Public health arguments in planning and licensing appeal processes:

A case study of the City of Casey's attempt to regulate a new chain packaged liquor outlet

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LA TROBE UNIVERSITY
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Executive summary

One approach to addressing health and social harms of drinking has been to limit alcohol availability. Given the reluctance of Australian state and territory governments in the current era to remove or limit liquor licences, the main conflicts over availability have been about new licences (Room, 2014: 5). Industry applicants, particularly large chain retailers, are frequently successful in being granted planning approval and liquor licences despite local government opposition to new outlets (Muhunthan et al., 2017).

This report aims to explore reasons why a local government's attempt to regulate packaged liquor outlets in a local area via the planning and licensing systems was unsuccessful. This was examined through a case study of the City of Casey's ('Casey') attempt to restrict the trading conditions and prohibit the opening of a large chain packaged liquor outlet in Cranbourne East, Victoria during 2011-2016. The case study focuses on the review proceedings and decisions at the Victorian Civil and Administrative Tribunal (VCAT) and Victorian Commission for Gambling and Liquor Regulation (VCGLR). The second aim of this report is to consider the ongoing implications of this case for local governments attempting to refuse or object to new packaged liquor licences in the future.

We studied decisions of both regulatory bodies: *Hunt Club Commercial Pty Ltd v Casey City Council*[1] (*'Hunt Club Question of Law'*) and *Hunt Club Commercial Pty Ltd v Casey City Council*[2] (*'Hunt Club Primary Proceeding'*), and *Woolworths Limited at Dan Murphy's Cranbourne East Premises (Liquor-internal review)*[3] (*'Dan Murphy's Cranbourne East'*) and interviewed 14 participants involved in one or both sets of proceedings. Participants comprised lay and expert witnesses (in alcohol epidemiology, statistics, community services, and social and town planning), legal counsel and representatives from the local government.

KEY FINDINGS

- This case sets an ambiguous direction for the scope of public health considerations within planning permit decisions for licensed premises. The *Hunt Club Question of Law* decision suggests social harm impacts of alcohol will rarely be a relevant consideration in planning law. This ruling appeared to undermine the state amendments to the planning system which came into effect in 2008 and 2011. These amendments sought to reduce negative social impacts of alcohol outlets by requiring local councils, in determining whether to grant a planning permit for the use of land as licensed premises, to consider various impacts on the amenity of the surrounding area, including the 'cumulative impact' of existing and proposed licensed premises (2008), and requiring planning permits for packaged liquor licences (2011).
- Casey had not developed a local planning policy for licensed premises. In the *Hunt Club Primary Proceeding*, Casey's action to impose additional trading conditions on the sale of packaged liquor through an amendment to the Cranbourne East Development Plan (which included an approved planning permit for Hunt Club), was partly undone by the absence of supportive local planning policy for licensed premises.
- Planning Practice Note 61 *Licensed Premises: Assessing Cumulative Impact* ('Planning Practice Note 61'), the guideline provided by the Victorian Department of Environment, Land, Water and Planning on

[1] [2013] VCAT 725 (20 May 2013)

[2] [2013] VCAT 726 (21 May 2013)

[3] [2016] VCGLR (11 April 2016)

assessing the cumulative impact of licensed premises, had limited relevance to packaged liquor licence permit assessments and was likely detrimental to Casey's regulatory effort.

- Participants in this case study observed that, in contrast to planning law applying to licensed premises, planning law does incorporate explicit considerations of social and economic impacts of new gaming machines.
- While *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325 ('*Kordister*') (a key precedent-setting licensing case in Victoria) was a landmark case in confirming harm minimisation as the primary object of the *Liquor Control Reform Act 1998* (Vic), the Casey case study demonstrates it (the *Kordister* decision) has not meant that the VCGLR will necessarily decide against the greater availability of alcohol on harm minimisation grounds.
- The VCGLR ruling establishes a very high bar for refusing applications based on harm and suggests that new licences, in particular, which can only be assessed on the basis of future risk of harm, are very unlikely to be refused on the misuse or abuse of alcohol ground.
- The VCGLR placed less weight on locality evidence because it was based on raw numbers rather than on rates.
- Cross-examination of expert witnesses was time intensive and adversarial.
- Casey incurred significant costs (financial, time and resources) in mounting this case.

Our case study has identified both legal and practical challenges for local governments seeking to regulate new packaged liquor outlets in their local area. We make several observations about the ongoing implications of the case and suggest the case has had a potentially chilling effect on local governments attempting to refuse or object to new packaged liquor licences in the future. Planning and licensing legislation will need to change if local government attempts to restrict, refuse or object to, new outlets are to have a greater likelihood of being upheld upon review.

Glossary of terms

Activity Centre	A purposefully designed area where people congregate to shop, work, socialise and relax. Activity centres typically provide a broad range of goods and services to the local community (Department of Environment, Land, Water and Planning, 2018).
Amenity	In a planning context, amenity encompasses the peace and good order of public space. Loud noise, especially late at night, incorrect disposal of rubbish and public intoxication and altercations are viewed as threats to amenity from an individual and community perspective. In the Victorian licensing law context, amenity is defined as 'the quality that the area has of being pleasant and agreeable' (Liquor Control Reform Act, 1998 (Vic), section 3A (1)). Factors that may be considered in determining whether a licence would detract from amenity include parking facilities, traffic, noise, nuisance and vandalism, and the harmony and coherence of the environment (Liquor Control Reform Act 1998 (Vic), section 3A (2)). Amenity is not defined in the Planning and Environment Act 1987 (Vic).
Decision maker	An authority determining whether to grant/refuse, or impose conditions on, a planning permit or liquor licence application.
Hunt Club	Hunt Club Commercial Pty Ltd. Applicant for the planning permit and land owner. Party to two related VCAT proceedings.
Kordister	A key precedent-setting licensing case in Victoria. (*Kordister Pty Ltd v Director of Liquor Licensing & Anor* [2012] VSCA 325)).
Member	A person who hears and decides cases at VCAT. Members must have specialist knowledge and qualifications, and a legal background.
Mini-major	An urban planning term used to describe a retailer of a recognisable brand or range of products which typically occupies retail floorspace of between 1,000m^2 and 2,500m^2. Examples of mini-major retailers include JB Hi-Fi (entertainment), Rebel Sports (sporting goods), Dan Murphy's (packaged liquor) (Essential Economics, 2017).
Objection	The avenue through which police, members of the public and local governments may express opposition to a liquor licence application.
Planning permit	A legal document that allows a certain use or development to proceed on a specified parcel of land (Department of Environment, Land, Water and Planning (2015a: Section G, p2).
Planning scheme	A statutory document which outlines state and local planning policies, zones and overlays concerning the use, development and protection of land in the area to which it applies. Each municipality is covered by one planning scheme (Department of Environment, Land, Water and Planning (2015a: Section G, p2).

Red dot decision	A decision made by VCAT, which is deemed to have notable significance within the planning system. These decisions provide guidance with respect to important planning matters (Martin, 2013).
Review	The process carried out when an affected party to a planning decision or licensing decision makes an application to have that decision re-examined. Reviews of planning decisions are conducted by VCAT. Reviews of VCGLR liquor licensing decisions are conducted internally by a panel of VCGLR Commissioners.
VCAT/ **The Tribunal**	Victorian Civil and Administrative Tribunal; previously VCAT determined reviews of liquor licensing decisions in Victoria, but as of 2012 its role in relation to licensed premises is limited to reviews of planning permit decisions.
VCGLR/ **The Commission**	Victorian Commission for Gambling and Liquor Regulation; the independent statutory authority that regulates the gambling and liquor industries in Victoria, and the primary decision maker and decision reviewer in Victoria in relation to gambling and liquor regulation.
Woolworths Limited	In the context of this report, the applicant for packaged liquor licences. Owner of Dan Murphy's, the brand name for many of Woolworths' liquor stores.

Introduction

Regulatory restrictions on the physical availability of alcohol have been identified as a cost-effective strategy to decrease alcohol consumption and related health and social harms and costs (Babor et al., 2010). A large body of research finds increasing the density of outlets is associated with higher rates of violence and chronic health conditions (Livingston, Wilkinson & Room, 2016). This is found for both on-premises and packaged liquor outlets, although the effects from packaged liquor outlet density may also be affected by the volume of alcohol sold (e.g. two small outlets may contribute less to violence than one larger outlet).

There are, however, limitations to this body of evidence which constrains its potential to be translated into policy and practice (e.g. Holmes, Guo, Maheswaran, Nicholls, Meier, et al. 2014; Gmel, Holmes & Studer, 2016a; Gmel, Holmes & Studer, 2016b; Morrison, Cerdá, Gorman et al. 2016). Most research in this area employs cross-sectional research designs that are relatively weak for drawing causal inferences (Livingston, Wilkinson & Room, 2016). Furthermore, most of the research comes from the United States, which potentially limits its applicability to other study settings. The strongest research designs use longitudinal data for both exposure (alcohol availability) and outcomes (e.g. alcohol-related harms such as rates of violence). However, such studies, which provide the most robust evidence, are not common. Moreover, even within robust study designs, three key limitations are: relatively crude measures of alcohol's availability (e.g. on- versus off-premises); variability in the geographical units used (e.g. proximate, land blocks, suburbs, municipalities etc.); and the degree to which varying effects across different areas can be measured in the research (Livingston, Wilkinson & Room, 2016).

Despite these limitations, it is generally recognised that the regulation of outlets would be a useful public health tool for the reduction of risky drinking and alcohol-related harm (WHO, 2017). However, there are few instances where this research is translated into policy and practice, for example, through policies that restrict the growth in the availability of alcohol (Livingston, Wilkinson & Room, 2016).

In this report, we examine the attempt of one Victorian local government to restrict the trading conditions, and prevent the opening, of a large chain packaged liquor outlet through both planning and licensing processes respectively. We begin with a brief review of recent Australian research on public interest, specifically public health, considerations in licensing decisions. Next, we describe the two distinct regulatory processes governing the issuing of planning permits and new liquor licences for alcohol outlets in Victoria. We describe relatively recent efforts to reconfigure these processes to better represent public health concerns when regulating the location and operation of licensed premises. This section sets the context for our case study. The local government – Casey – is in the southeast periphery of Melbourne, Victoria. Casey's actions were the subject of administrative review via Victoria's regulatory systems for planning and liquor licensing.

For several reasons described below, the selection of Casey as a case study provides substantial insights into challenges faced by local governments and other community members in intervening to restrict the opening of new licensed outlets on public health grounds. We argue that planning and licensing legislation will need to change if local government refusals of, or objections to, new outlets on these grounds are to have a greater likelihood of being affirmed on review. While the legal framework governing liquor licensing is specific to Victoria, the challenge of reconciling public health concerns with current laws on planning and alcohol licensing is a common one in the contemporary era of economic liberalisation (Nicholls, 2015).

THE IMPACT OF PUBLIC INTEREST PROVISIONS ON LICENSING DECISIONS IN AUSTRALIA

Public interest has been defined as 'involving a matter capable of affecting the people at large so they might be legitimately interested in or concerned about, what is going on, or what may happen to them or to others' (Australian Press Council, 2011). In legislation, the concept of the 'public interest' potentially covers a broad range of matters which a decision-maker or a court may be permitted or required to consider when making decisions. The precise content of the term 'public interest' is often informed by the purposes of the legislation. For instance, matters of public interest may include the proper administration of government; open justice; public health and safety; national security; the prevention and detection of crime and fraud; or the economic wellbeing of the country. In this case study, we focus on the extent to which public health, including potential harm and social impacts of liquor outlets, is a consideration in alcohol licensing and planning decisions. We take public health to refer to the organised response by society to protect and promote health and wellbeing, and to prevent injury, illness and disability. Public health works to provide the conditions under which people can maintain their health, improve their health and wellbeing, or prevent the deterioration of their health. As such, it aims to address factors, including social and environmental considerations that determine health and the causes of illness (MacIntyre, 2011).

