

‘LONG MAY THE BUSKERS CARRY ON BUSKING’: STREET MUSIC AND THE LAW IN MELBOURNE AND SYDNEY

JULIA QUILTER^{*} AND LUKE MCNAMARA[†]

Busking has been a feature of public spaces and cityscapes for centuries. For much of the 19th and 20th centuries, street performance occupied an ambiguous status in many cities: highly visible, but vulnerable to the harsh enforcement of public order offences and associated police powers. The 21st century has seen the proliferation of a different approach to regulation: permit systems established by local governments. This approach ostensibly represents a significant break with past law enforcement approaches which treated busking as a ‘nuisance’ to be discouraged or even criminalised. However, by imposing strict conditions, including location, volume and duration limits, and threatening hefty fines for illegal busking, local council regimes risk perpetuating the marginal and vulnerable position which buskers have traditionally occupied. Drawing on the findings of field work undertaken in the cities of Melbourne and Sydney — including interviews with council officers, rangers and buskers — this article examines the impact of contemporary busking laws, including whether this risk materialises, or whether, instead, councils have achieved the challenging dual goals of simultaneously encouraging and controlling busking.

^{*} BA (Hons) (Syd), LLB (UNSW), PhD (Monash), PLTC (College of Law); Associate Professor, Legal Intersections Research Centre, School of Law, University of Wollongong. We would like to acknowledge the expertise and cooperation of the local council and authority employees who agreed to be interviewed for this research project, and the buskers who generously took time out from the business of enlivening the streets of Melbourne and Sydney to chat with us. The quote in our title comes from the late Frank Walker, who, as Attorney-General of New South Wales in 1979, was responsible for reforms that abolished the crime of begging, which had been used against buskers: New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4920.

[†] BA, LLB (UNSW), LLM (Manit), PhD (Wollongong); Professor, Legal Intersections Research Centre, School of Law, University of Wollongong.

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I INTRODUCTION

There's nobility in being a street musician, [Glen] Hansard says. 'It's not just about making money and surviving. Not at all. It's the opposite. If you intend to make money, generally you won't make much money and won't meet anyone. But if your intention is to go out and sing a few songs and enjoy yourself, the world opens up. Which is a lesson for life.'¹

Busking has been a feature of public spaces and cityscapes for centuries.² It has long excited a diverse range of reactions. At one end, busking is celebrated as one of the delights of metropolitan life; liberated artistic expression that

¹ Anthony Breznican, 'Musical Stars of "Once" Strum Up Support', *USA Today* (online), 10 June 2007 <http://usatoday30.usatoday.com/life/movies/news/2007-06-10-once_N.htm>. See also Robbie Fraser, 'Ode to the Busker' (Spring 2011) *Solstice* <<http://solsticelitmag.org/content/ode-to-the-busker/>>; Louise Molloy, 'Busking' (2003) 29 *Hecate* 314.

² David Cohen and Ben Greenwood, *The Buskers: A History of Street Entertainment* (David & Charles, 1981).

adds colour and energy and enhances the urban mood; an antidote to, and welcome respite from, the routine, stress and intensity of urban transit. At the other, impromptu musical performance in public spaces has been demonised as a blight on the urban soundscape; a nuisance to be eradicated; merely begging in disguise.³ In some towns and cities it still attracts police attention and criminal law enforcement, including on-the-spot fines,⁴ arrests⁵ and court appearances.⁶

The late 20th and early 21st centuries have seen a movement away from criminal law-based prohibition and discouragement of busking towards regulatory regimes that purport to simultaneously *encourage* and *control* busking. Permit systems which involve a licence fee, possible audition, location and volume restrictions, and duration limits, and which are backed by the threat of hefty fines for illegal busking, have been criticised as over-regulation.⁷ At times, new busking laws have met with staunch resistance from buskers and their supporters.⁸ However, to a large extent, buskers appear

³ See, eg, Ian Munro, 'City Urged To Get "Beggar Buskers" under Control', *The Age* (Melbourne), 7 February 2000, 3.

⁴ See Peter Way, 'Community Calls for Buskers to Return to Campbelltown after Local Musician Fined by Police', *Macarthur Chronicle* (online), 17 June 2014 <<http://www.dailytelegraph.com.au/newslocal/macarthur/community-calls-for-buskers-to-return-to-campbelltown-after-local-musician-fined-by-police/story-fngr8h70-1226956236655>>; Katherine Fenech, 'Council Considers Lifting Ban on Buskers', *Campbelltown Macarthur Advertiser* (online), 21 August 2014 <<http://www.macarthuradvertiser.com.au/story/2503998/council-considers-lifting-ban-on-buskers/>>.

⁵ For recent examples from London and New York respectively, see Nick Clark, 'London Busking Arrests Lead to Calls for Code of Conduct', *The Independent* (online), 30 May 2014 <<http://www.independent.co.uk/news/uk/home-news/london-busking-arrests-lead-to-calls-for-code-of-conduct-9462272.html>>; Cady Drell, 'Why Was This Subway Musician Arrested for Playing Guitar?', *Rolling Stone* (online), 20 November 2014 <<http://www.rollingstone.com/music/features/subway-musicians-arrested-20141120#ixzz3KE9iiCkL>>.

⁶ See, eg, 'He's Breaking the Law by Busking', *Mackay Daily Mercury* (Mackay), 13 July 2010, 3. The Whitsunday Regional Council later lifted the ban after campaigning by Andrew Findlay: 'Buskers Get the Green Light', *Whitsunday Times* (online), 16 July 2010 <<http://www.whitsundaytimes.com.au/news/buskers-get-the-green-light-to-perform/583445/>>.

⁷ See, eg, Steve Dow, 'Buskers Bowed Down by Red Tape', *The Sydney Morning Herald* (online), 27 April 2013 <<http://www.smh.com.au/entertainment/music/buskers-bowed-down-by-red-tape-20130426-2ijuc.html#ixzz2pxe6jNeW>>.

⁸ For example, in 2014, buskers challenged a new licensing regime introduced by the local council in Camden, London, arguing (unsuccessfully) that the regulations breached the *European Convention on Human Rights: R (Keep Streets Live Campaign Ltd) v Camden London Borough Council* [2014] LGR 286. The Court of Appeal refused leave to appeal. In the

to have accepted (happily or otherwise) the reality of regulation, and have gone about their business, whether in conformity with local council rules, in blissful ignorance, or outright defiance.

In this article we present the findings of the first academic study in Australia of the origins and operation of busking laws.⁹ The operation of 'allied' public space laws, such as continuing criminal prohibitions on begging and vagrancy in some parts of Australia, have been the subject of politically-engaged scholarly analysis,¹⁰ but the nature of local council laws dealing with street performance, and the impact of these rules on the lives and activities of street buskers, and on other users of public spaces that buskers inhabit, have

United States, there is a long history of free speech-based (*United States Constitution* amend I) litigation over the validity of legal restrictions on busking: see James Graham Lake, 'Demsetz Underground: Busking Regulation and the Formation of Property Rights' (2012) 87 *New York University Law Review* 1100, 1127–30.

⁹ Busking and busking regulation have attracted some scholarly attention internationally, from a range of disciplines, including history, musicology, sociology and sound studies: see, eg, Cohen and Greenwood, above n 2; Susie J Tanenbaum, *Underground Harmonies: Music and Politics in the Subways of New York* (Cornell University Press, 1995); Sally Harrison-Pepper, *Drawing a Circle in the Square: Street Performing in New York's Washington Square Park* (University Press of Mississippi, 1990); Michael Bywater, 'Performing Spaces: Street Music and Public Territory' (2007) 3 *Twentieth-Century Music* 97; Murray Smith, 'Traditions, Stereotypes, and Tactics: A History of Musical Buskers in Toronto' (1996) 24 *Canadian Journal for Traditional Music* 6; John E Zucchi, *The Little Slaves of the Harp: Italian Child Street Musicians in Nineteenth-Century Paris, London, and New York* (Liverpool University Press, first published 1992, 1999 ed). See also Lily E Hirsch, "'Playing for Change": Peace, Universality, and the Street Performer' (2010) 28 *American Music* 346; John O Lemay IV and Larry W Bates, 'Exploration of Charity toward Busking (Street Performance) as a Function of Religion' (2013) 112 *Psychological Reports: Relationships & Communications* 578. There is an emerging body of cultural sociology literature on busking and street music: see, eg, Andy Bennett and Ian Rogers, 'Street Music, Technology and the Urban Soundscape' (2014) 28 *Continuum: Journal of Media & Cultural Studies* 454. See also Nick Crossley and Wendy Bottero, 'Social Spaces of Music: Introduction' (2015) 9 *Cultural Sociology* 3; Symposium, 'Music, Characterization and Urban Space' (2010) 2 *Popular Music History* 105. There has been very little research from a legal perspective. For rare exceptions, from the United States and New Zealand respectively, see Lake, above n 8; Fiona Wright, 'Sound Check: Bylaws, Busking and the *Local Government Act 2002*' (2005) 36 *Victoria University of Wellington Law Review* 105.

¹⁰ See, eg, Philip Lynch, 'Understanding and Responding to Begging' (2005) 29 *Melbourne University Law Review* 518; Philip Lynch and Kristen Hilton, 'We Want Change: Understanding and Responding to Begging in Melbourne' (2006) 19 *Parity* 40; Tamara Walsh, 'Defending Begging Offenders' (2004) 4 *Queensland University of Technology Law and Justice Journal* 58. See also Nicholas Blomley, 'The Right to Pass Freely: Circulation, Begging, and the Bounded Self' (2010) 19 *Social and Legal Studies* 331; Cristian Pérez Muñoz and Joshua D Potter, 'Street-Level Charity: Beggars, Donors, and Welfare Policies' (2014) 26 *Journal of Theoretical Politics* 158, 168–9.

escaped attention.¹¹ Busking laws rarely give rise to litigation,¹² but they are no less deserving of attention for that. In fact, like many public order laws and offences, their relative invisibility, absent regular (and publicised) judicial engagement and scrutiny, makes them especially worthy of research attention.

In this article we provide a backdrop for, and then present, the findings of field work undertaken in the cities of Melbourne and Sydney, including interviews with council officers, rangers and buskers. Our primary goal is to assess the street level impact of busking laws; specifically, whether they achieve the delicate balance of regulating without stifling busking's contribution to the quality of public life in Australia's two largest cities.¹³

¹¹ Our determination to making a contribution to filling this void forms part of a wider research agenda that investigates the operation of 'low-level' regulatory powers that are deployed to manage the propriety of behaviour in public spaces: see Julia Quilter and Luke McNamara, 'Time to Define "the Cornerstone of Public Order Legislation": The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)' (2013) 36 *University of New South Wales Law Journal* 534; Luke McNamara and Julia Quilter, 'Public Intoxication in NSW: The Contours of Criminalisation' (2015) 37 *Sydney Law Review* 1. See also David Brown et al, *Brown, Farrier, Neal and Weisbrof's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) ch 6. We value the work being done by scholars across law, sociology and geography that takes seriously the law's part in routine 'everyday' occurrences and interactions in urban settings: see, eg, Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1993); Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press, 2012); Nicholas Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow* (Routledge, 2011); Irus Braverman et al (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014); Alison Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Routledge, 2014).

¹² But see *Forest v City of Sydney* [2011] FMCA 480 (16 May 2011), where a dispute over permit revocation (City of Sydney) led to proceedings in the Federal Magistrates Court alleging disability discrimination. See also *Kelly v Tamworth Regional Council* [2013] NSWADT 107 (16 May 2013), where the applicants alleged racial discrimination in the enforcement of busking rules in Tamworth. See also the New Zealand case of *Heke v Police* (Unreported, High Court of New Zealand, French J, 4 December 2008).

¹³ Our research on busking regulation is located in the tradition of 'law and society' research: see Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009). That is, we are concerned with both the nature and scope of the rules established by local councils as they are expressed in local laws, policy documents and guidelines *and* with their operation in the real world. Very little scholarly attention has been paid to the law creation and enforcement practice of local governments, outside the context of planning approvals and environmental controls: see, eg, David Farrier and Paul Stein, *The Environmental Law Handbook: Planning and Land Use in NSW* (Thomson Reuters, 5th ed, 2011). For notable exceptions, see Katharine Gelber, 'Dis-

Part II of this article provides an overview of the history of ‘busking laws’ in the United Kingdom in the 19th century, and their transfer to Australia as part of public order laws. Part III describes and compares the current legal arrangements that have been put in place by the City of Melbourne and the City of Sydney respectively,¹⁴ in exercise of their broad local government jurisdiction to regulate activity in public places.¹⁵ We show that, on paper at least, busking laws are detailed and complex, have the potential to impose onerous conditions and restrictions on buskers and carry the threat of significant penalties for violations of the rules. Part IV summarises the findings of the empirical phase of the project, which includes interviews with three groups of people in Melbourne and Sydney: council officers responsible for the development and oversight of busking policies; rangers responsible for on-the-ground enforcement; and street performers themselves. Insights drawn from these perspectives add an original and essential dimension to our assessment of the impact of local government regulatory regimes on the capacity for street performers to enhance the ‘vitality of the everyday life of the city.’¹⁶

tracting the Masses: Art, Local Government and Freedom of Political Speech in Australia’ (2006) 10 *Law Text Culture* 195; Katharine Gelber, ‘Political Speech Practice in Australia: A Study in Local Government Powers’ (2005) 11(1) *Australian Journal of Human Rights* 203. There have been some significant recent judicial decisions on the constitutionality (implied freedom of political communication) of local government laws affecting preaching and protesting (but not busking): see *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *O’Flaherty v City of Sydney Council* (2014) 221 FCR 382; *Muldoon v Melbourne City Council* (2013) 217 FCR 450.

¹⁴ While our primary focus in this article is *local government* busking laws, we recognise that busking in some (public) parts of both cities (eg Queen Victoria Markets and Federation Square in Melbourne; Circular Quay and The Rocks in Sydney) is governed by different rules and authorities.

¹⁵ See generally Andrew H Kelly, ‘The Development of Local Government in Australia, Focusing on NSW: From Road Builder to Planning Agency to Servant of the State Government and Developmentalism’ (Paper presented at the 3rd World Planning Schools Congress, Perth, 5 July 2011).

¹⁶ Paul Simpson, ‘Street Performance and the City: Public Space, Sociality, and Intervening in the Everyday’ (2011) 14 *Space and Culture* 415, 427. For a fascinating localised study of this question, see Vivian Doumpa, *Music in Public Space: Changing Perception, Changing Urban Experience? The Effect of a Music Performance on People’s Perceptions on the Quality of Public Space, in Navarinou Square, Thessaloniki, GR* (Master Thesis, University of Utrecht, 2012). See also Paul Simpson, ‘Ecologies of Experience: Materiality, Sociality, and the Embodied Experience of (Street) Performing’ (2013) 45 *Environment and Planning A* 180; Paul Simpson, ‘A Soundtrack to the Everyday: Street Music and the Production of Convivial “Healthy”

II HISTORY OF BUSKING LAWS

In contrast to the permissive licensing regimes that have been established by local councils since the 1990s, during the 19th century and for much of the 20th century, buskers were subjected to public order laws and policing practices that regarded them as an urban nuisance because they generated noise, could obstruct traffic and impacted adversely on amenity. In this Part we provide a brief account of the laws and police powers that were employed in London in the 19th century to manage street musicians. We then trace the way in which this regulatory approach was largely replicated in the colonies (later States) of New South Wales and Victoria, and coupled with the broad powers of local governments in Australia to regulate activities in public places.

