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# Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health

Tony Brown\*

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*Contemporary public health literature contains an increasing emphasis on the commercial determinants of health including the influence of unhealthy food, beverage and tobacco industries on government harm prevention policy agendas and global sustainable development goals. Effective capture by the industries of the crucial legislative process associated with the harm prevention initiatives would have a detrimental impact on public health. This article proposes a qualitative multi-spectrum prototype legislative capture test with broad application to a range of industries and jurisdictions at all levels of government where legislative capture may be suspected. It is predicated on a finding of significant encroachment of the public interest (PI) by special interest groups and reciprocating beneficial conduct between the lawmakers and the group. The test is populated from a critical case study of key New South Wales (NSW) alcohol industry statutory amendments within a doctrinal and social inquiry/power framework. It relies upon parliamentary records and secondary data to analyse critically the 2015 “fit for purpose” (FFP) reforms to NSW alcohol supply laws and their consistency with the PI and other constitutional safeguards. It aligns the reforms with other research relating to the magnitude of alcohol and gambling industry political donations and the operation of the alcohol outlet post reform approval process. The application of the test to the case study finds that the 2015 FFP amendments are indicative of legislative capture and associated clientele corruption – critical new considerations in the commercial determination of health. It also identifies the commodification of the PI.*

**Keywords:** commercial determinants of health; legislative capture; clientele corruption; public interest; separation of powers; neoliberalism; alcohol

## I. INTRODUCTION

According to the Australian Burden of Disease Study, “Excessive alcohol consumption is the leading contributor to the burden of illness and deaths in Australia for people aged up to 44 years”.<sup>1</sup> It is estimated that on average there are four deaths, 40 Emergency Department admissions and 137 hospitalisations from alcohol each day in New South Wales (NSW).<sup>2</sup> While the overall consumption level of alcohol

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<sup>1</sup> C Gao et al, *Alcohol's Burden of Disease in Australia* (2014) Canberra: FARE and VicHealth in Collaboration with Turning Point <<https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/alcohol-misuse/Alcohols-burden-of-disease-in-Australia.pdf?la=en&hash=4E3FAB0E6DDF78C2DB4A3BBC83D5DD46A6149C4F>>.

<sup>2</sup> Centre for Epidemiology and Evidence, NSW Ministry of Health, *Health Statistics New South Wales* (2018) <<http://www.healthstats.nsw.gov.au>>.



in Australia is declining slightly,<sup>3</sup> alcohol contributes to a broad range of acute and chronic harms<sup>4</sup> on individual consumers and others.<sup>5</sup>

Contemporary public health literature contains an increasing recognition of the role unhealthy food, beverage and tobacco industries play in contributing to, and importantly impeding the prevention of, non-communicable diseases (NCDs)<sup>6</sup> and related sustainable development goals (SDGs). Addressing NCDs requires the effective regulation of those industries including alcohol, that profit from the supply of unhealthy and unsafe products.<sup>7</sup> Such regulation<sup>8</sup> occurs at all levels of government from transnational/global to the local setting.

Attempts by the unhealthy industries to influence regulation and the policymaking environment by the exertion of political power is reflected by the Australian Hotels Association (AHA) in February 2019 being recorded as the second largest federal political donor in Australia increasing its level of political donations from \$153,000 in 2016–2017 to \$1.1 million in 2017–2018.<sup>9</sup> The literature reveals the nature and magnitude of unhealthy food, beverage and tobacco industries' capacity to influence the public health policymaking process.<sup>10</sup>

This article, based upon a case study of the NSW Australia alcohol supply lawmaking jurisdiction, provides new insights and tools that can be applied more broadly to identify legislative capture and the commodification of the public interest (PI)<sup>11</sup> with those nations that have some regard to the concept of the overall "public" interest, welfare or good.

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<sup>3</sup> See Australian Bureau of Statistics, *Summary of Apparent Consumption of Alcohol, Australia, 2016–17* <<http://www.abs.gov.au/ausstats/abs@.nsf/latestProducts/4307.0.55.001Media%20Release12016-17>>; K Sexton-McGrath, *Demand for Non-alcoholic Beverages on the Rise as Australians Drink Less* (19 January 2019) <<https://www.abc.net.au/news/2019-01-19/demand-for-non-alcoholic-beverages-rise-australians-drink-less/10727172>>. NSW Health statistics show a rise in the risky levels of consumption of alcohol since 2015 <[http://www.healthstats.nsw.gov.au/Indicator/beh\\_alc\\_age/beh\\_alc\\_age?&topic=Alcohol&topic1=topic\\_alcohol&code=beh\\_alc](http://www.healthstats.nsw.gov.au/Indicator/beh_alc_age/beh_alc_age?&topic=Alcohol&topic1=topic_alcohol&code=beh_alc)>.

<sup>4</sup> Including high level of regional road fatalities, a significant proportion of domestic, non-domestic assaults, inland adult drownings and the State's road toll. In 2013, the NSW Auditor General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum with the cost to each NSW household being \$1,535 per annum: <[https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013\\_Aug\\_Report\\_Cost\\_of\\_Alcohol\\_Abuse\\_to\\_the\\_NSW\\_Government.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Aug_Report_Cost_of_Alcohol_Abuse_to_the_NSW_Government.pdf)>.

<sup>5</sup> AM Laslett et al, *The Hidden Harm: Alcohol's Impact on Children and Families* (2015) Foundation for Alcohol Research and Education <<https://fare.org.au/wp-content/uploads/01-ALCOHOLS-IMPACT-ON-CHILDREN-AND-FAMILIES-web.pdf>>.

<sup>6</sup> NCDs account for 71% of all deaths globally. World Health Organisation, *Fact Sheet: Noncommunicable Diseases* (1 June 2018) <<https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>>. See also B Hawkins et al. "Reassessing Policy Paradigms: A Comparison of the Global Tobacco and Alcohol Industries" (2016) 13 *Global Public Health* 1: for an examination of strategy and tactics deployed by some unhealthy industries to influence decision-makers. This paper however, concentrates on the lawmaking industry/political interface.

<sup>7</sup> See J Collin et al, "Can Public Health Reconcile Profits and Pandemics? An Analysis of Attitudes to Commercial Sector Engagement in Health Policy and Research (2017) 12(9) *PLoS ONE* e0182612.

<sup>8</sup> Regulation is defined as lawmaking, its application, enforcement and, interpretation. This research also acknowledges the concept of "decentering" regulation and the capacity of large corporations to exercise some quasi-regulatory functions. See J Black, "Regulatory Conversations" (2002) 29(1) *Journal of Law & Society* 170. It also considers industry self-regulation within the context of neoliberalism.

<sup>9</sup> See Australian Electoral Commission (AEC) "2017-18 Annual Financial Disclosure Returns Published Today" (Media Release, 02/01, 1 February 2019) <<https://www.aec.gov.au/media/media-releases/2019/02-01.htm>>. Most of the AHA's donations were reportedly provided to the incumbent Liberal (Conservative) party in the small State of Tasmania to successfully campaign against the opposition Labor party that was seeking to ban poker machines from hotels. See also D Wood, "Tasmania's Gambling Election Shows Australia Needs Tougher Rules on Money in Politics", *The Conversation*, 1 February 2019 <<https://theconversation.com/tasmanias-gambling-election-shows-australia-needs-tougher-rules-on-money-in-politics-110977>>.

<sup>10</sup> See, eg, I Rossow and J McCambridge, "The Handling of Evidence in National and Local Policy Making: A Case Study of Alcohol Industry Actor Strategies Regarding Data on On-premise Trading Hours and Violence in Norway" (2019) 19(1) *BMC Public Health* 44; J McCambridge, M Mialon and B Hawkins, "Alcohol Industry Involvement in Policy Making: A Systematic Review" (2018) 113 *Addiction* 1565–1764; M McKee, S Steele and D Stuckler, "The Hidden Power of Corporations" (2019) 364 *BMJ* 14; I Gilmore, L Bauld and J Britton, "Public Health England's Capture by the Alcohol Industry" (2018) 362 *BMJ* k3928.

<sup>11</sup> No exhaustive legal definition of PI is recognised in Australia given in part the situational/contextual aspect of this concept. Wheeler differentiates between the procedural and substantive (outcomes, objectives) aspects of PI. Unsurprisingly, the procedural component includes adherence to principles of natural justice, impartiality, integrity, transparency, accountability and fairness.

This article critically analyses through a regulatory lens key amendments to the NSW alcohol supply laws introduced into the NSW Parliament in November 2015. The *Gaming and Liquor Administration Amendment Bill 2015* (NSW) provided for “Fit for Purpose” (FFP) reforms that materially shifted the power balance of competing stakeholders and significantly reduced the distance (independence) between the lead regulator – Independent Liquor and Gaming Authority (ILGA) and the executive branch of government.

From an instrumental perspective, the *Liquor Act 2007* (NSW), the *Gaming and Liquor Administration Act 2007* (NSW) and the associated regulations (NSW alcohol supply laws) represent the “rule book” for the contestation between a range of private commercial interests in the alcohol industry, police, public health, local community interests and a State open to lobbying and manipulation particularly by commercial imperatives. The legislative process and the associated discourse and commentary including parliamentary debates, establishes and reflects the objectives, rationale, normative and ideological framework for the regulation of alcohol and gambling. This regulatory process and the associated discourse ultimately determine the gradient and symmetry of the playing fields and even who is allowed onto the field and when they can enter the contest. Substantive changes to the rules and their application associated with legislative amendments that impact upon alcohol harm outcomes, therefore provide a window to analyse critically with the assistance of the development of a qualitative multi-spectrum legislative capture<sup>12</sup> test, the relative power, ideological and governance mechanisms<sup>13</sup> underpinning the legislative changes and associated outcomes to determine who is really calling the shots.

The analysis consists in part of an examination of the front and backstage, the choreographed script, actors and props of this contested regulatory space or intersection where PIs collide with regulatory capitalism<sup>14</sup> and the “free market” imperative of neoliberalism. It relies upon a law-in-action approach. Ultimately, it confirms that the concepts of legislative capture and synonymous corruption are a primary but relatively overlooked consideration in the commercial determinants of health.<sup>15</sup> A deeper understanding of legislative capture mechanisms underpins policy evaluation programs and can contribute to the elimination of the undue influence of unhealthy industries on the public health harm prevention agenda.

