

Licensing Board of Tasmania: Decision

Application

Applicant: Mr Peter Aulich, Bicheno IGA Everyday, Foster Street, Bicheno.

Type of Application: Special Licence (Section 11 *Liquor Licensing Act* 1990).

The application was heard in Launceston on 24 September 2014.

Decision: 30 October 2014

Background

The application is for a Special Licence to sell a range of Tasmanian liquor products, specifically Tasmanian wine, spirits and liqueurs and Tasmanian made and brewed beer produced by Tasmanian owned breweries for consumption off the premises subject to the on-going sale of a range of hospitality tourist goods and services.

The premises are the Bicheno IGA Everyday located in Bicheno.

The application was heard on 24 September 2014 at which were present the applicant, Mr Peter Aulich, owner of the Bicheno IGA Everyday; and the objector, Senior Adviser and Industrial Relations Manager, Mr John Collier, on behalf of the Tasmanian Hospitality Association (THA). Mr Collier was accompanied by his legal representative, Ms Stephanie Manning and THA Deputy General Manager, Mr Rowan Wade.

Mr Aulich's application was supported by written documentation including a response (dated 14 September 2014) to the written objection of the THA.

Mr Collier (from here on referred to as the THA) made a written objection dated 28 August 2014.

Mr Collier sought leave from the Board for Ms Manning to represent him under Section 213 (6) of the *Act* which states:

A person is not entitled to be represented at a hearing unless the Board is satisfied that injustice could otherwise result.

The applicant was not represented by legal counsel but, after conferring, the Board decided to allow Ms Manning to represent the THA given the nature of the case in relation to Section 25A:

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

The applicant's submission

The applicant seeks a Special Licence to sell liquor from the IGA Everyday, of which he is the independent owner, located in the main street in Bicheno. He submits that this is in the best interests of the community.

The applicant submits that Bicheno is a major destination on the East coast for tourists and holidaymakers.

He submits that the store's major focus is to provide a one-stop fresh food offering using as much Tasmanian produce as he can source. The applicant provides a list of the Tasmanian produce available in the store including desserts, cheeses, biscuits, pates, olives, salads, meats, seafood and a range of packaged dry goods and fresh produce in addition to normal grocery lines.

He has received an increasing number of enquiries mostly from tourists and visitors requesting the sale of wine and beer in store.

The applicant submits that the grant of this Special Licence would offer the public, primarily tourists, a choice by providing a safe, easily accessible non-hotel environment to shop for local Tasmanian liquor supplies that would complement the fresh food offer and Tasmanian packaged products.

The proposed licensed premises would offer the tourist community the convenience of making liquor purchases as part of a broader one-stop shopping experience without having to travel to other locations to do so.

While acknowledging the availability of Tasmanian liquor products from two specialty stores with special licences in Bicheno, he submits that the IGA store would offer a bigger range and be more accessible. The store operates seven days a week from 8.00 a.m. until 5.30 p.m. in winter and until 7.00 p.m. (or later) in summer.

Additionally, he claims that many patrons, particularly Asian tourists, feel more comfortable in purchasing liquor through a shop than from a hotel/tavern.

The applicant submits that the staff deal one-on-one with customers and the store provides a mini-information centre for tourist enquiries.

The applicant rejects the THA's contention that there are sufficient licences in Bicheno and that a town its size does not require any more. He notes that there are no objections to his application from any other licensees in the town.

On the basis of these arguments, the applicant submits that it is in the best interests of the community to have a liquor licence granted for these premises (s24A (1) *Liquor Licensing Act 1990*).

In answer to the objections of the THA that the premises is a supermarket and therefore not permissible under Section 25A of the *Liquor Licensing Act 1990*, Mr Aulich submits that the

IGA store is not a supermarket by virtue of its branding as an “Everyday” store within the IGA network. He contends that this branding denotes a store as being too small (450m² to 650m²) to provide full grocery lines, with its orientation more of an everyday convenience store of a “top up” nature. The focus is on a prominent fresh food offer including delicatessen and meats with a medium range of grocery items to suit the local area.

He contends that within the grocery industry any store less than 1000m² is considered too small to provide a full grocery offer and is therefore labelled as a convenience store (and not a supermarket). He further contends that, despite there being no definition or regulation to that effect, most councils and planning schemes use the same 1000m² to differentiate a supermarket from a smaller store.

On this basis, the IGA Everyday in Bicheno is a convenience store and not a supermarket and therefore is eligible to be considered for a Special Licence.

He submits, also in answer to the objections of the THA, that while the store used to carry a sign saying “supermarket”, this is not the case now as the style and line of products have changed over the last two years to be aimed more at the tourist market, offering a much greater range of local produce such as cheeses and pates and fresh food.

The applicant submits that there are a number of stores of similar size to his that offer the same type of products that have been granted liquor licences such as Hill Street Grocers in Hobart and the IGA branded store in Austin’s Ferry.

