In the matter of an application for a liquor off licence by Ian Tanner on behalf of **BWS – The Cheaper Liquor Co - Woolworths Ltd** in relation to premises Kingston Town Shopping Centre, Maranoa Road, Kingston

and

In the matter of an application for a liquor off-licence by Ian Tanner on behalf of **BWS – The Cheaper Liquor Co - Woolworths Ltd** in relation to premises Green Point Shopping Centre, Green Point Road, Bridgewater

Before the Licensing Board, Tasmania

Heard at Hobart on 26, 27 and 28 July 2005

Decision dated 16th August 2005

Members of the Board, Phillip Kimber, Chairman
Louise Finney, Member
Kerry Sarten, Member

INTRODUCTION

1 Ian Tanner, an employee of Woolworths Ltd, on behalf of that company trading as BWS – The Cheaper Liquor Co, made application to the Commissioner for Licensing under the Liquor Licensing Act 1990 on 9 May 2005 for an "off-licence" in regard to premises at Kingston Town Shopping Centre, Maranoa Road Kingston and a separate off-licence in regard to premises at Green Point Shopping Centre, Green Point Road, Bridgewater, both in southern Tasmania, in the outer suburbs of the greater Hobart area.

2 Each application was advertised and sign posted and an inspector from the Commissioner's Office, Mr J Anderson, inspected the proposed premises and provided reports to the Board dated 5 July 2005.

3 The Commissioner for Licensing, Mr Coe, advised the Board by letter of 18 July that, in regard to each application, Mr Tanner was qualified to hold a liquor licence in accordance with s. 22 of the Act, and pursuant to s. 24 referred the applications to the Board for hearing.

4 A number of submissions were received from interested parties and the Board convened a public hearing commencing on 26 July 2005.

5 Numerous written submissions were received and read and considered by the Board. The Secretary of the Department of Treasury & Finance, following discussions with the Minister for Finance, the Honourable Mr J Cox wrote to the Board in regard to amendments to the Act in 2003 to state they were motivated by a

desire on the part of the Government to improve the regulatory framework and to remove unnecessary constraints on liquor licensees and to strengthen harm minimisation measures.

6 The Applicant provided written submissions in regard to each application dated 21 June 2005 and 6 May 2005, and during the hearing affirmed the accuracy of a proof of evidence dated 21 June 2005.

7 In regard to the Kingston application submissions against the application were received from the Australian Hotels Association (Tasmanian Branch) (hereafter "AHA"), the Salvation Army, the Alcohol, Tobacco and other Drugs Council of Tasmania ("ATDC"), the Calvin Secondary School/Christian Schools Tasmania, Anglicare Tasmania Inc, the Tasmanian Council of Social Service ("TasCOSS") and the licensees of the Snug Tavern, Carlysle Hotel, Kingston Hotel, Beachside Hotel, Howard's Cygnet Central Hotel and the Grand Hotel (Huonville).

8 Evidence at the hearing regarding the Kingston matter was given by the Applicant and Mr J Bleasel, Chairman of 9/11 Australia Pty Ltd an enterprise which through its nominees (including Mr Bleasel) holds 9 liquor licences in Tasmania.

9 Following receipt of initial submissions and inspection of those submissions by those interested, further written submissions were filed by or on behalf of 9/11 Australia Pty Ltd, the AHA, The Salvation Army, TasCOSS, Christian Schools Tasmania, Anglicare, and ATDC.

10 In regard to the Bridgewater application submissions in support were received from the Applicant (dated 21 June and 6 May 2005), and a proof of evidence was received from the Applicant, to which he asserted the accuracy, dated 21 June 2005. Submissions against the application were received from the AHA, the Salvation Army, ATDC, Anglicare, TasCOSS, the licensee of the Carlisle Hotel and the licensee of the Derwent Tavern.

11 Further written submissions were received from David Clements from ATDC, Anglicare, Gagebrook Community Centre Inc (Helen Manser), Family Support Brighton Municipality (Wendy Stott, Family Support Worker), St Johns Ambulance Service (Cath Burns), Mr Robin Pullen a member of the Bridgewater and Friends Country Music Club, the Salvation Army, TasCOSS (Mr Rowell and Mr D Owen), AHA, and 9/11 Australia Pty Ltd (Mr Bleasel).

PROCESS

12 The Board inspected both intended premises.

13 Each person who submitted written material was invited to attend the public hearing to give evidence, to advance their proposition and to be available to answer questions or to be cross examined.

14 At the hearing Mr Tanner was represented by Mr L Bryant of counsel instructed by Mr M Kellock solicitor of Mallesons Stephen Jaques and Mr J Oakley solicitor of Simmons Wolfhagen.

15 The AHA was represented by Mr S McElwaine of counsel with Ms M Polita.

16 TasCOSS, Anglicare, ATDC and the Salvation Army were represented by Mr I Duncan of Counsel.

17 Mr N Rowcroft appeared, representing the Christian Schools of Tasmania organisation.

17A Mr Bleasel appeared on his own behalf and for the interests of his company.

18 Each application was dealt with separately although by agreement evidence relevant to both applications was received in either one or the other application. In particular, evidence regarding harm minimisation or exacerbation, was received in each application but related to both applications.

