

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

And in the matter of an application by
Kenneth John Davies
for a special licence to permit the sale
of liquor for off premises consumption,
of certain classes of liquor (Italian wine and ‘organic’ wine)
subject to conditions from premises known as
Davies Grand Central Station at 78-96 Wellington Street
Launceston.

Decision: **Davies Grand Central Station Number 4, 2005 (“DGCS4”)**.

Heard before the **Licensing Board** at Launceston on 23rd June 2005
Date of decision: 2nd August 2005.

The Applicant was represented by Mr Ian Duncan of Counsel, and the AHA appeared to support their submissions, represented by Ms Marina Polita of Counsel.

The Applicant gave evidence via a substantial written submission which was put forward on behalf of both Mr and Mrs Davies, and Mrs Davies answered questions on behalf of the Applicant during the hearing.

This application is for a special licence (a licence subject to conditions) which would enable the applicant to sell from his premises known as the Davies Grand Central Station, liquor being Italian wine and ‘organic’ wine, for consumption off the premises. This is in addition to the presently authorised sale of Tasmanian wines and Tasmanian made and brewed beer produced from Tasmanian owned breweries (the details of such beer being as approved by the Board from time to time).

The special licence category is a separate category which permits adhesion of conditions to a licence grant, unlike the other licence categories of general, on, club and off licences, which by implication from the absence of a condition making power, do not carry with them conditions.

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 Mill*”).

In that decision 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.

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 caste

in mandatory terms in the event that the criteria set out are met. But it does not displace the broad discretion remaining under s11 nor under s 24A(1) of the Act.

We therefore conclude we are empowered by the Act to direct the grant of the application.

THE STRUCTURE OF THE ACT:

The Act prohibits sale of liquor without a licence or permit. Licences come in five categories: a general, an on, an off, a club licence, and 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 and the purposes of liquor regulation.

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

Implicit 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 present application meets that concern, head on.

The off-licence category 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 sale of 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 are 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.

The Board has 'bolted on' to this concept minor additions like Tasmanian made and brewed beer made in Tasmanian owned breweries. To us, this is consistent with the policy applicable to Tas wines in the Act and regulations, and is in the best interests of the community.

The concept of selling other limited categories of liquor for off premises consumption is not specifically dealt with by Parliament, save for the special licence category.

EVIDENCE

The assertion in the Applicant's material which would put the application outside of the norm in support of the capacity to sell Italian wine, is the proposal that the Applicant intends to sell regional Italian wines in conjunction with regional Italian gourmet foods, alongside Tasmanian gourmet food, Tasmanian wine, and Tasmanian 'boutique' beer.

What is the stated link between Italian wine and other services? The application asserts the perceived appropriateness that the public should be able to obtain goods by 'one-stop shopping', ours being a 'multi-cultural society' and the public should be able to obtain goods from other cultures as well as local goods. Convenience and choice were highlighted.

The level of association seems to be simply that Italian wine would be available alongside other Italian food produce. The Application is in terms of regional association, but it is apparent from a close reading that the relevant region is "Italy" and the produce is not any further linked apart from it being made in Italy.

The Applicant has extended his provision of Tasmanian wines to now approximately 200 separate lines. He intends to add up to 50 lines of Italian and 'organic' wine.

The evidence is clear and accepted that the Applicant runs a broad based business providing for a large range of products, open 7 days per week, 24 hours per day, and with convenience and professionalism.

The application refers to certification of 'organic' wine under bodies named "The National Association for Sustainable Agriculture Australia Ltd, the Biological Farmers of Australia Co-op Ltd, the Tasmanian Organic-Dynamic Producers Inc the International Federation of Organic Agriculture Movements, the United States Department of Agriculture National Organic Program, and International Certification

Services Inc. We know nothing about these organisations apart from the assertions advanced by the Applicant.

We were informed that certification ensures that products comply with recognised national and international organic production standards, and consumers are then assured that organically produced foods and wines consistently meet uniform standards of organic production.

We must confess being not significantly better informed from that. More detail may have assisted, including some objective data indicating the positioning of this sub-component of the wine industry. Perhaps the clearer statement of what is intended to be provided is at page 4 of 37 of the Application, *that the grapes used to make the wine are grown in a sustainable manner that excludes chemical fertilisers, synthetic pesticides, and herbicides*. Although even “sustainable manner” tends to be a modern buzzword without clear meaning.

That there are consumers who specifically seek out such wine product we can readily imagine. We understand that there is not a significant range of Tasmanian wines that fit that definition (of ‘organic wines’), and that mainstream vendors of liquor do not specialise in or provide a significant range of wine in that category.

This component of the application is separate and distinct from the Italian wines component.

REPRESENTATIONS

Although the application was signposted and advertised, there were no representations other than the Australian Hotels Association (Tas Branch). The AHA submission maintains that the special licence category in this type of application is intended to support the Tasmanian wine industry, and not for sale of other types of wine in an off-licence premises context, without application of the criteria and limitations applicable to the off-licence category (especially, the s 24A(2) principal activity criterion).

DECISION

The Applicant’s premises have been described in three prior decisions. They are substantially the same as there described. The premises provide a substantial multi-purpose business; convenience store, a large driveway and petrol vending business, a café, a delicatessen, and the sale of Tasmanian wine. Presently approximately 200 lines of Tasmanian wine are available in designated and limited areas of the store.

The Board directed the grant of authority to sell Tasmanian wine (decision: 4th April 2001 – “DSGC 2”) on the basis that the business conducted there provides hospitality and tourist goods and services, and that selling Tasmanian wine was not likely to have a detrimental effect on that activity. There was specific evidence from the Tasmanian wine industry at the prior matter indicating the perceived benefit of enabling greater availability of Tasmanian wine within Tasmania.

