

In the matter of the Liquor and Accommodation Act 1990

And in the matter of an application by **Ms Suzanne Demir** to Vary a special licence (restaurant) to permit the off-premises sale of Beer and Wine from premises known as **Marti Zucco's Italian Restaurant at North Hobart**.

Decision: **Marti Zucco's Italian Restaurant No. 1**

Heard before the **Licensing Board** at Hobart on Wednesday the 25<sup>th</sup> August 2004  
Date of decision: 25th August 2004.

This application is for a variation of an existing special licence (a licence subject to conditions) which presently enables the applicant to sell liquor to patrons for consumption on premises as an adjunct to a meal. The desired alteration would permit sale of a limited range of wine and beer, in limited quantities for home delivery as an adjunct to prepared and cooked food delivery from the restaurant.

The special licence category is a separate category which permits adhesion of conditions to a licence grant, unlike the other licence categories of general, on, club and off licences.

The category is affected by regulation 4:

*Special licence*

4. (1) *The Board is to direct the Commissioner to grant a special licence if satisfied that –*

*(a) the principal activity to be carried on at the premises specified in the licence will not involve the retail sale of liquor or, if the principal activity to be carried on at the premises will involve the retail sale of liquor, the premises form part of or are associated with a vineyard or winery and the sale of liquor will be restricted to Tasmanian wine; and*

*(b) in the case of premises at which meals are to be served, liquor will be sold only for consumption on or adjacent to the premises as an accompaniment to those meals.*

(2) *The Board is to direct the Commissioner to grant a special licence to sell Tasmanian wine if satisfied that –*

*(a) the principal activity to be carried on at the premises specified in the licence is the provision of hospitality or tourist goods or services; and*

*(b) selling the wine is not likely to have a detrimental effect on that activity.*

The Board expressed difficulty in reaching a conclusion as to the meaning of reg. 4(1)(a). In *Mill Providore & Gallery 2*, 24<sup>th</sup> August 2004, the Board determined that the intention was that this part of the regulation meant:

*The Board is to direct the Commissioner to grant a special licence if satisfied that –*

*(a) (i) the principal activity to be carried on at the premises specified in the licence will not involve the retail sale of liquor or,*

*(ii) if the principal activity to be carried on at the premises will involve the retail sale of liquor, the premises form part of or are associated with a vineyard or winery;*

*and in either case the sale of liquor will be restricted to Tasmanian wine;*

The Board also considered whether such authority as there is in reg 4 is intended to cover the field. Refer to s 11 of the Act:

### **Special licence**

11. A special licence authorizes the sale of liquor –

- (a) between times; and
- (b) on premises; and
- (c) subject to compliance with any condition –

specified in the licence.

Also; the principal guidance as to the Board's duty in considering applications is set out in s24A:

### **Requirements for licence**

**24A. (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.

We concluded in *The Mill* (above) that regulation 4 is not intended to remove the ability of the Board to direct the grant of a special licence for premises under s11 except where the application meets the criteria in that regulation. It appears to be cast in mandatory terms in the event that the criteria set out are met. But it does not displace the broad discretion remaining under s11 of the Act.

We therefore conclude we are empowered by the Act to direct the grant of the application.

## EVIDENCE

The applicant put forward evidence to the following effect:

- The principal business will continue to be the restaurant;
- Home delivery of prepared cooked food is the minority of the business activity;
- Such food delivered is the full range in an extensive Italian restaurant menu (provided);
- 30% to 40% of the deliveries are pizza, the balance other items from the menu;
- Provision of similar service exists in Tasmania and elsewhere. In Tasmania the “Pizza Pub” in Launceston was noted, and assertions about similar service in Queensland were made. We understand that a similar type of licence is available in Victoria and are not aware of any harm minimisation issues that have arisen (for example, licence for La Porchetta Pizza Restaurant in Hamilton, Victoria under the Liquor Control Reform Act 1998);
- Liquor would be sold at restaurant prices, that is above retail bottle shop prices, and would be provided principally to enhance the service and differentiate the service from other home delivery food businesses;
- Currently the restaurant serves approx 130 home delivery meals per week, between Glenorchy and Sandy Bay;
- The service is warranted as there is a need from tourists and locals who wish to stay in and seek to obtain both food and liquor from the one vendor for convenience;
- Nearby hotels, with existing authority in their general licences do not provide the service, except in a manner designed to be unattractive and not taken up by the public;
- A condition limiting sales to 2 bottles of wine only for more than 3 meals delivered to one customer, and 1 bottle of wine for up to 3 meals to one customer, and a maximum quantity of 6 half bottles of beer in any case would be desired.

