IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 1762 of 2010

DIRECTOR OF LIQUOR LICENSING — Appellant

v

KORDISTER PTY LTD — First respondent
and
CHIEF COMMISSIONER OF POLICE — Second respondent

JUDGE:	BELL J
WHERE HELD:	Melbourne
DATE OF HEARING:	28, 29 July 2010
DATE OF JUDGMENT:	18 May 2011
CASE MAY BE CITED AS:	Director of Liquor Licensing v Kordister Pty Ltd
MEDIUM NEUTRAL CITATION:	[2011] VSC 207

LIQUOR LICENSING LAW – appeal – Victorian Civil and Administrative Tribunal – application by licensing inspector to vary liquor licence to end late-night trading at bottle shop in hotel in Melbourne CBD – director granted application, accepting recommendation of Liquor Licensing Panel - tribunal upheld hotel's application for review – whether tribunal erred in law – whether tribunal properly applied harm minimisation object – whether properly considered general evidence of harm arising from misuse and abuse of alcohol– tribunal found hotel was not responsible for anti-social street behaviour – whether the wrong question asked – tribunal referred to but did not discuss recommendation of the panel – whether that 'full consideration' – tribunal found ending late-night trading would damage profitability and viability of hotel and other liquor outlets in Victoria – whether made without evidence – proper approach to applying statutory objects – provisions applying to determination of contested applications – precedent – whether previous decisions of the tribunal on legal questions should be followed unless clearly wrong - 'contribute to minimising harm arising from misuse and abuse of alcohol' - *Liquor Control Reform Act 1998*, ss 4(1) and (2), 44(2), 45, 46, 47(1) and (2), *Victorian Civil and Administrative Tribunal Act 1998*, s 148(1).

APPEARANCES:	Counsel	Solicitors
For the appellant	Peter Hanks QC and Chris Horan	Victorian Government Solicitor's Office
For the first respondent	Chris Canavan QC and Jason Pizer	Bazzani Scully Brand Lawyers
For the second respondent	Chris Horan	Victorian Government Solicitor's Office

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HIS HONOUR:

INTRODUCTION

1 The Exford Hotel has the only bottle shop licensed to sell liquor for 24 hours a day in Melbourne's central business district. It obtained these extended trading hours under the *Liquor Control Act 1987*, which did not have harm minimisation objects.

2 According to the police and liquor licensing authorities, the area around the hotel has become a 'hot spot' late at night for anti-social street behaviour arising out of the misuse and abuse of alcohol. Therefore a liquor licensing inspector applied to the Director of Liquor Licensing for a variation of the hotel's licence to end trading at the bottle shop from 11:00 pm to 7:00 am. The application was made under the *Liquor Control Reform Act 1997*, which does have such objects.

3 The director referred the application to a statutory advisory panel. It conducted a public inquiry, provided a detailed report and made a recommendation in favour of granting the application, which the director was bound fully to consider. Accepting the recommendation, the director granted the application.

4 The hotel applied to the Victorian Civil and Administrative Tribunal for review of the director's decision. Setting aside the director's decision, the tribunal found the hotel was not responsible for the anti-social behaviour. It noted, but did not go into, the recommendation of the panel. Without having the hotel's books of account or evidence about the operation of other hotels, it found that ending late-night trading at the bottle shop would damage the profitability and viability of the hotel and other liquor outlets in Victoria.

5 In this appeal, the director (supported by the Chief Commissioner of Police) contends the tribunal committed errors of law. She submits the tribunal did not properly perform its basic statutory function, which was to determine whether ending late night trading at the bottle shop would contribute to minimising harm arising from the misuse and abuse of alcohol, did not fully consider the recommendation of the panel and made the economic findings without evidence.

DIRECTOR'S DECISION TO VARY HOTEL'S LICENCE

Application by licensing inspector

6 Before the director varied the hotel's licence, these were the trading hours specified in its general licence:

> TRADING HOURS
>
> FOR CONSUMPTION OFF THE LICENSED PREMISES –
>
> | | |
> |---|---|
> | Sunday | Between 10 am and 7 am the day following |
> | Good Friday & Anzac Day | Between 12 noon and 1 am the day following |
> | On any other day | Between 7 am and 7 am the day following |
>
> FOR CONSUMPTION ON THE LICENSED PREMISES –
>
> | | |
> |---|---|
> | Sunday | Between 10 am and 7 am the day following |
> | Good Friday & Anzac Day | Between 12 noon and 1 am the day following |
> | On any other day | Between 7 am and 7 am the day following. |

7 The hotel, which is operated by Kordister Pty Ltd, obtained those extended trading hours in 1997. The hours were granted by the former Liquor Licensing Commission the under the *Liquor Control Act 1987* on the recommendation of the chief executive officer. His reason for making that recommendation reflected the comparative liberality of that legislation:

> Based on the material before me, my recommendation is that it would be in the interests of the community in the neighbourhood where the premises to which the application relates are situated to grant the application.
>
> The reasons for making the recommendation are:
>
> (i) I have had regard to the extent to which businesses carried on under licences and permits in the area in which the application relates are satisfying the need intended to be satisfied by the applicant and I consider the grant of the application will enable the licensee to provide an enhances service to patrons of this established premises and more effectively respond to their needs.
>
> (ii) In my opinion there are no factors that would cause the grant of this application to have an adverse effect on the interest of the community in the area.

8 In the decision under review, the tribunal relied on those reasons, even though harm minimisation objects had been inserted into the *Liquor Control Reform Act 1997*. An issue in the appeal is whether the tribunal was legally correct in doing so.

9 The licensing inspector's application under the *Liquor Control Reform Act 1997*, which was granted, was to vary the hours of trading to these:

TRADING HOURS

FOR CONSUMPTION OFF THE LICENSED PREMISES –

Sunday	Between 10 am and 11 pm
Good Friday & Anzac Day	Between 12 noon and 11 pm
On any other day	Between 7 am and 11 pm

FOR CONSUMPTION ON THE LICENSED PREMISES –

Sunday	Between 10 am and 7 am the day following
Good Friday & Anzac Day	Between 12 noon and 1 am the day following
On any other day	Between 7 am and 7 am the day following.

10 It can be seen the effect of the application, when granted, was to cut back the trading hours of the bottle shop so it could not sell alcohol from 11:00 pm every day until 10:00 am on a Sunday, until 12:00 noon on Good Friday and Anzac Day and until 7:00 am on any other day.

11 The director had to give a copy of the application to the licensee, which she did. The hotel had 21 days to object to the application, which it did.

Recommendation of Liquor Licensing Panel

12 The application being contested, the director referred it to a Liquor Licensing Panel. As will be seen, the legislation confers an important role on the panel and specifies the way in which that role is to be carried out. By following a prescribed process, the panel must consider contested applications, report its findings and reasons to the director and recommend whether the application should be granted or refused. Only after giving 'full consideration' to the recommendation of the panel can the director determine the application.

13 In the present case, the panel conducted a hearing, gave lengthy consideration to the application and reported its detailed findings to the director. It recommended granting the application and gave detailed reasons for doing so. It referred to the harm minimisation objects of the legislation and the amenity issues which had to be considered. Without blaming the hotel for the problem, it found (among other things) that late night trading at the bottle shop was detracting from the street amenity of the area:

> people should be able to congregate or pass through this area without the risk of being subject to people drinking liquor in the street (in contravention of a local law enacted by the City of Melbourne) or violent, threatening or anti-social behaviour that may result from such consumption. While such behaviour and amenity impacts may not be solely or directly related to the operation of the subject premises during the hours in contention, its presence and operation, particularly the late night/early morning hours, arguably do have the potential to contribute to a noticeable reduction in the amenity and safety of nearby street areas. This reduction in amenity is supported by the list of incidents submitted by the applicant recorded in a 21 day period earlier this year.

14 The panel also considered such matters as the service offered to consumers who wanted to buy alcohol late at night and the importance of that turnover of the bottle shop to the hotel's business. While recognising these benefits, the panel considered that they 'should not be realised at the expense of what may be unacceptable adverse physical or other impacts on the amenity of particular areas or members of the community'.

15 In conclusion, the panel said:

> for the reasons set out above, the application should be granted because a reduction in trading hours at the subject premises has the potential to reduce alcohol-related incidents in the vicinity of the subject premises consistent with the object of the Act without substantial adverse impact on those consumers who currently wish to purchase alcohol between 11 pm and 7 am in the Melbourne CBD.

16 As you can see, that conclusion focussed on the contribution which the variation would make to the object of minimising harm, not on whether the hotel was responsible for the anti-social behaviour.

Director's decision to vary hotel's licence

17 The director approved the application for variation and accordingly ended late-night trading at the bottle shop.

18 The director gave these reasons for doing do:

> The variation has been granted pursuant to s 44(2)(b)(i) and (ii) of the Act in that the application will ensure that detriment to the amenity of the area in which the premises are located is mitigated and that it would assist in reducing the misuse and abuse of alcohol.

> In making my decision, I formed the view that the evidence provided by Victoria Police in support of this application demonstrated that incidents had occurred on or around the premises late at night and more particularly early in the morning which had contributed to the detriment of amenity. In addition, patrons who were intoxicated had been supplied or had been involved in incidents in or around the premises.
>
> The continued operation of a poorly run 24 bottle shop is inconsistent with the objective of the Act particularly the objective of harm minimisation by means of providing adequate controls over the supply and consumption of alcohol.

19 Although it is not in issue in this appeal that the director gave full consideration to the report of the panel, these reasons focus on the operation of the hotel, rather than the broad harm minimisation objects of the *Liquor Control Reform Act 1997*, which were the focus of the recommendation of the panel. Further, the panel did not find the bottle shop was poorly run. On the view I take of the legislation, the then approach of the director was legally mistaken on the same basis that the decision of the tribunal was so mistaken. But that was not the approach of the director in the submission made to the tribunal and the court, which I will here uphold.

20 Before going to the decision of the tribunal, I will examine the governing legislation.

LIQUOR REGULATION LEGISLATION

Liquor Control Act 1987

21 As I have noted, the hotel obtained 24 hour trading for the consumption and sale of liquor both on and off-premises in 1997 under the previous statutory regime, the *Liquor Control Act 1987*.

22 This legislation was introduced in response to the Nieuwenhuysen Report.[1] It was deliberately more liberal than the previous legislation and intended to modernise the regulation of the liquor industry in the light of changed community expectations. As the responsible minister said in the second reading speech:[2]

> The new Bill represents a major step forward in the establishment of liquor licensing arrangements in the State. It establishes a logical framework both to accommodate current trading structures and provide flexibility to meet

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1 Victoria, *Review of the Liquor Control Act 1968* (January 1986).

2 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1591 (Robert Fordham, Minister for Industry, Technology and Resources).

changing community demands while still retaining proper control over licensed outlets. It also provides a simpler licensing system which will be of major assistance to present and future licensees in Victoria.

23 The object of the 1987 Act reflected that outlook (s 5):

> The object of this Act is to respond to community interests by –
>
> (a) promoting economic and social growth in Victoria by encouraging the proper development of the liquor, hospitality and related industries; and
>
> (b) facilitating the development of a diversity of licensed facilities reflecting consumer demand; and
>
> (c) providing adequate controls over the sale, disposal and consumption of liquor; and
>
> (d) contributing to the effective co-ordination of the efforts of government and non-government agencies in the prevention and control of alcohol abuse and misuse.

24 It would be wrong to think that preventing and controlling the use and misuse of alcohol was not a concern in this legislation. As indicated by the object in s 5(d), it was. That object was given considerable emphasis in the second reading speech.[3] But it was the last of four objects and the legislation did not contain harm minimisation objects as such. It was this legislation which the *Liquor Control Reform Act 1997* reformed.

25 Under the 1987 Act, a Liquor Licensing Commission was established (s 8). Licensees could apply to the commission for a grant of extended trading hours (s 64) or a variation of their licence (s 65). There was a procedure for the notification (s 70), objection by the police (ss 71 and 75); and advertisement (s 72) of such applications, and for representations as to community interest (s 75). The chief executive officer of the commission was required to make a recommendation as to the community interest (s 76). With contested applications, the function of the commission was to consider issues of compliance, the recommendation of the chief executive officer and whether 'the grant of the application would be in the interest of the community'

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3 Ibid, 1588.

(ss 79 and 78(b)). Obviously the 'interest of the community' is a different concept to harm minimisation.

26 Under this regime and from 1992 to 1997, the hotel obtained a gradual expansion of its trading hours, culminating in 24 hour trading. As shown in the evidence before the tribunal, that conformed to the general pattern at the time of increasing numbers of licensed premises and premises with extended hours of trading.

27 I have already noted the decision to grant 24 hours trading for the hotel was made by the Liquor Licensing Commission in 1997 on the recommendation of its chief executive officer. Although the tribunal relied on this decision and recommendation, both must be seen in the context of the objects of the legislation applying at the time. Harm minimisation was not an object of the 1987 Act, as it is of the 1998 Act (s 4(a)). There was no express requirement, as there now is (s 4(2)), for the power to determine applications for variations of a licence to be exercised in accordance with that object. As we will see, the current legislation has a different emphasis which was not reflected in the decision of the tribunal.

28 That brings me to the *Liquor Control Reform Act 1998*, which has itself been much amended.

Liquor Control Reform Act (as enacted in 1998)

29 The rapid growth of the liquor industry under the 1987 Act generated certain concerns which led to the reform of the regulatory regime by the *Liquor Control Reform Act 1998*. As described in the second reading speech of the responsible minister, those concerns were:[4]

> The Victorian government and the community have a concern about the level of underage drinking, violent and criminal behaviour as a consequence of drunkenness, drink-driving and any adverse effect on the amenity of communities in proximity to licensed premises.
>
> …

4 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 October 1998, 452 (Dennis Napthine, Minister for Youth and Community Services).

> Minimisation of harm resulting from the sale and supply of liquor is to be the principal purpose of the Act. New structural arrangements are to be implemented for the delivery of liquor licensing services.

30 The minister referred to the review of the legislation which had been carried out against national competition policy principles in 1998, and also to the challenge of minimising the harm which resulted from the misuse and abuse of alcohol with 'meeting the expectations of the community regarding availability and appropriate opportunities for consumption of alcohol'.[5]

31 As was documented in the review report,[6] the national competition policy, to which the Victorian government was committed,[7] required all Australian governments to review legislation and regulations which might inhibit competition.[8] But appropriate regulation of the industry in the community interest was seen to be consistent with that policy, and the review recommended the principal object of the legislation should be the minimisation of harm.[9]

32 The harm minimisation object which we now see in s 4(1) of the *Liquor Control Reform Act 1998* was introduced at this time. Of that object, the minister said:[10]

> The liquor reform package is underpinned by current research related to effective control of the sale of liquor in a harm-minimisation context and removes regulatory requirements upon licensees that are not directed to that purpose. The objects of the act are to be amended to identify harm minimisation as the prime purpose of the act. Licensing decisions will be made in that context.

The amenity object was also introduced at this time. Here is what the minister said about that object:[11]

> With the maintenance of the amenity of community life also being included in the objects of the act, residents, Victoria Police and councils/shires will have significant input to licensing decisions. No licence application will be able to be granted unless an appropriate planning permission is in place.

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5 Ibid.
6 Victoria, *Report of Liquor Control Act 1998*, Final Report (April 1998).
7 Ibid, 10.
8 Ibid.
9 Ibid, 9.
10 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 October 1998, 454 (Dennis Napthine, Minister for Youth and Community Services).
11 Ibid.

33 The reform legislation created the position of director for determining licensing applications (s 149), the panel for making recommendations on applications (s 157) and the arrangements, which are still in force, for administering and determining applications, contested and uncontested (Divisions 4-6 of Part 2).

34 Before describing the provisions in detail, I will refer to a number of amending enactments which were passed between 1998 and the present, all of which are of assistance in identifying the proper application of the harm minimisation object in the regulatory scheme.

Liquor Control Reform (Packaged Liquor Licences) Act 2002.

35 To use the words of the responsible minister in the second reading speech, the amendments made by the *Liquor Control Reform (Packaged Liquor Licences) Act 2002*, as relevant to the present case,[12] reflected the government's view that the 'community is entitled to have a genuine opportunity to scrutinise packaged liquor licence applications'.[13] To enhance the capacity of the community to make input into the process, three key amendments were made to the *Liquor Control Reform Act.*

36 First, the principal Act had a harm minimisation object in s 4(1). But this was not a ground on which a person could object to a licence being granted, varied or relocated (old s 38(1)). The amending Act included as a ground of objection whether the grant or refusal 'would be conducive to or encourage the misuse of alcohol' (new s 38(1A). The objection rights of local councils were also expanded to include that ground (new s 40(1A)).

37 Second, the principal Act gave the director discretion to order the applicant to advertise the application (old s 35(1)). The amending Act made this mandatory (new s 35(1)).

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12 The amending Act also began the process of removing the anti-competitive 8% rule with respect to the market share of licensees in particular areas: see new Division 3B of Part 2.

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2002, 1651 (John Brumby, Minister for State and Regional Development).

38 Third, it was a ground of objection under the principal Act, as it still is, that the licence 'would detract from or be detrimental to the amenity' of the local area (s 38(1)). But the concept of amenity was not defined. The amending Act introduced a definition of that concept.

Liquor Control Reform (Underage Drinking and Enhanced Enforcement) Act 2004

39 The purpose of the *Liquor Control Reform (Underage Drinking and Enhanced Enforcement) Act 2004* was (among other things) to make changes concerning underage drinking, to enhance the enforcement powers of the police force, to increase penalties for offences and to widen the categories of infringement notice offences (s 1(a)(i)-(iii)). The provisions which were enacted to achieve these purposes included widening the offences to cover allowing underage persons to be present in premises without an accompanying adult (new ss 120(1)(b) and 123(1)(c)(v)).

