

CITATION: *Australian Hotels Association (Tasmanian Branch) v Licensing Board*
[2006] TASSC 91

PARTIES: AUSTRALIAN HOTELS ASSOCIATION
(TASMANIAN BRANCH)
v
LICENSING BOARD

TITLE OF COURT: SUPREME COURT OF TASMANIAN (FULL COURT)

JURISDICTION: Appellate

FILE NO/S: FCA 27/2006

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DELIVERED AT: Hobart

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JUDGMENT OF: Slicer, Evans and Blow JJ

CATCHWORDS:

Liquor Law – Licensing – Application for a licence – Hearing of application – Other matters – Restriction on grant of licence in connection with the activities of a supermarket.

Liquor Licensing Act 1990 (Tas), s25A.

Acts Interpretation Act 1931 (Tas), ss8A, 8B.

Burswood Management Ltd & Ors v Attorney-General (CTH) & Anor (1990) 94 ALR 220, referred to.

Aust Dig Liquor Law [27]

REPRESENTATION:

Counsel:

Appellant: S B McElwaine

Respondent: No appearance

I C Tanner L Bryant

Solicitors:

Appellant: S B McElwaine

Respondent: No appearance

I C Tanner Simmons Wolfhagen

Judgment Number: [2006] TASSC 91

Number of paragraphs: 30

**AUSTRALIAN HOTELS ASSOCIATION (TASMANIAN BRANCH)
v LICENSING BOARD**

REASONS FOR JUDGMENT

**FULL COURT
SLICER J
EVANS J
BLOW J
8 November 2006**

Orders of the Court:

Appeal dismissed.

**AUSTRALIAN HOTELS ASSOCIATION (TASMANIAN BRANCH)
v LICENSING BOARD**

REASONS FOR JUDGMENT

**FULL COURT
SLICER J
8 November 2006**

1 The appellant organisation which represents the interests of hoteliers and others engaged in the liquor and hospitality industry, had opposed an application made by Ian Charles Tanner, liquor licensing manager for Woolworths Limited, for the granting of an "off licence" at premises in the Kingston Town Shopping Centre. The application came before the Licensing Board of Tasmania ("the Board") which, following a hearing, directed the Commissioner to grant the licence in accordance with the provisions of the *Liquor Licensing Act 1990* ("the Act"). The Board made findings of fact, summarised by the learned primary judge in her reasons for judgment (*Australian Hotels Association (Tasmanian Branch) v Licensing Board* [2006] TASSC 19), as:

"The applicant did not dispute findings of fact made by the Board and summarised those relevant as follows:

- The applicant for the licence, Mr Tanner, is and has been an employee of Woolworths Limited;
- Application was made by Mr Tanner to establish a BWS liquor outlet internally within the Kingston town shopping centre;
- The proprietor of the business will be Woolworths Limited;
- Woolworths Limited is the proprietor of a large number of liquor outlets throughout Australia, which trade under various names;
- BWS is not a legal entity separate from Woolworths Limited;
- Woolworths Limited is the proprietor of a supermarket within the Kingston town shopping centre;
- The applicant was already personally responsible for 220 liquor outlets in Victoria and Tasmania as an employee of Woolworths Limited;
- Woolworths supermarkets and BWS liquor stores have cross marketing and promotional activities which would be employed at the intended BWS liquor store;
- Woolworths supermarkets have a customer loyalty program, which includes the provision of 'shopper docket' and loyalty points, redeemable at any BWS outlet;
- The applicant is the liquor licensing manager for Woolworths Limited and resides in Victoria;
- Woolworths Limited will be the common employer for the supermarket and BWS employees;
- There will be co-promotion of products through advertising and catalogues as between the supermarket and the BWS liquor store;
- Liquor and supermarket goods have been and will be advertised together;
- The financial results of the Woolworths Limited liquor business is reported as part of its supermarket trading activities;
- Customers would be entitled to earn 'frequent shopper' points by purchases from the supermarket, redeemable in purchase in the BWS liquor store and vice versa;
- The lessee of the BWS liquor outlet will be Woolworths Limited which is also the lessee of the supermarket;

- The proposed BWS liquor outlet is to be situate approximately 50 metres from the existing Woolworths supermarket and within the confines of the same shopping centre'."

