

Licensing Board of Tasmania

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

and in the matter of an application for an off-licence
by **Tony John Jackson** for an off-licence, 191 Gilbert St, Latrobe.

REASONS FOR DECISION

The Board heard this matter at Devonport on 18th June 2004 and 7th October 2004,
and at Launceston on 23rd November 2004.

THE LAW

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

Liquor not to be sold except as authorized

5. A person shall not sell liquor except as authorized by –
- (a) a liquor licence; or
 - (b) a liquor permit; or
 - (c) a general liquor exemption.

Types of liquor licences and permits

6. The Commissioner may grant –
- (a) the following liquor licences:
 - (i) a general licence;
 - (ii) an on-licence;
 - (iii) an off-licence;
 - (iv) a club licence;
 - (v) a special licence;

Off-licence

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

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

Requirements for licence

24A. [Section 24A Inserted by No. 40 of 2003, s. 8, Applied:15 Sep 2003] (1) In considering an application for a licence, the Commissioner or the Board must make a decision which, in the opinion of the Commissioner or the Board, is in the best interests of the community.

(2) In considering an application for an off-licence, the Board must be satisfied that the principal activity to be carried on at the premises will be the sale of liquor.

(3) In considering an application for an on-licence for a restaurant, the Board must be satisfied that the premises are, or are intended to be, used as a restaurant.

Hearings by Board

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

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

(2) At a hearing the Board –

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

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

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

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

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

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

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

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

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

THE APPLICATION

The first relevant question in this particular application is whether the principal activity to be carried on at the premises will be the sale of liquor.

It was agreed by the Applicant that this was a relevant requirement.

The Applicant's written Application and the supporting document "TKM Business Plan" put forward the following relevant propositions:

From Application Document:

- Para 3.1: the application is to combine a liquor outlet with self-service fuel. Self-service fuel stations are marginal and their economic viability is dependent upon other uses that satisfy visitor demand and convenience.
- Previous land use of the site was as a fuel outlet with service and mechanical repairs. This proved not to be economically viable and the site has been vacant for some years.
- Traditionally service stations (meaning premises used primarily for the fuelling of motor vehicles involving the sale by retail of petrol, oil or other petroleum products) were supported by the distribution of products to complement core activities, but today the situation is reversed; self serve fuel is subservient to the demand for other services. Future development of economically viable activities is dependent on a mix of mutually supportive activities.

From TKM Business Plan Document:

- Para 7: a summary of the Applicant's budget for 2004-2005 states that the financial viability of the business is based on the sales of liquor of \$1.5M with a gross margin of 26.3%, and sales of fuel of \$1M with a gross margin of 6.1%; hence income after costs of goods sold of \$390,450 from liquor and \$61,000 from fuel.

- The applicant anticipates that liquor sales will be the major focus of the business and will only be supplying fuel on a self-service basis.
- The margin on fuel sales alone is not sufficient to sustain a viable business.
- There will be substantial redevelopment of the building (which in fact has already been done, and viewed by the Board).
- The projected operating budget for 2004-2005 was set out in appendix 1. In considering that financial projection, we can not ascertain what reasonable apportionment of overheads to sale of liquor and to sale of fuel is appropriate.

From the plan of the layout of the site, and from the view of the site:

- There are two fuel pump islands, with four lanes for traffic, those customers who drive onto the site to use the business will drive into the driveway, and will queue or park in one of a number of car park spaces, leave their cars to manage the pumps to fuel their car, or walk into the building to inspect, take up and pay for their liquor, then drive away.
- There are a number of bowsers: it is not clear from the material presented, but it seems there may be 5 double bowsers.
- Some customers for liquor will walk to the site.

