

In the matter of the Liquor Licensing Act 1990 (as amended to 2005).

And in the matter of an application by **Dennis Behrakis** for a special licence to permit the sale of liquor for off premises consumption of Tasmanian wines, spirits and liqueurs and Tasmanian made and brewed beer produced from Tasmanian owned breweries, subject to conditions from the premises known as **Fresh Fruit Market Salamanca** at 41 Salamanca Place, Hobart.

Before the Licensing Board, Tasmania

Heard at Hobart on 24 August 2005

Decision dated 9 September 2005

Members of the Board, Kerry Sarten, Acting Chairman
Louise Finney, Member

The Applicant was represented by Mr Ian Duncan of Counsel, and the AHA appeared to support their written submissions, represented by Mr Daniel Hanna, General Manager Australian Hotels Association (Tasmanian Branch) "AHA".

The Applicant gave evidence via a substantial written submission which was put forward on behalf of Mr Behrakis, and Mr Behrakis asserted to the accuracy of the material and was cross examined during the hearing.

THE LAW

This application is for a special licence (a licence subject to conditions) which would enable the applicant to sell Tasmanian wines, spirits and liqueurs and Tasmanian made and brewed beer produced from Tasmanian owned breweries, for off premises consumption, from his premises known as the **Fresh Fruit Market Salamanca**.

The special licence category is a separate category which permits adherence of conditions to a licence grant, unlike the other licence categories of general, on, club and off licences.

The category is affected by regulation 4:

Special licence

4. (1) *The Board is to direct the Commissioner to grant a special licence if satisfied that –*

(a) the principal activity to be carried on at the premises specified in the licence will not involve the retail sale of liquor or, if the principal activity to be carried on at the premises will involve the retail sale of liquor, the premises form part of or are associated with a vineyard or winery and the sale of liquor will be restricted to Tasmanian wine; and

(b) in the case of premises at which meals are to be served, liquor will be sold only for consumption on or adjacent to the premises as an accompaniment to those meals.

(2) *The Board is to direct the Commissioner to grant a special licence to sell Tasmanian wine if satisfied that –*

(a) the principal activity to be carried on at the premises specified in the licence is the provision of hospitality or tourist goods or services; and

(b) selling the wine is not likely to have a detrimental effect on that activity.

The meaning or intention of this regulation was commented upon in *Mill Providore & Gallery 2*, 24th August 2004.

The Board also considered whether such authority as there is in reg 4 is intended to cover the field. Refer to s 11 of the Act:

Special licence

11. A special licence authorizes the sale of liquor –

(a) between times; and

(b) on premises; and

(c) subject to compliance with any condition –

specified in the licence.

Also; the principal guidance as to the Board's duty in considering applications is set out in s24A:

Requirements for licence

24A. (1) In considering an application for a 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.

(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.

(3) In considering an application for an on-licence for a restaurant, the Board must be satisfied that the premises are, or are intended to be, used as a restaurant.

Further, in this instance the board considered s25A:

Restriction on grant of licence in connection with a supermarket

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

We concluded in *The Mill* (above) that regulation 4 is not intended to remove the ability of the Board to direct the grant of a special licence for premises under s11 except where the application meets the criteria in that regulation. It appears to be cast in mandatory terms in the event that the criteria set out are met. But it does not displace the broad discretion remaining under s11 of the Act.

THE STRUCTURE OF THE ACT

The Act prohibits sale of liquor without a licence or permit. Licenses come in five categories: a general, an on, an off, and a club licence, with a special licence. The first 4 types of licence have conditions express in the Act. The fifth, may have conditions imposed by the Commissioner. The Commissioner grants a licence on direction from the Board, and if the Board considers a special licence should be granted on any particular application, the Board will specify the licence conditions which are to be imposed on the grant of the licence. The conditions are structured to protect the integrity of the licence.

The special licence category enables the Board to grant a licence which would not fit within the other categories of licence, but which is nevertheless in the best interests of the community for the licence to be granted.

