

Public Health v Alcohol industry compliance laws: A case of industry capture?

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This article confirms industry compliance and enforcement processes are an essential consideration in the growing pantheon of legal and commercial determinants of public health. Whilst alcohol control laws vary between individual jurisdictions, their development and application are confronted by a common threat of undue industry influence or capture. This necessitates a greater understanding of this phenomenon to better inform a collective and effective international public health response. New South Wales (NSW) Australia, has developed a layer of alcohol industry compliance laws in the form of disciplinary schemes. This article critically explicates the first of these, the Violent Venues Scheme (VVS) to determine the nature and extent of any capture. This would significantly compromise harm minimisation statutory objects and disrupt the democratic process and the rule of law. In contrast, an influential industry identity, attributed the earlier last drinks laws, VVS and a related scheme as causing the alleged destruction of Sydney's night time economy and fun. The research also analyses the indispensable role of a neoliberal paradigm in legitimising exclusive relationships between governments and industry. This is indelibly imprinted on the alcohol regulatory landscape. One resistant to evidence based public health orientated improvements.

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PART 1. INTRODUCTION AND CAPTURE TEST

Western nations' varying attempts to curb the deadly 2019 corona virus pandemic provide no better and immediate illustration of the importance of legal determinants of public health.¹ These determinants include the regulatory process of law making, the application and enforcement of the laws to secure their compliance and, judicial interpretation.

As Australia's response to COVID-19 including extraordinary social distancing public health orders² demonstrates, effective legal compliance regimes are a critical component to achieve positive public interest and health outcomes.

One result of the forced closures of on-premise alcohol outlets such as hotels (pubs), clubs and restaurants because of COVID-19 restrictions in Australia, has been reported increases in social media alcohol promotions³ and the consumption of alcohol in homes.⁴ This has coincided with anecdotal reports of increased domestic violence (DV).⁵

Whilst crucial alcohol control laws vary between jurisdictions, this does not diminish the importance of their evaluation to better understand and effectively respond to a common thread of alcohol industry undue influence of the regulatory process.

New South Wales (NSW) directly legislates the supply, promotion and consumption of alcohol through the *Liquor Act 2007* (NSW) (the 'Act') and other related statutory and non-statutory controls. Unlike most other Australian jurisdictions, the Act contains a unique second layer of statutory industry compliance disciplinary schemes.

This article critically explicates the first of these schemes, the Violent Venues Scheme (VVS) to determine the nature and extent, if any, the formulation and application of the scheme has been captured by the alcohol industry.

¹ Gostin, L. et al. 'The legal determinants of health: harnessing the power of law for global health and sustainable development' (2019) *The Lancet* (online) 393(10183): 1857-1910. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)30233-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)30233-8/fulltext) ; Roger Magnusson et al, "Legal Capacities Required for Prevention and Control of Noncommunicable Diseases" (2018) 97(2) *Bulletin of the World Health Organization* 108. <<https://www.who.int/bulletin/volumes/97/2/18-213777/en/>>.

² See for example *Public Health (COVID-19 Gatherings) Order (No 3) 2020* (NSW). <[https://www.legislation.nsw.gov.au/emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020.pdf](https://www.legislation.nsw.gov.au/emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf)> .

³ Alana House, 'Alcohol brands lead social media growth during COVID-19', *drinkstrade* (online) 14 April 2020 < <https://www.drinkstrade.com.au/alcohol-brands-lead-social-media-growth-during-covid-19> >.

⁴ Joanna Reynolds and Claire Wilkinson, 'Accessibility of 'essential' alcohol in the time of COVID-19: Casting light on the blind spots of licensing?' (2020) *Drug and Alcohol Review* (online).

⁵ Rick Morton, 'Family violence increasing during Covid-19 lockdown'. *The Saturday Paper* (online) 4–10 April 2020. <<https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>>. In June 2018, the NSW Bureau of Crime Statistics and Research (BOCSAR) reported a reduction in domestic assaults based on Australian Bureau of Statistics data drawn from crime victim surveys. Freeman, K. 'Is domestic violence in NSW decreasing?' (2018) (Bureau Brief No. 134) NSW Bureau of Crime Statistics and Research. Note these results vary from the BOCSAR rates of DV recorded by NSW Police and reflected in their online report 'Domestic violence statistics for NSW' <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx>. This latter data originating from Police recorded criminal incidents, was relied upon to construct part of Figure 1 in the article.

The VVS commenced in December 2008 and still operates although subject of likely amendments arising from industry lobbying. The deterrence scheme imposes a range of escalating sanctions on on-premise licensed venues whose violent incidents recorded on premises and within a 50-metre radius from the venue in a year, fall within successively higher ranges of the number of reported violent incidents. The identity of those 'declared' venues are publicly 'listed' every six months on an annual rolling basis.

This article builds upon 2019 research⁶ involving a critical case study of the 2015 key amendments⁷ to the Act and the development of a prototype legislative capture test. This article's explication of the VVS, relies upon the same legal phronetic methodology,⁸ similar research method and capture test for the presence of industry capture. The 2019 test was formulated by a synthesis of regulatory⁹ and governance¹⁰ theory and praxis. For the purpose of this article, 'capture' is defined as

the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interests of a specific interest group or person. Capture is the opposite of inclusive and fair policy making, and always undermines core democratic values.¹¹

The 2019 research found that the amendments to the Act and subsequent policies and practices had shifted the power distribution between competing stakeholder interests further to the alcohol industry. This included the diminished autonomy of the NSW Independent Liquor and Gaming Authority (ILGA) from Government, dilution of the primacy of 'public interest' considerations in the determination of higher risk alcohol outlets in favour of the commercial criteria of 'customer convenience' and, was characterised by a lack of transparency and independent third party inclusiveness in the democratic law making process.

This article addresses an important research gap relating to the explication of the second essential element of the regulatory process – the compliance and enforcement process, by use of a critical case study of the VVS.

⁶ Brown T, 'Legislative Capture: Critical Consideration in the Commercial Determinants of Health' (2019) 26 *JLM* 764.

⁷ *Gaming and Liquor Administration Amendment Bill 2015* (NSW). See <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=888>.

⁸ Murphy B. and McGee G. 'Phronetic legal inquiry: An effective design for law and society research?' (2015) 24 (2) *Griffith Law Review* 288–313. It constitutes a blend of the more traditional legal doctrinal methodology and the process of 'phronetic social inquiry'.

⁹ D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013).

¹⁰ Kaufmann D, 'Corruption, Governance and Security: Challenges for the Rich Countries and the World' (October 2004). Available at SSRN: <https://ssrn.com/abstract=605801>.

¹¹ Daniel Carpenter 'Detecting and Measuring Capture' in Daniel Carpenter and David Moss (eds) *Preventing Regulatory Capture: Special Interest Influence and how to Limit It* (Cambridge University Press, 2013). Reflected in OECD definition Preventing Policy Capture: Integrity in Public Decision Making, *OECD Public Governance Reviews*, OECD Publishing (2017), Paris, 9, <http://dx.doi.org/10.1787/9789264065239-en>. See also essay of Elizabeth Warren 'Corporate Capture of the Rulemaking Process' (June 2016), *The Regulatory Review*. <https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/>.

The global response to the COVID-19 pandemic also illustrates how different Governments trade off the competing goals of public health with predominantly private financial and commercial interests to sustain capital accumulation and reproduction. Inherent in such determinative processes are inescapable normative, social and political-ideological considerations.

A similar mix of public health and commercial considerations are contained within the 'Objects' of the Act.¹²

In addressing alcohol-related public health and safety threats, the academic literature suggests the greatest impediment to effective reductions in alcohol-related harms is the corporate political activity (CPA)¹³ of the alcohol industry to sustain a politico-legal environment conducive to profit making¹⁴ and growth. This goal can be effectively achieved through a process of 'capture'. It is also inherently problematic given the most cost-effective enforceable regulations to reduce alcohol harms, relate to decreasing its availability, supply and challenging that it is a safe and ordinary consumer product.¹⁵

Lencucha and Thow¹⁶ caution that it's insufficient to rely on the concept of 'capture' alone as an explanation why unhealthy commodity industries including alcohol, can persuade Governments to contravene international obligations relating to reducing harms arising from the promotion and consumption of their unhealthy products.

They argue that a key consideration is the 'elusive'¹⁷ neoliberal paradigm predicated on individual liberty and freedom that conditions the policy/law environment and, is 'reified' in institutions and structures. These structures are, however, also subject to disruption.¹⁸ This paradigm is perceived as articulating the 'proper relationship between government, the market, and society'.¹⁹ It in effect, provides a *raison d'être* to legitimise Government decisions and relationships with stakeholders.

¹² <https://www.legislation.nsw.gov.au/#/view/act/2007/90/part1/sec3>.

¹³ Ulucanlar S, Fooks GJ and Gilmore AB 'The Policy Dystopia Model: An Interpretive Analysis of Tobacco Industry Political Activity' (2016) *PLoS Med* 13 (9). See also Paixão, M. and M. Mialon, 'Help or Hindrance? The Alcohol Industry and Alcohol Control in Portugal' (2019) *International Journal of Environmental Research and Public Health* 16(22).

¹⁴ West, R. and T. Marteau (2013), 'Commentary on Casswell (2013): The commercial determinants of health' 2013 *Addiction* 108(4): 686-687; see also Pinsky, I., Pantani, D, [Sanchez, Z.](#), 'Public health and Big Alcohol' (2020) *The Lancet Global Health* 8(5).

¹⁵ Lachenmeier, D. W. and J. Rehm, 'Comparative risk assessment of alcohol, tobacco, cannabis and other illicit drugs using the margin of exposure approach' (2015) *Scientific Reports* 5: 8126. See also McCambridge, J., et al. 'Alcohol Harm Reduction: Corporate Capture of a Key Concept' (2014) *PLoS Medicine* 11(12): e1001767.

¹⁶ Lencucha, R. and A. M. Thow 'How Neoliberalism Is Shaping the Supply of Unhealthy Commodities and What This Means for NCD Prevention' (2019) *International Journal of Health Policy and Management* 8(9): 514-520 and series of commentaries. < http://www.ijhpm.com/article_3646.html>.

¹⁷ See also Monbiot, G., 'Neoliberalism – the ideology at the root of all our problems', *The Guardian* (online) 15 April 2020 <<https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot?fbclid=IwAR2riLU4u2r6PBxqlcHW16fa7ANUVKRaoWckEF2nUy7gg-rwtjgJlcfMrbA>>.

¹⁸ Lencucha R, Thow A. Developing a research agenda for the analysis of product supply: a response to the recent commentaries. *Int J Health Policy Manag.* 2020;x(x):x–x. doi:10.34172/ijhpm.2020.25

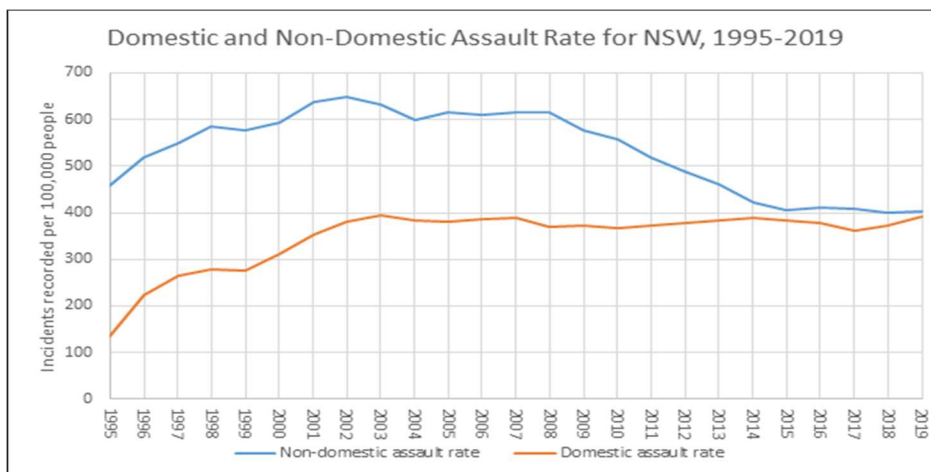
¹⁹ Lencucha and Thow, (n 16), 515.

This article adopts a micro-macro level approach to influence and power²⁰ that is integrally related to the phenomenon of regulatory capture. It suggests an indispensable role of a neoliberal paradigm in the ongoing legitimisation of exclusive relationships between NSW Government and the alcohol industry. This is revealed in part by the application of the following capture test to the empirical data derived from a critical case study of the VVS and, its postscript on the outcome of the strong industry lobbying to remove the scheme and further weaken the regulatory environment.

It also raises the contemporary question to what extent the Government’s focus on these on-premise regulatory intervention compliance schemes, may serve as a distraction or smokescreen from the off-premise industry’s contribution to high rates of DV.

Figure ‘1’ below compares the annual rates of reported DV and non-domestic violence assaults (NDV) in NSW for the period 1 January 1995 to 30 December 2019 in NSW.²¹ Since 1 January 1995, the rate of reported DV increased by 288% whilst the rate of reported NDV fell by 12%.

Figure 1.



Source: NSW Bureau of Crime Statistics and Research (BOCSAR)

Capture Test

A legislative capture test was derived from a synthesis of the results of the 2019 case study of the 2015 key amendments²² to the Act with regulatory and governance literature.²³ It

²⁰ For further consideration of power within the context of health equity see Harris, P., et al. "A glossary of theories for understanding power and policy for health equity." (2020) *J Epidemiol Community Health*

²¹ More detailed breakdown of BOCSAR’s domestic assault statistics for the years 2015 to and including 2019 can be found at online ‘Domestic violence statistics for NSW’

<<https://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/Domestic%20Violence%20Statistics.xlsx>> .