40 In the second reading speech, the responsible minister said:[14]

> Victoria's liquor laws offer a high degree of flexibility in terms of how, when and where liquor may be supplied by licensees. Whilst we should be proud of our diverse range of restaurants, bars, hotels and wineries, it is important that the increasing availability of liquor is matched by a continuing commitment to responsible serving practices by licensees and sensible consumption by the community.
>
> Alcohol is consumed by more Australians than any other drug, and whilst we recognise that moderate alcohol consumption may have some health and social benefits, the increasing abuse and misuse of alcohol is a concern to all members of the community.

The minister went on to refer to the actions which the government was taking to reduce the harm caused by alcohol and a 'three-year Victorian alcohol action plan being developed as a whole-of-government response to alcohol issues'.[15] As we will see, that plan was part of the evidence before the tribunal and led to further amendments of the *Liquor Control Reform Act*.

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14 Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2004, 1354 (Theo Theophanous, Minister for Energy Industries).

15 Ibid.

Liquor Control Reform (Amendment) Act 2006

41 The *Liquor Control Reform (Amendment) Act 2006* introduced a definition of 'state of intoxication' (new s 3AB(1)) and provisions enabling the director to impose late hour declarations in respect of licensed premises in specified areas or localities (new Division 7A of Part 2).

42 In the second reading speech, the responsible minister said:[16]

> The liquor industry in Victoria generates substantial economic and social benefits to the state, and the number and diversity of licensed outlets enhances Victoria's reputation as a lively and cosmopolitan place to live. However, the regulatory framework must balance the need to provide the community with reasonable access to alcohol whilst at the same time minimising the adverse amenity and social impacts that can flow from its misuse. In order to fulfil the above objectives, the bill before the house will improve the capacity of the regulatory framework to enhance amenity and community safety.

Liquor Control Reform Amendment Act 2007

43 The purpose of the *Liquor Control Reform Amendment Act 2007* was (among other things) to enable persons to be excluded from certain premises in areas in specified circumstances and to strengthen liquor licensing penalties and enforcement powers (s 1(a) and (b)).

44 The provisions which were enacted to achieve these objectives included empowering the police to issue a banning notice to exclude a person from a designated area (new s 148B(1)) and a court to make an exclusion order excluding a person from a designated area or premises (new s 148I). The director was given the power, by published order, to designate the relevant areas and provisions were enacted for enforcement of banning notices (new s 148F) and exclusion orders (new s 148J). Liquor accord provisions were also enacted. These enabled two or more licensees to enter into an agreement in writing with the director for the purpose of minimising harm arising from the misuse and abuse of alcohol (new s 146A, including by ceasing to supply liquor or allowing the consumption of liquor at their premises (new s 146B).

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16 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2194 (Rob Hulls, Attorney-General).

Liquor Control Reform Amendment (Enforcement) Act 2009

45 The evidence before the tribunal was that, in November 2007, the Premier established a Ministerial Taskforce on Alcohol and Public Safety to lead the development of an action plan to respond to public safety issues arising out of the misuse of alcohol. The result was the Victorian Alcohol Action Plan 2008-2013: Restoring the Balance.[17] As that action plan shows, the steps proposed reflected a National Alcohol Strategy to which other Australian governments were committed[18] and a national concern about alcohol abuse which was considered as part of the Council of Australian Governments process.[19] The sale of liquor late at night for off-premises consumption was expressed to be a significant issue in the plan. It recommended a freeze, which was later implemented prospectively, in issuing late-night liquor licences in certain local government areas, including the Melbourne CBD.[20]

46 The second reading speech for the *Liquor Control Reform Amendment (Enforcement) Act 2009* said the amendments reflected the policies announced by the government in the plan. In the proceedings in the tribunal, the director relied on this plan as being relevant to the exercise of the tribunal's regulatory discretion. The tribunal referred to it in its reasons for decision. The second reading speech described these amendments as being

> one aspect of a suite of measures that the government has put in place, and will continue to develop, to promote the appropriate and responsible service and consumption of alcohol and to reduce the negative consequences of excessive alcohol use.[21]

47 The amendments gave the director a short-term licence suspension power (new s 96B), authorised persons a right of entry to licensed premises (new s 129) and various powers of inspection (new s 130) and enhanced the director's powers of

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17 Victoria (May 2008).
18 Ibid 5.
19 Ibid 17.
20 Ibid 35.
21 Victoria, *Parliamentary Debates*, Legislative Council, 26 February 2009, 1007 (John Madden, Minister for Planning).

investigation and inquiry (new s 154). A compliance inspectorate was established (new Division 5 of Part 9).

Liquor Control Reform Amendment (Licensing) Act 2009

48 The evidence before the tribunal was that, in 2008, the government commissioned the Allen Consulting Group to estimate the social costs of alcohol-related harm in Victoria and to review the evidence linking that harm to the operation of licensed premises.[22] The report found 'a substantial body of empirical research identifies operating hours as a key determinant of alcohol-related harm'.[23] It recommended operating hours as a factor to be considered within a risk-based framework of licensing.[24] This recommendation was implemented in the *Liquor Control Reform Amendment (Licensing) Act 2009*. Among other things, its purposes were to strengthen the objects of the *Liquor Control Reform Act* in relation to harm minimisation and the responsible consumption of alcohol, to create three new licence categories (including late night licences) and to provide a new risk-based structure for licensing fees (s 1(a)(i), (ii) and (vi)).

49 In the second reading speech, the responsible minister described the evolution of the liquor industry in Victoria from the 1980s (when the *Liquor Control Act 1987* was enacted) to the present (where the *Liquor Control Reform Act 1998* (as amended) is in force), and the reasons for the evolving legislative response:[25]

> The liquor industry has dramatically changed in the last 20 years. In the 1980s the Nieuwenhuysen report recommended increasing competition in the liquor industry. The vision for Melbourne was for an entirely new system to encourage growth in European cafe-style outlets.
>
> In 2009, we are a city of small bars and restaurants attracting tourists from all over the world. Our chefs are world class and our wine is internationally recognised. What we did not account for at the time of the Nieuwenhuysen report was the increase in large nightclubs and bars that accompanied the liberalisation of liquor laws.

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22 Allen Consulting Group, *Alcohol-related Harm and the Operation of Licensed Premises* (Melbourne, 2009).
23 Ibid 23.
24 Ibid.
25 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2009, 2656 (Tony Robinson, Minister for Consumer Affairs).

> Recently we have seen community outrage over horrific incidents of late-night violence in and around licensed venues. The Brumby government is taking action to recast the liquor licensing system to ensure that bars and nightclubs that are open late and have large numbers of patrons contribute more to the cost of stronger regulation and enforcement of the liquor industry necessary to help reduce alcohol-related violence and contribute to a safer community. We are doing this without penalising the sophisticated food and cafe culture that has emerged in Melbourne by recognising that these venues present less risk to the community.

50 The minister also referred to the Victorian alcohol action plan and its emphasis on reducing:[26]

> (a) risky drinking and its impact on families and young people;
>
> (b) the consequences of risky drinking on health, productivity and public safety; and
>
> (c) the impact of alcohol-fuelled violence and antisocial behaviour on public safety.

51 Of the harm minimisation objects of the legislation, the minister referred to the existing elements and to the addition by amendment of the further element of encouraging the responsible consumption of alcohol (new s 1(a)(iv)):[27]

> in order to better support the aims of the Victorian alcohol action plan, the new risk-based fee model, and to reflect the community's expectations, we have clearly underscored that the harm minimisation object of the act extends to encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community.

52 The minister emphasised the importance of the declaration of intention (new s 4(2)) that the legislation be administered consistently with its harm minimisation objects:[28]

> The bill further reinforces the harm minimisation objects of the act by providing that it is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by the act shall be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol. This amendment is intended to reinforce the priority of harm minimisation in the act and to strengthen the way in which the objects of the act are applied.

53 The minister said the new risk-based fee structure reflected a substantial body of evidence connecting a higher risk of alcohol-related harm with premises having

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26 Ibid, 2657.
27 Ibid.
28 Ibid.

certain characteristics, including late-night opening hours and packaged liquor outlets:[29]

> The evidence shows that the later a venue trades, the more risk of alcohol-related harm. It also shows that a licensee's compliance history is an indicator of future behaviour. Licensees with a good compliance history are generally regarded as lower risk than licensees with a poor compliance history. The risk factors incorporated into the model reflect the evidence and were consistently identified by stakeholders during consultation - how late a venue trades and if it is caught serving intoxicated persons or minors or allowing drunken or disorderly persons or minors on a licensed premises, that is, its compliance history.
>
> Late opening hours and poor compliance history have been shown to increase the risk of alcohol-related harm, thus they were included as risk factors in the model.
>
> Additionally, there is concern in the community regarding the contribution of packaged liquor outlets to alcohol-related harm. More than three-quarters of alcohol sales are from packaged liquor outlets. Outlets that have extended trading hours are more likely to be associated with greater alcohol-related harm resulting from pre-loading, unsupervised and under-age consumption.

54 That then was the legislative route by which the *Liquor Control Reform Act* was enacted in 1998 and amended on several occasion since. I can now turn to the terms of that Act as it governed the application for review which was determined by the tribunal.

***Liquor Control Reform Act 1998* (as currently in force)**

55 By s 1, the purpose of the Act was 'to reform the law relating to the supply and consumption of liquor'. The objects of the Act are of critical importance in the present case (s 4(1)):

> (1) The objects of this Act are—
>
> (a) to contribute to minimising harm arising from the misuse and abuse of alcohol, including by—
>
> (i) providing adequate controls over the supply and consumption of liquor; and
>
> (ii) ensuring as far as practicable that the supply of liquor contributes to, and does not detract from, the amenity of community life; and

[29] Ibid, 2656.

(iii) restricting the supply of certain other alcoholic products; and

(iv) encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and

(b) to facilitate the development of a diversity of licensed facilities reflecting community expectations; and

(c) to contribute to the responsible development of the liquor and licensed hospitality industries; and

(d) to regulate licensed premises that provide sexually explicit entertainment.

56 The harm minimisation object is the first of the four objects. Its importance is underscored by the subsequent enactment of s 4(2):

> It is the intention of Parliament that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act must be exercised and performed with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.

As we have seen, when the harm minimisation object in s 4(1)(a) was introduced, it was described in the second reading speech as being the 'prime purpose of the Act'.[30] When the declaration of intention in s 4(2) was enacted, it was described as 'intended to reinforce the priority of harm minimisation in the Act'.[31] The language of the legislation bears those descriptions out. Without detracting from the importance of the other objects, it is clear that harm minimisation is the primary object of the reform legislation.

57 The harm minimisation object in s 4(1)(a)(ii) refers to the 'amenity of community life'. Other provisions refer to amenity – for example, the objection provisions in s 38 (see below). This is the definition of 'amenity' in s 3A, which you will see is broad and not exhaustive:

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30 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 October 1998, 454 (Dennis Napthine, Minister for Youth and Community Services).

31 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2009, 2657 (Tony Robinson, Minister for Consumer Affairs).

(1) For the purposes of this Act, the amenity of an area is the quality that the area has of being pleasant and agreeable.

(2) Factors that may be taken into account in determining whether the grant, variation or relocation of a licence would detract from or be detrimental to the amenity of an area include—

(a) the presence or absence of parking facilities;

(b) traffic movement and density;

(c) noise levels;

(d) the possibility of nuisance or vandalism;

(e) the harmony and coherence of the environment;

(f) any other prescribed matters.

(3) Nothing in subsection (2) is intended to limit the definition of amenity.

58 The licensing inspector made the application for variation of the hotel's licence under the provisions which were introduced in the 1998 Act. These provisions have not been materially amended and are still in force.

59 Section 29(1)(a) allows a licensing inspector to make an application for variation of a licence. By s 29(2)(a), the application may relate to a variation of the times outside ordinary trading hours[32] in which liquor may be applied. Section 30(a) requires the director to give a copy of the application to the licensee who, by s 30(b), may object by notice in writing given to the director, which the hotel in the present case did.

60 Different procedures are then prescribed for dealing with uncontested applications as against contested applications. As the present application was contested, I will refer only to those procedures.

61 There are provisions for the public display (s 34) and advertising (s 35) of licence applications. The director has the discretion to direct the applicant to notify particular persons (s 36). The director can issue guidelines with respect to the display, advertising and notification requirements (s 37).

62 The objection provisions allow the licensee (s 30(b)), any person (s 38(1)), the police (s 39(1)), the local council (s 40(1)) and a licensing inspector (s 41(1)) to object to the

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32 Section 3(3) defines "ordinary trading hours" to exclude trading after 11 pm until certain times the next day.

grant or variation of a licence. By the definition in s 3(1), a 'contested application' is one to which any such objection has been received within the prescribed time.

63 The importance of the concepts of amenity and harm minimisation is reflected in the objection provisions. For example, these are the grounds in s 38(1) and (1A) on which any person can object to an application:

> (1) Any person may object to the grant, variation or relocation of a licence on the ground that the grant, variation or relocation would detract from or be detrimental to the amenity of the area in which the licensed premises or proposed licensed premises are situated.
>
> (1A) In addition to the ground referred to in subsection (1), any person may object to the grant, variation or relocation of a packaged liquor licence or late night (packaged liquor) licence on the ground that the grant, variation or relocation would be conducive to or encourage the misuse or abuse of alcohol.

64 Reflecting the national competition principles which informed the reform of the legislation, market protection considerations cannot be a ground of objection. Here, for example, is s 38(3):[33]

> (3) None of the following is a valid reason for an objection under this section—
>
> (a) that the business carried on under the licence would or would not be successful;
>
> (b) that the business of another licensee or permittee (including the objector) may be adversely affected by the grant, variation or relocation;
>
> (c) that there is insufficient need or demand to justify the grant, variation or relocation.

65 Section 45 requires the director to refer a contested application to a panel for consideration and report. I will deal with the procedures that apply to the panel in detail later. It is sufficient here to say that, after consideration of the application and giving the applicant and each objector a reasonable opportunity to be heard (s 46(1)), the panel must report its findings to the director (s 46(3)). In its report, which must be supported by reasons (s 46(5)), the panel (s 46(4)):

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[33] See also, for example, ss 40(3) and 40(4).

(a) must make a recommendation as to whether or not the application should be granted; and

(b) may make any other recommendations it thinks fit concerning the application.

66 The director is required by s 47(1) to grant or refuse a contested application, but only 'after giving full consideration to the recommendations of the Panel under s 46(4)'. It is an issue in the appeal whether the tribunal complied with this requirement.

67 Under s 47(2), the director may grant or refuse a contested application 'on any of the grounds set out in s 44(2) and s 44(3) applies accordingly'. Only s 44(2)(b) is relevant in this case:

(2) The Director may refuse to grant an uncontested application on any of the following grounds—

…

(b) in any case—

(i) that the granting of the application would detract from or be detrimental to the amenity of the area in which the premises to which the application relates are situated;

(ii) that the granting of the application would be conducive to or encourage the misuse or abuse of alcohol;

(iii) if the applicant or proposed transferee is a natural person—that the applicant or proposed transferee does not have an adequate knowledge of this Act;

(iv) if the applicant or proposed transferee is a body corporate—that no director of the applicant or proposed transferee has an adequate knowledge of this Act;

(v) that the application has not been made, displayed or advertised in accordance with this Act.

It is an issue in the appeal whether a variation application by a licensing inspector involving the reduction of the hours of trading of the premises is governed by s 44(2)(b) or s 4(1) and (2).

68 The risk-based fee structure to which I referred above was introduced by way of amendment to the regulation making powers in s 180. As amended, those powers now include the power to make regulations with respect to fees, which (s 180(4)):

> (a) may provide for different fees for different classes of application;
>
> (b) may provide for fees that vary according to time, including but not limited to –
>
> (i) fees that vary according to the trading hours for which a licensee is authorised to supply liquor …

69 That is the governing legislation. I will analyse how it operates in the context of determining whether the tribunal committed errors of law, as contended by the director. It is first necessary to consider the decision of the tribunal from which the appeal is brought.

TRIBUNAL'S DECISION TO SET ASIDE DIRECTOR'S DECISION

70 After a substantial hearing, the tribunal (constituted by Robert Davis, a senior member) upheld the hotel's application and set aside the decision of the director, for which it gave reasons for decision.[34]

71 In those reasons, the tribunal referred to the recommendation and reasons of the panel, the key parts of which it set out. I will deal later with this aspect of the tribunal decision, as I will its findings in relation to the profitability and economic viability of the hotel and the industry.

72 The tribunal described the history of the trading hours of the hotel, the licensed premises and their management by the licensee. It identified, without analysing, the relevant statutory provisions, including the current objects.

73 Five other premises in inner Melbourne were found to be selling packaged liquor after midnight, but only the hotel in the Melbourne CBD.

74 On the nature of the application, the director had submitted it was for a licence variation under s 29 and not a disciplinary proceeding brought under ss 94 or 95 of

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34 [2010] VCAT 277.

the Act. Section 29 did not impose any preconditions and the discretion was unfettered except by the need to promote the objects of the Act. There was no requirement to prove wrongdoing on the part of the licensee.

75 The tribunal correctly accepted those submissions. Therefore, stated the tribunal, the question was 'whether the grant of the application would be consistent with the objects of the Act and would strike an appropriate balance between the need to minimise harm arising from the misuse and abuse of alcohol and the interests in developing a diversity of licensed facilities reflecting the community expectations'. As will be seen, the main issue in the appeal is whether the tribunal went beyond stating and actually addressed that question.