2 In reaching its decision, the Board had considered and interpreted the provisions of the Act, s25A, in the following terms:

"79 It is apparent that the Government did not intend to prevent any company that runs a supermarket from gaining a new licence otherwise, it would, absent any constitutional issues, have stated so in s 25A. In any event the Act does not say that. We consider the section was drafted widely in order to prevent causal circumvention of the specific intention. That specific intention being to prevent supermarkets generally from having as a component of their day to day affairs the sale of liquor."

3 The appellant sought review of that direction in accordance with the *Judicial Review Act* 2000. The grounds of review were that:

"(a) The Respondent erred in law in its interpretation of Section 25A of the Liquor Licensing Act 1990;

(b) The Respondent erred in law in its application of Section 25A of the Liquor Licensing Act 1990 to the facts as found by it in the decision;

(c) The Respondent directed the Commissioner for Licensing pursuant to the decision to grant an off licence to Ian Tanner in respect of the premises identified on a plan at the Kingston Town Shopping Centre pursuant to Section 214(1)(a)(i) of the Liquor Licensing Act 1990 when such direction was made contrary to Section 25A of the Liquor Licensing Act 1990; and

(d) The decision was not authorized pursuant to the provisions of the Liquor Licensing Act 1990 in that upon the facts as found by the Licensing Board in the decision the application made to it was for the grant of a liquor licence in connection with the activities of a supermarket contrary to Section 25A of the Liquor Licensing Act 1990."

4 The learned primary judge dismissed the application to review, stating that in her view:

"... the Board has correctly applied its interpretation to the facts as found."

5 Relevant to this appeal, her Honour stated, at pars17, 20 – 22, 24 and 25:

"Counsel for the applicant submitted that the phrase 'in connection with' was extremely broad and should be read by reference to the context in which it appeared and the purpose of the Act (see *Burswood Management Ltd & Ors v Attorney-General (CTH) & Anor* (1990) 94 ALR 220). That purpose, he submitted, was obvious from the construction of the legislation and was to control the issue of liquor licences, the conduct of licensed premises and the sale of liquor. In that context, Parliament had prohibited the grant of a licence in connection with the activities of a supermarket. In doing so, Parliament did not expressly provide that prohibition was confined to the physical conduct of a supermarket in conjunction with a liquor outlet.

...

The Bill was introduced in the climate of an application by Purity Supermarkets for a licence to sell wine in its supermarkets. The Parliamentary debate in both Houses, as evidenced by the speeches referred to by both counsel, focused on the object of preventing the sale of wine in supermarkets like any other grocery items.

Section 25A, in its original form, has remained in force without variation since 1995, notwithstanding other legislative changes which have changed the landscape in which liquor is sold to the public.

In summary, counsel for the applicant submitted that the prohibition contained in s25A should not focus on premises, but on the activities of the entity. He submitted

those extended beyond its location. The Board had erred in law in confining the operation of the section as it did and failing to apply the broader test to the facts before it.

...

Counsel for the applicant submitted the Board, in effect, rewrote the provision using words Parliament did not. He also submitted that the Board's reference in the first sentence to a company holding a licence, which of course one could not, was evidence the Board made an error at the start, causing it to err in its interpretation. It was also submitted that reliance on (and the incorrect citation of) *Executive Director, Public Health & Anor v Woolworths Ltd & Ors* [2002] WASCA 108 led the Board into error because that case dealt with a different issue and was irrelevant.

With respect, none of these submissions has any merit. The Board, in those paragraphs, expressed its interpretation of the meaning of s25A. That interpretation was, in my view, clearly open to it. The ordinary meaning of the words of s25A allowed for the construction that the phrase 'activities of a supermarket' referred to the day to day physical activities of the supermarket being considered and did not extend to elements which I might describe as further up the chain, such as its corporate structure and overall ownership. Were it to be interpreted as including such things, no supermarket owner could seek a licence at all. There was nothing in the legislation which supported that interpretation."

6 The appeal to this Court claims that the learned primary judge erred in law:

- "(a) in her construction of Section 25A of the Liquor Licensing Act 1990 (The Act);
- (b) in failing to find that upon the facts as found by the Respondent, the Respondent was prohibited by Section 25A from granting the liquor licence the subject of the application made to it and
- (c) in that she failed to express adequate reasons for her decision."