## II. THE NATURE OF LEGISLATIVE CAPTURE

Regulatory/legislative capture is defined as:

[T]he process of consistently or repeatedly directing public policy (law-making) decisions away from the public interest towards the interests of a specific interest group or person. Capture is the opposite of inclusive and fair policy-making, and always undermines core democratic values.<sup>16</sup>

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In terms of outcomes being in the PI and the overarching obligation of public officials to act in the PI, this article relies upon the Lockean concept of public interest being the “public good” derived by the exercise of legitimate sovereign power such as making laws with the informed consent of the people in the best interests of the common-wealth. C Wheeler, “How Do Public Interest Considerations Impact on the Role of Public Sector Lawyers” (Paper presented at Public Sector In-House Counsel Conference, Canberra, 30 July 2012) <[https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0007/50002/The-public-interest-revisited-we-know-its-important-but-do-we-know-what-it-means.pdf)>.

<sup>12</sup> Given the level of Ministerial control in NSW, it would be unlikely for capture of the alcohol regulatory agencies to occur in any systemic way without the imprimatur of the executive level of government. Within the Australian constitutional setting there is no clear separation between the executive and legislative branches of government.

<sup>13</sup> These mechanisms might also be termed “checks and balances”. See W Novak, “A Revisionist History of Regulatory Capture” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013) 40.

<sup>14</sup> D Levi-Faur, “Regulatory Capitalism” in P Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017).

<sup>15</sup> See I Kickbusch, L Allen and C Franz, “The Commercial Determinants of Health” (2016) 4 *The Lancet* e895.

<sup>16</sup> Adapted version of definition of D Carpenter, “Detecting and Measuring Capture” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013), reflected in OECD definition, “Preventing Policy Capture: Integrity in Public Decision Making” in *OECD Public Governance Reviews* (OECD Publishing, 2017) 9 <<http://dx.doi.org/10.1787/9789264065239-en>>. See also essay of E Warren, *Corporate Capture of the Rulemaking Process* (June 2016) *The Regulatory Review* <<https://www.theregview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/>>.

The author has inserted “law-making” into the above definition to specify “legislative” capture. This is regarded as a more specific and potent form of broader regulatory capture that can occur in all branches of government – executive, legislative and judicial as well as within government agencies.

Novak’s “Revisionist History of Regulatory Capture”<sup>17</sup> argues with respect to the concepts of capture and corruption “there is simply no older theme in the Western legal and political tradition than the one highlighted by capture”.<sup>18</sup> This is dependent upon the clear delineation between public and private interests. Within the three branches of government –the executive, legislature and judiciary, Madison (1787) warned of the dangers of not separating the powers between the three arms<sup>19</sup> given that even “enlightened statesmen” would be likely unable to resist the innate force of factionalism.<sup>20</sup>

The institutional and political response to concentrations of power is one of “checks and balances” as a “countervailing force” to offset endemic private corruption and public law capture. Novak concludes with the observation that capture theory has gone “somewhat astray” under the influence of economics and Private Interest Theory.<sup>21</sup> This however, cannot be solved, according to Novak, by invocation of an imaginary laissez-faire past in the frame of neoliberalism that embraces industry self-regulation.<sup>22</sup>

One of the most influential contemporary regulatory theories is Ayres and Braithwaite’s *Responsive Regulation*.<sup>23</sup> These authors consider regulatory capture and corruption as inevitable by-products of the ideal state of close distance, co-operation and regulator discretion in engaging with their targeted industries. Above this ideal relationship situation exists an ascending order of more stringent, regulatory “strategy” (commands) and “enforcement” (penalties) interventions as disincentives for non-compliance.<sup>24</sup>

Ayres and Braithwaite rely on civil republican tripartism inclusive of independent third-party interests, as a counterbalance to resolve the conundrum of attaining high levels of co-operation and closeness between the regulator and the regulated without this evolving into capture/corruption. The authors’ solution was empowering “Public Interest Groups” (PIGs)<sup>25</sup> – who should actively participate in the regulatory process as a “countervailing force”<sup>26</sup> and enjoy similar powers to the regulator including access to information and prosecutor powers – in effect, to keep them honest.<sup>27</sup>

Tombs and Whyte provide a strident critique of the *responsive regulation* approach. They traced the development of United Kingdom Workplace Safety laws and found a “logical affinity” with the

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<sup>17</sup> Novak, n 13.

<sup>18</sup> Novak, n 13, 38ff.

<sup>19</sup> Montesquieu (1748) drew upon ancient Greece and the Roman Republic to elaborate an important constitutional “check and balance” to the illegitimate use of sovereign power. James Madison, “The Federalist No. 10: The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued)”, *Daily Advertiser*, 22 November 1787.

<sup>20</sup> Novak, n 13, 39ff.

<sup>21</sup> B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP, 2007). See also R Chen and J Hanson, “The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law” (2014) 103(1) *Michigan Law Review* 1 for a thorough critique of the neoliberal economic, political and legal script. See also Novak, n 13.

<sup>22</sup> Ashley Schram provides a summary of some key aspects of neoliberalism within the context of public health values. These include: (1) “competition” being the defining characteristic of human relations; (2) redefines citizens as consumers; (3) the primacy of the “morally neutral” free market produces better results than the public sector hence the necessity for reducing the size of government, attainment of budget surpluses, deregulation, industry self-regulation and privatisation; (4) reducing competition and government intervention is “inimical” to liberty; (5) classic liberalism posits “there is no collective ‘public interest’ beyond the interests of the individuals who comprise that community”; and (6) negative externalities are ignored and all goods treated as ordinary commodities. A Schram, “When Evidence Isn’t Enough: Ideological, Institutional, and Interest-based Constraints on Achieving Trade and Health Policy Coherence” (2018) 18(1) *Global Social Policy* 62.

<sup>23</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992).

<sup>24</sup> Ayres and Braithwaite, n 23. See also B Reeve, “Regulation of Alcohol Advertising in Australia: Does the ABAC Scheme Adequately Protect Young People from Marketing of Alcoholic Beverages?” (2018) 18(1) *QUT Law Review* 96.

<sup>25</sup> Ayres and Braithwaite, n 23. Public interest groups themselves are not immune from industry capture.

<sup>26</sup> See JK Galbraith, *American Capitalism* (Houghton Mifflin, 1952).

<sup>27</sup> See extract from Ayres and Braithwaite reproduced in Morgan and Yeung, n 21, 57.

theory of responsive regulation. They also described this process as “regulatory degradation”<sup>28</sup> – the entrée for neoliberal regulatory settlement. They observed that the base of Ayres and Braithwaite’s enforcement strategy hierarchy model being “self-regulation” is ideologically appealing to capitalism and neoliberalism. It provides those with a predilection for budget surpluses, further legitimisation for reductions in public compliance and enforcement resources under the guise of “risk management”.

David Levi-Faur’s chapter “Regulatory Capitalism”<sup>29</sup> declares that regulatory capitalism is the “elephant in the room”<sup>30</sup> of scholarly literature:

Regulatory processes condition the operation, manipulation and deployment of political, social and economic power.<sup>31</sup>

The above short analysis of the regulatory theory literature and nature of legislative capture suggests that we cannot rely upon a fictitious “invisible hand”<sup>32</sup> or other constructs including the goal of industry self-regulation<sup>33</sup> and PIGs – that assumes an unrealistic symmetry of power with the regulator and industry, to simply eliminate the innate drive of individuals and organisations to form factions and exert illegitimate power for self-gain and greed. Second, as the size of industry finances invested in commercial alcohol advertising and political donations<sup>34</sup> confirm, the citizenry is susceptible to brainwashing.<sup>35</sup> This goes to the heart of the Lockean Government legitimacy, theoretically dependent upon the informed, independent and authentic consent of citizens. It elevates the importance of sustaining effective and transparent checks and balances within Western and global democratic and governance processes.

Flyvbjerg’s case study analysis of the planning system in Aalborg Denmark found that those organisations vested with protecting the PI were “deeply embedded in the hidden exercise of power and the protection of special interests”.<sup>36</sup> Lauren Snider’s study of white collar crimes in the Canadian corporate sector<sup>37</sup> suggested that this regulation process was effectively owned by the sector controlled by the ruling elite. She found that real progress to address these crimes and associated ineffectiveness of punishment was only achieved through the mobilisation of the proletariat and its allies and challenging hegemony at the ideological level. The law in comparison, was a relatively weak instrument to achieve genuine and effective reforms:

Class and rights struggles, by increasing the price the dominant class must pay for legitimacy, create interstices within capitalism whereby meaningful and beneficial change can occur.<sup>38</sup>

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<sup>28</sup> S Tombs and D Whyte, “Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK” (2012) 7(1) *Regulation & Governance* 61.

<sup>29</sup> Levi-Faur, n 14.

<sup>30</sup> Levi-Faur, n 14, 291.

<sup>31</sup> Levi-Faur, n 14, 291.

<sup>32</sup> Adam Smith, *The Wealth of Nations* (W. Strahan and T. Cadell, 1776); R Chen and J Hanson, “The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law” (2004) 103(1) *Michigan Law Review* 1, 28ff identify Hayek and other Chicago “schoolers” ideology that human freedoms were inextricably tied to private property and capitalism and that regulation detracted from these qualities. They also note at p 129ff that this famous “invisible hand” metaphor had more sinister deceptive connotations. Smith also wrote (p 130ff) “no other sovereigns ... could be so perfectly indifferent about happiness or misery of their subjects [as] the proprietors of such a mercantile company are, and necessarily must be”.

<sup>33</sup> See McCambridge, Mialon and Hawkins, n 10.

<sup>34</sup> See K Kyprri et al, “‘If Someone Donates \$1000, They Support You. If They Donate \$100000, They Have Bought You’. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties” (2018) 38 *Drug and Alcohol Review* 226.

<sup>35</sup> See B Hindess, *Discourses of Power: From Hobbes to Foucault* (Blackwell Publishers, 1996) See for discussion of various expressions of power including the manipulative face of power, false consciousness, Marx’s ideological power. See also the “anaesthetisation” of critical public discourse by commercial media in R Collins and D Skover, “The First Amendment in the Age of Paratroopers” (1990) 68(6) *Texas Law Review* 1087.

<sup>36</sup> B Flyvbjerg, *Rationality and Power Democracy in Practice* (University of Chicago Press, 1998) 225.

<sup>37</sup> L Snider, “Accommodating Power: The ‘Common Sense’ of Regulators” (2009) 18(2) *Social & Legal Studies* 179.

<sup>38</sup> Snider, n 37, 59.

