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Research paper: Council Planning Laws and Licensed Venues

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The Victorian Parliamentary Drugs and Crime Prevention Committee is currently undertaking an Inquiry into Strategies to Reduce Crime Against the Person. The Inquiry has been asked to focus on a number of areas or ideas, including:

strategies to address these crimes and reduce their incidence and increase the apprehension and conviction of offenders.

Could one strategy to reduce the incidence of alcohol-related crimes against the person be to provide local councils with greater control over the growth of licensed venues (in number and in size) in their municipality? The idea behind this is the increasingly powerful evidence that there is a positive relationship between the concentration of licensed venues, in particular certain types of licensed venues, and the incidence of alcohol-related crimes. In other words the idea being posed is that, given the opportunity, municipal councils are both in a better position (being more proximate to the local area and aware of local realities) and more likely (being more interested in preserving social relationships and safety in their locality) to intervene and restrict sensibly the number, type and density of licensed venues in the municipality.

This question has been posed in the context of a significant increase in the number of licensed venues in Victoria and in Melbourne CBD and surrounds over the last two decades, coinciding with the growing perception that there has been a concurrent increase in the incidence of alcohol-related crimes against the person in these areas.

This background paper begins in Part I by setting out some of the evidence of the link between alcohol use, licensed venues and crimes against the person. In Part II it sets out the structure of urban planning regulation in Victoria today. Part III it critically discusses how this structure has been relevantly modified in recent years to provide greater powers for councils to control the proliferation of licensed venues.

Finally, part IV provides a conceptual overview of the changing face of licensing in Victoria over the last 4-5 decades with the simple aim of suggesting that the attitude towards liquor licensing has played a significant role in the proliferation of licensed venues and that a return to a more regulated licensing market, in addition to increased local council powers, may be part of the solution to the problem of alcohol-fuelled violence.

Part I: A background to the link between alcohol use and crimes against the person

A. Some telling statistics

In considering crimes against the person, it has become evident over recent years that alcohol-related crimes against the person are a real concern in the Melbourne CBD and surrounds. This has become a popular topic for the media and also a community concern. In response to this (and alcohol-related problems in general), in 2007 the Victorian Government established the Ministerial Taskforce on Alcohol and Public Safety to lead the development of what was to become *Victoria's Alcohol Action Plan 2008-2013: Restoring the balance* (**Victoria's Alcohol Action Plan**).

According to Victoria's Alcohol Action Plan, each year in Victoria alcohol is associated with:

- 24,717 inpatient hospitalisations, of which 2,045 relate to assault;
- more than 8,000 emergency department presentations;
- more than 4,700 ambulance attendances in metropolitan Melbourne; and
- more than 1,500 assaults in licensed premises.[1]

It further notes that:

- between 41-70 per cent of violent crimes in Australia are estimated to be committed under the influence of alcohol;[2]
- of the 24,157 Victorian offenders processed for assault during 2005-2006, twenty-six per cent of the assaults occurred 'during high alcohol hours (Friday or Saturday night' and a further eight percent during medium alcohol hours (Sunday through Thursday); and
- in the twelve months prior to being surveyed, twenty-two per cent of surveyed Victorians reported being verbally abused, four percent physically abused and thirteen percent made fearful by someone affected by alcohol.[3]

[1] Victorian Government, *Victoria's Alcohol Action Plan 2008-2013: Restoring the balance* (2008) 6.
[2] Ibid, 11.
[3] Ibid.

Also reported in Victoria's Alcohol Action Plan, the *Alcohol and licensed premises: Best practice in policing monograph* found that it is generally only 'a small proportion of licensed premises, in particular late-night trading venues' that are associated with the majority of alcohol-related incidence and assaults. This was found to be 'particularly the case where licensed venues are in close proximity to one another'.[4] This study reported that alcohol is involved in:

- 62 per cent of all police attendances;
- 73 per cent of all street offences; and
- 90 per cent of late-night calls (10pm-2am) across Australia.

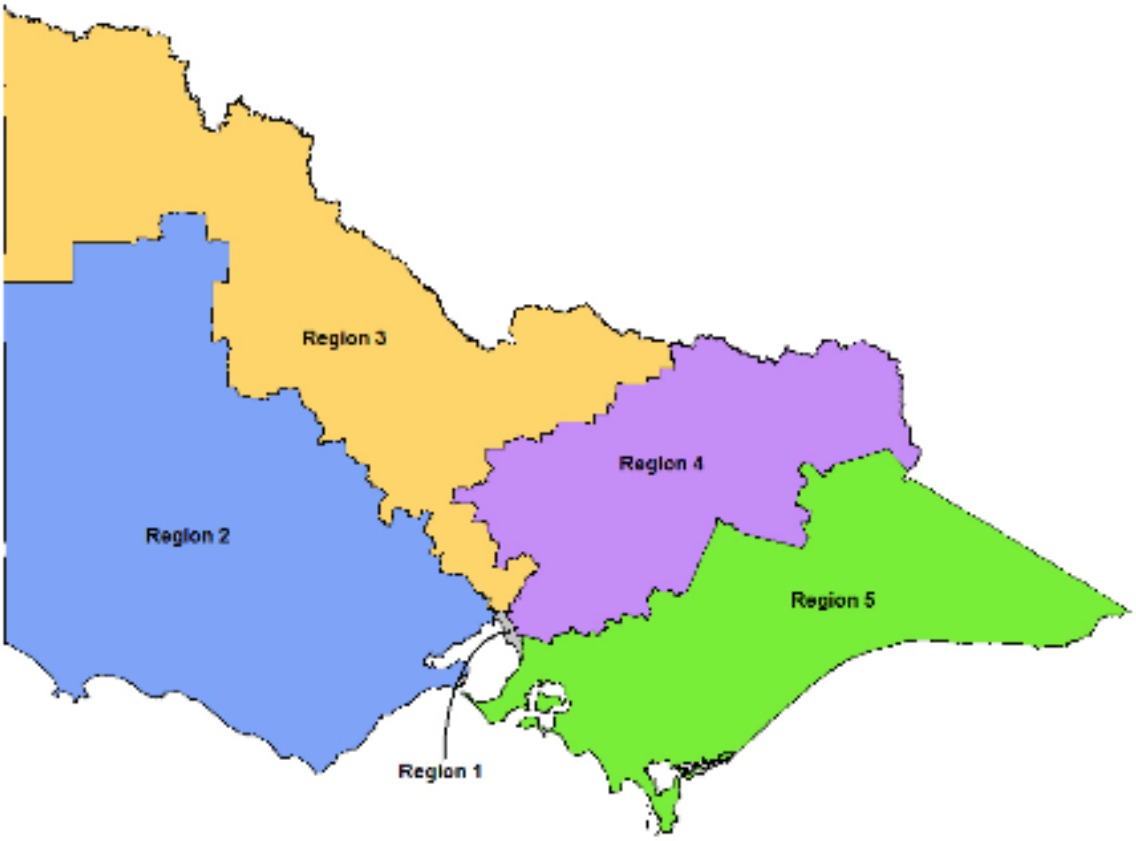
Considering assault generally (not taking into account the location of the assault or whether it was associated with alcohol), data from *Victoria Police Crime Statistics 2008/2009* as extracted below shows the rate of increase of reported assault in 2007-2008 and 2008-2009 in each of the five regions in Victoria (illustrated in Table 1 below). Notably, Region 1, containing Melbourne CBD and surrounds, experienced the greatest rate per 100,000 population in both years and the greatest percentage increase. Equivalent data for previous years has not been considered for the purposes of this research paper.

