Licensing Board of Tasmania	Decision
Legislation:	Liquor Licensing Act 1990
Applicant:	Peter Morrison
Nature of application:	For an off licence
Premises: name	Hill Street Cellars
Premises: address	Cnr Hill and Arthur Streets, West Hobart
Name of decision:	West Hobart Off Licence
Date & place of hearing:	20th July 2010 at RYCT Sandy Bay
Date of decision:	11th August 2010
Members of the Board:	PA Kimber (chairman), K Sarten and D Logie (members)

DECISION

Application

The Applicant was represented by Counsel Kyle Somann-Crawford with solicitor Sarah Sealy.

Mr Morrison saw an opportunity to start a new business. He became aware that the old petrol service station site on the corner of Hill and Arthur Streets, West Hobart, was going to be closed, and that the freehold owner wanted to make the premises available for any new business. The premises were for rent, and Mr Morrison obtained a conditional lease: subject to getting a liquor licence for sale off premises, and subject to council planning permit.

Mr Morrison has a good reputation and after due enquiry has been found to be a fit and proper person to hold a liquor licence. He has already held liquor licences and has not brought attention to himself for misconduct. He is entitled to the presumption that if he is granted a licence he will obey the law: he will manage the premises safely, will not sell to intoxicated people, will not sell to under-age people, and will serve liquor taking account of the recommendations arising from responsible service of alcohol education.

The application was sign-posted and advertised. The application drew considerable opposition from the people who live in the neighbourhood.

Mr Morrison put forward a written application, and attended the hearing and gave evidence and was available for and answered questions from the objectors present.

There is nothing particularly unusual about the application itself. It is similar to a number of applications granted in recent years. It is apparent that people in business have perceived that there has been some change in the method of consumption of liquor by Tasmanians, and that has leant toward provision of retail supplies by off licensed premises. Clearly the public in many areas have encouraged this change by supporting (by purchasing product) new operations. In many instances the new services provide diversity, new quality premises, a wide range of liquor, and they do so in predominantly safe circumstances.

In most instances of such licence applications the applicant has come to the Licensing Board of Tasmania with some level of community support, limited community objection (and in some instances no such objection) with prior approval from the planning authority for the use of the premises for the intended liquor outlet.

The applicant may have been surprised at the level of opposition to this matter. It is quite clear that the West Hobart community has galvanised its opinion and expressed it coherently and intelligently. They do not want another liquor outlet in what they consider to be a predominantly residential suburb.

The applicant stated that his application has benefits for the community: it will provide the benefit of a use for premises soon to be vacant (when the petrol station is to close), it will employ people, it will provide a service that some in the community will want, and it will provide economic stimulus by a business activity which will generate income to meet expenses, and surplus for the business proprietor.

He said that the benefit of this application is that the supply would be in the community, and convenient for the members of the community. They would not have to go very far for service, and local residents and city commuters would find the range attractive and convenience compelling. It would also be a locally owned business which, compared to the larger chain operatives, would put any surplus back into the Tasmanian community, not into larger shareholder pools or executives bloated salaries.

Although the premises would be adjacent to a yet undisclosed or unknown other small business, it would nevertheless be a separate business and premises, and would therefore not breach s 24A of the Liquor Licensing Act 1990, which requires that 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. We are so satisfied.

We accept the applicant's assertions as to his intentions regarding development of the property, the liquor to be available, and the method of service: it will be similar to a number of other such stand alone liquor outlets in Tasmania. Although faced with considerable opposition, the applicant expressed confidence that he would be able to gain community support for the business and that it would be successful. As indicated in a number of previous decisions, the Board is not overly concerned as to whether an intended new licensed business will be successful. That is the risk the applicant carries, and the Board is probably not well placed to judge it. The overall weight of the legislation is not to suggest enquiry by the licensing authority as to the profitability of the new business, but rather as to the impact on the community.