Findings from the research of Kypri et al<sup>39</sup> provide an important contribution bridging the critical evidentiary gap in the determination of capture within the Australian tobacco, alcohol and gambling supply industries. A sophisticated and responsive industry political donation environment in Australia was a key finding:

The alcohol and gambling industries make substantial (political) donations to influence particular decisions in the short term and build relationships over the long term.<sup>40</sup>

A 2011 NSW media exposé of the connections between the AHA, NSW political parties, bureaucrats and the media revealed among other things:

The AHA bragging in its private annual report about successful lobbying of government and secret deals with media representatives to counter negative press.<sup>41</sup>

The research findings of Flyvbjerg, Snider and Kypri and other pragmatic approaches suggest the means by which to address and reverse corporate regulatory capture ultimately lie with those governance-based public watchdogs<sup>42</sup> and independently informed citizenry (including effectively networks of public lobby groups)<sup>43</sup> with the power to change governments and mobilise honest media and public opinion.

### III. METHODOLOGY

The application and rationalisation of power that includes stakeholder “influence” mediated by the law are core considerations of this research. This lends itself to the adoption of Flyvbjerg’s phronetic research methodology.<sup>44</sup> The article relies upon a new variant methodology *legal phronesis*.<sup>45</sup> It constitutes a blend of the more traditional legal doctrinal methodology and the process of “phronetic social inquiry”. The latter is case/praxis-driven and focused on the “less visible” – what is occurring “backstage”,<sup>46</sup> the common, ordinary and different, the “modus operandi of power” and, the distinction between formal politics and the *Realpolitik*.<sup>47</sup> It has a strong normative focus based on the Aristotelian intellectual virtue of phronesis that reflects the concept of practical wisdom, public “interest”, “welfare” or “good”.

A content analysis of mainly publicly available documentation was initiated. This included primary data – the *Gaming and Liquor Administration Amendment Bill 2015* introduced into the NSW Parliament and associated Parliamentary Debates,<sup>48</sup> supporting explanatory memoranda and secondary data including communications between government officers and community stakeholders.

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<sup>39</sup> Kypri et al, n 34.

<sup>40</sup> Kypri et al, n 34, 1.

<sup>41</sup> J Hansen, “Questions Are Being Asked about the Connections between the O’Farrell Government and the Australian Hotels Association”, *The Sunday Telegraph*, 18 December 2011 <<https://bit.ly/2H7oCoJ>>. Hansen’s “backstage” investigation reveals possible examples of corruption involving both of NSW’s major political parties and the bureaucracy. See *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34. The hotel lobby’s alleged capture of both major political parties ensures unprecedented power to effectively control the alcohol regulatory agenda with the reciprocal disempowerment of the public health lobby. This however is not simple crude reductionism. A number of concessions are made and rhetoric deployed to emphasise the alleged “toughness” of its alcohol laws, the elimination of “rogue” operators from the industry and the protection of the “community’s interest”. This is important to preserve the pluralist, neutrality of the State facade of “balancing” the interests of stakeholders in the regulation of alcohol in NSW.

<sup>42</sup> Reliant upon government funding and support.

<sup>43</sup> With effective “agency” and “structure” – see “power” discussion by D Hudson and A Leftwich, “From Political Economy to Political Analysis” (Research Paper No 25, Developmental Leadership Program, June 2014) 82ff <<https://res.cloudinary.com/dlprog/image/upload/research-paper-25-from-political-economy-to-political-analysis>>.

<sup>44</sup> B Flyvbjerg, “Phronetic Planning Research: Theoretical and Methodological Reflections” (2004) 5(3) *Planning Theory & Practice* 283.

<sup>45</sup> B Murphy and G McGee, “Phronetic Legal Inquiry: An Effective Design for Law and Society Research?” (2015) 24 (2) *Griffith Law Review* 288.

<sup>46</sup> Flyvbjerg, n 36, 98.

<sup>47</sup> Flyvbjerg, n 36, 6.

<sup>48</sup> See New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2015; New South Wales, *Parliamentary Debates*, Legislative Council, 10 November 2015, esp 116, 124ff.

Documentation providing insight into the alcohol supply regulatory climate and practices preceding and following the amendments were also analysed including departmental annual reports, disciplinary decisions of the Authority against some industry businesses, industry publications and media reports. The post-reform impact analysis of the legislative amendments relied in part on recent research conducted by Alison Ziller relating to variations and inconsistencies in the NSW alcohol regulators' approach to the alcohol outlet licensing approval process.<sup>49</sup>

#### IV. DEVELOPMENT AND APPLICATION OF A MULTI-SPECTRUM LEGISLATIVE CAPTURE TEST

A review of regulatory capture theory and related governance and constitutional aspects of "public interest/good/welfare", "separation of powers" and forms of "corruption" was undertaken. This was then synthesised to create a broadly applicable prototype multi-spectrum<sup>50</sup> legislative capture test with the capacity to be applied in other jurisdictions that retain similar constitutional considerations.

Capture also implies mutuality of complementary interests. This involves acquiescence or collusion of a sovereign (government) entity or related individuals for some mutual benefit or quid pro quo with a private interest group whose power is enhanced by undue influence over a public regulatory process. This process is referred to as "reciprocal conduct".

The existence of legislative capture is a key consideration of the commercial determination of health and an essential prerequisite in any analysis of the likely effectiveness of alcohol and other unhealthy and unsafe products harm reduction and prevention interventions at all levels of government.

For the purposes of this article, the test analyses the NSW legislative amendments, the associated broadly construed narrative and the enduring relationship between the alcohol industry and politicians. It has been developed for multi-jurisdictional application.

The following five main elements were derived from the definition of legislative capture<sup>51</sup> relied upon in the design of the test.

- (1) **Identification of connected conduct:** identifying reciprocating conduct in association with the lawmaking process and its application alleged to have directed attention away from the PI to favour a sectional group or special interest. Donations buy privileged private access to politicians drowning out countervailing rational arguments and testing industry assertions. This also requires the identification of the PI allegedly impinged.
- (2) **Temporal link between connected conduct:** a temporal element requires the alleged conduct to be consistent or repeated over a moderate time period.
- (3) **Public interest considerations in relation to the connected conduct (PIC):** key normative consideration of establishing the alleged reciprocating conduct of favouring a specific interest group or individual was not in the PI. This can be examined from a "process and procedures" and "objectives and outcomes" perspective. In some cases, elements of both considerations may exist within the specific conduct under scrutiny.
- (4) **Separation of power considerations in relation to the connected conduct (SoPC):** regarded as an important constitutional "check and balance" of a concentration of powers in one branch of government that may lead to a usurpation of the PI. Separation of power (SoP) doctrine also promotes greater independence of quasi-judicial bodies. Some indicia of a lack of SoPs may include the capacity of the executive arm of government to directly and indirectly influence the operation of another branch of government including quasi-judicial tribunals, the composition and independent representative

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<sup>49</sup> This article relied in part on the evidence and analysis contained in A Ziller, "Eroding Public Health through Liquor Licensing Decisions" (2018) 25 JLM 489; A Ziller, "Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice" (2018) 36 *Impact Assessment and Project Appraisal* 383; A Ziller and T Brown, "Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away" (2019) 26 JLM 786.

<sup>50</sup> The test incorporates a range of recognised constitutional type safeguards and concepts. It also adopts a combination of a doctrinal and phronetic methodology.

<sup>51</sup> See references mentioned in n 16.

expertise of personnel constituting decision-making bodies and, an examination of decisions to determine impartiality, independence, consistency and an evidence-based (rational) approach.

- (5) **Intention and motivation allied to the connected conduct (IMC):** this element also implies mutuality of interests – an implied contract in the reciprocating conduct. It involves acquiescence or collusion of a government entity or related individuals for some mutual benefit or quid pro quo with a private interest group whose power is enhanced by sustained undue or potentially corrupt influence over a public lawmaking regulatory process including forms of industry self-regulation.<sup>52</sup>

The literature also identifies additional factors indicative of or reducing the risk of capture. Those that are indicative of capture include existence of “revolving doors” between industry and government;<sup>53</sup> the appointment<sup>54</sup> of current or former industry representatives to government boards and quasi-judicial bodies; the location of a regulator within a broader government portfolios with the primary responsibility for serving the interests of industries and related commercial type developments; the level of industry donations to politicians and political parties. Factors promoting a reduction in the risk of capture include rigorous transparency<sup>55</sup> in the decision-making and policy application processes; equality/symmetry of power and influence<sup>56</sup> between stakeholders; integrity, honesty and truthfulness; consistent fairness, objectivity and impartiality; and, indirectly, whether the outcomes are “just or right”.<sup>57</sup> These factors become more apparent when considering individual indicia contained within the Appendix matrix drawn from the following section’s case study of the impact of the “Fit for Purpose” 2015 amendments to the NSW alcohol supply laws.

In addressing the “motivate” and “intent” element of the capture test, a search identified 21 media articles from 2007 that related to the connections between the NSW alcohol industry, government and their officials including some indicia of regulatory capture such as the government/industry “revolving door”.<sup>58</sup> This research was fortified by Kypri et al<sup>59</sup> study that examined the nature and impact of alcohol, gambling and tobacco industry federal political donations in Australia on the government decision-making process. Most of the evidence relied upon in applying the legislative capture test is likely to be indirect or circumstantial – in nature, that is an identification of individual strands of information which combine building strength towards a particular inference as to the intention behind the reciprocating conduct. This type of reasoning is often compared to the individual strands in a length of rope that are entwined to present a coherent whole. Parties benefiting from legislative capture would not normally make any public admissions or leave “smoking guns” lying on boardroom tables. This may prima facie represent a form of clientele corruption identified by the High Court of Australia<sup>60</sup> relying upon a United States

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<sup>52</sup> See “Corrosive capture”: Carpenter, n 16.

<sup>53</sup> For example Hansen, n 41. See also S Nicholls, “Another Former Labor Staffer Joins Hotels Lobby”, *The Sydney Morning Herald*, 21 August 2010 <<https://www.smh.com.au/national/nsw/another-former-labor-staffer-joins-hotels-lobby-20100820-138yt.html>>; S Nicholls “She’s Back! Meagher Returns as Lobbyist for Pubs”, *The Sydney Morning Herald*, 10 May 2010 <<https://www.smh.com.au/national/nsw/shes-back-x2026-meagher-returns-as-lobbyist-for-pubs-20100509-ulqi.html>>.

<sup>54</sup> For example S Nicholls, “O’Farrell Left Exposed over Lobbyist Laws”, *The Sydney Morning Herald*, 10 September 2011 <<https://www.smh.com.au/politics/federal/ofarrell-left-exposed-over-lobbyist-laws-20110909-1k1n9.html>>.

<sup>55</sup> See European Union consideration of statutory transparency: A Alemmeno, “Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy” (2014) 39(1) *European Law Review* 72. See also N Ries and K Kypri, “Government-funded Health Research Contracts in Australia: A Critical Assessment of Transparency” (2018) 40 *Sydney Law Review* 367.