Table 1: Assault and its rate of increase in Victoria 2007/08 - 2008/09

Region	No 2007/2008	No 2008/2009	% Change from 2007/2008	Rate per 100,000 Population 2007/2008	Rate per 100,000 Population 2008/2009	% Change from 2007/2008
Region 1	5,715	6,332	10.8%	797.3	867.7	8.8%
Region 2	6,932	7,345	6.0%	611.7	632.7	3.4%
Region 3	6,550	7,009	7.0%	615.6	647.5	5.2%
Region 4	4,995	5.138	3.7%	363.4	373.6	2.8%
Region 5	7.192	7,842	9.0%	762.2	812.5	6.6%

Source: *Victoria Police Crime Statistics 2008/2009,* p 8.

[4] Ibid, 33.



Focussing in on assault offences at licensed premises and on a street/lane/footpath (also reported in *Victoria Police Crime Statistics 2008/2009*) during 2008-2009:

- 1,601 assault offences occurred at licensed premises (0.9% higher than the previous period); and
- 9,646 assaults occurred on a street/lane/footpath (4.5% higher than the previous period) (see Table 2 below).

Together, these accounted for 28.7 per cent of all assaults in the period.

Table 2: Assault offences by location 2008/09 compared with 2007/08				
		Street/Lane/Footpath	**Licensed Premises**	**Open Space**
	Total	**Total**	**Total**	**Total**
2008/2009	33,668	9,646	1,601	743
Percentage increase from 2007/2008 - 2008/2009	3.1%	4.5%	0.9%	-25.0%

Source: *Victoria Police Crime Statistics 2008/2009,* pp 14-15.

Excluded from the above data are other forms of crimes against the person, namely, robbery, sex (non-rape), rape, homicide and abduction/kidnap.

B. Victoria's Alcohol Action Plan and State Government plans to improve the situation

Victoria's Alcohol Action Plan sets out a range of actions that the Government sees as necessary in order to 'restore the balance'. In order to 'restore the balance for our community' ('community' being one of the areas in which the report sees a need to 'restore the balance'), actions set out include:

- enhancing enforcement of the *Liquor Control Reform Act 1998*;
- reviewing liquor licensing fees;
- reviewing obligations of managers and employees of licensed premises;
- considering introducing underage operatives;
- developing an assault reduction strategy;
- introducing late-hour entry restrictions;
- freezing the issue of late-night liquor licences;
- reviewing patron numbers in high-risk venues; and
- amending the Victorian Planning Provisions.

Some of these actions have already been undertaken. For example, the issue of late-night (post-1am) liquor licenses has been frozen since 2008 and continues (see discussion of liquor licensing below), and a risk-based fee structure of licensing was

controversially introduced in January 2010.[5] Particularly pertinent to this background paper has been the amendment in April 2008 of the Victorian Planning Provisions to include a new basis of legitimate consideration for councils considering permit applications for licensed premises. This leads naturally into Part II: how is planning in Victoria regulated and, more specifically, how is planning in relation to licensed premises regulated?

Part II: An introduction to the regulation of planning in Victoria today

A general overview of the Victorian Planning Policies

Urban planning in Victoria is regulated under the Planning and Environment Act 1987. When introduced, the Act did not much change the basic structure of planning in Victoria in comparison to what existed under the previous *Town and Country Planning Act 1961* (Vic). However, changes in the years following its introduction, including in particular the consolidation and restructure of local government (consolidation reduced the total number of municipalities from 210 to 78) and the introduction of the Victorian Planning Provisions in 1996 through the *Planning and Environment (Planning Schemes) Act 1996* (**P&E Act**) have resulted in more significant changes to the system. It is this modified system that applies today.

Under the P&E Act, the principle mechanism for controlling land use and development are pieces of subordinate legislation known as local planning schemes. Local planning schemes set out both specific provisions that regulate how different parcels of land may be dealt with, as well as more general policies and objectives aimed at guiding the application of the specific provisions.

The structure of planning schemes

Development in each municipality in Victoria is regulated by a municipal planning scheme. These schemes contain a number of layers, namely:

- the **State Planning Policy Framework** (**SPPF**) which is determined by the State;
- a **Local Planning Policy Framework** (**LPPF**) which is determined by the local council but ultimately requires approval by the Minister, it includes the **Municipal Strategic Statement**;
- **zones**;
- **overlays;**
- **particular provisions**;
- **general provisions**; and

[5] See, eg, http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/alcohol/about+liquor+licensing/reviews+and+consultations/justice+-+alcohol+-+risk-based+fee+structure+as+of+1+january+2010+%28pdf%29.