Integral to this is a requirement to ensure that the structure of licence categories is not subverted by the artificial use of the special licence category to overcome limitations or prohibitions attached to the other categories, and thereby to defeat the purpose of Parliament in establishing the categories.

The off-licence categorie enables a licence to be granted authorising sale of liquor between 5am and midnight on any day on the premises specified for consumption off those premises (s9 Liquor Licensing Act 1990 as amended).

S. 24A specifies that, 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.

So Parliament has expressed a preference that if liquor is to be sold on premises for off premises consumption, that the liquor be sold from premises principally dedicated to the sale of liquor, and not some other goods or services.

The Act and regulations (2003/96) permit an exception to that general prohibition, via the special licence category, with express reference to enable sale for off premises consumption if the principal activity is not the retail sale of liquor, or if the principal activity is the retail sale of liquor, that the premises form part of or are associated with a vineyard or winery and the sale of liquor will be restricted to Tasmanian wine.

In addition, at regulation 4(2), the Board is to direct the Commissioner to grant a special licence to sell Tasmanian wine if satisfied that the principal activity to be carried on at the premises specified in the licence is the provision of hospitality or tourist goods or services, and the selling of wine is not likely to have a detrimental effect on that activity.

Thus, for various policy reasons, which will be self evident, the Parliament encourages the Board to direct the grant of a special licence to sell Tasmanian wine, at premises the principal activity of which is not the sale of liquor, at vineyards and wineries, and at premises where the principal activity being carried on is the provision of hospitality or tourist goods or services, and where the sale of wine is not likely to have a detrimental effect on that activity.

EVIDENCE

The Applicant provided written submissions in regard to the application dated August 2005, and during the hearing affirmed the accuracy of this submission. In addition a written submission from Sam Richardson, Tas Independent Wholesalers (submitted in Davis Grand Central 4, 2005) was included regarding his perceived definition of a supermarket. Mr Peter Wise, General Manager Tasmanian Independent Retailers, also submitted on behalf of the Applicant that the premises are not a supermarket and offered to appear to support his evidence if required by the Applicant or Respondent.

Submissions against the application were received from the Australian Hotels Association (Tas Branch) (hereafter "AHA"), and Mr Peter Trioli the owner of the Wursthau Kitchen Pty Ltd Mr Trioli's business is a successful provider of hospitality and tourist goods and has the benefit of the type of licence the Applicants now seeks. It is also quite nearby the Applicant's premises (approximately 60 metres to the North along Salamanca Place, and one building up Montpelier Retreat to the West).

PROCESS

Each person who submitted written material was invited to attend the public hearing to give evidence, to advance their proposition and to be available to answer questions or to be cross examined.

At the hearing Mr Behrakis was represented by Mr I Duncan of Council.

The AHA was represented by Mr D Hanna, with Ms Melanie Bonde.

Mr Trioli appeared, representing The Wursthaus Kitchen Pty Ltd.

THE APPLICANT'S CASE

Mr Duncan asked that the submission be read into evidence.

Mr Behrakis gave evidence, including the following:

He has been in business for 24 years in the Salamanca area and over that time the business has evolved to meet the changing demands of the market.

This application is in context of continuing to meet customer demand.

That he is also improving the delicatessen area of his premises, extending the current display from 20ft to 30ft.

That his intention is to sell a range of Tasmanian wines at the top end of the pricing scale that, in his opinion, would not contribute to binge drinking or other harm associated with the misuse of alcohol.

That the premises are well staffed, with some staff having already completed the RSA course and all staff responsible for the sale of alcohol will complete the course.

That the premises are safe, convenient and well lit.

That he believes the support from Tasmanian wineries due to the increased potential to sell their wine is evidence that the application will be of benefit to the wineries.

That the majority of stock (98%) at the Fresh Fruit Market is sourced from local and national producers.