Car parking and traffic was an issue specifically addressed by a report submitted by the applicant. Candidly, unless it appears to be of singular significance or to be something which has accidentally missed attention by the planning authorities, parking and access are not of great significance to the Board. In this matter, the planning authority had not yet dealt with the matter, and the report was helpful to ascertain the situation.

As a petrol service station, perhaps in its declining years, the site has obviously had car parking and traffic ingress and egress of some significant degree. No doubt the community has changed over time (probably with more vehicles per household, and more households) but also traffic arrangements have been varied to try to accommodate that increase and also the community's other needs. Our impression is that if we waited until there was space for every car to park at every place retail goods are available to purchase, we would not licence any new business. The balancing item and weight is on overall convenience; not just to car drivers, but to the community in all its components.

Without working through the traffic proposals in detail, suffice to say that they are adequate, and to the extent that they may prove limited, then no doubt the use of the premises by customers may be curtailed and access to other more convenient premises will limit sales.

The streets surrounding the premises are a through way for commuters from Mt Stuart, Lenah Valley and West Hobart itself to the City each morning and evening.

There is no evidence of any particularly risky issues relating to car parking or access.

West Hobart and the immediately surrounding suburbs which will be the logical target market for the business are reasonably densely populated. There are ribbons of shopping areas in each suburb. The area is well known to the Board members, as it will be to most Hobartians.

There is nothing illogical about wishing to continue a retail shop use of the site. If the applicant is not successful, the site will either be used for another shop, might be re-developed for residential purposes (although it isn't immediately apparent that this is the highest and best use) or may be vacant for some time – if indeed it is uneconomical for a business use other than that planned by the applicant.

In addressing the criterion which the board must decide upon "that the grant of the application must be in the best interests of the community – s 24A(1) of the Act" – the applicant stated his business would:

- Provide needed and presently absent convenience, range and competition to the West Hobart area, for consumers, in terms of price and range, and return of profits to the community;
- The operation will benefit business and employment in construction and operation;
- RSA will be observed, so it will be a safe place for liquor to be purchased;
- A safe, easily accessible, well lit and non- hotel environment will particularly benefit women shoppers, who have expressed a desire for such premises;
- Superior range of product;
- Benefit to visitors to the locality;
- Improvement on accessibility, choice, competition, convenience and safety to shoppers in West Hobart and from surrounding areas.

Law

The relevant law in the *Liquor Licensing Act 1990* is easily accessible at www.thelaw.tas.gov.au and relevant provisions have been summarised in recent decisions of the Board available at www.treasury.tas.gov.au (under 'liquor licensing')– in particular see decisions on refusal and grant of off licence applications. Our principal consideration is to make a decision which in our opinion is in the best interests of the community. This phrase is not defined in the Act. It reflects what has been referred to time and again as the 'broadest discretion' that licensing authorities have had conferred upon them.

Objections

There were no submissions in support of the application. There were hundreds of submissions in opposition to the application. These submissions came from throughout the local community, and were well expressed and clearly defined. Many were replicas, evidencing the same concerns held by many people.

In addition numerous members of the local community attended the hearing: Romeo Venettacci of Arthur Street, Clare Hester of Forrest Rd, Lucia Ikin of Hamilton St, Glenn Francombe of Brisbane St, Jason Atkins of Darvall St, Ben Walker from the Tasmanian Hospitality Association (incorporating the Australian Hotels Association (Tas Branch) and the Restaurant and Caterers' Association), Ken Doughty of Poets Rd, Daria Gomer of Mellifont St, Gerald Kutzner of Mt Stuart Rd, Adam Alnasser of Mellifont St, Carolyn Burrows (with her husband Nick Burrows) of Cato Ave, Geoff Parr of Pine St. Sharon Harrison-Williams of Dalton Ave, Malcolm Grant of Mt Stuart Rd, Norman "Bluey" Watson of Hamilton St, Rob Rumbold from the AA Lord Homes, Paul Turvey of Hamilton St, Jim Anderson of Warwick St, John Carpenter of Corby Ave.