- **incorporated documents** (see diagram page 23).

Although local councils develop the local planning scheme for their municipality, the content of local schemes is quite restricted: local councils build local content by selecting from a pre-determined set of options provided by the State in the Victorian Planning Provisions (VPPs). In relation to zones and overlaps, the local council selects which zones should apply to which parcels of land and whether or not any of the prescribed overlays should also be applied to any parcels of land. The council can amend these to a limited degree through the pro forma schedules attached to zones and overlays. Similarly, councils can only amend the particular and general provisions by amending the attached pro forma schedules. For example, for particular and general provisions (which deal with, as the names suggest, either particular or quite general land use issues, such as easements restrictions and reserves (particular provisions), and decision guidelines (general provisions)) the pro-forma provisions might allow councils to exempt land zoned in a particular way from a particular provision or to exempt certain types of permits on land zoned in a particular way. The particular provision dealing with licensed premises, as is discussed further below, is one such example.

So, the VPPs are very much a menu for local councils to choose from when developing a local planning scheme. A local council has 34 different zones and 22 overlays to select from when determining what uses various parcels of land can or cannot be put to and determining restrictions relating to local environmental conditions. To the extent that a local council wishes to modify this content to suit its locality-specific objectives, this is restricted by the *types* of amendments that are permitted for in the schedules to each zone, overlay or provision as set out in the VPPs.

A very brief description of the content of the various layers of planning schemes is set out below.

State Planning Policy Framework (**SPPF**)

The SPPF is a state wide set of provisions that sets out general principles and policies for land use and development. It must be taken into account and given effect to when local authorities make planning decisions.[6]

[6] See, eg, *Victoria's Planning Framework for Land Use and Development*, 25.

Local Planning Policy Framework (**LPPF**)

As set out in section 7 of the Act, a planning scheme must include State standard provisions and local provisions. 'State standard provisions' are those provisions that are selected by the local municipality from the Victorian Planning Provisions. 'Local provisions' include the Municipal Strategic Statement (**MSS**) and local planning policies which together make up the LPPF.

The MSS is required under section 12A of the 1987 Act to set out planning, land use and development objectives; a general explanation of the relationship between these objectives and strategies and the controls on use and development; and anything else the Minister otherwise prescribes. It should explain its strategies for achieving these objectives, provides a framework for local planning decisions and guidance as to how local schemes will be given effect.[7]

Local Planning Policies (**LPP**) are policy statements of 'intent or expectation' which 'states what the responsible authority will do in specified circumstances or the responsible authority's expectation of what would happen... [giving] the responsible authority an opportunity to state its view of a planning issue and its intentions for an area.' Local Planning Policies are important because they can help the community understand how permit applications under the Act will be determined. Importantly, although LPPs enable local authorities to 'personalise' the application of the relatively stock-standard VPPs, these policies must not override or conflict with elements of the VPP.[8] Indeed if they do, they are unlikely to be approved for inclusion by the Minister, as required.

Zones and overlays

Planning schemes contain zones which determine the types of uses different areas of land may be put to. There are six categories of zones which in turn include numerous different zone types, namely:

- residential (6 residential type zones);
- industrial (3 residential type zones);
- business (5 business type zones);
- rural (8 rural type zones);
- public land (4 public land zones); and
- special purpose (8 special purpose zones).

The zones set out land uses, subdivision, construction of new buildings, and other land changes as well as when planning permits are required and what matters the local authority must consider when determining planning applications.

[7] Planning and Environment Act 1987 (Vic) s 12A; see also VPP Cl 20.01 'Operation of the Municipal Strategic Statement'; see also Eccles and Bryant, 52-3.
[8] See, eg, Ibid, 26. VPP Cl 20.02 'Operation of Local Planning Policies'

Zones set out uses as 'section 1 uses', 'section 2 uses' and 'section 3 uses'. Section 1 uses do not require a permit; section 2 uses require a permit; and section 3 uses are prohibited. In relation to section 2 uses, the responsible authority is required to determine whether the proposed permit will produce acceptable outcomes with reference to the SPPF, the LPPF, the purpose and decision guidelines of the zone and any other decision guidelines that are sent out in clause 65 (the general provision that sets out the manner of decision making) under schemes.

Whereas all parcels of land will be 'zoned', not all parcels of land are covered by an overlay. Overlays apply to land with 'special features' such as heritage buildings, significant environmental areas or areas facing particular environmental risks such as flooding; they are categorised as relating to environment and landscape, heritage and built form, land management and other.

Having set out some of the basics of the VPPs and local planning schemes in Victoria, we are now in a better position to consider the relationship between the VPPs, local planning schemes and the growth of licensed venues.

Part III: Planning schemes and licensed venues

Licensing of venues in Victoria is governed under the *Liquor Control Reform Act 1998* (Vic) (**LCR Act**). The regulating body is Responsible Alcohol Victoria which sits within the Victorian Department of Justice.

In order to supply liquor anywhere in Victoria a person or organisation must apply for a license from Responsible Alcohol Victoria (**RAV**). A range of different liquor licenses are available under the LCR Act. The most relevant to us are the:

- on-premises license, which authorises the sale of liquor for consumption on-premises;
- general licence, which allows for the supply of liquor for consumption both on and off premises; and
- late night varieties of both of these types of licenses (which allow for trading beyond 1am, on application).

It is also arguable that restaurant and cafe licenses are also of relevance to this discussion paper: there are many who have voiced concerns in relation to the morphing of restaurants into bars later into the evening with a significant proportion of 'vertical drinking' and drinking-oriented clients. As such, it may well be that venues with cafe and restaurant licenses should also be considered when assessing the relationship between licensed venues and the incidence of crimes against the person.