Two relatively recent Australian studies examine the impact of including public interest provisions in licensing regulation on licence application outcomes. Manton (2014) examined the effectiveness of public interest arguments and objections in licensing decisions. Examining the ten most recent contested licence applications in each of five jurisdictions she found that public interest arguments and objections (specifically those based on amenity or harm minimisation provisions, i.e. matters of public health) did not change the outcome of reviewed licensing decisions (e.g. decisions to grant licences were not reversed) but did result in additional conditions being added to the licence (Manton, 2014).

Muhunthan and colleagues (2017) reviewed five years of case law involving a review of contested licence applications (either planning permit or liquor licence applications) in Australian jurisdictions. Most decisions favoured the industry interests: 77 per cent (34 of 44 cases). Of 19 cases involving packaged liquor licences, 11 were instigated by the owners of Australia's two major chain retailers, which account for as much as 60 per cent of all off-premises alcohol sold (McCusker Centre for Action on Alcohol and Youth, 2014). The authors suggest that decisions against industry were due to administrative tribunals or courts taking a more precautionary approach, whereby a lack of full scientific certainty that the proposed development would cause particular harm was not a reason for allowing a new licence.

The authors found several elements accounted for the high rate of industry success. Public health evidence and arguments were discounted or weighted less heavily than industry arguments. Central here was that administrative or judicial decisions favouring industry prioritised data drawn from small geographic areas (even if of poorer scientific quality) and questioned public health arguments around cause and effect relations between specific types of outlets (e.g. packaged liquor outlets as part of shopping centres) and harm. Furthermore, public health arguments were dismissed within the planning jurisdiction because: a) health and wellbeing was not an objective of planning law, and b) the goal of fostering economic development underpinning planning frameworks (i.e. supporting local economic development and urban vibrancy) was privileged over any potential negative amenity impacts. Finally, the legislation did not mention public health, making it unclear to decision-makers how to treat public health research evidence.

Beyond the limitations of the legislation, the authors suggest the high rate of industry success was also shaped by the hearing process itself whereby public health expert witnesses are subject to cross-examination. Cross-examination was 'often used by opponents to magnify the inherent uncertainties in public health evidence generated through scientific methods' (2017: 369). Muhunthan and colleagues (2017: 368) conclude that it was 'legislation that enabled pro-competition decisions to be the default outcome'. Public health evidence had little or no influence in practice as there is no requirement for legislation to specifically consider public health benefit.

THE VICTORIAN CONTEXT: PLANNING AND LICENSING FRAMEWORKS

To sell alcohol in Victoria (whether at a bar, hotel, bottle-shop etc.), it is necessary to obtain licensing approval from the state and, in most cases, planning permission from an appropriate local authority (typically a local government). Under a very recent amendment to the LCR Act, determination of a liquor licence application must not be delayed until planning permission for the use of land as licensed premises is granted, allowing the planning permit and licence application processes to occur concurrently. [4] (Previously, a licence application was generally not determined until there was evidence of planning permission.) However, a liquor licence will not take effect until the day planning permission is granted or other evidence of compliance with the planning scheme is received.[5] Liquor licences for which a planning permit is not required are pre-retail, BYO, limited and major event licences; applicants for these licence types apply directly to the VCGLR for a liquor licence[6].

Victorian local government officers make planning permit decisions according to the objectives and requirements of state planning legislation (*Planning and Environment Act 1987* (Vic)), as well as the planning scheme for its local area. A planning scheme is a statutory document (prepared by a local council or the Planning Minister and approved by the Minister) which sets policies for and regulates the use and development of land. Each planning scheme incorporates mandatory and relevant provisions of the state-wide Victorian Planning Provisions, including the State Planning Policy Framework, as well as local planning strategies and policies, including zones and overlays. The planning system is, therefore, a devolved regulatory system – local government officers make decisions according to the rules of state government legislation, state planning policy, and any local policy they have developed[7]. This differs from liquor licensing where decisions are made by a single central (state) regulatory body and local governments are only allowed an opportunity to object to state decisions.

In Victoria, decision-making in the two systems involves:

1. Planning permit
    a. Determination of a planning permit for the use of land as a licensed premises is made by a local government official (generally a statutory planner). Anyone affected by the grant of a planning permit for a licensed premises can make an objection to their local government about that permit.
    b. Appeals against local government planning permit decisions are heard by VCAT.
    c. On a question of law, appeals against VCAT decisions may be made to the Victorian Supreme Court.
2. Liquor licence
    a. Determination of a liquor licence application is made by the VCGLR – initially by a single Commissioner or delegate of the Commission, according to the *Liquor Control Reform Act 1998* (Vic) ('LCR Act').
    b. Appeals against first instance VCGLR decisions are heard in a VCGLR Internal Review by a panel of three Commissioners, excluding any Commissioner making the original decision.
    c. On a question of law, appeals against VCGLR Internal Reviews can be made to the Victorian Supreme Court.

[4] LCR Act, s 44(1A), inserted by *Liquor and Gambling Legislation Amendment Act 2018* (Vic), s 16.
[5] LCR Act, s 49A(1), inserted by *Liquor and Gambling Legislation Amendment Act 2018* (Vic), s 18
[6] Prior to 2011, a planning permit was not required to obtain packaged liquor licences.
[7] For a guide to Victoria's planning system see https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system.

The assessment processes for planning permits and liquor licences are independent and each system considers slightly different issues. Nevertheless, there is some overlap between the systems, with issues such as amenity and cumulative impact considered by both planning and licensing decision-makers.

Planning objectives, processes and policies

Broadly speaking, planning is concerned with the use and development of land, including how the use and development of land influences other individuals and neighbourhood conditions. Section 60 of the *Planning and Environment Act 1987* (Vic) requires local authorities, before deciding applications for planning permits, to consider the relevant planning scheme for the local area, and a range of other factors, including the objectives of planning in Victoria, objections and submissions received, and other matters set out in section 60, including any significant social or economic effects of the use of land. As part of considering the local planning scheme, assessment of planning permit applications for licensed premises must be in accordance with clause 52.27 of the Victorian Planning Provisions, as this is a mandatory provision of all Victorian planning schemes.

Clause 52.27 has two purposes: to ensure that licensed premises are situated in appropriate locations and that the impact of the licensed premises on the amenity of the surrounding area is considered. The clause directs that responsible authorities have regard to the sale or consumption of alcohol, hours of operation, patron numbers, and 'cumulative impact' on the amenity of the surrounding area when deciding on an application but does not provide any description of the scope of 'the surrounding area' or the meaning of amenity and the concept of cumulative impact[8].

In 2011, the state government responded to growing community and local government frustration over the limited opportunities to influence licensing decisions, by amending clause 52.27 to require applicants for packaged liquor licences to hold planning permits. This amendment provided an additional opportunity for local input into decisions to issue packaged liquor licences as community members could object to the issuing of a planning permit in addition to the subsequent liquor licence. The amendment also signalled that packaged liquor licences would be subject to the same type of regulation as other permanent licence categories (Livingston, 2014). The Government was quoted as saying the change would enable local communities, families and local governments to decide whether new packaged liquor licences were granted in a local area (e.g. 'Premier Ted Baillieu said "[…] This means local councils and the community will now have an active role in deciding the location of new bottle shops."', Australian Food News, 2011; see also, Sydney Morning Herald, 2009; The Shout, 2011). Given that licensing policy in Australian state and territories at the time focused on regulating late-night trading at bars, clubs and pubs, this amendment was the most solid example of policy specifically targeting packaged liquor licences in Australia (Livingston, 2014).

Also in 2011, the Victorian Department of Environment, Land, Water and Planning (DELWP) issued Planning Practice Note 61 to assist local governments to assess cumulative impact as required by clause 52.27[9]. Practice Notes are guidance documents only and have no legal status. Planning Practice Note 61 recommends a cumulative impact assessment for all permit applications seeking to trade after 11 pm, where the proposed licensed premises would be located within a 'cluster' of licensed premises. A cluster is defined as three licensed premises within a 100m radius, or fifteen licensed premises within a 500m radius of the proposed new outlet. Planning Practice Note 61 represented a shift in planning policy with respect to licensed premises because it provided local governments with guidance on how planners might limit growth in outlet density based on cumulative impact considerations (Bradley, 2014).

[8] Based on recommendations of Melbourne's inner-city municipalities, the state government amended clause 52.27 in 2008 to include the consideration of cumulative impact of both existing and proposed licensed premises as a valid amenity consideration for planning permit applications. This new consideration pertained to all licence categories requiring a planning permit under clause 52.27.

[9] These guidelines were revised in 2015

Planning Practice Note 61 sets out a range of data, or types of information, responsible authorities may draw on to inform a cumulative impact assessment. While the Practice Note does not provide a definitive description of what constitutes amenity, the list of data does give some indication of elements that may affect amenity, such as patron noise, anti-social behaviour and violence, public disturbance, litter and lack of public amenities such as toilets (DELWP, 2015b). The Practice Note was based on the assessment methodology set out by VCAT in *Swancom Pty Ltd v Yarra CC (Red Dot)* [2009] VCAT 923 in which one inner-Melbourne municipality objected to the expansion of a late-night on-premise liquor licence. As such, planning commentators have noted it provides little guidance as to how decision-makers should assess cumulative impacts for packaged liquor outlets (Brown, 2012; Rosen, 2012).

In addition to clause 52.27, local governments may also adopt local licensed premises planning policies in order to outline their planning priorities for the use of land for licensed premises within their communities (VicHealth, 2014). These policies become part of the planning scheme for the local area, and must be taken into account by local authorities in making decisions about applications for planning permits for licensed premises (by virtue of section 60 of the *Planning and Environment Act 1987,* which requires planning permit decisions to consider the relevant planning scheme). A 2014 review found only five of Victoria's 79 local governments had a local planning policy for licensed premises (Wilkinson, 2017).

Licensing objectives and assessment processes

The VCGLR must assess liquor licence applications with a view to promoting the objects of the LCR Act. The primary object of the LCR Act is to 'contribute to minimising harm arising from the misuse or abuse of alcohol'.[10] In 2009, Victoria attempted to refocus liquor licensing laws towards this harm minimisation object by including a statement in the LCR Act that it is the intention of Parliament that every regulatory power or authority in the Act should be exercised with due regard to harm minimisation.[11] Harm minimisation is fundamentally a public health objective[12] aimed at reducing health and social harms of alcohol and drugs to the individual, the community and society. The harm minimisation approach originated in Australian drug policy in 1985 when governments moved away from criminal justice approaches to drug use towards more pragmatic and public health measures such as needle exchange programs (Manton & Zajdow, 2014: 25).

In *Kordister,* a key licensing decision in 2012[13], the Victorian Court of Appeal held that the licensing objective of harm minimisation was to be the primary consideration of the decision-maker in determining licence applications. The Court of Appeal held that the decision-maker must determine the contribution that a particular liquor licensing decision would make to minimising harm from alcohol. This must then be weighed and appropriately balanced against other matters that the legislation requires to be considered, including other objects of the legislation (such as facilitating the development of a diversity of licensed premises)[14] (Davoren & O'Brien, 2014).

This decision also distinguished between three types of evidence that could be considered by a decision-maker in assessing the risk of harm from a particular licence, and whether a liquor licence application is consistent with the harm minimisation object: general evidence, locality evidence, and specific incident evidence.

General evidence is evidence about the use or misuse of alcohol, or the connection between licensed premises (in general) and harm (e.g. academic or population-level studies about the association of outlets to harm, or rates of alcohol-related harm). The Court of Appeal held that the importance of the general evidence would depend on whether 'it has a connection with or is reinforced by' the locality evidence.

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[10] LCR Act *1998* (Vic), section 4(1)(a)

[11] LCR Act *1998* (Vic), s 4(2); inserted by *Liquor Control Reform Amendment (Licensing) Act 2009* (Vic), s 5

[12] Scotland is the only jurisdiction internationally to explicitly adopt 'improve and protect public health' as a licensing objective (Fitzgerald, N., Nicholls, J., Winterbottom, J., & Srinivasa, V. K. (2017))

[13] *Kordister Pty Ltd v Director of Liquor Licensing & Anor* [2012] VSCA 325.