There were also numerous well considered written submissions sent to the Commissioner and forwarded to the Board in accordance with s 23A of the Act. Note that submissions, for automatic consideration, must be made within 14 days after the public notice (in the newspaper or affixed to the site) is published/placed. Some concern was expressed about this tight time frame in the circumstances. Suffice to say that as the matter progressed to hearing, equitable opportunity to present submissions was provided. It does however evidence that if a local community wishes to have input to an application, the need to be active, and willing to express themselves to the Commissioner for submission to the Board, and also at the hearing.

Consideration of facts

The objectors were sceptical of the public benefits asserted by the applicant. They were critical of ready availability of liquor in the community, and although in one

breath some would say they were 'satisfied' with the ready availability of liquor, they were not interested in having any more outlets, in particular, of the type promoted by the applicant.

This is as relevant consideration. In the absence of countervailing evidence of some unmet community need, these assertions were particularly persuasive in this instance.

The Board's job is to weigh up the benefits and detriments.

The applicant has the onus of proof. That onus will shift to the objectors when they make positive assertions.

The Board is not bound by the strict rules of evidence. We are able to be informed as we think fit, subject to the over-arching rules of procedural fairness.

We will comment on the components of the objectors' submissions, but state now that the most significant factor in this application has been the overwhelming local community opposition. Although expressed in diverse ways and covering all logical aspects of opposition, the most serious and considered perspective was that the community simply does not want an off licensed liquor premises in the locality.

1. The applicant has not addressed the social harm issues: in the absence of any particular issues, the mere prospect that a licence may lead to harm by the supply to liquor which may be misused is not of itself a justification to refuse the licence. There were not any particular issues raised in the application documents or hearing which evidenced that the community in the locality was particularly vulnerable, or would be adversely affected by the liquor being available from the premises. Indeed, the contrary is probably the case. The community in the locality clearly enunciated that liquor was readily available from any number of licensed premises in West Hobart and North

Hobart, such that assertions this would increase consumption were not easily acceptable.

2. West Hobart could do better than a bottle shop: this is an expression of a local community member which positively reflected the firmly held views of the vast majority of those who lodged objection. They simply do not think that a liquor outlet of the type proposed adds anything of relevance to their residential amenity, and if it provides anything, it will not be something they will miss if it is absent. This is a valid objection.

3. 'Woman not wanting to go into hotels'. Some asserted that this so called advantage of the stand alone bottle shop was an exaggerated position, and that nevertheless anyone, male or female, who didn't wish to cross the front door of an hotel could easily get liquor supplies in the locality without inconvenience. This is valid and although it may be an issue in some applications, it is not apparently a valid concern for the community in this locality to try to cater for people shy of gaining liquor supplies in available licensed premises.

4. The Principal Activity Test is breached. We do not consider that is the case. On the evidence, the principal activity would be the sale of liquor. This objection is not supported; it is not a valid objection in the circumstances.

5. The area in the locality for buying liquor is North Hobart; it does not also need to be West Hobart. There are enough outlets. Excessive numbers of premises in places where the local residents do not want them is not in the community interest. We agree. This is a valid objection, and must be weighed in the balance with the positive considerations of contribution to economic growth, employment, etc as mentioned elsewhere in these reasons.

6. The premises will increase traffic, especially in sensitive or already over-used difficult traffic areas (Mellifont Street was mentioned in this context). We agree that if successful the business may well draw more traffic. More than likely it will simply deflect traffic already commuting through the area, or

catch people in cars who are already out purchasing other household requisites, rather than lead to a singular and offensive increase in traffic density. We believe that is supported by the traffic study presented. Whilst an issue, it is of marginal relevance in this application as a ground to weigh against the grant.

7. The demographic report creates an unrealistic impression of under-supply of liquor in the neighbourhood. If that is the case, then the Board is not misguided about the availability of liquor in the neighbourhood. We are well aware of available outlets in North Hobart, West Hobart, and for the commuter in the City of Hobart, and major outlets like BWS at South Hobart and the Gasworks at the eastern end of the city.