76 On the director's evidence, anti-social conduct, harmful behaviour (particularly by young people) and alcohol abuse was occurring in the locality of the hotel and was directly or indirectly connected with the sale of alcohol from the hotel after 11:00 pm. The tribunal referred to the evidence of some 21 witnesses who referred to some 50 incidents, of which it gave a summary.

77 The tribunal noted the evidence of the police that the area around the hotel was a street violence 'hot spot', but found the incidents were not necessarily caused by, or shown to relate to, the hotel. However, it did acknowledge the director's submission that the hotel might not succeed in the review application even if it had tried to minimise the harm which late night trading was causing.

78 After noting the evidence of Pier de Carlo, the Director of the Policy, Planning and Strategy Branch of the Mental Health and Drugs Division of the Department of Health, about the government's attempts to reduce the problems of alcohol and improve the general amenity of the area, and the link between operating hours and harmful consumption of packaged alcohol, the tribunal referred to the hotel's submission that it had done all it could to minimise that harm, including the introduction of a code of conduct, of which evidence was given by a retired licensing inspector.

79 Noting the hotel had been kept under close surveillance by the director and the police for some two years until November 2008, the tribunal analysed the evidence of the incidents, one by one. The focus of that analysis was on whether the hotel was responsible for the misbehaviour which had occurred. The hotel had made painstaking submissions to the tribunal about the individual incidents of street misbehaviour which had allegedly occurred. Without disputing every allegation, it submitted it was not responsible for those incidents. The tribunal accepted those submissions.

80 Responding to the evidence of people consuming alcohol in the streets, the tribunal accepted this was a breach of the local laws of Melbourne City Council. Without explaining why it was relevant, it observed that this law did not apply to the immediate north of the hotel. The evidence was that 182 infringement notices had been issued in three years. It said this was 'very few'. If consumption of alcohol in the streets was being taken seriously, the tribunal found, the police would have issued infringement notices against all offenders. It also noted that, although the hotel had warned people, it had no way of preventing people from breaching that law. It found that '[d]rinking in the street does not necessarily amount to harmful effects of alcohol or even detriment to the community. At is highest, it is a breach of a local law.' If street drinking was *not necessarily* harmful or detrimental to amenity, the tribunal did not identify the extent to which it actually was harmful or detrimental.

81 The tribunal accepted the hotel's submission that only nine of the incidents which had occurred in the surveillance period could conceivably justify ending late night trading at the bottle shop. As to those incidents, the tribunal found those which were allegedly linked to the operation of the bottle shop did not 'appear to be very serious'. It held that, despite the extensive two-year surveillance, only minor breaches of the law had been established. It found the hotel was 'taking its responsibility as a liquor supplier very seriously and had done almost all that could be expected of it'.

82 As I read the tribunal's reasons for decision, it did not reject the director's submissions that anti-social behaviour was occurring in the streets near the hotel, being 'street violence, domestic violence, hospital admissions, vandalism and property damage, theft, public drinking, groups of people congregating and arguing in the streets and vomiting and urinating in public places'. Rather, it found there was 'little or nothing to link the conduct of the bottle shop' to these vices, save perhaps for street drinking. It found the behaviour was more likely to be caused by the many other licensed premises and nightclubs which were nearby.

83 The director made a number of submissions about how the licence variation would serve the harm minimisation objects of the *Liquor Control Reform Act*, which the tribunal addressed. For example, the director submitted the variation would reduce to nil the number of bottle shops trading late at night and assist in implementing the government's harm minimisation strategy.

84 In that connection, the director relied on the government's 2006 policy statement[35] that bottle shops should not be allowed to trade past 12:00 midnight. The tribunal noted this statement was expressed not to affect existing licences and operated prospectively and correctly gave it no weight. That has not been challenged.

85 As I have noted, the tribunal referred to and set out the harm minimisation object of *Liquor Control Reform Act.* It acknowledged the object applied and 'must be given consideration in any balancing exercise done in relation to this application'. In the tribunal's view, the object required a balancing of facilitation of the development of a diversity of licensed facilities reflecting community expectations, on the one hand, with minimising harm arising from the misuse and abuse of alcohol on the other. The main issue in this appeal is not whether that view was incorrect, but whether that was what the tribunal did.

86 The director had submitted the licence variation would contribute to harm minimisation because it would end late night trading at the only hotel in the

35 Victorian Government Gazette, S294, 27 October 2006.

Melbourne CBD with a bottle shop supported by that kind of licence. The tribunal rejected those submissions because they were 'not supported by the evidence'. I take the tribunal here to mean the hotel was not responsible for street misbehaviour and drinking problems, as it here referred again to the hotel's submissions on this subject, and that is what it had earlier found in reference to those submissions.

87 The tribunal referred to *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board*.[36] In that case, the High Court held a hotel licensee had no tortious responsibility for injuries caused by a drunken patron to a third party. The tribunal got from the decision the general proposition, which it treated as being relevant to the application for review, that responsibility was 'more fairly to be placed on the drinker than the seller of the drink'.[37] In citing that proposition, the tribunal did not deny, but expressly accepted, that sellers had responsibilities. However, it held that it would be wrong to blame the seller for alcohol misuse by the consumer unless the seller was able to discover or actually knew that this would occur. In the present case, 'there was little or no evidence that the applicant was aware that any alcohol purchased from its bottle shop would be misused by the purchaser'. The tribunal did not advert to the distinction between an individual being responsible for a private wrong in tort and a tribunal being responsible for the exercise of a regulatory power in the public interest.

88 There was evidence about a number of undesirable drinking practices, including 'pre-loading' (consuming alcohol in the street before going to a nightclub, to avoid the high prices charged inside the nightclub), 'side-loading' (leaving the nightclub temporarily to do so) and 'back-loading' (leaving the nightclub permanently to do so). Consistently with its focus on whether the hotel was to blame, it did not accept the hotel knew people were drinking in the streets for these purposes. Further, drinking in the street did not 'amount to harmful effects of alcohol or even detriment to the community. At its highest, it is a breach of a local law'. The tribunal found

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36 [2009] HCA 47.

37 Citing from [54] of the plurality judgment.

pre-loading would have occurred by the time people entered nightclubs at 11:00 pm or 12:00 midnight, and other bottle shops were open at this time. There was 'little evidence to show the extent of that practice in relation to the [hotel's] bottle shop'.

89 Under the legislation, the tribunal was required to consider the amenity effects of the variation sought by the director. It found that late night trading (from 11:00 pm until 7:00 am the following morning – the existing trading hours of the bottle shop) was 'more beneficial to the amenity of the area than any harm that occurs from its extended hours'. It was in that connection that the tribunal endorsed the continuing relevance of the reasons given in 1997 for extending the trading hours of the bottle shop under the *Liquor Control Act 1987*. As we have seen, according to the recommendation of the chief executive officer of the then commission, these reasons included that extending the hours would enable the bottle shop to provide an enhanced service to patrons and thus respond to their needs. In endorsing this reasoning, the tribunal did not refer to the changed emphasis in the *Liquor Control Reform Act*.

90 The conclusion of the tribunal was that, 'in balancing the harm or detriment with the benefits of late night trading,' the hotel should be allowed to continue with late night trading in the bottle shop. It set aside the decision of the director accordingly. From that decision of the tribunal the director brings this appeal.

GROUNDS OF APPEAL

91 Pursuant to leave granted by this court, the appeal was brought under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* on 'a question of law'.

92 The notice of appeal sets out the questions of law and grounds of appeal. I will specify here the provisions of the *Liquor Control Act 1987* which were relied on, but these will be discussed later.

93 The director raises two questions of law. The first concerns the proper interpretation of the objects provisions in s 4(1) and (2) of the *Liquor Control Reform Act*. The

question is whether those provisions require a licence variation application under s 29 to be guided by the harm minimisation objects in s 4(1) and the direction in s 4(2), having regard to the local, social, demographic and geographic circumstances of the licensed premises. The second question concerns the way in which the tribunal discharged its review jurisdiction under the *Victorian Civil and Administrative Tribunal Act*. The questions are whether the tribunal failed properly to discharge that jurisdiction by limiting its inquiry to those alcohol-related harms and risks for which the hotel was responsible, failed to address the broader harm minimisation objects of the *Liquor Control Reform Act*, failed to give full consideration to the recommendation of the panel and made findings of fact for which there was no evidence.

94 With respect to those questions, the notice of appeal specifies these grounds of appeal:

> 1. The Tribunal asked itself a wrong question or identified a wrong issue, took into account irrelevant considerations and/or failed to take into account relevant considerations.
>
> 1.1 The Tribunal misconstrued or misapplied ss 4, 44 and 47 of the Act.
>
> 1.2 The Tribunal erred by asking, or asking only:
>
> (a) whether harm arising from the misuse and abuse of alcohol (alcohol-related harm) or detriment to the amenity of the area was directly and casually linked to the First Respondent's supply of packaged liquor from its licensed premises after 11.00 pm; and
>
> (b) whether the First Respondent was 'responsible' or 'to blame' for incidents involving the misuse and abuse of alcohol and other anti-social conduct having an impact on the amenity of the area.
>
> 1.3 The Tribunal should have asked whether the objects identified in s 4(1) of the Act and the matters identified in s 4(2) of the Act would be advanced by a variation of the First Respondent's licence so as to reduce the trading hours of the bottle shop to no later than 11.00 pm, having regard to the local, social, demographic and geographic circumstances of the licensed premises, including the area in which those premises are situated; and, in particular, the Tribunal:

(a) should have asked whether the supply of packaged liquor from the First Respondent's licensed premises after 11.00 pm might contribute to alcohol-related harm, detract from the amenity of community life, discourage a culture of responsible consumption of alcohol, or increase risky drinking and its impact on the community;

(b) should have had due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.

1.4 The Tribunal failed to give 'full consideration' to the recommendations of the Panel as required by s 47(1) of the Act.

2. The Tribunal made findings for which there was no evidence, or that were not open on the evidence, or that were unreasonable or perverse, namely:

2.1 the Tribunal's findings (at paragraphs [75]-[80]) that the variation of the First Respondent's licence would have a serious detrimental effect on the economic viability of many liquor outlets in Victoria, and would therefore be detrimental to the objects set out in s 4(1)(b) and (c) of the Act; and

2.2 the Tribunal's findings (at paragraphs [67]-[70] and [80]) that the variation of the First Respondent's licence would have a serious effect on the economic viability of and ultimate profit from the Exford Hotel.

95 On these grounds, the director seeks orders from the court setting aside the orders of the tribunal and remitting the review of the variation application back to the tribunal, differently constituted, for determination according to law.

DID THE TRIBUNAL MAKE AN ERROR OF LAW?

Applicable provisions

96 It is first necessary to identify the provisions which applied to the determination of the application before the tribunal.

97 The tribunal was determining (on review) an application for variation by a licensing inspector (s 29(1)(b)). Being contested, s 47 applied. As the tribunal refused the application, the issue I must determine is whether s 47(2) brought s 44(2) into operation. The tribunal did not apply s 44(2). It applied only s 4(1) and (2).

98 The director submitted s 47(2) of the *Liquor Control Reform Act* required the tribunal to have regard to the matters set out in s 44(2)(b), especially sub-paragraphs (i) and (ii), and in a way which made due allowance for the fact that the application was a variation application by a licensing inspector, and one which was for a reduction, and not for an increase, in the trading hours of the licensee. Further, the tribunal was required to consider and give effect to the objects in s 4(1) and apply the declaration of intention in s 4(2).

99 The hotel submitted the director (and the tribunal) must determine any contested application under s 29 by considering the objects in s 4(1) in the manner specified in s 4(2). It did not agree with the director's submission that variation applications proposing a reduction in trading hours were governed by s 44(2)(b) together with and s 4(1) and (2). In the hotel's submission, s 44(2)(b) did not refer to refusing a variation application. While conceding there was a power of variation, the hotel submitted that applications such as the present were governed entirely by the objects provision in s 4(1). It may be doubted that s 29 was the source of the variation power, because it referred to making an application. Section 90 (which concerns disciplinary cases) may be the appropriate provision, although the hotel was not taking that point in this case. The tribunal decided the case by reference to the objects in s 4(1), and that was the correct approach to adopt. It did not, and was not required, to apply s 44(2)(b). Generally, the regulatory purposes of the legislation did not appear generously to support variation of licences to reduce trading hours.

100 As we have seen, s 47(2)(b) allows the tribunal to refuse contested applications on the grounds set out in s 44(2). On its face, s 44(2) applies to all refusals of uncontested applications, including variation applications. It allows the director to 'refuse to grant an uncontested application' on the specified grounds. There is no warrant for reading down the plain language of this provision so as to remove from its scope variation applications like the one made by the inspector in the present case. Section 47(2) brings these grounds into operation when refusing all contested applications, including that variation application.

101 The hotel's submission that s 44(2) did not apply to refusing the variation application of the licensing inspector was based on the language of the grounds specified in that provision. For example, s 44(2)(b)(i) specifies the ground that 'granting the application would detract from or be detrimental to the amenity' of the local area. The ground in s 44(2)(b)(ii) is that granting the application 'would be conducive to or encourage the misuse or abuse of alcohol.' In the submission of the hotel, those grounds are not apt to a refusal of an application by an inspector to vary a licence by reducing the trading hours of premises.

102 I do not accept those submissions. Depending on the factual circumstances, an application for variation involving the reduction of trading hours might involve the considerations in s 44(2)(b)(i) and (ii). For example, reducing trading hours might detract from the amenity of a local area (s 44(2)(b)(i)) and encourage the misuse or abuse of alcohol (s 44(2)(b)(ii)). Reducing trading hours might deprive the area of the full benefit of premises which help to make it 'pleasant and attractive' (see the definition of amenity in s 3A(1)) or of premises which operate more responsibly, and minimise harm more positively, than an unsatisfactory alternative to which consumers may be driven (s 44(2)(b)(ii)). The factual circumstances will be critical in this regard. The grounds express principles and considerations which are easily capable of being moulded so as to apply sensibly in different kinds of cases. I therefore conclude that ss 47(2) and 44(2) are capable of applying to the refusal of a variation application by an inspector to reduce the trading hours of premises.

103 In determining the variation application, the tribunal adopted the practical approach of applying s 4(1) and (2) and not ss 47(2) and 44(2). That was technically incorrect. However, in the circumstances of this case, and perhaps in most cases of this nature, it did not produce any actual error. That is because the legislative scheme makes clear the primary consideration in the determination of such applications is the objects provision in s 4(1), especially the harm minimisation object in s 4(1)(a), as supported by the declaration of intention in s 4(2). The considerations specified in the objects and declaration provisions are broader than and wholly subsume the

considerations specified in s 44(2). Properly applying those provisions would necessarily involve considering the matters in s 44(2). The reform legislation has always operated such that the primary consideration has been the objects provision. The later enactment of the declaration provision reinforces the operation of the legislation in that respect (see above) and puts the matter beyond any doubt.

104 If a proper consideration of the issues of amenity and the misuse and abuse of alcohol under s 4(1) and (2) is wholly sufficient for the purposes of s 44(2)(b)(i) and (ii), it is now necessary to determine whether the tribunal did properly consider s 4(1) and (2) (grounds 1.1–1.3 of the appeal). To commence that analysis, it is appropriate to begin with the tribunal's jurisprudence on that subject.

Tribunal misunderstood previous decisions of the tribunal

105 In considering the general harm minimisation evidence of Mr de Carlo and the reports of the Allen Consulting Group and Marsden Jacob Associates, the tribunal referred to previous authorities of the tribunal, especially *Nardi v Director of Liquor Licensing*.[38] From those authorities, the tribunal got the principle that 'it is difficult to place generalised reports … in a position where they can be relevant to site specific situations'. The decision in *Nardi*, it held, made clear 'that expert evidence in relation to harm minimisation is to be treated with considerable caution'.

106 There were competing submissions in the appeal about whether the tribunal had misapplied these authorities. The director submitted the tribunal had misunderstood them, while the hotel submitted they had been properly applied. As you will see, this is an important question.

107 Previous decisions of the tribunal comprise an important body of jurisprudence. It is not, however, bound by an internal doctrine of binding precedent. Correctly, the senior member in the present case did not see himself as being bound by the previous decisions of the tribunal. Each member of the tribunal must personally exercise their jurisdiction to determine the application or proceeding which is before

38 [2005] VCAT 323.

them. That function is not discharged by simply applying a previous decision without giving due consideration to the issues. However, where there is a properly considered decision on point, especially on a legal question and by a presidential member, considerations of consistency and predictability of decision-making and maintaining public confidence in the legal process come into play. In my view, those considerations are as important to the tribunal as they are to the courts[39] and can be taken into account without detracting from the flexibility and informality which is an indispensable feature of the operation of the tribunal as a tribunal. It is therefore permissible, if not desirable, for individual members to follow such a decision unless they are convinced that it is clearly wrong. In this case, I see the senior member's reference to '[t]he authorities' in that light.

108 The decision in *Nardi* followed the previous decisions in the tribunal in *Black and Cook v Liquor Licensing Victoria*[40] and *Avery v Director of Liquor Licensing Victoria*.[41]

109 *Black and Cook* was decided by the then president of the tribunal, Kellam J, and Sally Angell, a member. It was the first major decision of the tribunal after the *Liquor Control Reform Act* came into force.