²² *Gaming and Liquor Administration Amendment Bill 2015* (NSW). See

<<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=888>> .

²³ Carpenter (n 11). Reflected in OECD definition Preventing Policy Capture: Integrity in Public Decision Making, OECD Public Governance Reviews, OECD Publishing (2017), Paris, 9,

<http://dx.doi.org/10.1787/9789264065239-en>.

consisted of five elements including ‘Separation of power considerations in relation to the connected conduct’.

However, for the purposes of detecting the presence of industry capture within the VVS, the initial legislative capture test has been modified into the following three prerequisites. Less reliance is placed on separation of powers considerations. One reason is the circuitous origin of the VVS that was not solely derived from an expansive Bill before Parliament. Instead, it evolved from a media release²⁴ from the NSW Premier and an Office of Liquor, Gaming and Racing (OLGR) ‘Fact sheet’.²⁵

Prerequisites for industry capture (2020)

Firstly, there is a **temporal component** that the conduct or outcomes in question must be ongoing, not a ‘one-off’ instance.

Secondly, capture requires two or more parties’ complementary interests expressed through **connected conduct** by way of action or inaction. There is the expectation of some quid pro quo but not necessarily associated with an immediate exchange of favours. It can include the creation of environment or ‘cultural’ capture²⁶ conducive to an exchange or expectation of mutual benefit.

This necessitates the acquiescence of a sovereign (government) entity or related individuals for some mutual benefit. It may include for example, Government inaction or deregulation defined by Carpenter as ‘corrosive’ capture,²⁷ with a private interest group whose power is enhanced by undue influence over a public regulatory process and/or desired outcome. Interwoven with this element of the test is the establishment of mens rea – consideration of motive and intent of the connected parties.

Finally, the tangible and intangible outcomes (including the ideological frame²⁸ that may serve to legitimate the connected conduct) being detrimental to the overall **public interest** This involves normative considerations.

²⁴ Premier of NSW ‘Media Release’ 8 July 2009.

²⁵ Original Fact sheet is unobtainable.

²⁶ Kwak, J. (2013), Cultural Capture and the Financial Crisis. In D. Carpenter & D. Moss (Eds.), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*. Cambridge: Cambridge University Press. 71 - 98.

²⁷ See discussion on Corrosive or Deregulatory Capture. Carpenter D. (2013). Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation. *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*. D. Carpenter and D. A. Moss. Cambridge, Cambridge University Press: 152-172.

²⁸ Schram, A. "When evidence isn't enough: Ideological, institutional, and interest-based constraints on achieving trade and health policy coherence." (2018) *Global Social Policy* **18**(1): 62-80.

PART 11. CASE STUDY - REGULATING THE SUPPLIERS OF ALCOHOL IN NSW – VIOLENT VENUES SCHEME (VVS)

1. Background

The Act prescribes a usual list of statutory offences²⁹ applying to liquor licensees and others, for example, the prohibition of the service of alcohol to intoxicated and under aged patrons.³⁰ However, unlike many other Australian jurisdictions, NSW has evolved a second layer of industry compliance controls in the form of ‘disciplinary’ compliance schemes. These impose a range of additional compounding sanctions against licensees and others for non-compliance with their statutory obligations related in part to the sale and service of alcohol. These schemes include the:

- Violent Venues Scheme (VVS) that commenced in December 2008;³¹
- Three Strikes Scheme (3SS) commenced January 2012;³² and
- The Minors Sanction Scheme (MSS) that took effect in December 2014.³³

This article explicates the first above scheme. This necessitates some limited examination of the second scheme, the 3SS. The 3SS has a more detailed statutory origin and been subject to substantial legal amendments before Parliament³⁴ following industry lobbying. This scheme imposes additional sanctions in the form of license conditions on licensees convicted with serious prescribed alcohol-related offences.

2. Emergence of NSW alcohol industry disciplinary laws – NSW regulatory context

The emergence of a second layer of industry compliance schemes in NSW commenced shortly after the Liquor Act 2007 took effect on 1 July 2008. The VVS and 3SS were in part, a response by the NSW Labor Government to the growing public backlash against unabated levels of

²⁹ See *Liquor Act 2007* (NSW) pt 2 ‘Principal offences relating to sale and supply of liquor’.

<<https://www.legislation.nsw.gov.au/#/view/act/2007/90/part2>> .

³⁰ *Liquor Act 2007* (NSW) pt 7.

³¹ *Liquor Act 2007* (NSW) sch 4 ‘Special licensing conditions for declared premises’.

<<https://www.legislation.nsw.gov.au/#/view/act/2007/90/sch4>> . See also for greater details of the scheme

<<https://www.liquorandgaming.nsw.gov.au/resources/violent-venues-scheme>> ; L&GNSW ‘Fact sheet FS3006 Violent venues scheme’;

<https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0020/202961/fs3006-violent-venues-scheme.pdf> .

³² *Liquor Act 2007* (NSW) pt 9A ‘Disciplinary action—3 strikes’. See Liquor & Gaming NSW *Fact sheet FS3015 ‘Three Strikes disciplinary scheme’* <<https://www.liquorandgaming.nsw.gov.au/documents/fs/fs3015-three-strikes-disciplinary-scheme.pdf>>.

³³ *Liquor Act 2007* (NSW) pt 7 div 4 provides for a Minors Sanction Scheme. See also the following L&GNSW explanation <<https://www.liquorandgaming.nsw.gov.au/working-in-the-industry/serving-alcohol-responsibly/managing-under-18s/minors-sanctions-scheme>>. The MSS is not evaluated in this article. The Act also provides disciplinary provisions for repeated non-compliance and reoccurring levels of violent incidents where a range of sanctions can be applied including changes to license conditions, authorisations and cancellation of license. See ss 51-54 of the Act.

³⁴ *Liquor Amendment (3 Strikes) Bill 2011* (No 2) (NSW). <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=927>>. The Bill was accompanied by a Liquor and Gaming NSW ‘Summary of changes’ <https://www.customerservice.nsw.gov.au/_data/assets/pdf_file/0019/502183/Summary-of-Changes-24-hour-Economy-Bill-2020-V7.pdf>. It will not be evaluated within this article.

highly visible alcohol fuelled street violence (NDV)³⁵ across late trading drinking precincts including in Sydney, Newcastle and some other major NSW regional centres.

Within the broader context of a public interest policy objective of reducing the overall rates of alcohol-related violence in NSW, Figure '1' above shows that up until 2008, DV and NDV had broadly similar trajectories. After this time, there was a significant divergence where DV remained high whilst NDV fell away till where the rate of DV in NSW may shortly exceed that of NDV.

Compared with the regulatory intervention in the form of the VVS and 3SS impacting on-premise licensed venues to address high rates of NDV, the regulation of the supply of takeaway alcohol in NSW reflected in domestic assaults rates in Figure '1', remains relatively minimal.³⁶ This disproportionately impacts³⁷ upon women and children.³⁸

In March 2008, the former NSW Liquor Administration Board (LAB) part of the former NSW Licensing Court,³⁹ determined an undue disturbance complaint initiated by Newcastle Police and subsequently joined by the community. Newcastle was experiencing the highest level of non-domestic assaults in NSW.⁴⁰ The LAB's landmark decision⁴¹ imposed a precinct-wide package of licensing conditions on all Newcastle CBD late trading (post-midnight) hotels.⁴² This included a reduction in trading from 5am to 3am, a 1am curfew and drink controls.

A detailed media investigation into the influence of the NSW alcohol industry on politics and the regulatory process suggested the 2008 Newcastle LAB decision sent reverberations through the national on-premises alcohol supply industry. It found

The (Australian Hotels Association) AHA bragging in its private annual report about successful lobbying of government and secret deals with media representatives to counter negative

³⁵ See Second Reading Speech The Hon. Kevin Greene NSW Labor Minister for Gaming and Racing, 2 December 2008 *Liquor Amendment (Special Licence Conditions) Bill 2008* <<https://www.parliament.nsw.gov.au/bill/files/1595/LA%2010208.pdf>> .

³⁶ See for example initiatives from Northern Territory government to reduce alcohol harms including Minimum Unit Pricing (MUP) See *Part 5 – 'Minimum Pricing' Liquor Act 2019* (NT). The Northern Territory government also provides the following web page on MUP. <<https://alcoholreform.nt.gov.au/milestones/floor-price>>; See also Reynolds and Wilkinson (n 4).

³⁷ Curtis, A. et al, 'Alcohol use in family, domestic and other violence: Findings from a cross-sectional survey of the Australian population' (2019) *Drug Alcohol Rev.*, 38: 349-358. See also Liang, W. and T. Chikritzhs. 'Revealing the link between licensed outlets and violence: Counting venues versus measuring alcohol availability' (2011) *Drug and Alcohol Review* 30(5): 524-535.

³⁸ Australian Institute of Health and Welfare 2018. *Family, domestic and sexual violence in Australia 2018*. Cat. no. FDV 2. Canberra: AIHW. <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/table-of-contents>>.

³⁹ The *Liquor Act 2007* (NSW) and the *Gaming and Liquor Administration Act 2007* (NSW), provided for the replaced of the Court and LAB with the NSW Casino Liquor and Gaming Authority – later renamed as the NSW Independent Liquor and Gaming Authority (ILGA).

⁴⁰ Police evidence provided to the LAB hearing.

⁴¹ D B Armati, Decision Liquor Administration Board s104 Conference, Newcastle 14 March 2008.

⁴² Jones C, et al., 'The impact of restricted alcohol availability on alcohol-related violence in Newcastle NSW' (2009) *Crime Justice Bull.* 137. <<https://www.bocsar.nsw.gov.au/Documents/CJB/cjb137.pdf>>.

press; The AHA's great fear of any spread of the "Newcastle system" of 3am closures for licensed venues.⁴³

In mid-2008, the Director of Compliance of the NSW Office of Liquor Gaming and Racing (OLGR) Mr Gardner, was reportedly applying a tough approach with the industry to secure compliance and force down the high level of NDV assaults.⁴⁴

This set of policy/law compliance and enforcement structures in NSW in part, reflected the above mix of a new Liquor Act, unsustainably high levels of non-domestic assaults enlivening negative public opinion, a 'tough' or 'vigorous' approach to compliance by the regulators, divided media and a powerful AHA closely connected with Government and Opposition political parties.

Lencucha and Thow recognise one symptom of the neoliberal paradigm is the presence of policy inconsistency or incoherency.⁴⁵

Overlaying the emergence of the three above NSW industry compliance disciplinary schemes, was the joint industry/government development of a Safe Venues Voluntary Rating Scheme (SVVRS)⁴⁶ in late 2008. It appeared to contradict the prevailing interventionist and forceful thrust of NSW industry compliance and enforcement measures at that time.

The SVVRS is evaluated at this stage as to not interrupt the sequencing of the emergence of the VVS.

The following critical exploration of the forerunners of the VVS and the 3SS including the 2009 Safe Venues Voluntary Rating Scheme (SVVRS), provides a rare insight into the neoliberal foundations of the current regulatory process and the likely direction of ongoing law 'reforms' favouring⁴⁷ the industry.

⁴³ Jane Hansen, 'Questions Are Being Asked about the Connections between the O'Farrell Government and the Australian Hotels Association', 18 December 2011, *The Sunday Telegraph* (Online) <<https://bit.ly/2H7oCoI>>.

⁴⁴ On 18 May 2008, it was reported that twenty-three of the state's most violent premises were pre-emptively requested by OLGR to provide evidence of the measures they were taking to prevent violence. Silmalis L. "State's violent pubs face closure", *The Sunday Telegraph* (online), 18 May 2008 <<https://www.dailytelegraph.com.au/news/nsw/states-violent-pubs-face-closure/news-story/c44b7163822ee503f8929702dffe5940>>. See also (Gardner) 'The new liquor hard man' *Sydney Morning Herald* (online), 31 May 2008 <https://www.smh.com.au/national/the-new-hard-liquor-man-20080531-gdsfy7.html> and (Gardner) Dan Proudman, 'I'll shut pubs even earlier', *Newcastle Herald* (online), 16 April 2008 <https://www.newcastleherald.com.au/story/482244/ill-shut-pubs-even-earlier/>.

⁴⁵ Lencucha and Thow, (n 16).

⁴⁶ NSW Department of Arts, Sport and Recreation 'Safety Rating System for Licensed Venues' Discussion Paper March 2009.

⁴⁷ At an Australian Hotels Association (AHA) awards night in November 2017, the (then) NSW Liberal/National Party (LNP) Minister for Racing the Hon. Paul Toole announced 'As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry'. Andy Young, 'Minister full of praise for pubs' *The Shout* (online) 27 November 2017 <<https://www.theshout.com.au/news/minister-promises-pub-reforms/>>. The above quotation was removed from the web page sometime after its publication, but reference was retained in this hyperlink.