PART 1: The Applicant's case regarding Kingston

19 Mr Bryant for the applicant reviewed the submissions on behalf of the Applicant and drew attention to the following points:

- The application is for an off premises licence within a shopping centre where currently no licence is held. If granted the premises would trade under the name "BWS – the Cheaper Liquor Co". The premises would be 201 m2 with a dedicated entrance with automatic sliding doors, in accordance with plans submitted. Ample car parking is provided in the shopping centre car park and the principal activity to be carried on would be the sale of liquor.
- The estimated cost for the construction and fit out of the premises was $400,000.00. The premises comprises a staff office and toilet facilities, a large walk-in cool room, and fixtures and fittings for the display and sale of wines, beers and spirits.
- The numerous other businesses trading in the centre were mentioned including 16 separate businesses one of which is a Woolworths supermarket.
- In pursuit of safe and responsible service of alcohol the Applicant would ensure that the advertising displays and sale of liquor would be at the highest level attainable in accordance with the concept of responsible service of alcohol. All staff employed in the business would undergo extensive responsible service of alcohol training, not only as required by the Liquor Licensing Act, but also in accordance with a highly developed and thorough and extensive training program, arranged and maintained by BWS. A comprehensive folder evidencing the training program was received.
- That the applicant met the requirements of s. 22 of the Act and had been determined by the Commissioner for Licensing to be qualified to hold a liquor licence in accordance with that section.
- Issues relating to quality and diversity in the provision of liquor were referred to including the introduction of new premises, a large product range, favourable pricing to the consumer, availability and continuity of

supply, increased competition in the local market, convenience in provision of the services from a large shopping centre where currently no off licensed premises exist, informed advice, the ability of those who do not wish to frequent hotels to obtain liquor, and the effective utilisation of existing amenities which are presently vacant. Mr Bryant submitted that in the best interests of the community the application should be granted, and directed the Board's attention to the safe and responsible service intended to be provided and the quality and diversity and the provision of liquor sale on the proposed premises. In addition the benefits submitted to be relevant were business and employment prospects within the community due to construction of the proposed licensed premises and employment of staff (stated to be 3 full time staff, 2 part time staff and 8 casual staff).

- The nature of the intended premises and business would not be "in connection with the activities of a supermarket and hence that it would not be a prohibited direction to grant pursuant to s. 25A of the Act."
- The Applicant's submissions included a comprehensive assertion to the effect that he would have effective control of the licensed premises and that, in any event, the Commissioner for Licensing had determined that he would have sufficient effective control to meet that component of the criteria under s. 22 of the Act.

20 Mr Tanner gave evidence. He indicated that the application was not as set out in paragraph 5.2 of the written submission in support of the application to the extent that there was not to be a drive through facility.

21 He was cross examined by Counsel for the AHA. Additional information was elicited:

- That the intended business was in fact to be owned by Woolworths Ltd
- That he was responsible for 220 liquor outlets in Victoria and Tasmania and would continue to reside in Victoria should a direction to grant the licence be made.
- That Woolworths Supermarkets and BWS Liquor stores have cross marketing/promotion activities (for example "shopper dockets" and redeemable customer loyalty "points") which would be used between Woolworths Supermarkets and the intended Kingston BSW Store.
- In re-examination Mr Tanner stated that BWS off licences held in Tasmania at this time were held by other licensees on behalf of Woolworths and that in due course if the application was successful the local manager would seek to have the licence transferred to him/her.

22 In opposition to the application the AHA did not advance any evidence. Mr Duncan's clients did not advance any evidence. Mr Rowcroft gave evidence to the effect that his major point was a practical point that the nearby school suffered litter and broken bottles on the site and that he and others associated with the school were concerned about the possibility of litter increasing should the licence be granted.

23 Mr Bleasel gave evidence. He introduced and spoke to a report he had commissioned which was principally written by his son Dr Martin Bleasel, a person also interested in the 9/11 Group, which relates to a review of published literature in relation to harm associated with liquor consumption and evidence of increase in such harm due to increase in liquor outlet density (the "outlet density" argument).

24 Mr Bleasel was cross examined by Mr Bryant and the following additional information was elicited.

- That Mr Bleasel has commercial interests encompassing 8 liquor licences in Tasmania and that possibly only one of those licences is held by Mr Bleasel as licensee [subsequently the Commissioner advised that Mr Bleasel's companies have interests in 9 licences and he personally holds 3 as licensee].
- That Mr Bleasel's concern was to restrict harm in places where he has family interests (which includes Tasmania).
- That there are other measures recommended to be taken in alcohol control policy to minimise harm other than attention to outlet density.
- That given there are two other premises authorised for off licence sales within a 3 kilometre radius, if the application were granted, that would result in a third such premise (the other two being adjuncts to general licensed premises).
- That there are positives in regard to the application to be considered in the balance with regard to what is in the best interest of the community.
- That there has been a 9.7% increase in population in the Kingston area between 2001 to 2003 and hence it is a "rapidly expanding area".

25 The evidence concluded in regard to the Kingston application and the AHA's Counsel made four substantive submissions

(i) That the applicant will not have effective control (s. 22)
(ii) That by addition of the licence there would be an increase in outlet density which would be contrary to principles of harm minimisation which would therefore make it not be in the best interests of the community to direct the grant (s 24A(1).
(iii) That the Board cannot direct the grant of the licence because it would be in connection with the activities of the supermarket (s. 25A)
(iv) That, in any event, it would not be in the best interests of the community to direct the grant of the licence (s. 24A).

The argument that the applicant would not have "effective control".

26 S. 22(1)(c) of the Act states that a person is not qualified to be granted a liquor licence unless he/she has satisfied the Commissioner that he/she will be able to exercise effective control over the service, and any consumption, of liquor on the premises in respect of which the licence is sought.

