

Licensing Board of Tasmania

In the Matter of the Liquor and Accommodation Act 1990
(as amended to October 2003)

and in the matter of an application for an off-licence
by **David Cush** for “**The Barrell**”, 10 Franklin Street, Swansea.

DECISION

The Board heard this matter at Swansea on the 30th September 2003.

THE LAW

This is an application under s9 of the Act, as recently amended. Relevant provisions include:

Liquor not to be sold except as authorized

5. A person shall not sell liquor except as authorized by –

- (a) a liquor licence; or
- (b) a liquor permit; or
- (c) a general liquor exemption.

Types of liquor licences and permits

6. The Commissioner may grant –

- (a) the following liquor licences:
 - (i) a general licence;
 - (ii) an on-licence;
 - (iii) an off-licence;
 - (iv) a club licence;
 - (v) a special licence;

Off-licence

9. [Section 9 Substituted by No. 40 of 2003, s. 6, Applied:01 Aug 2003] An off-licence authorizes the sale of liquor between 5 a.m. and midnight, on any day on the premises specified in the licence, for consumption off those premises.

23A. [Section 23A Inserted by No. 9 of 2002, s. 11, Applied:15 Sep 2003] (1) A person may make a written representation to the Commissioner in respect of an application for a liquor licence.

Requirements for licence

24A. [Section 24A Inserted by No. 40 of 2003, s. 8, Applied:15 Sep 2003] (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.

Hearings by Board

213. (1) [Section 213 Subsection (1) substituted by No. 9 of 2002, s. 23, Applied: 15 Sep 2003] The Board is to –

- (a) fix a time and place for a hearing in respect of an application or appeal; and
- (b) inform the Commissioner, the applicant or appellant and any person who made a representation in respect of the application or appeal accordingly; and
- (c) provide the applicant or appellant with a copy of any representation.

(2) At a hearing the Board –

- (a) shall decide the procedure to be followed; and
- (b) shall give the applicant or appellant, as the case may be, the opportunity to be heard; and
- (c) may receive evidence orally or in writing; and
- (d) may take evidence on oath or affirmation; and
- (e) is not bound by rules of evidence but may inform itself in such manner as it thinks most appropriate; and
- (f) shall observe the rules of natural justice in so far as they are applicable.

New regulations (Liquor and Accommodation Regulations 2003 (S.R. 2003, No. 96)) were promulgated at the same time the recent Act changes were made, but there are no specific regulations which impact on applications for an off-licence.

Before these changes, the considerations to be taken into account on such an application as the present one, were set out in the Act and in Guidelines. The Guidelines set out the policy the Board would take into account generally in determining whether or not to grant a licence. The fundamental Act provision was to the effect that the Board must make a decision which would best aid and promote the economic and social growth of Tasmania by encouraging and facilitating the orderly development of the hospitality industry in the State. That provision is repealed.

The present position is, with regard to the present application:

- 1 The Applicant must have a licence to sell liquor as proposed.
- 2 The Commissioner, on direction of the Board, may grant the off-licence.
- 3 The Act limits the hours of trading (s9).
- 4 People may make written representations to the Commissioner in respect of an the application (which has been done) and the Commissioner must refer those representations to the Board.
- 5 The Board must consider the application, and must make a decision which, in the Board's opinion, is *in the best interests of the community*.
- 6 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.
- 7 The Board hears the application (s213) and directs the Commissioner to grant the licence, or to refuse the application (s214).

There is no guidance in the Act or regulations as to the criteria to be taken into account by the Board in attempting to make a decision which is in the best interests of the community (s24A).

The Board is bound by the principles of natural justice in its administrative decision-making. We are therefore bound to take into account relevant matters.

We conclude that s24A provides a wide discretion whether or not to direct the grant of a licence. Matters which were relevant under the Act prior to the recent amendments and now rescinded Guidelines will generally continue to be relevant matters.

We take into account the written material submitted by the Applicant and by those people who made representations. We take into account the evidence advanced at the hearing and the submissions made by the Applicant and those people who made representations.

We summarise that material and our findings on any material question of fact:

THE APPLICATION

First, we are satisfied that the principal activity to be carried on at the premises will be the sale of liquor. That is the evidence from Mr Cush, and it was not contradicted. S.24A(2) is satisfied.

The Applicant submitted that there was a need for a dedicated bottle shop in the local community, as none of the existing licensed premises (clubs or on-licensed or general licensed premises) had a principal focus of providing for the take-away liquor market.

He asserted that a professionally managed bottle shop would fill a gaping hole in the local market, and also provide tourists with a convenient clean pleasant and friendly establishment in which to purchase liquor.

The premises are to undergo refurbishment, but to retain the present heritage character. What is currently used for storage would become available for a business, in the main street of Swansea, within the main shopping precinct.