3. Safe venues voluntary rating scheme (SVVRS) – revealing the neoliberal blueprint

On 1 March 2009, the NSW Labor Minister for Gaming and Racing released a joint discussion paper⁴⁸ on the proposed SVVRS stating a desire to ‘give patrons a transparent guide to safety standards at licensed venues across NSW’.⁴⁹

The proposed industry voluntary scheme was not implemented despite the production and release of the above joint government/alcohol industry discussion paper and a later document containing suggested practices and strategies.⁵⁰ This development needs to be evaluated because like no other NSW alcohol regulatory document, it highlighted the conflicts of interests between the sworn duty⁵¹ of elected public officials to make and apply laws in the public interest – and the economic private imperative associated with the operation of a deregulated NSW alcohol retail supply market.

This joint paper reflected both the capacity and power of the industry to drive the ideological agenda and, the emergence of policy proposals inconsistent with the high level of state and quasi-tribunal interventionism underway in NSW at that time.⁵²

As the following extracts of the SVVRS paper illustrate, in keeping with the neoliberal narrative, alcohol fuelled street violence was conceptualised in part by the NSW government and industry as symptomatic of inanimate market failure due to a lack of information and was therefore, capable of correction.

Also consistent with the neoliberal theme, a voluntary (non-statutory) scheme, is portrayed in the following extracts as preferable to the imposition of restrictive licensing conditions on businesses that may compromise loans or the ability to ‘obtain loans, damage business reputations and may result in a criminal record for non-compliance’.⁵³

Owners and controllers of licensed premises would theoretically compete to attract patrons to those venues that had the highest safety ratings determined by the industry itself.

⁴⁸ NSW Department of Arts, Sport and Recreation ‘Safety Rating System for Licensed Venues’ Discussion Paper March 2009.

⁴⁹ The Hon. Kevin Greene NSW Labor Minister for Gaming and Racing, Minister for Sport and Recreation, Media Release 1 March 2009. See also the former Minister’s post retirement attendance of AHA function. Sean Nicholls ‘Former gaming minister was guest of hotels lobby on luxury break’ *Sydney Morning Herald* (online), 30 August 2011, <<https://www.smh.com.au/national/nsw/former-gaming-minister-was-guest-of-hotels-lobby-on-luxury-break-20110829-1jiej.html>>.

⁵⁰ NSW Government ‘Safer nights out - Safety practices and strategies to reduce alcohol-related violence’ September 2009. See <https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/205549/Safer-nights-out_Sep_2009.pdf>.

⁵¹ Possible fiduciary duty See Exhibit 16 Independent Commission Against Corruption – Operation ‘Eclipse’ Gageler S. ‘The Equitable Duty of Loyalty in Public Office’ Cptr 5 *Finn’s Law: An Australian Justice* (2016) Tim Bonyhady (ed) <<https://www.icac.nsw.gov.au/ArticleDocuments/896/EXHIBIT%2016.pdf.aspx>>.

⁵² This included the March 2008 NSW Liquor Administration Board’s imposition in Newcastle CBD of a package of precinct-wide licensing conditions including earlier last drinks and, the Office of Liquor, Gaming and Racing’s Gaming (OLGR) Director of Compliance’s Mr Gardner’s publicly cautioning violent NSW licensing premises with tough sanctions if the alcohol violence continued. See references to ‘Gardner’ n 44.

⁵³ Discussion paper (n 48) 8.

The nature of the market place is that consumer choice influences industry and business behaviour. Effectively informing consumers about the safety practices of a venue could lead to greater support for businesses with a higher safety rating. This, in turn, would create an incentive for businesses to improve their practices.⁵⁴

Under this unitarist/neoliberal model, the industry was best placed to play a central role in developing, implementing and administering the voluntary safety rating system. In the arena of ideation, no space was left for active involvement by any third-party interest groups representing public health and local community interests.

A system that involves industry in its development, delivery and ongoing operation should also ensure the best safety outcomes are achieved using practical and workable solutions drawn from the experiences of licensees and business that comprise the liquor industry.

An industry operated system would have the benefit of generating confidence amongst participants that it is a system with merit, that has not been imposed by Government and that involves peer review and public recognition that contributes to business prosperity and strengthens perceptions of the liquor industry as a whole.⁵⁵

Following industry and community feedback on the draft proposal, on 1 September 2009, the Government released a guide titled 'Safer nights out - Safety practices and strategies to reduce alcohol-related violence'.⁵⁶ The document noted:

Consistent with **better regulation principles**, this resource has been developed to support stakeholders to **voluntarily** implement strategies that will achieve better **safety outcomes** without government imposing additional red tape or licence conditions (emphasis in original).⁵⁷

The critical evaluation of the SVVRS proposal reveals it was framed with a positivist view of the law underpinned by the operation of a virtuous guiding hand of a free market promoting venue safety.

The SVVRS narrative appears to shelter the industry from punitive compliance/enforcement measures that may adversely impact on their financial arrangements. The SVVRS could in this sense be construed as an important symbolic correction and affirmation of the close working relationship between the NSW alcohol industry and successive Governments.⁵⁸ This was arguably needed at a time when the industry was the subject of 'tough' and visible compliance activity from some of the regulators. As such, the above passages from the joint paper in their totality, provide the foundations of a legitimisation pathway for industry capture of the regulatory process.

⁵⁴ Ibid 7.

⁵⁵ Ibid 16.

⁵⁶ NSW Government, n 50.

⁵⁷ Ibid 2.

⁵⁸ See Brown n 6. The Appendix of the 2019 article contains media references to the political relationship between the industry and successive NSW governments. More recent examples are provided in following sections of this article.

The voluntary proposed scheme was not implemented, but its neoliberal spirit survived within the evolving NSW regulatory alcohol law making and compliance framework.

4. List of the most violent premises in NSW

In 2007-8, the Sydney Morning Herald (SMH) was involved in lengthy legal proceedings under the *Government Information (Public Access) Act 2009* (NSW) (GIPAA)⁵⁹ to obtain from the Police, crime statistics on the number of assaults in and surrounding all NSW hotels reflected in Police 'linking data'.⁶⁰ It was an important public interest consideration that the NSW public and pub patrons should be made aware in a timely manner of the true magnitude, identity and location of the level of alcohol fuelled violence within all its retail alcohol outlets.

The above GIPAA application was opposed by the Police and the Australian Hotels Association (AHA). The Police finally conceded and in March 2008, the SMH provided the public with the first list of the 100 most violent licensed premises in NSW.⁶¹ Coincidentally, the most violent identified venue, the 'Mean Fiddler' hotel was also awarded the AHA's 'best' hotel award for two years running.⁶² This raises important concerns about the capacity of the industry to self-regulate its own activities as advocated in the above proposed SVVRS.

It was also reported the senior police officer involved in opposing the SMH GIPAA application, left the Police and joined the AHA around the same time as the conclusion of the SMH's legal case. His position with the AHA was tentatively titled 'Director of policing and regulatory relations'. He reportedly had been discussing a position with the AHA for some time prior to leaving the Police.⁶³

The information contained within the list of violent licensed premises was based on Police recorded assaults on premises and were provided by the NSW Bureau of Crime Statistics and Research (BOCSAR). However, the BOCSAR Director advised the SMH

The figures only record assaults inside the hotel and were certain to grossly understate the real level of assaults ... We know from national surveys generally that the vast bulk of assaults

⁵⁹ *Government Information (Public Access) Act 2009* (NSW) (GIPAA). A related important benefit of the application was imposing greater transparency and accountability on the alcohol industry and Government.

⁶⁰ Origin and purpose of Police linking data <<http://fare.org.au/wp-content/uploads/Adoption-of-the-Alcohol-Linking-Program-into-Routine-Practice-by-New-South-Wales-Police.pdf>>. Several hospitals are also now recording patients' last place of consumption of alcohol. See Clare Sibthorpe, 'Canberra's alcohol hotspots targeted as Calvary Hospital records booze intake of emergency department patients', *Canberra Times* (online), 6 March 2017 <<https://www.canberratimes.com.au/story/6035672/canberras-alcohol-hotspots-targeted-as-calvary-hospital-records-booze-intake-of-emergency-department-patients/>>.

⁶¹ Matthew Moore, 'Revealed: the most violent pubs and clubs' *Sydney Morning Herald* (online), 11 March 2008 <<https://www.smh.com.au/national/revealed-the-most-violent-pubs-and-clubs-20080311-gds4na.html>>. The article also revealed political donations to the NSW Labor Party by interests in one of the most violent premises.

⁶² In 2007 the Mean Fiddler hotel was the recipient of the AHA NSW 'Hotel of the Year', 'Restaurant of the Year', 'Bottle Shop of the Year – Metro' and 'Marketing Campaign of The Year – Metro' Awards for Excellence. In 2008, the hotel won the AHA NSW 'Retail Metropolitan' and Live Entertainment' Awards for Excellence. <<https://www.ahaawardsnsw.com.au/uploads/2012--2007/18>>.

⁶³ Matthew Moore, 'Hazy start for AHA lobbyist' *Sydney Morning Herald* (online), 13 March 2008 <<https://www.smh.com.au/national/hazy-start-for-aha-lobbyist-20080313-gds4za.html>>.

are not reported ... These (reported assaults) would be the most serious assaults and probably the tip of the iceberg.⁶⁴

The Government's structural response in December 2008 to the SMH's initiative was to produce an embryonic VVS – a list of the 48 most violent premises in NSW based on reported assaults recorded by the Police. These 'listed' venues were subjected to drink controls including a 2am lock out preventing patrons entering or re-entering the premise, service of alcohol in plastic containers after midnight to prevent 'glassings', no shots and drink purchase limits after midnight and a 10 minute cessation of the service of alcohol every hour after midnight.⁶⁵

These venues were identified within the *Liquor Regulation 2008* (NSW). However, following a Supreme Court of NSW challenge by nine of the declared premises, the NSW Government quickly relocated the provisions within a new *Schedule 4* of the Act.⁶⁶

5. Emergence of Violent Venues Scheme

On 8 July 2009, the NSW Labor Premier Mr Rees⁶⁷ announced a more nuanced version of the list of the 48 most violent premises in NSW to take effect in December 2009. This change introduced the concept of the most violent licensed premises categorised into three Schedules based on the number of recorded violent incidents on the premise.⁶⁸ The Premier observed: -

the community is sick and tired of violence and these new arrangements will target venues that have rising alcohol-related assault rates ... we will **work with** venues to reduce incidents by imposing **strict** rules but also **reward them** for their success ... **strict** requirements will continue to be placed on venues based on the number of assaults **on** premises (emphasis added).⁶⁹

⁶⁴ Don Weatherburn Director BOCSAR in Moore (n 61).

⁶⁵ See description of scheme contained within Moffit, S. et al, 'What Does Research Tell Us about the Impact of Recent Liquor Licence Restrictions on Violence in New South Wales?' [2016] *ClCrimJust* 15; (2016) 28(1) *Current Issues in Criminal Justice* 97 <<https://www.bocsar.nsw.gov.au/Documents/BB/bb40.pdf>> and the first list on the violent venues <https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0007/205846/Round-1-List-of-Top-48-venues-pdf.pdf> .

⁶⁶ See <[Liquor Amendment \(Special Licence Conditions\) Act 2008 No 102](#)>. Assented to 3.12.2008. The Hon. Kevin Greene Minister for Gaming and Racing, and Minister for Sport and Recreation, Agreement in Principle NSW Legislative Assembly, 2 December 2007. <<https://www.parliament.nsw.gov.au/bill/files/1595/LA%2010208.pdf>>.

⁶⁷ See Stephanie Gardiner, 'NSW govt to stay tough on pub violence' *Sydney Morning Herald* (online) 5 November 2009 <<https://www.smh.com.au/national/nsw-govt-to-stay-tough-on-pub-violence-20091105-hz5m.html>> .

⁶⁸ The two published lists of declared violent NSW licensed premises first appeared in Round '2' (1 July 2008 – 30 June 2009) of the VVS. The first round consisted of a list of the 48 most violent premises in NSW. See <<https://www.liquorandgaming.nsw.gov.au/resources/violent-venues-scheme>> ('Previous rounds').

⁶⁹ Rees, N. Premier of NSW 'Restrictions continue to curb alcohol violence' Media Release 8 July 2009.

AHA response

On the same day (8 July 2008) of the Premier's above announcement of the new VVS, an unpublished memo⁷⁰ from the NSW AHA Chief Executive provided all their members with the Premier's media release outlining the new violent venues schedules. It also revealed the AHA's following strategy or 'play book' to undermine the adoption of laws such as the VVS, that may impact upon the volumes and strength of alcohol served - a core source of business revenue in addition to poker machine profits for many hotels and registered clubs.

The obvious agenda from here is to continue to **work with** Government and relevant stakeholders in order to ramp up the issues of personal responsibility, concerns about illicit drug use and other off premise solutions such as disbursement around closing time, better allocation of Police resources, sale and promotion of alcohol off premises etc (emphasis added).⁷¹

The AHA's strategy designed from the outset to counter strict forms of industry regulation, formed the basis of subsequent national responses⁷² from the AHA. They apparently chose to oppose or deflect any attempts by Governments to adopt evidence-based alcohol harm prevention initiatives across the country to reduce the availability and supply of alcohol. A key tactic was shifting blame (creating decoys) on to a range of other stakeholders and illicit drugs.⁷³

This ability of the industry to effectively coordinate nationally, provides them a capacity to bypass any individual jurisdiction's restrictions⁷⁴ on political donations,⁷⁵ such as those that came into effect in NSW on 1 January 2011 - before the 26 March 2011 NSW election.⁷⁶

OLGR was aware of the AHA's above memorandum informing their members of the aim to direct attention away from their alcohol supply and service practices that were contributing to the high levels of alcohol-related violence. This fundamental difference in the direction of regulation between industry and government undermines the overused pluralist expression of both parties 'working with' each other. It arguably represents a form of concealed antagonism or alternatively, some degree of 'corrosive' capture between the two parties.⁷⁷ This arises when Governments may constrain ('go soft') or compromise their compliance

⁷⁰ Fielke, S. CEO Australian Hotels Association NSW 'Announcement of Top 48' Memo to all members', 8 July 2009.