A 19th Century Laws in England

The history of laws impacting on buskers is intimately connected with changing and conflicting attitudes towards acceptable behaviour in public places, particularly with the rapid growth of urbanisation from the 18th century. For centuries, the streets were the *only* place that most people could hear music. Therefore, although not necessarily universally loved, musical performance was synonymous with *public* performance. However, during the 18th century, street music became ‘profoundly politicised’,¹⁷ and was increasingly perceived by political elites as a vice to be managed (in contrast to ‘high culture’ performance in private homes and concert halls to which only the wealthy had access).¹⁸ In Victorian England, the criminal law was invoked to this end.

Public Places’ in Gavin J Andrews, Paul Kingsbury and Robin Kearns (eds), *Soundscape of Wellbeing in Popular Music* (Ashgate, 2014).

¹⁷ Bruce Johnson, ‘From Music to Noise: The Decline of Street Music’ (Speech delivered at Street Music: An International Conference, Monash University, 8–9 December 2014). See generally Bruce Johnson, ‘Sites of Sound’ (2009) 24 *Oral Tradition* 455; Bruce Johnson, ‘Low-Frequency Noise and Urban Space’ (2010) 4 *Popular Music History* 177; John Shepherd, David Horn and Dave Laing (eds), *Continuum Encyclopedia of Popular Music of the World* (Continuum, 2005) vol 5, 235–47, 259–62, 264–7.

¹⁸ See Jacques Attali, *Noise: The Political Economy of Music* (Brian Massumi trans, University of Minnesota Press, 1985) 72–4 [trans of: *Bruits: Essai sur L’Économie Politique de la Musique* (first published 1977)]. For an interesting analysis of a late 19th century counter-movement to class-based access to the arts in London — Alexandra Palace, a place of ‘higher civilization’ for ‘the people’ — see Paul Watt and Alison Rabinovici, ‘Alexandra Palace: Music, Leisure and

One of the earliest public order statutes, the *Metropolitan Police Act 1839*, 2 & 3 Vict, c 47 (*Metropolitan Police Act*), contained two relevant offences that could be enforced against street singers and musicians. First, under s 54(12), it was an offence to ‘sing any profane, indecent, or obscene Song or Ballad’.¹⁹ Secondly, s 54(14) made it an offence to ‘blow any Horn or use any other noisy Instrument, for the Purpose ... of obtaining Money or Alms’. By virtue of inclusion in s 54, busking was treated as one of a long list of public nuisances, alongside activities such as allowing horses or cattle to run loose, discharging a firearm, or using insulting language with the intention of causing a breach of the peace.²⁰ As we will show below in Part III, although contemporary busking laws (created by local councils) still recognise the *potential* for busking to constitute a public nuisance, there has been a significant transition towards perceiving busking in a more positive light and towards regulation via a system of permission and conditions.

Coupled with these substantive offences, the *Metropolitan Police Act* also contained a provision that would today be referred to as a ‘move on’ power,²¹ targeted specifically at street musicians:

And be it enacted, That it shall be lawful for any Householder within the Metropolitan Police District, personally, or by his Servant, or by any Police Constable, to require any Street Musician to depart from the Neighbourhood of the House of such Householder on account of the Illness of any Inmate of such House, or for other reasonable Cause, and every Person who shall sound or play upon any Musical Instrument in any Thoroughfare near any House

the Cultivation of “Higher Civilization” in the Late Nineteenth Century’ (2014) 95 *Music & Letters* 183.

¹⁹ On the long history of street singing, see Cohen and Greenwood, above n 2, ch 3. For ‘bawdy ballads’, see also Patrick Spedding and Paul Watt (eds), *Bawdy Songbooks of the Romantic Period* (Pickering & Chatto, 2011) vol 1.

²⁰ The *Metropolitan Police Act* is still in force, and under s 54(14) it remains an offence to ‘blow any Horn or use any other noisy Instrument, for the Purpose of calling Persons together, or of announcing any Show or Entertainment, or for the Purpose of hawking, selling, distributing, or collecting any Article whatsoever, or of obtaining Money or Alms’. In May 2014, four men (members of the band ‘The King’s Parade’) were arrested pursuant to this law while performing in Leicester Square: Clark, above n 5. For mid-20th century examples of this law’s deployment, see Middle Templar, ‘From an English Office Window’ (1946) 24 *Canadian Bar Review* 43, 45; Note, ‘Courts of Summary Jurisdiction’ (1951) 15 *Journal of Criminal Law* 225.

²¹ See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 197–9; *Summary Offences Act 1966* (Vic) s 6; Brown et al, above n 11, 555–61.

after being so required to depart shall be liable to a Penalty not more than Forty Shillings.²²

In the 1860s, an aggressive anti-street music campaign led by Michael T Bass MP,²³ and supported by Charles Dickens,²⁴ pushed for further restriction on street musicians, and organ grinders in particular, including an expansion of the ‘move on’ power.²⁵ The campaign culminated in the *Metropolitan Police Act 1864*, 27 & 28 Vict, c 55. Bass’s aim was to have the power to demand that a street musician ‘move on’ be broadened so that neither illness nor any other reasonable cause was required. A compromise was reached and s 57 was reworded to refer to illness ‘or on account of the Interruption of the ordinary Occupations or Pursuits of any Inmate of such House, or for other reasonable or sufficient Cause’.²⁶

In addition to these public order laws directed expressly at street music, buskers who were seeking ‘alms’ in return for their services (as street performers invariably were) could also be arrested and punished under the *Vagrancy Act 1824*, 5 Geo 5, c 83 (*‘Vagrancy Act 1824’*) (and successor statutes). That is, busking could be regarded as a form of begging, and begging was expressly prohibited.²⁷

B Public Order Laws in New South Wales and Victoria

These laws were widely (though not uniformly) replicated in the Australian colonies in the 19th century, including in New South Wales and Victoria.²⁸ For

²² *Metropolitan Police Act* s 57.

²³ Michael T Bass, *Street Music in the Metropolis: Correspondence and Observations on the Existing Law, and Proposed Amendments* (John Murray, 1864). See also Charles Babbage, *A Chapter on Street Nuisances* (John Murray, 2nd ed, 1864).

²⁴ See Robert Terrell Bledsoe, *Dickens, Journalism, Music: Household Words and All the Year Round* (Continuum, 2012) 88–91.

²⁵ Bass, above n 23, 1–3. See also John M Picker, *Victorian Soundscapes* (Oxford University Press, 2003) 46–7.

²⁶ A number of scholars have doubted that the legislative change had any significant effect on the prevalence of street music: see Cohen and Greenwood, above n 2, 153–4; Picker, above n 25, 77; Mike Goldsmith, *Discord: The Story of Noise* (Oxford University Press, 2012) 111–15.

²⁷ *Vagrancy Act 1824* ss 3–4.

²⁸ Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37 *Melbourne University Law Review* 103, 109, 114, 120. See also Lynch, above n 10, 520.

example, the *Vagrancy Act 1835* (NSW) largely copied the *Vagrancy Act 1824*, including the prohibition on begging. The *Police Offences Act 1901* (NSW), which was the first comprehensive public order statute in New South Wales, contained a ‘noisy instrument’ offence modelled on s 54(14) of the *Metropolitan Police Act*.²⁹ These New South Wales statutes were later consolidated in the *Summary Offences Act 1970* (NSW). Two provisions of that statute could be applied to busking: s 19, which was an amalgam of the original *Metropolitan Police Act* ‘noisy instrument’ offence and the ‘move on’ power;³⁰ and s 26, which made it an offence to beg or gather alms.

In 1979, the *Summary Offences Act 1970* (NSW) was repealed as part of a new Labor government commitment to updating New South Wales public order laws, and removing public behaviour that did insufficient harm to warrant criminalisation from the reach of the criminal law and the police.³¹ Two such offences that were removed from the statute books were public drunkenness³² and begging. In the second reading speech on the Summary Offences (Repeal) Bill 1979 (NSW) the then Attorney-General, Frank Walker, explained the rationale for the decriminalisation of begging (and provided the ‘rallying cry’ that we have incorporated into the title of this article):

The offence of begging or gathering alms contained in section 26 is objectionable. To send a person to prison or penalize him financially for being destitute, which will usually be the case when someone is begging, is a totally unacceptable way of dealing with what is basically a social problem. ... The repeal of section 26, which relates to gathering alms, will have the effect of removing doubts about the legality of busking in the city streets and elsewhere in New South

²⁹ *Police Offences Act 1901* (NSW) s 9.

³⁰ An equivalent provision is still in existence in the Northern Territory: *Summary Offences Act 1979* (NT) s 76. See also Legal Policy Division, ‘Review of the *Summary Offences Act*’ (Issues Paper, Department of Justice, October 2010) 48, which called for the repeal of s 76:

This is basically an offence against busking, and as few find busking offensive in Darwin, and indeed many find it pleasant, there is no need to make it a criminal offence. Buskers can get a permit in Darwin from Darwin City Council for a small fee. If the busking is a nuisance it can be dealt with by the nuisance provisions (see section 47). There have been no convictions since 2000.

³¹ On criminalisation and public order, see Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33.

³² See McNamara and Quilter, ‘Public Intoxication in NSW’, above n 11, 11.

Wales. The Government recognizes the positive and desirable features of busking. Long may the buskers carry on busking. Busking will not now be an offence unless it comes within the purview of other general offences, such as obstructing traffic or causing alarm or affront.³³

In Victoria, the first public order statute was the *Police Offences Statute 1865* (Vic). In contrast to New South Wales, Victoria did not adopt the *Metropolitan Police Act's* prohibition on noisy instruments, but s 26 did provide that '[a]ny person who sings any obscene song or ballad ... in any public street thoroughfare or place or within the view or hearing of any person passing therein' is guilty of an offence. In addition, s 35(v) made it an offence 'to beg or gather alms'. These provisions remained essentially unchanged through various iterations of the Act.³⁴ In 1966, the *Summary Offences Act 1966* (Vic) replaced the *Police Offences Act 1958* (Vic) as the primary Victorian public order statute and included the obscene song or ballad offence.³⁵ The begging offence was relocated to s 6(d) of the *Vagrancy Act 1966* (Vic). In 2005, the *Vagrancy Act 1966* (Vic) was repealed³⁶ and the begging offence was moved to the *Summary Offences Act 1966* (Vic).³⁷ Begging is still a crime in Victoria and the offence continues to be enforced by the police.³⁸

³³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4919–20. See also Martin Armiger, 'The Illicit Voice of the City Sidewalks', *The National Times* (Sydney), 4–10 April 1982, 35.

³⁴ See, eg, *Police Offences Act 1890* (Vic) ss 26, 40(v); *Police Offences Act 1912* (Vic) ss 24, 69(4).

³⁵ *Summary Offences Act 1966* (Vic) s 17(1)(a).

³⁶ *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic).

³⁷ *Summary Offences Act 1966* (Vic) s 49A(1).

³⁸ Aisha Dow and Tammy Mills, "'Proceeds of Crime' Seizure Beggars Belief", *The Age* (online), 21 August 2014 <<http://www.theage.com.au/victoria/proceeds-of-crime-seizure-beggars-belief-20140820-3e109.html>>. Although begging has been continuously criminalised in Victoria since the colonial period, with the advent of local council permit systems for busking it is reasonable to assume that at some point busking ceased to be regarded as begging. Although the distinction has never been expressly drawn in Victorian legislation (cf Queensland, where begging also remains a criminal offence under s 8(1)(c) of the *Summary Offences Act 2005* (Qld), but s 8(2)(b) provides that s 8(1)(c) 'does not apply to a person who ... is authorised by a local government to busk in a public place'), in the City of Melbourne's Busking Guidelines (discussed below in Part III) begging is included on a list of activities (including, inter alia, tarot card reading and religious spruiking) expressly excluded from the definition of 'busking': City of Melbourne, *Street Activity Policy 2011: Busking Guidelines*, 2011, 5.

C Local Government Laws

The late 19th and early 20th centuries were also periods in which the jurisdiction of local councils was expanded by state legislation. An important site of local government law-making was (and continues to be) the regulation of ‘everyday’ activities (commercial, domestic, recreational) conducted in or near public places, particularly those that carry the risk of nuisance or other loss of amenity. For example, the *Local Government Act 1874* (Vic)³⁹ empowered municipalities to make by-laws with respect to a diverse range of activities and public settings, including ‘[s]uppressing nuisances’, ‘[r]estraining noisome and offensive trades’, ‘[c]ontrolling and managing and preserving commons and public reserves’, ‘[p]reserving public decency’ and ‘regulating traffic and processions.’⁴⁰ Section 243 of the *Local Government Act 1874* (Vic) recognised the substantial overlap with the *Police Offences Statute 1865* (Vic) and provided that ‘[n]o person shall be prosecuted or punished for the same offence under this Act or any bye-law [sic] regulation or joint regulation in force ... under “*The Police Offences Statute 1865*”’. The *Local Government Act 1919* (NSW)⁴¹ included provisions dealing with public roads, public health and convenience, and public recreation,⁴² and provided for the extension by proclamation to other municipalities of provisions in the *Police Offences Act 1901* (NSW) dealing with urban nuisance and vice that had originally been limited to Sydney.⁴³ Up until the 1990s, by-laws, ordinances and powers deriving from other legislation and regulations concerned with traffic, including pedestrians (such as the *Traffic Act 1909* (NSW)⁴⁴ and the *Road*

They note that ‘begging is illegal under the *Summary Offences Act* and enforcement is the responsibility of the Victoria Police’: at 5.

³⁹ Since repealed, and now replaced by the *Local Government Act 1989* (Vic).

⁴⁰ *Local Government Act 1874* (Vic) ss 213(VIII), (IX), (XIII), (XIV), (XVII).

⁴¹ Since repealed, and replaced by the *Local Government Act 1993* (NSW).

⁴² *Local Government Act 1919* (NSW) pts IX, X, XIII.

⁴³ *Ibid* s 275(2).

⁴⁴ For example, reg 8 of the *General Traffic (Pedestrian) Regulations 1937* (NSW) (made pursuant to the *Traffic Act 1909* (NSW) and since repealed) provided that:

No person shall, by speaking, shouting, singing, playing upon or sounding any musical or noisy instrument, or by any act, representation, exhibition, display or device, attract together a number of persons in a road or road related area to the inconvenience, annoyance or obstruction of any person.

