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Judicial intervention in alcohol regulation: an empirical legal analysis

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Abstract

Objective: While governments draft law and policy to promote public health, it is through cases put before the judiciary that the implementation of law can be challenged and where its practical implications are typically determined. In this paper, we examine the role of court judgements on efforts in Australia to regulate the harmful use of alcohol.

Methods: Australian case law (2010 to June 2015) involving the judicial review of administrative decisions relating to development applications or liquor licences for retail liquor outlets (bottle shops), hotels, pubs and clubs was identified using a case law database (WestLaw AU). Data were extracted and analysed using standard systematic review techniques.

Results: A total of 44 cases were included in the analysis. Of these, 90% involved appeals brought by industry actors against local or state government stakeholders seeking to reject applications for development applications and liquor licences. The proportion of judicial decisions resulting in outcomes in favour of industry was 77%.

Conclusions: Public health research evidence appeared to have little or no influence, as there is no requirement for legislation to consider public health benefit.

Implications for public health: A requirement that the impact on public health is considered in legislation will help to offset its strong pro-competition emphasis, which in turn has strongly influenced judicial decision making in this area.

Key words: alcohol regulation, judiciary, public health

The most effective and cost-effective disease prevention measures often fall into the category of public health law. For instance, public health laws to control tobacco and alcohol are ranked as one of the top World Health Organization (WHO) 'best buy' interventions for non-communicable diseases.[1] In Australia, legal strategies such as taxes on alcohol, subsidies for essential foods and the plain packaging of tobacco products have been hard won, celebrated initiatives instituted by national law makers to improve health. While it is the core business of the legislature and executive in drafting and implementing legislation to establish such laws, it is the role of courts and the unelected judiciary in refining the principles through which they operate that is seldom recognised. Yet, increasingly, the judicial arena is being used to challenge attempts by governments and their agencies to regulate major areas of public health concern, such as the availability of alcohol. Such judgements are potentially subject to a broad range of criteria, and the extent to which public health considerations play a role in their formulation is unclear.

Australia's 2013 National Drug Strategy Household Survey found that, for Australians 14 years and older, almost one in five (18.2%) consumed alcohol at levels that placed them at lifetime risk of an alcohol-related disease or injury.[2] Aboriginal and Torres Strait Islander people are disproportionately affected by harmful consumption, with alcohol associated with 7% of all deaths and 6% of the total burden of disease, despite higher overall rates of never drinking.

A number of studies, as well as WHO's 2014 *Global status report on alcohol and health*, have deemed regulatory restrictions on the physical availability of alcohol to be highly cost-effective.[2-5] A growing body of public health literature has suggested that, if executed well, tighter regulation of the availability of alcohol could reap substantial public health benefits. For example, it has been shown that a higher density of alcohol outlets is associated with higher levels of harmful drinking, chronic health conditions and mental health disorders, underage drinking and domestic violence, as well as other assaults and violent behaviour.[5-10]

Studies have also shown the potential effectiveness for policies limiting the density of outlets to improve population health outcomes.[4,5] In spite of the supporting evidence for these measures, successful implementation can be elusive.

In Australia, the availability of alcohol is regulated using administrative tools including development applications (DAs) to develop venues or outlet and liquor licences that can be obtained by industry actors seeking to sell or serve alcohol. For the development of an outlet such as a bottle shop, club, pub or hotel, a DA must be approved at the

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local government level. After development approval has been granted, industry actors must gain approval for a liquor license with state-level administrative institutions or semi-judicial institutions such as liquor commissions (e.g. the New South Wales [NSW] Independent Liquor and Gaming Authority).

The role and operation of authorities controlling the availability of alcohol have been significantly influenced by broader micro-economic policy. Australia's 1995 landmark National Competition Policy (NCP) agreements triggered a pro-competition overhaul of existing laws, including the relaxation of restrictive alcohol regulation. Implementation of the reforms came with strong financial sanctions – for instance, in 2003, five Australian jurisdictions incurred penalties of $27.2 million in withheld Competition Policy Payments.[11] Not surprisingly, alcohol industry groups have responded enthusiastically to such government leadership. At the same time, judicial systems have become significant forums for shaping the regulatory environment, particularly by holding state and local governments to account for unfavourable development and licensing decisions.