110 The proceeding was an objectors' application for review of a decision by the director to grant a packaged liquor licence to a suburban supermarket. The licence was not for late night trading. The objectors contended granting the licence would cause a loss of amenity within the meaning of s 38(1). It was also argued that rejecting the application for the licence would better serve the harm minimisation objects in s 4(1).

111 Much of the evidence of the objectors was directed at supporting the business of an independent liquor store which was 200 metres from the supermarket. They contended this business contributed to community amenity in a positive way, whereas selling liquor from the supermarket would detract from that amenity.

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39 See *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204; *Tomasevic v Travaglini* (2007) 17 VR 100, [21]-[24].

40 Unreported, Kellam J, president, and Angell M, 14 February 2000.

41 [2001] VCAT 2455.

112 The objectors relied on evidence given by Dr Ann Roche, a director of the Queensland Alcohol and Drug Research and Education Centre. Among other things, Dr Roche referred to research on binge-drinking by young people and how this was exacerbated by the easy availability of alcohol at supermarkets, as compared with the more difficult availability at independent and family-run bottle shops. There was no evidence connecting these general propositions with the relevant neighbourhood or premises.

113 It is apparent from the careful analysis of the tribunal that it took Dr Roche's evidence into account. It accepted her evidence that underage drinking and youth binge-drinking were problems. But it did not accept granting the licence would exacerbate these problems.[42]

114 In reaching that conclusion, the tribunal said 'harm minimisation as an object of the Act cannot be relied upon in a general sense only to defeat *any* application for a liquor licence'[43] (emphasis added). If that were so, 'few licences of any description, other than for consumption of alcohol in cafes and restaurants [would] ever be granted in the future'.[44] The proposition which the tribunal was here stating was that, by reason of the new harm minimisation objects, all applications for a liquor licence were not liable to be defeated on the basis of general evidence alone, not that such evidence was irrelevant.

115 For general evidence, on its own, can be relevant to decision-making under the *Liquor Control Reform Act*. The question is, how relevant is such evidence and what importance it should be afforded in the given case. That depends on the tribunal's evaluative judgment about the harm which is occurring or likely to occur and the nature of the apprehended harm. Another way of expressing the tribunal's conclusion in *Black and Cook* is that, depending on the circumstances, general evidence which has no connection with the specific premises or location may

42 Unreported, Kellam J, president, and Angell M, 14 February 2000, 13-14.
43 Ibid, 14.
44 Ibid.

provide such weak evidence of harm or likelihood of harm that it does not weigh heavily in the balance with the other objects.

116 The tribunal also said local considerations could tip the harm minimisation balance in the other direction. It acknowledged that, in the future, packaged liquor licences might be rejected because 'the object of harm minimisation stands out as being poorly served by reason of particular local, social, demographic and geographic circumstances'.[45] The proposition which the tribunal was here accepting was that harm minimisation evidence which had an appropriate connection with those circumstances might weigh more heavily in the evaluative balance. Clearly, general harm minimisation evidence might have such a connection, depending on the other evidence. Applying that reasoning to the case before it, the tribunal held the harm minimisation object was 'not substantiated in terms of geographic positioning of the supermarket or by any other site-specific evidence or evidence other than of a general nature'.[46] That is, the other evidence of those circumstances had not supplied that connection.

117 With respect to determining a liquor licensing application, the decision in *Black and Cook* does not state, explicitly or implicitly, that it is always necessary to determine, by site-specific evidence, whether a licensee was or would be individually responsible for harm arising from the misuse or abuse of alcohol. To hold otherwise would be to confuse the disciplinary processes under Part 6 with the regulatory processes under Part 2 of the *Liquor Control Reform Act*. Nor did the tribunal reject the relevance of, or fail to consider, the general evidence which was led in that case. To have done that would have been to ignore relevant considerations and act inconsistently with the legislative standard as expressed in the objects. Rather, the tribunal stated it was necessary to determine whether granting the application would be 'contrary to the object of harm minimisation',[47] in the sense of whether 'the object of harm minimisation stands out as being poorly served by reason of

45 Ibid.
46 Ibid, 14-15.
47 Ibid.

particular local, social, demographic and geographic circumstances'.[48] Applying that approach, the tribunal considered the general and the specific evidence and made the findings to which I have referred. That, with respect, reflected the proper application of the harm minimisation object.

118 In *Avery v Director of Liquor Licensing Victoria*,[49] there were objections to granting a licence to sell packaged liquor in a supermarket which was in an established shopping village in an inner suburb but also near schools.

119 As part of the general evidence, the tribunal also heard from Dr Roche. She gave this helpful account of the origin of the harm minimisation concept, which seems to have stood the test of time:[50]

> 'Harm minimisation' is a concept which has been central to the National Drug Strategic Plan (1993-1997) which guided the development and implementation of alcohol and drug policies across Australia through the 1990s. The concept was defined as an approach that aims to reduce the adverse health, social and economic consequences of alcohol and other drugs by minimising or limiting the harms and hazards of drug use for both the community and the individual without necessarily eliminating use. … The approach includes preventing anticipated harm and reducing actual harm.

120 In the case before the tribunal, Dr Roche said the issue was whether 'there is sufficient evidence to indicate that the additional liquor licence … will either increase or decrease aggregate harm to the community, and to particularly vulnerable members of that community ie the young'.[51]

121 Of the need to balance different perspectives, Dr Roche said:[52]

> For many, the sale and supply of alcohol is purely a matter of economic and market forces and the product is seen as one which should be dealt with like any other commercial commodity. For others, the safety and availability of alcohol has wider implications and involves issues of health, safety and wellbeing of individuals and communities. The current challenge is to find an equitable and reasonable balance between these different perspectives.

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48 Ibid, 14.
49 [2001] VCAT 2455.
50 Ibid, [38].
51 Ibid, [40].
52 Ibid, [41].

122 Dr Roche referred to previous decisions in relation to alcohol availability, which she said 'have been strongly influenced by free market forces for the past decade'.[53] She said the inclusion of the harm minimisation object in the *Liquor Control Reform Act* reflected a more balanced position. That position presented

> for consideration of a broader range of social and community factors (and not purely economic factors) to protect vulnerable members of the community (eg the young) and preserve social integration and connectedness.[54]

123 The tribunal fully considered and generally accepted this evidence. On that and the scant site-specific evidence which was also presented, it found that granting the application would not encourage or promote underage drinking.[55] It followed *Black and Cook*[56] and upheld the decision of the director to grant the licence.[57] At its highest, found the tribunal, the evidence 'merely suggests the possibility or a general proposition that youth who abuse alcohol may purchase it from the [stores], as they might from any other retail outlet'.[58]

124 If, by that remark, the tribunal was intending to say that evidence of the possibility of harm occurring was not a relevant consideration, and that it was necessary positively to prove that harm was probable, then I must respectfully disagree. By the very nature of harm minimisation as an object, it encompasses the possibility as much as it does the probability of harm occurring. As my later discussion of the West Australian authorities will show, determining whether harm will occur involves making an informed prediction about the degree of likelihood or risk of harm occurring and the nature of that harm. Of course, there must be a proper evidentiary foundation for this prediction. The tribunal cannot make arbitrary or capricious decisions which are not founded on evidence. But the conclusion to be reached concerns the degree of likelihood of harm occurring, and the nature of that harm, and a likelihood which is not as high as probable still requires due

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53 Ibid, [51].
54 Ibid, [51].
55 Ibid, [104].
56 Unreported, Kellam J, president, and Angell M, 14 February 2000.
57 [2001] VCAT 2455, [108].
58 Ibid, [108].

consideration. The evaluative judgment on that account may be different depending on whether the risk of harm is little or great and whether the seriousness of the harm is slight or severe. A low risk of a severe harm may warrant significant consideration in the evaluative balance, depending on the circumstances. A low risk of a slight harm may be treated differently.

125 I do not think the tribunal was intending absolutely to deny the potential relevance of the possibility of harm occurring or to imply that it was necessary to find that harm was probable. As I read the reasons for decision of the tribunal, it was saying the possibility of young people abusing alcohol purchased from the premises was so low that, on balance, it was not a reason to refuse to grant the licence. Whether that was so was a matter for the tribunal to decide in the case before it, but there was no error of approach in that regard. That was not the approach adopted by the tribunal in the case under appeal here.

126 *Wicked Holdings Pty Ltd v Director, Liquor Licensing Victoria*[59] was a case in which the tribunal affirmed a decision by the director to refuse to grant a pre-retail licence under s 12 of the *Liquor Control Reform Act* in respect of a new alcohol product by the name 'Moo Joose'. The tribunal (Mary Urquhart, a deputy president) held that approving the licence would be conducive to or encourage the misuse and abuse of alcohol contrary to s 44(2)(b)(ii) and not serve the harm minimisation object in s 4(1)(a).[60]

127 As the product was not yet on the market, there was no site-specific evidence. But there was comprehensive general evidence (including from Dr Roche) about the problems of underage drinking, alcohol misuse and abuse generally and the attractiveness of a milk-based alcohol product, especially one called 'Moo Joose', to young people.[61]

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59 [2003] VCAT 475.
60 Ibid, [76] – [77].
61 Ibid, [7]-[8], [65].

128 The tribunal found that granting the licence 'would create an unnecessary risk to the health and wellbeing of underage children' and that 'education [as represented by licensing decisions] is very important in encouraging desirable drinking habits … and plays an important role in harm minimisation'.[62] It held regulation in the particular circumstances of the present case could 'contribute to reducing the potential for harm'.[63] The tribunal adopted Dr Roche's evidence about implementing the harm minimisation object, particularly her view that this included preventing harm and reducing actual harm.[64] It found the new product was aimed at young people. It affirmed the decision of the director to refuse to grant the licence. It held at granting a licence would be conducive to or would encourage the misuse or abuse of alcohol contrary to s 44(2)(b)(ii).[65] Refusing the licence would also achieve the harm minimisation object in s 4.[66]

129 That brings me to *Nardi v Director of Liquor Licensing*.[67] This was also an objectors' application for review of a decision of the director to grant a packaged liquor licence to a supermarket in a suburban shopping centre. Late night trading was not sought. The main objectors, the Nardi's, were competitors, but relied on amenity and harm minimisation grounds.

130 The tribunal (Judge Bowman, a vice-president) identified the nature of its function under the *Liquor Control Reform Act* in these terms, which I respectfully endorse:[68]

> it is evident from the Act and the various provisions to which I have been directed, and from parliamentary speeches, that the concepts which I must consider are detriment to the amenity of the area in question and the minimising of harm in relation to the misuse or abuse of alcohol. The balancing factors are the development of a diversity of licensed facilities and the responsible development of the liquor and licensed hospitality industries. I also accept that, in relation to amenity and particularly in relation to harm minimisation, those responsible for the legislation placed strong emphasis upon the sale of packaged liquor.

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62 Ibid, [66].
63 Ibid, [67].
64 Ibid, [75].
65 Ibid, [77].
66 Ibid, [76].
67 [2005] VCAT 323.
68 Ibid, [48].

131 General harm minimisation evidence was given, supported to some degree by local evidence of alcohol misuse and abuse. Again the tribunal held the evidence did not rise far enough to establish that granting the licence would be detrimental to the amenity of the neighbourhood or be contrary to the harm minimisation object of the *Liquor Control Reform Act*.[69] But the tribunal adopted a balanced approach to considering the totality of the evidence, keeping its legislative function clearly in view.

132 In its consideration of the general evidence, the tribunal held such evidence could not produce a virtually automatic negative result in every case.[70] It went on to say the general evidence needed to be considered with the site-specific evidence ('viewed in that light'),[71] being evidence of 'the particular circumstances, sites and premises'.[72] With respect, those conclusions were consistent with the decision in *Black and Cook*,[73] as well as the terms of the *Liquor Control Reform Act*.

133 The tribunal did not state that evidence of a general kind needed to be treated with considerable caution. Indeed, it found the principal witness who gave such evidence to be 'quite impressive'.[74] Nor did the tribunal state it was difficult to make general evidence relevant to site-specific situations. It actually considered the general evidence along with the site-specific evidence in order to determine the issues in the case.[75] Any other approach would have been inconsistent with *Black and Cook*, which the tribunal cited with approval,[76] and contrary to the harm minimisation object in s 4(1)(a) of the *Liquor Control Act 1987*.

134 The tribunal also dealt with the nature of the harm minimisation object, holding the concept of harm minimisation was 'anticipatory and not merely reactive'.[77] It went

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69 Ibid, [51].
70 Ibid, [22]-[23].
71 Ibid.
72 Ibid, [24] and [35].
73 Unreported, Kellam J, president, and Angell M, 14 February 2000.
74 [2005] VCAT 323, [22].
75 See eg ibid, [22].
76 Ibid, [23], [51(a)(vi)].
77 Ibid, [51(a)(vii)].

on to hold there 'may indeed be situations in which a conservative approach to the granting of a licence should be adopted', without acting impermissibly on 'the slightest doubt or misgiving'.[78] Another way of putting that proposition is the importance to be afforded to minimising harm will depend on the nature of the harm (is it slight or severe) and the degree of the likelihood of the harm occurring (is it low, high or probable). An 'anticipatory' or 'conservative' approach may be required where the nature of the harm and the magnitude of the risk combine to make that warranted.

135 Subsequent decisions of the tribunal[79] have followed *Black and Cook*,[80] *Avery*[81] and *Nardi*.[82]

136 Correctly, with respect, the reasoning of the tribunal in *Nardi* displays no narrow conception of the statutory objects or of the general and specific evidence which might be relevant to the application of those objects. The reasoning follows directly from the description of the function of the tribunal (and the director) which the tribunal gave earlier. The tribunal found an application for a licence could not 'virtually automatically'[83] be rejected on the basis of general evidence. Neither could a consideration of the general and site-specific evidence together lead to the rejection of the application before it, for a 'proper foundation [did not] exist so as to justify [such] a decision, fairly and properly made'.[84] I cannot reconcile that approach, which I respectfully endorse, with what the tribunal got from *Nardi* in the present case.

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78 Ibid, [51(a)(vii)].

79 See *Smith v Director of Liquor Licensing* [2005] VCAT 1050, [55] (Preuss SM), *Hanson v Director of Liquor Licensing* [2006] VCAT 2544, [57] (Davis SM), *Palace Cinema Nominees Pty Ltd v Director of Liquor Licensing* [2007] VCAT 1829, [12] (Dwyer DP), *Papas v Director of Liquor Licensing* [2008] VCAT 1944, [56] (Coghlan DP), *Melbourne Theatre Company v Director of Liquor Licensing* [2009] VCAT 1535, [39]-[43] (O'Halloran M) and *Joshamie Nominees Pty Ltd v Director of Liquor Licensing* [2009] VCAT 2188, [32]-[34] (Megay SM).

80 Unreported, Kellam J, president, and Angell M, 14 February 2000.

81 [2001] VCAT 2455.

82 [2005] VCAT 323.

83 Ibid, [23].

84 Ibid.

137 Now to the decisions of the Full Court of the Supreme Court of Western Australia in *Executive Director of Health v Lily Creek International Pty Ltd*[85] and *Executive Director of Health v Lily Creek International Pty Ltd [No 2].*[86]

138 Section 5(1) of the *Liquor Licensing Act 1988 (WA)* provided that the 'primary objects of this Act are (a) to regulate the sale, supply and consumption of liquor; and (b) to minimise harm or ill-health to people, or any group of people due to the use or liquor.' The Act goes on to specify a number of other objects, including regulating the development of the liquor and hospitality industries (s 5(2)(a)) and facilitating the use and development of licensed facilities reflecting the diversity of consumer demand (s 5(2)(c)).

139 In *Executive Director of Health v Lily Creek International Pty Ltd,*[87] the executive director objected to granting a licence for licensed premises opposite an Aboriginal gathering area that would sell packaged liquor for off-premises consumption. He contended it would cause harm and ill-health to the Aboriginal community and led extensive and uncontradicted expert evidence about the impact of drinking on such communities and the relationship between the availability and consumption of alcohol. In applying the harm minimisation object, the Liquor Licensing Court held harm or ill-health had to be established on the balance of probabilities. It rejected the expert evidence as (among other things) 'mere conjecture, guesswork or surmise' and granted the licence.

140 The Full Court set aside the court's decision and remitted the matter for reconsideration. The leading judgment, which repays reading in full, was given by Ipp J (Owen and Miller JJ agreeing).

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85 (2000) 22 WAR 510.
86 [2001] WASCA 410.
87 (2000) 22 WAR 510.

141 As to applying the harm minimisation object, Ipp J held it was necessary to 'undertake a weighing and balancing exercise'[88] with the various objects. While harm minimisation was a primary object, it was significant that the object was

> to 'minimise' harm or ill-health, not to prevent harm or ill-health absolutely. The word 'minimise' is consistent with the need to weigh and balance all the relevant considerations.[89]

142 Ipp J held a licence might still be granted even though it might cause harm or ill-health. In such a case, it was necessary to evaluate the relative importance of the various factors:[90]

> Where there is a prospect of harm or ill-health being caused by the grant of a licence, and that grant would advance s 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind the that object under s 5(1)(b) is to be accorded primacy).

143 In carrying out the weighing and balancing exercise, His Honour held the likelihood of harm or ill-health was essentially a matter of prediction. That likelihood could only be determined 'by reference to a degree of probability.'[91] It was not necessary to establish that harm or ill-health would occur on the balance of probabilities and the court was wrong to insist on that standard of proof.[92] It was necessary to take into account even the possibility that harm or ill-health may occur.[93] In the view of Ipp J, the 'potential of harm or ill-health to people, irrespective of whether [it] is proved on a balance of probabilities, would be a powerful public interest consideration.'[94] The regulatory importance of the degree of probability was a matter for evaluation in the circumstances:[95]

> The Licensing Authority may decide that the possibility of harm or ill-health is so remote or insignificant that it should not be taken into account. It may be that a possibility of harm or ill-health of a particularly serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse to

88 Ibid, 515.
89 Ibid.
90 Ibid.
91 Ibid, 516.
92 Ibid 517.
93 Ibid.
94 Ibid.
95 Ibid, 515.

grant the licence absolutely. The decision in each case will depend on the particular circumstances.