[14] See for example, s 4(b)LCR Act *1998 (Vic)*

Locality evidence is evidence of 'the particular local, social, demographic or geographical circumstances of the relevant premises' (*Kordister*, 2012, para 192) (i.e. the nature of the area in which the licensed premises is located) (Davoren & O'Brien, 2014). Significantly, the Court of Appeal held that there is no need to establish a causal link between the licensed premises and the locality evidence. The relevant question is whether 'the particular local, social demographic and geographic circumstances surrounding the premises are conducive to the misuse of alcohol.' The court indicated that locality evidence alone could potentially be adequate to support harm minimisation arguments – in the *Kordister* case, to show that allowing 24-hour trading of a bottle shop would not serve the object of harm minimisation.

Specific incident evidence is evidence of either wrongful conduct by the licensee or specific incidents of alcohol-related harm linked to the venue. The Court of Appeal held that, in contrast with locality evidence, to rely on specific incident evidence, a causal connection must be established between specific incidents of harm and the operation of the licensed premises (*Kordister*, 2012, para 195).

The Court of Appeal stated that in some circumstances 'the locality evidence may have such probative value that there is no need for reliance upon specific incidents' (*Kordister,* 2012, para 195). However, evidence of specific incidents will be given special weight in decision making. The Court of Appeal's statements on locality evidence are significant as they may suggest a licence application could be refused on harm minimisation grounds by relying on evidence of the local context without proving that the licensed premises or conduct of the licensee will directly cause harm – just that it may be conducive to harm in the context of the circumstances of the locality.

Local government, a licensing inspector or any resident may object to any liquor licence by arguing that granting the application would detract from local amenity[15] For packaged liquor licence applications, local government or a resident may also object on the ground that granting the application would contribute to the 'misuse and abuse of alcohol'. [16] Police may object to a licence application 'on any grounds' and are not limited to matters of amenity and alcohol misuse or abuse. [17]

The LCR Act sets out grounds on which the VCGLR may refuse to grant a licence application. Two of these grounds mirror the 'amenity' and 'misuse of alcohol' grounds for objecting to a licence application: that a licence would detract from or be detrimental to local amenity or would contribute or be conducive to the misuse or abuse of alcohol.[18]

While the licensing authority should assess all licence applications according to the objects of the LCR Act (including the minimisation of alcohol-related harm) and the refusal grounds set out in the Act, the provisions for community objection play a key role in ensuring this occurs. The Victorian Auditor-General recently found that VCGLR were not assessing licence applications according to these key requirements of the Act, where no objections from the public were received (VAGO, 2017). However, the proportion of licence applications subject to objections is extremely low. For example, in 2017-2018, objections were received in relation to only one per cent of finalised applications (VCGLR, 2018). This means that the clear majority of applications are unlikely to have been assessed on harm minimisation (i.e. public health) grounds.

In summary, recent changes to Victoria's planning system seem to have made it easier for local governments to influence the local availability of alcohol through planning.

In relation to licensing, the *Kordister* decision indicates that locality evidence alone could be sufficient grounds to show that a liquor licence application does not support the object of harm minimisation and, if relying on locality evidence, that a causal relationship between specific incidents of harm and the operation of the

[15] LCR Act, ss 38(1), 40, 41(1)(b)(i)
[16] LCR Act, ss 38(1A) and 40(1A)
[17] LCR Act, s 39(1)
[18] LCR Act, ss 44(2), 47

licensed premises does not necessarily need to be demonstrated. This may assist communities to oppose development on harm minimisation grounds where evidence is still emerging, where 'liquor has not been sold previously, or in growth areas' (VAGO, 2012: 28). This decision has implications for how future licensing decisions are made.

Casey was the first municipality in Victoria to apply the new planning tools (i.e. cumulative impact and the planning permit requirement for packaged liquor outlets) to attempt to amend a local development plan to impose restrictions on packaged liquor outlets on harm minimisation grounds. This amendment was the subject of *Hunt Club Primary Proceeding.*

Casey's application for internal review of the VCGLR's decision to grant a liquor licence for the packaged liquor outlet, the subject of *Dan Murphy's Cranbourne East,* was also a key case in which the *Kordister* judgement was taken into consideration. The case of Casey, therefore, provides valuable insights into the challenges faced by local governments in regulating the availability of alcohol across the planning and liquor licensing systems.

In the context of the recent review by Muhunthan and colleagues (2017), the aim of this study was to add further insight into reasons decision-makers frequently rule against local governments that refuse planning permission or object to liquor licence applications for licensed premises on public health grounds, as well as to better understand the experience of participating in these cases. A case study approach (Yin, 2014) allows for an in-depth examination of one municipality's experience with Victoria's planning and liquor appeal processes. The practical goal of this case study was to inform how the regulatory process might be strengthened to better serve public health and the public interest.

THE CITY OF CASEY, MELBOURNE CASE STUDY

Casey is a large and rapidly growing municipality on the south-eastern outskirts of Melbourne. Casey is described as an 'Interface Council' as it sits between metropolitan Melbourne and rural Victoria, sharing characteristics of both urban and rural communities. In the last decade, Casey has consistently been one of Australia's ten fastest-growing municipalities (DELWP, 2011; DELWP, 2016), with large areas of land allocated for urban development. It is the most populous municipality in Victoria with 230,000 inhabitants. Residents in the municipality are car-dependent, being poorly serviced by public transport networks (Carey, 2017).

Cranbourne East is a suburb of Casey, located within its urban growth area. The suburb is characterised by considerable building activity and rapid population growth. In 2016, for example, Cranbourne East was the second fastest-growing suburb in Australia, with nearly 5,000 new residents that year (Carey, 2017). The suburb's population grew from 8,210 in 2011 to 25,688 in 2016 (ABS, 2017a; ABS, 2017b). In terms of built form, Casey is semi-rural, low density and comprises of several large, recently completed housing estates. In 2009, a draft Cranbourne East Precinct Plan identified that much of the land was designated for residential development, with a small proportion for retail and employment development (Growth Area Authority, 2009). This Plan projected that Cranbourne East was to accommodate over 6,500 households for 17-20,000 residents (and would accommodate 3,000 jobs) (Growth Area Authority, 2009).

Casey is a moderately disadvantaged municipality (2016 SEIFA Index of Disadvantage 49, 7th decile), with the suburb of Cranbourne East slightly more disadvantaged (adjoining suburbs of Cranbourne West and North are highly disadvantaged[19]). Between 2012 and 2017, Casey had the highest number of family violence incidents

[19] The City of Casey SEIFA Index of Disadvantage measures the relative level of socioeconomic disadvantage based on a range of Census characteristics. The index is derived from attributes that reflect disadvantage such as low income, low educational attainment, high unemployment, and jobs in relatively unskilled occupations. Casey is ranked at 49 in the ABS produced index of relative socioeconomic disadvantage (2016), Casey is in the 7th decile (2016). However, Cranbourne East is more disadvantaged (decile 6, ranked 52). (2033.0.55.001 - Census of Population and Housing: Socio-Economic Indexes for Areas (SEIFA), Australia, 2016)

in Victoria recorded by police. However, taking into account Casey's population, the family violence incident rate was lower than approximately 30 other Victorian municipalities (Crime Statistics Agency, 2018). In the first decade of the new millennium at least, incidents of alcohol-related harm increased above the rate of population growth (VAGO, 2012: 60). The municipality has seen substantial increases in the raw number of packaged liquor outlets in the context of steadily increasing populations (Livingston, 2017).

Facts of the Case

Our case study focuses on the review proceedings and decision at VCAT in relation to Casey's amendments to a development plan that imposed restrictions on packaged liquor stores in an activity centre, and the review proceedings and decision at VCGLR in relation to the grant of a liquor licence for a packaged liquor store in Casey. These events cover the period from February 2013 to April 2016 (Table 1). The original decisions to grant a planning permit and liquor licence for the packaged liquor store are not covered.

Table 1 Timeline of principal events, 2010-2016

	When		What
Planning Permit + VCAT	2010	November	Permit granted to Hunt Club for the use and development of land to develop a 'mini-major' retail premises
	2012	February + July	Casey City Council seeks to restrict the sale of packaged liquor through an amendment to Cranbourne East Development Plan applicable to Hunt Club land which was subject to the grant of the permit in 2010. Hunt Club Commercial Pty Ltd opposes the changes to the Development Plan
	2013	Feb-April	VCAT 5-day Planning Hearing (Primary Proceeding)
		April 16	VCAT Hearing (Question of Law)
		May 20	Question of Law decision: Hunt Club Commercial Pty Ltd v Casey City Council, VCAT 725 (Red Dot decision) (Dwyer)
		May 21	Hunt Club Commercial Pty Ltd v Casey City Council VCAT 726 (Glynn) – Council must delete changes to Cranbourne East Development Plan
	2014	May 13	Planning Permit for a packaged liquor licence granted
Liquor Licence + VCGLR	2014	17 June	Woolworths Limited (licensee) lodges packaged liquor licence application with the VCGLR
		15 July	Objection by the Victoria Police Casey Local Area Licensing Inspector
		15 July	Objection by Chief Commissioner of Police
		16 July	Objection by Casey City Council
		17 April	VCGLR Delegate grants packaged liquor licence to Woolworths Limited
		15 May	Casey City Council application to VCGLR for Internal Review
	2015	18 May	Chief Commissioner/Licensing Inspector application to VCGLR for Internal Review
		August-December	Six-day VCGLR Internal Review hearing conducted by a panel of three Commissioners
	2016	April 11	VCGLR determines to affirm Delegate decision to grant packaged liquor licence to Woolworths Limited, (Woolworths Limited at Dan Murphy's Cranbourne East Premises)

References: Hunt Club Commercial Pty Ltd v Casey City Council [2013] VCAT 726 (21 May 2013); Hunt Club Commercial Pty Ltd v Casey City Council (includes Summary) (Red Dot) [2013] VCAT 725 (20 May 2013); Woolworths Limited at Dan Murphy's Cranbourne East Premises, *(Liquor-internal review)* [2016] VCGLR (11 April 2016)

Planning Permit, Development Plan Amendment and VCAT proceedings

In November 2010 a planning permit application for a 'mini-major' retail premises in the Cranbourne East 'activity centre' was lodged with Casey City Council ('Casey') by the Hunt Club Commercial (the owner of the activity centre land). The permit was granted to use and develop a supermarket, specialty retail stores and a 1,400m sq. 'mini-major' premises within the activity centre. In 2012 and 2013, Casey amended the Cranbourne East Development Plan (hereafter 'Development Plan') governing the activity centre land ('Casey Amendments'). The first amendment was to add restrictions on how packaged liquor licences could operate within the activity centre based on social considerations, including the accessibility of alcohol in the Cranbourne East community. This amendment stipulated that packaged liquor outlets occupying more than 10 per cent of total retail floor space of an individual supermarket would not be supported by Casey. Casey further amended the Development Plan in 2013, to stipulate that a packaged liquor outlet should be part of a supermarket rather than a standalone outlet and have a total floor area not exceeding 300 square metres or 10 per cent of the floor area of a supermarket. Casey also included the requirement for new permit applicants to provide a social and economic impact analysis to demonstrate net community benefit.

The Hunt Club sought a review of the Casey Amendments in VCAT. The Hunt Club argued that Casey's proposition that the municipality had 'particular issues' associated with the sale and consumption of liquor that warranted the amendments to the Development Plan were not sufficiently founded. They also questioned whether the amendments to the Development Plan established *new policy* that should not be introduced in amendments to a Development Plan.

In the matter of *Hunt Club Commercial Pty Ltd v Casey City Council*[20] *('Hunt Club Primary Proceeding'),* the Tribunal ordered Casey to delete its amendments to the Development Plan.

The parties agreed to seek a separate determination of the following legal questions:

1. What is the scope of relevant considerations to the exercise of discretion under clause 52.27?
2. Do the relevant considerations extend to allow for a consideration of the significant social and economic effects of the use or development of the land to sell or consume liquor or is it restricted to impacts which manifest themselves into an amenity impact on the surrounding area?