The Applicant's Counsel, Mr G Richardson, in summing up made the following submissions relevant to this aspect of the law and the evidence:

- That "principal activity" of the business must mean "what is its primary purpose", all other potential interpretations are nonsense;
- It would be irrelevant and nonsensical to simply compare the number of litres of liquor budgeted to be sold with the number of litres of fuel budgeted to be sold;
- That the evidence from Peter Loone was that petrol concept was only an afterthought;
- That the evidence was that the original idea was to run a bottle shop;
- Sale of liquor without fuel is financially viable, but not the converse;
- Principal activity is the sale of liquor because;
 - That is the Applicant's stated purpose;
 - More profit is budgeted to come from sale of liquor (than fuel);
 - Sale of fuel is only an afterthought;
- This is a liquor outlet selling fuel as an addendum;
- That the proposition that the Board is being asked to licence a petrol station is a red herring;

On the other hand, Mr S McElwaine, Counsel for The Australian Hotel Association (Tas Branch), objecting to the grant of the application, submitted, relevant to this issue:

- That the Application was confused and contradictory – that the Applicant in his verbal evidence at the hearing was not consistent with the written material supplied, and could not explain what was meant by much of the written material;

- That the Applicant’s evidence on the separation of the use of the premises for sale of liquor compared with fuel was unclear, undelineated;
- That the manner in which the business would operate was not clear from the Applicant’s evidence;
- That the business mix is not clearly delineated in the Applicant’s evidence;
- That the Board must be satisfied on the Applicant’s evidence that the principal activity will be the sale of liquor;
- That, for that purpose, “activity” does not simply equate with “profit”;
- That there is no information from the Applicant to indicate the number of customers for each activity;
- That the profitability of the venture depends on the sale of liquor and fuel as a one stop shop;
- That when the Applicant Mr Jackson was asked to explain how (as was put forward in the Application Document) fuel sales would be subservient to alcohol sales, Mr Jackson was unable to answer or explain what was meant;
- That the application was not put on the basis that fuel was *incidental*;
- That there was no analysis or study to support the application;
- That the reliability of the Applicant’s broad statements in his Application Documents was relevant to the Board’s decision;
- That there was no research put forward on behalf of the Applicant to support the broad statements as to a perceived demand for the services (fuel and liquor) to be offered;
- That the two components of the business (sale of liquor and sale of fuel) are mixed, not separate.

It is apparent to us that the following conclusions or findings should be drawn from the material presented, and the criticism of it by the Respondents:

1. We have no evidence sufficient to enable us to conclude that self service fuel stations are marginal and their economic viability is dependent on other uses that satisfy visitor demand and convenience.
 - a. It seems inherently unlikely in regard to many fuel stations, particularly larger ones, that their fuel business is dependent on other activities to be viable.
 - b. Whilst we can take notice that many fuel stations also run convenience stores or mixed business shops, we have no evidence of the mix, return, allocation of overhead, and contribution to net profit of each segment of such mixed businesses, and in particular no research has been provided by the Applicant.
2. We accept that it is likely that the previous use of the property solely as a fuel station with mechanical repairs was not economically viable.
3. We do not accept and have no evidence to support the proposition put forward by the Applicant that self serve fuel is subservient to the demand for other services in modern fuel stations. It may be the case, but it seems unlikely to us as a general rule. The Applicant failed to demonstrate why it would be different for this site. Further in itself this assertion, if a fact, is not, inherently, a justification for that additional business to be the sale of liquor.