In summary, the application is in the community’s best interests as it offers the convenience of a one-stop shop for customers, is good for local tourism and the State generally, and would not contribute to harm through over-drinking given the price point for Tasmanian specialty liquor products. The IGA Everyday is not a supermarket.

The objector’s submission

The THA made an objection in writing (dated 28 August 2014) and appeared in person at the hearing in Launceston on 24 September 2014.

The THA objects to the granting of the special licence on the grounds that the IGA Everyday is a supermarket and therefore cannot be granted a licence under Section 25A of the *Liquor Licensing Act 1990* (the Act) which states that:

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

Through counsel, the THA submits that the IGA Everyday is a supermarket for the following reasons.

The business is advertised and carries signage identifying it as an “IGA Everyday” outlet (photographs were submitted to this effect). The Tasmanian IGA website clearly uses the words “supermarket” in relation to the three different types of store that exist within the network, including the “everyday” type: “IGA Everyday are medium format stores carrying a

mid-sized supermarket range”. The THA contends that this branding clearly states the IGA Everyday is a supermarket and therefore, under the law, is unable to be granted a liquor licence.

A further photograph submitted (dated “around 2012”) shows the signage on the store as “Bicheno IGA Supermarket”. The THA contends that, given the applicant’s statement of the business’s consistent growth, the store could only have got bigger, not smaller, in that time. Another photograph submitted shows a similar sized store in Swansea branded “Swansea IGA Everyday Supermarket”.

The THA submits that, in his written submission, the applicant includes a resume of his business and professional experience in which he describes the “Bicheno General Store as the first supermarket in Tasmania to trade with automatic reordering computer system”. In his own words, the applicant describes the business as a supermarket.

Counsel for the objector submits that in the Bicheno Structure Plan prepared for and approved by the Glamorgan Spring Bay Council, the IGA Everyday is referred to as a supermarket; her contention being that Council considers the store a supermarket for planning purposes.

The THA submits that the product lines at the store are domestic products and food lines, offering multiple brand choice across most product lines, just as one would see in a supermarket.

Additionally, the THA contends that the licence is not merited due to the number of existing licences in the town including a bottle shop and hotel located 300m from the applicant’s business. This outlet offers a full range of Tasmanian liquor. Concerns were expressed about the impact on existing licenced businesses should the licence be granted.

Counsel also makes reference to previous Licensing Board decisions (Fresco (2011) and Salamanca Fresh - Davey Street (2013)) as relevant to this application: particular reference was made to this latter application where the store was able to demonstrate to the Board’s satisfaction that it held over 50% of its stock with a focus on speciality Tasmanian produce. This made it a very different case from Bicheno IGA where specialty produce would not make up anywhere near this percentage of stock.

Counsel also pointed out that in the Salamanca Fresh - Davey Street decision, the Board discounted the argument related to women feeling uncomfortable in bottle shops; the THA contends the same could be said for Asian tourists.

Additionally, also drawing on that same decision, counsel submits that having tourist flyers and brochures in a store is not sufficient to make it a tourist focal point and that there is no evidence submitted by the applicant that there is any demand from tourists for the purchase of liquor from this store.

Considerations by the Liquor Licensing Board

The Liquor Licensing Board of Tasmania is called upon to determine this application for a Special Licence authorising the sale of Tasmanian liquor for consumption off the premises (s.11).

The principal test for the granting of any licence is if it is the best interests of the community to do so.

In considering an application for a liquor 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 (s24A (1)).

Prior to this consideration, however, the Board must determine whether the IGA Everyday is a supermarket and therefore its eligibility to be granted a licence in the first place.

The applicant is correct in saying that there is no definition of “supermarket” associated with this provision in the Act.

Evans, J. in his decision in *Australian Hotels Association (Tasmanian Branch) vs. Licensing Board* (2006) TASSC 91 (8 November, 2006) when considering whether premises in the Kingston Town Shopping Centre were connected with the activities of a supermarket confirms that:

25. 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.”

Reference to various other dictionary definitions does not assist. The characteristics of large, self-service, variety of food and household goods appear common (Random House Dictionary, 2014; Collins English Dictionary, complete and unabridged edition, 2011; Oxford Dictionary; Merriam-Webster Dictionary); along with aisle organisation, single level, situated near residential areas, convenient spread of opening hours that extend into the evening, ease of parking, allocation of budget for advertising typically through newspapers (Wikipedia, 2014).

While we note that all of the above characteristics apply to the IGA Everyday in Bicheno, the Board is unable to rely on a precise definition in standard use to assist decision-making.

As submitted by the THA, the Board’s reference to the IGA Tasmanian website is instructive:

Today IGA is the world’s largest voluntary supermarket network...

The stores are grouped under 3 categories depending on size:

Super IGA are large format stores carrying a comprehensive supermarket range; IGA Everyday are medium format stores carrying a medium-sized supermarket range; and IGA Xpress, smaller in format, providing a full or supplementary servicing....

