

Application by Dennis Behrakis for a Special licence for the premises at Salamanca Fresh - Kingston, Shop 101, 29 Channel Court Highway , KINGSTON; Ziggy's, 80 Hopkins Street, MOONAH; and Salamanca Fresh - Huonville, 19 Main Street, HUONVILLE.

Decision: Licence

Date: 14 September 2017

The application

The applicant seeks authority for the sale of liquor limited to Tasmanian wine, Tasmanian produced spirits and liqueurs and Tasmanian made and brewed beer produced by Tasmanian owned breweries for consumption off the premises at three of his premises. At the Moonah premises he seeks, in addition, authority for the sale of Polish liquor products.

The applicant provided photographs of the interior and exterior of each premises and supported his application in the following terms:

- *The sale of liquor is a minor adjunct to the principal purpose of providing sale of fresh fruit and vegetables and pre-prepared food items, together with allied consumables.*
- *Income from the businesses remains in Tasmania.*
- *There is an efficiency in managing to have somewhat similar (in terms of quality, style and range) enterprises in different suburbs, and an ability to bring cost benefit to us as business operators, price competitiveness for the benefit of consumers and quality by design to all the premises.*
- *Our focus is on Tasmanian product as a priority, not just because of the quality, taste, flavour but also that it is attractive to our local and tourist customers. We market specifically to encourage purchase of Tasmanian grown and/or manufactured product. We have the ability to provide an ongoing stream of Tasmanian product due to our vertical integration of our enterprises. Unlike larger enterprises, and smaller enterprises, we are not beholden to a national supply chain.*
- *The premises are neither large nor small. They are not supermarkets, they are not corner stores, milk bars or fish and chip shops.*
- *Our premises are not comparable with average retail outlets, or standard retail grocery stores. They are modern, fresh, well lit, with livery and style consistent throughout.*
- *Whilst, in the end, business premises must be in zones for businesses within planning schemes, and for prudent business purposes (including ease of access by customers, and for staff to attend) we assert that our businesses are tourist and hospitality inclined, and support that area of the Tasmanian economy to a significant degree.*
- *Proximity or otherwise to other licensed establishments does not indicate that 'the market is already satisfied' and thus that a Tasmanian wines licence should not be granted. It is a rare bottle shop, or hotel, if any, which will have as extensive an offering of Tasmanian produce including Tasmanian liquor, as our business.*
- *The perceived preference in Tasmanian liquor licensing laws for existing hotels and off-licence premises to continue to hold the priority right to sell liquor is not or would not be in the best interests of the community. Enabling or facilitating the sale of limited specific liquor product from business premises which provide fresh local product, and which*

businesses are owned by local people, has an inherent benefit to the Tasmanian community.

- *We submit that the special licence is a category designed to enable flexibility for the Commissioner to ensure conditions attached protect the objects of the Act. We submit that our application meets those objects.*
- *These applications are consistent with the Act, regulations, objects of the Act, historical grants of licences, and logical desires to ensure liquor is only available by safe retail methods, encouraging hospitality and service to locals and tourists, and good for productivity, industry and economic development. They will not detract from positive development of liquor and/or hospitality industries, and they will not exacerbate harm associated with consumption of liquor in our community. They will provide service in a safe, clean and modern environment, and in association with fresh food produce – to encourage consumption of liquor only with food: recognised to be of benefit to the consumer.*

In summary, the applicant submits that the licenses proposed allow for the sale of liquor in a manner that benefits the community rather than causing detriment, such benefit accruing through the convenience and efficiency afforded from purchasing food and Tasmanian wines in one place, and through support provided to Tasmanian primary industry and retail with the flow on effect of employment and economic growth. The applicant states that the success of the Salamanca Fresh establishments indicates its benefit, and that similar premises have licences and there have been no complaints or evidence of harm. The applicant submits that the provision of liquor from non-intensive businesses, where high volume consumption will not occur, should be considered in the community interest as it facilitates provision of service to the community in an area which it is wanted, without risk of adverse impact from the provision of that service.

Further submission regarding s25

At the time of application, the Tasmanian Liquor and Gaming Commission had not yet published its determination on the matter of Hill St Grocer Devonport. The applicant made a further submission in July of 2017 addressing the characteristics that the Commission determined were indicative of a supermarket in the Hill St decision. The applicant submits that with respect to the premises in his application:

- *The layout of the stores is not consistent with being a supermarket.*
- *The size of the premises (Moonah - 116m², Kingston - 740m², Huonville - 410m²) contributes to the conclusion that premises are not supermarkets.*
- *The premises are best described as fine food stores and fresh fruit grocers.*
- *The casual observer would not conclude it should be described as a supermarket.*
- *While the Kingston premises is in the shopping precinct it is on the upper level and remote from the main shopping centre.*
- *The stores do not have a large range, and have a focus on fresh fruit and vegetables, and fine food.*
- *The stores do not sell homewares, electrical, toys, or stationary.*
- *The application premises provide personal service by skilled staff in regard to all deli products and butchery products.*
- *None of the premises regarding the applications are large. Significant parts of the business are not self-service and require service by staff of the enterprise. Predominant product*

sold is food - there are very little domestic goods available, consistent with the style of corner shop, delicatessen and hospitality and tourist provision.