27 The evidence was to the effect that Mr Tanner has been and continues to be liquor licensing manager for Woolworths Ltd for Victoria and Tasmania and

responsible for 220 outlets, that he resides in Victoria and he intends only quarterly visits to Tasmania for relatively short periods of time, and thus his personal presence would be infrequent, his large responsibilities would splinter his attention, and that the person who would have effective control would be whomever his employer would decide to appoint as manager.

28 Mr McElwaine submitted that there was an absence of probative evidence that Mr Tanner could exercise effective or actual control in the sense required by s.22 and thus it was not appropriate to direct the grant of the licence.

The Objectors' argument about outlet density generally

29 It was submitted that the addition of one licence in the Kingston locality would be a significant increase in "outlet density" and that reputable studies and evidence submitted established a link between such density and harm associated with alcohol consumption.

30 Other factors associated with availability including price competitiveness and convenience accentuated the impact with increased density.

31 The AHA pointed to the government's perspective evidenced in the second reading speech by the then Minister the Honourable P Lennon stating "strong evidence that increased availability leads to harm".

32 Mr McElwaine pointed to a Woolworths Ltd report to the effect that the totality of liquor sales by the company were intended to increase significantly to lead to higher group profit. He pointed to a perceived absence of any market analysis of community aspects regarding the impact of more licences advanced by the Applicant. He submitted there was a strong focus by the applicant or at least the company which he represents, in high volume low price sales, being contrary to the community interest. He asserted the onus was on the Applicant to introduce evidence that the grant of a licence would not cause social harm.

The argument as to whether the grant would be in connection with the activities of a supermarket

33 The Board must not direct the grant of a liquor licence in connection with the activities of the supermarket.

34 During the hearing and in the written submissions there was much debate, evidence and submissions as to the meaning of each word in that phrase. Naturally the objectors submitted that there were numerous linkages between the Applicant, the desired licence, the intended business, and the activities of Woolworths Ltd as a company running its business which predominantly generates returns out of supermarkets, which meant that s.25A would be triggered in this instance. BWS is not a separate independent entity from Woolworths Ltd. The Applicant is employed by Woolworths Ltd and the business will be owned by Woolworths Ltd. There will be a common employer for all employees in the intended business along with all employees in the Woolworths supermarket nearby and in other Woolworths supermarkets. There would be co-promotion of products through advertising and

catalogues. Liquor and supermarket goods would be advertised together. The financials of each business would be reported by the company together. "Frequent shopper" promotions meant that points earned in purchase from the supermarket business could be redeemed in purchase in the liquor business and vice versa. The lessee of the supermarket in the shopping centre would be the same as the lessee of the BWS site.

35 We were referred to *Burswood Management v AG (1990) 94 ALR 220* as authority for the asserted extreme width of the phrase "in connection with".

The ultimate question: the best interests of the community

36 Counsel for the AHA submitted that this phrase in s. 24A(1) of the Act was imperative. He said that it was not "may be" or "is likely" but was a high threshold test of "is in the best interests of the community". We were referred to *Charlton v Baber [2003] NSW SC 745, (2003) 47 ACSR 31 at 45* to assist in comprehension of the meaning of "best interests" in this phrase (see also paragraphs 52 and 53).

37 We were referred to *R v Kimber, Morris & Voss TSCC 42/1997* where Crawford J in the Supreme Court of Tasmania determined a guideline was ultra vires (since repealed) s 216(2) of the Act because it obliged the Board to consider local circumstances (the community and the neighbourhood) whilst the Board should have (under that s. 216(2)) greater regard to the interests and concerns of the community as a whole. Whilst that component of the decision (paragraph 14) relates to since rescinded and repealed Regulation and Act provision the emphasis remains apposite to the effect that the interest and concerns of the community as a whole are relevant and one can extrapolate to s. 24A(1) that the community to be considered is the community as a whole.

38 The AHA's Counsel submitted that the Applicant had failed to adduce evidence to satisfy the Board that it was "in the best interests of the community" in particular regarding accessibility, social impact, health and safety, and the location relative to other institutions (for example schools) and regarding impact via social harm from misuse of alcohol. He submitted that the relevant Act provision requires that the Board must not direct the grant unless satisfied it is in the best interests, which sets an onus on the applicant. He submitted there is no evidentiary onus on the respondent.

39 The Board was urged to take account of the number of existing licences, the link between density and social harm, that the Board has a broad policy role to determine if it is in the best interests of the community to grant a particular licence, and that it would be contrary to such best interests to allow the proliferation of licences.

40 Mr Duncan on behalf of the community groups he represented submitted the evidence indicated Mr Tanner would not have "effective control" for the purposes of s. 22, that there was evidence of "connection" in terms of s. 25A which dictated that the Board could not direct the grant, and that proliferation of licences would lead to alcohol caused harm which was a counter-veiling factor for consideration by the Board in regard to s. 24A. He noted that the written submissions advanced by his

clients were submissions advanced with no commercial motivation and that their perspective was coming from the community and those involved in dealing with the harm effected by alcohol misuse (amongst other things).

41 Mr Bryant on behalf of the applicant in final submissions on the Kingston matter asserted the following points:

42 He submitted that "effective control" was a matter for the Commissioner under s. 22 which had already been dealt with and the Board had no relevant power and should refuse to consider that submission. He asserted the Commissioner had determined that Mr Tanner would have effective control for the purposes of the Act and that the actual circumstances of intended operation of the site would involve in due course a local manager having the licence transferred to him/her and she/he would certainly have effective control.

