



## **Submission on the Draft Determination**

### **Application for revocation and substitution of Authorisations A91224 & A891225**

The Distilled Spirits Industry Council of Australia (DSICA) is the peak industry body for Australia's manufacturers and importers of distilled spirits. We welcome this opportunity to make a submission on the draft determination on the revocation and substitution of Authorisations A91224 & A91225.

DSICA made a submission on the original authorisations for a pro-forma liquor accord arrangement (PLAA) in Queensland. At that time, we raised a number of objections to the price control mechanisms that were targeted at distilled spirits. We were disappointed that the ACCC granted the initial authorisations in the face of well-founded objections. We are extremely disappointed that the draft determination has proposed extending the potential for authorised price controls across all of Queensland for a period of five years.

DSICA acknowledges the acute problems of alcohol-related violence and antisocial behaviour that Queensland entertainment precincts face, and we support effective cooperation between licensed venues via liquor accords to counter that behaviour, except where those agreements are a) discriminatory against distilled spirits, and b) have potential for cartel behaviour.

DSICA has long supported the formation and operation of liquor accords on the basis that they are local solutions to local problems. The importance of having some local flexibility is due to alcohol-related issues such as violence and antisocial behaviour varying enormously by location, type of venue, time of day, and season. While state liquor licensing legislation can set a uniform regulatory framework, it is very useful to have the ability to have a local coordinating mechanism that can agree and quickly implement local responses to local (and often transient) problems. However, liquor accords do not remove the need for effective and ongoing regulation.

DSICA also supports Queensland having a pro-forma liquor accord agreement that eases the establishment of liquor accords, on the proviso that no condition of the Accord be compulsory and membership of an accord remains voluntary.

When discussing alcohol policy and enforcement mechanisms, it is important to remember that 'alcohol is alcohol is alcohol'. All alcohol has the same impact on the human body. It is not the type of alcohol that is consumed that it matters; it is how much alcohol is consumed and how fast. Effective and non-discriminatory regulation and liquor accord agreements are focused on controlling those factors: how much alcohol is consumed by an individual, and how fast.

DSICA would also make the point that there is a great level of academic debate about the true nature and extent of the costs of alcohol, especially in regard to what costs are truly social and which costs are borne by private individuals. In particular, the concept of 'lost productivity' and who bears the cost is highly arguable. There is also substantial academic debate about the validity of the Total Consumption Model that postulates that a nation's alcohol harm has a constant relationship with that nation's overall level of per-capita alcohol consumption. Nations are finding that their per-capita consumption is declining but the alcohol harms are increasing.

### **Application's misconception of the problem**

DSICA believes that the ACCC made a mistake to accept the OLGR's original application to authorise anti-competitive measures in the PLAA. This mistake arises from a fundamental misconception of the cause of the problem that is to be mitigated by the authorisation. The issue is not alcohol pricing or promotions – it is how alcohol is supplied and consumed in the Townsville nightclub strip, and how fast consumers drink.

It is clear from the draft determination and accompanying submissions that the licenced venues in the Townsville entertainment precinct were highly competitive, engaged in extreme price discounting, and were also largely absent in their responsible service of alcohol (RSA) obligations for competitive reasons. One of the obligations of RSA is that intoxicated people are not allowed to enter or to remain on licenced premises.

The price of alcohol sold in licensed venues is irrelevant where the licensees are complying with their RSA obligations that intoxicated people should not be served or allowed onto the premises. The draft determination makes clear that increasingly intoxicated patrons were leaving venues at the end of that venue's discounted drinks and going to venues that had started their discounting.

The Townsville Liquor Accord (TLA) introduced minimum pricing on spirits in order to solve the problem of how much alcohol was being supplied and consumed in the licensed venues of Townsville to intoxicated patrons, and the resulting antisocial behaviour and violence. The ACCC did not take into account that this problem was a result from the standards of service of alcohol in those venues, and accepted the argument that the licenced venues should be able to set minimum prices in order to solve a problem created by the venues' own management.