Public health law research can be used to inform improvements to decision making processes and to call attention to the health impacts associated with regulatory instruments. However, to date there has been a lack of empirical research undertaken to evaluate public health law and its impact in Australia.[12] Much of public health law research has entailed normative and doctrinal research forming the basis for legal commentary. Data-driven, empirical research is needed to test the assumptions underlying such research, ultimately giving weight to – or challenging – its assertions, especially those that propose legal strategies involving lawmaking or reform.[13] In this study, we used the harmful use of alcohol as a case study to investigate the broad range of criteria used in judicial decisions of public health significance. We also aimed to investigate the types of evidence being assessed by the judiciary as well as their implications for public health.

Methods

Inclusion criteria

Australian cases involving the judicial review of administrative decisions regarding liquor license or development applications were included (e.g. those relating to new or variations to existing liquor licenses or the construction or expansion of new or existing liquor venues).

Search strategy

The Australian case law database WestLaw AU was searched on 27 June 2015. A data limit was applied from January 2010 to June 2015 to ensure that only the most contemporary cases – those likely to be most policy relevant – would be evaluated (see Supplementary File 1, available online). The search was limited to liquor establishments of greatest public health concern: retail liquor outlets, pubs and clubs. Cases that began in court but were resolved through private conciliation between the parties were excluded.

Study selection

Case review and selection was undertaken by one author (JM). Full texts of each decision were reviewed and screened for compatibility with the inclusion criteria.

Data extraction

Data were extracted and analysed by two authors (JM and BA) using an extraction form developed for this review. Data extracted included: the courts and jurisdiction in which decisions were made; legal sources (e.g. legislative instruments) used to make the decisions; types of evidence presented; weight attributed to specific types of evidence; reasons for decision in favour of industry actors; and reasons for pro-public health decisions.

The authors considered the outcome of the dispute in favour of industry if the industry stakeholder initiating legal action succeeded in their appeal against the refusal of their application, even if the successful appeal was conditional on particular risk-mitigating measures (e.g. management plans, increased surveillance or security). Outcomes were considered pro-public health if industry proposals that were initially rejected by government agencies (partially or entirely) on public interest grounds were rejected by a judicial authority on appeal. It was held that weight had been attributed to evidence where attribution was explicitly stated by the judicial authority. Where competing evidence was presented by each party in relation to a specific issue, we determined that a greater weight had been attributed if the judicial officer expressed preference for one party's evidence on that issue.

Results

Characteristics of included cases

A total of 44 individual matters (2010 – June 2015) were identified and analysed (see Supplementary File 3, available online). The majority (n=40) involved industry appeals against local or state government stakeholders. The appeals featured a number of liquor establishments including liquor outlets (n=20), pub/hotels (n=21), bars (n=2) and one club.

Most disputes occurred in New South Wales (n=25), Australia's most populous state, and Western Australia (n=10). Disputes involving environmental and building development applications were generally heard in the Land and Environment Court, while the majority of liquor licensing cases were heard in higher state Supreme Courts.

Industry stakeholders varied between small businesses and major chain retailers. Government stakeholders included local governments (n=31 cases), state liquor commissions (n=7), police commissioners (n=2) and a federal government department (n=1). Judicial decision makers (hereafter judicial officers) included judges ranging in seniority as well as Commissioners of the Court who were legally qualified or held expertise in other areas (e.g. planning).

Decision outcomes

Most decisions (n=34, 77%) resulted in an outcome favourable to the industry actor in the case (n=24 development applications and n=10 liquor licensing decisions). The majority of decisions involving liquor outlets were brought by liquor establishments owned by Australia's two major grocery chains (n=11/19) and had a success rate of greater than 70% (n=8/11) in disputes. Governments and their agencies were successful in having appeals dismissed in less than a quarter (n=10) of the cases studied.

Instances of divergent outcomes in similar cases suggest that judicial discretion influenced outcomes of cases in which governments and their agencies succeeded in having appeals dismissed; for example, with regards to the threshold and type of evidence of adverse impact needed to warrant the refusal of an industry proposal. In one case, an industry actor seeking to develop a liquor

outlet was unsuccessful due to the judicial officer's concern for underage drinking. The outlet's proposed location was co-located with popular fast food restaurants McDonalds and Kentucky Fried Chicken, was opposite a skate park subject to Alcohol Free Zoning, and was close to two reserves. Further, the outlet would be less than two kilometres from the socioeconomically disadvantaged suburb of Claymore. In that case, despite the fact that a direct causal link to unacceptable social impact had not been established, the judicial officer asserted her discretionary capacity to take a "cautious approach" out of concern for adverse social impact, particularly that the proposal would increase secondary supply and encourage the illicit consumption of alcohol by minors.[14] However, in other cases pertaining to liquor outlets and potential social impact within New South Wales, which included some involving populations with severe social disadvantage or that were located within 250 metres of a child-care centre and primary school, judicial officers held that where evidence did not exist to link the proposal with unacceptable social impact within the locality, it had no authority to reject the proposal.[15-18]

