

Comments on the Harper Review Draft Report: public interest tests and alcohol

1. This note by Marsden Jacob Associates comments on two aspects of the Draft Report on Australian Competition Law by the Review Panel chaired by Professor Ian Harper. These are:
 - § the inappropriateness of the second of the two tests proposed for future reviews of legislation for anti-competitive effects; and
 - § issues of omissions and selectivity in the Draft's comments on alcohol.

Reviving NCP legislation reviews

2. The Panel's Draft Report recommends revival of the National Competition Policy (NCP) legislation reviews. Further, it recommends that the same tests/criteria as recommended by Hilmer and subsequently adopted by the Council of Australian Governments (COAG) be applied.¹

... any policies or rules restricting competition must demonstrate that:

- *they are in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*²

3. The Draft fails to recognise that the second test formulated by Hilmer should not be (and for at least the last (2004/05) assessment was not) applied literally. Rather, the National Competition Council (NCC), governments and those undertaking the NCP legislation reviews recognised the limitations of the second test as worded in the Hilmer report.

That is, restrictions on competition were endorsed where such restrictions were the best way – as distinct from the only way – to achieve policy objectives.

Competition is a means to enhance welfare

4. The Draft Report recognises that promoting competition is a strong force for economic efficiency and thus the promotion of the welfare of Australians. But the report also needs to recognise that competition is not an end in itself.

To promote competition to the detriment of the public interest (i.e., to the detriment of the welfare of Australians and the goals of efficiency and equity) is a nonsense. Rather, identified restrictions on competition need to be carefully weighed against the public interest benefit that arises from the restrictions on competition.

5. The promotion of competition is a highly effective and pervasive method of increasing the efficiency of the supply of (and demand for) goods and services. Like the Competition and Consumer Act (CCA) and many international agreements, the Draft Report focuses too

¹ See Marsden Jacob (2005).

² Draft Report p, 34.

narrowly on normal goods.³ It fails to acknowledge that the welfare of Australians is not adequately represented by the aggregation across markets of the welfare (or long-term interests) of consumers. Australians are not merely consumers, Thus, their welfare also involves their roles as, for example, parents, residents, taxpayers plus matters of fairness and equity.

There is, of course, a spectrum:

- § increases in the efficiency of supply and demand for normal goods and services are welfare improving;
 - § at the other extreme, increased competition and efficiency in markets for illicit goods and services, by definition, reduces economic welfare;
 - § between these extremes, alcohol consumption (like gambling) is an activity with strong negative externalities and significant levels of ill-informed and/or irrational decision making. For such activities, there is no intrinsic reason to believe that promoting competition, lowering prices or increasing availability will improve the welfare of Australians. On the contrary, there is good reason and considered evidence to indicate that the promotion of competition in these markets could be very bad policy. In many cases in these markets the outcome would more likely be to reduce the welfare of Australians.
6. This spectrum of outcomes was (belatedly) recognised explicitly and adopted by the NCC in its assessments of compliance of the individual states and territories with their obligations under NCP. Clarification in 2005 of the issues of alcohol regulation was a step in this recognition.

Increased competition can be welfare reducing for alcohol and gambling

7. The essence of the public policy reasons for regulating to restrict physical availability and to increase the price of alcohol are that:
- § alcohol consumption causes major negative externalities; and
 - § a high proportion of alcohol consumption reflects irrational decision making.
8. The availability of alcohol and gambling is restricted because economic and physical availability are known to be key drivers of consumption and of associated harms in both cases. Over 70% of alcohol consumption is in excess of NHMRC guidelines.⁴ Almost half of Australian drinkers drink in excess of either the short-term or long-term guidelines.⁵
9. Since the price of alcohol is a key driver of alcohol consumption and associated harms, should we be promoting competition as a means of lowering prices to consumers? While lower prices increase welfare for ordinary, normal goods this is not the case for alcohol.

³ ... the operating assumption in international agreements has often been to treat alcoholic beverages as an ordinary commodity. In a world of increasing trade globalization, this operating assumption has meant that national and local alcohol policies, predicated on the extraordinary nature of alcohol, have increasingly come under pressure at the international level. (Babor, Caetano et al. 2003, p.231).