43 He submitted that the AHA would without any witnesses yet they were asserting that because of the existing facilities in the area no one else should have a licence. He submitted that if the legislation had been intended to direct the Board not to issue any new licences based on a theory that increased outlet density leads to increased harm then the legislation could have so provided in unambiguous fashion but it does not.

44 He submitted that the objectors invite a conclusion that one more licence will cause chaos yet there was no evidence that the addition of one licence in the past had given rise to such circumstances.

45 He submitted that if s. 25A meant that a liquor licence could not be granted where liquor was to be sold within a supermarket, in a business adjacent to a supermarket or in a business 50 metres from a supermarket then the section had no significance, because it would then not matter what distance from a supermarket BWS ran a business, it could never get a licence, and that could not be the intention of the legislation.

46 Mr Bryant asserted that to put such a wide meaning on s. 25A "supermarket" "connection" by link to a corporate connection, media releases and marketing, would put a legal fence around Tasmania which could not have been intended by the legislation after National Competition Policy review. The Act having been reviewed, assessment made, new legislation proclaimed amending the Act and that s. 25A did not now say that a "company running supermarkets could not also have a liquor licence", meant that the section should have a narrower interpretation than that put forward by the AHA and other objectors. He submitted that the application took account of harm minimisation strategies. He countered assertions that the Minister's second reading speech was a declaration against any increased availability of liquor asserting etc that it included a statement against "significantly increased availability". He asserted one licence could not be considered as significantly increasing availability, in the particular circumstances of this application.

47 Mr Bryant referred us to the exhibit "Amsterdam Group" regarding cultural complexity associated with alcohol consumption and harm reduction strategies and submitted that no one strategy was propounded to remedy alcohol associated harm,

thus suggesting choking supply was only one matter with others in dealing with harm minimisation.

48 He criticised the operator of the Kingston Hotel, Mr R Tabor for not bringing forward evidence and not appearing, not being exposed to cross examination and not providing a proof of evidence. That being the closest hotel with bottle shop facilities to the proposed site.

49 He submitted that the complexity of the situation should not be underestimated and, for example, that high risk consumption should be differentiated regarding bars and hotels on the one hand and off licensed premises on the other.

50 He noted that BWS held existing licences for stores in sites around Tasmania which were held by individuals on behalf of Woolworths.

Reasons for decision: Kingston

51 There was no serious dispute about the facts. It was the implications to be drawn from those facts and the application of the relevant statutory provisions to those facts which lead to the parties, in seeking to support their respective stance, to draw diametrically opposed conclusions.

52 The Board has broad powers and obligations to provide the Applicant with an opportunity to be heard, to receive evidence orally or in writing, is not bound by rules of evidence, but may inform itself in such manner as it thinks most appropriate, but must observe the rules of natural justice (procedural fairness) so far as they are applicable.

53 Although not bound by the rules of evidence the Board is keen, in providing procedural fairness, to take account of relevant material, ignore irrelevant material, and to give appropriate weight to evidence. Thus the rules of evidence provide persuasive guidance in accepting and weighing material presented or taken into account.

54 The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non existence of a fact in issue, having regard to the standard of proof (Halsbury's Laws of Australia paragraph 195-305).

55 The onus is on the Applicant to put forward a credible case.

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.

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.

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).*

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.

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.

CONCLUSIONS: Kingston

Effective Control

62 We have concluded that the issue of the Applicant having effective control for the purposes of s. 22 of the Act is met satisfactorily by the Commissioner having already determined on that matter and that being the province of the Commissioner. If we are wrong about that then in any event we are of the opinion that the Applicant will have sufficient effective control to meet the criterion in s. 22. Clearly the intention is for the Applicant to seek to obtain the liquor licence and once the premises are open for business to arrange for a transfer of the licence to an appropriate on-site manager. Such arrangements are common place particularly with businesses which run more than one outlet. Take for example the 9/11 Group – Bleasel arrangements.

Outlet Density

63 The outlet density argument is problematical and the appropriate treatment for this Board to give to that argument has been of considerable concern. We have concluded after considering all the material put before us that, whilst there is evidence that increases in outlet density increases can, and have been demonstrated in particular circumstances to increase the harm associated with liquor consumption, in this instance our responsibility is to take account of the particular facts and circumstances surrounding this locality, the proposed premises, and the service offered to people in that area from alternate outlets, and the outlet density in that area. This is not to derogate from our obligation clearly enunciated by Crawford J in *R v Kimber, Morris & Voss Tas Sup Court 42/1997* to consider the broader community.

64 We have concluded that in the best interests of the whole community it is of more relevance in this particular application to consider the locality and that the evidence of prospective harm from the grant of the licence purely on the basis of an

argument of increased outlet density is not such as requires us to direct the refusal of the application.

65 If the objectors' argument were to be accepted, that would mean no new licences should be issued and any reduction in licences would be considered a favourable result. That is not the intention of Parliament otherwise a cap or moratorium would have been proposed. There are many circumstances impacting on the harm associated with consumption of alcohol and outlet density is but one factor.

66 The Tasmanian Government's response to the Review Group recommendation set out in the 2004 document "Public Benefit Justification for Retaining Certain Restrictions on Competition in the Liquor & Accommodation Act 1990" at page 6 of the printed document reinforces our view of the Government's stand. That is, that significant increase in outlet density or availability of liquor through retail outlets is not a desirable policy outcome. For that reason the Government did not remove the restriction imposed in s. 25A.