Legislative direction

All decisions were informed by one or more legislative instruments (see Supplementary File 2, available online). Liquor licensing decisions primarily employed state liquor licensing legislation (n=19 cases). For development applications, planning legislation including local government planning and development schemes (n=31) were principal legislative instruments. Thirty-two individual local planning instruments were cited. Some pertained to the same locality, for example, the South Sydney Local Environmental Plan (LEP) 1998 (n=5); City of Sydney Late Night Trading Premises Development Control Plan (DCP) (*n*=3); and Yarra Planning Scheme (*n*=2). The most common 'package' of legal instruments guiding decisions were state planning legislation coupled with a local planning instrument (e.g. an LEP or DCP).

In total, 53 individual state-specific Acts or regulations were cited. These instruments provided formal jurisdiction-specific parameters to guide and structure the resolution of the dispute, for example, by outlining: necessary public interest considerations such as balancing with public interest the development of the liquor industry; social impact through the encouragement of responsible attitudes toward the promotion, sale, supply and service of alcohol; and harm minimisation associated with misuse and abuse of alcohol (including harm arising from violence and other anti-social behaviour).[19,20]

Delivery of expert evidence presented

Many cases used expert evidence (*n*=27). Generally, when expert evidence was tendered, each party called on one or more experts to support their cases. Experts included academics, private consultants and government agency representatives. After each expert submitted their own report, experts from both sides prepared a joint report outlining matters on which they agreed and disagreed. 'Hot-tubbing' was a feature of the majority of cases involving development applications, but in only one recent liquor licensing decision in 2015. As the term vividly suggests, hot-tubbing seeks to resolve potential conflicts in evidence by requiring the experts on both sides to meet and coordinate their presentation of the evidence to the court. Where necessary, individual experts were subsequently cross-examined on their use and interpretation of evidence with a particular focus on points or matters of contention.

Types of evidence presented

Expert and other evidence in each case fell under three broad categories: health and safety; amenity and economic evidence (see Supplementary file 4, available online). Non-expert evidence pertained to the direct observations asserted by industry or government actor/s, residents, business owners or service providers within the neighbourhood of the proposal or local authorities. Expert evidence included both evidence of fact and opinion (inferences or conclusions drawn from evidence) given by local authorities, and independent public health, planning, traffic or amenity experts.

Weight of evidence presented

The types of evidence presented by industry actors in support of their claims were often weighted more heavily. In such cases, industry evidence aimed to establish that the risks to public health referred to by government agencies could either be dismissed or could not be mitigated without excessive or excessively costly restrictions on competition. Evidence seeking to challenge the risks highlighted by government stakeholders included industry-led or funded reports conducted by experts, observational studies or descriptive case studies that related or were comparable to the proposal under review. These included internal data from franchise establishments in other locations, and case studies investigating the social impact of outlets in the vicinity of local schools or fast food outlets, and the characteristics of patrons (e.g. whether families frequented the area with children). Judicial officers frequently heard, and accepted, opposing expert opinion asserting that industry-led evidence had been "cherry-picked" or that studies designed to be of comparative value were poorly designed or executed. However, in spite of this, major liquor groups often benefited from data they were able to assert was locally relevant, and it is this feature that often enabled them to trump evidence that in theory was of higher scientific standard. Case studies, in assessing community compatibility, were particularly effective. For example, in one case an industry's expert report *Comparable Retail Liquor Outlets* studying the potential impact of five new outlets appeared to be highly influential, in spite of several acknowledged methodological deficiencies: "*… it does not purport to be an academically rigorous study, and in my view it provides background information which is useful in understanding the potential social impacts of retail liquor outlets in locations similar to the subject application*".[18] The influence of this type of evidence on the judgement in favour of the development was reinforced by the willingness of industry actors to put forward measures in mitigation such as such as increased security, amended sale and service management plans, or the erection of fences to prevent access to sites known to attract under-age or binge drinkers.