The premises would not be large; 10m x 3m display. It is intended that liquor only be sold for off premises consumption, except for tastings.

There was some flexibility expressed in the likely opening hours, given the general perception given by all witnesses that Swansea (locals and tourists) does not have a strong market in the winter months.

The Applicant seeks to provide a full range of liquor, and also a substantial focus on local winery product.

OBJECTIONS/REPRESENTATIONS

The objectors were Mrs and Mr Burbury from the Bark Mill (premises benefiting from a licence to sell Tasmanian wines as an adjunct to provision of hospitality or tourist goods and services), and Mrs Woolnough and Nathaniel Marshall from the Swan Inn.

Mr Lyne from Spring Vale Vineyard appeared in support of the application.

Mrs Burbury was evidently concerned that the business intended to be run by the Applicant would adversely impact on the profitability of her family business at the Bark Mill.

That objection is answered by the licensing structure. Special licences such as the one held by Mrs Burbury are intended to be an adjunct to another principal purpose of providing tourist or hospitality goods and services. The sale of liquor should not be predominant. If it is, the holder is breaking the terms of the grant of the licence, and is likely to be subject to application for cancellation of the licence.

The licensee of the Swan Inn, Kerry Darby (not present) lodged a letter of objection. At the hearing it was evident that the motivation for objection was the likely impact on the profitability of his business. The objection was expressed in terms of concern about the absence of a need for a liquor outlet. Mr Darby has a general licence. He has no bottle shop. It was evident from the evidence of his employee, Mrs Woolnough, that should a customer wish to look at the bottles or labels of one or more of the number of wine bottles available at the Swan Inn, they would have to ask the bar attendant to get the bottle, and it would be some degree of trouble to do so on a repetitious basis. That, however, would be the very service intended to be offered by the Applicant. Clearly there is an uncatered for service.

That there may be a small community, and an existing hotel, and two or more motels, and three or so clubs, and a business selling predominantly tourism and hospitality goods, is not, in our view in this instance, a justification for concluding that it is not in the best interests of the community for this application to be positively considered.

There was no evidence of potential harm due to adverse impact from liquor consumption arising due to the grant of the present application. There was no one, other than what might be termed trade objectors in opposition and advocating that the community would be adversely affected.

Mr Marshall from the Swan Inn indicated he had recently been contracted by Mr Darby to assist in improving the service at the Swan Inn. His evidence was that when in Daylesford in Victoria, and there was a large increase in the number of licensed premises (the evidence was not clear, but we presume he meant restaurant premises) that a 'pie' was cut into smaller pieces, and all businesses suffered.

He gave evidence that "we are looking at fixing the bottle shop problems". That indicates that a real impetus is arising from the present application: and out of that there should be better service to customers. The holding of a general licence does not have attached to it the sole preserve of certain liquor sales. Others are entitled to apply

for licences and to enter the market. The crucial question remains that set out in s 24A of the Act (see above).

Criticism was made of the intended core hours of Mr Cush's business: 10am to 8pm 7 days per week in the busy months, and 12 noon to 5pm or 6pm in the winter months. There was indication that the hours might be reduced if demand was not adequate.

That is a reasonable prospect in opening a new business. It might fail, or it might need some attention and restructuring, but generally the Board is left with the perception that the public will be better served, without there being any significant prospect of adverse impact to the community.

CONCLUSIONS

The only objectors to this application were those in the business of selling liquor nearby. There was no community objection on the basis of a perception of the potential for harm arising from liquor abuse.

The specially licensed premises at the Bark Mill should have a principal purpose other than sale of liquor, and to object on the basis of an anti-competitive perspective ignores the reality that the licensing regime is not there to prevent entry into the market. The recent National Competition Policy review of the Act, and consequent changes to Act and regulations maintain a discretion in the Board to make a decision in the best interests of the community. We continue to be of the view, as expressed in decisions prior to the amendments, that the best interests of the community as a whole are rarely served by a licensing regime preventing new entrants to business; whether that be sale of liquor or otherwise.

The objectors associated with the Swan Inn had no hard evidence to support the generalist assertions that business for them would be more difficult if an off-licence was granted in Swansea. Indeed, whilst that is the negative side of the coin for them, the positive side is that with new services, there is often a greater impetus for visitors to stop and stay in a town, and for local to buy product in the town (rather than elsewhere). Increased services often comes with increased competition, and whilst there is often a benefit to the consumer, there is also often a benefit to the local community in the provision of a broader range of services, and a benefit to the whole Tasmanian community by a focus on providing better and more relevant services, stimulating demand and returns.

The Board is of the opinion that we would be acting in the best interests of the community, local and generally, to direct the grant of this licence.

We direct the grant of the licence.

Dated: 15th October 2003.

Phillip Kimber, Chairman. William Morris, Member. Louise Finney, Member.
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