In many ways then, the LCR Act and Responsible Alcohol Victoria rather than local councils appear to be the key sources of control over the proliferation of licensed venues. However, local councils *are*, under both the LCR Act and the P&E Act, given specific and not insignificant powers to play some role in this process:

- under the LCR Act local councils are given a specific power to object to licensing applications made to Responsible Alcohol Victoria;[9] and
- under the P&E Act local councils are given the opportunity to 'nip' licensing applications 'in the bud' by providing a set of rules for determining whether a permit for a licensed venue will be granted: if a liquor licence would contradict permit decisions under local planning provisions, Responsible Alcohol Victoria is not entitled to grant a licence.[10]

The powers under the P&E Act most relevant to this discussion paper are discussed in detail; the powers under the LCR Act are only briefly canvassed.

A. The power of a local council to object to a liquor licence under the LCR Act

Under section 40 of the LCR Act:

> *(1) The Council of the municipal district in which premises are situated may object to*
> *(a) the grant or variation of a licence in respect of those premises; or*
> *(b) the relocation of a licence to those premises*
> *on the ground that the grant, variation or relocation would detract from or be detrimental to the amenity of the area in which the premises are situated.*
>
> *(1A) In addition to [the above]... the Council ... may object to*
> *(a) the grant of a packaged liquor licence or late night (packaged liquor) licence in respect of those premises; or*
> *(b) the relocation of a packaged liquor licence or late night (packaged liquor) licence to those premises*
> *on the ground that the grant, variation or relocation would be conducive to or encourage the misuse or abuse of alcohol.*

The application of these provisions have not been included, however, it is worth noting that in a discussion with Rudie Werner, planning employee at Darebin City Council, Mr Werner discussed Darebin City Council's failure in contesting a packaged liquor licence grant in its municipality. The Council's objection was made on the basis of significant alcohol abuse issues identified in the municipality. VCAT upheld the Director of Liquor Licensing's decision to grant the licence. As noted by

[9] Liquor Control Reform Act 1998 (Vic) s 40.
[10] VPP cl 52.27.

Mr Werner, this decision highlights that these objection powers may not be powerful enough, or the guidance for their consideration under the LCR Act may not be guided enough towards prevention of the negative social impacts of alcohol use, in order to make the kinds of impacts that many may desire in terms of reducing alcohol-fuelled social problems, including crimes against the person.

As such, in addition to considering the relationship between council powers, licensed venues and crimes against the person specifically under the P&E Act, it may also be worthwhile to consider this relationship in relation to the LCR Act, in particular the objection powers under section 40 of that Act. After all, if this power to object were as effective as desirable, perhaps we would not be trying to answer the question of whether local councils should have, under the P&E Act, greater ability to control the proliferation of licensed venues in their municipality.

B. A local council's power to grant or refuse planning permits for licensed premises

Before the Director of Liquor Licensing will grant or vary a liquor licence it must be satisfied that adequate planning permission has been obtained. The extent to which planning permission is concerned with licensing issues is limited but nevertheless present and, particularly as a result of relatively recent amendments, is not insignificant.

Clause 52.57 of the VPPs is a **particular provision** entitled 'licensed premises'. Its purpose is

> *To ensure that licensed premise are situated in appropriate locations.*
> *To ensure that the impact of the licensed premises on the amenity of the surrounding area is considered.*

The clause sets out:

- when a permit is required to use land to sell or consume liquor (e.g. a permit is required when a licence is required under the LCR Act);
- exceptions to the above (e.g. despite the above, a permit is *not* required if a schedule to clause 52.27 in a given planning scheme specifies that a permit is not required for a particular type of licensed premises or in a particular part of the municipality); and
- the decision guidelines that local councils are required to follow in determining whether to grant the required permit for licensed premises (e.g. responsible authorities must look to the SPPF and the LPPF in making this decision).[11]

[11] Note: throughout this paper the decision making body in relation to permit applications is referred to as the local council. Technically, under the Act, the bodies with this power are called the *responsible authorities.* Whilst responsible authorities are generally local councils, sometimes they are not. For

As discussed earlier, VPPs can include pro forma schedules which councils can use to personalise the VPPs. The schedule to cl 52.27 allows for councils to :

- list specific parcels of land for which a permit is *not* required under the clause in relation to certain types of licences (e.g. in Melbourne City Council a permit is not required for any type of licence under the LCR Act in relation to land within the Capital City Zone or land within the Docklands Zone); and
- list specific parcels of land for which a permit may not be granted under the clause in relation to certain types of licences.

As noted earlier, Victoria's Action Plan stated that as a part of its recommendations to reduce the negative impacts of alcohol in Victoria, the VPPs had been amended. Specifically, on 7 April 2008 new powers under clause 52.27 were gazetted (Amendment C47). The amendment added an additional purpose and decision guideline to VPP cl 52.27. The new purpose is the second of the two purposes listed above (*'To ensure that the impact of the licensed premises on the amenity of the surrounding area is considered').* The new decision guideline required that before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

'the cumulative impact of any existing and the proposed liquor licence, the hours of operation and number of patrons, on the amenity of the area' (newly inserted guideline).

The purpose, as described in Victoria's Action Plan, was to ensure that the cumulative impact of both existing and proposed licensed premises is a valid amenity consideration for planning permit applications; and clarify that councils can consider amenity factors associated with licensed premises including hours of operation and patron numbers'.[12]

The amendment was a result of recommendations made by the Inner City Entertainment Precincts Taskforce (ICEPT). The ICEPT was a taskforce created with the view to developing 'a best-practice model for effectively managing inner metropolitan entertainment precincts to address safety, security and public amenity issues'.[13] The intention of the amendment appears to have been to make it clear that, in light of growing evidence of the clear links between alcohol-related problems such as street violence and density and type of licensed venues, it should be legitimate for local councils to consider the 'cumulative impact' of licensed venues in a municipal area when determining whether or not to grant a permit for a licensed

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example, if land in question falls outside a municipal district, the Minister is the default authority. Also, in the Melbourne Planning Scheme some areas are regulated by the Minister, for example the Melbourne Casino Area: Eccles and Bryant, *Statutory Planning in Victoria* (2006, 3rd edition), 24-25.

[12] Victoria's Alcohol Action Plan, p 35.

