

Licensing Board of Tasmania	Decision
Legislation:	<i>Liquor Licensing Act 1990</i>
Applicant:	Anthony Bentley-Williams
Nature of application:	For an off licence
Premises: name	Bayview Market
Premises: address	Shop 1, Lot 4, Opal Drive, Blackmans Bay
Name of decision:	Bayview Market
Date & place of hearing:	29 November 2006
Date of decision:	21 March 2007.
Members of the Board:	PA Kimber (chairman), L Finney and K Sarten (members)

## DECISION

### Application details

The Applicant applies for an off licence for shop 1, lot 4 Opal Drive, Blackmans Bay. The licence would permit sale of liquor for consumption off the premises and between 5am and midnight any day. The Kingborough Council placed zoning/planning restrictions on the premises such that the trading hours may be between 10am and 8pm. These restrictions do not need replication in a liquor licence, and indeed can not be replicated in an off-licence as conditions can not be applied. The legislative limit to opening hours is 5am to midnight, but subject to any other restriction imposed by law (for example, planning permit terms).

The premises have a floor area of 75m<sup>2</sup>, a relatively small area for an off licensed premises.

The proposed off licence shop is in the Bayview Market shopping centre, accessed off Opal Drive, near the junction of Algona Road, and Roslyn Avenue, Blackmans Bay. There is a butcher shop, newsagency, post office, two BYO restaurants, a craft shop, a doctor's surgery and a pharmacy within the shopping centre. The area immediately surrounding the shopping centre is predominantly residential. Nearby licensed premises are the Kingston Hotel, Beachside Hotel (both at Kingston with bottle shops. one substantial), the Beach Café at Blackmans Bay (on licence), and a bottle shop in the Kingston Town shopping centre. The area is, within Tasmania, a relatively fast growing residential area.

There is in existence a direction from this Board to the Commissioner to grant a licence to Mr Gary Baker for an off licence for premises adjacent to his Beach Café at Blackmans Bay. That licence has not been granted, and would be likely to be granted when the premises are finalised for operation. The direction to grant this licence was subject to the finalisation of the establishment of the premises, and was made in 2005 (over a year ago). For the purposes of considering existing liquor services in the locality, these premises do not currently provide any service.

The present application was signposted and advertised with a view to eliciting community input to the application hearing process.

The Applicant gave evidence by his original submission and written application, a research report commissioned by him and provided by Myriad Consultancy, and two 'petitions' signed by numerous local people in support of the application.

The Australian Hotels Association (Tas Branch) lodged a written submission opposing the grant of the licence, and Ms Melanie Bonde from the Association appeared at the hearing to make submissions.

Mr Royce Jessup from Crystal Downs Drive in Blackmans Bay lodged a letter of opposition, as did Mr Ron and Mrs Anna Tabor operators of the Kingston Hotel. Mr Gary Baker (operator of the Beach Café restaurant and person with the benefit of the direction to grant referred to above) lodged objection and appeared at the hearing to support his objection.

The *Liquor Licensing Act 1990* prohibits sale of liquor without a licence, and permits grant of an off licence (s9). S24A states that in considering an application for a licence, the Board must make a decision which, in the opinion of the Board, is in the best interests of the community. In addition (s24A(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.

A brief reflection on the history of off licence legislation, applications and Board determinations, and the developing Board policy may be a useful exercise now.

