violent incidents constituting each of the three schedules. However, no additional information is immediately apparent that provides the rationale for determining the range of reported violent incidents that constitute the parameters of the three bands of declared violent premises.

In what may be a possible legislative oversight, none of this “information” relating to the parameters of each schedule within the Fact Sheet, appears to be tied to an equivalent legislative prescription identifying the same range. Departmental “Fact Sheets” unless specifically identified within statutory provisions, do not normally constitute a statutory instrument upon which punitive sanctions can be lawfully imposed.<sup>86</sup>

### **Sanctions and Deterrence Measures**

BOCSAR is involved in preparing a six-monthly updated list of police-recorded number of assaults in each of the NSW’s licensed premises for the previous 12 months. This list is divided into three bands or tiers of licensed premises – Level “1”, 19 or more recorded assaults; Level “2”, 12–18 assaults and Level “3”, 8–11 assaults reported on premises. Level 3 listed premises are not published and attract no sanctions.

Consistent with Ayres and Braithwaite’s enforcement pyramid,<sup>87</sup> contained within their responsive regulation model, each level is prescribed an ascending order of more stringent restrictions (special liquor license conditions) listed in the table below.

**TABLE 1. Violent Venue Scheme sanctions**

Level 3	Level 2	Level 1
8–11 assaults	12–18 assaults	19 or more assaults
		1. A mandatory 1.30 am lockout of patrons (except members of a registered club)
	1. Cessation of alcohol services 30 minutes prior to close	2. Cessation of alcohol service 30 minutes prior to close
	2. No glass containers to be used after midnight	3. No glass containers to be used after midnight
		4. No shots and drink limit restrictions after midnight
“Level 3 venues do not have any special conditions imposed. They are however, effectively put on notice that they are near the threshold for regulatory intervention under Sch 4”.	3. 10-minute alcohol sales time out every hour after midnight or active distribution of water and/or food.	5. 10-minute alcohol sales time out every hour after midnight or active distribution of water and/or food

<sup>84</sup> *Liquor Act 2007* (NSW) ss 11(1A), 159.

<sup>85</sup> Liquor & Gaming NSW, n 31.

<sup>86</sup> This concern was raised by the author with a senior L&GNSW official in early 2020. No direct response was supplied. The VVS has been targeted for change by the NSW government as part of the Review of the Sydney lockout laws process. Any unacknowledged legal fault in the Scheme could be resolved by its abolition.

<sup>87</sup> Ayres and Braithwaite, n 80.

TABLE 1. *continued*

“Level 3 venues are encouraged to develop or review their venue safety plans and conduct a risk assessment to identify appropriate ways to reduce the incidences of violence”.		6. 1 or more additional security measure/s
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Source: NSW Liquor and Gaming “Violent Venue Scheme” 27 May 2019.<sup>88</sup>

An additional disincentive listed as a declared violent premise is the Government’s publication of the Level 1 and 2 lists every six months in the expectation that the potential reputational damage may persuade the same violent premises to improve the safety of their venue.

On release of the Round 20 VVS results, the Deputy Secretary of L&GNSW identified another disincentive of being a declared premise. “Venues on the list are closely monitored and incur substantial risk-based loadings<sup>89</sup> to their annual licence fees to offset the additional regulatory oversight”.<sup>90</sup>

### **Attribution/Review Process**

The Fact Sheet outlines a detailed consultation and review process where a licensee or club secretary can challenge any proposed attribution of a violent incident to the venue. It also provides for the provision of submissions regarding the proposed imposition of any subsequent special licensing condition. This appears to afford licensees substantial procedural fairness.

The Fact Sheet identifies the following four key considerations relating to this attribution process

1. “whether the incident meets the definition of a ‘criminal incident’”;
2. whether the incident falls within one of the categories of “violent criminal incidents” adopted by the Australian Bureau of Statistics’ Australian and New Zealand Standard Offence Classification (ABS 2011 Cat No 1234.0);
3. “whether the incident is ‘alcohol-related’”; and
4. “whether the incident has occurred on the licensed premises, applying the Police concept of ‘on licensed premises’”. This is defined in the Fact sheet as on or within 50 metres of the venue.

Based on the above considerations, an aggrieved licensee may lodge a review request with the local police district licensing unit for initial consideration. It then is progressed through the regional unit and finally, the police’s central State-wide Alcohol Licensing Support Unit to ensure a State-wide consistency in the application of the VVS.

If the licensee still disagrees, they may provide L&GNSW with a submission stating reasons for the disagreement.

A weakness in the attribution/review process is its closure to ordinary public scrutiny and overall accountability including the nature and level of discretion applied by the regulatory officers. It is understood that some of this information is collected but not routinely made public. There are no published figures for example, on the rate of review requests per violent incident attribution, the success rate of such requests and the identification of the licensed premises making the same requests.

### **Coverage of the VVS**

Section 89(1) of the *Casino Control Act 1992* (NSW)<sup>91</sup> provides that the Liquor Act and thereby the VVS, does not apply to or in respect of a Casino except as provided by the Regulations. An excuse

<sup>88</sup> Liquor & Gaming NSW, n 31.

<sup>89</sup> See compliance history risk loading information from L&GNSW, Risk-based Loading and Exemptions <<https://www.liquorandgaming.nsw.gov.au/operating-a-business/liquor-licences/liquor-licence-fees/risk-based-loadings-and-exemptions>>.

<sup>90</sup> P Newson, “Latest Violent Venues List Released – November 2018”, *Liquor and Gaming NSW*, 26 November 2018 <<https://www.liquorandgaming.nsw.gov.au/news-and-media/latest-violent-venues-list-released3>>.

<sup>91</sup> <<https://www.legislation.nsw.gov.au/#/view/act/1992/15/part5/sec89>>.

Brown

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provided by an unnamed L&GNSW spokesperson why Sydney's Star Casino was excluded from the Liquor Act was that is subject to "significant police and regulatory monitoring".<sup>92</sup>

In 2016 when controversy<sup>93</sup> arose from alleged underreporting of assaults at the casino to L&GNSW,<sup>94</sup> it appears that the number of assaults there were more than the total reported in all licensed premises in NSW.<sup>95</sup>

Round 14 (year end 30 June 2015) of the VVS schedule revealed the Sydney Cricket and Sports Ground Trust as the first sporting venue to be a declared violent (Level 2) premise.<sup>96</sup> The latest version of the Fact Sheet however, notes under the heading of "Sports Stadiums": –

Due to the unique scale and nature of their operations, sporting stadiums will generally not be categorised under the scheme. Many of these sporting venues operate comprehensive plans for alcohol and security management, and work closely with L&GNSW and police around major sporting events.<sup>97</sup>

There is no uniform and consistent VVS type compliance system covering all NSW on-premise retail alcohol outlets.

### **Geographic Scope**

The above L&GNSW Fact Sheet confines the definition of a connected alcohol-related violent incident within a 50-metre radius of the licensed premises. In 2011, BOCSAR published research<sup>98</sup> on outlet density that included an analysis of the relationship between the location of assaults and their proximity to licensed premises in the Sydney Local Government Area. It found that 92.8% of assaults occurred within a 200-metre radius and 56.8% within and up to a 50-metre radius from the licensed premise. The research also observed in general, that only 31% of assaults are reported to the police.<sup>99</sup>

### **BOCSAR Evaluation of Violent Venues Listing Scheme**

In October 2009, BOCSAR released a study on the effectiveness of the 48 most violent venues listing scheme<sup>100</sup> – a forerunner of VVS in similar operation today. It found that there had been a general decline in assaults that could not be solely attributed to the application of restrictions to the 48 most violent premises. The adverse publicity surrounding the package of restricted licensing conditions associated with the 48 most violent licensed premises list, the 2008 package of Newcastle licensing conditions

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<sup>92</sup> J Lemon, "New Face Tops Sydney's Most Violent Venue List", *Sydney Morning Herald*, 28 May 2018 <<https://www.smh.com.au/sydney-news/new-face-tops-sydney-s-most-violent-venue-list-20180525-p4zhju.html>>.

<sup>93</sup> A Branley, "Star Casino Violence Three Times Worse Than Official Crime Statistics, Leaked Report Says", *ABC News*, 1 November 2016 <<https://www.abc.net.au/news/2016-10-31/leaked-report-reveals-extent-of-violence-at-star-casino-sydney/7980186>>.

<sup>94</sup> Previously known as Office of Liquor Gaming and Racing (OLGR). The agency fell within the auspice of successive NSW government Departments including Communities NSW, Trade and Investment, Justice and Industry. It currently as "L&GNSW" is within the Better Regulation Division of the Department of Customer Service.

<sup>95</sup> BOCSAR found there was no significantly different rate in the reporting of assaults by staff at the casino. S Ramsey, "Reporting Rates of Assaults at The Star Casino by Licensed Premises Staff", (Issue Paper No 121, *Crime and Justice Statistics*, NSW Bureau of Crime Statistics and Research, November 2016) <<https://www.bocsar.nsw.gov.au/Publications/BB/Report-2016-Reporting-rates-of-assaults-at-The-Star-casino-BB121.pdf>>. See also J Horton, *A Review to Assist the Independent Liquor and Gaming Authority with Its Periodic Investigation Pursuant to Section 31(1) of the Casino Control Act 1992 (NSW)*, 28 November 2016 <<https://www.liquorandgaming.nsw.gov.au/documents/reports/casino/review-the-star-casino-licence-ilga-horton-qc-28-november-2016.pdf>>. Its considerations include the appropriate level of assault reporting at the casino and comparisons with VVS requirements.

<sup>96</sup> See <<https://www.liquorandgaming.nsw.gov.au/documents/resource-centre/violent-venues-list/20150630-violent-venues-scheme-Round-14.pdf>>.

<sup>97</sup> Liquor & Gaming NSW, n 31, 3.

<sup>98</sup> M Burgess and S Moffatt, "The Association between Alcohol Outlet Density and Assaults on and around Licensed Premises" (2011) 147 *Crime and Justice Bulletin* Table 1, 11 <<https://www.bocsar.nsw.gov.au/Publications/CJB/cjb147.pdf>>.

<sup>99</sup> Burgess and Moffatt, n 98.

<sup>100</sup> Moffatt et al, n 65.

including earlier closing times, and, the “more vigorous” enforcement of the liquor laws by police and licensing inspectors,<sup>101</sup> were attributed as more “likely” to have reduced the incidence of assaults.

A senior police representative attributed<sup>102</sup> the decline in assaults to “tougher enforcement”, the scheme’s restrictions and the shame factor of being publicly listed as a violent premise. He committed to continue to “**work with** the industry” (emphasis added).

The AHA NSW Chief Executive alternatively suggested their licensee members deserved the credit for the outcome: –

We would attribute this to the hard work that licensees have put in in terms of being extra vigilant on staff training, additional responsible service of alcohol measures and other proactive initiatives.<sup>103</sup>

## Success of the VVS

The primary goal of the VVS is to reduce the number of assaults occurring within and immediately surrounding (50 metres) declared violent licensed premises. It is highly unlikely for any off-premise (takeaway alcohol) licenced venue to become a declared premise where the consumption of alcohol occurs away from outlet.

The definition of “success” must acknowledge the preceding limitations of the VVS explicated within this case study. These include the Director of BOCSAR’s observations that the number of alcohol-related violent incidents captured by the VVS are only “the tip of the iceberg”.<sup>104</sup> Second, “violent” incidents are only one manifestation of alcohol-related harms arising from the non-compliance with statutory Responsible Service of Alcohol obligations associated with patrons’ excessive consumption of alcohol within on-premise venues. Other examples include motor vehicle accidents, drink driving, pedestrian accidents, domestic assaults and unintended injuries such as alcohol poisoning requiring medical treatment. Third, the most violent alcohol outlet in New South Wales, the Star Casino is not covered by the VVS. Licensed sports stadiums have also been administratively excluded from the scheme. Finally, the arbitrary geographic limitation of the application excludes around 43% of the total assaults occurring within a 200-metre radius of a licensed venue.

The effectiveness of the scheme’s sanction to deter individual premises from repeated listings should also be included as a criterion of “success”.

The following two figures were provided by L&GNSW to the 2019 Joint Parliamentary Select Committee Inquiry on Sydney’s Night Time Economy Sydney review the Sydney lockdown laws (Inquiry).<sup>105</sup> They identified the number of Levels 1 and 2 (although on different scales) declared premises recorded each overlapping 12 monthly round of the VVS since the third round of the scheme.<sup>106</sup> Each of the following figures geographically differentiates between declared premises in the Sydney and Kings Cross adjacent entertainment precincts and, the rest of New South Wales.

<sup>101</sup> See n 44 relating to the OLGR Director of Compliance’s strong approach to regulation.

<sup>102</sup> Gardiner, n 67.

<sup>103</sup> Gardiner, n 67.

<sup>104</sup> As reported by Moore, n 61.

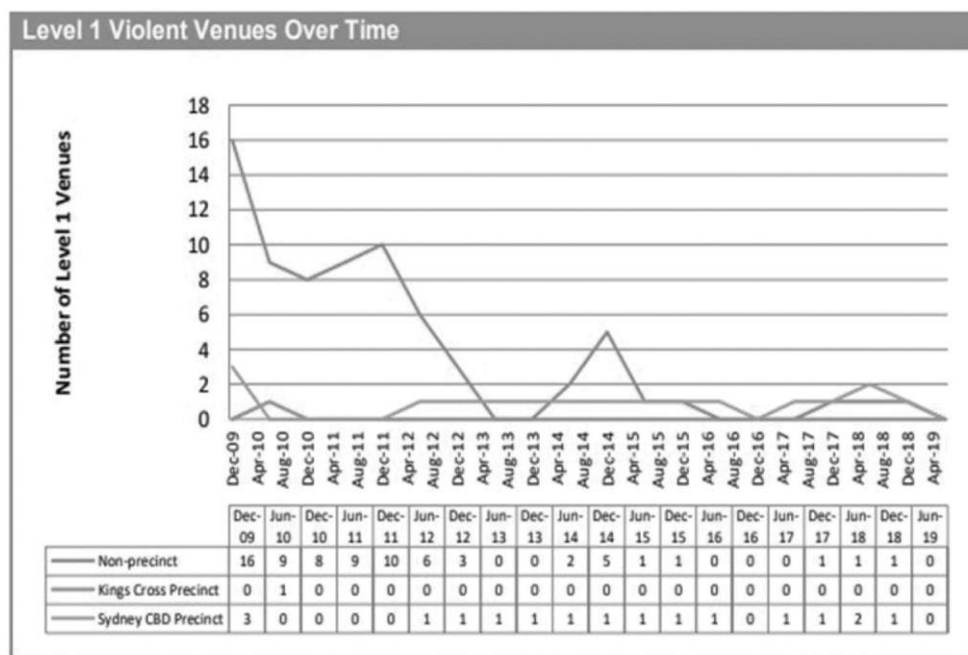
<sup>105</sup> Parliament of New South Wales, *Report on the Joint Select Committee on Sydney’s Night Time Economy*, 30 September 2109 <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2519/Report%20-%20Sydney%20night%20time%20economy.pdf>>. See L&GNSW, *Supplementary Submission*, 15 August 2019 <<https://www.parliament.nsw.gov.au/ladocs/other/12326/Liquor%20and%20Gaming%20NSW.PDF>>.

<sup>106</sup> In an additional supplementary response to questions from the Inquiry committee, L&GNSW Executive Director advised “The data already provided to the Committee on the Violent Venues Scheme demonstrates the success of the scheme, with significant drops in the numbers of venues included in the list since the scheme’s inception. In addition, since the scheme was introduced on 1 December 2008, we have seen a downward trend in assaults on licensed premises in New South Wales. Between April 2009 and March 2019, alcohol-related (non-domestic) assaults on licensed premises were down by 7.7% per year. In the ten years prior to this, these assaults had instead been steadily increasing. The clear turning point after the scheme’s introduction would indicate that it has had a positive impact on reducing levels of violence, consistent with its policy objective”. See L&GNSW, *Supplementary Submission*, 30 August 2019, 1 <<https://www.parliament.nsw.gov.au/ladocs/other/12598/Liquor%20and%20Gaming%20NSW.pdf>>. The Executive Director then reminded the committee that Merivale “had made proposals to amend” the VVS.

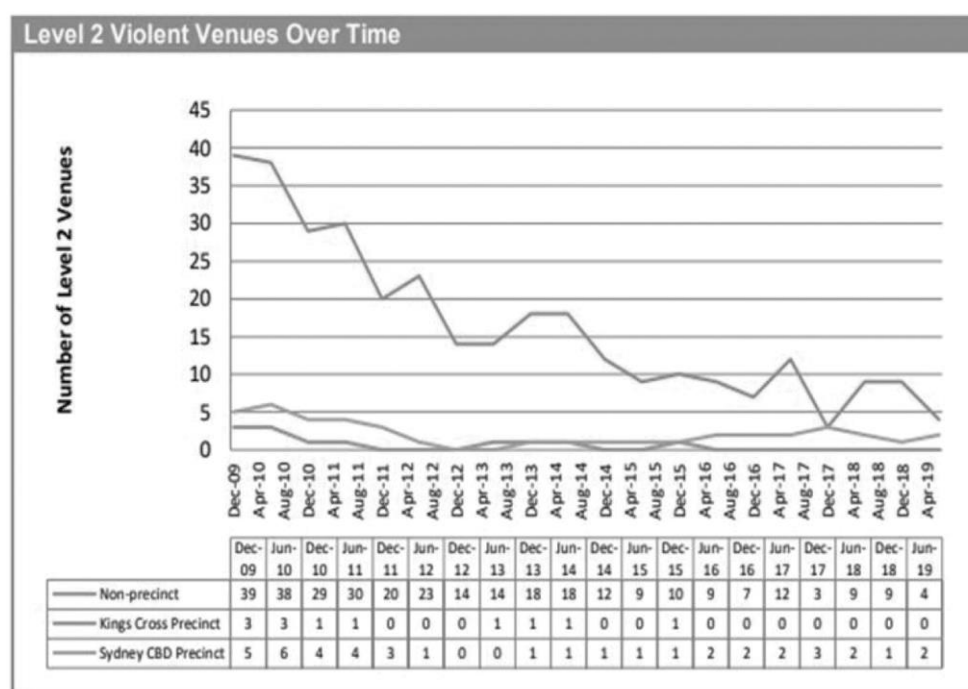
# THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Brown

**FIGURE 2.**



**FIGURE 3.**



Source: NSW Liquor and Gaming “Violent Venue Scheme” 27 May 2019.<sup>107</sup>

<sup>107</sup> See L&GNSW, n 105.

What is immediately apparent from the two above Figures is the fall in the total number of declared violent premises in New South Wales from 66 in the third round for the year ended December 2009, to 6 in the year ended June 2019. These Figures alone do not include the total number of declared alcohol-related violent incidents associated with each of the declared violent licensed premises. Nor do they include the number of recorded assaults on a premise where the 12-month total may be less than 12. The significant fall in the number of declared venues in the rest of New South Wales was not matched in the two Sydney precincts albeit, from a relative low base.

On closer examination of individual licensed premises' recorded levels of violent incidents contained in the published schedules, the large Sydney CBD hotel, The Ivy owned by billionaire<sup>108</sup> Justin Hemmes' family Merivale group,<sup>109</sup> remains the regular most violent licensed premise in NSW. It is located within a multi-story building with a range of bars, restaurants, pool area etc. Hemmes advised the Inquiry<sup>110</sup> that The Ivy has over two million patrons through their doors in any year.<sup>111</sup>

The Ivy has been a declared premise for all (overlapping) rounds of the tiered VVS. Over the last 21 rounds, The Ivy has been declared a Level 1 venue (19 or more assaults) on 11 occasions.<sup>112</sup> Of these, on 8 occasions, The Ivy topped this list as the most violent licensed premise in NSW. In round 15, 21 and the current round 22, there were no venues listed at Level 1, but on all these occasions, The Ivy topped the list of Level 2 violent premises (12–18 assaults). On 10 occasions, The Ivy was declared a Level 2 licensed premise.

The above October 2009 BOCSAR review<sup>113</sup> cautions against simplistic attribution of reductions in alcohol-fuelled NDV with the mere existence of a regulatory scheme – causation versus correlation. The fall in the total number of all declared violent licensed NSW premises shows some broad correlation with the reported decline in non-domestic assaults (Figure 1).

It is not known whether the levels of recorded alcohol-related violent incidents in non-declared licensed premises (ie, those whose annual number of assaults were less than 12) fell by greater or lesser amounts than reflected in the above Figures 2 and 3. Nor is it possible to determine the relative effectiveness of the VVS in combination with the 3SS in reducing the rates of recorded violent incidents and serious licensing offences associated with the 3SS.

The responsive regulation model<sup>114</sup> would suggest that successively more punitive sanctions would apply to repeatedly scheduled alcohol outlets such as The Ivy and arguably imposed on the Star Casino, until the levels of violence fell below the threshold levels of the number of violent incidents. The ultimate sanction would be loss of license/closure of premise.