- There are few aisles. They are not long aisles in any event. The number is limited by the floor size, which as mentioned, is relatively small. There is no large car park, save for Kingston. There are no adjacent speciality shops - as is often the case with supermarket placement.*
- The implication arising from the legislation which inserted s25A into the Act is that clear examples of supermarkets are those established and run by entities such as Coles and Woolworths. A logical approach would conclude that the legislative intent is to prevent liquor sales by the national conglomerate type of entity in conjunction with their drawing power by having ready-made customers from the supermarket also purchase their liquor requirements.*
- A large carpark is symbolic or indicative of a supermarket. That is not the case in regard to the applications.*
- Shopping trolleys: limited and small. None at Moonah. Baskets are provided, that is indicative of a grocer.*
- Walls of refrigerated cabinets: meat and deli products are kept chilled. Very limited frozen goods. Such things as fridge cabinets with cordials are not present.*
- Multiple payment points: 3 maximum cash points.*
- Part of a shopping precinct: not relevant except tangentially regarding Kingston, but that is explained in the positioning of that shop away from the main precinct.*
- The Applicant markets its product in a manner consistent with a fine food, delicatessen and grocer, not in a manner similar to supermarket marketing.*
- Garden/outdoor products not sold.*
- Cigarettes are only sold at Huonville store.*
- Aisles dedicated to lollies, soft drinks, chips and biscuits are not present.*

Site visits

All premises were inspected: Kingston on 28 April 2017, Huonville on 3 May 2017 and Moonah on 5 May 2017.

The Kingston premises is a light, open store with turnstiles at the entry and six checkouts at the exit. Its opening hours are 7am to 7pm. There are shopping baskets and trolleys available at the entrance and a broad range of products; bakery items, fresh fruit and vegetables, canned and packaged foodstuffs, condiments, cheeses, dairy products, fresh and processed meats, chicken, fish, cleaning products, laundry detergent, dry goods, pet food, jams and spreads and similar are found in fridges, shelving and racks in low aisles and around the walls, or at the delicatessen counter that runs along the back wall of the shop. There are specials advertised throughout the premises.

The Huonville premises is on the main street of Huonville in an area of other shops and businesses. There is a large carpark to the rear of the premises. Its opening hours are 7am to 7pm. There are shopping baskets and trolleys available at the entrance and there are three checkouts by the front door. The shelving is higher than at the Kingston premises, however the range of products is similar with fruit and vegetables, meat, chicken, processed meats, pre-prepared salads, bandaids, toothpaste, confectionary, chips, cheese, softdrink, cake mix, insect repellent, cat and dog food, shampoo, soap, pasta, tacos, flour deodorant, tea and coffee, jams and spreads, and so on. There are specials advertised at various locations through

the premises. The store is listed on the IGA website as an IGA Express store and has signage to that effect to the rear of the building.

The Moonah premises is considerably smaller than the Kingston and Huonville premises, though there are plans to enlarge it somewhat to enable a larger range of products. There is a car park for around twenty vehicles at the front of the store. The store is adjacent to the Ziggy's Smallgoods factory and the predominant stock was meats with some packaged European foodstuffs of various kinds (tinned fish, biscuits, confectionary, condiments and so on).

During the site visits the applicant was asked about application of sections 24A and 25A to his application, his response was to the effect that:

- The premises should be considered as speciality food stores.
- Unlike a supermarket the general customer is not someone doing a weekly household shop, rather they are picking up ingredients for an evening meal, purchasing a pre-prepared meal, or adding some gourmet and fresh higher-quality produce to their regular shop. That is to say, the general customer is more likely to be coming in more frequently for smaller purchases than would the customer of a supermarket.
- While the stores have a broad range of products, this is for the convenience of the customer and the range is not as deep as one would find in a supermarket, the range is also more at the gourmet or specialised end.
- In the case of the Kingston store, which at 740 square metres is large by comparison to other similar stores, the range is still the same as other Salamanca Fresh premises and the shelving is lower than you would generally find such that the store has a more open feel.
- The licences, if granted, would allow him the business efficiency of consistent stock lines across all of his premises and provide convenience for his customers to purchase a bottle of wine for their meal at the same time that they purchased the ingredients, or the pre-prepared meal.

Representations

No representations were received.

