

In the matter of the Liquor and Accommodation Act 1990

And in the matter of an application by **Mr Paul Bradbury** to Vary a special licence to permit the off-premises sale of Wine from France, Spain and Italy from premises at **The Mill Providore & Gallery**, Ritchies Mill, Launceston.

*The Mill Providore and Gallery: application to vary special licence to enable sale of wine only from 3 European countries (France, Spain, Italy) as adjunct to existing business. Direction to grant made, distinction between that and the application for Balfour St Deli (2003). Objection by AHA. Niche market, diversity, quality. A determination on the meaning of the reg 4 and the special licence discretion to grant licences subject to compliance with s24A.*

Decision: **The Mill Providore & Gallery No 2, August 2004**

Heard before the **Licensing Board** at Launceston on Tuesday the 24<sup>th</sup> August 2004  
Date of decision: 1<sup>st</sup> September 2004.

This application is for an amendment to an existing special licence (a licence subject to conditions) which presently enables the applicant to sell Tasmanian wine for consumption off premises as an adjunct to his principal business of providing principally Tasmanian made hospitality and tourist goods (including food). Amendment is achieved by a fresh application, and (if approved) a new licence grant, on condition that the previous licence is cancelled. There is no express provision for amendment or variation of a licence in the *Liquor and Accommodation Act 1990*. That is not a difficulty, as the process is pragmatic and effective. It is what was intended in the drafting of the Act.

The applicant seeks to offer for sale a maximum of 12 white and 12 red wine labels (in total) from the three countries, to complement the selection of Tasmanian liquor product and gourmet specialty food lines.

The evidence was clear that the wine component of sales was in all senses a minor part of his business. Hence the principal purpose is not the retail sale of liquor.

This brought into consideration new regulation 4(1)(a) (*Liquor and Accommodation Regulations 2003, effective 15<sup>th</sup> September 2003*). That regulation states:

*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 Board had considerable difficulty trying to reach a conclusion as to what the draftsperson intended by reg. 4(1)(a). In the end product we concluded it's meaning would be clearer if set out as:

*The Board is to direct the Commissioner to grant a special licence if satisfied that –*

*(a) (i) the principal activity to be carried on at the premises specified in the licence will not involve the retail sale of liquor or,*

*(ii) 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 in either case the sale of liquor will be restricted to Tasmanian wine;*

This (reg 4(1)(a) )appears to have been intended as a replacement, without significant alteration to meaning, for the Guideline under the Act as it was before this regulation came into effect, known as “5.7 Tasmanian and Local Wines”.

We have also considered whether such authority as there is in reg 4(1)(a) is intended to ‘dry up’ the ability to grant special licences regarding sale of liquor where the principal business conducted from premises is not the retail sale of liquor. 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 conclude that regulation 4 is not intended to remove the ability of the Board to direct the grant of a special licence for premises where the principal business conducted from those premises is not the retail sale of liquor for liquor other than Tasmanian wines. Indeed, it appears to be cast in mandatory terms in the event that the criteria set out are met.

We do not, however, believe it is mandatory to the extent that the obligation in s24A to make a decision in the best interests of the community is made, thereby, subservient. That is, all criteria for reg 4 might be met, but nevertheless the Board will have discretion to direct the refusal of a licence application because, in the Board's opinion, to grant the licence would not be in the best interests of the community.

However, we do view the licence structure of general, on, off, club and special as having a considered structure, and on occasion applications for special licences might be disapproved due to the appropriate licence category being one of the other 4 categories, and the criteria for that other (more appropriate) category being not met by the applicant.

For example, on occasion, an application for a special licence might better be considered in light of the restrictions for the grant of an off licence: eg see the Board's decision in *Balfour Street Deli 16<sup>th</sup> July 2003*. In that matter the applicant wanted a licence to sell any wine, from any country including Australia, with no limitation other than that it be considered by the applicant to be 'premium' wine. The Board determined that the appropriate category of licence was an off-licence, and that as the

principal business was not the sale of liquor, to employ the special licence category would subvert the intention. In the Board's discretion that application was refused.

This present application is more limited: the wine is only to come from 3 other countries. The applicant's evidence was that he would continue to focus on small Tasmanian vineyard exposure. Also his evidence was of a very strong tourism goods focus; more so than for example in the *Bladerunner* decision, and the *Balfour Street Deli* decision, and the *Davies Grand Central No. 2* decision.

Other relevant factors and considerations;

- the size of the outlet in regard to wine would be minimal,
- the appropriate desire to facilitate diversity and quality in provision of liquor services,
- there is not likely to be any adverse impact from the licence (if granted) in the sense of contributing to harm associated with consumption of liquor,
- the applicant has a proven record of provision of high quality service to the tourist public,
- the applicant seeks to expand the range of liquor only to enable food and wine matching particularly in regard to imported cheese content which has become an integral part of the existing business, and
- a somewhat similar niche application was recently approved in regard to "The South African Shop" authorising sale of only South African wine.

The Board has taken account of applicant's written submission and accepts the evidence there.

We also take account of the Australian Hotels Association (Tas Branch) submission and those made by Ms M Polita (representing the AHA) at the hearing. The clear concern of the AHA was the potential for flow on effect. We conclude that is answered by the niche nature of this application. It is unlikely to be able to be replicated by, for example, delicatessens, mixed retail businesses, or other retail shops. For those enterprises, generally, unless special considerations apply, the off-licence category should be applied, and if the principal business is not retail sale of liquor, then generally the Tasmanian wines regulation – 4(1) – should apply.

This serves to amplify that special provision is made for assistance to the Tasmanian wine industry as a significant component of the Tasmanian tourism industry. We accept Ms Polita's submission that there is an intention implicit in the Tasmanian wines category of special licence to enhance market opportunities for Tasmanian wine.

The Board retains flexibility under the licence category structure and under s24A of the Act, and taking account of the regulations, however, to consider and direct the grant of novel licence types under the special licence category.

In the Board's opinion it is in the best interests of the community for this licence to be granted. We have balanced competing negative factors (which are simply the possibility of a flow on effect distorting the licence category system) against the real likelihood that this application will cover a niche and give service desired by the

public, and without being a precedent for numerous other applications resulting in the retail off-premises sales market being distorted.

In conclusion, we direct the Commissioner to grant the licence as applied for, in replacement of the existing licence, such that it is effectively amended to be a special licence authorising sale of liquor from the premises for off premises consumption (except for tastings) subject to the condition that the only liquor to be supplied is to be Tasmanian wine, liqueur and spirits and wine produced in France, Spain or Italy.

Dated: 1<sup>st</sup> September 2004

PA Kimber, Chairman.

L Finney, Member.

K Sarten, Member

F:\Data\PAK\LICENSING\Mill Providore Gallery 2 2004.doc