

Licensing Board of Tasmania

In the Matter of the Liquor and Accommodation Act 1990
(as amended to October 2003)

and in the matter of an application for an off-licence
by **Josef Giedl** for “**Prospect Wines**” for Shop 2, T&G building
115 Collins Street, Hobart.

DECISION

The Board heard this matter at Hobart on the 1st October 2003.

THE LAW

This is an application under s9 of the Act, as recently amended. Relevant provisions include:

Liquor not to be sold except as authorized

5. A person shall not sell liquor except as authorized by –
- (a) a liquor licence; or
 - (b) a liquor permit; or
 - (c) a general liquor exemption.

Types of liquor licences and permits

6. The Commissioner may grant –
- (a) the following liquor licences:
 - (i) a general licence;
 - (ii) an on-licence;
 - (iii) an off-licence;
 - (iv) a club licence;
 - (v) a special licence;

Off-licence

9. [Section 9 Substituted by No. 40 of 2003, s. 6, Applied:01 Aug 2003] An off-licence authorizes the sale of liquor between 5 a.m. and midnight, on any day on the premises specified in the licence, for consumption off those premises.

23A. [Section 23A Inserted by No. 9 of 2002, s. 11, Applied:15 Sep 2003] (1) A person may make a written representation to the Commissioner in respect of an application for a liquor licence.

Requirements for licence

24A. [Section 24A Inserted by No. 40 of 2003, s. 8, Applied:15 Sep 2003] (1) In considering an application for a licence, the Commissioner or the Board must make a decision which, in the opinion of the Commissioner or the Board, is in the best interests of the community.

(2) In considering an application for an off-licence, the Board must be satisfied that the principal activity to be carried on at the premises will be the sale of liquor.

(3) In considering an application for an on-licence for a restaurant, the Board must be satisfied that the premises are, or are intended to be, used as a restaurant.

Hearings by Board

213. (1) [Section 213 Subsection (1) substituted by No. 9 of 2002, s. 23, Applied: 15 Sep 2003] The Board is to –

- (a) fix a time and place for a hearing in respect of an application or appeal; and
- (b) inform the Commissioner, the applicant or appellant and any person who made a representation in respect of the application or appeal accordingly; and
- (c) provide the applicant or appellant with a copy of any representation.

(2) At a hearing the Board –

- (a) shall decide the procedure to be followed; and
- (b) shall give the applicant or appellant, as the case may be, the opportunity to be heard; and
- (c) may receive evidence orally or in writing; and
- (d) may take evidence on oath or affirmation; and
- (e) is not bound by rules of evidence but may inform itself in such manner as it thinks most appropriate; and
- (f) shall observe the rules of natural justice in so far as they are applicable.

New regulations (Liquor and Accommodation Regulations 2003 (S.R. 2003, No. 96)) were promulgated at the same time the recent Act changes were made, but there are no specific regulations which impact on applications for an off-licence.

Before these changes, the considerations to be taken into account on such an application as the present one, were set out in the Act and in Guidelines. The Guidelines set out the policy the Board would take generally in determining whether or not to grant a licence. The fundamental Act provision was to the effect that the Board must make a decision which would best aid and promote the economic and social growth of Tasmania by encouraging and facilitating the orderly development of the hospitality industry in the State. That provision is repealed.

The present position is, with regard to the present application:

- 1 The Applicant must have a licence to sell liquor as proposed.
- 2 The Commissioner, on direction of the Board, may grant the off-licence.
- 3 The Act limits the hours of trading (s9).
- 4 People may make written representations to the Commissioner in respect of an the application (which has been done) and the Commissioner must refer those representations to the Board.
- 5 The Board must consider the application, and must make a decision which, in the Board's opinion, is *in the best interests of the community*.
- 6 In considering an application for an off-licence the Board must be satisfied that the principal activity to be carried on at the premises will be the sale of liquor.
- 7 The Board hears the application (s213) and directs the Commissioner to grant the licence, or to refuse the application (s214).

There is no guidance in the Act or regulations as to the criteria to be taken into account by the Board in attempting to make a decision which is in the best interests of the community (s24A).

The Board is bound by the principles of natural justice in its administrative decision-making. We are therefore bound to take into account relevant matters.

We conclude that s24A provides a wide discretion whether or not to direct the grant of a licence. Matters which were relevant under the Act prior to the recent amendments and now rescinded Guidelines will generally continue to be relevant matters. Some guidance can continue to be gleaned from past decisions of the Board.

We take into account the written material submitted by the Applicant and by those people who made representations. We take into account the evidence advanced at the hearing and the submissions made by the Applicant and those people who made representations.

We summarise that material and our findings on any material question of fact:

THE APPLICATION

First, we are satisfied that the principal activity to be carried on at the premises will be the sale of liquor. That is the evidence from Mr Giedl, and it was not contradicted. S.24A(2) is satisfied.