Ground (c) was abandoned.

Legislation

7 The Act provides a comprehensive scheme for the distribution, sale and control of alcohol within Tasmania. Any scheme requires consideration of competing and often conflicting economic, social, health, financial and political interests and factors. The Board had identified many of those considerations in its decision, referring to statements appearing in reports and policy statements placed before it in the hearing (eg, The World Health Report "Global Status Report: Alcohol Policy 2004", the response of the Tasmanian Government to a Review Group recommendation in a 2004 document "Public Benefit Justification for Retaining Certain Restrictions on Competition in the Liquor & Accommodation Act 1990").

8 The Act, s3, defines sale as including:

"**sell**' means sell by wholesale or retail and includes —

- (a) offer, display or expose for sale; and
- (b) keep or have in possession for sale; and
- (c) barter or exchange; and
- (d) deal in or agree to sell; and
- (e) supply, send, forward or deliver for sale or for or in expectation of receiving any payment or other consideration; and
- (f) authorize, direct, cause, attempt or permit any act referred to in paragraphs (a), (b), (c), (d) or (e)."

It prohibits the sale of liquor except as authorised (s5), restricts a "licence holder" to an identified individual (s22) and prohibits the grant of an "off licence" unless the principal "activity" to be carried out at the premises is the sale of liquor (s24A(2)), and affords the Board wide powers of control (ss39 and 42). Section 25A specifically provides:

"The Board must not direct the grant of a liquor licence in connection with the activities of a supermarket."

9 Relevant to any interpretation are the provisions of the *Acts Interpretation Act 1931*, which includes:

"8A — (1) In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.

(2) Subsection (1) applies whether or not the purpose or object is expressly stated in the Act."

which applies whether or not, as here, the purpose is not expressly stated in the legislation, although s8B permits the use of extrinsic material in such interpretation.

Interpretation

10 The application by Tanner was as an officer of the corporation, Woolworths. But the corporation itself was an entity composed of various divisions and subdivisions. Tanner was an officer of "BWS – The Cheaper Liquor Co – Woolworths Ltd", an entity owned and controlled by Woolworths Limited. He was responsible for 200 liquor outlets in Victoria and Tasmania. Central to the respective cases of the parties is whether the term "activities" appearing in s25A is governed by the "day to day physical activities of a supermarket" (BWS as distinct from Woolworths Limited) or the elements of control and structure of the parent. The learned primary judge adopted the latter test, holding at par25, that the term used in s25A "did not extend to elements which I might describe as further up the chain, such as its corporate structure and overall ownership." The central critique advanced by the appellant in support of its claim of error is stated in the written submissions of its counsel as:

- "• what is authorised by the grant of a liquor licence is the sale of liquor, by an individual, on specified premises;
 - by Section 24A(2) the principal activity to be conducted by the licensee under an off licence is to be the sale of liquor;
 - by definition the sale of liquor is not confined to the physical exchange which occurs between vendor and purchaser;
 - likewise the activities of a supermarket, as found on the facts but also in accordance with common sense, are not confined to the physical activity of the sale as between vendor and purchaser; and
 - it is the connection or association between selling liquor on specified premises which is prohibited if that is to occur in connection with the activities of a supermarket."

11 Secondary propositions which attach to the critique are:

- (1) the term "in connection with" is extremely broad and ought extend the import of the word "activities" to ultimate corporate control and/or ownership;
- (2) physical connection of premises or co-location ought not determine the interpretation.

12 The approaches advanced on behalf of the appellant ought not be followed. The licence was sought for physical premises in a shopping centre. It is the premises which are to be licensed, not the complex or centre. The evidence satisfied the Board that the principal activity of those premises will be the sale of liquor. The term "activities" is used in varying contexts throughout the Act. Within a supermarket there can be many "activities" but the Act, s25A, prohibited one such activity, "the sale of liquor", from them. It is the physical confines of a supermarket which governs the term.