- *Licensing Act 1976.*
  - For the entire period of this Act being in force (to 1990), it required or was interpreted as requiring consideration of aspects of 'need' for the intended new service, and hence objection based on provision of similar services by existing operators was taken into account. In addition adverse financial impact to existing operators was taken into account. Further, off licence applications could only be pursued during this time if the premises was not used for any other predominant purpose (other than sale of liquor) and if the minimum quantity to be sold in each transaction was 9 litres of liquor.
- Application by Ian Cragg for off licence at Blackmans Bay, May 1988.
  - This written decision of the Board under the 1976 Act was for an off licence in the same area as the current application. The Board (Mr G D Brown LL.B (Chairman), and Messrs G Finney and R Roach - members) determined to refuse the application based on adverse impact to existing licensed operators, and due to there being no demonstrated 'substantial public benefit' perceived to arise from the grant. It appears that the two criteria considered were taken to be interlinked, and the absence of substantial public benefit was taken to be demonstrated by the perceived adverse impact on the existing licensed operators.
- *Liquor and Accommodation Act 1990.*
  - This replacement Act included s213 which required the Board to make decisions which took account of social and economic benefit. Guidelines under s17 (as required by the legislation) were initially settled by the Licensing Board as an interim measure when the new

legislation commenced, replicating the policy in force at the rescission of the old Act. New Guidelines were settled by the Board in 1993-4 and approved by the then Minister the Hon. Peter Hodgman, and included express statements that the adequacy of existing liquor facilities in the locality of an application was relevant, but not the financial impact on existing operators. The public benefit from new licensed premises was paramount, not impact on private investment or businesses. These Guidelines were developed during the time of the 'Hilmer' National Competition Policy reforms in consideration of Australian Governments restrictions on competition. That process of reform continued through to 2005, when amendment to the 1990 Act under NCP responsibilities was completed by the Tasmanian Government. 1995 amendments required the Board not to direct the grant of any liquor licence in connection with the activities of a supermarket. This prohibition was inserted as a reaction to the prospect of major national supermarket chains establishing liquor outlets in their supermarket premises (as noted in *AHA v Woolworths* 2006 Supreme Court of Tasmania Full Court Appeal, per Evans J).

- 2003 amendments.
  - The amendments in 2003 included removal of the 9 litre imposition, but continued the requirement that the predominant purpose of the operator of off licensed premises must always be the sale of liquor, not some other business enterprise. The implicit purpose in that requirement was to avoid the proliferation of businesses and premises able to sell liquor throughout all retail environments. The off licence provisions however remained, otherwise, substantially the same. The Guidelines were removed and effectively replaced with a substantive discretion placed in the Licensing Board (per s 24A) to make decisions which the Board considers to be "in the best interests of the community". This batch of amendments removed some trade protective or anti-competitive elements in the Act, and was as a reaction to the State Government's obligations under National Competition Policy arrangements. Certain other amendments made in 2002 but which had not taken effect were repealed, apparently on the basis that they would have been likely to offend NCP principles. These factors indicate a strong flavour of pro-competition, or at least not anti-competitive aspects to the Board's responsibilities in deciding what is "in the best interests of the community". In any event, that has been the Board's policy in determining in 'its opinion' what is in the best interests of the community.
- *Liquor Licensing Act 1990* as it is now (November 2006).
  - The Act remains, so far as relevant, as it was after the 2003 amendments.
- Arthur Lakes Road House refusal (5<sup>th</sup> November 1998):

The applicant ran a remote multi-faceted service shop. The application was refused due to direct contravention of the 'principal purpose' prohibition.