Considerations

The following material was considered:

- Application and submission dated 28 September 2016
- Site visits
- Further submission dated 25 May 2017
- Further submission regarding s25 dated 21 July 2017

The primary matters to be considered for a licence application of this type (special licence) are to be found in sections 22, 24A and 25A of the *Liquor Licensing Act 1990* (the Act). While applications for three premises were lodged as in a single application, I will consider each premises separately in respect to sections 24A and 25A.

Section 22

Section 22 of the Act sets out the criteria that a person must meet in order to be qualified to be granted a liquor licence. I am satisfied that the applicant is qualified in accordance with section 22.

Section 25A

Section 25A states that “A liquor licence must not be granted in connection with the activities of a supermarket.”

The Act does not define what a supermarket is, and consequently the word has its usual meaning. The section has been the subject of some judicial consideration (in *Australian Hotels Association (Tasmanian Branch) vs. Licensing Board (2006) TASSC 91 (8 November, 2006)*) and has been considered recently by the Tasmanian Liquor and Gaming Commission in *Hill St Grocer Devonport (December 2016)*.

In *Australian Hotels Association (Tasmanian Branch) vs. Licensing Board (2006) TASSC 91 (8 November, 2006)*, Evans J. considered whether premises in the Kingston Town Shopping Centre were connected with the activities of a supermarket and stated at 25 that:

“The Act does not define “supermarket”. The meaning ascribed to that noun by the Macquarie dictionary, 2nd edn, is:

“A large, usually 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.”

In their *Hill St Grocer Devonport* decision, the Commission determined that the premises was a supermarket and their decision provides clear characteristics indicative of a supermarket that can be summarised as:

- retail space which is larger than any standard provedore or convenience store;
- largely self-service;
- shopping trolleys and/or pull along receptacles available at the door for transport of items around the store;
- aisles of standard domestic/household packaged products in standard shelving;
- walls of refrigerated cabinets for frozen and chilled goods;
- multiple payment points;
- a convenient spread of opening hours;
- car parking available directly outside and surrounding the store;
- product offerings common to supermarkets.

The Oxford English Dictionary online edition defines the adjective “large” as (1) Of considerable or relatively great size, extent or capacity and (2) Of wide range or scope. In the context of the definition of a supermarket given above, both meanings usefully apply, that is to say that consideration should be given to both the physical dimensions of the premises and also the range of food and domestic goods on offer, in the view of the Commission, sufficient for a customer to undertake the entirety of their weekly shopping.

In summarising, the Commission determined in regard to the Devonport Hill St Grocer that:

There is no doubt there are parts of the store that are more “up-market” in both styling and the quality and range of products on offer but, in our opinion, these are additional features that enhance the store rather than change its basic function. They are under the same roof and co-exist as the whole entity with the more traditional supermarket. At the end of the day, a customer could easily manage an entire weekly shopping from this store, competing directly with Coles/Woolworths as a full shopping destination. This is far from the “convenience type offering” described by the applicant.

The collective features described above give it the look of a supermarket and the Commission considers that any reasonable person entering the store would describe it in these terms.

In determining the relevance of section 25A to the premises subject of Mr Behrakis’s application it is necessary to consider the characteristics of each premises individually, though relevant to all premises I cannot find any support in the legislation or extrinsic material for the applicant’s argument that “the implication arising from the legislation which inserted s25A into the Act is that clear examples of supermarkets are those established and run by entities such as Coles and Woolworths. A logical approach would conclude that the legislative intent is to prevent liquor sales by the national conglomerate type of entity in conjunction with their drawing power by having ready-made customers from the supermarket also purchase their liquor requirements”. Consequently I do not accept that the applicant is correct, and I am satisfied that the intent of the section 25A is very simply to ensure that liquor is not sold in supermarkets, regardless of the owner of that supermarket.

Kingston premises

The Kingston premises is larger than a usual provedore or convenience store. At 740m² it is larger than the other premises subject of this application and, other than the Hill St Devonport application, which I referred to the Commission, it is substantially larger than the premises concerned in other similar applications that I have considered. The applicant says that the premises is neither large nor small however I am satisfied that it is of a sufficient size to operate as a supermarket, should the other characteristics of a supermarket apply.

The store is part of a large shopping centre and has substantial parking available to it. It is open from 7am until 7pm every day. Although the deli is staffed (as is the case in larger supermarkets), the store is otherwise a self-service store. It has products arranged in aisles, baskets and trolleys are available, and purchases are settled at one of the six checkouts once the customer has completed their selection. Shoppers at the premises were using trolleys to undertake their shop at the time of my visit and also in the photographs provided to me as part of the application.

The store has an extensive range of food and domestic products. The applicant has argued that the absence of certain products, such as toys, cigarettes and homewares, and the predominance of fruit, vegetables and meats over domestic consumables such as shampoo and laundry detergent means that the premises is not a supermarket. However I am not satisfied that this is the correct way to characterise a supermarket, neither do I accept that variations in layout, length of aisle, source of produce and so on are determinative of a supermarket. A store that meets the majority of the characteristics laid out by the Commission and from which an average consumer might do their weekly shop would be a supermarket regardless of the aisle length or the presence or absence of one or other product that might be found in the supermarket down the road.

