Licensing Board of Tasmania

In the Matter of the Liquor and Accommodation Act 1990

And in the matter of an application by way of an appeal
Against a decision of the Commissioner for Licensing
Refusing authority to sell beer in hamper containers.

In the matter of an application by Suzanne Manley
regarding "Totally Tasmanian".

DECISION

The board heard this matter at Hobart on the 5th March 2003.

The Commissioner decided against authorising sale of beer in the context of an application for a special permit. In his reasons, he stated that consideration was given to the application on the grounds similar to those set out in guideline 5.7 (Tasmanian and Local Wine). The Commissioner stated that whilst that clause refers to the granting by the Board of a liquor licence, he has historically applied the same criteria when considering permit applications.

The application for the permit was granted to the extent of permitting the sale of Tasmanian wine in the hampers.

In view of the long standing nature of the Tasmanian wines guideline, and the absence of any equivalent permitting sale of beer in hampers, the board directed that the appeal be advertised.

The Australian Hotels Association (Tas Branch) then indicated a desire to attend the hearing of the appeal; stating that they did not intend to object outright, but would reserve their position until further information about the appeal was revealed.

The implication clear from this submission was that some component of limited and special beer in hampers might not attract objection, if the component had some analogy to the special treatment given to Tasmanian wines.

The hearing of an appeal from the Commissioner is an appeal de novo, and the board makes its own decision on the basis of evidence before it at the hearing.

The appellant's case was that she wished to have the option of adding beer to her hampers to promote beer for the producer, and to promote "good Tasmanian beer". She indicated an intention to promote her product throughout Australia and overseas, and that adding Cascade, Boags or Hazards Ale or a 'boutique beer' would be appealing.

The indication was that the business was going to be on a small scale, and unlikely to have any significant social or economic impact, in terms of s216 of the Act.

At the hearing not much more was added by the appellant. Mrs Manley gave evidence. She did not call evidence from anyone else. No submissions were made regarding the public interest in departing from the guidelines (s17 of the Act).

Some indication of the possibility of using Hazards Ale was advanced, but no evidence of the nature of this beer, how and where it is made, or ownership of the brewery was forthcoming. Equally, an indication that, if favourable, Cascade or Boags might be used, left the board with the view that the appellant's plans were imprecise, and beer from an international brewer was as likely to be used as beer from a local small scale brewer.

No quantities or proportions of content in the hampers (alcohol viz a viz other content) were advised. Although the intended content of all hampers was stated, the likely set up of any particular hamper or class of hamper was not stated. How the product was to be marketed was not clear. Apparently '2 beers' would be the likely content, and we gather that would be cans or small bottles. Other content would include chocolates, fudges, jams, sauces, pickles, olives, cheese, short breads, meringue, liqueur chocolate – all either in jars or tins, not fresh.

The appellant, in anticipation of the AHA objection, indicated that her business was not likely to be in competition with hotels. The Board indicated that was not the concern of the Board, but rather obedience to the Act and Guidelines, or a public interest in departing from the guidelines. Also, if it was in the interests of the community for the licence to be granted (and as to which, the onus lay on the appellant to prove) then financial impact on existing licensed operators was not likely to be relevant.

The appellant indicated that she felt the hearing was 'sprung' on her. The hearing had been adjourned twice, and the appeal was lodged in November 2002. The appellant had plenty of time to prepare her evidence. She was offered an adjournment on the day of hearing, but declined.

The appellant's intended business has the capacity to be socially and economically advantageous to her, and to the people who make the goods she will include in her hampers.

That was the extent of the evidence and submissions in favour of the appeal.

The AHA, by Ms Jeschke, submitted that the guidelines, 9.1 permit relates to a specific occasion, not an ongoing use. We disagreed with that submission. The special permit category is a broad based permit.

Ms Jeschke submitted that it was not in the interests of the community to permit sale of beer in conjunction with hampers, in that it would extend the historical position which beer has held in distribution from established hospitality or tourism ventures. She submitted that if beer was to be sold for off premises consumption, then the off-licence conditions should be met – which clearly could not be met in the current appeal/application. Refer to *Davies Grand Central Station* decision where the board refused authority under a special licence for sale of beer.