#### Recent decisions:

- The Barrell Swansea 2003 approval: This decision sets out relevant components of the legislation (including the 2003 amendments) and the hearing process parts of the Act. It concludes that the Board has a wide discretion (oft cited in regard to liquor licensing matters, in all jurisdictions around Australia). Objections were received from local licensed establishment operators or owners. The Board commented that special licence holders were in a particular position where their sale of liquor should be as an adjunct to sale or provision of other products or services, and sale of liquor should not be predominant. Assertions by such objectors regarding adverse financial impact is answered by the Act structure, and Board interpretation that it is not a persuasive factor, and more so with a special licence complainant – as they should not be relying on sale of liquor as a principal focus. The licence was granted. The premises appear (now, in 2007) presently to service the community well.
- TKM Latrobe refusal (1) 2004: The applicant was under prepared, and failed to demonstrate that it was in the community interest to have the licence granted. Also, he failed to demonstrate that another purpose (ie sale of petrol) would not be his principal activity (s24A(2) prohibition).
- TKM Latrobe refusal (2): The applicant applied again, but suffered the same fate.
- Nubeena (1) 2004 approval: Initially this application was approved. The Applicant demonstrated a public interest in having the licence, and suitable premises. Objections were from local establishments which would suffer decreased trade, and hence for the reasons set out above, these objections were of little relevance. Public support was demonstrated. The business was established, but for reasons unclear, ceased within a year.
- Nubeena (2) 12<sup>th</sup> October 2006 refusal: Individuals associated with the ownership of the premises applied for an off licence. The local community RSL Club demonstrated that the impact of moving liquor sales or splitting such sales would have such serious adverse impact on their income that the club would more likely than not fail. In its discretion on the basis of likely reduction in community services the Board refused the application for the licence.
- Taroon 2006 refusal: The present applicant Mr Bentley-Williams sought a licence in a disused shopping centre. Little evidence was brought of community support or benefit, or the nature of the community and its needs. In the absence of some demonstrable community desire for the premises, or community benefit, the Board in its discretion refused the application.
- Just Add Wine approval: A small, dedicated bottled wine retail sale business was proposed in the heart of the North Hobart restaurant strip, to provide a broad range of wine, and for locals and visitors dining at BYO restaurants in the area, or wishing to purchase for home consumption. It was apparent there was no objection to the application, and it has since opened and appears to be providing a good service in the community.
- Nude Wine Hobart 16<sup>th</sup> August 2004 approval: Principally unlabelled or 'clean skin' wines were proposed, and again with the licence this business seems to be providing a good service, without any apparent adverse impact to the community.
- Nude Wine Launceston approval: As for the previous application.

- BWS Kingston Town shopping centre, approval: 2005: This was a hotly contested application, apparently perceived by trade objectors and their lobby groups as being the thin end of the wedge regarding liquor availability in shopping centres and supermarkets, and with that the risk of entities with greater buying power being able to sell on slimmer margins and decimate existing businesses. In the context of the prohibition on the Board authorising sale ‘in connection with the activities of a supermarket’ (s25A), the Board decided this provision was not breached, and that in the Board’s opinion, sale from within a shopping centre (not within a supermarket) called for exercise of the Board’s discretion, which found favour, and the licence was directed to be granted.
  - Supreme Court review AHA v Licensing Board [2006] TASSC 19: confirmation of the Board’s decision: decision date 8<sup>th</sup> November 2006.
  - Supreme Court Full Court review AHA v Licensing Board [2006] TASSC 91: confirmation of the Board’s decision and the review by Tennent J of 7<sup>th</sup> April 2006.
- BWS Bridgewater, refusal 2005: heard at the same time as the BWS Kingston matter, this application was opposed not just by local hoteliers and lobby groups, but also by community organisations and individuals based on considerations particular to that local community. In the weighing up of the benefits and perceived detriments, the views of the community organisations and individuals were persuasive and dominated the other consideration of the economic benefits of using then presently unused space in a substantially disused shopping centre. Some analogy to TBA Tarooma (Bentley-Williams). Application refused.
- Gary Baker at Blackmans Bay approval 2005: This was substantially similar to the present application, and Mr Baker put the application on the basis that such a licence would serve the community, which did not (and still does not) have off licence premises in the suburb. The closest such services are in Kingston, although not far away, they can be considered a separate locality. It is paradoxical that Mr Baker attended to oppose the present application, as the reasons for which he sought his licence apply directly to this present application, and whilst the community is apparently keen on having such a licence in the vicinity, and Mr Baker’s intended business is not established, he opposed the present application ‘in the community interest’. Perhaps a consideration might be that there may be 2 businesses competing if Mr Baker also does finally establish his enterprise. Competition per se is not negative to this subsequent application. The prior direction to grant does not give a priority right against another person desiring to establish a similar business.