67 The Government states in that document "*in determining whether to issue a licence, the Commissioner and the Board will consider issues such as accessibility, social impact, health and safety, the location of premises relative to other institutions or community facilities, including schools and other places where young people assemble or frequent. Issues of a commercial or economic development nature would be left to the market to determine."*

68 Those issues are to be taken in the balance in regard to their positive and negative attributes and a determination made. A blanket refusal to direct a grant simply because of the fact that it will result in an increase in outlet density is not, in our opinion, intended by the Act or the Government.

69 The World Health Organisation report "Global Status Report: Alcohol Policy 2004" recognises the numerous implements available to manage alcohol control policy. To paraphrase:

> *'Alcohol policy includes policy responses such as alcohol taxation, legislative restrictions on alcohol beverage availability, age restrictions on alcohol beverage purchasing, alcohol education and media information campaigns, measures affecting drinking within specific contexts and measures targeted at specific alcohol related problems like drink driving.*
>
> *Alcohol policy then could be roughly defined as being measures put in place to control the supply and/or affect the demand for alcohol beverages in our population, including education and treatment programs, alcohol control and harm reduction strategies (Babor 2002).*
>
> *Godfrey and Maynard (1995) have classified the wide range of policy options available to reduce the public health burden of alcohol consumption into three main groups: population – based policies, problem directed policies and direct interventions. The first group, or population based policies, are policies aimed at altering levels of alcohol consumption among the population. They*

include policies on taxation, advertising, availability controls including prohibition, rationing and state monopolies, promotion of beverages with low or no alcohol content, regulation of density of outlets, hours and days of sale, drinking locations, and minimum drinking age, health promotion campaigns and school – based education. Such strategies are usually seen as relatively "blunt" instruments, because rather than being directed at only those people with drinking problems, they affect all drinkers. However, it is worth noting that, except for school based education and health promotion campaigns, these are generally the policies where effectiveness has been most clearly demonstrated.

A second group of policies are those aimed at specific alcohol – related problems such as drink driving or alcohol – related offences. These policies are more focused and hence, are less likely to affect the non problem drinker.

The third group of policies involves interventions directed at individual drinkers. These include brief interventions, treatment and rehabilitation programs.'

70 The Board recognises the "blunt" nature of the impact of a moratorium as would result from simply accepting and acting on the pure outlet density argument. That would give less credibility to the wishes and needs of those people without drinking problems and those people wishing to enter into the competitive business of retailing liquor. It would also give less credibility to local issues which, we consider, must always be taken into account.

71 We consider the approach adopted in the recent Victorian Civil and Administrative Tribunal matter in *Stapleton v. Director of Liquor Licensing [2005] VCAT 1296* as appropriate in this instance. At paragraphs 25-29 the Tribunal adopted the view taken in *Black Lula Evangeline & Cooke Brian v Liquor Licensing Victoria and Green Dragon Pty Ltd [2000] VCAT 459* by Kellam J.

72 In the *Evangeline case* the Tribunal said:

"We consider that harm minimisation as an objective of the Act 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 future".

73 In the *Stapleton case* at paragraph 29 M Levine said:
"My view is that this application must be treated in its specific context and that in accordance with Black's case I see nothing that suggests that the Applicant should be otherwise than treated as a person who will comply with the law and not sell alcohol to those who are not entitled to obtain alcohol."

74 The Government itself in the productivity commission submission (above) recognises a balancing aspect and not a prohibition or moratorium perspective.

75 As an example of how the availability argument applies in practice to be

relevant can be gleaned from the treatment of the issue in *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258*, Ipp J. This decision indicates the appropriateness of taking account of harm likely to be caused and weighing or balancing the risk of the harm arising and the level of harm. A weighing and balancing exercise. His Honour at para 22 notes that (in the context of the case and the relevant legislation) that the Licensing Authority may decide that the possibility of harm or ill health is so remote or so insignificant that it should not be taken into account. On the other hand, the possibility of harm or ill health of a particular serious nature will be sufficient to cause the Authority to impose stringent conditions on a licence or refuse the grant absolutely. "The decision in each case will depend on the particular circumstances".

76 The evidence in that matter was directed specifically at the circumstances of the locality. Whilst the general proposition that there is a link between increased outlet density and increased harm was adverted to, it was the evidence of harm likely to arise in the vicinity of the intended licensed premises which was considered to be the issue of principal relevance.

77 We conclude that the outlet density evidence is not persuasive in this matter to require the Board to refuse the licence application as a criterion in consideration of our obligation under s24A of the Act. Population evidence, and the number and set-up of existing licensed premises in the vicinity have been taken into account.

Supermarket ?

78 There were numerous linkages to which we were referred and also a number of rationales as to why the Board should not consider those linkages sufficient to trigger s. 25A of the Act. That the Board must not direct the grant of liquor licence in connection with the activities of a supermarket is clear. What this phrase means is less than clear. In simple cases there will be no difficulty. If Woolworths applied via a nominee for a licence within the confines of an existing supermarket that would trigger the section of the Act.

79 It is apparent that the Government did not intend to prevent any company that runs a supermarket from gaining a new licence otherwise it would, absent any constitutional issues, have stated so in s 25A. In any event the Act does not say that. We consider the section was drafted widely in order to prevent casual circumvention of the specific intention. That specific intention being to prevent supermarkets generally from having as a component of their day to day affairs the sale of liquor.

80 We have reviewed the question of whether the section is triggered in some Board decisions: *Davies Grand Central Station 11 January 2001, Lipscombe Larder 15 December 2000* and the application by Mr Griggs for the *Legana Tavern 21 December 1998*. We maintain that the considerations enunciated in those decisions remain apposite but nevertheless each application must be considered on its merits and particular facts and circumstances.