The Tasmanian wines special licence category does not easily mould to beer. On the evidence there was little to indicate any support for a fledgling Tasmanian business; there was no evidence from any producer of the desire or need for special treatment. There is clearly no evidence of a need for the multinational conglomerates that control Cascade and Boags to have the same treatment as Tasmanian wine producers in the distribution via hampers.

The ramifications of extending the guidelines to permit this may be miniscule in one application, but might have flow on effects, which could not be justified.

We would need significantly more evidence of the nature of the application, and submissions on the impact to normal distribution methods, or further information suggesting limiting the permit terms to draw an analogy with the Tasmanian wines guideline before we could extend the ambit of this special permit/licence category.

The assertion by the appellant that the AHA submissions were narrow minded ignores the onus of proof. The application could well have been supported by evidence, and proposed in regard to analogous situation to those applying to Tasmanian wines. It was not, and the Appellant did not suggest such limitations. It is not for the Board to frame licence or permit terms in the first instance, it is for the applicant to clearly state the nature and ambit of their business, in conjunction with the sale of liquor, so the Board can apply the Act and guidelines.

In many instances the Board has indicated the need for thorough presentation of intentions with cogent and persuasive evidence. There are a number of decisions indicating that the Tasmanian wines special licence is a special category, not lightly to be extended:
Oast House: sale of beer in the context of an historic building especially linked to the history of growing and curing hops to make beer: authority to sell beer under a special licence granted
Hillwood: not sufficient evidence to justify grant of a special licence
Davies Grand Central (1 and 2): beer to be sold in conjunction with a special licence: refused.[i]
Penny Royal Souvenir Shop
Hong Kong Diner (part of decision set out below in extract from Davies Grand Central)
Wursthaus Launceston: sale of beer refused, subject to further evidence, no further evidence provided.

In conclusion the board determines this application by confirming the Commissioner's decision, not to permit sale of beer in conjunction with the intended hampers, as a component of the special permit application. At this stage we believe the appropriate way to deal with the special permit application is to treat it as analogous to the special licence category, and as there is a component of that permitting sale of Tasmanian wines (for reasons we have concluded above) there is insufficient evidence to support extending that or establishing a new category for beer per se. The general provision for an off-licence should be taken into account, and if that were to apply in this instance, there is insufficient evidence to indicate an off-licence should be granted.

Dated: 10th March 2003.

P Kimber, Presiding Member

W Morris, Member

L Finney, Member

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[i] *Extract from "Davies Grand Central Station decision":*

TASMANIAN WINES AND BEER

This second component is joined. The Board considered splitting it into two components, but the application appears to us to be together, and there was no request to sever the wine component from the beer component.

The purpose of the Tasmanian Wines guideline, in context of s216, is to promote the Tasmanian wine industry in suitable settings in the State where other Tasmanian products or services of a tourist or hospitality nature are available. Some places are evidently suitable: for example, the "Naturally Tasmanian" Shop, Salamanca Place, Hobart. Some places, whilst providing goods and services, which might or will certainly be used by tourists, are not of their nature specialist providores, and hence do not meet the intention of this guideline. Lipscombe Larder (supra) meets that criteria.

The present premises might be considered to meet the criteria, but there are two objections to that:

- *it is more of a general store and provides general goods and services, rather than having that 'specialist' component which has generally characterized the applications under guideline 5.7 (although this must be tempered by the reality that its deli section has a lot of gourmet take home and ready to cook meals, of a standard that no other premises in Launceston has reached.*
- *it is linked, in any event, to the sale of Tasmanian beer. There has not been any recognition in the Act or the Guidelines that the Tasmanian beer industry (either in the production or the consumption) requires special treatment in the same way that the Tasmanian wine industry has been treated in the guidelines.*

The Board has concluded that there is no part of the application or component of the evidence which justifies a decision to extend in this case (which would have general ramifications) the sale of liquor in the nature of beer from 11 convenience stores/petrol stations/delicatessens or combinations of such premises, or like premises.

The Board's decision in Hong Kong Diner (22nd July 1999) is apposite: [extracts]"

The framework of the Liquor and Accommodation Act 1990 is to provide for particular licence categories: for example the on-licence, general licence, and off-licence categories.

The latter, off-licence, is covered by a particular requirement that no less than 9 litres be sold. Whilst this restriction has been criticised in the National press in recent times, it remains the law.