## REPRESENTATIONS

The Australian Hotels Association (Tas Branch) attended the hearing on having been advised by the Commissioner of the time and place. Initial issues regarding their right or otherwise to appear and be heard were considered. The following issues arose and were resolved;

- The applicant was advised by the Board that the AHA representation was not received by the Commissioner within the prescribed 14 days specified in s23A;
- The Board was aware of the written representation having been lodged late, and had asked for a copy notwithstanding that the Commissioner had no duty to provide it. We determined that only a submission properly received within time under s23A of the Act was required by the Act to be forwarded to the Board under s23A(3);
- The Board's duty in hearing an application for a licence is set out in s213 of the Act;
- Whilst s213(1)(b) is prescriptive and obliges the Board to notify the Commissioner and the applicant of the date and time of a hearing, it does not prevent the Board notifying others;
- In this case, as a late representation had been lodged, it was appropriate to notify the AHA of the date and time of the hearing;
- S. 213(2)(b) obliges the Board to give the applicant the opportunity to be heard. The absence of a provision requiring the Board to give a representor the opportunity to be heard, and the fact that for present purposes (because the 'representation' by the AHA was out of time) meant that there is no requirement that the AHA (nor any other person who might make an representation in any particular case) be given an opportunity to be heard in the general case with a valid representation, nor where a representation has not been lodged;
- Whilst not obliged to notify or hear people who have lodged representations, nor people who have failed to lodge valid (ie within time) representations, the Board may nevertheless hear such people. Refer s213(2)(e) "*[the Board] is not bound by the rules of evidence but may inform itself in such manner as it thinks most appropriate..*".
- S. 213(4) gives the Board discretion to conduct hearings in public or in private. As a general rule hearings will be in public and exceptions may be appropriate in the case of appeals against the Commissioner's determination that a person is not fit and proper to hold a licence, or in discussion of financial business data put forward by an applicant or person making a representation;
- That, in summary, the amendments made effective 15<sup>th</sup> September 2003, by setting out requirements for valid representations to be submitted to the Board via lodgement within a time frame, and forwarding by the Commissioner, emphasise that purported representations lodged outside that time frame need not be considered by the Board.

On the applicant's submission we decided that the Board, pursuant to s213(2)(e) and s213(2)(a) has power to permit the AHA to be heard, and in this instance as their

submissions were likely to be relevant, the Board would exercise that power in favour of permitting that organisation to participate in the hearing.

To the extent evidence was to be lead by either the applicant or the AHA the other party will have the right to cross examine, and each party will have the right to make submissions on the evidence and the other party's submissions.

## SUBMISSIONS OPPOSING

The AHA submissions may be summarised:

- The categories of licences should not be widened by accepting this application;
- To do so would impinge on the integrity of the Act structure;
- There are community concerns over liquor consumption on premises where there is power for the licensee to exercise control and to monitor intake;
- Off licensed premises consumption is of more concern due to intake being effectively unregulated and unmonitored;
- The special licence category should be limited to Tas wines and in conjunction with hospitality and tourism – not a de facto method of permitting off sales;

## APPLICANT'S RESPONSE

In response the applicant submitted:

- Liquor would only be provided with meals: that was positive in regard to contributing to harm minimisation and limiting adverse impact of liquor consumption;
- The offered conditions limited liquor type and quantity, further contributing to harm minimisation;
- Hotels (generally members of the AHA) have no controls from bottle shop sales after the point of sale, and should look to themselves and the harm arising from their activities rather than seeking to oppose this licence application;
- All delivery staff will undertake the responsible service of alcohol course;
- The service was not intended to be significant to the applicant's business, but rather as an 'add on' service to differentiate, and support existing operations.

## DECISION

This application must be considered under s24A of the Act, for the Board to make a decision which in our opinion is in the best interests of the community.

There are positives in this application: better service to the public, a service not generally offered, and also a likelihood that the impact will not contribute to the harm associated with the sale of liquor.

On the other hand, there is no recognised category of licence either in the Act or regs, or under the previous Guidelines (up to September 2003) for home delivery of liquor. There is the possibility of contribution to harm by an increase in the number of

outlets, greater availability and hence more consumption by the public. This can be balanced by the possibility that in the manner in which the licence would be granted with limiting conditions applied, there would in fact be a contribution to reduction in consumption: purchasers would be able to buy only 1 or 2 bottles of wine or 2.25 litres of beer maximum, whereas if they decided to go to a regular bottle shop they might be tempted to buy greater quantities. The evidence is inconclusive on this point.

## DECISION

In conclusion the Board does not believe that there is likely to be any adverse impact by the grant of the licence applied for, and that under the conditions proposed there is sufficient protection to provide a useful service. On balance then, it is in the community interest, and we direct the Commissioner to grant the licence subject to the conditions specified.

### Conditions;

Type of licence: special licence, subject to conditions. Liquor may be sold:

1. For consumption on the premises as an adjunct to meals; and
2. For consumption off the premises:
  - a. Delivered as part of a delivery meal service to residential and accommodation premises in conjunction with the supply of a delivered meal or meals, and prepared at the licensee's premises; and
  - b. The quantity of liquor delivered must not exceed 2 x 750ml bottles of wine or 6 containers (not more than 375ml per container) of beer per delivery; and
  - c. Sale and delivery is limited to between 5pm and 11.30pm on any day; and
  - d. Full restaurant menu, as provided to the Board, or reasonable variations thereto, must be offered and available for delivery at all times whilst liquor is offered for off-premises consumption.

Dated: 9<sup>th</sup> October 2004.

PA Kimber, Chairman.

L Finney, Member.

K Sarten, Member