Some may argue that The Ivy should be an exception to the rule given its size and alleged level of patronage. However, Snider's study of the regulation of the Canadian financial sectors' level of "white collar" crime found a differential or "bifurcation"<sup>115</sup> in the way the regulatory system responded to

<sup>108</sup> Ingrid Fuary-Wagner, "New Billionaire Justin Hemmes' Empire of Escapism", *Australian Financial Review Magazine*, 29 May 2019 <<https://www.afr.com/rich-list/new-billionaire-justin-hemmes-empire-of-escapism-20190407-p51bqv>>.

<sup>109</sup> "Merivale is a family-owned business that employs over 3,000 people and operates 89 licensed restaurants, bars and event spaces across metropolitan Sydney, of which 46 are within the CBD. Our contribution to Sydney's social, tourist and economic fabric is enormous, with over two million visitors through Ivy's door alone in any one given year ... there is nothing more important ... than the safety and happiness of my patrons." J Hemmes, *Report on Proceedings Before Joint Select Committee on Sydney's Night Time Economy: Sydney's Night Time Economy*, 9 August 2019, 51ff. <<https://www.parliament.nsw.gov.au/ladocs/transcripts/2200/Joint%20Select%20Committee%20on%20Sydney%20s%20night%20time%20economy%20-%20corrected%20transcript%20-%202019%20August%202019.pdf>>.

<sup>110</sup> Parliament of New South Wales, n 105.

<sup>111</sup> See the Merivale submission (784) – 16 July 2019 from Justin Hemmes, CEO Merivale to the NSW Joint Select Parliamentary Committee on the Sydney's Night Time Economy (*Inquiry*). <<https://www.parliament.nsw.gov.au/ladocs/submissions/63907/Submission%20784%20-%20Merivale.pdf>>.

<sup>112</sup> Year to June and December results are published each year. This results in a six-month overlap of results.

<sup>113</sup> Moffatt et al, n 65.

<sup>114</sup> Ayres and Braithwaite, n 80.

<sup>115</sup> L Snider, "Accommodating Power: The 'Common Sense' of Regulators" (2009) 18(2) *Social & Legal Studies* 179.

Brown

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large and powerful financial corporations, compared with the non-complying businesses who lacked economic, legal and political resources and power to prevent or frustrate legal proceedings.<sup>116</sup> The latter description may more likely characterise smaller regional and rural licensed premises that originally dominated the numbers of NSW-declared licensed premises.

The “shame” effect of being a publicly declared licensed premise has not deterred The Ivy from being the most consistently declared violent licensed premise in New South Wales. It does not appear to have deterred patrons despite its violence status. Nor has it motivated NSW governments to amend the alcohol compliance laws including the VVS, to redress this situation. This belies the asymmetrical nature of alcohol supply law reforms in NSW inconsistent with the overriding public interest.

If “success” is defined in terms of an effective deterrent that limits the frequency a licensed venue is declared a violent premise, the above record of The Ivy<sup>117</sup> suggests the scheme has failed. The exclusion of the Star Casino from the same scheme and the lack of public reporting on the level of their violent incidents, compound this failure.<sup>118</sup>

While L&GNSW credited the VVS as contributing to the reported reduction in violence in NSW in more recent years,<sup>119</sup> this was only confined to the fall in the rate of non-domestic assaults that has stabilised since 2015 (see Figure 1). However, the rate of reported DV has increased significantly over the same period. Any claimed success of the VVS and the 3SS reducing NDV must be balanced within the bigger picture of total reported assaults and the Government’s apparent aversion to address by effective regulation, the availability and supply of take away alcohol.<sup>120</sup>

### Case Study Summary

The number of declared violent licensed premises has fallen significantly for the period of operation of the VVS. This has coincided with a more general decline and stabilisation of the rate of reported non-domestic assaults in New South Wales reflected in Figure 1 above.

The surprise emerging from the above evaluation of the VVS legal framework is the lack of statutory prescription and associated parliamentary oversight for key elements of the scheme. This includes the number of recorded violent incidents constituting the three “levels” of the scheme, the attribution and review of violent incidents processes and the variability of the coverage of the scheme to likely exclude sports stadiums for reasons not contained within the statutory prescription.

The scheme’s capacity to protect the public interest and safety is significantly constrained by its limited geographic scope. It is also limited by its sole reliance on recorded alcohol-related “violent” incidents as an unsatisfactory proxy for all alcohol-related harms arising from a venue’s operational, supervisory and compliance practices and related patrons’ drinking patterns and behaviour.

The VVS has provided the NSW government and alcohol industry with a valuable rhetorical tool to boast its success and deterrence value in reducing NDV while failing to include an important disclaimer

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<sup>116</sup> L Snider, “Towards a Political Economy of Reform, Regulation and Corporate Crime” (1986) 9(1) *Law and Policy* 37.

<sup>117</sup> Following sections will examine Hemmes’ lobbying in 2019 to weaken or remove the VVS to his business’s financial advantage and the reported connections with political parties.

<sup>118</sup> ICAC investigated an allegation that in 2015, the NSW Labor party received an illegal \$100,000 donation from a gambling syndicate in the Star Casino. Jamie McKinnell, “ICAC Hears \$100,000 Cash Withdrawn from The Star Casino Days before Same Amount Banked by NSW Labor”, *ABC news*, 13 December 2019 <<https://www.abc.net.au/news/2019-12-12/icac-cash-withdrawal-from-star-casino-before-labor-banked-money/11794496>>. For 2017–2018, it was reported the Star Entertainment Group Ltd provided \$43,196 in political donations to a range of political parties: Nick Evershed, “Political Donations 2017–2018: Search All the Declarations by Australian Parties”, *The Guardian*, 1 February 2019 <<https://www.theguardian.com/australia-news/ng-interactive/2019/feb/01/political-donations-2017-18-search-all-the-declarations-by-australian-parties>>.

<sup>119</sup> L&GNSW Executive Director, n 106; Newson, n 90.

<sup>120</sup> NSW Bureau of Crime Statistics and Research, “Domestic Violence Statistics for NSW” <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Domestic-Violence.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx)>.



that the same improvements have not occurred with respect to DV.<sup>121</sup> It also provides a pointer for the industry to assert the “responsibility” of their members.

The inconsistent coverage of the VVS to exclude casinos and the unwillingness of the legislators to impose tougher sanctions on the most frequently declared violent licensed premise in New South Wales is indicative of its asymmetrical nature. It also suggests the presence of bifurcation and lack of impartiality of the NSW regulatory process with priority seemingly afforded the most powerful commercial interests.

### **Industry Lobbying to Remove the Disciplinary Schemes**

In 2019 following a sustained and co-ordinated dystopian<sup>122</sup> form of lobbying from the industry, business and patron groups, the NSW government with the support of the Opposition and Greens, instigated a Joint Select Parliamentary Inquiry of the Sydney Night Time Economy (NTE) – (Inquiry). The headline complaint was that the 2014 Sydney “lock out” laws had caused serious financial and cultural damage to the adjacent Kings Cross and Sydney CBD entertainment precincts.<sup>123</sup> These laws consisted primarily of reductions in late night trading hours, a one-way door policy or “lock out” after 2 am and drink restrictions designed to reduce levels of intoxication.

While the headline publicity surrounding the Sydney lockout law inquiry was focused on these specific laws relating to the Sydney area, Hemmes’ oral<sup>124</sup> and written<sup>125</sup> submissions identified the regulatory system “imposed” on the industry as the root cause of the industry’s and Sydney’s NTE alleged “demise”. This system consisted of the VVS, 3SS and the lockout laws. Despite the Inquiry’s terms of reference confined to the Sydney area, Hemmes’ submissions on the disciplinary schemes, had significant State-wide implications for alcohol harm prevention and industry compliance.

Hemmes’ oral submission requested: –

With respect, Sydney’s lockout laws must now go. ... my submission particularly focuses on the need to also address the Government’s violent venues scheme and the three strikes regime. These two schemes are now outdated and any conversation about the revitalising of Sydney’s night-time economy must see these schemes drastically amended.<sup>126</sup>

An alleged primary failure of the VVS was its unjust penalisation of venues with large patronage. Hemmes argued on average customer numbers (per capita basis), his Ivy hotel provided a relatively safer place than the surrounding streets and smaller venues.<sup>127</sup> No independent evidence was provided to substantiate this assertion which appears somewhat counterintuitive. The claim was not challenged by the Inquiry however, one caution was expressed by the Executive Director of L&GNSW during the proceedings.<sup>128</sup>

<sup>121</sup> On 29 November 2019, Liquor and Gaming NSW advised in a media release “These results show our state’s licensed venues are now safer than they’ve ever been, meaning people can enjoy nights out with far lower risks of alcohol-related violence”. See <<https://www.liquorandgaming.nsw.gov.au/news-and-media/fewer-premises-on-violent-venues-list>>.

<sup>122</sup> Ulucanlar, Fooks and Gilmore, n 13. The dystopian model identifies a fear tactic of the tobacco industry. It forecasts and promotes gloom and doom for business, civil liberties and other erstwhile outcomes should government adopt harm prevention and/or reduction measures advocated by public health.

<sup>123</sup> See M Gorrey, “‘Remove the Shackles’: Bar Tsar Justin Hemmes Wants Lockouts Scrapped”, *Sydney Morning Herald*, 9 August 2019 <<https://www.smh.com.au/national/nsw/remove-the-shackles-bar-tsar-justin-hemmes-wants-lockouts-scrapped-20190809-p52fk4.html>>.

<sup>124</sup> Hemmes, n 109.

<sup>125</sup> Hemmes, n 111.

<sup>126</sup> Hemmes, n 109.

<sup>127</sup> Hemmes, n 109, 56. This argument contradicts government’s policy of the growth and promotion of small bars as a safer alternative to large alcohol outlets viewed as being more violent. See L&GNSW comments on relative safety of smaller bars vis-a-vis those over 120 patron capacity in supplementary submission to lockout inquiry (n 101) and related 2016 small bar review <<https://www.liquorandgaming.nsw.gov.au/documents/public-consultations/small-bars-review/small-bars-review-report-sept-2016.pdf>>.

<sup>128</sup> The Executive Director of L&GNSW response to the Inquiry regarding the alleged relative safety of The Ivy was “I think the alternative view is do we want to be saying that just because you are operating a big venue and you trade late at night we tolerate

Brown

Hemmes also sought more police on the streets to deal with the lack of “personal responsibility” of “messed up” and violent people but, less presence of police within his premises as it was “intimidating” and reduced the “vibe and atmosphere” of the alleged “well-controlled” venue spaces he operates.<sup>129</sup>

The punitive measures within the VVS were obviously designed to have a direct and indirect deterrence effects impacting upon a venue’s financial,<sup>130</sup> competitive and reputational circumstances. In December 2018, Hemmes announced a \$1.5 billion plan to transform the area surrounding his Ivy hotel in central Sydney CBD.<sup>131</sup> This large proposed investment provides an incentive or motive to advocate for a regulatory environment conducive to maximising the rate of return on investment and minimising uncertainty including regulatory risks and threats.

In contrast to this above history of recorded assaults on premises over a 10-year period, The Ivy was never issued a “strike” under the 3SS for a conviction of a serious Liquor Act offence including for example, allowing intoxication on premises and violent and quarrelsome behaviour.<sup>132</sup> The 3SS is a complex compliance process subjected to significant discretion for the regulators to issue a strike and related sanctions (license conditions) for a prescribed serious alcohol-related offence by the licensee. The issuing of three strikes may result in a licensee being removed from the industry.

On 28 November 2019, the NSW government supported the Committee’s recommendations<sup>133</sup> to review and amend some of the Act’s disciplinary schemes.<sup>134</sup>

### “Size Matters” Defence

Unlike the VVS, the 3SS contains a critical defence favouring The Ivy and other large venues.<sup>135</sup> A statutory requirement of the ILGA is when making a reviewable decision to award a “strike”, it must “take into account to the extent that it considers it to be relevant”: –

the size and patron capacity of the licensed premises and how this may impact on the ability of the licensee or manager to prevent the commission of prescribed offences the venue size and patron capacity.<sup>136</sup>

This legal defence has profound implications relating to the overall public good and the rule of law. It must be in the overriding public interest that a consistently high statutory and in some cases fiduciary duty of care and levels of compliance are owed by the owners and controllers of organisations to those who may be exposed to some connected foreseeable risk. The VVS has contemplated the likely consequences of the broader application of the NSW Government’s alcohol industry “size matters” legal defence that

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assaults in your venue ... (L&GNSW) not closed to tweaking (VVS) but in terms of the per capita argument I think we need to exercise caution”, Hemmes, n 109.

<sup>129</sup> Hemmes, n 109, 60.

<sup>130</sup> Drink driving criminal convictions on intoxicated patrons can also cause financial hardship through loss of driving licence and indirectly cause the loss of employment where that employment is dependent upon possession of driving licence.

<sup>131</sup> C Cummins, “Justin Hemmes Plans a \$1.5b George Street Empire”, *Sydney Morning Herald*, 13 December 2018 <<https://www.smh.com.au/business/companies/justin-hemmes-plans-a-1-5b-george-street-empire-20181212-p50lu2.html>>.

<sup>132</sup> See *Liquor Act 2007* (NSW) s 73 “Prevention of excessive consumption of alcohol on licensed premises” of the Act.

<sup>133</sup> See Parliament of New South Wales, n 105: An extract of the committee’s minutes contained with the report (122) identified apparent additional wording to the recommendation – “The Committee notes the regulatory success of the violent venues scheme, which adopts the principle of heavily regulating those venues that are contributing most to the number of violent incidents. The Committee believes this is an effective way to concentrate regulatory resources where they might have most effect”.

<sup>134</sup> It further noted “The Government will consider building upon the success of the Violent Venues scheme by merging existing sanctions schemes (Violent Venues, Minor Sanctions and Three Strikes) into a consolidated sanctions and rewards system that is focused on reducing serious breaches of the liquor laws, keeping levels of violence down on licensed premises, and incentivising good behaviour. The system will increase transparency and make it easier for venues to understand and comply with their obligations. Further stakeholder consultation will be undertaken before any changes are introduced” <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2519/NSW%20Government%20response%20-%20Sydney's%20Night%20Time%20Economy.pdf>>.

<sup>135</sup> ILGA’s schedule of strike recipients does not publicly identify the actual premise where the offence occurred. See <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0020/281018/Three-Strikes-Register.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0020/281018/Three-Strikes-Register.pdf)>.

<sup>136</sup> *Liquor Act 2007* (NSW) s 144M(1)(c)(ii).

Public Health versus Alcohol Industry Compliance Laws: A Case of Industry Capture?

favours larger businesses, to other organisations and industries including for example, building and construction, food producers and outlets, schools, hospitals, prisons, airlines and amusement parks.

Hemmes' submissions to the Inquiry requested the VVS be abolished or incorporated within the 3SS to reduce red tape and the regulatory burden. This would also conveniently enable the extension of the "size matters" legal defence to a broader range of his and other large licensed premise operators' alcohol law compliance obligations.

In contrast to the scientific evidence submitted to the Inquiry by Public Health experts, Hemmes asserted: –

There is good research to be found which evidences there to be no link between extended trading hours and rates of violent assaults, and that some countries have in fact introduced longer trading hours in order to prevent the harms associated with early fixed closing times.<sup>137</sup>

To add "credibility" to his written submission, Hemmes cited a 2015 report from Fox<sup>138</sup> who was critical of the effectiveness of reducing late trading hours as a successful harm minimisation initiative. Her report was commissioned by the Lion Alcohol company and subsequently critiqued by public health scholars.<sup>139</sup>

Hemmes' above submissions<sup>140</sup> to the Inquiry demonstrate the durability of the neoliberal narrative and justification identified in the earlier SVVRS of 2009. This includes the fusion of public with private commercial interest through attempts to broaden the application of the "size matters" defence, emphasis on deregulation by in part, the discouragement of police licensing compliance inspections, the references to reducing regulatory burden and cutting red tape and, the absence of consideration of the negative externality or adverse spill-over effects of a business's/industry's operations.

### Postscript

In early May 2020,<sup>141</sup> the NSW Government released a "public consultation draft" of the *Liquor Amendment (24-hour Economy) Bill 2020 (Draft Bill)*<sup>142</sup> as one outcome of the 2019 Inquiry. The NSW government responded favourably to Hemmes' submissions to the Inquiry. The *Draft Bill* proposes the collapse of the above three statutory compliance schemes into a single "integrated demerit points system and incentive scheme".<sup>143</sup>

The proposed integrated industry compliance scheme contained within Sch 1 of the *Draft Bill*, retains a similar central "size matters" defence.<sup>144</sup> Additional considerations in the early removal of a demerit include the presence of "serious harm"<sup>145</sup> resulting from an incident and, subsequent remedial action taken by the licensee or manager to "manage or reduce" the risk that gave rise to the demerit.<sup>146</sup> There appears no requirement that such action be evidence based and effective.

<sup>137</sup> Hemmes, n 111, 13.

<sup>138</sup> A Fox, "Understanding Behaviour in the Australian and New Zealand Night-time Economies: An Anthropological Study", January 2015 <<https://www.lionco.com/content/u12/Dr%20Anne%20Fox%20report.pdf>>.

<sup>139</sup> See critique of Fox. P Miller and A Wodak, "FactCheck: Can You Change a Violent Drinking Culture by Changing How People Drink?", *The Conversation*, 10 March 2015 <<https://theconversation.com/factcheck-can-you-change-a-violent-drinking-culture-by-changing-how-people-drink-38426>>. See also N Jackson and K Kypri, "A Critique of Fox's Industry-funded Report into the Drivers of Anti-social Behaviour in the Night-time Economies of Australia and New Zealand" (2016) 111 *Addiction* 552 <<https://doi.org/10.1111/add.13149>>.

<sup>140</sup> Hemmes' oral submission, n 109; Hemmes' Merivale written submission, n 111.

<sup>141</sup> The synthesis of the capture test with the case study of the VVS was completed prior to the release of the Draft Bill.

<sup>142</sup> *Liquor Amendment (24-hour Economy) Bill 2020*.

<sup>143</sup> *Liquor Amendment (24-hour Economy) Bill 2020*.

<sup>144</sup> Public consultation draft *Liquor Amendment (24-hour Economy) Bill 2020* s 144L(2c).

<sup>145</sup> *Liquor Amendment (24-hour Economy) Bill 2020* s 144ZD 2(a)(ii).

<sup>146</sup> *Liquor Amendment (24-hour Economy) Bill 2020* s 144ZD 2(a)(iii). Any further elaboration of the Bill is outside the scope of the article.

## APPLICATION OF THE INDUSTRY CAPTURE TEST

The purpose of this part is to apply the industry capture test to the preceding critical case study of the VVS.

This primarily focuses on the concept of “connected conduct” from the two interrelated perspectives of the powerful elements within the NSW alcohol industry and, government. In doing so, it also draws upon additional material of the reported leading alcohol and gambling industry businesses’ political activities, particularly as it relates to the essential capture elements of motive, intent and quid pro quo. The synthesis also incorporates a range of allied “governance” and “public interest” considerations. These include impartiality, transparency and conflicts of interest.<sup>147</sup>

The first consideration in the evaluation of the presence of capture of the VVS compliance scheme is recognition of the stratified NSW retail alcohol supply industry.

The first structural differentiation is between on-premise liquor license types where alcohol is consumed on the premises – for example hotels, clubs, restaurants, passenger ferries and small bars, and, off-premise take away packaged and online liquor licences. The most popular off-premise alcohol outlets are large supermarket discount stores<sup>148</sup> ranging down to smaller bottle shops and licence authorisations for on-premise type outlets, predominantly hotels, to also provide take away supplies of alcohol.

The second form of stratification of the NSW retail alcohol supply industry is the bifurcation of the industry discussed above.<sup>149</sup> Similar to the microeconomic terminology of “price maker” and “price taker” where the former firm exercises market power, a similar analogy can be applied to the oligopoly-type alcohol industry where a few very large organisations, “policy makers”, exercise disproportionate market and related political power or influence in the law making and compliance processes.

As will be established in the following synthesis of the case study results with the capture test, the locus of capture and connected conduct resides in this domain of market and political influence or power. It has the demonstrable capacity to divert the democratic law-making and compliance regulatory processes away from the public interest to benefit both these private commercial and public political entities. The relationship is tied by a symbiotic connection based on some degree of mutual dependency.

## Connected Conduct – Alcohol Industry

The 2019 explication<sup>150</sup> of the *Gaming and Liquor Administration Amendment Bill 2015* (NSW) revealed a relationship between successive NSW governments and the alcohol industry that was defined by undue influence, exclusive access and dealings with the industry in the development of new alcohol control laws, promotion of alcohol industry financial interests over alcohol harm reduction and reported breaches of the NSW political donation laws.<sup>151</sup>

<sup>147</sup> NSW Independent Commission Against Corruption, Operation Eclipse, Interim Report, October 2019 <[https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19\\_FINAL.pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19_FINAL.pdf.aspx)>.

<sup>148</sup> Roy Morgan, “The Australian Alcohol Retail Market In Review”, 20 March 2017 <<http://www.roymorgan.com/findings/7181-liquor-retail-australia-201703201051>>.

<sup>149</sup> Snider, n 115.

