

## **Tasmanian Liquor and Gaming Commission: Decision**

### **Application**

Applicant: Mr Stephen Longmore, Hill Street Grocer, Devonport.

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

The application was heard in Hobart on 5 December 2016.

Decision: 22 December 2016.

### **Background**

The application is for a Special Licence authorising the sale of liquor limited to Tasmanian wine, Tasmanian produced spirits and liqueurs and Tasmanian made and brewed beer produced by Tasmanian owned breweries sold for consumption on the premises as tastings and off the premises subject to the on-going sale of a range of gourmet fresh food/delicatessen products and consumption of liquor on the premises to a person consuming food in the area of the premises operated as Hill Street Home.

The premises are the Hill Street Grocer, Shop 3-5, Hill Street Centre, 48-54 Oldaker Street, Devonport.

The application was made to the Commissioner for Licensing on 7 September 2016 who, pursuant to section 24(2)(b) of the *Liquor Licensing Act 1990* (the Act), referred the matter to the Tasmanian Liquor and Gaming Commission (the Commission) on 13 October 2016. His reasons for referring the matter to the Commission were stated in the letter sent to the applicant on 14 October 2016. Essentially these are:

- the considerably larger size of the premises than other premises of this type where special licences have been granted;
- the proximity of a 9/11 bottleshop adjacent to the store; and
- the mixed use of a café and grocer.

In the Commissioner's view, these three factors put together make this application "sufficiently unusual" that he was of the opinion that it is in the public interest to refer the application to the Commission for a hearing.

On 21 October 2016, the applicant provided a further submission in support of his application and this was forwarded to the Commission for its further information.

At its meeting on 7 November 2016, the Commission determined to hear the application on 5 December 2016 at a private hearing on the basis of the written submission and prior to the hearing to visit the store on 30 November 2016. The applicant was so advised on 9 November 2016 and asked to provide a larger floor plan of the premises that indicated more clearly where it was proposed the liquor would be displayed.

The members of the Commission visited the store on 30 November 2016 and met with the applicant and Ms Natalia Urosevic who both answered questions and generally explained the activities carried out at the store including where the liquor would be displayed (if the licence were granted). The Commission was also given a larger floor plan of the store.

The application was heard on 5 December 2016 in Hobart.

In making its decision, the Commission considered:

- Mr Longmore's application and written documentation including an email of support from Mr Phil Dolan, White Rock Vineyard;
- the applicant's response (21 October 2016) to the advice from the Commissioner for Licensing that he had referred the matter to the Commission;
- information from Mr Longmore and Ms Urosevic at the site visit on 30 November 2016 along with members' own observations; and
- an email from Ms Urosevic (2 December 2016) containing additional information following the site visit.

### **The applicant's submission**

The applicant seeks a Special Licence to sell liquor from the Hill Street Grocer Devonport (HSGD), of which he is the co-owner. He submits that this is in the best interests of the community.

The store has a total space of 1452m<sup>2</sup> with a retail space of 967m<sup>2</sup> and sits within a small shopping centre development. Its focus is on local fresh food in what the applicant describes as "a sophisticated emporium style atmosphere" and includes an in-house baker (Pigeon Whole), in-house butcher and fishmonger, a very large international and local cheese selection, as well as fresh Tasmanian produce and extensive delicatessen range.

The applicant submits that this will be complemented by a homewares section offering food related homewares and gifts, in-house florist, a handmade local chocolate section and a café.

It is proposed that the placement of liquor for retail sale be concentrated in this homewares section, in refrigerated cabinets within the store and for consumption in the café with food. Additionally, large barrel type displays will hold "specials" throughout the store in three places marked on the floor plan submitted to the Commission during the site visit; and chilled liquor will be available in the refrigerated cabinets within the main packaged/frozen product area.

In the café section, the applicant intends to restrict the sale of alcohol to certain hours (for example, between 11.00 a.m. and 7.30 p.m.).

The HSGD joins eight other Hill Street stores throughout Tasmania with another four planned for 2017-18.

The applicant submits that a grant of this Special Licence would be in the best interests of the community for the following reasons:

- there is little potential for alcohol-related anti-social behaviour or crime from the consumption on site due to the restricted opening hours and that alcohol would only be served with meals by responsible café staff;
- the community will benefit due to greater accessibility to, understanding and awareness of Tasmanian wines, beers, ciders and spirits not ordinarily found in large “chain” bottleshops; this will be facilitated by holding tasting, educational and “Meet the Maker” nights;
- tourists, especially those travelling to and from Tasmania on the Spirit of Tasmania will have a total food/liquor destination in close proximity to the port;
- small local producers of liquor products will benefit from having another retail outlet from which to sell their products; and
- the positive impact on employment and the economy of the area.

On the matter of the 9/11 bottleshop, the applicant submits that its product offerings would be different and not devoted solely to stocking Tasmanian liquor (as HSGD will be); and that HSGD will have regular tastings and educational nights resulting in stimulus to the local and boutique liquor industry which would not be achieved by the 9/11 bottleshop.

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.