Traffic Act 1958 (Vic)), provided local councils in Melbourne and Sydney with the authority to exclude buskers from parts of the city.⁴⁵

D Discretionary Enforcement

As with all public order offences (and local council ordinances and by-laws), how the police (and council officers) have chosen to exercise their discretion has always been critical to the experience of buskers. For example, in London in the mid-19th century, although the police had a range of enforcement options at their disposal (and despite a chorus of middle-class professionals calling for the strict enforcement of the law), the street music scene remained vibrant. It has been estimated that, in the 1850s, some 1000 street musicians and about 250 street singers performed regularly on the streets of London.⁴⁶ The risk of being moved-on (officially or unofficially) or arrested was ever-present — buskers were always vulnerable to being characterised as a nuisance or a risk to public order and treated accordingly — but much depended on the exercise of discretion by police and other enforcement officers.⁴⁷

One of the buskers we interviewed for this project⁴⁸ told us that in Melbourne in the 1970s, when busking was technically illegal, the council by-laws officers were disinclined to enforce the law if they could avoid it. He recalled that when he was sighted busking on Bourke Street (before the pedestrian mall was constructed), the officers would deliberately approach at a leisurely pace, giving him time to pack up his case (and donations) and take off, thus avoiding the need to fine him or confiscate his proceeds.⁴⁹ In Sydney in the early 1990s, when busking was officially banned in Circular Quay, both the State government and the City of Sydney council preferred not to intervene unless complaints were received.⁵⁰

⁴⁵ See George Richards, 'For Buskers, Forbidden Ground Yields the Richest Fruit', *The Sydney Morning Herald* (Sydney), 24 December 1988, 2.

⁴⁶ Cohen and Greenwood, above n 2, 135, 137.

⁴⁷ See, eg, *ibid* 181–2. See also Jeff Ferrell, *Tearing Down the Street: Adventures in Urban Anarchy* (St Martin's Press, 2001) 59.

⁴⁸ Our interview data are discussed more fully below in Part IV.

⁴⁹ Interview with MB5 (Melbourne, 7 December 2013). See below n 136 for the coding system used for interviewees.

⁵⁰ See, eg, Angela Matheson, 'Circular Quay Buskers Facing Ban', *Green Left Weekly* (online), 24 April 1991 <<https://www.greenleft.org.au/node/1549>>.

These on-the-ground realities are important and they underscore the need to avoid too simplistic a dichotomy between the past and present when it comes to the legal status of busking. A useful way to characterise the evolution of busking laws is in terms of a transition from official *prohibition* (but with common de facto toleration and ad hoc enforcement) to *regulation*. Under the regulatory model, the ‘vice’ is reconfigured — from busking to *unlicensed* busking — and the law becomes a mechanism for managing and controlling busking’s contribution to public space amenity and for minimising negative effects.

Under Australia’s three-tiered system of government, local councils have broad powers to prohibit what they deem to be undesirable behaviour in public places, or to regulate the conditions under which individuals can lawfully engage in certain acceptable (even desirable) behaviours.⁵¹ In the remainder of this article, our focus will be on analysing the rules by which local councils in Melbourne and Sydney effect this transformation, and evaluating the effect on buskers and the implication for busking’s contribution to the production of urban public spaces.

III CONTEMPORARY BUSKING LAWS IN MELBOURNE AND SYDNEY

In this Part we describe and compare the busking rules that have been put in place by the City of Melbourne, pursuant to its powers under the *Local Government Act 1989* (Vic) (*LGA* (Vic)), and the City of Sydney, pursuant to its powers under the *Local Government Act 1993* (NSW) (*LGA* (NSW)).⁵² In Sydney, some of the most popular busking sites — in major tourism zones, such as Circular Quay and The Rocks — fall not within the jurisdiction of the City of Sydney council, but the New South Wales government’s Sydney

⁵¹ See, eg, *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 20–1 [15]–[17] (French CJ), 48 [83]–[85] (Hayne J).

⁵² While our focus in this article is on the form and operation of *current* busking laws, it is appropriate to acknowledge that, in both Melbourne and Sydney, busking permits were first introduced in the late 1970s. Although beyond the scope of this article, the history of busker licensing in Australia warrants further attention. One observation we would make is that in both cities it was agitation and advocacy by buskers themselves — to be ‘allowed’ to make music in the street — that prompted local council to move in the direction of permission- and condition-based regulation.

Harbour Foreshore Authority ('SHFA').⁵³ Therefore, we will also briefly draw attention to key and distinctive aspects of the rules put in place by the SHFA pursuant to the *Sydney Harbour Foreshore Authority Regulation 2011* (NSW) ('*SHFA Regulation*'). In Melbourne, buskers in the central business district must be cognisant not only of the City of Melbourne's laws but the separate rules that apply in Federation Square⁵⁴ and the Queen Victoria Market.⁵⁵

In Melbourne and Sydney, busking is legally regulated via a permit system — and noncompliance with the rules, among other things, may be punished by the imposition of criminal sanctions. On 'the books', the legal machinery establishing the permit system in Melbourne and Sydney is the product of the interaction between relevant powers found in the respective *LGA* (Vic) and *LGA* (NSW), local law in Melbourne or local policy in Sydney, a general Street Activity Policy in Melbourne and specific guidelines on busking in Melbourne and Sydney. The interlocking legal framework is complex and, on its face, appears to be highly restrictive and controlling of busking life, detailing multiple conditions with which a busker must comply.

Although our study is located in two cities, we have not set out to present a critical comparison of busking laws in Melbourne and Sydney. Rather, our aim is to explain and then evaluate local authority permit system-based regulation of busking, and we have chosen Australia's two largest urban centres as our case studies. In the account that follows we focus on common core features rather than minor differences, although we do note where there are significant differences in approach between the two cities.

A Power to Enact a Permit System

The City of Melbourne is empowered to regulate busking through its power to enact 'local laws' under pt 5 of the *LGA* (Vic). Under s 111(1), a council can enact local laws on any matter with respect to which the council 'has a

⁵³ See *Sydney Harbour Foreshore Authority Act 1998* (NSW). See also SHFA, *Sydney Harbour Foreshore Authority Busking Policy*, 16 July 2012 ('*SHFA Policy*'); *Sydney Harbour Foreshore Authority Regulation 2011* (NSW).

⁵⁴ Federation Square is a 'public square' in Melbourne. Permission to busk at Federation Square is controlled by Fed Square Pty Ltd, a private company owned by the Victorian government: see City of Melbourne, *Street Activity Policy 2011: Busking Guidelines*, 2011, 16.

⁵⁵ Queen Victoria Market Pty Ltd is owned by the City of Melbourne and has its own permit system for buskers: see *Become a Performer*, Queen Victoria Market <<http://www.qvm.com.au/become-a-performer/>>.

function or power' under the *LGA* (Vic) or any other Act. One such function (somewhat circularly) is 'making and enforcing local laws'.⁵⁶ Further, under s 113 of the *LGA* (Vic), a local law may introduce a system of permits, licences and fees. The City of Melbourne council has enacted the *Activities Local Law 2009* (Vic) ('*ALL* (Vic)') pursuant to the power in s 111. The *ALL* (Vic) applies throughout the municipality,⁵⁷ and covers a diverse range of activities, including busking:

- (b) control noise, behaviour, *liquor* consumption, *animals*, *spruiking*, busking, *advertising sign*, works and obstructions on *roads*, street trading, the use of *toy vehicles* and other activities ...⁵⁸

The inclusion of busking in this list of 'risky' public activities is reminiscent of the 19th century treatment of busking as a public nuisance under criminal public order legislation (see above Part II). However, as we will show, under contemporary busking laws there is a significant recalibration of the law's focus. Whereas in the 19th century there was a tendency to generally characterise busking as a public nuisance to be prevented, contemporary local council laws recognise that busking can and should be conducted in a manner that does not constitute a public nuisance. Specifically, one of the primary objectives of busking laws in Melbourne and Sydney is to demarcate permitted busking from other forms that might be viewed as a public nuisance (ie playing too loud or too long, obscene content, obstructing traffic flow). If busking is carried out in a manner which complies with all of council's conditions (ie if these evils are avoided), it is not only allowed but encouraged and celebrated. Arguably, it is a form of 'controlled' or structured busking that is promoted by the busking policies. The vice then is not busking per se but busking without regard to the conditions that make it an acceptable part of urban life.

The City of Sydney council is empowered to regulate busking via its powers in respect of 'community land' under *LGA* (NSW) ch 7 pt 1. Section 68 identifies a range of activities that can only be carried out on 'community land' with the prior approval of the local council, including:

⁵⁶ *LGA* (Vic) s 3E(1)(f).

⁵⁷ *ALL* (Vic) cl 1.6.

⁵⁸ *Ibid* cl 1.2(b) (emphasis in original).

4 For fee or reward, play a musical instrument or sing

5 Set up, operate or use a loudspeaker or sound amplifying device⁵⁹

The *LGA* (NSW) ch 7 pt 3 governs the process by which councils may develop a ‘local policy’ in relation to matters over which the council has jurisdiction to require approval — these include the matters described above on ‘community lands’ such as ‘busking.’ The current City of Sydney local policy on busking was developed in 2011: the *Interim Busking Policy* (‘*Sydney Policy*’).⁶⁰

The more detailed frameworks for the permit systems established by the *ALL* (Vic) and the *Sydney Policy* are set out respectively in the City of Melbourne’s *Street Activity Policy 2011* (‘*Melbourne Policy*’)⁶¹ and the *Street Activity Policy 2011: Busking Guidelines* (‘*Melbourne Guidelines*’)⁶² (which sits beneath and amplifies the *Melbourne Policy*), and in the City of Sydney’s *Interim Busking Guidelines 2011* (‘*Sydney Guidelines*’).⁶³

B *The Permit Systems*

In both Melbourne and Sydney the aim is to *regulate* rather than prohibit busking. For instance, in Melbourne, under pt 5 of the *ALL* (Vic), ‘Street Trading and *Special Events*’, the stated aim is to

manage and facilitate responsible trading and entertainment on streets and public places to increase the attractiveness and comfort of these places, by controlling the soliciting of gifts and money, busking, selling and other behaviour on public places.⁶⁴

⁵⁹ *LGA* (NSW) s 68 (table, part D).

⁶⁰ City of Sydney, *Interim Busking Policy*, 7 November 2011. The authority of the SHFA to regulate busking within its geographical jurisdictions is found in the *SHFA Regulation*. Clause 4 of the Regulation lists a range of things which must not be done ‘in a public area, except as authorised by the [SHFA]’. The list includes ‘collect or attempt to collect money’ and ‘busk’: at cls 4(f)–(g).

⁶¹ City of Melbourne, *Street Activity Policy 2011*, 2011.

⁶² City of Melbourne, *Street Activity Policy 2011: Busking Guidelines*, 2011.

⁶³ City of Sydney, *Interim Busking Guidelines*, 7 November 2011. The SHFA has a single document: *SHFA Policy*.

⁶⁴ *ALL* (Vic) pt 5 (emphasis altered).

The ‘purpose’ of the *Sydney Policy* is:

- To encourage activities that contribute to the colour and life of the city and provide opportunities for alternative voices to be heard through public performance.
- To provide an equitable system of use for popular busking sites in the city among the buskers earning a living through their art form.
- To identify locations in the city suitable as busking sites.
- To promote public safety and amenity, the protection of property and to help ensure the safety of buskers.
- To support the rights of buskers to express themselves in an artistic manner.⁶⁵

The primary mechanism for achieving the goal of regulating busking is the creation of a permit system. In Melbourne, cl 5.6 of the *ALL (Vic)* provides that, unless in accordance with a ‘permit’, a person must not in a public place:

- (a) sound or play a musical instrument, sing, give a recitation or perform any conjuring, juggling, puppetry, mime or dance or other entertainment or do any of those things concurrently ...⁶⁶

Clause 5.7 further provides that a permit is required to perform with an amplifier in a public place. The *Sydney Policy* simply provides that all buskers must obtain a valid busking permit.⁶⁷

In both cities the permit systems create different categories of busking permits according to the type of performance or the location for busking. In Melbourne, there are four categories of permits: General Area Permit; Pavement Art Permit; Bourke Street Mall Permit; and Circle Act Permit with or without Dangerous Goods.⁶⁸ The *Melbourne Guidelines* indicate that for the most common permit (the General Area Permit), applicants must attend an information briefing (a forum where buskers are briefed about the terms and conditions of busking in the city) and have his or her act reviewed via a

⁶⁵ *Sydney Policy* 3. See also *SHFA Policy* cl 1.2.

⁶⁶ ‘Public place’ under the *ALL (Vic)* has the same meaning as in the *Summary Offences Act 1966 (Vic)* s 3, with the relevant additions set out in cl 1.11 (definition of ‘public place’).

⁶⁷ *Sydney Policy* cl 1.1.

⁶⁸ *Melbourne Policy* 5. These categories are elaborated at *Melbourne Guidelines* 6.

minimum five minute performance by the Busking Safety, Amenity and Performance Review Panel ('Busking Panel') to determine the suitability of the applicant.⁶⁹ The *Melbourne Guidelines* indicate that the review criteria used are 'safety, amenity and performance',⁷⁰ and that it is known as a 'Level 1 Review Criteria at a Safety, Amenity and Performance Review'.⁷¹ There is a right of appeal under the *Melbourne Guidelines* for a busker aggrieved about the Busking Panel's decision.⁷²

A \$20 fee applies for all new permit applications (with a renewal fee of \$10 for subsequent years).⁷³ A \$10 fee also applies for a three month short-term permit for interstate or international applicants.⁷⁴ Buskers are not covered by the City of Melbourne's public liability insurance and are encouraged to obtain their own insurance.⁷⁵

In Sydney, there are three types of busking permits: Standard Busking Permit; Special Busking Permit (for acts that involve dangerous materials or implements); and the Australian Circus and Physical Theatre Association ('ACAPTA') Accredited Busking Permit.⁷⁶ Permits are either \$13 for three months or \$47 for 12 months.⁷⁷ The Standard and Special Busking Permits

⁶⁹ See *Melbourne Guidelines* 6, 9. The Busking Panel is comprised of at least three of the five following persons: a representative of the busking community; a representative from the City of Melbourne's Arts & Culture Branch; a representative from the City of Melbourne's Events Melbourne Branch; a representative from the City of Melbourne's Tourism Melbourne Branch; and a representative from the City of Melbourne's Street Trading Team: at 9.

⁷⁰ *Ibid* 9.

⁷¹ *Ibid* 6. A Bourke Street Mall Permit is designed for 'professional buskers' who have held a General Area Permit for a minimum of six months and, in addition to meeting the Level 1 Review Criteria, meet further performance, proficiency, uniqueness and professionalism criteria before the Busking Panel, which also includes a specialist busking peer assessor: at 6, 9–10.

⁷² *Ibid* 11.

⁷³ *Ibid* 7.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* 12. A busker who wants to perform at the Queen Victoria Market must hold a City of Melbourne permit and, in addition, must apply for a Queen Victoria Market permit: see *Become a Performer*, above n 55.

⁷⁶ *Sydney Policy* cls 2.1–2.3. The ACAPTA Accredited Busking Permit is for 'buskers that do involve dangerous materials or dangerous implements in their performance, carry a National Busking Accreditation Card and their own public liability Insurance': at cl 2.3.