The application was sought to enable the Applicant to open a franchised business in shop 2, T&G Building, Murray St, Hobart. His intention is to source wines from wineries throughout Australia and sell that wine under Prospect Wine label with a secondary label disclosing the source of that wine. The area of the shop is approximately 60 square metres of sales and administration area. The applicant intends to sell wine only, although the nature of the licence is such that if granted, it will permit sale of all types of liquor.

The Applicant stated he wishes to provide the communities of Hobart and surrounding suburbs a winery clearance centre for winemakers from around Australia, at one convenient cellar door style outlet. He states that there are a number of existing outlets of a similar nature in Victoria, under the same franchise.

In effect, it is 'cleanskin' wine, with Prospect Wines re-labelling, not indicating the exact winery from which the wine was sourced, but giving geographical and grape and winemaking style information. The Applicant hopes to obtain some Tasmanian wine product to add to the intended product range. He believes there is a niche sector of the wine purchasing market that is presently unsatisfied. He says this is demonstrated by the rapid growth of Prospect Wines in Melbourne.

There was no particular evidence from the objectors which contradicted this statement, although general evidence was lead, and accepted, that there are a number of outlets in the vicinity which provide wine for off-premises consumption. We accept that the operations of licensed premises in the vicinity do cater well for the needs of consumers. We also accept that the approach intended by the Applicant is novel, and

there will be niche market which would be interested in purchasing product of the nature intended to be offered, in the franchise structure intended.

The Applicant submitted that the community interests would be served by grant of the licence because:

- It would make the Prospect brand wines available, which they are not at present, to the Hobart community and visitors;
- It would enable a business opportunity to be pursued, with employment, effective use of vacant premises;
- It would provide products in a niche market that is underdeveloped and undervalued by suppliers in Hobart at present;
- It would provide greater choice of affordable quality product;
- It would add to the diversity of retail and product services;
- It would add to the opportunity for Tasmanian wine producers to market their product, within a city environment, to local and tourist trade.

The Applicant in response to written objections submitted additional evidence. In summary, in further stating that the application was based on a foundation of the best interests of the community, the Applicant stated:

- The product is not presently available in Tasmania: increased variety and diversity for the consumer;
- Tasmanians who do want the product now must pay a premium of \$17 or more for shipping;
- The wines are discounted (a figure of 55% was cited) compared with the same wines, with original labels at cellar door – hence a price benefit to consumers;
- The economic benefit of the sales of such product would flow out of the State – so with the Prospect franchise in Hobart, income and profit will be available in Tasmania;
- The shop will be unlike present bottle shops; it will not have a drive-through component, and will not be large nor all encompassing;
- Assertions of potential contribution to the harm associated with alcohol consumption by the shop making liquor available to under-age people was exaggerated by the objectors and unrealistic;
- The management of the shop, by the Applicant and his wife and two other co-owners, would ensure safe service practices in accordance with responsible service of alcohol advice;

OBJECTIONS

The objectors were the Australian Hotels Association (Hobart Branch), the licensee of Grays Hotel at George Town, Mr C McIndoe, and the Managing Director of Nine Eleven Australia Pty Ltd, a company predominantly involved in sale of liquor through the Hotel St Ives night club and drive through bottle shop, the Gas Works drive through bottle shop, and the Brooker Hotel (a gaming venue and drive through bottle shop).

The objectors did not make any objection on the basis of increased competition which might be caused by the opening of the Applicant's business (should he be granted a licence. Rather, the objections were advanced on public interest lines.

They may be summarised as follows:

- To determine what is in the best interests of the community the Board must weigh the benefits against the costs of granting a licence;
- The potential for social harm is a relevant factor;
- Benefits would include prosperity to the local and or state economy, likelihood of increased tourism, and scope for job opportunities,
- Social benefits including providing both local and tourist markets with a choice;
- Costs would include adverse effects from increased outlet density (asserted detriments include increased violent behaviour, increased high risk sexual behaviour, increased sexual disease, increased homicide, increased alcohol related hospital admissions,
- Proximity of licensed premises to other institutions or community facilities including schools;
- Increase of access to alcohol by young people (under age);
- Investment instability due to hotel owners not being willing to upgrade facilities because licences do not hold significant value;
- Discouragement to investment in hotels.

The objectors submitted that in weighing up the costs and benefits, the Board should conclude that there are no significant economic benefits of granting the licence. It was asserted there would be minimal impact on tourist numbers or employment. The only benefit conceded was a greater choice to consumers.

It was asserted that there is clear evidence that increased availability to liquor increased harm arising from its misuse.

CONCLUSIONS

Whilst this proposition (the availability theory) is correct in some instances, the Board determines that the evidence in this matter is not such as to cause the Board any concern that the grant of this licence application would give rise to any significant increase in liquor availability. We also conclude, on the evidence, that there is nothing to demonstrate that the grant of the licence would make any measurable increase in the misuse of liquor, and consequently the harm associated with that.

We conclude that more likely than not, the grant of the licence will make liquor available at one outlet which, in the geographical and social framework of Hobart, may enable potential customers to have a greater choice, diversity, and access to otherwise unavailable brands, perhaps at lower price than otherwise available, certainly stimulating some degree of competition in a niche market, but not such as will be likely to make liquor more accessible to young people (under age).