144 As to the rejection of the expert evidence, Ipp J set out at length the evidence of the various experts who were called by the executive director and found the licensing court had committed a 'fundamental' error of approach when assessing this evidence.[96] It was not conjecture, guesswork, surmise or speculation. It was expert evidence 'based on inferences drawn from past facts … [and] on many years of experience in the particular field. Many of the opinions were based on research and analysis as well.'[97]

145 On remitter, the licensing court again granted the licence. It held the expert evidence should be afforded little weight for various reasons, including that it was based on research carried out in different conditions and that outlet density was not above average in the relevant area. Again the executive director appealed. Again, in *Executive Director of Health v Lily Creek International Pty Ltd [No 2],*[98] the Full Court set aside the grant of the licence. This time, however, it determined not just to uphold the appeal but also substantively to refuse to grant the licence.

146 In upholding the appeal, the Full Court held the court had erred again in its treatment of the expert evidence. Wallwork J (Miller J agreeing) held the error was 'downgrading, without sufficient reasons, the expert evidence which was not contradicted in its overall effect.'[99] Wheeler J held the error included rejecting expert evidence on grounds which were 'incapable of leading to that conclusion.'[100] Their Honours held they had ample evidence on which to conclude the licence should not be granted on the ground of minimising harm or ill-health due to the use of liquor.[101]

147 In my view, the views expressed by the Full Court in these two cases, both as to the application of the harm minimisation object and the nature and treatment of the

96 Ibid 520.
97 Ibid 524.
98 [2001] WASCA 410.
99 Ibid [38].
100 Ibid [53].
101 Ibid [43] per Wallwork J (Wheeler and Miller JJ agreeing).

evidence which is relevant under the West Australian legislation, are consistent with the approach which was adopted by the tribunal in the previous cases, and which I would adopt in this appeal, under the Victorian legislation.

148 That brings me to the mistaken approach which was adopted by the tribunal.

Did the tribunal misinterpret and misapply the *Liquor Control Reform Act 1998* (grounds 1.1 – 1.3)?

Submissions of the director

149 The director (whose submissions were adopted by the chief commissioner of police) submitted the broad case presented to the tribunal was the cessation of late night trading at the bottle shop would be consistent with the harm minimisation objects of the *Liquor Control Reform Act* and strike the right balance between the need to minimise harm arising from the misuse and abuse of alcohol and developing a diversity of licensed facilities reflecting community expectations.

150 In her submissions to the tribunal, the director said it was not necessary to prove any breach of the legislation or other wrongdoing on the part of the hotel. The hotel was in an undesirable location for a bottle shop. The availability of packaged liquor after 11:00 pm gave rise to adverse amenity impacts which outweighed the modest benefits in terms of convenience to customers of the bottle shop. The economic and commercial interests of the hotel could not take precedence over community interests. The director submitted the tribunal had not property considered this broad case. Further, it had incorrectly excluded evidence of alcohol-related misbehaviour in the vicinity of the hotel because it did not appear to be related to the bottle shop.

151 In her submission, the tribunal fundamentally misconceived the question to be addressed under the *Liquor Control Reform Act*. As a result, it asked the wrong question and failed to take into account relevant considerations.

152 It was submitted the tribunal had erred in law by adopting a site-specific approach, relying on an incorrect understanding of the earlier decision of the tribunal in *Nardi v*

Director of Liquor Licensing.[102] She pointed to several features of the tribunal's reasoning which manifested that error, including discounting the 'hot spot' evidence because the hotel was not shown to be responsible for the misbehaviour, giving little weight to government policies about minimising harm arising from the misuse and abuse of alcohol because the evidence of such harm was not site-specific and following the High Court decision to decide it was the drinker, not the supplier, who should be held responsible.

153 The director submitted the tribunal's approach was too narrow and inconsistent with the objects of s 4(1)(a) and the declaration of intention in s 4(2). Rather than confining its inquiry to whether the supply of liquor by the bottle shop after 11:00 pm was causally linked to the incidence of street misbehaviour and anti-social conduct, the tribunal should have examined the impact of late night trading by the bottle shop, taking into account its particular local, social, demographic and geographic circumstances.[103] In doing so, the tribunal should have determined whether late night trading contributed to or detracted from the amenity of community life (s 4(1)(a)(ii)) or encouraged a culture of responsible alcohol consumption and reduced risky drinking and its impact on the community, and whether ending late night trading would contribute to minimising harm arising from the misuse and abuse of alcohol (s 4(1) and (2)).

154 The director submitted the variation power in s 47 was a broad regulatory power and was not limited to cases in which cause for variation had been shown, in the sense of proven regulatory misbehaviour by the licensee. Subject to the rules of natural justice, the licensee had no vested right to continuation of a licence if prevailing circumstances made it proper, under the legislation, for it to be varied. The issue raised by the director's application for variation was not whether the hotel had committed regulatory offences or deserved to be disciplined, but whether, having regard to the objects of the liquor licensing legislation, as a matter of public

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102 [2005] VCAT 323.

103 Citing *Black and Cook v Liquor Licensing Victoria* [2000] VCAT 459, [14].

policy it was appropriate for the late night trading hours of the bottle shop to be wound back.

155 It was submitted the broad case which the director made to the tribunal was supported by evidence which was not adequately addressed by the tribunal because of the site-specific approach which it adopted. The director referred to the evidence of Mr de Carlo about the government's harm minimisation strategy, the uncontradicted evidence about violence 'hot spots' in the Melbourne CBD (including in the area around the hotel), the Victorian Alcohol Action Plan, the Alan Consulting Group report on alcohol-related harm and the operation of licensed premises and the report by Marsden Jacob Associates for the National Competition Council on identifying a framework for regulation in the packaged liquor industry. The tribunal should have examined this evidence and determined whether harm from the misuse and abuse of alcohol in the area near the hotel was a major social issue, whether that harm could be minimised by reducing the hours of supply of alcohol by the bottle shop and whether the late night trading at that bottle shop was part of a negative culture of consumption of alcohol in the area.

Submissions of the hotel

156 The hotel submitted the questions of law were the subject matter of the appeal and were not to be distilled from the grounds of appeal.[104] It then made submissions by reference to those questions.

157 As to question 1 (concerning the proper interpretation and application of s 4(1) and (2) in the variation application made under s 29), the hotel accepted that the director (and the tribunal) must determine any contested application by considering the objects in s 4(1) in the manner specified in s 4(2). In the hotel submissions, that is what the tribunal did. In doing so, the tribunal referred to and accepted the submissions of the director to that effect. As submitted by the director, the hotel accepted it might be open to reduce the late night trading hours of a hotel which was

104 *Osland v Department of Justice* [2010] HCA 24, [21] per French CJ, Gummow and Bell JJ.

doing all it could to minimise harm arising from the misuse and abuse of alcohol, because alcohol being sold by the hotel was contributing to that harm. In the submission of the hotel, this was the approach followed by the tribunal. The tribunal had therefore followed the very approach which the director submitted was applicable. Its decision and findings of fact, and the due exercise of its discretion, were based on the evidence, submissions and other material before it and arrived at in that lawful manner.

158 The hotel submitted the tribunal did not confine itself to determining whether liquor being sold at the bottle shop was or would be a direct cause of incidents involving the misuse or abuse of alcohol, or whether the hotel was responsible for those incidents. But the tribunal was required to consider whether the hotel was so responsible. A critical plank of the director's case was that frequent incidents of anti-social conduct, harmful behaviour (particularly by young people) and the abuse of alcohol were directly or indirectly connected with the sale of alcohol from the hotel after 11:00 pm. In that connection, the hotel referred to the reasons for decision of the director, which said the 'continued operation of a poorly run 24 hour bottle shop [was] inconsistent with the objects of the Act.' In the hotel's submission, and with some justification in my view, those reasons placed that matter in issue.

159 Therefore, submitted the hotel, the tribunal had to consider the evidence of the 21 or so witnesses who gave evidence about some 50 incidents of alleged misbehaviour which were allegedly connected with the late night sale of liquor by the bottle shop. The finding by the tribunal that the alleged incidents were not very serious resulted from a consideration of that evidence. The tribunal found, and it was open to it to do so, that eliminating late night trading at the bottle shop would not reduce the incidence of misbehaviour in the 'hot spot' near the hotel, noting that those incidents reflected police reports, not judicial findings. The tribunal's reference to the few infringement notices which had been issued and the few minor regulatory breaches of the hotel in the two year surveillance period, were also necessary and resulted from a consideration of the evidence. So was and did the rejection by the tribunal of

the director's submission that the bottle shop had caused anti-social street behaviour in the local area and that it was supplying alcohol used for 'pre-loading', 'side-loading' and 'back-loading' by night club patrons. It did not follow from this consideration, however, that the tribunal focussed only on the hotel's responsibility for the alleged incidents and misuse or abuse of alcohol. Its comment that there was little or no evidence of the hotel being aware that alcohol sold by the bottle shop would be misused by the purchaser was made in passing and was not critical to its reasoning.

160 It was submitted by the hotel that the tribunal's reasons for decision showed that it did consider the director's broad case. The tribunal did not say one thing and do another. It referred expressly to the relevance of the government's policy of harm minimisation, quite apart from the alleged incidents of misbehaviour. It also referred to the generalised evidence of Mr de Carlo concerning the negative effects of excessive alcohol consumption, but he conceded that his evidence did not relate specifically to packaged liquor or the operation of the bottle shop at the hotel. The tribunal determined, and it was open to it to do so, that stopping late night trading at the bottle shop would make no difference to these problems.

161 The hotel relied on the tribunal's reference to the Allen Consulting Group report. That report, in the hotel's submission, was also highly generalised. Mr de Carlo had conceded the report showed a small minority of problematic licensed premises were associated with the vast majority of alcohol related problems, and it was dangerous to argue from the general to the specific and that the conclusions in the report were less reliable in relation to the opening hours of the premises which had packaged liquor licences. Having regard to such evidence, in the hotel's submission, it would not have been open to the tribunal to make a positive finding that restricting late night trading at the hotel would contribute to minimising harm arising from the misuse and abuse of alcohol. That was because there was no established link between the sales of alcohol by the bottle shop and the alleged harm.

162 The hotel disputed that the tribunal had accepted that the local area was a misbehaviour 'hot spot'. The tribunal made no such finding, and such a finding was not implicit in the tribunal's reasoning in relation to the hotel not being responsible for incidents relied upon by the director. In the hotel's submission, the evidence would not have supported a finding that the local area was a misbehaviour 'hot spot'. While the proper approach did involve a risk analysis – what was the nature of the peril to be avoided and what was the proportionate response to be adopted to address it – the analysis had to be supported by evidence, and the evidence showed that there were no risks associated with the late night operation of the bottle shop. That is what the tribunal found.

163 In the hotel's submission, the ultimate finding of fact which the tribunal made was that late night trading at the bottle shop was more beneficial to the amenity of the area than the harm that occurs from the extending trading hours. This finding was open on the evidence and made only after balancing the competing considerations in s 4(1) of the *Liquor Control Reform Act*. It was legitimate for the tribunal to take into account the importance of visitors to Melbourne being able to buy liquor when they wanted to, for otherwise Melbourne might risk losing its reputation as a vibrant international city.

164 The hotel submitted that, reading the tribunal's decision as a whole, it was clear the tribunal had properly interpreted and applied s 4(1) and (2). It had regard to whether the hotel was responsible for local street misbehaviour, but did not confine itself to this issue.

165 It was submitted that the tribunal was entitled to have regard to the recommendation of the chief executive officer which led to the granting of late night trading hours in 1997. Harm minimisation was only part of the equation; the benefits of the operation of the bottle shop also had to be considered. The objects of the legislation in 1997 did not differ in great substance from the objects of the current legislation, but only in emphasis. The current harm minimisation object did indicate

a stronger emphasis on that subject. But the trading hours of the bottle shop were extended in 1997 on the basis that this would not cause harm.

166 The hotel also referred to the late night licence provisions (s 11A), which expressly contemplated late night trading by licensees. The presence of such a licence category showed that late night trading was not seen to be inconsistent with the objects of the legislation and there was no presumption that such trading was harmful.

167 Pointing to the declaration of government policy that licences permitting bottle shops to trade late at night should not be issued in the future, the hotel submitted the inference was that existing licensees were not causing problems. If there was a problem with existing licensees, the policy would have covered them also. The hotel accepted, however, that the legislation applied to permit variation of existing licences even if the policy did not cover such licences.

168 The hotel submitted the harm minimisation object would not support a reduction in trading hours of licensed premises unless there was a link or close relationship between the alleged harm and the operation of the premises. It would have to be established that reducing the hours would contribute to minimising such harm, and that normally required a link, direct or indirect, and some facilitation of the harm on the part of the premises.

169 It was submitted the legislation proceeded on the basis that the provision and availability of alcohol was a good thing. The sale of packaged liquor was also seen to be a legitimate purpose, as encompassed in the diversity objective. There was no statutory presumption against availability of alcohol per se. The appropriate level of regulation turned on permitting or promoting the provision of alcohol, while ensuring it did not cause harm, as the objects in s 4(1)(b) and (c) indicated, and the level of regulation could not be arbitrarily chosen. It was to be accepted that the variation power could legitimately be exercised on the basis that inappropriate and anti-social activity was occurring in an area close to licensed premises, and that a reduction in supply would be likely to reduce the level of that harmful activity. In

the present case, the tribunal correctly found that such activity was not occurring close to the hotel. Varying the hotel licence to stop late night trading by the bottle shop would, in these circumstances, be arbitrary.

170 Before addressing the issues raised by these submissions, I will identify the proper approach to applying the objects of the *Liquor Control Reform Act* in a case like the one before the tribunal.

Properly applying the harm minimisation object

171 Based on the provisions of the *Liquor Control Reform Act* which I earlier set out, in my view the harm minimisation object applies as follows.

172 By reason of s 4(1)(a) and s 4(2) of the *Liquor Control Reform Act*, the primary consideration in the determination of the variation application before the tribunal (on review) was the object of contributing to the minimisation of harm arising from the misuse and abuse of alcohol. The objects in s 4(1)(b) and (c) also had to be considered and weighed in the balance, with the primary object being harm minimisation.

173 Harm minimisation in s 4(1)(a) (and s 4(2)) is a broad regulatory object which reflects a number of important public policy considerations connected with the sale and consumption of alcohol and the regulation of the liquor industry. The object was enacted to achieve the purpose of the *Liquor Control Reform Act*, which was to 'reform the law relating to the supply and consumption of liquor.'[105] Harm minimisation is the fulcrum on which the regulatory scheme now pivots. Rather than ignoring or denying such harm, Parliament has chosen legislatively to admit it. Marking a point of regulatory difference from the previous legislation, contributing to the minimisation of that harm was made the primary regulatory object and therefore the primary consideration in liquor licensing decisions. The significance of that step must not be overlooked in administrating the legislation.

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105 Section 1.

174 The harm minimisation object in s 4(1)(a) enables, indeed requires, a broad range of social, economic and cultural factors to be taken into account when making licensing decisions, which must then be weighed in the balance with the other objects in s 4(1)(b) and (c). Accepting the alcohol industry brings positive benefits, the legislation goes on to declare that Parliament expects regulatory decisions to be made with due regard to the minimisation of that harm (s 4(2)).

175 The legislation is based on no narrow conception of what harm might arise from the misuse and abuse of alcohol, which is to be minimised. It encompasses harm to the health and wellbeing of individuals, families and communities, as well as social, cultural and economic harm and harm to neighbourhood amenity. It encompasses our right to personal safety and our freedom to move in the streets without hindrance, disturbance or molestation. The intention of the object is to ensure the decision-making process is fully informed by all the costs and benefits, and is not dominated by economic considerations, as the previous legislation was seen to permit.

176 It is implicit in the regulatory scheme that decision-making under Part 2 will be objective, evidence-based and follow the prescribed due processes. But the harm minimisation object is expressed in terms of contributing to the minimisation of harm. In the end, an evaluative judgment must be made, guided by the objects of the legislation. The director (and the tribunal) must identify whether and how the decision will 'contribute to' minimising harm arising from the misuse and abuse of alcohol. That has important implications for the nature of the inquiry and the evidence which might be relevant.

177 In a given case, a finding on the balance of probabilities that a particular harm is occurring or will occur may be available or even required. But to make that the object of, or to allow it to dominate, every case or a given case may be distracting or even legally erroneous. In terms, the harm minimisation object is directed at the contribution which can be made to minimising harm. This necessarily directs

attention to whether harm is occurring or likely in the particular circumstances and the nature of that harm.

178 The proper consideration of the object requires a prediction to be made about the degree of the likelihood of harm occurring. There may be a possibility only that harm is occurring or will occur. That may be a light or heavy balancing consideration, depending on the nature of the harm and the circumstances of the case. A low likelihood of a severe harm occurring may require different consideration to a low likelihood of a slight harm occurring. On the other hand, the likelihood of harm occurring may be so great in magnitude as to be probable. Depending on the nature of the harm and those circumstances, that may have stronger evaluative consequences.