The licence held was extended on a 3rd application determined 16th July 2003 (DSGC 3), to confer the same capacity to sell for off premises consumption regarding

Tasmanian wines spirits and liqueurs, Tasmanian made and brewed beer produced from Tasmanian owned breweries (as such breweries are approved by the Board from time to time). The parallel between supporting Tasmanian grape producers and wine makers in enabling their product to be more widely available in Tasmania extends logically in regard to fledgling or small producers of Tasmanian beer. Of course there is no industry support required for the sale of mass produced beer from large manufacturers well established within the industry. They can distribute through the established distribution network.

What is the position regarding Italian wine and 'organic' wine? We deal with Italian wine first. Clearly this does not need support in the same way as Tasmanian wine. It does not add value to the tourism experiences in Tasmania in the same way. The rationale for supporting Tasmanian wine is the cross benefit of making the wine available, enabling tourists and locals to get the wine broadly and conveniently, outside (and within) the established network, and thereby improving the experience people have within Tasmania as a uniquely Tasmanian experience. In addition, the range of Italian wine must be quite large. Italy has an extensive industry and culture in wine making and consumption.

A number of decisions impact each way on the present application in this regard:

- *Balfour Street Deli: 16th July 2003*: application to sell wine described by the applicant as “premium and imported wine” from a delicatessen: refused. Reasoning: if a large category of liquor should be available from delicatessens, then the off licence category would not have the effective and specific limitation of enabling sale from premises dedicated to the sale of liquor. That is, that the licence structure would be subverted.
- *Bladerunner City: 15th April 2003*: application to sell liquor from a hairdressing salon: refused on the basis that the business was not a recognised category of special licence, the Board was not of the view the categories should be extended to such service businesses, and that there was insufficient evidence of public need.
- *Hong Kong Diner: 22nd July 1999*: application to sell Tasmanian wines from an established restaurant for off premises consumption. Decision: refused on the basis that enabling sale via more general retail businesses would subvert the off-licence structure.
- *South African Shop: 2004*: application to sell South African made wine in conjunction with a shop dedicated to offering for sale South African produce. Application granted on the basis of the synergy between the purpose of the business and the liquor product sought to be sold.
- *Delicacy: 28th January 2005*: application to sell a limited class of liquor (included Tasmanian, French, Italian and German wines): in conjunction with the principal purpose of sale of prepared food, much of which was to be prepared on site with a link between food preparation, dining, wine and food with authentic regional cuisine/produce/wine linkage: application granted on the basis that off sales would be significantly limited, and at the same time, directly linked to food provision. Maximum of 12 red and 12 white labels available.
- *Mill Providore: 1st September 2004*: application to sell a limited class of liquor (including wine from France, Spain and Italy): niche market, high

quality goods and exceptional service to tourist public, minor component of liquor overall as well as in context of other goods offered. Maximum 12 red and 12 white labels at any time. Licence granted.

The Board concludes that the special licence category, in regard to sale of liquor for off premises consumption is generally intended to enable sale of Tasmanian wine or similar produce. There are supply side and demand side reasons for this, which are of benefit socially and economically, particularly in the context of the Tasmanian tourism industry. It helps in making the experience of visiting Tasmania a uniquely Tasmanian experience, without subverting the principal licence structure.

Those exceptions regarding other than Tasmanian liquor product are in relation to unique businesses. They are few in number, they are small in impact, they are in conjunction very deliberately with provision of other product or services with a direct link, often of high, special and unique quality. Those applications which have been granted were not simply about a link between the country of origin of the liquor to be supplied and the packaged or delicatessen food available, but had very direct links and highlights. There were also links between the particular expertise of the Applicants, the other services and intended liquor services in those matters which have been successful.

In this present matter, the Board concludes that the application which would permit a significant number of wine labels (up to 50) in a very visible area of a general retail shop has significantly greater capacity to subvert the intention of the licence category system regarding off-licences than did *Delicacy* or *Mill Providore*. A range of Italian wine in that retail context (especially in conjunction with the large range of Tasmanian wines available), with no necessary link to provision of other services (although the voluntary link to sale of food with some link to the country of origin) could result in the premises becoming effectively an off licence premises in a department store context. Something which the Parliament apparently did not intend and something which we are obliged to conclude is not in the best interests of the Community.

This application falls between the decided matters referred to above, but in the Board's view, falls in the category which should not be granted. It is more akin by analogy, to the *Hong Kong Diner* or *Bladerunner City* matters than *Delicacy* or *Mill Providore*.

The subversion of the licence category system implicit in granting this application, the removal of such applications from the restrictions explicit in s24A for off-licence applications, makes this a matter where it is not in the best interests of the community for the licence to be granted. We agree with the AHA submissions.

Dealing now with 'organic' wine; our conclusion is that the onus of demonstrating that the grant of this special licence component is in the best interests of the community has not been met by the Applicant. We do not see that 'organic' food sales are a major focus of the DGCS. This is not a boutique specialty shop with intended sale as a linked adjunct to that other main purpose. This is very different from a specialty shop. The Applicant is trying to be all things to all people – open

24hrs a day, convenience store, deli, liquor in an extending range of categories. We do not see that as the purpose of the licence structure, the special licence category, or in the best interests of the community, in the context of this application and this business

We direct the Commissioner to refuse the application under s214(1)(a)(ii),

PA Kimber, Chairman.

L Finney, Member.

K Sarten, Member

E:\Liquor Licensing\Board decisions\drafts\Davies GCS 4 final.doc