By contrast, local government public health strategies were considered to be of limited relevance where socioeconomic and health considerations were in conflict or were not supported by broader local and state environment and planning policy. Casey Council's Municipal Health and Well Being Plan 2009-13 had been presented as evidence by the local government to justify its restrictions on the sale of packaged liquor. The judicial officer held that: "*The* [Health and Well Being Plan] *simply acknowledges that people in Casey are typically under some financial stress and have a relatively greater*

level of disadvantage compared to other local government areas. As such it states that Council's plan is focussed on improving social, economic and environmental factors that influence people's health and well-being … I cannot find any land use planning nexus between these documents and the [restrictions of packaged liquor] *proposed*".[21] In another case, judicial officers highlighted that managing land use where state policies encouraged entertainment, work and residential living in densely populated inner city areas presented challenges for local government decisions to reject industry proposals on public interest grounds.[22,23] For example, in one case, the industry actor's hotel was in an area where it is policy to support high density mixed residential and commercial developments. The industry actor in that case argued that the adverse impacts presented by the local government were to be expected by residents living in a mixed-use location. Impacts included the presence of syringes, broken glass and bottles in public spaces (in contravention of local laws banning the use of alcohol in these areas) as well as violence and damage to residential property.[22]

Expert opinion in the form of academic evidence was often poorly weighted or discounted due to a failure to demonstrate applicability to local context (e.g. an application for a purpose-built outlet within a fast food hub or licence to allow extended opening hours in a high outlet density precinct). In a case regarding a proposed liquor outlet, the decision maker stated: "*I accept … that the research literature is a relevant aspect of the evidentiary base on which to assess the social impacts of the proposed development. However, while informative, there are limitations as to its usefulness on the specific issues raised by the proposed development in its location and context*".[16] Public health arguments were also discounted on the basis that such decisions were primarily concerned with town planning and the use, development and protection of land. One judicial officer held that: "*Town planning does not involve itself in moral judgements nor … in the operation of a competitive market economy in which certain ~~good~~ and services are lawfully made, sold or consumed … it is not the role of town planning to address all issues of public health, nor to regulate the pricing or general availability of a product to manage the health and wellbeing of a society*".[21] In addition, public health arguments were discounted where expert opinion drawing population-level evidence could not be supported by locality-specific evidence (e.g. police evidence), or where population-level evidence answered a research question not related to the specific proposal but rather, relating to the area of harmful use of alcohol in general. For example, a judicial officer held that: "*… it is always difficult to conclude that a specific hotel is the direct cause of anti-social behaviour, particularly considering a locality … where there are a large number of licensed premises*".[24] In another case, the state government Liquor Commission's rejection of a proposal on public health grounds was criticised and overturned as it was held that: "*It is not sufficient to simply reason that, where there is already a high level of harm in the particular area, even a small increment in potential or actual harm may be determinative [in rejecting the proposal], without making specific findings on the evidence about the level of alcohol-related harm which is likely to result from the grant of the particular application*".[25]

In addition, as scientific evidence often worked to test a hypothesis or address a particular research question, research could be rendered irrelevant if the appeal was framed on varying criteria. For example, in a Victorian case, the local government had sought to amend the Cranbourne East Development Plan to require that licensed premises selling packaged liquor should be limited to 300 square metres of retail flood area or 10% of a retail floor area of supermarkets. It considered these requirements to be necessary in order to address the social impacts of packaged liquor including excessive episodic drinking within the locality. Further, it could be supported by research findings of an alcohol policy expert that liquor outlet density and size was linked to the impacts of the consumption of liquor. The judicial officer suggested that the research lacked relevance as it did not distinguish between packaged outlets that were standalone and those that were incorporated into an on premises location such as a hotel. Consequently, the impacts: "*could not be directly correlated to whether it was the off premises component of some outlets that may create the impact*". The Court's order in that case required the Council's amendments to the Development Plan to be deleted.[21]

In another case, in addressing the issue of underage drinking in the community, an academic expert appearing for government relied on public health literature pertaining to the extent of underage drinking in Australia and particular concerns relating to the aggressive price discounting engaged in by major chains. The expert acknowledged that the literature did not specifically address the potential impacts of the co-location of an outlet with a fast food outlet. However, the industry actor held that the real issue in question was whether the proposed liquor outlet, which would be in the vicinity of a number of fast-food outlets, would lead to increased underage drinking. Accordingly, the expert appearing for the industry actor held that as no causal link could be established between proximity to a fast food outlet and impacts on rates of underage drinking or secondary supply, it should be held that no such risk existed and the proposal should be approved. The judicial officer accepted this evidence and the proposal was approved.[18] Yet, in a 2013 case, despite the industry expert citing that there was no evidence to suggest an unreasonable risk, the judicial officer held that: "*… the relationship between increased availability and increased alcohol-related harm is indisputable, it follows that the addition of a retail outlet to the 'fast food hub' will lead to an increase in consumption of alcohol by socially and economically disadvantaged persons … and this will further disadvantage them and result in an adverse social impact in the locality*".[14]