In the separate proceeding of *Hunt Club Commercial Pty Ltd v Casey*[21] ('*Hunt Club Question of Law*'), VCAT Deputy President Dwyer held that while 'the scope of enquiry under clause 52.27 will rarely (if ever) necessitate a consideration of matters that do not manifest themselves as an amenity impact, it cannot be said that any other considerations will *never* be relevant' (*Hunt Club Question of Law,* 2013, para 6). Deputy President Dwyer also formed the view that concerns regarding 'the social harm caused by alcohol, the accessibility of alcohol in the community generally, or the potential for the abuse and misuse of alcohol, will rarely (if ever) be a relevant consideration in the exercise of discretion for a particular licensed premises under clause 52.27. These matters are more commonly relevant to the complementary framework under the *Liquor Control Reform Act* 1998' (*Hunt Club Question of Law*, 2013, para 14). This decision was classified as a Red Dot decision[22] by VCAT, the significance of which is explained below. The Hunt Club Question of Law case is also discussed further below.

Liquor Licence application, objections and VCGLR proceedings

Following Woolworths' lodgment of an application for a packaged liquor licence with the VCGLR in June 2014, Casey objected to the application on both the amenity and alcohol misuse grounds set out in the LCR Act. Casey argued the outlet would detract from the amenity of the surrounding area 'due to the anticipated

[20] [2013] VCAT 726 (21 May 2013)
[21] (Red Dot Decision) [2013] VCAT 725 (20 May 2013)
[22] A decision made by VCAT which is deemed to have notable significance within the planning system. These decisions provide guidance with respect to important planning matters

increase in the incidence of alcohol-related harm that is likely to occur if a large-scale liquor outlet providing discounted liquor is introduced into the area' (*Dan Murphy's Cranbourne East,* 2016*,* para 4). Casey also argued it would contribute to the misuse or abuse of alcohol 'due to the increased availability of discounted liquor that is likely to occur if a large scale packaged liquor outlet is introduced into the area' (*Dan Murphy's Cranbourne East,* 2016*,* para 4).

The local area Licensing Inspector and the Victorian Police Commissioner lodged an objection on the same grounds. The Victorian Police Commissioner's objection (amended from their original objection) relied additionally on amenity and alcohol misuse grounds given socioeconomic, demographic and Victoria police data (provided by Casey to VCGLR), and on the grounds that Woolworths had failed to disclose the projected retail alcohol sales for the proposed premises, which would prevent the VCGLR from having all the data relevant for harm minimisation and the risk of alcohol misuse.

On 17 April 2015, a VCGLR Delegate determined to grant the licence application. Casey and the Victorian Police Commissioner then sought a review of the original decision. The VCGLR Internal Review hearing (conducted by a panel of three Commissioners) was held over six days between August and December 2015. In April 2016, the VCGLR panel determined that the application would not be conducive to, or encourage, the misuse or abuse of alcohol and upheld the original decision to grant the packaged liquor licence. Casey did not appeal the VCGLR review decision to the Supreme Court. A package liquor licence was granted to Woolworths, trading as Dan Murphy's Cranbourne East.

METHOD

The research employed a case study design (Yin, 2014). Using Yin's typology, this case study is classified as a single case design with descriptive, explanatory and exploratory elements. It is a single case because we only investigated proceedings and decisions in relation to one premises – the Dan Murphy's packaged liquor store in Cranbourne East. It is descriptive in that it documents the steps in the proceedings and decisions, exploratory in that it examines participant perspectives and experiences on the case process and outcome, and explanatory in that we try to explain why the Casey Amendments were ordered to be withdrawn by VCAT and the decision to grant a liquor licence was affirmed by VCGLR. Data were drawn from the VCAT and VCGLR decisions documents and semi-structured interviews. The decision documents provide data on the arguments informing the decision and the interviews provide data on the experiences of participating in the regulatory process. Each data source is described below.

DOCUMENTS

Sample and analysis

Documents for this analysis comprise two review decisions and one decision on a question of law:

- Hunt Club Primary Proceeding (VCAT)
- Hunt Club Question of Law (VCAT)
- Dan Murphy's Cranbourne East (VCGLR).

This analysis has been conducted from a social science perspective, using the techniques of thematic analysis (Braun & Clarke, 2006). We also draw upon a legal reading of these decisions provided by author SJ.

INTERVIEWS

Sample and recruitment

Potential participants (n=37) were identified via two avenues: by reviewing VCAT and VCGLR decision documents (n=26); and by consulting with one key informant from Casey. The Casey key informant notified 11 potential participants, advising them of the research project and that follow-up contact would be made by the researchers. Both sources provided the participant's name and their institution or organisation. The decision documents specified each person's role in the proceeding (e.g. expert witness for Casey, VCAT). Potential participants from Casey were identified based on their roles within council departments and knowledge of matters related to the hearings.

Ethics approval for the project was granted by La Trobe University Human Ethics Committee (ID: S17-037). In consultation with Victoria Police members who had participated in the VCGLR hearings, we were advised of the need to apply for additional ethics approval from the Victoria Police Ethics Committee if we wished to recruit members of Victoria Police. We were not granted this approval (application 1.09.2017: notified outcome 20.12.2017) due to 'concerns about commenting on individual cases and other operational issues' (email correspondence, December 2017). Thus, eight potential participants from Victoria Police were not contacted.

Potential participants were sent an invitation to participate and a *Participant Information Statement* via email. Where there was no response, each participant was followed up with one further email. Overall, 29 individuals were invited to participate in the research. Fourteen participants were recruited and interviewed (Table 2). Interviews took place between May and November 2017.

Table 2 Profile of participants (*n* = 14)

Organisation/Role	*N*
Casey City Council	6
Witnesses (expert and lay)	7 [a]
Legal team/lawyers etc.	1
Total	**14**

a. Three expert witnesses appeared at both the planning and licensing stages

Data collection

Semi-structured interviews were conducted to explore participants' experiences and views of the review hearings and the outcome. An interview schedule was used to guide interviews. The schedule was adapted slightly to match the participant's role in the case (interview schedule for an expert witness is presented in Appendix A for illustration).

Three authors (JM, CW and RD) conducted interviews. Eight participants were interviewed face-to-face, and six were interviewed by telephone. Face-to-face interviews took place in the offices of the participants. Interviews took on average 40 minutes, ranging from 14 to 64 minutes. Interviews were digitally recorded and then transcribed verbatim. Participants were advised that the researchers would take every step to preserve their confidentiality and anonymity, that interview transcripts would be de-identified and that in publications arising from the research, participants would be identified only by broad descriptors (e.g. 'expert witness'). Participants signed a consent form prior to being interviewed. Participants were given the option of receiving the interview topic guide in advance, and most chose this option. Participants were also offered the opportunity to receive a copy of the transcribed interviews for review and all but three requested this. Of those

who requested a copy of the transcript, three participants requested amendments to the transcripts: two participants noted that the grammar of the spoken word – as transcribed – could be improved, and recommended changes to this end. These changes were minor in nature. One participant noted the wording of a point could be improved and suggested alternative wording via email. The transcript was amended using track changes to include this alternative wording.

Analysis

The software package, QSR NVivo11, was used to manage the qualitative data and coding system. Two authors (JM and CW) coded the transcribed interviews. An emergent coding technique was used to generate the initial codes (Neuendorf, 2016). Emerging themes were discussed by the research team, and these codes were applied to the data and refined throughout the analysis. Major codes included *hearing experience*, *hearing procedures and processes* and *policy and legislative context*. Findings are reported below according to the sequence of the decisions across the two regulatory systems (i.e. VCAT and then VCGLR). This is followed by participant perspectives and experiences on three salient themes: 1) the contrast with planning law on gaming venues, 2) the use of evidence and information, and 3) resources of participating in licensing matters. Findings are illustrated using verbatim quotations, labelled with each participant's role.

FINDINGS

VCAT DECISIONS

The extent to which social effects may be considered within planning

Both parties to the VCAT proceedings sought a legal determination from VCAT on the question of the extent to which significant social effects of the use of land to sell or consume liquor could be considered under clause 52.27 (i.e. in relation to planning decisions with respect to licensed premises) or whether relevant considerations are confined to amenity impacts[23].

This determination of the question of law was separate from the *Hunt Club Primary Proceeding*, which applied the determination to the facts of the case, in considering the merits of the review application.

In *Hunt Club Question of Law*, the Hunt Club's legal team argued that social considerations were under the *exclusive* remit of the LCR Act to the exclusion of the planning system. Hunt Club's position is illustrated in the following quotation from one interview participant:

> *… the Council wanted to invoke 52.27 to achieve this broad societal result…it couldn't do that; that was irrelevant… what [clause] 52.27 is concerned [with], like most planning, [is] controlling the interaction between land uses. It's about positioning land uses to make sure that society or community or metropolis functions well. And 52.27, on its face, determines amenity impacts, not societal impacts. And societal impacts – the health effects, the social effects of alcohol consumption – is a matter dealt with exclusively, and intendedly exclusively, by the Liquor Control Reform Act. [Participant 13, legal team]*

[23] VCAT planning proceedings may often be determined by a tribunal that does not include a legal member (a judicial member or a member who is a lawyer). In these cases, parties to the proceedings may agree to have a question of law arising in the proceeding decided by the presiding member, or in accordance with the opinion of a legal member (*VCAT Act 1998* (Vic), s107, and s 58 and Schedule 1, clause 66.).

Another participant suggested that the developer and their legal team had raised the legal question (over the scope of the planning system to consider societal impacts of land use) in order to limit consideration of claims about the social harms associated with a large packaged liquor outlet (i.e. the merit arguments of the case).

> *I don't think they [the Hunt Club] wanted a merits-based thing. …Look, they were obviously nervous going to a merits-based hearing. …And, regardless of the data we put on and how strong that is, they would have to have data that countered that. …Like, they've got to say why it's [the licence] not an impact. [Participant 5, City of Casey]*

In answer to the question of law, Dwyer determined that the scope of considerations under clause 52.27 would rarely, in practice, require consideration of matters other than amenity impacts, but that it cannot be said that other considerations will *never* be relevant (Hunt Club Question of Law, 2013, para 6).

Dwyer's decision begins by stating the question of law 'does not lend itself to a simple "yes" or "no" answer' (*Hunt Club Question of Law*, 2013, para 5) Dwyer noted that previous case law on the matter, suggesting that clause 52.27 did not authorise consideration of all possible impacts of the sale of liquor on the community, unless they manifested as amenity impacts, 'slightly over-simplified the legal position' (*Hunt Club Question of Law*, 2013, 6). Although Dwyer expressed the view that, in practice, matters that are not amenity impacts will 'rarely (if) ever' be relevant', he found that 'it cannot be said positively that other considerations will *never* be relevant' (*Hunt Club Question of Law*, 2013, para 6). Dwyer held that what is relevant will depend on each case, but matters must be relevant to town planning (having regard to the permit application, the purposes and decision guidelines in clause 52.27, and matters set out in planning legislation, [24] and any other relevant matter) (*Hunt Club Question of Law*, 2013, para 7).

On the basis of the planning legislation and planning scheme, he concluded that 'it cannot be said that a significant social effect that does not manifest itself as an amenity consideration will never be relevant (*Hunt Club Question of Law*, 2013, para 13)'. This was in part because one of the two purposes of clause 52.27 is 'to ensure that licensed premises are situated in appropriate locations', which is not necessarily restricted to amenity impacts (*Hunt Club Question of Law*, 2013, para 8). This, along with relevant provisions of planning legislation and the planning scheme 'provide a sufficient basis for considering a significant social effect of a planning decision *in appropriate circumstances'* (*Hunt Club Question of Law*, 2013 para 11).

Deputy President Dwyer then considered the likelihood of social impacts being established as a relevant consideration in relation to licensed premises. Dwyer acknowledged that it is conceivable that significant social effects could be a relevant consideration, and that one could 'never say never'. However, he offered the view that a broad concern about the social impacts of alcohol misuse or accessibility would 'rarely (if ever)' be relevant to decisions about licensed premises under clause 52.27, and that these matters would be more relevant to the liquor licensing framework under the *Liquor Control Reform Act 1998* (Vic) (*Hunt Club Question of Law*, 2013, para 14).