8. Different suburbs have different demographics: generalising is not to take account of the essential and unique nature of West Hobart. Those who live there do not wish to have another liquor outlet, and see no benefit in having one 'forced upon them' by the applicant, and consenting authorities like the Liquor Licensing Board and Council. This has some validity. The Board's concern is the best interests of the community. That is not necessarily always what the community may express itself, but the expression is of relevance. It is an objective test. It is also not exclusively the relevance of the wants and desires of the people in the local community: the whole community of Tasmania is the proper subject of consideration. That said, however, the wants and desires of the local community are relevant, and are taken into account in the balancing exercise the Board undertakes.

9. The community includes baby pushers and zimmer frames; there are vulnerable people in the community, and alcohol does have an effect by altering the culture of the local community. It does cause individual and family problems. Families and individuals need to work out how to manage alcohol. It is not handled exclusively by 'the law', but by people in their homes. A new outlet will add to the difficulty. This is relevant in a sense, but without objective evidence of particular vulnerability, it is difficult to take the

generalised opposition to a liquor outlet as meaning that the end result of refusing the licence will in fact or even be likely to minimise, reduce, or hold back the harm associated with excessive consumption of alcohol.

10. West Hobart is clean and friendly; a bottle shop would be a blot. Again, a generalised statement without evident objective support.

11. Concern for the residents of the AA Lord Homes (across the road from the proposed licensed premises) being in some cases people who suffer from alcoholism, mobility disability, and may suffer from risks from increased traffic. Although raised in the objection by Mr Rumbold, this aspect was under-developed, and not persuasive. Many communities have bottle shops, and have aged facilities or school facilities nearby. Specific evidence that this premises if licensed will cause harm was not presented. The Board remains sceptical in this matter that the grant of the licence would have the adverse impact feared.

12. The demographic survey should be discounted as it only sampled 1,000 people and once any respondent indicated they did not consume liquor, they were considered not relevant because they did not use liquor. This is relevant, and is taken in the mix as to relevant weight to be given to the EMRS report.

13. Why consider construction costs and fit out: something will be built. Perhaps. In any event the contribution to the economy is a relevant factor, to be taken in with the mix.

14. Any expression of benefit to the tourism industry is over-stated: the area is not a tourism area. We concur, that the area is not notably tourism oriented. The likely users will be local residents, and those in the adjacent suburbs who commute through West Hobart.

15. It may provide some benefit for a few, but we need to show respect for the community as a whole. Indeed, that is the question. What is in the best interests of the community as a whole?

We are aware that the Council as planning authority has not yet considered the matter, and a planning permit has not yet been issued. In recent decisions we have found it necessary to adjourn hearings to await planning decisions, to avoid the Board trying to do what the planning authority should or would do in due course. In this matter, our consideration is the additional impact of a business which sells alcohol in the manner proposed by the applicant. Planning considerations may overlap, issues of amenity (itself a difficult term to define) may be relevant because the business would be a sale of liquor business and because of the likely hours and manner of operation, which may be different from say a pharmacy, doctors' surgery, or cafe, flower shop or fruiterer.

In this instance we do not feel that the amenity issues from a planning perspective are likely to be determinative of the Board's decision.

It is also not a matter where there is evidently a link between the prospective grant of this application and an increase in binge drinking. No evidence to support that proposition was presented.

It is also not a matter where the grant of this licence may lead to an overall lessening of services to the community. The grant of this licence would not, in our opinion, lead in some manner to other licensed premises which already provide a service to the public being redundant and forced to close.

It is also not a matter where the onus is on the objectors. It is simply not the case that generalised assertions are automatically persuasive to force the rejection of a licence application. If that were the case no new licence application would be successful, and the community would be subjected to a liquor, hospitality and

tourism industry which was cast in concrete, not to change in the face of the expression of objection per se.