[13] Victoria's Alcohol Action Plan, p 35

venue. In other words, the amendment was designed to provide local councils with greater control over the proliferation of licensed venues.

What does or will clause 52.27 really do?

The amendment to clause 52.27 appears to be an encouraging move. It suggests that, whether or not local councils lost some of their powers to regulate the proliferation of licensed venues as a result of the 1996 reforms, in recent times there has been a recognition that local councils have an important role to play in ensuring that the number and type of licensed venues in a municipality does not contribute to problems such as alcohol-fuelled crimes against the person.

However, is clause 52.27 all it might be cracked up to be? Commentary and experience today suggests not, and a reflection on the initial ICEPT report '*A good night for all*' suggests that there are more issues to be considered and amendments to be made from the perspective of reducing alcohol-related problems through amendments to planning regulation in Victoria.[14]

Swancom Pty Ltd T/as Corner Hotel v Yarra City Council & Ors [2009] VCAT 923

Swancom Pty Ltd v Yarra City Council ('Swancom') is the first (and to date only) VCAT decision that considers the impact and application of amended cl 52.27. It offers a useful insight into not only how cl 52.27 is likely to be applied (and therefore insight as to whether local councils are likely to enjoy meaningful control over the proliferation of licensed venues) but also into some of the problems that can already be identified with the operation of cl 52.27.

The case involved an application by the Corner Hotel (located on Swan Street, Richmond) to, among other things, amend its existing planning permit. The Corner Hotel wished to extend its trading hours in its upstairs bar from 11:30pm to 3am (its downstairs areas were already licensed to 3am) and to increase its patron numbers from 750 to 1300.

The Corner Hotel was located in a Business 1 Zone. In this type of zone a hotel is a 'Section 2 use' and therefore requires a permit (in addition to a liquor licence from RAV). The schedule to cl 52.27 of the Yarra Planning Scheme is not utilised and so the permit conditions apply to all types of licensed premises in the whole of the municipality (this compares, for example, to Melbourne City Council as noted above). A substantial part of the decision of the Tribunal was dedicated to considering how cl 52.27 should be interpreted and how it should be determined whether or not a licence application may be rejected on the basis of 'cumulative impact'.

[14] ICEPT, *" 'A good night for all' Options for improving safety and amenity in inner city entertainment precincts'* (2005).

Two brief but important points to make are that the decision determined that cl 52.27 went to both new licensing/permit applications as well as amendments to these. Further, the decision confirmed that cl 52.27 goes not only to the question of operating hours but also to patron numbers (application to the later aspect was challenged in the course of submissions).

In its decision to reject to the Corner Hotel's permit application and in its submissions to VCAT, the Council submitted that the Corner Hotel's proposal would lead to unreasonable adverse impacts on the amenity of the surrounding area by adding to already considerable problems being experienced by residents - including in particular noise, anti-social behaviour, vandalism, litter, violence or perceptions of violence, and car parking deficiencies

In the course of coming to its decision, the Tribunal determined a set of considerations to be taken into account when undertaking a cumulative impact assessment. The full range of these considerations are set out in the full decision. In summary and abridged form, the Tribunal determined that the following questions should be considered:

- what is the relevant area and, in light of proposed and existing patterns of settlement and development, what/how much of the surrounds should fall within the amenity impact assessment;

- what is the density of licensed premises in the determined area? Although the Tribunal was careful to note that a finding of technical 'saturation' alone would not necessarily rule out any additional licensed premises approvals, it was important and informing. Specifically, the Tribunal determined that an assessment should ask:
  - are there more than 22 licensed venues per 10,000 head of population; and
  - are there more than 10 licensed venues within 500 metres of each other;
  - the Tribunal also noted that additional or alternative benchmarks may be developed later;

- what is the mix and type of existing licensing premises in the area? For example:
  - what are the trading hours of existing venues and do closing hours coincide;
  - what are current patron numbers in the area - by venue and in total;
  - are venues typically larger or smaller;
  - is queueing common; and
  - do venues offer drinks promotions;

- what is the existing level of amenity? this question involved asking questions like:
  - how is the area zoned (i.e. what does the zoning imply about intended uses and amenity);
  - are there any uses that are specifically encouraged or discouraged;
  - are there any 'sensitive uses' (such as residential) nearby;
  - in light of the above, what is the reasonable expectation for amenity in the area;
  - is there cogent evidence of the particular issues of concern, such as antisocial behaviour;
  - is there cogent evidence that these issues of concern are linked with or attributable to movement of patrons from or between licensed premises; and
  - what are the crime statistics in the area.

The decision highlighted as the three key considerations density, mix and type of venues already present and current levels of amenity. The Tribunal found that if a permit application triggers these concerns to a significant degree then an application deserves detailed assessment of the types of specific questions set out above.[15]

Although the above clarifies somewhat the determination of 'cumulative impact', the determination nevertheless revolves around the question of impacts to 'amenity', a term which is not defined. In fact, although invited to define 'amenity', the Tribunal declined instead stating that:

> *'amenity is an important but nebulous concept, the assessment of which will depend on a particular location and its surroundings, and the facts and circumstances of a particular matter. Amenity is not in our view a term that can or should be defined or codified for planning purposes'*[16]

This doesn't seem to be terribly helpful. What is more helpful is the evidence that the Tribunal used to find in this case that there was 'clear evidence' of regular and serious adverse amenity impacts sustained by local residents and business occupiers over a long period by patrons attending licensed premises in the Swan Street precinct'. The identified relevant amenity impacts included:

- noise from within venues disturbing people in the relevant area;
- noise created by people moving between venues;
- urination, defecation and vomiting in public places by patrons;
- litter and waste;
- trespass;
- property damage; and

[15] Swancom [73].
[16] Swancom [74], [78].

- violence or perceived threats to safety.[17]

It was also noted that evidence indicated that these problems had increased in the preceding 5 years.