Dwyer noted the potential analogy between planning decisions in relation to licensed premises and planning decisions in relation to gaming machines. However, he held that while there is 'a clear spatial context' for considering the social effects of the location of gaming machines, social concern about the accessibility of alcohol will be harder to establish as a relevant planning consideration, particularly for the sale of packaged liquor due to the spatial disconnection between the point of sale and alleged harm caused by the availability of alcohol (*Hunt Club Question of Law*, 2013, para 20). He stated: 'In suburban Melbourne, I find it difficult to conceive of a situation where the social harm caused by the availability of alcohol within a local community might ever be of such significance to warrant it being a relevant *planning* consideration in considering the

[24] Section 60 of the *Planning and Environment Act 1987* (Vic) requires the 'responsible authority (planning decision maker) to consider a range of matters before deciding on a planning application, including the relevant planning scheme, the objectives of planning, all objections and submissions received, and any significant social and economic effects which the use or development may have.

location or size of a packaged liquor outlet in a dedicated retail/activity centre.' (*Hunt Club Question of Law*, 2013, para 20).

Dwyer went on to make general pronouncements about the role of planning in considering social harms more broadly. In contrast to Deputy President Dwyer's qualified and nuanced statements answering the question of law that are well-supported with references, one paragraph is notable for its relative lack of discussion of supporting evidence or authority. This paragraph read as Dwyer's opinion on the role of town planning with little reference to the law:

> *Town Planning is not a panacea for all perceived social ills, nor is planning decision-making a forum for addressing all issues of community concern. At its heart, planning is about the use, development and protection of land. It has a spatial context that is primarily concerned with the fair, orderly, economic and sustainable use and development of land. Town planning does not involve itself in moral judgements, nor, subject to this locational or spatial perspective, in the operation of a competitive market economy in which certain goods and services are lawfully made, sold or consumed. Whilst town planning seeks to secure a pleasant and safe working, living and recreation environment, it is not the role of town planning to address all issues of public health, nor to regulate the pricing or general availability of a product to manage the wellbeing of society (Hunt Club Question of Law*, 2013, para *15).*

Here, Member Dwyer extends the scope of the question of law put before him by misrepresenting it: a moderate question as to what extent does the scope of relevant considerations under clause 52.27 extend to considering social effects of the use of land to sell liquor is extended to become the position that town planning is being asked to address 'all perceived social ills', 'all issues of community concern' and 'all issues of public health'. Dwyer's extreme representation of what is being asked of planning frames the matter under consideration as unreasonable. This allows him to dismiss any role for consideration of social and health impacts: it is absurd to expect town planning to solve all social ills, therefore social and health considerations are not within the purview of planning. Also implicit in this paragraph is the notion that the nature and purpose of town planning is well known and uncontested – 'planning is', 'planning does not'. This further establishes the authority of Member Dwyer's opinion.

Designation of Hunt Club Question of Law as a 'Red Dot' decision

The designation of the decision as 'Red Dot' indicates that it is likely to have significance or be of interest but does not confer any special legal status. As one interview participant said, the 'Red Dot' categorisation 'is just a way of flagging that people might feel interested in it. It's a sort of internal mechanism by the tribunal' [Participant 13, legal team]. In the Tribunal's 2013 annual review of decisions, the *Hunt Club Question of Law* decision was highlighted as an exemplar of a broader message about the role of the Tribunal and the extent of social considerations relevant to planning permits (Gibson, 2013). In this case, 'the ambit of discretion associated with a permit under clause 52.27 to use land to sell or consume liquor' (Gibson, 2013: 10).

The practice in relation to VCAT Red Dot decisions is to publish a summary, preceding the full text of the decision, in which the reasons why the decision is of interest or significance are identified. The summary does not form part of the original decision. In the Red Dot summary of Dwyer's decision, the emphatic paragraph (that 'town planning is not a panacea') is included. We argue that this potentially gives this aspect of the decision undue weight in the minds of laypersons, or local government officials considering whether to grant or refuse planning permits.

Several participants observed that 'the panacea' [Participant 13, legal team] was a regularly cited excerpt of the VCAT decision in subsequent VCAT planning decisions. While the decision determined precisely the scope of relevant considerations for clause 52.27, this decision excerpt was cited in planning decisions beyond the specific area of alcohol regulation, extending to decisions relating to other land uses such as for gaming, mobile

phone towers and mosques (religious facilities). One participant reflected that Dwyer had intended to use the Casey case to make a broad point about the limitations for social and health considerations in planning decision-making:

> *But because …the scope of relevance of planning controls is always a topical and important question, I think the Deputy President took it upon himself to make a … sort of broader statement … that was intended to set a more broader principle. [Participant 13, legal team]*

Participants' views of the decision's implications

From the perspective of Casey and those appearing on Casey's behalf, the implications of the *Hunt Club Question of Law* 'Red Dot' decision were significant. The decision implied a distinction between what impacts can be considered in the planning regulatory scheme compared to licensing:

> *… the argument [in Hunt Club Question of Law (Dwyer)] was that … social impact ... should be tested at the VCLGR process, which kind of also said it wasn't appropriate necessarily to bring it [up] with that [planning] process ... [Participant 5, City of Casey]*

> *Although the decision did not set a formal precedent that was binding on subsequent VCAT decisions, participants perceived that the decision has, in practice, set a precedent for what can now be considered in planning decisions: But, yeah, unfortunately that has set the precedent. And I know it's been used in other decisions since, to maintain that precedent, which I find very frustrating. [Participant 3, witness]*

> *With that VCAT decision, that's limited our scope on what we can consider. So, we could still [challenge an applicant] in relation to the immediate amenity impacts, but to consider … density and volumes and the availability of packaged liquor, the VCAT case clearly says you can't consider that in the planning realm. [Participant 5, City of Casey]*

One participant noted that the next steps for local governments may be to advocate for changes to planning legislation and policy:

> *I: Can Casey ever go now to a merits hearing given the red dot decision of the point of law?*

> *P: No, I don't [think so], not now from the planning point of view. … Look, it may be that we advocate to government to actually widen the scope [of planning] again ... or clarify it [planning] a bit more. I think it's been – look, that was only a VCAT interpretation. … But it does act as a bit of a case law. … Or [we] could lobby the government with other councils to find a bit more clarification in the planning scheme. [Participant 5, City of Casey]*

Decision on validity of changes to Development Plan

Following the *Hunt Club Question of Law* decision, in the *Hunt Club Primary Proceeding,* VCAT's decision on the validity of Casey's changes to the Development Plan was made in accordance with Dwyer's determination that social effects may conceivably be relevant under clause 52.27 in a given case but considerations other than amenity impacts of licensed premises will rarely be relevant. Several participants working with Casey noted that Dwyer's ruling curtailed the consideration of evidence on whether there was a rationale for Casey amending their Development Plan to address social harms associated with packaged liquor. This is illustrated in the following quotations:

> *… this was a case that had a lot of evidence. … the Council spent a lot of time on material that ultimately was regarded as irrelevant, or of only marginal relevance. [Participant 13, legal team]*

> *… there is not much point talking about the evidence. I think in that case, even great local evidence would have been not relevant because she [Panel Member Glynn] made the decision that it wasn't a harm that planning should worry about. [Participant 1, witness]*

The hearing was confined to considering a number of aspects of Casey's decision to amend their Development Plan, including 'is local government able to implement such policy?' and 'was there a rationale for the floor area and location provisions of the Development Plan?'

In relation to the first question, VCAT considered that the new provisions in the Development Plan were not predicated on existing policy documents. In particular, VCAT noted there were no specific provisions in the planning scheme that directed the need for the changes to the Development Plan and, moreover, there was no specific local plan or policy that identified a need to impose controls over the size and location of packaged liquor outlets in Cranbourne East. VCAT considered that the *Casey Alcohol Accord* and the *Municipal Health and Wellbeing Plan 2009-13* had limited relevance because they were not adopted policies contained within the planning scheme.

Some participants agreed that internal local government policies and consistency mattered. As one participant put it:

> *It [a case] needs to be driven really strongly internally by someone who can align the case, align the decision to put forward the case with Council's objectives, with their municipal health plan, their municipal wellbeing plan, their council plan for the next ten years, whatever. If they don't have that, nothing is going to work. [Participant 8, witness]*

Other participants suggested that Casey had changed the Development Plan without adopting a local policy specifically for license premises:

> *It did seem… a bit disorganised and a bit after the fact, but I don't know exactly what went on and why they hadn't put a policy in place earlier, that they could then lean on, rather than clearly doing it just for this one purpose. …. I got the sense that if Casey had a policy for all of their disadvantaged suburbs that they wouldn't approve shopping centres with Dan Murphy's, they would have had more chance than saying something about this particular development: it's so important that we are going to whack a condition on their approval that we just made up. … The council didn't have the internal processes, a clear set of policies around these things which was a weakness in their whole argument. [Participant 1, Witness]*

Cumulative impact and packaged liquor licences

Whether a larger catchment area than suggested in Planning Practice Note 61 should be used for assessing cumulative impacts of packaged liquor outlets was one of the most contested issues raised in the Hunt Club Primary Proceeding decision. Practice Note 61 recommends a 500-metre catchment area to assess existing levels of alcohol-related harm. It does not direct that a different radius be used for assessing packaged liquor outlets. Casey proposed cumulative impacts be assessed on a 2km-3km radius (the area in which people normally shop and consume alcohol) rather than the 500m radius identified in Planning Practice Note 61, as impacts of packaged liquor outlets are more distal than on-premise outlets. However, VCAT Member Glynn did not accept the Council's submissions, as illustrated in the following excerpt from the Hunt Club Primary Proceeding:

> *If a different approach is meant to be undertaken to interpret clause 52.27 in relation to cumulative impact and package liquor, I find this is a matter that should be addressed by policymakers*[25].

[25] [2013] VCAT 726 (21 May 2013) [53]

The relevance of Planning Practice Note 61 for licensed venues was widely acknowledged but applying the guidelines to packaged liquor was less straightforward. Several interview participants pointed to the fact that Planning Practice Note 61 was developed in direct response to government and community concerns about clusters of licensed venues within a short distance (e.g. Swan Street, Richmond). Consequently, impacts of packaged liquor outlets were not considered.

> *What they [State Government] did, is they [in 2011] just modified an existing State Government practice note. … It was a practice note that was developed for nightclubs and they just sort of said, okay, it now includes packaged liquor … there are different issues with nightclubs as opposed to packaged liquor when we talk about the concept of transferred harm.*
>
> *Most of the nightclub issues are … immediately outside the premises, the antisocial behaviour and everything like that, that the inner-city councils experience. Whereas packaged liquor, people drive to, and then they drive back home. So, it [associated harm and amenity impacts] could be, you know, a radius of five kilometres from the premises. [Participant 6, City of Casey]*

Some participants identified three key points of difference between on-premise and off-premise licences: saturation; impact radius; and amenity harms.

> *Part of what we were trying to demonstrate was saturation: so, at what point do you have too many packaged liquor outlets in a region? And that was the thing that we had significant trouble in proving. So, the planning practice note around late-night liquor outlets does speak to the concept of saturation and how many outlets within that 500 metre limit is too many, but it doesn't say anything about packaged liquor outlets. It was clear that the 500 metre boundary wasn't the only catchment for the facility. But that's the way we, because of the planning law at the time, that was the way we had to assess it. [Participant 3, witness]*
>
> *So, I think that was the issue, trying to understand that cumulative effect. It's a bit different when you've got a street like … Swan Street and the bars down there. And you've got a rather contained area, so you can see that every extra bar is going to bring more people in, and more noise and all that for the neighbours. [Participant 2, witness]*

Several participants suggested that Planning Practice Note 61 be amended to include different guidelines for packaged liquor outlets than for on-premise drinking places. This was considered necessary given the new packaged liquor permit requirement.

