

Licensing Board of Tasmania	Decision
Legislation:	Liquor Licensing Act 1990
Applicant:	Kenneth Davies
Nature of application:	For a special licence: to replace an existing special licence: to enable sale of Tasmanian, Italian and 'organic' wine.
Premises: name	Davies Grand Central Station
Premises: address	78-96 Wellington Street, Launceston
Name of decision:	DGCSV
Date & place of hearing:	28th September 2006 at Launceston
Date of decision:	8 th December 2006.
Members of the Board:	PA Kimber (chairman), L Finney and K Sarten (members)

DECISION

Application

This is a repeat with variations of an unsuccessful application. The decision in that matter is published as *Davies Grand Central Station Number 4, 2nd August 2005* ("DGCS4").

Mr Davies says that he wishes to be able to sell, in addition to Tasmanian wines, organic wines and wines of Italian origin, in association with the delicatessen business which is part of his "Grand Central Station" concept. 'Organic' wines is not limited in the application to Tasmanian 'organic' wines, but wine from any geographical region, worldwide.

He draws analogy, in particular, to two other decisions of the Board, and says that the refusal of an application in essentially identical terms (DGCS4) is inconsistent. Those decisions are *Mill Providore (August 2004)* and *Delicacy (January 2005)*.

He asserts that the granting of his application would be in the best interests of the community and would not subvert the licence category system by establishing a de facto off licence business.

Mr Davies relies on his gourmet food business, a component of the Davies Grand Central Station, as justifying the extension into organic and into Italian wines. He

says these extensions will be small additions. He says that the gourmet food business is attached to the broader extensive business should not be a reason for refusal.

Mr Davies says that his gourmet food and wine business is a specialty shop, and would logically and consistently with Mill Providore and Delicacy decisions, be entitled to a licence, and that this component of the business is part of a broader diverse business is not a justification in the public interest to decline a grant.

He wishes to add Italian wines to match with Italian food he sells from the delicatessen. Likewise, with certified organic wines alongside his certified organic food. This he says is a small addition to the existing licence which permits sale of Tasmanian wine and Tasmanian boutique beer.

The Davies Grand Central Station offers one stop shop convenience for customers, providing personal service seven days a week 24 hours a day.

The Applicant says the business is run with a focus on service and safety.

Mr Davies listed organisations which provide certification for organic food and wine. He presented evidence in support of the integrity of such organisations, and the classification of food and wine as 'certified organic', lending credence to this being a discrete and structured product. Tony Scherer, vineyard manager and co-owner of Frogmore Creek Vineyards gave evidence to support that proposition.

The application may either be looked at as an adjunct to the existing Tasmanian wines special licence category, or as a discrete application for organic and for Italian wines. We believe it is appropriate to do the latter.

The Board has directed the grant of such discrete special licences where the nature of the business and premises, and often the ability of the operator is such that some special circumstances indicate a separate approach.

For example *South African Wines* where the applicant was from South Africa, and intended as a discrete business, to offer goods of South African origin. He sought to

add to the goods available, just South African wines. The evidence was that there was little or no availability otherwise. He did not offer other goods or services, and was not running premises ideally or uniquely appropriate for a Tasmanian wines special licence. In the particular circumstance, it was appropriate to authorise him to sell South African wines.

Further *Raw* is a business which provides almost solely 'organic' food. The name of the business indicates the sharp and solitary focus on fresh and organic Tasmanian produce. It was (and is) also a specialty delicatessen shop with a discrete focus on Tasmanian fresh produce. The Board determined the *Raw* application should be granted for both Tasmanian and certified organic wines.

A further example is the *Oast House* decision, where the premises was dedicated to exhibition of historical aspects associated with beer making, and a special licence permitting sale of limited quantities and style of beer in conjunction with that activity was granted.

Evidence was offered from Michelle O'Byrne MHA in support. The member of Parliament described the Applicant's premises as unique and distinct, encompassing the service station with driveway service, delicatessen, and a food store comprising food including specialty products including Italian, organic, gluten free, and over 700 Tasmanian items.

Dick Adams MHR gave evidence in support, about the 'top quality gourmet produce', drive in convenience. He decried his need, if to buy European wine, to have to travel to *Delicacy or Mill Providore* (both also in Launceston) because the DGCS does not have the capacity to provide foreign wines under their licence.

Similar evidence from others by letter was tendered, and the tenor is accepted by the Board. We recognise that in many applications some members of the public will be in favour of a licence being granted purely on convenience grounds. That is not, however, the substantive criterion for determination.

Mr Peter Wise gave evidence for the Applicant. Mr Wise is a director of Statewide Independent Wholesalers Ltd, and his organisation supplies the Applicant's business with foodstuffs. Mr Wise has 26 years experience in the retail food and drink market business in Tasmania.

Mr Wise contradicts the views that permitting DGCS to sell Italian wine would cause it to approach the nature of an off licence premises. His perception in this regard is based on the limited range Mr Davies will offer compared with the significantly larger range (ie number of lines) that an off licence business normally offers. He says Mr Davies seeks to add 24 new lines, whilst off licences might have 1300 lines in total, and up to 2000 lines in total.