⁷⁷ *Sydney Guidelines* cl 4.1; City of Sydney, *List of Fees and Charges 2015/16* (2015) 13 <<http://www.cityofsydney.nsw.gov.au>>.

include public liability insurance cover.⁷⁸ No audition or briefing is required for a Standard Busking Permit; the applicant simply completes the busking permit application and the permit is issued over the counter with a photo taken of the busker. Special Busking Permits (for high risk acts) require a safety review before application can be made over the counter. A register of approved buskers is kept by the City of Sydney.⁷⁹ A separate permit is required to busk in Darling Harbour, The Rocks and Circular Quay, these precincts being under the jurisdiction of the SHFA.⁸⁰ A significant (and controversial)⁸¹ difference between the City of Sydney and SHFA permits is that, to obtain the latter, the busker must show proof of having public liability insurance cover.⁸²

The permit systems in both Melbourne and Sydney include positive definitions of busking and also definitions of what is not considered busking. In Melbourne, the *Melbourne Policy* defines busking as

sounding or playing a musical instrument, singing, reciting or performing conjuring, juggling, puppetry, miming, dancing or other entertainment or doing any of those things concurrently. Busking also includes the activity of drawing any message, picture or representation on a wall or pavement surface.⁸³

This definition does not include asking for money, however, elsewhere in the *Melbourne Policy*, under the heading of '[s]hort term' street activities,⁸⁴ 'busking' is referred to as a '[p]erson or group of people providing a public street performance in exchange for donation'.⁸⁵ In the more detailed *Melbourne Guidelines*, a busker is defined as 'an entertainer who is actively providing a public performance in the public space in exchange for a dona-

⁷⁸ Ibid cl 4.1; *Sydney Guidelines* cl 5.1.

⁷⁹ *Sydney Policy* cl 3.1.

⁸⁰ *SHFA Policy* cl 5. A SHFA permit costs \$20.

⁸¹ Caro Meldrum, 'Quay Buskers Forced to Buy Insurance', *ABC News* (online), 18 May 2007 <<http://www.abc.net.au/news/2007-05-17/quay-buskers-forced-to-buy-insurance/2551996>>.

⁸² *SHFA Policy* cl 5. In an interview, the SHFA told us that as a state government department and a non-self-insurer, the Authority was unable to provide insurance cover to its permit holders: Interview with C7 (Sydney, 24 March 2014). See below n 136 for the coding system used for interviewees.

⁸³ *Melbourne Policy* 2.

⁸⁴ As distinct from '[l]ong term' activities like newspaper kiosks and horse-drawn carriage services: *ibid* 4.

⁸⁵ *Ibid* 5.

tion.⁸⁶ It is noted that the offence of unlicensed busking (in the *ALL* (Vic)), which underpins the scheme discussed below, does not include the seeking of donations as part of the offence definition.⁸⁷

Under the *Sydney Policy* and *Sydney Guidelines* a busker is defined as follows:

a person who entertains in a public place by playing a musical instrument, dancing, singing, clowning, juggling, or performing acts of a similar nature with the intention of receiving donations from members of the public ...⁸⁸

Further, the *Sydney Guidelines* state:

Buskers may receive a monetary appreciation from the audience for their performance but may not solicit funds in a way which is likely to cause any discomfort to any individual.⁸⁹

In both cities, certain activities are expressly excluded from being busking activities. In Melbourne this includes vendors of any kind, fundraising, touting or spruiking, political rallying, religious spruiking, tarot card reading, massage, face or body painting, artists selling pre-fabricated work, temporary tattoo applications and begging.⁹⁰ It is worth noting that while some of these activity descriptions are clear enough, others are vague and loaded (eg 'political rallying' and 'religious spruiking'), with potential implications for fairness and enforceability. In Sydney, the *Sydney Guidelines* exclude similar activities:

Offering for sale or the provision of goods or services or one-on-one consultation for money, fee or reward ... [b]alloon sculpting or modelling, fortune, tarot card and palm reading, artists selling their works (such as portrait artists),

⁸⁶ *Melbourne Guidelines* 5.

⁸⁷ *ALL* (Vic) cl 5.6. Nonetheless, it appears to be the 'commercial' aspect of busking that is the primary reason for treating it like other forms of street activity which unambiguously have trading or commercial purposes — eg flower kiosks and food van sites, event and festival street trading, markets, spruiking and fundraising: *Melbourne Policy* 4–5.

⁸⁸ *Sydney Policy* (definition of 'Busker'); *Sydney Guidelines* 2.

⁸⁹ *Sydney Guidelines* cl 20.1.

⁹⁰ *Melbourne Guidelines* 5.

massage or any type of healing therapy, selling of any kind ... [and] solicitation of money for any purpose.⁹¹

Performances involving animals are also generally excluded in both cities.⁹² The sale of original CDs by buskers is, however, permitted in both cities — although an annual \$50 fee applies in Melbourne.⁹³

Once a permit is issued and accepted, buskers are taken to agree to comply fully with the terms and conditions of the permit — and hence the respective policies and guidelines. To that end, in both cities the policies and guidelines establish a series of conditions (see below table 1). Some are general including requirements to display the busking permit;⁹⁴ keeping busking sites clean;⁹⁵ not undertaking acts that cause public nuisance, use excessive noise, offensive language or are discriminatory;⁹⁶ and not undertaking acts that ‘unreasonably interfere with pedestrian flow or ... cause obstruction to traders or delivery vehicles.’⁹⁷ Other conditions require compliance with more detailed or specific requirements such as those relating to sound, amplification, times, duration, locations including restricted sites, and distances from other performers. Some of these are detailed in table 1.

C Penalties

In both Melbourne and Sydney, hefty fines *may* be imposed for busking without a permit or doing so in a way that does not comply with permit conditions. In Victoria, a ‘contravention of a local law’ may be penalised by up to 20 penalty units,⁹⁸ or a contravention may be enforced by way of an infringement notice.⁹⁹ Based on these provisions, in Melbourne, noncompli-

⁹¹ *Sydney Guidelines* cl 9.1. See also *Sydney Policy* cl 7.1; *SHFA Policy* cl 6.

⁹² *Melbourne Guidelines* 12; *Sydney Guidelines* cl 9.2; *Sydney Policy* cl 7.2.

⁹³ *Melbourne Guidelines* 17; *Sydney Guidelines* cls 22.1–22.4; *Sydney Policy* cls 6.1–6.4.

⁹⁴ *Melbourne Guidelines* 16; *Sydney Guidelines* cl 12.1.

⁹⁵ *Melbourne Guidelines* 13; *Sydney Guidelines* cl 18.1.

⁹⁶ *Sydney Guidelines* cls 17.1–17.2. See also *Melbourne Guidelines* 18.

⁹⁷ *Sydney Guidelines* cl 13.2. See also *Melbourne Guidelines* 12, 19.

⁹⁸ *LGA (Vic)* s 115(1)(a). Under the *Monetary Units Act 2004 (Vic)* s 5, the current value of a penalty unit in Victoria (in the financial year 2015–16) is \$151.67: Victoria, *Victoria Government Gazette*, No 6, 17 April 2015.

⁹⁹ *LGA (Vic)* s 117(1).

ance with the *ALL* (Vic) or a condition of the permit system is an offence¹⁰⁰ and carries a maximum penalty of 20 penalty units, equal to \$3033.40.¹⁰¹ 'As an alternative to prosecution,'¹⁰² an authorised officer may issue an 'on-the-spot' infringement notice. The maximum infringement notice penalty for a breach of cl 5.6 ('Busking without a *permit*') or cl 5.7 ('Causing excessive noise') is five penalty units, equal to \$758.35.¹⁰³ An 'authorised officer' includes a person appointed by the council to be an authorised officer (usually a compliance team officer) *and* any Victorian police officer.¹⁰⁴

Note that these penalties and enforcement options are not unique to busking, but apply generally in relation to all offences under the *ALL* (Vic), including in relation to topics as diverse as using a toy vehicle to endanger or obstruct any person; protecting trees; camping in public places; consuming liquor in public places; smoking in smoke-free areas; and owners failing to remove the excrement of animals.¹⁰⁵ It is questionable whether these activities are truly 'equivalent' in terms of harm, risk or culpability, which raises a question about the appropriateness of the penalty for busking.

In Sydney, under the *LGA* (NSW), carrying out an activity specified in s 68 (table, parts B–F) — which, as noted above, includes activities on community land such as busking — without approval is an offence, carrying a maximum penalty of 20 penalty units, equal to \$2200.¹⁰⁶ It may also be dealt with by way of a penalty notice ('on-the-spot fine'), which in the case of busking is \$220.¹⁰⁷ Carrying out an activity for which approval has been granted, but doing so in a way that does not comply with the conditions of approval, is also an offence

¹⁰⁰ *ALL* (Vic) cl 14.1.

¹⁰¹ See *ibid* cl 14.6(a), which provides that a person guilty of an offence against the *ALL* (Vic) is liable to a penalty not exceeding 20 penalty units.

¹⁰² *Ibid* cl 14.2.

¹⁰³ See *ibid* sch 1 (emphasis in original).

¹⁰⁴ A police officer may become an authorised officer upon the council publishing a notice in the Government Gazette under s 224A of the *LGA* (Vic): see *ibid* cl 1.11 (definition of 'authorised officer').

¹⁰⁵ *ALL* (Vic) cls 2.3, 2.7–2.8, 3.1, 3A.1, 3B.6.

¹⁰⁶ *LGA* (NSW) s 626(3). Under the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17, the current value of a penalty unit in New South Wales is \$110.

¹⁰⁷ *LGA* (NSW) s 679; *Local Government (General) Regulation 2005* (NSW) sch 12.

under s 627(3) (maximum penalty of 20 penalty units, equal to \$2200, or penalty notice of \$110).¹⁰⁸

While these criminal offences apply, other mechanisms may be used for dealing with a perceived breach of the permit system. In Melbourne, the *Melbourne Guidelines* contain a 'responsive regulation' style¹⁰⁹ enforcement protocol that foregrounds 'soft', education-based strategies and reserves licence revocation and financial penalties as last resort mechanisms.¹¹⁰ An authorised officer may orally or in writing 'direct a person to leave a public place' if the officer believes the person is failing to comply with the permit system.¹¹¹ The authorised officer may also, either as an alternative or in addition to issuing an infringement notice, serve a Notice to Comply on a person the officer 'reasonably suspects to be in breach' of the *ALL* (Vic).¹¹² Such a notice (as relevant to busking) may require the person to comply with the *ALL* (Vic), stop the conduct constituting the breach of the *ALL* (Vic), direct the person to remove any equipment constituting the breach of the *ALL* (Vic), and direct the person to leave an area within the time specified in the notice that constitutes a breach of the *ALL* (Vic).¹¹³ Failure to comply with a Notice to Comply is liable to an on-the-spot fine of 10 penalty units, equal to \$1516.70.¹¹⁴

¹⁰⁸ *LGA* (NSW) ss 627(3), 679; *Local Government (General) Regulation 2005* (NSW) sch 12. Under *SHFA Regulation* cls 4(1)(g), 27, sch 1, busking without authorisation (ie without a permit) is an offence with a maximum penalty of 20 penalty units, equal to \$2200, or a penalty notice of \$220. There is no separate offence of breach of a *SHFA Policy* condition. However, under cl 23 of the Regulation, police officers and rangers have the authority to force a person to move on if he or she '(a) causes inconvenience to other persons in a public area, or (b) contravenes any provision of this Regulation', and noncompliance is an offence with a maximum penalty of 20 penalty units, equal to \$2200, or a penalty notice of \$220: at cls 23(1)(a)–(b), (2), 27, sch 1. Clause 22(1) empowers a ranger or police officer to demand that a person provide their name and address details if he or she 'suspects on reasonable grounds that a person in a public area has committed an offence against this Regulation'. Noncompliance is an offence: at cls 22, 27, sch 1.

¹⁰⁹ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 4–7.

¹¹⁰ *Melbourne Guidelines* 18.

¹¹¹ *ALL* (Vic) cl 14.8 (emphasis altered).

¹¹² *Ibid* cl 14.9.

¹¹³ *Ibid* cl 14.11.

¹¹⁴ See *ibid* sch 1.

In the City of Sydney, authorised officers (rangers or police officers) may give directions to buskers to cease busking ‘if the performance is deemed loud or intrusive, or excessively repetitive, or is causing public inconvenience, or is likely to cause harm to the public or property’.¹¹⁵ The City of Sydney may also, pursuant to its *LGA* (NSW) powers, ‘revoke or modify permits ... if the permit holder fails to comply with the requirements and conditions of the permit’.¹¹⁶ Under the *SHFA Policy*, where a complaint is received about excessive noise or duration, SHFA rangers have express powers to direct a busker to cease and ‘leave the area if they are causing annoyance or inconvenience to other persons in a public area’.¹¹⁷ The Authority may also respond to a breach of the *SHFA Policy* or the *SHFA Regulation* by issuing a Show Cause Notice which ‘provide[s] details of the substance of the breach, and request[s] the permit holder to respond in writing within 14 days to show cause as to why the permit should not be revoked, suspended or conditions imposed’.¹¹⁸

D *The Paradox of Busking Laws*

On one side of the coin, busking laws appear to be restrictive, complex, ambiguous, and punitive. We offer six illustrations. First, the rules impose significant restrictions on busking, covering a broad range of matters, from location (including approved sites and ‘no-go’ zones and proximity to building lines, roads and intersections), start and finish times, volume (including amplification) and content. Buskers carry a heavy burden in terms of the expectation of familiarity with and full compliance with the intricacies of all local rules. The same might also be said of compliance officers or rangers with responsibility for interpretation and on-the-ground monitoring and enforcement of the rules.

Secondly, the offences that have been created to underpin the regulatory regime carry significant criminal penalties.¹¹⁹ For example, the maximum

¹¹⁵ *Sydney Guidelines* cl 17.4.

¹¹⁶ *Sydney Policy* cl 12.3.

¹¹⁷ *SHFA Policy* cl 8.14.

¹¹⁸ *Ibid* cl 8.22.

¹¹⁹ We recognise that there is a debate as to the dividing line between criminal offences and (merely) regulatory offences: *He Kaw Teh v The Queen* (1985) 157 CLR 523, 595 (Dawson J); *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 160 [101] (Kirby J). We take the view that these offences meet the definition of a criminal offence because the

penalty for contravening a permit condition in Victoria is over \$3000. This compares with the offence of singing an 'obscene song or ballad' or using indecent language in a public place under, respectively, ss 17(1)(a) and (c) of the *Summary Offences Act 1966* (Vic), which involve penalties of 10 penalty units, equal to \$1516.70, or imprisonment for two months for a first offence.¹²⁰ In New South Wales, the maximum penalty for busking without a licence is \$2200. This compares with the penalty for using offensive language in a public place under s 4A of the *Summary Offences Act 1988* (NSW) of \$660.¹²¹

Thirdly, these are complex offences to construe. For example, are they offences requiring (subjective) mens rea? Does strict liability attach to a component of the actus reus such that only an honest and reasonable mistake of fact 'defence' is available, or is there an absolute liability component?¹²² Where a basis for the charge is noncompliance with a condition, the character of the condition in question may give rise to debate over legal interpretation. For example, one condition common to both cities is that the content of a busking act cannot be political or religious. However, it is not clear where the legal dividing line is between permitted content and impermissible content. Would a busker performing a version of Yothu Yindi's hit song *Treaty* be in breach of this condition?¹²³

state imposes a penalty for violation. At a minimum there is no basis for distinguishing these offences from so-called minor criminal offences like traffic infringements or public order offences. We also note, as another indicia of a criminal offence, that 'authorised officers' (ie those that enforce these laws), while largely council rangers or officers, can include state police officers.