<sup>56</sup> See D Wood, K Griffiths and C Chivers, *Who’s in the Room? Access and Influence in Australian Politics* (2018) Grattan Institute <<https://grattan.edu.au/report/whos-in-the-room/>>.

<sup>57</sup> Flyvbjerg identifies this question as a normative consideration: Flyvbjerg, n 44.

<sup>58</sup> See J Kwak, “Cultural Capture and the Financial Crises” in D Carpenter and D Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013).

<sup>59</sup> See Kypri et al, n 34.

<sup>60</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 204 [36], 205 [38]; [2015] HCA 34: “the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder ... quid pro quo and clientelistic corruption threaten the quality and integrity of governmental decision-making, but the power of money may also pose a threat to the electoral process itself. This phenomenon has been referred to as ‘war-chest’ corruption.”

decision.<sup>61</sup> As the application of the proposed test to the information provided in the following case study and Appendix reveals however, direct evidence relating to reported admissions and documented industry political donation irregularities can arise. Incriminating direct evidence is most likely to emanate from disenchanted political, agency and industry informants.

All above elements of the test must be reasonably satisfied to reach a finding of legislative capture. Partial satisfaction would signal an environment conducive to capture and potential corruption. It is suggested this would necessitate timely, impartial and effective remedial action. In the case of the Australian alcohol and gambling industry this may include for example, public intervention of an independent preferably national government agency. The agency would require sufficient funding, inquisitorial, and inter-jurisdictional powers to effectively remediate the risk or presence of capture given the national market dominance of a small number of large alcohol and gambling industry corporations.<sup>62</sup> The independent authority would also require the capacity to investigate certain executive government, political party and industry/lobby group activities including political donations and other individual and organisational favours – given the inherent reciprocating conduct necessary to establish capture.<sup>63</sup> Public industry groups' capacity to initiate complaints and join proceedings should not be impeded.

Given the serious implications of capture, it is suggested a positive duty be placed on lawmakers and agencies to ensure a maximum level of genuine and timely openness and transparency in all decision-making processes commencing with the development and application of the law and all related written and unwritten policy instruments.<sup>64</sup> Accompanying the duty of openness and transparency must be genuine and symmetrical stakeholder inclusiveness and governance. Consistent with the demonstrable duty to ensure genuine openness, inclusiveness and transparency would be a reverse onus of proof upon those accused of enabling or ignoring suspected legislative capture, to reasonably satisfy they had met their above positive duties. While those industries accused of participating in legislative capture may argue that the democratic electoral process cycle validates or legitimates government decisions and responsible government, the same assertion becomes far more problematic when the same industries make large political donations to both major political parties. Having all bases covered by the industry, reflects the pervasive *realpolitik*.

The following case study of transformative amendments to NSW alcohol supply laws was relied upon to populate the test to illustrate its application to a situation. This has been transferred into a prototype multi-spectrum legislative capture test matrix in the Appendix for ease of reference.

## V. CASE STUDY: 2015 “FIT FOR PURPOSE” ALCOHOL LAW REFORMS

Evaluating the full impact and purpose of the 2015 FFP law reforms in terms of outcomes, power balances and narratives necessitates a comparative analysis of the approval system before and after the promulgation of the legislative reforms. It also requires close examination of the passage of the reforms through Parliament.

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<sup>61</sup> *McConnell v Federal Election Commission*, 540 US 93, 153 (2003).

<sup>62</sup> Roy Morgan reported for the year ended September 2018 that the Woolworths group controlled 52.1% (\$7.9bn) of Australia's packaged alcohol market estimated to be \$15.1 bn. The Coles group controlled the second largest market share of 15.4% (\$2.3bn): <<http://www.roymorgan.com/findings/7753-supermarkets-continue-to-take-alcohol-market-share-from-bottle-shops-201811080408>>. Woolworths group also owns or leases the largest number of pubs and poker machines via a joint venture in the nation. See N O'Malley and N Gladstone, "Fresh Food Jackpot: How Woolies Became the Biggest Pokie Owner in the Country", *The Sydney Morning Herald*, 17 February 2018 <<https://www.smh.com.au/national/fresh-food-jackpot-how-woolies-became-the-biggest-pokie-owner-in-the-country-20180216-h0w7v5.html>>.

<sup>63</sup> This would require a review of *Evidence Act 1995* (NSW) s 130(1) public interest immunity balancing test regarding release of materials relating to "matters of state".

<sup>64</sup> *Government Information (Public Access) Act 2009* (NSW) s 14 provides for public interest considerations against disclosure of requested information if the same may have an adverse impact on "Responsible and effective government" that includes "deliberative processes". Arguably, this is where the greatest need for transparency exists with respect to the process examined in the following case study. The NSW Department of Industry (L&GNSW) in a 2017 submission to ILGA opposing the imposition of harm mitigation conditions on a small bar licence application refer to the government "policy" on the same. They were however unable to provide the public on request, a written version of that policy.

The following description of the development, promulgation and application of the FFP reforms provides insight into any switch and/or morphing in the narrative, the pace of the alcohol law reforms through the NSW Parliament, the veracity and reliability of various government assertions, the retention of independence/SoP from the executive branch of government by the lead regulator and the level of genuine consultation and engagement with those stakeholders who could be construed as third-party PIGs but without similar powers of the regulator.

Four emergent themes became evident from the case study. These are presented in the final section of this Part.

## **A. Overview NSW Alcohol Supply Regulatory System**

A dual regulatory system determines the approval of alcohol outlets and related conditions of operation in NSW. The first step usually requires development consent approval from the local consent authority (Council), its planning panel or on appeal to the NSW Land and Environment Court consistent with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW).

Having satisfied this prerequisite, the proponent is then required to apply for a liquor licence consistent with the provisions of the *Liquor Act 2007*. Approvals are split between Liquor and Gaming NSW (L&GNSW) within the NSW Department of Industry (DOI) and the ILGA<sup>65</sup> based on the type of licence sought. The bulk of licences including on-premise and limited event licences are normally dealt with by DOI staff unless there is some contention or controversy such as media interest. Higher risk applications relating to hotels, clubs and packaged liquor licences are referred to ILGA who then consider reports from the DOI staff (acting under ILGA delegation) relating to each of these higher risk categories of licence. In most instances, ILGA accepts the recommendations from DOI. There are very limited rights of review from first instance decisions from ILGA to the NSW Commercial and Administrative Tribunal (NCAT).<sup>66</sup> The public has far less capacity to seek a similar review of an alcohol outlet approval decision.<sup>67</sup>

## **B. Antecedents to the 2015 NSW “Fit for Purpose” Alcohol Law Reforms**

### **1. Aims of the Original Liquor Act 2007**

The current *Liquor Act 2007* (NSW) took effect on 1 July 2008. It was introduced by the (then) Labor Government and removed the “needs” criteria for liquor licensing approvals that offended the National Competition Principles.<sup>68</sup> This criterion provided a ground for objection of an existing outlet against a proposed new entrant on the basis an additional alcohol outlet was not needed. It was replaced by a “rigorous and comprehensive” social impact assessment process.<sup>69</sup> The new Act also placed an emphasis on reducing alcohol harms as reflected in the following extracts from the responsible Minister’s Second Reading Speech:

Importantly, the liquor laws must continue to send a clear message to industry and the community about the need for responsible service and consumption of alcohol. Those who have responsibilities under the law ... must consider the need to minimise alcohol related harm. The law must ... support the need for alcohol consumers to be responsible in their decisions and behaviour.

These new liquor laws strike a *balance* between community and industry needs, now and into the future

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<sup>65</sup> ILGA is also primarily responsible for disciplinary matters involving licensed premises. This responsibility is not closely examined in this article.

<sup>66</sup> See <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/ncat-decisions>>.

<sup>67</sup> Prior to the commencement of the *Liquor Act 2007* (NSW), the alcohol outlet approval process was under the jurisdiction of the NSW Licensing Court and its Liquor Administration Board.

<sup>68</sup> Additional information on the Competition Policies can be found at <<http://ncp.ncc.gov.au/pages/about>>.

<sup>69</sup> Alison Ziller and Tony Brown proposed article – “Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away” submitted for publication March 2019.

Reforms in the Liquor Bill 2007 support the Government's program to reduce harm associated with alcohol abuse, and promote a culture of responsible service and consumption of alcohol. ... The bill requires that liquor regulators *must be guided by harm minimisation principles*.<sup>70</sup>

The above passage signifies an initial overt pluralist orientation of the Act represented by reliance upon the phrase "striking a balance". It also placed an emphasis on the imperative of being "guided by harm minimisation principles". The language of "balancing interests" may be deployed to mask the dominant rule of the elite by the occasional concession to competing stakeholders.<sup>71</sup>

### C. A New Government – A New Order?

In March 2011, the Liberal and National Coalition parties gained power in NSW.<sup>72</sup>

In November 2011, the predecessor to ILGA (in name only) the Casino Liquor and Gaming Authority, delayed 20 major packaged liquor outlet applications from the leading suppliers to further consider the impact of the promotion and sale of heavily discounted alcohol:

Greater weight will be given to the potential social impact of alcohol pricing on groups vulnerable to alcohol-related harm, taking into account density of licensed venues, alcohol-related crime statistics and socio economic factors... The Authority is particularly concerned about the potential social impact of alcohol pricing on groups at greater risk of harm stemming from violence and anti-social behaviour, public drinking and underage drinking.<sup>73</sup>

The Authority subsequently determined,<sup>74</sup> based on a lack of "conclusive" evidence, that only one of the applications would be refused with several subject to "conditions" and additional considerations. The delay, if not the outcome, was an unprecedented level of activism exercised by a NSW alcohol regulator.

Until the November 2015 "Fit for Purpose" reforms, ILGA enjoyed clearer statutory separation and independence from Ministerial direction and control. The Authority's exercise of independence was in part, reflected in their rejection rate of higher risk venues estimated to be around 40%.<sup>75</sup> In the 12 months preceding the approval of the alcohol law reforms in November 2015, ILGA considered 20 applications for bottle shops and refused nine in part because of likely detrimental social impact, including family and domestic violence. For the same period, ILGA considered 14 applications to extend late trading hours (post-midnight/ mainly for hotels). All but one was refused because of the likely detrimental social impact in entertainment type precincts with existing high levels of violence and related harms.