⁷¹ Ibid.

⁷² For AHA's national strategy and relationship with NSW LNP government see Hansen (n 43).

⁷³ For consideration of alcohol industry tactics see McCambridge, J., M. Mialon and B. Hawkins, 'Alcohol industry involvement in policymaking: a systematic review' (2018) 113 *Addiction*.

⁷⁴ The NSW *Election Funding and Disclosures Amendment Bill 2010* was subject to successful last-minute amendments by minor party representatives in the Legislative Council to prohibited alcohol industry political donations. See <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=1490>> .

⁷⁵ Andrew Clennell, 'NSW Liberals in a big shout from Australian Hotels Association' 8 November 2011, *Daily Telegraph* (online) <<https://www.dailytelegraph.com.au/news/nsw/nsw-liberals-in-a-big-shout-from-australian-hotels-association/news-story/fe0540f2cf16ee174031d5cb80fb5a82?sv=693d5af3a2a317b335c515b3bfdec059>> .

⁷⁶ Brown (n 6) see Appendix of the 2019 article.

⁷⁷ Carpenter (n 27).

initiatives in lieu of evidence based approaches⁷⁸ - in order not to jeopardise the industry's ongoing political support and funding.⁷⁹

Such an occurrence would challenge the application of the responsive regulation model⁸⁰ favoured by Government. It would also raise serious governance concerns.⁸¹

6. Legal Framework of the VVS

The VVS relies up statutory and non-statutory sources to give the scheme effect.

Legislation

Some elements of the VVS are located within *Schedule 4 – 'Special licence conditions for declared premises'* of the Act.⁸² This provides for two published levels of declared premises without identifying the number of recorded violent incidents constituting each 'level'. The *Schedule* proceeds to identify the declared premises for the latest round of the VVS including the number of attributable alcohol - related violent incidents after a venue has had an opportunity to obtain a review of any disagreements. It then prescribes the special license conditions (sanctions), additional security measures and other requirements contained in Table 1 of this article.

Regulations⁸³ under the Act facilitate the six-monthly updating of the published schedules of the most violent licensed premises in NSW for the preceding twelve-month period under the regulation making powers of the Act.⁸⁴ Simultaneously, those licensed premises whose recorded levels of violent incidents have fallen below the thresholds for the schedule, are removed from the lists and associated application of a sliding scale of sanctions.

⁷⁸ 'Substantial evidence exists for effective alcohol control policies; those that affect price, availability, and marketing of alcohol are recognised in WHO's "best buys" for interventions to reduce the harmful use of alcohol. The Lancet, editorial 'Alcohol and health: time for an overdue conversation' (2020) *The Lancet Gastroenterology & Hepatology* 5(3): 229. <[https://www.thelancet.com/journals/langas/article/PIIS2468-1253\(20\)30016-9/fulltext](https://www.thelancet.com/journals/langas/article/PIIS2468-1253(20)30016-9/fulltext)>.

⁷⁹ In April 2008, the Daily Telegraph reported that the new AHA NSW President's threat to cease all political donations because of government statistics linking hotels with alcohol violence had panicked the people. Unattributed 'Hotels boss sparks brawl over political donations' *Daily Telegraph* (online) 26 April 2008 <<https://www.dailytelegraph.com.au/news/national/hotels-boss-sparks-brawl/news-story/2b76d9e929e134997353a956556eef59?sv=f357ee82c3fbd4aff63a68170002d911>> .

⁸⁰ Ayres, I and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

⁸¹ The NSW Labor Premier was subsequently deposed on 3 December 2009. See unattributed 'Former NSW premier Nathan Rees to quit politics at 2015 state election' 29 March 2014 *ABC News* (online) <<https://www.abc.net.au/news/2014-03-28/former-nsw-premier-nathan-rees-to-quit-politics/5351890>> ; Nathan Rees 'Ten years after Labor dumped me as premier, it's high time it cleaned up its act' *Sydney Morning Herald* (online), 7 December 2019 <<https://www.smh.com.au/national/nsw/ten-years-after-labor-dumped-me-as-premier-it-s-high-time-it-cleaned-up-its-act-20191206-p53hk1.html>> .

⁸² <<https://www.legislation.nsw.gov.au/#/view/act/2007/90/sch4>>. See also s 11 (1A) of the Act. See [Liquor <Amendment \(Special Licence Conditions\) Act 2008 No 102>](#). Assented to 3.12.2008.

⁸³ See for example [Liquor Amendment \(Special Licence Conditions\) Regulation \(No 3\) 2019](#).

⁸⁴ *Liquor Act 2007* (NSW) ss 11 (1A), 159.

Departmental Fact sheet

The operation and definitions relied upon for the VVS can be found in L&GNSW ‘Violent Venues Scheme Fact sheet FS3006’.⁸⁵ It provides a broad overview of how the scheme operates including the number of recorded violent incidents constituting each of the three schedules. However, no additional information is immediately apparent that provides the rationale for determining the range of reported violent incidents that constitute the parameters of the three bands of declared violent premises.

In what may be a possible legislative oversight, none of this ‘information’ relating to the parameters of each schedule within the Fact sheet, appears to be tied to an equivalent legislative prescription identifying the same range. Departmental ‘Fact sheets’ unless specifically identified within statutory provisions, do not normally constitute a statutory instrument upon which punitive sanctions can be lawfully imposed.⁸⁶

Sanctions and deterrence measures

BOCSAR is involved in preparing a 6 monthly updated list of police recorded number of assaults in each of the NSW’s licensed premises for the previous 12 months. This list is divided into three bands or tiers of licensed premises - Level ‘1’ 19 or more recorded assaults, Level ‘2’ 12 -18 assaults and Level ‘3’ 8-11 assaults reported on premises. Level 3 listed premises are not published and attract no sanctions.

Consistent with Ayres and Braithwaite’s enforcement pyramid,⁸⁷ contained within their responsive regulation model, each level is prescribed an ascending order of more stringent restrictions (special liquor license conditions) listed in the table below.

Table: 1 Violent Venue Scheme sanctions

Level 3	Level 2	Level 1
8 – 11 assaults	12- 18 assaults	19 or more assaults
		1. A mandatory 1.30am lockout of patrons (except members of a registered club)
	1. Cessation of alcohol services 30 minutes prior to close	2. Cessation of alcohol service 30 minutes prior to close
	2. No glass containers to be used after midnight	3. No glass containers to be used after midnight
		4. No shots and drink limit restrictions after midnight
‘Level 3 venues do not have any special conditions imposed. They are however, effectively put on notice that they are near	3. 10 minute alcohol sales time out every hour after midnight or active distribution of water and/or food.	5. 10 minute alcohol sales time out every hour after midnight or active distribution of water and/or food

⁸⁵ L&GNSW VVS Fact sheet (n 31)

⁸⁶ This concern was raised by the author with a senior L&GNSW official in early 2020. No direct response was supplied. The VVS has been targeted for change by the NSW government as part of the Review of the Sydney lockout laws process. Any unacknowledged legal fault in the Scheme could be resolved by its abolition.

⁸⁷ Ayres and Braithwaite (n 80).

the threshold for regulatory intervention under Schedule 4'.		
'Level 3 venues are encouraged to develop or review their venue safety plans and conduct a risk assessment to identify appropriate ways to reduce the incidences of violence'.		6. 1 or more additional security measure/s

Source: NSW Liquor and Gaming 'Violent Venue Scheme' 27 May 2019⁸⁸

An additional disincentive being listed as a declared violent premise is the Government's publication of the Level 1 and 2 lists every 6 months in the expectation that the potential reputational damage may persuade the same violent premises to improve the safety of their venue.

On release of the Round 20 VVS results, the Deputy Secretary of L&GNSW identified another disincentive of being a declared premise. 'Venues on the list are closely monitored and incur substantial risk-based loadings⁸⁹ to their annual licence fees to offset the additional regulatory oversight'.⁹⁰

Attribution/Review process

The Fact sheet outlines a detailed consultation and review process where a licensee or club secretary can challenge any proposed attribution of a violent incident to the venue. It also provides for the provision of submissions regarding the proposed imposition of any subsequent special licensing condition. This appears to afford licensees substantial procedural fairness.

The Fact sheet identifies the following four key considerations relating to this attribution process

- I. 'whether the incident meets the definition of a 'criminal incident''.
- II. whether the incident falls within one of the categories of 'violent criminal incidents' adopted by the Australian Bureau of Statistics' Australian and New Zealand Standard Offence Classification (ABS 2011 Cat. No. 1234.0).
- III. 'whether the incident is 'alcohol-related''.
- IV. 'whether the incident has occurred on the licensed premises, applying the Police concept of 'on licensed premises'. This is defined in the Fact sheet as on or within 50 metres of the venue.

⁸⁸ L&GNSW VVS Fact sheet (n 31).

⁸⁹ See compliance history risk loading information from L&GNSW <<https://www.liquorandgaming.nsw.gov.au/operating-a-business/liquor-licences/liquor-licence-fees/risk-based-loadings-and-exemptions>>.

⁹⁰ Newson, P. 'Latest violent venues list released - November 2018' 26 November 2018 Liquor and Gaming NSW. <<https://www.liquorandgaming.nsw.gov.au/news-and-media/latest-violent-venues-list-released3>>.

Based on the above considerations, an aggrieved licensee may lodge a review request with the local Police district licensing unit for initial consideration. It then is progressed through the regional unit and finally, the Police's central state-wide Alcohol Licensing Support Unit (ALSU) to ensure a state-wide consistency in the application of the VVS.

If the licensee still disagrees, they may provide L&GNSW with a submission stating reasons for the disagreement.

A weakness in the attribution/review process is its closure to ordinary public scrutiny and overall accountability including the nature and level of discretion applied by the regulatory officers. It is understood that some of this information is collected but not routinely made public. There are no published figures for example, on the rate of review requests per violent incident attribution, the success rate of such requests and the identification of the licensed premises making the same requests.

Coverage of the VVS

Section 89(1) of the *Casino Control Act 1992* (NSW)⁹¹ provides that the Liquor Act and thereby the VVS, does not apply to or in respect of a Casino except as provided by the Regulations. An excuse provided by an unnamed L&GNSW spokesperson why Sydney's Star casino excluded from the Liquor Act was that is subject to 'significant police and regulatory monitoring'.⁹²

In 2016 when controversy⁹³ arose from alleged underreporting of assaults at the casino to Liquor & Gaming NSW (L&GNSW),⁹⁴ it appears that the number of assaults there were more than the total reported in all licensed premises in NSW.⁹⁵

⁹¹ <<https://www.legislation.nsw.gov.au/#/view/act/1992/15/part5/sec89>>.

⁹² James Lemon, 'New face tops Sydney's most violent venue list' *Sydney Morning Herald* (online), 28 May 2018 <<https://www.smh.com.au/sydney-news/new-face-tops-sydney-s-most-violent-venue-list-20180525-p4zhju.html>>.

⁹³ Alison Branley, 'Star Casino violence three times worse than official crime statistics, leaked report says' *ABC News* (online), 1 November 2016 <<https://www.abc.net.au/news/2016-10-31/leaked-report-reveals-extent-of-violence-at-star-casino-sydney/7980186>>.

⁹⁴ Previously known as Office of Liquor Gaming and Racing (OLGR). The agency fell within the auspice of successive NSW government Departments including Communities NSW, Trade and Investment, Justice and, Industry. It currently as 'L&GNSW' is within the Better Regulation Division of the Department of Customer Service.

⁹⁵BOCSAR found there was no significantly different rate in the reporting of assaults by staff at the casino. Ramsey, S. 'Reporting rates of assaults at *The Star* casino by licensed premises staff' Issue Paper No. 121 *Crime and Justice Statistics* November 2016 NSW Bureau of Crime Statistics and Research. <<https://www.bocsar.nsw.gov.au/Documents/BB/Report-2016-Reporting-rates-of-assaults-at-The-Star-casino-BB121.pdf>>. See also Horton J. 'A review to assist the Independent Liquor and Gaming Authority with its periodic investigation pursuant to section 31(1) of the *Casino Control Act 1992* (NSW)' 28 November 2016 <<https://www.liquorandgaming.nsw.gov.au/documents/reports/casino/review-the-star-casino-licence-ilga-horton-qc-28-november-2016.pdf>>. Its considerations include the appropriate level of assault reporting at the casino and comparisons with VVS requirements.

Round 14 (year end 30 June 2015) of the VVS schedule revealed the Sydney Cricket and Sports Ground Trust as the first sporting venue to be a declared violent (Level 2) premise.⁹⁶ The latest version of the Fact sheet however, notes under the heading of 'Sports Stadiums': -

Due to the unique scale and nature of their operations, sporting stadiums will generally not be categorised under the scheme. Many of these sporting venues operate comprehensive plans for alcohol and security management, and work closely with L&GNSW and police around major sporting events.⁹⁷

There is no uniform and consistent VVS type compliance system covering all NSW on-premise retail alcohol outlets.