<sup>150</sup> Brown, n 6, 782. See examples of this conduct contained within media references identified in the application of the (then) first element of the legislative capture test “Identification of reciprocating conduct...” within the “Appendix” of the 2019 article.

<sup>151</sup> Further published examples of alleged undue influence between NSW governments, Oppositions and NSW alcohol industry include S Nicholls, “Liberals Linked to Hotel Lobby Group”, *Sydney Morning Herald*, 13 July 2013 <<https://www.smh.com.au/national/nsw/liberals-linked-to-hotel-lobby-group-20130719-2q9sd.html>>; K Needham, “Baird Government Backs Down on Drunk Rules after Liberal Donors, Alcohol Lobby Complain”, *Sydney Morning Herald*, 25 July 2015 <<https://www.smh.com.au/national/nsw/baird-government-backs-down-on-drunk-rules-after-liberal-donors-alcohol-lobby-complain-20150725-gikb3m.html>>; P Begley, “Machine Men: How the AHA and ClubsNSW Seek Political Influence”, *Sydney Morning Herald*, 30 September 2016 <<https://www.smh.com.au/national/nsw/machine-men-how-the-aha-and-clubsnsw-seek-political-influence-20160930-grxe9.html>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

### Public Health versus Alcohol Industry Compliance Laws: A Case of Industry Capture?

The most obvious manifestation of connected beneficial conduct between the Australian alcohol and gambling industries and political entities is the legal and in some NSW cases flow<sup>152</sup> of political donations. Kypri et al<sup>153</sup> identify an array of industry's political inculcation tactics and the timing of political funding correlating with Ministerial and Parliamentary considerations of industry policy/law changes.

The Guardian reported<sup>154</sup> that in 2017/2018, the AHA provided over \$1 million in federal political donations. Political commentators have identified two recent examples where very large political donations from the AHA in the lead-up to the Tasmanian<sup>155</sup> and Victorian<sup>156</sup> elections, played a decisive role in quashing some opposition parties' attempts to introduce measures aimed to reduce gambling-related harms.

It is therefore practically impossible to quarantine consideration of the nature of connected conduct between the powerful groups within the NSW alcohol industry and successive NSW governments with the context of the VVS and other disciplinary/punitive statutory schemes – from broader examples of patterns of influence organised across the nation. This connected conduct was revealed by Hansen<sup>157</sup> and more recently, the attention by the media to the involvement of the alcohol and gambling industry in the last Tasmanian<sup>158</sup> and Victorian elections.<sup>159</sup>

A search of freely available media reports revealed the following connections between Justin Hemmes, his family's private business group Merivale and particularly, the Liberal Party. This research found no published allegations or evidence of Hemmes breaching NSW political donation laws. NSW electoral laws prohibit any political donations from property developers, and those in the alcohol, tobacco and gambling industries<sup>160</sup> with *Clubs NSW* exempted.<sup>161</sup> There are no similar restrictions on political donations to Federal politicians and parties other than reporting requirements. The barriers delineating NSW from Federal political donations appear weak and porous.<sup>162</sup>

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<sup>152</sup> M Koziol, "Former Liberal Party Treasurer Admits He Knew of Illegal Donations", *The Sydney Morning Herald*, 23 May 2016 <<https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html>>.

<sup>153</sup> K Kypri et al, "'If Someone Donates \$1000, They Support You. If They Donate \$100000, They Have Bought You'. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties" (2019) 38 *Drug and Alcohol Review* 226.

<sup>154</sup> C Knaus, "Liquor and Gaming Lobby Pumped More Than \$1m into Liberal, Labor and Far-right Parties", *The Guardian*, 29 April 2019 <<https://www.theguardian.com/australia-news/2019/apr/29/liquor-and-gaming-lobby-pumped-more-than-1m-into-liberal-labor-and-far-right-parties>>.

<sup>155</sup> See Australian Electoral Commission (AEC), "2017–18 Annual Financial Disclosure Returns Published Today" (Media release, 1 February 2019) <<https://www.aec.gov.au/media/media-releases/2019/02-01.htm>>. Most of the AHA's donations were reportedly provided to the incumbent Liberal (Conservative) party in the small state of Tasmania to successfully campaign against the Opposition Labor party that was seeking to ban poker machines from hotels. See also D Wood, C Chivers and K Griffiths, "Tasmania's Gambling Election Shows Australia Needs Tougher Rules on Money in Politics", *The Conversation*, 1 February 2019 <<https://theconversation.com/tasmanias-gambling-election-shows-australia-needs-tougher-rules-on-money-in-politics-110977>>.

<sup>156</sup> R Millar, B Schneiders and B Preiss, "Pokies Jackpot Helps Fund Daniel Andrews' Re-election", *The Age*, 3 February 2020 <<https://www.theage.com.au/politics/victoria/pokies-jackpot-helps-fund-daniel-andrews-re-election-20200203-p53x7u.html>>.

<sup>157</sup> Hansen, n 43.

<sup>158</sup> Wood, Chivers and Griffiths, n 155.

<sup>159</sup> Millar, Schneiders and Preiss, n 156.

<sup>160</sup> See amendments contained in *Election Funding and Disclosures Amendment Bill 2010* s 96GAA.

<sup>161</sup> S Nicholls, "Clubs Escape Political Donation Ban Despite Gaming, Alcohol Links", *Southern Highland News*, 12 November 2010 <<https://www.southernhighlandnews.com.au/story/903990/clubs-escape-political-donation-ban-despite-gaming-alcohol-links/?cs=4159>>.

<sup>162</sup> J Tham and H Aulby, "Hidden Money in Politics: What the AEC Disclosures Won't Tell Us" (The Centre for Public Integrity, February 2020) <<https://publicintegrity.org.au/hidden-money-in-politics-what-the-aec-disclosures-wont-show-us/>>.

Brown

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On 13 October 2018, the SMH reported that Hemmes hosted a \$7500-a-head Liberal Party dinner that included senior Federal Government Ministers and a Liberal candidate.<sup>163</sup>

On 6 May 2019, the SMH reported Hemmes hosting a \$3300 per head Liberal Party fund raiser.<sup>164</sup> Australian Electoral Commission political donation records revealed Hemmes Trading Pty Ltd declared a donation of \$21,858 on 6 May 2019 to the Liberal Party of Australia.<sup>165</sup> The Federal election was held on 18 May 2019 where the Liberal/National Party coalition were returned to power.

In December 2018, residents surrounding one of Merivale's large pubs on Sydney's northern beaches lodged complaints against noise and other disturbances from intoxicated patrons.<sup>166</sup> Merivale's only recent (December 2019) adverse media exposure concerned the initiation of legal class action proceedings against it for alleged \$129 million in underpayment of employee wages which the company has denied.<sup>167</sup>

Sydney's Star Casino, which is not covered by the VVS, has a record of large political donations. It was reported for 2017–2018 that the Star Entertainment Group Ltd provided \$111,740 in federal political donations to a range of political parties that appeared to include the NSW arms of the Federal Liberal and Labor parties.<sup>168</sup>

In October 2019, Woolworths, Australia's largest supermarket and retail alcohol supplier including through a subsidiary, the control of some NSW hotels, acknowledged an underpayment of wages to workers in the vicinity of \$200–\$300 million.<sup>169</sup> The Guardian's investigations in 2019 also revealed that Woolworths failed to declare to NSW planning authorities when seeking development application approvals from local councils, \$100,000 in political donations it made to the NSW Branches of the Liberal and National parties.<sup>170</sup>

For all Australian political parties interested in gaining or retaining office, the realpolitik message is apparently obvious. Australian alcohol and gambling industry political and related "deep pocket" financial support can provide a winning difference, especially where both major political parties are recipients of industry donations. So, what does the preceding critical evaluation suggest the more powerful segments of the NSW industry gain in return for this connected conduct? This question also relates to the identification of "motivation" and "intent".

### Connected Conduct – Government

This article does not explore the full range of benefits and concessions the NSW government has afforded the alcohol industry proceeding and following the former Racing Minister's undertaking in November 2017 of providing a "lot" more "good reforms" for the industry.<sup>171</sup>

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<sup>163</sup> A Smith and L Visentin, "Why This is the Most Important Week of the Year for the Liberal Party", *Sydney Morning Herald*, 13 October 2018 <<https://www.smh.com.au/politics/nsw/why-this-is-the-most-important-week-of-the-year-for-the-liberal-party-20181011-p50967.html>>.

<sup>164</sup> K Loussikian, "Liberal Party's Lavish Fundraiser at Justin Hemmes' Waterfront Mansion", *Sydney Morning Herald*, 6 May 2019 <<https://www.smh.com.au/national/liberal-party-s-lavish-fundraiser-at-justin-hemmes-waterfront-mansion-20190506-p51knn.html>>.

<sup>165</sup> AEC <<https://transparency.aec.gov.au/AnnualDonor/ReturnDetail?returnId=51696#ac1>>.

<sup>166</sup> M Gorrey, "'Highly Intrusive': Hemmes' Pub Warned over Patrons' Drunken Antics" *Sydney Morning Herald*, 22 December 2018 <<https://www.smh.com.au/national/nsw/highly-intrusive-hemmes-pub-warned-over-patrons-drunken-antics-20181220-p59ndc.html>>.

<sup>167</sup> S Molloy, "Billion-dollar Pub Empire Merivale, Owned by Justin Hemmes, Cranky about Having to Pay Staff Properly", *news.com.au*, 22 January 2019 <<https://www.news.com.au/finance/work/at-work/billiondollar-pub-empire-merivale-owned-by-justin-hemmes-cranky-about-having-to-pay-staff-properly/news-story/0317563d67bf04a08ad7030f3061dd4f>>.

<sup>168</sup> Evershed, n 118. The amount excludes donations under \$13500 and from associated entities.

<sup>169</sup> P Ryan and D Chau, "Woolworths Investigated after Admitting It Underpaid 5,700 Staff up to \$300 Million", *ABC News*, 30 October 2019 <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>.

<sup>170</sup> See also C Knaus and I Ariff, "Political Donations Hidden from NSW Planning Authorities by Big Corporations", *The Guardian*, 7 October 2019 <<https://www.theguardian.com/australia-news/2019/oct/07/political-donations-hidden-from-nsw-planning-authorities-by-big-corporations>>.

<sup>171</sup> Young, n 47.

With respect to the VVS, the asymmetrical regulatory approach of government is indicative of its longstanding tolerance of the Ivy Hotel's consistent declaration as the most violent licensed premises in NSW. The statutory exclusion of the Star casino from the same scheme and the VVS Fact Sheet provision quarantining sports stadiums, diminishes public transparency, accountability and consistency in the application of compliance and enforcement controls on all segments of the NSW alcohol supply industry. The case study within this article identified some critical deficiencies with the VVS. These include its geographic scope that does not appropriately reflect the significant proportion of alcohol-related assaults that occur between a 50-metre and 200-metre radius of the licensed venue once an alcohol-affected patron leaves the venue.<sup>172</sup> There are also statutory and administrative limitations on the coverage of the VVS to exclude casinos, the Star being the most violent alcohol outlet in NSW, and sporting stadiums. A third significant limitation is its narrow approach to alcohol harm prevention. The scheme is confined to "violent incidents" derived from the service and consumption of alcohol in on-licensed premises. This excludes other alcohol-related harms linked to an intoxicated patron for example, motor vehicle and pedestrian collisions/deaths and, unintended injuries, for example falls and drownings.

The presence of these deficiencies and the government's unwillingness (inaction) to address them compared with their positive responses to alcohol industry lobbying to weaken alcohol supply and compliance regulation (asymmetry),<sup>173</sup> represents a substantial concession to the industry at the expense of public safety, health and budgetary outcomes.

An observable connection between the NSW alcohol industry and successive NSW governments is their joint authorship and participation in the neoliberal paradigm and associated discourse. While there may be some small concessions along the way responding to the most egregious incidents of alcohol-related harms, this paradigm provides the important connected rationale for limited Government intervention, exclusion of third-party public interest groups and greater industry regulatory autonomy.

## Public Interest

Wheeler<sup>174</sup> considers the "public interest" concept within the Australian legal and political context. Deviation from the public interest is a cornerstone consideration in the identification of capture.

Following is a summary of some of the examples where conduct inconsistent with the public interest was evident in the above case study. There are several broad areas where this conduct can be found including:

### ***Primacy of Public Health and Safety over Commercial Considerations***

- a. Government tolerance of The Ivy being the regular most violent licensed premise in New South Wales and an apparent exclusion provided to sports stadiums from an L&GNSW Fact sheet, is indicative of bifurcation.<sup>175</sup>
- b. Government exclusion of the most violent alcohol outlet in New South Wales, the Star Casino, from the VVS.
- c. Limited scope of VVS to only defined violent alcohol-related incidents occurring on the licensed premise and within a 50-metre radius from the venue. Based on the BOCSAR research,<sup>176</sup> this could exclude potentially 43% of assaults attributable to a licensed venue within a 200-metre radius within which 92% of assaults occurred.

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<sup>172</sup> See Liquor & Gaming NSW, n 31; Burgess and Moffatt, n 98.

<sup>173</sup> Following the Sydney Inquiry, the NSW government amended the Liquor Regulation to increase the closing time for many NSW packaged liquor license venues across the whole of NSW from 11 pm to midnight. This took effect on 14 January 2020. No third-party public interest group consultation occurred. See Liquor & Gaming NSW, "Fact Sheet FS3158 Industry Information – Extended Take-away and Home Delivery Liquor Sales" <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0007/287440/FS3158\\_Industry-information-extended-takeaway-and-home-delivery-liquor-sales.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/287440/FS3158_Industry-information-extended-takeaway-and-home-delivery-liquor-sales.pdf)>.

<sup>174</sup> C Wheeler, "How Do Public Interest Considerations Impact on the Role of Public Sector Lawyers" (Public Sector In-house Counsel Conference, Canberra, 30 July 2012) <[https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf)>.

<sup>175</sup> Snider, n 115.

<sup>176</sup> Burgess and Moffatt, n 98.

Brown

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### ***Equity Distribution Considerations***

The NSW retail alcohol supply statutory regulatory process represents the sword and shield of the law. The readily correctible deficiencies found in the scope of the VVS, challenge the public interest equity criteria. Those commercial interests which profit from the harmful promotion, sale and service of alcohol, along with their customers, should arguably be equally accountable for its substantial cost burdens to drinkers and others.<sup>177</sup>

However, such a concept that recognises, equitably addresses and recompenses for the demonstrable negative externalities of the operation of the highly profitable alcohol market, is an anathema to the neoliberal paradigm. This contributes to a NSW alcohol supply regulatory and related political system, apparently intolerant to public interest and public health law reform. Conversely, as this research suggests, it is more likely to result in a tranche of regulatory amendments – law “reforms”, that favour the industry.<sup>178</sup>

### ***Pecuniary and Other Conflicts of Interest***

NSW public laws and integrity policies have long recognised the importance of identifying, avoiding and addressing perceived and actual conflicts of interests. These include: –

- a. New South Wales’s reportedly richest alcohol identity and owner of the consistently most violent licensed premise in NSW advocated for the removal of the VSS and a weakening of police inspections within his hotel. The weakening of these compliance requirements would be likely to deliver his family businesses significant financial gains. It would also have a detrimental impact on public safety;
- b. Hemmes’ “size matters” submission seeking its extension to the VVS compliance scheme;
- c. Failure of the Parliamentary Inquiry and NSW government to recognise inherent and substantial conflicts of interest with Hemmes’ submissions regarding the VVS and other regulatory compliance issues;
- d. Merivale has the greatest financial interest and most to gain from a weakened VSS and reduction in the legal duty of care for large and popular licensed premises. It also has a relative greater financial capacity to increase their security and other evidence-based harm prevention initiatives commensurate with patronage increases.

### ***Lack of Impartiality and Inclusiveness***

The application of impartiality is recognised by the NSW Independent Commission Against Corruption (ICAC)<sup>179</sup> as a key integrity requirement of all public officials. Ayres and Braithwaite<sup>180</sup> also suggested third-party public interest group involvement in the responsive regulation model was essential to avoid capture and corruption.<sup>181</sup> Four issues in this regard are troubling:

- a. SMH involvement in protracted legal proceedings against the police and indirectly the AHA. The action sought to obtain and publicly release information of the levels of violence associated with NSW licensed premises. Arguably, the police’s protracted refusal to provide the requested information represented a lack of impartiality. This is compounded by the officer responsible for the case leaving the police to become a senior advisor for the AHA.<sup>182</sup> This also raises concerns over a perceived conflict of interest;

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<sup>177</sup> In 2013, the NSW Auditor General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum with the cost to each NSW household being \$1,535 per annum: <[https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013\\_Aug\\_Report\\_Cost\\_of\\_Alcohol\\_Abuse\\_to\\_the\\_NSW\\_Government.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Aug_Report_Cost_of_Alcohol_Abuse_to_the_NSW_Government.pdf)>.

<sup>178</sup> See, eg, L&GNSW News, “NSW Government Announces Major Liquor Law Reforms”, 29 November 2019 <<https://www.liquorandgaming.nsw.gov.au/news-and-media/nsw-government-announces-major-liquor-law-reforms>>.

<sup>179</sup> ICAC, n 147, 12ff. Recognised by ICAC has a key integrity responsibility of all public officials.

<sup>180</sup> Ayres and Braithwaite, n 80.

<sup>181</sup> It is also noted that such groups can also be captured by industry and other vested interests.

<sup>182</sup> Moore, n 63.



- b. The Minister's announcement at 2017 AHA awards night to continue to make laws that the industry would be pleased with;<sup>183</sup>
- c. The asymmetrical nature of NSW alcohol law "reforms" that have consistently favoured the industry to the exclusion of public health and safety considerations;
- d. The Inquiry and NSW government supported industry recommendations regarding law changes including liquor licence approval processes outside the geographic scope of its investigations. Public health experts and related public interest groups were not afforded any opportunity to critique these submissions, tainted with an air of inevitability despite the government's offer to consult with "stakeholders before these reforms can be implemented".<sup>184</sup>

### *Temporal Link between Connected Conduct*

There is a solid temporal link between the connected conduct. The abovementioned incidents fall within a pattern of behaviour over an extended period.

## CONCLUSION

The preceding application of the industry capture test to the case study of the VVS demonstrates the three elements of this test – connected conduct of mutual benefit, processes and outcomes inconsistent with the public interest, and a pattern of conduct occurring over time.

A higher degree of proof of capture will be established when the NSW Parliament passes the public consultation draft *Liquor Amendments (24-hour Economy) Bill*, primarily in its current form. The *Draft Bill* appears to mirror Hemmes' submissions to the Inquiry relating to the future of the VVS and the broader application of the "size matters" defence notwithstanding, the warning provided to the Inquiry by a senior L&GNSW official.<sup>185</sup>

The industry capture test developed for this research includes a "public interest" component. This in turn contains important governance considerations including the presence of perceived and actual conflicts of interest. If the owner of one of the most popular and consistently declared most violent licensed premise in NSW is effectively empowered by lawmakers to be the main architect of the removal or weakening of the VVS, from a normative perspective, this could be construed as morally reprehensible.

This article has highlighted sustained procedural (transparency) and substantive deficiencies with the VVS that appear readily resolvable. It is the NSW Parliament's reluctance to address these deficiencies transparently, impartially and objectively that signifies the entrenchment of industry corrosive<sup>186</sup> and cultural<sup>187</sup> capture. The consequence of such regulatory inaction relating to the VVS and the broader unwillingness to apply effective evidence-based regulatory interventions to address high rates of DV, is detrimental to public health.

No longer can one confidently proclaim that the alcohol industry's compliance controls in NSW are indicative of proper accountability of government. This research establishes that industry capture has extended from the first regulatory function of lawmaking,<sup>188</sup> to the second function of the application and enforcement of the laws to secure their compliance. It demonstrates a confluence between the concepts of corrosive industry capture,<sup>189</sup> CPA<sup>190</sup> and the neoliberal paradigm<sup>191</sup> relying upon the VVS compliance requirements in NSW as a backdrop – a perfect match for the neoliberal paradigm that sanctions the application of power contrary to the overriding public interest.

<sup>183</sup> Young, n 47.

<sup>184</sup> See L&GNSW News, n 178.

<sup>185</sup> L&GNSW, n 128.

<sup>186</sup> Carpenter, n 27.

<sup>187</sup> Kwak, n 26.

<sup>188</sup> Brown, n 6.

<sup>189</sup> Carpenter, n 27.

<sup>190</sup> Ulucanlar, Fooks and Gilmore, n 13.

<sup>191</sup> Lencucha and Thow, n 16 and n 18.

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## 4.4 Article 4

Securing Industry Compliance: Rewriting the Alcohol Rule Book.

**AUTHOR:** Tony Brown & John Anderson.

Submitted for publication.

### OVERVIEW:

#### 4.4.1 Contribution to the Exegesis

The fourth and final article can be regarded as the capstone and culmination of the preceding four interlinked articles. They collectively provide a consistent and coherent chain of empirical evidence, analysis and evaluation responding to the research questions concerning the characterisation and manifestations, if any, of the alcohol industry capture of the regulation of the retail supply of alcohol in NSW.