The IGA stores sit within the “Tasmanian Independent Retailers” group which is “responsible for marketing of independent supermarkets in Tasmania”.

It would appear that there is little doubt in the view of the IGA organisation that the IGA Everyday type of store is a supermarket. The Board observes that a very similar store in Swansea is branded “IGA Everyday Supermarket”.

The advertising hoarding on the roof clearly says “Bicheno IGA Everyday” with no reference to “supermarket” in the branding on site. The THA submits that this is a new addition to the branding and the Board was shown a picture dated 2012 which advertises the store as “Festival IGA Supermarket”. The applicant does not deny that this branding existed at the time but submits that the store has changed focus since then.

The Board is aware that in his documentation submitted as part of his licence application, the applicant refers to the business as being a supermarket. (The premises is described as “the first supermarket to trade with (an) automatic reordering system”.)

All of this suggests to the Board that despite the applicant’s attempt to claim a standard understanding and clear definition of “supermarket” within the IGA network, there is no such consistency across stores or within the overall branding publicly available on the IGA website. In responding to the THA’s argument in this regard, his claim that it is up to individual independent storeowners how they describe their stores in signage is unconvincing given his reliance on the IGA definitions of store size and branding previously put forward in submission by him.

A site visit was conducted on 18 September 2014. The Bicheno store is clearly smaller than a standard Coles or Woolworths, undisputed supermarkets. However, the product range appears fulsome – whether there is the same breadth of line available as these supermarkets could not be tested but in terms of availability, there does not seem to be any standard grocery item that the Board could think of that was not on the shelves in some quantity, including cigarettes.

The aisles are organised as in a supermarket, the shelving is traditional supermarket style, trolleys are available for use, and registers and checkouts are present for payment. At the entry way and on exterior walls, large coloured advertisements of discounted “specials” are displayed and a coloured brochure available at the door contains 4 pages of “Footy Finals Savings”, all standard grocery lines. The Board notes the small print at the bottom of the page that says, “Some items may not be available at all supermarkets”.

The IGA store looks and feels like a supermarket, albeit smaller than Coles or Woolworths. It is branded a “supermarket” within its own IGA network and in its own advertising. Having inspected the premises, the Board agrees with the THA that the product lines at the store include mostly domestic products and food lines, offering multiple brand choice across most

product lines, just as one would see in a supermarket. Its layout, style and setup all connote “supermarket” to the Board.

The presence of fresh food and local produce, whether aimed at the tourist market or locals, is insufficient to brand the IGA Everyday a “provedore” type store. These product lines are also available in standard supermarkets and there is nothing significantly special about their inclusion, in terms of quantity or type, in the product line of this store.

It is the Board’s view that IGA Everyday in Bicheno is a supermarket and therefore, under section 25A, of the *Liquor Licensing Act 1990*, not able to be granted the Special Licence that the applicant seeks.

On the secondary matter of whether the application is in the best interests of the community, the Board offers the following observations.

The Board does not give much weight to the THA’s submission that there are sufficient licences already in Bicheno and the related impact on other businesses of a new licence. This is an anti-competitive argument that we have discounted on many occasions in previous decisions (Port Sorell 2013).

The Board does not give much weight to the applicant’s argument around the reluctance of Asian tourists to purchase liquor from a bottle shop associated with a hotel. If this were the case, there is a café/restaurant (Pasinis) directly opposite the IGA Everyday to which they could be directed that, under a Special Licence, is able to sell a similar range of Tasmanian liquor products that the applicant is seeking for this store.

Our main consideration here is to repeat the Board’s view stated many times in the past (Salamanca Fresh – Davey Street, 2013; Fresco, 2011) that it does not believe that the community wishes to see liquor available for sale in every retail outlet, including standard grocery/convenience stores. Hence, for premises to be granted a Special Licence it must show that it offers something to the community beyond standard grocery lines.

The Board is not persuaded that the fresh food offerings or the existence of local produce at the IGA Everyday is sufficient to give it a distinct specialty focus on Tasmanian hospitality and tourist products and services. Variations of most of the available fresh and local produce lines would be available in most other supermarkets or convenience stores.

As has been said in the past (Salamanca Fresh – Davey Street, 2012) the existence of some brochures/flyers advertising tourist attractions/venues or having staff answer tourist enquiries are not signs of a store having a specialty hospitality/tourist focus. These brochures/flyers are not particularly prominent at the IGA Everyday in any case such that they might distinguish it.

Notwithstanding that the Board has already determined that Bicheno IGA Everyday is a supermarket, we do not consider it in the best interests of the community for Bicheno IGA Everyday to be granted a Special Licence.

Decision

The Board directs the Commissioner to reject the application for a Special Licence for the Bicheno IGA Everyday.

Jenny Cranston (Chairperson)

Ann Cunningham (Member)

30 October 2014