On the basis of the evidence provided I am satisfied that the Kingston premises is a supermarket and consequently I must not grant the licence applied for.

Huonville premises

The Huonville premises is not as large as the Kingston premises. The premises has previously operated as a supermarket, and while not determinative of the current use, this does evidence that the store is of a sufficient size to accommodate a supermarket. The premises is also of a similar size to John's Friendly Grocer, a short distance along Main St from the premises, which advertises itself as a supermarket. At 410m² the applicant's Huonville premises is smaller than the Bicheno IGA premises (450m²) determined by the Board to be a supermarket in 2014 and is labelled as an IGA Express. The IGA website defines an express store as enabling a "full or supplementary grocery shop".

The range of produce available is extensive and includes fruit and vegetables, meats, dairy produce and dry goods and laundry, kitchen and bathroom consumables. There are trolleys available, multiple checkouts, a large car park at the rear, goods presented on rows of shelving for self-service and refrigerated shelving for frozen and perishable items. In summary it is a store that meets the majority of the characteristics laid out by the Commission and from which an average consumer might do their complete weekly shop. Consequently I am satisfied that the premises meets the definition of a supermarket and I am not able to grant the licence applied for.

Moonah premises

The Moonah premises is quite small (116m²) and, at the time of inspection had the characteristics of a speciality smallgoods store, selling produce from the adjacent factory and some packaged foods of largely European origin. I am satisfied that the Moonah premises is not a supermarket.

Section 24A

Section 24A of the Act states at (1) that:

"In considering an application for a liquor licence, the Commissioner or the Commission must make a decision which, in the opinion of the Commissioner or the Commission, is in the best interests of the community."

The term "best interests of the community" has been defined in the Act and the interests prescribed in regulations (*Liquor Licensing Regulations 2016*). This legislative definition did not exist at the time the earlier application was considered by the Board.

Regulation 4 provides:

4. Best interests of the community

For the purposes of the definition of *best interests of the community* in section 3 of the Act, the following interests are prescribed:

- (a) the general costs and benefits to the community of the supply, or proposed supply, of liquor;
- (b) whether the supply or proposed supply of liquor might cause undue offence, annoyance, disturbance or inconvenience to people who, in the area of the supply or proposed supply –
 - (i) reside or work; or
 - (ii) attend schools or other facilities frequented by children; or
 - (iii) attend hospitals or facilities where people receive treatment for alcohol dependence or other addictions; or
 - (iv) attend places of worship;

(c) possible adverse effects on the health and safety of members of the public due to the supply of, or proposed supply of, liquor.

I am satisfied on the evidence provided that the application in respect of the Moonah premises, if granted, would not offend 4(b) or 4(c) of the prescribed interests. Consequently, the relevant consideration is that of the balance between the general cost and benefits to the community of the proposed supply of liquor. The context for this consideration is provided by the Object of the Act which is defined at section 2A in the following terms:

- I) The object of this Act is to regulate the sale, supply, promotion and consumption of liquor so as to –
 - (a) minimise harm arising from the misuse of liquor by –
 - (i) ensuring that the supply of liquor is carried out in a way that is in the best interests of the community and does not, as far as practicable, detract from public amenity; and
 - (ii) restricting undesirable liquor promotion and advertising and the supply of certain liquor products; and
 - (iii) encouraging a culture of responsible consumption of liquor; and
 - (b) facilitate the responsible development of the liquor and hospitality industries in a way that is consistent with the best interests of the community.

The applicant told me that customers of his Moonah premises come from around the greater Hobart area to source speciality products, and particularly Polish products, and that there is an historical connection due to Ziggy Jakubowski's connection to the Polish community. I am satisfied that this is the case and that there would be community benefit in providing for the sale of limited liquor products alongside the speciality produce normally sold in the store.

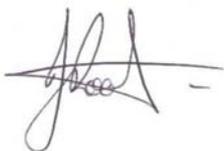
Decision

The licence applied for is not granted for the Kingston and Huonville premises as the Act prohibits granting of a licence to a supermarket.

The licence applied for is granted for the Moonah premises with the following conditions:

The sale of liquor is authorized between 5am and midnight daily subject to the following condition/s:-

- I. The sale of liquor is limited to Polish liquor products and Tasmanian wine, Tasmanian produced spirits, ciders and liqueurs, and Tasmanian beers produced by Tasmanian owned and operated breweries. These products may be sold for consumption off the premises subject to the ongoing sale of a range of gourmet food products, which must include Tasmanian produced foods.



JC Root

Commissioner for Licensing

14 September 2017