And, similar considerations apply to and are referred to in applications and determinations re special licence - off licence Tasmanian wines with extended capacity (eg regional geographic, or organic, Tasmanian owned and brewed brewery, or spirits or liqueurs). We will not, in this decision, stop now to review each of these special licence decision, as they are really a separate category, and carry separate considerations not the least of which is that, unlike the off licence category, the principal business should normally be some business other than the sale of liquor.

Relevant recent decisions on this category are:

- Balfour Deli 2002 refusal
- Delicacy 28<sup>th</sup> January 2005 approval
- Mill Provedore 1<sup>st</sup> September 2004 approval
- Davies Grand Central Station (DGCS)1, 11<sup>th</sup> January 2001: restaurant and Tasmanian wine and beer: restaurant approved, Tasmanian wine and beer: refused.
- DGCS 2 Tasmanian wine, 4<sup>th</sup> April 2001: approval.
- DGCS 3 Tasmanian premium and boutique beer made and brewed in Tasmania and from Tasmanian owned businesses. Approved.
- DGCS 4 Italian and organic: refusal
- DGCS 5 Italian and organic: refusal
- Ann Brakey, Delish, Wivenhoe: part approval (Tas wines) part refusal (German wines).

Consideration of the application:

There is nothing unique about this application. It is for a small bottle shop in a residential community. The provision of liquor services will be relatively standard for such premises in such a locality, and will in part be dictated by the purchasing patterns of initial customers.

There is nothing in the evidence to indicate that the sale of liquor from the intended licensed premises is likely to cause an increase in the harm associated with the consumption of liquor in the community.

The premises are zoned appropriately, and have local council approval for the development/use. The locality is the highest growth area in the State. There are no liquor off licensed premises in the immediate vicinity. Members of the local community indicate a desire for, and little opposition to, the application to be granted.

General issues regarding potential for increased harm due to an increase in outlet density because of the grant of any one particular licence have been dealt with in detail in the BWS decisions (refer above). They do not dictate that this licence should not be granted.

The Consultant Report by Myriad describes the community in the locality. There is nothing in the report which indicates that there are issues of particular concern in regard to alcohol consumption in that community which militate against the grant of this licence application.

Issues of competition with existing licensed operators have not been presented by the objectors on the basis that the net result of a grant of licence would be a lessening of service to the public.

Mr Baker's objection is not persuasive. It appears to be based on a desire to hold the direction to grant a licence under his control, without necessarily finalising the development. On the one hand he says there is a need to be serviced, then he opposes someone who seeks a licence to meet the need. There is also no evidence that the

combination of the grant of the present licence, together with the commencement of Mr Baker's intended licensed business will increase harm associated with consumption of liquor in the locality.

Issues of 'hooning' and traffic raised by Mr Jessup were unsupported by tangible and constructive evidence. They represented, rather, general concern at any development.

The Tasmania Police were advised of the application, and did not present any evidence in opposition.

The Applicant gave every impression of being able to manage and control the intended business in such a manner as to adhere strictly to responsible service of alcohol practices. He has extensive business experience, and is considered to be a person of good repute by the Commissioner for Licensing.

The opening of the business will not be the 'principal' tenant, but rather will be an additional operator in an existing and working shopping centre. That appears to us to be likely to be a good mix.

#### Applying the law to the facts and the Board's discretion

The law permits the Board to grant the licence. The relevant provisions require the Board to make a decision which, in its discretion and opinion, is considered to be in the best interests of the community.

The Board conducts a balancing of issues raised in favour of the application, and those which indicate a negative impact to the community. The community is both the general community and the community in the locality of the application premises.

The evidence is supportive of the grant, and the submissions in opposition are generally not supported by concrete evidence.

#### Decision

We direct the Commissioner to grant the licence as applied for to Mr Bentley Williams for the premises at Blackmans Bay.

Signed:

Chairman: PA Kimber. Member: L Finney. Member: K Sarten.