81 An analogous situation has been dealt with in the liquor licensing arena in *Western Australian Hospitality & Hotels Association Inc v Liquorland (Australia) Pty Ltd & Woolworths Ltd [2002] WASCA 108.* In that matter the question was whether an alteration to premises required physical or functional unity of the premises. Referring to the previous decision of *Tapp & Tapp v ALH Group Pty Ltd [2000] 76 SASR 397,* the Western Australian Full Court considered whether 'premises' in liquor licensing legislation meant the same premises, or whether it would be consistent to have detached parts of the one premises. Wallwork J at para 15 notes that the intended bottle shop was "as a matter of commonsense and ordinary language clearly a separate premises from the bottle shop within the shopping centre". He indicated that it was the creation of a new bottle shop some distance away, without the alteration or redefinition of the existing premises, and that the new bottle shop is not part of the same licensed premises.

82 Whilst not a direct analogy, this separation or delineation appears appropriate to us in the consideration of whether an intended licensed premises is to be considered to be 'in connection with the activities of a supermarket'. In the case at hand, we have a clearly separate premises, albeit within the same shopping centre.

83 We considered the second reading speech delivered by the Honourable Mr Peter Hodgman when the Liquor & Accommodation Amendment Bill 1995 was introduced on the 21 September 1995. The speech is remarkably concise. It mentions that the Government's view on the question of "Liquor in Supermarkets" is that it is strongly opposed to the sale of liquor in supermarkets. The Bill was intended to remove "the prospect of sale of liquor in supermarkets".

84 Criticism in the debate which followed indicated the term "supermarket" lacked definition and was likely to promote litigation.

85 The particular applications which prompted interested parties to lobby the Government to seek inclusion of s 25A in the Act were applications by Woolworths for authority to sell Tasmanian wine in (that is within the confines of) supermarkets.

86 Whilst the provision might not be circumvented by having licensed premises immediately adjacent to a supermarket, the factors of proximity, mutual access, and other "connections" will be relevant in determining the question in any particular instance. In balancing the factors in this application the Board determines that a direction to grant a licence to the applicant for the particular premises would not be "in connection with the activities of a supermarket".

87 Whilst there are the specified linkages (see above) there are the aspects of separation: No mutual entrance, it is not within the confines of a supermarket, it is not directly adjacent to but rather it is 50 metres away from a supermarket.

The General Discretion: s. 24A

88 There remains therefore to be considered the general discretion which the Board has to direct the grant of a licence, or not, by making a decision which is in the Board's opinion in the best interests of the community.

89 This broad discretion brings into consideration all relevant factors including consideration of representations made to the Board, the extent to which businesses carried on under licences and permits in the area to which the application relates are satisfying the need intended to be satisfied by the Applicant, potential adverse effects on the interests of the community as a whole and also the interests of the community in the area.

90 That weighing up exercise is neither an art nor a science. There will be clear cases on either side and no doubt many potentially difficult cases across the spectrum.

91 Of particular note in this Kingston matter is that there was no specific evidence regarding the prospect of increased harm associated with consumption of liquor in the locality likely to arise due to the grant of the licence. No evidence was advanced by the AHA. Mr Bleasel from 9/11 Group considered a number of positives whilst urging the Board to decline to direct a grant on the basis of the general outlet density argument. The community groups represented by Mr Duncan likewise advanced only general propositions and no specific information regarding the locality. Mr Rowcroft might be seen to be the only community objector who appeared and gave evidence and his concerns were limited to a general concern that there was a possibility of increase in litter in a nearby school. There was no persuasive evidence that this was in fact likely to occur due to the direction to grant the licence.

92 The evidence such as was presented indicated the only substantive bottle shop in the locality is at the Kingston Hotel and that being some distance away and not particularly convenient to a large segment of the population serviced by the Kingston Town Shopping Centre at Maranoa Road. The Board inspected the premises and noted some degree of “centre of gravity” for a large segment of the population in that area, without as convenient access to a bottle shop as is experienced by many in our community statewide.

93 There are the other positive factors being the good reputation of the company for which the Applicant applies in regard to responsible service of alcohol. In addition, the contribution to the economy in the cost of construction, the fit out, and the continuing benefit of employment to staff in the new business. The contribution to making better use of vacant premises in a shopping centre and assisting in revitalising the area are also positive factors.

94 These aspects contribute to improving the quality and diversity of provision of liquor services without, on the evidence before us, in any evident way being likely to contribute to the harm associated with the consumption of liquor.

Decision: Kingston

95 We therefore direct the Commissioner to grant an off-licence to Ian Tanner in respect of the premises identified on the plan at Kingston Town Shopping Centre, pursuant to s. 214(1)(a)(i).

PART 2: The Applicant's case regarding Bridgewater

96 The Applicant's Counsel referred the Board to the application form, plans, submissions, and proof of evidence by Mr Tanner. He referred to a "supplementary statement of the Applicant" filed shortly before the hearing dated 20 July 2005, the report by the Commissioner's inspector, Mr J Anderson, and documents tendered at the commencement of that part of the hearing relating to Bridgewater being a statement by Robert Rockefeller with "Group Profile" and population information indicating an increase in population from 2001 to 2003 within a 1.5 km radius of the intended premises of 1.96% to a total of 3,597 people with there being no off-licences or general licences within that radius, and an increase of 3.5% to a population of 7,704 people within the same time frame within a 3 kilometre radius of the intended premises. That data noted no off-licences within that radius and general licences at the Derwent Tavern (Bridgewater), Hilltop Tavern (on the opposite shore of the Derwent) and York Hotel (likewise on the opposite shore of the Derwent).