This article explicates the authorship of the re-written alcohol industry compliance and enforcement rulebook with associated amendments to the Act taking effect on 1 January 2021. Utilising a simplified version of a multi-dimensional test for capture developed in the first article, it finds a high correlation between the submissions from an industry elite hotelier, whose hotel, the largest and most popular in NSW, was consistently also the most violent in the state, with the subsequent alcohol law ‘reforms’. The reforms included some vital components of a new ‘integrated incentives and sanction system’ (IISS) found by this research to likely reduce the risk of a licensed premises receiving a sanction for non-compliance or a serious incident(or risk), or both. The IISS also entrenched the capacity to quickly negate the imposition of such sanctions at relatively little cost to a transgressor.

This research confirms the trend of intensification and pervasiveness of industry capture and the primacy of protecting the elites’ and their financiers’ private commercial interests, expressed in shorthand as the owners’ ‘bricks and mortar’. This kind of trend is considered symptomatic of regulatory capitalism.<sup>438</sup>

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<sup>438</sup> Brown article 1, David Levi-Faur (n 14) 768.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This article along with the rest of the author's research contained in this thesis, provides an important new element of capture from the perspective of the impact of the alcohol law reforms on front-line government compliance officers' capability, discretion<sup>439</sup> and preparedness to instigate legal proceedings against the range of alleged non-complying alcohol outlets. Increased legal complexity, statutory leniency including potential exemptions afforded to larger outlets, likely reductions in the effective numbers of compliance staff, the apparent substitution of specialist alcohol inspectors by those covering more generic multiple government functions, and in the first instance, shielding of the corporate owners and controllers of licensed premises from prosecution, were some of the major factors exemplifying the sustained and evolving capture of the IISS by the industry elite.

The final article also contributes to advancing regulatory theory by the contextualisation and expansion of the regulatory theory concepts of regulatory leniency and chill. The synthesis of these concepts from the theory and initial research findings provides new productive insights into the important capture mechanisms mentioned above.

### 4.4.2 Relationship with other articles

This fourth article dovetails with the previous fourth article, critically analysing the evolution of a unique second layer of NSW industry compliance-and-enforcement statutory schemes. It explicates the subsequent entire parliamentary law-making process of translating primarily industry submissions into weakened compliance schemes and other control processes via proclaimed legal amendments to the package of NSW alcohol laws. In doing so, it also confirms the minimal influence the public and CSOs have exerted on the political decision-making process as well as the dominance of a commercial narrative of achieving a '24-hour economy', 'incentivising' industry compliance and the promotion of COVID-19 financial recovery for the industry.

Finally, this article extends deeper into Snider's concept of bifurcation,<sup>440</sup> finding a replication in the narrative of the IISS of a 'blind spot' or presumption that suggests industry elites are incapable of wilfully non-compliant operations. Persistent non-compliance is portrayed as the exclusive

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<sup>439</sup> Brown and Anderson article 4 (n 80).

<sup>440</sup> Brown and Anderson article 4, 11–2. Previously discussed in Brown articles 1 and 3.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

domain of a small minority, the ‘other’ rogue operators. However, the same presumption is inconsistent with the bulk of contemporary regulatory compliance research cited in the article. This research finds that competition, profits and the risk of detection are vital drivers influencing corporate compliant behaviour.

Of the series of publications, this culminating article has the heaviest reliance on the doctrinal component of the legal phronetic methodology to critically analyse the key industry compliance amendments embodied in the new IISS. This analysis is conducted based on their likely effects on sustaining industry compliance and achieving optimal levels of harm reduction in the public interest. However, this objective could not be adequately attained without resorting to more normative considerations and social inquiry embodied in the blended legal phronetic approach adopted within this thesis.

This research extends beyond the important consideration of the real authorship of the amendments to the industry compliance rule book. From a theoretical perspective, it synthesises — from existing regulatory theory and the empirical results of the critical analysis of the law reforms and associated processes — an expanded and contemporised version of the concept of ‘regulatory chill’ and ‘regulatory leniency’. The additional development and application of these recognised regulatory phenomena provides demonstrable evidence of an important original academic contribution to regulatory theory and praxis.

#### 4.4.3 Copy of Article 4

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## **Sustaining Industry Compliance: Rewriting the Alcohol Rule Book**

### **Abstract**

While substantial research and public attention is devoted to the controversial packages of earlier 'last drinks' laws in Australia, relatively little global legal research attention is afforded to the fundamental issue of the relative power or influence competing stakeholders exert over the law-making process. This article critically analyses sweeping amendments to NSW alcohol industry compliance and enforcement laws that took effect on 1 January 2021 following extensive industry lobbying. Ineffective industry compliance laws and processes can have a significant negative impact on alcohol-related harm reduction interventions. This article provides key lessons for other national and international jurisdictions confronted with intensifying demands from unhealthy commodity industries (UCI) to liberalise specific compliance regulations. It intersects with a range of disciplines including, public health, politics, and other social sciences. In this regard, the legal phronetic methodology is used to facilitate a more nuanced transdisciplinary explication of the ownership and effectiveness of industry compliance law 'reforms'. The legislative amendments mirror prior industry submissions to deregulate the industry and protect its financial investments. This raises the spectre of regulatory capture symptomatic of the inability of traditional governance and democratic safeguards to moderate undue industry influence and prevents conflicts of interest.

Keywords: alcohol laws, industry compliance; regulatory capture; legal determinants of health

## Sustaining Industry Compliance: Rewriting the Alcohol Rule Book

### Introduction and Background

In the majority of cases, the effectiveness of any intervention in reaching a social or economic target (ie, reducing social or economic harm) and its efficiency (ie, doing so at least cost) will be the primary concerns of policymakers.<sup>441</sup>

In Australia, the primary responsibility for regulating the retail alcohol supply and gambling industries lies with individual State and Territory governments.

In November 2020, the New South Wales (NSW) Parliament rewrote the retail alcohol supply industry compliance rule book with the passing of the *Liquor Amendment (Night-time Economy) Act 2020* (NSW).<sup>442</sup> *Schedule 1* of the amending Act encompasses a novel, purportedly simplified, integrated incentive and sanctions system (IISS), ostensibly designed to achieve ongoing industry compliance with their various legal obligations.

Given the successful joint call from each jurisdiction's alcohol industry to relax alcohol availability and supply laws during the COVID-19 pandemic, it is conceivable that the industry may lobby other State and Territory governments to follow the NSW government's lead on reforming its industry compliance laws.<sup>443</sup>

The capability of industry compliance and enforcement laws to effectively secure and sustain industry compliance and prevent or minimise harm to consumers and others<sup>444</sup> are two essential components to define the overall public interest.<sup>445</sup> The attainment of the public interest depends upon several considerations.

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<sup>441</sup> Gunningham (2017).

<sup>442</sup> Hereafter referred to as 'the amending Act', which passed both Houses of Parliament on 17 November 2020 and was assented on 27 November 2020. It amended the [Liquor Act 2007 NSW](#). – hereafter referred to as the 'Act'. Schedule 1 containing the new IISS commenced operation on 1 January 2021. The amending Act also provides a new Cumulative Impact Assessment process addressing alcohol outlet density, the regulation of same-day alcohol home deliveries, other 'miscellaneous' measures: including arrangements for small bars and live music conditions and providing the industry with greater certainty as to the use of intoxication defences.

<sup>443</sup> It is also conceivable that Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016 (Qld). ([TAFV](#)) laws and related policies will increase pressure from the industry for removal, notwithstanding recent research evaluations indicating their ongoing success, especially in Fortitude Valley. See Drug and Alcohol Review Special Edition (2021).

<sup>444</sup> Allsop et al. (2018); Laslett et al (2019), p278.

<sup>445</sup> Walton (2015); Brown (2019a)



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The first is the strength and reliability of the evidence base substantiating the legally enforceable intervention, including, for example, the impact of reducing closing times for high-risk alcohol outlets. A second is the willingness of democratically elected decision-makers to prioritise the public interest over those of other stakeholders, notably those businesses and industries who provide them with the highest levels of ongoing direct or indirect political and financial support.

In this article, we analyse a third, less traversed but equally important related consideration by way of a critical explication of the nature and extent of competing stakeholders' influence in the design and application of regulatory compliance schemes.

Our research focuses on the alcohol industry's sustained capacity through political lobbying and other means to direct outcomes, including law-making and its related underpinning narrative, away from the public interest towards their profit, growth and partisan political interests. This phenomenon is defined as regulatory or industry capture.<sup>446</sup> It attaches multiple layers of detrimental public health, legal and governance consequences.

The three key ingredients of the capture test are the establishment of mutually advantageous 'connected conduct' between the regulator and regulatee, the diversion of outcomes away from the 'public interest' to private and/or political sectional interests and, that these deleterious relationships and outcomes represent a pattern of conduct and not 'one-off' incidents.<sup>447</sup>

Ineffective industry compliance laws and processes can have a significant negative impact on crucial alcohol-related harm reduction interventions.

A substantial research gap exists in the blended legal, public health and related alcohol harm prevention research on the critical role of industry compliance and the enforcement of legal processes at the individual jurisdictional level. Similar research gaps exist more broadly in the

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<sup>446</sup> Kaufmann (2004) identifies corruption can occur when vested interests ensure through their influence (power) the removal of public policy from democratic scrutiny – the 'privatisation of public policy' – with or without an exchange of a bribe. Referred to in Brown (2019b).

<sup>447</sup> The progressive refinement of the capture test is further reflected in Brown (2020). Elements of these three articles of Brown are repeated in this article to ensure an ongoing coherent and consistent approach to explicating evolving patterns of capture. Not all examples are referenced.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

regulation of other unhealthy commodity industries (UCI), including but not limited to highly processed foods and gambling.<sup>448</sup>

This article aims to enhance the understanding of the industry compliance and enforcement regulatory capture process at the individual jurisdiction level. This understanding of the process is based on our belief that a multi-dimensional and integrated approach incorporating regulatory theory, from the local to global levels, is an essential prerequisite to sustain reductions in alcohol-related harms. It is acknowledged that invaluable research and advocacy work is conducted at the global level of alcohol regulation including, exploring the benefits of a proposed Framework Convention on Alcohol Controls (FCAC) and the intrusion of alcohol industry oligopoly interests into international trade agreements and structures.<sup>449</sup>

According to Jernigan and Ross,<sup>450</sup> the alcohol industry was the eighth most profitable sector of ninety-four global industries. Alcohol is a controlled or regulated consumer product in Australia, and the retail supply of the same requires a liquor license and related authorisations. Around 84% of NSW adults consume alcohol, with 49% reported in a 2019 poll drinking to get drunk.<sup>451</sup> The state gains revenue from the industry that also provides a source of employment. Alcohol Beverages Australia assert their industry contributes \$52 billion to the Australian economy each year.<sup>452</sup> However, research commissioned by the Australian Institute of Criminology found that the national societal costs of the misuse of alcohol exceeded Commonwealth revenue derived by the sale of alcohol by a factor of 2:1.<sup>453</sup>

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<sup>448</sup> The Australian casino industry, particularly Crown casinos, is the subject of unprecedented independent scrutiny exposing deep flaws in their compliance and governance processes. Livingstone ([2021](#))

<sup>449</sup> The global influence of the alcohol lobby can directly impact on the capacity of individual jurisdictions to introduce evidence-based alcohol harm controls, especially where they may be deemed to be inconsistent with the 'competitiveness' requirements of international trade treaties relating to the same commodity. See Miller et al ([2021](#)).

<sup>450</sup> Jernigan and Ross ([2020](#)).

<sup>451</sup> Foundation of Alcohol Research and Education (FARE)/Galaxy Annual Alcohol Poll ([2019](#)), p 45.

<sup>452</sup> Alcohol Beverages Australia ([2021](#)).

<sup>453</sup> Manning et al ([2013](#)).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

In early 2020, the Guardian newspaper summarised an Australian Electoral Commission report on declared Federal political donations. The alcohol and gambling industry was one of the largest political donors, with the various branches of the Australian Hotels Association (AHA) contributing \$1.53 m to both major political parties.<sup>454</sup>

*HealthStats NSW* 'Commentary' identifies 'excessive alcohol consumption is the leading contributor to the burden of illness and deaths in Australia for people aged up to 44 years.'<sup>455</sup> It is also recognised as the most toxic of all legal and illicit drugs causing harm to users and others.<sup>456</sup> The consumption of alcohol is also implicated as a significant contributing factor to road deaths and serious injuries,<sup>457</sup> depression and suicides,<sup>458</sup> drownings - particularly of young men,<sup>459</sup> domestic violence and homicides,<sup>460</sup> Fetal Alcohol Spectrum Disorder (FASD) – the most common cause of permanent child developmental disabilities<sup>461</sup> and, a range of cancers.<sup>462</sup> The average alcohol-related assault that occurred in Sydney's Central Business District (CBD) and Kings Cross was estimated to have cost the victim and society around a total of \$85,000 in 2018 dollar value.<sup>463</sup>

In 2013, the NSW Auditor-General found that the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum, with the cost to each NSW household being \$1535 per annum.<sup>464</sup>

This article provides an original academic contribution to regulatory theory and praxis by expanding and partially integrating existing regulatory concepts of 'capture', 'chill'<sup>465</sup> and 'leniency'<sup>466</sup> to facilitate novel inter-jurisdictional comparisons of alcohol regulatory regimes. It

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<sup>454</sup> Karp et al ([2020](#)).

<sup>455</sup> NSW Department of Health ([2020](#)).

<sup>456</sup> Lachenmeier and Rehm ([2015](#)).

<sup>457</sup> NSW Centre for Road Safety estimates one in seven road fatal crashes involves alcohol. Centre for Road Safety ([2018](#)); Hoe et al ([2020](#)).

<sup>458</sup> Chong et al ([2020](#)); Hill et al ([2020](#)).

<sup>459</sup> Hamilton et al ([2018](#)).

<sup>460</sup> Miller et al ([2016](#)).

<sup>461</sup> Elliott ([2020](#)).

<sup>462</sup> The Australian Institute of Health and Welfare ([2021](#)) estimated expenditure attributed to alcohol related cancers was \$176m. See also Cancer Council WA ([2020](#)).

<sup>463</sup> Deeming and Kypri ([2021](#)).

<sup>464</sup> Audit Office of New South Wales ([2013](#)).

<sup>465</sup> Kelsey ([2017](#)).

<sup>466</sup> Page 14 Figure 1.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

also contextualises the useful regulatory concept of capture within the context of alcohol and other UCIs that contribute a disproportionate level of primarily preventable harms and associated costs to the community. This is achieved by synthesising regulatory literature with the empirical research findings from this and previous research on varying aspects of the regulation of the retail supply of alcohol in NSW by the lead author.

We conclude that the real risk of regulatory capture by industry poses a serious threat to the rule of law, the democratic process and the related concept of the 'public interest'. The risk of capture is a critical consideration of the profit-driven determinants of poor health. Industry capture provides an essential and cogent explanation of the inconsistency and incompatibility between public health research findings and the evidence that primacy is afforded to the private commercial interests of the most powerful industry elite and their financial industry backers.

The guiding narrative underpinning NSW Parliament's consistent approach to determining the legal compliance and enforcement environment for the retail suppliers of alcohol in NSW since 2015<sup>467</sup> is no better personified than in the following extract from the 2020 submission from Justin Hemmes, NSW's pre-eminent industry elite, regarding the amendment Bill.

When up to millions and millions of dollars are spent acquiring licensed premises, refurbishing and operating them, the enormously high risk of licence suspensions does not foster investment of employment, and certainly does not provide security nor growth appetite for licensed hospitality businesses in a post-COVID 19 New South Wales ... returning direct license suspension risk to bricks and mortar (physical venue asset of the owner) will immediately deter financial institutions from extending finance for licensed venues'. Banks will perceive that the risk of license suspension is too high.<sup>468</sup>

### Literature

The published case studies provide different perspectives of the NSW alcohol regulatory chain. Each draws upon a broad and relatively common range of academic literature, including the law, regulatory and political theory; public health research including epidemiological evidence relating to the magnitude and forms of alcohol-related harms; the most effective interventions to prevent

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<sup>467</sup> November 2015 'Fit for purpose' amendments to the Act.; Brown (2019a).

<sup>468</sup> Hemmes' Merivale email submission dated 28 June 2020 to Liquor & Gaming NSW regarding the initial draft public consultation Bill, 3, 7 <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0016/1012336/302-Merivale\\_Redacted.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0016/1012336/302-Merivale_Redacted.pdf)>; L&GNSW Summary of the Bill was published in May 2020.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

and reduce alcohol harms; the encouraging blended public health research relating to corporate political activity and industry tactics; and various conceptions of power and ideological frames.

It remains our view that the infusion of legal and regulatory theory concepts and processes can provide a substantial positive contribution to better explain, understand, and redress the disproportionate and apparent intensifying influence the alcohol lobby exerts over the regulation of alcohol from local to global jurisdictions.

At the root of this research is the widespread phenomenon of the apparent increasing divergence between satisfying basic collective public interest requirements highlighted by Burris<sup>469</sup> and actual politically derived outcomes - where the interests of the commonwealth appear to be subordinated by more powerful, private commercial interests. Novak argues that ‘... there is simply no older theme in the Western legal and political tradition than the one highlighted by capture’.<sup>470</sup>

Carpenter and Moss’s *Preventing Regulatory Capture: Special Interest Influence and how to Limit It*<sup>471</sup> provides an important contribution to contemporary capture theory. This includes Carpenter’s concept of ‘corrosive’ capture relating to weakening regulations and promotion of industry self-regulation,<sup>472</sup> and Kwak’s identification of ‘cultural’ capture that involves mechanisms ‘shaping assumptions, lenses and vocabularies’.<sup>473</sup>

This explication of the regulation of NSW’s alcohol supply laws is framed within the concept of regulatory capitalism articulated by David Levi-Faur as the ‘real elephant’<sup>474</sup> in the room of scholarly literature and its subset of neoliberalism.<sup>475</sup> This is associated with the industry push for deregulation and the promotion of various incentives to reward industry compliance, whether through luck or so-called ‘good practice’.

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<sup>469</sup> Locke (1988); Burris ([2021](#)).

<sup>470</sup> Novak ([2013](#)).

<sup>471</sup> Novak ([2013](#))

<sup>472</sup> Carpenter’s definition of ‘corrosive’ capture aligns closely with this article’s conception of ‘leniency’ discussed further at 9. Corrosive capture occurs if organized firms render regulation less robust than intended in legislation or than what the public interest would recommend. By less robust we mean that the regulation is, in its formulation, application, or enforcement, rendered less stringent or less costly for regulated firms (again, relative to a world in which the public interest would be served by the regulation in question)’. Carpenter and Moss ([2013](#)) 16 and Chapter 3.

<sup>473</sup> Kwak ([2013](#)) pp 71–98.

<sup>474</sup> Levi-Faur ([2017](#)) pp 289–303.

<sup>475</sup> Monbiot ([2016](#)); Smith ([2020](#)).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Regulatory research also contributes to the response of a central research question concerning the effectiveness of the package of the IISS to sustain industry compliance and reduce alcohol-related harms – two critical proxies for the concept of ‘public interest’ relied upon in this article.

Braithwaite and Drahos express scepticism of the ‘carrot and stick’ approach to sustain industry compliance behaviour.

The psychological research evidence showing that rewards and punishment routinely accomplish short-term compliance by undermining long-term commitment is now overwhelming.<sup>476</sup>

The same authors also identify a range of approaches to power within a regulatory environment including,

[t]he most powerful states are often captives of concentrated corporate interests which care enough about an issue to be willing to hurt their state’s political leaders unless they do what they’re told.<sup>477</sup>

Similarly, Baldwin and Black, when deconstructing corporate compliance behaviour, cautioned against overlooking the ‘power of oligarchy’, which ‘[is] often driven not by regulatory pressure but by the culture prevailing in the sector or by far more pressing forces of competition’.<sup>478</sup>

Regulatory theory research consistently identifies the relative ineffectiveness of the imposition of severe sanctions to achieve compliance. The most effective measure likely to instil and sustain regulatee compliant behaviour is the risk or fear of being caught.<sup>479</sup> Loxley et al observed:

It is well established that monitoring and enforcement of the laws is required to result in behaviour change in retailers leading to reduced serving of intoxicated people. Profit is a powerful incentive for retailers to disregard the laws.<sup>480</sup>

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<sup>476</sup> Braithwaite and Drahos (2000) p 558.

<sup>477</sup> Braithwaite and Drahos (2000) p 482.

<sup>478</sup> Baldwin and Black (2008).

<sup>479</sup> Hardy and Howe’s case study on compliance activities of Australia’s Fair Work Ombudsman within the context of general deterrence theory on businesses’ compliance behaviour found that ‘the perceived likelihood of detection has more regulatory potency than the perceived severity of the sanctions used’. Hardy and Howe (2017); Baldwin and Black (2008).