In comparison, for the first six months of 2018, a total of 146 decisions of alcohol outlet applications (Decisions of Interest)<sup>76</sup> were published by ILGA. Of these 72% were determined by DOI staff "under delegation" from ILGA with a 100% approval rate for valid applications. Of the remainder (40) applications determined by ILGA, nine were refused. This provided an overall approval rate of alcohol outlets in the first six months of 2018 of 94%.

<sup>70</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4637–4646 (Graham West) (emphasis added).

<sup>71</sup> See Snider, n 37, 58. Ziller, "Eroding Public Health through Liquor Licensing Decisions", n 49, identified significant inconsistencies and bias in ILGA decision-making post FFP reforms that favoured the industry. There does not appear to be consistent reasoning in the small number of ILGA licence application refusals.

<sup>72</sup> The Liberal Party reportedly received a large amount of political donations from the hotel industry immediately before such donations were prohibited. See A Clennell, "Liberals in a Big Shout from Australian Hotels Association", *The Daily Telegraph*, 8 November 2011 <<https://bit.ly/2TtUVEC>>.

<sup>73</sup> Casino Liquor and Gaming Authority, "Statement on Supermarket Bottleshops and Alcohol Pricing" (Media Release, 26 January 2012).

<sup>74</sup> Casino Liquor and Gaming Authority, n 73.

<sup>75</sup> Unpublished analysis based on ILGA Annual Reports and online decisions since removed from ILGA website.

<sup>76</sup> See <<https://www.liquorandgaming.nsw.gov.au/independent-liquor-and-gaming-authority/ilga-and-l-and-gnsw-decisions/liquor-decisions>>.

Prior to the FFP reforms, ILGA was subjected to increasing industry pressure. One could rationally infer from the tenor of the Chairperson's following report in the NSW ILGA 2013–2014 Annual Report, industry concerns translated into political pressure on the Authority:

[Major investigations] and the day to day regulation of the liquor and gaming industries, all demonstrate the importance of having an *independent* regulator to ensure that liquor and gaming in the State are provided with *integrity* and a minimum of harm. Policy concerning these industries is properly a matter for the political processes of Government and Parliament but *implementation and administration of the law are best done independently*. ... Independence is at the heart of the Authority's nature and functioning. It is clearly provided in the law we administer. It is enhanced through the appointment of statutory office holders to lead the Authority. It is made possible through *staff who are accountable only to the Authority and resources under the control of the Authority*.<sup>77</sup>

An interventionist ILGA with its relatively high rejection rate for more risky licence applications and a failed Court of Appeal challenge<sup>78</sup> by a late trading nightclub penalised by ILGA for being a violent premise, appears to have left only one other recourse for the alcohol industry to create a regulatory environment more conducive to its profit-making imperative. The well-trodden political influence pathway expounded by the media articles relating to the industry/government relationship since 2007 identified by this author and more broadly in Kypri's et al research,<sup>79</sup> paints an alternative route for the industry to pursue its discontent with the NSW independent regulator.

#### D. Introducing the New “Fit for Purpose” Alcohol Regulatory Order

A seismic reorientation of the NSW alcohol supply laws and regulatory organisational relationships occurred in November 2015. These impacted significantly upon the independence of ILGA from the executive branch of government, the rights of the public to pursue appeals for a limited number of alcohol outlet approvals and alcohol outlet approval rates.

On 28 September 2015 “Key stakeholders” including some community representatives received an email from the Secretary of the Department of Justice advising that the NSW Liquor and Gaming regulatory system was to be reformed to “improve efficiency, *reduce confusion*, and enhance service quality and *customer convenience*. It will also deliver a strengthened focus on minimising alcohol and gambling-related harm in the community” (emphasis added).

It also identified the following objectives – the origins of which were not fully explained:

The reform focuses the establishment of a new *fit for purpose* regulator, as well as *improving processes and transparency*. It *does not change the policy settings* for the regulated sectors. (emphasis added)

The government refused public health lobby consultation requests relying on the assertion that there was no “policy impact”. When the Minister was questioned by the media about the ILGA changes, he responded on 9 October 2015 “Liquor laws *have never been tougher*, and we need a regulator that is equipped to effectively enforce these laws”.<sup>80</sup> No further explanation was provided by the government how ILGA may not have been acting consistently with its alcohol harm prevention agenda.

#### E. Passage of the FFP Bill through Parliament

The *Gaming and Liquor Administration Amendment Bill 2015* was introduced into the Legislative Assembly on 27 October 2015 by the (then) Deputy Premier, leader of the National Party<sup>81</sup> and Minister responsible for alcohol, gambling and racing regulation among other portfolios. This was the first time the public had the opportunity to read the details of the proposed changes to the alcohol laws.

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<sup>77</sup> NSW Independent Liquor & Gaming Authority, *Annual Report 2013-14: Chairperson's Report* (emphasis added).

<sup>78</sup> *La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority* [2014] NSWSC 1798.

<sup>79</sup> Kypri et al, n 34.

<sup>80</sup> E Partridge, “NSW Government Shakes Up Alcohol and Gaming Regulation”, *The Sydney Morning Herald*, 9 October 2015 <<https://www.smh.com.au/national/nsw/nsw-government-shakes-up-alcohol-and-gaming-regulation-20151009-gk54ta.html>>.

<sup>81</sup> The first three Ministers responsible for the regulation of alcohol and gambling in NSW since the coalition gained power in 2011 to April 2019 were members of the National Party with their electorates in country NSW.

On the same day it passed the Lower House (29 October 2015) it was introduced into the Legislative Council. It was adjourned to the next working day 10 November 2015. The Second Reading Speech for the Bill commenced at 12.12am the following morning at which time the media were no longer present. It passed the Upper House later the afternoon of 11 November 2015 with no amendments.

In an unusual occurrence, the instigator of the Bill in the Lower House the Deputy Premier, oversaw the passage of the Bill in the Upper House as a “visitor”. At 12.42am he interrupted proceedings from the gallery and challenged the Greens party leader who was speaking against the Bill critical of the loss of independence of ILGA.<sup>82</sup>

## F. Key Changes to the Alcohol Laws

Amendments to the *Gaming and Liquor Administration Act 2007* provided for the Chief Executive position of ILGA to be abolished and all its employees subsumed by L&GNSW within the DOI under direct government control. The Minister responsible was also granted the power to make administrative directions<sup>83</sup> to the ILGA board which also was compelled to take “*particular consideration*”<sup>84</sup> of submissions made to them by the Secretary of the DOI. This is an unusual statutory prescription whose symbolism would not have been lost on the Authority or the alcohol industry.

Despite these above amendments, the Minister advised Parliament in his Second Reading Speech:

The bill also preserves the *independent* decision-making of the Independent Liquor and Gaming Authority in relation to contentious licensing proposals and disciplinary matters.<sup>85</sup>

While members of the community were granted the capacity to appeal a very limited number of adverse licensing approval decisions to the NCAT,<sup>86</sup> what the government did not reveal before the Bill entered Parliament was that this remedy was limited to only those persons who had lodged an original objection and occupied a premise within only a 50m or 100m radius<sup>87</sup> of the applicant’s proposed venue<sup>88</sup> depending upon the type of licence required. It bears no correlation with the likely footprint of harms arising from the proposed alcohol outlets.

The amendments also prescribed which type of decisions could be either internally reviewed by ILGA or ILGA’s first instance decisions reviewed by NCAT.<sup>89</sup> There appeared to be no logical (rational) basis for these decisions (or at least none was provided). This effectively granted some owners of certain classes of liquor licences (those of perceived lower risk) effective immunity from an external third-party review application of the approval decision.

## G. Emergent Themes Indicative of Legislative Capture Derived from Case Study

### 1. Dilution of the PI by Alcohol Industry’s “Customer Convenience”

The clash between public health<sup>90</sup> and private commercial interest is no better exemplified in the government’s alcohol agencies affording primacy to “consumer convenience” (though this term was

<sup>82</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 November 2015, 5625 (Dr John Kaye) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-63721/HANSARD-1820781676-63667>>.

<sup>83</sup> *Gaming and Liquor Administration Act 2007* (NSW) s 6. While the Minister cannot direct ILGA on individual licence-related applications, there is no statutory bar on the Minister hypothetically making directions to ILGA regarding classes of licences and overall approaches to all disciplinary matters.

<sup>84</sup> *Gaming and Liquor Administration Act 2007* (NSW) s 37A (emphasis added).

<sup>85</sup> Deputy Premier Troy Grant, New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2015 <<https://www.parliament.nsw.gov.au/bill/files/888/2R%20Gaming.pdf>>.

<sup>86</sup> *Gaming and Liquor Administration Act 2007* (NSW) s13A.

<sup>87</sup> *Liquor Regulation 2008* (NSW) regs 6–7 provide a statutory distance for notifications of a liquor licence application.

<sup>88</sup> For additional commentary see following article <<http://drinktank.org.au/2015/11/alcohol-law-backward-step/>>.

<sup>89</sup> See *Gaming and Liquor Regulation 2007* (NSW) cl 5A.

<sup>90</sup> The National Competition Council identified in 2004 they had “no doubt that harm minimisation should be the key objective of liquor regulation”. ABC Radio National, *Perspective*, Wendy Craik (17 February 2004) <<https://www.abc.net.au/radionational/programs/>>

not incorporated into the actual provisions of the alcohol laws) in approving higher risk alcohol outlets, particularly when the same proposed outlets correspond with locations of higher levels of violence and social dislocation and disadvantage.<sup>91</sup> Wheeler suggests the duty upon all arms of government and their public officials is to always act in and preserve the PI:

[G]overnments act, or at all events are constitutionally required to act, in the public interest.<sup>92</sup>

The concept of the PI represents a key safeguard or bulwark against legislative capture and clientele corruption. The government's reliance upon the vague concept of "customer convenience" particularly in contested cases where it is a key determinative consideration<sup>93</sup> is subjective and problematic. Such consideration does not take into account at the policy level, medical evidence that around 17–25% of people will at some stage develop a diagnosable (DSM-V)<sup>94</sup> alcohol use disorder.<sup>95</sup> Nor does it inquire into the familial circumstances of each of the outlet's proposed customers, especially when alcohol is involved in 34% of intimate partner violence incidents, 29% of family violence incidents<sup>96</sup> and 47% of intimate partner homicides.<sup>97</sup> The government determination process also gives weight<sup>98</sup> in some applications to unauthenticated petitions produced by the applicant from alleged prospective customers for a new alcohol outlet.

The continuing reliance by the government on the "consumer convenience" script risks it being perceived as a disingenuous proxy or code word by the authors of the (FFP) reforms for alcohol industry profits. It also raises some difficulties with establishing the coherency of the primacy of this criterion in a traditional "public" interest discourse and framework of responsible government and alcohol harm reduction.