DSICA points out that licensed venues have legal obligations to conduct their business according to RSA requirements, and that the monitoring and enforcement of RSA is the OLGR's and Queensland Police responsibility. Paragraph 148 of the draft determination details how TLA members said their agreement to end touting in proximity to other venues was also helpful in fixing the problems yet, as the ACCC itself notes, such forms of touting was illegal under Queensland's existing Liquor Act. This raises the question of what was the level of OLGR presence in Townsville and the standards of its enforcement.

DSICA also notes that in the supporting documentation submitted by the OLGR and the TLA there was a claim that Townsville's licensees were having distilled spirits drink promotions at less than \$.80 per drink. DSICA questions this could be the case. At the time of the original application (2010) the excise tax on distilled spirits was \$0.91 per standard drink (a standard measure of alcohol

equivalent to one nip of spirits) and that \$.80 per served drink would leave nothing for the cost of manufacturing, marketing and distribution, wholesalers' mark-up, nor any revenue for the venue.

While it is possible that the venues were loss leading at \$.80 per spirits drink, loss-leading cannot be carried out on a large scale or for very long. The purpose of any retailer loss-leading is to attract customers into a store or venue so that they then go on to buy other goods at full price. Townsville's licensees appear to have offered very cheap drinking to attract extremely price-conscious drinkers only to see those drinkers depart as soon as the venue's discounts ended.

Townsville police have supplied evidence that they now have a lower requirement to supply Police officers for the shifts covering the late-night entertainment area of Townsville since price controls were allowed. It is very likely that the drinkers attracted to the heavy and cheap intoxication offered in the Townsville entertainment precinct by the extreme discounting of spirits in a succession of venues, have shifted where they consume and what drinks they consume. It is unknown if this likely shift in drinking location and product has led to a lower rate of alcohol-related harms across the wider Townsville area.

DSICA notes that the draft determination (para 65) states "that the price and supply controls and other measures in the Townsville accord were implemented simultaneously and within a changing broader social and police enforcement environment that may have contributed to any observable changes and behaviour in the area". This point is largely repeated in paragraph 76.

DSICA is extremely concerned that the draft determination establishes the ability of accords to set an explicit minimum price if given the permission of the state alcohol regulator. The justification appears to be solely that the OLGR and the TLA believed it was useful in controlling the business behaviour of the TLA's own members. DSICA notes that the Queensland OLGR and the TLA have not given any independently sourced data on alcohol-related harms. In particular, neither party has given information on rates of intoxication, violent crimes, or accidents and emergency admissions in the wider Townsville area.

ACCC also supports its decision for granting the authorisation by using the alternative scenario that refusing the authorisation will mean liquor accords have fewer means of controlling intoxication and related harms. This is an argument that could be used to justify any condition in an authorisation.

### **Limited take-up of the Accord price-fixing arrangement**

ACCC points to the fact that the TLA was the only accord that had price controls during the period of the interim determination; from this the ACCC somewhat hopefully concludes that the future use of price controls will be limited. A more realistic view would be that the ACCC process for authorising the minimum pricing by the TLA was acting as a deterrent for other accords applying for similar authorisations.

As the draft determination itself notes (para 89), there are profit and competition reducing benefits from minimum price agreements, hence there will be ongoing and substantial incentives for accords to seek such agreements. If the ACCC believes that the future application to use price and supply controls will be limited, then maintaining the procedural status quo that individual liquor accords have to apply to the ACCC for authorisation would be a higher threshold that had to be met, and result in the least reduction in levels of competition for the offsetting gains in public benefit.

## **Specific objections to the conditions of the proposed reauthorisation**

### **Allowing the setting of minimum prices by venues**

DSICA objects to the creation of an easier means (via OLGR registration) for Queensland liquor accords to set a minimum price for alcohol for their members or to agree to restrict in-venue advertising or promotions of very high alcohol substances.

DSICA does not object to accords agreeing to restrict extreme discounts, discounts of limited durations or promotions (including advertising) that may encourage patrons to consume liquor irresponsibly and excessively.