It is indeed the case that the applicant bears the obligation to prove his or her case; we have addressed that in past decisions:

Club licence, Northern Hockey Association Inc, Launceston, 4th July 1995

Club licence, Geilston Bay Boat Club Inc, Geilston Bay, 6th April 1995

Application by Mr T Robinson for an On-Licence for 7 Despard St, Hobart. Page 3

And, from the decision of the Board in *Woolworths: Kingston Off Licence, July 2005:*

> 55 The onus is on the Applicant to put forward a credible case.
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> 56 The Applicant must establish a prima facie case. One scintilla is not enough but slight evidence adduced may be regarded as sufficient proof in the absence of an explanation or rebuttal by the opponent.
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> 57 These are not court proceedings. They are administrative. The Board is taken to be a specialist tribunal with a background in the matters presented before it.
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> 58 The proponent of an issue discharges the evidential burden by adducing prima facie evidence which may shift to the opponent, once the Applicant has so adduced that prima facie evidence. As a matter of common prudence the opponent should adduce some evidence to prove the matter to the contrary or throw its existence into doubt. This may be achieved by adducing evidence or by cross examination *(Halsbury 195-360).*
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> 59 The Board also has a significant discretion or duty imposed on it to make a decision which, in the opinion of the Board, is in the best interests of the community.
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> 60 Hence, in past decisions, the Board has stated that if an objection is to be successful the objector may need to provide evidence in support. The Applicant's case may in some instances be readily accepted as having met the prima facie standard and the absence of evidence supporting the objection be crucial to the decision. This is not to detract from the burden principally lying with the Applicant.

61 We have taken evidentiary principles into account and weigh all the evidence to reach a conclusion regarding the matters in issue.

An analogous application to the present in the respect that notwithstanding potential benefit to some in the local community, but where local objection was so overwhelming, is the decision in *Off-Licence by Adolphus Champion for premises Main Road, Wilmot, Tasmania 17th October 1995.* That licence application was refused predominantly based on absence of desire for the service in the locality.

We are concerned not to limit consideration to the 'community in the locality', we are aware that we are to take account of the whole community. The language of the Act provision is not precise about the meaning of the word 'community'. Some guidance can be obtained from the common knowledge of the meaning of the word, dictionary meaning, and court determinations.

We think 'community interest' is also closely aligned with 'public interest'. In *Harburg Investments Pty Ltd v Mackenroth [2005] QCA 243* the Queensland Court of Appeal considered that when referring to the "public interest", the determining authority (in that instance, the Minister) was authorised to 'exercise a discretionary value judgment by reference to factual matters, confined only in so far as the subject matter and the scope and purpose of the Act enabled given reasons to be pronounced definitely extraneous to any objects the legislature could have had in view.' (citing *O'Sullivan v Farrer (1989) 168 CLR 201 at 216).*

The Court considered that those matters included the strength of local community opposition to the proposed licences, irrespective of the cogency of their reasons for objecting to it.

We do not consider we should take account of the strong local community opposition *irrespective* of the cogency of the reasons, but in the instant case, and

under the legislation we are obliged to determine the issue taking account of that opposition, and the cogency of the reasons behind them.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 40 is authority for the proposition that the 'likely reaction of the community to the action proposed' is encompassed in relevant factors for consideration in making a discretionary judgment.

"Community" may mean those living and working in the locality, or may mean the broader Tasmanian community. It means, we think, in the context of the present legislation, a composite of both. Neither should, when relevant to the issue, be ignored.

The general community has an interest in seeing the orderly development of liquor facilities, and the control of grant, suspension and cancellation of licences. The wishes of the local community ought not to be determinative, necessarily, but will most likely be relevant.

The current legislation was amended in recent years, and the then s 216 criteria replaced with the current 'best interests of the community' criterion. Section 216 was considered in *R v Kimber, Morris & Voss; ex parte Tsinoglou [1997] TASSC4* and at para 14 Crawford J (as he then was) noted the previous legislative formula which required the Board to take account of the legitimate interests and concerns of any section of the community, but that the Board shall have greater regard for the legitimate interests and concerns of the community as a whole'.