Referring to section 25A of the *Act*, the applicant further submits that HSGD is not a supermarket.

Regarding the size of the store, the applicant submits that the HSGD will be a “provedore type store” rather than a “standard supermarket” - and references the Licensing Board of Tasmania decision of 2014 on the application of IGA Bicheno.

Citing matters raised by the (then) Licensing Board, he submits that the product mix at HSGD is significantly different from that of a supermarket and will be offering something distinctive to its customers. He submits the store might better be described as a food emporium or a food hall (such as Dean & DeLuca in New York or David Jones in Melbourne or Sydney).

He offers as points of difference from a supermarket:

- the opportunity to be seated and eat in a café environment and to showcase Tasmanian liquor products available for sale in the store;
- the provision of international and local cheeses; a strong emphasis on local fresh produce, delicatessen, fresh take home meals, fishmonger, locally sourced meat, and artisan in-house baker; and
- the ability to purchase florist and food related homewares and gifts including custom made gift hampers;

all of which create a certain atmosphere not found in a supermarket.

The applicant presents a series of graphs of projected sales (based on Hill Street Grocer, West Hobart) and actual sales (after a few weeks trading in Devonport) by department and compares these with figures obtained from “a Coles regional manager”. He submits these figures indicate that Coles’ sales are made up of 50% packaged groceries compared to HSGD which would be half that for the same category and offered to customers as a “convenience” type offering. This would be reflected in the store layout - five aisles for this kind of product whereas a supermarket generally offers 12 very long aisles. Additional information on HSGD updated figures for 2.4 weeks trading indicated packaged groceries constitute 23.2% of sales. It is also submitted that the fresh produce figures and delicatessen figures are “substantially different (greater) than a supermarket sales profile”.

On the same theme, the applicant submits that the floor space devoted to aisles of packaged groceries is 28.9% “as compared to a supermarket where up to 75% of the store consists of aisles of packaged goods”.

The graph submitted indicates HSGD 85% of sales are derived from bakery, meat/fish, frozen/dairy, groceries/cigarettes/general merchandise, deli and produce; the same sales for Coles are 100%. The other 15 % of sales is derived from the café and homewares.

HSGD is an IGA store and required to bear the IGA logo on signage and advertising as a condition of being a member of the national buying group, which comprises over 80 stores in Tasmania. The applicant submits that this does not make HSGD a supermarket.

### **Considerations by the Tasmanian Liquor and Gaming Commission**

The Commission is called upon to determine this application for a Special Licence authorising the sale of Tasmanian liquor for consumption off the premises and for consumption on the premises in an in-house café (s11).

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

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 (s24A(1)).

Prior to this consideration, however, the Commission must determine whether the Hill Street Grocer, Devonport (HSGD) is a supermarket as section 25A of the *Liquor Licensing Act* 1990 states that:

A liquor licence must not be granted in connection with the activities of a supermarket.

This is a threshold test irrespective of the interests of the community.

The applicant is correct in saying that there is no definition of “supermarket” associated with this provision in the Act. As was the case in the decision of the (then) Licensing Board of Tasmania in its decision on the Bicheno IGA, the Commission looks for definitions that might assist in this case.

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 that:

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

“A large, usually self service, retail store or market selling food and other domestic goods.””

Other dictionary definitions are not specific. 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).

A 2009 decision of the Victorian Civil and Administrative Tribunal<sup>1</sup> provides further guidance. Senior Member (Mr Robert Davis) cited a Victorian Supreme Court decision of *Seldan Pty Ltd v Liquor Licensing Commission and Wonga Park Village Supermarket Pty Ltd* (unreported 15 May 1990) in which his Honour, Nathan J. stated at p3:

A supermarket is commonly recognised as a place from which grocery items, dairy produce, some stationery and perishable food items are obtained.

Mr Davis went on to say:

In my view, that appears to depict the definition of “supermarket”.....I am fortified in this view by the fact that it is serviced by a 48 space car park. Such a car park is usual for a supermarket but would be rare for a convenience store or mixed business.<sup>2</sup>

Regarding the number of aisles of the Woolworth supermarket (some 14 aisles) vs the IGA shop in question which had 5 aisles, he further said:

In my view, clearly one would expect more modern and bigger stores operated by large public companies to be a lot bigger than other stores operated privately. However, that does not mean that they are not also supermarkets. I do not think it is helpful to draw such a distinction. The photographs I saw of the IGA shop looked like

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<sup>1</sup> VCAT decision No. B45/2009

<sup>2</sup> VCAT decision para 20

a supermarket and generally one can say if it looks like a supermarket, it is a supermarket and that is the view I will take in this case.<sup>3</sup>

What emerges from these sources is a combination of common features that together typically makes up a supermarket.