4. The budgets of gross income are not supported by any research or evidence. They are just prognostications without foundation. They are also critical to providing evidence to support the proposition that the principal activity will be sale of liquor.
5. There is no foundation given by the Applicant in any evidence put forward to demonstrate the margins asserted to apply to the gross return, and there is insufficient evidence to enable us to determine the net return from each segment of the business. Without this it becomes more hypothetical than substantiated to try to conclude that the principal business will be sale of liquor.
6. In the context of the Applicant in his verbal evidence being uncertain and or unclear about much of the content of the written application and the business plan he had submitted, it is difficult to have confidence that the hypotheses about returns, margins, and split of income and expenses (so far as that was done) are realistic.
7. More evidence could have been provided to support the proposition that sale of liquor is to be the principal purpose, particularly research data on the area, those living and working in the area, those passing through the area, the demographic profile of the area, the number of young people/adults living in the area, and likely take up of new liquor and petrol services, with more comprehensive projections of returns. Further information about the actual sales of fuel since the business opened would have been relevant, but were not provided by the Applicant.
8. That the Applicant gave evidence that he anticipates that liquor sales will be the major focus of the business is not supported by any corroborative evidence or evidence supportive of the conclusion that the market reaction to the existence of the conjoined premises will be consistent with that anticipation.
9. The Board accepts there has been redevelopment of the site. The assertion is that \$300,000.00 was spent on that. There is no evidence as to how that amount was spent, and on what elements of the business; for example, how much related to fuel sales infrastructure and plant and equipment compared with the share of such expenditure relevant to liquor sales. This would have been relevant to consideration of the principal activity issue.
10. The projected operating budget in the Applicant's business plan appendix 1: we reiterate that this is not fully fleshed out and is unsupported by any research.
11. The layout of the tarmac and number of fuel pump islands and bowsers and traffic arrangements: This is an evidently significant focus, which would support a conclusion that sale of goods other than liquor is the principal focus: the "look and feel" of the business premises being towards fuel sales.
12. There is no delineation by evidence or research of the number of walkers (therefore liquor purchasers) likely to attend the site compared with the number of people likely to drive to the site, and regarding the latter, the split

between likely purchasers of liquor compared with fuel. This would be relevant to determining the principal activity to be conducted. There is no evidence as to likely patronage dedicated to one service or the other except for the asserted but unsupported gross sales assumptions.

13. We consider that “principal activity” is not a shallow or simple phrase to define, and that it may have a wide range of relevant factors, gross return or net return from different activities being only two potentially relevant factors. The evidence therefore falls short of sufficient material to enable us to conclusively decide that sale of liquor will be the principal activity.
14. Whilst we were told that Mr Peter Loone’s evidence was that the original idea was to run a bottle shop, and that sale of fuel was an afterthought, the surrounding evidence is that the Applicant has gone to significant trouble and expense to maintain or protect the existing use right to sell fuel, and to develop the site for sale of fuel. This surrounding evidence supports the strength and importance of the fuel sale activity compared with the liquor sale activity. Again, where the principal activity of sale of liquor is a requirement, the evidence in this aspect is not conclusively in support. At best it is ambiguous, and to some degree it supports the contrary conclusion.
15. The confused and contradictory nature of or unsubstantiated quality of the application documents taken in conjunction with the Applicant’s inconsistency in his verbal evidence and lack of ability to explain elements of the application documents does not support the conclusion we are asked by him to make: that sale of liquor is to be the principal activity.
16. The mixing of some elements of the two activities makes it even more difficult to reach the conclusion the Applicant asks us to reach: the mixing of driveway services, entrance, cash register and personal service. The Applicant in his verbal evidence was unclear or uncertain about some crucial elements of this. The Board can not fill in the gaps and conclude that the layout of the premises might end up being such as to support the proposition that the principal activity will be, with any degree of certainty, sale of liquor.
17. The Applicant failed to demonstrate what knowledgeable and or professional and or personal services associated with the sale of liquor would be provided, in support of his general statement that sale of liquor is the principal activity.
18. We do not equate “activity” in this issue simply with “profit”.
19. That the profitability of the entire venture appears to require that there be the sale of both liquor and fuel tends to indicate sale of liquor is not the principal activity. They might be symbiotic, and neither predominant. The evidence on this point was ambiguous. Counsel for the Applicant indicated in closing that the petrol business could well be sacrificed and the business would still be viable. His client however in the application document (para 3.1) states that “the future development of economically viable activities is dependent on a mix of mutually supportive activities supported by the motor vehicle.” In his verbal evidence on the 7th October 2004, the applicant said that he did not know how liquor would be the major focus. He said he did not know the

volume of liquor estimated to be sold. Whilst he may have relied on the assumptions made and put forward in documents submitted on his behalf, the reality is that the application is put forward on the basis that he is to establish a business with the principal activity of liquor sales, yet he did not know relevant information such as this.