> *We're not trying to prohibit [packaged liquor licences]. We can't because [it's] important that with any policy you can't prohibit something. All you can do is provide some guidance there as to how we would assess applications. Because a permit is required at the moment for them, so we need to be able to assess them against something. We don't have that. [Participant 6, City of Casey]*
>
> *And that's the other argument behind all this was that – and I should actually say, this is really important. We have a practice note in Victoria at the moment, practice note 61 ... it articulates very well what cumulative impact is. Now, it's been misused and it's incredibly misleading. And I can't tell you how disappointed I am [that] it hasn't been rectified yet. I think it's a real shame that it's automatically been applied to packaged liquor. [Participant 7, City of Casey]*

VCGLR DECISION

Following the planning decisions, in *Dan Murphy's Cranbourne East,* the VCGLR heard Woolworths' application for a packaged liquor licence for the Dan Murphy's outlet.

In making its determination, the Commission was required to have regard to the objects of the LCR Act, Ministerial decision-making guidelines,[26] as well as relevant grounds for refusing to grant a contested licence application set out in the LCR Act, in this case the 'amenity' and 'misuse or abuse of alcohol' grounds in the LCR Act.[27]

The Commission determined that the task before it, according to the legislative framework and following the decision in *Kordister,* was to decide the application having regard to the objects of the LCR Act. The Commission followed *Kordister* in finding that the harm minimisation object is the primary consideration in liquor licensing decisions, but that this does not mean it should be given such weight that other objects are not considered (*Dan Murphy's Cranbourne East*, 2016, para 65). The Commission also noted the finding in *Kordister* that the anticipatory nature of harm minimisation (i.e. the need for assessment of future risk of harm) may mean that a precautionary approach should be adopted where an 'appreciable risk of harm is identified' (i.e. from a licence application), and the object of harm minimisation dictates that the risk should be avoided 'unless it can be positively justified' (*Dan Murphy's Cranbourne East,* 2016, para 65). However, the Commission did not accept Casey's submission that it is required to adopt a precautionary approach in determining licence applications. It held that the *Kordister* decision did not support a 'strict or mandatory application of the precautionary principle'; rather, application of the principle is discretionary according to the circumstances of the application (*Dan Murphy's Cranbourne East*, 2016, para 73).

The Commission considered that the refusal grounds in the LCR Act (set out above) provided 'relevant criteria for consideration' (*Dan Murphy's Cranbourne East*, 2016, para 64) but did not require that an application be refused if one of the grounds were satisfied, only that it '*may*' be refused (*Dan Murphy's Cranbourne East,* 2016, para 62). The Commission noted that the objects of the LCR Act may provide wider bases for refusal than the refusal grounds (for example, because the objects refer to *'amenity of community life'* whereas the amenity refusal ground refers more narrowly to '*amenity of the area'*). As a result, there may be a situation in which a ground for refusal is not satisfied but the Commission could nevertheless, having regard to the objects of the LCR Act, exercise its discretion to refuse to grant a licence (*Dan Murphy's Cranbourne East,* 2016, para 63). The Commission considered, therefore, that 'the ultimate determination of the application is made…with reference to the objects of the Act' (*Dan Murphy's Cranbourne East,* 2016, para 64).

It seems clear from the Commission's decision, however, that the refusal grounds were the primary guiding criteria for its consideration of the evidence and its determination of the application. In considering the task before it, the Commission outlined its approach to the misuse or abuse of alcohol ground. Casey and Victoria Police submitted that, having regard to the ordinary meaning of the terms 'conducive to' and 'encourage' in the ground, those terms should not be treated as meaning 'to cause', and accordingly, it was not necessary to establish a causal connection between the licensed premises in question and the misuse or abuse of alcohol in order to satisfy this ground. Casey and Victoria Police argued that this was supported by the finding in *Kordister* that there must be a connection between the licensed premises and locality evidence, but this connection needs not be causal.

The Commission did not accept Casey and Victoria Police's submissions. The Commission accepted that the words 'conducive to' and 'encourage' should be given their ordinary meanings: 'contribute or helping' and 'to stimulate'. However, the refusal ground still required that the Commission be satisfied that the licence

[26] The Commission found that the evidence showed a limited concentration of existing licensed premises in the area. As such, *"Assessment of the Cumulative Impact of Licensed Premises"* Ministerial decision-making guidelines had limited bearing on the application

[27] LCR Act*,* ss 44(2(b)(i) and (2), and 47(2)

application *'would'* contribute to or encourage the misuse or abuse of alcohol (*Dan Murphy's Cranbourne East,* 2016, para 77). The Commission distinguished between the relationship between the relevant premises and the locality evidence (in relation to which the *Kordister* decision makes clear there need not be a causal relationship), and 'the totality of the evidence on which the Commission relies and whether or not it considers the relevant ground has been established' – which does require the Commission to be satisfied that the licence application *would* contribute to or encourage the misuse or abuse of alcohol (*Dan Murphy's Cranbourne East*, 2016, para 78). In making this assessment, the Commission adopted the principles of evidence set out in the *Kordister* decision *(Dan Murphy's Cranbourne East,* 2016, para 77).

In outlining its approach to the amenity refusal ground, the Commission did not accept Casey and Victoria Police's submission that the concept of 'amenity' under the LCR Act allows for consideration of private as well as public amenity. Rather, amenity is directed towards 'the character of public areas proximate to the relevant premises' (*Dan Murphy's Cranbourne East,* 2016, para 85). The Commission held that this suggests issues of family violence are not relevant to amenity for the purposes of the Act, but are more appropriately considered in the context of misuse or abuse of alcohol.[28]

While the Commission's ruling suggests that the scope of relevant amenity impacts is uncontroversial, one participant noted the ambiguous language used in the LCR Act concerning the scope of considerations. This led them to take an inclusive and broad approach when preparing evidence for the VCGLR.

> *But I think this [the LCR Act] sets out what is a confusing process, because the commission and the legislation doesn't necessarily tell you what's in and what's out. … It's quite descriptive under, for example, what amenity is. You know, amenity can be … car parking, it can be noise and nuisance. But also, I think on the last point in the legislation it says 'or anything else.' And you sort of read that and think, okay! [Participant 7, City of Casey]*

EVIDENTIARY CONSIDERATIONS

The Commission set out the principles laid down by the Court of Appeal in *Kordister* as to how evidence should be considered in the application. The Commission noted that as the premises were not yet operating, specific incident evidence was not possible. Accordingly, only general and locality evidence were relevant. The Commission noted that general evidence should not be dismissed on the basis that if taken into account, the object of harm minimisation would invariably require refusal of a new licence application. Following *Kordister,* the Commission must apply the general evidence to the relevant local context, and assess it according to the extent to which it is connected to or reinforced by the locality evidence. In considering locality evidence, the Commission described the relevant question as, 'whether the particular local, social, demographic and geographic circumstances…are conducive to or encourage the misuse or abuse of alcohol – that is, whether the object of harm minimisation 'would not be well served' by the grant of a licence.' (*Dan Murphy's Cranbourne East,* 2016*,* para 95(c)).

The Commission determined that the relevant area to consider in assessing the licence application was generally the area within a 5km radius of the proposed premises, based on evidence put by Casey and the Police as to the catchment area for customers of the proposed outlet, and the dispersed area over which packaged liquor is consumed, and impacts may occur. However, depending on the circumstances, greater weight may be placed on evidence that relates to areas closer to the premises (*Dan Murphy's Cranbourne East,* 2016, para 140).

[28] However, the Commission noted that the definition of amenity in the Act had changed and there may be benefit in this issue being clarified.

EVIDENCE

General evidence adduced by the parties comprised of a large range of academic and industry research, with a focus on the type of harms associated with the supply of packaged liquor, including health impacts, violence and family violence. Evidence led by expert witnesses for Casey included a large number of peer-reviewed studies on the relationship between increases in packaged liquor outlet density and increases in alcohol-related harm, as well as evidence on the practice of preloading on packaged liquor before going out and its impact on violence and harm. Casey also presented evidence on the increasing prominence of packaged liquor outlets, and the recent growth in the proportion of alcohol consumed that is packaged liquor – now over 80 per cent.

The parties led a range of locality evidence, including evidence as to harm, and vulnerability to harm, in the local area.

Casey and the police led extensive evidence that the local Cranbourne area surrounding the proposed liquor outlet[29] was a 'hotspot for alcohol-related harm' (*Dan Murphy's Cranbourne East*, 2016, paras 210, 242) and vulnerable to alcohol-related harm both in comparison to other areas in Casey and in comparison to Melbourne (*Dan Murphy's Cranbourne East*, 2016, paras 221-244). Evidence led by an expert witness for Casey included the following:

- There were a range of indicators of socioeconomic disadvantage in the Casey area compared to other areas of Melbourne.
- The proposed outlet was in close proximity to Statistical Areas Level 1 (SA1s)[30] with high numbers of alcohol-related offences.
- The 5km radius around the proposed outlet was the area of the highest intensity of alcohol-related offences in Casey.
- The SA1s around the proposed outlet had high incidences of family violence, and two SA1s, 800m and 1.7km away from the proposed outlet, respectively, were ranked in the top one percent of areas for number of alcohol-related family violence offences in metropolitan Melbourne.
- The proposed outlet was in a Statistical Area Level 2 (SA2)[31] in the top 95 to 99 percent of reported family violence offences for metropolitan Melbourne.

Evidence led by Victoria Police witnesses included that:

- Casey had the highest levels of family violence in Victoria, and alcohol was a likely factor in one in four family violence reports in the police's Cranbourne Response Zone; and
- there was a high level of family violence in the Cranbourne area, and often both the victim and the offender were alcohol-affected.

[29] The surrounding area being between within 2km to within 5km of the proposed liquor outlet site.

[30] 'Statistical Areas Level 1 (SA1) have been designed by the ABS as the smallest unit for the release of Census data … as to the typical number of persons within an SA1 … SA1s [contain] between 200 and 800 people': *Liquor Decision - Internal Review - Dan Murphy's Cranbourne East* n 80. See also Australian Bureau of Statistics 2016, *Census Dictionary*, *2016*, ABS doc. no. 2901.0, definition of 'Australian Statistical Geography Standard (ASGS)', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter23002016>.

[31] 'The SA2s are a general-purpose medium-sized area built from whole SA1s. Their aim is to represent a community that interacts together socially and economically': Australian Bureau of Statistics 2016, *Census Dictionary*, *2016*, ABS doc. no. 2901.0, definition of 'Australian Statistical Geography Standard (ASGS)', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter23002016>.

The Commission's determination of the application

1. Would the grant of the licence application be conducive to or encourage the misuse or abuse of alcohol?

Many interview participants' reflections on the VCGLR process indicated that it was their understanding that the VCGLR had a broader remit than VCAT, particularly in terms of the consideration given to social harms from alcohol. However, as one person said, the reality did not match their expectations.

> *But we then object to the liquor licence through the VCGLR process. And so, this is the process where, you know, as I said earlier, we were told [in the planning decision] that this is the forum for these sorts of social impacts to be better addressed because the objective that the commission is bound to is looking at detriment and making sure that there is no net detriment on the wellbeing of the community, etc. So, it's a bit broader than what planning is, as far as that narrow focus on amenity [Participant 6, City of Casey]*

Participants' perceptions of a failure on the part of VCGLR to take into account social harms may have arisen from the very high threshold that the Commission appeared to apply to the objectors' evidence in relation to the risk of future harm from the proposed premises. In considering the general evidence and locality evidence presented by Casey and Victoria Police, the Commission appeared to require an extremely high level of certainty and completeness.

For example, although the Commission broadly accepted the large body of evidence showing the relationship between the supply of packaged liquor and harm, it appeared to diminish the weight it placed on the research because the causal pathway by which harm occurs is not yet entirely clear. The Commission concluded that the research evidence highlighted the 'ongoing uncertainty as to the theoretical underpinnings of the relationship between supply of liquor from packaged liquor outlets and alcohol-related harm' (*Dan Murphy's Cranbourne East*, 2016, para 202). It argued that this was highlighted by the evidence of an expert witness for Casey that, although evidence of the relationship between alcohol availability and harm was reasonably robust, the causal mechanism for the relationship is contested, with one possible explanation being that increases in alcohol availability affect only a small number of marginalised or heavy drinkers, due to the impact of increased availability on lowering the price of alcohol products.