13 Parliament amended the legislation by the addition of s25A through its enactment of the *Liquor and Accommodation Amendment Act 1995* ("the 1995 Act"). The Second Reading Speech of the Minister responsible for introducing the Bill into Parliament, included the following:

"The purpose of this bill is to remove the ability for a liquor licence to be granted to a supermarket. ... The Government is strongly opposed to the sale of liquor in supermarkets ... By cementing the inability for a liquor licence to be granted to a supermarket in the Liquor and Accommodation Act we remove the uncertainty that exists and has existed for some time ... It removes the prospect of sale of liquor in supermarkets which, in the Government's opinion, is not in the interests of the community and which would certainly erode the business and existing retail outlets for liquor."

14 The use of the word "in", whilst not conclusive, is a relevant extrinsic aid. There were significant amendments to the Act in 2003, altering the accommodation licensing system generally, but not amending s25A. The Review Group and its report, earlier referred to, was considered by the Board. That report contained consideration of the terms, import and effect of s25A, matters referred to Government before the 2003 amendments. In introducing the 2003 amendments to Parliament, the then responsible Minister stated:

"No amendment to the legislation is needed, as supermarkets are currently prohibited from obtaining a liquor licence ... The removal of restrictions on the operations of off-licence holders should not be seen as an opportunity by supermarket operators or other retailers to locate bottle shops in such a way that they are effectively part of their supermarkets or retail outlets."

Application of purpose and scheme

15 The Board has been vested with wide discretionary powers. While those powers do not permit "wrongful application of principle" or "varying interpretations of a legislative provision", they do permit consideration of factual matters within a wide context. Here the term "premises" did not confine the Board to consideration of "common ownership", but extended the basis of any determination to "an identifiable connection between the several components of those premises" (*Tapp & Tapp v ALH Group Pty Ltd* (2000) 76 SASR 397). In certain circumstances where a common owner or proprietor sought to delineate the premises by a marked line, temporary barrier or a marginal or artificial device or means, the Board would be entitled to conclude that a "supermarket" owner had breached the Act, s25A. In different circumstances where separate owners with separate titles to the land on which the premises were constructed had created a continuous or unseparated building to sell liquor alongside other products, but providing separate parts for payment or a notional or token division, the Board would be required to determine whether, as a matter of fact, any grant of licence was one "in connection with the activities of a supermarket" and was accordingly prohibited by the Act, s25A.

16 The interpretation adopted by the learned primary judge was, in my opinion, correct.

17 I would dismiss the appeal.

**AUSTRALIAN HOTELS ASSOCIATION (TASMANIAN BRANCH)
v LICENSING BOARD**

REASONS FOR JUDGMENT

**FULL COURT
EVANS J
8 November 2006**

18 This appeal relates to a decision of the Licensing Board to grant an "off licence" under the *Liquor Licensing Act 1990* ("the Act") to Ian Tanner in respect of premises in the Kingston Town Shopping Centre at Kingston. Mr Tanner is an employee of Woolworths Ltd and he applied for the licence on behalf of that company trading as BWS – The Cheaper Liquor Co. The appellant's challenge to the decision under the *Judicial Review Act 2000* was dismissed (*Australian Hotels Association (Tasmanian Branch) v Licensing Board* [2006] TASSC 19) and that dismissal is the subject of this appeal. The grounds of appeal are that the learned primary judge erred in law:

- (a) in her construction of the Act, s25A; and
- (b) in failing to find that upon the facts as found by the Licensing Board, the Board was prohibited by s25A from granting the liquor licence the subject of the application made to it.

19 The Act, s25A, provides:

"25 The Board must not direct the grant of a liquor licence in connection with the activities of a supermarket."

20 No facts were in dispute for the purposes of this appeal or on the hearing before the primary judge. The facts as found by the Board have been summarised by the appellant as follows:

- The applicant for the licence, Mr Tanner, is and has been an employee of Woolworths Limited;
- Application was made by Mr Tanner to establish a BWS liquor outlet internally within the Kingston town shopping centre;
- The proprietor of the business will be Woolworths Limited;
- Woolworths Limited is the proprietor of a large number of liquor outlets throughout Australia, which trade under various names;
- BWS is not a legal entity separate from Woolworths Limited;
- Woolworths Limited is the proprietor of a supermarket within the Kingston town shopping centre;
- The applicant was already personally responsible for 220 liquor outlets in Victoria and Tasmania as an employee of Woolworths Limited;
- Woolworths supermarkets and BWS liquor stores have cross marketing and promotional activities which would be employed at the intended BWS liquor store;
- Woolworths supermarkets have a customer loyalty program, which includes the provision of 'shopper docket' and loyalty points, redeemable at any BWS outlet;