20. We give details of Mr Jackson's uncertain or confused responses to questions about his application:

- a. His intended licensed premises are opposite the St Patrick's School. The School, through its chairman, was an objector to the application on the basis, amongst other things, of the traffic impact. Mr Jackson, in cross examination was unaware of the number of children who attend the school, and whether children from the school use a bus stop in the same street as the premises.
- b. In regard to a refrigerator in the premises; whether he was going to keep it in the position where it is, move it closer to the cash register, or remove it entirely.
- c. When questioned about whether sale of fuel would be a subservient issue, as stated in his application document, he said that he did not know.
- d. When asked how and why liquor would be the 'major focus' he said he did not know.
- e. When asked about a survey or questionnaire he referred to in his evidence, he said that the pad on which he had made notes of the enquiry was 'destroyed'.
- f. In regard to a statement in his application document that the business would serve the 'emerging tourist market' he said he did not know how it would do that, and implied he did not know what he meant by the statement, or what the statement meant.

Overall, from his answers to questions, and his demeanour, we had the overwhelming impression that he knew little of liquor retailing, product information, understood little of the underage issues and secondary sales, had no comprehension of the mix of his intended sales of liquor and fuel, no firm plan regarding the internal sales area, and separation of liquor and non-liquor items, particularly fuel.

We conclude that there is insufficient reliable information before us to demonstrate that the principal activity to be carried on at the premises will be the sale of liquor.

As the legislation (s24A(2)) requires that we must be satisfied as to that, and we are not, we must direct the Commissioner to refuse the application (s214(1)(a)(ii)).

THE BALANCE OF THE APPLICATION

A substantial amount of the evidence tendered and of the hearing time was devoted to issues regarding the requirement that the Board must be satisfied, in addition to the principal activity test, that the grant of the licence would be in the best interests of the community.

We have considered whether it is necessary or appropriate to go on to deal with that evidence and our conclusions on it, given that it would be superfluous to do so, as we have determined that the application should be refused. It may be that the Applicant will change the nature of the intended or actual use of the site, and may garner more relevant research, data and evidence to substantiate the s24A(2) criterion. His Counsel indicated in closing that the applicant may be willing to forgo the fuel sales altogether or change the business plan if that would assist.

It is not for the Board to write the application. But with the possibility that these issues are re-kindled, we consider it is relevant to indicate our conclusions on the balance of the evidence. We do so in a summary fashion, given its relevance to this application now:

Planning issues are relevant in this matter, principally because the existing use rights prevented full ventilation of the issues before Council and with the full opportunity for public input. There would be little point re-considering planning issues if they had been well ventilated in planning authority processes, if the property had appropriate zoning. Here, the Council itself made a submission raising some planning issues as they were not dealt with by Council due to reliance by the Applicant on existing use rights.

Whilst the parking and traffic plan was criticised during the hearing, and is clearly not ideal, we conclude that in the context of the nature of the neighbourhood (albeit that the evidence is thin on this point), the size of the community, and the likely traffic numbers, the traffic issue would not be likely to require the Board to conclude against directing grant of the licence.

Much of the criticism was based on concerns expressed by Mrs Jane Dutton, the Chairman of the neighbouring St Patrick's School. It was apparent the difficulties perceived could be reasonably accommodated. There were alternatives to the method or additional methods by which students could safely access the school. The concern was really of activity again on the property, after at least 2 years of inactivity.

Parking arrangements would be less than highly desirable, but the likely impact of that would be that the site would simply be inefficient, and sales and profit would be adversely impacted. Customer discomfort being the only likely adverse impact, the ability to provide some service, even though not at the higher end of best practice, would, in the context of the nature of the neighbourhood and in the context of there being only one bottle shop in the town, be likely to be sufficiently minor as not to require the Board to refuse the application.

Proximity to the school: Whilst the bottle shop would be immediately across the road from a primary school, that of itself does not indicate that the two can not peacefully

coexist, with adequate amenity to each (and each activity's users) preserved. There was no evidence of likely harm associated with the sale and or consumption of liquor relevant to the proposed licensed premises. General evidence about accessibility, availability and harmful effects of liquor consumption per se did not indicate this proposal was likely to increase such harm in the locality.