¹²⁰ For a second offence, 15 penalty units or imprisonment for three months, and for a third or subsequent offence, 25 penalty units or imprisonment for six months: *Summary Offences Act 1966* (Vic) s 17(1). In the case of using indecent language in a public place, ss 60AA and 60AB(2) empower a police officer to instead issue an on-the-spot fine of two penalty units, equal to \$303.34.

¹²¹ Police can also issue a \$500 criminal infringement notice: *Criminal Procedure Regulation 2010* (NSW) sch 3.

¹²² See *He Kaw Teh v The Queen* (1985) 157 CLR 523. We have noted elsewhere the tendency to under-appreciate and leave unresolved the legally complex nature of many 'minor' public order offences: Quilter and McNamara, above n 11, 536.

¹²³ See Yothu Yindi, *Treaty* (Yothu Yindi Music) <<http://www.yothuyindi.com/music/treaty.html>>.

Fourthly, to the extent that busking laws define forms of busking that will be regarded as a 'public nuisance' or otherwise undesirable,¹²⁴ the categories so defined often overlap with pre-existing public order offences¹²⁵ and civil anti-vilification laws, and suffer from the same ambiguities contained in those laws.¹²⁶

Fifthly, in relation to the elements of the offence there may be complex issues of evidence and proof. For example, it is difficult to know what evidence would be required to support the prosecution of a busker in Sydney for allegedly breaching the terms of a permit by using 'excessive noise'.¹²⁷ Even where a maximum decibel level is specified (such as in Melbourne and SHFA areas),¹²⁸ there is likely to be a practical evidentiary issue as to whether the relevant council is in possession of appropriate measuring equipment to substantiate an allegation of breach of such a condition. Furthermore, the ephemeral or transient nature of a busking performance will also often mean there is no permanent public record of the performance (eg content or volume) that might be used to evidence a charge.

Finally, it is a fundamental rule of law principle that laws must be accessible as a condition of legitimacy.¹²⁹ One of the consequences of the complexity and multiple 'layers' of busking law (ie legislation, local laws, policies and guidelines) is that it is reasonable to ask whether the rules are sufficiently accessible or 'knowable' to provide a meaningful guide to behaviour, and such that violations can be legitimately punished.

¹²⁴ See, eg, *Sydney Guidelines* cl 17.1, which prohibits 'any act that could be considered a public nuisance such as the use of excessive noise, offensive language or anti social behaviour'. Clause 17.2 states that '[t]he use of political, religious, racial, sexually explicit or homophobic material that may be deemed unduly persuasive, offensive or discriminatory is strictly prohibited as determined by the [*Anti-Discrimination Act 1977* (NSW)]'.

¹²⁵ See, eg, in relation to unlawful racial vilification: *Anti-Discrimination Act 1977* (NSW) s 20C; in relation to offensive language in a public place: *Summary Offences Act 1988* (NSW) s 4A.

¹²⁶ See Luke McNamara and Julia Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability' (2014) 39 *Alternative Law Journal* 36, 38.

¹²⁷ *Sydney Policy* cl 13.1.

¹²⁸ *Melbourne Guidelines* 13; *SHFA Policy* cl 8.12.

¹²⁹ Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 69, 69–70. See also New Zealand Law Commission, *Alcohol in Our Lives: Curbing the Harm — A Report on the Review of the Regulatory Framework for the Sale and Supply of Liquor*, Report No 114 (2010) 396 [21.27]; Mark Weinberg, 'The Criminal Law — A "Mildly Vituperative" Critique' (2011) 35 *Melbourne University Law Review* 1177.

Our analysis, so far, of busking laws in Melbourne and Sydney might give the impression that both councils merely tolerate busking, would prefer if it didn't happen, and are willing to use the regulatory 'big sticks' if a busker transgresses, and treat him or her as a nuisance or criminal. This would be misleading. Indeed, there is another side to the coin: busking laws are clearly designed to celebrate and promote busking's contribution to city life. Despite the specificity of the policies and guidelines and the heavy-handed nature of the penalties for the above offences, in both cities the policies and guidelines emphasise the positive nature of busking, including the value it adds to city life. Ultimately, the policies are expressly designed to support the lively and diverse street culture that busking provides whilst balancing this against a 'structured policy framework ... to minimise complaints'.¹³⁰ For example, the objectives of the *Melbourne Guidelines* include to 'support and encourage busking performances to enhance the vibrancy, vitality, diversity and ambience of the city'.¹³¹ The *Sydney Policy* sets out a number of 'principles' that recognise:

- Sydney has a strong tradition of busking and buskers contribute to a sense of place in the city of Sydney.
- Buskers make an important contribution to the cultural life of a city by reflecting styles, values and the issues of society at large.
- Buskers provide entertainment and thought provoking experiences to tourists and members of the general public.
- Busking is a valid means for *artists and performers* to make a living.
- Busking should not unduly interfere with pedestrian traffic, the conduct of business, contribute to a lack of safety or disturb public amenity.¹³²

The inclusion of this final point in a list of principles that effectively celebrate and affirm the value of busking draws attention to a central tension that is at the heart of busking laws in Melbourne and Sydney: how to balance the objectives of promoting and controlling street music and how to accommo-

¹³⁰ *Melbourne Guidelines* 2. See also *Melbourne Policy* 1; *Sydney Policy* 3.

¹³¹ *Melbourne Guidelines* 2.

¹³² *Sydney Policy* 3 (emphasis in original). See also *SHFA Policy* cl 2.

date the range of expectations of all users of public space. One manifestation of this is the long list of ‘Busking No-Go Zones’ in Melbourne.¹³³

There is a paradox where you have such legal complexity and ‘big stick’ enforcement approaches ‘on the books’, but alongside a strong policy commitment to promoting the very activity the subject of the regulation. On paper, it might appear that these dual objectives are incompatible. Our conclusion on this point will turn on what we learn about the laws in practice.

IV BUSKING LAWS IN PRACTICE

The primary objective of this study is to assess whether regulatory regimes established by the City of Melbourne and the City of Sydney achieve the delicate balance of regulating, without stifling, busking’s contribution to the quality of public life in Australia’s two largest cities. In Part III of this article we outlined a number of ways in which busking laws in both cities are onerous, complicated, ambiguous and potentially draconian. However, the nature of this study’s central question is that it could not be answered on the basis of a ‘desktop’ analysis of the rules alone. Evidence as to how busking laws operate ‘on the street’ — including insights from council officers about how busking laws are operationalised on the street and how they are experienced by buskers themselves¹³⁴ — is an essential component of such an analysis.¹³⁵

¹³³ *Melbourne Guidelines* 16.

¹³⁴ For other stories on and testimonies from buskers in Melbourne and Sydney, see Emily Meller, ‘The Secret Lives of Central Station Buskers’, *Vertigo* (online), 5 April 2013 <<http://utsvertigo.com.au/features/the-secret-lives-of-central-station-buskers/>>; Dan Schaumann, ‘Diary of a Busker’ on Dan Schaumann, *Dan Schaumann: Songs, Stories and Snapshots* (1 August 2010) <<http://schaumann.com.au/2010/08/diary-of-a-busker/>>; Peter Gillies, ‘4. Busking Sydney Continues’ on Peter Gillies, *Black Rainbow* (6 November 2012) <<https://www.blackrainbow.net.au/busking/busking-chronicles/busking-sydney-continues>>; Cate Snedden, ‘Busker Highlight: Amistat’ on Cate Snedden, *The Artist Orchard* (8 April 2013) <<https://theartistorchid.wordpress.com/2013/04/08/busking-highlight-amistat/>>; Evie Larssen, ‘Top 5 Buskers’, *Time Out Melbourne* (online), 19 February 2014 <<http://www.au.timeout.com/melbourne/aroundtown/features/1042/buskers>>; Catherine Lambert, ‘Race on to Find Melbourne’s Best Busker’, *Herald Sun* (online), 4 January 2015 <<http://www.heraldsun.com.au/entertainment/arts/race-on-to-find-melbournes-best-busker/story-fni0fcgk-1227171868533>>; *Melbourne Buskers*, Facebook <<https://www.facebook.com/pages/Melbourne-Buskers/186642121386295>>.

¹³⁵ Ethics approval for this component of the study was granted by the University of Wollongong’s Social Science Human Research Ethics Committee, HE13/348, 29 August 2013.

To this end, semi-structured interviews¹³⁶ were conducted with two groups of informants:

- 1 officers, rangers and compliance officers from the City of Melbourne, the City of Sydney and the SHFA (n=8); and
- 2 buskers performing in Melbourne and Sydney¹³⁷ (n=24, with 12 interviews in each city).¹³⁸

The primary aim of the interviews with council and authority employees was to better understand the origins and aims of existing busking laws in Melbourne and Sydney, and to gain *regulator* perspectives on how the laws are enforced. The primary aim of the interviews with buskers was to hear the views of the *regulated*, on the basis that this perspective is an essential component of any examination of the impact of busking laws. We did not set out to interview a representative sample (there are approximately 1800

¹³⁶ Interviews with 32 persons were conducted between December 2013 and February 2015, either in person or by phone. Most interviews were audio-recorded (facilitating the production of a complete transcript), and in a small number of cases the researchers made written notes of the interview. All interviews were conducted on a confidential basis to facilitate full candour. In the discussion that follows an alphanumeric code is used to reference interviews (eg 'MB1' = Melbourne Busker Number 1; 'SB2' = Sydney Busker Number 2; 'C3' = Council or Authority Employee Number 3).

¹³⁷ Consistent with our primary focus on the regulation of street *music*, most buskers interviewed were musical performers (vocal or instrumental). One busker who performs as an acrobat was interviewed on the basis of that person's extensive busking experience and active involvement in busker advocacy and local council policy development. The majority of interviewees were approached when they were busking in the most popular busking sites around Melbourne and Sydney (Bourke Street Mall, Swanston Street, Queen Victoria Market, Pitt Street Mall, Martin Place, Circular Quay). It is worth noting, however, that although there are a number of 'no busking' zones in both cities (particularly in Melbourne), busking (with permit and in compliance with conditions) is allowed generally across the local government areas of both cities.

¹³⁸ Of the 24 buskers interviewed, 22 were male and 2 were female. Based on our field observations, this is a relatively accurate representation of the ratio of male-to-female buskers. Of the interviewed buskers, 23 were approached by one or both of the authors during a break in their performance and invited to participate in the project. After written consent was obtained, most interviews took place 'in situ' (where buskers could keep an eye on their gear) or a nearby café if the interview was conducted after the completion of the busker's performance and they had packed up. One busker requested that the interview be conducted at a later date by telephone. One interviewed busker contacted the researchers upon becoming aware of the project and travelled to the University of Wollongong for the interview.

licensed buskers in Melbourne and 1500 in Sydney)¹³⁹ or to generate quantitative data. Rather, by asking a range of open-ended questions about motivations, experiences and opinions, our objective was to produce original qualitative data on the operation of busking laws to complement our law 'on the books' analysis. A central concern was whether buskers experienced busking laws as a constraint on their ability to make a positive contribution to the life of public spaces in Melbourne and Sydney. To put it another way: to what extent is the balance between *control* and *encouragement* inherent to contemporary busking laws achieved in practice?

Our main findings will be presented under the following thematic headings: motivations for busking; attitudes towards busking laws; experience of the permit application process; working with the rules and conditions; and enforcement practices, encounters with rangers and compliance officers.

A Motivations for Busking

Although our primary focus is on the regulation of busking, we regarded it as important to understand why people choose to busk, because their motivation and objectives are likely to have a significant impact on their attitudes towards, and experiences of, busking laws. Interviewees indicated a diverse range of motivations, including: a personal 'need' to get out and express themselves; personal satisfaction ('There's a thrill. There's a certain thrill, being able to captivate an audience');¹⁴⁰ the opportunity to practice and rehearse to become better performers or maintain the quality of their playing;¹⁴¹ the chance to become better known and widen their fan base ('It is a real oppor-

¹³⁹ Figures provided by City of Melbourne and City of Sydney, respectively: Interview with C1 (Phone Interview, 24 January 2014); Interview with C3 (Sydney, 19 February 2014). The SHFA estimates that there are currently almost 200 SHFA busking permits: Interview with C7 (Sydney, 24 March 2014).

¹⁴⁰ Interview with SB2 (Sydney, 20 December 2013). See also Interview with MB5 (Melbourne, 7 December 2013); Interview with MB11 (Melbourne, 15 August 2014); Interview with SB3 (Sydney, 20 December 2013).

¹⁴¹ Interview with SB4 (Sydney, 12 February 2015).

tunity to try and get out there and expose ourselves to more people’);¹⁴² and to make money.¹⁴³

For a large number of the buskers, street performance is a major (and for some, primary) source of income. They are ‘professional’ or ‘career’ buskers.¹⁴⁴ The fact that for many buskers street performance is much more like a *job* than a *hobby* has important implications for our analysis of the impact of busking laws. A critical (though not necessarily exclusive) reference point for busker evaluation of the rules is likely to be: do the rules assist or impede my desire to achieve my goals as a street performer?

B Attitudes towards Busking Laws

The romantic image of the busker as a ‘wandering minstrel’ or anti-authoritarian ‘free spirit’ might suggest that buskers are inclined to be sceptical about, or downright hostile towards, laws and rules. However, consistent with the prevalence of pragmatic commercial motivations, we found a very high level of acceptance of busking laws as a legitimate part of the urban environment.¹⁴⁵ A small number of interviewees indicated that they were philosophically opposed to any state-imposed restriction on busking (‘The streets should be free. They should be free for people to express themselves’);¹⁴⁶ but the large majority were supportive of the existence of busking laws, a number noting that they worked well for career buskers:

Yeah. Oh look, I think they help. Largely, they help. I guess it depends on who you talk to. It helps me because I’m a career busker. That’s what I do for my liv-

¹⁴² Interview with MB9 (Melbourne, 15 August 2014). See also Interview with MB1 (Melbourne, 6 December 2013); Interview with MB11 (Melbourne, 15 August 2014).

¹⁴³ Interview with MB1 (Melbourne, 6 December 2013); Interview with MB2 (Melbourne, 6 December 2013); Interview with MB4 (Melbourne, 6 December 2013); Interview with SB6 (Sydney, 12 February 2015); Interview with SB9 (Sydney, 12 February 2015).

¹⁴⁴ Interview with MB2 (Melbourne, 6 December 2013); Interview with MB6 (Melbourne, 15 August 2014); Interview with MB10 (Melbourne, 15 August 2014).

¹⁴⁵ It is appropriate to acknowledge that our methodology (approaching buskers during or after a street performance) is skewed towards musicians who are prepared to go out and busk at a time when busking laws and permit systems are in place. We recognise that some musicians might refrain from busking because they object to local government regulation and refuse to acquiesce. Our methodology does not allow for the inclusion of such ‘buskers’ in our study.