Of interest, the Commission also noted that the extent of harm in a particular location may depend on other policy interventions, and that it needed to have regard to these other interventions in considering the extent to which the new premises 'may result in harm'. It stated that it was not its task to study such policies, or assess the whole of the research evidence in relation to the spectrum of possible interventions. However, it noted that a community interest inquiry into this issue may be of benefit in guiding its future decision-making.

In considering the general evidence in light of the locality evidence, the Commission noted that there were limitations on the level and nature of information before it, including that 'information as to the impact of the premises on future alcohol supply and consumption is not complete' (*Dan Murphy's Cranbourne East*, 2016, para 279).

For example, in the context of the 'availability theory' – that greater availability of alcohol leads to greater consumption and harm, the Commission noted that it was not provided with any general research as to individual consumer behaviour and how this may relate to the relevant area, and was only provided with limited evidence as to alcohol pricing in the area. It stated that in addition to wholesale sales data (which at the time of the decision, was not yet being collected), 'survey data of individual consumer preferences or anticipated behaviour would also likely be of relevance.' (*Dan Murphy's Cranbourne East*, 2016, para 302).

The Commission accepted that there was evidence of alcohol-related family violence and other harm in the area surrounding the proposed premises, and in Cranbourne and Casey more generally. However, it appeared to apply a high standard in relation to the level of harm and vulnerability shown by the locality evidence; it was

influenced by whether the evidence represented not just a vulnerability, but a 'particular vulnerability' in the relevant area, a 'proportionally higher' level of harm than in other areas, and a 'uniform vulnerability' in the relevant area (*Dan Murphy's Cranbourne East*, 2016, para 293). Because evidence as to the harms at an SA1 level was provided on a numerical basis rather than a per capita basis, the Commission stated that it was not clear that harms were 'proportionally higher in the relevant area than elsewhere in the community, or whether they are increasing at a faster rate'. It also noted that 'the harms that have been detailed suggest the vulnerability in the relevant area surrounding the Premises is not uniform.' (*Dan Murphy's Cranbourne East*, 2016, para 293).

The Commission found that, on the evidence before it, the grant of the licence application would not result in a substantive increase in the supply and consumption of alcohol, in circumstances where there were already a number of licensed premises in the area (21 within 2km of the premises and 75 licences in the relevant 5km area).

Further, the licensee would be well placed to minimise any potential negative impacts from the licence given its previous good record, limited trading hours and commitment to responsible service.

The Commission concluded that the evidence had not identified an appreciable risk of harm, and that 'overall the application would not be conducive to or encourage the misuse or abuse of alcohol' (*Dan Murphy's Cranbourne East*, 2016, para 305).

2. Would the granting of the licence application detract from or be detrimental to the amenity of the area

In considering whether granting the licence would detract from, or be detrimental to, amenity of the area, the Commission accepted that alcohol-related antisocial behaviour can be connected with liquor availability, that there was evidence of this behaviour in Cranbourne East, and that this can be detrimental to amenity. However, the Commission noted that the Cranbourne area was already well serviced with on-premises and packaged liquor availability, thus the granting of one additional licence would not exacerbate adverse amenity impacts. Furthermore, the Commission noted that the licence would have a range of positive amenity effects (but some of these were associated with establishment of the retail centre generally rather than of a Dan Murphy's). Lastly, the Commission noted that the proposed hours of operation were more conservative than ordinary trading hours of existing licensed premises in the area, and therefore the potential negative amenity impacts of the licence were deemed negligible.

3. Having regard to the objects of the Act, is it appropriate to grant or refuse the licence application?

While the Commission did not consider either of the refusal grounds to have been satisfied, its ultimate task was to exercise its discretion according to the objects of the Act to determine whether to grant or refuse the licence application.

Despite its acknowledgement that harm minimisation is the primary consideration in liquor licence applications, the Commission appeared to give only cursory further consideration to the object of harm minimisation, relying on its assessment of the evidence in relation to the questions of whether the proposed premises would encourage or be conducive to the misuse or abuse of alcohol, or would be detrimental to the amenity of the area. The Commission noted only that the evidence and submissions presented by the parties in relation to the refusal grounds were relevant to its consideration of its discretion, and that it assessed them in determining whether granting or refusing the application would be consistent with the harm minimisation object.

While harm minimisation was the primary object the Commission was required to consider, it was also required to have regard to other objects of the Act, including facilitating the development of licensed facilities meeting community expectations. The Commission noted Casey's argument that as there were already four packaged liquor licences in the activity centre, a new large, freestanding, chain-operated packaged liquor store

in a vulnerable area would be contrary to this object. On the other hand, it noted Woolworths' argument that the proposed new outlet would provide convenient access to packaged liquor and diversity in the size of packaged liquor outlets for a community experiencing explosive population growth.

The Commission concluded that having regard to the objects of the Act, in particular the object of harm minimisation, it should exercise its discretion to grant the licence application (*Dan Murphy's Cranbourne East*, 2016, para 347).

GENERAL THEMES

Many key themes identified during data analysis were not necessarily limited to either the planning or licensing contexts. Three that we will discuss here are: 1) the contrast with gaming venues and planning law, 2) the use of evidence and information, and 3) resources of participating in licensing matters.

Gaming venues and planning law – Contrast on the extent to which social effects may be considered

The primary planning control relating to gaming, clause 52.28, requires that consideration be given to the social and economic impact of the use and development of land for gaming machines. The purpose of this clause is:

- To ensure that gaming machines are situated in appropriate locations and premises.
- To ensure the social and economic impacts of the location of gaming machines are considered.
- To prohibit gaming machines in specified shopping complexes and strip shopping centres.

Several participants considered regulatory practice for gaming, specifically electronic gaming machines (EGMs), to be more effective than for liquor licences for a number of interrelated reasons. Participants observed that in contrast to alcohol regulation, planning has evolved to incorporate social and locational considerations relating to gaming:

> *With gaming we can consider that [broader social issues]. It's standard practice of understanding EGM harm over a number of years. [Participant 5, City of Casey]*

> *They've [VCAT decision-makers] learnt to deal with gambling and gaming machines and stuff like that. And it took a long time because they had to establish precedents. And there were several cases that failed before they, the planners involved, finally worked out which arguments would work at VCAT…. But I think it will take… a few more goes at VCAT to establish case law before they will finally be taken seriously on this stuff [the geographic association between alcohol availability and harm]. [Participant 3, witness]*

Another point of difference between gaming and alcohol identified by some interview participants was a greater degree of 'political will' to regulate EGMs. For example, the introduction of caps to restrict the number of EGMs in an area was identified as a key government directive. In contrast, the state government's handling of alcohol was considered 'very-hands-off'.

> *I think there is a lot more research and data about the social and economic impacts of the proliferation of EGMs. The Government has seen that…. and that's why they put a cap on EGMs in parts of Casey, Dandenong and other vulnerable communities that have those harms. [Participant 5, City of Casey]*

The adoption of clear policies on the appropriate location of EGMs was another measure governments used to regulate gaming. A number of participants referred to the concept of 'convenience gambling' and the need to protect the community from the harm associated with gaming. The absence of similar measures to aid the regulation of packaged liquor was viewed as a lost opportunity.

And the State Government have acknowledged that [adverse social impacts of gaming] that's relevant for planning to consider… where we maybe should be discouraging gaming venues from establishing… next to schools, or … venues that facilitate convenience gambling. It's okay to have policies in the [planning] scheme for that [location of gaming machines]. Well, we would say equally that there should be policies that also address the same sort of impacts that can come from problem drinking, which is alcohol and how it affects the family environment. [Participant 6, City of Casey]

Evidence and information

A key theme related to how information and evidence are defined, assessed and treated within the administrative review hearing processes. This included what type of evidence was weighted most heavily in hearing decisions. Participants spoke of the primacy given to local information, including personal experiences and local data, and the limitations of using general evidence.

So, my role was more around, 'what do you see in your everyday work within the community, what do you see presenting [to the service]'? So it wasn't so much of, and I'm sure they would have loved it if we did have data, but we don't collect data on drug and alcohol addiction, so it really was more anecdotal evidence. [Participant 8, witness]

The participant continued:

So, I couldn't say 'this many people', I could say 'some', and that sort of thing, which a lot of people don't like because they don't see that as significant. But again, I think the strength from Casey's perspective was that the voices and the stories are important and we can't ignore those or reduce those to numbers. [Participant 8, witness]

Beyond locally relevant evidence, an additional challenge was having evidence that is both locally relevant and measuring an impact that is relevant according to legislation. As one participant stated:

I think the commissioner was really interested in this [academic] paper about litter and noise because that is what they wanted to decide upon, because it is an amenity harm, but it wasn't specific to Casey. So I think if there had been some study that said "If we put a Dan Murphy's on this block of land, all these residents nearby will be annoyed constantly by drunk people throwing bottles at their house". That would have been quite relevant. [Participant 1, witness]

Similarly, another participant stated:

But the hurdle that we were always going to have is being able to prove a nexus between: is this Dan Murphy's on that site going to result in an increase in, you know, family violence or other alcohol-related harm in that community? … Could we actually prove that… people …that bought liquor from that outlet were going to take it home and then, as a result of consuming it, then be involved in some sort of family violence or other alcohol-related crime? [Participant 6, City of Casey]

An academic expert witness, reflecting on their experience on the witness stand, echoed this view:

So, I got the sense that the commissioner didn't really care about the general evidence, that they're really trying to figure out, you know, this bit of land in this community, with these people living around it, and if I couldn't say anything about that, I think they generally thought that I was scene-setting rather than being very important to the hearing. [Participant 1, witness]

The challenge of accessing harm data at the local level, particularly from Victoria Police and the Crime Statistics Agency, was raised by some interview participants. Local government officers spoke of the challenges of accessing data to support an argument about a specific land site. As one participant said, 'We found that we would have loved to use a lot more data, but it just wasn't available in the area, or the spatial area that we

needed' [Participant 7, City of Casey]. From Casey's perspective, the fact that Victoria Police co-objected to the liquor licence was advantageous because it provided additional local-level data:

> *But what was compelling is where we did have data that was at that fine-grained level, which is why Victoria Police as a partner was really important, it was strong and it was bold and it was straight to the point that, yep, you can't question that this is happening in this area because here it is. You know, here's the identified spots. [Participant 7, City of Casey]*

In their decision, the VCGLR Commissioners noted that evidence from witness statements about the levels and experience of alcohol-related harm in the area surrounding the proposed premise was accepted, given its specificity, in contrast to some evidence from Casey and Victoria Police of levels and trends in alcohol-related harm at the municipality level (Dan Murphy's Cranbourne East, 2016, para 291).

The lack of data about the community living in the East Cranbourne area (or near the activity centre/Dan Murphy's) was identified as a significant challenge. There was a sense that this limited the ability of Casey to demonstrate a causal link between outlets and harm, which compromised Casey's position:

> *But because of those issues with the data, it just made it really hard to prove that nexus; to say that if you put a packaged liquor outlet in this particular location it's definite that there will be X per cent increase in domestic violence rates and cirrhosis of the liver and all that kind of stuff. That's what we really struggled with. [Participant 3, witness]*

Resources of participating in licensing matters

All witness participants identified that the process of being a witness and preparing background material and evidence statements was time intensive. Some witnesses also indicated that they spent numerous days at the hearing observing the discussions or waiting to be called before the Commissioners. Another common reflection of witnesses was the adversarial nature of cross-examinations. While there was widespread acknowledgement that it was the legal counsels' job to interrogate the opposing party's evidence, the experience was nevertheless unsettling for many witnesses. The language participants used to describe this experience illustrates its high level of intensity.

> *I had watched the expert witness before me who …got really dismantled and then I had my turn getting taken apart. [Participant 1, witness]*

> *Oh, I was cross-examined for about a day. So, it was quite an extensive cross-examination. [Participant 12, witness]*

> *I don't think I did get up and answer any questions in that forum. And I know I was shaking in my boots because I was watching the expert witnesses get torn to shreds. [Participant 8, witness]*

One participant used the analogy of chess to describe the cross-examination experience:

> *Yeah, and it's always a bit of a chess game because you've got to, they ask a question and you've got to think about what their follow-on questions are going to be three questions down, that will – you know, they're leading you into a trap kind of thing and you've got to make sure you don't get led into those traps. [Participant 3, witness]*

The intensity of the cross-examination experience was partly due to the degree to which evidence was seen as contested. This was attributed to the complexity of the issues presented.