179 The nature of what, if anything, can or should be done to contribute to minimising the predicted harm will be relevant, and the other objects will here come into play. In that regard, applying the object does not require satisfaction that the decision will definitely minimise the harm in the facts and circumstances of the case, but that it will contribute to minimising the harm in some positive and relevant way in those facts and circumstances. All these matters require evaluative judgment.

180 That the licensee is or will trade responsibly and in compliance with their licence conditions (which will be assumed to be so in the absence of evidence to the contrary) will be a relevant and, depending on the circumstances, may be an important consideration. But applying the harm minimisation object does not necessarily involve an inquiry into whether the licensed premises are, or will be, to blame for misuse or abuse of alcohol which is causing, or likely to cause, particular harm. If that happens to be at issue in a particular case, determining that issue should not be allowed to distract the tribunal from its main function. Determining a licence application under Part 2 is not a disciplinary process under Part 6. Depending on the evidence, it may significantly contribute to minimising harm to restrict the sale of alcohol from premises which trade responsibly. That is why the court refused to grant a licence for the bottle shop in premises opposite the

Aboriginal gathering place in Western Australia.[106] It was not suggested there that the licensee would not trade responsibly. The question is and always remains whether a licensing decision would contribute to minimising harm in the ways specified in s 4(1)(a) or otherwise.

181 Once a finding is made on the harm minimisation side of the account, it can be weighed in the balance in terms of achieving the statutory objects overall (see s 4(1)(b) and (c)) and their consistency with the declaration in s 4(2). The importance of making that finding cannot be underestimated. It is by making such a finding, and weighing it in the balance with the other objects, that decision-making will be properly and fully informed and reflect the declared expectation of Parliament.

182 Section 4(1)(a) specifies certain non-exhaustive means by which harm may be minimised. They are expressed in broad public policy terms. They include adequately controlling the supply and consumption of alcohol (s 4(1)(a)(i)), ensuring as far a practicable that the supply of liquor contributes to rather than detracts from the amenity of community life (s 4(1)(a)(ii)) and encouraging a culture of responsible consumption of alcohol and reducing risky drinking and its impact of the community (s 4(1)(a)(iv)).

183 It is apparent from the nature of harm minimisation, and those specified means for achieving it, that potentially the object has preventative (in the sense of 'anticipatory and not merely reactive'),[107] protective and responsive aspects. To contribute to minimising harm under the object in s 4(1)(a) may be to prevent or reduce the incidence of harm, to protect people from it and to reduce its impact to the minimum, taking into account the benefits which the industry provides, as reflected in the other objects in s 4(1)(b) and (c), and remembering that the object is to minimise harm, not prevent it absolutely.[108] That has similar implications for the nature of the inquiry and the evidence which may be relevant.

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106 *Executive Director of Health v Lily Creek International Pty Ltd [No 2]* [2001] WASCA 410.
107 *Nardi v Director of Liquor Licensing* [2005] VCAT 323, [51(a)(vii)].
108 See *Executive Director of Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510, 515.

184 Harm minimisation as an object is aimed at everybody who might experience harm from the misuse and abuse of alcohol, including those who misuse and abuse it and thereby cause harm to themselves and others, those who consume it responsibly and those who do not consume it at all, as well as their families and the community generally. Reflecting an important value of public policy, the legislation neither reprobates the misuser nor approbates the non-user. It makes minimising the harm for everybody the primary object of the regulatory scheme in the public interest. It is therefore especially inappropriate to administer the scheme in a way which gives undue weight to civil notions of private or individual responsibility such as those derived from the law of tort.

185 As the tribunal has held, every application for a liquor licence cannot be refused on the basis of general harm minimisation evidence. That would be a perversion of the regulatory scheme. The legislation regulates the supply and consumption of liquor by individuals exercising freedom of market choice. It acknowledges the benefits which the industry brings and provides a regulatory framework for the realisation of those benefits. The purpose of the *Liquor Control Reform Act* is regulation not prohibition.

186 But by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstances, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the 'particular local, social, demographic and geographic circumstances'[109] of

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109 *Black and Cook v Liquor Licensing Victoria,* Unreported, Kellam J, president, and Angell M, 14 February 2000, 14.

the given case. Any other approach to the consideration of such evidence would defeat the statutory objects.

187 That, in my view, is the scope and application of the harm minimisation object in the reform legislation which Parliament has enacted. I turn now to whether the tribunal applied the object in that manner.

Mistaken approach adopted by tribunal

188 I do not accept the submissions of the hotel that the tribunal properly addressed the broad case put forward by the director and the harm minimisation objects of the legislation. In my view, the tribunal stated but did not apply the correct approach. It allowed the issue of whether the hotel was responsible for anti-social behaviour to dominate its determination of the application. In consequence, it did not properly consider the primary consideration, which was whether ending late-night trading at the bottle shop would contribute to the minimisation of harm arising from the misuse and abuse of alcohol.

189 It is clear enough from the reasons for decision of the tribunal that it did adopt a case-specific and site-specific approach to its consideration of the evidence. In respect of the many incidents which it was asked by the director to examine, and about which evidence was led, its main focus was on whether the hotel was to blame for the anti-social behaviour which had occurred. In the findings which it made, it relied on the submissions of the hotel, which were painstakingly focussed on that question. While the tribunal did have to consider the evidence of and submissions on the incidents which had occurred, it allowed this to swamp its whole approach.

190 The mistaken approach of the tribunal is revealed by the way in which it dealt with the evidence of Mr de Carlo. This was general evidence and of some importance. Among other things, Mr de Carlo referred to the Victorian alcohol action plan, the second reading speech relating to the most recent statutory amendments and the reports of the Allen Consulting Group and Marden Jacob Associates. Mr de Carlo also referred to particular concerns arising from people buying pre-packaged liquor

from bottle shops late at night, consuming the liquor in the streets and associated anti-social behaviour.

191 On the correct approach which was adopted in previous decisions of the tribunal, and the panel, this evidence was relevant, especially when combined with evidence relating to the particular circumstances, site and premises of the application. To apply this approach in the present case is properly to apply the objects of the legislation, not act arbitrarily, as submitted by the hotel.

192 It was therefore legitimate for the director to present this evidence as part of her case. The panel had relied on evidence of the same nature. The evidence, which was not contradicted, pointed to various aspects of harm arising from the misuse and abuse of alcohol in the Melbourne CBD and more generally.

193 Properly applying the harm minimisation object, the tribunal should have considered this evidence together with the evidence about the particular local, social, demographic and geographic circumstances of the hotel. On the entirety of that evidence, the tribunal should have determined whether ending late-night trading would contribute to harm minimisation as specified in that object. The tribunal accepted some harm was occurring and it should have determined the nature of that harm and how likely it was that ending late-night trading at the bottle shop would contribute to minimising that harm. It should have weighed its conclusion in this regard with the benefits brought to the community by the bottle shop. That was the broad case of the director. Instead of considering the evidence of Mr de Carlo in that manner, the tribunal found such evidence to be of 'difficult' relevance and 'to be treated with considerable caution'. This reflected a misunderstanding of the previous decisions of the tribunal and betrayed a legal error in approach.

194 In particular, there was uncontradicted evidence of 'street violence, domestic violence, hospital admissions, vandalism and property damage, theft, public drinking, groups of people congregating and arguing in the street and vomiting and urinating in public places', to use the tribunal's description, in the Melbourne CBD.

That was evidence of serious harm, and detriment to amenity, arising from the misuse and abuse of alcohol. As I read the reasons for decision of the tribunal, it did not reject this evidence.

195 I have identified how evidence of this nature should be considered. The tribunal should have considered this evidence with the evidence about the particular circumstances of the bottle shop at the hotel. The question was whether ending late-night trading at the hotel would contribute to minimising harm arising from the misuse and abuse of alcohol. In that connection, the director relied on the fact that the bottle shop was the only one trading late at night in the Melbourne CBD. In her submission, reducing that supply of liquor would contribute to minimising the harm. However much the director relied on instances of non-compliance by the hotel, it was never her whole case that the bottle shop was to blame for the harm or that ending late-night trading would alone solve the problem.

196 The tribunal found 'there is little or nothing to link the conduct of the bottle shop to [those] vices'. Accepting the submissions of the hotel, it said the behaviour was more likely to be coming from people leaving Melbourne's many licensed establishments and nightclubs. As to the director's submissions that there were the problems in the Melbourne CBD relating to alcohol consumption, it found this was not supported by the evidence as analysed by the hotel. That analysis was directed at exculpating the hotel, not at denying the existence of the problems.

197 In my view, the same error vitiates this aspect of the tribunal's reasoning. While it was necessary to consider whether anti-social behaviour was being caused by people leaving other establishments, the question for the tribunal was whether ending late-night trading at the bottle shop, being the only one so trading in the Melbourne CBD, would contribute to minimising harm which, on the evidence, was actually or likely occurring. That question was not fully addressed by the finding that the harm was not 'linked to the *conduct* of the bottle shop' (emphasis added) or could not be blamed on the hotel. The question was, if people could not buy alcohol late at night from the bottle shop, how likely and to what degree was it that the anti-social

behaviour would diminish and what contribution would that make to minimising harm? The conclusion in that regard then had to be balanced with the benefits that late-night trading brought to the community.

198 In relation to the uncontradicted evidence about drinking in the street near the hotel, the tribunal said, to repeat and in summary, this was not an offence against the criminal law but against a local law, and no such law applied in the suburb to the north. It said the hotel could not stop people breaking this law (although it did warn people). The evidence was that 182 infringements had been issued to people consuming alcohol in a public place in the previous three years. The tribunal said this was 'very few'. The tribunal said that, if the issue of street drinking was being taken seriously, the police would have issued more infringement notices, indeed to everybody drinking in the street in the Melbourne CBD. It said drinking in the street was not necessarily a harmful effect of alcohol or even a detriment to the community. It said, '[a]t highest, is a breach of a local law.'

199 I cannot reconcile the tribunal's approach to street drinking near the hotel with the harm minimisation object of the legislation. The evidence showed, and the tribunal found, there was unlawful drinking in the streets near the hotel. That engaged the harm minimisation object. The issue could not be avoided by treating the activity as only a little bit unlawful and not unlawful at all in the next suburb. The tribunal should have treated breach of the local as a relevant regulatory consideration.

200 I do not understand the evidentiary basis of the tribunal's remark that there were 'very few' infringements issued. Issuing 182 infringements in three years is surely not very few. Was this not at least some evidence of street misbehaviour which needed to be considered, both in terms of harm minimisation and the amenity of community life? Nor can I understand the basis of the tribunal's remark that the police did not seem to be taking street drinking seriously. The number of infringements issued gave no support to that remark, and I look in vain for other evidence to support it. I think this was a legal error on the part of the tribunal, and

it meant that it externalised responsibility for something which was the tribunal's regulatory function to consider.

201 The tribunal's finding that the proven street drinking was *not necessarily* evidence of harmful affects of alcohol nor of amenity detriment did not fully address the harm minimisation object. It may be accepted that every instance of street drinking was not necessarily evidence of harmful drinking nor of amenity detriment. It may be accepted that not every person drinking on the street was engaged in anti-social behaviour. But the questions were, how much street drinking was there, how much anti-social behaviour was there, was the anti-social behaviour associated with street drinking and what degree of detriment to amenity was it causing? Once those questions were determined, it was necessary to consider what contribution to reducing street-drinking, and any associated anti-social consequences, would be made by ending late-night trading at the bottle shop. That could them be properly weighed with the other objects. This the tribunal did not do.

202 Even putting all that to one side and just taking the evidence as it was, the tribunal should have treated the proved unlawful street drinking as relevant. There were important questions in the application about whether the street drinking was associated with anti-social behaviour near the hotel. There were important questions about whether that anti-social behaviour represented a harmful product of misusing and abusing alcohol (see s 4(1)(a)) and a serious amenity detriment (see s 4(1)(ii) and s 44(2)(b)(ii)). There were important questions about whether late-night trading of the bottle shop was encouraging a culture of irresponsible consumption of alcohol and increasing risky drinking and its impact on the community (see s 4(1)(a)(iv)). If these questions were answered in the affirmative, it was then necessary to consider whether ending late-night trading at the bottle shop would contribute to minimising that harm and reducing that detriment, taking into account that it was the only one in Melbourne operating at this time of night. Then it would be necessary to weigh the conclusion on that side of the balance against the other objects (s 4(1)(b) and (c)), remembering that harm minimisation was primary. Because of the tribunal's

approach to the issue of street drinking, I do not think the tribunal properly considered that case.

203 That the focus of the tribunal was on whether the hotel was to blame for any anti-social activity is revealed by its reliance on the decision of the High Court in *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board*.[110] As we have seen, the decision in that case led the tribunal to say that 'it would be quite wrong to blame the purveyor of the alcohol when the alcohol that is purveyed is misused by the ultimate consumer.'

204 In *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board*, the court decided that a hotel who sold alcohol to a drunken patron was not liable to pay damages in tort in a widow's claim arsing out of the death, due to negligent driving, of the patron. The civil law of tort holds people liable to pay damages for private wrongs such as negligence. The purpose of this law is compensatory, not regulatory. The principles applied and discussed in *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board* are very different to those which govern the exercise of regulatory powers in the public interest under the *Liquor Control Reform Act*. That is made very clear by the nature and scope of the harm minimisation object. The purposes of that object are regulatory and public in character. Those purposes are not, like the law of tort, compensatory and private in character. Even though the hotel in the present case was not doing any civil wrong in selling liquor to patrons late at night, the question was and at all times remained whether ending that trading would contribute to the minimisation of harm as specified in the objects.

205 Further, the tribunal was very wide of the legislative mark when it made the observation about not blaming 'the purveyor of the alcohol when the alcohol that is purveyed is misused by the ultimate consumer.' Under the *Liquor Control Reform Act*, that is not the nature of the inquiry. It is aimed at everybody who might experience harm from the misuse and abuse of alcohol, including those who misuse and abuse it and thereby cause harm to themselves and others, those who consume it

110 (2009) 239 CLR 390.

responsibly and those who do not consume it at all, as well as their families and the community generally. Reflecting an important value of public policy, the legislation makes minimising the harm for everybody the primary statutory object of the regulatory scheme in the public interest. While it is relevant to take into account whether a licensee has complied with their licensing obligations, that is neither the nature nor the object of the inquiry.

206 As we have seen, the tribunal endorsed the view expressed in sub-paragraph (i) of the recommendation of the chief executive officer of the former commission in granting late night trading to the bottle shop. It said that view 'still holds true today'. The view expressed was those hours were warranted having regard to the extent to which other businesses were satisfying (or not) the needs of consumers. I cannot accept that, under the current legislation, this view is as relevant today as it was then.

207 Facilitating the development of a diversity of licensed premises reflecting community expectations is the second object (paragraph (b)) in s 4(1) of the *Liquor Control Reform Act*. The third (paragraph (c)) is contributing to the responsible development of the liquor and hospitality industries. Those were relevant considerations and I can see how the view of the chief executive officer may have been considered, in a modified way, under that rubric. But consistently with competition principles, whether the business would be successful or not, whether other businesses would be adversely affected and whether there was insufficient need or demand to justify the grant or variation are now all excluded as grounds of objection (ss 38(3), 40(3) and 41(4)). Meeting need as such is not a relevant consideration when determining contested applications under s 47(2) and uncontested applications under s 44(2) of the *Liquor Control Reform Act*, however much it may arise in another legitimate way.

208 Moreover, the decision of the former commission and the recommendation of the chief executive officer must be seen in the context of the objects of the legislation at the time. Harm minimisation was not an object, let alone the primary object, of the

1987 Act, as it is of the 1998 Act (s 4(1) and (2)). There was no express declaration, as there now is (s 4(2)), of Parliament's intention that the power to determine applications for variations of a licence should be exercised in accordance with that object. This significantly different emphasis was not reflected in the unqualified reliance of the tribunal on the decision of the commission and the recommendation of the chief executive officer.

209 Admittedly the tribunal was constituted by a senior member who was very experienced in this kind of case. The tribunal correctly referred to and took into account the beneficial aspects of the liquor industry generally and the bottle shop in particular. It properly took into account the importance of visitors to Melbourne being able to buy alcohol for off-premises consumption when they want to, including late at night, and the importance of maintaining Melbourne's reputation as a vibrant international city. That was part of the task which was assigned to the tribunal by the *Liquor Control Reform Act*, but not the whole task. While the tribunal gave those considerations due recognition in terms of s 4(1)(b) and (c), it did not balance them in a way which gave due recognition to the primary harm minimisation object in s 4(1)(a). The tribunal thereby asked the wrong question, failed to take relevant considerations into account and committed an error of law.

210 That brings me to how the tribunal dealt with the recommendation of the panel.

Tribunal failed fully to consider panel's recommendation (ground 1.4)

211 As we have seen, s 45 of the *Liquor Control Reform Act* provides the director 'must refer a contested application and each objection to the Panel for consideration and report.' Section 47(1) required the director, and therefore the tribunal, fully to consider the recommendation of the panel. That, submits the director, the tribunal failed to do.

212 The Liquor Licensing Panel was established by s 157(1) of the *Liquor Control Reform Act*. It consists of a chairperson and other members appointed by the minister (s 157(2) and (3)). Members may be appointed, on a full-time or part-time basis, for up

to five years and may be reappointed (s 158(1)(a) and (b)). Here are the functions of the panel (s 160):

> (a) to consider contested applications referred to it by the Director; and
>
> (b) to report to the Director on those applications; and
>
> (c) any other functions conferred on it by or under this Act.