Geographic scope

The above L&GNSW Fact sheet confines the definition of a connected alcohol-related violent incident to within a 50 metre radius of the licensed premises. In 2011, BOCSAR published research⁹⁸ on outlet density that included an analysis of the relationship between the location of assaults and their proximity to licensed premises in the Sydney Local Government Area (LGA). It found that 92.8% of assaults occurred within a 200 m radius and 56.8% within and up to a 50m radius from the licensed premise. The research also observed in general, that only 31% of assaults are reported to the Police.⁹⁹

7. BOCSAR evaluation of violent venues listing scheme

In October 2009, BOCSAR released a study on the effectiveness of the 48 most violent venues listing scheme¹⁰⁰ - a forerunner of VVS in similar operation today. It found that there had been a general decline in assaults that could not be solely attributed to the application of restrictions to the 48 most violent premises. The adverse publicity surrounding the package of restricted licensing conditions associated with the 48 most violent licensed premises list, the 2008 package of Newcastle licensing conditions including earlier closing times, and, the 'more vigorous' enforcement of the liquor laws by Police and licensing inspectors,¹⁰¹ were attributed as more 'likely' to have reduced the incidence of assaults.

A senior Police representative attributed¹⁰² the decline in assaults to 'tougher enforcement', the scheme's restrictions and the shame factor of being publicly listed as a violent premise. He committed to continue to '**work with** the industry' (emphasis added).

⁹⁶ See <<https://www.liquorandgaming.nsw.gov.au/documents/resource-centre/violent-venues-list/20150630-violent-venues-scheme-Round-14.pdf>>.

⁹⁷ L&GNSW VVS Fact sheet (n 31) 3.

⁹⁸ Burgess M and Moffatt S (2011) 'The Association between Alcohol Outlet Density and Assaults on and around Licensed Premises', *Crime and Justice Bulletin* No 147. Table 1, 11. <<https://www.bocsar.nsw.gov.au/Documents/CJB/cjb147.pdf>>

⁹⁹ *ibid*.

¹⁰⁰ Moffatt et al (n 65).

¹⁰¹ See (n 44) relating to the OLGR Director of Compliance's strong approach to regulation.

¹⁰² Gardiner (n 67).

The AHA NSW Chief Executive alternatively suggested their licensee members deserved the credit for the outcome: -

We would attribute this to the hard work that licensees have put in in terms of being extra vigilant on staff training, additional responsible service of alcohol measures and other proactive initiatives.¹⁰³

8. Success of the VVS

The primary goal of the VVS is to reduce the number of assaults occurring within and immediately surrounding (50 metres) declared violent licensed premises. It is highly unlikely for any off-premise (takeaway alcohol) licenced venue to become a declared premise where the consumption of alcohol occurs away from outlet.

The definition of 'success' must acknowledge the preceding limitations of the VVS explicated within this case study. These include the Director of BOCSAR's observations that the number of alcohol-related violent incidents captured by the VVS are only 'the tip of the iceberg'.¹⁰⁴ Secondly, 'violent' incidents are only one manifestation of alcohol-related harms arising from the non-compliance with statutory Responsible Service of Alcohol (RSA) obligations associated with patrons' excessive consumption of alcohol within on-premise venues. Other examples include motor vehicle accidents, drink driving, pedestrian accidents, domestic assaults and unintended injuries such as alcohol poisoning requiring medical treatment. Thirdly, the most violent alcohol outlet in NSW, the Star casino is not covered by the VVS. Licensed sports stadiums have also been administratively excluded from the scheme. Finally, the arbitrary geographic limitation of the application excludes around 43% of the total assaults occurring within a 200m radius of a licensed venue.

The effectiveness of the scheme's sanction to deter individual premises from repeated listings should also be included as a criterion of 'success'.

The following two figures were provided by L&GNSW to the 2019 Joint Parliamentary Select Committee Inquiry on Sydney's Night Time Economy Sydney review the Sydney lockout laws (Inquiry).¹⁰⁵ They identified the number of Level 1 and 2 (although on different scales) declared premises recorded each overlapping 12 monthly round of the VVS since the third round of the scheme.¹⁰⁶ Each of the following figures

¹⁰³ Ibid.

¹⁰⁴ Weatherburn (n 61).

¹⁰⁵ Parliament of New South Wales. Report on the Joint Select Committee on Sydney's Night Time Economy, 30 September 2109. <https://www.parliament.nsw.gov.au/ladocs/inquiries/2519/Report%20-%20Sydney's%20night%20time%20economy.pdf>. See supplementary submission 15 August 2019 from L&GNSW <https://www.parliament.nsw.gov.au/ladocs/other/12326/Liquor%20and%20Gaming%20NSW.PDF>.

¹⁰⁶ In an additional supplementary response to questions from the Inquiry committee, L&GNSW Executive Director advised 'The data already provided to the Committee on the Violent Venues Scheme demonstrates the success of the scheme, with significant drops in the numbers of venues included in the list since the scheme's inception. In addition, since the scheme was introduced on 1 December 2008, we have seen a downward trend in assaults on licensed premises in NSW. Between April 2009 and March 2019, alcohol-related (non-domestic) assaults on licensed premises were down by 7.7 per cent per year. In the ten years prior to this, these assaults had instead been steadily increasing. The clear turning point after the scheme's introduction would indicate that it has had a positive impact on reducing levels of violence, consistent with its

geographically differentiates between declared premises in the Sydney and Kings Cross adjacent entertainment precincts and, the rest of NSW.

Figure 2.

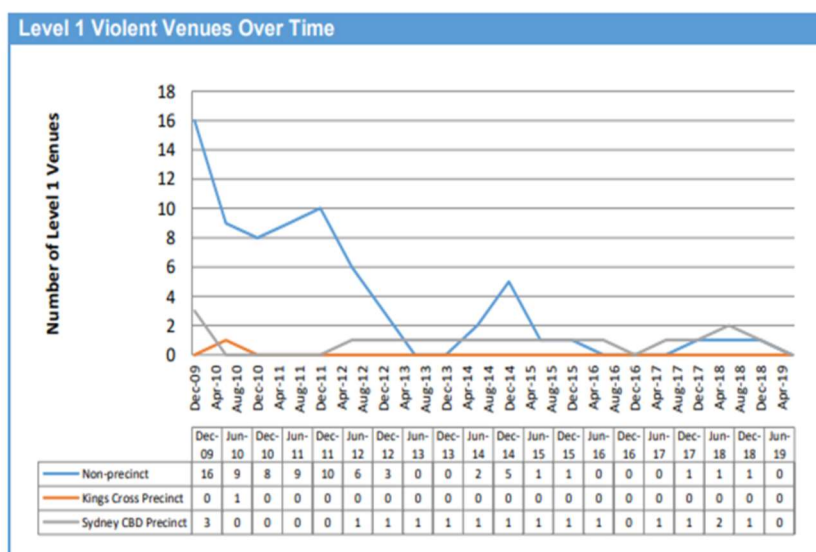
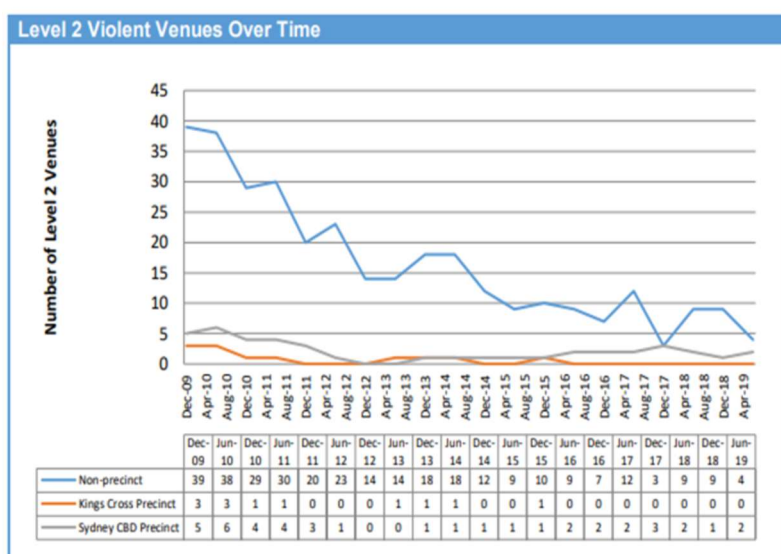


Figure 3.



Source: NSW Liquor and Gaming 'Violent Venue Scheme' 27 May 2019¹⁰⁷

What is immediately apparent from the two above Figures is the fall in the total number of declared violent premises in NSW from 66 in the third round for the year ended December

policy objective'. See L&GNSW supplementary submission 30 August 2019 p1.

<https://www.parliament.nsw.gov.au/ladocs/other/12598/Liquor%20and%20Gaming%20NSW.pdf>. The Executive Director then reminded the committee that Merivale 'had made proposals to amend' the VVS.

¹⁰⁷ See supplementary submission 15 August 2019 from Liquor and Gaming NSW (L&GNSW)

<<https://www.parliament.nsw.gov.au/ladocs/other/12326/Liquor%20and%20Gaming%20NSW.PDF>>.

2009, to 6 in the year ended June 2019. These Figures alone, do not include the total number of declared alcohol related violent incidents associated with each of the declared violent licensed premises. Nor do they include the number of recorded assaults on a premise where the twelve-month total may be less than twelve. The significant fall in the number of declared venues in the rest of NSW was not matched in the two Sydney precincts albeit, from a relative low base.

On closer examination of individual licensed premises' recorded levels of violent incidents contained in the published schedules, the large Sydney CBD hotel, The Ivy owned by billionaire¹⁰⁸ Justin Hemmes' family Merivale group,¹⁰⁹ remains the regular most violent licensed premise in NSW. It is located within a multi-story building with a range of bars, restaurants, pool area etc. Hemes advised the Inquiry¹¹⁰ that The Ivy has over two million patrons through their doors in any year.¹¹¹

The Ivy has been a declared premise for all (overlapping) rounds of the tiered VVS. Over the last 21 rounds, The Ivy has been declared a Level 1 venue (19 or more assaults) on 11 occasions.¹¹² Of these, on 8 occasions, The Ivy topped this list as the most violent licensed premise in NSW. In round 15, 21 and the current round 22, there were no venues listed at Level 1, but on all these occasions, The Ivy topped the list of Level 2 violent premises (12 -18 assaults). On 10 occasions, The Ivy was declared a Level 2 licensed premise.

The above October 2009 BOCSAR review¹¹³ cautions against simplistic attribution of reductions in alcohol fuelled NDV with the mere existence of a regulatory scheme – causation v correlation. The fall in the total number of all declared violent licensed NSW premises shows some broad correlation with the reported decline in non-domestic assaults (Figure '1').

It is not known whether the levels of recorded alcohol-related violent incidents in non-declared licensed premises (that is, those whose annual number of assaults were less than 12) fell by greater or lesser amounts than reflected in the above Figures '2' and '3'. Neither is it possible to determine the relative effectiveness of the VVS in combination with the 3SS in

¹⁰⁸ Ingrid Fuary-Wagner, 'New billionaire Justin Hemmes' empire of escapism', *Australian Financial Review Magazine* (online), 29 May 2019 <<https://www.afr.com/rich-list/new-billionaire-justin-hemmes-empire-of-escapism-20190407-p51bqv>>.

¹⁰⁹ 'Merivale is a family-owned business that employs over 3,000 people and operates 89 licensed restaurants, bars and event spaces across metropolitan Sydney, of which 46 are within the CBD. Our contribution to Sydney's social, tourist and economic fabric is enormous, with over two million visitors through ivy's door alone in any one given year... there is nothing more important... than the safety and happiness of my patrons'. Report on Proceedings Before Joint Select Committee on Sydney's Night Time Economy Sydney's Night Time Economy 9 August 2019 (Hansard). Justin Hemmes p51ff. <<https://www.parliament.nsw.gov.au/ladocs/transcripts/2200/Joint%20Select%20Committee%20on%20Sydney%20s%20night%20time%20economy%20-%20corrected%20transcript%20-%2009%20August%202019.pdf>>.

¹¹⁰ Joint NSW Parliamentary Inquiry (n 105).

¹¹¹ See the Merivale submission (784) – 16 July 2019 from Justin Hemmes, CEO Merivale to the NSW Joint Select Parliamentary Committee on the Sydney's Night Time Economy ('Inquiry'). <<https://www.parliament.nsw.gov.au/ladocs/submissions/63907/Submission%20784%20-%20Merivale.pdf>>.

¹¹² Year to June and December results are published each year. This results in a six month overlap of results.

¹¹³ Moffatt et al (n 65).

reducing the rates of recorded violent incidents and serious licensing offences associated with the 3SS.

The responsive regulation model¹¹⁴ would suggest that successively more punitive sanctions would apply to repeatedly scheduled alcohol outlets such as The Ivy and arguably imposed on the Star casino, until the levels of violence fell below the threshold levels of the number of violent incidents. The ultimate sanction would be loss of license/closure of premise.

Some may argue that Hemme's Ivy hotel should be an exception to the rule given its size and alleged level of patronage. However, Snider's study of the regulation of the Canadian financial sectors' level of 'white collar' crime found a differential or 'bifurcation'¹¹⁵ in the way the regulatory system responded to large and powerful financial corporations, compared with the non-complying businesses who lacked economic, legal and political resources and power to prevent or frustrate legal proceedings.¹¹⁶ The latter description may more likely characterise smaller regional and rural licensed premises that originally dominated the numbers of NSW declared licensed premises.