<sup>480</sup> Loxley et al (2004).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Parker and Nielsen's<sup>481</sup> holistic model of calculative thinking involving the enforcement of Australian anti-cartel laws following a substantial increase in sanctions found 'no evidence to bear out the assumption that bigger sticks can make up for a lack of big brother's eyes and spies'.<sup>482</sup>

Laureen Snider provides an important contribution to industry capture research and the concept of bifurcation<sup>483</sup> that is equally applicable to NSW alcohol retail supply industry compliance. Her study on the regulation of the Canadian Stock Exchange identifies the distinction between the '90 per cent [of regulatees who] identify as the law-abiding majority, from the 10 per cent considered wilfully deviants (or) rogues'.<sup>484</sup> She suggests that this bifurcation creates an ultimately unreliable 'a priori' assumption of positive compliance behaviour of the majority – the same mentality or 'regulatory blind spot' leading to the corporate collapse of Enron and the subsequent prosecution of some of its senior executives.<sup>485</sup>

It legitimates a norm of consensual, education-based regulation, thus reserving criminal law for 'the other', a tiny minority of miscreants<sup>486</sup>

Snider crucially observes that it is not for lack of laws that those powerful entities at the top of the industry tree enjoy relative impunity from applying compliance laws. But what the regulators lacked, according to Snider's study, was 'the political, social, cultural and economic authority to pro-actively investigate dominant market actors'.<sup>487</sup>

This article builds upon previous research of the lead author into the regulation of the supply of alcohol in NSW by the explication of the IISS. It also contributes to the development of regulatory theory by augmenting the ongoing critical 'capture' evaluative process with new expanded concepts of regulatory 'chill' and 'leniency'.

10

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<sup>481</sup> Parker and Nielsen ([2011](#)).

<sup>482</sup> Parker and Nielsen ([2011](#)).

<sup>483</sup> Snider ([2009](#)).

<sup>484</sup> Snider ([2009](#)) p 187.

<sup>485</sup> Australian examples of serious corporate non-compliance were identified in the [2019 Final Report](#) of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and, the ongoing Inquiries into the unlawful operations of the Crown casinos; Snider ([2009](#)).

<sup>486</sup> Snider ([2009](#)) p 187.

<sup>487</sup> Snider ([2009](#)) p 192.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This research on industry compliance theory and praxis builds upon Jane Kelsey's conceptualisation of regulatory 'chill' typology distinguishing between 'specific' and 'systemic' regulatory chill.<sup>488</sup> Kelsey's research is based on malevolent actions by the tobacco industry to frustrate through, in part, various international trade dispute mechanisms, the New Zealand government's attempts to introduce plain cigarette packaging. In its broadest sense, regulatory chill can occur where law makers are reluctant to initiate for example, public health or climate reforms<sup>489</sup> because of factors extraneous to the actual merits of the potential action. This can also include threats of costly and protracted litigation and the associated embedded fear of reputation loss and inertia against reforms.

Arguably, the concept of regulatory chill can be extended to embrace, at the more micro level, the calculative behaviour of front-line NSW government compliance officers or 'gate keepers' responsible for ensuring industry compliance in the first instance. This includes their likely willingness to follow through with punitive compliance action against well-funded and large industry operators and the complexity of the industry compliance rule book.

A simple measure of leniency<sup>490</sup> as one potential indicator of capture is whether the overall net effect of the IISS amendments, including compliance sanctions and incentives, reduces the actual risk and deterrence effect of the new sanctions system. It also includes the ease at which the same sanctions can be deferred or negated at low or no additional costs to the non-compliant industry member.<sup>491</sup> This expanded 'net leniency' regulatory concept distinguishes between 'direct' and 'indirect' forms of leniency.

This article synthesises from regulatory theory and empirical research results, a novel basic 'regulatory leniency' model of considerations (Figure 1 below) to enhance its critical analysis of the new NSW alcohol industry compliance rule book – the IISS.

11

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<sup>488</sup> Kelsey (2017).

<sup>489</sup> Burgess (2020).

<sup>490</sup> For a more economic approach to regulatory leniency see Heese et al (2015); Kerosky (2018).

<sup>491</sup> It is not suggested that any net increase in the levels of leniency is inherently inconsistent with the overall public interest. Sanctions for non-compliance may be disproportionate with the nature of offences, underlying research and contemporary views of justice.



*Figure 1 Summary of forms and indicators of regulatory leniency*

<b>Direct leniency indicators</b>
1) Net reduction in the severity of penalties imposed.
2) Higher threshold levels for the imposition of sanctions. Less onerous requirements to remove or weaken sanctions.
3) Introduction or enhancement of incentives and rewards for maintaining a clean compliance record.
4) Increased complexity that reduces understanding of amendments by all stakeholders.
5) Increased reluctance of front-line compliance officers to initiate prosecutions based on the merits of the case (chill). Greater reliance on statutory considerations such as size and patronage of venue and lack of serious injury to not proceed with prosecution.
<b>Indirect leniency indicators</b>
6) Reductions in government compliance capability and visibility – numbers and distribution of compliance officers and effective inspections.
7) Organisation focus point of imposition of sanctions distanced from the main owners and controllers of the alcohol outlet.
8) Failure to align required remedial action by licensee with successful evidence-based public health harm reduction measures.
9) The model of compliance adopted by the government agency(s) inconsistent with the most effective to sustain a corporate culture of compliance within the industry <sup>492</sup> .
10) Reduction in levels of public transparency exposing true levels of industry compliance and the timely identification of all non-compliant outlets.

## Methodology

The same legal phronetic methodology<sup>493</sup> is adopted for this research and the two previously published case studies by the lead author on other critical aspects of regulating the retail supply of alcohol in NSW.

<sup>492</sup> Gunningham (2017) (n 1) observed that whilst the risk-based model of regulation (adopted by NSW) rated high on the 'legitimacy' scale, it was lower on the demonstrated effectiveness rating. Similar views were shared by Baldwin and Black (2008). (n 38) including the more reactive approach to harm reduction. This shines through the provisions of the IISS.

<sup>493</sup> Murphy and McGee (2015) constitutes a blend of the more traditional legal doctrinal methodology and the process of "phronetic social inquiry".

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This methodology combines the more traditional legal doctrinal approach with Flyvbjerg's phronetic method of social inquiry.<sup>494</sup> One focus is on the exercise of concealed power and related discourse that assists to manufacture reality. It is concerned with what is occurring backstage, the *realpolitik*, and the desirability of the changes. Incorporating traditional legal doctrinal analysis is an important first step in the explication of the IISS law reforms. This, however, provides an insufficient mechanism to determine critical normative issues of the potential presence, nature and desirability of industry capture for our society.

### Method

The narratives associated with the development and enactment of the IISS are derived from Parliamentary reports on related matters, submissions to government from various stakeholders on drafts of proposed legislation (Bills), Government explanations of the proposed laws, Parliamentary debates concerning the passage of the Bill through Parliament, media reporting and other forms of secondary and grey literature. These narratives provide glimpses of the various stakeholders' underlying beliefs, motivations, and purpose for the proposed changes.

A doctrinal approach is adopted to determine the likely efficiency, effectiveness, and capacity of the amended alcohol laws to achieve the public interest goal of sustaining compliant industry behaviour. This critical analysis also incorporates the determination of the law reforms authors and how their power is exercised and manifested. The regulatory concepts of 'chill' and 'leniency' are uniquely adapted and contextualised to complement the existing capture test.

### Previous findings of industry capture

The explication of successive legal amendments or 'reforms'<sup>495</sup> to NSW retail alcohol supply laws necessitate a critical examination of the interventionist nature and role of the state and its agencies. Its 'neutral', 'independent' pluralist role is cast as addressing or 'balancing' the inherent tensions between public health, safety, and welfare interests and, private and commercial interests within a legal framework.

13

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<sup>494</sup> Flyvbjerg (1998).

<sup>495</sup> The NSW government's continued reliance on the term 'reform' to describe successive amendments to its package of alcohol and gambling laws, imports a sense of calculated positive and beneficial improvements. Our research suggests the benefits derived from amendments to the Act and related laws since its commencement on 1 July 2008, have primarily favoured the alcohol industry elite.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

As Flyvbjerg observed in his case study of the Danish city of Aalborg, public organisations vested with protecting the public interest were ‘deeply embedded in the hidden exercise of power and the protection of special interests’.<sup>496</sup>

Related research by the lead author evidences the presence of industry capture in strategic functional links of the NSW alcohol supply regulatory chain. This research relied upon a novel multi-dimensional test for regulatory capture progressively developed in the published research.<sup>497</sup>

Adopting a neoliberal discourse associated with these law reforms impacts the primary purpose or objectives of the NSW alcohol laws package. For example, the traditional primacy of ensuring the ‘public interest’ was shown to have been subordinated by the commercial object of maximising ‘customer convenience’.<sup>498</sup> Other locations and examples of capture include a reduction in the independence of the lead regulator body, the NSW Independent Liquor and Gaming Authority (ILGA)<sup>499</sup> and; delegation of the approval of most liquor license and related applications to the NSW Government Department of Customer Service and its agency known as Liquor & Gaming NSW (L&GNSW). This agency is directly responsible to the Executive/Legislative arms of the NSW Government.

Capture was also found to exist in the critical outlet approval process with less reliance on the objective, transparent and relatively meticulous use of a social impact assessment process.<sup>500</sup>

The new approval maxim became the ‘easy, quick and cheap’ approval of outlet license applications.

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<sup>496</sup> Flyvbjerg ([1998](#)) (n 54) 225. This inverse relationship or ‘mismatch’ between visible seriousness of undue influence or corruption and the amount of public discourse was considered by Reynolds ([2019](#)).

<sup>497</sup> Brown ([2020](#)).

<sup>498</sup> Brown ([2019a](#)).

<sup>499</sup> Brown ([2019a](#)).

<sup>500</sup> Ziller ([2018](#)); Ziller and Brown ([2019](#)).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Capture became evident with the persistent erosion of components of former statutory industry disciplinary schemes. These included the 2008 Violent Venues Scheme (VVS) and the 2012 Three Strikes Scheme (3SS)<sup>501</sup> that disproportionately afforded the most powerful licensed premises extraordinary concessions and leniency. For example, the narrow physical distances within which they could potentially be held accountable for a linked alcohol-related violent assault after a patron had left the premise.

In the period preceding the introduction of the IISS, bifurcation was apparent where the consistently most violent hotels controlled by the elite avoided conviction for serious licensing offences, including allowing assaults and intoxication on-premises,<sup>502</sup> that would normally have incurred a strike under the 3SS.

The hegemonic presumption of ‘credibility’ and ‘good faith’ associated with compliant behaviour of most of the industry elites studied by Snider,<sup>503</sup> is inconsistent with the extant regulatory literature. This found several factors, including profits, oligopoly market power and competition, as important determinants of industry compliant behaviour. Statistical research also found that a significant majority of young drinkers surveyed in the Kings Cross, NSW drinking precinct continued to be served alcohol when exhibiting three recognised signs of intoxication – ostensibly, the commissioning of a serious alcohol offence against the licensee and possibly the venue.<sup>504</sup>

One of the most explicit illustrations of the elites’ power to unduly influence the compliance law-making process occurred in 2016/2017. Arthur Laundy, an industry elite owner of a chain of hotels,<sup>505</sup> was reportedly convicted of a serious licensing offence for allowing the service of alcohol to two under-aged women. He successfully lobbied the NSW Government through the AHA for significant changes to the 3SS that devolved responsibility down to individual venue licensees and

15

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<sup>501</sup> These two statutory disciplinary schemes are explicated in Brown (2020) (n 7). They provided a range of sanctions against licensed premises that had accumulated successive ranges of violent alcohol related incidents occurring close to (50m) or within their licensed premise (VVS) and, a range of increasingly tough sanctions for the conviction of prescribed liquor related offence (3SS).

<sup>502</sup> *Liquor Act 2017* (NSW).

<sup>503</sup> Snider (2009) (n 43).

<sup>504</sup> Donnelly (2012). There appears no evidence of any strikes being issued for Kings Cross licensed venues during the same period for allowing intoxication on premises.

<sup>505</sup> Cummins (2021).

managers and, the abolition of all existing strikes. These earlier ‘reforms’ also ensured the size and patronage of a licensed premise became a mandatory consideration before sanctions could be imposed directly on a licensee.<sup>506</sup>

The NSW industry is dominated by a relatively small number of owners of large chains of ‘on-license’ and ‘off-license’ alcohol outlets. Each of these individual outlets has its own employed or contracted licensees or managers. Also, a small number of large corporations dominate the ownership of packaged liquor outlets and hotels,<sup>507</sup> again with their individual employed licensees or managers.<sup>508</sup> The increasing number of structural and legal separation of practical compliance responsibilities between the owners and corporate directors, and their employed licensees of large chains of individual liquor outlets, has profound and perverse regulatory implications for the new NSW alcohol industry compliance model.

### **Locating the emergence of the IISS**

The pattern of continuing alcohol supply law reforms lacking any reasonable semblance of impartiality, appears to have been foreshadowed by a former NSW Minister responsible for the regulation of alcohol and gambling in November 2017.

I would like to acknowledge [senior AHA representatives] for the work that [they do] in advocating for the industry ... the incredible work that you do behind the scenes with Parliament and with the Opposition in raising the industries concerns, to ensure that you are getting the best deal from whoever is in government... As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry.<sup>509</sup>

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<sup>506</sup> Nicholls (2017).

<sup>507</sup> Roy Morgan reported for the year ended September 2018 that the Woolworths group controlled 52.1% (\$7.9bn) of Australia’s packaged alcohol market estimated to be \$15.1 bn. The Coles group controlled the second largest market share of 15.4% (\$2.3bn). Roy Morgan (2018). Woolworths group also owns or leases the largest number of pubs and poker machines via a joint venture in the nation, O’Malley and Gladstone (2018).

<sup>508</sup> The on-line purchase and rapid home delivery of take away alcohol is making major inroads into how alcohol has been supplied in NSW, Liquor and Gaming NSW (L&GNSW) (2019). The amending Act included new provisions for regulating this process but are not considered in this research.

<sup>509</sup> Mr Paul Toole, MLA, at a NSW Australian Hotels Association’s (AHA) awards’ ceremony, Young (2017). The above quotation was removed from the web page sometime after its publication, but reference was retained in this hyperlink.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Since this reported Ministerial statement, two rounds of legislative amendments benefiting the industry in numerous ways, including financially, have occurred. These arose from recommendations<sup>510</sup> from a 2019 Joint Select NSW Parliamentary Committee Inquiry into Sydney's Night Time Economy (Inquiry). The key recommendations were largely adopted by the NSW Government and applied in many instances, state-wide despite geographic limitations in the committee's terms of reference primarily to the Sydney and Kings Cross entertainment precincts. The Inquiry was instigated following sustained levels of lobbying by those within the alcohol and related hospitality industry.

An influential oral submission was provided to the Parliamentary Inquiry on 9 August 2019 by Justin Hemmes,<sup>511</sup> owner of Sydney's largest and most popular hotel, the 'Ivy', which has also been the consistently most violent hotel in NSW under the former VVS.<sup>512</sup>

With respect, Sydney's lockout laws must now go. They have served their purpose and Sydney has been recast. To have an integrated solution my submission particularly focuses on the need to also address the Government's violent venues scheme and the three strikes regime. These two schemes are now outdated and any conversation about the revitalising of Sydney's night-time economy must see these schemes drastically amended...I love this city...<sup>513</sup>

The first round of alcohol law 'reforms' flowing from the Inquiry took effect from 14 January 2020.<sup>514</sup> These included the weakening and removal of some alcohol service controls in licensed premises in the Sydney Central Business District (CBD) and Kings Cross entertainment precincts and the removal of the 1.30am curfew in the CBD precinct (Sydney's 'lockout' laws).<sup>515</sup> Further,

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<sup>510</sup> Parliament of New South Wales. Report on the Joint Select Committee on Sydney's Night Time Economy ([2019](#)).

<sup>511</sup> [See transcript of Hemmes' oral submission in Report on Proceedings Before Parliament of New South Wales Joint Select Committee on Sydney's Night Time Economy \(Report 9 August 2019, p51\)](#). For some background on the size of Hemmes' Merivale operations see Molloy ([2020](#)).

<sup>512</sup> Hemmes/Merivale earlier written submission to the Inquiry identified "Merivale is a family-owned business that employs over 3,000 people and operates 89 licensed restaurants, bars and event spaces across metropolitan Sydney, of which 46 are within the CBD. Our contribution to Sydney's social, tourist and economic fabric is enormous, with over two million visitors through ivy's door alone in any one given year". Hemmes ([2019](#)). For some background on the size of Hemmes' Merivale operations see Molloy ([2020](#)).

<sup>513</sup> Hemmes (n 71) 51ff.

<sup>514</sup> Liquor & Gaming NSW ([2019](#)).

<sup>515</sup> These controls were pejoratively referred to as the 'lockout laws'. Unlike their later similar Sydney counterpart laws contained in the NSW Liquor Act, the 2008 Newcastle conditions were a package of liquor licensing conditions inserted into venues liquor license conditions and/or development consent conditions. See [Liquor Amendment \(Night Time Economy\) Regulation 2019 \(NSW\)](#).

there was a state-wide extension of closing hours for bottle shops from 11pm to midnight on Mondays through to Saturdays despite prevailing high levels of reported alcohol-related domestic assaults.<sup>516</sup> This change applied regardless of an alcohol outlet's compliance record and the levels of alcohol-related domestic violence in surrounding communities. This 'reform' was adopted without any community consultation.

In early May 2020, the NSW Government released its second round of more complex law reforms within its public draft Liquor Amendment (24-hour Economy) Bill 2020.<sup>517</sup> In the original L&GNSW summary of the Bill, the Government suggested the proposed industry compliance amendments to the Act offered several additional advantages. These included simplifying existing related regulations, enhanced understanding by 'the community, industry and government', utilisation of incentives to encourage compliance and, adoption of 'proactive' measures to reduce further risks and harms after a serious demerit offence and/or a minimum of two serious alcohol-related incidents had occurred.<sup>518</sup> Following a public consultation period from 4 May 2020 to 28 June 2020,<sup>519</sup> further changes were made to the Bill, debated in Parliament in September 2020.

### **The NSW Integrated Incentives and Sanctions System (IISS) 2021**

NSW has developed a unique second layer of industry compliance schemes over and above the more traditional alcohol laws across the nation. This carries an inherent risk of regulatory "overheating" in an apparent attempt to establish a mirage of which jurisdiction has, on paper, the alleged 'toughest' and detailed alcohol industry control laws.<sup>520</sup>

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<sup>516</sup> Brown (2020) n 7, 1047 and nn 36–8 identifies high rates of domestic violence in NSW and the success of some regulatory interventions including minimum unit pricing to reduce domestic violence.

<sup>517</sup> Hereafter referred to as 'the Bill'. [Liquor Amendment \(24-hour Economy\) Bill 2020 Act 40/2020](#).

<sup>518</sup> n 28, 5–6. Note, the NSW government has over time, interchanged the terms "scheme" and "system" with the latter more widely used for the latest amendments to the Act.

<sup>519</sup> See Department of Customer Service advice titled '[Laws to help grow a 24 hour economy](#)'. It is understood that some small extensions were subsequently granted.

<sup>520</sup> Deputy NSW Premier Troy Grant 'Liquor laws have never been tougher.' Partridge (2015).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Figure '2' provides a summary representation of the multiple layers of legal, organisational and administrative complexity, discretion,<sup>521</sup> mandatory considerations and appeal rights involving the IISS. It is derived in part from a synthesis of institutional complexity and discretion present in the IISS. Evident is the historic traditional criminal law stream involving prosecutions through the local courts and the newer IISS stream where the quasi-legal ILGA is the primary first instance decision-maker. Opportunities existed for the rationalisation or integration of these schemes to derive public interest benefits. However, the same industry disciplinary schemes were subject to sustained industry complaints in the 2019 NSW Parliamentary inquiry including, the allegation that these schemes were a significant contributor to the demise of the Sydney NTE.<sup>522</sup>

The new statutory system involved more than a simple amalgam of the previous schemes. These were 'cherry picked' to retain those measures supported by the industry and eliminate or weaken those that provided the most significant risks of an offending licensee or manager receiving a sanction. The best example was the extension of the concerning provision of 'size matters' to potentially exempt the recording of demerit points for the occurrence of serious alcohol-related violent incidents – formerly captured by the VVS, for those licensed premises with large patron capacity.

A request<sup>523</sup> by Hemmes to require the Police to consider the size and patron capacity of offending venues/licensees and the seriousness of an incident/injury before issuing a complaint to ILGA, found its way into ILGA Guideline 17.

If the number of acts or circumstances forming the grounds for the complaint are a very small proportion of the size and patron capacity of the venue, the Secretary or Commissioner of Police may decide not to make a prescribed complaint to the Authority'.<sup>524</sup>

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<sup>521</sup> For greater elaboration on 'discretion' see Black (2001).

<sup>522</sup> Hemmes [Report 9 August 2019](#) (n 76), Merivale (2019) (n 77).

<sup>523</sup> Hemmes' Merivale submission dated [28 June 2020](#) on Bill (n 28) 5.

<sup>524</sup> Independent Liquor & Gaming Authority (ILGA) GL4026 - [Guideline 17](#).