213 The panel system established by the legislation is nothing if not considered. Division 3 of Part 9 specifies the procedures which the panel must follow in performing its functions. The legislation anticipates it will conduct hearings, which must usually be in public (s 163). The panel is authorised to give directions about the time and place of hearings, preliminary matters and the conduct of hearings (s 162(1)), and may adjourn hearings as it considers necessary (s 167). Persons may appear personally or be represented by any other person (which would include a lawyer) (s 165).

214 The panel is not required to conduct hearings in a formal manner (s 164(1)(b)), but must 'act according to equity and good conscience without regard to technicalities or legal forms' (s 164(1)(a)). It is not bound by the rules of evidence and may inform itself in any way it sees fit (s 164(1)(c)). The panel has a power to enter the premises of applicants and objectors (s 171). It may regulate its own procedure (s 168), including any cross-examination, which may also be prohibited (s 164(2)). The panel may receive submissions and evidence orally or in writing or by a combination of both (s 164(3)). As can be seen, and like other similar boards and tribunals,[111] it is expected to operate flexibly and informally, as befits its statutory function and the importance of the harm minimisation objects of the *Liquor Control Reform Act*. This is a matter of some significance in understanding the role of the panel in the decision-making framework and the requirement that full consideration be given to its recommendation and report.

215 Turning to applications for variation of a liquor licence, we have seen that, under s 45, the director must refer all contested applications and objections to the panel for

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111 See generally *Secretary, Department of Human Services v Sanding* [2011] VSC 42.

consideration and report. The panel is required to consider the application. In doing so, it must give the applicant and objectors a reasonable opportunity to be heard and conduct hearings in accordance with the specified procedures (s 46(1) and (2)), which I have just described.

216 The panel is required to report its 'findings' to the director (s 46(3)), which implies it is expected to inquire into, consider and report on the relevant facts and circumstances. In that report, the panel is positively obligated to make a recommendation as to whether or not the application should be granted or refused and may make other recommendations concerning the application if it wishes to do so (s 46(4)(a) and (b)). The report must contain the reasons for the obligatory and any other recommendations (s 46(5)). Considering, making recommendations and reporting to the director in relation to contested applications is the primary function of the panel (s 160(a) and (b)).

217 Just as the panel is positively obligated to consider, make recommendations and report to the director in relation to contested applications, so the director is positively obligated to give full consideration to the recommendation of the panel in determining such applications. That obligation is in s 47(1), to which I have referred, but which I will here set out in full:

> Subject to Division 3, the Director must grant or refuse to grant a contested application after giving full consideration to the recommendations of the Panel under section 46(4).

218 Division 3 of Part 2 contains statutory restrictions on the grant of licences in respect of certain premises or for certain purposes, and is not relevant to this case.

219 As you can see from the terms of s 47(1), the director must determine a contested application 'after' giving full consideration to the panel's recommendation. Applying the principles enunciated in *Project Blue Sky Inc. v Australian Broadcasting Authority*, [112] this language and the role of the panel in the decision-making framework indicate that compliance by the director with this obligation is a

112 (1998) 194 CLR 355.

condition precedent to the valid exercise of the jurisdiction to grant or refuse the application.

220 What is required of the director is 'full consideration' of the panel's recommendation under s 46(4). As the recommendations of the panel may include obligatory and permissive recommendations (s 46(4)(a) and (b)), the full consideration obligation applies to both.

221 After the consideration and report of the panel, the legislation does not envisage the director will conduct a further hearing. While the director may make further inquiries, neither this nor giving persons a further opportunity to be heard is requisite (s 47(3)). Thus there are no specified procedures for the conduct of hearings by the director. Under the decision-making framework, the panel is assigned the function of giving applicants and objectors the opportunity to be heard, which dovetails into the director's mandatory responsibility to give full consideration to the outcome of panel's consideration. This serves to highlight the significance of the panel in the statutory scheme.

222 The hotel submitted the full consideration obligation applied only to the recommendation, and not to the report and reasons, of the panel. I reject that submission. It is not consistent with the function of the panel in the decision-making framework.

223 By provisions which I have already described, the primary function of the panel is to consider and report to the director on contested applications, not just to make a recommendation. The report must contain a recommendation on granting or refusing the application (and may contain other recommendations), but must also contain the reasons for a recommendation. It must also contain the panel's findings. The panel must provide the report, with those contents, after giving the applicant and objectors a reasonable opportunity to be heard. The director is not required to conduct a further hearing, but must fully consider the outcome of the process of consideration by the panel.

224 Having regard to those provisions, the clear expectation of the legislature is that the director will give full consideration to the recommendation of the panel, as well as the reasons for it and the report (with the findings) in which it was made. Indeed, 'full consideration' could not be given to the recommendation without doing so.

225 The director submitted the tribunal committed an error of law by failing to give full consideration to the panel's report. The hotel submitted to the contrary and, in the alternative, that any failure of that kind was not vitiating, as it would not have affected the result.

226 In determining the hotel's application for review, the tribunal was exercising its review jurisdiction under s 40(b) of the *Victorian Civil and Administrative Tribunal Act*, as conferred by s 87(1) of the *Liquor Control Reform Act*. In exercising that review jurisdiction, s 51(1)(a) of the former Act gave the tribunal all the functions of the decision-maker. The jurisdiction of the tribunal was substitutionary, not supervisory. Its general responsibility was independently to apply the provisions of the governing legislation and make the correct and preferable decision on the merits on the basis of the material which was presented to it.

227 In the present case, the applicable legislation was the *Liquor Control Reform Act*. The tribunal was bound to apply the same provisions of that Act which the director had to apply in making the decision under review. The tribunal, like the director, was bound to apply s 47(1). The same obligation fully to consider the recommendation and report of the panel as fell upon the director also fell upon the tribunal. Speaking jurisdictionally, that obligation was a condition precedent to the valid exercise of the power under s 47(1). For the tribunal not to perform it would be an error of law, indeed a jurisdictional error.

228 The director submitted the tribunal did fail to perform the obligation because it did no more than mention the panel's recommendation and set out some of the material parts of the report. The hotel submitted that this, together with the tribunal's

detailed consideration of the issues raised in the proceeding, represented full compliance with its obligations in this regard.

229 In the submissions of the parties, reference was made to the principles governing judicial review where the decision at first instance was allegedly made without properly taking relevant considerations into account. According to those principles,[113] the consideration which is required is one of real substance, not one of mere form. The obligation to consider is not sufficiently performed in law when the decision-maker fails to take relevant considerations into account in 'any real sense',[114] fails to consider the considerations 'genuinely and realistically'[115] or fails to undertake 'proper, genuine and realistic'[116] consideration. However, the weight to be given to a consideration is generally a matter for the decision maker to determine on the merits:[117] judicial review does not go beyond declaring and enforcing the law that determines the limits and governs the exercise of the decision-maker's powers,[118] which means the merits of the decision are the province of the decision-maker and not the courts.[119] In *Minister for Immigration and Citizenship v SZJSS*,[120] the High Court endorsed the principle that the decision-maker was obliged to give 'proper, genuine and realistic consideration to the merits of the case',[121] but in judicial review the court should not allow the principle to encourage 'a slide into

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113 The following summary is taken from my own summary in *Shields v Chief Commissioner of Police* (2009) 19 VR 33, 52, which the parties accepted was correct.

114 *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388, 392.

115 *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 195.

116 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1, 13 citing *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292; see also *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77; *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87, 96; *Sacharowitz v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 480, 486; *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169,178-179; *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453, 468; cf *Bruce v Cole* (1998) 45 NSWLR 163, 186; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 435-442.

117 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.

118 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 271-272 citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36.

119 See generally *A Goninan and Co Ltd v Commissioner of Patents* (1997) 75 FCR 200, 210-211.

120 (2010) 85 ALJR 306, 312 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

121 Citing *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292; and *Shand v Minister for Immigration and Ethnic Affairs* [1987] FCA 103 and *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472.

impermissible merits review'.[122]

230 Those authorities are of assistance in identifying the actual deliberative nature of the consideration which is required, one that is made clear by the provisions of the *Liquor Control Reform Act*. There is an express obligation in s 47(1) to give the panel's recommendation 'full consideration'. That obligation is imposed on the director under a decision-making framework in which the panel is required to hear from the applicant and objectors, come to findings and give a report to the director containing recommendations about the determination of the application.

231 While the director is not bound by the recommendation, full consideration in this context requires active intellectual engagement with, and evaluation of, the recommendation, including the report and the reasons given. That consideration must be full in the dictionary sense of complete and entire. Cursory consideration in plainly not enough, for the requirement is not simply to note the recommendation as if it were background information or decision-making history. It is to give the recommendation full consideration. The obligation is not to give the subject matter of the recommendation full consideration, as if conducting the review hearing was enough. The evaluative judgment of the panel, as reflected in the recommendation and the reasons for it, has a status of its own under the legislation, over and beyond the subject matter on which it is based. The tribunal must fully consider the recommendation and the reasons for it as part of its own independent consideration of the matter.

232 That the legislation has made this an express requirement serves to emphasise the significance of the panel in making licensing decisions. In that connection, the relationship between the role of the panel under s 46 and the harm minimisation objects in s 4(1)(a) of the *Liquor Control Reform Act* should be borne in mind, as should s 4(2), which requires the legislation to be applied with due regard to harm minimisation and the risks associated with the misuse and abuse of alcohol.

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122 Citing *Swift v SAS Trustee Corporation* [2010] NSWCA 182, [45] per Basten JA (Allsop P agreeing).

233 Applying and paying due regard to the harm minimisation objects will often raise competing issues of a broad nature. Those issues may be complex and sensitive and may require appropriate community, expert and industry input. Under the decision-making framework, the panel is required to follow the specified procedures which I have identified and inquire into and report on the relevant matters, with a recommendation on how the application should be determined. The applicant and objectors are given a right to be heard so that their legitimate interests can be taken into account. To ensure that the harm minimisation objects are properly considered and applied is one important reason why the director is positively obligated to give full consideration to the outcome of the panel processes, especially given that he or she is not required to conduct a further hearing or provide a further opportunity to be heard. Failing to perform this obligation would undermine an important mechanism for implementing those objects.

234 In the present case, the second section of the tribunal's reasons for decision set out the recommendation of the panel and some material parts of the reasons given in the report. The tribunal did not elsewhere comment on or analyse the panel's recommendation or reasons. Although it gave full reasons for decision, the tribunal did not expressly explain why it disagreed with the approach adopted by, or recommendation of, the panel.

235 Of course the reasons for decision of administrative decision-makers are 'not to be scrutinised upon over-zealous judicial review',[123] 'not to be construed minutely and finely with an eye keenly attuned to the perception of error'[124] and 'have to be read fairly and particular parts have to be read in the context of the reasons as a whole.'[125] In other words, it is necessary to read such reasons for decision fairly, in context and as a whole, not over-critically and always remembering the court is exercising a

123 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

124 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287; approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

125 *Shock Records Pty Ltd v Jones* [2006] VSCA 180, [85] per Bell AJA, Callaway and Ashley JJA agreeing; *Hesse Blind Roller Company Pty Ltd v Hamitoski* [2006] VSCA 121, [3] per Ashley JA and [19]-[22] per Redlich JA.

supervisory and not a substitutionary jurisdiction. As submitted by the hotel, the court should not reason from the mere setting out of the panel's recommendation and reasons that the tribunal failed to give full consideration to the recommendation. Further, absent consent, the parties were not free to rely on anything said or done at a panel hearing (s 170) and, at least in some cases, it may be that the report of the panel is overtaken, to some extent, by the proceeding in the tribunal. In the present case, for example, the tribunal conducted a five-day hearing in which a significant body of evidence was presented, much of which was not before the panel.

236 Adopting that approach, I must still conclude the tribunal failed to give full consideration to the recommendation and report of the panel. In the present case, merely setting out the recommendation and some of the panel's reasons was not sufficient.

237 The recommendation of the panel was that the hotel's licence be varied to end late-night trading at the bottle shop. The reason for that recommendation was that it would make a positive contribution to minimising harm arising from the misuse and abuse of alcohol. The panel did not focus only or even mainly on whether the hotel was to blame for the misbehaviour which had occurred. It focused on the broader harm minimisation rationale of the application

238 Rather than engaging actively with and evaluating that recommendation and those reasons, the tribunal left the panel's report in the background, as if it were of historical interest, and then adopted a much narrower approach to determining the application. In doing so, the tribunal did not consider or explain, explicitly or implicitly, why its own approach was to be preferred to that of the panel. In my view, that was an error of law. This was not the full consideration which was required.

239 The alternative submission of the hotel was that this error, if it was made, was not vitiating as it did not affect the result. I accept the premise of this submission that the court, in an error of law appeal, would not normally interfere with an error of the

tribunal which did not affect its determination of the application. I do not accept that this principle saves the decision of the tribunal from appellate override in the present case.

240 Far from not affecting the result, the failure of the tribunal fully to consider the panel's recommendation and report is one of the reasons why it adopted a legally mistaken approach. If the tribunal had fully considered the panel's approach to the application of the harm minimisation objects of the *Liquor Control Reform Act* and the resolution of the issues raised by the application for variation, it might not have adopted the narrow approach of focussing on whether the hotel was responsible for the misbehaviour which had occurred.

241 In conclusion, the tribunal failed to give full consideration to the recommendation of the panel and thereby committed an error of law.

242 Now to the second ground of appeal.

Tribunal made economic findings without evidence (ground 2)

243 To repeat, ground 2 of the director's appeal is that the tribunal made findings of fact for which there was no evidence in relation to the impact of the variation, if granted, on the economic viability of the hotel and liquor industry.

244 In determining whether the tribunal committed an error of law in relation to those findings, it is appropriate to begin by acknowledging that an appeal under s 148(1) of the *Victorian Civil and Administrative Tribunal Act* must be confined to a question of law. The scope of the appeal which that provision allows reflects a balance between the interests of finality and the interests of legality. The court has jurisdiction only to determine legal questions and can only make orders flowing from that determination. The court does not have jurisdiction to overturn the decision of the tribunal on the basis that it made a mistaken finding of fact. As Brooking JA (Ormiston and Charles JJA agreeing) said in *Ericsson (Aust) Pty Ltd v Popovski*:[126] 'the

126 (2000) 1 VR 260, 265.

appeal … is only on a question of law, and it is not enough to show error of law simply to persuade a judge that the magistrate went wrong on a question of fact.' Their Honours were speaking of s 109 of the *Magistrates' Court Act 1989* which is analogous to s 148(1) of the *Victorian Civil and Administrative Tribunal Act*.

245 Legal principles govern the making of findings of fact by a tribunal, as they do a court. Whether a tribunal has properly applied these principles can give rise to a question of law. While the tribunal is bound by the rules of natural justice, it is not bound by (but may voluntarily apply) the rules of evidence and may inform itself in such manner as it sees fit. [127] As with other tribunals of this nature, [128] the home legislation of the tribunal empowers and indeed expects it to operate with due flexibility and informality. Nevertheless, the tribunal must still have a proper basis for making findings of fact. In the absence of admissions, it can only make such findings on the basis of probative evidence or other admissible and relevant information, and cannot make findings which are capricious or arbitrary. As was recently said, it 'is well established that VCAT is not absolved by [its] Act from acting rationally on probative evidence.'[129] That requirement is fundamental and elementary to the tribunal as an institution of justice operating according to the rule of law.

246 When called on to do so in the exercise of its appellate jurisdiction under s 148 of the *Victorian Civil and Administrative Tribunal Act*, as it has been in the present case, this court will examine the tribunal's determination against those principles. This jurisdiction is supervisory, not substitutionary. Section 148 confers 'judicial power to examine for legal error what has been done' [130] by the tribunal. Although a proceeding under 148 is described as an appeal, it 'confers original not appellate

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127 *Victorian Civil and Administrative Tribunal Act*, s 98(1)(a), (b) and (c).

128 See generally *Secretary, Department of Human Services v Sanding* [2011] VSC 42, [132]-[133].

129 *Secretary, Department of Infrastructure v Williamstown Bay and River Cruises Pty Ltd* [2011] VSC 191, [59] per Dixon J.

130 *Osland v Secretary, Department of Justice* (2010) 241 CLR 320, 331 per French CJ, Gummow and Bell JJ, citing *Roy Morgan Research Centre Pty Ltd v Commission of State Revenue* (Vic) (2001) 207 CLR 72, 79 per Gaudron, Gummow, Hayne and Callinan JJ.

jurisdiction; the proceedings are "in the nature of judicial review"'.[131] The function of the court is to enforce the applicable legal standards, not to remake the tribunal's findings of fact.