⁴ Marsden Jacob (2012), p. 9.

⁵ Marsden Jacob (2012) p. 17.

10. The benefit-cost assessments and analyses undertaken by Marsden Jacob Associates for the New Zealand Law Commission, the Foundation for Alcohol Research and Education (FARE) and the Australian National Preventive Health Agency (ANPHA) indicate that increased excise taxes on alcohol would result in the welfare benefits which exceed the fully enumerated associated costs by a very substantial margin.⁶

Conversely, reducing prices for alcohol – whether by promoting competition or by reducing excise tax rates – would reduce the welfare of Australians.

11. Similar contradictions to the conventional wisdom on the net benefits from the promotion of competition arise with gambling. For instance, innovation in gambling has meant the faster ‘churn’ and less opportunity for gamblers to pause and consider their actions.
12. In other words, the principles and observations on the value of promoting competition may apply generally but they do not apply universally.

Exceptions, such as alcohol and gambling, need to be recognised in the Panel's report

13. Unlike the NCC, the Panel's Draft Report barely acknowledges and certainly does not seek to reconcile such exceptions by placing them in a broader framework.

Whereas the NCC (2005) states very explicitly first and foremost that

“Alcohol is not just another product”

the Panel's Draft Report simply states that:

“liquor retailing ... [is a] heavily regulated sector of the economy”.

These differences in wording are not merely semantic: they frame thinking and the debate. Just how markets and goods are perceived affects directly how the relevant regulatory tests are formed.

14. Up to 2004, the NCC had criticised jurisdictions for non-compliance with the NCP in relation to regulations restricting the availability of alcohol.⁷ Importantly, in 2003 and 2004 the NCC recommended that because of this non-compliance with NCP obligations certain states be penalised by reductions in their NCP payments from the Commonwealth. These recommendations were not, however, accepted by the Commonwealth.
15. However, by the 2004/05 assessments the NCC realised that its approach to alcohol regulation may have been too mechanistic in promoting competition. In the context of packaged liquor, it therefore sought external, independent advice on the nature of alcohol and its impacts on individuals, families and broader society.
- Marsden Jacob Associates, public policy economists, were commissioned to provide this advice.
16. The resulting advice was endorsed and published by the NCC in their Occasional series of reports as *“Identifying a framework for regulation in packaged liquor retailing”*.
17. Following consideration of this advice, the NCC concluded in a preface to the Occasional paper that *“alcohol is not just another product”* and that there were indeed adequate public policy reasons for restricting the availability of alcohol.

⁶ To date, the strength of the public interest case for taxing alcohol rationally has not been sufficient to outweigh the vested interest case for retaining the status quo.

⁷ The 2003 criticism for non-compliance on alcohol regulation was levelled at NSW, Qld, WA, SA and the NT.

Further, the NCC stated that:

“NCP obliges all Australian governments to review legislation that restrict competition and ensure any continued or new restriction is justified by an objective assessment that it serves the interests of the public”.

“... regulation that successfully addresses the public interest but also restricts competition can be justified, so long as the impact on competition is minimised.”

This interpretation of NCP obligations by the NCC is clearly more nuanced, appropriate and consistent with the public interest / the welfare of Australians than a literal reading of the second Hilmer test in legislation reviews (and re-endorsed in the Draft Report) that *“the objectives of the legislation or government policy can only be achieved by restricting competition”*. (underlining added)

Rather than “only” the test should relate the “*best be achieved*”

18. Draft Recommendation 1 and Draft Recommendation 11 should be recast accordingly and provide better guidance to policy makers and those charged with the responsibility to undertake regulation reviews.