The argument that there are schools nearby, or shops which cater for young people, is not compelling in the context of the nature of this application. There is no indication

that, thereby, there will be greater access by young people to liquor. The intended premises and the intended management just does not lend itself to a concern that liquor will be sold to young people, or procured for them from this outlet, if licensed. It is simply not the style of liquor that young people attracted to nearby schools or retail outlets will be likely to seek out.

The Board accepts that there has and will continue to be concern by the public, police and business operators in the CBD about violence and injuries in the area, in conjunction with alcohol consumption. We do not see that the granting of the present application would be likely to add to the cause of that anti-social conduct or contribute to that type of harm to the people and property in our society.

There is also the potential for social harm from the grant of any licence. The Parliament has decided that, on balance, it is appropriate to provide for the regulation of sale of liquor, rather than the prohibition of grant of new licences. There is also nothing in the Act which would require a conclusion that existing licensees and licensed premises should be favoured with a notional value to be attributed to their business, such that new purveyors of liquor would need to acquire their premises from existing licensees.

We do not consider the Liquor and Accommodation Act is intended to have a primary focus of being an instrument to protect investment in the hotel and associated industries. Especially given the recent changes inserted in the Act consequent on the National Competition Policy review. The focus is regulation of sale of liquor. Broad as that statement is, and as wide as the discretion established in s24A, protection of investment will generally just be an accidental by-product of decision making on licence applications.

As some new licences are granted, so too are licences cancelled or surrendered. There are also changes in the mix of licences, so that the pure number of licences is not reflective of the nature or extent of provision of liquor in the community. Recent data indicates that from 1992 to 2000, the number of general licences increased by only 4 (from 294 to 298) or 1.4%, but there was a significant increase in the number of restaurant licences: the impact of that is important given that the percentage of liquor sold from restaurants is a relatively minor amount of the total (approx 3%) and has not increased significantly (as a proportion of total liquor sales) over that period.

In the present hearings of the Board 3 liquor licences were cancelled. In general, apart from an increase in the number of licences permitting grape growers or winemakers to sell their product from cellar doors, and in the grant of restaurant licences, there is little change in the overall number of outlets dedicated to service of liquor in Tasmania over the last 40 years. It is not demonstrable that the grant of any one particular licence represents an increase in overall density of licences such as certainly increases availability. Also, the change in licence mix, and the number or proportion of licences permitting sale of liquor only as an adjunct to some other social or cultural or recreational activity, militates against accepting the proposition that grant of any one licence, per se, is not in the best interests of the community.

Liquor availability is not just reflected by the number of outlets or the density of outlets in terms of number of outlets per number of people in the local population.

We have reviewed the articles referred to us by both Mr Giedl and objectors, and conclude that in the context of the particular application, the locality, and the licensing environment in Tasmania, the evidence is not clear that either the grant of this licence will increase licence density, nor liquor availability (to any significant extent), and if it did, nor is it demonstrated that it would increase the harm caused by misuse of liquor.

In regard to the AHA submission that a new licence will be a disincentive to investment in the Tasmania: there are also negative impacts on the prospects of investment in Tasmania that would arise from refusal to grant licences that permit new businesses to open. The evidence is not sufficient for us to accept the AHA proposition.

The example given of recent improvements to the Customs House Hotel, the Central Bar and Café and the Telegraph hotel as having expended money on renovation, and the submission that a grant of an off licence to Prospect Wines would discourage further investment and have a negative effect on the state economy is unconvincing. The first two enterprises are owned indirectly or in part by a relatively recent applicant for a new licence in the wharf area, which is run as a nightclub. That the grant of that licence did not discourage that investment is at the least paradoxical.

The AHA recognised in their submission that benefits would include prosperity to the local and state economy. In the submission they also indicate that the likely benefit of the business and employment associated with this particular licence grant is likely to be minimal. It might be relatively minimal, but it is still a contribution which must be taken into account.

The assertion of proximity to local schools was exaggerated. Schools as far away as Mt Nelson, and Lower Sandy Bay were mentioned. Even those most proximate to the premises do not give the Board concern that there is even the slightest scintilla of a possibility that the intended management of the intended licensed premises will cause an increase in under-age drinking.

In conclusion, the Board concludes that the direction to grant the application would be a decision which, in our opinion, is in the best interests of the community – compared to the alternative of refusing the application, and preventing the intended business from opening, using the premises, employing labour, and providing the service intended to the local and tourist public. The evidence has not demonstrated the assertions of detriment.

We note the Applicant's application was firmly advanced on the basis that it would principally be a wine outlet, and not a full range bottle shop. The Board expects the operator and future operators to adhere to this undertaking, and indicates that the direction to grant the licence has been made with this in mind, otherwise s42(1)(i) may apply and the licence may be liable to application for cancellation. That is not to say that a full range bottle shop application might not be appropriate to be granted, but the evidence, submission and this decision were grounded on a different application.

We direct the grant of the licence.

Dated:October 2003.

Phillip Kimber, Chairman. William Morris, Member. Louise Finney, Member.