Following the Commission's site visit on 30 November 2016 and considering the applicant's submission, it is apparent that the HSGD contains many of these features common to supermarkets such as:

- a total footprint of 1452m<sup>2</sup> with 967m<sup>2</sup> of retail space which, while smaller than a Coles or Woolworths, is nevertheless larger than any standard "boutique" convenience store;
- self-service;
- shopping trolleys and pull along receptacles available at the door for transport of items around the store;
- 5 aisles of standard domestic/household packaged products in standard shelving;
- two walls of refrigerated cabinets for frozen and chilled goods;
- multiple payment points including behind the deli counters, 3-4 cash registers in a row (no moving conveyor belt) where customers queue and one section for express check out;
- opening hours from 7.30 a.m. (Monday to Saturday)/8.00 a.m. Sunday and public holidays and extending into the evening with closure at 8.00 p.m. (Monday to Saturday) and 7.00 p.m. (Sunday and public holidays);
- as part of a shopping centre development, car parking is available directly outside and surrounding the store; and
- the IGA (Hill Street Grocer Devonport) website advertises online shopping and home delivery.

Its product offerings common to supermarkets include:

- a full range of domestic, household packaged grocery items – multiple brands of individual products (e.g. corn flakes);
- a full range of frozen products, cooled drinks, standard dairy items (ice-cream, butter, cheese) – multiple brands and choice;
- discounted specials at the aisle ends of everyday items such as soft drinks;
- bulk soft drinks such as 30 can boxes of coke, freestanding slabs of water bottles;
- garden/outdoor products such as potting mix, rat and mouse poison, large bags of chicken food;
- a full selection of dog and cat food, dog bowls, collars/leads and grooming products;
- a substantial portion of a single aisle dedicated to lollies, soft drinks, chips and biscuits;
- an open section of fruit and vegetables, Tasmanian and Australian grown;

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<sup>3</sup> VCAT decision para 21

- a butcher/delicatessen range – fresh meats, small goods, seafood, cheeses;
- an in-house bakery;
- a small number of receptacles containing flowers; and
- weekly specials (advertised online) which, at the time of writing, included everyday items such as milk, bread, lollies, soft drinks and breakfast cereal.

The product range is fulsome – there does not appear to be any standard grocery item (including cigarettes) that the Commission could think of that was not available on the shelves/cabinets in some quantity, usually with multiple brand choice.

Fresh fruit and vegetables are also available in standard supermarket set-up and there is nothing significantly special about their inclusion, in terms of quantity or type or difference, in the product line of this store.

Considering all of the above, it would appear that HSGD is a supermarket.

It does have, however, some features which are not common to the general supermarket and these are:

#### 1. A café

The café section is unusual, situated as it is in the entrance to the store. The principal ingress to the store is through this area. While it is possible, on entry, to veer left towards the cash points/bakery etc., most customers would enter the main part of the store by walking through this area (as we did). Three long tables with bench seating are situated on the left side of the walk-through and a small counter selling salads, panini, biscuits and cakes etc. for a luncheon type meal on the other. From this same section one could order tea/coffee and drinks and a small number of more “upmarket” lunch offerings (such as risotto). There is also a small cabinet of hand made chocolates.

#### 2. The Homewares section

The presence of an upmarket homewares section is different. Although Woolworths and Coles both sell types of kitchen/food related items, the products being sold here are generally more expensive and better quality. The fresh florist items available here (in a few receptacles on the floor) looked more “artistic” than those found at Coles or Woolworths.

#### 3. The Tasmanian local produce focus

Tasmanian local produce is available in supermarkets but at HSGD there is more of this focus in some areas – for example, some fresh meat, seafood, gateaux, and chocolates – than the standard supermarket.

#### 4. The gourmet offerings

There is an impressive array of international and local cheeses in the delicatessen section, many of which may not available in Coles/Woolworths stores.

There are “ready made” take-away meal offerings in the delicatessen section, not often seen in a supermarket.

An in-house bakery is not unique (for example, Woolworths, Sandy Bay has a large bakery that bakes daily) but the HSGD’s connection to the “artisan” Pigeon Whole Baker in Hobart is certainly a point of difference for the purchase of bread.

#### 5. The styling of parts of the store

Parts of the store are more attractively styled than Woolworths/Coles – the tiling behind the meat/seafood/delicatessen areas is “on trend” New York white subway tiling and this part of the store is more spacious than standard supermarkets. It is extremely attractive and this part of the store on its own differs from the standardised “look” of supermarkets generally.

#### 6. The sales revenue by department

The Commission is unable to verify any of the sales data submitted by the applicant, especially for Coles. A supermarket is not defined solely on the basis of the packaged everyday grocery/household items section. Combined with frozen and cold products as well as meat, delicatessen and fruit and vegetables, and bakery products – the full categories of products sold in HSGD and supermarkets are the same. The individual department sales might differ but the Commission does not consider this to be relevant.

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.

It is the Commission’s view that the Hill Street Grocer Devonport is a supermarket and therefore, under section 25A, of the *Liquor Licensing Act 1990*, the applicant cannot be granted a Special Licence.

### **Decision**

The Tasmanian Liquor and Gaming Commission directs the Commissioner for Licensing to refuse the application for a Special Licence for the Hill Street Grocer, Devonport.

Jenny Cranston (Chair), Stuart Barry (Member), Leanne Topfer (Member)

22 December 2016