The 'shame' effect of being a publicly declared licensed premise has not deterred The Ivy from being the most consistently declared violent licensed premise in NSW. It does not appear to have deterred patrons despite its violence status. Nor has it motivated NSW governments to amend the alcohol compliance laws including the VVS, to redress this situation. This belies the asymmetrical nature of alcohol supply law reforms in NSW inconsistent with the overriding public interest.

If 'success' is defined in terms of an effective deterrent that limits the frequency a licensed venue is a declared violent premise, the above record of The Ivy¹¹⁷ suggests the scheme has failed. The exclusion of the Star casino from the same scheme and the lack of public reporting on the level of their violent incidents, compounds this failure.¹¹⁸

Whilst L&GNSW credited the VVS as contributing to the reported reduction in violence in NSW in more recent years,¹¹⁹ this was only confined to the fall in the rate of non-domestic assaults that has stabilised since 2015 (see Figure 1). The rate of reported DV has however, increased

¹¹⁴ Ayres and Braithwaite (n 80).

¹¹⁵ Lauren Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009) *Social & Legal Studies* 18(2): 179-197.

¹¹⁶ Lauren Snider, 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1986) 9(1) *Law and Policy* 37-67.

¹¹⁷ Following sections will examine Hemmes' lobbying in 2019 to weaken or remove the VVS to his business's financial advantage and the reported connections with political parties.

¹¹⁸ ICAC investigated an allegation that in 2015, the NSW Labor party received an illegal \$100,000 donation from a gambling syndicate in the Star casino. Jamie McKinnell, 'ICAC hears \$100,000 cash withdrawn from The Star casino days before same amount banked by NSW Labor', *ABC news* (online), 13 December 2019 <<https://www.abc.net.au/news/2019-12-12/icac-cash-withdrawal-from-star-casino-before-labor-banked-money/11794496>>. For 2017-18, it was reported the Star Entertainment Group Ltd provided \$43,196 in political donations to a range of political parties Nick Evershed, 'Political donations 2017-18: search all the declarations by Australian parties', *The Guardian* (online), 1 February 2019 <<https://www.theguardian.com/australia-news/ng-interactive/2019/feb/01/political-donations-2017-18-search-all-the-declarations-by-australian-parties>>.

¹¹⁹ L&GNSW Executive Director (n 106); L&GNSW Media Release 29 November 2019 (n 90).

significantly over the same period. Any claimed success of the VVS and the 3SS reducing NDV, must be balanced within the bigger picture of total reported assaults and the Government's apparent aversion to address by effective regulation, the availability and supply of take away alcohol.¹²⁰

Case Study Summary

The number of declared violent licensed premises has significantly fallen for the period of operation of the VVS. This has coincided with a more general decline and stabilisation of the rate of reported non-domestic assaults in NSW reflected in Figure 1 above.

The surprise emerging from the above evaluation of the VVS legal framework is the lack of statutory prescription and associated parliamentary oversight for key elements of the scheme. This includes the number of recorded violent incidents constituting the three 'levels' of the scheme, the attribution and review of violent incidents processes and, the variability of the coverage of the scheme to likely exclude sports stadiums for reasons not contained within the statutory prescription.

The scheme's capacity to protect the public interest and safety is significantly constrained by its limited geographic scope. It is also limited by its sole reliance on recorded alcohol-related 'violent' incidents as a unsatisfactory proxy for all alcohol-harms arising from a venue's operational, supervisory and compliance practices and, related patrons' drinking patterns and behaviour.

The VVS has provided the NSW government and alcohol industry with a valuable rhetorical tool to boast its success and deterrence value in reducing NDV whilst failing to include an important disclaimer that the same improvements have not occurred with respect to DV.¹²¹ It also provides a pointer for the industry to assert the 'responsibility' of their members.

The inconsistent coverage of the VVS to exclude casinos and the unwillingness of the legislators to impose tougher sanctions on the most frequently declared violent licensed premise in NSW, is indicative of its asymmetrical nature. It also suggests the presence of bifurcation and lack of impartiality of the NSW regulatory process with priority seemingly afforded the most powerful commercial interests.

Industry lobbying to remove the Disciplinary schemes

In 2019 following sustained and a coordinated dystopian¹²² form of lobbying from the industry, business and patron groups, the NSW government with the support of the

¹²⁰ NSW Bureau of Crime Statistics and Research "Domestic violence statistics for NSW". Accessed 25 April 2020. <https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx>.

¹²¹ On 29 November 2019, Liquor and Gaming NSW advised in a media release 'These results show our state's licensed venues are now safer than they've ever been, meaning people can enjoy nights out with far lower risks of alcohol-related violence'. See <<https://www.liquorandgaming.nsw.gov.au/news-and-media/fewer-premises-on-violent-venues-list>>.

¹²² Ulucanlar, Fooks and Gilmore, (n 3). The dystopian model identifies a fear tactic of the tobacco industry. It forecasts and promotes gloom and doom for business, civil liberties and other erstwhile outcomes should government adopt harm prevention and/or reduction measures advocated by public health.

Opposition and Greens, instigated a Joint Select Parliamentary Inquiry of the Sydney Night Time Economy (NTE) – (Inquiry). The headline complaint was that the 2014 Sydney ‘Lock out’ laws had caused serious financial and cultural damage to the adjacent Kings Cross and Sydney CBD entertainment precincts.¹²³ These laws consisted primarily of reductions in late night trading hours, a one-way door policy or ‘lock out’ after 2am and drink restrictions designed to reduce levels of intoxication.

Whilst the headline publicity surrounding the Sydney lockout law inquiry was focused on these specific laws relating to the Sydney area, Hemmes’ oral¹²⁴ and written¹²⁵ submissions identified the regulatory system ‘imposed’ on the industry as the root cause of the industry’s and Sydney’s NTE alleged ‘demise’. This system consisted of the VVS, 3SS and the lockout laws. Despite the Inquiry’s Terms of Reference confined to the Sydney area, Hemmes’ submissions on the disciplinary schemes, had significant state-wide implications for alcohol harm prevention and industry compliance.

Hemmes oral submission requested: -

With respect, Sydney's lockout laws must now go. ... my submission particularly focuses on the need to also address the Government's violent venues scheme and the three strikes regime. These two schemes are now outdated and any conversation about the revitalising of Sydney's night-time economy must see these schemes drastically amended.¹²⁶

An alleged primary failure of the VVS was its unjust penalisation of venues with large patronage. Hemmes argued on average customer numbers (per capita basis), his Ivy hotel provided a relatively safer place than the surrounding streets and smaller venues.¹²⁷ No independent evidence was provided to substantiate this assertion that appears somewhat counter intuitive. The claim was not challenged by the Inquiry however, one caution was expressed by the Executive Director of L&GNSW during the proceedings.¹²⁸

Hemmes also sought more Police on the streets to deal with the lack of ‘personal responsibility’ of ‘messed up’ and violent people but, less presence of Police within his

¹²³ See Megan Gorrey, *'Remove the shackles': Bar tsar Justin Hemmes wants lockouts scrapped* Sydney Morning Herald (online), 9 August 2019 <<https://www.smh.com.au/national/nsw/remove-the-shackles-bar-tsar-justin-hemmes-wants-lockouts-scrapped-20190809-p52fk4.html>>.

¹²⁴ Hemmes (n 109).

¹²⁵ Hemmes (n 111).

¹²⁶ Hemmes (n 109).

¹²⁷ Ibid 56. This argument contradicts government’s policy of the growth and promotion of small bars as a safer alternative to large alcohol outlets viewed as being more violent. See L&GNSW comments on relative safety of smaller bars vis a vis those over 120 patron capacity in supplementary submission to lockout inquiry (n 101) and related 2016 small bar review <<https://www.liquorandgaming.nsw.gov.au/documents/public-consultations/small-bars-review/small-bars-review-report-sept-2016.pdf>>.

¹²⁸ The Executive Director of L&GNSW response to the Inquiry regarding the alleged relative safety of The Ivy was ‘I think the alternative view is do we want to be saying that just because you are operating a big venue and you trade late at night we tolerate assaults in your venue... (L&GNSW) not closed to tweaking (VVS) but in terms of the per capita argument I think we need to exercise caution’ Report on Proceedings Before Joint Select Committee on Sydney's Night Time Economy, 12 August 2019, 21. <<https://www.parliament.nsw.gov.au/ladocs/transcripts/2201/Transcript%20for%20Joint%20Select%20Committee%20on%20Sydney%20s%20Night%20Time%20Economy%20-%20Public%20Hearing%20-%202012%20August%202019.pdf>>.

premises as it was 'intimidating' and reduced the 'vibe and atmosphere' of the alleged 'well-controlled' venue spaces he operates.¹²⁹

The punitive measures within the VVS were obviously designed to have a direct and indirect deterrence effects impacting upon a venue's financial,¹³⁰ competitive and reputational circumstances. In December 2018, Hemmes announced a \$1.5 billion plan to transform the area surrounding his Ivy hotel in central Sydney CBD.¹³¹ This large proposed investment provides an incentive or motive to advocate for a regulatory environment conducive to maximising the rate of return on investment and minimising uncertainty including regulatory risks and threats.

In contrast to this above history of recorded assaults on premises over a ten-year period, The Ivy was never issued a 'strike' under the 3SS for a conviction of a serious Liquor Act offence including for example, allowing intoxication on premises and violent and quarrelsome behaviour.¹³² The 3SS is a complex compliance process subjected to significant discretion for the regulators to issue a strike and related sanctions (license conditions) for a prescribed serious alcohol-related offence by the licensee. The issuing of three strikes may result in a licensee being removed from the industry.

On 28 November 2019, the NSW government supported the Committee's recommendations¹³³ to review and amend some of the Act's disciplinary schemes.¹³⁴

¹²⁹ Hemmes (n 109) 60.

¹³⁰ Drink driving criminal convictions on intoxicated patrons can also cause financial hardship through loss of driving licence and indirectly employment where dependent upon possession of driving licence.

¹³¹ Carolyn Cummins, 'Justin Hemmes plans a \$1.5b George Street empire' *Sydney Morning Herald* (online), 13 December 2018 <<https://www.smh.com.au/business/companies/justin-hemmes-plans-a-1-5b-george-street-empire-20181212-p50lu2.html>>.

¹³² See *Liquor Act 2007* (NSW) s 73 'Prevention of excessive consumption of alcohol on licensed premises' of the Act. <<https://legislation.nsw.gov.au/#/view/act/2007/90/historical2016-02-19/part5/div1/sec73>>.

¹³³ See <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2519/Report%20-%20Sydney's%20Night%20Time%20economy.pdf>> An extract of the committee's minutes contained with the report (p122) identified apparent additional wording to the recommendation – 'The Committee notes the regulatory success of the violent venues scheme, which adopts the principle of heavily regulating those venues that are contributing most to the number of violent incidents. The Committee believes this is an effective way to concentrate regulatory resources where they might have most effect'.

¹³⁴ It further noted 'The Government will consider building upon the success of the Violent Venues scheme by merging existing sanctions schemes (Violent Venues, Minor Sanctions and Three Strikes) into a consolidated sanctions and rewards system that is focused on reducing serious breaches of the liquor laws, keeping levels of violence down on licensed premises, and incentivising good behaviour. The system will increase transparency and make it easier for venues to understand and comply with their obligations. Further stakeholder consultation will be undertaken before any changes are introduced'.

<<https://www.parliament.nsw.gov.au/ladocs/inquiries/2519/NSW%20Government%20response%20-%20Sydney's%20Night%20Time%20Economy.pdf>>.

'Size matters' defence

Unlike the VVS, the 3SS contains a critical defence favouring The Ivy and other large venues.¹³⁵ A statutory requirement of the Independent Liquor and Gaming Authority (ILGA) is when making a reviewable decision to award a 'strike', it must 'take into account to the extent that it considers it to be relevant': -

the size and patron capacity of the licensed premises and how this may impact on the ability of the licensee or manager to prevent the commission of prescribed offences the venue size and patron capacity.¹³⁶

This legal defence has profound implications relating to the overall public good and the rule of law. It must be in the overriding public interest that a consistently high statutory and in some case, fiduciary duty of care and levels of compliance is owed by the owners and controllers of organisations to those who may be exposed to some connected foreseeable risk. Contemplated the likely consequences of the broader application of the NSW Government's alcohol industry 'size matters' legal defence that favours larger businesses, to other organisations and industries including for example, building and construction, food producers and outlets, schools, hospitals, prisons, airlines and amusement parks.

Hemmes' submissions to the Inquiry requested the VVS be abolished or incorporated within the 3SS to ostensibly reduce red tape and the regulatory burden. This would also conveniently enable the extension of the 'size matters' legal defence to a broader range of his and other large licensed premise operators' alcohol law compliance obligations.

In contrast to the scientific evidence submitted to the Inquiry by Public Health experts, Hemmes asserted: -

There is good research to be found which evidences there to be no link between extended trading hours and rates of violent assaults, and that some countries have in fact introduced longer trading hours in order to prevent the harms associated with early fixed closing times.¹³⁷

To add 'credibility' to his written submission, Hemmes cited a 2015 report from Fox¹³⁸ who was critical of the effectiveness of reducing late trading hours as a successful harm minimisation initiative. Her report was commissioned by the Lion Alcohol company and subsequently critiqued by public health scholars.¹³⁹

¹³⁵ ILGA's schedule of strike recipients does not publicly identify the actual premise where the offence occurred. See <https://www.liquorandgaming.nsw.gov.au/_data/assets/pdf_file/0020/281018/Three-Strikes-Register.pdf>.