### **Period of the proposed reauthorisation**

The length of the proposed authorisation at five years is excessive, and if authorisation is granted, a three-year authorisation would be more appropriate.

### **OLGR role of approving anti-competitive measures**

The draft determination outlines a procedure for OLGR to authorise anti-competitive measures for accords that are registered by the OLGR. The registration of accords is an invention of the ACCC as part of having the OLGR act as a state-based arbiter of anti-competitive measures. DSICA does not believe that OLGR can or will fulfil this role objectively without greater reporting and transparency obligations being attached to this role.

The draft determination lacks any objective tests that the OLGR needs to meet in order to grant registration. The only tests are that the price or supply control is “appropriate for reducing an identified harm”, which is a very broad and easy test to meet, and also “proportionate” which can always be argued for (at the least). The words “appropriate” and “proportionate” are entirely subjective.

The draft determination sets out that liquor accords will be able to freely choose which of the measures contained in the authorised pro-forma agreement that the accord adopts, however the fact that OLGR will be able to grant or withhold a registration that enables profit-enhancing and competition-lessening controls is highly likely to lead to OLGR bargaining with accords so that they adopt more of the conditions in order to gain registration. At the very least, if the OLGR is the authoriser of competition-reducing measures through its registration of accords, then it should have additional reporting requirements to make public the number and percentage of total applications for competition-reducing measures that it has rejected as unwarranted, not just make an annual report to the ACCC.

### **Makes available a geographically broad anti-competitive measure when other means of cooperation and regulation are available**

It is unclear why the ACCC would enable easier access to a price-fixing measure state-wide across Queensland when there are effective and widely used alternative measures that do not lessen competition or restrict choice that are available to hotel and nightclub licensees, the accords, and the OLGR. They do however depend on regulation efforts by the OLGR.

No other Australian jurisdictions have enabled explicit price setting by licenced venues as a means of controlling alcohol-related harms, antisocial behaviour and violence.

The Queensland Government is currently substantially updating and reforming the liquor licensing act 1992 as part of its Safe Nights policy. The legislation changes contained in the *Safe Night Out Legislation Amendment Bill 2014* substantially increase the obligations on licensees in regard to the responsible service of alcohol and promotion and advertising.

The new Act will also include declaring a locality a Safe Night Precinct, and for all licensees to be obliged to be members of the precinct's Boards of Licensees to manage alcohol related issues in that locality.

### **Shots and shooters**

DSICA objects to the proposed conditions that accord members are able to agree to restrict the serving of shots and shooters under these definitions:

- avoid offering drinks that, by the method of consumption, encourages the responsible drinking habits and it is likely to result in rapid intoxication
- not advertise or allow promotions of very high alcohol substances such as over proof rum and high alcohol carbonated drinks.

Despite the listing of examples in the definitions, these are still subjective decisions about what is irresponsible. As DSICA noted above, it is not the form of the drink or the alcohol content of a particular drink that matters, it is how much alcohol is consumed and how fast. Venues agreeing to these conditions would be doing so as a replacement for their RSA obligations.

The draft determination supports the OLGR and TLA opinion that one of the least disruptive mechanism for their businesses to control levels of in-venue and precinct drunkenness is for venues to agree not to sell or promote specific categories of drinks, specifically shots and shooters served after 2am.

DSICA objects to the targeting of "very high alcohol drinks", defined in the draft determination as any drink that has more than two standard drinks. That definition will capture jugs of beer, large glasses of wine (175ml) with an ABV in excess of 14.5% (which is increasingly common), larger serves of fortified wines, and almost all cocktails. There are probably few cocktails served in Townsville's nightclubs, but it is not accords' jobs to ban them because of an arbitrary limit on standard drinks in a glass.

DSICA submits that the ACCC proposes to allow a substantial lessening of consumers' choices in this condition, as a substitute for venues carrying out their RSA requirements to monitor their patrons' pace of drinking and level of intoxication.