¹⁴⁶ Interview with SB1 (Wollongong, 6 August 2014). See also Interview with MB3 (Melbourne, 6 December 2013); Interview with MB5 (Melbourne, 7 December 2013).

ing. I do this four days a week and it makes me enough money to live. So awesome for me.¹⁴⁷

Even those who were opposed in principle saw merit (and personal advantage) in the existence of rules.¹⁴⁸ As one busker put it: the permits system 'keeps away the riff raff'.¹⁴⁹

Although some specific conditions rankled, buskers did not indicate that they felt unduly constrained by the existence of busking laws. One busker told us:

I feel like it works. It's very easy to get the permits. It's not a hassle. There isn't [sic] that many restrictions. There's no restrictions on what you can play. There's no restriction on your performance, as long as it's not rude, lewd or anything like that. As long as you're not breaking the law you can basically do anything. As long as you're safe, it doesn't matter.¹⁵⁰

Interestingly, this articulation of a view that the rules are benign involves an internalisation of standards embedded in the busking laws (ie *don't* be rude or lewd; *do* be safe; *stop* after two hours, one hour or 30 minutes).¹⁵¹ This suggests that, whether or not buskers are aware of it (or care), busking laws *are* having some effect on the 'shape' of (permissible) busking. But it would appear that so long as the constraints are not incompatible with a busker's motivations, objectives and performance plans, he or she is unlikely to be moved to adopt antagonism towards busking laws.

The following comment by a council officer is a further illustration of the way in which 'good' (licensed) buskers have internalised the rules and so rarely act in a noncompliant way. This also aids in the identification of 'bad' (unlicensed) buskers:

¹⁴⁷ Interview with MB6 (Melbourne, 15 August 2014). See also Interview with MB5 (Melbourne, 7 December 2013); Interview with MB11 (Melbourne, 15 August 2014); Interview with SB2 (Sydney, 20 December 2013); Interview with SB6 (Sydney, 12 February 2015).

¹⁴⁸ Interview with MB3 (Melbourne, 6 December 2013); Interview with MB5 (Melbourne, 7 December 2013).

¹⁴⁹ Interview with SB2 (Sydney, 20 December 2013). See also Interview with MB5 (Melbourne, 7 December 2013).

¹⁵⁰ Interview with MB9 (Melbourne, 15 August 2014).

¹⁵¹ See table 1.

People who don't have permits really stand out because they're in a wrong spot, they're against a building line, they're juggling like a chainsaw in the middle of the city square and it's just like okay, it's so obvious when people don't know the regulations.¹⁵²

Another factor is that when buskers conceive of 'the rules' they are not necessarily thinking only of laws enacted by local councils but the unwritten rules or 'street laws' that are an important part of the regulatory environment. For example, one busker who described busking laws as 'fair enough' went on to say, 'it's good because there's just this unspoken etiquette between buskers.'¹⁵³ The rules are also credible because they are generally consistent with instinctive fairness principles and the 'unwritten rules' of being a good busker.¹⁵⁴ A further practical reason for busker acceptance of busking laws is that they facilitate a sharing of the most popular (and lucrative) pitches amongst buskers.¹⁵⁵

One busker did express concern that busking laws were really designed to suit the 'bourgeois busker' and that there was a danger of losing desirable 'randomness': 'I think keeping it — it's got to be of the street. It's got to be rough and tumble.'¹⁵⁶ This was a minority view, however. The large majority of buskers found the 'order' created by busking laws to be appealing.¹⁵⁷ A comment from one Melbourne busker — that the staff at the council 'really take care of us'¹⁵⁸ — suggests considerable success in terms of the City of

¹⁵² Interview with C1 (Phone Interview, 24 January 2014). This internalisation might be regarded as a form of 'reverse regulatory capture'. 'Regulatory capture' usually refers to the development of a counterproductive relationship between a regulatory agency (or particular officers) and the individuals or organisations against whom it is expected to enforce the law, because its officers 'identify' too closely with the industry or activity in question, because they sympathise with the difficulty of complying with regulatory requirements, or because they are reluctant to enforce with 'toughness': see Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12 *Journal of Public Policy* 61. See generally Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How To Limit It* (Cambridge University Press, 2014).

¹⁵³ Interview with SB12 (Sydney, 20 February 2015).

¹⁵⁴ Interview with MB9 (Melbourne, 15 August 2014); Interview with MB3 (Melbourne, 6 December 2013).

¹⁵⁵ Interview with MB12 (Melbourne, 15 August 2014).

¹⁵⁶ Interview with MB3 (Melbourne, 6 December 2013).

¹⁵⁷ Interview with MB9 (Melbourne, 15 August 2014).

¹⁵⁸ Interview with MB1 (Melbourne, 6 December 2013).

Melbourne's goal of not merely *managing* busking but actively *supporting* street performance and getting the balance right. The City of Sydney has precisely the same objective, but there is a recognition that the balance has not been achieved yet: 'We're great on the regulation and most of our documentation has come from that position. What we're not very clear on is how we want to encourage things.'¹⁵⁹

Overall, the sentiments described here suggest there is a stark contrast between the *vulnerability* which was part and parcel of being a street musician for centuries — constantly at risk of being characterised as a nuisance and threat to public order or public safety, and dealt with accordingly by the police or council rangers — and the *certainty* that is afforded by contemporary busking laws. One busker compared the certainty that Sydney's busking laws provide with the unpredictability she has experienced in some European cities where busking is officially prohibited, but tolerated in practice, though subject to periodic 'crackdowns'.¹⁶⁰

C The Permit Application Process

All interviewees described the task of obtaining a permit as easy and straightforward.¹⁶¹ In fact, the process as described by buskers was often simpler than dictated by the policy. For example, both the policies of the City of Melbourne and SHFA indicate that applicants will (or may)¹⁶² be required to give a sample performance as part of the application process, but buskers reported that they had not been required to do so.¹⁶³ Even those buskers who held Bourke Street Mall permits in Melbourne — and therefore had to go through an audition (after having held a regular permit for at least six months) — had

¹⁵⁹ Interview with C4 (Sydney, 19 February 2014). See also Interview with C3 (Sydney, 19 February 2014).

¹⁶⁰ Interview with SB7 (Sydney, 12 February 2015).

¹⁶¹ Interview with SB9 (Sydney, 12 February 2015). See also Interview with SB5 (Sydney, 12 February 2015); Interview with SB6 (Sydney, 12 February 2015); Interview with SB7 (Sydney, 12 February 2015); Interview with SB10 (Sydney, 12 February 2015); Interview with SB11 (Phone Interview, 17 February 2015); Interview with MB3 (Melbourne, 6 December 2013); Interview with MB5 (Melbourne, 7 December 2013).

¹⁶² SHFA Policy cl 5.1: 'the Authority reserves the right to request applicants for a Busking Permit to attend an audition.'

¹⁶³ One busker indicated that he had provided the SHFA with links to YouTube clips of him performing 'in lieu' of audition: Interview with SB4 (Sydney, 12 February 2015).

no complaints.¹⁶⁴ One said the audition was ‘not too strict’ and that the council ‘really want to give the chance to everyone. That’s very nice.’¹⁶⁵ Holders of SHFA permits did not express unhappiness about having to obtain their own public liability insurance (‘I mean most musicians these days, we have liability insurance anyway’),¹⁶⁶ but some buskers with a City of Sydney permit did identify the insurance issue as a reason why they had not yet obtained a SHFA licence.¹⁶⁷

In addition to providing a basis for giving credit to both councils and the SHFA for making the process straightforward (consistent with the agenda of not merely *allowing* busking, but *encouraging* it),¹⁶⁸ busker responses on the permit application process provide further evidence of how the regulatory systems work best (though not necessarily only) for professional or semi-professional musicians. As one busker said of the SHFA system, the expectation that buskers arrange and pay for their own insurance is a ‘bit harder though if you’re just a uni student or something and you want some extra cash or you’re a backpacker and you wanted some extra cash. It’s a bit harder.’¹⁶⁹ A Melbourne busker commented that expecting *everyone* to have a permit — including ‘homeless people and children and guys making not much’ — was a bit harsh: ‘Now how many of those people go in and get the \$20 permit? I don’t know’.¹⁷⁰

D Working with the Rules and Conditions

Our desktop analysis in Part III of this article characterised the rules and conditions embedded in Melbourne and Sydney busking laws as numerous, complex and potentially onerous. Staff from the City of Melbourne and City

¹⁶⁴ See, eg, Interview with MB9 (Melbourne, 15 August 2014).

¹⁶⁵ Interview with MB1 (Melbourne, 6 December 2013). See also Interview with MB5 (Melbourne, 7 December 2013); Interview with MB6 (Melbourne, 15 August 2014); Interview with MB8 (Melbourne, 15 August 2014).

¹⁶⁶ Interview with SB4 (Sydney, 12 February 2015).

¹⁶⁷ Interview with SB7 (Sydney, 12 February 2015); Interview with SB8 (Sydney, 12 February 2015). See *SHFA Policy* cl 5.

¹⁶⁸ Interview with C1 (Phone Interview, 24 January 2014); Interview with C3 (Sydney, 19 February 2014); Interview with C7 (Sydney, 24 March 2014).

¹⁶⁹ Interview with SB4 (Sydney, 12 February 2015).

¹⁷⁰ Interview with MB3 (Melbourne, 6 December 2013).

of Sydney acknowledged that the policies and guidelines were unnecessarily complex and dry (and therefore inaccessible),¹⁷¹ and recognised that this could create the impression that buskers are over-regulated:

There's this perception that busking is really difficult and there's too much red tape. In fact if you step through it, in the City of Sydney it is so simple to get a busking permit, if you didn't have to sit and wade through the guidelines and everything, and simplify them, it would be great, and there's a fabulous news story there as well, that in fact most of the LGA [local government area] is unregulated. You can go there and you can busk for up to two hours. You can do pretty much anything as long as it's not dangerous.¹⁷²

The buskers that we interviewed did not report being weighed down by, or being unhappy with, the rules. Our interviews suggest that part of the explanation lies in the fact that buskers are not necessarily worrying about developing a detailed knowledge of the rules before they hit the streets. For councils this may be regarded as a problem:

[Buskers are] just not reading the policy, or they're not reading the guidelines, and that's where we've realised that that's where the work needs to be done, is really simplify it and make sure that it is almost universal in its language.¹⁷³

Our field work does suggest, however, that most buskers do have, and get by with, a solid understanding of the busking law 'essentials.' Although there were a small number of 'grey areas' in Sydney (eg can you busk in Hyde Park? What about the Central Station tunnel?),¹⁷⁴ and confusion caused by the use of the term 'Restricted Areas'¹⁷⁵ to describe selected areas where busking is actually allowed,¹⁷⁶ most buskers seemed comfortable that they knew *where*

¹⁷¹ Interview with C1 (Phone Interview, 24 January 2014); Interview with C4 (Sydney, 19 February 2014).

¹⁷² Interview with C4 (Sydney, 19 February 2014).

¹⁷³ Interview with C3 (Sydney, 19 February 2014).

¹⁷⁴ Interview with SB3 (Sydney, 20 December 2013); Interview with SB5 (Sydney, 12 February 2015).

¹⁷⁵ See *Sydney Policy* cls 14.1–14.3.

¹⁷⁶ Interview with C4 (Sydney, 19 February 2014). 'Restricted Areas' are the precise locations in particular streets, squares and parks where buskers must perform if they choose to busk in those locations. For example, there are five designated pitches (ie 'Restricted Areas') in Martin Place.

they were allowed to busk because the permit application process (and freely available maps) had equipped them with that knowledge:

Sydney is definitely one of the best places to come in the sense that they give you a map with areas you can and can't busk. It's not — in some cities it's quite vague. Even the cops don't know. If you ask them, they're like I'm not really sure, whereas here it's very black and white, which I think is good. So I like that system.¹⁷⁷

Buskers don't necessarily learn all that they need to know at the outset. Knowledge accumulation occurs 'on the job'.¹⁷⁸ Buskers learn pretty quickly about other key conditions like duration limits and start times. Noise, and the question of just how loud is 'too loud' is much more uncertain and seems to be negotiated on a daily basis, depending on complaints or ranger intervention.

We found that the 'rules on the street' are a mediated (and sometimes augmented) form of the rules found in official policies, and that buskers learn what they need to know from other buskers as much as from council or authority officers.¹⁷⁹ This was most vividly illustrated in Pitt Street Mall — one of the most popular busking locations and pedestrian-dense precincts in Sydney.¹⁸⁰ The rules are strict. Buskers cannot start performing before 2:00 pm on weekdays (11:00 am on weekends) and cannot play for more than one hour before they must handover the pitch to a busker who is waiting his or her turn. The City of Sydney plays no formal part in managing busker demand for access to these prime Pitt Street Mall locations. However, buskers have themselves filled the vacuum. They have adopted a 'first in, first served' queuing system to determine which busker gets to go on at 2:00 pm, 3:00 pm, 4:00 pm and so forth. The busker-driven nature of the system and the role that buskers play in educating each other is illustrated by the following comments:

¹⁷⁷ Interview with SB9 (Sydney, 12 February 2015). See also Interview with MB11 (Melbourne, 15 August 2014).

¹⁷⁸ Interview with SB12 (Sydney, 20 February 2015).

¹⁷⁹ This may be regarded as an example of what Merry has described as the 'complex and interactive relationship between official and unofficial forms of ordering': Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869, 873.

¹⁸⁰ It is also the focus of the City of Sydney's regulatory energy, and the source of 75 per cent of complaints: Interview with C4 (Sydney, 19 February 2014).

I heard ... different things from different people. I thought, maybe you have to ask the Mall, and it was a roster? Then a few people told me, oh you just line up and you get an hour to play. I was like, cool. Then I think I asked the council guy a couple of days ago when I was getting the permit, and I said, can you just line up? He's like, yeah I'm pretty sure you just line up, you get an hour, that sounds about right.¹⁸¹

[The queuing system has] just been passed on to the new guys. They always tell the new guys. You can't really start playing here without being aware of it. If you try it, they'll go up straight away to you and go hey, you can't play here, or you have to wait, you have to join the queue.¹⁸²

That the system for managing access to Sydney's most popular and lucrative busking location is handled by buskers raises some potentially challenging enforcement issues. As one busker indicated:

If someone skipped the queue I don't know what we would do. I think we'd have to deal with it ourselves. We wouldn't be able to ring up the council and be like hey, someone's not obeying the rules we have. I imagine we would have to self-govern if that were to happen, but thank God it hasn't happened yet.¹⁸³

Rangers do regularly patrol in Pitt Street Mall, but their primary concerns are whether buskers have a permit, and noise levels.¹⁸⁴ They recognise that the buskers do a good job of regulating access to the pitches in Pitt Street and enforcing time limits, and implicitly endorse this form of self-regulation.¹⁸⁵

Most buskers indicated that they thought the rules (as they are enforced by rangers and other buskers) are basically fair. One of the few specific conditions about which buskers (mildly) complained was the late start time on weekdays in Pitt Street Mall: 'On weekdays you can't perform before two, which is quite frustrating and I don't really understand why. It seems quite

¹⁸¹ Interview with SB12 (Sydney, 20 February 2015).

¹⁸² Interview with SB9 (Sydney, 12 February 2015). See also Interview with SB8 (Sydney, 12 February 2015).

¹⁸³ Interview with SB9 (Sydney, 12 February 2015). See also Interview with SB10 (Sydney, 12 February 2015).

¹⁸⁴ Interview with C6 (Sydney, 19 February 2014).