Mr Wise contradicts that Mr Davies operation is akin to a department store, as he says is suggested in the Board's previous decision. He says it is better described as a unique, highly specialised small retail business that combines a 24 hour fuel outlet, restaurant, and tourism information service, with a unique gourmet food and wine business and some local convenience shop facilities. He says the retail offering is too limited for the business to be termed a department store.

Mr Wise stated he relies on his extensive experience in retail food and drink to describe Mr Davies' venture as a boutique specialty shop, albeit operating in conjunction with a 24 hour restaurant, fuel supply, and sale of some standard grocery lines.

Mr Wise asserts the previous decision is unfairly discriminatory, and serves only to provide a competitive barrier to a business which is not likely to contribute (negatively) to the harm associated with the consumption of liquor.

The Australian Hotels Association (Tas Branch) provided a submission. They suggest that the special licence category covers a range of different types of businesses, in most of which, liquor represents a small part of the operation and generally for on premises consumption.

The AHA asserted that some licence categories may be seen as more high risk: those being general, off and on licences. On the other hand, special licences are generally perceived as low risk, as being sale of liquor only as an adjunct to other principal business activities which are of a general public good. Hospitality and tourist services, being two such principal activities.

They note that the Tasmanian wine special licence category was originally established to assist Tasmanian wineries to get access to distribution channels and to make it easier for tourists to access Tasmanian wine. The AHA noted that the Board has permitted some minor extension into specialty offers of a limited range of liquor other than Tasmanian wine under the special licence category, but raised the concern as to the boundaries between the special and the off licence categories. They say that whilst what Mr Davies has applied for may not be inappropriate in isolation, the question remains as to whether all of the products (Tas, organic, and Italian) should be available from one location under the special licence category. They say, 'how far is the niche component to go', if the premises offer a number of niche products. Is it any longer 'niche', or is it approaching the off licence?

At the hearing the AHA did not object specifically, but rather sought that the application be a vehicle for a clearer definition of when a special licence for other than Tasmanian wines would be appropriate.

Consideration of the application

The Board does not doubt the integrity of the Applicant's view motivating the application. The Applicant and his wife own and manage a very professional business, with consistency and quality. They rightly pride themselves in the provision of a complex of businesses and services under one roof (and petrol service station apron) with quality 24 hour, 7 day a week service.

The critical nub of the special licence category as the Board applies its discretion generally under s24A(1) is to enable sale of liquor where the sale would not fit within the other established licence categories. One such recognised SLC is the Tasmanian

wines category. The rationale for that has been expressed above and many times before in Board decisions.

The extension of the rationale for a Tasmanian wines special licence to other liquor types be they organic wine from anywhere in the world, or any wine of Italian origin, does not apply. There must be some other perspective. It is not simply the benefit of further supply of liquor to the public. The licence regime is inherently about regulating sale, access, and hence consumption of liquor, to provide safety, quality and diversity. The limits on licence types inherently limits the number and extent of venues from which liquor may be sold or on which it may be consumed. That is not to say limits on numbers of licences are per se appropriate, but rather that the type of premises for sale of liquor in particular circumstances is limited.

The special licence category is generally to enable sale of liquor where liquor is not the principal activity (see for example regulation 4(1)). One of the recognised sub categories is for sale of Tasmanian wine (under certain conditions). Another, less easily defined, is the sale of specific and limited categories of liquor as an adjunct to some specialised purpose for which the operator, premises and business is clearly identifiable, and which is therefore considered to be in the community interest (eg, *Raw, South African Shop etc*). The off licence category is the major category for sale of liquor for off premises consumption and is to authorise sale of liquor for consumption off the licensed premises. That category requires that sale of liquor is the principal activity.

The issue which is brought up for consideration is whether, as in this application, premises which purport to provide a number of specialised services is appropriate for an extended special licence, authorising sale of a number of categories of liquor. Or, as has characterised applications to date, the retailing aspects of premises has been substantially limited to one or perhaps two aspects and hence the sale of liquor can be aligned to those aspects.

Our perception is that the addition of a number of retailing aspects at some stage in the progression creates a substantially different mix and business, and such a business would have to be treated separately from the standard Tasmanian wines special

licence. In effect there are two axis. The 'X' relates to the number of different categories of liquor sought to be sold, and the 'Y' relates to the number of different goods and services sought to be provided. As each factor on each axis gets wider, longer, higher, and more extensive, the combination lends to a conclusion that it is heading towards the nature which should be reserved for an off licence, and is heading away from the specialty nature which provides a reserve for separate liquor categories.

An example of a simpler situation is the recently determined *Delish Fine Foods* 2006 matter (Ann Brakey applicant) for Wivenhoe, September 2006. The Applicant sought to retail for off premises consumption Tasmanian wines, also French and Italian wines and German and Belgium beers. The nature of the applicant's business was stated to be intended to be dedicated to produce with special features aligned to those geographical areas. The totality of the ambit of the licence was considered to be potentially too broad without demonstrable evidence of high quality and specific service to the tourist public (in the particular circumstances of that application).