A study of the parliamentary debates and subsequent government documentation revealed a key mechanism to legitimate or rationalise the primacy of "customer convenience". It relies upon a neoliberal "trickle down" and unitarist narrative to blur the distinction between public and private commercial interest. It resembles the frame of the proposed reductions in company taxes, inferring that what is good (in this case) for the alcohol industry – must be equally good for the public – with most adults (a "community") being alcohol industry customers.

The Government, through this bill, will help the hospitality industry by reducing red tape and *improving the approval process*. ... This bill will provide greater support for the industry to the benefit of the community.<sup>99</sup>

This arguably shows a unitarist-fusion shift in rhetoric – what is good for the alcohol industry must be good for the community – from a government member in the parliamentary debate. As Flyvbjerg observed in his phronetic case study:

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[archived/perspective/wendy-craik/3409144](http://archived/perspective/wendy-craik/3409144)>. They also observed in a related media report "The public interest is served by restrictions being placed on the availability of alcohol in certain circumstances" <<http://ncc.gov.au/images/uploads/PR03Liq-001.pdf>>.

<sup>91</sup> See Ziller, Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice, n 49; Brown and Ziller, n 49 for specific decisions including those that were also opposed by police and public health agencies. See also P Klarenaar, Northern Sydney Local Health District Health Promotion, *Northern Sydney Local Health District Health Promotion Submission Regarding the Regulatory Impact Statement and the Proposed Liquor Regulation 2018*, 19 July 2018 <[http://www.nslhd.health.nsw.gov.au/HealthInformation/HealthPromotion/Documents/Projects/Alcohol/Reducing%20Access%20To%20Alcohol/Examples/NSLHD\\_SubmissionCIS\\_Review19Jul17.pdf](http://www.nslhd.health.nsw.gov.au/HealthInformation/HealthPromotion/Documents/Projects/Alcohol/Reducing%20Access%20To%20Alcohol/Examples/NSLHD_SubmissionCIS_Review19Jul17.pdf)>. NSW Coroner's report into domestic homicides recommended a rebuttable presumption against approval of alcohol outlets in areas associated with high levels of domestic violence. No action by government to date. NSW Coroner's Office, *Domestic Violence Deaths Review Team Report for 2015-2017*, xvii, Recommendation 14 <[http://www.coroners.justice.nsw.gov.au/Documents/2015-2017\\_DVDRT\\_Report\\_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)>.

<sup>92</sup> Wheeler, n 11.

<sup>93</sup> See Ziller, Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice, n 49; Brown and Ziller, n 49 provides examples of decisions.

<sup>94</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5<sup>th</sup> ed, 2013).

<sup>95</sup> C Chapman et al, "Delay to First Treatment Contact for Alcohol Use Disorder" (2015) 147 *Drug & Alcohol Dependence* 116.

<sup>96</sup> See <[http://www.ndlrf.gov.au/publications/monographs/monograph-68 Alcohol/Drug-Involved Family Violence in Australia](http://www.ndlrf.gov.au/publications/monographs/monograph-68%20Alcohol/Drug-Involved%20Family%20Violence%20in%20Australia)>.

<sup>97</sup> Australian Institute of Criminology, *Alcohol and Homicide 2017* <<https://aic.gov.au/publications/tandi/tandi372>>.

<sup>98</sup> One of the many indicators of the disparity in the evidentiary standards and onus of proof between applicants and objectors in the NSW alcohol supply jurisdiction.

<sup>99</sup> Reflected in a government member's observation in New South Wales, *Parliamentary Debates*, Legislative Assembly, 27, 29 October 2015 (emphasis added).

One of the privileges of power ... is the freedom to define reality. ... A party's unwillingness to present rational argument or documentation may quite simply indicate the freedom to define reality.<sup>100</sup>

The Department of Justice's 2016/2017 Annual Report also perpetuated this narrative of blurring the distinction between public and private interest, conflating "public" with "community" interest and failing to identify the obvious substantial "primary purpose" pecuniary benefits derived by the alcohol industry from the FFP law reforms:

This reporting period saw the first full year of reforms to Liquor & Gaming NSW, with notable *improvements delivered to the community*. *Customer timeframes for licensing* were significantly reduced to under 120 days.<sup>101</sup>

It contributes to the process of normalising the alleged benefits of decreasing approval time of alcohol outlets. The dominant narrative is not offset with recognised risks associated with increasing outlet density and downward pressure on alcohol pricing arising from increased competition. The apparent disproportionate promotion of the alleged benefits to alcohol consumers of the FFP reforms by the NSW Government with little acknowledgment of potential negative public health consequences, may risk the perception that this could be adversely construed as a form of corporate social responsibility promoted by the State for the alcohol industry.<sup>102</sup>

What the Annual Report does not disclose is the reduction in processing time was in part achieved by the apparent unpublished performance goal of seeking a virtual 100% approval rate<sup>103</sup> for valid key categories of licence applications by DOI – L&GNSW with all legitimate concerns addressed through harm mitigation licence conditions.<sup>104</sup> This also served the purpose of discouraging genuine community members and police and health agency objectors from expending efforts opposing problematic outlet applications.<sup>105</sup>

## 2. Loss of Independence of ILGA – SoP

Twelve months before the FFP reforms were introduced into NSW Parliament in November 2015, the then Chairperson of ILGA cautioned the NSW Deputy Premier and Minister responsible for the regulation of alcohol that "Independence is at the heart of the Authority's nature and functioning. It is clearly provided in the law we administer".<sup>106</sup> However, prior to the introduction of the FFP Bill to Parliament, the government had already sealed the fate for a truly independent ILGA when advising the reforms would ensure:

[A]ll decision making and processes are aligned with the government's goals and properly support government harm reduction policy settings<sup>107</sup>

No evidence was provided by the government supporting its inference that ILGA had acted inconsistently with its harm reduction policy.

In early 2016 the Chairperson of ILGA reportedly resigned because of concerns that the independence of ILGA had been compromised.<sup>108</sup> A loss of particularly senior employees with high levels of corporate

<sup>100</sup> Flyvbjerg, n 36, 37.

<sup>101</sup> NSW Department of Justice, *Annual Report 2016-17*, 22. This illustrates an example of the power of State narrative (emphasis added).

<sup>102</sup> See TF Babor et al, "Is the Alcohol Industry Doing Well by 'Doing Good'? Findings from a Content Analysis of the Alcohol Industry's Actions to Reduce Harmful Drinking" (2018) 8(10) *BMJ Open* e024325.

<sup>103</sup> See n 49.

<sup>104</sup> This goal was expressed to several community members in different forums by L&GNSW representatives following approval of the FFP reforms. There is no apparent written confirmation of this position.

<sup>105</sup> Butler and Crawley in considering the production of neoliberal authority observed "Just as neoliberal states have sought to deregulate and liberalise their economies, they have been intimately involved in imposing the logic of the market on areas of decision-making and service delivery which had previously been guided (however inadequately) by principles of the public good (Honig 2013)". C Butler and K Crawley, "Forms of Authority Beyond the Neoliberal State: Sovereignty, Politics and Aesthetics" (2018) 29 *Law and Critique* 265.

<sup>106</sup> NSW Independent Liquor & Gaming Authority, n 77.

<sup>107</sup> NSW Department of Justice, *Liquor and Gaming Reform* <<https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx>>.

<sup>108</sup> S Nicholls, "Liquor and Gaming in 'Chaos' before Lockout Laws Review", *The Sydney Morning Herald*, 5 April 2016 <<https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html>>.

“memory” in licensing and compliance occurred. In June 2016 all nine Newcastle (NSW) licensing inspector positions were removed and the local office effectively closed without any public or police consultation.<sup>109</sup> The inspection services were centralised in Sydney approximately 160km away.

Despite the government’s assurances to Parliament<sup>110</sup> regarding the independence of ILGA, it appears that the ILGA’s original Chairperson’s caution for preserving the SoPs may well have been overlooked in the formulation of the FFP reforms.<sup>111</sup>

So, what transpired between 12 November 2014 when the ILGA Annual report was presented to the Deputy Premier and almost 12 months later when the FFP law reforms were presented to the NSW Parliament for their approval?<sup>112</sup> On 28 March 2015, the NSW Coalition Government was re-elected and the NSW Deputy Premier retained his liquor, gaming and racing portfolio. In March 2016 after the FFP reforms took effect, a Liberal Party insider<sup>113</sup> alleged that his Party had received illegal political donations from the alcohol industry and other prohibited donors in the 2011 State election. The receipt of suspicious or unlawful donations in general, was apparently confirmed by the NSW Electoral Commission and a reported \$586,992 in illegal donations was withheld from the Liberal Party by the Commission after initially withholding \$4.4m in publicly funded electoral funding.<sup>114</sup> It is understood the Party refused to disclose the identity of the individual donors and that no prosecutions followed these specific breaches of the election funding laws.

### 3. Transparency

Transparency is an essential ingredient in preserving the PI and preventing capture and corruption. Timely public scrutiny enables the identification of actors and the real backstage machinations occurring between all three arms of government and all interest groups. It is an essential element of accountability, integrity, probity and governance. The Minister in his Second Reading Speech claimed that the amendments were in part, necessary to remedy a “lack of transparency in decision-making”.<sup>115</sup>

The lack of transparency and community inclusiveness that enhances the scope for transparency associated with the development of the FFP reforms before and during its introduction to Parliament appears inconsistent with the government’s advice to Parliament that the reforms had no policy implications.<sup>116</sup> The lack of genuine consultation also appears to have been inconsistent with the NSW Government’s requirements for “Regulatory Impact Assessments”:<sup>117</sup>

The seven principles of Better Regulation should be applied when designing and developing regulatory proposals. This ensures that each proposal is required, reasonable and responsive to the economic, social, and environmental needs of business and the community. ... (Principle 5.) *Consultation* with business and the community should inform regulatory development

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<sup>109</sup> A De Lore, “MP Tim Crakanthorp Alleges Newcastle Office of Liquor and Gaming Has Been Closed by Stealth”, *Newcastle Herald*, 25 July 2016 <<https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305>>.

<sup>110</sup> “The bill also preserves the independent decision-making of the Independent Liquor and Gaming Authority in relation to contentious licensing proposals and disciplinary matters” (Second Reading Speech n 85).

<sup>111</sup> It is understood that senior ILGA officials may not have been provided with any advanced opportunity to consider the proposed Bill well before it was introduced into Parliament.