Evidence given by police officers pointed to a clear connection between violence, public order offences and property damage in the area and provided statistics showing an increase in assaults (among other things) relating to licensed premises in the municipality. They suggested that the main problems related to people *outside* of licensed premises and/or moving between licensed premises and that most problems occurred when people were leaving or migrating between 10pm-2am.[18]

Ultimately, the Tribunal was satisfied that the combination of late night trading and the high number of licensed venues and patron numbers in the Swan Street precinct was already leading to adverse and unacceptable impacts. The Tribunal did not link its decision to the management of the Corner Hotel itself, finding that it was well managed both internally and in the immediate vicinity. Rather, the Tribunal drew the connection between licensed venues in general, the behaviour of patrons of these venues generally, and the already poor situation in relation to amenity. As such, the Tribunal upheld the council's decision to reject the Corner Hotel's application to increase its trading hours and patron numbers.

Worth noting is that there were residential areas in the relevant area which obviously impacted the Tribunal's determination of the reasonable expectations of amenity for the area. An interesting question that this leaves unanswered is, in less residentially-focussed areas (say, the Melbourne CBD), would the rest of the factors influencing the Swancom decision have been enough to lead the Tribunal to nevertheless find that the permit application would have had an unacceptably adverse effect on the amenity of the area?

<u>General criticism - a lack of guidance</u>

It is all very well to include the capacity for local councils to consider 'cumulative impact' and 'amenity' in permit decisions in relation to licensed venues, but without further clarification one might ask: are these meaningful powers?[19]

[17] Swancom [80].
[18] Swancom [85]
[19] See, also, eg, comment in National Local Government Drug and Alcohol Advisory Committee (NLGDAAC), Submission to Ministerial Council on Drug Strategy (MCDS) for consideration at the National Alcohol Forum, Tuesday 15 July 2008, Canberra: *Local Government Recommendations on Liquor Licensing: Appendix 2 - Evidence Case - Local government action on alcohol: using planning opportunities to reduce alcohol-related harm.*

We have seen above that VCAT managed to get around this lack of guidance to some degree and come to a decision under cl 52.27 by using a wide range of evidence provided to it (including importantly the findings of the ICEPT report) in order to determine a range of reasonable factors to enable a reasoned decision. However, the Tribunal was critical in its decision. It noted that whereas ICEPT had recommended in 2005 that:

- state government '*develop a standard statewide framework for inclusion in local planning policies to define cumulative impact benchmarks and the criteria by which this can be measured. It may consider existing and past trends in type and mix of licensed premises, reported crime and perceptions of safety, transport availability, proximity of residential use (actual and planned), public safety initiatives, and enforcement resources*.'; and

- local government use LPPF framework to develop location-specific local policy to manage cumulative impact which would '*clearly define the benchmark by which cumulative impact would be measured and provide the rationale upon which decisions to refuse applications is made. It would have particular regard to the impact of specific types and mix of licensed premises*.'

the Tribunal was not made aware of any such standard statewide framework nor of any local policies developed to benchmark cumulative impact and noted that there was none for the Swan Street precinct.[20] As a result, the Tribunal pointed out that developing benchmarks and guidelines should be a 'priority task' so as to ensure proper and consistent application of cl 52.27 in a way that is in concordance with its intended affect and in a way that ensures a reasonable level of certainty from communities and business operators.

Similarly, in a submission to *Modernising Victoria's Planning Act - Planning and Environment Amendment (General) Bill 2009*, dated 12 February 2010, the Alcohol Policy Coalition (a collaboration of the Australian Drug Foundation, the Cancer Council Victoria, Turning Point Alcohol and Drug Centre and Vic Health)[21] noted that whilst it:

> *supports the recent changes to Victorian Planning legislation allowing for the consideration of the cumulative impact of both existing and proposed licensed premises when considering planning permit applications ... local councils, who*

[20] Swancom [56]
[21] The cover letter to the submission describes these members as sharing concern in relation to the 'misuse of alcohol and its health/social impacts on the community' and as having a long-term goal of reducing the 'negative health and social impact of alcohol, promote a safer community drinking culture and improve the health of all Australians.

are tasked with assessing planning permits, report that they have received very little guidance on how to assess 'cumulative impact' and that they lack the resources and capacity to undertake their own research in the area.[22]

As such, the Coalition encouraged the Department of Planning and Community Development to consider measures to build capacity within local councils to consider cumulative impact matters in planning decision.

Logistical problems of applying Cl 52.27 to all areas - limitations of schedules

Another interesting critique of clause 52.27 raised in informal discussions with an employee of Melbourne City Council was the question of reasonable burden on council decisions makers. In the Melbourne City Council municipality the schedule to 52.27 has been amended so that cl 52.27 does not apply to any type of licence applications within the Capital City Zone (CCZ) or the Docklands Zone (DZ).

It was suggested in these informal discussions that the reason for this was that permit applications are onerous and for this reason it is not feasible for councils to assess permit applications for licensed venues where there is such a high concentration of venues.

It has not been formally confirmed that this is the key or only reason for exempting the CCZ or DZs from application of cl 52.27 permit requirements. However if this *is* true then it is perhaps important to consider whether additional resources can be made available to ensure that local councils are resourced to enable not only the development of a proper local policy dealing with cl 52.27 (as raised by VCAT in the Swancom decision) but also to allow meaningful consideration of applications on the basis of cl 52.27. Given that 52.27 appears to be a response to alcohol-fuelled social problems relating to a high-density of licensed venues, it seems strange and problematic for it not to apply to the Melbourne CCV (essentially the Melbourne CBD), particularly so if this is due to a lack of resources.

Further considerations and suggestions in relation to council powers

In addition to and in further support of the above, in its Submission to Ministerial Council on Drug Strategy (MCDS) for consideration at the National Alcohol Forum (15 July 2008) The National Local Government Drug and Alcohol Advisory Committee (NLGDAAC) suggested that there was a need (nationally) for, among other things:

[22] Alcohol Policy Coalition, Submission to *Modernising Victoria's Planning Act - Planning and Environment Amendment (General) Bill 2009*, 12 February 2010.