The community interest in these questions is about the prospect of proliferation of outlets outside established categories, and into areas of routine retailing. It is perceived by the Board that this is not Parliament's intention as evinced by the legislation, to open the range of premises in this manner: and this view is enunciated in *Hong Kong Diner 1999*, and *Bladerunner 2003*. That is not to say, as suggested by Mr Wise, that premises with a more extensive group of services is necessarily run of the mill and without special services and qualities, but rather that the grant of a licence to such premises will extend the apparent right to a licence to a significant number and range of retail premises.

It nevertheless remains that the Applicant's premises trade 24 hours a day, 7 days a week, he already has the capacity to sell Tasmanian wines, has sought to sell beer and other liquor products, and wishes now to sell a range of liquor which removes the local geographical aspect usually attendant, and to place organic and wine of Italian origin in premises which have a large range of other activities.

In the circumstances, and for the reasons above and as set out in the previous application decision, the Board concludes that it remains of the same opinion, and that extending the licence is not warranted as being in the best interests of the community.

Whether akin to a department store, as an imperfect but effective analogy, or whether better described as business premises with a wide diversity of services including 24 hour 7 day a week availability, the situation remains the same.

The definition of boutique specialty shop does not sit logically with the range of service types and hours of operation of the Applicant's business. To be all things to all people is not exclusive specialty boutique and such as warrants a special limited liquor licence – in the context of the licence categories as they are, and the extent to which the Board is willing to extend those special categories. In general in regard to sale of liquor it is also not consistent with specialty and unique quality for provision 24 hours a day. There is a time when extended hours is just opportunistic to the operator, without any community benefit.

The Applicant's intention is to continue to be open for 24 hours a day and to sell liquor for off premises consumption at any time of the day. When asked about amending the application to limit hours, or to his reaction to the proposition that the licence be limited to more regular off licence hours (as apply to normal off licences) the Applicant indicated he wished the application to proceed on its original terms.

Special links to services provided as in *Raw* and *South African Shop* and *Delicacy* and *Mill Providore* have been established where the link is special as in unique, and limited, not as a component of a larger and more general business.

Additionally, to add the further components sought to be added to a prescribed limited floor area available for retail of liquor means that less area will be devoted to Tasmanian wines. That is counterproductive to the original intent and purpose of the Tas wines special licence, which remains the substantive component of the Applicant's justification for authority to sell liquor.

The Applicant, in evidence from Mrs Davies, co-owner and operator, indicated clearly that he was not willing to consider any reduction in availability by reduction in hours of provision of liquor service, nor in regard to the prospect of future applications for extensions to the licence. Both indicate a desire to simply offer liquor more widely and extensively, rather than as an adjunct to other specialised services.

It is not only the nature of this application in itself which is of concern in regard to prospect of harm from consumption of liquor, but the extension to other premises of the right to sell liquor other than Tas wines by linking sale to some cultural or geographical aspect, thus extending the ambit of the licence past that originally intended by the Tas wines special licence and other special licence categories.

For these reasons, and in our discretion pursuant to s24A, we conclude it would not be in the best interests of the community to grant this licence as applied for, and we direct the refusal of the application.

As a final note, we refer to the issue of recurrent applications for similar premises and authority to sell liquor. There are a number of decided cases which indicate that it is not appropriate to reverse a previous decision where the facts are similar. It is sometimes the case that facts have changed or that better evidence may be more persuasive, and a re-consideration is appropriate. This is the fifth application by the present applicant, for the same premises, and some consideration of these authorities is appropriate.

In *Laval Pty ltd v Hackham Plaza Investments Pty Ltd [2004] SASC 111*, the Full Court of the Supreme Court of South Australia per DeBelle J (with whom Prior & Bleby JJ agreed) noted that the application and determination of the Licensing Court (to grant an application for an off-licence) under consideration followed two prior unsuccessful applications. The Court said (para 5) “*The Licensing Court should be slow to depart from a previous decision, if a second application is made for a licence in respect of premises which are the same as those for which an earlier application has been refused*”.

In *Harding Hotels Pty Ltd v Jatadd Pty Ltd* (2001) 81 SASR 222 at 227 Doyle CJ said:

“The Licensing Court should be slow to depart from a previous recent decision, if a second application is made for a licence in respect of premises after a refusal of an application.....”

Admittedly, this latter case was in the context of consideration of public demand (an expressly relevant criterion in the South Australian Act under consideration), and not an expressly relevant criterion in the present application. The statement is nevertheless relevant, in the context that this Board will be reluctant to depart from a previous decision where the factual material and the premises and type of application are such that there is no material change in relevant circumstances.

Decision

We direct the Commissioner to refuse the grant of a licence to Mr Davies in replacement for the existing licence.

PA Kimber; Chairman.

L Finney; Member.

K Sarten; Member