97 The Applicant provided a document indicating the nature and activities of the Bridgewater Urban Renewal Project Community Group ("BURP") was provided and further data (AA4) from ABS Census 2001 relating to demographics of the area, unemployment statistics for Brighton, some photographs of the centre within which the premises would be housed, and (as with the previous matter) case studies/analysis of previous Board decisions.

98 This application differed from the Kingston one due to the different locality, and the demographic differences associated with those two areas, that there is no Woolworths supermarket in the Green Point Shopping Centre and that there are less liquor service facilities in the locality with the closest and arguably only relevant premises in the locality being the Derwent Tavern at Bridgewater between 2 and 3 km away from the desired premises.

99 The Applicant states his intention is to incorporate a two lane drive through facility and that ample car parking is provided in the shopping centre car park. The estimated cost for construction and fit out is $400,000.00 and the existing newsagency business would be relocated within the shopping centre.

100 The Applicant asserted that the project would significantly improve the condition and appearance of the shopping centre which is currently in a poor and run down condition.

101 Evidence regarding safe and responsible service of alcohol, s. 22 qualifications and quality and diversity and the provision of liquor were substantially the same as per the Kingston application. An analogy was proposed to the recently refurbished Claremont Shopping Centre where a liquor store and supermarket co-exist.

102 It was urged on the Board that the benefit to the community would include benefit to business and employment (with the intention of employing three full-time staff, two part-time staff and eight casual staff), also the improvement to vacant

premises and the revitalisation which would occur to surrounding areas, increasing the potential for further development within the shopping centre.

103 It was asserted that as there is no supermarket within the shopping centre s.25A of the Act would not be relevant. The Applicant stated there was no realistic prospect of Woolworths seeking to establish a supermarket within the shopping centre or nearby.

104 On inspection it was noted that there is a large convenience store within the existing shopping centre which, it is presumed, will continue to operate.

105 In cross-examination Mr Tanner indicated that no community impact studies had been commissioned relevant to the application, that he was not an expert in such matters and that he could not comment on questions regarding the potential for greater problems regarding alcohol in the locality given the socio economic profile.

106 He acknowledged that within the shopping centre or in adjacent or nearby buildings there are housed a number of community organisations including Police Citizens & Youth Club, Community Health Centre, State Government facility (Service Tasmania and Housing Tasmania), and a Centrelink office.

107 The Applicant admitted not being aware of or being able to assist the Board with any data regarding the social or economic status of people living and working in the locality of the intended premises.

108 Mr Tanner was asked by Counsel for the AHA to accept that there was no need for the intended premises and that it was not in the best interests of the public for them to be licensed. He disagreed and said that it was over 2 kilometres to the nearest hotel and that the community deserved a service.

109 Mr Tanner gave evidence of discussion with the police officer Senior Sergeant Spaulding who apparently made some suggestions regarding the safe conduct of the premises, but Senior Sergeant Spaulding was not called to give evidence.

110 Mr Rockefeller (whose family company owns the Green Point Shopping Centre) was called, gave evidence and indicated his commitment to improve the shopping centre and that the addition of a bottle shop under BWS was seen to be a positive attribute. Mr Rockefeller indicated that it was unlikely in his view in the extreme that a supermarket would be added to or incorporated within the shopping centre.

111 He gave figures of considerable intended expenditure to improve the centre, and stated that it was not his family's modus operandi to leave their properties (of which this centre is but one of a few) undeveloped and run down. We appreciate a tenant such as Woolworths would be attractive, however we do not draw the conclusion that the Rockefeller project and expenditure will be abandoned if Woolworths is not a tenant because a bottleshop liquor licence is not granted.

112 The AHA again referred the Board to the report submitted by Mr Bleasel and the Alcohol and other Drugs Council of Australia submission to the Productivity Commission enquiring into National Competition Policy arrangements of June 2004.

113 These reports, again, tended towards supporting a general proposition that increasing outlet density carried a risk of increase in harm associated with alcohol consumption.

114 Mr Duncan provided evidence as to the social cost of alcohol and drug use in Australia and referred the Board to the written submissions by his clients. Mr David Owen, policy officer with TasCOSS was called and gave evidence.

115 He advised that the organization he represented was funded by the Tasmanian Government to represent the interests of community service organizations, and to provide policy advice to Government.

116 Mr Owen expressed his concerns regarding the present application being the generality of a link between chain supermarkets and sale of liquor and specifically in the Brighton municipality.

117 A number of organizations in the area, he said, had made submissions and all were in support of the TasCOSS stand save for "BURP" mentioned above. He noted that BURP had not attended and might be seen as neither supporting nor objecting to the application.

118 He expressed concern at the role of liquor outlets because of the harm from liquor consumption and misuse he referred to the evidence of co-location and cross-promotion and suggested that the submissions regarding minimizing harm through responsible sale ignored the reality of consumption and misuse after removal from the licensed premises.

119 Mr Owen said his organization was in favour of making accessibility more difficult rather than the reverse in the Bridgewater area. He acknowledged the density of outlets is not the sole issue for minimizing harm associated with alcohol consumption. He indicated agreement with earlier submissions that there were other issues to be taken into account regarding the Kingston application due to demographic considerations and that it was not just a matter of density of outlets but in addition educational attainments, and family modelling. He referred to evidence that in Brighton there were 8,300 recipients of Centrelink payments and of them 6,700 received full payments. Of those 6,200 had been in receipt of full payments for more than two years. He indicated his view that this was a fragile and precarious social system able to be harmed by small changes.