¹⁸⁵ *Ibid.* See also Interview with C3 (Sydney, 19 February 2014); Interview with SB12 (Sydney, 20 February 2015).

silly',¹⁸⁶ 'It is a bit of a bummer that we can't start till so late in the day'.¹⁸⁷ Generally, however, we were struck by how little resistance to, or resentment towards, the rules we encountered amongst the buskers interviewed.

In addition to the matters already discussed, there are two additional reasons for high levels of busker satisfaction with the rules, as suggested by our interviews. First, generally, the rules accord with the standards, values, expectations and ethics that most buskers bring to the business of street performance. One busker emphasised that he is respectful about where he plays. He said he would not play loudly or repetitively for a long time outside the same shop because that would be 'rude and annoying'.¹⁸⁸ Buskers are aware that they operate in an environment where there are multiple stakeholders and competing considerations: 'we're part of that balancing act. If you piss people off, it will go too far one way. So we've got to try and keep it balanced'.¹⁸⁹ The second point is that, even in a context where the majority of buskers in both cities reported a positive and supportive esprit de corps (a camaraderie that councils also recognise and encourage),¹⁹⁰ rules are attractive because, if necessary, they can be invoked against other buskers. One busker told us that 'if someone was to wait here for two hours that spot would rightfully be theirs. It's an honour system I think. If you don't move they can just call a ranger and the ranger will move you'.¹⁹¹ One busker had a sanguine take on the 'downside' of buskers being well acquainted with the rules:

There is a terrible time of the year just before Christmas when you get all the buskers who have just gone up and they've just got their one-month licence so they can busk. They've read all the rules and they want to stick by all the rules, and they want to make you stick by all the rules in terms of how long you play and all that kind of thing.¹⁹²

¹⁸⁶ Interview with SB9 (Sydney, 12 February 2015).

¹⁸⁷ Interview with SB12 (Sydney, 20 February 2015).

¹⁸⁸ Interview with MB4 (Melbourne, 6 December 2013). See also Interview with MB3 (Melbourne, 6 December 2013).

¹⁸⁹ Interview with MB6 (Melbourne, 15 August 2014).

¹⁹⁰ Interview with C1 (Phone Interview, 24 January 2014).

¹⁹¹ Interview with SB2 (Sydney, 20 December 2013). See also Interview with C4 (Sydney, 19 February 2014).

¹⁹² Interview with SB6 (Sydney, 12 February 2015).

Ultimately, most buskers (for whom street performing is a serious income-generating business) have a vested interest in working within the rules and accepting them. One busker described a (rare) unpleasant encounter with a ranger ‘who knew every rule in the book and was just really cranky all the time. He threatened to revoke my licence. As this is my living, I couldn’t really risk that’.¹⁹³

E Enforcement Practices

A key factor when it comes to the impact of busking laws on street performers, and whether the regulatory arrangements restrict their capacity to contribute to the life of the city, is how the laws are enforced. Our field work in Melbourne and Sydney revealed that, whatever risk exists in the law ‘on the books’ to undermine the efforts of buskers to enhance the quality of urban life and the vibrancy of public spaces, that risk is obviated by the way in which the laws operate in *practice*. It is not that there is an enforcement vacuum — busking laws *are* enforced. However, the generally ‘collaborative, non-combative’¹⁹⁴ ways in which the rules are enforced by council or authority staff, compliance officers or rangers and by buskers themselves (ie self- and peer-enforcement) mean that the potential for rule ambiguity and complexity to undermine effectiveness, and the potential for punitive enforcement to breed busker resentment and a retreat from the streetscape, are avoided.

Busking laws *are* complex, ambiguous and harsh on their face, but the rules and regulations are not self-executing, and so human agency — particularly the decisions made by compliance officers or rangers and buskers themselves — is a critical variable. Before turning to what our field work revealed about enforcement practices, it is important to recognise that none of the regulatory agencies involved — City of Melbourne, City of Sydney and the SHFA — are inclined to enforce the laws strictly by punishing every breach. On the contrary, they appear to go to considerable lengths to avoid prosecuting or imposing fines, even when a busker is in breach of the rules. The disinclination to punish is one of the strongest and most consistent manifestations of their mandate to *promote*, and not merely *control* busking: ‘nobody’s

¹⁹³ Interview with SB2 (Sydney, 20 December 2013). See also Interview with SB1 (Wollongong, 6 August 2014).

¹⁹⁴ Interview with C1 (Phone Interview, 24 January 2014).

going to end up in the courts because they're busking ... without a permit. It's just not going to happen';¹⁹⁵ 'there's no reason to fine someone really or go to court if we catch them [in breach]'.¹⁹⁶

In both cities there is a high level of surveillance of whether buskers are complying with busking laws. Enforcement takes the form of a combination of *proactive* patrolling of popular busking locations, and *reactive* investigation of complaints made to the council or authority and relayed to compliance officers (usually made by business owners or inner city residents about noise levels). In the City of Sydney, rangers focus their proactive surveillance on the known 'hotspot'¹⁹⁷ of Pitt Street Mall¹⁹⁸ — and generally only visit other areas after receiving a complaint (eg about noise).¹⁹⁹ Noting that Sydney rangers have a range of duties of which busking law enforcement is only a relatively small part,²⁰⁰ it is only on 'slower days' that proactive policing of busking (aside from Pitt Street Mall) is undertaken.²⁰¹ One busker reported that until she decided to busk on Pitt Street Mall she had not encountered any rangers (eg in Hyde Park, and outside the Queen Victoria Building), and so wondered whether she really 'needed' a permit at all.²⁰² The City of Melbourne compliance officer we interviewed estimated that about 80 per cent of busking-related duties²⁰³ were spent on proactive patrol, surveillance and relationship management, with the remaining 20 per cent devoted to responding to complaints.²⁰⁴ SHFA rangers are a visible presence around Circular

¹⁹⁵ Interview with C4 (Sydney, 19 February 2014).

¹⁹⁶ Interview with C1 (Phone Interview, 24 January 2014).

¹⁹⁷ Interview with C4 (Sydney, 19 February 2014).

¹⁹⁸ Interview with C6 (Sydney, 19 February 2014).

¹⁹⁹ Interview with C6 (Sydney, 19 February 2014). See also Interview with C2 (Phone Interview, 13 February 2014).

²⁰⁰ Rangers are responsible for enforcement in relation to 'dogs, dog attacks, rubbish dumps, noise pollution, building sites, breach of development approvals, residential rubbish bins, busking, illegal sellers': Interview with C6 (Sydney, 19 February 2014).

²⁰¹ *Ibid.*

²⁰² Interview with SB12 (Sydney, 20 February 2015).

²⁰³ Street Trading Compliance Officers have enforcement responsibilities in relation to all aspects of street trading, including newspaper, flowers and fruit kiosks, food vans, horse-drawn carriages, and busking: Interview with C2 (Phone Interview, 13 February 2014).

²⁰⁴ Interview with C2 (Phone Interview, 13 February 2014).

Quay and The Rocks, noting that their role is primarily focused on 'safety and security'.²⁰⁵

Most complaints and ranger-observed compliance issues relate to excessive noise. One of the challenges in this area is how to assess whether a busker is too loud. As noted above in Part III, Melbourne and SHFA busking laws specify maximum decibel levels; Sydney laws do not. A variety of methods for assessing volume were revealed in the interviews: in Melbourne, the use of an iPhone app;²⁰⁶ in SHFA areas, the use of a decibel measuring device;²⁰⁷ and the use of ranger judgement of 'what is offensive', unassisted by technology, in Sydney.²⁰⁸

Councils recognise that busker self-regulation is an important part of the successful operation of busking laws in Melbourne and Sydney: 'It's almost self-running'.²⁰⁹ Buskers are responding not only to the expectations of councils, but also to the expectations of their peers: 'There's also a certain level of mentoring that seems to go on, particularly with the street performers that are circle act performers, they've got a vested interest in making sure that buskers who come on board are safe'.²¹⁰ In turn, busking law enforcers need to be cognisant of another set of stakeholders: members of the public (the 'audience'). Compliance officers and rangers reported that, on occasion, when they are talking to a busker on the street, members of the public will intervene on behalf of the busker and tell them to 'go easy'.²¹¹

How compliance officers and rangers do their job is critical to the enforcement process. One experienced busker offered the following description of a 'good ranger':

One who's familiar with both the letter and the spirit of the policy. What makes a good ranger is someone who actually gets the same beat enough to be familiar

²⁰⁵ Interview with C8 (Sydney, 24 March 2014).

²⁰⁶ Interview with C2 (Phone Interview, 13 February 2014).

²⁰⁷ Interview with C8 (Sydney, 24 March 2014).

²⁰⁸ Interview with C6 (Sydney, 19 February 2014).

²⁰⁹ Interview with C4 (Sydney, 19 February 2014). See also Interview with C1 (Phone Interview, 24 January 2014); *ibid.*

²¹⁰ Interview with C1 (Phone Interview, 24 January 2014).

²¹¹ Interview with C6 (Sydney, 19 February 2014); Interview with C2 (Phone Interview, 13 February 2014).

with all the various stakeholders in that space. Has discretionary power within that space to keep everyone happy within guidelines.²¹²

While a small number of negative accounts were reported, overwhelmingly, buskers spoke positively about their encounters with the 'busking police'.²¹³ One said: they are 'all fairly lovely'.²¹⁴ Another: 'We get pretty close to them [the rangers]. Now we're on a name-to-name basis, we've become friends, so it's good fun'.²¹⁵ The issue of familiarity and repeat encounters is an important part of the process of developing positive relationships between councils, authorities, officers and rangers, on the one hand, and buskers, on the other. The rangers we interviewed²¹⁶ also described a generally positive relationship with buskers.²¹⁷

Buskers are not all (and always) 'law-abiding angels' when it comes to potential nuisance factors like volume levels and duration limits. Some will try to work the system to their advantage and there is an element of 'cat and mouse' in terms of busker-ranger interactions.²¹⁸ It is likely that buskers know there is a fair bit of give in the system, given that they know that the council wants them around, and they know that compliance officers and rangers tend to be tolerant and disinclined to reach for the 'big stick' mechanisms like fines and licence revocations.

It follows that compliance officer or ranger personality and style is likely to be a significant influence on the enforcement experience for buskers.²¹⁹ Not

²¹² Interview with SB1 (Wollongong, 6 August 2014).

²¹³ Interview with MB6 (Melbourne, 15 August 2014); Interview with MB3 (Melbourne, 6 December 2013); Interview with MB8 (Melbourne, 15 August 2014); Interview with SB5 (Sydney, 12 February 2015).

²¹⁴ Interview with MB12 (Melbourne, 15 August 2014).

²¹⁵ Interview with SB10 (Sydney, 12 February 2015).

²¹⁶ It is appropriate to acknowledge that we interviewed only one of Melbourne's three Street Trading Compliance Officers and one of Sydney's more than 30 rangers. We have no way of confirming that they were 'typical' officers or rangers (noting that the City of Melbourne and the City of Sydney nominated the officer and ranger for interviews). However, the generally positive feedback reported by buskers (who would have had dealings with a wider range of compliance officers and rangers) gives us confidence that the officers interviewed were not seriously unrepresentative.

²¹⁷ Interview with C2 (Phone Interview, 13 February 2013); Interview with C6 (Sydney, 19 February 2014).

²¹⁸ Interview with MB6 (Melbourne, 15 August 2014).

²¹⁹ Interview with C1 (Phone Interview, 24 January 2014).

all rangers are the same — they have different personalities and may have different attitudes towards busking and different tastes in music. There is inevitably a ‘human factor’²²⁰ that influences enforcement practices. It was evident that not all rangers approach the enforcement task in the same way. One said: ‘Every one of us, all of us, do things different[ly] and council can’t say you will or you won’t issue a penalty [notice] so it’s your own thing.’²²¹ Buskers too recognised variation: ‘Some [compliance officers] do it better than others.’²²²

On the question of how councils respond to breaches of busking laws — ie a person busking without a permit, or a permit holder who is in breach of conditions — the City of Melbourne has a formal ‘pyramid’ enforcement protocol (discussed above in Part III).²²³ The *Sydney Policy* and *Sydney Guidelines* do not contain a formal protocol on enforcement. It is left to the discretion of individual rangers to decide how to respond when they detect someone busking without a permit or in breach of conditions,²²⁴ though, consistent with the City of Sydney’s approach to compliance and enforcement generally,²²⁵ this practice closely resembles the Melbourne ‘pyramid’ approach.²²⁶ Where breaches are detected there is a strong emphasis on ‘soft’ education-based enforcement methods (including provision of information and warnings or cautions), with ‘hard’ enforcement (licence revocation and penalty notices) reserved for recalcitrants.²²⁷

None of the buskers interviewed had been issued with a fine, though a small number reported having been threatened with fines or permit revocation. It appears that penalty notices are only issued where ‘all the other

²²⁰ Interview with MB3 (Melbourne, 6 December 2013). See also Interview with SB9 (Sydney, 12 February 2015).

²²¹ Interview with C6 (Sydney, 19 February 2014).

²²² Interview with MB7 (Melbourne, 15 August 2014). See also Interview with SB11 (Phone Interview, 17 February 2015).

²²³ See Ayres and Braithwaite, above n 109, 35–6.

²²⁴ Interview with C7 (Sydney, 24 March 2014).

²²⁵ See City of Sydney, *Compliance Policy*, 7 April 2014, cls 5, 10; City of Sydney, *Prosecution and Civil Enforcement Policy*, 7 April 2014, cl 5.

²²⁶ The same can be said of the SHFA: Interview with C7 (Sydney, 24 March 2014).

²²⁷ Persons found busking without permits are more prevalent in the Christmas and summer period: Interview with C6 (Sydney, 19 February 2014).

avenues have been exhausted'.²²⁸ A typical enforcement action in a case where a compliance officer or ranger assesses that a busker is in breach of volume or location conditions is a conversation with the busker (usually between songs) and a request that the busker immediately remedy the problem by turning down the amplifier volume or moving. Cautions and warnings are regularly employed. In Sydney, one busker described his understanding of ranger enforcement practices:

I'm pretty sure you get three warning[s] a day so that's — it's fairly lenient, so it's really hard to get fined. I know a couple of people who've got a couple of warnings in a day. [For] [j]ust being too loud, carrying on a bit aggressively or just sometimes they'll have a bad day and yell through a microphone a little bit too loud. It happens.²²⁹

As noted above, the City of Melbourne has a published enforcement action hierarchy that starts with education and can escalate to written warnings ('Notices to Comply') and penalty notices.²³⁰ Compliance officers use their discretion to determine when it is necessary to move from informal conversations that encourage cooperation and compliance to a written warning. This may depend on how the busker 'reacts to our suggestion. If he is nice'.²³¹ Notices to Comply are rarely issued (approximately 25 a year) because buskers are compliant or respond positively to volume 'turn down' requests '95 per cent' of the time.²³² Fines appear to be very rare: 'generally after the written warning is issued it usually falls into place'.²³³ An infringement is only likely to be issued where the situation is 'really serious and combative and all the other avenues have been exhausted'.²³⁴ The Melbourne compliance officer we interviewed advised in three years they had never issued a penalty notice

²²⁸ Interview with C1 (Phone Interview, 24 January 2014).