*Figure 2: Synthesis of institutional complexity and discretion in the IISS*

Organisation	Discretion/powers
<b>Gatekeepers – Criminal and IISS streams</b> NSW Police & L&GNSW compliance officers	Detection of licensing offences or presence of serious risk. Discretion to <ul style="list-style-type: none"> <li>• Ignore breach - ‘work with’ offender</li> <li>• Informal caution</li> <li>• Formal caution – possible voluntary undertakings from a licensee with Police</li> <li>• Initiate legal action either by penalty notice or court attendance notice</li> </ul> <i>Conviction by Court of a demerit offence triggers a demerit point and two points for an offence related to service to minors</i>
<b>Criminal Law Stream</b>	
NSW Local Court	Depending on the plea in response to a court attendance notice: <ul style="list-style-type: none"> <li>• Find the defendant not guilty of the offence</li> <li>• Find the defendant guilty but not proceed to a conviction</li> <li>• Convict the defendant of the offence and impose a penalty on the offender</li> </ul>
NSW District Court	Hear appeals against conviction and/or sentence from decisions of Local Court magistrates
NSW Supreme Court	<ul style="list-style-type: none"> <li>• Determine appeals from Local Court magistrates or District Court judges based on questions of law</li> <li>• Powers to consider questions of law arising from decisions of ILGA</li> </ul>
<b>New IISS Stream</b>	
NSW Police & L&GNSW compliance officers	Becoming aware of and presumably referring to a chain of command <ol style="list-style-type: none"> <li>a. Two or more serious indictable offences involving violence in the last 12 months</li> <li>b. Two or more incidents posing a serious risk to the health and safety of persons that occurred in the previous 12 months</li> </ol>
Secretary, Department of Customer Service, and Commissioner of Police	Discretion to lodge a ‘prescribed complaint’ to ILGA for <ol style="list-style-type: none"> <li>a. Two or more serious indictable offences involving violence in the last 12 months</li> <li>b. Two or more incidents posing a serious risk to the health &amp; safety of persons that have occurred in the previous 12 months</li> </ol>
Secretary of DCS	<ul style="list-style-type: none"> <li>• Maintains demerit point register</li> <li>• First instance discretion to impose, vary or rescind license conditions (Part 9 of Act)</li> </ul>
Independent Liquor & Gaming Authority	Discretion to: <ol style="list-style-type: none"> <li>1. Impose prescribed demerit point(s) after mandatory consideration of a range of factors, potentially reducing the risk of demerit point(s).</li> <li>2. Determine whether 1 or 2 demerit points should be imposed</li> <li>3. Take remedial action against the licensee and possibly license for ongoing accumulation of demerit points. After further mandatory considerations, determine the most appropriate corrective action to take, if any.</li> <li>4. On application of a licensee, remove a demerit point after making mandatory considerations</li> <li>5. Additional powers of ILGA to take further disciplinary action pursuant to Part 9 of the Act.</li> </ol>
NSW Civil & Administrative Tribunal	<ul style="list-style-type: none"> <li>• Power to determine licensee applications to review the disciplinary decisions made by ILGA</li> <li>• Limited appeal rights from these decisions to NSW Supreme Court.</li> </ul>

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

If some form of sanction is eventually imposed by ILGA following a prescribed complaint,<sup>525</sup> it can be relatively easily removed for a first offence. A minimum of two serious incidents or risk events are required to have been recorded before a complaint can be made. The offending licensee is encouraged to adopt 'pre-emptive' (sic) 'measures' that may prevent the same offence or incidents from reoccurring. None of these suggested measures appears to significantly impact the availability and supply of alcohol, namely the likely profitability of the business.

A new feature of the compliance process is the incentive of license discounts for attaining a clean record. The following Part discusses key findings of the explication of the NSW's Parliament rewriting of the State's retail alcohol supply rule book through a lens of potential regulatory capture. It relies upon, in part, the development and application of our revised concepts of regulatory leniency and chill.

### Results

The results confirm an emergent trend that key pivotal points of regulating the retail supply of alcohol in NSW are strategically and effectively captured by the elites within the NSW alcohol industry.<sup>526</sup> The level of capture appears to be intensifying and increasingly entrenched with the bipartisan support of the NSW Parliament.

The major reforms to the NSW alcohol laws since 2008 have been reinforced by a legitimisation/rationalisation narrative. This includes the introduction of 'Fit for purpose' amendments in 2015 that negated any requirement for community consultation as these reforms were only considered by the Government as 'policy' matters. The 2021 reforms' imperative is creating a vibrant '24' hour economy and promoting the alcohol industry recovery from the pandemic.

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<sup>525</sup> Serious breaches of the NSW Liquor Act – 'prescribed offences' automatically attract a demerit point. Points can also be imposed for serious alcohol incidents or serious risks occurring within a licensed premise or within 50 metres outside the venue. The majority of alcohol linked assaults occur within a 200m range from the premise the venue is usual not held accountable for these. (Sydney Star's Casino – most violent venue in NSW is excluded from the IISS). Burgess and Moffatt (2011) Table 1.

<sup>526</sup> Brown (2019a) (n 5), Appendix. Brown (2020) (n 7) 1068ff.

Snider's<sup>527</sup> identification of a 'blind spot' towards industry elite non-compliance and an associated misdirected 'educative' remedial response appears to be replicated in the drafting and structure of the IISS.<sup>528</sup>

The explication of the IISS finds a consistent joint Government and industry tactic of relying upon a limited selective range of positive crime statistics to generalise and attribute the same to 'policy' success and justify a general weakening in industry compliance controls. For example, the NSW Government relied upon an average annual reduction of 7.7% in reported non-domestic assaults as one important factor justifying an easing in the regulatory burden on alcohol industry participants.<sup>529</sup> This reduction is implicitly attributed to the operation of the (then) existing industry compliance schemes without any substantiating evidence. It could equally have been a result of changing demographic and social trends of fewer young people attending licensed premises.

Coinciding with this attribution problem,<sup>530</sup> the legitimising narrative consistently overlooks the substantial increase in reported domestic assaults and its connections with the promotion and supply of alcohol.<sup>531</sup> The increases coincided with a proliferation of packaged liquor outlets and emergent online purchasing and rapid home delivery. NSW public health data also indicates an increasing rate of alcohol attributed hospitalisations.<sup>532</sup> For more serious alcohol-related harms, there is a notable increasing rate of the more acute forms of alcohol-related hospital emergency department admissions.<sup>533</sup> This public health concern is compounded by the possibility of a

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<sup>527</sup> Snider (2009) (n 43).

<sup>528</sup> See Summary of changes, 'Potential benefits and costs' Hemmes' Merivale submission dated [28 June 2020](#) (n 28) 6. "More incentives to manage venues well – the annual liquor licence fee discount will reward venues where demerit points are not obtained, and earlier demerits removal will ensure venues are encouraged to proactively (sic) respond where demerits are incurred".

<sup>529</sup> Brown (2020) (n 7) Figure '1' 1050. Summary of Bill (n 29) 7. The latest BOCSAR data for past 10 years to March 2021 shows decline of only 3.7% and for the past 5 years that the rates are 'stable' (no significant change).

<sup>530</sup> See BOCSAR cautions over the use of crime statistics in Brown (2020) (n 7) 1061, 1063.

<sup>531</sup> Brown (2019a).

<sup>532</sup> For the period 2001/2 to 2018/19, the rate of alcohol attributed hospitalisation in NSW steadily increased from 337 per 100,000 to 523.6 per 100,000 per population. See [HealthStats NSW](#).

<sup>533</sup> The overall rate of alcohol problems presented at 81 Emergency Departments in NSW increased from 216.3 per 100,000 in 2008/9 to 254.5 in 2018/19 [HealthStats NSW](#). Alcohol problem presentations to 81 NSW emergency departments [by triage category trend](#) can be found at [HealthStats NSW](#).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

substantial reduction in the number of liquor licensing inspectors.<sup>534</sup> It also understood specialised industry inspectors are being replaced by those with more generic experience.

The 2020 submission on the draft Bill by Hemmes<sup>535</sup> argues the risk of licence suspension as a form of deterrence should not be contemplated. The Bill provides invaluable insight into the apparent connected industry-Government rationale on the subordination of industry compliance to what is perceived to be the greater imperative of business success in the market economy.

One of the most concerning illustrations of the disproportionate elite influence or power arising from the amended compliance scheme was Parliament's lack of apparent concern for serious conflicts of interest and the ramifications for public health, safety, and integrity. The owner of the consistently most violent and largest licensed premise in NSW successfully lobbied for the weakening of the new statutory compliance system. The outcome further reduced the risk of his business being subjected to sanctions for non-compliance and the occurrence of serious, high-risk alcohol-related incidents.

Reduction in the risk of the imposition of sanctions was achieved by extending the 'size matters' consideration to the component of the IISS replacing the previous VVS. In addition, the increase from a single to two serious incidents required for the Police and Secretary of the Department to lodge their discretionary prescribed complaints to ILGA was a reflection of greater leniency.<sup>536</sup> Arguably, this also creates significant integrity risks arising from the lack of transparency and independent scrutiny of compliance officers including Police, exercising this critical discretion to not initiate a complaint because of the vague criteria of 'size' and 'patronage' of an alleged non-compliant or high-risk licensed venue.

Within the context of previous interlinked research by the lead author this research further corroborates the conclusion that the regulation of the retail supply of alcohol in NSW including industry compliance mechanisms, is the subject of systemic and intensifying regulatory capture.

23

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<sup>534</sup> In 2020, application under the Government Information (Public Access) Act 2009 (NSW) ([GIPA Act](#)) was made to the NSW Department of Customer Service seeking details on the substantive and actual number of compliance officers engaged for the last five years. Despite repeated requests, they were unable to provide the information for other than the previous year stating a change in government portfolios responsible for the regulation of alcohol over the period of the information requested had rendered it unobtainable.

<sup>535</sup> Hemmes' Merivale submission dated [28 June 2020](#) (n 28).

<sup>536</sup> [Liquor Act 2007 Act \(NSW\)](#) s139 'Grounds for making complaint'. See also Merivale submission dated [28 June 2020](#) (n 28) and [Liquor and Gaming NSW Factsheet FS 3015](#) Incentives and Demerit Point System.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This research identifies key sections of the written and oral submissions by Hemmes and other industry representatives, were adopted into law despite reservations expressed by the CEO of Liquor & Gaming NSW during the 2019 Parliamentary Inquiry.<sup>537</sup> Size and associated power do matter. Previous 2017 amendments<sup>538</sup> had delegated compliance away from the large owners and controllers to expendable employed or contracted licensees and managers. This devolution of the responsibility away from the elite owners and controllers was reconfirmed in the 2020 IISS reforms.

The increased complexity and leniency associated with the IISS reforms depicted in Figure 2, risks creating a reverse version of regulatory chill, regulatory ‘overheating’ or deregulatory ‘fever’. However, both alternative and combined routes can achieve the same ultimate industry goal of regulatory failure. A consequential regulatory compliance environment conducive to profit maximising, market concentration and growth.

This current complex layering, and interaction of compliance-related litigation and appeal pathways, provides an appreciation of how the system can be unfairly weighted towards those elite private interests with ready access to substantial funds and very costly legal expertise. This legal complexity is a looming disincentive or chilling effect for front-line compliance officers to initiate legal proceedings for alleged non-compliance, especially when the agencies’ mandated preference is to ‘work with’ the industry.<sup>539</sup>

Unlike Kelsey’s analysis of regulatory chill derived from the study of New Zealand tobacco industry plain packaging matter,<sup>540</sup> there appears to be no recent malevolent public pressure by the NSW alcohol lobby on NSW elected lawmakers and the main Opposition party, to withdraw proposed amendments to NSW alcohol laws. On the contrary, the NSW alcohol and gambling lobby have been some of the most significant political donors to federal political parties.<sup>541</sup>

24

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<sup>537</sup> Parliament of New South Wales ([Report 12 August 2019](#)).

<sup>538</sup> n 27.

<sup>539</sup> Hemmes’ Merivale submission (n 28) on the 24 hour economy bill requested that front line compliance officers be required to consider before any compliance action, the size of the licensed premise and number of patrons. ILGA is required to take this consideration into account. See Brown ([2020](#)) (n 7), 1060, 1069 for references on ‘working with’ the industry.

<sup>540</sup> Kelsey (n 48), 12.

<sup>541</sup> [Electoral Funding Act 2018 \(NSW\)](#), s 51 (c) prohibits political donations from the NSW alcohol industry to the NSW jurisdiction. Reid and Bestman ([2020](#)) identify for the 10 years up to 2018, AHA NSW provided a total of \$1,472,357 to Federal political parties.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

A regulatory paradox or enigma, dependent upon a high level of regulatory capture emerges whereby the objective of effective industry deregulation is achieved and disguised by an increase in legal complexity and the perpetuation of the false assumption of the elites' almost inherent compliant behaviour. Multiple layers of statutory discretion, exclusions, exemption and appeals, are likely to render the whole integrated system practically unworkable.<sup>542</sup> It privileges the industry's elite, whose operations are viewed as indispensable to attracting business investment in the NSW economy.

Regulatory theory suggests an increase in the numbers and visibility of compliance officers and related inspections of licensed premises is the most effective form of sustaining corporate compliance.<sup>543</sup> When formally requested, the NSW Government could not provide details of the actual number of compliance officers working over the last five consecutive years.

Suspected chronic government underfunding of compliance resources, especially when running unprecedented budgetary deficits arising from COVID related costs and financial stimuli, can also provide a potent disguised tool to support industry interests of deregulation.<sup>544</sup> The continuation of the risk management regulatory approach with a declining public compliance workforce would likely have a sustained deleterious impact on public safety.<sup>545</sup> Hemmes advocated in the 2019 Parliamentary Inquiry that Police be kept out of his licensed premises.

The presence (of Police) in venues, I feel, is intimidating and really changes the vibe and atmosphere in a space. It actually deters people from going to those venues.<sup>546</sup>

The modified versions of the regulatory concepts of 'chill' and 'leniency' developed within this research assist to illustrate how critically important it is to establish and retain an effective, transparent, and accountable industry compliance and governance process.

25

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<sup>542</sup> See the defacto evidence-based policymaking by the judiciary in Columbia, Hawkins and Alvarez Rosete (2017).

<sup>543</sup> Mr Justin Hemmes' evidence before the NSW Parliament Joint Select Committee on Sydney's Night Time Economy on (Report 9 August 2019) (n 71) encouraged a reduction in police attendances of his licensed venues. Hansard p60.

<sup>544</sup> In February 2021, a NSW Inquiry Report into serious allegations concerning the proposed Crown Casino conducted by former Judge Bergin found a history of serious systemic weaknesses in ILGA. This raises a concern of systematic underfunding and resourcing by successive NSW governments to effectively emasculate ILGA's regulatory capacity. See Parliament of New South Wales (2021).

<sup>545</sup> It is understood the NSW Government is replacing its departmental specialist alcohol and gambling industry compliance officers with generalist officers whose portfolios embrace multiple diverse industries.

<sup>546</sup> Hemmes Report 9 August 2019 (n 71) 59–60.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Direct regulatory leniency was evident in the weakening of industry sanctions, including, in some instances, doubling the number of demerit points required to instigate remedial action against a licensee and, abolishing, for the third time in recent years, all previously accumulated demerit related points. Leniency was also exhibited by the new capacity for non-compliant licensees to easily rescind a demerit point by the reactive adoption of measures with no recognised harm reduction value, for example, membership of a liquor accord or adoption of unenforceable plans of management.<sup>547</sup>

The meta-message for the IISS alcohol law reforms is the economic imperative for establishing a '24 hour' vibrant and 'fun' economy, the imperative of securing industry financial investments and, supporting industry financial recovery from COVID-19. The research confirmed Flyvbjerg's conceptions of power<sup>548</sup> and the capacity of those with power to define reality, especially in this post-truth world<sup>549</sup> where less reliance appears to be afforded the best available scientific independent evidence. It signifies the importance of considering the underlying dominant narrative as a form of rationalisation and legitimisation.

The absence of rational argument and factual documentation in support of certain actions may be just as important indicators of power as the arguments and documents produced. A party's unwillingness to present rational argument or documentation may quite simply indicate the freedom to define reality.<sup>550</sup>

### Conclusion

The recent enactment of the IISS in NSW indicates the unwillingness of Parliament to address failures, gaps and weaknesses in the previous alcohol industry compliance regulatory process. These 'reforms' can be interpreted as a politicised instrument indicative of regulatory capture. Their real purpose appears to be sustaining a bifurcated<sup>551</sup> regulatory environment that will secure ongoing banking credit to fuel profits and returns on investment, business growth and certainty for the industry elite, consistent with regulatory capitalism.<sup>552</sup>

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<sup>547</sup> See table last page L&GNSW Summary of the Bill was published in [May 2020](#) 'Summary of changes' (n 28).

<sup>548</sup> Flyvbjerg (n 54).

<sup>549</sup> Tactics to deliberately circulate false information to divert or distract attention away from evidence-based information to the contrary. See Rose and Barros ([2017](#)).

<sup>550</sup> Flyvbjerg (n 54).

<sup>551</sup> Snider (n 43).

<sup>552</sup> Levi-Faur (n 34).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This research develops and applies more nuanced regulatory concepts to detect and analyse the possible presence of industry capture, regulatory leniency and chill within the compliance and enforcement law-making and application process. These instruments also create a valuable pathway for more meaningful inter-jurisdictional comparisons of alcohol industry regulatory processes.

The application of the umbrella of regulatory concepts, enables a calibration of the power or relative influence of competing stakeholders within a vital context of whether the compliance laws satisfy the public interest test. It is applicable especially in circumstances where key members of the same industry are suspected of or played a demonstrable leading role in authoring their own industry's compliance rule book.

This concept is consistent with the dominant neoliberal political environment favouring ultimate industry self-regulation. This explication of the regulation of the retail supply of alcohol in NSW culminating in the IISS, confirms the pervasive presence of intensifying corrosive and cultural forms of regulatory capture. These latest asymmetrical alcohol law 'reforms' seriously impede the attainment of the public interest, the public's confidence in the transparent and impartial regulation of alcohol in NSW and, the rule of law. They also provide a significant impediment to reducing the primarily preventable high levels of direct and indirect alcohol-related harms.

Finally, this research confirms the inexorable inability of traditional governance processes, institutions, and narrow, outdated, and ineffective legal definitions of corruption<sup>553</sup> to safeguard the integrity of our democratic political processes.

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<sup>553</sup> Walton ([2015](#)) (n 5), Kaufmann ([2004](#)) (n 6).



## CHAPTER 5: CONCLUSION

The concluding chapter includes the exegesis, key findings to the research questions, a summary of the original academic contributions of the thesis, proposed reforms and a concluding commentary.

### 5.1 Exegesis

The four articles in Chapter 4 collectively constitute the main body of empirical research evidence. This evidence is relied upon to substantiate and contextualise the argument that the systemic industry capture of the regulation of the retail supply of alcohol in NSW since the Act commenced operation on 1 July 2008 is expanding and intensifying.

Chapter 1.8.1 provides an overview of the definition of capture relied upon on this thesis. This is extended in chapter 2 and the articles in chapter 4. As a recap, the following adopted definition of capture below, is based in part on the research of Carpenter and Moss.<sup>554</sup>

Capture is the process of consistently or repeatedly directing public policy [law-making] decisions away from the public interest towards the interests of a specific interest group or person. Capture is the opposite of inclusive and fair law-making, and always undermines core democratic values and the rule of law.

Chapter 2 also discussed the synthesis and subsequent refinement of a test for the presence of capture that relied on, firstly, the three elements of connected conduct between the alcohol industry and elected law-makers, secondly, actions inconsistent with the public interest and, thirdly, a pattern of such connected conduct occurring over a period of time. The chapter also provided greater detail of key concepts utilised in the thesis, including the connections between critical governance concepts such as corruption, undue influence and the public interest within the NSW jurisdictional setting.

Each of the articles contained within the previous chapter is preceded by a brief overview with the express purpose of establishing the connections between each of the articles, the research questions and the thesis topic. These overviews constitute a key component of the exegesis and are designed in part to establish an integrated and coherent body of work. They also chart the

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<sup>554</sup> Carpenter and Moss n 187, see also defining capture within the thesis 3 [2], 29-32, 42-8.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

synthesis and subsequent refinement of a new transdisciplinary test for regulatory capture. This contribution to scholarly knowledge includes enhancing the existing theory on regulatory leniency and chill in the regulation of alcohol in NSW.

In their totality, these theoretical contributions add value to the transdisciplinary academic research of the nature and extent of the influence of alcohol industry elites and the inadequacy of existing governance processes to deter regulatory capture and serious conflicts of interest. They demonstrate how these enhanced regulatory theoretical concepts and tools developed and applied across the succession of articles can better enable evidence-informed legal and policy prescriptions and interventions.

Chapter 4 provides evidence of strategic, systematic, and systemic procedural and substantive alcohol supply law reform outcomes in NSW over a thirteen-year period that consistently favour the commercial interests of the industry elites. This includes jointly authored law reforms and associated interpretation of key objectives of the Act,<sup>555</sup> the outlet approval process,<sup>556</sup> the relative reduction in the autonomy of ILGA,<sup>557</sup> the legal devolution of primary responsibility for compliance from the elite corporate owners to their individual employed licensees<sup>558</sup> and the second layer of an array of industry compliance and enforcement schemes.<sup>559</sup> These reforms create and sustain a regulatory environment conducive to profit maximisation and growth.<sup>560</sup> These same reforms specifically target pivot points in the regulatory chain where industry profit-making, consolidation and reputation enhancement opportunities are concentrated.