¹³⁶ *Liquor Act 2007* (NSW) s 144M (1) (c) (ii).

<<https://www.legislation.nsw.gov.au/#/view/act/2007/90/part9a/div4/sec144m>>.

¹³⁷ Hemmes (n 111) 13.

¹³⁸ Fox A. "Understanding behaviour in the Australian and New Zealand night-time economies: An anthropological study" January 2015

<<https://www.lionco.com/content/u12/Dr%20Anne%20Fox%20report.pdf>>

¹³⁹ See critique of Fox. Miller P. and Wodak A. 'FactCheck: can you change a violent drinking culture by changing how people drink? *The Conversation* 10 March 2015 <<https://theconversation.com/factcheck-can-you-change-a-violent-drinking-culture-by-changing-how-people-drink-38426>> . See also Jackson N. and Kyri K.

Hemmes' above submissions¹⁴⁰ to the Inquiry demonstrate the durability of the neoliberal narrative and justification identified in the earlier SVVRS of 2009. This includes the fusion of public with private commercial interest through attempts to broaden the application of the 'size matters' defence, emphasis on deregulation by in part, the discouragement of Police licensing compliance inspections, the references to reducing regulatory burden and cutting red tape and, the absence of consideration of the negative externality or adverse spill-over effects of a business's/industry's operations.

Postscript

In early May 2020,¹⁴¹ the NSW Government released a 'public consultation draft' of the Liquor Amendment (24-hour Economy) Bill 2020 (draft Bill)¹⁴² as one outcome of the 2019 Inquiry. The NSW Government responded favourably to Hemme's submissions to the Inquiry. The draft Bill proposes the collapse of the above three statutory compliance schemes into a single 'integrated demerit points system and incentive scheme'.¹⁴³

The proposed integrated industry compliance scheme contained within Schedule '1' of the draft Bill, retains a similar central 'size matters' defence.¹⁴⁴ Additional considerations in the early removal of a demerit include the presence of 'serious harm'¹⁴⁵ resulting from an incident and, subsequent remedial action taken by the licensee or manager to 'manage or reduce' the risk that gave rise to the demerit.¹⁴⁶ There appears no requirement that such action be evidence based and effective.

PART 111. APPLICATION OF THE INDUSTRY CAPTURE TEST

The purpose of this Part is to apply the industry capture test to the preceding critical case study of the VVS.

This primarily focuses on the concept of 'connected conduct' from the two interrelated perspectives of the powerful elements within the NSW alcohol industry and, government. In doing so, it also draws upon additional material of the reported leading alcohol and gambling industry businesses' political activities, particularly as it relates to the essential capture elements of motive, intent and quid pro quo. The synthesis also incorporates a range of allied

'A critique of Fox's industry-funded report into the drivers of anti-social behaviour in the night-time economies of Australia and New Zealand' (2016) 3 *Addiction* issue 3. <<https://doi.org/10.1111/add.13149>>.

¹⁴⁰ Hemmes' oral submission (n 109), Hemmes' Merivale written submission (n 111).

¹⁴¹ The synthesis of the capture test with the case study of the VVS was completed prior to the release of the draft Bill.

¹⁴² *Liquor Amendment (24-hour Economy) Bill 2020*

<https://www.customerservice.nsw.gov.au/_data/assets/pdf_file/0011/823349/Draft-Liquor-Amendment-24-hour-Economy-Bill-2020.pdf>.

¹⁴³ Ibid.

¹⁴⁴ Public consultation draft Liquor Amendment (24-hour Economy) Bill 2020 s 144L (2c).

¹⁴⁵ Ibid s 144ZD 2(a) (ii).

¹⁴⁶ Ibid s 144ZD 2(a) (iii). Any further elaboration of the Bill is outside the scope of the article.

‘governance’ and ‘public interest’ considerations. These include impartiality, transparency and conflicts of interest.¹⁴⁷

The first consideration in the evaluation of the presence of capture of the VVS compliance scheme is recognition of the stratified NSW retail alcohol supply industry.

The first structural differentiation is between on-premise liquor license types where alcohol is consumed on the premise for example hotels, clubs, restaurants, passenger ferries and small bars, and, off-premise take away packaged and on-line liquor licences. The most popular off-premise alcohol outlets are large supermarket discount stores¹⁴⁸ ranging down to smaller bottle shops and licence authorisations for on-premise type outlets, predominantly hotels, to also provide take away supplies of alcohol.

The second form of stratification of the NSW retail alcohol supply industry is the bifurcation of the industry discussed above.¹⁴⁹ Similar to the microeconomic terminology of ‘price maker’ and ‘price taker’ where the former firm exercises market power, a similar analogy can be applied to the oligopoly type alcohol industry where a few very large organisations, ‘policy makers’, exercise disproportionate market and related political power or influence in the law making and compliance processes.

As will be established in the following synthesis of the case study results with the capture test, the locus of capture and connected conduct resides in this domain of market and political influence or power. It has the demonstrable capacity to divert the democratic law making and compliance regulatory processes away from the public interest to mutually benefit both these private commercial and public political entities. The relationship is tied by a symbiotic connection based on some degree of mutually dependency.

A. Connected conduct – alcohol industry

The 2019 explication¹⁵⁰ of the *Gaming and Liquor Administration Amendment Bill (2015)* NSW revealed a relationship between successive NSW governments and the alcohol industry that was defined by undue influence, exclusive access and dealings with the industry in the development of new alcohol control laws, promotion of alcohol industry financial interests over alcohol harm reduction and, reported breaches of the NSW political donation laws.¹⁵¹

¹⁴⁷ NSW Independent Commission Against Corruption, Operation Eclipse, Interim Report October 2019. <https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19_FINAL.pdf.aspx>.

¹⁴⁸ Roy Morgan, ‘The Australian alcohol retail market in review’, 20 March 2017 (online) <<http://www.roymorgan.com/findings/7181-liquor-retail-australia-201703201051>>.

¹⁴⁹ Snider (n 115).

¹⁵⁰ Brown (n 6) 782. See examples of this conduct contained within media references identified in the application of the (then) first element of the legislative capture test ‘Identification of reciprocating conduct...’ within the ‘Appendix’ of the 2019 article.

¹⁵¹ Further published examples of alleged undue influence between NSW governments, Oppositions and NSW alcohol industry include Sean Nicholls ‘Liberals linked to hotel lobby group’, *Sydney Morning Herald* (online), 13 July 2013 <<https://www.smh.com.au/national/nsw/liberals-linked-to-hotel-lobby-group-20130719-2q9sd.html>>; Kirsty Needham, ‘Baird government backs down on drunk rules after Liberal donors, alcohol lobby complain’, 25 July 2015, *Sydney Morning Herald* (online) <<https://www.smh.com.au/national/nsw/baird-government-backs-down-on-drunk-rules-after-liberal-donors-alcohol-lobby-complain-20150725->

The most obvious manifestation of connected beneficial conduct between the Australian alcohol and gambling industries and political entities is the legal and in some NSW cases, unlawful flow¹⁵² of political donations and other inducements. Kypri et al¹⁵³ identify an array of industry's political inculcation tactics and the timing of political funding correlating with Ministerial and Parliamentary considerations of industry policy/law changes.

The Guardian reported¹⁵⁴ that in 2017/18, the AHA provided over \$1 million in federal political donations. Political commentators have identified two recent examples where very large political donations from the AHA leading up to the Tasmanian¹⁵⁵ and Victoria¹⁵⁶ elections, played a decisive role in quashing some Opposition parties' attempts to introduce measures aimed to reduce gambling related harms.

It is therefore practically impossible to quarantine consideration of the nature of connected conduct between the powerful groups within the NSW alcohol industry and successive NSW governments with the context of the VVS and other disciplinary/punitive statutory schemes - from this above broader examples of patterns of undue connected influence organised across the nation. This connected conduct was revealed by Hansen¹⁵⁷ and more recently, the media's attention to the involvement of the alcohol and gambling industry in the last Tasmanian¹⁵⁸ and Victorian elections.¹⁵⁹

A search of freely available media reports revealed the following connections between Hemmes, his family's private business group Merivale and particularly, the Liberal Party. This research found no published allegations or evidence of Hemmes breaching NSW political donation laws. NSW electoral laws prohibit any political donations from property developers,

[gikb3m.html](#)>; Patrick Begley, 'Machine men: How the AHA and ClubsNSW seek political influence', *Sydney Morning Herald* (online) 30 September 2016 <<https://www.smh.com.au/national/nsw/machine-men-how-the-aha-and-clubsnsw-seek-political-influence-20160930-grrxe9.html>>.

¹⁵² Michael Koziol "Former Liberal Party Treasurer Admits He Knew of Illegal Donations", *The Sydney Morning Herald* (online), 23 May 2016 <<https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html>>.

¹⁵³ Kypri, K. et al 'If someone donates \$1000, they support you. If they donate \$100 000, they have bought you'. Mixed methods study of tobacco, alcohol and gambling industry donations to Australian political parties'. (2019) *Drug Alcohol Rev.*, 38: 226-233.

¹⁵⁴ Christopher Knaus, 'Liquor and gaming lobby pumped more than \$1m into Liberal, Labor and far-right parties', *The Guardian* (online), 29 April 2019 <<https://www.theguardian.com/australia-news/2019/apr/29/liquor-and-gaming-lobby-pumped-more-than-1m-into-liberal-labor-and-far-right-parties>>.

¹⁵⁵ See Australian Electoral Commission (AEC) '2017-18 annual financial disclosure returns published today' 1 February 2019, <<https://www.aec.gov.au/media/media-releases/2019/02-01.htm>>. Most of the AHA's donations were reportedly provided to the incumbent Liberal (Conservative) party in the small state of Tasmania to successfully campaign against the Opposition Labor party that was seeking to ban poker machines from hotels. See also Danielle Wood, Carmela Chivers and Kate Griffiths, 'Tasmania's gambling election shows Australia needs tougher rules on money in politics', *The Conversation* (online), 1 February 2019 <<https://theconversation.com/tasmanias-gambling-election-shows-australia-needs-tougher-rules-on-money-in-politics-110977>>.

¹⁵⁶ Royce Millar, Ben Schneiders and Benjamin Preiss, 'Pokies jackpot helps fund Daniel Andrews' re-election' *The Age* (online) 3 February 2020. <<https://www.theage.com.au/politics/victoria/pokies-jackpot-helps-fund-daniel-andrews-re-election-20200203-p53x7u.html>>.

¹⁵⁷ Hansen (n 43).

¹⁵⁸ Wood (n 155).

¹⁵⁹ Millar (n 156).

and those in the alcohol, tobacco and gambling industries¹⁶⁰ with *Clubs NSW* exempted.¹⁶¹ There are no similar restrictions on political donations to Federal politicians and parties other than reporting requirements. The barriers delineating NSW from Federal political donations appear weak and porous.¹⁶²

On 13 October 2018, the SMH reported that Hemmes hosted a \$7500-a-head Liberal Party dinner that included senior Federal Government Ministers and a Liberal candidate.¹⁶³

On 6 May 2019, the SMH reported Hemmes hosting a \$3300 per head Liberal Party fund raiser.¹⁶⁴ Australian Electoral Commission political donation records revealed Hemmes Trading Pty Ltd declared a donation of \$21858 on 6 May 2019 to the Liberal Party of Australia.¹⁶⁵ The Federal election was held on 18 May 2019 where the Liberal/National Party coalition were returned to power.

In December 2018, residents surrounding one of Merivale's large pubs on Sydney's northern beaches lodged complaints against noise and other disturbances from intoxicated patrons.¹⁶⁶ Merivale's only recent (December 2019) adverse media exposure concerned the initiation of legal class action proceedings against it for alleged \$129 million in underpayment of employee wages which the company has denied.¹⁶⁷

Sydney's Star casino that is not covered by the VVS, has a record of large political donations. It was reported for 2017-18, the Star Entertainment Group Ltd provided \$111740 in federal political donations to a range of political parties that appeared to include the NSW arms of the Federal Liberal and Labor parties.¹⁶⁸

¹⁶⁰ See amendments contained in s 96GAA Election Funding and Disclosures Amendment Bill 2010. <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=1490>>.

¹⁶¹ Sean Nicholls, 'Clubs escape political donation ban despite gaming, alcohol links', *Southern Highland News* (online), 12 November 2010 <<https://www.southernhighlandnews.com.au/story/903990/clubs-escape-political-donation-ban-despite-gaming-alcohol-links/?cs=4159>>.

¹⁶² Tham J. and Aulby H. 'Hidden money in politics: What the AEC disclosures won't tell us'. The Centre for Public Integrity, February 2020. <<https://publicintegrity.org.au/wp-content/uploads/2020/02/Briefing-paper-Hidden-money-in-politics-2019.pdf>>.

¹⁶³ Alexandra Smith & Lisa Visentin, 'Why this is the most important week of the year for the Liberal Party', *Sydney Morning Herald* (online), 13 October 2018 <<https://www.smh.com.au/politics/nsw/why-this-is-the-most-important-week-of-the-year-for-the-liberal-party-20181011-p50967.html>>.