Alcohol: the challenge of an adequate discussion

19. Alcohol is a complex issue and there is a considerable body of Australian and international work directly dealing with the issues raised in the Draft. This includes but is not limited to:

§ the NCC Occasional paper *“Identifying a framework for regulation in packaged liquor retailing”*. That project:

- surveys the evidence on the nature of alcohol and the regulatory tools available,
- provides a framework in which to reconcile alcohol and competition policies,
- surveys, *inter alia*, the evidence on differential harms from different types of retail outlets.⁸ (see extract attached below)
- suggests (section D) guidelines for best practice regulation of retailing of packaged liquor;

§ the more recent examination by NCETA of *“Liquor Licensing Legislation in Australia”*;

§ the now several assessments by Marsden Jacob Associates and others of the incremental benefits and costs of increasing the price of alcohol through increases in excise taxes on alcohol.⁹ The key findings are that:

- based on the value judgments widely endorsed by the Australian community, the benefits of taxing alcohol rationally exceed the associated costs very substantially,
- this is so even when several major sources of benefit are omitted or not fully measured but all costs are fully counted,

⁸ One example of differential harms is the likelihood of underage purchases. This is outlined in para 103 and footnote 11 in the extract

⁹ See references attached below.

- moderate drinkers are the largest group of (net) beneficiaries from limiting availability and reducing consumption through increased rates (and rationalisation) of excise taxation; and

§ new evidence on the efficiency of restrictions on physical availability in reducing harms in Western Australia and northern Australia, and in Newcastle and Sydney is also available.¹⁰

In public interest terms, there is a case for returning to more restrictive regulatory settings, rather than further liberalising.

20. Thank you for the opportunity to contribute to the Review on the issue of the appropriate regulatory test and the complexities of the interface of alcohol and competition policy. We are available, if desired, for further discussion or clarification.

J.S. Marsden

17 November 2014

¹⁰ See National Drug Research Institute (2007), Miller, Tindell et al (2012), Miller, Diment et al (2012) and BOCSAR (2014)

References

- Babor, T., Caetano, R., Casswell, S., Edwards, G., Giesbrecht, N., Graham, K., Grube, J., Gruenewald, P., Hill, L., Holder, H., Homel, R., Osterberg, E., Rehm, J., Room, R. and Rossow, I. (2003) *Alcohol: No ordinary commodity – Research and public policy*, New York, Oxford University Press
- Bureau of Crime Statistics and Research (BOCSAR) (2014) *Alcohol related assault (non-domestic assault) in New South Wales, from July 2002 to June 2014*
- Marsden Jacob Associates (2005) *Identifying a framework for regulation in packaged liquor retailing*, National Competition Council Occasional series, September. [Available here](#)
- Marsden Jacob Associates (2010) “The benefits, costs and taxation of alcohol: towards an analytical framework” Appendix in New Zealand Law Commission (2010) *Alcohol in Our Lives: Curbing the Harm*, report no. 114. [Available here](#)
- Marsden Jacob Associates (2012) *Bingeing, collateral damage and the benefits and costs of taxing alcohol rationally*, research report for the Foundation for Alcohol Research and Education, October. [Available here](#)
- Marsden Jacob Associates (2013) “A note on the role of value judgements in public interest tests on alcohol policy”, prepared for Australian National Preventive Health Agency (2013) *Exploring the public interest case for a minimum (floor) price for alcohol*, May. [Available here](#) – at appendix 7.
- Miller, P., Tindall, J., Sonderlund, A., Groombridge, D., Lecathelinais, C., Gillham, G., McFarlane, E., de Groot, F., Droste, N., Sawyer, A., Palmer, D. Warren, I. and Wiggers, J. (2012) *Dealing with alcohol-related harm and the night-time economy (DANTE)*, Monograph Series No. 43, funded by National Drug Law Enforcement Research Fund, April
- Miller, P., Diment, C. and Zinkiewicz, L., (2012) “The role of alcohol in crime and disorder” *Prevention Research Quarterly*, No. 18, August
- National Competition Council (2003) *Annual Report*, including the assessments for 2002/03
- National Competition Council (2004) *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2004*, Volume 1 Assessment, October
- National Competition Council (2005) preface to Marsden Jacob Associates (2005), September
- National Competition Council (2005) *Annual Report*, including the assessments for 2004/05, 12 October
- National Drug Research Institute (2007) *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes*, Perth: National Drug Research Institute, Curtin University of Technology
- Trifonoff, A., Andrew, R., Steenson, T., Nicholas, R., & Roche, A.M (2011) *Liquor Licensing in Australia: An Overview*, report prepared for the National Centre for Education and Training on Addiction (NCETA), Flinders University commissioned by the Inter-Governmental Committee on Drugs
- Wagenaar, A.C., Finnegan, J.R., Wolfson, M., Anstine, P.S., Williams, C.L. and Perry, C.L. (1993) “Where and how adolescents get their alcoholic beverages” in *Public Health Reports*, Vol. 108 No. 4, pp. 459-464