- The applicant is the liquor licensing manager for Woolworths Limited and resides in Victoria;
- Woolworths Limited will be the common employer for the supermarket and BWS employees;
- There will be co-promotion of products through advertising and catalogues as between the supermarket and the BWS liquor store;
- Liquor and supermarket goods have been and will be advertised together;
- The financial results of the Woolworths Limited liquor business [are] reported as part of its supermarket trading activities;
- Customers would be entitled to earn 'frequent shopper' points by purchases from the supermarket, redeemable in purchase in the BWS liquor store and vice versa;
- The lessee of the BWS liquor outlet will be Woolworths Limited which is also the lessee of the supermarket;
- The proposed BWS liquor outlet is to be situate approximately 50 metres from the existing Woolworths supermarket and within the confines of the same shopping centre."

21 The Board also found that the Woolworths supermarket was one of 16 separate businesses trading in the shopping centre, that the premises of the proposed liquor outlet did not share a mutual entrance with the supermarket and was not directly adjacent to the supermarket.

22 This appeal turns on the interpretation to be given to s25A, as to which the Board said:

"78 ... That the Board must not direct the grant of liquor licence in connection with the activities of a supermarket is clear. What this phrase means is less than clear. In simple cases there will be no difficulty. If Woolworths applied via a nominee for a licence within the confines of an existing supermarket that would trigger the section of the Act.

79 It is apparent that the Government did not intend to prevent any company that runs a supermarket from gaining a new licence otherwise, it would, absent any constitutional issues, have stated so in s 25A. In any event the Act does not say that. We consider the section was drafted widely in order to prevent causal circumvention of the specific intention. That specific intention being to prevent supermarkets generally from having as a component of their day to day affairs the sale of liquor."

23 As to the interpretation that was given to s25A by the Board, the learned primary judge said:

"That interpretation was, in my view, clearly open to it. The ordinary meaning of the words of s25A allowed for the construction that the phrase "activities of a supermarket" referred to the day to day physical activities of the supermarket being considered and did not extend to elements which I might describe as further up the chain, such as its corporate structure and overall ownership. Were it to be interpreted as including such things, no supermarket owner could seek a licence at all. There was nothing in the legislation which supported that interpretation."

24 The intended breadth of s25A is uncertain, in no small part because of the wide meaning that can be given to the words "in connection with the activities of a supermarket". The scope to be attributed to the expression "in connection with" is, ambulatory. As observed in *Burswood Management v Attorney-General* (1990) 94 ALR 220 by Lockhart, Wilcox and Hill JJ at 233:

"The words 'in connection with' are words of wide import; and the meaning to be attributed to them depends on their context and the purpose of the statute in which they appear. As Davies J said in *Hatfield* (FCR at 491; ALR at 106-7):

'Expressions such as "relating to", "in relation to", "in connection with" and "in respect of" are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute... The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.'

Reference to particular reported cases is of little assistance in determining the meaning of the words 'in connection with' because they take their meaning from the particular statute in which they appear."

25 In this instance, the difficulty of delineating the operation of the expression "in connection with" is potentially compounded by uncertainty about the meaning to be given to the expression "the activities of a supermarket". The Act does not define "supermarket". The meaning ascribed to that noun by the Macquarie dictionary, 2nd edn, is:

"A large, usu, self service, retail store or market selling food and other domestic goods."

I find it instructive that the activity that identifies a large store or market as a supermarket is the retail sale of food and other domestic goods; this is a core, in fact defining activity of a supermarket as without it a premises could not be so described. Obviously enough, many incidental activities are undertaken in the course of operating a supermarket such as employing staff, transporting stock, banking, providing credit facilities, advertising, providing parking facilities, maintaining and cleaning the premises and obtaining power, light and water for the premises. Many businesses besides supermarkets undertake incidental activities such as these. I am unable to find in the Act or elsewhere any reason for suggesting that a connection between the grant of a liquor licence and the sort of incidental activities of a supermarket I have referred to is intended to be prohibited by s25. This suggests that the connection with which s25A is concerned is the connection of a liquor licence with the core activity of a supermarket; the sale of items.