The present formula is not so specific; but we believe the net result is that we are still obliged to take account of the local and the general community, where relevant.

Unlike legislation in some other jurisdictions, there is little guidance as to the objects and aims of the *Liquor Licensing Act 1990.* It is not necessary to be prescriptive for the Board to know what is to be taken into account. Guidance can be had as to the

broad and possibly changing factors of relevant by considering provisions in other legislation.

By reference to the Victorian Act, we think relevant purposes to be taken into account include:

- Contributing to minimising harm arising from the misuse and abuse of alcohol, including by:
    - Providing adequate controls over the supply and consumption of liquor; and
    - Ensuring as far as practicable that the supply of liquor contributes to, and does not detract from the amenity of community life; and
    - Restricting the supply of certain other alcoholic products; and
    - Encouraging a culture of responsible consumption of alcohol and reducing risky drinking of alcohol and its impact on the community; and
- To facilitate the development of a diversity of licensed facilities reflecting community expectations; and
- To contribute to the responsible development of the liquor and licensed hospitality industries.

What is 'amenity'? Again guidance can be gleaned from the Victorian legislation, which is by analogy relevant to our considerations:

Amenity of an area is the quality that the area has of being pleasant and agreeable. Factors that may be taken into account in determining whether the grant of a licence would detract form or be detrimental to the amenity of an area include:

(a) The presence or absence of parking facilities;

(b) Traffic movement and density;

(c) Noise levels;

(d) The possibility of nuisance or vandalism;

(e) The harmony and coherence of the environment.

The *Oxford English Dictionary, 2nd Edition, 1989* includes a number of definitions of amenity, including: "*pleasant, quality of being pleasant or agreeable – of places, their situation, aspect and climate."*

How do we apply the facts to these as relevant sub-components to the principal criterion that we must make a decision which we consider to be 'in the best interests of the community', in this matter?

As discussed above, when deliberating on the evidence and submissions, we consider that the onus is on the applicant to persuade us that the grant of the application meets the principal criterion. He has brought in useful evidence to discount the problems associated with traffic caused by this potential commercial activity. He has described a facility which will to a large degree be innocuous. It is not likely, on the evidence, to be the immediate cause of harm. *'The harm minimisation factor as an object to be taken into account by the Board cannot be relied upon in a general sense only to defeat any application for a liquor licence. If this were so it may well be arguable that few licences of any description, other than for the consumption of alcohol in cafes and restaurants should ever be granted in the future.'* (adopted from *Lula Evangeline Black v Liquor Licensing Victoria* [1999] VCAT 66874 at page 14).

We do not accept that all the fears of the objectors, although genuinely held, can be borne out. We have commented on them above. There is no specific evidence that the premises, which we can assume will be well run, will give rise to abuse or misuse of alcohol.

However, it is abundantly clear that in this instance the local community does not want a liquor outlet of the nature offered by the applicant at the site. They will find such a business, or an additional business of that type, to be out of harmony with their expectation of the development of their community.

Like the matter of *Papas et al v Director of Liquor Licensing* [2008] VCAT 1944, the residents are concerned that the proposal will be intrusive and unwelcome, and unnecessary for their needs. Unlike the tribunal in that matter, we find that the overwhelming opposition from the neighbourhood, the universal expression of that before the Board in every submission, and in each person who presented at the hearing (except, obviously, for the applicant and his counsel) does, on weighing the factors in favour with those in opposition, dictate that the community desire as expressed should require that the licence application be rejected.

To do otherwise would be to seriously undermine the relevance of a local community's universal expression of discontent with 'an unnecessary liquor outlet'. We do not consider the legislation compels the Board to direct the grant of a licence over such universal expression of desire against it.

We direct the Commissioner to refuse the licence application.

PA Kimber; Chairman. K Sarten; Member. D Logie; Member.

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