<sup>112</sup> In August 2014, the NSW Government provided a detailed response to the 2013 (Foggo) Review of the NSW Liquor Act recommendations. These contained no references to the 2015 FFP reforms. See <[https://www.liquorandgaming.nsw.gov.au/documents/reports/GovernmentResponse\\_StatutoryReview\\_LA\\_GALAA.pdf](https://www.liquorandgaming.nsw.gov.au/documents/reports/GovernmentResponse_StatutoryReview_LA_GALAA.pdf)>.

<sup>113</sup> Hansen, n 41.

<sup>114</sup> S Gerathy, “NSW Liberal Party Received Almost \$600,000 in Unlawful Donations before 2011 Election, Electoral Commission Finds”, *ABC online news*, 22 September 2016 <<https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824>>.

<sup>115</sup> Grant, n 85.

<sup>116</sup> Grant, n 85; Email from Department of Justice Secretary on 28 September 2015 to stakeholders.

<sup>117</sup> See <<https://www.finance.nsw.gov.au/better-regulation/regulatory-impact-assessments>>.

Wheeler's second stage of PI application involves scrutiny of the objectives and outcomes of government action.<sup>118</sup> Ziller identifies a pattern of the denial of procedural and substantive fairness to objectors in the alcohol outlet approval process.<sup>119</sup> This includes denial of scrutiny by objectors of some submissions and evidence relied upon by the applicant in support of their application.<sup>120</sup>

Legislative capture of the regulation of the supply of alcohol in NSW would pose a greater detrimental impact upon the most disadvantaged and disaffected communities, families and their public health supporters. In emphasising the disproportionate vulnerability experienced by the socially and economically disadvantaged, a NSW Bureau of Crime Statistics and Research (BOCSAR) study found:

[T]hat the odds of being a repeat victim of intimate partner violence (IPV) within 12 months are 10 times higher in the most disadvantaged 20 per cent of the Australian population than in the least disadvantaged 20 per cent.<sup>121</sup>

The government's adoption of a meticulous level of openness, transparency and informed public inclusiveness concerning the development, ratification and application of its FFP reforms (and all subsequent amendments) to alcohol regulations, would be in the PI.

#### 4. *Winners and Losers*

This research establishes that the NSW alcohol supply industry has benefited<sup>122</sup> the most from the 2015 FFP reforms relying upon the measure of the success rate of alcohol outlet applications. Though more difficult to establish in the short term, a media review undertaken as part of this research and Kypril et al's study into industry political donations, suggests that there has been a mutual flow of benefits between the industry and the politicians as an exercise in illegitimate power.<sup>123</sup>

The NSW alcohol industry's overt power<sup>124</sup> is its access to significant financial resources to make large political donations and call in favours despite the existence of political donation laws in NSW prohibiting the same. Its kinetic power lies in its latent capacity to also influence and mobilise its many patrons (voters) and related third-party vocal interest groups to oppose any proposed laws<sup>125</sup> that may inhibit their drinking patterns – a crucial factor in industry profits. The 2018 Tasmanian election demonstrated the capacity of the alcohol and gambling industry to invest very large sums to reportedly thwart the risk of the Tasmanian Labor Party's aim to reduce the number of poker machines.<sup>126</sup> This outcome projects a sober message to any other emboldened political party or candidate contemplating challenging the Australian alcohol and gambling industry to redress their related public health harms.

The NSW Government has a Liquor Authority that regularly asserts its "independence". This serves the useful political purpose of distancing the government from its decisions including the exceptionally high alcohol outlet approval rate and affording primacy to commercial interests over those of alcohol harm minimisation and prevention.

<sup>118</sup> Wheeler, n 11. See Alcohol Focus Scotland, *Community Toolkit: "Alcohol Licensing in Your Community: How You Can Get Involved"* <<https://www.alcohol-focus-scotland.org.uk/media/133477/Community-licensing-toolkit.pdf>>.

<sup>119</sup> See Ziller, *Online Retail of Alcohol, Some Dilemmas for Professional SIA Practice*, n 49; Brown and Ziller, n 49.

<sup>120</sup> Unlike developments in Scotland n 118, the capacity of the public including community objectors to attend ILGA Board meeting determinations save for a small number of on-site public hearings by ILGA, appears more constrained.

<sup>121</sup> S Rahman, "Assessing the Risk of Repeat Intimate Partner Assault" (Crime and Justice Bulletin No 220, NSW Bureau of Crime Statistics and Research, 2018) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/cjb220-Assessing-the-risk-of-repeat-intimate-partner-assault.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_news/cjb220-Assessing-the-risk-of-repeat-intimate-partner-assault.aspx)>.

<sup>122</sup> Flyvbjerg's methodology encourages the examination of "winners and losers": Flyvbjerg, n 44.

<sup>123</sup> S Lukes, *Power: A Radical View* (Macmillan, 1974).

<sup>124</sup> See S Battams and B Townsend, "Power Asymmetries, Policy Incoherence and Noncommunicable Disease Control – A Qualitative Study of Policy Actor Views" (2018) *Critical Public Health* 1–14.

<sup>125</sup> For example, laws reducing trading hours and impose other conditions such as one-way doors, drink strengths and other availability supply measures on high-risk precincts. See "*Keep Sydney Open*" Policy <<https://www.keepsydneyopen.com/policy#h1>>.

<sup>126</sup> An alleged \$5m spent on attacking poker machine harm reduction proposals. See <[https://www.abc.net.au/news/2018-03-05/tasmanian-liberals-reject-\\$5-million-campaign-spend-claim/9510156](https://www.abc.net.au/news/2018-03-05/tasmanian-liberals-reject-$5-million-campaign-spend-claim/9510156)>.

The biggest losers arising from the 2015 alcohol reforms are the recognised principles protecting our democratic process and public health – the “public interest” concept and the “separation of powers” doctrine. This translates in a diminution of power of the public health lobby, local disaffected communities and the police to have their voices and evidence considered and accepted at the NSW alcohol lawmaking table. The continuation of the approval of especially large discount alcohol stores (packaged liquor outlets) within or close to communities with high levels of violence and social disadvantage, may contribute to the intractability of alcohol violence and related harms to consumers and others.

## VI. CONCLUSION AND RECOMMENDATIONS

Consideration of the case study and its application to the prototype legislative capture test satisfies all elements of the test as readily demonstrated in the matrix in the Appendix. The reported admissions by politicians that the purpose of large industry political donations was to buy influence extends the finding of capture into the realms of clientele corruption.<sup>127</sup>

The search for the solutions to prevent legislative capture and related corruption can be contextualised within regulatory capitalism. This provides the subsonic (felt but not heard) drumbeat to drive the unhealthy food, beverage and tobacco industry to maximise profits and shareholder value. It is also dependent upon the creation at all levels of government environments conducive to its accumulation and reproduction of capital/wealth.

This case study of the regulation of the supply of alcohol in NSW explicates how the capitalist imperative<sup>128</sup> appears to have commodified the PI, democracy and authorship of the rule book. Legislative capture and equivalent clientele corruption of government is as an essential ingredient in this process. It is also an important new consideration in the commercial determination of health. Determining who effectively is in control of lawmaking and application of backstage levers for the effective regulation of NCDs, and the upstream unhealthy food and beverage industries, is a critical primary consideration. Any analysis and comparison of public health policy development and implementation at the global, national, regional and local levels may benefit from this inquiry and recognition of the central role of law as a public health policy collaborator.<sup>129</sup> Additional critical research into other statutory schemes within the NSW alcohol regulatory system would assist to determine the magnitude of systemic industry legislative capture.

Not only does legislative capture lubricated by substantial bipartisan political donations impact upon elected representatives’ willingness and capacity to serve the PI by preventing and minimising alcohol harms and other NCDs, it exposes deep fissures in democratic systems and consequential low levels of the public’s trust and confidence in the same.

An opportunity exists for the re-animation of the concept of the PI and to assert what is just and right – to bring back phronesis.<sup>130</sup> The revitalisation of structural safeguards, public anti-corruption and similar governance type organisations<sup>131</sup> can support this reformative process. Constitutional safeguards

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<sup>127</sup> See *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.

<sup>128</sup> Peters considers neoliberalism functions as a “secular religion – one which intensifies liberal individualism and involves a blind faith in the market redefining all social interactions in terms of contract”. TD Peters, “Corporations, Sovereignty and the Religion of Neoliberalism” (2018) 29 *Law and Critique* 271, Abstract.

<sup>129</sup> WHO European Office for the Prevention and Control of Noncommunicable Diseases, *Policy in Action – A Tool for Measuring Alcohol Policy Implementation 2017* <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0006/339837/WHO\\_Policy-in-Action\\_indh\\_VII-2.pdf](http://www.euro.who.int/_data/assets/pdf_file/0006/339837/WHO_Policy-in-Action_indh_VII-2.pdf)>; A Plonsky, *New WHO Factsheets Reveal Europe Struggles to Implement Policies to Reduce Alcohol Consumption* (5 February 2019) Eucam <<http://eucam.info/2019/02/05/new-who-factsheets-reveal-europe-struggles-to-implement-policies-to-reduce-alcohol-consumption/>>; see K Buse, S Tanaka and S Hawkes, “Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-communicable Diseases and Identifying Options for Reducing Risk Exposure” (2017) 13 *Globalization and Health* 34; N Fitzgerald et al, “Exploring the Impact of Public Health Teams on Alcohol Premises Licensing in England and Scotland (ExILEnS): Protocol for a Mixed Methods Natural Experiment Evaluation” (2018) 18(1) *BMC Medical Research Methodology* 123; RS Magnusson et al, “Legal Capacities Required for Prevention and Control of Noncommunicable Diseases” (2018) 97(2) *Bulletin of the World Health Organization* 108.

<sup>130</sup> Flyvbjerg, n 44. See also R Horton, “Offline: Defending the Left Hand of the State” (2018) 391 *The Lancet* 2484.

<sup>131</sup> See Wood, Griffiths and Chivers, n 56.

as part of the Maginot line defending the PI are however, dependent upon Parliament providing such independent inquisitorial public organisations and accompanying legal process with sufficient statutory powers and resources to effectively prevent capture and related corruption.