- national guidelines for density of high risk areas to be developed to guide state legislation, including benchmarks on cumulative impacts of outlet density, assessment on a balance of the type of licences, consideration of hours of operation, review of the local environment capacity to meet needs of high volumes of patrons (e.g. public transport, public toilets and taxis);
- empowerment of local government through legislation to decide on outlet density and hours of operation with stronger rights to appeal on behalf of local communities;
- empowerment of local governments to 'embed alcohol management in precinct and local area plans by:
  - identifying outlet density caps for areas by number of venues per 10,000 population; and
  - setting negotiable and non-negotiable conditions on trading hours, security requirements, lighting levels, connecting street access and other urban design areas to manage possible alcohol harms; and
- greater resourcing of enforcement.

To summarise this part. It appears as though some progress has been made in recent years in terms of bolstering council powers to control the growth of licensed venues in their municipality. However some problems have been canvassed above. In particular, there is a lack of clear guidance as to what 'cumulative impact' means and how it should be applied. Without guidance, in the absence of the Swancom decision one could not help but wonder if the amendments to cl 52.27 are paper tigers; amendments to look good but achieve little. The Swancom decision does however suggest that the amendments may have some weight and provide Victorian councils with greater licensing control.

Nevertheless, a key problem appears to be the lack of local policies on this issue and a lack of resources to both develop local policies and then to implement them.[23] Further, that only one decision has been put to VCAT under the new provisions leaves councils and planners in a degree of uncertainty as to the manner in which the council powers will be interpreted when applied to different zones with different uses and reasonably expected amenity. Further, that Melbourne City Council appears to have excluded the CCZ from cl 52.27 permit requirements also seems odd in light of the purpose of cl 52.27 and the concerns of alcohol-related social problems in the Melbourne CBD. This decision may warrant further investigation.

[23] Although Melbourne City Council has in fact drafted a local *Policy for Licensed Premises that Require a Planning Permit* (see http://www.melbourne.vic.gov.au/BuildingandPlanning/Planning/planningschemeamendments/Pages/AmendmentC141.aspx), according to one Melbourne City Council employee the draft policy has been sitting with the Minister for many months and there is some frustration as to the time being taken to deal with the proposed amendment. Further, it is unclear as to whether all elements of the Policy will be deemed acceptable policy material by the Minister and further, it remains to be seen how VCAT may apply the policy.

Part IV: liquor licensing

This final Part offers a brief and thematic overview of the changing face of liquor licensing in Victoria by making reference to a presentation made by Dr Grazyna Zaydow, sociologist, Deakin University, of her PhD thesis to staff at Minter Ellison Lawyers in Melbourne (28 July 2010). In this presentation Dr Zaydow discussed the development the 'market for alcohol' in Victoria since the 1960s.

The purpose of this brief discussion is not to outline the procedures of liquor licensing or identify specific problems with the regime. Rather, it is to highlight a shift in attitudes of licensing regulation over the last 4-5 decades. In light of the terms of reference for this background paper, it is suggested that in addition to it being worthwhile further refining and developing the powers of local government in controlling the proliferation of licensed venues, the importance of reconsidering the regulatory attitude to liquor licensing cannot be overstated.

The presentation by Dr Zaydow was structured around three inquiries/reports into reforms of the liquor licensing, namely:

- 1965 Phillips Royal Commission;
- 1977 Davies Inquiry; and
- 1985 Nieuwenhuysen Inquiry.

Most interestingly, Dr Zaydow pointed out the significant change over time in the focus of the terms of reference dictated under each inquiry. Dr Zaydow noted a clear shift from a key focus on the social consequences of alcohol use with a more peripheral concern for the interest of consumers, employers, employees etc in 1965 towards a very clear focus on tending to the demands of alcohol consumers, liquor business and the night time economy with a peripheral focus on social consequences of the desired freeing up of the market in 1985. Indeed, as described in the presentation, whereas the 1965 Royal Commission was concerned with increasing licensing hours to reduce the negative impacts of the 'afternoon swill' (the rush to guzzle as much alcohol as possible before licensed venues shut at 6pm), the 1985 Inquiry was a more economically driven inquiry, headed indeed by an economist.

Nieuwenhuysen's Inquiry was highlighted by a lack of willingness to consider useful or worthy of real consideration the evidence that even then existed to suggest a relationship between licensed venues and alcohol related problems. Indeed, the report of the Inquiry was littered with comments such as '*It is a non-sequitur, for example, to say that "liquor intoxicates; therefore, the numbers of outlets must be reduced'*

What evidence there was that linked alcohol consumption and social problems was dismissed on the basis that it was not locally applicable or relevant (i.e. it was not Victoria-specific evidence and so could not be relied upon). For example, the 'Ledermann Curve' was developed in the 1950s as a 'single distribution argument', providing evidence that there is a single distribution linking alcohol consumption and social problems such that an increase in consumption leads to an increase in problems such that reducing accessibility of alcohol would reduce social problems (such as, for example, violence).

Perhaps most interestingly, whereas in 1986 Nieuwenhuysen proclaimed that a relaxation of liquor licensing laws would not result in an explosion of the number of licenses, in 2008 Nieuwenhusen was quoted in The Age as saying, in response to a reported increase in violence in the city of Melbourne:

> *'This is definitely not what I had in mind. I was looking to promote a more European, civilised style of drinking, but we seem to have been swept away by a wave of binge drinking. These places that disgorge thousands of people onto the streets are inherently dangerous'.*[24]

Evidently there has been a change, at least for Nieuwenhuysen, in the understanding of the connection between the liquor licensing regime and alcohol related problems such as crimes against the person.