Discussion

The majority of legal actions uncovered in this study were cases initiated by industry actors seeking to increase availability of alcohol and were actioned against governments and their associated agencies who had initially rejected industry proposals for development. The rulings in these cases were overwhelmingly in favour of industry actors. Competition principles underpinned by legislation were highly influential in decisions and it is the presence of such legislation that enabled pro-competition decisions to be the default outcome. A consequence of the lack of explicit legislative support for preventive health arguments is that public health impact is relegated in practice below other considerations including market freedoms, amenity and the compatibility of industry's proposal with existing planning controls. The success of major liquor groups to oppose the regulation of liquor outlets through the court system suggests that there is significant

scope in this arena for regulatory systems to be shaped by interest groups.

Some jurisdictions featured more strongly than others in our included cases. A potential factor underlying this disparity may be that Queensland and the Australian Capital Territory include health considerations in relevant planning frameworks, which may have resulted in decisions to reject industry proposals being less vulnerable to appeal.[26,27] Similarly, in South Australia and Victoria, while health does not feature as an explicit objective in principal planning legislation, subordinate instruments and policy documents indicate that it can be a relevant consideration in planning decisions.[28]

Local governments, despite lacking the resources of state and territory governments and their agencies, were the most frequent government stakeholders to have legal actions initiated against them. Thus, it follows that local governments were most affected by the financial and political consequences of decisions in favour of industry actors. A potentially powerful reason explaining the over-representation of local governments, may be the absence of financial motivations to incorporate competition principles into local-level decision making processes, despite possible incentives to align liquor industry objectives with local economic development. Unlike state governments, local governments received no ongoing financial incentives for implementing pro-competition directives posed by the NCP. This point was highlighted in a 2014 submission by the Australian Local Government Association (ALGA), which represents 560 Australian local governments, to the Competition Policy Review.[29] Such payments as a consequence can be seen as a major driver of state and territory government decisions to adopt a pro-competition or pro-industry perspective – and any similar future incentives for local governments could potentially shift their decision making in the same direction.

The incremental process by which precedent shapes case law means that it often evolves independently of any broader public health agenda. The reliance on common law and legislative direction significantly constrains agenda setting. The judiciary can only decide disputes that come before it and this limits its ability to develop solutions to particular social issues in the same way as the legislature can. The judiciary is to a large degree unable to take into account social concerns that have not been explicitly addressed in previous cases or in legislation.[30] Thus, this form of decision making often provided no consistent, system-wide approach to controlling alcohol or protecting populations such as those that are socioeconomically disadvantaged or disenfranchised. In one example, community members objected to the development of a liquor outlet that they argued would take the place of an alternative grocery retailer, which would facilitate competitive pricing and increase food security for vulnerable members of the community. The judicial officer responded in stating that it was not its role to decide on the best possible use of a space but, rather, to grant approvals in the absence of conflicts with orderly, proper planning and amenity.[31]

The institutional norms and considerations of the courts in which judicial officers served also shaped their approach to matters of public health significance. In the cases we studied, judicial behaviour centred on the efficient resolution of disputes, and was to a large extent indifferent to achieving public health benefit due to the limited remit of the legislative instruments they employed. In contrast, there are specific public health provisions in the regulations pertaining to drug problems. For example, the NSW Drug Court aims to "deliver an overall benefit to the community of NSW". A core objective of that court is reducing dependency and promoting re-integration into the community.[32] Having explicit public health provisions in the *Drug Act* has resulted in pro-public health outcomes (e.g. less drug-related crime) and this offers a promising way forward.[32] In contrast, in this study judicial officers remained relatively passive, non-intervening adjudicators. In one example, development consent for a major chain, purpose-built outlet was granted in spite of the pronounced disadvantages faced by a community due to alcohol. In that case, the socioeconomically disadvantaged community of East Nowra already had a high density of outlets, alcohol abuse was a significant problem, rates of alcohol-related crime and domestic violence were among the highest in the state, and service provider evidence had asserted that availability of discount liquor at the new outlet would exacerbate existing problems of foetal alcohol syndrome, neglect, physical and sexual abuse and poor school attendance, as well as behavioural and mental issues.[16]

