

Licensing Board of Tasmania

In the Matter of the *Liquor and Accommodation Act 1990* and in the matter of an application for an off-licence by Leanne Karen Fraser for “Nude Wine”, 153A Argyle Street, Hobart.

DECISION

The Board heard this matter at Hobart on the 8th July 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 2003 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 the 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.

We summarise that material and our findings on any material question of fact:

THE APPLICATION

First, we are satisfied that the principal activity to be carried on at the premises will be the sale of liquor. That is the evidence from Ms Fraser and Mr Tony Guy for the applicant, and it was not contradicted. S.24A(2) is satisfied.

The Applicant informed the Board that “Nude Wine” had commenced operations in Launceston at Lloyds Hotel, and was now seeking to expand its operation to Hobart. She stated that she intended to sell clearance labels and cleanskin wines only. She said that clearance wines would be no more than 10% of the total sales.

The Australian Hotels Association (Tas Branch) was represented by its General Manager, Daniel Hanna and Legal Officer, Marina Polita. They advised the Board that, having considered the evidence, the AHA had no objection to the application being granted, provided that the Applicant restricted sales to wine, in accordance with the evidence of intention and submissions made by the Applicant.

The Board does not have power to include conditions on the direction to grant an off-licence. However, we can, and do now, record that undertakings and expressions of intention were given at the hearing to the following effect:

1. Liquor intended to be sold was cleanskin wine, except for 10% of sales, which it is intended will be clearance wines;
2. No intention to sell other wine or liquor;
3. Intending to seek designation from the Commissioner for Licensing the premises to be a restricted area, where minors may only attend in company with a responsible adult.

The Board notes these expressions and undertakings and notes that in the event the business is conducted in a manner materially different, then that will be relevant evidence that the licence has been obtained by means of a false or misleading statement or by a failure to disclose relevant information (refer licence suspension provisions: s 42(1)(i) of the Liquor and Accommodation Act 1990).

The Applicant submitted that there was an unmet need in the locality for a bottle shop, as none of the existing licensed premises (clubs or on-licensed or general licensed premises) had a principal focus of providing for the take-away liquor market in regard to the niche area of cleanskin and clearance wines. As evidence of this she referred to the significant increase in sales from her Lloyds Hotel Launceston outlet since the change in service to substantially what is intended for the Hobart site.

The premises are to undergo refurbishment, but to retain the present heritage character. Approximately \$15,000 is budgeted for that project.

The premises would not be large; 70m² sales floor. It is intended that liquor only be sold for off premises consumption, except for tastings.

There was some flexibility expressed in the likely opening hours.

There was evidence of intended employment of 2 to 3 staff, the renovation and efficient use of presently vacant premises, and the provision of a service (in supply of goods) which would be welcomed by the community, assisting in economic and social growth. There was no evidence to the contrary.

OBJECTIONS/REPRESENTATIONS

The AHA dealt with their concerns by, in effect, a negotiated arrangement (with the Applicant) where they were satisfied with what was being offered by the Applicant.

CONCLUSIONS

There was no community objection on the basis of a perception of the potential for harm arising from liquor abuse.

The intended business is of limited impact, but such impact as there will be, was described in positive terms by the Applicant and her witness, in economic and social terms. The Board has no reason to doubt the Applicant's intentions as expressed.

We continue to be of the view, as expressed in decisions prior to the amendments, that the best interests of the community as a whole are rarely served by a licensing regime preventing new entrants to business; whether that be sale of liquor or otherwise.

The Board is of the opinion that we would be acting in the best interests of the community, local and generally, to direct the grant of this licence.

We direct the grant of the licence.

Dated: 16th August 2004

Phillip Kimber, Chairman.

Louise Finney, Member.

Kerry Sarten, Member