> *I'm often an expert witness and it's not unusual for judges or judicial officers to wish that experts wouldn't argue with each other. So that was, you know, pretty common. [Participant 12, witness]*

Yeah. Look, they always, the best way to prove an argument is to discredit the opponent's expert witnesses, and so usually the questioning is around trying to discredit my work…And all you can really do is try and prove that your work is credible. And, so a lot of the time you're talking about where the data came from and how you assessed it and trying to prove the credibility of what you're saying. [Participant 3, witness]

These sentiments may arise from the situation whereby very complex academic evidence is presented and debated in an adversarial setting.

There was general acknowledgement that the VCAT and VCGLR proceedings were costly and resource intensive with considerable time spent gathering and preparing background material presented at the hearings and the associated legal costs. As one participant said 'If councils want to win an argument they've got to pay for the expert witnesses, they've got to pay for the lawyers … So, it all costs money' [Participant 3, witness].

Local government officers stated that the high level of internal commitment to pursue the matter, which included the decision to dedicate staff time to the case, reflected the council's ongoing concerns about alcohol-related harm experienced in the community. The extent of the work involved is illustrated in one local government officer's comment on the outcome of the *Dan Murphy's Cranbourne East* proceedings at VCGLR:

I completely felt that at the VCGLR, we were going to be successful with that. The sheer line-up of experts we had, the creative way we approached it, the amount of information that we had gathered, and the relevance that information had to a specific site – my understanding was it had never been done before to that level of detail. And that taking that somewhere in front of people that make honest decisions based on the intent of the legislation, the objectives, I actually felt like we would have been successful. [Participant 7, City of Casey].

Discussion

We conducted a case study in community control of packaged liquor alcohol availability in the context of changes to planning law, and liquor licensing legislation and case law, in Melbourne, Australia. We analysed the review decisions to examine the written reasons for not ruling in favour of Casey, as well as analysing the experiences and views of those involved in the proceedings. We also examined the case with the aim of considering its implications for future attempts by local governments to refuse or object to new liquor licences.

Changes to Victoria's planning law were, in part, justified as an additional means to reduce negative social impacts of alcohol outlets. This study shows, however, that the case has set an uncertain direction for the scope of social considerations, including public health considerations, within planning decisions because in *Hunt Club Question of Law*, VCAT determined that although matters other than amenity impacts of licensed premises cannot be definitively ruled out as relevant considerations under clause 52.27, in practice, other matters will rarely if ever be relevant. The case study suggests that the introduction of the requirement for planning approval to be granted for packaged liquor outlets has not had the effect of increasing local government control over the impacts of packaged liquor outlets. This is partly because the mechanism is located within planning law and there are conflicts between the epistemological frames of planning and public health, with the former focused on proximal locational impacts, and the latter examining impacts at a broader area or population level.

The case study highlights the importance of local alcohol policy. The City of Casey had not developed a local planning policy for licensed premises. In the *Hunt Club Primary Proceeding*, the City of Casey's action to impose additional trading conditions on the sale of packaged liquor through amendment to the Cranbourne East Development Plan (which included an approved planning permit for Hunt Club), was partly undone by the absence of a supportive local planning policy for licensed premises.

While only a guidance document, Planning Practice Note 61 had limited relevance to packaged liquor licence permit assessments and was likely detrimental to Casey's regulatory effort, mainly because it suggests an area for assessing impacts of premises that is far too narrow, and definitions of clusters of licensed premises that are inappropriate, in relation to packaged liquor outlets. There is good reason for councils to be wary when applying the practice note to permit applications for packaged liquor. It is possible that Planning Practice Note 61 continues to be applied to permit applications for packaged liquor licences in the absence of any other guidance of criteria against which to assess packaged liquor applications. Our case study supports the need for advocacy to the state government to re-examine the application of the Practice Note to the assessment of planning permit applications for packaged liquor licences.

Kordister was a landmark case in confirming harm minimisation as the primary object of the LCR Act and the primary consideration in liquor licensing decisions. However, as this case study demonstrates, the *Kordister* decision has not meant that VCGLR will necessarily decide against the greater availability of alcohol on harm minimisation grounds. While in *Dan Murphy's Cranbourne East* the VCGLR considered general evidence on the relationship between availability and harms, following *Kordister,* the weight it attached to this evidence was determined by the extent it was linked to or reinforced by locality evidence.

In *Dan Murphy's Cranbourne East,* it is arguable that the VCGLR, by focusing heavily on the misuse of alcohol and amenity grounds for refusing to grant a liquor licence application in the LCR Act, and applying a very high threshold to its consideration of the general and locality evidence, failed in its task of considering whether, in light of the local, social, demographic and geographic circumstances, the object of harm minimisation would not be well served by granting the licence application. Despite the established primacy of the harm minimisation object in liquor licensing decisions, it was the perception of participants that the liquor licence application process did not in practice provide a forum for social harms to be considered. This may be linked to the legislative framework of the LCR Act, which places the onus on objectors to a licence application to

provide evidence relevant to the objection and refusal grounds, but places no evidentiary onus on the licence applicant. It may also be related to the narrow wording of the refusal grounds which require the Commission to be satisfied that a licence application *would* be conducive to or encourage the misuse or abuse of alcohol, or *would* detract from or be detrimental to the amenity of the area. Although the Commission held that the ultimate determination of the application should be made according to the objects of the LCR Act, in practice the refusal grounds appeared to operate as the primary guiding criteria for its consideration of the evidence and its determination of the application.

The second aim of this report was to consider the implications of this case for local government alcohol regulation efforts in the future. We suggest that the experience of the participants and real and perceived legal barriers may act as a disincentive to future local government attempts to oppose liquor outlets for several reasons. Firstly, there are perceptions that it would be fruitless to refuse a planning permit on social impact grounds because the *Hunt Club Question of Law* determination has been (mis)interpreted as meaning that social effects of licensed premises will never be relevant. Secondly, the cost, time and resources involved for Casey may be a disincentive for other municipalities. Thirdly, the way that the VCGLR dealt with evidence of harm in *Dan Murphy's Cranbourne East* and the very high threshold it appeared to apply to the evidence required, as well as the perception that the liquor licensing process did not provide a forum for social harms to be considered, may discourage future attempts to refuse or object to licences on harm minimisation grounds. Lastly, beyond licensed premises, we have touched on the broader implications of the *Hunt Club Question of Law* determination in terms of acting as a barrier to social effects and impacts being considered in regulating other land uses.

STRENGTHS AND LIMITATIONS

We note both the strengths and limitations of this case study. A strength of the study is its analytic generalisability (Yin, 2014: 40-41). By examining in-depth the processes and principles underlying the decisions to allow the large chain packaged liquor outlet, our case study can inform future efforts to regulate alcohol availability at the local level. For example, highlighting the importance of pre-existing strategic policy on licensed premises and the inadequacy of Planning Practice Note 61 for guiding assessment of planning permit applications for packaged liquor outlets.

Limitations of the study include that a relatively small sample was recruited for the interview component of the study and we were not granted approval to interview officers from Victoria Police, which meant that not all perspectives were represented. This study should, therefore, be viewed as an exploration of issues faced by local governments in regulating local availability of alcohol, rather than a comprehensive assessment of those issues. Another limitation is that the study sought views on a licensing case that commenced in 2010 (some participants were involved in related matters much earlier). The study, therefore, relied on participant recall of how events unfolded and what were significant reasons explaining the case outcome.

POLICY IMPLICATIONS AND RECOMMENDATIONS

A key policy implication to stem from this research is the need for greater legislative support for considering social impacts and the risk of harm from licensed premises in planning and licensing decision-making. It would be beneficial to have further information about the planning regulatory framework for gaming venues in order to better inform policy advocacy for liquor. For example, what was the rationale and policy motivation for social and economic considerations to be included as relevant considerations for gaming venues in planning policy?

Furthermore, within planning law, there is a need for guidance on the application of clause 52.27 in relation to the assessment of planning permit applications for packaged liquor. As noted in this study, there was

considerable ambiguity about the scope for planning law to regulate new packaged liquor licences. It would be of benefit for the Victorian Government to provide guidance to support local governments in their role of assessing planning permit applications for packaged liquor outlets, including consideration of the cumulative impact of multiple outlets.

The Victorian Government should amend the purposes of clause 52.27 to include consideration of social impacts of the use of land for licensed premises (i.e. to mirror the purpose of the planning control for gaming, clause 52.28). The introduction of a health and wellbeing object in the *Planning and Environment Act 1987* (Vic) is also worth considering. While in *Hunt Club Question of Law,* VCAT held that social impacts would rarely be a relevant consideration in planning decisions, there are views that public health should be a relevant consideration in Australian planning law should have regard to public health goals and impacts (e.g. Mills, 2014).

The *Hunt Club Primary Proceeding* determination suggests local governments should have a local planning policy for licensed premises already in their local planning policy documents to support determinations on planning permits for licensed premises. This would protect them against the appearance or reality of regulating on a case-by-case basis. While this may not have resolved all the appealable issues in this case, it likely would have helped.

In relation to objections to liquor licence applications, local governments would do well to prepare locality evidence on a per capita basis rather than as raw numbers. The VCGLR approach to the *Dan Murphy's Cranbourne East* case suggests local government objections are unlikely to succeed without strong locality evidence based on per capita data. The availability of wholesale alcohol sales data since 2015-2016 may mean local governments are better positioned to provide data relevant to harm minimisation and the risk of alcohol misuse in a local area when objecting to a new licence application.

Finally, the liquor licence application and decision-making process should be reformed so that the onus is on the liquor licence applicant, rather than objectors, to provide relevant evidence in relation to the potential impacts of the proposed licence. A new test should be introduced which gives the VCGLR discretion to grant a new or varied licence only if satisfied that the grant is in the public interest and consistent with the objects of the LCR Act. This would follow the approaches in Western Australia and the Northern Territory, where the onus of proof in liquor licensing decisions is on the licence applicant, and the licensing authority may only grant an application if satisfied that it meets a public interest test (*Liquor Control Act 1988* (WA), s 38(2)), (*Liquor Act* (NT), ss 6, 6B). (Amendments to the *Liquor Licensing Act 1997* (SA) to introduce a similar community interest test in South Australia have been enacted under section 36 of the Liquor Licensing (Liquor Review) Amendment Act 2017 but have not yet come into effect.)

Conclusion

Our case study has identified both legal and practical challenges for local governments seeking to regulate new packaged liquor outlets in their local area. We make several observations about the implications of the case and suggest the case may have a chilling effect on local governments refusing or objecting to new packaged liquor licences in the future. Planning and licensing legislation will need to change if local government attempts to restrict, refuse, or object to new outlets are to have a greater likelihood of being upheld on review.

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Appendix A

Interview schedule for expert witnesses

- We understand you were an expert witness for the City of Casey in the Hunt Club Commercial Pty Ltd v Casey City Council VCGLR hearing. Can you tell me, who approached you to be a witness, and what did they ask you to do?
- Can you tell me a little bit about the submission you prepared for the hearing?
    - What type of evidence did you draw on?
    - What arguments did you make?
- Prior to the hearing, did you receive any guidance or support with your submission or role as an expert witness? Who provided the support/assistance and what did it consist of?
- Were you notified about the outcome of the VCGLR hearing? (If yes, what did you make of the decision?)
- At the VCGLR hearing, how was your testimony/evidence received?
    - To what extent was your evidence accepted or subjected to cross-examination?
    - Was any of your evidence misunderstood by the Chair or by the opposition?
- After the hearing, did you have a sense of how the case went?
- What are your thoughts on the Chair's final decision, and how your evidence was used?
    - Do you have any thoughts about why the City of Casey's objection was unsuccessful?
- How would you describe your overall experience as an expert witness? Would you do it again?
- Is there anything you would do differently, if you had your time over?
- Is there anything else about this case that you think is important for us to know?

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