That at this time of year approximately 15-20 requests for wine are made each week, which number increases dramatically over summer.

Mr Behrakis was cross examined by Mr Hanna of the AHA. Additional information was elicited:

At this time of year the customers are primarily local Tasmanian people.

Over summer approximately 20% of custom is from tourists, some of whom do not know where to source wine.

The size of the premises is approximately 380m² with about 40-45% dedicated to fruit and vegetables. A small range of basic grocery items are stocked with limited choice and range, and there is a large delicatessen section.

The intention is to stock wine from 10-12 producers, with up to 5 lines from each range. The display area for liquor will be limited to display shelving 4-5metres long and about 1.4metres high, some 400 bottles will be on display with some bottles standing and some on their side. The intention is to source wine directly from the vineyards and have in stock only 5 doz per vineyard.

The hours of operation will remain the same, 7am-7pm, 7 days per week.

That during busy times there may be as many as 50 customers in the store, with about 8 staff on the floor.

On Saturday they have a full time security officer.

That there is no proposal, or capacity to extend the premises or the floor space dedicated to the display of liquor.

That it is estimated, if successful in this application, liquor will represent approximately 5% of turnover.

In addition Mr Hanna submitted that as the AHA do not believe the premises to be a supermarket, that s25A was not applicable, and that he would address s24A (the general discretion) in his summing up.

The Applicant then clarified and summarised his expectation that it is estimated if successful liquor will represent approximately 5% of turnover, that the principal activity is the sale of fruit and vegetables, and further that the business is not part of or associated with a vineyard or winery.

Mr Duncan offered to connect to Mr Wise via teleconference should any party wish to question him concerning his submission, namely that the premises is not a supermarket. Neither representor required this.

REPRESENTATIONS

Mr Hanna relied on the written submission from the AHA submitted before the hearing, however was questioned in the submission by Mr Duncan. Specifically, the AHA reiterated that they do not consider the primary purpose of the business to be tourism or hospitality related, and that therefore the applicant did not satisfy the requirement under Regulation 4 (2).

Mr Duncan countered this by drawing attention to the provisions in Regulation 4 (1) (a), where “the principal activity will not involve the retail sale of liquor”.

Mr Trioli of the Wursthau Kitchen gave evidence stating:

That he objected under s24A due to the asserted proliferation of outlets in the Salamanca precinct, Wursthau, Norman & Dan, Naturally Tasmania, and Say Wine & Cheese, all being within approximately 50 metres of the applicant’s premises. In addition that Sal’s is undergoing refurbishment and looking to use the existing licence allowing off liquor sales.

That the addition of another licence in the area will result in a lack of differentiation of product, diversity and interest in the precinct, which is detrimental to the attractiveness of the area, from both a local and tourism perspective, and therefore was not in the best interest of the community.

That he considered the premises to be *nearly* a supermarket, not specialising in any particular product, a general store for general purposes. That the 5-7 checkouts at the entrance contribute to the premises having the look and feel of a supermarket, as opposed to the counter-style operations at Wursthau, Hill St Grocer, Salad Bowl and Lipscombe Larder. That size should not determine the definition of a supermarket, citing a Coles supermarket in the State of Victoria which is smaller than the Applicant’s premises, as an example, and that given 2 other outlets in the greater Hobart area, he contended that they had “buying power”.

On cross examination from Mr Duncan the following was also elicited;

That Mr Trioli asserted that he was not objecting on the grounds of competition, however he agreed with the proposition put by Mr Duncan that there would be a detrimental effect on small businesses in the area.

Mr Duncan proposed that factors such as buying power, number of outlets and diversity of product range and price were all factors contributing to whether a business could be considered a supermarket, as supported by the asserted expert opinion of Mr Wise and Mr Richardson. Mr Trioli was unaware of price differences between the Fresh Fruit Market and other premises which are supermarkets.

SUMMARY

The AHA submitted that they felt the “best interests of the community” could be judged by the capacity for harm, and that in this application given the price point this prospect of harm was considered to be low; they therefore had no objections on this issue.