Finally, the high rate of industry success may have been shaped by the weight judicial officers attributed to diverse forms of expert evidence. The primary objective of expert evidence in civil cases is to reduce uncertainty and thus to improve the decision making process. However, historically courts have struggled to find the best way to present expert evidence to scientifically lay, generalist fact finders. Where the reliability and applicability of the evidence is at issue, this presents a bigger issue as judicial officers are tasked with not only having to understand evidence, but engage in critical appraisals and attribute weight depending on the facts and assertions (e.g. that adverse social impact would be unacceptably high) that were put forward by each party. The 'hot tubbing' method, an Australian innovation, allows judicial officers to hear experts speak to the same issue at the same time and has enjoyed widespread support from experts and their professional organisations.[33] Experts have said that this method allowed them to be able to better communicate their opinions to the Court and they felt there was less risk that their opinions would be distorted by legal advocates during cross-examination.[34]

Nevertheless, this study revealed that in spite of its recognised benefits, hot tubbing may hold important implications for stakeholders pursuing public health arguments. For example, while hot tubbing (and subsequent cross-examination) allowed public health experts to directly address the potential public health impact of particular industry proposals, it was often used by opponents to magnify the inherent uncertainties in public health evidence generated through scientific methods. In many cases, this type of evidence was discounted when doubts could be raised about its applicability to the local context. Thus, the poor weighting of population health evidence, coupled with a narrow conceptualisation of causation set a high evidentiary burden that was infrequently met, resulting in high rates of industry success. Martineau and colleagues have suggested similar issues exist with regards to liquor licensing and planning policy decisions by licensing authorities in the UK, highlighting that: "*The more specifically evidence relates to the premises or location of concern, the greater its legal weight and the less vulnerable it is to appeal. Routine health data, rarely collected in a way that can be linked to individual premises, are unlikely to be considered relevant*".[35]

On the other hand, it remains unclear whether the measures proposed by industry actors to mitigate the public health risks

emphasised by their opponents (e.g. incidences of underage drinking and increased rates of alcohol-related harm) would prevent or limit such risks, as industry actors were not required to show evidence of effectiveness. This raises potential concerns, as recent research has shown that while the alcohol industry has intensified its sponsorship of scientific research and industry-funded policy initiatives, efforts to reduce risky drinking and alcohol-related harm are seldom evidence-based.[36,37]

Some commentators within the legal profession have argued that case law should be viewed and studied on their own merits and that systematic comparison using a pre-determined criteria oversimplifies legal reasoning.[38] While context must be given to empirical legal research to account for the subtleties of each dispute, our findings highlight that inherent patterns exist and can contribute to the generation of policy-relevant findings.

Conclusion

The judicial arena is an important policy-making forum that requires greater attention. The study found that pro-competition legal precedents could shift the boundaries of local government roles and responsibilities as they apply to alcohol. Government agencies are unlikely to champion public health arguments that are infrequently successful in legal actions (that can be costly to administration and tax payers), or do so at considerable risk. In this study, we have demonstrated that judicial intervention in the public health space (to the extent that it occurs) tends to be a reflection of the legislative environment. Such an environment is currently framed not by public health considerations but by planning and development as well as by economic imperatives such as the need to encourage competitive markets.

Without formal legislative backing, 'pro-public health' judgements tend to be made only with a great deal of judicial discretion and can often be at odds with similar judgements elsewhere. As a consequence, while the judicial arena has significant potential to shape public health action in Australia, it is largely influenced at present by legislation that favours pro-competition considerations and largely produces decisions in favour of industry. This has also meant that public health evidence in this arena has largely been discounted, since there is no clear basis on which such evidence is to be used.

The ability of government and community groups to better execute a public health case in the area of alcohol regulation can thus be addressed from the top down through the inclusion of explicit public health objectives in existing planning and liquor licensing controls. This would at least impose some onus on industry to address the question of its potential harms to the health of the community. Further, greater legislative support for public health imperatives could have considerable flow-on effects for the authority and autonomy of local governments in building environments that are healthy, equitable and prosperous. In light of the complex role of judicial officers as receptors and appraisers of evidence, guidelines or benchmarks for judicial decision makers in approaching public health considerations could play an important role, especially in mitigating risks to disadvantaged or marginalised populations.

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Supporting Information

Additional supporting information may be found in the online version of this article:

Supplementary File 1: Search strategy.

Supplementary File 2: Planning, liquor and court legislation and regulation cited in cases studied.

Supplementary File 3: Please supply name.

Supplementary File 4: Summary of evidence presented by industry, government and community stakeholders.