Marsden Jacob Associates

email: economists@marsdenjacob.com.au web: www.marsdenjacob.com.au

Harper Submission

Attachment

Outlet type: Summary of evidence on differential harms and risks (extract from NCC Occasional Paper, paras 99-105)

99. A consumer may purchase packaged liquor from several different types of commercial outlet: for example, bottleshops, discount liquor barns, specialty liquor stores, grocery stores (including supermarkets), and convenience stores (including milk bars).

To the extent that different types of outlets sell liquor to consumers in different environmental conditions or settings and at different times, there is potential for differing patterns of consumption and level of risk.

100. First, convenience stores and supermarkets, for example, may trade for longer hours than bottleshops. Longer trading hours increases late night and opportunistic purchases and therefore high-risk drinking (refer section commencing paragraph 106).
101. Second, convenience [stores] and supermarkets may be more likely to engage in price discounting promotions, which have been shown to increase risky consumption. In addition, prices may well be lowered due to increased buying power and efficiencies of large chains (refer section commencing paragraph 82)
102. Third, there is a perception, at least, that compliance with regulations, especially regarding sale to minors may be lower in the case of non-specialty liquor retail, such as convenience and grocery stores.¹¹

However, larger chains may be better resourced to develop policies and procedures to ensure compliance with regulations. In addition, there is the argument that large chains may have more incentive to ensure compliance for public relations reasons. There is wide scope for variation of in-store layout, staffing and other dimensions. For instance, whether liquor is presented in distinct or separate aisles in groceries, or if its purchase requires proceeding through a physically distinct register.

103. Finally, there is concern over the ‘normalisation’ of alcohol (medically classed as a drug) as a consumer good when it is sold alongside other foodstuffs. The ready availability of alcohol in close proximity to the muesli, the fruit and vegies or the detergent tends to treat alcohol as a very familiar, very ‘ordinary commodity’ – no different from other retail goods. These concerns over ‘normalisation’ of attitudes to alcohol and the erosion of previous social norms are not limited to sales of packaged liquor at grocery stores, but extend and strengthen in the case against convenience stores and petrol stations.

.../

¹¹ Patterns of acquisition of alcoholic beverages by underage youth have been studied using focus group methods. In one US study, results showed that: For example, in a US study results found “*In the mid to late teens, young people purchase alcohol from commercial alcohol outlets, despite the fact that 21 is the legal age for purchasing alcohol. Factors reported to increase the rate of successful alcohol purchases include female buyer, male seller, young seller, and convenience store outlet. Results of focus group interviews revealed the easy accessibility of alcoholic beverages to underage youth. ... Focus group participants reported greater ease in purchasing alcohol at some types of outlets than others. There was consensus that convenience stores are the easiest places to purchase alcohol.*” Wagenaar, A. C., J. R. Finnegan, et al. (1993). "Where and how adolescents obtain alcoholic beverages." *Public Health Reports* **108**(4): 459(6).

104. In summary, there are several public health reasons for discriminating between the types of retail sales outlets permitted to obtain a liquor licence. But in many cases alternative forms of non-discriminatory regulation may be available. Generally regulating the times at which alcohol may be sold is likely to distort competition to a lesser extent than restricting sales to bottleshops on the basis that bottle shops are likely to be open for shorter hours. The maintenance of separate premises restrictions that require designation of specific space for liquor sales in supermarkets and other non specialised outlets and separate check out facilities makes restricting times of sale simpler and to a degree addresses concerns regarding normalisation.
105. The case for restricting alcohol sales to specialist liquor stores is strongest where the rigour and resources committed to ensuring compliance with the licensing regime are least. But if a greater level of resources and commitment to enforce compliance is forthcoming allowing a greater range in the type of licensed retail entities would be less likely to have adverse consequences. Liberalisation of outlet type or numbers without a consequent increase in the enforcement of licensing is however a recipe for increased harm.

— || —