The guidelines should not be employed to subvert the overall intention of the Act. They should be interpreted in a manner to support the s216 criteria, and the licence structure.

The exception established by guideline 5.7, whereby off sales is authorised in single bottles sale, is not intended to be an indirect method of avoiding the restrictions imposed by s9 of the Act. It is a special licence category, designed to assist in the economic and social development of Tasmanian industry and provision of tourist services.

Should guideline 5.7 be used to enable a restaurant to sell single bottle sales of Tasmanian wine, the structure of the s9 limitation would be subverted, and the criteria in s216 of facilitating the orderly development of the hospitality industry would not thereby be pursued.

Whilst a 'floodgates' argument is not attractive, the reality is that if the Hong Kong Restaurant were to be permitted to sell single bottles of wine for consumption off the premises, there would be no justification for refusing that authority to almost every restaurant. That would not be consistent with the apparent intent of the licence structure around s9 of the Act, nor (unless there was substantial additional evidence in support of the proposition) in accordance with the obligations of the Board stated in s216.

It may be that the proprietors of the Hong Kong Restaurant are asked from time to time, by tourists, for single (or more) bottles of Tasmanian wine, for off premises consumption. This does not thereby justify direction for a grant of such a licence authority.

The evidence was to the effect that local hotels do provide a wide range of Tasmanian wines (particularly the Valern Hotel), so there is no justification in going outside the existing guidelines, as an exception, to cater for an otherwise unsatisfied demand.

The Board is entitled to deviate from its own guidelines where it is in the public interest to do so. In this case it is not demonstrated that the public interest would be served by, in effect, creating a new special licence sub-category authorising restaurants to sell Tasmanian wine for consumption off the premises.

Perhaps that day will come, when (and if) the liquor sale industry is more deregulated than it is at present. The Board however is guided by the objects of the Act, the framework of s216, and the guidelines already set down.

In this instance the Board directs the grant of a special licence (restaurant) but directs that the ancillary proposal of authority to sell Tasmanian wine for off premises consumption not be granted.

[end of extract].

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Now, in the present context, the issue is sale of beer in petrol stations etc, not sale of Tasmanian wine in restaurants. By application of the same logic, we determine that there is no case made out for the sale of Tasmanian beer (however that may be defined – on the basis of evidence before us) from Davies Grand Central Station, predominantly a petrol station, convenience store, delicatessen, and restaurant.

This leaves the question of Tasmanian wines. We have found that the application as put forward intertwined the beer and wine issue as one. We find it difficult to separate them, and indeed, whether the application permits a severance on that issue. It may be unfair to the objectors to do so, or unfair to the applicant, in that they might have lead more evidence on that ground alone, or put forward their application quite differently in the event that the only issue to be considered was the Tasmanian wines issue.

On that basis we are unable to determine to direct the grant of the Tasmanian wines component of the application, given procedural fairness issues. We feel those issues would best be cured by a fresh application on that ground alone, if the applicant wishes to proceed with that component. To that extent we determine the application by refusing the application. Of course, the applicant may apply again, reframing the application more along the lines of the traditional Tasmanian wines type of application. Whether their intentions and the manner and style of their business would meet the criteria and satisfy the Board in regard to its overall discretion would be the issue in such further application.

CONCLUSION

In conclusion, in taking account of the interests and concerns of the community, in the context of the meaning and intent of s216 of the Act, and the licence structure in the early sections of the Act, the Board has:

- *Taken account of representations made in the course of the hearing;*

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- *Taken regard to the extent to which businesses carried on under licences and permits in the area to which each application relates are satisfying the need intended to be satisfied by the applicant (in this regard, we feel there is adequate service provided by such other businesses, such that the grant of the application(s) is not appropriate in the Board's discretion);*

Determined whether the grant(s) are likely to have an adverse effect on the interests of the community as a whole and also the interests of the community in the area (in this regard we do not feel the grant would have such adverse effect that this criterion is critical to the application). The application so far as a restaurant licence is concerned is accepted and the Board directs the Commissioner to grant a special licence (restaurant). So far as concerns the application to sell Tasmanian beer and wine, that component is refused. The Board determined that, for the purposes of s25A of the Act, the premises are not a supermarket.
Dated: 11th January 2001