## Appendix: Prototype Multi-spectrum Legislative Capture Framework Test

Development and application of Gaming and Liquor Administration Amendment Bill 2015 (NSW)

Component of Test	Factors and Evidence	Source
1. Identification of reciprocating conduct suggestive of alleged legislative capture	<p>a. Development and application of the <i>Gaming and Liquor Administration Amendment Bill 2015</i> and related legislation favouring the NSW alcohol supply industry</p> <p>b. Reported admission by Mr Yabsley former Federal Treasurer of Liberal Party of unlawful, potentially corrupt political donations from the within the NSW alcohol industry to the NSW Liberal Party (May 2016). “We’re talking about property developers, owners of certain licensed premises. I don’t think it was a great secret about the fact that that was happening. It struck me as being something that had been happening over a long period of time”</p> <p>c. NSW Electoral commission withholds \$586,992 in political donations to the Liberal Party from their refusal to identify the source of the donations</p> <p>d. Mr Toole previous NSW Minister responsible for alcohol, gambling and racing reported (Nov 2017) statement to a NSW Australian Hotels Association (AHA) awards ceremony “I would like to acknowledge (senior AHA representatives) for the work that (they do) in advocating for the industry ... the incredible work that you do behind the scenes with Parliament and with the Opposition in raising the industries concerns, to ensure that you are getting the best deal from whoever is in government. ... As the Minister, the New South Wales Government has made a number of reforms in relation to this industry. And I can tell you this, we are not finished there. We have got a lot of other reforms that we are going to be announcing shortly that are going to be good for your industry”</p> <p>e. “If someone donates \$1,000, they support you. If they donate \$100,000, they’ve bought you”. Quote from politician interviewed in research project</p> <p>f. The NSW alcohol outlet licensing process “favour(s) the applicant, demonstrate inconsistencies, fail to use health statistics, misinterpret other statistics, make inconsistent use of reputable health research findings and treat legal obligations as mitigations. The cumulative effect is a low refusal rate. Of 168 applications, 15 were refused. Review and appeal for objectors have been severely restricted in NSW”.</p>	<p>See “Part V. Case Study” of this article. Hereafter “Case Study”.</p> <p>M Koziol “Former Liberal Party Treasurer Admits He Knew of Illegal Donations”, <i>The Sydney Morning Herald</i>, 23 May 2016 &lt;<a href="https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html">https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html</a>&gt;</p> <p>S Gerathy, “NSW Liberal Party Received almost \$600,000 in Unlawful Donations before 2011 election, Electoral Commission Finds”, <i>ABC online news</i>, 22 September 2016 &lt;<a href="https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824">https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824</a>&gt;</p> <p>A Young, “Minister Promises More Pub Reforms: NSW Minister for Racing Has Promised More Pub Reforms That Will Be Good for the Industry”, <i>The Shout</i>, 27 November 2017 &lt;<a href="https://www.theshout.com.au/news/minister-promises-pub-reforms/">https://www.theshout.com.au/news/minister-promises-pub-reforms/</a>&gt;. Note the above extract from the original article was subsequently removed from the online publication after it is understood inquiries were made from a major media source. The original heading of the article “Minister Promises More Pub Reforms” however remains in the URL.</p> <p>K Kypri et al, “If Someone Donates \$1000, They Support You. If They Donate \$100000, They Have Bought You”. Mixed Methods Study of Tobacco, Alcohol and Gambling Industry Donations to Australian Political Parties”. (2019) 38 <i>Drug and Alcohol Review</i> 226. Hereafter “Kypri et al 2018”.</p> <p>A Ziller, “Eroding Public Health through Liquor Licensing Decisions” (2018) 25 <i>JLM</i> 489. Hereafter “Ziller 2018”.</p>

Component of Test	Factors and Evidence	Source
2. Alleged consistent and repeated capture conduct	a. Demonstrable shift in narrative towards a neoliberal script from November 2015 to current period b. Published evidence of a pattern of alcohol outlet decisions exhibiting bias favouring the industry since the introduction of the FFP reforms c. Increase in ILGA approval rate of outlets following FFP amendments in November 2015 d. Relationship between government and industry establishes consistent and repeated pattern of undue influence “If you join the dots, you will find policy decisions were made when very substantial donations were made by the AHA ...”. There has been a lot to answer for between political donations and policy outcomes,” he adds about the general nature of political lobbying e. A pattern of persistent political donations and related irregularities before and after the same were banned	Case study Ziller 2018 Ziller 2018 J Hansen, “Questions Are Being Asked about the Connections between the O’Farrell Government and the Australian Hotels Association”, <i>The Sunday Telegraph</i> , 18 December 2011 < <a href="https://www.dailytelegraph.com.au/news/opinion/questions-are-being-asked-about-the-connections-between-the-ofarrell-government-and-the-australian-hotels-association/news-story/75bd55de6b4b73b9234651f04296088c">https://www.dailytelegraph.com.au/news/opinion/questions-are-being-asked-about-the-connections-between-the-ofarrell-government-and-the-australian-hotels-association/news-story/75bd55de6b4b73b9234651f04296088c</a> >. Media analysis contributing to case study See above article and related contained within this table
3. Public Interest (PIC) – Above alleged conduct was not in the public interest		
A. Process & procedure	Insufficient public notice of statutory amendments. Only made publicly available after Bill was introduced into Parliament for (it is understood) the Second Reading Speech	Timetable of passage of Bill. See Case Study.
	No opportunity for public input for example Parliamentary Committee to review Bill	Timetable of passage of Bill. See Case Study.
	Questionable assertion Bill had no “policy” implications thereby negating consultation requirements with public	Government correspondence to stakeholders preceding passage of Bill through NSW Parliament 28 September 2015
	Prima facie inconsistency with NSW Better Regulation Principles requiring business and community consultation	NSW Department Finance, Services and Innovation
B. Objectives and Outcomes	Public health and safety is a core public interest consideration. Industry profits and their consumers’ “convenience” are primarily private commercial interests and rate lowly as a non-excludible “public good”. Retaining democratic processes, public corruption prevention and public confidence in government administration are also fundamental public interest considerations. The current reality is that only the alcohol industry has sufficient access to resources to finance any Supreme Court challenges to the alcohol regulation system in NSW.	See Ian Harper et al, <i>Competition Policy Review Final Report</i> (March 2015) 47, 127, 145ff < <a href="http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf">http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf</a> >

Component of Test	Factors and Evidence	Source
	Reliance on neoliberal narrative emphasising “customer convenience”, “reducing red tape”, “regulatory burden” and “confusion”. While not incorporated into statutes, became a primary consideration factors in operation of outlet approval process.	Minister’s Second Reading Speech and Parliamentary Debate See ILGA decisions identified by Ziller 2018
	Post 2015 reform increase in ILGA outlet approval rate for higher risk outlets	Case Study
	Blurring of the narrative distinction between public and private interest. Consumer convenience conflated into public interest.	Department of Justice Annual report 2016/2017 Parliamentary debate. See also case study analysis
	Arbitrary limitations on public objectors to appeal certain outlet approval decisions confined to those within 100m of proposed outlet. This and the following item are examples where conduct may fall in both subcategories of public interest examination “process” and “outcomes”	“Fit for Purpose” 2015 Statutory amendments contained within Gaming and Liquor Administration Amendment Bill (2015) detailed in Case study. Hereafter “Statutory amendments”
	Unexplained inconsistencies between which types of licence applications can be externally appealed to the NSW Civil and Administrative Tribunal	Statutory amendments
	Alcohol industry provided prohibited political donations to government	Attributed to former Treasurer of the Liberal Party
	NSW Electoral Commission reportedly withheld over \$500,000 from Liberal Party as they refused to acknowledge source of donations. See item 1 “c” above	< <a href="https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824">https://www.abc.net.au/news/2016-09-22/liberal-party-received-unlawful-donations-electoral-commission/7869824</a> > and < <a href="https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html">https://www.smh.com.au/politics/federal/former-liberal-party-treasurer-admits-he-knew-of-illegal-donations-20160523-gp1zsh.html</a> >
	Size of industry donations to political parties influence their decision-making/reform processes	Kypri et al 2018
	Closure of Newcastle OLGR inspector office in June 2016 with loss of all 9 positions. No consultation with the public or police. A hotel in Newcastle’s suburb of Hamilton subsequently became the most violent premise in NSW	< <a href="https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305">https://www.theherald.com.au/story/4052696/liquor-office-closed-by-stealth-mp/?cs=305</a> >
4. Separation of Powers (SoPC) regarded as “check and balance” to prevent concentration of power in one branch of government. Promotes independence, objectivity, impartiality and fairness	All ILGA employees as part of a former Independent Statutory Authority absorbed within government Department of Industry	Statutory amendments

Component of Test	Factors and Evidence	Source
	Abolition of ILGA Chief Executive position	Statutory amendments
	ILGA subjected to Ministerial Direction with exceptions relating to individual licensing approval matters and disciplinary action under the Act. Nothing however appears to prevent the Minister from making directions regarding a class of licences and an overall approach to disciplinary matters	Statutory amendments
	ILGA <i>must</i> consider advice from Secretary of the Department	Statutory amendments
	Unitary alignment of all decision-making with the government's goals. No scope for ILGA effective independence "all decision-making and processes are aligned with the government's goals and properly support government harm reduction policy settings".	NSW Department of Justice website, "Liquor and Gaming Reform" < <a href="https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx">https://www.justice.nsw.gov.au/Pages/about-us/liquor-gaming-reform/liquor-gaming-reform.aspx</a> >
	Resignation of ILGA's first chairperson after introduction of measures alleging loss of independence of the Authority	Sean Nicholls, "Liquor and gaming in 'chaos' before lockout laws review", <i>The Sydney Morning Herald</i> , 5 April 2016 < <a href="https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html">https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html</a> >
	Post reform outlet approval process subject to bias, inconsistency, lack of procedural and substantive fairness and transparency.	Ziller 2018
5.Intention and Motivation allied to conduct (IMC)	Admission in media by former Liberal Party Treasurer that party had received unlawful political donations from the alcohol industry that influenced policymaking in test 1 above. Hansen in "2 d" above also reveals the alleged influence of the AHA over the government decision-making process and the reciprocating relationship between governments and industry with donations exchanged for the creation of a legislative environment conducive to industry profitability and development. The closeness of the mutually beneficial relationship between industry and government is further highlighted by the reported 2017 statement of the NSW Minister Toole at "1 d" above.	
	Admission by anonymous interviewee that large sums of political donations would effectively enable the donor to "buy" the party	Kypri et 2018
	Reported comment (2007) from former President NSW AHA to the effect "who said democracy was cheap"	A Clennell, "Politicians Sup at the Table with Hoteliers", <i>The Sydney Morning Herald</i> , 13 February 2007 < <a href="https://www.smh.com.au/national/politicians-sup-at-the-table-with-hoteliers-20070213-gdpglx.html">https://www.smh.com.au/national/politicians-sup-at-the-table-with-hoteliers-20070213-gdpglx.html</a> >
	See reported comment (2017) from Mr Toole, previous NSW Minister responsible for alcohol, gambling and racing in test "1 d" above	