Since 1995 the total number of liquor licenses in Victoria has grown from 7937 to 18310 (an increase of 10,373).[25] In the quoted article from The Age newspaper above, Sue Maclellan (then director of Liquor Licensing) noted that liquor licenses had increased from 3,500 to 19,000 in the past 20 years, indicating that the significant rate of increase began prior to 1995.[26] In fact, Victoria's Alcohol Action Plan reported that liquor licenses have increased in Victoria over the last 20 years; and the rate of increase began following significant liquor licensing reforms of 1989.[27]

The Victorian Government appears to have begun to recognise that there are clear issues associated with the proliferation of licensed venues, evidence being for example Victoria's Alcohol Action Plan. One example of a measure taken by the Government was to place a freeze on the granting of liquor licences trading after 1am. This was gazetted on 2 May 2008. The initial freeze has already expired but has been extended until 31 December 2011. Until that date, the Director of Liquor

[24] Cameron Houston, Chris Johnston and Paul Austin, 'This is Melbourne at night: 'anarchy', *The Age*, 23 February 2008.
[25] Data provided by RAV on file with author.
[26] In addition to this data, the author has on file digital images of Melbourne CBD (the CCZ) illustrating the growth in licensed venues over the last 10-15 years. These were provided by Melbourne City Council but the level of confidentiality to be applied to them, if any, is yet to be confirmed.
[27] Ibid, 31.

Licensing will not grant any applications for bar, pub or night club licenses to trade past 1am. As per the liquor licensing website '*The freeze aims to contain growth in late night licences so that the long term strategies to improve the safety and amenity of the entertainment precincts can take effect'.*[28]

The question is, has enough been done and how drastic should measures become? Further, how committed to increasingly strong measures is the Victorian Government? After all, as Dr Zaydow pointed out, there seems to be an ongoing commitment to promoting and shaping Melbourne as a 24 hour city. But is this compatible with a reduction in a concurrent policy shift aimed at reducing alcohol-related social issues such as crimes against the person. After all, does a 24 hour city imply or even necessitate the 24-hour availability of alcohol? If it does, does this suggest that although steps in the liquor licensing field are being taken, in actual fact a fundamental shift of attitude may be required by the Victorian Government as to the feasible form of Melbourne as an entertainment city in order to truly impact on the current social problems being experienced in connection with alcohol consumption?

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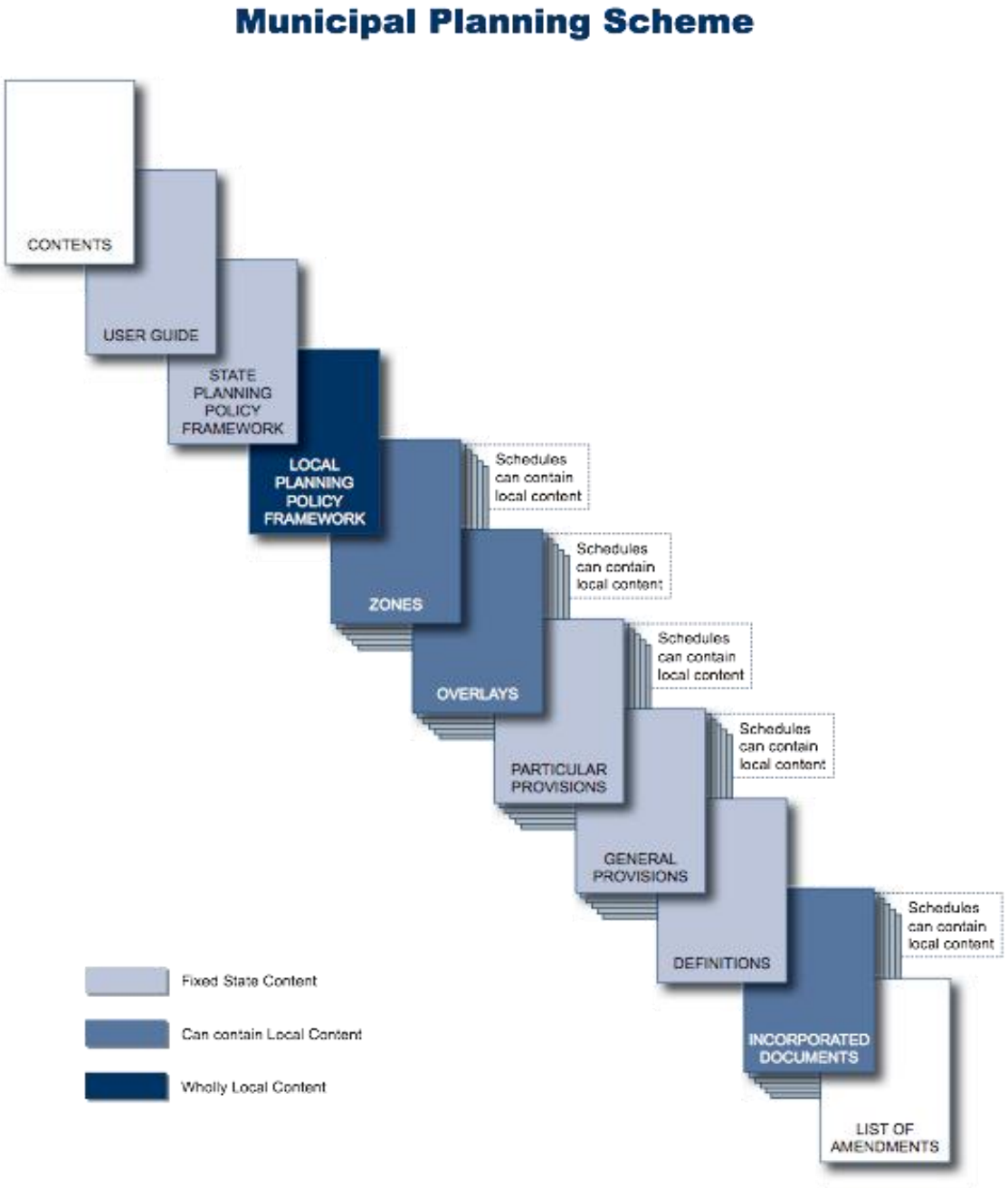
http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/alcohol/apply+for+a+liquor+licence/justice+-+alcohol+-+freeze+on+late+night+licences



Source: *Structure of planning scheme diagram; from http://www.dse.vic.gov.au/DSE/nrenpl.nsf/FID/-395DABC9D30686DECA256D480003CF61?OpenDocument*