The AHA did not submit that the Fresh Fruit Market is a supermarket and therefore do not object under s25A.

The AHA do submit that the premises are primarily a fruit and vegetable store, not a provider of hospitality or tourism goods and services and that therefore the licence should not be granted as the application does not meet the requirements under Regulation 4 (2).

Mr Duncan submitted on behalf of the applicant that:

The Hill St Grocer and Davies Grand Central are similarly structured businesses that were thought to be appropriate under Regulation 4, that the application could probably comply with 4 (2) and gave as an example Spreyton Fresh Fruit and Vegetable Market, that the premises nevertheless would not be excluded under Regulation 4 (1) (a).

That there is clear evidence from two asserted experts regarding s25A that the premises are not a supermarket.

That the application is in the best interests of the community as required under s24A due to:

- Written evidence of support,
- Accessibility, popularity, convenience, safe atmosphere, and
- That there was no evidence submitted that proliferation of outlets would contribute to social harm resulting from the misuse of alcohol, merely competition and that this application should be welcomed.

CONCLUSIONS AND THE DECISION

The Board does not consider the premises to be a supermarket and hence the grant of the licence is not one prohibited as being ‘in connection with the activities of a supermarket’.

The premises are more akin to those in the Davies Grand Central, Lipscombe Larder, and Hill Street Grocer applications, rather than any supermarket of the major ‘chain’ variety (Coles and Woolworths) or of the smaller variety as referred to by Mr Richardson and Mr Wise.

The Board does not accept that determining whether or not the grant of a licence is in connection with the activities of a supermarket is a matter for which evidence from people with the experience and qualifications of Mr Richardson and Mr Wise will be determinative, although their evidence may be relevant on particular occasions.

Indicia which tend toward the conclusion that the premises are a supermarket include the use of shopping trolleys and the checkout arrangement. On the other hand, the smaller nature of the premises, the limited range of general grocery items, the lack of connection with a buying group or chain, the concentration on fresh fruit, and on delicatessen items and other specialty products, and the position of the premises in the Sullivans Cove tourist precinct, weigh in the balance to oblige the Board to conclude the supermarket question as we have.

The AHA tended to submit that s24A of the Act required only a consideration of harm minimisation issues or harm associated with the misuse of liquor. There are many factors to the general discretion given to the Board by s24A. Harm minimisation is an important factor, but not the only one. Other factors like contribution to economic activity, employment, improvement to facilities and general amenity, consumer demand, diversity, quality, and safety, competition, may all be relevant in any particular application.

In this application, weighing these factors in the balance, we conclude that the grant of the licence would be in the best interests of the community. The premises are in a recognised tourist area. The business caters predominantly for the hospitality and tourism market, in the broad sense of that phrase (including local people wishing to purchase fruit and vegetables and delicatessen items for hospitality purposes), and given that it is in the Salamanca/Sullivans Cove area, special considerations are relevant. We consider that the Salamanca precinct is generally one which caters to tourism and hospitality. It is in the best interests of the community that such areas are able to provide a diverse range of goods and services, some including liquor. The intended range and display area for liquor; represented by display shelving situated opposite the delicatessen counter and catering for some 400 bottles, a single glass door refrigerated cabinet which will provide for a limited selection of chilled liquor, and the occasional display of significant premium wine and/or liqueurs on shelving situated within the delicatessen area is consistent with this. The present application will, on balance, add benefit to the area, and to the service of the needs of the public including locals and tourists. The premises are suitable.

We therefore direct the Commissioner to grant a special licence to Dennis Behrakis to permit the sale of liquor (being Tasmanian wines, spirits and liqueurs and Tasmanian made and brewed beer produced from Tasmanian owned breweries as determined by the Board from time to time) for off premises consumption from the premises known as the Fresh Fruit Market Salamanca.

K Sarten, Acting Chairman

L Finney, Member