26 An interpretation of s25A that promotes the purpose of the Act is to be preferred to an interpretation that does not; *Acts Interpretation Act* 1931, s8A(1). The meaning of s25A being "ambiguous or obscure", it is permissible to consider extrinsic material that may assist in its interpretation; *Acts Interpretation Act*, s8B(1)(a). Extrinsic material that may be considered includes "the speech made to a House of Parliament by a member of the house in moving a motion that the bill be read a second time"; *Acts Interpretation Act*, s8B(3)(f). Section 25A was inserted into the Act in 1995. At that time the short title of the Act was the *Liquor and Accommodation Act* 1990. The second reading of the bill that inserted s25A into the Act was moved by Mr Peter Hodgman, the Minister for Tourism, Sport and Recreation. He said:

"The purpose of this bill is to remove the ability for a liquor licence to be granted to a supermarket. The Tasmanian community is well served by traditional liquor outlets, in particular hotel bottle shops and nine-litre outlets. These types of licensed premises enable members of the public and visitors to Tasmania to choose from wide ranges of packaged liquor throughout the State. As I said in this House on 20 June 1995, the Government's view on the question of liquor in supermarkets has been carefully considered over a long period of time. The Government is strongly opposed to the sale of liquor in supermarkets.

By cementing the inability for a liquor licence to be granted to a supermarket in the *Liquor and Accommodation Act* we remove the uncertainty that exists and has

existed for some time. The bill contains sound policy which will find favour in general throughout the community, and certainly with the existing liquor industry elements. It removes the prospect of sale of liquor in supermarkets which, in the Government's opinion, is not in the interests of the community and which would certainly erode the business and existing retail outlets for liquor."

- 27 For the purposes of the *Acts Interpretation Act*, s8B(1)(a), extrinsic material also includes relevant material in any official record of debates in Parliament. The record of the second reading debate of the bill that introduced s25A confirms what emerges from what was said by Mr Hodgman, that is, that the purpose of s25A is to ensure that liquor is not sold in supermarkets.
- 28 In 1995 when s25A was inserted in the Act and as is still the case, the generic term "liquor licence" was used in the Act to encompass five different forms of licence, one of which is the form of licence in question, an "off licence". Features common to each of the five forms of licence are that they authorise the sale of liquor on premises specified in the licence. This is significant as it brings into focus a matter that is common to liquor licences and supermarkets, that is, sales from premises. A liquor licence authorises the sale of liquor from specified premises and a defining activity of a supermarket is the sale of food and other domestic items from premises. This common matter confirms for me that the connection between the grant of a liquor licence and the activities of a supermarket that is prohibited by s25A relates to the sale of liquor from the premises of a supermarket. In 1995 it was notorious that some entities owned and operated both supermarkets and liquor outlets in Tasmania, the operations being on separate and distinct premises. Similarly in 1995 it was notorious that some supermarkets were in the vicinity of liquor outlets and that their customers might utilise common public facilities such as parking areas and walkways. It is clear from the record of the second reading debate on the introduction of s25A that none of these connections between supermarkets and liquor outlets were of concern, the concern that dominated the debate was the sale of liquor in supermarkets. Against this background I construe s25A as prohibiting the Board from granting a liquor licence in respect of premises, the proximity of which is so interrelated with the premises of a supermarket as to in effect enable liquor to be sold in the supermarket. This could be so where an application for a liquor licence related to an area within the premises of a supermarket or adjoining to or in close proximity to the premises of a supermarket, albeit that the area was owned or leased by the applicant and the applicant had no apparent link to the operator of the supermarket.
- 29 The meaning I give to s25A is not relevantly inconsistent with that which was adopted by the Board and the learned primary judge. With this meaning in mind I am satisfied that on the facts as found by the Board its finding that it was not prohibited by s25A from granting the liquor licence to Mr Tanner was correct. I would dismiss the appeal.

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REASONS FOR JUDGMENT

**FULL COURT
BLOW J
8 November 2006**

30 I agree in substance with the reasons for judgment of both Slicer and Evans JJ. I would dismiss the appeal.