²²⁹ Interview with SB10 (Sydney, 12 February 2015).

²³⁰ *Melbourne Guidelines* 18.

²³¹ Interview with C1 (Phone Interview, 24 January 2014).

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.* For details of a rare case in which fines were issued, see Greg Thom, 'Sword-Swallowing Busker Ends Up on the Sharp End of the Law', *Herald Sun* (online), 13 May 2011 <<http://www.news.com.au/national/busker-in-bizarre-police-confrontation/story-e6frfkvr-1226055065408>>.

(‘there never has been a situation that I had to issue a fine’),²³⁵ although they did recall that a colleague once issued a fine, two or three years ago. The Sydney ranger we interviewed had occasion to issue three penalty notices in the previous month, but this was anomalous. Prior to these incidents they had not issued a penalty notice in 12 months.²³⁶

In both cities, permit revocation (or the *threat* of permit revocation) is a powerful enforcement tool which is sometimes employed for dealing with permit holders who repeatedly breach conditions. In such cases, buskers may be directed to meet with council or authority staff so that they can be re-educated about the rules and regulations and their obligations as a permit holder.

Interestingly, even though the ‘big sticks’ in the enforcement toolkit are used very rarely, things have not reached the point where the deterrent effect of a hefty fine has been lost. One busker offered the following account of when, having recently arrived in Sydney, he told fellow buskers that he did not have a permit:

They were all like, what the hell? Go and get one right now. Leave your shit and go right now and get it, because they’ll fuck you up the wall if you don’t have a licence — pardon my French — they’ll take you to town if you don’t.²³⁷

In Sydney, and to a lesser extent in Melbourne, our interviews revealed that a direction to ‘move on’ was another of the enforcement techniques that could be employed. Certainly, in Melbourne it was reported that a busker might be asked to move where his or her location was deemed to be a problem, or where he or she had stayed in one spot for too long.²³⁸ Melbourne’s busking laws expressly provide for such directions.²³⁹ However, in Sydney, a move on direction appeared to be used in a different manner — as akin to a ‘shutdown notice’ for the day; for example, where a busker had failed to respond to requests and warnings about noise levels, or where a busker had no permit at all.

²³⁵ Interview with C1 (Phone Interview, 24 January 2014).

²³⁶ Interview with C6 (Sydney, 19 February 2014).

²³⁷ Interview with SB9 (Sydney, 12 February 2015).

²³⁸ Interview with MB6 (Melbourne, 15 August 2014); Interview with MB8 (Melbourne, 15 August 2014); Interview with C1 (Phone Interview, 24 January 2014).

²³⁹ *ALL (Vic) cl 14.1(e); Melbourne Guidelines 18.*

Legislative move on powers have become a staple of public order policing in the last two decades, including in New South Wales under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW),²⁴⁰ and so the idea of their deployment in the context of busking regulation should perhaps not surprise. However, until recently, only New South Wales police officers have been empowered to issue move on directions under the Act. The source of the authority of City of Sydney rangers to issue move on directions is unclear. Under the *Sydney Policy* rangers can give 'lawful directions' but it is not clear that a geographical move on direction falls in this category.²⁴¹

In practical terms, *licensed* buskers have an incentive to move on when directed to do so, because noncompliance may result in licence revocation or a fine for the condition breaches that triggered the move on direction in the first place. Interestingly, we were advised that a ranger's power is diminished in the case of a person busking without a permit (compared to a licensed busker who is breaching conditions) because the sanction of permit revocation is unavailable, and City of Sydney rangers regarded their power to demand identification (information which is necessary in order to issue a penalty notice) as limited.²⁴² In such cases, we were advised that noncompliance with an informal ranger move on direction would typically result in the busker being warned that the police were going to be called and 'by the time you say, "well, I have to get the police here to remove you" they will usually move on eventually'.²⁴³

Finally, we note that buskers were generally accepting of the wide variety of enforcement strategies employed by compliance officers and rangers,

²⁴⁰ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197. See also *Summary Offences Act 1966* (Vic) s 6; Brown et al, above n 11, 554–61.

²⁴¹ See *Sydney Policy* cl 12.1. Section 680A of the *LGA* (NSW) now empowers rangers to issue a move on direction 'to a person in a public place'. Note that the power can only be exercised by a council employee who has received written authorisation from the New South Wales Commissioner of Police to exercise the s 680A power, and only if that council employee 'believes, on reasonable grounds, that the person's behaviour or presence in the place is *obstructing another person or persons or traffic*' (emphasis added).

²⁴² Interview with C6 (Sydney, 19 February 2014). Note, however, that s 680 of the *LGA* (NSW) provides that a ranger may demand a person's name and address if that person is reasonably suspected of 'committing an offence under this Act in a public place': s 680(1)(a). SHFA rangers have explicit move on powers and the power to ask for identification: *SHFA Regulation* cls 22–3, 27, sch 1.

²⁴³ Interview with C6 (Sydney, 19 February 2014).

including repeat requests for identification or permits in the course of a day.²⁴⁴ Buskers appear to have largely accepted that ‘part of the deal’ of being ‘allowed’ to busk in Melbourne and Sydney is that they must submit to higher levels of surveillance and interruption than would be regarded as reasonable for users of public space generally.

V CONCLUSION

Based on our review of the history of the regulation of busking and our desktop analysis of local council policies and permit systems, we approached our field work in Melbourne and Sydney with four tentative hypotheses about busking laws, their impact on street musicians, and the implications for the capacity of buskers:

- 1 busking laws are complex and onerous;
- 2 punishments for noncompliance are draconian;
- 3 busking laws are consequently ‘unknowable’ and alien to the culture of busking; and
- 4 as a result of these factors, busking laws are likely to substantially stifle the capacity of street performers to enhance the urban environment in Melbourne and Sydney.

The qualitative data drawn from interviews with eight council and authority employees and 24 buskers suggests that none of these characterisations accurately describes how busking laws operate in practice in Melbourne and Sydney. First, the *appearance* of stringent and complex regulation is substantially ‘softened’ in practice by a combination of factors, including: the distillation of the rules into a simpler working list of ‘essentials’ which aligns with principles for ‘fair play’ widely embraced by buskers; and an approach to enforcement by compliance officers and rangers that emphasises cooperation and education rather than confrontation and punishment. Moreover, buskers play a part in shaping the street rules of busking — the busker-run queuing system in Pitt Street Mall is the most striking example — and councils

²⁴⁴ Interview with SB9 (Sydney, 12 February 2015); Interview with SB4 (Sydney, 12 February 2015).

embrace, rather than resist, this agency and the co-regulation and legal pluralism it produces.

Secondly, and relatedly, although breaches of busking laws occur regularly (and inevitably so, given, in particular, the difficulty of establishing objectively when noise rises to the level of nuisance), regulators very rarely reach for the 'big stick'. In fact, they are loath to do so. The City of Melbourne, the City of Sydney and the SHFA all pursue an enforcement approach which foregrounds education, encouragement and warnings over fines and licence revocations. Although there is some evidence of ranger-to-ranger variation in how discretions are exercised, overall, enforcement practices tend to conform with the principles of 'responsive regulation'.²⁴⁵ The higher punitive levels of the enforcement pyramid are almost never engaged, but the threat of same — with seriously negative implications for the ability to make a living — remains sufficiently present in the minds of buskers to promote compliance.

Thirdly, even more powerful in producing compliance than the threatened 'big stick' is the fact that buskers did not report being hostile towards the regulatory environment within which they operate. Many buskers appear to have internalised the core conditions in contemporary busking laws, likely as a result of the perception that the distilled rules, as they are enforced, strike a fair balance between the myriad considerations which rightly impact on the regulation of urban public spaces. Although it might appear, superficially, that councils have thrown street music into the mix of urban annoyances and nuisances with which local government is often associated (from parking to smoking to litter to dogs), buskers did not report feeling treated as an urban inconvenience. On the whole, our data supports the conclusion that councils do a good job of respecting the uniqueness of buskers, and of communicating to street performers that they are appreciated.

It might be argued there is a degree of 'reverse regulatory capture'²⁴⁶ occurring here, buskers having acquiesced in a curtailment of their freedom to perform in the streets however they see fit, or having 'sold out' to the desire of local (and state) governments to harness and deploy a 'sanitised' version of the tradition of the street performer for their own civic or commercial purposes.

We make two responses to this suggestion. First, as we showed in Part II, for centuries buskers have been subjected to restrictions and exclusions

²⁴⁵ See Ayres and Braithwaite, above n 109.

²⁴⁶ See above n 152 and accompanying text.

imposed by the state, such that the romantic image of ‘unpredictability and freedom’²⁴⁷ associated with buskers is largely mythic. In fact, what has often been *unpredictable* in the past (and remains so in some cities) is the opportunity for buskers to ply their trade, vulnerable as they have been to shifting attitudes towards street music and urban noise, prevailing laws, and public space policing practices by police forces and local councils.²⁴⁸ In relative terms, 21st century busking laws in Melbourne and Sydney produce an environment in which street performers can be more confident than ever that their desire to add music to the urban streetscape (whatever their motivations for doing so) will not be blocked by the law. Our second response is that buskers’ voices need to be heard, and their views respected, on this issue. None of the 24 buskers we interviewed expressed the view that buskers and rules don’t mix, or that current laws are unfair or unduly restrictive. Certainly, there is a degree of pragmatism in buskers’ reactions to the regulatory environment, but this should hardly be surprising given that today’s buskers are rarely ‘wandering minstrels’ but, more often than not, talented musicians determined to make a full or part living by sharing their passion or aptitude for music with other users of city streets.²⁴⁹

Overall, then, we found little evidence that busking laws have stifled the capacity of buskers to make a positive contribution to the urban environment. This is not because busking laws have been perfectly drafted. They have not. Local councils in both Melbourne and Sydney recognise the need for further improvement and fine-tuning. Rather, it is the *combination* of factors described here — many of them human factors, about choice and discretion exercised — that produces high levels of busker compliance and satisfaction, and the healthy state of the urban soundscape in both cities, courtesy of numerous buskers.

²⁴⁷ Cohen and Greenwood, above n 2, 199.

²⁴⁸ See Interview with SB7 (Sydney, 12 February 2015).

²⁴⁹ We acknowledge that city-specific busking rules and permit systems are more likely to be regarded as problematic by ‘transient’ buskers (although a number of the buskers we interviewed spoke of their experiences in other cities and countries and did not identify having to deal with multiple regulatory regimes as a serious problem). Consequently, we do not assume that our findings can be extrapolated to other parts of the world (eg Europe) where multi-city ‘touring’ by buskers may be more common. In the Australian context, we note that ACAPTA’s National Busking Accreditation Card is an attempt to reduce the regulatory burden on street performers who travel to different parts of the country: see *Sydney Guidelines* cl 3.3.

One such ‘human factor’ which we have not previously addressed is that, in both Melbourne and Sydney, the local council’s efforts to carry off a delicately balanced regulatory mission — one that blends promotion with management, and which is responsive to a diverse constituency — is led by a genuine busking ‘champion.’²⁵⁰ Their positive influence on the busking scenes in Australia’s two largest cities was remarked upon numerous times in the course of our research. Another human factor that underpins our generally positive assessment of busking laws in Melbourne and Sydney (an assessment shared by a recent international study of 35 cities which rated Melbourne and Sydney equal first²⁵¹ for encouraging busking)²⁵² is that buskers were actively involved in the construction of each city’s regulatory regime.²⁵³

We conclude by suggesting that contemporary busking laws in Melbourne and Sydney offer a good example of a successful mediation of what Boutros and Straw have described as the enduring tension between ‘the regulatory order and the fleeting ephemerality of modern urban life.’²⁵⁴ Perhaps most importantly, although some buskers express doubts about whether the taint of being ‘glorified beggars’²⁵⁵ still lingers,²⁵⁶ there is little doubt that the status of, and legal treatment of, buskers has improved significantly. In 1979, the then Attorney-General of New South Wales, Frank Walker, was moved to exhort: ‘[l]ong may the buskers carry on busking.’²⁵⁷ In 2015, with some 3500 licensed buskers across Melbourne and Sydney, the evidence is strong that they are doing just that. Moreover, these days the law validates and protects, rather than imperils, the contribution that musicians and other performers make to the streets of Australia’s two largest cities.

²⁵⁰ Namely, the City of Melbourne’s Busking and Program Coordinator, and the City of Sydney’s Cultural Projects Coordinator.

²⁵¹ Along with São Paulo, Brazil.

²⁵² The Busking Project, ‘The Beat of the Street Report’ (Report, 2014) 14.

²⁵³ Interview with SB1 (Wollongong, 6 August 2014).

²⁵⁴ Alexandra Boutros and Will Straw, ‘Introduction’ in Alexandra Boutros and Will Straw (eds), *Circulation and the City: Essays on Urban Culture* (McGill-Queen’s University Press, 2010) 3, 6.

²⁵⁵ See Munro, above n 3.

²⁵⁶ Interview with SB2 (Sydney, 20 December 2013); Interview with SB8 (Sydney, 12 February 2015); Interview with MB5 (Melbourne, 7 December 2013).

²⁵⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4920.

Table 1: Permit Conditions for Busking in Melbourne and Sydney

Conditions	City of Melbourne	City of Sydney
Location	<p><i>General</i></p> <p>Public spaces throughout city</p> <p>Busking 'No-Go Zones' (eg parks)</p> <p><i>Bourke Street Mall</i></p> <p>Six designated pitches (five for music)</p> <p>Ballot and roster system</p>	<p><i>General</i></p> <p>No restrictions in LGA (NSW)</p> <p>Designated pitches in some locations ('Restricted Areas')</p> <p><i>Pitt Street Mall</i></p> <p>Three designated pitches (two for music)</p>
Time	<p>No restrictions (but see amplification restrictions)</p>	<p><i>General</i></p> <p>Mon to Thu: 7:00 am–10:00 pm Fri and Sat: 7:00 am–12:00 am Sun: 9:00 am–10:00 pm</p> <p><i>Pitt Street Mall</i></p> <p>Mon to Fri: not before 2:00 pm Sat and Sun: not before 11:00 am</p> <p><i>Queens Square</i></p> <p>Sat: only if the Supreme Court is not sitting Sun: only from 1:00 pm</p>
Duration	<p><i>General</i></p> <p>Maximum two hours in the same location</p> <p><i>Bourke Street Mall</i></p> <p>All day: rotations of 30 minutes</p>	<p><i>General</i></p> <p>Maximum two hours in the same location</p> <p><i>Pitt Street Mall</i></p> <p>Maximum one hour</p>
Volume	<p>'[N]ot intrusive above background levels'</p> <p>Maximum decibel levels specified</p>	<p>'Excessive' noise prohibited</p> <p>No decibel levels specified</p>
Amplification	<p>Battery power only</p> <p><i>Time restrictions</i></p> <p>Sun to Thu: 8:00 am–10:00 pm Fri and Sat: 8:00 am–11:00 pm</p> <p>Prohibited in non-amplified zones</p>	<p>Battery power only</p> <p>'Excessive' amplification prohibited</p>
Distance	<p>Acts with sound must be 30 metres away from one another</p>	<p>No restrictions</p>