¹⁶⁴ Kylar Loussikian, 'Liberal Party's lavish fundraiser at Justin Hemmes' waterfront mansion', *Sydney Morning Herald* (online), 6 May 2019 <<https://www.smh.com.au/national/liberal-party-s-lavish-fundraiser-at-justin-hemmes-waterfront-mansion-20190506-p51knn.html>>.

¹⁶⁵ <https://transparency.aec.gov.au/AnnualDonor/ReturnDetail?returnId=51696#ac1> .

¹⁶⁶ Gorrey, M. 'Highly intrusive': Hemmes' pub warned over patrons' drunken antics' *Sydney Morning Herald* (online) 22 December 2018 <<https://www.smh.com.au/national/nsw/highly-intrusive-hemmes-pub-warned-over-patrons-drunken-antics-20181220-p50ndc.html>>.

¹⁶⁷ Shannon Molloy, 'Billion-dollar pub empire Merivale, owned by Justin Hemmes, cranky about having to pay staff properly', *news.com.au* (online) 22 January 2019 <<https://www.news.com.au/finance/work/at-work/billion-dollar-pub-empire-merivale-owned-by-justin-hemmes-cranky-about-having-to-pay-staff-properly/news-story/0317563d67bf04a08ad7030f3061dd4f>>.

¹⁶⁸ Evershed (n 111). The amount excludes donations under \$13500 and from associated entities.

In October 2019, Woolworths, Australia's largest supermarket and retail alcohol supplier including through a subsidiary, the control of some NSW hotels, acknowledged an underpayment of wages to workers in the vicinity of \$200 - \$300 million.¹⁶⁹ The Guardian's investigations in 2019 also revealed Woolworths, failed to declare to NSW planning authorities when seeking development application approvals from local councils, \$100,000 in political donations it made to the NSW Branches of the Liberal and National parties.¹⁷⁰

For all Australian political parties interested in gaining or retaining office, the realpolitik message is apparently obvious. Australian alcohol and gambling industry political and related 'deep pocket' financial support can provide a winning difference, especially where both major political parties are recipients of industry donations. So, what does the preceding critical evaluation suggest the more powerful segments of the NSW industry gain in return for this connected conduct? This question also relates to the identification of 'motivation' and 'intent'.

B. Connected Conduct – Government

This article does not explore the full range of benefits and concessions the NSW government has afforded the alcohol industry proceeding and following the former Racing Minister's undertaking in November 2017 of providing a 'lot' more 'good reforms' for the industry.¹⁷¹

With respect to the VVS, the asymmetrical regulatory approach of Government is indicative of its lengthy tolerance of the Ivy hotel's consistent declaration as the most violent licensed premise in NSW. The statutory exclusion of the Star casino from the same scheme and the VVS Fact sheet provision quarantining sports stadiums, diminishes public transparency, accountability and consistency in the application of compliance and enforcement controls on all segments of the NSW alcohol supply industry.

The case study within this article identified some critical deficiencies with the VVS. These include its geographic scope that does not appropriately reflect the significant proportion of alcohol-related assaults that occur between a 50 metre to 200 metre radius of the licensed venue once an alcohol affected patron leaves the venue.¹⁷² There are also statutory and administrative limitations on the coverage of the VVS to exclude casinos, the Star being the most violent alcohol outlet in NSW, and sporting stadiums. A third significant limitation is its narrow approach to alcohol harm prevention. The scheme is confined to 'violent incidents' derived from the service and consumption of alcohol in on-licensed premises. This excludes other alcohol-related harms linked to an intoxicated patron for example, motor vehicle and pedestrian collisions/deaths and, unintended injuries, for example falls and drownings.

¹⁶⁹ Peter Ryan and David Chau, D. 'Woolworths investigated after admitting it underpaid 5,700 staff up to \$300 million' *ABC News*, 30 October 2019 <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>.

¹⁷⁰ See also Christopher Knaus and Imran Ariff 'Political donations hidden from NSW planning authorities by big corporations' *The Guardian* (online) 7 October 2019 <<https://www.theguardian.com/australia-news/2019/oct/07/political-donations-hidden-from-nsw-planning-authorities-by-big-corporations>>.

¹⁷¹ Young (n 47).

¹⁷² See L&GNSW VVS Fact sheet (n 31); Burgess and Moffatt (n 93).

The presence of these deficiencies and the Government's unwillingness (inaction) to address them compared with their positive responses to alcohol industry lobbying to weaken alcohol supply and compliance regulation (asymmetry),¹⁷³ represents a substantial concession to the industry at the expense of public safety, health and budgetary outcomes.

An observable connection between the NSW alcohol industry and successive NSW Governments is their joint authorship and participation in the neoliberal paradigm and associated discourse. Whilst there may be some small concessions along the way responding to the most egregious incidents of alcohol-related harms, this paradigm provides the important connected rationale for limited Government intervention, exclusion of third-party public interest groups and greater industry regulatory autonomy.

C. Public Interest

Wheeler¹⁷⁴ considers the 'public interest' concept within the Australian legal and political context. Deviation from the public interest is a cornerstone consideration in the identification of capture.

Following is a summary of some of the examples where conduct inconsistent with the public interest was evident in the above case study. There are several broad areas where this conduct can be found including

1. Primacy of public health and safety over commercial considerations

- a. Government tolerance of The Ivy being the regular most violent licensed premise in NSW and an apparent exclusion provided to sports stadiums from an L&GNSW Fact sheet, is indicative of bifurcation.¹⁷⁵
- b. Government exclusion of the most violent alcohol outlet in NSW, the Star casino, from the VVS.
- c. Limited scope of VVS to only defined violent alcohol-related incidents occurring on the licensed premise and within a 50 metre radius from the venue. Based on the BOCSAR research,¹⁷⁶ this could exclude in theory, potentially 43% of assaults attributable to a licensed venue within a 200m radius within which 92% of assaults occurred.

¹⁷³ Following the Sydney Inquiry, the NSW government amended the Liquor Regulation to increase the closing time for many NSW packaged liquor license venues across the whole of NSW from 11pm to midnight. This took effect on 14 January 2020. No third-party public interest group consultation occurred. See Liquor and Gaming NSW 'Fact sheet FS3158 Industry information - extended take-away and home delivery liquor sales' <https://www.liquorandgaming.nsw.gov.au/data/assets/pdf_file/0007/287440/FS3158_Industry-information-extended-takeaway-and-home-delivery-liquor-sales.pdf>.

¹⁷⁴ Wheeler, C. 'How do public interest considerations impact on the role of public sector lawyers' - Public Sector In-House Counsel Conference - Canberra - 30 July 2012 <https://www.ombo.nsw.gov.au/data/assets/pdf_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf>.

¹⁷⁵ Snider (n 115).

¹⁷⁶ Burgess and Moffatt (n 98).

2. Equity distribution considerations

The NSW retail alcohol supply statutory regulatory process represents the sword and shield of the law. The readily correctible deficiencies found in the scope of the VVS, challenge the public interest equity criteria. Those commercial interests who profit from the harmful promotion, sale and service of alcohol, along with their customers, should arguably be equally accountable for its substantial cost burdens to drinkers and others.¹⁷⁷

However, such a concept that recognises, equitably addresses and recompenses for the demonstrable negative externalities of the operation of the highly profitable alcohol market, is an anathema to the neoliberal paradigm. This contributes to a NSW alcohol supply regulatory and related political system, apparently intolerant to public interest and public health law reform. Conversely, as this research suggests, it is more likely to result in a tranche of regulatory amendments – law ‘reforms’, that favour the industry.¹⁷⁸

3. Pecuniary and other conflicts of interest

NSW public laws and integrity policies have long recognised the importance of identifying, avoiding and addressing perceived and actual conflicts of interests. These include: -

- a. NSW’s reportedly richest alcohol identity and owner of the consistently most violent licensed premise in NSW, advocated for the removal of the VSS and a weakening of Police inspections within his Ivy hotel. The weakening of these compliance requirements would likely deliver his family businesses, significant financial gains. It would also have a likely detrimental impact on public safety.
- b. Hemmes’ ‘size matters’ submission seeking its extension to the VVS compliance scheme
- c. Failure of the Parliamentary Inquiry and NSW government to recognise inherent and substantial conflicts of interest with Hemmes’ submissions regarding the VVS and other regulatory compliance issues
- d. Merivale has the greatest financial interest and most to gain from a weakened VSS and reduction in the legal duty of care for large and popular licensed premises. They also have a relative greater financial capacity to increase their security and other evidence-based harm prevention initiatives commensurate with patronage increases.

¹⁷⁷ In 2013, the NSW Auditor General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum with the cost to each NSW household being \$1,535 per annum: <https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Aug_Report_Cost_of_Alcohol_Abuse_to_the_NSW_Government.pdf>.

¹⁷⁸ See for example L&GNSW (online) News ‘NSW Government announces major liquor law reforms’, 29 November 2019 <<https://www.liquorandgaming.nsw.gov.au/news-and-media/nsw-government-announces-major-liquor-law-reforms>>.

4. Lack of impartiality and inclusiveness

The application of impartiality is recognised by the NSW Independent Commission Against Corruption (ICAC)¹⁷⁹ as a key integrity requirement of all public officials. Ayres and Braithwaite¹⁸⁰ also suggested third party public interest group involvement in the responsive regulation model was essential to avoid capture and corruption.¹⁸¹

- a. SMH involvement in protracted legal proceedings against the Police and indirectly the AHA. The action sought to obtain and publicly release information of the levels of violence associated with NSW licensed premises. Arguably, the Police's protracted refusal to provide the requested information represented a lack of impartiality. This is compounded by the officer responsible for the case leaving the Police to become a senior advisor for the AHA.¹⁸² This also raises concerns over a perceived conflict of interest
- b. Minister's announcement at 2017 AHA awards night to continue to make laws that the industry would be pleased with.¹⁸³ This is indictive of motive and intent
- c. the asymmetrical nature of NSW alcohol law 'reforms' that have consistently favoured the industry to the exclusion of public health and safety considerations
- d. The Inquiry and NSW government supported industry recommendations regarding law changes including liquor license approval processes outside the geographic scope of its investigations. Public health experts and related public interest groups were not afforded any opportunity to critique these submissions, tainted with an air of inevitability despite the Government's offer to consult with 'stakeholders before these reforms can be implemented'.¹⁸⁴

Temporal link between connected conduct

There is a solid temporal link between the connected conduct. The abovementioned incidents fall within a pattern of behaviour over an extended period.

PART 1V. CONCLUSION

The preceding application of the industry capture test to the critical case study of the VVS demonstrates that the three elements of this test - connected conduct of mutual benefit, processes and outcomes inconsistent with the public interest and, a pattern of conduct occurring over time, are reasonably satisfied.

A higher degree of proof of capture will be established when NSW Parliament passes the Public consultation draft Liquor Amendments (24 hour Economy) Bill, primarily in its current form. The draft Bill appears to mirror Hemmes' submissions to the Inquiry relating to the

¹⁷⁹ ICAC (n 133). Recognised by ICAC has a key integrity responsibility of all public officials.

¹⁸⁰ Ayres and Braithwaite, (n 80).

¹⁸¹ It is also noted that such groups can also be captured by industry and other vested interests.

¹⁸² Moore, (n 63).

¹⁸³ Young (n 47).

¹⁸⁴ See L&GNSW website 'Other liquor law reforms' <<https://www.liquorandgaming.nsw.gov.au/news-and-media/nsw-government-announces-major-liquor-law-reforms>>.

future of the VVS and the broader application of the 'size matters' defence notwithstanding, the warning provided to the Inquiry by a senior L&GNSW official.¹⁸⁵

The industry capture test developed for this research includes a 'public interest' component. This in turn contains important governance considerations including the presence of perceived and actual conflicts of interest. If the owner of one of the most popular and consistently declared most violent licensed premise in NSW is effectively empowered by law makers to be the main architect of the removal or weakening of the VVS, from a normative perspective, this could be construed as morally reprehensible.

This article has highlighted sustained procedural (transparency) and substantive deficiencies with the VVS that appear readily resolvable. It is the NSW Parliament's reluctance to transparently, impartially and objectively address these deficiencies that signifies the entrenchment of industry corrosive¹⁸⁶ and cultural¹⁸⁷ capture. The consequence of such regulatory inaction relating to the VVS and the broader unwillingness to apply effective evidence-based regulatory interventions to address high rates of DV, is detrimental to public health.

No longer can one confidently proclaim that NSW's alcohol industry's compliance controls are indicative of a sovereign state answerable to its people. This research establishes that industry capture has extended from the first regulatory function of law making,¹⁸⁸ to the second function of the application and enforcement of the laws to secure their compliance.

This research demonstrates a confluence between the concepts of industry corrosive capture,¹⁸⁹ corporate political activity¹⁹⁰ and the neoliberal paradigm¹⁹¹ relying upon the VVS compliance requirements in NSW as a one backdrop. A perfect match for the neoliberal paradigm that sanctions the application of power contrary to the overriding public interest.

¹⁸⁵ L&GNSW (n 128).

¹⁸⁶ Carpenter (n 27).

¹⁸⁷ Kwak (n 26).

¹⁸⁸ Brown (n 6).

¹⁸⁹ Carpenter (n 27).

¹⁹⁰ Ulucanlar, Fooks and Gilmore, (n 13).

¹⁹¹ Lencucha and Thow, (n 16, 18).