All these regulatory related avenues to enhance the relative financial position and security of the industry elite, especially, are explicated in this thesis. At a more macro level of power distribution, the articles also illustrate the restrained countervailing capacity of the community and CSOs to effectively participate in the alcohol-supply regulatory process and have their safety and health interests articulated and actioned. This capacity has progressively declined in cases where there appears to be a competition of interests. As West and Marteau observed, ‘The greatest challenge

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<sup>555</sup> Brown article 1, Brown and Anderson article 4.

<sup>556</sup> Ziller and Brown article 2; Alison Ziller, ‘Eroding Public Health through Liquor Licensing Decisions’ (2018) 25 *Journal of Law and Medicine* 489–520.

<sup>557</sup> Brown article 1 (n 26).

<sup>558</sup> Brown articles 1 and 3, Brown and Anderson article 4.

<sup>559</sup> Brown article 3, Brown and Anderson article 4.

<sup>560</sup> Arguably tempered with some concessions to create a perception of neutrality, balance, equity, and fairness.

to improving health may lie in the tension between wealth- and health-creation'.<sup>561</sup> This is a dominant theme emerging from this exegesis.

## 5.2 Key findings to the primary and supplementary research questions

### 5.2.1 Question 1

*Has the regulation of the retail supply of alcohol in NSW since the commencement of the current Liquor Act on 1 July 2008 been the subject of capture and if so, what does capture look like, where it is found, how does it work and, what are its direct impacts on the public interest?*

In Chapter 4, each article's explication of a different yet essential component or function of the overall regulation of the retail supply of alcohol in NSW supports the existence and successive intensification of the presence of industry capture. The following responses to the first research question, and their associated considerations, are analysed under each key component of the capture test developed within this thesis.

#### 5.2.1.1 Capture test – Connected conduct

There is much valuable academic literature that focuses on corporate political activity, including the tactics of industries associated with alcohol, tobacco, gambling, highly processed foods and other unhealthy, environmentally destructive products.<sup>562</sup> Alcohol-harm research overall appears to afford more attention to the industry actors and their motivation, with less insight into similar reciprocating characteristics of the political process of the lawmakers. The research of this thesis includes factors likely to determine the propensity of elected politicians and their officials to be captured by private commercial interests. Hence this thesis' preference for the descriptive term of 'connected conduct' between the industry elites and lawmakers and those applying the laws.

The second component of the capture test focused on the relationship, if any, of co-dependency between the regulator and the regulatee – 'connected conduct'. In this case, the NSW government, with the consistent support of the opposition and alcohol industry elites, diverted outcomes favourable to each party's commercial and political interest away from what could be reasonably construed as the public interest.

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<sup>561</sup> West and Marteau n 1.

<sup>562</sup> See analysis in chapter 2.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

This strongly connected conduct between the alcohol lobby and NSW Parliament is best illustrated in a previous NSW Minister's reported acknowledgement of the vital role of industry lobbying at an industry function:

I would like to acknowledge [senior AHA representatives] for the work that [they do] in advocating for the industry ... the incredible work that you do behind the scenes with Parliament and with the Opposition in raising the industry's concerns, to ensure that you are getting the best deal from whoever is in government... As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry.<sup>563</sup>

The above reported address by the Minister responsible for liquor and gambling in NSW at that time is indicative of the close and ongoing relationship between elite industry representatives and groups, on the one hand, with both sides of the NSW Parliament, on the other. It highlights the likely significant magnitude and success of behind-the-scenes bipartisan industry lobbying. Such non-transparent lobbying practices mitigate against discovering definitive and conclusive evidence of connected and potentially unlawful conduct that may breach NSW corruption and political donation laws.<sup>564</sup> Any practitioners of such sophisticated connected conduct and associated politico-industrial communication are unlikely to leave a "smoking gun".'

The articles explicate the underpinning politico-industrial environment.<sup>565</sup> This includes examples of serious conflicts of interest conveyed in numerous media reports and Kypri and others'<sup>566</sup> research into large federal donations by the related alcohol and gambling industries coinciding chronologically with key political events and alcohol law reforms, and the strategic level of political grooming of emerging politicians likely to favour the industry's present and future interests.

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<sup>563</sup> Brown article 3 (n 47). Andy Young, 'Minister full of praise for pubs' *The Shout* (online) 27 November 2017 <<https://www.theshout.com.au/news/minister-promises-pub-reforms/>>. The latter parts of the above quotation appear to have been removed from the web page sometime after its publication, but reference was retained in this URL. Previously cited by Brown article 1, 782 and Brown article 4 (n 47). As a postscript, on 6 October 2021, Paul Toole MP (National Party) was sworn in as Deputy Premier of NSW 'pledging to restore business as usual' 'VIDEO: New Deputy Premier hopes to get on with business as usual' *ABC News* 6 October 2021 <<https://www.abc.net.au/news/2021-10-06/new-deputy-premier-hopes-to-get-on-with-business-as-usual/13572774>>.

<sup>564</sup> In December 2010, that alcohol and gambling industries were declared prohibited political donors. ClubsNSW was excluded from this amendment to NSW electoral laws. See Brown article 3, 1069.

<sup>565</sup> Additional references to likely connected conduct can be found in media reports contained in article 1 (nn 53- 54, 108), Appendix and, Brown article 4 (n 49) 1068–70.

<sup>566</sup> Kypri et al (n 209).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

Article 1 also identifies a reported admission from a former senior NSW Liberal party official of unlawful acceptance of industry political donations and the transmission of federal industry political donations to their state party coffers.<sup>567</sup> This continuing connected conduct appears to have significantly influenced significant alcohol and gambling decisions in several state jurisdictions.

Article 4 confirms the extent to which the NSW government, with the support of the opposition, relied upon and supported the industry elites' 2020 submission to the NSW government on the Bill amending industry compliance and enforcement laws, including that of Mr Hemmes/Merivale. The commercial interest of the elite and their backing financial institutions were effectively afforded priority over the public interest, illustrated in this submission:

When up to millions and millions of dollars are spent acquiring licensed premises, refurbishing and operating them, the enormously high risk of licence suspensions does not foster investment of employment, and certainly does not provide security nor growth appetite for licensed hospitality businesses in a post-COVID 19 New South Wales ... returning direct license suspension risk to bricks and mortar [physical venue asset of the owner] will immediately deter financial institutions from extending finance for licensed venues'. Banks will perceive that the risk of license suspension is too high.<sup>568</sup>

### 5.2.1.2 Public interest

A multidimensional test for the presence of capture was synthesised from regulatory theory. This test was developed and progressively reviewed in part to enhance the objectivity, coherence and robustness of the research findings in a contested sphere of research and potential challenge from the alcohol industry and its political supporters. The second component of the capture test was simplified and contextualised to focus on the critical analysis of evidence pertaining to whether the succession of NSW alcohol law reforms can be reasonably construed as being in the public interest.<sup>569</sup>

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<sup>567</sup> Koziol in Brown article 1, 782; Brown article 3 (n 109).

<sup>568</sup> Hemmes' Merivale email submission dated 28 June 2020 to Liquor & Gaming NSW regarding the initial draft public consultation Bill, 3, 7 <[https://www.liquorandgaming.nsw.gov.au/data/assets/pdf\\_file/0016/1012336/302-Merivale\\_Redacted.pdf](https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0016/1012336/302-Merivale_Redacted.pdf)>. The industry theme of the primacy of protecting the elites' assets and financial loans 'bricks and mortar' was generally accepted in the related media coverage and Parliamentary debates concerning the 2015 'Fit for purpose' alcohol law reforms. Original tougher sanctions including loss of license for the accumulation of three serious licensing offences against the venue owner, were consistently but incorrectly described as having 'unintended consequences' following the prosecution of an industry elite-Nicholls (n 186). For additional background on the Merivale empire and related earlier submissions to the Sydney 2019 Parliamentary Inquiry, see Brown article 3 (n 105).

<sup>569</sup> Wheeler (n 199) cp 2, 40.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

‘Public interest’ is predicated on an important implicit assumption based in part on the conception of the Lockean social contract model and the obligation of the sovereign to fulfil the basic requirements of the commonwealth, the ‘public good’.<sup>570</sup> This involves the defence of the realm, peace, public health, and good order. Hindess characterises Locke’s conception of political power as both a ‘right’ and a ‘capacity’ that constitutes the legitimate use of political power. It must only be, firstly, exercised by those with the right to govern, our democratically elected representatives and, secondly, used for the public good.<sup>571</sup>

‘Private Actions’ driven by private and self-interests were construed by Locke as tyranny and usurpation ‘making use of the [sovereign] Power any one has in his hands; not for the good of those who are under it, but for his own private separate Advantage satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion’.<sup>572</sup>

The most apparent evidence, provided in Chapter 4, of the illegitimate use of political power by the NSW government in the regulatory process includes the complete exclusion of public input into the 2015 ‘fit for purpose’ alcohol law reforms.<sup>573</sup> This exclusion was legitimated by the erroneous claim that the changes involved no ‘policy considerations’.<sup>574</sup> Further evidence of the arguably illegitimate exercise of power includes the weakening of provisions in the three strikes disciplinary scheme (3SS) by the inclusion of ‘size’ and ‘patronage’ considerations regarding a licensed premise before the commencement of detrimental legal action against it.<sup>575</sup> This action, coupled with the devolution of the primary legal responsibility of compliance to licensees,<sup>576</sup> led to an extension into all relevant components of the IISS of the quarantining of elite owners from sanctions.<sup>577</sup> Exercise of industry power at the expense of the public interest was also evident in closing times of packaged liquor outlets being extended regardless of their compliance records and surrounding levels of domestic violence with no opportunity for community input<sup>578</sup> —and,

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<sup>570</sup> Hindess (n 146), ch 3, 49.

<sup>571</sup> Ibid.

<sup>572</sup> Hindess (n 146), 52.

<sup>573</sup> Brown article 1, 766. This exercise of power also aligns with Luke’s second face of power ‘agenda setting’ or ‘structural’ as described by Lacy-Nichols and Marten (n 118, 1–2). See also Hindess (n 146), ch 4 ‘the supreme exercise of power: Lukes and Critical Theory’.

<sup>574</sup> Brown article 1, 764.

<sup>575</sup> Brown, article 3, 1066.

<sup>576</sup> Nicholls n 436. Brown and Anderson article 4 (n 66).

<sup>577</sup> Brown and Anderson article 4, 17–9.

<sup>578</sup> Brown and Anderson article 4, 20–1.

furthermore, with the owner of the largest and consistently most violent hotel in NSW authoring key consistently favourable amendments to the Act including important aspects of the IISS.<sup>579</sup>

Additional examples of systemic capture arguably inconsistent with the public interest include the presence of regulatory chill and broadly-defined regulatory leniency associated with the latest IISS reforms.<sup>580</sup> Article 2 evidenced more subtle examples of the illegitimate use of political power in governmental reliance upon economic expediency as a reason to reduce the requirements for rational social-impact assessments of liquor licence-related applications. This identification of the commodification of the concept of public interest represented an example of Lukes' third, more sinister, face of power.<sup>581</sup>

This consistent pattern of successful industry influence and subsequent favour is in sharp contrast to the fortunes of public health and CSO stakeholders. There are few examples in NSW of their achievement of the introduction and application of proven, evidence-based measures to reduce alcohol-related harms and achieve genuine inclusion and greater effectiveness in the series of alcohol law reforms explicated in this thesis.

### 5.2.2 Pattern of capture over time

The third component of the capture test synthesised within this thesis is the identification of a pattern of consistent connect conduct over time, not a one-off type of occurrence. The findings of this thesis establish that the presence and reach of documented undue influence, conflicts of interest and the important related narrative associated with such connected conduct progressively intensified and became more overt as successive retail alcohol law reforms were promulgated in NSW<sup>582</sup> under different governments.

Overall, there is a strong argument supported by mainly, but not exclusively, circumstantial evidence that the regulation of the retail supply of alcohol in NSW since the commencement in 2008 of the *Liquor Act 2007* has been the subject of sustained industry capture.

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<sup>579</sup> Brown and Anderson article 4, 31–2.

<sup>580</sup> Ibid. See for example figures 1 and 2 illustrating leniency and complexity.

<sup>581</sup> Hindess (n 146).

<sup>582</sup> Some of the alcohol law 'reforms' have required amendments to the NSW Planning laws to weaken or remove important planning controls or public safeguards on the approval process for alcohol related development applications and subsequent amendments. These changes to NSW Planning laws are mainly excluded from this thesis.

### 5.3 Question 2

*What are the fundamental underpinning assumptions, values and themes driving changes in the regulation of the retail supply of alcohol in NSW, including industry compliance and enforcement?*

This secondary consideration is reflective of the critical explicative process adopted in the thesis. Some of the phenomena of capture observed and critically analysed in this research span a number of these research-question considerations.

From this thesis, several common interrelated themes emerge concerning the regulation of the retail supply of alcohol in NSW since 1 July 2008. Some of these have already been identified in the above response to the primary research question.

The most pervasive theme underpinning the regulation of the retail supply of alcohol in NSW is regulatory capitalism and its subvariant, neoliberalism. The potential for contradiction between the interests of commercial industry and public health remains very high in the interpretation and application of NSW alcohol-related laws.<sup>583</sup> The articulation and resolution of these conflicts provide insight into the fundamental underpinning assumptions, values and, most importantly, the real authorship of the outcomes.

In critical amendments of the Act and related laws analysed in this thesis, there exists a conflict where the interests of the commercial industry elite interests are unmistakably prioritised over that of the public good, a prioritisation which appears to intensify over time. This thesis relies on the description of the ‘public interest’ or ‘good’ within the context of regulating the retail supply of alcohol in NSW, where it is primarily embodied by the minimisation and ultimate prevention of a comprehensive range of alcohol-related harms, the attainment of effective industry compliance and enforcement, the sustainability of the democratic process and the rule of law that also incorporates good governance requirements.

For example, the most recent amending Act is entitled, with Sydney-centric overtones, *Liquor Amendment (Night-time Economy) Act 2020* NSW but has extended application to all of NSW. One aim of the same is to boost the financial recovery of segments of the industry following COVID-19 restrictions. Within the associated parliamentary debates and related secondary

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<sup>583</sup> Ziller and Brown article 2, 796–7 considers in greater detail the contradiction in objects of the Act and case law regarding the primacy of ‘public interest’ requirements in the alcohol jurisdiction. See also Brown article 1, 776–80.



## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

documentation,<sup>584</sup> emphases were placed on creating a '24 hour' 'vibrant', 'sophisticated' and 'fun' 24-hour economy.<sup>585</sup> Interestingly, underpinning this narrative is an implicit shaming counter-narrative mechanism that infers those not supporting the 24-hour availability of alcohol, live music and 'jobs' as 'wowsers' and 'fun police'.

In 2020, the supply of alcohol in NSW was considered an essential consumer product,<sup>586</sup> notwithstanding anecdotal evidence of a significant increase in requests for assistance relating to alcohol-related domestic violence during extended COVID-19 closures.<sup>587</sup>

Another justification and rationalisation for a weakening in compliance controls by the government were the reported reductions in the levels of non-domestic alcohol-related violence.<sup>588</sup> Missing from the government's calculus were the increases in the levels of alcohol-related domestic violence and serious alcohol-related hospital admissions.<sup>589</sup>

The clearest example of the NSW Parliament's ongoing prioritisation of the commercial interests of the industry elites' commercial interests revolves around the discourse of protecting the elites' 'bricks and mortar' as key collateral for large business investments and related loans from financial institutions.<sup>590</sup> This protection of the owners' capital coincided with the relegation of the primary responsibility and accountability for compliance to alcohol outlets' licensees and managers who, in many instances, may be under the direct control and direction of large corporations.<sup>591</sup>

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<sup>584</sup> See Brown article 3 and, Brown and Anderson article 4, 30 (n 79).

<sup>585</sup> In the 2020 Parliamentary debates involving the amendment Bill, the terms 'vibrancy' or 'vibrant' were relied upon around fifty-one times whilst 'fun' was used five times. It appears no popularist NSW Parliamentarian wishes to be labelled a member of the 'fun police'. See a sample of Parliamentary debates in the NSW Legislative Assembly 23 September 2020 <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-112819>>.

<sup>586</sup> Stephanie Colbert et al, 'COVID-19 and Alcohol in Australia: Industry Changes and Public Health Impacts' (2020) 39(5) *Drug and Alcohol Review* 435–40, 2. BOCSAR found no increase in reported domestic violence related assaults to December 2020 coinciding with COVID restrictions. They did however report in their 'Plain language summary' 'evidence of an increase in domestic 'discord' from the time COVID-19 restrictions'.

<sup>587</sup> Karen Freeman and Felix Leung (2021) *Domestic Violence in NSW in the Wake of COVID-19: Update to December 2020* (Bureau Brief No 154) <<https://www.bocsar.nsw.gov.au/Publications/BB/2021-Report-Domestic-Violence-COVID-update-Dec2020-BB154.pdf>>. See also Domestic Violence NSW, 'Domestic Violence NSW Report Highlights Impacts of COVID Lockdown on Domestic and Family Violence Services' 10 August 2021. Media Release <<https://www.dvnsw.org.au/wp-content/uploads/2021/08/COVID-Impact-Report-Media-Release.pdf>>.

<sup>588</sup> Brown article 3 (n 5); L&GNSW, 'Summary of Changes Liquor Amendment (24-Hour Economy) Bill 2020–May 2020, 7 <[https://www.liquorandgaming.nsw.gov.au/\\_data/assets/pdf\\_file/0007/990088/Summary-of-Changes-24-hour-Economy-Bill-2020-V7.pdf](https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/990088/Summary-of-Changes-24-hour-Economy-Bill-2020-V7.pdf)>.

<sup>589</sup> See Brown article 1, 764–5; Brown article 3, figure 1, 1050; Brown and Anderson article 4 (nn 92–3), 6.

<sup>590</sup> Hemmes/Merivale (n563).

<sup>591</sup> Nicholls (n 436).

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The subset of regulatory capitalism, the neoliberal political environment and narrative, is also a key related theme emerging from the different aspects of the regulation of alcohol. Article 4 analyses the attainment of a new industry compliance scheme that appears to favour the profit interests and market imperatives of larger industry elites in particular. The industry does not bear the actual social and cumulative costs or negative externalities associated with the dangerous oversupply of alcohol and failed responsible service of alcohol. The concept of collective responsibility, along with the willingness of the industry for precinct-wide compliance and safety outcomes, appears to have been effectively erased as part of the evident individualistic neoliberal agenda. The commodification of the traditional concept and safeguard of the public interest has morphed into customer convenience, a key illustration of neoliberal discourse.

The ultimate neoliberal fusion of public versus private commercial interests is identified in article 1,<sup>592</sup> including the need to cut red tape, improve the alcohol outlet approval process and provide more significant support for the industry that will then benefit the community. In essence, what is good for business is portrayed by the state as being good for the community. Reflecting this bold assumption is a statement in the Department of Justice's 2016–17 Annual Report that reducing the industry's waiting time for licensing approvals was a 'notable' improvement delivered to the community.<sup>593</sup>

Another emerging trend in article 4 is the emboldenment of the powerful industry elite. Articles 3 and 4 evidence how the elite has been influential in weakening and sometimes eliminating key industry compliance requirements that pose a threat to their personal financial gains, potential reputation and business investment certainty.<sup>594</sup> Article 4 establishes that most of the specific amendments sought by one industry elite were delivered by the NSW Parliament with the bonus of 'incentive' license fee discounts for a clean record due to good management or, alternatively, it would appear, luck.

A common bifurcation<sup>595</sup> type of discourse revolves around non-compliant premises being portrayed as a small minority, 'rogue operators' or industry transgressors making 'unintentional'

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<sup>592</sup> Brown article 1, 776–80 and the neoliberal discourse related to the proposed safety rating system for licensed premises in Brown article 3, 1053–5.

<sup>593</sup> Brown article 1, 778.

<sup>594</sup> Hemmes n 563.