120 In response to public interest submissions put by the Applicant, Mr Owen indicated his view that, in particular regarding the Bridgewater community, competition is not to be taken to be an inherent good and it needs to be set against competing factors and public interest notions.

121 The Applicant tended to make some positive value of BURP's lack of opposition, and his intention to join or participate in the organisation's activities if the

licence were to be granted. However, aside from printing out the organisation's information gleaned from the Internet, he gave no indication as to whether he had contacted anyone in the organisation –this level of information, and the promise to seek to join, could not be considered to be any support for the application.

122 Mr Bleasel gave evidence consistent with the material presented the previous day in the Kingston matter.

123 Final submissions on behalf of the AHA reiterated the perception of lack of effective control, but did not submit that in the Bridgewater matter s. 25A (in association with the activities of the supermarket) was applicable. The AHA did indicate that if a licence were to be granted, they would be content with a condition attached to the licence with effect:

> "In the event that the business for which this licence is issued is conducted in connection with the activities of a supermarket at Green Point Shopping Centre then this licence ends".

124 There was some debate about the power of the Board to attach conditions to licences and Counsel for the AHA referred to *Country Roads Board v Neal Advertising [1930] 43 CLR 126* as authority for the proposition.

125 In regard to the "best interests of the community" we were referred to *Footscray Football Club [2000] VCAT 1460 at paragraph 7* where VCAT considered (in the gaming machine context) that it was not in the best interests of the community for a licence to be granted. There is useful guidance in that care as to the treatment of benefits and detriment flowing from a grant (see pages 19-42).

126 The AHA submitted that the grant of a licence is a privilege, that the proceedings are adversarial and that the onus of proof lay on the Applicant to demonstrate that the licence should be granted in the context of s. 25A, and if that was not done then the Applicant must fail.

127 It was urged that it is imperative to take account of social and economic effects and balance the positive with the negative (reference *Footscray VCAT case above paras 23 and 27*).

128 We were referred to the *TKM decision* of the Board of November 2004 at page 10 where a similar application was refused.

129 It was submitted there was no evidence to indicate that the level of supply at present was not adequate and there was no evidence regarding social impact, crime rates, impact of outlet density in the area, alcohol dependence, socio economic issues, income statistics etc. It was asserted that there was no evidence brought by the Applicant from the community at all in support of the application. Health and safety issues, crime acceleration or exacerbation, prospect of anti-social behaviour and negative impact on harm minimization strategies in the locality were referred to.

130 Mr Duncan on behalf of his four clients asserted that the burden of proof had not been met and core issues remained regarding s. 24A and s. 25A.

131 Mr Bryant in conclusion adopted his submissions from the Kingston matter regarding s. 22 (effective control) and submitted that the Board can be satisfied in regard to s. 24 and s. 24A “the best interests of the community”.

132 He referred to *The Barrell* decision of the Board of 15 October 2004 regarding the acceptance of the positive value of employment improvement and redevelopment. He asserted there was no evidence from schools in the vicinity or others with regard to the prospects of social harm arising.

Reasons for decision: Bridgewater

133 For the reasons given in the Kingston matter (above) we dispel the issues of effective control and whether the application is in connection with the activities of a supermarket and also the general outlet density proposition. That leaves the specific consideration of whether the direction of a grant of the licence would, in our opinion, be in the best interests of the community.

134 In this application, significantly, there was no more information regarding the demographic and social and economic nature of the community at Bridgewater than was advanced regarding the Kingston matter. However, the evidence from the objectors represented by Mr Duncan and some others who submitted written objections but did not appear (Family Support, Brighton Municipality, St Johns Ambulance Service, Mr Robin Pullen of Bridgewater a member of the Bridgewater & Friends Country Music Club) squarely raised the issue of the contribution that the grant of this licence would make to harm associated with issues of alcohol in the Bridgewater community.

135 Whilst the onus may be considered to be on the Applicant, once these issues are raised with particular relevance to an application, for the reasons set out above regarding “evidential burden”, the Applicant carries a greater responsibility to satisfy the Board that it is in the best interests of the community for the licence to be granted.

136 One might expect that with the likely perception that harm would be a critical issue in the locality of the intended licensed premises, that if evidence to dispel that was available, then it would have been brought forward. It was not.

137 There was no evidence from the community that the licence was desired except for the commercial interests of the Applicant and the freehold premises owner of the shopping centre.

138 The evidence from Mr Owen was persuasive with regard to the particular locality to the effect that there was a significant risk of harm associated with consumption of liquor increasing should the licence be granted, given the social and economic aspects of that local community and given the situation of the premises being adjacent to a number of community services. He felt that there was an incompatibility in that proximity and we were persuaded to agree.

139 Such data as was received (the one page table AA4 Key Socio-Economic characteristics of the Brighton Local Government Area 2001), to the extent we could interpret it, did not give confidence that directing the grant of the licence in the context of all the evidence would be in the best interests of the community.

140 The Applicant did put the argument that the people in that vicinity, like others in other local communities, deserved the opportunity to have the same services and in that regard a drive through bottle shop was such a service. Whilst that may be so, there are the recognized dangers associated with consumption of liquor and on balance the onus to satisfy us under s. 24A has not been met by the Applicant.

Decision: Bridgewater

141 We therefore direct the Commissioner to refuse the application for an off-licence by Mr Tanner for the Green Point Shopping Centre, Green Point Road, Bridgewater pursuant to s. 214(1)(a)(ii) of the Liquor Licensing Act 1990.

F:\Data\PAK\LICENSING\BWS decision.doc