247 In *Rugolino v Howard*,[132] I set out the principles which are applied by the court in the exercise of its appellate jurisdiction in relation to findings of fact. Remembering the tribunal is not bound by the rules of evidence and can base its findings on any probative material, those principles apply equally here:[133]

> in *Roads Corporation v Dacakis*,[134] Batt J held 'the question whether there is *any* evidence of a particular fact is a question of law.' Therefore a finding of fact is open to challenge as 'erroneous in law', but only if 'there is no probative evidence to support it'.[135] Similarly, in *S v Crimes Compensation Tribunal,*[136] Phillips JA said making a finding of fact would ordinarily give rise to an error of law only if 'it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it.' His Honour emphasised that the question was not whether the finding was 'reasonably open', for that implied the court on appeal could test the finding against a reasonableness standard, but whether the finding was open at all.
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> *S v Crimes Compensation Tribunal* has been followed and explained by the Court of Appeal. In *Myers v Medical Practitioners' Board of Victoria,*[137] Warren CJ (Chernov JA and Bell AJA agreeing) held there was no error of law in making a finding of fact unless the finding was 'not open'. After endorsing[138] the decision of Phillips JA in *S v Crimes Compensation Tribunal*, the Chief Justice approved the statement of Kirby P in *Azzopardi v Tasman UEB Industries*[139] that it was 'critical' to making findings of fact that they be based on the evidence, but there would be no error of law 'unless it can be shown that there was no evidence' to support the finding. The decision of Phillips JA in *S v Crimes Compensation Tribunal* was also followed in *ISPT Pty Ltd v Melbourne City Council.*[140] After approving the 'not open' test, Warren CJ, Kellam JA and Osborn AJA referred to *Transport Accident Commission v Hoffman*[141] where Young CJ and McGarvie J said an appeal court, when determining whether a finding of fact was made in error of law, had to determine whether there was 'any evidence' to support it.[142]
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> In *State of Victoria v Subramanian*, [143] Cavanough J examined these and other

131 Ibid.
132 (2010) 57 MVR 178; [2010] VSC 590.
133 Ibid [10]-[12].
134 [1995] 2 VR 508, 517.
135 Ibid, 520.
136 [1998] 1 VR 83, 90.
137 (2007) 18 VR 48, 59.
138 Ibid [43]-[44].
139 (1985) 4 NSWLR 139, 151.
140 (2008) 20 VR 447.
141 [1989] VR 197, 199.
142 (2008) 20 VR 447, [65].
143 (2008) 19 VR 335, [32].

> authorities. As his Honour held, whether a finding was open on the evidence, or whether there was any or some evidence to support it, are different ways of expressing the same test.

248 It follows that, in the present case, the court must determine whether there is some evidence which could support the findings of fact made by the tribunal, which is a question of law.[144] If there is some evidence or other probative information supporting the finding of fact of the tribunal, the finding will be legally open to the tribunal to make in the exercise of its statutory jurisdiction. In an appeal of this nature, the court could not overturn the finding even if it thought it was erroneous or against the weight of the evidence.

249 Where the tribunal made the finding by drawing inferences from the evidence or other information which was presented, further rules apply in an appeal to the court. In such a case, the function of the court is to determine whether the inference drawn by the tribunal was reasonably open on that evidence or information, not whether the court itself would have drawn that inference. In exercising that appellate jurisdiction, the court must remember the tribunal, not the court, is 'the constitutional judge of fact'.[145]

250 In *Rugolino v Howard*,[146] I also set out the principles which are applied by the court in determining whether an inference is reasonably open. Making the same due allowance for the statutory entitlement of the tribunal to act on probative material which is not evidence in a court of law, those principles too apply equally here:[147]

> in *Roads Corporation v Dacakis*,[148] Batt J said it was a question of law 'whether a particular inference *can* (as opposed to whether it *should*) be drawn from the facts found.' His Honour referred[149] to *Australian Broadcasting Tribunal v Bond*,[150] where Mason CJ said: 'So long as there is some basis for the inference – in other words, the particular inference is reasonably open - ... no error of

144 See also *Secretary, Department of Infrastructure v Williamstown Bay and River Cruises Pty Ltd* [2011] VSC 191, [59] per Dixon J where these principle were recently applied in an appeal from a decision of the tribunal.
145 *Chamberlain v R [No 2]* (1983) 153 CLR 521, 598 per Brennan J, speaking of the analogous role of a jury.
146 (2010) 57 MVR 178; [2010] VSC 590.
147 Ibid [16]-[17].
148 [1995] 2 VR 508, 517.
149 Ibid, 518.
150 (1990) 170 CLR 328, 356.

law has taken place.' In *S v Crimes Compensation Tribunal,*[151] Phillips JA said 'reasonably' was used in this context 'to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily.' His Honour adopted this oft-cited test stated by Mildren J in *Tracey Village Sports and Social Club v Walker*:[152]

> 'If there are primary facts upon which a secondary fact *might* be inferred, there is no error of law. It is not sufficient that this Court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference *might* be drawn.'

The Court of Appeal has also endorsed this approach to appellate review of drawing inferences. When approving the decision of Phillips JA in *S v Crimes Compensation Tribunal,* in *Myers v Medical Practitioners' Board of Victoria*[153] Warren CJ cited with approval the judgment of Mildren J in *Tracey Village Sports and Social Club v Walker*. The Chief Justice went on to refer to this passage from the judgment of Kirby P in *Azzopardi v Tasman UEB Industries Ltd*:[154]

> 'If there is evidence, or if there are available inferences which compete for the judge's acceptance, no error of law occurs simply because the judge prefers one version of the evidence to another or one set of inferences to another. This is his function. The evaluation of competing evidence and inferences is reserved … to the judge '

251 Turning now to the findings of the tribunal, there was evidence that ending late night trading would reduce the turnover of the hotel. According to the hotel managers, about 60% of its turnover came from the bottle shop, and some 50-60% of that came from late night trading. On this evidence, the hotel submitted the variation application would impair the viability of the hotel business. But the evidence of the hotel went little further than that.

252 As turnover is not profit, economic viability cannot be assessed by reference to turnover alone. Consequently, the tribunal had to accept the director's submission that, as the hotel had failed to produce its books of account, its economic evidence could not be accepted. However, in the view of the tribunal, which I cannot uphold, this did not preclude it from making a finding that ending late night trading would seriously impair the viability of the hotel.

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151 [1998] 1 VR 83, 91.
152 (1992) 111 FLR 32, 37-38.
153 (2007) 18 VR 48, 60.
154 (1985) 4 NSWLR 139, 151.

253 In that regard, the tribunal accepted the bottle shop was busy after 11:00 pm and charged premium prices for its liquor ('far in excess of the prices that would be charged by a liquor shop in suburban Melbourne'). It was a 'large source of profit' for the hotel. Therefore, restricting the hours of operation would have a serious effect on its ultimate profitability.

254 On the tribunal's initiation, the parties made competing submissions, but presented no further evidence, on whether reducing the trading hours of the hotel would have a serious effect on the viability and value of the hotel and also upon other liquor outlets in Victoria. In determining these submissions, the tribunal made a general finding that a liquor business without a late night trading licence was less valuable than one with such a licence, and taking that licence away would reduce the profitability of the business and impair its capacity to renew its financial commitments and obtain finance in the future. Many liquor suppliers may be forced out of business, the tribunal found. Taking these general considerations into account, the tribunal found that 'to refuse the applicant's application would have a serious detrimental effect on the economic viability not only of the applicant but of many other liquor outlets in Victoria'.

255 In this appeal, the hotel made three general submissions in support of the findings of the tribunal. The first was that such challenges were strictly confined and rarely succeeded.[155] The second was that such challenges could only succeed if there was *no* evidence or other material to support the finding. The third was that making the impugned finding would constitute an error of law only if it played a particular role or was critical to the tribunal's ultimate determination.[156]

256 In addition to those general submissions, the hotel made a number of specific submissions about the findings.

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155 Citing *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [141] per Cavanough J.

156 Citing *Myers v Medical Practitioners Board (Vic)* [2007] VSCA 163, [55] per Warren CJ; Chernov JA and Bell AJA agreeing.

257 As to whether varying the hours would have a serious effect on the economic viability and ultimate profitability of the hotel, it submitted there was evidence to support that finding. The hotel management witnesses had given evidence of the high proportion of the hotel's turnover which was due to the trade (and the late-night trade specifically) of the bottle shop, and other evidence. It could not be said there was no evidence to support the finding.

258 As to whether varying the hours of the hotel would have a serious detrimental effect on the viability of other liquor outlets, the hotel relied on the opportunity which the tribunal gave the parties to make submissions on that issue, which they took up. The director's then submissions did not suggest there was no evidence to support any finding. If the director had so submitted, the hotel could have led evidence to overcome any such deficiency.[157] Even if the director was not prevented from raising this issue on appeal, the hotel submitted it should not now be accepted. The tribunal was not bound by the rules of evidence[158] and could inform itself as it saw fit.[159] The senior member hearing the application was very experienced in this field and gave due notice of the issue to the parties. It was open to the tribunal to make findings on that basis.

259 In the alternative, the hotel submitted the findings were not critical to the tribunal's ultimate determination, which really followed from its conclusion that late night trading at the bottle shop was more beneficial to the amenity of the area than any harm that occurred from extended hours of trading. The findings did not play a sufficiently central role in that decision to vitiate it.

260 I would accept that, in general terms, the impact of a variation of the licence on the business of the hotel was a relevant consideration. That follows from the objects in s 4(1)(b) and (c) of the *Liquor Control Reform Act*, which relate to the facilitation of the development of a diversity of licensed facilities and the liquor and hospitality

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157 Citing *Coulton v Holcomb*e (1986) 162 CLR 1, 7; *Medical Practitioners Board of Victoria v Lal* [2009] VSCA 109, [41(b)].

158 Section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act*.

159 Section 98(1)(c).

industries. It was also necessary to take into account the restrictions in s 38(4) and similar provisions.

261 It is one thing to accept the relevance of the variation on the business of the hotel as a general consideration. It is quite another to determine what the impact of the variation would be in specific terms. That is a question of fact which must be addressed on the basis of proper evidence. There are no short-cuts by which the necessary disciplines of that route can be avoided. In the absence of concessions, the tribunal could make no particular finding about the profitability and economic viability of the hotel without examining the books of account of the business and properly considering what contribution the bottle shop was making to overhead costs, turnover and profitability, which the tribunal did not do.

262 Therefore, in my view, the tribunal could not base economic viability and profitability findings solely on the fact that the bottle shop was busy, and charged premium prices for its liquor, after 11pm. On its own, this was not evidence from which inferences about the economic viability and profitability of the hotel business might reasonably have been drawn.

263 Further, there was no evidence about the businesses of other liquor licensees, or about their ability to obtain finance. There was no evidence about the effect which varying a licence of a particular licensee would have on the viability, profitability or value of the businesses of other licensees. There was no evidence about the financial arrangements which were common in the industry and how varying the hotel's licence might affect those arrangements. There was no evidence about how other licensees and their financiers might respond to such a variation. The tribunal did not qualify its reasoning by reference to the particular circumstances relied on by the director to support the variation of the hotel's licence. The tribunal did not take into account how unlikely it was that ending late-night trading at the only bottle shop in the Melbourne CBD with a licence to trade on that basis might economically or financially affect, in an adverse way, other liquor outlets in Victoria It made a generalised industry finding without having evidence as to whether other licensees

might fall into the same category as the hotel. That finding could only have been made by inference, yet there was no evidence from which that inference might reasonably have been drawn. That must especially be so when the tribunal's finding in relation to the hotel was itself not legally open.

264 The tribunal devoted a lot of time to the economic impact issue. After the completion of the hearing, it invited the parties to make further submissions on the subject. The analysis in the reasons is extensive. I must therefore reject the hotel's submission that the tribunal's error did not play a vitiating role in its decision.

265 I do not accept the hotel's submission that, by reason of disentitling conduct, the director is precluded from raising this ground of appeal. There is nothing unfair in the course adopted by her, either in the tribunal or in this court. Proceedings in the tribunal are inquisitorial, not adversarial. It was the tribunal, supported by the hotel, which was agitating the profitability and viability issues. The director was not obliged to point out the inadequacies in the evidence in relation to those issues which she now relies on in this court. She was entitled to make submissions to the tribunal on the basis of the evidence as it was before it. She is entitled to make submissions to this court on appeal that there was a legally insufficient evidentiary foundation for the findings which the tribunal came to make.

266 In conclusion, the findings made by the tribunal with respect to the profitability and viability of the hotel and other liquor outlets in Victoria were made without evidence and in error of law.

CONCLUSION

267 The Director of Liquor Licensing (supported by the Chief Commissioner of Police) has appealed against a decision of the Victorian Civil and Administrative Tribunal to refuse to vary the liquor licence at the Exford Hotel, which is operated by Kordister Pty Ltd. The director had varied that licence under the *Liquor Control Reform Act 1998* to end late-night trading (ie, between 11:00 pm and 7:00 am) at the hotel bottle shop, which was the only one in the Melbourne CBD with those extended trading

hours. Upholding the hotel's application for review of the director's decision, the tribunal restored late-night trading at the bottle shop.

268 The function of the court in this appeal is not to determine whether the tribunal was correct in setting aside the director's decision or whether late-night trading at the bottle shop should end. That is the statutory function of the tribunal. The function of the court in this appeal is to determine whether the tribunal committed an error of law.

269 The director contended the tribunal made three errors of law: failing properly to apply the harm minimisation objects of the *Liquor Control Reform Act*; failing fully to consider the recommendation of the Liquor Licensing Panel; and, without evidence, making findings of fact about the economic impact of the variation on the profitability and viability of the hotel and other liquor outlets in Victoria.

270 Contributing to minimising harm arising from the misuse and abuse of alcohol is a broad regulatory object which was included in the *Liquor Control Reform Act* as it was enacted in 1998 and has been strengthened by subsequent amendments since. When making liquor licensing decisions, harm minimisation is the primary consideration, although not the only consideration. The application of that object requires a range of social, economic and cultural factors to be taken into account, which must then be weighed in the balance with the positive benefits which are brought to the community by the liquor industry, as reflected in the other objects.

271 Under the legislation, harm minimisation encompasses harm to the health and wellbeing of individuals, families and communities, as well as social, cultural and economic harm and harm to neighbourhood and street amenity. It encompasses harm to our personal safety and our freedom to move in the streets without hindrance, disturbance or molestation. It has preventative, protective and responsive aspects. By so applying the object, Parliament expects the liquor licensing decision-making process to be fully informed by all the costs and benefits,

and not dominated by economic considerations, as the previous legislation was seen to permit.

272 The director contended before the tribunal that the harm minimisation object would be well served by ending late-night trading at the bottle shop. To establish that contention, she presented evidence in two main categories. In the first category, there was general evidence about violence and anti-social street behaviour in the community and the Melbourne CBD arising from the misuse and abuse of alcohol. In the second category, there was evidence of that nature concerning the streets near the hotel. The broad case of the director was that ending late-night trading at the bottle shop would positively contribute to minimising harm due to the misuse and abuse of alcohol, especially because it was the only one in the Melbourne CBD with those hours of operation.

273 Misunderstanding the approach adopted in previous decisions of the tribunal, the tribunal in the present case held the director's general evidence was of difficult relevance and had to be treated with considerable caution. In my view, that was an error of law. General evidence of the kind presented by the director is relevant and must be given due consideration, along-side the specific evidence, in the application of the harm minimisation object in the liquor licensing decision-making process. Such evidence, with the other evidence, allows the tribunal to determine whether harm arising from the misuse and abuse of alcohol is occurring or likely, the degree of that likelihood and the nature and magnitude of the harm. That determination can then be weighed in the balance with the benefits which the licensed premises bring to the community.

274 When considering the specific evidence, the tribunal focussed on whether the hotel was to blame for the violence and anti-social behaviour which had occurred nearby. It found the hotel had complied with its licence conditions and it would be wrong to hold the hotel responsible for misuse and abuse of alcohol by the ultimate consumer.

275 In my view, that narrow approach was also an error of law. While compliance by the licensee is a relevant consideration, the question to be asked always is whether the licensing decision will contribute to minimising harm arising from the misuse and abuse of alcohol. The positive benefits arising from the liquor industry, which are reflected in other objects in the legislation, must be weighed in the balance with minimising that harm. Even though the particular premises may not be to blame for misuse and abuse of alcohol which has occurred or will be likely, a decision to vary a licence can be made because, when so balanced, it would positively contribute to minimising that harm.

276 In this case, what the tribunal was required to do, and did not do, was to make an evaluative judgment about the contribution which ending late-night trading at the bottle shop would make to minimising harm arising from the misuse and abuse of alcohol. That required the tribunal to consider the degree and nature of the harm which was occurring or likely, from whatever cause, and how, if at all, ending that trading would contribute to minimising that harm, even if the bottle shop was not responsible for it.

277 The Liquor Licensing Panel occupies an important place in the decision-making scheme. It is a forum in which the views of a range of interested parties can be heard, including the licensee, community objectors, local councils and the police. When making certain licensing decisions, including decisions to vary a licence, the legislation requires the director and the tribunal to give full consideration to the panel's recommendation.

278 In the present case, the panel conducted a public inquiry and provided a detailed report. Applying the correct approach to the application of the harm minimisation object, it recommended in favour of varying the hotel's licence to end late-night trading at the bottle shop. In its reasons for decision, the tribunal referred to this recommendation and the reasons for it. The tribunal did not otherwise refer to the panel. It did not explain why it was adopting an approach, and making a decision, which was different to the panel.

279 In my view, that did not represent full consideration of the recommendation of the panel. Full consideration requires positive engagement with the panel's recommendation and the reasoning behind it. More is required than treating the recommendation and its reasoning as a background or historical consideration. In this respect also the tribunal committed an error of law.

280 Among other things, the tribunal made findings that ending late-night trading at the bottle shop would damage the profitability and viability of the hotel and other liquor outlets in Victoria. In doing so, it relied on evidence that the bottle shop was able to charge premium prices for late-night liquor sales. The tribunal did not examine the books of account, and had no evidence of the profitability, of the hotel or other licensed premises. It follows, in my view, that the tribunal had no evidence on which to make those findings, by inference or otherwise. Evidence of the late-night turnover of a bottle shop at premium prices is not evidence of the overall profitability of the business, much less its viability, or that of other liquor outlets. Making the findings was an error of law.

281 Despite the forceful and cogent submissions made on behalf of the hotel, the director has made good each of the legal grounds of appeal on which it has relied. I uphold the appeal, set aside the orders of the tribunal dated 9 March 2010 and remit the hotel's application for review back to the tribunal (to be differently constituted) for reconsideration according to law.