The submission that if the licence is granted then as a precedent the decision would mean there would be a great many new applications for similar licences is not persuasive. Each application must be determined on its merits. Each application is different at least in time and place, and as a stand alone bottle shop (or a mixed business not prohibited by s24A(2)) this application if granted would not stand as a precedent requiring any other application necessarily to be granted. Evidence covering all relevant matters would need to be considered.

Sale of liquor from premises which also sell fuel: There was no persuasive evidence to support the proposition that this is inherently likely to contribute to an increase in harm associated with consumption of liquor, or drink driving. From our knowledge, the majority of liquor sold is sold from bottle shops, a majority of which are drive-through. No evidence was brought to our attention that the situation where a fuel stop in close proximity to a bottle shop (for example, the TRC Hotel in Launceston) has contributed to an increase in harm per se.

Much of the evidence about visitor numbers and tourism impact was put to us in a vague or general manner. It was rightly criticised. More relevant information on demographics and the nature of the neighbourhood would be relevant. As we do not need to, we do not conclude this application would have succeeded or failed on this point. However, better evidence – if available - would take the application outside of the realm of doubt.

Evidence in the Application Document which was of a very general and of a hyperbolic nature was not greatly helpful. Assertions rightly criticised included general statements about meeting tourist demand (unsupported and unrealistic), and regarding sale of 'Tasmanian produce': it is an overstatement by the Applicant in this context to say fuel and liquor is 'Tasmanian produce'. Nevertheless, that would not have caused us to direct refusal of the application.

That there is one other stand alone bottle shop in the town, two other general licensed premises (in one of which the bottle shop is incorporated), that there are licensed clubs in the locality, and that hotel proprietors as close as the same street and as far away as Hobart were motivated to object does not force us to conclude that the licence should not be granted. Competition is beneficial, there is little competition in the stand-alone bottle shop market in the town, and whilst harm contributed to by consumption of liquor will in some instances be increased with greater availability of liquor, it depends on the facts of each case. We do not conclude that harm will be exacerbated in this town if the application were granted.

Investment instability: this argument usually equates to concern by existing licensed operators about competition and hence the prospect of having to spend more on maintaining a good service or establishing a better service to maintain market share

against that new competition, or the genuine personal concern at loss of profitability due to introduction of new businesses.

This Board has made many statements in past decisions indicating our view that new competition is not of itself against the public interest, and is in many instances in the public interest. The exception is where a new business may have the effect of causing an overall reduction in facilities and services in the locality. Nothing put forward by the hoteliers who did give evidence at this hearing, relevant to this application, persuades us that 'investment instability' is relevant in this matter.

The evidence from Mr Brian Dixon (letter 15th April 2004) indicates significant financial investment in Mackey's Hotel in Latrobe, notwithstanding that this application has been on foot. The investment appears to have been motivated by offering the public greater gaming machine access, so liquor services may have only been peripheral to the decision – this is not clear from his evidence.

The reality of his evidence is that there is no investment instability in the most proximate bottle shop/hotel/gaming venue business caused by the prospect of a new business opening in part in competition. The contrary, as is often the case, is the result; that more investment is made and greater attention given to improving facilities, to the public benefit.

Underage access: whilst a relevant concern in determining what is in the best interests of the community, the nature of a stand alone bottle shop (compared to general licensed premises or on-licensed premises) in Latrobe and normal controls on potential illegal activity by licensees, does not indicate this should be a ground for refusal. Proximity to a school has not been demonstrated to be a realistic cause of concern that children will want to or be able to acquire alcohol in this instance.

On the other side of the balance sheet is the Application itself, that there are positive benefits of making efficient use of a (until recently) derelict and unused site, reusing existing building stock, the income to the community from employment and business endeavour, and other social and economic benefits from heightened business activity.

We direct the Commissioner to refuse the application.

Dated: 26th November 2004

Phillip Kimber, Chairman. Louise Finney, Member. Kerry Sarten, Member