<sup>595</sup> Brown and Anderson article 4, 11, 17.

mistakes. However, in no government or industry publications promoting and explaining the proposed 24-hour economy alcohol law reforms was any mention made of the possible significant reductions in the numbers of government compliance staff.<sup>596</sup>

Regarding most of the changes to the industry compliance and enforcement regulatory process, it appears that no regard was given to contrary public submissions warning of crucial gaps in the proposed new IISS. This has the effect of ensuring elite licensed premises could not be held accountable for a large percentage of alcohol-related violent incidents occurring outside, but linked to the service of alcohol within, licensed premises.<sup>597</sup>

Flyvbjerg's phronetic methodology, adopted in this thesis and most associated publications, encourages focus on the minutiae and what is occurring 'backstage'.<sup>598</sup> Article 4 identified concerns<sup>599</sup> expressed by a senior departmental official during the 2019 Joint Select Parliamentary Inquiry into Sydney's night time economy — a precursor to the *Liquor Amendment (24-Hour Economy) Act 2020* (NSW). Her response to the industry-requested 'size matters' exemption from a sanction was that it may infer that those assaults occurring in large late-trading licensed venues were 'tolerable'. This legitimate concern was not accepted by the Parliamentary committee.<sup>600</sup>

Another challenge to public health research arose in the same elite's submissions to the 2019 NSW Parliamentary inquiry, which included unsubstantiated contradictions of established scientific evidence that increased trading hours or later closing times were unlikely to exacerbate alcohol-related harms.<sup>601</sup> This type of assertion is a recognised common tactic of the tobacco and alcohol industries.<sup>602</sup> It also provides an excellent illustration of Flyvbjerg's conception of power,<sup>603</sup> where the most powerful can determine reality and impose their views and values via the curated

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<sup>596</sup> Brown and Anderson article 4, 29.

<sup>597</sup> Brown article 3 (nn 98–9), 1060.

<sup>598</sup> Flyvbjerg (n 69) 98, 228–9; Brown article 1, 769.

<sup>599</sup> Brown article 3 (n 128), 1065.

<sup>600</sup> Following the commencement of the amending Act, ILGA introduced new enforceable guidelines that reflected Hemmes' request that the Police consider the size and patronage of a venue before instigating legal proceedings. See Brown and Anderson article 4 (n 84), 22–3.

<sup>601</sup> Merivale's written submission to 2019 Parliamentary Inquiry in Brown article 4 (n 111), 13.

<sup>602</sup> Merivale's submission appears consistent with Australian research of 214 alcohol industry submissions to government that found 'almost all submissions (91%) denied the effectiveness of evidence-based strategies; the most common denial practices were making unsubstantiated claims about (alleged) adverse effects of (evidence based) policies'. See Julia Stafford et al, 'Industry Actor Use of Research Evidence: Critical Analysis of Australian Alcohol Policy Submissions' (2020) *Journal of Studies on Alcohol and Drugs* 81(6): 710–8.

<sup>603</sup> Flyvbjerg (n 69), 37.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

narrative —a situation where the more significant the power, the less likelihood there is that the wielder of power's assertions will be rigorously scrutinised resulting in their accountability for the same.<sup>604</sup>

Finally, from the competing public interest perspective, safety was consistently raised in the connected industry-government narrative as a key desirable outcome. The narrative on safety was relatively hollow or selective, based on a narrow, alleged decline in the levels of non-domestic alcohol-related assaults. Missing from the government-industry narrative was the existence of a range of concerning non-criminal alcohol-harm indicators.<sup>605</sup> This selective reliance on only positive alcohol-harm crime statistics and the associated avoidance of the application of proven alcohol-harm minimisation statutory interventions further illustrates the depth of connected conduct and the manufactured reality generated by the apparent mutually beneficial government-industry relationship.

### 5.4 Question 3

*What, if any, are the main implications of the presence of capture in respect of who gains and who loses in the ongoing regulation of the retail supply of alcohol in NSW and by which mechanisms of power and, is this desirable, and if not, what reforms may remediate the situation on a sustained basis?*

Hindess provides essential insights into the concepts of power in the context of modern western political thought. This includes the work of Foucault and Lukes, whose contributions feature in public health-related academic articles addressing corporate influence and related power. The critical consideration of the manifestation of sovereign power, according to Hindess, is that of qualified consent.<sup>606</sup> This consideration is sometimes absent in scholarly reliance on the term 'undue industry influence'. Ultimate rule-making power is exercised by the government of the state, which is dependent upon the ongoing informed and rational consent or capacity of the people to provide it with legitimacy.

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<sup>604</sup> See also Reynolds (n 119).

<sup>605</sup> NSW Department of Health *Healthstats* (n 25).

<sup>606</sup> Hindess (n 146) 12–3.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

The notion of industry or regulatory ‘capture’ is preferred over the use of ‘undue influence’. Capture more viscerally implies the subordination of prime sovereign power by other interests that lack essential constitutive legitimacy and cannot be reasonably construed as operating in the public interest.

The evidence of this thesis demonstrates the extensive application of illegitimate power through government in regard to the regulation of the retail supply of alcohol since the commencement of the Act. This illegitimacy is facilitated by the deliberate conflation or blurring of the concept of the public interest with that of customer convenience. The public good has been subordinated by market forces of supply and demand that take minimal account of negative externalities and other recognised forms of market failure.

Chapter 4 provides examples where the NSW public was excluded from any effective input into significant amendments to alcohol laws favouring, especially, industry elites. The same amendments have also significantly and progressively constrained the community’s participation in the regulatory process, especially limiting their capacity to lodge objections against the approval of licensed premises and related conditions based on likely negative social impact.<sup>607</sup> The community has no direct involvement in the new industry disciplinary processes constituted within the IISS.

Mainly absent in the dominant narrative was the epidemiological evidence of the recognised harms, including violence and unintended injuries associated with extending trading hours of the supply of alcohol.<sup>608</sup> Nor was there any counter-balancing reference associated with the recognised increased risks of cancer<sup>609</sup> associated with the consumption levels of alcohol. Also

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<sup>607</sup> Ziller and Brown article 2.

<sup>608</sup> Contained within the NSW risk-based licensing scheme is a trading hours component. See Liquor & Gaming NSW <<https://www.liquorandgaming.nsw.gov.au/operating-a-business/liquor-licences/liquor-licence-fees/risk-based-loadings-and-exemptions>>. The IISS provides for discounting of these license loadings for sustained clean compliance records <<https://www.liquorandgaming.nsw.gov.au/resources/incentives-and-demerit-point-system>>. J Foster et al, *Anytime, anyplace, anywhere? Addressing physical availability of alcohol in Australia and the UK*. (2017). London and Canberra: Institute of Alcohol Studies and the Foundation for Alcohol Research and Education <<https://fare.org.au/wp-content/uploads/AVAILABILITY-REPORT-30-May-2017-FINAL.pdf>>.

<sup>609</sup> Australian Institute of Health and Welfare, and the Cancer Council WA (n 32). See also research relating to industry over-stating alleged cardio-health benefits of alcohol. Lewis Peake et al, ‘Analysis of the accuracy and completeness of cardiovascular health information on alcohol industry-funded websites’ (2021) *European Journal of Public Health* 1–8.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

missing were the social and other costs to the public of increasing policing, public health and transport costs, loss of residents' amenity and clean-up costs.

Article 4 evaluates the recent significant amendments to the NSW alcohol industry's statutory compliance and enforcement processes. These, theoretically, should provide a transparent bulwark against industry non-compliance and the occurrence of preventable alcohol-related incidents causing harm. Such industry compliance schemes are, more generally, a critical link in the regulatory chain. However, they are susceptible to capture, given their pivotal role in deterring and punishing non-compliant industry behaviour, especially where the risk to public health and safety is high. Evidence was provided in this article of industry capture where it appears that seriously conflicted elites were afforded effective authorship of some key components of the new compliance laws. These, in some instances, personally favoured the elites' commercial interests and reduced the risk of imposition of effective deterrence sanctions.

The effectiveness and independence of the regulatory process are essential in securing and sustaining industry compliance with evidence-based deterrent mechanisms and alcohol-harm minimisation and prevention interventions. Article 4 suggests overly complex, lenient and insufficiently resourced statutory industry compliance schemes can deliver suboptimal levels of industry compliance. These levels are more likely in NSW when the public interest object of effective industry compliance appears to be subordinated by the profit interests of the industry elite, including the owner of the most prominent and most violent licensed premises in NSW.<sup>610</sup>

From a regulatory theory perspective, this thesis raises a potential practical weakness in the influential theoretical *responsive* regulation<sup>611</sup> model. How do a politically and legally disenfranchised public and CSOs attain and sustain effective countervailing power against the combined might of the NSW Government, opposition parties and wealthy industry, which exerts disproportionate influence?

Introducing and enhancing the regulatory concepts of chill and leniency provides a mechanism to illustrate how increasing the complexity of legal compliance structures, and reduced compliance resources can reduce the risk of industry participants being successfully prosecuted for non-

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<sup>610</sup> The most violent venue in NSW is reportedly the Star Casino. It is not however, a 'licensed' premise as its operations are not prescribed within the NSW Liquor Act.

<sup>611</sup> Brown, article 1, 767–8.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

compliance with alcohol laws. These two new expanded concepts are valuable additions in preventing, detecting and addressing regulatory capture by the alcohol and other unhealthy industries.

This thesis argues that successive major alcohol supply law reforms significantly attenuate the relative sovereign power of the regulator over the regulatee to the latter's favour within a bifurcated industry. This relatively obscure process of manufactured regulatory chill can flourish behind a facade of alleged neutrality, 'balance of interests' and the positivistic assertion of the inherent independence of the law, all to the detriment of the public interest, the democratic process and the rule of law.

In summary, this thesis establishes the potency of the industry-government narrative and shared values in prioritising the commercial interests of the alcohol industry and the gains of likely indirect political donations and other forms of support for political actors over those of the public good and the integrity of the regulatory process.

### 5.5 Desirability and reforms

From the perspective of the overall public interest, the presence and apparent intensification of industry capture in pivotal areas of the regulation of the retail supply of alcohol in NSW is undesirable.

An underlying issue associated with the inconsistent and selective reliance on alcohol harm statistics as a source of power and legitimacy is that politicians and media may fall into the attribution trap identified by Weatherburn.<sup>612</sup> This trap involves blurring the difference between causation and coincidence when relating statistical and anecdotal data with policy outcomes. In essence, this joint tactic of government and industry creates a false sense of legitimacy of the application of sovereign power. It leads to sub-optimal outcomes of the effective regulation of the industry and resultant harm outcomes.

Arguably, the most significant long-term detrimental impact of capture is its corrosive properties on the foundations of our democratic process and the rule of law.

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<sup>612</sup> Don Weatherburn, 2011, *Uses and abuses of crime statistics*, Crime and Justice Bulletin, *Contemporary Issues in Crime and Justice*, No 153, November 2011. NSW Bureau of Crime Statistics and Research. <<https://www.bocsar.nsw.gov.au/Publications/CJB/cjb153.pdf>>.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

There are several possible systematic reforms to resolve the problem of industry capture in the regulation of the retail supply of alcohol in NSW. The suggested starting point within the local setting is the urgent reform of existing politico-industrial governance systems, including the expansion of a nationwide definition of corruption<sup>613</sup> to reflect contemporary unsustainable electoral and political donation practices.

Crucial governance<sup>614</sup> reforms to the political process in NSW, particularly as they pertain to the regulation of the supply of alcohol, must synchronise with global governance reforms, including a Framework Convention on Alcohol Controls (FCAC).<sup>615</sup> This could broadly reflect the existing tobacco industry equivalent that attempts to constrain industry's engagement in the law- and policy-setting harm-reduction process.

### 5.6 Original academic contributions

This thesis makes the following demonstrable original academic contributions:

1. Reliance on a legal phronetic methodology<sup>616</sup> for the explication of the regulation of the retail supply of alcohol laws in an individual jurisdiction through a regulatory capture lens blended with a public health perspective.
2. The synthesis and development of enhanced and contextualised regulatory concepts and methods of capture, leniency and chill for application to the regulation of the retail supply of alcohol and potentially other UCIs.
3. The development of research-informed benchmarks to better undertake and evaluate inter-jurisdictional comparisons of the presence or risk of regulatory capture of alcohol and other UCI laws.
4. The development of a new research process to better determine the effective authorship of an industry's compliance laws and highlight any deep-seated conflicts of interest requiring urgent redress.

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<sup>613</sup> To incorporate a broader definition of corruption suggested by Kaufmann (n 179) and consideration of the inclusion of the concept of regulatory capture advanced in this thesis.

<sup>614</sup> Jonathan H Marks, 'Beyond Disclosure: Developing Law and Policy to Tackle Corporate Influence' (2020) 46(2–3) *American Journal of Law & Medicine* 275–96.

<sup>615</sup> Room and Örnberg (n 222).

<sup>616</sup> Murphy and McGee (n 16) ch 3, with additional discussion in each article.



## 5.7 Conclusion

Jonathon Marks recognises, ‘corporate influence is the most pressing issue in public health’.<sup>617</sup>

This blended research of the regulatory capture of the retail supply of alcohol in NSW as an exemplar provides invaluable lessons for national and international alcohol trade oversight, UCI regulation and any jurisdictions where the concept of the public interest is under challenge from private commercial interests. Capture can be interpreted as symptomatic of a much deeper malaise, including the systematic failure of traditional governance and corruption safeguards.

The asymmetrical legal and extra-legal possession and application of power by industry elites has effectively enabled these key stakeholders to call the regulatory shots — to the net detriment of the public interest, the democratic process and the rule of law. This stems from the associated capacity of those possessing the most power to manufacture, legitimate and propagate their dominant version of reality and associated discourse, consistent with the findings of Flyvbjerg.<sup>618</sup>

The empirical research reflected within Chapter 4 provides corroborating evidence from multiple perspectives on the regulatory chain of the intensification of regulatory capture by influential industry stakeholders. This capture is achieved with the continuing acquiescence of both major NSW political parties. Capture manifests in various forms, including prioritising the objective of customer convenience over that of the public interest,<sup>619</sup> reducing the capacity and requirement to undertake rational social impact assessments of liquor licence-related applications,<sup>620</sup> delegating the majority of licence and related approvals to the relevant government department for quick, cheap and relatively easy approval<sup>621</sup> and effectively quarantining the elite owners and controllers of large licensed premises from the primary responsibility of compliance.<sup>622</sup>

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<sup>617</sup> Marks (n 614).

<sup>618</sup> Flyvbjerg (n 69) 32 ‘a privilege of power is the freedom to define reality’. Stafford’s et al research of the veracity of industry submissions to government (n 247) suggests that the value or currency of scientific verifiable evidence in the competitive political decision-making process, is being devalued.

<sup>619</sup> Brown, Article 1.

<sup>620</sup> Ziller and Brown, Article 2.

<sup>621</sup> The *Gaming and Liquor Administration Act* 2007 (NSW) s 2, requires related matters under the Act ‘be dealt with and decided in an informal and expeditious manner’.

<sup>622</sup> Brown articles 1 and 3, Brown and Anderson article 4.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

At the same time, the ‘independent’ quasi-legal tribunal has been diminished, and the ability of surrounding residents and other occupiers to seek independent review of an ILGA decision has been severely curtailed.

The empirical research in Chapter 4 evidences the exercise of illegitimate power by the alcohol industry elite. This power includes the capacity to shape and author critical components of new legal compliance schemes such as the IISS in ways favourable to their commercial interests. However, their power to achieve such demonstrable results is incompatible with the public-interest goals of achieving improvements in public health and safety, governance controls and the rule of law. The elites’ apparent dominant influence in designing the new IISS has resulted in regulatory processes inconsistent with regulatory research findings that identify the most effective regulatory interventions to ensure a culture of long-term industry compliance.

The thesis provides key recommendations in preventing capture, commencing with the national adoption of a better definition of corruption to embrace the variety of contemporary versions identified by the High Court in *McCloy v NSW* (2015).<sup>623</sup> This includes the readily demonstrable forms of cultural and corrosive<sup>624</sup> capture and apparent quid pro quo or clientele corruption.<sup>625</sup> Such law reforms may assist in reducing corrupt practices by eliminating the apparent inter-jurisdictional laundering of alcohol industry political donations formally banned in NSW. A national contemporary definition of corruption may also better reflect the nationally organised character of the alcohol and gambling lobby. Statutory corruption reforms are, however, dependent upon political support.

Restoring the genuine independence, impartiality and sufficient levels of funding and resources<sup>626</sup> of the ILGA or, preferably, replacing within the Department of Health may assist. However, this portfolio occupies just one seat in the NSW Government’s Cabinet and reform needs to go further. The systematic undue industry influence exemplified in the critical case studies in Chapter 4

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<sup>623</sup> *McCloy v NSW* (2015) 257 CLR 178 identification of quid pro quo and clientele forms of corruption. See ch 2, 47–9.

<sup>624</sup> Carpenter et al (n 187).

<sup>625</sup> n 623.

<sup>626</sup> Brown and Anderson, article 4 (n 103) Crown Casino Inquiry report by Bergin J ‘found a history of serious systemic weaknesses in ILGA. This raises a concern of systematic underfunding and resourcing by successive NSW governments to effectively emasculate ILGA’s regulatory capacity. See also Brown and Anderson article 4 (n 102) where the NSW government was unable to provide requested information under the *Government Information (Public Access) Act 2009* of the number of actual compliance liquor licensing compliance officers for each of the preceding five years.

## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

appears to justify a more comprehensive reform of both the operations of the alcohol regulatory system in NSW and the underlying backbone of safeguards for governmental integrity and democratic governance.<sup>627</sup> The first significant alcohol law reforms after the *Liquor Act 2007* (NSW) had commenced, involving the creation of a unique second layer of industry compliance and enforcement schemes, was a direct political response to worsening levels of non-domestic alcohol-related violence and other harms associated with concentrations of late-trading hotels in Sydney and Newcastle CBDs.<sup>628</sup> Thirteen years after the current package of NSW retail alcohol laws took effect, this thesis establishes that the present and foreseeable dominant forces propelling the regulation of the retail supply of alcohol in NSW are the private commercial interests of the industry elite and the continued connected conduct between elected decision-makers and opposition party aspirants.

Each Australian and international jurisdiction usually has its own unique set of alcohol laws derived in part from a diverse range of historical, social, political and cultural backgrounds. In the first instance, such divergences may inhibit intra-jurisdictional or inter-jurisdictional statutory comparative analysis of multiple unhealthy commodities and environmentally destructive industries. A primary purpose of such critical analysis is to unmask the real extent to which alcohol and other industries may have effectively captured the legal, regulatory process and related environment, including industry compliance and enforcement, and the mechanisms used to achieve this capture. The development, integration and application of new transdisciplinary regulatory tools in this thesis provides an essential new method to undertake this comparative research. The asymmetrical concentration and influence of illegitimate power, enabling capture from the local to global levels, is crucial in the ultimate effectiveness of any proposed public health-related intervention to prevent or reduce alcohol and, possibly, other unhealthy product harms. The regulatory process, with its related literature and techniques that extend beyond the label of 'licensing', is an essential political, legal and commercial determinant of health.

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<sup>627</sup> Brown Article 4.

<sup>628</sup> Ibid. For additional background and impact of the evidence-based package of alcohol harm reduction liquor licensing conditions introduced in Newcastle in 2008, see Tony Brown, 'Newcastle, Australia: Tale of Two Cities' in *Preventing Alcohol-Related Problems: Evidence and Community-Based Initiatives* Norman Giesbrecht and Linda M Bosma (eds) (American Public Health Association, 2017) ch 9.

## APPENDICES

### Appendix 1 Co-author Certificate for Article 2

DISCIPLINE OF GEOGRAPHY AND PLANNING  
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**RE. RATIONAL SOCIAL IMPACT ASSESSMENT OF ALCOHOL OUTLETS: SLIP SLIDING AWAY (2019)  
26/4 JOURNAL OF LAW AND MEDICINE 786–799**

**AUTHORS:** Alison Ziller and Tony Brown

I hereby certify that Tony Brown, as co-author of the above publication, made a significant overall academic contribution. This included:

- Conceptualisation of the research gap demonstrated in the paper
- Contextualising the research problem in alcohol harm and alcohol regulatory matters
- Contribution of legal expertise in a paper which combined social impact analysis with regulatory review
- Co-writing, revision of manuscript and empirical data.

This paper was a collaborative joint research project where sign off was reached through extensive discussion and consensus.



Alison Ziller PhD  
Lecturer in Social Impact Assessment  
Discipline of Geography and Planning  
Macquarie School of Social Sciences

6 September 2021



Professor Tania Sourdin  
Dean and Head of Newcastle Law School  
University of Newcastle

6 September 2021

Appendix 2 Co-author Certificate for Article 4

**Brown Tony and John Anderson, 'Securing Industry Compliance: Rewriting the Alcohol Rule Book'. Submitted *Griffith University Law Review*.**

**AUTHORS:** Tony Brown and John Anderson

I certify below that Tony Brown is the lead author in the above paper submitted for publication. As such, he provided the intellectual inspiration and primary substantial research and writing contribution. This contribution included the conceptualisation of the research problem, synthesis of the empirical research results with regulatory theory, the explication of the law reforms from both a public health and regulatory perspective, enhancement of regulatory capture theory to incorporate the concepts of regulatory chill and leniency, the literature review and final revisions to the manuscript.

My contribution as co-author was providing guidance mainly as a sounding board and brainstorming ideas, working on the structure of the paper and assisting with the synthesis. I carefully reviewed all content, making suggestions for changes, adding some additional content and re-shaping parts of the paper. Overall, my contribution was limited but assisted in the final consensus as to the content and structure of the paper.



Professor John Anderson

Co-author  
30 August 2021



Professor Tania Sourdin  
Dean and Head of

Newcastle Law School  
6 September 2021.

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## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

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## THE REGULATION OF THE SUPPLY OF ALCOHOL IN NEW SOUTH WALES: A CASE OF REGULATORY CAPTURE?

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